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Carla Ambrose
1960-1986

The Editors and Staff of the New England Law Review dedicate volume Twenty-One to the memory of attorney Carla Ambrose, a 1985 honors graduate of New England School of Law. Attorney Ambrose served as a staff member of the New England Law Reivew in 1983 and 1984, and authored a Case Comment appearing in 19:2. As a Lead Articles Editor in 1984-1985, she contributed immensely to the editorial improvement of this periodical.

The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO

*Philip A. Lacovara**
*Geoffrey F. Aronow***

With little discussion, the House of Representatives in 1970 added a provision for private civil suits to a Senate-passed bill that included the Racketeer Influenced and Corrupt Organizations, or "RICO,"[1] title of the Organized Crime Control Act of 1970.[2] That Act, including the RICO title, was primarily designed to give the Department of Justice new criminal enforcement tools to attack "the mob."[3] The Senate had drafted a bill with broad language in

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This article is based on the submissions that the authors have made to Congress as counsel to the American Institute of Certified Public Accountants in seeking a congressional amendment of the civil RICO statute.

1. 18 U.S.C. § § 1961-68 (1982). *See generally* 116 CONG. REC. 35,191-217, and 35,287-363 (1970). The provision of the statute which provides for a private civil remedy states in pertinent part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c)(1982).

2. 18 U.S.C. § § 1961-68 (1970).

3. *See* 116 CONG. REC. 35,191-217, and 35,284-363 (1970). RICO is directed at "racketeering activity," which is defined as any act chargeable under specific state criminal laws, any act "indictable" under several federal criminal provisions which are specifically enumerated in the statute and any "offense" involving bankruptcy, securities fraud or drug-related activities punishable under federal law. *See* 18 U.S.C. § 1961 (1982).

The statute specifically defines "racketeering activity" as:

> (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United

order to give the Justice Department adequate latitude in prosecuting persistent offenders, even if they were not members of traditional criminal syndicates.[4] Congress expected, however, that the Justice Department, in exercising its enforcement discretion, would be faithful to the expressed legislative purpose to direct the new criminal sanctions against "organized crime," as experienced prosecutors understand that term. The Justice Department, in fact, has adopted formal guidelines to avoid abusive or excessive use of the broad language of RICO, and has exercised discretion in selecting cases for prosecution under RICO.[5]

The provision for private civil suits was intended to have the same focus as the rest of the RICO title — that focus being to protect legitimate businesses from incursions by professional criminals.[6] Congress neglected, however, to include any specific mechanism to confine private civil suits to cases involving the activities of "organized crime."

Private claimants invoking the broadly phrased statute have not shown any of the discipline exercised by the Justice Department in its selective use of this powerful new weapon.[7] As a result, inventive private lawyers seeking treble damages are arguing successfully for the most sweeping interpretation of RICO's broad language, and are attempting to apply RICO in contexts far removed from those conceived by the statute's supporters. RICO claims now are added as a matter of course in virtually all cases challenging securities

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States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement for pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-46 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 USCS § 186] (dealing with restrictions on payments and loans to labor organizations) or section 501(c) [29 USCS § 501(c)] (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States. . . .

18 U.S.C. § 1961.

4. *See* 116 CONG. REC. 845-46 (1970).

5. *See* U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL, § § 9-110.200 to 9-110.707 (March 9, 1984). *See also infra* notes 197-209 and accompanying text.

6. *See* 116 CONG. REC. 25,190 (1970) (statement by Senator McClellan). Senator McClellan stated that the provision would be "a major tool in extirpating the baneful influence of organized crime in our economic life." *Id. See also* Sedima v. Imrex Co. Inc., 105 S. Ct. 3275, 3286 (1985).

7. *Sedima*, 105 S. Ct. at 3287.

transactions or alleging some type of commercial fraud. RICO also crops up in landlord-tenant[8] and real estate disputes,[9] attorney-client conflicts,[10] employment grievances,[11] and even divorce battles.[12] By contrast, only a tiny handful of the thousands of cases alleging private civil claims under RICO involve either the people or the conduct that supporters of the bill sought to attack.[13]

Without any of the restraint and responsibility that governs the decisions of public prosecutors, private lawyers are invoking civil RICO on behalf of private clients to level charges of "racketeering" against reputable businessmen and professionals such as investment bankers, brokers, and accountants. Although RICO was intended to protect legitimate business, the statute is now being used almost exclusively to attack established businesses and firms. The threat to bring a "racketeering" charge sometimes coerces settlements before the filing of a RICO complaint, while the actual filing of a RICO complaint exposes businessmen to continuing embarrassment and expense.

In July, 1985, the Supreme Court held that the courts do not have the authority to stop the misuse of civil RICO, and that only Congress may do so.[14] In its decision in *Sedima, S.P.R.L. v. Imrex Co.*, the Court unanimously recognized that RICO is being used in ways unintended by Congress: as a weapon against legitimate businessmen in ordinary commercial disputes.[15] A bare majority of the Court, however, held that this unfortunate result "is inherent in the statute as written, and its correction must lie with Congress."[16] Thus, the unintended targets of RICO actions have little or no hope of relief from the courts. The misuse repeatedly noted by commentators and courts alike, including now the United States Supreme Court, can only be eliminated by congressional action.

Congress has begun to respond to the Supreme Court's challenge.[17] In 1985, Representative Frederic C. Boucher, a Democrat from Virginia, introduced a bill which would amend RICO to confine treble damage claims under this special statute to cases in which the defendant previously has been convicted either under RICO itself or under one of the predicate criminal offenses listed in RICO.[18] Four other bills, introduced by Senator Orrin Hatch of

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8. Park South Associates v. Fischbein, 626 F. Supp. 1108 (D.C.N.Y. 1986); Pit Pros, Inc. v. Wolf, 554 F. Supp. 284 (D.C. Ill. 1983).

9. *See, e.g.*, Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986); Bowling v. Founders Title Co., 773 F.2d 1175 (11th Cir. 1985).

10. *See, e.g.*, White v. Fosco, 599 F. Supp. 710 (D.D.C. 1984).

11. *See, e.g.*, McLendon v. Continental Group, Inc., 602 F. Supp. 1492 (D.N.J. 1985).

12. *See, e.g.*, Erlbaum v. Erlbaum, FED. SEC. L. REP. (CCH) Paragraph 98,772 (E.D. Pa. 1982).

13. *Report of the Ad Hoc Civil RICO Task Force*, 1985 A.B.A. SEC. CORP., BANK. & BUS. L. at 55-58 (hereinafter cited as *ABA RICO Task Force Report*).

14. *Sedima*, 105 S. Ct. at 3287.

15. *Id.*

16. *Id. See also* American Nat'l Bank & Trust Co. v. Haroco Inc., 105 S. Ct. 3291 (1985).

17. Bills have been introduced in both the House and the Senate in an effort to modify the present civil RICO provisions. *See* H.R. 4892, 99th Cong., 2d Sess. (1986); H.R. 2943, 99th Cong., 2d Sess. (1985); H.R. 3985, 99th Cong., 2d Sess. (1985); S. 1521, 99th Cong., 2d Sess. (1985).

18. H.R. 2943, 99th Cong., 2d Sess. (1985).

Utah,[19] Representative John Conyers,[20] and Representative Barney Frank of Massachusetts,[21] and Representative Peter Rodino, Chairman of the U.S. House of Representative's Judiciary Committee, which has jurisdiction over this issue and these bills,[22] would deal less comprehensively with the problems created by civil RICO.[23]

This Article will examine the structure and history of RICO, and the ways in which it has become a weapon in ordinary commercial litigation. It will also discuss why the creation of a prior-criminal-conviction requirement is the best solution to the problems that Congress inadvertently created.

I. The Structure of the RICO Statute Permits Overly Broad Use By Private Plaintiffs

Under civil RICO, a person may press a civil RICO claim if he alleges that he was "injured in his business or property by reason of" the defendant's "pattern of racketeering activity."[24] The plaintiff may recover treble damages as well as costs and attorney's fees.[25] The private civil claim under RICO involves three main components: 1) predicate offenses; 2) a pattern of racketeering activity; and 3) the enterprise requirement.[26]

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19. The Hatch Bill, S. 152(1), 99th Cong., 2d Sess. (1985), would require a civil RICO plaintiff to allege that the defendant had engaged in at least one criminal act other than fraud. It would also authorize awards of attorneys' fees against plaintiffs who bring "frivolous" suits.

20. The Conyers Bill, H.R. 3985, 99th Cong., 2d Sess. (1985), would refashion RICO's definition of a "pattern" of racketeering and would require that the defendant have acted "knowingly."

21. The Frank Bill, H.R. 4892, provides for a series of changes, including providing for the arbitrability of RICO claims. Many of the provisions of H.R. 4892, such as the amendments permitting recovery for personal injury and injunctive relief, would actually increase the incentives for private parties to convert ordinary commercial disputes into RICO actions.

22. The central feature of the Rodino Bill, H.R. 5290, would eliminate automatic treble damages from the private civil RICO remedy and would substitute an award of actual damages plus "punitive damages," in an amount up to twice actual damages, if the court finds that the defendant acted with "actual malice."

23. On August 14, 1986, the Criminal Justice Subcommittee of the House of Representative's Judiciary Committee reported a bill that would amend the civil provisions of RICO. The bill, H.R. 5445, contains five major features: (1) elimination of treble damages in private RICO actions, substituting actual damages plus attorney's fees for a prevailing plaintiff; (2) substitution of the term "illicit activity" for the terms "racketeering" and "racketeering activity;" (3) a provision spelling out the circumstances under which an organization can be held liable under civil RICO for the acts of its agents and employees; (4) a three year statute of limitations, running from the time the plaintiff knew or should have known of the conduct that gave rise to the RICO claim; and (5) a requirement that a plaintiff prove any allegations of fraud by "clear and convincing evidence." While H.R. 5445, if enacted, would eliminate some of the misuse of civil RICO, it does not address the cause of that misuse as directly or as effectively as does H.R. 2943.

24. The private civil RICO section is 18 U.S.C. § 1964(c) (1982). See *supra* note 1 for language of the civil remedy portion of the statute.

25. *Id.*

26. 18 U.S.C. § 1962 (1982).

A. Predicate Offenses: "Racketeering Activity"

Congress was concerned that any attempt to define "organized crime" might unconstitutionally create a "status" crime.[27] Instead, Congress conferred broad authority upon the Executive Branch to exercise discretion to identify and prosecute racketeers. Congress defined the term "racketeering activity" to include a long list of federal and state crimes as diverse as murder, kidnapping, arson, and mail fraud.[28] The list of what could be branded as "racketeering activity" was made quite broad, because, as Senator McClellan observed, organized crime had shown great flexibility in branching into additional illegal activities, and "if we name one crime, they will commit another."[29] Narrowing the list, it was feared, only would create a "loophole" into which organized crime would move.[30] Congress, the Senator explained, could not "anticipate everything;" it would "have to make a statute general."[31]

Nevertheless, Congress expected the Department of Justice to channel this broad authority into a precisely-targeted law enforcement program directed at "organized crime," as experienced prosecutors understand organized crime to be.[32] Congress chose an approach that is familiar in crime legislation — that of entrusting broad statutory authority to Executive Branch discretion. Senator McClellan himself later explained that prosecutorial screening was the key to assuring that the broad new authority would only be used against "organized crime" figures.[33]

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27. *See, e.g.*, 116 CONG. REC. 35,343 (1970) (remarks of Rep. Celler); *Id.* 35,344 (remarks of Rep. Poff).

28. 18 U.S.C. § 1961(1). See *supra* note 3 for language of the statute.

29. 116 CONG. REC. 845-46 (1970).

30. *Id.*

31. *Id.*

32. *Measures Relating To Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 346-47 (1969) (hereinafter cited as *Senate Hearings*). The provisions in S. 30 being discussed were the RICO provisions that the Senate Judiciary Committee eventually reported as part of the Organized Crime Control Act.

This expectation is illustrated in a colloquy between Senator McClellan and the Deputy Staff Director of the Katzenbach Commission, Henry Ruth:

> Senator McClellan: '. . .I note that you say that while S. 30 is aimed at organized crime it has a general application to the criminal justice system. Do you think there is any practical way in which we can limit its application to organized crime?'
> Mr. Ruth: *'Legislatively no, sir; I think, administratively you can.* The difficulty is in drawing up the statutes aimed at organized crime, as you are probably aware of, as much as anyone in the country — you have drafted statutes in the past trying to define organized crime as a crime — and it has been very difficult on a constitutional basis.'

Id. (emphasis added). Similarly, the former Chief of the Organized Crime and Racketeering Section of the Justice Department's Criminal Division, William Hundley, testified that the authority being conferred was "very broad" and would have to be "very selectively used." *Id.* When Senator McClellan asked, "how could you write into the statute a provision that would compel this sort of selective use?", Hundley responded, "I don't think there's any way. *I think you're going to have to rely on the Justice Department.*" *Id.* at 424.

33. *See* McClellan, *The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 114 (1970).

The key to RICO coverage is an extensive list of "predicate" offenses that are defined as constituting "racketeering activity."[34] These include a variety of violent crimes, such as murder, kidnapping, extortion, and arson — crimes that one normally associates with organized crime. In addition, because of some indications from the Securities and Exchange Commission staff that organized crime figures were involved in trafficking in stolen or counterfeit securities and similar kinds of activity, the Commission asked the Senate to expand the list of predicate offenses in its bill to include mail fraud, wire fraud, and "fraud in the sale of securities."[35]

B. "Pattern" of Racketeering Activity

The commission of at least two predicate acts within a ten year period can be a "pattern" of racketeering activity.[36] The initial step in a plaintiff's civil RICO claim is to assert that a "person" — including the whole spectrum of legitimate business corporations, associations, partnerships, and their executives — committed two predicate acts within ten years and thus engaged in a "pattern of racketeering activity."[37]

Unfortunately, this sweeping coverage makes virtually any businessman or business organization a potential target of a RICO claim. Since the two predicate offenses may not need to be separated in time or involve different transactions, a claimant may allege that a single commercial transaction that generates a dispute constitutes a "pattern of racketeering."[38] For example, an investor may allege simply that a securities transaction consisting of two steps involved fraud. This allegation may make out a "pattern of racketeering activity" involving "fraud in the sale of securities."[39] Similarly, a would-be RICO plaintiff may assert that two separate copies of a financial statement, bill, contract, advertisement, or other document involved in an allegedly "fraudulent" transaction were sent through the mails. As Justice Marshall, writing for four Justices of the Supreme Court in the *Sedima* case, recognized, the breadth of the federal fraud statutes means that "the effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering."[40]

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34. 18 U.S.C. § 1961(1). See *supra* note 3 for language of statute.

35. *See infra* notes 177-85 and accompanying text.

36. 18 U.S.C. § 1961(5) (1982). A " 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. . . ." *Id.*

37. 18 U.S.C. § 1962(a) (1982). This section makes unlawful certain acts involving a "pattern of racketeering activity" or "collection of an unlawful debt." *See also* 18 U.S.C. § 1961(3) (1982) (defining person as any "individual or entity capable of holding a legal or beneficial interest in property").

38. *See* Noland v. Gurley, 566 F. Supp. 210 (D.C. Colo. 1983) (racketeering activity includes acts arising out of one episode).

39. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

40. *See Sedima*, 105 S. Ct. at 3293 (Marshall, J., dissenting). In the course of deciding *Sedima*, the Supreme Court suggested that the lower courts had paid insufficient attention to the "pattern" requirement, and that, while the commission of two acts of racketeering activity is a necessary condition to proving a "pattern," it may not be sufficient. 105 S. Ct. at 3296-97. In the

C. *"Enterprise Requirement"*

RICO also requires that the person commit the predicate acts in particular relationship to an "enterprise."[41] Under the statute, it is unlawful to obtain any interest in an "enterprise" through a pattern of racketeering activity, to control an enterprise through such activity, or to conduct the affairs of an enterprise through racketeering activity.[42] Depending on the facts, a plaintiff easily can satisfy the "enterprise" requirement in actions against legitimate businesses or businessmen by alleging that, for example, a defendant corporation is conducting the affairs of an affiliate — the "enterprise" — improperly,[43] or the partners are conducting the affairs of the partnership, — the "enterprise" — improperly.[44] Plaintiffs also have successfully maintained RICO suits by alleging that employees conducted the business "enterprise" through a "pattern of racketeering," and then seeking to hold the business itself responsible under the doctrine of *respondeat superior*.[45]

II. THE LEGISLATIVE DEVELOPMENT OF CIVIL RICO SHOWS A DOMINANT PURPOSE TO PROTECT LEGITIMATE BUSINESSES

The bill that became the 1970 Organized Crime Control Act, including the RICO title, originated in the Senate.[46] The Senate report stated unambiguously the objective of the legislation was:

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wake of *Sedima*, some lower courts have taken the cue from the Supreme Court, requiring plaintiffs to plead facts showing a "relationship" and "continuity" between the alleged criminal acts. *See, e.g.*, Northern Trust Bank/O'Hare N.A. v. Inry Co., 615 F. Supp. 828 (N.D. Ill. 1985). Other courts appear to continue to require the plaintiff to plead and prove little more than the occurrence of two predicate acts within a ten year period. *See e.g.*, R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985). *But see* Armco Indus. Credit Corp. v. SLT Warehouse Co. 782 F.2d 475 (5th Cir. 1986) (indicating post-Sedima test for "pattern" remains an open question).

41. 18 U.S.C. § 1961(4) (1982). Enterprise is defined in 18 U.S.C. § 1961(4) as including: "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.*

42. 18 U.S.C. § 1962 (1982). The statute provides in relevant part that "[i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity. . . to use or invest. . . any part of such income. . . in, or the activities of which affect, interstate or foreign commerce." *Id.* at § 1962(a). It also provides that "[i]t shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain. . . any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce," *id.* at § 1962(b), and "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Id.* at § 1962(c).

43. *See, e.g.*, Haroco Inc. v. American Nat'l Bank & Trust Co. of Chicago Inc., 747 F.2d 384, 402-03 (7th Cir. 1984), *aff'd per curiam*, 105 S. Ct. 3291 (1985).

44. *See, e.g.*, McCullough v. Suter, 757 F.2d 142, 143 (7th Cir. 1985). Further, the argument can be extended to sole proprietorships and limited partnerships. *Id.*; Eisenberg v. Gognon, 564 F. Supp. 1347 (E.D. Pa. 1983). *See also* United States v. Sutton, 605 F.2d 260, 270 (6th Cir. 1979) (enterprise involves any activity of a group or individual which is for a lawful end).

45. *See, e.g.*, Bernstein v. IDT Corp., 582 F. Supp. 1079, 1083 (D. Del. 1984).

46. S. 30, 91st Cong., 1st Sess. (1969), 116 CONG. REC. 845-46 (1970).

> [T]he eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions *and new remedies to deal with the unlawful activities of those engaged in organized crime.*[47]

In this vein, Senator McClellan, the bill's chief sponsor and a longtime foe of organized crime, focused his arguments for the bill on the insidious activities of "La Cosa Nostra."[48] In particular, his sponsorship reflected awareness that, when "organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses."[49] The Senate wanted to provide a mechanism to respond to reports that "organized crime has begun to penetrate" some legitimate businesses, such as securities firms from which gangsters were stealing securities.[50]

The Senate RICO bill contained no provision for private civil suits when Senator McClellan introduced it,[51] when the Judiciary Committee added the fraud predicates,[52] or when the Senate initially passed the bill.[53] The private civil remedy was added to the RICO legislation in the House Judiciary Committee at the urging of Representative Steiger, who submitted the draft of the language that ultimately became law.[54] In submitting the amendment, Representative Steiger explained that his proposal was designed to add a private remedy in order to help in the fight "to deal with organized crime."[55] He carefully emphasized his understanding that RICO was designed "to prevent and reverse the corrupt infiltration of legitimate commercial activities by ruthless organized criminals."[56] So as to leave no room to doubt that he expected that the new statute, including his civil damage remedy, would be directed against "ruthless, organized criminals," Representative Steiger described examples of penetration of legitimate business by various "families" of "La Cosa Nostra."[57] In the sparse debate on the civil damage provision when the bill reached the House floor, the Chairman of the House Judiciary Committee, Representative Cellers, explained that the addition of treble-damage remedy

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47. S. REP. No. 617, 91st Cong., 1st Sess. 2 (1969) (emphasis added).

48. 115 CONG. REC. 5872-5875 (1969).

49. *See* S. REP. No. 617, 91st Cong., 1st Sess. 77; 116 CONG. REC. 591 (1970) (remarks of Senator McClellan).

50. 116 CONG. REC. 585-86 (1970). The House shared this concern about the infiltration of organized crime into legitimate businesses across the nation. 116 CONG. REC. 6709-10 (1970). Thus, for example, when Congressman Poff, a leading proponent of the legislation, pointed to the forcible takeover of a jukebox business by "a mafia boss," he illustrated the general understanding that RICO was meant to protect legitimate business people injured by organized crime. *Id.* (remarks of Congressman Poff).

51. S. 30, 91st Cong., 1st Sess. (1969), 116 CONG. REC. 845-46 (1970).

52. S. REP. No. 91-617, 91st Cong., 1st Sess. (1969).

53. 116 CONG. REC. 845-46 (1970).

54. *Id.* at 519 (1970).

55. *Organized Crime Control: Hearings Before Subcommittee No. 5 of the Committee on the Judiciary on S. 30 and Related Proposals Relating to the Control of Organized Crime in the United States*, 91st Cong., 2d Sess. 519 (1970).

56. *Id.*

57. *Id.*

was to be one of the tools "designed to inhibit the infiltration of legitimate business by organized crime."[58]

The bill returned to the Senate shortly before Congress was to adjourn, and the Senate accepted the amended version without seeking a conference.[59] In doing so, however, no one suggested that the focus of congressional concern — that of protecting legitimate businessmen — had shifted in the slightest. Indeed, Senator McClellan described the House amendments, including the addition of the civil provision, as "comparatively . . . minor changes."[60] At no time did any supporter of the bills suggest that the private civil remedy was intended for use *against* legitimate business people, corporations, or partnerships of licensed professionals, nor was it to be used in commercial disputes having nothing whatever to do with the activities that were and are commonly recognized as involving "organized crime."

III. The Use of the Private Civil Damage Provision has Actually Undermined the Congressional Objective

In light of the unambiguous congressional focus, civil RICO actions should closely parallel criminal prosecutions. Instead, civil RICO is used almost exclusively in commercial disputes, against what Assistant Attorney General Stephen S. Trott, in testimony on RICO before the Senate Judiciary Committee on May 20, 1985, called "conduct bearing little resemblance to organized crime activity in the traditional sense."[61] The statute now is being invoked in every kind of litigation where a plaintiff possibly can allege the predicate offense of "fraud." Virtually all of these claims are covered either by specific federal regulatory laws such as the securities laws, or do not belong in the federal courts at all. In the vast majority of cases, civil RICO claims are being used as weapons against the very people Congress was seeking to protect: legitimate business people. Not only have these developments distorted congressional expectations, but they also present widely recognized and increasing opportunities for abuse.

A. The Ability Of A Private Lawyer To Charge A Person With Criminal "Racketeering" Is Easily Abused.

RICO is unprecedented in authorizing private lawyers who are representing purely private clients to invoke the judicial process by charging another private person *with crimes*. Under RICO, the private lawyer exercises power that normally is reserved to public officials and grand jurors: the power to lodge a formal accusation of crime. Those public officials and grand jurors, of course, have a duty of fairness and restraint in deciding whether to make that kind of accusation.[62] A private lawyer, by contrast, owes allegiance to his cli-

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58. 116 Cong. Rec. 35,196 (1970).

59. *Id.* at 36,293-96.

60. *Id.* at 36,293.

61. *Statement of Stephen S. Trott, Assistant Attorney General, Criminal Division, Before the Committee on the Judiciary, United States Senate, Concerning Civil RICO Suits*, May 20, 1985 at 25 (Trott Testimony) (available at the New England Law Review).

62. As the Supreme Court once described the special responsibilities of prosecutors:

The United States Attorney is the representative not of an ordinary party to a con-

ent's private interest, not to a higher sense of justice. His interest is not in impartiality, but in partisan advocacy. He is his client's servant, not the servant of the law. His client's interest is not that "justice" be done, but that he call upon any tools the law provides him in order to pursue his client's cause and obtain money from the defendant.

Because of these fundamental differences, our system surrounds the exercise of prosecutorial power with many legal and ethical restrictions not applicable to the private attorney.[63] The officials who exercise prosecutorial discretion are accountable to the public for their judgments. As a further shield against overzealousness, the Constitution interposes grand jurors who must independently evaluate the evidence before the government may proceed and who, like the prosecutor himself, are sworn to secrecy while the prosecutor is attempting to demonstrate that there is substantial evidence to justify lodging a proposed criminal charge.[64] None of these restrictions, however, applies to a private lawyer who is considering filing a civil lawsuit in order to promote his client's personal interests.

Yet, the private claimant's power to brand a businessman or firm a "racketeer" may cause almost as serious damage to the legitimate businessman as may an unwarranted criminal charge. Business rivals may use this power to gain economic advantage without actually having to go beyond the threat to file a civil RICO suit. The people who are monitoring the actual use of civil RICO know that this is the reality, not mere speculation. As Justice Marshall noted in the *Sedima* decision: "[T]he defendant, facing a tremendous financial exposure in addition to the threat of being labelled a 'racketeer,' will have a strong interest in settling the dispute."[65] Ironically, therefore, civil RICO creates an opportunity for civil claimants to engage in a form of extortion, even though the criminal features of the statute are geared to prevent similar exactions by organized crime figures.

Several recent RICO cases illustrate the full range of the distortion to which the present language of the civil RICO provision lends itself and the difficulties the courts are having in applying the statute sensibly. For example, a RICO suit was filed against former Vice President Walter Mondale, the Democratic National Committee, and several individual members of the Committee, alleging that the defendants offered to channel political contributions to other democratic candidates in exchange for promises not to oppose certain

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> troversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88 (1935).

63. For instance, the Department of Justice places restrictions on how federal prosecutors use RICO to ensure that their use of the statute is consistent with Congress' intent and the overall public interest and not just consistent with the letter of the law. *See* U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS MANUAL §§ 9-110.200 to 9-110.500 (March 9, 1984). *See* text accompanying *infra* notes 198-212.

64. U.S. CONST. amend. V.

65. *Sedima*, 105 S. Ct. at 3294 (Marshall, J., dissenting).

Reagan Adminstration policies.[66] While the court dismissed the claim, it did so solely on the ground that the plaintiffs had failed to allege acts pleading the correct predicate "crimes" specified in the RICO statute.[67] Thus, the court found nothing wrong with the basic use of RICO, only with the choice of the particular criminal acts pleaded as predicate offenses.[68] Similarly, an agri-business has been allowed to sue Cesar Chavez, the United Farm Workers Union, their counsel and strike coordinators, under civil RICO, claiming that the Union and these leaders had induced the California Agricultural Labor Relations Board to issue fraudulent complaints against the business.[69]

Perhaps the most striking misuse of what Congress intended to be a powerful new weapon against organized crime has come in cases in which civil RICO has been turned against the Federal Bureau of Investigation and its agents. In *Compton v. Ide*,[70] the plaintiff brought a civil RICO treble-damage suit against the FBI and individual federal agents and others, based upon actions by law enforcement officers in connection with the investigation and arrest of the plaintiff leading up to his conviction for illegal possession of weapons by a felon.[71] The plaintiff challenged, as fraudulent and extortionate, various tactics used in an undercover investigation. After two years of motion practice and after the government's responses to five amended complaints, the trial court finally was able to dismiss the claims on statute of limitations grounds, and the Ninth Circuit affirmed on that ground. Significantly, however, neither court suggested that the plaintiff's allegations under RICO would not otherwise have been sufficient to warrant discovery and trial.[72]

In addition, at least one federal court has held that the fraud predicates supported a civil RICO claim for damages against FBI agents who orchestrated an undercover "sting" operation.[73] The FBI has been subjected to several years of pretrial proceedings in that case, including extensive discovery, and many rounds of briefing on pretrial motions, including at least one appeal to the Seventh Circuit. If this case goes to trial, the United States will be forced to litigate whether FBI agents were acting as "racketeers" in performing their duties.[74] It is hard to imagine a more glaring illustration of the point that civil RICO is now being used against the very people it was designed to aid.[75]

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66. Taylor v. Mondale, No. 84-3149 (D.D.C. May 7, 1985), *reported in* CIVIL RICO REP., (BNA) June 5, 1985, at 6.

67. *Id.*

68. *Id.*

69. Bruce Church, Inc. v. United Farm Workers, No. CV-F-84-231REC (Jan. 24, 1986) *reprinted in* 3 RICO LAW REP 723 (May 1986).

70. 732 F.2d 1429 (9th Cir. 1984).

71. *Id.* at 1432.

72. *Id.* at 1432-33.

73. Lightner v. Tremont Auto Auction, No. 82C-20090 (N.D. Ill. June 29, 1984), *reported in* 1 RICO LITIGATION REP. 317 (Sept. 1984).

74. *Id.*

75. In at least three instances RICO has been invoked in religious squabbles. A federal district court in California denied a motion to dismiss a civil RICO claim brought by the Church of Scientology against former members who allegedly conspired to steal church scriptures for their financial benefit and were allegedly "perverting" the texts. Church of Scientology v. Armstrong, (D.C. Cal. July 16, 1985), *reported in* 1 CIVIL RICO REP. (BNA), at 2, July 24, 1985. In two

State governments are not immune from the irresistible temptation to find ways to exploit the federal treble-damage remedy under RICO, even though those uses may distort principles of federalism and equip state and local officials with weapons that their own legislatures have chosen not to give them. For example, in *Illinois Department of Revenue v. Phillips*,[76] the State of Illinois sued a retailer under civil RICO, alleging that he had understated his sales taxes.[77] Although state law did not provide a treble-damage remedy for tax violations, the state tax collector sought treble damages in federal court under RICO.[78] The district court dismissed the suit, holding that, while the state was technically able to allege all the elements of a civil RICO suit, "RICO should not become a vehicle for federal jurisdiction and treble damages in state tax fraud cases."[79]

On appeal, the court of appeals, "however reluctantly,"[80] reversed the district court and reinstated the complaint. The court held that, in light of the Supreme Court's decisions in *Sedima* and *Haroco*, the courts do not have the power to reject a RICO suit that fits within the broad contours of the statutory language, however far from the intended use of RICO it may be.[81] Thus, the court ruled that, as written, RICO makes the federal courts the agencies for potentially thousands of state tax collection cases in which local revenue officials will find the lure of treble damages virtually irresistable.[82] The court of appeals, however, made it clear that Congress should not tolerate the present state of civil RICO:

> Perhaps we can take solace in the fact that the Illinois Department of Revenue promised in oral argument that such tax collection suits will be few, but we doubt, once the cause of action is established, this will be true. *We can only hope that this decision appears to Congress as the distress flag that it is, and that Congress will act to limit, as only it is empowered to, the statute's application to*

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other RICO cases revolving around religious disputes, the trial judges have struggled to make RICO inapplicable. In Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125 (D. Mass. 1982), the district court was faced with a claim brought by a disaffected former adherent of the Scientologists alleging fraudulent misrepresentations. *Id.* The RICO claim in Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555 (E.D.N.Y. 1983), turned on a dispute about the proper succession to the "Skolyer Rebbe," a Chassidic Jewish leadership position. *Id.* The plaintiffs invoked "mail fraud" and other predicate offenses based on alleged misrepresentations by the defendants about their right to administer the congregation. The district court dismissed the suit on the ground that the religious issues were non-justiciable. *Congregation Beth Yitzhok*, 566 F. Supp. at 555, 558.

RICO is being used as well in disputes between spouses and over inheritance. *See ABA RICO Task Force Report*, *supra* note 13, at 39 n.41. In another case, the only surviving count against a *township* in a case involving a dispute over a toxic waste dump site is the RICO count. *See* Bonne v. Beacon Bldg. Corp., No. 84-2557 (D.N.J. July 25, 1985), *reprinted in* 2 RICO LAW REP. 267 (Aug./Sept. 1985).

76. 771 F.2d 312 (7th Cir. 1985).

77. *Id.* at 313.

78. *Id.*

79. *Id.* at 316.

80. *Id.*

81. *Id.*

82. *Id.*

cases such as the one before us now.[83]

B. Civil RICO Suits Are Directed Mostly At Well Established Businesses, Not Organized Crime.

The American Bar Association's special RICO Task Force collected comprehensive data about hundreds of private civil RICO cases, almost all of which were reported after 1982.[84] This task force's conclusions along with other private surveys indicate that cases that fairly could be characterized as having anything to do with aiding the war on organized crime are a tiny minority.[85]

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83. *Id.* at 317 (emphasis added). The court of appeals' concern about future state tax cases under RICO has already proved accurate. The State of Michigan has already filed at least two cases seeking treble damages under RICO for alleged tax fraud with facts remarkably similar to the Illinois case. *See* Michigan v. Dry Land Marina, Inc., 86 CV 0007 (W.D. Mich., complaint filed Jan. 6, 1986); Michigan v. Fawaz, No. 86 CV 70054DT (E.D. Mich., complaint filed Jan. 8, 1986) (copies of complaints on file at the New England Law Review).

84. *ABA RICO Task Force Report*, *supra* note 13, at 53, 55 (of the cases collected in the Report's database, 3% were decided prior to 1980, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984).

85. *Id.* The Report classified the essential allegations underlying the RICO charges as follows:

Percentage	Underlying Allegation
40%	securities fraud
37%	common law fraud in a commercial setting
4%	antitrust or unfair competition
4%	bribery or commercial bribery
3%	other fraud
2%	labor disputes
1%	theft or conversion
9%	offenses associated with professional criminal activity

Id. at 55-58.

Another private survey with which the authors are familiar analyzed 132 randomly selected civil RICO cases in which opinions have been published. According to the descriptions of allegations contained in those cases, they fall into the following categories:

Securities transactions	57
Commercial and contract disputes	38
Commodities trading	6
Bank loans	6
Antitrust price fixing	3
Religious disputes	2
Divorce	1
Union affairs	3
Commercial bribery/kickbacks	2
Political corruption (including official extortion and bribery)	9
Theft (by cleaners from apartment dwellers)	1
Violent crimes (murder, arson, extortion)	3

See American Institute of Certified Public Accountants, *The Authority to Bring Private Treble-Damage Suits Under RICO Should be Removed* at 13 (October 10, 1984).

Both the majority and minority opinions in *Sedima* cited and accepted the ABA Task Force statistics. *Sedima*, 105 S. Ct. at 3287 n.16, 3295. Both opinions recognized that the pattern shown

In his testimony before the Senate Judiciary Committee on the need for civil RICO reform, Assistant Attorney General Trott of the Department of Justice reported that the Department's own survey of private RICO cases confirmed this pattern of abuse.[86] According to the Justice Department's calculations, only about 7% of all civil RICO cases involve either actual organized crime figures or the kinds of criminal conduct common to organized crime syndicates.[87] As Assistant Attorney General Trott concluded:

> Experience has shown. . . that the instances of private civil RICO's use against traditional organized crime activities are far outweighed by examples of its application as a general federal anti-fraud remedy against seemingly reputable businessmen.[88]

On some occasions, private plaintiffs have used civil RICO to pursue people who first had been prosecuted and convicted of the predicate acts of RICO itself. The three civil RICO cases noted in the private survey of 132 cases which involved allegations of gangster-like conduct — murder, arson and extortion — were cases filed *after* the authorities had obtained criminal convictions.[89] In addition, at least a dozen other civil RICO cases in these surveys have followed criminal convictions, generally for some form of political corruption.[90] In one case, the Seventh Circuit upheld a RICO judgment against a defendant sued after he had pleaded guilty to charges of mail fraud based on the same conduct.[91] In another action filed in 1985, a corporation brought RICO claims against, *inter alia*, two individuals who had recently pleaded guilty to federal securities law violations.[92] Thus, RICO can be, and has been, used to pursue civil remedies against *convicted* felons.

In most civil RICO cases, however, the public authorities have not found a basis to proceed with any criminal charges. There has been, therefore, no careful screening by publicly accountable officials before private claimants have charged those defendants with criminal "racketeering." This is not surprising, because public officials would not have considered it fair or accurate to brand the defendants in these cases "racketeers." Indeed one commentator, who maintains the comprehensive coumputerized database of civil RICO decisions upon which the ABA RICO Task Force relied and who served as Executive Director of that Task Force, concluded that, "realistically speaking, the

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by this data was not what Congress intended; they diverged only on the question whether the courts may properly do anything to prevent future use of the statute in this manner. The majority concluded that this is a task for Congress, not the courts. *Id.* at 3287.

86. Trott Testimony, *supra* note 61, at 26-29.

87. *Id.* at 28.

88. *Id.* at 45.

89. *See* Anderson v. Janovich, 543 F. Supp. 1124 (W.D. Wash. 1982) (tavern owner claimed that convicted competitors tried to control local tavern business through threats of murder and arson); State Farm Fire and Casualty Co. v. Estate of Caton, 540 F.Supp. 673 (N.D. Ind. 1982)(insurance company sought to recover fraudulently obtained proceeds after convictions in arson-for-hire case); City of Milwaukee v. Hansen, No. 77-C-246 (E.D. Wis. filed January 13, 1981) (city sought to recover costs incurred in fighting fires started by convicted arsonists).

90. See Trott Testimony, *supra* note 61, at 26-29, referring to Department of Justice Survey.

91. McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985).

92. Anheuser-Busch Co., Inc. v. Thayer, No. 3-85-0794-R (N.D. Tex. filed April 26, 1985), *reported in* RICO LITIGATION REP. at 695 (May 1985).

likelihood of state or federal prosecutors seeking indictments in the vast majority of these types of cases is as close to zero as anything could be."[93] Thus, these civil cases are not supplementing the enforcement efforts of prosecutors who simply lack the resources to deal with all the offenses deserving prosecution. Instead, these cases involve, with rare exceptions, disputes that no responsible prosecutor would brand as criminal, much less as manifestations of "organized crime" or "racketeering."

Although the burden of RICO's misuse does not fall solely on persons in the financial community and in related professional services, the burden has, however, become especially severe for these people because they are viewed as vulnerable "deep pockets" whenever an investment or a commercial transaction goes sour. As the New York Times reported, despite the expectation that civil RICO would focus on "mobster deals," "legitimate businesses" such as Morgan Stanley, American Express, and Lloyd's of London have "found their names smeared with racketeering charges . . . ."[94]

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93. Wessman, *Circuit Aims To Curb Private Civil RICO Actions*, Legal Times, Aug. 20, 1984, at 12, col. 2.

94. N.Y. Times, Sept. 4, 1984, § D2, at 56, col. 1. A partial roster of defendants in civil RICO suits includes the following established and respected entities that private claimants have charged with a "pattern of racketeering:"

Investment Bankers and Brokers
- Bache Halsey Stuart Shields, Inc.
- Bear Sterns & Co.
- Dean Witter Reynolds
- E.F. Hutton, & Co.
- Lehman Brothers Kuhn Loeb, Inc.
- Loeb Rhodes & Co., Inc.
- Merrill Lynch, Pierce Fenner & Smith, Inc.
- Morgan Stanley & Co., Inc.
- Oppenheimer & Co.
- Paine Webber Jackson & Curtis, Inc.
- Shearson/American Express, Inc.
- Thomson McKinnon Securities, Inc.

National C.P.A. Firms
- Alexander Grant & Company
- Arthur Andersen & Co.
- Coopers & Lybrand
- Ernst & Whinney
- Laventhol & Horwath
- Peat Marwick Mitchell & Co.
- Price Waterhouse
- Touche Ross & Co.

Law Firms
- Lord, Bissel & Brook
- Pierson, Ball & Dowd
- Singer, Hutner, Levine & Seemans
- Sullivan & Wooster

C. *Civil RICO Is Used Most Extensively In Ordinary Commercial Disputes.*

As the figures demonstrate, the vast bulk of private civil RICO cases have come in ordinary commercial contexts — hardly in the settings that Congress thought needed bold new weapons or special incentives to sue. All its sponsors expressly agreed that RICO was aimed at preventing the infiltration of legitimate business by organized crime.[95]

The draftsmen certainly did not intend, for example, to have RICO become a device for challenging corporate takeover bids or to add a new level of regulation of those hotly contested deals. Yet, as SEC Commissioner Charles

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Banks
Citibank, N.A.
Continental Illinois National Bank & Trust Co.
Crocker National Bank
First American Bankshares, Inc.
First Interstate Bank of Oregon
First National Bank of Atlanta
First National Bank of Maryland
National Republic Bank of Chicago
Pacific Western Bank
Riggs National Bank of Washington, D.C.
Sierra Federal Savings & Loan Association
Southwest National Bank
State Bank of India
Union Bank

Insurance Companies
Allstate Insurance Co.
Lincoln Insurance Co.
Prudential Insurance Co. of America
State Farm Mutual Automobile Insurance Co.
Travelers Insurance Co.
Underwriters of Lloyd's London
USLIFE Corp.

Manufacturing Companies
A.H. Robins Co., Inc.
Boeing Co.
Continental Group, Inc.
General Dynamics Corp.
General Motors Corp.
Miller Brewing Co.
Mitsui & Co. (U.S.A.), Inc.
Rockwell International Corp.
Rohm & Haas Co.

Amicus Curaie Brief in Support of Respondents by American Institute of Certified Public Accountants at app. A, Sedima v. Imrex, 105 S. Ct. 3275 (1985). These firms have been named as defendants in dozens of civil RICO suits, even though the Justice Department has not seen merit enough even to *file* criminal charges against them, much less to obtain convictions. Of course, the enormous expenses associated with defending against unchecked civil RICO claims become a cost of doing business that ultimately is passed on to the consumers of the goods and services provided by these firms and by their customers and clients.

95. *See supra* note 6 and accompanying text.

Marinaccio told the Senate Judiciary Committee in May of 1985: "It has become standard practice to add a RICO charge to lawsuits challenging tender offers."[96] In *Dan River, Inc. v. Icahn*,[97] the Fourth Circuit Court of Appeals expressed concern about attempts to use RICO to block a takeover bid through a public tender offer, pointing out that this is simply one illustration of the unintended and excessive use of civil RICO.[98]

The treble-damage weapon of RICO and the "racketeering" label are also being used to challenge the ways banks set up their loan procedures and terms. For instance, in *Morosani v. First National Bank of Atlanta*,[99] the Eleventh Circuit has allowed a case to proceed on the claim that the "prime rate" used in computing the interest on the plaintiff's loan was not the bank's true prime rate.[100] In *Lode v. Leonardo*,[101] the court explained why it, too, felt obliged to entertain a RICO suit involving alleged misrepresentations relating to a commercial loan:

> Congress may not have envisioned that the civil remedies it supplied in RICO would find the widespread use that they have in commercial fraud cases. And such use of RICO's remedies may well be somewhat undesirable. But, when a plaintiff makes allegations which appear to state a claim under the statute as it is written, it is not the function of this Court to reject that claim on the ground that Congress must have meant something other than what it said in the statute.[102]

The Supreme Court has agreed that RICO sweeps so broadly as to encompass such cases.[103]

RICO counts have already appeared in many other cases involving dis-

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96. *Statement of Charles L. Marinaccio, Member of the Securities and Exchange Commission, Before the Committee on the Judiciary, United States Senate*, May 20, 1985, at 3. (available at the New England Law Review).

97. 701 F.2d 278 (4th Cir. 1983).

98. The court stated in *Icahn*:

> Finally, we note the mounting controversy in the federal courts over the proper limits, if any, upon the use of RICO in cases far removed from the context which Congress had in mind when it enacted the statute. Congress was out to attack the problem of organized crime, not the problem of corporate control and risk arbitrage. We of course make no attempt to resolve the dispute here and now. We do not propose to enter the fray. We only note that the reach of RICO is itself a troubling issue . . . .

701 F.2d at 291. *See also* Gearhart Indus. Inc. v. Smith Int'l Inc., 592 F. Supp. 203 (N.D. Tex. 1984), *modified*, 741 F.2d 707 (5th Cir. 1984); Tyson & August, *The Williams Act After RICO: Has The Balance Tipped In Favor of Incumbent Management?*, 35 HASTINGS L.J. 53, 111-12 (1983). "By giving target management a powerful new weapon in the takeover battle, the judicial approval of RICO suits predicated on Williams Act violations undermines the careful policy of evenhandedness that the Williams Act Congress sought so hard to attain." *Id.*

99. 703 F.2d 1220 (11th Cir. 1983).

100. *Id.*

101. 557 F. Supp. 675 (N.D. Ill. 1982).

102. *Id.* at 681.

103. *See* Haroco v. American Nat'l Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), *aff'd, per curiam*, 3291.

puted commercial transactions, including: churning of stock,[104] representations about a broker's expertise,[105] projections used in real estate syndication,[106] disputes between landlord and tenant,[107] disallowance of insurance claims,[108] alleged overcharges by a printer,[109] failure to publish a medical journal according to a contractual agreement,[110] disputes over commissions owed by tour packagers to travel agents,[111] claims by the disappointed bidder against the winner of a cable television franchise,[112] diversion of goods sold for export,[113] and sale of a joint venture interest.[114] Because Congress included open-ended "fraud" predicates, there is ample room for transforming additional kinds of commercial disputes into RICO cases.

Although the "fraud" predicates are the easiest to abuse by artful pleading, they are not the only predicates subject to abuse. The Fourth Circuit ordered reinstatement of a civil RICO case brought by a condominium developer who alleged that the purchasers of an office condominium unit were trying to "extort" an unreasonably high price from him in connection with the developer's effort to repurchase the condo unit in order to include it in a block of units the developer wanted to sell to IBM.[115] Although the district court found that this was "at best a garden-variety commercial breach of contract" case, the Fourth Circuit concluded that the allegations might make out a claim of "extortion" under state law and, therefore, the plaintiff could press the case under RICO.[116] The two businessmen who originally bought the condominium unit — and their wives as co-defendants — thus stand accused of being racketeers and must defend themselves against a statute that Congress believed would *protect* business people from, in Representative Steiger's words, "ruthless organized criminals."[117]

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104. *See, e.g.*, Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002 (C.D. Cal. 1982).

105. *See, e.g.*, Noland v. Gurley, 566 F. Supp. 210 (D. Colo. 1983).

106. Gordon v. Terry, 684 F.2d 736 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983).

107. Pit Pros, Inc. v. Wolf, 554 F. Supp. 284 (N.D. Ill. 1983).

108. Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983).

109. Estee Lauder, Inc. v. Harco Graphics, Inc., 558 F. Supp. 83 (S.D.N.Y. 1983).

110. American Soc'y of Contemp. Med. Surgery & Opthalmology v. Murray Communications, Inc., 547 F. Supp. 462 (N.D. Ill. 1982).

111. Ark Travel, Inc. v. Travelers Int'l Tour Operators, Inc., No. 84-623 (D.N.J.), *motion to dismiss denied reprinted in* 2 RICO LAW REP. 283 (Aug./Sept. 1985).

112. District Telecommunications Dev. Corp. v. Dist. Cablevision Inc., No. 85-2348 (D.D.C.), *reported in* 2 RICO LAW REP. 249 (Aug./Sept. 1985).

113. Fieldcrest Mills, Inc. v. Congo Agencies, Inc., Civil No. 85-305 (D.N.J.), order denying motion to dismiss *reprinted in* 2 RICO LAW REP. 181 (July 1985); Shulton, Inc. v. Optel Corp., (D.N.J., complaint filed June 14, 1985), *reported in* 1 CIVIL RICO REP. (BNA), at 5 (June 26, 1985).

114. Steinbrenner v. Peavey Co., (W.D.N.Y. July 30, 1985) (motion to dismiss denied), *reported in* 1 CIVIL RICO REP. (BNA), at 8 (Aug. 14, 1985).

115. Battlefield Builders, Inc. v. Swango, 743 F.2d 1060, 1063-64 (4th Cir. 1984).

116. *Id.* at 1062-63.

117. *Organized Crime Control: Hearings Before Subcommittee No. 5 of the Committee on the Judiciary on S. 30 and Related Proposals Relating to the Control of Organized Crime in the United States*, 91st Cong., 2d Sess. 519 (1970).

D. The Inclusion Of Fraud-Based Predicate Offenses Is The Source Of Most Of The Abuse Of Civil RICO

Although other predicate offenses are subject to abuse under civil RICO, without doubt, the single most important aspect of RICO that permits plaintiffs to transform commercial disputes into federal treble-damage actions is the inclusion of "mail fraud," "wire fraud," and "fraud in the sale of securities" in the list of predicate offenses.[118] The comprehensive survey by the ABA Special Task Force on Civil RICO ascertained that ninety-one percent of RICO claims appear in cases that involve sales of securities or commodities or relate to contract disputes or other ordinary commercial transactions.[119] Although Congress added the fraud-based predicates at a time when RICO did not provide for a private remedy, and it added the private remedy at the last minute without careful consideration of how it would be used, the result, to quote the words of Justice Marshall in *Sedima*, "quite simply revolutionizes private litigation."[120] Justice Marshall further stated: "The single most significant reason for the expansive use of civil RICO has been the presence in the statute, as predicate acts, of mail and wire fraud violations."[121] He similarly recognized that the fraud-based predicates allow a plaintiff to bypass the federal securities laws in favor of a claim under RICO.[122] The result, Justice Marshall and other dissenting Justices realized, is "the federalization of broad areas of state common law of frauds, and. . . the displacement of well-established federal remedial provisions.[123]

Claims based on "mail fraud" and "wire fraud" predicate offenses are easy to plead in many commercial disputes. They are also likely to survive early motions to dismiss because of the broad reading courts have given the federal criminal mail and wire fraud statutes.

> The crime of mail fraud is [broad] in scope. The fraudulent aspect of the scheme to 'defraud' is measured by a non-technical standard. Law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.' This is indeed broad.[124]

In almost any instance where a venture has lost money, or a stock has fallen in value, a disappointed investor can allege that the businessman's behavior was not a "reflection of moral uprightedness" and "fair play." As Justice Marshall noted in his opinion in *Sedima*:

> The effects of making a mere two instances of mail or wire fraud

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118. *See ABA RICO Task Force Report*, *supra* note 14, at 55-56.

119. *Id.*

120. *Sedima*, 105 S. Ct. at 3293.

121. *Id.*

122. *Id.* at 3294-95.

123. *Id.* at 3293.

124. Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (quoting Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958)).

> potentially actionable under civil RICO are staggering, because in recent years courts of appeal have 'tolerated an extraordinary expansion of mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal and civil law.'[125]

Justice Marshall recognized that the "only restraining influence on the 'inexorable expansion of the mail and wire fraud statutes,' has been the prudent use of prosecutorial discretion."[126] The courts have permitted the expansive reading of the mail and wire fraud statute knowing full well that no private right of action existed under those criminal statutes.[127] Even Congress never directly or advertantly authorized private civil suits under the mail or wire fraud statutes, the inclusion of those offenses among the predicates for a civil suit under RICO now has given this vast discretion to private claimants through the back door.[128]

Nothing in the legislative history of RICO suggests Congress intended to federalize local commercial disputes.[129] Continued inclusion of "mail fraud" and "wire fraud" as predicates for civil RICO claims, however, allows private plaintiffs to disregard these concerns about federalism and to transform local disputes into federal cases simply because one of the parties used the mail or the telephone.

Similarly, private plaintiffs find it easy to level allegations of "securities fraud." Since the federal courts are reluctant to dismiss complaints before a plaintiff has had a chance to pursue substantial discovery in a search of evidence to support his allegations of "fraud," these cases withstand initial challenges. Even if the predicate offense that a plaintiff must ultimately prove in a civil RICO case is *criminal* securities fraud, a plaintiff may not even have to

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125. *Sedima*, 105 S. Ct. at 3293 (quoting United States v. Weiss, 752 F.2d 777, 791 (2d Cir. 1985) (Newman, J., dissenting)).

126. *Sedima*, 105 S. Ct. at 3294 (quoting United States v. Siegal, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting in part)).

127. *Id.*

128. The result, as Justice Marshall wrote, in *Sedima*, is an enormous expansion in federal jurisidiction over ordinary civil disputes:

> In the context of civil RICO. . . the restraining influence of prosecutors is completely absent. . . . [S]uch litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud. . . . The civil RICO provision consequently stretches the mail and wire fraud statutes to their absolute limits and federalizes important areas of civil litigation that until now were solely within the domain of the states.

Id. at 3294 (Marshall, J., dissenting).

As one former federal prosecutor wrote in calling for legislation to delete the mail and wire statutes stipulated as requisite predicate acts for private civil RICO actions:

> [A] general problem with RICO, that the constraints of prosecutorial discretion and guidelines which limit its application in the criminal sphere are no bar to its private civil application. . . , is most acute when the underlying predicate statutes are mail fraud and wire fraud, since it is the breadth of these statutes, both actual and potential, that forms the basis for most of the recent expansion of civil RICO litigation.

Rakoff, "*Opinion*," 1 RICO LITIGATION REP. 206-07, 211 (Sept. 1984).

129. See *supra* notes 46-61 and accompanying text for a discussion of legislative history.

allege — much less prove — a deliberate intent to defraud him.[130]

Moreover, the result of converting securities fraud claims into RICO claims is to displace the carefully structured remedies of the federal securities laws. First, civil RICO has unwittingly created a treble-damage remedy for ordinary securities law violations even though "the federal securities laws contemplate only compensatory damages and ordinarily do not authorize recovery of attorney's fees."[131] Second, under RICO the plaintiff can raise the nonmonetary stakes as well, because now the defendant runs the risk of being branded a "racketeer." As Justices Marshall, Brennan, Blackmun, and Powell recognized, the result of this double-barreled risk is not justice, but capitulation:

> Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat.[132]

Third, and perhaps most important, this use of civil RICO "virtually eliminates decades of legislative and judical development of private civil remedies under the federal securities laws."[133] This end-run around the requirements of the securities laws is possible because a RICO plaintiff can simply allege a RICO violation growing out of a securities transaction based on mail or wire fraud predicate acts, rather than "securities fraud." Thus, despite the fact that, in interpreting and applying the securities laws, "[o]ver the years, courts have paid close attention to matters such as standing, culpability, causation, reliance and materiality, as well as the definitions of 'securities' and 'fraud,' "[134] the broad swath that the civil RICO's fraud provisions cut through established legal principles makes all of this carefully fashioned law "now an endangered species. . . ."[135]

This circumvention of federal securities laws by a civil RICO action is illustrated in the opinion of the Oregon Federal District Court on cross-mo-

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130. For example, in United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976), the court upheld the conviction of a partner in a major accounting firm. *Id.* The partner was convicted of assisting in the corporation's filing of a false proxy statement in violation of federal law, 15 U.S.C. § 78ff(a) (1982), on the basis of a finding that he had "recklessly" conducted a corporate audit. The trial judge, in sentencing the partner/accountant, indicated that no finding of actual knowledge of falsity was necessary for conviction. "I think you are absolutely sincere when you say that you do not believe that you did anything wrong in this audit or audits. . . . But the tragedy is that the jury found that this was an audit or audits done with reckless disregard for what was really involved." Petition for Writ of Certiorari to the United States Supreme Court at 23, United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976) (citing from the district court's Transcript of Sentencing at 12). Thus, a plaintiff may be able to assert a viable RICO claim based on alleged "fraud in the sale of securities" simply by claiming that the defendants were reckless in their actions, and that, as a result, a "fraudulent" filing or similar securities law violation occurred.

131. *Sedima*, 105 S. Ct. at 3295 (Marshall, J., dissenting).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

tions for summary judgment in *Ahern v. Gaussoin.*[136] *Ahern* arose from a typical "securities" dispute, in which note holders, whose ability to collect on notes was affected by adverse events at the obligor company, sued the company's directors, officers, accountants, and lawyers for allegedly being involved in issuing misleading statements as to the financial position of the company prior to the adverse events.[137] The investor plaintiffs asserted various claims under federal (and state) securities laws — and under RICO. The court carefully considered whether the plaintiffs met the various legal criteria under the federal securities laws that structure the types of suits that may be brought.[138]

Over the past fifty years, Congress and the courts have carefully worked out appropriate standards to guide liability in securities disputes; the district court spent fifty pages in its slip opinion setting out the standards and then applying those standards to the applicable undisputed facts.[139] The court granted summary judgment to various defendants on certain issues, and held as to some issues that the questions were too close and would have to go to the jury.[140]

The plaintiffs, however, also invoked civil RICO to challenge the same transactions as violating the mail fraud statute.[141] On the civil RICO counts, all the securities laws issues became insignificant. The trial judge in *Ahern* overruled the objection to using RICO to bypass the precisely crafted structure of the federal securities laws.[142] He concluded that, even though civil

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136. 611 F. Supp. 1465 (D. Ore. 1985).

137. *Id.* at 1471.

138. *Id.* at 1474-90. These issues included:

— whether the notes in question were "securities" within the meaning of the 1933 and 1934 Acts, *id.* at 1474-77;

— whether plaintiffs were "purchasers" of securities in the relevant time period, *id.* at 1477-79;

— whether the defendants had exercised "due diligence" in connection with the claims under section 11 of the 1933 Act, *id.* at 1479-81;

— whether officers who did not sign the registration statement could be liable under section 11, *id.* at 1481-82;

— whether the defendant lawyers and/or accountants could be held liable under section 11 as "experts", *id.* at 1482-84;

— what are the standards for "aiding and abetting" liability under sections 11 and 12 of the 1933 Act, and section 10(b) of the 1934 Act, *id.* at 1482, 1486, 1489;

— what are the circumstances that may justify accountant's liablity under section 11, *id.* at 1482-84;

— whether any of the defendants were "sellers" of securities within the meaning of section 12, *id.* at 1484-87;

— whether there is a private right of action under section 17(a) of the 1933 Act, *id.* at 1487;

— whether certain defendants could be liable as "controlling persons" under section 15 of the 1933 Act, *id.*;

— who has the burden of proving reliance under section 10(b) of the 1934 Act (which depends upon whether the case rests on "omissions" or "misrepresentations"), *id.* at 1488; and

— whether, under the "flexible duty" test applicable to section 10(b) cases, any of the defendants owed no duty to the plaintiffs. *Id.* at 1488-90.

139. *Id.* at 1477.

140. *Id.* at 1477. The most notable issue that went to the jury was whether the notes in question were "securities" within the meaning of either Act. *Id.* at 1474-77.

141. *Id.* at 1491.

142. *Id.* at 1493.

RICO threatens more "severe" sanctions than the securities laws themselves, the court could not properly impose "restrictions on its broad reach" as currently drafted.[143] In the same vein, there are literally hundreds of other securities-related disputes that have been transmogrified into "racketeering" cases under civil RICO.[144]

The insertion of fraud as a RICO predicate does not justify this pervasive distortion. The Senate added securities fraud, as well as wire and mail fraud, to the bill's list of predicates at the suggestion of the SEC's Division of Enforcement because organized crime figures had begun to engage in market manipulation and securities theft and counterfeiting. The SEC officials recommended the changes when they understood that the bill provided only for government remedies, particularly criminal prosecution, not private remedies. They believed that RICO could serve as an important weapon for *government* enforcement against those activities.[145] When the House added the private civil remedy, no one suggested that the fraud predicates were intended to displace the long-standing specific statutory schemes, including the federal securities laws themselves.

Moreover, when Congress decided to add securities fraud as a RICO predicate, legislative discussion referred to only one significant kind of misconduct that was not already covered by the federal securities laws but was attracting organized crime —trafficking in stolen or counterfeit securities.[146] Experience has shown, however, that civil RICO is not being used against schemes of that type. Instead, by including the fraud predicates, RICO allows private claimants to duplicate — but for treble damages and attorney's fees — the rights already granted by the federal securities laws. Conversely, RICO allows these claimants to circumvent the limitations that Congress has deliberately fashioned for civil suits under those laws. In neither type of situation is there any justification for tolerating the costly mischief that civil RICO permits.[147]

E. The Supreme Court Has Held That Congress, Not The Courts, Must Correct Civil RICO's Overbreadth.

Many trial judges and one federal circuit attempted to restrain the use of civil RICO in ordinary commercial disputes.[148] Some district judges tried to

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143. *Id. See also* Nunes v. Merrill Lynch Pierce Fenner & Smith, Inc., No. M-84-3118 (D. Md. Apr. 2, 1985) *reprinted in* 2 RICO LAW REP. 304 (Aug./Sept. 1985).

144. *See infra* notes 177-85 and accompanying text.

145. *See ABA RICO Task Force Report, supra* note 13 at 99-100 n.130.

146. One commentator has suggested, before *Sedima*, that the courts should draw upon this limited legislative intent to confine the use of the fraud predicates to the specific kinds of fraud mentioned in the legislative history. *See* Note, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513, 1522 (1983).

147. The fraud predicates are not the only potential source of this kind of abuse. For example, RICO also includes the "interstate transportation of stolen property" statute, 18 U.S.C. § 2314, among its predicates. 18 U.S.C. § 1961 (a) (1982). That statute covers property — including money — allegedly obtained by fraud. *See* 18 U.S.C. § 2314 (1982).

148. *See, e.g.*, Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278, 1282 (D. Del. 1978) (civil RICO claims against defendant which allegedly assigned forged securities, where neither a purchase nor sale was alleged).

treat the statute as requiring an allegation of some actual connection with "organized crime."[149] Others tried to require a showing of some special "racketeering injuries."[150] These efforts generally met with disapproval in most appellate courts.[151]

Last year, the Supreme Court destroyed whatever faint hope had existed that judicial construction of the statute could tame runaway civil RICO.[152] In a 5-4 vote, the Court overturned a decision of the Second Circuit in which the court of appeals had held that a civil RICO claim could only be brought against a defendant who had been convicted of the predicate acts underlying the RICO claim or of RICO itself and could only be brought to collect damages for a separate "racketeering injury," wholly distinct from the injury arising from the predicate acts themselves.[153] At the same time, the Court affirmed a Seventh Circuit decision in which the lower court had rejected the requirement of a separate injury.[154] In deciding these cases, the Court made very clear that any correction in the course civil RICO has taken must come from Congress, not the courts.[155]

The Court was unanimous in recognizing that civil RICO had strayed far from the object that Congress had in mind when it wrote and passed the Act.[156] The majority opinion in *Sedima* acknowledged that it understood the "concern over the consequences of an unbridled reading of the statute," and the Second Circuit's perception of "misuse of civil RICO."[157] The majority opinion also recognized that, "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors,"[158] and that "private civil actions under the statute are being brought almost solely against" what the Court called "respected and legitimate enterprises," rather than against "the archetypal, intimidating mobster."[159] The majority cited with approval the statistics from the ABA Task Force Report that bear out this conclusion.[160]

Justice Marshall, writing in dissent for four members of the Court, was even more explicit than the majority in detailing the ways in which civil RICO

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149. *E.g.*, American Savings Ass'n v. Sierra Federal Savings & Loan Ass'n, 586 F. Supp. 888, 889 (D. Colo. 1984).

150. *E.g.*, Harper v. New Japan Sec. Int'l Inc., 545 F. Supp. 1002, 1006 (C.D. Cal. 1982).

151. *See, e.g.*, Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984)(rejecting requirement of link to "organized crime"); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984) (rejecting requirement of link to "organized crime"); Schacht v. Brown, 711 F.2d 1343, 1358 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 508, 509 (1983) (rejecting special injury requirement); Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1167 (5th Cir. 1984) (rejecting special injury requirement); Alexander Grant & Co. v. Tiffany Industries, Inc., 742 F.2d 408, 413 (8th Cir. 1984) (rejecting special injury requirements).

152. *Sedima*, 105 S. Ct. at 3275.

153. *Id.* at 3287.

154. American Nat'l Bank and Trust Co. of Chicago v. Haroco, Inc., 105 S. Ct. 3291 (1985) (per curiam).

155. *Sedima*, 105 S.Ct. at 3287.

156. *Id.*

157. *Id.* at 3278.

158. *Id.* at 3287.

159. *Id.*

160. *Id.* at 3287 n.16.

claims have caused disruptions far beyond anything intended by Congress.[161] However, even the majority did not disagree with the dissenters' descriptions. Justice Marshall detailed the ways that "in both theory and practice, civil RICO has brought profound changes to our legal landscape,"[162] and he recognized that "nothing in the language of the statute or the legislative history suggests that Congress intended either the federalization of state common law or the displacement of existing federal remedies."[163]

Justice Marshall, as a general matter, is neither a strident supporter of states' rights nor an advocate of business interests against the injured consumer. Yet, he concluded in no uncertain terms that civil RICO has unintentionally altered the balance between federal and state law in a profound manner and has made legitimate businesses a target of "uncalled-for punitive bills and undeserved labels."[164]

Justice Powell, who joined in Justice Marshall's opinion, also wrote separately, reiterating the manner in which civil RICO has come to be used "against legitimate businesses seeking treble damages in ordinary fraud and contract cases," and concluding that "it defies rational belief, particularly in light of the legislative history, that Congress intended this far-reaching result."[165]

The majority and minority parted company only concerning the question of whether the courts could play any role in narrowing civil RICO's reach. The minority believed that the language of the statute could plausibly be interpreted narrowly in certain respects, at least on the kind of injury covered. The majority, however, accepted the premise that the statute is being used in unintended ways but rejected the notion that the Court properly could play any role in solving that dilemma. The majority placed responsibility for solving the problem upon the legislative body that passed the statute in the first place: "[T]his defect — if defect it is — is inherent in the statute as written, *and its correction must lie with Congress.*"[166]

F. Since Sedima, *Civil RICO Claims Against Legitimate Businesses Are Burgeoning.*

In the face of the Supreme Court's rejection of the major judicial attempts to construe civil RICO narrowly and its deferral to Congress to correct the overbreadth, RICO suits simply alleging securities fraud, commercial fraud, or other "imaginative" claims have continued to grow.

Relatively few private RICO cases have progressed all the way to judg-

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161. *Id.* at 3293-96 (Marshall, J., dissenting).

162. *Id.* at 3296.

163. *Id.* Justice Marshall's opinion summarized the problematic results of civil RICO:

> These cases take their toll; their results distort the market by saddling legitmate businesses with uncalled-for punitive bills and undeserved labels. To allow punitive actions and significant damages for injury beyond that which the statute was intended to target is to achieve nothing the statute sought to achieve, and ironically to injure many of those lawful businesses that the statute sought to protect.

Id. at 3302.

164. *Id.*

165. *Id.* at 3291 (Powell, J., dissenting).

166. *Id.* at 3287 (emphasis added).

ment, because intensive use of the statute in civil cases only began to blossom a few years ago. The ABA RICO Task Force Report found that, although the statute was enacted in 1970, there was only one reported opinion in a civil RICO case as of 1972, only one other case reported prior to 1975, and only nine reported decisions prior to 1980.[167] Since then, the numbers have grown exponentially.[168] The invocation of RICO against legitimate businesses in kinds of disputes never contemplated by Congress when it passed RICO is almost certain to accelerate, since the Supreme Court has eliminated almost any chance that previously existed that a defendant could defeat a RICO claim at the threshold of litigation.[169]

In addition, there is rapidly spreading publicity about the utility of RICO as a device for getting a local commercial dispute into federal court or as a tactic for dramatically increasing the stakes in a case otherwise covered by the traditional single-damage federal laws such as remedies under the securities laws.[170] Legal and business journals are filled with articles discussing the statute.[171] Law reviews are also focusing a great deal of attention on the statute, debating the extent of its flaws and the proper methods of correcting them.[172]

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167. *ABA RICO Task Force Report supra* note 13, at 55.

168. *Id.*

169. Reflecting this impact, the headline over the Washington Post article on the *Sedima* decision announced: "RULING SEEN INCREASING OUT-OF-COURT SETTLEMENTS: More Costly Litigations Also Predicted." Abramowitz, Washington Post, July 2, 1985, at E10, col. 1.

170. The Washington Post story on *Sedima* quoted a leading plaintiff's attorney who predicted that civil RICO would be used increasingly in the future to "federalize" product liability litigation. Abramowitz, Washington Post, July 2, 1985, at E10, col. 1. The same day, the *Wall Street Journal* also commented that civil RICO suits, "few of which involve organized crime, are proliferating because they can be quite lucrative." Wermiel, *Supreme Court Refuses to Curb Racketeer Law*, Wall St. J., July 2, 1985, at 2, col. 2. The article summarized the lure: "Plaintiffs favor RICO because of the chance to triple damages and win attorneys' fees and legal costs, and because it poses fewer procedural hurdles than federal securities law or state contract law." *Id.* As another article discussing the wider use of civil RICO expected in the wake of the Supreme Court's decision put it in its headline: " 'Sedima': The Civil RICO's Juggernaut Steams On." Matthews and Weissman, Legal Times (ABA daily ed.), July 9, 1985, at 10, col. 2.

171. *See, e.g.*, Blakey, *RICO Is Working*, Summer 1985 THE BRIEF 18 (the magazine published by the Tort and Insurance Practice Section of the American Bar Association); *Business is Picking Up An Anticrime Weapon*, BUS. W., February 20, 1984, at 85; Falaherty, *Private RICO Damages Awarded*, NAT'L L.J., December 26, 1983, at 8; *Murphy, RICO — A Federal Treble Damage Fraud Statute?*, N.Y.B.J., July 1983, at 18; Pickholtz, *The Firestorm Over Civil RICO*, 71 A.B.A.J. 79 (1985); Quinn and Bograd, *RICO is Backfiring*, Summer 1985 THE BRIEF, 19; Skinner and Tone, *Civil RICO and the Corporate Defendant*, NAT'L L. J., January 30, 1984, at 22; Skinner and Tone, *Recent Development in RICO Litigation*, NAT'L L. J., February 13, 1984, at 20; Weissmann, *'Moss' Makes RICO Statute the Darling of Plaintiffs' Bar*, Legal Times, December 19, 1983, at 24.

172. *See, e.g.*, Campbell, *Civil RICO Actions in Commercial Litigation: Racketeer or Businessman?*, 36 SW. L.J. 925 (1982). One recently published bibliography listed approximately 150 articles on civil RICO that have appeared in legal publications. *See* Milner, *A Civil RICO Bibliography*, 21 CAL. W.L. REV. 409, 427-35 (1985); *Civil RICO Symposium*, 21 CAL. W. L. REV. No. 2 (1985); Sackheim, Leto & Friedman, *Commodities Litigation: The Impact of RICO*, 34 DEPAUL L. REV. 23 (1984); Tyson & August, *The Williams Act After RICO: Has the Balance Tipped In Favor Of Incumbent Management*, 35 HASTINGS L.J. 53 (1983); Note, *Civil RICO:*

In addition, various organizations have sponsored "how to-do-it" courses nationwide to acquaint lawyers with RICO possibilities.[173]

The volume of RICO litigation is expected to be so heavy that at least three special reporting services have sprung up dealing exclusively with RICO developments on a monthly or weekly basis.[174] The recent Supreme Court decisions, with the attendant publicity as well as the substantive message contained in those decisions — that it is all right to use civil RICO broadly — will only increase the spotlight on civil RICO's potential uses as a weapon in commercial litigation.[175]

In addition to multiple damages, the plaintiffs in these actions seek attorney's fees. While there are few civil RICO cases that have progressed far enough to have reached the fee-determination stage, the amounts at issue are substantial.[176] Awards of hundreds of thousands or even millions of dollars are

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The Temptation and Impropriety of Judicial Restrictions, 95 HARV. L. REV. 1101 (1982); Note, *Civil RICO: A Call For A Uniform Statute of Limitations*, 13 FORDHAM URBAN L.J. 205 (1984-1985); Note, *RICO and Securities Fraud: A Workable Limitation*, 83 COLUM. L. REV. 1513 (1983); Comment, *Sedima v. Imrex: Civil Immunity for Unprosecuted RICO Violations?*, 85 COLUM. L. REV. 419 (1985).

173. With ominous accuracy the ABA aptly titled its National Institutes on this subject "RICO: The Ultimate Weapon in Business and Commercial Litigation." Among the featured topics at ABA programs have been discussions of RICO's impact on states and municipalities, RICO suits by and against unions, and RICO suits against financial institutions. The Practicing Law Institute (PLI) in its RICO programs has featured various topics including the use of RICO in "antitrust cases," "commercial bribery and faithless employee cases," "unfair competition cases," "securities and commodities cases," and "corporate takeover cases." Lest there be any doubt about civil RICO litigation as a major growth industry for lawyers, in October 1985 the ALI-ABA Committee on Continuing Legal Education selected RICO as the topic to inaugurate its multi-city satellite system. The joint committee beamed a live telecast, via satellite, to lawyers assembled in 37 cities around the country. The major theme of the program, entitled "Civil RICO Litigation After *Sedima*," was the "Federalization of Commercial Torts."

174. These specialized reporters include: 1) *RICO Law Reporter*, 2) *Civil RICO Reporter*, 3) *CCH, RICO Business Disputes Guide*.

175. The bonanza for lawyers in RICO cases is widely and candidly recognized. Indeed, when the *Los Angeles Times* did a series of articles on "the litigation explosion," it devoted a front page article just to private civil RICO suits, entitling the feature, " 'RICO' Running Amok in the Board Rooms," and subtitling the piece, "Law aimed at mafia becomes popular in private suits." Sieger, L.A. Times, February 15, 1984, at 15, col. 2. The article quoted one RICO lawyer as explaining that when he set up his private law practice he "was looking for a way to develop business," and he "studied RICO and saw the potential for lots of civil litigation." *Id.* As the Supreme Court recognized, as long as the statute remains worded broadly, lawyers will have every incentive to continue pushing its use to the outer limits of the statutory language. As one author counseled: "[A] plaintiff's attorney zealously protecting the rights of his client, as he is charged to do, is obligated to bring RICO claims where they can reasonably be interposed." Brodsky, *RICO*, Feb. 15, 1984, at 1, col. 1.

176. For example, in *Schacht*, 711 F.2d 1343, the lead counsel for the plaintiff Insurance Commissioner reported billings of $363,737.00 through September of 1982. *Insurance Liquidations a Legal Bonanza*, Chicago Tribune, Sept. 12, 1982, § 5 at 1, col. 3. This may include expenses for some items in addition to the *Schacht* litigation itself, but the vast majority is almost certainly for that civil RICO action, in a period *before* any significant discovery had commenced. In another instance, the court awarded $213,000 in attorney's fees in a case in which the court awarded $618,000 in actual damages. Armco Industrial Credit Corp. v. SLT Warehouse Co., No. 3-82-127-H (N.D. Tex.), *reported in* 1 RICO LITIGATION REP. 473 (November 1984). In Greg-

not uncommon under other statutes that contain similar "fee shifting" provisions. The prospect of such handsome fee awards is a powerful stimulus to press RICO to even newer frontiers.

IV. Reform Of Civil "RICO" Should Reintroduce The Important Oversight By Federal And State Public Prosecutors By Creating A Prior-Criminal-Conviction Requirement.

A. The Administration, The Courts, And Others Have Recognized The Need For Reform.

The explosion of unjustified civil RICO cases is already at hand, and the adverse effects of this development on the courts and on legitimate business are direct, palpable, and unwarranted. It would be difficult to overstate the *in terrorem* effect of civil RICO on legitimate businesses, even though relatively few companies, so far, actually have been ordered to pay treble damages in these cases.[177]

In addition, the scope of the permissible allegations permits wide-ranging pre-trial discovery: "That gets very, very expensive," one securities lawyer was quoted as explaining, "and the cost tends to result in settlements."[178] As Justice Marshall recognized in *Sedima*, a "defendant, facing a tremendous financial exposure in addition to the threat of being labeled a 'racketeer,' will have a strong interest in settling the dispute, . . ." even a case with no merit.[179]

The American Bar Association has urged reform in the area of civil RICO.[180] Further, SEC Chairman John S.R. Shad and Commissioner Charles

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ory v. Atlantic Permanent Federal Savings and Loan Assoc., Civil Action No. 84-620-N (E.D. Va.) the parties settled the claim for just over $100,000 and the court amended attorney's fees and expenses of well over $500,000. *See* Memorandum of Settlement Agreement and Judgment of the Court on Attorney's Fees and Expenses (on file at the office of the New England Law Review).

177. As *Business Week* reported: "Lawyers say the number of court awards under RICO is not an accurate measure of the problem, because few cases go to trial: The mere threat of a headline suggesting a connection with organized crime often induces a settlement." Sommers, *Business is Picking Up An Anticrime Weapon*, No. 2829 Bus. Wk. 85 (Feb. 20, 1984).

178. *Id.*

179. *Sedima*, 105 S. Ct. 3294.

180. In urging reform, the American Bar Association has stated:

> When RICO is combined with mail fraud predicate offenses, the effect is to federalize all torts involving business transactions in which a party thinks deceitfully and uses the mails. This result is undesirable in two respects: (1) the efficient operation of federal courts will be significantly impaired, if not crippled, by a tidal wave of RICO civil actions when plaintiffs become aware of the attractions of treble damages and recovery of attorney's fees; and (2) the balance between state and federal power will be substantially disrupted. If future RICO statutes are to include civil remedies, use of mail fraud as a predicate offense must be limited.

Report No. 1 of the Section of Criminal Justice, 107 Rep. A.B.A. 434 (1982).

According to the subsequent ABA RICO Task Force Report, 74% of all lawyers surveyed with actual experience with RICO claims, either as counsel for plaintiffs or for defendants, believe that the statute should be amended, and only 8% see no need for reform. *ABA RICO Task Force Report*, *supra* note 13 at 62.

L. Marinaccio have both called for reform of civil RICO.[181] Commissioner Marinaccio expressed his view that civil RICO has "gone awry in the execution," and is being used against "the very legitimate corporations and businesses that were intended to be protected" to undermine the "carefully crafted structures" of express and implied remedies under state and federal securities laws.[182] As the Commissioner told the Senate Judiciary Committee, "I believe there is an urgent need to amend RICO by legislation to end the excessive uses to which the statute's private civil remedy has been put."[183] The Commissioner recounted the ways in which private civil RICO is "threatening to disrupt the balance of the [federal securities] regulatory scheme,"[184] and he concluded that "predicating the availability of a private remedy on prior criminal convictions offers the most reasonable way to mitigate problems in the securities fraud area."[185]

SEC Chairman Shad has also expressed concern about the unintended impact of civil RICO on "the carefully crafted scheme of express and implied remedies for securities law violations which the Congress and the courts have fashioned over the past 50 years."[186] Chairman Shad has also testified before Congress in support of the prior-criminal-conviction requirement.[187]

Federal judges, acting in their capacity as commentators on what they are witnessing, have also spoken out in public about the problem.[188] The Judicial

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181. *See Statement of Charles L. Marinaccio, Member of the Securities and Exchange Commission, Before the Committee on The Judiciary, United States Senate*, May 20, 1985, Exhibits 2 & 3 (available at the New England Law Review).

182. *Id.*

183. *Id.* at 1.

184. *Id.* at 6.

185. *Id.* at 8.

186. *Id.* at Exhibit 2.

187. *Testimony of John S. R. Shad, Before the Subcommittee on Criminal Justice of the Committee on the Judiciary of the House of Representatives*, Oct. 2, 1985, *reported in* 1 CIVIL RICO REPORT (BNA) No. 18, at 3 (Oct. 9, 1985). See text accompanying *infra* notes 218-22 for a description of the proposal to add a prior-criminal-conviction requirement to RICO's private civil provisions.

188. For example, District Judge Milton Pollack of New York has said that:

> [O]ne of the proliferating developments in civil litigation has been the use of RICO, the Racketeer Influenced and [Corrupt] Organizations Act, in civil claims, in routine commercial disputes, including those arising under the Federal Securities Laws. I think that the proliferation of those claims and the use of a law that was designed to eliminate organized crime is a very bad influence on the commercial community.

Symposium Highlighting Developments in Securities Law Over Past Century, N.Y.L.J., Jan. 30, 1984, at 52. Further, Judge Abner Mikva of the United States Court of Appeals for the District of Columbia, who as a member of Congress in 1970, had warned against the overbreadth of the proposed RICO bill when he was in Congress in 1970, has seen RICO outstrip his worst fears. H.R. REP. NO. 1549, 91st Cong., 2d. Sess., *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4007, 4083. Judge Mikva warned then that placing a treble-damage remedy under so broadly worded a statute would provide an "invitation to the disgruntled and malicious. . . to harass innocent businessmen. . . ." *Id.* As he predicted, "[W]hat a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish — destruction of the rival's business. . . ." *Id.* Judge Mikva was quoted in an interview as expressing regret that these problems were not avoided by complete deletion of the civil provision, which "was not an important element of the legislation." L. A. Times, Feb. 15, 1984, at 25, col. 3.

Conference of the United States has called for a "substantial" cut back in the scope of the private civil provisions of RICO because the "extraordinary penalties provided by the civil RICO statutes" are leading to the statutes" use to fill federal court dockets with ordinary commercial disputes, thereby, not only increas[ing] the burden on the federal courts, but caus[ing] friction with the state court system."[189] In their formal opinions as well, many judges have warned about these dangers and abuses, as the Supreme Court did in *Sedima*, even while deciding that they currently are obliged to apply the expansive language of the statute as originally written.[190] For example, in allowing a mail fraud allegation to proceed as a RICO case, the Seventh Circuit in *Schacht* v. *Brown* ruefully observed that Congress inadvertently "may well have created a runaway treble damage bonanza for the already excessively litigious."[191] In another Seventh Circuit case, the court observed that RICO "is constructed on the model of a treasure hunt."[192] The court went further by commenting:

> We must abide by Congress's decision, made at a time of less sensitivity than today to the workload pressures on the federal courts and to the desirability of maintaining a reasonable balance between state and federal courts, however much we may regret not only the burdens that the decision has cast on the federal courts but also the displacement of state tort law into the federal courts that it has brought about.[193]

As already noted, the Seventh Circuit recently sent out what it called a "distress flag" asking Congress to reform civil RICO.[194] The Fifth Circuit has called the scope of civil RICO "breathtaking,"[195] and the Second Circuit has opined, "[g]iven the general purpose of the RICO legislation, the uses to which private RICO has been put have been extraordinary, if not outrageous."[196]

The Administration has heard these calls for reform and has decided that

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Illustrating the intensity of his concern, Judge Mikva recently returned to testify before a subcommittee of the House Committee on the Judiciary on which he once served and declared:

> I stand amazed. . . to realize that my hyperbolic horrible examples of how far the law would reach pale into insignificance when compared to what has actually happened. . . . What started out as a small cottage industry for federal prosecutors has become a common-place weapon in the civil litigator's arsenal.

Testimony of Abner J. Mikva before the Subcommittee on Criminal Justice of the House Judiciary (October 9, 1985) at 1-2 (available at the New England Law Review). He concluded: "The civil RICO provision's use as a weapon in various sorts of commercial disputes is, to my mind, both improper and an acute embarassment to all concerned." *Id.* Like the SEC Commissioners, Judge Mikva called for the creation of a prior-criminal-conviction requirement. *Id.* at 5-7.

189. 18 *Third Branch* No. 5, at 3 (May 1986)

190. *Sedima*, 105 S. Ct. at 3287.

191. *Schact*, 711 F.2d at 1361.

192. *Sutliff*, 727 F.2d at 652.

193. *Id.* at 654.

194. *See* Illinois Dept. of Revenue v. Phillips, 771 F.2d 312, 317 (7th Cir. 1985); *see also supra* note 83 and accompanying text.

195. R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985).

196. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 487 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985).

they are well-founded. The Vice President's Task Group on Regulation of Financial Services, whose members included the Attorney General, recognized in its final report, adopted on July 2, 1984, that civil RICO is being abused.[197] Accordingly, one of the Task Group's recommendations calls for "Elimination of Nuisance Litigation Under RICO."[198] Without defining precisely how RICO should be amended, the Task Group states as the Administration's goal the formulation of amendments to "ensure that its civil liability provisions are not misused by private parties in litigation involving financial institutions."[199]

In July of this year, the Department of Justice endorsed the creation of a prior-criminal-conviction requirement for civil RICO suits brought by private parties.[200] In supporting that approach, the Department stated that "private RICO suits have not achieved their intended purpose as supplements to the federal government's criminal enforcement efforts against organized crime," and that "private uses of the statute have created clear and substantial dangers to other important federal interests."[201] The Department also concluded that "by helping to alleviate burdensome and vexatious litigation, enactment of this bill would have a salutary effect on the workload of the federal courts."[202]

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197. *The Report of the Task Group on Regulation of Financial Services* (July 2, 1984) (available at The New England Law Review). The Task Group found that:

> [A] statute designed to control organized crime through both criminal and civil penalties against racketeering. . . has increasingly been utilized by imaginative lawyers in suits against banks, securities firms, accountants and other perfectly legitimate businesses without even any alleged connection to organized crime.

Id. The Report continued: "This litigation increases the backlog in federal courts, undermines the structure of the substantive banking and securities laws enacted by Congress, and creates totally unnecessary costs for the affected firms and, ultimately, their customers." *Id.*

198. *Id.* at 95 (recommendation 5-15).

199. *Id.* Attorney General Meese expressed similar concerns during his confirmation hearing before this very Committee. In response to a question from Senator Grassley about RICO, Mr. Meese stated: "I share with you your concern that what is essentially a form of action against criminal activity, even though with civil penalties and civil actions involved — that this not be misused as a means of carrying on ordinary civil litigation where no organized crime is involved." Transcript of Proceedings (Jan. 30, 1985) at 13. Assistant Attorney General Richard Willard recently spoke out strongly about the overbreadth of civil RICO. He noted that, in "a perversion of original intent, "[under civil RICO], [v]irtually any legitimate enterprise can be found liable for treble damages for even simple business torts." He warned that "[l]egislative and industry inertia in the face of those developments is not without cost, "and that" [a]s lawyers develop a vested interest in this lucrative statutory cause of action, it will become harder to obtain meaningful reform." *Remarks of Richard K. Willard Assistant Attorney General Civil Division, Before the American Insurance Assoc., Washington D.C. Concerning Private Civil RICO*, May 21, 1986 (available at the offices of the New England Law Review).

200. Letter from John R. Bolton, Assistent Attorney General, Office of Legislative and Intergovernmental Affairs, United States Department of Justice, to Thomas P. O'Neill, Speaker, United States House of Representatives, dated July 22, 1986 (available at the New England Law Review).

201. *Id.* at 1.

202. *Id.* at 6.

B. The Justice Department's RICO Guidelines Apply The Prosecutorial Discretion Envisioned By Congress, And Absent From Private Actions, That Prevents Abuse of RICO.

In 1981, the Criminal Division of the United States Department of Justice promulgated guidelines for the exercise of the Department's power to initiate criminal prosecutions under RICO.[203] The Department disseminated the Guidelines because it recognized the great possibility for abuse if RICO is applied to every set of circumstances that may conceivably be covered by the broad statutory language.[204] These Guidelines, in effect, formalize the exercise of prosecutorial discretion that Congress envisioned when it wrote this broadly worded statute.

In their Preface, the Guidelines state that, despite the statutory provision that RICO is to be "liberally construed to effectuate its remedial purpose,"[205] it is the policy of the Department of Justice that RICO should only be used "selectively."[206] The Guidelines are designed to assure "that not every case, in which technically the elements of a RICO violation exists, will result in the approval of a RICO charge."[207] The Justice Department will not "approve 'imaginative' prosecutions under RICO which are far afield from the Congressional purpose of the RICO statute."[208] As the Guidelines recognize, "the activity which Congress most directly addressed — the infiltration of organized crime in the nation's economy" — is the touchstone for determining whether a RICO charge is warranted.[209]

Moreover, the overall theme of the Guidelines, as stated in their Preface, is that "the consequences for the accused" require "particularly careful and reasoned application" of RICO's purposes before making the decision to charge a RICO violation.[210] Accordingly, the Guidelines insist on careful monitoring and centralized control over the government's filing of any RICO charge.[211] This centralized monitoring guarantees that the Guidelines will be effectively enforced by officials who are charged with public accountability. In dramatic contrast, the decision whether to file a private RICO claim under the broadly worded statute is currently left wholly to the discretion of entrepreneurial private lawyers. Their sole loyalty is to their private clients, and they have no public responsibility for the consequences of any extravagant allegations.

The Justice Department Guidelines highlight another problem with civil RICO as it currently stands. The Preface states that the Department ordinarily will not add a RICO charge "which merely duplicates the elements of proof of a traditional" statute that specifically covers the conduct in ques-

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203. *See* U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § § 9-110.200 to 110.705 (March 9, 1984).

204. *Id.*

205. Organized Crime Control Act of 1970, Oct. 15, 1970, P.L. 91-452, tit. IX, 904, 84 Stat. 947 (1970-71) 91st Cong. 2d Sess.2, *reprinted in* U.S. CODE CONG. & ADM. NEWS 70-122.

206. U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUEL, § 9-110.200 (March 9, 1984).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

tion.[212] One of the major criticisms of the current civil RICO provision, however, is that it creates a general, private federal claim for treble damages even where federal law already provides a carefully crafted set of prohibitions and remedies.

The Justice Department's Guideline III expressly directs that, except in extraordinary circumstances, a RICO count will not be asserted "where the predicate acts consist solely and only of state offenses."[213] Reflecting important considerations of federalism, the commentary explains that this guideline is designed "to underscore the principle that prosecution of state crimes. . . is primarily the responsibility of the state authorities."[214]

Similar observations apply to the use of the federal courts to litigate civil disputes governed by state law. Nevertheless, the inclusion of "mail fraud" and "wire fraud" in RICO has been used by private plaintiffs as a device for bringing into federal courts what are essentially local commercial or property disputes. This use of RICO has "federalized" state commercial and tort cases.

The statute suggests that any two occurrences of a predicate violation within ten years may be sufficient to show a "pattern of racketeering activity."[215] Guideline IV recognizes that this definition is subject to abuse and provides that no RICO count will be charged "based upon a pattern of racketeering activity growing out of a single criminal episode or transaction."[216]

A segment of the private civil cases that have been filed under RICO, by contrast, relate to allegedly fraudulent activity in connection with a single episode or transaction, such as the sale of stock in a single company or the structuring of a particular venture that includes a number of parties. Since each mailing for example, of a copy of an allegedly misleading financial statement constitutes a separate violation, it is easy for the artful pleader to allege a "pattern" of racketeering in connection with a single commercial episode or transaction. This usage, however, has little to do with the congressional goal of cracking down on racketeers who make their living by engaging in a continuous pattern of illicit activity over a long career.

In addition, Guideline V states that, in order to constitute a violation of RICO, the "pattern of racketeering activity" should have "some relation to the purpose of the enterprise."[217] This sensible interpretation is not followed in the civil cases that have been filed under RICO, where allegedly fraudulent activities conducted by legitimate businesses such as investment banking houses, brokerage firms, accounting firms, law firms, and others are — even if true — aberrational rather than related to the purpose of those "enterprises."

Many of the concerns reflected in the Justice Department Guidelines, thus, apply with equal force to private civil litigation under RICO. These internal Guidelines, however, do not regulate the activity of private plaintiffs. Therefore, legislation is necessary in order to erect similar safeguards around the private civil RICO mechanism and in that way to minimize its great po-

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212. *Id.*

213. *See id.* at § 9-110.330.

214. *See id.* at § 9-110.331.

215. *See* text accompanying *supra* notes 34-38.

216. U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-110.340 (March 9, 1984).

217. *See id.* at § 9-110.350.

tential for abuse.

C. A Prior-Criminal-Conviction Requirement Is The Most Straightforward And Workable Solution To The Current Abuse Of Civil RICO.

There is one straightforward amendment to civil RICO that would eliminate the existing abuses, refocus the statute on its intended targets, and effectively adapt the Justice Department's Guidelines to the civil use of RICO. This amendment would permit civil claims to proceed under RICO only after the defendant has been convicted of a RICO offense or of one of the predicate offenses. This kind of amendment would effectively curb the abuse of the discretionary power to bring private claims against legitimate business people involved in ordinary commercial activities. It would confine the circumstances in which suits can be filed to those in which public prosecutors have screened those people who may fairly be charged with being involved in crimes from those who should not be subject to accusations of "racketeering."[218]

In 1985, Representative Frederick C. Boucher, Democrat from Southwestern Virginia, introduced H.R. 2943, which would amend section 1964(c) in precisely this manner.[219] Under the Boucher revision of civil RICO the statute could no longer be used simply to raise the stakes in or federalize commercial disputes.[220] To recover under civil RICO, under the proposed amendment the plaintiff would have to prove that:

> (1) the defendant violated the provisions of RICO by engaging in conduct that violated 18 U.S.C. § 1962;
>
> (2) the defendant has been convicted either of a RICO violation or of one of the predicate acts based on the conduct upon which the plaintiff bases his civil RICO claim;
>
> (3) the plaintiff has been injured in his business or property by the defendant's violation of Section 1962; and
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> (4) the plaintiff has filed his treble-damage suit within one year of the latest pertinent convictions.[221]

With this change in the law, civil RICO could only be used against per-

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218. *Id.* This is the kind of protection that a panel of the Second Circuit read into RICO in the *Sedima* case and that Judge Mikva, SEC Chairman Shad, and SEC Commissioner Marinaccio called upon Congress to write into the statute. It is also the legislative action recently recommended by the Committee on Federal Legislation of the Association of the Bar of the City of New York. *See Committee On Federal Legislation, The Association of the Bar of the City of New York, Reform of the Private Civil Action Provision of RICO* (undated) (released in Jan. 1986) (available at the New England Law Review) [hereinafter cited as *Committee On Federal Legislation*].

The American Bar Association's Special Task Force on Civil RICO also recognized that a prior criminal conviction requirement would eliminate the abuse of civil RICO and restore the statute to the purpose Congress originally intended.

"Requiring a criminal conviction as a predicate to civil treble damage liability under RICO would alleviate virtually all the problems critics have posed concerning overbreadth of the civil remedy." *ABA RICO Task Force Report, supra* note 13, at 222.

219. H.R. 2943, 99th Cong., 2d. Sess. (1985). *See supra* note 18.

220. *Id.*

221. *Id.*

sons whom prosecutors have decided to charge with crimes and who have been found guilty of criminal acts. This amendment would restore the central role of public prosecutors originally envisioned by Congress. Before plaintiffs could call upon the RICO treble-damage remedy that Congress made available specifically to deal with organized crime, public prosecutors and juries first would have to have determined that the defendant actually engaged in criminal activity.

The ABA RICO Task Force Report agreed that the creation of some prior-criminal-conviction requirement "would be preferable to the present statute and its intolerable overbreadth."[222] Nevertheless, instead of this direct and precise solution, the ABA Task Force offered as an alternative a package of ten different substantive changes in the statute in order to achieve the same basic result as the prior-criminal-conviction requirement — returning civil RICO to its proper focus.[223] That laundry list of changes, however, is cumbersome. It is likely to raise complex problems in the course of drafting and implementation. In fact, the drafting issues were so unwieldy that the Task Force did not even attempt to offer specific statutory language to implement its proposals.[224]

Furthermore, most changes in statutory language, no matter how minor, raise issues of interpretation and implementation unanticipated at the time of passage. An approach that requires ten major changes is certain to create many new issues. The prior-criminal-conviction requirement achieves the same result with but one simple amendment. It has already been drafted and its impact has been subjected to intense scrutiny and conjecture by its proponents and opponents alike. Despite that intense scrutiny, opponents have identified no major problems that would arise from its implementation.[225]

The ABA RICO Task Force alternatively suggested that, if some version of a prior-criminal-conviction requirement is adopted, Congress should consider making treble damages available only where there has been a prior conviction, but allow private plaintiffs to sue for actual damages even where there have been no previous convictions.[226] Such a change would, of course, not solve the underlying problem, which is the use of civil RICO for unintended and abusive purposes. Two major opportunities to abuse civil RICO would remain. First, plaintiffs would still be able to increase the *in terrorem* effect of their suits — and hence their settlement value, whatever the merits of the cases — because of the coercive effect of even an unsubstantiated accusation of "racketeering." Second, plaintiffs would be able to "federalize" traditional state tort law and contract claims by recasting them as RICO cases, and thus accelerate the growth of cases on the federal court dockets that rightfully belong in the state legal systems, if anywhere. Thus, *all* civil RICO claims should be subject to a prior-conviction-requirement.

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222. *ABA RICO Task Force Report*, *supra* note 13, at 238.

223. *Id.*

224. *Id.*

225. *Id.* See *infra* Part IV (D), of this article for a discussion of the lack of foundation in the criticisms of the amendments requiring a prior criminal conviction.

226. *ABA RICO Task Force Report*, *supra* note 13, at 238.

D. None Of The Criticisms Of A Prior-Criminal-Conviction Requirement Is Substantial.

Persons eager to preserve the potent weapon which civil RICO has become in ordinary commercial litigation have repeatedly thrown out a laundry list of so-called problems associated with a prior-criminal-conviction requirement. Through repetition — and undoubtedly because to date these claims have generally gone unanswered — these assertions have taken on more credence than they deserve, and we find less jaundiced observers, such as the ABA RICO Task Force and the five-Justice majority of the Supreme Court in *Sedima*, repeating these criticisms.[227] In truth, if these so-called problems are examined one by one, one discovers that there is no substance behind the rhetoric.

1. "Gutting" The Civil Remedies

A criminal conviction precondition to private civil RICO actions would not "gut" the remedies available to private parties, as some critics of a prior-criminal-conviction requirement charge. As our earlier discussion demonstrates, there already have been cases in which plaintiffs have used civil RICO to go after defendants who had been first convicted of criminal charges.[228] Cases of this type would continue. Moreover, if there has been no criminal prosecution and conviction, a potential plaintiff would still have available all the other federal and state law remedies that apply to commercial disputes and torts. Consequently, such a plaintiff would not be left without a remedy.

2. The "Private Attorney General" Rationale

The ABA Task Force suggested that the criminal-conviction-requirement may be "too restrictive" because it would eliminate "what some courts have labelled the useful 'private attorney general' aspect of civil RICO."[229] The Supreme Court majority in *Sedima* similarly referred to section 1964(c) as a "private attorney general provision."[230] This view, however, rests on the erroneous assumption that civil RICO was meant to deputize private claimants and their lawyers to serve as "private attorneys general." The private damage remedy under RICO, however, was not created in order to empower private citizens to take on law enforcement responsibilities, and there is no good reason to view the statute today as serving that end.[231]

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227. *See generally ABA RICO Task Force Report*, *supra* note 13 (discussion of impact of prior-criminal-conviction on civil RICO remedies); *Sedima* 105 S. Ct. at 3284; (statutory history and policy considerations do not indicate required prior criminal conviction condition).

228. The proof, in part, is in the doing. We discussed earlier cases in which plaintiffs brought civil RICO cases against defendants who had first been convicted on criminal charges. There is no indication in any of these cases that the plaintiffs found insurmountable problems or even substantial difficulties in bringing those lawsuits.

229. *ABA RICO Task Force Report*, *supra* note 13, at 238.

230. *Sedima*, 105 S. Ct. at 3284.

231. No one who has taken a hard look at the problem of organized crime — not the Kefauver Committee in the 1950's, nor the Katzenbach Commission in the 1960s and 1970s — has ever believed that private civil suits could be an important weapon in the war against organized crime. Significantly, the Department of Justice itself has never suggested that it believes that private citizens should have the right to accuse other persons of crimes, nor has the Justice De-

Indeed, it would be foolish to believe that a private citizen would have the temerity to sue a real organized crime figure for racketeering, unless the government has first prosecuted and convicted him. The National Association of Former United States Attorneys, whose members are in the position to evaluate the likelihood of private plaintiffs using civil RICO independently to confront organized crime, agree that:

> It is unrealistic to expect that private litigants can supplement federal law enforcement efforts. . . . [V]ery few private plaintiffs will have the fortitude and the resources to undertake a RICO prosecution against organized criminal elements.[232]

There is no indication that anyone in Congress entertained a contrary naive belief when RICO was passed in 1970. The lesson of the last 16 years experience with civil RICO confirms the sensible assumption that criminal conviction is, as a practical matter, a necessary precondition to private RICO suits against the kind of criminal that Congress had in its sights. In the few civil RICO cases that have been brought against violent organized crime figures, private suits *actually have followed* prosecution and conviction, and have not been a substitute for criminal conviction.[233] Thus, the only impact from adopting a criminal-conviction-requirement would be to filter out the suits that have nothing to do with the war on organized crime.[234]

3. Possible Effects On Public Prosecutors

The opponents of the prior-criminal-conviction requirement assert that this requirement could influence the way public prosecutors perform their duties.[235] They speculate:

> (1) Federal prosecutors could be subject to undue pressures from private parties with potential civil RICO claims to press RICO-related prosecutions.
>
> (2) Prosecutors may be subject to accusations that they were influenced in their decisions to press RICO-related prosecutions because of the impact on individuals' civil remedies.

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partment indicated that private suits are necessary to supplement its efforts to attack organized crime.

232. *Testimony of the National Association of Former United States Attorneys Before the U.S. Senate Committee on the Judiciary*, Sept. 25, 1985, at 11-12.

233. *See supra* notes 87-89 and accompanying text.

234. Moreover, Assistant Attorney General Trott's testimony before the Senate Judiciary Committee in May, 1985 shows that the Justice Department has brought hundreds of criminal prosecutions under RICO and the number of criminal RICO cases is growing. *Trott Testimony supra* note 61. Additionally, every year federal and state prosecutors bring thousands of non-RICO prosecutions involving the predicate offenses listed in RICO. It is also baseless to assert that the targets of the private civil RICO cases that private lawyers have brought in the absence of prior convictions would have been prosecuted if only federal and state prosecutors had more resources. The simple truth is, as the Executive Director of the ABA RICO Task Force acknowledged elsewhere, these private civil suits are brought in cases that no responsible prosecutor would have treated as criminal. Weissman, 'Moss' *Makes RICO Statute the Darling of Plaintiffs' Bar*, Legal Times, Dec. 19, 1983, at 24.

235. *See* Mathews & Weissman, RICO LAW REP. 1 (Jan. 1986).

> (3) Prosecutors may be willing to accept plea bargains that are unrelated to the merits of the case. The criminal conviction requirement, it is suggested, could create a powerful new weapon in the hands of the prosecutor to force defendants to plead to lesser, non-predicate-act offenses. If prosecutors accept pleas to non-predicate-act offenses, private litigants would lose their opportunity for civil relief, or at least lose the opportunity to sue certain defendants.[236]

The fact is that public prosecutors already are subject to the entreaties of private parties whose interests are at stake in criminal proceedings. In the full range of potential civil litigation, from murder and arson to securities fraud and antitrust, there are private parties whose ability to win civil damage suits would be vastly enhanced by a successful criminal prosecution. The public prosecutor's duty, however, is to weigh those interests in balance along with other relevant factors in deciding where the public interest lies. There is simply no reason to presume that a RICO statute subject to a prior-criminal-conviction requirement would create pressures qualitatively different from those which already exist, or that the prosecutors would no longer be able to discharge their duties fairly, or that the public perception of the prosecutor's decisionmaking would be adversely affected.

Nor is there any basis to assume that a federal prosecutor will bargain away a good case against racketeers — either on the predicate offenses or the RICO charge itself — and thus foreclose an otherwise proper civil RICO case. Many of the predicate acts listed in the RICO statute do not have "lesser included offenses," and so it would be difficult, if not impossible, to arrange a plea to a non-predicate offense in an organized crime case. Furthermore, plea bargaining in the federal courts has never been as extensive as in the overcrowded and understaffed state court systems. Federal prosecutors simply do not bargain away good cases because of other constraints, such as limited resources. It is virtually unthinkable that federal prosecutors, despite public and congressional oversight, would irresponsibly agree to drop real organized crime cases in plea bargaining.

The decision to enter a plea bargain in federal court is governed principally by three general considerations: (1) the severity of the crime; (2) the record of the defendant; and (3) the strength of the government's case.[237] The United States Attorneys' Manual, which states the rules and guidelines that govern federal prosecutors, sets out eleven factors that the prosecutor must consider in "determining whether it would be appropriate to enter into a plea agreement."[238] The factors at the top of the list include the "defendant's willingness to cooperate in the investigation or prosecution of others," the defendant's criminal record, the nature of the charges, the defendant's "remorse or contrition," the "likelihood of obtaining a conviction at trial," and similar concerns.[239] Only at the end of this exhaustive list does the manual even mention

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236. *Id.* at 2-3.

237. *See* U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.420 (June 15, 1984).

238. *Id.*

239. *Id.*

consideration of prosecutorial and judicial resources.[240] Thus, the Department of Justice's own standards will prevent prosecutors from allowing organized crime figures to escape with pleas to minor crimes.

Finally, as a practical matter, it is doubtful that fear of civil liability would be a major factor in a criminal defendant's decision whether to enter a plea bargain. Moreover, if it did provide an additional incentive to get organized crime figures to plead guilty and to cooperate with the federal authorities, Congress should encourage that result, not fear it. The primary purpose of RICO has always been, and should remain, to increase the weapons available to federal prosecutors in fighting organized crime. If the rare case comes along in which the prosecutor concludes that he can use the threat of a private civil suit to gain cooperation from a racketeer, purely private financial interests should not be allowed to frustrate the public interest in effective criminal law enforcement.

4. Possible Effect On Witness Credibility

Another concern is that a witness's credibility would be subject to challenge at a criminal trial if he stands to gain from the conviction of the defendant. Here again, a criminal conviction requirement would not qualitatively change the present situation. Any witness with an actual or potential civil claim against the defendant has a financial and personal stake in the success of the criminal prosecution. Under modern notions of collateral estoppel, if the defendant is convicted on the charges, the factual issues resolved against the defendant by the verdict would, in all likelihood, be considered settled against him in a civil suit.[241] Thus, under RICO as well as under other statutes, the benefit accruing to a victim/witness from a conviction in a parallel criminal proceeding already provides a basis for attacking the witness's credibility in the criminal trial.

Indeed, if a criminal conviction is not a *precondition* to civil suit, the witness may have a civil suit pending concurrently with his testimony in a criminal case. In the jury's eyes, this direct and specific interest in obtaining a conviction may cast more doubt on the witness's credibility than would the mere possibility that the witness might file a civil suit if the defendant is convicted. Thus, by postponing the ability to file a civil RICO suit, Congress could actually minimize questions about the complaining witness's credibility at the criminal trial and could advance the statute's primary purpose; the prosecution and conviction of organized crime figures.

5. Delay In Bringing The Civil RICO Suit

Another category of issues raised about the prior-criminal-conviction requirement involves the timing of civil suits. The adverse comments generally take the following form:

> (1) Uncertainty would exist as to when the statute of limitations begins to run on the RICO claim, and whether the civil plaintiff must wait until criminal appeals are exhausted.

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240. *Id.*

241. *Id. See* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

(2) It is unclear what effect reversals or pleas of *nolo contendere* would have on civil RICO claims.

(3) Private parties would be forced to divide causes of action and bring two separate suits, because they have to go forward with their non-RICO claims before the statute of limitations runs out.

(4) Because of the long interval that can pass between the occurrence of a crime and a conviction, the private plaintiff's ability to pursue a civil remedy successfully could be prejudiced by (a) the staleness of evidence and (b) the defendant's dissipation or concealment of assets.[242]

None of these worries are substantial. There is no difficulty in establishing the beginning of the limitations period. A claim does not accrue for purposes of a statute of limitations until all the elements of the plaintiff's cause of action exist.[243] If a prior-criminal-conviction is a necessary element of a civil RICO claim, the statute of limitations will not begin to run until the government has secured the pertinent conviction. In any event, the amendment can include language that specifically links the limitations period to the date of the latest pertinent judgment of conviction.[244]

The other issues can be handled equally easily under well-established principles of judicial procedure. By analogy to principles of res judicata and collateral estoppel, which take effect as soon as the trial court enters its judgment, the civil RICO suit could commence as soon as a judgment of conviction is entered and need not wait until appeals have run their course. If one of the predicate convictions is reversed on appeal and remanded for a new trial, the civil action could be stayed during the proceedings on remand, or could be dismissed without prejudice to refiling at a later date if the defendant is reconvicted.

If in the criminal proceeding the defendant pleads *nolo contendere* or enters the kind of "no contest" plea that the Supreme Court approved in *North Carolina v. Alford*,[245] the judgment in either case would lay the foundation for a civil RICO complaint. The law treats either of those pleas as a confession of guilt, and the court renders a judgment of conviction.[246] Once a conviction is entered, the private plaintiff could proceed accordingly with a RICO suit under the proposed amendment.

Nor is there any problem because certain related causes of action might accrue before the civil RICO claim accrues. The premise underlying this concern is that the civil RICO remedy *duplicates* other existing federal or state remedies that the plaintiff may pursue. Since the purpose of creating the civil RICO remedy was to authorize redress for people who otherwise have *no* legal rights under other statutes and legal theories, this is an ironic objection. In cases of that sort, a potential RICO claim should be viewed as merely cumula-

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242. Mathews & Weissman, *supra* note 235.

243. *See, e.g.*, Impro Products, Inc. v. Block, 722 F.2d 845, 850-51 (D.C. Cir. 1983), *cert. denied*, 105 S. Ct. 327 (1984).

244. Such a linkage is provided for in the bill (H.R. 2943) introduced by Representative Boucher. *See supra* text accompanying note 218.

245. 400 U.S. 25 (1970).

246. *See id.* at 35-37; Lott v. United States, 367 U.S. 421, 426-27 (1961).

tive. The plaintiff has no legitimate grievance if he must proceed with *other* remedies that the law already makes available to him.

In any event, if a plaintiff has both a potential RICO claim and ripe claim under another legal theory, normal rules of procedure would govern. The plaintiff may bring his non-RICO claim on a timely basis. If he wishes to defer further proceedings in that suit until any criminal charges against the defendant are resolved, he may seek to stay his civil suit until the RICO claim ripens. If he proceeds with the non-RICO claim, the established principles of res judicata and collateral estoppel would govern the impact of the outcome of that first action on any later RICO action.[247] If he loses his non-RICO case claim after a fair opportunity to establish it, he has little reason to complain that this decision would bar an overlapping RICO-related claim based on the same conduct.

If, by contrast, the plaintiff wins a damage award in his non-RICO suit based on the predicate acts, and then brings a proper RICO case, the damage awards may not completely overlap. His RICO claim may relate to a distinct type of injury and, in any event, would be trebled. To the degree that there is duplication, the second court would reduce the later award under established legal principles preventing duplicate awards for the same injury.[248]

The concerns expressed about the staleness of evidence also suffer from similar defects. A problem of stale evidence would seldom arise. As previously discussed, modern notions of offensive collateral estoppel would treat the criminal conviction as establishing the defendant's civil liability in the ensuing civil RICO suit, without even the need for further evidence. Moreover, all of the evidence collected through the government's resources and presented at the criminal trial would be available to the civil plaintiff.

In any event, a plaintiff with a civil RICO claim may have to depend, for practical purposes, on a prior criminal proceeding. RICO defines a "pattern of racketeering," which even the civil plaintiff must allege and prove, as the commission of at least *two* predicate offenses within a ten-year span. Thus, no one may bring a civil RICO claim until the defendant has committed at least a second predicate offense, at which point the first offense may well be quite dated. In the absence of a prior criminal prosecution, a private party could have substantial difficulty proving the earlier predicate offense, especially if it involved an unrelated transaction, as it should. Therefore, not only is the "lag time" in government prosecutions unlikely to undermine a plaintiff's ability to prove a proper civil RICO case, prior prosecution may well be a necessary component of a successful private civil case.[249]

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247. *See* 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE 0.441-0.448 (2d ed. 1984).

248. *See, e.g.*, American Mail Line, Ltd. v. Weaver, 408 F.2d 674, 675 (9th Cir. 1969).

249. It is true that some civil RICO plaintiffs have manufactured a "pattern" out of essentially simultaneous events, principally because separate acts of mail fraud, wire fraud, or securities fraud can be pleaded for each instance in which the mail or telephone is used or each time a share is sold. *See supra* note 34-38 and accompanying text. These are instances, however, in which RICO is being *abused* to apply only to a single episode or transaction.

In cases actually involving organized crime, the predicate acts will be more widely separated in time. The Justice Department recognizes that this separation in time is a characteristic of a proper RICO case. Under its RICO guidelines, the Department prohibits use of RICO to chal-

The prospect of dissipation of assets is also illusory. Under the 1984 amendments to RICO, Congress gave the government expanded powers to bring forfeiture proceedings in conjunction with criminal charges under RICO and to obtain preliminary relief in the form of seizure of assets *even prior to indictment*.[250] The government, therefore, has both the power and the incentive to prevent the defendant from secreting his assets. Moreover, under the 1984 amendments, the Attorney General is empowered to use the funds actually obtained through criminal forfeiture to "restore forfeited property to victims" of a RICO violation or "take any other action to protect the rights of innocent persons" and "award compensation to persons providing information resulting in a forefeiture . . . ."[251] Thus, prior criminal proceedings actually may enhance the ability of civil plaintiffs to secure compensation.[252]

6. Inability To Reach Some Of The Culprits

Finally, questions have been raised about whether it is sound to prevent private plaintiffs from bringing civil RICO suits against actual criminal offenders who, for some reason not related to their culpability, are not convicted. We have already touched on one of these situations, where federal prosecutors are able to get one of the suspects to cooperate by allowing him to plea bargain to a non-predicate offense or even by immunizing him from all criminal liability.[253] Traditionally, prosecutors have had great difficulty getting such cooperation from organized crime figures because of the enormous risks faced by the member of organized crime who aids the government. Congress, therefore, should embrace, not reject, the opportunity to create a new incentive to get persons to give evidence against organized crime. Moreover, the private party in these hypothetical situations will still have other potential defendants to sue — those against whom the cooperating culprit testifies. It is also reasonable to assume that it will be the minor figures who are given the opportunity to plea bargain; the major targets, who are likely to have greater assets, will remain exposed to private civil RICO claims.

The other points voiced by opponents fall equally short. They are:

(1) If the indictment is dismissed for reasons unrelated to the

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lenge conduct that is simply part of a single episode or transaction. U.S. DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-110.340 (March 9, 1984). As the Department explicitly states in explaining this limitation, "[t]he purpose of this guideline is to prevent a pattern of racketeering activity being charged which lacks the attributes which Congress had in mind but which is literally within the language of the statute." *Id.* at § 9-110.341. *See also Sedima*, 105 S. Ct. at 3285 n.14 (suggesting the statutory requirement of proof of a "pattern" demands something more than just proof of two predicate acts within ten years).

250. *See* Pub. L. No. 98-473, § 302, 98 Stat. 2040-44 (amending 18 U.S.C. § 1963).

251. 18 U.S.C. § 1963(h)(1) & (3) (1982).

252. Nor should one lose sight of the fact that persons with claims for relief arising from the predicate acts may press those claims immediately. If they have damage claims for securities fraud or commercial fraud, for example, they would not be inhibited from bringing those claims simply because there is a separate limitation designed solely to assure that civil RICO claims deal only with actual criminal conduct. Rule 64 of the Federal Rules of Civil Procedure provides ample remedies to the private plaintiff to assure that the defendant preserves enough assets to satisfy a potential judgment. FED. R. CIV. P. 64.

253. *See supra* notes 237-40 and accompanying text.

merits, the civil plaintiff will never be able to sue.

(2) Without changes in the legal concept of derivative liability, if individual principals are convicted of predicate acts, but the organization holding the assets is not, the civil plaintiff will not be able to reach the assets necessary for compensation.

(3) If the criminal defendant remains a fugitive from justice, the criminal case will remain unresolved and the private plaintiff will go uncompensated even though the fugitive has assets in this country against which a civil award could be collected.

In fact, a fatal dismissal of an indictment for reasons unrelated to the merits occurs only in the rarest of cases. In virtually all instances in which the indictment is dismissed on technical grounds, the government can simply reindict. Federal law specifically provides for an extension of all statutes of limitations in order to guarantee federal prosecutors just such an opportunity to reindict.[254]

Opponents of the criminal conviction requirement also conjure up the specter of a serious criminal case that the government cannot successfully prosecute after a court supresses critical evidence because it was seized in violation of the fourth amendment. This is a far-fetched fear. Even before *United States v. Leon*,[255] in which the Supreme Court created a substantial exception to the "exclusionary rule" for cases in which the police rely in good faith on a search warrant, the exclusionary rule actually had led to suppression of evidence in a miniscule proportion of all criminal cases.[256] The empirical studies cited by the Supreme Court in the *Leon* case found that the exclusionary rule affected the prosecution in the cases of only about one percent of the persons *arrested* for felonies.[257] Since these figures relate to all persons arrested, the percentage of arrestees who were actually guilty but escaped conviction because of the suppression of evidence must have been even smaller.

Even those figures overstate the effect of the exclusionary rule in organized crime cases, since most challenged searches and seizures involve street crimes investigated by local police, not carefully planned and supervised federal investigations of organized crime. It will be the careful investigations of organized crime activities, where search warrants are typically used, that will particularly benefit from the Supreme Court's decision in *Leon* to eliminate the exclusion of evidence when investigators rely on warrants.

Furthermore, even when the exclusionary rule applies, its scope is extremely limited. The illegally seized evidence may be used against all defendants except the particular person whose fourth amendment rights were actually violated.[258] Thus, the case against all co-conspirators and other defendants accused of participating in the racketeering enterprise would be unaffected. Ultimately, then, only in the rarest of cases, if ever, would the fourth amendment block conviction in RICO-related charges and deprive an otherwise deserving plaintiff of the opportunity to pursue a civil RICO recovery.

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254. 18 U.S.C. § 3288-89 (1982).

255. 104 S. Ct. 3405 (1984).

256. *Id.* at 3413.

257. *Id.* at 3413 n.6.

258. Brown v. United States, 411 U.S. 223 (1973).

Equally insubstantial is the speculation that a conviction requirement could insulate from recovery the assets that a convicted racketeer has placed within some unconvicted enterprise. It is quite unlikely that an organized crime figure will place his assets in a business organization that is outside of his personal control. Rather, the enterprise will be operated in a form — such as a partnership or a joint venture — where the assets can be reached through a suit against the individual. Even if the criminal resorts to a corporate form, the assets will still be reachable for at least one of two reasons. The criminal principal will own or control the stock of the corporation, in which case that stock, representing the value of the assets, can be reached. If the criminal does not own the enterprise outright, then he will undoubtedly be milking it or otherwise misusing the corporate form in a manner that will allow the court to "pierce the corporate veil," thus, permitting the civil plaintiff to reach the assets at issue.[259] In sum, no criminal is simply going to give away his ill-gotten gains. As long as the assets remain his, the law provides the necessary tools to break through any formal barriers. Thus, the problem supposedly posed by the conviction of the "principals" not the "organization" is no problem at all.

Similarly, the defendant's fugitive status will rarely, if ever, stand in the way of a civil RICO claim. There are few places left in the world for an indicted criminal to hide. The United States currently has criminal extradition treaties with over one-hundred nations, including the countries in which a wealthy racketeer might want to take refuge.[260] Moreover, Congress cannot realistically assume that all members of a criminal enterprise will successfully flee the United States and in that way escape conviction. Only in that extraordinarily unlikely event would a plaintiff be left with no target for a civil RICO suit. Thus, few if any proper civil RICO plaintiffs will be left without any civil recourse against *any* racketeer.

E. The Alternative Legislation Proposals Are Inadequate.

Two other major bills were introduced in Congress last session that would affect litigation under civil RICO.[261] Senator Orrin Hatch of Utah introduced S. 1521.[262] The Hatch bill would amend RICO in three respects: (1) it would require that the plaintiff suffer a "competitive, investment, or other business injury" rather than the current requirement that the plaintiff be injured in his "business or property;" (2) it would require the plaintiff plead and prove the violation of at least one predicate act *other than* mail fraud, wire fraud, or fraud in the sale of securities; and (3) it would permit the award of attorney's fees to the defendant if a court determines that the case was "frivolous and without merit."[263]

In December 1985, Representative John Conyers of Michigan, Chairman

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259. *See* Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853 (1982).

260. See I. KAVASS & A. SPRUDZS, EXTRADITION LAWS AND TREATIES: UNITED STATES Dec. (1985) for a listing of the extradition agreements the United States has established with foreign nations.

261. S. 1521, 99th Cong., 2d Sess. (1985); H.R. 3985, 99th Cong., 2d Sess. (1985).

262. S. 1521, 99th Cong., 2d Sess. (1985).

263. *Id.*

of the Criminal Justice Subcommittee Committee on the Judiciary, introduced H.R. 3985.[264] Representative Conyers's Bill would amend RICO in three respects: (1) it would add language to the definition of "pattern" to require that the instances in which the defendant is accused of violating the predicate acts not be "isolated," and not be "so closely related to each other and connected in point of time and place" that "they constitute a single transaction, involving only one victim, not evincing continuity of activity;" (2) it would insert the word "knowingly" into the sections of RICO that define what the defendant must have done "through a pattern of racketeering activity" to violate RICO; (3) it would replace the predicate act of "fraud in the sale of securities" with a laundry list of federal statutes which prohibit fraud in a variety of investment-related contexts.[265]

Each of these proposals suffers from serious defects that make them inappropriate or inadequate. The problem with the Hatch Bill is that its main provision — the requirement that a suit be based on some predicate act in addition to fraud — is both overinclusive and underinclusive. On the one hand, a plaintiff could not bring an action against someone who had been convicted of the most notorious charges based upon a pattern of fraudulent activities, unless the plaintiff also could come up with some additional non-fraud charges. On the other hand, this amendment would not eliminate the abuse of civil RICO in ordinary commercial litigation. Experience has already shown that creative plaintiffs' lawyers can find other predicate acts to use as alternatives to charges of mail fraud, wire fraud, and fraud in the sale of securities in order to by-pass existing federal and state remedies.[266]

Furthermore, the injury definition as amended by the Hatch Bill would still be too broad to have any real impact on the abuse of the statute. The threat of penalties for "frivolous" suits would be equally ineffective; the problems with the statute arise out of its breadth, and the unanticipated variety of commercial disputes that can reasonably fit within its existing terms, not out of the "frivolous" nature of the assertions themselves in the legal sense of that term.

Representative Conyers's proposal suffers from different, but equally devastating, defects. The change in the definition of "pattern" addresses only one small part of the problems caused by civil RICO, and it does so in a way that is likely to be ineffective.

It is true that, since each use of the mails and wires is considered a separate violation of the mail or wire fraud statutes, plaintiffs have been able to create civil RICO suits out of the isolated transactions involving only one party. While the language proposed in Conyers's Bill eliminates those suits, it would only create an additional pleading requirement that plaintiffs can easily meet in the vast majority of ordinary business transactions in which civil RICO is being invoked.[267]

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264. H.R. 3985, 99th Cong., 2d Sess. (1985).

265. *Id.*

266. *See supra* notes 103-114. For example, virtually all of the "fraud" cases could be classified as involving the alleged tranportation of "stolen" property in interstate commerce; *see also supra* note 146.

267. This change would do little to curb the misuse of civil RICO. Almost any business relationship extends over a period of time; many business transactions involve several participants.

The other two changes proposed in the Conyers's Bill fall even shorter of the mark. The addition of the word "knowingly" to the provisions of section 1652 will only add to the need for judicial interpretation of RICO, without much substantive impact. Courts have interpreted the term "knowingly" in a wide variety of ways. More often than not, they have held that it does not require wrongful intent to evade the law, but merely awareness of the physical acts being done.[268] Congress itself has recognized the limited meaning of "knowingly" in its work on reform of the federal criminal code during the 1970s. At that time, the proposal to use the term in certain sections of the code acknowledge that the "knowingly" standard is significantly less demanding than a requirement of "intentional" conduct. Thus, the addition of this term to RICO is likely to do little, if anything, to ease the burden on the victims of civil RICO.

The replacement of "fraud in the sale of securities" with a list of statutory provisions does eliminate one theoretical possibility: that "fraud in the sale of securities" can be satisfied by proof of fraud that would not be sufficient to prove criminal fraud. However, few believe this would be a proper interpretation of RICO even as presently drafted, and there is no evidence that the courts are ready to interpret this provision to allow claims based on allegations that would not satisfy a criminal standard. The listing of statutory provisions may, in fact, *expand* the potential for abuse of civil RICO because the Conyers's Bill includes in its list several regulatory statutes that the courts have not held to fall within the meaning of "fraud in the sale of securities." By explicitly listing those statutes as predicate acts, the bill invites plaintiffs to use civil RICO to evade those regulatory statutes as well.

The most serious problem with the Conyers's Bill is that its approach to the reform of RICO would affect the government's ability to use RICO to prosecute criminal actions. H.R. 3985 would amend sections of RICO that set the standards not only for private, civil treble-damage actions, but for criminal prosecutions by the United States as well. Yet, few would dispute that the criminal provisions of RICO provide the government with effective weapons in fighting organized crime and should not be tampered with. Thus, the approach taken in H.R. 3985 may be the worst of both worlds: it would do little to ease the problem in private civil suits under RICO, but it would tamper with the criminal provisions, which should be left alone.

Thus, these other legislative proposals suffer from substantial problems, both theoretical and practical.[269] We know of no proposal on the horizon that

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Since businesses deal in regional or national markets, and have continuing relationships with their customers, suppliers, and clients, there will be few cases in which civil RICO is currently misused to federalize ordinary commercial litigation or to evade carefully crafted regulatory systems in which the plaintiff will not be able to meet the additional pleading requirements created by H.R. 3985. Moreover, many courts, in the wake of *Sedima*, have interpreted the existing "pattern" requirement to require a showing that would not be significantly affected by the amendment proposed in H.R. 3985, 99th Cong., 2d Sess. (1985); *see also supra* note 40.

268. *See, e.g.*, Tager v. SEC, 344 F.2d 5 (2d Cir. 1965).

269. As discussed previously, *see* text accompanying *supra* notes 21 and 22, Representatives Frank and Rodino have also introduced bills to amend civil RICO. The Frank Bill, H.R. 4892, purportedly seeks to limit the use of civil RICO principally by amending the definition of "pattern" in a manner similar to the Conyers Bill and by making RICO claims subject to the Federal

would be as effective as the prior-criminal-conviction requirement.

CONCLUSION

The need, nature, and the responsibility for reform is clear. Congress should amend the civil provisions of RICO to focus the private remedy on its original purpose of aiding the war against organized crime, while curing its capacity to victimize innocent business people.

The easiest and best method to accomplish this purpose is to amend 18 U.S.C. § 1964(c) to create a prior-criminal-conviction requirement in private civil RICO actions. This type of amendment will give rise to the fewest complications. None of the arguments against this requirement stand up under analysis. The proper civil RICO plaintiff — the victim who has been damaged by actual criminal activity committed by a repeat criminal offender — will have a full and effective remedy. The only losers will be those persons who should have no legitimate claim to invoke this special anti-racketeering statute at all.

Arbitration Act, 9 U.S.C. §§ 1-14 ch 1. The former proposal would have little impact. See text accompanying *supra* note 261. The latter would also do little to remedy the existing problem. It could only affect cases in which the parties had a direct, written contractual relationship and where the contract included an enforceable arbitration clause. Even in those cases in which such a clause exists, defendants would find little comfort in turning over the determination of a treble damage RICO claim to a non-Article III decision maker. In addition, H.R. 4892 contains numerous provisions that would make civil RICO a more powerful threat in ordinary commercial disputes. *See supra* note 21. The bill is, in fact, a proposal supported by those who oppose real reform of Civil RICO and who would be just as happy if the current statute remained unchanged.

The Rodino Bill, H.R. 5290, while not likely to make matters worse under civil RICO, would do little to eliminate the current misuse of the statute. In the real world of litigation, the substitute of actual damages, plus punitive damages if the plaintiff shows "actual malice," will not alter the calculus that currently drives civil RICO litigation. It will be an easy matter for plaintiffs alleging fraudulent activity — as is the case in most ordinary commercial cases transformed into civil RICO suits — to meet any pleading requirements created by the "actual malice" standard. Once plaintiffs thus are able to avoid an early motion to dismiss, the civil RICO defendant will continue to face all of the same uncertainties and risks that he faces today — and which provide the incentive for plaintiffs to find ways to transform ordinary civil litigation into RICO cases. Nor does H.R. 5290 offer any changes to civil RICO that would address the other fundamental problems created by the current law — the federalization of cases properly handled in state courts under state law, and the evasion of long-established and carefully crafted regulatory systems.

H.R. 5445, the bill reported out of the Criminal Justice Subcommittee of the United States House of Representatives, *see supra* note 23, at least would provide some relief from the misuse of civil RICO by private parties. However, because it does not address the underlying source of the problems civil RICO creates, this bill will not cure the disease as thoroughly or as completely as would a prior-criminal-conviction requirement.

The NCAA and Its Student-Athletes: Is There Still State Action?

*Gordon A. Martin, Jr.**

The National Collegiate Athletic Association (NCAA), the embattled governing body of American intercollegiate athletics,[1] survived its first sixty-two years in its self-proclaimed role as "The Voice of College Sports,"[2] unencumbered by efforts to apply to it the standards of the United States Constitution.[3] The last decade and a half have, however, been replete with such litigation, much of it successful, at least at the initial stages of equitable relief.[4]

Recently, the NCAA has adopted Bylaw 5-1-(d)-(3)[5] which, though in part facially neutral, renews its effort to control the participation of older, more mature foreign athletes in this country's college athletics. Subsequently, the fundamental premise of state action, the threshold step courts must recognize prior to constitutional scrutiny and a premise accepted almost unani-

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1. *See, e.g.*, NCAA v. Board of Regents of the University of Oklahoma, 104 S. Ct. 2948 (1984). For a general understanding of the operation of the NCAA, see Martin, *The NCAA and the Fourteenth Amendment*, 11 NEW ENG. L. REV. 383, 389-92 (1976).

2. *See* J. FALLA, NCAA: THE VOICE OF COLLEGE SPORTS (1981) (authorized history published by Association to celebrate seventy-fifth anniversary).

3. Philpott and Mackall, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 STAN. L. REV. 903, 928 (1972) [hereinafter cited as Philpott and Mackall].

4. J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 1.14 (1979 & Supp. 1985).

5. 1982-83 NCAA MANUAL 72 (1982). For the text of this bylaw, see the text accompanying note 13, *infra*.

mously by federal circuit and district courts in the seventies,[6] has been shaken by an important, though still clearly minority decision concerning the bylaw by the United States Court of Appeals for the Fourth Circuit.[7] This article will analyze that opinion as well as the earlier precedent and the ingredients of state action in the context of the college athletic industry. It will also discuss the "over the age of twenty" rule[8] which, it is submitted, is an ill-disguised attempt by the NCAA to perpetuate the particular discrimination against aliens first ruled unconstitutional by the United States District Court for the District of Columbia in 1973, in *Howard University v. NCAA*.[9] Such an effort illustrates the need for continued scrutiny of the NCAA by our courts.

I. Among Those Affected

To those concerned with the civil rights of student-athletes and alert to the nuances of the rules and regulations of the NCAA, a brief item in the May 29, 1985, "Transactions" column which appears on the sports scoreboard page of most large American newspapers had particular significance. The Boston Bruins of the National Hockey League had signed Kraig Nienhuis,[10] a six foot, three inch tall, 205 pound junior forward at Rensselaer Polytechnic Institute (RPI),[11] the 1985 NCAA champion. While a valuable regular performer throughout his three years at the Troy, New York school, Nienhuis's forsaking his college degree to turn professional after his junior season would have been a surprise since, despite his size, he was not the kind of dominant college player who ordinarily would attract professional teams as an underclassman, were it not for one thing. Kraig Nienhuis had played hockey for one season in Ontario after reaching the age of twenty and prior to matriculating at RPI. Thus, pursuant to NCAA Bylaw 5-1-(d)-(3), Nienhuis was ineligible to play intercollegiate hockey in what would have been his senior year.[12]

Proposal Number 83 (seasons of competition), which was later codified as Bylaw 5-1-(d)-(3), was passed by the NCAA Convention in January 1980, to take effect August 1, 1980, and read:

> Any participation by a student as an individual or as a representative of any team in organized competition in a sport during each 12-month period after the student's 20th birthday and prior to matriculation at a member institution shall count as one year of varsity competition in that sport. Participation in organized competition during times spent in the armed services, on official church missions or with recognized foreign aid services of the U.S. Gov-

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6. 2 R. Berry & G. Wong, Law and Business of the Sports Industries, § 1.31 (1986); R. Yasser, Sports Law 82-83 (1985).

7. *See* Arlosoroff v. NCAA, 746 F.2d 1019 (4th Cir. 1984) (vacating injunction No. C-83-230-D (M.D.N.C. 1983)).

8. 1986-87 NCAA Manual, Bylaw 5-1-(d)-(3) (1986).

9. Howard University v. NCAA, 367 F. Supp. 929 (D.D.C. 1973), *aff'd*, 510 F.2d 213 (D.C. Cir. 1975).

10. Boston Globe, May 29, 1985, at 82, col. 6.

11. 1984-85 ECAC Hockey Guide 40 (1984).

12. 1985-86 RPI Hockey Guide 8 (1985).

ernment shall be excepted.[13]

Nienhuis was not the only athlete affected by the bylaw. In January of 1980, Chaim Arlosoroff, discharged from the Israeli army in March 1979 at the age of twenty-two, was a member of the Israeli Davis Cup Team and competing in a series of amateur tennis tournaments.[14] Rob Spath of Downsview, Ontario, already a high school graduate, was playing for the Dixie Beehives of Toronto's Metro Junior B Hockey League, a major recruiting ground for American college coaches, and was working for a Toronto department store.[15] Jan-Ake Danielson, at age twenty, was attending secondary school in Sweden and playing ice hockey for Leksland, a local club.[16] Albert Butts, six feet, nine inches tall, 215 pounds, had left his Philadelphia area high school and was a senior, playing basketball at Frederick Military Academy in Virginia. He would remain for a post-graduate year during which he played basketball and reached his twentieth birthday.[17]

During 1984 all four would be plaintiffs in federal courts challenging the NCAA bar under Bylaw 5-1-(d)-(3) to their playing another college season in their respective sports because of amateur athletic competition in which they had *already engaged* at the time of the bylaw's adoption by the NCAA. Each plaintiff would have to cross the state action threshold to have his claim considered.

II. BACKGROUND

In 1972 the first significant attempt by a legal journal to analyze possible judicial relief in connection with disputes between student-athletes and the NCAA accurately stated:

> Any attempt to invoke the protections available under the fourteenth amendment for a college athlete penalized by the NCAA must be qualified with the caveat that such an invocation resides on the borderline of established constitutional doctrine.[18]

The article was prompted by *Curtis v. NCAA*,[19] which involved plaintiffs whose academic achievements in college had far surpassed the minimal 1.600

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13. 1982-83 NCAA MANUAL 72 (1982). Unlike Proposal 83, three other enacted proposals — No. 72 (recruiting contacts), No. 80 (high school all-star games) and No. 97 (soccer playing season) — all also effective August 1, 1980, were interpreted by the NCAA Council and officers as being applicable only to conduct subsequent to adoption. *Effective dates issued*, NCAA News, Feb. 15, 1980, at 1, col. 1. On the question of retroactivity, *see generally* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) (discussing fairness regarding retroactive application of statute).

14. Arlosoroff v. NCAA, No. C-83-230-D, slip op. at 3 (M.D.N.C. 1983), *vacated*, 746 F.2d 1019, 1020 (4th Cir. 1984).

15. Record Appendix at 4-6, Spath v. NCAA, No. 84-1005 (1st Cir. 1984).

16. Affidavit of Jan-Ake Danielson at paragraphs 14-15, Danielson v. NCAA, No. 84C-832-C (W.D. Wis. Oct. 10, 1984).

17. Butts v. NCAA, 600 F. Supp. 73, 74 (E.D. Pa. 1984), *aff'd*, 751 F.2d 609, 610 (3rd Cir. 1984).

18. Philpott and Mackall, *supra* note 3, at 928.

19. No. 712088 ACW (N.D. Cal. 1972).

grade point average prediction requirement of that time,[20] yet were being barred permanently from intercollegiate competition by the NCAA because they participated, contrary to the rule, during their freshman year.[21]

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20. The "1.600 Rule" was as follows:

> A member institution shall not be eligible to enter a team or individual competitors in an NCAA-sponsored meet, unless the institution in the conduct of all its intercollegiate athletic programs: (1) Limits its scholarship or grant-in-aid awards (for which the recipient's athletic ability is considered in any degree), and eligibility for participation in athletics or in organized athletic practice sessions during the first year in residence to student-athletes who have predicted minimum grade point averages of at least 1.600 (based on a maximum of 4.000) as determined by the Association's national prediction tables or Association-approved conference or institutional tables.

See Howard University v. NCAA, 510 F.2d 213, 216 n.3 (D.C. Cir. 1975) (quoting NCAA Bylaw 4-6-(b)-(1)).

21. The plaintiffs, black juniors at the University of California at Berkeley, had been admitted under a special action admissions program known in California as the four percent rule. No college board examinations, SATs or ACTs were required. Educational need and promise was the standard. They were deemed ineligible despite their actual in-college performance since, without the college boards, no prediction under the NCAA formula could be made.

The most controversial recent NCAA bylaw change, known originally as Proposal No. 48 when adopted by the 1983 Convention, has been formalized as Bylaw 5-1-(j)-Note. *See* 1986-87 NCAA MANUAL 96 (1986).

Effective August 1, 1986, in order to attain initial eligibility at an NCAA Division I institution, a student-athlete must have achieved a 2.000 minimum high school grade point average in a core curriculum of at least eleven academic courses, including at least three years of English and two years of mathematics, social science, and natural or physical science (including at least one laboratory class if offered by the high school). Minimum SAT (combined 700) or ACT (15) scores must also be achieved, though an eligibility indexing system, Proposal 16, adopted by the 1986 Convention, permits a slightly higher grade point average to offset a slightly lower SAT or ACT score, and vice versa, for the 1986-87 and 1987-88 academic years. Crowl, *NCAA Votes Stiffer Academic Requirements for Participation in Intercollegiate Sports; Black-college presidents call action "patently racist,"* Chronicle of Higher Education, Jan. 19, 1983, at 1, col. 4. *See* NCAA News, Feb. 19, 1986, at 1, col. 4; NCAA News, Jan. 8, 1986 at 1, col. 1; NCAA News, Nov. 5, 1984, at 1, col. 1. *See generally* Greene, *The New NCAA Rules Of The Game: Academic Integrity or Racism?*, 28 ST. LOUIS U.L.J. 101 (1984) (discussing NCAA Proposal 48) [hereinafter cited as Greene, *Academic Integrity*].

For one high school senior's struggle with the new rules, *see* Farrell, *How Colleges Courted Mark Tillmon, and How He decided Which to Accept*, Chronicle of Higher Education, April 30, 1986, at 34, col. 1. The fact that Tillmon, a C+ student at Gonzaga, a respected Washington, D.C., Jesuit-run private high school, achieved only a combined SAT score of 660 the first time he took the examination, exemplifies the concern felt by many black educators and others about the impact of the new rule. One mid-western college ice hockey coach involved in recruiting for his institution has expressed to the author his doubts as to the ability of certain of his recruits to meet the new standards.

A New York Times survey conducted in late July 1986 with the athletic departments of schools competing in Division I, in either football or men's basketball, found that approximately 5% of the incoming athletes scheduled to receive scholarships in those sports were ineligible, 153 football players and 52 basketball players. Of the 286 institutions in the category, 276 of them responded. In almost all instances, the problem was not an insufficient grade-point average but inadequate scores on the SAT or ACT. Goodwin, *Survey: New N.C.A.A. Standards Sideline More Than 200*, New York Times, Aug. 3, 1986, at 1S, col. 1.

By September 1986 the number had doubled. *Bylaw 5-1-(j) said to affect 483 recruits*, NCAA

The preliminary injunction issued in favor of the plaintiffs in *Curtis* by Judge Arthur C. Wollenberg mentioned only that half of the NCAA's membership consisted of public institutions, cited no authority, and went officially unreported. That did not long remain the state of the law, however. United States District Judges Joseph L. Tauro and Gerhard A. Gesell, ruling within two weeks of one another, saw to that.

At issue in *Buckton v. NCAA*[22] were official interpretations 4 and 5,[23] promulgated by the NCAA at its January 1971 Convention in a climate of growing concern in American athletic circles over the increasing dominance of Canadian hockey players in American intercollegiate ice hockey.[24] Judge Tauro found in *Buckton* that the plaintiffs, Canadian citizens attending Boston University, had been subjected to official interpretations by the NCAA which constituted "disparate eligibility standards, one for student-athletes who have played hockey in the United States, and another for those who have played in Canada."[25] Regulations setting forth facially disparate conditions for the participation of a foreign student in a sport, as opposed to an American student, had to fall when judicially challenged.

News, Sept. 8, 1986, at 13, col. 3; *See* Farrell, *About 400 Freshman Athletes in Big-Time Sports Are Ineligible to Compete Under New Rules*, Chronicle of Higher Education, Sept. 10, 1986 at 1, col. 2.

22. 366 F. Supp. 1152 (1973).

23. Official Interpretations 4 and 5 read as follows:

> O.I.4. A student-athlete may have played ice hockey on a team in a foreign country prior to his matriculation at a member institution, provided that any student-athlete who has been a member of any ice hockey team in a foreign country shall be ineligible if he has received, directly or indirectly, from a hockey team any salary, division or split of surplus, educational expenses, or has received payment for any expenses in excess of actual and necessary travel expenses on team trips, a reasonable allowance for one meal for each practice and home game and actual and necessary travel expenses to practice and home games. No student-athlete shall represent his institution in ice hockey unless there is on file in the office of the director of athletics an affidavit in form prescribed by this Association signed by the student-athlete stating his compliance with this provision.
>
> O.I.5. Any student-athlete who has participated as a member of the Canadian Amateur Hockey Association's major junior A hockey classification shall not be eligible for intercollegiate athletics.

1973-74 NCAA MANUAL, art. III, § 1 (d), 7 (1973). Renumbered as Official Interpretations 5 and 6, they were rescinded following the *Buckton* decision, effective October 26, 1974. *See* Martin, *Due Process and Its Future Within the NCAA*, 10 CONN. L. REV. 290, 294 n.14 (1978) [hereinafter cited as Martin, *Due Process*].

24. For general background information concerning Canadian junior hockey as played by Buckton and Spath, and its influence upon American intercollegiate hockey, see the transcripts and exhibits of Buckton v. NCAA, Civ. No. 73-3475-T (D. Mass. 1973).

25. *Buckton*, 366 F.Supp. at 1157. Following the plaintiffs' graduation from Boston University, an attorney's fee was awarded their counsel pursuant to the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. Buckton v. NCAA, 436 F. Supp. 1258 (D. Mass. 1977). Judge Tauro summarized the history of the case following his issuance of the preliminary injunction four years earlier and concluded "that plaintiffs have vindicated a very important policy — the constitutional prohibition against denying resident aliens equal protection of the laws." *Buckton*, 436 F. Supp. at 1266. This, he found, had "benefitted the NCAA. . . ." *Id.* at 1262 n. 10.

Thus, the District of Columbia Circuit affirmed Judge Gesell's decision rendered just after *Buckton*. Howard University and one member of its wholly alien soccer team succeeded in their challenge to the "foreign student" rule which denied alien student-athletes, and only them, one year of varsity competition for each twelve-month period in which they had competed in a foreign country following their eighteenth birthday.[26] Some solace may have been obtained by the NCAA from the circuit court's *dictum* that "the objective of preventing older players from dominating competition may be substantial. . . ."[27] To have reached the merits of the constitutional challenges mounted in *Buckton* and *Howard*, the plaintiffs had overcome, as Curtis had, the threshold applicability of the state action concept to the NCAA.

III. The Voluntary Association and College Athletics

The NCAA describes itself as "a voluntary non-profit educational organization."[28] While the individual colleges and local conferences retain some degree of control over which students may participate in an intercollegiate sport, their decisions may not be less restrictive than those of the national regulatory body, the NCAA. Nearly one thousand members, consisting of colleges and universities, affiliated conferences and associations, compose the NCAA.[29]

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26. In relevant part, the "Foreign-Student" rule read as follows:

> Any participant in a National Collegiate Athletic Association event must meet all of the following requirements for eligibility. . . . He must not previously have engaged in three seasons of varsity competition after his freshman year, it being understood that: Participation as an individual or as a representative of any team whatever in a foreign country by an alien student-athlete in each twelve-month period after his nineteenth birthday and prior to his matriculation at a member instituion shall count as one year of varsity competition.

Howard, 510 F.2d at 215 n.1 (quoting NCAA Bylaw 4-1-(f)-(2)).

27. *Howard*, 510 F.2d at 222. Beyond that, however, the two NCAA regulations subjected to constitutional analysis by the court were upheld, the "1.600" Rule, *Id.* at 219 n.10, and the "Five-Year" rule which read in pertinent part:

> An institution shall not permit a student-athlete to represent it in intercollegiate athletic competition unless he meets the following requirements of eligibility: He must complete his seasons for participation within five calendar years from the beginning of the semester or quarter in which he first registered at a collegiate institution. . . .

Id. at 215 n.2 (quoting NCAA Const. art. III, § 9 (a)). The court found that the rules met the reasonable relationship standard and applied "close judicial scrutiny" only to the "Foreign-Student" rule because of its alienage classifcation. *Id.* at 220-22 (citing Reed v. Reed, 404 U.S. 71 (1971)).

Cases which upheld the "1.600" rule, and were cited by the District of Columbia Circuit, were Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975) and Associated Students, Inc. v. NCAA, 493 F.2d 1251 (1974). *Howard*, 510 F.2d at 221.

For a description of Canada's governing and coordinating body for both men's and women's university sports, the Canadian Interuniversity Athletic Union (CIAU), and its rule limiting the number of seasons of competition, see J. Barnes, Sports and the Law in Canada 184-92 (1983).

28. Transcript, Fifth Annual NCAA Media Seminar, at 4 (1970) [hereinafter cited as Media Transcript] (on file with the author).

29. *Arlosoroff*, 746 F.2d at 1020; Record Appendix at 44, *Spath*, No. 84-1005 (1st Cir.

During the two decades between 1950 and 1970 the membership had increased 128 percent.[30] When Bill Buckton and his co-plaintiff Peter Marzo brought suit against it in October of 1973, the NCAA had approximately 664 members.[31] By the time Rob Spath's complaint was filed in the same court ten years later, the membership was up to 971.[32]

The active members are four-year colleges and universities located throughout the United States, approximately half of which are public institutions.[33] The active members pay annual dues to the NCAA and adopt, in annual convention, various rules regulating athletic competition among the members, including the eligibility of students to compete in intercollegiate athletics.[34]

The Association sponsors seventy-seven national championships, forty-one of which are for men, thirty-four are for women and two are for both men and women.[35] Only active member institutions in good standing may compete.[36] With the decline of professional minor leagues in sports generally, participation in the NCAA championships in such men's sports as basketball, ice hockey, and baseball brings with it not simply prestige, but exposure to major league scouts, and is thus of significant value to the student-athlete aspiring to a professional career in his sport. As one recent commentator succinctly stated:

> [N]ot only is the athlete often exchanging his prowess for an education, 'the chance to display. . . athletic prowess in college stadiums and arenas throughout the country [may be] worth more in economic terms than the chance to get a college education.' Even if the college athlete does not reach the professional ranks, our sports-dominated culture often rewards outstanding college athletes in both tangible and intangible ways. Viewed from several different perspectives, the interests of athletes cannot be lightly disregarded. Moreover, these are interests that are not formally represented in the NCAA process, or by member institutions.[37]

U.S. District Judge Miles W. Lord put it more bluntly in a recent college basketball eligibility case:

> The private interest at stake here, although ostensibly academic, is the plaintiff's ability to obtain a 'no cut' contract with the National Basketball Association. The bachelor of arts, while a mark of achievement and distinction does not, in and of itself, assure the

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1984).

30. Media Transcript, *supra* note 28, at 4.

31. *Buckton*, 366 F. Supp. at 1155.

32. Record Appendix at 44, *Spath*, No. 84-1005 (1st Cir. 1984).

33. *Id.*

34. Answer for NCAA at ¶ 3, Jones v. NCAA, Civ. No. 74-5519-T (1974).

35. 1985-86 NCAA MANUAL, Exec. Reg. § 3(a), at 172 (1985).

36. *Id.*, Exec. Reg. § 1(e) at 167.

37. Greene, *Academic Integrity*, *supra* note 21, at 137 (quoting Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 604 (D. Minn. 1972)). Concerning the possible divergence in interest between the student-athlete and the institution, see Martin, *Due Process*, *supra* note 23 at 315 nn. 120-21.

> applicant a means of earning a living. This applicant seems to recognize this and has opted to use his college career as a means of entry into professional sports as do many college athletes. His basketball career will be little affected by the absence or presence of a bachelor of arts degree. This plaintiff has put all of his 'eggs' into the 'basket' of professional basketball. The plaintiff would suffer a substantial loss if his career objectives were impaired.[38]

The response of the NCAA to dissidents when criticism of its actions arises has always been that it is a voluntary association and that its dissatisfied members may simply leave.[39] However, for the institution that wanted prestige in ice hockey, just as for the institution that simply wanted a cut of the NCAA's television revenue, membership was far from voluntary. Judge Tauro found:

> No comparable associations or conferences are available to [Boston University]. Should B.U. permit plaintiffs to play hockey in the face of a determination of ineligibility by the defendant Associations, it would run the risk of a variety of sanctions, including forfeiture of those games in which plaintiffs participated.[40]

Despite the Supreme Court's break-up of the organization's television monopoly,[41] there is still no alternative for the institution seeking any real form of athletic prominence. In the high pressure sport of major intercollegiate basketball, there is no substitute for the season-end NCAA tournament. To varying degrees, this holds true in the other intercollegiate sports. Thus, the NCAA, in its regulation of student-athletes through its member institutions, may be properly subject to a scrutiny akin to that applied to professional associations whose exclusions or sanctions may have severe effects upon practitioners of the particular professions.[42]

IV. Applicability of the State Action Concept to the NCAA

The jurisdictional prerequisite to consideration by our federal courts of alleged constitutional violations by the NCAA is that the actions challenged "were taken 'under color of state law' within the meaning of 42 U.S.C. § 1983 so as to confer jurisidiction. . . under 28 U.S.C. 1343 (3)."[43] Until October of 1984, "with only one exception, every federal court that. . . considered this question. . . answered it affirmatively."[44] That court, the United States Dis-

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38. Hall v. Univ. of Minn., 530 F. Supp. 104, 108 (D. Minn. 1982).

39. Media Transcript, *supra* note 28, at 175-76.

40. *Buckton*, 366 F. Supp. at 1155.

41. *Board of Regents of the Univ. of Okla.*, 104 S. Ct. 2948. As Professor Greene has stated, "there is but one well-kept playing field open to colleges and universities, private or public, and the NCAA is the groundskeeper." Greene, *Academic Integrity, supra* note 21, at 127.

42. Pinsker v. Soc'y of Orthodontists, 81 Cal. Rptr. 623, 460 P.2d 495 (1969); Philpot and Mackall, *supra* note 3 at 914 n.77. *See* Greene, *Academic Integrity*, *supra* note 21, at 135 n.155.

43. *Parish*, 506 F.2d at 1031 (footnote omitted).

44. *Id.* at 1031. Comparable holdings subsequent to *Parish* included: Rivas Tenario v. Liga Atletica Interuniversitaria, 554 F.2d 492 (1st Cir. 1977); Colorado Seminary v. NCAA, 417 F. Supp. 885 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. 1977); Regents of Univ. of Minn. v.

trict Court for the Central District of California, was subsequently overruled by its circuit court in *Associated Students v. NCAA*.[45]

Where technically private acts were alleged to invade constitutional rights, the Supreme Court has outlined the following guiding principle: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to constitutional limitations placed upon state action."[46] The scope of the doctrine was broad though its contours sometimes imprecise: "[T]he Fourteenth Amendment forbids States to use their governmental powers. . . [for discriminatory purposes]. . . where there is state participation through any arrangement, management, funds or property."[47]

Nominally private action could be deemed governmental for constitutional purposes, but remain legally private for all other purposes. For example, a shopping center, though it was not permitted to bar labor pickets from its parking lots, remained as private as ever for other legal purposes.[48]

The various federal judges assessing the NCAA have pierced its "private" character from almost every conceivable vantage point. Judge Tauro found that "the NCAA in supervising and policing the majority of intercollegiate athletics and athletes nationwide performs a public function, sovereign in nature, that subjects it to constitutional scrutiny."[49] He also noted "that state universities make up one-half the membership of the NCAA; that these public institutions pay dues to the NCAA, and that state involvement in the NCAA includes the support, control and regulation of member institutions as well as the provision of state facilities for NCAA contests."[50]

Fourteen months later, in January 1975, the Fifth Circuit in *Parish v. NCAA*[51] noted the "substantial, although admittedly not pervasive, role in the NCAA's program" played by public institutions and their officials.[52] It noted that the association as "coordinator and overseer of college athletics" was performing "a traditional governmental function" and that "meaningful regulation of this aspect of education is beyond the effective reach of any one state."[53]

It concluded "that were the NCAA to disappear tomorrow, government would soon step in to fill the void."[54] In what ultimately must be the most telling argument for subjecting the NCAA to constitutional scrutiny, it de-

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NCAA, 420 F. Supp. 1158 (D. Minn.) *rev'd on other grounds*, 560 F.2d 352 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 978 (1978); Howard Univ. v. NCAA, 367 F. Supp. 929 (D.D.C. 1973), *aff'd*, 510 F.2d 213 (D.C. Cir. 1975); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975); Hunt v. NCAA, No. 676-370 C.A. (W.D. Mich. 1976).

45. 493 F.2d 1251, 1254-55 (9th Cir. 1974) (overruling by implication McDonald v. NCAA, 370 F. Supp. 625 (C.D. Cal. 1974)).

46. *Howard*, 510 F.2d at 217 (quoting with approval Evans v. Newton, 382 U.S. 296, 299 (1966)).

47. Cooper v. Aaron, 358 U.S. 1, 4 (1958).

48. Food Employees Local v. Logan Valley Plaza, 391 U.S. 308 (1969).

49. *Buckton*, 366 F. Supp. at 1156.

50. *Id.* at 1157.

51. 506 F.2d 1028 (5th Cir. 1975).

52. *Id.* at 1032.

53. *Id.* at 1032-33.

54. *Id.* at 1033.

clared that "it would be strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by bonding together to form or support a 'private' organization to which they have relinquished some portion of their governmental power."[55]

The D.C. Circuit, two months later in *Howard*, was more pragmatic in its analysis, "[s]ince financial contribution to the NCAA is based upon institutional size, and since public institutions provide the vast majority of the NCAA's capital. . . ."[56] The court continued:

> [T]he state instrumentalities are a dominant force in determining NCAA policy and in dictating NCAA actions. That conclusion is buttressed by reference to the record before us which documents that both the President and Secretary-Treasurer were representatives of public instrumentalities and that state instrumentalities traditionally provided the majority of the members of the governing Council and the various committees.[57]

As it appeared to the Circuit Court for the District of Columbia, "[t]he NCAA and its member public instrumentalities. . . [formed] the type of symbiotic relationship between public and private entities which triggers con-

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55. *Id.* (quoted with approval in *Howard*, 510 F.2d at 220). The Fifth Circuit throughout the two decades prior to *Parish* had particular expertise in detecting subterfuge as certain states, countries and municipalities within its jurisdiction attempted to deny basic rights to their black citizens. *E.g.*, Louisiana High School Athletic Ass'n. v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968); United States v. Lynd, 301 F.2d 818 (5th Cir. 1962).

56. *Howard*, 510 F.2d at 219.

57. *Id.* In a supporting footnote, Judge Tamm stated:

> While, unlike in the high school cases, no particular state's instrumentalities are able to control the association, it is clear that all NCAA actions are undertaken on the votes of public instrumentalities, and it would not overstate the practical situation to assert that no NCAA action could be taken by the Convention, Council, or any committee without the substantial support of the public instrumentalities.

Id. at 219 n.11. The only other national regulatory body for intercollegiate athletics besides the NCAA is the National Association of Intercollegiate Athletics (NAIA). It fulfills essentially the same function for its member institutions as does the NCAA but has a very different and lower key constituency: 512 four-year colleges ranging in enrollment from small (500) to moderate (1100). Williams v. Hamilton, 497 F. Supp. 641, 643 (D. N.H. 1980).

The less pressured and less lucrative world of small college athletics not suprisingly has produced little litigation. *Williams* is, however, notable in its finding the NAIA to be a state actor despite the latter's contention, with which the court agreed, that "the amount of state involvement in [it] pales in comparison to the [NCAA]." *Williams*, 497 F. Supp. at 644. State supported schools, contributing 37% of the organization's total dues, composed but 33% of its membership. The representatives of private institutions also had a majority of the members on both the Executive Committee and the National Eligibility Committee. Chief Judge Devine found, however, that the question of state action could not be "reduced to a mere numbers game . . . ." *Id.* at 644. He held that the substantial contribution made by the state schools to the organization's "financial stability and its decision making process" was sufficient for state action to be found. *Id.* at 645.

The Association for Intercollegiate Athletics for Women (AIAW), which was put out of business by the entry of the NCAA into women's college sports, *see e.g.*, AIAW v. NCAA, 558 F. Supp. 487 (D.D.C. 1983), conceded, in a case where both were co-defendants, that its actions were state actions for constitutional purposes. Pavey v. Univer. of Alaska, 490 F. Supp. 1011, 1014 (D. Alaska 1980).

stitutional scrutiny."[58] It found "the degree of public participation and entanglement between the entities substantial *and* pervasive."[59]

In 1977, in opinions written by the same senior circuit judge, the First Circuit in *Rivas Tenario v. Liga Atletica Interuniversitaria*, [60] and then the Eighth Circuit in *Regents of the University of Minnesota v. NCAA*,[61] endorsed the holding that NCAA "activities do constitute governmental action for purposes of the Constitution and § 1983. . . . We, like the First Circuit. . ., agree with the analysis and conclusion of Judge Tamm for the District of Columbia Circuit in *Howard*. . . ."[62]

V. *Arlosoroff v. NCAA*

With that background of federal precedent, it was not surprising that when the NCAA and Duke University removed Chaim Arlosoroff's suit to the United States District Court for the Middle District of North Carolina after he had obtained a temporary restraining order on March 1, 1983. United

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58. *Howard*, 510 F.2d at 220.

59. *Id.* (emphasis added).

60. 554 F.2d 492 (1st Cir. 1977). Judge Martin Van Oosterhaut, a senior circuit judge of the Eighth Circuit, was, as is not uncommon for senior judges, sitting by designation in another circuit when he wrote this opinion.

The challenged regulation of the Liga Atletica Interuniversitaria (LAI), the rough equivalent in Puerto Rico of the NCAA, bore a striking resemblance to that struck down in *Howard*. *Id.* at 493. Student-athletes not born in Puerto Rico who entered an LAI member instituion after their twenty-first birthday were barred from the annual LAI competitions unless they had resided in the Commonwealth for at least five years prior to matriculation or had a parent who was Puerto Rican. *Id.* at 493. The district court, in ruling for the LAI, had not disputed the correctness of *Howard, Parish* or *Associated Students* in holding the NCAA to be a state actor. *Id.* at 494. It attempted, however, to distinguish the LAI from the NCAA by its being financially self-sufficient and a corporation while the NCAA was neither. *Id.* at 495.

The court of appeals rejected the attempted distinctions. While recognizing also that the LAI's regulation and supervision of intercollegiate athletics was not as extensive as that of the NCAA, the First Circuit found "that LAI's authority extends to such matters as organizing the annual competitions, establishing individual eligibility criteria, collecting gate receipts and negotiating television and radio rights, and providing disciplinary sanctions to member institutions and individual athletes for violations of the regulations." *Id.* at 495-96. Four of the seven LAI member institutions were part of the University of Puerto Rico. They both fielded separate athletic teams and had separate voices in establishing LAI policy. Thus, the court concluded: "To a substantial extent then, the LAI does control public schools which are commonwealth instrumentalities and does perform a traditional governmental function. . . . In that sense, the Commonwealth has indeed relinquished some portion of its governmental power to LAI." *Id.* at 495.

A very substantial, though not pervasive, degree of public participation and entanglement was found sufficient for the court to recognize the existence of the type of symbiotic relationship triggering constitutional scrutiny. *Id.* at 496. On the merits, the court of appeals then reversed the district court ruling because of the "stark alienage grounds" of the classification in the regulation and remanded the case for hearing with a strict scrutiny standard of review to be applied. *Id.* at 497-98.

61. 560 F.2d 352 (8th Cir. 1977).

62. *Id.* at 364-65 (citing *Howard*, 510 F.2d at 216-20). In 1978 the Tenth Circuit affirmed *per curiam* a Federal District Court for Colorado opinion which had also determined that the NCAA should be held constitutionally accountable. Colorado Seminary v. NCAA, 417 F. Supp 885 (D. Colo. 1976), *aff'd per curiam*, 570 F.2d 320 (10th Cir. 1978).

States District Judge Robert Erwin cited *Howard, Parish, Associated Students, Inc.*, as well as *Regents of the University of Minnesota*, and declared: "This court believes that these decisions are sound and persuasive, besides representing the clear weight of authority on the question, and consequently holds that the state action requirement is satisfied."[63] The court accepted Arlosoroff's contention "that the actual intent of NCAA Bylaw 5-1-(d)-(3) is to discriminate against foreign student athletes and that although facially neutral, the bylaw creates an invidious and suspect classification according to national origin."[64] Consequently, a preliminary injunction was issued.[65]

Arlosoroff, a native Israeli, had been graduated from high school there at the age of eighteen.[66] Thereafter, he served three years in the Israeli army, being discharged in March, 1979 at the age of twenty-two.[67] From the time of his discharge through November of 1980, Arlosoroff played in some seventeen amateur tennis tournaments and also competed for the Israeli Davis Cup team.[68]

In August of 1981, he had enrolled at Duke University after receiving an athletic scholarship.[69] As a freshman, Arlosoroff won 32 of 36 matches while playing the number one singles position on the Duke tennis team.[70] The team won the championship of the highly competitive Atlantic Coast Conference, and Arlosoroff became the University's first tennis All-American.[71] However, because he had played organized tennis for three years after military discharge and before his matriculation at Duke, the NCAA ruled him ineligible for further competition after his freshman year.[72]

On appeal, the Fourth Circuit, relying on the June 25, 1982, Supreme Court decisions in *Rendell-Baker* v. *Kohn*,[73] and *Blum* v. *Yaretsky*,[74] became the first appellate court not to find state action in the operation of the NCAA.[75] While recognizing the directly contrary holdings of four circuits[76]

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63. Arlosoroff v. NCAA, No. C-83-230-D, slip op. at 5-6 (M.D.N.C. 1983).
64. *Id.* at 6.
65. *Id.* at 10.
66. *Id.* at 3.
67. Arlosoroff v. NCAA, 746 F.2d 1019, 1020 (4th Cir. 1984).
68. *Arlosoroff*, No. C-83-230-D, slip op. at 3.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Arlosoroff*, 746 F.2d at 1020.
73. 457 U.S. 830 (1982).
74. 457 U.S. 991 (1982).
75. In so finding, the court noted:

> A private school's discharge of employees was not state action in spite of the fact that the school was extensively regulated and highly subsidized by the state. The state's regulatory and funding activities had not compelled the discharge of those employees, *Rendell-Baker v. Kohn*, 457 U.S. 830. . . (1982); see also *Blum v. Yaretsky*, 457 U.S. 991. . . (1982), just as they had not compelled a private nursing home's involuntary transfer and discharge of a group of Medicaid patients.

Arlosoroff, 746 F.2d at 1022.

76. *Arlosoroff*, 746 F.2d at 1021 (citing Regents of Univ. of Minn. v. NCAA, 560 F.2d 352 (8th Cir. 1977); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); Howard Univ. v. NCAA, 510 F.2d 213 (D.C. Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251 (9th Cir. 1974)).

and certain of their rationales,[77] the court, through Senior Circuit Judge Clement Haynsworth, declared:

> These earlier cases rested upon the notion that indirect involvement of state governments could convert what otherwise would be considered private conduct into state action. That notion has now been rejected by the Supreme Court, however, and its decisions require a different conclusion.[78]

The Court concluded that the adoption of the bylaw represented private conduct, and did not rise to the level of state action.[79]

> It is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action. . . . There is no suggestion in this case that the representatives of the state institutions joined together to vote as a block to effect adoption of the Bylaw over the objection of private institutions.[80]

VI. THE FIRST CIRCUIT

The First Circuit, while neither abandoning nor mentioning its holding in *Rivas Tenario*, has cited with approval the Fourth Circuit's analysis regarding the NCAA and stated its own reading of *Rendell-Baker* and *Blum*.[81]

In *Ponce v. Basketball Federation of the Commonwealth of Puerto Rico*,[82] the plaintiff had argued that the Commonwealth sufficiently regulated and financially supported amateur basketball "to establish a 'sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.' "[83]

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77. Three rationales recognized, but not accepted, by the Fourth Circuit were as follows: It was variously said that the NCAA performs a public function regulating intercollegiate athletics, *see Parish v. NCAA*, 506 F.2d 1032, that there was substantial interdependence between the NCAA and the state institutions that comprise about one-half of its membership, *e.g.*, *Howard University*, 510 F.2d at 219, and that the state institutional members played a substantial although admittedly not pervasive role in NCAA funding and decision making. *Parish*, 506 F.2d 1032, *see Howard University*, 510 F.2d at 219.

Arlosoroff, 746 F.2d at 1021.

78. *Id.*

79. *Id.* at 1022.

80. *Id.*

81. *See* Ponce v. Basketball Fed'n. of Comm. of P.R., 760 F.2d 375, 379 (1st Cir. 1985); Johnson v. Educational Testing Service, 754 F.2d 20 (1st Cir. 1984); *see also* Cohen v. President of Harvard College, 729 F.2d 59, 60 (1st Cir.) (per curiam), *cert. denied*, 105 S. Ct. 233 (1984) (argument that Harvard, because of its receipt of federal funds, would be liable for violating the first and fifth amendments had become devitalized).

82. 760 F.2d 375 (1st Cir. 1985).

83. *Ponce*, 760 F.2d at 377 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351

The First Circuit concluded, however, that "the criteria established by the Supreme Court preclude a finding of state action where there is no evidence that the government encouraged or affirmatively induced appellants' conduct."[84] It found the failure of the Secretary of the Commonwealth's newly created Sports and Recreation Department to have exercised statutory and regulatory responsibilities, which could have affected plaintiff's eligibility, insufficient to meet the affirmative nexus test of the mid-eighties.[85]

As to the plaintiff's contention that the federation was performing a public function, the court noted the *Rendel-Baker* requirement that the functions performed have been "traditionally the *exclusive* prerogative of the State."[86]

The "symbiotic relationship" found in *Ponce* by the district court, just as the court of appeals had found in *Rivas Tenario*,[87] was overturned because, as emphasized in *Rendell-Baker*, "the key factor in determining the existence of a symbiotic relationship is whether the state profited from the discriminatory activity."[88]

Eight months prior to *Arlosoroff*, in *Spath v. NCAA*,[89] another eligibility case, the First Circuit, citing *Rivas Tenario*, noted that "hitherto the weight of authority would support [the] plaintiff that [the] NCAA is sufficiently state connected to incur 42 U.S.C. § 1983 liability. . .,"[90] but that recent decisions such as *Rendell-Baker* and *Blum* had limited that concept.[91] The University of Lowell, the NCAA's co-defendant, was, however, "a 'state funded' university," thus the court assumed state action and moved to the merits of the case.[92]

At issue in *Spath*, initially before District Judge Joseph L. Tauro, who

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(1974) which was cited in Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

84. *Ponce*, 760 F.2d at 378.

85. *Id.* at 278-80.

86. *Id.* at 381 (quoting *Rendell-Baker*, 457 U.S. at 842).

87. 554 F.2d 492 (1st Cir. 1977); *see supra* note 60.

88. *Ponce*, 760 F.2d at 382 (citing *Rendell-Baker*, 457 U.S. at 842). The court distinguished one of its own mid-seventies state action cases as follows:

> Appellee's reliance on *Fortin v. Darlington Little League, Inc.*, 514 F.2d 344 (1st Cir. 1975) is. . . misplaced. In *Fortin*, we found that there was evidence of a symbiotic relationship between the Little League and the City of Pawtucket because the Little League nightly occupied six of eight city-kept baseball diamonds and took on a semi-official character in the public's eye. The city laid the diamonds to the Little League's specifications, and accommodated its practice and playing schedule to the virtual exclusion of other members of the community. *Fortin* was decided before the Supreme Court fully articulated the requirement that an economic incentive provide the basis for a symbiotic relationship. *Rendell-Baker v. Kohn*, 457 U.S. at 843. . . . Even so, we note that the evidence of accommodation by the government or municipalities of Puerto Rico to the specific needs of the Federation and League is significantly less than in *Fortin* and does not warrant a finding of state action. For example, the League shares the stadiums with other teams and other sports, the courts were not constructed for the exclusive benefit of the Federation, nor were they laid out or maintained to the Federation's specifications.

Id. at 382 n.5.

89. 782 F.2d 25 (1st Cir. 1984).

90. *Id.*

91. *Id.*

92. *Id.* at 28.

had decided *Buckton*, was both the applicability to Spath and the constitutionality of NCAA Bylaw 5-1-(d)-(3) under which Division I competitors lost one of their four years of eligibility for each year of organized competition in their particular sport after the age of twenty.[93] Spath, a Canadian, contended that the bylaw, though for the most part facially neutral,[94] was intended to discriminate against foreign student-athletes[95] and, in fact, had done so.[96] The

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93. *Id.* at 27.

94. The 1983 NCAA Convention broadened the only facial discrimination in the bylaw, regarding foreign aid agencies, to include military service as well, changing the exempting phrase to "armed services of the United States . . . ." Affidavit of Stephen R. Morgan, Director of Legislative Services, NCAA, dated October 22, 1984, paragraph 8, Danielson v. NCAA, No. 84C832C (W.D. Wis. 1984). Called to the attention of the First Circuit in *Spath*, the intent illustrated by the exemption was ignored: "We have no data indicating the effect of this to be other than minimal." 728 F.2d 25, 28 n.3. With the *Arlosoroff* injunction entered in the district court just days before, though unreported, the NCAA's own counsel was more sensitive to the impact of the 1983 amendment's addition to the facial discrimination concerning foreign aid agencies. The NCAA Council on July 28, and August 1, 1983, "noted that Association legal counsel has expressed concern regarding [the 1983 amendment] and that the Division I committee will consider legislation in the August meeting that would eliminate all of the exceptions in Bylaw 5-1-(d)-(3)." *Danielson* No 84C832C, Morgan Affidavit at paragraph 14e.

Effective August 1, 1984, pursuant to a vote of the January 1984 Annual Convention, Bylaw 5-1-(d)-(3) was amended to read as follows:

> Any participation by a student as an individual or as a representative of any team in organized competition in a sport during each 12-month period after the student's 20th birthday and prior to matriculation at a member institution shall count as one year of varsity competition in that sport, provided, however, that in no event shall the student be charged with more than one year of competition in that sport in any 12-month period after the student's 20th birthday.
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> (Adopted: 8/1/80, Revised: 8/1/84)

Danielson, No. 84C832C, Morgan Affidavit at paragraph 9.

By deleting the two areas of facial discrimination, the NCAA was heeding its counsel's advice and removing points sure to be raised by everyone litigating the constitutionality of the bylaw. By adding the new final clause the NCAA eliminated one particular inequity — the potential counting of two year's eligibility for conduct occurring in a single twelve-month period. Thus one Western Collegiate Hockey Association goaltender, born March 14, 1963, who matriculated in August 1983, will be able to compete during his senior year, 1986-1987, despite having played a game in Switzerland for his junior league's all-star team following his twentieth birthday. Since the last game of his college freshman year was on March 3, 1984, all post-twentieth birthday competition had occurred in a twelve month period. Letter from his coach to the Commissioner of the Western Collegiate Hockey Association (January 7, 1986); and, Letter from the commissioner to the coach (January 10, 1986) (discussing eligibility status of the athlete).

What concerns may have been at work in the NCAA in 1984 have apparently subsided. Effective January 14, 1986, the previous facial discrimination for American servicemen was back in place, added as the bylaw's final sentence: "Participation in organized competition during time spent in the U.S. armed services shall be excepted." 1986-87 NCAA MANUAL 93 (1986).

95. The first proposed successor to Bylaw 4-1-(f)-(2), which had been struck down in *Howard*, was defeated at the 1978 NCAA Convention. Record Appendix at 136, Spath v. NCAA, No. 84-1005 (1st Cir. 1984). Prior to the final vote, amendments had been adopted raising the relevant age from 19 to 20 and applying the bylaw to all student-athletes, not just those who had been recruited. *Spath*, Record Appendix at 136-37. The First Circuit correctly noted the beneficial aspect of the increase to Canadians, many of whom attend five years of high school rather than four. *Spath*, 728 F.2d at 28. Despite that change, the proposal had drawn considerable criticism:

earlier version of the NCAA bylaw, which had previously been found discrimi-

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Thomas Niland (LeMoyne College): 'I can't believe with all the problems we have with discriminatory actions that we want to enact another discriminatory action to eliminate somebody because he was born on a certain particular time. I believe we are making a grave error in trying to pass this legislation.'

Stephen Horn (California State University, Long Beach): 'I completly agree with the last gentleman. When I look at my own university, the average age of the undergraduate body is 24. The average of the graduating class is 26. In regard to what was said earlier this morning, we are in an era where students leave high school, work, marry, might come up to school for one or two courses, save up enough money and then go full-time, and all of a sudden we are saying because you weren't the typical American in the 1930's and didn't get to college at age 17 we are ruling you out for opportunity of athletic participation. I think the proposal is really nonsense.'

Spath, Record Appendix at 140.

The Proposal as it had been amended was defeated again in 1979:

Rev. Joseph Eagan (University of San Francisco): . . . 'This proposal deprives a student athlete of his basic right to compete in collegiate athletics, and it does this solely on the basis of a student-athlete's age and previous legitimate athletic experience. To thus deprive student-athletes of this basic right is to invite legal action. Furthermore, it appears that this proposal is aimed specifically at the sport of soccer in which older foreign players do compete. This proposal is, therefore, discriminatory to those institutions in which many foreign students are enrolled.

My own university has more than 20 percent foreign students. I believe strongly that foreign student-athletes who qualify for academic eligibility deserve the same treatment by the NCAA as the American student receives.

I would like to make a further point here. Excellent foreign soccer players are doing a significant service in upgrading the caliber of American collegiate soccer. This often is overlooked.

I also would like to stress that it is not only foreign students who are discriminated against by this proposal. Yesterday's paper carried a feature article about an American goalie just signed by a professional team. This young man, American born, is 27. He spent four years in the Coast Guard where he played organized soccer regularly. After leaving the Coast Guard, he enrolled in our university and competed for four years in intercollegiate soccer. Three of those years his team was the NCAA Division I champions. This proposal would have denied him those three years of collegiate competition and the excellent coaching and experience that went with it. So, I strongly would urge you to vote against proposal No. 107.'

Michael T. Johnson (University of Houston): 'The previous speaker may have answered my question. I was wondering if this would exhaust the eligibility of men and women who participate in athletic competitions in the military? If they participate in athletic competition beyond age 20 in the military, would it also exhaust their eligibility?'

Mr. Coleman: 'The answer is yes.'

Mr. Johnson: 'Then I would speak in opposition to it. I think it would be wrong to exhaust the opportunity of men and women who go in the military prior to going to college and say to them if they participate beyond age 20 that it either totally or partially exhausts their eligibility for competition.'

Spath Record Appendix at 142-43.

Proposal 83 took care of Mr. Johnson's concerns about those in the military, as well as American foreign aid services and official church missions, a requirement of the Morman faith. The current NCAA President, John R. Davis of Oregon State University, moved for its adoption on behalf of the NCAA Council and the Division I Steering Committee.

'This proposed legislation is designed to equalize the opportunity for competitive

natory on its face and unconstitutional in *Howard*, was among those points

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athletic experience of individuals participating in the NCAA championships and avoid what many members feel is an unfair advantage for scholarships and competition by older, more experienced athletes.

A similar proposal was presented last year, but it didn't pass a result of some concern by several members about athletic participation that occurred during military service and for several other reasons. The Council believes that this proposal now contains exemptions that should respond positively to those earlier concerns.

These exemptions are also consistent with the exemptions, permitted by the five-year rule, incidentally. This legislation does not discriminate at all against the older student. It treats all students alike who have competed in organized competition prior to their matriculation at a member institution and after their 20th birthdays.

Now, this should result in a much more responsive attitude toward the vast majority of students who attend our member institutions. . . .'

Spath, Record Appendix at 145-46.

Responding to the statement made by Mr. Davis were:

Jim Tuppeny (University of Pennsylvania): 'Mr. President, I am president of the NCAA Division I Track Coaches Association from the University of Pennsylvania and a member of the U.S. Track Coaches Association. The Division I Track Coaches Association wishes to support Proposal No. 83, Section 3, as submitted by the steering committee.

In June, the NCAA Division I Track Coaches Association voted to propose a similar piece of legislation to limit the age of competitors in college competition. In November, the Division I Cross Country Coaches Association voted to propose No. 83, Section 31. Many young men in the United States have been discriminated against in track and field because they are unable to compete successfully against more mature athletes.

Many of these young men are denied scholarships because they have been awarded to more mature athletes. I have been coaching for 30 years and the normal age for college athletes seems to be approximately 18 to 21. Proposal No. 83 would permit the athletes to compete until they are approximately 24 years of age. Many of these over-age athletes are foreigners. The track coaches association is not opposed to foreigners but is opposed to over-age athletes.

In the outdoor championships last year one team had 16 of its 17 points scored by over-age athletes. At the recent cross country championships, one entire team was over-age. Eleven of the top 16 finishers were also over-age.

As a precedent the secondary schools of the United States have had an age requirement for many years. On behalf of the Division I Track Coaches Association, I ask your support. . . .'

Rev. Joseph Eagan (University of San Francisco): 'Mr. President, despite the eloquent comments by the man representing track, I would like to speak against this proposal. . . .

The seemingly logical intent of this proposal, as stated in our Convention Program is the following: "To equate the competitive experience of individuals participating in NCAA championships in Division I." However, the exception granted in Proposal 83 is inconsistent with this stated intent. The exception is for student-athletes who have competed while in the armed services or in church missions, or with foreign aid services of the U.S. government. These American student-athletes will have thus gained extra competitive experience and be older. You will note the exception seems to be for American student-athletes.

It thus seems clear, to me at least, that the main issue in this proposal is not competitive experience but rather American student-athletes against foreign student-athletes. Such discrimination is not only unfair in itself but it seems to me to be

relied upon by Spath.[97]

Spath had not been recruited during his high school senior season, most of

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against the spirit of our American legal system that gives equal protection of the law to foreigners as well as Americans. I, likewise, feel that it is contrary to the spirit of the NCAA which I believe seeks to encourage competitive excellence to all qualified student-athletes.

I would thus pose to you this question. Is this the kind of treatment the NCAA wishes to extend to our foreign students? I strongly believe that foreign student-athletes who qualify for academic eligibility deserve the same treatment the American students receive, regardless of age or previous experience. . . .'

David L. Maggard (University of California, Berkeley): 'As chairman of the International Relations Committee, I wish to speak in favor of Proposal No. 83. As has already been indicated, we are not opposed to foreign athletes participating on our college and university teams.

We are, however, opposed to the 26-to-28-year-old foreign athlete being able to compete against many of our 17-and-18-year-old students. This piece of legislation, I believe, rectifies that situation. I urge your support.'

Leo F. Miles (Howard University): I would like to speak against this amendment simply because I view this as similar to what I remember a few years ago was in the district courts in Washington, which indicated to us that foreign students who were invited to this country are protected by the Constitution of the United States.

This is purely an age factor and we have some laws on the books that say you can't discriminate because of age. . . .

Spath, Record Appendix at 146-48.

No longer were Canadian hockey players the main target. By 1980 it had become outstanding foreign runners such as England's Geoff Smith of Providence College. Concannon, *PC runner ineligible*, Boston Globe, November 14, 1980, at 65, col. 1. The lead paragraph of the country's leading sports magazine could not have been clearer: "A new rule intended to curb the influx of foreign athletes into U.S. colleges goes into effect next week. . . . The rule applies to everybody, Americans included, but the number of homegrown athletes who enter college after 20 is relatively small. The main targets are over-age athletes from abroad who have been a major force at recent NCAA track and field championships." *Last call for 31-year-old frosh*, Sports Illustrated, Scoreboard section (Kirshenbaum, ed., July 28, 1980).

96. The court of appeals found insufficient " 'purposeful intent' to discriminate against aliens because of their alienage:"

> The most the record might show is an overall awareness of a possible greater impact on aliens. Plaintiff's statistics as to impact tend to bear out these concerns, although the most that can be said is that the Bylaw has been officially applied to a few more aliens than Americans. On the other hand, an overwhelming majority of informal inquiries were received from Americans.

Spath, 728 F.2d at 29.

The actual numbers as to official application of the bylaw were eleven Americans and sixteen foreign student-athletes. *Spath*, Record Appendix at 164. The Court ignored other relevant additional facts: of sixteen inquiries concerning specific enrolled student-athletes where their eligibility was affected, thirteen were foreign. *Spath*, Record Appendix at 133-34, 165. The NCAA erroneously disputed this fact, which was recognized by Judge Tauro during the preliminary injunction hearings, *Spath*, Record Appendix at 278, despite it being part of the Agreed Statement of Facts. *Spath*, Reply Brief at 4. Finally, the significance of all of these statistics is put into perspective by the fact that the number of students in higher education in the United States, during the 1982-83 academic year, was 12,425,780 of whom 336,985 (2.7 percent) were foreign. *Spath*, Record Appendix at 167.

97. *Spath*, 728 F.2d at 28.

which he had missed due to a shoulder separation.[98] He worked for a Toronto department store while playing during the next two hockey seasons, in Toronto's highly competitive Metro Junior B League.[99] In June of 1980, when Spath was twenty-one, the University of Lowell, a Division II institution to which Bylaw 5-1-(d)-(3) was not applicable, offered him an athletic scholarship for the 1980-81 academic year, which he accepted.[100] Both the University of Lowell[101] and Providence College[102] (in which the twenty-six year old English distance runner Geoff Smith enrolled the same year), held summer orientation sessions prior to the August first effective date of the new bylaw. The NCAA, however, considered the first day of classes to be the date of a student's matriculation.[103] Thus, when Lowell's ambitious hockey program made its tenative venture into Division I status in 1983,[104] the bylaw was applied to Spath.

Judge Tauro entered a temporary restraining order on November 28, 1983,[105] and all parties expedited the preparation of an agreed statement of facts and the hearing on a motion for preliminary injunction. On December 21, 1983, the record was complete.[106] The district court, however, never had the opportunity to make findings of fact or rulings of law concerning the motion. Notice of appeal was filed by the NCAA just six days later on December 27, 1983.[107] The court of appeals ruled the temporary restraining order under which defendant played fifteen games for the University of Lowell, to be, in effect, a preliminary injunction.[108] The appellate court was thus lacking the findings of fact and rulings of law it normally would have from the trial court when it vacated the injunction on the likelihood-of-success issue.[109]

At the time the district court's order was entered, it was following not only the logic of its own decisions in *Buckton* and in *Jones v. NCAA*,[110] but also both the district and circuit courts in *Howard*, and the sound reasoning of

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98. *Spath*, Record Appendix at 6.

99. *Id.* at 6.

100. *Id.* at 5-7.

101. *Id.* at 154.

102. Concannon, *PC runner ineligible*, Boston Globe, November 14, 1980 at 65, col. 1.

103. *Spath*, 728 F.2d at 27 n.1.

104. *Id.* Lowell had not scheduled a sufficient number of Eastern College Athletic Conference (ECAC) Division I teams to be eligible for the ECAC tournament, its only conceivable route to the NCAA tournament. While theoretically an independent team could be selected for the NCAA Division I Hockey Championships, that never has happened. All participants have emerged from the playoffs of conferences such as the ECAC in which all but five NCAA Division I schools participated. *Spath*, Record Appendix at 325. As of the date of this article, only two such independent schools remained.

105. *Spath*, Record Appendix at 2.

106. *Id.* at 333.

107. *Id.* at 231-32.

108. *Spath*, 728 F.2d at 27.

109. *Id.*

110. 392 F. Supp. 295 (D. Mass. 1975). While a temporary restraining order was entered for the freshman student-athlete in this case, the court ruled in favor of the NCAA at the preliminary injunction stage, distinguishing the situation of the young American plaintiff, who had gone to Canada to play junior hockey and had received remuneration for his play after being graduated from high school, from that of the *Buckton* plaintiffs. *Id.* at 298.

the only court then to have ruled on the constitutionality of Bylaw 5-1-(d)-(3), the *Arlosoroff* district court. Indeed, it would be premature to view the issue of the constitutionality of the bylaw as settled. There has been only one other reported decision concerning the bylaw, and that, subsequent to *Spath*, also was at the preliminary injunction stage.[111] While the issue has neither been resolved nor is it moot, the cause of the older foreign student-athlete was dealt a strong blow by Senior Circuit Judge Bailey Aldrich, who showed little understanding of the nature of major college athletics today as he authored the First Circuit opinion vacating the district court order.[112]

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111. Butts v. NCAA, 600 F. Supp. 73 (E.D. Pa.), *affirmed*, 751 F.2d 609 (3d Cir. 1984). The preliminary injunction sought by Swedish hockey player Jan-Ake Danielson of the University of Wisconsin was denied without opinion. Danielson v. NCAA, No. 84C832C (W.D. Wis. 1984).

Butts, a highly recruited black basketball player from Philadelphia who had academic problems, enrolled for his senior year, 1979-80, at Frederick Military Academy in Virginia, from which he received his high school diploma. *Butts*, 751 F.2d at 610. He remained at Frederick for the 1980-81 academic year, during which he reached his twentieth birthday, to improve his academic qualifications while also playing another year of basketball. He returned to Philadelphia, entering LaSalle College where he played for the next three years, in the fall of 1981 with a full basketball scholarship. *Id.* The district court found "persuasive" the First Circuit opinion in *Spath* but went on to explore Butts' contention of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000d. *Butts*, 600 F. Supp. at 74. With Bureau of Census statistics showing the number of blacks in high school at age 20 some four times larger than whites of the age, the Court was "satisfied that the plaintiff has shown a strong likelihood of establishing that the bylaw in question does have racially disparate impact." *Id.* at 75. The district court found, however, that there was a "rational connection between a combination of age and competitive experience, on the one hand, and enhanced ability to compete, on the other." Emphasizing its "narrow scope of review," and that it did not "intimate any view of what the final disposition of Mr. Butts' and LaSalle's complaints should be," the Third Circuit affirmed. *Butts*, 751 F.2d at 613.

112. His unrealistic attitude was perhaps best exemplified in the following excerpt from his decision:

> The primary question, therefore, is whether the rule is reasonable. It seems entirely so. Professionalism, through granting scholarships to older and more experienced students, may be unfortunate. College athletics are not professional sports, played primarily for the winning, however pleasing success may be, but are, within reason, democratic opportunities for students. Fairness suggests restrictions against those who may be excessively qualified. The fact, if it be the fact, that a higher percentage of Canadians, or aliens, fall into this special class is no more unlawfully discriminating than it would be if, to equalize college basketball, players who exceeded 6'6" were barred, and the majority of those turned out to be black. Plaintiff has a very heavy burden to show the rule was intended to discriminate against aliens rather than to have a legitimate purpose. Simply compiling statistics is not enough.

Spath, 728 F.2d at 29. Ironically, Spath's age would be considered a disadvantage in the youth-conscious sport of hockey. *Spath*, Record Appendix at 209-14 (Affidavit of former Brown University coach Paul Schilling).

Judge Aldrich simply misuses the term "professionalism." All Division I schools vigorously recruit the most qualified athletes they can in the sports they care about winning. For some schools those are just the spectator sports; for other institutions, more sports are included. The relationship between alumni contributions and defeating the big rival in the major sport is not unknown. The women and minorities who benefitted from the striking of non-job related minimum height requirements might also be surprised by Judge Aldrich's sanctioning of maximum height requirements on the basketball court. *See* Mieth v. Dothard, 418 F. Supp. 1169, 1182 (M.D. Ala. 1976);

VII. A JUDICIAL BANDWAGON OR A CLOSER ANALYSIS

The *Arlosoroff* - *Ponce* revisionist approach to state action has not been limited to the fourth and first circuits. In *McHale* v. *Cornell University*,[113] the plaintiff, who had played intercollegiate football during the two academic years he attended the University of Maryland, challenged the application to him of the one-year residency requirement of NCAA Bylaw 5-1-(j)-(7), which governed transfer students.[114] In January of 1985 McHale had transferred to Cornell, a private Ivy League institution which does not offer athletic scholarships.[115] He had not been recruited by Cornell, transferring there solely for academic reasons. He contended, therefore, that his competing prior to having been in residence for a full academic year would "not subvert the purposes of the rule."[116] A temporary restraining order was issued on September 26, 1985, but a preliminary injunction was denied on October 18, 1985.[117]

The district court had no difficulty in finding that the prospect of McHale

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cf. Castro v. Beecher, 459 F.2d 725, 734 (1st Cir. 1972) (plaintiffs failed to demonstrate that the minimum height requirement had a disproportionate impact on Spanish-surnamed persons). Most of the minimum height cases have proceeded under the broader statutory reach of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. Horace v. City of Pontiac, 624 F.2d 765 (6th Cir. 1980); United States v. City of Buffalo, 457 F. Supp. 612, 625-27 (W.D.N.Y. 1978).

113. 620 F. Supp. 67, 68 (N.D.N.Y. 1985).

114. NCAA Bylaw 5-1-(j)-(7) provides in relevant part:

> 'A transfer student from a four-year institution shall not be eligible for any NCAA championship until the student has fulfilled a residence requirement of one full academic year (two full semesters or three full quarters), and one full calendar year has elapsed from the first regular registration and attendance date at the certifying Division I or Division II institution.'

620 F.Supp. 67, 68 n.3. Bylaw 11-1-(d) then applies the standards of Bylaw 5 to regular-season competition. *Id.* at 68, n.2. A highly controversial exemption from the transfer rule permits the athletic director of the school from which a student-athlete is seeking to leave, to waive under certain circumstances, the year's residence requirement at the next institution pursuant to Bylaw 5-1-(m)-(14).

A waiver is allowed if the transferring student meets the following conditions:

> (i) The student has not transferred previously from one four-year college to another four-year college;
>
> (ii) The student did not receive athletically related financial assistance or the student's athletically related financial assistance was not renewed for the ensuing academic year at the previous institution;
>
> (iii) The student is in good academic standing and meets the satisfactory-progress requirements;
>
> (iv) The student's previous institution certifies in writing that it has no objection to the student being granted an exception to the transfer residence requirement; and
>
> (v) The student is a participant in a sport other than football or men's basketball.

1985-86 NCAA MANUAL 102 (1985).

The 1986 Convention added men's ice hockey and women's basketball to the prohibited sports. Burke, *New N.C.A.A. Rule Puts Player on Ice*, New York Times, February 16, 1986, at 4S, col. 1; NCAA News, Jan. 22, 1986 at 3, col. 1. The potential for mischief in letting the "departing athletic director" determine where an athlete can go without losing a crucial year of eligibility is readily seen. *Kopecky On His Way to R.P.I.*, HOCKEY/USA 11 (Oct. 29, 1985).

115. *McHale*, 620 F. Supp. at 68, 69.

116. *Id.* at 68.

117. *Id.* at 67-68.

losing one of his four seasons of football eligibility constituted "a likelihood of irreparable injury."[118] Judge Neal McCurn, however, accepted the *Arlosoroff-Ponce* reasoning that *Rendell-Baker* and *Blum* "now mandate a different decision. . ." from *Howard* and *Parish*.[119]

Before too many board a judicial bandwagon, it would be well to analyze precisely what the facts were in *Rendell-Baker* and *Blum*. *Rendell-Baker v. Kohn*[120] was the consolidation of separate discharge actions brought by a vocational counselor and five teachers against a Brookline, Massachusetts, secondary school.[121] The school specialized in handling students with special needs, including those with drug, alcohol and behavioral problems.[122] Virtually all of the school's fifty students, during the period in question, had been referred to it by either the Boston or Brookline School Committees or the Drug Rehabilitation Division of Massachusetts's Department of Mental Health.[123] The Brookline School Committee certified its diplomas, and public funds accounted from ninety to ninety-nine percent of the school's operating budget.[124] Additionally, Rendell-Baker herself was a vocational counselor whose position was funded with federal monies of the Law Enforcement Assistance Administration distributed by the State Committee on Criminal Justice.[125]

On the other hand, the school had been founded as a private institution, was located on private property and had a board of trustees including neither public officials nor anyone selected by them.[126] Agreements entered into by the school with the Boston School Committee and the state drug rehabilitation agency both referred to the school as a "contractor." The latter agreement did not cover personnel policies except for general requirements such as an equal employment opportunity clause. The former specified that school employees were not city employees. In its contract with the city, the school agreed to carry out the individualized plan developed for each student referred to it by the School Committee.[127]

While the State Committee on Criminal Justice had to approve the school's initial selections for vocational counselor, its purpose was to make certain that those hired met the qualifications set forth in the school's grant proposal to the committee.[128] The Committee did not interview applicants.[129] The Committee did not request the school to provide Rendell-Baker with a written explanation of the reasons for her discharge. Upon its doing so, the Committee

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118. *Id.* at 69.

119. *Id.* A month prior to *McHale*, Chief Judge John Feikens gave detailed consideration to equal protection and due process claims in another NCAA eligibility case, Karmanos v. Baker, No. 85-CV-600089-AA (E.D. Mich. Sept. 13, 1985) but, deciding them adversely to the plaintiffs, refrained from addressing whether the NCAA was a state actor.

120. 457 U.S. 830 (1982).

121. *Id.* at 833-36.

122. *Id.* at 832.

123. *Id.*

124. *Id.*

125. *Id.* at 833.

126. *Id.* at 831-32.

127. *Id.* at 833.

128. *Id.* at 833-34.

129. *Id.* at 834.

responded that it was satisfied with the explanation but would not pay any back pay or other damage award Rendell-Baker might obtain as a result of the discharge.[130]

The respondents in *Blum v. Yaretsky*[131] represented a class of Medicaid patients in New York challenging decisions by the nursing homes in which they resided to discharge or transfer patients with neither notice nor opportunity for a hearing.[132] New York was a participating state in the Medicaid program[133] and directly reimbursed the nursing homes chosen by the Medicaid patients for the reasonable cost of their health care services.[134] As a condition to federal assistance, states were required to review patient care to insure that payments were, in fact, reasonable. Those reviews were made by a "utilization review committee" of private physicians who were not directly responsible for the care of the patient being reviewed.[135]

In both cases, the Supreme Court focused upon the private decision maker — New Perspectives School in *Rendell-Baker* and the private reviewing physicians in *Blum* — in determining that state action did not exist.[136] The ultimate issue, whether the alleged infringement of federal rights was "fairly attributable to the State"[137] was decided adversely to the plaintiffs. Specifically, in *Blum*, the adjustment of benefit levels resulting from what was considered to be a private medical decision was determined not to involve state action.[138] *Rendell-Baker* and *Blum* represent important brakes on the expansion of the state action concept, but their applicability to the NCAA is dubious. That organization receives from its member institutions delegated powers of a breadth and scope unknown to one small urban school or physician's committee, important though their work be.

VIII. Overburdened Courts and Delegated Powers

Title 42 U.S.C. section 1983 had its incarnation as Section 1 of the 1871 Civil Rights Act,[139] just three years after the adoption of the fourteenth amendment and in the Reconstruction atmosphere of regional and racial mistrust.[140] Today's state governments are vastly different, as are state courts. They are, however, simply not equipped to cope with a national entity of the magnitude of the NCAA.[141] When a plaintiff commences his or her action in a state court, removal to the appropriate federal court, as in *Arlosoroff*, is likely.[142]

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130. *Id.*
131. 457 U.S. 991 (1982).
132. *Id.* at 993.
133. Social Security Act, Title XIX, 42 U.S.C. § 1396 (1976 & Supp. IV).
134. *Blum*, 457 U.S. at 994.
135. *Id.* at 994-95.
136. *Rendell-Baker*, 457 U.S. at 840; *Blum*, 457 U.S. at 1005.
137. *Rendell-Baker*, 457 U.S. at 838.
138. *Blum*, 457 U.S. at 1005.
139. Act of Apr. 20, 1871, 17 Stat. 13.
140. *See* Blackman, *Section 1983 and Federal Protection of Individual Rights - Will the Statute Remain Alive or Fade Away?* 60 N.Y.U.L.Rev. 1, 4-5 (1985).
141. *Parish*, 506 F.2d at 1032.
142. *Cf.* Knight v. NCAA, Civ. No. IP 75-693-C (S.D. Ind. Dec. 10, 1975). The basketball

The increased use of the statute in the last quarter century,[143] lifting section 1983 complaints to more than eleven percent of the federal district court civil cases filed in the twelve-month period ending June 30, 1983,[144] brings with it the cry of "overburdening the federal courts."[145]

To what extent this may have influenced the 1982 Supreme Court decisions and the subsequent decisions of the Fourth and First Circuits, one can only speculate. Athletic cases, like all others, run the risk of encountering an occasional chilly judicial reception.[146] Yet, constitutional rights come in many and varied settings, and the threshold for obtaining constitutional scrutiny must be fairly and realistically applied.

In *Regents of the University of Minnesota*, Michael Thompsons's sale of his 1974-75 complimentary season tickets for more than twice their face value constituted a violation not only of NCAA and Big Ten rules[147] but of the University's conduct code administered by its Campus Committee on Student Behavior, a committee of students, faculty and staff appointed by the president of the University.[148]

In its internal handling of the matter, the University of Minnesota was endeavoring to treat Thompson as a student, as well as a "student-athlete."[149] While not successful on the merits in the Eighth Circuit, both there and in the district court, the state action threshold was crossed and scrutiny applied.[150]

Today's university students participate intensely in non-athletic as well as athletic extra-curricular activities. Yet no one outside the university determines which of its students may participate in the competition for the campus newspaper, seek the lead in the next drama production, or sing second tenor for the glee club. Whether this disparity of treatment can be justified has yet to be determined.[151]

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coach of the University of Indiana sought injunctive relief against the enforcement of certain NCAA rules and bylaws setting limits upon the size of travel squads for Division I intercollegiate basketball games and alleged them to be "arbitrary and capricious." The U.S. District Court for the Southern District of Indiana granted the coach's motion to remand his action to the state superior court in which he had initiated it, declaring: "It is clear that the plaintiff may choose to forego his constitutional claims and rely on state law as the basis of his action if he so desires." *Id.*, slip op. at 1. The NCAA, apparently preferring the federal forum, had removed the case to federal court pursuant to 28 U.S.C. § 1446, asserting that the essential nature of the action had to be under the fourteenth amendment and thus under 42 U.S.C. § 1983.

143. Baumann, *Civil Rights Litigation: Section 1983*, ANNUAL SURVEY OF AMERICAN LAW 204 n.9 (1985).

144. *Id.* at 204 n.8.

145. Blackman, *supra* note 141, at 2.

146. *See, e.g., Spath*, 728 F.2d 25. "[T]he district court [has] other obligations beyond deciding whether one college student can play hockey. . . ." *Id.* at 27.

147. 560 F.2d at 356 n.5.

148. *Id.* at 358 n.12.

149. The current definition of student-athlete appears in 1986-87 NCAA MANUAL, Const. 3-1, Bylaw 1-1-(a) (1986).

150. 422 F.Supp 1158, *rev'd on other grounds*, 560 F.2d at 365-72. For one columnist's critique of the district court ruling, see Will, *Wringing law from hoop tickets*, Boston Globe, Jan. 8, 1977, at 9, col. 1.

151. *See* Greene, *supra* note 21, at 128. "[I]t may be argued that the equal protection clause is violated when eligibility distinctions are applied to athletes but not to other students involved in

Weistart and Lowell, authors of the leading text in the area of sports law, have appropriately defined what they termed to be *Arlosoroff's* important underlying issue:

> The court's perspective on the state action issue is drawn very narrowly and seems not to consider the most compelling claims that an athlete might raise. The real problem in the NCAA cases may not be whether the NCAA performs a traditional state institutional function or whether the state controls the details of the NCAA's operation. Rather, the important underlying issue may be one of delegation. State educational institutions present the clearest examples. At a state school, the state has a close and continuing relationship with its student-athletes. That relationship imposes certain prerogatives and responsibilities, including a right to define eligibility. If the state executes these itself, there should be no question that there is state action present and that constitutional norms must be satisfied. The critical question to be examined is whether the state's constitutional responsibility ends when the state agrees to have standards of conduct and eligibility defined in a collective venture in which it participates. It is likely that there are limits on the extent to which the state can use the delegation device to confine its obligations. The prospect of a continuing constitutional duty seems especially strong in those situations in which the state agrees to have the NCAA apply to its athletes standards devised by the latter group.[152]

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demanding extracurricular activities." *Id.*

152. J. WEISTART AND C. LOWELL, *supra* note 4, §1.14, at 8 (Supp. 1985). The authors also provided us with this timely example of state responsibility or its avoidance:

> Without a restraint, the potential for evasion of difficult but important constitutional duties would otherwise be too appealing. The matter of drug testing among athletes provides a useful example. If the state undertakes to test its students itself, it should be made to comply with whatever constitutional controls are applicable. Avoidance of those duties should not be as simple as appointing the NCAA as the testing and enforcing entity.

Id.

The cocaine induced death of college basketball star Len Bias less than two days after being drafted by the Boston Celtics was certain to lead to more expanded drug testing of student-athletes. *See, e.g.*, Farrell, *Drug Use and Academic Rules Are Probed After Death of Maryland Basketball Player*, Chronicle of Higher Education, July 2, 1986, at 17, col. 2.

The Executive Director of the NCAA thereafter declared:

> The facts are that N.C.A.A. members have put in place the most comprehensive and demanding drug-testing program of any domestic sports organization. It has committed $3.5 million to a procedure that will assure premier laboratory testing capabilities. This mandatory program determines eligibility for postseason football competition and N.C.A.A. championship events. Backed by two International Olympic Committee-approved laboratories, the N.C.A.A. will be prepared to test for 76 drugs, including anabolic steriods.

Byers, *The N.C.A.A.'s View of College Sports*, New York Times, Sept. 13, 1986 at S13, col. 2. *Cf.* Healy, *The Stampede to Drug Testing*, Washington Post, Aug. 31, 1986, at D7, col. 1 (Father Healy, President of Georgetown University, forcefully decries "mandatory drug tests for students [as] legally, morally and educationally wrong.")

Every time an institution, public or private, joins the NCAA, it surrenders to that entity its prerogatives to determine the eligibility of the men and women who seek to participate on an intercollegiate athletic team. Public universities such as Minnesota and Lowell receive that power directly from the state which created and funded them.[153] As to that one-half of the NCAA membership which is nominally private,[154] it is contended that the same constitutional responsibility must attach:

> The delegation notion. . . is intended to suggest that the NCAA is different. It is not simply providing a service to the state; it is exercising authority that comes from the state. And its very 'authority' within college athletics depends on broad-based state involvement. It would not be the ultimate arbiter of eligibility in big-time college athletics if it did not have grants of power from government. The import of such grants does not vary on an action-by-action basis. Rather, it is the organization that partakes of state authority. Hence all of its actions should be deemed affected, including those that involve private members.[155]

This is not to say that the litigating tools of the seventies must be abandoned or that the refinements of the eighties cannot be met on their own terms. Voting at NCAA Conventions or Council Meetings may in fact reflect "that the representatives of the state institutions joined together to vote as a block. . . over the objection of private institutions."[156] State financial pres-

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153. *See, e.g.*, Fluitt v. Univ. of Neb., 489 F. Supp. 1194 (D. Neb. 1980). In a forthright statement as to one public university's surrender of its institutional prerogatives, the court declared:

> University of Nebraska Athletic Director Robert Devaney testified that the University of Nebraska was a state institution. It has, in essence, delegated most of its rule-making authority in the area of athletics to the Big Eight Conference which is made up of eight state supported schools, and the NCAA, whose rules are incorporated into the Big Eight Conference.

Id. at 119.

154. In the strict financial sense of the term, "private" institutions have ceased to exist. *E.g., Cohen*, 729 F.2d at 60; *Buckton*, 366 F. Supp. at 1157.

155. J. WEISTART & C. LOWELL, *supra* note 4, § 1.14, at 9 (Supp. 1985). As was stated aptly at the secondary level:

> There is no question of state action. The Association, although not itself a governmental body, is supported in large part by dues paid by public school districts, and the authorities in the member districts make a practice of abiding by eligibility standards and other rules on athletic subjects made and announced by the Association. The Association in effect exercises a delegated governmental power. It is, at least for present purposes, subject to the Equal Protection Clause of the Fourteenth Amendment.

Dodson v. Ark. Activities Ass'n., 468 F. Supp. 394, 396 (E.D. Ark. 1979).

156. *Arlosoroff*, 746 F.2d at 1022. Roll-call votes do occasionally occur. The votes of each Division I active member institution and each Division I conference on the three proposals voted upon by roll-call at the 1986 Annual Convention were printed in the NCAA News, Jan. 22, 1986, at 4, col. 1.

While they were not alone in their displeasure, the eight Ivy League schools - all private institutions - were greatly disturbed at their demotion to I-AA status in football at an earlier convention. *Presidents Question Downgrading of Ivy Football*, Harvard University Gazette, Jan. 15, 1982, at

sures and constraints may affect the positions taken by their universities on NCAA matters.[157] While the regulation of intercollegiate sports may not have been "traditionally the *exclusive* prerogative of the State,"[158] states surely may be found to have had "an economic incentive"[159] to bind themselves to the NCAA and have profited from that relationship.

All things considered, however, one must come back to the language in *Parish*, now more than a decade old, which described as "strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or support a 'private' organization to which they have relinquished some portion of their governmental power."[160]

1, col. 1.

157. Limitations on the number of coaches and scholarships in a particular sport or lowering the number of varsity sports required to maintain one's membership at a particular division level come readily to mind, as does a school's position concerning television revenues.

158. *Rendell-Baker*, 457 U.S. at 842.

159. *Ponce*, 760 F.2d at 382 n.5. What greater economic incentive could have existed than the potential support given a state university's athletic program through past NCAA television revenues.

160. 506 F.2d at 1033.

NOTE

Diablo Canyon Licensing Oversights: Does the NRC Licensing Process Assure Nuclear Safety?

> For nearly a quarter of a century the theology of nuclear power — unchallenged and unchangeable — was accepted. . . . Rarely did those who seized on nuclear power as a means to their own ends know its actual economic and technical status. Instead, the information available to them was part of a catechism whose basic function was to answer infidels and sustain the faith of the converted. The result, a circular flow of self-congratulatory claims, preserved the discrepancy between promise and performance. Systematic confusion of expectation with fact, of hope with reality, has been the most characteristic feature of the entire 30-year effort to develop nuclear power.[1]

As a precondition to grant a license to operate a nuclear power plant, the Nuclear Regulatory Commission (NRC)[2] must find that the facility can operate without endangering the public health, safety, or the environment.[3] The

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1. I. BUPP & J. DERIAN, LIGHT WATER: HOW THE NUCLEAR DREAM DISSOLVED 188 (1980) (footnotes omitted).

2. Congress created the Nuclear Regulatory Commission (NRC) in 1974 when it amended the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § § 2011-2296 (1982). See *infra* note 43 for a discussion of how from the enactment of the AEA in 1954 until the 1974 amendments, the Atomic Energy Commission (AEC) was the agency charged with regulating nuclear power development and safety. *Id.* at § § 5814, 5841.

3. *See* 42 U.S.C. § 2133(d) (1982) (NRC's power to grant license is limited where issuance of such license would be inimical to public health and safety); 42 U.S.C. § 2232(a) (1982) (license must comply with NRC standards imposed to provide adequate protection to health and safety of public); 10 C.F.R. § 50.57(a)(3),(6) (1985) (NRC may issue license upon finding that there is reasonable assurance that public health and safety will not be endangered and issuance of such license will not be inimical to public health and safety).

The NRC's decision to issue a nuclear power plant license is also subject to the condition that the plant meet the stringent requirements imposed under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § § 4321-4370 (1982). *See* Citizens For Safe Power, Inc. v. Nuclear Regulatory Comm'n, 524 F.2d 1300, 1300 (D.C. Cir. 1975). See *infra* note 148 for a discussion of

Atomic Energy Act (AEA),[4] which created the NRC and defines its authority, is elusive as to any definition of safety.[5] The NRC, therefore, is given broad discretion by Congress and the courts, both as to how it defines safety, and how it applies its regulations in each particular licensing case.[6]

The NRC has interpreted the AEA's licensing provisions as a demand for a "reasonable assurance" that the public health and safety will be protected.[7] Under this standard, the definition of what is "safe"[8] for puposes of licensing a nuclear facility is determined by a calculus designed by the NRC which factors "acceptable degrees of risk"[9] against technologic and scientific uncertainties.[10] The issue as to whether nuclear power plants should be permitted to

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NEPA's requirements regarding nuclear power plant licensing.

4. Atomic Energy Act of 1954, 42 U.S.C. § § 2011-2296 (1982).

5. State of New Hampshire v. Atomic Energy Comm'n, 406 F.2d 170, 173 (1st Cir. 1969), *cert. denied*, 395 U.S. 962 (1969). Although the AEA is replete with references to safety, "any attempt to delimit 'safety'. . . is singularly in abstentia." *Id.*

6. *See* Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n, 598 F.2d 759, 771 (3rd Cir. 1979). The *Westinghouse* court stated that: "[i]n passing the Atomic Energy Act of 1954, Congress enacted 'a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.' " *Id.* (citing Siegel v. Atomic Energy Comm'n, 400 F.2d 778, 783 (D.C. Cir. 1968)).

7. Nader v. Nuclear Regulatory Comm'n, 513 F.2d 1045, 1052 (D.C. Cir. 1975). The reasonable assurance standard is the "hallmark" of many of the NRC's regulations. *Id.* (citing 10 C.F.R. § § 50.35(c), 50.40(a) (1974) (construction permit may be issued on finding of reasonable assurance that public health and safety will not be endangered); 10 C.F.R. § 50.57(a)(3)(1985) (operating license may be issued where there is a reasonable assurance that operation of plant will not endanger public health and safety and will be in compliance with NRC regulations).

8. *See, e.g.*, Carstens v. Nuclear Regulatory Comm'n, 742 F.2d 1546 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2675 (1985). The reasonable assurance standard does not translate into safety in fact as a prerequisite of nuclear power. *Id.* It requires "not a risk free environment but a 'reasonable assurance. . . that the reactor [can] be safely operated at the proposed location.' " *Id.* at 1557 (citing Power Reactor Dev. Co. v. Int'l Union of Elec., Radio and Machine Workers, AFL-CIO, 367 U.S. 396, 414 (1961)).

9. *See* Green, *Safety Determinations in Nuclear Power Licensing: A Critical View*, 43 NOTRE DAME LAW. 633 (1967). The author questions whether the safety risks that the AEC (now the NRC, *see infra* notes 35-39 and accompanying text) determines to be acceptable when it licenses nuclear power plants would in fact be acceptable to the public:

> It is said that normal operation of a reactor in accordance with AEC regulations poses no risks to the health and safety of the public. The fact of the matter is, however, that even these standards represent a balancing of risks against hazards. . . . [T]he entire licensing structure is based on the premise that effective and vigilant. . . regulation makes the risk of a major accident exceedingly low. Significantly, however, the public is asked to assume a risk that the nuclear industry [under the Price Anderson Act] is not prepared to assume itself.

Id. at 644-45 (footnote omitted). The Price Anderson Act, 42 U.S.C. § 2210 (1982), limits the liability of utilities should a nuclear accident occur. *Id.* See Maleson, *infra* note 34 for a discussion of the Price Anderson Act.

10. Examples of uncertainties associated with NRC licensing decisions include uncertainty concerning the probability and impact of a serious radiologic accident (*see infra* notes 146-70 and accompanying text); uncertainty regarding the adequacy of investigative techniques for site suitability and the acceptability of plant sites (*see infra* notes 93-124 and accompanying text); uncertainty concerning the risks associated with nuclear reactor waste disposal methods (*see* Baltimore

operate despite their uncertain risks to public health and safety is the focus of much current debate.[11] Recently, courts have effectively insulated from attack the reasoning process used by the NRC in licensing plants, on the presumption that the NRC is making scientific predictions within "its area of special expertise" and should be given great deference.[12]

In *San Luis Obispo Mothers For Peace v. The United States Nuclear Regulatory Comm'n*,[13] the Federal Court of Appeals for the District of Columbia expanded the parameters of the NRC's discretion, by emphasizing the Supreme Court's "unequivocal proscriptions against judicial overreaching" in the area of nuclear power plant licensing.[14] The appeals court claimed that these proscriptions are the result of the Supreme Court's recognition of the "national commitment" to nuclear power development.[15]

Mothers For Peace was an appeal from a decision of the NRC to grant licenses for low power and full power operations at Unit 1 of the Diablo Canyon nuclear power plant.[16] Diablo Canyon is located on the California coast, within 3 miles of the active Hosgri Fault.[17] The Hosgri Fault has been determined capable of producing a 7.5 magnitude earthquake.[18] For over fifteen years the seismic risk associated with the Diablo Canyon site has created controversy at NRC licensing proceedings.[19] Challenges against licensing the plant stem from several concerns. Not only was the plant mistakenly sited adjacent to the active Hosgri Fault,[20] but the design and construction process at the plant has been laden with problems, including blueprint mix-ups and design errors.[21] The NRC imposed minimal construction modifications on the Diablo Canyon plant, despite the fact that these errors and problems were not

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Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983)). In *Baltimore Gas*, the Court acknowledged that the risks associated with proposed nuclear waste disposal methods were uncertain, but found the uncertainties insignificant based on the assumption that future research would resolve the uncertainties. *Id.* at 104-05.

11. *See Baltimore Gas*, 462 U.S. at 97.

12. *Id.* at 103. The Supreme Court stated that as long as the NRC considered and disclosed the uncertainties involved in nuclear power plant licensing, its decisions would be upheld. *Id. See also Carstens*, 742 F.2d at 1551 (Supreme Court has made it clear that judicial review of NRC decisions is limited — in substantive areas court deference to NRC reaches its "zenith").

13. 751 F.2d 1287 (D.C. Cir. 1984).

14. *Id.* at 1296.

15. *Id.* at 1294. "Just as we must not usurp the scientific role properly accorded the [NRC] by the Atomic Energy Act and other governing statutes, neither are we permitted to question this nation's commitment to the development of nuclear power as a significant power source." *Id.*

16. *Id.* at 1293.

17. *Id.* at 1296.

18. *In re* Pacific Gas & Elec. Co., 13 N.R.C. 903, 910, 923 (1981). The magnitude of an earthquake is defined by NRC regulation as "a measure of the size of an earthquake and is related to the energy released in the form of seismic waves. 'Magnitude' means the numerical value on a Richter scale." Seismic and Geologic Siting Criteria For Nuclear Power Plants, 10 C.F.R. pt. 100, app. A(III)(a)(1985). For a discussion of the NRC's analysis of effects of a Hosgri earthquake in the Diablo Canyon area, see *In re Pacific Gas*, 13 N.R.C. at 913-78.

19. *See infra* notes 110-24 and accompanying text.

20. *See Mothers For Peace*, 751 F.2d at 1296.

21. *See infra* notes 128-29 and accompanying text.

discovered until the first of two units was ready to begin operation.[22] In addition, the NRC failed to require that emergency plans be prepared to respond to the occurence of a simultaneous earthquake and radiologic accident at the plant.[23]

This Note will discuss the NRC licensing procedures for nuclear power plants as well as court review of this process, using the licensing of the Diablo Canyon plant as an illustration. Part I will discuss the historical factors which have affected NRC safety decisions. Part II will describe the NRC licensing process in general, and as it was applied to the Diablo Canyon nuclear power plant. Part III will discuss the problems with this process and recommend changes in the NRC procedures and in court review of NRC licensing decisions.

I. The Concurrent Development of the Nuclear Power Industry and Government Regulation of that Industry

The NRC's authority to regulate the nuclear power industry is derived from federal standards embodied in the Atomic Energy Act (AEA),[24] the Administrative Procedure Act (APA),[25] the National Environmental Policy Act (NEPA),[26] and the NRC regulations.[27] A history of the concurrent development of the nuclear power industry and of NRC regulation provides an insight into some of the factors affecting the NRC's safety decisions. These factors include: the promotional philosophy historically assigned the NRC,[28] the imbalance between the rate of growth of nuclear technology and the scientific understanding of the consequences of that technology,[29] hesitation by the NRC and courts to recognize the legitimacy of public concern regarding the dangers posed by nuclear power,[30] and the NRC's failure to develop a long term nuclear policy.[31]

A. The NRC's Promotional Philosophy

Nuclear power has been recognized as a source of energy since 1942.[32] In 1954 Congress had great expectations for the development of nuclear power.[33] Although the technology was unproven, Congress encouraged private industry

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22. *Id.*
23. *See infra* notes 172-200 and accompanying text.
24. 42 U.S.C. § § 2011-2296 (1982).
25. 5 U.S.C. § § 500-576 (1982).
26. 42 U.S.C. § § 4321-4370 (1982).
27. 10 C.F.R. § § 1.1-.84 (1985).
28. *See infra* notes 32-47 and accompanying text.
29. *See infra* notes 68-79 and accompanying text.
30. *See infra* notes 48-65 and accompanying text.
31. *See infra* notes 80-90 and accompanying text.
32. *See* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 206 (1983). Enrico Fermi demonstrated the first nuclear power reactor in 1942. *Id.*
33. *Nuclear Economics, Oversight Hearings Before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs, House of Representatives*, 96th Cong., 1st Sess. 1 (1979) (statement of the Honorable Morris K. Udall, Chairman of the Subcommittee on Energy and the Environment).

participation in what it believed to be a safe and inexpensive source of national energy.[34]

Under the AEA, Congress created the Atomic Energy Commission (AEC), and delegated to it the duties of both promoting private industry participation in nuclear power development, and regulating the nuclear industry.[35] Almost twenty years later, in 1974, Congress amended the AEA by terminating the AEC and establishing the NRC.[36] Congress transferred the licensing and regulatory functions of the AEC to the NRC.[37] The promotional functions under the AEA are now carried out by the Department of Energy.[38] The purpose behind this split was to eliminate the promotional philosophy from nuclear power regulation, and to redirect the emphasis in NRC policies to the protection of public health and safety.[39]

One presidential investigation reveals, however, that some of the "promotional philosophy" of the AEC persists in NRC licensing decisions.[40] Further-

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34. *Id.* at 1. "The technology was promising but unproven. The hope was that nuclear [power] would evolve into a reliable and inexpensive energy source." *Id.* Congress believed that private industry involvement in nuclear power development was "more consistent with Amercian capitalism than complete government control." Maleson, *The Historical Roots Of The Legal System's Response To Nuclear Power*, 55 S. CAL. L. REV. 597, 602 (1981-1982).

Although at that time Congress was convinced that nuclear power was both safe and economical, its encouragement of private industry investment into nuclear power development was discouraged by the concerns of insurance companies to underwrite the risks of a nuclear accident. *Id.* Congress removed this obstacle by enacting the Price Anderson Act of 1957, 42 U.S.C. § 2210 (1982). *Id.* The Price Anderson Act provides for limited liability of utility owners in the event of a nuclear accident. *Id.*

35. Cotter, *Nuclear Licensing: Innovation Through Evolution in Administrative Hearings*, 34 AD. L. REV. 497, 499 (1982).

36. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 526-27 n.4 (1978), *on remand*, 685 F.2d 459 (D.C. Cir. 1982), *rev'd sub nom*, Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983).

37. *Id.* With The Energy Reorganization Act of 1974, Congress transferred the licensing and regulatory functions of the AEC to the NRC, and the promotional functions to the Energy and Research Development Administration. *Id. See* 42 U.S.C. § § 5801-79 (1982).

38. *See* 42 U.S.C. § 7151 (1982). In 1978 the Energy Research and Development Administration was terminated and its functions transferred to the Department of Energy. *Id.*

39. 1979 N.R.C. ANN. REP. 38 (1979).

40. *See id.* The Kemeny Commission, created by Presidential Executive Order No. 12130 (Apr. 1979), was ordered to investigate the causes and implications of the nuclear accident which occurred at the Three Mile Island nuclear power plant in 1978. *Id.* at 35. The Commission was also asked to assess the adequacy of NRC policies and procedures to prevent such an accident from reoccurring. *Id.* One of the findings reported by the Commission was that the promotional philosophy of the AEC continued to remain in NRC licensing decisions, causing the NRC, to "err on the side of industry convenience." *Id.* at 38. The Commission found "serious inadequacies" in both the NRC's licensing procedures and its enforcement activities including:

> - [NRC] licensing of plants when relevant safety issues remain unresolved.
> - Insufficient attention [by the NRC] to the ongoing process of assuring nuclear safety, as exemplified by the NRC's categorization of a safety issue as a 'generic problem,' thereby referring the licensee . . . responsibility for resolving the issue before licensing.
> - [NRC] reluctance to apply new safety standards to previously licensed plants.

Id.

more, although the primary concern of the NRC under the 1974 Act is safety, the NRC has qualified this concern by stating that its licensing decisions must recognize the added importance of avoiding plant delays caused by the growing need for electrical power.[41] Thus it appears that from the inception of the AEA a tension between the interests of industry growth and development on the one hand, and the protection of public safety on the other hand, has influenced the licensing process. Although these interests need not be mutually exclusive, the potential for promotional concerns to override safety interests is present in NRC licensing decisions.[42]

This same promotional philosophy has also affected the courts in reviewing NRC decisions.[43] One commentator argues that the promotional philosophy under the AEA was so firmly entrenched during the 1950's and 1960's, that the judiciary established a "mindset" favoring the development of nuclear power.[44] According to this view, the task facing those who doubt the safety of nuclear power is not simply to present concerns before an objective judiciary, but to dislodge a judicial mindset.[45] The commentator analogizes this situation to the legal protectionism afforded by the judiciary to emerging industries during the industrial revolution.[46] Just as the law of torts insulated emerging industries from legal liability during the nineteenth century in order to avoid stunting industrial progress, excessive judicial deference to the NRC's licensing decisions assures that nuclear power development will not be undercut.[47]

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41. Statement of General Policy and Procedure: Conduct of Proceedings for the Issuance of Construction Permits and Operating Licenses for Production and Utilization Facilities for Which a Hearing is required under Section 189A of the Atomic Energy Act of 1954, as amended. 10 C.F.R. pt. 2, app. A (1985).

42. *Id. See, e.g.*, Maleson, *supra* note 34, at 603.

> In retrospect, it seems anomalous to have given responsibility for both promotion and safety to the same agency, as the potential for conflict between these two goals appears so great. Nonetheless, at the time combining both goals in one agency seemed sensible. Because little was known of the hazards of nuclear power, it was not difficult for employees of the AEC to convince themselves and Congress that the new technology was safe.

Id. (footnotes omitted); *see also supra* note 40 (promotional philosophy causes NRC to "err on the side of industry convenience").

43. *See Pacific Gas*, 461 U.S. at 221. The Supreme Court, in *Pacific Gas*, stated that "[t]here is little doubt that a primary purpose of the Atomic Energy Act. . . continues to be, the promotion of nuclear power." *Id.* The Court rejected the argument that the division of safety and promotional responsibility under the Energy Reorganization Act reveals a change in congressional outlook towards the objective of promoting nuclear power. *Id.* at 221-22. *See also Mothers For Peace*, 751 F.2d. at 1294 (Supreme Court has explicitly recognized Congress's commitment to "careful nurturing" of nuclear power industry); *Vermont Yankee*, 435 U.S. at 557-58 (Congress made decision to try nuclear energy and courts should not question decision).

44. *See* Maleson, *supra* note 34, at 610 n.61. Professor Maleson argues that the judiciary is influenced by what it perceives to be a congressional mandate for the development of nuclear power under the AEA. *Id.* at 609. She asserts that this perception is erroneous, arguing that Congress created only an option to develop nuclear power. *Id.* Further, although on its face the AEA treats safety and promotion equally, the courts have increasingly exaggerated the deference due to NRC safety decisions. *Id.* at 615.

45. *Id.*

46. *Id.* at 604-05.

47. *Id.*

B. The "Illegitimacy" of Public Concern

Over the past decade the length of time required to bring a nuclear power plant into operation has increased.[48] Operational delays have in turn increased the costs of building nuclear power plants, thus making nuclear power a less attractive investment and source of energy.[49] The causes of increased lead times[50] for nuclear power plant design and construction has been the subject of recent Congressional debate.[51] Much of the dispute has focused on the appropriateness of limiting the procedural rights of citizen intervenors in order to expedite the licensing process.[52]

Intervenor participation, however, is not necessarily the direct cause of nuclear power plant licensing delays.[53] Rather, one major cause of recent NRC licensing delays was the accident at the Three Mile Island nuclear power plant in 1978.[54] Three Mile Island demonstrated that the NRC's regu-

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48. Bain, *Informal Rulemaking: In Quest of Nuclear Licensing Reform*, 55 DEN. L.J. 177, 177 n.2 (1978).

49. *See id.* at 177. Bain suggests that nuclear power plant delays are caused by unprecedented NRC workload. *Id.*

50. A plant lead time is that time from which site plannings begin up until the issuance of a final operating license by the NRC. Comment, *Regulatory Reform Arrives at the NRC: Agency, Congress Act on Licensing Shortcuts*, 11 ENVTL. L. REP. 10176, 10176 (1981).

51. *See, e.g., Nuclear Safety - Three Years After Three Mile Island: Joint Hearings Before Certain Subcomms. on Government Operations and Interior and Insular Affairs*, 97th Cong., 2d Sess. (1982); *NRC Licensing Speedup: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 97th Cong., 1st Sess. (1981); *Nuclear Regulatory Commission Operating Licensing Process: Oversight Hearing Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 97th Cong., 1st Sess. (1981); *Nuclear Economics, supra* note 33.

52. *Regulatory Reform Arrives at the NRC, supra* note 50, at 10176-77. Congress recently amended two sections of the Atomic Energy Act to allow plants to be licensed to operate without intervenor participation in the hearing process. Section 2242 permits the NRC to issue a temporary operating license at a specific level pending final action by the NRC on the application. 42 U.S.C.S. § 2242 (Law. Co-op. 1978 & Supp. 1985). Had the NRC held a full hearing before issuing a low power license to the Diablo Canyon plant, it may have discovered that PG&E had supplied it with the wrong blueprints of the plant. *See infra* note 128. Section 2239(a)(2)(A) allows the NRC to issue and make immediately effective, notwithstanding public requests for a hearing, any amendment to a nuclear power plant operating license upon a determination that such amendment involves no significant safety hazards. *See* 42 U.S.C.S. § 2239(a)(2)(A) (Law. Co-op. 1978 & Supp. 1985).

53. *See, e.g., Nuclear Safety—Three Years After Three Mile Island, supra* note 51, at 5-6 (NRC Commissioner Bradford attributes delays to excessive industry growth and inexperience of NRC); *NRC Licensing Speedup, supra* note 51, at 2 (statement of Senator Moffet, Chairman, Subcommittee on Environment, Energy and Resources). Senator Moffet stated:

> First of all, the public and the Congress have been seriously misled about the extent of delay in the nuclear industry caused by NRC regulations. In its most recent report to Congress. . . the NRC includes its latest list of plants facing delays attributed to the NRC licensing procedures. Out of some 90 plants in various stages of construction in the country, only 10 reactors are on that list.

Id. Of the 10 reactors referred to by Senator Moffet, only two reactors were complete and facing operational delays; the McGuire Plant in North Carolina and the Diablo Canyon plant, both of which had significant safety problems. *Id.*

54. *See Regulatory Reform Arrives at the NRC, supra* note 50, at 10176.

latory provisions for emergency evacuation planning were completely inadequate to assure safety to those actually threatened by the accident.[55] The lack of adequate emergency planning triggered the NRC to impose an eighteen month moratorium on nuclear power plant licensing in order to conduct a thorough re-examination of the entire NRC regulatory structure.[56] In addition to the moratorium, licensing delays have often resulted from the NRC's recognition of and attempt to resolve safety problems which intervenors have been able to bring to its attention at licensing hearings.[57]

Despite the fact that intervenor participation may not be the direct source of licensing delays, the NRC prefers to remedy the situation by shortcutting the licensing process, possibly at the expense of a thorough inquiry into safety issues.[58] To this end, the NRC has persuaded Congress to enact legislation limiting the role of intervenors in the NRC licensing process.[59]

The NRC's success in restricting intervenor participation can be partially attributed to the Supreme Court's attack on the integrity and competency of citizen intervenors. In the case of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[60] the Court effectively reduced the legitimacy of public concern for safety by labeling intervenor participation as a form of "obstructionism," attempting to make the proceedings a "game."[61]

The Court's attitude concerning the legitimacy of public concern and the public's ability to appreciate the dangers posed by nuclear power, was paralleled by recent actions taken by the Department of Energy. In October of 1984, the Department of Energy granted $85,000 to fund a study aimed at establishing that those who oppose nuclear power — stated to be an estimated forty to fifty percent of the public — suffer from a phobia.[62] Robert Dupont,

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55. Seacoast Anti-Pollution League of New Hampshire v. Nuclear Regulatory Comm'n, 690 F.2d 1025, 1028 (D.C. Cir. 1982) (citing 1 Nuclear Regulatory Commission Special Inquiry Group, *Three Mile Island: A report to the Commissioners and to the Public* (Rogovin Report), at 197-205 (1980)). *See* 1979 N.R.C. ANN. REP., *supra* note 39, at 37. The Kemeny Commission reported that the emergency response at Three Mile Island "was dominated by an atmosphere of almost total confusion." *Id.* at 10176. *See also infra* note 149 (accident at Three Mile Island worst accident in United States nuclear history).

56. *See Regulatory Reform Arrives at the NRC*, *supra* note 50, at 10176.

57. *See, e.g., Nuclear Safety—Three Years After Three Mile Island*, *supra* note 51, at 3.

58. *Regulatory Reform Arrives at the NRC*, *supra* note 52, at 10176. The NRC in 1982 amended a rule enacted after Three Mile Island which made the adequacy of emergency preparedness an issue for giving an operating license. *See* Union of Concerned Scientists v. United States, 735 F.2d 1437, 1440 (D.C. Cir. 1984) (NRC amendment to 10 C.F.R. § 50.47(a)(2) (1983)). The amended rule effectively withdrew the issue of emergency preparedness from the hearing process. *Id.* The court of appeals in *Union of Concerned Scientists* found the amendment invalid, charging that the NRC had "upended the balance struck by Congress between efficiency and public participation." *Id.* at 1446.

59. See *supra* note 52 for a discussion of amendments to sections 2242 and 2239 which permit issuance of temporary licenses and amendments to licenses without full hearing.

60. 435 U.S. 519 (1978).

61. *Id.* at 553-54. "[A]dministrative proceedings should not be a game or forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that 'ought to be' considered. . . ." *Id.*

62. Boston Globe, Oct. 30, 1984, at 4, col. 2. This type of promotional campaign by the Department of Energy is the worst kind of propagandizing which subverts truth for ecomomic

the scientist chosen by the Department of Energy to conduct the study, characterized those who oppose nuclear power as "phobia inducers infecting the populate with mental illness."[63]

C. *Regulatory Oversights*

A more plausible theory to explain the nuclear power industry's present problems relates to the NRC's oversight of the need for intensive regulation to ensure public health and safety.[64] In an industry characterized by rapid growth and development[65] absent a complete understanding of the technology, regulation by the NRC has been after the fact and incomplete.[66] In addition, the NRC has been unable or unwilling to formulate a long-term nuclear policy.[67]

1. Rapid Industry Growth

Under the Atomic Energy Act, the AEC issued the first nuclear power industry regulations in 1955 and 1956.[68] "The basic assumption [underlying the first regulatory scheme]. . . was that the industry would be able to handle technology well, and that regulation would entail only a brief design review of safety components and periodic inspections."[69] With the rapid evolution of nuclear technology, however, it became apparent that both the industry and the AEC had underestimated the difficulty in assuring nuclear safety.[70] Thus, during the 1960's and 1970's, with the increasing appreciation of the impact of nuclear power on public health, safety, and the environment, regulatory activity expanded in both scope and complexity.[71] Because the lead time for a nuclear power plant is roughly ten to fifteen years,[72] these rapid changes within the NRC regulatory structure resulted in nuclear power plants, like Diablo Canyon, being designed and constructed to NRC safety standards no longer in

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interest at the expense of public safety.

63. *Id.*

64. This oversight was recognized during congressional hearings after the accident at Three Mile Island. *See Nuclear Safety - Three Years After Three Mile Island, supra* note 51, at 3 (statement of Commissioner Bradford). See also *infra* notes 69 -73 and accompanying text for a discussion of this theory.

65. *Nuclear Safety - Three Years After Three Mile Island, supra* note 51, at 5 (statement of Commissioner Bradford). Commissioner Bradford's assertion that the nuclear industry's problems are related to excessive industry growth is based on the writings of Irving Bupp and Jean Claude Derian in their book LIGHT WATER. *Id.*

66. *See infra* notes 68-92 and accompanying text.

67. *See infra* notes 80-90 and accompanying text.

68. *Nuclear Power in an Age of Uncertainty* (Washington, D.C. U.S. Congress, Office of Technology Assessment, OTA-216, Feb. 1984, at 144).

69. *Id.*

70. *Id.*

71. *Id. See also* Bain, *supra* note 48, at 177 n.2. In 1972 nuclear power plants were subject to 32 regulatory guides. *Id.* The number doubled in 1973 and rose to 250 by 1978. *Id.* By 1985 the NRC has multiplied the original figure by at least 50 times. *See* 10 C.F.R. § § 0.735-1 to 170.51 (1985).

72. *Regulatory Reform Arrives at the NRC, supra* note 50, at 10176.

effect by the time the plant operations were ready to begin.[73]

To meet this problem the NRC is required to subject all nuclear facilities to post-licensing review under the evolving and more demanding safety standards.[74] The NRC, in its discretion, must consider the possibility of backfitting[75] nuclear power plants in order to incorporate new technologic developments[76] required to bring the plants to a level of safety undetermined at the time that plants were licensed for construction.[77] Although backfits may be expensive and difficult to incorporate, they are the "necessary product of the industry's having [progressed] from the equivalent of small propeller planes to 747's in about 12 years."[78] Despite the added costs and delays associated with backfitting, however, the NRC, with Supreme Court approval, continues to allow nuclear power plants to be constructed under provisional safety standards.[79]

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73. *See* Nuclear Safety *Three Years After Three Mile Island*, *supra* note 51, at 6.

74. Fort Pierce Util. Auth. v. United States, 606 F.2d 986, 996 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 842 (1979). The court, in upholding the application of revised regulations to a plant which had been constructed prior to promulgation of such standards, stated that:

> Congress, . . . must have envisioned that licensing standards, especially in the areas of health and safety regulation, would vary over time as more was learned about the hazards of generating nuclear energy. Insofar as those standards become more demanding, Congress surely would have wanted the new standards. . . to apply to nuclear facilities. . . .

Id. (footnote omitted).

75. 10 C.F.R. § 50.109 (1985). Backfitting means: "the addition, elimination or modification of structures, systems or components of the facility after the construction permit has been issued." *Id.*

76. *See id.* The NRC may "require backfitting of a facility if it finds that such action will provide substantial, additional protection which is required for the public health and safety. . . ." *Id. See also* Calvert Cliffs' Coord. Comm. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1128 (D.C. Cir. 1971) (for pre-operational phase of licensing to be effective NRC should seriously consider halting construction to backfit technological innovations).

77. Nuclear Safety *Three Years After Three Mile Island*, *supra* note 51, at 6 (statement of Commissioner Bradford). Commissioner Bradford, asserted that one of the most obvious reasons for the regulatory uncertainty associated with rapid industry growth, is the need to backfit plants in order to incorporate adequate levels of safety:

> Perhaps most importantly, in terms of present claims of regulatory uncertainty, it resulted in the NRC's having to backfit the lessons of experience into the concrete, the wiring, and the piping of plants completed or near completion. In most cases, this was not the process that the industry derogatorily terms 'ratchetting,' that is, the retrospective imposing of higher levels of safety on plants already certified as safe enough through the licensing process. It was, instead, a process of restoring these plants to compliance with the regulations, that is, to the level of safety that the AEC or the NRC had wrongly found to exist at the time it had licensed them. If you look at such subjects as fire protection after the Browns Ferry fire, equipment qualification after the 1977 Union of Concerned Scientists' petition, operator training after Three Mile Island, BWR scram systems after the Browns Ferry partial failure, you will find that in each case the NRC had found 'reasonable assurance' of levels of compliance that did not in fact exist.

Id. at 5-6.

78. *Id.* at 6.

79. Power Reactor Dev. Co. v. Int'l Union of Elec., Radio and Mach. Workers, AFL-CIO, 367 U.S. 396, 403 (1961). "A more severe safety test [must] be passed when the reactor [is]

2. The Absence of a Long Term Nuclear Policy

Another source of the nuclear power industry's present problems is the NRC's ad hoc approach[80] to the assurance of nuclear safety. An indication of this approach is revealed by instances, such as those that occurred at Three Mile Island and Diablo Canyon, which forced the NRC to implement regulations due to after-the-fact discoveries of safety problems at those plants.[81] An ad hoc approach is due, at least in part, to the absence of a long term nuclear policy within the NRC.[82] "Despite in-depth studies and critiques within and outside the agency, there is no well thought out, integrated system for assurance of nuclear safety within the NRC."[83]

The lack of a long term nuclear policy presents an anomoly, since the NRC's decision to issue a license involves the exercise of judgment in the "face of uncertainties."[84] Licensing decisions are based on predictions that research and technology will be developed to provide solutions for nuclear safety problems before they pose a threat to society.[85] The absence of a long term nuclear policy indicates that the NRC is making judgments in its licensing proceedings about the future of nuclear safety, without any substantial foresight as to whether or not solutions can or will be developed. This, coupled with the fact that the NRC is permitted to project predictions regarding the safety of nuclear technology absent a scientific or probabilistic basis for such predictions,[86] leaves the appearance that where uncertain risks are involved in

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completed. . . since [t]he degree of 'reasonable assurance'. . . that satisfies [the Commission]. . . for purposes of the *provisional* construction permit would not be the same. . . in considering the issuance of the *operating* license. . . ." *Id.* at 402-03; see also *infra* notes 261-69 and accompanying text for a discussion of provisional safety review at plant construction phase of licensing.

80. *See* County of Rockland v. United States Nuclear Regulatory Comm'n, 709 F.2d 766, 776 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 485 (1984). The accident at Three Mile Island taught the NRC that "ad hoc responses to nuclear emergencies [are] ineffective." *Id.* at 769.

81. *Id.* at 771-73. Prior to the accident at Three Mile Island there were no comprehensive guidelines within the NRC regulatory framework to coordinate off-site emergency planning. The sites for Diablo Canyon, Units One and Two, were approved by the NRC in 1968 and 1970. *See infra* note 111. The NRC's Seismic and Geologic Siting Criteria, 10 C.F.R. pt. 100, app. A (1985) were not promulgated until 1973. *See* 38 Fed. Reg. 31281 (1973).

82. *See Nuclear Safety - Three Years After Three Mile Island*, *supra* note 51, at 5 (statement of Commissioner Bradford). "Contrary to public belief. . . the NRC does not spend time debating nuclear future. Indeed I can remember no Commission meeting at which that subject came up." *Id. See also* 1979 N.R.C. ANN. REP., *supra* note 39, at 64. An NRC task force set up to investigate the reasons for the Three Mile Island accident determined that the NRC is in great need of an articulate, long term national nuclear safety policy. *Id.*

83. 1979 N.R.C. ANN. REP., *supra* note 39, at 64.

84. *See Baltimore Gas*, 462 U.S. at 97 (uncertainty of risks of long term repository failure were not found sufficient to affect NRC licensing decision based largely on assumptions regarding such risks); State of Minnesota v. United States Nuclear Regulatory Comm'n, 602 F.2d 412, 416 (D.C. Cir. 1979) (the critical issue is probability, not fact, that solutions will be reached in time); Citizens For Safe Power, Inc. v. Nuclear Regulatory Comm'n, 524 F.2d 1291, 1297 (D.C. Cir. 1975) (NRC not required to go beyond present technology in making safety determinations). .

85. *See, e.g., Baltimore Gas*, 462 U.S. at 92-93 (NRC rule based on assumption of "zero" risk because NRC staff believed technology would be developed to isolate risks). *See supra* note 83.

86. Union of Concerned Scientists v. Atomic Energy Comm'n, 499 F.2d 1069, 1069 (D.C.

plant licensing, the decision-making process operates in a vacuum.

The Supreme Court has recognized that a wait-and-see approach to reactor licensing is unpredictable and increases the risk of harm to public health and safety.[87] The Court is committed, however, to the proposition that because Congress made the decision to develop nuclear energy, Congress must make the judgment as to whether this decision has proved wrong.[88] Due to the absence of any real legislative direction,[89] the NRC has approached the improvement of the technology on a piecemeal basis,[90] causing the safety of nuclear power to remain an uncertainty.

II. The Diablo Canyon Licensing History

Licensing a nuclear power plant is a step-by-step process for the utility.[91] The Atomic Energy Act requires the issuance of two separate licenses by the NRC; one for plant construction, and one for plant operation.[92] Section 189(a) of the AEA mandates a public hearing before the NRC may issue a construction permit. It also provides for optional hearings at the request of any interested party prior to issuance of an operating license.[93] The NRC regulations

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Cir. 1974).

87. *See Pacific Gas*, 461 U.S. at 196-97. The Court stated that the lack of a long term nuclear waste disposal option is unpredictable, uneconomical, and increases public risk. *Id.* See *Baltimore Gas*, 462 U.S. 87 (1983), for a discussion of the controversy surrounding nuclear waste disposal methods.

88. *See Vermont Yankee*, 435 U.S. at 557-58.

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.

Id.

89. *See* State of New Hampshire v. Atomic Energy Comm'n, 406 F.2d 170, 173 (1969) (no real guidelines for safety contained in Atomic Energy Act).

90. *Nuclear Economics*, *supra* note 33, at 45 (statement of Dr. Lewis J. Pearl, National Research Associate).

91. *Power Reactor*, 367 U.S. at 405.

92. *Id.* Under the AEA, an applicant is first granted a construction permit, constructs the facility, and finally, requests the NRC to grant a license to operate the facility. *Id. See* 42 U.S.C. § § 2232(a), 2235 (1982).

93. *See* Atomic Energy Act of 1954, § 189(a), 42 U.S.C.S. § 2239(a) (Law. Co-op. Supp. 1985). This section provides in pertinent part:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit,. . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application where a construction permit has been issued. . . . [T]he Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license. . . .

Id.

Although given a strict reading, section 189(a) does not mandate a hearing on the record, both the NRC and the courts have interpreted section 189(a) to require that NRC licensing hearings incorporate the formal or trial type procedures required under sections 556 and 557 of the APA.

require that every applicant for a construction permit provide sufficient information to support a determination by the NRC of a plant's site suitability, design safety, and acceptable environmental impact.[94] The AEA and NRC regulations provide that NRC may not issue an operating license until it deter-

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Administrative Procedure Act, 5 U.S.C. § § 551-56 (1982); City of West Chicago v. United States Nuclear Regulatory Comm'n, 701 F.2d 632 (7th Cir. 1983). "[O]n the record" need not appear in a governing statute for formal hearings to be required. *Id.* at 642. The AEC, now the NRC, has traditionally provided for formal hearings in all contested reactor cases. *See generally* Union of Concerned Scientists, 735 F.2d 1437, 1444 n.12 (D.C. Cir. 1984) (because licensing is an "adjudicatory matter" NRC must generally provide on-the-record procedures); Porter County Chapter of Izaak Walton League of America, Inc. v. Nuclear Regulatory Comm'n, 606 F.2d 1363, 1368 (D.C. Cir. 1979) (formal adjudicatory procedures apply to nuclear power plant revocation proceedings under section 186 of the Act); *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778, 785 (D.C. Cir. 1968) (NRC has invariably distinguished between rulemaking and adjudication, and provided for formal hearings in adjudication).

NRC licensing hearings are held by a three-member Atomic Safety and Licensing Board (ASLB), comprised of one member qualified in the conduct of administrative proceedings, and two members qualified in scientific and technical issues. *See* 42 U.S.C. § 2039 (1982); 10 C.F.R. § 2.721(a)(1985). The ASLB's reviewing function is limited to making determinations regarding the sufficiency of the record compiled by the NRC's Advisory Committee on Reactor Safeguards (ACRS) and staff. 10 C.F.R. § 1.20 (1985). It is not the function of the ASLB to determine the correctness of ACRS and staff determinations on safety. *Union of Concerned Scientists,* 499 F.2d at 1076. *See* 10 C.F.R. § 1.20(1985). A decision of the ASLB can be appealed to the Atomic Safety and Licensing Appeal Board (ASLAB), and concurrently, in the NRC's discretion, to the NRC itself. *Vermont Yankee*, 435 U.S. at 527 (citing 10 C.F.R. § § 2.714, 2.721, 2.786, and 2.787) (1977). The NRC, in its discretion, reviews decisions of the hearing boards only in cases of exceptional legal or policy importance. *Id.*

94. When a construction permit application is filed with the NRC the utility must prepare a Preliminary Safety Analysis Report (PSAR) and an Applicant's Environmental Report (AER). Note, *The Use of Generic Rulemaking to Resolve Environmental Issues in Nuclear Power Plant Licensing*, 61 VA. L. REV. 869, 874 (1975). The PSAR generally includes information regarding the plant's site design and construction, while the AER contains information regarding the plant's impact on the environment. *Id.* The NRC's siting criteria require that:

> The geologic, seismic and engineering characteristics of a site and its environs shall be investigated in sufficient scope and detail to provide a reasonable assurance that they are sufficiently well understood to permit an adequate evaluation of the proposed site, and to provide sufficient information to support the determinations required by these criteria and to permit adequate engineering solutions to actual or potential. . . seismic effects at the proposed site.

Seismic and Geologic Siting for Nuclear Power Plants, 10 C.F.R. pt. 100, app. A (IV) (1985).

The principal design criteria for a plant must establish "the necessary design, fabrication, construction, testing, and performance requirements for structures, systems, and components. . . that provide reasonable assurance that the facility can be operated without undue risk to the health and safety of the public." General Design Criteria For Nuclear Power Plants, 10 C.F.R. pt. 50, app. A (Introduction) (1985). These criteria require that a plant be built to withstand the effects of natural phenomena, such as earthquakes. 10 C.F.R. pt. 100, app. A (I) (1985).

The requirement of an AER is in response to the NRC's obligation to comply with section 102(2)(C) of the NEPA, 42 U.S.C. § 4332(2)(C) (1982). *See* 10 C.F.R. § 51.21 (1985). From the utility's AER the Commission's staff prepares a draft Environmental Statement, which it circulates to state and federal agencies and the public for comment. 10 C.F.R. pt. 50, app. D (1985). The staff then incorporates the suggestions to form a Final Environmental Statement (FES), which is its term for the Environmental Impact Statement required by the NEPA. Note, *supra* note 94, at 875.

mines that the design and construction of a plant are adequate to protect the public from the hazards of a radiologic release.[95]

Throughout the Diablo Canyon licensing history, intervenors challenged the NRC's decisions regarding the effect of the Hosgri Fault on the design and construction of the plant. In *Mothers For Peace*[96] it was argued that the NRC failed to adequately assess Diablo Canyon's Seismic Design,[97] Quality Assurance Program,[98] Emergency Planning Program,[99] and the possibility of a Core Melt occurring at the plant.[100]

A. Seismic Design

All nuclear power plants must be designed and constructed to prevent the occurrence of a radiologic release should an earthquake occur during a facility's operating lifetime.[101] The NRC's Seismic and Geologic Siting Criteria[102] describe the relationship between the seismic potential of a given site and its impact on design, construction, and operation of a nuclear power plant.[103] The occurrence of two seismic events is considered in the NRC regulations[104] — a Safe Shutdown Earthquake,[105] and an Operating Base Earthquake.[106] A nu-

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95. *See supra* note 3. *See also* Final Safety Analysis Report, 10 C.F.R. § 50.34(b) (1985) and Issuance of Operating License Report, 10 C.F.R. § 50.57(a) (1985). Under § 50.34(b) each application for the issuance of an operating license must include a final safety analysis report which describes the facility's design bases and presents a safety analysis of the structures, systems and components of the facility. *Id.* Section 50.57(a) provides that the NRC may issue an operating license only upon a finding that the facility has been constructed in conformity with the application, as amended, and that there is reasonable assurance that operation will not endanger the health and safety of the public. *Id.*

96. 751 F.2d 1287 (D.C. Cir. 1984).

97. *See infra* notes 101-24 and accompanying text.

98. *See infra* notes 125-44 and accompanying text.

99. *See infra* notes 172-200 and accompanying text.

100. *See infra* notes 145-69 and accompanying text.

101. *In re Pacific Gas*, 13 N.R.C. at 909.

102. Seismic and Geologic Siting Criteria For Nuclear Power Plants, 10 C.F.R. pt. 100, app. A (1985).

103. *In re Pacific Gas*, 13 N.R.C. at 913. "When considering the possibilities of plant damage occuring from seismic events it is important to understand the severity of seismic events, their range of probabilities, and the potential for reactor accidents caused by seismic events." *In re Pacific Gas & Elec. Co.*, 19 N.R.C. 937, 948 (1984). The purpose of the NRC's regulations regarding seismic events is:

> [T]o estimate the magnitude of the strongest earthquake that might affect the site of a nuclear power plant during its operating lifetime, to determine the most intense ground motion that a seismic event could cause there and to ensure that the nuclear facility is designed and built to survive such an event without undue risk to the public.

In re Pacific Gas, 13 N.R.C. at 913. Because seismology is an evolving science, however, the criteria do not contain detailed standards against which to evaluate the NRC's seismic predictions for a given site. *Id.*

104. North Anna Envtl. Coalition v. United States Nuclear Regulatory Comm'n, 533 F.2d 655, 665 (D.C. Cir. 1976).

105. *See In re Pacific*, 19 N.R.C. at 948. The SSE produces:

> [T]he maximum vibratory ground motion for which certain structures, systems, and components are designed to remain functional. These structures, systems, and com-

clear power plant must be designed to achieve a safe shutdown after a Safe Shutdown Earthquake whereas all plant systems are designed to remain in operation during an Operating Base Earthquake.[107] In the event of an earthquake at or near a plant site, a radiologic release could result in at least two instances: (1) where an earthquake up to the predicted Safe Shutdown Earthquake occurs together with a major design error, or safety function failure,[108] or (2) where an earthquake of greater than the predicted Safe Shutdown Earthquake occurs.[109]

The AEC, as predecessor to the NRC,[110] issued construction permits to Pacific Gas & Electric (PG&E) for Units 1 and 2 of the Diablo Canyon plant in 1968 and 1970.[111] The permits were issued based on the assumption that the site was an area of relatively low seismicity, and involved no substantial seismic hazards.[112] A year after the second permit was issued, however, it was discovered that the plant was being constructed within three miles of the Hos-

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ponents are those necessary to assure: (1) The integrity of the reactor coolant pressure boundary, (2) The capability to shut down the reactor and maintain it in a safe shutdown condition, or (3) The capability to prevent or mitigate the consequences of accidents which could result in potential offsite exposures comparable to guideline exposures of this part.

10 C.F.R. pt. 100, app. A (III)(c) (1985).

106. *See In re Pacific Gas*, 19 N.R.C. at 948. The OBE is "that earthquake which, considering the regional and local geology and seismology. . . characteristics could reasonably be expected to affect the plant site during the operating life of the plant. . . ." 10 C.F.R., pt. 100, app. A (III)(d) (1985).

The distinction between a Safe Shutdown Earthquake (SSE) and an Operating Base Earthquake (OBE) in terms of plant design, is that the "SSE is the seismic design basis for safety-related. . . structures and equipment and the OBE the benchmark for the balance of the plant." *In re Pacific Gas*, 13 N.R.C. at 989 (footnote omitted). The NRC has stated that the probability of an earthquake beyond an OBE and up to a SSE is in the area of a one in one-thousand or one in ten-thousand per year. *In re Pacific Gas*, 19 N.R.C. at 948 (1984).

107. *See In re Pacific Gas*, 19 N.R.C. at 948.

108. *Id.* The NRC has stated that in its estimation "[t]he probability of these two events (SSE and safety function failure) occurring simultaneously is very much lower than the probability of either one, perhaps on the order of one in a million per year or less." *Id.*

109. *Id.* at 949. The NRC cannot predict the probability of an earthquake greater than the SSE occurring at a plant. "The absolute probabilities for earthquakes at and beyond the SSE are extremely difficult to estimate and thus have large associated uncertainties." *Id.*

110. *See supra* notes 36-37 and accompanying text.

111. *Mothers For Peace*, 751 F.2d at 1296.

112. *Id.* Evaluation of the Diablo Canyon site prior to the issuance of the construction permits in 1968 and 1970 established that the site was an area of relatively low seismicity. *Id.* For design purposes, the maximum probable earthquake was postulated to be a 6.75 magnitude earthquake. *Oversight on Diablo Canyon Nuclear Generating Plant: Oversight Hearings Before the Subcommitee on Energy and the Environment of the Committee on Interior and Insular Affairs, House of Representatives*, 95th Cong., 1st Sess. 30 (1977) (statement of Edson Case, Acting Director, Office of Reactor Regulation, N.R.C.). Because of the absence of seismic activity that would indicate a significant nearby fault, it was assumed that offshore exploration was not necessary. *Id.*

Intervenors raised questions regarding the NRC's estimates of low seismicity prior to the issuance of the construction permit on Unit 2, including questions regarding the possiblity of offshore seismic activity. *Id.* The questions were evaluated by the NRC staff and consultants and found not to be significant to the NRC's decision to issue construction permits at Diablo Canyon. *Id.*

gri Fault.[113] The existence of the Fault was first reported in the scientific literature in January of 1971 by two Shell Oil geologists.[114] The NRC did not become aware of the existence of the Fault, however, until 1973.[115] It was brought to their attention by PG&E in their application for an operating license.[116]

Although the NRC acknowledged the need to investigate the implications of the Shell Oil findings in 1973, it did not halt construction of the plant at that time,[117] but rather ordered PG&E to continue construction concurrent with a re-examination of the facility's seismic design.[118] At the same time the United States Geological Survey, consultant to the NRC, was asked to investigate the seismic potential of the Diablo Canyon site.[119] In 1976 it reported that the site's seismic potential was greater than originally predicted for plant design and construction purposes.[120]

Intervenors made several attempts during the pre-operational phase of licensing to institute proceedings for reconsideration of Diablo Canyon's seismic design safety.[121] Because neither the AEA nor the NRC regulations require

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113. *See Mothers For Peace*, 751 F.2d at 1296.

114. *Oversight on Diablo Canyon, supra* note 112, at 4 (Statement of Edson Case) (report referred to as Hoskins and Griffiths paper).

115. *See id.* at 5. Mr. Case basically put forth two reasons as to why the NRC had not become aware of the fault until two years after its existence was published and construction had begun: (1) comprehensive NRC staff review generally is not given to a facility between the time a construction permit is issued and submission of an operating license application, and (2) lack of available expertise in the area of seismology. *Id.*

116. *Mothers For Peace*, 751 F.2d at 1296-97.

117. *Id.* In using this approach the NRC took the risk that design specifications used for the construction of the plant might not meet the design requirements discovered in the re-examination. According to an ACRS report, this risk became reality:

> [a]s recognized by the [NRC's]. . . own technical consultant, the Advisory Committee on Reactor Safeguards (ACRS), 'the design bases and criteria utilized in the seismic re-evaluation of the Diablo Canyon Station for the postulated Hosgri event are in certain cases *less conservative* than those that would be used for an original design.'

Petitioner's Memorandum In Support Of Emergency Motion For Stay Pending Review at 8 n.11, San Luis Obispo Mothers For Peace v. United States Nuclear Regulatory Comm'n, No. 84-1410 (D.C. Cir. 1984) (quoting ACRS, Report on Diablo Canyon Nuclear Power Station Units 1 and 2, at 3 (July 14, 1978)).

118. *See Oversight on Diablo Canyon, supra* note 112, at 5-6 (Statement of Edson Case).

119. *Id.*

120. *See Oversight on Diablo Canyon, supra* note 112, at 30. (Statement of Henry Coulter, Assistant Director, United States Geologic Survey). "The original design of the plant was based on a 6.75 magnitude earthquake in the immediate vicinity versus the actual 7.5 magnitude potential at a 5 kilo distance." *Id.*

121. *See Oversight on Diablo Canyon, supra* note 112, at 13. (Statement of Brent Rushforth, founder and staff attorney, Center for Law in the Public Interest). In 1974 intervenors requested that the Atomic Safety and Licensing Board issue a Work Stop Order due to the controversy surrounding the implications of the Hosgri Fault on Diablo Canyon. *Id.* The Work Stop Order was denied because the NRC determined that "no controversy" existed between the United States Geological Survey and the NRC staff at that time. *Id.* at 29 (Statement of Mr. Allison, NRC project manager). The Commission did not feel that a controversy began to arise until 1975. *Id.* at 29-30.

the NRC to commence such enforcement proceedings,[122] intervenors' attempts were unsuccessful.[123] Ultimately the NRC concluded that the plant as originally designed, would withstand the more severe earthquake shocks.[124]

B. Quality Assurance Breakdown

In September of 1981 the NRC issued a license to load fuel and conduct low power operations at the Unit 1 of Diablo Canyon plant.[125] On the eve of fuel loading the NRC received information contrary to statements made in PG&E's operating license application, revealing serious weaknesses in PG&E's Quality Assurance Program.[126] A Quality Assurance Program establishes requirements for the design, construction, and operation of plant safety structures, that function to prevent or mitigate the consequences of a radiologic accident occurring at a plant.[127] PG&E's Quality Assurance Program failed to uncover blueprint mix-ups between Units 1 and 2 of the Diablo Canyon plant.[128] Investigations of these mix-ups, in turn, revealed serious problems in the seismic design and equipment piping at the Diablo Canyon

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122. *See* Liesen v. Louisiana Power & Light Co., 636 F.2d 94, 95 (5th Cir. 1981). Other than participating in the licensing hearings under section 189(a) of the Atomic Energy Act, the only other way a private litigant can challenge the safety of a reactor is by filing an Order to Show Cause. 10 C.F.R. § 2.206. Where the NRC receives information indicating that a serious safety problem exists at a particular reactor, it will issue an Order to Show Cause pursuant to section 2.202 of its regulations, demanding that the utility's license should not be revoked. People of the State of Illinois v. Nuclear Regulatory Comm'n, 591 F.2d 12, 14 (7th Cir. 1971).

Both the Atomic Energy Act, section 2236(a), and section 2.206 of the NRC regulations permit, but do not mandate, that the NRC take action to revoke a license. Rockford League of Women Voters v. United States Nuclear Regulatory Comm'n, 679 F.2d 1218, 1222 (7th Cir. 1982). *See also*, Lorion v. United States Nuclear Regulatory Comm'n, 712 F.2d 1472, 1475 (D.C. Cir. 1983) (request to initiate license revocation proceedings is merely a request, and until granted, does not constitute a proceeding under section 189(a)).

123. *See supra* note 121.

124. *See infra* note 130.

125. *Mothers For Peace*, 751 F.2d at 1296-97 (citing 14 N.R.C. 5986 (1981)).

126. *Id. See In re Pacific Gas*, 14 N.R.C. 950, 951 (1981).

127. *See* General Design Criteria for Nuclear Power Plants — Overall Requirements, 10 C.F.R. pt. 50, app. A (1)(1985). Every applicant for a construction permit is required to include a description of the Quality Assurance Program to be applied to the design, fabrication, construction and testing of the stuctures, systems, and components for the facility. *Id.* Provided in 10 C.F.R. pt. 50, app. B (1985), establishes Quality Assurance Criteria for the design, construction and operation of structures, systems and components that prevent or mitigate the consequences of radiological accidents. 10 C.F.R. 34(a)(7) (1984). " 'Quality Assurance' comprises all those planned and systematic actions necessary to provide adequate confidence that a plant can withstand effects of natural phenomenon such as earthquakes, without loss of capability to its structures to perform safely." 10 C.F.R. pt. 50, app. A (1) (1984).

128. *See Oversight on Diablo Canyon Nuclear Power Plant, supra* note 112, at 22-23 (Statement of Hon. J. Palladino, Chairman, NRC).

PG&E reported to the NRC that it had discovered what it referred to as the "mirror image problem — the blue prints of Unit 2, which is the mirror image of Unit 1, had been used in the seismic analysis of the equipment for Unit 1. *Id.* Chairman Palladino explained that the Quality Assurance breakdown was essentially due to the fact that the communications between PG&E engineering contractors during plant construction were not formal enough to ensure that the information transmitted between them was correct. *Id.* at 30.

Plant indicating that the plant, may not have been properly designed to withstand an earthquake.[129] Despite the discovery of these errors, the NRC performed only a partial construction review of the plant,[130] and concluded that no construction modifications were necessary.[131]

Both the NRC and the court of appeals denied intervenors the right to a hearing on the issue of the plant's construction after the Quality Assurance breakdown.[132] The NRC was able to preclude intervenors from litigating the issue in two ways. First, Quality Assurance review was separated into distinct design and construction components.[133] Despite the fact that the NRC regulations treat Construction Quality Assurance and Design Quality Assurance as one program[134] — the same top PG&E management runs both aspects of the Quality Assurance Program,[135] and the same Quality Assurance manual governs both Construction Quality Assurance and Design Quality Assurance[136] — the NRC refused to acknowledge a link between the design breakdown at Diablo Canyon and the possibility of a resultant construction breakdown.[137]

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129. *Mothers For Peace*, 751 F.2d at 1297 (citing 14 N.R.C. at 951). PG&E's report also indicated that the plant may not have been designed and constructed to withstand the effects of earthquakes from the fault. *See In re Pacific Gas*, 14 N.R.C. at 951.

130. *See In re Pacific Gas & Elec.*, 19 N.R.C. 953 (1984). The NRC suspended PG&E's low power operating license pending satisfactory completion of an Independent Design Verification Program (IDVP). *Id.* at 954. The standard for satisfactory completion of the IDVP and modification resulting from that program is measured against the same standard applied to Quality Assurance programs: "whether the verification program provides 'adequate confidence that . . . [safety related] structures, systems, or components will perform satisfactorily in service.' " *In re Pacific Gas & Elec.*, 19 N.R.C. 571, 572 (1984). The IDVP was found to be satisfactorily completed by PG&E in 1983. *Id.* at 618-19. This finding was made despite the fact that only two of the several PG&E contractors were reviewed under that program. *See In re Pacific Gas & Elec.*, 18 N.R.C. 1340, 1349 (1983). The NRC admitted that its limited review did reveal a number of construction errors, but found that "these deficiencies were essentially matters of minor significance." *Id.*

131. *See In re Pacific Gas*, 18 N.R.C. at 1354.

132. *See In re Pacific Gas*, 19 N.R.C. at 957-98.

After failing to obtain hearings on the plant's Construction Quality Assurance Design, the intervenors attempted to re-open the record on those issues. The first instance was in 1977, where intervenors' attempts proved unsuccessful. *See In re Pacific Gas & Elec. Co.*, 14 N.R.C. 107, 114-15 (1981). In 1982, after the Quality Assurance breakdown, intervenors were successful in re-opening the record on the issue of Design Quality Assurance only. *See In re Pacific Gas*, 19 N.R.C. at 575. In that proceeding, the NRC concluded that PG&E's Design Quality Assurance program was sufficient. *Id.* at 571, 619. In 1984, intervenors again attempted to re-open the record on the issues of Design and Construction Quality Assurance, but were unsuccessful. *See In re Pacific Gas*, 19 N.R.C. 1361 (1984). The NRC's refusal to litigate the issue of the plant's Construction Quality Assurance was upheld by the court of appeals. *See Mothers For Peace*, 751 F.2d at 1317-18.

133. *See In re Pacific Gas*, 18 N.R.C. at 1345-46.

134. *Id. See, e.g.*, Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants, 10 C.F.R. pt. 50, app. B (1985). Nowhere in the NRC's regulations governing Quality Assurance, do the regulations distinguish between Quality Assurance as applied to design and construction.

135. *See In re Pacific Gas*, 18 N.R.C. at 1246.

136. *Id.*

137. *Id.*

Second, the NRC denied intervenors their statutorily prescribed right to a hearing on the construction issue under section 189(a) of the AEA.[138]

Eventually intervenors were successful in re-opening the record on Design Quality Assurance,[139] but were never able to re-open the record on the issue of Construction Quality Assurance.[140] The NRC ruled that the intervenors had failed to meet the required burden of proof necessary to *re-open* the record.[141] The NRC's standard for re-opening is much more stringent than section 189(a)'s standard for granting a hearing.[142] Intervenors would never have been required to meet this higher standard, however, had they been given the section 189(a) hearing to which they were entitled in the first instance.

Although the court of appeals found that the NRC had unlawfully denied intervenors their statutorily prescribed right to a section 189(a) hearing on the issue of Construction Quality Assurance, it held that this procedural mistake did not entitle intervenors to relief.[143] The court's analysis was based on the premise that since the evidence offered by intervenors to re-open the record was insufficient, the same evidence, if presented at the original hearing, would have been found unpersuasive.[144]

C. *The Possibility of a Core Melt*

Prior to the 1979 accident at the Three Mile Island Nuclear Power Plant,[145] the NRC treated the risks associated with a Core Melt[146] as ex-

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138. *See Mothers For Peace*, 751 F.2d at 1314-16. The court, relying on Brooks v. Atomic Energy Comm'n, 476 F.2d 924 (D.C. Cir. 1973), found that NRC violated intervenors' statutorily prescribed right to a section 189(a) hearing, which entitles intervenors to formal adjudicatory hearings for any licensing amendments, including amendments to extend the term of a low power license. *Id.* at 1316. See *supra* note 92 for a discussion of section 189(a).

139. *See supra* note 132.

140. *Mothers For Peace*, 751 F.2d at 1316. *See also id.* at 1317.

141. *Id.* at 1317-18.

142. Section 189(a) of the AEA requires that licensing proceedings must encompass all material issues *relevant* to licensing proceedings raised by requestor. Union of Concerned Scientists v. Nuclear Regulatory Comm'n, 735 F.2d 1437, 1443 (D.C. Cir. 1984). In comparison, the NRC's re-opening standard requires that evidence must be timely, safety significant, material, and reliable. *In re Pacific Gas*, 19 N.R.C. at 1365-67. *See* 10 C.F.R. § § 2.714(b), 2.743(c).

Even where intervenors are successful in obtaining evidence of cummulative deficiencies at a plant, such deficiencies must be shown to be individually significant to meet the NRC's burden of proof for re-opening the record. *In re Pacific Gas*, 18 N.R.C. at 1345-54.

143. *See Mothers For Peace*, 751 F.2d at 1316-17.

> Our conclusion that the Commission acted unlawfully in denying petitioners a hearing itself constitutes one particularly powerful form of judicial relief. . . . We believe, however, that additional relief in the present case would serve no meaningful purpose. . . . First, the failure to accord petitioners a hearing occurred in the context of the *low* power proceedings. Low power testing at the facility has now been completed. . . . A second, and more substantive reason. . . is that the evidence petitioners would have introduced on the construction quality assurance issue had they been accorded a hearing was neither outcome-determinative nor safety significant.

Id.

144. *See id.*

145. *See infra* note 149.

146. A Core Melt or Loss-of-Coolant-Accident (LOCA) is the kind of radiologic accident

tremely remote, assuming a low probability of serious accident sequences occuring.[147] Consequently, the NRCin assessing plant safety, excluded treatment of a Core Melt in preparing Environmental Impact Statements (EIS) pursuant to its duty under the National Environmental Policy Act.[148]

Beginning in 1980, the NRC instituted an Interim Policy in direct response to the accident at Three Mile Island[149] and the discovery that its assumptions regarding the remote probability of Core Melt accidents were inaccurate.[150] The NRC's Interim Policy ordered NRC personnel to consider the

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most experts postulate will occur in the event of a nuclear accident. FENN, THE NUCLEAR POWER DEBATE: ISSUES AND CHOICES 121 (1981). The core of a nuclear power plant requires a continuous flow of cooling water to dissipate the heat produced by fission. *Id.* An accident which could cause a pipe to burst and shut off the water flow would cause an automatic shutdown. *Id.* The residual radioactive decay caused by the heat released during the shutdown could lead to a "melt-down" through the reactor core, and, theoretically to China (thus the "China Syndrome"). *Id.*

147. *See* 45 Fed. Reg. 40101, 40103 (1980). The year 1971 was the first time that the NRC initiated a formal policy for treatment of nuclear power plant accidents. *Id.* In December of 1971, the Atomic Energy Commission published a proposed Annex to the NRC regulations. 10 C.F.R. pt. 50, app. D. *Id.* The Annex contained "standardized assumptions" in the form of a classification scheme to be used by applicants regarding nuclear accidents. *Id.* Accidents were classified from Class One to Class Nine according to probability and severity of accident risks. *Id.* Although the consequences of a Class Nine, or Core Melt, were considered most severe, the NRC did not require consideration of a Class Nine accident in its licensing application reviews, based on the assumption that the probability of Core Melt occurring was so small that environmental risks would be extremely remote. 36 Fed. Reg. 22851, 22852 (1971).

The NRC's 1971 policy under the Annex to Appendix D has so far been upheld by courts. 49 Fed. Reg. at 9356 n.11 (1984) (citing Carolina Envtl. Study Group v. United States Atomic Energy Comm'n, 510 F.2d 796, 801 (D.C. Cir. 1975); Vermont Yankee Nuclear Power Corp. v. United States Nuclear Regulatory Comm'n, 435 U.S. 519, 551 (1978).

148. *See* Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions, 10 C.F.R. § § 51.20-.26 (1985). The NEPA imposes two duties on federal agencies: (1) the preparation of an EIS pursuant to section 102(2)(C), 42 U.S.C. § 4332(2)(c) (1982), and (2) adherence to the regulations of the Council of Environmental Quality (CEQ), pursuant to section 102(2)(B), 42 U.S.C. § 4332(2)(B) (1982). Sierra Club v. Sigler, 695 F.2d 957, 967 (5th Cir. 1983).

While the NEPA establishes significant substantive goals for the Nation, it imposes duties upon agencies that are essentially procedural. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 417 (1971). The NEPA requires *agencies* to take a "hard look" at the environment, whereas the role of *courts* in NEPA review is to ensure that the NRC has considered and disclosed the environmental impact of its decision. *Baltimore Gas*, 467 U.S. at 97 (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

149. The accident at Three Mile Island is regarded as the worst accident in United States nuclear history. "Despite the fact that no one was killed and no physical injuries occurred among the general public because of [the TMI accident], the accident. . . is unquestionably the most serious in the history of commercial nuclear power. . . ." 1979 NRC ANN. REP., *supra* note 39, at 39.

150. *See Mothers For Peace*, 751 F.2d at 1298. *See also* Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969, 45 Fed. Reg. 40101-03 (1980). The NRC's assumptions regarding the remote probability of radiological accidents were supposedly confirmed in a 1975 NRC publication. *See id.* at 40101. In September of 1978, however, a Risk Assessment Review Group Report indicated that the finding of low probability in the earlier study was inaccurate due to errors in the estimates used in that study. *Id.* The Review Group was "unable to determine whether the absolute probabilities of accident sequences in the

possibility and impact of a Core Melt in all ongoing and future EIS's.[151] This new policy was not applied to the Diablo Canyon plant, however, because a final EIS had been issued for that plant prior to implementation of the Policy.[152]

The NRC refused to give the Interim Policy retroactive effect absent a showing of "special circumstances."[153] Intervenors had argued that the proximity of the Diablo Canyon plant to the Hosgri Fault constituted a "special circumstance," based on a recent NRC ruling which listed proximity to natural or man-made hazards as a special circumstance deserving EIS consideration.[154] The appeals court upheld the NRC's finding of no "special circumstance" on the theory that the seismic design of the Diablo Canyon plant was found adequate by the NRC, and thus the possibility of a Core Melt occurring at the plant was too remote.[155] In so ruling, the court failed to recognize the distinction in the NRC regulations between safety design and construction review, and EIS review.[156] The court, relying on an environmental standard ap-

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study. . . [were] high or low, but believe[d] that the error bounds on those estimates in general, . . . [were] greatly understated." *Id.* at 40102. *See also Mothers For Peace*, 751 F.2d at 1299. The NRC accepted the Review Group findings, but did not, however, change its policy on accident risks until after the occurence of the accident at Three Mile Island. *Id.*

151. 45 Fed. Reg. at 40103. The Interim Policy statement did two things. First it withdrew the NRC's 1971 policy that the possibility of a Core Melt is too insignificant to be considered in EIS preparation. *See* 49 Fed. Reg. at 9357. It also ordered that all ongoing and future NRC EIS's give attention to the probability and impact of a Core Melt. 45 Fed. Reg. at 40103.

152. *See In re* Pacific Gas & Elec. Co., 20 N.R.C. 819, 820 (1984). Although the EIS prepared for Diablo Canyon had not been fully litigated at the time the Interim Policy statement was issued, review of the EIS was not considered "ongoing" within the meaning of the policy statement. *Id.* The final EIS for Diablo Canyon was issued in 1973, supplemented in 1976, and found satisfactory by the NRC licensing board in 1978. *Mothers For Peace*, 751 F.2d at 1298.

153. *Mothers For Peace*, 751 F.2d at 1300 (citing 45 Fed. Reg. at 40103).

154. *See id.* at 1303-04 (citing *In re Public Service Co.*, 11 N.R.C. 433 (1980)).

155. *See Mothers For Peace*, 751 F.2d at 1304. The appeals court, in reviewing the NRC's finding, stated that because the seismic design of Diablo Canyon had been found adequate by the NRC, the plant design would be "more than adequate to guard against such a horrific possibility." *Id.* (citation omitted).

156. *See id.* The court failed to recognize that design and construction review under the NRC regulations, § § 50.1-110, are separate from EIS review under § § 51.1-.99. *See, e.g., supra* note 94. In failing to make this distinction, the court treated the analysis of plant construction and design under EIS review as superfluous to plant safety. Such an oversight is dangerous not only because of its impact on precedent, but also because it indicates that judicial review of the licensing decision of Diablo Canyon was less than complete.

Furthermore, the Court overlooked the fact that NRC's compliance to the letter of the CEQ regulations appears to contradict the NRC policy enunciated in an earlier case, which emphasized that NRC decisions regarding Core Melts must be based on *available* information. *See Union of Concerned Scientists*, 499 F.2d at 1086. In that case, the NRC expressly recognized its lack of analytical methods capable of making predictions of phenomenon suspected to occur during a Core Melt: "In absence of such perfection, adequate assurance of safety can be obtained from an appropriate conservative analysis *based on available expert information.* In areas of incomplete knowledge, conservative assumptions or procedures must be applied. *Id.* (quoting the Commission) (emphasis added). *See also* Minnesota v. United States Nuclear Regulatory Comm'n, 602 F.2d 419 (D.C. Cir. 1979)."There is no implication that Congress intended that the NRC ignore new knowledge or analysis in its licensing decisions. *Id.* at 419.

plied in a separate proceeding, on a separate issue, concluded that the possibility of an earthquake triggering a nuclear accident at Diablo Canyon is "so small as to be rated zero."[157]

Intervenors further challenged the NRC's decision not to apply its Interim Policy retroactively on two additional grounds. The first was based on the NRC's duty to supplement an EIS where significant new information or circumstances arise.[158] The second ground was based on the NRC's failure to construct a "Worst Case Analysis" for Diablo Canyon.[159]

1. Duty to Supplement

The NRC has a duty to supplement an EIS if it determines that there exists significant new circumstances or information relevant to the licensing of a nuclear power plant.[160] The duty to supplement arises under federal case law and pursuant to the regulations of the Council on Environmental Quality.[161]

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157. *See Mothers For Peace*, 751 F.2d at 1304. In citing this proposition the court referred to the "zero-release assumption" at issue in *Baltimore Gas*. *See supra* note 10. The "zero-release assumption" was a term used by the NRC in that case regarding the environmental effects of nuclear waste storage. *Id.* at 106. Nowhere in the Diablo Canyon licensing history did the NRC state that the probability of an earthquake triggering a nuclear accident is zero. On the contrary, the NRC staff acknowledged that the probability of an earthquake occurring greater than an SSE is extremely difficult to estimate, because of the large, associated uncertainties involved with such a prediction. *See supra* note 108. In applying its analysis, it appears that the court violated its own proscription on judicial overreaching, by making scientific predictions which it has stated should be left to the "expertise of the NRC." *See, e.g., supra* notes 12-14 and accompanying text.

158. *Mothers For Peace*, 751 F.2d at 1320.

159. *Id.* at 1331.

160. Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981). Although the NEPA does not contain a specific requirement of supplementation, courts have recognized that federal agencies have such a duty if there is significant new information relevant to a proposed action. *Id.* (citing 42 U.S.C. § 4332). *See also* Wisconsin v. Weinberger, 745 F.2d 412, 420 (7th Cir. 1984) (duty to supplement arises where new information reveals a "seriously different picture" of probable environmental effects not in original EIS); *Marsh*, 651 F.2d at 991 (supplementation required where modification of project added elements which had never had environmental impacts publicly analyzed); Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1025 (9th Cir. 1980) (further supplementation required where final and supplemented EIS for construction of dam did not examine report indicating dam might not withstand effects of earthquake at nearby fault).

Supplementation is required under the regulations of the Council of Environmental Quality (CEQ) if: "the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(i) (1985). The CEQ standard for determining the need for supplementation is essentially the same as that used for an original EIS — the operative language setting forth the standard is "major federal action" and "significance." *Marsh*, 651 F.2d at 991-92. *See* 40 C.F.R. § § 1508.18 & 1508.27 (1985).

161. See *supra* note 160 for a discussion of federal case law requiring duty to supplement. Under its original grant of authority, the CEQ was entitled to issue guidelines only. *See* Exec. Order No. 11514, 35 Fed. Reg. 4247 (1970), *reprinted in* 42 U.S.C. § 4321 (1982). In 1977, however, the CEQ was empowered with the authority to issue regulations to federal agencies to implement the procedural provisions of the NEPA. *See* Exec. Order No. 11921, 3 C.F.R. § § 123, 124 (1977), *reprinted in* 42 U.S.C. § 4321 (1982). The CEQ regulations governing the NRC are

The Council on Environmental Quality is empowered with the authority to issue regulations controlling federal implementation of the procedural provisions of the Environmental Procedures Act.[162]

The NRC, in its discretion, determined that supplementation of Diablo Canyon's EIS to include consideration of the possibility and impact of a Core Melt accident was not required.[163] In support of the NRC, the court of appeals erroneously stated that although the Interim Policy revealed new information relevant to the licensing of Diablo Canyon, the information was not significant because "the [NRC] continues to regard [Core Melt] accidents as highly improbable events."[164] On the contrary, the NRC's basis for instituting the Interim Policy was the discovery that its earlier assumptions of improbability were incorrect.[165]

2. "Worst Case Analysis"

Intervenors also argued that the NRC's failure to address the possibility of a Core Melt occurring at Diablo Canyon violated its duty to construct a "Worst Case Analysis" under regulations of the Council on Environmental Quality.[166] The Worst Case Analysis requirement provides that where an agency is dealing with scientific uncertainty or gaps in relevant information while preparing an EIS, it must disclose the uncertainties and set forth a

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at 40 C.F.R. § 1500 (1985).

162. *See supra* notes 161-62.

163. *See Mothers For Peace*, 751 F.2d at 1331. NRC determinations as to EIS supplementation are discretionary and will be upheld as long as found reasonable by a reviewing court. *See generally* People Against Nuclear Energy v. United States Nuclear Regulatory Comm'n, 678 F.2d 222, 234 (D.C. Cir. 1982) (agency determinations regarding supplementation upheld as long as reasonable); *Weinberger*, 745 F.2d at 418 (agency may not arbitrarily exercise discretion to supplement unless new information provides a *seriously* different picture of environmental impact); *Sigler*, 695 F.2d at 964 (standard of review for supplementation of an EIS is arbitrary, capricious, and abuse of discretion standards of sections 706(2)(A) and (D) of the APA); *Marsh*, 651 F.2d at 992 (reviewing court should uphold the agency's decision if reasonable).

164. *See Mothers For Peace*, 751 F.2d at 1331. The court's assertion regarding the improbability of a Core Melt occurring at the Diablo Canyon plant is itself incorrect, and thus unreasonable as a basis for denying EIS supplementation. *See, e.g., supra* note 157.

165. *See supra* note 150 regarding the NRC's statement that its previous policy regarding the law of probability of a Core Melt occurring was inaccurate due to errors in earlier estimates. The court, in *Mothers For Peace*, however, stated that the NRC did not, by its Interim Policy, find its original assumptions incorrect. *Mothers For Peace*, 751 F.2d at 1331. The court's distinction between inaccuracy and incorrectness is baffling.

166. *Mothers For Peace*, 751 F.2d at 1302 (citing 40 C.F.R. § 1502.22(b)). The CEQ Worst Case Analysis regulation provides that:

> If (1) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are exorbitant or (2) the information relevant to adverse impacts is important in the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurance.

40 C.F.R. § 1502.22(b) (footnote omitted).

Worst Case Analysis of the effects of the proposed action.[167] The Council of Environmental Quality exempts from the regulation's coverage, however, any EIS drafted before the effective date of the regulation.[168] Some courts have required a retroactive Worst Case Analysis, claiming that the regulation merely codifies judicially created principles of the NEPA's mandate for full disclosure of the potential consequences of agency action where scientific uncertainty exists.[169] In the Diablo Canyon case, however, the NRC with court approval, strictly complied with procedural requirements of the Council on Environmental Quality, declining to construct a Worst Case Analysis for Diablo Canyon since a draft EIS had been issued before the regulations went into effect.[170]

D. Emergency Planning

Another result of the accident at Three Mile Island was the promulgation of binding regulations by the NRC providing for review standards for emergency planning.[171] Emergency plans at a nuclear power plant site must be found adequate to protect public safety before an operating license will be

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167. *See* 40 C.F.R. § 1502.22(b), *supra* note 166.

168. *See Mothers For Peace*, 751 F.2d at 1303 (citing 40 C.F.R. § 1506.12(a)).

169. *See Sigler*, 695 F.2d at 971.

170. *See Mothers For Peace*, 751 F.2d at 1303.

171. The NRC published guidelines for emergency planning at reactor sites in 1974. Sylves, *Nuclear Power Plants and Emergency Planning: In Intergovernmental Nightmare*, 1984 PUBLIC ADMIN. L. REV. 393, 394. No comprehensive regulations, however, were promulgated until after the accident at Three Mile Island. *See County of Rockland*, 709 F.2d at 769. Three Mile Island demonstrated that the guidelines were completely inadequate to plan for and respond to the effects of nuclear accidents. Seacoast Anti-Pollution League of New Hampshire v. Nuclear Regulatory Comm'n, 690 F.2d 1025, 1028 (D.C. Cir. 1982) (citing, 1 Nuclear Regulatory Comm'n Special Inquiry Group, *Three Mile Island: A Report to the Commissioners and to the Public* (Rogovin Report) 139 P.A. at 197-205 (1980)). *See also* 1979 ANN. REP., *supra* note 39, at 37 (Kemeny Commission Report indicating that emergency response at Three Mile Island was "dominated by an atmosphere of almost total confusion").

As a result of Congressional investigations after Three Mile Island, and the findings of the Kemeny Commission, an Emergency Planning Rule was issued by Executive Order in 1980. *See* Exec. Order No. 12148, 45 Fed. Reg. 55,402, 3 C.F.R. 376, 412 (1980). Under that rule the NRC and the Federal Emergency Management Agency (FEMA), were given joint responsibility for coordinating and evaluating emergency response plans at reactor sites. *County of Rockland*, 709 F.2d at 770. In response to Three Mile Island and the Emergency Planning Rule, the NRC, in 1980, enacted emergency planning regulations. *County of Rockland*, 709 F.2d at 769. *See* Emergency Plans, 10 C.F.R. § 50.47 (1985) and Emergency Planning and Preparedness for Production and Utilization Facilities, 10 C.F.R. pt. 50, app. E (1985).

Recently the NRC appears to have forgotten the lessons of Three Mile Island. Since 1980 the NRC has attempted to eliminate the issue of emergency preparedness exercises from the hearing process. *See Union of Concerned Scientists*, 735 F.2d at 1445 (amendment to 70 C.F.R. § 50.47(a)(2) eliminating emergency preparedness from authorization of operating license). In addition, the NRC has had its decisional authority extended to permit it to issue a license absent FEMA approval of state or local emergency plans. 1983 A.B.A. SEC. PUB. UTIL. L. REP. 42 (citing the NRC Authorization Act of 1980, Pub. L. No. 96-295, § 109(b)(1), 94 Stat. 780, 784). Section 109(b)(1) provides that the NRC may issue an operating license absent FEMA approval if the NRC believes that adequate protective measures will be taken in the event of a radiological emergency. *Id.*

granted by the NRC.[172] Although the regulations provide some structure for emergency planning and review, they do not specify that emergency plans must account for adverse weather conditions or hazardous site characteristics.[173] Therefore, the NRC has broad discretion to determine adverse conditions that it believes should be considered in emergency planning in each licensing case.[174]

Intervenors argued before the NRC that PG&E's emergency plans for the Diablo Canyon plant were deficient because they did not plan for the occurence of a concurrent earthquake and radiologic accident.[175] The NRC had announced its position on this issue in its 1981 *San Onofre* decision.[176] In that proceeding, the NRC held that its regulations do not require consideration of the impact of earthquakes on emergency planning.[177] In addition, it was decided in *San Onofre* that any change in its regulations to provide for consideration of earthquake effects on emergency planning should be decided on a generic, as opposed to a case-by-case basis.[178] The NRC has used generic rules in the past to resolve recurrent, factual issues in reactor licensing,[179] since generic rules promote administrative efficiency by precluding relitigation of the

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172. *See* Emergency Plans, 10 C.F.R. § 50.47(a)(1)(1985):

> [e]xcept as provided in paragraph (d) of this section, [relating to low power authorization] no operating license for a nuclear power plant will be issued unless a finding is made by the [NRC] that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

Id.

173. *See In re Pacific Gas*, 19 N.R.C. at 943. The NRC has stated that emergency plans must be capable of responding to a wide spectrum of accidents. *Id.* (citing 44 Fed. Reg. 61,123 (1979)). Neither 10 C.F.R. § 50.47 nor Appendix E of the NRC's regulations on Emergency Planning specify the accidents or adverse consequences to which such emergency plans must respond. *Id.* As a result of this non-specificity, the NRC has broad discretion to determine, in individual licensing proceedings, the types of adverse conditions emergency plans must respond to at each particular reactor. Although this type of flexibility may enable the NRC to consider conditions not recognized in its regulations, it also, however, allows the NRC to *disregard* any conditions not specified in its regulations.

174. *See id.*

175 *See In re Pacific Gas*, 19 N.R.C. at 937.

176. *See Mothers For Peace*, 751 F.2d at 1306 (citing 14 N.R.C. 1091 (1981)).

177. *Id.* (citing 14 N.R.C. at 1091-92 (1981)):

> Current regulations do not require consideration of the impacts on emergency planning of earthquakes which cause or occur during accidental radiological release. Whether or not emergency planning should be amended to include these considerations is a question to be addressed on a generic, as opposed to a case-by-case basis.

Id.

178. *See id.*

179. Note, *The Use of Generic Rulemaking to Resolve Environmental Issues in Nuclear Power Plant Licensing*, 61 VA. L. REV. 869, 880 (1975):

> [A] generic factual issue of fact is an issue common to several (or all) licensing hearings, that should be resolved identically in at least a substantial number of them. . . . A generic issue is to be distinguished from a 'local' issue — that is, a particularized or unique local effect of the construction and operations of a nuclear power plant.

Id.

same factual issues in subsequent licensing adjudications.[180] In 1981, when intervenors presented the issue of earthquake effects on emergency planning at Diablo Canyon, the NRC stated that it would reconsider the policy that it had announced in *San Onofre*.[181] The NRC, however, did not resolve the issue until it granted an operating license for Unit 1 of Diablo Canyon to PG&E in 1984.[182] At that time it effectuated a concurrent order which reaffirmed its *San Onofre* policy to proceed on a generic basis.[183]

The NRC's decision to proceed on a generic basis has delayed the final resolution of this issue indefinitely. It also has effectively denied the intervenors objecting to Diablo Canyon's operation a hearing on the earthquake-emergency planning issue, since administrative rules generally have only prospective application.[184] Any rule regarding the earthquake-emergency planning issue promulgated by the NRC in generic proceedings will not be retroactively applied to the Diablo Canyon plant unless the NRC decides to give such rules retroactive effect.[185]

On appeal, intervenors challenged the NRC's decision as to the emergency planning issue on three grounds:[186] (1) that the earthquake-emergency planning issue is material to the licensing decision at Diablo Canyon, and thus cannot be precluded from the AEA section 189(a) hearing requirement,[187] (2)

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180. *Id.*

181. *Mothers For Peace*, 751 F.2d at 1305 (citing *In re Pacific Gas*, 19 N.R.C. at 938). In response to the *San Onofre* decision, the NRC technical staff reported its view on the NRC's policy of generic consideration of earthquakes:

> [I]t is the judgment of the staff that for most sites earthquakes need not be explicitly considered for emergency planning purposes because of the very low likelihood that an earthquake severe enough to disturb onsite or offsite planned responses will occur concurrently with or cause a reactor accident. *Planning for earthquakes. . . in areas where seismic risk of earthquakes to offsite structures is relatively high may be appropriate (e.g., for California sites and other areas of relatively high seismic hazard in the Western U.S.).*

In re Pacific Gas, 19 N.R.C. at 941 (emphasis added).

182. *In re Pacific Gas*, 19 N.R.C. at 937-38.

183. *Id. See also Mothers For Peace*, 751 F.2d at 1305.

184. *See* Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (agency rules apply prospectively only and are not binding on prior agency decisions unless agency chooses to give rule retroactive effect); American Airlines, Inc. v. Civil Aeronautics Bd., 359 F.2d 624, 630 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843 (reaffirming *Chenery* rule). Agency decisions in adjudicatory proceedings, on the other hand, apply retroactively (e.g., to the parties before the agency). *Id. See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969) (policy of adjudicated cases may apply prospectively, but only as precedent and do not have legal effect of binding rules).

The course of action that the NRC has chosen to take in the Diablo Canyon case, i.e. to initiate rulemaking only after the plant has been licensed, effectively removes from that case any application of an NRC generic rulemaking proceeding on the issue of earthquake effects on emergency planning. Thus, the San Onofre and Diablo Canyon plants, which both face seismic risk, will not benefit from a rule should the NRC decide to promulgate one.

185. *See supra note* 184.

186. *See Mothers For Peace*, 751 F.2d at 1306-07.

187. *Id.* See *supra* note 93 for a discussion of section 189(a). Section 189(a) requires that once an NRC licensing hearing has begun, it must encompass all material factors bearing on the licensing decision raised by the requesting party. *Union of Concerned Scientists*, 735 F.2d at

that the resolution of the earthquake emergency planning issue on a generic basis is inappropriate,[188] and (3) that the failure of the NRC to commence rulemaking proceedings prior to issuing an operating license to PG&E denied intervenors an opportunity to participate in the hearing process on the issue.[189] The court deferred to the NRC's substantive and procedural discretion as to all three challenges.[190]

1437, 1443-46. A requesting party must, however, first overcome a threshold test of materiality which includes a substantial burden of proof. *Vermont Yankee*, 435 U.S. at 553-54, *on remand*, 685 F.2d 459 (D.C. Cir. 1982), *rev'd sub. nom.*, *Baltimore Gas*, 462 U.S. 87 (1983). The threshold test is equivalent to the burden of proof requirement in the civil litigation concept of a prima facie case. *Id. See also Union of Concerned Scientists*, 735 F.2d at 1448 (to avoid requesting summary disposition party must identify and support specific facts upon which reasonable inferences can be drawn that emergency plans are not safe) (citing 10 C.F.R. § § 2.743(c), 2.749).

188. *See Mothers For Peace*, 751 F.2d at 1307. Beginning in the late 1970's the NRC began experimenting with generic rulemaking to resolve recurrent, complex factual issues. Note, *The Use of Generic Rulemaking*, *supra* note 179, at 880. Courts have generally approved generic rules where factual issues do not involve particularized situations. *State of Minnesota*, 602 F.2d at 416-17. Generic rules for local or particularized issues diminish procedural fairness unacceptably by circumventing the greater procedural protection afforded by adjudication. *Id.*

189. *See Mothers For Peace*, 751 F.2d at 1307. Although the NRC has discretion to change its procedures on a case-by-case basis, due process requires timely notice be given to the parties involved. West Chicago, Ill. v. United States Nuclear Regulatory Comm'n, 701 F.2d 632, 647 (1983). The NRC did not give intervenors in the Diablo Canyon case adequate notice, that it was changing its San Onofre policy as it changed its policy concurrent with issuing its order in that case. *See In re Pacific Gas & Elec. Co.*, 20 N.R.C. 249, 257 (1984). *See also supra* note 183.

In response to challenges that the NRC's delay prejudiced intervenors' hearing rights, NRC Chairman Pallodino noted that "[w]hile the delay on the. . . [NRC's] part to address the generic policy issue [was] regrettable, it would be too speculative to conclude that it prejudiced. . . intervenors. . . ." *In re Pacific Gas*, 20 N.R.C. at 257. The NRC gave as its reason for the delay the presence of "other pressing Commission business." *Id.* at 255. The NRC stated that "in retrospect," because it disagreed with its staff recommendations not to pursue on a generic basis, it should have initiated the rulemaking sooner. *Id.*

190. *See Mothers For Peace*, 751 F.2d at 1307-09. As to intervenors first ground, the court of appeals found that the NRC had not violated section 189(a)'s hearing requirement by excluding the earthquake issue from emergency planning review, based on findings that: (1) the NRC's finding of immateriality removed the earthquake issue from section 189(a) coverage, and (2) the finding of immateriality was within the NRC's discretion and was based on well articulated scientific conclusions. *Id.* at 1037. This type of circular reasoning indicates that the court failed to decide on the issue.

As to the second ground, the court approved the NRC's decision to generically consider the earthquake-emergency planning issue on two bases: (1) it found that the NRC, having decided that the earthquake risk was immaterial, was justified in treating the issue as a generic problem, and (2) it found that although a substantial earthquake risk presently exists only at two California reactor sites, such a risk cannot be said to be unique. *Id.* at 1308. As to the court's first ground, its analysis seems to indicate not only that a different standard of materiality is applied to adjudicatory versus rulemaking proceedings, but the logical conclusion of this analysis is that the NRC considers issues in its generic proceedings to be immaterial. This notion that a different standard of materiality applies to adjudiciatory versus rulemaking proceedings bears no support from the NRC regulations, *see* 10 C.F.R. § 2.749 (1985)(test for materiality), nor case law, *see Vermont Yankee*, 435 U.S. at 553-54 (threshold test for materiality announced by the court did not differentiate between adjudicatory and generic rulemaking proceedings). In addition, court approval of the NRC's decision to review the earthquake issue on a generic basis not only significantly departs

E. Motion to Supplement

To add to the confusion and controversy surrounding the Diablo Canyon licensing case, several days before oral arguments were scheduled to be heard before the court of appeals, Representative Richard Ottinger[191] and NRC Commissioner James Asselstine,[192] moved to supplement the administrative record.[193] Representative Ottinger and Commissioner Asselstine accused the NRC of licensing the Diablo Canyon plant in knowing disregard of the insufficiency of the record to support a "reasonable assurance" finding on the emergency planning issue.[194] They argued that certain documents and transcripts relating to the NRC deliberations would reveal improper and illegal actions on behalf of the NRC, and should thus be considered by the court as part of the administrative record.[195]

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from prior judicially approved administrative procedure, but it also contradicts recent statements made by the District of Columbia court, that evaluation of emergency planning at nuclear power plant sites is a particularized issue. *See Union of Concerned Scientists*, 735 F.2d at 1451. The court stated that:

> [E]mergency preparedness exercises. . . are not evaluated in terms of pre-established criteria; they are evaluated to ensure that they do not reveal any fundamental inadequacies in the nature or implementation capacity of emergency preparedness plans. . . . Exercise evaluations focus on the coordination of police, fire, medical and other service personnel who operate under the auspices of several independent entities. . . . Evaluation of such exercises, insofar as it involves the adequacy of community preparedness plans, will be as much within outside participant's expertise, or. . . FEMA['s], as within the expertise of the NRC staff.

Id.

The basis for intervenors third challenge was made on the grounds that the NRC's delay violated due process, because intervenors were not given a hearing in a meaningful time or manner on the earthquake issue as it applied to Diablo Canyon. *Mothers For Peace*, 751 F.2d at 1309. *See, e.g., supra* note 184. Because, however, the right to a hearing exists only as to material issues, *see supra* note 187, intervenors were effectively foreclosed from making such a challenge. *Mothers For Peace*, 751 F.2d at 1309.

191. Rep. Richard Ottinger was the Chairman of the House Subcommittee on Energy, Conservation and Power at the time the Diablo Canyon plant was licensed. *Mothers For Peace*, 751 F.2d at 1323.

192. *Id.* NRC Commissioner James Asselstine dissented from the NRC's decisions to license Diablo Canyon at both low power and full power operation stages. *Id.*

193. *Id.* Supplementation of an agency record is appropriate where the agency has acted in bad faith or has relied on information outside the administrative record. *Id.* at 1327 (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971)) (reviewing court may require agency explanation of record where bare record does not disclose factors considered by such agency).

In cases involving technical disputes where an agency is making assumptions, some courts have required the agency to explain its assumptions, and if necessary, the court may go beyond the administrative record to determine if the agency considered all relevant factors, and to require the agency to explain the policies on which it relied. *See infra* note 159.

194. *Mothers For Peace*, 751 F.2d at 1323.

195. *Id.* Representative Ottinger, after reading the NRC's brief on appeal, wrote a letter to NRC Chairman Palladino. *Id.* Representative Ottinger asserted that in his view, the NRC's brief "seriously misstated" actions taken by the NRC in its decision denying petitioners an on-the-record hearing of the earthquake emergency planning issue. *Id.* Representative Ottinger called upon the NRC to correct the statements and release the hearing transcripts. *Id.* Specific allega-

The court of appeals denied the motion to supplement.[196] While recognizing that supplementation of an agency record may be appropriate where the agency has acted in bad faith or has relied on information outside the administrative record,[197] the court found that the grounds asserted by Representative Ottinger and Commissioner Asselstine were insufficient to warrant supplementation.[198] The court further stated that if in fact the NRC lacked a basis for its assumptions, the proper course for the court would be to reverse and remand the issue to the NRC, and not require supplementation.[199] Rather than doing either, the court upheld the NRC's decision to issue the license for Diablo Canyon.

In her dissent,[200] Judge Wald asserted that the court's denial of the motion to supplement, without first conducting an in camera examination of the documents and transcripts, was an abdication of the court's responsibility to provide meaningful judicial review.[201] Judge Wald emphasized that the un-

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tions made by Representative Ottinger against the NRC included: (1) disregard of the advice of the NRC's General Counsel that the earthquake issue was material to emergency planning, (2) the NRC's failure to order an adjudicatory hearing was primarily for the purpose of avoiding delay in the start up of Diablo Canyon, and (3) NRC reliance on material not part of the administrative record. *Id.* at n.223.

Commissioner Asselstine voiced basically the same allegations against the NRC as did Representative Ottinger: (1) the absence of a factual basis to support the NRC's conclusions on the earthquake issue, (2) NRC reliance on material not part of the administrative record, and (3) that the NRC's decision was motivated solely to avoid operational delay at Diablo Canyon. *Id.* at n.224.

196. *Id.* at 1323.

197. *See Volpe*, *supra* note 193.

198. *Mothers For Peace*, 751 F.2d at 1326.

> What passes for proof of 'bad faith' on this motion are inferences — inferences based on the speculation and conjecture of a dissenting Commissioner and a chairman of a House oversight subcommittee who have read between the lines of the Commission's deliberations. . . Petitioners' characterization of the probity of these transcripts must be further discounted by the likelihood that. . . [they] read as much into the transcripts as they read in them.

Id. at 1328.

199. *Id.* at 1326. The court seems to have missed the point of the Motion to Supplement. The predecisional transcripts would have provided a basis for substantiating petitioners' claims — without the transcripts as evidence of improper conduct on the part of the NRC, the court likely would not, and did not, have a reason to remand the case. The seriousness of petitioners' allegations should have put the court on notice as to the propriety of the NRC's actions. *See id.* at 1331 (Wald, J., concurring in part and dissenting in part).

200. *Id.* at 1329-34 (Wald, J., concurring in part and dissenting in part). Judge Wald concurred with the majority on all parts of the case except for its decision relating to the complicating effect of earthquakes on emergency planning, and the Motion to Supplement the record. *Id.* at 1239.

201. *Id.* at 1329-40. Judge Wald pointed to three NRC conclusions which appeared to be unexplained by the record: (1) The NRC cited no specific record support for its conclusion that it is unlikely an earthquake would occur contemporaneously with a radiological accident, (2) the NRC's conclusion that emergency planning for other natural phenomenon, such as tornados or hurricanes, is flexible enough to handle earthquake disruptions appears to be based on conjecture, and (3) the nature of emergency planning is to respond to unlikely events. *Id.* at 1333-34. Judge Wald asserted that the second and third of these conclusions made by the NRC appear to be based on "unexplained extrapolations from massive and, for practical purposes, an incomprehensi-

foreseen calamities which have taken place throughout the Diablo Canyon licensing history, along with serious allegations against the NRC's decision-making process by responsible officials, justified judical review of the transcripts to determine if there existed a sound factual basis for the NRC's decision.[202]

III. ANALYSIS

The risk of catastrophic consequences resulting from an incorrect nuclear power plant licensing decision necessitates informed and reasoned decision-making by both the NRC and the courts. In *Mothers for Peace*,[203] the NRC, with court approval, determined that the Diablo Canyon nuclear power plant was safe to operate, absent a substantive inquiry into the issues of Construction Quality Assurance,[204] the possibility of a Core Melt,[205] and the complicating effects of an earthquake on emergency planning.[206] Both the NRC and the court of appeals determined that these issues were insignificant to a finding of safety at the Diablo Canyon Plant.[207] The controversy surrounding this decision stems from the recognition of several concerns about the adequacy of the NRC licensing process to assure nuclear power plant safety.

A. NRC Policy Regarding Nuclear Safety

One reason for concern is the NRC's treatment of scientific and technologic uncertainties involved in the decision-making process.[208] Since nuclear power is an evolving technology,[209] NRC licensing decisions involve both assumptions relating to the risk associated with the technology and predictions that technology will resolve any uncertainties which may threaten safe plant operations.[210] The failure of the NRC to construct a long term nuclear policy allows the NRC discretion to resolve occurring safety problems after the fact.[211] An ad hoc approach to regulatory oversight of nuclear safety is ineffective because of the risk that substantial harm will be done before the public can benefit from the protection of a well planned policy.[212]

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ble mound of data, as well as what appears to be intuitive assumptions with no evident basis in the record." *Id.* at 1333.

202. *Id.* at 1330.

203. 751 F.2d 1287 (D.C. Cir. 1984).

204. *See supra* notes 130-44 and accompanying text.

205. *See supra* notes 145-70 and accompanying text.

206. *See supra* notes 171-90 and accompanying text.

207. *See Mothers For Peace*, 751 F.2d at 1293.

208. *See supra* note 11. The risk inherent in the NRC's approach to nuclear safety regulation is that present scientific knowledge is or may be ignorant of entire categories of harm, such that after the passage of time the actual danger to society is much greater than projected. Citizens For Safe Power v. United States Nuclear Regulatory Comm'n, 524 F.2d 1291, 1233 (Bazelon, J., concurring).

209. *See* Fort Pierce, Util. Auth. v. United States, 606 F.2d 986, 996 (D.C. Cir. 1979), *cert. denied*, 44 U.S. 842 (1979).

210. *See supra* notes 85-86.

211. *See supra* notes 81-90 and accompanying text.

212. *See, e.g.*, County of Rockland v. United States Nuclear Regulatory Comm'n, 709 F.2d 766 (2d. Cir. 1983), *cert. denied*, 104 S.Ct. 485 (1984). (Three Mile Island accident taught that

Another concern is the fear of complacency within the NRC. An NRC report issued after the Three Mile Island incident concluded that a primary problem within the NRC regulatory process is the complacent attitude of many members towards the treatment of nuclear safety.[213] Evidence of this complacency within the NRC may be evidenced not only by the lack of a long term nuclear policy, but also by its failure to codify standards that address particular safety issues which it has already recognized.[214] Because Congress intended that licensing standards would vary as more was learned about the hazards of nuclear power,[215] the NRC must apply standards in licensing proceedings which are based on available information significant to safety.[216] Current information which has been available to the NRC since at least 1982 indicates that current NRC seismic design criteria and methods for qualification of seismic equipment may not be adequately conservative to provide assurances that the equipment can resist seismically induced loads.[217] There is

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ad hoc responses are ineffective.) This possibility became reality in the case of *Three Mile Island*. *See supra* note 150 (accident at Three Mile Island worst in United States nuclear history).

213. *See* 1979 NRC ANN. REP. *supra* note 39, at 1. After the Three Mile Island Accident in 1979 the NRC re-examined its primary goals in nuclear regulation and set out a process to reappraise its priorities. "If there is a common thread recreated in the ongoing reassessments, it is a complacency that has served to undercut the many conscientious efforts to assure nuclear safety." *Id.*

214. *See, e.g.*, 49 Fed. Reg. at 9356. With respect to its fifteen year attempt to codify regulations regarding accident risks, the NRC stated that:

> [P]ending completion of rulemaking activities in the areas of emergency planning, siting criteria, and design and operational safety all of which involve considerations of serious accident potential, the Commission finds it essential to improve its procedures for describing and disclosing to the public the basis for arriving at conclusions regarding the environmental risks due to accidents at nuclear power plants. . . .

Id. (footnote omitted).

A 1980 letter from CEQ Chairman Gus Speth to NRC Chairman John Ahearne characterized NRC treatment of potential accidents and their environmental impacts in EIS's as "largely perfunctory, remarkably standardized, and uninformative to the public. . . ." *Id.* at 9357. Chairman Speth noted that most NRC EIS's fail to consider Core Melts, despite the fact that these accidents have the potential for environmental harm and have led to the greatest public concern. *Id.*

215. *See Fort Pierce* 606 F.2d at 996.

216. See *supra* note 160 for a discussion of the duty to supplement EIS where significant information is learned.

217. *See Nuclear Power In An Age of Uncertainty*, (Washington, D.C., U.S. Congress, Office of Technology Assessment, OTA-216, February, 1984). Since 1978 the NRC has been required by Congress to prepare a list of generic reactor problems. *Id.* at 90. Among the 15 most important unresolved safety issues reported by the NRC in 1982 were seismic design criteria and seismic qualifications of equipment in operating plants:

> Seismic Design Criteria: while many conservative factors are incorporated into the seismic design process, certain aspects of it may not be adequately conservative for all plants. Additional analysis is needed to provide assurance that the health and safety of the public is protected. . . .
>
> Seismic Qualifications of Equipment in Operating Plants: the design criteria and methods for seismic qualifications of equipment in nuclear plants have undergone significant change. *Consequently, the margins of safety provided in existing equipment to resist seismically induced loads may vary considerably and must be reassessed.*

Id. at 91 (emphasis added) (citing United States Nuclear Regulatory Comm'n, "Unresolved

no evidence in the Diablo Canyon licensing record, however, indicating an analysis of the seismic equipment to this regard. In addition, despite the grave consequences associated with radiologic accidents, [218] the NRC has never, in its thirty year existence, codified its position on the treatment of serious nuclear power plant accident risks.[219] Consequently, the NRC's assumptions regarding the probability and impact of radiologic accidents have never been subject to public scrutiny and analysis in agency rulemaking proceedings.[220]

The NRC's failure to codify the treatment of accident risks also insulates its informal safety standards from scrutiny in adjudicatory proceedings. The NRC has held that compliance with existing regulations provides a sufficient basis for a finding that a nuclear power plant is safe.[221] This compliance standard permits the NRC to decide both how and if new information should be applied in any particular licensing case.[222] As was demonstrated in the Diablo Canyon case, for example, risks associated with the plant which have not been addressed by the regulations, may be deemed by the NRC to be immaterial to the licensing of the plant, and thus not considered when evaluating plant safety.[223] The application of uncodified safety standards is insulated from attack because courts appear to give NRC decisions based on these informal standards the same level of deference that they give to its decisions based upon formally codified rules.[224]

An argument may be made that the use of informal standards as opposed to codified regulations allows the NRC the flexibility to address complex safety issues arising from an uncertain and rapidly changing technology. Only by eliminating the compliance standard, however, can such a flexible approach work consistently with the NRC's responsibility of assuring nuclear safety.[225]

Safety Issues Summary," Aug. 20, 1982).

218. *See Mothers For Peace*, 751 F.2d at 1304.

219. See *supra* note 146 for a discussion of a Core Melt.

220. *See, e.g., supra* note 148. Rather, the NRC has treated the issue on a policy basis, thus free from public decision-making. *See, e.g., supra* notes 147-49.

221. *See* Citizens For Safe Power, Inc. v. United States Nuclear Regulatory Comm'n, 524 F.2d 1291 (D.C. Cir. 1975) (AEA safety determinations are made upon compliance with NRC regulations).

222. Under the compliance standard a petitioner is foreclosed from putting the sufficiency of the regulations themselves in issue, but only whether the reactor lives up to pre-established regulations. *See id.* The problem with this approach to NRC licensing is the danger that NRC standards become self-reinforcing, failing to incorporate and impose higher safety standards as nuclear technology advances.

223. *See, e.g., Mothers For Peace*, 751 F.2d at 1305-08. Because, for example, earthquake risks are not included in the NRC regulations governing emergency planning, *see supra* note 177, the NRC was given broad discretion to dismiss such risks, *see supra* notes 173-90 and accompanying text.

224. The Supreme Court, in *Baltimore Gas*, when emphasizing that reviewing courts must be deferential to NRC decisions, made no distinction between NRC decisions based upon formal or informal standards. *See Baltimore Gas*, 462 U.S. 87, 103 (1983). Rather, the Court's reasoning for judicial deference appears to be based solely upon its perceived notion of the expertise of the NRC. *Id.*

225. The NRC has, under the AEA and its own regulations, the responsibility to postpone the issuance of a license for a nuclear power plant if such issuance would be inimical to public health or safety. *See supra* note 2. *See also supra* note 157.

The NRC has a duty both under the Atomic Energy Act and federal case law to consider all relevant available information in its licensing decisions, regardless of whether information has been formally incorporated into an NRC regulation.[226] Thus, if information significant to safety is discovered, such as the probability of the occurrence of a Core Melt, or a report regarding the adequacy of seismic equipment qualifications, the NRC should nevertheless apply the information to its licensing decision. Relevant information relating to the supplementation of Diablo Canyon's EIS to incorporate consideration of a Core Melt was denied not because the information was immaterial to plant safety, but rather because of the NRC's adherence to procedural provisions of the Interim Policy.[227] Finally, where new information has not been subject to substantive analysis and critical review during rulemaking proceedings, it does not deserve the same judicial deference.

It should also be recognized that the compliance standard presents a problem even where the NRC has codified treatment of safety issues in its regulations, because it wrongly assumes that existing regulations provide sufficient standards to assure nuclear power plant safety. The NRC's regulations relating to site investigations, for example, specifically state that they are incomplete due to lack of expertise.[228] Given that the judgment of site suitability is a critical point in nuclear power plant licensing,[229] it would be more consistent with the NRC's responsibility to assure nuclear safety, if it were to adopt a policy that site investigations require comprehensive site specific evaluations in each licensing case.[230] In this way, incomplete siting criteria could be re-evaluated and supplemented as more is learned through each site investigation.[231]

Another concern regarding the adequacy of the NRC's treatment of nuclear safety is its categorization of a safety issue as a generic problem, thereby avoiding the responsibility of resolving the issue before licensing the plant.[232]

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226. *See supra* note 160.

227. *See supra* note 152. The NRC refused to apply the new risk assessment methods outlined by its Interim Policy to the Diablo Canyon plant. Part of the purpose of the Interim Policy was to account for site specific hazards and to improve the NRC's risk assessment methods. *See* 49 Fed. Reg. at 9357-58. The CEQ, in response to the Interim Policy, encouraged the NRC to "consider preparing supplemental accident analyses for plants currently licensed for operation, particularly for those. . . with unique features suggesting higher risk. . . ." *Id.* at 9358.

228. *See* Seismic and Geologic Citing Criteria For Nuclear Power Plants, 10 C.F.R. § 100.1(b) (1985): "Insufficient experience has been accumulated to permit the writing of detailed standards that would provide a quantitative correlation of all factors significant to the question of acceptability of reactor sites." *Id.*

229. North Anna Envtl. Coalition v. United States Nuclear Regulatory Comm'n, 533 F.2d 655, 659 (D.C. Cir. 1976) (citing *Union of Concerned Scientists*, 499 F.2d at 1090).

230. The term site specific means that such investigations would be required to analyze all of the possible effects of the site and its environs on plant safety, and not just those site characteristics and evaluations enumerated in the regulations. If, for example, the U.S. Geological Survey had conducted offshore explorations, it may have discovered the existence of the Hosgri Fault prior to Diablo Canyon's construction. *See supra* notes 114-17 and accompanying text.

231. As with the all ongoing NRC accident risk assessment methods, the NRC should approach plant evaluations so that the investigations themselves identify the uncertainties in its probabalistic assumptions. *See, e.g.*, 49 Fed. Reg. 9357 (1984).

232. *See* 1979 NRC ANN. REP., *supra* note 39, at 38. The Kemeny Commission Report on

Although courts generally have approved of the use of generic rules where factual issues do not involve particularized situations,[233] the application of generic rules to local issues diminishes procedural fairness by circumventing the procedural protections afforded by adjudication.[234] *Mothers for Peace* illustrates this problem.[235]

The NRC's decision in *Mothers for Peace*, to treat the earthquake-emergency planning issue generically, should be viewed with skepticism for several reasons. First, both the NRC and the court of appeals concluded that despite the substantial earthquake risks known at only two California nuclear power plant sites, Diablo Canyon and San Onofre,[236] such risks are not particular to those plants.[237] Labeling a problem currently known to occur at approximately[238] only 2.5% of all nuclear power plants as generic, departs significantly from judicially approved administrative procedure.[239] Second, the court in *Mothers For Peace* failed to consider the fact that emergency planning is itself a particularized issue.[240]

B. Excessive Deference By Reviewing Courts

An issue central to nuclear power plant safety is the appropriateness of the excessive deference that reviewing courts give to NRC decisions involving complex technical and scientific problems.[241] Because reviewing courts often lack both the technical expertise[242] and the statutory authority to conduct sub-

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Three Mile Island stated that there was evidence suggesting that the NRC labels a problem as generic in order to postpone the decision on a difficult safety question: "Insufficient attention to the 'ongoing', process of assuring nuclear safety, as exemplified by the NRC's categorization of a safety issue as a 'generic problem. . .' [relieves] the licensee of responsibility for resolving the issue before licensing." *Id.*

233. *See* Minnesota v. United States Nuclear Regulatory Comm'n, 602 F.2d 412, 416-17 (D.C. Cir. 1979).

234. *Id.*

235. *See Mothers For Peace*, 751 F.2d at 1305-09. The NRC's decision to treat the earthquake-emergency planning issue at Diablo Canyon as a generic issue, despite the particularity of the earthquake risk to the plant, and the particularity of emergency planning itself, resulted in denying intervenors a hearing on that issue as it applied to Diablo Canyon. *See supra* note 190.

236. *Id.* at 1308-09. In fact, the court was reluctant at all to conclude that the risk was specific to those plants. "Even if it were *currently* believed that Diablo Canyon and San Onofre were the only nuclear facilities in America located in areas of significant seismicity, future research might reveal the existence of faults near other facilities." *Id.* at 1309 (emphasis in original). At the time Diablo Canyon was licensed, it and San Onofre were the only plants of record at which substantial seismic hazards were detected.

237. *Id.*

238. At the time Diablo Canyon was licensed, there were 84 nuclear power plants licensed to operate in the United States. *See Nuclear Power in an Age of Uncertainty*, *supra* note 217, at 87. Statistically, Diablo Canyon and San Onofre out of 84 plants, represents roughly 2.5%.

239. *See supra* note 187. Such a figure should reasonably cause the issue to be "particularized."

240. *See Union of Concerned Scientists*, 735 F.2d at 1451.

241. *See, e.g., supra* note 12.

242. *See* Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 67 (D.C. Cir. 1976) (Bazelon, J. concurring) (en banc), *cert. denied*, 426 U.S. 941 (1976). Judges are, for the most part, "technically illiterate." *Id.* at 67. *See also* International Harvester Co. v. Rockelhaus, 478

stantive review of NRC decisions,[243] it is important that these courts closely scrutinize the procedures applied in NRC licensing proceedings to insure that they comply with federal statutory and regulatory requirements.[244] Although the courts defer greatly to NRC resolutions of technical disagreements and difficult safety questions, its decisions are not immune from review.[245] The decisions whether to follow federal safety standards[246] or the procedural requirements of the Administrative Procedure Act,[247] are not matters committed to agency discretion.[248] Likewise, although the standard for judicial review of

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F.2d 615, 651 (D.C. Cir. 1973) (Bazelon, C.J., concurring). Chief Justice Bazelon stated that the court did not have "technical know-how" to understand the agency decision. *Id.*

243. *See* Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc. 435 U.S. 519, 558 (1978). The function of judicial review of NRC decisions is essentially procedural. *Id.* The Atomic Energy Act gives the NRC authority to make determinations on nuclear safety issues. Reviewing courts must uphold such determinations as long as they are reasonable. *See, e.g., Minnesota*, 602 F.2d at 419 (NRC decides the ultimate question of certainty implicit in health and safety judgments and resolves technical disagreements); *County of Rockland*, 709 F.2d. at 776 (Congress gave NRC considerable latitude to decide difficult safety issues); Westinghouse Elec. Corp., v. United States Nuclear Regulatory Comm'n, 598 F.2d 759, 771 (3rd Cir. 1979). The AEA's delegation of authority to NRC is " 'virtually unique in the degree to which broad responsibility is reposed in the. . . [NRC], free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.' ". *Id.* Further, NRC decisions are entitled to a presumption of regularity, *Volpe*, 401 U.S. at 415, and courts cannot proscribe procedures, but must provide a "searching" review. *Vermont Yankee*, 435 U.S. at 558. Essentially, an NRC decision will be upheld by a reviewing court if it is satisfied that the NRC "considered" all relevant factors. *See id. But see* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 229 (1980) (Marshall, J., dissenting):

> *Vermont Yankee* does not stand for the proposition that a court reviewing agency action under NEPA is limited solely to the factual issue of whether the agency 'considered' environmental consequences. The agency's decision must still be set aside if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'. . ., and the reviewing court must still insure that the agency 'has taken a hard look at environmental consequences. . . .' . . .I do not subscribe to the Court's apparent suggestion that *Vermont Yankee* limits the reviewing court to the essentially mindless task of determining whether an agency 'considered environmental factors. . . .'

Id. at 228.

244. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 823 (1977). Courts should scrutinize and monitor the decision-making process where technical disputes are involved to assure it is thorough, rational and that all relevant information has been considered. *Id.* at 823. Courts cannot afford to deal with issues in a way that invites public distrust.

245. *Minnesota*, 602 F.2d at 419. "[I]t is for the [NRC] to decide the ultimate question of certainty implicit in health and safety judgments and to resolve technical disagreements, but that is not to say that these matters are totally immune from judicial review." *Id. See also Volpe*, 401 U.S. at 405 (judicial deference to NRC decisions does not shield NRC from a "thorough, probing in-depth review" by the Court).

246. These standards include the statutory requirements of the AEA, the NEPA, and the regulations of the NRC, *see supra* notes 24, 26, 27 and accompanying text.

247. *See supra* note 25.

248. *See, e.g.*, Ligon Specialized Hauler, Inc. v. I.C.C., 587 F.2d 304, 319 (6th Cir. 1978). Agency expertise and procedural requirements in APA are complementary elements and cannot be substituted for each other. *Id.* "The decision whether to follow the [APA]. . . is not a matter

agency actions is a narrow one,[249] courts may not simply defer to the discretionary judgments of the NRC absent a finding that the agency has supplied "substantial evidence" to support its decision.[250] Absent such meaningful judicial review, a court should postpone plant operations.[251]

One reason that courts defer to NRC licensing decisions is the assumption that NRC judgments are based on "special expertise."[252] This assumption may not always prove to be true. The Diablo Canyon siting mistake reveals that there are times during the licensing process when there may be an insufficient number of experts available among NRC staff and agency advisors to resolve safety issues.[253] The shortfall results from a backlog in licensing cases which prevents the NRC staff and advisors from conducting thorough investigations into nuclear safety issues.[254] The NRC attributed its failure to discover the Hosgri Fault to this problem.[255] In addition, NRC licensing decisions are not premised on expertise when the NRC refuses to accept the recommendations of its scientific and technical staff and advisors regarding nuclear safety issues.[256]

Because licensing decisions involve uncertainties and may not always be based on special expertise, it is important that the licensing procedures incorporate a "comprehensive review of opposing scientific and technological viewpoints."[257] Only this sort of a decision-making process in an area as technical as nuclear litigation, can assure a reasoned decision which may be held up to the scrutiny of the scientific community and the public.[258] Some courts have required, in technical cases involving scientific and technologic uncertainties, that an agency explain the assumptions which premise its decision, and, if necessary, the court may go beyond the administrative record to determine whether the agency considered all relevant factors in its decision.[259] As Judge

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'committed to agency discretion'. . . ." *Id.* (quoting North American Van Lines, Inc. v. United States, 412 F.Supp 782, 803 (N.D. Ind. 1976)). *See also* Baltimore & O.R.R. Co. v. Aberdeen & Rockfish R.R. Co., 393 U.S. 87, 92 (1968). For a court to defer to agency expertise without requiring its administrative decisions be based on substantial evidence or reasoned findings would cause judicial review to be "lost in the haze of so called 'administrative expertise.' " *Id.*

249. *See, e.g., supra* note 11.

250. *See West Chicago*, 701 F.2d at 648 (citing 5 U.S.C. § 706).

251. Where the bare record does not disclose factors considered by the agency, a reviewing court may require some explanation to determine if the agency acted within its scope of authority and to determine if its actions are justifiable under the applicable APA reviewing standards. *Volpe*, 401 U.S. at 420-21. Where there is such a failure to explain the administrative action as to frustrate meaningful judicial review, the judicial remedy is to remand the case to the NRC. Environmental Fund, Inc. v. Costle, 657 F.2d 275, 285 (D.C. Cir. 1981).

252. *See supra* note 12.

253. *See Oversight on Diablo Canyon* (statement of Edson Case), *supra* note 114, at 5.

254. *Id.*

255. *See id.*

256. *See, e.g., supra* note 183. The NRC technical staff disagreed with the NRC's decision to treat the earthquake emergency planning issue on a generic basis.

257. *See* Friends of Earth v. United States Atomic Energy Comm'n, 485 F.2d. 1031 (D.C. Cir. 1973) (Bazelon, J., concurring) (citing International Harvester v. Rucklehaus, 478 F.2d 615 (D.C. Cir. 1973)).

258. *See*, Bazelon, *Coping With Technology Through the Legal Process*, *supra* note 244.

259. *See also Mothers For Peace*, 751 F.2d at 1332 (Wald, J., dissenting in part and concur-

Wald pointed out in her dissent in *Mothers For Peace*, requiring the NRC to explain its assumptions and the public policy behind them would not only serve to make judicial review of NRC decisions more meaningful, but it would also serve to ensure that NRC decisions are not premised on poor reasoning or irrelevant policy judgments.[260]

C. *Provisional Safety Review*

Another aspect of NRC licensing procedure which deserves re-evaluation is the different standard of safety review applied at the construction and operating stages of plant licensing.[261] The "reasonable assurance" standard, which the NRC applies to plant safety[262] takes on a different significance to the meaning of plant safety at the two stages of licensing. The authorization of a construction permit by the NRC indicates only that the NRC has made provisional safety determinations that site investigations and the proposed plant design are sufficient.[263] In contrast, the meaning attributed to "reasonable assurance" for purposes of an operating license requires a more positive safety finding by the NRC.[264]

In the case of *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*,[265] the Supreme Court approved this distinction on the grounds that the safety issues raised at the construction phase involve only basic design matters of the "general type" of reactor proposed.[266] The Court thus concluded that definitive safety findings could be postponed until the operating stage of licensing, because plant design could be changed as the technology developed and more information became available

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ring in part). Asarco Inc. v. United States E.P.A., 616 F.2d 1153, 1160 (9th Cir. 1980). The Ninth Circuit Court of Appeals in *Asarco* stated that a court may supplement the administrative record with evidence it deems relevant to the substantive merits of the agency action: (1) for background information, (2) to determine if the agency considered all relevant factors, or (3) to determine if the agency fully explained the course of conduct or grounds for its decision. *See also* Columbia Gas Transmission Corp. v. Federal Energy Comm'n, 628 F.2d 578, 593 (D.C. Cir. 1979). In that case the court reasoned that where the Federal Energy Commission finds it necessary to extrapolate from the record, it should fully explain all assumptions and the public policy supporting them. *Id.* at 593. Only by observing these minimum standards, the court reasoned, can a reviewing court be confident that missing facts, gross flaws in agency reasoning, and statutorily irrelevant or prohibited policy judgments will come to a reviewing court's attention. *Id. See supra* note 193.

260. *See Mothers For Peace*, 751 F.2d at 1332 (Wald, J., dissenting in part and concurring in part).

261. *See, e.g.*, Power Reactor Dev. Co. v. International Union of Elec., Radio and Machine Workers, AFL-CIO, 367 U.S. 396 (1961), in which the court stated that "[a] more severe safety test. . . [must] be passed when a reactor. . . [is] completed. . . since '[t]he degree of "reasonable assurance. . ." that satisfies [the NRC]. . . for purposes of the *provisional* construction permit would not be the same. . . in considering issuance of the *operating* license.' "
Id. at 403 (emphasis on original) (quoting *Opinion and Final Decision*, Atomic Energy Commission (May 26, 1959)).

262. *See, e.g., supra* notes 8-9 and accompanying text.

263. *See Power Reactor*, 367 U.S. at 260.

264. *Id.*

265. 367 U.S. 396 (1961).

266. *Id.* at 407-08.

to the NRC.[267] In applying this analysis, the Court overlooked the fact that unlike plant design, which can be modified should the NRC so choose, the siting of a nuclear plant cannot be changed at the operating phase of licensing. When the NRC issues a construction permit, it makes an irretrievable committment to the proposed site. Site suitability is the critical point in reactor licensing,[268] because the plant's design and construction specifications must incorporate standards based on the geologic and seismic features of the site.[269] Given this fact, it is not logical, nor efficient, for the NRC to apply a less conservative standard of safety review at the construction phase of licensing. Arguably, a more stringent safety review could have avoided the Diablo Canyon siting oversight.

The postponement of positive safety findings until the operating stage of licensing also raises the issue that in making licensing decisions, both the NRC and reviewing courts may be unduly influenced by economic considerations. The concern is that the NRC would never insist on costly modifications at the operating phase, after billions of dollars have been sunk into the plant construction.[270] Although theoretically, utilities and their investors bear the risk that the development of nuclear technology will occur simultaneously with plant design and construction,[271] there is evidence that utility costs have influenced the NRC to err on the side of industry convenience and avoid backfitting.[272] This argument has, for the most part, been rejected by the courts.[273]

D. The National Committment To Nuclear Power

Although courts may be reluctant to acknowledge that the economic in-

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267. *Id.*

268. *See North Anna Envtl. Coalition*, 533 F.2d at 655.

269. See *supra* note 96 for a discussion of NRC regulations,10 C.F.R., pt. 50, app. A, and 10 C.F.R. pt. 100, app. A, regarding plant design and construction based on site characteristics.

270. *See supra* notes 77-79 and accompanying text.

271. *Power Reactor*, 367 U.S. at 415. "[A]n [applicant] has been on notice. . . that it proceeds with construction at its own risk and that all its funds may go for naught." *Id.*

272. *See* Kemeny Commission Report, *supra* note 39.

273. *See* Rockford League of Women Voters v. United States Nuclear Regulatory Comm'n, 679 F.2d 1218 (7th Cir. 1982). The court in *Rockford* dismissed arguments that the NRC would never insist on costly modifications of a nuclear power plant at the operating phase. *Id.* at 1223. In fact, the court charged the League, accusing the NRC of being a "tool of the utility." "In polite but unmistakeable inuendo the League accuses the [NRC] of being a tool of the utility. . . . If the League is right in its insinuation. . . [t]here is very little this court can do."
Id. See also Seacoast Anti-Pollution League v. Nuclear Regulatory Comm'n, 690 F.2d 1025, 1033 (D.C. Cir. 1982). The NRC "does not and cannot" consider utility investment in a particular reactor in making determination that reasonable assurance exists to justify granting of operating license. *Id. But see* Porter County Chapter of Izaak Walton League of America Inc. v. Nuclear Regulatory Comm'n, 606 F.2d 1363, 1370 (D.C. Cir. 1979):

> We do not ignore appellees' fear that the inertia generated by completion of a nuclear plant with the massive investment it represents, will sway the licensing authority from faithfully carrying out its mandate to protect the public safety, if necessary by denying an operating license. While that contention may have practical force in some instances, a court may not transform a projected tendency to inertia into a presumption of infidelity to duty.

Id.

fluence of utility investments affect NRC licensing decisions, they openly support the notion that the national commitment to nuclear power development is a factor to be considered by the NRC and reviewing courts in NRC licensing cases.[274] This commitment to the development of nuclear power is, however, a larger economic influence which the courts do not seem to acknowledge. The courts' recitation in *Mothers For Peace*[275] of this nation's historical commitment to nuclear power as a primary source of energy,[276] only serves to obfuscate the issue of nuclear safety. Although Congress committed the nation to developing nuclear power,[277] neither the NRC nor the courts are committed to enabling that development if nuclear power is found to be an unsafe source of energy.[278] Utilities and their investors, and not the public, assume the risk that nuclear power development was a mistake.

CONCLUSION

The question of whether the NRC licensing process assures nuclear safety is a complicated one. This article has discussed only some of the problems and concerns regarding nuclear power plant safety, and as they relate to the Diablo Canyon plant. Even if nuclear technology does or could reach a level of certainty in terms of adequately assuring against nuclear safety risks, other factors that affect licensing decisions, such as plant delays, investment concerns, and the need for energy, cause the issue of plant safety to become obscure. Although such other concerns are legitimate, they are not relevant to plant safety. The responsibility of the NRC and reviewing courts is limited in each licensing case to determining whether a nuclear power plant is or is not safe to construct and operate.[279] Their function is to assure nuclear safety, and not to promote economic protectionism for the nuclear power industry. The Department of Energy and state utility commissions retain responsibility for determining the questions of need and cost.[280]

Kimberly K. Hayden

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274. *See, e.g., Mothers For Peace*, 751 F.2d at 1294 (citing *Vermont Yankee*, 435 U.S. at 557-58).

275. 751 F.2d 1287 (D.C. Cir. 1984).

276. *Id.* at 1294.

277. *See Vermont Yankee*, 435 U.S. at 557-58.

278. *See* Power Reactor Dev. Co. v. Int'l Union of Elec., Radio and Machine Workers, AFL-CIO, 367 U.S. 396, 402 (1961). Public safety is first, last and permanent consideration of the NRC in any licensing decision. *Id.* Furthermore, because Congress specifically restricted the NRC in its operating license decisions to make positive safety determinations, court review of the NRC decision-making process is also restricted to safety concerns. *Id.* at 402, 407.

279. *See supra* notes 3 and 93. The NRC was not given the authority over the economic question of whether a plant should be built. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983). The NRC does not purport to have such authority. *See* 10 C.F.R. § 8.4 (1985).

280. *See Pacific Gas*, 461 U.S. at 205, 207.

COMMENTS

Firefighters Local Union No. 1784 v. Stotts: A Clash Between Affirmative Action and Seniority

The turbulence of the 1960's permeated all aspects of society, resulting in a revolution in the area of civil rights. The Warren Court, empaneled in Washington during this era, rendered a multitude of landmark decisions expanding the scope of civil liberties afforded to minorities.[1] In response to the active role taken by the Judiciary,[2] Congress enacted the Civil Rights Act of 1964 (the Act).[3] The Act sought the eradication of discrimination perpetuated against individuals based on race, color, religion, sex, or national origin.[4] Encompassed within the Act was Title VII, a provision specifically aimed at the elimination of discriminatory employment practices.[5] Members of Congress were concerned, however, that the Act would have an adverse effect upon es-

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1. R. FUNSTON, CONSTITUTIONAL COUNTERREVOLUTION: THE WARREN COURT AND THE BURGER COURT: JUDICIAL POLICY MAKING IN MODERN AMERICA 1 (1977); *See* Loving v. Va., 388 U.S. 1 (1967); Reitman v. Mulkey, 387 U.S. 369 (1967); Harper v. Va. Board of Elections, 383 U.S. 663 (1966); Heart of Atlanta v. United States, 379 U.S. 241 (1964); Griffin v. Cty. School Bd. of Prince Edward Cty., 377 U.S. 218 (1964); Peterson v. Greenville, 373 U.S. 244 (1963); Cooper v. Aaron, 358 U.S. 1 (1961).

2. All courts have been active to some degree, with the decisive factor being the area of law focused upon. For example, under the leadership of Justice John Marshall, the Court stressed the importance of expanding federal power. A. MASON, THE SUPREME COURT FROM TAFT TO BURGER 4 (1979). The Taney Court, however, strove towards strengthening the police power of the individual states. *Id.* at 5. Carrying the concept of judicial activisim to "unprecedented heights," Chief Justice Fuller read the "lassiez faire" doctrine into the Constitution, thereby promoting an unregulated economy. *Id.* No court, however, raised as much controversy as did the Warren Court, under which the Court took a special interest in guarding the rights of minorities. *Id.* at 6-7. In an attempt to combat what he viewed as unbridled exercises of authority, Justice Harlan continually cautioned the Court that "the Constitution does not confer on courts blanket authority to step into every situation where the political branch may be thought to have fallen short." *Id.*

3. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

4. *Id.*

5. 42 U.S.C. §§ 2000e to 2000e-17 (1982 & Supp. I 1983).

tablished seniority systems.[6] To assauge these concerns, Congress added section 703(h) to Title VII, thereby immunizing certain seniority systems from challenges made under Title VII.[7]

Drawing upon the Act, affirmative action programs developed providing for preferential treatment to minorities in an attempt to counter the effect of years of discrimination.[8] Society's enthusiasm for these programs began to wane in the presence of economic recession.[9] Faced with limited employment opportunities, white employees with greater seniority found themselves competing with recently hired minority employees.[10]

In such instances, an employer's adherence to a "last hired-first fired" seniority system operated to frustrate the progress made by minorities pursuant to affirmative action programs.[11] Hence, the constitutionality of these programs became a highly controversial issue.[12]

In *Firefighters Local Union No. 1784 v. Stotts*,[13] the United States Supreme Court attempted to resolve the difficult issues presented when layoffs made pursuant to a last hired-first fired seniority system conflicted with the goals of a race-concious voluntary settlement. In *Stotts*, the Court concluded that the lower court had abused its discretion by ordering an injunction calling for the layoff of white employees possessing greater seniority than black employees. This Comment will focus on the factors taken into consideration by the Court in reaching this conclusion.

Part I of this Comment presents an historical overview of the development of affirmative action programs, their goals, and how courts have attempted to reconcile these objectives with those of incumbent employees pursuant to seniority systems. The facts and holding of *Stotts* are addressed in Part II. Finally, drawing on issues raised by the dissent, Part III provides an analysis of the *Stotts* decision and explores its potential ramifications upon future litigations.

I. HISTORICAL PERSPECTIVE

A. Race-Concious Remedies

Congress enacted the Civil Rights Act of 1964 in an attempt to eradicate

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6. *See infra* notes 38-50 and accompanying text.

7. *See infra* note 41 and accompanying text.

8. *See infra* note 15 and accompanying text.

9. Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531, 536 (1981).

10. *Id.*

11. *See infra* notes 47-50, 94, and accompanying text.

12. Belton, *supra* note 9.

> A fundamental problem in the affirmative action/reverse discrimination controversy is the alleged conflict between the desire to render the law 'blind' as to particular attributes (for example, race) and the pragmatic need to prefer, in some but not all circumstances, one group historically disadvantaged in its competition with other's because of that attribute.

Id. at 536.

13. 104 S. Ct. 2576 (1984).

discrimination against minorities.[14] As a means of actively implementing the promise of equality set forth in the Civil Rights Act, the concept of affirmative action developed.[15] Affirmative action programs are founded upon the belief that some forms of race-conscious remedies are necessary in order to reverse the impact of years of discrimination perpetuated against minorities.[16] Racial quotas were often utilized as a primary means of promoting this remedial effort.[17] Non-minorities began to challenge these quota systems as an equally objectionable form of discrimination.[18]

Courts have had difficulty reconciling the conceptual distinction between the notions of affirmative action and reverse discrimination because each view is able to draw upon the Constitution and the Civil Rights Act to support its claims.[19] Initially, courts faced with claims of reverse discrimination upheld the use of quotas, reasoning that they were necessary to remedy past instances of discrimination.[20] In *Regents of the University of California v. Bakke*,[21] however, Justice Powell, writing for the plurality, limited the use of racial quotas.[22]

In *Bakke*, the Court examined the admissions program utilized by the Davis Medical School which reserved sixteen places exclusively for minori-

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14. *See supra* note 3.

15. Belton, *supra* note 9, at 533 n.9.

16. *Id.* at 534. The affirmative action concept is premised on the theory that passive prohibitions against discriminatory practices are insufficient to effectively combat the years of discrimination suffered by minorities. *Id.*

In his concurring opinion in *Bakke*, Justice Blackmun observed that "it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. *In order to get beyond racism, we must first take account of race. There is no other way.*" Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978). *See* Belton, *supra* note 9 at 534 n.13 (discussing *Bakke*).

17. *Id.* Belton, *supra* note 9 at 561. Race-conscious remedies may be implemented pursuant to a judicial finding of a statutory violation; through the voluntary actions of an employer; by legislative or executive action; or pursuant to a consent decree. *Id.* at 535.

18. *Id.* at 536, 561.

19. *Id.* at 537. The two provisions most often relied upon by plaintiffs instituting claims of both discrimination and reverse discrimination are the Equal Protection Clause and Title VII. 42 U.S.C. § § 2000e to 2000c-17 (1982 & Supp. I 1983) *Id.* at nn.26-27. Use of identical provisions to support competing interests will only result in conflict. As one commentator has observed, "[h]aving found support in the Constitution for equality, they now claim support for inequality under the same Constitution." A. BICKEL, THE MORALITY OF CONSENT 133 (1975) (quoted in Belton, *supra* note 9, at 536 n.25).

The same statute or constitutional provision is unable to simultaneously afford the same type of protection to both the majority *and* the minority. Any attempt to do so may destroy the gains made by minorities by perpetuating the "superior status" of the majority. Harvey, *The Reagan Administration And Affirmative Action In Four Major Cities: Detroit, Boston, New Orleans and Memphis*, 9 THURGOOD MARSHALL L. REV. No. 1 & 2, 1, 2 (1984).

20. Belton, *supra* note 9, at 561.

21. 438 U.S. 265 (1978). Justice Powell delivered the plurality opinion. Justice Stevens, concurring in judgment in part and dissenting in part, filed an opinion in which Chief Justice Burger and Justices Stewart and Rehnquist joined. Justices Brennan, White, Marshall, and Blackmun filed an opinion that concurred in judgment in part and dissented in part. *Id.*

22. *Id.* at 271-72.

ties.[23] Bakke, a white male, challenged the use of this racial quota, alleging that the program "operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment. . . and . . .Title VI of the Civil Rights Act. . . ."[24] Justice Powell asserted that the rigid quota system used by the medical school was unconstitutional.[25] Justice Powell also maintained that race may be used as one of several factors when implementing an academic admissions program.[26]

A year after *Bakke*, the Supreme Court, in *United Steelworkers of America v. Weber*,[27] addressed the question of whether "Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans. . . ."[28] In *Weber*, an employer and a union entered into a collective bargaining agreement which, in part, sought to increase minority

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23. *Id.* at 279.

24. *Id.* at 277-78 (footnotes omitted).

25. *Id.* at 320. The petitioner urged the Court to adopt a more restrictive interpretation of the equal protection clause stating that "discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.' " *Id.* at 294 (footnote omitted). Justice Powell refused to adopt such a restrictive view and stressed that "[i]t is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Id.* at 295 (footnote omitted; emphasis in original). Therefore, Justice Powell concluded that *any* form of preferential treatment provided to members of a particular group based *soley* on race or ethnic origin *is* discrimination, and therefore unconstitutional. *Id.* at 307.

26. *Id.* at 320. One factor contributing to the tension between affirmative action and reverse discrimination is the apparent conflict between rendering the law "color blind," (the failure to take race into account as a factor at all), and the necessity in certain circumstances to render preferential treatment to a group which has been historically disadvantaged. Belton, *supra* note 9, at 537.

In Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), the Court of Appeals for the First Circuit noted:

> [O]ur society cannot be completely color blind in the short term if we are to have a color blind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities.

Id. at 16. In addition to the opinion of Justices Brennan, White, Marshall and Blackmun which concurred in the judgment in part and dissented in part, Justice Blackmun set forth some related "general observations." *Bakke*, 438 U.S. at 402. Justice Blackmun observed that it would be impossible to successfully maintain a racially neutral affirmative action program, and that, "[i]n order to get beyond racism, we must first take account of race." *Id.* at 407 (Blackmun, J., concurring in part and dissenting in part).

27. 443 U.S. 193 (1979).

28. *Id.* at 200 (emphasis in original). The Court did not address the issue of what would be required by Title VII or a reviewing court in order to remedy a previously proven violation of the Act. Instead the Court limited itself to the issue of whether Title VII prohibits private parties from agreeing upon a voluntary affirmative action program. *Id.*

The Court observed that this question had not been answered in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), a case which did not involve an affirmative action issue, but which, instead, held only that Title VII serves to protect both whites and blacks from certain types of racial discrimination. *Id.* at 280 (cited in *Weber*, 443 U.S. at 200-01).

representation in the plant's "craftwork forces."[29] Pursuant to the plan, fifty percent of the slots available for a craftworker training program were to be filled by black employees.[30] Brian Weber, a white production worker, was denied admission to the training program.[31] Weber subsequently brought a class action suit under Title VII of the Civil Rights Act alleging that the program was discriminatory because it allowed black employees with less seniority than white employees to enter the training program.[32] The *Weber* Court held that "Title VII's prohibition. . . against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans."[33] The Court concluded that in light of the goals of the Civil Rights Act, the program in question was a permissible attempt to achieve a racial balance in a previously seg-

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29. *Id.* at 198.

30. *Id.* at 199.

31. *Id.*

32. *Id.* at 199-200.

33. *Id.* at 208. The Court noted the argument presented by respondents, namely — that Title VII was intended by Congress to prohibit *all* forms of race-conscious affirmative action programs. *Id.* at 201. Respondents advocating a literal reading of § 703(a) and (d) of the Act, argued that it is "unlawful to 'discriminate. . . because of. . . race' in hiring and in the selection of apprentices for training programs." *Id.* Drawing upon the holding in *McDonald*, 427 U.S. 273, 280 (1976) — Title VII forbids discrimination against both whites and blacks — the respondents asserted that the affirmative action program at issue violated Title VII because it discriminated against white employees solely because of race. *Weber*, 443 U.S. at 201.

The Court observed that respondents' reliance upon *McDonald* and its literal interpretation of § 703(a) and (d) were misplaced. *Id.* Turning to the legislative history surrounding the enactment of Title VII, the Court observed that the intent of Congress in passing Title VII "[was] to open employment opportunites for Negroes in occupations which have been traditionally closed to them." *Id.* at 203 (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)). Furthermore, the Court observed that it is "plainly" visible from the House Report which accompanied the Civil Rights Act that Congress had no intention of solving this problem by prohibiting private and voluntary affirmative action programs. *Id.* On the contrary, the House Report specifically provided that:

> No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership. . . dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.*

Id. at 203-04 (quoting H.R. REP. NO. 914, 88th Cong., 1st Sess. pt. 1, at 18 (1963)) (emphasis in original). Therefore, the Court found itself unable to agree with the respondent's argument — that Congress intended to prohibit the private employer from taking voluntary affirmative measures to accomplish the goal set forth in Title VII. *Id.* at 204.

With respect to the legislative history surrounding § 703 (j) of Title VII, the Court observed that if Congress had intended to prohibit *all* forms of race-conscious remedies it could have placed a provision in § 703 (j) stating that, "Title VII would not require or *permit* racially preferential integration efforts." *Id.* at 205 (emphasis in original). Congress failed to insert such a provision. Therefore, this section states that "nothing contained in Title VII 'shall be interpreted to *require* any employer. . . to grant preferential treatment. . . to any group because of race. . . of such. . . group on account of' a *de facto* racial imbalance in the employer's work force." *Id.* at 205-06 (emphasis in original). Thus, the Court concluded that use of the word "require" rather than "permit" indicated that Congress did not intend to prohibit all voluntary forms of race-conscious remedies in its enactment of Title VII. *Id.* at 206.

regated job classification.[34]

B. Seniority Systems Under Title VII

Title VII of the Civil Rights Act of 1964[35] addressed issues related to discrimination in employment practices.[36] Members of Congress expressed concern, however, that this remedial effort could have an adverse impact upon established seniority systems.[37] Seniority systems have traditionally been utilized by employers and employees as a means of determining society's labor hierarchy.[38] Due to this reliance, investigations were undertaken by Congress to determine the impact of Title VII upon such systems.[39] These concerns were addressed in section 703(h) of Title VII, which provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. . . .[40]

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34. *Id.* at 209.

35. 42 U.S.C. § § 2000e to 2000e-17 (1982 & Supp. I 1983).

36. *Id.* Title VII specifically provides that: "It shall be an unlawful employment practice for an employer. . . to refuse to hire. . . any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin. . . ." *Id.* at § 2000e-2(a).

37. Franks v. Bowman, 424 U.S. 747, 759-62 (1976). A seniority system has been defined as a system which, "alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." California Brewers Ass'n v. Bryant, 444 U.S. 598, 606 (1980), *cited with approval in* Comment, *Employment Discrimination-Seniority System Under Title VII*, 62 N.C.L. REV. 357, at n.1 (1984).

The issue of the Act's impact upon established seniority systems was not addressed in either the House bill or the Judiciary Committee report. It was raised during the debates on the bill. *Franks*, 424 U.S. at 759-60. *See* H.R. REP. No. 914, 88th Cong., 1st Sess., *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2355 (cited in *Franks*, 424 U.S. at 759 n.12).

Responding to criticism that Title VII would destroy existing seniority interests, Senators Clark and Case filed a memorandum which stated that Title VII's impact would be "prospective and not retrospective" and would therefore "have no effect on established seniority rights." *Franks*, 424 U.S. at 759-60.

38. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Questions Under Title VII*, 62 N.C.L. REV. 943, 953 (1984). The American labor force both relies upon and supports seniority systems because of the "job security which they foster." Seniority allows "employees to predict their future employment positions" by providing an objective standard by which employees may measure their benefits, pensions rights, promotions, etc. *Id.* at 953. *See also* Transworld Airlines, Inc., v. Hardison, 432 U.S. 63, 79 (1977) (collective bargaining "lies at the core of our national labor policy"); Humprhey v. Moore, 375 U.S. 335, 346 (1964) (seniority systems are of "overriding importance" in collective bargaining). *See generally* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, (1962) (discussing status given to seniority).

39. *Franks*, 424 U.S. 747, 761 n.16. *See supra* note 38.

40. Title VII of The Civil Rights Act of 1964, § 703(h), 42 U.S.C. § 2000e-2(h) (1982).

Section 703(h) exempts "bona fide" seniority systems which are "not the result of an intention to discriminate" from Title VII coverage.[41] Consequently, section 703(h) may provide a defense for employers and/or unions accused of maintaining an unlawful seniority system.[42]

An examination of the legislative history of section 703(h) reveals an intent to expedite minority integration into the mainstream of society through the use of affirmative action programs,[43] while simultaneously attempting to protect the interest of incumbent employees.[44] Congress' failure to define a bona fide seniority system that is "not the result of an intention to discriminate" has frustrated the effective implementation of section 703(h).[45] In the absence of legislative definitions, courts have attempted to define these vague terms on a case-by-case basis.[46] One issue addressed by the courts is whether the gains made by minorities pursuant to affirmative action programs are entitled to greater deference than the expectations of incumbent employees pursuant to seniority systems.[47] Any remedy provided to a minority employee under an affirmative action program has the potential to adversely affect the seniority expectations of an incumbent majority employee.[48] The implementation of an affirmative action program may therefore result in claims of reverse discrimination.[49] In an attempt to resolve this conflict, courts have gradually broadened the scope of immunity provided to seniority systems under section 703(h).[50]

II. JUDICIAL INTERPRETATIONS OF SECTION 703(H)

Although Title VII initially enabled minorities to transfer into depart-

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41. *Id.*

42. Comment, *Employment Discrimination-Seniority Systems Under Title VII*, 62 N.C.L. REV. 357, 357 (1984). [hereinafter cited as Comment, *Employment Discrimination*].

43. 110 CONG. REC. 6548, 7204 (1964) (remarks of Sen. Clark) *cited in* United Steelworkers of America v. Weber, 443 U.S. 193, 202-03 (1979).

44. Poplin, *Fair Employment in a Depressed Economy, The Layoff Problem*, 23 U.C.L.A. REV. 177, 191 (1975), *cited in* Brodin, *supra* note 38, at 952 n.40.

45. Brodin, *supra* note 37, at 949-50.

46. *Id.* at 952.

47. Despite congressional efforts to strike a balance between the competing interests of minorities and incumbent employees by enacting § 703(h), the tension between these two groups has continued to grow, subsequently resulting in an increase in litigation of this difficult issue. *See* Local Firefighters' Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).

48. These concerns were expressed and analyzed in the congressional debates surrounding the enactment of the Civil Rights Act of 1964. *See supra* note 37. Title VII's impact " 'would have no effect on established seniority rights.' "*Franks*, 424 U.S. at 759 (quoting an interpretive memorandum of Senators Clark and Case, 110 CONG. REC. 7213 (1964)).

49. Belton, *supra* note 9, at 536. "[A]ffirmative action became one of the most controversial and vigorously litigated issues because it was claimed to impose discrimination in 'reverse' against white male citizens and was, therefore, legally and morally indefensible." *Id.*

50. Comment, *Employment Discrimination, supra* note 41, at 358. Section 703(h) of Title VII serves to give "seniority systems a general immunity from Title VII scrutiny." *Id.* The scope of this immunity has been gradually expanded by courts interpreting § 703(h). See *infra* notes 51-91 and accompanying text for an analysis of cases enlarging the scope of immunity provided by § 703 (h).

ments which had previously been closed to them,[51] it became apparent that any transfer into higher paying positions often resulted in the loss of accumulated seniority.[52] In *Quarles v. Philip Morris Inc.*,[53] the district court addressed this problem, setting forth one of the earliest interpretations of section 703(h). The court focused on the question of whether pre-Act discriminatory practices could be reached through Title VII.[54] The *Quarles* court, considering the original intent of the employer as a decisive factor, concluded that a seniority system that perpetuated pre-Act discriminatory employment practices was not immunized by section 703(h).[55] The *Quarles* rule was subsequently criticized for its failure to consider the countervailing seniority expectations of incumbent employees.[56]

In *Local 189 Papermakers v. United States*,[57] the Court of Appeals for

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51. Brodin, *supra* note 37, at 952.

52. *Id.* In his article, Professor Brodin explained that this loss of seniority was attributed to the fact that many plants and companies operated under a departmental seniority system. *Id.* This often resulted in the accrual of seniority in only one department. *Id.* Furthermore, a minority employee seeking a transfer into a "newly integrated department" was often treated as a new employee, thereby losing all seniority accrued thus far. *Id.* at 952-53. Therefore, the risk of being laid-off became greater for minority employees when the economy demanded a slow-down in production. *Id.* at 953. Thus, the fear of being laid-off, provided an incentive for minorities to remain in their low-paying segregated positions. *Id.* The passage of Title VII, therefore, offered little aid to minorities in their advancement, but instead served to lock minorities into the positions provided to them by previous discriminatory practices. *Id.*

53. 279 F. Supp. 505 (E.D. Va. 1968). The *Quarles* case involved a plant which had been departmentally segregated, and whose collective bargaining agreement prohibited the transfer of minorities between departments. *Id.* at 508. Quarles, a black employee of the defendant-company for nine years, had been unsuccessful in his attempts to transfer from one department to another. *Id.* at 513. Although the collective bargaining agreement had been amended in 1966, thereby providing Quarles with the opportunity to transfer, in reality any attempt to move upward would result in the loss of all seniority accrued thus far. *Id.* at 514. Quarles subsequently instituted a class action suit in which he alleged that this practice violated Title VII. *Id.* at 507.

54. *Id.* at 510.

55. *Id.* at 517-18. The *Quarles* court noted that section to 703(h) allows an employer to apply different standards pursuant to a *bona fide* seniority system only when such differences are not based on an intention to discriminate because of race:

> The act does not condone present differences that are the result of an intention to discriminate before the effective date of the act. . . [t]he court holds that the present differences in departmental seniority of Negroes and white[s] that result from the company's intentional, racially discriminatory hiring policy before January 1, 1966 are not validated by the *proviso* of § 703(h).

Id. at 518 (emphasis in original).

56. Comment, *Employment Discrimination*, *supra* note 42 at 360-61.

57. 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). Defendants who had maintained segregated lines of progression in the past vacated this practice in 1966 by merging individual black and white hierarchal lines. *Id.* at 984. With few exceptions, black lines were usually placed below white lines, thereby making it more difficult for a black employee than for a contemporaneously-hired white employee to rise through the lines of progression. *Id.*

Although the system was facially neutral, the court determined that the previously maintained racial classifications reasserted themselves each time that a black employee hired under the old system bid against a white employee. *Id.* at 988. The court concluded that the system was not protected by § 703(h) of Title VII. *Id.* at 997. For an in-depth analysis of the *Papermakers* decision see Comment, *Employment Discrimination*, *supra* note 42 at 361-63.

the Fifth Circuit observed that minorities were systematically penalized by the employer's pre-Act discriminatory hiring practices each time they competed with a white employee.[58] The *Papermakers* court followed the *Quarles* rule and held that a facially neutral seniority system that reasserts an employer's prior bias is in direct contravention of Title VII.[59] Despite this reliance on the *Quarles* rule, the *Papermakers* decision is noteworthy because of the Fifth Circuit's determination that seniority expectations are to be considered along with equal employment policies.[60]

The court in *Papermakers* also noted that section 703(h) was intended to serve as a limitation on the court's remedial powers.[61] The *Papermakers* court observed that the question of whether a victim of employment discrimination was entitled to an award of constructive seniority required an examination of "whether the Act was a discriminatory assignment or a refusal to hire."[62] The court concluded that victims of a pre-Act discriminatory refusal to hire were not entitled to relief.[63] An employee subjected to discriminatory placement, however, was entitled to an award of constructive seniority upon a showing that the system was unlawful.[64]

In *Griggs v. Duke Power Co.*,[65] the United States Supreme Court focused

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58. *Papermakers*, 416 F.2d at 988.

59. *Id.* at 995. The *Papermakers* court held that "a department seniority system that has its genesis in racial discrimination is not a bona fide seniority system." *Id.* (quoting *Quarles*, 279 F. Supp. at 517).

60. *Papermakers*, 416 F.2d at 988 *cited in* Comment, *Employment Discrimination, supra* note 42 at 362.

61. *Id.* at 995, *cited in* Comment, *Employment Discrimination, supra* note 42 at 362. Section 706(g) of Title VII (42 U.S.C. §2000e-5(g)) is the statutory provision relied upon by courts when formulating remedial relief in a Title VII case. This section provides that:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or *any other equitable relief* as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual. . ., or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

Franks, 424 U.S. at 762-63 n.19 (citing § 706(g) of Title VII 442 U.S.C. §2000e-5(g) (1970)).

62. Comment, *Employment Discrimination, supra* note 42 at 363.

63. *Id.*

64. *Id.* The court's distinction between victims of a pre-Act discriminatory refusal to hire and a discrminatory placement in the workforce is informative. This distinction, invoked by the court, operated to limit the power of a reviewing court by prohibiting the granting of constructive seniority in situations where a person, initially refused employment, was subsequently hired. *Id.* Thus, § 703(h) served as a limitation on the court's remedial authority. *Id.*

65. 401 U.S. 424 (1971). *Griggs* involved a class action suit instituted by Negro employees alleging that certain employment practices implemented by defendant employer were in violation

on the present effects of a seniority system rather than on the employer's original intent in creating the system.[66] This mode of analysis, termed "disparate impact," serves as a foundation upon which Title VII claims may be instituted.[67] Under this theory, employment practices that are facially neutral, yet have a discriminatory impact upon protected groups,[68] will be deemed invalid unless it can be shown that such practices are related to job performance or based on a business necessity.[69]

In *Franks v. Bowman Transportation Co.*,[70] the Supreme Court enlarged

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of the Civil Rights Act of 1964. *Id.* at 426. Specifically, plaintiffs argued that the defendant's use of general intelligence tests, combined with the requirement of a high school diploma as conditions of employment, operated to have a discriminatory impact upon blacks who, because of their long-received inferior education, were unable to perform as well as whites in these areas. *Id.* at 427-29.

66. *Id.* at 432-33. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432 (emphasis in original).

The Court further noted that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in-headwinds' for minority groups and are unrelated to measuring job capability." *Id.*; *cf. id.* at 435 n.11 (quoting from the interpretive memorandum of Senators Clark and Case, *reprinted in* 110 CONG. REC. 7247 ("tests which measure 'applicable job qualifications' are permissible under Title VII")).

67. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

> 'Disparate treatment'. . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Claims of disparate treatment may be distinquished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive. . . is not required under a disparate-impact theory.

Id. (footnotes and citations omitted).

68. *Id.* The *Griggs* Court observed that the intent of Congress in passing Title VII was not merely the eradication of overt practices of racial discrimination in employment, but also the removal of practices which although neutral on their face impacted discriminatorily upon a specific group of employees. *Id.* at 431.

69. *Id.* "Business necessity" provides a defense for an employer against a Title VII claim instituted under the theory of disparate impact. *Id.* In their memorandum addressing the subject of employer testing, Senators Clark and Case emphasized that tests designed to measure "applicable job qualifications" would be permitted under Title VII. *Id.* at 435 n.11 (citing 100 CONG. REC. 7213 (1964)).

70. 424 U.S. 747 (1976). *Franks* was a class action suit instituted by plaintiffs who maintained that their employer and union had engaged in racially discriminatory employment practices by denying them employment as over-the-road drivers. *Id.* at 751-52. The district court determined that these minority employees had been unlawfully excluded from over-the-road truck driver positions after the effective date of Title VII and that the collective bargaining agreement perpetuated this discrimination. *Id.* at 752. The court of appeals noted that the district court ordered the employer to give priority consideration to members of the designated class, but declined to award retroactive seniority to the unnamed members of the class who had been denied employment. *Id.* Franks v. Bowman Transportation Co., 495 F.2d 398, 402 (5th Cir. 1974).

The court of appeals reversed the district court's ruling concerning back pay, *id.* at 422, but affirmed its denial of retroactive seniority. *Id.* at 418. The court focused on the language contained in § 703(h) which states that "it shall not be an unlawful employment practice for an employer to

the class of employees entitled to awards of constructive seniority. In *Franks*, an employer had excluded minorities from over-the-road truck driver positions after the effective date of Title VII.[71] The *Franks* Court concluded that identifiable plaintiffs who had adequately established the presence of *post-Act* discriminatory hiring practices were presumptively entitled to an award of constructive seniority dating from the initial refusal to hire.[72] Such an allocation of constructive seniority, however, could give rise to claims of reverse discrimination.[73] Nevertheless, the Supreme Court stressed the importance of providing "make-whole" relief to victims of discrimination,[74] and observed that section 706(g) vests "broad equitable discretion" in the federal courts, allowing them to provide any relief deemed appropriate under the circumstances.[75] The *Franks* Court noted that the promotion of equality in employment is a sufficiently strong policy interest to warrant a modification of the expectations of incumbent employees pursuant to an established seniority system.[76]

In *International Brotherhood of Teamsters v. United States*,[77] the Su-

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apply different standards. . . of employment pursuant to a bona fide seniority or merit system," concluding that as a matter of law § 703(h) barred relief of this nature. *Id.* at 417 (quoting Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h)). However, the Supreme Court observed that: "[Section] 703(h) [serves as] a definitional provision. . . [and] delineates which employment practices are illegal. . . and which are not." The court added that "[s]ection 703(h). . . does not expressly purport to qualify or proscribe relief otherwise appropriate under the remedial provisions of Title VII. . . in circumstances where an illegal discriminatory act or practice is found." *Franks*, 424 U.S. at 758 (footnote omitted). Thus, the Supreme Court reversed that portion of the court of appeals' opinion which "barred [an] award of seniority relief to the unnamed class. . . members." *Id.* at 762.

71. *Id.* at 750-51.

72. The *Franks* Court noted:

> [T]he thrust of [703(h)] is directed toward defining what is and what is not an illegal discriminatory employment practice in instances in which the past-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act. There is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved — as in the instant case, a discriminatory refusal to hire.

Id. at 761-62.

73. *Id.* at 774-75. "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *Id.* at 775 (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971); *see also id.* at 756 n.35. "The Court must be free to deal equitably with conflicting interests of white employees in order to shape remedies that will most effectively protect and redress the rights of. . . victims of discrimination." *Id.*

74. *Id.* at 763. The *Franks* Court noted that "one of the central purposes of Title VII is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.' " *Id.* (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

75. *Id.* at 763-64. Specifically, the Court observed that § 706(g) gave the federal courts the discretionary power to order such equitable relief which they view as necessary. *Id.* at 763.

76. *Id.* at 774. To award a victim a grant of the seniority which he would have received but for the discriminatory act is in sync with the congressional objective of eliminating the discriminatory effects of past discrimination. *See supra* note 73.

77. 431 U.S. 324 (1977).

preme Court determined that the employer had engaged in discriminatory employment practices and the company's seniority system perpetuated the effects of past discrimination.[78] The *Teamsters* Court, following the *Franks* decision, stated that "[p]ost-Act discriminatees" were entitled to full relief which included an award of retroactive seniority.[79] The Supreme Court concluded, however, that a seniority system that perpetuated the effects of past discrimination may be protected if it conforms to the requirements set forth in section 703(h).[80] The *Teamsters* Court, departing from the *Quarles* rule,[81] found that since the seniority system in question was bona fide, it did "not become unlawful under Title VII simply because it perpetuate[d] pre-Act discrimination."[82]

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78. *Id.* at 350-51. In *Teamsters*, the United States instituted a cause of action pursuant to Title VII against a nationwide motor freight carrier and the union which represented a large portion of the company's employees. In its complaint, the government alleged that the company had violated Title VII by engaging in a pattern and practice of discrimination against Negroes and Spanish-surnamed Americans. *Id.* at 328. Specifically, the government maintained that the company had placed these minority applicants into the lower paying, less desirable positions of a local-city driver — while the better paying, long-distance line-driver positions went to white employees. *Id.* at 329-30.

The government further observed that the union had violated the Act as well, by agreeing to maintain a seniority system that perpetuated or "locked in" the effects of past discrimination because any local driver who attempted to transfer into a long-distance line-driver position would, under the established seniority system, forfeit all their seniority accrued thus far. *Id.* at 328. The government thus charged the company with both pre-Act and post-Act discrimination. *Id.* at 347.

The government sought, as a remedy, a grant of a general injunction as well as specific "make whole" relief which would permit discriminatees to transfer to line-driver positions with full company seniority. *Id.* at 330.

79. *Id.* at 347-48.

80. *Id.* at 354-55. The *Teamsters* Court observed that without the inclusion of § 703(h) within Title VII, the seniority system at issue would have fallen under a *Griggs* analysis, and would have subsequently been deemed invalid, because the disproportionate advantages of the seniority system were the result of the employer's prior intentional discriminatory practices. *Id.* at 349.

The Court noted, however, that the language contained in § 703(h) as well as the legislative history of Title VII indicated that Congress considered this potential effect upon seniority systems and therefore "extended a measure of immunity to them" by enacting § 703(h). *Id.* at 350.

Drawing from the legislative history, the Court reiterated
the following:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, *if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis.* He would not be obliged — or indeed, permitted — to fire whites in order to hire Negroes or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.

Id. at 350-51 (emphasis in original) (citing 110 CONG. REC. 7213 (1964)).

81. The *Teamsters* holding appears to discredit *Quarles*. The *Quarles* Court held that present differences in employment which result from pre-Act discriminatory hiring policies are not within the scope of protection provided by § 703(h). *Quarles*, 279 F. Supp. at 518. See *supra* note 55 and accompanying text discussing *Quarles*.

82. *Teamsters*, 431 U.S. at 353-54.

The Court concluded that the system at issue was bona fide by noting that to the extent that the

The pre-Act discriminatees in *Teamsters* were therefore denied relief.[83]

In *Pullman-Standard v. Swint*[84] the Supreme Court imposed an additional burden upon a plaintiff instituting an action under Title VII in addition to those set forth in the *Teamsters* decision.[85] The *Pullman-Standard* Court held that in order to invalidate a seniority system, "direct evidence" of an employer's actual discriminatory intent is required.[86]

The *Teamsters* and *Pullman-Standard* decisions indicate that it has become very difficult for a plaintiff to successfully challenge seniority systems pursuant to Title VII.[87] The broad interpretation of section 703(h) favoring

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seniority system "locks" employees into certain positions, it does so for all employees and therefore constitutes a bona fide system. *Id.* at 355-56.

83. *Id.* at 356-57. In American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), the Supreme Court noted that " 'seniority systems are afforded special treatment under Title VII,' " pursuant to § 703(h). *Id.* at 75 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 81 (1977)). The *Patterson* Court refused to limit the scope of § 703(h) and extended its protection to seniority systems established both before *and* after the effective date of Title VII. *Id.* at 77. The Court stated: "Section 703(h) makes no distinction between seniority systems adopted before its effective date and those adopted after its effective date. . .[and] declin[ed] respondents' invitation to read such a distinction into the statute." *Id.* at 76. The Court reasoned that a construction of § 703(h) which limited its application to systems established before the effective date of Title VII was contrary to the plain meaning of the statute, against national labor policy, and inconsistent with the Court's previous decisions in the area. *Id.* at 77.

84. 456 U.S. 273 (1982). Minority employees of Pullman-Standard, a freight car manufacturer, brought suit against the company and union alleging violations of Title VII. *Id.* at 275. The Court of Appeals for the Fifth Circuit reversed the findings of the district court and held that "because the differences in the terms, conditions and standards of employment for black workers and white workers at Pullman-Standard resulted from an intent to discriminate because of race. . . the system is not legally valid under § 703(h). . . ." *Pullman-Standard*, 24 F.2d 525, 533-34 (1980). The Supreme Court granted *certiorari* on the following issue: "Whether a court of appeals is bound by the 'clearly erroneous' rule of Federal Rules of Civil Procedure 52(a) in reviewing a district court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system; and whether the court below applied wrong legal criteria in determining the *bona fides* of the seniority system." *Pullman-Standard*, 456 U.S. at 276.

85. *Teamsters* established that a showing of disparate impact standing alone, was insufficient to invalidate an otherwise bona fide seniority system. See *supra* notes 79-82 and accompanying text discussing *Teamsters*. Furthermore, in *Trans World Airlines* the Court noted: "[A]bsent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." 432 U.S. at 82.

86. *Pullman-Standard*, 456 U.S. at 277. The *Pullman-Standard* Court stated that the question of intent was to be determined by applying four factors set forth in James v. Stockham Valves & Fittings Co., 559 F.2d 310, 352 (1977):

> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
> 3) whether the seniority system had its genesis in racial discrimination; and
> 4) whether the system was negotiated and has been maintained free from any illegal purpose.

Id. (citing International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

87. *Teamsters* and *Pullman-Standard* undermine the disparate impact analysis set forth in *Quarles*. The additional requirement of proof of actual discriminatory purpose operates to "fore-

seniority systems indicates a departure from earlier constructions of section 703(h) initially adopted by courts in order to promote the goals of affirmative action programs.[88] The conflict between these two competing interests has been a central issue for many courts. A recent case addressing this issue is *Local Union No. 1764 v. Stotts*.[89]

III. Statement Of The Case

A. *Facts*

In 1977, Carl Stotts, a black firefighter employed by the City of Memphis (City), filed a class action suit in federal district court[90] alleging that the Memphis Fire Department and certain city officials had engaged in racially discriminatory hiring and promotion practices in violation of Title VII of the Civil Rights Act of 1964.[91] The parties subsequently entered into a consent decree in settlement of the dispute.[92] The stated purpose of the consent decree was to remedy departmental hiring and promotion practices with respect to black employees.[93] In order to achieve this purpose, the consent decree pro-

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close judicially enforced relief for plaintiffs. . . [for] [o]nly in the most blatant cases will plaintiffs be able to meet this onerous burden of proof." Comment, "*Last Hired, First Fired*" *Rights Without Remedies*: Firefighters v. Stotts, 1 DET. C.L. REV. 215, 227 (1985) [hereinafter cited as Comment, "*Last Hired, First Fired*"]. Hence, in effect the *Teamsters* and *Pullman-Standard* decisions operate to resolve all doubts, in a seniority case, in favor of the seniority system. *Id.* at 228. In his dissent to *Pullman-Standard* Justice Marshall stated:

> [P]lacing such a burden on plaintiffs who challenge seniority systems with admitted discriminatory impact, a burden never before imposed in civil suits brought under Title VII, frustrates the clearly expressed will of Congress and effectively 'freezes an entire generation of Negro employees into discriminatory patterns that existed before the Act.'

Pullman-Standard, 456 U.S. at 295 (Marshall, J., dissenting) (quoting *Quarles* 279 F. Supp. at 516); *see* Brodin, *supra* note 38, at 969.

88. These decisions illustrate a departure from the narrow view initially adopted by courts reviewing § 703(h) in order to promote the goals of affirmative action programs. See *supra* notes 51-67 and accompanying text for an analysis of cases narrowly construing § 703(h).

89. 104 S. Ct. 2576 (1984).

90. Stotts v. Memphis Fire Dept., 679 F.2d 541, 574 app. (6th Cir. 1982). The United States District Court for the Western District of Tennessee entered a consent decree in *Stotts*. See *infra* notes 90-94 and accompanying text discussing consent decree. The consent decree is reprinted in the appendix to the court of appeals' decision.

91. *Id.* at 573 app.

92. *Id.* at 574-75 app. A "consent decree" is a decree entered into at the consent of both parties as a means of settlement of an existing dispute between the parties. It serves as a contract between the parties which has been executed by the court. 27 Am. Jur.2d *Equity* § 245 (1966). See United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975) ("consent decrees are construed for enforcement purposes as contracts"), *cited in* Stotts v. Memphis Fire Department, 679 F.2d 541, 557 (1982), where the court observed that:

> The subject matter of a decree in an employment discrimination action, the right to litigate the issue of discrimination, is always unique. Both parties relinquish this valuable right in reliance upon the decree. Plaintiff forgoes the right to be made whole by proving a violation of Title VII.

Id. (footnote omitted).

93. *Stotts*, 679 F.2d at 575-76 app. Due to congressional preference for the voluntary settle-

vided for the immediate promotion of thirteen employees and for a gradual increase in the proportion of minorities hired by the City.[94] The consent decree, however, failed to set forth guidelines to govern the manner in which employees were to be laid off in the event of a fiscal crisis.[95]

In May of 1981, the City announced that budget deficits required a reduction in personnel employed in non-essential service divisions.[96] Proposed layoffs were to be based on the "last hired-first fired" rule pursuant to the collective bargaining agreement which governed all city-wide seniority systems.[97] The plaintiffs claimed that the use of the last hired-first fired rule frustrated the stated purpose of the decree.[98] In response to plaintiffs' request, the district court issued a temporary restraining order which prohibited the City from conducting layoffs of any black employee.[99]

After a premliminary injuction hearing,[100] the district court concluded that although the seniority system had not been adopted with any intent to discriminate, it could not be deemed bona fide due to its racially discriminatory impact.[101] The district court therefore granted an injunction prohibiting

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ment of employment discrimination suits, consent decrees are both available and readily used, in class action suits of this nature. *See* McArthur v. Southern Airways Inc., 404 F. Supp. 508 (N.D. Ga. 1975). Consent decrees which seek to settle class action suits generally require court approval, with the court often retaining jurisdiction to insure compliance with the decree. *See* EEOC v. Int'l Union of Operating Engineers, 416 F.Supp. 728 (N.D. Cal. 1975).

94. *Stotts*, 679 F.2d at 575-76 app. The consent decree, in *Stotts*, adopted the long-term goal set forth in a previously entered consent decree based upon a complaint issued by the Attorney General against the City of Memphis. *Id.* at 570 app.

The complaint alleged that the City of Memphis had engaged in patterns or practices of discrimination based on race or sex in their hiring and promotional practices in certain city departments. *Id.* A consent decree was subsequently entered into between the parties in 1974 as a means of settlement of the dispute. *Id.* For a more detailed discussion of the goals espoused in the 1974 consent decree see *id.* at 572-73.

95. *Stotts*, 104 S. Ct. at 2582.

96. *Stotts*, 679 F.2d at 549.

97. *Id.* Under a "last hired-first fired" system, an employee's length of service operates as the basis for determining who will be laid-off. The application of this rule during times of recession often requires the layoff of minorities who, having been recently hired, have had less time to accrue seniority. The issue of whether such layoffs are violative of Title VII has been addressed in numerous cases. *See* Note, *Last Hired First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544, 1544 (1975).

98. *Stotts*, 679 F.2d at 549-50.

99. *Id.* at 549. The firefighters' union intervened at this point in the litigation in order to protect the rights of its members. *Id.*

100. *Id.* At the preliminary injunction hearing it appeared that 55 overall positions in the department were to be eliminated, 39 of which were filled with employees who had "bumping rights." *Stotts*, 104 S. Ct. at 2582. It was also estimated that 40 "least senior" employees would subsequently be laid off, 25 of whom were white and 15 of whom were black. *Id.* Furthermore, it was discovered that 56% of the employees hired by the department since 1974 were black and that the percentage of blacks employed in the fire department had increased from approximately 3% or 4% in 1974 to 11.5% by 1980. *Id.*

101. *Stotts*, 679 F.2d at 550-51. The district court concluded that the proposed layoffs would have a "devasting and retrogressive effect" on minorities presently, as well as on affirmative action gains achieved by them pursuant to the 1974 and 1980 consent decrees. *Id.* at 549. Specifically, the district court noted that most minorities above the rank of private had accrued little seniority,

the City from implementing its seniority policy insofar as it would decrease the percentage of black employees in certain job classifications.[102] A modified layoff plan was instituted[103] which resulted in both layoffs and demotions of non-minority employees possessing greater seniority than minority employees.[104]

The Court of Appeals for the Sixth Circuit affirmed the lower court's decision to modify the consent decree despite its conclusion that the seniority system was bona fide.[105] The court of appeals reasoned that the modification was necessary to enforce the contractual obligation of the City to increase minority representation in the department.[106] In addition, the court of appeals noted that the modification was proper in light of the hardship created by unforeseen economic circumstances.[107]

Local Union No. 1784 (Union) and the City filed separate petitions which were consolidated for review.[108] The Supreme Court granted certiorari on the following issues: whether the case had been rendered moot;[109] and, whether the district court had exceeded its authority by issuing an injunction modifying the consent decree in contravention of the City's last hired-first fired seniority system.[110]

B. *Majority Opinion*

Justice White, writing for the majority,[111] first addressed the issue of mootness.[112] The respondents argued that the case was rendered moot because all of the employees that had been laid off pursuant to the injunction had been

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and would have constituted nearly 60% of all firemen affected by the demotions. *Id.* Furthermore, 55% of all lieutenants and 46% of all drivers who were minority employees would have been laid-off or demoted in rank if the proposed layoffs had occurred. *Id.* Based on this, as well as other evidence gathered, the district court ruled that because the proposed layoff policy, if implemented, would impact discriminatorily upon minorities and the gains achieved by them in employment thus far, the seniority system was not a bona fide system. *Id.* at 550-51.

102. 104 S. Ct. at 2582.

103. *Id.* In conformity with the modified layoff plan mandated by the district court, the City discharged approximately twenty-four privates, only three of whom were black. *Stotts*, 104 S. Ct. at 2582 n.2. Had the city followed its established seniority system only six of the twenty-four employees laid-off would have been black. Thus, as a direct result of the district court's modified layoff plan, three white employees were discharged. *Id.*

104. *Stotts*, 679 F.2d at 556.

105. *Id.* at 556 n.6, 562.

106. *Id.* at 561. The court of appeals reasoned that this modification was permissible based on basic contract principles. *Id.* at 560. They maintained that the City of Memphis contracted to provide "a substantial increase in the number of minorities in supervisory positions" and that the proposed layoffs in issue would constitute a breach of contract. *Id.*

107. *Id.* at 562-63.

108. *Stotts*, 104 S. Ct. at 2583.

109. *Id.*

110. *Id.* at 2585.

111. Justice White delivered the majority opinion. Chief Justice Burger, and Justices Powell and Rehnquist joined. Justice O'Connor filed a concurring opinion. Justice Stevens filed an opinion concurring in judgment only. Justice Blackmun filed a dissenting opinion in which he was joined by Justices Brennan and Marshall.

112. *Stotts*, 104 S. Ct. at 2583.

rehired.[113] Justice White rejected this argument and held that the case had not been rendered moot because the modified consent decree would continue to prevent the City from implementing its seniority system in the manner that it chooses.[114]

Addressing the second issue, the majority held that the district court had exceeded its authority by ordering an injunction providing for the layoff of white employees with greater seniority in contravention of the City's seniority system.[115] The *Stotts* majority reached this conclusion by systematically rejecting repondent's arguments in support of the district court's order.[116]

The first argument advanced by respondent Stotts in support of the injunction was that it served as a valid enforcement of the terms of the consent decree.[117] The respondents claimed that the consent decree was a contract that had been breached by the City's use of a seniority system that adversely affected the parties sought to be protected by the decree.[118] In response to this argument, Justice White noted that the parameters of a consent decree are limited by its contents.[119] Therefore, the *Stotts* majority concluded that since

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113. *Id.* Respondents maintained that only one month after the modified layoff plan had been implemented all non-minority employees who had been laid-off or demoted pursuant to this plan had been restored to their original positions. *Id.* Therefore, respondents argued that the injunction had no present force or effect upon the parties, thereby rendering the case moot. *Id.*

114. *Id.* at 2583. Going beyond the question of "whether the injunction is still in effect," the majority focused on the issue of "whether the mandated modification of the consent decree continues to have an impact on the parties such that the case remains alive." *Id.* (footnote omitted). The majority observed that in the event that layoffs became necessary in the future, both the city and the respondents would be affected by the modified consent decree. *Id.* at 2583 n.4. The city would be affected because it would be unable to apply its seniority system in the manner in which it chooses. *Id.* Furthermore, if this ruling were left intact, the city would be deprived of its ability to offer employees the benefit of seniority and the opportunity to promise its employees "that layoffs will be conducted solely on the basis of seniority." *Id.* Hypothetically, respondents would be affected because they would be afforded "greater protection than they would otherwise receive under the system." *Id.*

The majority also observed that all non-minority employees who had been laid-off and subsequently restored to their previous positions had nonetheless suffered a loss of one month in wages and seniority. *Id.* at 2584. Furthermore, the majority noted that no measures had been taken to provide these employees with any "make-whole" relief. *Id.* Therefore, the majority concluded that, unless overturned, the decision of the court of appeals would foreclose the parties from instituting any future claims against the city regarding these losses, because the modified layoff plan would be treated as a legal system no longer subject to challenge. *Id.*

115. *Id.* at 2585.

116. *Id.* at 2585-90.

117. *Id.* at 2585.

118. *Id.* The court of appeals adopted a "specific-performance approach" which rested on the notion that the city was obligated to use its best efforts to increase the percentage of blacks employed by the department pursuant to the consent decree. *Stotts*, 679 F.2d at 557. The court of appeals further noted that the city's attempted implementation of its last-hired first-fired layoff policy resulted in a decrease in the percentage of blacks employed by the department, thereby constituting a breach of the provisions of the decree. *Id.* at 563-64.

119. *Stotts*, 104 S. Ct. at 2586. The Court reiterated that the " 'scope of a consent decree must be discerned within its four corners, and not be reference to what might satisfy the purposes of one of the parties to it' or by what 'might have been written had the plaintiff established his factual claims and legal theories in litigation.' " *Id.* (quoting United States v. Armour & Co., 402

there were no specific provisions for layoffs or demotions within the text of the decree, the injunction could not be upheld on this basis.[120]

The majority also rejected Stott's argument that the injuction was proper because it carried into effect the specific purposes of the consent decree.[121] The majority noted that although the consent decree did provide for a remedy, it did not require the displacement of white employees holding greater seniority over black employees.[122]

The *Stotts* majority noted that the City's seniority system was bona fide and had not been adopted with an intention to discriminate.[123] Relying on *Teamsters*,[124] Justice White concluded that the City's last hired-first fired seniority system was therefore immunized by section 703(h) of Title VII.[125] The majority further noted that although a plaintiff may adequately demonstrate the presence of a "pattern or practice having a discriminatory effect on black. . . employees," mere membership in a disadvantaged class is insufficient to warrant a grant of retroactive seniority, and each individual must prove actual injury resulting from the discriminatory practice.[126] The majority observed that there had been no direct evidence presented on the issue of whether the black employees protected from layoff by the injunction had been actual victims of discrimination.[127] Under these circumstances, the *Stotts* ma-

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U.S. 673, 681-82 (1971)).

120. *Id.* Justice White observed that no specific mention of layoffs or demotions were stated in the consent decrees, nor was there any suggestion of an intention by either party to depart from the city's established seniority system. *Id.* Therefore, Justice White argued that had there been an intention to depart from the existing seniority system, it is reasonable to assume that the parties would have placed a provision to that effect directly into the consent decree. *Id.* It is not surprising that the city initially followed its seniority system in its anticipation of layoffs. *Id.* These facts led the majority to conclude that the injunction did not serve as a valid enforcement of the express terms of the consent decree because the decree failed to make specific mention or to even contemplate the type of injunction which would result in a modified layoff plan such as the one implemented in this case. *Id.*

121. *Id.* The stated purpose of the consent decree was " 'to remedy past hiring and promotion practices' of the Department." *Id.* (quoting *Stotts*, 679 F.2d at 575-76).

122. *Id.* at 2586. The majority of the Court maintained that it was reasonable to assume that the stated remedy provided by the decree would not infringe upon those remedies deemed appropriate under § 706(g) of Title VII. *Id.* See *supra* note 60 for the contents of 570(g).

The Court also noted that neither the union nor the non-minority employees could be bound by any agreements made in the 1980 consent decree because neither had been parties to the suit giving rise to the consent decree. *Stotts*, 104 S. Ct. at 2586. The Court emphasized that the absence of these parties in those proceedings made it highly unlikely that they would simply bargain away their rights pursuant to the established seniorty system. *Id.* Based on the foregoing analysis, the majority concluded that the injunction could not be upheld as a valid enforcement of the parties' agreement. *Id.*

123. *Id.* at 2587.

124. *Teamsters*, 431 U.S. 324 (1977). "[Section] 703(h). . . [permits] the routine application of a bona fide seniority system." *Id.* at 352.

125. *Stotts*, 104 S. Ct. at 2587. The majority noted that § 703(h) immunizes a bona fide seniority system from such scrutiny "absent proof of an intention to discriminate." *Id.* (citing *Teamsters*, 431 U.S. at 352). Because the proposed layoffs had not been adopted by the city with the intent to discriminate based on race, the system was deemed bona fide. *Id.*

126. *Id.* at 2588.

127. *Id.* In *Franks* and *Teamsters*, the Court postulated that only individual members of a

jority concluded that the district court did not possess the authority to disregard the established seniority system in fashioning a remedy under section 706(g).[128]

C. *Concurrence*

In his concurring opinion, Justice Stevens observed that the *Stotts* case presented no claim under Title VII because the consent decree had not been predicated upon a specific Title VII violation.[129] Justice Stevens stated that the decree merely served as a means of settling the existing dispute between the parties without making any determinations regarding liability under Title VII.[130] According to Justice Stevens, the majority should have focused on the administration of the consent decree rather than on Title VII issues.[131] Consequently, Justice Stevens concluded that the majority's "discussion of Title VII" was wholly advisory in nature.[132]

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plaintiff class who have demonstrated that they are actual victims of discriminatory practices may be awarded a grant of competitive seniority. *Franks*, 424 U.S. 747, and *Teamsters*, 431 U.S. 324. *Stotts* made no mention of any finding that the minorities protected from layoff had been actual victims of discrimination. 104 S. Ct. at 2588.

128. Turning to the policy underlying § 706(g), the majority observed that § 706(g) endeavors to provide actual victims of discrimination with "make whole" relief. *Id.* at 2589. Focusing on the legislative history surrounding this section, they observed that § 706(g) served as a limitation upon a court's remedial authority. *Id.*

In response to the fears expressed by congressional members that, if passed, Title VII could require employers to hire and promote individuals pursuant to an affirmative action program aimed at the maintenance of a racially-balanced workplace. *Id.* Senator Humphrey responded that there were limits on a court's remedial powers:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. . . [c]ontrary to the allegations of some opponents. . . there is nothing in it that will give any power to the Commission or to any court to require. . . firing. . . of employees in order to meet a racial 'quota' or to achieve a certain racial balance.

Id. at 2589 (citing 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey)).

129. *Id.* at 2594. Justice Stevens maintained that the case did not involve any issue under Title VII, but merely the administration of a consent decree. *Id.* In support of this position, Justice Stevens reiterated the following facts: 1) a consent decree had been entered between the parties in settlement of their dispute on April 25, 1980; 2) all of the present petitioners had notice of this decree along with the opportunity to object to its entry; 3) like all other final judgments, the decree was appealable immediately following its entry; and, 4) that no appeal had been taken. *Id.* Therefore, according to Justice Stevens, the consent decree operated as a binding and legally enforceable obligation upon the parties. *Id.* Hence, if the consent decree authorized the injunction, it "should be upheld irrespective of whether Title VII would authorize a similar injunction." *Id.* (footnote omitted). Subsequently, what would govern this case would *not* be Title VII, but the consent decree. *Id.* at 2594-95.

Justice Stevens noted, however, that if the consent decree had been predicated upon a specific Title VII violation, the remedial policies underlying Title VII might have been properly activated. *Id.* at 2595 n.4.

130. *Id.* at 2594.

131. *Id.*

132. *Id.* (Stevens, J., concurring). Although unwilling to join with the majority in its analysis of the case, Justice Stevens concurred in the judgment. He stated that there were two ways in

D. Dissent

In his dissent, Justice Blackmun criticized the majority's conclusion that the case had not been rendered moot by the subsequent rehiring of the employees that had been laid off.[133] Justice Blackmun concluded that the Court lacked jurisdiction to hear the case because the rehirings had terminated the controversy between the parties.[134]

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which the injunction could be justified: as a "construction of the consent decree" or "as an actual modification of the decree." *Id.* at 2595. Justice Stevens observed that, in the first instance, the district court failed to specify which portion of the decree it was construing, hence there was no basis upon which the injunction could be justified. *Id.* In the second instance, agreeing with Justice Blackmun in his dissent, Justice Stevens reiterated what had already been stated in the majority opinion. *Id.* That is, had the respondents adequately demonstrated the existence of "changed circumstances", the modification might have been deemed a valid one. *Id.* The facts state that the only "circumstance" found by the Court was the adverse impact which the proposed layoff would have upon black employees. *Id.* This was not a "changed circumstance" within the context of the consent decree. *Id.* Rather, this was a condition which was known by both parties when they entered into the decree. *Id.* It was therefore, according to Justice Stevens, the responsibility of both parties to have realized that any seniority-based layoffs which were contemplated for the future would have an adverse effect upon minority employees. *Id.*

133. *Id.* at 2596 (Blackmun, J., dissenting).

134. *Id.* Justice Blackmun, writing for the dissent, criticized the majority for the law which it has chosen to ignore in its analysis of the *Stotts* decision. *Id.* at 2595. Specifically, the dissent contended that the Court had improperly asserted its jurisdiction by hearing a case which had been rendered moot by time and circumstance. *Id.* at 2596. Noting that the 1981 layoffs had long since ended, Justice Blackmun argued that the preliminary injunction no longer restrained the parties from instituting any future action. *Id.* Therefore, a ruling under these circumstances became "wholly advisory". *Id.* The dissent, in restating that the Court has a duty to decide cases in controversy by rendering judgments which can be carried into effect, emphasized that the Court has no authority to render opinions on moot or abstract issues nor establish laws which have no bearing on the matter in issue before the Court at that time. *Id.* (citing Oil Workers v. Missouri, 361 U.S. 363, 367 (1960) (quoting Mills v. Green, 159 U.S. 651, 653 (1895)).

Reiterating the requirement that an actual "case or controversy" be present at all levels of appellate and certiorari review, Justice Blackmun stressed that it is insufficient that a controversy existed when the action was first instituted. *Id.* Rather, Justice Blackmun asserted that the controversy must be present at all levels of appellate and certiorari review. *Id.* (citing Roe v. Wade, 410 U.S. 113, 125 (1973)).

Furthermore, in absence of such a controversy, a federal court is deprived of its jurisdiction to hear a case. *Id.* Hence, "a case, although live at the start, becomes moot when intervening acts destroy the interest of a party to the adjudication." *Id.* (citing Defunis v. Odegard, 416 U.S. 312 (1974)).

The dissent emphasized that the usual practice of a federal court in the presence of such intervening acts is to vacate its judgment, remanding it to the lower courts with directions to dismiss. *Id.* (citing United States v. Munsingwear, 340 U.S. 36, 39 (1950)). The Court in *Munsingwear* noted that this procedure "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.* at 2596-97 (quoting *Munsingwear*, 340 U.S. at 40). Justice Blackmun stressed that if the court properly vacated a case which has become moot, then the legal rights of the parties would have been preserved. *Id.* at 2597. Therefore, if there had been a need for future layoffs, the respondents could challenge this new injunction on any ground because the preliminary injunction would no longer bind them. *Id.* Justice Blackmun criticized the majority for "[s]truggling to find a controversy on which to base its jurisdiction." *Id.*

In addition to the dissent's determination that the majority opinion was "wholly advisory," Justice Blackmun criticized the majority's treatment of the district court's order as a permanent injunction rather than a preliminary injunction.[135] The dissent stressed the importance of this distinction as a means of determining the proper standard of review.[136] Having characterized the order as a preliminary injunction, Justice Blackmun stated that the appropriate standard of review should have been whether the district court abused its discretion when it issued the injunction.[137] The dissent concluded that the majority applied an improper standard of review which allowed them to reach the merits of the case.[138]

The dissent also noted that the majority addressed an issue which was not present in the case.[139] The majority stated the issue as being whether the district court had exceeded its authority by ordering an injunction which required

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By failing to remand the case, Justice Blackmun charged the majority with creating the illusion of a controversy where in fact none existed. *Id.*

135. *Id.* at 2600 (Blackmun, J., dissenting).

136. *Id.* at 2600-02 (Blackmun, J., dissenting). The dissent drew support for its position from University of Texas v. Camenisch, 451 U.S. 390 (1981). *Camenisch* involved a suit instituted by a deaf student who had obtained a preliminary injunction which required the University of Texas to pay for an interpreter to assist with his studies. 451 U.S. at 392. While the case was pending on appeal, the student had graduated. *Id.* at 393. Nonetheless, the court of appeals affirmed the district court's preliminary injunction, holding that the student's graduation had not rendered the case moot because he had been required by the district court to post a bond before they could grant him a preliminary injunction. *Id.* Hence, the issue of whether the University of Texas should bear the cost of the interpreter still remained. *Id.* The Supreme Court granted certiorari, vacated the court of appeals decision, and remanded the case back to the district court. Explaining that the court of appeals correctly held that on the whole, the case was not moot, the Supreme Court, however, also noted:

> [T]he issue before the Court of Appeals was not who should pay for the interpreter, but rather whether the District Court had abused its discretion in issuing a preliminary injunction requiring the University to pay for him. . . . The two issues are significantly different, since whether the preliminary injunction should have issued depended on the balance of factors. . . [for granting preliminary injunctions], while whether the University should ultimately bear the cost of the interpreter depends on a final resolution of the merits of Camenisch's case. . . . Until [a trial on the merits] has taken place, it would be inappropriate for this Court to intimate any view on the merits of the lawsuit.

Id. at 393, 398 (citations omitted). *Camenisch* supports the position that a determination of whether a party is entitled to a preliminary injunction is a distinct issue from that of deciding the merits of the case and that a *reviewing court should not confuse the two. Stotts*, 104 S. Ct. at 2601 (Blackmun, J., dissenting). See *id.* at n.7 for a discussion of the importance of distinguishing between preliminary and permanent injunctions.

137. *Id.* at 2600. Justice Blackmun noted that the scope of inquiry of a district court granting a preliminary injunction is limited to deciding: "whether the plaintiffs have shown *a possibility of success on the merits*, whether the plaintiff or defendant would suffer irreparable harm and whether the public interest warrants the injunction. . . . The standard of appellate review is whether the district court abused its discretion in granting the preliminary injunction." *Id.* at n.6 (emphasis added) (quoting *Stotts*, 679 F.2d at 560). Furthermore, "likelihood of success" on the merits is not to be equated by a reviewing court with actual "success" on the merits —the two being significantly different. *Id.* at 2602 (quoting *Camenisch*, 451 U.S. at 394).

138. *Id.* at 2600 (Blackmun, J., dissenting).

139. *Id.* at 2602.

the layoff of white employees.[140] The dissent pointed out that the preliminary injunction did not require the layoff of white employees, but instead prohibited layoffs which would decrease the percentage of black employees presently employed in certain positions.[141] In the dissent's view, the issue should have been stated in terms of whether the district court had the requisite authority "pursuant to the consent decree. . . to enjoin a layoff of more than a certain number of blacks."[142] In order to address the issue of whether the district court had exceeded its authority, however,the dissent proceeded under the majority's assumption that the order was a permanent injunction.[143]

Justice Blackmun further criticized the majority for analyzing this issue under Title VII rather than pursuant to basic contract principles.[144] Noting that a "consent decree is to be construed for enforcement purposes essentially as a contract,"[145] the dissent stated that respondents were entitled to specific performance of the provisions of the negotiated decree.[146] In support of this position, the dissent noted that "a court of equity has [the] inherent power to modify a consent decree [if] changed circumstances [can be shown]," and that the consent decree specifically provided for " '[t]he Court [to retain] jurisdiction of this action for such further orders as may be necessary or appropriate to effectuate the purposes of this decree.' "[147] Justice Blackmun therefore maintained that the pertinent issue was whether the district court's order furthered the purposes underlying the consent decree.[148] The dissent noted, however, that due to the majority's characterization of the order as a permanent injunction, the respondents were denied the opportunity to prove their claim that the proposed layoff plan was in contravention of the consent decree.[149]

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140. *Id.* (Blackmun, J., dissenting). The majority stated that the issue at the heart of the *Stotts* decision was "whether the District Court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority." *Id.* at 2585.

141. *Id.* at 2602 (Blackmun, J., dissenting). The dissent emphasized that the preliminary injunction did not *require* that the city layoff white employees. *Id.* It noted that the preliminary injunction merely served to limit the options available to the city in meeting its fiscal crisis by requiring that the city maintain a certain percentage of blacks in specific positions. The choice of who would be laid-off remained with the city. *Id.* The dissent stressed the importance of this fact "because it makes clear that the preliminary injunction did not abrogate the contractual rights of white employees." *Id.*

142. *Id.* at 2602 (Blackmun, J., dissenting). The dissent maintained that the remaining question presented by these cases was "whether the District Court's authority pursuant to the consent decree enabled it to enjoin a layoff of more than a certain number of blacks," and not "whether the District Court could require the city to layoff whites, or. . . abrogate [the] contractual rights of white firefighters." *Id.*

143. *Id.* at 2602-03 (Blackmun, J., dissenting).

144. *Id.* at 2605 (Blackmun, J., dissenting).

145. *Id.* at 2603 (Blackmun, J., dissenting) (quoting United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975)).

146. *Id.* at 2603 (Blackmun, J., dissenting).

147. *Id.* (Blackmun, J., dissenting).

148. *Id.* at 2605 (Blackmun, J., dissenting) (citing from Chrysler Corp. v. United States, 316 U.S. 556, 562 (1942)).

149. *Id.* at 2603 (Blackmun, J., dissenting). The dissent observed that if respondents had been able to prove their allegations at trial, they may also have been able to prove a Title VII violation. *Id.* However, the fact remains that an actual trial on the merits never occurred. Instead,

The dissent also observed that the majority was incorrect in concluding that the district court could not have granted the requested relief had respondents litigated their Title VII claim.[150] Justice Blackmun initially noted that a trial on the merits had never occurred.[151] The dissent therefore concluded that since the nature and extent of the discriminatory practices had not been established at trial, it was impossible to determine whether the relief granted by the preliminary injunction would have been appropriate.[152]

Justice Blackmun also criticized the majority for its failure to distinguish between the types of relief appropriate under section 706(g).[153] The dissent noted that courts have recognized that two types of relief may be granted under section 706(g): "individual relief" and "race conscious class relief."[154] Under a theory of "race conscious class relief," the individual is not required to demonstrate that he was an actual victim of the discriminatory practice; mere membership in the disadvantaged class is sufficient to warrant a grant of relief.[155] Conversely, under the theory of "individual relief" espoused in *Teamsters*, actual injury to the individual must be evidenced in order to obtain relief.[156] The dissent noted that the language of the district court's order required the city to implement its layoff "in a race conscious manner."[157] Furthermore, the dissent pointed out that the respondents did not request "individual awards of retroactive seniority — and . . . the District Court did not make any such awards."[158] Justice Blackmun therefore asserted that the majority's reliance on *Teamsters* was misplaced since that case focused on the

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the parties chose to settle their dispute by entering into a consent decree. The majority's treatment of the injunction as a permanent one operated to deprive the respondents of the opportunity to substantiate their claim and subsequently faulted them for their failure to do so. If the Court had treated the injunction as a preliminary one, the case could have been remanded, and adequate evidence presented. Instead, the Court placed respondents in a no win situation by first precluding them from presenting evidence on whether the proposed layoff was in violation of the terms of the consent decree and subsequently holding this lack of evidence against them. *Id.* at 2603-04. In his dissent, Justice Blackmun criticized the majority's opinion as being "unfair" for it "focused entirely on what respondents have actually shown, instead of what they might have shown had trial ensued." *Id.* at 2607.

150. *Id.* at 2605 (Blackmun, J., dissenting).

151. *Id.* at 2606 (Blackmun, J., dissenting).

152. *Id.* (Blackmun, J., dissenting).

153. *Id.* at 2605 (Blackmun, J., dissenting).

154. *Id.* (Blackmun, J., dissenting).

155. *Id.* at 2606 (Blackmun, J., dissenting). A majority of courts agree that in a Title VII class action suit race-conscious remedies are appropriate. *Id.* The purpose served by these remedies is the eradication of present discrimination and the prevention of future violations of Title VII. *Id.* Because race-conscious relief attempts to remedy the "class-wide effects of past discrimination," relief of this nature "is provided to the class as whole rather than to its individual members." *Id.*

156. *Id.* at 2605-06 (Blackmun, J., dissenting). In class action suits instituted under Title VII, an individual is entitled to a grant of "individual relief" only if he has adequately demonstrated that he suffered actual injury as a result of the discriminatory practice at issue. *Id.* at 2605. The dissent observed that the requirement that a party be an actual victim has grown from the equitable principle of providing "make whole" relief only to victims who have suffered an actual injury. *Id.* (citing *Teamsters*, 431 U.S. at 347-48).

157. *Id.* at 2606 (Blackmun, J., dissenting).

158. *Id.* (Blackmun, J., dissenting).

issue of individual relief.[159]

IV. ANALYSIS

There are several factors contributing to the underlying tension between the concepts of affirmative action and seniority. Foremost is the theory of "preferential treatment," whereby one group receives favorable treatment under the Act to the detriment of a competing group.[160] Initially courts construed section 703(h) of Title VII narrowly in support of affirmative action programs.[161]

The economic pressures of the early 1970's resulted in a re-evaluation of the benefits and potential consequences of these programs.[162] This societal change in attitude generated a shift in judicial philosophy.[163] Courts have recently retreated from their earlier stance by affording greater deference to the concerns of incumbent employees in their analysis of Title VII issues.[164] *Stotts* is representative of this evolution in judicial philosophy.

The majority's decision in *Stotts* may also be termed "result oriented," an assertion which gains support from the many troublesome aspects of the case.[165] At the outset, it is questionable whether the Court had jurisdiction

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159. *Id.* at 2608 (Blackmun, J., dissenting).

160. Harvey, *The Reagan Administration and Affirmative Action in Four Major Cities: Detroit, Boston, New Orleans and Memphis*, 9 THURGOOD MARSHALL L. REV. 1, 2 (1984).

161. See *supra* notes 27 and 51-75 and accompanying text for a discussion of cases construing § 703(h) narrowly.

162. Belton, *supra* note 9.

163. A. MILLER, SOCIAL CHANGE AND FUNDAMENTAL LAW: AMERICA'S EVOLVING CONSTITUTION 354 (1979):

> That in a democracy law follows society and cannot precede it in any significant way is a proposition that seems to be too obvious for more than mention. The institutions erected within a given social structure are solidified by law and given form and coherence. The decisions which government makes — in the courts, in the legislature, and in the public administration — make up a body of public law which collectively represents consensus reached on specific issues through the operation of the political process. [Hence], [i]n a static period of history, we could expect little change in law, while a period of dynamic fluidity should reveal a similar development in law. Accordingly, constitutional law may be expected to change with considerable speed following in the wake of social alteration.

Id. (footnote omitted).

164. See *supra* notes 110-25 and accompanying text for discussion of cases enlarging scope of § 703(h).

165. The term result-oriented connotes a process of reasoning "backwards from a desired result without regard for the merits, logic, established law, or social policy applicable to the case." Simonett, *The Use of the Term "Result-Oriented" to Characterize Appellate Decisions*, 10 WM. MITCHELL L. REV. 187, 192 (1984).

> 'Result-oriented' is an elusive concept. Each time judges seek to find a way to attain a certain result that to them, seems just under the circumstances, they are, of course, being result minded. Nor need there by anything wrong in this. 'Result-oriented' becomes reprehensible, and is used pejoratively, only when the way in which the desired result is reached is 'unjudicial,' that is, when there has been a departure from the desionmaking norm.

Id. at 209.

over the case.[166] As was noted by the dissent, all incumbent employees who had been laid off or demoted as a result of the modified plan had been rehired or had returned to their original positions before the case reached the Supreme Court.[167] Therefore, any controversy previously existing between the parties had been resolved and the case was thereby rendered moot.[168]

Assuming, however, that there was an actual case in controversy, the majority should have limited itself to the issue of whether the district court abused its discretion by modifying the consent decree.[169] Instead, the majority attempted to reach the merits of the case and decide the issue of reverse discrimination by characterizing the lower court's order as a permanent injunction, thereby applying an improper standard of review.[170] This was precisely what Justice Burger warned against in his dissent in *Weber*. There, Chief Justice Burger noted that " 'hard' cases always tempt judges to exceed the limits of their authority. . . to reach a 'desireable' result."[171] This active role taken by the majority in *Stotts* was therefore in direct contravention with the doctrine of "judicial self-restraint."[172] Although the majority asserted that the

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166. *See supra* notes 133-34 and accompanying text.

167. *Id.*

168. *Id.* The dissent stated that the majority should have remanded the case on the issue of mootness, a position which has been subsequently adopted by the Court in Boston Firefighters'Union Local 718 v. Boston Chapter NAACP, 104 S. Ct. 3576 (1984). *Boston Firefighters'* involved a controversy remarkably similar to the one involved in *Stotts*. In an attempt to resolve certain financial difficulties, the City of Boston implemented layoffs in both the police and fire departments. *Id.* Both of these departments had been operating under consent decrees which sought to "remedy past discriminatory hiring practices." *Id.* Similar to the consent decree entered in *Stotts*, *Boston Firefighters'* decrees required that preferential treatment be afforded to minorities in an attempt to raise minority representation in various departments. *Id.* Because proposed layoffs were to be conducted according to the "last-hired, first-fired" rule, any such layoff would impact upon minority employees hired pursuant to the consent decree. *Id.* Minority employees therefore instituted an action in federal court to enjoin these layoffs. *Id.* The district court fashioned an appropriate remedy, which in the same manner as *Stotts* resulted in the layoff of non-minority employees having greater amounts of seniority. *Id.* In response, the Massachusetts Legislature enacted the Tregor Act, 1982 Mass. Acts, chapter 190, to remedy this situation, by providing the city with sufficient funds to rehire all officers laid-off during this period. *Id.* at 3577. Respondents argued that "the Tregor Act's mandatory reinstatement of all laid-off" officers rendered the case moot by removing any controversy existing between the parties. *Id.*

In response to the request that the *Stotts* rule be applied, the Court observed:

> It is true that *Stotts* involved ancillary backpay issues somewhat similar to those in these cases, but the Court's opinion never explained why vacating the District Court's orders would not have cleared the path for full litigation of the backpay issues in an appropriate proceeding involving adverse parties. Instead, the Court's opinion in *Stotts* proceeded from the misconception that even if the District Court's orders in those cases were vacated, they still might control backpay claims. . . [b]ecause a vacated judgment, by definition, cannot have any preclusive effect in subsequent litigation, the portion of the Court's decision in *Stotts* that assumes the contrary is tautologically incorrect.

Id. at 3579 (citations omitted).

169. See *supra* note 143 and accompanying text discussing Justice Blackmun's dissent.

170. See *supra* notes 135-43 and accompanying text analyzing dissenting opinion.

171. 443 U.S. 193, 218 (1979).

172. In his concurrence in Ashwander v. Valley Authority, 297 U.S. 288 (1935), Justice

case was justiciable by concluding that the injunction had a continuing effect upon the parties, had the case been properly remanded, any potential continuing effect could have been avoided.[173]

By failing to remand the controversy and treating the case as if an actual trial on the merits had occurred, the majority precluded the plaintiffs from proving their case against the defendants.[174] The majority's resolution of the dispute without the benefit of a trial denied the plaintiffs the opportunity to produce sufficient evidence on the issue of whether they had been actual victims of the alleged discriminatory practices.[175] Therefore, the majority's analysis operated to penalize the plaintiffs for their failure to produce sufficient evidence on this issue when in reality they had no opportunity to do so.[176]

One commentator has noted that an immediate result of the *Stotts* decision will be the discouragement of settlement through consent decrees as a means of resolving Title VII disputes.[177] It is unlikely that plaintiffs instituting a claim under the Act will relinquish the benefits of a completed trial to enter into a consent decree when it is doubtful whether the district court will have the requisite authority to enforce the terms of the decree.[178] In addition to undermining the authority of a district court to modify or enforce a consent decree, *Stotts* also frustrates the policy underlying Title VII of promoting the

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Brandeis stated that the Court had developed "a series of rules for its own governance under which it has avoided passing upon numerous constitutional questions presented to it for decision." *Id.* at 346 (Brandeis, J., concurring). These rules are as follows: 1) The court will only pass upon the constitutionality of a law in an adversarial proceeding. *Id.* 2) The Court will only decide constitutional questions where necessary (doctrine of ripeness). *Id.* at 346-47. 3) The Court may not create constitutional law beyond the scope of the facts presented. *Id.* at 347. 4) The Court will not decide constitutional questions where the case may be resolved in some other manner. *Id.* 5) The Court may not address the constitutionality of a statute, unless the party instituting the complaint has demonstrated that he has been injured by the operation of such statute (doctrine of standing). *Id.* 6) The Court may not address the constitutionlity of a statute, if the party bringing the complaint has received some benefit from such statute. *Id.* at 348. 7) When addressing the validity of a Congressional act, the Court must first determine whether the question may be avoided by fairly construing the statute. *Id.*

In his dissenting opinion in United States v. Butler, 297 U.S. 1, (1936), Justice Stone stated "that while unconstitutional exercise by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." *Id.* at 78-79 (Stone, J., dissenting).

In response to the judicial activism of the Warren Court, Justice Harlan commented that:

> This Court, limited in function. . ., does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so. . . .

Reynolds v. Sims, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting)(emphasis in the original). *See* MASON, THE SUPREME COURT FROM TAFT TO BURGER 7 (1979).

173. *See supra* note 149.

174. 104 S. Ct. at 2607.

175. *Id.* at 2607-08.

176. *Id.* at 2608. *See* Comment, "*Last Hired First Fired*," *supra* note 87, at 242-44.

177. *Id.* at 242.

178. *Id.*

voluntary settlement of disputes.[179] *Stotts* will therefore result in a substantial increase in the number of Title VII cases which are actually adjucated.[180] Although a more costly alternative to settlement, a completed trial will ensure that no future plaintiff is left without any form of legal recourse.[181]

The majority's holding that the district court's order could not be justified as a valid enforcement or modification of the consent decree is indicative of the preferential treatment presently provided to incumbent employees by the majority. *Stotts* is therefore representative of the conservative shift in philosophy taken by the majority of the Court as a means of accommodating both the public sentiment as well as the present administration.[182] The decision has received criticism for its detrimental impact upon the gains made by minorities pursuant to affirmative action programs.[183] Other analysts, particularly those representing the interests of the labor force, view *Stotts* in a more positive light.[184] These commentators maintain that "once minorities are on the job, seniority rules will protect them as well."[185] Opponents of this position are quick to note that the primary objective of affirmative action was, and still remains, to resolve the problem of mainstreaming minorities into the workforce.[186] Therefore, despite the so-called "victory" won by the present administration,[187] doubt remains as to how broadly courts are willing to construe the majority's pronouncement that race-conscious remedies must be tailored to actual victims of discrimination.[188]

In their analysis of Title VII issues, courts appear unwilling to expand the scope of *Stotts* beyond its facts.[189] Opting for a narrow construction of the *Stotts* rule, courts have noted a distinction between private voluntary affirmative action programs and public court ordered programs.[190]

The affirmative action program at issue in *Stotts* was a court ordered program which had been implemented by a public employer.[191] Therefore, the argument presented is that *Stotts* has no impact on voluntary programs entered into between private parties as a means of settling their disputes.[192] Had

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179. *Id.* at 242-43.

180. *Id.* at 243.

181. *Id.*

182. Harvey, *The Reagan Adminstration and Affrimative Action: Part II*, 10 THURGOOD MARSHALL L. REV., 353, 360-64 (1985).

183. *Id.* at 360-61.

184. *Id.* at 361.

185. *Id.* (quoting Hamby, *Court Ruling Splits Labor, Civil Rights*, The Oxford Eagel, June, 1984, at 9).

186. *Weber*, 443 U.S. at 202.

187. *See* Harvey, *supra* note 182 at 362-63.

188. *See* EEOC v. Local 638, 753 F.2d 1172, 1185-86 (1985); Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 911 (1984).

189. Van Aken v. Young, 750 F.2d 43, 45 (6th Cir. 1984); *Kromnick*, 739 F.2d at 911.

190. *Van Aken*, 750 F.2d at 45; *Kromnick*, 739 F.2d at 911.

191. *Van Aken*, 750 F.2d at 45. The *Van Aken* court noted that *Stotts* involved a court-ordered consent decree and did not result from a voluntary program. *Id.* Therefore, *Stotts* will not read as "barring this form of affirmative action." *Id.* The court also noted that *Stotts* does not overrule *Weber*, in which the Court "declined to 'condemn all private, voluntary, race-conscious affirmative action plans.'" *Van Aken*, 750 F.2d at 45 (citing *Weber*, 443 U.S. at 208).

192. Deveraux v. Geary, 596 F. Supp. 1481, 1486 (Mass. 1984).

the majority intended to depart from its interpretation of Title VII by requiring a finding of actual discrimination in all affirmative action cases, it stands to reason that they would have made mention of this fact in their analysis.[193] By limiting itself, however, to only those programs entered into pursuant to a court order, indicates the majority's reluctance to "rewrite Title VII law to mean that all affirmative action programs are improper absent a finding of actual past discrimination."[194] Furthermore, the *Stotts* decision has been criticized for the majority's "unwilling[ness] to hold public employers to the same standards as it has held private employers" regarding conflicts between affirmative action programs and seniority systems.[195] The majority's inconsistent application of the law in this area has therefore made a reconciliation of these important and competing interests all the more elusive.

CONCLUSION

In *Stotts*, the Supreme Court addressed the difficult issue of resolving the conflict between the employment objectives of incumbent employees pursuant to established seniority systems, and those of minorities in accordance with affirmative action programs. In an attempt to reconcile this tension, the Supreme Court employed an improper standard of review, encroaching upon the doctrine of judicial self-restraint as a means of reaching the issue of reverse discrimination.

Stotts adds little to employment discrimination law because the merits of the case were never adequately addressed by the court below. Courts interpreting *Stotts* have therefore construed it narrowly, limiting the case to its facts. If the Supreme Court had remanded the case, a complete analysis of the Title VII issues, which were prematurely addressed by the Supreme Court, would have occurred. The failure to remand the case, however, illustrates the lack of

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193. *Id.*

194. Comment, "*Last Hired, First Fired*", *supra* note 87, at 244. The dissent in *Stotts* stressed that the Court should have followed the holding in W.R. Grace & Co. v. Local Union 759, 103 S. Ct. 2177 (1983). *Stotts*, 104 S. Ct. at 2602 (Blackmun, J., dissenting). Like *Stotts*, *Grace* involved a similar fact pattern where an employer was faced with a conflict between a "Title VII conciliation agreement protecting its femal employees and the seniority rights of its male employees." *Stotts*, 104 S. Ct. at 2602 (Blackmun, J., dissenting). In *Grace*, the employer implemented the layoff of male employees as a means of resolving the dilemma presented. *Grace*, 103 S. Ct. at 2181. These male employees subsequently filed a complaint and eventually received grants of relief which were later upheld by the *Grace* Court. *Grace*, 103 S. Ct. at 2186. In upholding these awards, the Court noted:

> Given the Company's desire to reduce its workforce, it is undeniable that the Company was faced with a dilemma: it could follow the conciliation agreement as mandated by the District Court and risk liability under the collective-bargaining agreement, or it could follow the bargaining agreement and risk both a contempt citation and Title VII liability. The dilemma, however, was of the Company's own making. The Company committed itself voluntarily to two conflicting contractual obligations.

Grace, 103 S. Ct. at 2184.

195. The *Stotts* dissent asserted that the *Grace* decision should have been adhered to by the *Stotts* majority. To the dissent, the Court's failure to apply the *Grace* rationale indicated its unwillingness to hold public employers to the same requirements as private employers regarding a conflict between affirmative action and seniority. Comment, "*Last Hired, First Fired*," *supra* note 87, at 244.

concern for the difficult position of the *Stotts* plaintiffs. Furthermore, applying different standards to private and public employers implementing affirmative action programs complicates the law in this area.

In summation, apart from the procedural problems involved in *Stotts*, the Supreme Court has achieved precisely what Title VII sought to prevent — a "preference for any group, minority, or majority."[196] The Court's failure to account for the rights of minorities in its attempt to preserve the countervailing interests of incumbent employees trammels the rights of minorities. Thus, it appears that the Supreme Court in *Stotts* chose to ignore one of the basic tenets underlying Title VII: that *all* forms of racial discrimination perpetuated against individuals in the labor force are to be eliminated.[197]

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196. 42 U.S.C. § § 2000e to 2000e-17 (1982 & Supp. I 1983).
197. *Id.*

Commonwealth v. Cass: Criminal Liability for the Death of a Viable Fetus Under the Massachusetts Vehicular Homicide Statute

Recent advances in medical science have drawn attention to the legal status and rights of the unborn.[1] Although the Supreme Court has expressly stated that the fetus is not a person for the purposes of the fourteenth amendment,[2] the law has afforded protections to the unborn in a variety of ways. At common law the fetus was given certain property rights.[3] Modern tort law has recognized the right of a fetus to recover damages for prenatal injuries, if the fetus survives.[4] There is also a recent trend permitting recovery for wrongful

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1. *See* State v. Dickinson, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971), *aff'g* 23 Ohio App. 2d 259 (1970). Although holding that a viable unborn fetus is not a person under the Ohio vehicular homicide statute, the court acknowledged a viable fetus' potential for life:

> It is common knowledge that giant strides have been taken in medical technology during recent years. Where it was once impossible to determine the various stages of development of a fetus, such stages may be determined today with relative accuracy. An unborn fetus can be examined to determine its health while still in the womb, and numerous infants survive premature birth and caesarian deliveries. These infants, having had the opportunity, have clearly demonstrated their viability, i.e., ability to live independent of their mother.

Id. at 69-70, 275 N.E.2d at 602. *See also* People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980). The *Greer* court stated that "[t]he extent to which the unborn child is to be accorded the legal status of one already born is one of the most debated questions of our time, and one to which we do not find any completely consistent response." 79 Ill. 2d at 114, 402 N.E.2d at 208.

2. Roe v. Wade, 410 U.S. 113, 158 (1973). Thus a fetus does not enjoy a right to life as specifically guaranteed by the fourteenth amendment. *Id.* at 156-57.

3. *See* Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

> [The fetus] is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born.

Id. at 638-39, 470 P.2d at 629-30, 87 Cal. Rptr. at 493-94 (citing W. BLACKSTONE, COMMENTARIES 130 (1765)).

4. *See* W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS § 55, at 335 (4th ed. 1971). The right of a fetus to maintain a cause of action for prenatal injuries was first recog-

death when the fetus dies as a result of prenatal injuries.[5] Thus, as technological advances are made regarding the physical development of the fetus, the law continues to evolve to keep stride with the ever expanding knowledge of the scientific community.

The Supreme Court has also provided the states with guidelines for protecting the unborn under state abortion statutes. In *Roe v. Wade*,[6] the Court held that states may proscribe abortions in the stage subsequent to viability,[7]

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nized in 1946. *Id.* at 336 (citing Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946)). By 1967 the cause of action had been recognized in every American jurisdiction. *Id.* at 337 (footnote ommitted). Earlier decisions denying the right of a fetus to recover for a prenatal injury were based on the belief that a fetus was not in existence and therefore was owed no duty of care. *Id.* at 336-37. Courts were also concerned that proof of the causal connection between the negligence and the injury was too speculative. *Id.* at 336. The right to recover requires that the child be born alive. *Id.* at 337. If the child is born alive and subsequently dies from the injuries inflicted, then an action can be maintained for wrongful death. *Id.* at 336-37. See *infra* note 5 for a discussion of the statutory right of recovery for the wrongful death of a fetus.

There is a split in authority as to whether the fetus must be viable at the time of the injury in order to recover. W. PROSSER & W. KEETON, *supra* this note at 337. Although most cases have involved viable fetuses and have contained dicta indicating that a fetus must be viable, only in rare cases has a nonviable fetus been denied a right to recover for prenatal injuries. *Id.* at 368-69. *See generally* Annot., 40 A.L.R.3d 1222, 1228 (1971) (liability for prenatal injuries). The trend in the more recent cases is to allow the right of action whether or not the fetus was viable at the time of the injury. *Id.* at 1230. In Massachusetts, the right of action for a viable fetus was first recognized in Keyes v. Construct. Serv., Inc., 340 Mass. 633, 637, 165 N.E.2d 912, 915 (1960). The right of action was later extended to a nonviable fetus in Torigan v. Watertown News Co., 352 Mass. 446, 449, 225 N.E.2d 926, 927 (1967).

5. Although there is a split in authority, a substantial number of jurisdictions now recognize a right of recovery for the wrongful death of a fetus. Annot., 84 A.L.R.3d 411, 422 (1978). Where the fetus is viable at the time of the injury, the weight of authority is in favor of allowing an action to be maintained. *Id.* at 417. Courts in several jurisdictions, however, have expressly held that a right of action does not lie even if the fetus is viable at the time the fatal injury is sustained. *Id.* at 446. Two states, however, have indicated that they will permit the cause of action to be maintained even if the fetus was nonviable when the fatal injuries were sustained. *Id.* at 453-54 (citing Porter v. Lassiter, 91 Ga. App. 712, 715-16, 87 S.E.2d. 100, 102-03 (1955) (action maintainable where fetus "quick" in womb, although not yet viable); Presley v. Newport Hosp., 117 R.I. 177, 188-89, 365 A.2d 748, 753 (1976) (dictum rejecting viability as requisite to recovery)). Massachusetts recognized a viable fetus as a person within the meaning of the wrongful death statute in Mone v. Greyhound Lines, Inc., 368 Mass. 354, 361, 331 N.E.2d 916, 920 (1975). The court noted that viability rather than live birth was a more reasonable and just line of demarcation for allowing recovery. *Id.* at 360-61, 331 N.E.2d at 919-20.

6. 410 U.S. 113 (1973).

7. Although the Supreme Court has not rendered a precise definition of viability, the Court has articulated guidelines to be followed by the lower courts. The import of viability was first addressed by the Court in Roe v. Wade, 410 U.S. 113 (1973). In *Wade*, the Court asserted that the state's interest in the potential life of the fetus becomes compelling at the point of viability. *Id.* at 163. At that point a state may regulate and even prohibit abortion unless the life or health of the pregnant woman would be endangered. *Id.* at 163-64. In *Wade*, the Court defined viability as an interim point between conception and live birth when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Id.* at 160 (footnotes omitted).

One commentator suggests that the question left open by *Wade* is whether a presumption of viability arises at 24 weeks, the lowest age at which a fetus has been known to survive, or at 28

except where the life or health of the mother would be endangered.[8] Abortion statutes, however, vary considerably from state to state in the scope of protections they afford the fetus.[9] Courts also differ as to whether abortion statutes

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weeks, when most fetuses are known to survive. King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1679 (1979). King concludes, however, that a reading of post-*Wade* cases indicates that presumption of viability at 24 weeks would be unconstitutional. *Id.* at 1680.

In Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976), the Court adopted a flexible definition of viability, *id.* at 64, and rejected the contention that viablity could be fixed in a specific number of weeks. *Id.* at 65. The Court, however, clarified the definition:

> [I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

Id. at 64.

In Colautti v. Franklin, 439 U.S. 379 (1979), the Court reaffirmed its position in *Danforth*: that viability is a matter of the attending physician's judgment in the particular case. *Id.* at 388. Stressing the uncertainty and complexity of determining viability, the Court also enumerated a list of factors upon which a physician could base his or her judgment, *id.* at 395-96, but indicated that no single factor would be determinative. *Id.* at 388-89. The factors listed by the Court are "the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors." *Id.* at 395-96 (footnote omitted).

In *Colautti*, the Court also substituted a slightly different definition of viability from the one it had used earlier in *Wade*. The majority in *Colautti* stated that "[v]iability is reached when . . . there is a *reasonable likelihood* of the fetus' sustained survival outside the womb, with or without artificial support." *Id.* at 388 (emphasis added). As stated above, this determination would depend in each case upon the judgment of the physician. The Court indicated, however, that something more than "a remote possibility of fetal survival outside the womb" would be required to meet the "reasonable likelihood" standard. *Id.* at 393.

In the view of the dissenting Justices in *Colautti*, however, the majority had established a later time for viability than had been originally intended by the Court's opinion in *Wade*. *Colautti*, 439 U.S. at 402 (White, J., dissenting). The dissent focused on the requirement in *Wade* that the fetus be "*potentially able*" to survive, and noted that "being *able* and being *potentially able* do not mean the same thing." *Id.* (emphasis in original). The dissent argued that the *Wade* court did not intend to define viability as "that stage of development at which the fetus actually *is* able or actually *has* the ability to survive outside the mother's womb, . . . but as that point at which the fetus is *potentially* able to survive." *Id.* (emphasis in original). The dissent concluded that this point would arise at "an earlier point in the development of the fetus than that stage at which a doctor could say with assurance that the fetus *would* survive outside the womb." *Id.* (emphasis in original).

Thus, some degree of ambiguity still remains as to the constitutional definition of viablity. The *Colautti* majority, although asserting that it remains faithful to the definition in *Wade*, appears to be setting a standard based on a fetus' actual ability to survive as predicted by a physician, rather than on a fetus' mere potential ability to survive. *Colautti*, 439 U.S. at 393 n.11.

8. *Wade*, 410 U.S. at 163-64.

9. *See, e.g.*, MO. REV. STAT. § 188.030.3 (Supp. 1982) (upheld as constitutional in Ashcroft v. Planned Parenthood, 462 U.S. 476, 486, (1983)). The statute requires the presence of a second physician during an abortion on a viable fetus to preserve the life and health of the fetus, provided there is no risk to the life or health of the mother. MO. REV. STAT. § 188.030. Noting that the state has a compelling interest in the life of a viable fetus, the Court reasoned that the second

should be narrowly or broadly construed in their applicability to conduct which causes the death of a fetus.[10]

Criminal liability for the death of a fetus, however, remains a vigorously debated area, and existing protections for the unborn under the criminal law are very limited.[11] The majority of jurisdictions do not recognize the unborn as persons entitled to the protection of the criminal law.[12] A few states, however, have enacted separate feticide statutes to protect the unborn from homicide.[13] In a few other jurisdictions, the unborn are expressly included in the coverage of the general homicide statutes.[14]

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physician would be of assistance to the first physician. *Ashcroft*, 462 U.S. at 486. While the first physician would be ministering to the needs of the woman's health, the second physician would be free to attend to the medical needs of the fetus, thereby protecting the state's interest in the life and health of the child. *Id.*; *see also* MASS. GEN. LAWS ANN. ch. 112, § 12O (West 1983) (prohibits use of abortion procedures designed to destroy life of unborn, unless alternative procedures would create greater risk to life or health of mother); MASS GEN. LAWS ANN. ch. 112 § 120 (West 1983) (after 24th week, requires physician to take "all reasonable steps. . . in keeping with good medical practice. . . to preserve the life and health of the aborted child," including presence of life support equipment).

10. Some state courts have expanded the definition of abortion to include intentional conduct by a non-physician third party which causes a miscarriage. *See, e.g.*, Hollis v. Commonwealth, 652 S.W.2d 61, 65 (Ky. 1983) (husband forced hand up wife's vagina with intent to destroy fetus); Keeler v. Superior Court, 2 Cal. 3d 619, 635-36, 470 P.2d 617, 627-28, 87 Cal. Rptr. 481, 491-92 (1970) (former husband shoved knee into wife's abdomen with intent to stomp fetus out of her). Other courts have characterized abortion as a distinct offense which does not include criminal conduct by non-physician third parties. *See, e.g.*, *Hollis*, 652 S.W.2d at 67 (Wintersheimer, J., dissenting) (abortion statute designed for protection of consenting mother and physician); State v. Willis, 98 N.M. 771, 775, 652 P.2d 1222, 1226 (Ct. App. 1982) (defendant indicted under vehicular homicide statute rather than abortion statute).

11. *See Commonwealth v. Cass*, 392 Mass. 799, 803 n.3, 467 N.E.2d 1324, 1327 (1984) and cases cited therein. The *Cass* majority observed that "[m]any of the courts which have considered the question have decided that the destruction of a fetus should be considered a homicide but, because that rule would conflict with established precedent, have concluded that establishing such a rule requires legislative action." *Id.* at 803, 467 N.E.2d at 1327.

12. *Id.*

13. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 9-1.1 (a) (Smith-Hurd Supp. 1984-1985). The Illinois statute provides in pertinent part:

> A person commits the offense of feticide who causes the death of a fetus if, in performing the acts which caused the death, he, without lawful justification: (1) either intended to kill or do great bodily harm to the mother carrying the fetus or knew that such acts would cause death or great bodily harm to the mother. . .

Id.; see the following state statutory provisions which define killing of an unborn child by injury to mother as manslaughter: FLA. STAT. § 782.09 (1983); GA. CODE ANN. § 16-5-80 (1984); MICH. COMP. LAWS § 750.322 (1948) (MICH. STAT. ANN. § 28.554 (Callaghan 1982)); MISS. CODE ANN. § 97-3-37 (1972); R.I. GEN. LAWS § 11-23-5 (1956).

The New Mexico legislature has enacted a statute which protects the pregnant woman rather than the fetus from injury sustained as a result of the unlawful operation of a motor vehicle. *See* N.M. STAT. ANN. § 66-8-101.1 (Supp. 1985).

14. *See, e.g.*, N.Y. PENAL LAW § 125.00 (McKinney 1975). "Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks. . . ." *Id.*; *see also* CAL. PENAL CODE § 187(a) (West Supp. 1984). "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." CAL. PENAL CODE § 187(a).

The lack of protection afforded the unborn in the criminal law can be traced directly to the three-hundred year old common law born alive rule.[15] Under the rule, a fetus which died in utero was not a person and hence could not be the victim of homicide.[16] If there was proof of live birth, however, the fetus was considered a person, and the common law of homicide was applied.[17]

In *Commonwealth v. Cass*,[18] the Supreme Judicial Court of Massachusetts, in an unprecedented decision, overturned the born alive rule.[19] The court in *Cass* held that a viable fetus is a person under the Massachusetts vehicular homicide statute.[20] The court concluded that viability rather than live birth was a better standard for ascribing criminal liability for the death of a fetus.[21] The court relied on the legislative intent in using the word "person" in the vehicular homicide statute and found that the legislature intended to include a viable fetus.[22]

This Comment will examine the *Cass* decision and compare it with the decisions of other state courts which have ruled on the issue. Part I presents a brief history of the born alive rule. Part II sets forth arguments which favor the rejection of the rule. In Part III, the decisions of courts upholding the born alive rule are analyzed. In Part IV, the majority and dissenting opinion in *Cass* are examined in the light of existing law. In Part V, the implications of *Cass* are analyzed. This Comment concludes that a decision to protect the unborn under the criminal law involves the balancing of complex policy issues and therefore is a matter best left for the legislature.

I. History of the Born Alive Rule

The early origins of the born alive rule date back to the fourteenth century.[23] Its most influential exponent was Lord Coke of seventeenth century England.[24] In Lord Coke's view, there was no criminal liability for killing a

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15. According to the born alive rule, "a person could not be convicted of homicide at common law for the death of a child as the result of prenatal injuries, unless the child was first born alive." Annot., 40 A.L.R. 3d 444, 447 (1971).

16. *Cass*, 392 Mass. 799, 805, 467 N.E.2d 1324, 1328 (1984).

17. See *infra* notes 23-52 and accompanying text for a discussion of the born alive rule.

18. 392 Mass. 799, 467 N.E.2d 1324 (1984).

19. *Id.* at 807, 467 N.E.2d at 1329. Before *Cass*, every American jurisdiction which had decided the issue had followed the common-law born alive rule. *Id.*

20. *Id.* at 808, 467 N.E.2d at 1330.

21. *Id.* at 807, 467 N.E.2d at 1329.

22. *Id.* at 800-08, 467 N.E.2d at 1325-30.

23. *Cass*, 392 Mass. 799, 806, 467 N.E.2d 1324, 1328 (1984); *see also* Annot., 40 A.L.R.3d 444, 446-47 (1971) (history of born alive rule).

24. Keeler v. Superior Court, 2 Cal. 3d 619, 625, 470 P.2d 617, 620, 7 Cal. Rptr. 481, 484 (1970). Lord Coke's statement of the rule is:

> If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprison [i.e. misdemeanor], and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.

Id. (footnotes omitted) (emphasis in original) (quoting 3 Coke, Institutes *58 (1648)).

Although the term quickening no longer has validity in modern medicine, its use still persists in

fetus before it was capable of discernible movement.[25] The killing of a fetus which was capable of discernible movement, however, was treated as a misdemeanor.[26] If the fetus was born alive, lived for a brief time, and subsequently died from the criminal act, then the killing of the fetus was punishable as murder.[27]

The born alive rule, although variously stated by American courts[28] had

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some states' feticide statutes. Annot., 40 A.L.R.3d 444, 447 (1971); *see, e.g.*, GA. CODE ANN. § 16-5-80 (1984) (feticide is killing of unborn "quick" child). At common law the beginning of life was equated with "quickening," the first recognizable movement or stirrings of a fetus in utero and was generally held to occur between the 16th and 18th week of pregnancy. Roe v. Wade, 410 U.S. 113, 132 (1973). At least one modern case has held that quickening need not mean that the mother have actually experienced movement, but it is sufficient if the fetus has reached a certain age at which it would be capable of movement. Brinkley v. State, 253 Ga. 541, 544, 322 S.E.2d 49, 53 (1984).

There are indications that the common law view that treated the killing of a quickened fetus as merely a *misdemeanor*, and the killing of an unquickened fetus as no crime at all, was a departure from the ancient law. Annot., 40 A.L.R.3d 444, 446 (1971). Ancient law was that "one who procured an abortion by any means was guilty of murder if there was a living fetus in utero." *Id. But see Wade*, 410 U.S. at 130 (although abortifacients severely punished during Persian Empire, abortion freely practiced in early Greek and Roman times).

25. *See* Annot., 40 A.L.R.3d 444, 446 (1971)(legal consequences at common law for death of fetus before and after "quickening"); *see also Wade*, 410 U.S. at 132 (undisputed that abortion before quickening was not "indictable offense"). *See supra* note 24 (quoting COKE).

26. *See supra* note 24.

27. *See supra* note 24.

28. In interpreting the born alive rule, some courts do not focus on whether the injury to the fetus is prenatal or postnatal. They simply state the rule as requiring a live birth. *See, e.g.*, State v. McCall, 458 So. 2d 875, 876 (Fla. Dist. Ct. App. 1984) (killing of unborn child not homicide under English common law); *Cass*, 392 Mass. at 805, 467 N.E.2d at 1328 (destruction of fetus in utero not homicide at common law).

Other courts and commentators have stated the rule to require that the criminal agency occur after live birth. *See, e.g.*, Commonwealth v. Edelin, 371 Mass. 497, 510-11, 359 N.E.2d 4, 10-11 (1976) (in case of live birth, subsequent wanton and wreckless behavior is on point). The issue was debated by a divided court in *Edelin*, where testimony as to the defendant's alleged conduct towards the fetus, prenatally, was potentially more damning than his alleged conduct postnatally. *Id.* at 506-07, 359 N.E.2d at 9. Because the trial court's instructions clearly indicated that the jury could only consider postnatal conduct, however, the plurality held that prenatal conduct could not be considered. *Id.* at 512-13, 359 N.E.2d at 12. The plurality also found a basis in Massachusetts precedent for only considering postnatal conduct. *Id.* (citing Dietrich v. Northampton, 138 Mass. 14,15,17 (1884)). Another justification for the plurality opinion position was that if prenatal conduct could be considered, then a criminal agent might make certain he or she killed the fetus in utero, thus avoiding criminal liability altogether by virtue of there not being a live birth. *Id.* at 512-13, 359 N.E.2d at 12. The concurring justices, however, concluded that, under *Wade*, prenatal conduct could be considered because, under the facts in *Edelin*, there was sufficient evidence of viability. *Id.* at 527-29, 359 N.E.2d at 20 (Reardon J., concurring in result but dissenting in part).

Still other courts have explicitly interpreted the rule to allow for a homicide conviction where there has been a criminal act towards the fetus prenatally, subsequent to which the child was born alive and then died. See, *e.g.*, the following courts that have ruled that a homicide occurs where a child is born alive and dies from injuries sustained prior to birth: Clarke v. State, 117 Ala. 1, 8, 23 So. 671, 674 (1899); People v. Greer, 79 Ill. 2d 103, 111, 402 N.E.2d 203, 209 (1980); People v. Bolar, 109 Ill. App. 3d 384, 389, 440 N.E.2d 639, 643 (1982); Abrams v. Foshee, 3 Iowa 274, 278

continued vitality as the established law.[29] The rule answered the question of when a fetus becomes a person entitled to the protections of the criminal law.[30] The rule was considerably influenced by the scientific, philosophical, and theological concepts of common law England.[31]

At common law, the definition of homicide was "the killing of one human being by another."[32] Since a fetus was not considered a living being at common law, it could not be a victim of homicide.[33] The question of whether a fetus is considered a living being remains critical for determining criminal liability in modern times as well.[34] Most states do not define person or human being in their homicide statutes.[35] When courts construe homicide statutes, therefore, they must determine the legislative intent by looking to the common law meaning of human being at the time the statute was enacted.[36]

The born alive rule grew out of a concern with the difficulty in proving that the criminal act had caused the death of the fetus.[37] In the absence of scientific knowledge, there was no way to determine whether the fetus was

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(1856) (same); State v. Anderson, 135 N.J. Super. 423, 430, 343 A.2d 505, 509 (1975), *rev'd on other grounds*, 173 N.J. Super. 75, 413 A.2d 611 (1980); and Morgan v. State, 148 Tenn. 417, 421, 256 S.W. 433, 434 (1923).

29. *Cass*, 392 Mass. at 805, 467 N.E.2d at 1328. Until *Cass*, every jurisdiction which had considered whether the fetus is a person for the purposes of a criminal homicide statute had declined to abrogate the born alive rule absent legislative action. *Id.* After *Cass*, only one state court of last resort has made a similar ruling. *See* State v. Horne, 282 S.C. 444, 447, 319 S.E.2d 703, 704 (1984) (action for homicide can be maintained where fetus viable).

Other courts have declined to follow *Cass* as persuasive precedent. *See, e.g.*, *McCall*, 458 So. 2d at 877 (full term viable fetus not protected under vehicular homicide statute). In *McCall*, the Florida District Court of Appeal distinguished *Cass* as relying on Massachusetts precedent which had interpreted a viable fetus to be a person under the wrongful death statute. *Id.* at 876-77. In Florida, a viable fetus, subsequently stillborn, is not a person under the wrongful death statute. *Id.* at 877. The *McCall* court also noted the partial reliance of the *Cass* majority on the notion that the common law should evolve along with changes in medical science. *Id.* at 876-77.

See also State v. Soto, 378 N.W.2d 625 (Minn. 1985) (not within province of judiciary to include viable fetus as "human being" under vehicular homicide statute); State *ex rel.* Atkinson v. Wilson, 332 S.E.2d 807, 812 (W. Va. 1984) (whether unborn can be murder victim is matter for legislature).

30. *See infra* notes 32-46 and accompanying text.

31. *Wade*, 410 U.S. at 133; *see also* Annot., 40 A.L.R.3d 444, 447 (1971).

32. Annot., *supra* note 31, at 446.

33. *Id.*

> [S]ince there could be no homicide without a living human being as the victim, the killing of an unborn child was not regarded as homicide at common law for the reason that the fetus was not considered a 'person' or a 'reasonable creature in being' before its birth. Thus it was necessary that the child be born alive and exist independently of the mother's body before it was thought to be a 'human being' within the meaning of that term as understood in the law of homicide.

Id. (footnote omitted).

34. 40 C.J.S. *Homicide* § 2a (1944). "Any *living* human being may be the subject of a felonious homicide. . . ." *Id.* (emphasis in original).

35. *See infra* notes 82-83 and accompanying text.

36. *See infra* notes 95-97 and accompanying text.

37. *Cass*, 392 Mass. at 806, 467 N.E.2d at 1328.

alive at the time of the criminal act.[38] If it could be shown that the fetus was capable of an independent and separate existence apart from the body of its mother, then the cause of death could be linked to the criminal act.[39] Proof of live birth provided the certainty that the victim was a human being.[40]

The common law developed criteria to be applied in determining what constituted an independent existence.[41] Evidence of respiration[42] and independent circulation[43] were required as proof of a live birth.[44] Although there have been some modifications, these criteria have essentially been followed in most modern American jurisdictions.[45] Proof of live birth is a question for the trier of fact and must be established beyond a reasonable doubt in order to sustain a conviction for homicide.[46]

Modern medical techniques have eliminated many of the difficulties in determining when live birth and independent existence have occurred.[47] De-

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38. Annot., *supra* note 31, at 446-47.

39. *Id.* at 446.

40. *Id.* at 447.

41. *Id.* at 446. The most crucial element to be established was that the child had an existence completely independent and separate from its mother. *Id.* The traditional requirement was that the child must be fully brought forth and delivered from its mother. Annot., 65 A.L.R.3d 413, 415 (1975).

42. Independent existence was generally said to be shown by evidence of breathing and/or independent circulation. Annot., 65 A.L.R.3d 413, 415 (1975); *see, e.g.*, State v. Winthrop, 43 Iowa 519, 522 (1876). " 'It must be evident that when a child is born alive, but has not yet respired, its condition is precisely like that of the *foetus in utero*. It lives merely because the *foetal* circulation is still going on.' " *Winthrop*, 43 Iowa at 522 (quoting BECK, 1 MEDICAL JURIS 498) (emphasis in original). Breathing alone, however, was "not [necessarily] conclusive of. . . life [as] children sometimes breathe before complete delivery." 40 C.J.S. *Homicide* § 2a (1944) (footnote omitted); *see, e.g.*, *Edelin*, 371 Mass. at 518-19, 359 N.E.2d at 15 (despite unequivocal evidence of breathing outside mother's body, inquiry must establish whether breathing was evidence of postnatal life).

43. Independent circulation could be demonstrated either by evidence of breathing or by severance of the umbilical cord. Annot., 65 A.L.R.3d 413, 417-20 (1975); *see, e.g.*, *Bolar*, 109 Ill. App. 3d at 391, 440 N.E.2d at 645 (court relied on doctor's testimony that after umbilical cord severed, beating of heart caused circulatory system to function on its own). There has been a split of opinion, however, as to whether a child is considered to have a separate existence before the umbilical cord has been severed. 65 A.L.R.3d at 419; *see, e.g.*, *Morgan*, 148 Tenn. at 420, 256 S.W. at 434 (severed umbilical cord and independent circulation needed to establish independent existence); *but see* Jackson v. Commonwealth, 265 Ky. 295, 296, 96 S.W.2d 1014, 1014 (1936) (child completely expelled but still attached by umbilical cord when criminal act perpetrated held to be murder victim).

44. *See supra* notes 41-43.

45. People v. Chavez, 77 Cal. App. 2d 621, 625, 176 P.2d 92, 94 (1947).

> [J]urisdictions still require a rather complete separation from the mother and a rather complete demonstration that there was an entirely independent existence in the child before considering the infant as a human being, although in some of the more modern cases it has been held that the cutting of the cord was not necessary to this end.

Id.

46. *Bolar*, 109 Ill. App. 3d at 391, 440 N.E.2d at 643.

47. *See Edelin*, 371 Mass. at 504-05, 359 N.E.2d at 8. Post mortem microscopic examination of lung tissue by a pathologist can indicate whether there is respiratory activity. *Id*; *see also Chavez*, 77 Cal. App. 2d at 623, 176 P.2d at 93. The physician performing the autopsy concluded

spite the accuracy and reliability of modern science, however, jurors and courts are still faced with the dilemma of making artificial determinations as to what constitutes a live birth.[48] Although criteria have been developed to define the elements of live birth, no uniform standard has evolved,[49] nor is one likely to emerge.[50] The lack of a clear standard poses the danger of broad judicial discretion in rendering jury instructions defining the elements of live birth.[51] Thus, application of the born alive rule has often produced incongruous and unjust results.[52]

II. REJECTION OF THE BORN ALIVE RULE

Most courts which have decided the issue have acknowledged that the born alive rule is archaic.[53] Nevertheless, they have been reluctant to overturn

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that the child was born alive "based on . . . the fact that the lungs contained air and the blood was extravasated or pushed back into the tissues, indicating heart action." *Id.*

48. *See, e.g., Bolar*, 109 Ill. App. 3d at 388, 391, 440 N.E.2d at 643, 645. The court upheld the trial court's use of a heartbeat test to determine a live birth and convict the defendant of reckless homicide. *Id.* Although the fetus had suffered irreversible brain damage before birth and exhibited only a few heartbeats which ceased in a matter of minutes, the court found there was enough evidence of live birth to sustain a conviction of the defendant. *Id.* at 386-87, 440 N.E.2d at 641-42. The defendant argued for the application of the medical standard, which defines death as "a demonstrable absence of brain activity." *Id.* at 387, 440 N.E.2d at 642. The court rejected this test as impractical. *Id.* at 391, 440 N.E.2d at 644.

49. In *Edelin*, three of the justices noted that without a clear standard, the definition of live birth could exist at any point on a continuum. *Edelin*, 371 Mass. at 519, 359 N.E.2d at 15 (Broucher, Kaplan & Wilkins, J. J., concurring in result). It could be at one end, the slightest evidence of life, "such as a single gasp," or at the other end, a requirement that the child be able to live indefinitely on its own without the aid of life support equipment. *Id.*

50. *Bolar*, 109 Ill. App. 3d at 391, 440 N.E.2d at 644. The majority noted that setting arbitrary criteria for live birth had not proved workable, as each of the criteria had its own pitfalls. *Id.* The majority's solution was that the question of live birth should remain a question for the triers of fact. *Id.* "The anomaly persists whether we require a heartbeat, brain activity or breathing as a predicate for criminal liability." *Id.* at 390, 440 N.E.2d at 644.

51. *See, e.g., id.* at 389-92, 440 N.E.2d at 644-45 (majority upheld criminal trial court's use of Illinois Vital Records Act, a civil act, as criterion for establishing live birth).

52. In Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975), the Supreme Judicial Court of Massachusetts noted the incongruity of the born alive rule insofar as application of the rule resulted in a denial of recovery for the wrongful death of a viable fetus. *Id.* at 360-61, 331 N.E.2d at 920.

> [C]onditioning a right of action on whether a fatally injured child is born dead or alive is not only an artificial and unreasonable demarcation, but is unjust as well. . . . '[I]f the trauma is severe enough to kill the child, then there could be no recovery; but if less serious, allowing the child to survive, there might be recovery. Again, if the fatality was immediate, the suit could not prevail, but if the death was protracted by a few hours, even minutes, beyond birth, the claim could succeed. Practically, it would mean that the graver the harm the better the chance of immunity.'

Mone, 368 Mass. at 360-61, 331 N.E.2d at 920 (quoting Todd v. Sandrige Constr. Co., 341 F.2d 75, 77 (4th Cir. 1964)).

53. *See, e.g.*, Love v. State, 450 So. 2d 1191, 1192 (Fla. Dist. Ct. App. 1984) (state should prohibit violent acts against mother which result in injuries to fetus); People v. Greer, 79 Ill. 2d 103, 111, 402 N.E.2d 203, 207 (1980) (noting incongruous results of born alive rule); People v.

the rule by judicial decision.[54] Most courts view the rejection of the rule and the extension of the protections of the criminal law to the fetus as a matter for the legislature.[55]

Courts consider the rule obsolete for a number of reasons. Some courts have referred to the incongruous results of the rule.[56] For example, "[i]f the fetus survives long enough. . . to take a single breath, the defendant committed homicide. If, however, the fetus expires during birth, or just before, homicide has not occurred."[57] This anomaly could lead to the inconsistent result that if a viable fetus was killed on a highway on its way to the hospital to be born, it would not be a crime. On the other hand, if the same child were killed on the way home from the hospital after it was born, there would be criminal liability for vehicular homicide.[58]

The other most frequently cited reason for rejection of the rule is that it is based on the outdated scientific knowledge of the seventeenth and eighteenth centuries.[59] The high infant mortality rate coupled with the lack of medical knowledge led common law courts to presume that a fetus prematurely expelled would be born dead.[60] Such a presumption is inconsistent with modern scientific and medical realities.[61] Medical science can now provide competent

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Guthrie, 97 Mich. App. 226, 232, 293 N.W.2d 775, 778 (1980) (court described rule as archaic, outmoded, and of no useful purpose), *appeal denied*, 417 Mich. 1006, 334 N.W.2d 616 (1983); State *ex rel.* A.W.S., 182 N.J. Super. 278, 281, 440 A.2d 1144, 1146 (1981) (emergence from mother's body need no longer be determinative of fetus' capacity for independent life), *aff'g*, 182 N.J. Super. 334, 440 A.2d 1174 (1980).

54. See *infra* notes 71-114 and accompanying text for a discussion of the prevailing view.

55. See *infra* notes 71-114 and accompanying text for a discussion of the prevailing view.

56. *See* People v. Chavez, 77 Cal. App. 2d 621, 626, 176 P.2d 92, 94 (1947). In *Chavez*, the court held that a child in the process of being born is a human being under the California manslaughter statute. *Id.* at 622, 176 P.2d at 94-95. The court observed that there is not much change in a child between a moment before and a moment after it is born. *Id.* at 625, 176 P.2d at 94. "The mere removal of the baby . . . does not, of itself and alone, create a human being." *Id.* The court further stated:

> While the question of whether death by criminal means has resulted while the process of birth was being carried out, or shortly thereafter, may present difficult questions of fact, those questions should be met and decided on the basis of whether or not a living baby with the natural possibility and probability of growth and development was being born, rather than on any hard and fast technical rule establishing a legal fiction that the infant being born was not a human being because some part of the process of birth had not been fully completed.

Id. at 626, 176 P.2d at 94.

57. *Greer*, 79 Ill. 2d at 111, 402 N.E.2d at 207.

58. *See* Brief for Appellee at 9, Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984).

59. *Greer*, 79 Ill. 2d at 111-12, 402 N.E.2d at 207.

60. *Id.*

61. The phenomenon of a fetus' ability to survive on its own outside of its mother's body has been well documented by medical science. *Id.* at 112, 402 N.E.2d at 207. Although there is not complete agreement in the medical community, viability has been placed somewhere between 20 to 28 weeks. King, *supra* note 7, at 1674. The youngest fetus known to survive reportedly weighed less than 601 grams and was 24 weeks old. *Id.* at 1674 n.129. "Today, a baby born at even the extraordinarily tender age of 26 weeks has a shot at survival. And infants born at 28 weeks — weighing under two pounds — routinely survive and often thrive." Nickerson, *Fetal Viablity,*

proof as to whether the fetus was alive at the time of the defendant's conduct and whether the defendant's conduct was the cause of death.[62]

Modern medical science regards viability,[63] rather than live birth, as the stage at which a fetus has a separate and distinct existence from that of its mother.[64] Viability has a "well defined and medically determinable meaning"[65] and has been routinely applied by courts in civil matters.[66] Moreover, expert testimony can be used to establish viability.[67] Thus, the issue of the

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Overlaps the Legal Abortion Line, Boston Globe, May 20, 1985, at 41, col. 1.

Even when inside its mother's body, the fetus is regarded by the scientific community as having a distinct and separate existence from its mother. King, *supra* note 7, at 1660. "[M]odern biological studies have verified that the fetus is *genetically* a separate entity from a point at or near conception." *Id.* (foonote omitted) (emphasis in original).

62. Medical science has advanced to the point where the stages of fetal development and viability can be determined with relative precision. *See* King, *supra* note 7, at 1673-75. (footnotes omitted) (emphasis in original). "We have also developed a variety of techniques for observing individual fetuses. It is possible, for example, to detect and accurately diagnose, *in utero*, some disabilities and anomalies resulting from genetic conditions. We can determine the sex of the fetus, hear fetal heartbeats, diagnose multiple fetuses, and obtain an outline of fetal structure." *Id.* (footnotes omitted).

63. *See* Roe v. Wade, 410 U.S. 113, 160 (1973) (defining viability as "potentially able to live outside. . . mother's womb, albeit with artificial aid"); *see also* Larkin v. Cahalan, 389 Mich. 533, 541-42, 208 N.W.2d 176, 180 (1973). In *Larkin*, the court upheld the constitutionality of Michigan's assaultive abortion and manslaughter abortion statutes, which defined viable as "an unborn child whose heart is beating, . . . experiencing electronically measurable brain waves, . . . discernibly moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of the usual medical care. . . ." *Id.*

64. *See* Allaire v. St. Luke's Hosp., 184 Ill. 359, 370, 56 N.E. 638, 641 (1900) (Boggs, J., dissenting). In a famous dissent, which laid the groundwork for a civil cause of action on behalf of a viable fetus, Justice Boggs stated:

> Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition, the fetus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother.

Id.

One commentator has concluded that, for the purposes of the law, viability can be equated with the personhood or humanity of the fetus. *See* King, *supra* note 7, at 1676. King contends that since viability is the point at which there is a demonstrated capacity for independent existence, there is no relevant distinction between a viable fetus and a newborn. *Id*; *see also Chavez*, 77 Cal. App. 2d at 626, 176 P.2d at 95. Referring to the technical rule of live birth as a "legal fiction," the *Chavez* court suggested that the humanity of the fetus according to "scientific fact, common experience and knowledge" should be determined by a standard of viability. *Id.* Viability would be achieved "when the destruction of the life of [the] mother would not end its [the fetus'] existence and when, if separated from [its] mother naturally or by artificial means, it will live and grow in the normal manner." *Id.*

65. Keeler v. Superior Court, 2 Cal. 3d 619, 641, 470 P.2d 617, 631, 87 Cal. Rptr. 481, 495 (1970) (Burke, J., dissenting). *See supra* note 61.

66. *See supra* notes 4-5.

67. *See, e.g., State v. Horne*, 282 S.C. 444, 446, 319 S.E.2d 703, 704 (1984). The autopsy report revealed both the cause of death and the fact that the fetus had developed normally and was capable of a separate and independent existence ex utero. *Id.*

viability of a particular fetus can be left to the trier of fact.[68]

Courts have also cited policy reasons for rejecting the born alive rule. Some courts have suggested that a wrongdoer who brings about an intentional and often violent destruction of a viable fetus should not go unpunished by the criminal law.[69] These courts have expressed concern that the state's compelling interest in protecting a viable fetus is frustrated by a lack of criminal sanctions.[70]

III. The Prevailing View and the Excercise of Judicial Restraint

The holding of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Cass*[71] — that a viable fetus is a person for the purposes of the vehicular homicide statute[72]— was a bold departure from the overwhelming weight of authority.[73] Several state courts have considered the issue of the personhood of a viable fetus under homicide statutes.[74] Prior to *Cass*, however,

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68. *See Larkin*, 389 Mich. at 542, 208 N.W.2d at 180.

> The question of whether the deceased was a living human being at the time of an alleged homicide, like the cause of death itself, is a proper subject of adversary litigation. Scientific and lay evidence is admissible, and the jury can bring to its deliberations its experience in the ordinary affairs of life.

Id.

69. *See, e.g., Cass*, 392 Mass. at 807, 467 N.E.2d at 1329 (violent attack on pregnant woman resulting in the death of viable fetus should not go unpunished).

70. *See, e.g., Greer*, 79 Ill. 2d at 125, 402 N.E.2d at 213-14 (Clark, J., concurring in part and dissenting in part). "[I]t is not necessary to plumb the depths of one's reason to reach the conclusion that it is wrong for there to be such a sizeable gap in our criminal law that a person may destroy a viable, 8½-month-old fetus with impunity." *Id.*; *see also* Hollis v. Commonwealth, 652 S.W.2d 61, 66 (Ky. 1983) (Wintersheimer, J., dissenting). "[T]his matter is simply a brutal murder committed on an innocent, defenseless victim." *Hollis*, 652 S.W.2d at 66 (Wintersheimer, J., dissenting).

71. 392 Mass. 799, 467 N.E.2d 1324 (1984).

72. *Id.* at 808, 467 N.E.2d at 1330.

73. *Id.* at 808, 467 N.E.2d at 1329. As acknowledged by the *Cass* majority, "the rule that a fetus cannot be the victim of a homicide is the rule in every jurisdiction that has decided the issue, except those in which a different result is dictated by statute." *Id.*

74. The following cases were decided under vehicular homicide statutes: State v. McCall, 458 So. 2d 875 (Fla. Dist. Ct. App. 1984); People v. Bolar, 109 Ill. App. 3d 384, 440 N.E.2d 639 (1982); People v. Guthrie, 97 Mich. App. 226, 293 N.W.2d 775 (1980), *appeal denied*, 417 Mich. 1006, 334 N.W.2d 616 (1983); State v. Soto, 378 N.W.2d 625 (Minn. 1985); State *ex rel.* A.W.S., 182 N.J. Super. 334, 440 A.2d 1174 (1980), *aff'd*, 182 N.J. Super. 278, 440 A.2d 1144 (1981); State v. Willis, 98 N.M. 771, 652 P.2d 1222 (Ct. App. 1982); State v. Dickinson, 23 Ohio App. 2d 259, 263 N.E.2d 253 (1970), *aff'd*, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971); State v. Amaro, 448 A.2d 1257 (R.I. 1982); State v. Larsen, 578 P.2d 1280 (Utah 1978).

Cases decided under general homicide statutes are as follows: Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970); People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); Hollis v. Commonwealth 652 S.W.2d 61 (Ky. 1983); State v. Brown, 378 So. 2d 916 (La. 1979); State v. Gyles, 313 So. 2d 799 (La. 1975); State v. Anderson, 135 N.J. Super. 423, 343 A.2d 505 (1975), *rev'd on other grounds*, 173 N.J. Super. 75, 413 A.2d 611 (1980); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984); State *ex rel.* Atkinson v. Wilson, 332 S.E.2d 807 (W. Va. 1984); *see also* Love v. State, 450 So. 2d 1191 (Fla. Dist. Ct. App. 1984) (aggravated battery).

no court had abolished the well established common law born alive rule.[75] Courts of sister jurisdictions have uniformly concluded that extending the protections of the criminal law to a viable fetus is a matter strictly within the province of the legislature.[76]

Courts have generally approached the issue as a matter of statutory construction and legislative intent.[77] Although most courts have acknowledged the modern medical view that a viable fetus is a person,[78] they have uniformly declined to make a determination of when life begins.[79] The issue has been

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75. *Hollis*, 652 S.W.2d at 62. In support of its reluctance to overturn the born alive rule, the *Hollis* court cited the "decisions from nineteen sister states holding to judicial insistence on proof that life existed separate from the mother to establish a charge of criminal homicide." *Id.* In those states with feticide statutes the legislature has expressly overruled the born alive rule. *See supra* notes 13-14 and accompanying text.

76. *See, e.g., McCall*, 458 So. 2d at 877 (vehicular homicide); *Guthrie*, 97 Mich. App. at 238, 293 N.W.2d at 781 (negligent homicide); *State ex rel. A.W.S.*, 182 N.J. Super. at 282, 440 A.2d at 1147 (same).

77. *See, e.g., Dickinson*, 23 Ohio App. 2d 259, 261, 263 N.E.2d 252, 255 (1970). The majority stated that "since the [l]egislature did not otherwise define the word ['person'], we feel the more appropriate. . . 'question is not what did the [legislature] intend to enact but what is the meaning of that which it did enact.' " *Id.* (quoting *In re* Torok, 161 Ohio St. 585, 589, 120 N.E.2d 307, 310 (1954) (citation omitted)); *see also* State v. Dickinson, 28 Ohio St. 2d 65, 67, 275 N.E.2d at 600 (1971). In an attempt to determine whether the legislature intended to include the unborn in the vehicular homicide statute, the court looked to another statute *in pari materia* which defined person as "every natural person." *Id.* (citation omitted). The court then looked to *Webster's Third New International Dictionary* which defined "natural" as "existing or present from birth." *Dickinson*, 23 Ohio App. 2d at 67, 275 N.E.2d at 600. The court found these definitions to be indicative of a legislative intent not to protect the unborn under the vehicular homicide statute. *Id.*

78. *See, e.g., Greer*, 79 Ill. 2d at 111-112, 402 N.E.2d at 209. The *Greer* court reversed the murder conviction of the defendant although there was undisputed evidence that his fatal beating and rape of the mother had caused the death of her eight and one half month old fetus. *Id.* at 124, 402 N.E.2d at 213.

The state had argued that insofar as a viable fetus is regarded by modern medicine as a "distinct individual," the common law rule requiring a live birth was no longer valid. *Id.* at 111-12, 402 N.E.2d at 207. Although the court acknowledged the validity of the state's argument for protecting the fetus, *id.* at 114, 402 N.E.2d at 208, the court concluded that "taking the life of a fetus is not murder. . . unless the fetus is born alive and subsequently expires as result of the injuries inflicted." *Id.* at 116, 402 N.E.2d at 209.

79. *See, e.g., id.* at 125, 402 N.E.2d at 213 (Clark, J., concurring in part and dissenting in part).

> The. . . question. . . [of] when a fetus becomes a human being so that it is entitled to protection under the law. . . is certainly no stranger to controversy. At various times in history it has been promoted as doctrinal truth that humanity attaches at conception. . . at quickening. . . and at birth. . . . No single view has achieved total acceptance in the law at any one time, and any harmony of thought seems remote in our time.

Id. (citation omitted); *see also Wade*, 410 U.S. at 160 (1973). Acknowledging the complexity of the question of when life begins the Supreme Court noted that "[w]hen those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Id.* at 159.

analyzed in the context of both general homicide statutes[80] and vehicular homicide statutes.[81] The statutes use the terms "person," "human being," "individual," or "another."[82] These terms have not been expressly defined in the statutes.[83] The task for the courts has been to determine whether the legislature intended for a viable fetus to be protected under a criminal statute. The courts have generally concluded that the legislative intent was not to extend the criminal law to the protection of the unborn.[84]

State courts which have decided the issue have universally exercised judicial restraint in construing the relevant penal statutes.[85] They have stated that the making of the criminal law is strictly within the province of the legislature[86] and have limited their interpretation of the statute so as to avoid judicial legislation.[87] Some courts have expressly stated that all criminal law flows from the Penal Code and that they do not recognize common law crimes.[88] In some states there are state constitutional limitations restricting the role of the judiciary in defining criminal activity.[89] Many courts have agreed that to extend the criminal law to protect a viable fetus, absent an express legislative statement, would infringe upon the power of the legislature to define criminal activity.[90]

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80. *See supra* note 74.

81. *See supra* note 74.

82. *See, e.g.*, ILL. REV. STAT. ch. 38, § 9-3 (1979) ("individual") (construed in *Bolar*, 109 Ill. App. 3d at 389-92, 440 N.E.2d at 643-45); MASS. GEN. LAWS ANN. ch. 90 § 24G(b) (West Supp. 1985) ("person") (construed in *Cass*, 392 Mass. at 800-01, 467 N.E.2d at 1325-26); MICH. COMP. LAWS § 750.324 (1948) (MICH. STAT. ANN. § 28.556 (Callaghan 1982)) ("another") (construed in *Guthrie*, 97 Mich. App. at 228-238, 293 N.W.2d at 776-81); N.J. STAT. ANN. 2C:11-2 (West 1982) ("human being"), (construed in *State ex rel. A.W.S.*, 182 N.J. Super. at 279-81, 440 A.2d at 1145-46.

83. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 90, § 24G (West Supp. 1985). The language of the statute in pertinent part is as follows: "Whoever. . . operates a motor vehicle recklessly or negligently so that the lives or safety of the *public* might be endangered, and by any such operation. . . causes the death of *another person*, shall be guilty of homicide by a motor vehicle. . . ." *Id.* (emphasis added).

84. *See infra* notes 94-101 and accompanying text.

85. Courts have overwhelmingly declined to include a fetus as a person protected under a criminal statute absent express legislative authority. *See, e.g., Larsen*, 578 P.2d at 1282. The *Larsen* court stated that "[i]f the Utah Legislature wishes to pass this type of statute, it should do so in clear and specific language." *Id.*

86. *See supra* note 85.

87. *See infra* notes 90-93 and accompanying text.

88. *See, e.g., Keeler*, 2 Cal. 3d at 631, 470 P.2d at 624, 87 Cal. Rptr. at 488 (court would not extend penal code on constitutional balance of powers grounds); *Hollis*, 652 S.W.2d at 63 (court refused to extend state penal code); *Dickinson*, 23 Ohio App. 2d at 259-60, 263 N.E.2d at 255 (court refused to establish precedent of common law crimes).

89. *See, e.g., State ex rel. A.W.S.*, 182 N.J. Super. at 339, 440 A.2d at 1177. The *A.W.S.* court noted that "[u]nder the Constitution of the State of New Jersey, 'the judicial function is not an instrument through which legislation can be extended beyond its stated limits, no matter how ennobling the idea or laudatory the purpose.' " *Id.* (quoting Washington Twp. v. Central Bergen Mental Health Center, Inc., 156 N.J. Super. 388, 383 A.2d 1194 (Law Div. 1978)).

90. *See, e.g., id.* at 282, 440 A.2d at 1147. The *A.W.S.* court stated that interpreting the New Jersey homicide statute to include viable fetus "would be contrary to the rules of construction of statutory provisions as applied by the court." *Id.*

Most state courts have held that a judicial decision to include a viable fetus within an undefined statutory term enlarges a criminal statute, in effect creating a new crime.[91] The perceived danger in interpreting a statute beyond its plain meaining is that too much discretion is vested with the judiciary.[92] The concern is that conduct or classes of persons will be punished beyond what the legislature had contemplated at the time the statute was enacted.[93]

Although courts in sister states uniformly agree that the specification of criminal conduct is a statutory matter,[94] they have acknowledged that the criminal law had its origins in the common law.[95] Courts, therefore, have had to look to the common law for aid in determining legislative intent.[96] Every court prior to *Cass* concluded that when the legislature used the term "person" or "human being," it intended the term to be defined in conformity with its common law definition at the time the statute was enacted.[97]

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91. *See, e.g., Brown*, 378 So. 2d at 918 (not within court's power to define homicide to include feticide); *Guthrie*, 97 Mich. App. at 233, 293 N.W.2d at 778 (court cannot expand upon statutory crime by altering common law definition of terms); *Willis*, 98 N.M. at 772, 652 P.2d at 1223 (same); *see also Keeler*, 2 Cal. 3d at 632, 470 P.2d at 625, 87 Cal. Rptr. at 489. The *Keeler* court stated that "it is clear the courts cannot go so far as to create an offense by enlarging a statute, by inserting or deleting words, or by giving the terms used false or unusual meanings." *Keeler*, 2 Cal. 3d at 632, 470 P.2d at 625, 87 Cal. Rptr. at 489.

92. *Hollis*, 652 S.W.2d at 63-64.

93. *State ex rel. A.W.S.*, 182 N.J. Super. at 336, 440 A.2d at 1177; *see also Guthrie*, 97 Mich. App. at 233, 293 N.W.2d at 778. The *Guthrie* court cautioned that criminal laws should not be tampered with by the courts. *Guthrie*, 97 Mich. App. at 233, 293 N.W.2d at 778. The court stated that " '[c]riminal statutes, in contrast with the common law, may not be expanded to meet new problems beyond the contemplation of the legislature when the statute was enacted.' " *Id.* (quoting People v. Adams, 34 Mich. App. 546, 573, 192 N.W.2d 19 (1971); *see also Keeler*, 2 Cal. 3d at 632, 470 P.2d at 625, 87 Cal. Rptr. at 489. The *Keeler* court stated:

> It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

Id. (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96 (1820)).

94. *See, e.g., Keeler*, 2 Cal. 3d at 632, 470 P.2d at 624-25, 87 Cal. Rptr. at 488-89. "In order that a public offense be committed, some statute,. . . prior in time to the commission of the act must denounce it. . . ." *Id.*

95. *See, e.g., Dickinson*, 23 Ohio App. 2d at 261, 263 N.E.2d at 255. "[I]t is axiomatic that certain words, when used in criminal statutes, are judicially construed to have been used by the legislature in their common-law sense, in the absence of any express legislative definition to the contrary." *Id.* The court went on to state: "[S]ince we find no legislative definition of the word 'person' in the Ohio criminal homicide statutes, we hold that when the legislature used the word 'person' in a homicide statute, that word must be understood to mean what it meant in common-law homicide." *Id. See also Hollis*, 652 S.W.2d at 63. The *Hollis* court stated that since "[t]he statute makes no effort to define the word 'person,' . . . it should be interpreted in conformity with the law regarding criminal homicide as it existed at the time when the statute was passed." *Hollis*, 652 S.W.2d at 63.

96. Courts have applied the presumption that when the statute was originally enacted, the legislature was familiar with both common-law precedent affecting the subject of the legislation and with the holding of the high court of its own jurisdiction. State v. Amaro, 448 A.2d 1257, 1259 (R.I. 1982).

97. *See supra* notes 71-76 and accompanying text. The day after *Cass* was decided, the Supreme Court of South Carolina held that the common-law definition of human being could be

Some courts have found legislative support for applying the common law definition.[98] Other courts have followed the settled rule that where there is a clear cut common law meaning for a statutory term, and the legislature has provided no other definition, the common law meaning will apply.[99] In looking to the common law at the time the respective statutes were enacted, most state courts have agreed that the common law definition of human being includes only those born alive.[100] These courts have concluded that had the legislature wished to deviate, it would have done so by an express legislative enactment.[101]

Courts have also applied the settled rule of statutory construction that penal statutes must be narrowly construed and any doubts resolved in favor of the criminal defendant and against the state.[102] The reason behind this rule is to afford the criminal defendant the due process right to have fair notice and not to be penalized under an ex post facto law.[103] Otherwise, a person could be charged with a crime without notice that the act charged is within the meaning of the statute.[104]

The rule requiring strict construction of penal statutes has also been ap-

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changed by the court "to better serve an ever-changing society as a whole." *Horne*, 282 S.C. at 447, 319 S.E.2d at 704. *But see State ex rel Atkinson*, 332 S.E.2d at 811. In *Atkinson*, the West Virginia Supreme Court of Appeals disagreed with *Horne*, stating: "[t]he [*Horne*] court, in a brief opinion without any discussion of its power to create new common law crimes, held that the murder of a viable unborn child would henceforth be a crime." *Id.* (footnote omitted).

98. *See, e.g., Greer*, 79 Ill.2d at 111, 402 N.E.2d at 207. The Supreme Court of Illinois found an express legislative statement in the Committee Comments that the homicide statute codified the pre-existing common law. *Id.*

99. *Dickinson*, 23 Ohio App. 2d at 259-60, 263 N.E.2d at 255.

100. See *Cass*, 392 Mass. at 805 n.4, 467 N.E.2d at 1328 and cases cited therein. "The [born alive] rule has been accepted as the established common law in every American jursidiction that has considered the question." *Id.* at 805 (footnote omitted).

101. *See, e.g., Amaro*, 448 A.2d at 1259. The *Amaro* court noted that since the born alive rule was well established in the common law at the time the vehicular homicide statute was enacted, the legislature would have expressly deviated from the common law had it so intended. *Id.*

102. *See, e.g., Amaro*, 448 A.2d at 1259 (vehicular homicide statute to be narrowly construed); *see also* State v. Willis, 98 N.M. 771, 772, 652 P.2d 1222, 1223 (1982). The *Willis* court noted that "[t]he cardinal rule in construction of a statute is to ascertain the intention of the Legislature as it is expressed in the words of the statute, and for this purpose the whole act must be considered. The law requires that penal statutes shall be strictly construed. . . ." *Willis*, 98 N.M. at 772, 652 P.2d at 1223 (quoting State v. Garcia, 83 N.M. 490, 493 P.2d 975 (Ct. App. 1971).

103. *Keeler*, 2 Cal. 3d at 633-36, 470 P.2d at 626-28, 87 Cal. Rptr. at 490-92. The *Keeler* court stated " '[t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . .' " *Id.* at 633, 470 P.2d at 626, 87 Cal. Rptr. at 490 (quoting Connally v. General Constr. Co. 269 U.S. 385, 391 (1926)). "This requirement of fair warning is reflected in the constitutional prohibition against the enactment of ex post facto laws." *Id.* at 634, 470 P.2d at 626, 87 Cal. Rptr. at 490 (citing U.S. CONST. art. I, § § 9-10; CAL. CONST. art. I, § 16). The court further noted that the due process requirement of fair warning is lacking not only when a new penal statute is applied retroactively, but also "when such an act is made punsihable under a existing statute but by means of an unforseeable *judicial* enlargement thereof." *Id.* at 634, 470 P.2d at 626, 87 Cal. Rptr. at 490 (citing Bouie v. City of Columbia, 378 U.S. 347, 354-55 (1964)) (emphasis in original).

104. *See supra* note 103.

plied by many courts to reject any analogy between the right of the representatives of a viable fetus to recover under a wrongful death statute, and the right of a viable fetus to be protected under a homicide statute.[105] In many jurisdictions courts have recognized the right of recovery for the wrongful death of a viable fetus.[106] Nevertheless, these courts have rejected the argument that since a viable fetus is recognied as a person for the purposes of a civil recovery, it should likewise be recognized as a person under the criminal law.[107] Courts have reasoned that wrongful death statutes are remedial and thus should be broadly construed whereas criminal statutes are penal and should be narrowly construed.[108]

The different objectives of the criminal law and the civil law have persuaded courts that different principles can govern the same factual situation.[109] The purpose of the civil right of action is to recognize the fetus as a valuable entity.[110] The interest protected is to compensate the parents who have suffered the loss from the wrongful death of a fetus.[111] The interests of the criminal law, on the other hand, are to protect and vindicate the public at

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105. *See, e.g., Willis*, 98 N.M. at 772, 652 P.2d at 1223 (no punishment for acts not plainly within language used); *Dickinson*, 28 Ohio St. 2d at 70, 275 N.E.2d at 602 (word used in civil statute does not necessarily import same meaning when used in criminal statute).

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

107. *See Greer*, 79 Ill. 2d at 114-15, 402 N.E.2d at 208 (notwithstanding right of viable fetus to recover under wrongful death statute, criminal common law requires fetus to be born alive); *Hollis*, 652 S.W.2d at 63 (prior case recognizing civil action for death of unborn fetus did not indicate intention to change criminal law); *Guthrie*, 97 Mich. App. at 232-33, 293 N.W.2d at 778 (criminal law expanded only by legislative enactment); *Amaro*, 448 A.2d at 1259 (remedial statute such as wrongful death liberally interpreted, criminal statutes strictly construed). In some jurisdictions, however, civil recovery for the wrongful death of a fetus had not been recognized at the time the court was deciding whether to protect the fetus under the criminal law. *See Keeler*, 2 Cal.3d at 628, 470 P.2d at 622, 87 Cal. Rptr. at 486 (Legislature of 1850, at time of enacting general homicide statute, did not intend to include viable, unborn fetus); *Dickinson*, 28 Ohio St.2d at 70, 275 N.E.2d at 602 (high court had not extended wrongful death law to include unborn fetus).

108. *Amaro*, 448 A.2d at 1259; *see Hollis*, 652 S.W.2d at 63-64. In *Hollis*, the court noted that changing or reversing "established principles of common law in civil matters [is one thing, but] . . .[i]t is quite another to do so in regard to criminal statutes." *Hollis*, 652 S.W.2d at 63-64. (quoting *Guthrie*, 97 Mich. App. 226, 292, 293 N.W.2d 775, 778 (1980)). The court further stated that its reasons for establishing a civil right of action were based on its recognition of the developing trend in sister states to protect the fetus under tort law. *Id. But see Hollis*, 652 S.W..2d at 68 (Wintersheimer, J., dissenting). The dissent noted that "[t]he legislators, as well as the general public, should have reasonable acquaintance with the civil laws of Kentucky." *Id.* The dissent further recognized that the civil right of action for a viable fetus had been in existence for twenty years before the adoption of the penal code, and in view of the presumption that the legislature is familiar with the decisions of the state's highest court of last resort, "it is reasonable to believe that the Kentucky legislature intended the concept of personhood be extended to the criminal law." *Id.* The dissent concluded that "[i]t is easy to argue that civil cases have no technical application to criminal statutes. However, we believe that the legislative intent has been sufficiently manifested in Kentucky to include a fabric of the law that is uniform and whole and not unduly fragmented." *Id.*

109. *Greer*, 79 Ill. 2d at 115, 402 N.E.2d at 209.

110. *Hollis*, 652 S.W.2d at 63.

111. W. PROSSER & W. KEETON, *supra* note 4, § 2, at 7.

large, to punish the wrongdoer through penal sanctions, and to deter others from committing similar crimes.[112] Courts have concluded, therefore, that the "divergence between tort law and criminal law is not necessarily inconsistent."[113] This reasoning is consistent with the historicial treatment of the fetus, which has received little protection under the civil law and even less protection under the criminal law.[114]

IV. *Commonwealth v. Cass*: Facts and Holding

A. *Procedural History*

In *Commonwealth v. Cass*,[115] a criminal complaint was issued charging the defendant with violation of the Massachusetts vehicular homicide statute.[116] An agreed statement of facts was entered into by both parties.[117] Since the only matter for decision in the case was the legal issue of whether the word "person" under the statue also included a viable fetus,[118] the trial court reported the case to the appeals court.[119] Subsequently, the Supreme Judicial Court of Massachusetts, on its own intitiative, ordered a direct review.[120]

B. *The Facts*

In November of 1982, the defendant, while operating a motor vehicle on a public way, struck a woman pedestrian who was eight and one-half months pregnant.[121] The woman was brought to a hospital shortly after the accident and upon her arrival, doctors were able to detect a fetal heartbeat.[122] A short

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112. *Id.*

113. *Greer*, 79 Ill. 2d at 115, 402 N.E.2d at 209. The majority illustrated some examples of the divergent treatment of the fetus: The fetus has historically enjoyed "substantial rights" under property law and more recently under tort law. *Id.* at 114-15, 402 N.E.2d at 208. The fetus, however, has not been deemed to be a person under the fourteenth amendment. *Id.* at 114, 402 N.E.2d at 208 (citing *Wade*, 410 U.S. at 158). Furthermore, the unborn fetus has not received the protection of criminal homicide statutes unless first born alive. *Id.* at 115, 402 N.E.2d at 208.

114. *Id.* at 113-15, 402 N.E.2d at 208. In *Greer*, the court noted that historically there have co-existed "opposing tendencies to protect the fetus in some instances and not in others. . . ." *Id.* at 114, 402 N.E.2d at 208.

115. 392 Mass. 799, 467 N.E.2d 1324 (1984).

116. *Id.* at 800, 467 N.E.2d at 1325. The vehicular homicide statute, Mass. Gen. Laws Ann. ch. 90, § 24G(b) (West Supp. 1985), provides in pertinent part:

> 'Whoever. . . operates a motor vehicle while under the influence of intoxicating liquor, or of marihuana, narcotic drugs, depressants, or stimulant substances. . . or the vapors of glue, or whoever operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered and by any such operation causes the death of another person, shall be guilty of homicide by a motor vehicle. . . .'

Id. (footnote omitted) (quoting Mass. Gen. Laws. Ann. ch. 90, § 24G(b)).

117. *Cass*, 392 Mass. at 799, 467 N.E.2d at 1324-25.

118. *Id. See supra* notes 77-84.

119. *Cass*, 392 Mass. at 799, 467 N.E.2d at 1324-25.

120. *Id.* at 799, 467 N.E.2d at 1325.

121. *Id.* at 799-800, 467 N.E.2d at 1325.

122. Brief for Appellant at 2, Commonwealth v. Cass, 392 Mass. 799, 467 N.E. 2d 1324 (1984).

while later, the heartbeat ceased.[123] A caesarian section was performed and the infant was delivered stillborn.[124] An autopsy revealed that the fetus had died from internal injuries caused by the impact of the accident and that the fetus was viable at the time of the accident.[125] The defendant was charged with vehicular homicide of the unborn fetus.[126]

C. *The Majority Holding*

In a four to three decision[127] the Supreme Judicial Court of Massachusetts held that "[a] viable fetus is a 'person' for purposes of the vehicular homicide statute. . . ."[128] The court set forth several reasons for its holding. The first reason was based on the legislative intent in using the word "person" in the vehicular homicide statute.[129] The court looked to its decision in *Mone v. Greyhound Lines, Inc.*[130] in which it had held that a viable fetus was a person for the purposes of the wrongful death statute.[131] Shortly after *Mone*, the legislature enacted the vehicular homicide statute.[132] The *Cass* court concluded, therefore, that the legislature intended to include a viable fetus as a person protected under the vehicular homicide statute.[133] The court reasoned that the rationale for adopting a viablity standard under the wrongful death statute applied as well under the vehicular homicide statute.[134] Moreover, the court interpreted the word person in accord with its ordinary meaning and found that person is synonymous with human being.[135] The court concluded that the offspring of human parents must be human both before and after birth, and therefore a person protected under the statute.[136]

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123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 3.

127. The majority opinion in *Cass* was written by Chief Justice Hennessey, joined by Justices Nolan, Lynch and O'Connor. *Cass*, 392 Mass. at 799, 467 N.E.2d at 1324. The dissenting opinion was written by Justice Wilkins, joined by Justices Liacos and Abrams. *Id.* at 808, 467 N.E.2d at 1330.

128. *Id.* at 808, 467 N.E.2d at 1330.

129. *Id.* at 801, 467 N.E.2d at 1325.

130. 368 Mass. 354, 331 N.E.2d 916 (1975).

131. *Id.* at 361, 331 N.E.2d at 920. The *Cass* court reasoned that *Mone* was applicable because " '[t]he Legislature is presumed to have knowledge of the decisions of this court.' " *Cass*, 392 Mass. at 801, 467 N.E.2d at 1325 (quoting MacQuarrie v. Balch, 362 Mass. 151, 152, 285 N.E.2d 103, 104 (1972)). The *Cass* majority also noted that the facts and legal issues in *Mone* were strikingly similiar to those in *Cass*. *Cass*, 392 Mass. at 800, 467 N.E.2d at 1325. Both cases involved the death of an eight and one-half month old fetus resulting from the negligent operation of a motor vehicle. *Id.* at 801, 467 N.E. 2d at 1325.

132. *Cass*, 392 Mass. at 800, 467 N.E.2d at 1325.

133. *Id.* at 801, 467 N.E.2d at 1325.

134. *Id.* at 800, 467 N.E.2d at 1325. "[In *Mone*] [w]e found 'neither reason nor logic in choosing live birth over viability,' and we stated that 'conditioning a right of action on whether a fatally injured child is born dead or alive is not only an artificial and unreasonable demarcation, but is unjust as well.' " *Id.* (quoting Mone v. Greyhound Lines, Inc., 368 Mass. at 360-61, 331 N.E.2d at 920).

135. *Id.* at 801, 467 N.E.2d at 1325.

136. *Id.*

The court offered an alternative rationale for its holding. The court recognized the possibility that the legislature, in enacting the vehicular homicide statute, may not have even considered whether the fetus was a person protected under the statute.[137] The court cited its historic role in providing judicial construction of nonspecific terms in criminal statutes by looking to the common law.[138] The court viewed its role, however, as not only defining but also as developing the common law.[139] In concluding that a viable fetus could be the victim of homicide, the court reasoned that it was not bound by the preexisting common law definition of person.[140] The court explained that in the Commonwealth, unlike in code jurisdictions, the criminal law is largely common law rather than statutory law.[141] Thus, the court has had an expansive role in both defining and developing the criminal law.[142]

In addition, the court rejected the mechanical application of the rule of statutory construction which requires the strict interpretation of penal stat-

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137. *Id.* at 801, 467 N.E.2d at 1326.

138. *Id.* at 801-03, 467 N.E.2d at 1326-27. The court cited numerous examples of its past decisions defining the terms "murder" and "manslaughter" as well as other decisions in which the court had refined the definition of statutory terms of art such as "premeditation" and "malice aforethought." *Id.* at 802-03, 467 N.E.2d at 1326. The court further stated that "it is clear from long usage that the process of judicial definition of statutory terms is within the expectation of the Legislature when it employs undefined terms in criminal statutes." *Id.* at 803, 467 N.E.2d at 1326-27.

139. This view is expressly stated in several sections of the majority opinion: "[W]e may assume that the Legislature intended for us to define the term 'person' by reference to established and developing common law." *Id.* at 801, 467 N.E.2d at 1326. "[W]e reject the notion that we are unable to develop common law rules of criminal law. . . ." *Id.* at 803, 467 N.E.2d at 1327.

In support of its position, the court cited the "litany of cases" wherein it had "provided definitive common law rulings required by general language used by the Legislature." *Id.* Although the court acknowledged that language used by the legislature limited its "common law prerogatives," it emphasized that "the administration of [the] criminal law would be all but unworkable without the application of the common law within the limits permitted by statutory language." *Id.* at 803-04, 467 N.E.2d at 1327.

140. *Id.* at 804, 467 N.E.2d at 1327. The court noted that "[p]reexisting [sic] common law meaning may be a useful indication of legislative intent. However, to conclude that mere use of the term was intended to freeze its meaning is to make a shibboleth of a rule of construction." *Id.* (citing Keeler v. Superior Court of Amador County, 2 Cal. 3d 619, 641, 87 Cal. Rptr. 481, 470 P.2d 617 (1970) (Burke, Acting S.J. dissenting)).

141. *Id.* at 803, 467 N.E.2d at 1327. The *Cass*. . . majority rejected the notion that: "courts are unable to develop common law rules of criminal law because the Legislature has occupied the entire field of criminal law." *Id.*; *see also* State v. Soto, 378 N.W.2d 625 (Minn. 1985). *Soto* distinguished between common law and code jurisdictions as follows:

> In the United States some jurisdictions recognize common law crimes as well as those crimes defined and proscribed by legislative enactment. Such states are known as 'common law' states. Other states of the union have abolished common law crimes either by statute or constitution and have provided that no act or omission constitutes a crime unless defined by statute. Such jurisdictions are known as 'code states.'

Id. at 627. Even in code jurisdictions, however, courts may look to the common law statutory construction. *Id.*

142. *See supra* notes 138-41 and accompanying text.

utes.[143] The court concluded that it was not limited to interpreting the word "person" in accord with its pre-existing common law meaning.[144] The court also found that the holding satisfied the constitutional requirement of notice and fairness to the defendant by making the decision prospective.[145]

Lastly, the court reviewed the history and rationale behind the common law born alive rule.[146] The court rejected the rule as no longer relevant in the twentieth century in view of modern medical advances.[147] The court reasoned that concerns about whether the fetus was alive at the time of the defendant's act are no longer valid.[148] The court concluded that speculation as to causation can be removed through competent medical testimony.[149]

D. The Dissent

The three dissenting justices concluded that the issue of the personhood of a fetus is a matter of social policy best left to the legislature.[150] They argued that the majority had acted in excess of its judicial powers.[151] They also emphasized that every other jurisdiction which had considered the issue had exercised judicial restraint and upheld the born alive rule in the absence of legislative authorization.[152] The dissent also noted that the majority's reliance on its power to interpret common law crimes is irrelevant where the crime at issue is strictly statutory.[153]

Moreover, the dissent disagreed with the majority's reliance on the connection between the *Mone* decision and the enactment, shortly thereafter, of the vehicular homicide statute.[154] The dissenting justices reasoned that the legislature would not have ignored hundreds of years of criminal common law history in favor of a definition of "person" as interpreted in a recent civil tort case.[155] Finally, the dissent stated that the majority had ignored the rule

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143. *Cass*, 392 Mass. at 804, 467 N.E.2d at 1327. See *supra* notes 102-08 and accompanying text for a discussion of the rule and its treatment in other jurisdictions.

144. *Cass*, 392 Mass. at 804, 467 N.E.2d at 1327.

145. *Id.* at 805, 467 N.E.2d at 1328.

146. *Id.* at 805-07, 467 N.E.2d at 1328-29.

147. *Id.* at 806, 467 N.E.2d at 1328. In overturning the born alive rule, the court stated:

> 'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.'

Id. at 805-06, 467 N.E.2d at 1328 (quoting O.W. Holmes, 10 HARV. L. REV. 457, 469 (Jan. 8, 1897).

148. *Id.* at 806, 467 N.E.2d at 1328.

149. *Id.*

150. *Id.* at 809, 467 N.E.2d at 1330 (Wilkins, J., dissenting).

151. *Id.* at 810, 467 N.E.2d at 1330 (Wilkins, J., dissenting). "I think that this is an inappropriate 'exercise of raw judicial power.'" *Id.* (quoting Doe v. Doe, 365 Mass. 556, 565, 314 N.E.2d 128 (1974) (Hennessey, J., dissenting in part) quoting Doe v. Bolton, 410 U.S. 179 (1974) (White, J., dissenting)).

152. *Id.* at 809, 467 N.E.2d at 1330 (Wilkins, J., dissenting). *See supra* notes 75-79 and accompanying text.

153. *Cass*, 392 Mass. at 809, 467 N.E.2d at 1330 (Wilkins, J., dissenting).

154. *Id.* (Wilkins, J., dissenting).

155. *Id.* (Wilkins, J., dissenting). The dissent noted that "the development of civil liability

which requires a strict construction of penal statutes.[156]

V. THE IMPLICATIONS OF *Cass*

The *Cass* decision is significant because the court viewed its role not only as defining but also as developing the criminal law.[157] The holding in *Cass* is also consistent with modern medicine which regards a viable fetus as distinct and separate from its mother.[158] By contrast, courts in sister jurisdictions, in their refusal to overrule the born alive rule, appear to be clinging to an outmoded law that has outlived its usefulness.[159] The Supreme Judicial Court of Massachusetts departed from the weight of authority for two reasons. First, in Massachusetts, the criminal law is largely common law[160] in contrast to code jurisdictions where the legislatures have preempted the common law.[161] Thus, the majority in *Cass* was able to justify its dynamic approach to the judicial construction of the vehicular homicide statute and its rejection of the principle that the court is bound by the pre-existing common law definition of human being.[162]

The court in *Cass*, however, failed to distinguish between the interpretation of a statutory term and the creation of a new crime.[163] The court extended the protections of the vehicular homicide statute to a class of persons not explicitly designated by the legislature.[164] As the *Cass* dissent noted, the court's traditional role of construing common law crimes is irrelevant when it construes a strictly statutory crime.[165] The second reason why the court de-

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for injuries to a fetus is 'quite distinguishable' from the criminal law." *Id.* (citing Commonwealth v. Edelin, 371 Mass. 497, 513 n.23, 359 N.E.2d 4, 12 (1976) (plurality opinion)).

156. *Id.* (Wilkins, J., dissenting) (citing Commonwealth v. Howard, 386 Mass. 607, 617, 436 N.E.2d 1211, 1216 (1982) (O'Connor, J., concurring)).

157. *Cass*, 392 Mass. at 804, 467 N.E.2d at 1327 (1984). The court noted that it had "developed and redefined the meaning of the common law applicable to other criminal statutes." *Id.*

158. See *supra* notes 61-68 and accompanying text for a discussion of the modern medical view of viability.

159. See *supra* notes 53-70 for a discussion of reasons to reject the born alive rule.

160. *Cass*, 392 Mass. at 803, 467 N.E.2d at 1327.

161. *See, e.g.*, Hollis v. Commonwealth, 652 S.W.2d 61, 63 (Ky. 1983). The *Hollis* court noted that "[i]n this state. . . criminal sanctions are supposed to flow from the Kentucky Penal Code rather than evolving out of court decisions. . . ." *Id.* The court held that a fetus was not a person protected under the Kentucky homicide statute. *Id.*

162. *Cass*, 392 Mass. at 801-04, 467 N.E.2d at 1326-27.

163. Courts in other jurisdictions have reasoned that define the word person in a homicide statute to include viable fetus is in effect to create a new crime. *See, e.g.*, Keeler v. Superior Court, 2 Cal. 3d 619, 633, 470 P.2d 617, 625-26, 87 Cal. Rptr. 481, 489-90. In *Keeler*, the Supreme Court of California stated that to prosecute the killing of a viable fetus under a statute not expressly so providing "would indeed be to rewrite the statute under the guise of construing it." *Id.*

164. *See* MASS. GEN. LAWS ANN., ch. 90, §24G(b) (West Supp. 1985) (vehicular homicide statute). The Massachusetts statute penalizes those who cause the death of "another person." *Id.*; *see also Hollis*, 652 S.W.2d at 63. The *Hollis* court refused to construe the Kentucky homicide statute to include the unborn. *Hollis*, 652 S.W.2d at 63. "This Court cannot presume that the legislature intended to license us to expand the class of persons who could be treated as victims of criminal homicide as we should deem appropriate in our own discretion." *Id.*

165. *Cass*, 392 Mass. at 809, 467 N.E.2d at 1330. "The court's extended reliance on its

parted from the weight of authority was that the vehicular homicide statute was enacted shortly after the court held in *Mone* that a viable fetus is a person under the wrongful death statute.[166] Thus, the court inferred a legislative intent to include a viable fetus as a person protected under the vehicular homicide statute.[167] In most jurisdictions which had ruled on the issue, however, the criminal statute had been enacted prior to a ruling by the state high court recognizing a right of action for the wrongful death of a viable fetus.[168] The *Cass* court, however, failed to consider that the criminal and civil law have different objectives,[169] and that the legislature did not expressly extend the protections of the criminal law to a viable fetus.[170] It may be assumed that the legislature was aware of the *Mone* decision and the protections afforded the fetus in that case.[171] Thus, had the legislature intended to include a viable fetus as a person protected under the vehicular homicide statute, it would have expressly done so.[172]

The dissent noted that the court should have exercised judicial restraint as a matter of wise social policy.[173] There are two important policy considera-

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power to construe common law crimes and judge-made rules is beside the point. That power has no place in the construction of an exlusively statutory crime." *Id.*

166. *Id.* at 800, 467 N.E.2d at 1325.

167. *Id.* at 801, 467 N.E.2d at 1326. "Despite the fact that *Mone* was a civil case, we can reasonably infer that, in enacting § 24G [the vehicular homicide statute], the Legislature contemplated that the term 'person' would be construed to include viable fetuses." *Id.*

168. *See, e.g.*, People v. Guthrie, 97 Mich. App. 226, 229-31, 293 N.W.2d 775, 776-77 (1980), *appeal denied*, 417 Mich. 1006, 334 N.W.2d 616 (1983) (negligent homicide statute enacted in 1921; wrongful death of viable fetus recognized in 1971).

169. *See* State v. Soto, 378 N.W.2d 625 (Minn. 1985). The *Soto* court refused to follow the *Cass* court in reliance on a wrongful death case. *Id.* at 629-30. The *Soto* court reasoned that:

> It does not follow that because we held in *Verkennes* that next of kin might recover damages arising out of the destruction of a viable fetus in a civil action. . . that a viable fetus is a 'human being' for purposes of the criminal law. This court may exercise its common law powers to fashion a remedy for a civil wrong. . . . The Death by Wrongful Act Statute creates a civil cause of action protecting and limited to survivors' expected interest in the continued life of the unborn child. This civil statute focuses on compensating a future interest of a survivor, not a present interest of a decedent.

Id. at 630.

170. *See* State *ex rel.* Atkinson v. Wilson, 332 S.E.2d 807 (W. Va. 1984). The court in *Atkinson* noted that tort law is a constantly evolving area of the law in which courts have had a major role in forging new common law principles. *Id.* at 810. The court stated that "there exists a distinction between a court's power to evolve common law principles in areas in which it has traditionally functioned, i.e., the tort law, and in those areas in which the legislature has primary or plenary power, i.e., the creation and definition of crimes and penalties." *Id.*

171. *Cass*, 392 Mass. at 801, 467 N.E.2d at 1325. *See also supra* notes 130-34 and accompanying text.

172. *See* State v. Amaro, 448 A.2d 1257, 1259-60 (R.I. 1982). The court noted that the Legislature had expressly made provisions for the unborn under the Workers' Compensation Act and under the feticide statute. *Id.* The court found "[t]he fact that the Legislature referred to unborn children in the foregoing two statutes but not in the vehicular-homicide statute strongly supports the conclusion that the Legislature did not intend to change the common-law meaning of the term 'person' in that statute." 448 A.2d at 1260.

173. *Cass*, 392 Mass. at 809, 467 N.E.2d at 1330 (Wilkins, J., dissenting).

tions raised in *Cass*. The first is whether, and under what circumstances, a criminal defendant should be liable for his or her conduct which causes the death of a viable fetus. The second is whether, and to what extent, the fetus should be protected under the criminal law. These are complex and far reaching policy issues that can only be adequately addressed by a representative body answerable to the electorate.

The court's decision in *Cass* has not only left many issues unresolved, but has also created a broad range of potential criminal liability for the death of a viable fetus. Although *Cass* was decided under the vehicular homicide statute,[174] the court has indicated in dicta that it was adopting a broad rule applicable to every homicide of a viable fetus.[175] The court has failed to consider that homicide is a general term which covers a wide range of criminal activity from involuntary manslaughter to first degree murder.[176] The court has, in effect, created potential liability not only for crimes involving the intentional and deliberate killing of a fetus but also for less serious crimes involving mere negligence.[177]

In states where feticide statutes have been enacted, legislators have made specific and separate determinations as to what constitutes the elements of feticide.[178] In the majority of these states, legislators have not provided criminal sanctions where the defendant's conduct lacked the requisite mental intent for murder.[179] No state legislature has expressly created criminal liability for

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174. *Cass*, 392 Mass. at 808, 467 N.E.2d at 1330. "A viable fetus is a 'person' for purposes of the vehicular homicide statute. . . ." *Id.*

175. *Id.* at 807, 467 N.E.2d at 1329. The court's statement of its new rule is as follows:

> We think that the better rule is that infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide. If a person were to commit violence against a pregnant woman and destroy the fetus within her, we would not want the death of the fetus to go unpunished. We believe that our criminal law should extend its protection to viable fetuses.

Id. (footnotes omitted).

176. *See* Annot., 40 A.L.R.3d 444, 445 n.1, (1971). The common law definition of homicide is "the killing of one human being by another." *Id.* at 446 (footnote omitted). The common law established two categories of homicide: murder and manslaughter. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 528, 571 (1972). The required mental state for murder is malice aforethought, which encompasses "(1) intent-to-kill murder; (2) intent-to-do serious-bodily-injury murder; (3) depraved-heart murder; and (4) felony murder." *Id.* at 528. In most states murder is categorized as either first or second degree for the purpose of providing penalties. *Id.* at 562. First degree murder most commonly requires premeditation and deliberation or murder while in the commission of other felonies. *Id.* Second degree murder is any other murder which does not fall within the category of first degree murder. *Id.*

Manslaughter, which the common law divided into voluntary and involuntary, "includes homicides which are not bad enough to be murder but yet are bad enough to be criminal." *Id.* at 571. Voluntary manslaughter is an intentional killing in which there are extenuating circumstances which mitigate the crime. *Id.* at 572. Involuntary manslaughter is generally a homicide committed with criminal negligence or during the commisssion of an unlawful act. *Id.* at 586.

177. *See supra* note 176.

178. *See, e.g.*, FLA. STAT. § 782.09 (1983). "The willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter. . . ." *Id. See also* GA. CODE ANN. § 16-5-80 (1984); MISS. CODE ANN. § 97-3-37 (1972).

179. *See, e.g.*, CAL. PENAL CODE § 187 (West Supp. 1984), *construed in* People v. Apodaca,

the vehicular homicide of a viable fetus.[180] In some states, legislators have determined that feticide is a lesser crime than murder and have classified it as manslaughter.[181]

Under the *Cass* ruling, a defendant can now be charged with and convicted of the murder of a viable fetus.[182] By not categorizing feticide as a distinct crime, the court in *Cass* has also failed to consider whether the applicable penalties should be the same as or different from penalties for other homicide crimes.[183] Under *Cass*, a criminal defendant would be potentially subject to the penalties previously established by the legislature for the homicide of persons already born.[184] Thus, a defendant could potentially receive the same penalty for feticide as for murder.[185] In the event the death penalty is restored in Massachusetts, the door is left open for applying the death penalty

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76 Cal. App. 3d 479, 142 Cal. Rptr. 830 (1978). "[I]f a killing of a fetus is committed with malice aforethought, the crime is murder, either in the first or second degree. However, if because of a diminshed mental capacity, there was no malice aforethought, the killing of a fetus is neither murder nor any other criminal homicide." *Apodaca*, 76 Cal. App. 3d at 491, 142 Cal. Rptr. at 839; *see also* FLA. STAT. § 782.09 (1983), *construed in* Love v. State 450 So. 2d 1191 (Fla. Dist. Ct. App. 1984). "[T]his statute does not make it a crime to willfully kill an unborn quick child by an act against the mother unless that act would have been *murder* had the mother died." *Love*, 450 So. 2d at 1193 (emphasis in original). *But see* N.Y. PENAL LAW § 125.00 (McKinney 1975) (homicide includes "murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide. . . ."). See *supra* note 176 and accompanying text for a discussion of the various categories of homicides.

180. One state, however, has enacted legislation which stipulates protection of a pregnant woman rather than the fetus from the reckless operation of a motor vehicle. *See* N.M. STAT. ANN. § 66-8-101.1(C) (Supp. 1985). In pertinent part, the New Mexico statute states: "Any person who commits injury to a pregnant woman by vehicle while under the influence of intoxicating liquor or while under the influence of any drug. . . is guilty of a third degree felony. . . ." *Id.*

181. *See, e.g.*, FLA. STAT. § 782.09 (1983)(killing of unborn quick child deemed manslaughter); MICH. COMP. LAWS § 750.322 (1948) (MICH. STAT. ANN. § 28.554 (Callaghan 1982)) (quick child standard applied); MISS. CODE ANN. § 97-3-37 (1972)(same); R.I. GEN. LAWS § 11-23-5 (1956) (death of quick child ruled manslaughter). *But see* CAL. PENAL CODE § 187 (West Supp. 1985), *construed in Apodaca*, 76 Cal. App. 3d at 486, 142 Cal. Rptr. at 835. "[A]n assault on a pregnant woman without her consent for the purpose of unlawfully killing her unborn child can constitute the crime of murder." *Apodaca*, 76 Cal. App. 3d at 486, 42 Cal. Rptr. at 835.

182. See *supra* notes 174-77, and *infra* notes 183-86, and accompanying text for a discussion of the potentially broad range of criminal liability created by the *Cass* decision; *see also* Beggy, *Brockton Man Charged in Death of Woman, Fetus*, Boston Globe, Sept. 29, 1985, at 35, col. 1 (suspect charged with murder of woman and her seven month old fetus).

183. *See State ex rel. Atkinson*, 332 S.E.2d at 810. In *Atkinson*, the West Virginia Supreme Court of Appeals held that a viable unborn fetus was not protected under the murder statute. *Id.* The court reasoned that the creation of new crimes is a matter for the legislature because "the legislature is able to make more discrete distinctions as to the degrees of the offenses and to graduate the penalties to match the severity of the offenses whereas [the] Court would be limited to the facts before it. . . ." *Id.*

184. The broad rule adopted by the *Cass* court, *see* 392 Mass. at 807, 467 N.E.2d at 1329, could result in a future ruling that a viable fetus is a person for the purposes of the *murder* statute, thus subjecting a criminal defendant to the already existing penalties for murder. This inference is made by the court in a footnote. *See id.* at 807 n.10, 467 N.E.2d at 1329 n.10. The court stated that violence against a woman resulting in the death of a viable fetus can be punished not only under the abortion statute but also under other applicable criminal laws. *Id.*

185. *See supra* note 184 and accompanying text.

to feticide.[186]

The *Cass* court's adoption of a viability standard,[187] although routinely applied in civil cases,[188] presents further problems for the criminal law. Not only is the medical definition of viability in a state of flux,[189] but the time at which viability occurs differs for each individual fetus.[190] This uncertainty and vagueness surrounding the term viability has potential constitutional implications for a criminal defendant.[191] Absent an objective standard for viability, a

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186. One state legislature which has addressed the issue has expressly barred application of the death penalty. *See* ILL. ANN. STAT. ch. 38, § 9-1.1 (Smith-Hurd Supp. 1984-85). "The sentence for feticide shall be the same as for murder, except that the death penalty shall not be imposed." *Id.*

187. *Cass*, 392 Mass. at 807, 467 N.E.2d at 1329. See also *supra* note 7 for a discussion of the term "viability."

188. See *supra* notes 4-5 for a discussion of the viability standard in modern tort law.

189. Medical science continues to reduce the age of viability. *See* Nickerson, *supra* note 61, at 41. "Premature babies who only 10 or 15 years ago normally died, now live. . . ." *Id.* (citation omitted). " 'By pulling out all the stops, doctors can now save a very premature infant, one who would have had zero chance of survival only a few years ago. . . .' " *Id.* (quoting Thomas Murray, an ethicist at the University of Texas/Galveston Medical School); *see also Apodaca*, 76 Cal. App. 3d at 487, 142 Cal. Rptr. at 836. The *Apodaca* court upheld a murder conviction where the fetus was between 22 and 24 weeks old and there was undisputed medical evidence that the fetus was viable. *Id.*

190. *See* People v. Smith, 59 Cal. App. 3d 751, 758, 129 Cal. Rptr. 498, 503 (1976) (citing various indices of viability including age, weight and length); *see also Apodaca*, 76 Cal. App. 3d at 490, 129 Cal. Rptr. at 837 (viability is question of fact dependent on circumstances of each case). In its abortion decisions, the United States Supreme Court has treated viability as a flexible concept to be determined by medical skill and judgment. *See, e.g.*, Colautti v. Franklin, 439 U.S. 379, 388 (1979).

> Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability — be it weeks of gestation or fetal weight or any other single factor — as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point.

Id. at 388-89.

191. The use of the term viability in a criminal statute can be subject to challenge as unconstitutionally vague unless "some objective legal standard [is set] for deciding if the accused knew he was terminating the life of a viable fetus." *Hollis*, 652 S.W.2d at 64. Due process requires that a criminal statute give a " 'person of ordinary intelligence fair notice his contemplated conduct is forbidden by the statute.' " *Colautti*, 439 U.S. at 390 (quoting United States v. Harris, 347 U.S. 612, 617 (1954)).

In *Colautti*, the Supreme Court struck down as impermissibly vague a section of a Pennsylvania abortion statute which required a physician to determine whether the fetus is viable or " 'if there is sufficient reason to believe that the fetus may be viable.' " *Id.* at 391 (quoting Pennsylvania Abortion Control Act, PA. STAT. ANN., tit. 35,] 660]5(a) (Purdon 1977). The Court reasoned that it was "unclear whether the statute imports a purely subjective standard, or whether it imposes a mixed subjective and objective standard." *Id.*

The Court also noted the inherent difficulty in the use of the term viability. *Id.* at 395-96. In discussing the ability of a physician to determine when a fetus is viable, the Court noted that "[b]ecause of the number and imprecision of . . . variables, the probability of any particular

"jury would be left to speculate whether the accused knew, or should have known, that he was killing a fetus capable of being born alive."[192]

The other far reaching implication of the *Cass* decision is its impact on other areas of the law involving the rights of the fetus.[193] Policy decisions to protect the fetus under the criminal law cannot be treated in a vacuum. At present, there is considerable controversy surrounding abortion laws and balancing the fetus' right to life, against a woman's right to privacy and freedom of choice.[194] As the age for medical viability continues to decline, an overlap is being created in which the permissible age for abortion exceeds the age at which a fetus is able to survive.[195] "[T]he ethics of abortion and the ethics of fetal therapy are on a collision course."[196]

The debate has become polarized. Proponents of fetal rights are advocating for a reversal of the Supreme Court's decision in *Roe v. Wade*.[197] Some would permit abortion only in cases of rape or incest or where the pregnant

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fetus' [sic] obtaining meaningful life outside the womb can be determined only with difficulty." *Id.* at 396.

192. *Hollis*, 652 S.W.2d at 64; *see also* N.Y. PENAL LAW § 125.00 (McKinney 1975) (homicide statute includes unborn more than 24 weeks old). *But see Apodaca*, 76 Cal. App. 3d at 486, 142 Cal. Rptr. at 835. The *Apodaca* court upheld the constitutionality of the California homicide statute against a vagueness challenge by the defendant. *Apodaca*, 76 Cal. App. 3d at 486, 142 Cal. Rptr. at 835. The statute defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." CAL. PENAL CODE § 187(a) (West Supp. 1985). The defendant appealed his conviction on due process grounds because the statute "merely used the term 'fetus' and did not notify him as to exactly what stage of development of unborn human life it was intended to cover." *Apodaca*, 76 Cal. App. 3d at 485, 142 Cal. Rptr. at 835. The court ruled, however, that the statute gave him fair warning that "an assault on a pregnant woman without her consent for the purpose of unlawfully killing her unborn child can constitute the crime of murder." *Id.* at 486, 142 Cal. Rptr. at 835.

193. Advances in medical science have now made it possible for the unborn to receive medical treatment while still in the womb. For example, medicines have been developed for the treatment of metabolic disorders and other fetal defects; experimental surgery permits physicians to insert catheters to correct hydrocephalus and urinary tract blockages; "sound waves, called sonograms, now allow the fetus to be seen in compelling detail." In light of these technological advances, there is a growing "tendency to regard the fetus — especially the fetus between the ages of 20 and 30 weeks, the so-called 'grey-zone' of viability — as a patient in its own right," with enhanced moral and legal status. Nickerson, *supra* note 61, at 42.

194. *See generally* Boston Globe, Oct. 8, 1984, at 30, col. 5. The abortion issue was debated by President Ronald Reagan and Senator Walter Mondale during the 1984 presidential campaign *Id.*

195. *See generally* Nickerson, *supra* note 61. A University of Texas ethicist has commented that " '[i]t is very, very disturbing that you can abort a 26-week-old fetus in one room of a hospital while just down the hall doctors are frantically attempting to save an infant of the exact same age' " *Id.* at 42 (quoting Thomas Murray, an ethicist at the University of Texas/Galveston Medical School).

196. Nickerson, *supra* note 61, at 42 (quoting Dr. Mark I. Evans, Director of the Division of Reproductive Genetics at Michigan's Wayne State University Medical School).

197. 410 U.S. 113 (1973). In *Wade*, the Supreme Court held that a state could not regulate abortion during the first trimester; that a state may regulate only to promote maternal health during the second trimester; and that a state may proscribe abortion during the third trimester except where the life or health of the mother is in danger. *Id.* at 164-65.

woman's life would be endangered.[198] Fetal rights proponents further argue that the fetus is a human being and that abortion is tantamount to feticide.[199] On the other side, proponents of abortion, who favor maintaining the status quo, argue that abortion should remain the personal and moral choice of the pregnant woman.[200]

A resolution of the abortion debate does not lend itself to clearcut or easy answers.[201] The personhood of the fetus is one of the most debated issues of our time. As fetal medicine becomes more advanced, the fetus is gaining more rights which may ultimately establish its personhood.[202] In light of this trend, any decision extending the rights of the fetus, particularly under the criminal law, can only be viewed in the broader context of issues raised by the abortion debate.

CONCLUSION

Considering the complex and far-reaching implications of any decision regarding the rights of a fetus, the interest of society must be carefully weighed and balanced. As an elected body, the legislature is uniquely qualified to represent the public interest in an area involving controversial social issues.[203] In

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198. Reverend Jerry J. Falwell, leader of Moral Majority, Inc., has publicly stated this as his position. Groer, *Reagan Aides Screen Anti-Abortion Film*, Boston Globe, Feb. 13, 1985 at 1, col. 6.

199. President Ronald Reagan has, in essence, stated this position. *See* Boston Globe, Oct. 8, 1984, at 28. "With regard to [abortion] being a personal choice, isn't that what a murderer is insisting on?' He asked, 'isn't it strange that someone who kills a woman and her unborn child is charged with murder, but a woman is allowed to abort that child without being charged.' " *Id.* at 28, col. 6 (quoting President Reagan).

200. Judy Goldsmith, President of the National Organization for Women, believes that "the rights of the already living take precedence." Nickerson, *supra* note 61, at 42. " 'I don't think any outside agency should be allowed to make hard and fast rules. I think the question has to be left to the individuals involved.' " *Id.* (quoting Judy Goldsmith).

201. Robert E. Mansbach, Chairman of the Department of Religion and Philosophy at Hartwick College in Oneonta, New York, in discussing the extremes of the abortion debate, believes that neither side has a winning position. Nickerson, *supra* note 61, at 42.

202. The legal status of the fetus is clearly gaining recognition. "New York City already requires bars and restaurants to post warnings that liquor can cause birth defects. . . ." Nickerson, *supra* note 61, at 42; *see also* Jefferson v. Griffin Spalding Cty. Hospital, 247 Ga. 86, 89, 274 S.E.2d 457, 460 (1981) (per curiam). The *Jefferson* court upheld a lower court order requiring a pregnant woman to submit to a caesarean section despite religious objections. *Jefferson*, 247 Ga. at 89, 274 S.E.2d at 460. Physicians had determined that the life of her viable fetus would be endangered by a vaginal delivery. *Id.* at 86, 274 S.E.2d at 458. The court found the State has a duty to protect the life of the unborn fetus. *Id.* at 89, 274 S.E.2d at 460; *see also* Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 424, 201 A.2d 537, 538 (1964), *cert. denied per curiam*, 377 U.S. 985 (1964). The court in *Anderson* held that a Jehovah's Witness could be compelled to submit to blood transfusions to save the life of her unborn child. *Id.*

203. *See State ex rel. Atkinson*, 332 S.E.2d at 810. The *Atkinson* court found that:

> there are fundamental policy reasons why it is appropriate. . . to defer the creation of new crimes to the legislature. First, besides having the primary right to create new crimes, the legislature is composed of persons proportionately elected at more frequent intervals than are the members of this Court. Obviously, the legislature is more closely attuned to and representative of the public will than this Court.

Id.

a public forum, the countervailing interests of the citizens can be openly debated. Although the Supreme Judicial Court of Massachusetts has acted within the bounds of its traditional role in shaping the criminal law, perhaps it would have been wiser to exercise judicial restraint.

Roselee Price

Municipal Tort Liability for Negligent Police Protection: *Irwin v. Town Of Ware*

The preamble to the Massachusetts Constitution defines government as a "social compact [in which it is agreed]. . . that all shall be governed by certain laws for the common good."[1] This conceptualization of government — as an instrument for promoting the common good[2] — was part of the rationale for the immunity of Massachusetts municipalities, at common law, from liability for negligent torts committed by municipal employees while performing municipal functions.[3] It was reasoned that municipalities should be immune from tort liability because municipal functions were performed, in theory, for the good of the public as an undivided whole,[4] and, consequently, individual members of the public could not sue for their negligent misperformance.[5]

Judicial dissatisfaction in Massachusetts with the doctrine of governmen-

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1. MASS. CONST. preamble.

2. *Id. See also* U.S. CONST. preamble ("We the people of the United States, in order to. . . promote the general welfare, do . . . establish this Constitution").

3. *See* Whitney v. City of Worcester, 373 Mass. 208, 214-16, 366 N.E.2d 1210, 1214-15 (1977) (discussing theory of governmental immunity); Glannon, *Governmental Tort Liability Under the Massachusetts Tort Claims Act of 1978*, 66 MASS. L. REV. 7, 8 (1981); Note, *Municipal Liability for Negligent Enforcement of Driving While Intoxicated Statutes: Massachusetts Leads the Way in Irwin v. Town of Ware*, 7 W. NEW ENG. L. REV. 239, 246-47 (1984) [hereinafter cited as Note, *Municipal Liability*]. Another justification for municipal tort immunity was that because the state legislature mandated performance of certain municipal functions, there was no local control over, and thus no local responsibility for, a municipal employee's performance of the functions. Morash & Sons, Inc. v. Commonwealth, 363 Mass. 612, 616-17, 296 N.E.2d 461, 464 (1973) (discussing theory of governmental immunity). The state's inherent sovereignty was thought to preclude holding it in turn responsible. *Id.* at 618, 296 N.E.2d at 465.

A comprehensive discussion of the doctrine of governmental immunity is beyond the scope of this Comment. For more complete discussions, see W. PROSSER & W. KEETON, THE LAW OF TORTS § 131 at 1032-52 (5th ed. 1984); C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 32.2 (1980); Glannon, *supra* this note, at 8-9; Note, *Municipal Liability*, *supra* this note, at 245-47.

4. *See Whitney*, 373 Mass. at 214-16, 366 N.E.2d at 1214-15; Glannon, *supra* note 3, at 8; Note, *Municipal Liability*, *supra* note 3, at 246-47.

5. *See supra* note 4.

tal immunity[6] resulted, in part, from the realization that while the ultimate beneficiaries of municipal functions might be the public generally, municipal employees frequently came into the type of contact with individual members of the public that, if municipalities were private entities, tort law would ordinarily impose liability for injuries caused by the contact.[7] For example, a police officer performing the municipal function of apprehending criminals might, during a car chase, negligently run over a pedestrian. Although a pedestrian hit by a negligently driven car ordinarily has a right of action against a principal on whose behalf the driver was acting,[8] the doctrine of governmental immunity would preclude recovery by the pedestrian in the hypothetical from the police officer's municipal employer.[9] This unfair result — complete denial of an ordinarily available right of action because of the fortuity that the defendant was municipal — was one reason why the Massachusetts Supreme Judicial Court, in *Whitney v. City of Worcester* (1977),[10] demanded legislative abrogation of governmental tort immunity in Massachusetts.[11]

In 1978, the Massachusetts legislature responded to *Whitney*[12] by passing the Massachusetts Tort Claims Act.[13] The Act imposes tort liability on municipalities for injury caused by negligent acts or omissions of municipal employees "in the same manner and to the same extent as a private individual under like circumstances."[14] The Supreme Judicial Court has interpreted the quoted language to mean that "actions brought under the [Tort Claims] Act are governed by the same principles that apply to private parties."[15] Thus, the Su-

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6. *See Whitney*, 373 Mass. at 210-12, 215-18, 366 N.E.2d at 1212-13, 1215; *Morash*, 363 Mass. at 623-24, 296 N.E.2d at 467-68.

7. *See Whitney*, 373 Mass. at 215, 366 N.E.2d at 1214-15.

8. W. PROSSER & W. KEETON, *supra* note 3, § 69 (explaining doctrine of *respondeat superior*).

9. Glannon, *supra* note 3, at 8.

10. 373 Mass. 208, 366 N.E.2d 1210 (1977).

11. *Id.* at 210, 366 N.E.2d at 1215. *Compare* Ford v. City of Caldwell, 79 Idaho 499, 506-07, 321 P.2d 589, 592-93 (1958) (city not liable for injuries suffered by boy visiting fire department who fell through hole in floor for fire pole) *with* Chandler Supply Co. v. City of Boise, 104 Idaho 480, 485, 660 P.2d 1323, 1328 (1983) (result in *Ford* type that "legislature most likely intended to change when it waived governmental tort immunity"). Another reason why the *Whitney* court perceived the doctrine of governmental immunity to be unfair was that it resulted in some contributing only taxes to receive municipal services, while from others, additional contributions were exacted in the form of uncompensated injuries. *Whitney*, 373 Mass. at 215, 366 N.E.2d at 1214-15.

12. Glannon, *supra* note 3, at 7; Note, *Municipal Liability*, *supra* note 3, at 248 n.75.

13. 1978 Mass. Acts 512 (codified with amendments at MASS. GEN. LAWS ANN. ch. 258, § § 1-13 (West Supp. 1985)). Section 16 of the Tort Claims Act made it retroactive in application to August 16, 1977, the date on which *Whitney* was decided.

14. MASS. GEN. LAWS ANN. ch. 258, § § 1-2 (West Supp. 1985). For comprehensive discussions of the provisions of the Tort Claims Act, see Glannon, *supra* note 3, at 7-21; Perlmutter, *The Scope of the Right to Recover under G.L. c. 258: Basic Liability Provisions*, in PRACTICE AND PROCEDURE UNDER THE MASSACHUSETTS TORT CLAIMS ACT § D (Mass. Acad. of Trial Att'ys 1984).

15. *See, e.g.*, Dinsky v. Town of Framingham, 386 Mass. 801, 804, 438 N.E.2d 51, 53 (1982). "[T]he abrogation of the doctrine of governmental immunity by the [Tort Claims] Act simply removed the defense of immunity in certain tort actions. . . . It did not create any new theory of liability for a municipality." *Id.* at 804, 438 N.E.2d at 53.

preme Judicial Court has held that the elements of a negligence claim under the Act are the same as those of a negligence claim against a private defendant.[16] Because establishment of proximate cause[17] and injury[18] is not susceptible to argument based on a defendant's identity as private or municipal, the Supreme Judicial Court has tended to emphasize the element of duty as determinative of the Tort Claims Act's applicability to negligence claims against muncipalities.[19]

The Supreme Judicial Court's "duty analysis" of municipal liability under the Tort Claims Act[20] led it, in *Dinsky v. Town of Framingham* (1982),[21] to recognize the liability-limiting "public duty doctrine."[22] Under the public duty doctrine,[23] a plaintiff cannot recover from a municipality for negligent performance of a municipal function unless the duty to perform the function was owed to the plaintiff as an individual, and not generally to the public.[24] Individual duty may be established by demonstrating that a "special relationship" existed between the plaintiff and the municipal employee with the responsibility for performing the function.[25]

The Supreme Judicial Court recently considered the public duty doctrine and its special relationship test of individual duty in *Irwin v. Town of Ware* (1984).[26] The *Irwin* plaintiffs were injured in an auto accident caused by an intoxicated driver, whom two town police officers stopped but negligently released shortly before the accident.[27] A divided *Irwin* court decided that the public duty doctrine did not bar the plaintiffs' action against the Town of Ware[28] because there was a special relationship between the police officers and the plaintiffs.[29] The majority reasoned that the special relationship was established by intent of state laws to protect users of highways from intoxicated drivers, and by the foreseeable risk of immediate physical harm created by

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16. *Id.*

> In order to recover against [a municipality] for negligence, the plaintiffs must show (1) the existence of an act or omission in violation of a (2) duty owed to the plaintiffs by the defendant, (3) injury, and (4) a causal relationship between the breach of duty and the harm suffered.

Id.

17. *See supra* note 16.

18. *Id.*

19. *See* Ribeiro v. Town of Granby, 395 Mass. 608, 611, 481 N.E.2d 466, 467-69 (1985); Irwin v. Town of Ware, 392 Mass. 754-62, 467 N.E.2d 1292, 1299-1304 (1984); *Dinsky*, 386 Mass. at 804-09, 438 N.E.2d at 53-56.

20. *See supra* note 19 and accompanying text.

21. 386 Mass. 801, 438 N.E.2d 51 (1982).

22. *Id.* at 804, 438 N.E.2d at 53.

23. The brief explanation of the public duty doctrine that follows, *see infra* text accompanying notes 24-25, is introductory. For a discussion of the theory and meaning of the doctrine, see *infra* notes 32-61 and accompanying text.

24. *See, e.g.*, E. MCQUILLAN, 18 THE LAW OF MUNICIPAL CORPORATIONS § 53.04b, at 165 (3d ed. 1984).

25. *Id.*

26. 392 Mass. 745, 467 N.E.2d 1292 (1984).

27. *Id.* at 763-64, 467 N.E.2d at 1304-05.

28. *Id.* at 755, 467 N.E.2d at 1299.

29. *Id.* at 762, 467 N.E.2d at 1303-04.

release of an intoxicated driver.[30]

The purpose of this Comment is to critically discuss the imposition of municipal liability for negligent police protection in *Irwin*. The Comment takes the position that the decision of the *Irwin* majority was incorrect. As argued by the dissent, the majority misapplied the public duty doctrine and erroneously concluded that the Town of Ware was liable to the plaintiffs under the Massachusetts Tort Claims Act.[31] The dissent's argument against liability did not go far enough, however, because it did not fully explain *why* the town should not have been liable for the injuries of the *Irwin* plaintiffs.

This Comment responds to the *Irwin* dissenting opinion by arguing that the application of the public duty doctrine urged by the dissent is necessary in order to minimize judicial interference with the ordering of municipal government. In addition, the dissent's articulation of municipal liability under the Tort Claims Act, unlike that of the majority, does not unfairly afford a public recovery alternative to some plaintiffs that is unavailable to other similarly situated plaintiffs. As a starting point for this discussion, the Comment examines the theory and meaning of the public duty doctrine, with a focus in the footnotes on recent application of the doctrine in negligent police protection cases.

I. THE THEORY AND MEANING OF THE PUBLIC DUTY DOCTRINE

The public duty doctrine incorporates the notion that municipal functions are intended for public, and not individual, benefit.[32] The duty of municipal employees to carefully perform municipal functions is, under the public duty doctrine, initially a "public duty" owed generally to the public, and therefore not actionable against a municipality by individual members of the public.[33] The public duty doctrine recognizes, however, circumstances where a municipal employee acts not on a general public basis, but with respect to specific individuals.[34] In these circumstances, a municipal employee's public duty of care may narrow into an actionable, individual duty of care.[35]

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30. *Id.*

31. *See infra* notes 127-83 and accompanying text.

32. E. MCQUILLAN, *supra* note 24, § 53.04b, at 165.

33. *Id.* at 165; C. RHYNE, *supra* note 3, § 32.9. *See infra* notes 54-56 and accompanying text discussing the rationale for public duty doctrine.

34. *See, e.g.*, Mann v. State, 70 Cal. App. 3d 773, 779-80, 139 Cal. Rptr. 82, 85-86 (1977) (police assistance to passengers of stalled car); Fischer v. Travelers Ins. Co., 429 So. 2d 538, 539-40 (La. Ct. App. 1983) (police investigation of auto accident); Prattini v. Wharton, 326 So. 2d 576, 579 (La. Ct. App. 1976) (police direction of traffic); Endy v. Village of Nyack, 576 F. Supp. 1562, 1564 (S.D.N.Y. 1984) (applying New York law; police discovery of intoxicated motorist asleep in parked car); Chambers-Castanes v. King County, 100 Wash. 2d 275, 285-86, 669 P.2d 451, 457-58 (1983) (police promise of assistance to crime victim); *see also* E. MCQUILLAN, *supra* note 24, § 53.04b, at 165-66.

35. E. MCQUILLAN, *supra* note 24, § 53.04b, at 165-66; *see, e.g.*, *Mann*, 70 Cal. App. 3d at 780, 139 Cal. Rptr. at 86 (liability for police failure to protect passengers of stalled car from passing cars); *Fischer*, 429 So.2d at 540 (liability for police loss of auto accident report, resulting in plaintiff's inability to identify other driver and losing cause of action); *Prattini*, 326 So. 2d at 579 (liability for damage to plaintiff's car caused by police traffic direction); *Endy*, 576 F. Supp. at 1564 (liability for police failure to care for intoxicated motorist found asleep in parked car);

The following example illustrates the public duty/individual duty distinction. A police officer has a duty, created by statute, to apprehend criminals.[36] This duty is ordinarily a public duty[37] because it is equally owed to all members of the public, each of whom, from the police officer's perspective, may be a potential victim of a criminal.[38] Therefore, the public duty doctrine typically precludes a crime victim's action against a municipality for negligent failure of a police officer to apprehend a criminal.[39] On the other hand, if the police

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Chambers-Castanes, 100 Wash. 2d at 286-87, 669 P.2d at 458 (liability for police failure to respond to crime victim's calls for assistance).

36. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 41, § 98 (West 1979) (providing that police "shall suppress and prevent all disturbances and disorder").

37. W. PROSSER & W. KEETON, *supra* note 3, § 131, at 1049.

38. *See* Lopez v. Southern Cal. Rapid Transit Dist., 200 Cal. Rptr. 779, 783 (1984) ("the risk of crime is common to all citizens"), *aff'd*, 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985); Duffy v. City of Philadelphia, 580 F. Supp. 164, 166 (E.D. Pa. 1983) (applying Pennsylvania law; all persons attending football game in danger of assault).

39. W. PROSSER & W. KEETON, *supra* note 3, § 131, at 1049-50. Recovery for negligent police protection from crime has been denied under the following circumstances:

1. Mere knowledge by police of criminal propensity. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 430, 551 P.2d 334, 340, 131 Cal. Rptr. 14, 19-20 (1976) (police released assailant from custody, with knowledge of threats to kill crime victim); Shore v. Town of Stonington, 187 Conn. 147, 148-50, 444 A.2d 1379, 1380 (1982) (police stopped but released intoxicated driver); Santy v. Bresee, 129 Ill. App. 3d 658, 662, 473 N.E.2d 69, 72-73 (1984) (police "knowledge of threats against a third person"); Satiro v. City of New Rochelle, 102 A.D.2d 821, 821, 476 N.Y.S.2d 377, 377-78 (1984) (police knew of assailant's "dangerous and vicious propensities"); Yearwood v. Town of Brighton, 101 A.D.2d 498, 502, 475 N.Y.S.2d 958, 960-61 (1984) (police knew of estranged husband's threats to kill wife and burn down family home); Crosby v. Town of Bethlehem, 90 A.D.2d 134, 134-35, 457 N.Y.S.2d 618, 619 (1982) (police saw motorcyclist drinking at party and knew of his intoxicated condition); Barrat v. Burlingham, 492 A.2d 1219, 1222 (R.I. 1985) (police observation of citizen's conduct that might create risk of harm to others); *see* Comment, *Municipal Liability: The Failure to Provide Adequate Police Protection — The Special Duty Doctrine Should Be Discarded*, 1984 WIS. L. REV. 499, 509 n.54 (collecting older decisions) [hereinafter cited as Comment, *Municipal Liability: The Failure to Provide Adequate Police Protection*].

2. Mere proximity of police to criminal activity. Marvin v. Chicago Transit Auth., 113 Ill. App. 3d 172, 176-77, 446 N.E.2d 1183, 1186-87 (1983) (police officer patrolling in immediate vicinity of assault when it occurred); Nachowitz v. New York City Hous. Auth., 97 A.D.2d 373, 373-74, 467 N.Y.S.2d 386, 386 (1983) (same); Torres v. Salty Sea Days, Inc., 36 Wash. App. 668, 673-74, 676 P.2d 512, 516-17 (1984) (police present on cruise where minor dangerously intoxicated herself).

3. Mere knowledge by police of dangerous area. Chapman v. City of Philadelphia, 290 Pa. Super. 281, 285, 434 A.2d 753, 755 (1981) (police aware that railroad station, where assault occurred, was particularly dangerous area); *cf.* Curtis v. County of Cook, 109 Ill. App. 3d 400, 407-08, 440 N.E.2d 942, 947 (1983) (county aware that teen-age drivers used signpost as quarter-mile marker when playing "speed clocking" game; no liability to injured passenger), *rev'd in part on other grounds*, 98 Ill. 2d 158, 456 N.E.2d 116 (1983); *Nachowitz*, 97 A.D.2d at 374, 467 N.Y.S.2d at 386-87 (housing authority failed to provide adequate lighting in housing project, creating dangerous area; no liability to assault victim).

4. Mere request for police assistance. Shelton v. City of Westminister, 138 Cal. App. 3d 610, 622, 188 Cal. Rptr. 205, 213 (1982) (request that police investigate missing person); Warren v. District of Columbia, 444 A.2d 1, 6 (D.C. 1981); *Santy*, 129 Ill. App. 3d at 662, 473 N.E.2d at 72; Tanasijevich v. City of Hammond, 178 Ind. App. 669, 675, 383 N.E.2d 1081, 1085 (1978);

officer induced the crime victim to rely on a promise of protection from the criminal, as in *DeLong v. County of Erie*[40] where a police emergency operator told a woman who telephoned for help to remain in her house because police assistance was on the way,[41] then the police officer would incur a common-law duty to protect the victim's reliance.[42] Because this duty would be owed to the victim only (the victim being the only member of the public to whom protection was promised), it is an individual duty, and not a public duty.[43]

A test used by the public duty doctrine to determine whether or not individual duty was owed is the "special relationship" test.[44] The test examines the relationship between a municipal employee and a person injured by the municipal employee's negligence.[45] An individual duty is indicated if this relationship was "special," or different than the municipal employee's relationships with other members of the public.[46] For example, a crime victim whose reli-

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Nelson v. Freeman, 537 F. Supp. 602, 611 (W.D. Mo. 1982) (report of child abuse); Comment, *Municipal Liability: The Failure to Provide Adequate Police Protection, supra*, at 509 & n.54 (collecting older decisions).

5. Mere taking of steps by police to provide assistance. *Shelton*, 138 Cal. App. 3d at 622, 188 Cal. Rptr. at 213 (police undertaking to prepare missing persons' report); *Warren*, 444 A.2d at 6-7 (police response to rape call); *cf. Nelson*, 537 F. Supp. at 611 (mere establishment of child abuse hotline); DeLong v. County of Erie, 89 A.D.2d 376, 383, 455 N.Y.S.2d 887, 892 (1982) (mere establishment of "911" emergency call system), *aff'd*, 60 N.Y.2d 696, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983). *Contra* Mann v. State, 70 Cal. App. 3d 773, 780, 139 Cal. Rptr. 82, 86 (1977) (police undertaking to assist passengers of stalled car; duty to protect passengers from passing cars); Comastro v. Village of Rosemount, 122 Ill. App. 3d 405, 410-11, 461 N.E.2d 616, 620-21 (1984) (police undertook to provide " 'level of service greater than that afforded other [members of public]' "; duty to protect concert-goers); Tompkins v. Kenner Police Dep't, 402 So. 2d 276, 280 (La. Ct. App. 1981) (police undertaking to investigate accident scene; duty to have discovered and cared for victim lying on side of road); Endy v. Village of Nyack, 576 F. Supp. 1562, 1564 (S.D.N.Y. 1984) (police discovery of intoxicated motorist asleep in parked car; duty to have cared for motorist). Arguably, it is not the mere rendering of police assistance that should have been held to create the duty in *Mann*, *Tompkins*, and *Endy*; the duty should have been held to arise because the assistance "lull[ed] the injured parties into a false sense of security [or] perhaps prevent[ed] other assistance from being sought [or offered]." *See* Davidson v. City of Westminister, 32 Cal. 3d 197, 208, 649 P.2d 894, 900, 185 Cal. Rptr. 252, 258 (1982) (explaining *Mann*); *accord* Ramundo v. Town of Guilderland, 108 A.D.2d 995, 997, 485 N.Y.S.2d 388, 389 (1985) (police owed duty of care to accident victim, where police presence at accident scene deterred others from helping victim).

40. 89 A.D.2d 376, 455 N.Y.S.2d 887 (1982), *aff'd*, 60 N.Y.2d 296, 457 N.E.2d 717, 467 N.Y.S.2d 611 (1983).

41. *Id.* at 384, 455 N.Y.S.2d at 892.

42. *Id.* If A induces B to rely on a promise of action, and B relies to his detriment on A's promise, then tort law may impose a duty on A to have protected B's reliance. *See* W. PROSSER & W. KEETON, *supra* note 3, § 56, at 379-82; RESTATEMENT (SECOND) OF TORTS § 323(b) (1965).

43. *See DeLong*, 89 A.D.2d at 383-84, 455 N.Y.S.2d at 891; C. RHYNE, *supra* note 3, § 32.9.

44. *E.g.*, J&B Dev. Co. v. King County, 100 Wash. 2d 299, 304, 669 P.2d 468, 472 (1983); *see* E. MCQUILLIN, *supra* note 24, § 53.04b, at 165.

45. *See infra* note 46.

46. *E.g.*, Warren v. District of Columbia, 444 A.2d 1, 5 (D.C. 1981). "When considered in combination with the 'special relationship' rule,. . . [the public duty doctrine] becomes a mechanism for focusing upon whether a duty is actually owed an individual claimant rather than the public at large." *J&B Dev. Co.*, 100 Wash. 2d at 305, 669 P.2d at 472.

Under the public duty doctrine, a crime victim who was not in a special relationship with police,

ance on protection from a criminal is specifically induced by a police officer, as in *DeLong*, shares a relationship with the police officer that is distinctly different than the police officer's relationships with other members of the public.[47] The difference arises from the victim's reliance on the police officer to apprehend the criminal, which subjects the victim to an enhanced risk of harm.[48] The enhanced risk results from the police officer's promise of protection, which causes the victim to forego action that he would otherwise take to protect himself, and thereby exposes him to a danger that others avoid.[49] Accordingly, the

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may nonetheless be able to recover from a municipality. Recovery may be effected by demonstrating another relationship with the municipality or a municipal employee that the common law has traditionally recognized to establish a duty of care. *See, e.g.*, Lopez v. Southern Cal. Rapid Transit Dist., 153 Cal. App. 3d 1135, 200 Cal. Rptr. 779, 782-83 (1984) (common carrier-passenger relationship between rapid transit district and plaintiff assaulted on bus), *aff'd*, 40 Cal. 3d 780, 710 P.2d 907, 221 Cal. Rptr. 840 (1985); Comastro v. Village of Rosemount, 122 Ill. App. 3d 405, 408-09, 461 N.E.2d 616, 620-21 (1984) (property owner-business invitee relationship between village and plaintiff attending concert in village-owned concert arena); Crossland v. New York City Transit Auth., 110 A.D.2d 148, 155-56, 493 N.Y.S.2d 474, 480 (1985) (common carrier-passenger relationship between transit authority and passenger assaulted at train stop); McLeod v. Grant County School Dist. No. 128, 42 Wash. 2d 316, 319-20, 255 P.2d 360, 362-63 (1953) (custodial relationship between school district and student raped during recess); *see also* Note, *Municipal Tort Liability for Criminal Attacks Against Passengers on Mass Transportation*, 12 FORDHAM URB. L.J. 325, 344-45 (1984) (arguing in favor of common carrier liability for public transportation authorities). For cases not imposing municipal liability, viewing the crime victim's complaint as a non-actionable claim for general failure to provide police protection, see Hernandez v. Southern Cal. Rapid Transit Dist., 142 Cal. App. 3d 1063, 1067, 191 Cal. Rptr. 436, 439 (1983) (passenger shot on city bus); Weiner v. Metropolitan Transp. Auth., 55 N.Y.2d 175, 182, 433 N.E.2d 124, 127, 448 N.Y.S. 2d 141, 144 (1982) (passenger assaulted on subway platform); Duffy v. City of Philadephia, 580 F. Supp. 164, 165 (E.D. Pa. 1983) (spectator assaulted at football game played in city-owned stadium).

47. *See infra* notes 48-49 and accompanying text.

48. *See infra* note 49 and accompanying text.

49. C. RHYNE, *supra* note 3, § 32.9; *see* Mann v. State, 70 Cal. App. 3d 773, 776-77, 139 Cal. Rptr. 82, 86 (1977) (police assistance to stalled car created special relationship with passengers because they were lulled into false sense of security, thereby exposed to increased risk from passing cars), *as explained in* Davidson v. City of Westminster, 32 Cal. 3d 197, 208, 649 P.2d 894, 900, 185 Cal. Rptr. 252, 258 (1982); *DeLong*, 89 A.D.2d at 384, 455 N.Y.S.2d at 892-93 (discussed *infra* text accompanying notes 50-53). For cases in which no special relationship was found because crime victim reliance and enhanced risk were absent, see *Davidson*, 32 Cal. 3d at 203, 208, 649 P.2d at 898, 900, 185 Cal. Rptr. at 255, 258 (discussed *infra* note 53); Yearwood v. Town of Brighton, 101 A.D.2d 498, 501-02, 475 N.Y.S.2d 958, 960 (1984) (police statements to wife regarding arrest of husband did not induce act or omission by wife or her attorney; municipality not liable for deaths of children when husband burned house).

Generalized reliance on police protection has been held not to create a special relationship with police. Nelson v. Freeman, 537 F. Supp. 602, 611 (W.D. Mo. 1982) (generalized reliance by public on public officials to investigate calls made on child abuse hotline); *see* Melendez v. City of Philadelphia, 320 Pa. Super. 59, 65-66, 466 A.2d 1060, 1063 (1983) (police assurance of protection given to entire neighborhood did not create special relationship with residents of neighborhood). The reason why generalized reliance does not create a special relationship may be because the reliance is not reasonable, *see* Irwin v. Town of Ware, 392 Mass. 745, 775, 467 N.E.2d 1292, 1311 (1982) (Nolan, J., dissenting) (special relationship created by *specific* assurances of protection giving rise to *justifiable* reliance), or because the duty that would otherwise be established would be owed to many members of the public and, in effect, a public duty.

DeLong[50] court found a special relationship between police and the murdered woman,[51] and therefore an individual duty of care owed to her,[52] because the police assurance of rescue caused her to remain defenseless in her house when others would have fled from the house to safety.[53]

Forced dependency on police for protection, like reliance, may subject a person to a risk of harm that is different from the risk that other members of the public are subject to, and create a special relationship with police. *Cf.* Lopez v. Southern Cal. Rapid Transit Dist., 200 Cal. Rptr. 779, 783 (Cal. Ct. App. 1984), *aff'd*, 40 Cal. 3d 780, 788-91, 710 P.2d 907, 911-14, 221 Cal. Rptr. 840, 844-47 (1985). In *Lopez*, the court gave the following explanation of its holding that passengers assaulted on a public bus were in a special relationship with a public transportation authority:

> And while the risk of crime is common to all citizens, the danger is enhanced for bus passengers who may be, in effect, sealed in a moving steel cocoon. They have no say as to who else may be admitted onto the bus and they may have no means of avoiding another passenger bent on attack. The means of summoning help and the means of escape may be in the exclusive control of the bus driver.

Id. Despite forced dependency on a police officer for protection, a plaintiff might not be able to recover from a municipality if he was himself the cause of his harm. *See* Garrison v. City of Berwick, 417 So. 2d 48, 51 (La. Ct. App. 1982) (no liability to hand-cuffed arrestee who provoked attack in back seat of police cruiser by fellow, but unhand-cuffed arrestee); *see also* Hildenbrand v. Cox, 369 N.W.2d 411, 415-16 (Iowa 1985) (no liability to intoxicated driver whom police failed to take into protective custody). *But see* Endy v. Village of Nyack, 576 F. Supp. 1562, 1564 (S.D.N.Y. 1984) (liability for death of intoxicated motorist whom police discovered asleep in parked car, but failed to care for).

50. *See supra* text accompanying notes 40-43 (discussing *DeLong*).

51. *DeLong*, 89 A.D.2d at 384, 455 N.Y.S.2d at 892.

52. *Id.*

53. *Id. Compare DeLong*, 89 A.D.2d at 384, 455 N.Y.S.2d at 892 (special relationship established between police and victim) *with* Davidson v. City of Westminister, 32 Cal. 3d 197, 208, 649 P.2d 894, 900, 185 Cal. Rptr. 197, 258 (1982) (victim did not rely on police protection). In *Davidson*, police staked out a laundromat that was the scene of prior stabbings. *Id.* at 201, 649 P.2d at 895, 185 Cal. Rptr. at 253. The plan was to permit the suspect in the case to approach an intended victim, and then to intervene after the suspect had sufficiently committed himself to the crime, but before he actually injured the intended victim. *Id.* The police failed to intervene in time, and the victim suffered stab wounds. *Id.* The *Davidson* court held that there was no special relationship between police and the victim because there was no reliance or enhanced risk:

> Obviously the peril to [the victim] was not created by the officers. She was unaware of their presence and did not rely on them for protection. Their conduct did not change the risk which would have existed in their absence. There is simply no reason to speculate that anyone — . . . victim or assailant — would have acted differently had the officers not placed the laundromat under surveillance.

Id. at 208, 649 P.2d at 900, 185 Cal. Rptr. at 258.

Not all courts that adhere to the public duty doctrine recognize a requirement of plaintiff reliance or enhanced risk before a special relationship between a municipal employee and the plaintiff will be found. *See, e.g.*, Dolezal v. City of Cedar Rapids, 326 N.W.2d 355, 357 (Iowa 1982); Tompkins v. Kenner Police Dep't, 402 So. 2d 276, 280 (La. Ct. App. 1981); Lorshbough v. Township of Buzzle, 258 N.W.2d 96, 102-03 (Minn. 1977); Melendez v. City of Philadelphia, 320 Pa. Super. 59, 65, 67-68, 466 A.2d 1060, 1064-65 (1983); *see also* C. RHYNE, *supra* note 3, at § 32.9 (discussing various tests of special relationship). In these decisions, a special relationship was established either by plaintiff membership in an at-risk class of persons, or by foreseeability of injury to the plaintiff that a municipal employee could have prevented. *See, e.g.*, *Tompkins*, 402 So. 2d at 280 (special relationship between police investigating accident and undiscovered accident victim lying near side of road); *Lorshbough*, 258 N.W.2d at 102-03 (special relationship

Some courts have rejected the public duty doctrine for the reason that "a duty to none where there is a duty to all" is, in essence, another form of governmental immunity.[54] One court, disagreed that the public duty doctrine reestablishes governmental immunity, and noted the following distinction between the two doctrines:

> In short, the 'public duty doctrine' recognizes the existence of a tort, authorizes the filing of a claim against a municipality and also recognizes applicable liability subject to some limitations. The concept of '[governmental] immunity,' while recognizing the existence of a tort, denies all liability within the limits of the immunity.[55]

Courts that follow the public duty doctrine typically support their position with policy arguments that stress the undesireability of extending an actionable municipal duty of care to each and every member of the public.[56]

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between county and class of persons owning property near negligently maintained county dump). For discussion suggesting that class membership and foreseeability criteria do not differentiate public duties from individual duties, and therefore do not supply a valid analysis of municipal liability under the public duty doctrine, see *infra* notes 147-50 and accompanying text.

54. *See, e.g.*, Ryan v. State, 134 Ariz. 308, 310, 656 P.2d 597, 599 (1982); Martinez v. City of Lakewood, 655 P.2d 1388, 1390 (Colo. App. 1982); Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1015 (Fla. 1979); Brennen v. City of Eugene, 285 Or. 401, 409-11, 591 P.2d 719, 724-25 (1979); *see also* Note, *Negligence of Municipal Employees: Re-Defining the Scope of Police Liability*, 35 U. FLA. L. REV. 720, 737 (1983) [hereinafter cited as Note, *Negligence of Municipal Employees*]; Comment, *Municipal Tort Liability for Negligent Failure to Provide Adequate Police Protection*, 20 WAKE FOREST L. REV. 697, 705-15 (1984) [hereinafter cited as Comment, *Municipal Tort Liability*]; Comment, *Municipal Liability: The Failure to Provide Adequate Police Protection*, *supra* note 39, at 509-10 (all criticizing public duty doctrine).

At early common law, a defendant's duty of care extended to anyone who might be injured by his conduct. W. PROSSER & W. KEETON, *supra* note 3, § 53, at 356-57. Since that time, however, the concept of duty has evolved to require that there have been "some specific relation between the plaintiff and the defendant," *id.* at 357, — "negligence in the air, so to speak, will not do," (quoting F. POLLOCK, LAW OF TORTS 486 (13th ed. 1920)). An extension of a municipal employee's duty of care to the entire public may be inconsistent with the modern concept of duty as relative and limited in nature.

One court made the following response to the "duty to none where there is a duty to all" argument against the public duty doctrine:

> The absence of a duty specifically enforceable by individual members of the community is not peculiar to public police services. Our representative form of government is replete with duties owed to everyone in their capacity as citizens but not enforceable by anyone in his capacity as an individual. . . . As members of the general public, individuals forego any direct control over the conduct of public employees in the same manner that such individuals avoid any direct responsibility for compensating public employees.

Warren v. District of Columbia, 444 A.2d 1, 8 (D.C. 1981).

55. J & B Dev. Co. v. King County, 100 Wash. 2d 299, 303, 669 P.2d 468, 471 (1983).

56. *See, e.g.*, Davidson v. City of Westminister, 32 Cal. 3d 197, 207-09, 649 P.2d 894, 900, 185 Cal. Rptr. 252, 258 (1982) (duty to warn all potential victims of criminal might paralyze entire neighborhood); Posey v. State, 173 Cal. App. 3d 835, 846, 219 Cal. Rptr. 534, 540 (1985) (state highway patrol would become "an insurer of safety on the highway instead of an enforcer of the vehicle code"); Shore v. Town of Stonington, 187 Conn. 147, 157, 444 A.2d 1379, 1382 (1982) (adopting "rule of liability where some kind of harm may happen to someone would cramp

The Massachusetts Supreme Judicial Court first recognized and applied the public duty doctrine in *Dinsky v. Town of Framingham*.[57] *Dinsky* was an action under the Massachusetts Tort Claims Act that arose from a town building inspector's alleged negligent failure to enforce state building laws.[58] Although the end result in *Dinsky* was consistent with the public duty doctrine,[59] the *Dinsky* court's reasoning may not have been consistent with the doctrine.[60] This reasoning laid the foundation for the subsequent misapplication of the public duty doctrine by the *Irwin* majority.[61] The next section of the Comment analyzes *Dinsky*, in the light of the discussion of the public duty doctrine contained in this section.

II. Application of the Public Duty Doctrine by the Massachusetts Supreme Judicial Court in *Dinsky v. Town of Framingham*

The plaintiffs in *Dinsky* were purchasers of a newly-built home.[62] The builder of the home failed to comply with state building laws with respect to the grading of the land on which the home was situated.[63] As a result, the home later suffered serious flooding damage.[64] Despite the deficient grading, a Town of Framingham building inspector issued to the builder building and occupancy permits for the home.[65]

The plaintiffs sued the Town of Framingham under the Massachusetts

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the exercise of official discretion beyond the limits desirable in our society"); Warren v. District of Columbia, 444 A.2d 1, 8-9 (D.C. 1981) ("public time and money would be consumed in litigation of private claims rather than in bettering the inadequate service which draws the complaints;" noting that public duties remain enforceable through accountability of public officials to electorate); Santy v. Bresee, 129 Ill. App. 3d 658, 662, 473 N.E.2d 69, 72-73 (1984) (because police assimilate vast amounts of information in course of work, liability for mere knowledge of threats would add "intolerable burden" to ways in which police handle information); Neider v. Gacy, 121 Ill. App. 3d 854, 857, 460 N.E.2d 342, 344 (1984) (unlimited liability for negligent police protection would make municipality insurer of every person, an impossible burden); O'Connor v. City of New York, 58 N.Y.2d 184, 191, 447 N.E.2d 33, 36, 460 N.Y.S.2d 485, 488 (1983) (imposition of unlimited liability "might well discourage municipalities from undertaking activities to promote the general welfare"); Weiner v. Metropolitan Transp. Auth., 44 N.Y.2d 175, 182, 433 N.E.2d 124, 127, 448 N.Y.S.2d 141, 144 (1982) (unlimited liability would result in significant judicial interference with legislative-executive decision how to utilize municipal resources); Barrat v. Burlingham, 492 A.2d 1219, 1221 (R.I. 1985) (public duty doctrine recognizes state's "valid claim to exercise certain powers for the good of all without burdensome and disruptive forces"); *see also* Hernandez v. Southern Cal. Rapid Transit Dist., 142 Cal. App. 3d 1063, 1067 n.4, 191 Cal. Rptr. 436, 439 (1982); Shelton v. City of Westminister, 138 Cal. App. 3d 610, 622-23, 188 Cal. Rptr. 205, 214 (1982); Chapman v. City of Philadelphia, 290 Pa. Super. 281, 285-86, 434 A.2d 753, 755-56 (1981). See *infra* text accompanying notes 186-97 discussing policy and fairness concerns raised by broad municipal tort liability for negligent police protection.

57. 386 Mass. 801, 438 N.E.2d 51 (1982).
58. *Id.* at 801-02, 438 N.E.2d at 51-52.
59. *See infra* text accompanying notes 87-88.
60. *See infra* notes 74-76 and accompanying text.
61. *See infra* notes 131-52 and accompanying text.
62. *Dinsky*, 386 Mass. at 801-02, 438 N.E.2d at 51-52.
63. *Id.* at 802, 438 N.E.2d at 52.
64. *Id.*
65. *Id.*

Tort Claims Act to recover for the flood damage to their home, which they alleged was caused by the building inspector's negligent issuance of building and occupancy permits to the builder.[66] The theory of causation was that if the permits had not been issued, then the builder could not have built the home or sold it, and the plaintiffs would never, consequently, have purchased the home or suffered the flood damage.[67] The town argued that, under the public duty doctrine, it was not liable because the building inspector's duty to issue the building permits in a non-negligent manner was a public duty only.[68]

A unanimous *Dinsky* court agreed with the town, and held that the public duty doctrine barred the plaintiffs' claim.[69] The town building inspector's duty to enforce building laws against the builder of the plaintiffs' home and not issue the building permits was, the court concluded, a public duty.[70] The court reasoned that no individual duty existed because there was no intention in relevant legislation to benefit the plaintiffs differently than other members of the public.[71] State building legislation, stated the court, "[spoke] in terms of a public interest only,"[72] and did not evince an intention to make municipalities liable to individual property owners on the facts of *Dinsky*.[73] Although the *Dinsky* court correctly held that, under the public duty doctrine, the defendant town was not liable,[74] the court's reasoning with respect to the duty issue may not have been consistent with the doctrine.[75]

The *Dinsky* court essentially reasoned that individual duty may be established by legislative intent of statutes to impose municipal liability for negligent conduct of municipal employees.[76] However, legislative intent to impose liability does not, under the public duty doctrine, necessarily narrow public duties into individual duties.[77] To illustrate, the express intention of the Massachusetts mob violence statute[78] is to make municipalities liable to property

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66. *Id.* at 801-02, 438 N.E.2d at 51-52.

67. *See id.*

68. *Id.* at 805, 438 N.E.2d at 53.

69. *Id.* at 810, 438 N.E.2d at 56.

70. *Id.* at 809-10, 438 N.E.2d at 55-56.

71. *See id* at 809-10, 438 N.E.2d at 55-56.

72. *Id.* at 809, 438 N.E.2d at 55. The applicable legislation that was in effect when the *Dinsky* plaintiffs' home was constructed is reproduced in the *Dinsky* opinion. *See id.* at n.3, 438 N.E.2d at 55. The legislation that was in effect when *Dinsky* was decided captures the essence of the former legislation, but in abbreviated form: "This code shall be construed to secure its expressed intent which is to insure public safety, health and welfare insofar as they are affected by building construction through structural strength, adequate egress facilities, light and ventilation and fire safety; and, in general, to secure safety to life and property." *Id.* (quoting MASS. ADMIN. CODE tit. 780, § 100.4 (1980)).

73. *Dinsky*, 386 Mass. at 809-10, 438 N.E.2d at 55-56. *See supra* note 72 (quoting relevant building legislation).

74. *See infra* text accompanying notes 87-88.

75. *See infra* notes 76-86 and accompanying text.

76. *See* Glannon, *The Scope of Public Liability Under the Tort Claims Act: Beyond the Public Duty Rule*, 67 MASS. L. REV. 159, 162 (1982); *see supra* notes 69-73 and accompanying text.

77. *See infra* notes 78-86 and accompanying text.

78. MASS. GEN. LAWS ANN. ch. 269, § 8 (West Supp. 1985).

owners for property damage caused by riots.[79] Liability is imposed without regard to the number of property owners whose property was damaged. Conceivably, entire sections of a city could suffer damage from a riot, and an extremely large number of affected property owners, whose identities would be uncertain, might have claims against the city under the mob violence statute. Because the mob violence statute may make municipalities liable to many members of the public, the intent of the statute that there be municipal liability does not, under the public duty doctrine, change a police officer's public duty to suppress riots into an individual duty owed to owners of riot-damaged property.[80]

Many statutes, like the mob violence statute, impose a duty on municipal employees to act for the benefit of large and shifting segments of the public.[81] Therefore, intent discernable in such statutes to create private causes of action does not, under the public duty doctrine, narrow a municipal employee's duty of care from a public duty into an individual duty.[82] Instead, statutory intent to impose municipal liability probably represents, without regard to the concepts of public duty or individual duty, a legislative determination that municipal employees should be encouraged to act in a certain way,[83] and/or that members of the public should receive public compensation for certain injuries.[84] Consequently, the test of individual duty relied on by the *Dinsky* court — whether there was intention in applicable legislation to impose municipal liability on the facts of the case[85] — does not differentiate public duties from individual duties, and is not a valid analysis of municipal liability under the public duty doctrine.[86]

The inconsistency between the *Dinsky* court's reasoning and the public duty doctrine did not, however, produce an end result in *Dinsky* that was inconsistent with the doctrine. The duty of the town building inspector in *Dinsky* to non-negligently issue building permits for the plaintiffs' home was clearly a

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79. *Id.*

> If property of the value of fifty dollars or more is destroyed or if property is injured to that amount by five or more persons who are riotously or tumultuously assembled, the town within which the property was situated shall. . . be liable to indemnify the owner thereof in tort to the amount of three fourths of the value of the property destroyed or of the amount of such injury thereto. . . .

Id.

80. *See id.*

81. *Id.*

82. *See id.*

83. *See* Yalenezian v. City of Boston, 238 Mass. 538, 541, 131 N.E. 220, 221 (1921). The *Yalenezian* court stated that the Massachusetts mob violence statute is " 'penal in so far as it throws the burden of. . . compensation on the municipality within whose borders the destruction took place.' In this aspect the statute is to be construed. . . in such a way as shall tend to suppress the mischief." *Id.* (source of internal quotation unclear).

84. *See id.* The *Yalenezian* court indicated that one purpose of the Massachusetts mob violence statute was " 'to make good, at the public expense, the losses of those who may be so unfortunate . . . to be injured in their property by acts of lawless violence. . . .' " *Id.* (source of internal quotation unclear). *See infra* note 144 (discussing compensation purpose of mob violence statute).

85. *See supra* notes 71-73 and 76, and accompanying text.

86. *See* Glannon, *supra* note 76, at 163-64.

public duty. Although in issuing the permits the building inspector interacted with members of the public on an individual basis, he still acted for public benefit at all times. His concern was not solely for those for whose immediate benefit the building permits were issued; he also acted to protect the safety and welfare of remote owners and occupiers of the plaintiffs' home, as well as that of all who might enter the home at one time or another.[87] The building inspector's public duty of care did not narrow into an individual duty because his relationship with the plaintiffs did not differ from his relationships with other members of the public. The building inspector did not induce the plaintiffs to rely on him or otherwise enhance their risk of injury, so as to set them apart from other members of the public who were potentially affected by issuance of the building permits.[88] Because the building inspector's duty of care to the plaintiffs was a public duty only, the *Dinsky* court was correct in its ultimate conclusion that the public duty doctrine barred the plaintiffs' claim against the defendant town.

Like the *Dinsky* court, the *Irwin* majority looked to statutory intent in applying the public duty doctrine.[89] Although the *Dinsky* court's misplaced reliance on statutory intent did not result in a decision that was inconsistent with the public duty doctrine, the *Irwin* majority's reliance did lead to an inconsistent result.[90] Part IV of this Comment critically discusses, among other things, the inconsistency between the *Irwin* majority decision and the public duty doctrine. In preparation for that discussion, the next part of the Comment summarizes the facts of *Irwin*, and the opinions of the *Irwin* majority and dissent.

III. *Irwin v. Town of Ware*: Statement of the Case

A. Facts

During the early morning hours of May 14, 1978, a car in which the Irwin family was riding was struck head-on by a car driven by one Fuller, who was intoxicated at the time.[91] The collision killed Fuller, Mr. Irwin, and the Irwins' daughter.[92] Mrs. Irwin and the Irwins' son were severely injured.[93]

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87. *Cf.* O'Connor v. City of New York, 58 N.Y.2d 184, 190, 447 N.E.2d 33, 35, 460 N.Y.S.2d 485, 487 (1983) (discussing building inspector's duty to enforce gas piping regulations, in case where building exploded as result of building inspector's failure to discover gas leak). "[T]he gas piping regulations in this case [were] designed, at least in part, to protect persons from death, injury or property damage. The regulations were intented to benefit the injured persons, but in the broad sense of protecting all members of the public." *Id.*

88. *See supra* notes 47-53 and accompanying text (discussing way in which reliance on municipal employee enhances risk of harm). The textual discussion accompanying this footnote assumes that an individual duty under the public duty doctrine is established only where a municipal employee induced plaintiff reliance or otherwise enhanced the plaintiff's risk of injury. For a critical discussion of other tests of individual duty relied on by some courts, see *infra* note 150.

89. *See* Irwin v. Town of Ware, 392 Mass. 745, 762, 467 N.E.2d 1292, 1303-04 (1984); *see also* Note, *Municipal Liability*, *supra* note 3, at 253.

90. *See infra* notes 146-52 and 181-83 and accompanying text.

91. *Irwin*, 392 Mass. at 763-64, 467 N.E.2d at 1304-05.

92. *Id.* at 764, 467 N.E.2d at 1305.

93. *Id.*

Ten minutes before the accident, two Town of Ware police officers had stopped Fuller for speeding.[94] Fuller told the police officers that he had consumed a "couple of beers."[95] Although the police officers could smell alcohol on Fuller's breath, they did not conduct a field sobriety test.[96] After checking Fuller's driver's license and car registration, and speaking with him briefly, the police officers allowed Fuller to proceed on his way.[97]

Mrs. Irwin brought suit against the Town of Ware, on behalf of herself, her son, and her deceased husband and daughter.[98] The complaint made a claim under the Massachusetts Tort Claims Act against the town for the police officers' negligent failure to have taken Fuller into protective custody.[99] The jury before whom the case was tried returned verdicts for the plaintiffs.[100] The trial judge denied the town's motion for judgments notwithstanding the verdicts.[101] The town appealed the denial.[102] The Massachusetts Supreme Judicial Court allowed the plaintiffs' application for direct appellate review.[103]

B. Majority Opinion

A majority[104] of the Massachusetts Supreme Judicial Court held that, under the Massachusetts Tort Claims Act,[105] a municipality may be liable for personal injuries or death that result from a police officer's negligent failure to remove an intoxicated driver from the highways.[106]

Chief Justice Hennessey, writing for the majority, considered whether the plaintiffs' action against the town was barred by the public duty doctrine.[107]

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94. *Id.* at 763, 467 N.E.2d at 1304.

95. *Id.*

96. *Id.* at 764, 467 N.E.2d at 1305.

97. *Id.* at 763-64, 467 N.E.2d at 1304-05.

98. *Id.* at 745 n.1, 467 N.E.2d at 1292.

99. *Id.* at 746-47, 467 N.E.2d at 1295.

100. *Id.* at 747, 467 N.E.2d at 1295.

101. *Id.*

102. *Id.*

103. *Id.*

104. The *Irwin* court addressed a number of issues on appeal. The court divided only on the issue of the town's liability for the police officers' negligence. Chief Justice Hennessey announced the judgment of the majority on this issue, in an opinion joined by Justices Wilkins, Liacos, and Abrams. *Irwin*, 392 Mass. at 745-46, 467 N.E.2d at 1292. Justice Nolan delivered the dissenting opinion, in which Justices Lynch and O'Connor joined. *Id.* at 775, 467 N.E.2d at 1311.

105. 1978 Mass. Acts 512 (codified with amendments at MASS. GEN. LAWS ANN. ch. 258, § § 1-13 (West Supp. 1985)). For a brief discussion of the events preceding passage of the Tort Claims Act and of the Act's provisions, see *supra* notes 6-14 and accompanying text.

106. *Irwin*, 392 Mass. at 755, 762, 467 N.E.2d at 1299, 1303-04.

107. *Id.* at 752-63, 467 N.E.2d at 1298-1304. Another issue regarding the town's liability that the *Irwin* court addressed was whether the plaintiffs' claim was barred by the "discretionary function exception" contained in the Tort Claims Act. *Id.* at 752-54, 467 N.E.2d at 1298-99. Section 10(b) of the Act retains governmental immunity from claims that are "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." MASS. GEN. LAWS ANN. ch. 258, § 10(b) (West Supp. 1985); *see also* Whitney v. City of Worcester, 373 Mass. 208, 218, 366 N.E.2d 1210, 1216 (1977) (rationale for discretionary function immunity is to avoid endangering creative exercise of political judgment); Irwin v. Commissioner of the Dep't of Youth Servs., 388 Mass. 801, 817, 448 N.E.2d 721, 725-26 (1983) (discussion of

The town argued that the police officers' duty to take Fuller into custody was a public duty only, and, under the public duty doctrine, was non-actionable by the plaintiffs.[108] Rejecting the town's argument, the majority held that the officers owed an individual duty of care to the plaintiffs because they were in a special relationship with them.[109] The majority reasoned that the special relationship arose from two factors present in *Irwin*. One was the intention of state

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discretionary function immunity in *Whitney* is guide for applying Tort Claims Act discretionary function exception). The town contended that the police officers' decision whether to remove Fuller from the highways was a discretionary act, and therefore that the discretionary function exception to the Tort Claims Act immunized the town from liability to the plaintiffs. *Irwin*, 392 Mass. at 752, 467 N.E.2d at 1298. The *Irwin* court unanimously held that the police officers' decision was not a protected discretionary act, because it did not involve a "[public] policy and planning decision." *Id.* at 753, 467 N.E.2d at 1299.

Courts in jurisdictions outside of Massachusetts have reached differing conclusions with respect to whether police law enforcement activity is an immunized discretionary function. *Compare* Everton v. Willard, 468 So. 2d 936, 937 (Fla. 1985) (police decision whether to arrest criminal discretionary) *and* Higdon v. Metropolitan Dade County, 446 So. 2d 203, 208 (Fla. Dist. Ct. App. 1984) (police handling of riot and decision whether to warn of riot discretionary acts) *and* City of Cape Coral v. Duvall, 436 So. 2d 136, 137 (Fla. Dist. Ct. App. 1983) (police decision whether to detain intoxicated driver discretionary) *and* Carter v. City of Stuart, 433 So. 2d 669-70 (Fla. Dist. Ct. App. 1983) (decision whether to impound vicious dog discretionary) *and* Crouch v. Hall, 406 N.E.2d 303, 304 (Ind. Ct. App. 1980) (police investigation of crime discretionary activity) *and* Wuetrich v. Delia, 134 N.J. Super. 400, 412, 341 A.2d 365, 371 (1975) (police decision whether to arrest discretionary) *and* McCroskey v. Fettes, 310 N.W.2d 773, 775-76 (N.D. 1981) (police determination of whether person intoxicated discretionary; decision what to do with person afterwards discretionary) *with* Cain v. Leake, 695 P.2d 798, 800 (Colo. App. 1984) (police decision whether to take intoxicated driver into custody not discretionary; citing *Irwin*) *and Wuetrich*, 134 N.J. Super. 400, 412, 341 A.2d at 371-72 (nondiscretionary that police initiate investigation of crime) *and McCroskey*, 310 N.W.2d at 775-76 (non-discretionary that police make observations necessary to determine whether person intoxicated, although actual determination of intoxication discretionary as long as based on observations) *and* Cantwell v. Allegheny County, 319 Pa. Super. 255, 260, 466 A.2d 145, 148 (1983) (police investigation of crime and custody of evidence not discretionary) *and* Chambers-Castanes v. King County, 100 Wash. 2d 275, 282-83, 669 P.2d 451, 456-57 (1983) (police decision whether to dispatch officer to crime scene not discretionary) (disapproving Moloney v. Tribune Publishing Co., 26 Wash. App. 357, 360, 613 P.2d 1179, 1181-82 (1980) (holding police release of investigation information to press discretionary act) *and* Clipse v. Gillis, 20 Wash. App. 691, 695-96, 582 P.2d 555, 558 (1978) (holding police investigation of criminal complaints discretionary).

A reason why some courts accord police law enforcement activity discretionary status is in recognition of the difficult circumstances under which police frequently are called to act. *See* Chandler Supply Co. v. City of Boise, 104 Idaho 480, 486, 660 P.2d 1323, 1329 (1983); Robertson v. City of Topeka, 231 Kan. 358, 362, 644 P.2d 458, 462 (1982).

> Surely, by enacting the discretionary function exception, the legislature recognized that discretion in making [law enforcement] judgments is entitled to deference at least equal to that given to legislators and judges who have the luxury of time, debate and a comparatively safe and comfortable place to ponder and decide the ways in which governmental business should be conducted.

Chandler Supply Co., 104 Idaho at 486, 660 P.2d at 1329; *see also Everton*, 486 So. 2d at 939 (no distinction between police decision to arrest an individual and judicial decision whether to release individual on bail or place him on probation).

108. *Irwin*, 392 Mass. at 754-55, 467 N.E.2d at 1299.

109. *Id.* at 762, 467 N.E.2d at 1303-04.

laws[110] to protect users of the highways from intoxicated drivers which, asserted the majority, "creates a duty to the motoring public upon which tort liability may be based."[111] The second factor was the foreseeable risk of immediate physical injury created by the release of an intoxicated driver.[112]

The special relationship between the town police officers and the plaintiffs, concluded the majority, made the public duty doctrine inapplicable and meant that the town could be liable for the police officers' failure to enforce intoxicated driving laws against Fuller.[113] The majority supported its decision by distinguishing *Dinsky*[114] and by relying on cases holding liquor vendors liable to members of the public injured by intoxicated customers.[115]

C. *Dissent Opinion*

Justice Nolan, speaking for the dissent, disagreed with the majority's holding that the town was liable to the *Irwin* plaintiffs for the police officers' negligent failure to take Fuller into custody.[116] The dissent disputed the majority's finding of a special relationship between the police officers and the plaintiffs.[117] Two factors, the dissent explained, must be present for a relationship between police and a plaintiff to be special under the public duty doctrine.[118] First, the plaintiff's identity must be known in advance to police.[119] Second, police must make specific assurances of protection to the plaintiff, giving rise to reasonable reliance on those assurances by the plaintiff.[120] Based on these criteria, the dissent determined that no special relationship existed in *Irwin*.[121] Before the accident, the town police officers were not aware of the plaintiffs' identities as potential victims of Fuller.[122] In addition, the police officers did not provide specific assurances of protection to the plaintiffs.[123]

The dissent noted inconsistency between the public duty doctrine and its "reasonable" special relationship requirement, and imposition of municipal liability in *Irwin*.[124] The reality of the majority's decision, the dissent argued, was to make a police officer's public duty to enforce laws actionable by "all possible plaintiffs."[125] Without elaborating, the dissent concluded that this ex-

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110. *See infra* notes 133-36 (setting forth state laws on which majority relied).

111. *Irwin*, 392 Mass. at 762, 467 N.E.2d at 1304.

112. *Id.*

113. *Id.* at 759, 762, 467 N.E.2d at 1302-04.

114. *See id.* at 755-56, 467 N.E.2d at 1300. *See infra* notes 153-65 and accompanying text (discussing majority's distinguishing of *Dinsky*).

115. *Irwin*, 392 Mass. at 757-60, 467 N.E.2d at 1301-02. *See infra* notes 166-73 and accompanying text (discussing majority's reliance on dram shop decisions).

116. *Irwin*, 392 Mass. at 775, 467 N.E.2d at 1311 (Nolan, J., dissenting).

117. *Id.* at 775-76, 467 N.E.2d at 1311 (Nolan, J., dissenting).

118. *Id.* at 775, 467 N.E.2d at 1311 (Nolan, J., dissenting).

119. *Id.*

120. *Id. See supra* notes 44-53 and accompanying text (discussing crime victim reliance as creating special relationship with police).

121. *Irwin*, 392 Mass. at 776, 467 N.E.2d at 1311 (Nolan, J., dissenting).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

tension of police duty was "regrettable," and that "[i]ts effect on tomorrow is frightening."[126]

IV. *Irwin v. Town of Ware*: ANALYSIS

Dinsky established the applicability of the public duty doctrine to negligence claims brought under the Massachusetts Tort Claims Act.[127] In addition, *Dinsky* set a precedent for reference to statutory intent to determine whether a negligent municipal employee owed a public or an individual duty of care to a plaintiff.[128] The Supreme Judicial Court did not find an individual duty in *Dinsky* because it discerned no intention in relevant building legislation to impose liability to individual property owners for the negligent issuance of building permits involved in that case.[129] The *Irwin* majority followed *Dinsky* by applying the public duty doctrine to determine the Town of Ware's liability under the Tort Claims Act[130] and looking, at least initially, to statutory intent to decide the issue of duty.[131]

Had the *Irwin* majority literally applied the *Dinsky* test of individual duty — whether there was intent in relevant legislation to impose liability on municipalities to members of the public[132] — it would have had to decide that there was no liability in *Irwin*. The legislation that the majority deemed relevant to *Irwin* consisted of statutes authorizing police to arrest intoxicated drivers[133] and to otherwise deal with them,[134] and statutes directing police to issue

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126. *Id.* at 777, 467 N.E.2d at 1312 (Nolan, J., dissenting).

127. Dinsky v. Town of Framingham, 386 Mass. 801, 810, 438 N.E.2d 51, 56 (1982); Glannon, *supra* note 76, at 159; Note, *Municipal Liability, supra* note 3, at 250.

128. *See* Note, *Municipal Liability, supra* note 3, at 253, 255 & n.130.

129. *Dinsky*, 386 Mass. at 809-10, 438 N.E.2d at 55-56.

130. *See* Irwin v. Town of Ware, 392 Mass. 745, 754-63, 467 N.E.2d 1292, 1299-1304 (1984). At one point, the *Irwin* majority appeared to indicate an intention to possibly abandon the public duty doctrine. *See id.* at 755, 467 N.E.2d at 1300 (public duty rule "[a]rguably. . . contains a seed which could reintroduce a broad-based municipal tort immunity"). *But see supra* text accompanying note 55 (distinguishing between public duty and governmental immunity doctrines). In Ribeiro v. Town of Granby, 395 Mass. 608, 481 N.E.2d 466 (1985), which was decided by the Supreme Judicial Court after *Irwin*, the court apparently reaffirmed its adherence to the public duty doctrine. *See Ribeiro*, 395 Mass. at 611-12, 481 N.E.2d at 467-68 (negligent building inspection case).

131. *See Irwin*, 392 Mass. at 758-60, 467 N.E.2d at 1301-02; Note, *Municipal Liability, supra* note 3, 253, 255 & n.130.

132. *See supra* notes 75-77 and 134-35 and accompanying text.

133. *Irwin*, 392 Mass. at 759, 467 N.E.2d at 1302. "'Any officer authorized to make arrests. . . may arrest without warrant any person. . . who the officer has probable cause to believe has operated or is operating a motor vehicle while under the influence of intoxicating liquor. . . .'" *Id.* (quoting MASS. GEN. LAWS ANN. ch. 90, § 21 (West Supp. 1985)).

134. *Id.*

> 'Whoever operates a motor vehicle upon any way or in any public place to which the public has right of access. . . shall be deemed to have consented to submit to a chemical test or analysis of his breath or blood in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor. . . . Such test shall be administered at the direction of a police officer. . . having reasonable grounds to believe that the person arrested has been operating a motor vehicle. . . while under the influence of intoxicating liquor'. . . . 'Any person who is

records for intoxicated driving citations[135] and, in general, to "suppress and prevent all disturbances and disorder."[136] These statutes, unlike those relied on in *Dinsky*, do not expressly mention public safety and welfare.[137] However, nothing in the statutes relied on by the *Irwin* majority indicates that, with respect to handling of suspected intoxicated drivers, police act other than to secure common, public good.[138] Thus, if the majority had strictly adhered to the reasoning of *Dinsky*, it would have been forced to conclude that, because there was no intention in relevant legislation to make municipalities liable to individual members of the public,[139] the police officers did not owe an individual duty of care to the plaintiffs.[140] This would have meant that the police officers' duty to take Fuller into custody was a public duty only, and that the public duty doctrine barred the plaintiffs' claim against the town.[141] In order to avoid this result, the majority adopted a different significance of statutory intent than did the *Dinsky* court with respect to the issue of duty.

Instead of considering statutory intent to impose municipal liability, as did the *Dinsky* court, the *Irwin* majority focused on the intent it perceived in relevant legislation to protect users of the highways from intoxicated drivers.[142] In addition, unlike the *Dinsky* court, the majority purported to rely on

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> incapacitated may be assisted by a police officer with or without his consent to his residence, to a facility or to a police station. To determine. . . whether or not such person is intoxicated, the police officer may request the person to submit to reasonable tests.'

Id. (quoting MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1985) and MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1979)).

135. *Id.* at 759-60, 467 N.E.2d at 1302 (citing MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a)(1) and ch. 90C, § 2 (West Supp. 1985)).

Chapter 90, § 24(1)(a), provides in part: "Whoever. . .operates a motor vehicle while under the influence of intoxicating liquor. . . shall be punished by a fine of not less than one hundred or more than one thousand dollars, or by imprisonment for more than two years, or both." MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a)(1) (West Supp. 1985). Chapter 90C, § 2, provides in part: "Any police officer assigned to traffic enforcement shall. . . record the occurrence of automobile violations upon a citation." *Id.* ch. 90C, § 2.

136. *Irwin*, 392 Mass. at 760, 467 N.E.2d at 1302 (quoting MASS. GEN. LAWS ANN. ch. 41, § 98 (West 1979)). " '[P]olice officers of all cities and towns. . . shall suppress and prevent all disturbances and disorder. . . .' " *Id.*

137. *Compare supra* notes 133-36 (setting forth statutes relied on by *Irwin* majority) *with supra* note 72 (describing legislation relied on by *Dinsky* court).

138. *See supra* notes 133-36 (setting forth statutes relied on by *Irwin* majority); *see also* MASS. GEN. LAWS ANN. ch. 22, § 9-9A (West 1984). Sections 9 and 9A of ch. 22 authorize additional appointments to the state police force when "necessary to provide for the protection of persons' property and for the maintenance of law and order *in the commonwealth*." *Id.* (emphasis added). This language provides further support for the proposition that the purpose of police law enforcement activity is a public purpose.

139. *See supra* notes 137-38 and accompanying text (discussing public purpose of statutes relied on by *Irwin* majority).

140. *See supra* notes 71-73 and 76 and accompanying text (discussing *Dinsky* reasoning with respect to duty). *See supra* notes 80-92 (criticizing *Dinsky* test of individual duty as not being valid analysis of municipal liability under public duty doctrine).

141. *See supra* notes 69-71 and accompanying text (discussing *Dinsky*).

142. *See Irwin*, 392 Mass. at 755, 762, 467 N.E.2d at 1300, 1304.

the special relationship test of individual duty.[143] The majority reasoned that the legislative intention to protect highway users, combined with the foreseeability that release of an intoxicated driver would create a risk of physicial injury, established a special relationship between the police officers and the plaintiffs.[144] The existence of a special relationship meant that the police officers' duty to protect the *Irwin* plaintiffs was an individual duty, and not a public duty.[145] As the *Irwin* dissent observed, however, the relationship given legal effect by the majority was not a special relationship under the public duty doctrine.[146]

The test of special relationship applied by the majority was essentially plaintiff membership in a class of legislatively-protected highway users, who were foreseeably endangered by police release of an intoxicated driver.[147] However, the class of highway users in danger from an intoxicated driver constitutes an appreciable segment of the public.[148] At any moment, an extremely large and indefinite number of persons use highways in manners that may expose them to harm from intoxicated drivers, whose paths of travel may be erratic and unpredictable. The mere fact that the *Irwin* plaintiffs were high-

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143. *See id.*, 392 Mass. at 754-62, 467 N.E.2d at 1299-1304.

144. *Id.* at 762, 467 N.E.2d at 1303-04. The majority's reliance on perceived intention of state laws to protect highway users creates an appearance that the Massachusetts legislature intended, with passage of the Tort Claims Act, to impose municipal liability for police failure to take intoxicated drivers into custody. As Professor Prosser has noted however:

> Many courts. . . purport to 'find' in [a] statute a supposed 'implied,' 'constructive,' or 'presumed' intent to provide for tort liability. *In the ordinary case this is pure fiction, concocted for the purpose.* . . .
>
> . . .[T]he most satisfactory explanation [for this] is that the courts are seeking, by something in the nature of judicial legislation, to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind.

W. PROSSER & W. KEETON, *supra* note 3, § 36, at 220-22 (emphasis added).

An argument can be made that the Massachusetts legislature did not, in fact, intend that the Tort Claims Act result in the type of liability imposed in *Irwin*. The Massachusetts mob violence statute, MASS. GEN. LAWS ANN. ch. 269, § 8 (West Supp. 1985), expressly makes municipalities liable to property owners for property damage caused by riots. *Id.* One commentator has noted that a reason for compensating riot victims at public expense is that "[t]he suddenness of [a riot] and the anonymity of the [rioters] frequently leave victims. . . with no realistic possibility of recovering damages from those actually causing them." Annot., 26 A.L.R. 1198, 1207 (1969). The Supreme Judicial Court has not indicated that riot victim inability to identify and recover from rioters is a rationale for the Massachusetts mob violence statute. *See* Abraham v. City of Woburn, 383 Mass. 724, 731, 421 N.E.2d 1206, 1211-12 (1981); Yalenzian v. City of Boston, 238 Mass. 538, 541, 131 N.E. 220, 221 (1921) (discussing purpose of mob violence statute). If, however, there is a legislative policy in Massachusetts to specially protect crime victims who have no practical way to identify the criminals who harmed them, then that policy is not furthered by *Irwin*, where the criminal (Fuller) was readily identifiable by the plaintiffs.

145. *See Irwin*, 392 Mass. at 755, 762, 467 N.E.2d at 1299, 1303-04.

146. *Id.* at 776, 467 N.E.2d at 1311 (Nolan, J., dissenting).

147. *See supra* notes 142-44 and accompanying text (discussing *Irwin* majority reasoning with respect to special relationship issue).

148. Note, *Municipal Liability*, *supra* note 3, at 254. Persons engaged in any of the following activities would be exposed to harm from an intoxicated driver: as drivers or passengers of cars, trucks, or buses; motorcyclists; bicyclists; pedestrians; or joggers.

way users, in danger from an intoxicated driver, did not, therefore, distinguish them in a meaningful way from other members of the public.[149] Thus, there was nothing "special" about the plaintiffs' relationship with the town police officers, indicating that the officers' duty to protect the plaintiffs was a public duty only.[150] *Dinsky* established that a plaintiff cannot maintain a negligence action against a municipality if the duty breached by a municipal employee was a public duty.[151] Consequently, the *Irwin* dissent correctly stated that the majority decision "[flew] in the face of. . . *Dinsky*."[152]

No doubt anticipating criticism that *Irwin* departed from *Dinsky*, the majority attempted to distinguish the decisions.[153] Whereas in *Irwin* there was a legislative intention to protect the motoring public from intoxicated drivers, the majority asserted,[154] *Dinsky* "concluded that there was no intention in [state building legislation] to benefit purchasers of premises which were developed in violation of governmental requirements."[155] This distinction between *Irwin* and *Dinsky* is false, however, because it is based on a misstatement of the reasoning in *Dinsky*.

Contrary to the *Irwin* majority's assertion, the *Dinsky* court did not conclude that a public duty of care was owed to the *Dinsky* plaintiffs because there was no intent in the relevant building legislation to benefit them.[156] Instead, the *Dinsky* court reasoned that there was no legislative intent to benefit the plaintiffs differently than other members of the public.[157] The court reached this conclusion based on its determination that there was no legislative

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149. The concept of a "special relationship," under the public duty doctrine, is that a relationship between a municipal employee and a member of the public is different from the municipal employee's relationships with other members of the public. *Irwin*, 392 Mass. at 775, 467 N.E.2d at 1311 (Nolan, J., dissenting); *see supra* notes 44-53 and accompanying text (discussing meaning of special relationship under public duty doctrine). The existence of a special relationship indicates that the municipal employee's duty of care to the plaintiff was an individual duty, and not a public duty. *See supra* notes 44-53 and accompanying text.

150. *See supra* note 149. Through use of class membership and foreseeability criteria to analyze the special relationship issue in *Irwin*, the majority fell into the trap foreseen by one court:

> [B]y finding a particular class of individuals to have been particularly subject to injury by breach of a 'public duty,' for example, bar patrons, workmen, pedestrians, tenants, or. . . *users of the public highways*, the 'public duty' concept can as a practical effect be eliminated as an active concept in our law.

McNeal v. Division of State Police, Dep't of Pub. Safety, 412 So.2d 1123, 1128 (La. Ct. App. 1982).

A number of courts applying the public duty doctrine have recognized special relationships based on plaintiff membership in an at-risk class or foreseeability of injury to the plaintiff. *See supra* note 53 (collecting cases). As suggested by the discussion in this footnote and accompanying text, class membership and foreseeability criteria do not differentiate public duties from individual duties, and therefore do not supply a valid analysis of municipal liability under the public duty doctrine.

151. Dinsky v. Town of Framingham, 386 Mass. 801, 810, 438 N.E.2d 51, 56 (1982).

152. *Irwin*, 392 Mass. at 775, 467 N.E.2d at 1311 (Nolan, J., dissenting).

153. *See Irwin*, 392 Mass. at 755-56, 467 N.E.2d at 1299-1300.

154. *See id.* at 755, 762, 467 N.E.2d at 1300, 1304.

155. *Id.* at 755, 467 N.E.2d at 1300.

156. *See infra* notes 157-58.

157. *See Dinsky*, 386 Mass. at 809-10, 438 N.E.2d at 55-56; *see also supra* notes 71-73 and accompanying text (discussing *Dinsky*).

intent to impose municipal liability to individual property owners on the facts of *Dinsky*.[158] As discussed above, a similar analysis of the duty issue in *Irwin* — an analysis based on statutory intent to impose municipal liability — would have resulted in a determination that the police officers did not owe an individual duty of care to the *Irwin* plaintiffs,[159] and therefore that the town, like the defendant in *Dinsky*, was not liable under the public duty doctrine.[160]

A second ground on which the *Irwin* majority attempted to distinguish *Dinsky* was based on the nature of the injuries involved in each case.[161] "Unlike *Dinsky* and its relatively leisurely course of events," the majority explained, "the threat [in *Irwin*] (intoxicated driving) is immediate; it threatens serious physical injury; the threat is short-lived, unlike negligent landscaping; and the plaintiffs (the motoring public) have no chance to protect themselves."[162] Although the majority was correct in its observation that the plaintiffs' injuries in *Irwin* and *Dinsky* were quite different,[163] the difference was not significant for purposes of municipal liability under the public duty doc-

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158. *Id.*

159. *See supra* notes 132-41 and accompanying text.

160. *Id.*

161. *See infra* notes 162-65 and accompanying text.

162. *Irwin*, 392 Mass. at 756, 467 N.E.2d at 1300. In a case decided after *Irwin*, the Massachusetts Supreme Judicial Court held that a town was not liable for a building inspector's negligent failure to enforce state building code regulations against an apartment building owner. Ribeiro v. Town of Granby, 395 Mass. 608, 613, 481 N.E.2d 466, 469 (1985). The building inspector had notified the owner that the apartment building violated building code regulations because there were no second means of egress from some of the apartments. *Id.* at 609, 481 N.E.2d at 467. The owner never constructed the required egresses. *Id* at 610, 481 N.E.2d at 467. Approximately one and one-half years after the building inspector's notification to the owner of the building code violation, the apartment building burned and a second floor tenant died from smoke inhalation and asphyxiation. *Id.*

The administrators of the tenant's estate sued the town of Granby under the Massachusetts Tort Claims Act. *Id.* at 608, 481 N.E.2d at 466. The complaint alleged that the building inspector's nonenforcement of the second egress regulation against the apartment building owner was the cause of the tenant's failure to escape death from the fire. *Id.* at 610-11, 481 N.E.2d at 467. The Supreme Judicial Court held that the building inspector did not breach an individual duty of care to the tenant, and therefore the public duty doctrine barred the plaintiff's action. *See id.* at 613, 481 N.E.2d at 469.

The *Ribeiro* court distinguished *Irwin* on the grounds that, unlike *Irwin*, *Ribeiro* "present[ed] a 'relatively leisurely course of events.' The danger was discernible for many months before the harm occurred. More than one year ensued between the building inspector's warning letter and the fatal fire. During this time the owners of the premises, and indeed the occupants themselves, could have taken measures to rectify or avoid the danger." *Ribeiro*, 395 Mass. at 612, 481 N.E.2d at 468-69 (citation omitted) (quoting *Irwin*).

The *Irwin* and *Ribeiro* courts' reliance on immediacy of a danger and perceived ability of a plaintiff to protect against it may make future cases under the Tort Claims Act difficult to decide. How much time must pass between a municipal employee's negligent act and a plaintiff's injury before a municipality will not be held liable for the negligence? How is a plaintiff's ability to have protected himself from the negligence to be judged? Apart from constituting a potentially unworkable basis for decision, the vague criteria relied on in *Irwin* and *Ribeiro* unfairly deprive municipalities of a certain standard by which to measure and protect against liability.

163. The injury that the *Dinsky* plaintiffs suffered was severe flooding damage to their home and the surrounding property. *Dinsky*, 386 Mass. at 802, 438 N.E.2d at 52.

trine. The public duty doctrine is concerned with numbers of persons to whom an asserted duty is owed.[164] Thus, the fact that members of the public in *Irwin* were vulnerable to serious injury did not change the town police officers' duty to protect them from a public duty into individual duties. In fact, the common danger simply underscored the public nature of the police officers' duty of care.[165] While the emphasis on the *Irwin* plaintiffs' vulnerablity to harm lent emotional appeal to the majority's opinion, it did not, as suggested, serve to distinguish *Dinsky* in a meaningful way.

Apart from distinguishing *Dinsky*, the majority attempted to defend imposition of liability on the town in *Irwin* with reliance on decisions holding liquor vendors liable to plaintiffs injured in auto accidents caused by intoxicated customers of the vendors.[166] According to the majority, a liability-creating "special relationship" existed in these dram shop decisions between the defendant liquor vendors and the plaintiffs.[167] This dram shop "special relationship," the majority reasoned, supported a finding of a special relationship in *Irwin* between the town police officers and the plaintiffs.[168] As will be demonstrated, however, the majority's analogy to dram shop liability was flawed, and did not, in fact, support a conclusion in *Irwin* that the town was liable to the plaintiffs under the public duty doctrine.

"Special relationship" is a term that may be used in the analysis of both dram shop liability and municipal tort liability. Under the public duty doctrine, interaction between a police officer and a plaintiff may create a "special relationship," giving rise to a duty of care owed by the police officer to the plaintiff.[169] In a dram shop case, interaction between a liquor vendor and his

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164. *See supra* notes 32-35 and accompanying text (discussing theory of public duty doctrine).

165. *See* Duffy v. City of Philadelphia, 580 F. Supp. 164, 166 (E.D. Pa. 1983). A plaintiff cannot recover from a municipality under the public duty doctrine if a municipal employee's negligence did not expose him to a danger that was distinctly different from that to which other members of the public were exposed. *See, e.g., id.*; *see supra* text accompanying notes 44-53. In *Duffy*, the court denied recovery to a spectator assaulted at a football game played in a city-owned stadium because "like other members of the general public attending the football game, plaintiff was exposed to the arguably dangerous conditions which prevail in a large and enthusiastic crowd where alcoholic beverages are bought and consumed." 580 F. Supp. at 166.

166. *See Irwin*, 392 Mass. at 757-60, 467 N.E.2d at 1301-02 (discussing Michnik-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 453 N.E.2d 430 (1983) and Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968)).

167. *See Irwin*, 392 Mass. at 757-58, 467 N.E.2d at 1301-02. *But see infra* note 170 (concluding that "special relationship" in dram shop case is between liquor vendor and intoxicated customer, not between vendor and plaintiff). It should be noted that in neither *Michnik-Zilberman* nor *Adamian* did the Supreme Judicial Court mention the concept of "special relationship." Instead, the *Michnik-Zilberman* and *Adamian* courts analyzed liquor vendor dram shop liability in terms of violation of a statute (laws prohibiting sale of alcoholic beverages to intoxicated persons and minors) as evidence of negligence, foreseeability, and proximate cause. *See generally Michnik-Zilberman*, 390 Mass. at 10-12, 453 N.E.2d at 433-34; *Adamian*, 353 Mass. at 499-501, 233 N.E.2d at 19-20. This is apparently how most courts have analyzed dram shop liability. *See* Comment, *Dram Shop Liability - A Judicial Response*, 57 CAL. L. REV. 995, 1005-08 (1969).

168. *Irwin*, 392 Mass. at 757-58, 467 N.E.2d at 1301-02.

169. *See supra* notes 44-53 and accompanying text (discussing special relationship test of individual duty under public duty doctrine).

customer — the liquor vendor's sale of alcoholic beverages — may create a "special relationship," giving rise to a duty of care owed by the liquor vendor to accident victims of the customer.[170] In either context, dram shop liability or municipal liability, the term "special relationship" refers to an interaction between parties out of which a duty of care may arise. This is where, however, any analogy that can be drawn between dram shop liability and municipal tort liability ends.

The label "special relationship," in any factual context, is merely a way of saying that the law attaches legal significance, in terms of tort liability, to an interaction between parties. Tort law is a reflection of societal expectations and judgments with respect to the conduct of members of society.[171] The policies that cause one interaction to have legal significance do not necessarily support the legal significance of another. In other words, the fact that there is a "special relationship" in one case should not sustain a "special relationship"

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170. *See* W. PROSSER & W. KEETON, *supra* note 3, § 56, at 383-84.

One issue in a dram shop case is whether a liquor vendor owes a duty of care to accident victims of the vendor's intoxicated customers. As a general rule, tort law does not recognize a duty for defendants to protect plaintiffs from third parties. Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887 (1934). An exception to the general rule is where there has been a certain interaction between the defendant and the plaintiff, or between the defendant and the third-party tortfeasor. W. PROSSER & W. KEETON, *supra* note 3, § 56; Harper & Kime, *supra* this note, at 888. For example, the interaction between an innkeeper and his guest may create a duty for the innkeeper to protect the guest from criminal attack on inn premises, W. PROSSER & W. KEETON, *supra* note 3, § 56, at 383; the interaction between a psychotherapist and his patient may create a duty for the psychotherapist to warn another of the patient's dangerous propensities, *id.* at 384. These duty-creating interactions are sometimes referred to as "special relationships." *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965). Thus it may be said that there is a "special relationship" between an innkeeper and his guest, *e.g.*, Comastro v. Village of Rosemont, 122 Ill. App. 405, 408, 461 N.E.2d 616, 619 (1984), and between a psychotherapist and his patient, *e.g.*, Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 436-37, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976).

According to the *Irwin* majority, the duty of a liquor vendor in a dram shop case arises from a "special relationship" between the vendor and the plaintiff-accident victim. *Irwin*, 392 Mass. at 757-58, 467 N.E.2d at 1301-02. Although the majority was correct about the liquor vendor's duty arising from a "special relationship," it was mistaken with respect to which parties the "special relationship" is between. As discussed above, the term "special relationship" is a label for a duty-creating interaction between parties. In a dram shop case, the plaintiff is injured by an intoxicated customer of a liquor vendor at a location removed from the vendor's business establishment. Because there is no interaction between the liquor vendor and the plaintiff, there cannot be a "special relationship" between them. Instead, the "special relationship" that creates the duty in a dram shop case is between the liquor vendor and the intoxicated customer, who do interact in the sale of alcoholic beverages from the one to the other. *See* W. PROSSER & W. KEETON, *supra* note 3, § 56, at 383-84.

In *Irwin*, the issue was whether there was a "special relationship" between the town police officers and the plaintiffs. *See Irwin*, 392 Mass. at 756-62, 467 N.E.2d at 1300-04. The *Irwin* majority asserted that an analogy could be drawn between municipal liability for police failure to arrest intoxicated drivers and dram shop liability because "[t]he [dram shop] decisions [also] involve special relationships between plaintiffs and defendants." *Id.* at 758, 467 N.E.2d at 1302. This assertion is incorrect. As demonstrated, the "special relationship" in a dram shop case is not between the plaintiff (accident victim) and the defendant (liquor vendor), but between the defendant and the third-party tortfeasor (intoxicated customer).

171. *See* W. PROSSER & W. KEETON, *supra* note 3, § 3, at 15-17, § 53, at 359.

in another, unless the social policies favoring tort liability in each case match. Decisions regarding municipal liability for police negligence involve the duties of *public* officials and employees, and implicate important policy considerations regarding the proper role of courts in the ordering of municipal government.[172] These considerations are not present in decisions concerning the duties of *private* defendants, such as liquor vendors in dram shop cases. Because the tort liabilities of public and private defendants do not implicate identical policy considerations, the *Irwin* majority erred in its conclusion that, from the mere fact that there is a "special relationship" in a dram shop case, it follows that there is a "special relationship" between a police officer and plaintiff injured by an intoxicated driver.[173]

The majority's reliance on decisions holding liquor vendors liable to members of the public, in addition to its emphatic distinguishing of *Dinsky*, impart an aura of "rightness" to the majority opinion.[174] An unwary reader might be

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172. *See* Shore v. Town of Stonington, 187 Conn. 147, 152, 444 A.2d 1379, 1382 (1982). "The distinction between public and [individual] duty [under the public duty doctrine] is an expression of the many policy considerations which lead the law to determine whether interests of a particular type are entitled to protection against conduct by officials." *Id.* For discussion of these policy considerations, see *supra* note 56 and accompanying text, and *infra* notes 185-96 and accompanying text.

173. The *Irwin* dissent made the following comments: "The court's reliance on [the] decisions addressing the duty of liquor store owners to the general public is entirely off the mark . . . . The public duty rule is simply not applicable in the private sector and the cases cited cannot serve as analogues." *Irwin*, 392 Mass. at 776, 467 N.E.2d at 1312 (Nolan, J., dissenting).

In addition to dram shop decisions, the *Irwin* majority relied on a number of cases, decided in different factual contexts, in which a duty was imposed on the defendant to protect the plaintiff from a third person. *See Irwin*, 392 Mass. at 760-62, 467 N.E.2d at 1302-03. Some of these cases are irrelevant for the same reason that the dram shop decisions are irrelevant, *see supra* notes 171-73 and accompanying text (discussing irrelevancy of dram shop decisions); some of the cases were miscited for other reasons, *see infra* note 175 (discussing miscited cases).

174. Another factor contributing to the "aura of 'rightness' " is the majority's citation to numerous cases in support of its holding. *See Irwin*, 392 Mass. at 760-62, 467 N.E.2d at 1302-03. However, some of the cited cases are irrelevant. *See supra* notes 171-73 and accompanying text. In other cases that the majority cited, the criteria relied on by the courts of decision for finding an actionable duty critically differ from that relied on by the *Irwin* majority. *See* Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 435-36, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976) (duty based on common-law psychiatrist-patient special relationship); Mann v. State, 70 Cal. App. 3d 773, 779-80, 139 Cal. Rptr. 82, 86 (1977) (duty based on police changing of risk that plaintiffs subject to), *as explained in* Davidson v. City of Westminister, 32 Cal. 3d 197, 208, 649 P.2d 894, 900, 185 Cal. Rptr. 252, 258 (1982); Sestito v. Groton, 178 Conn. 520, 528, 423 A.2d 165, 171 (1979) (duty based on apparentness that failure to act would likely subject *identifiable* victim to imminent harm); Huhn v. Dixie Ins. Co., 453 So. 2d 70, 76 (Fla. Dist. Ct. App. 1984) (jurisdiction rejecting public duty doctrine; duty based on foreseeability alone); DeLong v. County of Erie, 89 A.D.2d 376, 384, 455 N.Y.S.2d 887, 892 (1982) (duty based on plaintiff's detrimental reliance on police promises of assistance), *aff'd*, 60 N.Y.2d 696, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983); McLeod v. Grant County School Dist., No. 128, 42 Wash. 2d 316, 323-24, 255 P.2d 360, 362-63 (1953) (duty based on common-law custodial special relationship). Other cases are arguably miscited because the deciding jurisdiction had in another case found no special relationship between police and a member of the public injured by an intoxicated driver. *Compare* Sestito v. Groton, 178 Conn. 520, 423 A.2d 165 (1979) (cited in *Irwin*) *with* Shore v. Town of Stonington, 187 Conn. 147, 157, 444 A.2d 1379, 1383-84 (1982) (no special relationship between police and victim of intoxicated driver previously stopped by police); *compare* DeLong v. County of Erie, 60

persuaded that there was a special relationship between the town police officers and the *Irwin* plaintiffs, and therefore that imposition of liability on the town was consistent with the public duty doctrine. However, one of the two distinctions that the majority drew between *Irwin* and *Dinsky* was false;[175] the other distinction was not meaningful for purposes of analyzing municipal liability under the public duty doctrine.[176] As just discussed, the "special relationship" in a dram shop case is not completely analogous to, and therefore does not support, a special relationship in a public duty doctrine case.[177] Because the majority purported to follow the public duty doctrine in *Irwin*,[178] the reliance on dram shop liability was misplaced.[179] Careful scrutiny of the majority opinion reveals that its appearance of consistency with the public duty doctrine is a veneer.[180]

The reality of the *Irwin* majority decision is that it extended the town police officers' duty to enforce intoxicated driving laws not only to the *Irwin* plaintiffs, but to all members of the public.[181] A duty that is actionable by the entire public contradicts the public duty doctrine in terms.[182] As noted by the *Irwin* dissent, the majority "essentially abandoned the public duty rule and. . . imposed a new 'common law duty' upon police officers while still using the rubric of the public duty rule."[183] The dissent concluded that the ma-

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N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983) (cited in *Irwin*) *with* Crosby v. Town of Bethlehem, 90 A.D.2d 134, 135, 457 N.Y.S.2d 618, 619 (1982) (no special relationship between police and victim of intoxicated motorcyclist whose intoxication was previously known to police); *see also Irwin*, 392 Mass. at 776, 467 N.E.2d at 1311 (Nolan, J., dissenting) ("some of the very cases which the court cites as authority support the traditional rule of public duty").

175. *See supra* notes 154-60 and accompanying text.

176. *See supra* notes 161-65 and accompanying text.

177. *See supra* notes 166-73 and accompanying text.

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

179. *Irwin*, 392 Mass. at 776, 467 N.E.2d at 1312 (Nolan, J., dissenting).

180. *Id.*

181. *Id.* ("[t]he court extends the duty to all possible plaintiffs"); *see supra* notes 147-49 and accompanying text (indicating "possible plaintiffs" to whom duty extended by majority decision).

182. *See supra* note 33 and accompanying text (discussing meaning of public duty doctrine). A number of courts that adhere to the public duty doctrine have held municipalities to not be liable for failure of police officers to arrest intoxicated drivers on facts indistinguishable from *Irwin*. *See* Lehto v. City of Oxnard, 171 Cal. App. 3d 285, 291, 217 Cal. Rptr. 450, 453-54 (1985); Shore v. Town of Stonington, 187 Conn. 147, 156-57, 444 A.2d 1379, 1383-84 (1982); Crosby v. Town of Bethlehem, 90 A.D.2d 134, 135-36, 457 N.Y.S.2d 618, 619 (1982); Barratt v. Burlingham, 492 A.2d 1219, 1222 (R.I. 1985). Two recent cases in which liability was recognized were decided in jurisdictions that have rejected the public duty doctrine. *Compare* Martinez v. City of Lakewood, 655 P.2d 1388, 1390 (Colo. App. 1982) *and* Brennen v. City of Eugene, 285 Or. 401, 409-11, 591 P.2d 719, 724-25 (1979) (both rejecting public duty doctrine) *with* Cain v. Leake, 695 P.2d 798, 800-01 (Colo. App. 1984) *and* State v. Westlund, 75 Or. App. 43, 46 n.2, 705 P.2d 208, 210 (1985) (both recognizing municpal liability for police failure to arrest intoxicated drivers).

183. *Irwin*, 392 Mass. at 776, 467 N.E.2d at 1312 (Nolan, J., dissenting). The duty recognized by the *Irwin* majority is not confined to the context of police handling of intoxicated drivers. The majority decision subjects a municpality to liability for all activities within municipal boundaries which involve an immediate and foreseeable risk of physical injury to vulnerable persons. *See Irwin*, 392 Mass. at 756, 467 N.E.2d 1300; *see infra* text accompanying note 185. These activities would include: police protection against murderers, muggers, and rapists; fire protection; and, reg-

jority's extension of police duty was "regrettable" and "frightening."[184] Although the dissent did not elaborate on this point, it was not unfounded.

The majority did not evidence an intent to necessarily limit the principles of municipal liability that it recognized to liability for police failure to remove intoxicated drivers from the highways. Indeed, the majority expansively declared: "[w]here the risk created by the negligence of a municipal employee is of immediate and foreseeable injury to persons who cannot protect themselves, a duty of care should reasonably be found."[185] Much of police law enforcement activity involves protecting members of the public against immediate and foreseeable physical danger. Thus, *Irwin* could result in numerous damage awards against municipalities for negligent police protection. Municipal tort liability that is broad in scope may constitute a questionable judicial encroachment upon the province of legislative and executive officials.[186]

The legislative and executive branches of government are assigned the responsibility for making and enforcing laws.[187] If the right to recover under the Tort Claims Act for police failure to enforce laws is broad, then the judicial branch, instead of the legislative or executive branches, may become a significant arbiter of law enforcement in society. For example, the municipal tort liability contemplated by the *Irwin* majority decision[188] may exert pressure on municipalities to increase the level and quality of police protection against crimes that involve serious physical injury.[189] While this result is

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ulation of certain dangers such as construction blasting or natural gas line installation. No private organization or person is subject to tort liability of this magnitude. *Cf.* Shelton v. City of Westminister, 138 Cal. App. 3d 610, 623 n.7, 188 Cal. Rptr. 205, 214 (1983). Thus, the nature of liability established by the *Irwin* majority decision arguably contravenes the Tort Claims Act's requirement that tort liability be imposed on municipalities "in the same manner and to the same extent as a private individual under like circumstances." MASS. GEN. LAWS ANN. ch. 258, § 2 (West Supp. 1985).

184. *Irwin*, 392 Mass. at 776, 467 N.E.2d at 1312 (Nolan, J., dissenting).

185. *Irwin*, 392 Mass. at 756, 467 N.E.2d at 1300. The majority's implication that the town police officers "created" the danger to the plaintiffs in *Irwin* is not accurate. It was Fuller who created the danger by consuming alcoholic beverages and intoxicating himself. The police officers played no part in Fuller's intoxication; their only invovlement was a failure to take Fuller into custody and thereby abate the danger that he posed. *See* Lehto v. City of Oxnard, 171 Cal. App. 3d 285, 291, 217 Cal. Rptr. 450, 453 (1985) (noting that police officers who failed to arrest intoxicated driver did not create peril to victim of driver).

186. *See infra* notes 187-95 and accompanying text.

187. 16 AM. JUR. 2D *Constitutional Law* § 294 (1979).

188. *See supra* text accompanying note 185 (discussing scope of municipal liability for negligent police protection portended by *Irwin* majority decision).

189. *See* O'Connor v. City of New York, 58 N.Y.2d 184, 191, 447 N.E.2d 33, 36, 460 N.Y.S.2d 485, 488 (1983). "[O]pen-ended liability. . . could. . . impede municipal officials from allocating resources where they would most benefit the public, by making the prime concern the avoidance of tort liability rather than the promotion of the public welfare." *Id.* The experience of some Massachusetts municipalities suggests that the *O'Connor* court may be correct. In order to avoid lawsuits, the Town of Ipswich increased police patrols of beach areas and added lifeguards. Chinlund, *Insurance rates crimp cities, towns*, The Boston Globe, July 28, 1985, at 1, col. 1, 18, col. 5. As a result of a dramatic increase in liability insurance premiums, the Town of Southbridge had to postpone an addition to its public works building, and a new heating system for its fire station. *Id.* Since the trial court decision in *Irwin* (February 1983), which the *Irwin* majority affirmed, arrests for intoxicated driving have increased throughout Massachusetts. Taylor, *Police*

desireable, the direction to bring it about should come from the legislature or the executive branch, and not from the judiciary.[190]

If a municipality increases the level and quality of police protection, the increase is necessarily made at the expense of other services that the municipality provides.[191] Judges are not in a position, nor do they possess the expertise, to sensitively balance provision of vital municipal services one against the other.[192] Legislative and executive officials are better equipped to determine public needs and how they may best be served, taking into consideration available public resources.[193] Furthermore, the judiciary, unlike the legislature and the executive branch, is insulated from the political process. The decisions that courts render concerning the delivery of municipal services may or may not

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on guard against lawsuits, The Boston Globe, May 13, 1985, at 17, col. 2, 20, col. 4 (reporting 4.2% increase in 1983, and 13.3% increase in 1984).

Instead of reallocating municipal resources to avoid tort liability, a municipality might forego provision of "high liability" services altogether. In *Irwin*, the town of Ware argued that fear of causing judgments against municipal employers could lead police to not interfere in doubtful cases of motorist intoxication. *Irwin*, 392 Mass. at 763, 467 N.E.2d at 1304. The majority dismissed the town's argument as "speculative." *Id.* Nevertheless, during a recent lapse in liability insurance coverage, one small Massachusetts town (Shutesbury) instructed its police officers to stay in their cruisers while on patrol. Chinlund, *supra* this note, at 18, col. 1. Town officials reasoned that if the officers did not leave their cruisers, there was little likelihood that they would do anything that could result in a lawsuit. *Id.*

190. One court that refused to impose liability on a municipality for police failure to arrest an intoxicated driver stated:

> [I]f a governmental entity is going to be held liable for the negligent. . . decisions made by its police officers in enforcing the law, this means of accountability by tort liability should be imposed by the elected representatives in the legislative branch who may create this duty of care and place this fiscal responsibility on the governmental entity and its taxpayers, rather than having the judiciary establish this new duty by judicial fiat.

Everton v. Willard, 468 So. 2d 936, 939 (Fla. 1985); *accord* Shelton v. City of Westminister, 138 Cal. App. 3d 610, 623, 188 Cal. Rptr. 205, 214 (1982); *O'Connor*, 58 N.Y.2d 184, 192, 447 N.E.2d 33, 36, 460 N.Y.S.2d 485, 488 (1983). "Through its representatives, the public creates community service; through its representatives, the public establishes the standards which it demands of its employees in carrying out those services and through its representitatives, the public can most effectively enforce adherence to those standards of competence." Warren v. District of Columbia, 444 A.2d 1, 8 (D.C. 1983).

191. *See supra* note 189.

192. *See* Note, *Negligence of Municpal Employees*, *supra* note 56, at 726. "Local government decisions which affect large groups of people involve a delicate balancing of conflicting interests." *Id.* (citing Owen v. City of Independence, 445 U.S. 622, 648 (1980)).

193. *See, e.g.*, Chapman v. City of Philadelphia, 290 Pa. Super. 281, 285-86, 434 A.2d 753, 755-56 (1981).

> The amount of [police] protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. . . . '[T]o foist a presumed cure for [inadequate police protection] by judicial innovation of a new kind of liabiltiy in tort would be foolhardy indeed and an assumption of judicial wisdom and power not possessed by the courts.'

Id. (quoting Riss v. City of New York, 22 N.Y.2d 579, 581, 240 N.E.2d 860, 861, 293 N.Y.S.2d 897, 898 (1968)).

conform to public wishes.[194] Considerations of legislative-executive expertise and public accountability suggest, consequently, that municipal tort liability for negligent police protection should remain narrow in scope.[195] Unfortunately, the *Irwin* majority decision appears to pave the way for increased judicial activism in the area of police law enforcement.[196]

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194. *See* Higgins, *Police feeling 'ripple effects' of Ware suit*, The Boston Globe, Mar. 13, 1983, at 1, col. 1, 16, col. 5. This *Boston Globe* newspaper article quoted the following negative reaction of one member of the public to the *Irwin* decision:

> '[The Irwins' accident was] a sad thing to have happen, but holding the taxpayers to blame is getting a little out of hand. . . . Why should the cops be liable for what basically comes down to a judgement call? Isn't that what we pay them for? Next thing you know, they're going to be waiting for the guy to wrap his car around a tree before they get invovled.'

Id. at 16, col. 5.

195. Another policy consideration that has led several courts to narrowly limit the scope of municipal tort liability is fear that broad liability will impose crushing financial burdens on municipalities. *E.g.*, O'Connor v. City of New York, 58 N.Y.2d 184, 191, 447 N.E.2d 33, 36, 460 N.Y.S.2d 485, 488 (1983). The *Irwin* majority rejected the town of Ware's argument that imposition of liability in *Irwin* would result in "limitless damage claims" against municipalities. *Irwin*, 392 Mass. at 762, 467 N.E.2d at 1304. According to the majority, the town's argument "ignore[d] the obvious fact that the Legislature, by enacting [the Tort Claims Act], chose to put the public funds at risk." *Id.* In addition, the majority noted that the Act's $100,000 per plaintiff liability limitation would reduce financial exposure. *Id.*; *see also id.* at 766-73, 467 N.E.2d at 1306-10 (interpreting Tort Claims Act to limit recovery to $100,000 per plaintiff). It is obvious, however, that if enough lawsuits are brought against a municipality, then the $100,000 limitation may cease to be meaningful.

One argument against the contention that broad tort liability will bankrupt municipalities is that municipalities can obtain insurance. *E.g.*, Comment, *Municipal Tort Liability*, *supra* note 54, at 711; *see also* MASS. GEN. LAWS ANN. ch. 258, § 8 (West Supp. 1985) (authorizing insurance). This argument is undercut, however, by the dramatic increase in insurance premiums that some municipalities have experienced. *See* Chinlund, *Insurance rates crimp cities, towns*, The Boston Globe, July 28, 1985, at 1, col. 1, 18, col. 5 (1984 to 1985 premium increase for Manchester, Massachusetts was $38,000 to $180,000; increase for Southbridge, Massachusetts was $4,600 to $45,000). For a small city or town, high insurance rates may pose a significant hardship.

196. One commentator, arguing that the public duty doctrine should be abolished, has stated, "The imposition of monetary liability will induce [municipalities] to adopt better procedures and to improve police services to avoid future loss." Comment, *Municipal Tort Liability*, *supra* note 54, at 714. This argument ignores, however, the fact that the American form of government contemplates that imperfections in the provision of government services will be corrected through the political process, and not in courtrooms. *See* Warren v. District of Columbia, 444 A.2d 1, 8 (D.C. 1983); *see supra* note 190 (quoting *Warren*). If citizens are dissatisfied with the government services that they receive, they can vote incompetent public officials out of office and vote in competent replacements, and thereby exert pressure on the public employees serving under the officials. *See id.*

Under certain circumstances, judicial interference with affairs of the legislative and executive branches is justified. This was true, for example, with respect to public school intergration because of the discrete and insular character of the black children who were being harmed by segregation. *Compare* Brown v. Board of Educ., 349 U.S. 294, 299-301 (1955) *with* United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938). The risk from crime, however, is not confined to isolated and powerless segments of society. All members of the public are potential victims of criminals. As a result, there is active public interest in crime prevention, which provides an incentive for police to perform well. Another incentive is the extensive media coverage of crime and the police

Apart from raising questions with regard to the proper role of the judiciary in the ordering of municipal government, the *Irwin* majority decision may have sowed a seed of unfairness into recovery under the Tort Claims Act. A factor that was critical to the plaintiffs' recovery from the town was the police officers' encounter with Fuller shortly before the accident.[197] This probably means that other victims of intoxicated drivers, where there was no prior police involvement, but who were in no less danger from intoxicated drivers than were the *Irwin* plaintiffs, could not recover from municipalities for their injuries. Thus, the *Irwin* majority decision seems to enable some crime victims to look to funded public sources for recovery[198] but, just because no police officer became involved, requires other victims to look only to private defendants, who may be assetless and judgment-proof. It is unfair to make the availability of a funded public recovery alternative for crime victims depend, as it did in *Irwin*, on prior police contact with a criminal which, from the victims' standpoint, is a purely fortuitous occurrence.

The policy and fairness concerns generated by the *Irwin* majority decision, which this Comment addresses, were not specifically discussed by the *Irwin* dissent. Nevertheless, the application of the public duty doctrine urged by the dissent, which was not followed by the majority, answers these concerns.

The dissent argued that, under the public duty doctrine, a special relationship between police and a plaintiff is established only where a police officer gave specific assurances of protection to the plaintiff, and the plaintiff reasonably relied on the assurances.[199] As discussed in Part I of this Comment, by promising protection to a crime victim, a police officer incurs a common-law duty to protect the victim's reliance on the promised protection.[200] Because

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response to it. Given these incentives, imposition of tort liability on municipalities is not necessary to insure adequate police protection.

197. *See Irwin*, 392 Mass. at 762, 765, 467 N.E.2d at 1303, 1306.

198. *Cf.* Hopkins, *Municipal Tort Liability in Iowa*, 31 DRAKE L. REV. 855, 861 (1981-82). "[W]here the third party tortfeasor is financially irresponsible, there may be a tendency for the injured plaintiff to pursue the municipality in lieu of the tortfeasor. . . ." *Id.*

199. *Irwin*, 392 Mass. at 775, 467 N.E.2d at 1311 (Nolan, J., dissenting). *See supra* notes 40-53 and accompanying text (discussing crime victim reliance under public duty doctrine). Joseph W. Glannon, who authored an article on the public duty doctrine focussing on *Dinsky*, *see* Glannon, *supra* note 76, also served as co-counsel for the *Irwin* plaintiffs, *see Irwin*, 392 Mass. at 746, 467 N.E.2d at 1295. In his article, Mr. Glannon reached the following conclusions:

> Where publicly intitiated activity directly causes harm, or where injured persons have relied to their detriment on personal assurances of public assistance, liability should be imposed under a general negligence standard. In the absence of personal assurances, public employers should be held liable under a gross negligence standard for negligent provision of services which the public must rely upon the municipality to provide.

Glannon, *supra* note 80, at 169. The town police officers did not make personal assurances of protection to the *Irwin* plaintiffs. *Irwin*, 392 Mass. at 776, 467 N.E.2d at 1311 (Nolan, J., dissenting). However, the *Irwin* majority did not follow the recommendation made by Mr. Glannon in his article that, where personal assurances of public assistance are absent, municipalities should be held liable under a gross negligence standard. *See Irwin*, 392 Mass. at 754 n.8, 467 N.E.2d at 1299 (rejecting town's argument that finding of more than "ordinary negligence" was required).

200. *See supra* notes 40-42 and accompanying text.

this duty is owed to the victim only, it is an individual duty, and not a public duty.[201] The dissent's tests of special relationship, in which crime victim reliance is determinative, differentiates public duties from individual duties. Consequently, the dissent's analysis of municipal tort liability for negligent police protection, unlike that of the majority, is consistent with the public duty doctrine.[202]

The effect of the plaintiffs' reliance that the dissent would require would be to narrowly restrict recovery from municipalities for negligent police protection. It stands to reason that in relatively few cases will a plaintiff be able to show detrimental reliance on a specific promise of police protection. This was true in *Irwin*, for example, because the town police officers did not specifically assure the plaintiffs that highways would be free of intoxicated drivers,[203] and the plaintiffs did not undertake an automobile trip that they would not otherwise have taken. A narrow right to public recovery for negligent police protection, as articulated by the *Irwin* dissent, would result in less judicial input into the provision of municipal services than the broad right to recovery recognized by the *Irwin* majority decision. As discussed above, the role of the judiciary in the ordering of municipal government should be narrowly limited for reasons of legislative-executive expertise and public accountability.[204]

In addition to soundly limiting the scope of municipal liability for negligent police protection, the *Irwin* dissent's articulation of municipal tort liability does not result in unfair recovery under the Tort Claims Act. Under the dissent's test of liability, induced plaintiff reliance on a police promise of protection is critical to recovery.[205] The injury of a crime victim who was induced to rely on a police promise of protection is qualitatively different than the injuries of other crime victims. It can be inferred that if there had been no promise of protection the crime victim would not have relied on police, but would have taken action to protect himself.[206] Consequently, recovery by the crime victim from a municipality is arguably for an injury that, but for police negligence, would never have occurred.[207] In contrast, in cases where crime victims did not rely on police protection, it cannot be similarly said that, but for police negligence, there would have been no injury. In *Irwin*, for example, if the town police officers had not stopped Fuller in the first place, there is no way of knowing whether or not he would still have struck the plaintiffs' car.[208] Thus,

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201. *See supra* note 43 and accompanying text.

202. *See supra* text accompanying notes 147-52 (criticizing majority's analysis of special relationship issue in *Irwin*).

203. *Irwin*, 392 Mass. at 776, 467 N.E.2d at 1311 (Nolan, J., dissenting).

204. *See supra* notes 186-94 and accompanying text; *see also supra* note 56 (setting forth other policy arguments against broad municipal tort liability).

205. *See supra* notes 199-202 and accompanying text.

206. *See* DeLong v. County of Erie, 89 A.D.2d 376, 385, 455 N.Y.S.2d 887, 892 (1982), *aff'd*, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983). *See supra* text accompanying notes 40-43 and 51-53 (discussing crime victim reliance in *DeLong*).

207. *See* Davidson v. City of Westminister, 32 Cal. 3d 197, 208, 649 P.2d 894, 900, 185 Cal. Rptr. 252, 258 (1982). *See supra* note 53 (discussing absence of crime victim reliance in *Davidson*).

208. *See* Lehto v. City of Oxnard, 171 Cal. App. 3d 285, 291, 217 Cal. Rptr. 450, 453 (1985). The *Lehto* court denied recovery from a municipality for injuries caused by an intoxicated driver whom police negligently failed to take into custody. *Id.* In holding that the police owed the

the dissent's requirement of plaintiff reliance differentiates between cases where police negligence actually contributed to a crime victim's injury (victim relied on police and can recover), and those cases where police negligence consisted of a mere failure to abate a risk of injury (victim did not rely on police and cannot recover).

It is not unfair, as the *Irwin* dissent would do, to afford public recovery to plaintiffs whose risk of injury was increased by police negligence, but deny it to plaintiffs whose risk of injury was unchanged by police negligence. On the other hand, there is an unfairness in the right of recovery for negligent police protection established by the *Irwin* majority decision. The unfairness results from the availablity of a public recovery alternative based on the fortuity that a police officer had contact with a criminal shortly before a crime was committed.[209] One purpose of the Massachusetts Tort Claims Act was to prevent unfair denials of tort recovery from municipalities.[210] Ironically, *Irwin* may introduce an unfair availability of recovery.[211]

CONCLUSION

The purpose of the public duty doctrine is to preserve a balance between the need to leave the ordering of government to those with expertise and political accountability, and the desire to compensate injured parties. *Irwin* has unwisely upset this balance, in favor of injury compensation. In addition, *Irwin* has created inequity in recovery under the Massachusetts Tort Claims Act, by affording a public recovery alternative to some plaintiffs, but denying it to other, similarly situated plaintiffs.

No one would dispute that the *Irwin* plaintiffs suffered undeserved and tragic injuries. It is tempting to courts to intervene in cases like *Irwin* and compensate unjust wrongs. The *Irwin* majority did so, however, at the expense of important public policies and fairness in the availability of public recovery. The outrage at the *Irwin* plaintiffs' tragedy shared by all was misdirected by

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plaintiff a public duty of care only, the court observed: "The officers. . . did [not] increase the risk to [the plaintifff] that would have otherwise existed." *Id.*

209. *See supra* text accompanying note 198 (discussing unfairness).

210. *See supra* notes 6-11 and accompanying text (discussing events leading to passage of Massachusetts Tort Claims Act).

211. *Cf.* Hopkins, *supra* note 198, at 861.

> The [public duty] doctrine may reflect a deeper and broader policy than its traditional statement suggests. Despite the potential for imposing unwanted financial burdens on the taxpayer, there is justice in holding a municipality liable when its employee negligently inflicts injury directly on the plaintiff. Better the taxpayer bear the financial burden of injury than the guiltless injured party. The justice, however, is not quite so apparent when holding a municipality liable for failing to prevent one of its citizens from tortiously injuring another. In the latter situation, the injured party may pursue his rights against the principal tortfeasor and in theory, at least, will not have to bear the burden of his loss.

Id.

the majority to the Town of Ware and away from the responsible party: the intoxicated driver.

Holly A. Raths*

* Dedicated to my grandmother, Attorney Anne M. Mack

Critical Theory, Structuralism and Contemporary Legal Scholarship

David Kennedy *

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I. BEFORE CRITICAL THEORY AND STRUCTURALISM

After several decades of interdisciplinary nourishment, one can hardly peruse a law journal without encountering references to what once seemed the obscure texts of divergent disciplines: economics, sociology, philosophy, anthropology, literary criticism and beyond. In the years since the New Deal, legal theory has become more sophisticated and the methods of legal scholarship more eclectic. This article explores this expanding eclecticism by introducing two lines of thought which have influenced some legal scholars who have departed from mainstream legal thought: critical theory and structuralism.[1] I

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1. The rather summary treatment given these traditions in this article is intended to whet the reader's appetite for further reading. In order to fit these very diverse projects into a single story line, I have not selected texts and authors for consideration primarily for their representative quality or "historical importance." Instead, I have, throughout, indicated other secondary literature which I find useful for readers who seek alternative accounts of these traditions. I have selected these works either for their clarity or because they tell a different story about the authors I discuss. My hope is that legal scholars who have not yet dipped into these literatures, but who have been at least somewhat intrigued by recent critical strands of legal scholarship, will go beyond these secondary accounts to develop their own understanding of the underlying texts. To assist readers who want to go further, I have tried to indicate the major works of authors I discuss as well as essays or portions thereof which I have found particularly accessible. Many legal scholars who have relied upon these two intellectual traditions are to be found in the critical legal studies movement. Generalizations about the Conference on Critical Legal Studies, founded in 1977, are difficult. The conference has no definitive methodological approach but rather seems a somewhat unstable coalition of legal academics united by their commitment to a form of radical eclecticism reappraising basic approaches to legal scholarship. Some of the conference's work seems grounded in Legal Realism. *See, e.g.*, Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230, 1233 (1981) [hereinafter Freeman, *Truth and Mystification*]; Parker, *The Past of Constitutional Theory and Its Future*, 42 OHIO ST. L.J. 223 (1981); Tushnet, *Post-Realist Legal Scholarship*, 15 J. SOC'Y PUB. TCHRS. L. 20, 21 (1980).

The intellectual legacies of the school extend beyond Legal Realism and include *inter alia*: (1) Marxism, *see, e.g.*, Fraser, *The Legal Theory We Need Now*, 40-41 SOCIALIST REV. 147 (1978); Klare, *Law-Making as Praxis*, TELOS (no. 40) 123 (1979); (2) New Left anarchism, *see, e.g.*, DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983); (3) Sartrean existentialism, *see, e.g.*, Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); (4) Structuralism, *see infra* notes 90-143 and accompanying text; (5) Neo-Progressive historiography, *see, e.g.*, M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977); (6) liberal sociology, *see, e.g.*, Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); (7) radical social theory, *see, e.g.*, R. UNGER, KNOWLEDGE AND POLITICS (1975); R. UNGER, LAW IN MODERN SOCIETY (1976); and (8) empirical social science, *see, e.g.*, Macaulay, *Private Legislation and the Duty to Read — Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966); Trubeck, *The Construction and Deconstruction of a Disputes-Focused Approach: An Afterword*, 15 LAW & SOC'Y REV. 727 (1981). For a more extensive list of the writings of the critical school, see *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984). Much of the scholarship of this group develops a critique of the legal discourse of "rights." *See, e.g.*, Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25 (1980); Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining*, 4 INDUST. REV. L.J. 450 (1981); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

This strand of the movement is associated with a critique of legal scholarship which is not

argue that although these complementary disciplines provide useful leverage against liberal legal thought, in many ways their use in legal scholarship has repeated the difficulties which motivated their importation. The final section of the article suggests that the diverse work of "post-structuralists" might prove suggestive and provocative for legal scholars who have heretofore foraged in critical theory and structuralism.

Legal scholars who look to the literatures of critical theory[2] and structuralism[3] share a sense of the difficulties faced by contemporary legal scholarship. Indeed, their perception of the problems faced by post-war legal scholars differs very little from the perception of other scholars who have turned to foreign disciplines. All seem to feel that legal theory and doctrine have become increasingly fragmented since the era of realist scholarship before the Second World War.

Although legal theory and doctrine have become more pervasive over the past decades, they seem paradoxically also to have become weaker and less persuasive. Doctrinal argument seems increasingly complex and ever less able to determine outcomes. The normative moorings of the most basic doctrinal discourse by lawyers, scholars and judges seem infirm. Despite their continued, if muted claims to account for events and behavior either proscriptively or prescriptively, legal principles, rules and policy arguments seem to dissolve far too easily into thin disguises for assertions of interest. The more diverse the sphere of an argument's application, the thinner it seems to become until its manipulability becomes more apparent than its persuasive clout. The result has been ever more polarized arguments, ever more sophisticated doctrinal di-

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directed at breaking down this ideology. *See, e.g.*, Freeman, *Truth and Mystification*, *supra* note 1; Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Trubek, *Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 [hereinafter Trubek, *Scholars in Self-Estrangement*]; Tushnet, *Legal Scholarship; Its Causes and Cures*, 90 YALE L. J. 1205 (1981). This strand of the movement exists in some tension with more program-related strands. For a fuller discussion of these splits, see Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984). The movement has devoted some attention to criticism of law and economics from both directions. *See, e.g.*, Baker, *Starting Points in the Economic Analysis of Law*, 8 HOFSTRA L. REV. 939 (1980); Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980); Duncan Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

For a description of the critical legal studies movement, see 1 ZEITSCHRIFT FUER RECHTSSOZIOLOGIE (1980), and HELLER, A BRIEF REJOINDER TO THE DISCUSSION OF CCLS 126 (1976).*See also* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). For a critique of the effectiveness of the critical scholars' historical and doctrinal work in the furtherance of their political vision, see Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1676-88 (1982). The Conference and The National Lawyers Guild have jointly published an introductory anthology of characteristic work. *See* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982). In a concluding essay, Bob Gordon summarizes the various theoretical stands of critical legal scholarship. *See* Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (D. Kairys ed. 1982). *See also* Dalton, *Book Review*, 6 HARV. WOMEN'S L.J. 229 (1983) (reviewing THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982)).

2. *See infra* notes 11-89 and accompanying text.

3. *See infra* notes 90-143 and acccompanying text.

versity, and ever more narrowly applicable holdings. Interdisciplinary foraging by legal scholars has been a response to this doctrinal diversity.

At the same time, legal theory often seems both bogged down in controversy and irrelevant to the work of legal practice. Traditional descriptions and analyses of doctrinal developments have been unable to explain the unstructured and diverse nature of contemporary law without either abandoning the idea of a law which can embody some sense of "ought" or limiting the ambit of such normative claims to a few fairly narrow cases. Theoreticians working with the traditional tools of legal method have been unable to describe what goes on in legal culture without choosing between a defense of law's normative claims which abandons a great deal of the field occupied by lawyers to politics and a defense of law's scope which abandons claims about its special normative status.

Legal scholars of many political stripes seeking a way out of this dilemma have gone to the bookstore. Scholars have turned to sociology, history, political science and economics, philosophy, moral theory and literary criticism for relief. They have found themselves tempted by two extremes. On the one hand, they have tended to account for legal diversity by claiming that everything "legal people" do constitutes or is structured by the legal process. This very practical, practice oriented approach is very uncritical. Scholars have met this skepticism with the claim that law exists and works when it is good and followed. These extreme strategies seem equally unappealing. Alone, each would merely restate the problem of traditional legal theory: how to account for law's scope without reducing its power in a culture skeptical of both natural law and science. Modern legal scholars, like their practitioner counterparts, have responded with proliferation: more articles, more references, more diverse arguments, drawing simultaneously on as many disciplines as possible.

Legal theorists who have turned to critical theory and structuralism share a common perspective on this difficulty and a common diagnosis of what they perceive to be the failure of more mainstream legal scholarship to resolve the problem. They argue that legal scholars have not adequately overcome the distinction between theory and practice in their work and have not resolved the complementary and contradictory claims of the law to be both descriptive and normative.

In the eyes of these scholars, most contemporary legal scholarship oscillates in one or another fashion between the norm and the deed, the theory and the practice. Traditional scholars, for all their eclecticism, seem to retain faith in the severability of doctrinal and theoretical tasks. They seek to elaborate the system of norms on the one hand, and then to analyze the normative system which they have created. They speak with two voices, imagining themselves as both creator and consumer of the legal fabric. Thus, for example, mainstream critics might use history today to attack law's idealist claims and logic tomorrow to demonstrate that law's purported scope is unsustainable. The result is an interminable discussion in flight from the very closure it seeks.

To the critical theorist or structuralist, legal people who repeat the distinction between the norm and the deed seem to avoid inquiry into both their knowledge and their activity. The interminability of doctrinal discourse seems to result from the attempt to pursue doctrinal analysis separate from both theory and social life. Unmoored from theory, doctrine flies off into uncritical generality and trivial specificity. Similarly, theory cut free from doctrine

rushes to utopian speculation and uncritical description, unable in any other way to account for doctrine without determining doctrine. The failure of theoretical work — and hence the motive for eclecticism — results from the pursuit of a theory which is not itself a doctrinal practice.

To the structuralist or critical theorist, most of the recent interdisciplinary foraging has perpetuated rather than questioned the tendency to oscillate between disconnected theoretical and doctrinal work. Of course, some contemporary scholars who see the problem this way have begun deploying notions gleaned from other literatures (most notably the traditions of hermeneutics and literary criticism) in defense of legal doctrine and legal scholarship.[4] But it has largely been those more disposed to criticize who have turned to literatures which take as their starting point a rejection of the disjuncture between theory and practice.

Both critical theory and structuralism are literatures of this type. There is no natural connection between these two traditions. Nor are they either harmonious or unproblematic enough to have been adopted wholesale by legal scholarship. Nevertheless, one claim they share has attracted frustrated legal critics. Both traditions begin with the late nineteenth century insight that social theory's essential dilemma is the contradiction between the experientially-based conviction that everything seems connected to everything else and the need to resort to reduction to explain or understand social life, a process which diminishes the complexity of reality.[5] Put differently, a social theory which seeks both to explain and to predict must be simultaneously inductive and deductive, creating tension between our experience and our theory.[6]

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4. *See* J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984). *See also* Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982); Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982); Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985); Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135 (1985); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982); Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983).

5. This reductionism in social theory is often generated by an epistemology based upon simple causality. *See* R. UNGER, KNOWLEDGE & POLITICS 14 (1975). Unger refers to such critiques as "partial assaults on a mode of thought they have neither repudiated nor understood in its entirety." *Id.* at 5-6.

6. *See, e.g.*, G. HEGEL, HEGEL: PHENOMENOLOGY OF SPIRIT (A. Miller & J. Findlay trans. 1977). Hegel considers an ideal-typology:

> [i]s the instrument for seizing hold of absolute essence . . . [it] does not leave the thing as it is for itself, but entails some transformation or change in it. If . . . knowledge is . . . a passive medium . . . we are still unable to attain truth as it is in itself but only as it is through and in this medium.

Id. at 46. For Weber's analysis of ideal-types, see M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 328-63 (T. Parsons ed., A. Henderson & T. Parsons trans. 1947). Weber saw the ideal-type as one form of explicating the meaning of social action. *See* Weber, *"Objectivity" in Social Science and Social Policy*, in THE METHODOLOGY OF THE SOCIAL SCIENCES 50, 101 (E. Shils & H. Finch eds. 1949). For a commentary on Weber's use of ideal-typologies, see Eldridge, *Max Weber: Some Comments, Problems and Continuities*, in MAX WEBER: THE INTERPRETATION OF SOCIAL REALITY 9, 28 (J. Eldridge ed. 1980). Weber also warns that the methodology of ideal-types recognizes that to obtain a more coherent and intelligible understanding of a phenomena it is necessary to confront and come to grips with ways of thinking that are foreign to conventionally trained minds. *See* Weber, *The Meaning of "Ethical Neutrality" in Sociology and*

Structuralism and critical theory have followed quite different trajectories from appreciation of this core dilemma of late nineteenth century social thought. Critical theory proceeds from the relationship between attempts by Hegel and Marx to locate either the source of the dichotomy between object and subject in history or to locate the identical subject/object of history which could transcend both the antinomies of traditional philosophy and the alienation of bourgeois life.[7] As one after another proposed historical subject failed to fulfill this role, critical theory developed a rich literature of explanation, critiquing the social mechanisms which generate alienation. Each of these critiques, however, was supplemented by a relocation of the aspiration for liberation. Brought into law, this theoretical enterprise produced a helpful analytic methodology and a series of accounts of continued injustice.

Structuralism, on the other hand, began by suspending the question of historical origin, separating the fluid present moment from the text of its past and future. This suspension of the search for historical transcendence permitted an elaborate series of explorations into the relational nature of meaning which structuralists take to be the social condition. But these analyses were always supplemented by shadow theories of the origin of the social relations or structures which they analyzed. These supplemental assumptions, when avoided, dessicated structural analysis into a rigid analysis of form.

Despite these difficulties, both traditions sought to dislodge the complacent everyday perception of reality. They share the conviction that the paradigmatic interpretation which underlies the most prosaic of observations has an anesthetising and alienating effect upon those who hold it, which can be overcome only through a traumatic reinterpretation of reality which changes the world for the observer. Paradoxically, each of these traditions suggests that this inertia is easiest to overcome when theories are at their most comprehensive, since such comprehensiveness is gained at the price of flexibility.

Despite these similarities, the traditions of structuralism and critical theory remain distinct. Structuralism has skewed the attention of its adherents away from the social context which is the central concern of critical theory.[8]

Economics, in THE METHODOLOGY OF THE SOCIAL SCIENCES 1, 41 (E. Shils & H. Finch eds. 1949). *See also* Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720.

7. The terms "subject" and "object" have acquired a variety of different associations in law and philosophy. The lawyer typically associates "subjective" with "formal" or "express" as opposed to "implied." I use the term "subject" to refer to the essence, mind or agency of history as opposed to the attribute, instrument or context of that subject. In a way, the relationship between subject and object evokes that between theory and practice or norm and deed, since "theory" or "norm" suggest the realm of thought or intention rather than action.

8. Many French Marxists, for example, criticized structuralists for defining themselves out of the political dialogue so important to French intellectual life and avoiding the difficult social dilemmas which gave rise to the events of May and June, 1968. Despite the potential for structuralism to integrate theory and practice, politics and ideology, the French structuralists have remained politically aloof. Levi-Strauss's failure to engage in any of the controversies that divided the French during the Algerian war led the Marxist Henri LeFebvre to denigrate structuralism as politically effete: "a fetishism of knowledge, baptised 'epistemology,' which sacrifices the division of labor on the intellectual level, and which protects the division of knowledge under a mantle of encyclopedism." H. LEFEBVRE, AU DELA DU STRUCTURALISME 11 (1971). Levi-Strauss and the structuralists also stayed off the barricades during the events of May and June, 1968, Althusser not because of an apolitical disposition, but rather through support of the French Communist

Structuralism seems more reflective or descriptive and analytical than prescriptive or engaged, involving exploration of the hidden and unconscious determinants of ritual, language or literature.

Certainly it is possible to make too much of these differences.[9] The method of critical theory is also deeply reflective. The Frankfurt School seeks to expose the underlying nature of the belief structure which supports a social system so that it might be discarded by the agents of that system. In doing so, its members, like the structuralists, are careful to subject their own theory to the same exposé.[10] Structuralism's devaluation of the content of cultural artifacts fits well with the mission of critical theory.

Nevertheless these surface differences suggest the difficulty legal scholars face in turning to structuralism and critical theory for help in transcending the theory/practice distinction. In this article, I argue that these two disciplines merely restate the problem legal scholars turn to them to solve: critical theory by valorizing a posited transcendental subject and structuralism by positing an origin for autonomously investigable doctrinal activity. To the extent this analysis is correct, it is not surprising that neither critical theory nor structuralism has provided a "method" which lawyers can "deploy" against their theoretical and doctrinal malaise.

Party's failure to align with the students' and workers' movement. *See* E. KURZWEIL, THE AGE OF STRUCTURALISM 73 (1980). Interestingly, LeFebvre, despite sympathy with the uprising, did not join the 1968 movement. See H. LEFEBVRE, THE EXPLOSION: MARXISM & THE FRENCH REVOLUTION (A. Ehrenfeld trans. 1969) for his answer to Marxist students' challenge that he had failed to practice his preachings. He excused his lack of support on the grounds that (1) the contradictions in capitalist society had yet to reach crisis point, and (2) that a "revolution" without strategy and a systematic program was doomed to failure. *Id.* at 12-13, 51, 130, 154. Michael Foucault's post-1968 work on the question of power and knowledge, has clearly been influenced by the events of that social movement, not the least influence was that intellectuals were among the instigators of that political and social upheaval. It is not that his earlier work did not relate to the integration of knowledge and power, *see, e.g.*, M. FOUCAULT, MADNESS CIVILIZATION (R. Howard trans. 1965), but that this topic thereafter became the focal point of his writings. *See* M. FOUCAULT, *Truth and Power*, in POWER-KNOWLEDGE 109, 111, 115 (C. Gordon ed. 1980). His analysis has also led him to dispute the polemic that Marxism is synonymous with the revolutionary process. *See* M. FOUCAULT, *Body/Power*, *id.* at 55, 57. But the events of 1968 appear to have played a significant role in prompting Levi-Strauss to return to his earlier interests in philosophy and kinship studies. *See generally* C. LEVI-STRAUSS, L'HOMME NU (1971). However in the final pages of this text he reaffirms his belief in structuralism being the appropriate methodology for the analysis of all of culture. *Id.* at 583-86. *Cf.* Levi-Strauss, *Structuralism and Ecology*, in READING IN ANTHROPOLOGY 226 (A. Wiess ed. 1976); *Structuralisme et Empirisme*, 16 L'HOMME 23 (1976). A fascinating account of the relationship between the development of structuralist psychoanalytic theory and the events of 1968 is S. TURKLE, PSYCHOANALYTIC POLITICS: FREUD'S FRENCH REVOLUTION (1978).

9. *See infra* Part IVA, notes 144-154 and accompanying text.

10. Indeed, it has been suggested that structuralism may provide clues about the nature of belief systems which might be expected to collapse when elaborated to those who hold them or about the even more basic inter-subjective or transcendental beliefs about the appropriateness of systems of belief. Althusser indicates a potential integration of the discourses of structuralism and critical theory when he postulates that the social totality, in consequence of its many inherent contradictions, must be subject to a "structure in dominance." *See* L. ALTHUSSER, *infra* note 144, at 91. For an analysis of this integration focusing on the notion of ideology, see R. COWARD & J. ELLIS, LANGUAGE AND MATERIALISM 61-92 (1977).

II. CRITICAL THEORY

The first thing to understand about "critical theory" is that the word "critical" is not meant to suggest criticizing, in the fashion of either liberal reformism or cantankerous radicalism. Rather, it refers to a particular style of work developed primarily by a group of German intellectuals who saw themselves as the inheritors of a tradition begun by Hegel and Marx.[11] Such theorists as Georg Lukacs,[12] Max Horkheimer,[13] Theodor Adorno,[14] Herbert Mar-

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11. The "Frankfurt School" is the name which has come to refer to the tradition of critical theory emanating from the *Institut fuer Sozialforschung* and its journal, the *Zeitschrift fuer Sozialforshung*, which in the 1930's embraced the writings of Max Horkheimer, Theodor Adorno, Herbert Marcuse and Walter Benjamin among others. The most seminal work of the early Frankfurt School is M. HORKHEIMER & T. ADORNO, THE DIALECTIC OF ENLIGHTENMENT (J. Cumming trans. 1972) which articulates the revisions of Marx's categorical framework of historical materialism which had been underway since G. LUKACS, HISTORY AND CLASS CONSCIOUSNESS (R. Livingstone trans. 1971). For Marx, the overcoming of philosophy as philosophy was the prerequisite for assuring that Marxist theory was critique. *See generally* K. MARX, *Toward the Critique of Hegel's Philosophy of Law: Introduction*, in WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 249 (L. Easton & R. Guddat eds. 1967) [hereinafter K. MARX, *Critique of Hegel's Philosophy*]. In contrast, Horkheimer and Adorno and the early Frankfurt School are preoccupied with ridding Marxism of its scientific overtones (i.e., defining knowledge and "truth" by the methodologies of the natural sciences) to restore it as critique. This "critique of instrumental reason" sometimes dissolved into pessimistic *Kulturkritik* and sometimes into an over a-rationalism which despaired of finding an Archimedean point on which to base its critique. Having reached its most pessimistic stage with Horkheimer and Adorno in the 1940's, the school distinguished itself by continuing and refining its critique of positivism and, in particular, behavioralism and scientism. This took a variety of forms, the most widely popular being that of H. MARCUSE, ONE DIMENSIONAL MAN (1964); H. MARCUSE, EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD (2d ed. 1966). For a history of the early Frankfurt School, see M. JAY, THE DIALECTICAL IMAGINATION (1973). *But cf.* Jaccoby, *Marxism and the Critical School*, 1 THEORY & SOC'Y (1974); Kellner, *The Frankfurt School Revisited: A Critique of Martin Jay's "The Dialectical Imagination"*, 4 NEW GER. CRITIQUE 131 (1975). For anthologies of the Frankfurt School writings, see THE ESSENTIAL FRANKFURT SCHOOL READER (A. Arato & E. Gebhardt eds. 1982); ON CRITICAL THEORY (J. O'Neill ed. 1976). For commentaries on the Frankfurt School, see D. HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS (1980); M. THEUNISSEN, GESELLSCHAFT UND GESCHICHTE: ZUR KRITIK DER KRITISCHEN THEORIE (1969).

12. *See generally* G. LUKACS, *supra* note 11. For commentaries on the work of Lukacs, see Arato, *Lukacs' Theory of Reification*, TELOS (no. 11) 25 (1972); Schmidt, *The Concrete Totality and Lukacs' Concept of Proletarian Building*, TELOS (no. 24) 2 (1975). Despite his critical perspective on Marx's concept of historical materialism, Lukacs remained committed to a number of tenets of orthodox Marxism, in particular those governing the role of the party. *See* G. LICHTHEIN, MARXISM 368-70 (1961); Jaccoby, *Towards a Critique of Automatic Marxism: the Politics of Philosophy from Lukacs to the Frankfurt School*, TELOS (no. 10) (1971).

13. *See* M. HORKHEIMER, ECLIPSE OF REASON (1947); M. HORKHEIMER, CRITICAL THEORY (M. O'Connell ed. 1972); M. HORKHEIMER, CRITIQUE OF INSTRUMENTAL REASON (M. O'Connell ed. 1974); M. HORKHEIMER & T. ADORNO, *supra* note 11. For examples of commentaries on the work of Horkheimer, see J. CARLEBACH, *Marx and the Sociologists: Max Horkheimer*, in KARL MARX AND THE RADICAL CRITIQUE OF JUDAISM 234 (1978); Siebert, *Horkheimer's Sociology of Religion*, TELOS (no. 30) 127 (1976).

14. *See* T. ADORNO, AUFSÄTZE ZUR GESELLSCHAFTSTHEORIE UND METHODOLOGIE (1970); T. ADORNO, NEGATIVE DIALECTICS (E. Ashton trans. 1973); Adorno, *Sociology and Psychology* (pts. 1&2) NEW LEFT REV. (no. 46) 67 (1967), NEW LEFT REV. (no. 47) 79 (1968). For examples of commentaries on the work of Adorno, see G. ROSE, THE MELANCHOLY SCIENCE (1978); H.

cuse,[15] and Jürgen Habermas,[16] often referred to collectively as the Frankfurt School, interpreted both Hegel and Marx to have been concerned with overcoming the split between theory and action. They sought to reinterpret and continue that endeavor.

In the process, they elaborated different notions about the nature and scope of "critical theory," and developed a number of images of the relationship between theory and social life which have been suggestive for legal scholars. In this section, I introduce the work of these German intellectuals by focusing both on their evolving tradition of response to Hegel and Marx and on the set of ideas about the relationship between social life and theory which they make available to legal scholars. The "critical theory" which I describe here is an idiosyncratic account which does not correspond to the work of any particular author, and is held together only by my own conception of what critical theory has suggested for legal scholarship.

A. Moments of Reinterpretation

Introduced by Lukacs and culminated by Horkheimer and Adorno,[17] the

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SCHWEPPENHAUSER, THEODOR W. ADORNO ZUM GEDÄCHTNIS (1971); Benjamin, *The End of Internalization: Adorno's Social Psychology*, TELOS (no. 32) 42 (1977); Buck-Morss, *The Dialectic of T.W. Adorno*, TELOS (no. 14) 137 (1972); Snow, *Introduction to Adorno's "The Actuality of Philosophy,"* TELOS (no. 31) 113 (1977).

15. For examples of the works of H. Marcuse, see H. MARCUSE, THE AESTHETIC DIMENSION (H. Marcuse & E. Sherover trans. 1978); H. MARCUSE, COUNTERREVOLUTION AND REVOLT (1972); H. MARCUSE, AN ESSAY ON LIBERATION (1969); H. MARCUSE, FIVE LECTURES (J. Shapiro & S. Weber trans. 1979); H. MARCUSE, NEGATIONS (J. Shapiro trans. 1968); Marcuse, *On Science and Phenomenology*, in POSITIVISM AND SOCIOLOGY 225 (A. Giddens ed. 1974); H. MARCUSE, STUDIES IN CRITICAL THEORY (J. de Bres trans. 1973); Marcuse, *Contributions to a Phenomenology of Historical Materialism* TELOS (no. 4) 3 (1969); For examples of commentaries on the work of Marcuse, see: A. MCINTYRE, MARCUSE (1970); ANTWORTEN AUF HERBERT MARCUSE (J. Habermas ed. 1968); CRITICAL INTERRUPTIONS: NEW LEFT PERSPECTIVES ON HERBERT MARCUSE (P. Breines ed. 1972); Cohen, *Critical Theory: The Philosophy of Marcuse*, NEW LEFT REV. (no. 57) 35 (1969); Piccone & Delfini, *Herbert Marcuse's Heideggerian Marxism*, TELOS (No. 6) 36 (1970); Schoolman, *Introduction to Marcuse's "On the Problem of the Dialectic,"* TELOS (no. 27) (1976).

16. The dominant thinker in the contemporary Frankfurt School is Jurgen Habermas whose main works translated in English are COMMUNICATION AND THE EVOLUTION OF SOCIETY (T. McCarthy trans. 1976); KNOWLEDGE AND HUMAN INTERESTS (J. Shapiro trans. 1971); LEGITIMATION CRISIS (T. McCarthy trans. 1975); THEORY AND PRACTICE (J. Viertel trans. 1973); TOWARD A RATIONAL SOCIETY (J. Shapiro trans. 1971). There is a growing secondary literature on Habermas and Critical Theory. Afrequently cited commentary is: R. GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS & THE FRANKFURT SCHOOL (1981). However, in attempting to assimilate Habermas into "mainstream" analytical philosophy, Geuss distorts most of Habermas's central themes, in particular the emancipatory role of critical theory which flows from it not only being an explanation of the inadequacy of current views, but more importantly a guide for both transforming reality and a methodology for criticizing that reformation. *Cf.* Taylor & Montefiore, *Introductory Essay: From an Analytical Perspective*, in G. KORTIAN, METACRITIQUE 1, 11-13, 16-18 (J. Raffan trans. 1980). Two better guides to Habermas's work are G. Kortian, *supra* and T. MCCARTHY, THE CRITICAL THEORY OF JUERGEN HABERMAS (1978). For a collection of essays on Habermas, with a response by Habermas, see HABERMAS: CRITICAL DEBATES (J. Thompson & D. Held eds. 1982).

17. *See supra* notes 12-14 and accompanying text. *See also* G. KORTIAN, *supra* note 16, 42-

Frankfurt School began by developing a reading of Marx which emphasized his distance from positivism.[18] Rather than a "scientific" social analyst who sought to replace one account of history with another, Marx was to be understood as a critic, in a dynamic relationship of response to the claims of the Hegelian philosophy against the background of which he worked. To treat Marx's account of social transformation as if it were a positivist narration of "what is really going on" or a prediction of "what is inevitably going to happen" would, in this view, strip Marx of his most crucial insights. Such a reading would, ironically, impute to Marx the same unproblematic relationship between theory and action that he meant to criticize in Hegel.

To these early Frankfurt School scholars, Marx only *seemed* "scientific" because of his relationship to Hegel. Marx thought that the false separation and privileging of philosophy over social life had strangled meaningful social criticism and understanding. In reaction to what seemed the false claims of naturalist philosophy, Marx developed a theory which could reconfirm itself in social life, in the manner of a positivist science. As a result, his work appeared scientific. Decades later, the Frankfurt School faced the inverse dilemma. Although philosophy and politics had been scientized, exactly as Marx seemed to have demanded, it still seemed impossible to develop a theory which could get a critical grip on social life. In fact, the Frankfurt School wanted to criticize the false claims of positivism: claims about the objectivity and neutrality of social and political discourse. But they did not want to return to the naturalism to which Marx had responded.

Partly to explain their own relationship to naturalism, the Frankfurt School re-examined the work of Hegel and Marx, arguing both that Hegel did more than privilege philosophy over history and that Marx did more than reverse that hierarchy. The Frankfurt School argued that these philosophers were different from traditional philosophy precisely because they did more than reorganize the relationship between theory and practice — they sought to transcend that distinction, transforming philosophy from a continual oscillation between positivism and naturalism into a dynamic progressive force. If Hegel and Marx could do it, so could the Frankfurt School. The key was to identify those elements in Hegel and Marx which permitted that forward movement — permitted, in their terms, a philosophy which was "critical" rather than "traditional." Their own work, if "critical" in this sense, could then succeed in opposing the dominance of positivism without simply returning to naturalism.

Critical theory consequently needs to be understood both as a particular moment in the history of continental philosophy and as a style of intellectual work. As a moment in continental philosophy, it expresses a critique of epistemology and metaphysics which has not been part of the Anglo-American philosophic tradition.[19] Continental "critical theory" has redeveloped and ex-

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47. For a short critical analysis of this shift and of its subsequent development, see Benhabib, *Modernity and the Aporias of Critical Theory*, TELOS (no. 49) 39 (1981).

18. For a fuller description of positivism, see *infra* note 49 and accompanying text.

19. The departure from Kant dominant in Anglo-American philosophy and jurisprudence, has proceeded primarily as a critique of epistemology, developed by grafting some late Wittgenstein onto the work of Quine and others. *See* Taylor & Montefiore, *supra* note 16. There are some parallel themes in the works of Karl Popper, and the Frankfurt School. Both Critical Theory and

tended the double critique of philosophy offered by Hegel on the one hand and by Marx and then Lukacs on the other. The status which a twentieth century "critical theory" claims for itself developed out of this historical relationship among Hegel, Marx and early Frankfurt School theorists.

The story begins with Hegel.[20] In the *Phenomenology of the Spirit*, Hegel radicalizes inquiry into the relationship of subject and object. For Hegel, traditional philosophy took the distinction between subject and object for granted. It inquired into the relationship and hierarchy between them in a variety of ways and explored the origin of each, but was unable to account for or overcome the division between them. Hegel sought to account for and overcome the distinction between subject and object. His tactic was to develop a philosophical account of the origin and development of the subject. His account suggested that the subject, by slowly educating itself about itself, in fact transcended its oppositional relationship with the object. He reimagines each instance of what was formally thought to be the subject/object relationship as a *phase* in "the *education* of consciousness itself to the standpoint of Science."[21] Hegel demonstrates the movement of these various moments of consciousness into one another until an absolute standpoint which is neither subject nor object is achieved.

This philosophical process of transcendence is illustrated by Hegel's examination of the configurations of consciousness which produce sense certainty. He begins by thinking about a common sense example of the subject/object relationship: the apparently concrete opposition of the "I" facing a "this."[22] He demonstrates that the "I" and the "this" can be revealed to be the opposite of what they claim. In order to stand against and comprehend a "this," the "I" must see itself as an object. For the "this" to oppose the "I" and demand comprehension, it must be constituted as an "other" to the "I," and hence also as subject. Far from being natural, the configuration of "I" and "this" which associates the "I" with "subject" and the "this" with "object"

Popper's philosophy of science are attempting to "break the grip" of closed systems of thought: to undermine conventional views that claim completeness and encourage an unreflected affirmation of society. *See* K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (1950); K. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE (2d ed. 1965); Popper, *Normal Science and Its Dangers*, in CRITICISM AND THE GROWTH OF KNOWLEDGE 51 (I. Lakatos & A. Musgrave eds. 1970). For a commentary on Popper, see B. MAGEE, POPPER (1973). However, despite this similarity, there are enormous differences between Popper and the Frankfurt School. *See* Popper, *Reason or Revolution?*, in THE POSITIVIST DISPUTE IN GERMAN SOCIOLOGY 288 (T. Adorno ed., G. Adey & D. Frisby trans. 1976). Popper criticizes the critical school generally for "simply talking trivialities in high sounding language." *Id.* at 296. He describes Habermas's work as mostly "trivial; the rest seems to me mistaken." *Id.* at 297. But it should be added that Popper fails to analyze any of the major works of Habermas and Adorno (and ignores Horkheimer). In particular, Popper fails to distinguish Habermas's concern for "rational criticism" from either cynical skepticism or "trashing."

20. *See, e.g.*, G. HEGEL, PHENOMENOLOGY OF SPIRIT (A. Miller trans. 1977). A useful introduction to Hegel, with annotated bibliography is G. HEGEL, THE ESSENTIAL WRITINGS (F. Weiss ed. 1974). For an analysis of the relationship among the projects of Hegel and modern critical legal scholars, in particular Roberto Unger, see D. Cornell, The Heart's Revenge, (1983) (unpublished manuscript) (available in the Harvard Law School Library).

21. G. HEGEL, PHENOMENOLOGY OF THE SPIRIT 56 (A. Miller trans. 1977).

22. *Id.*

and is responsible for common sense about perception and understanding is a configuration which must be maintained. Hegel argues that a set of ideas (such as the relationship between the universal and the individual or the object and the particular) are used to sustain this configuration. As a result, we might think of the various subject/object distinctions we experience as sustained by or situated within a larger set of ideas which is neither subject nor object. Hegel calls this the "Spirit."

The various notions used to mediate or sustain particular subject/object configurations change historically. Hegel argues that as they become conscious, they give way to one another. We should think of these ideas as a continual movement of consciousness to self-consciousness which reaches completion when all mediations of subject and object have been revealed. At that end point, an Absolute Subject, the subject whose object is its own history, arises. Hegel argues that history is the Spirit's vehicle for movement to this self-consciousness and eventually for the constitution of the Absolute Subject. Far from the triumph of the subject, the achievment of the Absolute Subject is a mutual recognition of subject and object. "They recognize themselves as mutually recognizing one another."[23] Politics, morality and the entire collection of human configurations such as the master-slave dialectic which restate the subject/object relationship are now seen as mediations or phases in the development of the Spirit.[24]

This Hegelian picture is critiqued by Marx. Critical theorists understand Marx's critique as a shift in the focus of historical dialectics from theory to practice. For Hegel, objectification is the self-alienation of Spirit, to be transcended by the realization by consciousness that what it took to be given was its own substance. To Marx, the configurations of history are not the objectification of Spirit's substance, an objectification to be overcome by reincorporation into Spirit's self-knowledge.

> Self-consciousness is rather a quality of human nature, of the human eye, etc.; human nature is not a quality of self-consciousness.[25]

Objectivity is neither undesirable nor avoidable.

> The fact that man is a *corporeal*, actual, sentient, objective being with natural capacities means that he has *actual, sensuous objects* for his nature as objects of his life-expression, or that he can only *express* his life in actual sensuous objects. *To be* objective, natural, sentient and at the same time have an object, nature, and sense outside oneself or be oneself object, nature, and sense for a third person is one and the same thing.[26]

Consequently, to Marx, the alienation of a subject-object division cannot be overcome in thought alone through progressive realization that the other differs in form only from the Spirit itself. Alienation is not the result of an

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23. *Id.* at 112.

24. *Id.*

25. K. MARX, *Excerpt — Notes of 1844*, in WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 323 (L. Easton & R. Guddat eds. 1967).

26. *Id.* at 325.

untranscended objectivity or of an inabsolute Spirit, but rather of antagonistic social relations. Alienation must be overcome as a precondition of freedom, not truth. That transcendence is not achievable through the development of thought, but through the action of theory in life. "[I]n short, you cannot transcend philosophy without actualizing it."[27] This actualization requires the agency of the proletariat, a class whose absolute alienation will overcome its own objectification.[28] In the proletariat, Marx claimed to find an empirical rather than a speculative historical subject.

Because Marx situated his work against Hegel, critical theorists contended, when he talked about practice or the "proletariat," people, thought he meant some real existing historical entity. Critical theorists argued rather that Marx thought of the proletariat neither spiritually nor empirically but as a potential to be achieved in history. At first it seems that the difference between Hegel and Marx is that between faith in the subject and faith in the object. Hegel seems naturalist and idealist, Marx positivist and empirical. This interpretation is appealing. After all, Hegel writes about a "Spirit" which will achieve an "Absolute Subject" and Marx writes about the scientifically verifiable work of the proletariat to bring about a revolution. But to the critical theorist, this is a serious misunderstanding of Hegel and Marx. Both are concerned with overcoming the subject/object distinction, not privileging one term over the other. The Spirit is not just subject, nor is the proletariat simply object.

More importantly, however, interpreting Marx and Hegel as naturalist or positivist misunderstands their dialectic relationship to one another. Critical theorists argue that Marx's early writings reveal awareness of a dialectic between Hegel's approach to transcendence and his own. Their goal then, was to understand Marx's central claim not to be about the necessity of a shift from naturalist to positivist philosophy, but about the necessary distance between philosophy, trapped in its social context, and critique. If, and to the extent that Marx claimed to have developed an analysis of social life which was objective and predictive in the fashion of a natural science, he was wrong. To the critical theorists, social theory cannot develop a set of true observations or predictions which have the quality of scientific axioms. Critical theorists emphasized the dialectical character of Marx's social inquiry rather than the scientization of theory with which Marx distinguished himself from the philosophy which prevailed in his particular historical context.[29]

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27. K. MARX, *Critique of Hegel's Philosophy*, *supra* note 11, at 256.

28. *See* K. MARX & F. ENGELS, *The Communist Manifesto*, in ESSENTIAL WORKS OF MARXISM 13 (Mendel ed. 1961); K. MARX, *Critique of Hegel's Philosophy*, *supra* note 11, at 262-63.

29. Thus the critical school concentrates on Marx's early writings, many first translated in this century. Collections of Marx's early works include: K. MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844 (1959); K. MARX, WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY (L. Easton & R. Guddat eds. 1967); K. MARX, EARLY WRITINGS (R. Livingstone & G. Benton trans. 1975). *See* K. MARX, ON THE JEWISH QUESTION 212 (1843). For discussions of the distinction between the instrumental scientific perspective on Marx and the critical approach based on Hegelian philosophy, see A. GOULDNER, FOR SOCIOLOGY 425-62 (1973); TAYLOR & MONTEFIORE, *supra* note 16, at 15-17. *See also* A. GOULDNER, THE TWO MARXISMS, CONTRADICTIONS AND ANOMOLIES IN THE DEVELOPMENT OF THEORY (1980) (part of the trilogy entitled "The Dark Side of the Dialectic"); F. JAMESON, MARXISM AND FORM: 20TH CENTURY DIALECTI-

Elaborating upon dialectics made it seem possible to understand how social theory could both analyze and create social life.[30] Although Marx's analysis of social life had developed the technique of dialectics, he had often been read to seem scientific, rational, or reductionist. The Frankfurt School resolved this tension dialectically: by seeing Marx's scientism in relation to his philosophical context as productive of his analytical method which was itself neither scientific nor naturalist in nature.

For this purpose, Hegel, Marx and, for that matter, Lukacs, might be thought to have been involved in a common critical project; to reveal the source of the antinomies of traditional philosophical thought in an uncritical approach to the subject-object relationship.[31] Traditional philosophy was understood to accept as given that which was in the greatest need of philosophical reflection. Hegel, Marx and Lukacs attempted in different ways to locate the source of the antinomy in an entity which united both poles; the identical subject-object of history, which was both the present embodiment and future resolution of the traditional antinomies of thought and life. Yet their resolutions, coming at different moments in social and philosophical history, differed.

Hegel located the subject-object of history in the Spirit, a consciousness educated to self-consciousness at the end of the historical moment of alienation. Marx, on the other hand, viewed man's objectification in the world as a natural human activity, whose transcendence is neither possible nor desirable. To Marx, theory alone cannot achieve transcendence as Hegel seems to have suggested through a series of mutual self-realizations by subject and object. Transcendence can occur in the actualization of theory through the development of an historical agent which unites subject and object: the proletariat. The proletariat is not simply empirical, anymore than Hegel's Spirit was simply subjective. It would be wrong to suggest that Hegel was a Utopian naturalist or Marx a rigid positivist. Marx did not imagine that a natural philosophic method might not bear fruit in some situations. Only an extreme reading of Marx would understand his "scientific" concerns so broadly. Rather, Marx viewed the proletariat to be the transcendence of the dichotomy

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CAL THEORIES OF LITERATURE (1974).

30. "Dialectics" is a logic of reasoning the analytic logic of understanding (which, applied to "sensations," yields knowledge of the natural, phenomenal world). *Cf.* F. ENGELS, *Socialism: Utopian and Scientific* (1880), in ESSENTIAL WORKS OF MARXISM 45 (Mendel ed. 1961); G. LUKACS, *The Changing Function of Historical Materialism*, in HISTORY AND CLASS CONSCIOUSNESS 223 (R. Livingstone trans. 1971). The dialectics of Marx presupposes that there is some idea, theory and/or movement which is called the "thesis." The critique of this thesis produces an oppositional movement called the "antithesis." The struggle between the thesis and antithesis continues until a "synthesis," is reached. The synthesis transcends both the thesis and antithesis, by attempting to incorporate and preserve the merits, but avoiding the limitations of both the conflicting perspectives. This synthesis in turn becomes a new thesis and the process continues. Marx contended that development of society was dialectical in nature: mankind progressed through the clash of contradictory social systems with their concomitant contradictory ideologies and modes of thought. Thus, this dialectical form of thinking was necessary to transcend the limitations of analytical understanding and obtain a "true" and more integrated knowledge. *See, e.g.*, K. MARX, *Theses on Feuerbach*, in WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 400 (L. Easton & R. Guddat eds. 1967).

31. *See* N. Berman, Philosophical Pre-history of Critical Theory (1983) (unpublished manuscript).

of alienation and subjectivity. The absolute alienation of the working class would generate its subjectivity as the proletariat.

This early moment of critique generated two different roads to liberation from the antinomies of philosophy; the one spiritual, the other empirical. Yet neither Hegel nor Marx embraced either naturalism or positivism. Each "dialectic" is a transcendence of that dichotomy. To critical theorists, the opposition of Hegel and Marx regenerated the antinomy of subject and object as the opposition of theory and practice. Critical theory since Horkheimer has responded to that disjuncture much as Hegel, Marx, and later Lukacs critiqued traditional philosophy. In this sense, the eighteenth century dialectical mechanism embracing and reinventing antinomy seems to continue within the Frankfurt School and might be thought to generate both the main insights of the School and a number of difficult aporias for the critical enterprise as a whole.[32] This progressive development of critique, its own "dialectic of enlightenment," might be characterized as the repeated search for the identical subject-object of history.

B. A Process of Development

As the Frankfurt School developed, it generated insightful critiques of modernity each of which relied upon a particular link between subject and object. One way of thinking about their evolving criticism of modernism is as a repeated relocation of the identical subject-object of history. As one critical theorist transcended another, much as Marx had succeeded Hegel, this very dialectic of enlightenment became the object and engine of theoretical interest.[33] The tradition produced a variety of critical analyses dependent upon a constellation of agents or processes which were thought able to bridge the gap between theory and action.[34]

To sustain these images, the Frankfurt School developed a set of notions about their theoretical work and a set of assumptions about the context within which they theorized which have been suggestive for legal scholarship. In a nutshell, critical theory was to be both a form of cognition and a form of freedom. It could be both if it were self-reflective. Critical theory was to operate in a domain legitimated by a pattern of false consciousness. Through a dialectic of enlightenment, self-reflective theory might liberate or transform its contextual domain by undoing false consciousness.[35] Before taking up these notions about critical theory and its context directly, it is important to under-

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32. *See* Benhabib, *Modernity and the Aporias of Critical Theory*, TELOS (No. 49) 39 (1981).

33. *See* T. ADORNO, NEGATIVE DIALECTICS, *supra* note 14; M. HORKHEIMER & T. ADORNO, *supra* note 11. *Cf.* T. MCCARTHY, *supra* note 16, at 232-71, *discussing* J. HABERMAS, ZUR REKONSTRUKTION DES HISTORISCHEN MATERIALISMUS (1976); D. HELD, *supra* note 11, at 148-74, 200-22.

34. Throughout this article, I use the word "agent" to suggest an acting subject, one who knows, decides and acts. Lawyers often think of the agent as the instrument of another's will. Although both are suggested by the Latin in *agere*, the usage adopted here is more common in the literatures of social theory which I consider.

35. *See infra* note 43 and accompanying text. *See also* J. HABERMAS, LEGITIMATION CRISIS, *supra* note 16; F. JAMESON, THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT 281-99 (1981); T. MCCARTHY, *supra* note 16, at 358-86.

stand their generation in the historical unfolding of criticism, through critical theory's continual relocation of the subject-object of history.

The first moment of critical theory, characterized by the work of Horkheimer and Adorno, sought to reinvestigate the relationship between subject and object in a way which could achieve their resolution in a historical moment of frustrated revolutionary hopes and fascism.[36] Neither theory nor practice seemed likely to overcome its objectification through self-reflection or the processes of historical oppression. Many elements of the tradition of Hegel and Marx were accepted and elaborated. Horkheimer, for example, begins his essay "Traditional and Critical Theory" with a Hegelian rejection of the apparent representational nature of sensual knowledge.[37] Although the world *appears* to the individual, he argues, that relationship itself is a social production with a particular history.

> [T]he world which is given to the individual and which he must accept and take into account is, in its present and continuing form, a product of the activity of society as a whole.[38]

These insights produce a superb analysis of modern life in which "in the bourgeois economic mode the activity of society is blind and concrete, that of individuals abstract and conscious."[39]

Although Horkheimer thus distances himself from Hegel and Marx, he continues to search for a historical subject which, in light of his analysis of the relationship of individual to social totality, could overcome alienation. In this the structure of his work is similar to that of Marx and Hegel. Yet the engine of oppression and emancipation is different. As a mediated social construct, history is neither completely intelligible nor "moving" from an irrational past to a rational future through the agency of either Spirit or class. The role of the proletariat is greatly diminished:

> [E]ven the situation of the proletariat is, in this society, no guarantee of correct knowledge. The proletariat may indeed have experience of meaninglessness in the form of continuing and increasing wretchedness and injustice in its own life. Yet this awareness is prevented from becoming a social force by the differentiation of social structure which is still imposed on the proletariat from above and by the opposition between personal class interests which is transcended only at very special moments. Even to the proletariat the world superficially seems quite different than it is.[40]

To Horkheimer, emancipation must be created by society as a whole, assisted by theory. Given the disjunction between the consciousness of the proletariat and critical awareness, theory plays a new emancipatory role, as does the critical theorist, as midwife for the revolution. The primacy of theory has been dialectically restored, not as Hegel understood it, but as the impetus to prac-

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36. *See supra* notes 13 and 14.

37. M. HORKHEIMER, *Traditional and Critical Theory*, in CRITICAL THEORY 188 (M. O'Connell ed. 1972).

38. *Id.* at 197.

39. *Id.* at 200.

40. *Id.* at 212-13.

tice by the proletariat. The critical theorist may come from any class, for "under the totalitarian lordship of evils, men may retain not simply their lives but their very selves only by accident."[41] They maintain the hope of a more human society. "The circle of transmitters of this tradition [of critical consciousness] is neither limited nor renewed by organic or sociological laws. . . . In general historical upheaval the truth may reside with numerically small groups of men."[42]

The first moment of twentieth century critical theory thus retained the search for a historical transcendence of the relations between subject and object. It generated an elaborate conception of the agency of theory which forms part of the Frankfurt School tradition. It also developed in a self-consciously dialectic transcendence of the debate between Hegel and Marx. As a result, the focus on Marx as dialectician seemed persuasive to Frankfurt School Marxists in part for its alluring self-reflective quality: it was itself an illustration of the method it produced. This foreshadowed one of the fundamental aspects of Frankfurt School critical theory: validation through self-reference which produces practical effects.[43] The Frankfurt School meant not to predict social life on the basis of principles derived from objective analysis. They intended to anticipate what will logically result in the world from a body of theoretical work whose logical determinancy is validated by self-reference.

Already at this early point, we see both the specific critiques and general social theory of the Frankfurt School animated by the dynamic search for a link between subject and object — for intellectual work which was positioned between theory and practice. We see the basic mechanism which Frankfurt School intellectuals would deploy to create and sustain work of this sort: a dialectic focus upon the origins of theory and its reenactment in the context of the dialectical motion which gave rise to it. And we see the continual search for an agency to drive this dialectical transformation, a search which plagued the Frankfurt School, constantly reminding its practitioners of their failed aspiration to bridge the gap between theory and practice. This suppressed renewal of the unfound bridge between subject and object became an aporia which unites the various moments of critical theory and generates theories of ideology and legitimation important for legal scholarship.[44]

As the Frankfurt School developed, the identical subject-object of emancipation migrated from the proletariat to the social totality, assisted in turn by the critical theorist, the alternative communities of the sixties and the middle class movements of social solidarity (feminism, environmentalism, pacifism) of the seventies.[45] As the work of the Frankfurt School became increasingly tran-

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41. *Id.* at 252.

42. *Id.* at 241.

43. "In self-reflection, knowledge for the sake of knowledge comes to coincide with the interest in autonomy; for the act of reflection knows itself as a movement of emancipation. Reason is simultaneously subject to the interest in reason. Reason, it can be said, pursues an emancipatory cognitive interest which aspires to the act of reflection as such." J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 197-98 (J. Shapiro trans. 1971). Habermas's insistence that his theory can be validated through the practical discourse of those concerned and that this event can be "anticipated" is further emphasized in THEORY AND PRACTICE 22-39 (J. Viertel trans. 1975).

44. For a discussion of this process in a non-legal context, see Benhabib, *supra* note 17.

45. Arato, *Esthetic Theory and Cultural Criticism: Introduction*, in THE ESSENTIAL FRANK-

scendental in the work of Habermas, the identification of a particular agent was downplayed in favor of a new general sociology of legitimation and alienation. Emancipation became a lost image of ideal communication.[46]

In each of these moments, the Frankfurt School opposed two tendencies. On the one hand, cognition was established by a form of self-reflective criticism which focused on the resolution of theoretical conflict (i.e., by dialectics). On the other hand, liberation was achieved by a series of assumptions about the consciousness of the agents to whom a critical theory is addressed. These two techniques reinforced each other. The cognitive content was tested by the action of liberated agents. They were to be induced to liberation by the self-reflective nature of the theory.[47] These dialectical rotations shared a great deal with the initial movement from Hegel to Marx as understood by Adorno and Horkheimer. Taken together, they illustrate a continuing set of notions about theory and its context which can be explored in a more static fashion.

C. *Critical Theory Refuses Positivism and Naturalism*

Like much of modern thought, a critical theory seeks to develop a valid form of knowledge about the world which avoids the dangers of both positivism and naturalism. Indeed, there is nothing startling about the claims which the Frankfurt School makes for a "critical" theory. A critical theory claims to be a form of knowledge about the world (it has cognitive content) which is inherently liberating or emancipating for those who are exposed to it and which can therefore be tested by its effects. Advocates of both positivist and naturalist philosophy may have made similar claims — as do other modern thinkers. The key to a "critical" theory is that these two conditions (to be cognitive and liberating) must be simultaneously satisfied in a way which does not recommit the errors which the Frankfurt School associates with positivist

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FURT SCHOOL READER 185, 207-24 (A. Arato & E. Gebhardt eds. 1982) describes these tendencies. *See also* H. MARCUSE, *An Essay on Liberation, The End of Utopia*, and *The Problem of Violence and the Radical Opposition*, in FIVE LECTURES 62-108 (J. Shapiro & S. Webber trans. 1979); H. MARCUSE, COUNTERREVOLUTION AND REVOLT (1972). Contemporary critical legal scholarship is similarly enthusiastic about feminism, *see* Dalton, *Book Review*, 6 HARV. WOMAN'S L. J. 247 (1983); MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703 (1982); MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 515 (1982).

46. *See infra* note 70 and accompanying text. *Cf.* Thompson, *Universal Pragmatics*, in HABERMAS: CRITICAL DEBATES 116-33 (J. Thompson & D. Held eds. 1982).

47. The idea of "reflection" has been used to refer to both aspects of this approach. It has meant self-reference, or the quality of a theory being in part about itself, able to explain its own origin, and subject to its own critique. It has meant mirroring and involvement in social life, or the quality of being active in the world as a liberating force. I tend to use the term in the first of these senses, preferring "emancipatory" or "liberating" for the second element. Because they are related in the fashion I described, however, this association could be reversed. See J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 197-213 (J. Shapiro trans. 1971), for a detailed discussion of the two perspectives on "self-reflection." *Compare* "[i]n self-reflection, knowledge for the sake of knowledge comes to coincide with the interest in autonomy and responsibility," *id.* at 197-98 *with* "self-reflection is at once intuition and emancipation, comprehension and liberation from dogmatic dependence," *id.* at 208 (emphasis deleted) *and* "since at every stage it strikes at the dogmatic character of both a world view and a form of life, the cognitive process coincides with a self-formative process." *Id.* at 210.

and naturalist social theory.

Although the Frankfurt School has inherited the Marxist critique of natural philosophy, its adherents are particularly sensitive to what they regard as the errors of positivism.[48] Positivism, in this use, means the objectifying, rationalistic style of analysis familiar in the natural sciences. It is characterized by an analytic method which imagines itself free from cognitive value, or neutral with respect to epistemological content, but which strives nevertheless to be able to judge the verity of various claims about historical reality.

The difficulties with positivism and naturalism which seem most salient to Frankfurt School theorists might be described in a variety of ways. One might say that positivists achieve a liberating methodology by banishing all cognitive content from it and yet relied on a grounding in a subjective empirical world to define liberation. As a corollary, it might seem that naturalism achieved cognitive content at a cost to the emancipation of a neutral methodology which could confirm itself in social life. The description of the failures of these approaches could be reversed. If one focused on the ability to know truth from falsity, that is, upon the methodology as a form of cognition, it could be said that positivism failed to prove liberating just as naturalism failed to develop an acceptable epistemology. More important than the form of the critique is the insight that neither could simultaneously achieve the goals of epistemological content and liberating effect. This, then, became a test of critical theory.

The trouble is that a sensitivity to the difficulties of positivism makes claims about the cognitive content of theory difficult to sustain. In order that they not repeat the errors of positivism, critical theorists pay special attention

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48. Positivism is the principal "abandoned stage of reflection" which Habermas examines in order to locate his doubly-reflective critique. For these purposes, the term positivism is probably best understood in its Comtean sense, *i.e.*, that all "true" knowledge is scientific and thus limited to describing the coexistence and succession of observable phenomena. Habermas based his critique on a claim that positivism is not reflective and, indeed, aims at immunizing the sciences against philosophy. *See id.* at vii, 67-69. *See also* D. HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS 296-329 (1980). *Cf.* Hesse, *Science and Objectivity*, in HABERMAS: CRITICAL DEBATES 98 (J. Thompson & D. Held eds. 1982). There are several critical perspectives on positivism to be found in the works of the Frankfurt School. The "strongest" view is that "scientific experience, as well as prescientific experience are false, incomplete in as much as they experience as objective (material or ideational) what in reality is subject-object, objectification of subjectivity." Marcuse, *On Science and Phenomenology*, in POSITIVISM AND SOCIOLOGY 234 (A. Giddensed ed. 1974). *Cf.* M. HORKHEIMER & T. ADORNO, THE DIALECTIC OF ENLIGHTENMENT 24-25 (J. Cumming trans. 1972); M. HORKHEIMER, *The Latest Attack on Metaphysics*, in CRITICAL THEORY 146 (M. O'Connell ed. 1972). Habermas specifically rejects this position partly on the grounds that positivism gives a correct account of natural science and is a necessary part of any complete theory which could fulfill several specific human interests in knowledge and control. *See* J. HABERMAS, TOWARD A RATIONAL SOCIETY 82-91 (J. Shapiro trans. 1971). But it is difficult to discern whether Habermas supports the "strong view" that positivism is an inadequate methodology for dealing with the peculiar nature of the subject matter of the social sciences about human society; or the "weak" view that positivism can cope with "empirical-analytical" aspects of social science, but social theory also has a critical component which can only be engaged by normative, metaphysical or theological discourse. See J. HABERMAS, THEORY AND PRACTICE 263-68 (J. Viertel trans. 1973) for a discussion supporting in general the "weak" perspective. See also *id.* at 7-27, for a valuable summary of his theory of the appropriate "interests" served by various forms of knowledge.

to the roots of their theory when making claims about the social world. At the same time, however, a sensitivity to the difficulties of naturalism encourages critical theorists to make claims about their theory's cognitive content while rendering it difficult to sustain claims about the value of self-reflection. As a result, critical theory has developed out of a conflict between these opposed sensitivities in a process which might be called the "dialectic of criticism."

The Frankfurt School elaborates the difference between what they term "critical" theories and "scientific" theories in a number of specific ways.[49] Much of the discussion of critical theory's particular response to the difficulties of positivism and naturalism has occurred in the context of debates with practitioners of other theories. Perhaps because the particular image of critical theory has been shaped by sensitivity to the problems of other theories, it has seemed easier to articulate the self-image of "critical" theory in a negative, exclusionary fashion. Hard as it is to know what it is, we know what it is not, what it wants to achieve and how it proposes to go about it. For our purposes, it may be sufficient to illustrate these distinctions by focusing on three broadly divergent methodological approaches which have been distinguished from critical theory. These are the analytic or explanatory modes of empirical science, such as those familiar in the natural sciences but often attempted also in the social sciences, grand theory in the style of Marx or Freud, and hermeneutic concentration on textual elaboration partly identified by Habermas as "interpretation." The critical theorist acknowledges that each of these methodological strands of contemporary theory can be useful, but only as components of a more total "critical theory."

To the Frankfurt School theorist, enterprises of the first and second type attempt to objectify aspects of social life through theory. Such scholars seek to examine facts carefully until relations between them can be mapped and to examine theoretical maps of social life for imperfections. Theoretical work of this type proceeds primarily inductively — hence the analogy to the objectivity characteristic of natural sciences. But this is no more than a historical accident. For Marx, the "science" to be critiqued was deductive and natural. Of course, practitioners of grand theory distinguish themselves quite forcefully from empirical social scientists: Marxists because their empiricism is driven by and confirms theoretical consciousness and Freudians because they dislodge the subjectivity of the scientist. Nevertheless, to the Frankfurt School, grand theory shares with empiricism an aspiration for control, if not by evidence,

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49. Critical and scientific theories are alike in only a trivial sense: they are both "empirical" in the sense that they are both based on and can only be confirmed by experience. However, the essential difference between a critical theory and a scientific theory is that the former aims at emancipation and is part of the domain which it describes, whilst the latter aims at prediction and control and is not part of its own object-domain. A scientific theory, therefore, cannot be self-reflective. *See supra* note 47 and accompanying text. For a discussion of the difference between a critical and a scientific theory, see R. GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS & THE FRANKFURT SCHOOL 55-56, 88-95 (1981). *See also* M. HORKHEIMER, *Traditional and Critical Theory*, in CRITICAL THEORY 188 (M. O'Connell ed. 1972). *Cf.* R. UNGER, KNOWLEDGE AND POLITICS 32 (1975). The theories of science are partial languages because they classify things in the world. Their claims to acceptance must, therefore, rest on their ability to contribute to particular ends, like the prediction or control of events rather than on their fidelity to a true world of essences. *Id.*

then by theory or analysis.

The Frankfurt School would not reject these approches. Indeed, critique requires these analytical techniques. To Habermas they contribute to what he terms an "empirical analytic interest," itself an important component of a critical theory.[50] But the Frankfurt School would distance itself from both elaborative description and analytical scholarship of this type. Both seem to imagine a separation of theory and practice which must be bridged by theoreticians and practitioners working to render social life comprehensible and to redraw theoretical maps. The goal of such theory is to reflect life and to reflect upon life. To the Frankfurt School no form of empirical science can fully achieve this. Attempts at deductive work from theoretical models fare no better, for they misunderstand the complete nature of the relationship between theory and action. Consequently, grand theory which focuses on the elaboration of historical maps of social life is no improvement.

Interpretive, or hermeneutic, theory has a different focus. Rather than perfecting the relationship between theory and social life, it focuses on theory in action — much as critical theory might.[51] The focus is not upon the essence of theory or practice, but upon manifestations in either realm as mere tellings about those essences. A hermeneutic inquiry, then, claims to avoid the infinite regress of an inductive or deductive search for the true shape of social life or theory which plagued both analytic and elaborative forms of scientific theory.

The mission of hermeneutic scholarship is to produce the best possible interpretation of the texts of theory and practice. A good interpretation is produced by a reasoned study and elaboration of the instances of social life which is sympathetic to the mission of the author of those texts. One searches to understand the true meaning of both theory and practice. Understanding is produced by a variety of close reading techniques which might reveal the true source or intention of a text, perhaps in its relationship to the broader content of life or thought. The attempt is to discover the relation of manifestations of both theory and practice to the essence of what is beneath them. One reads "sympathetically" and each text may have a different map.

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50. Habermas considers that the "general orientation" of the natural sciences is rooted in an "anthropologically deep-seated interest" in predicting and controlling events in the natural environment. This he called the "technical" or "empirical-analytical" interest. *See* J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 302-15 (J. Shapiro trans. 1971). Although a critical theory might, and in general will, contain an empirical interest allowing some prediction, it is not this aspect of the theory which renders it critical in nature.

51. Hermeneutics is the science of interpretation originally developed for use with Canonical texts whether religious or legal. Wilhelm Dilthey introduced the term to mainstream German philosophy, *see* 7 GESAMMELTE SCHRIFTEN (1927), and it has traditionally been used by those who wish to counter the simplistic sensory impression theory of the world first put forward by the Vienna Circle of positivists. Instead, hermeneutics aims at an understanding of the *meaning* of the situation for the actor concerned. For a discussion of the term hermeneutics, see D. HOY, THE CRITICAL CIRCLE: LITERATURE, HISTORY AND PHILOSOPHICAL HERMENEUTICS 1-3 (1978). Probably the most well-known hermeneuticist is Hans-Geory Gadamer. *See, e.g.*, H. GADAMER, PHILOSOPHIC HERMENEUTICS (D. Linge ed. & trans. 1976); *Hermeneutik als praktiche Philosophie*, in 1 ZUR REHABILITIERUNG DER PRAKTISCHE PHILOSOPHIE 335 (M. Reidel ed. 1972). For a discussion of Gadamer's work, see D. HOY, *supra*, at 41-72. An extremely useful discussion of various approaches to hermeneutic analysis is R. HOWARD, THREE FACES OF HERMENEUTICS: AN INTRODUCTION TO CURRENT THEORIES OF UNDERSTANDING (1982).

Although hermeneutics adds something to a complete critical theory, in the eyes of the Frankfurt School, hermeneutics does not go far enough. The focus on theories as instances of theory, on facts as instances of life, is helpful. It recognizes the indeterminancy of the connections between theory and action which scientific theory seeks. Moreover, by seeing both theory and action as artifacts of an understanding of essence in either realm, hermeneutics avoids the error which led to the failure of scientific endeavor. The hermeneuticist does not view the separation of theory and action as fundamental. Unlike scientific thought which split theory and practice to explain its project of unifying them, hermeneutic approaches begin by asserting that both are cut from the same cloth and need be approached similarly.

Nevertheless, for all its diversity, the hermeneutic approach has not abandoned the belief that such understanding can be achieved, or that texts have meanings. Hermeneutics is like science in its belief that accurate maps of social life and thought can be developed. This explains the cozy relationship of hermeneutics and functionalism.[52] The critical theory of the Frankfurt School treats hermeneutics like science, as useful, but partial. It fulfills the need for knowledge just as empiricism or science generally fulfill the social interest in control.[53] Yet both are treated as incomplete and wrong in so far as they purport to be complete because they cannot be self-referential. Although critical theorists carve out a place for these theories which they have elaborately critiqued, critical theory is associated with a deep skepticism about the project of both hermeneutics and science for neither seems able to be fully liberating or fully cognitive, although each strives to achieve both. By distinguishing itself from empiricism, grand theory and hermeneutics, critical theory rejects the aspiration for an externally grounded cognition or control. It commits itself to a totalizing skepticism and self-reflection. At the same time, however, and somewhat paradoxically, critical theory heightens its commitment to liberation and cognition.

D. Critical Theory Aspires to be Liberating and Cognitive

Critical theorists want their theory to be liberating so that it may be ac-

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52. *See* N. LUHMANN, LEGITIMATION DURCH VERFAHREN (2d ed. 1975).

53. According to Habermas, hermeneutics serves the "anthropologically deep-seated interest" in understanding, see *supra* note 50 and accompanying text, both on the horizontal level (within cultures) and vertical level (between cultures). Habermas sided with Gadamer insofar as the latter's hermeneutics represents a criticism of the unreflective nature of positivism. *See* J. HABERMAS, ZUR LOGIK DER SOCIALWISSENSCHAFTEN 172 (1970) [hereinafter LSW]. However, he doubted whether hermeneutics is an adequate and a complete "paradigm" for philosophical reflection and consequently the basis for a critical theory without being conjoined with the critique of ideology. *Id.* at 188-251. A debate ensued between Habermas and Gadamer. Gadamer replied to LSW, *supra*, in H. GADAMER, *On the Scope and Function of Hermeneutical Reflection*, in PHILSOPHICAL HERMENEUTICS, *supra* note 51, at 18. Habermas answered in *On Systematically Disturbed Communication*, 13 INQUIRY 205 (1970). For secondary literature on this debate, see D. HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS 310-17 (1980); D. HOY, *supra* note, 51, at 117-28; T. MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS 187-93 (1978); Misgeld, *Critical Theory and Hermeneutics*, in ON CRITICAL THEORY 164 (J. O'Neill ed. 1976); Ricoeur, *Ethics and Culture: Habermas and Gadamer in Dialogue*, 17 PHIL. TODAY 157 (1973).

tive in the world it analyzes. By "liberating" they mean a theory which both exists in the world of action and acts in that world as theory to bring about some change in social relations. This was also the project of positivists or empiricists: to construct a realm of theory so grounded in practice that it would not suffer the idealistic irrelevance of naturalist philosophy and utopian speculation. This was the project also of Marx: to turn social theory into a science to permit that theory to be an instrument of action. But the reemergence of empiricism and scientism frustrated these hopes. To be grounded in facts was to lose the critical distance necessary to spark reform.

Although one might take the extreme view that empiricism denied human possibilities in all spheres, Habermas urges theorists to capture what is true about empirical insight while refusing its own claims about its status. We are urged to imagine that there is an appropriate domain for empiricism both in the physical sciences and in the internal elaboration of a set of propositions of facts from which critical distance is not necessary.[54] In the social sciences we

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54. A succinct statement of Habermas's views on empiricism and hermeneutics in J. HABEMAS, *Some Difficulties in the Attempt to Link Theory and Praxis*, in THEORY AND PRACTICE 1-40 (J. Viertel trans. 1973). *See also* D. HELD, *supra* note 53, at 296-329; T. MCCARTHY, *supra* note 53, at 42-52 (distinguishing Popper). *Cf.* D. Trubek, Where the Action Is: Critical Legal Studies and Empiricism (1983) (unpublished working paper 1983-10 Disputes Processing Research Program, University of Wisconsin Law School). Compare this with the anarchic position of Paul Feyerabend on the source of progress in the natural sciences. *See* P. FEYERABEND, AGAINST METHOD (1975); Feyerabend, *Explanations, Predictions, Theories*, in PHILOSOPHY OF SCIENCE 3 (F. Baumrin ed. 1963); Feyerabend, *Problems of Empiricism, Part II*, in NATURE AND FUNCTION OF SCIENTIFIC THEORIES 275 (R. Colodny ed. 1970). Feyerabend's position is that science is "an essentially anarchistic enterprise." Scientific philosophy based on anarchistic ideals is more humanitarian and more likely to encourage progress for "[t]he idea that science can, and should, be run according to fixed and universal rules is both unrealistic and pernicious. It is *unrealistic*, for it takes too simple a view of the talents of man and of the circumstances which encourage, or cause, their development. And it is *pernicious*, for the attempt to enforce the rules is bound to increase out professional qualifications at the expense of our humanity." *Id.* For a critique of Feyerabend, see McMullin, *The History and Philosophy of Science: A Taxonomy*, in MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE 12, 34-41 (R. Stuewer ed. 1970). *See also* I. SCHEFFLER, SCIENCE AND SUBJECTIVITY 50-52 (1967); Giedymin, *Consolations for the Irrationalist?*, 22 BRIT. J. PHIL. SCI. 28 (1971); Kordig, *Feyerabend and Radical Meaning Variance*, 9 NOUS 399 (1970); Suppe, *The Search for Philosophical Understanding of Scientific Theories*, in THE STRUCTURE OF SCIENTIFIC THEORIES 170-80 (2d ed. 1977); Suppe, *Afterword-1977*, *id.* at 615, 636-43; Townsend, *Feyerabend's Pragmatic Theory of Observation and the Comparability of Alternative Theories*, in PSA 1970 202 (R. Buck & R. Cohen eds. 1971).

Kuhn, in his discussions of "normal" science, would seem to agree. Although Kuhn considers that the "greatest" scientific discoveries are part of the process of paradigmatic revolution, he also believes that the existence of a paradigm guarantees at any given moment that a discipline will devote itself to puzzle-solving along limited but productive lines. This is referred to as the "period of normal science." Furthermore, it is often the gradual accumulation of incremental pieces of contradictory evidence during this period which can lead in the long-term to a "paradigm clash" and "revolution." *See* T. KUHN, THE ESSENTIAL TENSION xvii-xix, 270-92 (1979). *But see* Feyerabend, *Consolations for the Specialist*, in CRITICISM AND THE GROWTH OF KNOWLEDGE 197, 207 (I. Lakatos & A. Musgrave eds. 1970) (" 'normal' or 'mature' science, as described by Kuhn, is not even a historical fact"); Hull, *Book Review*, 24 SYSTEMATIC ZOOLOGY 395, 397 (exemplifies a growing skepticism of Kuhn's views on how science oscillates between "normal" and "revolutionary" science). *Cf.* Popper, *Normal Science and Its Dangers*, in CRITICISM AND THE GROWTH OF

might imagine a field of administration appropriately concerned with control in an established state apparatus where empiricism would be required.

The scientization of politics, however, was subtler and more powerful than the triumph of positivism in the natural sciences. In decisional politics or social theory, both of which are concerned with enabling and liberating rather than with control, the critical theorist is more hesitant about positivism. Because the empiricist takes the very conditions he produces as his objectively present field for analysis or action, the empirical technocrat will be self-validated in a way which precludes emancipation.[55] Consequently, the scientization of politics, or, we might imagine, of law, forecloses social possibility and limits discussion of precisely the nature of that reduction.

It is in response to these limitations that the critical theorist aspires to be liberating.[56] One way to understand how a change in the self-image of theory, absent a change in its content might be thought to relate to a project of liberation, is to think about the Frankfurt School's sense of the inadequate nature of reformism. Beginning with Marx, critical theorists found the reformist critiques of traditional scholarship unsatisfying. This had only very little to do with their sense that these critiques did not go far enough.[57] Often, as Lenin was to demonstrate, reformism could be a crucial part of revolutionary development.[58] Marx's claim was that reformism was wrong because it was insufficiently grounded in social life. Being insufficiently scientific, it could never be effective in liberating men who lived in the world because it was simply mistaken or ignorant about the conditions of life.

KNOWLEDGE 51 (I. Lakatas & A. Musgrave eds. 1970) (outlines negative features of "normal" science).

55. Habermas concedes that interest in prediction and control is best served by the empirical analytical sciences provided this technologically utilizable information is under the control of an enlightened public sphere. *See* J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 191-98 (J. Shapiro trans. 1971). He states that "[e]mpirical-analytical knowledge is thus possibly predictive knowledge. However, the *meaning* of such predictions, that is their technical exploitability, is established only by the rules according to which we apply theories to reality." *Id.* at 308.

56. Critical theory induces self-reflection in members of society resulting in these people's enlightenment and emancipation, and in turn, the transformation of society. *See supra* notes 43 and 47 and accompanying texts.

57. The "revisionist controversy" which arose in the German Social Democratic Party at the turn of the twentieth century was the first such major debate in Marxism. This controversy centered about E. BERNSTEIN, EVOLUTIONARY SOCIALISM (E. Harvey trans. 1961), which was published in German in 1899. Bernstein based his revisions of Marxist doctrine upon the observation that trends of development in Western capitalist societies were diverging from those foreseen by Marx. Thus he questioned the orthodox Marxist view of crisis and the "inevitable economic breakdown of capitalism." *Id.* at 73-94. However, a number of Marxists attacked Bernstein and defended the revolutionary core of Marxism against reformism. *See, e.g.*, R. HILFERDING, DAS FINANZKAPITAL (1910) (capitalism has the flexibility to subsume minor economic crises, but would eventually be overthrown not as a consequence of economic collapse, but as a result of the political struggle of the working class); R. LUXEMBURG, THE ACCUMULATION OF CAPITAL (A. Schwarzschild trans. 1968) (the capitalist system would inevitably collapse after it had incorporated all the remnants and vestiges of the pre-capitalist system).

58. Lenin argued frequently that Marxists must participate in reform movements and cooperate in coalition governments as a strategic step towards bringing about the revolution. *See* V. LENIN, "LEFT-WING" COMMUNISM, AN INFANTILE DISORDER 30-59 (1940). For Lenin "theory is not a dogma, but a *guide to action*." *Id.* at 53.

The Frankfurt School makes a similar claim about contemporary reform. They do not claim that liberal reform is not progressive. Rather, the claim that liberal reform tendencies are wrong because, by being grounded in social life, they can never comprehend the overall structure which generates them as it imprisons.[59] As a result, although reform often produces good results, it blinds to the true conditions of social life and is unable to generate imaginative alternatives. In this, reform is insufficient not only because it is too scientific but also because it is too naturalistic.

These criticisms are based in an understanding of the way theory acts in the world. Critical theorists struggle to imagine the interlocking relationship of theory and practice.[60] To their minds, liberal reformist scholarship fails either because it submerges itself in social life and blinds itself to the theoretical aspects of domination which exist even there or because it distances itself from social life and fails to be able to affect those conditions.[61] Built into this analysis of liberal reformism is an assumption about the "real" relation between theory and practice. As a result, the aspiration to be liberating entails a cognitive aspiration to be accurate.

Another way of putting it would be to say that a critical theory's capacity to liberate addresses both the interest in control served by science and that in knowledge which is served by interpretation. Just as these were to be used to elaborate critical theory, so critical theory aims to liberate us from scientific and interpretive inquiry. By "liberating," the Frankfurt School does not mean that critical theory suggests tactics for achieving the ends of freedom already held by social actors. Nor does it simply argue for a specific set of reforms which agents may be persuaded to accept as in their interests. To do either of these would be to provide content in precisely the manner of scientific or interpretive theory. To argue with agents about the meaning of freedom would be to accept a determinative notion of the concrete manifestations appropriate for the idea of freedom in a non-self-reflective fashion. It was by attempting to

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59. Habermas distinguishes between liberal and radical or critical reformism. He considers that liberal reformism fails to transcend the ideology causing the oppression, thereby often "humanizing" and camouflaging the faults of the system rather than leading to positive, rational reforms. *See* J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 24 (J. Shapiro trans. 1971). For example, Habermas argued that as Popper's "critical rationalism" stopped short of drawing radical implications for the theory of knowledge, its final consequence was only to promote rather than reduce a scientistic misunderstanding of science on several important grounds. *See* Habermas, *Analytische Wissenschaftstheorie und Dialektik, Ein Nachtrag zur Kontroverse Zwischen Popper und Adorno*, in LOGIK DER SOZIALWISSENSCHAFTEN 291 (E. Topitsch ed. 1971); Habermas, *Rationalism Divided in Two*, in POSITIVISM AND SOCIOLOGY 195 (E. Giddens ed. 1974). In Habermas's critical theory there is little need to distinguish between revolution and reform. The reflective critique of ideologically "frozen" forms of consciousness will lead towards a more rational social order, whether those changes are sudden or gradual. The labeling of such emancipation as "revolutionary" or "reformist" is superfluous and is only a diversion from the more important task of self-reflective critique. *Cf.* R. UNGER, LAW IN MODERN SOCIETY 234 (1976). "One mistaken view confuses the actuality of revolutionary socialism with its future oriented ideal of egalitarian community . . . . [This] approach reduces reality to ideology." *Id.*

60. *Cf.* R. UNGER, KNOWLEDGE AND POLITICS 31-36 (1975) (a refutation of the antimony of theory and fact).

61. *Cf.* J. HABERMAS, THEORY AND PRACTICE 268-76 (J. Viertel trans. 1973) (Habermas's analysis of the separation of theory and "commitment" in positivism's critique of ideology).

construct such a form of knowledge and program for action that science limited itself.

Critical theory aims to elaborate the goals which in a certain sense it "must" be in the interests of actors to pursue. This "must" is easy to misunderstand. At first glance it appears that the Frankfurt School has replaced argument about the conditions of freedom with bold assertiveness. Much of the work of the Frankfurt School sounds totalitarian in precisely this sense, for it claims to pre-figure or predict what agents will want and how they will freely act. This charge misses the point in so far as it suggests that critical theorists attempt to force a specific content on the social world. They aim only to be descriptive. Critical theorists propose an elaborate series of assumptions about the conditions of social life which, if true, could be altered, as a matter of logical necessity, by a process of theoretical and practical enlightenment. These assumptions are validated and this claim can be substantiated when that theory produces these effects. In this sense, then, the liberation claim is also a cognitive claim.

This double claim about liberation might also be misunderstood in a way which is connected to earlier claims about prediction and logical compulsion. Once critical theorists have established the initial conditions of social life, they claim that theoretical activity of a certain sort will bring about certain changes in social life. This resembles Marx's theory of historical necessity, which the Frankfurt School claims has been misunderstood in precisely the same way.[62] To critical theorists, Marx could not have meant to cloak his claims with scientific legitimacy by appearing to predict, in the style of a scientific theory, anything about what would actually happen in the world of action. If he had done so, his theory would have been subject to the errors of empiricism, to the extent that it misunderstood the relationship between consciousness and action.

On the contrary, Marx, as read by the Frankfurt School, meant only to describe the logical consequences of his own assertions about the initial conditions of social life. His predictions were more than merely the theoretical

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62. Habermas considers that "vulgar" Marxists have interpreted historical materialism in a predictive empirical fashion rather than as a set of assertions to be tested in a critical theory discourse. *See* J. HABERMAS, *Geschichte und Evolution*, in ZUR REKONSTRUKTION DES HISTORISCHEN MATERIALISMUS 200, 246-50 (1976). He considers that the "vulgar" Marxists have at best a hermeneutic interpretation of the world. He distinguishes his critical approach to Marxism from either a philosophy of history or a universal history, both of which he considers bound to a narrative framework, and consequently a particular hermeneutic standpoint. Rather, he describes his approach as a theory of social evolution, a reconstructive ahistorical enterprise. He can only maintain this position by introducing a division between historical narrative and the reconstruction of social evolution as theory. *Id.* at 244-45, 249. Although his critique of "vulgar" Marxism is appropriate, this sharp separation of theory and history has been criticized, particularly as an artificial separation of theory and practice. *See* T. MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS 268-71 (1978).

> [T]he aims of a critical social theory are not exhausted in the construction of a theory of social evolution. Primary among these aims is the analysis of contemporary society; and this analysis requires both a practical and a historical orientation. It requires, that is, a critical, historical account of how we come to be what we are, a reflection on the particulars of our self-formative process.

Id. at 269-70.

working out of his own conceptions, precisely because his theory was able to explain its own origins in a self-reflective manner. The Frankfurt School intends to be predictive in this sense. They want more than simply to elaborate their own theoretical premises. They want to make a claim about what will in fact happen, but only in so far as they have elaborated the way in which consciousness mediates the actions of social agents to whom their theory is addressed. Their claims will be validated in open discourse, not by adherence by a vanguard to a scientifc prescription. Critical theory then, is a cognitive enterprise.[63] Unlike scientific theories, critical theory claims to do more than simply inform agents about their social condition or suggest methods of achieving goals which they may or may not share. It liberates agents because it demands of them that they liberate themselves.

E. The Content and Domain of a Critical Theory

The Frankfurt School has sought to fulfill its aspiration for a theory which is both liberating and cognitive by developing a series of assumptions about the social domain within which critical theory operates and by constructing a theory which relates to its own origins in a particular way. These assumptions, developed in their work on "legitimation" and "ideology," are expressed by the notion of "self-reference." The notions of legitimation and ideology have been thought to be mutually supporting. Indeed, Frankfurt School theorists seem to feel that these two dimensions of their project are both liberating (in the sense of opening methodological and cognitive possibilities closed by belief in either natural or positive method) and epistemologically valid (there seems some real sense in which they demonstrate the inadequacy of natural and positive methods). Nevertheless, each of these two dimensions of Frankfurt School work raises serious difficulties. Assumptions about the epistemological position of agents seem subject to a critique parallel to that leveled at naturalism. Requiring that critical theory be self-reflective and self-validating threatens to plunge us back into the hermeneutic crisis which engulfed positivist methodology.

Frankfurt School inspired social analysis often seems sustained by an image of social structures being reinforced or "legitimated" by "ideology." Usually, Frankfurt School scholars seem to have in mind a world view or belief system which is held by social actors and which structures their actions and

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63. Scientific theories are "objectifying" in the sense that the theory and the objects to which the theory refers can be clearly distinguished. For example, Newton's theory of mechanics is not itself a body in motion; the theory is not part of the object-domain it describes. In comparison, critical theories are "cognitive" in structure, as the theory itself is always part of the object-domain which it describes. For a discussion of the cognitive nature of critical theory, see R. GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL 55-75 (1981). These two different approaches to theory development are distinguished in Habermas's writings on Marx. Habermas comments at length on the tension in Marx's thought between the reductivist/scientific side and the critique of ideology and critical scheme of revolutionary practice. *See* J. HABERMAS, THEORY AND PRACTICE 195-252 (J. Viertel trans. 1973). It is because the latter side of the theory is embedded in an analysis of cultural erudition and the role of symbolic interaction that Habermas's ideal speech situation is so important. His analysis of the universal pragmatics of speech provides in some sense a counterbalance to the scientific tendencies of traditional Marxism.

perhaps also their beliefs about other collateral matters.[64] There are three key elements here. First, ideology is a form of consciousness — a theory, rather than a practice. Second, it is "held" by actors, implying some difference between the actor's self and the ideology he possesses. Although people sometimes speak of an ideology having possession of an individual's consciousness, the difference between object and subject is retained. Third, the ideology acts to change and limit the actor's actions and ideas — imposing itself on the world through the action of the social agent. This active dimension of ideology is often discussed under the rubric of "legitimation" rather than "ideology." Social forms "legitimate" themselves by inducing or possibly simply by benefiting from an ideological system into which they are integrated. Likewise, ideologies "legitimate" social forms.

Even without refining these ideas, the centrality of this set of assumptions to the project of practicing a liberating theory which avoids the pitfalls of empiricism and naturalism is obvious. If the world is composed of actors whose ideologies affect their social relations in this way, a cognitively true theory could be liberating. The focus on ideology and false consciousness corresponds to an early moment of the Frankfurt School when the critical theorist was to bridge the gap between proletarian stupor and self interest. As the enterprise became more diffusely aimed at society as a whole, the emancipatory potential became more transcendental and the emphasis shifted from false consciousness to legitimation. This earlier moment, however, seemed to compel those who would have pursued the goal of critical theory to imagine social actors, including other, non-critical theorists, to act "willfully" in pursuit of their "interests," and to be deluded by a set of demonstrably "false" beliefs in such a way as to act to perpetuate wrong or oppressive social relations.[65]

It was crucial, in other words, that ideology be distinguishable from consciousness. Ideology needed to be part of what an actor thought, but not his entire personality and consciousness. Only if ideology could be cordoned off from thinking and feeling generally — only if the subject/object distinction in fact characterized the self — could a correct theory be active against legitimation. As a result, the Frankfurt School devoted a great deal of attention to the idea of "false" consciousness — often used as a virtual synonym for ideology.[66]

The problem was to distinguish true and false consciousness in some sustainable fashion. For example, one might think consciousness false when it produces barriers to free communication or to the free exercise of will. These barriers might be self imposed: an agent might be deluded by his ideology in such a way as to block his own interests or prevent his own participation in open communication. Ideology might also produce actions which blocked the

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64. For a discussion of the different ways in which social theorists, including the Frankfurt School use the term "ideology", see R. GEUSS, *supra* note 63, at 1-44. A more general list of works on the nature of ideology include: H. BARTH, WAHRHEIT UND IDEOLOGIE: TRUTH AND IDEOLOGY (1975); J. LARRAIN, THE CONCEPT OF IDEOLOGY (1979); K. MANNHEIM, IDEOLOGY AND UTOPIA (L. Wirth & E. Shils trans. 1936); J. PLAMENATZ, IDEOLOGY (1970).

65. Foucault has described the atomized way in which deluded actors fashion oppression for themselves and others in his descriptions of a diffuse social power. *See, e.g.*, M. FOUCAULT, *Two Lectures*, in POWER-KNOWLEDGE 78-108 (C. Gordon ed. 1980).

66. *See supra* note 64.

participation of others; that is, it might sometimes be effective in fulfilling the interests of some actors in domination.[67] So one might picture two forms of surplus repression: self imposed and socially imposed. Both would be legitimated by false consciousness.

While aiming to expose false consciousness and liberate social agents, critical theorists have elaborated various types of belief which might be deluding.[68] Each such elaboration is problematic. An ideology might be constraining and therefore false because of its lack of correspondence to the real interests of the agents who held it. Such a view, however, requires a theory of interests which critical theorists have by and large failed to provide.[69] The search for an approach to interests has become steadily more diffuse, often lodging itself in theories of evolution, social functionalism, or, at its most transcendental, of communication. Habermas, for example, tackles this problem by proposing an "ideal speech situation" of unencumbered communication from which a program of social development might be reverse-engineered.[70] Each of these approaches seem threatened with reduction to the naturalist tautology that an ideology which oppresses is oppressive.

This general approach is often supplemented in Frankfurt School work by its inverse. Instead of testing ideology against some set of actualizable interests or desires, one might imagine epistemological principles deeper than mere ideology or interests by which agents would test ideologies before allowing them to structure their interests. One might imagine, for example, that one had grounds for rejecting beliefs which could only be held so long as their inner contradictory nature, source, or effects remained hidden. A set of beliefs

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67. J. HABERMAS, THEORY AND PRACTICE 1-41 (J. Viertel trans. 1973).

68. Habermas envisages critical theory as capable of serving the role of liberating people aware of their "suffering" from the oppression of ideology. However, others in the Frankfurt School, such as Marcuse and Adorno, criticize even "deeper" forms of ideological delusion. They consider that the modern industrial state can exercise such an extensive control over the cognitive processes of its members as to prevent them from becoming fully aware of the frustration of their "true" interests. The difficulty facing critical theory in this latter conception is to explode society's "myth of happiness" before it can proceed to reveal the source of suffering in a social framework which falsely lays claim to legitimacy. For a discussion of these differences between members of the Frankfurt School, see R. GEUSS, THE IDEA OF CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL 80-85 (1981).

69. *Id.* at 45-54; OTTMANN, *Cognitive Interests and Self-Reflection*, in HABERMAS: CRITICAL DEBATES 79 (J. Thompson & D. Held eds. 1982) (commenting on Habermas's various "cognitive" interests).

70. Habermas uses the term "ideal speech situation" to refer to a situation of absolutely uncoerced and unlimited discussion between completely free and equal human agents. *See* J. HABERMAS, *What is Universal Pragmatics?*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 1-68 (T. McCarthy trans. 1975). For thorough accounts of Habermas's position, see D. HELD, INTRODUCTION TO CRITICAL THEORY HORKHEIMER TO HABERMAS 334-39 (1980); T. MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS 272-91 (1978). Habermas suggests a way of eliding this difficulty by reference away from the social condition legitimated by an ideology onto the ideology itself. By suggesting that we prefer theories which expose themselves to validation by correspondence with the interests of those in the ideal speech situation he is able to hook this cognitive branch of his theory, threatened with reduction to naturalist speculation, onto the branch concerned with liberation and testable in action. Still, as we will see, when that branch comes in turn to be threatened with the problems of positivism, he returns to this one.

might be false if it is based on false premises or is internally contradictory. Of course, this approach is as subject to the pitfalls of positivism as was the last to those of naturalism. Just as scientific empiricism had a role as to play in elaborating the conditions of oppression and control, so hermeneutics provides a methodolgy for uncovering inconsistency of this sort.[71]

Of course these two approaches to the problem of differentiating true and false consciousness do not fit harmoniously together. Indeed, the Frankfurt School has spent a lot of time working on the conundrum posed by the insight that oppression is known only by the falsity of the ideology which supports it while falsity can only be identified by symptoms of oppression. Some search for a context specific approach which begins with the experience of pain and suffering in a given historical context.[72] Others seek more transcendental conditions for defining freedom.[73] These are supplemented by the discoveries of linguistic, anthropological or psychological structuralists about the internal structures of consciousness which might lie beneath ideology.[74]

To develop a "dialectical" route out of this dilemma Frankfurt School theorists have returned to their claim that theoretical work can be both liberating and a form of knowledge if it remains critical. The idea seems to be that by radically denying the validity of truth-finding mechanisms in contemporary theory and by focusing not on the task of making sense of the world but on that of ascertaining how it might not make sense, the Frankfurt School might, in a relentless process of criticism, expose the consciousnesses acting in social life and lead to the rejection of false ones.

Of course, such a relentless process could as easily generate a dialectic of legitimation as of enlightenment and liberation. One might even characterize liberalism in exactly these terms. To the Frankfurt School, the key to avoiding the reformist legitimation of a more traditional approach is to direct the force

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71. Nevertheless, just as Habermas shifted away from the effects of an ideology on interests and conditions to avoid the problems of naturalism, so he also shifts away from inductive investigation of a theory's consistency to avoid the pitfalls of positivism. Instead, he suggests that a critical theory be required only to be self-referential — exposing its own origins so as to permit its open acceptance or rejection. If theories are self-referential in this way, we might imagine that agents will find themselves able to make comparisons with the ideal speech situation.

72. *See, e.g.*, ADORNO, *Introduction to The Positivist Dispute*, in GERMAN SOCIOLOGY 1, 21-22 (T. Adorno ed., G. Adey & D. Frisby trans. 1970).

73. *See, e.g.*, Habermas and his "ideal speech situation." Habermas uses the term "ideal speech situation" to refer to a situation of absolutely uncoerced and unlimited discussion between completely free and equal human agents. *See* J. HABERMAS, *What is Universal Pragmatics?*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 1-68 (T. McCarthy trans. 1975). For thorough accounts of Habermas's position, see D. HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS 334-39 (1980); T. MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS 272-91 (1978).

74. Like Habermas, the structuralists also reject contextualist views in favor of what they often refer to as a "synchronic" approach. They examine particular systems or structures under artificial or ahistorical conditions, simultaneously ignoring and exploring their evolution in order to explain their present functioning. *See* N. CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX (1965) (linguistics); C. LEVI-STRAUSS, L'HOMME NU (1971) (anthropology); J. PIAGET, *infra* note 110 (psychology). "This is why, in France especially, structuralism has often found itself at odds with Marxism, for which any such denial of history is unthinkable." STRUCTURALISM AND SINCE, *infra* note 91, at 9.

of criticism against critical theory itself. As a result, the critical theorist will develop a relationship to his theory quite different from that which the social agent customarily has with his ideology. This self-reference sustains the cognitive claim of critical theory. Its content is established without succumbing to the pitfalls of positivism or naturalism by inter-subjective reflection and empirical investigation which is self-consciously critical. As a result, while the social agent believes his ideology, the critical theorist *knows* his critical theory.

Just as the liberating and cognitive claims of critical theory were related in a mutually sustaining fashion, so also the images of social belief and action are related to the image of critical theory in a fashion which sustains those double claims through the mechanism of self-reference. As a result, these various components of critical theory are all made to seem related and mutually supportive. The focus on ideology in the development of a "liberating" social theory prevents claims about cognitive content from collapsing into empiricism. The self-referential nature of cognition prevents the liberating drive from descending into utopianism. The Frankfurt School shuttles among these aspects of their approach, alternatively emphasizing one or the other.

Taken together, the assumptions which the Frankfurt School makes about the world of social actors and the possibilities for a self-referential theory respond to the twin demands that a critical theory be cognitive and liberating. But it is important to realize that this image of cognition and liberation is a very peculiar one. The assumptions which the Frankfurt School makes about the world tend to retain the gap between subject and object or theory and practice which it seemed at first to reject. Sustaining the relationships among agents, ideologies, social forms and criticism which result has generated a relatively mechanical image of social power and has led to a retreat from the very issues of historical agency which critical theory seemed initially most suited to tackle.

Critical theory is able to claim both to be cognitive and to be a liberating enterprise because of a series of assumptions about the human condition which it contains. But these assumptions appear to restate the difficulties which critical theory aspires to avoid. The Frankfurt School would have one imagine that before the enterprise of critical theory gets going, people suffer from both a lack of freedom and from false consciousness. These two notions are different but related. One must imagine that agents are unfree because of their false consciousness. Social agents share an incorrect world view which causes either self-imposed or legitimated external oppression. Moreover, one must imagine that this consciousness is shared by actors only when and to the extent that these actors do not realize that they share it. One must imagine a world in which people are oppressed because of a consciousness which they would not hold if it were revealed to them.

In such a world a critical theory could be liberating if true and true if liberating. Moreover, one could expect that a theory which was relentlessly self-aware might be both. A critical theory which effectively revealed to agents the self-imposed coercion and the falsity of their world-view would lead them through enlightenment to emancipation. Each of these assumptions, however, is problematic. One way of summarizing the difficulty would be to say that critical theory overcomes the split between theory and practice by projecting it into the heads of social agents as the difference between true and false consciousness, or interests and ideologies. Another way of saying the same thing

would be to suggest that critical theory overcomes the difference between practice and theory by projecting it into the world as the difference between legitimated oppression and the actualization of interests.

The first difficulty is easiest to see. The Frankfurt School seeks to expose the falsity of the consciousness in a way which does not rely on linking it either to an unacceptable social situation or to a particular constellation of interest. The method is to induce self-reflection, on the assumption that false consciousness will only be held because its true nature is hidden. We must imagine, then, that agents are not completely deluded about some deeper epistemological notions than those apparent on the face of the consciousness whose falsity is to be revealed. The critical theorist faces a difficult set of questions. Where within the head of the social agent is the truth to be located? Moreover, once the truth has been placed within the heads of social agents, how is the critical theorist to predict its content? For critical theorists do not see themselves arguing with agents about what is in their interests. Agents will in fact give up beliefs when they should if the criteria of "should" are examined like the consciousnesses themselves.

The Frankfurt School has responded to these difficulties in a variety of ways. All avenues are difficult. One possibility is to reveal belief structures to agents so that they will relinquish beliefs which do not serve their interests or fit with their empistemological first premises. Although such a critical theory might be effective in improving the self-awareness of actors and in bringing about equilibrium among their awareness, activity, and interests, such a theory would not be cognitive. Relying solely on the action of agents confronted with their own beliefs, it could not give an account of when an agent should relinquish a consciousness except to say that they should when they do. We would be left with no way of telling when agents clung perversely to world-views alien to their interests. Such a critical theory, moreover, could give no account of its own justification. Why, we might ask, should we bother to expose false consciousnesses except as it is in our interests? The liberating mission of critical theory would be threatened with the cognitive emptiness which had plagued both positivism and naturalism in different ways.

The critical theory of the Frankfurt School wants no less to rely on agents than to argue with them. The critical theory is to "anticipate" the actions of agents and anticipate their interests, an anticipation which is confirmed by their action, to be sure, but which is not grounded there. It is grounded rather in the cognitive content of critical theory, saved from skepticism by self-reference. The Frankfurt School suggests that the liberating, critical nature of critical theories gives them content: the preference for exposure over concealment. As a result, "anticipation" is neither prediction in the style of the empirical sciences (inexorably descriptive) nor prescription in the style of naturalism (idealistically normative).[75]

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75. When Habermas uses "anticipation" he refers to a demand or requirement of rationality rather than an empirical-analytical prediction. *See* J. HABERMAS, *Bewusstmachende oder rettende Kritik—Die Aktualitaet Walter Benjamin*, in KULTUR UND KRITIK 302, 309, 312 (1973). Thus a critical theory does not predict that members of society will adopt the theory to liberate themselves and re-order society, but rather "demands" that they embrace the theory. In a sense the theory "requires" that they "ought" to act upon the theory. However, this is not the idealist "ought" of a normative system. Although it does not follow that just because members of society

The difficulty, of course, is to account for the continued presence of a cognition within the head of the social agent which can be apprehended by critical theory. The most widespread approach to this difficulty, characteristic of the late Marcuse or of an early Habermas, is associated with the presence in alienated modernity of apparently already liberated agents. The sixties furnished a variety of communal constellations which captured the anticipatory imagination of the Frankfurt School.[76] These groups made it seem possible to give expression to true consciousness in social practice. As a result, critical theory could literally see its cognitive presence in agent's true selves, confirming itself in action.

In another view, characteristic of later critical theorists such as Habermas who abandoned the notion of an historically identifiable counterhegemonic practice, agents are thought to share some deep notions about truth and falsity independent of their ideology to which an external theorist can appeal. The later Habermas develops an elaborate system of choices agents would make in situations of ideal communication based upon some assumptions about rationality and the universal nature of moral and pragmatic interests rather than truth and falseness.[77] For him, these principles transcend historical context. Adorno, although also grounding his claims in a set of deep principles, makes no trans-historical claims about the principles which enable agents, on reflection, to recognize the falsity of their consciousness.[78] His approach has been supplemented by a variety of evolutionary theories reminiscent of contemporary analyses of moral development.[79] These approaches, however, are threatened by the problems of positivism to the extent that they sustain some claim about the objective reality of the cognition which critical theory predicts.

Of course, one way out of this dilemma would be to avoid any claims about the grounding of critical theory in objective beliefs or practices or epistemological principles. Critical theory might be limited to the realm of theory.

"ought" to adopt the theory they will do so, one can predict that they will do so. Approaching the term "anticipation" from another angle, members of society "anticipate" the "ideal speech situation" whenever they act. *See supra* note 73 and accompanying text. In every action the ideal speech situation must be presupposed, even though it is probably not attained, in order that propositions and norms can be developed and accepted free from unnecessary domination in all forms. For a discussion of "anticipation" in the ideal speech situation, see R. GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL 661 (1981).

76. *See supra* notes 11, 45, 46 and accompanying text.

77. *See supra* note 70 and accompanying text.

78. Adorno believed that members of society's epistemic principles and their standards of reflective acceptability vary historically according to different levels of development and their concomitant pains, frustrations and sufferings. The contextualist view of Adorno conceives of the critical theory as helping a particular group of people explicitly to comprehend their epistemic principles and their idea of the "good," and showing that a particular belief and/or practice is reflectively unacceptable for those who hold those principles and ideals. Thus, this group would have to modify their beliefs and actions in order to attain their ideal of a rational, satisfying existence. *Cf.* Unger's principle of subjective value: R. UNGER, KNOWLEDGE AND POLITICS 76-81 (1976) (values are individual and subjective).

79. For an analysis of U.S. constitutional history influenced by this turn to theories of moral development, see G. FRANKENBERG & U. ROEDEL, VON DER VOLKSSOUVERÄNITÄT ZUM MINDERHEITENSCHUTZ (1981).

If one imagined that false consciousness seems appealing to agents because it is rooted in the true interests of the agents who were deluded by it, such a false consciousness would be susceptible to reflective exposure because of the internal inconsistency of being grounded in interests which it does not in fact serve.[80] Such a contradiction in a false consciousness would mean that such a theory would need to hide its tracks in precisely the sense a critical theory could expose. Moreover, if the false consciousness is grounded, not in true interests, but in an invalid epistemology which is then disguised, critical theory could also proceed by internal criticism of the false consciousness.[81] In either of these situations, the mission of a critical theory would be to reveal the delusion of false consciousness by exploiting its incoherence in theoretical terms. The difficulty here, of course, is that the whole point of looking to critical theory is for a way of avoiding this confinement to the realm of ideas.

Nevertheless, critical theorists often seem to be limiting their claims in precisely this way only to extend them again when focusing on what they see as the process of social change. Indeed, one might be content with a theory which operated solely as a purifier of consciousness if one could differentiate social forms which were the product of free choice from those that were generated by ideology-legitimated social mechanisms. But it is difficult to separate the claims which science makes from the claims of critical theory about the nature of social oppression and consciousness. In order to avoid locating cognitive content unreachably within the consciousness of the agents they address, critical theorists sometimes claim that the emancipatory content of their theory, unlike that of scientific theory, can be confirmed by the action of social agents without surrendering its content to their will in the fashion of empiricism or positivism. As a result, critical theorists avoid a separation of theory and practice by relying upon a dialectical image of the relationship between others and their environment.

To the Frankfurt School, institutions of social control are empowered by their objects when they are viewed as legitimate.[82] The link between consciousness and social life is fairly mechanical: agents act out their views about legitimacy.[83] The Frankfurt School consequently spends much of its energy

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80. For Habermas's most detailed discussion of this form of delusion, see *Sozialtechnologie*, *infra* note 83, at 239-67.

81. For an example of false consciousness grounded in an invalid epistemology, see Habermas's critique of Nietzsche's "theory of knowledge" in *Knowledge and Human Interests*, *supra* note 16, at 295-300.

82. Compare this with Foucault's description of fragmented social power. *See, e.g.*, M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (A. Sheridan trans. 1979).

83. Habermas distinguishes several historical stages in the development of forms of social legitimation. *See* J. HABERMAS, *Toward a Reconstruction of Historical Materialism*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 130, 156-58 (T. McCarthy trans. 1976). In modern society, (1) the capitalist enterprise, the social order, is justified by exclusive reference to its technical efficiency independent of conceptions of the "good life"; (2) other legitimating doctrines, such as rational natural law are also developed along universalistic grounds; and (3) conflicts are resolved from a stand-point of a "strict separation of legality and morality," i.e., public issues are resolved by a "general, formal and rationalized law," while private issues are guided by principles of morality. *Id.* at 158. Habermas further emphasized that the belief in legitimacy can not be reduced to a belief in legality in *Theorie der Gesellschaft oder Sozialtechnologie?: Eine Auseinandersetzung mit Niklas Luhmann*, in THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE

elaborating the assumptions about legitimacy which might undergird applications of power or systems of oppression.

This effort has by and large not sought to define oppression. Rather it has sought to elaborate the social results of legitimation which are likely to be the products of false consciousness. This avoids the initial difficulties of naturalism. To the Frankfurt School, a society is particularly susceptible to critical theory when oppression covers its tracks by preventing awareness of the theories of legitimacy upon which it depends. Forms of consciousness which cover their tracks by preventing awareness of their first principles are very likely to turn out to be false. The link between false consciousness and oppression, then, is particularly subject to critique when the system of power denies access to views about legitimacy embedded in consciousness and when consciousness operates in such a way as to prevent reflection on this cover-up operation. The lack of self-reflection in a consciousness, then, might at least make us suspicious about its validity. Self-reflective consciousness, by contrast, would be far less likely to obscure those of its premises which legitimized constellations of power.

A critical theory is liberating because by inducing self-reflection by agents it breaks the mutually reinforcing bondage of a social structure that avoids discussion of the world-view which supports it. It avoids substituting another false consciousness because its own cognitive theory of legitimacy, when present, is subject to its own critique. It allows agents to formulate their moral vision freely, in conditions of debate unencumbered by false notions of legitimacy. We can be sure that it will not regenerate oppression, in part because critical theory is itself self-reflective in precisely the sense that it seeks to bring about self-reflection by social actors. It is under these conditions of consciousness and power, then, that critical theory is able to validate itself by self-reflection.

A scientific theory could never validate itself by self-reflection because it cannot criticize its own premises without holding its methodology constant. Indeed the demonstration that a scientific theory "assumes its conclusion" invalidates it in important ways. This is because scientific theory is valid if its content accurately reflects either life or thought outside itself. The project of scientific theory is to deal with a content of which it is not a part either predictively or explanatively. A scientific medical theory is about disease and health, about diagnosis and treatment. A critical theory of medicine is also about the fabric of theory about these things: it is about, among other things, itself. As a result, such a theory not only may be self-reflective, but must be so to be valid.

All of this, however, depends upon a notion of legitimation which is neither empirically compelled by the "forces of production" nor coincidental to a cultural superstition. Efforts to elaborate legitimation have replayed the double effort of theories about ideology to avoid empirical or naturalist moorings. Like ideology, legitimation in the work of Habermas, no less than in

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142, 243-44 (J. Habermas & N. Luhmann eds. 1971) [hereinafter *Sozialtechnologie*], Habermas stressed that "legality is just one part of the total legitimation process related to authority and power in modern society." *Id.* The object of a critical theory is to demonstrate that such a set of beliefs or world-view is not legitimate, but ideological. Once the world-view is seen to be reflectively unacceptable, the repressive social institutions these beliefs legitimate are also not acceptable.

Weber's classic formulation, has become a placeholder for the sought historical subject.[84] It brings into cognition an interminable search for origins and cause. The Frankfurt School resolves this dilemma as they resolved the dilemma of ideology. Instead of relying upon a self-reflective theoretical intervention, they have developed theories of unalienated communication against which to measure mediated, and hence, legitimizing consciousness. These two solutions are then combined to produce a sustainable critical analysis. The oscillation between legitimation and ideology, like those between empiricism and naturalism or theory and practice, is to be overcome dialectically — perhaps by reference to a transcending free communicative experience.

The social analyses produced out of this dialectic are far removed from either the mechanization of more "vulgar" Marxisms or the speculation of policy science. In that, the Frankfurt School provides useful indications of what critical legal analyses might achieve. Critical theory seems best at generating internal critique of structures of belief. The difficulty is that its aspiration is to avoid precisely this limitation — to respond to the realization that such belief systems are enmeshed in social life. The result is a continuing search for a historical agent which can be relocated but never found. Paradoxically, then, an effort begun to understand, predict and locate historical agency has led, most strikingly in the work of Habermas, away from concern with historical agency.

F. Critical Theory and the Law

Although the traditions of social theory within which the Frankfurt School works would seemto address issues of interest to legal scholars, the Frankfurt School approach has not in fact had much currency in American legal scholarship. The Frankfurt School itself has produced little legal scholarship.[85] Despite occasional appearances in general criticisms of cultural phenomena or analyses of the dialectic of enlightenment by which man's alienation is thought to be reproduced through social progress, the law has not been systematically addressed by the Frankfurt School. Their work typically treats law from the outside — as an object of study, as an instance of congealed ideology or as a mechanism of legitimation.[86] It is seen as the locus of conspir-

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84. *See* M. WEBER, 1 ECONOMY AND SOCIETY 212-26 (G. Roth & C. Witlich eds. 1968). Habermas develops a typology of legitimations, each of which distracts attention from a presumption about origins, in *Legitimation Problems in The Modern State*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 178 (T. McCarthy trans. 1978). Thus, for example, his description of a "reconstructive" concept of legitimation, while purporting to transcend an empirical search for beliefs, closes by suggesting that "cognitive developmental psychology, which is well corroborated and which has reconstructed ontogenic stages of moral consciousness in this way, can be understood at least as a heuristic guide and an encouragement," *Id.* at 205. For a critical review of legitimation theory in legal scholarship, see Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379.

85. *See* ROTTLEUTHNER, *The Contribution of the Critical Theory of the Frankfurt School to the Sociology of Law*, in SOCIOLOGICAL APPROACHES TO LAW 111 (A. Podgorecki & C. Whelan eds. 1981).

86. *See, e.g.*, DIE HERRSHAFT DES GESETZES, EINE UNTERSUCHUNG ZUM VERHÄLTNIS VON POLITISCHER, THEORIE UND RECHTSSYSTEM IN DER KONKURRENZ GESSELSHAFT (A. Soellner trans. 1980); J. HABERMAS, STRUKTURWANDEL DER OFFENTLICHKEIT 131-41 (1962), J. HABERMAS, THE-

acy or the reproducer of false consciousness. The law figures in a number of functionalist social analyses produced by Frankfurt School scholars as the force which transforms social necessity into belief and permits domination.[87] These external treatments of law, however, have by and large been disappointing.

Many legal scholars have drawn both inspiration and methodological insight from more conventional Marxist social theory.[88] A number of legal scholars seem to have been particularly influenced by the work of the Frankfurt School.[89] As imported into legal scholarship, critical theory has been associated with a number of approaches to legal materials and with the valorization of a posited transcendental subject. As methodology, critical theory seems to have encouraged a particular skeptical stance towards legal doctrine, a skepticism animated by a dialectical style of analysis in both historical and doctrinal work. These analytical tools —indeed this analytical stance — has been quite successful. The substantive tendency to bridge the gaps uncovered by this method with a reference to some historical agent or client, however, has been more troubling.

Methodologically, the major contribution of critical theory for legal scholarship seems to be its encouragement of a habit of radical distance from the materials of legal culture. Once attuned to the possibility of "false" consciousness and the mechanisms of social "legitimation," it seems difficult to speak about the law in the normalizing rhetoric common to much legal scholarship. Although this habit of distance is present in the work of many who have not had any contact with critical theory, it is one of the Frankfurt School's lessons for those who have immersed themselves in its social theory. A legal scholar who sought to develop such a distance from legal materials might begin by treating a court opinion as more than a description of legal theory or doctrine. Rather, he might regard it as a document which purports to be such a description — which claims to be descriptive of a legal culture which it is simultaneously creating.

Normally, when a legal scholar confronts a court opinion, it appears richly textured. Some elements seem more a part of the story it tells about the application of norms than others. Some parts are deeply normative (the holding), others only peripherally so (the dicta), others merely descriptive (recita-

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ORY AND PRACTICE 156 (J. Viertel trans. 1973); F. NEUMANN, *The Change in the Function of Law in Modern Society*, in DEMOCRATIC AND AUTHORITARIAN STATE (1957); OVERMANN, *Sozialisationstheorie: Ansätze zu Einer Soziologischen Sozialisations Theorie und ihrer Konsequenzen fuer die Aegemeine Soziologische Analyse*, in KOELNER ZEITSCHRIFT FUER SOZIOLOGIE UND SOZIALPSYCHOLOGIE 143 (1979).

87. *See, e.g.*, F. NEUMANN, *supra* note 86.

88. *See, e.g.*, M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977); Balbus, *Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law*, 11 LAW & SOC'Y REV. 571 (1977); Klare, *Labor Law as Ideology: Toward a New Histriography of Collective Bargaining*, 4 INDUST. REV. L. J. 450 (1981);Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSP. 96 (1978).

89. *See, e.g.*, Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 3 RES. L. & SOC. 1503 (1984); *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25 (1980); Trubeck, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

tion of facts or elaboration of doctrine). Depending upon the purpose with which we read, this landscape will change, thrusting different aspects of the court's story to the forefront. Moreover, we might imagine the opinion to be part of an elaborate historical context, which showed now an economic, now a political, now a psychological facet. Viewed by a critical theorist, however, the text is uniformly flat. It is all a telling at equal distance. Each element of the text would stand in potentially the same relationship to the text's larger cultural claim about itself. This approach would thus focus on situating the legal text as a whole in a cultural project. Once having established this stance, the legal-scholar-as-critical-theorist would search in the text for evidence that the claims which the text made did not cohere. The legal scholar would then struggle to demonstrate that the law is a tale, an ideology about itself. He would seek to exploit the incompleteness of that ideology to expose both its incoherence and its status as a form of consciousness.

Two potential avenues of legal criticism seem to have been encouraged by the Frankfurt School tradition. In the first, elements of the text are brought into relationship with other elements whose presence they seem to exclude. Exceptions are made to devour rules and rules to devour exceptions. Principles are extended until they conflict with one another, undoing the text's attempt to "balance" principled alternatives. Results are shown to be consistent with the principle whose application they purport to be and with the principle excluded by the process of their derivation. And so on. A second avenue of criticism challenges the historical claims which legal doctrine and theory make about themselves by replacing accounts of progress with accounts of dialectical struggles in which one "consciousness" about the law displaced another.

The objective for these critical maneuvers is not to demonstrate that legal materials are or were mistaken in their accounts of doctrine or facts. The critical-theory-inspired-legal-theorist would not point out, for example, that the "better" rule, the real interest or policy, the "relevant" facts, the "most important" holding was not X, but Y. Criticism of this sort is situated inside the claims law makes about itself. Distanced from those claims, the critical theorist examines the claim that the law is a sustainable story about rules, facts, etc. The objective is to dislodge the everyday perception of the participant in legal culture — to challenge the level at which legitimation occurs, if only the legitimation of apparent normalcy.

The critical legal theorist would imagine, then, that examination of the tale law tells might reveal contradictions which call into question legal ideology. One way in which a consciousness can be made to reveal its falsity is by demonstration that its source or nature repudiates it. Therefore, the critical theorist seeks to explain the ways in which the self-reflective claims of legal ideology are unsustainable. The goal would be to explore the extent to which the self-reflective claims law makes do not hold up — an exploration conducted by an internal reading of legal materials which reveals their contradictory nature.

The only way to tell whether critical theory has hit its mark, however, is to see it confirmed in practice, in the activity of liberated agents. This idea has been reflected in legal scholarship influenced by the Frankfurt School in two ways. In the first place, this scholarship puts a great deal of faith in method. The critical theorist hopes that his critical method — the grab bag of techniques by which he brings the claims of a consciousness into contrast with its

content — will shake the grip of legal consciousness on agents' will. The critical theorist does not seek to persuade agents with programatic alternatives. He seeks to liberate them with a methodological karate chop. As a result, the legal scholar inspired by critical theory spends a great deal of time practicing his karate — and is likely to imagine that success resides in refinement of the chop.

This approach runs into trouble when it confronts the diversity of contemporary legal scholarship which it criticizes. Indeed, it seems that the strength of contemporary legal consciousness resides precisely in its supple eclecticism — a diffusion which makes it invulnerable to any single methodological maneuver. The result for critical legal scholars has been a great deal of theoretical defense of the claim that legal consciousness can be predicted *a priori* to be susceptible to a methdological critique. This claim, which seems by the critical theorist's own account to be impossible to prove, except in the doing, has made the critical legal theorist vulnerable to criticism for methodological formalism as well as radical skepticism or a belief in nihilism, odd as that may sound.

Secondly, the emphasis on confirmation in action has contributed to the uneasy relationship which legal scholars generally have to the world of practice. Just as critical theorists of the Frankfurt School continually reinforced their theoretical work with a location for historical agency, those in legal scholarship who have been influenced by critical theory tend to displace their politics through academic activity into legal culture and the legal profession. They often imagine themselves to be working in alliance with, or on behalf of, some group of progressive practitioners or at least against mainstream legal scholars whose work they think of as legitimating the status quo of legal culture.

As a result, the product of the critical legal scholar often refers out or forward, expiating politics by the invocation of another on whose behalf the legal academic remains in the academy. Like the Frankfurt School, critical scholars of the law have cycled through a number of potential clients. The critic often began by situating himself with the mainstream academic, as a scholar working on behalf of practice. By valorizing the practice of the left bar, the critic could ground his attack on the "apologetic" mainstream colleague. As this relationship gave way to a critique of legal practice and culture generally, the critic came increasingly to invoke either the positions and activities of the political "left" generally or various dispossessed groups. Such invocations often appear in relatively undifferentiated string-cite form in critical articles; minorities, women, Jews, Palestinians, homosexuals, people of color, the third world, and so on. Often, however, a single group has been singled out — most recently women — as the unspeakable voice, the political redeemer of legal work which no longer feels comfortable expressing its commitment directly to a legal client. Alternatively, one finds a more general invocation of authentic human relations, of the private, passionate, intuitive world of phenomenologically comprehended face-to-face human interaction.

These references outside the world of legal theory by the critical theory-inspired theorist of law are troubling. In the first place, they recapitulate the relationship which most legal scholars think of themselves as having to some portion of the bar, and it is difficult to see how the relationship of the critical theorist to the left bar is different from the other relationships of service and

persuasion which a pluralist academy has developed with a pluralist profession. Indeed, this homological relationship suggests the aporia of a search for origins in critical theory.[90] The origin of oppression, the source of alienation, the driveshaft of capitalism, the agent of liberation remains the grail of the Frankfurt School, although it is a hidden and dialectically diffused and transformed grail. The result, when critical theory has unpacked a cultural discourse such as law which is not itself the history of philosophy, has been a cynical critique of "legal ideology" which is unable to locate the absent agent, or of "legal legitimation" which cannot contextualize the oppression. Rather than cognition or liberation we find ourselves tempted by circular cynicism.

III. STRUCTURALISM

Lawyers use the word "structural" in a wide variety of ways when describing their approach to legal doctrine and institutions. A "structural" approach might be one which relies heavily upon sociological insights about the ways in which rules connect and define institutional functions, or one which focuses on the relationship between particular doctrines and some broad "structure" such as federalism or the separation of powers. The "structuralist" tradition which I describe here has very little to do with such uses of the word "structure." Structuralism refers rather to a distinct body of work developed in a variety of fields during the first two-thirds of this century.[91]

Unlike critical theory which needs to be understood both as a historical-theorizing endeavor and as a set of continuing conditions on, and assumptions about, scholarship, structuralism needs to be understood more statically — as a common problem or approach emerging in different disciplines. As a result, I treat the "structuralisms" of linguistics, anthropology, literature and law distinctly. It will be useful, however, to keep in mind the problematic which

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90. *See, e.g.*, Benhabib, *Modernity and the Aporias of Critical Theory*, TELOS (No. 49) 39 (1981); G. FRANKENBERG & R. ROEDELL, *supra* note 79 (acknowledging the difficulty of searching for origins through moral development theory).

91. For a straightforward introductory essay on structuralism, see Caws, *What is Structuralism?*, 35 PARTISAN REV. 75 (1968). The oldest text with a claim to being structuralist is GIAMBATTISTA VICO, THE NEW SCIENCE (1725) (T. Bergin & M. Fisch trans. 1968). The seminal modern structuralist is Ferdinand de Saussure (1857-1913) whose work in linguistics on the "lexicon of signification" in the early years of this century laid the groundwork for all of modern structuralism. Structuralism has been far more influential in the development of French intellectual thought than in Anglo-Saxon traditions. Unlike the American Critical Legal Studies School, the French Structuralists are not a self-identified school and many, like Roland Barthes, have considered being labeled a "structuralist" both an arbitrary classification and a violation of their freedom of thought. For a brief discussion of their objections to being categorized as structuralists, see INTRODUCTION TO STRUCTURALISM AND SINCE: FROM LEVI-STRAUSS TO DERRIDA 3-4 (J. Sturrock ed. 1979) [hereinafter STRUCTURALISM AND SINCE]. However, because of their common ancestry in the works of Saussure, they are still commonly referred to as the French Structuralists. For interesting anthologies of structuralist writings, see STRUCTURALISM (J. Ehrmann ed. 1970); STRUCTURALISM, A READER (M. Lane ed. 1970); THE STRUCTURALISTS (R. de George & F. de George eds. 1972). There is also a growing literature of commentary on structuralist thought. *See, e.g.*, T. HAWKES, STRUCTURALISM AND SEMIOTICS (1977); E. KURZWEIL, THE AGE OF STRUCTURALISM (1980); P. PETTIT, THE CONCEPT OF STRUCTURALISM (1977); STRUCTURALISM AND SINCE, *supra*.

unites these efforts. The structuralist seeks to develop accounts which will make more intelligible and coherent the total collection of surface manifestations associated with a phenomenon or field (including those often considered to be contradictory or unrelated or marginal by more conventional analysis) without reference to any causal origin for the phenomenon's coherence external to it. Unlike critical theory, which constantly sought to identify and make responsible the agents of history, structuralism sets aside any question of agency. The structuralist asks how language can explain its puzzling flexibility and coherence without reference to either the object world described by words or the subject world which invents and deploys language. He asks how culture can account for its diversity and meaningfulness without reference to history or function. He explores the "literariness" of literature without linking it to an originating literary genius or a consuming culture.

The structuralist answers these questions by reference to relations among terms within the texts of language or literature, suggesting, for example, that language is generated by a structuralist grammar. The difficulty for structuralists is to sustain their original disinterest in external agency or to avoid simply reconstituting an image of agency internal to the materials with which they do work.

A. Linguistics

The tradition of structuralism in linguistics was enabled by the theoretical separation of what Ferdinand de Saussure termed the "synchronic" and "diachronic" studies of language.[92] Prior to Saussure's work, linguists had primarily studied the historical development of language, recounting the alteration and reinforcement of meaning over time. Saussure referred to this work as "diachronic." In his own work, Saussure examined the present linguistic moment, in which meaning is produced by the relations among linguistic terms themselves rather than by history. He terms this work "synchronic." This differentiation, which took slightly different forms in various branches of early structuralism, permitted Saussure to study the relational structures of linguistic meaning and set aside questions about the subject of history or of conscious agency. Thus, Saussure not only distinguished these two realms of inquiry, he sought to work only in the synchronic. To his mind, only the synchronic was available to linguistic inquiry. This isolation of the synchronic dimension of language from issues of historical agency led to a series of studies of synchronic systems of meaning which constitute the tradition of structuralism.

If critical theory left the nineteenth century searching for the historical subject, structuralism began the twentieth by refusing such an inquiry.[93] This inattention to questions of history and agency proved problematic. As the

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92. *See* F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (C. Bally, A. Sechehaye & A. Reidlinger eds., W. Baskin trans. 1959). For a discussion of Saussure's works and their importance for the subsequent expansion of the structuralist method, see J. CULLER, FERDINAND DE SAUSSURE (1976).

93. For an elaboration of this comparison, see F. JAMESON, THE PRISON-HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM (1972). *Cf.* A. SCHMIDT, HISTORY AND STRUCTURE, AN ESSAY ON HEGELIAN-MARXIST AND STRUCTURALIST THEORIES OF HISTORY (J. Herf trans. 1981).

methodological separation of synchronic and diachronic developed into a theory of meaning which excluded the diachronic from consideration, structuralists tended to reintroduce the absent subject into their work. To avoid the tendency toward sterile formalism encouraged by the focus only upon the synchronic, structuralists developed theories of history, rupture or agency which addressed the question of the origins of synchronic structures and might be thought of as placeholders for the absent subject. The key to deciphering structuralists' analysis is to trace the disappearing subject toward its eventual reassertion within the synchronic.

Saussure's insistence upon the exclusivity of synchronic analysis is expressed by his analysis of the "sign." According to Saussure, "the linguistic sign unites, not a thing and a name, but a concept [the signified] and an acoustic image [the signifier]."[94] Because the bond between the signifier and the signified exists only within the system of language, the sign is also arbitrary. Moreover, Saussure insists that signs, themselves disconnected from names or things, fully constitute language. As a result, Saussure asserts the independence of the linguistic synchronic by asserting the primacy of the sign: "to the degree that something is meaningful, it will be found to be synchronic."[95] This approach asserts that there is no referent other than another sign. Structural linguists do not think of language as cut off from social meaning, but rather as fully constitutive of social meaning at each moment.[96]

The most important insight produced by subsequent structuralist analyses of synchrony is the notion that the relationships between things rather than the things themselves are important. Things do not have true essences which can be studied; their existence is defined by their relationship to other things. One should therefore study the relationships among things. This claim is different from relativism. The assertion is not that things are only important relative to each other or only meaningful in their context. The claim is not that essences are badly connected to meaning and understanding. The claim is that essences are present only in the relationships which lend them meaning.[97]

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94. *See* F. DE SAUSSURE, *supra* note 92, at 98.

95. *Quoted* in Buyssens, *La Linguistique Synchronique de Saussure*, in XVIII CAHIERS FERDINAND DE SAUSSURE 17 (1961).

96. Saussure's insistence on the comprehensiveness of social meaning at each moment is echoed by other structuralists. Lacan writes, for example, "only the relationship of one signifier to another signifier engenders the relationship of signifier to signified." A. WILDEN, THE LANGUAGE AND THE SELF 239 (1968) (quoting Lacan). Similarly, the Russian Formalists began their project of literary criticism by opposing notions of literature as the bearer of a philosophic or natural content which could be uncovered in a search for the origins of literary development. *See* F. JAMESON, *supra* note 93, at 43-47. This critical stance rejected diachronic study of literature as an evolving essence as well as the study of contemporary literary products as the embodiment of a single, timeless technique or psychological impulse. The elaboration of these refusals in Russian Formalism isolated and privileged the synchronic literary system exactly as de Saussure had isolated the synchronic linguistic moment. "Literariness," for the formalists, became a function of synchronic relations which could be historically isolated.

97. The classic work on structural linguistics is F. DE SAUSSURE, *supra* note 92. A standard introduction to structural linguistics remains J. LYONS, INTRODUCTION TO THEORETICAL LINGUISTICS (1968). *See also* T. HAWKES, *supra* note 91; P. PETTIT, *supra* note 91, at 1-29. Recent developments in structural semiotics are presented in R. COWARD & J. ELLIS, LANGUAGE AND MATERIALISM (1977). *See also* P. de Man, *Semiology and Rhetoric*, in TEXTUAL STRATEGIES 121

Within language, this is easy to see. It is a common experience that speakers of a foreign language often are hard pressed to *hear* phonetic differences which change the meaning of English words. L and R for the speaker of Japanese, D and T or T and Th for the German speaker; W, V, F and WH for speakers of many languages, are simply not heard. English speakers are likewise likely to miss tonal changes in some Asian languages or the ü and u or o and ö in German. As a result, words with widely different meanings are in fact not different. The Chinese "san" might be translated as "three" (san), "umbrella" (sān) or "to disperse" (sàn). In other words, there is no natural degree of difference between particular words. Boston pronounced "bawhston" or "baahston" will not sound different, but "lend" and "lent" will. The existence of a given entity or sound unit is defined only by its contrast to things which seem different. The sense of difference comes from notions of relationship, not from the things themselves.

While this is easy enough to see within language, it is much more difficult to imagine how language could be the definer of differences external to itself, between a world of concepts and world of objects. A group of American linguists, foremost among them Edward Sapir and Benjamin Whorf, suggested the process by which language defined or structured both the nature of the reality it described and the speaker's cultural conception of it.

> The worlds in which societies live are distinct worlds, not merely the same world with different *labels attached* . . . . We see and hear and otherwise experience very largely as we do because the language habits of our community predispose certain habits of interpretation.[98]

The notion is that we perceive something only in opposition to something else and that there is a cultural mechanism which structures the way those oppositions occur.

Earlier linguists had been able to explain the relative fixity of meaning in language — and consequently its ability to communicate — by reference to agents and social processes external to language. For linguists who focused solely upon the sign, cut loose from its referent, it was more difficult to explain how language generated meaning. If not for a more or less accurate "fit" between words and ideas or things, how is language stabilized? The structuralists responded to this difficulty by dividing the synchronic into two levels.

Language was understood to operate on two distinct levels. There is a surface level of speech, of particular utterances, which has been termed *parole*, and a deeper level of linguistic rules structuring those utterances and giving them meaning, which has been termed *langue*.[99] At the level of *parole*,

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(J. Harari ed. 1979). On Saussure, see J. CULLER, FERDINAND DE SAUSSURE (1976).

98. E. SAPIR, SELECTED WRITINGS OF EDWARD SAPIR IN LANGUAGE, CULTURE AND PERSONALITY 162 (D. Mandelbaum ed. 1949). *See also* E. SAPIR, LANGUAGE (1921); B. WHORF, LANGUAGE, THOUGHT AND REALITY (J. Carroll ed. 1956). For a commentary on the works of Sapir and Whorf in this area, see G. STEINER, AFTER BABEL: ASPECTS OF LANGUAGE & TRANSLATION 87-94 (1975).

99. F. DE SAUSSURE, *supra* note 92, first introduced the terms *langue* and *parole*. Briefly, *langue* is the structure of a language, the body of linguistic rules which must be followed to communicate in that language; *parole* is the actual day-to-day use made of that system by individ-

words are given meaning by their relationship with — degree of difference from other words. We understand a world of objects differentiated according to our naming scheme, and related to each other in accordance with our categorizing scheme. The grammar which structures these relations is the *langue*. Because this underlying *langue* is visible only as it is manifested in *parole* it can be apprehended only through the study of the *parole*.

The development of a distinction between the *langue* and *parole* permits analyses of the synchronic as a system of meaning. At the same time, however, it threatens the enterprise of synchronic study by suggesting a place, the *langue*, in which the origins of meaning might be "found." The assertion of the *langue/parole* distinction has led to attempts to locate the *langue* in social, psychological or genetic existence or to search for the essential pattern of the *langue* as if this would be other than a *parole* relationship.[100]

The independence of the sign thus seemed to require that the synchronic moment be composed of various levels. Meaning, if not diachronically produced, came to seem generated by a deep level of synchrony. As a result, structuralist linguists began to constitute relations within the synchronic analogous to those between the diachronic, which they initially sought to set aside, and the synchronic. The development of two levels of synchronic structure is the first reappearance of the bracketed subject within structuralism. Despite its tendency to subvert the structuralist's initial denial of the subject or of external referents for language, the development of the *langue/parole* distinction opened up a series of synchronic studies in various fields.

B. Anthropology

Structural anthropologists extended the work of structural linguistics to suggest that the whole of culture also has a *langue* and a *parole*.[101] Man's

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ual speakers or writers of the language. According to F. DE SAUSSURE, *supra* note 92, at 10, "what is natural to mankind is not oral speech, but the faculty to construct a language, i.e., a system of distinct signs corresponding to distinct ideas." Thus *langue*, "the linguistic faculty proper [lies] beyond the functioning of the various organs." *Id.* at 11. Furthermore, it is "both a social product of the faculty of speech and a collection of necessary conventions that have been adopted by a social body to permit individuals to exercise that faculty." *Id.* at 9. Thereafter, *langue* is the "larger" structure, while *parole* the smaller, material aspect of language. *Cf.* N. CHOMSKY, LANGUAGE AND RESPONSIBILITY (M. Ronat interviewer, J. Viertel trans. 1979). Chomsky distinguishes between linguistic "competence" and "performance": the former referring to the speaker's theory of language, the latter to practical application of that theory. *Id.* at 48-50.

100. *See infra* notes 118-20 and accompanying text.

101. *See* C. LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY (C. Jacobson & B. Schoepf trans. 1968). It is fruitful to contrast Levi-Strauss's approach with the two views that have dominated anthropology. Originally, non-Western peoples were considered to be psychologically different. Therefore, the study of other cultures was considered to be psychologically relevant from both an evolutionary and a comparative viewpoint. Works such as H. MAINE, ANCIENT LAW (1861); L. MORGAN, ANCIENT SOCIETY (1877); E. TYLOR, PRIMITIVE CULTURE (1971), laid the foundations for the study of cultural evolution. Modern anthropology accepts the psychic unity of mankind, and in fact, uses this argument to distinguish anthropology from psychology: since the human mind is "common" across cultural settings, anthropological study should focus upon the different social structures and institutions of different peoples. *See, e.g.*, E. EVANS-PRITCHARD, THE NUER (1940); J. MIDDLETON, THE LUGBARA OF UGANDA (1965); S. MOORE, POWER AND PROPERTY IN INCA PERU (1958). Like this modern approach, structural anthropology begins with cultural vari-

overall relationship with the world may be thought of as an elaborate linguistic process in which essence is given to things and concepts through a complex coding scheme. As a result, the study of cultural outputs (empiricism) or conceptions (naturalism) needs to be supplanted by a search for the cultural *langue*.

These anthroplogists, most important among them Levi-Strauss, approach culture as a complex fabric of synchronic relationships. At one end, a variety of real world things are organized into patterns. At the other end, ideas are given shape and expression. The middle, where all this happens, where the objects and ideas are created *and* comprehended is the realm of explanation, discourse, ritual, myth, argument, thought, action; in short, of culture. Levi-Strauss wants to show that the structures of myths in this cultural realm both create and reflect our minds and our world.[102] To find out how this happens, he searches for underlying structures, accepted patterns of understanding, of behaving or of categorizing, which are typical of a given culture, and analyzes them in relationship to one another. He takes myths apart to discover repeating patterns which transcend and order the content of the individual myth.

In the process, Levi-Strauss describes two levels within each myth which are reminiscent of the *langue* and *parole* of structural linguistics. First, there are the individual statements, or story segments, or events which make up a given telling of the myth. Then there is the grammar by which these units are assembled into a coherent myth. This second level is larger than any given

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ety, but rather than featuring this variety as the level of analysis, it is concerned with the ultimate basis from which this variety is generated. Of course this deep structure is derived from the diverse body of material selected for study, but in the final analysis all surface differences are traceable to basic characteristics of the mind. According to Sperber, *Claude Levi-Strauss*, in STRUCTURALISM AND SINCE, *supra* note 91, at 19: "Levi-Strauss's originality . . . is to have combined [contemporary anthropology's] psychic unity of man (actually, he has strengthened it) with new arguments to show that ethnography has a true, indeed unique, psychological relevance." *Id. See, e.g.*, C. LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP (J. Bell, J. von Sturmer & R. Needham trans. 1969); C. LEVI-STRAUSS, THE RAW AND THE COOKED (J. Weightman & D. Weightman trans. 1969). *See also* CHARBONNIER, CONVERSATIONS WITH CLAUDE LEVI-STRAUSS (J. Weightman & D. Weightman trans. 1969).

102. *See* C. LEVI-STRAUSS, *supra* note 101. *See also* the following works of Levi-Strauss: FROM MONEY TO ASHES (J. Weightman & D. Weightman trans. 1973); THE SAVAGE MIND (1966); THE SCOPE OF ANTHROPOLOGY (S. Paul & R. Paul trans. 1967); TOTENISM (R. Needham trans. 1963) TRISTES TROPIQUES (J. Weightman & D. Weightman trans. 1973); *The Bear and the Barber*, in READER IN COMPARATIVE RELIGION 289 (W. Lessa & E. Vogt eds. 1958); *The Story of Asdiwal*, in THE STRUCTURAL STUDY OF MYTH AND TOTENISM 1 (E. Leach ed. 1967). An interesting set of interviews with Levi-Strauss is CHARBONNIER, CONVERSATIONS WITH LEVI-STRAUSS, *supra* note 100. For commentaries on the work of Levi-Strauss, see, CLAUDE LEVI-STRAUSS (E. Hayes & T. Hayes eds. 1970); T. HAWKES, *supra* note 91, at 32-58; E. KURZWEIL, *supra* note 91, at 1-34; E. LEACH, CLAUDE LEVI-STRAUSS (1970); O. PAZ, CLAUDE LEVI-STRAUSS (1970); THE STRUCTURAL STUDY OF MYTH AND TOTENISM (E. Leach ed. 1967); THE UNCONSCIOUS IN CULTURE (I. Rossi ed. 1974); Dyson-Hudson, *Structure and Infrastructure in Primitive Society: Levi-Strauss and Radcliffe-Brown*, in THE STRUCTURALIST CONTROVERSY 218 (R. Macksey & E. Donato eds. 1972); Harris, *Levi-Strauss et La Palourde*, 16 L'HOMME 5 (1976); Sperber, *supra* note 100; Steiner, *Orpheus with his Myths: Claude Levi-Strauss*, in LANGUAGE AND SILENCE 248 (G. Steiner ed. 1969). For a provocative critique of Levi-Strauss, see J. DERRIDA, *Structure, Sign and Play in the Discourse of the Human Sciences*, in WRITING AND DIFFERENCE 278-93 (A. Bass trans. 1978).

telling of the myth and in this sense he maintains that a myth is properly understood to consist of all its versions.[103] This deeper structure is what permits us to place the myth, recognize it as a myth, understand it. Terrence Hawkes usefully describes this sensation as follows:

> Of course, when we hear any myth being told, we only ever encounter the "orchestra" score line by line, diachronically, and we infer (or "hear") the resonances of each 'bundle' as we go along, just as, to take another musical analogy, when we listen to a soloist in a jazz group we (and he) infer from his solo performance the original sequence of chords; the "tune" from which it derives, and on which it contributes a tonal commentary.[104]

This insight leads Levi-Strauss to study a wide variety of myth-tellings, and indeed of diverse myths, in a single framework. In doing so, he builds archetypes, fills in the blanks, reduces and mutates the content of individual myths in a myriad of ways. He seems to open himself thereby to the charge that he has not adequately accounted for various myths in their specificity. Indeed, he seems to claim that it is *only* by rupturing the synchronic from the diachronic that he can discover the myth's place in the *langue*.

The structuralist's distance from more traditional approaches is more visible in anthropology than in linguistics. We are used to thinking of a "grammar" which structures our language — and may have practiced doing violence to sentences in order to uncover the "parts of speech" in elementary school. But we are not used to unraveling our cultural narratives in the same way. Thus, Levi-Strauss's assertion that he is not interested in the *parole* level specificity of culture, except to the extent that it reveals something about the *langue*, which structures it seems bold.

This boldness results from the insight that the mythmaking *langue* exists only as it is used. Just as the grammar of a language is only known by the way it structures concrete sentences, or the "tune" in a piece of music is only known as it structures individual notes, chords or rhythms, so also the cultural *langue* is a pattern of myths which exist only on the *parole* level. Consequently, the building of archetypical *parole* models is the only way to discover the *langue* which lies beneath. The process of doing violence to individual tellings of the myth is necessary to the undertaking.

By ripping culture from its apparent grounding in the diachronic, moreover, Levi-Strauss develops a dynamic dimension within the synchronic. The structuralist anthropologist focuses on the dynamics of myth-making. Levi-Strauss sought to capture the process of myth-making, of structuring, with his concept of "*bricolage*." *Bricolage* is the process by which people (*bricoleurs*) manipulate structures in the *langue* to order and produce outputs at the *parole* level.[105] The *bricoleur* implements or deploys a refined and complex logic to link culture and nature, thereby constructing the world, he seems, at the *parole* level, only to be describing.

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103. C. LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY, *supra* note 101, at 217.

104. T. HAWKES, *supra* note 91, at 45.

105. *See* C. LEVI-STRAUSS, THE SAVAGE MIND 16-33 (1966). The term *bricoleur* has no precise equivalent in English. At best, it refers to a kind of professional do-it-yourself man, or jack of all trades.

The system of *bricolage* is important because it answers the difficult question of how culture can be both free of grounding in the things and ideas to which it seems to refer and still be experienced as meaningful and relatively stable. In language, once words were recognized to refer only to other words, the question to be answered by linguistics was how language could permit a perhaps infinite variety of new expressions to be recognized and understood. The separation of *langue* and *parole*, together with the development of sophisticated, and in part, structural grammars provided the answer. *Parole* outputs could be devised ad infinitum in accordance with the grammatical rules which made up the *langue*. These would continue to be understood because they would be accepted, *langue* approved transformations of previous outputs.

In anthropology, the route was somewhat more difficult than in linguistics. The recognition that myths were neither "real" nor "false" but somewhere in between required not just the development of a cultural *langue*, but some conception of how the *langue* structured the *parole*, of how the process of organizing the world operated both to change the organizing scheme and to create the world. This process of *bricolage* remains fuzzy at best, but can be thought of as similar to the way speakers of a language implement grammar to introduce new grammatical construction as well as sentences with new content. The important point is that *bricolage* remains an imagined process unlocated in specific *bricoleurs*. Levi-Strauss suggests that this apparent origin for myth is itself a myth.[106]

Just as the *langue* took the place within the synchronic of the diachronic which had been set aside by structural linguistics, so the *bricoleur* threatens to introduce into structural anthropology the historical agency or subject initially set aside by Levi-Strauss. Internal neither to the synchronic scheme nor to its diachronic origin, the *bricoleur* operates the system of meaning. Just as the creation of the *langue* to undergrid the *parole* echoed the exclusion of the diachronic from study, so also the *bricoleur* echoes the rehabilitation of the *langue* as part of the synchronic; the trace of its diachronic possibility.

Although the *bricoleur* reminds us of the historically situated subject, the *bricoleur's* subjectivity is impaired. *Bricolage*, after all, is a synchronic process. Although it is difficult to get a sense of how a synchronic structure can unite myths about different things or provide the mechanism for production of new myths without actually working through several of Levi-Strauss's classic examples, it might be useful to describe several general aspects of his approach.[107] To Levi-Strauss, "mythical thought always progresses from the awareness of oppositions to their resolution."[108] His vision is that our cosmology, itself the product of prior myth-making, proposes oppositions in our experience: man/woman; raw/cooked; related/not related; native/foreign. A myth

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106. *Id.* at 17. *Cf.* C. LEVI-STRAUSS, THE RAW AND THE COOKED 5-6 (J. Weightman & D. Weightman trans. 1969).

107. C. LEVI-STRAUSS, L'HOMME NU (1971) contains over 800 examples of his analysis of myths. For a more concise description of the methodology with examples, see C. LEVI-STRAUSS, *Four Winebago Myths: A Structural Sketch*, in CULTURE IN HISTORY 351 (S. Diamond ed. 1960). *See also* Jacobson & Levi-Strauss, *Charles Baudelaire's "Les Chats,"* 2 L'HOMME 5 (1962); Levi-Strauss, *The Structural Study of Myth*, 78 J. AM. FOLKLORE 428 (1955).

108. C. LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 224 (C. Jacobson & B. Schoepf trans. 1968).

will typically relate one irresolvable tension to another resolvable one. This "transformation" permits the feeling of opposition to subside while reaffirming the cosmology of differences. That is, we structure social life to validate our "cosmology by its similarity of structure."[109]

As a result, *bricolage* is self-validating and has no origins or consequences beyond the synchronic. The *bricoleur* consequently inhabits a closed social structure. Piaget, more than Levi-Strauss, has directed his attention to this social closure as an experience of actual people. He elaborates most fully the nature of a structure such as that which constitutes the myth-making *bricoleur*.[110] Such a structure, in Piaget's terms, has three principle attributes. First, it is whole, by which Piaget means that a structure is internally coherent and complete. Completeness means that each part is only important for the role it plays in the whole. Second, a cultural structure is transformable, by which he means that it is dynamic and able to process new material through itself, thereby changing itself, without losing its wholeness. Third, such a structure is self-regulating, in the sense that these transformational possibilities are governed by the structure itself and need not be externally validated. If myth-making, and by implication, culture generally, is such a structure, it will be able to develop endlessly without violating itself and without exposing itself or permitting the *bricoleur* an external perspective.

This self-validating aspect of a cultural *langue* permits the structure to hide itself as it performs. The vision is one of a ceaseless reordering of the world to validate an ever-mutating cosmology. In such a world the *bricoleur* could not be an agent *using* or *being used by* the structure. The word "*bricoleur*" would refer only to the intersection of mythic structures. There

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109. *Id.* at 216.

110. J. PIAGET, STRUCTURALISM 5-16 (C. Maschler trans. 1968). Piaget's analysis attempts to capture the deep structure, the real essences of mind rather than transitory ideological structures. *See also* J. PIAGET, BIOLOGY AND KNOWLEDGE (B. Walsh trans. 1971); J. PIAGET, THE ORIGINS OF INTELLIGENCE IN CHILDREN (M. Cook trans. 1966); J. PIAGET, THE PRINCIPLES OF GENETIC EPISTEMOLOGY (W. Mays trans. 1973). For an interesting set of commentaries on Piaget, see STUDIES IN COGNITIVE DEVELOPMENT (D. Elkind & J. Flavell eds. 1969). *See also* Flavell, *An Analysis of Cognitive Development Sequences*, in GENETIC PSYCHOLOGY MONOGRAPHS (No. 86) 279 (1972). Piaget's cognitive theory has influenced much contemporary developmental psychology, particularly that concerned with moral development. *See, e.g.*, Kohlberg, *Stage and Sequence: the Cognitive-Developmental Approach to Socialization*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 353 (D. Goslin ed. 1969); Kohlberg, *From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away with it in the Study of Moral Development*, in COGNITIVE DEVELOPMENT AND EPISTEMOLOGY 163 (T. Mischel ed. 1971). It is interesting to note that Habermas has drawn upon the Piagetian tradition (in particular the work of Kohlberg) in his attempt to develop the psychological dimension of critical theory. *See* J. HABERMAS, *Historical Materialism and the Development of Normative Structures*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 95 (T. McCarthy trans. 1976). Habermas considers that the Piagetian School provides an important integration of structuralism, action theory and developmental concepts: "[t]he stimulus that encouraged me to investigate normative structures from the point of view of developmental logic also came from Piaget's *genetic* structuralism, that is, from a conception which has overcome the traditional structuralist front against evolutionism and has assimilated motifs of the theory of knowledge from Kant to Pierce." *Id.* at 124-25. *See also* Rotenstreich, *An Analysis of Piaget's Concept of Structure*, 37 PHIL. & PHENOMENOLOGICAL RES. 368 (1977).

would be no ground from which the *bricoleur* could confront the transformational oppositions of culture. The process of explanation, of thought, of culture, would deny him this direct confrontation.

The self-validating nature of cultural structures makes them difficult to study, for the participant in the *parole* can never glimpse the *langue*. It is not surprising that insight into *bricolage* developed in cross-cultural anthropology — in the observation of foreign *bricoleurs*. At the same time, however, this mechanism at the core of structuralism seems to preclude falsification of any account one might generate. To illustrate this problem of self-validation, consider a very stylized philosophic history such as the following.

Imagine that one detected in the history of social theory a tendency towards division and specialization of certain key conflicts, such as that between male and female, reason and desire, or hard and soft.[111] Imagine that the world of ideas progressively fragmented in an attempt to build pure conceptual alternatives. Suppose that upon examining the content of each specialized pole, one found it theoretically incomplete, or impossible to fully isolate from its partner and incapable of standing alone. The division of male and female, for example, might turn out to be theoretically untenable because each had meaning only as the other's antithesis and yet was inadequate alone. Or we might find that either a reason without the motivation, validation and content of desire or a desire without the calculus of reason to define it was unthinkable, yet each was defined by the exclusion of the other.

Two approaches equally possible and self-validating would be available to explain this phenomenon. But each would be unable to exclude the other. We might say, for example, that the real world is characterized by a unity of opposites which we perversely insist on bringing into conflict. In this view, the specialization of theory over the last 500 years was a continual attempt to force our conflicting cosmology on the world. Each time, however, the unity reasserted itself (the man in woman, the woman in man) and we were forced to define further our level of specialization in order to revalidate our cosmology. On the other hand, we might say that the world is in tension, that conflict is the fundamental fact of social life and that our cosmology reflects this tension. Therefore, argument and thought will continually force us to reflect on the conflicting nature of reality in each level in our theory. In this view, specialization recognizes conflict, rendering it analogous, and hence, understandable through theory.

In other words, accounts of the underlying *langue* of culture seem unable to generate any particular concrete insights about culture itself. The *parole* would be compatible with two self-validating and inconsistent analyses of the real world. The structuralist does not attempt to figure out "which way it really is." He has abandoned the effort to ground his exposé outside the *parole* which generates it. Moreover, he has set aside the attempt to ground the *parole* anywhere except in the *langue* which he claims can be understood to lie beneath its maneuvers. Indeed, one could not give content to either realm if

111. *See* L. Schiebinger, (1982 untitled and unpublished manuscript) (available on file at the Dept. of History, Harvard University). *Cf.* R. UNGER, KNOWLEDGE AND POLITICS 51-55 (1975). (Unger's discussion of the antinomy of reason and desire). He argues that "[n]either the morality of desire nor the morality of reason withstand close inspection. Each is inadequate, and needs to be qualified by the other." *Id.* at 51.

the circle of theory and action is itself a self-validating and self-creating structure.

Nevertheless, the structuralist might try to say something about the relationship among transformations of the conflict, however they might come out. In this sense, the structuralist analysis is not self-validating precisely because the structure is. The self-validating nature of the structure leads to a stranglehold of culture and nature. It is impossible for the inhabitant, the *bricoleur*, to see this structure precisely because it is effective in creating the world he sees. Terrence Hawkes has termed this the "anesthetic grip that such a permanent structuring process has on the human mind."[112] To the extent the structuralist aims to rupture that anesthetic grip, he begins to sound like an agent himself —reminiscent of the critical theorists who claimed to be able to tell the true from the false ideology by self-reflection.

Retrospectively, it is easy to understand how linguistic scholarship came to this point. Observing the development of a native language or even casual exposure to a foreign tongue quickly convinces one that the words themselves have no natural quality (a study of etymology can only be so interesting), and that to teach a language one must look for grammatical patterns which will ensure that while the foreigner's speech will be understandable he can choose his own content. This is also true of anthropology. Just as investigation of "primitive" and foreign Indian tongues jogged linguistics into the structuralist age, so it was the study of myths and primitive cultures which permitted the development of structuralism in anthropology. After cultural relativism had been fairly well accepted one could not simply dismiss myths as bad science or as interesting but fictitious stories.[113] Nor, however, were the myths of any one culture "true," in some absolute sense. This relativism made it easy to imagine that the content of the myth was not the main event — they were, after all, myths — but that they played an important cultural role. Cross cultural comparison of a variety of astonishingly similar myths led to the structuralist approach.

In this sense, Levi-Strauss's advances were ironically permitted by precisely the stereotypical view of savage primitivism against which he argued. The notion that these were "other" systems exempted them and him from the anesthetic grip which would hinder a structuralist analysis of the researcher's own cultural *langue*, at least in the first instance. The difficulty with such a liberating mission for structuralism, however naturally it seems to flow from the sense of having understood "what was going on" behind the cultural forms others experience as natural, was that it threatened to reopen the diachronic. Indeed, the notion of a closed system of synchronic references seems to have troubled Piaget. He is continually attracted to questions of origins, of child

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112. T. HAWKES, *supra* note 91, at 14.

113. Cultural relativism became generally accepted after R. BENEDICT, PATTERNS OF CULTURE (1934). This position contradicts the views advanced by pioneer figures in psychological anthropology that personality configurations are a stable, enduring aspect of a culture. Benedict, for example, stressed the peaceful, noncompetitve nature of the Pueblo Indians, contrary to the fact that in the sixteenth and seventeenth centuries that race had fought a series of messianic wars during which they had massacred Spanish priests and laid waste their churches and monasteries. For a discussion of the historicity of de-centered analysis, see Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences*, in WRITING AND DIFFERENCE 278-80 (Bass trans. 1978).

development, and develops a wide variety of accounts of the structural development of the omitted subject.

C. *Literature*

Structuralist literary critics extended the synchronic study of culture in a variety of ways.[114] Among the most significant were the studies of "literariness" and plot structure carried out by the Russian Formalists and their successors and the approach to literary history and readership developed by Roland Barthes. Like the structural linguists, the Russian Formalists changed the focus of their study from diachronic accounts of literary developments to synchronic analyses of literature's structure.[115] Once the synchronic dimension of literature had been isolated, however, they felt it necessary to explain the "literary" quality of literature.

So long as literature was understood to be connected to, indeed expressive of, a diachronic process of cultural development, its literary quality seemed but one dimension of its social meaning. Aspects of art could be thought to exist for an external purpose — they express a historical subject or produce an

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114. For some general works on structuralist literary criticism, see J. CULLER, *supra* note 97; S. DOUBROVSKY, THE NEW CRITICISM IN FRANCE (D. Coltman trans. 1973); T. HAWKES, *supra* note 91; F. JAMESON, references, *supra* note 93; R. SCHOLES, STRUCTURALISM IN LITERATURE (1974); THE STRUCTURALIST CONTROVERSY (R. Macksey & E. Donato eds. 1972).

The movement in literature from traditional criticism to the "new" criticisms of which structuralism is a part has not followed any single, discernible path. The change has been more eclectic and pluralistic. Very generally, the movement from "old" to "new" criticism might be described in the following ways: (1) In terms of the aesthetics/view of the text: from viewing the text as a created, mystified product of talent, as intellect and sensibility assisting in the "knowing of reality," to seeing it as an artifact of the intersection of a particular psyche, culture, historical era and ideology, to considering it a generative instance of language, a message constructed from a code; (2) In terms of the focus of criticism: from examining the biographical and historical details of the author and era to considering the genre and the context of other texts to concern with only the individual text itself as self-explanatory, to a consideration of language itself and the accidental or arbitrary quality of any text; (3) In terms of methodology: from objectification and rationalization, to (emotional) subjectification, to the attempt to transcend the distinction between the text and reader through a temporal concept of reading the text being the same as writing the text; (4) In terms of theoretical basis: from the aesthetical, to the social and political, to the apolitical concerns of the structuralists and linguists; and (5) In terms of the purpose and function of the critic and criticism: from evaluating and revealing the relationships between text and reality in terms of the degree to which the work accurately expresses and describes it, to less evaluative interpretation of text as "fictive" truth, to the description or delineation of text as experience. For a discussion of traditional approaches to literary criticism, see R. BLACKMUR, NEW CRITICISM IN THE UNITED STATES (1951); J. RANSOM, THE NEW CRITICISM (1941); I. RICHARDS, PRINCIPLES OF LITERARY CRITICISM (1939). For examples of contemporary critical approaches, see J. CULLER, STRUCTURALIST POETICS (1975); P. de Man, *supra* note 97; THE FRONTIERS OF LITERARY CRITICISM (D. Malone ed. 1974); G. HARTMAN, CRITICISM IN THE WILDERNESS (1980); F. JAMESON, MARXISM AND FORM (1979); TEXTUAL STRATEGIES (J. Harari ed. 1979).

115. For commentaries on the Russian Formalists, see V. ERLICH, RUSSIAN FORMALISM (2d. ed. 1965); G. HARTMANN, BEYOND FORMALISM (1970); F. JAMESON, references, *supra* note 93. Another interesting collection of writings on Russian Formalism is the special double issue of *Twentieth Century Studies*, No. 78 (1972). For a commentary on this school, see T. HAWKES, *supra* note 91, at 59-76.

emotion or pleasure when consumed. The isolation of the synchronic broke these "meanings." Once literature was understood to present only a synchronic moment of meaning for study, unmoored from grounding in authorship or context, it became difficult to understand the distinctiveness of literature. For the Formalists, aspects of the text are meaningful only in relationship to other dimensions of the text and exist to bring the work into being as a work of art. Thus, aspects of a work have its "literariness" as their object and subject. This approach reimagines the historical function and distinctiveness of literature within the synchronic. The "literariness" of a text is the trace of the subject initially set aside by the structuralist literary critic.

This search for the "literary" produced studies of two types. The first, represented by Vladimir I. Propp and A.J. Greimas,[116] developed grammatical structures to "account for" the varieties of literary plots and characters. This approach sought an account for literature's special something by reference to the *langue*-like patterns which generated literary narratives. The second, best represented by Viktor Shklovsky, sought a synchronic device connecting the writing to the reader in a way which signified literariness.[117] Although also seeking to explain literariness as a product of the text's synchronous features, this approach brought the audience into that synchrony. Each of these efforts constituted a moment in the structuralist reimagination of the diachronous subject.

In developing grammatical structures of plot, character and poetic device, the Formalists developed an approach to texts reminiscent of Levi-Strauss's approach to myth. These model structures reveal a method by which other such abstract grammars might be developed. Propp, for example, develops a series of functions and spheres of actions for characters which unite the tellings of a single fairy tale or delimit the genre of fairy tale.[118] Propp develops a literary *langue* which is characterized by the interplay of conflict and resolution. A.J. Greimas proceeds similarly.[119] Where de Saussure was concerned with the *langue* which underlies the *parole* of language, Levi-Strauss with the *bricolage* responsible for myth, Greimas seeks the deep, inner "model" which structures story-telling.[120]

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116. *See infra* notes 118 and 119.

117. *See infra* note 123.

118. V. PROPP, MORPHOLOGY OF THE FOLKTALE 20-63 (2d ed. L. Wagner ed. 1968). *Cf.* E. MARANDA & P. MARANDA, STRUCTURAL MODELS IN FOLKLORE AND TRANSFORMATIONAL ESSAYS (1971) (maintaining that there are only five possible plot structures in myth and folklore). For an interesting commentary on the relationship between "formalism" and "structuralism", see Levi-Strauss, *Structure and Form: Reflections on a Work by Vladimir Propp*, in 2 STRUCTURAL ANTHROPOLOGY 115-45 (1976).

119. A. GREIMAS, DU SENS 135-55 (1970); A. GREIMAS, SEMANTIQUE STRUCTURALE 18-23, 173-96 (1966); A. GREIMAS, *Pour une Theorie due Discours Poetique*, in ESSAIS DE SEMIOTIQUE POETIQUE 6 (A. Greimas ed. 1971). For commentaries on Greimas's work, see T. HAWKES, *supra* note 91, at 87-95; F. JAMESON, *supra* note 93, at 163-65.

120. This work resembles Noam Chomsky's concern with the "competence" that underlies "performance" of speech. *See supra* note 99. For further works by Chomsky see ASPECTS OF THE THEORY OF SYNTAX (1965); CARTESIAN LINGUISTICS (1966); CURRENT ISSUES IN LINGUISTIC THEORY (1965); REFLECTIONS ON LANGUAGE (1975); SYNTACTIC STRUCTURES (1957); TOPICS IN THE THEORY OF GENERATIVE GRAMMAR (1966); Chomsky & Halle, *Some Controversial Questions in Phonological Theory*, 1 J. LINGUISTICS 97 (1965). For a commentary on Chomsky's work,

Like Levi-Strauss, Greimas feels the basic structural element is the perception of difference, of contrast. He develops a grammar for narrative which, he maintains, structures all stories. The nuts and bolts of this structure are oppositions which are resolved or changed. He develops a series of roles for narrative actors, who, in their relationship with each other will combine struggle and reconciliation, conflict and compatibility. Narration is the construction of movement and transformation by these actors of these contradictions.

The key to Greimas's contribution lies in the structure of contradiction which he develops. To him, opposition can be reduced to four relationships. Each entity may be confronted with its opposite or its negation. Thus, B is confronted with both A and -B, and A by both B and -A. Thus, -B is the contradiction of both B and -A, -A of both -B and A; A of both -A and B, B of both A and -B. These relationships are:

A vs. B

-A vs. -B

B vs. -B

A vs. -A

According to Greimas, these four relationships can be manipulated to produce either conflict or reconciliation. When A is confronted with its negation (-A) it can be falsely made to seem compatible with its opposite (B). By focusing, for example, on the fact that the opposite and the negation of A are different; contradictory in relationship with A, (B vs. -A) one can commute to discover that both A and -A are in contradiction to B, and therefore, in that respect reconciled. Easier to see is the opposite, namely, that -A and B must be compatible because both are in contradiction with A. A narrative can be reduced to an interplay of two agents who, at any single moment, are either in opposition or not. The narration describes a surface level transaction which stands for some transformation in the underlying relationship. Thus actions produce disjunction and conjunction, separation and union, struggle and reconcilation, etc.[121]

Greimas elaborates a number of basic narrative oppositions which can be combined to generate stories. His goal is not to understand the stories, but to develop a story-generating mechanism which could account for the variety of stories and their recognition as such. The particular arrangement of pairs mat-

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see J. LYONS, CHOMSKY (1970).

121. *See* A. GREIMAS, SEMANTIQUE STRUCTURALE, *supra* note 119, at 175-85. A classic example would be the narrative of the quest for the Holy Grail. Using two of Greimas's fundamental "actant oppositions" (subject and object, sender and receiver), we might imagine that the subject is the hero, the object the Holy Grail; the sender God, and the receiver Man. Thus:

Hero (A) vs. Grail (B)

God (-A) vs. Man (-B)

The hero is a man, and the Grail is God, so the A/-B and B/-A relationships are complementary. Yet in their relationship to the grail, or to man, the hero and God stand similarly, thus rendering complementary the tension between A and -A, and, by commutation, between -A and -B. The story is the movement from a view of "A complementary with -B" and "-A complementary with B" to "A complementary with B" and "-A complementary with -B".

ters less than the overall pattern. Like structuralist anthropology, then, literary structuralism develops a *langue* of binary oppositions. These models are interesting for the same reasons that a structural grammar for language or culture is interesting: it seems able to account for the diversity and boundedness of literature without reference to the diachronic.

So long as the fluidity of the synchronic can be accounted for by reference to a structure within the text, the literary structuralists are able to maintain a very strong claim about the disconnection of the synchronic and diachronic. They seem to be saying that the literary *text* should be studied without attention to its historical setting, authorship, or likely readership. The claim that grammatical patterns "account" for a text's literary quality, coherence and fluidity is meant to displace reference beyond the work of literature itself. Yet structuralists who made this very strong claim about the independence of the text seemed to be paying most careful attention to that hidden aspect of the text (the *langue*) which reminds us of the agency which has been set aside. Indeed, in order to bring this structure to our attention, these structuralists are willing to ravage the text to which they first admonished us to pay sole regard.

Consequently, we wonder how, if not who or by whom, the *langue* "structures." To Levi-Strauss this is the handiwork of the *bricoleur*. The Formalists seem to have brought conflict into the literary text itself. Indeed the literary is produced or enabled by patterns of conflict resolution. Yet the resolution worked by the text seems unimportant. By recognizing the role played by literary structures of this sort, one implicitly recognized each particular textual manifestation as just that: one among many, important only as a transformation of the *langue*.[122]

Other structuralist literary critics have modified this strong claim about the independence of the literary text — without abandoning the claim that only the synchronic can be studied. Shklovsky locates the literary quality of a piece of literature in the ability of the text to define the ordinary in such a way as to make it apparent; in other words, through rhyme, metaphor, etc., to make the normal strange.[123] This process, which Shklovsky termed *ostranenie*, seems to reach outside the text — to imply an observer for whom the normal would be rendered strange. But Shklovsky does not abandon the claim that literariness is solely a product of the synchronic. He simply involves the reader in that synchrony. Consequently, *ostrananie* is not a historical phenomenon. Rather, the defamiliarization of literature is a synchronic relationship of difference permitting the story.

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122. *See* T. TODOROV, GRAMMAIRE DU DECAMERON (1969); T. TODOROV, *Language and Literature*, in THE STRUCTURALIST CONTROVERSY 125 (Macksey & Donato eds.); T. TODOROV, SYMBOLISM AND INTERPRETATION (C. Porter trans. 1982). For a secondary work treating Todorov's analyses, see Schole's, STRUCTURALISM IN LITERATURE 111-17 (1974). Todorov argues: "Literary theory provides criticism with instruments; yet criticism does not content itself with applying them in a servile fashion, but transforms them through contact with new material." GRAMMAIRE DU DECAMERON, *supra*. To Todorov, each literary output was generated by a pre-existing vision of literature and by contributing to that vision could transform the entire structural system which produced it.

123. For a general overview see the following works by Shklovsky: ON THE THEORY OF PROSE (1925 & 1929); READINGS IN RUSSIAN POETICS (L. Matejka & K. Pomorska eds. 1971); RUSSIAN FORMALIST CRITICISM (L. Lemon & M. Reis trans. & eds. 1965).

Ostranenie is thus quite different from Berthold Brecht's notion of *Verfremdung* or alienation whereby the artist forces the audience to be aware of the unnaturalness of the usual by making him aware of the process of playwriting itself.[124] *Verfremdung* is clearly an historical and social estrangement. In the manner of critical theory, it attempts to confront agents with the contradictions in their situation. Nevertheless, *Verfremdung* reminds us of the diachronic potential within *ostranenie*.[125] Although *ostranenie* suggests the possibility of a synchronic social relation which could temper the extreme claims about textual independence made by literary structuralists, it has within it the shadow of the diachronic subject which could generate the estrangement: the social difference of reader and text, or of normal and strange.

Like Piaget's notion of a complete structural system, *ostranenie* sought to explain movement of the synchronic in a way which would not reintroduce the diachronic. Roman Jakobson defended this Formalist approach most eloquently.[126] To Jakobson, the structure is completed in the difference, or rupture, between reader and text, rather than by the reader's colonization as an agent by the text or author. For example, by breaking the flow or perspective of narration (I think I want to stop for coffee now — if you do too you won't notice how I slipped past the self-validation point) the writer sets the reader in opposition to the normalcy apparent on the face of the literary product. The writer aims to engender the same response to the content of culture and the real world as he creates towards his own product. Each of these players is thus involved in the synchronic production of the literary narrative.

If Piaget's complete system sent scholars in search of the system's developmental logic, Jakobson's notion of a synchronic break between text and reader seemed to respond to the difficulty of explaining the movement of a literary structure which was closed. Where Piaget responds to the potential presence of agency within a structuralist account by elaborating the closure of the system — its complete colonization of agency subjectivity, Jakobson responds by emphasizing the breaks between texts, authors and readers — breaks which situated them all within a single synchronic moment of mutual reflection. More interesting than the apparent contradiction between these two responses to the difficulty of explaining a synchronic system's distinctive features is the tendency of each to embrace and submerge the diachronic within a synchronic field of study. Later structural literary critics tended to soften the initial claims about the text's independence from author and reader even further, integrating ever more features of what had been thought of as the diachronic into a single synchronic system. These developments prepared the way for the move to post-structuralism.

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124. B. BRECHT, SCHRIFTEN ZUM THEATER (1957). *See* T. EAGLETON, LITERARY THEORY: AN INTRODUCTION 135-37 (1983); F. JAMESON, THE PRISON HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM 58-59 (1972).

125. That reminder was later developed by the post-structuralists who sought to rehabilitate the synchronic trace within *verfremdung* and the diachronic shadow within *ostranenie*.

126. Jakobson, *Closing Statement: Linguistics and Poetics*, in STYLE IN LANGUAGE 350, 356 (T. Sebeok ed. 1960). For other works by Roman Jakobson, see R. JAKOBSON & M. HALLE, FUNDAMENTALS OF LANGUAGE (1956); R. JAKOBSON, *Language in Relation to Other Communication Systems*, in II SELECTED WRITINGS 697 (1971). For a commentary on Jakobson, see T. HAWKES, STRUCTURALISM AND SEMIOTICS 76-87 (1977).

Roland Barthes best epitomizes these developments.[127] Barthes asserts the connections between the literary text and its historical and social context, but he does not think of this relationship as one between synchronic and diachronic. Rather, individual elements in a text engage a variety of "codes" which refer to other texts. The multiplicity of referents generated by a single word or portion of a piece of literature allow the text to participate in its readership — or, more accurately, bring that reading within a system of synchronic referrals.

For Barthes, literature presents itself as innocent, normal, reflective of a natural world, and yet it creates that world in an elaborate process of encoded, intertextual, references. As a result, Barthes is able to return a sense of history and of critique to the structuralist without abandoning the attention to the synchronic. Indeed, for Barthes, history has become the mere outcome of synchronic intertextuality: "a purely formal process of the rotation of possibles."[128] The diachronic relationships among synchronic moments can be analyzed as a synchronic instant. "Here *difference* is the motor, not of history, but of diachrony."[129] History reenters structuralist work as the history of models. In this, the rehabilitation of the diachronic itself sets aside the subject.

Barthes's work is directed at decoding literature, exposing it as the manifestation of a cultural *langue* in order to expose literature as the encoder and transmitter of bourgeois values. Ideologically, then, the search for a literary *langue* has become associated with an attempt to shake the foundations of the status quo; to unseal literature's participation in the extension of the anesthetic grip of bourgeois society. Barthes's literary criticism is designed primarily to break the apparent neutrality of literary style in an era dominated by a single style: French *écriture classique*. The attempt to demonstrate and then to destroy the presumption of neutrality in a ruling style extended the essentially cross-cultural work in linguistics and anthropology and brought structuralists closer to the work of critical theorists.

Barthes sought to break the hold of a ruling style by demonstrating that no element of the text had a unitary meaning. Concentrating exclusively on the text, he attempted to *reverse* the meaning of each textual element to show that the connection of binary oppositions which constituted the work were united in single referential series. He isolated oppositions and then demonstrated them to be linked in a series of coded references.[130] Although these

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127. *See, e.g.*, R. BARTHES, CRITICAL ESSAYS (R. Howard trans. 1972); R. BARTHES, IMAGE — MUSIC — TEXT (S. Heath ed. 1978); R. BARTHES, MYTHOLOGIES (A. Lavers trans. 1969); R. BARTHES, ON RACINE (R. Howard trans. 1964); R. BARTHES, THE PLEASURE OF THE TEXT (R. Miller trans. 1976); R. BARTHES, S—Z (R. Miller trans. 1974); R. BARTHES, WRITING DEGREE ZERO (A. Lavers & C. Smith trans. 1967); R. BARTHES, *To Write: An Intransitive Verb*, in THE STRUCTURALIST CONTROVERSY, *supra* note 102, at 134; R. BARTHES, *From Work to Text*, in TEXTUAL STRATEGIES, *supra* note 97, at 73; R. BARTHES, *Science versus Literature*, TIMES LITERARY SUPP., Sept. 28, 1967, at 897; For commentaries on Barthes, see J. CULLER, ROLAND BARTHES (1983); T. HAWKES, *supra* note 126, at 106-22; E. KURZWEIL, THE AGE OF STRUCTURALISM 165-91 (1980); *Roland Barthes*, in STRUCTURALISM AND SINCE, *supra* note 91, at 52; Sturrock, *Roland Barthes: A Profile*, 1 THE NEW REV. (no. 2) 13 (1974).

128. R. BARTHES, CRITICAL ESSAYS, *supra* note 127, at 262.

129. *Id.*

130. A particularly accessible example of Barthes's work of this type is *Textual Analysis of*

codes within the text *seem* to refer outside the text for resolution of the conflict, Barthes demonstrates that their referent remains embroidered within the text or within a wider system of texts.

Turning his attention from literature to contemporary popular culture, Barthes sought to decode a number of bourgeois "myths."[131] He understands or reads advertisements, films, exhibitions or political speeches as he reads literature; searching to reverse the relations among textual elements to release new meanings. Typically, he focuses upon some apparently trivial element in the piece, enjoying an ironic presentation of its normalcy. For example, he wonders why everyone but Caesar in the film version of Julius Caesar is dripping globules of vaseline sweat.[132] Their sweat relates, he suggests, to their knowledge — they know what awaits Caesar, while he remains blissfully ignorant. The sweat/no sweat distinction refers to the cultural referents of knowledge (worry) and ignorance (bliss). By reassociating the lack of sweat with the death awaiting Caesar — by reading the sweat/no sweat distinction in *reverse* — Barthes draws attention to the *unnaturalness* of the association of knowledge/ignorance and worry/bliss.

This approach to bourgeois culture expands the realm of synchronic critique. By transforming history into a rotation of synchronous intertextual references, the authority of causality and intentionality — in short, authorship — is lost. The claim is not that one should ignore the author when thinking about a text. In a sense the claim is much more modest. Barthes claims that the relationship between the author and the text is not different from the relationship among elements of the text itself. Another way of thinking of this is that the author-text relationship presents merely another text to be read.

On reflection, however, this claim is more far-reaching than the assertion that the text be investigated internally — without reference beyond its four corners. Barthes claims to have exploded the boundary of the text itself, bringing within its corners the author and history of its production. As a result, the reader confronts a social text open to a variety of interpretations, free of the authority of origins. When the reader disassociates the author from the text, even if the reader seeks to remain "within" the text's boundaries, there is no escaping the authority of the author — who will define the limits of textual analysis. Normally, then, the reader submits to the text and to the readings which it presents. By replacing authorship with intertextuality, however, Barthes seeks to liberate the reader from the tyranny of hermeneutics.[133] The result is the "pleasure" of readership as the text is recreated by the reader.[134]

Still, one is left wondering about this reader who has been lifted from the intertextuality of social mythology. The "reader," liberated from the "tyranny" of the author reminds us of the historical agency denied the author. As

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Poe's 'Valdemar', in UNTYING THE TEXT 13-161 (R. Young ed. 1981).

131. R. BARTHES, THE EIFFEL TOWER AND OTHER MYTHOLOGIES (R. Howard trans. 1979); R. BARTHES, MYTHOLOGIES, *supra* note 127. For a commentary on these works, see J. CULLER, *supra* note 127, at 33-41.

132. R. BARTHES, *The Romans in Films*, in MYTHOLOGIES, *supra* note 127, at 26-28.

133. A fascinating account of "intertextuality" between critical theory and structuralism is provided by J. FROW, MARXISM AND LITERARY HISTORY 125-26 (1986).

134. *See* R. BARTHES, THE PLEASURE OF THE TEXT, *supra* note 127; J. CULLER, *supra* note 127, at 91-113.

the *bricoleur* makes myths, so the reader seems to make texts. Here, in readership, we find again the trace of the subject set firmly aside by structuralism. Still, just as the *bricoleur* is not an author — he has been brought into the textual fabric by the closed social system of meaning — so also the "reader" seems a mere exchange of references. "He" participates in the text, or, more appropriately, in the intertextuality set in motion by the text, exchanging its meaning with his identity. Despite this attempt to situate the "reader" intertextually, however, at this high point of structuralism we are again reminded of social agency.[135]

As structuralism has moved from linguistics through anthropology and literary criticism to sociology, ever more spatial and temporal dimensions have become integrated into a theory of textuality which begins by setting historical agency aside. This seems like a maturation for structuralism — able to encompass ever more dimensions of social life, but it is also troubling. Structuralism's claims that reality and meaning are synonymous and that meaning is relational rather than essential, require the distinguishability of the synchronic and the diachronic. If the diachronic fully colonizes the synchronic, there seems no reason to stand with relational rather than essentialist meaning, or with the openness of social possibility rather than with a sense of historical determination. It is important that the placeholders for agency and context in structuralism remain just that — reminders and placeholders. Consequently, it is important to be able to retain a hierarchical relationship within structuralist theory between the synchronous and diachronous elements of a given approach. Thus, the *langue* structures (and is structured by) the *parole*. The *bricoleur* acts (and is acted upon). The Reader enjoys (and exchanges with) the text, but these hierarchies are difficult to maintain. At each stage the placeholder for agency threatens the comprehensiveness of the theory of a socially constructed system of meaning and reality. The move to post-structuralism is addressed to this difficulty. Before exploring later responses to the difficulties of structuralist analysis which build upon the stance of Barthes, however, we should explore the applicability of what might be thought of as "high structuralism" to legal analysis.

D. Law

A structuralist legal theory is difficult to imagine. The structuralists produced almost no legal analysis, except as law played some part in myth or literature.[136] There have been few attempts to think about law in a self-consciously structuralist fashion.[137] Nevertheless, a number of recent works of le-

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135. Indeed, Barthes has been criticized for his tendency toward hedonism should the "reader" break out of synchronic exchange with the text to become a consumer of pleasure. *See id.* at 91.

136. *See, e.g.*, R. BARTHES, *Dominici, Or the Triumph of Literature*, in MYTHOLOGIES, *supra* note 43.

137. *See, e.g.*, Heller, *Is the Charitable Exemption from Property Taxation an Easy Case? General Concerns About Legal Economics and Jurisprudence*, in ESSAYS ON LITTAUER: THE LAWS AND ECONOMICS OF LOCAL GOVERNMENTS 183 (D. Rubinfeld ed. 1979); Goodrich, *Language, Text, and Sign in the History of Legal Doctrine*, LIVERPOOL L. REV. 95 (Ann. 1984); DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987); Duncan Kennedy, *The Structure*

gal theory seem to have been influenced by structuralism.[138] These works suggest that elements of the legal fabric might be thought to play a role in legal theory which corresponds to the role played in myth, culture, and literary text, by grammar, opposition, structure, etc., in these other disciplines. This importation effort has encouraged a particular stance towards the problems addressed by legal theory and led to the refinement of a set of techniques for understanding legal doctrine.

Thinking about law like a structuralist changes one's stance toward the materials one analyzes. The legal structuralist sets aside questions of law's origin, consequence and meaning. He focuses on the relationships within legal texts rather than between law and its content. If he imagines that the human conditions encoded in law are like the "real world" described by language or literature, the specific content of legal doctrines will seem less interesting to him because doctrines would be disconnected from the real world relations and

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of Blackstone's Commentaries, 28 BUFFALO L. REV. 205 (1979); Duncan Kennedy, *Form and Substance In Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the '70s*, 57 TEXAS L. REV. 1307 (1979). A good short discussion of the relevance of structuralism for legal scholarship which does not accept the interpretive mission of traditional legal scholarship is Broekman, *A Structuralist Approach to the Philosophy of Law*, 49 PROC. CATH. PHIL. A. 37 (1977). Andre-Jean Arnaud is the best known French jurist to work within the tradition of structuralism. *See* A. ARNAUD, ESSAI D'ANALYSE STRUCTURALE DU CODE CIVIL FRANCAIS: LA REGLE DU JEU DANS LA PAIX BOURGEOISE (1973) (analyzing the French civil code in the fashion of Levi-Strauss, identifying hidden oppositions resolved through the mechanism of "exchange" characteristic of bourgeois culture of a certain epoch); A. ARNAUD, CRITIQUE DE LA RAISON JURIDIQUE (1981) (extending the structuralist critique of apparent systems and legal reasoning to criticize the effort to develop a sociology of law); Arnaud, *Structuralisme et Droit*, 1968 ARCHIVE DE PHILOSOPHIE DU DROIT ET DE PHILOSOPHIE SOCIALE 283, 289-91 (developing a program for structuralist legal scholarship which would separate synchronic from diachronic work, studying both structurally). Waldemar Schreckenberger develops a more formal structural analysis of several provisions of the German federal constitution as illustrations of semiotic textual analyses in W. SCHRECKENBERGER, RHETORISCHE SEMIOTIK: ANALYSE VON TEXTEN DES GRUNDGESETZES UND VON RHETORISCHEN GRUNDSTRUKTUREN DER ARGUMENTATION DES BUNDESVERFASSUNGSGERICHTES (1978). *See also* Hermann, *A Structuralist Approach to Legal Reasoning*, 48 SO. CAL. L. REV. 1131 (1975) (criticizing evolutionary and functional analyses for reliance upon conventional theories of legal reasoning and developing a structuralist account of the "transformation of deep structures" in criminal procedure, products liability and antitrust law); Robertshaw, *Unreasonableness and Judicial Control of Administrative Discretion: The Geology of the Chertsey Caravans Case*, 1975 PUB. L. 113-36 (especially developing a Levi-Straussian analysis of categories of land tenure present in a single opinion).

For commentaries on efforts to develop a structuralist legal scholarship, see B. JACKSON, SEMIOTICS AND LEGAL THEORY (1985); Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thoughts to Legal Phenomena*, 36 U. OF MIAMI L. REV. 279 (1982); Note, *Towards a Structuralist Theory of Law*, 2 LIVERPOOL L. REV. 5 (1980).

138. *See, e.g.*, Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Gabel, *Reification in Legal Reasoning*, 3 RESEARCH IN LAW AND SOCIOLOGY 25 (1980); Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

conditions they purport to depict.

The structuralist would think of legal doctrines as signs referring only to other signs. Moreover, the structuralist would set aside interest in the *content* of justificatory arguments (why does or should norm X bind behavior?). The structuralist would seek to disassociate himself from behavioral, policy or historical analysis of doctrine — at least to the extent this analysis purported to track connections between legal discourse and human conditions. The structuralist legal scholar would imagine that legal discourse, and by that I mean all artifacts of legal culture, was *parole* — particular manifestations of an encoding mechanism which created relations in the guise of describing them and which was structured by an underlying legal *langue*, grammar, model or encoding system.

In this way, the structuralist imagination would flatten the realms of norm and behavior into a single synchronic system of meaning. Then the structuralist would search in the structure of the resulting text for the underlying *langue* which could account for law's ability to mutate in order to encompass new situations and still retain its recognizable legal character. Legal thinking would no longer seem primarily a historically situated process of applying techniques like analogy, reason or logic to situations in order to resolve them in accordance with past doctrines. Such a vision of legal activity imagines a difference and a connection between human relations and legal talk. For the structuralist, these realms are not separated and do not need to be connected. As *bricoleur*, the jurist manipulates a legal structure or *langue* of law. The function of a legal concept, then, is like the function of a word. It is not a meaningful symbol of a real essence, but a grammatical operator: e.g. conjunction, differentiator, preposition, object or modifier. The "structure" is nothing more complicated than the diagram of this discursive argumentative "sentence."

Of course a legal theorist so distanced from claims made by legal materials about their relationship to the non-legal world would be skeptical of the naturalness of the *parole* — about the existence of "rights" and "duties" and about the logic of the law. The structuralist would think of "rights" and "duties" as grammatical operatives, referring us to one or another code and text. The legal *bricoleur* produces the relationships which we see as certain permutations of "rights," "duties," "powers" and "liabilities." The *parole* (the rights or duties themselves) does not act; the *bricoleur* or *langue* acts.

The initial goal of a structural legal scholarship might be to uncover the *langue* which produces legal culture. The difficulty, of course, is that the encoding process itself would continually hide the *langue* beneath the *parole*. When most successful, the *bricoleur* would produce not a myth but a reality fully corresponding to our sense of justice and to our experience, precisely because he or she would simultaneously create that experience and that vision of justice. The legal *bricoleur* would grip us anesthetically. Although as scholars we would want to uncover this *langue*, not least of all because one wants to know when one is being anesthetized, doing so seems difficult.

Legal scholars who have sought to deploy the insights of structuralism in their work have begun by freeing themselves from anxiety about doing violence to legal content or doctrine in order to concentrate on argumentative patterns. Such a study is necessarily stylistic, stereotypical, and interpretive. One needs to be able to focus on the grammatical function of a term like

"right" without feeling that one thereby weakens its "meaning." Moreover, they have needed to free themselves of anxiety about setting aside investigation into the questions which cry out for investigation in legal materials — the accuracy of doctrinal purports about connections to "real world" causes and effects.

In other disciplines, the distance necessary to break the anesthetic grip produced by the materials under study has been achieved, or perhaps forced, by comparison of different *langues*. In law this is difficult to achieve, and comparativists, by focusing on content, or on different methods of doctrinal problem solving within a common *langue*, often reinforce rather than expose the anesthetic belief in the naturalness of legal *parole* and its connection to real world human relations. The problem, then, is to break the code of a system which we experience, not as a code at all but as *a*, or as *the* way of thinking.

Structuralist-inspired legal scholars have by and large pursued two paths. First, working historically, legal structuralists have sought to demonstrate the artificial nature of the legal *parole* by elaborating the different *langue* underlying the equally natural seeming former *parole*.[139] Moreover, the development of the *langue* through changing *parole* patterns might itself follow rules. These developments might not be responses to real world pressures as much as transformations of the *langue* itself. This second form of historiography would demonstrate the dynamic character of *bricolage* and the self-regulating nature of the structure.

Second, legal scholars influenced by structuralism have developed a number of techniques for analyzing doctrines which draw on the various narrative models devised by Propp, Greimas, Levi-Strauss, Barthes and others.[140] By identifying and manipulating oppositions and resolutions within legal texts, these scholars have sought to shake the normalcy of legal texts and expose them as a system of shifting internal references generated by an act of abstraction.

For those scholars who have deployed the insights of high structuralism in this way, the enterprise has been a critical one. But it has not always been satisfying. Few legal scholars seem willing to leave issues of law's social context, origins and authority permanently aside. Although critical scholars have deployed structuralist "methodology" in their textual analysis, and invoked the authority of structuralism to free themselves from the normal issues and approaches of legal scholarship, they have generally been unwilling to follow the notion of intertextuality very much farther than that. Typically, after "exposing" a contradiction resolved within the legal text, the structuralist legal scholar will turn to critical theory for assistance in interpreting this "deception." In this, legal scholars, like structuralists in other disciplines, seem unable to resist the temptation to reintroduce diachrony into their analysis.

Other scholars, also influenced by structuralist analytic methods, have

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139. For examples of critical legal scholarship attempting to discern different ideological *langues* governing equally natural seeming former *paroles*, see M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977); Duncan Kennedy, *The Stucture of Blackstone's Commentaries*, *supra* note 130. *Cf.* P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979) for a similar enterprise from a "non-critical legal studies" perspective.

140. For a non-historical search for the *langue* underlying contemporary legal *paroles*, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 138.

been unwilling to set diachronic concerns aside in the first place. As a result, structuralism has by and large been imported into legal scholarship to assist in the hermeneutics of doctrinal interpretation.[141] Linguistic analyses of legal argument have categorized various forms of persuasion as rhetorical devices.[142] Cross-cultural or historical analyses which have drawn upon structuralism have contributed to the study of law and "sociology."[143] The tendency to stop short of the ambition of intertextuality has been enormous in the purportedly antonymous and normative literature of legal scholarship. As a result, structuralist legal scholarship has scarcely been critical. Indeed, structuralism seems to have encouraged many in the tendency towards interpretive formalism.

But if the structuralist asks us to suspend disbelief in anything beyond the text, he also requests that we relinquish a rigid notion of "relationship" as the

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141. *See* G. GURVITCH, SOCIOLOGY OF LAW (1942) (early effort to analyze law as part of a cultural symbolic system). Gurvitch, drawing upon Durkheim, posits various levels of cultural meaning, resting at bottom on a collective consciousness. Although he searches for the historical or cultural basis for symbolic associations in a way alien to structuralism, the legal typologies which he develops resemble in many ways both the functionalism of some work done by critical theorists and the narrative grammars of earlier structuralist literary critics. *See also* McDonald, *The Legal Sociology of Gurvitch*, 6 BRIT. J. OF L. & SOC. 24, 31-38 (1980) (commentary on Gurvitch's structuralist conventions). Some attempts to systematize legal scholarship have been influenced by the structuralist tradition. Most directly, perhaps, analysis of Vico's jurisprudence has dealt with his claim to be an early structuralist. *See, e.g.*, Gianturco, *L'importance de Vico dans l'histoire de la Pensee Juridique*, 24 ETUDES PHILOSOPHIQUES 327, 344 (1968).

On the potential value of linguistic analytic techniques for traditional scholarship about legal reasoning, see Mounin, *La Linguistique comme Science Auxilaire dans les Disciplines Juridiques*, 24 META 9 (1979). Jovan Brkic advocates a phenomenological approach to legal scholarship which could incorporate insights from the philosophy of language. In elaborating his proposal, Brkic discusses several themes important for a structural flattening of the object of analysis. He considers, for example, the difficulty of privileging intuitive insights into the text (associates with spontaneity and the unconscious) while simultaneously suspending value judgment about the relative importance of various terms in the legal text (associated with reflection and reason). This tension is avoided by a call for analysis of the systematic establishment of phenomena in consciousness. Brkic's analysis, however, turns out to be directed towards assisting in the interpretation of legal texts and the empirical study of moral norms by awareness of semantic peculiarities, the openness of language, the importance of use and context, etc. *See* J. BRKIC, NORM AND ORDER: AN INVESTIGATION INTO LOGIC, SEMANTICS, AND THE THEORY OF LAW AND MORALS (1970). A more elaborate call for linguistic insights in the hermeneutic process is Moore, *The Semantics of Judging*, 54 SO. CAL. L. REV. 151 (1981). Moore analyzes the problems posed for various theories of meaning associated with formalism by linguistic characteristics such as ambiguity and vagueness, and concludes by advocating an alternative, "subjectivist account of meaning" under which the judge would acknowledge his creative role as manipulator of metaphor. A direct discussion of hermeneutics in legal scholarship is McIntosh, *Legal Hermeneutics: A Philosophical Criticism*, 35 OKLA. L. REV. 1 (1982) (considering particularly literary theory).

142. *See, e.g.*, J. SVARTICK, THE EVANS STATEMENTS: A CASE FOR FORENSIC LINGUISTICS (1968); Haynes, *The Language and Logic of Law: A Case Study*, 35 U. OF MIAMI L. REV. 183 (1981).

143. *See supra* note 141. *See also* Watkins, *Studies in Indo-European Legal Language, Institutions, and Mythology*, in INDO-EUROPEAN AND INDO-EUROPEANS 334-45 (G. Cardona, H. Hoenigswald & A. Senn eds. 1979) (developing a structural analysis modeled on the work of Levi-Strauss on the Roman Law of theft); Robertshaw, *Structuralism and Law: Some Comments*, 2 LIVERPOOL L. REV. 31 (1980).

unit of induction and deduction. The grammatical relationship between "to jump" and "to hop," after all, is not "one and two legs" but "verb." From "verb" we could not produce "to jump" or "to hop" — nor vice versa — the relationship has nothing to do with content. But this example can be no more than allegorical, for a content-based explanation based on function within a sentence context might be possible. The relationships we are asked to seek are, however, more of this nature. For structuralism to realize its intertextual potential, legal scholars would have to abandon the search for fixed connections of analogy or metaphor. The structuralist alternative at its best offers the search for patterns of tension and resolution; not *ad hoc* connections among events, but a deeper grammatical dialectic.

V. Beyond Critical Theory and Structuralism

A. Some Similarities and Differences

The intellectual traditions of critical theory and structuralism share an ambition to displace the relationship between theory and practice with which legal scholars are familiar. This displacement is accompanied, in both traditions, by a heightened attention to the involvement of intellectual work in the objects and subjects of its study. Still, these two intellectual traditions have developed quite different strategies of displacement. Indeed, the strategies implied by "dialectics" and "synchronicity" seem diametrically opposed. This opposition, however, suggests yet another, broader similarity — a common tendency to stop short — to leave intact or aside exactly that upon which the tradition relies.

The aspiration of both structuralism and critical theory to displace the relationship between theory and practice is apparent, ironically enough, in their common concern with two differentiated levels of existence and of analysis. The first is the shallow level of appearance and behavior. To the critical theorist this is the level of self-awareness and oppression before the advent of critical theory. To the structuralist, this is *parole*. The second is a deeper level which organizes appearance and behavior. This is the ideology or consciousness of the critical theorist and the *langue* of the structuralist. Each of these traditions seems to imagine that the deeper level affects the more manifest level, although they picture this process quite differently. The ideology affects social life through legitimation. The *langue* affects the *parole* far more directly and completely —perhaps as *bricolage*.

Both suggest, moreover, that this deeper level is not what legal scholars customarily picture when we think of legal doctrine or analysis being informed by "theory." We usually mean that the choice among and the understanding of doctrinal interpretations needs to be supplemented by an understanding of some mixture of moral, economic, or political notions, class or individual interest analysis, social or historical vision, coupled with some jurisprudential or methodological idea about the hierarchy and interaction of these various dimensions of doctrine and of the social life to which it responds and which it affects. To both the structuralist and the critical theorist, this entire package belongs to the surface level of *parole* and is structured, like doctrine, by a deeper *langue* or ideology.

These two disciplines seem to suggest that we "look for" the level which "structures" or "reproduces" both doctrines and theory. This deeper level is

always implicated in manifestations of theory and doctrine, but not in the same way in which they implicate each other. It seems true that we cannot imagine a social theory without a doctrinal manifestation or vice versa. But we might distinguish manifestations of one from manifestations of the other and we try to study them separately. This is not possible for the deep and shallow levels suggested by structuralism and critical theory. Unlike, say, economic theory, which can be elaborated independent of any doctrinal manifestation, these deep structures exist only as they manifest themselves, and change or are transformed in each such manifestation.

Both traditions seek to expose and describe the deeper level by focusing on the shallower level. The structuralist imagine a *langue* which only reveals itself in the *parole*. But the *parole* can only be interesting as evidence. To the structuralist the *langue's* hold on the *parole* is complete, but may still be revealed. To the critical theorist the hold of ideology may be revealed because it is incomplete. Both seem to suggest that we turn our attention to legal doctrine and theory in order to uncover this deeper level.

Just as the shallow *parole* level contains both doctrine and theory, the deeper level of *langue* is imagined to "contain" an active and a cognitive aspect. Both structuralism and critical theory suggest that there are some fundamental relationships which are recombined and hidden by the shallow level. These are the basic binary relations, or contradictions, of structuralism and the ideological legitimacy criteria of critical theory. Both traditions suggest that these relationships are combined and covered in certain ways as they enter the shallow level of *parole* or social relations. This might be the work of the rules of transformation of structuralism or the principles for recognizing true and false consciousness of critical theory. Structuralists have both elaborated the structure of this deep level and documented the tricks by which it transforms itself. Critical theory has emphasized both the techniques of legitimation and the dynamic of their manifestation.

In developing these analyses, structuralism and critical theory share what might be termed self-reference, self-validation or self-reflection. Both are concerned with the ways in which their own work is generated by and participates in the *langue* and *parole* or consciousness and culture which it addresses. Critical theory aspires to account for its own existence and to apply to itself. The critical theory could protect itself from the blind falseness it critiques by exposing itself as it criticizes. To the structuralist, an important indicator of elegance is often self-mirroring. The theory should share the structure uncovered in *parole* because it too is *parole*, structured by *langue*. This self-reflective feature permits the structuralist to shatter the anesthetizing effect of the *langue* upon those who exist in the world of *parole*.

Despite these similarities, the styles or strategies of displacement developed by the traditions of structuralism and critical theory differ widely. In both traditions, the deeper level of *langue* or consciousness sometimes seems partial, historically specific and changing and sometimes seems complete, historically transcendent and unchanging. Although both strands are present in both structuralism and critical theory, structuralism seems associated more with the latter and critical theory with the former. Structural anthropologists and psychologists often seem to search for basic cognitive patterns and transformational rules which define human culture and being. Linguists and literary critics have seemed more often to emphasize the ephemeral quality of the

langue. Critical theorists, while often elaborating a structure of legitimation as well as of validation which transcends particular historical forms of consciousness, seem more often associated with an approach which treats the forms of oppression as contextually specific. A tension exists moreover between those who emphasize the static content of the deep level and those who emphasize the dynamics of *bricolage* or oppression. Again, both streams are present in both traditions, but structuralism seems, somewhat ironically, to be associated with content and critical theory with dynamics.[144]

One could as well focus on the *form* of dynamism which is emphasized. Both approaches emphasize that the dynamic process by which the underlying level controls the surface level of appearances is a two-way street. The critical theorist suggests that the form of consciousness hides itself as it acts to legitimize forms of oppression just as critical theory reveals itself. The original consciousness, like the critical theory, is itself changed through this feedback process. This is what keeps a self-reflective theory valid. The structuralist maintains that just as the *langue* structures the *parole*, so it is altered by its encoding in *parole*. This is what permits us to uncover it by analysis of the *parole*. But one might emphasize one or another side of this process: either the encoding or the feedback. Although both strands are present in both approaches it is very difficult to do both simultaneously. Structuralism seems concerned with *bricolage*, and critical theory with its inverse, for critical theory is concerned more with undoing the *bricolage* than is structuralism. Both traditions have been criticized for their supposed emphasis on one or the other leg. Indeed, they have criticized one another for these concentrations.[145]

Nevertheless, these differences in emphasis indicate a much more important difference in starting point. Structuralism began by focusing attention upon the "synchronic," setting aside inquiry into the "diachronic." This focus upon the current textual moment is quite different from critical theory's focus upon the historical relationship of thought and action. Indeed, it was by setting aside the particulars of the relationship between Marx and Hegel to focus upon what might be thought of as their diachronic relationship that critical

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144. Indeed, structuralists develop a stance towards the synchronic which avoids the criticism of ideology typical of critical theorists. They develop techniques for unravelling puzzles of social meaning which avoid the question of agency, conspiracy or intention. This stance permits a move from ideology to theory. Louis Althusser, seeking to rehabilitate critical theory and respond to the difficulties created by the bracketing of agency in structuralism describes this distinction between ideology and theory as the move from the real to the ideational. L. ALTHUSSER, FOR MARX (B. Brewster trans. 1972); L. ALTHUSSER, LENIN AND PHILOSOPHY 155 (1971). *See also* A. SCHMIDT, HISTORY AND STRUCTURE, AN ESSAY ON HEGELIAN - MARXIST AND STRUCTURALIST THEORIES OF HISTORY 82-95 (J. Herf trans. 1981); R. COWARD & J. ELLIS, LANGUAGE AND MATERIALISM 74-76 (1977). The stance of critique and the generation of social meaning have been decoupled from social form but not lost. To Althusser, this stance is permitted by a conceptual rupture. "The process which produces a concrete object on the level of knowledge takes place entirely within the realm of theoretical practice." L. ALTHUSSER, FOR MARX, *supra* at 189-90. Like the structuralists, however, Althusser presupposes ultimate reality beyond the sign system; in his case a historical process of rupture within the flat plain of a concrete reality and a concrete thought. Nevertheless, it is interesting that the critical stance developed by Althusser, which stands as the last moment of structuralism and the beginning of its replacement, should relate to critical theory in this way.

145. *See supra* note 8.

theory developed its analysis of the "dialectics of enlightenment."[146] The structuralist displaces the relationship of theory and practice through a strategy of synchronicity which sets aside issues of origin and historical relationship. The critical theorist displaces the relationship of theory and practice through a strategy of dialectics which sets aside issues of textual content and purport.

B. A Common Problem

This difference brings a more troubling similarity between the two approaches into view. Each theory works through a systematically pursued blindness. The structuralist turns his eyes from diachrony. The critical theorist turns his eyes from the assertions of Hegel and Marx. This turning aside continues. The structuralist constantly reminds himself of the diachrony he has set aside — in the *langue*, the *bricoleur*, the reader. The critical theorist reminds himself of the historical agent whose meaning could be fixed — in the proletariat, the intellectual, the counter hegemonic enclave or transcendent speech situation.[147] Thus each tradition sets itself against that which it does not consider. Indeed, each tradition seems simply to repeat the setting aside, working by remembrance of that in which it is not interested. This common tendency qualifies the "self-reflection" of both traditions.

It is the "set aside" which differentiates the two traditions. The structuralists have often been criticized for an apolitical navel contemplation and idealism precisely because they seemed to emphasize the unchanging content of the *langue* or the unconscious. Critical theory seems radically indeterminate, on the other hand, if it cannot provide some mooring in a transcendent theory of interest or historical process. This split affects not only the mission of the two traditions, but their validation as well. Structuralism, less concerned with the feedback of action on the *langue*, emphasizes the elegant and the intuitive. Critical theory which begins with self-reflection, is concerned more with its impact than with the particular forms of legitimation. It emphasizes that its approach must be validated in action.

Moreover, it has been impossible for either tradition to fully remember what it has set aside in order to respond to these criticisms, or to join forces with its brother tradition. Better, it seems that each tradition, in searching to respond to these criticisms has *only* been able to remember that which it set aside. Critical theory can do no more than posit an agent. Structuralism can do no more than suggest the dynamics of *bricolage*. To speak for the agent would undermine the distance which the critical theorist must maintain in order to distinguish true and false consciousness. To locate an origin for the

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146. *See supra* note 33.

147. Foucault expresses a similar commonality between the two approaches in the following terms:

> Neither the dialectic, as logic of contradictions, nor semiotics, as the structure of communication, can account for the intrinsic intelligibility of conflicts. 'Dialectic' is a way of evading the always open and hazardous reality of conflict by reducing it to a Hegelian skeleton, and 'semiology' is a way of avoiding its violent, bloody and lethal character by reducing it to the calm Platonic form of language and dialogue.

M. FOUCAULT, *Truth and Power*, in POWER-KNOWLEDGE 114-15 (1980).

transformation would be to abandon the textuality which generated the structuralist's willingness to violate the *parole* in search of the *langue*.

Finally, it seems impossible for the intellectual simply to combine these traditions — to supplement the historical analysis of critical theory with the textual insights of structuralism — for each of these traditions sets aside the other. It is not enough to argue that each tradition, after all, hinted at the importance of that which the other emphasizes. The hint is important precisely because it remains a hint. Each theory promises access to the social totality.[148] Particularly in an age of totalized alienation or bureaucratic technocracy the promise appeals to the legal analyst as much as the social theorist.[149] Sadly, each fulfillment of the promise threatens it.[150]

Perhaps the most that can be said at this point is that structuralism and critical theory bequeath contemporary legal scholarship a residue of enabling metaphors. Alternating between a bracketed and a flattened subject, we catch glimpses of the legal totality. We can momentarily elude the positivism of pragmatism or the complicity of reasoned elaboration by speaking of a "structure" which "structures," an "ideology" which "legitimates," "criticism" which "liberates," etc. Each of these notions signals an aspiration to put aside the inevitability of history or a representational approach to true reality without losing the grip of theory on doctrine. By removing or diffusing causality or

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148. *See* J.P. Sartre, *infra* note 154, at 54. For a critique of this promise and the idea of totality, see M. FOUCAULT *Body/Power*, in POWER-KNOWLEDGE 81 (C. Gordon ed. 1980). "In each case the attempt to think in terms of totality has in fact proved a hinderance to research." *Id.*

149. The relationship between alienation and the progressive integration of social life, an integration maintained by a reified and categorical division of intellectual and physical labor, has been the focus of much Frankfurt School criticism of modernity. Building upon Weber's somewhat ambivalent analysis of bureaucratic modernism, these accounts of alienation concentrate upon the self's projection of identity into an impoverished role system. *See, e.g.*, M. HORKHEIMER & T. ADORNO, THE DIALECTIC OF ENLIGHTENMENT 120-67 (J. Cumming trans. 1972); H. MARCUSE, ONE DIMENSIONAL MAN 84-122 (1964) (particularly on the disintegrated nature of "total administration"). The tendency to frame alienation as partiality is described and criticized for encouraging fantasies of totalization by Roberto Unger. *See* R. UNGER, KNOWLEDGE AND POLITICS 57-188 (1975) (connecting the images of totality espoused by the ideas of transcendence and immanence to the modern social-welfare state); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 648-75 (1983). For background, see T. SCHROYER, THE CRITIQUE OF DOMINATION: THE ORIGINS AND DEVELOPMENT OF CRITICAL THEORY (1941).

150. For example, consider an ideology-legitimation critique of an announced "covert" war. The absurdity of the acknowledgment attracts our attention. Connecting the pretention of secrecy to the "ideological imperative" of democratic theory or the "legitimation needs" of a democratic state, which consumes but must deny violence, captures something true and total about the moment of the announcement. Elaborating the conditions of legitimation, the historical pressure of theory or the imperative of ideology in a democracy diverts us into a spin of unsustainable either-ors. Although it seems true that sovereignty *is* patriarchy, or that territoriality *is* homophobia, we cannot unlock the relations among men, women and culture by programatic unpacking of these insights. *Cf.* Dalton, *Book Review*, 6 HARV. WOMEN'S L. J. 247 (1983); Mackinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 515 (1982). For a distinctly unprogramatic unpacking, see Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). For fascinating critique of legal racism achieved by exploiting these connections unprogramatically, see Wriggins, *Rape, Racism and The Law*, 6 HARV. WOMEN'S L. J. 103 (1983).

agency we can find a place for critique which does not plunge us into utopian speculation or historical determinism. In short, we might limit our blind complicity without losing our sanity.

But these enabling notions remain metaphors, dense distracting moments in the text. Pressed, unpacked, defined away from the momentary access they give us to a particular totality; congealed, abstracted, posited and formulated, they disintegrate. Structuralism just can't keep that diachrony down. The agent resurfaces in each dialectic unfolding of a critical theory. We have reimagined historical movement, resituated the text as a flattened relational moment and sought to capture the fluid, mutually constituting relations between them. This creative release is indicated by the constellation of textuality, legitimation, ideology, grammatical structure or historicism in contemporary critical legal scholarship. The point, however, can not be the elaboration or empirical measure of these "phenomena."[151] Legitimation can not be an object of an inquiry.[152] We cannot search for the elusive contradiction.[153] As soon as these notions become objects of inquiry in this sense, they lose their ability to access the totality.[154] The bracketed subject has re-emerged, the refusal has come unstuck. The legacy of critical theory and structuralism, then, seems more like a problem or a caution than a method. Rather than a technology for normal legal science which we can receive we find a vigilance to be maintained.

C. *Some Departures from Critical Theory and Structuralism*

A number of scholars working in a variety of disciplines have responded to the difficulties encountered by the synchronics of the structuralist tradition and the dialectics of critical theory. Variously labeled "post-structuralist" or "post-modern," these authors all seek to refuse to adopt any stable origin, standpoint, agency or totalizer in their work.[155] Rather than setting aside the diachronic, only to reinvent it later as the privileged realm of the "*langue*," "*bricoleur*," or "reader" in the syle of the structuralist, these authors embrace

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151. *But see* Trubek, *Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WISC. L. REV. 1062.

152. *See* Hyde, *The Concept of Legitimation in The Sociology of Law*, 1983 WISC. L. REV. 379.

153. *But see* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979). *See also* Duncan Kennedy & Gabel, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

154. *See* Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25 (1980); Trubek, *Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WISC. L. REV. 1062.. *But see* J.P. SARTRE, CRITIQUE OF DIALECTICAL REASON 805-18 (A. Smith trans. 1976).

155. A good general description of post-structuralism is T. Eagleton, *infra*, at 127-50. *See also* R. COWARD & J. ELLIS, LANGUAGE AND MATERIALISM 61-92 (1977) (focusing on Althusser); J. CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTUALISM (1982); V. LEITCH, DECONSTRUCTIVE CRITICISM: AN ADVANCED INTRODUCTION & SURVEY (1983); T. EAGLETON, AGAINST THE GRAIN (1986) (a collection of relatively accessible essays); STRUCTURALISM AND SINCE (J. Sturrock ed. 1979). A very readable introduction to post-structuralism which places it between critical theory or structuralism and feminism is A. JARDINE, GYNESIS: CONFIGURATIONS OF WOMAN AND MODERNITY (1985).

both the diachronic and the synchronic, shifting between them in a variety of ways. Unlike the critical theorist, who would set aside inquiry into history's origin to focus on dialectics only to reinvent the historical subject as the privileged agent of social change, these authors shift among the affirmation, denial and transcendence of prevailing relations between subject and object. Their common project is to reintroduce the diachrony set aside by structuralism without falling into the mechanical determinism or transcendental nostalgia characteristic of late critical theory.

The diverse work produced by post-modern scholars is far more difficult to organize or summarize than that of structuralists and critical theorists. Their work is far more eclectic in style and subject matter and they do not form anything like a self-conscious "school." Organizing their work historically, as I organized critical theory, seems inappropriate if only because, in sharp contrast to the Frankfurt School, they join structuralists in asserting the impossibility of definitive historical ground for their work. Unlike structuralists, however, they reject the stability of ideational patterns such as those supporting the division and characterization of knowledge into "disciplines." Consequently, interpreting their work according to its academic field, as I interpreted structuralism, seems unlikely to capture their totalizing ambition.

Most people encounter post-modern scholarship in the work of individual scholars — associating post-modernism with names like Barthes,[156] Foucault,[157] Lacan,[158] Derrida,[159] Baudrillard,[160] Bourdieu,[161] Kristeva,[162] de Man,[163] Guattari,[164] Deleuze,[165] Bataille,[166] and Blanchot.[167] Yet such a list

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156. On Barthes, see *supra* notes 127-36 and accompanying text. *See also* R. COWARD & J. ELLIS, *supra* note 155, at 33-60; T. Eagleton, *supra* note 155, at 134-50.

157. On Foucault, *see infra* note 181. H. White, *Michel Foucault*, in STRUCTURALISM AND SINCE, at 81-115 (J. Sturrock ed. 1979).

158. On Lacan, *see infra* notes 180-81. *See also* J. LACAN, ECRITS (A. Sheridan trans. 1977) (an important and accessible paper in this collection is "The Mirror State as Formative of the Function of the I" at 1-7); J. LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS (J. Miller ed., A. Sheridan trans. 1977) (a series of introductory lectures). A readable introduction to Lacan is A. LEMAIRE, JACQUES LACAN (D. Macey trans. 1977). *See also* Bowie, *Jacques Lacan*, in INTRODUCTION TO STRUCTURALISM AND SINCE, 116 (J. Sturrock ed. 1979); R. COWARD AND ELLIS, *supra* note 155, at 93-121; S. TURKLE, PSYCHOANALYTIC POLITICS: FREUD'S FRENCH REVOULTION (1978); LACAN AND NARRATION: THE PSYCHOANALYTIC DIFFERENCE IN NARRATIVE THEORY (R. Davis ed. 1983); Baer, *Understanding Lacan*, in 3 PSYCHOANALYSIS AND CONTEMPORARY SCIENCE 473-544 (1974).

159. On Derrida, see *infra* note 182. *See also* J. CULLER, *supra* note 155; C. NORRIS, DECONSTRUCTION: THEORY AND PRACTICE 18-85 (1982).

160. *See* J. BAUDRILLARD, LE SYSTEME DES OBJECTS (trans. 1968); J. BAUDRILLARD, DE LA SEDUCTION (1979).

161. *See* P. BOURDIEU, OUTLINE OF A THEORY OF PRACTICE (1977).

162. *See* J. KRISTEVA, DESIRE IN LANGUAGE (L. Roudiez ed. 1980).

163. P. DE MAN, ALLEGORIES OF READING (1979); P. DE MAN, BLINDNESS AND INSIGHT (2d. ed. 1983); P. DE MAN, THE RHETORIC OF ROMANTICISM (1984).

164. *See* F. GUATTARI, MOLECULAR REVOLUTION: PSYCHIATRY & POLITICS (Sheed trans. 1984) (with a useful introduction by David Cooper, contains a selection of Guattari's early essays).

165. Deleuze is best known in English for a work co-authored by Guattari, ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA (Hurley, Seem & Lane trans. 1983). He has also written extensively about Kant, Nietzsche and Kafka.

seems the least promising way to capture the post-modern response to critical theory and structuralism. These scholars often disagree bitterly or seem fully unaware of one another's work. Some of these people wrote before structuralism got going — one might as well expand the list to include Breton and more conventional surrealists. Others equally "responsive" to the difficulties of critical theory and structuralism are omitted — perhaps Laing,[168] Althusser,[169] Jameson[170] or Geertz[171] should be added. Finally, nothing seems more foreign to the project of post-modernism than the authority of authorship implied by such a list of names.[172] Consequently, rather than introduce post-modernism historically, by discipline or by author, I will suggest some tendencies common to much of it which might appeal to legal scholars motivated to pursue interdisciplinary reading but frustrated by both critical theory and structuralism.

Much post-structuralist work is about other work. Rather than investigating some issue — like the origin of the historical subject or the meaning of myth — the typical post-structuralist work will read other approaches to such issues in order to comment upon the arrangement and presentation of the issue as well as upon the "answer to the question." In this, these scholars are like both critical theorists and structuralists. The tradition of critical theory began with a re-reading of Marx and Hegel, and structuralism concerned itself with the construction of texts rather than the motives or context of authorship. But the post-structuralist does not respect either the projects of or the claims about themselves made by the texts he reads as faithfully as do these traditions.

Critical theorists saw their work as a continuation of the project begun by Hegel and Marx — to figure out how the subject and object really fit together in history. Similarly, although structuralism changed the method of each discipline radically by setting aside the diachronic, the discipline's interpretive project remained intact. The structuralist tried to figure out what was really going on in myth or literature or language. The post-structuralist is more interested in the construction and reproduction of these projects than in their resolution. To the post-structuralist, it was precisely the determination to "get it right" which led the critical theorist to construct an authoritative historical subject

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166. G. BATAILLE, VISIONS OF EXCESS: SELECTED WRITINGS 1927-1939 (A. Stoekl trans. 1985). On Bataille, see J. DERRIDA, *From Restricted to General Economy: A Hegelianism without Reserve*, in WRITING AND DIFFERENCE 251 (A. Bass trans. 1978); KRAUSS, *No More Play*, in THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS 42 (1984).

167. M. BLANCHOT, DEATH SENTENCE (L. Davis trans. 1978); M. BLANCHOT, THE GAZE OF ORPHEUS AND OTHER LITERARY ESSAYS (S. Adams ed., L. Davis trans. 1981); M. BLANCHOT, THE MADNESS OF THE DAY (L. Davis trans. 1981); M. BLANCHOT, THE WRITING OF THE DISASTER (A. Smock trans. 1986).

168. R. D. LAING, KNOTS (1970); R. D. LAING, SELF AND OTHERS (1961).

169. *See supra* note 10.

170. F. JAMESON, THE POLITICAL UNCONSCIOUS (1981); F. JAMESON, THE PRISON-HOUSE OF LANGUAGE, (1972).

171. C. GEERTZ, THE INTERPRETATION OF CULTURES (1973) (selected essays); C. GEERTZ, LOCAL KNOWLEDGE (1983).

172. On the name, see Krauss, *In the Name of Picasso*, in KRAUSS, THE ORIGINALITY OF THE AVANT GARDE AND OTHER MODERNIZED MYTHS 23 (1985); Derrida, *Otobiographies, the Teaching of Nietzsche and the Politics of the Proper Name*, in THE EAR OF THE OTHER, OTOBIOGRAPHY, TRANSFERENCE, TRANSLATION TEXTS & DISCUSSIONS WITH JACQUES DERRIDA 3 (C. Levesque & C. McDonald eds. 1985).

and the structuralist to invent an authoritative "deeper" level which could account for the diversity of myth or language. To avoid these difficulties, the post-structuralist remains agnostic about these issues.

They do not usually argue that all answers are wrong or that answering these questions is impossible or uninteresting. They simply set these issues aside, much as the structuralist set aside the diachronic or the critical theorist set aside the particulars of Marx or Hegel to focus on the relationship between them. In this sense, the post-structuralist approaches the work which he analyzes much as I have tried to approach the traditions of critical theory and structuralism. By setting aside their concerns about dialectics or synchrony, it became possible to analyze the ways in which the construction of their project implicated a certain set of responses and repetitions, without suggesting that their projects were impossible and undesirable or that their results were flawed.

Much post-structuralist work uses the distance achieved by this agnosticism to uncover marginal indications in the work it analyzes of a reliance upon that which the work self-consciously excludes, just as I sought to uncover a continued reliance upon the diachronic in structuralism or upon historical agency in critical theory.[173] This reading technique — uncovering the positive in the negative and *vice versa*[174] — is similar to the elaboration of contradictory structures within the *parole* and to the identification in Marx of a dialectic more important than the particularities of his rather scientific sounding analysis. Unlike structuralism and critical theory, however, this work treats these relations neither as contradictions which can be resolved at some deeper *langue* level nor as generative of a historical resolution. Because he is agnostic about the projects of both textual interpretation and definitive social theory, the post-structuralist is more likely simply to explicate these hidden dependencies and acknowledge their importance in generating comprehensible narratives within the conventions of modern philosophy.

Moreover, unlike critical theory and structuralism, post-structuralist work tends to locate the dependence outside the frame which the analyzed text presents. The elaborate models of plot or myth developed by the structuralist identified and arranged elements within the myths or narratives they analyzed. Critical theory began by looking at the relationship between Hegel and Marx within the tradition of philosophy. By contrast, the dependence of structuralism upon some diachronic invention which I identified in this article was not located "within" the *parole* as one term in some contradiction, subject to capture by the *langue*. Nor was it located in the "false consciousness" of the structuralist and able to be rejected by the theorist once it had been exposed. Instead, it seemed both indispensable to the structuralist project and located at the very margin of structuralist theory — indeed, in the diachronic which structuralism self-consciously excluded.

This reading technique has been pursued in an enormous variety of ways — applied to philosophic texts,[175] works of art,[176] historical movements,[177]

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173. The most explicit elaboration of this idea is J. DERRIDA, MARGINS OF PHILOSOPHY (A. Bass trans. 1982). A particularly helpful essay is *The Pit and the Pyramid: Introduction to Hegel's Semiology*. *Id.* at 69.

174. Bataille asserts this relation most aggressively. *See supra* note 166.

175. *See, e.g.*, Derrida, *infra* note 182 (particularly the essays in OF GRAMMATOLOGY). See

works of literature and literary criticism.[178] Post-structuralist work of this sort seems extremely empirical, detailed and careful in its argument. Bound tightly to the texts it explicates, these performances develop a habit of extremely close reading which seems almost positivist in its assertions about meaning and origin. At first this assertiveness seems quite paradoxical in works which seem to be going the doubts of structuralism and critical theory one further. No structuralist would assert the stability of textual connections this strongly, nor would any critical theorist make historical arguments as overtly determinist.

And yet, the whole point of this post-structuralist reading technique is to demonstrate that the modesty of the more conventional work is misplaced. Although the structuralist is modest about his interpretations, he thinks he has taken the problem of origin into account by setting the diachronic aside. His modesty covers a more dramatic assertion: that this method can resolve the problem of interpretation. Although the critical theorist is modest about his particular textual interpretations, this modesty masks his assertions about the possibility of philosophy once the problem of textual instability is solved by focusing on the dialectic relations among texts. The post-structuralist argues the vanity of conventional modesty by drawing these assertions into question. Of course one could easily argue that the post-structuralist simply repeats this maneuver — covering his positivist assertions with an even more thorough going agnosticism about the possibility of his endeavor — and indeed post-structuralists often level this critique at one another and at their own work. But the point is simply to acknowledge this pattern, not to escape it.

This post-structuralist ambition to acknowledge what one cannot escape is reminiscent of critical theory's attempts to undo false consciousness or structuralism's aspiration to get to the *langue* beneath the *parole*. But the post-structuralist does not assert that his work will liberate the falsely conscious or expose the real beneath the merely apparent. To do so, he would need to assert some privilege or power for either critical ideas or the grammatical base. By unearthing the marginal and hidden reliance of one textual term upon another, the post-structualist tries to destabilize the priorities necessary to sustain such claims. In this sense, the reading of critical theory and structuralism which I presented in this article is typically post-structuralist. It identified marginal dependencies in these traditions and then questioned the privilege accorded both the dialectics of critical theory and the synchronic of structuralism. I argued that the critical theorist had to posit the social agent it sought to create, just as the structuralist needed the diachronic it set aside to generate the *parole* it analyzed.

The goal of much post-structuralist work is to renounce textually sustained hierarchies of this sort, and the point of reading closely at the margins of various texts, seeking to expose the negative in the positive and *vice versa*, is

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also de Man's work on Rousseau, collected in ALLEGORIES OF READING (1979).

176. *See, e.g.*, KRAUSS, *supra* note 172; THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE (H. Foster ed. 1983).

177. See Foucault's work on penology *infra* note 181.

178. A most accessible essay is B. JOHNSON, *Melville's Fist*, in THE CRITICAL DIFFERENCE 79-109 (1985). See also her essay *The Critical Difference: Barthes/Balzac, id*; Barthes, *Textual Analysis of Poe's 'Valdemar'*, in UNTYING THE TEXT: A POST-STRUCTURALIS ANTHOLOGY 133-61 (R. Young ed. 1981).

precisely to undo hidden assertions of this type. At the same time, however, the post-structuralist generally acknowledges the importance, even necessity, of such textual hierarchies within the traditions of contemporary philosophy or literature. This renunciation of textual hierarchies is thus not a rejection or condemnation. The post-structuralist develops no program or authority which could immunize texts from such privileged exclusions. At best his own texts are content when they are able to mark or acknowledge their reliance upon such rhetorical mechanisms. In this article, for example, my point was not to condemn structuralists for having privileged the synchronic. The point rather is to uncover the equivalence of structuralism and critical theory, destabilizing the definitive purport of each.

This renunciation and acknowledgement — even reacceptance — of textual hierarchies takes a number of forms within post-structuralist work. Sometimes it is achieved by a radical assertion of intertexuality. In his later work, for example, Barthes extended the relationships he encountered among textual elements in his early work to analyze the relationship among authors, texts and readers, developing a literary criticism which refused to privilege any particular origin for meaning.[179] Sometimes, this refusal is presented as a critique

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179. In his early and most structuralist work, Barthes seemed to seek a science of literary criticism, albeit a science of "forms." *See* R. BARTHES, MICHELET PAR LUI-MEME (1954); R. BARTHES, SYSTEMES DE LA MODE (1967). For a criticism of the view that Barthes' early works were less open than earlier criticisms, see J. CULLER, *supra* note 155, at 87-90. He removed the author and the historical context from view and focused upon the synchronic arrangement of the literary text, seeking to open texts to diverse readings by analyzing the various ways in which elements in the text activated associations in readers with other texts. This approach was structuralist because it self-consciously directed its attention to intertextual relationships, first by banishing the author as an extratextual origin for the narrative and second by focusing on reading as an intertextual process through which elements of the text were associated with other texts.

This early work seemed incomplete. If the relationship between the reader and the text could be understood intertextually, it seemed difficult to understand why the relationship between author and text, or indeed, author and reader could not be imagined in the same way. Moreover, by privileging the text over the author and then giving the text meaning through a process of intertextual associations by readers, Barthes seemed to be relying upon a reader's subjectivity — albeit a subject which was only present as the plane in which associative intertextual connections were made. This made it difficult to see why the author and historical context should not be imagined to have a similar subjectivity. Releasing the text from the tyranny of origin led to a tyranny of readership. The totalizing claim reversed itself to yield a flexible but reconstituted hierarchy.

Barthes' later works suggest the direction of post-structuralism. In S/Z, Barthes' analysis of Balzac's novel *Sarrasine*, the hierarchy of author, text and reader is acknowledged, opened and rearranged. See R. COWARD & V. ELLIS, *supra* note 155, at 45-60; T. HAWKES, STRUCTURALISM AND SEMIOTICS 113-22 (1977); V. LEITCH, *supra* note 155, at 102-15, 198-204 for a discussion of S/Z. The search for an essentialist grammar of the narrative is absent. The narrative codes through which intertextual associations are thought to be made have been expanded to raise questions about the relations of the text's production and reception. For example, the "referential code" weaves the milieu into the text, positioning the reader in knowledge and the production of knowledge. The "symbolic code" explores the articulation of a series of differences which create the text, establishing identities which are not representations. The critic is no longer only a reader but also a writer, writing his way around and through the text, himself a text, speaking with the author and his creator. The critic as producer reverses the relationship of structure and text, *langue* and *parole*.

of the privileging practice dominant within a single discipline. Lacan, for example, argued that the Freudian psychiatric tradition privileged the unconscious as a dark absence and the analyst as he who could reveal its contents and work. Lacan argued that the unconscious, like the conscious, is a system of signs which is "structured like a language," and that the analyst and analysand exchange meanings and interpretations from one symbolic system to another.[180]

In this way, Barthes has reorganized the hierarchies of texts and authors, or readers and texts, which seemed so crucial to more classically structuralist literary criticism. It is not that he has abandoned those earlier intertextual insights. Rather, he has extended them to acknowledge and include the process of textual production and the setting aside of that origin. The result is a meandering collection of glimpses among texts — Balzac's, Barthes', ours. The text is no longer structured as much as it begins to structure, to write Barthes or Balzac. The author, text and critic flow into one another in S/Z. The result is a refusal not only of role, or representation, but of the hierarchy of refused roles characteristic of structuralist synchronic criticism. The upset of synchronic and diachronic, rather than ending analyses, opens the way for momentary connections among text and context.

180. Lacan and Foucault, like Barthes, criticize the formal hierarchies of structuralism, introducing notions of fluidity and history without returning to critical theory. For Lacan, the relationship between conscious and unconscious is like the relationship between signifier and signified. J. LACAN, *The Unconscious and Repetition*, in THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS 17-68 (J. Miller ed., A. Sheridan trans. 1977). The varying claims which are generated by this notion are clearly presented in A. LEMAIRE, *supra* note 158. *See* J. LACAN, *Function and Field of Speech and Language in Psychoanalysis*, in ECRITS 30 (A. Sheridan trans. 1977). As a result, the unconscious itself is structured like a language. *See generally* J. LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS 30 (1977).

Lacan dramatizes the separation and hierarchy of the Saussurian system of "signifier" and "signified" in which the deep and the shallow are distinguished and then related temporally, causally, representationally or, ultimately, structurally. Lacan suggest that the signified is itself a signifier, doubling the sign. The Lacanian redoubled sign is considered in A. LEMAIRE, *supra* note 158, at 96-131 (presenting several clarifying examples of this approach to the psychoanalytic symptom). The infinite reduplication of the sign could find rest in the unconscious if the unconscious were given a privileged status outside the social process by which meanings are generated. This is the contention which Lacan rejects with the statement "the unconscious is structured like a language." *See* J. LACAN, ECRITS, *supra*, at 55-56, § 193.

For Lacan the child's entrance into the symbolic world through the Oedipal struggle, is not the loss of any privileged, true, pre-social consciousness which could ground the sign. *See* J. LACAN, *The Mirror Stage as Formative of the Function of the I as Revealed in Psychoanalytic Experience*, in ECRITS, supra, at 1; A. LEMAIRE, *supra* note 158, at 78-92 (considering the Lacanian conception of the "accession to the symbolic"). *See also* J. LACAN, ECRITS, *supra*, at 67, 199 and 217. Rather, the pre-Oedipal child comes to know itself in the "imaginary." *See* Baer, *Understanding Lacan*, in 3 PSYCHOANALYSIS AND CONTEMPORARY SCIENCE 511-17 (1974). *See also* J. LACAN, ECRITS, *supra*, at 1-7, 20-25, 56-77; A. LEMAIRE, *supra* note 158, at 72-77. The child develops the unconscious to be suppressed in movement into the symbolic by knowing the absolute object of its desire (say, being everything with the mother) in nodes of symbolic identity (say, the phallus). The suppression of the phallus by the father, then, is the movement from one socially mediated state to another. As a result, the imaginary, in which one knows oneself, is itself a set of mediated identity pictures. The symbolic "nodes" which constitute it are greater than the self. The unconscious, rather than a dark inner sanctum, is a social fabric in which the individual experiences the breakthrough of the other.

Lacan develops a psychoanalytic practice out of this insight which is instructive for legal analysis. *See* J. LACAN, *The Direction of the Treatment and the Principles of its Power*, in ECRITS,

Some post-structuralists explore the hierarchies and marginalizations of particular historical epochs or situations. Most notable of these are the narratives about penology, insanity and sexuality written by Foucault.[181] His ap-

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supra at 226; Baer, *supra*, at 483-92, 500-10. As Lacan understands it, both the analyst and the analysand, are situated in the symbolic. Symbolic nodes provide occasions for contact or exchange between one conscious and one unconscious. The analysis proceeds as the two work to follow each other between conscious and unconscious signification, building and disconnecting a map of the difference at work both between them and within each of them. The interaction between the unconscious and the conscious, as well as the communication between analyst and analysand, are produced by similar movements among nodes which have meaning in two symbolic systems with different codes. In such an analysis, the analyst, and analysand are similarly situated, exchanging meanings much as Barthes interacted with Balzac. The analysis, moreover, is neither critical nor constructive, neither theory nor doctrine, but a constituting exchange which permits momentary glimpses of the totality rather than fixed access to some privileged realm. For Lacan, moreover, this process is a playful one, providing fleeting access to our situations most easily when symbolic nodes are followed least earnestly. The image of imaginary and symbolic exchanging meanings in an endless communication suggests a shifting pattern of signification positioned against some absence which is never located. The placeholder for this absence against which signification occurs Lacan labels the "real." *See* J. LACAN, ECRITS, *supra*, at 65, 192-99; A. LEMAIRE, *supra* note 158, at 40-61; Baer, *supra*, at 517-18. Named and known within a linguistic labyrinth, the vocabulary of its naming nevertheless refers outside the social totality which is playfully glimpsed in analysis. Able to be described within the imaginary and symbolic as that outside, the "real" operates like death, which, as Heidegger noted, is "the totally real," able only to be known from life. This absence anchors analysis even as Lacan refuses it in his constitution of both conscious and unconscious. Its constant absence seems to render Lacan's playful refusal anxious. Despite this difficulty, Lacan's approach suggests the possibility for contextual insight within an awareness of ambiguous signs and unknowable origins.

181. *See* M. FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (Howard trans. 1965). For a critical comment, see J. DERRIDA, *Cognito and the History of Madness*, in WRITING AND DIFFERENCE 31 (A. Bass trans. 1978); M. FOUCAULT, DISCIPLINE AND PUNISH (A. Sheridan trans. 1979); 1 THE HISTORY OF SEXUALITY (R. Hurley trans. 1978).

Despite their appreciation for intertextuality and the problems associated with a referential subject, Foucault's studies seem anchored in a context of authority. His "archeologies" of penology, insanity and sexuality develop connections among exclusions of knowledge and power. At different historical moments Foucault finds what he terms the *"épistème"* of the age in a set of exclusionary relationships, such as the relationship between insanity and reason in the modern era. An interesting commentary on this study is J. DERRIDA, *Cognito and the History of Madness*, in WRITING AND DIFFERENCE 31 (A. Bass trans. 1978). By tracing both asylum and philosophic practices to a set of relations rather than to historical forces or agents, Foucault's work seems structuralist. Yet he speaks of these as relations of knowledge and power which operate in a particular historical field. As a result, Foucault's study seems to analyze a social totality at once contextual and abstract. As he relates the historical transformation of penology from punishment to surveillance we glimpse totalitarianism without defining it as a relationship of struggle between the "individual" and the "state." For Foucault, "discourse" expresses the ultimate non-fixing of social relations in which nothing is "real." The exclusionary relations which he uncovers between reason and madness do not preceed or "structure" the relations among philosophical texts or the reasonable and the insane nor *vice versa*. More importantly, Foucault claims no priority for his *épistèmic* relations over their precursor or their successor. They do not "originate" in some earlier *épistème*, nor do they enable their analysis. In this sense, for all his apparent contextual grounding and concern with power, Foucault's historiography is self-consciously unconcerned with "what really happened." In particular, he is not concerned to write history as the unlocking of power by knowledge or the production of knowledge by power. Because Foucault collapses knowledge and

proach to each of these historical institutions is at once abstract and contextual. For example, he traces the simultaneous marginalization of insanity by reason and internment of the insane in eighteenth century Europe. Other post-structuralists focus on the texts of modern philosophy, producing a highly abstract account of the tendency to privilege one term against another in Western thought. Derrida's work on the texts of Husserl and Rousseau are perhaps the most remarkable of this type.[182]

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power into one another he seems unconcerned with the relationship between his analysis and its apparent object. History becomes a "discourse," neither text nor context nor interactive mutual feedback of text and context. His own work is a discourse about discourses, an archeological investigation of knowledges. On the notion of discourse, see M. FOUCAULT, POWER-KNOWLEDGE 123-62 (1980). *See* M. FOUCAULT, THE ORDER OF THINGS (A. Sheridan trans. 1970); M. FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 21-70 (A. Sheridan trans. 1972). *See also* Foucault, *War in the Filigree of Peace*, 4 OXFORD LITERARY REV. 15 n.2 (1980).

Foucault constructs his archeologies of exclusion by invoking some historical alternative — some moment in which the excluded and the excluder could have been part of the same referential system. Thus, he articulates the mutual exclusion of reason and madness as intertextual, discursive exercises of power in a historical fashion by invoking some earlier épistème in which the exclusion did not operate. Although this historical difference threatens Foucault's ambition to escape from a more traditional historical project. Foucault asserts that the pre-exclusionary épistème is not a true, recoverable past. The rupture between épistèmes is itself a textual difference which might be reversed. Thus, we might think of the exclusion of insanity by reason as generating for the first time a system in which both were included. Nevertheless, even as this reading is reversed, some grounding Other (here an earlier incompatibility or lack of recognition between reason and insanity) is again invoked. The excluded Other remains essential to constitute the totality, but cannot be recovered. Foucault's archeology thus resembles Lacanian analysis in which the absolute object of desire finds its presence only in symbolic nodes created in the imaginary against some "real". *See supra* note 180. Another way of understanding this resemblance is to focus on Foucault's use of the word "power". *See* M. FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE, *supra*, at 95-114.

His archeologies are emphatically not analyses of relations emanating from some authority or cognitive apparatus. Because he weaves historical precursors and analystic successors into his story, his narration seems to do without the priority of either power or knowledge. But the word "power" is not always used in this way in his work. Often it takes on a certain priority and seems to indicate both the object and subject of his inquiry. All of Foucault's analytic work is, like Lacan's, emphatically *not* something. He thinks about the history of ideas without giving them autonomy or effect. He writes about social relations without passing on their authority. This paradoxical lack or absence of authority in his work seems to preoccupy Foucault even as he banishes it. And he calls this preoccupation "power." This second use of the word power — the use which makes Foucault of all post-structuralists seem most attuned to what we think of as history and context — is as a translation into Foucault's work of the Lacanian "real."

182. Jacques Derrida focuses his philosophic criticism upon the enduring "logocentrism" or metaphysical attachment to "presence" in the Western tradition of philosophy. He identifies the enduring attachment of philosophy (even, and often especially, post-structuralist philosophy) to some grounding location — some definable "inside" or "outside" against which a philosopher's system unfolds. Western philosophy for Derrida is the redevelopment of oppositions which purport to be contradictions or exclusions but which are arranged in a preferential hierarchy. Thus, of presence and absence we prefer presence (logocentrism) and so also with speech and writing (phonocentrism) or man and woman (phallocentrism). *See* J. DERRIDA, OF GRAMMATOLOGY (G. Spivak trans. 1976); J. DERRIDA, DISSEMINATION (B. Johnson trans. 1981). This project is pursued in a critique of Husserl in J. DERRIDA, SPEECH AND PHENOMENA: AND OTHER ESSAYS ON HUSSERL'S THEORY OF SIGNS (D. Allison trans. 1983). *See also* Spivak, in OF GRAMMATOLOGY, *supra*, at

All of these works, whether gounded in a particular discipline in some general or specifically critical fashion or working more broadly from either history or philosophy, renounce patterns of privilege in the texts, accounts and practices which they analyze. However, one might argue that each post-struc-

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Much of Derrida's work focuses of the preference for speech as it is associated with presence. In a critique of Saussure and Rousseau, Derrida unravels this preference by showing that the special qualities of writing (absence) which make it secondary are qualities of speech as well. More than a simple reversal of this heirarchy, this argument lays the groundwork for an elaborate refusal of the preferencing of logocentric thought. This project is suggestive both for its insight into the philsophic traditions under consideration here and for the analytic or "reading" techniques which Derrida develops. For example, Derrida suggests that philosophic texts characteristically operate by exclusion and preference. Thus, we might think of critical theory preferring the transcendence of an excluded dialectic opposition or as sustaining its analytic power by continued identification of some transcendent subject-object. Similarly, structuralist texts seem to exclude diachrony and prefer synchrony. To Derrida, such exclusions and preferences are not sustainable — even in the work of post-structuralists who seem most comfortable with a synchronized or intertextual approach to the excluded diachronic. Something seems, of necessity, excluded — perhaps the real power or the place where reader, text and author refer to one another.

Derrida's work aims to expose the placeholders for these excluded terms and lables the suppression within philosophic texts of that which they must exclude "supplementarity." The supplement is the hidden addition, the absence, without which presence could not be imagined but which threatens to deny it. The hierarchical repression of the supplement permits the relational contrasts which constitute a logocentric system of meaning. Speech and writing seem different in their relative presence — a relationship which can only be sustained so long as the absence of speech and the presence of writing is suppressed. This suppression can only last as long as speech, the relatively present, is preferred to writing. Consequently, the suppression of the supplement is related to its continuity. *See* J. DERRIDA, *That Dangerous Supplement*, in OF GRAMMATOLOGY, *supra*, at 141-64. Most commentaries on Derrida's work consider the idea of the supplement. Particularly helpful are J. CULLER, *infra*, at 102-10; V. Leitch, DECONSTRUCTIVE CRITICISM, AN ADVANCED INTRODUCTION 169-78 (1983). This double relationship within logocentrism Derrida expressed in a variety of ways — evoking the supplement as both enabling and threatening logocentrism. Sometimes he terms this phenomenon *differance*, evoking both the spatial differencing of speech and writing and the deferral of the preference for presence which enables it. *See* J. DERRIDA, POSITIONS 7-14 (A. Bass trans. 1981) ; OF GRAMMATOLOGY, *supra*, at 1-65. For elaboration of the notion of differance see J. CULLER, ON DECONSTRUCTION: THEORY OF CRITICISM AFTER STRUCTURALISM 95 (1982), *et passim*; C. Norris, DECONSTRUCTION, THEORY AND PRACTICE 24-41 (1982). The term "deconstruction" refers to the reading strategy by which these characteristics of Western philosophy are revealed. It elaborates the ways in which a text renders its own premises open to question and uses the constructs of a text to produce a structure that challenges the consistency of those very constructs. In this sense a text is seen to "de-construct" itself or to be "always already" deconstructed. However, this self-contradiction does not invalidate the intellectual enterprise of the text. The deconstruction is not a criticism of the author's mistakes or the text's weakness. Derrida renounces any attempt to identify and judge authors guilty of logocentricism or to replace logocentricism. *See, e.g.*, J. DERRIDA, POSITIONS, *supra*, at 52 (referring to Saussure). If anything is destroyed by deconstruction, it is the view that a text has a "correct," "proper," or "natural" meaning intended by the author. For examples of deconstruction see J. DERRIDA, OF GRAMMATOLOGY, *supra*, at 97-316 (a critique primarily of Rousseau with reference also to Levi-Strauss); J. DERRIDA, *Structure Sign, and Play in the Discourse of the Human Sciences*, in OF GRAMMATOLOGY, *supra*, at 250-65 (a critique of Levi-Strauss); J. DERRIDA, *Freud and the Science of Writing*, in WRITING AND DIFFERENCE (A. Bass trans. 1980). For additional commentary on Derrida's deconstruction, see J. CULLER, *supra*, at 171-79; Miller, *Deconstructing the Deconstructors*, in DIACRITICS (1975).

turalist style *itself* privileges either the discipline or the history or the theory which it analyzes and uproots. This charge is often made by one post-structuralist about the work of another.[183] Oddly, perhaps, each of these writers names the mechanism which produces this privilege. Barthes unabashedly trumpets the pleasure of "reading," Lacan the playfulness of analysis against the inevitability of the "real," Foucault the analysis of "power," Derrida the inescapability of textual "differance."

And yet, they tend not to argue the priority of their particular privileging scheme. Derrida goes so far as continually to rename the process of marginalization or privileging by which textual argument proceeds.[184] The point is less to argue the priority of a particular analysis than to confront or recover the process by which analysis is generated — to mark the acts of power of exclusion by which thought proceeds. In this article, for example, it remains unclear whether structuralism is best understood to have forgotten the diachronic or to have been compelled simply to repeat it. Similarly, it seems unimportant to me whether critical theory is thought to proceed by positing a historical subject or a terrain for that subject's operation.

The point of the analysis is to renounce the ambition or the purport to have provided a solution for the dilemma of subject and object, rather than to undo some particular textual, disciplinary or historical resolution. Foucault's use of the word "power" to name the exclusion and construction of both philosophy and history reminds us of critical theory's privileging of agency just as Derrida's use of the word *differance* reminds us of structuralism's preoccupation with the synchronic. Unlike the structuralists, however, Derrida renounces any attempt to settle what is going on in the texts he analyzes — to solve the riddle of interpretation — by reference to *differance*. *Differance* does not "work" in the text or "account" for the text like the *langue*. It merely marks the process by which the text itself works.

As a result, the purport of post-structuralist texts seems extremely modest. Rather than resolving the riddles confronted by the texts they analyze or criticizing texts for failing to resolve important issues, the post-structuralist simply recounts the maneuvers presented by a text or discipline which does make such claims. As to their own text, the post-structuralist is often coy and playful — at once asserting a precise reading or series of readings and disowning any intention to closure or program.

Consequently, for all their diversity, post-modern works share a great deal stylistically. Their texts are elaborate imitations and reconstructions of other

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183. *See, e.g.*, Derrida's discussion of Foucault in *Cognito and the History of Madness*, in OF GRAMMATOLOGY 105, *supra* note 182.

184. Sometimes he labels this "*differance*", *see* MARGINS OF PHILOSOPHY 29 (1982). But Derrida moves among metaphors. Sometimes he uses the word "trace" to indicate the marginal supplement — he then abandons the word when it seems reconnected to "origin." Similarly, he abandons using the words "laugh" and "play" when they come to be merely differences from serious work. Derrida tears these indicators from their place in the logocentric text in order to mark the differencing process by which he moves forward. This self-reflection, or awareness and playful use of his own logocentrism dislodges Derrida's own work from the texts which he analyzes and differentiates him from other structuralists and critical theorists. *See* J. DERRIDA, POSITIONS, *supra* note 182, at 23-36, 46-48; J. DERRIDA, *The Outside is the Inside*, in GRAMMATOLOGY, *supra* note 182, at xvii-xxi; Leitch, *supra* note 182, at 169-78.

works — often quoting at length as they slowly read the argument being analyzed. As they recount the work of other texts they continually weave and unweave alternatives present and absent in the texts under scrutiny. Moreover, their accounts often seem quite playful. At times their playfulness seems very affirmative, validating one after another inconsistent approach to a given problem and suggesting that others be imagined. At times it seems nasty and sarcastic, as if the post-structuralist refuses to take the works he analyzes seriously even as he works them over with a fine tooth comb. Post-structuralism often juxtaposes an extremely serious and meticulous critical reading with an apparent lack of commitment to outcome or a playful imitation of more traditional work with an iconoclastic sounding critique.

These matters of style raise questions about post-structuralism as a scholarly practice. To those situated in the discipline under scrutiny, however flattering the attention, the playful tone and relentless recovery and rejection of various privileged relations often feels quite unfriendly. When the post-structuralist uses irony to suggest the simultaneous impossibility and necessity of some particular textual move, it is not the familiar irony of unmet expectations or suddenly juxtaposed opposites. It seems rather the irony of one pedagog winking to another in bemusement as an acolyte struggles with some elemental difficulty. It is an irony which stings, for it suggests the failure of a text both in its own terms and as a result of its own terms. At the same time, however, the playful refusal to take on the projects of contemporary philosophy — to continue the attempt to interpret and solve the dilemmas posed by various disciplines — combines with the abandonment of any programatic assertions to raise questions about the seriousness of post-structuralistic work. The same playful tone which seems critical and affirmative can seem apolitical, disengaged and nihilistic.

Despite these questions, legal scholars working in the traditions of structuralism or critical theory might find this material worth the formidable barriers to entry posed by difficult vocabularies and presumed familiarity with other texts.[185] Legal scholars often turn to other disciplines out of some frustration with the materials of law. Their diffuse manipulability makes it difficult to take positions or make professional choices with any sense of confidence. Both structuralism and critical theory purport to offer ground on which the lawyer can stand — the ground of social theory or textual structure. In this article, I have argued that both traditions ultimately fail to provide the sort of definitive or totalizing security which legal scholars have sought, for each proceeds by presuming precisely the authority it purports to generate.

The work of post-structuralists, by contrast, makes no such claim. Nevertheless, or perhaps, ironically enough, precisely as a result, the experience of

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185. With few exceptions, post-structuralists have devoted almost no energy to the study of law. Exceptions to this include: Barbara Johnson, *Melville's Fist*, in THE CRITICAL DIFFERENCE 79-109 (1985), and de Man's work on Rousseau in ALLEGORIES OF READING 135 (1979). For legal work explicitly influenced by the tradition of post-structuralism, see Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L. REV. 997 (1985); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Hoy, *Interpreting the Law: Hermeneutical and Post-Structuralist Perspectives*, 58 S. CAL. L. REV. 136 (1985); Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 YALE L. J. 209 (1984); Kennedy, *Spring Break*, 63 TEXAS L. REV. (1985).

reading post-structuralist literature does seem to provide the legal scholar with something to say about the perplexing disintegration of contemporary legal theory and doctrine. Partly post-structuralism works in legal scholarship precisely as structuralism and critical theory worked — providing citable outside authority for a set of interpretations. But more seems to be going on than that.

The habit of reading other work — merging with it and exploring the mechanisms of its own production — and infusing it with authority rather than assuming authority as an interpreter is, of course, familiar from the law. The suggestion that the scholar simply "restates" the law, exploring doctrine in its own terms is a congenial one. At the same time, the post-structuralist materials, by refusing the projects of the texts they so carefully read, suggest a more thorough-going scholarly distance from legal texts than other interdisciplinary alternatives. By modelling distanced work of this sort, post-structuralists do seem to provide an authority of sorts for standing more rigorously external to the law as a scholar — even if they do not provide a particular extra-disciplinary ground to stand upon or an authoritative method to apply.

Moreover, post-structuralism suggests a set of reading habits which might be useful for legal scholars. The close attention to texts is of obvious significance for legal work. The recovery of marginal assertions and exclusions in a text — breaking the analytic frame which a text generates for itself — is also instructive for scholars seeking to understand the mechanism of law's proliferation critically. The habit of refusing to accept particular textual hierarchies while acknowledging their inevitability allows the legal scholar to comprehend the various claims made by legal doctrine and theory without either adopting a particular claim as valid or rejecting the practice of legal interpretation altogether.

Much contemporary interdisciplinary work seems frustrating at least partly because it is often pursued out of a conviction that legal culture is anything but autonomous and yet generates theories about the relationship between law and society which require and reproduce a sense of the distinguishability of legal culture. The elaborate eclecticism of post-structuralism, weaving its analysis across a number of disciplinary boundaries, might reawaken the legal scholar's sense of law's participation in a broader culture without forcing him to produce a particular account of the relationship between law and society, which would reassert law's unsustainable distinctiveness. The post-structuralist text often resembles a collage — picking up various marginal strands from the text and juxtaposing them with other external materials to dislodge the text's own claims. This habit might reawaken the legal scholar's collegiate sensibilities and suggest a sense of law in culture which does not depend upon a simultaneous sense of law's distinctive features more effectively than a straightforward defense of a particular discipline's authority.

The post-structuralist habit of serious attention to text without surrender to the text's thematic claims or structure encourages both a distanced legal scholarship grounded in intellection and a more playful or ironic relationship to legal culture. This stance might appeal to critical legal scholars both because it could free us to understand the conditions of law's operation more fully and because it gives us a place in legal scholarship for the feelings of frustration and cynicism which first motivated our collective interdisciplinary tour. Although the post-structuralist cannon's appeal to legal scholars who

have been influenced by critical theory or structuralism suggests a leftist orientation for post-structuralism in the legal academy, post-structuralism seems poised rather equivocally between an affirmative criticism and a neo-conservative imitation.

Critical Legal Studies: A Dialogue*

John W. Van Doren **
Patrick T. Bergin ***

CCLS (Critic of Critical Legal Studies): Dean Carrington sums up my views on Critical Legal Studies (CLS) when he states that advocates of CLS (CLSers) should leave law schools.[1]

CLSer: Where would he have them go?

CCLS: At least as far away as political science or philosophy faculties. You see, the basic attack which CLS law professors level against the legal system makes it difficult for young lawyers to perform their professional duties. How can you function in a system if you do not believe in it?

CLSer: Does academic freedom mean so little to you? And after all, is law a liberal art or is it more analogous to plumbing?[2]

CCLS: We need plumbers you know. That is a noble calling. And as far as academic freedom is concerned, why did your CLSers make life so miserable

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1. *See* Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (indicating that Professor Unger and CLS advocates are nihilists who have "an ethical duty to depart the law school [scene], perhaps to seek a place elsewhere in the academy").

2. *See, e.g.*, Gordon, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 1-26 (1985) (responses to Carrington's *"Of Law and the River," supra* note 1, from scholars including Professor Gordon of Stanford Law School). *See also A Discussion on Critical Legal Studies at the Harvard Law School*, at 31 (debate sponsored by the Harvard Society and the Federalist Society for law and public policy studies on May 13, 1983, with Professors Robert Clark, Duncan Kennedy, Paul Bator, and Abram Chayes as participants [hereinafter *A Discussion*]). This discussion focused on the tension between law as a liberal arts subject and the more practice-oriented imperatives.

for the Harvard Law professor who went to Chicago if CLS really believes in academic freedom?[3]

CLSer: That is a complex case.

CCLS: Speaking of complexity, what is CLS?

CLSer: I am glad you asked. CLS advocates believe roughly this. First, the legal system is indeterminate and incoherent.[4] "Indeterminate" means that the legal system is open-ended, or composed of conflicting rules, which dictate no clear choice (within the legal system). For example, legal doctrines such as reasonableness, fairness, and injustice are open-ended. While courts purport to reach decisions on the basis of preexisting rules — in actuality, they do not. Consider, for example, the claim that law and equity are in constant opposition: A rule "applies," but the person claiming the benefit is estopped to assert it. Or, how can rules or standards be deemed to govern when we do not know whether a court will choose a "growing" minority rule over a majority rule? This analysis is borrowed from legal realism[5] and is scarcely contested today.

Second, the legal system is incoherent because there is an unresolved conflict or fundamental contradiction between the use of state power and the preservation of individual freedom.[6] No rules or principles inside the system resolve legal controversies which embody in one form or another this basic conflict. Outside the system there can be resolution, but only from subjective "culture-bound" politics.[7] Thus, the judicial process is pictured as indistinguishable from politics generally with elaborate attempts to disguise.[8]

Third, since nothing objective either inside or outside the legal system

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3. Several publications reported that Professor Paul Bator, a former U.S. Deputy Solicitor General, moved to the "more congenial precincts of the University of Chicago Law School" after 26 years at Harvard. Bator claims CLS is a "force for 'philistinism' and 'mediocrity' " and that the "intellectual integrity and academic excellence of Harvard are at stake." *See* Lacayo, *Critical Legal Times at Harvard*, TIME, Nov. 18, 1985, at 87. *See also e.g.*, Menand, *Radicalism for Yuppies*, THE NEW REPUBLIC, Mar. 17, 1986, at 20-23.

4. *See* Van Doren, *Exploring Contradictions*, 59 FLA. B.J. 21-3 (Apr. 1985).

5. *See, e.g.*, Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 209 (1984) ("Liberalism and contemporary legal thought persist in treating this contradiction as a mere conflict of competing individual and communal interests which can be rationally compromised or mediated"). *See also id.* at 204-05.

6. Kennedy and Unger maintain: "[T]he outcomes of struggle are not preordained by any aspect of the social totality, and the outcomes within law have no 'inherent logic.' " Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40, 50 (D. Kairys ed. 1982), *quoted in* Hutchinson & Monahan, *supra* note 5, at 223. Moreover, Kennedy and Unger's analysis of legal doctrine emphasize its incoherence and its espousal of contradictory values. *Id.* For further discussion on this theory, see generally Hutchinson & Monahan, *supra* note 5, at 223-27.

7. Hutchinson & Monahan, *supra* note 5, at 213-19 (discussing social contingency and legal consciousness). The term "culture-bound," is borrowed from Harvard Law Professor Albert Sacks, which was used by him in a lecture at Florida State University, College of Law, in Tallahassee, Florida, on Jan. 29, 1986.

8. *See* Hutchinson & Monahan, *supra* note 6, at 206 (law is politics in a different garb). It is this conception that Professor Dworkin attempts to refute with his distinction between policies and principles. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

resolves the doctrinal open texture and the fundamental contradiction, rights are formed after the fact. "Public policy" provides no resolution as it is only an empty caldron into which to pour inconsistent philosophies that are extant at a particular time. Professor Dworkin's rights analysis is deemed difficult to accept: "Background rights" and "political morality" contain so much conflict that it seems strange to speak of rights arising out of the legal arena itself.[9] Claims that there is a consensus — much less an objectively verifiable consensus — to resolve ambiguity are found equally lacking. Law and economics movements are deemed to be based on arbitrary assumptions which purport to be objective, but are value laden.[10]

In short, CLSers say that the portrayal of legal system as natural and necessary is a ruling technique when it is in fact, transient and peculiar to the politics of time and place. After all, slavery has been presented as natural and necessary by apologists from Aristotle to those defending the American South.[11] As Duncan Kennedy has indicated, "things that are rotten and unjust [are made to] look natural, inevitable, logical and inherently fair. So that if you are a loser, it's your own fault."[12]

One of the contradictions is that the United States legal system reflects a contradiction between an individualist ethic and a paternal or "we are all in it together" ethic.[13] Perhaps we should move more toward a paternal ethic.

CCLS: Wait a minute, CLSer. That was quite a barrage. I might be willing to concede that there is open texture in the law. But no objective determinant! You are wrong in that. I expect we will come back to each of these points in time. And as for your claims for community and paternalism, community is stifling and conformist. It destroys individualism.

CLSer: No person is an island.

CCLS: No person is merely a social being existing for others. Existence in groups may stifle self-development.

CLSer: Existence with others and for others gives meaning to life and personhood. At the same time, I must admit to a strong need for individualism,

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9. For Professor Dworkin's exposition, see DWORKIN, *supra* note 8, at 125-30.

10. *See* Schlegal, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 203 (1979). For further discussions and criticism of law and economics theories, see Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of Law and Economics*, 33 J. LEGAL EDUC. 274 (1983); Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485-770 (1980).

11. *See* W. STYRON, THIS QUIET DUST 35-38 (1982) (reviewing justifications of slavery); B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 186 (1972) (citing Aristotle's *Politics*) ("Slavery is expedient and right, but the slave should be *naturally* inferior to the master.") (emphasis in original).

12. *See A Discussion, supra* note 2, at 10.

13. *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713-24 (1976) (dividing conflicting societal ethics into altruism and individualism). Basically, individualism is where one looks out for his own interest and is not obligated to share the benefits of his efforts; altruism is where one engages in sacrifice and sharing for the benefit of others. *Id.*

hence, the fundamental contradiction. The problem is that under your system only certain persons have freedom for self-development.

CCLS: They deserve it.

CLSer: I have heard that before. If you lose in the struggle, it is your own fault. But those who are born with fewer of the qualities your system exalts do not deserve their fate. Hierarchies lead to domination of the underclass — the poor, minorities, women.[14]

CCLS: It has been awfully good to you.[15] You are a bit hypocritical, are you not? You talk "left" and live "right." There is always Russia if you are so dissatisfied.

CLSer: Your response does not surprise me. It is a part of your "politics of mischaracterization";[16] you wish to brand any differing thought as "Communist."

First, I do not have to become a janitor to criticize, do I? Secondly, I freely admit that Russia has its problems. They have heirarchies, too. Only a totally new approach can avoid the problems inherent in your system.

CCLS: What specifically do you have in mind?

CLSer: I do not have that formulated as yet.

CCLS: That is *your* problem. You criticize without ever offering a solution. The so-called deconstruction or trashing you do on law and liberal institutions is easy. It is building a viable structure that is meaningful,[17] and we have done an admirable job of it if you ask me. Have you no ideas for your "new approach?"

CLSer: Maybe I do — small decentralized communities, for which we have no current models.[18]

CCLS: That is odd. That is what the conservative, Professor Nozick advocates.[19] In any event, your "solution" is utopian.

CLSer: I knew I should not have told you. What do you have in mind yourself

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14. Lecture by Duncan Kennedy, Jurisprudence Section, American Association of Law Professors, New Orleans, La., Jan. 6, 1986.

15. *See* Johnson, *Do You Sincerely Want To Be A Radical?*, 36 STAN. L. REV. 247, 264 (1984) (CLS composed of professors at prestigious universities).

16. "Politics of mischaracterization" is a phrase used by Professor Kennedy in his lecture, *supra* note 14.

17. *See* Johnson, *supra* note 15, at 247-89.

18. *Compare* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 36 (1985) ("[T]he anti-federalists believed in decentralization. Only in small communities would it be possible to find and develop the unselfishness and devotion to the public good on which genuine freedom depends.")

19. *See generally* R. NOZICK, ANARCHY, STATE, AND UTOPIA, 332 (1973) (advocating particular communities). *See also Symposium: Robert Nozick's Anarchy, State, and Utopia*, 19 ARIZ. L. REV. 1-283 (1977) (examination of Nozick's justification of "the state" and concept of rights and their importance).

for solving your system's problems? Have you a cure for the domination of the few over the many?

CCLS: Not this again. Until you show me something better, I will stay with my system. What is wrong with that?

CLSer: Another typical response. There is nothing objective about your system. It favors the people at the top. As Thurman Arnold said, you like it because it keeps you up and others down.[20] You continually use the ploy of saying that your system is natural and necessary. I say it is contingent on time and place. In fact, everything you claim is based on transient and passing values.

CCLS: Wait a minute. If I cannot transcend history, precisely at what point were you able to do so?

CLSer: Admitted. I am not supra-historical. But I am, at least, a good comparativist. I look to other societies and I see that one legal doctrine more or less does not matter.[21] Life goes on after the abolition of contributory negligence. Even in your own system, business people do not really do serious business planning based on whether there is the fellow servant rule, or the doctrine of comparative negligence. Each of these little doctrines is a tempest in a tea pot.

Despite your fear of change, individual aspects of your legal system are not necessary, for example, the capitalist mode of production. And by the way, the "capitalist mode of production" is a highly indeterminate description which can and does accommodate a variety of possibilities.[22]

CCLS: If law does not matter, a lot of people waste a lot of effort lobbying the legislature and litigating to enforce rights in court.

CLSer: It matters to particular people, but to economic actors it does not matter so much.[23] Moreover, it is an oversimplification to explain the existence of laws on the basis that interest groups get what they want.

CCLS: But law does matter to groups. Lots of groups try to get laws made favorable to them — consumers, business people, and so on.

CLSer: If you mean *that* as a total explanation, you are mesmerized by outdated instrumentalism. Groups often do not get the particular effect they want.

CCLS: But take one example. Wealthy people do not want to pay taxes. Therefore, they use their influence to get a tax code which lowers their tax

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20. *See* T. ARNOLD, SYMBOLS OF GOVERNMENT, 98-99 (1935); *see also* T. ARNOLD, THE FOLKLORE OF CAPITALISM (1973), *cited in* Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 425 (1984).

21. *See* Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 100-01 (1984).

22. *See* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 570 (1983). Compare, for example, the excellent job tenure provided employees in Japanese industry with the lesser protection provided in the United States.

23. *See* Gordon, *supra* note 21, at 100-02.

bills.

CLSer: Now wait a minute. No one really knows what effect a given law will have. Legislation is a blunt social tool. For instance, judges distort and nullify intent, not to mention juries. And there are gaps — the differences between the law on the books and what is observed in practice.[24] Let us leave this subject. You know the basic problem? Your system lacks legitimacy because rights have no objective basis.

CCLS: What is this "legitimation" you always talk about? Talk about mystification, you do a pretty good job of that. Are you one of those "Ungerian" types who likes to talk in impenetrable prose?

CLSer: Legitimation is used in several senses. When I use the term, I am saying that Western constitutional liberalism fails to deliver on an objective theory for determination of rights that is supposed to justify coercion of the state.

CCLS: Wait. What do you mean by liberalism?

CLSer: Well, not liberalism as opposed to conservatism. I mean the liberal tradition common to all Western societies. That tradition, as I said, has failed to justify objectively the existence of the state; therefore, its legitimacy is in doubt.

CCLS: Are there degrees of legitimation? Is not liberalism more legitimate than totalitarianism? You seem to ignore the fact that rights are only one aspect of legitimacy. Let me get this straight. Is law illegitimate?[25]

CLSer: Sounds like "loopified" thinking to me. But I agree that totalitarianism lacks legitimacy to the extent that it purports to rationalize the use of force and produces hierarchy and domination. Law, I must concede, appears necessary for social ordering. I gather there are good defenses of anarchy, such as Robert Wolff's *In Defense of Anarchism*. I am not in that camp myself, however.

CCLS: Well, the legislative process, separation of powers, democratic consent — all comport a legitimacy, do they not, irrespective of the alleged plasticity of rights?

CLSer: What you defend is basically a mask of your domination.

CCLS: Do none of you have a blueprint or any suggestions?

CLSer: Well, here is one. Liberalism has something to be said for it. Some focus on the individual personality is good. It is just that you took it too far to the exclusion of community and thereby lost your way, probably due to self-interest. Certain ways of overly individualistic thinking get imbedded and they

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24. *See* Singer, *The Player and The Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1, 15 (1984) ("legal rules in force may contain gaps").

25. This was a question asked by Professor Sacks at the lecture, *supra* note 7.

become sticking points. We need to unstick them.[26]

CCLS: All right. I will say what you have been waiting for. This system is the best obtainable at this time: natural and necessary, if you like.

CLSer: At last, you have said it explicitly! That claim of a "natural and necessary" legal system is the same claim made in the 18th Century — and the 13th. All systems make such a claim. Certain power aggregations justify their power by putting forward rationalizations that become accepted as natural and necessary rather than contingent and particular.

CCLS: Again, I ask: What is it you want?

CLSer: Again, I say — we are not required to give you a road map.[27] However, I begin with the idea that a main feature of the human is his or her ability to transcend the constraints of particular ways of thinking. I will institutionalize this capacity and make change the fundamental rule. The Constitution is to be amended to say that it is subject to ongoing revision — that is its essential feature. This may prevent any one point of view from becoming imbedded in stone. Hierarchies may be dissolved, as social arrangements will be subject to constant revision. No way of thinking will be able to make an exclusive claim to truth or necessity. People must be able to achieve their own self-realization, as an existentialist may believe, by exercising the ability to transform their situation. Just rely on human nature in a context of law that is subject to revision. People have the ability to alter positively their situation when hierarchies do not restrain them.

There also should be immunity rights — rights that keep the individual from falling prey to heirarchies. And the government should really be able to function more along British Parliamentary lines and not be impeded by the stalemate of checks and balances.[28]

CCLS: Anything else? What about property in your system?

CLSer: Since I have accepted your continual challenges to come up with an alternative, I will keep drawing a map for you. There should be a revolving capital account where the state charges interest for funds made available to groups on a rotating basis, with an emphasis on entrepreneurship and innovation. You see, this is supra-liberalism. I really take what liberalism says seriously.[29]

CCLS: But you are subject to the criticisms you raised about liberalism. First,

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26. This notion of unsticking or unfreezing legal reality comes from, inter alia, Professor Robert Gordon when he gave the Mason Ladd Lecture, at Florida State University, College of Law, on Mar. 6, 1985.

27. This was similarly noted by Professor Gordon in a Property Class Lecture at Florida State University, College of Law, on the day of the Mason Ladd Lecture, *supra* note 26.

28. *See* Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 584, 662 (1983) (elimination of discrimination through weakening of hierarchies will allow individuals to achieve their potential).

29. *See, e.g., id.* at 596-97.

these are just your preferences, and no objective theory guides your creation.[30]

CLSer: My fundamental premise that everything can be changed (except maybe that that notion cannot be changed) nicely parallels the idea that knowledge is contingent. It is very consistent and constitutes our last best hope. It is either this or despair.[31]

CCLS: Perhaps it is consistent with your premises. But the fact remains you are positing all sorts of rights apparently out of air as thin as those theories you criticize. And what about stability? The human personality needs some anchor, some fixed point of reference. The capacity for eternal change will be psychologically disorienting.[32]

CLSer: Stability is a catch word of the status quo.

CCLS: That does not take away its value.

CLSer: Anyway, I know what I am against: illegitimate hierarchies which lead to domination, and alienation of persons from their real needs and from each other, generated by liberal theorists' stress on individualism and individual rights, so that not just some but all persons may realize their potential.[33]

CCLS: Strange, those are my values too. Perhaps we are not so far apart.

CLSer: Much further than, apparently, you are able to imagine.

CCLS: Sometimes it seems to me that our philosophical perspectives are so different that real communication between us is impossible. Anyway, tell me this, do you seek changes within liberalism or do you envision totally new social arrangements? For example, what do you think about rights?

CLSer: Well, there is a split in CLS, and there is uncertainty on the question of rights. Unger, for example, freely employs rights in his model.[34] Tushnet is very skeptical about the very notion of rights.[35] As to changes, others really take the values of liberalism seriously, but seek to eliminate the hardening of the arteries that comes from particular ideas that become frozen and therefore difficult to change. Some CLS theorists say we should try to change the system from within while others say we should try to generate other modes.[36]

CCLS: Tell me this, since you admit that "rights" are here to stay, what is the

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30. Hutchinson & Monahan, *The "Rights" Stuff: Robert Unger and Beyond*, 62 TEX. L. REV. 1477, 1521-23 (1984) (Unger's postulates are "nothing more than a series of contingent and controversial choices about the proper organization of society"). Similarly, "Unger cannot claim any real neutrality for the institutional program he formulates." *Id.* at 1522.

31. *See* Unger, *supra* note 28, at 652-54.

32. "Unger's obsession with change has caused him to overlook the necessity for constancy. . . . The Ungerian notion of freedom would only exacerbate most people's feelings of hopelessness and insecurity." Hutchinson & Monahan, *supra* note 30, at 1533-34.

33. *See* Singer, *supra* note 24, at 6 n.11.

34. *See* Unger, *supra* note 28, at 597-602.

35. *See* Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

36. *See* Trubeck, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 L. & SOC'Y REV. 529, 563-66 (1977), which contrasts Trubeck's view that the system can be changed meaningfully from within, with Professor

matter with formalism — you know, the idea that rights exist and are deduced from inside the legal system?

CLSer: First, the "legal system" is composed of rules and principles that are radically indeterminate. Legal doctrine exists in opposition, like the free contract versus unconscionability dichotomy in contracts. In other situations, rules are vague and point in no direction at all, or in two directions at once. Legal doctrine and principles contain very few "answers." Resolutions must come from outside.[37]

Secondly, the liberal legal system contains a fundamental contradiction. On the one hand, there is individualism and free will, and on the other hand, there is a state that exercises coercion. All legal controversies boil down to this because they take place in a background of coercive resolution. Contracts, for example, involve an opposition of freedom to do what we like versus the security of contract rights. The need for coercion is explained by a promise that there will be rights which will be enforced with objective generality. In other words, the promise is made that the enforcement machinery will not be exercised in favor of one particular faction or group.[38] But the promise is not kept. Nothing inside helps because the legal system is indeterminate. Abstractions such as property rights or freedom of contract[39] do not decide particular controversies. There is no choice but to go outside.

CCLS: What about rights theories? Be careful, I sense you have some goals sought by persons you consider liberal apologists, and you may throw the baby out with the bath. If there are no rights, there are no civil liberties.[40]

CLSer: Rights theories? They begin with arbitrary premises or with premises so abstract as to be meaningless in the resolution of particular controversies. For example, should we start with liberty? Private property? Or equality?[41] What does equality mean in a reverse discrimination case? Getting legal results is a game of easy analogies.[42] After all, from contradiction anything follows.

CCLS: What about reason?

CLSer: Reason can only help you get from point A to point B. But where did point A come from? And, as Gödel has shown in number theory, even the best

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Balbus' view who apparently maintains that it cannot.

37. *See* text accompanying *supra* note 7.

38. *See* Unger, *supra* note 28, at 566.

39. *See* Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 753-54 (1981). *See generally* G. GILMORE, THE DEATH OF CONTRACT (1974) (origins, development, decline and fall of contract law).

40. Schwartz, *supra* note 20, at 454 (would CLS favor abolition of the Bill of Rights?).

41. *See* Hutchinson & Monahan, *supra* note 30, at 1516 (We like Rawls, you like Nozick. We win 6-3). *See also*, Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

42. Unger, *supra* note 28, at 570 (legal reasoning is a mere "game of analogies").

formal theories are necessarily incomplete.[43]

CCLS: What about natural law?

CLSer: Natural law I take to be basically the idea that there is an ethical or moral set of principles outside the law by which the appropriateness of law can be judged.

But the natural law move will not work. High level generalizations lack specific content.[44] When it comes time to apply them, it is simply a subjective preference. That is the whole point. Human nature is contradictory. There is *no one* human nature. Natural law embodies rather than resolves the fundamental contradiction.

CCLS: What about law and economics advocates?

CLSer: Law and economics? That is a long story.

CCLS: Make it short.

CLSer: Wealth maximization as a goal solves nothing. Persons may seek their optimum position in any system. To say that the particular position achieved in private property arrangements is the desired one and that other positions are a distortion is a subjective value-laden preference. To say that the state should not intervene in the free market system is to be highly selective in what state activity advocates desire and do not desire. The state is certainly called upon to define the background property and contract rights in which market transactions are to take place.[45] The state becomes fully implicated in the distribution that results. Such a choice involves assumptions about property and its protection, and a series of arbitrary policy decisions are made. Explanation of stopping points where the state is to leave the arena to "private" actors is open to the charge of bias. The whole separation between "private" and "public" is false.[46] The only way to eliminate the state is to argue for anarchy. Moreover, some economists, who purport to be objective, overlook distribution and the extent to which legitimate hierarchies perpetuate and heighten wealth and power concentration.

CCLS: I take it you reject the policy approach?

CLSer: If by policy, you mean that all law is politics, I accept it; that rids us of the legal positivist position. But if you mean that policy is objectively determinable, then I must reject it. Policy approaches simply shift the level of indeterminacy from the legal to the policy level. These policy analysts are only "secular natural law" theorists who import equally vague abstractions which constitute only their own subjective preferences. Regrettably, efforts to postu-

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43. D. HOFSTADTER, GÖDEL, ESCHER, BACH, AN ETERNAL GOLDEN BRAID 23-24, 229-30 (paperback ed. 1979).

44. *See generally* Van Doren, *Implications of Jurisprudence to Law Teaching and Student Learning*, 12 STETSON L. REV. 613, 615, 616-17 (1983) (study of natural law, legal positivism, sociological jurisprudence, legal realism).

45. *See* Mensch, *supra* note 39, at 764.

46. *See A Symposium: The Public/Private Distinction*, 130 U. PA. L. REV. 1289-1518 (1982).

late "preferred community policies" fail because some prefer them, and others do not.[47]

CCLS: Surely, there is a consensus on policy and norms.

CLSer: There is no consensus.[48] That is what interest group conflict is all about. And even interest groups such as merchants have contradictory needs. They need security *and* they need its opposite: freedom to accept or reject a contract at different times. They need rules that are precise *and* they need the opposite: broad standards of good faith which mean that one cannot take advantage of another over the letter of a law.

For example, where is the consensus on abortion, race discrimination, capital punishment? What there is, as I said before, is managed information and false consciousness.[49] Dominant groups control information dissemination and coerce us into thinking we should want what they say, which may be different from what we really need.

CCLS: You know better than others what they need? They vote *voluntarily* with their dollars.

CLSer: Yes, in a constrained atmosphere where their tastes are dictated.

CCLS: I do not think you understand human nature very well.

CLSer: I do not think you seek human potential in very expansive terms. At least we agree that what we are talking about is human fulfillment.

I believe, more or less, in the ideals you profess. I just think you are hypocritical because you subtly maintain your own control through legitimacy claims, and preach that any change will be disastrous.

CCLS: Be realistic! Not all change is for the good. We had better hold on to what we have. Better the demon I know than the one I do not know.

CLSer: What *you* have.

CCLS: You have it too. You are a Harvard Professor of Law! Talk about the hierarchy — you get a high salary, prestige, tenure (one of those property rights you keep complaining about). And how about what Nietzsche once said, that for one to deserve respect, "one must *preach by example.*"[50] Shall I continue?

CLSer: I admit that our status must continue to be an example of hierarchy and a source of rage,[51] but do I have to take a job cleaning the toilets in order

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47. For a valiant attempt, see L. MCDOUGAL & M. MCDOUGAL, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT (1981).

48. *See* Schlegal, *supra* note 10 (referring to a "pseudo-consensus morality").

49. *See* R. GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL 12-22 (1981). *But see generally* Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 701 n.48 ("Geuss misunderstands Habermas' view"). Professor Boyle provides an interesting and brief discussion on the writings by and about Jürgen Habermas. *Id.*

50. CAMUS, *Absurdity and Suicide*, in THE MYTH OF SISYPHUS AND OTHER ESSAYS 3 (1955) (emphasis added).

51. Unger, *supra* note 28, at 674.

to criticize?

CCLS: You might be more believable.

CLSer: Listen, I am only an extension of a system that is contradictory and indeterminate, and I am implicated in what I criticize.[52] I admit I am a "living contradiction." But what if I did resign from Harvard, (or Stanford, Buffalo or Wisconsin) what credibility would I have? How effective could I be? Should I not remain so as to influence those whom I may teach and ultimately enlighten? Would a law review or NEW REPUBLIC publish something written by a sanitation engineer?

Let us get back to substance and stop the ad hominem arguments.

CCLS: If thought is so contingent, what is the matter with arguments ad hominem?

CLSer: Ignoring your bad manners, I was saying, there is no theory that satisfactorily explains why legal phenomena are what they are. Viewing the system in terms of contradictions has more explanatory power than any other. An approach which reduces conflicts in contracts or property to individualism versus paternalism (or altruism) is the most promising model. CLS finds prevailing explanations partial and incomplete: for example, such explanations are that law evolves to meet societal needs, or that it reflects interest group needs, or the power of dominant classes.[53] Law is not, therefore, explicable solely in instrumental terms, except maybe, when it is. By "instrumental" I mean that law responds to social needs, or pressure groups or even dominant classes. In fact, "society" influences "law" which in turn influences "society" and so on in a loop, not a situation where factor A influences factor B.

Many legal decisions do not seem to make sense except as an arbitrary political position between two irreconcilable extremes. This is a powerful descriptive model to explain what is happening in the legal sphere.

CCLS: Are you saying that the legal system reflects equal portions of individualism and altruism?

CLSer: No. I agree that the individualist model controls now, but I insist that it lacks objective justification.

CCLS: Dworkin once noted in his essay, *Paternalism*,[54] that paternalism is "justified only to preserve a wider range of freedom for the individual in question." How far should we allow this principle to be extended?

CLSer: I do not engage in discussions of how much of this, how much of that. Suffice it to say that both paternalistic and individualistic needs exist for both the strong and the weak. Businessmen need individualistic rules, and they need the "paternal" approach of trust and good faith.

CCLS: Suppose we were to explain physics by saying that there are fundamental contradictions and that phenonmenon alternate between polar concepts.

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52. *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 212 (1979) (We are implicated in what we would transform).

53. *See* Gordon, *supra* note 21, at 101.

54. Dworkin, *Paternalism*, in R. WASSERSTROM, MORALITY AND THE LAW 118 (1971).

We would be laughed out of the university. There is one conceptual scheme that predominates in physics.

CLSer: Let us not get into that. I do not know that much about physics. But natural science has its own problems of indeterminacy, and relativity in determining scientific theory.[55] They change those "conceptual models" all the time.

CCLS: Speaking of the criteria for natural science models, is your model predictive?

CLSer: I think not. It is hard to see how a model based on contradiction can be predictive. The purpose is not predictive.

CCLS: Is it descriptive?

CLSer: I think so.

CCLS: Is not the model of the neo-Realist a better predictor? I am thinking of a recent article that correlates political attitudes with voting on cases.[56]

CLSer: Ah yes — the vote counters. They miss a lot that is going on. There is a lot more to it than that. For another example, courts sometimes follow rules "because they are rules" even though they disagree with the outcome. To that extent, the legal system is autonomous and stare decisis does have an effect. And certain changes made by previous courts stick — desegregation, for example, which some of the current justices of the Supreme Court might not have initiated. Some judges at least do believe that there are institutional limits on what they should and can do. Some also believe that they should search for neutral principles, that they should not act in their class interest, or upon their personal preferences.

CCLS: Let us talk more about your aims. Do you not feel that freedom and equality are guiding principles?

CLSer: Neo-Marxists say that the content of freedom, community and equality is so meaningless in liberal society that living up to that ideal without fundamental changes of the production mode would be meaningless.[57]

CCLS: It seems to me that we are quite free, and that equality is a guiding directive of our system. The claim of false consciousness is wrong. People know their own interests, and they seem to like what they have. But for the sake of the argument, let me accept your premise. Suppose there are contradictions. I would say that there will always be.

CLSer: No. Really, they can be resolved better than they are being resolved. We just cannot assume that existing social arrangements lead to the best

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55. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d. ed. 1970).

56. Nowak, *Resurrecting Realist Jurisprudence: The Political Bias of the Burger Court Justices*, 17 SUFFOLK U. L. REV. 549 (1983).

57. *See* Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the L.*, 11 LAW & SOC'Y REV. 571, 580 (1977).

resolution.

CCLS: If we accept your theoretical model, what then?

CLSer: The purpose of the model is to call attention to the illegitimacy of the existing situation.

CCLS: Until you tell where you are going, I will take the existing system with its imperfections. You cannot beat something with *nothing*.[58] Your view is nothing more than nihilism.[59]

CLSer: This is an odd term. Was Descartes a nihilist when he showed that logic and reason were inadequate to prove the existence of God?

CCLS: I guess not. But I am not opting for the unknown.

CLSer: This failure to take CLS seriously, unless we reveal a blueprint, seems to involve a misconception.

CCLS: How so?

CLSer: First, an epistomological misconception. Second, a wrong notion of how thought evolves. As Foucault has pointed out, if thought is culture-bound, we can abandon the quest for universals. A tremendous freedom may result if thought is constantly subject to revision, and this becomes an appropriate end of the thinker.[60] This blurs the distinction between creation and destruction. What we really see in the evolution of thought is not a clear destructive process or a pure creative process, but a fusion of processes in which destruction is creation, and creation is destruction. Progress in natural science is made by attack on existing models. Without that, we might still think the earth is at the center of the solar system.

CCLS: Are you so sure that the sun is at the center.

CLSer: That is the Spirit!

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58. *See, e.g.*, Hutchinson & Monahan, *supra* note 30, at 1483 (CLS "does not possess a common diagnosis . . . much less a remedy").

59. *See supra* note 1 and accompanying text.

60. *See* J. RAJCHMAN, MICHEL FOUCAULT: THE FREEDOM OF PHILOSOPHY 121-24 (1985).

NOTES

Employment Discrimination Against the Handicapped: An Analysis of Statutory and Constitutional Protections in Massachusetts

With the adoption of chapter 533 of the Acts of 1983, the Massachusetts legislature accomplished for the Commonwealth what Congress has repeatedly tried but failed to do for the country[1] — amend the fair employment law to prohibit discrimination on the basis of handicap. In so doing, it worked a significant revision of state law by abrogating an earlier handicap discrimination statute[2] and by adding substantial statutory rights to the existing state constitutional protections afforded the handicapped.[3] However, the new state anti-discrimination laws are not the first to govern this field. Indeed, both the state constitutional and statutory provisions are modeled after federal law, which, unlike its state counterparts, has been the focus of much discussion and fre-

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1. Amendment to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e to 16) to cover handicap discrimination has been repeatedly proposed but not enacted. *See* H.R. 10, 962, 92d Cong., 1st Sess., 117 CONG. REC. 33, 884 (1971); H.R. 13, 199, 93d Cong., 2d Sess., 120 CONG. REC. H1393 (daily ed. Mar. 4, 1974); H.R. 12,654, 93d Cong., 2d Sess., 120 CONG. REC. H617 (daily ed. Feb. 6, 1974); H.R. 461, H.R. 1107, 95th Cong., 1st Sess., 123 CONG. REC. H193, H209 (daily ed. Jan. 6, 1977); S. 446, 96th Cong., 1st Sess., 125 CONG. REC. S3052 (Feb. 22, 1979); H.R. 1200, 98th Cong., 1st Sess., 129 CONG. REC. H289 (Feb. 2, 1983).

2. MASS. GEN. LAWS ANN. ch. 149, § 29K (West 1982).

3. MASS. CONST. art. 114.

quent judicial interpretation.

Beginning with the federal law as a point of departure, this Note explores the state statutory and constitutional measures and concludes that the state laws, while similar in many respects to the federal, provide more expansive jurisdictional and substantive protections against discrimination in employment on the basis of handicap. Part I compares the state and federal statutes, examining the statutory language as well as the interpretations given the statutes by the administrative agencies responsible for their enforcement. The federal case law is evaluated for its persuasive force in anticipated judicial construction of the state statute. Part II analyzes the handicap discrimination amendment of the state constitution by assessing its relationship to the state and federal statutes and its application to employment discrimination, especially in the context of the Massachusetts Civil Rights Act. Finally, Part III considers the procedural and jurisdictional requirements of the state and federal laws for their effect on the extent to which each remedy may be involved in cases of handicap discrimination.

I. THE MASSACHUSETTS STATUTE

A. M.G.L. Chapter 151B As Amended by Chapter 533

The Massachusetts fair employment practices statute, General Laws chapter 151B, sets out the grounds of unlawful discrimination and requires that all legal action under the statute begin with the filing of an administrative complaint with the Massachusetts Commission Against Discrimination (MCAD).[4] The Commission has broad powers to receive, investigate and resolve such disputes.[5] The statute covers private employers with more than five employees, as well as all political subdivisions of the Commonwealth.[6] Prevailing plaintiffs are entitled to an award of attorneys' fees.[7] The adoption of chapter 533 of the Acts of 1983 amended General Laws chapter 151B to include discrimination in employment against the handicapped,[8] using as its model the Federal Rehabilitation Act.

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4. *See* Carter v. Supermarkets General Corp., 684 F.2d 187, 190-91 (1st Cir. 1982); Flynn v. New England Tel. Co., 615 F. Supp. 1205, 1207-09 (D. Mass. 1985).

5. MASS. GEN. LAWS ANN. ch. 151B, § 3 (West 1982).

6. MASS. GEN. LAWS ANN. ch. 151B, § 1(5) (West 1982). "The term 'employer' does not include a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit, nor does it include any employer with fewer than six persons in his employ, but shall include the Commonwealth and all political subdivisions, boards, departments and commissions thereof." *Id.* Domestic servants and individuals employed by their parents, spouse, or child are excluded from the definition of "employee" by section 1(6) of chapter 151B.

7. MASS. GEN. LAWS ANN. ch. 151B, § 9 (West 1982). The authority to award attorneys' fees to prevailing plaintiffs is limited to the courts, however; MCAD is without power to make such awards. Massachusetts Elec. Co. v. MCAD, 375 Mass. 160, 179, 375 N.E.2d 1192, 1205 (1978).

8. The other proscribed bases of discrimination are race, color, national origin, ancestry, sex and religious creed. MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1982).

i. The Federal Rehabilitation Act of 1973

Enacted as part of the general corpus of federal civil rights law,[9] the Rehabilitation Act of 1973[10] prohibits discrimination against the handicapped by federal agencies,[11] contractors,[12] and recipients of federal financial assistance.[13] Because section 504 of the Act, covering recipients of federal aid, has been the most widely applicable, and because it is the section most closely analogous to the state laws, it will be the focus of the Rehabilitation Act discussion here.[14] Section 504 provides, "[n]o otherwise qualified handicapped individual in the United States. . . shall, solely because of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assis-

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9. New York State Ass'n for Retarded Children, Inc. v. Carey, 612 F.2d 644, 649 (2d Cir. 1979).

10. Pub. L. No. 93-112, 87 Stat. 357 (1973), *amended by* the Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617 (1974), *amended by* the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2984 (1978); codified at 29 U.S.C. §§ 701-96 (1985).

11. 29 U.S.C. § 791 (1985).

12. 29 U.S.C. § 793 (1985) (limited to contracts of $2,500 or more).

13. 29 U.S.C. § 794 (1985).

14. Although much of what is said here about section 504 is true for all employers covered by the Rehabilitation Act, and where that is so the corresponding citation is given, section 501 (federal agencies) and section 503 (federal contractors) also differ somewhat from section 504. Probably the most significant difference is that sections 501 and 503 require affirmative action while section 504 does not. *Compare* 29 U.S.C. § 791 (section 501) ("Each department, agency and instrumentality . . . in the executive branch shall . . . submit an affirmative action plan. . . .") *and* 29 U.S.C. § 793 (section 503) ("[a]ny contract in excess of $2,500 . . . shall contain a provision requiring that, in employing [a] person[ ] to carry out such contract the party contracting with the United States shall take affirmative action. . . .") *with* 29 U.S.C. § 794 (section 504) ("No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, . . . be subjected to discrimination . . . .").

Also, section 504 by its terms prohibits discrimination only against "otherwise" qualified persons "solely" because of the handicap; the other sections contain no such language, although courts have read these qualifying limitations into section 501. *See, e.g.*, Jasany v. United States Postal Serv., 755 F.2d 1244, 1249, n.5 (6th Cir. 1985); Daubert v. United States Postal Serv., 733 F.2d 1367, 1369-70 (10th Cir. 1984); Bentivegna v. Department of Labor, 694 F.2d 619, 621-22 (9th Cir. 1982).

Further, the "remedies, procedures and rights" of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to -4 (1985), have been attached to section 504, while those set forth in section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1985), are available under section 501. 29 U.S.C. § 794a (1985). Additionally, there is no private right of action under section 503. *See* Healy v. Bergman, 37 Fair Empl. Prac. Cas. (BNA) 1589, 1594 (D. Mass. 1985); Bento v. I.T.O. Corp., 599 F. Supp. 731, 739 (D. R.I. 1984) (collecting cases). Further, no award of attorneys' fees is provided under section 503, unlike the other sections, 29 U.S.C. § 794(b). As to a private right of action for section 504, see Ciampa v. Massachusetts Rehabilitation Comm'n, 718 F.2d 1, 5 (1st Cir. 1983). The Supreme Court has not expressly decided the issue of a private right of action for section 504, but it has assumed a private right of action in the cases it has heard, and has noted, with apparent approval, the reliance of the lower courts on Cannon v. University of Chicago, 441 U.S. 677 (1979), in finding such a right. *See* Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1252, n.7 (1984). In section 501 cases, the operation of section 717 of Title VII carries with it a private right of action.

tance . . . ."[15]

The federal statute defines a handicapped person as one who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[16] Administrative regulations[17] promulgated under section 504 have supplemented the statute. Under the regulations, the term physical or mental impairment includes any physiological disorder or condition affecting major body systems, and mental or psychological disorders.[18] A major life activity is a function such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.[19] A qualified handicapped person, in the context of employment, is a handicapped person who, with reasonable accommodation, can perform the essential functions of the job.[20] This duty to provide reasonable accommodation is balanced by the limitation that no accommodation is required if the handicap is not known to the employer, or if the employer can show that it would impose undue hardship given the size and nature of the company and the nature and cost of the accommodation.[21]

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15. 29 U.S.C. § 794 (1985).

16. 29 U.S.C. § 706(7)(1985). Specifically excluded from this definition, however, are alcoholics and drug abusers whose current use of alcohol or drugs prevents safe performance of the job. This group is also excluded from the protections of section 503 but is covered by section 501. *Id.*

17. Although different federal agencies have regulatory authority for different sections of the Act (i.e., the Equal Employment Opportunity Commission for federal agencies and departments, the Department of Labor for federal contractors, and the Department of Justice for recipients of federal aid), the various regulations are consistent on these points. Regulatory authority for section 504 first rested with the Department of Health, Education and Welfare (HEW), and was later transferred to the Department of Justice, with the HEW regulations deemed promulgated by the Department of Justice. Executive Order No. 12,250, 45 Fed. Reg. 72995, *reprinted in* 42 U.S.C. § 2000d-1 (1983). These regulations were modified in 1981. 46 Fed. Reg. 40686, 40687, Aug. 11, 1981. While the Justice Department has coordinating authority, all federal agencies are required by the statute to promulgate their own regulations, and those of the Justice Department are minimal requirements. Owing to the influence of the initial HEW regulations, most if not all federal agency regulations for section 504 follow the HEW model which is somewhat more elaborate than that of the Justice Department.

18. *See* section 501, 29 C.F.R. § 1613.702(b) (1985); section 504, 28 C.F.R. § 41.31(b)(1) (1985).

19. *See* section 501, 29 C.F.R. 1613.702(c) (1985); section 503, 41 C.F.R. § 60-741.2 app. A (1985); section 504, 28 C.F.R. § 41, 31(b)(2)(1985).

20. *See* section 501, 29 C.F.R. § 1613.702(f) (1985); section 503, 41 C.F.R. 60-741.2 (1985); section 504, 28 C.F.R. § 41.32 (1985). The courts have differed widely on when accommodation is reasonable and when it imposes undue hardship. *See, e.g.*, Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd mem.*, No. 83-1626 (3d Cir. Mar. 6, 1984) (in work requiring 90% reading, reasonable to provide readers for blind employee); Upshur v. Love, 474 F. Supp. 332 (N.D. Cal. 1979) (providing reader to blind school district administrator was undue hardship); Stutts v. Freeman, 30 Fair Empl. Prac. Cas. 1121 (11th Cir. 1983) (employer failed duty to accommodate dyslexic employee even though made many unsuccessful efforts to have non-discriminatory test administered); Bey v. Bolger, 540 F. Supp. 910 (E.D. Pa. 1982) (assigning employee to light duty position for which qualified but ineligible under terms of collective bargaining agreement was undue hardship).

21. *See* section 501, 29 C.F.R. § 1613.704 (1985); section 503, 41 C.F.R. § 60-741.6(d)

Additionally, the regulations provide that employers may not make use of selection criteria that screen out or tend to screen out qualified handicapped persons unless they are shown to be job related and the least discriminatory.[22] Nor may an employer make pre-employment inquiry into the existence or severity of handicaps except that it may allow voluntary, confidential disclosure for affirmative action purposes,[23] and may condition an employment offer on the results of a medical examination conducted to determine the person's ability to perform the essentials of the job.[24]

ii. Chapter 533 of the Acts of 1983

Chapter 533 of the Acts of 1983 amended General Laws chapter 151B by incorporating many of the key concepts and much of the language of section 504 of the Rehabilitation Act. It defines a handicapped person as one who has a physical or mental impairment which substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment.[25] A qualified handicapped person is one capable of performing essential job functions with reasonable accommodation.[26] Interpretative guidelines[27] promulgated under the statute by the MCAD define a major life activity as a function such as walking, sitting, standing, speaking, seeing, hearing, breathing, learning and working.[28] A job function is essential under the MCAD guidelines if it "must necessarily be performed by an employee to accomplish the principle object(s) of the job."[29]

Discrimination against qualified handicapped persons is prohibited (a) in employment by employers and their agents[30] unless doing so would subject the employer to undue hardship given the size of the company, the type of com-

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(1985); section 504, 45 C.F.R. § 84.12 (1985).

22. Section 501, 29 C.F.R. § 1613.705 (1985); section 503, 41 C.F.R. § 60-741.6(c) (1985); section 504, 28 C.F.R. § 41.54 (1985).

23. Section 501, 29 C.F.R. § 1613.706 (1985); section 504, 28 C.F.R. § § 41.51(4), 41.56, 41.57 & 41.58 (1985).

24. Section 501, 29 C.F.R. § 1613.707 (1985); section 503, 41 C.F.R. § 60-741.5(c)(1) (1985); section 504, 28 C.F.R. § 41.55 (1985).

25. 1983 Mass. Acts 533, § 2, (amending Mass. Gen. L. ch. 151B, § 1).

26. *Id.*

27. MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, GUIDELINES: EMPLOYMENT DISCRIMINATION ON THE BASIS OF HANDICAP — CHAPTER 151B [hereinafter GUIDELINES] (adopted Sept. 30, 1986)(available from the Commission, One Ashburton Place, Boston, MA 02108).

28. GUIDELINES, *supra* note 27, at § II A.1. A major life activity has also been defined by the Commission as "a function which is essential to the enjoyment of life." Villecco v. General Elec. Co., 8 MASS. DISCRIM. L. REP. 1010, 1037 (1986).

These guidelines were not adopted pursuant to the Commission's formal rulemaking authority, Mass. Gen. L. ch. 151B, § 3, and thus do not have the force of law. *See, e.g.*, Solomon v. School Committee of Boston, 395 Mass. 12, 15, 478 N.E.2d 137, 139 (1985). Rather, they were designed to be interpretive rules and as such are "entitled to great weight." *Id. See also* Massachusetts Elec. Co. v. MCAD, 375 Mass. 160, 169, 375 N.E.2d 1192, 1198, (1978); Rock v. MCAD, 384 Mass 198, 203, 424 N.E.2d 244, 247 (1981) (primary responsibility for construing chapter 151B entrusted to MCAD, not courts).

29. GUIDELINES, *supra* note 27, at § IIB.

30. 1983 Mass Acts 533, § 6 (amending Mass. Gen. Laws ch. 151B, § 4).

pany, and the nature and cost of the accommodation;[31] (b) in union membership by labor organizations unless based upon a bona fide occupational qualification,[32] and by labor organizations against employers or their employees unless based upon a bona fide occupational qualification;[33] and (c) in job referrals and classifications by employment agencies unless based upon a bona fide occupational qualification.[34]

Chapter 533 requires that job qualifications be functionally related to the

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31. *Id. See also* GUIDELINES, *supra* note 27, at § VI, which add to the statute's undue hardship factors the following:

> 1) whether the provision of reasonable accommodation will prevent the employer from providing service required by and/in compliance with all federal and state regulations;
>
> 2) whether the health or safety of the public will be unduly compromised by providing the accommodation.

Id.

32. The bona fide occupational qualification (BFOQ) exception is an affirmative defense. Sarni Original Dry Cleaners, Inc. v. Cooke, 388 Mass. 611, 617, 447 N.E.2d 1228, 1233 (1983). It has long been part of the law of sex discrimination, but has not yet been construed in the context of handicap discrimination. It is "an extremely narrow exception." Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

> In order to invoke the BFOQ successfully, the employer must show that it has a '*factual* basis for believing that all or substantially all [members of the excluded category] would be unable to perform safely and efficiently the duties of the job involved.' This factual basis must be based upon objective evidence and not on 'subjective doubts, which may themselves be based upon impermissible stereotypes.'

Sarni, 388 Mass. at 617-18, 447 N.E.2d at 1233 (emphasis supplied by court) (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) and Long v. Sapp, 502 F.2d 34, 40 (5th Cir. 1974)). The employer must show that the essence of the business would be undermined by hiring members of the excluded class. Weston v. Massachusetts Dept. of Corrections, 7 Mass. Discrim. L. Rep. 1247, 1275 (1985); Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971).

The Equal Employment Opportunity Commission has adopted guidelines with regard to sex as a BFOQ under Title VII. These guidelines provide that the BFOQ exception is not met where it is based on assumptions about comparative employment characteristics, stereotypes, or preferences of co-workers, clients, customers or the employer. *See* 29 C.F.R. § 1604.2 (1985). These guidelines have been cited with apparent approval by the Massachusetts Appeals Court. *See* Blue Hills Regional Dist. School Comm. v. Flight, 10 Mass. App. Ct. 459, 470 n.12, 409 N.E.2d 226, 234 n.12 (1980) *rev'd on other grounds*, 383 Mass. 642, 421 N.E.2d 755 (1981). They have also been adopted, in substance, by the MCAD as the sex discrimination guidelines for chapter 151B. *See* MASS. REGS. CODE tit. 804, § 3.02 (1985). Like the general duty imposed by the handicap statute, the BFOQ exception itself requires accommodation of the excluded class. *See* Hardin v. Stynchcomb, 691 F.2d 1364, 1373 (11th Cir. 1982) and cases cited therein. Of potential significance in the context of handicap discrimination is the question of health and safety risks. In the area of sex discrimination, questions of personal risk to the employee cannot be the basis of a BFOQ, but the health and safety of third persons may be. *See* Burwell v. Eastern Airlines, Inc., 633 F.2d 361 (4th Cir. 1980) (en banc); Harris v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980). The MCAD handicap Guidelines treat health and safety questions under the rubric of undue hardship. *See supra* note 31. The handicap guidelines are silent in the area of the BFOQ exception.

33. 1983 Mass. Acts 533, § 4 (amending MASS. GEN. L. ch. 151B, § 4).

34. *Id.* at § 5 (amending MASS. GEN. L. ch. 151B, § 4).

position.[35] It also prohibits pre-employment inquiry into the existence or severity of a handicap except that an employer may condition a job offer on the result of a medical examination conducted solely to determine the applicant's ability to perform the essential functions of the job.[36]

It is apparent then that chapter 533 is modeled on and borrows heavily from section 504. The definition of handicap is that of the Rehabilitation Act, as are the requirements that the handicapped person be qualified to perform essential job functions, that reasonable accommodation be offered, and that no accommodation impose undue hardship given those factors identified by the administrative regulations of section 504. Further, chapter 533 imposes both the duty that job requirements be functionally related, as well as the prohibition against pre-employment inquiry, with the exception that a job offer may be conditioned upon the results of a medical examination conducted to determine whether the handicapped person can perform adequately with reasonable accommodation to the handicap.

Beyond these broad outlines, however, there is reason to pause before importing wholesale into chapter 151B the jurisprudence of the Rehabilitation Act.[37]

B. A Comparison of the Statutory Language

i. Program Specificity

First, there are some differences in statutory language between chapter 151B and section 504. The most obvious is that because receipt of federal aid by a program is necessary to trigger the statute, section 504 is program specific. The prohibition against discrimination applies only to the particular program receiving federal financial assistance, and not to the entity of which the

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35. *Id.* at § 6 (amending MASS. GEN. L. ch. 151B, § 4). Under the MCAD Guidelines:

> employment criteria must be designed to measure only those abilities necessary to perform the essential function of a job. . . . Criteria which are not essential should be dropped . . . . To comply with the law, a job description should include only those functions which must be performed by that particular employee or that the employee may readily be expected to perform in that position.

GUIDELINES, *supra* note 27, at § III A, B.

36. 1983 Mass Acts 533, § 6 (amending MASS. GEN. L. ch. 151B, § 4). Prior to extending a job offer, the employer may not use any direct or indirect means to elicit information regarding a handicap. *See* GUIDELINES, *supra* note 27, at § IV. Job offers may be conditioned upon the results of a medical examination of the applicant, but only if such examinations are administered to all prospective employees entering the same job category. *Id.* at § V. Under the statute, medical information gained as the result of this examination must be strictly controlled. *Id.* A separate civil action may also lie against both the physician and the employer for unauthorized disclosure of medical information about the employee. *See* Cronan v. New England Telephone Co., 41 Fair Empl. Prac. Cas. (BNA) 1273, 1274 (Suffolk Sup. Ct. 1986); Alberts v. Devine, 395 Mass. 59, 479 N.E.2d 113 (1985); Bratt v. International Business Machs. Corp., 392 Mass. 508, 467 N.E.2d 126 (1984); Bratt v. International Business Machs. Corp. 785 F.2d 352 (1st Cir. 1986).

37. "[W]hile interpretations of a Federal statute which is similar to the State statute under consideration are often helpful in setting forth all the various policy considerations, such interpretations are not binding on a State court construing its own state statute." Massachusetts Elec. Co. v. MCAD, 375 Mass. 160, 167, 375 N.E.2d 1192, 1198 (1978).

program is a part.[38] Chapter 151B, however, is not so restricted; an employer comes within the statute as an institution by virtue of employing the requisite minimum number of employees.[39] Because receipt of government aid plays no part in the operation of chapter 151B, the position applied for or held by the complainant is immaterial to statutory jurisdiction.

ii. The Definition of Handicap

In addition to wider employer application, the state statute adopts a more expansive view of protected handicaps. Although it shares the Rehabilitation Act's definition of handicap as a "physical or mental impairment which substantially limits a major life activity,"[40] unlike section 504 of the Rehabilitation Act, the state statute does not exclude alcoholism and drug addiction from this definition. Indeed, MCAD guidelines specifically include substance abuse within the definition of impairment.[41] These guidelines also define handicap more broadly than the Rehabilitation Act does by including obesity and communicable diseases such as Acquired Immune Deficiency Syndrome.[42]

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38. *See* United States Dept. of Transp. v. Paralyzed Veterans of America, 106 S. Ct. 2705 (1986); Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1255 (1984); Grove City College v. Bell, 104 S. Ct. 1211 (1984) (institutions as a whole do not become subject to non-discrimination provision of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), where one program receives federal aid); Tonnesson v. Youville Hospital, 35 Empl. Prac. Dec. (CCH) ¶34, 898 (D. Mass 1984) (section 504 plaintiff must show job connected in some way to federal funds). Note, however, that non-earmarked federal funds need not be traced from general revenue to the specific program. Arline v. School Bd., 772 F.2d 759, 763 (11th Cir. 1985). *See also* Consolidated Rail Corp., 104 S. Ct. at 1255. "*Grove City College* considered grants of financial aid to students. The Court specifically declined to analogize these grants to non-earmarked direct grants and, indeed, characterized them as 'sui generis.' " Henning v. Village of Mayfield, 610 F. Supp. 17, 19 (N.D. Ohio 1985) (village receiving federal revenue sharing funds into general account is recipient under 504 irrespective of fact that at its discretion it used them for a program other than the one that employed plaintiff); Tudyman v. United Airlines, 608 F. Supp. 739, 743 (C.D. Calif. 1984) "[T]he only holding of *Grove City* that is relevant . . . to most § 504 cases, is that indirect funding is sufficient to trigger § 504's coverage, but that the effect . . . on the plaintiff must be more than merely 'freeing up' defendant's own resources for use elsewhere." *Id.* (emphasis omitted); Bradford v. Iron County, 36 Fair Empl. Prac. Cas. (BNA) 1296, 1299 (E.D. Mo. 1984) (there should be a presumption that every program within an institution receiving unrestricted federal funds is covered by § 504). *But see* Doyle v. Univ. of Alabama, 680 F.2d 1323, 1326 (11th Cir. 1982) (not sufficient to show entity receives federal funds, must show that program itself received or directly benefitted). *Accord* Doe v. Region 13 Mental Health-Mental Retardation Comm., 704 F.2d 1402 (5th Cir. 1983); Collins v. Chrysler Corp., 602 F. Supp. 1456, 1458 (E.D. Mo. 1985).

39. Private employers must have six or more employees to come within the statute. Political subdivisions of the state have no minimum number. *See supra* note 6.

40. 29 U.S.C. § 706(7)(B) (1985); MASS. GEN. LAWS ANN. ch. 151B, § 1(17) (West 1982).

41. *See* GUIDELINES, *supra* note 27, at § II A 2. In order to qualify as a protected handicap, however, substance abuse must generally be the result of physical or mental dependency. *Id. See supra* note 16 for § 504's explicit exclusion.

42. *See* GUIDELINES, *supra* note 27, at § II A 3. As to AIDS, see also Cronan v. New England Telephone Co., 41 Fair Empl. Prac. Cas. (BNA) 1273 (Suffolk Sup. Ct. 1986). The condition of being overweight has been held not a protected handicap under § 504. Tudyman v. American Airlines, 608 F. Supp. 739, 746 (C.D. Cal. 1984). Although at this writing the question is still being debated, communicable diseases have also been determined to be outside the protection of

Further, contrary to the widely held view of the Rehabilitation Act,[43] temporary disabilities are also not excluded from the state statute; provided the impairment substantially limits a major life activity (or has historically, or is so regarded), it need not be permanent to bring the complainant within the statute.[44]

iii. Otherwise Qualified

Moreover, unlike section 504, the state measure omits the conditional "otherwise" in its definition of qualified handicapped persons. Where the Rehabilitation Act covers "otherwise qualified handicapped individuals," the state statute speaks of "qualified handicapped persons." The import of this change may be evaluated with reference to the landmark Rehabilitation Act decision, *Southeastern Community College v. Davis*,[45] where the United States Supreme Court addressed the definition of "otherwise qualified handicapped individual" and the duty to provide "reasonable accommodation." Frances Davis was a deaf student who applied to the nursing program at Southeastern Community College.[46] On the basis of a medical examination which showed that she could communicate effectively only by lip reading, the college denied her admission on the ground that her handicap prevented her from safely tending to patient needs.[47] Davis brought suit under section 504 claiming that she was otherwise qualified and that Southeastern owed her accommodation, including modification of the nursing program and individual supervision.[48] The Court rejected this contention, holding that "[a]n otherwise qualified handicapped person is one who is able to meet all of a program's

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section 504. *See* United States Dep't of Justice Office of Legal Counsel, Memorandum for Ronald E. Robertson, General Counsel, Department of Health and Human Services, The Application of Section 504 to Persons with AIDS (1986). The United States Supreme Court has agreed to hear a case raising the question. Arline v. School Bd., 772 F.2d 759 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 1633 (1986).

43. Grimard v. Carlston, 567 F.2d 1171, 1174 (1st Cir. 1978); Stevens v. Stubbs, 376 F. Supp. 1409, 1414 (N.D. Ga. 1983); Doss v. Gen. Motors Corp., 25 Fair Empl. Prac. Cas. (BNA) 419 (C.D. Ill. 1980). *But see* Dept. of Health and Human Servs. Regulations, 45 C.F.R. pt. 84, app. A at 310. "The Department continues to believe. . . it has no flexibility within the statutory definition to limit the term to persons who have. . . permanent conditions. . . ." *Id.*

44. The statute and MCAD Guidelines are silent on temporary disabilities. However, there is ample reason to believe that they are included within the definition of handicap. The "record of" handicap and "regarded as" handicapped provisions of the definition are not time bound. Nor are, for example, obesity or high blood pressure, both of which are expressly included as protected impairments by the guidelines, as are other illnesses. *See* GUIDELINES, *supra* note 27, at § II A(1), (3). Further, that no time restriction should be placed on the definition of handicap is supported by the Massachusetts workers' compensation statute which declares that all work-related injuries are handicaps within the meaning of chapter 151B. MASS. GEN. LAWS ANN. ch. 152, § 75B (West 1986). Advocates for the handicapped have also seen chapter 151B as including temporary disabilities. *See* DISCRIMINATION ON THE BASIS OF HANDICAP 9 (1983); PRACTICE MEMO ON CHAPTER 533, 24 (1984) (both publications prepared by and available from the Developmental Disabilities Law Center, 11 Beacon Street, Boston).

45. 442 U.S. 397 (1979)

46. *Id.* at 400.

47. *Id.* at 400-02.

48. *Id.* at 407-08.

requirements in spite of his handicap,"[49] and that section 504 does not require "fundamental alteration," "extensive modification," or "substantial adjustment" in a program in order to accommodate the handicapped.[50] The Court characterized the foregoing as "affirmative action" and held that it was not unlawful to refuse to take such measures,[51] although it noted that the line separating affirmative action and illegal discrimination "will not always be clear."[52]

Because the state statute omits the word "otherwise," the *Davis* interpretation of the federal law requiring qualification "in spite of" the handicap should have no application. This omission is edifying; the word "otherwise" is superfluous and confusing when the purpose it serves is better advanced by the concepts of reasonable accommodation and undue hardship. That is, given a particular handicap, the question is always whether it is unlawful to deny employment. The state statute makes it clear that such discrimination is not unlawful if the person is incapable of performing the essential functions of the position with accommodation to the handicap, or if the provision of accommodation to enable the handicapped person to so perform would impose unfair cost on the employer.

The word "otherwise" in this context simply creates conceptual obstacles to understanding the reasonable accommodation requirement. It suggests that, as a condition of invoking the protections of the statute, the handicapped person be able to perform regardless of the handicap, thus negating the reasonable accommodation requirement.[53] In fact, the question of qualification can be answered only after the issue of reasonable accommodation has been resolved.[54] Indeed, the initial section 504 regulations[55] omitted the word altogether, but perpetuated the confusion by explaining that:

> [t]he omission of the word 'otherwise' is necessary to comport with the intent of the statute because, read literally, 'otherwise' qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus could be said to be otherwise qualified for the job of driving.[56]

The fear seems to be that such a reading would require hiring blind bus drivers. This is absurd, of course, but not for the reason given by the regulations

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49. *Id.* at 406.

50. *Id.* at 410.

51. *Id.* at 410-11.

52. *Id.* at 412-13. For examples of reasonable accommodation, see supra note 20.

53. *See, e.g.*, Daubert v. United States Postal Serv., 733 F.2d 1367, 1370-72 (10th Cir. 1984).

54. Mass. Gen. L. ch. 151B, § 1 (16) provides: "The term 'qualified handicapped person' means a handicapped person who is capable of performing the essential functions of a particular job, *or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap.*" *Id.* (emphasis added).

55. Promulgated by the Department of Health, Education and Welfare, 42 Fed. Reg. 22,676 (May 4, 1977) (45 C.F.R. § app. A, subpart a(5) (1985)).

56. 45 C.F.R. 84, app. A, subpart a(5) (1985).

and relied upon by the *Davis* court. The simple fact is that blind people are not capable of performing an essential function of bus drivers — driving — even with the most extravagant accommodation. Because the state statute omits the word "otherwise," the confusion engendered by the section 504 regulations and *Davis* is avoided. To the extent that "otherwise qualified" suggests that handicapped employees must be able to perform irrespective of their handicap before they may invoke the protection against discrimination, this limitation on the federal statute has no application to the state statute. Rather, the inquiry shifts from the federal law's inherently speculative and ultimately pointless debate over whether an employee is qualified "in spite of" rather than "except for" the handicap, to a straightforward examination of which job functions are essential and what accommodations would be reasonable.

iv. Discrimination Solely on the Basis of Handicap

Another notable difference in statutory language is the omission from the state statute of the word "solely" in the prohibition against discrimination. That is, section 504 provides "[n]o otherwise qualified handicapped individual . . . shall, *solely* by reason of his handicap, be. . . subjected to discrimination. . . ."[57] Although this language has not received wide attention, at least one federal circuit adheres to the view that it distinguishes discrimination on the basis of handicap from other forms of unlawful discrimination. While Title VII of the Civil Rights Act of 1964[58] — the federal statute governing employment discrimination on the basis of, for example, race and sex — precludes decisionmaking "because of"[59] the statuses it protects, section 504 proscribes only adverse employment action based entirely on the handicap.[60] In other words, in contrast to Title VII, where consideration of the protected status as *a* motivating factor in the decision is impermissible, section 504 prohibits only that discrimination where a handicap is *the* motivating factor.[61] Further support for distinguishing section 504's "solely" from Title VII's "because of" standard may be found in *McDonald v. Santa Fe Trail Transportation Co.*,[62] where the Supreme Court noted that Title VII plaintiffs need only show that consideration of the protected status was the "but for" cause, not the sole cause, of adverse employment action.[63] Although the law under section 504 is by no means fully developed on this point, it may be that liability for handicap

57. 29 U.S.C. § 794 (1985) (emphasis added).

58. 42 U.S.C. § 2000e — 2000e-16 (1986).

59. *Id.* at § 2000e-2.

60. Norcross v. Sneed, 755 F.2d 113, 117 n.5 (8th Cir. 1985).

61. To prevail under Title VII in the First Circuit it is not necessary to show that no other factors were taken into account, but it must be shown that consideration of an impermissible factor was determinative of the outcome, that but for the employer's reliance on it the adverse employment action would not have been taken. Mack v. Cape Elizabeth School Bd., 553 F.2d 720, 722 (1st Cir. 1977); Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979) (age discrimination). Other courts have applied a less demanding standard. *See, e.g.*, Brodin, *The Standard of Causation in The Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982) (surveying the varying standards and suggesting, *inter alia*, a "some factor" test); *see also* Bibbs v. Block, 749 F.2d 508, 511 (8th Cir. 1985)(en banc)(adopting Brodin view).

62. 427 U.S. 273 (1976).

63. *Id.* at 282 n.10.

discrimination requires a stricter standard of causation than other forms of employment discrimination.[64]

To the extent that this distinction permits an employer to make decisions about the qualifications of a handicapped employee or applicant by taking the handicap into consideration — in a way that the employer is prohibited from doing if the employee were black or female — the same should be true of the state statute.[65] However, to the extent that this language suggests that a handicapped person alleging discrimination under section 504 must establish that the employer had no motivation, however slight, other than one based entirely on the handicap, the state statute differs. Like Title VII, it recognizes a "because of" standard of causation.[66] This situation often arises where, for example, an employer is shown to have acted on the basis of the employee's race in addition to other factors, such as absenteeism. Chapter 151B has clearly prohibited this type of mixed-motive decision making,[67] and it should be unchanged by the addition of handicap. In fact, prior to the adoption of the bill that amended chapter 151B, the legislature rejected competing proposals which would have imposed the "solely" standard of causation in handicap discrimination.[68]

v. Affirmative Action

Of potentially greater significance in distinguishing the state and federal statutes is the issue of affirmative action. At least since *Davis* it has been evident that section 504 does not require affirmative action.[69] Although the Court's use of the phrase "affirmative action" has been subject to some confusion,[70] it is clear that recipients of federal aid need not act preferentially to-

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64. There are a number of reasons to believe that the term "solely" will not be widely read in this strict sense. In Alexander v. Choate, 105 S. Ct. 712 (1985), the United States Supreme Court held that discrimination based on facially neutral motives entirely unrelated to discriminatory animus against or even consideration of a handicap may nonetheless be prohibited under section 504. *Id.* at 718-20. *See infra* notes 99-102 and accompanying text.

Moreover, the evidence necessary to establish and rebut a prima facie case of discrimination under section 504 has followed the model under Title VII where the test of causation is "because of" rather than "solely." Section 504 plaintiffs have not been required to prove that the employer's decision was based entirely on a single factor or to disprove all other possible explanations, however causally insignificant. *See infra* notes 119-39 and accompanying text.

65. Unlike the equal employment opportunity principle underlying the prohibition against discrimination on the basis of other protected statuses where the characteristic is wholly unrelated to the ability to perform, the prohibition against discrimination on the basis of handicap recognizes that the handicap may be related to qualification. Thus, the reasonable accommodation requirement and the allowance for employment offers conditioned upon the result of a medical examination implicitly assume that the handicap may, and indeed must, be taken into account.

66. MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1982).

67. The standard of causation under chapter 151B is the First Circuit's "determinative factor" test for Title VII. Smith College v. MCAD, 376 Mass. 221, 227, n.8, 380 N.E.2d 121, 125 n.8 (1978).

68. S. 208, 109th Gen. Court, 1st Sess. (1981); H. 353, 109th Gen. Court, 1st Sess. (1981); H. 485, 109th Gen. Court, 1st Sess (1981); H. 3537, 109th Gen. Court, 1st Sess. (1981); S. 650, 108th Gen. Court, 2d Sess. (1980).

69. *See supra* notes 45-52 and accompanying text.

70. The Court acknowledged the difficulty with this term in Alexander v. Choate, 105 S. Ct.

ward the handicapped or establish hiring quotas. This is also generally true of chapter 151B.[71]

Significantly, however, in amending chapter 151B to include protection against handicap discrimination, the legislature did not amend the provision of the statute that declares that preferential treatment and hiring quotas are not required for the protected classes. Consequently, this provision lists every other unlawful basis for discrimination, but does not speak to handicap discrimination. Whether this was the intent of the legislature or simply careless drafting is a difficult question compounded by the lack of formal legislative history. It may have been the legislature's intent to avoid confusion on the issue of reasonable accommodation by making it clear that some special treatment of the handicapped may be necessary. Thus, unlike the general equal opportunity principle requiring identical treatment of majorities and minorities, it may be discriminatory to treat handicapped employees the same as non-handicapped employees.[72] If this rather limited modification of employment practices was the legislature's intent, however, it chose an inartful method of expressing it, failing to recognize that the statute's "no preferential treatment" provision is addressed not only to some limited special treatment but to a much greater duty to make employer hiring statistics representative of the workforce at large.

Moreover, the argument that the legislature intended to enact affirmative action is bolstered if knowledge of unsuccessful congressional proposals to amend Title VII is imputed to the drafters of the amendment of chapter 151B.[73] This congressional activity provided the background against which the

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712, 721 n.20 (1985).

71.

> Nothing contained in this chapter or in any rule or regulation issued by the commission shall be interpreted as requiring any employer, employment agency or labor organization to grant preferential treatment to any individual or group because of the race, color, religious creed, national origin, sex, age or ancestry of such individual or group because of imbalance which may exist between the total number or percentage of persons employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to or employed in any apprenticeship or other training program, and the total number or percentage of [such] persons . . . in the commonwealth, section or other area therein, or in the available workforce in the commonwealth, or in any of its political subdivisions.

MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1982).

72. MCAD Guidelines for example, state that failure to provide reasonable accommodation "is in itself a violation of law," GUIDELINES, *supra* note 27, at § VI, and require employers to "select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the factor the test purports to measure rather than the handicap. *Id.* at § III D. Similarly, the regulations pursuant to section 504 provide that recipients of federal aid shall not "[p]rovide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others *unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others.*" 28 C.F.R. § 41.51(b)(iv) (1985) (emphasis added).

73. *See supra* note 1.

amendment of chapter 151B took place, and the most recent effort[74] to amend Title VII prior to the adoption of the bill that amended chapter 151B[75] modified the federal statute's parallel "no preferential treatment" provision to include handicap.[76] Assuming knowledge of this model on the part of the legislature, its failure to act likewise in amending a virtually identical statute is telling.[77]

C. Application of the Federal Case Law to the State Statute

i. Reasonable Accommodation

Beyond the differences in statutory language between the state and federal acts, many restrictions that have developed in the judicial construction of section 504 have no application to the state statute. One important distinction is found in the duty of employers to provide reasonable accommodation to handicapped employees. Both the state and federal administrative interpretations require accommodation only to those handicaps known to the employer.[78] However, in contrast to the federal statute where the failure to provide reasonable accommodation is excused if the need or the handicap is not actually known,[79] the state statute imposes some duty to investigate. This duty arises because the state guidelines provide that even where the employee does not request reasonable accommodation, the employer must provide it if the employer has reason to know of the handicap.[80]

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74. S. REP. NO. 316, 96th Cong., 1st Sess. (1979). Committee on Labor and Human Resources, Equal Employment Opportunity for Handicapped Individuals Act of 1979, S. 446.

75. S. 57, 109th Gen. Court. 2d Sess. (1982) and S. 67, 109th Gen. Court, 1st Sess. (1981) were identical to S. 75 which was adopted in 1983.

76. S. REP. NO. 316, 96th Cong., 1st Sess. (1979).

77. Even if chapter 151B does not require private employers to engage in affirmative action to hire the handicapped, affirmative action is the rule for state employers. Massachusetts Executive Order 246, Nov. 2, 1984, requires that all agencies and authorities of the executive branch implement an affirmative action plan to hire handicapped applicants. Aggrieved persons may complain to the State Office of Affirmative Action which investigates noncompliance and which may take control of the offending agency's personnel actions and/or refer violations of chapter 151B to the Massachusetts Commission Against Discrimination. *Id.* at 13. Guidelines promulgated pursuant to Executive Order 246 by the State Office of Affirmative Action on November 12, 1985, set the hiring goal for handicapped persons at 12 percent for each state agency. *See* STATE OFFICE OF AFFIRMATIVE ACTION GUIDELINES EXECUTIVE ORDER 246 PROGRAM FOR THE HANDICAPPED, at 10. Certain classes of impairments are targeted for priority consideration. *Id.* at 6. These affirmative action guidelines also establish formal procedures and forms.

78. 28 C.F.R. § 41.53 (1985); GUIDELINES, *supra* note 27, at § 6.

79. Cooke v. Department of Labor, 688 F.2d 669 (9th Cir. 1983) (no duty to investigate handicap claim before terminating employee); Robinson v. Devine, 37 Fair Emp. Prac. Cas. (BNA) 728, 730 (D. D.C. 1985) (no duty to accommodate until employee makes handicap known); Fitzgerald v. Green Valley Educ. Agency, 589 F. Supp. 1130, 1137-38 (S.D. Iowa 1984) (need not consider or implement accommodations where applicant did not request, even if employer's statements gave applicant justifiable impression that no accommodation was possible and applicant had no information to contrary); Butler v. Department of Navy, 595 F. Supp. 1063, 1067-68 (D. Md. 1984) (handicap not known even though employee's record contained disability certificate).

80. *See* GUIDELINES, *supra* note 27, at § VI.

The state statute also forecloses another reasonable accommodation defense available under the Rehabilitation Act, though perhaps not without some uncertainty. Specifically, the Massachusetts Commission Against Discrimination guidelines provide that reasonable accommodation may include restructuring the handicapped employee's job duties and hours.[81] Although this is also true of the federal regulations,[82] courts construing the federal statute have determined that an employer does not act unlawfully if he terminates a handicapped employee rather than accomodate his handicap in a way that violates a collective bargaining agreement.[83]

Under the state statute the duty imposed by the reasonable accommodation requirement should not be avoided by agreements with labor unions. Jurisdictional differences between the state and federal statutes and significant policy considerations underlie this interpretation. Although the Rehabilitation Act requires all recipients of federal aid, including labor unions, to reasonably accommodate handicapped employees, it may be a justifiable restriction on the Rehabilitation Act to hold that an employer acts lawfully if he denies reasonable accommodation rather than violate a collective bargaining agreement. That is, although an employer may be covered by the Rehabilitation Act through its receipt of federal funds, the labor organizations with whom the employer has collective bargining agreements may not, and requiring the labor union to participate in accommodating the handicapped employee may be seen as an unwarranted extension of the Act.[84]

Under the state statute, however, both the employer and the union are

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81. *Id.* at § II C.

82. *See, e.g.*, Regulations of the Department of Health and Human Services, 45 C.F.R. § 84.12(b) (1985).

83. *See* Jasany v. United States Postal Serv. 755 F.2d 1244, 1252 (6th Cir. 1985); Daubert v. United States Postal Serv. 733 F.2d 1367, 1369-70 (10th Cir. 1984); Bey v. Bolger, 540 F. Supp. 910, 927 (E.D. Pa. 1982). Reassignment to another job has also been held to exceed the bounds of reasonable accommodation. *See, e.g.*, Dancy v. Kline, 639 F. Supp. 1076 (N.D. Ill. 1986) and cases cited therein.

84. *See supra* note 38 and accompanying text. Significantly, however, although it has been completely ignored, the regulations promulgated by each federal agency under section 504 expressly provide that the obligation to comply is not affected by inconsistent terms in collective bargaining agreements. *See, e.g.*, Regulations of the Department of Health and Human Services (HHS), 45 C.F.R. § 84.11(c) (1985). But there is analagous federal precedent suggesting that the duty to provide reasonable accommodation does not require violation of collective bargaining agreements. In Trans World Airlines v. Hardison, 432 U.S. 63 (1977), the Court was concerned with the duty of employers under Title VII to provide reasonable accommodation to the religious needs of employees. *Hardison* held that in the context of religious accommodation Title VII requires no more than a "*de minimus*" burden. *Id.* at 84. Although, in religious accommodation, Title VII uses the terms "reasonable accommodation" and "undue hardship," *Hardison's de minimus* standard has never been applied to the Rehabilitation Act. *See, e.g.*, Prewitt v. United States Postal Serv., 662 F.2d 292, 308 n.22 (5th Cir. 1981). Nonetheless, the opinion contains fairly sweeping language regarding the special importance of collective bargaining in national labor policy. *Hardison*, 432 U.S. at 78-82. Interestingly, although Title VII's reasonable accommodation to religion requirement applies by its terms only to employers, labor unions, also subject to Title VII, have been held to the same duty. *See, e.g.*, Lutcher v. Musicians Union, 633 F.2d 880, 884 (9th Cir. 1980). Further, it is worth noting that the United States Supreme Court has held that collective bargaining provisions which are contrary to public policy are not enforceable. *See* W.R. Grace and Co. v. Rubber Workers, 461 U.S. 757, 766-67 and n.6 (1983).

required to provide reasonable accommodation.[85] Moreover, because both employers and labor organizations are covered by the state statute, a reading of the statute that permits a collective bargaining defense to the reasonable accommodation requirement produces the anomalous result of allowing the employer to combine with the labor union to do indirectly what neither may do directly.

Nonetheless, because of conflicting language in the state statute, this outcome is not entirely free from doubt. Elsewhere in chapter 151B is the caveat that:

> Notwithstanding any provision of this chapter, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to (a) observe the terms of a bona fide seniority system or any bona fide employee benefit plan. . . . which is not a subterfuge to evade the purposes of this section.[86]

Thus, to the extent that accommodation to a handicapped person requires violation of a seniority system, as distinguished from some other provision of a collective bargaining agreement, the seniority system defense provided by the statute appears to retain its vitality.

It should be noted in this regard that although the Supreme Judicial Court has not decided the question whether a seniority system must give way to reasonable accommodation, it has held that the rights secured by chapter 151B are beyond a labor union's power to bargain away.[87] Reading reasonable accommodation as such a right points up the conflict in the statute. On the one hand, employers must provide and labor organizations must not interfere with the provision of reasonable accommodation to handicapped employees — including job and hour modifications — and neither may the right to reasonable accommodation be bargained away. On the other hand, seniority systems need not be disturbed, apparently even if they are at odds with the only available accommodation.[88]

One way of resolving this conflict may be in the definition of undue hardship. That is, the statute identifies three undue hardship factors to be used to determine whether accommodation is necessary: (1) the type of the employer's

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85. MASS. GEN. LAWS ANN. ch. 151B, § 4(2) (West 1986) provides in relevant part that it shall be an unlawful practice "[f]or [a] labor organization because of . . . the handicap of any person alleging to be a qualified handicapped person to . . . discriminate in any way against any of its members or against any employer or any individual employed by an employer, unless based upon a bona fide occupational qualification." *Id.* Read in conjunction with the definition of "qualified handicapped person" provided by § 1(16), labor organizations are also subject to the reasonable accommodation requirement.

86. MASS. GEN. LAWS ANN. ch. 151B, § 4(17) (West 1986).

87. School Comm. of Brockton v. MCAD, 377 Mass. 392, 399, 386 N.E.2d 1240, 1244 (1979).

88. This internal conflict within the statute also exists as to the employee benefit plan provision. *See supra* note 86. Thus, for example, it is not difficult to imagine a need on the part of a handicapped employee for additional sick time; and while MCAD guidelines expressly provide for modification of work schedules as reasonable accommodation, see GUIDELINES, *supra* note 27, at § II C, the statute declares that employers do not act unlawfully by refusing to depart from established employee benefit packages.

company, (2) the size of the company, and (3) the nature and cost of the accommodation.[89] But there is no indication that these are intended to be exhaustive. Were they only representative of the factors to be taken into account, the opportunity exists for including consideration of collective bargaining agreements in the undue hardship calculus.[90] Likewise, the factor "nature of the accommodation" may be read to include the effect on the terms of a collective bargaining agreement. The danger of abuse and difficulty of detection, however, may make this approach an unattractive solution. Collective bargaining agreements must not be allowed to become an avenue for surreptitiously evading the duty of both employers and labor unions to reasonably accommodate the handicapped, or a shield behind which the right of the handicapped to reasonable accommodation may be bargained away.[91]

ii. Substantially Limits

A further restriction on section 504 is also inapplicable to the state statute. With increasing frequency, courts have determined that where the section 504 plaintiff contends that "working" is the major life activity which is substantially limited so as to constitute a handicap within the meaning of the Rehabilitation Act, it may be necessary to show more than adverse employment action by the defendant employer alone. That is, whether the plaintiff's impairment substantially limits the major life activity "working" depends on

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89. MASS. GEN. LAWS ANN. ch. 151B, § 4(16) (West 1986)

> In determining whether an accommodation would impose undue hardship on the conduct of an employer's business, factors to be considered include: (1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and [the] size of budget or available assets; (2) the type of the employer's operation, including the composition and structure of the employer's workforce; and (3) the nature and cost of the accommodation needed.

Id.

90. The same language in the federal section 504 regulations, however, is seen by HHS as exclusive. 45 C.F.R. pt. 84, app. A, subpart b, ¶ 16 explains, "this section sets forth the factors that the Office of Civil Rights will consider . . . ." *Id.* The difficulty of limiting ad hoc addition to the factors specified by the statute may also mitigate against this approach. However, there does appear to be some precedent for seeing the enumerated factors as only representative. Thus, although the statute lists only the type and size of the company and the nature and cost of the accommodation, the MCAD Guidelines include two additional factors: (1) whether the health and safety of the public will be unduly compromised by providing the accommodation; and (2) whether the provision of reasonable accommodation will prevent the employer from providing service required by and/in compliance with all federal and state laws and regulations. GUIDELINES, *supra* note 27, at § VI (e).

91. Interestingly, however, the Legislature may have provided that in some circumstances a collective bargaining agreement takes precedence over the duty to provide reasonable accommodation. Under the Massachusetts workers' compensation statute, work-related injuries are deemed handicaps for the purposes of chapter 151B, and reasonable accommodation must be afforded to those employees. MASS. GEN. LAWS ANN. ch. 52, § 75B (West 1986). However, the statute also specifies that "[i]n the event any right set forth in this section is inconsistent with an applicable collective bargaining agreement, such agreement shall prevail." *Id.* Whether this language was meant to subject the reasonable accommodation right to collective bargaining, and if so whether such a provision is viable in view of *School Comm. of Brockton*, 377 Mass. 392, 386 N.E.2d 1240 (1979) has not been decided.

the number of alternative job prospects in the geographic region to which the plaintiff has access.[92] For example, one denial of employment based on the disability to a person with an employment specialty in a rural location may be substantially limiting and therefore unlawful, while the same act against an unskilled worker in an urban setting may not.

The result has been severely criticized as contrary to the purpose of the Rehabilitation Act, and for allowing "free" discrimination,[93] but no court has yet rejected it. As interpreted by MCAD, however, denial of employment is substantially limiting and unlawful under the state statute if the applicant is qualified, irrespective of the number of available job alternatives, and no inquiry into the existence of the complainant's other job prospects among nondiscriminatory employers will protect a discriminating employer from liability.[94]

Although the MCAD imposes no quantitative restriction on working as a major life activity, it has imposed a "qualitative" restriction. In the Commission's view, an impairment substantially limits an employee's ability to work, and is therefore a handicap, only if employment is denied because of the impairment. If, instead, the employer acts against an employee because of perceived performance deficiencies associated with the impairment, rather than because of the impairment itself, the employee's employability is not substantially limited, and the employee is therefore not handicapped within the meaning of the statue.[95]

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92. *See* Jasany v. United States Postal Service, 755 F.2d 1244, 1248-49 (6th Cir. 1985); Tudyman v. United Airlines, 608 F. Supp. 739, 744-46 (C.D. Cal. 1984); E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100-03 (D. Haw. 1980); Salt Lake City Corp. v. Confer, 674 P.2d 632, 636-37 (Utah 1983) (state statute with identical language). *See also* de la Torres v. Bolger, 610 F. Supp. 593, 596-97 (N.D. Tex. 1985) (impairment which interferes with ability to do a job but does not significantly decrease ability to obtain satisfactory employment is not substantially limiting).

93. Haines, E.E. Black, Ltd. v. Marshall: *A Penetrating Interpretation of "Handicapped Individual" for Sections 503 and 504 of the Rehabilitation Act of 1923 and for Various State Equal Employment Opportunity Statutes*, 16 LOY. L.A. L. REV. 527, 543-47 (1983).

94. This at least is the implicit result of the Commission's opinion in Villecco v. General Electric Co., 8 Mass. Discrim. L. Rep. 1010 (1986). In *Villecco*, discussed in greater detail in the note below, the Commission, in its first and to date only reported decision on handicap discrimination, held that working is substantially limited only where the employer takes adverse employment action because of an employee's impairment. The opinion expressly purports not to express a view on the line of cases under the Rehabilitation Act which hold that an impairment does not substantially limit an employee's ability to work if there are other employment options open to him. *Id.* at 1028 n.4. However, in holding that working is substantially limited if the employer discharges an employee because of an impairment, the Commission tacitly recognizes that denial of employment by one employer is substantially limiting.

95. Villecco v. Gen. Elec. Co., 8 Mass. Discrim. L. Rep. 1010, 1032 (1986). It is not clear analytically or as a matter of policy why this should be so, and an examination of the Commission's analysis reveals important difficulties with this approach.

In *Villecco*, the Complaintant's impairment was "shift sickness," an illness caused by a change in his work schedule from the day to the night shift. *Id.* at 1034-35. He alleged that working was the major life activity which was substantially limited by this impairment. *Id.* at 1011. On Respondent's motion to dismiss, the Commission undertook a lengthy analysis of the conditions necessary to establish that an impairment substantially limits the ability to work so as to constitute a handicap.

Interestingly, the requirement imposed by chapter 151B that an impairment be substantially limiting to constitute a handicap — and the consequent

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The Commission began with a concern that working as a major life activity not be construed too broadly lest it "suggest that any substantially adverse employment decision, which is in any way connected with an employee's impairment, would interfere with a major life activity and thereby create a 'handicap.' " That is, the statute defines handicap as a physical or mental impairment which substantially limits a major life activity. But if an employee's job is a major life activity, and if any termination substantially limits it, then any impaired employee who is discharged is a handicapped person, and the distinction between impairment and handicap is destroyed. Worse, because "[m]any performance problems . . . can be ultimately traced to some underlying psychological or physiological cause [and] the definition of impairment is broad enough to include all such causes," the protected class of handicapped becomes unmanageable. *Id.* at 1023.

To avoid this overinclusive definition of handicap the Commission then set out to place some restriction on the extent to which denial of employment substantially limits an impaired employee's ability to work. It reviewed the Rehabilitation Act case law and discerned the principle that "in order for employability to be qualitatively 'limited' by an impairment, the adverse action must be animated by such impairment." *Id.* at 1028. "Put simply, employment may be invoked as one's major life activity in establishing one's status as handicapped only where the employer is directly motivated by such employer's perception of the underlying impairment." *Id.* at 1032.

Although this statement of the problem and the Commission's corresponding answer offer an intuitive appeal, there are a number of difficulties with this approach. First, the initial concern that, without limits, the concept of working as a major life activity can transform all impairments into handicaps, is largely inconsequential. It may result in defining all terminated employees with impairments as handicapped, but it does not necessarily affect employer liability. Discharging handicapped employees is not unlawful unless the employee is qualified and the employer acts because of the handicap. *See supra* text accompanying notes 45-67. Likewise, refusal to reasonably accommodate handicapped employees is unlawful only if the employer knows of the handicap and the need for reasonable accommodation and the accommodation would not impose undue hardship on the employer. *See infra* text accompanying notes 140-43. Thus, it is not true that an expansive definition of working as a major life activity presents employers with liability for acting against unqualified employees with hidden impairments.

If the initial concern is misplaced, more serious problems are created by the conclusion the Commission reaches. Under the Commission's rule, if an employee is discharged because of an impairment, his ability to work is substantially limited and he is, therefore, a handicapped person who, tautologically, cannot be discriminated against because of his handicap. If, on the other hand, an employee is discharged because of performance problems associated with his handicap, he is not substantially limited and is, therefore, not a handicapped person and can be discriminated against with impunity. Not only does this present employers with a thin pretextual veil for discriminating against people with disabilities, it is supported by no clear principle. The latter employee's ability to work is no less limited by the impairment than the former's.

More importantly, it requires that to qualify as a handicapped person an employee must prove facts sufficient to establish liability for handicap discrimination. The threshold question thus becomes dependent upon the final outcome of the case. In order to invoke the protections of the statute, the employee is required to prove the ultimate fact at issue: that the employer acted adversely against him because of his impairment. Moreover, it is not clear how this is to be accomplished. Under traditional burden of proof standards, the employee creates a presumption of discrimination by presentation of a prima facie case; direct evidence of discrimination is not required. *See infra* notes 118-53. But such a prima facie case is not possible here because the employee cannot show membership in a protected class — he cannot show that he is handicapped. Direct evidence of discrimination may therefore be required, and as the principle behind the traditional allocation of burdens of proof acknowledges, direct evidence of discrimination is rarely available.

difficulty of defining the meaning of "substantially limited" — is completely avoided for one class of disabled persons. Under the state workers' compensation statute,[96] all work-related injuries are handicaps, irrespective of whether the injury substantially limits the employee's ability to work, or any other major life activity.[97] Thus, employees whose disabilities are not related to their employment must show that the impairment substantially limits a major life activity in order to qualify as handicapped, while employees whose impairments are the result of work-related injuries need not show that the injury limits them in any way in order to claim the protection of chapter 151B.[98]

iii. Unintentional Discrimination

An additional aspect of differences in coverage between the state and federal statutes may arise in the matter of unintentional discrimination. Whether, in addition to purposeful discrimination, the federal act also reaches conduct or practices that, while fair in form, operate discriminatorily against the handicapped[99] was answered affirmatively, if not comprehensively, in *Alexander v. Choate*.[100] What section 504 requires, the United State Supreme Court said, is

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96. MASS. GEN. LAWS ANN. ch. 152 (West 1986).

97. This is so because the workers' compensation statute declares:

> Any employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of such job with reasonable accommodations, shall be deemed to be a qualified handicapped person under the provisions of chapter one hundred and fifty-one B.

Id. at § 75B. The use of the term "work-related" is somewhat problematic. It is not defined nor used elsewhere in the statute, nor is it defined in the case law. To be compensable under the statute, an injury must, inter alia, "aris[e] out of and in the course of the employment." *Id.* at § 26. The Supreme Judicial Court has instructed that this means attributable to the nature, conditions, obligations or incidents of the employment looked at in any of its aspects. *See* Zerofski's Case, 385 Mass. 590, 433 N.E.2d 869 (1982); Souza's Case, 316 Mass. 332, 55 N.E.2d 611 (1944); Caswell's Case, 305 Mass. 500, 26 N.E.2d 328 (1940). In some instances the court has used the term "work-related" to mean compensable. *See, e.g.*, Kelly's Case, 394 Mass. 684, 477 N.E.2d 582 (1985); Niemi v. Genrad, Inc., 20 Mass. App. Ct. 948, 479 N.E.2d 742 (1985). In others the term is used in the broad sense to mean sustained at work, whether or not compensable. *See, e.g.*, Flattery v. Gregory, 397 Mass. 143, 489 N.E.2d 1257 (1986); Zerofski's Case, 385 Mass. 590, 433 N.E.2d 869 (1982); Azzi v. Western Elec. Co., 19 Mass. App. Ct. 406, 474 N.E.2d 1166 (1985); *In re* Tassinari's Case, 9 Mass. App. Ct. 683, 403 N.E.2d 1193 (1980). However, there is no indication in the statute that the legislature intended "work-related" to mean "arising out of and in the course of" employment or to mean "compensable." Indeed, had either meaning been intended one would expect the legislature to have used the more specific term, rather than the apparently broader term "work-related."

98. In addition to encompassing a wider range of impairments, the inclusion of work-related injuries may bring a larger class of employers and employees within the scope of chapter 151B. That is, Chapter 151B excludes from the definition of employee any person who works as a domestic servant and those who work for a parent, spouse or child, and excludes from the definition of employer any business with fewer than six employees and all non-profit social clubs. *See supra* note 6. The workers' compensation statute, however, contains none of these restrictions. MASS. GEN. LAWS ANN. ch. 152, § 1(4), (5) (West 1986).

99. For a further discussion of these two theories of discrimination see *infra* notes 118-53 and accompanying text.

100. 105 S. Ct. 712 (1985).

meaningful access and equal opportunity for handicapped persons, balanced against considerations of burden and hardship to the employer; it does not require equal results or "Handicapped Impact Statements."[101] Thus while the Court "reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under § 504, [it] assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped."[102]

If this language leaves some doubt regarding the application of section 504 to discriminatory impact cases, there appears to be no doubt in the state statute. The Massachusetts Supreme Judicial Court has made it plain that chapter 151B is congruent with Title VII,[103] and therefore reaches both intentional discrimination and some practices that unintentionally but disproportionately burden protected classes. Thus, discrimination as the result of the disparate impact of facially neutral criteria will be remedied by chapter 151B in handicap cases just as it is in race and sex discrimination cases.[104]

iv. Damages

Significantly, the distinction between intentional and unintentional discrimination assumes equal consequence in the area of damages. A number of federal courts, purporting to apply the authority of *Guardians Ass'n v. Civil Service Comm'n*,[105] have held that a section 504 plaintiff, in order to recover

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101. *Id.* at 720-25.

102. *Id.* at 720.

103. School Comm. of Braintree v. MCAD, 377 Mass. 424 n.10, 386 N.E.2d 1251, 1254 n.10 (1979).

104. The traditional use of statistical data as evidence of disparate impact has been questioned in handicap discrimination cases, however, because the connection between handicap and functional job performance limitations suggests that disproportionate underrepresentation of people with a particular handicap does not necessarily indicate unlawful discrimination. UNITED STATES COMMISSION ON CIVIL RIGHTS, CONG. SESS., ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 157 (1983). The caution has also been urged that:

> when assessing the disparate impact of a facially neutral criterion, courts must be careful not to group all handicapped persons into one class, or even into broad subclasses. This is because 'the fact that an employer employs fifteen epileptics is not necessarily probative of whether he/she has discriminated against a blind person.'

Prewitt v. United States Postal Serv., 662 F.2d 292, 307 (5th Cir. 1981) (quoting Gitler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DEPAUL L. REV. 953, 958-66 (1978).

105. 463 U.S. 582 (1983). In *Guardians*, a divided Court affirmed a decision of the Second Circuit Court of Appeals that under Title VI compensatory damages may not be awarded absent proof of discriminatory intent. *Id.* at 607 n.2. In a decision reminiscent of the Court's last encounter with Title VI, Regents of the Univ. of Cal. v. Bakke, 441 U.S. 677 (1978), six justices wrote and no opinion commanded a majority. Justice White found in Title VI a prohibition against both intentional and disparate-impact discrimination, but would limit compensatory damages to showings of intentional discrimination. *Guardians*, 463 U.S. at 589 (White, J.). Justice Powell and the Chief Justice believed that Title VI did not provide a private right of action or, alternatively, that Title VI was limited to intentional discrimination. *Id.* at 608-12 (Powell, J.). Justice Rehnquist joined the latter part of Justice Powell's opinion, but also joined Justice White in the view that compensatory damages are available where such discrimination is found. *Id.* at 612 (Rehnquist, J.). Justice O'Connor would also limit Title VI to intentional discrimination. *Id.* at 612-16 (O'Connor, J.).

compensatory damages, must show that the discrimination suffered was fueled by invidious animus against the handicapped.[106] Although this reading of *Guardians* appears to be at odds with later expressions by the Supreme Court,[107] and the applicability of *Guardians* to the Rehabilitation Act is even

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Justices Stevens, Brennan, and Blackmun would have held that Title VI, of its own force, reaches only intentional discrimination, but that administrative regulations promulgated pursuant to it extend its prohibitions to disparate-impact discrimination. *Id.* at 635-46 (Stevens, J.). In either case they believed compensatory damages were proper. *Id.* Justice Marshall, while agreeing that compensatory relief was available without proof of discriminatory intent would, like Justice White, hold that Title VI covers both forms of discrimination without resort to the administrative regulations. *Id.* at 616-35 (Marshall, J.). Thus, there were four votes to limit Title VI to intentional discrimination (Justices Powell, Rehnquist, O'Connor and the Chief Justice), and five votes to extend it to unintentional discrimination, but only four votes to allow compensatory relief for such cases.

106. *See* Carter v. Orleans Parish Pub. Schools, 725 F.2d 261, 264 (5th Cir. 1984); Sabo v. O'Bannon, 586 F. Supp. 1132, 1137-38 (E.D. Pa. 1984). *See also* Manecke v. School Bd., 762 F.2d 912, 921 n.8 (11th Cir. 1985) (citing *Guardians* in dicta for the proposition that compensatory relief is not available to a private plaintiff under section 504 absent intentional discrimination); Organization of Minority Vendors, Inc. v. Ill. Cent. Gulf R.R., 579 F. Supp. 574, 594 n.10 (N.D. Ill. 1983) (non-Rehabilitation Act decision reading *Guardians* as limiting compensatory damages to intentional discrimination).

107. Less than one year after *Guardians*, the Court, in Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984), applied it to uphold an award of backpay because the plaintiff had alleged intentional discrimination. However, the Court went on in a footnote to affect what may be a significant reworking of the holding by saying that in *Guardians* "[a] majority of the Court agreed that retroactive relief is available to private plaintiffs for all discrimination, whether intentional or unintentional, that is actionable under Title VI." *Darrone*, 465 U.S. at 630 n.9. It is difficult to escape the conclusion that the Court is being somewhat disingenuous here. *Darrone* would have the *Guardians* votes thus: Justices Marshall, Stevens, Brennan and Blackmun in favor of retroactive relief for intentional and disparate-impact discrimination; Justice O'Connor agreeing that both forms of discrimination are covered, while reserving judgment on the question whether there is a private right of action for damages relief; Justices White and Rehnquist contending that only prospective relief is available without discriminatory intent, and Justice Powell and the Chief Justice voting that no private cause of action existed, or that Title VI reaches only intentional discrimination. *Id.*

But this tabulation of the votes does not support the initial statement. There is no fifth vote to join Justices Marshall, Stevens, Brennan and Blackmun on compensatory relief for disparate-impact discrimination. The opinion of Justice O'Connor is unequivical that only intentional discrimination is within the ambit of Title VI. "Were we construing Title VI without the benefit of any prior interpretation from this Court, one might well conclude that the statute was designed to redress more than purposeful discrimination . . . . In *Bakke*, however, a majority of the Court concluded otherwise. . . [and] I feel constrained by *stare decisis* to follow that interpretation." *Guardians*, 463 U.S. at 612 (O'Connor, J., concurring).

Similarly, Justices Powell, Rehnquist and the Chief Justice are clear "that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's" and therefore limited to intentional discrimination. *Id.* at 611 (Powell, J., concurring) (quoting *Bakke*, 441 U.S. at 352). Neither is the vote of Justice White available. "[A] private plaintiff should recover only injunctive, noncompensatory relief for a defendant's unintentional violation of Title VI." *Id.* at 607 (White, J.).

So, while the decisions of the lower courts holding section 504 to intentional discrimination in light of *Guardians* may be questionable, they are also readily understandable.

more highly in doubt,[108] it is a view which, while not unanimous,[109] shows no sign of weakening.

This restriction on compensatory damages to findings of intentional discrimination, however, is contrary to the Supreme Judicial Court's instruction on chapter 151B.[110] Under chapter 151B, both MCAD and the courts have broad authority to fashion remedies to make whole the injured plaintiff.[111] Moreover, not only are compensatory damages not limited to intentional discrimination under chapter 151B, the remedial authority of MCAD and the courts extends — in contrast to Rehabilitation Act precedent[112] — to awarding damages for emotional distress.[113]

D. Legislative Intent

Finally, in addition to differences in statutory language and case law be-

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108. In *Choate* the Court explained that:

> [A] two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in [*Guardians*]. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. . . . *Guardians*, therefore, does not support [the] blanket proposition that federal law proscribes only intentional discrimination against the handicapped. Indeed, to the extent our holding in *Guardians* is relevant to the interpretation of § 504, *Guardians* suggests that the regulations implementing § 504. . . could make actionable the disparate impact challenged in this case. Moreover, there are reasons to pause before too quickly extending even the first prong of *Guardians* to § 504. Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference . . . .

Choate, 105 S. Ct. at 717-18 (citations omitted).

109. *See* Kling v. County of Los Angeles, 769 F.2d 532, 534 (9th Cir. 1985); Wilder v. New York, 568 F. Supp. 32, 32-36 (E.D. NY 1983); *see also* Fitzgerald v. Green Valley Educ. Agency, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984) ("full panoply of remedies is available to a private plaintiff under § 504"). *But see* Hurry v. Jones, 734 F.2d 879, 886 (1st Cir. 1984) (extent to which damages are available under § 504 is still unanswered) (dicta).

110. In School Comm. of Braintree v. MCAD, 377 Mass. 424, 386 N.E.2d 1240 (1979), the court awarded compensatory damages while noting that, though litigated on a disparate treatment theory, disparate impact was also established. *Id.* at n.12. *See also* Freeman v. World Travelogue Co., 6 Mass. Discrim. L. Rep. 1783, 1799-1802 (1984) (awarding compensatory damages for disparate impact violation).

111. Bournewood Hosp., Inc. v. MCAD, 371 Mass. 303, 316, 358 N.E.2d 235, 242 (1976). Massachusetts General Laws chapter 151B, section 5, empowering the Commission to take such action as in the judgment of the Commission will effectuate the purposes of this chapter, "represents a significant delegation of discretion and authority by the Legislature to the administrative agency established to enforce the Commonwealth's anti-discrimination laws." *Id.*

112. Bradford v. Iron Cty., 36 Fair Empl. Prac. Cas. (BNA) 1296, 1301-02 (E.D. Mo. 1984); Martin v. Cardinal Glennon Mem. Hosp., 599 F. Supp. 284 (E.D. Mo. 1984).

113. Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. Ct. 172, 182, 478 N.E.2d 1292, 1299 (1985), *further appl. rev. denied*, 395 Mass. 1103 (1985); Bournewood Hosp., Inc. v. MCAD, 371 Mass. 303, 317, 358 N.E.2d 235, 243 (1976). *But see* Montgomery Ward & Co. v. Bureau of Labor, 42 Or. App. 159, 600 P.2d 452 (1979). Unlike race discrimination, handicap discrimination does not necessarily support an inference of indignity, so that damages for mental suffering must be specifically proved and will not be inferred from the act of discrimination. *Id.*

tween the state and federal statutes, there are more general reasons for believing that in amending chapter 151B the legislature intended to enact something other than the Rehabilitation Act. Although there is no formal legislative history, inferences may be drawn from the process by which handicap discrimination was added to the state statute. First, prior to its adoption, the bill that amended chapter 151B competed with legislation that even more profoundly mimicked section 504.[114] Presumably had the legislature intended a state version of section 504 it would have enacted the competing proposal. That it did not is evidence that something else was intended. Further, an earlier version of the bill that did become law[115] required MCAD to investigate every complaint for jurisdiction under the Rehabilitation Act and to refer all covered complaints to the appropriate federal agency.[116] Thus, those complainants covered by the Rehabilitation Act would have been left to their federal remedy, and only those not otherwise protected would have a cause of action under the state statute. This provision was ultimately deleted from the bill, giving rise to the inference that the state statute was designed to enhance, not merely substitute for, the relief afforded by the federal statute.[117]

E. Evidentiary Burdens

Beyond the proper interpretation of the terms of the state statute there are questions about how a violation may be proved in court or in administra-

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114. H. 2562, 109th Gen. Court, 1st Sess. (1981) was an effort to enact what was in language and format HEW's administrative regulations for section 504, except that government financial assistance was not required to bring an employer within the legislation.

115. S. 75, 110th Gen. Court, 1st Sess. (1983).

116. S. 57, 109th Gen. Court, 2d. Sess. (1982) would have required that:

> [u]pon receipt of a complaint. . .the commission shall immediately notify the employer by certified mail that a complaint has been filed and shall request the employer to identify in writing within thirty days of receipt of the certified mail any federal contracts and all federal assistance which would make the complaint subject to section 503 or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 793 and 29 U.S.C. 794). If within thirty days, the employer notifies the commission in writing of such a federal contract or federal assistance, the commission shall within seven days of such notification refer the complaint to the appropriate federal Agency or Authority. . . . If every federal Agency and Authority to which the commission has referred the complaint determines in writing that such Agency or Authority does not have jurisdiction, or . . . the employer notifies the commission that there is neither a federal contract, or federal assistance which would make the complaint subject to said section 503 or section 504,. . . the commission shall then have jurisdiction over the complaint.

See also S. 113 and H. 1553, 107th Gen. Court, 1st Sess. (1977) and H. 607, 108th Gen. Court, 1st Sess. (1979) providing that a determination of compliance with section 503 or 504 would have been conclusive as to the state law.

117. Although this provision was ultimately deleted, MCAD may still defer its investigation and afford "substantial weight" to the findings of federal agencies with concurrent jurisdiction. The Commission's regulations provide that it may do so if another forum is conducting a "prompt and thorough investigation of such complaint in a manner consistent with the requirements and standards of the commission." MASS. REGS. CODE tit. 804, § 1.3 (1978). To date no such practice has developed. Indeed, to the extent that state law differs from the Rehabilitation Act it may be that no federal investigation will meet the requirements and standards of the Commission.

tive proceedings before the Massachusetts Commission Against Discrimination. The similarity between Title VII and chapter 151B has led Massachusetts courts to apply the Title VII procedure for allocating the burden and order of proof to cases under chapter 151B.[118] However, factors peculiar to handicap discrimination demand modification of the traditional analysis. This need has been recognized at the federal level in Rehabilitation Act cases,[119] but the decisions suffer from a number of shortcomings and are in such disarray that they present at best an imperfect model for the state statute.

Probably the dominant view of the allocation of burdens and order of presentation of proof in Rehabilitation Act cases is that set out by the Fifth Circuit in *Prewitt v. United States Postal Service*.[120] The *Prewitt* court began by recognizing three forms of discrimination against the handicapped: intentional (where the employer acts out of personal bias); disparate impact (where facially neutral criteria have a disproportionate impact); and surmountable barrier (where the employer fails to reasonably accommodate the handicapped plaintiff).[121] Of these, the court noted that Title VII jurisprudence is relevant to disparate impact and intentional discrimination, but that surmountable barrier discrimination is unique to handicap cases.[122] The *Prewitt* analysis then focuses on disparate impact and surmountable barrier discrimination,[123] and

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118. Wheelock College v. MCAD, 371 Mass. 130, 355 N.E.2d 309 (1976).

119. For a discussion of evidentiary burden in Rehabilitation Act cases, see Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of The Rehabilitation Act of 1973*, 69 CORNELL L.REV. 401 (1984).

120. 662 F.2d 292 (5th Cir. 1981).

121. *Id.* at 305 n.19 (citing Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of The Rehabilitation Act*, 55 N.Y.U. L. REV. 883, 883-84 (1980). The court also recognized "insurmountable barrier" discrimination, but held that *Davis* makes this type of discrimination lawful. *Prewitt*, 662 F.2d at 308.

122. *Prewitt*, 662 F.2d at 305 n.19. In Title VII disparate treatment cases, the plaintiff makes out a prima facie case by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainants' qualifications." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (footnote omitted). This prima facie case shifts the burden of production to the defendant to articulate a legitimate, non-discriminatory reason for the plaintiff's rejection sufficient to justify a judgment for the defendant. If the defendant carries this burden, the plaintiff then has an opportunity to prove that the reasons offered by the defendant are not true but are a pretext for discrimination; that is, that a discriminatory reason more likely motivated the employer, or that the explanation offered is not worthy of credence. *Id.* at 802-804 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981).

"To establish a prima facie case of disparate-impact" discrimination, the plaintiff must "show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). Once the discriminatory effect is shown the defendant must prove that the requirement has " 'a manifest relationship to the employment.' " *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1970)). If the defendant proves that the challenged requirements are job related, "the plaintiff may then show that other selection devices without a similar discriminatory effect would also serve the [defendant's] interest in efficient and trustworthy workmanship." *Id.*

123. Although *Prewitt* was limited to disparate impact and surmountable barrier discrimination, the narrowness of its holding has not been universally appreciated, and some courts have

requires the plaintiff to make out a prima facie case by proof that (a) except for the handicap he is qualified; (b) the handicap prevents him from meeting the employer's criteria; (c) the challenged criteria have a disproportionate impact on persons with his handicap.[124] The plaintiff must also make a facial showing or present plausible reason to believe that the challenged criteria are not job-related or that reasonable accommodation is possible.[125] Following the prima facie case, the burden of persuasion shifts to the defendant to show that the criteria are related to the safe and efficient performance of the job's essentials and, if the plaintiff raises the issue of reasonable accommodation, that accommodation to the plaintiff's handicap cannot reasonably be made.[126] The plaintiff may then show that less discriminatory criteria exist, or may come forward with evidence that reasonable accommodation may be made.[127]

An alternative approach was taken in *Doe v. New York University*,[128] where the Second Circuit identified two forms of discrimination against the handicapped; one where the defendant disclaims reliance on the plaintiff's handicap as the reason for its decision, and the other where the defendant acknowledges reliance on the plaintiff's handicap but claims a reasonable basis for doing so. In the former, the court suggested that the Title VII procedure for disparate treatment cases may be appropriate.[129] In the latter type of discrimination, however, the plaintiff establishes a prima facie case by proof (a) that he has a recognized handicap; (b) that he is qualified apart from it; but (c) that the position was denied him because of his handicap. To rebut the inference arising from the plaintiff's prima facie case, the defendant must then present evidence "that the handicap is relevant to the position sought," and "renders the plaintiff less qualified than the successful applicant."[130] The plaintiff must then bear the ultimate burden of showing that in spite of the handicap "he is at least as well qualified as the applicant who was accepted."[131]

Like the *Doe* court, the Tenth Circuit, in *Pushkin v. Regents of the University of Colorado*,[132] questioned the application of Title VII jurisprudence to the Rehabilitation Act, but it went further by rejecting both disparate treat-

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used this construct in the context of intentional discrimination as well. *See* Sisson v. Helms, 751 F.2d 991, 993 (9th Cir. 1985); *see also* Treadwell v. Alexander, 707 F.2d 473, 475 (11th Cir. 1983). "Once a plaintiff shows an employer denied him employment *because of* a physical condition, the burden of persuasion shifts to the federal employer to show that the criteria used are job related and that the plaintiff could not safely and efficiently perform the essentials of the job." *Id.* (emphasis added).

124. *Prewitt*, 662 F.2d at 309-10.

125. *Id.* at 310.

126. *Id.*

127. *Id.*

128. 666 F.2d 761 (2d Cir. 1981).

129. *Id.* at 776.

130. *Id.*

131. *Id.* at 776-77. *See also* Bento v. I.T.O. Corp., 599 F.Supp. 731, 741 (D.R.I. 1984)(adopting this formulation); Norcross v. Sneed, 755 F.2d 113, 116-17 (8th Cir. 1985) (purporting to adopt *Doe* but apparently inadvertently switching its application from the "acknowledging-reliance" type to the "disclaiming-reliance" type).

132. 658 F.2d 1372 (10th Cir. 1981).

ment and disparate impact theories.[133] Rather, the court said, the Rehabilitation Act sets up its own framework.[134] The plaintiff establishes a prima facie case by proving that he is an otherwise qualified handicapped person apart from his handicap, and that he was rejected under circumstances giving rise to the inference that the denial was based solely on his handicap.[135] Presentation of a prima facie case shifts the burden of persuasion to the defendant to prove that the plaintiff is not able to meet all job requirements in spite of his handicap, or to prove a legitimate non-discriminatory reason for its decision.[136] The plaintiff may then rebut the defendant's evidence by showing that the defendant's reasons for rejecting him were based on misconceptions or unfounded factual conclusions, and that the articulated reasons other than the handicap encompass unjustified consideration of the handicap itself.[137]

Still another view was taken by the Ninth Circuit in *Sisson v. Helms*,[138] where the court designed a model synthesizing the Title VII and Rehabilitation Act decisions. This analysis requires that a handicapped person seeking relief prove (a) that he applied for a job for which the defendant was seeking applicants; (b) that he is qualified for the position in spite of his handicap, under all but the criteria challenged as discriminatory; (c) that he has a handicap that prevents him from meeting the criteria for employment; (d) that the standards he must meet have a disproportionate impact on persons with his handicap; (e) that despite his qualifications he was rejected; and (f) that the position remained open and the employer continued to seek applications from persons who did not have the plaintiff's handicap. In addition, the plaintiff must make a facial showing or present plausible reason to believe that the defendant's criteria are not job-related or that the handicap may be accommodated.

Satisfaction of this prima facie case shifts the burden of production to the defendant to show: (a) that the criteria offered as justification for refusal to hire the plaintiff are related to the safe and efficient performance of job essentials; and (b) if the issue of reasonable accommodation is raised, that accommodation cannot reasonably be made to enable the handicapped person to perform the essentials of the job safely. The burden then shifts back to the plaintiff to present persuasive evidence that less discriminatory selection criteria are available that would also serve the defendant's interest in safety and efficiency. If reasonable accommodation is at issue, the plaintiff must meet the defendant's evidence by coming forward with evidence that suggests that accommodation may be reasonably made.[139]

While each of these formulas makes some concession from the traditional burden of proof analysis to the peculiar facts of handicap discrimination, none

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133. *Id.* at 1384.

134. *Id.* at 1387.

135. *Id.*

136. *Id.*

137. *Id.* This procedure was approved in Jasany v. United States Postal Serv., 755 F.2d 1244, 1249 n.5 (6th Cir. 1985). The MCAD, in its first reported decision on handicap discrimination, also alluded to this formulation with apparent approval. *See* Villecco v. General Elec. Co., 8 MASS. DISCRIM. L. REP. 1010, 1019 (1986).

138. 751 F.2d 991 (9th Cir. 1985).

139. *Id.* at 993.

accounts for the fundamental interrelationship between the concepts of qualification, reasonable accommodation, and essential job functions.[140] Each requires the plaintiff to establish as an element of his prima facie case that he is qualified for the position. The question of qualification in handicap discrimination, however, can be answered only after the matter of reasonable accommodation has been addressed, and this in turn depends on the undue hardship determination where the burden of proof rests with the defendant.[141] Moreover, it is only the essential functions of the job for which the plaintiff must be qualified, and whether a job function is essential is an issue that, again, must be proved by the defendant.[142] Neither do these approaches require that the plaintiff show, as a part of his prima facie case, that his handicap was known to the employer.[143]

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140. UNITED STATES COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983).

> Whether a person is qualified is a threshold question that must be resolved before the individual can invoke the antidiscrimination statutes. To determine whether a person is qualified, however, there must be an examination of essential program functions, the person's abilities, and possible accommodations — some of the ultimate legal considerations that may establish unlawful discrimination. The threshold question — whether a person is covered by the nondiscrimination provision — is answered only after extensive analysis that assumes coverage.

Id. at 118. The link between these concepts, however, has been routinely ignored. *See, e.g., Jasany*, 755 F.2d at 1250. "If the plaintiff fails to establish a prima facie case, it is unnecessary to address the question of reasonable accommodation." *Id. See also* Wimbley v. Bolger, 642 F. Supp. 481, 485 (W.D. Tex. 1986).

141. MASS. GEN. LAWS. ANN. ch. 151B, § 4(16) (West 1985). Reasonable accommodation is required "unless *the employer can demonstrate* that the accommodation required. . . would impose undue hardship. . . ." *Id.* (emphasis added). *See* GUIDELINES, *supra* note 27, at § VI. "The employer bears the burden of proving undue hardship." *Id. See also* Cronan v. New England Telephone Co., 41 Fair Empl. Prac. Cas. (BNA) 1273, 1277 (Suffolk Sup. Ct. 1986).

142. The MCAD guidelines clearly place the onus on the employer to establish which job functions are essential. Employers are required to determine which job functions are essential and to write job descriptions which reflect only essential requirements. GUIDELINES, *supra* note 27, at § § III A, B. Employment tests must be designed to measure only essential job functions. *Id.* at § III D. Medical examinations conducted by the employer must evaluate only those abilities necessary to perform the essential functions of the job. *Id.* at § V. *See also* Note, *To Be Otherwise Qualified: When Does Section 504 of the Rehabilitation Act Protect the Handicapped*? 57 TEMP. L. Q. 179, 195-200 (1984). The employer also has the burden of proof on this element under section 504. *See supra* notes 126, 139. *See also* 45 C.F.R. pt. 84, app. A, subpart a, § 5 which explains:

> Certain commentators urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular . . . characteristic is essential. Because the same result is achieved by the requirement . . . [that] an employer . . . establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Id.

143. An employer need only make reasonable accommodation to known physical or mental limitations. GUIDELINES, *supra* note 27, at § VI.

F. Suggested Evidentiary Model for the State Statute

Development of the state statute presents an opportunity to draw upon the learning of the Rehabilitation Act decisions without unquestioningly importing the infirmities of the federal case law. A suggested approach for intentional discrimination cases,[144] borrowing from the Title VII and Rehabilitation Act decisions, begins by requiring that the plaintiff make out a prima facie case by presenting evidence (a) that he is handicapped within the meaning of the statute; that is, that he is impaired in a way that substantially limits a major life activity or has a history of or is regarded by the employer as having such an impairment. Next, he must show (b) that he applied for a position for which the employer was seeking applicants; (c) that he was capable of performing the job apart from the challenged functions or selection criteria; (d) that he requested accommodation or that the employer knew or should have known of his handicap; (e) that he was denied the position; and (f) that thereafter the position remained open while the employer sought applications from persons of his qualifications but without his handicap.

Meeting this prima facie case should shift the burden of persuasion to the defendant to prove some legitimate, lawful reason for the plaintiff's rejection by showing either (a) that it had no knowledge of the plaintiff's handicap; (b) that accommodation would impose undue hardship; (c) that even with accommodation the plaintiff would be incapable of performing an essential job function; or (d) that possession of an ability the plaintiff lacks is necessary to the safe and efficient performance of the job — that is, a bona fide occupational qualification.[145] Finally, the plaintiff must then have an opportunity to prove (a) that the offered reasons are pretextual, (b) that the challenged job function is not essential, (c) that reasonable accommodation is possible, or (d) that the challenged selection criteria are not the least discriminatory.

Allocating the burden and order of proof along these lines differs from the Rehabilitation Act cases in that it rejects the prevailing categorization of handicap discrimination typified by *Prewitt*. Rather than distinguish between bias, disparate impact and "surmountable barrier" discrimination, this approach follows the traditional disparate treatment — disparate impact dichotomy. This result flows from the recognition that in employment discrimination, intentional discrimination encompasses more than merely conduct motivated by hostility or animus; it speaks as well to action that is deliberate as opposed to accidental.[146] Thus, "surmountable barrier" discrimination, which is concerned with the failure to provide reasonable accommodation, should be subsumed within the ambit of intentional discrimination, rather than disparate

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144. As with Title VII, this approach is not intended to be exclusive. The purpose of requiring a prima facie case in this way is to require the plaintiff to produce evidence sufficient to permit the court to infer the fact at issue. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 n.7. Direct evidence may serve this function as well. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977).

145. The BFOQ defense is available by the express language of the statute only to labor organizations and employment agencies, not to employers. *See supra* notes 30-34 and accompanying text.

146. Sarni Original Dry Cleaners v. Cooke, 388 Mass. 611, 616, 447 N.E.2d 1228, 1232 (1983).

impact, since denial of reasonable accommodation is actionable only where the handicap is known to the employer.[147] As to disparate impact discrimination, this formulation preserves the understanding that the disparate impact, theory is addressed to neutral practices that operate with discriminatory effect against a class, not an individual,[148] proof of which is accomplished by establishing that an employment practice "select[s] applicants for hire or promotion in a . . . pattern significantly different from that of the pool of applicants."[149]

This approach also takes notice of the special problems in handicap discrimination. First, it relieves the plaintiff of proving as part of his prima facie case that it is possible to accommodate his handicap in such a way as to allow him to perform the essentials of the job without undue hardship to the employer by postponing until the defendant's evidence the proof on the issues of the reasonableness of accommodation and essentiality of job functions. At the same time, by requiring that the plaintiff show as part of his prima facie case only that he was capable of performing the job apart from the challenged functions or selection criteria, it avoids confusion over the applicability of *Davis's* "qualified in spite of" language to the state statute.[150] Next, it requires the plaintiff to prove that the employer knew or should have known of his handicap. This is necessary because the statute requires accommodation only to known handicaps.[151] Further, unlike the federal law, this formulation does not require the plaintiff to show that the adverse employment action was taken solely because of the handicap, recognizing that the state and federal statutes differ in this respect.[152] Lastly, this framework is sensitive to the specific nature of handicaps and handicap discrimination by providing that the plaintiff show only that the employer continued to seek applications from persons without his handicap, rather than requiring that he show that no other handicapped applicants were sought. "This is because 'the fact that an employer employs fifteen epileptics is not necessarily probative of whether he or she has discriminated against a blind person.' "[153]

II. The Massachusetts Constitutional Amendment

In addition to the Rehabilitation Act and chapter 151B, there is in Massachusetts a third protection against discrimination on the basis of handicap: Amendment article 114 of the Massachusetts Constitution. Adopted by the electorate in 1980, this provision parallels and supplements the state and federal statutes. Yet, while some analytical ground exists for interpreting the state statute's prohibition against handicap discrimination in light of the Rehabilitation Act and an understanding of the principles underlying chapter

147. Denial of reasonable accommodation is a per se violation of chapter 151B. *See* GUIDELINES, *supra* note 27, at § VI.

148. *Teamsters*, 431 U.S. at 335-36 n.15; Griggs v. Duke Power Co., 401 U.S. 424, 431 (1970).

149. Albermale Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

150. *See supra* notes 45-56 and accompanying text.

151. *See supra* note 143.

152. *See supra* notes 57-68 and accompanying text.

153. Prewitt v. United States Postal Serv., 662 F.2d 292, 307 (5th Cir. 1981) (citation omitted).

151B, analysis of the constitutional measure is necessarily more conjectural. Not only does it share with the state statute the uncertainty brought by the lack of prior judicial construction, it also suffers from the additional infirmity created by the amendment's broad and imprecise language. Nevertheless, analogy and general principles of constitutional construction suggest two possible analytical constructs: one within the conceptual framework of the state and federal statutes, and the other an equal protection formula.

A. A Comparison With the State and Federal Statutes

As with chapter 151B, reference may properly be made to the Rehabilitation Act. Article 114 states in its entirety:

> No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from participation in, denied the benefits of, or be subject to discrimination under any program or activity within the Commonwealth.[154]

It is immediately apparent that this is, word for word, the language of section 504, with the exception that it extends not only to programs and activities "receiving Federal financial assistance," but to all programs and activities "within the Commonwealth." Significantly absent, however, are many of the concepts and definitions provided by the state and federal statutes. There is no definition of "handicapped," or "otherwise qualified;" there is no explicit duty to provide reasonable accommodation, nor any exemption for hardship. For further amplification and clarification, established rules of constitutional construction are insightful.

Because the amendment was adopted by the voters, courts will endeavor to interpret it "in light of the circumstances under which it was framed, the causes leading to its adoption, the imperfections to be remedied and the ends designed to be accomplished."[155] Its words are to be given their natural and obvious meaning according to the common and approved usage at the time of adoption,[156] and the sense most obvious to the common intelligence.[157] It is to be construed so as to accomplish a reasonable result and achieve its dominating purpose.[158]

With these guidelines it is possible to build on the amendment's broad foundation. In this task, section 504 may not be ignored; the identity of the language indicates that it was firmly within the contemplation of the drafters. But as true as this is, it does not automatically transform the amendment into a consitutional version of either section 504 or chapter 151B. There is reason to believe, for instance, that in the sense most obvious to the common intelligence, the definition of handicap may not be as expansive as the "record of"

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154. MASS. CONST. amend. art. 114.

155. General Outdoor Advertising Co. v. Dept. of Pub. Works, 289 Mass. 149, 158, 193 N.E. 799, 803 (1935).

156. *Id.*

157. Yont v. Secretary of the Commonwealth, 1275 Mass. 365, 366, 176 N.E.2d 1, 72 (1931).

158. Lincoln v. Secretary of the Commonwealth, 326 Mass. 313, 317, 93 N.E.2d 744, 747 (1950).

handicap or "regarded as" handicapped provisions of the state and federal statutes.[159] It may not include temporary disabilities, alcoholism and drug addiction.[160] Similarly, a popular conception of "qualified" may, unlike the statutes, not include within it a duty to reasonably accommodate before determining the handicapped employee's abilities.[161] A reasonable accommodation requirement may be imported, however, when it is considered that the amendment's "dominating purpose" is to establish equal opportunity, and that its framers took the language directly from section 504 which does impose the duty to reasonably accommodate prior to judging fitness to perform essential job functions.[162] At the same time, the amendment's definition of "otherwise" may depart from *Davis's* "in spite of" the handicap in favor of "except for," "apart from," or "in other respects."[163] The inclusion of the word "solely," moreover, may separate Article 114 from chapter 151B by requiring a stricter standard of causation.[164]

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159. MASS. GEN. LAWS ANN. ch. 151B, § 1(17); 29 U.S.C. § 706(7).

160. Illinois, one of three other states with constitutional provisions addressed to handicap discrimination (the others are Florida, Art. I, § 2, and Louisiana, Art. I, § 3), has determined that in its ordinary and popularly understood sense handicap means "a class of physical and mental conditions which are generally believed to impose severe barriers upon the ability of an individual to perform major life functions." Advocates for the Handicapped v. Sears Roebuck and Co., 67 Ill. App. 3d 512, 516-17, 385 N.E.2d 39, 43, *cert. denied*, 444 U.S. 981 (1978). Presented with the same problem of defining handicap, however, at least two states have adopted the broader definition given by Webster's Third New International Dictionary: "a disadvantage that makes achievement unusually difficult; *esp.*: a physical disability that limits the capacity to work." Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Washington State Human Rights Comm'n, 87 Wash. 2d 802, 557 P.2d 307, 310 (1976); Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Dept. of Indus., Labor & Human Relations, 62 Wis. 2d 382, 398, 215 N.W.2d 443, 446 (1974) (quoting WEBSTER'S THIRD NEW WORLD INTERNATIONAL DICTIONARY 1027 (1976)).

161. *See supra* note 54 and accompanying text.

162. 28 C.F.R. § 41.32 (1985).

163. Although it was suggested earlier that the word "otherwise" adds nothing to, and indeed detracts from, an understanding of the federal law, the Massachusetts Supreme Judicial Court has said that words in the constitution may not be disregarded as meaningless. Opinion of the Justice to the Senate, 332 Mass. 769, 777-78, 126 N.E.2d 795, 800 (1955). Significantly, proponents of the measure saw it as consistent with the decision in Southeastern Community College v. Davis, 442 U.S. 397 (1979) that otherwise qualified handicapped persons are those who can meet all of a program's requirements in spite of their handicap. Background and History of the Proposed Constitutional Amendment 3, 4 (unpublished document available in office of the Human Services Committee, Massachusetts Senate). One commentator has suggested, however, that otherwise qualified should mean qualified "except for" rather than "in spite of" the handicap, because the latter reading reduces the language to meaninglessness in contravention of the Supreme Judicial Court's instruction in Opinion of the Justices, 332 Mass. 769, 777-78, 126 N.E.2d 795, 800 (1955). *See* Crane *The Massachusetts Constitutional Amendment Prohibiting Discrimination on the Basis of Handicap: Its Meaning and Implementation*, 16 SUFFOLK U. L. REV. 47, 54 (1982). *Davis's* "qualified in spite of" language may come to mean "qualified except for." *See e.g.*, Bowen v. Am. Hosp. Assoc., 106 S. Ct. 2101, 2127 (1986) (White, J., dissenting). Qualified in spite of "may be read as implying that where a handicapped person meets all of the requirements normally necessary to receive a program's benefits regardless of his or her handicap, he or she is otherwise qualified because that handicap does not interfere with and is thus irrelevant to his or her qualification for the program." *Id.*

164. *See supra* notes 57-68 and accompanying text. But see *supra* note 64 for an argument that "solely" should not be seen to impose a different standard of causation than governs other

B. As an Equal Protection Measure

One commentator has suggested that the constitutional amendment may also be viewed under an equal protection scheme.[165] The Massachusetts Supreme Judicial Court has so construed the State Equal Rights Amendment.[166] Borrowing the jurisprudence developed under the United States Constitution, the court has said that the state ERA subjects classifications based on gender to strict judicial scrutiny so that they will be upheld only if supported by a compelling purpose, and only if their impact is limited as narrowly as possible consistent with a legitimate purpose.[167] The court has noted in this regard that the practical effect of such scrutiny is to prohibit all such classifications.[168] Ratification by the legislature and adoption by the voters of Article 114 by the same process as the state ERA should suggest a similar desire to heighten the level of judicial scrutiny beyond the minimal equal protection standard.[169]

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forms of discrimination. In addition to the reasons noted therein, a fundamental difficulty is presented by reading Article 114 as imposing a more stringent standard of causation than chapter 151B. Because the statute applies to a narrower class of employers and employees than the constitutional amendment, *see infra* notes 201-02 and accompanying text, liability for handicap discrimination could turn, somewhat arbitrarily, on whether the employee was required, by exclusion from the statute, to rely on the constitutional amendment to remedy his injury. Such a dual standard of liability may not be viewed as a reasonable interpretation of the constitutional amendment, particularly where no other employment discrimination plaintiffs are required to prove that the challenged conduct was caused *solely* by unlawful considerations. Indeed, the courts have recognized the difficulty of such a standard because employers "will seldom admit that they harbored a bias." Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. Ct. 172, 177, 478 N.E.2d 1292, 1296 (1985), *further appel. rev. denied*, 395 Mass. 1103 (1985). In the context of unfair labor practices, the Supreme Judicial Court has rejected such a standard. "This is a heavy burden for the charging party, who must address the opponent's frame of mind, and prove the negative proposition that no lawful reason motivated the discharge decision." Trustees of Forbes Library v. Labor Relations Comm'n, 384 Mass. 559, 564, 428 N.E.2d 124, 127 (1981).

165. *See* Crane, *supra* note 163, at 58-60.

166. MASS. CONST. amend. art. 106.

167. Lowell v. Kowalski, 380 Mass. 663, 666, 405 N.E.2d 135, 139 (1980); Commonwealth v. King, 374 Mass. 5, 21, 372 N.E.2d 196, 206 (1977).

168. *King*, 374 Mass. at 21 n.12, 372 N.E.2d at 206-07 n.12.

169. Adoption of the State ERA by the same process as the handicap amendment led the court to "conclude that the people of Massachusetts view sex discrimination with the same vigorous disapproval as they view racial, ethnic, and religious discrimination." *Id. See also* Crane, *supra* note 163 at 58-60. Whether the equal protection standard applied to the handicap amendment will be strict scrutiny, however, is not entirely free from doubt. Article I, section 3 of the Louisiana Constitution provides in relevant part that "no law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of . . . physical condition," and yet it affords classifications based on handicap only intermediate scrutiny. Clark v. Manuel, 463 So. 2d 1276, 1285 (La. 1985). On the other hand, even without an express constitutional provision some courts have applied heightened judicial scrutiny to classifications that disadvantage the handicapped. *Compare In re* G.H., 218 N.W.2d 441, 447 (N.D. 1974) (strict scrutiny) *with* Frederick L. v. Thomas, 408 F. Supp. 832 (E.D. Pa. 1976) (intermediate scrutiny) and *In re* Jessup, 85 Misc. 2d 575, 379 N.Y.S.2d 626 (Fam. Ct. 1975) (intermediate scrutiny). Other courts have applied minimal scrutiny but have still found a constitutional violation. *See* Vecchione v. Wohlgemuth, 377 F. Supp. 1361 (E.D. Pa. 1974), *aff'd* 558 F.2d 150 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977). *See also* Garrity v. Galen, 522 F. Supp. 171, 237 (D.N.H. 1981) (§ 504 implicitly codified equal protection clause of fourteenth amendment and requires heightened scrutiny). Cleburne Living

The question arises, however, whether this formulation is appropriate when removed from the context in which it was developed: state action and regulatory classifications. Under the terms of the amendment it is not clear that state action is required to establish a violation. The phrase "any program or activity within the Commonwealth" seems sufficiently inclusive to impose no such requirement.[170] If, however, the amendment reaches private conduct, there is no precedent for speaking of compelling private as opposed to state purposes.

C. *The Massachusetts Civil Rights Act*

Moreover, even if the amendment of its own force does not address private action, a statutory vehicle exists for asserting the rights embodied in the amendment so as to protect against at least some forms of private discrimination.[171] The Massachusetts Civil Rights Act[172] provides a private right of action to any person whose exercise or enjoyment of a right secured by the state constitution[173] has been interfered with by threat, intimidation or coercion,

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Center v. Cleburne, 105 S. Ct. 3249, 3255 (1985) (no heightened scrutiny for mental retardation); *But see* Massachusetts Coalition of Citizens with Disabilities v. Civil Defense Agency, 649 F.2d 71, 76 (1st Cir. 1981) (rejecting strict scrutiny in fourteenth amendment claim). *See also* Crane, *supra* note 163, at 54-56.

170. For one superior court decision which has so held, see Gubber v. Automobile Rental Corp., No. 83-26945 (Worcester Sup. Ct., March 12, 1984). *See also* Crane, *supra* note 163 at 54-56.

171. In an analogous situation, the Massachusetts Supreme Judicial Court has indicated in dicta that although the State Equal Rights Amendment requires state action, the protection of constitutional rights introduced by the Massachusetts Civil Rights Act is not so limited. United States Jaycees v. MCAD, 391 Mass. 594, 609 n.9, 463 N.E.2d 1151, 1160 n.9 (1984).

172. MASS. GEN. LAWS ANN. ch. 12, § § 11H, 11I (West 1982). Section 11H provides:

> Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the Commonwealth, the attorney general may bring a civil action for injunctive or other appropriate relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the Commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

Id.

Section 11I provides:

> Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the Commonwealth, has been interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of litigation and reasonable attorneys' fees in an amount to be fixed by the court.

Id.

173. Of course, much turns on how the right is defined. Construing Article 114 to establish a

and provides for equitable relief, compensatory damages, and attorney's fees to the prevailing party.[174] This remedy is, in fact, coextensive with 42 U.S.C. § 1983, except that the federal statute requires state action while the state counterpart does not.[175]

Whether denial of employment, without more, is sufficient interference by threat, intimidation or coercion to come within the statute is an open question.[176] On the one hand, emphasis has sometimes been placed on the necessity of showing some extra force.[177] On the other hand, it has been noted that as a remedial civil rights statute the law is entitled to a liberal construction, and proof of conduct falling short of a literal reading of the language has been held sufficient to prevail or at least state a claim.[178]

The characterization of the state civil rights act by the Supreme Judicial Court as coextensive with the federal civil rights act raises additional undecided questions the answers to which may also distinguish employment dis-

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right against state-sponsored discrimination would prevent its application to private conduct. The Massachusetts Supreme Judicial Court has intimated, however, that as used in the statute:

> A right can be deemed secured by the Constitution or laws of the United States. . . even though only governmental interferences with the exercise of the right are prohibited by the Constitution itself (or another federal law). The term 'secured' means 'created by, arising under or dependent upon,' rather than 'fully protected.' A right is 'secured by the Constitution'. . . if it emanates from the Constitution, if it finds its source in the constitution.

Bell v. Mazza, 394 Mass. 176, 182, 474 N.E.2d 1111, 1115 (1985) (quoting United States v. Guest, 383 U.S. 745, 778-79 (1966) (Brennan, J., concurring)).

174. "A party prevails under G.L. c. 12, § 11I when he or she achieves success on a substantial question of law arising out of a common nucleus of facts that gives rise to a cause of action under the statute." Batchelder v. Allied Stores Corp., 393 Mass. 819, 822, 473 N.E.2d 1128, 1130 (1985). "A claim presents a substantial question of law unless it is obviously without merit or its unsoundness so clearly results from the previous decisions of the Supreme Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be subject to controversy." Guardianship of Hurley, 394 Mass. 554, 558, 476 N.E.2d 941, 945 (1985). Success in the litigation is achieved when a party obtains some of the benefit sought in bringing the suit, or when the suit acts as a catalyst in prompting the defendant to take action to meet the plaintiff's claims. *Id.*

175. *Batchelder*, 393 Mass. at 822-23, 473 N.E.2d at 1131; *Bell*, 394 Mass. at 181, 474 N.E.2d at 1115.

176. *But see* Appling v. City of Brockton, No. 85-1439 (D. Mass. Sept. 8, 1986) (simple allegations of employment discrimination not sufficient to make out cause of action under civil rights act). *Cf.* Grubba v. Bay State Abrasives, No. 86-1444, slip op. at 5 (1st Cir. 1986) (denial of reasonable accommodation, threat of job loss for absenteeism, and termination of employment sufficient coercion).

177. *Bell*, 394 Mass. at 183, 474 N.E.2d at 1115; *Hurley*, 394 Mass. at 555, n.2, 476 N.E.2d at 942-43 n.2.

178. *Batchelder*, 393 Mass. at 822-23, 473 N.E.2d at 1131 (security guard requesting that political candidate stop soliciting petition signatures sufficient intimidation or coercion); United States Jaycees v. MCAD, 391 Mass. 594, 609 n. 9, 463 N.E.2d 1151, 1160 n.9 (1984) (Jaycees' membership restrictions as to women might constitute coercion) (dicta); *see also* Redgrave v. Boston Symphony Orchestra, 557 F.Supp. 230, 243 (D. Mass. 1983) (complaint not alleging threat, force or intimidation stated claim sufficient to avoid dismissal); Radvillas v. Stop & Shop, Inc., 18 Mass. App. Ct. 431, 466 N.E.2d 832, (1984), *further appel. rev. denied*, 396 Mass. 110 (1985) (evidence sufficient to establish prima facie case of age discrimination in employment also sufficient for civil rights act).

crimination actions brought under the constitutional amendment from those brought under chapter 151B. First, one court has said that a violation of the state civil rights act requires specific intent,[179] though this is not true for the federal act[180] and a contrary interpretation by the Supreme Judicial Court is possible.[181] Specific intent is not required to find a violation of chapter 151B.[182] The question of a jury trial under the state civil rights act is also problematic,[183] though again because of the correlation with the federal act such a right is likely.[184] Under chapter 151B there may be no right to a jury trial.[185] Finally, like the federal civil rights act, the state act will recognize some governmental immunity,[186] though the precise contours are not yet

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179. Redgrave v. Boston Symphony Orchestra, 602 F.Supp. 1189, 1214 (D.Mass. 1985).

180. Parratt v. Taylor, 451 U.S. 527, 535 (1981); Monroe v. Pape, 365 U.S. 167, 187 (1961).

181. Central to the Court's holding in *Monroe* was the contrasting language of section 1983 and its criminal corrollary 18 U.S.C. section 242. The criminal provision uses the word "willfully" while the civil statute does not. *Monroe*, 365 U.S. at 187. This difference also exists between the state civil rights act's civil and criminal provisions. *Compare* MASS. GEN. LAWS ANN. ch. 12, § § 11H, 11I *with* MASS. GEN. LAWS ANN. ch. 265, § 37.

182. Chapter 151B may be violated by facially neutral practices that operate with discriminatory effect against a protected class. *See* School Comm. of Braintree v. MCAD, 377 Mass. 424 n.10, 386 N.E.2d 1251, 1254 n.10 (1979).

183. *See* Redgrave v. Boston Symphony Orchestra, 602 F.Supp. 1189, 1192-93 (D. Mass. 1985).

184. MASS. GEN. L. ch. 12, § 11I provides for both equitable relief and money damages. A section 1983 action combining equitable relief and money damages is triable to a jury. Burt v. Bd. of Trustees, 521 F.2d 1201, 1206 (4th Cir. 1985); Chapman v. Kleindienst, 507 F.2d 1246 (7th Cir. 1974); Terrien v. Metropolitan Milwaukee Crim. Justice Counsel, 455 F. Supp. 1375 (E.D. Wis. 1978); Van Ermen v. Schmidt, 374 F. Supp. 1070 (W.D. Wis. 1974); Cook v. Cox, 357 F. Supp. 120 (E.D. Va. 1973).

185. Although it has been widely held that there is no right to a jury trial under Title VII, *see, e.g.*, Lehman v. Nakashian, 453 U.S. 156, 164 (1981) (dicta); Great American Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 375 (1979) (dicta); Lincoln v. Board of Regents, 697 F.2d 928 (11th Cir.) *reh'g denied*, 705 F.2d 471, *cert. denied*, 104 S.Ct. 97 (1983); Marotta v. Usery, 629 F.2d 615 (9th Cir. 1980); Harmon v. May Broadcasting Co., 583 F.2d 410 (8th Cir. 1978), the right to jury trial under 151B has not been squarely decided by the Massachusetts Supreme Judicial Court, and there is reason to believe that such a right exists. *See* Radvillas v. Stop & Shop, Inc., 18 Mass. App. Ct. 431, 466 N.E.2d 832 (1984) (error to direct verdict on sex discrimination claim); Comey v. Hill, 387 Mass. 11, 438 N.E.2d 811 (1982) (age discrimination claim brought under chapter 151B tried to jury).

Claims for compensatory damages for emotional distress, awardable under chapter 151B, *see supra* note 113, are legal in nature. *See* Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477-78 (1962). Moreover, a substantial line of authority holds that back pay is legal rather than equitable relief. *See* Setser v. Novack Investment Co., 638 F.2d 1137, 1142 (8th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1981); Paxman v. Campbell, 612 F.2d 848, 857-58 (4th Cir. 1980); Powell v. Pennsylvania Housing Fin. Agency, 563 F. Supp. 419 (N.D. Pa. 1983). The right to a jury trial of legal claims includes all issues common to equitable claims joined with it. Curtis v. Loether, 415 U.S. 189 (1974); Lincoln v. Board of Regents, at 934; Lartius v. Iowa Dept. of Transp., 705 F.2d 1018, 1020 (8th Cir. 1983); Moore v. Sun Oil Co., 636 F.2d 154, 157 (6th Cir. 1980); Plummer v. Aman, 36 Fair Empl. Prac. Cas. (BNA) 960, 961-62 (E.D. Pa. 1984).

186. Chicopee Lions Club v. Dist. Attny. for the Hampden Dist., 396 Mass. 244, 485 N.E.2d 673 (1985).

Like the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, the Massachusetts

known.[187] Chapter 151B, however, covers state employers without any such immunity.[188]

It bears noting, moreover, that the statutory remedy provided by the state civil rights act is not exclusive. The equity jurisdiction of the courts extends to the enforcement of constitutional rights,[189] and includes the power to award compensatory damages for constitutional violations.[190]

D. The Constitutional Amendment as an Alternative Remedy

To the extent that a violation of the handicap amendment may be redressed through an action brought under the Massachusetts Civil Rights Act or an action in equity, this constitutional remedy may be broader than that provided by chapter 151B. Unlike the statute, the constitutional amendment places no restriction on the number of employees an employer must have to come within its jurisdiction.[191] Likewise, non-profit social clubs are not exempt.[192] Further, under chapter 151B a claim is time-barred if not filed with MCAD within six months of the alleged discriminatory act.[193] A claim asserted under the state civil rights act alleging the same wrong under the state constitutional amendment, however, enjoys a three-year statute of limitations.[194] Given the breadth of the decisions holding federal employees to fed-

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> Civil Rights Act by its terms admits of no immunities. We do not presume, however, that the Legislature in passing this statute intended to abrogate a tradition of judicial and prosecutorial immunity rooted in history and based upon sound considerations of public policy.

Id. at 252, 485 N.E.2d at 678.

For a fuller discussion of this issue, see Glannon, *Recovery for Civil Rights Violations in Massachusetts: A Comparison of Section 1983 With State Tort Remedies*, 18 SUFFOLK U. L. REV. 247 (1984).

187. "[T]he scope of prosecutorial immunity. . . under G.L. c. 12 is at least as broad as under § 1983 . . . ." *Chicopee Lions Club*, 396 Mass. at 251, 485 N.E.2d at 677.

188. *See supra* note 6.

189. *See* Phillips v. Youth Development Program, Inc., 390 Mass. 652, 657-58, 459 N.E.2d 453, 457 (1983); West Broadway Task Force v. Commissioner, 363 Mass. 745, 750, 297 N.E.2d 505, 509 (1973); Kenyon v. City of Chicopee, 320 Mass. 528, 531, 70 N.E.2d 243, 242 (1946).

190. Gardner v. Berkman, 365 Mass. 481, 484, 312 N.E.2d 563, 565 (1974). *See also* Crane, *supra* note 163 at 62-67. *But see* Grubba v. Bay State Abrasives, No. 86-1444, slip op. at 6-7 (1st Cir. 1986) (where state civil rights act available, no cause of action directly under article 114); Cronan v. New England Telephone Co., 41 Fair Empl. Prac. Cas. 1273, 1279 (Suffolk Sup. Ct. 1986) (same).

191. MASS. GEN. LAWS ANN. ch. 151B, § 1 (West 1982).

192. *Id.*

193. *Id.* § 5. This administrative complaint must be filed with the commission for 90 days, though a right to sue letter may be obtained by request from the commission prior to the expiration of 90 days and it has been the practice of the commission to grant these readily. Thereafter, the statute of limitations is three years from the date of the alleged discriminatory conduct. 1986 Mass. Acts 94.

194. Until September 14, 1986, the state Civil Rights Act specified no statute of limitations. The absence of an explicit statute of limitations was at least partly rectified by the legislature with the adoption of Chapter 94 of the Acts of 1986. Under this act:

> [a]ctions arising on account of violations of any law intended for the protection of civil rights, including but not limited to actions alleging employment, housing and

eral statutory remedies for employment discrimination, however, it appears unlikely that resort may be had by federal employee plaintiffs to the state constitution as an alternative to the Rehabilitation Act.[195]

The question arises, however, whether other plaintiffs may invoke the state constitutional amendment to avoid the limits of chapter 151B. Although the state civil rights act, like its federal counterpart,[196] may be used to assert statutory as well as constitutional rights, there is ample precedent under the analogous federal act suggesting that the state civil rights act may not be available to assert the rights established by chapter 151B.[197] More importantly, there is federal precedent suggesting that where detailed administrative procedures have been established by statute they may not be avoided by a § 1983 action under a constitutional provision.[198] This construction of the state

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other discrimination on the basis of race, color, creed, national origin, sex, age, ancestry or handicap shall be commenced only within three years next after the cause of action accrues.

The question arises, however, whether this provision is to be applied retroactively. The statute is silent on this point. However, the general rule of construction suggests that retroactive application is proper. Under the rule adopted in City Council of Waltham v. Vinciullo, 364 Mass. 624, 307 N.E.2d 316 (1974), the court determines whether an amending statute is to be given retroactive effect in a given proceeding by looking to the stage of the proceedings affected by the change. *Id.* 364 Mass. at 628-29, 302 N.E.2d at 319. If that stage has been completed on the effective date of the amendment, the proceedings are not subject to the amendment. *Id.* If, on the other hand, that point has not yet been reached, the new provision applies. *Id. See, e.g.*, Porter v. Clerk of the Super. Ct., 368 Mass. 116, 118, 330 N.E.2d 206, 208 (1975). *Cf.* Baldassari v. Pub. Fin. Trust, 369 Mass 33, 42-44, 337 N.E.2d 701, 708 (1975) (new statute of limitations not applied retroactively where act explicitly provides for only prospective application; *see also* Economic Devel. and Indus. Corp. of Boston v. United States, 546 F. Supp. 1204, 1213 (D. Mass. 1982), *rev'd on other grounds*, 720 F.2d 1 (1st Cir. 1982) (subject to constitutional restrictions legislature may enlarge statute of limitations to revive lost cause of action).

If this statute of limitations is not given retroactive application, it is likely that a two-year limitations period will govern state civil rights act claims under Article 114 accruing prior to the effective date of the enactment. A two-year limitations period has been applied to claims under 42 U.S.C. section 1983 alleging discrimination under the United States Constitution. Hester v. City of Lawrence, 602 F. Supp. 1420, 1422 (D. Mass. 1985); Isaac v. Harvard Univ., 603 F. Supp. 22, 24 (D. Mass. 1984). Because of the acknowledged similarity between the state civil rights act and section 1983, this two-year limitations period should also hold for the state civil rights act.

195. *See* Connolly v. United States Postal Serv., 579 F. Supp 305, 307 (D. Mass. 1984); McGuiness v. United States Postal Serv., 744 F.2d 1318, 1322 (7th Cir. 1984); Smith v. United States Postal Serv., 742 F.2d 257, 261-62 (6th Cir. 1984). *See also* Brown v. General Serv. Admin., 425 U.S. 820, 833-35 (1976); Kizas v. Webster, 707 F.2d 524, 542 (D.C. Cir. 1983); Gissen v. Tackman, 537 F.2d 784, 786 (3rd Cir. 1976) (en banc).

196. *See* Maine v. Thiboutot, 448 U.S. 1 (1980).

197. Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n., 453 U.S. 1, 20 (1981) (where remedial devices provided by statute are sufficiently comprehensive they may not be bypassed by bringing suit under section 1983); LeBoeuf v. Ramsey, 503 F. Supp. 747, 754 (D. Mass. 1980) (right created by Title VII cannot be basis for cause of action under § 1983). *But see* Appling v. City of Brockton, No. 85-1439 (D. Mass. Sept. 8, 1986) (state civil rights act may be applied to violations of Title VII even though section 1983 may not).

198. Smith v. Robinson, 104 S. Ct. 3457, 3468-70 (1984); Tafoya v. Adams, 612 F. Supp. 1097, 1103 (D. Colo. 1984); Torres v. Wisconsin, 592 F. Supp 922, 930 (E.D. Wisc. 1984); H.R. v. Hornbeck, 524 F. Supp. 215, 221-22 (D. Md. 1981). *But see* Trigg v. Fort Wayne Comm. Schools, 766 F.2d 299, 302 (7th Cir. 1985); Day v. Wayne County Bd. of Auditors, 749 F.2d

civil rights act would foreclose employment discrimination actions under it where the administrative requirements of chapter 151B have not been satisfied.[199]

Independent of the foregoing discussion, at least one state with a similar constitutional provision against handicap discrimination has determined that the administrative procedures established by the state's fair employment statute constitute the exclusive remedy for employment discrimination claims so that no action under the constitution may be brought without first pursuing and exhausting that procedural plan.[200]

However, unless an exception to the rule were created, at least one questionable result would flow from construing Article 114 as a mere supplement to chapter 151B. The statute does not apply to employers that are non-profit social clubs or employers of fewer than six employees.[201] It likewise does not apply to persons employed as domestic servants or those employed by their parents, spouse, or children.[202] The constitutional amendment, however, covers "all programs and activities within the Commonwealth." Reading the constitutional amendment, then, as simply a complementary provision to the state statute produces one of two equally unsatisfactory alternatives; either plaintiffs coming within an exception to the statute would be required to fruitlessly seek jurisdiction under the statute by filing an obviously unsupportable claim with the Massachusetts Commission Against Discrimination only to have MCAD dismiss the complaint after committing its burdened resources to investigation, or an entire class of defendant employers would be immune from the demands of the state constitution by virtue of avoiding a statute. Thus, requiring prior resort to the state statute's administrative procedures before allowing a claim to be brought under the state constitutional amendment would result in either a needless expense of time and resources or a class of employers who may discriminate with impunity. This outcome is averted only by creating an ex-

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1199, 1202-05 (6th Cir. 1984); Storey v. Bd. of Regents, 600 F. Supp. 838, (W.D. Wisc. 1985); Green v. Ill. Dept. of Transp., 609 F. Supp. 1021, 1027-28 (N.D. Ill., E.D. 1985); Daisernia v. New York, 582 F. Supp 792, 795-97 (N.D.N.Y. 1984). *See also* Melley v. Gillette Corp., 19 Mass. App. Ct. 511, 475 N.E.2d 1227 (1985), *aff'd* 397 Mass. 1004 (1986) (exclusivity of chapter 151B precludes common law action for employment discrimination).

199. This was in fact the result in Contaxes v. Eusey Press, Inc., No. 82-23220 (Worcester Sup. Ct. June 21, 1983) where the court held that a sex discrimination plaintiff could not avoid the administrative requirements of chapter 151B by bringing an action under the Massachusetts Civil Rights Act. *See also Melley*, 19 Mass. App. Ct. 511, 475 N.E.2d 1227, *aff'd* 397 Mass. 1004, 491 N.E.2d 252 (1986). Interestingly, however, chapter 151B has been construed to broaden remedies rather than requiring exclusive resort to it. Comey v. Hill, 387 Mass. 11, 20, 438 N.E.2d 811, 817 (1982). *See also* Cronan v. New England Telephone Co., 41 Fair Empl. Prac. Cas. (BNA) 1273, 1277-78 (Suffolk Sup. Ct. 1986). In *Cronan* the plaintiff's claim directly under article 114 was dismissed. However, he was still allowed to bring his state civil rights act claim with his chapter 151B claim. The court was not clear how in these circumstances the plaintiff's right against handicap discrimination was "secured" for the purpose of the state civil rights act if not by chapter 151B.

200. Yount v. Hesston Corp., 124 Ill. App. 3d 943, 464 N.W.2d 1214, 1218 (1984). *See also Cronan, supra*, note 199, at 1279 (because chapter 151B provides comprehensive scheme for remedying handicap discrimination, no cause of action under article 114).

201. *See supra* note 6.

202. *Id.*

ception to the rule that meets the exceptions to the statute, so that those falling outside chapter 151B jurisdiction would be permitted to file a complaint under the constitutional amendment without first filing with MCAD.

III. Procedural Considerations

The constitutional amendment and the addition of handicap to the classes protected by the fair employment statute add two new state anti-discrimination causes of action to the federal Rehabilitation Act. Important questions for handicap discrimination litigants are raised because each remedy is governed by its own set of jurisdictional and procedural requirements, and its availability to handicapped plaintiffs turns in large part on the identity of the defendant. Understanding the extent to which the state and federal laws may be involved in handicap discrimination disputes, therefore, requires examination of each device in the context of an action against three types of potential defendants: state, federal and private.

A. State Employers

Because many state programs and agencies receive federal funds, they come within section 504 of the Rehabilitation Act for all positions "connected in some way" with the receipt of federal aid.[203] In Massachusetts, the statute of limitations for claims under the Rehabilitation Act is three years,[204] and complainants may file suit without pursuing the administrative remedies established by the federal agency supplying the aid,[205] though doing so tolls the

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203. Tonnesson v. Youville Hosp., 35 Empl. Prac. Dec. (CCH) ¶ 34,898 (D. Mass. 1984).

204. *Id.* at 35,967. Because section 504 does not contain its own statute of limitations, the court applied what it found to be the most analogous state statute of limitations, the commonwealth's three-year period for tort claims. The continued vitality of this holding is not entirely free from doubt, however. As authority for its decision, the court rightly relied on Burnett v. Gratton, 104 S. Ct. 2924 (1984), where the United States Supreme Court held that the statute of limitations for actions under 42 U.S.C. § 1983 is the state law of limitations governing the most analogous state cause of action, but that it could not be a six-month administrative claim period. *Id.* at 2929. The *Tonnesson* court then relied on Burns v. Sullivan, 619 F.2d 99, 107 (1st Cir. 1980), *cert. denied*, 449 U.S. 893 (1980), for the proposition that the "tort statute of limitations is the most analogous to federal discrimination claims *when* '. . .*the state has not prohibited by statute the deprivation of the specific civil right at bar.*' " *Tonnesson*, 35 Empl. Prac. Dec. (CCH) at 35,967 (emphasis added).

The court was apparently unaware that chapter 151B does prohibit by statute the deprivation of this civil right. Moreover, subsequent decisions have held in light of *Burnett* that the statute of limitations for actions under § 1983 is the two-year period for claims brought under chapter 151B where the state statute also makes unlawful the challenged conduct. *See* Hester v. Lawrence, 602 F. Supp. 1420, 1422 (D. Mass. 1985); Isaac v. Harvard Univ., 603 F. Supp. 22 (D. Mass. 1984). Nonetheless, whatever the soundness of *Tonnesson's* reasoning, the statute of limitations for Rehabilitation Act claims is likely to be three years in view of 1986 Mass. Acts 94. *See supra* note 194.

205. *Tonnesson*, 35 Empl. Prac. Dec. (CCH) 35,967 *Accord* Bento v. I.T.O. Corp., 599 F. Supp. 731, 741 (D.R.I. 1984); Turillo v. Tyson, 535 F. Supp. 577, 584-85 (D.R.I. 1982); Garrity v. Galen, 522 F. Supp. 171, 212 (D.N.H. 1981). *But see* Clark v. United States Postal Service, 35 Fair Empl. Prac. Cas. (BNA) 1408 (D. Mass. 1984) (erroneously reported by BNA as a decision of the district court for the District of Columbia) where a complaint brought by a federal em-

statute of limitations.[206] Significantly, however, as the result of *Atascadero State Hospital v. Scanlon*,[207] state defendants are immune by operation of the eleventh amendment[208] from suit in federal court for violations of the Rehabilitation Act.[209] Thus, all Rehabilitation Act claims against state employers must be heard in state court.[210]

The commonwealth and its political subdivisions are also subject to chapter 151B.[211] Any action under the state statute, however, must be preceded by filing an administrative complaint with the Massachusetts Commission Against Discrimination within six months of the alleged violation.[212] Unless MCAD consents to removal, this complaint must remain with the agency for 90 days before suit may be commenced in superior court.[213] Thereafter, the statute of limitations for filing suit is three years.[214]

With fewer clear requirements, Article 114 also presents itself as a remedy for handicap discrimination by state employers. Although it has not been established that state action is necessary to violate the constitutional amendment,[215] any such requirement is obviously met where the defendant is the state itself. Whether the constitutional amendment will be available as an alternative to chapter 151B or simply a complement to it is also uncertain.[216] Against state defendants, the federal corollary to the Massachusetts Civil Rights Act, 42 U.S.C. § 1983, might appear an alternative vehicle for asserting an Article 114 complaint, and one which would confer federal jurisidiction

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ployee under both sections 501 and 504 was dismissed for failure to exhaust administrative remedies. Although the court's language is broad, "[e]xhaustion of administrative remedies is a jurisidictional requirement when the action is brought under Section 791 or Section 794," it should be limited in view of *Tonnesson* to complaints by federal employees proceeding under section 501. *See also* Peterson v. Gentry, 29 Fair Empl. Prac. Cas. (BNA) 273, 274-75 (S.D. Iowa 1981) (although § 504 administrative remedies need not be exhausted, where state law prohibits handicap discrimination and provides administrative remedies, section 504 plaintiff required to exhaust state administrative remedies before proceeding in federal court).

206. *Tonnesson*, 35 Empl. Prac. Dec. at 35,967. This holding is somewhat unusual in that administrative proceedings do not toll the statute of limitations for race and sex claims under the Federal Civil Rights Act, Johnson v. Railway Express, 421 U.S. 454 (1974), nor for claims under Title VII, International Union of Elec., Radio & Mach. Workers, AFL-CIO, Local 490 v. Robbins & Meyers, 429 U.S. 229 (1976).

207. 105 S.Ct. 3142 (1985).

208. The eleventh amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. CONST. amend XI.

209. *Atascadero*, 105 S. Ct. at 3149.

210. It is worth noting, however, that the eleventh amendment limits federal jurisdiction only as to the states, not as to counties, cities, towns or other municipal corporations. Lincoln Cty. v. Lunig, 133 U.S. 529, 530 (1890).

211. MASS. GEN. LAWS ANN. ch. 151B, § 1(5)(West 1982).

212. *Id.* at § 5.

213. *Id.* at § 9.

214. *Id.* Prior to September 14, 1986, the statute of limitations was two years. *See supra* note 194.

215. *See supra* note 170 and accompanying text.

216. *See supra* notes 195-200 and accompanying text.

otherwise closed by *Atascadero*. The Massachusetts Supreme Judicial Court, however, has expressly said that § 1983 may not be used to enforce state constitutional rights.[217]

B. *Federal Employers*

While complaints against the state under chapter 151B, Article 114 and section 504 of the Rehabilitation Act must be brought in state court, those against federal employers are limited to federal court because the Rehabilitation Act constitutes the exclusive remedy for handicap discrimination complaints in federal employment.[218] There is no jurisidiction over federal defendants under chapter 151B,[219] and it is likely that the state constitutional amendment will also be unavailable.[220] Moreover, unlike Rehabilitation Act claims against state defendants, administrative remedies must be exhausted where the defendant is a federal agency.[221] Because section 717 of Title VII governs the rights, remedies and procedures of Rehabilitation Act complaints against federal employers,[222] the administrative plan that must be followed includes an initial complaint within thirty days of the alleged violation to the equal employment opportunity officer of the federal department that is the subject of the dispute, and then an internal agency investigation before complaint to the Equal Employment Opportunity Commission or suit in federal court is permitted.[223]

C. *Private Employers*

Private employers, may also be subject to the Rehabilitiation Act through receipt of federal funds.[224] Rehabilitation Act complaints against private defendants are treated in much the same way as those against state defendants; the position in question must be connected to the federal aid, the complaint must be brought within three years, and administrative remedies need not be pursued. Because the eleventh amendment is not implicated, suit against private employers may be brought in federal court.

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217. Phillips v. Youth Development Program, Inc., 390 Mass. 652, 657, 459 N.E.2d 453, 457 (1983).

218. Connolly v. United States Postal Service, 579 F. Supp. 305, 307 (D. Mass. 1984); Smith v. United States Postal Service, 742 F.2d 257, 261 (6th Cir. 1984); McGuiness v. United States Postal Service, 744 F.2d 1318, 1332 (7th Cir. 1984).

219. Brown v. Gen. Servs. Admin., 425 U.S. 820, 833-35 (1976), held that Title VII is the exclusive remedy for discrimination claims in federal employment. Because section 501 of the Rehabilitation Act, covering federal employers, incorporates the rights, remedies and procedures of Title VII, exclusivity is also the case for the Rehabilitation Act. Connolly v. United States Postal Serv., 579 F. Supp. 305, 309 (D. Mass. 1984), and thus an action under chapter 151B should be foreclosed.

220. *See supra* note 195.

221. Clark v. United States Postal Serv., 35 Empl. Prac. Cas. (BNA) 1408 (D. Mass. 1984).

222. 29 U.S.C. § 794(a) (1985).

223. 29 C.F.R. § 1613.708 (1985).

224. Full treatment exceeds the scope of this discussion, but private employers with federal contracts of more than $2,500 are also subject to section 503 of the Rehabilitation Act. Although this section requires affirmative action to hire the handicapped, it has proven to be a more limited remedy than section 504. *See supra* note 14.

Irrespective of whether a private employer is covered by the Rehabilitation Act, those with more than five employees that are not non-profit social organizations come within chapter 151B.[225] Again, the complaint process must begin with the Massachusetts Commission Against Discrimination within six months of the alleged discriminatory conduct, and a three-year statute of limitations applies to a suit in superior court after administrative remedies have been pursued for at least 90 days.

If state action is not required, a complaint may be brought against a private employer directly under the state constitutional amendment.[226] Notwithstanding a state action requirement, the state constitutional amendment may reach private employers via the Massachusetts Civil Rights Act if discrimination occurs with threats, intimidation or coercion.[227] Again, however, it is not clear that the constitutional amendment will be available as an alternative to chapter 151B and its administrative procedures.

CONCLUSION

Civil rights plaintiffs have historically sought federal jurisdiction in the belief that the independence and sophistication of the federal judiciary afford the greatest protection for their claims. Whatever the accuracy of this belief generally, it is probably less true in handicap discrimination cases. Indeed, claims against the state are wholly barred from federal court. Even where federal jurisidiction lies, there is reason to believe that state court will be more favorable to handicap discrimination plaintiffs because the state fair employment statute and constitutional amendment will likely provide more expansive remedies than the federal Rehabilitation Act.

The state and federal statutes are similar in many respects. Both define a handicapped person as one who has a physical or mental impairment which substantially limits a major life activity, or who has a record of such an impairment, or is regarded as having such an impairment. Both impose on employers a duty to reasonably accommodate handicapped employees to allow performance of essential job functions, tempered by the qualification that accommodation is unnecessary if it would impose undue hardship on the employer given the size and type of the company and the nature and cost of the accommodation, or if the employee's handicap is not known to the employer. Both statutes also require that employment selection criteria be job-related, and prohibit pre-employment inquiry into the existence or severity of an applicant's handicap except that employers may, after extending a job offer, condition it on the result of a medical examination conducted to determine the applicant's fitness to perform the job.

These broad similarities may quite naturally lead courts to derive the meaning of the state statute by looking for guidance to the abundant case law that has developed under the more familiar federal statute. Yet too facile assimilation of the jurisprudence developed under the federal statute must be resisted. A comparison of the statutory language of the amended chapter 151B and the Rehabilitation Act, and evaluation in light of the statutory language

225. MASS. GEN. LAWS ANN. ch. 151B, § 1(5) (West 1982).

226. *See supra* notes 170, 189-90 and accompanying text.

227. *See supra* notes 172-78 and accompanying text.

of Rehabilitation Act and pre-handicap chapter 151B precedent yields significant differences between the two statutes.

The state statute begins by recognizing a broader class of handicaps than does the Rehabilitation Act, including alcoholism, drug addiction, communicable diseases, and temporary disabilities. At the same time, it also has wider employer application, covering employers as institutions in contrast to the Rehabilitation Act's program-specific limitation. And unlike the Rehabilitation Act, complaintants under the state statute need not show that they are qualified in spite of their handicap in order to claim a right to reasonable accommodation on the job. Nor does the right to reasonable accommodation under the state statute turn on the employer's actual knowledge of the employee's handicap if it can be shown that the employer should have known. Reasonable accommodation as understood in the state statute may also be a broader concept than under the Rehabilitation Act. By subjecting labor unions, in addition to employers, to the reasonable accommodation requirement, it should be no defense to a failure to accommodate that the terms of a collective bargaining agreement prevent modification of job duties or schedules.

Moreover, the state statute is not violated only when discrimination occurs solely by reason of the handicap; mixed-motive decisions are also prohibited where handicap is the determinative factor. And even where such intentional discrimination is not shown, compensatory damages as well as damages for emotional distress may be awarded under the state statute, although this is generally not true of the Rehabilitation Act. Further, while it may be somewhat surprising, the legislature's amendment of chapter 151B did not also include the customary caveat that hiring quotas are not required, and hence it is not unreasonable to believe that unlike the Reabilitation Act the state statute mandates affirmative action by employers to hire the handicapped. Finally, the procedure for allocating the burden and order of proof in litigation under the state statute may, and indeed should, differ from the Rehabilitation Act. In fact, the only sense in which the state statute may be seen as more restrictive than the federal is the requirement of filing an administrative complaint within six months of the alleged violation; under the Rehabilitation Act there are no administrative requirements and three-year statute of limitations.

While the Rehabilitation Act was its obvious model, it is unanswered whether Article 114 of the Massachusetts Constitution will be construed as elevating to constitutional proportion the specific concepts of the state and federal statutes — including for example a broad definition of handicap, and a duty on the part of employers to provide reasonable accommodation so as to allow performance of essential job functions — or whether it will be seen as an equal protection measure against which state action will be scrutinized. But notwithstanding a state action requirement, the constitutional amendment reaches private discrimination characterized by threat, intimidation or coercion through the Massachusetts Civil Rights Act.

Although less certainty attends the state constitutional amendment, it may, like the state statute, prove to be more protective of handicap discrimination in the workplace than the Rehabilitation Act, if only because by applying to all programs and activities within the state rather than only to specific programs receiving federal funds it reaches a greater number of employers. The constitutional amendment may also reach a greater number of employers than the state statute by avoiding the statute's jurisdictional limit on employers

with fewer than six employees and on non-profit social organizations.

It is not clear, however, that the constitutional amendment will be available as an alternative to the state statute, and for one class of plaintiffs, federal employees, it may not be available at all. Nonetheless, with the state statute the constitutional amendment has materially altered employment discrimination law in Massachusetts, at the very least extending something like the Rehabilitation Act's prohibition against discrimination on the basis of handicap to all employers in the state, and with the state statute very probably expanding the federal law's substantive protections.

Kevin Baker-Kamalay

Social Host Liability: Am I My Brother's Keeper?

Alcohol has been a part of American society since its inception.[1] Since then there have been numerous efforts to curtail its undesirable effects, the most extreme of which has been complete prohibition.[2] With the introduction of the automobile into the lives of Americans and its subsequent invasion of the nation's roadways came the inevitable comingling of drinking and driving. This resulted in carnage on the highways,[3] and a heightened concern for the dangers of alcohol. The latest attempted control on the effects of alcohol is known as "social host liability." This involves the imposition of civil liability on a host, in a social setting, who has gratutitously furnished his/her guest with alcoholic beverages, for the torts of the intoxicated guest against a third person.[4]

Although the assurance of compensation for all victims of drunk driving accidents is a noble goal, the possible ramifications of the imposition of social host liability on an already "litigious" society are immeasurable. The theme of this Note is that the imposition of such liability is an error in the application of modern tort principles and that the consequences of such an error will have the effect of making every man his brother's keeper. In furtherence of this theme it will be useful, as a first step, to examine the history and development of social host liability. Then the two major stumbling blocks of imposing social host liability must be examined; the duty owed by a host to the general public and whether the furnishing of alcohol, rather than the imbibing of it can be considered the proximate cause of the injuries sustained by the third party. Finally we must examine the public policy reasons in favor of and opposed to imposition of such liability. This analysis will facilitate an informed decision regarding the imposition of this type of liability.

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1. Note, *Torts - Negligence - Social Host Held Liable for Serving Liquor to Intoxicated Guests Who Cause Auto Accident Injuring Third Party* - Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984), 15 SETON HALL 616, 616-17 (1985).

2. U.S. CONST. amend XVIII (1919, repealed 1933).

3. Comment, *Third Party Liability for Drunken Driving: When "One For the Road" Becomes One For the Courts*, 29 VILL. L. REV. 1119, 1120 (1983-84).

4. Kelly v. Gwinnell, 96 N.J. 539, 548, 476 A.2d 1219, 1224 (1984).

I. THE HISTORY OF SOCIAL HOST LIABILITY

The concept of holding a social host liable for the torts of his/her intoxicated guest, or for injuries sustained by that guest, has its origin in the parallel theory of the liability of vendors of intoxicating liquors. Vendor liability has been imposed either by statute or by common law. The traditional common law approach was to refuse to impose liability in tort for the furnishing of alcoholic beverages to a person of ordinary mental and physical ability.[5] The reasoning proffered in support of this approach was that the act of selling liquor is too remote to be considered the proximate cause of any injuries negligently inflicted by the inebriated purchaser of the liquor.[6]

However, in recent years the courts of thirty-three jurisdictions[7] have, by judicial decision, abrogated this strict common law view.[8] The legislatures of sixteen jurisdictions have imposed vendor liability by statutes known as "Dram Shop Acts."[9] A "Dram Shop Act" is a legislatively created cause of action for those individuals who have been injured in any way as a result of the acts or omissions of an intoxicated person, against the vendor who supplied the liquor thereby causing the intoxication, in whole or in part.[10] These statutes afford causes of action which are separate and distinct from common law negligence principles.[11] In fact the judiciary of four jurisdictions whose legislatures have

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5. 45 AM. JUR. 2d *Intoxicating Liquors* § 553, at 852 (1969). Many courts have held that there is no cause of action against one who provides alcohol to an intoxicated person who subsequently injures another. *Id.* The reason behind this common law rule is that it is the imbibing of the intoxicating liquor rather than its dispensation which is the proximate cause of the injury. *Id.* at 852-53.

6. Seibel v. Leach, 233 Wis. 66, 68, 288 N.W. 774, 775 (1939).

7. The jurisdictions which have judicially imposed liability on liquor vendors are: Alaska, Arizona, Colorado, California, District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Washington, Wisconsin, and Wyoming. *See infra* appendix B.

8. When denouncing this strict common law view of proximate cause one court stated that "[t]his Neanderthal approach to causation exempts the purveyor of alcoholic beverages from liability without regard to his own negligence or fault." Nehring v. La Counte, ___ Mont. ___, ___, 712 P.2d 1329, 1335 (1986).

9. The jurisdictions which currently have Dram Shop Acts imposing liability on vendors of liquor are: Alabama, Alaska, Connecticut, Georgia, Illinois, Iowa, Maine, Michigan, Minnesota, New York, North Carolina, North Dakota, Ohio, Rhode Island and Utah. *See infra* appendix A.

10. 45 AM. JUR. 2d *Intoxicating Liquors*, § 561, at 859 (1969). These statutes, also known as "civil damage acts," were originally imposed to remedy what was thought to be a harsh common law view which did not afford a cause of action against a liquor vendor. *Id.*

11. *Id.* The right of action given by these statutes is generally considered to be exclusive and may not be enlarged by judicial decision. *Id. See also* Ruth v. Benvenutti, 114 Ill. App. 3d 404, 449 N.E.2d 209 (1983) (minor sued liquor vendor to recover for injuries sustained as result of his intoxication, held that Dram Shop Act was exclusive avenue of relief and minor had no right of action under common law); Thompson v. Capasso, 21 Ill. App. 2d 1, 157 N.E.2d. 75 (1959) (action under Dram Shop Act — court held Dram Shop statute of limitations applied and such action was not a personal injury action but governed exclusively by Dram Shop Act). *But cf.* Haafke v. Mitchell, 347 N.W.2d 381, 387 (Iowa 1984) where the court stated it cannot "be argued that a common-law action based on traditional negligence concepts is inconsistent with the

adopted such statutes, have refused to recognize a common law cause of action.[12] Thus the development of these two avenues of relief will be examined separately.

A. The Common Law Basis of Vendor Liability

Recognized principles of negligence underlie the common law basis of liability in the situation where a vendor of liquor furnishes alcohol to an imbibing patron and that patron subsequently injures a third party.[13] Traditionally, a cause of action for negligence requires the existence of four elements:[14] 1) a duty; 2) a breach of that duty; 3) proximate cause; and 4) actual damage or injury.[15] In addition, many jurisdictions require that the plaintiff be a "foreseeable plaintiff"[16] using the standard set forth by Justice Cardozo in *Palsgraf v. Long Island R.R. Co.*[17] This was the approach taken by the New Jersey Supreme Court in *Rappaport v. Nichols*,[18] the leading case in applying com-

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dram shop act, at least as to the defendants who are not covered by the act."

12. The jurisdictions which have Dram Shop legislation and whose courts have refused to impose common law liability are: Connecticut in Nelson v. Steffens, 170 Conn. 356, 365 A.2d 1174 (1976); and Slicer v. Quigley, 180 Conn. 252, 429 A.2d 855 (1980); Georgia Keaton v. Kroger Co., 143 Ga. App. 23, 237 S.E.2d 443 (1977); Illinois in Thompson v. Trickle, 114 Ill. App. 3d 930, 449 N.E.2d 910 (1983); and North Dakota in Thorning v. Bottonsek, 350 N.W.2d 586 (N.D. 1984).

But see Buchanan v. Merger Enterprises, Inc., 463 So.2d 121, 127 (Ala. 1984) in which the Alabama Supreme Court overruled a prior decision (DeLoach v. Mayer Elec. Supply Co., 378 So. 2d 733 (Ala. 1979)) which refused to recognize a common law cause of action against liquor vendors, where a Dram Shop Act existed. The court cited "an increase in the public's awareness in the drunken driving problem since *DeLoach* was decided" as one reason for creating a common law right of action. *Id.*

13. Rappaport v. Nichols, 31 N.J. 188, 201, 156 A.2d 1, 8 (1959). The test for negligence is whether the reasonable person of ordinary prudence under the circumstances would foresee an unreasonable risk of harm to another. *Id.*

14. W. KEETON & W. PROSSER, TORTS § 30, at 164 (5th ed. 1984).

15. *Id.*

16. *Id.* at 284-86. Foreseeability involves a defendant's ability to predict the possibility of harm to a particular plaintiff. *Id.* If the defendant can do so than the injury is foreseeable and the defendant may be held liable for resulting injuries. *Id.*

17. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928), *reargument denied*, 249 N.Y. 911, 164 N.E. 564. This famed case involved a plaintiff standing on a platform waiting for a train. *Id.* at 340, 162 N.E. at 99. As one passenger boarded another train an employee of the railroad negligently knocked a package out from under his arms. *Id.* at 340-41, 162 N.E. at 99. The package which contained fireworks, fell to the tracks and exploded. *Id.* at 341, 162 N.E. at 99. The ensuing explosion rocked the platform knocking a scale over onto the plaintiff, Mrs. Palsgraf. *Id.*

Justice Cardozo in this now highly acclaimed opinion, held that Mrs. Palsgraf could not recover because she was not within, what could be called, the zone of foreseeability of injury. Since Mrs. Palsgraf was not within the zone of foreseeability the railroad owed no duty to her. *Id.* at 344-45, 162 N.E. at 100. As Cardozo stated [t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Id.*

18. 31 N.J. 188, 202, 156 A.2d 1, 8 (1959). In this case the defendant tavern owner served the defendant Nichols, then a minor, intoxicating beverages. *Id.* at 192-93, 156 A.2d at 3. There were circumstances imputing knowledge on the tavern owner that Nichols was a minor. *Id.* Subse-

mon law negligence principles to these types of actions.[19]

1. The Standard of Care

In *Rappaport* a tavern owner served liquor to one Robert Nichols under circumstances which constituted knowledge that Nichols was a minor.[20] The court held that an unreasonable risk of harm is presented when a vendor of liquor sells alcoholic beverages to a minor or to an intoxicated person.[21] In addition, the court stated that this risk "may be readily recognized and foreseen."[22] Commenting on the standard of care, the *Rappaport* court stated that the standard of care to be used in negligence cases is the standard of the "reasonable person of ordinary prudence under the circumstances."[23]

On this issue a plaintiff may introduce evidence that the defendants knew or should have known that the individual involved was intoxicated.[24] However, it is often not required that the plaintiff show that the defendant knew or should have known that the bar patron would be driving.[25] The Massachusetts Supreme Judicial Court abandoned this scienter requirement in *Cimino v.*

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quently Nichols operated a motor vehicle and was involved in an accident with one Arthur Rappaport in which Rappaport died. *Id.*

The court held the defendant tavern owner liable for the injuries. *Id.* at 202, 156 A.2d at 8. The court stated that "[w]hen alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may be readily recognized and foreseen . . . ." *Id.*

19. In *Rappaport*, the Supreme Court of New Jersey held that the selling of intoxicating beverages by the proprietor of a drinking establishment to a minor or an intoxicated person presents an unreasonable risk of harm to the minor and to third persons who may be traveling on the highways. 31 N.J. at 202, 156 A.2d at 8. The court further held that this risk was foreseeable. A factor which influenced the court in making this determination of the presence of foreseeability was the general knowledge that in today's society people frequently travel to and from drinking establishments in automobiles together with the knowledge that accidents due to intoxicated drivers are commonplace. *Id.*

20. Rappaport v. Nichols, 31 N.J. 188, 192, 156 A.2d 1, 3 (1959).

21. *Id.* at 202, 156 A.2d at 8.

22. *Id.*

23. *Id.*

24. *Id.* at 202-03, 156 A.2d at 9.

25. Cimino v. Milford Keg, Inc., 385 Mass. 323, 328-32, 431 N.E.2d 920, 924-26 (1982). *Cimino* involved an intoxicated patron of a tavern who was served liquor at that tavern after he was so intoxicated. *Id.* at 328-32, 431 N.E.2d at 924-26. Thereafter, the patron left the tavern by automobile and struck a pedestrian. In the ensuing suit the defendant tavern owner alleged lack of knowledge that the patron would be operating a motor vehicle as a defense. *Id.* The court rejected this defense stating "[w]e see no reason why the recovery by those injured by that driving should turn on such fortuities as the ability of such injured persons to prove that the defendant knew or should have known the particular person who caused the injury was going to use a motor vehicle." *Id.* at 330, 431 N.E.2d at 925. *But see* McGuiggan v. New England Tel. & Tel. Co.; Peabody, 398 Mass. 152, 496 N.E.2d 141 (1986). In this case the Massachusetts Supreme Judicial Court, when extending liability to a social host, held that "[i]n deciding whether the social host exercised ordinary prudence in such circumstances, a relevant consideration will be whether the social host knew or reasonably should have known that the intoxicated guest might presently operate a motor vehicle." *Id.* at 162, 496 N.E.2d at 146. This is inconsistent with that court's earlier ruling in *Cimino*. *See supra* this note. This demonstrates that the court perceives a social host to be in a position different from that of a commercial vendor of liquor.

Milford Keg, Inc.,[26] stating that it was unduly burdensome to require the plaintiff to prove that the defendant knew or should have known that the intoxicated patron was driving.[27] The court noted that such a requirement "flies in the face of the realities of modern life" since in today's society people ordinarily travel from one bar to another by automobile.[28]

The standard of care may also be inferred from a criminal statute making certain conduct illegal. For example, in *Nazareno v. Urie*[29] the Supreme Court of Alaska held that a "duty of care and the attendant standard of conduct may be found in a statute silent on the issue of civil liability."[30] Here the court applied a statute making it a criminal offense to supply a minor or intoxicated person with liquor[31] to set a standard of care. Violation of the standard set forth in the statute was held to constitute negligence *per se*.[32]

2. The Elements of Duty and Breach

The key elements involved in a common law negligence case of vendor (or social host) liability are the finding of the existence of a duty, the breach[33] of which proximately caused[34] the injury. In *Jardine v. Upper Darby Lodge No. 1973, Inc.*,[35] the Supreme Court of Pennsylvania held that there is a common

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26. *Cimino*, at 330, 431 N.E.2d at 925.

27. *Id.*

28. *Id.*

29. 638 P.2d 671 (Alaska 1981). *See also* Elder v. Fisher, 247 Ind. 599, 602, 217 N.E.2d 847, 850 (1966) where the Supreme Court of Indiana held that "if the obvious intention is to provide for the safety of the public, the violation of that statute is negligence *per se*." *Id. But cf.* Keaton v. Kroger Co., 143 Ga. App. 23, 237 S.E.2d 443 (1977) (statute making the supplying of liquor to minors and intoxicated persons a misdemeanor cannot be analogized to other types of negligence *per se*.)

30. *Nazareno*, 638 P.2d at 675 (citing RESTATEMENT (SECOND) OF AGENCY § 286, comment d (1965)).

31. ALASKA STAT. § .04.15.020(a) (1976), *repealed by*, ALASKA STAT.§ .04.16.030 (1980), provides in pertinent part: "It is unlawful to give, barter or sell any intoxicating liquors, including beer and wine, to a person under the age of 19 years or to an intoxicated person . . . ." *Id.*

32. *Nazareno*, 638 P.2d at 675.

33. *See* Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 631-32, 198 A.2d 550, 553 (1964). Here the Pennsylvania Supreme Court held that every person owes a duty to society to stop pouring alcohol into an inebreate. *Id.* This duty, the court said, exists whether or not there is a Dram Shop Act. *Id.*

34. *See* Elder v. Fisher, 247 Ind. 590, 605-06, 217 N.E. 2d 847, 852 (1966). That case involved a retail druggist who sold liquor to a minor who subsequently caused plaintiff's injuries in an automobile accident. *Id.* In holding that a reasonable jury could find proximate cause here the court stated:

> [I]f harm is a natural, probable and foreseeable consequence of the first negligent act or omission, the original wrongdoer may be held liable even though other independent agencies intervene between his negligence and the ultimate result . . . . [T]he test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable consequences . . . .

Id. (quoting 21 I.L.E. § 67 *Negligence*, 331-33).

35. 413 Pa. 626, 198 A.2d 550 (1964). In this case an intoxicated person entered a bar and was supplied with numerous beers. *Id.* at 627-32, 198 A.2d at 551-53. He subsequently left the bar in his automobile and struck down a pedestrian. *Id.* The court found that the Upper Darby

law duty not to serve alcohol to an intoxicated person.[36] This duty was held to be independent of any statute.[37] In reaching this decision the court stated "[t]he first prime requisite to de-toxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him. This is a duty which *everyone* owes to society. . . ."[38] However, many states have declined to make such an extension of the law.[39]

Duty has been defined as "a concept which arises out of the recognition that relations between individuals may impose upon one a legal obligation for the benefit of the other."[40] In *Keaton v. Kroger*[41] the Georgia Court of Appeals refused to adopt a common law duty to the potential victims of an intoxicated person.[42] The court reasoned that to impose a duty of care under the common law would inject an element of uncertainty[43] into the law with which the judiciary is not equipped to handle.[44] The difficulty of determining when an individual has reached the point of intoxication and what conduct an intoxicated person will engage in were two factors recognized by the court as creating "a situation rife with uncertainty and difficulty."[45] In addition the court cited, as a reason for not imposing such a duty upon a vendor of intoxicating beverages, the possibility that this duty could be extended to apply to a social

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Lodge owed a duty to society and to law not to serve an already-intoxicated individual. *Id.* Additionally, the dispensing of the liquor was found to be the proximate cause of the resultant injuries. *Id.*

36. *Id.* at 631-32, 198 A.2d at 553. In finding the existence of a duty, the court analogized the serving of liquor to an intoxicated person to supplying an insane person with a firearm. *Id.* The court reasoned that this is a duty which everyone owes to society since the possible consequences of allowing a drunk to drive are so grevious. *Id.*

37. *Id.*

38. *Id.* (emphasis added).

39. The jurisdictions which have declined to hold a vendor of liquor liable for the torts of intoxicated patrons are: Arkansas, Connecticut, Delaware, Georgia, Illinois, Kansas, Maryland, Nebraska, Nevada, and North Dakota. *See infra* Appendix C.

40. Ontiveros v. Borak, 136 Ariz. 500, 508, 667 P.2d 200, 208 (1983) (holding that a vendor of liquor has a duty to third persons not to serve intoxicated persons).

41. 143 Ga. App. 23, 237 S.E.2d 443 (1977). In this case a minor purchased beer from the defendant store. *Id.* at 23-24, 237 S.E.2d at 446. After consuming the beer and becoming intoxicated, the minor drove his automobile through a stop sign and collided with another car, killing five people. *Id.* The Georgia court held that without a statute "no redress exists against persons selling, giving, or furnishing intoxicating liquor, or their sureties, for the resulting injuries or damages due to the acts of intoxicated persons . . ." at common law. *Id.*

42. *Id.* at 28, 237 S.E.2d at 447.

43. *Id.*

44. *Id.* The court stated that "in the final analysis, the controlling considerations are public policy and whether the court or the legislature should declare it." *Id.* The court went on to conclude that the legislature was best equipped to handle questions of public policy because the legislature has the power to "hold hearings, debate the relevant policy considerations, weigh the testimony, and, in the event it determines a change in the law is necessary or desirable, it can then draft statutes which would most adequately meet the needs of the public in general, while balancing the interests of specific sectors." *Id.* (quoting Holmes v. Circo, 196 Neb. 496, 505, 244 N.W.2d 65, 70 (1976)).

45. *Id.*

host.[46] However the Supreme Court of Arizona, when presented with this same argument in *Ontiveros v. Borak*,[47] refused to adhere to the traditional rule of vendor non-liability merely because of the fear that if a duty were imposed upon a vendor it could someday be extended to a social host.[48] The court specifically left open the question of social host liability.[49]

Indeed a major argument proffered by the Supreme Court of Wisconsin in *Garcia v. Hargrove*[50] against extending a duty to a vendor of liquor was grounded in the fact that it would be difficult to determine a cut-off point where liability would stop.[51] The court feared that if liability were imposed upon a vendor of liquor a future decision might extend liability to a social host.[52] The *Garcia* decision was recently overruled. In 1984 in *Sorensen by Kerscher v. Jarvis*,[53] the Supreme Court of Wisconsin abrogated the rule of non-liability for a vendor of liquor as espoused in *Garcia*.[54] In its holding the court rebutted the argument made by the *Garcia* court that the imposition of vendor liability would eventually lead to social host liability. This rebuttal argument proceeds on the basis that "the necessity of drawing a line between a commercial vendor and a social host is a 'strawman' argument, because 'social justice' and 'common sense' require that a social host not give an intoxicated guest more liquor . . . ."[55] This argument is premised on the idea that extension of this type of liability to a social host is undesirable. Thus the possible extension of liability to social hosts has been a factor in deciding whether or not to impose a duty upon vendors of intoxicating beverages.[56]

The test used to determine whether a duty is owed by one party to an-

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46. *Id.* The court posed the question: "[i]f the commercial vendor is liable for negligence, does the host at a social gathering owe a duty to prospective victims of guests?" *Id.* The court implied that an affirmative answer to this question would be undesirable.

47. 136 Ariz. 500, 667 P.2d 200 (1983).

48. *Id.* at 511, 667 P.2d at 211.

49. *Id.* at n.4.

50. 46 Wis. 2d 724, 176 N.W.2d 566 (1970) *overruled in* Sorenson by Kerscher v. Jarvis, 119 Wis. 2d 627, 350 N.W.2nd 108 (1984).

51. *Garcia*, 46 Wis. 2d at 734, 176 N.W.2d at 570-71. The court stated:

> [I]t is illogical to adopt a rule which would subject to liability a licensed commercial liquor vendor, and not a friend, employer or acquaintance who gave liquor away. [citation omitted] If the act of providing liquor to one already intoxicated is a negligent act, then it remains a negligent act regardless of who the supplier may be.

Id. This demonstrates the court's strong conviction against the imposition of social host liability. The Wisconsin Supreme Court here was willing to sacrifice vendor liability in order to ensure that it would not one day be extended to include a social host.

52. *Id.*

53. 119 Wis. 2d 627, 350 N.W.2d 108 (1984).

54. *Sorenson*, at 640-44, 350 N.W.2d at 115-17.

55. *Sorenson*, at 643, 350 N.W.2d at 116. *But see* Ling v. Jan's Liquors, 237 Kan. 629, 703 P.2d 731 (1985) (accepting argument that vendor liability may be extended to encompass a social host as valid argument for refusing to grant a cause of action against vendors of liquor).

56. *See Ontiveros*, 136 Ariz. at 511, 667 P.2d at 211; Garcia v. Hargrove, 46 Wis. 2d 724, 736-37, 170 N.W.2d 566, 571 (1970) (citing possible extension of social host liability as one reason for not imposing vendor liability), *overruled in*,Sorenson by Kerscher v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108, 116 (1984) (possibility of extension of vendor liability to a social host not sufficient to preclude vendor liability).

other is based on forseeability.[57] If a reasonably forseeable risk of harm to one party exists, if due care is not exercised by the second party, then the second party owes a duty to the first.[58] Applying this test, the Supreme Court of Alabama in, *Buchanan v. Merger Enterprises, Inc.*,[59] concluded that when a tavern patron had been consuming alcohol in the defendant's tavern all day, the defendant should have forseen that the patron "was becoming so intoxicated that to continue serving him alcohol would create an unreasonable risk of harm to third persons."[60]

The Supreme Court of Arizona in *Ontiveros* went beyond the limits of this test basing the imposition of a duty upon the relationship between the liquor vendor and the patron.[61] There the court argued that changing social conditions require the imposition of a duty upon commercial vendors of liquor towards innocent third parties who may be injured by intoxicated patrons.[62] Thus it is evident that the imposition of a legal duty under the common law has involved more than mere negligence principles and in fact has taken into account the current social attitude. The courts have engaged in this type of duty analysis when extending liability to a social host.

3. The Element of Proximate Cause

The element of negligence which has proven to be the most troublesome is that of proximate cause.[63] There is considerable difficulty in deciding whether it is the imbibing of the alcohol or the furnishing of it, which is the proximate cause of injuries to a third party resulting from the conduct of a drunkard. The traditional common law view held that the imbibing of alcohol was an intervening cause.[64] In 1970 the Supreme Court of Wisconsin addressed this question in *Garcia*.[65] The court saw this issue as one of public policy and held that the imbibing and not the furnishing of intoxicating beverages was the proximate cause of injuries inflicted by an intoxicated person.[66]

One argument was that the court should defer to the legislature on a social matter such as intoxication.[67] The court reasoned that since intoxication was a social rather than a legal problem it should be dealt with by the legisla-

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57. Buchanan v. Merger Enters. Inc., 463 So. 2d 121, 126 (Ala. 1984).

58. *Id.*

59. 463 So. 2d 121 (Ala. 1984).

60. *Id.* at 126.

61. *Ontiveros*, 136 Ariz. at 508, 667 P.2d at 208.

62. *Id.*

63. W. PROSSER & W. KEETON, TORTS § 41, at 263 (5th ed. 1984). Dean Prosser, speaking of proximate cause, noted that "[t]here is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion." *Id.*

64. Beck v. Groe, 245 Minn. 28, 34, 70 N.W.2d 886, 891 (1955) (overruled Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973)).

65. 46 Wis. 2d 724, 176 N.W.2d 566 (1970).

66. *Id.* In determining that the furnishing of alcohol was not the proximate cause of the resultant injuries, the court stated that "[p]roblems arising out of intoxication are perhaps as old as mankind, probably they have never been unknown in Wisconsin. It is basically a social problem and not a legal problem." *Id.* at 733, 176 N.W.2d at 570.

67. *Id.*

ture which is better equipped to handle such problems.[68] Another argument, which was proffered by the *Garcia* majority, was that the imposition of liability upon vendors of liquor would only serve to cripple a licensed industry which carries on a legitimate trade and has gained wide-spread acceptance in today's society.[69] By extending liability to vendors of liquor the court would, in effect, be subjecting a licensed business person to litigation everytime there was an accident involving the consumption of liquor.[70] The multiplicity of such litigation, it was argued, would impose an unjust financial burden upon the industry.[71] The *Sorenson* court, however, argued that the liquor industry should not be immunized from liability.[72] The industry, argued the court, is not being singled out, but rather it is merely being held liable for negligence in situations in which persons in general are liable.[73] Other arguments deserving of consideration include the fact that the extension of liability would open a floodgate of litigation placing additional burdens upon the courts,[74] as well as the fear that imposing liability on the vendor of alcohol would diminish the sense of responsibility of the drinker.[75]

Aside from the common law basis for imposing liability on a purveyor of spirits,[76] many states have provided a statutory basis for liability by enacting "dram shop" acts which provide for strict liability against vendors of liquor. Several courts have explicitly deferred to the legislature on the issue of vendor liability.[77] In *Keaton v. Kroger*, the court stated that where there is no Dram Shop Act there is no right of action against a vendor of liquor for negligently serving alcohol to a minor or intoxicated person.[78] Thus the court refused to create a common law cause of action and deferred to the legislature.

However, other courts are willing to impose liability regardless of the existence of a Dram Shop Act.[79] For example, in *Haafke v. Mitchell*,[80] the Su-

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 734, 176 N.W.2d at 571.

72. *Sorenson*, 119 Wis. 2d at 645, 350 N.W.2d at 108.

73. *Id.* at 644, 350 N.W.2d at 116.

74. *Garcia*, 46 Wis. 2d at 733, 176 N.W.2d at 570.

75. *Id.*

76. The following jurisdictions have enacted Dram Shop Acts: Alabama, Alaska, Connecticut, Florida, Georgia, Illinois, Iowa, Maine, Michigan, New York, North Carolina, North Dakota, Ohio, Rhode Island, Utah, and Vermont. *See infra* Appendix A.

77. *See* DeLoach v. Mayer Elec. Supply Co., 378 So. 2d 733 (Ala. 1979) (overruled in Buchanan v. Merger Enters. Inc., 463 So. 2d 121 (Ala. 1984)); Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Slicer v. Quigley, 180 Conn. 252, 429 A.2d 855 (1980); Wright v. Moffitt, 437 A.2d 554 (Del. 1981); Keaton v. Kroger, Co., 143 Ga. App. 23, 237 S.E.2d 443 (1977); Demchuk v. Duplancich, 92 Ill. 2d, 1, 440 N.E.2d 112 (1982); Ling v. Jan's Liquors, 237 Kan. 629, 703 P.2d 731 (1985); Fisher v. O'Connor's, Inc., 53 Md. App. 338, 452 A.2d 1313 (1982); Swartzenberger v. Billings Labor Temple Assn., 179 Mont. 145, 586 P.2d 712 (1978); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); Thoring v. Bottonsek, 350 N.W.2d 586 (N.D. 1984).

78. Keaton v. Kroger, 143 Ga. App. 23, 27, 237 S.E.2d 443, 446 (1977) (citing 48 C.J.S. *Intoxicating Liquors* § 430, at 716-17).

79. *See* Buchanan v. Merger Enters., 463 So. 2d 121 (Ala. 1984); Nazareno v. Urie, 638 P.2d 671 (Alaska 1981); Davis v. Shiappacosse, 155 So. 2d 365 (Fla. 1963); Haafke v. Mitchell,

preme Court of Iowa stated that the purpose of Dram Shop Acts is to remedy the courts refusal to impose liability under the common law.[81] Thus where the judiciary failed to impose liability the legislature, in many jurisdictions, has stepped in to provide a statutory cause of action.

B. The Development of Social Host Liability

As the law of vendor liability progressed it became apparent that this type of liability would eventually be extended to include social hosts who gratuitously furnished alcohol to intoxicated persons.[82] There is a jurisdictional split among those courts which have addressed the issue of social host liability thus far. Five jurisdictions have recognized the liability[83] of a social host for

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347 N.W.2d 381 (Iowa 1984); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965); Hutchons v. Hankins, 63 N.C. App. 1, 303 S.E.2d 584, *reh. denied*, 309 N.C. 191 (1983); Mason v. Roberts, 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973).

80. 347 N.W.2d 381 (Iowa 1984).

81. *Id.* The court here held that although there was a statutory cause of action against a vendor of intoxicating liquors, the existence of such a statute does not preclude a common law cause of action. In support of this conclusion the court stated:

> It would be strange if the legislature, by stepping in to modify the harshness of the common-law defense. . . should be held to have preempted the field, freezing the development of the common law at that point, and disabling the courts from subsequently changing the doctrine in any other respect.

Id. at 386 (quoting Goetzman v. Wichern, 327 N.W.2d 742, 748 (Iowa 1982)).

The court argued that the common law cause of action was not inconsistent with the "Dram Shop Act" because the latter provides for strict liability while under the former the four elements of a tort must be proved. Thus a defendant who was not covered by the Dram Shop Act could not claim that there could be no common law action against him/her. This ruling left the door open for the court to invite liability against a social host. *Id.* at 387.

82. *See* Coulter v. Superior Court of San Mateo Cty., 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); Andre v. Ingram, 164 Cal. App. 3d 206, 210 Cal. Rptr. 150 (1985); Blake v. Moore, 162 Cal. App. 3d 700, 208 Cal. Rptr. 703 (1984); Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985); Ashlock v. Norris, 475 N.E.2d 1167 (Ind. 1985); Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985); McGuiggan v. New England Tel. & Tel. Co.; Peabody, 398 Mass. 152, 496 N.E.2d 144 (1986); Langemann v. Davis, 398 Mass. 166, 495 N.E.2d 847 (1986); Longstreth v. Gensel, 423 Mich. 675, 377 N.W.2d 804 (1985); Reinert v. Dolezel, 147 Mich. App. 149, 383 N.W.2d 148 (1985); Meany v. Newell, 367 N.W.2d 472 (Minn. 1985); Holmquist v. Miller, 367 N.W.2d 468 (Minn. 1985); Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972); Boutwell v. Sullivan, 469 So. 2d 526 (Miss. 1985); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984); Linn v. Rand, 140 N.J. Super. 212, 356 A.2d 15 (1976); Settlemyer v. Wilmington Veterans Post No. 49, 11 Ohio St. 3d 123, 385 N.E.2d 1078 (1984); Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 Or. 632, 485 P.2d 18 (1971); Aebischer v. Reidt, 74 Or. App. 692, 704 P.2d 531 (1985); Congini v. Portersville Valve Co., 504 Pa. 157, 470 A.2d 515 (1983); Klien v. Raysinger, 504 Pa. 141, 470 A.2d 507 (1983); Douglas v. Schwenk, 330 Pa. Super. 392, 479 A.2d 608 (1984); Langle v. Kurkel, ___ Vt. ___, 310 A.2d 1301 (1986); Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985).

83. *See* Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534, 577 P.2d 669 (1978) abrogated by statute CAL. BUS. & PROF. CODE § 25602 (West Supp. 1985) and CAL. CIV. CODE § 1714 (West Supp. 1985); Ashlock v. Norris, 475 N.E.2d 1167 (Ind. 1985); Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985); McGuiggan v. New England Tel. & Tel. Co.; Peabody, 398 Mass. 152, 496 N.E.2d 144 (1986); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219

the torts of an intoxicated *adult* guest and five have refused to recognize such liability.[84] Four jurisdictions have refused to impose it judicially.[85] One state legislature[86] has statutorily abrogated the judicial imposition of such liability and another has severely limited the common law liability by statute.[87] This

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(1984).

84. *See* Holmquist v. Miller, 367 N.W.2d 468 (Minn. 1985); Boutwell v. Sullivan, 469 So. 2d 526 (Miss. 1985); Congini v. Portersville Valve Co., 504 Pa. 157, 470 A.2d 515 (1983); Klein v. Raysinger, 504 Pa. 141, 470 A.2d 507 (1983); Langle v. Kurkel, ____ Vt. ____, 510 A.2d 1301 (1986).

85. *See supra* note 84.

86. CAL. BUS. & PROF. CODE § 25602 (West Supp. 1985) provides in pertinent parts:

> (b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person result of intoxication by the consumer of such alcoholic beverage.
>
> (c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as Vesley v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal. 3d 313) and Coulter v. Superior Court (____ Cal. 3d ____) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

Id. CAL. CIV. CODE § 1714 (West Supp. 1985) provides:

> (b) It is the intent of the Legislature to abrogate the holdings in cases such as Vesley v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313), and Coulter v. Superior Court (_____ Cal. 3d _____) and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.
>
> (c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.

Id.

87. OR. REV. STAT. ch. 801 § 2 (1979) provides:

> Section 1. No licensee or permittee is liable for damages incurred or caused by intoxicated patrons off the licensee's or permittee's business premises unless the licensee or permittee has served or provided the patron alcoholic beverages when such patron was visibly intoxicated.
>
> Section 3. Notwithstanding ORS 471.130 and Sections 1 and 2 of this Act, no licensee, permittee or social host shall be liable to third persons injured by or through persons not having reached 21 years of age who obtained alcoholic beverages from the licensee, permittee or social host unless it is demonstrated that a reasonable person would have determined that indentification should have been requested or that the identification exhibited was altered or did not accurately describe the person to whom the alcoholic liquor was sold or served.
>
> The Supreme Court of Pennsylvania in Klien v. Raysinger, 504 Pa. 141, 470 A.2d 507 (1983) refused to find that the furnishing of intoxicating beverage is the proximate cause of injuries inflicted upon a third party by an intoxicated person. Instead the Court held that it is the imbibing of the alcohol which is the proximate cause of such injuries.

Id. at 148-49, 470 A.2d at 510-11.

jurisdictional split brings to light the difficulty in resolving the issue. The waters are by no means settled. Eventually each and every jurisdiction will be forced to resolve this issue one way or the other.

The first step towards this type of liability came in 1971 in *Weiner v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, which extended liability to a social host for the torts of a minor guest.[88] In that case, a fraternity hosted a party at which it provided alcohol knowing that minors would be in attendance at the party and that some of them would be driving home.[89] The defendant was a minor in attendance at the party and became intoxicated there.[90] Subsequently, the defendant drove his automobile into a building causing injuries to the plaintiff.[91]

The Supreme Court of Oregon held that a social host may be held liable for torts committed by their intoxicated guests.[92] According to the Oregon court, each case should be decided on its own facts.[93] Factors which may be taken into consideration in rendering a decision are: 1) the propensity of the drinker to be adversely affected by alcohol;[94] and 2) the youth of the drinker.[95] Based on the facts presented, the court held that a jury could find the defendant fraternity liable.[96]

The next significant development came much later, when liability was extended to a social host for the tort of his intoxicated *adult* guest. The leading case in this area, *Kelly v. Gwinnell*,[97] was decided in 1984. In *Kelly*, defendant Donald Gwinnell drove defendant Joseph Zak home one night.[98] Zak invited Gwinnell inside; Gwinnell accepted and remained there for several hours.[99] Zak testified that "[d]uring that time, . . .Gwinnell consumed two or three drinks of scotch on the rocks."[100] Zak then walked Gwinnell to his car and watched him drive off.[101] Gwinnell was subsequently involved in an automobile accident in which Marie Kelly was seriously injured.[102] A blood test taken after the accident indicated that Gwinnell had a blood alcohol content of .286,

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88. 258 Or. 632, 485 P.2d 18 (1971).
89. *Id.* at 636, 485 P.2d at 20.
90. *Id.*
91. *Id.* at 637, 485 P.2d at 20.
92. *Id.* at 643, 485 P.2d at 23.
93. *Id.* at 639-40, 485 P.2d at 21-22.
94. *Id.* at 639, 485 P.2d at 21.
95. *Id.*
96. *Id.* at 643, 485 P.2d at 23. The Court stated that:

> The fraternity status as host and its direct involvement in serving the liquor to Blair are sufficient to raise the duty. . . to refuse to serve alcohol to a guest when it would be unreasonable under the circumstances to permit him to drink. The allegations that Blair was a minor and that the fraternity ought to have known he was driving after the party adequately charge the existence of circumstance from which a jury might conclude that the fraternity's behavior was in fact unreasonable.

Id.
97. 96 N.J. 538, 476 A.2d 1219 (1984).
98. *Id.* at 541, 476 A.2d at 1220.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

a level which, according to an expert, would have required the consumption of thirteen drinks and thus, Gwinnell would have been visibly intoxicated while at Zak's house.[103]

The Supreme Court of New Jersey held that a host who serves intoxicating beverages to an adult guest will be held liable for damages sustained by a third party who is subsequently injured.[104] This holding is limited to injuries resulting from the negligent operation of an automobile by the defendant's "guest when such negligence is caused by the intoxication" of the guest.[105] The court qualified this holding by requiring as a prerequisite for recovery that: 1) the host have knowledge of the guest's intoxication; and 2) the host have knowledge that the guest will be driving home.[106] In reaching this conclusion the court found the existence of a duty[107] of a social host to the general public and that the serving of the alcohol is the proximate cause[108] of the third party's injuries.

The most far-reaching developments, however, have occurred very recently. Several cases have extended this liability in startling directions[109] and have strengthened opponent's fears that the courts are opening a Pandora's Box of litigation. For example, in *Clendening v. Shipton*,[110] the defendant Shipton held a party at his home at which beer was served in kegs to between

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103. *Id.* The court noted this holding was inconsistent with Anslinger v. Martinsville Inn, Inc., 121 N.J. Super. 525, 298 A.2d 84 (App. Div. 1972), *cert. denied*, 62 N.J. 334, 301 A.2d 449 (1973). *Kelly*, 96 N.J. at 548 n.8, 476 A.2d at 1224 n.8.

104. *Id.* at 548, 476 A.2d at 1224.

105. *Id.* The court reserved for another day the question of whether the drunkenness of the driver would constitute contributory negligence. *Id.* at 549 n. 8, 476 A.2d at 1224 n.8.

106. *Id.* at 548, 476 A.2d at 1224.

107. *Id.* at 547-48, 476 A.2d at 1224. The court based this imposition of a duty on public policy considerations. *Id.* These public policy considerations of affording economic redress to the innocent victims of drunk driving were said to "far outweigh" any considerations asserted in opposition of this duty. *Id.* Although the court realized that its holding would infringe upon the societal relations of the general public, it did not deem this infringement serious enough to warrant a finding of no duty. *Id.* at 548, 476 A.2d at 1224.

In the justification of the imposition of this duty the court stated:

> In a society where thousands of deaths are caused each year by drunken drivers, where the damage caused by such deaths is regarded increasingly as intolerable, where liquor licenses are prohibited from serving intoxicated adults, and where long-standing criminal sanctions against drunken driving have recently been significantly strengthened. . . the imposition of such a duty by the judiciary seems both fair and fully in accord with the State's policy.

Id. at 543, 476 A.2d at 1222.

108. *Id.* at 543, 476 A.2d at 1221. In finding that the serving of the alcohol was the proximate cause of the injuries to the third party, the court stated:

> When negligent conduct creates such a risk, setting off foreseeable consequences that lead to a plaintiff's injury, the conduct is deemed the *proximate cause* of the injury. '[A] tortfeasor is generally held answerable for the injuries which result in the ordinary cause of events from his negligence and it is generally sufficient if his negligent conduct was a *substantial factor* in bringing about the injuries.'

Id. (emphasis added) (quoting Rappaport v. Nichols, 31 N.J. 188, at 203, 156 A.2d 1, 9, (1959).

109. *See infra* notes 313-64 and accompanying text.

110. 149 Cal. App. 3d 191, 196 Cal. Rptr. 654 (1983).

200 and 250 guests.[111] The beer was purchased from a fund contributed to by the guests.[112] Plaintiff's husband became intoxicated at the party and later that evening assaulted plaintiff breaking her neck and permanently paralyzing her.[113] The California court found the serving of the beer to plaintiff's husband by defendant to be the proximate cause of the plaintiff's injuries.[114] Thus, the court extended liability to a social host for the intentional tort of one of his intoxicated guests.[115]

A more startling development can be found in the Indiana case of *Ashlock v. Norris*.[116] In that case the defendant social host was a mere bar patron who had purchased several drinks for a friend. Defendant's friend became intoxicated as a result of the consumption of these drinks and left the bar in her automobile over the protest of the defendant.[117] Subsequently, she struck and killed plaintiff's decedent.[118] The court held that the defendant breached a duty imposed by statute when he purchased the drinks for his friend.[119]

Several jurisdictions have held that where a parent allows a child to hold a party at which minors will be present, that parent will be held liable for the torts of a minor who becomes intoxicated at the party.[120] In *Koback v.*

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111. *Id.* at 194, 196 Cal. Rptr. at 655.

112. *Id.*

113. *Id.* at 195, 196 Cal. Rptr. at 656.

114. *Id.* at 198, 196 Cal. Rptr. at 658. In finding proximate cause the court stated:

> 'Foreseeablility is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.'. . . Moreover, it is settled that what is required to be foreseeable is the general character of the event of harm. . . not its precise nature or manner of occurrence.

Id. (quoting Bigbee v. Pacific Tel. & Tel. Co., 34 Cal. 3d 49, 57-58, 665 P.2d 947, 952, 192 Cal. Rptr. 857, 862, (1982)).

The court went on further to note that "alcohol plays a major role in" assaults and wife beatings. *Id.* at 198, 196 Cal. Rptr. at 658. Thus,indicating that liability should be extended to cover these types of intentional torts whether they occur within a drinking establishment, out on the street or even in the home. *Id.*

115. *Id.*

116. 475 N.E.2d 1167 (Ind. 1985).

117. *Id.* at 1168.

118. *Id.*

119. *Id.* at 1168-69. The Indiana statute which the court held imposes the duty here is IND. CODE ANN. § 7.1-5-10-15 (Burns 1984), which provides in pertinent part:

> It is unlawful for a person to sell, barter, deliver, or give away an alcoholic beverages to another person who is in a state of intoxication if the person knows that the other person is intoxicated.

Id. The court phrased the issue of statutory interpretation as "whether the legislature intended to, and whether sound public policy supports, the extension of civil liability to family, friend or acquaintance who merely furnishes 'one more drink' to an intoxicated person." *Ashlock*, 475 N.E.2d at 1169. The court, after consideration of the effects of drunk driving on society, answered both questions in the affirmative. *Id.*

120. *See* Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985); Langemann v. Davis, 398 Mass. 166, 495 N.E.2d 847 (1986); Longstreth v. Gensel, 423 Mich. 675, 377 N.W.2d 804 (1985); Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985). *But see* Reinert v. Dolezel, 147 Mich. App. 149, 383 N.W.2d 148 (1985).

Crook,[121] the Wisconsin court was presented with such a situation and analogizing this case to the *Sorenson* case,[122] the court held that a social host who served alcohol to a minor could be liable to a third person for injuries sustained as a result of the conduct of an intoxicated minor.[123] The Iowa court in *Clark v. Mincks*[124] extended liability to social hosts for serving adult guests alcohol stipulating however, that the host must have been personally aware that the guest was intoxicated.[125]

The Massachusetts Supreme Judicial Court in *McGuiggan v. New England Telephone & Telegraph Company; Peabody*[126] went one step further than the landmark decision of *Kelly v. Gwinnell* by not requiring that the host actually serve the alcohol, but merely that the host *permitted* the guest to consume alcohol.[127] In *Kelly* the Supreme Court of New Jersey required that

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121. 123 Wis. 2d 259, 366 N.W.2d 857 (1985).

122. *Id.* at 266-75, 366 N.W.2d at 860-64. In *Sorenson* it was held that the sale of alcohol to a minor was negligence *per se*. *Sorenson*, 119 Wis. 2nd at 645, 350 N.W.2d at 117. The *Koback* court analogized *Sorenson* by stating that "the negligence alleged in the complaint must be proven at trial and, if proved, is the predicate for liability of a non-commercial supplier, a social host, to the same extent that the negligence *per se* conduct of violating a liquor statute triggers liability for a licensee." *Koback*, 123 Wis. 2d at 265, 366 N.W.2d at 860. Thus the court applied the *Sorenson* rationale to the facts before it and found the social host liable. *Id.*

123. *Koback*, 123 Wis. 2d. at 277, 366 N.W.2d at 865. In making its holding the court stated that it could find no fundamental difference between the basis of liability to a commercial vendor and liability to a social host. *Id.* at 274, 366 N.W.2d at 864. The court found these two types of liability to be "indistinguishable because both stem from negligent conduct . . . ." *Id.*

124. 364 N.W.2d 226 (Iowa 1985). This case involved an action brought by the parents of a child who was killed in an automobile accident against the hosts of a cookout. *Id.* at 227. Plaintiffs and their children attended the cookout hosted by their friends the Mincks. *Id.* at 228. The Mincks served beer to Nancy Mincks a relative, when she was intoxicated. *Id.* Nancy Mincks subsequently operated a motor vehicle in which plaintiffs' child was a passenger and drove the vehicle off the road killing herself and plaintiffs' child. *Id.* The plaintiffs' then brought suit against the Mincks as social host of the accident. *Id.*

125. *Id.* at 231. The court held for the plaintiffs, however, with a very limited holding. The court stated:

> we hold, and only hold, that a motion to dismiss should be overruled by virtue of section 123.49(1) of the Code when the allegations of the petition are such that the plaintiff could introduce substantial evidence showing (1) the guest was intoxicated, (2) the host personally was actually aware the guest was intoxicated, (3) the host then made beer (or other intoxicating beverages) available to the guest, (4) the guest drank the beer (or beverages), (5) the guest while intoxicated, then operated a motor vehicle, and (6) by reason of the intoxication, the guest operated the vehicle in a manner which caused injury to (or the death of) the plaintiff (or the plaintiff's decedent).

Id.

126. 398 Mass. 152, 496 N.E.2d 141 (1986).

127. *Id.* at 162, 496 N.E.2d at 146. The court concluded:

> We would recognize a social host's liability to a person injured by an intoxicated guest's negligent operation of a motor vehicle where a social host who knew or should have known that his guest was drunk, nevertheless gave him or *permitted* him to take an alcoholic drink and thereafter, because of his intoxication, the guest negligently operated a motor vehicle causing the third person's injury.

Id. (emphasis added).

the host actually *serve* the guest the alcohol.[128] This requirement precluded liability where a guest served him/herself or was served by another guest.[129] The Massachusetts rule would hold the host liable where the guest helped him/herself to alcohol provided at the social gathering or, perhaps even where the guest brought his/her own alcohol to the party.

The Supreme Court of Vermont recently rejected social host liability in *Langle v. Kurkul*.[130] The court found no compelling public policy reasons to impose a legal duty of care on a social host "where the injured party was the imbiber himself."[131] In addition the court held that Vermont's Dram Shop Act[132] did not create a duty to the imbiber of alcohol regardless of whether the purveyor of alcohol be a commercial vendor or a social host.[133] The court however, left open the question of whether a social host could be liable to a third party injured by the negligent acts of an intoxicated guest.

When addressing the question of social host liability, these courts have struggled with basic negligence principles. As can be seen through the jurisdictional split in the courts which have addressed the issue, these principles are not easily applied. Thus, many courts have based their holdings on issues of public policy. The remainder of this note will discuss the application of two basic tort concepts, duty and proximate cause. In addition, the public policy considerations of social host liability will be analyzed. This analysis will facilitate the legal and social soundness of social host liability.

II. Does a Social Host Owe a Duty to Protect the General Public?

Since the development of social host liability has been effectuated, in many cases, through the application of common law negligence principles, it will be useful to examine those principles. One of the prime elements required for a common law action for negligence is the existence of a duty.[134] Does a

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128. See *Kelly*, 96 N.J. at 538, 476 A.2d at 1224 where the court held that:

> a host who *serves* liquor to an adult social guest knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party . . . .

Id. (emphasis added). *But see Sutter*, 254 Ga. at 199, 327 S.E.2d at 720 (social host who *encouraged* minor to consume alcohol held liable); *Ashlock*, 475 N.E.2d at 1169 (bar patron who merely *purchased* drinks for another held liable); *Clark*, 364 N.W.2d at 231 (court merely required that host be *aware* that guest was intoxicated).

129. *Kelly*, 96 N.J. at 556, 476 A.2d at 1228. The court stressed that liability would be found only "where the social host *directly* serves the guest. . . ." *Id.* (emphasis added).

130. ___ Vt. ___, 510 A.2d 1301 (1986).

131. *Id.* at ___, 510 A.2d at 1306.

132. Vt. Stat. Ann. tit. 7, § 501 (1972) provides in pertinent part that:

> A husband, wife, child, guardian, employer or other person who is injured in person, property or means of support by an intoxicated person, or in consequence of the intoxication of any person, shall have a right of action in his or her own name, jointly or severally, against a person or persons, who, by selling or furnishing intoxicating liquor unlawfully, have caused in whole or in part such intoxication. . . .

Id.

133. *Langle*, ___ Vt. at ___, 510 A.2d at 1303.

134. *See supra* notes 13-19 and accompanying text.

social host owe a duty to protect the general public from the actions of an intoxicated person who reached such a state through the furnishing of alcohol by the host? This raises the familiar question - "am I my brother's keeper?"[135] The Supreme Court of Wisconsin answered this inquiry in the affirmative. That court in *Koback* noted:

> We are still our brothers keepers, and it would be a rare host at a social gathering who would knowingly give more liquor to an intoxicated friend when he knows his invitee must take care of himself on the highway and will potentially endanger other persons. Social justice and common sense require the social host to see within reason that his guests do not partake too much of his generosity.[136]

This line of reasoning may support a contention that a moral duty exists, however, a moral duty has no effect in the law. What then is a legal duty? "A [legal] duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."[137] The law will recognize a duty to persons to whom there was a foreseeable, unreasonable risk of harm.[138] The two avenues by which the imposition of a duty may be reached are: 1) judicial development of the common law; and 2) act of the state legislature.

A. Common Law Imposition of a Duty

Several courts have chosen to judicially impose a duty. In *Coulter v. Superior Court of San Mateo City,*[139] the California Supreme Court held that a "reasonably foreseeable" risk of harm to highway travelers was present when a social host served alcoholic beverages to a visibly intoxicated person knowing that that person intends to operate a motor vehicle upon public highways.[140]

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135. *Genesis* 4:9 (King James).

136. *Koback*, 123 Wis. 2d at 271, 366 N.W.2d at 862 (quoting Garcia v. Hargrove, 46 Wis. 2d 724, 740, 176 N.W.2d 566, 573-74 (1970) (Hallows, J., dissenting)). The court further argued that: "[t]he duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act . . . ." *Id.* at 213, 366 N.W.2d at 863 (quoting Osen v. Copeland, 90 Wis. 2d 483, 280 N.W.2d 178, 184 (1979) (Day, J., dissenting)).

137. W. PROSSER & W. KEETON, TORTS § 53 at 356. (5th ed. 1984).

138. *Id.* This is evident once one examines Justice Cardozo's famed opinion in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928), where he stated that "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others, within the range of apprehension." *Id.* Thus it must be shown that the injuries to unknown parties are the foreseeable consequences of serving alcohol to guests in a social setting.

139. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1970).

140. *Id.* at 152-53, 577 P.2d at 674, 145 Cal. Rptr. at 539. This case involved a plaintiff who was a passenger in an automobile driven by an intoxicated person. *Id.* at 147-48, 577 P.2d at 671, 145 Cal. Rptr. at 535-36. The driver had become intoxicated at a social affair hosted by the defendant, an apartment complex management company, and subsequently drove his car off the road injuring his passenger, the plaintiff. *Id.* The plaintiff then brought suit against the defendant as a social host. *Id.* at 144, 577 P.2d at 669, 145 Cal. Rptr. at 534.

The Supreme Court of California, *en banc*, held that the defendant would be liable as a social

The court felt that the existence of a reasonably foreseeable risk of harm weighed heavily in favor of the imposition of a duty to third persons.[141] The California legislature apparently viewed this reasoning to be not without fault, for it legislatively abrogated the existence of such a duty by enacting statutes[142] which expressly provide that there shall be no civil liability against a social host nor against a vendor of liquor.[143]

The Supreme Court of Vermont, however, refused to impose a duty upon a social host, reasoning that the existence of a legal duty is a question of law and is based upon public policy considerations and other relevant factors.[144] The court stated that duty "is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[145] Thus, when considering recognition of a new duty such as that sought to be imposed upon social hosts, courts must first examine the foreseeability of the risk involved and then weigh the relevant public policy considerations.

There are strong public policy reasons for not imposing such a duty on a social host. These considerations were stressed by the dissent in *Kelly*.[146] Justice Garibaldi warned that the New Jersey court should carefully consider the possible effects of its holding before imposing such a high duty of care on social hosts.[147] Justice Garibaldi further stressed that this is a problem of "unknown proportions" and extreme care should be taken when deciding whether or not to impose such a duty.[148]

A major public policy argument proffered by the proponents of social host liability is that the imposition of a duty to third parties would prevent future injuries of this nature, specifically, injuries caused by drunk driving.[149] This

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host, finding the existence of both a duty and proximate cause. *Id.* The duty was said to have two origins. The first was statutory, derived from CAL. BUS. & PROF. CODE § 25602 (West 1985) which provided that "[e]very person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to . . .any obviously intoxicated person is guilty of a misdemeanor." *Id.* That section has since been completely revised. *See supra* note 86.

The second ground for finding a duty was based on common law tort principles. The Court said that "[t]he existence of a duty is primarily a question of law, and dependent upon a variety of relevant factors which, foreseeability of the risk is a primary consideration . . . ." 21 Cal. 3d at 152, 577 P.2d at 674, 145 Cal. Rptr. at 539 (quoting Weirum v. RKO General, Inc., 15 Cal. 3d. 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471, (1975)). The court went on to hold that a reasonably foreseeable risk to travelers on the highway was created here. *Id.* at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539.

141. *Id.* at 153-54, 577 P.2d at 674, 145 Cal. Rptr. at 539.

142. *See supra* note 86.

143. *See supra* note 86.

144. Langle v. Kurkul, ___ Vt. ___, ___, 510 A.2d 1301, 1305 (1986).

145. *Id.* (citing Dillon v. Legg, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968)) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS 332-33 (3d ed. 1964))).

146. *Kelly*, 96 N.J. at 560-70, 476 A.2d at 1230-36 (Garibaldi, J., dissenting).

147. *Id.* at 563, 476 A.2d at 1232 (Garibaldi, J., dissenting).

148. *Id.* (Garibaldi, J., dissenting).

149. *Id.* at 544-45, 476 A.2d at 1222.

Here the majority stated that "the imposition of a duty is both consistent with and supportive of a social goal — the reduction of drunken driving — that is practically unanimously accepted by society." *Id.*

argument is based on the premise that the fear of a lawsuit will deter individuals from allowing their social guests to indulge in spirits to excess. However, it ignores the resultant stress placed upon otherwise convivial gatherings of family and community members.[150] A party host can no longer remain merely a host but must assume the role of a "big brother" and actively engage in policing the conduct of her/his guests. This will serve only to strain the relationship between host and guest.[151]

There are intense social pressures inflicted on a host who is thrust into a position of having to refuse to serve alcohol to a guest.[152] The desire to avoid social confrontation make this a very difficult task.[153] In the businesslike atmosphere of the commercial vendor, it is a relatively simple and common task for a bartender to refuse to serve a patron.[154] However, for a social host to tell a friend or family member that he will not serve him/her another drink will create hostility.[155]

Another problem is that the guest may insist on consuming more alcohol. A social host, unlike a commercial vendor, does not have a bouncer at his/her disposal.[156] Should the host be required to exert physical force to restrain his guest? If so, would this not leave the host vulnerable to a subsequent lawsuit by his guest for assault and battery?[157] This presents the host with a Catch 22 situation. If the host allows the guest to continue imbibing alcohol and leave the party, he/she is opening him/herself to liability for injuries subsequently inflicted upon third parties by the intoxicated guest. However, if she/he attempts to prevent the guest from indulging further by use of force the host may be exposing him/herself to liability for any injuries inflicted upon the guest.[158] The host is also faced with a dilemma when he/she attempts to restrain his guest from leaving the party. If he attempts to keep the intoxicated individual against his/her own will the host may now be susceptible to an action for false imprisonment.[159] These types of issues remain unanswered by the courts and will surely lead to judicial chaos if social host liability is to become the norm.[160]

The fact that the social host and the commercial vendor of liquor are not similarly situated lends further support for the view that liability should not be extended to include a social host. Alcohol affects everyone differently and it is usually difficult to determine when an individual has reached the point of in-

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150. *Id.* at 566-67, 476 A.2d at 1234 (Garibaldi, J., dissenting). The *Kelly* majority addressed this argument by arguing that the goal of deterence of drunk driving outweighs "the potential revision of cocktail party customs." *Id.* at 555, 476 A.2d at 1227.

151. *Id.* at 566-67, 476 A.2d at 1234 (Garibaldi, J., dissenting).

152. *Id.* (Garibaldi, J., dissenting).

153. *Id.* (Garibaldi, J., dissenting).

154. *Id.* (Garibaldi, J., dissenting).

155. *Id.* (Garibaldi, J., dissenting).

156. Comment, *Social Host Liability for Furnishing Alcohol: A Legal Hangover?* 10 PAC. L. J. 95, 104-08 (1978).

157. *Id.*

158. *Id.*

159. *Id.*

160. Note, *Torts - Negligence - Social Host Held Liable for Serving Liquor to Intoxicated Guest Who Causes Auto Accident Injuring Third Party* - Kelly v. Gwinnell, *96 N.J. 538, 476 A.2d 1219 (1984)*, 15 SETON HALL 616, 635 (1985).

toxication.[161] This difficulty is augmented by the fact that it takes a significant amount of time for alcohol which has already been consumed to enter the bloodstream.[162]

A tavern keeper usually has some degree of expertise in determining whether an individual is intoxicated, whereas a social host may have considerable difficulty in making such a determination.[163] The problem is compounded because in most cases the host is also engaging in the social indulgence of alcohol thereby decreasing his/her ability to discern whether or not a guest is intoxicated.[164] Furthermore, in a social setting, the host is usually not the only one serving the drinks. Frequently, the guests serve themselves or they serve other guests making it impossible for the host to determine how many drinks any one guest has consumed.[165]

Another area in which there exists a disparity between commercial vendors and social hosts is the ability to apportion the cost of liability effectively.[166] The liquor vendor has the capability of shifting the cost of insurance on to those who consume alcohol.[167] This results in the class of people who cause alcohol-related injuries, intoxicated drivers, ultimately paying the cost. The commercial purveyor of intoxicating beverages simply raises the price of his/her product to reflect the cost of insurance.[168] The social host on the other hand must bear the entire burden of insurance her/himself.[169] It is unclear whether homeowners' insurance policies will insure against this type of risk.[170]

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161. *Kelly* at 566-67, 476 A.2d at 1234 (Garibaldi, J., dissenting).

162. *Id.* at 565-66, 476 A.2d at 1233-34 (Garibaldi J., dissenting) (citing Perr, *Blood Alcohol Levels and "Diminished Capacity,"* 3 (No. 4) J. LEGAL MED. 28-30 (Apr. 1975)).

163. Justice Garibaldi argued that: Licensed commercial providers, unlike the average citizen, deal with the alcohol consuming public every day. This experience gives them some expertise with respect to intoxication that social hosts lack. A social host will find it more difficult to determine levels and degrees of intoxication. *Id.* at 567, 476 A.2d at 1234 (Garibaldi, J., dissenting).

164. *Id.* at 566-67, 476 A.2d at 1234. Justice Garibaldi further distinguished a host from a commercial vendor as follows:

> [f]urthermore, the commercial bartender usually does not drink on the job. The social host often drinks with the guest, as the Zaks did here. The more the host drinks, the less able he will be to determine when a guest is intoxicated. It would be anomalous to create a rule of liability that social hosts can deliberately avoid by becoming drunk themselves.

Id. (Garibaldi, J., dissenting).

165. The *Kelly* decision limited liability only to those situations in which the host "directly serves" the guest. *Kelly*, 96 N.J. at 556, 476 A.2d at 1228. However, the Supreme Judicial Court of Massachusetts left the door wide open for lawsuits where the intoxicated guest helps him/herself to intoxicating beverages. In *McGuiggan* the court held that a social host could be held liable for the torts of an intoxicated guest if he/she "gave" or *"permitted"* the guest to consume alcohol. *McGuiggan* at 162, 496 N.E.2d at 146 (emphasis added). This demonstrates the potential for abuse of this type of liability.

166. *Kelly*, 96 N.J. at 568, 476 A.2d at 1234 (Garibaldi, J., dissenting).

167. *Id.* at 566-67, 476 A.2d at 1234. (Garibaldi, J., dissenting).

168. *Id.* at 567, 476 A.2d at 1234 (Garibaldi, J., dissenting).

169. *Id.* (Garibaldi, J., dissenting).

170. *See* Worcester Mutual Ins. Co. v. Marnell, 398 Mass. 240, 496 N.E.2d 158 (1986). The Massachusetts Supreme Judicial Court held that a homeowners' insurance policy required the defendant insurance company to defend the insured in a tort action against them as social hosts. *Id.* at 245-46, 496 N.E.2d at 161. The cause of action against the insured arose out of a party

If civil liability were to be imposed upon social hosts, there is no doubt that the insurance industry would make available appropriate coverage; however, the premiums will inevitably be beyond the resources of the average homeowner.[171]

Rather than require the homeowner to bear the cost of insuring against this kind of liability, a more apposite remedy would be to require all motorists to carry a minimum amount of liability coverage which would provide for this type of contingency.[172] As an additional precaution all operators of motor vehicles should be required to carry uninsured motorist insurance.[173] This would provide for payments in the event that the victim is hit by an uninsured motorist.[174] Many jurisdictions have already enacted such comprehensive automobile insurance programs.[175] This is the surest way to guarantee that every automobile operator injured on the highways has an avenue of relief.

In situations where the injured victim is a pedestrian, the pedestrian may obtain a judgment against the intoxicated motorist. If the driver proves to be uninsured, and therefore, judgment proof, many states provide a fund out of which unsatisfied judgments may be paid.[176] Thus, under an insurance scheme such as the one outlined, the only uncompensated victim will be the intoxicated driver who operates his vehicle without insurance and is injured or killed as a result of his own negligence.[177]

In addition to public policy considerations, the imposition of a duty is based on the existence of a reasonably forseeable risk of harm.[178] In *McGuiggan* the Massachusetts Supreme Judicial Court, following its own reasoning in *Adamian*, held that injury to a third party on the highway was a reasonably foreseeable risk created by serving liquor to an intoxicated individual.[179] However, in *McGuiggan* the court felt that the factual setting therein did not give rise to a reasonably foreseeable risk of injury to third persons.[180] That case involved a high school graduation party held by the McGuiggans for their

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held by the insured at which a guest became intoxicated. *Id.* at 241, 496 N.E.2d at 159. The guest subsequently left the party in his automobile and struck and killed a third party. *Id.* The insurance company claimed it had no duty to defend the insured in the ensuing wrongful death action by virtue of a "motor vehicle exclusion" clause in the policy. *Id.* at 242-43, 496 N.E.2d at 160. In holding that the insurance company was required to defend the insured the court stated "[c]learly, the manifest design of homeowners' insurance is to protect home-owners from risks associated with the home and activities related to the home." *Id.* at 245, 496 N.E.2d 161.

171. *Kelly*, 96 N.J. at 555, 476 A.2d at 1227. The majority in *Kelly* noted its belief that homeowners' insurance is "available" to the social host. *Id.* However the court did not allude to the *cost* at which such insurance would be available. As sure as the *Kelly* court is certain that insurance will be "available" to social hosts, it may be equally certain that the cost will be prohibitive. Indeed the ramifications of the "availability" of such coverage will affect not only those homeowners who are also social hosts, but it will reach into the pockets of homeowners in general.

172. *Kelly*, 96 N.J. at 564, 476 A.2d at 1232-33 (Garibaldi, J., dissenting).

173. *Id.* (Garibaldi, J., dissenting).

174. *Id.* (Garibaldi, J., dissenting).

175. 4 No-Fault and Uninsured Motorist Insurance (M B) app. B (1986).

176. *Kelly*, 96 N.J. at 568-69, 476 A.2d at 1232-33 (Garibaldi, J., dissenting).

177. *Id.* (Garibaldi, J., dissenting).

178. *See supra* notes 57-62 and accompanying text.

179. *McGuiggan*, 398 Mass. at 157, 496 N.E.2d at 143.

180. *Id.* at 161, 496 N.E.2d at 146.

eighteen year old son, Daniel.[181] The McGuiggans provided a bar and several people acted as bartender. In addition, several guests served themselves.[182] After the party, Daniel left with several friends in an automobile driven by one James Magee who had also been in attendance at the party.[183] While traveling in the car driven by Magee, Daniel became ill and leaned his head out of the window. His head struck a cement post maintained by the defendant telephone company.[184]

Mr. McGuiggan testified that he "may have given Magee one drink when he arrived, but thereafter did not see him drinking and did not know how many drinks Magee had."[185] A breathalyzer test indicated that he had a blood alcohol content (B.A.C.) of .140.[186] Testimony of an expert revealed that Magee would have had a B.A.C. between .185 and .215 three hours earlier, approximately the time Magee left the party.[187] Thus Magee would have been noticeably intoxicated according to the expert.[188]

The court however rejected the medical testimony which dealt with Magee's blood alcohol content because it did not deal with "specific circumstances such as when Magee consumed his drinks or when Magee ate his dinner."[189] The court thus found that the McGuiggans did not know nor should they have known, that Magee was intoxicated when he left the party.[190] Thus the court found the element of foreseeability to be lacking, and held that this case was not appropriate for the imposition of social host liability.[191] The court however warned that it would, in the appropriate circumstances, recognize social host liability.[192]

As pointed out by Justice Lynch in his concurring opinion in *McGuiggan*, this approach to foreseeability allows a jury to act as a "Monday morning quarterback."[193] With the benefit of hindsight any event becomes "foreseeable." In addition, the tragic consequences normally involved with alcohol-related automobile accidents tend to convince the jury that the host should have known of the guest's intoxication.[194]

Through the application of the foreseeability test and the weighing of the relevent public policy considerations, it is apparant that the imposition of a duty is not proper in the case of a social host. The host is in a much different situation from the commercial vendor and does not have the equivalent re-

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181. *Id.* at 153, 496 N.E.2d at 141.

182. *Id.* at 153-54, 496 N.E.2d at 141-42.

183. *Id.* at 154, 496 N.E.2d at 142.

184. *Id.*

185. *Id.*

186. *Id.* at 155, 496 N.E.2d at 142.

187. *Id.*

188. *Id.*

189. *Id.* at 162 n.10, 496 N.E.2d at 146 n.10. The court stated that "[t]he inference of the affidavit is in effect that, with full knowledge of the facts and without objection, the McGuiggans permitted their son to leave in a motor vehicle operated by a markedly intoxicated eighteen year old." *Id.*

190. *Id.* at 162, 496 N.E.2d at 146-47.

191. *Id.*

192. *Id.*

193. *Id.* at 163, 496 N.E.2d at 147 (Lynch, J., concurring).

194. *Id.*

sources available to detect the intoxication of an individual. In addition, the strain placed on social relations and the financial burden with which the homeowner is saddled weigh heavily against the imposition of such a duty.

B. Statutory Basis for Imposition of a Duty

The courts of several jurisdictions have held that the legislature is better equipped to deal with the problem of social host liability.[195] In *Boutwell v. Sullivan*[196] the Supreme Court of Mississippi held that since the issue of social host liability involves strong public policy considerations, a change of the law should be made by the legislature because it has the opportunity and resources to engage in a comprehensive study.[197] The Georgia state legislature has imposed such a duty on social hosts by statute,[198] or at least the Georgia Supreme Court has interpreted the statute to create such a duty.[199] However, this duty was limited to the minor guests of social hosts.[200] Thus an uninjured third party could not recover from a social host where the intoxicated guest was an adult.[201]

The State of Oregon has also provided for a duty of a social host to a third party by statute.[202] This statute provides for a duty only where the guest was visibly intoxicated at the time the host served him/her.[203] This statute was enacted after the Oregon Supreme Court's decision in *Wiener v. Gamma Phi*

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195. *See Holmquist*, 367 N.W.2d at 472. There the Minnesota Supreme Court stated:

> It may be that the social and economic consequences of "mixing gasoline and liquor" should lead to a rule of accountability by those who furnish intoxicants to one who becomes a tortfeasor by reason of intoxication, but such a policy decision should be made by the legislature after full investigation, debate and examination of the relative merits of the conflicting positions.

Id. (quoting Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 765, 458 P.2d 897, 900 (1969)). *See also* Boutwell v. Sullivan, 469 So.2d 526, 529 (Miss. 1985). There the Mississippi Supreme Court stated: "We are of the opinion that this question [social host liability], which involves strong public policy and change of the law, should be studied comprehensively and addressed by the Mississippi State Legislature." *Id.*

196. 469 So.2d 526 (Miss. 1985).

197. *Id.* at 529.

198. Section 3-3-22 of the Georgia Code provides that:

> No alcoholic beverage shall be sold,. . . given, provided, or furnished to any person who is in a state of noticeable intoxication.

GA. CODE ANN. § 3-3-22 (1986).

Section 3-3-23(a)(1) of the Georgia Code provides that:

> No person knowingly, by himself or through another, shall furnish [or] cause to be furnished. . . any alcoholic beverage to any person under 19 years of age. . . .

GA. CODE ANN. § 3-3-23(a)(1)(1986).

199. Sutter v. Hutchings, 254 Ga. 194, 197, 327 S.E.2d 716, 720 (1985). The court interpreted the Georgia statute as creating a duty of a social host to the general public. The court cited GA. CODE ANN. § 51-1-6 which provides: "When the law requires a person . . . to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby." *Id.*

200. *Id.* at 198, 327 S.E.2d at 719-20.

201. *Id.*

202. *See supra* note 87.

203. *Id.*

Chapter of Alpha Tau Omega Fraternity.[204]

In that case the court held that an innocent third party who has been injured by an intoxicated person has a cause of action against the social host who provided him/her with such alcohol.[205] The court relied on the former Oregon Dram Shop Act,[206] which provided for liability against anyone who furnished alcohol to an intoxicated person or habitual drunkard, in favor of third parties specifically set out in the statute. Some of the factors which the court felt should be taken into consideration when determining whether the host has a duty to refuse to continue to serve his/her guest alcohol include: 1) the propensity of the guest to act unreasonably under the effects of alcohol; and 2) the youth of the guest.[207]

The Minnesota Supreme Court in *Ross v. Ross*[208] held that a social host could be held liable to third parties injured by their intoxicated guests under the Minnesota Dram Shop Act.[209] This statute purported to grant a right of

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204. 258 Or. 632, 485 P.2d 18 (1971). This case involved a party hosted by a fraternity at the University of Oregon at which a minor became intoxicated and subsequently drove his automobile so as to injure an innocent third party. The court held that the "fraternity status as host and its direct involvement in serving the liquor to the minor was sufficient to establish a duty . . . ." *Id.* at 643, 485 P.2d at 23.

205. *Id.*

206. OR. REV. STAT. § 30.730 provides:

> Any person who shall bargain, sell, exchange or give to any intoxicated person or habitual drunkard spiritous, vinous, malt or intoxicating liquors shall be liable for all damage resulting in whole or in part therefrom, in an action brought by the wife, husband, parent or child of such intoxicated person or habitual drunkard. The act of any agent or employee shall be deemed the act of his principal or employer for the purposes of this section.

Id.

207. *Wiener*, 258 Or. at 638 n.2, 485 P.2d at 21 n.2.

208. 294 Minn. 115, 200 N.W.2d 149 (1972). Here the court held as follows:

> Where liquor is furnished in a purely social setting, ordinarily it may be expected that the donor will take some precautions to determine the age of the recipient or his state of intoxication. While the act applies to those invited to wedding receptions and company picnics as well as to other gatherings where supervision may be onerous, no reason occurs to us why those who furnish liquor to others, even on social occasions, should not be responsible for protecting innocent third persons from the potential dangers of indiscriminately furnishing such hospitality.

Id. at 121-22, 200 N.W.2d at 153.

209. MINN. STAT. ANN. § 340.79 (West 1972) provides:

> Any person who shall give to, procure or purchase, intoxicating liquors for any minor person or other person to whom the sale of intoxicating liquors is by law forbidden, is guilty of a gross misdemeanor and, upon conviction, shall be punished in accordance with the laws of the state.

Id. (repealed by Act of June 5, 1985, c. 305, 1985 Minn. Laws 1454-1505). MINN. STAT. § 340.95, (West 1972) provides:

> Every husband wife, child, parent, guardian, employer, or other person who is injured in person or property, or means of support, by any intoxicated person, or by the intoxication of any person, has a right of action, in his own name, against any person who, by illegally selling, bartering or giving intoxicating liquors, caused the intoxication of such person, for all damages, sustained; and all damages recovered by a minor under this section shall be paid either to such minor or his parent, guardian, or next friend, as the court directs; and all suits for damages under this

action against "any person" responsible for selling "or giving" alcohol to the intoxicated individual who caused the injuries.[210] In construing the statute to apply to a social host, the court made an extensive examination of its legislative history.[211] In doing so, some significance was attached to the fact that as early as 1882 the court construed the words "any person" so as not to forclose prosecution for liquor violations against those persons other than commercial vendors.[212] The court then recognized that if the legislature disagreed with its interpretation of the statute it could abrogate the present holding through an amendment to the statute.[213]

In 1977 the Minnesota legislature acted on the Court's invitation to curb such liability by amending Minnesota's Dram Shop Act. This was done by deleting the words "or giving" from the statute.[214] The Supreme Court then in *Holmquist v. Miller*[215] held that the Dram Shop Act preempted a cause of action against a social host for injuries sustained by a third party as a result of the furnishing of alcohol to a guest.[216]

Thus, it seems that when the state legislatures do consider the issue of social host liability, they decide to curb or abrogate such liability altogether. In fact the New Jersey legislature is considering a statute which would limit the effectiveness of *Kelley v. Gwinnell*, the landmark case in the area of social host liability.[217] The bill, among other things, would limit liability to situations where the guest was visibly intoxicated and would include a presumption that visible intoxication does not occur until a person has a Blood Alcohol Content of .15 percent which is well above the legal standard of .10.[218] New Jersey State Senator Raymond Lesniak stated that the bill is designed to safeguard the residents from the possibility of judicial expansion of the doctrine.[219]

These types of measures enacted by legislatures suggest that the legislative branch of state government feels that social host liability is an ineffective

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section shall be by civil action in any court of this state having jurisdiction thereof.

Id.

Id. (repealed by Act of June 5, 1985, c. 305, 1985 Minn. Laws 1454-1505).

210. MINN. STAT. ANN. § § 340.79, 340.95 (West 1972).

211. *Ross*, 294 Minn. at 119-22, 200 N.W.2d at 151-53.

212. *Id.* at 119, 200 N.W.2d at 151.

213. *Id.* at 120, 200 N.W.2d at 152.

214. Act of June 2, 1977, c. 390, § 1, 1977 Minn. Laws 887.

215. 367 N.W.2d 468 (Minn. 1985). This case involved a party hosted by a minor at the home of his parents, at which all of the guests were minors. Plaintiff's decedent attended the party with one Kevin Shimmer. Both became intoxicated at the party and the host as well as his parents were aware of this intoxication. Shimmer left the party in his car with plaintiff's decedent, Barbie Jo Holmquist. While driving along the highway, Holmquist fell out of the car and Shimmer continued to drive on apparently being so inebriated he was unaware of what had happened. Holmquist's received injuries from the fall as well as being exposed to subfreezing temperatures caused her subsequent death.

This court held that a social host is not liable under the common law for negligently furnishing a minor with alcoholic beverages. Such an action is preempted by the state's Dram Shop Act. *Id.*

216. *Id.* at 471-72.

The court further held that no common-law cause of action against a social host could lie.

217. *Host's Liability Curb is Urged*, N.Y. Times, Sept. 22, 1985 at 56, col. 1.

218. *Id.*

219. *Id.*

way to combat drunk driving. The legislatures of these states have enacted strict drunk driving statutes imposing severe criminal penalties upon the intoxicated driver him/herself.[220] This view suggests that social host liability is a rather draconian sanction to impose on individuals who often have virtually no control over the intoxicated driver. Further, as suggested by statistics, the deterrent effect is virtually nonexistent.[221]

The limiting statutes also suggest a fear of opening a floodgate of litigation. The possible implications of recognizing liability of a social host for torts of his/her intoxicated guest are unfathomable. The courtroom doors would be open to a diverse range of litigation naming very remote defendants. The ramifications of such liability will be explored later in this note.

Many courts have deferred to the legislature because they feel that the legislature is better equipped to handle this problem.[222] The legislature has the requisite time and resources to commission a detailed study of the problem to enable them to discern the most effective solution.[223] Thus, it appears that when the state legislatures have ruled on this issue, they have decided against the imposition of duty.

III. THE PROBLEM OF PROXIMATE CAUSE

The existence of a duty, however, is not the only element lacking in social host liability. A requisite element in any cause of action for negligence is that there be a causal connection between the conduct of the defendant and the injury incurred by the plaintiff.[224] This causal connection, universally known as "proximate cause," has been the source of considerable debate among legal scholars.[225] Furthermore, it has generated a multitude of widely divergent approaches as expressed in the opinions of various jurisdictions.[226] The difficulty arises in the attempt to distinguish proximate damages from remote damages.[227] The arguments herein presented by the various courts which have im-

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220. Note, *D.W.I. Laws: Getting Tough on Drunks* 28 S.D.L. REV. 491, 497-504 (giving detailed survey of state drunk driving laws).

221. *See* H.L. ROSS, DETERRING THE DRINKING DRIVER 99-115 (D.C. Heath & Co. 1982). "The long-run prognosis for achieving marginal increases in deterrence through modifications in existing law is less positive. Even the most successful of deterrent interventions appear in the course of a few years to have lost their entire beneficial effect." *Id.*

222. *See supra* note 117.

223. Keaton v. Kroger Co., 143 Ga. App. 23, 237 S.E.2d 443, 447 (1977). The court here stated that:

> We believe that the decision should be left to the Legislature. The Legislature may hold hearings, debate the relevant policy considerations, weigh the testimony, and, in the event it determines that a change in the law is necessary or desirable, it can then draft statutes which would most adequately meet the needs of the public in general, while balancing the interest of specific sectors.

Id.

224. W. PROSSER & W. KEETON, TORTS § 41 at 263 (5th ed. 1984).

225. *Id.*

226. *Id.*

227. Ryan v. N.Y. Central R.R. Co., 35 N.Y. 210, 91 Am. Dec. 49 (1986). There the Court said:

> It is a general principle that every person is liable for the consequences of his own

posed social host liability strain the meaning of "proximate cause."[228] There are two contrasting theories of proximate cause.[229] The first theory extends liability to encompass all forseeable risks whereas the second theory extends liability to all direct consequences and those forseeable indirect consequences.[230]

The traditional common-law view was that it was the consumption of alcohol and not the furnishing of it which was the proximate cause of injuries inflicted by an intoxicated individual.[231] As the Georgia Supreme Court admitted in *Sutter v. Hutchings*, in most instances it is the consumption of alcohol which is the proximate cause of injuries resulting from the intoxication of an individual.[232] This is so because the act of the purveyor of alcohol is too remote to be considered the proximate cause of any subsequent negligent acts of the imbiber of the alcohol.[233] The *Sutter* court, however, found proximate cause where alcohol was furnished to a minor.[234]

In *Clark v. Mincks*[235] the court relied upon a finding of proximate cause in a vendor liability case[236] and found the same reasoning[237] to apply to a social host.[238] In *Koback v. Crook* the Wisconsin Supreme Court found a causal connection between the gratuitous furnishing of alcohol to a minor by a

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> acts. He is thus liable in damages for the proximate results of his own acts, but not for remote damages. It is not easy at all times to determine what are proximate and what are remote damages.

Id.

228. W. PROSSER & W. KEETON, TORTS § 42, at 274 (5th ed. 1984).

229. *Id.*

230. *Id.*

231. *See supra* note 5.

232. *Sutter*, 254 Ga. at 197-98, 327 S.E.2d at 719 (emphasis original); *But see* Nehring v. LaCounte, 712 P.2d 1329 (Mont. 1986) where this view was characterized as a "Neanderthal approach to causation."

233. *Sutter*, 254 Ga. at 197-98, 327 S.E.2d at 719; *See also McGuiggan*, 398 Mass. at 152, 496 N.E.2d at 147 (Lynch, J., concurring) where Justice Lynch stated that "the drinker's consumption of alcohol alone is the proximate cause of injuries to third parties."

234. *Sutter*, 254 Ga. at 198, 327 S.E.2d at 720.

235. 364 N.W.2d 226 (Iowa 1985). The court held that a common law cause of action against a social host can arise from Iowa Code § 123.49(1). This statute provides that: "No *person* shall sell, dispense, *or give* to any intoxicated person, or one simulating intoxication, any alcoholic liquor or beer." *Id.*

236. Lewis v. State, 256 N.W.2d 181 (Iowa 1977). That case involved a state liquor store employee who, in violation of Iowa Code, section 123.43, sold liquor to a minor. The minor thereby became intoxicated and subsequently injured Lewis. Lewis brought an action, not under the Act, but under common law principles of negligence. The court held that Lewis had a common law cause of action.

237. *Clark*, 364 N.W.2d at 229. The *Clark* court followed the reasoning in *Lewis* and Haafke v. Mitchell, 347 N.W.2d 318 (Iowa 1984). The court quoted from Haafke as follows:

> Applying the principles of common-law liability discussed above, we hold that these employees may be held liable under common law for negligence in furnishing liquor to Miller, and such negligence may be based upon violations of statute or ordinance as alleged here, under the authority of Lewis. This liability is not preempted by the dram shop act.

Haafke, 347 N.W.2d at 388.

238. *Id.* at 229, 231.

social host and the injuries sustained by a third person as a result of that minor's action while intoxicated.[239] Relying on *Sorensen*,[240] the court rejected the traditional view that it is the consumer, not the purveyor of the liquor who causes the resultant injuries.[241]

The New Jersey Supreme Court in *Kelly* held that proximate cause was satisfied if the defendant's negligence was a "substantial factor in bringing about the injuries."[242] The court found that a reasonable person in the defendant's position could have foreseen that by continuing to serve his guest alcoholic beverages he was increasing the likelihood that the intoxicated guest would injure someone on the highway.[243] The New Jersey Supreme Court followed its reasoning in the earlier case of *Rappaport v. Nichols*[244] which dealt with vendor liability.[245] In that case the Court stated that:

> There may be any number of causes and effects intervening between the first wrongful act and the final injurious occurrence and if they are such as might, with reasonable diligence, have been foreseen, the last result as well as the first, and every intermediate result, is to be considered in law as the proximate result of the first wrongful cause.[246]

In *Elder v. Fisher*,[247] the Supreme Court of Indiana set forth a test to be used in the determination of whether or not proximate cause exists.[248] This test is based upon the existence of intervening causes. If the injuries incurred are the natural, probable and foreseeable result of the first negligent act or omission, then the chain of causation is not broken by the existence of intervening acts.[249] The test turns upon the character of the intervening events as

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239. *Koback*, 123 Wis. 2d at 261-62, 366 N.W.2d at 858.

240. Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984).

241. *Koback*, 123 Wis. 2d at 265-66, 366 N.W.2d at 859-60. The court states: "In *Sorensen* we rejected the shibboleth that it was the imbiber and not the supplier of the alcohol who caused the injury . . . ." *Id.* at 265, 366 N.W.2d at 860.

242. *Kelly*, 96 N.J. at 543, 476 A.2d at 1221 (quoting Rappaport v. Nichols, 31 N.J. 188, 203, 156 A.2d 1, 9 (1959)).

243. *Kelly*, 96 N.J. at 544, 476 A.2d at 1222. Here it was established, through the use of the testimony of an expert toxoligist that Gwinnell was in fact severely intoxicated when he left the Zak's home. Gwinnell's blood alcohol content was recorded at .286 percent, well above the legal limit of .10 percent. From this information the expert concluded that Gwinnell "must have been showing unmistakable signs of intoxication. . . ." *Id.* at 541, 541 n.1, 476 A.2d at 1220, 1220 n.1.

244. 31 N.J. 188, 156 A.2d 1 (1959).

245. *Id.* at 204, 156 A.2d at 10.

246. *Id.* (quoting Menth v. Breeze Corp., 4 N.J. 428, 441-42, 73 A.2d 183, 189 (1950)). The court went on to explain that the theory on which proximate cause is based in cases of liquor dispensation is that the original negligence of dispensing the liquor operates contemporaneously with the intervening act of imbibing the alcohol to cause the resulting injury.

247. 247 Ind. 590, 217 N.E.2d 847 (1966). This case involved retail druggist who sold liquor to a minor. The minor consumed the liquor, became intoxicated, and subsequently injured a third party in an automobile accident. The Supreme Court of Indiana held that there was a common law cause of action against the liquor vendor. *Id.* at 606, 217 N.E.2d at 852.

248. *Id.*

249. *Id.* (quoting 21 I.L.E. *Negligence*, § 67 331-33).

natural or probable rather than the number of such events.[250] Thus the Indiana court would also hold liable the original "wrongdoer" regardless of the number of intervening causes so long as the resultant injuries are "reasonably foreseeable."[251]

The issue of foreseeability was addressed by a Massachusetts court in *Adamian v. Three Sons, Inc.*[252] In that case the court said that it was unwilling to hold, as a matter of law, that the selling of liquor to an intoxicated person could not be the proximate cause of the injuries inflicted upon a third person by that intoxicated individual.[253] In reaching this conclusion the court argued that death caused by drunken drivers should not be placed outside the zone of foreseeable risk created when alcohol is sold to an intoxicated individual.[254] The Massachusetts Supreme Judicial Court relied on the reasoning in *Adamian* when it held a vendor of liquor liable for injuries to a third party in *Cimino v. Milford Keg, Inc.*[255] There the court held that if it could be shown that a vendor of liquor: 1) served alcoholic beverages to a patron and; 2) knew or should have known that said patron was; 3) intoxicated, then it can be said that the tavern owner created an unreasonable risk of harm.[256] Thus, the jury

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250. *Id.*

251. *Id.* The Court stated that: "it is well settled that for a negligent act or omission to be a proximate cause of injury, the injury need be only a natural and probable result thereof; and the consequence be one which in the light of the circumstances should reasonably have been foreseen or anticipated." *Id.*

252. 353 Mass. 498, 233 N.E.2d 18 (1968). Here the defendant, a vendor of liquor, continued to serve an intoxicated patron alcoholic beverages after his intoxication had become readily apparent. *Id.* at 499, 233 N.E.2d at 19. The defendant knew or should have known that the patron had arrived at the tavern by automobile. *Id.* The patron subsequently operated his motor vehicle in such a manner as to cause injury to the plaintiff. *Id.* In holding for the plaintiff the Court noted that "[a] strong recent trend has been that the sale by a bartender to an intoxicated drinker may be found to be the proximate cause of an injury to a third person caused by the drinker's driving of an automobile." *Id.* at 500, 233 N.E.2d at 20.

253. *Id.* at 501, 233 N.E.2d at 20.

254. *Id.*

255. 385 Mass. 323, 331, 431 N.E.2d 920, 926 (1982).

256. The court set forth a test as follows:

> The ultimate question for the jury is whether the service of liquor by the defendant tavern keeper to the intoxicated patron was a failure to exercise that degree of care for the safety of travelers that ought to be exercised by a tavern keeper of ordinary prudence in the same or similar circumstance.

Id. at 331, 431 N.E.2d at 926.

The court then stated that the elements required to satisfy this test are as follows:

> The views we express make it clear that the cause of action for negligence in this case such as his is essentially composed of the same elements as any other tort for negligence for which the tavern owner and bartender are liable and they are (1) a patron of premises (2) who is served intoxicating liquors (3) while he is intoxicated (4) and under circumstances from which the defendant knew or reasonably should have known that he was intoxicated when served (5) operates a motor vehicle while intoxicated (6) such operation was reasonably foreseeable by the defendant (7) and a person of ordinary prudence would have refrained from serving liquor to that patron in the same or similar circumstances (8) and such operation causes the plaintiff's death or injury within the scope of foreseeable risk.

Id. at 331-32, n.9, 431 N.E.2d at 926, n.9.

was warranted in finding that an innocent third person injured by the negligent operation of a motor vehicle by an intoxicated individual was the proximate cause of a liquor vendor's negligent act.[257]

The Massachusetts Supreme Judicial Court recently had occasion to address the question of social host liability in *McGuiggan v. New England Telephone and Telegraph Company; Peabody*.[258] The majority, following the reasoning of *Adamian* and *Ciminor*, held that the gratuitous furnishing of alcohol to an intoxicated person was indeed the proximate cause of injuries negligently inflicted by that person.[259] The court stated that "[t]he risk created by serving liquor to an intoxicated person who is about to operate a motor vehicle is far too apparent to permit the conclusion that the social host's act could not have been the 'proximate' cause of a third person's injury."[260] Thus, the Massachusetts court views the proximate cause question as well settled.

The Supreme Court of Arizona recently grappled with the problem of causation in relation to vendor liability cases in *Ontiveros v. Borak*.[261] The court made the obvious statement that "one cannot become intoxicated by drinking liquor unless someone furnishes it."[262] The Court reasoned that although there may be more than one cause of a plaintiff's injuries, if the defendant's act even contributes "only a little" to those injuries then the defendant can be said to have proximately caused them.[263] Thus establishing a general rule of liability if "but for" the conduct of the defendant, the plaintiff's injuries would not have occurred.[264]

The *Ontiveros* court went on to examine whether the act of the patron imbibing the alcohol would act as a superseding intervening cause and answered this inquiry in the negative.[265] The court then set up a test to deter-

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257. *Id.*

258. 398 Mass. 152, 496 N.E.2d 141 (1986).

259. *Id.* at 162, 496 N.E.2d at 146.

260. *Id.* at 160, 496 N.E.2d at 145.

261. 136 Ariz. 500, 667 P.2d 200 (1983). This case involved an action against a tavern owner for negligently serving intoxicating beverages to an intoxicated patron who subsequently caused plaintiff injury while operating a motor vehicle. The defendant tavern owner moved for summary judgment on the basis that Arizona law provided that the imbibing and not the furnishing of the alcohol is the proximate cause of injury to a third party. The court, in denying defendant's motion for summary judgment stated that "[t]o serve an intoxicated person more liquor is to light the fuse." *Id.* at 507, 667 P.2d at 207. (quoting Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 632, 198 A.2d 550, 553 (1964)). Thus, the Arizona Supreme Court overruled its previous cases which held that the negligence of a tavern owner in serving an intoxicated patron can never be the proximate cause of a subsequent accident. *Id.* at 508, 667 P.2d at 208.

262. *Id.* at 505, 667 P.2d at 205.

263. *Id.* (citing Mankeiwicz v. Salt River Valley Water Users' Assoc., 118 Ariz. 329, 338 n.6, 576 P.2d 517 n.6 (Ariz. Ct. App. 1978) (citing McDowell v. Davis, 104 Ariz. 69, 72, 448 P.2d 869, 872 (1968))).

264. *Id.* at 505, 667 P.2d at 205. The general rule of proximate cause is: "a defendant may be held liable if his conduct contributed to the result and if that result would not have occured 'but for' defendant's conduct." *Id.*

265. *Id.* at 506, 667 P.2d at 206. The old common law rule of the nonliability of a vendor was founded upon the idea that the chain of legal causation between the dispensation of the alcohol and the subsequent injury inflicted by the intoxicated person was "superseded by the voluntary act of the purchaser in imbibing the drink." *Id.*

mine whether the actions of a patron would constitute a superseding cause.[266] This test allows the court to use hindsight to determine whether a bar patron's conduct was within the realm of foreseeability of the liquor vendor.[267] If the conduct was unforeseeable and extraordinary then the actions of the patron will be seen as a superseding cause and will relieve the vendor of liability.[268]

In *Cowman v. Hansen*[269] the Iowa court set out a test for finding the proximate cause of injuries sustained as a result of the conduct of an intoxicated person. That test asks whether a person of ordinary prudence would have thought his act or omission would probably result in injury to someone.[270] The court reasoned that if the negligence of a liquor vendor merely made it possible for a collision to occur, then the selling of the liquor is not the proximate cause of the injuries.[271] This case was subsequently overruled[272] and recently Iowa adopted a rule of social host liability.[273] However, several courts still adhere to this line of reasoning which is not entirely without merit.[274] For example, the Pennsylvania Supreme Court in *Klien* found that the great weight of authority favored the view that its the imbibing, rather than the purveyance, of alcohol which is the proximate cause of any subsequent injuries.[275]

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266. *Id.*

267. *Id.* The court quoted the Supreme Court of Hawaii as follows:

> We hold that the consequences of serving liquor to an intoxicated motorist, in light of the universal use of automobiles and the increasing frequency of accidents involving drunk drivers, are foreseeable to a tavern owner. . . . The consumption, resulting inebriation and injurious conduct are therefore foreseeable intervening acts which will not relieve the tavern of liability.

Ono v. Applegate, 62 Haw. 131, 141, 612 P.2d 533, 540-41 (1980) (citations omitted).

268. *Id.*

269. 250 Iowa 358, 92 N.W.2d 682 (1958).

270. *Id.* at 366, 92 N.W. at 686-87.

271. *Id.* The Court stated:

> [w]hile it may be foreseen, or it may be a natural result of furnishing an alcoholic beverage to an intoxicated person, that he himself will get hurt, it is not at all clear that he will naturally assault someone, drive a car and injure or kill another, or do some other tortious act. It is possible, but it is open to debate that such results are probable. This would seem even more clear where another's negligence intervenes, such as a third party's asking the intoxicated person for a ride in his automobile, or furnishing the intoxicated one an automobile. Such result would scarcely be a natural result of the tavern keeper's negligence.

Id.

272. Haafke v. Mitchell, 347 N.W.2d 381 (Iowa 1984).

273. Clark v. Mincks, 364 N.W.2d 226, 231 (Iowa 1985).

274. *See* Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Wright v. Moffit, 437 A.2d 554 (Del. 1981); Ling v. Jan's Liquors, 237 Kan. 629, 703 P.2d 731 (1985); Fisher v. O'Connor's, Inc., 53 Md. App. 338, 452 A.2d 1313 (1982); Runge v. Watts, 180 Mont. 91, 589 P.2d 145 (1979); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969).

275. Klein v. Raysinger, 504 Pa 141, 148, 470 A.2d 507, 510 (1983) (citing Chastain v. Litton Systems, Inc., 527 F.Supp. 527 (W.D.N.C. 1981) vacated on other grounds, 694 F.2d 957 (4th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983); Cartwright v. Hyatt Corp., 460 F. Supp 80 (D.D.C. 1978); Fruit v. Schreiner, 502 P.2d 133 (Alaska 1972); Kowal v. Hofher, 181 Conn. 355, 436 A.2d 1 (1980); Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981); Behnke v. Pierson, 21 Mich. App. 219, 175 N.W.2d 303 (1970); Cole v. City of Spring Lake Park, 314

The reasoning expressed in the foregoing opinions which have accepted social host liability has so convoluted the requirement of proximate cause that it has become void of meaning. First, the argument that the chain of causation, from the time of the serving of the alcohol to the time of the accident, remains unbroken is wholly without merit.[276] The chain is broken by the act of the imbiber of the alcohol.[277] A normal able-bodied man or woman has the capacity to discern when he/she is approaching the point of intoxication, more so than does the host or anyone else. At that point it is the individual's duty to exercise self-control if he/she plans to operate a motor vehicle subsequent to such consumption.[278] If, however, the individual chooses to continue to consume alcohol, this act supersedes any act of the purveyor of the alcohol as the proximate cause of any negligent acts subsequently committed by the intoxicated person.[279]

The reasoning applied to hold a social host liable for the torts of his/her intoxicated guest is in derrogation of the general rule of proximate cause. The general rule of proximate cause is that if the injury would not have occurred "but for" the act of the defendant, then the defendant's act could be said to have proximately caused the injury.[280] It can be said that "but for" the act of the guest in imbibing the alcohol the injury would not have occurred. However, it may not be said with equal certainty that "but for" the host's act of serving the liquor the accident would not have occurred. The guest might just as easily have obtained the intoxicant from another source.

A third defect in the proximate cause analysis of the courts which have imposed liability on a social host is the finding that the providing of alcohol to a guest is not a remote cause of the third party's injuries. The term proximate cause was coined by Lord Chancellor Bacon in the maxim "*In jure non remota cause, sed proxima spectatur*" [In law the near cause is looked to, not the remote one].[281] The mere providing of alcohol is an act which is remote in time and space to the actual injury inflicted by the intoxicated individual.[282] Thus the providing of the alcohol is not the "near cause" but perhaps the cause which is most removed from the actual injury.

Finally, the courts err in using hindsight to determine the existence of proximate cause.[283] In hindsight, any injury is foreseeable and thus the foreseeability test becomes void of meaning. A more appropriate approach would

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N.W.2d 836 (Minn. 1982); Runge v. Watts, 180 Mont. 91, 589 P.2d 145 (1979); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); Schirmer v. Yost, 60 A.D.2d 789, 400 N.Y.S.2d 655 (1977); Edgar v. Kajet, 84 Misc. 100, 375 N.Y.S.2d 548 (1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976); Tarwater v. Atlantic Co., 176 Tenn. 510, 144 S.W.2d 746 (1940); Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 458 P.2d 897 (1969).

276. Klien v. Raysinger, 504 Pa. 141, 148, 470 A.2d 507, 510 (1983).

277. *Id.*

278. 45 AM. JUR. 2d *Intoxicating Liquors* § 554 at 853 (1969)

279. *Id.* "So long as the person to whom the liquor was sold or given was not in such a state of helplessness or debauchery as to be deprived of his willpower or responsibility for his behavior . . . ." The imbibing of the alcohol will be held to be the proximate cause of the resulting injuries. *Id.*

280. W. PROSSER & W. KEETON, TORTS § 41, at 266 (5th ed. 1984).

281. *Id.* at § 42, 273.

282. *Id.* at § 43, 282-83.

283. Ontiverso v. Borak, 136 Ariz. 500, 506, 667 P.2d 200, 206 (1985).

be to apply the *Palsgraf* zone of foreseeability approach.[284] This test can be applied without the use of hindsight and hence results in a more objective determination of foreseeability.[285]

Thus, a cause of action against a social host for injuries sustained as a result of the conduct of any of his/her intoxicated guests should not be recognized because there is no proximate cause attributable to the host. In a drunk driving accident the proximate cause of the injuries sustained by a party as a result of the intoxicated driver's conduct is the actual imbibing of alcohol, not its dispensation. By holding otherwise, courts are eroding recognized negligence principles and requiring a purveyor of alcohol to have insight into consequences which extend far beyond Justice Cardozo's "range of apprehension."[286]

IV. At What Point Should the Line Be Drawn?

If the common law tort principles of duty and proximate cause are to be properly applied, liability should not be imposed upon a social host. However, the strongest argument opposing the imposition of social host liability is based on the possible extension of the doctrine. The courts are opening a Pandora's Box of litigation by extending liability to include a mere social host who gratuitously furnishes a guest with alcoholic beverages. The implications of such a holding are virtually limitless.[287] Courts are opening themselves up to a fallacy of continuum whereby a perpetual extension of their liability would leave a social host open to a lawsuit from any number of diverse defendants.

If a social host is held liable to unknown third parties injured in a motor vehicle accident with his/her intoxicated guest, should he/she then, under the same reasoning, be held accountable for the intentional torts of his/her intoxicated guest? If the rationale which is applied in cases of vendor liability involving intentional torts is applied here, the answer would have to be in the affirmative.[288] Is this type of liability sound judicial decision making?

In *Kiriluk v. Cohn*[289] the decedent became intoxicated after purchasing liquor from the defendants. The defendants knew that decedent was a habitual drunkard and that he had a propensity to abuse his wife when under the influence of alcohol.[290] Defendants nevertheless sold liquor to decedent who thereupon became intoxicated and assaulted his wife (plaintiff).[291] Plaintiff shot

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284. Palsgraf v. Long Island R. R. Co., 248 N.Y. 339, 342-49, 162 N.E. 99, 100-01 (1928). Justice Cardozo stated that "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Id.*

285. *Id.*

286. *Id.* at 341-43, 162 N.E. at 99-100.

287. *Kelly* at 570-71, 476 A.2d at 1230-36 (Garibaldi, J., dissenting).

288. *See* Clendening v. Shipton, 149 Cal. App. 3d 191, 196 Cal. Rptr. 654 (1983); Allen v. Babrab, Inc., 438 So.2d 356 (Fla. 1983); Kiriluk v. Cohn, 16 Ill. App. 2d 385, 148 N.E.2d 607 (1958); Carey v. New Yorker of Worcester, Inc., 355 Mass. 450, 245 N.E.2d 420 (1969); Griesenback v. Walker, 199 N.J. Super. 132, 488 A.2d 138(1985); Ollison v. Weinberg Racing Ass'n., Inc., 69 Or. App. 653, 688 P.2d 847 (1984).

289. 16 Ill. App. 2d 385, 148 N.E.2d 607 (1958).

290. *Id.* at 391, 148 N.E.2d at 610.

291. *Id.*

and killed decedent in self-defense.[292]

The Illinois court held that it should have been foreseeable to the defendants that if they continued to sell liquor to the decedent there was a probability of resultant family harm.[293] Thus a reasonable jury could infer that but for the intoxication of the decedent his death would not have occurred. Therefore the intervening act of the plaintiff in shooting did not break the chain of causation.[294] Would the result here have been the same if the defendant had been a social host? Would such a result have been reasonably foreseeable to a social host while hosting a party? The answers to these questions would certainly be in the affirmative if the reasoning proffered by those courts which have approved of social host liability were adopted.

The Supreme Judicial Court of Massachusetts in *Carey v. New Yorker of Worcester, Inc.*[295] held a tavern owner liable for injuries sustained by a patron who was shot by another patron.[296] The court stated that proximate cause must be shown in order to hold the defendant liable.[297] However, the court also held that it is not required that the actual manner in which the injury was incurred be foreseeable so long as it was foreseeable that an injury would result from the negligent act.[298] If this reasoning were to be applied in the case of social host liability it would place an incredible burden upon the private host. A host would be required to know the temperment and propensity for violence of each of his/her guests. This would prove to be exceedingly difficult, especially in the case where the host is not well acquainted with all of his/her guests.

Indeed the Supreme Court of Florida held that a specific knowledge of the dangerous propensities of an individual is not required to prove that the injuries sustained were foreseeable.[299] Instead, the court opted for a lesser standard which would find foreseeability if a proprietor knew of or should have recognized the likelihood of disorderly conduct by third persons, which might "endanger the safety of the proprietor's patrons."[300] Thus, in the case of *Allen*

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292. *Id.*

293. *Id.* at 392, 148 N.E.2d at 610.

294. *Id.* The court stated that:

> [the] defendants knew there was family concern about decedent's drinking, and they were bound to foresee that if they continued selling decedent liquor the family concern might be realized in family harm. The jury could therefore infer that decedent's death would not have occurred had he not been intoxicated, and accordingly the intervention of plaintiff's act, the shooting, did not break the chain of events which flowed from the sale of liquor.

Id.

295. Carey v. New Yorker of Worcester, Inc., 355 Mass. 450, 245 N.E.2d 420 (1969).

296. *Id.* at 451-54, 245 N.E.2d at 421-23.

297. *Id.*

298. *Id.* at 454, 245 N.E.2d at 423. Discussing the issue of proximate cause the Court stated:

> The defendant could not be held liable unless the injury was a foreseeable consequence of the act or failure to act, if there was such failure or such negligent act. There must be a proximate causal relationship to hold the defendant responsible.

Id.

299. 438 So.2d 356 (Fla. 1983).

300. *Id.* at 357.

v. Babrab, Inc.[301] it was found that a tavern owner could be held liable for injuries to a third person due to the intentional conduct of an intoxicated patron outside the tavern.[302]

In *Ollison v. Weinberg Racing Association*[303] the Court of Appeals of Oregon also held that it is not required that the defendant be able to foresee the exact manner of the harm. Instead the court phrased the test as being "whether the harm is of the general kind to be anticipated from the conduct."[304] If the prevailing vendor liability rule were applied to a social host, private individuals would be held liable for totally unforeseen consequences of their hospitality.[305] The danger of applying this type of reasoning to social host cases can be seen through the analysis of two recent cases, *Clendening v. Shipton*[306] and *Griesenbeck v. Walker*.[307] In both cases plaintiff claimed damages against a social host for injuries sustained due to the conduct of an intoxicated guest.

In *Clendening*, as previously described,[308] the plaintiff was assaulted by her husband who had become intoxicated at a social gathering at defendant's home.[309] In concluding that the plaintiff's harm was foreseeable to the defendants, the court stated that the test of foreseeability should not hinge on whether the occurrence of an injury is more probable than not, but rather it should encompass "whatever is likely enough in the setting of modern life" that a reasonable prudent person would anticipate in guiding his/her actions.[310] Using this standard a social host was held liable for the assault of an intoxicated guest on his wife after they had left that party and were in their own home.[311] This type of ruling was subsequently abrogated by statute in

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301. *Id.*

302. *Id.* at 358.

303. 69 Or. App. 653, 688 P.2d 847 (1984). This case involved a defendant racetrack owner who held a "Fan Appreciation Night" and sold beer at half price. *Id.* at 655, 688 P.2d at 849. A drunken patron fired a gun which set off a stampede of patrons in which plaintiffs were trampled and injured. *Id.*

The court held that the plaintiff's injuries were reasonably foreseeable and thus the plaintiff had a cause of action against the race track. *Id.* at 657, 688 P.2d at 851.

304. *Id.*

305. *See infra* text accompanying notes 306-24.

306. 149 Cal. App. 3d 191, 196 Cal. Rptr. 654(1983).

307. 199 N.J. Super. 132, 488 A.2d 1038 (1985).

308. *Clendening*, 149 Cal. App. 3d at 194-95, 196 Cal. Rptr. at 655-56. Plaintiff's husband alleged that he was merely engaging in playful wrestling with his wife. Plaintiff alleged that her husband "squeezed her neck, choked her and used a sleeper hold." *Id.* at 195, 196 Cal. Rptr. at 656. Plaintiff's neck was broken by her husband and as a result she was permanently paralyzed.

309. *Id.* at 194-95, 196 Cal. Rptr. at 655-56.

310. *Id.* at 198, 196 Cal. Rptr. at 658 (quoting Bigbee v. Pacific Tel. & Tel. Co., 34 Cal.3d 49, 57, 192 Cal. Rptr. 857, 862, 665 P.2d 947, 952 (1983) (quoting 2 HARPER & JAMES LAW OF TORTS § 18.2 at 1020 (1956)).

The court further explained the issue of foreseeability as follows:

> Moreover, it is settled that what is required to be foreseeable is the general character of the event or harm - e.g., being struck by a car while standing in a phone booth — not its precise nature or manner of occurrence.

Id.

311. *Id.*

California.[312] However, this case is a prime example of the dangers of imposing liability upon a social host.

Another example can be found in *Griesenbeck*.[313] In that case the defendants served several drinks to their daughter, an adult, who became intoxicated. She went home and in her drunken state, negligently started a fire in which she, her husband, and son were killed.[314] The only survivor was her daughter who brought the suit.[315] The Appellate Division of the Superior Court of New Jersey found the absence of a duty[316] and of proximate cause[317] and thus held for the defendants.[318] It should be noted that this refusal to follow the *Kelly* doctrine[319] was made at the appellate level which also refused to impose liability in *Kelly*.[320] Should *Griesenbeck* reach the Supreme Court of New Jersey the possibility of reversal exists.

In determining the lack of duty the *Griesenbeck* court reasoned that it is highly unlikely that a "reasonably prudent person" could have forseen such a chain of events leading to the injuries of the plaintiff.[321] This reasoning however is wholely inconsistent with that espoused by the New Jersey Supreme Court in *Kelly*.[322] The court in *Kelly* found that a social host had a duty to unknown third persons on the highways.[323] The *Griesenbeck* court however, relying on the same principles, found that those individuals who relied on the

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312. *See supra* note 86.

313. *Griesenbeck*, 199 N.J. Super. at 134-35. 488 A.2d at 1040. Caryl Griesenbeck, the mother of the five year old plaintiff, was found to have a blood alcohol content of .172. Plaintiff's expert toxicologist determined that Caryl must have consumed approximately nine drinks at defendant's home, thus making her obviously intoxicated. *Id.*

314. *Id.* at 134, 488 A.2d at 1039.

315. *Id.* at 132, 488 A.2d at 1038. This suit was instigated by the infant's Guardian Ad Litem.

316. *Id.* at 138, 488 A.2d at 1042.

In finding the absence of a duty the court stated:

> Such a sequence of events leading to the ensuing deaths and injury can hardly be equated with what a reasonably prudent person would anticipate as a probable result of the assumed activity of the Walkers. As such foreseeability defines the duty to be obeyed, in the absence thereof there is no just basis for imposing upon the Walkers a duty toward the Griesenbeck children to have refrained from serving liquor to their mother.

Id.

317. *Id.* at 138, 488 A.2d at 1042.

In holding that the plaintiff failed to show proximate cause the court stated:

> If Mrs. Griesenbeck's intoxication was connected with the cause of the fire, it was such a highly extraordinary consequence that justice, fairness and common sense compel the conclusion that the Walkers' assumed conduct may not be considered the proximate cause of the death and injury which befell the Griesenbeck children. The asserted liability of the Walkers is beyond the boundary of that which might justly be deemed a foreseeable probable consequence of their conduct.

Id. at 140, 488 A.2d at 1043.

318. *Id.* at 141-42, 488 A.2d at 1044.

319. *Kelly*, 96 N.J. at 548, 476 A.2d at 1224.

320. Kelly v. Gwinnell, 190 N.J. Super. 320, 463 A.2d 387 (1984).

321. *Griesenbeck*, 199 N.J. Super. at 139, 488 A.2d at 1042.

322. *Kelly*, 96 N.J. at 542-52, 476 A.2d at 1221-25.

323. *Id.*

intoxicated person for support and protection (i.e., the children of Mrs. Griesenbeck) did not fall within the zone of forseeability.[324] This decision flies in the face of the *Kelly* decision.

In *Rappaport*[325] the New Jersey Supreme Court quoted, with approval, a passage from *Manning v. Yokas*[326] in which the Pennsylvania Supreme Court held that injuries inflicted by an intoxicated individual through intentional torts or other negligent actions are indistinguishable from injuries occasioned as a result of drunk driving accidents.[327] This type of reasoning opens the door for the extension of social host liability to other types of injuries. Thus, it seems as if a social host may be liable for a number of actions of his/her intoxicated guest, perhaps even to the extent that a host in the situation of the defendant in *Griesenbeck* may be held liable.[328]

The factors examined here give credence to Justice Garibaldi's statement in the dissenting opinion of *Kelly*, that the implications of the situations which may arise when the liquor is served at a social gathering, are without bounds.[329] Justice Garibaldi severely criticized the majority in *Kelly* for acting with disregard for the potential undesirable ramifications of its decision.[330]

Another troublesome possible extension of social host liability involves liability to the imbiber of the alcohol him/herself. In *Zamiar v. Linderman*[331] the appellate court of Illinois held that the social host defendants were not liable for injuries sustained by a minor who became intoxicated at their home and subsequently tripped and fell.[332] This ruling was based primarily on the fact that Illinois does not recognize a common-law cause of action against a social host.[333] However, this case is illustrative of the potential for recovery by the intoxicated person himself in situations where social host liability is recognized.

The Supreme Court of Vermont was faced with this very question in *Langle v. Kurkel*.[334] That case involved a plaintiff who became intoxicated at the defendant's party.[335] The plaintiff subsequently climbed upon the railing of a swimming pool with the intent to dive into the pool.[336] The railing broke and

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324. *Greisenbeck*, 199 N.J. Super. at 139-40, 488 A.2d at 1042.

325. 31 N.J. 188, 156 A.2d 1 (1959).

326. 389 Pa. 136, 132 A.2d 198 (1957).

327. Rappaport, 31 N.J. at 196-97, 156 A.2d at 5-6. The court stated:

> If a drunken minor staggered from a saloon and fell over a child, it could not be argued that his fall was not the consequence of the furnishing of liquor. So far as liability is concerned, there can be no difference between an injury caused through one's falling body and injury inflicted by one's automobile under his management and control.

Id. (quoting Manning v. Yokas, 389 Pa. 136, 140, 132 A.2d 198, 199-200 (1957)).

328. *Greisenbeck*, 199 N.J. Super. 132, 488 A.2d 1030 (1985).

329. *Kelly*, 96 N.J. at 562-63, 476 A.2d at 1231-32 (Garibaldi, J., dissenting) (quoting Edgar v. Kajet, 85 Misc. 2d 100, 103, 375 N.Y.S.2d 548, 552 (1975)).

330. *Id.* at 560-70, 476 A.2d at 1230-36.

331. Zamiar v. Linderman, 132 Ill. App. 3d 886, 478 N.E.2d 534 (1985).

332. *Id.* at 887, 478 N.E.2d at 534.

333. *Id.* at 889, 478 N.E.2d at 535.

334. ___ Vt. ___, 510 A.2d 1301 (1986).

335. *Id.* at ___, 510 A.2d at 1302.

336. *Id.*

plaintiff fell headfirst into the pool and broke his neck.[337] The court refused to recognize a common-law cause of action against the defendant social host.[338] In addition the court held that Vermont's Dram Shop Act provided no remedy to the imbiber of alcohol.[339] Vermont has never recognized a common-law cause of action against a social host for injuries inflicted upon third persons.[340] Had such a cause of action been previously recognized, the court may have simply extended the cause of action to include injuries sustained by the imbiber as a result of his/her own actions.

In *Congini v. Portersville Valve Co.*,[341] the Supreme Court of Pennsylvania recognized a cause of action against a social host where the intoxicated guest was a minor.[342] In this case the minor guest became intoxicated and drove his car into another which resulted in several injuries to the minor guest.[343] The court ruled that the minor guest could recover from the social host for injuries sustained.[344] In so holding the court argued that to limit the right of action to third parties alone would be to make a distinction without a difference and thus the imbiber of alcohol should have a cause of action against the host who provided him with the intoxicants.[345] Although the *Congini* court seemed to be willing to make this extension of the law because the plaintiff was a minor, its decision is illustrative of the type of reasoning that leads to these inevitable extensions of the law.[346]

In *Longstreth v. Gensel*[347] the Michigan Supreme Court addressed the question of whether underage inebriates who are injured as a result of their intoxicated state may recover against a social host who has unlawfully provided them with liquor.[348] The court answered that question in the affirmative.[349] The court reasoned that the law is not static but rather is everchanging and must adapt to changes in social mores.[350] Citing several jurisdictions that

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337. *Id.*

338. *Id.* The court stated that it "should not recognize a new cause of action or enlarge an existing one without first determining whether there is a compelling public policy reason for the change." *Id.* at ____, 510 A.2d at 1305-06. The court found no public policy reason sufficient to make a change in the existing law.

339. *Id.* at ____, 510 A.2d at 1303. The court stated that "[t]he Dram Shop Act provides no remedy to the imbiber, whether he be a customer of a commercial vendor or a guest of a social host, to recover for subsequent injuries to himself as the result of his consumption of too much alcohol." *Id.*

340. *Id.*

341. 504 Pa. 157, 470 A.2d 515 (1983). In this case a minor employee of the defendant company became intoxicated at a Christmas party held by the defendant. The minor then attempted to drive home and subsequently was involved in an automobile accident. As a result the minor suffered serious injuries and brought suit against the defendant. The court held the defendant social host liable to the minor who had consumed the alcohol. *Id.* at 160, 47 A.2d at 516.

342. *Id.* at 162, 470 A.2d at 518.

343. *Id.* at 160, 470 A.2d at 516.

344. *Id.* at 162, 470 A.2d at 518.

345. *Id.* at 163, 470 A.2d at 510.

346. *Id.*

347. 423 Mich. 675, 377 N.W.2d 804 (1985).

348. *Id.* at ____, 377 N.W.2d at 806.

349. *Id.*

350. *Id.*

have decided similar cases,[351] the court noted that those decisions recognized a social trend to inhibit the dangers to serving alcohol to *all age groups*.[352] Thus the court left an open avenue to decide to hold a social host liable to an adult intoxicated guest at some time in the future.

It seems that if social host liability were adopted the host could be liable to the drinker him/herself as well as to the third party. The result would be to exonerate one who is likely to possess a high degree of culpability and at the same time punish one who may have acted merely with misplaced hospitality. This is in derrogation of all social values which mandate that every individual is responsible for the consequences of his/her own actions. To allow such liability would be to allow a tortfeasor to divert the costs of his/her own negligence upon another whose only act was to be the supplier of the alcohol. To impose such liability would be to make every man his brother's keeper.

Furthermore, if the drinker could not be held liable this would strip the social host of the defenses of contributory negligence and assumption of the risk.[353] This would operate to make the host solely liable for the injuries of the intoxicated person regardless of the extent to which the imbiber of the alcohol him/herself was liable.[354] This goes against the grain of the general principles of tort law.

The doctrine also presents the problem of extension of liability to a remote defendant upon whom a duty would not have been perceived to have existed. The best example of this is *Ashlock v. Norris*.[355] In that case the court extended liability to a mere bar patron who purchased drinks for another bar patron.

The Indiana Court of Appeals held that Indiana's Dram Shop Act[356] imposed civil liability where the provider of alcohol knew that the person receiving the alcohol was already intoxicated.[357] The court stated that "what and how much the person was known to have consumed, the time involved, person's behavior at the time, and person's condition" were factors to be considered in making the determination of the existence of the scienter requirement.[358]

In applying the preceding reasoning to this case the court held that Ashlock had stated a claim for which relief could be granted against Norris.[359] This holding extends the social host doctrine to a defendant who merely, with

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351. *Id.*

352. *Id.*

353. Zerby v. Warren, 210 N.W.2d 58 (Minn. 1973). In this case a 14 year old boy died from sniffing glue which was sold to him by defendant in violation of a statute. The court held the defendant liable after finding that the legislative purpose of the statute was to "protect a limited class of persons from their inexperience, lack of judgment, inability to protect themselves or, to resist pressure, or tendency toward negligence." *Id.* at 62. This same argument can be used in cases where a liquor vendor sells intoxicating beverages to a minor in violation of a statute.

354. *Id.*

355. Ashlock v. Norris, 475 N.E.2d 1167 (Ind. 1985).

356. IND. CODE § 7.1-5-10-15 (West Supp. 1986). This statute provides: It is unlawful for a person to sell, barter, deliver or give away an alcoholic beverage to another person who is in a state of intoxication if the person knows that the other person is intoxicated.

357. *Ashlock*, 475 N.E.2d at 1169.

358. *Id.* at 1170.

359. *Id.* at 1169.

misplaced generosity, purchased several drinks for a friend. If every ordinary bar patron who purchased a drink for a friend were to be liable as a social host, a floodgate of litigation would open creating judicial mayhem. This ruling not only offends general notions of public policy, it makes effective judicial administration of these types of cases impossible.

The possible extension of this doctrine does not stop at the type of defendant that may be impleaded. The imposition of social host liability opens up the possibility of holding a social host liable for injuries due to causes other than alcohol. In *Aebischer v. Reidt*[360] the Oregon Court of Appeals entertained the notion that a youth who provided marijuana to several friends, and indulged in its effect along with them, could be liable as a social host to a subsequently injured third party.[361] The court distinguished *Wiener*[362] on the basis that "there is not a similar host-guest relationship in which the host arranges the party, invites guests and causes intoxicants to be served to them."[363] The court, however, went on to rule that a reasonable jury could have found the defendant liable.[364]

CONCLUSION

The judicial imposition of social host liability can only be effectuated through the misapplication of common law tort principles. Courts which have imposed such liability upon social hosts have created a legal duty where none has existed before and have strained the meaning of proximate cause. By stretching the limits of these elements of a tort the courts have fashioned a new cause of action in order to achieve certain social goals which they deem desirable. This is judicial legislation of the rankest sort.

New imposition of social host liability would open a Pandora's Box of litigation, it would create limitless possibilities of the extension of this type of liability into holiday parties, family gatherings, barbeques and other social gatherings. The judiciary would be extending its already far reaching arm into the homes of individuals and regulating their private affairs. This, in effect, would make every individual his brother's keeper.

This type of extension of liability would be highly undesirable. It would remove culpability from the real party at fault and shift it to another, innocent, party. Social relations among friends would become strained. Alcohol has been a part of our society since its inception, and there have been numerous unsuccessful efforts to curtail its undesirable effects. An attempt to solve this problem through judicial fiat by the imposition of social host liability would

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360. Aebischer v. Reidt, 74 Or. App. 692, 704 P.2d 531 (1985).

361. *Id.* at 695, 704 P.2d at 533.

362. *See supra* notes 201-07 and accompanying text.

363. *Aebischer* 74 Or. App. at 695, 704 P.2d at 533.

364. *Id.* at 696, 704 P.2d at 533.

create a situation rife with uncertainty in the courts, and impose unwarranted restraints upon social relations.

Anthony F. DiPadova, Jr.

Appendix A

The following sixteen jurisdictions have enacted Dram Shop Acts making a vendor of liquor subject to civil liability for the torts of intoxicated patrons:

Alabama: Ala. Code § 6-5-71 (1979).

Alaska: Alaska Stat. § 04.21.02 (1980).

Connecticut: Conn. Gen. Stat. § 30-102 (1985).

Florida: Fla. Stat. § 768.125 (1983).

Georgia: Ga. Code Ann. § 3-3-22 (1982).

Illinois: Ill. Ann. Stat. ch. 43, § 135 (Smith-Hurd Supp. 1984).

Iowa: Iowa Code Ann. § 123.92 (West Supp. 1984).

Maine: Me. Rev. Stat. Ann. tit. 17, § 2002 (1983)

Michigan: Mich. Stat. Ann. § 18.993 (Callaghan Supp. 1984).

New York: N.Y. Gen. Oblig. Law § 11-1101 (McKinney Supp. 1984).

North Carolina: N.C. Gen. Stat. § 1813-121 et seq. (1983).

North Dakota: N.D. Cent. Code § 5-01-06 (Supp. 1983).

Ohio: Ohio Rev. Code Ann. § 4399.01 (Page 1982).

Rhode Island: R.I. Gen. Laws § 3-11-1 (1976).

Utah: Utah Code Ann. § 32-11-1 (Supp. 1983).

Vermont: Vt. Stat. Ann. tit. 7, § 501 (1972).

Appendix B

The following thirty-three jurisdictions have recognized a common law cause of action in negligence against commercial vendors of liquor:

Alabama: Buchanan v. Merger Enterprises, Inc., 463 So. 2d 121 (Ala. 1984).

Alaska: Nazareno v. Urie, 638 P.2d 671 (Alaska 1981); and Morris v. Farley Enterprises, Inc., 661 P.2d 167 (Alaska 1983).

Arizona: Ontiveros v. Borak, 136 Ariz. 500, 667 P.2d 200 (1983); and Brannigan v. Raybuck, 136 Ariz. 513, 667 P.2d 213 (1983).

Colorado: Kerby v. Flamingo Club, 35 Colo. App. 127, 532 P.2d 975 (1974).

California: Vesely v. Sagar, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) abrogated by statute in 1978 by **Cal. Bus. & Prof. Code** § 25602 (West Supp. 1985) and **Cal. Civ. Code** § 1714 (West 1985).

District of Columbia: Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973).

Florida: Davis v. Shiappacosse, 155 So. 2d 365 (Fla. 1963); and Prevatt v. McClennan, 201 So. 2d 780 (Fla. Dist. Ct. App. 1967) limited in 1981 by **Fla. Stat.** § 708. 125 (1983).

Hawaii: Ono v. Applegate, 62 Hawaii 131, 612 P.2d 533 (1980).

Idaho: Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980).

Indiana: Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966).

Iowa: Haffke v. Mitchell, 347 N.W.2d 381 (Iowa 1984).

Kentucky: Pike v. George, 434 S.W.2d 626 (Ky. 1968).

Louisiana: Thrasher v. Leggett, 373 So. 2d 494 (La. 1979).

Massachusetts: Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); and Michnick-Zilberman v. Gordon's Liquor, Inc., 390 Mass. 6, 453 N.E.2d 430 (1983).

Michigan: Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973).

Minnesota: Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973).

Mississippi: Munford, Inc. v. Peterson, 368 So. 2d 213 (Miss. 1979).

Missouri: Sampson v. W.F. Enterprises, Inc., 611 S.W.2d 333 (Mo. App.

1980); and Carver v. Schafer, 647 S.W.2d 570 (Mo. App. 1983).

Montana: Nehring v. LaCounte, ___ Mont. ___, 712 P.2d 1329 (1986).

New Hampshire: Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965).

New Jersey: Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

New Mexico: Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982); MRC Properties, Inc. v. Gries, 98 N.M. 710, 652 P.2d 732 (1982); and Porter v. Ortiz, 100 N.M. 58, 665 P.2d 1149 (N.M. Ct. App. 1983).

New York: Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S. 2d 290 (N.Y. Sup. Ct. 1965).

North Carolina: Hutchons v. Hankins, 63 N.C. App. 1, 303 S.E.2d 584, *reh'g denied*, 309 N.C. 191 (1983).

Ohio: Mason v. Roberts, 33 Ohio St.2d 29, 294 N.E.2d 884 (1973).

Oklahoma: Brigance v. Velvet Dove Restaurant, Inc., No. 62,005, slip op. (Okla. S. Ct. July 8, 1986).

Oregon: Campbell v. Carpenter, 279 Or. 237, 566 P.2d 893 (1977) limited in 1979 by **Or. Rev. Stat.** § 30.950 et. seq. (1983).

Pennsylvania: Jardine v. Upper Darby Lodge No. 1973, 413 Pa 626, 198 A.2d 550 (1964).

South Dakota: Walz v. City of Hudson, 327 N.W.2d 120 (S.D. 1982).

Tennessee: Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755 (Tenn. Ct. App. 1964).

Washington: Callan v. O'Neil, 20 Wash. App. 32, 578 P.2d 890 (1978); and Halligan v. Pupo, 37 Wash. App. 84, 678 P.2d 1295 (Wash. Ct. App. 1984).

Wisconsin: Sorensen v. Jarvis, 119 Wis.2d 627, 350 N.W.2d 108 (1984).

Wyoming: McCellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).

Appendix C

The courts of the following ten jurisdictions have refused to impose liability on a commercial vendor of liquor for the torts of intoxicated patrons.

Arkansas: Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965).

Connecticut: Nelson v. Steffens, 170 Conn. 356, 365 A.2d 1174 (1976); and Slicer v. Quigley, 180 Conn. 252, 429 A.2d 855 (1980).

Delaware: Wright v. Moffitt, 437 A.2d 554 (Del. 1981).

Georgia: Keaton v. Kroger Co., 143 Ga. App. 23, 237 S.E.2d 443 (1977).

Illinois: Demchuck v. Duplancich, 92 Ill.2d 1, 440 N.E.2d 112 (1982).

Kansas: Ling v. Jan's Liquors, 237 Kan. 629, 703 P.2d 731 (1985).

Maryland: Felder v. Butler, 292 Md. 174, 438 A.2d 494 (1981).

Nebraska: Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976).

Nevada: Hamm. v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969).

North Dakota: Thorning v. Bottonsek, 350 N.W.2d 586 (N.D. 1984).

Appendix D

I. The following jurisdictions have, by judicial decision, extended liability to social hosts for the torts of intoxicated *adult* guests:

California: Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978); Common law established in this case abrogated by Act of the California State Legislature: **Cal. Bus. & Prof. Code** § 25602 (West Sup. 1985) and **Cal. Civ. Code** § 1714 (West 1985).

Indiana: Ashlock v. Norris, 475 N.E.2d 1167 (Ind. App. 1985) (liability extended to mere tavern patron who purchased drinks for another patron).

Iowa: Clark v. Mincks, 364 N.W.2d 226 (Iowa 1985) (social host liable for torts of adult intoxicated guest).

Massachusetts: McGuiggan v. New England Tel. & Tel. Co.; Peabody, 398 Mass. 152, 496 N.E.2d 144 (1986) (court held in an appropriate case social host could be held liable for torts of adult intoxicated guest).

New Jersey: Kelly v. Gwinell, 96 N.J. 538, 476 A.2d 1219 (1984) (social hosts held liable for torts of intoxicated adult guest); Bill currently before the New Jersey State Legislature would narrow the scope of liability.

II. The following jurisdictions have by judicial decision, extended liability to social hosts for the torts of intoxicated *minor* guests:

Georgia: Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985) (liability limited to social host who furnished minor with alcohol).

Michigan: Longstreth v. Gensel, 423 Mich. 675, 377 N.W.2d 804 (1985) (social host liable to intoxicated minor guest for injuries sustained by guest in intoxicated state); *But cf.* Reinert v. Dolezel, 147 Mich. App. 149, 383 N.W.2d 148 (1985) (parents not liable for torts of adult intoxicated children where children, who were under the legal drinking age, consumed alcohol in parent's home and subsequently injured others).

Oregon: Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity, 258 or. 632, 485 P.2d 18 (1971) (social hosts held liable for torts of intoxicated minor guest).

Wisconsin: Koback v. Crook, 123 Wis. 2d 259, 366 N.W.2d 857 (1985) (liability extended to social host who served liquor to minor).

Appendix E

The courts of the following five jurisdictions have refused to extend liability to a social host:

Minnesota: Holmquist v. Miller, 367 N.W.2d 468 (Minn. 1985).

Mississippi: Boutwell v. Sullivan, 469 So. 2d 526 (Miss. 1985).

Ohio: Settlemyer v. Wilmington Veterans Post No. 49, 11 Ohio St. 3d 123, 385 N.E.2d 1078 (1984).

Pennsylvania: Congini v. Portersville Valve Co., 504 Pa. 157, 470 A.2d 513 (1983); Klien v. Raysinger, 504 Pa. 141, 470 A.2d 507 (1983).

Vermont: Langle v. Kurkel, ___ Vt. ___, 510 A.2d 1301 (1986).

The Disposition of Father-Daughter Incestuous Assault Cases: An Overview

Since the mid 1970's, reports of child sexual victimization have been increasing.[1] While child sexual abuse may encompass many behaviors, professionals treating sexually abused children consider father-daughter incestuous assault as potentially the most damaging to the victim and the family.[2] Tradi-

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1. D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 131 (1979). The number of confirmed sexual abuse cases in Houston, Texas, rose from 214 in 1974 to 1,153 in 1977, and in Santa Clara, California, 36 reported cases in 1971 increased to 600 in 1977. B. JUSTICE & R. JUSTICE, THE BROKEN TABOO 11-16 (1979). *See* Massachusetts Department of Social Services *Monthly Report on Ch. 288 Legislation* 1-2 (May 1985) [hereinafter *Monthly Report*] (available in the New England Law Review office). In May, 1985, 97% of the cases referred to the District Attorneys (D.A.) by the Massachusetts Department of Social Services (DSS) for potential prosecution involved sexual abuse. *Id.* From the time of the implementation of the reporting law in October, 1983, until the report in May, 1985, 90% of the cases reported were for sexual abuse. *Id.* The number of reported cases of child abuse continues to increase. A report completed by the Child Welfare League of America and released in February, 1986, indicated that reports of child abuse and neglect rose 16% from 1983 to 1984; sexual abuse involved 59% of these cases. *See* New Bedford Standard Times, Feb. 26, 1986, at 3, col. 3.

Section 51B of chapter 119 under the Massachusetts General Laws reflects the increased concern by the state for the large number of abused children by requiring mandatory reporting to the D.A.'s office of any cases in which DSS "has a reasonable cause to believe that any of the following conditions has resulted from abuse or neglect: a child has died; or been raped . . .[or] a child has been sexually exploited . . . ." MASS. GEN. LAWS ANN. ch. 119, § 51B (West Supp. 1985); *see also* FLA. STAT. ANN. § § 415.501-15 (West Supp. 1985). This statute contains a detailed list of mandatory reporters "who know or have reasonable cause to suspect, that a child is an abused or neglected child . . . ." *Id.* at § 415.504. The statute also contains a comprehensive list of definitions of what constitutes sexual abuse. *Id.* The Department of Health and Rehabilitative Services is required to report aggravated and sexual abuse cases to the state attorney. *Id.* at § 415.505.

While the numbers of reported cases have greatly increased, studies indicate that the incidence of sexual assault itself has not increased. D. FINKELHOR, *supra*, at 144. See also *infra* note 32 and accompanying text for a listing of studies concerning the rate of incestuous sexual assault.

2. Giarretto, *Humanistic Treatment of Father-Daughter Incest*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 40 (B. Jones, L. Jenstrom & K. MacFarlane eds. 1980). "[T]he potential for damage appears to be so great that the children and families involved in incestuous

tional criminal court dispositions of incestuous assault cases have consisted of incarceration of the offender or dismissal of the case, both potentially damaging situations for the victim and the family.[3] Juvenile court disposition has often resulted in the removal of the child from the family and home when the child was considered vulnerable to further assault.[4] In both these situations, the family as a whole, and as individuals, were usually left untreated, frequently resulting in serious long-term effects, particularly for the victim.[5] Because of the scope of father-daughter incestuous assault, and the negative effects that traditional disposition of the cases within the criminal and juvenile courts have on the victim, the offender, and the family,[6] innovative methods of disposition of these cases that result in treatment of the entire incestuous family have been developed within the last decade. Alternatives now exist to the legal system's traditional disposition of cases of father-daughter incestuous assault.[7]

Part I of the Note details the nature and scope of the problem of father-daughter incest. Part II discusses the dynamics of father-daughter incest. The traditional methods of disposing of these cases within the criminal and juvenile justice systems are discussed in Part III. Part IV of this Note details some recent successful and innovative programs aimed at treating the incestuous family. The effect of incest on the victim and treatment goals for the entire family are discussed in Part V. Part VI offers recommendations for the disposition of cases based on concerns for the victim, the offender, the family, and society.

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relationships must be seen as in need of immediate help." DeVine, *Incest: A Review of the Literature*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 27 (B. Jones, L. Jenstrom & K. MacFarlane eds. 1980). *See also* D. FINKELHOR, *supra* note 1, at 101 (experiences with close family members more traumatic than those with strangers); R. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 58 (1979) (less than 25% of females who experience incestuous assault do not suffer negative effects); Sgroi, *Child Sexual Assault: Some Guidelines for Intervention and Assessment*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 133 (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi eds. 1978) (father-daughter incestuous assault the most difficult to diagnose and treat).

3. For a discussion of the difficulties associated with criminal prosecution and the effects of a criminal proceeding on the incestuous family see *infra* notes 83-121 and accompanying text.

4. See *infra* notes 140-44 and accompanying text for a discussion of the effects of removal from the home on the child.

5. See *infra* notes 200-11 and accompanying text for a discussion of the effects of incestuous assault on the victim.

6. The incarceration of the father or the removal of the child from the home and family has been the standard remedy in incestuous assault cases. Ahlgren, *Maintaining Incest Victims' Support Relationships*, 22 J. FAM. L. 483, 536 (1983-84). "Typically, the repertory of law enforcement officials in the handling of father-daughter sexual abuse is ineffective and unpredictable." Giarretto, *supra* note 2, at 37.

7. See *infra* notes 145-99 and accompanying text for a discussion of alternative disposition methods.

I. THE NATURE AND SCOPE OF THE PROBLEM OF FATHER-DAUGHTER INCEST

A. Definitions of Incest and the Rationale for the Incest Taboo

There is a great disparity between the legal and sociological definitions of acts which constitute incestuous behavior. Statutorily, incest has been defined as the intermarriage, carnal knowledge, or sexual intercourse between people with whom marriage is forbidden because of the relationship of the parties through consanguinity or affinity.[8] Although the degree of consanguinity or affinity required by statute is not uniform within the jurisdictions,[9] almost all jurisdictions do require proof of intercourse.[10] Thus, father-daughter sexual contacts that do not include sexual intercourse are not considered to be in violation of the incest statutes in most jurisdictions, because the statutory definitions of incest are too narrow to include all the sexual acts that may occur.[11]

In contrast to the narrow legal definition of incest, sociological definitions are much broader and include a variety of sexual behaviors that occur in families. Incestuous assault in sociological terms is any sexual activity that occurs between a parent and child.[12]

Due to the disparity between the legal and sociological definitions of incest, father-daughter incestuous assault will include, for the purposes of this Note, any contact between a father and his daughter in which the daughter is being used for the sexual stimulation of the father.[13] The term "father" will include adoptive and stepfathers, as well as biological fathers.

The incest taboo existed long before any statutory prohibition.[14] The pur-

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8. *See, e.g.*, CAL. PENAL CODE § 285 (West Supp. 1985); D.C. CODE ANN. § 22-1901 (1981); MASS. GEN. LAWS ANN. ch. 272, § 17 (West 1970); 18 PA. CONS. STAT. ANN. § 4302 (Purdon 1983).

9. Wulkan and Bulkley, *Analysis of Incest Statutes*, in CHILD SEXUAL ABUSE AND THE LAW 57 (J. Bulkley ed. 1982). In thirteen states incest is a crime only between blood relatives. *Id.* Twenty-six states protect step-children and thirteen states protect adoptive children. *Id.*

10. *Id.* In most jurisdictions only sexual intercourse is criminally proscribed by the incest codes. *Id.* at 52. For states whose incest statutes also proscribe deviate sexual behavior *see* IND. CODE ANN. § 35-46-1-3 (Burns Supp. 1985); OR. REV. STAT. § 163.525 (1983); TEX. PENAL CODE ANN. § 25.02 (Vernon 1974).

11. *See supra* notes 8 and 10 and accompanying text.

12. Giarretto, *supra* note 2, at 37. "Incest [is] sexual contact between family members, including not just intercourse but also mutual masturbation, hand-genital and oral-genital contact, sexual fondling, exhibitionism, and even sexual propositioning." D. FINKELHOR, *supra* note 1, at 84.

13. U.S. Dept. of Health & Human Services, Office of Human Development Services, *Adolescent Abuse and Neglect: Intervention Strategies* 14 (July 1980) *reprinted in* SUFFOLK UNIVERSITY LAW SCHOOL WORKSHOP ON CARE AND PROTECTION OF ABUSED AND NEGLECTED CHILDREN (Mar. 30, 1985) (available in New England Law Review office).

14. Ahlgren, *supra* note 6, at 486. The author states that:

> Examination of human cultures reveals, however, that the incest taboo has been broken regularly since time immemorial. Children have always served as sexual objects of adult desires. However, the incest prohibition has not been randomly broken. Instead a pattern emerges; the infractions usually involve an adult male perpetrator and a feminine child.

Id.

pose of the incest taboo was to encourage people to seek partners outside the family so as to strengthen the community and broaden its ties.[15] The rationale for incest statutes was to promote genetic purity by prohibiting sexual relations between closely related adults,[16] to protect the family structure by deterring sexual contact which might damage family relationships, and to protect children from the risks caused by the violation of the parent-child relationship.[17] Incestuous sexual activity confuses the roles of family members and makes it more difficult for a child to become independent of the family.[18]

The incest taboo failed to eliminate incestuous behavior, but, paradoxically, it effectively eliminated both the reporting and discussion of such behavior.[19] As a result, for decades professionals in the social sciences and the law were either unaware that father-daughter incestuous assault was a common occurrence, or knew that it did occur, but refused to acknowledge its existence. For example, Freud, Wigmore and Kinsey were all partially responsible for perpetuating the erroneous conclusion that incestuous assault rarely occurred.[20] Within the last two decades incest has become a powerful, controver-

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15. S. FORWARD & C. BUCK, BETRAYAL OF INNOCENCE, INCEST AND ITS DEVASTATION 13 (1978).

16. Coleman, *Incest: A Proper Definition Reveals the Need for a Different Legal Response*, 49 MO. L. REV. 258 (1984). Since the incest taboo preceeded any knowledge of genetics, it is doubtful that genetics was the primary reason for the taboo. *Id.* The author contends that in some cases, intermarriage strengthens desirable traits. *Id.* Further, if harmful genetic effects were the main reason for the incest prohibition, then the taboo would apply only to people capable of having children, or only to heterosexual behavior. *Id.* at 259. *See, e.g.*, TEX. PENAL CODE ANN. § 25.02 (Vernon 1974). The rationale for Texas's incest code is family protection, not the prevention of genetic defects. Searcy & Patterson, *Practice Commentary* to TEX. PENAL CODE ANN. § 25.02 (Vernon 1974). For this reason, homosexual and other deviant behaviors are included in the Texas statute. *Id.*

17. Note, *Incest: The Need to Develop a Response to Intrafamily Sexual Abuse*, 22 DUQ. L. REV. 902 (1984). *See infra* notes 228-29 and accompanying text.

18. B. JUSTICE & R. JUSTICE, *supra* note 1, at 28-29.

19. *Id.* at 260. "On one hand . . . [incest] is treated as a serious threat to the social order . . . on the other hand, unlike sexual abuse, which is almost never joked about, incest is often the subject of ribald humor, innuendo, and the like." D. FINKELHOR, *supra* note 1, at 85. Incestuous fantasies have become part of the pornography trade. *Id.* at 86.

20. J. HERMAN, FATHER-DAUGHTER INCEST 9-17 (1981). The author discusses in some detail the attitudes of Freud, Wigmore, and Kinsey toward sexual assault on females. *Id.* In the course of his research, Freud became uncomfortable with the number of incestuous assaults being reported by his patients and his subsequent discovery that female hysteria was caused by childhood sexual trauma. *Id.* at 9. Further, to reconcile his distress with what appeared to be the frequent incestuous behavior of his contemporaries, Freud shifted the blame to the daughters by concluding that they lied, and that their experiences were in reality the manifestation of their own incestuous fantasies. *Id.* at 10. The author states quite succinctly: "[s]crupulously honest and courageous in other respects, Freud falsified his incest cases." *Id.* at 9.

See IIIA J. WIGMORE, EVIDENCE § 924A, at 736-47 (J. Chadbourn rev. ed. 1970). Wigmore addressed what he perceived to be the problems of allegedly sexually assaulted females who brought what he considered to be false charges against innocent men. *Id.* He seriously doubted the truthfulness of any female of any age who brought charges against men for any type of sexual assault. *Id.* at 736-37.

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are

sial, and more thoroughly researched issue, attributable to the increase of social awareness associated with the rise of the women's movement.[21] Additionally, social scientists, legislators, and members of the legal profession have begun to voice concerns for the need for new and expanded programs for treating both the victims and their families in incestuous assault cases.[22]

B. Scope of the Problem of Father-Daughter Incestuous Assault

In addition to the lack of a common definition of which behaviors constitute father-daughter incestuous assault, there is also a lack of uniform statistics that accurately measure the scope of the problem.[23] Studies reveal, however, that the number of cases reported is far less than the actual number of child sexual assaults.[24] In most states, social workers indicate that an over-

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> multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. *No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.*

Id. at 736. See Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. W. L. REV. 235 (1983) for a detailed description of Wigmore's falsification of scientific authority to support his claim of false charges of sexual assault brought by women. Specifically, the author states:

> To the legal community, this (Wigmore's prejudice against female complainants in sexual assault cases) would be no more than a historical curiosity if Wigmore's view had not been accepted and carried forward through several generations of legal scholarship. . . . However, Wigmore's views are still given deference with the result that many female children sexually abused by adults have been told by courts or prosecutors that the state and the law did not believe them and would not protect them or punish the offenders.

Id. at 237.

Kinsey, in his much publicized works, almost ignored the problem of child sexual assault. J. HERMAN, *supra* at 16. He failed to see why children would be disturbed by many forms of sexual contact, and blamed the child's emotional turmoil on the reaction of prudish parents and teachers. *Id.* Kinsey was more concerned about the effects of sexual assault charges on the male. *Id.* at 17.

21. J. HERMAN, *supra* note 20, at 18. "Incest was rediscovered . . . in the 1970's by the women's liberation movement." *Id.* Other issues that became prominent were spouse abuse, rape, and sexual abuse of children. *Id.*

The level of concern for sexually abused children continues to increase. In May, 1986, the Fourth National Conference on the Sexual Victimization of Children was held in New Orleans. The Boston Globe, June 2, 1986, at 45, col. 4. During the past year five scholarly journals concerned with sexual abuse have been started. *Id.* Plans are being made to institute an American Professional Society of Sexual Child Abuse. *Id. But see* Rosenfeld, *Sexual Misuse and the Family*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 93 (B. Jones, L. Jenstrom & K. MacFarlane eds. 1980) in which the author attributes the recognition of incest as being a significant problem to the public attention given by child protective workers and psychiatrists who had noticed a large number of cases among their clients. *Id.*

22. See Massachusetts Department of Social Services, CHAPTER 288 "THE D.A. BILL" THE FIRST YEAR, OCTOBER 1983—SEPTEMBER 1984 60-67 (1984) [hereinafter the D.A. BILL] for one state's reaction to the need for treatment of victims of sexual abuse.

23. *See infra* notes 24 and 28 and accompanying text.

24. *See* S. BUTLER, CONSPIRACY OF SILENCE — THE TRAUMA OF INCEST 12 (1978) (50% to

whelming number of incestuous families occupy their caseload,[25] with the father being the most common perpetrator of incestuous assault.[26] Furthermore, past underreporting[27] and the lack of specific data collection instruments[28] resulted in the non-existence of reliable statistics on the national incidence of the varying forms of child sexual abuse.[29]

Without reliable and uniform statistics from governmental agencies, the best estimates as to the scope of the problem of incestuous abuse are derived from studies done by researchers in the fields of psychology, psychiatry and sociology.[30] It was a commonly held belief that the incidence of incest was less than two cases per million of the population.[31] However, in five major studies concerning sexual experiences of women that were conducted between 1940-1978, it was reported that one percent of the women had experienced sexual contact with their father or stepfather.[32] If these studies have produced an accurate estimate, then they are an indication that at least three quarters of a million women over the age of eighteen have had an incestuous relationship with their father,[33] and an incredibly large number of new cases, approxi-

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90% of all sexual assaults on children unreported); R. GEISER, *supra* note 2, at 44 (for every case reported, 25 unreported) B. JUSTICE & R. JUSTICE, *supra* note 1, at 16 (for every case reported, 20 cases unreported). *Id.*

25. Zaphiris, *Incest: The Family with Two Known Victims*, in CHILD PROTECTION 1 (undated)(available in New England Law Review office). *See infra* note 66 and accompanying text.

26. *See infra* note 33. *See also* Sgroi, *supra* note 2, at 133. Dr. Sgroi hypothesizes that when a father murders his family the cause is a confrontation where the father is accused of the incestuous acts by the child in front of the entire family. *Id.* at 136-37.

27. *See supra* note 24.

28. *See, e.g.*, OFFICE OF MANAGEMENT AND BUDGET FORM NO. 43-R0001 (1984) (utilized by Crime Reporting Unit, Comm. of Mass.) (available in New England Law Review office). The Uniform Crime Report forms, used by the communities in reporting crimes to state and federal agencies, contain one category for sex crimes: forcible rape, which is further subdivided into rape by force and attempts to commit forcible rape. Thus, there are no categories that detail the various forms in which child sexual abuse can be manifested.

29. Server & Janzen, *Contraindication to Reconstitution of Sexually Abusive Families*, LXI CHILD WELFARE 279 (1982).

30. *See infra* notes 32-33.

31. B. JUSTICE & R. JUSTICE, *supra* note 1, at 15. See also *supra* note 20 for a discussion of attitudes that fostered the belief that incestuous assault was an extremely rare occurence.

32. J. HERMAN, *supra* note 20, at 12. These studies were conducted by Carney Landis in 1940 with approximately 300 women; Alfred Kinsey in 1953 with approximately 4,400 women; Judson Landis in 1956 with approximately 1,000 women; John Gagnon in 1965 with 1,200 women from Kinsey's group; and David Finkelhor in 1978 with approximately 500 women. *Id.* The author states that: "[t]he results of these five surveys were remarkably consistent." *Id.* Herman believes that it is probable that these figures are low because the subjects in these studies were primarily white, middle class, urban, educated women. *Id.* at 14. Since poor and minority women are more likely to be victims of all types of assault, Herman feels it is reasonable to project that women in these groups also suffer a higher incidence of sexual assault in childhood. *Id.* See also D. FINKELHOR, *supra* note 1, at 116, in which the author notes that his studies had shown that: "[l]ower income families had remarkedly higher rate of incest. . . ." *Id.*

33. D. FINKELHOR, *supra* note 1, at 88. *See, e.g.*, *Monthly Report*, *supra* note 1, at 1-4. In May, 1985, 97% of the cases referred to the D.A. by DSS (106 out of 118) were for rape (106) and/or sexual exploitation (8). *Id.* at 1. Forty-nine of these cases involved fathers or step-fathers. *Id.* at 3. Between October, 1983, when a mandatory reporting bill became effective, and May,

mately sixteen thousand, are added each year.[34]

II. DYNAMICS OF FATHER-DAUGHTER INCEST

Once initiated, incestuous conduct usually becomes an established, repetitive pattern of behavior, with the relationship typically lasting at least two years,[35] and frequently involving more than one daughter.[36] The relationship most often begins with fondling, particularly when small children are involved, and intercourse occurs only after a long history of sex play.[37] While daughters of all ages are victims, studies reveal that children between the ages of eight and twelve years are the most vulnerable, because it is at these ages that children are more independent and less supervised, yet still unskilled at resisting sexual advances.[38]

Once begun, the incestuous relationship is rarely discontinued by the father.[39] Incestuous abuse ceases when the daughter runs away, leaves home to

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1985, 90% of the 1,456 cases referred were for sexual abuse. *Id.* at 1. Five hundred sixty-three fathers and step-fathers were involved in these cases. *Id.* at 3.

34. D. FINKELHOR, *supra* note 1, at 88.

35. R. GEISER, *supra* note 2, at 46. See Berliner, Blick & Bulkley, *Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development*, in CHILD SEXUAL ABUSE AND THE LAW 171-72 (J. Bulkley ed. 1982), for a general discussion of sexual abuse dynamics.

36. R. GEISER, *supra* note 2, at 46.

37. *Id.* at 31. "Usually, incestuous conduct begins when the child is quite young and consists of fondling, caressing and perhaps oral-genital contact. . . . Obviously, this pattern implies repetitive, prolonged conduct." Katz, *Incestuous Families*, 1983 DET. C. L. REV. 79, 83-84.

Incestuous assault differs from assault by strangers in that force and coercion are usually not present. *See* S. FORWARD & C. BUCK, *supra* note 15, at 21 (usually no need for force or coercion since a tremendous amount of psychological coercion already in existence); B. JUSTICE & R. JUSTICE, *supra* note 1, at 94 (approximately 90% of incestuous assault cases involve no force).

Although force is seldom necessary to involve a child in a relationship, it should not be implied that the child is an equal, willing partner. *See also* Groth, Hobson & Gray, *The Child Molesters*, in SOCIAL WORK AND CHILD SEXUAL ABUSE 140 (1982). Although children may cooperate, they are not fully capable of giving consent. *Id.* "Children are essentially a captive population, totally dependent upon their parents. . . for their basic needs. Thus, they will do whatever they perceive to be necessary to preserve a relationship with their caretakers." J. HERMAN, *supra* note 20, at 27. Consent can only exist among peers; a child is not in control of a relationship with an adult. *Id.*

Child victims of incestuous assault keep incest a secret and continue in the relationship for many reasons. See S. FORWARD & C. BUCK *supra* note 15, at 21 (fear of punishment by one or both parents and fear of removal from home); Burgess & Holmstrom, *Accessory to Sex: Pressure, Sex, and Secrecy*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 99 (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi eds. 1978) (fear of not being believed and fear of rejection or abandonment); Burgess, Holmstrom & McCausland, *Divided Loyalty in Incest Cases*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 121 (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi. eds. 1978) (fear of disrupting the family unit).

38. D. FINKELHOR, *supra* note 1, at 61. *See* Devine, *supra* note 2, at 27 (estimated age of the average victim being ten years old). *But see* The D.A. BILL, *supra* note 22, at 15. This report stated that in a 12 month period between October, 1983, and September, 1984, almost 22% of the rapes of females reported (including assaults by family members as well as strangers) were of girls between the ages of three and six. *Id.* at 16. This was the largest amount of assaults in any one age group, comprising 116 rapes occurring out of a total of 516 reported rapes. *Id.*

39. Summit & Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, in SEXUAL ABUSE OF

live on her own, marries, or when the abuse is discovered as part of another investigation by outside sources,[40] or is disclosed by the daughter to someone in authority, or to someone who notifies the authorities.[41]

Social scientists have described common characteristics of incestuous fathers.[42] Fathers who commit incest seldom have a criminal record[43] or a deviant psychiatric history.[44] Introverted and often depressed,[45] and with strong unmet needs for affection,[46] the incestuous father frequently uses sex as a means of fulfilling a variety of needs.[47] Many fathers exhibit poor impulse control,[48] while others view the child as an adult in the relationship.[49] Although they are not necessarily alcoholics,[50] as many as twenty to thirty per cent have an alcohol abuse problem.[51]

It is usually thought that most mothers are aware on some level of the incestuous situation.[52] These mothers are absent from the home in some manner, through recurring mental illness, physical illness, alcoholism, withdrawal,

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CHILDREN: SELECTED READINGS 54 (B. Jones, L. Jenstrom & K. MacFarlane eds. 1980). Once an incestuous pattern is established, there is a compulsion on the part of the father to repeat the contact. *Id.*

40. *See* The D.A. BILL, *supra* note 22, at 28. Frequently sexual abuse cases come to light after DSS has been called to investigate other behavior problems with the child. *Id.* In the course of the investigation and work with the child, the sexual abuse is revealed to the worker, or the worker recognizes the indicators of sexual abuse. *Id.*

41. *See* D. FINKELHOR, *supra* note 1, at 67 (63% of women in study never told anyone of incestuous experiences prior to study); B. JUSTICE & R. JUSTICE, *supra* note 1, at 79-80 (girls reveal secret when father becomes so possessive that he refuses to allow dating); Zaphiris, *supra* note 25, at 4 (disclosure occurs during adolescence when daughter realizes relationship not normal).

The girl may confide in someone who is a mandated reporter under her state's child sexual assault reporting law and thus the incest becomes known to the authorities. *See, e.g.*, FLA. STAT. ANN. § 415.504 (West Supp. 1985) for a comprehensive list of mandated reporters which includes: physicians, osteopaths, medical examiners, other health professionals, mental health professionals, school personnel, social workers, law enforcement officers. *Id.*

42. See S. BUTLER, *supra* note 24, at 68; S. FORWARD & C. BUCK, *supra* note 15, at 32-33; B. JUSTICE & R. JUSTICE, *supra* note 1, at 60-66, for descriptions of these characteristics.

43. S. BUTLER, *supra* note 24, at 68.

44. *Id. See* Costell, *The Nature and Treatment of Male Sex Offenders*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 29 (B. Jones, L. Jenstrom & K. MacFarlane eds. 1980) Dr. Costell states that most incestuous fathers are not sexually deviant and choose a child as a partner only when an adult partner is unavailable and the minor is easily accessible. *Id. See also* Summit & Kryso, *supra* note 39, at 53 (fathers appear well-adjusted and well-functioning in other areas of their lives).

45. B. JUSTICE & R. JUSTICE, *supra* note 1, at 64.

46. *Id.*

47. S. FORWARD & C. BUCK, *supra* note 15, at 33.

48. S. BUTLER, *supra* note 24, at 68.

49. *Id.* at 65.

50. *Id.* at 68.

51. S. FORWARD & C. BUCK, *supra* note 15, at 32.

52. *Id.* at 45. By not preventing or reporting the incest, the mother becomes a silent participant. *Id. See also* S. BUTLER, *supra* note 24, at 120, who suggests that mothers who allow the incestuous assault to continue do so because of fear of being beaten, loss of financial support, break-up of the family, or loss of respect in the community if the incest is discovered. *Id.*

or employment.[53] Many were abused[54] or deprived children,[55] and are now oppressed by their husbands.[56] Alienation between the mother and daughter is often present and increases the risk to the child.[57]

Along with the absence of the mother, hostility often exists between both parents.[58] Sexual relations between the parents are either non-existent or strained,[59] and the wife may be dissatisfied with the husband and the marriage.[60] In situations where these factors are present, some fathers turn to the daughter in place of the mother.[61]

Incest is a sign of severe family dysfunction.[62] Regardless of the family problems that exist, it is the father who is ultimately and totally responsible for the assault on the child, and it is he who must accept the blame for the damage done to the child and the family.[63] Whether the father ever accepts responsibility for his actions may be a determining factor in the eventual resolution of the case.[64]

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53. S. BUTLER, *supra* note 24, at 110.

54. *Id.* at 114.

55. Devine, *supra* note 2, at 26.

56. J. HERMAN, *supra* note 20, at 49. Dr. Herman suggests that "mothers who are strong, healthy and competent do not tolerate incest." *Id.* See also B. JUSTICE & R. JUSTICE, *supra* note 1, at 97, who describe her as weak, submissive, frigid, indifferent, and desirous of a role reversal with her daughter. *Id.*

57. J. HERMAN, *supra* note 20, at 50. *See also* Burgess, Holmstrom & McCausland, *Divided Loyalty in Incest Cases*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 115-16 (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi eds. 1978) (mothers and daughters almost always estranged prior to occurrence of incestuous assault); S. FORWARD & C. BUCK, *supra* note 15, at 46 (once incestuous assault commences, daughter feels betrayed by mother for lack of protection).

Gordy, in her work with adult women who were incest victims, states that this feeling of betrayal continues into adulthood and that many women remain angry at their mothers because of their failure to protect them from the father. Gordy, *Group Work That Supports Adult Victims of Childhood Incest*, in SOCIAL CASEWORK 304 (1983).

58. B. JUSTICE & R. JUSTICE, *supra* note 1, at 135. *See generally* S. FORWARD & C. BUCK, *supra* note 15, at 4 (emotional problems within family include isolation, hostility and loneliness); J. HERMAN, *supra* note 20, at 43 (studies indicate high incidence of marital discord and sexual problems within the marriage).

59. S. BUTLER, *supra* note 24, at 115.

60. Summit & Kryso, *supra* note 39, at 54.

61. See B. JUSTICE & R. JUSTICE, *supra* note 1, at 110-18, for a discussion of other factors, such as the physical size of the home, recent excessive changes in the families, financial difficulties, or recent unemployment of the fathers, which may foster the development of an incestuous relationship. *Id. But see* J. HERMAN, *supra* note 20, at 49, who states: "no degree of maternal absence or neglect constitutes an excuse for paternal incest. . . ." *Id.* She concludes that since a father is usually able to command sex from his wife, a lack of spousal contact is in reality not a contributing factor to the occurrence of incestuous assault. *Id.* at 43.

62. Usually there are problems within all familial combinations of the father-mother-daughter triad. Incestuous sexual activity within a family stirs up passions and jealousies that disrupt family life. B. JUSTICE & R. JUSTICE, *supra* note 1, at 28-29. See *supra* notes 45-51 and 53-61, and accompanying text for a discussion of the problems involved in these families.

63. S. BUTLER, *supra* note 24, at 56 (father determines when incestuous relationship develops with child); Summit & Kryso, *supra* note 39, at 54 (father alone responsible for eroticizing relationship with daughter).

64. See *supra* notes 161-82 and 183-99 for two innovative programs that require an offender to admit full responsibility for the assault in order to be accepted into a program.

III. The Disposition of Father-Daughter Incestuous Assault Cases

A. *Initial Procedures*

Police officers may be the initial investigators of incestuous abuse,[65] although incest is also discovered by social workers during the course of working with families,[66] and by reports made to social service agencies.[67] If a determination is made that an incestuous assault has in fact occurred, there are alternative approaches available in the resolution of a case: criminal proceedings may be instituted by the District Attorney's office,[68] a care and protection petition may be filed in the juvenile court,[69] or both these procedures may be

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65. Interviews with James Moran, Chief of Police, Mattapoisett, Massachusetts, in Mattapoisett, Mass. (April 2, 1985, November 7, 1985).

66. Interviews with Beverly F. Baccelli, Senior Social Worker, New Bedford office Massachusetts DSS in New Bedford (July 17, 1985, December 30, 1985) (many CHINS cases (children in need of services) involve adolescents who have been incestuously assaulted), and Barbara Best, Supervisor, Brockton office, Massachusetts DSS and counselor for therapy groups for incestuous fathers, in Mattapoisett, Mass. (June 19, 1985) (overwhelming number of cases referred to the DSS for reasons other than incestuous assault, ultimately found to involve some form of incest).

67. *See* Mass. Gen. Laws Ann. ch. 119, § 51A (West Supp. 1986). In Massachusetts, DSS has 24 hours in which to investigate and evaluate a case when there is reasonable cause to believe that a child's health or safety is in immediate danger. Mass. Gen. Laws Ann. ch. 119, § 51B (West Supp. 1986). If at the end of that period the social worker determines that there are sufficient facts to substantiate the charges, then the referral process to the D.A. as mandated by law must be completed. *Id.* Incestuous behavior is covered under Mass. Gen. Laws Ann. ch. 119 § 51B(4)(e) which allows DSS to notify the D.A. of any incident reportable under § 51A which includes sexual abuse, not just rape. Incestuous behavior is also covered under § 51B(4)(b) which states, "a child has been sexually assaulted, as set forth in sections. . . twenty-two A [and] twenty-three. . . of chapter two hundred and sixty-five." *Id.* These sections define rape to include both natural and unnatural sexual intercourse with a child under sixteen years of age. *See* Mass. Gen. Laws Ann. ch. 265, § § 22A, 23 (West Supp. 1986).

Upon completion of the investigation, or any time during the investigation, if the social worker determines that a violation has occurred, the immediate Supervisor must be notified and the case discussed. Massachusetts Department of Social Services, Procedures for the Implementation of Chapter 288 of the Acts of 1983: The District Attorney Reporting Bill 3 (Sept. 16, 1983) (available in New England Law Review office). The Supervisor reviews the case and records his or her recommendation as to referral to the D.A. *Id.* The recommendation is immediately referred to the Area Director of DSS who indicates "whether the facts in the case meet the criteria for referral to the District Attorney." *Id.* The Regional Director is then immediately notified and is the only person who determines whether to make or withhold the referral to the D.A.'s office. *Id.* The Regional Director must make a decision regarding the referral no longer than five working days after the original referral by the social worker. *Id.* at 4. If a case is referred to the D.A.'s office then a team composed of a member from DSS, the D.A., and a neutral third person should meet to discuss the status of the child and the family. *Id.* at 5. A service plan for the family should be developed and the advisability of prosecution, diversion, or dismissal and the effects of each of these on the family is discussed. *Id.* at 6. The D.A. makes a decision concerning the filing of criminal charges and DSS makes a decision concerning the filing of a care and protection petition in the juvenile court. *Id.*

68. *See* Wulkan & Bulkley, *General Survey Findings Relating to Prosecutorial Practices and Policies*, in Innovations in the Prosecution of Child Sexual Abuse Cases 3 (J. Bulkley ed. 1981).

69. See *infra* notes 131-32 for a discussion of child care and protection petitions.

initiated.[70] A treatment plan may be prescribed in conjunction with any of these alternatives, or substituted as part of a diversionary program.[71] Criminal prosecution is often undertaken since in all states either an incest statute or a child sexual assault statute has been violated.[72] When cases proceed to trial, offenders are often charged under numerous statutes.[73] All states have statutes criminalizing sexual intercourse and sexual contact with children, and forty-four states have statutes criminalizing incest with children.[74] If the incest statute only proscribes intercourse, then incest may be charged only if penetration can be proven.[75] In cases involving other forms of incestuous contact, charges cannot be brought under the incest laws of most states,[76] but can be brought under the child abuse or sexual assault statutes of every jurisdiction.[77] In many cases, however, concern for the welfare of the child and family, as well as the difficulties associated with successful prosecution of an incest case, often lead to an alternative disposition.[78]

B. The Difficulties Associated with Criminal Prosecution

There are various difficulties associated with the prosecution and disposition of incestuous assault cases. The victim is often a young child who may be further traumatized by the proceeding or may not be competent to testify as a witness.[79] Credibility of a victim/witness is frequently a problem in both sexual assault cases and in cases where a child is the witness.[80] Problems of proof are compounded by the lack of eyewitnesses or physical evidence of abuse.[81] Additionally, both acquittal and incarceration may have serious effects on the family.[82]

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70. Bulkley & Wulkan, *Pre-Trial Diversion, Juvenile/Criminal Court Coordination and Other Innovative Approaches in Legal Intervention*, in INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES 15 (J. Bulkley ed. 1981).

71. See *infra* notes 149-60, 183-99 and accompanying text for a discussion of diversionary programs.

72. Kocen & Bulkley, *Analysis of Criminal Child Sex Offense Statutes*, in CHILD SEXUAL ABUSE AND THE LAW 1 (J. Bulkley ed. 1982).

73. *See* Wulkan & Bulkley, *supra* note 68, at 4. Prosecutors may charge the offender with incest, assault and battery, indecent assault and battery, sex offenses, nonconsenting or consenting intercourse, forcible rape, sexual contact with a child, or sodomy. *Id.* Prosecutors also use sexual assault statutes because they allow for stronger penalties, protect step-children and adoptive children, and lead to the filing of multiple charges, which encourages plea bargaining. *Id.*

74. *See* Wulkan & Bulkley, *supra* note 9, at 52. In New Jersey, Michigan, New Hampshire, Ohio, Vermont and Maine, incest with a child is not a crime. *Id.*

75. *See supra* notes 8 and 10 and accompanying text.

76. *See* Wulkan & Bulkley, *supra* note 9, at 52.

77. Bulkley, *Analysis of Civil Child Protection Statutes Dealing with Sexual Abuse*, in CHILD SEXUAL ABUSE AND THE LAW 82 (J. Bulkley ed. 1982).

78. *See infra* notes 83 and 127 and accompanying text.

79. *See infra* notes 83-104 and accompanying text.

80. *See infra* notes 105-10 and accompanying text.

81. *See* Wulkan & Bulkley, *supra* note 68, at 3. *See also* People v. King, 41 Colo. App. 177, 179, 581 P.2d 739, 741 (1978) (generally no corroborating witnesses to sexual molestation).

82. *See infra* notes 124-29 and accompanying text.

1. Effects of Criminal Proceedings on the Victim/Witness

The decision to bring criminal charges against the father can have detrimental effects on the child victim/witness.[83] Parents and even professionals may fail to report suspected cases of sexual abuse out of concern that their actions will exaggerate the trauma already experienced by the child.[84] In incestuous assault cases a child victim/witness is routinely subjected to multiple questioning by the police, social service agencies, medical personnel, the prosecutor's office, and if the case goes to trial, the defense counsel.[85] Since the victim is usually the only witness to the assault, she becomes the prosecutor's most important means of proving that the offense occurred.[86] It becomes crucial that she testify in court, even if it means reliving the experience.[87]

The child victim/witness is further victimized by the manner in which she is treated during the judicial proceeding.[88] Protection for juveniles in the court system extends only to offenders; child victim/witnesses are treated as adults.[89] During the trial she is placed in a totally unfamiliar courtroom, exposed to vocabulary and jargon with which she is unfamiliar, and then made to recite her story.[90] She must confront in open court the father who was her

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83. Burgess, Holmstrom & McCausland, *Counseling Young Victims and Their Families*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 181 (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi eds. 1978), who state that: "[g]oing to court recapitulates the original assault and can assume crisis proportions to the family and victim." *Id. See also* Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take the Testimony of Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995, 997, n.6 (1985) (listing of articles dealing with child victim/witness testimony).

84. MacFarlane, *Sexual Abuse of Children*, in A CURRICULUM ON CHILD ABUSE AND NEGLECT 63 (1978).

85. *Id.* at 64. *See also* Parker, *The Rights of Child Witnesses, Is the Court a Protector or Perpetrator?* 17 NEW ENG. L. REV. 643 (1982).

86. Berliner & Stevens, *Advocating for Sexually Abused Children in the Criminal Justice System*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 48 (B. Jones, L. Jenstrom & K. MacFarlane eds. 1980). *See also* MacFarlane, *supra* note 84, at 56, who states that: "[T]he decision to try a sexual abuse case in a criminal or civil court often depends as much upon . . . the evidence available or the immaturity of the witness as upon the nature or degree of what was actually done to the child." *Id.*

87. *See* Burgess & Holmstrom, *The Child and Family During the Court Process*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 205 (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi eds. 1978). "The court process recapitulates in a psychological manner the original assault situation. The child relives the assault mentally and verbally in a public setting at least three times: at the hearing for probable cause, before the grand jury, and at the superior court level." *Id.*

88. Parker, *supra* note 85, at 643. See also Ahlgren, *supra* note 6, at 515, who states: "The traditional legal and medical remedies have served to make the child a double victim. First, she is a victim within the home. Second, she is a victim within a society that subjects her to traumatic public trials, detrimental foster placements, and insensitive medical personnel." *Id.* Coleman, *supra* note 16, at 267, states: "a legal system that pits a child against a parent can cause more harm than the incestuous act itself." *Id.*

89. BUTLER, *supra* note 24, at 160. "When incestuous offenders are prosecuted, the child victim must undergo the same procedures as adult victims; seldom are any special procedures or protections provided." *Id.*

90. Note, *Parent-Child Incest, Proof at Trial Without Testimony in Court by the Victim*, 15 U. MICH. J. L. REF. 131, 132 (1981-1982). The psychological trauma the child experiences by the incestuous assault is further compounded when the child has to reveal publicly the details of the

abuser.[91] She is further subjected to upsetting questions by the defense attorney who is trying to impeach her.[92] Added to this trauma is the possibility that the child may have been removed from the family and placed in substitute care,[93] or if allowed to remain at home, subjected to pressures and hostility by the rest of the family because of her testimony.[94] All these pressures may be too severe for the child who has already been victimized by her father.[95]

2. Competency of the Victim/Witness

The victim may have difficulty in being adjudged a competent witness because of her age, which is one factor in determining competency.[96] Some jurisdictions have statutes containing an age above which a child is presumed to be competent.[97] The most common ages for the presumption of competency are ten and fourteen,[98] but children younger than that can be judged compe-

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assault. *Id.*

91. Since trials are held in criminal court, traditional courtroom procedure is followed, even when the child is a witness. The sixth amendment right of a defendant to confront witnesses against him includes face-to-face confrontation. It is for this reason that the defendant is present in the courtroom when the child victim testifies. *See* United States v. Benfield, 593 F.2d 815 (8th Cir. 1979) (normally, confrontation includes face-to-face contact at time of cross-examination).

Many states have recently passed videotaping statutes that would allow a victim's testimony to be videotaped and played at trial. *See infra* note 238. These statutes technically do not allow the defendant to confront the witness. It remains to be seen if these statutes will survive a sixth amendment challenge.

92. Coleman, *supra* note 16, at 275.

93. Cobey & Minzer, *Santa Clara County Child Sexual Abuse Treatment Program*, in INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES 24 (J. Bulkley ed. 1981). In discussing treatment of victims prior to the institution of their program, the author states: "in virtually every case it was the victim who was immediately removed from the home. This caused her to feel as if she was the guilty party." *Id.*

94. *See* CHILD SEXUAL ABUSE: INCEST, ASSAULT AND EXPLOITATION 6 (1981). "A child may be rejected by both parents, perceived as guilty, and seen as a betrayer of the family." *Id.*

95. *See* Coleman, *supra* note 16, at 278. A prosecutor may want a child removed from her home so that the family will not pressure the child into recanting her story. *Id.* It is not uncommon for a family to pressure the victim into recanting to avoid prosecution and disgrace. Summit & Kryso, *supra* note 39, at 54.

96. There is no age at which a child is automatically deemed to be incompetent. In Wheeler v. United States, 159 U.S. 523 (1895), the Court allowed a five and one half year old boy to testify, stating what has become a general rule concerning child competency: "[t]he boy was not by reason of his youth, as a matter of law, absolutely disqualified. . . . [T]here is no precise age which determines the question of competency." *Id.* at 524-25. Competency is decided by the trial judge on a case-by-case basis. *See* United States v. Banks, 520 F.2d 627 (7th Cir. 1975), where the court stated: "[c]ompetency of a witness. . . is a limited threshold decision by the trial judge as to whether a proferred witness is capable of testifying in any meaningful fashion whatsoever." *Id.* at 630. See generally Siegel & Hurley, *The Role of the Child's Preference in Custody Proceedings*, XI FAM. L. Q. 1, 33-42 (Spring 1977); Stafford, *The Child As A Witness*, 37 WASH. L. REV. 303, 303-17 (Autumn 1962) for a discussion of the principles involved in determining child competency.

97. Melton, Bulkley & Wulkan, *Competency of Child Witnesses*, in CHILD SEXUAL ABUSE AND THE LAW 126 (J. Bulkley ed. 1982).

98. *Id. See, e.g.*, OHIO REV. CODE ANN. § 2317.01 (Page 1981). "All persons are competent witnesses except. . . children under ten years of age who appear incapable of receiving just im-

tent by the court.[99] Typically, under these statutes, the potential witness must show sufficient mental capacity to observe and receive impressions, to remember and relate the details of the assault(s), to communicate the details, and to show an understanding of the difference between truth and falsity and to have an obligation to tell the truth.[100]

If child developmental standards were applied by the court in determining competency, young victims would have less difficulty in being adjudged competent witnesses.[101] Studies by professionals treating sexual assault victims have shown that children aged four to six, while not possessing orderly concepts of time, space, and distance, can usually distinguish fact from fantasy, and are usually unable to be truly deceptive.[102] Even though professionals believe that children can determine fact from fantasy, because they are not always verbal, or are unable to relate times, dates, and places in an adult manner, very young children have a difficult time being found competent by the court.[103] Children

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pressions of the facts and transactions respecting which they are examined, or of relating them truly." *Id.* With this type of statute a child over ten is not presumed incompetent while the determination of competency for a child less than ten is left to the court.

99. *See* Kelluem v. State, 396 A.2d 166 (Del. 1978) (court acted within discretion in finding four year old witness qualified); State v. Pinkham, 411 A.2d 1021 (Me. 1980) (trial court acted within discretion in finding eight year old competent to testify for state in criminal case); State v. St. John, 120 N.H. 61, 62-63, 410 A.2d 1126, 1127 (1980) (trial court acted within discretion in finding six year old competent); Commonwealth v. Short, 278 Pa. Super. 581, 420 A.2d 694 (Pa. Super. Ct. 1980) (trial judge did not abuse discretion in finding nine year old competent).

100. For a discussion of these criteria see Wheeler v. United States, 159 U.S. 523 (1895); Burnham v. Chicago GWRR, 340 Mo. 25, 100 S.W.2d 858 (1937); State v. Starks, 472 S.W.2d 407, 408 (Mo. 1971). *See also* Litzkuhn v. Clark, 85 Ariz. 355, 359, 339 P.2d 389, 392 (1959)(competency to testify is determined by degree of understanding and knowledge); State v. Segerberg, 131 Conn. 546, 547, 41 A.2d 101, 102 (1945) (tests for determining competency are: "sufficient intelligence and a proper appreciation of the obiligation of an oath. . . ."); Rueger v. Hawks, 150 Neb. 835, 846, 36 N.W.2d 236, 244 (1949) (competency depends upon child's capacity and intelligence, and appreciation of difference between truth and falsehood); State v. Collier, 23 Wash. 2d 678, 683-89, 162 P.2d 267, 270-75 (1945) (intelligence and not age is proper test by which competency of infant is determined).

101. Berliner & Stevens, *supra* note 86, at 48. *See* Melton, Bulkley & Wulkan, *supra* note 97, at 131-33.

102. Berliner & Stevens, *supra* note 86, at 48.

103. *See* The Boston Globe, July 12, 1985, at 23, col. 2. A three and one half year old girl, originally judged competent to testify at the trial of her father who was accused of raping her, was later deemed incompetent. *Id.* After initially testifying at the trial, she refused to answer further questions. *Id.* The judge requestioned the girl about the meaning of the word punishment and its synonyms in an attempt to see if the child understood the concept of lying. *Id.* When the child did not know the definitions, she was adjudged to be an incompetent witness. *Id.* As a result, the case was dismissed. *Id. See also* Boardman, *Protecting Child Victims*, The Boston Globe, Aug. 7, 1985, at 17, col. 1. Dr. Boardman, the examining physician in that case stated: "It is tragic when a child is a victim. It is unnecessary that the same child should subsequently be subjected to a system that is unduly elaborate, confusing and may deny justice to a child simply because of age. Such a system victimizes the child a second time." *Id. But see* People v. Damon H., 165 Cal. App. 3d 471, 211 Cal. Rptr. 623 (1985). A two year, nine month old child's complaint of sexual assault was admitted as a spontaneous declaration exception to the hearsay rule. *Id.* at 625-26. This testimony was supported by a doctor who stated that the child had suffered a trauma caused by a blunt instrument. *Id.* The testimony was sufficient to sustain a petition finding that the juvenile defendant violated sexual assault statutes. *Id.* at 628.

aged six to eleven have been found to seldom lie about major issues, especially those concerning justice and equality.[104] When children are uncomfortable in a courtroom setting, the resulting testimonial difficulties lead to some cases being unsuccessfully prosecuted.

3. Credibility and Corroboration of the Victim/Witness's Testimony

The child victim/witness who is adjudged competent may have difficulty in being deemed a credible witness. A child is often confused in the courtroom because of the language used, and thus may make inappropriate responses.[105] The presence of the perpetrator in the courtroom may prevent the child from focusing on the questions asked.[106] When a child becomes confused or misunderstands the questions, her credibility is jeopardized, since her responses may be mistakenly viewed as deceit.[107]

There is frequently a credibility problem with a victim/witness in sexual assault cases, and this is especially true when the victim/witness is a child.[108] The credibility of the child's testimony can be enhanced when the following descriptions or situations are present: multiple incidents happening over a period of time; progression of sexual acts from less intimate to more intimate; direct or implied elements of secrecy; elements of pressure and coercion to begin and continue the contact as well as to prevent disclosure; and explicit details of sexual behavior.[109] Since these kinds of descriptions are typical of the dynamics of incestuous abuse, a child who describes these incidents most probably has been a victim of incestuous assault.[110]

While most jurisdictions no longer require corroborating evidence in most circumstances,[111] additional evidence is often needed to prove the defendant

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104. Berliner & Stevens, *supra* note 86, at 48.

105. See *supra* notes 88-95 and accompanying text for a discussion of problems associated with a child's testimony.

106. *See* Berliner & Stevens, *supra* note 86, at 19. Children are reluctant to challenge the authority of a parent, and a child may be fearful of retaliation by that parent. *Id.* If the father denies the assault, the child is pitted against the father in an adversarial role. Summit & Kryso, *supra* note 39, at 54.

107. Leaman, *Sexual Acts Against Children: Medical-Legal Aspects*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 32 (B. Jones, L. Jenstrom & K. MacFarlane eds. 1980). *See* Swann, Coffey, Courtney, Moore & Moriarity, *Johnson County Child Sexual Abuse Treatment Program*, in INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES 44 (J. Bulkley ed. 1982), who state: "[c]hildren rarely lie about sexual matters. *Id.* In the process of investigation, children distinguish fact from fantasy and will often understate the actual abuse in order to protect the offender." *Id.*

108. Lloyd, *The Corroboration of Sexual Victimization of Children*, in CHILD SEXUAL ABUSE AND THE LAW 103-06 (J. Bulkley ed. 1982). See *supra* note 20 for a discussion of Wigmore's attitude concerning the credibility of victims of sexual assault. *See also* Weiss, *Incest Accusation: Assessing Credibility*, 11 J. PSYCHOLOGY & LAW 305, 307 (Fall 1983) (uncommon for children to make accusations of sexual abuse and uncommon for accusation to be product of child's sexual wishes and fantasies).

109. S. SGROI, HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE 70-72 (1982).

110. *Id.*

111. Lloyd, *supra* note 108, at 106-07. Corroboration is not required in most jurisdictions, but prosecutors seem reluctant to prosecute without corroborating evidence. Wulkan & Bulkley,

guilty beyond a reasonable doubt,[112] as well as to establish the credibility of the witness. Eyewitnesses and confessions are the strongest forms of corroboration, although when these are present there is usually plea bargaining.[113] Another means of corroborating the victim's testimony when the assault has recently occurred is through evidence gained by an examination of the victim's clothing[114] or the scene of the crime.[115] Evidence of this nature is seldom present in these cases since the assault usually has occurred too far in the past.[116] A comprehensive medical examination may result in the discovery of evidence,[117] but in fact, this discovery seldom occurs in incest cases, either because intercourse has not taken place, force has not been used, physical injuries have healed, or evidence has been destroyed by the passage of time.[118] Corroborating evidence may also include evidence of prior sexual contacts between the parties,[119] or testimony from the victim's sisters that they were also subjected to similar incestuous assault by the father.[120] Additionally, behav-

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supra note 68, at 3. Some states require corroboration for certain sex offenses. GA. CODE ANN. § 26-2018 (1978), MISS. CODE ANN. § 97-3-67 (1972) and OHIO REV. CODE ANN. § 2907.06 (Page 1982). Texas requires corroboration if the offense is not reported within six months. TEX. CRIM. PROC. CODE ANN. § 38.07 (Vernon 1975). Idaho requires corroboration when the chastity or veracity of the witness has been impeached. State v. Gee, 93 Idaho 636, 638-39, 470 P.2d 296, 297-98 (1970). In Illinois corroboration is needed only when the testimony is not clear and convincing. People v. Taylor, 64 Ill. App. 3d 279, 281, 381 N.E.2d 303, 305 (1978). "When a conviction is based solely on the testimony of the complaining witness, who is a child, and the defendant denies the charge, the testimony of that witness must be clear and convincing or must be corroborated by other substantial evidence." People v. Henderson, 102 Ill. App. 2d 152, 157, 243 N.E.2d 605, 607(1968). Washington D.C. requires no corroboration when the victim is a mature female as determined by the trial judge. Robinson v. United States, 452 A.2d 354 (D.C. 1982). Nebraska was the last state to always require corroboration for sex offenses against children. The revision of this statute, effective March 26, 1985, now states: "the testimony of a victim shall be entitled to the same weight as the testimony of victims of other crimes under this code." NEB. REV. STAT. § 28-703(b) (1985).

112. *See* State v. Foust, 588 P.2d 170, 173 (1979). In this case the court stated: "no conviction of the defendant can be had in the absence of competent, admissible evidence constituting proof beyond a reasonable doubt (1) that the crime of incest was committed, and (2) that it was committed without the consent of the prosecutrix." *Id.*

113. Lloyd, *supra* note 108, at 107.

114. S. SGROI, *supra* note 109, at 318.

115. *Id.* at 319.

116. *Id.* at 318.

117. Sgroi, *Comprehensive Examination for Child Sexual Assault: Diagnostic, Therapeutic, and Child Protection Issues*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 144 (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi eds. 1978). Examining physicians usually find little or no evidence of physical trauma. Stern & Meyer, *Family and Couple Interactional Patterns In Cases of Father/Daughter Incest*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 83 (B. Jones, L. Jenstrom & K. MacFarlane eds. 1980).

118. S. SGROI, *supra* note 109, at 318.

119. *See* Woods v. Indiana, 250 Ind. 132, 144, 235 N.E.2d 479, 486-87 (1968). State v. Crossman, 229 Kan. 384, 387, 624 P.2d 461, 464 (1981); State v. Haseltine, 120 Wis. 2d 92, 97, 352 N.W.2d 673, 676 (1984); Commonwealth v. Ritchie, 324 Pa. Super. 549, 551, 472 A.2d 220, 223 (Pa. Super. Ct. 1984).

120. *See* People v. Hammer, 98 Mich. App. 471, 476, 296 N.W.2d 283, 286 (1980); State v. Keithly, 218 Neb. 707, 712, 358 N.W.2d 761, 763 (1984); State v. Sutton, 4 N.C. App. 664, 665, 167 S.E.2d 499, 500 (1969). *But see* People v. McMillan, 86 Ill. App. 3d 208, 211, 407 N.E.2d

ioral symptoms which are indicators of sexual abuse may be admitted as corroborating evidence.[121]

4. Conviction and Sentencing

Offenders frequently plead guilty in intra-family abuse cases rather than face a public trial.[122] It also appears that prosecutors only go to trial when they have a strong case.[123] When an offender is convicted in the criminal court, the disposition that results may vary. The sentences imposed range from incarceration, incarceration with work release, probation with or without treatment, or deferred or suspended sentences.

Cases that proceed to trial, but result in an acquittal, can have devastating effects on the victim who may then face the hostility of her family for testifying against the father.[124] In addition, a child who publicly accuses her father from the witness stand may be in danger of physical harm when the father is acquitted and left untreated, and both are living in the same home.[125] Similarly, if the case is not prosecuted, the victim may feel abandoned.[126]

The trial process in the criminal justice system has the potential to inflict serious harm on the victim and the family. Incarceration results in the break-up of the family, which may in turn result in financial instability and emotional crises.[127] In fact, the harm that may be done to the victim by testifying

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207, 210 (1980) (evidence of incestuous assault with daughter not allowed to show intent in similar acts with another daughter).

121. Berliner, Blick & Bulkley, *Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development*, in CHILD SEXUAL ABUSE AND THE LAW 172 (J. Bulkley ed. 1982). Neurasthenia symptoms, such as bedwetting, fatigue, weakness, stomachache or headache which are present without physiological cause, and depression, isolation, drug or alcohol abuse may be exhibited by a sexually abused child. *Id.*

122. Wulkan & Bulkley, *supra* note 68, at 6, reported that prosecutors who participated in a survey indicated that two-thirds of the offenders pleaded guilty. *Id.* This survey was conducted by the Child Sexual Abuse Project, National Legal Resource Center for Child Advocacy and Protection, American Bar Association, Josephine Bulkley, Director. A total of 241 questionnaires were sent to prosecuting attorneys in the 50 largest cities in the United States and the three to five largest cities in each state. *Id.* at 1. Forty-six more were sent directly to prosecutors or sexual abuse treatment programs known to the center. *Id.* Approximately one fourth of the questionnaries were returned. *Id.* The authors do not intend the survey results to represent national statistics since the survey was not a random sample. *Id.* For a reproduction of the questionnaire see Appendix A in INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES 155 (J. Bulkley ed. 1981).

123. Wulkan & Bulkley, *supra* note 68, at 6. Approximately 70% of the cases that went to trial resulted in a conviction. *Id.*

124. Giarretto, *supra* note 2, at 37.

125. MacFarlane, *supra* note 84, at 65.

126. Giarretto, *supra* note 2, at 37.

127. Urzi, *Cooperative Approaches to Child Protection, A Community Guide*, in CHILD ABUSE AND NEGLECT LITIGATION: A MANUAL FOR JUDGES 143-44 (1981). Incarceration does not treat the problem: for the father is punished, when in fact, the entire family needs treatment. *Id.* at 144. "Child abusers often see themselves as victims . . . .Incarceration may tend to reinforce these feelings and may lead to increased hostility and resentment. These feelings may in turn lead to further abusive acts." *Id.* at 143. *See also* J. BULKLEY & H. DAVIDSON, CHILD SEXUAL ABUSE LEGAL ISSUES AND APPROACHES 8-10 (1981). Incarceration may create guilt feelings in

is potentially so great, that any advantages gained by criminally prosecuting the father[128] may be negated by any risk to the victim.[129]

C. *Juvenile Court Disposition*

Proceedings in the juvenile court may be initiated regardless of whether a criminal prosecution is undertaken.[130] In all states, statutory standards exist for care and protection proceedings in the juvenile court when a parent has abused a child.[131] A care and protection petition is brought by the social service agency to obtain temporary legal and physical custody of the child when the child is at risk or when the family has not fully accepted a treatment plan.[132] Temporary custody can evolve into permanent custody if the court deems that the family has not consented to treatment or that the child would be at risk of further assault if allowed to remain in the home.[133] Juvenile court proceedings tend to be less traumatic to the victim and family than criminal prosecutions, in that the child may never have to testify and also that the proceedings are private.[134] There is a less rigorous burden of proof needed in a

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the victim who views herself as being responsible for sending the father to jail and breaking up the family. *Id.*

128. A criminal conviction assures the removal of the offender from the home and terminates his access to the child. Davidson, *Sexual Abuse of Children - Effective Utilization of the Legal Systems*, in CHILD ABUSE AND NEGLECT LITIGATION: A MANUAL FOR JUDGES 145 (1981). A conviction is also proof to the community that the need for justice has been served. *Id.* at 146.

129. See *supra* notes 83-95 and accompanying text for a discussion of potential traumatic effects on the victim/witness. The child may be at risk when the father is released from incarceration since punishment alone rarely brings about a change in behavior. Giaretto, *Coordinated Community Treatment of Incest*, in SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 231 (B. Jones, L. Jenstrom & K. MacFarlane eds. 1980).

130. *See infra* notes 131-32 and accompanying text.

131. PROTECTION OF ABUSED VICTIMS: STATE LAWS AND DECISIONS 83 (1983). *See also* MASS. GEN. LAWS ANN. ch. 119, § 24 (West Supp. 1985) (authorizing any person to file care and protection petition when family of child whose abuse has been reported to D.A. refuses services offered to them by social service agency).

132. Interviews with Beverly F. Baccelli *supra* note 66. Generally, a care and protection (dependency) petition requesting temporary legal and physical custody of the child by the social service agency is filed if a social worker deems that there is any risk to a child. *Id.* If a situation exists where the father remains in the home, the mother does not believe the child or cannot protect the child, the family refuses treatment, or treatment appears to be unsuccessful, then the DSS may request a full hearing in order to gain permanent custody of the child. *Id.* When a child is in temporary custody, she is not necessarily removed from the home; however, when there is permanent custody, she is usually removed. *Id.*

133. *See* MASS. GEN. LAWS ANN. ch. 119, § § 24-25 (West Supp. 1985). *See also* interview with Barbara Best, *supra* note 66. Most fathers are emotionally involved with their families and do not want to see the family unit dissolved. *Id.* For many of them, the threat of the loss of the family is sufficient to encourage them to enter treatment. *Id.* For this reason social workers will use the possibility of seeking a care and protection petition to pursuade a family to enter treatment. *Id.*

134. Ahlgren, *supra* note 6. "Neither the juvenile courts nor the child protection services pits family members against one another in an adversarial posture." *Id.* at 508. Treatment rather than punishment is the major orientation of the juvenile courts when dealing with incestuous assault cases. *Id.* at 509.

care and protection proceeding than in a criminal prosecution.[135] Additionally, the parents may be less likely to contest the charges and submit to a treatment plan since there is no threat of incarceration to the father.[136] After the initial interview, the victim may not have to relate the assault again in juvenile court. This protects the child not only from the trauma of testifying, but also from the family's anger at her for having done so.[137] The advantage of bringing a care and protection proceeding in juvenile court is that the court's focus is on protecting the child and monitoring treatment of the family.[138] It is only in a juvenile court that the social service agency can be ordered to provide services for the child.[139]

An aspect of the juvenile court process that may be damaging to the child, however, is the possibility that she may be removed from the home, often against her wishes.[140] Removal of the child may serve to punish her further,[141] for it is she who is treated as the guilty party, since the father/perpetrator remains in the home while she is forced to leave.[142] The child may also be traumatized by the placement in substitute care.[143] When a father remains untreated, or unpunished by the judicial system, or a mother is unable to protect the child, there is always the danger of further incestuous assault once the initial reaction to the relationship has dissipated.[144] Removal from the home may be the only means of protecting the child until the father is treated or the mother receives services that result in her being able to protect the child. It is

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135. Lloyd, *supra* note 108, at 103. "[T]he burden should rest on the petitioner to prove by clear and convincing evidence that the child is endangered. . . ." *National Advisory Committee on Criminal Justice Standards and Goals, Standard 13.7 - Endangered Children, Standard of Proof*, in CHILD ABUSE AND NEGLECT LITIGATION: A MANUAL FOR JUDGES 97 (1981). *See* Mele-Sernowitz, *Parental Sexual Abuse of Children as a Therapeutic Tool for Families, quoted* in PROTECTION OF ABUSED VICTIMS: STATE LAWS AND DECISIONS 110-12 (1983). The author has suggested the development of a sexually abused child syndrome, which is a *res ipsa loquitur* approach to be used when the evidence is scarce or circumstantial. *Id.* Using this approach, the social service agency would have to show in juvenile court that the sexual abuse would not have happened without the father's involvement. *Id.* For pre-adolescents, if any two of the following categories or symptoms are present, then it is an indication that sexual abuse has likely occurred: 1) neurasthenia symptoms without any physiological basis; 2) acting out behavior; 3) father denies the incest and this is coupled with (a) excessive drinking with blackouts, (b) no concern about the incidence(s), (c) father claims it is part of sex education; 4) physical evidence of sexual abuse or activity; 5) medical evidence of sexual activity; 6) sibling complaint of incest; 7) child assumes the maternal role in the home; 8) gender role confusion in the home; 9) father's excessive concern about the child's activities. *Id.*

136. J. BULKLEY & H. DAVIDSON, CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES 6 (1981).

137. Davidson, *supra* note 128, at 146.

138. B. JUSTICE & R. JUSTICE, *supra* note 1, at 242.

139. Davidson, *supra* note 128, at 145.

140. "Separating the child from her family increases her guilt feelings, adding to her belief that she is being punished for her part in the incestuous affair." Coleman, *supra* note 16, at 278.

141. Zaphiris, *supra* note 25, at 6.

142. Cobey & Minzer, *supra* note 93, at 24. *See supra* note 140 and accompanying text.

143. MASSACHUSETTS DEPARTMENT OF SOCIAL SERVICES, *supra* note 22, at 4.

144. R. GEISER, *supra* note 2, at 63. When the father remains in the home it is often essential to remove the child from a physically dangerous situation or one in which she is under pressure to withdraw the complaint. S. SGROI, *supra* note 109, at 104.

also possible that the parents may separate or that the child may never return to live with the parents.

IV. INNOVATIVE PROGRAMS

A. General Procedures

As an alternative or supplement to the criminal and juvenile justice systems, and in an attempt to foster treatment for the entire family, prosecutors, police departments, and social service agencies have been working together in recent years to develop programs that are oriented toward treating the entire incestuous family.[145] Treatment, as opposed to incarceration, is preferred in counties with innovative programs even when the father pleads guilty in a criminal prosecution.[146] This is especially true when the father is not considered dangerous and appears amenable to rehabilitation.[147] The court ensures participation by the offender in a treatment program by incorporating treatment in the court's disposition of the case.[148]

In some programs the offender begins to receive treatment prior to trial, conviction, or entry of judgment.[149] In a pre-trial diversionary program the offender, prior to trial or entry of judgment, usually agrees to enter and complete a treatment program, in which case the criminal proceedings are stayed.[150] Upon successful completion of the program, the charges are dismissed.[151] Several states have statutes authorizing diversion for intra-family sex offenders,[152] while some jurisdictions authorize diversion on a case-by-case basis.[153] Jurisdictions that do not allow diversion prior to trial either do not have a statute authorizing the program, believe that the crime is too serious to warrant diversion, and that the deterrent effect of prosecution needs to be maintained.[154] In both pre-trial diversionary programs and in situations where the father pleads guilty, treatment goals are stated in a contract signed by the offender and the District Attorney.[155] Treatment in a program typically lasts two years,[156] and may be monitored by the court probation department, the District Attorney's office, or by a special unit devised specifically for that pur-

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145. *See infra* notes 149-99 and accompanying text.

146. Bulkley & Wulkan, *Pre-trial Diversion, Juvenile/Criminal Court Coordination, and Other Innovative Approaches in Legal Intervention*, in INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES 12-14 (J. Bulkley ed. 1981).

147. C. FORWARD & S. BUCK, *supra* note 15, at 150. Most fathers are not considered dangerous and do not require incarceration. *Id.*

148. *See infra* notes 155-58, 170-72, 176-78, 188-91 and accompanying text.

149. *See* Bulkley & Wulkan, *supra* note 146, at 9-15.

150. *Id.* at 9-10.

151. *Id* at 9.

152. *Id.* at 20 n. 28.

153. *Id.* at 10-11. See MASS. GEN. LAWS ANN. ch. 276A, § § 1-9 (West Supp. 1986) for the Massachusetts diversion statute.

154. Bulkley & Wulkan, *supra* note 146, at 14. *But see* Froelich, *Family Crises Intervention*, 29 JUV. & FAM. CT. J. 3 (1978), *reprinted in* CHILD ABUSE AND NEGLECT LITIGATION: A MANUAL FOR JUDGES 151 (1981) (percentage of reported cases resulting in conviction and sentencing so small that deterrence meaningless).

155. Bulkley & Wulkan, *supra* note 146, at 12-13.

156. *Id.*

pose.[157] During treatment, the offender must meet the conditions of the agreement in order to avoid the threat of prosecution, or incarceration if a guilty plea has already been entered.[158]

Programs that consist of treatment have been very successful in rehabilitating incestuous fathers, and it appears that a majority of fathers can be treated.[159] The rate of recidivism drops sharply when an offender successfully completes the goals set in a treatment program.[160]

B. The Child Sexual Abuse Treatment Program, Santa Clara County, California

One of the most successful programs in the United States for treating incestuous families, and the program that has become the prototype for other programs throughout the country, is the Child Sexual Abuse Treatment Program (CSATP) of San Jose, California, started in 1971.[161] This program operates on a hypothesis that both the reporting of incestuous assault cases and the conviction rate for such assaults will increase when treatment is the focus of the court's disposition.[162] During the first two weeks, the family averages over forty hours of direct services.[163] This includes individual counseling as well as self-help groups.[164] The individual treatment order is: 1) individual counseling for mother and child; 2) individual counseling for the father; 3) mother-child counseling; 4) marital counseling; 5) father-child counseling; 6) family counseling; 7) group counseling.[165] When an incest case is reported the District Attorney files a criminal complaint and the Juvenile Probation Department

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157. *Id. See also* note 190 and accompanying text.

158. Bulkley & Wulken, *supra* note 146, at 9-10.

159. *See* S. FORWARD & C. BUCK, *supra* note 15, at 43. *See also supra* notes 179-82, 198-99 and accompanying text.

160. Swann, Coffey, Courtney, Moore & Moriarity, *supra* note 107, at 43, 52. The rate of recividism is extremely low when the offender satisfies the terms of his agreement. Bulkley & Wulkan, *supra* note 146, at 14.

161. The CSATP was developed by the Juvenile Probation Department in Santa Clara, California. Cobey & Minzer, *supra* note 93, at 24. The CSATP has been utilized the State of California Child Sexual Abuse Training and Demonstration Center since 1977. Cobey & Minzer, *id.* at 25. The objectives of this program are: to provide immediate counseling and practical assistance to both child and the family; to hasten the reconstruction of the family and of the marriage; to coordinate all official services and insure comprehensive case management; to employ a treatment model that fosters self-managed growth; and to facilitate expansion and autonomy of self-help groups to educate the public and to provide materials for other communities. Giarretto, *supra* note 2, at 42. The self-help groups, Parents United and Daughters-Sons United are a major component of the treatment program. Cobey & Minzer, *supra* note 93, at 28, 30. The Center has become a national and international training headquarters for Parents United and Daughters-Sons United chapters from across the country and Canada and Australia. Telephone interview with Chuck Lent, staff person, Chapter Development, Parents United (April 2, 1986). There are now approximately one hundred fifty chapters in the United States. *Id.* The State of California is the major funding agent for the Center, providing $350,000 a year to train professionals from Northern California. *Id.*

162. Cobey & Minzer, *supra* note 93, at 24-25.

163. *Id.* at 30.

164. *Id.*

165. *Id.*

files a dependency petition.[166] In order for a family to be admitted into the CSATP the incestuous assault has to have been reported to the authorities.[167] The offender does not have to admit guilt or acknowledge the assault to begin participation in the program;[168] although he must later admit the assault and plead guilty to the charge in criminal court.[169] Both the criminal and the juvenile courts mandate participation in the CSATP,[170] which is committed to treatment with some form of incarceration, with or without work furlough.[171] Proceedings remain confidential throughout the entire program unless the offender breaches the court order, or assaults the victim or another child.[172]

Since the family is introduced into the program after the victim has been interviewed by the police or juvenile probation officer,[173] the child does not later have to repeat the story numerous times, or even go to court.[174] The daughter is frequently allowed to decide whether to remain at home or be separated from the family.[175] If the offender does not comply with the mandated treatment plan, he may be asked to leave the program, which may result in imprisonment, the child being placed or remaining in foster placement, or the family's loss of custody of the child.[176] The offender remains in treatment until his counselor and the counseling staff determine that he has successfully completed the program.[177] Successful completion results in the guilty plea be-

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166. *Id.* at 27. In California, the Juvenile Probation Department and workers are what are termed Child Protective Services and workers in other states. *Id.* at 25-26.

167. *Id.* at 27.

168. *Id.* at 28.

169. *Id.*

170. *Id.* Participation is not an alternative to the criminal and juvenile justice systems, but an integral part of both systems. *Id.* "In its eleven years of existence, the program has determined that counseling and self-help groups alone are not enough. . . . [T]he internal changes that the parents must make are too painful and too frightening to be undergone voluntarily." *Id.*

171. *Id.* at 29. Generally an offender who pleads guilty is given a county jail term with work furlough, probation up to five years to ensure treatment, a suspended prison term, or court ordered volunteer service. *Id.* at 28. An offender who fails to plead guilty usually goes to prison. *Id.*

172. *Id.* at 29. This program thus avoids the stigma placed on a family when the incest is publically disclosed and also avoids the financial instability associated with the father losing his job. *Id.*

173. *Id.* at 26. The juvenile probation officer does the investigation of the reported abuse and a trained police officer collects all the evidence needed to charge the offender. *Id.*

174. *Id.* at 25. Since participants in the program must plead guilty, the victim never needs to testify.

175. Giarretto, Giarretto & Sgroi, *Coordinated Community Treatment of Incest*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 234-35 (A. Burgess, A. Groth, L. Holmstrom & S. Sgroi eds. 1978). See *supra* notes 140-44 and accompanying text for a discussion of problems associated with removal of child from the home as a result of a juvenile care and protection petition.

176. Cobey & Minzer, *supra* note 93, at 31.

177. *Id.* at 31. The criteria for determining successful completion of the program include: 1) the offender poses no risk to the victim or other children; 2) "he has apologized to the victims and taken full responsibility"; 3) "he has established a trust bond with the victims"; and 4) he has acquired self-esteem, and parenting and social skills. *Id.* When the offender has reached this point, the counselor notifies the probation office that counseling is no longer needed. *Id.* The probation office makes the final decisions and notifies the court. *Id.*

ing changed to not guilty and the case being dismissed by the court.[178]

In the first ten years of its existence, over eighty per cent of the approximately three thousand offenders referred to the program have successfully completed it; this includes ninety-five per cent of all incestuous offenders who were charged and referred to the CSATP.[179] The recidivism rate was less than one per cent among those who had successfully completed the program.[180] Ninety per cent of the families were reunited, most within the first month.[181] Normal father-daughter relationships were achieved in most families.[182]

C. Johnson County Child Sexual Abuse Treatment Program, Olathe, Kansas

The Johnson County program, a coordinated effort by the District Attorney, Social and Rehabilitative Services and the Johnson County Mental Health Center, was initiated in June, 1979, out of concern for the increased reports of incidences of sexual abuse and high rate of recidivism among offenders.[183] The original task force was trained by the CSATP in San Jose in 1980.[184] Designed specifically for incestuous families,[185] the goal of the program is the rehabilitation of sexual offenders through a pre-trial diversionary program which is an alternative to full prosecution and "motivate[s] the offender to participate in extensive" treatment.[186] One hypothesis of the program is that the use of the criminal justice system is necessary to motivate offenders and their families to receive treatment.[187]

The offender must request diversion at his first appearance in court when he is charged with the offense.[188] At a multi-disciplinary diversion conference, at which time the offender must acknowledge full responsibility for the assault, the District Attorney decides whether to divert, or to proceed with the criminal prosecution.[189]

If diversion is the decision, an agreement is signed by the offender, the

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178. *Id.* at 32.

179. *Id.* There have been no recent statistics kept because of the lack of funds. Telephone interview with Chuck Lent, *supra* note 161. When Santa Clara County withdrew its funding in 1982, all monies were used for services. *Id.*

180. Cobey & Minzer, *supra* note 93, at 32.

181. Giarretto, Giaretto & Sgroi, *supra* note 175, at 233.

182. *Id.*

183. Swann, Coffey, Courtney, Moore & Moriarity, *Johnson County Child Sexual Abuse Treatment Program*, in INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES 43 (J. Bulkley ed. 1982). The recidivism rate had reached 34% by 1978. *Id.*

184. *Id.*

185. *Id.* at 46.

186. *Id.* at 43.

187. *Id.* at 44.

188. *Id.* at 47.

189. *Id.* at 46-47. Criteria for considering diversion include: 1) nature and circumstances of the assault; 2) acceptance of responsibility for the assault and remorse for its occurring; 3) evidence indicating the offender will comply with and benefit from the program; 4) provisions for restitution by the offender; 5) D.A. can effectively prosecute the case; 6) prior criminal record of the offender. *Id.* at 47.

District Attorney and defense counsel.[190] Criminal proceedings are stayed until the District Attorney files a motion to dismiss or reinstates prosecution.[191]

Initial services provided to the victim and family include medical, social, and mental health services.[192] Each family member then receives individual and family therapy.[193] Offenders must attend specialized group sessions.[194] The average length of treatment for a family is twelve to eighteen months.[195]

Failure of the offender to attend required sessions may result in revocation of diversion, although unresponsiveness to treatment will not.[196] When an offender successfully completes a diversionary program, a district court judge dismisses the case with prejudice.[197]

During its first year of operation, this program was the method of disposition for sixty-five per cent of the charged sexual offenders.[198] There was no recidivism during the first year of the program among offenders who successfully completed the program.[199]

V. Effects of the Incestuous Assault on the Victim and Present Treatment Goals for the Incestuous Family

A. Effects of the Assault on the Victim

Regardless of the disposition concerning the father, it is imperative that the victim receive counseling, since the potential for damage is so great.[200] A child victim of incest suffers the loss of her inviolability and also experiences a

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190. *Id.* at 48. The agreement may include: payment of court and diversion fees, a change in residence, employment, non-drinking, and avoidance of certain people and places. *Id.*

191. *Id.*

192. *Id.* at 49.

193. *Id.* at 50.

194. *Id.*

195. *Id.*

196. *Id.* at 50-51.

197. *Id.* at 51.

198. *Id.* at 52.

199. *Id. See also* Tipple, Fox & Downey, *Boulder County Child Sexual Abuse Treatment Program*, in Innovations in the Prosecution of Child Sexual Abuse Cases 119 (J. Bulkley ed. 1981). From June, 1979, to June, 1981, a program in Boulder, Colorado, for incest offenders received 220 referrals. *Id.* at 129. Seventy-one percent of the offenders pleaded guilty; sixty-two of these participated in the diversionary program. *Id.* There was no recidivism among the offenders who successfully completed the program. *Id.*

For a discussion of other innovation programs, see the following articles which appear in Innovations in the Prosecution of Child Sexual Abuse Cases (J. Bulkley ed. 1981): Dutton & Gazzo, *Polk County Intra-Family Sexual Abuse Program, Des Moines, Iowa* 84; Wenk & Server, *The Baltimore Network for Intervention, Prosecution and Treatment of Intra-Family Child Sexual Abuse Cases, Baltimore, Maryland* 99; Edelman, *Incest-Diversion Program, Dayton, Ohio*, 108; Berliner, *King County's Approach to Child Sexual Abuse, Seattle, Washington* 112; Anderson, *Sexual Assault Services Hennepin County Attorney's Office, Minneapolis, Minnesota* 130.

200. DeVine, *supra* note 2, at 27. The impact of the incestuous assault can be lessened by the techniques used in crisis intervention. *Id. See also* D. Finkelhor, *supra* note 1, at 101, who states: "[o]ur findings give full support to the belief that father-daughter incest is indeed the most traumatic kind of sexual experience that can occur." *Id.*

loss of trust in the adults in her life.[201] Victims may exhibit the effects of the abuse by sexually acting out, or by developing learning problems in school.[202] Other victims may develop mistrust of adults, fear, anxiety, confusion, self-hate, or alienation from peers.[203] The severity of the effects on the daughter are determined by such factors as the duration of the relationship,[204] the degree of force or violence used,[205] the degree of fear or shame felt by the victim,[206] and the disruption caused by the termination of the relationship.[207] Older girls seem to experience the relationship as being more traumatic than younger children, possibly because they are more aware of what is happening and are also more likely to resist, necessitating the use of force or violence.[208]

Victims of incest are also more likely to suffer pathological developments in later life.[209] Common manifestations are drug abuse, alcoholism, and suicidal tendencies.[210] Incest victims also experience more physical symptoms, marital conflicts, and difficulties with interpersonal relationships than the general population.[211]

The effects of incest are frequently generational. Children who have lived within an incestuous family have had poor role models for parents.[212] In many instances, mothers of incest victims were themselves abused children.[213]

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201. S. BUTLER, *supra* note 24, at 5. If the mother denies that the assault occurred, she has in effect abandoned the child and denied her the strong relationship needed for successful treatment. Coleman, *supra* note 16, at 272.

202. S. BUTLER, *supra* note 24, at 37.

203. CHILD SEXUAL ABUSE: LEGAL ISSUES AND APPROACHES 3-4 (Monograph of the National Legal Resource Center for Child Advocacy and Protection, A.B.A. (1980)).

204. J. HERMAN, *supra* note 20, at 29.

205. *Id.*

206. Sgroi, *supra* note 2, at 135.

207. *Id. See also* D. FINKELHOR, *supra* note 1, at 99 (severity of trauma related to age difference between child and offender); C. FORWARD & S. BUCK, *supra* note 15, at 52 (mother's reaction key factor in determining emotional harm to child); Berliner & Stevens, *supra* note 86, at 48 (child feels blameworthy when mother views child as changed by assault).

208. D. FINKELHOR, *supra* note 1, at 100-01.

209. J. HERMAN, *supra* note 20, at 29. *See also* Gordy, *supra* note 57, at 303. Women who were incest victims as children continue to experience difficulty in dealing with the trauma of the incest and assault. *Id.* Reactions can include either withdrawing or acting out behavior. *Id.* Additionally, these women find it difficult to combine sex and affection with the same man. *Id.*

210. Gordy, *supra* note 57, at 304.

211. J. HERMAN, *supra* note 20, at 32 (recapitulating a study done by Karin Meiselman, as printed in K. MEISELMAN, INCEST (1978)). In studies of prostitutes conducted by James Baisden of women afflicted with rosaphrenia (failure of a person to accept her own sexuality), and Odyssey House of New York with drug abusers, 20% of these women had a background which included father-daughter incest. Coleman, *supra* note 16, at 272.

212. B. JUSTICE & R. JUSTICE, *supra* note 1, at 169. "All of us, to some extent, use the parenting we received as children as a model for how we parent our children." *Id.* at 198. An abused child becomes an abuser as a parent, and may also choose a partner with the same attitude toward parenting. *Id.* Children who do not get their needs met become adults who still need nurturing and then turn to their children. *Id.* at 199. *See also* D. FINKELHOR, *supra* note 1, at 148, who states: "[w]hen mothers themselves are demoralized and disorganized, and are victims themselves in their relationships with husbands and other men, they are in no position to transmit self-protective coping behavior to their daughters." *Id.*

213. *See generally* S. BUTLER, *supra* note 24, at 114 (abuse either sexual or physical); B.

B. Present Treatment Goals for the Incestuous Family

In order to aid the victim and the family, to reunite the family when that is a desired goal, and to prevent the generational effects of incest, treatment of all involved is necessary, whether mandated by the criminal court or incorporated as part of a treatment plan by a social service agency. Treatment models may vary depending on the age of the child, and the program.[214] Treatment programs may last as long as three years[215] and ideally include the entire family.[216]

Counseling techniques include individual and dual counseling, mother-daughter, father-daughter, family and small group counseling.[217] With young children, structured and unstructured play sessions with toys, puppets, dolls, drawings, and writings are used.[218] For older victims of incest, support groups have proven successful.[219]

The victim must be aided in coping with the anger and guilt felt because of the assault,[220] and must be shown that the full culpability for the assault rests with the father, and to a lesser degree on a silent, but knowing, mother.[221] The mother must be counseled in ways of protecting her child as well as in dealing with her guilt for not protecting the child.[222] Additionally, the mother's relationship with her daughter must also be strengthened.[223] The father has to learn to control his impulses and to accept the fact that the incest was entirely his fault.[224] He must also come to realize that his behavior was wrong and not to be repeated.[225]

JUSTICE & R. JUSTICE, *supra* note 1, at 198 (past abuse leads abused parent to accept abuse of child).

214. DeVine, *supra* note 2, at 27. "The immediate impact can be lessened by effective crisis intervention." *Id.*

215. Zaphiris, *supra* note 25, at 5-7.

216. All members of the family should be treated if family reunification is to be accomplished. Sgroi, *supra* note 2, at 139. The marriage must be strengthened and become more satisfying to both parties if the risk of the incest recurring is to be eliminated. B. JUSTICE & R. JUSTICE, *supra* note 1, at 249.

217. Zaphiris, *supra* note 25, at 5-7.

218. Burgess, Holmstrom & McCausland, *Counseling Young Victims and Their Families*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 183-84 (A. Burgess, A. Groth & L. Holmstrom, S. Sgroi eds. 1978).

219. Gordy, *supra* note 57, at 302. Support groups, meeting for eight sessions, have proven successful in helping adults who have been childhood victims of incestuous assault gain insight into the situation. *Id.* at 303. Role playing and letter writing are two techniques used to help the victims work through their feelings. *Id.* at 304.

220. Stern & Meyer, *supra* note 117, at 85. This therapy must again be considered to be long term. *Id.*

221. S. FORWARD & C. BUCK, *supra* note 15, at 166-67. *See also* B. JUSTICE & R. JUSTICE, *supra* note 1, at 241, who state: "[t]he emphasis needs to be on the fact that the child is not to be blamed, even if she participated with some willingness." *Id.*

222. S. FORWARD & C. BUCK, *supra* note 15, at 46.

223. *See* Gordy, *supra* note 57 and accompanying text.

224. C. FORWARD & S. BUCK, *supra* note 15, at 173.

225. Giarretto, Giarretto & Sgroi, *supra* note 175, at 237.

VI. Recommendations for the Disposition of Father-Daughter Incestuous Assault Cases

A. Statutory Changes

The protection of the victim must be of paramount importance in any statutory scheme concerned with child sexual abuse. Presently, incest statutes offer inadequate protection to many of the victims of incestuous assault because of the restrictive definition of incest.[226] Statutes need to define incest as including other behaviors in addition to intercourse, such as, but not limited to, fondling, caressing and exhibitionism.[227] Since a victim is harmed psychologically by the violation of the trust relationship between the father and the daughter,[228] other acts committed by a father that are not categorized by the statutory definition can still be destructive to the child.[229] Furthermore, incest statutes fail to protect all children because of the limitations imposed by consanguinity or affinity.[230] Although all children are protected by child sexual abuse or sexual contact statutes,[231] a differentiation needs to be made statutorily between sexual assault by a trusted family member who is an authority figure and supposed caregiver, and assault by a stranger. Since the traditional family is no longer the family of many children, a new, more modern definition of incest should include sexual acts committed by adult males who have assumed a patriarchal role in the home, such as a biological, adoptive, step or foster father, as well as a mother's boyfriend who resides in the home.

Mandatory child abuse reporting laws presently exist in all states,[232] although there is no uniformity in who must report the known or suspected abuse and to whom it must be reported.[233] Mandatory reporting laws should be revised to include a broader spectrum of people who must report to either the social service agency or the police department.[234] It is believed that the passage of more comprehensive reporting acts increases the number of reported cases.[235]

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226. See *supra* notes 8-10 and accompanying text for a discussion of statutory requirements for a charge of incest to be brought.

227. Coleman suggests that a definition of incest should also include fondling, caressing, or touching of a minor by an adult, or an adult by a minor, with the intention of the adult being to sexually arouse or gratify either of the partners. Coleman, *supra* note 16, at 287.

228. *Id.* at 286.

229. It appears that the whole disruptive family dynamics causes harm to the child, not just intercourse, which is required by incest statutes. See generally notes 35-61 and accompanying text for a discussion of the family dynamics involved in incestuous assault.

230. *See supra* note 9 and accompanying text.

231. See *supra* note 73 and accompanying text for the various types of charges that are brought against incestuous fathers and the rationale for such charges.

232. Child Abuse and Neglect Litigation: A Manual For Judges 1 (1981).

233. Bulkley, *Analysis of Civil Child Protection Statutes Dealing with Sexual Abuse*, in Child Sexual Abuse and the Law 83-84 (J. Bulkley ed. 1982).

234. See Fla. Stat. Ann. § 415.504 (West 1986) and Mass. Gen. Laws Ann. ch. 119, § 51A (West Supp. 1985) for detailed lists of persons who must report suspected cases of child abuse.

235. Giarretto, *supra* note 2, at 40. The passage of statutes requiring mandatory reporting of child abuse and neglect resulted in a large volume of cases being reported. Drews, *Child Protective Services*, *quoted* in Child Abuse and Neglect Litigation: A Manual For Judges 19

To aid in the cooperation between police, the social service agencies, and the prosecutor's office, statutes should be enacted that require social service departments to report cases of incestuous assault to the prosecutor's office.[236] Programs that have involved cooperation between all interested groups have proven successful.[237]

Statutes allowing for the use of videotaping of a child's testimony for use at trial have begun to be passed in some states.[238] Although there is a constitutional challenge to videotaped testimony under the sixth amendment right of an accused to confront witnesses against him, jurisdictions have been enacting statutes that provide for videotaping when there is a substantial likelihood that the victim/witness will be harmed if required to testify in court.[239]

B. Non-Statutory Recommendations

A single investigator, specifically trained to deal with incestuously assaulted children, should interview the child.[240] This interview should take place in a non-threatening environment and should be audio or videotaped without the child's knowledge.[241] This procedure would spare the child from being interviewed by the numerous people involved in the legal process.

Successful innovative programs based on concerns for the entire incestuous family, such as those in Santa Clara County and Johnson County, should be implemented in more jurisdictions. In many cases, court mandated treatment, rather than the disruption of the family through incarceration of the father or removal of the daughter, appears to be a more effective means of

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(1981).

236. *See, e.g.*, FLA. STAT. ANN. § 415.505 (West 1985) and MASS. GEN. LAWS ANN. ch. 119, § 51B (West Supp. 1985).

237. *See supra* notes 161-99 and accompanying text.

238. *See* ARIZ. REV. STAT. ANN. § § 13-4251-53 (Supp. 1985) (victim under 15, defendant may hear and observe the testimony, but the minor may not see or hear defendant); ARK. STAT. ANN. § 43-2035-36 (Supp. 1985) (victim under 17, child may be called to testify at trial if in interest of justice); CAL. PENAL CODE § 1346 (West Supp. 1986) (victim 15 or under; admitted as former testimony); COLO. REV. STAT. § 18-3-413 (Supp. 1984); FLA. STAT. ANN. § 90.90 (West Supp. 1985); KY. REV. STAT. ANN. § 421.350 (Bobbs-Merrill Supp. 1984) (victim 12 or younger; each party reviews recording before shown in courtroom); ME. REV. STAT. ANN. tit. 15, § 1205 (Supp. 1985) (victim under 14; statement recorded by any means approved by court); MASS. GEN. LAWS ANN. ch. 278 (Leg. Rep. Ser. 1986) (victim 15 or younger; prosecutor must prove by preponderance of evidence that child would suffer significant degree of trauma); MONT. CODE ANN. § 46-15-401-403 (1985); N.M. STAT. ANN. § 30-9-17 (1984) (victim under 16); N.Y. CRIM. PROC. LAW § 190.30(4) (Consol. 1985) (victim videotaped while examined by district attorney; used only at grand jury proceeding); S.D. CODIFIED LAWS ANN. § 23A-12-9-10 (Supp. 1985) (victim less than 16); TEX. CRIM. PROC. CODE. ANN. § 38.071 (Vernon Supp. 1986) (victim 12 or younger); WIS. STAT. ANN. § 9967.041-043 (West 1985).

239. See *supra* note 238 for states with video taping statutes.

240. One writer suggests that a "child examiner" who is trained in legal procedure, rules of evidence, and most importantly, human behavior, be the only person who investigates and interviews the child-victim. Libai, *The Protecting of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 996, 1002 (1969). These "child examiners" could be psychologists, psychiatrists, psychiatric social workers, child care workers, and probation officers. *Id.* at 996.

241. *Id.* at 1002.

delivering services to the entire family and of also reuniting the family when that is a desired goal.

Finally, education of the public is necessary to aid in the reporting of cases as well as the prevention of new incestuous assault. Social workers need to be made aware of symptoms of incestuous abuse. Schools, television, and commercial publications must offer programs and materials to children, explaining to them the differences between "good" touching and "bad" touching.[242]

CONCLUSION

It is not necessary to have documented numbers of cases from every jurisdiction to realize that father-daughter incestuous abuse is a national problem of significant proportions. Because of the damage done to the victims and the society which experiences the after effects of the abuse, the legal and social service professions must continue working together to develop and expand new approaches for dealing with the problem. Society needs to be made more aware that father-daughter incestuous assault occurs frequently among all classes and races of children.[243]

The development of innovative programs, statutory changes, and a general awareness by the public are evidence of a heightened concern for the victims of incestuous assault and their families. Hopefully, these recent developments will lead to a reduction of the number of assaults, as children and their families become aware of the dynamics and the effects of father-daughter incest.

"If no one interferes and no one intercedes, the incestuous family may continue for countless generations without help and without change."[244]

Patricia A. Harrington

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242. Kid's Stuff Records and Tapes, IT'S OK TO SAY NO (1984). This set includes a record and a coloring book concerning child sexual abuse for young children.

243. *See* D. FINKELHOR, *supra* note 1, at 116; S. BUTLER, *supra* note 24, at 11.

244. S. BUTLER, *supra* note 24, at 140.

Protecting Guiltless Guilty: Material Witness Recantation and Modern Post-Conviction Remedies

The majority of jurisdictions, when faced with a post-trial recantation[1] by a material witness, refuse relitigation of the case and declare the original testimony valid.[2] If a new trial were granted automatically, then the witness, not the court, would control the judicial process.[3] However, a strong argument exists that justice should not be denied to an individual convicted upon recanted testimony.[4] For example, in 1985, almost six years after trial, Cathleen Crowell Webb, the alleged victim of rape and kidnapping, retracted her testimony claiming the man the jury convicted, Gary Dotson, was innocent.[5] As a result, questions concerning how to treat voluntary[6] material witness recanta-

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1. *See* 8A J. MOORE, MOORE'S FEDERAL PRACTICE § 33.05 (1985 revision) [hereinafter MOORE]. "Although . . . there can be several variations on this theme, the term 'recantation' connotes an intentional and formal renunciation by a witness of his former testimony." *Id.* (footnote omitted).

2. *See generally infra* notes 48-131 and accompanying text (post-conviction relief based upon material witness recantation in federal and state courts).

3. People v. Shilitano, 218 N.Y. 161, 169, 112 N.E. 733, 735 (1916) (citation omitted). For an analysis of the *Shilitano* case, see *infra* notes 119-28 and accompanying text. "Of course, the court's desire to maintain control of the right to decide when a new trial is warranted is no doubt reinforced by the instinctive feeling that the recanting testimony is generally worthless." Ingulli, *Trial by Jury: Reflections on Witness Credibility, Expert Testimony, and Recantation*, 20 VAL. U.L. REV. 145, 180 (1986) [hereinafter *Reflections*].

4. Bussey v. State, 69 Ark. 545, 547, 64 S.W. 268, 269 (1901). "It is the witness, and not the defendant, that has trifled with the court, and she, and not the defendant, should suffer for such contempt . . . but, if her affidavit is true, her testimony is false, and the judgment wrong." *Id.* For reasons why current remedies are insufficient see *infra* notes 132-91 and accompanying text.

5. N.Y. Times, Mar. 30, 1985, at A6, col. 1. *See generally infra* notes 14-47 and accompanying text (analysis of the *Dotson* case following Webb's recantation).

6. This Note is concerned only with a "voluntary" recantation of testimony given by a material witness. This Note does not consider those recantations obtained through duress, coercion, bribery, or from codefendants, accomplices, or where a witness confesses to have committed the crime. For cases dealing with these types of recantations see Annotation, *Statements by Witness After Criminal Trial Tending to Show that His Testimony Was Perjured, as Ground for New Trial*, 33 A.L.R. 550, 555-59 (1924); Annotation, *Statement by Witness After Criminal Trial Tending to Show that His Testimony Was Perjured, as Ground for New Trial*, 74 A.L.R. 757,

tions in general, and recantation by a purported victim in particular,[7] were renewed.[8]

Section I of this Note will analyze the recantation implications of the *Dotson* case.[9] In Section II, the federal and state post-conviction relief available following a material witness recantation will be addressed.[10] Section III exposes the inherent problems with the courts' treatment of recantations.[11] This Note proposes a change in procedure to deal with the situation of a material witness subsequently recanting trial testimony.[12] The proposed reform will be discussed in Section IV with an application to the *Dotson* case.[13]

I. THE *Dotson* CASE AND CATHLEEN CROWELL WEBB'S RECANTATION

In 1979, Gary Dotson was found guilty of rape and aggravated kidnapping following a jury trial.[14] Dotson was sentenced by the Cook County Cir-

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760-61 (1931); Annotation, *Statements by Witness After Criminal Trial Tending to Show that His Testimony Was Perjured, as Ground for New Trial*, 158 A.L.R. 1062, 1069-78 (1945).

7. Recantation of testimony by a purported victim differs significantly from a recantation made by a mere witness to the crime. This difference, outlined by the following, should be kept in mind by the courts when attempting to deal with recanted testimony:

> Legal experts generally agree that this [Dotson] case is unlike the typical recantation situation, in which the person retracting testimony may have an ulterior motive or may have been bribed or threatened. Case law is replete with instances in which a criminal later denies that a confederate committed a robbery or murder, a child denies being sexually molested by a relative or a woman says she lied about a boyfriend's role in a crime. It is in such situations that the courts have been most reluctant to accept recantations as true. Of the Dotson case, . . . [one commentator] said: 'I think it's profoundly different. This is a very special type of recantation testimony.' Typically, . . .[the commentator] said, a recantation concerns the question of guilt. But here, he said, the recantation concerns the question *whether there was ever a crime at all.*

Shipp, *Rape Case Plea: Unusual Legal Issue Faces Illinois*, N.Y. Times, May 9, 1985, at A25, col. 1 (emphasis added).

8. Recantation of testimony by a material witness is a problem the courts have grappled with for many years. One early California case set the tone for current recantation treatment by stating "[i]t cannot be said that, as a matter of law, a new trial should be granted whenever an important witness against the defendant shall make an affidavit that he committed perjury in his testimony. If that were so, justice would be defeated in many grave cases." People v. Tallmadge, 114 Cal. 427, 430, 46 P. 282, 283 (1896). Rather, the court will look at the case as a whole to determine whether a new trial should be granted. *Id.*

9. *See infra* notes 14-47 and accompanying text.

10. *See infra* notes 48-131 and accompanying text.

11. *See infra* notes 132-91 and accompanying text.

12. *See infra* notes 192-235 and accompanying text.

13. *Id.*

14. People v. Dotson, 99 Ill. App. 3d 117, 118, 424 N.E.2d 1319, 1321 (1981). At trial, the alleged rape victim, a high school student, testified that on Saturday evening, July 9, 1977, while walking home from work, she was forced into the back seat of a vehicle by two men. *Id.* One was identified by the victim as the defendant. *Id.* The defendant got into the back seat with her while the other assailant got into the front seat with the driver. *Id.* After completing the act of intercourse, the defendant allegedly tried to write words on the stomach of the victim with a broken beer bottle. *Id.* She was pushed out of the car and she was eventually assisted by the police. *Id.* The victim was taken to the hospital and the examining doctor later testified at trial that "he

cuit Court to serve two concurrent terms of 25 to 50 years in the Illinois Department of Corrections.[15] On appeal, the convictions and sentences were affirmed.[16] During Dotson's incarceration, his purported victim, Cathleen Crowell Webb,[17] signed an affidavit in 1985 which revealed, for the first time, that she had lied at trial.[18] In the affidavit, Webb stated that Dotson was innocent[19] and that she had fabricated the rape story because Webb thought

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observed a swelling on her head, bruises on her arm, markings on her breast and raised red scratches on her stomach, which looked like letters." *Id.* The doctor also stated that abrasions to the hymen and trauma to the vaginal area were suffered by the victim. *Id.* Prior to trial, a police artist sketched a picture of the purported rapist based upon a description given by the victim. *Id.* The victim, after examining several hundreds of photographs, identified the defendant as the alleged rapist and subsequently picked him out in a police line-up. *Id.* at 119, 424 N.E.2d at 1321-22. Based upon testimony given by the alleged victim and that given by a forensic scientist, the jury convicted Dotson of the crimes charged. *Id.* at 118-19, 424 N.E.2d at 1322. Dotson was convicted even though his alibi was corroborated by four witnesses. *Id.*

15. *Id.* at 118, 424 N.E.2d at 1321.

16. *Id.* at 126, 424 N.E.2d at 1326. The Illinois Appellate Court held, *inter alia*, that even though the alleged victim failed to inform the police that her assailant had a mustache, "[w]hen the identification of the witness is positive, precise accuracy in describing facial characteristics is unnecessary . . . . Failure to describe the mustache only affects the weight of her testimony and does not destroy the credibility of her identification." *Id.* at 121, 424 N.E.2d at 1323 (citations omitted). Also, contradictory and inconclusive scientific evidence did not raise a reasonable doubt concerning Dotson's guilt. *Id.* Furthermore, even though the alibi witnesses' testimony was unimpeached "[i]t is the province of the jury to weigh and balance identification testimony against the alibi presented by the defense." *Id.* (citation omitted). Thus, since the reviewing court will not set aside a criminal conviction "unless the evidence is so improbable as to raise a reasonable doubt of guilt, . . ." and no such doubt of guilt was found, the convictions were affirmed. *Id.*

17. At the time of the alleged rape, the purported victim's name was Cathy Crowell. She subsequently married and became Cathy Crowell Webb.

18. Motion to Vacate Judgment and Sentence, Pursuant to Chapter 110, Section 2-1401 at 2, People v. Dotson, No. 77 16 5200 (Cook County Cir. Ct. filed Mar. 26, 1985), *motion denied*, N.Y. Times, Apr. 12, 1985, at 1, col. 1 (Cook County Cir. Ct. Apr. 11, 1985) [hereinafter Motion to Vacate]. In the motion, Dotson pointed out that only two witnesses were presented by the prosecution, the alleged victim and a forensic scientist. *Id.* at 1. As to the forensic scientist, Dotson argued that his testimony was inconclusive:

> Amongst other things, . . . [the scientist] testified that GARY DOTSON was a Group B secreter, as is the alleged victim, yet blood stains on the panties contained both blood groups A and B. He concluded that it was impossible for either the victim, or GARY DOTSON, to have produced the A stains. His remaining testimony as to pubic hair samples and blood type failed to produce any certainty whatsoever as to GARY DOTSON's personal participation in the crime.

Id. at 2. Dotson further argued that since the scientific evidence was inconclusive, the jury's verdict rested mainly upon the testimony of the alleged victim, Cathy Crowell. *Id.* Thus, following the recantation of trial testimony by the alleged victim, "[i]f the court had known at the time of trial that the testimony of the complaining witness was feigned and perjurious, the court would not have rendered the judgment it was otherwise compelled to do." *Id.* at 3.

19. Affidavit of Cathleen Crowell attached to Motion to Vacate, *supra* note 18. In her affidavit, Webb swears that "Gary Dotson was a person unknown to . . . [her] and is completely innocent, and a man who never assaulted . . . [her] in any way, at any time." *Id.* She claims to have had sexual intercourse voluntarily with a boy her age, and thinking she had become pregnant, decided to claim that she had been raped. *Id.* She scratched herself with a piece of glass, bruised herself and "did other things all to make it appear that . . . [she] had been violently attacked."

she was pregnant.[20]

After Webb submitted the affidavit, Dotson filed a motion to vacate the judgment and sentence rendered in 1979.[21] The motion declared that the jury's verdict was based substantially upon Webb's testimony[22] and that such testimony was admittedly false.[23] In addition, had the jury known that the purported victim testified falsely at trial, it arguably would not have convicted Dotson.[24] After two days of hearings,[25] the original trial judge ruled that Webb's recantation was not credible, denied the motion, and ordered that Dotson be returned to prison.[26]

Id. After giving a fabricated description of her alleged attacker, Webb picked Dotson's picture out of a mug shot book even though she never saw him before in her life. *Id.* Finally, as to why Webb waited almost six years before recanting, she claims she is "now a Christian, fully understanding the evil . . . [she] committed and that . . . [she] must undo it to the extent possible." *Id. See also* WEBB, FORGIVE ME (1985) (Cathy Crowell Webb's personal explanation of why she recanted and attempt to persuade public that Dotson was innocent). Apparently, few people believe or forgive Webb. N.Y. Times, Nov. 18, 1985, at 16, col. 1.

20. Affidavit of Cathleen Crowell attached to Motion to Vacate, *supra* note 18. Judge Richard Samuels, the judge at the original trial, found Webb's claim unacceptable:

> She knew she wasn't pregnant by the time she identified the defendant. (Webb's menses arrived a few days after the incident, and before the lineup identification of Dotson.) That means it is likely she really didn't fear pregnancy, which she now claims was the motive. And the trial itself was two years after her period. I presume during the two years she figured out she wasn't pregnant. So that motive is really hard to accept.

Black, *Why Judge Samuels Sent Gary Dotson Back to Prison*, 71 A.B.A. J. 56, 58 (Sept. 1985) [hereinafter Black]. Furthermore, large semen stains found on Webb's panties were allegedly the result of a sexual encounter Webb had with her boyfriend a few days earlier which "set her off on her pregnancy panic. To believe this, one would need to believe that Cathy didn't change her underwear for several days." *Id.* Her motive became even more questionable after her foster mother testified that Webb "was fastidious about her grooming." *Id.*

21. The motion was filed pursuant to ILL. REV. STAT. ch. 110, § 2-1401 (1985) which provides, in pertinent part, that:

> (a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section.
>
> (b) The petition *must be filed in the same proceeding in which the order of judgment was entered* but it is not a continuation thereof.

Id. (emphasis added).

22. Motion to Vacate, *supra* note 18, at 2.

23. *Id.*

24. *Id.* at 3. *See also supra* note 18 (Dotson's claims in support of the Motion to Vacate).

25. Black, *supra* note 20, at 57. Initially, after Webb's recantation, even Judge Samuels thought Dotson was innocent:

> Samuels at first believed Webb's recantation, as broadcast by newspapers and television. 'Like everybody else, I was inclined to take what Cathy said on face value.' So he expedited the case, setting a hearing on the motion to vacate the conviction within 10 days instead of the normal 30. When he sensed the proceedings might not be completed in a single day, he set 'reasonably low bond, $100,000 or $10,000 in cash — a bond I was certain Gary could raise from his supporters or from other resources he had access to.' The willingness to set a low bond was itself a presumption that the hearing would vindicate Dotson.

Id.

26. Record of Hearing on Motion to Vacate Judgment and Sentence Pursuant to Chapter

One case cited by the judge as precedent for his decision was *People v. Marquis*.[27] In *Marquis*, the accused's fifteen-year-old daughter testified as to statements made by the accused which linked him to the murder of his son.[28] In a subsequent affidavit recanting her testimony, the daughter stated that she lied at trial because she was pregnant and dreaded the approach of motherhood.[29] The court, however, held that recantation by a witness does not necessarily entitle the convicted to a new trial.[30] Furthermore, a court will usually deny a new trial when it is not convinced that the recantation is true.[31] A new trial will only be granted if the case is extraordinary and unusual.[32]

110, Section 2-1401 at 227, People v. Dotson, No. 77 16 5200 (Cook County Cir. Ct. filed Mar. 26, 1985), *motion denied*, N.Y. Times, Apr. 12, 1985, at 1, col. 1 (Cook County Cir. Ct. Apr. 11, 1985) [hereinafter Record of Hearing on Motion to Vacate]. In denying the motion, Judge Samuels found that perjury was not committed at the original trial in 1979:

> I have . . . observed and heard the testimony on the stand taken a week ago today by Cathy Crowell Webb. I have had an opportunity to observe her demeanor on the stand here on April 4, 1985 and to consider the credibility of her testimony and her demeanor on the stand and I suggest that her demeanor did include what might be called a selective recollection or an inability to recall certain items on cross-examination.

Id. See also Black, *supra* note 20, in which Judge Samuels explained his decision:

> 'The central issue . . . was Cathy's credibility. The credibility of Cathy's recantation testimony . . . was really affected by the physical evidence, which was corroborative of rape, not the absence of rape. For example, all her conduct (in 1977) was consistent with that of a rape victim . . . she gave a very prompt, believable complaint of rape . . . [and concerning the bruises on her hymen] means something had to have happened to her that night — not a couple of nights before, but within hours.'

Id. at 59. Samuels pointed out that Webb's recantation suffered mostly due to her own behavior. *Id.* Since Samuels heard both the testimony at trial and at the motion hearings, he was able to observe Webb's demeanor and "[d]emeanor is one of the factors that determines credibility." *Id.* Thus, taking into consideration the evasiveness of Webb at the hearing and lack of evasiveness at the original trial, "Samuels ruled that Dotson had 'failed to prove the likelihood' that Webb's recantation was true." *Id.*

27. 344 Ill. 261, 176 N.E. 314 (1931).

28. *Id.* at 263-64, 176 N.E. at 315.

29. *Id.* at 264, 176 N.E. at 315. The daughter stated that she testified falsely at trial because she feared her father's wrath if he were to find out who was responsible for her pregnancy. *Id.*

30. *Id.* at 265, 176 N.E. at 315 (recanting testimony regarded as very unreliable).

31. *Id.* The court added that "[e]specially is this true where the recantation relied on involves a confession of perjury." *Id.*

32. *Id.* The court, oddly enough, cites to Annotation, *Statements by Witness After Criminal Trial Tending to Show that His Testimony Was Perjured, as Ground for New Trial*, 33 A.L.R. 550 (1924) as support of this statement. The annotation states, as an introductory note, that "[t]he courts, with their experience of witnesses, pay in general but little regard to the statements of a recanting witness, and only in *extraordinary and unusual* cases can a new trial be looked for on this account." *Id.* at 550 (emphasis added). Based upon this standard, the court concluded:

> The affidavit of a recanting witness is not entitled to so much weight as to justify the conclusion that the evidence given by him was corrupt and willfully false. The conclusion of the jury would rather warrant the presumption that his testimony was truthful and his affidavit false. Those experienced in the administration of criminal law well know the untrustworthy character of recanted testimony.

People v. Marquis, 344 Ill. 261, 265, 176 N.E. 314, 315 (1931) (citing People v. Shilitano, 218

The denial of Dotson's motion to vacate judgment was thereafter appealed.[33] As grounds for appeal, Dotson argued, *inter alia*, that the trial court erred by strictly applying legal precedent with disregard to the extraordinary facts of the case.[34] Dotson maintained that since Webb was the purported victim of the crimes charged, without her testimony, there would not have been a conviction.[35] In other Illinois cases relied on by the court, the recantation was from a witness only, not from a victim.[36] Therefore, Dotson argued, his case was clearly distinguishable, if not precedent-setting.[37]

N.Y. 161, 112 N.E. 733 (1916)). For an analysis of the *Shilitano* case, see *infra* notes 119-28 and accompanying text.

33. People v. Dotson, No. 85-1057 (Ill. App. Ct. filed Apr. 1985), *appeal dismissed*, N.Y. Times, Aug. 20, 1985, at A19, col. 1 (Ill. App. Ct. Aug. 19, 1985).

34. Brief for Defendant-Appellant at 6, People v. Dotson, No. 85-1057 (Ill. App. Ct. filed Apr. 1985), *appeal dismissed*, N.Y. Times, Aug. 20, 1985, at A19, col. 1 (Ill. App. Ct. Aug. 19, 1985) [hereinafter Brief for Dotson]. Dotson, noting Judge Samuels' references to a presumed unreliability of recanted testimony, argued that since Webb was not merely a witness to the alleged crime, but also the purported victim, "without her testimony, there exists no crime." *Id.* at 9. Furthermore, Webb lacked a motive for recanting her testimony; "Hers was the most human and most believable reason possible; a need for personal catharsis and a conviction to publish the truth, regardless of the consequences." *Id.*

However, the first part of this argument misstates the issue — the problem is not whether there could be a conviction without Webb's testimony. To state this is to state the obvious, since but for Webb's complaint of rape, there never would have been a trial. The issue, rather, is whether Webb lied at trial or in her recanting affidavit. "In most cases, the problem is not what to about perjured testimony, but how to determine which testimony was perjured." *Reflections*, *supra* note 3, at 183. Therefore, the second part of Dotson's argument would be persuasive in determining when Webb lied. Unfortunately, the reason given by Webb was perceived by Judge Samuels to be sufficiently weak and unconvincing so as to not vacate Dotson's sentence. *See supra* notes 20 and 26.

35. *See supra* note 34.

36. Those cases cited included People v. Hilliard, 109 Ill. App. 3d 797, 441 N.E.2d 135 (1982) (recantation of testimony by sole eyewitness who was the convicted murderer's stepson); People v. Bickham, 23 Ill. App. 3d 1074, 320 N.E.2d 478 (1974) (recantation of testimony given by mother of complainant witness); People v. Nash, 36 Ill. 2d 275, 222 N.E.2d 473 (1966) (recantation of testimony by principal witness, also an accomplice, promised leniency if he testified against defendant); People v. Marquis, 344 Ill. 261, 176 N.E. 314 (1931) (recantation of testimony by daughter of convicted murderer). Another case cited by the court was People v. Cihlar, 125 Ill. App. 3d 204, 465 N.E.2d 625 (1984). In *Cihlar*, a convicted rapist petitioned for a new trial under the Illinois Post-Conviction Relief Statute. *Id.* at 206, 465 N.E.2d at 627. The petition alleged that post trial statements made by the complaining witness, inconsistent with her trial testimony, warranted a new trial on the basis of newly-discovered evidence. *Id.* These inconsistent statements, alleged to have been made by the purported rape victim, do not fall within the "voluntary" element of the definition of "recantation." *See supra* note 1. Thus, *Cihlar* is distinguishable from the above cited cases in that no formal renunciation of testimony occurred. For an analysis of the *Cihlar* case, see *infra* note 116.

37. Brief for Dotson, *supra* note 34, at 10. Dotson's attorney observed:

> By any account, this case is extraordinary and unusual; indeed, it is unprecedented. In [sic] *People v. Marquis*, . . . the very case upon which Judge Samuels relied so heavily and from which he quoted so liberally, states: 'The recanting testimony of witnesses will not ordinarily be regarded as sufficient grounds for a new trial, *except in extraordinary and unusual cases*' . . . . Notwithstanding the extraordinary and unusual facts of this case, Judge Samuels rigidly embraced the pure proposition that recanted testimony is unreliable, and discarded those facts as little more than insig-

The State, however, argued that since the trial court found the purported recantation of Webb to be inherently incredible and contradicted by evidence, Dotson's motion to vacate judgment was properly denied.[38] In support of this argument, the State extensively reviewed the evidence adduced at both the 1979 trial and 1985 hearings[39] and concluded that Webb's trial testimony was completely corroborated while her recantation lacked corroboration and was wholly unbelievable.[40] In response to the claim that Dotson's case was distinguishable from those cited by the trial court, the State pointed to two Illinois cases.[41] In those two cases, there existed no apparent ulterior motive to recant.[42] However, the recantations were rejected due to the implausibility or

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nificant minutiae . . . . [W]hile his [judge's] office demands that he recognize and follow legal precedent, it also demands that he follow that precedent in a manner which makes sense — in a manner which is equitable and just — in light of the particular facts of the case being presented for decision.

Id. (citation omitted).

38. Brief for Plaintiff-Appellee at 19, People v. Dotson, No. 85-1057 (Ill. App. Ct. filed Apr. 1985), *appeal dismissed*, N.Y. Times, Aug. 20, 1985, at A19, col. 1 (Ill. App. Ct. Aug. 19, 1985) [hereinafter Brief for State]. The State noted that Dotson's brief ignored the trial court's findings and merely stated an "opinion that the trial judge only denied defendant a new trial because he felt compelled to do so on the basis of antiquated legal precedent regarding recantation testimony." *Id.*

39. *Id.* at 20-25. Most notably, the State relied upon the implausibility of Webb's motive for recanting. *Id.* at 23-24. Even though Webb claimed that her motive for recanting was her fear of being pregnant, she was "found wandering along the road and then [was] taken to the hospital . . . [while] wearing underwear with a large seminal stain." *Id.* at 23. According to Webb, she had sexual intercourse with her boyfriend two or three days prior to the alleged rape which would account for the stain. *Id.* Yet, "[t]his stain indicated that the panties had not undergone any washing prior to being examined by forensic experts." *Id.* (citation omitted). Thus, the State concluded, "[e]ither, Mrs. Webb, ostensibly fearing pregnancy, wore panties with a large seminal stain for several days without changing them or washing them or she was in fact raped by the defendant. Only the latter explanation is not patently ludicrous." *Id.* at 23-24. The State also noted several inconsistencies between Webb's 1977 trial testimony and that testimony given at the 1985 recantation hearing. *Id.* at 21-23. *See also* Black, *supra* note 20, at 58 (Judge Samuels' reasons for denying new trial motion).

40. *Id.* at 20.

41. People v. Hilliard, 109 Ill. App. 3d 797, 441 N.E.2d 135 (1st Dist. 1982) (recantation by murderer's accomplice); People v. Nash, 36 Ill. 2d 275, 220 N.E.2d 207 (1966) (recantation by sole eyewitness, the accused's stepson, in murder prosecution). For an analysis of these two cases see *infra* note 42.

42. Brief for State, *supra* note 38, at 27-28. The State noted that, in the *Nash* case, an accomplice to a murder gave both an eyewitness account and described the plan by which both he and the defendant killed the victim. *Id.* at 27. After trial and conviction of defendant, the accomplice submitted an affidavit recanting his trial testimony which linked the defendant to the murder. *Id.* The trial judge, however, found "the original testimony to have been fully believable and corroborated" and rejected the recantation. *Id.* On appeal, the state supreme court found the recantation to be "evasive, self-contradictory, unresponsive and in many respects highly improbable." *Id.*

Similarly, the State noted that in *Hilliard*, the sole eyewitness to a murder was the defendant's stepson. *Id.* at 28. The stepson later recanted his trial testimony with "the implication . . . that the stepson simply wanted to set the record straight." *Id.* Thus, in both *Nash* and *Hilliard*, concluded the State, the recantation "was rejected not because of the motives behind it but . . . because the recanter told an evasive, implausible and contradictory tale." *Id.*

contradictory nature of the recanter's story.[43] Since a mere recantation of testimony alone does not justify a new trial, it remained Dotson's burden to show that Webb had lied at the 1979 trial.[44]

Apparently, the Illinois Appeals Court felt that Dotson's case had already been subjected to a full review and denied a new trial.[45] Another possible reason for the appeals court decision would be the fact that Illinois Governor James Thompson commuted Dotson's sentence following a petition for clemency.[46] However, even though Dotson no longer is incarcerated, he remains a convicted rapist.[47]

II. POST-CONVICTION RELIEF BASED UPON MATERIAL WITNESS RECANTATION IN FEDERAL AND STATE COURTS

While invoking executive clemency may have quelled the public outcry surrounding the *Dotson* case, the problem of material witness recantation remains.[48] On a broad level, the *Dotson* decision raises the issue whether the need for finality of judgments[49] outweighs the truth-seeking process[50] in cases

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43. *Id. See supra* note 42 (analysis of *Hilliard* and *Nash* cases).

44. Brief for State, *supra* note 38, at 26. The State put forth the following reason why a mere recantation does not justify a new trial:

> The disfavor with which recantation is viewed is premised on the fact that a judicial system is only effective if its results are presumed to be just. Given the array of procedural safeguards inherent in the justice system, once a jury has determined a defendant's guilt that result must be accorded respect and a presumption of validity. No case and no defendant is so far above the law as to justify a departure from applicable, well-reasoned precedent.

Id. One commentator has reasoned that "[t]he basis for the law is simple: Courts like finality and they do not like the notion of cases being reopened because a witness has been intimidated, bribed, or just overcome with sympathy for the defendant." Shipp, *Rape Case Plea: Unusual Legal Issue Faces Illinois*, N.Y. Times, May 9, 1985, at A25, col. 2. For a discussion of finality of judgments, see *infra* notes 157-70 and accompanying text.

45. N.Y. Times, Aug. 20, 1985, at A19, col. 1. Judge Richard J. Fitzgerald of Cook County Circuit Court stated that the post-conviction relief Dotson sought " 'was not intended to provide a method of obtaining successive evidentiary hearings where there has already been a full review.' " *Id.*

46. N.Y. Times, May 13, 1985, at A17, col. 1. While the evidence presented did not prove Dotson guilty of raping Webb, according to Governor Thompson, nor did the evidence exclude him:

> [Governor] Thompson said that he, like many others familiar with the case, was troubled by the absence of an apparent motive for Mrs. Webb to lie in her recantation. 'All I'm saying,' Mr. Thompson said, 'is that I don't believe the testimony for the most part that she gave [at the recantation hearing] . . . because it was either inherently incredible or flatly contradicted by other witnesses who had no motive at all to lie. That's the most we can find.'

Id. For a discussion of executive clemency see *infra* note 64.

47. *See supra* note 46. For a discussion of executive clemency see *infra* note 64.

48. *See infra* notes 132-91 and accompanying text.

49. See *infra* notes 157-70 and accompanying text for a discussion of finality of judgments.

50. The truth-seeking process in criminal cases applies the "beyond a reasonable doubt" standard which reflects "the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 799 (2d ed. 1972). However, attempts at defining this standard have proved fruitless

where incarceration or execution may be imposed. An analysis of post-conviction remedies available to a convicted individual after a material witness recants exposes several flaws. Such flaws create a potential injustice to the convicted individual.[51]

A. Relief in Federal Courts

Following a recantation, a convicted person traditionally bases a claim for new trial upon newly-discovered evidence.[52] Claims of newly-discovered evidence have often been deemed insufficient grounds for post-conviction relief.[53]

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because "the explanations themselves often need more explanation than the term explained." *Id.* at 800 (footnote omitted). For example, the United States Supreme Court upheld a jury instruction, which attempted to define "reasonable doubt," since the judge "gave all the definition of reasonable doubt which a court can be required to give." Dunbar v. United States, 156 U.S. 185, 199 (1884). In *Dunbar*, the jury instruction stated:

> 'I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt — that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt . . .'

Id.

This inability to define "reasonable doubt" reflects a lack of certainty in determining truth, which is inherent in the American criminal justice system. *See* Burr v. Florida, 106 S. Ct. 201, 202 (1985) (mem. decision) (Marshall, J., dissenting). In his dissent, Marshall explains that "[a]lthough a uniform definition of the term has never evolved, it is clear that juries are not instructed to return a verdict only when all doubt has been eliminated. Rather, the 'reasonable doubt' standard merely attempts 'to exclude as nearly as possible the likelihood of erroneous judgment.' " *Id.* (citing Addington v. Texas, 441 U.S. 418, 423 (1979)). Marshall comes to the conclusion that the " 'beyond a reasonable doubt' [standard] cannot ensure that a jury will not convict a defendant without foreclosing all possibility of innocence in the jurors' own minds." *Id.* In this respect, the "assumption about the equation of finality and truth that trangresses law and institution alike" is erroneous since "our legal system is no pretender to absolute truth" and, in reality, "the factfinding process falls short of that ideal." *Id.*

The above problem became accentuated in the *Dotson* case since Webb was both the victim and the sole witness:

> [One legal commentator] said: 'The thing that bothers me most about it [Webb's recantation] is that if she had said this at the time of the trial, there'd be no conviction because there's at least a reasonable doubt. So how can you send a man to prison when there's a reasonable doubt now about his guilt? Are we saying that we are that inflexible, that uncivilized?'

N.Y. Times, Apr. 13, 1985, at 6, col. 4.

51. *See infra* notes 132-91 and accompanying text.

52. *See* MOORE, *supra* note 1, at § 33.05, which also points out that a recantation is, in fact, newly-discovered evidence "[s]ince the witness's testimony at the new trial, as at the old, constitutes 'evidence' and . . . the recantation presumably contains a 'new' version of the events . . . ." *Id. But see* Newman v. United States, 238 F.2d 861, 862 (1956) stating that "[t]he 'new' evidence was not new at all in the real sense. On the contrary, it was but an assertion that . . . [the] former, 'old,' testimony was false as . . . [the] recantation reflected." *Id.*

53. D. WILKES, FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF § 1-13 (1983) [hereinafter WILKES, POSTCONVICTION REMEDIES]. "This strange rule forbidding collateral at-

Such relief is denied due to the courts' reluctance to reopen those cases where the issue of guilt or innocence has already been decided.[54] Refusing collateral relief for newly-discovered evidence reflects an ongoing tenacity within the judicial system that a judgment must be labeled final even though injustice might prevail.[55] A brief examination of the only avenues of federal judicial relief available following a recantation, Federal Rule of Criminal Procedure 33[56] (a direct remedy[57]) and 28 U.S.C. § 2255[58] (an extremely limited collateral relief[59] statute), reveals the frightening inadequacies of modern post-con-

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tacks based on claims of new proof of innocence probably originated in the older rule that a claim of innocence, without more, is not a ground for postconviction relief . . . ." *Id.* (footnote omitted). *See also* MOORE, *supra* note 1, at § 33.03[1] (noting that few motions based upon this ground are meritorious).

54. WILKES, POSTCONVICTION REMEDIES, *supra* note 53, at § 1-13.

55. *See infra* notes 157-70 and accompanying text.

56. 18 U.S.C. FED. R. CRIM. P. 33 provides:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made *only before or within two years* after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial based on any other grounds shall be made within seven days after verdict of finding of guilty or within such further time as the court may fix during the seven-day period.

Id. (emphasis added). One purpose served by the two-year limitation on Rule 33 motions for new trial based upon newly-discovered evidence is that "passage of time facilitates the fabrication of evidence and makes retrials progressively less reliable." Bean v. United States, 679 F.2d 683, 685 (7th Cir. 1982). *See also infra* note 62 (history of two-year time limitation on Rule 33 motions).

57. Generally, "direct" post-conviction remedies involve trial court motions and appellate review of convictions. *See* SALTZBURG, AMERICAN CRIMINAL PROCEDURE 1134 (2d ed. 1984). Such motions include an acquittal on the ground that the evidence is insufficient to sustain a conviction; Rule 33-type motions, along with newly-discovered evidence claims; and claims of error in the proceedings. *Id.* at 1137-46.

58. The provisions of 28 U.S.C. § 2255 include the following:

> (1) a person in custody who claims his federal sentence is subject to collateral attack may file in the sentencing court a motion to vacate, set aside or correct sentence;
>
> (2) the motion may be made *at any time*;
>
> (3) the sentencing court may grant a hearing on the motion and may grant appropriate relief if it finds in favor of the movant;
>
> (4) the motion may be determined without requiring the presence of the movant;
>
> (5) a second or successive motion need not be entertained;
>
> (6) the order granting or denying relief is appealable; and
>
> (7) a person authorized to apply for relief under Section 2255 may not apply for federal habeas corpus relief unless the motion remedy is inadequate or ineffective. (Although the language of Section 2255 refers only to sentences, the remedy authorizes relief from defective convictions as well as sentences).

WILKES, POSTCONVICTION REMEDIES, *supra* note 53, at § 4-2 (footnote omitted) (emphasis added).

59. Generally, "collateral" relief is attempted "[a]fter new trial motions have been made and all appeals are exhausted (or lost, perhaps for failure to comply with an appellate rule, such as a time limit on filing a notice of appeal), [and] a defendant['s] conviction emerges unscathed

viction relief.

1. Federal Rule of Criminal Procedure 33

One judicial remedy in the federal system available for claims of newly-discovered evidence by a convicted person is a motion for new trial.[60] The major problem with this type of post-conviction relief, however, is that unless the motion is made within a certain time period following sentencing or conviction, such a claim will be barred.[61] A convicted person must make a motion for a new trial based upon newly-discovered evidence within two years[62] under Rule 33 of the Federal Rules of Criminal Procedure.[63] If a witness recants after the two year limitation, a convicted person must resort to executive clemency,[64] or seek other post-conviction relief.[65]

. . . ." SALTZBURG, AMERICAN CRIMINAL PROCEDURE 1150 (2d ed. 1984). Collateral remedies provide " 'an avenue for upsetting judgments that have become otherwise final.' " *Id.* For an analysis of the two most significant common law writs considered collateral remedies, *coram nobis* and *habeas corpus*, see *id.* at 1150-70.

60. WILKES, POSTCONVICTION REMEDIES, *supra* note 53, at § 1-13.

61. *Id.*

62. The United States Supreme Court included the two-year limitation in FED. R. CRIM. P. 33 even though "[t]he Advisory Committee had proposed that no limitation of time be placed upon making the motion." MOORE, *supra* note 1, at § 33.03[2](footnote omitted).

> 'I don't know quite how they arrived at the term of two years. It is not infrequent for one in my business to find out that people — few people — really are innocent and get into the penitentiary, and they can't get the case up or get it to attention until some time more than two years. Of course, in those cases, if they can be brought up, sometimes they are taken care of by executive clemency.'

Id. at § 33.03[2] n.14 (quoting NYU INSTITUTE, FEDERAL RULES OF CRIMINAL PROCEDURE 229-30 (1946) (statement of James V. Bennet, then Director of the Federal Bureau of Prisons)). In addition, "[t]his two-year period may not be enlarged for any reason." *Id.* at § 33.03[2] (footnote omitted).

63. See *supra* note 56 for text of Rule 33. For cases discussing what constitutes newly-discovered evidence under FED. RULE CRIM. P. 33 see Annotation, *What Constitutes "Newly Discovered Evidence" Within the Meaning of Rule 33 of Federal Rules of Criminal Procedure Relating to Motions for a New Trial*, 44 A.L.R. FED. 13 (1979).

64. For an analysis of state statutes, rules, and constitutions governing clemency see NATIONAL CENTER FOR STATE COURTS, CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE (1977). "Clemency is defined as an act of leniency or a disposition to be merciful . . . which includes a pardon, commutation of sentence, reprieve, or remission of fines and forfeitures" by either the President of the United States or the governor of a state. *Id.* at xii. Yet, clemency creates some tension between the three branches of government because "[w]hile the legislative branch establishes the law and the judicial branch finds the facts and applies the law to the facts, the executive branch is constitutionally empowered to grant some exceptions to the law by virtue of its clemency authority." *Id.* The overall effect of executive clemency has provoked conflicting views:

> One view is that the clemency eliminates the punishment resulting from the conviction and blots out of existency any moral guilt or blame which may have accompanied the commission of the crime. Opponents of that view believe that while clemency may remove the punishment, it does not remove the offender's moral guilt. Under this theory, clemency does not proceed upon the theory of innocence, but, rather, implies guilt; it involves forgiveness but not forgetfulness.

Id. See also S. Martin, *Commutation of Prison Sentences: Practice, Promise, and Limitation*, 29

With respect to a Rule 33 motion for new trial based upon newly-discovered evidence, two standards have been applied. The first standard, referred to as the *Berry*[66] standard, requires a new trial to be granted only where the newly-discovered evidence would *probably* change the original trial result.[67] The second standard, named the *Larrison*[68] standard, has been applied only in cases of recanted or perjured testimony.[69] This standard requires a new trial

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CRIME & DELINQ. 593 (1983) (exploring rationale and structure of executive clemency within the United States).

65. *See* WILKES, POSTCONVICTION REMEDIES, *supra* note 53, at § 4-1. Section 2255 applies to those persons convicted in a court established by an Act of Congress. *Id.* at § 4-1 (footnote omitted). In a Section 2255 proceeding, relief may be granted if, *inter alia*, "the conviction or sentence is otherwise defective by reason of an error that is neither jurisdictional nor constitutional, but nonetheless fundamental." *Id.* at § 4-4 (footnote omitted). However, "[t]he lower federal courts are divided on whether newly-discovered evidence of innocence is a ground for Section 2255 relief." *Id.* (footnote omitted). For an analysis of Section 2255 relief see *infra* notes 96-108 and accompanying text.

66. Berry v. State, 10 Ga. 511 (1851). In *Berry*, an individual convicted of larceny moved for a new trial based upon, *inter alia*, newly-discovered evidence. *Id.* at 515-16. The alleged new evidence consisted of a witness who stated he would testify that he neither saw nor heard anything that was incriminating while conversing with the accused. *Id.* at 527. The court pointed out that these types of motions are not looked upon favorably and that six requirements must be satisfied by the movant before a new trial will be granted:

> 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. *That it is so material that it would probably produce a different verdict, if the new trial were granted.* 4th. That is not cumulative only, —viz.: speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.

Id. (citations omitted) (emphasis added). Tried by these tests, the alleged new evidence in *Berry* was "strikingly deficient in several important particulars." *Id.* at 528. Thus, failure to satisfy these six requirements resulted in the court refusing a new trial based upon such new evidence. *Id.* at 531.

67. *See supra* note 66. This Note only discusses the standard of review applicable to motions for new trial based upon newly-discovered evidence. For an analysis of the other *Berry* requirements, see MOORE, *supra* note 1, at § 33.03[1].

68. Larrison v. United States, 24 F.2d 82 (7th Cir. 1928). In *Larrison*, seven individuals were convicted of various offenses stemming from a post office burglary. *Id.* at 82. After trial, one of the principal witnesses for the government recanted his testimony and subsequently repudiated his recantation. *Id.* at 85. On a motion for new trial based upon newly-discovered evidence in the form of a recantation, the court noted that such motions should not necessarily be denied when the alleged perjured testimony is only cumulative. *Id.* at 87. Rather, three requirements must be met:

> [A] new trial should be granted when, (a) The court is reasonably well satisfied that the testimony given by a material witness is false. (b) *That without it the jury might have reached a different conclusion.* (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

Id. at 87-88 (emphasis added). Failing to satisfy these requirements, the *Larrison* court denied the motion and affirmed the judgments. *Id.* at 89.

69. *See* Note, *Ninth Circuit Adopts* Berry *Standard for New Trials Based Upon Perjured*

be granted where the jury *might* have reached a different conclusion without the false testimony.[70]

Historically, motions for new trial based upon newly-discovered evidence have been viewed by the courts with great caution.[71] Reasons for this cautious view include the need for finality of judgments and a general mistrust of new evidence.[72] Therefore, in order to limit claims based upon newly-discovered evidence, many courts[73] adopted the stringent standard embodied in *Berry*.[74] However, following a recantation, or when allegations exist that a material witness testified falsely at trial, courts are more willing to apply the less re-

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Testimony, 11 GOLDEN GATE L. REV. 171, 175 (1981) [hereinafter Note, *Ninth Circuit Adopts*].

70. *See supra* note 68. This Note only discusses the standard of review applicable to motions for new trial based upon newly-discovered evidence. For an analysis of the other *Larrison* requirements see MOORE, *supra* note 1, at § 33.05. *See also* 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § § 557-557.1 (1982) [hereinafter WRIGHT] (analyzing both *Berry* and *Larrison* standards); United States v. Bonilla, 503 F. Supp. 626, 628-9 (D. P.R. 1980) (showing development of both *Berry* and *Larrison* standards).

71. *See* United States v. Bonilla, 503 F. Supp. 626, 628 (D. P.R. 1980). *See also* WRIGHT, *supra* note 70, at § 557 noting that "[n]o court wishes a defendant to remain in jail if he has discovered evidence showing that he is not guilty, but after a man has had his day in court, and has been fairly tried, there is a proper reluctance to give him a second trial." *Id.* Furthermore, "[c]ourts seldom grant motions for new trial because, in the interest of finality, district judges avoid granting costly retrials unlikely to result in a different verdict." Note, *Ninth Circuit Adopts*, *supra* note 69, at 174. In summary:

> Courts cite several reasons for the general rule that recantation by a witness does not necessarily entitle a defendant to a new trial, including the widely shared belief that recantation testimony is inherently lacking in credibility, the reluctance of judges to tamper with decisions reached by a jury, and the need for finality of judgments. *No doubt another factor, albeit an unarticulated one, is the difficulty human beings, including judges, have in admitting that they have been duped by a liar.*

Reflections, *supra* note 3, at 177 (footnotes omitted) (emphasis added).

72. Comment, *Criminal Procedure: Minnesota Adopts the* Larrison *Standard for Granting a New Trial Because of Newly Discovered Evidence*: State v. Caldwell, 67 MINN. L. REV. 1314, 1317 (1983) [hereinafter Comment, *Minnesota Adopts*].

> *Berry's* restrictions on the right to a new trial have been justified by the need for finality in the judicial process, notions of judicial economy, a recognition that the prosecution may suffer an undue burden by the debilitating effect of such a delay on eyewitness testimony and other evidence, and a mistrust of the credibility of new evidence, particularly perjured or recanted testimony.

Id. (footnotes omitted). *See also supra* note 71 (reasons for denial of new trial motions).

73. *See infra* note 77. *See also* United States v. Bonilla, 503 F. Supp. 626, 628 (D.P.R. 1980) (showing development of *Berry* standard).

74. *See supra* note 66. If a motion for new trial based on newly-discovered evidence is promptly made, however, the restrictive *Berry* requirements may not apply:

> If the motion is made within seven days after verdict or finding of guilty it is to be granted if it is in the interest of justice to do so, and the more onerous restrictions on later motions on the ground of newly discovered evidence do not apply. If, however, the motion is made more than seven days after verdict, but within the two-year period allowed by the rule [FED. R. CRIM. P. 33], the . . . [*Berry* standard] must be satisfied.

WRIGHT, *supra* note 70, at § 557 (footnote omitted).

strictive *Larrison* rule.[75] Application by a court of this relaxed rule reflects a belief that the entire judicial system weakens with allegations that a conviction rests upon perjured testimony.[76] Yet, those federal courts adhering to the *Berry* standard[77] worry that a literal application of the *Larrison* rule requires reversal of all cases in which claims of perjury occur, even if the perjury concerns a minor matter.[78] These courts see little effective difference between alleged false testimony and other types of newly-discovered evidence.[79] Therefore, the strict standard embodied in *Berry* should apply since, in both situations, the jury has heard something other than the complete truth.[80]

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75. *See* United States v. Wallace, 528 F.2d 863, 866 (4th Cir. 1976) (case remanded to trial court for new determination on defendant's motion for new trial under *Larrison* test); United States v. Johnson, 142 F.2d. 588, 591 (7th Cir. 1944) (*citing* Larrison v. United States, 24 F.2d 82 (7th Cir. 1928)).

76. WRIGHT, *supra* note 70, at § 557.1. Furthermore, "a conviction based on perjured testimony is inherently unfair and compromises judicial integrity." Comment, *Minnesota Adopts*, *supra* note 72, at 1317 (footnote omitted). *But see* Note, *Ninth Circuit Adopts*, *supra* note 69, at 181 (observing that the *Larrison* standard actually results in fewer motions for a new trial granted). Also, "if the court determines that the witness did not in fact commit perjury, that, as a practical matter, is the end of the motion." MOORE, *supra* note 1, at § 33.06[1].

77. *See, e.g.*, Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985) (applying the "probability" standard); United States v. Ramsey, 726 F.2d 601, 605 n.2 (10th Cir. 1984) (applying *Berry* standard); United States v. Krasny, 607 F.2d 840, 844 (9th Cir. 1979) (agreeing with reasoning in *Stofsky* court rejecting *Larrison* standard); United States v. Stofsky, 527 F.2d 237, 245-46 (2d Cir. 1975) (rejecting *Larrison* and applying *Berry* standard); United States v. Lewis, 338 F.2d 137, 139 (6th Cir. 1964) (quoting Winer v. United States, 228 F.2d 944, 952 (6th Cir. 1956) (applying the "probability" standard)); Connelly v. United States, 271 F.2d 333, 335 (8th Cir. 1959) (citing Johnson v. United States, 32 F.2d 127 (8th Cir. 1929) (newly-discovered evidence would probably produce acquittal)); United States v. On Lee, 201 F.2d 722, 723-24 (2d Cir. 1953) (applying the "probability" standard).

78. *See* United States v. Stofsky, 527 F.2d 237, 245-46 (2d Cir. 1975). The court stated:

> [T]he */Larrison/* test, if literally applied, should require reversal in cases of perjury with respect to even minor matters, especially in the light of the standard jury instruction that upon finding that a witness had deliberately proffered false testimony in part, the jury may disregard his entire testimony. Thus, once it is shown that a material witness has intentionally lied with respect to any matter, it is difficult to deny that the jury, had it known of the lie, "might" have acquitted.

Id. However, in actual practice, courts applying the *Larrison* standard generally deny the new trial motion. *See* Note, *I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases*, 83 MICH. L. REV. 1925, 1929 n.16 (1985). "The failure to establish the falsity of trial testimony is the dominant reason for denial of rule 33 motions for new trial based upon perjured testimony." *Id.* A thorough compilation and analysis of federal circuit and district court cases, in which a motion for retrial alleged false testimony at trial, reflected that "[o]f 50 cases in which the *Larrison* test or its substantial equivalent was employed, retrials were denied in 40." *Id.* Instead, a different standard of review is proposed for adoption by the courts. *Id.* at 1947-48. There must be "a significant chance that a jury with knowledge that the witness testified falsely would return a different verdict." *Id.* at 1947 (footnote omitted) (emphasis added). This standard would "strike a proper balance between the interest in the efficient administration of criminal justice and the interest in safeguarding the rights of the accused." *Id.* at 1947.

79. United States v. Krasny, 607 F.2d 840, 844 (9th Cir. 1979) (quoted in WRIGHT, *supra* note 70, at § 557.1). *See generally* Note, *Ninth Circuit Adopts*, *supra* note 69, at 174-78 (analyzing *Larrison* and *Berry* standards).

80. Comment, *Minnesota Adopts*, *supra* note 72, at 1319. The *Larrison* rule and *Berry* stan-

Not all circuit courts commit themselves to either the *Berry* or *Larrison* standard.[81] These circuits tend not to accept a specific rule or standard.[82] Instead, they place a great amount of discretion in the hands of the judge who originally presided over the case in determining whether the trial testimony or the subsequent recantation is true.[83] Motions for new trial are brought before the original trial court judge[84] and are decided either upon affidavits alone[85] or following a hearing.[86] In other words, the judge is granted an opportunity to rule upon his or her own conduct.[87] Since the courts, in effect, impose a pre-

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dard differ in two other respects:

> First, the *Larrison* standard looks back to the trial to determine what effect the perjured testimony had on the prior decisionmaker, while the *Berry* standard anticipates the retrial by determining what effect the new evidence would have on the new decision maker. A second difference . . . [is] [w]hile a court applying the *Berry* test would deny a retrial if diligent defense counsel should have discovered the new evidence during trial, a court applying the *Larrison* test would require only that the perjured testimony prejudicially surprised defense counsel.

Id. (footnotes ommitted).

81. *See, e.g.*, Pelegrina v. United States, 601 F.2d 18, 21 (1st Cir. 1979) (*Larrison* inapplicable since the newly-discovered evidence must be material and have some effect on the outcome); United States v. Mackin, 561 F.2d 958, 961 (D.C. Cir. 1977) (refusing to decide which standard would control since a new trial would be unwarranted under either standard); Newman v. United States, 238 F.2d 861, 862-63 (5th Cir. 1956) (trial judge has wide discretion in weighing all evidence in determining whether justice has been served); United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954) (mentioning *Larrison* "might" standard, however, basing its decision upon the trial judge's reasonable belief that the testimony of a material witness at trial was true); Gordon v. United States, 178 F.2d 896, 900 (6th Cir. 1949) (mentioning *Larrison* "might" standard, however, basing its decision upon the trial judge's reasonable belief that recantation was false).

82. *See supra* note 81.

83. *See, e.g.*, Newman v. United States, 238 F.2d 861, 862 (5th Cir. 1956). The *Newman* court stated: "The function, on well-defined standards, is that of the District Judge for it is . . . 'important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances'. . . ." *Id.* at 862-63 (quoting United States v. Johnson, 327 U.S. 106, 111 (1946)).

> If the District Judge, on the basis of the whole record of the original trial and the matters presented on the hearing of the motion, believes the statements in the affidavit of recantation to be false, . . . the decision is for him to reach for he is 'not at liberty to shift upon the shoulders of another jury his own responsibility, but [is] charged with the responsibility to seek the truth himself.'

Id. at 863 (quoting Gordon v. United States, 178 F.2d 896, 900 (6th Cir. 1949), *cert. denied*, 339 U.S. 935 (1950)). *But see* Martin v. United States, 17 F.2d 973, 976 (5th Cir. 1927) (new trial required since a court cannot determine whether perjured testimony had controlling weight with jury).

84. This requirement apparently evolved out of customary practice and is not one enumerated by the Federal Rules. MOORE, *supra* note 1, at § 33.03[1] n.8.

85. *Id.* at § 33.03[3] (footnote omitted).

86. *Id.* However, "[a] motion based upon a recantation is ordinarily decided without a hearing." *Id.* at § 33.05.

87. *Id.* at § 33.03[1] (footnote omitted).

> There is surely great economy in having the person who knows most about the case determine the validity and probable effect of alleged new evidence. But there is also the danger that the judge might become an advocate for the result. One might ex-

sumption that a recantation is false,[88] the result has been that very few such motions are granted.[89]

Furthermore, in *United States v. Johnson*,[90] the Supreme Court ruled that findings on conflicting evidence made by the trial court following a motion for new trial will not be changed on appeal except in extraordinary situations.[91] The Court noted that since the judge conducting the original trial watched the case unfold, and the findings were supported by evidence, the judge was in the best position to resolve any conflicts.[92] As a result, the power to grant or deny a motion for new trial under Rule 33 lies chiefly in the discretion of the trial court[93] and any evidentiary findings will rarely be disturbed.[94]

2. 28 U.S.C. § 2255

If a motion for new trial based upon newly-discovered evidence in the form of a recantation is unavailable under Rule 33,[95] an individual convicted in federal court may have one last, though unlikely, chance at obtaining a new trial.[96] A minority of circuit courts[97] extend collateral relief under 28 U.S.C. §

> pect the appellate courts, recognizing the natural resistance to reversing oneself, to exercise a broad scope of review of new trial denials. Actually, what happens in practice is just the opposite.

Id. (footnotes omitted). *See also supra* note 78 (noting a recent analysis which revealed that 40 out of 50 motions for new trial based on false testimony made in federal court were denied).

88. MOORE, *supra* note 1, at § 33.05.

89. *See* Note, *Ninth Circuit Adopts*, *supra* note 69, at 181 n.59.

90. 327 U.S. 106 (1946).

91. *Id.* at 111. The Court stated that it is "important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances." *Id.* Although "extraordinary circumstances" were not defined, the Court held that neither the Supreme Court nor the Circuit Court of Appeals may "review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact." *Id.* (citations omitted). The only exception exists "where the findings of fact are wholly unsupported by evidence." *Id.* (citations omitted). Even then, it must "*clearly* appear that the findings are not supported by *any* evidence." *Id.* at 112 (emphasis added).

92. *Id.* The Court concluded that "the trial judge was exceptionally qualified to pass on the affidavits. The record of both the original trial and the proceedings on the motions for new trial shows clearly that the trial judge gave the numerous elements of the controversy careful and honest consideration." *Id.*

93. *See, e.g.*, Batsell v. United States, 403 F.2d 395, 403 (8th Cir. 1968); United States v. Lewis, 338 F.2d 137, 139-40 (6th Cir. 1964).

94. *See supra* note 91.

95. *See supra* note 56.

96. *See* WILKES, POSTCONVICTION REMEDIES, *supra* note 53, at § 4-8. "A few courts have held that a federal conviction can be subjected to Section 2255 attack on grounds of newly-discovered evidence, but these cases are clearly the minority view, however desirable they may be." *Id.* (footnotes omitted).

97. *See, e.g.*, Bentley v. United States, 701 F.2d 897, 898 (11th Cir. 1983) (newly-discovered evidence must probably produce acquittal); Anderson v. United States, 443 F.2d 1226, 1227 (10th Cir. 1971) (evidentiary hearing may be granted unless frivolous or incredible allegation of newly-discovered evidence made); Everitt v. United States, 353 F.2d 532, 532 (5th Cir. 1965) (applying same standards as generally applicable to Rule 33 motions for new trial).

2255[98] to claims based upon newly-discovered evidence. Relief under § 2255 applies to persons convicted in any court established by an Act of Congress[99] and is a federal post-conviction remedy similar to the old common law writ of *coram nobis*.[100]

Relief may be granted, *inter alia*, if the conviction was defective by reason of a fundamental error,[101] such as errors or defects occurring in proceedings on plea and sentence or violations of due process.[102] However, ordinary prejudicial trial errors are not a basis for relief.[103] Advocates maintain that if newly-discovered evidence exists that a crime was never committed, then post-conviction relief would be justified under this provision.[104] Those circuit courts which allow claims of newly-discovered evidence under the federal post-conviction statute[105] generally apply the same standards which govern Rule 33 motions.[106] Other circuit courts either have not ruled on the availability of such relief[107] or have expressly denied motions for new trial based on this ground.[108]

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98. See *supra* note 58 for text of 28 U.S.C. § 2255.

99. *See supra* note 65.

100. WILKES, POSTCONVICTION REMEDIES, *supra* note 53, at § 4-1. The writ of error *coram nobis* originated in English common law and "consisted of an order purporting to issue from the Sovereign in his capacity as the fountain of justice." *Id.* at 18. The writ, once issued, authorized a new and independent civil action in order that "the Court of King's Bench could vacate its own previous final decisions in civil and criminal cases." *Id.* (footnote omitted). A jury trial would be held if a factual dispute was raised by the pleadings and "in accordance with the pleadings or the verdict, the Court of King's Bench would either affirm or set aside its earlier civil judgment or criminal conviction and sentence." *Id.* (footnote omitted). For a historical discussion concerning the availability of *coram nobis* relief for claims of newly-discovered evidence of innocence, see Note, *Post-Conviction Remedies — the Need for Coram Nobis*, 57 NW. U.L. REV. 467 (1962). *See also* SALTZBURG, AMERICAN CRIMINAL PROCEDURE 1150-70 (2d ed. 1984) (analysis of *coram nobis* and *habeus corpus* as collaterial relief).

101. *See supra* note 65.

102. MOORE, *supra* note 1, at § 33.02[3][a] (footnotes omitted).

103. *Id.*

104. *See, e.g.*, WILKES, POSTCONVICTION REMEDIES, *supra* note 53, at § 4-8; United States v. Robinson, 585 F.2d 274, 278 n.5 (7th Cir. 1978).

105. *See supra* note 97.

106. *See, e.g.*, Lindhorst v. United States, 658 F.2d 598, 602 (8th Cir. 1981). The *Lindhorst* court, however, also pointed out that in order for claims of newly-discovered evidence in the form of allegedly perjured testimony to result in a new trial, a convicted person must prove that perjury was in fact committed "or that the government knew or should have known" that perjury had occurred. *Id.* at 602-3. Another circuit court has stated that Section 2255 relief for alleged perjured testimony claims requires that "a defendant . . . show that a prosecutor knew or should have known a witness's answers were false in order to merit a new trial." United States v. Robinson, 585 F.2d 274, 279 (7th Cir. 1978). For standards governing Rule 33 motions see *supra* notes 60-94 and accompanying text.

107. *See, e.g.*, Baumann v. United States, 692 F.2d 565, 578-79 (9th Cir. 1982) (noting district court's acceptance of newly-discovered evidence claims under Section 2255 but not reaching correctness of decision); Bean v. United States, 679 F.2d 683, 685 (7th Cir. 1982) (stating that district judges should decide question at first appropriate opportunity); Pelegrina v. United States, 601 F.2d 18, 19 (1st Cir. 1979) (deciding question under Rule 33 and not applying Section 2255). For contrasting views in federal district courts compare Franklin v. United States, 428 F.Supp. 1184, 1187 (E.D. Okla. 1977) (newly-discovered evidence may establish basis for Section 2255 relief) with Clark v. United States, 370 F.Supp. 92, 95 (W.D. Pa. 1974) (newly-discovered evidence not grounds for either Section 2255 or FED. R. CRIM. P. 33 relief).

Therefore, if new evidence of innocence is discovered and the current federal remedies are not available, then the individual must request extrajudicial relief[109] or serve the sentence.

B. Relief in State Courts

Similar to the federal system, a person convicted in a state court may make a motion for new trial,[110] following a recantation, based upon newly-discovered evidence.[111] Some states[112] have adopted a statute substantially similar to Federal Rule of Criminal Procedure 33[113] while other jurisdictions dictate specific requirements to be met before a new trial will be granted.[114] If the state requirements for a motion for a new trial cannot be met by the convicted individual, then a motion to vacate judgment may be made[115] or some other post-conviction relief may be sought.[116]

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108. *See, e.g.*, United States v. Kearney, 682 F.2d 214, 218-19 (D.C. Cir. 1982). The court noted that motions for new trial based upon newly-discovered evidence are generally made under FED. R. CRIM. P. 33. *Id.* at 218. In *Kearney*, since the motion was made twelve years after conviction, the two-year time limitation required by the rule had expired. *Id.* Taking the untimeliness of the motion into consideration, the court pointed out that "[t]he recognized difficulties imposed on the government in reprosecuting criminal cases long after the event present considerations that are to be weighed in the balance against granting new trials." *Id.* at 219 (quoting United States v. Frady, 456 U.S. 152, 166 (1982)). Because the filing of the motion was untimely, and evidence existed which supported the conviction beyond a reasonable doubt, the *Kearney* court impliedly rejected the applicability of Section 2255 relief for newly-discovered evidence claims:

> This case personifies the great abuse of repetitive postconviction section 2255 proceedings that clog the courts and raise unjustified hopes in convicted criminals that a new trial years down the road from their conviction will leave the government with insufficient witnesses and evidence to again obtain a conviction for a most heinous offense.

Id. at 226.

109. See *supra* note 64 and accompanying text for discussion of executive clemency.

110. For a complete list of these statutory provisions see Appendix A.

111. *See generally supra* note 52 (recantation as newly-discovered evidence in federal court). The same arguments apply at the state court level.

112. *E.g.*, ALASKA RULES OF COURT, CRIM. R. 33 (Book 1985) ME. R. CRIM. P. 33 (West 1985). *See generally* Appendix A (noting those jurisdictions which have enacted a statute similar to FED. R. OF CRIM. P. 33).

113. *See supra* note 56.

114. *E.g.*, N.Y. CRIM. P. LAW § 440.10 (McKinney 1983). In New York, new evidence must have been discovered after trial and it cannot be the type of evidence which could have been discovered during trial with due diligence on defendant's part. *Id.* In addition, a more favorable verdict for defendant would have probably resulted, if such evidence existed at the original trial, and the motion for new trial "must be made with diligence after the discovery of such alleged new evidence." *Id.*

115. *See, e.g.*, ILL. REV. STAT. ch. 110, § 2-1401 (1977); FLA. R. CRIM. P. 3.850. For a detailed survey of all current state provisions governing post-conviction relief see WILKES, POST-CONVICTION REMEDIES, *supra* note 53, at app. A.

116. *See, e.g.*, ILL. REV. STAT. ch. 38, § 122-8 (1977 and Supp. 1984). Several legal experts in Illinois commented that Dotson made a tactical error in filing a motion for new trial under the civil code. N.Y. Times, Apr. 13, 1985, at A6, col. 5. Under the Illinois Civil Code, motions for new trial are made before the same judge who presided over the original proceeding and "lawyers had complained that it was futile to ask a judge to overturn the conviction because of error." *Id.*

However, instead of applying a specific standard following a recantation, as is done in the federal system,[117] many state courts grant the trial judge wide discretion in determining the credibility of the recanting witness.[118] The case most often cited in support of judicial discretion is an early New York case, *People v. Shilitano*.[119] In *Shilitano*, the witnesses for the state in a first degree murder case later claimed that their trial testimony was false.[120] In denying a motion for new trial, the court noted that recantation by a witness cannot automatically entitle a convicted person to a new trial.[121] If new trials were allowed automatically, the power to grant such trials would rest with the witnesses who testified against the defendant and not with the court.[122] In determining whether a new trial should be granted, the court must look for the motive behind the recantation.[123] If the recantation appears to have a corrupt or unworthy motive and the trial testimony appears to have been given without false motive, little weight should be given to the recantation.[124]

In a concurring opinion, Judge Cardozo emphasized the important role

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The Illinois Criminal Code, however, provides that "[a]ll proceedings under this Article [Article 122 — Post-Conviction Hearing] shall be conducted and all petitions shall be considered by a *judge who was not involved* in the original proceeding which resulted in conviction." ILL. REV. STAT. ch. 38, § 122-8 (Supp. 1984) (emphasis added).

Furthermore, although the convicted individual must usually allege that the prosecution knowingly used perjured testimony, one may assume, *arguendo*, that an evidentiary hearing would have been granted before a different judge in the *Dotson* case. In People v. Cihlar, 125 Ill. App.3d 204, 465 N.E.2d 625 (1984), a defendant who sought post-conviction relief under Article 122, on the grounds of newly-discovered evidence, did not have to claim that the alleged perjured testimony, in the form of inconsistent post-trial statements, was used knowingly in order for defendant to be entitled to an evidentiary hearing. *Id.* at 212, 465 N.E.2d at 630. An evidentiary hearing was required since the defendant had established a factual question as to whether the rape victim's testimony, which had resulted in the initial conviction, was perjured. *Id.* If Dotson had been able to obtain an evidentiary hearing before a different judge, one wonders if Dotson's case would have had a different outcome in light of strong public support for his release.

117. *See supra* notes 52-109 and accompanying text.

118. *See, e.g.*, Derrington v. United States, 488 A.2d 1314, 1338-40 (D.C. 1985); State v. Tharp, 372 N.W.2d 280, 284 (Iowa Ct. App. 1985); Commonwealth v. Tobin, 392 Mass. 604, 619-20, 467 N.W.2d 826, 833 (1984); Commonwealth v. Jones, 340 Pa. Super. 448, 455, 490 A.2d 863, 867 (1985).

119. 218 N.Y. 161, 112 N.E. 733 (1916).

120. *Id.* at 169, 112 N.E. at 735.

121. *Id.*

122. *Id.* The court reasoned that:

> Bearing in mind that the witnesses to crimes of violence are often of a low and degraded character and that after they have given their testimony they are sometimes influenced by bribery and other improper considerations, it is evident that the establishment of a rule which left the power to grant a new trial to a defendant to depend upon recantation by such witnesses would be subversive to the proper administration of justice.

Id.

123. *Id.* at 170, 112 N.E. at 736.

124. *Id.* Commenting on the suspicious nature of recantation of witness testimony, the court noted that "[t]here is no form of proof so unreliable as recanting testimony. In the . . . [public] mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character." *Id.*

that the trial judge must serve in making a determination as to the credibility of the recanting witness.[125] It remains the judge's responsibility to resolve the conflict and ascertain the truth through a determination of the facts.[126] If the trial judge believes with reasonable probability that the recantation is true, then a new trial may be granted.[127] However, if the trial judge believes the recantation lacks credibility, a new trial will be denied.[128]

The majority of jurisdictions allow judicial discretion,[129] with many courts ruling that the trial judge's determination of credibility and subsequent denial of post-conviction relief was not an abuse of discretion.[130] Thus, even though a

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125. *Id.* at 180, 112 N.E. at 739 (Cardozo, J., concurring) ("It became . . . [the judge's] duty to say whether . . . [the recanters] were conscience-stricken penitents, or criminal conspirators to defeat the ends of justice").

126. *Id.*

127. *Id.*

128. *Id.* Apparently, Judge Cardozo feared that a floodgate effect would result if new trials were granted as a matter of law following a recantation by a witness. He seemed to place extremely high priority on the finality of judgments and the preservation thereof by placing the power to determine the "truth" in the hands of the trial judge:

> He [the trial judge] was not at liberty to shift upon the shoulders of another jury his own responsibility. That would have been to make the conspiracy triumph. He was charged with a responsibility to seek the truth himself. In fulfillment of that duty the judge who heard and saw the witnesses has held that there has been an attempt by the defendant 'to poison the wells of justice.' We ought not to set aside that decision on the facts unless it is clearly wrong.

Id. at 180-81, 112 N.E. at 739 (citation omitted).

129. See *supra* note 119-28 and accompanying text for the *Shilitano* court's analysis for allowing judicial discretion in recantation cases.

130. Only a few courts have held that an abuse of discretion occurred when the trial judge denied a motion for new trial based upon recanted testimony. *E.g.*, Roath v. State, 185 Ark. 1039, 1050, 50 S.W.2d 985, 989 (1932) (material witness recantation following murder prosecution necessitated new trial); Commonwealth v. Mosteller, 446 Pa. 83, 85, 284 A.2d 786, 788 (1971) (child prosecutrix's recantation following rape trial necessitated new trial where such testimony formed sole basis for defendant's conviction). For cases discussing recantations by victims of sex crimes see Annotation, *Recantation by Prosecuting Witness in Sex Crime as Ground for New Trial*, 51 A.L.R. 3d 907 (1973). "Generally, the fact that a witness for the prosecution has recanted does not automatically entitle the defendant to a new trial." *Id.* at 909.

Furthermore, if a defendant was convicted *solely* on the basis of a witness who later recants, failure to grant a new trial has been deemed as abuse of judicial discretion. *See* State v. York, 41 Wash. App. 538, 544, 704 P.2d 1252, 1255 (1985). The trial court need not determine whether the recanting witness committed perjury. *Id.* at 539, 704 P.2d at 1253. Rather, a new trial will automatically be granted as long as the court finds support in the trial record that the defendant's conviction rested solely on the recanted testimony. *Id.*

In contrast, the Massachusetts Supreme Judicial Court, in a rare move, remanded a lower court judge's decision to allow a criminal defendant's motion for post-conviction relief based upon newly-discovered evidence in the form of a recantation by a key prosecution witness. Comm. v. Grace, 397 Mass. 303, 313, 491 N.E.2d 246, 252 (1986). The defendant was convicted of first degree murder and served eleven years in prison before a lower court judge reversed the conviction. *Id.* at 304, 491 N.E.2d at 247. The case was remanded to determine "whether the defendant has met his burden of showing that reasonable diligence would not have produced . . . [the two "new" witnesses allegedly corroborating the recantation] before trial . . . [or] in connection with any prior motion for new trial." *Id.* at 309, 491 N.E.2d at 250. In other words, "whether the witnesses' testimony was newly discovered." *Id.* at 308, 491 N.E.2d at 249.

material witness may claim that a defendant was convicted as a result of false testimony, if post-conviction relief is unavailable or denied, a potentially innocent person must serve the imposed sentence or seek extrajudicial relief.[131]

III. Problems With Current Post-Conviction Remedies Based On A Recantation

Three general problem areas exist with regard to the courts' treatment of recanted testimony. First, too much discretion is given to the trial judge in determining a recanting witness's credibility, contrary to a fundamental evidentiary principle.[132] Under Anglo-Saxon law, witness credibility is a factual determination left to the jury.[133] Since a jury collectively convicted the accused based primarily upon testimony subsequently recanted, allowing the trial judge to decide credibility clearly usurps this jury function.[134] Next, contrary to a belief that finality of judgments lends certainty to the judicial system, the "reasonable doubt" standard applied in all criminal cases[135] reflects an inherent lack of absolute truth in the fact-finding process.[136] Since absolute truth can rarely, if ever, be achieved at trial, a material witness recantation, therefore, casts severe doubt upon those facts a jury has found to warrant conviction.[137] The need for finality of judgments must bend to the need for truth if justice is to be served.[138] Finally, the lack of ability to ascertain truth demands re-evaluation of facts in capital cases since, once executed, a convicted person's ability to appeal vaporizes.[139] A close analysis of these problem areas provokes serious questions concerning post-conviction remedies following a material witness recantation and demands reform.

A. Judge vs. Jury

Current post-conviction remedies available following a material witness recantation allow the trial judge wide discretion in ascertaining credibility.[140] The rationale is that since the judge was present at both the trial and the subsequent hearing, the judge remains in the best position to determine whether the credibility of the witness at trial exceeded that of the recantation.[141] Although this procedure probably evolved from the practice of making motions for a new trial before the original trial judge,[142] it contradicts a fun-

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131. *See supra* note 64 and accompanying text.

132. *See infra* notes 140-56 and accompanying text (analyzing problem of judicial discretion).

133. *See infra* notes 142-46 and accompanying text (judge versus jury debate).

134. *See infra* notes 140-56 and accompanying text (analyzing problem of judicial discretion).

135. *See supra* note 50 (analyzing problem of defining "reasonable doubt").

136. *See infra* notes 157-70 and accompanying text (finality vs. truth debate).

137. *Id.*

138. *Id.*

139. *See infra* notes 171-91 and accompanying text (execution as non-appealable).

140. *See supra* notes 60-109 (federal courts), 110-31 (state courts), and accompanying text.

141. *Id.*

142. *See supra* note 84 and accompanying text.

damental principle of evidentiary law.[143] In a broad sense, within the criminal context,[144] juries determine questions of fact while the judge decides questions of law.[145] As long as juries remain factfinders in criminal cases,[146] the role of the judge should not infringe upon their function as determiners of witness credibility.

Furthermore, if the sole justification for allowing a judge to usurp the jury's function remains the mere fact that the judge was present at the original trial,[147] then this reason becomes unsubstantiated in jurisdictions which allow a different judge, at a post-conviction evidentiary hearing, to determine witness credibility.[148] In such jurisdictions, the new judge simply imposes his/

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143. *See* 4 S. GARD, JONES ON EVIDENCE § 29:9 (6th ed. 1972). "It is the exclusive province of the jury . . . to pass upon the credibility of the witnesses and to weigh the evidence in arriving at a factual determination." *Id.* (footnote omitted). *See also* 81 AM. JUR. 2D *Witnesses* § 658 (1976) which states that "[a]fter a witness has testified in a case tried before a jury, the question of his credibility in general becomes a matter for the consideration and determination of the jury, both in civil and criminal cases." *Id.* (footnotes omitted).

Furthermore, the United States Supreme Court has noted that "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." Hoffa v. United States, 385 U.S. 293, 311 (1966). For a typical jury instruction regarding determination of credibility of witnesses see 25 AM. JUR. PL. AND PR. FORMS 366-67 (Witness Form 181.1) (Supp. 1986). This jury instruction states, in part, that the jury members "are the sole and exclusive judges of the evidence in the case and of the credibility of the witnesses who have appeared before . . . [them]." *Id.*

144. *See* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 6 n.13 (1978) [hereinafter cited as LILLY]. Lilly states that "[i]n criminal cases, by uniform tradition if not constitutional compulsion, the jury always applies the law to the facts unless the defendant waives his right to jury trial." *Id.* (citation omitted). *See also* U.S. CONST. amend. VI (right to jury trial in criminal cases).

145. LILLY, *supra* note 144, at § 6. The rationale for this division is that "the judge, through training and experience, is particularly qualified to resolve legal questions while the jury, which brings to the courtroom the common experience of the community, is better equipped to settle factual disputes." *Id.*

146. *See supra* notes 143-44. The debate over whether juries should be used at all as determiners of fact has provoked numerous writings. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 4 n.2 (1966). The extreme arguments are that "since the jury was employing laymen amateurs in what must be a technical and serious business, it could not be a good idea . . . [versus] the enthusiasts of the jury . . . [who] have tended to lapse into sentimentality and to equate literally the jury with democracy." *Id.* at 5. The debate between judge vs. jury as adjudicators of fact, however, is well beyond the scope of this Note. For further analysis of this issue see Flango & Rober, *Rise or Fall of the American Jury*?, 7 STATE CT. J. 27 (1983); P. DEVLIN, TRIAL BY JURY (1956); H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1956); Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939).

While the issue of who is more competent to administer justice remains unresolved, the role of the jury throughout history is well documented. *See generally* L. MOORE, THE JURY TOOL OF KINGS, PALLADIUM OF LIBERTY (1973) (historical development of the jury system). For example, "perhaps even the Egyptians had a role in the formation of the jury. The Egyptians had a jury (kenbet) of eight members, four from each side of the Nile, which tried minor charges against workmen in the necropolises. A fellow workman presided. This jury existed almost 4,000 years ago . . . ." *Id.* at 4.

147. *See supra* notes 90-4 and accompanying text.

148. *See supra* note 116.

her learned opinion, based solely upon the trial record and his/her observation of the recanting witness, as to when perjury was committed.[149] The decision of one judge should not be greater than that of the several jurors.[150]

Similarly, this determination of credibility is, in reality, a determination of whether the witness lied at trial or is lying in the recantation.[151] Unlike a perjury trial, the recanting witness will always be found to have lied.[152] A recantation hearing differs from a formal perjury trial due to the lack of penal sanctions imposed.[153] Yet, both a perjury trial and recantation hearing resolve

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149. *See* Martin v. United States, 17 F.2d 973, 976 (5th Cir. 1927) *cert. denied*, 275 U.S. 527 (1927). The court observed:

> There is no way for a court to determine that the perjured testimony did not have controlling weight with the jury, and . . . a new light is thrown on it by the admission that it was false; so that, on a new trial, there would be a strong circumstance in favor of the losing party that did not exist, and therefore could not have been shown, at the time of the original trial.

Id. The central problem with having the judge who originally heard the case decide whether a motion for new trial or post-conviction relief should be granted is outlined by the following:

> Such motions are frequently brought months, occasionally even years, after the original trial, so that there is little reason to be confident that most judges are actually capable of remembering a particular witness' performance at trial. It is just as likely that the information that is brought to the post-conviction hearing by the original judge includes some emotional investment in believing that the first trial was fair and just.

Reflections, supra note 3, at 179 (footnotes omitted).

150. *See* United States v. Mitchell, 29 F.R.D. 157, 159 (N.J. 1962). The court stated:

> Further, in view of the requirement of the sixth amendment to the United States Constitution guaranteeing every man the right to trial by jury for crime, it is not the function of a trial judge to decide finally what the verdict should be, but simply to determine whether the newly discovered evidence should be submitted to a new jury.

Id. Similarly, in People v. Shilitano, 218 N.Y. 161, 112 N.E. 733 (1916), while the majority opinion allowed the trial judge to determine credibility of the recanting witness, the dissent questioned the court's reasoning since an accused must be found guilty beyond a "reasonable doubt":

> The defendant was presumed innocent. It was incumbent upon the People to establish his guilt beyond a reasonable doubt. That burden the prosecution assumed by the testimony of the witness named; the jury believed their evidence and convicted the defendant. The jurors were afforded an opportunity to look upon the witnesses and hear their testimony. What court or judge can fathom the minds of the jurors or speculate upon what basis they formed a judgment?

Id. at 194, 112 N.E. at 744 (Hogan, J., dissenting). Granting sole power to determine credibility to a single trial judge's opinion and observation following a recantation usurps the original jury's decision. It is this collective decision by a group of one's peers which must be preserved and not merely the original conviction.

151. *See, e.g.*, Record of Hearing on Motion to Vacate, *supra* note 26, at 229. Judge Samuels, upon ruling that Cathleen Crowell Webb's recantation was not credible, stated that he could not find that perjury was committed at the original trial. *Id.*

152. *See* N.Y. Times, Apr. 16, 1985, at 26, col. 1 ("[c]onfidence in American justice cannot rest easily when he [Dotson] is sent back to jail on the word of a woman [Webb] who is, one way or the other, an acknowledged liar"). Similarly, "[r]ecanting testimony is thought to be inherently unreliable, in part because it comes from the lips of a liar, and there is a persistent belief that he who lies once will lie again. Thus, why grant any credence at all to the affidavit or testimony of a self-admitted perjurer?" *Reflections, supra* note 3, at 177 (footnote omitted).

153. Since it remains the prosecutor's choice whether or not to bring formal charges against

the issue of whether a person has lied while under oath.[154] Therefore, since a jury trial is allowed in most perjury cases,[155] a hearing by one's peers should also be allowed as to the sole issue of the recanting witness's credibility.[156]

B. Finality vs. Truth

An automatic new trial based upon a recantation is rarely ever granted due to the belief that finality of judgments produces certainty within the factfinding process.[157] If the purposes of criminal law and punishment include rehabilitation and deterrence, then society must have the ability "to say that one violating the law will swiftly and certainly become subject to punishment, just punishment."[158] The rehabilitation process cannot even begin if society is unable to tell the convicted individual that the punishment rendered was just.[159] Furthermore, this belief in finality reflects a desire that the factfinding must, at some point, come to an end:

> Both the individual criminal defendant and society have an interest in ensuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately

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a recanter, an automatic perjury trial does not occur. Yet, a prosecutor would win in either case — perjury either was committed at trial or in the sworn affidavit of recantation. The only problem for the prosecutor would be determining on which occasion the witness lied. However, a prosecutor would have a conflict of interest in that if formal perjury charges were brought against the recanting witness, the original trial conviction upon which the now recanting witness testified could be undermined. A prosecutor would have to prove that both the recantation is false and the trial testimony is true. Therefore, no incentive to bring formal charges of perjury against a recanting witness exists where a prosecutor already has a conviction. Consequently, a prosecutor, in order to maintain the original conviction, would support the position favoring finality of judgments. For a discussion of finality of judgments see *infra* notes 157-70 and accompanying text. Thus, in the absence of formal perjury charges, very few trial court judges who have sat through one entire trial would overturn a conviction or grant a new trial both for judicial administration, efficiency, and finality reasons and, perhaps, for the reason of judicial pride. *See supra* note 71 (reasons why new trial rarely granted).

Prosecutors will bring formal charges, however, in certain recantation cases. In Massachusetts, two teenagers were indicted for perjury after bringing charges of rape against two men and then recanting those charges during trial. Bennett, *2 indicted for perjury in rape case*, Boston Globe, Jan. 16, 1986, at 23, col. 4. This situation differs, of course, from the usual case where the witness or victim recants after trial. Here, the prosecutor has an incentive to prosecute since no conviction resulted from the rape charge. Also, query whether the two men would have been found not guilty if the two girls had not recanted during trial but rather after trial.

154. *See infra* note 155 (perjury trial); *see supra* note 151 (credibility hearing).

155. *See, e.g.*, N.Y. PENAL LAW §210.15 (McKinney 1975). "A person is guilty of perjury in the first degree when he swears falsely and when his false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made. Perjury in the first degree is a class D felony." *Id.*

156. *See supra* notes 147-50 and accompanying text.

157. *See supra* notes 44 and 71. For an analysis of arguments against collateral attacks on criminal judgments see Friendly, *Is Innocence Relevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 146-50 (1970) [hereinafter Friendly].

158. Friendly, *supra* note 157, at 146 (quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963)).

159. *Id.* (footnote omitted).

> be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.[160]

However, in *Burr v. Florida*,[161] a dissenting Justice Marshall, joined by Justice Brennan, attacked this belief in finality as being subservient to the need for truth.[162] Although our legal system often assumes the equation of truth and finality, it falls far short of reaching the ideal of absolute truth.[163] Marshall noted that the Anglo-Saxon factfinding process reflects this inability to ascertain truth through the use of the "reasonable doubt" standard.[164] Juries are not instructed to eliminate all doubt before returning a verdict.[165] Instead, the standard merely attempts to exclude, as close as possible, the likelihood of erroneous judgment.[166]

Consequently, stated Marshall, "the institutions of criminal justice have been adjusted in recognition that a jury's verdict and truth are not unerringly synonymous."[167] Where a convicted individual provides sufficient justification

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160. *Id.* (quoting Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting opinion)). Three other reasons exist in support of disallowing collateral attacks on criminal judgments. First, collateral attacks consume a lot of time and "[t]he longer the delay, the less the reliability of the determination of any factual issue giving rise to the attack." *Id.* at 147 (footnote omitted). Next, "the most serious single evil with today's proliferation of collateral attack is the drain upon the resources of the community — judges, prosecutors, and attorneys appointed to aid the accused, and even of that often overlooked necessity, courtrooms." *Id.* at 148. Finally, collateral attacks " 'must prejudice the occasional meritorious application to be buried in a flood of worthless ones.' " *Id.* at 149 (quoting Justice Jackson in Brown v. Allen, 344 U.S. 433, 437 (1953)).

Even though Judge Friendly agrees that finality of judgments should be outweighed by a policy against incarcerating or executing an innocent person, too broad a policy would allow "a man steeped in guilt . . . [to attack] his conviction years later because of some technical error." *Id.* at 150. Judge Friendly would, however, allow a post-conviction remedy based upon newly-discovered evidence. *See infra* note 205.

161. 106 S. Ct. 201 (1985) (mem. decision) (Marshall, J., dissenting).

162. *Id.* at 203. The dissent arose from the Court's denial of a petition to stay execution. *Id.* at 201. The issue concerned whether the sentencing jury in a capital case, in considering whether the accused deserves to die, may be prohibited from taking into account its own lingering doubts as to the accused's guilt. *Id.* During trial, the State's key witness testified against the accused, but on the following day recanted her previous testimony. *Id.* The State would probably not have had a case without the witness's testimony since the State produced no other evidence directly linking the accused with the crime. *Id.* at 202. Even though the jury recommended life imprisonment thetrial judge overrode the recommendation and imposed the death penalty. *Id.* at 202.

163. *Id.*

164. *Id.* (citation omitted). Marshall stated that "the beacon of truth-seeking process in criminal cases is not absolute certainty, but the 'reasonable doubt' standard, which has eluded definition by the courts for centuries." *Id.* For an analysis of the "reasonable doubt" standard, see *supra* note 50.

165. Burr v. Florida, 106 S. Ct. 201, 202 (1985) (mem. decision) (Marshall, J., dissenting). Furthermore, "no instruction can prevent the possibility of human error. '[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened.' " *Id.* (citing In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

166. *Id.* at 202.

167. *Id.* at 203.

that the jury's verdict, based upon the "reasonable doubt" standard, was wrong, finality of judgments "yields to the more compelling concerns of truth and fairness."[168] Every jurisdiction recognizes that a jury's verdict is neither certain nor infallible by providing a post-conviction relief mechanism for claims based upon newly-discovered evidence.[169] Applying Marshall's reasoning, a material witness's recantation often, if not always, casts sufficient doubt to warrant a new trial or, at least, a careful re-evaluation and determination of the recanting witness's credibility.[170]

C. *Execution of a Convicted Person as Non-Appealable*

In capital cases, the possibility of innocence should be a mitigating factor.[171] A need exists for a new trial, or at least a credibility hearing before a jury, following a recantation in a capital case.[172] This need becomes paramount due to the finality of such a sentence.[173] A recent study reveals that, in this century alone, some 343 American citizens who were convicted of capital crimes[174] were later found innocent even though many were sentenced to death.[175] Some jurisdictions provide compensatory relief for persons who have

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168. *Id.*

169. *Id.* Judge William Young, formerly of the Massachusetts Superior Court, expressed a similar view toward the judicial process:

> Our system of justice is designed to acquit the innocent and to convict the guilty. It's designed with a great number of checks to assure that no innocent person is convicted and sent to prison. At the same time we have to keep in mind the approach we use to trials. It's a form of democracy. We turn to a jury of a person's peers. Now, in any human system, the system is not infallible. So when we have a situation where a key witness recants his or her testimony, naturally it's taken very seriously.

Nightline: Dotson Case: The Ripple Effect 4 (ABC television broadcast, May 9, 1985).

Justice Marshall's and Justice Brennan's dissent, along with Judge Young's explanation, stand for the proposition that the factfinding process in criminal cases embodied by our legal system, being one of "peer democracy," is subject to human shortcomings. Due to this infallibility, we as society, must take meticulous care and see to it that the truth, or as close to absolute truth as possible, is ascertained at trial. Since witness testimony plays an integral part in the factfinding process, society must demand that such testimony be reliable. Therefore, when a material witness, upon whose testimony a conviction primarily rests, voluntarily recants that testimony, the goal of truth necessitates a re-evaluation of that testimony. Truth and finality are not the same. To refuse to re-open those cases where a witness recants results in injustice and weakens the credibility of the judicial system as a whole. For a complete list of state statutes which provide motions for new trial based upon newly-discovered evidence see Appendix A.

170. *See supra* note 169.

171. Burr v. Florida, 106 S. Ct. 201, 203 (1985) (mem. decision) (Marshall, J., dissenting).

172. *See infra* notes 179-91 and accompanying text.

173. *See infra* notes 179-91 and accompanying text. "The unique finality of a capital sentence obliges society to ensure that capital defendants receive a fair chance to present all available defenses . . . ." Justice Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 1 (1986). *See also* Boston Globe, Sept. 7, 1985, at 32, col. 1 where Justice Marshall admonished his colleagues, accusing them of rushing "defendants toward execution before their appeals have been adequately reviewed." *Id.*

174. H. BEDAU & M. RADELET, MISCARRIAGES OF JUSTICE IN POTENTIALLY CAPITAL CASES 1 (1985) [hereinafter BEDAU & RADELET].

175. *Id.* In a 1982 Ohio case provided by the study, two men were convicted and sentenced

been wrongly convicted.[176] However, no amount of damages could ever compensate the victim of a wrongful execution.[177] The possibility of wrongful execution dictates strong support in favor of granting new trials in order to ensure accurate convictions.[178]

In *Dobbert v. Wainwright*,[179] a dissenting Justice Brennan stressed that it is the Court's duty to ensure that innocent people are not executed by minimizing all possibilities of erroneous judgment.[180] In *Dobbert*, the application for a stay of execution was denied.[181] In his dissent, Justice Brennan noted that an allegation had been made by the accused that his conviction rested upon perjured testimony.[182] The alleged perjury was in the form of a recantation of testimony by the son of the accused.[183] Although the accused conceded that a strong presumption exists against recanted testimony, he argued that there is a need in federal courts to formulate proper standards for evaluating both the materiality and the credibility of recantations.[184] The need for proper standards is paramount where the recanted testimony provides the sole basis of support for a first degree murder conviction.[185]

In response, Justice Brennan agreed that a strong presumption exists against allowing a recantation to be a basis for granting a new trial.[186] Society needs to have factual disputes resolved and finality accorded to those resolu-

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to life imprisonment for the rape and murder of a child. *Id.* at 68. Neither defendant was directly linked to the crime by physical evidence. *Id.* Not until a key witness recanted and was convicted of perjury were the charges dropped or defendants acquitted. *Id.* "The erroneous convictions rested entirely on the testimony of two witnesses and the jury's refusal to believe the defendants' alibis." *Id.*

176. *See, e.g.*, Gorman, *Compensating the Wrongfully Convicted in Illinois*, 73 ILL. B.J. 226 (Dec. 1984). For a New York case in which compensation was awarded, see *Innocent Man Awarded $1 Million After 24 Years In Prison*, 14 CRIM. JUS. NEWSL. 6 (June 20, 1983).

177. The victim of a wrongful execution cannot be compensated since, by definition, an executed individual no longer exists. All the procedures and safeguards built into the criminal justice system, though supposedly designed to protect the individual, can and do fail. *See generally* BEDAU & RADELET, *supra* note 174 (study showing 343 American citizens wrongfully convicted this century). Query whether the estate of the deceased could recover under a wrongful death claim.

178. *See* BEDAU & RADELET, *supra* note 174, at 29. The main thrust of this study condemns the death penalty and advocates its repeal, thereby eliminating with one stroke the risk of executing the innocent. *Id.* According to the study, removal of the death penalty entirely would be the only way to avoid wrongful executions:

> Just as the practice of criminal prosecutions is bound to result in occasional error, the practice of carrying out the death penalty is bound to result in occasionally executing the innocent. Defenders of the death penalty and the general public must accept this inference, even if they minimize the size of the risk as well as the magnitude of the stakes by insisting that, whatever their size, the risk is justified.

Id.

179. 105 S. Ct. 34 (1984) (mem. decision) (Brennan, J., dissenting).

180. *Id.* at 39.

181. *Id.* at 34.

182. *Id.* at 35.

183. *Id.*

184. *Id.* at 36.

185. *Id.*

186. *Id.* at 38.

tions.[187] However, society at large and the convicted individual in particular have an equal interest in ensuring that only the guilty are incarcerated, fined, executed, or otherwise punished.[188] Regardless of how these interests are ultimately balanced in the ordinary case, Justice Brennan claimed that the eighth amendment[189] dictates special consideration by the courts in capital cases.[190] Thus, both state and federal courts must, at least in the capital context, strike a special balance.[191]

IV. Reforming Recantation Procedure: Its Application and Effect

In order to resolve the problems material witness recantations pose, it is necessary to reform current post-conviction procedure. The procedural reforms that follow are premised on the reasoning espoused by Justice Marshall in *Burr*[192] that neither certainty nor infallibility are attained by the "reasonable doubt" foundation of the adversary system.[193] Even in criminal cases where no recantation occurs, this grey area of "reasonable doubt" reflects the inability of the judicial system to obtain absolute truth.[194] Yet, society needs to draw the line at some point during the judicial process and call a judgment final.[195] The result has been to allow only a limited number of collateral attacks upon judgments.[196] These have usually occurred only in cases of constitutional magnitude.[197] Consequently, other than a motion for new trial,[198] few remedies

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187. *Id.*

188. *Id.*

189. The eighth amendment provides that "nor [shall] cruel and unusual punishments [be] inflicted." U.S. CONST. amend. VIII.

190. Dobbert v. Wainwright, 105 S. Ct. 34, 38 (1984) (mem. decision) (Brennan, J., dissenting).

191. *Id.*

192. *See* Burr v. Florida, 106 S. Ct. 201, 203 (1985) (mem. decision) (Marshall, J., dissenting).

193. *See supra* notes 161-70 and accompanying text.

194. *Id.*

195. *See* IV AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Commentary at 22:18 (2d ed. 1980) [hereinafter ABA, POSTCONVICTION STANDARDS]. Post-conviction relief is a fairly new development and poses a problem to the concept of finality:

> The essential problem is the degree of finality to be accorded criminal judgments, a vexing, complicated problem. It is only from about the turn of the century that federal criminal judgments became generally appealable; until then, the decision in the trial forum was virtually unreviewable . . . . Post-conviction remedies in the current sense are considerably more recent than appeals. Serious evaluation of the problems of finality has just begun.

Id. (citing, *inter alia*, Bator, *Finality in Criminal Law and Federal Habeus Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963)). *See also supra* notes 157-70 and accompanying text (discussing finality of judgments).

196. *See* WILKES, POSTCONVICTION REMEDIES, *supra* note 53, at § 1-9. "The different claims recognized as grounds for post-conviction relief in the federal and various state courts fall into three broad classifications: (1) jurisdictional grounds, (2) constitutional grounds, and (3) other grounds." *Id.* However, in general, if a claim is neither jurisdictional nor constitutional, it will not be grounds for post-conviction relief. *Id.* at § 1-12. Furthermore, newly-discovered evidence of innocence is also usually not a ground for relief. *Id.* at § 1-13 (footnote omitted).

197. *Id.* at § 1-11. "Constitutional grounds for relief are by far the most frequently raised

exist for newly-discovered evidence based upon a material witness recantation.[199] These following reforms propose, therefore, that newly-discovered evidence ought to be a ground for post-conviction relief.[200] If the evidence is in the form of a recantation, a credibility hearing before a jury should be allowed.[201]

A. Post-Conviction Relief and Newly-Discovered Evidence

One type of reform should be the inclusion of newly-discovered evidence as a ground for collateral post-conviction relief. This view has been adopted by the American Bar Association (ABA).[202] Under the ABA standards, post-conviction review in general would be a single, comprehensive remedy.[203] This unified system admittedly departs from current collateral post-conviction relief mechanisms[204] by including a remedy similar to a motion for new trial based

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and litigated in current federal and state post-conviction remedy proceedings." *Id.*

198. In federal court, a motion for new trial may be made under FED. R. CRIM. P. 33, *supra* note 56. For statutory provisions governing motions for new trial in state courts see Appendix A.

199. *See* WILKES, POSTCONVICTION REMEDIES, *supra* note 53, at § 1-13.

200. *See infra* notes 202-23 and accompanying text.

201. *See infra* notes 224-35 and accompanying text. Increasing the sanction for perjury would ideally deter witnesses from lying at trial and thus promote truth — the ultimate goal strived for by the adversarial system. On the other hand, instead of deterring the initial lie, a higher penalty may have the greater effect of deterring the recantation. If the goal remains truth at the trial level, then increasing the penalty for perjury probably would not have a significant effect.

202. ABA, POSTCONVICTION STANDARDS, *supra* note 195, at 22:16. The ABA Project on Criminal Justice Standards began in 1963 and produced "the 'single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history.'" I AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE xv (2d ed. 1980) (quoting Burger, C.J.). The philosophy of the standards is to allow each individual jurisdiction to choose what form of implementation, if any, it desires. *Id.* at xix. For example, a jurisdiction may "do so by translating the standards into a code, by incorporating the principles of the standards into rules of court or practice, or by encouraging its judicial officers to look to the standards as authority in deciding appropriate cases before them." *Id.* Former Chief Justice Warren E. Burger noted:

> In sum, *this project was much more than a theoretical and idealistic restatement of the law, but rather a synthesis of the experience of a diverse and highly experienced group of professionals.*
>
> The Standards are a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual. Taken as a whole, they can be utilized by the various states and federal system to elevate criminal justice to a new level — one that is reasonable, workable, and above all fair . . . . They need not be accepted on an 'all or nothing' basis but used as a resource for improvement.

Id. (quoting Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 251-52 (1974)).

203. ABA, POSTCONVICTION STANDARDS, *supra* note 195, at 22:6. The post-conviction standards were designed to "replace the hodgepodge of procedures with a single, comprehensive method of handling postconviction litigation. Traditional procedures, fashioned before modern postconviction review emerged, are not adequate for present needs." *Id.* Commentary at 22:7 (footnote omitted).

204. *Id.* Commentary at 22:19. *Compare* Robinson, *Proposal and Analysis of a Unified Sys-*

upon newly-discovered evidence.[205] The ABA standards point out, however, that factual issues raised by a direct motion for new trial could also be grounds for collateral post-conviction relief.[206] Therefore, the ABA system incorporates newly-discovered evidence as one available basis for a collateral post-conviction claim.[207]

Procedurally, under the ABA standards, a convicted person must submit an application, along with an affidavit by a third person,[208] supporting the claim for post-conviction relief.[209] A submitted application should not be dismissed outright if lacking in evidentiary support.[210] The case may be summarily disposed of[211] when, after responsive pleadings have been filed[212] and dis-

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tem for Review of Criminal Judgments, 54 B.U.L. REV. 485 (1974) (providing defendant with evidentiary hearing immediately following trial thereby integrating direct and collateral claims into one review) *with* Nejelski & Emory, *Unified Appeal in State Criminal Cases*, 7 RUT.-CAM. L.J. 484 (1975) (unified review limited in that, *inter alia*, constitutionally-based collateral attacks generally allowed multiple review).

205. Judge Henry J. Friendly of the Second Circuit Court of Appeals approves of the ABA's inclusion of newly-discovered evidence as a grounds for post-conviction relief. Friendly, *supra* note 157, at 159 n.87. However, Judge Friendly ultimately rejects the proposed ABA standards, as a whole, because "while professing devotion to finality, [it] would in fact work a wholesale repudiation of it." *Id.* at 158 (footnote omitted). Yet, he would "allow an exception to the concept of finality where a convicted defendant makes a colorable showing that an error, whether 'constitutional' or not, may be producing the continued punishment of an innocent man." *Id.* at 160 (footnote omitted). A "colorable showing of innocence" is satisfied only if "the petitioner for collateral attack . . . show[s] a fair probability that, in light of all the evidence, . . . [including] evidence . . . [which has] become available only after trial, the trier of facts would have entertained a reasonable doubt of his guilt." *Id.* (footnote omitted). A material witness recantation would seem to be grounds for post-conviction relief under this view.

206. ABA, POSTCONVICTION STANDARDS, *supra* note 195, Commentary at 22:19-20. "Separation of the two inquiries could easily produce difficult questions of the proper remedy in certain cases." *Id.* at 22:20.

207. *Id.* at 22:16. The standard provides:

> Standard 22-2.1. Grounds for relief encompassed . . .
> A postconviction proceeding should be sufficiently broad to provide relief:
> (a) for meritorious claims challenging judgments of conviction and sentence, including cognizable claims:
> . . .
> (v) that there exists evidence of material facts which were not, and in exercise of due diligence could not have been, theretofore presented and heard in the proceedings leading to conviction and sentence, and that now require vacation of the conviction or sentence;
> . . . .

Id.

208. *Id.* at 22:35. For example, an affidavit by the recanting material witness should satisfy the requirement.

209. *Id.*

210. *Id.* Commentary at 22:35. One cannot reasonably expect a convicted person, in all cases, to be able to obtain such supporting affidavits even where witnesses to the alleged facts are available. *Id.* The application and supporting affidavits should be viewed as giving the court a "feel" for the case and not for the purposes of final disposition. *Id.* Commentary at 22:36.

211. *Id.* at 22:46-47. Summary disposition without a plenary evidentiary hearing would also be proper if a case is submitted on an agreed statement of facts. *Id.* at 22:47.

212. *Id.* at 22:43-44. "Prompt handling of postconviction proceedings is in the interest of

covery taken,[213] no factual issue exists.[214] If not summarily dismissed, a plenary evidentiary hearing,[215] whereby material questions of fact are resolved, determines the proper disposition of the application.[216]

At the plenary evidentiary hearing, the rules governing admissibility of evidence are applied.[217] The proponent of an issue has the burden of establishing the facts by a preponderance of evidence.[218] Such evidence may include a duly authenticated record of previous proceedings[219] and depositions of witnesses unavailable for the hearing.[220] Furthermore, the judge presiding over the hearing may not consider facts, unless judicially noticed, that are within the judge's personal knowledge.[221] The judge, therefore, cannot preside at the

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both the state and the applicants." *Id.* at 22:45. "The respondent should provide the court with such portions of the record of previous proceedings which are relevant to the applicant's claim." *Id.* The respondent can recommend that the case be terminated without further review. *Id.* The purpose of the respondent's pleading is to inform the court and should not consist solely of an adversary attack on the allegations made for relief. *Id.*

213. *Id.* Commentary at 22:48. "One recurrent problem in the administration of a system of postconviction relief arises when a prisoner alleges in the application an apparently meritorious claim but the evidence which can be adduced to support the claim is unkown [sic] to the court." *Id.* To avoid needless evidentiary hearings, and to promote judicial efficiency, "[c]ontrolled use of discovery devices . . . will demonstrate what applications are baseless while marshaling the evidentiary basis for applications with merit." *Id.* Once discovery has been taken, a court may dismiss the application without a plenary evidentiary hearing if the applicant cannot support the elements of his claim with a reasonable offer of evidence. *Id.* Commentary at 22:49.

214. *Id.* at 22:47. As in most procedural systems, a need exists to dispose of cases quickly and correctly after the case has been developed by both sides. *Id.* Commentary at 22:47.

215. A "plenary action" is "a complete and formal hearing or trial on the merits as distinguished from a summary hearing which is commonly less strict and more informal." BLACK'S LAW DICTIONARY 1038 (5th ed. 1979) (citing May v. Henderson, 268 U.S. 111 (1925)).

216. ABA, POSTCONVICTION STANDARDS, *supra* note 195, at 22:49.

217. *Id.* "Few jurisdictions still cling to the old *habeus corpus* rule forbidding impeachment of the record and limiting relief to defects that appear on the face of the record." *Id.* Commentary at 22:51.

218. *Id.* at 22:50. Also, "[f]inality of a prior judgment and abuse of process are appropriately affirmative defenses rather than part of a prima facie case." *Id.* Commentary at 22:53 (footnote omitted).

219. *Id.* at 22:49. In a recantation situation, the applicant would have to overcome the previous statements made at trial by the now recanting witness. The duly authenticated trial record may raise a presumption of truth of the original testimony. If so, the applicant would have to both disprove the trial testimony (or at least overcome the presumption) and prove the truth of the recantation.

220. *Id.* at 22:49-50. One legal commentator advocates the use of expert testimony to aid in evaluating the credibility of witnesses. She concluded:

> Traditionally, courts have been reluctant to look to experts for assistance in such evaluations [of witness credibility]. As psychologists and other experts add to our body of knowledge about the way in which human beings think, remember, react, and communicate, the possibilities increase for enhancing the truth-seeking abilities of judges and jurors by drawing on the knowledge of such experts to help evaluate live witness testimony.

Reflections, supra note 3, at 185.

221. ABA, POSTCONVICTION STANDARDS, *supra* note 195, at 22:50. If a judge were to simply combine both his subjective recollections and the testimony adduced at the hearing, manifest unfairness results. *Id.* Commentary at 22:52. " 'If a presiding judge has relevant personal knowledge

hearing "[i]f facts within the personal knowledge of the judge who presided at an earlier proceeding are to be adduced by the judge's testimony."[222] At the end of the hearing, the court shall resolve material questions of fact and make explicit findings.[223]

B. Credibility Hearing Before a Jury in Recantation Cases

The ABA standard should be modified for those claims based upon newly-discovered evidence in the form of a material witness recantation.[224] First, a determination of whether the recanting witness's testimony was material to the conviction[225] would be made by the court or a jury[226] after respon-

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falling outside the area of judicial notice, and it is decided to employ this knowledge in the trial, irregular presentation of the judge's evidence is no more tolerable than irregular presentation of the evidence of an ordinary witness.'" *Id.* (quoting E. MORGAN & J. MAGUIRE, CASES AND MATERIALS ON EVIDENCE 326 n.1 (3d ed. 1951)). Taking this reasoning one step further, the judge who presided at the original trial should never preside at an evidentiary hearing following a recantation. Courts have allowed the original trial judge to preside at such a hearing because the judge has observed the demeanor of the witness at trial and is in the best position to determine credibility. Yet, the judge, at the hearing, is using his own subjective recollection to determine credibility of the recanting witness. This seems grossly unfair, if not unjust, especially since a jury may have had completely different views on the witness' credibility. Clearly, the "trial by democracy" is undermined and usurped by letting the original trial judge preside at the subsequent hearing.

222. *Id.* at 22:50. Even though a judge is currently deemed incompetent to be a witness in a case where he/she presides, there exists an "increas[ing] need to call judges as witnesses in post-conviction cases and . . . such testimony is not only proper but required in the interests of justice, provided . . . that a different judge presides." *Id.*, Commentary at 22:52 (citing *Report of the Special Committee on the Propriety of Judges Appearing as Witnesses*, 36 A.B.A. J. 630 (1950)).

223. *Id.* at 22:50. "The absence of explicit findings of fact by state courts is a part of the basis for the need for federal habeas corpus review of the claims of state prisoners." *Id.* Commentary at 22:54 (footnote omitted).

224. *See infra* notes 225-35 and accompanying text.

225. *See* ABA, POSTCONVICTION STANDARDS, *supra* note 195, at 22:16. Post-conviction relief based upon newly-discovered evidence must consist of "material facts." *Id.* A material witness recantation following trial would be a "material" fact in that the jury based its conviction on what they thought were "true facts." In reality, these "true facts" were the product of fabrication. By definition, even the exercise of due diligence could not have allowed presentation of a recantation in the proceeding leading to conviction and sentence.

Materiality of the testimony is obvious where the prosecuting witness is both the victim and sole witness, as in the *Dotson* case. However, where the recanting witness was one of several witnesses who testified at trial, a problem arises as to whether that recanting witness' testimony was material to the conviction. If the jury could still have found the accused guilty beyond a "reasonable doubt" without the recanter's testimony, then the witness recantation was not material and no new trial should be granted. This initial determination of materiality should dispel the *Stofsky* and *Krasny* courts' fear that, in applying the *Larrison* standard, a new trial must be granted even where the perjury goes to a minor issue. However, it should be noted that, under *Larrison*, the *court* is given wide discretion in determining credibility of the recantation. This could explain why so few new trials have been granted even under the *Larrison* "might" standard. *See generally supra* notes 71 (reasons for denial of new trial motions) and 78 (noting a recent analysis which reveal that 40 out of 50 motions for new trial made in federal courts were denied).

226. The materiality of testimony issue would be determined, in recantation cases, in the same manner as each jurisdiction would determine the materiality of testimony as forming the

sive pleadings have been filed and discovery taken.[227] If the recanting witness's testimony is deemed not to have been material to the accused's conviction, the application for post-conviction relief should be summarily dismissed since the material facts requirement has not been satisfied.[228] If, on the other hand, the recanting witness's testimony is found to have been material to the accused's conviction, a plenary evidentiary hearing would be scheduled.[229]

Second, the plenary hearing would consist solely of the issue of the recanting witness's credibility.[230] This hearing should be held before a jury as an extension of the sixth amendment right to jury trial in criminal cases.[231] The jury would resolve the issue of whether the material witness lied at trial or during the recantation.[232] The recanting witness would testify at the hearing and, perhaps, the judge who presided over the original trial could be called as a witness.[233] If the witness's recantation is deemed credible, then a new trial should be granted.[234] If the trial testimony is deemed more credible than the

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basis of a perjury charge. *See, e.g.*, Sinclair v. United States, 279 U.S. 263, 298 (1929) (question of pertinency of false testimony in perjury cases for court to decide as matter of law); Sigman v. United States, 320 F.2d 176, 177 (9th Cir. 1963) (under federal perjury statute, whether false testimony was material is a question of law for the court to determine). *Compare* People v. Lem You, 97 Cal. 224, 228, 32 P. 11, 12 (1893) (question of materiality of evidence for court to determine as matter of law) *and* Yarborough v. State, 617 S.W.2d 221, 228 (Tex. Ct. App. 1981) (lower court did not err by instructing jury that certain statements, if made, were material) *with* Commonwealth v. McDuffee, 379 Mass. 353, 365, 398 N.E.2d 463, 470 (1979) (issue of materiality of allegedly false statments is one for jury to determine) *and* People v. Clemente, 309 N.Y. 890, 891, 131 N.E.2d 294, 294 (1955) (question of materiality of alleged perjured testimony for jury to determine). For other cases dealing with the materiality of testimony issue as a question for either the court or jury, see Annotation, *Materiality of Testimony Forming Basis of Perjury Charge as Question for Court or Jury in State Trial*, 37 A.L.R. 4th 948 (1985).

A proposed standard for determining credibility might be whether, in light of all the evidence most favorable to the defendant, the jury could have found the accused guilty of the crime charged beyond a "reasonable doubt" without the testimony of the recanting witness. *See also infra* note 227 (explaining the need for a materiality determination).

227. Having the materiality issue determined at this point would be fair to the applicant and efficient for the court. The applicant would have had enough time to produce any necessary supporting evidence. The court, meanwhile, may obtain a duly authenticated record of the previous proceeding. Based upon the convicted person's application and supporting affidavits, the responsive pleadings, and all necessary discoverable evidence, the court or jury may then determine materiality.

228. *See supra* notes 225-26.

229. *See* ABA, POSTCONVICTION STANDARDS, *supra* note 195, at 22:49.

230. *See generally supra* note 26 (central issue to be determined following Webb's recantation in the *Dotson* case was her credibility).

231. *See generally supra* notes 140-56 and accompanying text (analyzing why the right to jury trial ought to be extended).

232. *Id.*

233. *See supra* note 221.

234. *See, e.g.*, People v. Osorio, 108 Misc. 2d 100, 105, 436 N.Y.S.2d 958, 962 (1981) ("if . . . recantation found to be credible, new trial would have to be ordered"). Of course, it would be up to the prosecutor to determine whether enough evidence remains, without the recanting witness's testimony, to convict the defendant. Perjury charges, perhaps, could still be brought against the recanting witness. Also, in all likelihood, a duly authenticated record of the post-conviction hearing would be admissible into evidence at perjury trial.

recantation, then post-conviction relief would be denied.[235]

CONCLUSION

It must be realized that it is virtually impossible to ensure that the truth will be stated at all times by all witnesses. Clearly, there would exist no need for the adversary system if this were so. However, when a material witness upon whose testimony the conviction of an accused primarily rests, comes forward and, for whatever reason, voluntarily recants his or her testimony, a very close examination of that witness's credibility must occur.[236] If one purpose of

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235. *See, e.g.*, People v. Shilitano, 218 N.Y. 161, 170, 112 N.E. 733, 739 (1916). This same procedure may be followed when courts are faced with a motion for new trial based upon newly-discovered evidence in the form of a recantation. For example, applying these reforms to the *Dotson* case, the following procedures would have been utilized:

1. Following Webb's recantation six years after the conviction, Dotson applies for post-conviction relief based upon newly-discovered evidence. Attached to this application would be Webb's affidavit. In this case, a motion for new trial would be inadequate since the time limitation would have expired.
2. The State of Illinois files a responsive pleading and any needed discovery is taken at this point.
3. The Illinois court, other than the original trial judge (Samuels), determines whether Webb's testimony was material to Dotson's conviction. The standard to be applied would be whether, in light of all the evidence most favorable to the defendant, the jury could have found the accused guilty of the crime charged beyond a "reasonable doubt" without the testimony of the recanting witness. Pretty clearly, since Webb was both the victim and sole testifying eyewitness to the alleged rape, the materiality requirement would be satisfied. If, for some reason, this requirement were not satisfied, the case would be summarily dismissed and Dotson would remain in prison.
4. A plenary hearing is held before a jury consisting solely of the issue of Webb's credibility. Evidence at this hearing may include the trial record and, if allowed, the original trial judge (Samuels) may testify. Dotson must show by a preponderance of the evidence that Webb's recantation is credible.
5. If the jury determines that Webb's recantation is not credible, Dotson's application for post-conviction relief would be denied. However, if the jury determines that Webb's recantation is credible, a new trial would be granted. The State, of course, has the option not to retry the case if the remaining evidence appears insufficient.

236. For example, as a result of the *Dotson* case, the ancient axiom of Lord Hale, that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent," reared its ugly head. *See* 1 M. Hale, PLEAS OF THE CROWN 635 *quoted in* Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1137 (1967). Although society has come to appreciate the gravity of the offense of rape, statistics consistently show that the crime is grossly underreported. *See Rape and the Law*, Newsweek, May 20, 1985, at 63, col. 1 (an estimated 45.3% of rape victimizations are not reported to the police).

The subject of rape law reform is beyond the scope of this Note. For an interesting Idaho case where the court enumerated reasons why the requirement of corroboration in sex crimes cases is no longer the law in that state, see State v. Byers, 102 Idaho 159, 627 P.2d 788 (1981). Also, for intelligent articles concerning the area of rape law reform, consult Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977); Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137 (1967); Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500 (1975); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972).

incarceration is to punish the blameworthy,[237] then isn't this purpose invalidated when a material witness claims the convicted to be blameless? Under the present procedural structure, too much discretion is given to the trial court judge in disregard of fundamental evidentiary principles. This proposed procedural reform extends the right to a jury to the credibility hearing held after a material witness recants. Finality of judgments must succumb to the need for truth or society will incarcerate or execute an innocent person. This need for truth grows paramount in the capital context since "[t]he defendant who has been condemned to die will not reap the benefits of post-conviction remedies designed to compensate for jury fallibility when the basis for such relief arises long after the conviction."[238]

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Victim recantations, such as Cathleen Crowell Webb's, may have the effect of undermining those steps taken in the area of rape law reform. However, material witness recantations, as a whole, need to be taken seriously and treated with an eye toward the individual convicted on such testimony.

237. *See* I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 99-102 (J. Ladd Trans. 1965) (quoted in S. KADISH, S. SCHULHOFER, AND M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES — CASES AND MATERIALS 187 (4th ed. 1983). "Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead must in all cases be imposed on him only on the ground that he has committed a crime." *Id.* The criminal "must first be found to be *deserving* of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens." *Id.* (emphasis added).

238. Burr v. Florida, 106 S. Ct. 201, 203 (1985) (mem. decision) (Marshall, J., dissenting). The accused's "only protection lies in the consciences of the jurors, for only they know the degree of certainty with which they voted the defendant guilty." *Id.*

Appendix A

Statutory Provisions Governing Motions for New Trial Based Upon Newly-Discovered Evidence in State Courts

JURISDICTION	WHERE FOUND
Alabama	**Ala. Code** § 15-17-5 (1982)
Alaska	I **Alaska Rules of Court, Crim. R.** 33. (Book 1985)*
Arizona	**Ariz. Stat. Ann. R. of Crim. P.**, 24.2 (West 1986) [Motion to Vacate Judgment]
Arkansas	**Ark. Stat. Ann.** § 43-2201 (Bobbs-Merrill 1977)
California	**Cal. Penal Code Ann.** § 1181 (West 1985)
Colorado	**Colo. Rev. Stat., R. Crim. P.** 33 (Bradford 1984)*
Connecticut	**Conn. Gen. Stat. Ann.** § 52-270 applicable to criminal cases under § 54-95 (West 1958)
Delaware	**Del. Code Ann., Ct. Common Pleas Crim. R.** 33; **Sup. Ct. R. Crim. P.** 33 (Michie 1981)*
District of Columbia	**D.C. Sup. Ct. R. Crim. P.** 33 (Michie 1986)*
Florida	**Fla. Stat. Ann., R. Crim. P.** 3.600 (West 1975)
Georgia	**Ga. Code Ann.** § 5-5-23 (Michie 1982)
Hawaii	**Hawaii Rev. Stat.** § 635-56 (1976)
Idaho	**Idaho Code** § 19-2406 (Bobbs-Merrill 1979)
Illinois	**Ill. Rev. Stat. Ann.**, ch. 38, § 116-1 (West 1977)
Indiana	**Ind. Code Ann.**, TR. 59 (Burns 1983)
Iowa	**Iowa Code Ann.** § 813.2, **R. Crim. P.** 23 (West 1979)
Kansas	**Kan. Stat. Ann.** § 22-3501 (Ensley 1981)*
Kentucky	**Ky. Rev. Stat. Ann., Ky. R. Crim. P.** 10.02 (Michie 1982)*
Louisiana	**La. Stat. Ann., Code Crim. P.**, tit. XXIX, ch. 1 (West 1984)
Maine	**Me. R. Crim. P.** 33 (West 1986)*
Maryland	**Md. R. P.** 770 (Michie 1984)
Massachusetts	**Mass. R. Crim. P.** 30 (West 1986) [Postconviction Relief]

Michigan	**Mich. R. Civ. P.** 2.611 applicable to criminal cases under **Mich. Ct. R.** 6.001
Minnesota	**Minn. R. Crim. P.** 26.04 (West 1986)
Mississippi	**Miss. Code Ann.** § 99-17-47 (Harrison 1972)
Missouri	**Mo. Rev. Stat.** § 547.020 (Vernon 1953)
Montana	**Mont. Rev. Stat.** § 46-16-702 (1985)*
Nebraska	**Neb. Rev. Stat.** § 25-1142 (1943)
Nevada	**Nev. Rev. Stat.** § 176-515 (1979)*
New Hampshire	**N.H. Rev. Stat. Ann.** § 526:1 (Equity 1974)
New Jersey	**N.J. R. Crim. Practice** 3:20-2 (West 1986)
New Mexico	**N.M. Stat. Ann. Judicial**, ch. 6, **Dist. Ct. Crim. R.** 45 (Michie 1985)*
New York	**N.Y. Crim. P. Law** § 440.10 (McKinney 1983)
North Carolina	**N.C. Gen. Stat.** § 15A-1415 (Michie 1983)
North Dakota	**N.D. Cent. Code Ann., R. Crim. P.** 33 (Allen Smith 1985)*
Ohio	**Ohio Rev. Code Ann.** 2945.79 (Page 1982)
Oklahoma	**Okla. Stat. Ann.** tit. 22, § 952 (West 1958)
Oregon	**Or. Rev. Stat.** § 138.520 (1983)
Pennsylvania	**Pa. Stat. Ann.** tit. 19, ch. 10, § 861 (Purdon 1964)
Rhode Island	**R.I. Gen. Laws, Sup. Ct. R.** 33 (Bobbs-Merrill Supp. 1986)*
South Carolina	**S.C. Code Ann.** § 17-23-110 (Law. Co-op 1979)
South Dakota	**S.D. Codified Laws Ann.** § 23A-29-1 (Allen Smith 1979)*
Tennessee	**Tenn. Code Ann.** § 40-35-401 (Michie 1982)
Texas	**Tex. Crim. P. Code Ann.** § § 40.03, 40.04 (Vernon 1977)
Utah	**Utah Code Ann.** § 77-35-24 (Allen Smith 1982)
Vermont	**Vt. Ct. R. Ann., R. Crim. P.** 33 (Equity 1986)*
Virginia	**Va. Code Ann.** § 19.2 - 324 (Michie 1983)
Washington	**Wash. Crim. R.** 7.6 (West 1986)
West Virginia	**W. Va. Code, R. Crim. P.** 33 (Michie 1982)*
Wisconsin	**Wis. Stat. Ann.** § 974.02 (West 1985)
Wyoming	**Wyo. Stat. Ann.** § 7-12-301 (Michie 1982)

(*) denotes those jurisdictions which have enacted a statute similar to Federal Rule of Criminal Procedure 33. *See supra* note 56. For a detailed survey of all current state provisions governing post-conviction relief see **Wilkes, Postconviction Remedies**, *supra* note 53, at app. A.

It's Only Rock-and-Roll But They Don't Like It: Censoring "Indecent" Lyrics

Since its inception, rock-and-roll[1] music has proven to be an area subject to wide and varied controversy.[2] Brought to the American forefront in the 1950's, much of the adult population was taken aback by the "immorally" suggestive actions and lyrics of rock's early performers.[3] Nationwide concern over the well-being of America's youth has lead to various measures aimed at filtering the performers' messages before being received by minors.[4] In the past, public outrage has focused on the excessive presence of sex and drug related lyrics[5] as well as the rise of the "punk" era during the late 1970's.[6] With the passing of time however, apparent tolerance of such "corruptive"

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1. "Rock-and-roll" has been defined as "popular music [usually] played on electronically amplified instruments and characterized by a persistent heavily accented beat, much repetition of simple phrases, and often country, folk and blues elements." WEBSTER'S NEW COLLEGIATE DICTIONARY 994 (1980). It has also been defined as a "blues music term for sex, suggested rebellion and abandon." Powell, *What Entertainers Are Doing To Your Kids*, U.S. NEWS & WORLD REPORT, Oct. 28, 1985, at 47 [hereinafter Powell]. *See also* Dougherty, *Parents vs. Rock*, PEOPLE, Sept. 16, 1985, at 52 [hereinafter Dougherty] (stating that rock-and-roll is a blues term for sexual intercourse).

2. Cocks, *Rock Is a Four-Letter Word*, TIME, Sept. 20, 1985, at 70 [hereinafter Cocks] (discussing current outrage over lyrical content of rock music); Dougherty, *supra* note 1 (discussing the alliance of concerned parents and citzens forming to battle "rock porn"); Powell, *supra* note 1 (concerning the battle against indecent lyrics for protection of youth).

3. Artists and groups such as Elvis Presley, Little Richard, The Beatles and The Rolling Stones created controversy regarding either their sexually suggestive stage antics, the lyrical content of their music, or a combination of the two. Dougherty, *supra* note 1, at 52-53; Cocks, *supra* note 2, at 71.

4. Dougherty, *supra* note 1, at 53. Such measures geared toward protecting minors have included, but not been limited to censoring of live performances, record burnings, and general protesting. *See id.*

5. Dougherty, *supra* note 1, at 52-53. It has not solely been the lyrics of rock-and-roll that have come under attack. Artists such as Cole Porter, Bessie Smith, and Duke Ellington all had recording releases that were either altered, banned, or criticized because of their lyrical content. *See id.* at 52.

6. Cocks, *supra* note 2, at 71.

lyrics has prevailed, until recently.[7]

The spring of 1985 marked the beginning of the latest surge of national concern over lyrics in rock music alleged to be indecent.[8] Groups such as the Parents Music Resource Center (PMRC) and the National Parent Teacher Association (NPTA) increased pressure on the Recording Industry Association of America (RIAA) to provide parents with increased information regarding the lyrical content of rock albums. They proposed that the recording industry adopt a content-based rating system similar to that currently employed by the motion picture industry.[9] The predominant focal point of these groups is that genre of rock-and-roll labeled "heavy metal."[10] While it is not the only form of rock currently under attack, it is "heavy metal" that is believed to be the most notorious vehicle for promoting rape, incest, sadomasochism, devil worship, substance abuse and suicide.[11] At stake allegedly, is the moral and physical well-being of America's youth, at least in the minds of groups like the PMRC and NPTA.[12]

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7. *See* Cocks, *supra* note 2 (discussing Senate committee inquiry as to whether rock-and-roll lyrics have exceeded the limits of moral toleration); Dougherty, *supra* note 1 (stating that rock lyrics are focusing too heavily on sex, drugs, violence and the occult); Powell, *supra* note 1 (discussing effect performers are having on America's youth).

8. Cocks, *supra* note 2, at 71; Dougherty, *supra* note 1, at 47. In June of 1985, an informal Senate Commerce Committee hearing was held to discuss the recent surge in indecent lyrical content. Present at the hearing were seven senators, their staff, Federal Communications Commission Chairman, Mark Fowler, members of the Parents Music Resource Center (a group of senator's wives formed to battle indecent lyrics) and Reverend Jeff Ling. *Id.* at 49.

9. *See Hearing on Record Labeling before the Subcomm. on Communication of the Senate Comm. on Commerce, Science and Transportation*, 5, 10-11 (Sept. 19, 1985) [hereinafter *Record Hearing*] (testimony of Tipper Gore and Millie Waterman respectively) (transcript on file at office of New England Law Review).

10. "Heavy metal" has been described in the following manner:

> Heavy metal refers to a type of music that was first developed in England. The music is loud and powerful, with most of the strength coming from electric guitars. The makeup or facial expressions [of heavy metal musicians] are either hateful or demonic or [they] have symbols and costumes representing power, which is the basic core issue. Examples [of this are] facial painting. . . tatoos of snarling animals, black leather, chains [and] motorcycles.

Record Hearing, *supra* note 9, at 42 (testimony of Dr. Paul King).

11. Cocks, *supra* note 2, at 71. *See also Record Hearing*, *supra* note 9, at 3-4 (testimony of Susan Baker) (using groups and artists like AC/DC, Judas Priest, WASP, Quiet Riot, Blue Oyster Cult, Motley Crue and Ozzy Osbourne as examples); *Id.* at 45 (testimony of Dr. Paul King) (stating that Son of Sam, killer of eight people in New York, was allegedly obsessed with Black Sabbath's music; Ricky Kasso, teenager who stabbed friend, bugged out his eyes and then hung himself, followed Black Sabbath and Judas Priest; and, the "Night Stalker of California," Richard Ramirez, was allegedly influenced by AC/DC); Powell, *supra* note 1, at 46, 47 (noted incident of 14 year-old murderer allegedly obsessed with heavy metal).

Some of the "pop" artists under attack include, Prince (concerning lyrics in his song "Darling Nikki," about masturbation); Cyndi Lauper (for song "She Bop" also about masturbation); Sheena Easton (for her song "Sugar Walls" which expresses an urgent desire to have sexual intercourse) and Michael Jackson (accused of having included a song about sadomasochism on a recent album). Dougherty, *supra* note 1, at 49.

12. *Record Hearing*, *supra* note 9, at 2-4, 7-8 (testimony of Susan Baker, Tipper Gore and Millie Waterman respectively).

Directly opposing these groups are members of the musical recording industry.[13] They maintain that rock lyrics mirror society's behavior more than they mold it.[14] Until the fall of 1985, the recording industry had been reluctant to comply with the demands of the PMRC and NPTA.[15] The industry has asserted that the sought after "corrective measures" would be an invasion of their first amendment rights of freedom of expression.[16] Although concern over threats to artistic freedom remained paramount, the recording industry agreed, in November of 1985, to affix a warning to recordings containing "explicit" lyrics.[17] The warning label would potentially apply to all material that contains references to one or more of the following: sex, violence, sadomasochism, substance abuse, the occult, and suicide.[18] Although the plan is voluntary, it has thus far been endorsed by twenty-two major recording companies and is believed to be the opening of a "Pandora's box."[19]

The debate between the PMRC and the music industry has, until now, centered primarily upon the rights of parents to protect their children versus the rights of musicians to express themselves freely. There remains, however, an unrecognized but interested party. At the heart of this matter is America's youth and their rights with respect to freedom of expression.[20]

This Note will examine whether the government should be able to regulate the content of music recordings alleged to be indecent. The courts have yet to decide this issue. Further, it will explore whether the recording industry should regulate itself privately and place warning labels or rating symbols on

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13. Well-respected musician Frank Zappa has labeled the PMRC as a group of "D.C. wives . . ., non-members of an organization that raises money by mail, has tax-exempt status, and seems intent on running the Constitution of the United States through the family paper shredder." *Record Hearing*, *supra* note 9, at 21 (testimony of Frank Zappa). Magazine editor Bob Guccione, Jr. has described the evolution of the PMRC as follows:

> [S]ome women who are married to some politicians discover a box that is tightly closed and marked all over WARNING: DO NOT OPEN. This, of course, excites them to open it . . . . The box apparently comes from somewhere, or is going to someone called PANDORA — no matter, they are determined to have it open, and the thought that it may be none of their business does not occur to them.

Guccione, *Sticks & Stones*, SPIN, Dec. 1985, at 19 [hereinafter Guccione].

14. *Record Hearing*, *supra* note 9, at 18 (testimony of Stanley Gortikov, President of the Recording Industry Association of America (RIAA).

15. *Id.* at 8 (testimony of Millie Waterman).

16. *Id.* at 18-19 (testimony of Stanley Gortikov).

17. *Warning: 'Love' for Sale*, NEWSWEEK, Nov. 11, 1985, at 39 [hereinafter *'Love' for Sale*].

18. *See* Guccione, *supra* note 13, at 19; *Record Hearing*, *supra* note 9, at 1 (testimony of Susan Baker); *Id.* at 8 (testimony of Millie Waterman). In expressing her concern over the content of rock-and-roll lyrics, Ms. Waterman stated that:

> [T]he problem is that there are many songs which include lyrics that may not be appropriate for young children or that send messages that may be dangerous to individuals or society. Some examples of songs that might be inappropriate for children are those that contain profane language, sexual references, vulgarity or violence. Those that could be dangerous to individuals or society include songs that promote suicide, practice of the occult, rape, incest, murder or bondage, among others.

Id.

19. *'Love' for Sale*, *supra* note 17, at 39; *Clean Rock*, NEWSWEEK, Sept. 1, 1986, at 5.

20. *See Record Hearing*, *supra* note 9, at 18 (testimony of Stanley Gortikov, RIAA).

music recordings containing "explicit" lyrics. This will be accomplished primarily through examining some important differences between the ability of the government to regulate speech content, versus that of the private regulator. The importance of this distinction stems from the fact that first amendment protections do not apply to censorship that is purely private, as opposed to governmental, in nature.[21]

Part I outlines the evolution of obscenity as constitutionally unprotected speech. It also provides a general basis for understanding the difference between obscene and indecent speech. Part II defines rock music as a constitutionally protected medium of expression and discusses the permissible degree of governmental regulation of speech content within several of the most pervasive communication modes. Part III focuses on a specific difficulty the government may encounter in preventing obscene lyrics from reaching minors, given the unique characterisitics of the musical recording medium. Part IV focuses on the rating system employed by the private, self-regulated, motion picture industry. The rating system currently proposed by the PMRC and NPTA can be considered analogous to that used by the motion picture industry. Therefore, examination of the Motion Picture Rating System is helpful in demonstrating the extent to which private regulation of speech content can exceed the ability of governmental bodies, which are bound by the Constitution, to do the same. Part V then discusses the rights possessed by minors both to express themselves and to receive the expression of others. This is essential for two reasons. First, it is minors who allegedly need to be shielded from "explicit" lyrics. Thus, it is necessary to discern the boundaries, under the first amendment, of that which minors are entitled to hear. Second, if it is found that they are entitled to receive "explicit" communications, then the industry should feel no pressure to succumb to the demands of private groups seeking regulation. Finally, Part VI analyzes whether or not the music recording industry should adopt the private regulatory scheme proposed by the PMRC and NPTA. It does so in three distinct phases. First, it is determined that the Constitution would place severe limits on the government if it were to undertake regulating indecent speech content in music recordings. Second, it is observed that under a privately-adopted regulatory scheme, the recording industry could excercise *de facto* unconstitutional ability in controlling indecent expression. Third, it is suggested that a rating scheme applied to recorded music would be effectually impractical. This Note concludes that regulation of indecent lyrics in music recordings should be initiated, if at all, only through the elected members of governmental legislatures.

I. THE EVOLUTION OF OBSCENITY AS UNPROTECTED SPEECH

No right, granted to the people through the Bill of Rights, is absolute, including the first amendment right to freedom of expression.[22] This right was

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21. F. SCHAUER, THE LAW OF OBSCENITY 243 (1976) [hereinafter SCHAUER]. "If censorship, of any kind, is clearly private, then the First Amendment is inapplicable and there are no constitutional restrictions on the types of censorship imposed." *Id. Cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 254-58 (1974) (where Court invalidated state statute requiring newspaper to publish specified matter).

22. Roth v. United States, 354 U.S. 476, 483 (1957). "[I]t is apparent that the unconditional

created to protect the free flow of ideas.[23] All ideas, although contrary to the majority, or of seemingly unmeritorious value, are deemed worthy of protection.[24] However, the Supreme Court has created exceptions to the right to speak freely.[25] It has decided that the first amendment does not protect fighting words,[26] incitement of imminent illegal acts,[27] libel,[28] or obscenity.[29] The justification for these exceptions stems largely from the belief that speech of such nature does not in fact communicate ideas at all.[30] In order to fully appreciate the controversy surrounding allegedly "indecent" or "explicit" lyrics in recorded music, it is first necessary to examine the extent to which obscenity law has developed in American courts.

A. Early American Obscenity Doctrine

An early influence on American obscenity law was the decision in the English case of *Regina v. Hicklin*.[31] This case established perhaps the strictest test for obscenity under which almost any questionable work could be found obscene.[32] Applying the *Hicklin* test, a court could find a complete work to be obscene by taking an isolated passage and determining that the passage would

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phrasing of the First Amendment was not intended to protect every utterance." *Id.*

23. *Id.* at 484. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* Although the *Roth* Court spoke only about political and social change as the reason to protect free expression, it has been clearly identified that the first amendment protects serious literary, scientific and artistic expression as well. *See* Miller v. California, 413 U.S. 15, 22-23 (1973).

24. *Roth*, 354 U.S. at 484. "All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties . . . ." *Id.*

25. *Id.* at 483-87. *See infra* notes 26-29 and accompanying text.

26. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). *Chaplinsky* involved a defendant convicted under a New Hampshire law which made it illegal to "address any offensive, derisive or annoying word to . . . [a] person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, . . . with intent to deride, offend or annoy him . . . ." *Id.* at 569. The Court was of the belief that fighting words were not an essential component of any idea. Thus, society's interest in order and morality outweighed any slight social value derived from the truth contained in such words. *Id.* at 572.

27. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). The Court reversed the conviction of a Ku Klux Klan leader who had been convicted under a statute which punished those who assembled to advocate or teach the necessity of violence. The statute fell to a first amendment challenge because it punished for "mere advocacy" rather than just the incitement of imminent lawless action. *Id.* at 448-49.

28. Beauharnais v. Illinois, 343 U.S. 250, 255-57 (1952).

29. *Roth*, 354 U.S. 476, 485.

30. *See Roth*, 354 U.S. at 484-86; SCHAUER, *supra* note 21, at 99-100.

31. L.R. 3 Q.B. 360, 18 L.T. 395 (1868) (Regina v. Hicklin is the name by which this case, which is actually Regina v. The Recorder of Wolverhampton, is commonly known). For complete discussions on the history of American obscenity law, see D. MORETTI, OBSCENITY AND PORNOGRAPHY, THE LAW UNDER THE FIRST AMENDMENT 1-42 (1984) [hereinafter MORETTI] and SCHAUER, *supra* note 21, at 8-48.

32. *See Roth*, 354 U.S. at 488-89. "The *Hicklin* test, judging obscenity by the effect of *isolated passages* upon the *most susceptible persons*, might well encompass material legitimately [dealing] with sex, and . . . must be rejected as unconstitutionally restrictive of the freedoms of speech and press." *Id.* at 489 (emphasis added).

have a harmful effect on society's most susceptible individuals.[33] The court's decision in *Hicklin* produced the seminal test in the early obscenity law of America.[34]

The *Hicklin* test was criticized, however, by Judge Learned Hand in *United States v. Kennerley*.[35] Judge Hand felt the test to be overly harsh in two ways. First, literature could be judged in terms of its effect on children, society's most sensitive individuals.[36] Second, the test allowed judges to find entire literary works as unprotected expression even if only one isolated passage in the work was obscene.[37] Judge Hand believed that the test would reduce adult libraries to those fit for children.[38]

The *Hicklin* test was further discredited in *United States v. One Book Called "Ulysses,"* [39] where the court chose not to apply it, and instead, established a new obscenity test.[40] The holding suggested that first a work was to be viewed as a whole to determine whether it was written with pornographic intent.[41] A determination was then made as to whether the work tended to arouse lustful thoughts in the average member of the community.[42] Since the holding was limited to the Second Circuit,[43] many other courts still applied the *Hicklin* test.[44]

In another case, *Butler v. Michigan*,[45] the Supreme Court reversed a

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33. *Hicklin*, 18 L.T. at 397. The complete test was embodied in the following language of Judge Cockburn's decision regarding an allegedly obscene work which he had before him:

> I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall . . . . [W]ith regard to this work, it is quite certain that it would suggest to the minds of the young . . . thoughts of a most impure and libidinous character.

Id.

34. MORETTI, *supra* note 31, at 1.

35. 209 F. 119 (S.D.N.Y. 1913).

36. *Kennerley*, 209 F. at 120.

37. *Id.* That Judge Hand realized how simple it would be to find a work obscene under the *Hicklin* test became apparent when he stated:

> Under this [test], such parts of this book as pages 169 and 170 might be found obscene, because they certainly might tend to corrupt the morals of those into whose hands it might come and whose minds were open to such immoral influences. Indeed, it would be just those who would be most likely to concern themselves with those parts alone, forgetting . . . their relevancy to the book as a whole.

Id. See MORETTI, *supra* note 31, at 2.

38. *Kennerley*, 209 F. at 121. *See also* SCHAUER, *supra* note 21, at 70 (discussing the move away from basing an obscenity test on society's most susceptible individuals).

39. 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd sub nom*, United States v. One Book Entitled Ulysses By James Joyce, 72 F.2d 705 (2d Cir. 1934).

40. *One Book Called "Ulysses,"* 5 F. Supp. at 184.

41. *Id.* at 183. Demonstrating that the work was to be examined in its entirety, District Judge Woolsey stated: "I have read 'Ulysses' once in its entirety and. . . in order properly to approach the consideration of it it is advisable to read a number of other books which have now become its satellites." *Id.*

42. *Id.* at 184. For more discussion on this case, see SCHAUER, *supra* note 21, at 24.

43. MORETTI, *supra* note 31, at 3.

44. *Id.*

45. 352 U.S. 380 (1957).

criminal conviction under a Michigan statute making it a misdemeanor to distribute materials "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."[46] This statute, which embodied the *Hicklin* test, was found unconstitutional.[47] Justice Frankfurter, expressing concerns equivalent to those made earlier by Judge Hand remarked, "[t]he incidence of this enactment is to reduce the adult population. . . to reading only what is fit for children."[48]

Notwithstanding the above decisions, American obscenity law did not realize uniformity until the Supreme Court's decision in *Roth v. United States*.[49]

B. Contemporary American Obscenity Doctrine

The landmark decision in *Roth* was important for two reasons. First, the Court explicitly ruled that obscene material was not within the scope of first amendment protection.[50] Justice Brennan stated, that "the unconditional phrasing of the First Amendment was not intended to protect every utterance."[51] Second, the Court openly rejected the *Hicklin* test and established a uniform test for obscenity.[52] The test asked whether the "average person, applying contemporary community standards," believed that "the dominant theme of the material taken as a whole appeal[ed] to the prurient interest."[53]

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46. *Id.* at 381. Section 343 of the Michigan Penal Code stated in part:

> Any person who shall import, print, publish, sell, possess with the intent to [distribute in any manner], any book, magazine, newspaper, writing . . . containing obscene, immoral, lewd or lascivious language, or . . . prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth . . . shall be guilty of a misdemeanor.

Id. (citing section 343 of the Michigan Penal Code).

47. Although the Court made no reference to the *Hicklin* test, it nonetheless struck down the statute because it based the definition of obscenity on society's most sensitive individuals — children. *Id.* at 383-84. The effect of obscene expression on society's most sensitive individuals was a determinative part of the *Hicklin* test. See *supra* notes 31-34 and accompanying text for a discussion of the *Hicklin* test.

48. *Butler*, 352 U.S. at 383.

49. *See* Roth v. United States, 354 U.S. 476 (1957).

50. *Id.* at 484-85. "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* at 484.

51. *Id.* at 483.

52. *Id.* at 489. The Court recognized that judging obscenity in accordance with the *Hicklin* test would have the effect of restricting expression that was within first amendment protection such as "material legitimately [dealing] with sex . . . ." *Id.* The method by which the *Roth* Court established the new obscenity test was by explicitly approving the standards employed by the lower court. *See id.* at 489-90.

53. *Id.* at 489. The Court approved of the lower court judge's jury instructions which stated:

> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion.

Id. at 490.

Also, although not part of the test, the Court assumed that obscene material was "utterly without redeeming social importance."[54] The *Roth* test was not changed by a majority Court for sixteen years.[55] During those interim years, however, it was slightly altered in a series of plurality opinions.[56]

In *Kingsley International Picture Corporation v. Regents*,[57] Justice Stewart explained that sexual immorality was not a concept equal to pornography or obscenity and thus, a work could not be banned merely because of the ideas it conveyed.[58] The Court in *Manual Enterprises, Inc. v. Day*[59] added to the *Roth* test by requiring that a work be "patently offensive" before being deemed obscene.[60] Justice Brennan, in *Jacobellis v. Ohio*,[61] attempted to establish a national, rather than community, standard for obscenity.[62] He did not believe *Roth* required that local communities be allowed to set their own obscenity standards. Rather, he felt that to ensure uniformity, obscenity standards must apply to the entire nation.[63] In his concurring opinion, Justice Stewart epitomized the difficulty the Court was having in defining obscenity by stating, "[I shall not attempt to define it] . . .[b]ut I know it when I see it. . . ."[64]

By 1966, in *Memoirs v. Massachusetts*,[65] the Court appeared to have reshaped the *Roth* test into a new three-part test.[66] In the plurality opinion,

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54. *Id.* at 484. *See supra* note 50.

55. *See Miller*, 413 U.S. at 22-25.

56. *See infra* notes 57-68 and accompanying text. *See also Miller*, 413 U.S. at 21-22 (discussing the alteration of the *Roth* test). For a detailed discussion of Supreme Court decisions which, subsequent to *Roth*, changed the test for obscenity, see SCHAUER, *supra* note 21, at 40-44; MORETTI, *supra* note 31, at 13-19.

57. 360 U.S. 684 (1959) (regarding denial of license to film distributor for certain immoral film).

58. *Id.* at 688-89. Justice Stewart stated that the first amendment's guarantee of freedom to advocate ideas "is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax." *Id.* at 689.

59. 370 U.S. 478 (1962). This case involved a challenge to a Post Office Department ruling which barred the use of the mails for the purpose of distributing material which was either itself obscene, or provided information as to where obscene material could be obtained. *Id.* at 479.

60. *Id.* at 482. "These [distributions] cannot be deemed so offensive on their face as to affront current community standards of decency — a quality that we shall hereafter refer to as 'patent offensiveness'. . . ." *Id. See also* SCHAUER, *supra* note 21, at 103.

61. 378 U.S. 184 (1964). *Jacobellis* involved the conviction of a motion picture theatre manager for possessing and exhibiting an allegedly obscene film. *Id.* at 185-86.

62. *Id.* at 192-95.

63. *Id.* at 192-93. To support his view, Justice Brennan relied on the explanation of "contemporary community standards" provided by Judge Learned Hand in United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913). In doing so, he urged: "It seems clear that in [*Kennerley*] Judge Hand was referring not to state and local 'communities,' but rather to 'the community' in the sense of 'society at large; . . . the public, or people in general . . . .' It is, after all, a national Constitution we are expounding." *Id.* at 193, 195 (citation omitted).

64. *Id.* at 197.

65. 383 U.S. 413 (1966). *Memoirs* was a civil equity suit brought by the Massachusetts Attorney General to have the book, *Memoirs of a Woman of Pleasure*, declared obscene. *Id.* at 415.

66. *Id.* at 418.

Justice Brennan suggested that for a work to be obscene it must be patently offensive; its dominant theme must appeal to the prurient interest; and, it must have utterly no redeeming social value.[67] During the period in which the Court employed the *Memoirs* test, expressive works were infrequently deemed obscene.[68]

The present obscenity test was established in the 1973 Supreme Court case *Miller v. California*.[69] The importance underlying the *Miller* decision was threefold. First, the Court rejected a national standard of obscenity.[70] Instead, it stated that each "community" should be allowed to set its own standards as to what appeals to the prurient interest.[71] Second, courts need not decide that a work has utterly no redeeming value in order to find it obscene.[72] They need only find that the work lacks serious literary, artistic, political or scientific value.[73] Third, only "hardcore pornography" could be prohibited.[74]

C. *The Distinction Between "Obscenity" and "Indecency"*

At this point it is both useful and necessary to distinguish obscenity from indecency. The words "obscene" and "indecent" are more synonymous by dictionary definition[75] than they are in the constitutional sense. The Supreme

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67. *Id.*

68. SCHAUER, *supra* note 21, at 43. The difficulty in finding a work obscene was the requirement that it have utterly no redeeming social value. It was believed that the burden of proving that a work had absolutely no redeeming social value was next to impossible. *Id.*

69. 413 U.S. 15 (1973). The new test prescribed by the *Miller* Court was as follows:

> (a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ;
> (b) [w]hether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . ; and
> (c) [w]hether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24. (citations omitted).

70. *Id.* at 30-34. In delivering the Court's opinion, Chief Justice Burger declared: "[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists." *Id.* at 30.

71. *Id.* "Prurient" has been defined as that which has a "tendency to excite lustful thoughts." *Roth*, 354 U.S. at 487 n.20. Further, it has been described as " 'itching, morbid, or lascivious longings . . . .' " *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (Unabridged, 2d ed. 1949)).

72. *Miller*, 413 U.S. at 24-25.

73. *Id.* at 24.

74. *Id.* at 27. The requirement that material be hardcore pornography was an embodiment of the *Manual Enterprises* and *Jacobellis* decisions which initially required that a work be patently offensive to be obscene. SCHAUER, *supra* note 21, at 46-47. The *Miller* Court gave examples to help provide a clearer understanding of what was meant by "hardcore pornography":

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Miller, 413 U.S. at 25.

75. "Indecent" is defined in one dictionary as "grossly unseemly or offensive to manners and

Court has emphasized that, "[p]rurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."[76] After many years of extensive debate, the Supreme Court finally produced a somewhat objective and workable definition for obscenity.[77]

To date, the Supreme Court has attempted to define and permit regulation of "indecent" content only within the broadcast media.[78] In *Federal Communications Commision v. Pacifica Foundation*,[79] the Court indicated that the definition would encompass no more than that which portrays sexual or excretory organs or functions.[80] It has been recognized that the definitions of indecency in general are completely "amorphous," "elusive" and "subjective."[81] While indecent expression can be described as that which is offensive, vulgar, filthy, tasteless, shocking and vile, it is not obscene unless it appeals to the prurient interest.[82] Consequently, as long as indecent speech is not obscene, it is entitled to extensive first amendment protection.[83]

II. The Varying Degrees of Permissible Regulation of Obscene and Indecent Musical Content Within Different Media Forms

Consistent with first amendment doctrine, the government is permitted to regulate speech content in each form of communication, but to varying degrees.[84] Each medium of expression possesses unique characteristics which justifiy varied government regulatory treatment.[85] This section will focus briefly on the extent to which the government may permissibly regulate obscene and

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morals." Webster's New Collegiate Dictionary 578 (1980). "Obscene" is defined as "disgusting to the senses: abhorrent to morality or virtue: designed to incite lust or depravity." *Id.* at 786. The dictionary definition of "obscene" would appear not to be significantly different from that of "indecent." The fact that the definition of "obscene" includes a reference to inciting lust provides only a slight indication as to the constitutional differences between the two words.

76. F.C.C. v. Pacifica Found., 438 U.S. 726, 740 (1978).

77. *See supra* notes 22-74 and accompanying text. The degree of objectivity, if there truly is any, found in the constitutional definition of "obscenity" lies in its focus specifically on appeal to the prurient interest. "Indecency," on the other hand, encompasses the vast remainder of that which is immoral and offensive.

78. Note, *Indecent Programming on Cable Television*, 51 Geo. Wash. L. Rev. 254, 257 (1983) [hereinafter *Indecent Programming*]. The decision in which the Supreme Court allowed the partial regulation of "indecent" content in the broadcast medium was F.C.C. v. Pacifica Found., 438 U.S. 726 (1978). Since that decision the Court has produced no authority supporting the regulation of indecency in another medium.

79. 438 U.S. 726 (1978).

80. *Id.* at 743.

81. Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356, 1363 (9th Cir. 1985). Writing for the majority, Judge Norris noted that, "[l]anguage that may be considered 'indecent' in one segment of our heterogeneous society may be common, household usage in another." *Id.*

82. *Miller*, 413 U.S. at 24. For a detailed discussion of the definition of "obscenity" and the requirement that it "appeal to the prurient interest," see Schauer, *supra* note 21, at 96-115.

83. *See Miller*, 413 U.S. at 23-24.

84. *Indecent Programming*, *supra* note 78, at 256.

85. *Pacifica*, 438 U.S. at 748. The Supreme Court has stated that it has "long recognized that each medium of expression presents special First Amendment problems." *Id.* citing Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952); *Indecent Programming*, *supra* note 78, at 256-57.

indecent content within some of the more pervasive communication media.

Of the different media, print is subject to the least regulation.[86] The government may not, except in very limited instances, impose prior restraint restrictions on the dissemination of literature containing obscene or indecent language.[87] Unlike printed works, films have been subject to a greater degree of content regulation. While freedom of speech protects the free flow of ideas, it was not always clear whether films were indeed a mode for communicating ideas and deserving of first amendment protection.[88]

For example, in 1915, the Supreme Court in *Mutual Film Corporation v. Industrial Commission of Ohio*[89] allowed state censoring of motion pictures.[90] Films were considered to be nothing more than a "business"[91] and not a mode for expressing protected ideas. Thus films were not protected under the first amendment.[92] It was not until almost forty years later, in the landmark case of *Joseph Burstyn, Inc. v. Wilson*,[93] that the Supreme Court held motion pictures to be a "significant medium for the communication of ideas" entitled to first amendment protection.[94]

Presently, films cannot be subject to government regulation of indecent language although they can be subject to prior review by a licensing board in order to prevent obscene films from being exhibited.[95] One possible reason for subjecting films to more strict regulation than the print medium was based on the suggestion that because movies are "larger than life" portrayals, they are capable of producing a greater impact on those who view them.[96] The motion picture industry, in 1968, chose to adopt a form of private self-regulation for films in an attempt to forestall state and local governments from constructing

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86. *See Pacifica*, 438 U.S. at 747-48; SCHAUER, *supra* note 21, at 232; *Indecent Programming, supra* note 78, at 256-57.

87. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 n.10 (1963). *See* SCHAUER, *supra* note 21, at 232.

88. *See* Mutual Film Corp. v. Indus. Comm'n, 236 U.S. 230 (1915); MORETTI, *supra* note 31, at 87-88.

89. 236 U.S. 230 (1915). The case involved an injunction sought by the appellant, Mutual Film Corporation, to restrain the enforcement of a state statute allowing the censorship of motion picture films. *Id.* at 230-31.

90. *Id.* at 244-45.

91. *Id.* at 244. In so ruling, the Court opined that films were not to be considered vehicles for representing the ideas of the public. Moreover, the Court considered films to be "mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, . . . but,. . . capable of evil . . . ." *Id.* at 244.

92. *See id.*

93. 343 U.S. 495 (1952). *Burstyn* involved the constitutionality of a statute which permitted the banning of films deemed to be sacrilegious. *Id.* at 497.

94. *Id.* at 501-02.

95. *See* Freedman v. Maryland, 380 U.S. 51 (1965). The Court in *Freedman* allowed the state of Maryland to require that films be submitted to a censor prior to their exhibition. *Id.* at 58. However, the Court struck down the particular scheme employed by the state because it had not been designed with proper procedural safeguards. *Id.* at 59-60.

Under the guidelines of *Freedman*, the burden of proving a film obscene was placed on the censor. No restraint on films could be imposed without a final judicial determination. Moreover, the entire procedure was to be enacted in a manner that ensured promptness. *Id.* at 58-59.

96. MORETTI, *supra* note 31, at 91-92.

censorship boards.[97]

The broadcast medium has received the most stringent degree of governmental control.[98] Aided by a 5-4 Supreme Court decision in *Pacifica*,[99] the Federal Communications Commission is able to prevent "indecent" as well as "obscene" language from being broadcast over public airwaves.[100] The Court in *Pacifica* held an "indecent" program, broadcasted over public airwaves during the afternoon, to fall outside first amendment protection.[101] To justify its holding, the Court emphasized the broadcast media's unique pervasiveness which "confronts the citizen, not only in public, but also in the privacy of the home, . . ." where the individual's right to privacy is paramount.[102] Equally important to the Court was that broadcasting is "uniquely accessible to children, even those too young to read."[103]

There has yet to be a decision by the Supreme Court on the extent to which the cable television industry can be regulated. Proponents of the cable industry argue that the medium most resembles the print media and should be treated accordingly.[104] Alternatively, it has been maintained that the cable medium shares the characteristic of pervasiveness with the broadcast media, and consequently should be given more limited first amendment protection.[105] A third group of critics lie between these opposing views, stressing that each medium type is unique and deserves its own form of regulation.[106]

With respect to rock-and-roll music, the Supreme Court as well as federal circuit and district courts have held that music is a form of expression which the first amendment was meant to protect.[107] More specifically, the Ninth Cir-

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97. *Id.* at 94-98. *See also* Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation By the Film Industry*, 73 COLUM. L. REV. 185, 186, 191 (1973) [hereinafter Friedman] (containing a thorough examination of the Motion Picture Rating System and the extent to which the private regulator can greatly exceed the government in monitoring speech content).

98. *Pacifica*, 438 U.S. at 748; MORETTI, *supra* note 31, at 63.

99. 438 U.S. 726 (1978).

100. *Id.* at 750-51.

101. The broadcast in question was a George Carlin monologue entitled "Filthy Words." The content was comprised of repetitive use of words pertaining to sexual and excretory functions. *Id.* at app. 751-55. The broadcast had been aired during the afternoon and was heard by a man while in the car with his young son. The man subsequently complained to the FCC. *Id.* at 729-30. The Court stressed the narrowness of its holding in that it was not deciding that all indecency could be banned from the airwaves at all times of the day. *Id.* at 750.

102. *Id.* at 748. Supporting that belief, Justice Stevens stated that "[t]o say one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." *Id.* at 748-50.

103. *Id.* at 749.

104. *Indecent Programming*, *supra* note 78, at 256. For a detailed discussion of regulating indecent expression within the cable television medium, see MORETTI, *supra* note 31, at 77-85; *Indecent Programming*, *supra* note 78.

105. *Indecent Programming*, *supra* note 78, at 257.

106. *Id.*

107. " 'Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.' " Cinevision Corp. v. City of Burbank, 754 F.2d 560, 567 (9th Cir. 1984) (citing Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65 (1981)).

cuit, in *Cinevision Corporation v. City of Burbank*,[108] made it clear that a city ordinance forbidding the playing of rock-and-roll music, based on its content, would be an infringement of first amendment rights.[109]

Although music is a form of protected expression, it does not follow that musical recordings are immune from all forms of governmental regulation. The lyrical content of music recordings has remained relatively free from governmental regulation over the years. The extent to which the government, under the current state of the law, might be able to regulate the content of rock music will be discussed in Part VI.

III. A Practical Barrier on Governmental Regulation: Applying the "As A Whole" Test to Obscene Recordings

Notwithstanding any method of regulation the government may choose to employ, it still must follow the mandate of *Miller* when judging works obscene.[110] This may present a special challenge given the unique characteristics of the recording industry. Part of the *Miller* test dictates that in determining whether or not a work is obscene, a work must be considered "as a whole."[111] As will be examined, applying the "as a whole" test to musical recordings may present difficulties to a trier of fact or law. More specifically, it is the *manner* in which recorded songs are made available to the public that may present problems in attempting to remove obscene musical works from distribution.[112]

That a particular song, by itself, should be judged "as a whole" is clear. A single recorded song, like a book or film would constitute the complete physical work to be examined. If the song was found obscene, it could be kept off the airwaves and out of the marketplace. But, what happens when the song is placed together with another non-obscene song to constitute a "forty-five?" Or, more importantly, suppose the obscene song appears on an album containing a collection of several non-obscene songs. Would it not be possible for recording artists to release songs via albums which, if appearing alone or with one other song on a "forty-five," could be labeled obscene? Consequently, would it not then be possible for minors, let alone adults, to gain access to these very songs? To answer the latter question it is necessary to determine

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108. 745 F.2d 560 (9th Cir. 1984).

109. *Id.* at 567. The court affirmed a jury's determination that a contract entered into between Cinevision Corporation and the City of Burbank, to promote concerts in a city owned amphitheater, violated Cinevision's first amendment rights. The contract terms stated in part that the city *"shall have the right to disapprove and cancel any show or performance* [the nature and content of] *which has the potential of creating a public nuisance or which would violate any State law or City ordinance."* *Id.* at 565 (emphasis in original). The City Council had refused performances by Blue Oyster Cult, Jackson Browne, Roxy Music, Todd Rundgren, Patti Smith and Al Stewart. *Id.* at 566, n.1.

110. *See* Miller v. California, 413 U.S. 15 (1973). Also, as will be discussed *infra* in Part V, a variable test for obscenity may be specially employed for application to minors. *See* Ginsberg v. New York, 390 U.S. 629 (1968).

111. *Miller*, 413 U.S. at 25. Requiring that a work be examined in its entirety was not new to obscenity law at the time *Miller* was decided. The "as a whole" test was first applied by a majority Supreme Court in *Roth*, 354 U.S. at 489-90.

112. *See infra* notes 114-41 and accompanying text.

whether an entire record album should be examined "as a whole." This determination requires knowledge of the legal history behind judging books, films, magazines and periodicals "as a whole."[113]

In the early 1900's, American courts applying the *Hicklin* test could find an entire work obscene even if it contained only a sole isolated passage which was actually obscene.[114] In *United States v. One Book Entitled Ulysses,*[115] the Second Circuit rejected the "isolated passages" test and decided that a work could be found obscene only after it was examined in its entirety and considered "as a whole."[116] After the Supreme Court's decision in *Roth*, American courts were required to consider the entire work.[117] While the phrase "judged as a whole" may appear straightforward, it has nonetheless been held open to varying interpretation depending upon the type of work being considered.[118]

When examining books or films the courts have consistently applied the "as a whole" test to the entire work.[119] There has been disagreement among the courts, however, when the work under consideration is a periodical.[120] The argument has been made that a magazine composed of individual articles is not a "work" but rather a "volume" composed of many "works."[121] Since *Miller*, the Supreme Court has not rendered significant authority applying the "as a whole" test to magazines.[122] However, in the time between *Roth* and *Miller*, the Court had the occasion to review several allegedly obscene magazines and decided to evaluate them in their entirety.[123]

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113. *Id.* The scope of this Note is limited to discerning the extent to which lyrical content in recorded form might, and should be regulated. It is worth noting, however, that obscene music may be more difficult to totally suppress than other media forms because musical works appear in many forms and in various media. We not only gain access to music through recordings, but also in the form of live concert performances, movie soundtracks, music videos and over the airwaves. Rock musicians have often produced full length feature films around a particular album such as the rock opera "Tommy" by The Who, "The Song Remains the Same" by Led Zeppelin, "The Wall" by Pink Floyd and Prince's "Purple Rain" to name just a few. What is hoped to be gained in this section is an understanding that while one particular song may be considered, by itself, obscene, it may appear in other contexts such that it could not be constitutionally suppressed by the government.

114. See *supra* notes 31-34 and accompanying text for a discussion of the *Hicklin* test.

115. United States v. One Book Called "Ulysses," 5 F. 182 (S.D.N.Y. 1933), *aff'd sub nom*, United States v. One Book Entitled Ulysses By James Joyce, 72 F.2d 705 (2nd Cir. 1934).

116. 72 F.2d at 707.

117. 354 U.S. at 489-90.

118. *See* SCHAUER, *supra* note 21, at 105-09 (discussing the "as a whole" concept).

119. *Id.* at 105-06.

120. *Id.* at 106. Schauer points out that the "question to be asked [with respect to magazine articles] is whether the objectionable [articles] are related to text or other materials which are themselves constitutionally protected, or whether the [articles are] merely inserted as a sham to attempt to shield commercial pornography in a cloak of legitimacy." *Id.*

121. Penthouse Int'l Ltd. v. McAuliffe, 610 F.2d 1353, 1366-67 (5th Cir. 1980) (publishers of adult periodicals sought relief from the Georgia Solicitor General who engaged in a program of harassing and arresting retailers of PENTHOUSE and HUSTLER magazines).

122. *Id.* at 1367. Research of Supreme Court decisions from 1980 to the present also supports this fact.

123. *Id.* at 1367-68 (discussing Ginzburg v. United States, 383 U.S. 463 (1966), and Manual Enters., Inc. v. Day, 370 U.S. 478 (1962), with respect to the Supreme Court's interpretation of the "as a whole" test subsequent to *Roth* and prior to *Miller*).

For example, the issue before the Court in *Ginzburg v. United States*[124] was whether the "as a whole" standard was applied correctly to a particular magazine.[125] The trial court judge had concluded that although only four of the fifteen articles were obscene, the magazine, examined "as a whole," was obscene.[126] Explaining its determination that both the magazine and a newsletter were obscene, the Court stated that, "[o]ur affirmance of the convictions . . . is based upon their characteristics as a whole, including their editorial formats, and not upon particular articles contained, digested, or excerpted in them."[127]

Lower federal courts and state courts have also produced decisions supporting the application of the "as a whole" test to periodicals.[128] *United States v. Head*[129] involved an "underground" newspaper containing an objectionable excerpt in the form of a cartoon depicting a male masturbating in front of a wall covered with nude pinups.[130] In reviewing the newspaper the court found it to be thematically integrated, "much like a novel or a film."[131] The fact that the court found the theme to be centered merely on the "assumed foibles of the way of life generally accepted in this country today" did not defeat the

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The Court's first chance occured in Manual Enters., Inc. v. Day, 370 U.S. 478 (1962). The case involved the withholding from delivery, by the Postmaster General, of 405 copies of 3 magazines on the grounds that they were violative of the federal obscenity statute. In reversing the district court and court of appeals, both of whom had found the questionable magazines obscene, Justice Harlan rejected the "isolated excerpt" approach in stating:

> [We] . . . hold that the magazines in question, taken as a whole, cannot, under any permissible Constitutional standard, be deemed [obscene] . . . .
>
> We cannot accept in full the Government's description of these magazines which, contrary to *Roth* . . . tends to emphasize and in some respects overdraw certain features in several of the photographs, at the expense of what the magazines fairly taken as a whole depict.

Id. at 489 (citation and footnote omitted).

124. 383 U.S. 463 (1966).

125. *Id.* at 464. The Court examined a hard-cover magazine entitled EROS and a bi-weekly newsletter called LIASON. The lower court judge had examined each of the articles within the publications separately. Although he found only four of the fifteen articles in EROS to be obscene he nonetheless determined that the publication violated the federal obscenity statute. *Id.* at 471.

126. *Id.* at 466 n.5.

127. *Id.* The Court further stated that, "we do not decide whether particular articles, for example, in EROS, although identified . . . as offensive, should be condemned as obscene whatever their setting." *Id.* Although the Supreme Court has never explicitly decided that magazines or "underground" newspapers should be judged "as a whole" and thus similar to books or films, the language of *Manual Enterprises* and *Ginzburg* at least provides for the argument that, although magazines are composed of individual articles, they nonetheless deserve to be viewed "as a whole." *Penthouse*, 610 F.2d at 1368.

128. *See, e.g.*, Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980); Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2d Cir. 1960); United States v. Head, 317 F. Supp. 1138 (E.D. La., New Orleans Div. 1970); Dillingham v. State, 9 Md. App. 669, 267 A.2d 777 (Md. Ct. Spec. App. 1970).

129. 317 F. Supp. 1138 (E.D. La., New Orleans Div. 1970).

130. *Id.* at 1140. The newspaper, entitled "NOLA Express" was a radical bi-weekly distributed primarily on the streets of New Orleans. Its contents included news reports, poetry, artwork and discussions of general community interests. *Id.* at 1139, 1144.

131. *Id.* at 1144.

court's finding of a common thread.[132] Although recognizing that the paper was comprised of "discrete" articles, the court nonetheless applied the "as a whole" test.[133]

In a similar case, *Dillingham v. State*,[134] the Maryland Appeals Court examined a newspaper in its entirety and found that a cartoon portraying a local judge masturbating did not render the work obscene.[135] The court decided that the cartoon was consistent with the "iconoclastic" theme of the newspaper.[136] Additionally, in a more recent case, the Fifth Circuit[137] determined that "Penthouse," "Playboy," and "Oui" magazines should be judged as a whole, not on an article-by-article basis.[138] In so deciding the court stated:

> While the parts of a magazine may not be interrelated in the same manner as a particular episode in a novel to the balance of the book, it is the interrelation between the various features or articles of a magazine and the magazine's basic editorial philosophy or purpose that is significant.[139]

The courts have yet to decide a case directly on the issue of whether record albums, comprised of individual songs, are to be treated "as a whole." If, when the courts do confront the issue, they liken record albums to books or films, then perhaps albums will be given equivalent treatment under the "as a whole" test.[140] On the other hand, if courts decide that albums are more like periodicals, the treatment they receive may vary depending upon the jurisdiction in which the case is tried until the Supreme Court decides the issue.[141]

IV. Possible *De Facto* Abuses of First Amendment Rights Under a Private Regulatory Scheme

Until recently, the musical recording industry has remained relatively free from the regulation of lyrical content. Those currently attempting to pressure

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132. *Id.*

133. *Id.* at 1141-44. In support of applying the "as a whole" test, Judge Rubin wrote:

> [a]lthough there has been considerable difference of opinion among the members of the Supreme Court over the various tests for obscenity . . . that Court has been consistently unanimous on the proposition that material must be judged as a whole in order to determine whether it is obscene, before it can be suppressed because it contains offensive segments.

Id. at 1142.

134. 9 Md. App. 669, 267 A.2d 777 (Md. Ct. Spec. App. 1970).

135. *Id.* at 677-78, 267 A.2d at 782. The picture appeared on a page containing the headlines "Dear Judge Pugh," and "A Pornobiography." The cartoon was a crude depiction of the judge sitting in a chair, with a swastika on it, masturbating. Directly above the cartoon was the caption "HE' COMM D' JUDJE" [sic]. The article surrounding the cartoon was a critique of the judge's professional capacity. *Id.* at 670-71, 267 A.2d at 778-79.

136. *Id.* at 677, 267 A.2d at 782.

137. Penthouse Int'l, Inc. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980).

138. *Id.* at 1371.

139. *Id.* at 1370-71.

140. *See* SCHAUER, *supra* note 21, at 105-06.

141. *See id.* at 106-09; *supra* notes 119-39 and accompanying text. Suggestions on such treatment will be developed in Part VI.

the recording industry into "cleaning up its act," however, have suggested that rock music should be rated in a manner similar to that currently employed by the motion picture industry.[142]

A. The Motion Picture Rating System

The current Motion Picture Rating System (MPRS), a program of private self-regulation, has been in existence since 1968.[143] The governing board of the system is the Motion Picture Association of America (MPAA).[144] It requires that films be submitted to the Code and Rating Administration (CARA) for rating prior to their release for exhibition or else recieve an automatic "X" rating.[145] Although the system is theoretically voluntary, both social and economic factors compel most filmmakers and theatre owners to comply.[146]

A film will be given one of five possible ratings: G, PG, PG-13, R or X.[147]

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142. *See Record Hearing, supra* note 9, at 5-7, 10-11 (testimony of Tipper Gore and Millie Waterman, respectively). Although neither speaker specifically stated that the recording industry should adopt a rating system identical to that of the motion picture industry, both speakers nonetheless issued proposals containing elements similar to those employed in the private regulation of films. Ms. Waterman suggested that the recording industry agree on a symbol to be used to designate recordings containing sexually explicit language, violence, profanity, the occult and glorification of drugs and alcohol. She suggested the use of the symbol "R" be used on indecent recordings "because it is familiar to consumers as a warning that material may be inappropriate for young people or sensitive adults as part of the movie rating system." *Id.* at 10-11 (testimony of Millie Waterman). Furthermore, Ms. Waterman urged that the industry form a panel to establish standards which all record companies could use in determining whether a particular recording required the warning label. *Id.* at 9.

Ms. Gore stressed that her proposal involved no governmental intervention. She also requested that the industry construct an ad-hoc panel to establish a "uniform set of criteria which could serve as a policy guide for the individual companies." *Id.* at 5-6 (testimony of Tipper Gore). Furthermore, she suggested that those criteria be used to place a "generic warning label" on indecent albums. *Id.* at 5.

143. Attanasio, *The Rating Game, Desperately Seeking Standards*, NEW REPUBLIC, June 17, 1985, at 16 [hereinafter Attanasio]; de Grazia & Newman, *From G to X: Self-Regulation or Self-Protection?*, SCH. LIBRARY J., Dec. 1982, at 17 [hereinafter de Grazia].

144. Attanasio, *supra* note 143, at 16. The MPAA has been rating films for approximately 18 years. *Id.* The Motion Picture Rating System actually contains three industry trade associations. However, since the MPAA rates about 92 percent of all commercially exhibited films it is the association most often referred to when discussing the rating system. *See* Friedman, *supra* note 97, at 191-92.

145. MORETTI, *supra* note 31, at 97; Friedman, *supra* note 97, at 192, 216. The Code and Rating Administration is a board consisting of seven members headed by a director along with six staff members chosen by the director and approved by the president of the MPAA. *Id.* at 193 n.61; Attanasio, *supra* note 143, at 16.

146. Attanasio, *supra* note 143, at 17. Attanasio noted that "[i]n the end, the ratings are as voluntary as 'your money or your life.' "*Id.*

147. *Id.* at 16. The ratings suggest the suitability of films in the following manner: "G" indicates that a film is suitable for all ages; "PG" represents that parents should use discretion in deciding whether their children should view the film alone; "PG-13" is similar to "PG" but directs parents more towards protecting only pre-teens; "R" means that children under 17 may only view the film in the presence of an adult; "X" represents adult material only and children under 17 are denied access altogether. *Id.*

In determining each appropriate rating, the industry has no written absolutes.[148] Rather, the fundamental question asked in determining the appropriate rating for a film is: "[W]ould the average American parent consider the film suitable for children under 17?"[149]

The purpose behind creating the system was to satisfy two goals; first, to give parents reliable information, thus helping them to make informed judgments in guiding the film viewing of their children; and second, to forestall censorship by the federal and local governments.[150] Whether or not the system has attained those goals has been the subject of debate.

B. Criticism of the Motion Picture Rating System

It has been suggested that the Motion Picture Rating System has been unsuccessful in its informational function;[151] that it abridges the substantive rights of four categories of persons, including minors;[152] and that any censoring of films should be subject to review by independent tribunals.[153] Further, it inappropriately creates a national, rather than local community standard of content acceptability.[154] A closer look at the MPRS may lead one to believe that at least one, if not all, of the aforementioned contentions is true.[155]

1. Lack of Objective Rating Criteria Undermines The Informational Function

Opponents of the system submit that the lack of any real rating criteria allows the current director and board members of CARA to excercise an excessive amount of discretion.[156] Additionally, they argue that because the five-symbol rating system is not based on solid criteria, the ratings do not convey adequate or reliable guidelines for the parents of movie-going children.[157]

A film can receive an "R" or "X" rating based upon a predominance of any one of several factors. For example, one film may be given an "R" rating because it contains excessive violence; another because of too much nudity or

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148. Friedman, *supra* note 97, at 194; Attanasio, *supra* note 143, at 16. There is one exception to this assertion, however, known as the "automatic language" rule under which ratings are applied according to the number of times the "harsher, sexually derived words" are used. A film using such words a single time warrants the affixation of a "PG-13" rating; an "R" for the second time. However, the application of this rule falls most often, when appealed. *Id.* Director Albert Brooks, in voicing his firsthand knowledge of having the "automatic language" rule applied to a film stated, "[i]f you say, 'I'm going to fuck you over,' that's a PG-13. If you say, 'I'm going to fuck you over the desk,' that's an R." *Id.*

149. Attanasio, *supra* note 143, at 16.

150. Friedman, *supra* note 97, at 186.

151. *Id.* at 196-99.

152. *Id.* at 206-21.

153. *Id.* at 240.

154. *Cf.* Miller v. California, 413 U.S. 15 (1973) (rejecting a national definition of obscenity, instead requiring that determinations made as to what constitutes obscenity be based on local community standards).

155. See *infra* notes 156-85 and accompanying text for a discussion of Motion Picture Rating System.

156. *E.g.*, Friedman, *supra* note 97, at 194-96.

157. *Id.* at 194-99; Attanasio, *supra* note 143, at 16-17; de Grazia, *supra* note 143, at 17.

sex; and yet another due to the repetitive use of four-letter expletives.[158] It is imaginable that in one instance a parent might condone his or her child's viewing a violent film, rated "R", while in another instance, not approve of a film with the same "R" rating placed on a different film because of nudity.[159] Standing alone, the "R" rating fails to adequately inform parents as to the precise nature of the material contained in the film and the context in which it appears. Thus, critics have concluded that the system "disseminate[s] initials, not information."[160]

2. The System Has the Effect of Abridging Substantive Rights

Critics have also argued that the rating system, based on age classifications, affects the substantive rights of adult moviegoers, persons under seventeen, parents who wish to have their children view X-rated films, and filmmakers.[161] It is important to note that purely private regulation is not government action.[162] Therefore, substantive constitutional rights, technically, are not violated. However, such private regulation may have the *de facto* effect of impinging upon rights recognized by the Constitution.[163]

First, opponents maintain that adults' rights are affected by the ratings because, for a number of reasons, movies are edited and reshaped to conform to "suitable for children" standards.[164] Thus, adults are deprived from receiv-

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158. Friedman, *supra* note 97, at 196-98; Attanasio, *supra* note 143, at 17; de Grazia, *supra* note 143, at 17. One critic, who has provided a further explanation of the lack of true information contained within film ratings, has stated:

> The X ratings, which were previously applied mostly in the area of sex, are now applied to violence as well. Films formerly rated PG for violence are now rated R. And finally, pictures containing strong language and language that is sexually oriented may receive R ratings. . . . [N]either designation informs parents or children why it was conferred — whether the R rating was due to the sex, violence, strong and possibly offensive language, all, or some combination. The PG rating does not indicate to parents specifically what to watch for in choosing films.

Id.

159. Friedman, *supra* note 97, at 197.

160. *See, e.g., id.* at 199.

161. *Id.* at 206; de Grazia, *supra* note 143, at 18.

162. *See* Friedman, *supra* note 97, at 221 n.235 (citing Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972)); SCHAUER, *supra* note 21, at 244-45. The private censor, unlike the government, does not have to comply with first amendment doctrine and the corresponding limits it places on regulating and suppressing speech content. *See id.*

163. *See* Friedman, *supra* note 97, at 206-22 (discussing substantive rights affected by the Motion Picture Rating System); Attanasio, *supra* note 143; de Grazia, *supra* note 143, at 17-18.

The word "*de facto*" is a legal term often used to describe how a certain activity or law actually, or in effect, affects the rights of people. *See* BLACK'S LAW DICTIONARY 374 (5th ed. 1983). The constitutional counterpart of "*de facto*" is "*de jure*," a term used to describe a condition in which there has been full compliance with the law. *See Id.* at 382. In the context of the Motion Picture Rating System, although the operation of the scheme does not legally violate the Constitution, it is alleged to, *in effect*, deprive people of rights to which they are otherwise entitled to exercise. *See* Friedman, *supra* note 97, at 206-21; *infra* notes 164-86 and accompanying text.

164. Friedman, *supra* note 97, at 206-09; Attanasio, *supra* note 143, at 16-17. As Attanasio noted: "[I]n today's market, most films need a PG or PG-13 to turn a profit; instead of turning to the appeals board, filmmakers simply make the necessary changes." *Id.* at 17.

ing the originally intended message of the filmmaker. Such a denial arguably violates the right to receive the free expression of others.[165]

Secondly, although minors do not share constitutional rights equally with adults,[166] minors do nonetheless possess significant first amendment rights.[167] While extra measures may be taken to shield minors from certain sexually explicit material which is otherwise protected for adults, the Supreme Court has never specifically held or even implied that all minors under the age of seventeen must be sheltered from all sexual content, or content which is violent, sacrilegious or expletive-laden.[168] Inconsistent with their first amendment rights, however, minors may be denied access to "R" rated films containing such content unless accompanied by a parent or guardian. Similarly, a movie rated "X", whether or not obscene to anyone, may not be viewed at all by minors.[169]

Thirdly, constitutionally protected rights of parents, to decide what is in the best interest of their children, are disregarded by the MPRS.[170] While probably not practiced to an overwhelming extent, parents may wish to have their children accompany them to an "X" rated film.[171] Under the present system, however, they may not do so. With respect to "X" rated films, a board consisting of seven members has, in essence, become a complete surrogate parent for each child and decided that parents shall not possess the capacity for choosing whether or not their child should view such a film. Although today, this can be circumvented thanks to home video recorders, the parents of earlier days were left without a choice.

Finally, it has been suggested that the substantive rights of filmmakers are affected. First, it has been argued that the film classification criteria ex-

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165. *See* Stanley v. Georgia, 394 U.S. 557 (1969). The Court in *Stanley* stated that, "[i]t is now well established that the constitution protects the right to receive information and ideas. 'This freedom [of speech and press] . . . necessarily protects the right to receive . . . .'" *Id.* at 564 (citation omitted). Because filmmakers often change their films to conform to the rating scheme, adults are, in essence, denied access to the initial complete message of the filmmakers. Thus, it would seem appropriate to argue that technically, the first amendment rights of adults are violated by the Motion Picture Rating System. *See* Friedman, *supra* note 97, at 206-09.

166. *See* SCHAUER, *supra* note 21, at 87-92.

167. *See infra* notes 188-236 and accompanying text (containing a detailed discussion of minors' first amendment rights).

168. SCHAUER, *supra* note 21, at 89. *See* Ginsberg v. New York, 390 U.S. 629 (1968).

169. de Grazia, *supra* note 143, at 17.

170. Friedman, *supra* note 97, at 213-16.

171. At least one Supreme Court Justice has recognized that some parents may wish to expose their children to indecent materials that a censor has deemed inappropriate for children. In the context of the Court's decision in FCC v. Pacifica Found., allowing the FCC to ban George Carlin's "dirty words" monologue from the airwaves, primarily in the interest of protecting young children, Justice Brennan commented:

> As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven "dirty words" healthy and deem it desirable to expose their children [to them]. . . . Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or existence.

FCC v. Pacifica Found., 438 U.S. 726, 770 (1978) (Brennan, J., dissenting).

ceed permissible constitutional bounds due to the system's lack of well-defined standards.[172] The Supreme Court, in *Interstate Circuit, Inc. v. Dallas*,[173] invalidated a city ordinance which allowed films to be classified according to their "suitability for minors."[174] The Court, in striking down the ordinance on vagueness grounds stated that, "[v]ague standards, unless narrowed by interpretation, encourage erratic administration whether the censor be administrative or judicial; 'individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by the law.' "[175] The Code and Rating Administration has no published standards. The Dallas ordinance, invalidated in *Interstate Circuit*, at least contained a two-part test expressed in some detail.[176] In the past, statutes attempting to incorporate the rating code were consistently struck down due to either patent vagueness or a lack of ascertainable standards, or both.[177] Accordingly, many critics believe that the Motion Picture Rating System is "unconstitutionally vague."[178] Such vague standards negatively impact upon filmmakers' freedom of expression by failing to provide adequate notice as to what content will render a given rating.

Secondly, it has also been argued that the rating program's appellate procedures "do not satisfy the due process command of *Freedman v. Maryland*."[179] In *Freedman*,[180] the Supreme Court stressed that, among other factors, any laws requiring submission of films to a censor, prior to exhibition, must contain a provision for an expedient, independent, final judicial decision.[181] Producers or distributors dissatisfied with a CARA rating decision have no right to appeal to a judicial or other independent tribunal. Thus, it is

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172. Friedman, *supra* note 97, at 218-19.

173. 390 U.S. 676 (1968).

174. *Id.* at 690. The city ordinance stated:

> 'Not suitable for young persons' means: (1) Describing or portraying brutality, criminal violence or depravity in such a manner as to be . . . likely to incite or encourage crime or delinquency on the part of young persons; or (2) Describing or portraying nudity beyond the customary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be . . . likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.
>
> A film shall be considered 'likely to incite or encourage' crime delinquency or sexual promsicuity. . . if. . . it will create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted.

Id. at 681.

175. *Id.* at 685 (citing Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 701 (1959) (Clark, J., concurring in result)).

176. *Id.* at 681-82.

177. SCHAUER, *supra* note 21, at 244-45 n.92 and accompanying text.

178. *See, e.g.*, Friedman, *supra* note 97, at 219.

179. *Id.* Under the guidelines of *Freedman*, the burden of proving a film obscene was placed on the censor. No restraint on films could be imposed without a final judicial determination. Moreover, the entire procedure was to be enacted in a manner that ensured promptness. Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).

180. *Freedman*, 380 U.S. 51 (1965).

181. *Id.* at 58-59.

believed that the rating system is violative of the first amendment in this respect as well.[182]

3. CARA Ratings Based On National Standards Are Arguably Unconstitutional Under *Miller*

It would appear that the rating system is *de facto* unconstitutional in yet a third area. The Supreme Court, in *Miller v. California*,[183] openly rejected a national definition of obscenity.[184] Rather, it is the states and local communities that are to be left to decide which material is within their standards of public morality under the guidelines of *Miller*.[185] By analogy, it would appear that the Code and Rating Administration violates that principle. A seven-member board is vested with the initial power to decide which films are suitable for minors and those decisions are applicable to the entire nation.[186] In this respect, it would appear that the rating system has the effect of abridging first amendment rights and, thus, is arguably *de facto* unconstitutional.

In sum, many critics feel that the Motion Picture Rating System fails to provide functional information, violates substantive rights, and is a more harsh censor than the government constitutionally could be. Ideally, there should be no attempts to classify non-obscene materials by either the private regulator or the government. However, if a rating system is inevitable, there is considerable support for bringing the classification of films back into the hands of the government. Under this method, the industry would "obtain [a] fuller measure of artistic freedom by abandoning its classification scheme and fighting its censorship battles in the constitutionally appropriate tribunals."[187]

V. Attempts To Shield Minors From Indecent Expression Violates Rights Protected Under the First Amendment

The current controversy over rock lyrics alleged to be indecent has

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182. The appellate process for motion pictures is entirely intra-industry. The sole avenue of relief for producers displeased with a Code and Rating Administration decision is through the Code and Rating Appeals Board. The board consists of the head of the MPAA, 12 of its board members, two members from each of the other two industry trade associations, plus others to fill its 25 person membership. A 66 percent vote by the board will sustain "X" ratings. The other ratings can be sustained by a majority vote. de Grazia, *supra* note 14, at 17.

183. 413 U.S. 15 (1973).

184. *Id.* at 31-34.

185. *Id.* While the *Miller* decision concerned the area of obscenity, it would appear clear that requiring any regulation of indecent or unsuitable material to be based on community standards would also be consistent with that decision. The Court stated that "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33. Thus, the argument could be made that determining the suitability of movies should not be determined on a nationally appropriate basis. *Cf. id.* (Code and Rating Administration decisions affect the entire nation in their application, rather than individual communities. Thus, varied tastes within the 50 states are ignored).

186. While there are appellate procedures for review of CARA rating determinations, the appeals board consists only of another 25 members. Thus, in the aggregate, there are still only 32 people vested with the sole power of determining the appropriateness of films for the entire nation. *See infra* note 182.

187. Friedman, *supra* note 97, at 240.

stemmed primarily out of a belief that the lyrics are harmful to the development of certain age groups.[188] The PMRC has specifically pointed out that its concern is with pre-teenagers and young teenagers having access to materials perceived to influence them adversely.[189] The NPTA has gone even further, stating that it desires a system that would "protect *consumers* from exposure to material they feel may be harmful to *themselves or children.*"[190] Without determining whether these groups are trying to protect consumers in general, it is clear that they are at least trying to protect minors up through junior high school age. Their concerns focus on the exposure of those minors to lyrics which are sexually explicit, violent, profane or occult in nature, or which glorify substance abuse or the committing of crimes.[191] It is clear that minors may be shielded from material determined to be legally obscene under *Miller.* However, the extent to which minors may be shielded from materials alleged to be "indecent" or otherwise objectionable is not quite so clear.

A. The Scope of Minor's Rights to Receive the Expression of Others

1. The Supreme Court Has Recognized that Minors Possess Extensive First Amendment Rights

The fact that a particular form of expression is protected for dissemination to adults does not lead, in all instances, to the same result as applied to minors. Minors do not share first amendment rights co-extensive with adults.[192] However, they are nonetheless entitled to a significant measure of first amendment protection.[193] As was stated in *Tinker v. Des Moines School Dist.*,[194] "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights [and]. . . may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[195] The Court has also stated that only in "narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]. . . ."[196]

The Supreme Court, in *Board of Education, Island Trees Union Free*

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188. *Record Hearing, supra* note 9, at 3, 8 (testimony of Susan Baker and Millie Waterman respectively). Ms. Baker makes the inference that the current proliferation of "outrageous recordings" is in some way connected to recent increases in teen pregnancies, suicide and rape. *Id.* at 2-3.

189. *Id.* at 7 (testimony of Tipper Gore).

190. *Id.* at 8 (testimony of Millie Waterman) (emphasis added).

191. *Id.* at 1, 8 (testimony of Susan Baker and Millie Waterman respectively).

192. Tinker v. Des Moines School Dist., 393 U.S. 503, 514-15 (1969) (Stewart, J., concurring). *See* Ginsberg v. New York, 390 U.S. 629, 636-38 (1968). *See generally Pacifica*, 438 U.S. at 726 (allowing suppression of an indecent radio broadcast partly out of concern for young children).

193. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975). This case involved the Court's upholding of drive-in movie exhibitors' right to display films containing nudity even though they might be seen by minor or sensitive adult passers-by from the street. *See id.* at 212-14.

194. 393 U.S. 503 (1969).

195. *Id.* at 511.

196. *Erznoznik*, 422 U.S. at 213.

School District No. 26 v. Pico,[197] shed additional light on the ability of others to suppress minors' first amendment rights. In a plurality opinion, the Court held that a book review committee could not remove books from a high school or junior high school library if their intent was to, "deny [students] access to ideas with which [the board] disagreed"[198] if such intent was the "decisive factor" in the board's decision. The board had characterized the books it sought to be removed as "anti-American, anti-Christian, anti-Semitic, and just plain filthy."[199] Stating that it had a duty to protect the moral, physical and medical well-being of the students, the board removed books from the school libraries which it considered "irrelevant, vulgar, immoral, and . . . educationally unsuitable."[200]

Justice Brennan stressed that the discretion of book review boards is limited by the first amendment in situations where they attempt to remove non-required reading materials already a part of school libraries.[201] This decision exemplifies the notion that junior high and high school students enjoy a substantial degree of rights to obtain access to ideas even though such ideas are believed by parents and teachers to be vulgar, immoral, and in bad taste.[202]

2. Recognized Limitations on Free Expression Regarding Obscenity and Indecency

Despite the fact that minors possess significant first amendment rights, the Supreme Court has recognized certain limitations. For example, in *Ginsberg v. New York*,[203] it approved a variable obscenity statute which prohibited distributing obscene materials to minors even though they were not considered obscene for adults.[204] The Court felt this was justified because of a state's overriding interest in the ethical and moral development of youth.[205] Although the Court has not had the occasion to decide the effect of *Miller* on *Ginsberg*, it has been stated that "under any test of obscenity to minors . . . to be obscene such expression must be, in some significant way, erotic."[206]

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197. 457 U.S. 853 (plurality opinion).

198. *Id.* at 871.

199. *Id.* at 857. The books sought to be removed from the high school library were: Slaughter House Five, by Kurt Vonnegut, Jr.; The Naked Ape, by Desmond Morris; Down These Mean Streets, by Piri Thomas; Best Short Stories of Negro Writers, edited by Langston Hughes; Go Ask Alice, anonymous; Laughing Boy, by Oliver La Farge; Black Boy, by Richard Wright; A Hero Ain't Nothin' But A Sandwich, by Alice Childress; and Soul On Ice, by Eldridge Cleaver. In the junior high library the book in question was, A Reader for Writers, edited by Jerome Archer. *Id.* at 856-57 n.3.

200. *Pico*, 474 F. Supp. 387, 392 (1979), *aff'd*, 457 U.S. 853 (1982) (plurality opinion).

201. *Pico*, 457 U.S. at 861-62.

202. *See id.* at 871-72.

203. 390 U.S. 629 (1968).

204. *Id.* at 638. The statute merely adjusted the then-applicable obscenity test of *Roth* and its progeny by substituting "minors" for the "average adult." *Id.* at 633. See *supra* notes 49-54 and accompanying text for a discussion of the *Roth* test.

205. *Ginsberg*, 390 U.S. at 636, 640-41. The Court also recognized that "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* at 639.

206. *Erznoznik*, 422 U.S. at 213 n.10 (quoting Cohen v. California, 403 U.S. 15, 20 (1971)).

The more difficult question remaining is to what extent can indecent speech and expression be kept from minors in light of their lesser yet significant first amendment rights? The *Ginsberg* test applies only to those works or forms of expression which appeal to the prurient interest of minors.[207] The Supreme Court has never held the *Ginsberg* test to apply to brutality, violence, sacrilege, substance abuse, or four-letter expletives.[208]

In another case, *Federal Communications Commission v. Pacifica Foundation*,[209] the Court permitted the FCC to regulate the broadcasting of "indecency" under certain circumstances.[210] A major reason supporting the decision centered on the unique accessibility of broadcasting to children.[211] The Court also recognized the government's interest in supporting parents' claim to authority over children in their own household.[212]

Although the *Pacifica* Court decided that indecent materials could be prevented from being broadcast, the decision contained limitations. First, the holding applied only to the public broadcast media and was not meant to ban all indecent broadcasts from being aired at all times.[213] Second, there is evidence to suggest that the Court intended the definition of indecency to include only patently offensive material describing sexual or excretory functions.[214] Third, since the *Pacifica* decision was based on a nuisance rationale, the argument can be made that the focus of the Court's decision centered on the intrusion of the broadcast media into the privacy of the home.[215] Finally, there is no indication that the Court was concerned with indecent broadcasts reaching the willing ears of teenagers or young adults. Rather, Justice Stevens used the words "children," "the young," and those who were "too young to read" and could have their vocabulary enlarged "in an instant" in describing those minors who needed extra protection from indecent broadcasts.[216]

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207. *See Ginsberg*, 390 U.S. at 635.

208. This follows from the fact that there exist no Supreme Court decisions following *Ginsberg* holding that such is the case.

209. 438 U.S. 726 (1978).

210. *See supra* notes 98-103 and accompanying text.

211. 438 U.S. at 749.

212. *Id.*

213. *Id.* at 745, 747-48, 750.

214. *Id.* at 743. The Court explained that, "the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern." *Id.*

215. This rationale can be supported by the arguments forwarded by the Court that programs broadcast over the airwaves confront the individual in the privacy of the home, and that the government has an interest in supporting the child-raising authority of parents within their household. *Id.* at 748-49. However, in deciding whether an indecent program could be aired, several variables were to be considered, such as the context of the indecency as well as the time of day at which it is aired. Thus, it was not a complete ban on minors' access to indecent broadcasts, rather it appears to have been aimed at suppressing the indecency during the time of day when young ones were most likely to gain access or be subjected to unknowing exposure. *Id.* at 750.

216. *Id.* at 749.

B. Minors' Rights To Express Themselves Freely

The extent to which minors enjoy first amendment rights can perhaps be understood further through examining a line of cases in the area of free expression in public schools. Using *Tinker v. Des Moines School District* as a foundational beginning,[217] the courts have had several occasions to interpret high school students' right to speak freely. A United States district court in *Koppel v. Levine*[218] used the *Ginsberg* test of obscenity to determine whether the use of expletives and sexually suggestive language in a school publication justified a school official's impounding of the material.[219] In deciding the issue in the negative, the court noted that the dialogue was of the kind, "heard repeatedly by those who walk the streets of our cities, use public conveyances and deal with youth in an open manner."[220]

Similarly, the Seventh Circuit, in *Jacobs v. Board of School Commissioners*,[221] used the *Ginsberg* test to affirm a judgment enjoining the suppression of an unofficial student newspaper.[222] The court found that the publication, containing "earthy words relating to bodily functions and sexual intercourse," was not obscene and thus could be distributed to the high school students.[223] In following the guidelines of *Tinker*, the court also based its affirmation on the belief that the publication would not cause a "substantial disruption of school activity or materially impair the accomplishment of educational objectives."[224]

In a later case, *Reineke v. Cobb County School District.*,[225] the court applied what remains the contemporary general rule pertaining to expression by high school students. The relevant portions of the rule provide that, "expression by high school students cannot be prohibited solely because other students, teachers, administrators or parents may disagree with its content," unless it "substantially interferes with school activities or with the rights of other

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217. *See Tinker*, 393 U.S. 503 (1969). The *Tinker* Court provided the framework for students' free expression rights by determining that expression could not be prohibited unless it " 'materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school' . . . [or] materially disrupts classwork or involves substantial . . . invasion of the rights of others . . . ." *Id.* at 513 (citations omitted). Later court decisions helped to interpret the above language from *Tinker* and clarified the limits placed on the free expression of students. *See infra*, notes 218-33 and accompanying text.

218. 347 F. Supp. 456 (E.D.N.Y. 1972).

219. *Id.* at 459. The publication contained a story which used four-letter words spoken by an adolescent and a description of a movie scene where a couple "fell into" bed. *Id.* at 458. The court spoke in terms of the obscenity test for minors, found in *Ginsberg*, in making a determination that the publication could not be suppressed by stating that the "magazine contained no extended narrative tending to excite sexual desires or constituting a predominant appeal to the prurient interest." *Id.* at 459.

220. *Id.*

221. 490 F.2d 601 (7th Cir. 1973), *vacated*, 420 U.S. 128 (1975).

222. *Id.* at 610. In actuality, the court explained that it was not deciding the effect of *Miller* on *Ginsberg*. It did state however that "[m]aking the widest conceivable allowances for differences between adults and high school students . . . the material . . . could not be said to fulfill the *Miller* definition of obscenity." *Id.* Realistically, this was an application of the *Ginsberg* test.

223. *Id.*

224. *See Tinker*, 393 U.S. at 513.

225. 484 F. Supp. 1252 (N.D. Ga. 1980).

students or teachers . . . ."[226]

Finally, in *Fraser v. Bethel School District*,[227] the Ninth Circuit was asked to extend the doctrine of the *Pacifica* decision, regarding indecent speech content, to the high school environment.[228] The case involved official action taken against a student who gave a speech containing sexual innuendos to students voluntarily attending the assembly at which the speech was given.[229] In determining that the principles behind *Pacifica* had no applicability to the high school setting the court pointed out that the speech was not made to "impressionable young children,"[230] too young to read. Furthermore, the court stressed that the decision in *Pacifica* rested largely on respect for the privacy of the home.[231] In expressing its concern over the possibility of arbitrary speech supression, the court stated:

> We fear that if school officials had the unbridled discretion to apply a standard as subjective and elusive as "indecency" in controlling the speech of high school students, it would increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools. Language that may be considered "indecent" in one segment of our heterogeneous society may be common, household usage in another.[232]

In closing, the court made clear that under the protection of the first amendment, a student cannot be punished by school officials for expressing himself or herself as long as the content was not obscene or disruptive.[233]

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226. *Id.* at 1257.

227. 755 F.2d 1356 (9th Cir. 1985), *rev'd*, 106 S. Ct. 3159 (1986).

228. 755 F.2d at 1362.

229. The text of the speech was as follows:

> I know a man who is firm — he's firm in his pants, he's firm in his shirt, his character is firm — but most of all, his belief in you, the students of Bethel is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds. Jeff is a man who will go to the very end — even the climax, for each and every one of you. So vote for Jeff for ASB vice-president — he'll never come between you and the best our high school can be.

Id. at 1357.

230. *Id.* at 1363. Circuit Judge Norris noted that:

> Realistically, high school students are beyond the point of being sheltered from the potpourri of sights and sounds we encounter at every turn in our daily lives. Although we may be offended by some of what we see and hear, that is a price we must pay for the privilege of living in a free and open pluralistic society.

Id.

231. *Id.*

232. *Id.*

233. *Id.* at 1365. (quoting Supreme Court Justice Jackson from an earlier decision, " '[t]hat they (school officials and teachers) are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles or our government as mere platitudes.' " *Id.* (citing West Virginia v. Barnett, 319 U.S. 624, 637 (1943)).

Although the Supreme Court eventually reversed the Ninth Circuit's opinion, the reversal does not appear to have been fatal to the points presented regarding the circuit court decision. Unlike

The Supreme Court has recognized minors' rights to receive the communications of others and to express themselves freely. While limitations on these rights have been recognized as well, they are arguably narrow. First, for speech to be considered obscene to minors, and therefore unprotected, it must still be in some way patently erotic.[234] Second, the type of indecency which the FCC was able to prevent from being aired, in the interest of protecting youth, was narrowly defined.[235] The definition did not include violent, profane, occult or drug-related language, nor did it include all references to sex and lovemaking. Finally, the principles behind shielding minors from indecent expression arguably apply only to the very young.[236] Thus, there is minimal support for asserting protectionist rationales or denying minors access to material, unless it is found to be patently descriptive of sexual or excretory functions. However, even the standards within this category are elusive.

VI. The Musical Recording Industry Should Not Adopt A Private Regulatory Scheme

Both the Parents Music Resource Center (PMRC) and National Parent Teacher Association (NPTA) have expressed plans to reach a common goal. Their primary interest is the protection of youth from the allegedly harmful influences emanating from explicit rock lyrics. These groups believe that the most effective method in reaching their goal would be to provide consumers with increased information regarding the lyrical content of albums and tapes.[237] Each group urges that it is not in any way advocating censorship.[238]

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the Ninth Circuit, the Supreme Court found the "pervasive sexual innuendo" in the speech to have been substantially disruptive to the educational process. *See* 106 S. Ct. at 3168 (Brennan, J., concurring). Furthermore, the Court found that the "vulgar speech and lewd conduct [was] wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 1366. Thus, the Court was simply adhering to its earlier decision in *Tinker* which allows the regulating of speech which is materially and substantially disruptive within the public school setting. *See supra* note 217.

In his concurring opinion, Justice Brennan stressed the limited scope of the Court's decision:

> If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate,. . . the Court's opinion does not suggest otherwise . . . . Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interest in teaching and maintaining civil public discourse were less weighty.

106 S. Ct. at 3167-68 (Brennan, J., concurring) (citations and footnote omitted).

234. *See supra* note 206 and accompanying text.

235. *See supra* note 214 and accompanying text.

236. *See supra* notes 216-33 and accompanying text. Support for this proposition is gained from the substantial free expression rights afforded high school students along with the language in *Pacifica* pertaining to that narrow group of "youth" in need of protection from "indecent" broadcasts. *Id.*

237. *Record Hearing, supra* note 9, at 5-7, 10-11 (testimony of Tipper Gore and Millie Waterman respectively). Both the PMRC and the NPTA believe that the increased information should be provided through the use of some form of "warning label" placed on recorded materials. The difference between the proposals of the PMRC and NPTA is in the type of label they want to see affixed to indecent recordings. The PMRC claims to desire a single generic warning label. *Id.* at 5 (testimony of Ms. Gore). On the other hand, that would not appear to satisfy the NPTA.

Moreover, neither of them have suggested legislation or any form of government intervention. Instead, they desire the recording industry to "exercise self-restraint" by privately regulating the content of lyrics alleged to be "obscene" or "indecent."[239] Closer examination of the extent to which music recordings may be regulated under a governmental scheme as compared to a private, industry-adopted scheme, may reveal the reasons behind the groups' aggressive pursuit of one scheme over the other.

A. Government Regulation of Obscene and Indecent Content

Whenever the government attempts to regulate obscene or indecent speech content, it must do so within the strictures of the Constitution. Consequently, the discussion below will demonstrate some of the more notable areas in which the government would encounter difficulty, if not an impossibility, in trying to regulate lyrical content consistent with the goals of the PMRC and NPTA.

1. Obscenity Regulation

a. Variable Obscenity Standard for Minors

Obscene musical works clearly will receive no first amendment protection. Furthermore, the government can adopt more stringent standards in determining what is obscene to minors.[240] However, the point has been reiterated by the Supreme Court that for a work to be obscene, even to minors, it must be patently erotic.[241] The requirement that an obscene work "appeal to the prurient interest" applies as equally to minors as it does to adults.[242]

When a state attempts to define that which appeals to the prurient interest of minors, it can take into account the different levels of maturity possessed by minors of various age groups. This is something a state need not do with respect to adults of various age groups when drafting an adult obscenity statute. The maturity level of the class labeled "minors" is not as homogeneous as that of adults.[243] The Supreme Court has recognized, and it stands to reason,

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Regarding the Recording Industry Association of America's proposal to use a "Parental Guidance: Explicit Lyrics," Ms. Waterman stated that, "[W]e view this as a very positive step . . . [but] [o]ur concern is that the industry's proposal does not define what explicit lyrics are." *Id.* at 10 (testimony of Ms. Waterman). Another difference concerns the scope of people for whom the warnings are meant to protect. The PMRC speaks in terms of pre-teens and young teenagers. *Id.* at 7 (testimony of Ms. Gore). The NPTA, however, indicates that the protection should be for consumers in general. *Id.* at 8 (testimony of Ms. Waterman).

238. *Id.* at 6, 8 (testimony of Tipper Gore and Millie Waterman respectively).

239. *Id.* at 1, 7 (testimony of Susan Baker and Tipper Gore respectively).

240. *See* Ginsberg v. New York, 390 U.S. 635 (1968).

241. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 n.10 (1975); Cohen v. California, 403 U.S. 15, 20 (1971).

242. SCHAUER, *supra* note 21, at 89. Schauer states that "[t]he *Ginsberg* test is still a test of obscenity, albeit modified, and if material does not meet each of the three tests, it may not be prohibited, even for minors." *Id.* It should be noted that Schauer completed his work before the Court's decision in *Pacifica* but the *Pacifica* decision did not alter either *Miller* or *Ginsberg*.

243. While the *Miller* obscenity test does not base the "average adult" on a specific age category the same is not the case with the *Ginsberg* obscenity definition of the "average minor." A

that different age groups of minors possess varying levels of maturity.[244] Thus a state, making it illegal to distribute obscene materials to minors, can, for example, base the definition of the average minor on the average 13 year-old, or the average 9 year-old as long as it clearly states for whom the variable test is being modified.[245]

Although a state possesses the power to vary the definition in this manner, it has been suggested that it may encounter difficulty in effectively and fairly doing so.[246] The problem would result from basing the definition of the "average minor" at either too low an age or too high an age. For example, if the "average minor" were defined as being a 9 year-old, that would reduce the older, more mature minors to listening to material suitable for younger minors.[247] The Supreme Court has previously expressed similar concern.[248] Alternatively, if the "average minor" were defined as being a 13 year-old, then the statute would not effectively prohibit dissemination of materials otherwise deemed obscene to younger minors.[249]

b. Statutory Construction

The manner in which a state defines obscenity faces further constitutional limits regarding statutory construction. Out of concern for society's well-being, states and localities have often attempted to incorporate as much allegedly harmful expression as possible into their "prohibited expression" legislation.[250] The Supreme Court has repeatedly struck down such legislation on grounds of vagueness or overbreadth.[251] Moreover, even though a state may be exercising its power to protect its youth, it is not then justified in drafting an ill-defined statute.[252] An example demonstrating this principle can be found in *Interstate Circuit, Inc. v. Dallas*.[253] The Supreme Court invalidated a Dallas ordinance, on vagueness grounds, which attempted to classify films as unsuitable for mi-

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helpful comparison of the Court's treatment of defining the "average adult" and the "average minor" is provided in SCHAUER, *supra* note 21, at 72-77, 90-92.

244. *See* Rowan v. Post Office Dept., 397 U.S. 728, 741 (1970) (Brennan, J., concurring).

245. SCHAUER, *supra* note 21, at 90-91.

246. *See, e.g., id.*

247. *See id.* at 91.

248. The Court, in *Butler*, invalidated a statute which it felt would "reduce the adult population of Michigan to reading only what is fit for children." Butler v. Michigan, 352 U.S. 380, 383 (1957). It is proper to assume that the Court did so, recognizing the difference in maturity between adults and children. By analogy then, it would appear that basing an obscenity statute for minors on 9 year-olds, for example, would also violate the principle behind *Butler*. Surely there must be some clearly distinguishable levels of maturity possessed by minors of various ages. *See* SCHAUER, *supra* note 21, at 91.

249. *See* SCHAUER, *supra* note 21, at 91. For a thorough discussion of the variable obscenity test for minors see *id.* at 87-92.

250. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 681-82 (1968); Butler v. Michigan, 352 U.S. 380, 381 (1957).

251. *See, e.g., Erznoznik*, 422 U.S. at 214-16; *Interstate Circuit*, 390 U.S. at 688-90; *Butler*, 352 U.S. at 381.

252. *See Interstate Circuit.*, 390 U.S. at 690.

253. 390 U.S. 676 (1968). See *supra* notes 173-76 and accompanying text for further discussion of the case.

nors.[254] In so doing, the Court stated that "[v]agueness and the attendant evils. . . are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression."[255]

Attempts have often been made to give legal effect to the rating system of the Motion Picture Association of America (MPAA). Specifically, governmental bodies have attempted to enforce age restrictions, much like the "R" and "X" ratings used for movies.[256] However, to the extent any classifications exceeded the definition of obscenity, the attempts were struck down.[257] It has been determined that, with the exception of the broadcasting medium, the government shall not place restrictions on non-obscene materials.[258] It would stand to reason that this principle also applies to music recordings. Consequently, any attempt by the government to employ age based classifications on non-obscene recorded music should fail as well.[259]

c. Applying the Miller "As a Whole" Test

Another problem the government might encounter involving the distribution of obscene songs pertains to examining musical works as a whole. Under any obscenity definition, the courts must examine a work in its entirety when determining whether or not it is obscene.[260] The application of the "as a whole" test has given the courts trouble with respect to magazines.[261] Similar case law concerning music recordings is non-existent. The argument can be made, however, that any decision in this area should follow the case law developed around magazines.

It is suggested that recorded music shares characteristics analogous to those which courts have considered determinative in applying the "as a whole" test to magazines.[262] Although a magazine often contains discrete articles which can be enjoyed independently of one another, courts have considered the entire magazine as the unit to be examined.[263] Similarly, record albums can be enjoyed in much the same manner. Like magazine articles, songs on an album normally are not dependent upon each other for their artistic or entertainment value.[264] Thus, it stands to reason that an entire record album, like the maga-

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254. 390 U.S. at 681.

255. *Id.* at 688.

256. SCHAUER, *supra* note 21, at 244.

257. *Id.*

258. *See supra* notes 84-106 and accompanying text.

259. *Cf. id.* (the courts have yet to decide that government may regulate indecency in musical recordings to any degree).

260. Miller v. California, 413 U.S. 15, 24 (1973).

261. *See* SCHAUER, *supra* note 21, at 108-09.

262. For example, individual articles found in magazines and newspapers are rarely distributed to the public, separate from the entire work, by those who create, edit or publish the periodical. Similarly, although music artists release individual songs (in the form of "singles" or "45's") the majority of their individual works appear in the form of an album containing many additional songs which are never separately released.

263. *See* Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980); Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2nd Cir. 1960); United States v. Head, 317 F. Supp. 1138 (E.D. La. New Orleans Div. 1970); Dillingham v. State, 9 Md. App. 669, 267 A.2d 777 (1970).

264. Just as one can pick up a magazine, read one specific article and then put it down, having grasped the fully-intended message of the article notwithstanding the rest of the magazine,

zine, should be the physical unit to be examined "as a whole." Alternatively, it is clear that a song released independently of an album, would constitute the "whole" to be examined.

It should be noted, however, that courts usually require that the magazine in question possess a theme, however minimal or general, in order to trigger application of the "as a whole" test to the entire magazine.[265] Accordingly, it may be argued that as long as an album is constructed under a certain theme it deserves similar treatment. Assuming this to be so, then the effective ability of the government to prevent obscene songs from being distributed might be somewhat hindered. Although a song by itself may be obscene and thus illegal to distribute or broadcast over the airwaves, it might nonetheless fall through the crack because it appears on a thematically integrated album. Then, to the extent that one is able to purchase the album, the attempts to prevent distribution of the song would prove somewhat futile.

d. Community Standards

The Supreme Court, in *Miller v. California*, specifically held that there was to be no national definition of obscenity.[266] In so holding, the Court recognized that some cities and states might be more sensitive than others and thus possess different standards of social morality.[267] It is clear, that if the government were to undertake the task of regulating the recording industry in accordance with the desires of the PMRC and NPTA, it would not be able to have a committee determine the suitability of rock lyrics for the nation as a whole.[268] Instead it would have to leave that task to the several communities.

2. Regulating Indecency

As observed in Part II, the government's ability to control indecent expression is minimal. Presently, the broadcast medium is the one area in which indecent speech content may be regulated. The landmark decision, allowing at least partial suppression of indecent content in a particular medium, was

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the same holds true for songs of a particular album. One can either play a single song of an album and then put it away or, one can hear the song of a particular album being broadcast over the airwaves. In either case, the song can be enjoyed notwithstanding the remainder of the album on which it was released.

265. *See Penthouse*, 610 F.2d at 1370; *Head*, 317 F. Supp. at 1144; *Dillingham*, 9 Md. App. at 677, 267 A.2d at 782. For a discussion of the "as a whole" test see *supra* notes 110-41 and accompanying text.

266. 413 U.S. 15, 31 (1973).

267. *Id.* at 32-33.

268. *Cf. id.* (PMRC and NPTA have each suggested that some sort of an ad hoc committee be formed to determine standards of indecency which would be applied to the nation as a whole because the recording companies and not each community would be applying those standards. *See Record Hearing, supra* note 9, at 5-6, 10 (testimony of Tipper Gore and Millie Waterman respectively)). An interesting contradiction can be found in the testimony of Ms. Waterman. She proclaims that one set of rating criteria be established to apply to the entire recording industry because, "[w]hat is explicit to one company may be acceptable to another." *Record Hearing, supra* note 9, at 10 (testimony of Millie Waterman). The contradiction lies in the fact that while she believes that the different recording companies have different tastes, her proposal ignores the different tastes in music possessed by the American people.

Pacifica.[269] The *Pacifica* Court based its opinion on two specific factors. First, the Court acknowledged the unique pervasiveness of broadcasting, especially its intrusion into the home.[270] Second, it recognized that radio broadcasts are highly accessible to young, unsupervised children. Consequently, the government, consistent with its interest in protecting youth, may act to shield unsupervised children from indecent broadcasts.[271] Closer examination of these rationales may suggest that similar treatment applied to music recordings would not be justified.

a. The Privacy Argument

The Supreme Court has long recognized the ability of the government to shield persons from non-obscene indecent speech when it substantially invades their privacy.[272] Similarly, the inability or impracticability of a person to avoid exposure to offensive speech has also justified the restraint of the speaker under a "captive audience" theory.[273] The *Pacifica* Court found a broadcast of a George Carlin monologue violative of both principles. First, the Court pointed out that indecent broadcasts "confront the citizen. . .in the privacy of the home, where the individual's right to be left alone plainly outweighs the first amendment rights of an intruder."[274] Second, because listeners are constantly turning the radio on and off, they cannot be adequately warned before being exposed to offensive program content.[275]

The Court has recognized, however, that outside the home, the balance weighs in favor of the speaker rather than the unwilling or unsuspecting audience.[276] Earlier Supreme Court decisions have required the young or sensitive recipient to avoid offensive expression confronted in public.[277] Unless the speaker invades the privacy of the home or makes avoidance of his speech impractical, it is up to the viewer or listener to "avoid further bombardment" of the expression.[278]

It is urged that recorded music is not the trespasser that radio broadcasts are. Rather, like a novel by Dostoevsky or a Shakespearean drama, recorded music must be invited into the home. Further, recorded music does not hold

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269. 438 U.S. 726 (1978).

270. *Id.* at 748.

271. *Id.* at 749-50.

272. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cohen v. California, 403 U.S. 15 (1971); Rowan v. Post Office Dept., 397 U.S. 728 (1970).

273. *Cf. Erznoznik*, 422 U.S. at 208-10 (discussing the concept of "captive audience").

274. 438 U.S. at 748.

275. *Id.* Justice Brennan, disagreeing with that point stated:

> Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the 'off' button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. To reach a contrary balance . . . is 'to burn the house to roast the pig.'

Id. at 764-65 (Brennan, J., dissenting) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

276. *See Erznoznik*, 422 U.S. at 209-11; *Cohen*, 403 U.S. at 21-22.

277. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cohen v. California, 403 U.S. 15 (1971).

278. *Erznoznik*, 422 U.S. at 210-12; *Cohen*, 403 U.S. at 21.

the listener captive in the manner that broadcasting does. The broadcast medium has become an integral source of news and education as well as entertainment. While it may indeed be impractical to require or expect one to refrain from using the television and radio to avoid confrontation with offensive content, the same cannot be said for a recording.[279] The purchaser of an album is faced with at least two choices when he or she confronts an offensive song on an album; either play only the inoffensive songs on the rest of the album or, discard it entirely, keeping in mind not to purchase another recording by the "offensive" artist. Consequently, with respect to this part of the *Pacifica* rationale, it is argued that recorded music should not be thought of as analogous to the broadcasting medium. Rather, music recordings should be likened to print, which presently is free from indecent content regulation.[280]

b. Protection of Children Rationale

The *Pacifica* Court found further justification for allowing the government to suppress some types of indecent broadcasts during certain hours because of its interest in protecting the well-being of youth.[281] Although minors do have significant first amendment rights, the *Pacifica* decision might, at first glance, appear to place a limit on them. However, upon close examination, the decision appears to have only narrow implications. First, the Court was concerned with young, unsupervised childrens' unique accessibility to radio broadcasts. It was concerned with the possibility of enlarging the vocabulary of those too young to read or comprehend the content of the broadcast.[282] Second, the indecency from which the government may permissibly shield the young was narrowly defined.[283] The Court's decision applied strictly to the facts of the case;[284] the context of the indecency was important.[285] The offen-

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279. While it would be unreasonable to ask members of today's society to refrain from using the radio or television it would arguably not be as unreasonable to ask them to refrain from purchasing recorded music if they feared coming in contact with indecent language. Such measures would hardly be necessary though. Sensitive consumers can be assured that they can freely purchase records and tapes while avoiding indecent language. They would simply have to avoid rock-and-roll and stick to purchasing albums by Barry Manilow, Air Supply, Anne Murray, ABBA and the like. Emphasizing that avoidance of all indecency is practically impossible, Frank Zappa, speaking about the current proposal to rate music, stated:

> Because of the subjective nature of the PMRC ratings, it is impossible to guarantee that some sort of 'despised concept' won't sneak through . . . . If the goal here is TOTAL VERBAL/MORAL SAFETY, there is only one way to achieve it: watch no TV, read no books, see no movies, listen to only instrumental music, or buy no music at all.

Record Hearing, supra note 9, at 23 (testimony of Frank Zappa).

280. It would seem reasonable to assume that we often invite books into our home without fully knowing the content of the language we will encounter as we delve into the pages. The government has yet to regulate indecency in the print media. It is thus argued that this same passive role should hold true to the albums we invite into our home.

281. *Pacifica*, 438 U.S. at 749.

282. *Id.*

283. *Id.* at 743.

284. *Id.* at 738-39. The Court stated that the "statutory question presented by this case is whether the afternoon broadcast of the 'Filthy Words' monologue was indecent within the meaning of § 1464." *Id.*

sive content of the program in question contained only expression which depicted sexual and excretory functions.[286] Although the Court's primary interest concerned the young, its decision did not reduce adults to hearing only material fit for children; adults had other available means for gaining access to the contents of the banned program.[287]

Music recordings are not uniquely accessible to the unsupervised young in the same manner that broadcasts are.[288] There is no indication that the rationale in *Pacifica* would be applicable to minors who possessed the intellectual desire, physical capacity and financial ability to purchase recorded music for themselves.

Furthermore, for the government to suppress indecent lyrical content in the recording medium, it would have to interfere with the available sources of a musician's expression to a greater degree than *Pacifica* authorizes. Although indecent materials may be suppressed from the airwaves, a willing and interested listener still retains the option to purchase a recording of such material. The *Pacifica* Court noted this to be a significant factor in allowing the FCC to ban George Carlin's monologue.[289] However, if an indecent recording itself was suppressed, listeners would possess only the option of attending a live performance.

Assuming, arguendo, that the government could supress indecent record content of some type, *Pacifica* does not provide authority for regulating content which is violent, drug-related or occult in nature.[290] Consequently, the desires of the PMRC and NPTA would remain largely unsatisfied under a government regulatory scheme.[291] In light of the points developed above, however, it is argued that the rationales behind regulating indecency in the broadcast medium should not be applicable to recorded music.

Clearly, the government would be subject to many limitations if it were to attempt to regulate offensive speech content in music recordings. Not only would it encounter difficulties in attempting to prevent obscene musical works from legally reaching the public, but its hands would be tightly bound with respect to controlling indecent musical works as well. Even considering the government's strong interest in youth, attempts to protect minors must be effectuated in a very narrow and clearly-defined manner. It would appear, therefore, that any attempt by a governmental entity to classify recordings as "un-

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285. *Id.* at 750.

286. See *id.* at app. 751-55 for a transcript of the monologue.

287. *Id.* at 750 n.28. The Court noted that those who wanted to hear George Carlin's monologue of "Filthy Words" could purchase the tape or album, or see a live performance of Carlin's act. *Id.*

288. While young children can easily flick the "on" button of the radio or television they cannot purchase a recording unless they have the money to buy one. Even if they do, they often do not have the means of getting to the record store without the aid of their parents. Moreover, playing the recordings on a stereo or tape deck requires several more steps than merely flicking the "on" switch.

289. *.Pacifica*, 438 U.S. at 750 n.28.

290. The *Pacifica* Court stressed that the Commission's definition of indecency would "[a]t most . . . deter only the broadcasting of patently offensive references to excretory and sexual organs and activities." *Id.* at 743.

291. *See Record Hearing*, *supra* note 9, at 10 (testimony of Millie Waterman).

suitable for minors" would fail. To date, there exists no authority which would allow a governmental body to adopt a rating scheme for recorded music based on indecent content present in rock lyrics. Perhaps that is why the current thrust of the PMRC and NPTA is towards encouraging the recording industry to regulate itself privately.

B. Regulation Under a Private Scheme

Under a private, industry-adopted, regulatory scheme, there exists much greater, if not unlimited, freedom for the censor to regulate offensive content. There are not the constitutional checks and balances with respect to private censorship that exist when the censoring is performed by the government.[292] Nowhere, perhaps, has that been more clearly demonstrated than with the MPAA.[293] The MPAA's movie rating system provides a model example because both the PMRC and NPTA have requested that the recording industry develop a similar system to reflect the lyrical content of music recordings.[294] Were the Recording Industry Association of America to adopt a private regulatory scheme, it could create rules and procedures that are *de facto* unconstitutional.[295]

Unlike the government, a private censor would not have to be concerned with making distinctions between obscene and indecent expression when regulating content.[296] It would not have to construct its rating criteria with the precision required by *Interstate Circuit*. Nor would the private censor ever be required to publish its rating criteria.[297] Instead of classifying recordings only as "obscene" for minors it could use an "unsuitable for minors" standard. In defining "unsuitable" the censor could use adjectives such as "shocking", "tasteless", "filthy", "disgusting" and "immoral."[298] The private censor could

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292. *See* SCHAUER, *supra* note 21, at 244-45; Friedman, *supra* note 97, at 221.

293. *See* Friedman, *supra* note 9; *supra* notes 142-82 and accompanying text.

294. Both groups are asking the recording industry to regulate itself; they are asking that industry appointed boards establish standards to evaluate lyrical content of rock-and-roll albums and, they are asking that a label of some sort be affixed to albums judged to contain indecent content. *See Record Hearing*, *supra* note 9, at 5, 9 (testimony of Tipper Gore and Millie Waterman respectively).

295. *Cf.* Friedman, *supra* note 97 (discussing *de facto* unconstitutionality of the privately regulated motion picture industry).

296. This follows from the fact that private censorship does not have to abide by the first amendment of the Constitution. It also can be observed from the MPAA's classification of films based on violent, sexual, profane and sacrilegious content, or for that matter anything which the current CARA board members believe to be unsuitable film content. *See, e.g.*, *supra* note 158 and accompanying text.

297. It has been explained that "there are no written absolutes — every tub stands on its own bottom." Attanasio, *supra* note 143, at 16. In the article by Friedman she wrote, "[n]either [the] MPAA nor its Code and Rating Administration has ever published rating criteria, ostensibly because of its desire to remain flexible . . . . Whatever standards do exist are almost totally dependent on the [whims] of whoever happens to be the current CARA director." Friedman, *supra* note 97, at 194-95.

298. Paul Attanasio explains that "[t]he single, generally phrased standard for ratings (taking into account the film's level of violence, sexuality, nudity, and profanity) is: 'Would the average American parent consider this film suitable for children under 17.' " Attanasio, *supra* note 143, at 16. It has been suggested that the ratings proposed by the PMRC would be totally subjec-

restrict minors' access to more than just materials which appeal to their prurient interest. The censor could choose not to allow distributors to sell "unsuitable" recordings to minors unless accompanied by an adult. The recording industry could even mimic the film industry and give some albums an "X" rating. However, where the success of the "X" rating of films rests largely with the ability to keep minors out of the theatres even if accompanied by a parent, the same success applied to music recordings would require a suppression of the content altogether. Otherwise, adults could simply make the purchase of the X-rated album for the minor.

Thus far, neither the PMRC nor the NPTA wishes to criminalize or otherwise prohibit the distribution of "unsuitable" records. The PMRC and NPTA do, however, wish to have some form of "scarlet letter"[299] affixed to indecent albums to warn consumers of their content. While artists would not be in fear of creating works which might subject them to criminal sanctions, they would likely face economic consequences which might "chill"[300] their intended message. It is a realistic concern that parents might not purchase, and record shops would refuse to carry, the stigmatized recordings.[301] Thus the artists would face the ecomomic repercussions of placing their indecent works in the marketplace. Since minors comprise a significant percentage of the record-consuming public,[302] such stigmatization could cause a large cut in album

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tive in nature. Further, it has been emphatically suggested that:

> [t]he establishment of a rating system, voluntary or otherwise, opens the door to an endless parade of Moral Quality Control Programs based on 'Things Certain Christians Don't Like.' What if the next bunch of Washington Wives demands a large yellow 'J' on all material written or performed by Jews, in order to save helpless children from exposure to 'concealed Zionist doctrine?'

Record Hearing, supra note 9, at 23 (testimony of Frank Zappa).

299. The Supreme Court has recognized that those who express their ideas to generate a profit are not less deserving of first amendment protection. Specifically, Justice Marshall stated that "one who wished to convey his ideas through [a] medium . . . of course includes one who is interested not so much in expression as [he is] in making money . . . ." Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 684 (1968). Moreover, Justice Marshall noted that, "[one] who cannot afford to risk losing the youthful [market] when a [work] may be of marginal interest to adults . . . may contract to [produce] only the totally inane." *Id.* at 684.

300. The "chilling effect doctrine" is a constitutional law term used to describe a law or practice which has the effect of seriously discouraging the exercise of a constitutional right. BLACKS LAW DICTIONARY 217 (5th ed. 1983). In the context of the current controversy it has been observed that "[a] chilling effect would encourage record companies to select artists that don't cause controversy like requiring a label on their music. Less music would be available, and [it] would be the blandest of all music — something that offends no one." *Record Hearing, supra* note 9, at 39 (testimony of Robert Sabatini, Jr.).

301. As of September 1985, one major retail outlet had informed Capitol records that it would purchase no albums that have warning labels on them of any kind. Another chain with outlets in shopping malls has been told by the landlord of a mall that if it carried 'hard-rated' albums, they would lose their lease. *Record Hearing, supra* note 9, at 23-24 (testimony of Frank Zappa).

302. Nine percent of rock music buyers are between 10 and 14 years of age. Twenty-two percent are between the age of 15 and 19. Letter from Stanley M. Gortikov, president of the Recording Industry Association of America, to Pam Howar, president of the PMRC (Aug. 13, 1985) (addressing the RIAA reaction to proposals made by the PMRC) (on file at the New England Law Review Office).

sales. Thus, in order to maintain their level of sales and profit, artists may be economically persuaded into producing music suitable for childrens' ears only.

Rating criteria under a private system could, in effect, violate the principle in *Miller* concerning the use of community standards for defining unprotected expression.[303] Although *Miller* dealt with defining obscenity, there would seem to be no reason why community standards would not be used to establish standards for indecency if the government could so regulate it.[304] The PMRC has recommended that a one-time panel be established to construct guidelines for the recording industry to follow in classifying lyrical content.[305] Thus, *de facto* against the mandate of *Miller*, a handful of people could have the power to decide what is suitable and moral for the entire nation.[306] This could, for example, reduce the people of New York City to listening only to that which is fit for the more sensitive communities.[307]

Lastly, the industry could adopt a system such that the only appellate procedures for unfavorable rating determinations remain within the industry itself. The motion picture industry provides no review of its decisions by an independent tribunal.[308] The PMRC and NPTA both stress that submission of an artist's works would be completely voluntary. However, it may very well end up that the word "voluntary" would acquire the same euphimistic meaning that it has acquired under the motion picture rating scheme.[309]

If the Recording Industry Association of America succumbs to the pressures of the PMRC and NPTA by regulating itself, these groups would potentially realize much greater success in attaining their goals. The industry, could, in effect, overstep otherwise constitutional bounds by: (1) regulating indecent content in a medium other than broadcasting; (2) constructing criteria for indecency in subjective, ill-defined terms; (3) applying those criteria to the entire nation; and (4) denying artists proper appellate procedures for unfavorable rating classifications applied to their works.

C. *Practical Considerations and Questions of Fairness*

Aside from the differences between governmental and private regulation of recordings are some considerations regarding the practicability and fairness

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303. *See* Miller v. California, 413 U.S. 15, 24 (1973).

304. *See supra* note 185.

305. *Record Hearing, supra* note 9, at 5-6 (testimony of Tipper Gore).

306. The NPTA's position on establishing a uniform set of criteria appears to be contradictory. On one hand Ms. Waterman suggests that uniform set of rating criteria be established for application by the entire industry because as it presently stands each recording company has its own ideas about what is explicit. On the other hand, while recognizing that the record companies each have different tastes, the criteria she hopes are established will totally ignore the fact that America's people possess tastes of their own. *Id.* at 10 (testimony of Millie Waterman).

307. *Cf.* Butler v. Michigan, 352 U.S. 380 (1957) (where the Court invalidated statute which had effect of limiting adult population to reading that which was appropriate for children).

308. *See supra* notes 179-82 and accompanying text.

309. The problems with the voluntariness of the MPAA rating system are threefold. First, all the major studios comply with the system. Second, those who do refuse to submit their films will find their film banned by 90 percent of all commercial theatres. Third, for those theatres that will exhibit the film, they will affix an exhibitor applied X to it which results in significant market consequences. *See* Freidman, *supra* note 97, at 216; Attanasio, *supra* note 143, at 17.

of the PMRC's and NPTA's proposals.

1. Practicability

One major obstacle the recording industry would confront if it were to undertake rating recordings would be providing enough personnel to screen the mass of songs that are released each year. The Recording Industry Association of America releases approximately 25,000 new songs annually. Comparatively, less than 400 films, on the average, are rated annually. The NPTA has stated that it does not desire that a panel review each song and affix to it a rating.[310] It is hard to imagine, however, that a program could be truly effective unless each song was, to some extent, reviewed. Moreover, unlike films, which have always been subject to heavy regulation, music has thus far flourished largely free from content regulation. What is to be done with the mass of allegedly indecent recordings that have already been released and are safely in our homes? Should one of each of the thousands of different albums, cassettes and singles all be recalled from the shelves of record stores for evaluation?[311] Retrospective application would be largely impractical, if not wholly impossible. This is not to say that regulation of any kind should never be attempted or justified. It is only to suggest that a substantial quantity of allegedly harmful lyrics will survive, having pre-dated any regulation.

The PMRC and NPTA insist that any rating system will be voluntary. To the extent that would remain true, the effectiveness of the system would at best be minimal. What purpose would be served if groups like Twisted Sister and Judas Priest volunteered while AC/DC and Def Leppard refused to comply? The Motion Picture Rating System has demonstrated that there is no room for both true voluntariness and system effectiveness. Even if all artists did cooperate, that may not prove to be wholly effective either. What is to stop one minor's access to the records and tapes of another minor, whose parents are less concerned with indecent lyrics, and allow their child to listen to everything from Aerosmith to Zeppelin?

Finally, there would appear to exist less restrictive means of providing parents with content information than to affix a warning label or rating symbol to a recording. For example, just as broadcasters are required to know the content of the music they play, why not require to some lesser degree a certain amount of familiarity on the part of record shop sales personnel? Granted, they sell a higher volume and wider variety of recordings than the disc jockeys play. Would it be too great a burden, however, for record distributors and salespeople to have enough familiarity with the music they sell to be able to recommend alternative selections for those consumers expressing a desire to

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310. *Record Hearing, supra* note 9, at 9 (testimony of Millie Waterman).

311. This point was raised somewhat dramatically by Mr. Zappa who stated:

> The PMRC wants ratings to start as of the date of their enactment. That leaves the current crop of 'objectionable material' untouched. What will be the status of recordings from the Golden Era prior to censorship? Do they become collector's items . . . or will another 'fair and unbiased committee' order them destroyed in a public ceremony?

Id. at 25 (testimony of Frank Zappa).

avoid artists who notoriously express themselves on the fringe of decency?[312]

2. Questions of Fairness

An element of unfairness would be ever-present in a system where a group of unelected officials attempts to decide for the entire nation what a particular song should mean and how it might affect them. How many times have we all believed that a particular song was referring to one thing when months, or maybe years later, it was discovered what the artist's actual intent was or what the words really said? Has it been forgotten that one person's trash is another person's treasure? As the recording industry has pointed out, lyrics "deal with interpretations, imagery and illusions . . .[and] [a]ny attempt to create a master bank of . . . right/wrong or good/bad characteristics is likely to become a first step toward censorship . . . ."[313]

Additionally, many believe that rock-and-roll is being unjustly singled out as a negative influence on the development of youth. The Recording Industry Association of America claims that all rock artists have been characterized by the PMRC as "universal practitioners of evil."[314] The RIAA stresses, however, that the "mass of lyrics reflects either pure entertainment or socially positive attitudes and practices."[315] It has been pointed out that country music has its fair share of songs containing sexual, violent, drug-related and profane language as well, yet the PMRC and NPTA have not expressed the intent to rate it.[316] Indecency is present everywhere. It is in books, magazines, newspapers, on television and in theatres. It can be found inside the home, in public, and in school. It has been suggested that society as a whole has undergone an irre-

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312. The least restrictive means of all that could and should be used is closer monitoring of children by parents themselves. If parents are so concerned over their childrens' access to indecent recordings they should refuse to let them bring any rock-and-roll recordings into the household until they are of an age such that they will not be unduly influenced by the recordings. The point has been made that if "parents are concerned about the musical lyrics their children are listening to, [they] have the duty, [and] obligation to 'screen' that music personally and should not expect some other group to do that for them." Foerster, *We need caring parents, not control & censorship*, GOLDMINE MAGAZINE Sept. 13, 1985 (on file at the New England Law Review).

313. *Record Hearing, supra* note 9, at 17 (testimony of Stanley M. Gortikov, President of RIAA). That rampant misinterpretation due to subjective rating criteria would flourish is clear, it has happened in the past and will continue. For example, John Denver's song "Rocky Mountain High" was banned from many radio stations because it was considered drug-related. As John Denver clarified:

> This was obviously done by people who had never seen or been to the Rocky Mountains and also never experienced the elation, celebration of life, or the joy in living that one feels when he observes something as wondrous as the Perseides meteor shower on a moonless, cloudless night . . . camping with your . . . best friends.

Recording Hearing, supra note 9, at 27 (testimony of John Denver).

Another example can be found in the PMRC's interpretation of AC/DC's song "Shoot to Thrill." The PMRC has repeatedly categorized that song as one that encourages suicide. *Id.* at 4 (testimony of Susany Baker). Taking certain lines out of context certainly supports her belief, but if one listens to the entire song he or she will find that the song "encourages" free love if it "encourages" anything at all (the song appears on the AC/DC album *Back in Black*, copyright 1980).

314. *Id.* at 17 (testimony of Stanley M. Gortikov).

315. *Id.*

316. *Id.* at 23 (testimony of Frank Zappa).

versible liberation and that the "real problem isn't with rock 'n' roll but with us."[317] Perhaps we should rate all things that confront children, including people, so that we might protect them from all potentially negative influences.

CONCLUSION

The PMRC emphasizes certain points regarding the validity of their proposals. First, they believe that voluntary labeling will not restrict access or suppress content.[318] Perhaps they do not fully understand the concept known as the "chilling effect." Second, they assert that their proposal involves no government action and that they are not requesting legislation.[319] This may be comforting to those who fear "big brother," however, it is difficult to imagine that any constitutionally-sound legislation could exceed the ability of a private censor to regulate indecent content. Third, they contend that voluntary labeling does not violate first amendment rights.[320] While this may be technically true, it is only because it accords with the assertion that their proposals involve no government action.

Whether or not the proposals of the PMRC and NPTA should be followed is still a matter that the recording industry is under pressure to accept. The industry has already partially acquiesced. While deciding whether or not to continue to give in further, the recording industry should carefully consider the differences between private and governmental ability to regulate expression. It should also appreciate the extensive autonomy that minors enjoy under the first amendment with respect to free expression. Moreover, it should recognize that the subject matter which could be classified under a word as amorphous as "indecent" would be potentially limitless. This could prove especially fatal to first amendment rights when a small, select group attempts to define "indecency" for the entire nation, in a manner which would allow that group to substitute its interpretations of each recording for our own.

Optimally, there should be no regulating of allegedly indecent lyrical content in music recordings. Parents should take the time to listen to the music their children are playing and make decisions as to what is proper subject matter for young listeners. As has been suggested, "parents trying to supervise the record industry are no substitute for parents supervising their own children."[321]

Let it be said that it is not the concern for the well-being of our youth that is misguided with the current proposals. Keep in mind that the government shares in this interest. If the need arises, however, where there must be

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317. *Explicit Lyrics, Explicit Society*, Washington Post, Sept. 2, 1985, at C2, col. 1. Mr. Gortikov believes that "[i]f there is to be a review of negative forces in the environment of younger children, let it be a review of all such forces, not one which focuses on rock music alone." *Record Hearing, supra* note 9, at 18 (testimony of Stanley M. Gortikov).

318. *Record Hearing, supra* note 9, at 6 (testimony of Tipper Gore).

319. *Id.*

320. *Id.*

321. *The Devil's Music*, Washington Post, Aug. 23, 1985, at A23, col. 1 (quoting Stanley M. Gortikov). As one critic of the PMRC has stated, "parents should get to know their children and environments, and explain at least part of the world to them, rather than relying on a record label to protect them from the world." *Record Hearing, supra* note 9, at 40 (testimony of Robert Sabatini, Jr.).

regulation of some kind imposed on recordings, it should not be performed by any ad hoc star panel. Rather, the regulating should be left to the elected members of our legislatures so that the courts will be able to keep it in constitutional check.

Paul E. Scheidemantel*

* Dedicated to my grandfather, Edward B. Perry.

COMMENT

New Jersey v. T.L.O.: The School Search Exception to Probable Cause

The government's campaign for return to order and traditional American values has resulted in an expansion of governmental power, favoring collective security at the expense of the protection of individual rights.[1] This Comment

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1. Rudovsky, *Criminal Justice: The Accused*, in OUR ENDANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTIES TODAY (N. Dorsen ed. 1984). Rudovsky asserts that "law and order campaigns" typically result in increased state power over the individual. *Id.* at 203. By way of background, he provides that "law and order campaigns" result from the use, by government officials, of the public's legitimate fear of crime. *Id.* Government officials exploit public sentiment in order to "justify regressive legislation and arbitrary police controls." *Id.* Furthermore, Rudovsky claims that the decreased individual rights that result when state power is increased does not result in a reduction in crime. *Id.* The end result is increased government power, decreased individual rights and no reduction in crime. *Id.*

The traditional "law and order campaign" has recentiy developed the idea that "constitutional protection for the accused is incompatible with effective law enforcement." *Id.* Rudovsky points to the Reagan administration's attempts to fight the war on crime by the restriction of civil liberties. *Id.* The Reagan administration blames crime on the constitutional protections afforded in our criminal justice system. *Id.* Statistics do not support this theory nor do they support the recommendations of the United States Department of Justice. *Id.* (citing U.S. DEPT. OF JUST., ATT'Y GEN. TASK FORCE ON VIOLENT CRIME, FINAL REP. (1981)). The Attorney General's report proposes modification in the exclusionary rule among other remedies for fighting the war on crime. *Id.* In fact:

focuses on the fourth amendment protection afforded to students in the public schools. The United States Supreme Court decided in *New Jersey v. T.L.O.*[2] that the fourth amendment applies to students in the public school setting.[3] However, the student's right to be free from unreasonable government intrusion, their "right to be let alone,"[4] is limited by the school's interest in order

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> [T]he exclusionary rule does not cause the release of significant numbers of defendants. Recent studies show that evidence was excluded in federal prosecutions in only 1.3 percent of all cases (0.5 percent were dismissed because of the rule) and that in state prosecutions only 0.8 percent of all arrests were declined for prosecution for reasons of improper searches.

Id. at 204. Therefore, it follows that effective law enforcement and the exclusionary rule can coexist. The function of the exclusionary rule is to deter police misconduct thereby protecting the rights of the accused. *Id.* Rudovsky points out that protection of the civil liberties of the accused provides protection for the constitutional rights of all citizens. *Id.* Elimination of the protection provided by the exclusionary rule will further diminish the constitutional rights of the individual while expanding governmental rights in the name of effective law enforcement. *Id.* at 209.

2. 105 S. Ct. 732 (1985). The Court, for the first time, interpreted the extent of protection provided by the fourth amendment to students in the public school setting. *Id.*

However, the Court denied certiorari on previous occasions in situations where the protection provided by the fourth amendment in the school setting was at issue; Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) (canine search of person considered intrusion on dignity and personal security); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *modified*, 631 F.2d 91 (7th Cir. 1980), *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1980) (generalized canine sniff of 2,780 students not search within protection of fourth amendment).

3. *T.L.O.*, 105 S. Ct. at 737. The right of individuals to be free from unreasonable government searches is provided by the fourth amendment:

> 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.

4. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

> The makers of our 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.

Id.

The *Olmstead* majority held that there is no fourth amendment violation in tapping a person's phone if the tapping was accomplished without unlawfully entering the person's property. *Id.* at 452. Therefore, the result was that without physical trespass there was considered to be no search because no privacy interest was invaded. *Id.* Justice Brandeis in a vigorous dissent recognized broader protection provided by the fourth amendment:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Id. at 485.

and discipline.[5]

In the *T.L.O.* case, the United States Supreme Court considered the exclusion of evidence seized from a student's purse by a school administrator.[6] The Court held that searches of students by school officials need only meet a "reasonableness under all the circumstances" standard,[7] and not the probable cause standard traditionally required to justify a search.[8] The factors that in-

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Later, the Court determined that the trespass requirement was no longer a necessary element of a search. Katz v. United States, 389 U.S. 347, 353 (1967). The fourth amendment was held to apply where F.B.I. agents intercepted phone conversations in public telephone booths when no physical trespass was present. *Id.* at 348-49. Electronic surveillance without physical trespass was held to constitute a search. *Id.* at 353.

5. *T.L.O.*, 105 S. Ct. at 742. The majority maintained that the school's interest in preserving order and discipline must be balanced against the student's interest in privacy. *Id.*

6. *Id.* at 737. The New Jersey Supreme Court held that the fourth amendment protects students in the public school from unreasonable government searches and held that where the search is conducted in violation of the fourth amendment any evidence obtained is inadmissable against students in criminal proceedings. State *ex rel.* T.L.O., 94 N.J. 331, 463 A.2d 934, 943-44 (1983).

The exclusionary rule was developed by the Court in Weeks v. United States, 232 U.S. 383 (1914). The *Weeks* Court ruled that documents seized in violation of the fourth amendment were not admissable in a criminal proceeding. *Id.* at 398. The fourth amendment protects citizens from unreasonable government searches. *See supra* note 3 and accompanying text. However, the Constitution does not provide a remedy for violations constituting illegal searches by government officials under the fourth amendment. Rather, the remedy for violations of the fourth amendment is a judicially created doctrine. *Weeks*, 232 U.S. at 383. According to *Weeks*, evidence seized by way of an illegal search is inadmissable in a criminal proceeding. *Id.* Thus, the exclusionary rule was established by the Court. The *Weeks* Court stressed the importance of fundamental fourth amendment protection:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, . . . might as well be striken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principals [sic]established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Id. at 393. The exclusionary rule is a rule of evidence designed to deter police misconduct. Elkins v. United States, 364 U.S. 206, 217 (1960). The concept being that if the evidence cannot be used to further the criminal prosecution, then the police have no incentive to conduct an illegal search. *Id.*

In *T.L.O.*, the state argued that the exclusionary rule should not apply to searches by school officials because there would be limited deterrent effect on the conduct of school officials whose incentive for a search is not criminal prosecution. Brief for Petitioner at 16, New Jersey v. T.L.O., 105 S. Ct. 733 (1985)(hereinafter Brief for Petitioner). The State of New Jersey contended that school officials seldom conduct searches of students since the primary duty of school officials is education, not law enforcement. *Id.* Therefore, New Jersey argued that school officials have limited contact with the criminal justice system and, as such, would be unfamiliar with the law of search and seizure and specifically with the exclusionary rule. *Id.* Thus, it is contended that use of the exclusionary rule to bar evidence seized by school officials would have limited deterrent effect on the behavior of those school officials. *Id.* at 15-16.

7. *T.L.O.*, 105 S. Ct. at 743. *See infra* notes 211-43 and accompanying text.

8. *See infra* note 87.

fluenced the Supreme Court's decision to adopt a lesser standard include: the public perception of the school environment;[9] the responsibility of school officials in a system of compulsory education;[10] the special need for order and discipline in the school environment;[11] and the role of the educational institution as a cultivator of democratic values.[12]

While the Court adopted a "reasonableness" standard for public school searches, it failed to adequately define the boundaries of this standard.[13] As a

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9. Gallup, *The 16th Annual Gallup Poll of the Public's Attitudes Toward the Public Schools*, 66 PHI DELTA KAPPAN 23, (Sept., 1984). The Gallup Poll finds that "discipline" is considered by parents, as well as students, to be the biggest problem facing the nation's public schools. *Id.* at 36.

10. Brown v. Board of Educ., 347 U.S. 483, 493 (1954). "Today, education is perhaps the most important function of state and local government. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . . It is the very foundation of good citizenship." *Id.*

11. For a discussion of the school discipline problem, see Baker, *Research Evidence of a School Discipline Problem*, 66 PHI DELTA KAPPAN 482-88 (Mar. 1985). The report concludes that discipline is a serious problem in the United States schools, however, since 1976 some improvement has occurred. *Id.* The author suggests that the failure of educators to recognize and deal with the problems of discipline contributes to the discipline problem. *Id. See also* Bauer, *Restoring Order to the Public Schools*, 66 PHI DELTA KAPPAN 488-91 (Mar. 1985) (author supports Reagan administration's position that focuses on improving school discipline in order to develop excellence in education); Nicholson, Stephens, Elder and Leavitt, *Safe Schools: You Can't Do It Alone*, 66 PHI DELTA KAPPAN 491-96 (Mar. 1985) (author calls for cooperation from community agencies, state officials, parents, administrators and teachers to combat discipline problems in school).

12. *T.L.O.*, 105 S. Ct. at 760-61 (Stevens, J., concurring in part and dissenting in part). "Schools are places where we inculcate the values essential to meaningful exercise of rights and responsibilities by a self-governing citizenry." *Id.* (footnote omitted) The concept of the public schools as teacher of democratic values to our citizenry has long been recognized. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). The Court in *Yoder* referred to compulsory education as "necessary to prepare citizens to participate effectively and intelligently in our open political system, if we are to preserve freedom and independence," recognizing the teachings of Thomas Jefferson. *Id.* at 221.

"Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms." Doe v. Renfrow, 451 U.S. 1022, 1027-28 (1981) (Brennan, J., dissenting from denial of certiorari). "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356, 1365 (1985) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)). On July 7, 1986, the United States Supreme Court in a seven to two decision ruled that the first amendment rights of public school students are more restricted than those of adults. Boston Globe, July 8, 1986, at 10, col. 1. The Court approved of a two day suspension of a high school student based on a speech containing sexual innuendoes but not obscenity. *Id.*

13. *T.L.O.*, 105 S. Ct. at 743-44. The standard adopted by the Court to justify a search of a student by a school official is defined as a "reasonableness under all the circumstances" standard. *Id.* at 743.

In the *T.L.O.* case, all state courts and the United States Supreme Court applied a variation of a "reasonableness" standard in order to justify the search. Application of the same standard resulted in differing notions of "reasonableness." The New Jersey Juvenile Court, 178 N.J. Super. 329, 428 A.2d 1327 (1980), and the New Jersey Superior Court, Appellate Division, 185 N.J. Super. 279, 448 A.2d 493 (1982); upheld the "reasonableness" of the search based on a "reason-

result, school officials may intrude on a student's constitutional right to be free from unreasonable searches.[14]

This Comment examines the "reasonableness" standard for public school searches conducted by school officials, as enunciated in *New Jersey v. T.L.O.*[15] Part I reviews both the history of the fourth amendment and the historical development of students' rights. Part II presents the facts of *T.L.O.* and the majority, concurring and dissenting opinions. Part III explores the standards rejected by the Court and analyzes the "reasonableness" standard which it adopted. Part IV discusses the future impact of the decision on school policy, school authorities, students and law enforcement officials.

I. HISTORICAL PERSPECTIVE

To fully understand the Supreme Court's landmark opinion in *New Jersey v. T.L.O.*, one must read the case in light of the historical development of both the fourth amendment and students' rights.

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ableess" standard. The New Jersey Supreme Court held that the search of T.L.O. was unreasonable based on a "reasonableness" standard, State *ex rel.* T.L.O., 94 N.J. 331, 347, 463 A.2d 934, 942 (1983), and the United States Supreme Court held that the search of T.L.O. was "reasonable" based on a "reasonableness" standard. *T.L.O.*, 105 S. Ct. at 746. If the judicial system, in applying the standard comes up with inconsistent results, the standard cannot lend itself to clear definition or ready predictability by school officials.

14. *T.L.O.*, 105 S. Ct. at 756 (Brennan, J., dissenting in part and concurring in part). Justice Brennan criticized the standard adopted by the majority as "likely [to] spawn increased litigation and greater uncertainty among teachers and administrators." *Id.*

The *T.L.O.* decision is already being used to shape school policy and justify searches of students. Two assistant principals in Washington D.C. violated school policy by searching ten students for a missing twenty dollar bill. N.Y. Times, Feb. 17, 1985, § 1 at 27, col. 5. The incident occurred within weeks of the *T.L.O.* decision. In Milford, Connecticut a new school search policy has been adopted which allows students suspected of having drugs, weapons or contraband to be searched. N.Y. Times, Sept. 8, 1985, at 1, col. 3. In East Rutherford, New Jersey school officials are seeking to test students for drug and alcohol use. N.Y. Times, June 16, 1985, § 1 at 26, col. 1. The East Rutherford School board is appealing a trial court decision which prohibits urinalysis to detect drug and alcohol use. Englade, *Who's Hired And Who's Fired*, 14 STUDENT LAW. 20, 26 (Apr. 1986).

Coercive school policy is likely to look for support in the *T.L.O.* decision. One school, Arkadelphia High School, Arkansas, requires that students submit to drug testing by urinalysis. Silas, *School Drug Tests: Arkansas Policy Challenged*, 70 A.B.A. J., at 36 (Apr. 1984) (citing Annable v. Ford, No. 84-6033 (W.D. Ark. July 12, 1985)). Refusal to submit to the test is grounds for dismissal. *Id.* Arkadelphia's policy allows highly intrusive search techniques that the school officials may attempt to support by reliance on the *T.L.O.* "reasonableness" standard. Reasonable suspicion would thereby be used to support a highly intrusive search of students by school officials. The Arkadelphia policy has been held to be highly intrusive and therefore impermissable. Englade, *Who's Hired and Who's Fired*, 14 STUDENT LAW. 20, 26 (Apr. 1986).

At least one District Attorney's Office in Massachusetts has used the *T.L.O.* decision to establish guidelines for school policy and suggests "close cooperation between school authorities and law enforcement officials." District Attorney's Policy on Drug and Alcohol Abuse Cases Arising in the Schools, Middlesex County, Massachusetts, 1985 (available at New England Law Review Office). The policy includes "guidelines for searching students suspected of illegal use of drugs or alcohol" based on the Court's standard adopted in *T.L.O. Id.*

15. 105 S. Ct. 733 (1985).

A. *Development of the Fourth Amendment and the Exclusionary Remedy*

The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant 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.[16]

The fourth amendment of the United States Constitution was a response by the authors of the Bill of Rights to prevent and condemn the inherent abuse of general warrants and writs of assistance.[17] This amendment requires that a warrant may be issued only when probable cause exists.[18] While the fourth amendment provides for privacy protection for persons,[19] it does not expressly provide a remedy for conduct which violates its command. Consequently, the Supreme Court developed the exclusionary remedy.[20]

In *Weeks v. United States*,[21] the Supreme Court introduced the exclusionary rule as a remedy for violations of the fourth amendment. The rule bars the use of illegally seized evidence in criminal trials.[22] The exclusionary rule originally applied only to searches by federal government officials,[23] where evidence

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16. U.S. CONST. amend. IV.

17. F. FRIENDLY & M. ELLIOTT, THE CONSTITUTION THAT DELICATE BALANCE 134-35 (1984). General warrants could be issued without probable cause and without specifically designating the person to be searched. The general warrant remained effective for the lifetime of the monarch and was primarily used to apprehend and prosecute critics of the crown. It was regarded as a "tool of censorship and tyranny." *Id.* (citing P. Stewart, "Who Freed Dollree Mapp?", Harlan Fiske Stone Memorial Lecture (April 26, 1983)).

18. U.S. CONST. amend. IV. "[N]o Warrant shall issue, but upon probable cause. . . ."

19. *Katz*, 389 U.S. at 351. The *Katz* Court emphasized that "the Fourth Amendment protects people, not places." *Id.*

20. Boyd v. United States, 116 U.S. 616 (1886). In 1886, the Court in *Boyd*, for the first time, excluded evidence on constitutional grounds. The *Boyd* Court relied on fifth amendment protection against self-incrimination to exclude the private papers seized by the government for use as evidence against the accused. *Id.* at 634-35. Although in *Boyd* the Court relied on fifth amendment grounds, the Court read the fourth and fifth amendments together. *Id.* at 630-35. The Court stressed, "the fourth and fifth amendments run almost into each other." *Id.* at 630. Other remedies for constitutional violations relied upon by the Court included holding the officer "responsible for the wrong done" while admitting the evidence against the defendant at the same time. Adams v. New York, 192 U.S. 585, 595 (1904). The *Adams* Court reasoned that otherwise competent evidence would not be excluded because it was seized pursuant to an illegal search, however, the Court recognized the necessity for some remedy for the violation. *Id.*

21. 232 U.S. 383 (1914). In the *Weeks* case, the Court noted the need for effective deterrent methods to control police misconduct. *Id.* at 392. The *Weeks* Court clearly recognized that "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . ." was a danger to be guarded against. *Id.*

22. *Id.*

23. *Id.* at 398. The *Weeks* Court applied the exclusionary remedy where the evidence in question was personal documents. *Id.* The rule was later expanded to exclude evidence of contraband where it was seized illegally. People v. Defore, 242 N.Y. 13, 18, 150 N.E. 585, 586 (1926). Harsh criticism of the exclusionary rule was cited by Justice Cardozo: "[t]here has been no blink-

was introduced in federal court.[24] Such a narrow application of the exclusionary rule afforded individuals limited privacy protection.[25]

As a result, federal law enforcement officers could conduct illegal searches and turn the evidence seized over to the states for prosecution on a "silver platter."[26] Evidence that was inadmissable in federal trials was used to obtain convictions in state courts, even though such evidence was seized under circumstances that violated the fourth amendment.[27] In addition, state officials could conduct themselves in a manner inconsistent with the fourth amendment and successfully turn evidence seized over to federal officials for use in federal proceedings.[28]

In *Elkins v. United States*,[29] the Court considered one aspect of the "silver platter" problem and held that evidence seized by both federal and state officials in violation of the fourth amendment was inadmissable in federal courts.[30] However, the Court in *Elkins* did not extend the exclusionary rule to state court cases involving seizures by state law enforcement officials.[31] One year later, the Supreme Court addressed the other problem. In *Mapp v. Ohio*,[32] the Court held that the fourth amendment also applies to the conduct of state officials, and that evidence seized pursuant to an illegal search is barred in both state and federal criminal trials.[33]

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ing the consequences. The criminal is to go free because the constable has blundered." *Id.* at 21, 150 N.E. at 587.

24. Byars v. United States, 273 U.S. 28, 33 (1927).

25. *See infra* notes 26-33 and accompanying text.

26. Lustig v. United States, 338 U.S. 74, 79 (1949).

27. *See id.*

28. *See infra* notes 31-33 and accompanying text.

29. 364 U.S. 206 (1960).

30. *Id.* at 223. Even though state and federal officials were encouraged to cooperate, police misconduct was not to be encouraged by allowing the use of evidence seized in illegal searches. *Id.* at 221-22. Justice Stewart expressed concern that the "silver platter" doctrine was an "inducement to subterfuge and evasion." *Id.*

31. *See id.* However, some states had voluntarily adopted the exclusionary rule remedy to protect their citizens from illegal searches by state law enforcement officials and to bar the use of such evidence in state proceedings. *See id* at 219-21. *See also Defore*, 242 N.Y. at 21, 150 N.E. at 585. This created a lack of uniformity among the states. *See Elkins*, 364 U.S. at 219-21. The Supreme Court had an opportunity to create a uniform application of the exclusionary remedy in 1949. Wolf v. Colorado, 338 U.S. 25 (1949). Alternatives to the exclusionary remedy offered in *Wolf* included suit against the offending officer and/or a charge of criminal trespass. *Id.* at 30 n.1. The dissent warned that "[a]lternatives are deceptive . . . there is but one alternative to the rule of exclusion. That is no sanction at all." *Id.* at 41 (Murphy, J., dissenting). Although the majority failed to give deference to the exclusionary remedy, Justice Frankfurter stressed the importance of protecting the right to be free from unreasonable search in language which emphasized basic human rights:

> The knock at the door, whether by day or by night as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Id. at 28.

32. 367 U.S. 643 (1961).

33. *Id.* at 655.

For the fourth amendment to apply, a person must have a legitimate expectation of privacy.[34] A legitimate expectation of privacy includes both an objective standard, one which society is prepared to recognize as legitimate, and a subjective standard, where an individual must have an actual expectation of privacy.[35] In order to protect an individual's legitimate expectation of privacy, the fourth amendment generally requires a warrant.[36] As a general rule, warrantless searches are *per se* unreasonable.[37] If the government attempts to use evidence seized in a warrantless search, then it has the burden of proving that an exception to the warrant requirement exists.[38]

Several exceptions to the warrant requirement have been recognized by the Court.[39] These exceptions include: searches made pursuant to a valid arrest,[40] "stop and frisk" patdowns,[41] private party searches,[42] administrative[43] and regulatory[44] searches, a search where voluntary consent[45] is given, auto-

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34. *Katz*, 389 U.S. at 351. The *Katz* Court abandoned the idea of constitutionally protected areas and held that "the Fourth Amendment protects people, not places." *Id.*

35. *See id.* at 352. In order for the fourth amendment to apply, it is not enough that an expectation of privacy is one that is generally recognized, but an individual must also have an actual expectation of privacy. Both the objective and subjective expectation must be satisfied for the fourth amendment to apply. *Id.* at 361 (Harlan, J., concurring).

36. U.S. CONST. amend. IV.

37. *Katz*, 389 U.S. at 357 & n.18.

38. Johnson v. United States, 333 U.S. 10, 17 (1947). It is the state's burden to show that a valid exception to the warrant requirement exists. *Id.*

39. See *infra* notes 40-49 and accompanying text for a discussion of existing exceptions.

40. Chimel v. California, 395 U.S. 752 (1969). Searches made pursuant to a valid arrest are restricted to the area within the suspect's immediate control in order to prevent the destruction of evidence and protect the safety of the officer and the public. *Id.* at 763. General searches are not permitted pursuant to arrest. *Id.* New York v. Belton, 453 U.S. 454, 460 (1981) (extends area defined as within suspect's control to entire passenger compartment of automobile).

41. Terry v. Ohio, 392 U.S. 1 (1968). A *Terry* patdown is authorized when there is reasonable fear for the officer's safety or that of the public. *Id.* at 24. The search is restricted in scope to a limited patdown of the suspect and is considered to be a limited intrusion. *Id.* at 29.

42. Burdeau v. McDowell, 256 U.S. 465 (1921). Since there is no deterrent effect on a private party's conduct, the fourth amendment has been held not to apply to conduct of private individuals. *Id.* at 475. The remedy for a private invasion of privacy would be an action for trespass. *See id.* Even when evidence is turned over to law enforcement the fourth amendment does not apply so long as the government search does not exceed the scope of the private search. Walter v. United States, 447 U.S. 649, 657 (1980).

43. *See* Marshall v. Barlow's Inc., 436 U.S. 307 (1978) (OSHA inspection); Michigan v. Tyler, 436 U.S. 499 (1978) (arson inspection); Camara v. Municipal Ct., 387 U.S. 523 (1967) (housing inspection); See v. City of Seattle, 387 U.S. 541 (1967) (commercial establishment inspection).

44. *See* United States v. Biswell, 406 U.S. 311 (1972) (inspection of firearms dealer authorized with no warrant); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (inspection of alcohol dealer authorized with no warrant). Searches of such highly regulated industries is justified because of the "long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Marshall*, 436 U.S. at 313.

45. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). "Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing voluntary consent." *Id.* at 248-49.

It was not argued that T.L.O. consented to the search since New Jersey law required that she

mobile searches,[46] seizure of items in "plain view,"[47] searches at the border,[48] and searches conducted under the emergency or "hot pursuit" doctrine.[49]

In addition to these warrant exceptions, law enforcement officials have also been afforded flexibility in a warrant situation.[50] In *United States v. Leon*,[51] the Supreme Court held that a search will be valid even when probable cause is lacking, so long as the officers had a "good faith" belief that they were acting pursuant to probable cause.[52] Moreover, the Court has relaxed the probable cause standard in certain areas of criminal procedure.[53] While administrative searches[54] and "stop and frisk" patdowns[55] require less than probable cause, they still pass the constitutional test. Likewise, the Supreme Court has recently rejected the strict "two-pronged" test for a more flexible "totality of the circumstances" approach when determining if probable cause exists in an informant situation.[56]

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have knowledge of a right to refuse consent in order for any consent to be considered voluntary. Brief for Respondent at 14 & n.4, New Jersey v. T.L.O., 105 S. Ct. 733 (1985) (hereinafter Brief for Respondent) (citing State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975)). It has also been held that consent may not be valid where students only consents because they are afraid. Tarter v. Raybuck, 742 F.2d 977, 980-81 (6th Cir. 1984). Also since there is a presumption against the waiver of constitutional rights, it would be the school's burden to demonstrate any voluntary consent by the student. *Id.* at 980. It may be difficult to argue that a student's consent is voluntary because of the level of maturity necessary to validate a consent. 3 W. LAFAVE, SEARCH AND SEIZURE § 10.11, at 471 (1978).

46. *See* California v. Carney, 105 S. Ct. 2066 (1985) (extends auto exception to warrantless search of mobile motor home); United States v. Johns, 105 S. Ct. 881 (1985) (upholding warrantless search of packages from truck three days after seizure); South Dakota v. Opperman, 428 U.S. 364 (1976) (upholding inventory search of automobile); Chambers v. Maroney, 399 U.S. 42 (1970) (extends auto exception to search when vehicle is at police station); Carroll v. United States, 267 U.S. 132 (1925) (authorizes automobile search because mobility of vehicle presents possibility of destruction of evidence). *But see* Arkansas v. Sanders, 442 U.S. 753 (1979) (officers cannot wait until item placed in automobile to utilize auto exception in order to justify search); United States v. Chadwick, 433 U.S. 1 (1977) (incidental contact of foot locker with automobile not enough to apply auto exception to justify search).

47. Harris v. United States, 390 U.S. 234, 236 (1968).

48. *See* United States v. Montoya de Hernandez, 105 S. Ct. 3304 (1985); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (held no requirement of reasonable suspicion as prerequisite to stop at border).

49. Mincey v. Arizona, 437 U.S. 385 (1978) (four day search after suspect was apprehended went beyond scope of emergency justification for search); Warden v. Hayden, 387 U.S. 294 (1967) (warrantless search permissible where exigent circumstances make delay impractical).

50. *See infra* notes 51-52 and accompanying text.

51. 104 S. Ct. 3405 (1984); Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984) (companion case to *Leon*).

52. In a case where officers reasonably believed they were acting pursuant to probable cause, *see Leon*, 104 S. Ct. 3405 (1984), or pursuant to a facially valid warrant which turned out to be procedurally in error, *see Sheppard*, 104 S. Ct. 3424 (1984), the Court refused to exclude the evidence on the grounds that the police acted in "good faith."

53. *See supra* notes 41, 43-44. *See also infra* notes 54-56 and accompanying text.

54. *See supra* notes 43-44.

55. *See supra* note 41.

56. Illinois v. Gates, 462 U.S. 213 (1983). Prior to *Gates*, it was necessary to meet the requirements of a two-pronged test in order to establish the existence of probable cause. The two-pronged test was applied where the person seeking the warrant relied on an unknown informant to

In *New Jersey v. T.L.O.*, the Supreme Court struggled with the school search issue for the first time in view of the warrant requirement, its many exceptions, and the present flexibility of the probable cause standard.[57]

B. Development of Students' Rights in the School Setting

The Court has established that students are "persons" under the Constitution and, as such, have constitutional rights.[58] The Court has recognized that

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support a claim of probable cause. The analysis was used to determine whether the informant's information was sufficient to supply probable cause (i.e. whether it was credible and reliable). One prong required the credibility of the informant be established either by a showing that the informant was inherently credible or that the informant was reliable on this particular occasion. The other prong required a showing of the informant's basis of knowledge either supported by personal observation of the informant or a showing that the informant had so much knowledge that it must be personal. *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

Gates rejected the two-pronged test and adopted the totality of the circumstances approach. *Gates*, 462 U.S. at 230. The *Gates* Court made use of the two-pronged test but relaxed the requirement that both prongs must be established for there to be probable cause. *Id.* at 233. *Gates* also allowed independent corroboration to support probable cause even where both prongs could not be satisfied. *Id.* at 241-46. For a general discussion of the two-pronged test and the totality of the circumstances approach see Note, *Corroboration of an Informant's Tip and the Probable Cause Equation: A Massachusetts Perspective*, 20 NEW ENG. L. REV. 469 (1984-85).

57. *T.L.O.*, 105 S. Ct. at 733.

58. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969). "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution." *Id. Tinker* protected the first amendment rights of students in the public school. Freedom of expression was held to protect a student's right to wear black armband in symbolic protest to the Vietnam War. *Id.* at 513-14. The *Tinker* Court stated that "students do not abandon their Constitutional rights at the schoolhouse gate." *Id.* at 506. *See* Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986) for a 1986 case on students and first amendment rights. *Fraser* allowed school officials broad authority to discipline students, limiting students' first amendment rights in school.

Rights of minors have traditionally been recognized by the Court, although these rights have been limited by the state based on a need for greater authority over children than over adults. *See* Bellotti v. Baird, 443 U.S. 622, 643-44 (1979) (providing judicial consent for minor's abortion decision as alternative to parental consent); Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) (protecting minor's right to obtain contraceptives); Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (parents cannot have absolute veto power over minor's abortion decision); Breed v. Jones, 421 U.S. 519, 541 (1975) (juveniles protected from double jeopardy); *In re* Winship, 397 U.S. 358, 368 (1969) (beyond a reasonable doubt standard applies in juvenile proceedings); *In re* Gault, 387 U.S. 1, 31 (1967) (protection afforded to minors in juvenile justice system parallel to that of adults in criminal proceedings; juvenile is entitled to notice of specific charge and chance to be heard if desired). "Constitutional rights do not mature and come into being magically only when one attains the state defined age of majority." *Planned Parenthood*, 428 U.S. at 74-75.

The Court has recognized several areas where the state's *parens patriae* interest prevails to restrict activities where minors are concerned. Prince v. Mass., 321 U.S. 158, 170 (1944). These areas include: Schall v. Martin, 467 U.S. 253, 264-268 (1984) (authorization of preventive detention of minors based on state's *parens patriae* interest); Ingraham v. Wright, 430 U.S. 651, 671 (1977) (holding eighth amendment inapplicable to prohibit corporal punishment in the schools); Ginsberg v. New York, 390 U.S. 629, 636-37 (1968) (restricting otherwise protected expression

students retain their first amendment rights while in school.[59] A student's freedom of expression in school can be limited only if there is "substantial disruption" of the school environment.[60] To a lesser extent, the Court has protected a student's fifth and fourteenth amendment due process right in school.[61]

In the context of the Supreme Court's recognition of students' first, fifth and fourteenth amendment rights, the lower courts struggled with the application of the fourth amendment to students in the school setting.[62] The student-search issue had received differing treatment by state and lower federal courts.[63] Three distinct theories had developed. The first theory rejected the fourth amendment analysis in favor of the *in loco parentis* doctrine.[64] The second theory applied the fourth amendment and required that the probable cause standard be met.[65] The third theory also applied the fourth amendment to student searches, however a lesser standard than probable cause was permissible.[66]

At the intersection of traditional fourth amendment jurisprudence, development of students' rights, and treatment of school searches by the state and lower federal courts, the Supreme Court decided *New Jersey v. T.L.O.* In *T.L.O.*, the Court adopted the third theory. While recognizing that fourth amendment analysis is necessary, the Court adopted a lesser standard than probable cause after considering the unique nature of the school environment.[67]

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from dissemination to minors); *Prince*, 321 U.S. at 170-71 (restricting parental authority over children where state interest in child's health and safety dominated).

59. *Tinker*, 393 U.S. at 506.

60. *Id.* at 513 (citing Burnside v. Byars, 363 F.2d 744, 749 (1966)). The *Tinker* standard for restricting constitutional rights is when a student's conduct "materially" and "substantially" disrupts school work and discipline. *Id.* It is the school's burden to show substantial disruption in order to restrict first amendment rights. Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356 (9th Cir. 1985). However, in a recent Supreme Court decision school officials were granted broad authority to restrict speech. Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986). The *Fraser* Court distinguished a student's right to express political speech under the Tinker standard from what the Court viewed as "lewd and obscene speech." *Id.* at 3163.

61. Goss v. Lopez, *rev'd*, 106 S. Ct. 3159 (1986) (student entitled to pre-suspension hearing and opportunity to explain); *accord In re* Gault, 387 U.S. 1, 30 (1967) (granting due process rights to juveniles in criminal context).

62. *See infra* notes 64-66 and accompanying text.

63. *See infra* notes 64-66 and accompanying text.

64. The doctrine of *in loco parentis* is defined as referring to one who is "charged, factitiously, with a parent's rights, duties and responsibilities." BLACK'S LAW DICTIONARY 708 (5th ed. 1979). See *T.L.O.*, 105 S. Ct. at 738-39 n.2 for case authority to support this doctrine.

65. This basis to justify school searches finds little support in existing case law, however, one court has held the probable cause requirement to be fully applicable in the school setting where the search was conducted by school officials. *T.L.O.*, 105 S. Ct. at 738-39 n.2 (citing State v. Mora, 305 So. 2d 317 (La. 1975), *vacated and remanded sub nom.*, 423 U.S. 809 (1976), *aff'd on remand*, 330 So. 2d 900 (La. 1976), *cert. denied*, 429 U.S. 1004 (1976)). Other courts find that the probable cause standard is appropriate only where the police are participants in the search, while one court uses the probable cause standard only to justify searches which are highly intrusive. *Id.* (citing M.M. v. Anker, 607 F.2d 588, 589 (Cal. 1979)).

66. *T.L.O.*, 105 S. Ct. at 738-39 n.2 (cites numerous case authority to support this doctrine).

67. *Id.* at 740-43. The Court has traditionally valued education and has been careful to protect students' rights while recognizing the school as a special environment. *See supra* note 10.

II. STATEMENT OF THE CASE

A. The Facts

T.L.O., a 14 year-old freshman at a New Jersey high school, was taken to the Assistant Principal's office after a teacher reported that she was smoking in the lavatory.[68] Although smoking was permitted in designated areas of the school, smoking in the lavatory was a violation of a school rule.[69] Assistant Vice-Principal Theodore Choplick questioned T.L.O. regarding the reported incident.[70] T.L.O. denied that she had been smoking.[71] Although discipline could have been imposed without further investigation,[72] the Vice-Principal believed that if he found cigarettes on the student this would be additional proof of the violation.[73] Whereupon, he asked T.L.O. to come into a "private office and demanded to see her purse."[74] When he opened the purse he found a package of tobacco cigarettes.[75] The Vice-Principal removed the cigarettes, confronted T.L.O. with this evidence, and accused her of lying.[76] At that time, he noticed a package of cigarette rolling papers.[77] Suspecting that the rolling papers may be connected to drug use,[78] Mr. Choplick further investigated the contents of the purse.[79] As a result, he discovered "a small amount of mari-

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68. State *ex rel.* T.L.O., 94 N.J. at 336, 463 A.2d at 936. The teacher reported that T.L.O. and another girl were smoking in the lavatory. The other girl admitted that she had been smoking. She was assigned to a smoking clinic for three days. *Id.*

69. *T.L.O.*, 105 S. Ct. at 763 n.16 (Stevens, J., concurring in part and dissenting in part) (citing PARENT-STUDENT HANDBOOK OF PISCATAWAY [N.J.] H.S. (1979)).

70. *Id.* at 736-37.

71. *Id.* at 737.

72. Brief for Respondent at 3 (citing to transcript of hearing on motion to suppress). At the hearing on the motion to suppress, Mr. Choplick admitted that when the teacher reported that the girls had been smoking it was not necessary to obtain further evidence of the infraction since the teacher's report was sufficient basis to impose discipline. *Id.*

73. *Id.* at 2 (citing to transcript of hearing on motion to suppress). It should also be noted that possession of cigarettes was not a violation of a school rule, but rather smoking in undesignated areas was the violation that was at issue. State *ex rel.* T.L.O., 94 N.J. at 347, 463 A.2d at 942.

The New Jersey Supreme Court also noted that the Vice-Principal had no information to support a belief that the student had cigarettes in her purse, but only a report that she had been smoking. *Id.* at 347, 463 A.2d at 942. Therefore, the New Jersey Court noted that Mr. Choplick had "at best a good hunch. No doubt good hunches would unearth much more evidence of crime on the persons of students and citizens as a whole. But more is required to sustain a search." *Id.* at 347, 463 A.2d at 942-43.

74. *T.L.O.*, 105 S. Ct. at 737.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* Rolling papers are not contraband. However, Mr. Choplick believed from his experience that it was likely that the rolling papers were associated with drug use. *Id.*

79. *Id.* Concern was raised by the New Jersey Supreme Court that this second search, after the initial discovery of the cigarettes and rolling papers, may have justified further search for drugs, but not "wholesale rummaging" through the contents of the purse including T.L.O.'s personal papers, "in the unparticularized hope of uncovering evidence of a crime." State *ex rel.* T.L.O., 94 N.J. at 348, 463 A.2d at 943 (1983) (citing State v. Smith, 113 N.J. Super. 120, 135, 273 A.2d 68 (App. Div. 1971)).

huana, a pipe, a number of empty plastic bags, a substantial quantity of money in one dollar bills, an index card that appeared to be a list of students who owed T.L.O. money and two letters that implicated T.L.O. in marihuana dealing."[80] The evidence was turned over to the police.[81]

After being advised of her *Miranda*[82] rights, T.L.O. admitted that the items in the purse were hers and that she had sold marihuana in school.[83] T.L.O. was charged with delinquency based on a violation of the criminal law which prohibited the possession of marihuana with intent to distribute.[84]

Counsel for T.L.O. moved to suppress both the evidence seized and the confession, arguing that the search violated T.L.O.'s fourth amendment rights.[85] The motion was denied.[86] The Juvenile and Domestic Relations Court of Middlesex County, New Jersey, held that the fourth amendment applied to school searches, but that school officials need not meet the probable cause standard in order to conduct a search.[87] Rather, the juvenile court determined that a school search is justified if there is "a reasonable suspicion that a crime has been or is in the process of being committed, *or* reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies."[88] T.L.O. was found guilty of possession of marihuana with intent to distribute, adjudicated delinquent, and sentenced to one year probation.[89]

On appeal, the New Jersey Superior Court, Appellate Division, affirmed the trial court's finding that the search of T.L.O. did not violate the fourth amendment.[90] T.L.O. appealed to the Supreme Court of New Jersey, which

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80. *T.L.O.*, 105 S. Ct. at 737. "At trial it was stipulated that the bag contained 5.40 grams of marijuana." Brief for Respondent at 3 n.2 (citing the trial record). The substantial quantity of one dollar bills consisted of forty dollars, which T.L.O. claimed to be money from her paper route. *Id.* at 4.

81. *T.L.O.*, 105 S. Ct. at 737.

82. Miranda v. Arizona, 384 U.S. 436 (1966)(providing right to counsel at custodial interrogation).

83. *T.L.O.*, 105 S. Ct. at 737.

84. State *ex rel.* T.L.O., 94 N.J. at 337, 463 A.2d at 936-37. *See* N.J. Stat. Ann. § 24:21-19 (a)(1) (West 1940 & Supp. 1983)(intent to distribute marijuana unlawful); N.J. Stat. Ann. § 24:21-20(a)(4) (West 1940 & Supp. 1983) (one in possession of less than 25 grams of marijuana a disorderly person).

85. State *ex rel* T.L.O., 178 N.J. Super. 329, 336, 428 A.2d 1327, 1330 (1980).

86. *Id.* at 336-43, 428 A.2d at 1331-34 (J.D.R.C. 1980)(hereinafter juvenile court).

87. Carroll v. United States, 267 U.S. 132, 161 (1925). The traditional standard required to justify a search is probable cause. The *Carroll* court defined probable cause as evidence which would "warrant a man of reasonable caution in the belief" that a felony had been committed, it need not be enough evidence to find beyond a reasonable doubt. *Id.* at 162. "[G]ood faith is not enough to constitute probable cause." *Id.* at 161. "[R]elaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice.' "Wong Sun v. United States, 371 U.S. 471, 479 (1963) (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

88. State *ex rel T.L.O.*, 178 N.J. Super. at 341, 428 A.2d at 1333 (emphasis in original).

89. *T.L.O.*, 105 S. Ct. at 737.

90. State *ex rel.* T.L.O., 185 N.J. Super. 279, 448 A.2d 493 (1982). The appellate division vacated the delinquency adjudication and remanded the case to determine whether T.L.O. voluntarily waived her fifth amendment rights. *Id.* Waiver of right to counsel must be knowing, intelligent, and voluntary in order to be effective. *Miranda*, 384 U.S. at 475-79 (1966). It is the govern-

reversed the appellate division, and suppressed the evidence on the grounds that the search of the purse was unreasonable.[91] The New Jersey Supreme Court agreed with the standard applied in the juvenile court,[92] holding that school officials need only meet a "reasonable suspicion"[93] standard, rather than a probable cause[94] standard, to comply with the fourth amendment. However, the New Jersey Supreme Court in applying the reasonable suspicion standard determined that the search in this case was unreasonable since it was not supported by evidence of "criminal activity or evidence of activity that would seriously interfere with school discipline or order."[95] While all three state courts applied the "reasonable suspicion" standard to the *T.L.O.* facts, they could not agree on the result.[96] The two lower courts found the search to be "reasonable" and allowed the evidence to be used against T.L.O.; the New Jersey Supreme Court found the search to be unreasonable and suppressed the evidence.[97]

On appeal to the United States Supreme Court, the New Jersey Supreme Court's ruling was affirmed in part and reversed in part.[98] The United States Supreme Court agreed with the New Jersey Court's holding that the fourth amendment applies to school officials conducting searches of students.[99] However, the United States Supreme Court disagreed with the New Jersey Supreme Court's finding that the search was unreasonable, and held that the search of T.L.O.'s purse was "reasonable under the circumstances."[100]

B. The Majority Opinion

The justices unanimously agreed that the fourth amendment does apply to searches conducted by school authorities.[101] A more controversial issue however, was the proper standard to be applied under the fourth amendment.[102] Considering this issue the Court recognized that students are protected under the fourth amendment, continuing a tradition of constitutional protection af-

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ment's burden to show waiver of the privilege of self-incrimination. *Id.* at 475. "This Court has always set high standards of proof for the waiver of constitutional rights." *Id.* (citing Johnson v. Zerbst, 304 U.S. 458, 465 (1938)). The "totality of the circumstances" determines whether statements were voluntarily made. Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968) (citing Clewis v. Texas, 386 U.S. 707 (1967)).

91. State *ex rel.* T.L.O., 94 N.J. at 348, 463 A.2d at 943-44 (1983).

92. *Id.* at 337, 463 A.2d at 937.

93. *See supra* note 13 and accompanying text.

94. *See supra* note 87 and accompanying text.

95. State *ex rel.* T.L.O., 94 N.J. at 347, 463 A.2d at 942.

96. *See supra* note 13 and accompanying text.

97. *See supra* note 13 and accompanying text.

98. *See infra* notes 99-100 and accompanying text.

99. *T.L.O.*, 105 S. Ct. at 739.

100. *Id.* at 747.

101. *Id.* at 738. The Court refused to accept New Jersey's contention that the intent of the fourth amendment was to regulate searches conducted by law enforcement officers therfore is not applicable to searches conducted by school officials. *Id.* There is a long history of case authority providing that fourth amendment protection applies to searches conducted by other government agents. *See supra* notes 43-44 and accompanying text.

102. *T.L.O.*, 105 S. Ct. at 736.

forded to students under other constitutional provisions.[103] The Court followed previous decisions holding that students are "persons"[104] and found that school officials are government agents for fourth amendment purposes.[105] Further, the Court refused to lessen the standard of a "reasonable" search merely because of the contention that school authorities are surrogate parents and thereby have broader authority than other government agents.[106] However, because of the special nature of the school environment, the standard to be applied to a student search is more relaxed.[107]

The Court acknowledged that students have a legitimate expectation of privacy.[108] Justice White, writing for the majority, recognized that students have a legitimate need to carry items of a personal nature to school.[109] Students do not abandon their right to privacy in these items by bringing them to school.[110] The Court viewed a student's subjective expectation of privacy as comparable to that of an adult.[111]

By a six to three vote, the majority adopted a "reasonableness under all the circumstances" standard for student searches.[112] While the student's expectation of privacy was given considerable weight, the "substantial interest" of maintaining order in the school setting was of primary concern to the majority.[113] The Court reasoned that the special nature of the school setting re-

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103. *See supra* notes 58-61 and accompanying text.

104. *Tinker*, 393 U.S. at 511.

105. *T.L.O.*, 105 S. Ct. at 741.

106. *Id.* at 740-41.

107. *Id.* The Court refused to exempt school officials from constitutional requirements by virtue of the doctrine of *in loco parentis* where school officials would be considered the same as parents rather than considered as government officials. *Id. See also infra* notes 162-93 and accompanying text.

108. See *supra* notes 34-35 and accompanying text for a discussion of the concept of legitimate expectation of privacy. The *T.L.O.* majority refused to equate the status of a student to that of a prisoner with no legitimate expectation of privacy, taking into account that school discipline is critical in the institutional setting but not equating the schools to the prisons for fourth amendment purposes. *T.L.O.*, 105 S. Ct. at 742. See Hudson v. Palmer, 104 S. Ct. 3194 (1984) for a case involving the privacy interests of prisoners. One court has approved the use of two-way mirrors in the boys' bathroom as not infringing on a student's legitimate expectation of privacy. Stern v. New Haven Community Schools, 529 F. Supp. 31 (E.D. Mich. 1981). The *Stern* court also held that there was no requirement of individualized suspicion as a prerequisite to this type of search technique. *Id.* Also, at oral argument in *T.L.O.*, Justice Rehnquist commented: "I don't know why two-way mirrors in a restroom would be a violation of privacy." Stewart, *In her Purse the Principal found Marijuana*, 71 A.B.A. J., Feb. 1985, at 53 (quoting Rehnquist, J.). A legitimate expectation of privacy has been held to exist in a purse, wallet or pocket. Brief for Amici Curiae, Legal Aid Society of the City of New York, Juvenile Rights Division, and Advocates for Children of New York, Inc. at 29-30, New Jersey v. T.L.O., 105 S. Ct. 733 (1985) (citing United States v. Monclavo-Cruz, 662 F.2d 1285, 1287 (9th Cir. 1981))[hereinafter Brief for Legal Aid Society]. The search of a purse has been considered to be equivalent to a search of a person. *Id.* (citing United States v. Graham, 628 F.2d 1111, 1114 (7th Cir. 1981)); United States v. Jeffers, 524 F.2d 253, 256 (7th Cir. 1975); Stewart v. State, 611 S.W.2d 434, 438 (Tex. 1981).

109. *T.L.O.*, 105 S. Ct. at 742.

110. *Id.*

111. *Id.* at 741-42.

112. *Id.* at 743-44.

113. *Id.* at 742.

quired an "easing of the restrictions"[114] in order for school authorities to be effective in maintaining discipline.[115] The Court, by giving deference to the specialized school environment, unanimously agreed that the warrant requirement was inapplicable to a search by school officials.[116] The probable cause standard was also dispensed with as not serving the interest of the school authorities in maintaining order.[117]

Having determined that the warrant and probable cause requirements do not apply, Justice White, balancing the interests of student privacy and school order,[118] held that the legality of a student search by a school official is based on a "reasonableness under all the circumstances" standard.[119] Justice White articulated a two-step process to determine "reasonableness."[120] First, the action must be *justified at its inception.*[121] A search by school officials is " 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[122] Second, the scope of the search must be *reasonably related* to the initial justification for the search.[123] The Court maintained that the "search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search . . . in light of

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114. *Id.* at 743.

115. *Id.*

116. *Id.* The Court recognized that the warrant requirement is suspended when it "is likely to frustrate the governmental purpose behind the search . . . ." *Id.* (quoting Camara v. Municipal Ct., 387 U.S. at 532-33).

117. *Id.* at 744. Justice White rationalized the decision to depart from the probable cause standard by recognizing that teachers cannot be expected to be trained in law enforcement standards. "[T]he standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause . . . ." *Id.*

118. *T.L.O.*, 105 S. Ct. at 742. The school's need to maintain control is balanced against the privacy interest of the students. *Id.* Justice Blackmun, although concurring in the judgment, objected to the Court's use of "the balancing test [as] the rule rather than the exception." *Id.* at 749 (Blackmun, J., concurring). Justice Blackmun reasoned that the special requirements of the school setting allowed for the application of the 'balancing test' departure rather than traditional rule. *Id.* However, Justice Blackmun noted that the majority applied the balancing test without first explaining that it was a departure and that conditions required its application in this case. *Id.* at 748-50.

119. *T.L.O.*, 105 S. Ct. at 743-44. *See infra* notes 211-43 and accompanying text.

120. *T.L.O.*, 105 S. Ct. at 744.

121. *Id.* (quoting *Terry*, 392 U.S. at 20)(emphasis added). However, for a *Terry* search to be justified at inception the party searching must have a reasonable concern for their safety. *See Terry*, 392 U.S. at 24.

122. *T.L.O.*, 105 S. Ct. at 744. Although the *Terry* reasonable suspicion standard was adopted, *Terry* applied only to a weapons search. *See Terry*, 392 U.S. 1 (1968). In *T.L.O.*, the standard is lowered as well as broadening the application. Rather than being authorized to conduct a weapons search, school officials need only suspect a violation of a school rule or a violation of the law to initiate a search. *T.L.O.*, 105 S. Ct. at 744. While the language is borrowed from *Terry*, the results are more permissive.

123. *T.L.O.*, 105 S. Ct. at 744. The Court adopted a *Terry* like standard, however the scope of a *Terry* search authorizes only a patdown of the outer clothing after the initial justification for search is triggered by a fear for the officer's safety or the safety of others. *See Terry*, 392 U.S. at 30.

the age and sex of the student and the nature of the infraction."[124] Applying this two-step process the Court held that the search of T.L.O. was "reasonable."[125]

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124. *T.L.O.*, 105 S. Ct. at 744.

125. *T.L.O.*, 105 S. Ct. at 745-47. The Court granted certiorari solely on the issue of whether the exclusionary rule was an appropriate remedy for searches of students by school officials conducted in violation of the fourth amendment. *T.L.O.*, 105 S. Ct. 733 (1985). Since the Court held that the search in *T.L.O.* did not violate fourth amendment principles, the majority found it unnecessary to decide whether the exclusionary rule applied to evidence seized illegally from students in public schools. *T.L.O.*, 105 S. Ct. at 736.

School searches have been consistently upheld in the lower courts. *See* Buss, *infra* note 162, at 739 n.1. Therefore, it has been rare for the courts to reach the issue of whether to apply the exclusionary rule to evidence seized pursuant to an illegal school search. *T.L.O.*, 105 S. Ct. at 739 n.2. The courts that have considered the issue are split on the appropriateness of the exclusionary remedy. *Id.* (citing State v. Young, 234 Ga. 488, 498, 216 S.E.2d 586, 594 (1975), *cert. denied*, 423 U.S. 1039 (1975) (Georgia courts have held the exclusionary rule inapplicable to the school search). Some courts have held that the exclusionary remedy is inappropriate because the primary function of school officials is not law enforcement. Reply Brief for Petitioner at 9, New Jersey v. T.L.O., 105 S. Ct. 733 (1985) [hereinafter Reply Brief for Petitioner]. "[S]chool official's primary concern is education and he has no professional interest in the criminal justice process." *Id. See also infra* note 182 for a discussion of the law enforcement function of school officials. Therefore, there is no deterrent effect by application of the exclusionary rule to evidence seized by those school officials. Reply Brief for Petitioner at 8. However, school officials possess good faith immunity with regard to acts performed pursuant to their duties. Wood v. Strickland, 420 U.S. 308, 320 (1975). Thus, it cannot be argued that the actions of school officials could be deterred by the threat of civil liability.

Even though punishment in diciplinary proceedings is often more severe than criminal sanctions for juveniles, other courts have decided to apply the exclusionary remedy to evidence used in criminal proceedings, but not to evidence used in school disciplinary actions. State v. Mora, 307 So.2d 317 (La. 1975), *vacated*, 423 U.S. 809 (1975), *aff'd on remand*, 330 So.2d 900 (La. 1976), *cert. denied*, 429 U.S. 1004 (1976); Gordon v. Santa Ana Unified School Dist., 208 Cal. Rptr. 657, 665 (Cal. App. 4 Dist. 1984). The exclusionary rule should be available where punishment is likely to be severe in civil or criminal actions; the remedy should be tied to the penalty. *Gordon*, 208 Cal. Rptr. 667 (quoting Buss). School discipline often "entails exclusion from school — a sentencing to the life of the streets." Brief for Amici Curiae, American Civil Liberties Union and The American Civil Liberties Union of New Jersey at 13 n.5, New Jersey T.L.O., 105 S. Ct. 733 (1985) (quoting ABA *Standard Relating to Schools and Education* 1 (1982)) [hereinafter Brief for A.C.L.U.]. Therefore, the ABA recommended that school officials comply with law enforcement standards where school disicipline could lead to harsh punishment such as suspension or expulsion. *Id.*

Although the Court expressed no opinion on the application of the exclusionary remedy, the implication from *T.L.O.* is that the validity of the remedy is at best questionable in the school search. *T.L.O.*, 105 S. Ct. at 739 n.3. The Court noted that fourth amendment violations do not necessarily trigger the exclusionary remedy. *Id.* A failure to apply the remedy in the school search situation, would seriously risk the student privacy interest since the standard adopted for the search already diminishes those rights. Where the conduct of school officials is so outrageous that the search is not considered valid under the flexible "reasonableness under all the circumstances" test, application of the exclusionary rule is necessary in order to deter this type of conduct. Brief for Respondent, at 28. The exclusionary rule should be applied to inhibit collusion between law enforcement and school officials. Brief for A.C.L.U., at 4.

C. *The Concurring Opinions*

The concurring opinion of Justice Powell stressed the specialized school environment as the primary rationale for application of the lesser "reasonableness" standard to searches conducted by school authorities.[126] Justice Powell noted that teachers are uniquely familiar with their students.[127] He contrasted the cooperative teacher-student relationship to the adversarial nature of the relationship between law enforcement officials and criminal suspects.[128] Therefore, he reasoned that this special relationship and special environment, coupled with his observation that "it is unnecessary to afford students the same constitutional protections granted adults . . .,"[129] justified the majority decision.

Justice Blackmun wrote a separate concurrence in order to clarify that the "balancing test,"[130] which the majority applied to the facts of this case, is not the usual approach to fourth amendment issues, but rather is useful only where there are special circumstances[131] which trigger an exception to the usual probable cause requirement.[132] He further stated that since special circumstances existed in this case, the balancing test is appropriate.[133] However, Justice Blackmun expressed concern that the majority applied the balancing test without first articulating their rationale.[134]

D. *The Dissenting Opinions*

Justice Brennan was troubled by the Court's departure from precedent in dispensing with the probable cause standard.[135] Justice Brennan criticized the Court for failing to support the decision with "any case in which a full-scale intrusion upon privacy interests has been justified on less than probable cause."[136] The dissent argued that once it is determined that the fourth amendment applies, the significant inquiry should be whether there is a full-

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126. *T.L.O.*, 105 S. Ct. at 747 (Powell & O'Connor, JJ., concurring).

127. *Id.* Because of their unique familiarity with students, the dissent argued that teachers would be able to apply the probable cause standard with relative ease. *Id.* at 756 (Brennan, J., dissenting).

128. *Id.* at 748. Justice Powell pointed to the duty of school officials to educate and train our youth. *Id.* He noted the obligation of school authorities "to protect pupils from mistreatment by other children, and also to protect teachers from violence. . . ." *Id.* However, he failed to recognize a concern for protecting children from abuses of a search that could result if guidelines for search are lax.

129. *Id.* at 747. *See also supra* note 12.

130. *Id.* at 749 (Blackmun, J., concurring).

131. *Id.* at 749. "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.*

132. *Id.*

133. *Id.*

134. *Id.* "The Court's implication that the balancing test is the rule rather than the exception is troubling . . . ." *Id.*

135. *Id.* at 753 (Brennan & Marshall, JJ., concurring in part and dissenting in part). See *supra* note 87 and accompanying text for a discussion of probable cause.

136. *T.L.O.*, 105 S. Ct. at 753.

scale search[137] or a minimal intrusion.[138] If there is a full-scale search, then the only proper standard is probable cause.[139] The dissent pointed out that the probable cause standard is not a difficult test to meet, particularly in view of the flexibility afforded the standard in recent years.[140] The dissent viewed the application of the probable cause standard in the teacher-student relationship as relatively easy[141] to apply, especially since teachers are familiar with their students and do not need to rely on outside sources to establish or corroborate grounds for a search.[142] In addition, a probable cause standard lends itself to more predictable guidelines.[143]

Justice Brennan would apply "traditional Fourth Amendment jurisprudence"[144] to a school search. Departure from the probable cause standard should only be allowed where there is minimal intrusion or a compelling need.[145]

In a separate dissent, Justice Stevens approved of the New Jersey Supreme Court decision which held that the exclusionary rule applied to a school search where the evidence is used for a criminal proceeding.[146] He accused the majority of judicial activism for failing to decide the exclusionary rule issue, which was the sole issue before the Court.[147]

Justice Stevens was seriously concerned by the majority's lack of distinction between a violation of a school rule and a criminal violation as grounds for a student search.[148] Troubling Justice Stevens was the potential misuse of a school search based on inconsequential violations of school rules.[149] Justice Stevens would only approve of a student search where there was a suspected

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137. *Id.*

138. *Terry*, 392 U.S. 1 (1968). A minimal intrusion in *Terry* was considered to be a "limited search of the outer clothing" in a situation where there was a reasonable fear for safety. *Id.* at 30.

139. *T.L.O.*, 105 S. Ct. at 755.

140. *Id.* at 756 (citing *Gates*, 462 U.S. 213 (1983)). *See supra* note 56 and accompanying text.

141. *T.L.O.*, 105 S. Ct. at 756.

142. *Id. See supra* note 56 and accompanying text.

143. *T.L.O.*, 105 S. Ct. at 756.

144. *Id.* at 757.

145. *Id. See supra* notes 40-49 and accompanying text.

146. *T.L.O.*, 105 S. Ct. at 760 (Stevens & Marshall, JJ., concurring and dissenting, Brennan, J., joins as to part I). However, Justice Stevens did note a distinction between evidence used in juvenile proceedings and in school disciplinary actions. *Id.* It appears that Justice Stevens would not go so far as to extend use of the exclusionary remedy to disciplinary actions conducted by the school. *See also supra* note 125.

147. *T.L.O.*, 105 S. Ct. at 759. "[T]he Court has unnecessarily and inappropriately reached out to decide a constitutional question." *Id.* Justice Stevens offers harsh criticism for "a Court that not only grants prosecutors relief from suppression orders with distressing regularity, but also is prone to rely on grounds not advanced by the parties in order to protect evidence from exclusion. In characteristic disregard of the doctrine of judicial restraint . . . ." *Id.* at 761-62.

148. *Id.* at 763. "For the Court, a search for curlers and sunglasses in order to enforce the school dress code is apparently just as important as a search for evidence of heroin addiction or violent gang activity." *Id.* Justice Stevens pointed out further that if the concern in our nation's schools is for crime and violence then the standard should be directed at this concern. *Id.*

149. *Id.* at 765. "Unlike the Court, I believe the nature of the suspected infraction is a matter of first importance in deciding whether *any* invasion of privacy is permissible." *Id.* (emphasis in original).

violation of the law or substantially disruptive behavior which threatened the need to maintain discipline in the educational setting.[150] Justice Stevens believed that since the search of T.L.O.'s purse for a minor infraction, such as smoking in the lavatory, was based on neither of these grounds[151] it was "unjustified at its inception,"[152] and therefore an unreasonable search.

III. ANALYSIS

The United States Supreme Court held in *New Jersey v. T.L.O.*, for the first time, that fourth amendment protection applies to students in the school setting.[153] In order to arrive at this decision, the court maintained that students are "persons" with a legitimate expectation of privacy to be protected under the Constitution.[154] In addition, the Court asserted that the conduct of school officials is considered government action for fourth amendment purposes.[155]

While the fourth amendment was held to apply to searches of students by school officials, the standard of protection afforded to students was considerably relaxed compared to constitutional protection afforded non-students.[156] To justify the "reasonableness" standard, the Court relied heavily on the special nature of the school environment and the need of school officials to maintain order and discipline in the classroom.[157] Several theories were considered by

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150. *Id.* at 763.

151. *Id.* at 765. Justice Stevens referred to "the trivial character of the activity that promoted the official search . . . [of T.L.O]." *Id.*

152. *Id.* at 766-67. "Because this conduct was neither unlawful nor significantly disruptive of school order or the educational process, the invasion of privacy associated with the forcible opening of the [sic] T.L.O.'s purse was entirely unjustified at its inception." *Id.*

153. *Id.* at 741.

154. *Id.* at 742. "Students in school as well as out of school are 'persons' under our Constitution." *Tinker*, 393 U.S. at 511. Although the *T.L.O.* Court did not expressly reiterate that students are 'persons,' the *Tinker* precedent was cited.

155. *Id.* at 741. The *T.L.O.* Court recognized that actions of school officials must conform to constitutional requirements:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures - Boards of Education not excepted. These have, of course, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.

Id. at 739-40 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

156. *Id.* at 743. "The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search . . . must be based upon 'probable cause'. . . ." *Id.*

157. *Id.* at 742. The *T.L.O.* Court cited the National Institute of Education, U.S. Dept. of Health, Education and Welfare, Violent Schools-Safe Schools: The Safe School Study Report to the Congress (1978), to support the theory that crime and violence are major problems in the Nation's schools. *Id.* The report indicates that crime and violence were serious problems in 1976. The Safe School Study also indicates that students from minority groups were more likely to be victims of crime in the schools. Baker, *supra* note 11, at 483-84. Since minority students are more likely to be affected by crime in the schools, it may follow that minority students may be disproportionately affected by new standards adopted by the Court to maintain order in the schools. *New Student Search Rule Will Prove Hard on Blacks*, 67 JET 37 (Feb. 4, 1985).

From a survey of reports prepared after the Safe School Study, the author indicates that there

the Court as possible standards for school officials to justify searches of students.[158] The standards considered were *in loco parentis*,[159] probable cause,[160] and "reasonableness."[161]

A. In Loco Parentis

The Court in *T.L.O.* did not rely on the *in loco parentis* doctrine to justify student searches.[162] The *in loco parentis* doctrine is a common law doctrine which is based on the idea that parents delegate a portion of their authority over the child to school officials.[163] The doctrine was originally protective in nature and was used to support regulations which protected "student morals, welfare and safety. . . ."[164] To use the *in loco parentis* doctrine to lessen the protections afforded students under the fourth amendment denies the protective origins of the common law doctrine.[165]

Under the *in loco parentis* doctrine, school officials would be deemed to stand in the place of parents.[166] Consequently, since parental conduct is not

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has been some improvement in the discipline problem in the schools but that a serious problem still exists. Baker, *supra* note 11, at 485-86.

The Reagan Administration has adopted a five-point plan to combat crime in the Nation's schools. The plan includes: 1) focusing national attention on the need for discipline in schools; 2) research by the Department of Education to find effective solutions for the problem; 3) joint involvement of the Department of Education and the National Institute of Justice to assist local school districts; 4) the establishment of a National School Safety Center in the Department of Justice and 5) filing friend of the court briefs, where appropriate, to support increased authority of school officials. *See* Bauer, *supra* note 11, at 490. The United States submitted a brief supporting reversal of the New Jersey Supreme Court decision. Brief for Amicus Curiae, United States at 29, New Jersey v. T.L.O., 105 S. Ct. 733 (1985) [hereinafter brief for United States].

The strong stand of the Reagan Administration is evidenced by President Reagan: "There's no need to call in a grand jury every time a principal needs to check a student locker." Address by President Reagan, *National Association of Independent Schools* (Feb. 28, 1985), *reprinted in* 45, No. 2313 WORLD NEWS DIGEST at 207 (Mar. 22, 1985).

158. *See* W. LAFAVE, SEARCH AND SEIZURE § 10.11 at 452 (1978).

159. *See infra* notes 162-93 and accompanying text.

160. *See infra* notes 194-210 and accompanying text.

161. *See infra* notes 211-43 and accompanying text.

162. *T.L.O.*, 105 S. Ct. at 741. See Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974), for a discussion of *in loco parentis* and treatment of school officials as private individuals.

163. The doctrine states:

> The parent may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of power of the parent committed to his charge, viz that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

Trosch, Williams, & Devore, *Public School Searches and the Fourth Amendment*, 11 J.L. & EDUC. 41, 53 & n.77 (quoting 12 Blackstone, Commentaries 453).

164. *Id.* at 53 & n.78 (quoting Comment, *Search and Seizure — School Officials Authority to Search Students as Augmented by the In Loco Parentis Doctrine*, 5 FLA. S.L. REV. 526, 530-31 (1971)).

165. *Id.* at 53 & n.79.

166. Frels, *Searches and Seizures in the Public School*, 11 HOUS. L. REV. 876, 879 (1974). Since school officials and students maintain a special relationship, the school official is considered to stand in place of the parent. *Id. See also supra* note 64.

restricted by the fourth amendment, the conduct of school officials would likewise be unrestricted.[167] The fourth amendment would have no applicability to the conduct of school officials since, under the *in loco parentis* doctrine, they would not be considered government officials, but rather parental substitutes.[168]

Application of the *in loco parentis* standard would have provided less than minimal protection of students' privacy rights. A number of considerations speak strongly against the adoption of the *in loco parentis* doctrine, including the following: public education is compulsory;[169] parental and state interests differ;[170] obligations under the doctrine require protection of the child as well as the exercise of authority over the child;[171] and family privacy interests provide parents with special authority over the child.[172]

One significant criticism of the doctrine is that its application is inconsistent with the concept of compulsory education.[173] In a system of compulsory school attendance, parents are required by law to send their children to school and do not voluntarily relinquish their parental rights to public school offi-

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167. *See* Frels, *supra* note 166.

168. *See* Frels, *supra* note 166.

169. *T.L.O*, 105 S. Ct. at 741 (citing Ingraham v. Wright, 430 U.S. 651, 662 (1977)). "[T]he concept of parental delegation . . . [is not] consonant with compulsory education laws." *Id.*

Every state has compulsory education laws. Brief for Amicus Curiae National School Boards Association at 9, New Jersey v. T.L.O., 105 S. Ct. 733 (1985) [hereinafter as Brief for N.S.B.A.]. (citing P. Lines, *Private Education Alternatives and State Regulation*, Education Commission of the States (1982)).

170. *See* Mawdsley, *In Loco Parentis: A Balancing of Interests*, 61 ILL. B.J. 638 (1973) for a discussion of parent's interests and those of school authorities. "The interests of the home on the one hand are not always the same interests as those of the school. Where a conflict occurs . . . a court must decide which of the conflicting interests is the most compelling." *Id.* at 645.

171. *See* Buss, *supra* note 162, at 768.

> Insofar as *in loco parentis* sums up the peculiar school-student relationship and the school's related interest in searching students, it focuses almost entirely on protection of other students and on coercive power over the searched student. One of the things that makes *in loco parentis* such an erroneous phrase in this context is precisely the absence of a genuinely parental protective concern for the student who is threatened with the school's power.

Id.

172. *See infra* notes 187-93 and accompanying text. Another problem in applying *in loco parentis* doctrine is that once a child reaches adulthood the doctrine would have no applicability. *See* Lafave, *supra* note 158, at 453-54. Therefore, the doctrine could not be employed to justify the search of a small number of students in the secondary schools who may have reached the age of majority. *See id.* Also, at the college level, the doctrine would have very limited application. Moore v. State Affairs Comm. of Troy State Univ., 285 F. Supp. 728 (M.D. Ala. 1968).

173. *See* Buss, *supra* note 162, at 767.

> Under a system of compulsory education, a school authority acquires power over the child directly by reason of law and solely because that authority is the agent of the governmental branch charged with carrying out the law . . . . [I]t is errant nonsense to characterize this governmentally derived power as *in loco parentis* and then to deny its governmental origins.

Id.

cials.[174] The authority of school officials is not derived from a voluntary delegation of parental power which is a basic requirement of the *in loco parentis* doctrine.[175] Since public school officials derive their authority from compulsory education laws their governmental capacity cannot be denied.[176] Therefore, application of the *in loco parentis* doctrine to authorize searches of students in the public school is inappropriate.[177]

Second, the *in loco parentis* doctrine would not apply since the interests of parents and school officials are not identical.[178] School officials cannot be deemed to stand in place of the parent where the interests of the school official diverge from those of the parent.[179] While parents and educators are both concerned for the "best interest of the child,"[180] school officials have legitimate state interests beyond traditional parental interests.[181] In some jurisdictions school officials have an affirmative duty to investigate and report incidents of crime.[182] However, parents are neither likely to have such an affirmative duty nor are they likely to turn evidence of a child's wrongdoing over to law enforcement agencies.[183]

Third, a significant problem in applying the *in loco parentis* doctrine concerns its use to support coercive conduct by school officials without also providing the student with adequate protection against unreasonable intrusion.[184] If

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174. *Id.*

175. *Id. See also supra* note 163. *See also supra* note 173.

176. *See* Buss, *supra* note 162, at 767. *See also supra* note 173.

177. *See* Buss, *supra* note 162, at 767. *See also supra* note 173.

178. Mawdsley, *supra* note 170, at 645.

179. *Horton*, 690 F.2d at 480-81 n.18. The *Horton* court stated:

> The law recognizes broad powers in a parent in part because one can safely assume that the parent will exercise those powers in the best interests of the child. The school administrator's duties, however, are not always exercised with only the child who is being disciplined or searched in mind.

Id. School officials represent the state's interest and not the parent's interest and so school officials ought to be held to a probable cause standard. Brief for A.C.L.U. at 5.

180. *See supra* note 179.

181. *See* Mawdsley, *supra* note 170. The school's interests include: protecting school property from furthering illegal activity, preserving the school as a symbol of authority and preventing disruption of the educational process. *Id.* at 641-43.

182. Mercer v. State, 450 S.W.2d 715, 721 (Tex. Ct. Civ. App. 1970) (Hughes, J., dissenting). The *Mercer* dissent pointed out that school authorities had a duty to report a student in possession of marijuana to police while parents under the same circumstances could remain silent. *Id.* Under the *in loco parentis* doctrine a school official may be considered to have an affirmative duty to inspect and search students. Donaghue, *Emerging First and Fourth Amendment Rights of the Student*, 1 J. L. & EDUC. 449, 451 (1972). Statutes may also impose an affirmative duty on school officials to maintain a safe environment in the schools. *In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969). In some cases school officials have an affirmative duty to investigate drug use. People v. Overton, 20 N.Y. 2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967).

Brief for Respondent at 20, cites numerous state statutes requiring the reporting of crime to police, thereby creating a law enforcement role for school officials. Other statutes require teachers to maintain order in schools, while still others require teachers to discipline students who are responsible for disruptions. *Id.*

183. Three per cent of juvenile referrals come from schools. Brief for N.S.B.A. at 13 (citing *Report to the Nation on Crime and Justice* 60 (1983)).

184. *See* Buss, *supra* note 162, at 767.

the *in loco parentis* doctrine is used as the basis to assert parental authority for searching a student in order to protect the school community, the doctrine would also require a parental duty to protect the individual student being searched.[185] Therefore, application of the doctrine to justify a search may be inconsistent with the corresponding obligation to protect a student's privacy interest.[186]

Finally, the *in loco parentis* doctrine fails to recognize that parents have greater child rearing control than do state officials.[187] School officials cannot restrict political speech,[188] or require children to salute the flag.[189] Parents, however, are allowed wider latitude in child rearing because of strong family privacy interests.[190] State interest, on the other hand, is triggered only when the "best interest of the child" is at risk.[191] The state cannot intrude into the family without sufficient justification.[192] School officials cannot assert family privacy interests to justify a search and must be held to a higher standard than parents in order to justify conduct.[193]

As a result of the Court's decision in *T.L.O.*, the doctrine of *in loco parentis* no longer retains vitality as the basis for a school search. It cannot be used as a justification for the conduct of school officials.

B. Probable Cause

The Supreme Court in *T.L.O.* rejected the probable cause requirement for student searches conducted by school officials.[194] Probable cause has been the

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185. *See* Buss, *supra* note 162, at 767.

186. *See* Buss, *supra* note 162, at 767.

187. *See infra* notes 188-92.

188. *Tinker*, 393 U.S. at 513.

189. *Barnette*, 319 U.S. 637.

190. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (protecting parental religious freedom in child-rearing); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (protecting parental right to send child to private school); Meyer v. Neb., 262 U.S. 390 (1923) (state may not forbid teaching of foreign language in school).

191. *Prince*, 321 U.S. 158 (1944) (state interest prevails where health and safety of child is at risk).

192. *Id.*

193. Furthermore, parental authority may also be diminished. Parents may not be able to assert their consent in place of the child's to authorize a warrantless search of a child's belongings. *In re* Scott K., 24 Cal. 3d 395, 595 P.2d 105, 155 Cal. Rptr. 671 (1979). Therefore, it would seem that *in loco parentis* rights would be substantially diminished; where a parent's authority is diminished they would have less authority to voluntarily transfer.

194. *T.L.O.*, 105 S. Ct. at 743. Prior to *T.L.O.*, one lower court held that the probable cause requirement is applicable in the school setting where the search was conducted by school officials. State v. Mora, 307 So.2d 317 (La. 1975), *vacated*, 423 U.S. 309 (1975), *aff'd on remand*, 330 So.2d 900 (La. 1976). However, the probable cause basis to justify school searches conducted by school officials finds limited support in existing case law. Other courts found that the probable cause standard is appropriate only where the police are participants in the search. M. v. Board of Educ. Ball-Chatham, 529 F. Supp. 288, 292 (S.D. Ill. 1977); Picha v. Wielgos, 410 F. Supp. 1214, 1219-21 (N.D. Ill. 1976); State v. Young, 234 Ga. 488, 498, 216 S.E.2d 586, 594 (1975), *cert. denied*, 423 U.S. 1039 (1975). One court required the probable cause standard only to justify a search which was highly intrusive. M.M. v. Anker, 607 F.2d 588, 589 (2d Cir. 1979). See *T.L.O.*, 105 S. Ct. at 739, n.2 for a discussion of these cases.

traditional standard for fourth amendment analysis.[195] Yet in *T.L.O.*, the Court allowed a personal, highly intrusive search based on a "reasonabless" standard, a lesser standard than probable cause.[196] Prior to *T.L.O.*, the "reasonableness" standard had been used to justify only minimal intrusions, such as a *Terry* search,[197] or searches which were not personal in nature, such as administrative searches.[198] The Court relied on these previous applications of a lesser standard to support the *T.L.O.* decision, thereby, for the first time, expanding application of a lesser standard than probable cause to a search which is personal in nature.[199]

The Court's failure to recognize the probable cause standard in the school setting is unjustified. Given the increased flexibility of the probable cause standard in recent years[200] and the unique nature of the teacher-student relationship,[201] it would not be difficult for a teacher to fulfill the requirements of the probable cause standard.[202]

The probable cause requirement is "easily applied."[203] School officials are in a favorable position to know their students, to know who they can rely on for trustworthy information, and therefore, are not as likely to be presented with the problem of what to do with information obtained from an anonymous informant, a common problem for police officers.[204] Even if school officials are faced with anonymous tips, they are more likely to have personal knowledge about the suspect student than police would have about suspect individuals in similar circumstances.[205]

Furthermore, teachers, as educated persons, should not have difficulty with versing themselves in the "niceties of probable cause,"[206] given the relaxation of the probable cause requirement.[207] If school officials must learn what meets a "reasonable under all the circumstances" test, they can learn what constitutes sufficient facts to give rise to probable cause.[208] Moreover, under

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195. *See supra* note 87 and accompanying text.

196. Highly intrusive searches may be authorized at the border, however, the fourth amendment is held not to apply at the border. "There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause." United States v. Ramsey, 431 U.S. 606, 619 (1977).

197. *Terry*, 392 U.S. 1 (1968). The stop and frisk exception is limited to a brief patdown for the limited objective of discovering weapons. This is considered a minimal intrusion. *Id.* at 27.

198. *Camara*, 387 U.S. at 535. These administrative searches are not directed at uncovering crime but rather at regulation and safety inspections. Administrative searches are not personal in nature and therefore are considered limited intrusions. *Id.*

199. *See supra* notes 196-98.

200. *See supra* note 56 and accompanying text.

201. *T.L.O.*, 105 S. Ct. at 756 (Brennan, J., dissenting).

202. *Id.*

203. *Id.* (citing *Gates*, 462 U.S. 213 (1983)). "Among the adjectives used to describe the standard were 'practical,' 'fluid,' 'flexible,' 'easily applied,' and 'non-technical.' " *Id.*

204. *Id.*

205. *Id.* The facts of most such cases in the school would meet the requirements of probable cause where information is obtained through personal knowledge and/or familiarity with a student informant. *See* LAFAVE, *supra* note 158, at 460.

206. *T.L.O.*, 105 S. Ct. at 756.

207. *See supra* note 56 and accompanying text.

208. Brief for Respondent at 28 n.15. Teachers as well-educated individuals should not have

the *T.L.O.* decision, school officials may find it necessary to verse themselves in the "niceties of probable cause" if they act at the request of, or in conjunction with, law enforcement authorities.[209] Although these are persuasive arguments for retaining the probable cause standard, the Court instead chose to adopt a "reasonableness" standard.[210]

C. *"Reasonable Under All the Circumstances"*

While school officials are not considered exempt from the fourth amendment by virtue of a special status, such as *in loco parentis*, neither are they held to the same standard as law enforcement officers.[211] After rejecting the *in loco parentis* and probable cause theories, the *T.L.O.* Court adopted a "reasonable under all the circumstances" test to uphold student searches by school officials.[212]

"Reasonableness" was to be determined by a two-step analysis.[213] First, in order to be considered "reasonable," the search must be "justified at its inception;" there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[214] Secondly, the scope of the search, as conducted, must be "reasonably related. . . to the circumstances which justified the interference in the first place. . . ."[215] To decide whether the search is permissible in scope it must be determined whether "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[216]

One problem with the first step of the analysis is that it fails to distinguish between a suspected violation of a school rule and a suspected criminal violation as initial justification for a student search.[217] Justice Stevens, in his dissenting opinion, criticized the Court for including minor infractions of

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difficulty conforming their conduct to fourth amendment principles. *Id.*

209. *T.L.O.*, 105 S. Ct. at 744 n.7. Since the *T.L.O.* Court declined to suggest a standard to govern the behavior of school officials who act with or at the direction of police, it is not inconceivable that teachers could be required to conform their conduct to a probable cause standard in these situations.

210. *T.L.O.*, 105 S. Ct. at 756.

211. *Id.* at 743. The *in loco parentis* doctrine has been applied to lessen the standard applicable to school officials by way of two separate approaches. The first approach considers the school official the same as the parent and therefore immune from fourth amendment principles; no standard at all is required. *See supra* notes 162-93 and accompanying text. The second approach under *in loco parentis* doctrine would apply the fourth amendment but require a lesser standard than probable cause. *See generally* LAFAVE, *supra* note 158, at 454. Even though the *T.L.O.* Court held that the fourth amendment applies to the conduct of school officials and also adopted a lesser standard for a school search, the Court did not use the *in loco parentis* doctrine as the basis for the standard which it adopted.

212. *T.L.O.*, 105 S. Ct. at 743-44.

213. *Id.* at 744.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 763 (Stevens, J., dissenting).

school rules as grounds for a student search.[218] Justice Stevens recognized the need to maintain order and discipline in the schools.[219] However, he maintained that student searches should not be triggered by trivial infractions of school rules.[220] The student's conduct should be seriously disruptive of the school environment to justify a search in the name of school order and disicipline.[221] The majority's approach makes any conduct proscribed by the school rules *per se* disruptive, and therefore, any violation of the school rules would constitute grounds for a search.[222] Studies have indicated that searching students for minor infractions may not contribute to maintaining order in the schools, but rather may have the opposite effect.[223]

The "reasonableness" standard allows school officials to exercise authoritarian power over students, thereby limiting students' privacy rights.[224] A search would be justified at its inception if the basis of the search was a violation of a school rule.[225] While the language of the Court was derived from *Terry v. Ohio*,[226] the permissible grounds for the search is much broader than that in *Terry*. A *Terry* search is only justified at its inception when there is a reasonable fear for safety.[227]

The second step of the analysis was established to limit the permissible

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218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 763-64.

222. *Id.* at 763 n.16 (Stevens, J., dissenting). Justice Stevens pointed out that, under the majority's test, searches could be based on violation of school rules such as tardiness, profanity, wearing curlers or sunglasses. *Id.*

223. Brief for Respondent at 41.

> None of these studies found the infrequency of student searches to be a significant factor in schools with a serious crime problem. . . . [T]he findings would seem to suggest that several of the conditions which are associated with a high crime rate could actually be exacerbated by an increase in the number of searches conducted, and by the failure to stringently penalize school personnel who conduct unreasonable searches.

Id.

> Peaceful or not, the educational prospects of schools run on the model of an authoritarian regime are dubious. Such schools are less educational institutions than institutions for custodial confinement whose principal assignment is to keep the young off the streets, out of trouble and off the labor market. The resulting atmosphere is likely to prove incompatible with either learning or teaching.

Gordon, 162 Cal. App.3d at 537, 208 Cal. Rptr. at 664 (citing Letwin, *Perspectives on the Post-Civil War Amendments, After Goss v. Lopez: Student Status as Suspect Classification*?, 29 STAN. L. REV. 627, 650 (1977)). See also Brief for Legal Aid Society at 54 n.20, suggesting that searches would have an adverse effect on school discipline where students at a New York City high school reacted violently to an unannounced search for weapons. The students overturned desks and chairs and staged a vigorous protest in response to the search. *Id.*

224. *T.L.O.*, 105 S. Ct. at 767 (Stevens, J., dissenting). "The rule the Court adopts today is so open-ended that it may make the Fourth Amendment virtually meaningless in the school context." *Id. See also supra* note 14 and accompanying text.

225. *T.L.O.*, 105 S. Ct. at 744.

226. 392 U.S. 1 (1968).

227. *Id.* at 28-29.

scope of the search.[228] This involves two limitations.[229] The first limitation requires that the scope of the search be reasonably related to the objective of the search.[230] While this standard was also borrowed from *Terry v. Ohio*,[231] a *Terry* search is related to the objective only if it is limited to a search for weapons.[232] The school search is not limited to a search for weapons.[233] In a school search, the Court has extended the objective beyond the narrow safety issue of *Terry v. Ohio*,[234] to the much broader objective of maintaining order and discipline.[235] Since any breach of a school rule could be considered *per se* disruptive, and therefore, directed at the broader objective of maintaining order in the schools, the scope of the search will not be limited according to the seriousness of the infraction, but rather restricted only by the discretion of school officials.[236]

The second limitation on the scope of the search is that it not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."[237] This limitation offers minimal protection since the guidelines are not clearly defined. In *T.L.O.*, the Court validated a male school administrator's search of a 14-year-old female student in a private office, even though the search was unnecessary to discipline the student and the scope of the search went beyond the particular item sought.[238] The Court held that the nature of the initial smoking infraction authorized the search and that the search was not excessively intrusive although the items seized were not in "plain view."[239] Moreover, the school official was found to be acting within the permissible scope of a search for marijuana when reading T.L.O.'s personal letters.[240] This second limitation on the scope of the search was designed to prevent obvious abuses, such as "shocking strip searches."[241] However, be-

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228. *T.L.O.*, 105 S. Ct. at 744.

229. *See infra* notes 230-41 and accompanying text.

230. *T.L.O.*, 105 S. Ct. at 744.

231. 392 U.S. 1 (1968).

232. *Id.* at 28-29.

233. *T.L.O.*, 105 S. Ct. at 744. The objective is considered by the *T.L.O.* Court to be "the legitimate end of preserving order in the schools." *Id.*

234. 392 U.S. at 28-29.

235. *T.L.O.*, 105 S. Ct. at 743-44.

236. *Id.* at 744 n.9. The Court gave deference to the judgment of school officials in promulgating the rules which guide student behavior. *Id.* The Court suggests that courts in general "refrain from attempting to distinguish between rules that are important . . . and rules that are not." *Id.*

237. *Id.* at 744.

238. *See supra* notes 68-81 and accompanying text.

239. *T.L.O.*, 105 S. Ct. at 746-47. The Court noted that the first search for the cigarettes, which also uncovered the rolling papers, provided the basis for a second search for the marijuana. *Id.*

240. *Id.* The Court reasoned further that the reading and examining of personal letters and documents was within the permissible scope of a search for marijuana. *Id.*

241. *Id.* at 765 n.25. "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude . . . . [T]he conduct herein described exceeded the 'bounds of reason' by two and a half country miles." Doe v. Renfrow, 631 F.2d at 92-93. A class of 5th graders was strip searched in an attempt to locate $3.00 in cash which was reported missing; the money was never found. Bellnier v. Lund,

cause of the flexibility of the "reasonableness" test, school officials have wide discretion to conduct a broad range of personal searches.[242] By adopting such flexible grounds, the majority gave limited consideration to the student's expectation of privacy.[243]

IV. IMPACT

The *T.L.O.* decision has provided the basis for future school policy regarding student searches.[244] The decision gives wide discretion to school officials at the expense of the privacy rights of students in the public schools.[245] The flexibility of the "reasonableness under all the circumstances" test, coupled with the issues left unresolved by the Court leaves school officials free to pursue policies with far reaching implications.[246] The Court's failure to address issues of individualized suspicion,[247] to define the least intrusive means for a search,[248] and to establish a standard for police searches conducted in the

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438 F. Supp. 47 (N.D.N.Y. 1977).

242. *T.L.O.*, 105 S. Ct. at 765. Justice Stevens is concerned that the test was designed to protect against "obviously unreasonable intrusions" but on the other hand may not offer effective protection because it is too flexible. *Id.* The reasonable suspicion standard, "subjectively applied by a school official. . . is really no standard at all." State v. Young, 234 Ga. 488, 492, 216 S.E.2d 586, 599 (1975) (Gunter, J., dissenting).

243. *T.L.O.*, 105 S. Ct. 742. The *T.L.O.* Court recognized the student's legitimate expectation of privacy, but balanced it against the school's interest. *Id.*

244. *See supra* note 14.

245. *Id.*

246. Specifically, the *T.L.O.* Court noted several issues not decided by the case, but relegated discussion of those issues to the footnotes. *T.L.O.*, 105 S. Ct. at 739-44 n.3-8:

1) Exclusionary rule: "Thus our determination that the search at issue in this case did not violate the Fourth Amendment implies no particular resolution of the question of the applicability of the exclusionary rule." *T.L.O.*, 105 S. Ct. at 739 n.3.

2) Locker search: "We do not address the question . . . whether a schoolchild has a legitimate expectation of privacy in lockers, desks or other school property . . . ." *Id.* at 741 n.5. It has been held that since lockers are school property, school officials have a right to inspect them. Zamora v. Pomeroy, 639 F.2d 662, 670 (10th Cir. 1981). It has also been held that school authorities can consent to a locker search conducted by law enforcement officers. People v. Overton, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 47 (1969). A companion case to *T.L.O.* which involved a locker search was not appealed to the United States Supreme Court since the student's death made the issue moot. State v. Engerud, 94 N.J. 331, 463 A.2d 934 (1983). The New Jersey Supreme Court in *Engerud* held that a locker search, based solely on an anonymous tip, was a violation of the student's expectation of privacy in the locker. *Id.* at 335, 463 A.2d at 943. "[T]he student had a expectation of privacy in the contents of his locker . . . for the four years of high school, the school locker is a home away from home . . . . In it the student stores the kind of personal 'effects' protected by the Fourth Amendment." *Id.* The New Jersey Supreme Court, however, recognized that had the school maintained a regular policy of locker inspections, the student's expectations of privacy in the locker may be diminished or nonexistent. *Id.*

3) Individualized suspicion: "We do not decide whether individualized suspicion is an essential element of the reasonableness standard . . . ." *T.L.O.*, 105 S. Ct. at 744 n.8.

4) Lack of police standard: "This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question." *Id.* at 744 n.7.

247. *See supra* note 246.

248. *See infra* notes 256-60.

schools,[249] leaves the school-search issue subject to uncertainty and future debate.[250]

Because the Court failed to establish whether individualized suspicion is a prerequisite for a school search, students may be subjected to individual searches where there is merely a generalized suspicion of wrongdoing.[251] By failing to require individualized suspicion, the *T.L.O.* decision has left the use of search devices, such as metal detectors,[252] for school wide searches, to the discretion of school officials. The use of metal detectors to discover weapons in the school has not been expressly approved by the Court.[253] An analogy to the use of metal detectors in airports has not been a successful argument since school attendance is compulsory unlike air travel.[254] Students may not evade such searches by avoiding school.[255] Based on the *T.L.O.* decision, however, metal detectors may be considered the least intrusive means available.[256]

Perhaps even more troublesome than the possibility of generalized

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249. *See supra* note 246.

250. *See* N.Y. Times, May 19, 1985, § 1, at 47, col. 1. *See also* Flygare, *High Court Approves Searches of Students But Ducks Many Tough Issues*, 66 PHI DELTA KAPPA 504 (Mar. 1985) (suggesting that issues left unresolved by the Court will require costly litigation to resolve).

251. *T.L.O.*, 105 S. Ct. at 744 n.8. In other settings the Court has required individualized suspicion to uphold a search while expressing a distaste for generalized searches and/or detention. Ybarra v. Illinois, 444 U.S. 85 (1979) (generalized search and detention of bar patrons held violation of fourth amendment); Davis v. Mississippi, 394 U.S. 721 (1969) (detention and fingerprinting of suspects without individualized suspicion held violation of fourth amendment).

One state court has held that individualized suspicion is a prerequisite to a school search in a case that was decided after the *T.L.O.* decision. Kuehn v. Renton School Dist. No. 403, 103 Wash. 2d 594, 694 P.2d 1078 (1985) (generalized probability is not enough for reasonable suspicion). The *Kuehn* court also suggested that as an alternative to searching the student's luggage as a prerequisite to a school trip, the parents could sign a statement okaying the luggage. Thus any need for a search would be obviated. *Id.* at 601, 694 P.2d at 1083.

Other courts have held that the absence of individualized suspicion renders dog sniffing unreasonable. Jones v. Latexo, 499 F. Supp. 223, 236 (E.D. Tex. 1980); *Horton*, 690 F.2d at 482 (canine search of lockers and cars not search, but canine sniff of person not justified without individualized suspicion). *But see Zamora*, 639 F.2d at 671 (upheld general search by canine sniffing of student's lockers without individual suspicion); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), *modified*, 631 F.2d 91 (7th Cir. 1980), *reh'g denied*, 635 F.2d 582 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1980) (general exploratory search of person by dog sniff considered minimal intrusion).

252. Stelley, *Okaying the Use of Metal Detectors Proves Easier than Using Them*, 171 AMER. SCH. BD. J. 47 (1984). The New Orleans schools okayed the use of metal detectors where there are articulable facts which lead to reasonable suspicion, but not for the purpose of conducting wholesale searches. *Id.* It has also been suggested that metal detectors may prove useful in combating the weapons problem in the Boston Public Schools. Boston Herald, Oct. 23, 1985, at 8, col. 1. Metal detectors have been used in the past in the Boston Public Schools. Lupo, *When Guns Go to School*, Boston Globe, Nov. 16, 1985, at 19, col. 6.

253. *See* Stelley, *supra* note 252, at 47.

254. "[C]ourts have upheld the warrantless use of magnetometers in light of their minimally intrusive character as weighed against the danger of skyjacking." *Horton*, 690 F.2d at 479 (citing United States v. Cyzewski, 484 F.2d 509 (5th Cir. 1973). See *supra* notes 169, 173-77 for a discussion of compulsory education.

255. *See supra* note 169.

256. *See* Hogan & Schwartz, *Search and Seizure in the Public Schools*, 90 CASE & COM. 28, 29 (July-Aug.1985).

searches with metal detectors is the potential for schools to use intrusive search techniques, such as urinalysis or other medical tests to detect drug or alcohol use.[257] Since the *T.L.O.* Court failed to define the least intrusive means requirement, personally intrusive searches may be authorized under the flexible, "reasonable under the circumstances" test.[258] The use of such tests to search will depend upon their intrusiveness.[259] Some medical tests have been considered highly intrusive where a bodily invasion is necessary.[260] However, even tests which require a bodily invasion could be considered the least intrusive means available.[261] Furthermore, such excessively intrusive search techniques could affect the general student population without a strict requirement of individualized suspicion.

In addition to problems with the Court's standard for searches conducted by school officials, the Court refused to consider what standard would apply when police are involved in the school search.[262] The failure of the *T.L.O.* Court to adopt a standard applicable to law enforcement officials may cause confusion among law enforcement agencies.[263] When acting in a school setting, it is unclear whether police are to conform their conduct to the traditional probable cause requirement, or the "reasonable under all the circumstances" standard.[264] If police are expected to conform their conduct to a probable cause standard, and school officials need only meet a "reasonable under all the circumstances" test, a search which would be acceptable if done by school officials could be illegal if conducted by police.[265]

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257. *See* Silas, *supra* note 14, at 36.

258. *T.L.O.*, 105 S. Ct. at 743-44.

259. See Hogan & Schwartz, *supra* note 256, at 30, for a discussion of the intrusiveness of scientific tests which are gaining recognition in the field of drug and weapon detection, such as:

1. Detection of the drug P.C.P. in the hair of users.
2. Toenail and fingernail clippings used to identify drug users.
3. Swabbing of hands to collect traces of marijuana.
4. Identification of metal traces in the palms.
5. Detecting metal objects by laser beams.
6. The 'Tri-Ess Mini Metal Detector.'

Id. (footnotes omitted).

260. Schmerber v. California, 384 U.S. 757 (1966) (extracting blood samples to determine alcohol content constitutes search within fourth amendment). The *Schmerber* holding has been applied to find that breathalyzer tests, urinalysis tests, and detention of suspected drug smugglers are all searches within the meaning of the fourth amendment. Allen v. City of Marietta, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985). The Supreme Court refused to allow surgery to remove a bullet in order to obtain evidence. Winston v. Lee, 105 S. Ct. 1611 (1985). The surgery was considered to be an unreasonable bodily intrusion. *Id.*

261. United States v. Montoya De Hernandez, 105 S. Ct. 3304 (1985). The Court upheld an alimentary canal search based on a reasonable suspicion standard, suggesting that excessively intrusive searches may be justified on mere reasonable suspicion. *Id.*

262. *T.L.O.*, 105 S. Ct. at 744 n.7.

263. Tarter v. Raybuck, 742 F.2d 977, 984 (6th Cir. 1984). A standard more than reasonable suspicion is not required where police involvement is marginal. *Id.*

264. *Horton*, 690 F.2d at 481 n.19. "[W]here there is some component of law enforcement activity in the school official's action the consideration may be critically different." *Id.* It has been held that school officials may search and/or consent to a search of lockers by law enforcement. *Zamora*, 639 F.2d at 670.

265. M.J. v. State, 399 So. 2d 996 (Fla. Dist. Ct. App. 1981) (law enforcement officers

The problem caused by differing standards between police and school officials, raises similar concerns as those expressed under the "silver platter" doctrine.[266] Inconsistent standards would allow school officials to act as conduits for the police in instances where police were unable to meet the probable cause standard.[267] Since a school official may conduct a student search under the "reasonableness" standard, police may encourage school officials to make such a search even where probable cause does not exist and the police could not legally conduct the search.[268] This is analagous to federal officers turning illegally seized evidence over to state officials, prior to *Elkins*,[269] and *Mapp*.[270]

While cooperation between school officials and police should be encouraged, school officials should not act as agents of the police.[271] Where school officials act as agents of the police they should be held to police standards.[272] A double standard for school searches is not a workable alternative, since police misconduct will be encouraged, rather than deterred, by allowing school officials to act as conduits for the police.[273]

In addition to the above concerns, students' rights would further deteriorate if police were allowed to search based on a standard less than probable cause.[274] Police would have unprecedented latitude to conduct searches, if they were allowed to initiate a search based only on "reasonable" suspicion that a student violated a school rule or the law.[275]

Given the fact that police would be able to search based on a mere violation of a school rule, coupled with the fact that a search would be permissible

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directing or participating in school search must have probable cause, even though school officials are not required to meet probable cause requirement).

266. See *supra* notes 26-33 and accompanying text for a discussion of the "silver platter" doctrine.

267. *Engerud*, 94 N.J. at 331, 463 A.2d at 937 (police passed information to school officials who conducted search where suspicion was based merely on anonymous tip).

268. *See* Buss, *supra* note 162, at 788.

> So long as school officials are permitted broad authority to make searches, and then to turn over the evidence to police who themselves would have been banned by the fourth amendment from making the search, there is a substantial likelihood that arrangements will be (and evidence that they have been) worked out so as to make such turnovers possible.

Id.

269. 364 U.S. 206 (1960).

270. 367 U.S. 643 (1961).

271. *See supra* notes 26-33 and accompanying text.

272. *See* Doe v. Renfrow, 451 U.S. 1022 (1980) (Brennan, J., dissenting from denial of certiorari). "Once school authorities enlist the aid of police officers to help maintain control over the school's drug problem . . . their conduct must be judged according to the traditional probable cause standard." *Id.* at 1026. *See also* Doe v. Renfrow, 635 F.2d 582, 583 (7th Cir. 1980) (Swygert, J., dissenting from denial of rehearing). "I cannot consider this a 'school' search because the mass search was planned and executed with extensive police involvement rather than solely by school personnel." *Id.*

273. *See* Phay & Rogister, *Searches of Students and the Fourth Amendment*, 5 J.L. & EDUC. 57, 63 (1976).

274. *Id.*

275. *T.L.O.*, 105 S. Ct. at 744. Not only would police be allowed to search based on a reasonable suspicion standard but they would have grounds for a search merely if a student violated a school rule.

on a mere "reasonableness" standard, police would be encouraged to come to the school grounds to carry out their police business in ways that would be wholly unconstitutional just beyond the school property line.[276] As a result, police would have incentive to delay a search until a suspect was on school property so as to assure the legality of a search.[277] Moreover, this incentive for police to conduct their business on school grounds would necessarily increase their presence in the school. This police presence would likely interfere with the existing educational environment.[278]

As a result of *T.L.O.*, law enforcement agents are without guidance as to the proper guidelines for police searches in the schools or as to the use of evidence obtained from searches by school officials.[279] If police involvement is necessary to maintain order in the school, police need appropriate guidelines.

School administrators are likewise without guidance as to the proper guidelines for their searches where they require police assistance.[280] If police searches in the school setting are held to the probable cause standard, then in instances where school personnel request police assistance to conduct a search, the conduct of school officials may need to meet a probable cause test.[281] Thus, school officials will face the dilemma of either conducting a search unassisted by police, where such cooperation may be beneficial, or requesting police involvement thereby requiring that the stricter probable cause standard be met before conducting a search.

As a result of *T.L.O.*, students may seek to rely on state constitutional grounds to provide them with more privacy protection.[282] If states are forced to rely on their respective constitutions, searches which are permissible in one jurisdiction may be illegal in others.[283] Furthermore, some school boards may adopt stricter search standards than others, causing lack of uniformity within jurisdictions.[284] In addition, since the Court failed to decide the exclusionary

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276. Police conduct regarding searches must conform to the probable cause standard to be permissible under the fourth amendment. *See supra* note 87 and accompanying text.

277. It follows that if police need to meet only a reasonableness test in the school search, but need to pass the probable cause test in other settings then police will be encouraged to delay a search until a suspect is on school grounds in situations where police have reasonable suspicion that does not rise to the probable cause level. This is analagous to the situation where police have waited until a suspect has placed evidence in an automobile and then tried to use the auto exception to justify the search. *Sanders*, 442 U.S. 753. The Court has held that police cannot wait for evidence to be placed in the automobile and then use the auto exception to justify the search. *Id.*

278. One of the primary concerns of the *T.L.O.* Court was preserving the special school environment. *T.L.O.*, 105 S. Ct. at 743.

279. *T.L.O.*, 105 S. Ct. at 744 n.7.

280. *Id.*

281. *Id.* (citing Picha v. Wieglos, 410 F. Supp. 1214, 1219-21 (N.D. Ill. 1976)).

282. *Id.* at 745 n.10. "Of course New Jersey may insist on a more demanding standard under its own Constitution . . . ." *Id.*

283. *See Mapp*, 367 U.S. 643 (1961). Prior to *Mapp*, states adopted their own standards regarding privacy rights of citizens, causing lack of uniform protection among the states. The *Mapp* decision created uniform privacy protection. This uniform application could deteriorate as a result of the *T.L.O.* decision.

284. Hogan & Schwartz, *The Fourth Amendment and the Public Schools*, 7 WHITTIER L. REV. 527 (1985). The Report indicates that school policy is set by local school districts. *Id.* at 540-41.

rule issue, illegally seized evidence may also be subject to disparate treatment among school districts.[285] The Court needs to adopt definitive guidelines in order that student privacy rights need not depend on the locale of the school district.

CONCLUSION

Prior to *T.L.O.*, the Court had not defined what constituted an "unreasonable" search of a student in the public school setting. While *T.L.O.* has settled some issues, much confusion remains. Students are protected by the fourth amendment where they have a legitimate expectation of privacy, but the extent of protection afforded to students is minimal. The "reasonableness" standard permits searches based on as little as minor infractions of school rules and is so flexible that school searches will almost always, except in the most extreme circumstances, be upheld. The Court's failure to: 1) distinguish between major and minor infractions as grounds for a search, 2) give deference to individualized suspicion, as opposed to generalized suspicion, as a prerequisite to search, and 3) adopt a standard for police searches, may further diminish a student's privacy right. The standard adopted by the Court, and the issues left unresolved, render the students' fourth amendment protection in the school meaningless.[286]

The short term goal of maintaining order and discipline in the schools could have been accomplished without compromising the long term goal of teaching democratic values and constitutional rights. Both goals could have been achieved, if the Court adopted a probable cause standard but allowed an existing exception for school officials, where, like *Terry*, safety was threatened.

The *T.L.O.* decision presents an unfortunate lesson in privacy protection and democratic values to the youth of our country.[287] *T.L.O.* also reflects the

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285. *T.L.O.*, 105 S. Ct. at 739 n.3. Finally, *T.L.O.* may be used as a basis to diminish the fourth amendment protection afforded to minors in other settings. *See* E.Z. v. Coler, 603 F. Supp. 1546 (N.D. Ill. 1985) (authorizing nude search of suspected child abuse victim in home). A Washington court disapproved of general search of rock concert patrons (predominantly minors). Jacobsen v. Seattle, 98 Wash. 2d 668, 658 P.2d 653 (1983). *T.L.O.*. may also be used as a basis to diminish fourth amendment rights of other persons if other specialized environments are recognized in the future. Rosenberg, *New Jersey v. T.L.O.: of Children and Smokescreens*, 19 FAM. L. Q. 311, 329 (1985). It is conceivable that the reasonable suspicion standard could be extended to apply to searches of college dormitory rooms since colleges are similarly considered as specialized educational environments with an " 'affirmative obligation' to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process." Moore v. Student Affairs Comm. of Troy State, 284 F. Supp. 725, 729 (N.D. Ala. 1968).

It may also follow that the standard for searching teachers in the school setting could be diminished to a "reasonableness" standard. "Just as students are protected by the Fourth Amendment, teachers are also entitled to the amendment's protection against unreasonable searches by school officials." Alinovi v. Worcester School Comm., 766 F.2d 660, 666 (1st Cir. 1985).

286. *See supra* note 224.

287. *See* Buss, *supra* note 162, at 792 (quoting E. FRIEDENBERG, THE DIGNITY OF YOUTH AND OTHER ATAVISMS at 93 (1965)). "It is idle to talk about civil liberties to adults who were systematically taught in adolescence that they had none; and it is sheer hypocrisy to call such people freedom-loving." *Id.* The school is a teacher of democracy:

By failing to impart to our citizens a passionate devotion to their freedom and an

recent trend of the Supreme Court in further weakening fourth amendment protection.[288] If the Court had adopted a probable cause standard, with application of existing exceptions, both the school's interest and the students' fourth amendment rights would be afforded meaningful protection.[289] Instead, the Court chose to adopt a far reaching exception to the probable cause requirement: the school-search exception.

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understanding of their obligations as free citizens we have inadvertently engaged in a kind of unilateral disarmament which could well prove more devastating to the cause of liberty than would the voluntary destruction of our defense arsenals.

J. HOWARD, 20:6 REOPENING THE BOOK ON ETHICS: ROLE OF EDUCATION IN A FREE SOCIETY 611 (American Education, U.S. Dept. of Educ., Oct. 1984).

The Court has recently recognized the function of the school in preparing our youth for citizenship: "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum and the civics class; schools must teach by example the shared values of a civilized social order." *Fraser*, 106 S. Ct. at 3165 611.

288. *See* United States v. Montoya De Hernandez, 105 S. Ct. 3304 (1985) (upholding alimentary canal search based on reasonable suspicion). Routine border searches are allowed without probable cause, reasonable suspicion or warrant. *Id.* at 3309 (citing United States v. Ramsey, 431 U.S. 606 (1977)). *See also* California v. Carney, 105 S. Ct. 2066 (1985) (upholding warrantless search of mobile motor home based on auto exception); United States v. Sharpe, 105 S. Ct. 1568 (1985) (holding 20 minute detention for investigative purpose as reasonable); United States v. Johns, 105 S. Ct. 881 (1985) (upholding warrantless search of packages in truck three days after seizure).

See also T.L.O., 105 S. Ct. at 761 n.12 (Stevens, J., dissenting). Justice Stevens cited the Court's willingness to grant "prosecutors relief from suppression orders with distressing regularity" by reference to more than twenty cases since 1982 in which the Court has reversed suppression orders. *Id.*

289. It has also been traditional for the courts to protect those individuals who are powerless to protect themselves by way of the political process. However, *T.L.O.* has not extended this protection to students in the schools. "[T]he Court hasn't been sufficiently protective of the unique status of children." Bowen, *Search Rules: The Court Sets A Standard*, TIME, Jan. 28, 1985, at 77 (quoting J. Weill, Children's Defense Fund, Washington, D.C.).

Conscientious Objection: A Constitutional Right

*Fredrick L. Brown**, Stephen M. Kohn*** & Michael D. Kohn****

I. The Constitutional Status of Conscientious Objection

Thousands of conscientious objectors (C.O.s) to military service have been indicted, fined and imprisoned for following their consciences instead of the draft laws. Although many C.O.s still face this same dilemma, the Supreme Court has consistently avoided directly addressing the issue of a constitutional right to conscientious objection.[1]

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1. Although some Justices have urged the Supreme Court to consider this issue, *see, e.g.*, Ehlert v. United States, 402 U.S. 99, 113-15 (1971) (Douglas, J., dissenting), the Court has consistently refused, *see, e.g.*, United States v. Sisson, 399 U.S. 267, 288 (1970); Gillette v. United States, 401 U.S. 437, 461 n.23 (1971), and Johnson v. Robinson, 415 U.S. 361, 375 n.14 (1974). Thus, in *Gillette*, the Court, addressing the issue of "selective C.O." (i.e., whether a C.O. had to oppose all wars or could gain exemption from fighting in a particular war he felt was unjust) chose explicitly to reject considering an independent constitutional right to C.O. *See* 401 U.S. at 461 n.23. The Court's conclusion that section 6(j) of the Selective Service Act exempted only persons "opposed to participation in war of any form" and not those who objected to fighting in a particularly "unjust" war was based solely on statutory construction. *Id.* at 441-50. In terms of a free exercise clause argument, *Gillette* simply held that a political decision based on the merits of a particular war did not rise to the level of a religious or moral decision based against all war. The Court held that disallowing selective C.O. did "not work a penalty against any theological position," because selective objectors were not morally opposed to killing or warfare. *Id.* at 462. Likewise, *Johnson* also refused to address the issue of a consitutional right to conscientious objection. 415 U.S. at 375 n.14. *Johnson* considered the issue of whether a C.O. who performed alternative service was entitled to veteran's benefits. *Id.* at 374. The Court held that veteran's benefits are neither designed to nor in fact do interfere with the free exercise of religion. Veteran's benefits, the Court reasoned, are designed to promote manpower recruitment into the armed ser-

There are three actively enforced draft laws that currently deny the right to conscientious objection: the draft registration requirement[2] and two Solomon Act laws.[3] The draft registration laws require all young men born after 1960 to register with the Selective Service or face a criminal conviction with a maximum of a five year prison sentence and a $10,000 fine.[4] The Solomon Act laws preclude nonregistrants from obtaining access to federal educational or job training assistance.[5]

The Selective Service regulations do not contain provisions to allow a C.O. to register as such; they do not allow (and, in fact, deny) the right to an administrative hearing to anyone who feels he cannot register because of conscience; and C.O.s are precluded from raising conscientious objection as a defense to criminal prosecutions resulting from non-registration. The first Solomon Act amendment (Solomon I) denies all federal aid for higher education to students, regardless of age or sex, who refuse to sign draft law compliance statements.[6] Similarly, the second Solomon Act amendment (Solomon II) denies federal assistance to C.O.s who wish to enroll in Federal Job Training Programs, Veteran's Employment Programs, and the Job Corps.[7] The administrative regulations of both Solomon Acts fail to provide space on their required compliance forms to allow C.O.s to register as such. Furthermore, both Solomon I and Solomon II not only deny federal educational and job training benefits to C.O.s, but also preclude any administrative or judicial review of those denials. Consequently, untold thousands of sincere moral and religious

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vices and the readjustment of former soldiers into civilian life. *Id.* at 376. The Court concluded that these purposes were rational, non-discriminatory and clearly within Congress' power to "raise and support armies." *Id.* at 385.

Most circuit courts of appeal have denied the existence of a constitutional right to conscientious objection to military conscription. *See, e.g.*, United States v. Murray, 452 F.2d 503, 504 (8th Cir. 1971); Polsky v. Wetherril, 438 F.2d 132, 134 (10th Cir. 1971); Wood v. United States, 373 F.2d 894, 900 (5th Cir. 1967); Richter v. United States, 181 F.2d 591, 593 (9th Cir. 1950). Some courts have indicated there may be such a right: *e.g.*, United States v. Boardman, 419 F.2d 110, 112-13 (1st Cir. 1969); United States v. Thorn, 317 F. Supp. 389, 393-94 (E.D. La. 1970), and at least one court has explicitly upheld a first amendment right to conscientious objection: United States v. Sisson, 297 F. Supp. 902, 910 (D. Mass. 1969).

2. Military Selective Service Act, 50 U.S.C. app. § 462 (1982); Proclamation No. 4771, 45 Fed. Reg. 45, 247 (1980); Solomon Amendment I, 50 U.S.C. app. § 462, (f) (1981) and Solomon Amendment II, 29 U.S.C. § 1504 (1982).

3. *See infra* notes 5-6.

4. Selective Service Act, 50 U.S.C. app. § 462 (1982).

5. In Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984), the Supreme Court held that the Solomon Act was not an illegal bill of attainder or an unconstituional violation of the fifth amendment privilege against self-incrimination. The first amendment weaknesses of the Solomon Act were not raised by any party or addressed by the court. Justice Marshall's dissent noted that potential first amendment challenges to the Solomon Act could be raised. In Justice Marshall's words: "there are other 'rights of constitutional stature whose exercise [government] may not condition by the exaction of a price', 'such as the exercise of rights guaranteed by the First Amendment, but the posture of this appeal presents only a challenge to the burdens the legislation places on the exercise of Fifth Amendment rights." *Id.* at 861 n.12 (Marshall, J., dissenting) (citations omitted).

6. Solomon Act Amendment I, 50 U.S.C. app. § 462(f) (1981).

7. Solomon Act Amendment II, 29 U.S.C. § 1504 (1982).

objectors face indictment, felony convictions and the loss of federal assistance.[8]

The major constitutional rationale justifying denial of a right to conscientious objection to conscription is the war power of Congress. The potential threat of military conquest has been used to justify an absolute war power under article I, section 8, of the United States Constitution. But this argument is seriously flawed, without historical support and contrary to modern Supreme Court jurisprudence.[9]

It is our contention that the principles of freedom memorialized in the free exercise clause (FEC) of the first amendment guarantee freedom of conscience as a fundamental and absolute right paramount to the war powers of Congress. The efficacy of this argument will be demonstrated by: (1) tracing the legacy of our Founding Fathers to divine their original intent regarding the FEC; (2) examining the historical interplay between the war power of Congress and the right to C.O. under the FEC; and (3) analyzing Supreme Court decisions that shed light on how the FEC operates in the context of conscientious objection to military conscription.

II. The Historical Background of Conscientious Objection In The Pre-Revolutionary Colonies

The free exercise clause of the first amendment was the pinnacle of the colonial and revolutionary struggle for religious freedom in the New World. Incorporating the ideals of leading American civil libertarians such as Roger Williams, William Penn, and James Madison, the FEC was designed to protect individuals from religious oppression and to provide a right to conscientious objection.[10]

Pacifist religious sects such as the Quakers, Mennonites, and Brethren were well represented in early colonial immigration.[11] Many of these religious pacifists had fled from persecution in England and Europe. For example, members of the Society of Friends (Quakers) were persecuted for their religious beliefs and practices: "The main accusation brought against Friends during this period were those of blasphemy; disturbing of ministers; non-payment of tithes; plotting against the government; vagrancy . . . and refusal to perform military service . . . ."[12] Among the many laws used to persecute Friends were the English Militia Acts of 1649 and 1650, which granted county militia commissioners the powers to conscript soldiers and to raise money and supplies.[13] Refusal to train was punishable by a fine or imprisonment.[14] Prosecu-

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8. See United States v. Schmucker, 721 F.2d 1046 (6th Cir. 1983), which notes that the majority of defendants to date are "religious or moral objectors, including a large number of Mennonites." *Id.* at 1049.

9. For a critique of the government's right to conscript in peacetime, see Holmes v. United States, *cert. denied*, 391 U.S. 936, 936-49 (1968) (Douglas, J., dissenting).

10. S. Kohn, Jailed for Peace: The History of American Draft Law Violators 1656-1985, 133-35 (1986) [hereinafter Jailed for Peace].

11. *See, e.g.*, P. Brock, Pacifism In The United States - From The Colonial Era To The First World War (1968).

12. E. Vipont, The Story of Quakerism 40-41 (1954). Mennonites also left Germany in the 1720s to escape persecution for C.O.: P. Brock, Pacifism In The United States — From The Colonial Era To The First World War (1968).

13. English Militia Acts of 1649 and 1650 can be found in Acts & Ords. Interregnum.

14. M. Hirst, The Quakers in Peace and War 54-55 (1923).

tion for resistance became a "common form of Quaker suffering" and imprisonments, fines, and seizure of property were reported throughout the countryside.[15]

When Quakers settled in America, they became leaders in the struggle for freedom of conscience. Not surprisingly, these pacifists considered conscientious objection a fundamental right. This right was secured in the religious free colonies, including Rhode Island and Pennsylvania.[16]

A. Rhode Island

The first American colony to establish an absolute right to religious freedom was Rhode Island. The Rhode Island Charter of 1663 recognized religious liberty as part of the fundamental law.[17] Free exercise of religion was not a mere statutory right which the colonial legislature was free to amend or retract. Instead, it was canonized into *The Colonial Charter* comparable to a modern constitutional right.[18]

The Rhode Island Charter established three basic principles: (1) freedom of religion necessarily implied the free exercise of religion; (2) free exercise was absolute except when it actually created a civil disturbance; (3) any law or regulation which negated the free exercise of religion was nullified.[19] The fact that the Charter protected both religious belief and free exercise is not surprising, considering the hardships that religious minorities had suffered for practicing proscribed religious activities, including refusing to train for military service.[20]

In 1673, the issue of whether conscientious objection was a protected fundamental right was first tested in Rhode Island. Fearing an imminent attack by both Dutch settlers and Indians, the colony passed a militia conscription bill.[21] The actions of the Rhode Island legislature in protecting conscientious objectors were sweeping and unequivocal. The legislators incorporated into the military conscription bill a recognition of their duties under the Charter. The law exempted from active military duty all those who for reasons of conscience

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15. *Id.*

16. *See infra* notes 15 & 24; M. HIRST, *supra* note 14, at 330-34, 350-52, 370-72 (1923).

17. The Rhode Island Charter of 1663, provided C.O.s with the right to be "secure . . . in the free exercise and enjoyment of all their civil and religious right[s] . . . ." SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE US CONSTITUTION AND BILL OF RIGHTS (R. L. Perry & J. Cooper eds. 1952) [hereinafter DOCUMENTARY ORIGINS].

18. JAILED FOR PEACE, *supra* note 10, at 7-9.

19. *Id.*

20. This colonial Rhode Island distinction remains at the foundation of modern Supreme Court FEC jurisprudence. The Supreme Court has continued to hold that "religious beliefs and opinions [are] absolute." Braunfeld v. Brown, 366 U.S. 599, 603 (1961); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). But it has also recognized, as did the Rhode Island Charter, that overt acts could be regulated. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 215 (1972); Reynolds v. United States, 98 U.S. 145 (1878). The Rhode Island Charter articulated the distinction as follows: religious rights were absolute except as they "actually disturb the civil peace of our said colony." M. HIRST, *supra* note 14, at 55.

21. For an account of these Rhode Island events, see M. HIRST, *supra* note 14, at 330-40.

could not "train, arm, rally to fight, or kill another person."[22]

The first colony to consider the rights of conscientious objectors under a free exercise clause unequivocally guaranteed, even in the face of actual invasion of hostile forces, an absolute right to conscientious objection exemptions.[23]

B. Pennsylvania

Pennsylvania was also one of the earliest colonies to establish a right to conscientious objection based on religious freedom. Founded by William Penn, the colony was clearly stamped with his pacifist and civil libertarian ideals.[24] Penn's philosophy synthesized two important concepts: first, that pacifism was an essential element of religious freedom, and second, that freedom of religion encompassed not just freedom of thought but also the free exercise of conscience.

As a Quaker, Penn was well aware that Friends suffered persecution for religious pacifism. He recognized resistance to war as a valid religious exercise not "obnoxious" to civil government:

> Not fighting, but suffering . . . affirm that Christianity teacheth people to beat their swords into plowshares, and their spears into pruning hooks, and to learn war no more . . . faith and patience succeeded in fighting in the doctrine and practice of [Quakers]. Nor ought they for this to be obnoxious to civil government, since they cannot fight for it neither can they fight against it . . . .[25]

Penn explicated his beliefs in his 1670 booklet, *The Great Case of Liberty of Conscience*.[26] He wrote: "First, by liberty of conscience, we understand not

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22. The act provided:

> [N]oe person nor persons [within this Colony], that is or hereafter shall be persuaded in his, their conscience or consciences [and by him or them declared], that he nor they cannot nor ought not to trayne, to learne to fight, nor to war, nor kill any person or persons.
>
> That neither he nor they shall at any time be compelled against his or their judgment and conscience to trayne, arm or fight, to kill any persons by reason of, or at the command of any officer of this collony, civill nor military, nor by reason any by-law here past or formerly enacted; nor shall suffer any punishment, fine, distraint, penalty nor imprisonment, who cannot in conscience trayne, fight or kill any person or persons for the aforesaid reasons expressed with many more implyed, and others for brevety concealed, such aged men of such said understandings shall be exempt from traynings, arminge, rallyinge to fight, to kill, and all such martiall service as men are by any other debility. . . .

Act of August 13, 1673, 2 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 498 (J. Bartlett ed. 1968).

23. JAILED FOR PEACE, *supra* note 10, at 8.

24. Penn's philosophies were very influential in the development of civil liberties in the United States. The "Liberty Bell" was cast in his honor and the Bill of Rights author, James Madison stated that "Pennysylvania may well be proud of such a founder and lawgiver as William Penn, and an obligation be felt by her enlightened citizens to cherish by commemorations of his exalted philanthropy and his beneficient institutions." W. COMFORT, WILLIAM PENN AND OUR LIBERTIES 2 (1947).

25. W. PENN, RISE AND PROGRESS OF THE QUAKERS, IV (1664); *see also Micah* 4:3-4.

26. W. PENN, THE GREAT CASE OF LIBERTY OF CONSCIENCE ONCE MORE BRIEFLY DEBATED

only a mere liberty of the mind, in believing or disbelieving this or that principle or doctrine, but the exercise of ourselves in a visible way."[27] In 1701, these basic ideas were codified into the *Pennsylvania Charter of Privileges*.[28] This Charter was an important document in the development of democratic rights in America and has been praised as "the most famous of all colonial constitutions."[29] It duplicated the three major premises of the Rhode Island Charter: (1) the synthesis between protecting religious belief and exercise; (2) the absolute right to free exercise excepting only the creation of actual civil upset; and (3) the supremacy of the charter over any law which contravened the sacred right to free exercise.[30]

Under the Pennsylvania Charter, no person could be compelled to act contrary to conscience. Free exercise was not a license for disrupting society, but on the other hand, it was an absolute bar against governmental compulsion "to do or suffer any . . . [a]ct" which was "contrary to their religious [p]ersuasion."[31] Thus, although people could not be *forced to act* contrary to their religious beliefs, overt religious practices causing an actual disruption of society could be prohibited.[32]

The absolute right not to be compelled to act contrary to conscience was often debated in Pennsylvania over the issue of forming a colonial militia. The English Crown had continually requested Pennsylvania's colonial legislature to form a militia. These requests were rejected. As early as 1689, one legislator articulated the sentiment against forming a militia saying that: "I had rather be ruined than violate my conscience . . . ."[33]

In 1739, the Royal Governor pleaded with the legislature to establish a militia. Again the request was denied. Among the arguments used to defeat

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AND DEFENDED, BY THE AUTHORITY OF REASON, SCRIPTURE, AND ANTIQUITY: WHICH MAY SERVE FOR PLACE OF A GENERAL REPLY TO SUCH LATE DISCOURSES, AS HAVE OPPOSED A TOLLERATION 11 (1670).

27. *Id.*

28. B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND 171 (1977) [hereinafter GREAT RIGHTS].

29. E. CHANNING, A HISTORY OF THE UNITED STATES, VOLUME II: A CENTURY OF COLONIAL HISTORY, 1660-1760, 322 (1927).

30. The Charter stated:

> That no person or persons . . . who shall confess . . . one almighty God . . . and profess him or themselves obliged to live quietly under the civil government, shall be in any case molested or prejudiced . . . because of his or their conscientious persuasion or practice . . . or to do or suffer any other act or thing, contrary to their religious persuasion.

W. PENN, PENNSYLVANIA CHARTER OF PRIVILEGE (1701), *reprinted in* GREAT RIGHTS, *supra* note 28, at 171.

31. *Id.*

32. Many pacifist sects settled in Pennsylvania because of William Penn's acceptance of religious freedom. For example, in a 1718 address to William Penn, the Mennonite community wrote: "We came to Pennsylvania to seek an asylum from the persecution to which we had been subjected to in Europe . . . . We came to Pennsylvania to enjoy freedom of mind and body. . . ." P. BROCK, PACIFISM IN THE UNITED STATES — FROM THE COLONIAL ERA TO THE FIRST WORLD WAR 163 (1968).

33. SHARPLESS, A QUAKER EXPERIMENT IN GOVERNMENT 195 (1898) (citing Pennsylvania Colonial Records).

the proposal was opposition to forcing pacifists to bear arms, which was condemned by the Assembly as violating "a fundamental [right] in our constitution" and a "direct breach of our charter."[34]

In 1754, at the onset of the French and Indian War, the Royal Governor again pleaded with the Assembly. He proposed a militia bill exempting those "conscientious about bearing arms."[35] The Assembly compromised and established a strictly voluntary militia.[36] But the Assembly remained unequivocal about the rights of conscience. No person would be required to join a militia against his conscience even if the very existence of the colony were at stake. The Pennsylvania Assembly declared that "*[t]hose who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.*"[37]

Every subsequent Pennsylvania militia act would contain conscientious objector provisions.[38] As with the colony of Rhode Island, Pennsylvania considered conscientious objection to be a fundamental right guaranteed under its Charter.

C. Other Colonies and the Revolution

Not all of the colonies were as tolerant of Quakers and conscientious objectors. Some colonies passed laws prohibiting Quakers from entering their territories. In the mid 1600s, Massachusetts passed a number of laws directed at Quakers, including banishing them from the colony.[39] A Quaker who returned after banishment could be sentenced to death.[40] In 1660, Virginia banished its Quaker population[41] and in 1663 a member of the Virginia House of Representatives was expelled for "loving" a Quaker.[42]

Both North Carolina and New Jersey attempted to persecute Quaker minorities by enacting militia conscription laws.[43] In New Jersey, Quakers were a powerful force in the western part of the state. In 1704, an anti-Quaker governor passed a broad militia act which imposed heavy fines and confiscation of property of those who refused to train. The law was condemned as an anti-Quaker measure and the local constables refused to enforce it. When the Attorney General attempted to try a case, a sympathetic jury refused to convict.[44] Within the year, the law was disallowed by the Crown and the legisla-

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34. *Id.* at 207.

35. *Id.* at 214-15.

36. *Id.* at 218.

37. *Id.* at 219.

38. Russell, *Development of Conscientious Objection Recognition in the U.S.*, 20 GEO. WASH. L. REV. 409 (1951-52).

39. Massachusetts Colonial Laws of 1660-1672 can be found in HOWE, THE PURITAN REPUBLIC 198-206 (1899). In fact, four Quakers were hanged for violating banishment orders. *Id.* at 238.

40. *Id.*

41. *Id.* at 256-60.

42. *Id.* at 260.

43. *See* HIRST, *supra* note 14, at 351; E. TANNER, THE PROVINCE OF NEW JERSEY 563-75 (1908).

44. E. TANNER, *supra* note 43, at 563-75.

tures refused to reenact the measure.[45] All future colonial New Jersey militia laws contained liberal provisions which allowed Quakers to escape compulsory personal service.[46]

North Carolina passed a law in 1695 exempting all conscientious objectors from militia service.[47] But in 1704, Quakers lost control of the colonial assembly. An anti-Quaker assembly expelled Quaker representatives for refusing to take oaths[48] and immediately repealed the conscientious objector's exemption to the state militia bill.[49]

As the American revolution approached, religious tolerance blossomed and many colonial anti-Quaker laws were repealed.[50] On July 8, 1775, the Continental Congress passed the first national conscientious objection statute.[51] It recognized that many patriots could not bear arms out of religious conviction:

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intends no violence to their consciences, but earnestly recommend it to them to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and do all other services to their oppressed country, which they can consistently with their religious principles.[52]

The rights of C.O.s remained intact regardless of the extreme national crisis during the American Revolutionary War. In fact, even when cities were facing British invasion and occupation, the rights of conscience were protected. In a revealing letter to the Pennsylvania Council of Safety, George Washington, the Commander of the Revolutionary Armies, warned of the imminent attack on Philadelphia and called for the conscription of all persons, *except* conscientious objectors. Washington wrote: "As . . . the principal object of the enemy is . . . the City of Philadelphia, it is absolutely necessary, that every [p]erson able to bear [a]rms (except such as are [c]onscientiously scrupulous against in every [c]ase), should give their personal service. . . ."[53]

Five new state governments also recognized the rights of conscientious objectors. In 1776, the Delaware[54] and Pennsylvania[55] Declarations of Rights included exemptions from military service for religious pacifists. In 1777, the

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45. *Id.*

46. *Id.*

47. HIRST, *supra* note 14, at 350-51.

48. *Id.* at 351.

49. *Id.*

50. Russell, *supra* note 38, at 413 (citing North Carolina, Act of December 5, 1770; Virginia, Act of November 1766; Massachusetts, Act of December 31, 1757; New York, Act of February 19, 1775).

51. *Id.* at 414.

52. *Id.*

53. 7 THE WRITINGS OF GEORGE WASHINGTON 34-35 (J. Fitzpatrick ed. 1931) (letter dated January 19, 1777).

54. DELAWARE DECLARATIONS OF RIGHTS § 10 (1776).

55. PENNSYLVANIA DECLARATION OF RIGHTS § 8 (1776). Now, PA. CONST. art. III, § 16.

New York Constitution[56] and Vermont Declaration of Rights[57] institutionalized the same exemptions. The New Hampshire Constitution[58] of 1784 also explicitly recognized a right to conscientious objection. Thus, at the birth of the United States, the right of religious conscientious objection was protected and recognized by our Founding Fathers and numerous state legislatures.[59]

III. Conscientious Objection and the Federal Constitution

A. The Debates Concerning a Federal Constitutional Amendment of Conscientious Objection

When the Founding Fathers debated the Constitution, there was no mention of either conscientious objection or the power of the federal government to conscript. The new constitution did not contain any Bill of Rights or any guarantee of religious freedom. As a result of these absences, many of the state ratifying conventions passed resolutions urging Congress to incorporate a bill of rights.[60] Conscientious objection was considered one of the fundamental rights needing constitutional protections.[61]

Pennsylvania initiated the state movement for a federal bill of rights in the now famous Minority Report of the Pennsylvania Convention.[62] The Minority Report warned that the "sacred" right of conscientious objection may be violated and called for its federal protection.[63] Other state ratifying conventions — Maryland, Virginia, Rhode Island and North Carolina — joined with Pennsylvania to demand federal protection of conscientious objectors.[64]

On June 8, 1789, Virginia Representative James Madison introduced the original Bill of Rights into Congress.[65] One of his proposed amendments would

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56. N.Y. Const. art. XL (1777).

57. Vermont Declaration of Rights § 9 (1777). Now, Vt. Const. ch. I art. 9.

58. N.H. Const. pt. 1, art. 13.

59. *See, e.g.*, Fox, *Conscientious Objection to War: the Background in Current Appraisal*, 31 Clev. St. L. Rev. 77, 79 (1982).

60. Jailed For Peace, *supra* note 10, at 10.

61. *Id.*

62. B. Schwartz, II The Bill of Rights: A Documentary History 628 (1977) [hereinafter Documentary History].

63. The Minority Report of the Pennsylvania Convention stated in part:

> [T]he rights of conscience may be violated as there is no exemption of those persons who are conscientiously scrupulous of bearing arms. These compose a respectable proportion of the community in the State. This is the more remarkable, because even when the distresses of the late war, and the evident disaffection of many citizens of that description, inflamed our passions, and when every person who was obliged to risk his own life, must have been exasperated against such as on any account kept back from the common danger, yet even then, when outrage and violence might have been expected, the rights of conscience were held sacred.

Id. at 627.

64. I J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 334 (1896) (Rhode Island) [hereinafter Elliot's Debates]; II Elliot's Debates 531 (Pennsylvania); III Elliot's Debates 659 (Virginia); IV Elliot's Debates 244, 245 (North Carolina); V Elliot's Debates 533 (Maryland); Documentary History, *supra* note 62, at 898.

65. Great Rights, *supra* note 28, at 110.

have prohibited *states* from conscripting religious conscientious objectors into their militias.[66] Madison's proposed amendment required all states to exempt "persons religiously scrupulous" from being "compelled to render military service in person."[67]

The application of this amendment only to the states is understandable. The history of conscription clearly indicates that at the time of the original Constitutional Convention and the debates on the Bill of Rights, there was no recognition of a federal power to conscript *or draft*.[68] Instead, the Founding Fathers understood conscription to be a state power over state militias.[69]

No representative at the Constitutional Convention was ever to suggest or debate that Congress should be granted the power to initiate a federal draft.[70] The defense of the United States was provided for in article I, section 8, clauses 12, 15 and 16 of the Constitution. These clauses gave Congress the power to "raise and support armies;"[71] call the state militias into national service;[72] and to organize, arm, and discipline the nationalized militias.[73] Nowhere was there an explicit federal power to conscript. The phrase "raising and supporting" armies was adopted from the English concept of raising and supporting armies, which did not allow for a draft, but instead was based on voluntary enrollment.[74] Thus, it is not surprising that Madison's original proposal for a conscientious objection exemption applied only to the state militias, as they were the only bodies with an undisputed power to conscript.[75]

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66. *Id.* at 166.

67. *Id.*

68. JAILED FOR PEACE, *supra* note 10, at 14 n.36.

69. *See, e.g.*, Friedman, *Conscription and the Constitution: The Original Understanding*, 67 MICH. L. REV. 1493 (1969). *But see* Malbin, *Conscription, The Constitution and the Framers: An Historical Analysis*, 40 FORDHAM L. REV. 805 (1972).

70. JAILED FOR PEACE, *supra* note 10, at 10-11.

71. U.S. CONST. art. I, § 8, cl. 12.

72. *Id.* at cl. 15.

73. *Id.* at cl. 16.

74. Holmes v. United States, 387 F.2d 781 (7th Cir. 1967), *cert. denied*, 391 U.S. 936, 945-46 n.8 (1968) (Douglas, J., dissenting on denial of granting writ of certiorari); *see* Freeman, *The Constitutionality of Peacetime Conscription*, 31 VA. L. REV. 40, 68-69 (1944); Wells, *The Draft and the Militia Clause of the Constitution: A Layman's View*, 28 GUILD 27-28 (1969); FARRAND'S RECORDS I: 25, II: 323, 329, 509, 616-17; III: 56, 116; I ELLIOT'S DEBATES, *supra* note 64, at 328, 335; II ELLIOT'S DEBATES, *supra* note 64, at 136-37, 520, 536, 545; III ELLIOT'S DEBATES, *supra* note 64, at 178, 248, 410; IV ELLIOT'S DEBATES, *supra* note 64, at 96-100, 245, 260-61, 441-42; V. ELLIOT'S DEBATES, *supra* note 64, at 580; THE FEDERALIST Nos. 9, 22-26, 28-29, 41 (Hamilton).

75. The failure of the Constitution to explicitly authorize a federal draft led to serious challenges to the constitutionality of a federal draft when the American Civil War threatened the existence of the federal system itself in 1863. The Pennsylvania Supreme Court found the draft act of 1863 unconstitutional. Kneedler v. Lane, 45 Pa. 238 (1863) (3-2 decision) [hereinafter *Kneedler I*]. This decision was quickly overturned when there was change in court personnel. Kneedler v. Lane, 45 Pa. 295 (1863) (3-2 decision) [hereinafter *Kneedler II*]. But the issue was still the subject of serious debate for over fifty years after *Kneedler II* was decided. *See* Arver v. United States, 245 U.S. 366 (1918) (constitutionality of draft was decided). *But see* Taney, *Thoughts on the Conscription Law of the United States - Rough Draft Requiring Revision, printed in* 18 TYLER'S QUARTERLY HISTORICAL AND GENEALOGICAL MAGAZINE 74 (1937) 74-87 (Chief Justice Taney concluded that federal draft was unconstitutional). *See also* J. RANDALL,

Madison's proposed Conscientious Objection Amendment was adopted by the House after serious debate[76] that centered around criticism by states' rights advocates in House Committee. Arguments were made that independent state militias were essential for a state to remain capable of protecting itself from potential federal tyranny. They felt that a federal C.O. exemption could be abused by the federal government to undermine the independence of state militias. After the C.O. clause passed the House, it was defeated in the Senate. Unfortunately, the Senate debates were closed and no records exist as to the reasons for its defeat.[77] The Senate also went on to defeat all House attempts to have the Bill of Rights applied to the states.[78]

Thus, the Congressional choice not to adopt a constitutional amendment protecting C.O.s from service in state militias was not an indication of opposition to conscientious objection.[79] Instead, it was an affirmation of states' rights, which demanded that none of the fundamental rights protected under the Bill of Rights would be applied to the states. Nonetheless, Congress did pass the free exercise clause of the first amendment. This clause, modeled after the original Rhode Island Charter,[80] was designed to protect the free exercise of religion from federal government oppression.

CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1951); Black, *The Selective Draft Cases — A Judicial Milepost on the Road to Absolutism*, 11 B.U. L. REV. 37 (1931).

76. The amendment adopted by the House on August 24, 1789, read: "A well regulated militia, composed . . . being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person." GREAT RIGHT, *supra* note 28, at 238. Representative Gerry felt that granting the federal government the power to exempt people from state militias could lead to the destruction of the militia system. He opposed the conscientious objection clause in the House Committee stating: "They (the United States Congress) can declare who are those religiously scrupulous, and prevent them from bearing arms . . . whenever governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia . . . ." DOCUMENTARY HISTORY, *supra* note 62, at 1107. The sentiments of Rep. Gerry were repeated in House debates on the Federal Militia Bill of 1790. A C.O. exemption was recommended to the Bill, but again House members thought that states should retain control of state militias. Rep. Jackson (a member of the Constitutional Convention) said: "If this privilege (granting militia exemptions) belongs to the state, as they have declared it does, why shall Congress attempt to wrest it from them . . . . Certainly, such conduct must occasion an inconsiderable degree of jealousy." IV ELLIOT'S DEBATES, *supra* note 64, at 424 (debate of December 22, 1790). The Senate also went on to defeat all House attempts to have the Bill of Rights applied to the States. *Id.*

77. GREAT RIGHTS, *supra* note 28, at 181-82.

78. The House had passed the following Amendment which was defeated by the Senate: "No state shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the Freedom of Speech, or of the Press." *Id.* at 182, 240. The failure to pass this amendment led to judicial refusal to apply any of the Bill of Rights to the states until after the passage of the fourteenth amendment. *See, e.g.*, Barron v. The Mayor & City Council of Baltimore, 32 U.S. 243, 247 (1833); Permoli v. First Municipality, 44 U.S. 588, 609 (1845).

79. S. KOHN, JAILED FOR PEACE, THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS, 1658-1985, 9-14 (1986) [hereinafter JAILED FOR PEACE].

80. *See supra* notes 14, 17 & 66-69. *Compare* U.S. CONST. amend. I (FEC) *with* Rhode Island Charter of 1663; *compare* U.S. CONST. amend. I (FEC) *with* Pennsylvania Charter of Privileges of 1701. *See also supra* note 30.

B. The Free Exercise Clause and Conscientious Objection

Although the Founding Fathers did not specifically include C.O. in the Bill of Rights, it is clear that they considered C.O. a right protected under the free exercise clause.

First, the colonial charters used by the Founding Fathers as models for the FEC recognized C.O. as a fundamental right. The influence of the Pennsylvania Charter on the Founding Fathers is well documented.[81] The Rhode Island Charter was explicitly referred to in the House Committee debates on the first amendment.[82] During the August 15, 1789 House Committee on the whole debate over the first amendment, Representative Huntington was recorded as stating that under the Charter of Rhode Island, no religions could be established by law and he hoped the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of religion.[83] Second, when the Founding Fathers debated incorporating C.O. into the Constitution, their debate was limited to exemption from *state* militia service. There was no notion of a federal power to conscript; consequently, the debate revolved around the duty of the states to provide C.O. exemptions. The existence of a right to C.O. was not questioned.[84] Rather the debate focused on who should protect the right. Although there was substantial support in Congress to mandate the states to exempt C.O.s, the states' rights advocates prevailed, and thus the states retained the power to exempt persons from state militia duty.

Third, the Founding Fathers were not concerned that C.O. would lessen available manpower during national military emergencies. Even during the gravest threats to the new nation, C.O. exemptions *had been* recognized by the new federal government and the newly independent states.[85]

Fourth, the Founding Fathers respected the important role played by religious pacifists who settled the New World. Pacifism was a mainstream religious doctrine, clearly supported in both the New and Old Testaments.[86]

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81. *See, e.g.*, E. CHANNING, A HISTORY OF THE UNITED STATES: A CENTURY OF COLONIAL HISTORY, 1660-1760, 322 (1927); *see also supra* notes 63 and 69.

82. DOCUMENTARY HISTORY, *supra* note 62, at 1089.

83. *Id.*

84. *See* JAILED FOR PEACE, *supra* note 79, at 8.

85. There are also numerous examples of pacifists who refused to defend themselves against Indian attacks or other warfare during the colonial period — even when the very existence of a settlement was threatened. *See generally* P. BROCK, PACIFISM IN THE UNITED STATES — FROM THE COLONIAL ERA TO THE FIRST WORLD WAR (1968).

86. The Old Testament ordered: "Thou shalt not kill" as one of the Ten Commandments, *Exodus*, 20:13. Proverbs preached a doctrine of loving enemies: "if thine enemy be hungry, give him bread to eat; and if he be thirsty, give him water to drink." *Proverbs*, 25:21. *See also Isaiah* 9:6, 2:4, 32:17; *Zachariah* 8:17.

The New Testament was even more explicit and uncompromising in its testaments to peace. In St. Luke, soldiers were urged not to fight: "And the soldiers likewise demanded of him, saying, and what shall we do? And he said unto them, do violence to no man." *St. Luke* 3:14. St. Matthew praised peacemakers and demanded nonviolence in the face of evil, persecution and violence:

> Blessed are the peacemakers: For they shall be called the children of God . . . Ye had heard that it hath been said, thou shalt love thy neighbor, and hate thine enemy. But I say unto you, love your enemies, bless them that curse you, do good to

Therefore, to conclude that the Founding Fathers did not respect pacifists, did not consider C.O. an integral component of religious free exercise, had forgotten of the instrumental role pacifist Quakers played in the development of religious freedom in America, were unaware of the respective colonial histories of Pennsylvania, Rhode Island, New Jersey, Delaware, Massachusetts, and North Carolina and were ignorant of the important theological place of pacifism, would confound logic, reason and history.[87]

C. *Conscientious Objection and The War Power*

Article I, section 8, clause 12 grants Congress the exclusive power to raise and support armies, and allows Congress to make all laws necessary to that end. How far do Congress' constitutional war powers extend? Are they paramount to the guarantee of freedom of conscience in the Bill of Rights?

The concept of a "limitless" war power, superior to the Bill of Rights, was first articulated as dictum in *Jacobson v. Massachusetts*.[88] *Jacobson*, however, was neither a "war powers" nor a free exercise clause case. *Jacobson* upheld a local state regulation requiring smallpox vaccinations during an outbreak of smallpox epidemic. The argument before the Court was whether, by granting exemptions to children but not adults, the regulation violated the equal protection clause of the fourteenth amendment.[89] A FEC argument was neither raised nor addressed by the Court. *Jacobson* went no further than to hold that a "great danger" of a smallpox epidemic had created a "paramount necessity" to vaccinate and that the method prescribed was reasonably and rationally related to that goal.[90]

In dicta, the Court made a number of analogies concerning the power of government to coerce activity in times of emergency. One such notion was that of a limitless war power. The Court stated that a person may be "compelled, by force . . . against his will and without regard to his personal wishes or . . . even his religious . . . convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense."[91]

Obviously, the war power issue was neither briefed nor argued; no case or historical reference was cited to support *Jacobson's* sweeping conclusion. Nonetheless, the *Jacobson* dictum was subsequently utilized in a trilogy of

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> them which hate you, and pray for them which disrespectfully use you, and persecute you . . . . Ye have heard it hath been said, An eye for an eye, and a tooth for a tooth: But I say unto you, that ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also.

Matthew 5:9, 5:38-39; 5:43-44. The New Testament is replete with similar peace commands. *See, e.g., Matthew* 26:52; *Romans* 12:9, 10, 14, 17, 21; 2 *Corinthians* 10:3-4; *Luke* 6:27-38; I *Thessalonians* 5:15; *Revelation* 13:10; I *Peter* 3:9-11, 14; *Hebrews* 12:14. For an early account of Christian martydom, *see* BUTLER'S LIVES OF THE SAINTS 571-73 (H. Thurston & D. Attwater ed. 1968).

87. *See supra* notes 9-75 and accompanying text.

88. 197 U.S. 11 (1905).

89. The factual argument presented by *Jacobson* was that the vaccination was ineffective and dangerous to adults. But the court took judicial notice that smallpox vaccinations were the only known method of combating the spread of the disease. *Id.* at 30.

90. *Id.* at 27.

91. *Id.* at 29.

Supreme Court cases: *United States v. Schwimmer*,[92] *United States v. Macintosh*,[93] and *United States v. Bland*.[94] These cases all involved challenges to immigration regulations requiring, as a prerequisite to citizenship, that each immigrant swear an oath to "take up arms in defense of the country."[95] In each case, a pacifist refused to take such an oath and was denied citizenship.

These cases held that religious objection to bearing arms was irrelevant and that only Congress could exempt a C.O.[96] The *Macintosh* trilogy explicitly denied a free exercise claim, concluding that an overriding principle of the constitution requires all citizens, without regard to religious beliefs, to bear arms and kill for the state if Congress so requires.

Besides *Jacobson*, the *Macintosh* trilogy cited to only one other case to support the principle of limitless war power: *Arver v. United States*.[97] *Arver* concerned the constitutionality of conscription. In *Arver*, the Court concluded, in a cursory fashion, that article I, section 8 granted Congress the power to conscript and laid to rest arguments made by Chief Justice Taney and others that congressional power to conscript was limited by the United States Constitution.[98] A constitutional right to C.O. was not at issue and was neither briefed, raised, nor argued. Nonetheless *Macintosh*, citing to *Arver*, held that citizenship itself mandates compulsory military service of all citizens.[99]

The Court's reasoning in the *Macintosh* trilogy rested solely on interpreting Congress' war powers to be absolute. From the article I, section 8, clause 12, powers to raise and support armies, the Court reasoned that Congress must have an implied plenary power to raise armies by whatever means necessary. Thus, Congress could grant or withhold exemption from the draft at its discretion because "the duty of citizens by force of arms to defend our government [was] a fundamental principle of the Constitution"[100] and was paramount to any other constitutional provision or interpretation to the contrary.[101]

At first glance, this logic may appear to make sense. If a nation is threatened with armed destruction, should it not be able to utilize every power and means at its disposal?[102]

However, closer examination of the historical keystones of our constitu-

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92. 279 U.S. at 653-55 (Holmes, J., dissenting).

93. 283 U.S. at 627-35 (Hughes, C. J., dissenting).

94. *Bland*, 283 U.S. at 636.

95. *Macintosh*, 283 U.S. at 617; *Schwimmer*, 279 U.S. at 647; *see also Bland*, 283 U.S. at 637.

96. *Macintosh*, 283 U.S. at 624; *Bland*, 283 U.S. at 637; *Schwimmer*, 279 U.S. at 650.

97. 245 U.S. 366 (1918).

98. *Id.* at 374-75; *see supra* note 66.

99. *Macintosh*, 283 U.S. at 620.

100. *Id.*; *see Schwimmer*, 279 U.S. at 650.

101. *Macintosh*, 283 U.S. at 620.

102. See United States v. Henderson, 180 F.2d 711 (7th Cir. 1950), in which the appeals court upheld the conviction of three Quakers who refused on religious grounds to register for the draft. First amendment and free exercise clause arguments were dismissed on the basis of Congress' war powers. The court reasoned that Congress' power to raise armies was "unqualified," and designed to protect the "very existence of government." *Id.* at 713. Consequently, these powers had to be beyond the scope of the first amendment, for "[i]f this Nation were successfully attacked and conquered by enemies from without, or within, none of us would have the rights guaranteed to us by the First Amendment." *Id.* at 715.

tion and of contemporary Supreme Court jurisprudence shows that Congress' war power is indeed limited. During the Constitutional Convention, the Founding Fathers successfully insured that the military would be subordinate to the Constitution and civilian government. They passed a variety of constitutional provisions including placing a civilian President as Commander-in-Chief of all the branches of the military,[103] subjecting the military budget to public scrutiny,[104] and requiring that all military expenditures be approved by Congress every two years.[105] Fearing the possibility of a federal military takeover, the framers granted all citizens the right to keep and bear arms, and required each state to maintain a militia.[106] Furthermore, the Continental Congress was limited because it had to rely on the states for quotas of troops for each campaign. It was further limited because it also had virtually to beg the states to pay and supply the troops so furnished, as it then lacked both a broad power to tax and a method to require states to comply with its requests.[107] Given this history, it is not surprising that the Supreme Court has consistently subjected the war powers of Congress to the appropriate limitations set forth in the Constitution.[108] The Supreme Court has acknowledged limitations on the war power granted Congress in the areas of the first, fifth and sixth amendments of the Constitution. In *Hamilton v. Kentucky Distilleries Co.*,[109] the Court concluded that in the area of the fifth amendment, "the war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations."[110]

In *United States v. Cohen Grocery Co.*,[111] the Court concluded that the "mere existence of a state of war" was insufficient to suspend the protections of the fifth and sixth amendments.[112] In *United States v. Robel*,[113] the Court once again limited the war powers of Congress; and held that when first amendment rights are at stake, the "phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which

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103. U.S. CONST. art. II, § 2, cl. 1.

104. U.S. CONST. art. I, § 9, cl. 7.

105. U.S. CONST. art. I, § 8, cl. 12.

106. *See* U.S. CONST. art. I, § 8, cl. 16; U.S. CONST. amend. II.

107. *Compare* U.S. CONST. art. I, § 9, cl. 4 *with* U.S. CONST. amend. XVI. *See generally* Reid v. Covert, 354 U.S. 1 (1956). *Reid* contains an extensive discussion on how the Founding Fathers attempted to limit the war powers. *Id.* at 23-36. *Reid* outlined numerous instances of military overthrows of European republics and emphasized how this history molded the Constitution: "[There was a] deeply rooted and ancient opposition" to the "extension of military control" over civilian life. *Id.* at 33.

108. *See, e.g., Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). In *Milligan*, the Court stated that constitutional guarantees are to be upheld and protected by the courts at "all times and under all circumstances," irrespective of whether the nation is at peace or war. *Id.* at 120-21. The Court was clear. The war powers must be subordinate to the Constitution. *Id.* at 125; *see also* United States v. Joint Traffic Assn., 171 U.S. 505, 571 (1898), *citing* United States v. Cress, 243 U.S. 316, 326 (1917); McCray v. United States, 195 U.S. 27, 61 (1904); Monongahela Navigation Co. v. United States, 148 U.S. 312, 336 (1896).

109. 251 U.S. 146 (1919).

110. *Id.* at 156.

111. 255 U.S. 81 (1921).

112. *Id.* at 88.

113. 389 U.S. 258 (1967).

can be brought within its ambit."[114] *Robel* also pointed out that it is the duty of the judiciary to enforce all the constitutional safeguards essential to liberty.[115] Most recently, in *Rustker v. Goldberg*,[116] the Court again reiterated that Congress' war power remains subject to the constitutional guarantees of the Bill of Rights.

Thus, it seems clear that the Founding Fathers did not grant Congress limitless war powers; and it comes as no surprise that *Schwimmer*, *Macintosh* and *Bland* were all explicitly overruled by *Girouard v. United States*.[117]

Girouard struck down the immigration oath upheld in the *Macintosh* trilogy. The *Girouard* decision cited to the excellent dissents of Justice Holmes in *Schwimmer*[118] and Chief Justice Hughes in *Macintosh*[119] in support of its position. Significantly, the Holmes and Hughes dissents placed great importance on the history of Quakers and other pacifist religions in "making this country what it is."[120] Justice Hughes reiterated the historical significance of pacifists in American history to defend the right to be a Conscientious Objector.[121]

Some federal courts of appeal have cited to a 1934 Supreme Court case, *Hamilton v. Regents*,[122] in support of the contention that there is no constitutional right to conscientious objection.[123] This interpretation of *Hamilton*, however, is incorrect. *Hamilton* never addressed C.O. under FEC analysis. *Hamilton* upheld the constitutionality of a state law which required male students at a federally subsidized state college to take a course in military science. *Hamilton*, citing *Macintosh* as precedent, held that the "authority" of the states to train their citizens for service in their militias and to be the "sole judges of the means to be employed" in training their citizens was a power retained by the states.[124] This holding was based solely on the privileges and immunities and the due process clauses of the fourteenth amendment. Signifi-

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114. *Id.* 389 U.S. at 263-64 (quoting Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 426 (1934)).

115. *Id.* 389 U.S. at 267-68; *see also* United States v. Brown, 381 U.S. 437, 461 (1965).

116. 453 U.S. 57, 67 (1981).

117. 328 U.S. 61 (1946).

118. *Id.* at 64.

119. *Id.* at 64-66.

> When we consider 'the history of the struggle for religious liberty, the large number of citizens of our country from the very beginning, who have been willing to sacrifice their religious convictions and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God.' I find it impossible to conclude that such persons are to be deemed disqualified . . . .

Id. at 65 (citing *Macintosh*, 283 U.S. at 631 (Hughes, C. J., dissenting)). Surprisingly, a number of circuit courts have incorrectly cited the *Jacobson* dicta and the overruled *Macintosh* case in denying a constitutional right to be a C.O. *See, e.g.*, Turner v. United States, 410 F.2d 837, 840 (5th Cir. 1969); Tyrell v. United States, 200 F.2d 8, 12-13 (9th Cir. 1952); George v. United States, 196 F.2d 445, 449 (9th Cir. 1952).

120. *Girouard*, 328 U.S. at 64.

121. *Id.* at 65-66.

122. 293 U.S. 245 (1934).

123. *See, e.g.*, Wood v. United States, 373 F.2d 894, 900 (5th Cir. 1967); Richtor v. United States, 181 F.2d 591, 593 (9th Cir. 1950).

124. *Hamilton*, 293 U.S. at 260.

cantly, the student-appellants did not raise, argue or base their right to freedom of conscience and free exercise of religion on the FEC of the first amendment.[125]

In *West Virginia State Bd. of Education v. Barnette*,[126] the Court chose to distinguish *Hamilton* by differentiating between mandatory (primary and secondary) education[127] and "optional" (college) education. The Court viewed the state interest of raising and supporting a militia as more important than the state interest regarding mandatory state education regulations that also offended conscience such as saluting the flag. The Court stated "[i]f *Hamilton* retains any vitality with respect to higher education, we [must] recognize its inapplicability to cognate questions in public primary and secondary schools."[128]

Hamilton was again limited by *Tinker v. Des Moines School Dist.*,[129] when the Court noted that the *Hamilton* holding turned not on a state's power to raise and support a state militia, but on a valid state interest to prescribe an educational science curriculum, even if that "science" curriculum included a mandatory course in military science and tactics.[130] The Court further distinguished and limited *Hamilton* by concluding that *Hamilton* could no longer "be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees."[131] Additionally, *Hamilton* has been harshly criticized in a number of recent federal court of appeals decisions.[132] Thus, Congress' power to conscript and the states' power to raise and support militia are limited by the Constitution itself.

D. Conscientious Objection and the Free Exercise Clause

Is the right to C.O. protected under Supreme Court Free Exercise Clause jurisprudence?[133] Although the Supreme Court has never directly applied a FEC analysis to military draft conscription,[134] modern FEC cases demonstrate

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125. This failure to raise an FEC claim is not surprising. The Supreme Court did not consider applying the FEC to the states through the fourteenth amendment until at least six years after *Hamilton* was decided. See Cantwell v. Connecticut, 310 U.S. 296 (1940), which is now considered the beginning of the Court's FEC application to the states through the fourteenth amendment. Since 1940, *Hamilton* has been severely limited.

126. 319 U.S. 624 (1943).

127. *Id.* at 631-32.

128. *Id.*

129. 393 U.S. 503 (1969).

130. *Id.* at 506 n.2.

131. *Id.*

132. *See, e.g.*, Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972); *see also* Anderson v. Laird, 466 F.2d 283, 295 n.80 (1972), *cert. denied*, 409 U.S. 1076 (1972). Both of these cases criticized the validity of *Hamilton*.

133. *See, e.g.*, Gillette v. United States, 401 U.S. 436, 461 n.23 (1971).

134. The Supreme Court has recognized that conscientious objection need not be based upon a belief in God. Strong moral or ethical beliefs, which take the place of God within the lives of the objectors, are protected under religious objection. Thus, agnostic and atheist C.O.s receive protection equal to C.O.s who base their objection upon theist beliefs. The Supreme Court has declined to place one set of ideals and beliefs over another set. Thus, in terms of FEC protection, belief in a

that stringent protection of conscientious objectors exists under the first amendment.[135]

Modern FEC reasoning divides potentially disruptive religious activity into three categories: "overt-act," "non-act," and "belief." Each category has an independent standard of review, a standard contingent upon the method used to manifest the belief or practice in question.

1. Overt Acts

The first category of cases have been labeled "overt-act" cases.[136] An overt act is committed when, because of strongly-held religious beliefs, a person publicly engages in an activity which violates a law or regulation. For example, in *United States v. Lee*,[137] the defendant chose to "enter into commercial activity"[138] in a manner violative of federal law; in *Reynolds v. United States*,[139] Mormons wanted to marry in violation of polygamy laws;[140] in *Prince v. Massachusetts*,[141] parents attempted to have their minor children engage in religious work in violation of child labor laws;[142] and in *Braunfeld v. Brown*,[143] a store owner wanted to open his store in violation of a state law requiring a uniform day of rest.[144]

Overt act cases afford the least amount of first amendment protection.[145] The Court has developed a tripartite test concerning religious overt acts which violate state or federal law or regulations.[146] First, the law itself must protect a substantial "interest in" public safety, health or order.[147] Second, the governmental interest in enacting the law must be sufficiently strong so as to "override" private religious interests. Third, the regulation must have a "real and substantial" relationship to the protected public interest.[148]

The overt act test was applied to a draft law violation in *United States v. O'Brien*.[149] Although *O'Brien* was decided on free speech grounds, the Court

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God is not essential. Rather, the Court focuses on the sincerity of the belief and whether the objector opposes all wars and not just those he personally dislikes. *See* Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965); *Gillette*, 401 U.S. at 445-46.

135. *See* Spek & Valentine, *Objectors Without Recourse: The Right of Conscience & Military Draft Registration*, 13 SETON HALL L. REV. 667, 676 (1983) (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW 856 (1978)).

136. Sherbert v. Verner, 374 U.S. 398, 407 (1963).

137. 455 U.S. 252 (1982).

138. *Id.* at 261.

139. 98 U.S. 145 (1878).

140. *Id.* at 165.

141. 321 U.S. 158 (1944).

142. *Id.* at 160-61.

143. 366 U.S. 599 (1961).

144. *Id.* at 601-02.

145. *Id.* at 606-09.

146. *Id.*

147. *Id.*

148. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257-58 (1981); Braunfeld v. Brown, 366 U.S. 599, 603 (1961); Cleveland v. United States, 329 U.S. 14 (1946).

149. 391 U.S. 367 (1968).

used an overt act FEC analysis in its reasoning.[150] The defendant in *O'Brien* had engaged in the overt act of burning his draft card in violation of federal law. The Court upheld his conviction, finding that the statute served a "substantial" governmental interest, that O'Brien sought to "frustrate" these legitimate interests, and that the law was narrowly designed to protect the public interest and did not unduly encroach on protected rights.[151] The *O'Brien* rule is consistent with other decisions which provide minimum protection to overt conscientious objector activities under the FEC, such as publicly urging others to refuse to register for the draft.[152]

Neither draft registration nor Solomon Act pledge regulations concern overt acts by C.O.s in violation of federal law. These activities involve the refusal of C.O.s to engage in an activity required by law, rather than engagement in activities proscribed by law. Non-registration and Solomon Act noncompliance are not overt acts, but are "non-acts" and the least covered under the second and third categories of FEC cases.

2. Non-Acts

The second category of cases analyzed under the FEC concerns instances of non-acts or acts of "no conduct."[153] A non-act is the refusal to perform an act required by law. Examples of non-acts would include the refusal to work on one's Sabbath Day despite a government regulation to do so,[154] refusal to send one's children to public school,[155] refusal to sit on a jury in violation of a legal obligation,[156] refusal of employment in an armament factory despite an unemployment compensation regulation requiring the taking of such a job,[157] and refusal to leave the ministry in order to participate in a governmental forum.[158] In each of these cases, the Court found that noncompliance of a law requiring affirmative action was protected by the FEC and as such the Court chose to explicitly distinguish "non-action" from overt action.

Non-acts are afforded a greater degree of constitutional protection than overt actions. First, a legitimate or rational governmental interest alone will not suffice to override the free exercise of non-actions. Second, there must be a "compelling state interest" of paramount necessity in order to justify an infringement on religious practices. Third, if the law can be justified under the compelling state interest test, it still must use the "least restrictive means" to achieve its goals.[159]

Both the draft registration and the Solomon Act require people to choose between receiving a governmental benefit, such as federal student financial aid, and violating conscience by signing a draft pledge. A long line of cases

150. *Id.* at 376 n.22; *see also id.* at 377 nn.25, 27.
151. *Id.* at 382.
152. *See* Gara v. United States, 178 F.2d 38 (1949), *aff'd*, 340 U.S. 857 (1950).
153. *See Sherbert*, 374 U.S. at 403.
154. *Id.*
155. Wisconsin v. Yoder, 406 U.S. 205 (1972).
156. *In re* Jenison, 375 U.S. 14 (1963).
157. Thomas v. Review Bd., 450 U.S. 707 (1981).
158. McDaniel v. Paty, 435 U.S. 618 (1978).
159. *See Thomas*, 450 U.S. at 718; *Yoder*, 406 U.S. at 215; *Sherbert*, 374 U.S. at 406.

has upheld the invalidity of this undemocratic choice.[160]

The Solomon Act not only compels C.O.s to make an unconstitutional choice, but also it bears no relationship to the goal it is attempting to enforce. It requires *all students* who seek federal financial aid, regardless of age, sex or legal responsibility to sign a draft law compliance pledge. It infringes upon the religious practices of persons who are under no obligation to register and consequently fails to serve a rational state interest (other than perhaps a monetary one), and certainly not a compelling state interest.

Even more offensive is its failure to recognize the rights of C.O.s. The draft registration laws, under a least restrictive alternative analysis, fail to protect the conscience of many sincere C.O.s who find filling out and signing the draft law compliance form obnoxious to their conscience. There is no space on the Solomon Act compliance form for a student to indicate that religious principles forbid him or her from signing the form. This simple procedure would provide thousands of C.O.s with a method to comply with draft laws without offense to their consciences. Furthermore, there is no administrative appeal or judicial review available to a C.O. who refuses to sign the form. For example, a sixty-year-old woman who is also a C.O. could be denied federal student aid and not even be allowed a simple administrative appeal of this denial.

The 1980 draft registration regulations commit similar infractions. First, there is no space on the registration form to register as a C.O. This simple procedure, which would not affect the efficiency of selective service, clearly would provide a "less restrictive" option for C.O.s. who currently must make an unconstitutional choice between violating the law or affirming a religious or moral conviction.

The draft registration law also provides no administrative or judicial appeal of a decision not to register. The rights of C.O.s are shut out of the process. This procedure violates even the rational basis test of *Braunfeld v. Brown*.[161] There is no rational basis for denying a C.O. an administrative or judicial appeal of his decision not to register. This procedure leads to the paradoxical situation in which a nonregistrant who notifies the Selective Service of his refusal to register and provides the Selective Service with all the information requested on the registration form is criminally prosecuted.

What is the rational reason for prosecuting a sincere religious C.O. who would be legally exempt from military service and who has provided Selective Service with all the basic information requested on a registration form?

3. Beliefs

The third category of protected religious activity is "beliefs." This category concerns the relatively rare instances in which a government regulation requires a person to sign a statement, affirm an opinion or acknowledge a belief which runs directly counter to a deeply held religious conviction. The rule concerning infringement upon belief is simple and clear: "The freedom to hold

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160. In *Thomas*, the Court declared: "More than 30 years ago, the Court held that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas*, 450 U.S. at 716; *accord McDaniel*, 435 U.S. at 626; *Sherbert*, 374 U.S. at 406.

161. 366 U.S. 599, 603-09 (1961).

religious beliefs and opinions is absolute."[162] One can never be forced to espouse a belief, take an oath, or publicly affirm any statement or pledge which violates one's freedom of religion.[163]

There is an "absolute prohibition of infringements" on the "freedom to believe."[164] Regardless of any compelling or paramount social interest, the state cannot coerce persons to affirm a statement or principle they hold to be morally repugnant.[165]

The Court has recognized that the Founding Fathers intended that the realm of conscience must remain outside the power of the state.[166] During the war for independence, the Founding Fathers chose to protect freedom of conscience even at the expense of losing battles. For example, when Philadelphia was on the verge of British occupation, General George Washington still refused to coerce the Quaker population into violating their pacifist consciences.[167] In essence, the Founding Fathers upheld the absolute right of conscience, even in the face of losing important battles of the Revolution.

Later, during the Civil War, the Supreme Court went so far as to affirm the right to a "forever inviolable" freedom, even in the face of military defeat.[168] The Court stated that "a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation."[169]

Regardless of military necessity, a C.O. still retains the absolute right to affirm his or her moral conviction against any war system, including the individual right to refuse to cooperate with the military.[170] Both the draft registration and the Solomon Act require all C.O.s to sign military conscription pledges. Many C.O.s believe that this act of acquiescence to a military conscription law is a sacreligious affirmation of murder and the validity of war. Furthermore, by signing the form, they are forced to conscientiously affirm this validity. It is not surprising that thousands of religious C.O.s have risked or will risk imprisonment instead of signing the draft pledge.[171]

Whether Congress or the courts agree or disagree with these minority religious opinions is irrelevant. The Supreme Court has recognized that unacceptable or apparently illogical beliefs are still afforded first amendment protection:

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162. *Id.* at 603; *accord McDaniel*, 435 U.S. at 627; *Girouard*, 328 U.S. at 68-69; *Barnette*, 319 U.S. at 630, 633, 638; *Cantwell*, 310 U.S. at 303; *Jacobson*, 197 U.S. at 29.

163. The *Barnette* Court declared: "[o]fficial compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship. . . ." *Barnette*, 319 U.S. at 646.

164. *McDaniel*, 435 U.S. at 627.

165. The *Girouard* Court stated that "in the domain of conscience there is a moral power higher than the State." 328 U.S. at 68.

166. *Braunfeld*, 366 U.S. at 604. In *Braunfeld*, the Court quoted Thomas Jefferson to reinforce the principle that actions can be regulated by government, but religious opinions deserve great constitutional protection. *Id.*

167. *See supra* note 53.

168. *Ex Parte* Milligan, 71 U.S. at 126; *see supra* note 75.

169. *Ex Parte* Milligan, 71 U.S. at 126.

170. *See* Macintosh v. United States, 42 F.2d 845 (2d Cir. 1930). The court of appeals in *Macintosh* recognized that conscientious objection and "scruples against bearing arms" were part of the realm of "unalienable" rights of conscience which no government could abridge. *Id.* at 848.

171. *See* United States v. Schmucker, 721 F.2d 1046 (6th Cir. 1983).

> The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . . . However, the resolution is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.[172]

The draft registration and Solomon Act requirements, by providing neither alternative statements to sign, nor appeals procedures for C.O.s, violate the religious beliefs rule articulated in *Girouard v. United States*.[173] In *Girouard*, the Court threw out an immigration service regulation requiring C.O.s to sign a form acknowledging their willingness to defend the United States by force of arms.[174] The *Girouard* Court recognized that forcing C.O.s to sign a war pledge was violative of the first amendment.[175]

Although the regulation in *Girouard* was promulgated by the immigration service, this case is binding authority for similar restrictive regulations, such as those promulgated by the Selective Service[176] and the Department of Education.[177] Thus, the Solomon Act regulations and procedures of the Department of Education,[178] and the draft registration regulations and proce-

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172. *Thomas*, 450 U.S. at 714.

173. 328 U.S. 61 (1946).

174. *Id.* at 62.

175. *Id.* at 68-69.

176. *Id*; *see generally supra* notes 1-4 and accompanying text.

177. Compare the specific language of the Military Selective Service Act, *supra* note 2, and the Solomon Act's language, *supra* note 2, with the wording of the Immigration and Naturalization Service's regulations in *Girouard*, 328 U.S. at 62.

178. In a 2-1 decision, the U.S. Court of Appeals for the First Circuit held that the Solomon Act did not violate the free exercise clause of the U.S. Constitution. Alexander v. Trustees of Boston Univ., 766 F.2d 630, 645 (1st Cir. 1985). Unfortunately, the First Circuit declined to consider whether conscientious objection was a constitutional right. Instead of addressing this hard issue, the court *assumed* that there was no such constitutional right. *Id.* at 641 n.15. The First Circuit incorrectly held that it was "established" in law that "conscientious objection to military service is not a right founded in the first amendment." *Id.* (citing *Gillette*, 401 U.S. at 461-62 (1971)). The First Circuit cited to *Gillette* to support this proposition. The Supreme Court in *Gillette* explictly decided *not* to address the issue of whether there was a constitutional right to conscientious objection. *Gillette*, 401 U.S. at 461 n.23. Likewise, the First Circuit ignored the most important Supreme Court case concerning this issue. *Girouard*, 328 U.S. 61 (1946). Indeed, the First Circuit cited to the case *Girouard* in support of its conclusion that the Solomon Act was constitutional. *See Alexander*, 766 F.2d at 645 n.19 (citing the overruled United States v. Macintosh, 283 U.S. 605 (1931)).

In addition, by concluding that the religious burden on students was too "remote and tangential" to require the court to apply the constitutionally required tests of United States v. Lee, 455 U.S. 252 (1982); *Thomas*, 450 U.S. 707; *Yoder*, 406 U.S. 205; *Sherbert*, 374 U.S. 398; and *Alexander*, 766 F.2d at 643, the First Circuit failed to consider properly the student's rights guaranteed under the free exercise clause. As Chief Justice Burger warned in *Thomas*, determining what is a religious belief or practice is a "delicate task [and] need not be acceptable, logical, consistent, or comprehensible to others . . . ." *Thomas*, 450 U.S. at 714. An even more serious oversight of the First Circuit was their conclusion that giving "routine personal data [had] no religious significance to plaintiffs." *Alexander*, 766 F.2d at 644. Although giving data on a form may not appear as serious as ordering a person to kill another person in times of war, throughout American history conscientious objectors received exemption from all of the steps leading to ac-

dures of the Selective Service, violate the FEC by ignoring the fundamental right of Conscientious Objection.

CONCLUSION

Conscientious objection is a fundamental religious right. Almost every religion in the United States recognizes conscientious objection as a valid manifestation of its creed.[179] At least twenty-six other sects with significant American memberships affirmatively teach their adherents to become C.O.s.[180] Far

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tual combat. For example, George Washington freed objectors from the stockade during the French and Indian War who had refused to participate in a draft lottery. In Rhode Island, the 1673 draft law exempted objectors not only from actual combat, but recognized the legitimacy of people who could not "trayne" for war, or "learn" to fight. Most of the colonial repression against Quakers did not concern actual refusals by the Quakers to kill in combat, but their refusals to cooperate in other symbolic forms of military cooperation — such as training with the local colonial militia in times of peace. For an outline of this history, see JAILED FOR PEACE, *supra* note 79, at 5-9. Perhaps the most serious oversight committed by the First Circuit was their failure to understand the importance of symbolic action in cases concerning freedom of religion. *See, e.g., Girouard*, 326 U.S. 714; *Barnette*, 319 U.S. 624; *The Trial of William Penn and William Mead at the Old Baily for Tumultuous Assembly*, 22 Charles II, 6 State Trials 951 (1670); *The Trial of Margaret Fell and George Fox for not taking Oath of Obedience*, 16 Charles II, 6 State Trials 629 (1664); *The Trial of John Crok, Isaac Grey and John Bolton, Quakers, at the Old Baily, for refusing to take the Oath of Allegiance and Supremacy*, 14 Charles II, 6 State Trials 201 (1662). The "symbolism" of signing a Solomon Act form is extremely significant to many religious conscientious objectors. As Justice Rehnquist recognized in *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981), draft registration is the first step of the military induction process. Clearly the "first step" of induction can be as objectionable as any other step of the induction process to religious conscientious objectors. *See, e.g.*, Selective Service System v. Minnesota Public Interest Research, 468 U.S. 841, 863 n.5 (1984) (Marshall, J., dissenting).

179. American religions which recognize the validity of C.O. include: Assembly of Convenant Churches; Assembly of God - General Council; American Baptist Churches; Seventh Day Baptist General Conference; Southern Baptist Convention; Buddhist; Christian Church; Christian Reformed Church; Church of Christ; Church of Christ, Scientist; Church of God (Anderson); Church of God, General Conference; Church of the Nazarene; Episcopal Church; Evangelist Convenant; Greek Orthodox; International Society for Krishna Consciousness; Jehovah's Witnesses; Synagogues Council of America; Central Conference of American Rabbis; Rabbinical Assembly (Consecrative); American Lutheran Church; Association of Evangelical Lutheran Churches; Lutherian Church; Lutherian Church — Missouri Synod; Free Methodist Churches; The Missionary Church; Moravian Church (Northern Province); National Council of Churches of Christ in the U.S.A.; Presbyterian Church in the U.S.; United Presbyterian Church in the U.S.A.; Reformed Church in America; Reorganized Church of Jesus Christ of Latter Day Saints; U.S. Catholic Conference (Roman Catholic); Catholic Peace Fellowship; National Federation of Priest's Council; Pax Christi - U.S.A.; Salvation Army; Seventh Day Adventist; Unitarian Universalists Assn.; United Church of Christ; World Council of Churches; Black Muslim; Holy Hindu Faith.

180. These religions include: Baha 'i'; Church of the Brethren; Dunkard Brethren; Old German Baptist Brethren; Brethren in Christ Church; Christadelphians; Christ Sanctified Holy Church; Church of God; Church of God (Seventh Day); Church of God of the Abrahamic Faith; Church of the Gospel; Church of the Lord Jesus Christ of the Apostolic Faith; Doukhobours; The Religious Society of Friends (Quakers); Hutterian Brethren; Church of Christ; Hutterian Society of Brothers; Israelite House of David; Meggido Mission Church; Breachy Amish Mennonite; Mennonite Churches; United Methodist Church; Sojourness Fellowship; Worldwide Church of God; United Molokan Christian Assn.; United Pentecostal Church, International.

from unorthodox, conscientious objection is a widely respected religious practice recognized by such diverse religious traditions as Christianity, Buddhism, Judaism, and Hinduism.

The free exercise clause would be a dead letter if it failed to protect this fundamental religious and moral practice. In its most extreme manifestation, conscientious objection is the refusal to kill or take actions which will lead to the killing of others. The killing of others is the most forceful conduct any state can demand of its citizens. The Supreme Court has protected other conduct which is far less oppressive and overbearing, such as the right not to salute a flag, work on a Sabbath, or attend secular schools. Is it possible that refusing to salute a flag is protected activity while refusing to kill another person is unprotected activity?

The courts have failed to look beyond the Selective Service Act's statutory C.O. provisions. The Act only allows C.O. claims to be raised at administrative hearings during the induction process, where the hearing officers, serving at the pleasure of the President, are required to meet specific induction quotas.[181] Moreover, federal courts are denied the power to grant C.O. claims and the 1980 registration law and Solomon Act make no provisions for C.O. exemptions, providing neither administrative nor judicial review of a C.O. claim. Under the present laws, the rights of conscience have been completely ignored.

Granting rights to C.O.s is both simple and inexpensive.[182] The registration form and Solomon Act compliance forms merely need an additional box to check. For the minority of those who would find even that alternative offensive, an alternative C.O. form or the ability to raise conscience as a defense to a criminal trial or administrative appeal would resolve the problem.[183]

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181. For a critique of these hearings, see Brown & Kohn, *Human Rights and Freedom of Conscience in Administrative Law: A Critique of the Fugitive Slave Act and the Selective Service Act Through Use of the Liberty — Fact Doctrine*, 61 U. DET. J. URB. L. 177 (1984).

182. The English draft system recognized a C.O.'s right not to register with military authorities. Instead of requiring objectors to sign the "Military Service Register," an alternative process was provided. They could sign a separate register, the "Register of Conscientious Objectors." Legal Affairs Committee, Council of Europe, *Legal Position of Conscientious Objectors in the Member States of the Council of Europe* (1976).

183. Both congressional and legal commentators have either recognized the validity or urged the adoption of a special conscientious objector checkoff box to be added to the draft registration form. *See, e.g.*, H. R. REP. NO. 223, 98th Cong., 1st Sess. at 43 (1983); Kellett, *Draft Registration and the Conscientious Objector: A Proposal to Accommodate Constitutional Values*, 15 COLUM. HUM. RTS. L. REV. 167, 180 (1984). Representative Steven Gunderson (R-Wi.) proposed an amendment to the Military Selective Service Act in order to require that the draft registration form have a conscientious objector checkoff box. H.R. 1611, 98th Cong., 1st Sess., 129 CONG. REC. H.628 (1983). The Selective Service System has resisted this change. In a 1983 report, Selective Service recommended against the adoption of the checkoff box for objectors. Although they ignored the constitutional issues raised by the present form, Selective Service did raise bureaucratic objections: "many registrants would be hearing about conscientious objection for the first time (because of the box). Some would ask the postal clerk about it. He or she might know a little more about it than the registrant but might also be misinformed about it in some critical way. Some would decide to defer registration and go home and talk with their parents or pastor about it." Selective Service System, *The Feasibility of Allowing Young Men to Register as Conscientious Objectors: Hearings Before a Subcommittee of the Committee on Appropriations,*

The failure to make relatively small changes in the registration procedure, and the failure to allow conscientious objectors faced with criminal prosecution the right to raise the issue of moral or religious principles against war, will invariably result in thousands of objectors being indicted and imprisoned. Prisoners of conscience disgrace and degrade our entire judicial and legislative systems. It is time for the courts to take cognizance of the fundamental right to conscience recognized in early colonial America, and to apply this first amendment freedom to a small but important minority.

House of Representatives, 98th Cong., 2nd Sess., 837, 846 (1984) (a report by the selective service system pursuant to the House Appropriations Committee Report No. 98-223, dated May 24, 1983).

Small Scale Right to Resist

*Arthur Kaufmann**

I.

Ilmar Tammelo once said in a very significant, although short, publication:

> The commandment ranking highest for me in the hierarchy of justice consists of the elimination, or the best possible reduction of misery. That principle of positive utilitarianism which says that the greatest possible fortune shall be sought for the largest possible number of persons is to be doubted. Fortune is just luck . . . the unfortunate share my concern, too. In addition, the fortune of the majority is all too often bought with the suffering of minorities. Considering all this, I prefer rather the negative utilitarianism — that utilitarianism which says that misfortune shall be diverted from as many as possible and as far as possible.[1]

I, too, have characterized the idea of law negatively: "The essence of justice is resistance against injustice." This occurred in a speech about "Thoughts on the Right to Resist" which I gave in the year 1968 and which was occasioned by the assassination of Martin Luther King.[2] Is there a common concept of justice? Does Tammelo's "negative utilitarianism" also contain an ele-

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* Translated and reprinted with the permission of the author and his publisher, Carl Heymanns Verlaq KG, from the original German publication: *Das Widerstandsrecht der Kleinen Münze* (1983). Translated by Mary Gräfin Praschma.

Translator's note: "Rechtsstaat" is a term peculiar to Germany and its Constitutional law jurisprudence. A major commentary to the Grundgesetz sees a similarity in the term "rule of law" in Anglo-American jurisprudence. Therefore, I have translated it with "rule of law and constitution." Basically, the principle encapsuled in the term means: the government and the administration is bound by the laws and the citizen shall have recourse to independent courts if he thinks such laws are violated.

1. Tammelo, Ungerrechtigkeit als Grenzsituation, in: 61. Schopenhauer-Jahrbuch für das Jahr 1980, p. 30 ss., 35.

2. Printed in: Arthur Kaufmann, Rechtsphilosophie im Wandel, 1972, p. 326 ss., 331.

ment of resistance?

When one continues reading him, one is tempted perhaps to answer this question in the negative. It reads: "That injustice which does not show any way out should be tolerated. . . . Each attempt of fighting such injustice is a priori hopeless. The outcry against the defective constitution of the world rings into the void, and the heroism to subdue the impossible remains quixotic. This heroism is questionable because it may lead to futile sacrifice and meaningless suffering."[3] This predicates, so it appears, the renunciation of resistance against injustice, because such resistance is almost always doomed to failure, as we know from painful experience.

This interpretation, however, I feel, would not do justice to Tammelo, because he continues:

> The renunciation of fighting borderline injustice does not call by any means for resigning from the task of struggle against the evil. The fighting for tolerable circumstances, albeit frought with injustice, is always meaningful and may be even an ethical duty. It requires the exercise of a reasonable strategy and tactics of the best possible avoidance of suffering — a prudent, careful acting to divert the worst.[4]

We ask: Does not such "struggle against the evil" have the character of resistance, at least in some cases? But what kind of resistance would this be? Certainly not one which may be mentioned in the same breath with tyrannicide.

II.

In recent times, much confusion has come into the discussion of the right to resist. Therefore, it has fallen into discredit with some. Today, it is almost an everyday occurrence that squatters, environmental protectionists, antinukers, and other "alternatives" (whom I do not throw into one basket with terrorists) refer to a right to resist when and if they confront governmental orders with coercion and violence. Moreover, it is more than macabre that they do not even shy away from associating such actions with the resistance of the 20th of July 1944 or with that of the "Weisse Rose."[5] This is a sell-out of the right to resist at bargain basement prices. Thus, it is understandable that as early as 1968 Dolf Sternberger coined the phrase, "untimely resistance": in NS (Nazi) times, so he maintains, "there was one tyrant and little resistance; today, there is much resistance and no tyrant."[6] Another difficulty of the right to resist must be added, one which Themistokles Tsatsos has pointed out, that is the limitation of its recognition in time: the question of whether there exists any right to resist at all is "asked either at the same time when the right is exercised . . . or only after elimination of the power structure against whose

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3. Tammelo, Ungerrechtigkeit (fn. 1), p. 35 ff.

4. Tammelo, Ungerrechtigkeit (fn. 1), p. 36.

5. Translator's note: Early in 1943 the University of Munich became the center for anti-Hitler resistence, led by Hans Scholl and his sister Sophie. They spread their propaganda to other universities through the White Rose Letters. Early in February 1943, the Scholl's were betrayed to the Gestapo for distributing their leaflets, convicted of treason by the People's Court, and executed. *See* W. SHIRER, INSIDE THE THIRD REICH (1960).

6. Sternberger, Frankfurter Allgemeine Zeitung für Deutschland of 6 May 1968, p. 1.

provisions or measures resistance was offered."[7]

It is, however, tragic that those who wanted to secure a legitimate function for the right to resist within the constitutional order have also contributed materially to making it relative. I refer to those parliamentarians and politicians who, in the fateful year of 1968 — out of understandable reasons (the new state-of-emergency constitution had to be made acceptable to the unions) — aimed for and ensured that the right to resist was anchored in the Basic Law (Art. 20 Par. 4). This was certainly well-meant. But the squaring of the circle ensued. The incorporation of the right to resist into statutory law is a contradiction in itself because it would be the fixture by statute of a right which by its nature can exist only above any statute, the regulation of something which in no way can be regulated. As a free decision of conscience cannot be commanded, so resistance against governmental injustice cannot be regulated by government. A legal system cannot institutionalize its own control outside of the system from within the system. Viewed from statutory law, the words of Jacques Benique Bossuets, a contemporary of Louis XIV, still apply: "Il n'y a pas de driot contre le loi."[8] Thus, it is not surprising that the theoreticians of the constitution are rather embarrassed about Art. 20, par. 4, of the Basic Law.[9] Hans Schneider — for the most part consistently — chose the alternative, to reinterpret the provision to the effect that rather than legalizing resistance *against* the sovereign power of the Federal Republic of Germany, only that resistance which would be in its *defense* would be legalized.[10] Art. 20, par. 4 of the Basic Law is certainly not intended in this manner. Intended is, without doubt, the citizen's right of defense against governmental power exercised illegally. However, the result was almost the exact opposite. Peter

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7. Th. Tsatsos, Zur Begründung des Widerstandsrechts, in: Der Staat 1 (1962), 157 ss., 169; also in: Widerstandsrecht (Wege der Forschung, Vol. CLXXIII), ed. by Arthur Kaufmann, 1972, p. 505 ss., 519.

Translator's note: Art. 20, Par. 4 of the Basic Law (constitution) provides that: "(a)ll Germans shall have the right to resist any person or persons seeking to abolish that Constitutional order, should no other remedy be possible." Flanz, *Federal Republic of Germany*, in 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Blaustein & Flanz eds. 1986).

8. Cf. also Kant, Metaphysik der Sitten, Ed. Karl Vorländer, Philosophische Bibliothek Vol. 42, 1954, p. 144: To be entitled to resist the highest legislated law, "there had to exist a public law which would permit this resistance of the people, i.e. the legislated law would contain in itself a provision that it not be the highest law and make the people being subject in one and the same judgment sovereign over the one to whom it is subject; which is contradictory, and the contradiction soon becomes soon apparent with the question: who should be the judge in a dispute between people and sovereign?"

9. Cf. for instance Isensee, Das legalisierte Widerstandsrecht; Eine staatsrechtliche Analyse des Art. 20 Abs. 4 Grundgesetz, 1969; Scholler, Widerstand und Verfassung, in: Der Staat 8 (1969), 19 ss.; Christoph Böckenfoerde, Die Kodifizierung des Widerstandsrechts im Grundgesetz, in: Menschen im Entscheidungsprozess; Festschr. f. Johannes Messner, 1971, p. 329 ss.; Kröger, Widerstandsrecht und demokratische Verfassung, 1971; Sophi Wührer, Das Widerstandsrecht in den deutschen Verfassungen nach 1945; Ein rechstheoretisches und rechtspolitisches Problem, 1973. — A complete bibliography to the right to resist is provided by Backmann, in: Arthur Kaufmann (Editor), Widerstansrech (fn. 6), p. 561 ss. 9 Hans Schneider, Widerstand im Rechtsstaat, 1969, p. 13. Item Kroeger, Widerstansrecht 9 (fn. 8), p. 6.

10. Hans Schneider, Widerstand im Rechtsstaat, 1969, p. 13. Item Kröger, Widerstandsrecht (fn. 8), p. 6.

Schneider speaks of a "negative double effect" which each constitutional codification of the right to resist inevitably triggers: "the dramatizing of the normal situation" and "the playing down of the exceptional situation."[11] Art. 20, par. 4 of the Basic Law, and the writings on it, effectuated by and large the perversion of the right to resist into a "right" which, if and when exercised, may only be valued as an abuse of right.[12]

It would be too moderate simply to refer to the "tragedy" of the right to resist and to shrug one's shoulders in resignation. Very often legal problems seem to defy solution because analysis, and the distinctions drawn, are not made carefully enough. The tragedy of resistance, not only its futility but also its danger to the order of the community, is based at the very least on the fact that until today it has not secured a place in the minds of the people. That sounds paradoxical, yet the paradox is dissolved when one realizes that the term "resistance" is employed carrying a twofold meaning.

III.

In its traditional, "classic" meaning, the right to resist is a right to *social self-defense* against a *criminal* government which exercises its power in such a way that it results in a physical or psychological menace and threat to the people. Only this consideration as an emergency right attributable to an extremely exceptional situation makes understandable why the right to resistance, from its establishment in antiquity until today, is bound to extremely strict requirements. This, in turn, explains the reason why resistance fails in the great majority of cases — either because it has not met with success, or because it has not even been attempted. The "classic" requirements of the right to resist can be given in broad outlines.[13]

First: Resistance, especially active resistance, requires a *crass abuse of sovereign power*; the government must appear unequivocally as the aggressor against the common welfare and essential human rights, and the illegality of its activity must be, so to speak, written on its face.

Second: Resistance may be considered only *subsidiary*, to wit, when and if all legal and peaceful remedies have been exhausted. Resistance may only be the ultimate ratio in an emergency which cannot be overcome in any other way. A more generous attitude would jeopardize public security, possibly lead even to anarchy and chaos.

Third: The principle of proportionality must be observed. The means employed — disobedience, force, and in the extreme, tyrannicide — must be in adequate relation to the intended purpose. From this, in particular, it follows that resistance is not permissible if one ought to fear that, in the long term, the national plight will be worsened instead of improved — the medicine ought not to have worse consequences than the illness. It should always be remembered that justified resistance aims for the re-establishment of the dis-

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11. Peter Schneider, Recht und Macht, 1970, p. 151 s.

12. Hans Schneider articulated the opinion of many, to wit that it is inevitable "that the appeal to such a transcendental 'right' be denied any legal argumentative value." Therefore, it ought not to result in "any excuse for exclusion of criminal responsibility or exemption of sanction." (Widerstand [fn. 9], p. 22 s.).

13. A good summary is to be found in: Staatslexikon of the "Görres-Gesellschaft," 6.ed., 8th vol., 1963, Col. 670 ss.: Article "Widerstandsrecht" by Angermair and Weinkauff.

turbed order and not for overthrow, like revolution.

A further requirement is closely allied, namely a reasonable hope for the *success* of the resistance. Although the legality of resistance may not be made dependent on the actual success — it is also to be kept in mind that resistance which fails in reality may nonetheless have a very high moral value — resistance which appears at the outset completely hopeless and therefore meaningless is not legitimate.

Finally, it is to be required that the resisting party have the necessary *insight* to properly judge the situation and that he be convinced that he is acting only in the interests of the common welfare and not only for his own ends. The requirement of a clear and reliable judgment has as a consequence the restriction of the circle of those entitled to resist according to the principle "in dubio pro superiore," generally to those persons of a certain station and repute; in an earlier time these were spoken of as "authorities of second rank."

It is clear that the requirements set out above draw rigid limits to the right to resist. Yet one should not fail to see that these criteria are not exact at all, therefore, the legality of resistance may be very doubtful in individual cases. Almost never can it be said with precision: from here on the erring sovereign may be resisted with force. In the last analysis, a decision is mandated for which one is to answer with one's own conscience. All too often it is the resister's fate to give the outer appearance of high treason without the opportunity to present those justifications which would preclude illegality — and that, for the sake of a constitutional state, which at the time of his act is remote and which could only be re-established in the future.

How to break out of this impasse? How to avoid such a situation in which the battle for justice is called high treason? How to escape the doom that that injustice which is administered from above may only be fought when it is already too late? How to prevent the escalation of violence which regularly results from resistance by force and its suppression by force?

IV.

The right to resist in its traditional, classic meaning was conceived, as mentioned, as an extreme, last resort self defense measure against a government doubtlessly perverted and already wearing illegality on its face, so to speak (some speak even of a "headband theory"),[14] and an act which ought to remain restricted to extremely extraordinary and exceptional cases. This explains the unfortunate association of resistance with tyrannicide, and if not with tyrannicide, then at least with the exercise of violence, with insurrection and revolt. Only out of such a reading of resistance can Dolf Sternberger speak of "untimely resistance," or can one dispute the idea that today's protest activities against government actions have the character of the right to resist, because the Federal Republic of Germany is clearly no tyranny.

But neither was the Weimar Republic, yet the most horrifying despotism ever witnessed in world history sprang from it. When, then, would resistance have been at the right time, and hence legitimate? As long as the public authorities stayed within the form and boundaries of law or as long as the at least elementary principles of the rule of law and constitution had not been

14. Beutler, Widerstandsrecht (review), in: Der Staat 14 (1975), 589 ss., 592.

abandoned, that extreme situation to which the right to resist should be restricted was not present; law and order had priority over the fighting of injustice which might have been connected with outbreaks of violence. When, however, the last remnants of the rule of law and constitution had been eliminated and despotism firmly established, resistance was useless because it seemed hopeless — it was not even permitted any more, if one follows the classic teaching, because the legitimacy of resistance requires potential success, i.e. the expectation that it would improve, not worsen the situation. This raises the nagging question as to when resistance is ever at the right time and, thus, legitimate. Apparently, it never is.

The error lies at the outset. The hypothesis: here rule of law and constitution, there tyranny, is wrong, and at best an inadmissible simplification. The boundaries between the rule of law and constitution and of injustice are in flux. There is no state which would be immune to the risk of perversion which an illegal state espouses. The perversion of systems of law, says Fritz von Hippel, is a permanent problem of earthly existence.[15] The perversion begins at that point where law and the rule of law and constitution are taken for granted, something one regards as a status which ought to be preserved, as the attained goal at which one may rest. The upshot of this way of thinking is necessarily petrification, a hardening, and thus alienation of justice, because justice can only remain true justice if it is kept alive, i.e. constantly being formed and developed. Only that which is unfinished and still subject to process is alive.

This leads to a new understanding of the right to resist, a right to resist not of the great, heroic and so often futile acts, but a right to resist of everyday practical reason, a *right to resist on a small scale*, as I should like to call it. Resistance in this meaning is not the last resort against an already completely perverted state, but rather the first remedy against apparent deviations of the right path; it serves the function of arresting the beginnings of perversion. The stubborn resistance against a threatening condition is necessary in order to continuously regenerate justice and the rule of law and constitution in such a way as to preclude that exceptional situation where justice can be prevented only by force. This "petty" resistance must be continuously raised to render "grand" resistance obsolete. Care must be taken under normal circumstances to ensure that emergencies or extreme cases do not come about. Understood this way, resistance is part of law's nature, appearing as its dynamic element and, as such of course, defying statutory fixation.

Since resistance in this form is not directed against an illegitimate sovereign, but rather against a still-legal one, the exercise of force as well as of *open civil disobedience* is prohibited under all circumstances. "Small scale resistance" on a grassroots level is not a matter of loud agitation, but is rather a matter of the intellect, a civic attitude in various hues: distrust of the powerful, the courage to voice open criticism, the unveiling of abuse, saying nay to injustice, also and especially, if it comes from "above" or constitutes the "pre-

15. Fritz v. Hippel, Die Perversion von Rechtsordnungen, 1955, p. 178 ss. *See also* Sladeczek, Zum konstitutionellen Problem des Widerstands, in: ARSP 43 (1957), 367 ss., esp. p. 384, 388, 389; Weinkauff, Über das Widerstandsrecht, 1956, p.3; also in: Arthur Kaufmann (ed.), Widerstandsrecht (fn. 6), p. 392.

vailing opinion," not participating in actions recognized as harmful in spite of risking the loss of sympathies — the possibilities are of vast number. Richard Hauser mentions as remedies against transgressions of legitimate authority those objections provided by law: protest, secret indemnity, the virtue of epieikeia,[16] and especially "suffering obedience" which, as Hauser correctly stresses, is in its inner structure no obedience at all, because hidden in such submission lies the negation of the command.[17] Especially the effect of this "suffering obedience" as a means of intellectual resistance is generally undervalued. If only those who during times of dictatorship, and who later made claims to the contrary, had made the effort to remain passive, to withhold any consent, acclamation, or opportunistic reverence, and to vote "No" at the so-called referenda, surely many things would have taken a different course. These would have been actions of resistance which would not have overtaxed the common man, and even if bringing him some inconvenience, they certainly would not have lead to imprisonment or concentration camps.

Therefore, resistance in this meaning has nothing to do with revolution. Basically, revolution is a twin of reaction: as soon as it has obtained victory, it endeavers to secure the status reached as immutable, and forbids any change. Resistance, on the other hand, is permanent evolution. It never reaches its goal, as the seafarer never reaches the horizon. But it is the moving force which both justice and the rule of law and constitution need for their continuous renewal and, thus, for preventing their perversion.

What is meant here by the term "resistance" was once expressed very vividly by Erich Kästner:

> The events from 1933 to 1945 should have been fought not later than 1928. Later was far too late. One cannot wait until the fight for freedom is labeled high treason. One cannot wait until the snowball becomes an avalanche. One must trample the rolling snowball. Nobody can ward off an avalanche. It comes to rest only when everything is buried underneath . . . . The threat of dictatorships can only be fought before they have taken over the power. It is a matter of timing, not of heroism . . . .[18]

It is a matter of timing, not of heroism. That is the essential point. Over many centuries philosophy and theology have taught us that obedience to the authorities of state as well as of church was the highest virtue, and that the obedient had no responsibility for that which had been commanded to him.[19] Thus, citizens have obeyed reprehensible instructions, soldiers criminal commands, judges unjust laws, Christians heresies of the church, blindly, without

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16. An example of this is the "invention" of the extremely subjective theory of complicity by the former imperial court (Reichsgericht) in order to avoid an unjust death sentence which otherwise could not have been avoided (RGSt 74,85).

17. Richard Hauser, Sinn und Grenze politischen Gehorsams, in: Was des Kaisers ist; Zehn Kapitel christlicher Ethik des Politischen, 1968, p. 149 ss., 178 s.; also in: Arthur Kaufmann (ed.), Widerstandsrecht (fn. 6), p. 170 ss., 191 s.

18. Erich Kästner, Address to the Hamburg Conference of the PEN Club on the occasion of the 25th anniversary of the burning of books, 1958.

19. *Cf.* Peter Noll, Jesus und das Gesetz; Rechtliche Analyse der Normenkritik in der Lehre Jesu, 1968, esp. p. 28 ss.

remorse, and all this not only in times of dictatorship. To resist was not for them. Resistance was something abstract, unreal, something which in earlier times was of importance or is presently important for others, but not here and now. Therefore, it did not concern them personally.

The present set of circumstances, however, seems to belie this statement. The insurrection against government authority as well as against valid laws is, after all, an everyday occurrence — one not limited to our country. It is not possible anymore to build a road, an airport, a nuclear power station without all-out efforts, including violence, of militant groups seeking to paralyze such projects. Yes, basically I consider the vigilance of citizens against the many threats to our living conditions a good thing, because the officials are thereby forced to ponder more thoroughly, and to justify more carefully their actions. And, in many cases, they have had to revise their plans. As Utopian as the goals of the present peace movement appear to me, I find them vindicated and even necessary in light of the current, irresponsible and worldwide arms race. I remain optimistic that these expressions of mankind's yearning for peace do not fade away unheard by those in power.

These positive forms of civic initiative should not be scoffed at. Yet it cannot be denied that many, even most, actions are blind and harmful actions which have nothing in common with resistance as an activity directed to improve justice. Whoever does not like something, does not want to submit to a majority decision, or is not willing to make a sacrifice for the sake of the common welfare, goes into the streets to enforce by fighting his imagined "right," even if this means violence against persons or things. In opposition to this, it ought to be emphatically stressed that resistance is justified only in the name of justice and not for the satisfaction of personal interests and needs, and that force is never permitted in a legally intact state except for those cases provided for by law.

The resistance of which we speak here is basically different from loud agitations, rioting, and production of outward unrest. It concerns something else: that intellectual unrest, that *cor inquietum*, and planned action, responding individually, not hidden in the masses. It is precisely this which requires also a Tammelo approach in the face of this injustice and suffering in our world: prudent, careful action — and especially deliberateness.[20] To this, I should like to add another virtue akin to this: patience. Patience is an essential prerequisite to resistance, although it is almost never mentioned in this context. The impatient, as Gustav Radbruch once said, cannot wait for something to grow; he wants to be finished at a moment's notice, to reach his goal instantaneously.[21] Since impatience cannot wait, since it must have everything totally and immediately, it is the main cause of violence. This reveals again the basic problem of the right to resist, the problem of proper timing: the "grand" resistance usually arrives late, the "petty" resistance is too hurried. This is, however, no hopeless tragedy. One must only give reason and prudence a

20. Tammelo, Ungerechtigkeit (fn. 1), p. 36. See also Tammelo, Zur Philosophie des Überlebens; Gerechtigkeit, Kommunikation und Eunomik, 1975, p. 259 ss.

21. Radbruch, Aphorismen zur Rechtsweisheit, ed. by Arthur Kaufmann, 1963, p. 100.

chance.[22]

V.

The objection which every reader is already prepared to make, I make myself: What is discussed here is not resistance, but the exercise of freedom of opinion, of the right to criticize, to demonstrate, to oppose. It is the expression of civic courage, not of resistance, because what is discussed centers around acts allowed in the sphere of existing law. The right to resist would have its place exclusively in the unjust state, only there where it presents itself as a *ius contra legem corruptam.* Whoever separates it from this context, contributes to its deprecation and devaluation.[23]

This objection must be taken seriously. There are doubtless situations in which civic courage is so obviously practiced, that it does not appear to be something extraordinary, and is not perceived by anyone as resistance. Thus, there is no reason to speak of resistance in such situations. Such is not the case here.

The theologian, Steinbach of Tübingen, once lamented our poor use of those opportunities for the future which were opened by the men and women of the resistance: "Resistance has not found a home in the hearts of the people. We have not turned into a people of politics but are again complacent with our own private existence corresponding to the phantomlike abstracts of our political routine."[24] This statement strikes the heart of the matter. Whereas in Latin and Anglo-Saxon, and at least formerly also in eastern European countries, resistance (in its traditional sense) is anchored securely in their peoples' legal thinking, we have such great difficulties with the July 20, 1944, because we have a different relation to government between 1840 and 1930. German constitutional and democratic government between 1840 and 1930 was based on a rule of law which emerged through the conscious turning away from the medieval right to resist. This is the reason for the repeated warning in our country not to disregard the fact that the "Third Reich" and the resistance raised against it were of exceptional character. Certainly, this reference is somewhat justified in view of the requirement of obedience in a state under the rule of law and constitution. Yet it carries a great danger, to wit, that the traditions and teachings of the right to resist are pushed aside and especially the conscience and critical vigilance of citizens are numbed. In this way, many today snub the idea of resistance in our setting as of marginal importance at best.[25] Even Kröger writes: "the picture of a singular tyrant and of an individual member of government corrupting the constitution hardly cor-

22. Read Ernst Bloch's provocative speech on "resistance and peace," in Widerstand und Friede; Aufsätze zur Politik, 1968, p. 84 ss.; also in: Arthur Kaufmann (ed.), Widerstandsrecht (fn.6), p. 548 ss.

23. Similarly, Peter Schneider, Widerstandsrecht und Rechtsstaat, in Archiv für öffentliches Recht 89 (1964), 1 ss.; also in: Arthur Kaufmann (ed.), Widerstandsrecht (fn. 6), p. 362 ss., esp. p. 379 ss.

24. Steinbach, Süddeutsche Zeitung of 22, July 1968.

25. I cite only: Jorgensen, Das Individuum, die Gesellschaft und das Widerstandsrecht, in: Österreichische Zeitschrift für öffentliches Recht 24 (1973), 19 ss., 22 s., and Beutler, Widerstandsrecht (fn. 13), p. 593.

responds to the present"[26] — just as though something similar to this did not exist any more in today's world, or, at least, could not occur any more in our country. This clearly demonstrates where the threat of trivialization of the problem of resistance comes from.

This diagnosis appears to mandate, particularly in the area of a small scale right to resist, the securing of its position and function in its defense against abuse or impropriety of power. People must be made aware of the fact that this means a resisting, an opposing, which might demand sacrifice owed to, but limited also in its extent by, the common welfare. It is of an importance almost unparalleled in the formation of a democratic consciousness that resistance in this sense may not be shelved even in a democratic state under the rule of law and constitution. The realization that resistance is as much a part of the law as is its antagonistic element provides an exit out of the vicious circle of action and reaction, of that ideology embracing destructive uprising and debilitating submission which is so indicative of our situation. It is this which renders freedom so abstract in our country. Only in the tension between obedience and objection does freedom become concrete.

26. Kröger, Widerstandsrecht (fn.8), p. 21.

The "Necessity" to Restrict Appeals to Judicial Prejudice

*Elliot C. Rothenberg**

Beginning with the civil rights movement in the 1960s, but more especially with increasing illegal activity by "peace," "sanctuary," anti-nuclear power, anti-apartheid and other protesters, and outright terrorists, courts have faced greater numbers of cases where defendants seek to make their ideology regarding public policy issues their central defense to charges of committing crimes. Some federal and state courts have ruled that the justification defenses of necessity, competing harms, defense of others, defense of property, and international law are inadmissible in cases of political protest. These courts have disallowed as irrelevant the introduction of political, moral, and religious motivations of political activists for committing crimes.[1] Martin Luther King himself urged restraint in violating laws and recognized that those disobeying the law, even arguably unjust laws, must accept the legal consequences of their conduct.[2]

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1. In a recent example, U.S. District Judge Earl Carroll in October, 1985 barred eleven "sanctuary" activists, on trial in Tucson, Arizona for smuggling and concealing illegal Central American aliens including possible terrorists, from testifying regarding their disagreements with U.S. foreign policy and their political and religious motivations for breaking the law. The defendants told reporters that this ruling "effectively cut the heart out of" their defense in the case. N.Y. Times, Oct. 21, 1985, at A10, col. 2; *id.*, Nov. 3, 1985, § 1, at 13, col. 1; *id.*, Dec 23, 1985, at A9, col. 6. The jury convicted eight of the defendants of various crimes. N.Y. Times, May 4, 1986, § 4 at 8, col. 1; New Yorker, June 30, 1986, at 22, col. 1.

2. *See* M. KING, *Letter from Birmingham Jail*, in WHY WE CAN'T WAIT 77 (1963).

> In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

This authority notwithstanding, judges in recent cases of trespass, property damage, and crimes of violence, including murder, have admitted testimony which otherwise would be irrelevant and have, in effect, given preferred treatment to those breaking the law ostensibly for political motives. They have allowed these lawbreakers to evade punishment and even conviction through the use of such testimony.

Criminal defendants who break the law to propagandize their various public policy views, which previously have been rejected through the democratic political process, should not then be afforded the opportunity to use the court system to advance their political ideologies. Former U.S. Supreme Court Justice Abe Fortas, himself a liberal, observed that the violation of laws like those against trespass and murder which are not the subject of objection, to dramatize disagreement with given policies, is "morally as well as politically unacceptable."[3] Going further, an exasperated state judge told a group of defendants, "[w]hen one strips the noble labels from where they have been pasted, one finds that [the criminal acts of anti-nuclear protesters] . . . are the first cousin to the bomb-throwers, grenade-throwers, and the airplane hijackers."[4]

Protesters for ideology charged with property offenses or crimes of violence have used several devices to seek to avoid punishment or conviction of crimes. For example, protesters against nuclear power plants, nuclear research, and abortion claim that their conduct is protected by the "necessity" defense to prevent the perpetration of a greater evil. "Peace" protesters have made a similar assertion and in addition have argued that international law, under their interpretation, prohibits U.S. efforts to produce armaments. Proponents of all these causes have insisted upon a constitutional right to testify as to their political motives in order to persuade judges and juries that the law ought not be enforced. Terrorists under threat of extradition for crimes committed abroad have contended that their acts of violence fall within "political offense" exceptions to extradition treaties.

Until recently, however, most decisions have refused to allow conduct undertaken to advance a particular political position to excuse violations of the criminal law. Even in this decade, federal and state courts have ruled the defense of "necessity" and the like inapplicable to political protest and have prohibited testimony on political and moral motivations for crimes.[5] They have

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Id. at 86.

3. A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 124 (1968).

4. Rhode Island v. Holladay, National Law Journal, Nov. 4, 1985, at 3, col. 1. Rhode Island Superior Court Judge John P. Bourcier gave maximum sentences of one year in prison and $500 fines to five anti-nuclear protesters convicted of illegally entering facilities of the Electric Boat Co. and damaging missile tubes. The judge called defendants' testimony attempting to politically justify their illegal conduct "irrelevant." *Id.* at 42, col. 3.

5. United States v. Seward, 687 F.2d 1270 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 789 (1983) (affirmed trial court's refusal to permit defendants, tried for and ultimately convicted of trespassing at nuclear power plant site, to introduce evidence on their political and religious beliefs); United States v. Quilty, 741 F.2d 1031 (7th Cir. 1984) (rejected appeal based on necessity defense by defendants convicted of illegally entering military property to stage an anti-nuclear demonstration, on grounds that there was reasonable, legal alternative to violating law); State v. Olsen, 99 Wis. 2d 572, 299 N.W.2d 632 (1980) (upheld trial court's granting of motion barring

adjudged that the necessity defense must be narrowly construed and, further, that motions *in limine* and other pretrial motions by prosecutors are proper to exclude irrelevant political statements sought to be introduced via attempted use of the necessity defense.

One leading appellate decision, *United States v. Seward*,[6] held that proffered evidence must fall within "the very narrow limits of justification defenses"[7] and must show:

> 1. A direct causal relationship between the defendants' actions and the avoidance of the perceived harm.
> 2. That the act to be prevented by their conduct was criminal. Belief that the government approved conduct violated some religious or moral code is not sufficient.
> 3. That the alleged criminal act was occurring in their presence and would subject defendants to immediate harm which a reasonable person would think would be eliminated by their conduct.
> 4. Defendants had no alternative to violating the law. If other forms of noncriminal protest were available "to enable them to dramatize" their views, they would not be entitled to the necessity defense.[8]

In citing *United States v. Bailey*,[9] *Seward* emphasized the "indispensable element" of the necessity defense of the absence of "a reasonable, legal alternative to violating the law."[10] The court concluded, "[i]t is obviously not a defense to charges arising from a typical protest."[11]

Some courts have also considered, but rebuffed, claims of a constitutional right to testify regarding political motivations for crimes.[12] In one of these cases, *Commonwealth v. Hood*,[13] the Massachusetts Supreme Judicial Court noted the need to restrict the introduction of potential evidence "when the mere offer of evidence in open court on a controversial subject may create a

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defendants, on trial for disorderly conduct at nuclear power plant, from introducing evidence regarding safety aspects of these facilities, ruling such testimony was irrelevant as to whether crime had been committed). The court in *Olsen* also held the doctrine of necessity "generally inappropriate to justify acts of civil disobedience," because this conduct, "rather than attempting to directly avoid a specific harm, attempts to transcend accepted democratic processes and seeks to change a political decision of society which may only secondarily avoid a particular harm or evil . . . ." *Id.* at 577, 299 N.W.2d at 635. "A contrary holding in this case would allow a citizen to disrupt government any time he felt government was not properly exercising its choice of values." *Id.* In Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188 (1983), the court upheld a trial court order excluding defendants' testimony regarding their political reasons for trespassing at a laboratory allegedly conducting nuclear weapons research. The decision held the defense of necessity or competing harms inapplicable, and defendants' proffered evidence irrelevant, in part because of legal alternatives open to them to oppose nuclear arms.

6. 687 F.2d 1270 (10th Cir. 1982).

7. *Id.* at 1273.

8. *Id.* at 1273-74.

9. 444 U.S. 394 (1980).

10. *Seward*, 687 F.2d at 1276.

11. *Id*; *see also* United States v. Best, 476 F. Supp. 34 (D. Colo. 1979).

12. *Hood*, 389 Mass. 581, 452 N.E.2d 188; *Olsen*, 99 Wis. 2d 572, 299 N.W.2d 632.

13. 389 Mass. 581, 595 n.5, 452 N.E.2d 188, 197 n.5.

prejudice to the objecting party which could not be eradicated by curative instructions to the jury."[14] In a concurring opinion,[15] Justice Liacos expressed concerns over constitutional questions relating to the right to present a defense by limiting testimony before the trial. Even so, he agreed that the right of defendants to present testimony to a jury is not boundless but is limited to relevant defenses where sufficient evidence on each element of the defense is offered to generate a jury question. Justice Liacos found no prejudicial error, because defendants in the case did not offer to prove the lack of a legal alternative to their conduct or the failure of the Legislature to preclude the necessity defense by a clear and deliberate choice regarding the values at issue.[16]

Regardless of these precedents, recent decisions have raised anew the issue of the proper role of political ideology in justifying violations of the criminal law. The essential facts were not in dispute in these cases, the critical question being the relevance of defendants' ideology regarding public policy issues to charges of committing crimes. In none of the cases did the defendants deny that they had full rights to participate in the political process and thus had alternatives available to them to violating the law.[17] In all of these cases, the defendants were deliberately violating laws and the rights of others, not in protest against the laws being infringed, but to dramatize (and maximize media coverage of) their disapproval of policies adopted by democratic procedures or to physically harm those charged with their administration. These defendants have sought refuge in justification defenses and, even more, in the political prejudices of judges and juries to escape penalties for breaking the law.

To illustrate, U.S. District Judge Miles Lord in an October 1984 trial, *United States v. LaForge and Katt*,[18] allowed defendants, charged with destroying a computer built by Sperry Corp. under contract with the U.S. De-

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14. *Id.*

15. *Id.* at 596, 452 N.E.2d at 197-98.

16. *See id*; *see also* Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982); Commonwealth v. Averill, 12 Mass. App. Ct. 260, 423 N.E.2d 6 (1981).

17. Martin Luther King emphasized the moral nexus between the defiance of laws and the denial of the opportunity to seek changes in these laws through the normal political process.

> Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us to consciously break laws. One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. Conversely, one has a moral responsibility to disobey unjust laws.
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> . . .
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> A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law. Who can say that the legislature of Alabama which set up that state's segregation laws was democratically elected? Throughout Alabama all sorts of devious methods are used to prevent Negroes from becoming registered voters, and there are some counties in which, even though Negroes constitute a majority of the population, not a single Negro is registered. Can any law enacted under such circumstances be considered democratically structured?

M. KING, *Letter from Birmingham Jail*, in WHY WE CAN'T WAIT 77, 84, 85-86 (1963).

18. No. CR-84-66 (D. Minn. Nov. 8, 1984).

fense Department, to argue their political motives for the offense over the prosecutor's objections that "appeals to passion and prejudice" do not belong in a criminal trial. The defendants then proceeded to contend that their conception of international law justified their destruction of property which would be used for U.S. defense efforts.[19] The jury did not agree and convicted them of destroying property being manufactured for the U.S. government,[20] for which they could have been sentenced to ten years in prison and a $10,000 fine.[21]

Judge Lord, however, released the defendants with a six-month suspended sentence.[22] In a statement read in the courtroom, the judge declared his support for the political objectives of the defendants, whom he called "friends of the people,"[23] and attacked the defense industry as "warmongers."[24] He lauded, by contrast, the "more sanctified endeavor" of the convicted pair "who by their acts attempt to counsel moderation and mediation as an alternative method of settling international disputes."[25] He also saw a "plausible argument that international law prohibits what our country is doing by way of manufacturing mass weapons of destruction."[26]

Judge Lord then attacked Sperry employees for having allegedly "stole[n] $3.6 million worth of property" by embezzlement from the U.S. government and "wrongfully and feloniously juggling the books."[27] No one at Sperry was ever convicted of or even prosecuted for such an offense. The failure to punish Sperry officials for this alleged crime, said the judge, gave him a "clear conscience"[28] in freeing the defendants.[29]

Although devoid of the invective of Judge Lord's comments, another 1984 Minnesota decision concerning protests against a defense contractor potentially has greater importance as a precedent. *State v. Brechon*[30] reversed a lower court decision which excluded testimony regarding political beliefs in trials for criminal trespass for periodic mass blockades of the entrances and exits of the Minneapolis headquarters of Honeywell, Minnesota's largest defense contractor.[31] A special three-judge state district court had ruled that constitutional rights to a fair trial do not "allow defendants to use the court as

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19. Minneapolis Star and Tribune, Oct. 11, 1984, at 1B, col. 1.

20. *Id.*, Oct. 12, 1984, at 1B, col. 2.

21. 18 U.S.C. § 1361 (1982).

22. Minneapolis Star and Tribune, Nov. 9, 1984, at 1A, col. 2.

23. Record at 18, United States v. LaForge, No. CR-84-66 (D. Minn. Nov. 8, 1984).

24. *Id.* at 15.

25. *Id.* at 14.

26. *Id.*

27. *Id.* at 16-17.

28. *Id.* at 21.

29. Judge Lord, who had been chief justice of the U.S. District Court for Minnesota, retired in the summer of 1985 after nineteen years on the federal bench. An "evening of tribute" for him on August 26, 1985, in Minneapolis (attended by the author) featured almost four hours of encomiums from such national figures of the left as George McGovern, Ramsey Clark, William Kunstler, and assorted "peace" activists, feminists, and civil liberties group leaders.

30. 352 N.W.2d 745 (Minn. 1984).

31. Rothenberg, *Heat's on Honeywell, and the Public Gets Burned*, Wall St. J., Dec. 13, 1983, at 30, col. 3.

a forum to air their political, religious, and moral beliefs and appeal to the passions of the jury."[32]

Minneapolis city prosecutors sought the lower court ruling after a jury acquitted 36 Honeywell protesters in June 1983 solely because of sympathy for their political views, according to jurors interviewed by the media. Said jury foreman Susan Kela, "[w]e tried to address ourselves to the legal facts and to separate the moral issue, although when we came down to the interpretation of the 'claim of right' we had to get down to the moral issue." She added that the jurors were unanimous on the "moral" issues. "Who is not against nuclear war?"[33]

On review of the district court decision, however, the Minnesota Supreme Court found that defendants had a constitutional right to testify to juries about their political opinions and why their opposition to U.S. defense and foreign policy supposedly justifies criminal acts.

> We deem it fundamental that criminal defendants have a due process right to explain their conduct to a jury. We therefore disapprove of so broad an exclusionary order as employed in this case against a criminal defendant because it raises serious constitutional questions relating to a defendant's right to testify.[34]

Trial courts thus were denied the authority to exclude political testimony; in an implicit acknowledgment that a defendant's politics had no relevance to whether a crime had been committed, the decision recommended that judges "instruct the jury to disregard defendants' subjective motives in determining the issue of intent."[35]

Nevertheless, since the *Brechon* decision, juries have acquitted many of the Honeywell protesters, even though virtually none have denied the essential facts relevant to the charge of criminal trespass.[36] Prosecutors dropped the charges before trial in several other cases, because, one said, they "did not think it wise to spend that much taxpayers money to allow the defendants to get up and give their spiel about nuclear war."[37] As of early 1987, mass trespass against Honeywell continues with demonstrators saying they are acting not only in opposition to Honeywell's production of components for missiles but to apartheid and to aid to anti-Communist forces in Central America as well.[38]

Applying the *Brechon* case, a Ramsey County (St. Paul) Municipal Judge allowed 31 defendants on trial for trespass against a Sperry plant to seek to excuse their conduct on the basis of their political opposition to

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32. State v. Brechon, No. 83094 at 14 (Dist. Ct. Hennepin County, Minn. Oct. 25, 1983).

33. Minneapolis Star and Tribune, June 4, 1983, at 1A, col. 1; St. Paul Pioneer Press and Dispatch, June 4, 1983, at 1A, col. 4.

34. State v. Brechon, 352 N.W.2d 745, 751 (Minn. 1984).

35. *Id.*

36. Minneapolis Star and Tribune, Oct. 20, 1984, at 1B, col. 2; *Id.*, Nov. 9, 1984, at 10A, col. 3.

37. *Id.*, Oct. 23, 1984, at 5D, col. 5 (quoting William Korn); Minneapolis Star and Tribune, Dec. 12, 1984, at 31A, col. 1; St. Paul Pioneer Press and Dispatch, Apr. 6, 1985, at 7A, col. 1.

38. Minneapolis Star and Tribune, Apr. 18, 1986, at 1B, col. 1; St. Paul Pioneer Press and Dispatch, Apr. 18, 1986, at 1C, col. 4.

Sperry's production of missile guidance systems for the U.S. Again the facts were not in dispute, but a jury in April, 1985 acquitted all the defendants. Juror Roger Green said the jurors agreed that Sperry's defense contracts presented an "imminent danger to the world. We felt that they superseded the trespass law."[39]

The decisions discussed at the beginning of this article held that defendants had no right under the necessity defense to present political testimony. *Brechon*, however, ruled that they could request from the jury acquittal on the basis of their political motives for illegal conduct without satisfying, or even claiming to meet, the requirements of the necessity defense set forth in *United States v. Steward*.[40] The Minnesota Supreme Court thus appears to have established a new defense to criminal charges offering defendants unlimited license to appeal to political prejudices of judges and juries.[41]

Supporters of the *Brechon* decision and the subsequent trespass acquittals occasionally point to the doctrine of "jury nullification" as representing the "conscience of the community" acting "against political oppression," referring to such cases as the jury's acquittal of John Peter Zenger who was prosecuted in 1735 for publishing stories not approved by British censors.[42] It can hardly be taken seriously, however, that foreign and defense policies adopted by democratically elected Presidents and Congressmen, and laws protecting private property, are similarly "oppressive" of those disapproving of them. Far from viewing them as acts of "conscience," one federal appellate court regarded the pursuit of political objectives as exacerbating rather than justifying violations of the criminal law.

> One who elects to serve mankind by taking the law into his own hands thereby demonstrates his conviction that his own ability to determine policy is superior to democratic decision making. Appellant's professed unselfish motivation, rather than a justification, actually identifies a form of arrogance which organized society cannot tolerate.[43]

Even *Brechon* allowed trial courts to refuse to admit "expert testimony or objective proof" relating to political grievances of defendants.[44] A 1984 Pennsylvania decision,[45] however, ordered a new trial of the Berrigan brothers and others convicted of burglary of a General Electric plant, even though the trial judge had permitted them to testify regarding their political views opposing U.S. defense and foreign policy. The appellate court decided that they had the additional right to present the testimony of purported experts on the conse-

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39. St. Paul Pioneer Press and Dispatch, Apr. 6, 1985, at 1A, col. 1.

40. State v. Brechon, 352 N.W.2d 745, 751 n.3 (Minn. 1984) (citing United States v. Steward, 687 F.2d 1270, 1275 (10th Cir. 1982)).

41. *Cf.* State v. Marley, 54 Haw. 450, 509 P.2d 1095 (1973), which held that defendants found guilty of trespassing on Honeywell property in Honolulu to protest the Vietnam War were not justified in violating the law because of the availability of other forms of noncriminal protest.

42. Gaut, *What Judges Don't Tell the Juries*, Minneapolis Star and Tribune, Nov. 30, 1984, at 25A, col. 1.

43. United States v. Cullen, 454 F.2d 386, 392 (7th Cir. 1971).

44. *Brechon*, 352 N.W.2d at 751.

45. Commonwealth v. Berrigan, 325 Pa. Super. 242, 472 A.2d 1099 (1984).

quences of nuclear war.

Defense contractors are not the only targets of illegal activity; anti-abortion activists have concentrated their attention on abortion clinics. In contrast to "peace" protesters who are resisting policies adopted by elected legislatures and chief executives, the abortion opponents are challenging practices protected by federal court decisions which have struck down legislation barring or restricting abortion. Some may argue that this affords a stronger moral claim than that of, say, the Honeywell trespassers. Still, no reported federal or state appellate decisions have extended abortion protesters privileges comparable to those of "peace" activists regarding the introduction of evidence on political and moral views and exoneration from conviction or punishment.[46] On the contrary, the cases have refused to consider the moral and religious beliefs of abortion opponents in deciding guilt or innocence or punishment.

Gaetano v. United States,[47] and *Cleveland v. Municipality of Anchorage*,[48] barred anti-abortion protesters from excusing violations of criminal trespass laws by virtue of their moral and religious beliefs and rejected appeals to the necessity defense. *Gaetano* denied the request of defendants, charged with unlawful entry of an abortion clinic, to introduce moral and religious testimony opposing abortion. In holding the necessity defense inapplicable, it recognized the rights of victims of crimes.

> Unlike medical necessity or other emergency situations, the necessity cited by appellants cannot shield them from criminal liability for their acts. The rights to free speech, to assembly, and to petition the government for grievances are a cornerstone of the American system. So, too, is the right to be free from criminal interference. These appellants trespassed on the rights of others and did so without excuse.[49]

Rather than regarding defendants' repugnance to abortion based on moral philosophy and religion as extenuating the crime, recent decisions have imposed harsh prison terms and fines for bombings of abortion clinics. The U.S. District Court for the Northern District of Florida, in May, 1985, sentenced two defendants to ten years in prison and ordered them to pay over $350,000 each to doctors whose offices were destroyed in December, 1984 bombings.[50] In his closing arguments to the jury, the prosecuting attorney noted, "[w]e are a nation of laws, not of men. The only thing that keeps us out of the jungle is the law. We don't decide which laws to obey and which ones not to obey." In what probably was unintended irony in light of the extradition cases considered below, he asserted that those committing unlawful acts in the name of religion are no different from terrorists in Northern Ireland.[51] Some

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46. *Cf.* Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1077 (Alaska 1981) (discussing two unreported Virginia district court cases: County of Fairfax v. Gaetano, No. 13974 (Gen. Dist. Ct. of Fairfax County Va. Oct., 17, 1977); County of Fairfax v. Smith, (Gen. Dist. Ct. of Fairfax County Va. Feb. 11, 1978)).

47. 406 A.2d 1291 (D.C. 1979).

48. 631 P.2d 1073 (Alaska Ct. App. 1981).

49. Gaetano v. United States, 406 A.2d 1291, 1295 (D.C. 1979).

50. N.Y. Times, May 31, 1985, at A15, col. 3.

51. *Id.*, April 25, 1985, at A23, col. 1.

weeks later, the Maryland U.S. District Court sentenced two defendants to ten years and two years imprisonment respectively and the payment of more than $43,000 in restitution for 1984 bombings of abortion facilities.[52] One commentator supporting legalized abortions called the bombings "terrorism" and demanded a "firm approach," declaring that the "response to it should not be determined by the political coloration of the terrorists' cause."[53]

Courts have allowed political motivations to justify not only property offenses against businesses but more serious crimes as well. Several recent federal cases have refused to extradite Irish Republican Army (IRA) members charged with or even convicted of murder and other violent crimes in Great Britain. The decisions all found these crimes "political" and thereby nonextraditable under the applicable treaty which requires denial if "the offense for which extradition is requested is regarded by the requested Party as one of a political character."[54] The political offense exception was successfully invoked by Joseph P.T. Doherty,[55] convicted by a British court of murdering a British army captain; Desmond Mackin,[56] indicted for attempted murder of a British soldier and other crimes; and Peter G.J. McMullen,[57] charged with bombing British army barracks.[58]

These decisions depart from the reasoning of *Eain v. Wilkes*,[59] which ordered extradition of a Palestine Liberation Organization (PLO) terrorist charged with bombing an Israeli marketplace, killing and maiming several persons. The court spurned the argument that Abu Eain should be set free on the grounds that his offense was "political."

> The evidence in this case reveals that the PLO seeks the destruction of the Israeli political structure as an incident of the expulsion of a certain population from the country, and thus directs its destructive efforts at a defined civilian populace. That, it could be argued, may be sufficient to be considered a violent political disturbance. If, however, considering the nature of the crime charged, that were all that was necessary to prevent extradition under the political offense exception nothing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone anywhere for their crimes. The law is not so utterly absurd. Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets

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52. *Id.*, July 3, 1985, at A19, col. 6; *Id.*, July 13, 1985, at A42, col. 6.

53. Simmons, *Reagan's Silence on Abortion Terror*, N.Y. Times, July 29, 1985, at A15, col. 2.

54. Treaty of Extradition with the United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468, art. V, para. (1)(c)(i) (effective Jan. 21, 1977).

55. *In re* Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984); *see also* United States v. Doherty, 615 F. Supp. 755 (S.D.N.Y. 1985).

56. *In re* Mackin, 668 F.2d 122 (2d Cir. 1981).

57. *In re* McMullen, No. 3-78-1099 MG (N.D. Cal. May 11, 1979).

58. *See* National Law Journal, Sept. 16, 1985, at 10, col. 3 (discussing *In re* Barr, No. 84-943 (D. Pa. Aug. 25, 1985)). The court in *Barr* refused to extradite an IRA member charged with shooting a British marine on the grounds that the evidence was insufficient. *Id.*

59. 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

> forever free from any accountability for their acts. . . . [T]he political offense exception. . . should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere.[60]

It stressed that "the indiscriminate bombing of a civilian populace is not recognized as a protected political act."[61]

In contrast, U.S. District Judge Robert P. Aguilar denied extradition of American citizen William J. Quinn, charged with murdering an off-duty and out-of-uniform police constable and conspiring to cause a wave of bomb explosions in England, ruling that civilian targets were legitimate political objectives.[62] The court's opinion suggested that any violent act intended as part of an uprising against governments in power should be covered by the political offense exception. In February, 1986, however, a Ninth Circuit U.S. Court of Appeals panel, by a 2-1 vote, remanded the case not on the basis of repugnance for Quinn's crimes against nonmilitary victims, but on the narrow ground that the political offense exception, according to the court, would only protect IRA crimes committed in Northern Ireland itself.[63] It specifically rejected *Eain's* condemnation of terrorism against a civilian population, because excluding "some forms of internal revolutionary conduct" would "run contrary to the exception's fundamental purpose."[64] The court cited with approval a law review note criticizing the *Eain* case for inviting determinations in accordance with "ideological and foreign policy views" of judges.[65] Under the decision's logic, an IRA terrorist committing Quinn's crimes in Belfast, rather than London, could not be extradited.[66]

The later decisions did not share *Eain's* concern with making the U.S. a haven for terrorists either. U.S. District Judge John E. Sprizzo remarked, in *Doherty*, that:

> The Court is not persuaded by the fact that the current political administration in the United States has strongly denounced terrorist acts and has stated that to refuse extradition in this case might jeopardize foreign relations.[67]

The IRA extradition cases failed to address the matter of the availability of alternatives to violence in democratic societies to express political viewpoints and to effect change through lawful participation in the political process. Instead, like the Sperry and Honeywell protest cases, they in effect sanctioned crimes against innocent persons by organized minorities seeking to secure political objectives they could not achieve through democratic and con-

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60. *Id.* at 520.

61. *Id.* at 521.

62. Quinn v. Robinson, No. C-826688 RPA (N.D. Cal. Oct. 3, 1983) (reversing September 1982 decision of federal magistrate).

63. Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986).

64. *Id.* at 808.

65. *Id.* at 802 (*citing* Note, *Terrorist Extradition and the Political Offense Exception: An Administrative Solution*, 21 VA. J. INTL. L. 163, 178 (1980)).

66. *See id.* at 818 (Duniway, J., concurring) (criticizing *Quinn* majority reasoning).

67. *In re* Doherty, 599 F. Supp. 270, 277 n.6 (S.D.N.Y. 1984).

stitutional means. Indeed, the *Doherty* decision held the IRA could rely upon the political objectives they could not achieve through democratic and constitutional means. Indeed, the *Doherty* decision held the IRA could rely upon the political offense exception even though its methods and objectives were not supported even by a majority of the Catholics in Northern Ireland.[68]

Further, none of these cases evinced any concern for the rights of the victims of the crimes; some even cast blame upon them. Like Judge Lord's censure of Sperry,[69] Judge Sprizzo reproved the target of a terrorist attack. "The death of Captain Westmacott, while a most tragic event, occurred in the context of an attempted ambush of a British army patrol. It was the British Army's response to that action that gave rise to Captain Westmacott's death."[70]

As shown above, federal and state judges and juries have allowed "peace" protesters and IRA terrorists, but not opponents of abortion, to elude punishment for and even conviction of crimes perpetrated for a claimed political or moral motive. The cases benefiting protesters and terrorists for political causes have articulated no criteria defining or restraining the use of political considerations to exonerate from conviction or punishment. They offer no safeguards comparable to the restrictions of the necessity defense. The absence of any standard jeopardizes the integrity of the judicial process by permitting and even encouraging the appeal to and expression of political prejudices of judges and juries. The emergence of judicial double standards becomes almost inevitable.

Even within the same jurisdiction, actions of courts (and prosecutors as well) have indicated that not all who claim to be acting because of ideological or moral motivations will be permitted to evade the consequences of their illegal conduct but only those whose philosophy is shared by sympathetic judges and juries. In Washington, D.C., for example, none of the thousands of anti-apartheid protesters at the South African Embassy, who have been arrested for violating a District of Columbia law against demonstrating within 500 feet of an embassy,[71] have been convicted or even prosecuted. In contrast, scores of rabbis and others demonstrating in the same manner, but at the Soviet Embassy protesting the treatment of Soviet Jews, were convicted of this offense.[72] One District of Columbia Superior Court judge, Colleen Kollar-Kotelly, told a group of rabbis on trial in December, 1985 that "the courtroom is not the forum for speaking out" on issues of Soviet Jewry and sentenced them to fifteen days in jail to be served during the Jewish holiday of Hanukah.[73] The rabbis claimed a double standard and selective prosecution as did anti-abortion protesters kneeling in prayer on the steps of the Supreme Court who, in January, 1985, were convicted of and jailed for violating a law prohibiting

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68. *Id.* at 273 n.2.

69. Record at 16-17, United States v. LaForge, No. CR-84-66 (D. Minn. Nov. 8, 1984). *See supra* note 26 and accompanying text.

70. *In re* Doherty, 599 F. Supp. 270, 276 (S.D.N.Y. 1984).

71. D.C. CODE ANN. § § 22-1115, 22-1116 (Michie 1981 & Supp. 1986) (pertaining, respectively, to the prohibition of interference with foreign diplomatic offices, and the penalties for violating such prohibition).

72. N. Y. Times, Dec. 6, 1985, at A3, col. 2; Washington Post, Dec. 12, 1985, at A43, col. 1.

73. Washington Post, Dec. 13, 1985, at C1, col. 2.

demonstrations at the building.[74]

In January, 1986, D.C. Corporation Counsel, Inez Smith Reid, explaining her office's failure to prosecute South African Embassy protesters, said "it would be untenable" to press charges against those objecting to "the gross injustices which result from the South African policy of apartheid."[75] Ms. Reid did not disclose her criteria for determining that apartheid, but not religious persecution, was a "gross injustice" or what legal or constitutional authority, if any, exists for selective prosecution or punishment on the basis of the political or moral motivations of lawbreakers.

Minnesota courts also have sanctioned double standards in adjudicating the rights of protesters. *State v. Brechon*[76] declared "distinguishable" *Cleveland v. Municipality of Anchorage*.[77] Interestingly, the latter's concurring opinion of Justice Dimond, cited a Minneapolis Municipal Court decision which excluded all evidence of a medical, religious, or philosophical nature offered by abortion opponents to justify their trespass at an abortion clinic.[78] The Minneapolis decision concluded:

> In this case, there are several other entirely lawful alternatives which can be utilized by anti-abortion foes. Peaceful picketing conducted within the framework of the law and with no physical intrusion of the property of those sharing a contrary view has already been utilized. Educational programs discouraging abortion and fostering a respect for life are another means which have and can be employed. . . . Utilization of such frontier-day violence is not an attractive prospect to most Americans, be they pro or anti-abortion.[79]

It is not the author's intention to argue that those who bomb abortion clinics or even persons who engage in nonviolent protests against abortion or the persecution of religious minorities should be above the law. But neither should IRA terrorists, "peace" protesters, or anti-apartheid activists be exempted from punishment for their crimes. The law should be enforced without fear or favor regardless of the political predilections of judges and juries or prosecutors.[80]

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74. N.Y. Times, Jan. 25, 1985, at B8, col. 5.

75. Human Events, Jan. 11, 1986, at 8, col. 2.

76. 352 N.W.2d 745, 751 n.3 (Minn. 1984).

77. 631 P.2d 1073 (Alaska 1981). *See supra* note 47 and accompanying text.

78. State v. Rasmussen, No. 1010575 (Hennepin County Mun. Ct. Oct. 5, 1978).

79. *Id.*, slip op. at 6.

80. The disparate treatment of protesters, based on the perceived fashionability of their ideology, extends to college campuses as well. Recently, Dartmouth College suspended ten students for attempting to dismantle "shanties" erected in violation of College rules, to force divestment of the school's funds from stock in companies doing business in South Africa. Apartheid protesters also occupied Dartmouth's administration building, and seventeen of them were arrested on criminal trespass charges for preventing removal of the shanties when Hanover, N.H. city officials determined that they violated local zoning laws. Another protester was arrested for assaulting a police officer. The College, in contrast to its treatment of their antagonists, imposed no penalties on any of the anti-apartheid protesters and has even formally requested that all criminal charges be dropped against them. N.Y. Times, March 30, 1986, at E9, col. 1; Wall St. J., April 9, 1986, at 30, col. 1; National Review, April 25, 1986, at 20, col. 1; Gladwell, *Fast Times at Dartmouth*

In spite of its abuse, the politicization of the judicial process has gathered influential support. Nationally syndicated columnist Colman McCarthy, for example, has lavished editorial praise upon Judge Miles Lord for his release of those convicted of destroying the Sperry computer. Referring to Judge Lord's statement about his clear conscience in releasing the defendants because Sperry employees allegedly "stole" $3.6 million without punishment, McCarthy wrote, "[i]t is such clarity that has assured Lord of continued respect."[81] In another column, he declared it "twisted" to view as criminal the destruction of "property that could destroy the ultimate property — the world."[82]

Likewise, ferocious oppposition in and outside of Congress blocked, for over a year, Senate ratification of an amended U.S. — British extradition treaty signed in June, 1985 which would bar such acts as murder, conspiracy to commit bombings, hijackings, hostage-taking, and other violent crimes from being classified as "political" offenses.[83] One prominent critic, Senator Christopher Dodd (D. Conn.), called the amended treaty an attempt to "short-circuit the Constitution and the political freedoms guaranteed by it."[84]

At best, support for the intrusion of political ideology into the criminal justice process is shortsighted and based upon identification with the particular causes of the defendants who have profited from it. Yet, the politicization of criminal justice can be turned to the advantage or disadvantage of individuals and groups at judicial whim. Judicial favoritism of "peace" protesters and IRA terrorists over opponents of abortion and Soviet religious persecution can be reversed tomorrow as judges with different judicial and political philosophies are appointed to the bench.

Even more, injecting politics into criminal trials could result in unwarranted convictions and aggravation of punishment depending upon the prejudices of judges and juries. This allegedly occurred in the Sacco-Vanzetti convictions and executions.[85] Later, during World War II, a series of Supreme Court decisions by New Deal counterparts of today's judicial activists approved the shameful en masse evacuation and internment of Japanese-Americans.[86] Now, after more than forty years, the D.C. circuit U.S. Court of Appeals ruled in January, 1986 that Japanese-American citizens have the right to sue for compensation for their lost property resulting from the violation of

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High, The American Spectator, April, 1986, at 28, col. 1.

81. McCarthy, *Vindication for Judge Lord*, Minneapolis Star and Tribune, Jan. 6, 1985, at 14A, col. 1.

82. McCarthy, *Destroying Property that Endangers All Property*, Minneapolis Star and Tribune, Nov. 10, 1984, at 17A, col. 1.

83. N. Y. Times, July 11, 1985, at A22, col. 1; *Id.*, Aug. 20, 1985, at A15, col. 1; *Id.*, Jan. 19, 1986, § 1, at 1, col. 4; Nat'l L.J., July 29, 1985, at 5, col. 1; Washington Post National Weekly Edition, Nov. 18, 1985, at 27, col. 1; Biden, *A 'Bad Law' on Terrorists*, U.S. News & World Report, Feb. 3, 1986, at 83, col. 1. The Senate eventually ratified the amended treaty on July 17, 1987. N.Y. Times, July 10, 1986, at A1, col. 6.

84. *See* Clarizio, *Striking at the Heart of Liberty*, A.B.A. J. Jan. 1986, at 38, col. 1 (*quoting* Sen. Dodd).

85. For the argument that Sacco and Vanzetti were wrongfully convicted, see L. JOUGHIN & E. MORGAN, THE LEGACY OF SACCO AND VANZETTI (1964); H. EHRMANN, THE CASE THAT WILL NOT DIE (1969); and R. FEUERLICHT, JUSTICE CRUCIFIED (1977).

86. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943).

their constitutional rights by their incarceration.[87]

Above all, those who have sought to bend the judicial process to their own political ends have failed to recognize that preserving liberties for themselves and others, depends far more upon maintaining the rule of law impartially administered by the courts than upon securing a momentary advantage no matter how supposedly good the cause. In *Walker v. City of Birmingham*,[88] the U.S. Supreme Court ruled that an injunction barring street demonstrations must be obeyed until reversed through the appeal process even if the injunction raises "substantial constitutional" questions.[89]

> [I]n the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law which alone can give abiding meaning to constitutional freedom.[90]

Today's courts should return to this wisdom. No one's politics, however fashionable at the time, should place him or her above the law.

87. Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986).
88. 388 U.S. 307 (1965).
89. *Id.* at 316-17.
90. *Id.* at 320-21.

Maternal Duties During Pregnancy: Toward a Conceptual Framework

*Maxwell L. Stearns**

I. INTRODUCTION

As medical science improves its ability to monitor fetal development and treat fetal maladies, the courts must begin to question whether a pregnant woman should properly be regarded as one patient or two.[1] Courts will increasingly face suits to enjoin maternal acts or omissions that are likely to result in permanent harm or death to the fetus.

To determine whether and when to allow fetal interests to prevail over maternal interests, courts will need to address several legal issues. A pregnant woman seeking to protect her choice of lifestyle, or to avoid an intrusive procedure, can assert her constitutional rights to make certain intimate decisions, to bodily integrity, and to the free exercise of religion. In a *parens patriae* suit to enjoin detrimental conduct by a mother, a state could raise claims on behalf of a fetus in tort and in equity.[2]

To resolve these competing doctrines in particular cases, courts will need to consider the broad range of situations in which maternal-fetal conflicts can arise. To date, courts have only imposed duties on pregnant women to save the

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1. At least one obstetrician gynecologist has asserted that both the mother and the fetus ought to be regarded as patients. *See, e.g.*, Bowes & Selgestad, *Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 OBST. & GYNECOL. 209 (1981).

2. This article will address whether states can and should intervene to protect fetal health. Because order and contempt proceedings are quasi civil and quasi criminal, persons with an interest in protecting the health of a given fetus must rely on reporting devices to prompt state intervention.

lives of viable fetuses in situations where the medical procedure posed little or no risk to the mother.[3] No court has addressed whether a pregnant woman has a duty to protect or improve fetal health where the life of her fetus is not at stake.[4] Nor is it clear whether a court can impose a duty to protect or benefit a pre-viable fetus without violating a woman's constitutional rights.[5]

A pregnant woman can seriously harm her fetus through adverse conduct early in gestation. Certain adverse conduct, especially during early pregnancy, including excessive alcohol consumption and drug abuse, can result in a variety of birth defects affecting physical growth and mental development.[6] In ad-

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3. In fact, thus far courts have only imposed duties on pregnant women when both their lives and those of their fetuses were threatened by their refusal to accept medical care. *See* Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 88, 274 S.E.2d 457, 458 (1981). "Delivery by Caesarean section prior to labor beginning would have an almost 100% chance of preserving the life of the child, along with that of defendant." *Id.* Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 423, 201 A.2d 537, 538 (1964). "The welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them . . . ." *Id.*

In a recent California case, however, a woman was charged with the crime of fetal abuse for her failure to abstain from taking drugs, resulting in the death of her child at birth. *See* Washington Post, Oct. 9, 1986, at A22, col. 1; Chambers, *Woman facing criminal charges over her pregnancy*, N.Y. Times, Oct. 9, 1986 at A22, col. 1. Unlike in *Jefferson* and *Anderson, supra*, the woman's life in this case was not immediately threatened by her conduct. Thus, she is being charged solely for the harm she caused her fetus. On February 26, 1987, the trial judge dismissed the charges on the ground that the California statute that makes it "a crime for a parent to 'willfully omit, without lawful excuse' to furnish necessary medical attendance for a child" and that "permits a fetus to be deemed a person," was intended as a financial support statute and not as one to prosecute pregnant women. *See* Chambers, *Case Against Woman in 'Baby Death Dropped,'* N.Y. Times, Feb. 28, 1987 at A32 col. 1. The district attorney in this case is considering an appeal. *Id.* While this article involves whether the state can impose affirmative duties to prevent harm to fetal health rather than whether it can criminally sanction a woman's failure to aid fetal health, the two issues are closely related.

4. However, at least one commentator has taken such a position. *See generally* Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 441 (1983) [hereinafter Robertson, *Procreative Liberty*]. "The mother who chooses not to abort has the same duty as an outsider to avoid prenatal actions injurious to a child who would otherwise be born healthy." *Id.*

5. *See, e.g.*, Taft v. Taft, 388 Mass. 331, 334 n.4, 446 N.E.2d 395, 397 n.4 (1983). "No case has been cited to us, nor have we found one, in which a court ordered a pregnant woman to submit to a surgical procedure in order to assist in carrying a child not then viable to term." *Id.*

6. For example, Fetal Alcohol Syndrome (FAS) may result in ". . . multiple congenital anomolies with microcephaly, micrognathia, microphthalmia, cardiac defects, prenatal growth retardation and developmental delay." Ouellette, Rossett, Rosman & Weiner, *Adverse Effects on Offspring of Maternal Alcohol Abuse During Pregnancy*, 297 NEW ENG. J. MED. 528, 528 (1977). Moreover, FAS increases prenatal mortality. *Id.* Heavy drinking during the first trimester poses the greatest risk to fetal maldevelopment, while heavy drinking later in pregnancy has a "greater effect on fetal nutrition and size." *Id.* at 530. Women using psychotropic drugs during pregnancy may give birth prematurely to underweight and malnourished infants. Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 74 (1984) [hereinafter Shaw]. Moreover, such infants may experience symptoms of withdrawal. *Id.* at 75; *see also* Finnegan & Wapner, *Drug Abuse During Pregnancy*, 111 MED. TIMES 4 (1983) (describing effects of maternal drug addiction on the fetus); Tye, *Alarm raised on cocaine, pregnancy*, The Boston Globe, July 1, 1986, at 21, col. 1 (single use of cocaine at any time during pregnancy poses high risk of death to

dition, women may endanger fetal health prior to viability by failing to maintain their own health. Examples include diabetic women who fail to properly monitor their insulin levels,[7] women with phenylketonuria who fail to follow certain dietary restrictions[8] and epileptic women who fail to take proper medication.[9] Finally, recent medical advances enable doctors to correct certain fetal abnormalities in utero.[10] For example, doctors have successfully performed in utero surgery to drain excess fluid buildup in the cranial cavity and kidneys of fetuses thus preventing serious injury or death at birth.[11] While many in utero surgical procedures are currently experimental, they may become accepted

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both mother and fetus, and of brain damage to fetus).

7. Diabetic women who neglect to monitor adequately their insulin levels may expose their fetuses to high risks of heart defects, hypoglycemia, loss of neurological function and other birth defects. *See generally* Pildes, *Infants of Diabetic Mothers*, 289 NEW ENG. J. MED. 902 (1973) (describing morbidity of fetuses with diabetic mothers); Sosenko & Kitzmiller, *The Infant of the Diabetic Mother*, 301 NEW ENG. J. MED. 859 (1979) (describing case study involving fetuses with diabetic mothers).

8. Pregnant women who suffer from phenylketonuria (p.k.u.) or who carry the gene may give birth to severely retarded infants. *See generally* Waisman, *Role of Hyperphenyllaninemia in Pregnant Women as a Cause of Mental Retardation in Offspring*, 99 AM. J. OBST. GYNEC. 431 (1967) (discussing extent that maternal p.k.u. can be controlled to benefit offspring). The offspring of women with p.k.u. who were successfully treated are now at the reproductive age and as carriers of the gene themselves suffer the same risk. *See* Shaw, *supra* note 6, at 85. By placing themselves on a severely restrictive and unpleasant diet, women can reduce this risk. *Id.* Since the disorder is caused by the high phenylalanine level in the mother's bloodstream which travels across the placenta, in-vitro fertilization to a surrogate mother can prevent this disorder. *Id.* at 85-86. Women can also endanger their fetuses by failing to provide themselves with adequate nutrients during pregnancy. *See generally Fetal Malnutrition May Impair Intelligence Despite Birthweight*, 11 OB. GYN. NEWS 1 (Jan. 15, 1976) (discussing adverse effects of malnourishment on the fetus).

9. While seizure disorders in pregnant women can result in "[s]tillbirth, microcephaly, mental retardation, and nonfebrile seizure disorders in . . . offspring," anticonvulsant drugs themselves have significant tetarogenic effect. *See* Dalessio, *Seizure Disorders and Pregnancy*, 312 NEW ENG. J. MED. 559, 560 (1985). Thus, the American Academy of Pediatrics Select Committee on Anticonvulsants in Pregnancy has recommended "that medication should be withdrawn before pregnancy from a woman who has been free of seizures for 'many years.' " *Id.* at 561. For other women, Dalessio recommends "optimal seizure control with a single anticonvulsant drug." *Id.* at 562.

10. *See generally* Elias & Annas, *Perspectives on Fetal Surgery*, 145 AM. J. OBST. GYNEC. 807 (1983) [hereinafter, Elias & Annas, *Perspectives*] (discussing recent medical advances in in-utero surgery and ethical and legal issues raised by these advances).

11. Hydrocephalus involves excessive fluid build up in the skull during gestation and results in abnormal brain development. *See generally* Harrison, Golbus & Filly, *Management of the Fetus With a Correctable Congenital Defect*, 246 J. A.M.A. 774, 775 (1981) [hereinafter Harrison, Golbus & Filly] "In obstructive hydrocephalus, high intraventricular pressure compresses the developing brain." *Id.*; *see also* Brinholz & Frigoletto, *Antenatal Treatment of Hydrocephalus*, 303 NEW ENG. J. MED. 1021 (1981) (discussing case report of in utero surgical procedure to correct fetal hydrocephalus). Hydronephrosis involves post-urethral valves blocking the passage of urine to the bladder and results in destruction of the kidneys. *See generally* Harrison, Golbus & Filly, *supra* this note, at 775. "In congenital hydronephrosis, unrelieved urinary tract obstruction results in progressive deterioration of renal function." *Id.*; *see also* Harrison & Golbus, *Fetal Surgery for Congenital Hydronephrosis*, 306 NEW ENG. J. MED. 591 (1982) (discussing unsuccessful case involving in utero surgery to correct hydronephrosis).

medical practice in the near future.[12]

A prenatal-duty rule would require a pregnant woman to manage her pregnancy in a way that benefits the health of her fetus. Because fetal harm can result from a variety of maternal acts and omissions,[13] potential prenatal duties could require a pregnant woman to avoid particular activities which directly harm the fetus, to care for her own health where failing to do so might harm the fetus, or to engage in medical procedures which will correct or ameliorate exogenously-caused fetal maladies. This article will propose a framework for restricting the scope of prenatal duties based upon whether the mother caused the fetal harm.

The first section will address the constitutional issues that may be implicated by a prenatal-duty rule. The Constitution provides the floor of maternal rights below which the state may not go to protect the fetus. The second section will go beyond the issue of whether such a rule can be imposed constitutionally and will address whether it should be created, given existing legal doctrines and policy considerations. The rescue doctrine and existing state laws on child abuse and neglect provide the ceiling beyond which states are unlikely to go in protecting fetal health, thus providing a useful starting point for analyzing maternal-fetal conflicts. The final section will divide maternal-fetal conflicts that may arise into three categories: maternal *conduct* harming fetal health; maternal *omissions* harming fetal health; *exogenous factors* harming fetal health. By drawing on the legal principles outlined in the first two sections, this section will explain which categories are and are not suitable for judicial intervention.

II. Constitutional Restrictions on Prenatal Duties

While most pregnant women undoubtedly welcome technological advances that enable them to give birth to healthier children, some are unwilling or unable to act in the best interest of their fetuses. Courts cannot intervene, however, each time a woman acts against the best interest of her fetus.

The Constitution guarantees individuals, especially women, the right to make certain intimate decisions regarding reproductive matters.[14] Duties to protect fetal health may therefore be inconsistent with a woman's right to make these decisions. In addition, several Supreme Court decisions restrict the degree to which a state may invade a person's body through the exercise of its police power without violating that person's right to due process.[15] Forced pre-

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12. Elias & Annas, *Perspectives*, *supra* note 10, at 807. "Experimentation with fetal surgery has come of age, and its routine clinical application seems inevitable." *Id.*

13. *See supra* notes 6-9 and accompanying text.

14. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (right of married couples to use contraceptives); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of single persons to use contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (right of women to abort).

15. *See, e.g.*, Winston v. Lee, 470 U.S. 753 (1985) (disallowing compelled surgical removal of a bullet); Schmerber v. California, 384 U.S. 768 (1966) (allowing compelled blood test in exigent circumstances); Rochin v. California, 342 U.S. 165 (1952) (disallowing use of stomach pump to obtain evidence). Numerous state court decisions have extended the right to bodily integrity to include the right to decline medical treatments. *See, e.g.*, *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) (allowing family of irreversibly comatose patient in consultation with physicians and hospital ethics committee to terminate respiratory life-support system); Superintendent of

natal testing[16] as well as corrective procedures themselves[17] may therefore impinge upon a woman's due process rights. Finally, some medical procedures may contravene a woman's religious beliefs thereby implicating her right to free exercise of religion.[18] This section will address each of these constitutional issues.

A. Right of Autonomy in Decision Making

Beginning with *Griswold v. Connecticut*,[19] the modern Court has recognized the right of individuals, especially women, to make certain intimate decisions regarding reproductive matters.[20] While the *Griswold* Court character-

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Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977) (allowing severely retarded adult with myeloblastic monocytic leukemia to forego life-sustaining chemotherapy where doing so is in the patient's best interest). Patients do not lose this right when they are incompetent. *Quinlan*, 70 N.J. 10, 41, 355 A.2d 647, 664. "[A] valuable incident of her right of privacy, . . . should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice." *Id.*; *Saikewicz*, 373 Mass. 728, 745, 370 N.E.2d 417, 427. "[A] general right . . . to refuse medical treatment in appropriate circumstances . . . must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both." *Id.* For a discussion of the constitutional right to bodily integrity, see *infra* notes 72-110 and accompanying text.

16. There are several forms of prenatal testing including sonograms, amniocentesis, fetoscopy, amniography and collecting fetal fluid. *See* Harrison, Golbus & Filly, *supra* note 11. "Real-time sonographic evaluation may yield important information on fetal breathing, fetal movements and fetal vital functions." *Id.* at 776. "Amniocentesis allows culture of amniotic fluid cells for detection of chromosomal defects and inherited metabolic abnormalities, evaluation of fetal pulmonary maturity from lecithinsphingomyelin analysis, and detection and quantization of fetal hemolysis." *Id.* This procedure involves passing a "needle attached to a syringe . . . through the mother's abdominal wall and uterine wall and [puncturing] the fetal membranes so that a sample of fluid surrounding the fetus may be withdrawn." *See* Shaw, *supra* note 6, at 76 n.85 (citing Kolata, *First Trimester Prenatal Diagnosis*, 221 SCIENCE 1030, 1031 (1983)). "Fetoscopy allows direct fetal visualization, fetal skin biopsy, and fetal blood sampling for diagnosis of hemoglobinopathies and other hematologic diseases." Harrison, Golbus & Filly, *supra* note 11, at 776. "Amniography affords further definition of fetal anatomy including the fetal GI tract." *Id.* "[F]luid collections in the fetus . . . can be aspirated under real-time sonographic guidance for both diagnosis and therapy." *Id.* Chronic villi biopsy, a less common method of prenatal testing involves inserting a "thin catheter through the cervix and [removing] a small plug of chorionic tissue surrounding the fetus by suction." Shaw, *supra* note 6, at 76 n.85 (citing Kolata, *First Trimester Prenatal Diagnosis*, 221 SCIENCE 1030, 1031 (1983)). A final test, still in the experimental stage, involves retrieving fetal cells from the mother's blood stream. *Id.* at 76 n.89 (citing Herzenberg *et al.*, Fetal Cells in the Blood of Pregnant Women: Detection and Enrichment of Fluorescence — Activated Sorting, 76 PRAC. NAT'L ACAD. SCI. 1453 (1979)).

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

18. Jehovah's Witnesses, for example, interpret the Biblical proscription against drinking blood as prohibiting blood transfusions even if life saving. *See* Application of President & Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964) (compelling women to consent to blood transfusion to save life of infant).

19. 381 U.S. 479 (1965) (statute proscribing married couples from using contraceptives violates right of privacy).

20. *See, e.g.*, *Eisenstadt*, 405 U.S. 438 (upholding right of single persons to use birth control); *Roe*, 410 U.S. 113 (statute proscribing abortion impinges on woman's right to privacy); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976) (statute requiring spousal con-

ized the right of married couples to use contraceptives as a right of privacy,[21] the Court in subsequent cases has simply recognized a substantive due process right of individuals to make certain personal decisions.[22]

In *Griswold*,[23] the Supreme Court struck down a Connecticut statute proscribing all individuals, including married couples, from using birth control.[24] To justify applying the strict scrutiny test, a higher standard of judicial review used to strike statutes which impinge on fundamental rights, the Court asserted that the Bill of Rights implicitly protects a "zone of privacy."[25] While the Bill of Rights does not expressly mention "privacy," the Court found this right in the penumbras emanating from several specific guarantees.[26] In providing support for explicit guarantees, this implicit right of privacy makes these provisions "fully meaningful."[27]

The Connecticut statute violated the privacy rights of married couples in two distinct but related ways. First, the statute impinged on the right of married couples to make certain intimate decisions.[28] Second, the statute violated the privacy of married couples in a direct physical sense since enforcing the statute would require the state to invade "the sacred precincts of marital bedrooms."[29] While the *Griswold* Court emphasized the physical invasion of privacy,[30] the Court in subsequent cases extended this right to expand the protected sphere of autonomous decisionmaking.[31]

Six years after *Griswold*, the Supreme Court applied the equal protection

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sent for abortion violates woman's right to abort); Bellotti v. Baird, 443 U.S. 622 (1979) (statute requiring parental consent for abortion for minor women violates a minors' right to abort).

21. 381 U.S. at 485. "[T]he zone of privacy [is] created by several fundamental constitutional guarantees." *Id.*

22. *See, e.g.*, *Roe*, 410 U.S. at 168 (Stewart, J., concurring). "*Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it is such." *Id.*; *see also* Carey v. Population Services International, 431 U.S. 678, 687 (1977). "Read in light of its progeny, the teaching in *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Id.*

23. 381 U.S. 479 (1965).

24. *Id.* at 485.

25. *Id.* at 484.

26. Specifically, Douglas claimed that the right of privacy was implied in the penumbras of the first amendment right of association, the third amendment prohibition against quartering soldiers in peacetime, the fourth amendment prohibition against unreasonable searches and seizures, the fifth amendment protection against self incrimination and the ninth amendment, vesting in the people those rights not enumerated in the Constitution. *Id.*

27. *Id.* at 483.

28. *See, e.g.*, Note, *Constitutional Limitations on State Intervention in Prenatal Care*, 67 VA. L. REV. 1051, 1057 (1981) [hereinafter Note, *Constitutional Limitations*] (*Griswold* provides that "individual[s] should have a right to autonomy in making certain personal decisions.").

29. *Griswold*, 381 U.S. at 485.

30. *Id.*

31. *See, e.g.*, *Eisenstadt*, 405 U.S. at 453 (1971). "[I]f 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*." *Id.* (partial emphasis added); *Roe*, 410 U.S. at 153 (1973). "This right of privacy, . . . is broad enough to encompass a woman's *decision whether or not to terminate her pregnancy*." *Id.* (emphasis added).

clause of the fourteenth amendment in *Eisenstadt v. Baird*[32] to extend the right to use contraceptives to nonmarried couples.[33] More importantly, two years after *Eisenstadt*, the Supreme Court in *Roe v. Wade*,[34] after applying the strict scrutiny test to a Texas statute prohibiting abortion, held the statute an unconstitutional infringement on privacy.[35] The Court asserted that, like the decision to use contraceptives, the decision to terminate a pregnancy falls within the zone of privacy protected by the Constitution.[36] To withstand the strict scrutiny test, the state would have had to have shown an interest sufficiently compelling to override this constitutional guarantee.[37] The Court recognized two state interests as legitimate: the state's interest in protecting the health of the mother[38] and the state's interest in protecting the potentiality of human life.[39]

Since abortion does not pose a greater risk to maternal health than does natural childbirth until the end of the first trimester, the state's interest in maternal health does not become sufficiently compelling to regulate abortion until that time.[40] At the end of the first trimester, the state can regulate abortion to protect maternal health.[41] The more difficult issue which the Court faced was: when the state's interest in the potentiality of human life becomes sufficiently compelling to allow it to proscribe abortion altogether. After reviewing a wide array of historical and medical data, the Court concluded that the state's interest in the potentiality of human life does not become compelling until the fetus can survive independently of the mother's womb.[42]

This point, which the Court termed "viability,"[43] occurs at approximately

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32. 405 U.S. 438 (1971).

33. *Id.* The Massachusetts statute made distributing contraceptives to married couples, except by prescription, a felony. *Id.* at 440-42.

34. 410 U.S. 113 (1973). The Supreme Court recently upheld *Roe* in Thronburgh v. American Coll. of Obst. & Gyn., 106 S. Ct. 2169, 2185 (1986) (striking Pennsylvania statute requiring extensive informed consent and medical disclosures designed to discourage abortion).

35. 410 U.S. at 164. For a discussion of the jurisprudential flaws in *Roe*, see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973). Ely argues that *Roe* is worse than *Lochner* era substantive due process because while *Lochner* and its progeny proscribed certain state regulatory goals as altogether impermissible, *Roe* acknowledged the legitimacy of the state's interest but condemned the legislation as not satisfying an ad-hoc balancing test. *Id.* at 942. Ely concludes that *Roe* "is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." *Id.* at 947. Ely further observes that the privacy interest protected in *Griswold*, based on the invasion which would be necessary to enforce the statute, is entirely lacking in *Roe*. *Id.* at 930. Thus, Ely asserts that the Court concludes without reason that the right of privacy embraces the right to abort. *Id.* at 932.

36. 410 U.S. at 153.

37. *Id.* at 155.

38. *Id.* at 162.

39. *Id.*

40. *Id.* at 163. "[U]ntil the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Id.*

41. *Id.*

42. *Id.* The Court added, "[s]tate regulation protective of fetal life after viability thus has both logical and biological justifications." *Id.*

43. *Id.* The viability criterion has been criticized as subject to change along with medical technology. *See* Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). "The *Roe* framework . . . is clearly on a collision course with itself."

the end of the second trimester.[44] The state may proscribe abortion altogether after viability except in cases where childbirth poses a serious risk to maternal health.[45]

To analyze whether a prenatal-duty rule would impinge upon a woman's constitutional right to make intimate decisions, it is necessary to consider the range of decisions that the right of privacy is designed to protect. Since *Roe v. Wade*, the Court has distinguished two types of abortion-related statutes: those affecting maternal conduct during pregnancy and those actually limiting or removing the right to abort.[46] While the Court has continued to strike down statutes which actually restrict the right to abort absent a compelling state interest, the Court has used a lesser standard of scrutiny to uphold statutes which collaterally affect the abortion decision.[47] For example, in *Akron v. Akron Center for Reproductive Health*,[48] the Court struck down an Ohio statutory scheme that restricted the medical procedure by which a woman could have an abortion on the ground that the restriction was unrelated to maternal health.[49] Similarly, in *Planned Parenthood of Missouri v. Danforth*,[50] the Court held invalid a statute requiring spousal consent during the first trimester, stating that even the husband may not prevent his wife from deciding to abort.[51] Finally, in *Bellotti v. Baird*,[52] the Court overruled a Massachusetts statute which required minor women to get parental consent or judicial approval for abortions, stating that for mature minors it is inappropriate to allow a third-party veto. [53]

Id.

O'Connor argues that as technology advances, the point of viability will be pushed back until the state may only proscribe abortions to protect maternal health. *Id.* at 456-57.

44. 410 U.S. at 163.

45. *Id.* at 164-65.

46. *See, e.g.*, Note, *Constitutional Limitations*, *supra* note 28, at 1059. "[T]he Court has applied a less demanding scrutiny to state actions that merely affect a woman's decision whether to have an abortion than to state actions that deny her the right to decide." *Id.*

47. This results from the Supreme Court's literal reading of *Roe v. Wade* as providing a legal right to abort which the state may not infringe upon, but as not providing protection against state regulation tending to make this legal right more difficult to act upon. *See infra* notes 48-58 and accompanying text.

48. 462 U.S. 416 (1983).

49. *Id.* The statute required women to have abortions in a hospital during the second trimester when outpatient abortions were safe. *Id.* at 422. The statute also required an elaborate disclosure provision designed to deter abortions, *id.* at 444-45, and a parental consent provision for minors seeking an abortion. *Id.* at 422, 439.

50. 428 U.S. 52 (1976).

51. *Id.* at 69. "[T]he state cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." *Id.* The Supreme Court also struck two additional provisions of the Missouri statute, one requiring parental consent for minors, *id.* at 74, and the other proscribing abortion by saline amniocentesis during the first twelve weeks of pregnancy, the most commonly used and safest method of abortion. *Id.* at 77-79.

52. 443 U.S. 622 (1979).

53. *Id.* at 647. The Court reasoned that the statute appropriately allowed a judicial veto where the superior court judge considers prohibiting abortion to be in the minor's best interest. *Id.* at 648. Thus, the Court held that provided a court finds the minor sufficiently mature to decide to abort, it must allow the minor to decide irrespective of parental consent. *Id.* at 647-48. If, on the other hand, the minor is not sufficiently mature, a court must still allow her to abort if in her best

While the Court has rejected statutes which prevent women from exercising their right to abort, it has upheld statutes which make it more difficult to act on a decision to abort. The state cannot make abortion more costly or difficult to obtain, but it need not make abortion more accessible. Thus, the Court has upheld statutes removing public funds for nontherapeutic[54] and even therapeutic[55] abortions. Similarly, the Court has sustained a parental notification provision for minor women seeking abortions.[56] Unlike the parental-approval statute held unconstitutional in *Bellotti v. Baird*,[57] this statute did not vest in parents the authority to veto a minor woman's abortion decision.[58]

Under the Supreme Court's analysis, the test of whether a statute unconstitutionally infringes on a woman's decision to abort is not whether a statute simply affects maternal conduct or choices during pregnancy, but whether it actually limits or removes this fundamental right. One author condemns prenatal duties imposed prior to viability for two reasons. First, *Roe v. Wade* appears to establish viability as the point at which the state's interest in the fetus is sufficiently compelling for the state to act on its behalf.[59] Second, by imposing prenatal duties prior to viability, states may encourage women to abort.[60] This reasoning is flawed since the second argument undercuts the first by confusing removal of a constitutional right with actually encouraging the exercise of that right. Whether a prenatal-duty rule imposed prior to viability will or will not actually encourage abortion in no way affects its constitutionality since it does not remove the right to abort.

If a prenatal-duty rule were imposed, a pregnant woman who inade-

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interest. *Id.* at 647-48. *But cf.* H. L. v. Matheson, 450 U.S. 398, 413 (1981) (parental-notification statute "serves important state interests [and] is narrowly drawn to protect only those interests").

54. *See* Maher v. Roe, 432 U.S. 464 (1977). The Court stated: "We think it abundantly clear that a state is not required to show a compelling interest for its policy choice to favor normal childbirth." *Id.* at 477; *see also* Beal v. Doe, 432 U.S. 438 (1977) (state need not fund nontherapeutic abortion); Poelker v. Doe, 432 U.S. 519 (1977) (city need not fund nontherapeutic abortions).

55. Harris v. McRae, 448 U.S. 297 (1980). The Court stated: "where, as here, the Congress has neither invaded a substantive constitutional right or freedom . . . the only requirement of equal protection is that congressional action be rationally related to legitimate governmental interest." *Id.* at 326.

56. *Matheson*, 450 U.S. at 409 (1981). "Although we have held that a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion, a statute setting out a 'mere requirement of parental notice' does not violate the constitutional rights of an immature, dependent girl." *Id.* (footnotes omitted).

57. 428 U.S. 132 (1976).

58. 450 U.S. at 411. "The Utah statute gives neither parents nor judges a veto power over the minor's abortion decision." *Id.* (footnote omitted).

59. *See*, Meyers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1 (1984) [hereinafter Meyers]. Meyers argues that a state may impose a duty to protect fetal health in certain situations, but it may never do so prior to viability. *Id.* at 65. Meyers states that "Roe v. Wade clearly marks viability as the point at which state interests[in the fetus] elevate to a level approximately at balance with those of the mother." *Id.* at 68 (footnotes omitted).

60. Meyers argues that if prenatal duties are imposed prior to viability, women may be more likely to abort. Meyers, *supra* note 59, at 68; *accord*, Note, *A Maternal Duty to Protect Fetal Health*, 58 IND. L. REV. 531, 540 (1984). "[I]mposing liability before viability may also encourage mothers to abort. . . . If a court were to order a pregnant alcoholic not to drink, she might opt to abort to avoid compliance." *Id.*

quately cares for the health of her previable fetus may possibly be subject to a court order enjoining her adverse conduct.[61] While the purpose of the court order is to encourage her to alter her conduct and carry the fetus to term, she may instead decide to abort as a way to circumvent that order. The statute, therefore, could have a direct impact on her conduct prior to the viability of the fetus. It might also have an indirect or collateral affect in making abortion a relatively more attractive option after the court order than before, as continued pregnancy would carry an added duty. It is inconsistent to argue that a rule unconstitutionally removes the right to abort if in fact the rule actually encourages women to exercise that very right. Statutes held to be an unconstitutional violation of the right to abort have precisely the opposite effect of restricting, not encouraging, the abortion option.

A prenatal duty imposed prior to viability may appear unconstitutional since the state's interest in the potentiality of human life does not become compelling until viability.[62] Imposing a duty to protect and nurture fetal health prior to viability seems to elevate the state's willingness to protect fetal health above its ability to protect fetal life in a logically inconsistent manner. In fact, however, the inconsistency does not result from elevating the state's interest in fetal health above its interest in potential life. The anomaly results because once the state protects a fetus' potential life, the mother automatically loses her right to abort. The state's willingness to protect fetal health and the mother's right to abort, by contrast, can exist simultaneously.[63] Thus, it is unnecessary to elevate the state's interest in fetal health above its interest in the potentiality of human life to justify the rule. Both the state's interests in fetal life and in fetal health are legitimate and coexist prior to viability.[64] Given the nature of the maternal rights against which these state interests are

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61. A hypothetical prenatal-duty rule could encompass a variety of duties such as duties to refrain from adverse conduct or duties to undergo medical procedures designed to cure fetal abnormalities. This article proposes that the appropriate bases for limiting the scope of prenatal duties stems not from the viability criterion established in *Roe v. Wade*, but rather stems from other legal doctrines including the right to bodily integrity and the rescue doctrine. *See infra* notes 72-110 & 221-77 and accompanying text. While these doctrines may restrict the scope of legal duties in any context to situations involving fairly egregious conduct, they absolutely prohibit imposing maternal duties to undergo in utero surgery to cure fetal abnormalities not caused by the mother.

62. *See Roe*, 410 U.S. at 163 (1973). "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." *Id.*

63. The state's interest in the potentiality of human life is by definition opposed to the mother's right to abort. The two rights are logically inconsistent because the exercise of abortion necessarily defeats the state's interest in potential life and the preservation of fetal life necessarily precludes abortion. Both the state's interest and the mother's right cannot be exercised simultaneously. By contrast, a state interest in protecting and nurturing fetal health is not opposed to the right to abort since the mother retains the right to abort until viability. *Roe*, 410 U.S. at 163. Instead, it is opposed to the mother's rights to control her body and to act on her personal beliefs. *See infra* notes 72-127, and accompanying text. Holding these rights aside, however, the rule is not opposed to the fundamental right to abort, and therefore may require only a legitimate state interest rationally related to a permissible end. *See* Note, *Constitutional Limitations, supra* note 28. at 1059.

64. *See Roe*, 410 U.S. at 162. "[T]he State does have an *important and legitimate interest in . . . protecting the potentiality of human life.*" *Id.* (emphasis added).

opposed, however, courts can give force to the state's interest in fetal health before they give force to the state's interest in fetal life.[65]

Accepting the argument that a prenatal-duty rule would not violate a woman's right to abort, it also would not impinge upon the type of intimate decision making created by the right of privacy. The right of privacy protects women in their decisions not to conceive,[66] or, having conceived, not to bear a child.[67] The right to make these intimate decisions protects women from having to assume a responsibility which they may not desire to undertake. Regardless of one's personal view on the use of contraceptives and abortion, no one can deny that requiring a woman to bear a child against her will can have a lasting and potentially devastating impact upon her.

By contrast, preventing a woman from acting in ways detrimental to her fetus does not protect her interests in such a fundamental manner. Whether or not a woman ultimately decides to bear a child, requiring her to insure that if born, her child will be healthy, is not detrimental to her long-term self interest. In fact, the opposite is more likely to be true. A woman who is not prepared to raise a healthy child is even less prepared to raise one with a serious birth defect.[68] Ironically, therefore, a prenatal-duty rule may protect a woman's self interest by denying the right to make some intimate decisions while the right of privacy protects her self-interest by enabling her to make other intimate decisions.

Thus, while *Roe v. Wade*[69] precludes states from infringing upon the mother's right to abort prior to viability,[70] the state may have a legitimate interest in fetal health at an earlier point.[71] A prenatal-duty rule may, how-

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65. *Cf.* Taft v. Taft, 338 Mass. 331, 446 N.E.2d 395 (1983) (state may not protect potential life prior to viability).

66. *See Griswold*, 381 U.S. 479; *Eisenstadt*, 405 U.S. 438.

67. *See Roe*, 410 U.S. 113.

68. The costs associated with raising a physically or mentally handicapped child, both emotionally and financially are obviously higher than those associated with raising a normal child, all else being equal, since impaired children require special education and greater attention than normal children.

69. 410 U.S. 113.

70. *Id.* at 164-65.

71. In a recent article, one author stated that any prenatal-duty rule must withstand a strict scrutiny test. Johnson, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L.J. 599 (1986) [hereinafter Johnson]. The author adds that "[l]aws that attempt to regulate the actions of pregnant women by creating fetal rights clearly do not survive this standard." *Id.* at 619. While the author states that under a prenatal-duty rule a state could regulate a woman's eating and drinking, "the types of physical activities in which she engaged, with whom and how often she had sexual intercourse, and where she worked — to name only a few areas of regulation," her argument suffers two flaws. *Id.*

First, she fails to recognize the limits the Supreme Court has drawn on the constitutional right of privacy. Specifically, the Supreme Court has not required a compelling state interest for all state regulations affecting maternal choices regarding the decision to bear a child. *See supra* notes 46-58 and accompanying text. Thus, the Court may only require a legitimate interest where the state is not removing the right to abort. Second, and more importantly, Johnson does not explain why a prenatal-duty rule could not be narrowly tailored to prevent state intrusion except where needed to prevent serious harm *caused by* the mother's adverse conduct. Under such a narrowly defined rule, outlined in this article, most of the horrors envisioned by Johnson simply could not occur.

ever, be limited by other fundamental constitutional rights, specifically the rights to bodily integrity and to the free exercise of religion.

B. The Right to Bodily Integrity

The constitutional right to bodily integrity is derived from two sources.[72] First, the fourth amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures,"[73] thus providing a doctrinal basis for prohibiting unreasonably intrusive searches.[74] Second, courts have also stated that the right of privacy supports the right of individuals to have their bodily integrity respected.[75]

While the right of automony in intimate decision making might not be contravened by a duty to protect fetal health, the right to bodily integrity may be, since any prenatal duty would have a direct impact on how the mother controls her body. In granting injunctive relief to benefit a fetus, a court will impose constraints on maternal conduct and may even subject a woman to physically-intrusive procedures.

Intuitively it may be unclear whether brief physical bodily intrusions, including shots or X-rays, are more of an invasion of privacy than longer non-intrusive restrictions on conduct such as forced abstentions from drugs or alcohol. The Supreme Court, however, has expressed a stronger distaste for compelled physical intrusions than for compelled limitations on conduct.[76] The Court has sanctioned brief detentions based on reasonable suspicion of criminal activity, a standard lower than probable cause.[77] In a recent case,[78] the Court held that an alien suspected of smuggling cocaine by means of balloon swallowing may be detained at the border on this lower standard for as long as sixteen hours while restricted from unsupervised bowel movements.[79]

While the Court has been far more strict in determining the degree to which a state may compel physically-intrusive procedures, the Court has failed to adopt a per se rule.[80] Two early cases have established a rough set of crite-

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72. *See* Note, *Constitutional Limitations, supra* note 28, at 1053 n.12. "Courts have found a basis for a right to bodily integrity in the fourth amendment . . . and in a general constitutional right to privacy." *Id.*

73. U.S. CONST. amend. IV.

74. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) (use of stomach pump to obtain evidence "is conduct that shocks the conscience" and "is bound to offend even hardened sensibilities"). *But see* Schmerber v. California, 384 U.S. 757 (1966) (in urgent circumstances, police may compel suspect to undergo blood test without search warrant).

75. *See In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) (right of privacy includes right to decline life sustaining medical treatment); Superintendent v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977) (discussing patient's right to decline life-prolonging, as opposed to life-saving medical treatment).

76. *See generally* Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1583-88 (1977) [hereinafter Regan] (discussing the reluctance of courts to compel physically-intrusive procedures)

77. *See* Terry v. Ohio, 392 U.S. 1 (1968) (allowing stop and frisk based on reasonable suspicion of criminal activity).

78. United States v. Montoya de Hernandez, 105 S. Ct. 3304 (1985).

79. *Id.* at 3310-11.

80. *See, e.g.*, Schmerber v. California, 384 U.S. at 768. "[T]he fourth amendment's proper

ria for determining what constitutes acceptable compelled physical intrusions. In *Jacobson v. Massachusetts*,[81] the Court upheld a state statute compelling smallpox vaccinations stating, "[t]he safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect."[82] In *Rochin v. California*,[83] by contrast, the Supreme Court condemned the use of an enemic to pump defendant's stomach for evidence.[84] The Court asserted that such conduct "shocks the conscience" and "is bound to offend even hardened sensibilities."[85]

In *Schmerber v. California*,[86] the Court presented its first comprehensive statement on how to determine what constitutes an acceptable degree of intrusion. Specifically, the Court balanced the gravity of the invasion of privacy against the state's legitimate interests in seeking evidence.[87] In *Schmerber*, the Court weighed several factors to decide whether it is constitutionally permissible to compel a blood test to determine the defendant's blood-alcohol level. The Court stated that to extract bodily fluids without a warrant, the officers required a clear indication that the procedure would reveal the evidence they were seeking.[88] Since blood tests are commonplace,[89] an effective means of determining blood-alcohol level,[90] and a minimally intrusive means of securing the evidence sought,[91] the Court held that the state's legitimate interest in securing evidence outweighed the defendant's right to bodily integrity.[92]

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function is to constrain not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Id.*; *see also* Missouri v. Overstreet, 551 S.W.2d 621, 625-26 (Mo. 1977). "*Schmerber* confirms . . . that it does not prohibit all intrusions." *Id.* In *Schmerber*, the Court rejected the per se rule proposed by Warren, C.J. in Breithaupt v. Abram, 352 U.S. 432, 442 (1957) (Warren, C.J., dissenting). "[D]ue process means at least that law-enforcement officers in their efforts to obtain evidence . . . must stop short of bruising the body, breaking the skin, puncturing tissue or extracting body fluids . . . ." *Id.* Thus, the Court added "that today we hold that the Constitution does not forbid the State's 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." 384 U.S. at 772. In addition to rejecting a fourth amendment challenge, the *Schmerber* Court rejected defendant's claim that the blood test violated his fifth amendment privilege against self-incrimination. *Id.* at 760-61. The Court stated that the fifth amendment privilege only protects defendant from having to provide "evidence of a testimonial or a communicative nature." *Id.* at 761.

81. 197 U.S. 11 (1905).

82. *Id.* at 38.

83. 342 U.S. 165 (1952).

84. *Id.* at 172.

85. *Id. See also* Brown v. Mississippi, 297 U.S. 278 (1936) (tortured confessions violate due process).

86. 384 U.S. 757 (1966).

87. *Id.* at 768.

88. *Id.* at 770. While the officers did not have a search warrant, the Court held that the exigency justified proceeding without one since blood alcohol-level changes quickly. *Id.*

89. *Id.* at 771. "Such tests are commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Id.* (footnote omitted).

90. *Id.* "Extraction of blood samples . . . is a highly effective means of determining . . . the influence of alcohol." *Id.*

91. *Id.*

92. *Id.* at 772. "We thus conclude that the present record shows no violation of petitioner's

While the balancing test in *Schmerber* is more comprehensive than the "shocks the conscience" standard in *Rochin*, it is nonetheless imprecise. A review of how this test was applied to two bullet removal cases, however, may make it possible to discern the acceptable range of physical intrusions into a mother's body under a prenatal-duty rule.

In both *United States v. Crowder*[93] and *Winston v. Lee*,[94] the defendant was arrested and presented with a court order to have a bullet removed from his body.[95] Both defendants were afforded adversarial hearings and full appellate review.[96] In *United States* v. *Crowder*, the Court of Appeals for the D.C. Circuit upheld the admissibility of the removed bullet,[97] and in *Winston v. Lee*, the Supreme Court upheld the district court order enjoining surgical removal.[98] While both cases involved removal of a bullet, the major basis for distinguishing them is the extent to which the requested surgical procedure invaded the defendants' privacy.[99]

In *Crowder*, the removal involved a ten-minute surgical procedure under local anesthesia.[100] Because the bullet was lodged in fat rather than in muscle, the risk was minimal and the procedure was medically advisable. In *Winston*, by contrast, the bullet was lodged approximately three centimeters deep in muscle.[101] The removal procedure therefore required general anesthesia and posed some risks to the defendant.[102] Moreover, the estimated surgical time needed to remove the bullet from the defendant's leg ranged from twenty minutes to two and one-half hours.[103]

Two factors distinguish these cases. First, *Crowder* involved local anesthesia while *Winston* involved general anesthesia. Although the risks associated with general anesthesia may be low statistically,[104] the *Winston* Court took into consideration the fact that both lower courts believed "[t]he use of a gen-

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right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures." *Id.*

93. 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

94. 470 U.S. 753 (1985).

95. *Winston*, 470 U.S. at 757; *Crowder*, 543 F.2d at 314.

96. *Winston*, 470 U.S. at 757-58; *Crowder*, 543 F.2d at 316.

97. *Crowder*, 543 F.2d at 316. In *Crowder*, the district court ordered the surgical removal of the bullet in defendant's forearm as the procedure posed no risk and was medically advisable. *Id.* at 313. It declined, however, to order removal of the bullet in defendant's leg as the procedure posed some risk of reduced function of the leg. *Id.* Both orders were affirmed. *Id.* While the distinction in *Crowder* between the two bullets comports with the distinction advanced in the text between *Winston* and *Crowder*, an additional factor may have influenced the *Crowder* court. Since the state was authorized to extract the bullet from the defendant's arm, the additional probative value of the second bullet may have been insufficient to justify the further invasion of privacy.

98. *Winston*, 470 U.S. at 755.

99. *Winston*, 470 U.S. at 755; *Crowder*, 543 F.2d at 316. In *Winston*, the Court noted that the evidentiary value of the bullet was itself suspect since the markings from the gun may have eroded. *Id.* at 766, n.10. This, however, does not appear to be the major basis for the Court's decision.

100. 543 F.2d at 315.

101. 470 U.S. at 757.

102. *Id.* at 763-64.

103. *Id.* at 764.

104. *Id.* at 764, n.7.

eral anesthetic, would be an extensive intrusion on respondant's personal privacy and bodily integrity."[105] The *Crowder* Court, by contrast, asserted that the use of local anesthesia was "reasonable and proper."[106] Second, removal of the bullet in *Winston* was not advisable given the medical risks to defendant apart from those associated with the use of general anesthesia.[107] In *Crowder*, by contrast, the procedure was medically advisable since it posed virtually no risk.[108] These two cases establish that courts can order minor surgery if the procedure is medically advisable for the patient, is the least intrusive means of obtaining the evidence sought, and does not unduly invade bodily integrity. When a requested procedure is not advisable for the patient, however, courts will be reluctant to grant orders compelling the intrusion. Unfortunately, these cases leave a large grey area regarding low risk procedures which are neither beneficial nor harmful to the patient.

In the context of prenatal duties, courts are likely to weigh two factors in deciding whether to issue orders compelling bodily intrusions. First, courts will apply the balancing test to see whether the medical test itself is a permissible intrusion. Most prenatal tests, amnioscentesis or chorionic villi biopsy,[109] for example, pose no significant risks to the mother yet can provide indirect benefits to the fetus by permitting doctors to discover problems they can later treat.[110] These tests are more intrusive than a blood test, yet are less intrusive than the surgical removal of a bullet. Thus, most prenatal tests, whether for injuries resulting from maternal misconduct or for genetic defects unrelated to maternal conduct, are likely to fall within the grey area that remains following the *Winston* and *Crowder* decisions. Second, and more importantly, however, courts will weigh whether the test results will yield information conducive to further judicial intervention.

For example, a court would be more likely to order a series of blood tests that will reveal whether a woman is an alcoholic than it would be to order a sonogram which will reveal fetal hydrocephalus. If the court determines that the woman is an alcoholic, it can compel her to favorably alter her conduct without violating her right to bodily integrity. The court cannot, however, compel her to submit to corrective prenatal surgery without violating this constitutional right. The dispositive factor is therefore not only the intrusiveness of the medical test, but also the intrusiveness of the corrective measure indicated by the test results.

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105. *Id.* at 764.

106. *Crowder*, 543 F.2d at 316.

107. These risks included "injury to the muscle as well as injury to the nerves, blood vessels and other tissue in the chest and pleural cavity." *Winston*, 470 U.S. at 764.

108. *Crowder*, 543 F.2d at 316.

109. See *supra* note 16 for an explanation of these and other prenatal testing procedures.

110. Certain prenatal tests, however, pose significant risks to the fetus itself. *See* Harrison, Golbus & Filly, *supra* note 11, at 776. "[T]he risks involved in fetal diagnosis and treatment are generally greater for the fetus than the mother and vary greatly according to the magnitude and invasiveness of the procedure." *Id.* The issue of prenatal duties will only arise, of course, where the benefit of the test to the fetus outweighs the risks.

C. *Right to Free Exercise of Religion*

In addition to implicating a woman's rights to privacy and bodily integrity, a prenatal-duty rule also may, in certain situations, contravene a woman's religious beliefs.[111] In fact, the two reported cases requiring pregnant women to save the lives of their viable fetuses involved medical procedures which the mothers opposed on religious grounds.[112] The Constitution does not, however, provide an unlimited right to act in accordance with one's religious beliefs, especially where doing so will harm others.[113]

Thus, in *Reynolds v. United States*,[114] for example, the Supreme Court upheld a statute proscribing bigamy against petitioner's religious challenge.[115] While petitioner had an unlimited right to believe that bigamy is morally correct, the state had a legitimate interest in preserving the institution of monogamous marriage and could therefore prevent petitioner from actually engaging

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111. The Constitution also provides parents a limited right to raise children in accordance with their beliefs. Like the right to bodily integrity, the right to autonomy in child-rearing is derived from two sources: the free exercise clause of the first amendment and the right of privacy. *See generally* Note, *Constitutional Limitations*, *supra* note 28, at 1061-64 (discussing the constitutional right to rear children).

In *Griswold v. Connecticut*, which created the modern right of privacy, the Supreme Court relied on two early substantive due process cases involving the right to rear children. 381 U.S. 479, 481-82 (discussing Pierce v. Society of Sisters, 268 U.S. 510 (1924); Meyer v. Nebraska, 262 U.S. 390 (1923)). In *Meyer v. Nebraska* the Supreme Court held unconstitutional a statute preventing the instruction of foreign languages in school. The Court asserted that due process includes the right "to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [one's] conscience." 262 U.S. 390, 399. Similarly in *Pierce v. Society of Sisters*, the Court upheld the "liberty of a guardian to direct the upbringing and education of children . . ." holding unconstitutional a statute requiring public education. 268 U.S. 510, 534. In a more recent case, the Court upheld the first and fourteenth amendment challenge by Amish parents to a statute requiring public school attendance until the age of sixteen. Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1972). The Court asserted that when the rights enunciated in *Meyer* and *Pierce* are combined with a first amendment challenge, the state must satisfy more than a "reasonable relation test." *Id.* at 235; *see also* Parham v. J.R., 442 U.S. 584 (1979) (upholding right of parents to civilly commit child without adversarial hearing).

Like the right to free exercise of religion, however, the right to autonomy in child rearing is not unlimited. The Constitution secures the right of parents to raise children because the family unit is generally the most suitable for that purpose. *See* Note, *Constitutional Protection*, *supra* note 28, at 1062. Where parents demonstrate that they are not concerned with their child's well-being, however, the state can legitimately disrupt the family unit in the same way it can restrict a person's right to act in accordance with his or her religious beliefs. *See infra* notes 159-220 and accompanying text.

112. *See* Jefferson v. Griffin Spalding Cty. Hosp., 247 Ga. 86, 274 S.E.2d 457 (1981) (upholding court-ordered Caesarian section to save lives of mother and fetus over mother's religious objection); Raleigh-Fitkin Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964) (upholding court-ordered blood transfusion to save the lives of mother and fetus over mother's religious objection).

113. *See, e.g.*, *Prince*, 321 U.S. 158 (1944) (upholding statute proscribing child labor over aunt's religious objections); *Reynolds*, 98 U.S. 145 (1878) (upholding statute proscribing bigamy over defendant's religious objections).

114. 98 U.S. 145 (1878).

115. *Id.* at 166.

in bigamy.[116] Similarly, in *Prince v. Massachusetts*,[117] the Court upheld a statute proscribing child employment notwithstanding the first and fourteenth amendment challenge of her aunt and custodian.[118] The aunt, a Jehovah's Witness, asserted that the statute that restricted the right of her nine-year-old niece to distribute religious materials violated her rights of free exercise of religion and equal protection.[119] After noting the state's legitimate interest in protecting children, the Court stated that "[p]arents may be free to become martyrs themselves. But it does not follow that they are free, . . . to make martyrs of their children . . . ."[120]

The distinction between the right *to hold* religious beliefs and the right *to act* on those beliefs applies in the context of prenatal duties. A pregnant woman faced with a court-ordered medical procedure may claim that her right to practice her religion is thereby violated. In *Jefferson v. Griffin Spalding County Hosp. Auth.*,[121] for example, a Jehovah's Witness was ordered to submit to a Caesarean section followed by a blood transfusion to save her life and the life of her fetus.[122] In rejecting petitioner's first amendment challenge, one concurring justice distinguished the "freedom to believe" from "the freedom to act,"[123] essentially echoing the distinction set forth in *Prince v. Massachusetts*.[124] Similarly, in *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,[125] the Supreme Court of New Jersey upheld a court-ordered blood transfusion to save the life of the mother and her fetus over the mother's religious objections.[126]

The right to free exercise of religion is therefore unlikely to pose a significant threat to a prenatal-duty rule in cases involving a serious threat to fetal health.[127] During gestation, the needs of a fetus are entirely physical in nature. Where a fetus' health is seriously threatened by a mother's religious practices, the state can legitimately override the mother's right to act in accordance with her religious beliefs. The mother's right to bodily integrity will therefore place more significant restraints on the acceptable range of prenatal duties than either the right to intimate decision making or the right to free exercise of religion.

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116. *Id.* "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices." *Id.*

117. 321 U.S. 158 (1944).

118. *Id.* at 170.

119. *Id.* at 164.

120. *Id.* at 170. The Court added, "[w]e think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,. . . and the rightful boundary of its power has not been crossed in this case." *Id.*

121. 247 Ga. 86, 274 S.E.2d 457 (1981).

122. *Id.* at 87, 274 S.E.2d at 458.

123. *Id.* at 91, 274 S.E.2d at 461 (Smith, J., concurring).

124. 321 U.S. 158 (1944).

125. 42 N.J. 421, 201 A.2d 537 (1964).

126. *Id.* at 424, 201 A.2d at 538.

127. *See* Note, *Constitutional Limitations*, *supra* note 28, at 1062-64.

III. State Intervention

As indicated above, maternal misconduct can cause several severe fetal abnormalities.[128] A suit for damages after birth cannot provide a permanently impaired child with adequate compensation. A *parens patriae* suit compelling the mother to alter her conduct can, however, have a significant impact on ameliorating or eliminating such disorders. While a duty to protect fetal health prior to viability is constitutionally permissible in certain situations, the more difficult issue is whether and when to adopt such a rule. This section will consider state law doctrines which may influence whether and when prenatal duties may be appropriate.

Part A of this section will review fetal rights in tort law.[129] While a *parens patriae* suit involves equitable relief rather than damages, this discussion will demonstrate the law's flexibility in providing relief for fetal injuries which occur throughout gestation. Part B of this section will consider the rights of children to equitable relief for parental misconduct.[130] Since a fetus will not be granted greater legal status than a child, these cases will demonstrate the maximum likely extent of state intervention for a child not yet born. Part C of this section will then consider how the rescue doctrine may serve to limit the scope of any prenatal-duty rule.[131] While our legal system imposes duties not to harm, it generally eschews affirmative duties to rescue.[132] The personal autonomy protections created by this doctrine are similar to those created by the constitutional right to bodily integrity. Given the unique physical and emotional relationship between a pregnant woman and her fetus, the rescue doctrine may provide an appropriate basis for restricting the scope of any prenatal-duty rule. Finally, part D of this section will briefly discuss some enforcement and monitoring problems associated with prenatal duties in an effort to demonstrate why, even though these problems are significant, they are not insurmountable.

A. The Legal Rights of the Fetus[133]

Courts have granted even pre-viable fetuses certain legal rights in several contexts. In property law fetuses traditionally could inherit.[134] In criminal law

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128. *See supra* notes 6-12 and accompanying text.

129. *See infra* notes 136-59 and accompanying text.

130. *See infra* notes 165-220 and accompanying text.

131. *See infra* notes 221-77 and accompanying text. The rescue doctrine stands for the proposition in our legal system that people are not required to come to the aid of others. *See* Regan, *supra* note 76, at 1572.

132. *See* Regan, *supra* note 76, at 1638 (discussing Bad Samaritan doctrine as restricting duty to aid others).

133. This section addresses the rights of a child to assert claims for injuries sustained prior to birth. Because these rights are primarily in tort, they are legal rights and must therefore be distinguished from interests in health or life which the state may be willing to protect. The former involve damages; the latter involve injunctive relief and thus possess added complications. The point of this section is simply to show that the viability criterion has been rejected for recovery at law and is no longer appropriate as a bar to injunctive relief to prevent prenatal injuries.

134. *See, e.g.*, Deal v. Sexton, 144 N.C. 157, 156 S.E. 691 (1907) (holding that inheritance vests in fetus at death of father); Briggs v. McCarty, 86 Ind. 352 (1882) (establishing right of

fetuses are sometimes protected by statute.[135] Similarly, in tort law, children may recover for prenatal injuries inflicted on them by third parties and even by parents.[136] This right of individuals to sue for injuries inflicted upon them prior to birth is, however, both recent and ambiguous.

Traditionally, children could not recover in tort for such injuries.[137] The first major criticism of this doctrine was Judge Boggs' dissenting opinion in *Allair v. St. Luke's Hospital*.[138] Judge Boggs asserted that since a fetus can survive independently of the mother prior to birth, viability was a more appropriate criterion for limiting tort recovery than birth.[139] At the point of viability, Boggs reasoned, the fetus should no longer be considered "part of the bowels of the mother."[140]

The first tort case to grant a fetus legal status separate from that of its mother was *Bonbrest v. Kotz*.[141] In *Bonbrest*, the court adopted Judge Boggs' reasoning to deny defendant's motion for summary judgment, thus enabling a

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fetus to inherit).

135. *See* CAL. PEN. CODE § 187 (West 1979). "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." *Id.* In a recent Massachusetts case, a man was convicted of first degree murder of a pregnant woman and involuntary manslaughter for the death of her six month old fetus. See Taylor, *Man convicted in death of teenager, fetus*, The Boston Globe, Dec. 17, 1986, at 39, col. 1. This is the first case in which a Massachusetts court convicted a person for the death of a fetus. *Id.*

136. *See, e.g.*, Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971); *see also* Grodin v. Grodin, 102 Mich. App. 396, 301 N.W.2d 869 (1981) (allowing tort recovery against mother for injuries from negligent use of tetracycline during pregnancy). While courts have recognized a broad right of children to sue for prenatal injuries, few courts have allowed children to sue for wrongful life. *See* PROSSER & KEETON, TORTS § 55, at 371 (5th ed. 1984). A wrongful-life suit is based on a claim that due to severe birth defects the child would have been better off not living. *Id.* For example, in *Turpin v. Sortini*, an infant afflicted with Tay-Sachs disease was allowed to sue her mother's doctor for failing to disclose her birth defects, depriving her parents the opportunity to abort the pregnancy. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982). Most courts, however, have rejected wrongful-life claims due to the impossibility of assessing damages stemming from a failure to be aborted. *See, e.g.*, Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980); Procanik by Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984).

137. *See* Simpson, *Parental Liability for Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47, 50 (1978):

> Courts gave the following justifications for denying recovery: lack of precedent, stare decisis, the belief that there is no duty owed to an unborn child inasmuch as it is part of its mother and not a separate entity, difficulty in determining the existence of any causal relation between the wrong done and the resulting malady of the child after birth, danger of fraudulent claims and the fear that if such an action would be maintained, an infant could sue its own mother for injuries caused by the mother while pregnant.

Id.; *see also* King, *The Judicial Status of the Fetus: A Proposal for Legal Protection of The Unborn*, 77 MICH. L. REV. 1647, 1663 (1979). "Birth was traditionally the point at which the fetus was entitled to full legal protection of its interests because birth was once synonymous with viability." *Id.*

138. 184 Ill. 359, 370, 56 N.E. 638, 640 (1900).

139. *Id.* at 370, 56 N.E. at 641.

140. *Id.* The infant was injured as a fetus when the mother fell off a seat in an elevator which defendant had negligently operated. *Id.* at 361-62, 56 N.E. at 639.

141. 65 F. Supp. 138 (D.D.C. 1946).

child to recover for injuries inflicted after viability but prior to birth.[142] The more difficult issue is whether to allow a child to sue for prenatal injuries inflicted prior to viability.

Regardless of whether a fetus can survive independently of the mother's womb, injuries inflicted on it can be severely debilitating after birth.[143] Since severe injuries can occur throughout gestation, the viability criterion may itself be inappropriate for determining whether to grant relief. Thus, in *Smith v. Brennan*,[144] a severely deformed infant was allowed to recover for negligence notwithstanding that the injuries occurred prior to viability.[145] The Supreme Court of New Jersey stated, "[w]hether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress."[146] The court further explained that no court that granted tort recovery for prenatal injuries based on viability had subsequently denied recovery for injuries inflicted prior to viability.[147]

Similarly, in *Womack v. Buchhorn*,[148] the Supreme Court of Michigan allowed an infant to recover in tort for injuries resulting from an automobile accident which occurred during the fourth month of gestation.[149] The court noted a striking trend toward allowing prenatal tort recovery and stated that "a child has a legal right to begin life with a sound mind and body."[150]

Finally, in *Renslow v. Mennonite Hospital*,[151] the Supreme Court of Illinois allowed a child to recover for a preconception tort, stating that "the denial of claims for injuries to the previable fetus may indeed cut off some of the most meritorious claims . . . ."[152] Thus, the court allowed a mother to sue on behalf of herself and her child for a forseeable injury which the child sustained from a negligently administered blood transfusion to the mother eight years earlier.[153]

Fetal tort recovery has not been limited to claims against third parties. In *Grodin v. Grodin*,[154] the Court of Appeals of Michigan allowed a child to sue her mother for negligent conduct resulting in prenatal harm.[155] The mother's continued use of tetracycline during pregnancy resulted in injury to the

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142. *Id.* at 142-43. The court rejected defendant's arguments that such suits would be "brought in bad faith and might present insuperable difficulties of proof . . . ." *Id.*

143. *See supra* notes 6-9 and accompanying text.

144. 31 N.J. 353, 157 A.2d 497 (1960).

145. *Id.* at 367, 157 A.2d at 504. The fetus was in its seventh month of gestation, which at the time of the opinion was considered pre-viable. *Id.*

146. *Id.* The injuries resulted from an automobile accident in which defendant was negligent. *Id.* at 355, 157 A.2d at 498. The infant suffered deformities of his legs and feet. *Id.*

147. *Id.* at 366-67, 157 A.2d at 504.

148. 384 Mich. 718, 187 N.W.2d 218 (1971).

149. *Id.*

150. *Id.* at 725, 187 N.W.2d at 222 (quoting Smith v. Brennan, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960)).

151. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

152. *Id.* at 352-53, 367 N.E.2d at 1252.

153. *Id.* at 349, 367 N.E.2d at 1250.

154. 102 Mich. App. 396, 301 N.W.2d 869 (1981).

155. *Id.* at 401, 301 N.W.2d at 871. The court stated that the "litigating child's mother would bear the same liability for injurious, negligent conduct as a third person." *Id.* at 870.

child.[156]

The viability criterion is no more appropriate in the context of maternal duties than in the context of torts by third parties. As indicated above, many severe fetal abnormalties are the direct result of maternal misconduct early in pregnancy. Thus, as stated in *Renslow*,[157] a viability restriction would deny recovery for "some of the most meritorious claims."[158] The more difficult issue is whether courts should issue orders compelling pregnant women to alter conduct detrimental to their fetuses. The next section on child abuse and neglect will address this issue by examining the degree to which courts are willing to compel parents to alter conduct detrimental to their children.

B. Child Abuse and Neglect

While courts are willing to provide damages to children injured prior to birth, they may be less willing to compel a pregnant woman to alter her conduct to prevent such injuries. Family decisionmaking is not only protected by the Constitution,[159] albeit with certain limitations, but also is protected by state laws on child abuse and neglect.[160] Since fetal rights cannot exceed those of children, these laws provide the likely ceiling of state intervention to benefit fetal health. Although child abuse and neglect statutes vary from state to state,[161] most share certain common characteristics.[162] In general, modern statutes are designed to preserve the family unit to the maximum possible extent, while protecting children from parental conduct which falls outside the bounds of acceptable parenting.[163]

1. Defining Medical Neglect[164]

In general, child neglect laws establish a bifurcated system designed to

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156. *Id.* at 398, 301 N.W.2d at 869. In fact, the suit was originally filed only against the doctor, but because the parents' attorney was concerned that the jury may find the mother at fault and because the mother's homeowner's insurance policy included coverage for tort liability, the attorney advised the parents to attach the mother as a defendant. *See* Robertson, *Procreative Liberty, supra*, note 4, at 441 n.114.

157. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

158. *Id.* at 352-53, 367 N.E.2d at 1252.

159. *See supra* note 111.

160. *See generally*, Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 250-67 (1982) [hereinafter Note, *Unequal and Inadequate Protection*] (outlining history of state child abuse and neglect statutes).

161. *Id.* at 252.

162. *Id.*

163. *See generally* W. WADLINGTON, DOMESTIC RELATIONS 518 (1985) (commenting on The Juvenile Justice Standards Relating to Abuse and Neglect (1981)). "One of the goals of the proposed system would be 'to allow intervention only where there is reason to believe that coercive intervention will benefit the child.' " *Id.*

164. While this section discusses child abuse and neglect, the author does not equate a fetus with a child. The section is designed to demonstrate a ceiling beyond which the state will not rise to protect fetal health.

The author's own view is that a fetus does not instantly become a person at any particular point during gestation. Instead the fetus starts closer to a thing at the moment of conception and becomes more and more like a person throughout gestation. By viewing the transformation of a fetus

protect children and to limit state intervention into the family unit. Child neglect statutes do not permit state intervention whenever parents make a medical decision which the state does not consider to be in a child's best interest.[165] Before the state can substitute its judgment for that of the parents, it must demonstrate that the parents have failed to meet the standards of acceptable parenting.[166] Thus, the first step in the two part statutory scheme is to decide whether the parents have failed to provide minimally acceptable or adequate care.[167] If it cannot be shown that the parents have failed to provide minimum or adequate care, the state cannot second guess their decisions. If, however, the parents do fail to provide minimally acceptable care the state can then substitute its judgment for the that of the parents and decide what is in the

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in these terms, one can avoid the difficulty of having to vest a fetus with full human rights at a given moment. Since human rights are categorical, one has them or one does not, equating the fetus with a person at any point, for example viability, has tremendous ramifications. If a fetus becomes a person at viability it has a full right to life at that point and no right to life the moment before. Because a categorical approach can often lead to undesirable and inconsistent results, it is important not to discuss fetal interests in terms of rights but rather in terms of a state's willingness to protect those interests.

In the author's view a state's willingness to protect particular fetal interests should evolve over the nine-month gestation period. Since serious fetal harm can occur early in gestation, a state should be willing to protect fetal health relatively early in pregnancy. A state's willingness to protect fetal life can arrive later, for example, at viability under *Roe*, since in protecting fetal life, a state removes an important right from the mother. Finally, a state's willingness to require women to save a fetus' life through affirmative conduct may come later still. Thus, while the *Jefferson* and *Anderson* courts were willing to require blood transfusions to save the life of a fetus about to be born, they may have been less willing to do so one month earlier. The fetus is unique in that it is a nonperson which becomes a person. By allowing a state's interest in the well-being of a fetus to evolve over a continuum, a state has greater flexibility to protect the fetus without cutting off all maternal rights at a set date during gestation.

165. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 119, §§ 24, 26 (West Supp. 1986). Section 24 provides that for the Boston Juvenile Court to assert jurisdiction over a child without proper care, a petition on behalf of the child must allege that said child is without:

> (a) necessary and proper physical or educational care and discipline; or (b) is growing up under conditions or circumstances damaging to the child's sound character development; or (c) who lacks proper attention of parent, guardian with care and custody, or custodian; or (d) and whose parents, guardian or custodian are unwilling, incompetent or unavailable to provide any such care . . . .

MASS. GEN. LAW ANN. ch. 119, § 24 (West Supp. 1986). Only if the allegations are proved, may the court "make any . . . appropriate order . . . as may conduce to [the child's] best interests. . . ." MASS. GEN. LAWS ANN. ch. 119, § 26 (West Supp. 1986).

166. *See* Arthur, *Judicial Procedures, Child Abuse and Neglect*, JUV. & FAM. CT. J. ch. 3, 15 (Winter 1984) "The issue [in cases of child abuse] is not whether a child will be better off with natural parents or with foster parents, the issue is whether the parents meet minimum standards of care." *Id.*

167. *See, e.g., In re* Hudson, 13 Wash. 2d 673, 700, 126 P.2d 765, 778 (1942). "The mere fact that the court is convinced of the necessity of subjecting a minor child to a surgical operation will not sustain a court order which deprives a parent of the responsibility and right to decide respecting the welfare of the child." *Id. See also In re* Hofbauer, 47 N.Y.2d 648, 656, 393 N.E.2d 1009, 1014 (1979) "Nor can a court assume the role of a surrogate parent and establish as the objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided . . . ." *Id.*

child's best interest.[168]

While the statutory scheme distinguishes failure to provide minimal care from failure to act in the child's best interest, the difficult issue is defining what constitutes a lack of minimum care. Where a child's life is threatened by a parent's failure to consent to a medical procedure, this statutory distinction makes little difference.[169] Courts will compel parents to provide their children with life-saving medical treatment over religious or other objections. In fact, one court acquired jurisdiction over a fetus whose mother indicated that she would not consent to a life-saving blood transfusion for the child after it was born.[170]

Cases that involve unconventional medical treatment for illnesses that are life threatening, or remedial medical procedures for illnesses that are not life threatening, present courts with more difficult questions. To illustrate the difficulty in defining lack of minimal care, this section will consider two cases involving unconventional medical treatments, one allowing state intervention and one leaving the decision to the parents.

In *Matter of Hofbauer*,[171] the Court of Appeals of New York refused to compel the parents of a child with Hodgkin's disease to consent to conventional medical treatment, including chemotherapy, for their child.[172] The parents, with the guidance of a physician, pursued an alternative course of treatment involving nutritional therapy and laetrile.[173] The New York statute defined child neglect as "failure of [a] . . .parent . . .to exercise a minimum degree of care in supplying the child with adequate . . .medical . . .care, though financially able to do so."[174] The court explained that the statute did not authorize courts to become surrogate parents and that provision of adequate medical care did not involve a " 'right' or a 'wrong' decision."[175] Since the parents' preferred course of medical treatment was not "totally rejected by all responsible medical authority," the court held that the parents exercised adequate care.[176]

The Supreme Judicial Court of Massachusetts reviewed a similar set of

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168. *See* Ewald, *Medical Decision Making for Children: An Analysis of Competing Interests*, 25 ST. LOUIS U.L.J. 689, 693 (1982). "If a child is in serious danger because of lack of medical care, state neglect statutes normally authorize intervention by courts having juvenile jurisdiction." *Id.*

169. *See, e.g.*, Wallace v. Labrenz, 411 Ill. 618, 624, 104 N.E.2d 769, 773 (1952) (compelling blood transfusion to save child's life over parent's religious objections under statute defining neglect as failure to provide "proper parental care"); Jehovah's Witnesses in the State of Washington v. King County Hosp. Unit No. 1 (Harborview), 278 F. Supp. 488, 498-99 n.1 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (declining to enjoin defendant hospital from giving blood transfusions to plaintiffs' children under statute defining dependent child as one "who is grossly and willfully neglected as to medical care necessary for his well-being").

170. Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (1961).

171. 47 N.Y.2d 648, 393 N.E.2d 1009 (1979).

172. *Id.* at 648, 393 N.E.2d at 1009.

173. *Id.* at 652, 393 N.E.2d at 1011.

174. *Id.* at 654, 393 N.E.2d at 1013 (citation omitted).

175. *Id.* at 656, 393 N.E.2d at 1014.

176. *Id.* at 656-57, 393 N.E.2d at 1014. The child subsequently died at the age of ten. N.Y.Times, July 18, 1980, at D13, col. 5.

facts in *Custody of a Minor*.[177] In that case, the parents of a three-year-old boy with acute lymphocytic leukemia had been ordered to submit their child to chemotherapy. The parents wished to supplement this treatment with metabolic therapy, including laetrile.[178] Unlike the New York court in *Hofbauer*, the Massachusetts court found the child "to be in need of care and protection"[179] under the Commonwealth's statute, enabling it to apply its "substituted judgment" in the "best interest of the child."[180] The court dismissed metabolic therapy not only as ineffective but also as possibly detrimental to the child's health.[181] The court distinguished *Hofbauer*,[182] explaining that in the present case there was no medical evidence that the parents' course of treatment was curative.[183] Thus, the court also found irrelevant "arguments which posit the existence of a fundamental right in competent adults to make personal health care decisions and to choose or reject medical treatment, whether orthodox or unorthodox, rational or foolish."[184] The Massachusetts court ordered the parents to both continue chemotherapy and cease metabolic therapy.[185]

When medical procedures are not life saving, courts are generally more deferential to parental choices. For example, in *In Re Seiferth*,[186] the Court of Appeals of New York declined to compel a father to consent to three operations to correct his sixteen year old son's harelip and cleft palate.[187] Because the condition could be corrected at a later date[188] and because the father was willing to allow the boy to decide whether to have the operations, the court did not consider the child neglected.[189]

In a somewhat aberrational decision, the same court ordered corrective surgery and blood transfusions for a sixteen-year-old boy with Von Recklinghauson's disease, over his mother's religious objections.[190] In *In Re Sampson*[191] the boy's condition, though it included severe deformities of the face and neck, was not life threatening.[192] While, the statutory definition of neglect was failure "to exercise a minimum degree of care,"[193] the *Sampson* court simply stated that *Seiferth*[194] expressly or implicitly recognized the court's authority to order corrective surgery even where the underlying condition is not

177. 378 Mass. 732, 393 N.E.2d 836 (1979).
178. *Id.* at 735, 393 N.E.2d at 839.
179. *Id.* at 733, 393 N.E.2d at 838.
180. *Id.* at 744, 393 N.E.2d at 843.
181. *Id.* at 742, 393 N.E.2d at 842.
182. 47 N.Y.2d 648, 393 N.E.2d 1009 (1979).
183. 378 Mass. at 746, 393 N.E.2d at 846.
184. *Id.* at 744, 393 N.E.2d at 844.
185. *Id.* at 745, 393 N.E.2d at 844. The boy died in Mexico at the age of three. San Francisco Chron. Oct. 19, 1979, at 1, col. 1.
186. 309 N.Y. 80, 127 N.E.2d 820 (1955).
187. *Id.*
188. *Id.* at 83, 127 N.E.2d at 822.
189. *Id.* at 86, 127 N.E.2d at 822.
190. *In re* Sampson, 29 N.Y.2d 900, 278 N.E.2d 918 (1972).
191. *Id.*
192. *Id.* at 901, 278 N.E.2d at 919.
193. *In re* Sampson, 65 Misc. 2d 658, 663, 317 N.Y.S.2d 641, 647 (1970).
194. 309 N.Y. 80, 127 N.E.2d 820 (1955).

life threatening.[195]

The Supreme Court of Pennsylvania criticized the *Sampson* holding in *In Re Green*,[196] a case involving "virtually identical facts."[197] The Pennsylvania court refused to order corrective surgery for a boy with several non-life-threatening conditions even though they prevented him from standing or moving.[198] The court stated that non-lifesaving procedures are not "required" within the meaning of the Pennsylvania neglect law.[199] The court also added that unless the fatal/nonfatal distinction is maintained courts will be drawn into "a medical and philosophical morass: if spinal surgery can be ordered, what about a hernia or gall bladder operation or a hysterectomy?"[200] Ultimately the court took a middle path and remanded to determine the child's wishes.[201]

No clear standard has evolved to determine when a state may intervene to order corrective surgery when there is a non life-threatening medical problem. One author has suggested that there may be no optimal legislative solution and, therefore, that courts inevitably must choose between maintaining the fatal/nonfatal distinction or engaging in entirely ad hoc determinations.[202]

In the context of maternal duties, these line-drawing problems are not insurmountable. In fact, the bifurcated scheme of most child neglect laws is helpful in distinguishing those cases in which states should protect fetal health from those in which it should defer to maternal decisionmaking. Specifically, the state should not intervene merely because a pregnant woman fails to provide her fetus with optimal care. Instead the state should limit intervention to cases in which the mother has crossed the boundary of acceptable maternal conduct by failing adequately to manage her pregnancy.

Thus, when the mother is harming her fetus through affirmative conduct or failure to care for her own health, the state may have grounds to intervene. The state should not intervene, however, when the mother has provided adequate prenatal care but is nevertheless carrying a fetus that suffers from an exogenously-caused defect and that would benefit from an in utero medical procedure. Requiring a woman to engage in such a procedure would violate the bifurcated scheme since the mother has done nothing indicating a lack of adequate care for her fetus. In fact, the woman's conduct may have been entirely responsible such that her child would have developed normally but for the fortuity of an exogenously-caused defect. Another possible basis upon which courts might determine whether maternal conduct justifies state intervention is whether that conduct will result in permanent fetal harm. While the fatal/nonfatal distinction advanced in *Green*[203] is easier to apply, it may lead to unjustified results in many cases.

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195. 29 N.Y.2d at 901, 278 N.E.2d at 919.

196. 448 Pa. 338, 292 A.2d 387 (1972).

197. *Id.* at 347, 292 A.2d at 391.

198. *Id.* at 340-41, 292 A.2d at 388.

199. *Id.* at 348, 292 A.2d at 392.

200. *Id.*

201. *Id.* at 349, 292 A.2d at 392.

202. *See* W. WADLINGTON, CHILDREN IN THE LEGAL SYSTEM 935 (1983). "The courts must either abide by the time-honored limitation of relief to life-threatening circumstances or engage in a series of wholly ad hoc responses to differing factual situations." *Id.*

203. 448 Pa. 338, 292 A.2d 387 (1972).

As indicated in *Seiferth*[204] and *Green*,[205] certain nonfatal conditions can be corrected at a later point, especially if the neglected child is close to majority. By contrast, the result of maternal misconduct during gestation can be severe and permanent harm. Since fetal alcohol syndrome can result in permanent growth retardation and cardiac disorders, conditions which may not prove fatal, yet which cannot be corrected at a later point,[206] excessive drinking may provide reasonable grounds for intervention. Similarly, pregnant diabetics who fail to monitor adequately their insulin may expose their fetuses to high risks of heart defects and loss of neurological function.[207] Thus, these women might appropriately be subjected to court orders. By contrast, neither maternal conduct which merely slows development, nor genetically transmitted defects provide a state with grounds to intervene on behalf of a fetus.

2. Procedural Aspects of Abuse and Neglect[208]

As shown, not only do child neglect laws define the perameters of acceptable parental decision making on medical care, but they also provide procedural requirements designed to further limit state intervention into the family unit. These procedures reflect a delicate balance between efforts to maintain the family unit and efforts to protect children who may be subject to serious harm.[209] State laws on child abuse and neglect contain elaborate procedures to ensure that parents are given reasonable opportunities to provide their neglected or abused children with adequate care.[210]

While some neglect statutes will not allow judicial intervention unless the parents intentionally or recklessly harm their child[211] others only require a

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204. 309 N.Y. 80, 127 N.E.2d 820 (1955).

205. 448 Pa. 338, 292 A.2d 387 (1972).

206. *See supra* note 6 and accompanying text.

207. *See supra* note 7 and accompanying text.

208. In the prenatal context the distinction between abuse and neglect is unclear. Whether a mother harms her fetus through affirmative conduct or failure to care for her own health, the harm which the fetus endures is closer to child medical neglect than child abuse. The problems associated with excessive discipline and sexual abuse do not arise in the prenatal context. Therefore this section will focus on procedures common to both abuse and neglect.

209. *See supra* notes 165-68 and accompanying text. To some extent this area of the law has been "constitutionalized" due to the potential criminal sanctions and loss of custody. For example, in *Santosky v. Kramer*, the Supreme Court held that a state may not permanently remove custody over parental objections upon establishing permanent neglect by a mere preponderance of the evidence. 455 U.S. 745, 764 (1982). Because of the parents' fundamental interest in child-rearing and the uncertainty over whether removing custody is in the child's best interest, due process requires that a state prove by clear and convincing evidence that abuse or neglect is likely to continue. *Id.* at 768-70. Since prenatal abuse or neglect will not involve permanent custody removal, *Santosky* does not apply in this context.

210. *See generally* Brown & Riley, *Agency Procedures With Abuse Reports*, JUV. & FAM. CT. J. 45 (Winter 1984) [hereinafter Brown & Riley, *Agency Procedures*] (outlining procedures from referral to adjudication). The authors explain that among the purposes behind conducting investigations is to "offer appropriate ameliorative services in support of the family, and . . . [to] ensure that these services are being rendered effectively in conjunction with a specific treatment plan." *Id.* at 45.

211. *See* Simpson, *supra* note 137, at 66. "[S]ome courts require that the act [of child abuse] be done in *malo animo* whereas others have held that acts done recklessly, in willful and

showing that the child suffered some harm.[212] Most states require individuals "with reasonable cause or knowledge to believe that a child is being neglected or abused" to report neglect or abuse to a state agency.[213] Failure to make such a report can result in civil or even criminal sanctions.[214] Many states have set up agencies to screen reported cases.[215] These agencies attempt, wherever possible, to remedy neglect or abuse without resorting to adjudication in an effort to preserve the family unit.[216] Finally, states must allow parents the opportunity to alter their allegedly neglectful and abusive conduct, and must employ the least restrictive means to help the child.[217] Thus, judicial sanctions are always measures of last resort.

Since court-ordered prenatal duties might impose a social stigma and indirectly harm the fetus, a parallel system of agency intervention prior to adjudication is appropriate. Unfortunately, the duration of pregnancy and the severity of the harm to the fetus which can occur over a short period of time may require states to curtail these procedures to a significant extent. Nonetheless, some intermediate step between reporting and adjudication is necessary to protect the interests of both the mother and the fetus and to ensure that states employ the least restrictive means of correcting the adverse conduct. Even with the use of an intermediate agency, states might still pursue judicial proceedings and court orders for pregnant women who resist less restrictive means.

One final procedural safeguard for pregnant women is necessary in prenatal abuse and neglect cases. Although parents know or should know when their acts or omissions harm their children, a pregnant woman often may not know when her acts or omissions could harm her fetus. A woman may act in a manner harmful to her fetus, for example, before she knows she is pregnant. Since the purpose of a prenatal-duty rule is to protect the fetus rather than to punish the mother, judicial intervention at this point would be inappropriate. Alternatively, a prenatal-duty rule could delay judicial intervention until the woman has clearly decided to carry her fetus to term.[218] Unfortunately, this

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wanton disregard of the consequences and rights of others, will suffice." *Id.*

212. *See* ten Bensel, *Reporting Child Abuse, Child Abuse and Neglect*, 35:4 JUV. & FAM. CT. J. ch. 6, at 42 (Winter 1984-85) "In general, the proof of neglect and abuse is based on the effects of the parent's act and not the reason for the act itself. The issue is . . . that harm was done to the child." *Id.*

213. *Id.* at 41. "Most states have taken the necessary steps to remove the barriers in reporting systems so that anyone who is suspicious of, or has reasonable cause or knowledge to believe that a child is being neglected or abused, is mandated to report." *Id.*

214. These statutes immunize reporters acting in good faith from tort liability. *See* Note, *Unequal and Inadequate Protection*, *supra* note 160, at 262-63.

215. In fact, only 20% of reported cases result in adjudication. *See* Brown & Riley, *Agency Procedures*, *supra* note 210, at 48.

216. *See id.* at 49. "Whenever possible, all efforts should be focused on maintaining the family as a unit." *Id.*

217. *See* Armstrong, *Termination of Parental Rights*, 8 J. JUV. LAW 442, 445 (1984). "The state has the obligation to allow the parents the opportunity to develop parental skills and to re-establish the parental bond." *Id.*

218. *See* Robinson, *Procreative Liberty*, *supra* note 4, at 438. "Once the mother decides not to terminate the pregnancy, the viable fetus acquires rights to have the mother conduct her life in ways that will not injure it." *Id. But see* Shaw, *supra* note 6, at 83. "Her failure to decide to abort

may encourage women to delay their decisions until they lose their legal right to abort. Since significant harm can occur prior to viability, this would undermine the very purpose of a prenatal-duty rule. A better solution is to provide a pregnant woman a reasonable opportunity in which to conform her conduct. While she has until viability to make her abortion decision, she should not be allowed to harm her fetus by failing to decide earlier. Even after the woman conforms her conduct, she may still abort under *Roe v. Wade*.[219] If a reasonableness standard is difficult in practical application, however, legislatures can mandate the precise point at which a pregnant woman is expected to conform her conduct to benefit her fetus's health.[220]

C. *The Rescue Doctrine*

Under current child abuse and neglect laws certain maternal conduct during pregnancy adverse to fetal well-being may provide grounds for a court order to protect a fetus's life or health. The more difficult issue involves correctable fetal defects which the mother did not cause through her acts or omissions.[221] While a woman may have a duty not to harm her fetus, she may not have a corresponding duty to improve its health.[222]

To date, only two courts of record have required women to engage in

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should not relieve her of prenatal duties earlier in pregnancy." *Id.*

219. 410 U.S. 113 (1973).

220. A state legislature could choose one of several methods to derive the appropriate point at which prenatal duties begin. For example, it could determine that after one or two months there is a rebuttable presumption that a woman knows she is pregnant. This provides the opportunity to rebut in unusual circumstances. Or, the legislature could choose the point at which fetal brain waves begin on the theory that at this point a fetus may be able to experience pain. Finally, it could give an additional grace period up to the end of the first trimester, although this would prevent enforcement during a period where potential harm from maternal misconduct can be great.

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

222. For an interesting analysis on how the rescue doctrine may be combined with the equal protection clause of the fourteenth amendment to hold statutes proscribing abortion unconstitutional on non-substantive due process grounds, see Regan, *supra* note 76. Regan argues that pregnancy should be viewed properly as a continuous state of rescue. *Id.* at 1573-83. While a pregnant woman may have assumed the duty in some sense through conception, Regan essentially asserts that the punishment does not fit the crime. *Id.* at 1583. Since the legal system generally condemns affirmative duties to rescue, a law requiring pregnant women to rescue fetuses by carrying them to term violates equal protection by imposing duties on women which are "not consistent with our legal tradition." *Id.* at 1638. While the rescue doctrine provides an exception for parties voluntarily starting to aid, and while women may be viewed as "starters," Regan rejects this argument on the ground that unlike traditional starters, pregnant women do not excite the expectations of the rescuee. *Id.* at 1600. In fact, however, the starter doctrine may be justified on an alternative ground, namely that by starting to rescue, the rescuer deters other would-be rescuers. By its very nature, pregnancy precludes others from rescuing the fetus without maternal consent, and therefore the starter analogy may be sound. While the rescue doctrine may not provide an appropriate basis for holding statutes proscribing abortion unconstitutional, it may provide a way to limit maternal duties to cases in which the woman is actually causing harm to the fetus. See *infra* notes 223-77 and accompanying text for a complete discussion of how maternal duties might be affected by the rescue doctrine.

medical procedures to protect their fetuses.[223] In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,[224] the Supreme Court of New Jersey ordered a Jehovah's witness, more than thirty-two weeks pregnant, to submit to a blood transfusion to save both her life and that of her fetus.[225] Although the court stated that "the unborn child is entitled to the law's protection," it then added that "the welfare of the child and the mother are intertwined and inseparable."[226] In a 1981 case,[227] the Supreme Court of Georgia faced a similar situation. In *Jefferson v. Griffin Spalding County Hosp. Auth.*,[228] the court ordered a Jehovah's witness with placenta previa[229] to have a Caesarean section to save herself from a fifty percent chance of death and her fetus from a ninety-nine percent chance of death through natural childbirth.[230] In ordering the Caesarean section contingent upon a complete placental blockage, the court stated that "the State has an interest in the life of this unborn, living human being."[231]

In a 1983 case,[232] the Supreme Judicial Court of Massachusetts refused to order a woman four months pregnant to submit to a purse string operation[233] in order to prevent a miscarriage.[234] In *Taft v. Taft*,[235] the court held that the woman who opposed the operation for religious reasons was competent to do so[236] and stated that "[n]o case has been cited to us, nor have we found one, in which a court ordered a pregnant woman to submit to a surgical

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223. *See Jefferson*, 247 Ga. 86, 274 S.E.2d 457 (1981); *Anderson*, 42 N.J. 421, 201 A.2d 537 (1964). In addition to these reported cases, courts have enjoined maternal conduct in several unreported cases. In one recent case a doctor asked a Maryland court to enjoin a pregnant woman from taking unprescribed drugs. The court never tried the case, however, because the woman entered a drug rehabilitation program voluntarily. *See* Feldman, *Leading Them to Water and Making Them Drink*, LEGAL ASPECTS OF MEDICAL PRACTICE (Dec. 1985); F. Silas, *An Issue is Born*, 71 A.B.A.J. 21 (Aug. 1985). For a similar 1983 case, see *Doctor says Narcotics Endanger Fetus*, Boston Globe, Apr. 27, 1983, at 8, col. 1.

For a discussion of a case compelling a Caesarian section, see Bowes and Selgestad, *Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 OBSTET. & GYNEC. 209 (1981). Finally, for a case involving civil commitment of a psychotic woman in her seventh month of pregnancy who denied her condition and engaged in acts dangerous to her fetus, see Soloff, Jewell & Roth, *Civil Commitment and the Rights of the Unborn*, 136 AM. J. PSYCHIATRY 114 (Jan. 1979).

224. 42 N.J. 421, 201 A.2d 537 (1964).

225. *Id.* at 423, 201 A.2d at 537.

226. *Id.* at 422, 201 A.2d at 538.

227. Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981).

228. *Id.*

229. Placenta previa involves complete blockage of the placenta and makes vaginal delivery extremely dangerous for the mother and fetus. *Id.* at 86, 274 S.E.2d at 460.

230. *Id.* at 86, 274 S.E.2d at 459. In an unusual change of circumstances, the placenta moved and the woman was able to deliver through natural childbirth. *Pregnant Woman Believes Prayers Obviated Caesarean*, N.Y. Times, Jan. 26, 1981, at A12, col. 5.

231. 247 Ga. at 89, 274 S.E.2d at 460.

232. Taft v. Taft, 388 Mass. 331, 446 N.E.2d 395 (1983).

233. A purse string operation involves "suturing so that the cervix would hold the pregnancy." *Id.* at 332, 446 N.E.2d at 396 (citation omitted).

234. *Id.*

235. *Id.* at 331, 446 N.E.2d at 395.

236. *Id.* at 333-34, 446 N.E.2d at 396-97.

procedure in order to assist in carrying a child not then viable to term."[237]

In fact, with the exception of the *Anderson*[238] and *Jefferson*[239] courts, no court has ever required an unwilling person to undergo an intrusive procedure to save another's life, much less to improve another's health. A leading commentator, John A. Robertson[240] argues that *Anderson*[241] and *Jefferson*[242] may imply that pregnant women have a broad duty to undergo in utero surgery to prevent birth defects if and when such procedures become accepted medical practices.[243] Thus, Robertson states, "If the mother has already foregone her right not to procreate by not aborting, then she no longer has a right to produce a dead or unhealthy baby."[244] This sweeping result does not follow, however, from either these cases or the general principles of tort law and equity.

To analyze the implications of *Jefferson*,[245] *Anderson*[246] and *Taft*,[247] it is necessary to distinguish two situations. The first involves a woman who discovers through prenatal testing that without an intrusive procedure, her fetus will not be born alive. Assuming the fetus is not then viable, the woman has no duty to engage in the procedure. Under *Roe v. Wade*[248] she has the right to abort her fetus prior to viability, and therefore she has no duty to bring her fetus to term alive.[249] Alternatively, if the fetus is viable, the state's interest in the potentiality of the human life is sufficiently compelling to override the

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237. *Id.* at 334 n.4, 446 N.E.2d at 397 n.4.

238. 42 N.J. 421, 201 A.2d 537 (1964).

239. 247 Ga. 86, 274 S.E.2d 457 (1981).

240. His articles in this area include: Robertson, *Procreative Liberties*, *supra* note 4, and Robertson, *The Right to Procreate and In Utero Fetal Therapy*, 3 J. LEGAL MED. 333 (1982) [hereinafter Robertson, *Right to Procreate*].

241. 42 N.J. 421, 201 A.2d 537 (1964).

242. 247 Ga. 86, 274 S.E.2d 457 (1981).

243. *See* Robertson, *Right to Procreate*, *supra* note 240, at 357-59. Robertson further stated:

> If resolution of the fetal-maternal conflict in *Raleigh-Fitkin* and *Jefferson* in favor of the near-term fetus over the mother's interest in bodily integrity was correct, then far-reaching intrusions on the mother's body and freedom of action for the benefit of the unborn child may legitimately follow. Women, for example, might then be forced to deliver by cesarean section. They may also be prohibited from using alcohol or other substances harmful to the fetus during pregnancy, or be kept from the workplace because of toxic effects on the fetus. They could be ordered to take drugs, such as insulin for diabetes, medications for fetal deficiencies, or intrauterine blood transfusions for RH factor. Pregnant anorexic teenagers could be force-fed. Prenatal screening and diagnostic procedures, from amniocentesis to sonography or even fetoscopy, could be made mandatory. And, in utero surgery for the fetus to shunt cerebroventricular fluids from the brain to relieve hydrocephalus, or to relieve the urethral obstruction of bilateral hydronephrosis could also be ordered. Indeed, even extra-uterine fetal surgery, if it becomes an established procedure, could be ordered, if the risks to the mother were small and it were a last resort to save the life or prevent severe disability in a viable fetus.

Id.

244. *Id.* at 360. *But see* Regan, *supra* note 76.

245. 247 Ga. 86, 274 S.E.2d 457 (1981).

246. 42 N.J. 421, 201 A.2d 537 (1964).

247. 388 Mass. 331, 446 N.E.2d 395 (1983).

248. 410 U.S. 113 (1973).

249. *Id.*; *accord Taft v. Taft*, 338 Mass. 331, 446 N.E.2d 395 (1983).

mother's right to abort.[250] *Jefferson*[251] and *Anderson*[252] go beyond *Roe v. Wade*[253] in holding that not only may a state proscribe abortion of a viable fetus, but also a state may impose an affirmative duty to engage in reasonably safe medical procedures to save a viable fetus's life.[254] *Taft*[255] holds, in accordance with *Roe v. Wade*,[256] that a state may not impose an affirmative duty to bring a nonviable fetus to term alive.[257]

The second and more difficult situation involves a pregnant woman who discovers through prenatal testing that, without an in utero surgical procedure, her child may be born with a birth defect. Professor Robertson[258] argues that the second situation is no different analytically than the first.[259] The traditional rescue doctrine, however, may compel the opposite result.

Some courts have issued orders authorizing legally incompetent individuals to undergo intrusive procedures to save the lives of others.[260] No court, however, has imposed upon a competent person an affirmative duty to rescue another by forcing the competent person to submit to an intrusive medical procedure against his or her express objection. Cases in which incompetent patients were ordered to undergo intrusive procedures to benefit others have been based upon finding, through the substituted-judgment doctrine,[261] that the donor would, on balance, benefit from the procedure.[262] For example, in *Strunk v. Strunk*,[263] a Kentucky appellate court authorized a kidney transplant from a twenty-seven-year-old mentally incompetent patient to his brother upon finding that the donor's "well being would be jeopardized more severely by the loss of his brother than by the removal of a kidney."[264] In *Hart v. Brown*,[265] the Superior Court of Connecticut employed the same test to authorize a seven-year-old girl to donate a kidney to save the life of her twin sister.[266] The court found that "insofar as she may be capable of understanding she desires to donate her kidney so that her sister may return to her."[267] The court added that "the donor would be better off in a family that was

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250. Roe v. Wade, 410 U.S. 113, 164-65 (1973).

251. 247 Ga. 86, 274 S.E.2d 457 (1984).

252. 42 N.J. 421, 201 A.2d 537 (1964).

253. 410 U.S. 113 (1973).

254. In fact, both cases also involved serious threats to the womens' lives. *Jefferson*, 247 Ga. at 459, 274 S.E.2d at 458; *Anderson*, 42 N.J. at 423, 201 A.2d at 538.

255. 388 Mass. 331, 446 N.E.2d 395 (1983).

256. 410 U.S. 113 (1973).

257. Taft, 388 Mass. at 334, 446 N.E.2d at 397 (1983).

258. *See* Robertson, *Right to Procreate*, *supra* note 240.

259. *Id.* at 360-61. While Robertson would factor in risks to the mother from particular procedures, he would not limit intervention based on mere physical intrusiveness. *Id.*

260. *See, e.g.*, Strunk v. Strunk, 445 S.W.2d 145 (Ky. Ct. App. 1969) (authorizing retarded adult to donate kidney to brother); Hart v. Brown, 29 Conn. Supp. 368, 289 A.2d 386 (1972) (authorizing seven year old girl to donate kidney to twin sister).

261. *Strunk*, 445 S.W.2d at 148; *Hart*, 29 Conn. Supp. at 370, 289 A.2d at 388.

262. *Strunk*, 445 S.W.2d at 149; *Hart*, 29 Conn. Supp. at 378, 289 A.2d at 389.

263. 445 S.W.2d 145 (Ky. Ct. App. 1969).

264. *Id.* at 146.

265. 29 Conn. Supp. 368, 289 A.2d 386 (1972).

266. *Id.*

267. *Id.* at 375, 289 A.2d at 389.

happy than in a family that was distressed and in that it would be a very great loss to the donor if the donee were to die from her illness."[268] Where, on the other hand, the courts have found that an incompetent donor would not benefit from a surgical procedure intended to benefit another, they have not authorized the procedure.[269] Thus, in *Bonner v. Moran*,[270] the United States Court of Appeals for the District of Columbia held invalid a fifteen-year-old boy's consent to a skin-graft operation to benefit his cousin where the court found no corresponding benefit to the donor.[271] Furthermore, in *In re Guardianship of Pescinski*,[272] the Supreme Court of Wisconsin refused to apply the substituted-judgment doctrine where it found no benefit to the proposed kidney donor.[273]

These cases indicate that courts will order surgery to be performed on an incompetent donor to benefit another only upon finding that the donor would benefit from the procedure. When a competent woman declines surgery to improve her fetus's health, however, it is illogical to argue that imposing the surgical procedure against her will would in any way serve her best interest. Analytically, this situation, involving an affirmative duty to improve a fetus's health is different from the first situation which involves a duty to preserve a viable fetus's life.

Under the decision in *Roe v. Wade*,[274] the state's interest in the life of a viable fetus is compelling.[275] It is therefore within the state's power to require the mother to protect the life of that fetus. A fetus does not, however, have a corresponding right to have its health improved where the mother was not responsible for its condition and where correcting the condition would require surgery against the mother's will. Since courts will not impose surgical procedures against a competent donor's will to benefit another,[276] they should not do so to benefit a fetus, especially where the fetus's life is not at stake. As indicated above, the status of a fetus cannot exceed that of a child already born. Thus, any prenatal-duty rule must be limited by a causation criterion.

In the context of in utero therapy, there are also unique enforcement problems which make injunctive relief inappropriate.[277] Women who would prefer not to engage in in utero procedures may simply bypass tests that would reveal fetal abnormalties. Theoretically, a rule might require such tests for all

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268. *Id.*

269. *See, e.g.*, Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941); *In re* Guardianship of Pescinski, 67 Wis. 2d 4, 226 N.W.2d 180 (1975); McFall v. Shimp (unpublished, Ct. of Comm. Pleas, Allegheny County Pa. Civil Division, July 26, 1978).

270. 126 F.2d 121 (D.C. Cir. 1941).

271. *Id.*

272. 67 Wis. 2d 4, 226 N.W.2d 180 (1975).

273. *Id.*

274. 410 U.S. 113 (1973).

275. *Id.* at 163.

276. *See, e.g.*, Sirianna v. Anna, 285 N.Y.S.2d 709 (1967) (mother has no duty to donate kidney to son). While in utero surgery does not involve donating an organ, and, in fact, may only result in the destruction of cells which will rejuvenate themselves, no recorded case has required a parent to donate blood or bone marrow, both of which are also self-rejuvenating, against his or her will to benefit a child.

277. For a more thorough discussion of enforcement problems generally associated with prenatal duties, see *infra* notes 278-80 and accompanying text.

pregnant women or women who have a higher risk of carrying a deformed fetus. This rule would be analogous, however, to requiring police inspection of all homes to find the occasional home in which child abuse occurs, thereby violating the fourth amendment prohibition against unreasonable searches and seizures.[278]

D. Enforcing Prenatal Duties

While a comprehensive discussion of enforcement procedures and problems for prenatal duties are beyond the scope of this article, this section will address a few issues which merit further exploration. The most obvious problems with imposing duties to protect fetal health involve ensuring compliance and monitoring. These problems are real and should be factored in when deciding whether to create a prenatal-duty rule. Nonetheless, states need not correct all instances of fetal abuse and neglect to justify the rule. In fact, by correcting even a few egregious cases, states may encourage women to weigh more seriously their decisions concerning conception.

One author has argued that court orders imposed prior to viability may encourage women to abort.[279] Assuming, however, that a woman has already decided to carry her fetus to term, she may be sufficiently committed to her fetus's well-being that the added burden will not encourage her to abort. If, however, the woman has not yet decided whether to ultimately give birth to her child, she may also wish to comply with the rule if doing so would be less intrusive physically, and less demeaning emotionally, than abortion itself. These women are the most likely to be affected favorably by a prenatal-duty rule.

One problem with judicial enforcement of prenatal duties is that an adversarial hearing may itself indirectly harm the fetus through the anxiety it causes the mother. The fetus is likely to be adversely affected by the mother's psychological state given the unique physical and emotional link between the two.[280] Nonetheless, in severe cases involving, for example, alcohol or drug abuse, the harm from maternal conduct will undoubtedly exceed that of a court order.

Even if a court orders the mother to conform her conduct, however, enforcement problems remain. One approach would be for the court to require the mother to see a doctor at fixed intervals for periodic testing. Thus, for example, courts could order diabetics to have their insulin level checked and alcoholics to have their blood-alcohol level monitored. Failure to comply with these orders would constitute contempt. In choosing sanctions for contempt,

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278. *See* U.S. CONST. amend. IV.

279. *See* Meyers, *supra* note 59, at 68. "[T]o extend state authority prior to viability may cause an increase in abortion, and abortion of the fetus which the state seeks to help is certainly not to be encouraged." *Id.*; *see* Note, *A Maternal Duty to Protect Fetal Health*, 58 IND. L.J. 531, 540 (1982). "Imposing liability before viability may . . . encourage mothers to abort. . . . If a court were to order a pregnant alcoholic not to drink, she might opt to abort to avoid compliance." *Id.*

280. *See* Note, *Constitutional Limitations*, *supra* note 28, at 1065. "[A] fetus and his mother are closely linked physiologically. If state intrusion causes the mother to suffer emotionally, the fetus probably will suffer too." *Id.*

however, courts must consider the effects on both the mother and fetus.

These enforcement and monitoring problems illustrate the need for intermediate agencies like those used in child abuse and neglect proceedings. Agency social workers could develop a more personal rapport with the pregnant woman while reminding her of possible sanctions for failure to improve the conditions leading to fetal harm.

Given the duration of pregnancy, however, state agencies and courts must be prepared to move quickly. In extreme cases, court orders may be essential to protect a child from permanent disfigurement and retardation. One difference between a prenatal-duty rule and child abuse and neglect laws involves reporting. Children at school age are exposed to many people who can report parental misconduct. Fetuses are not. Nonetheless, many cases of child abuse and neglect involve preschool children. Just as pediatricians report instances of child abuse and neglect, so too can obstetricians and family doctors report fetal abuse and neglect. It is quite possible that some pregnant women who irresponsibly manage their pregnancies will seek medical attention, just as some parents who abuse their children will bring them to a doctor.

Where a pregnant woman engages in certain acts or omissions which actually harm the fetus, a medical doctor through his observation of the woman has some grounds to suspect that the fetus is being harmed. Where a pregnant woman does not engage in such acts or omissions, however, her doctor has no equivalent basis for suspecting that her fetus is suffering from an exogenously-caused congenital abnormality. As indicated by the requisite probable cause standard in criminal law, states should limit investigation to cases in which there is a reasonable basis for suspecting that a mother's acts or omissions are causing harm to her fetus. This approach respects individual autonomy, whereas testing of pregnant women for genetically transmitted defects is unduly invasive. Respecting personal autonomy in the context of pregnancy is particularly crucial as excessive state intervention may harm the very being a prenatal-duty rule is intended to protect. Since the state should never discourage women from seeking proper medical care, the enforcement problems involved in forced in utero medical procedures make a prenatal-duty rule in this context inappropriate. Again, the enforcement problems associated with prenatal duties, while more difficult, are quite similar to those involved in cases of child abuse and neglect.

IV. Proposed Analytical Framework

As indicated at the outset, maternal-fetal conflicts can arise in three contexts. A pregnant woman can engage in acts that are detrimental to her fetus.[281] In addition, a pregnant woman can neglect to care adequately for her own health, thereby adversely affecting her fetus' health.[282] Finally, a pregnant woman can refuse to improve her fetus' health upon discovering that her fetus has an exogenously-caused defect correctable through in utero or other medical procedures.[283] This section will address each of these situations and propose a basis for determining when to impose a maternal duty to protect

281. *See supra* note 6 and accompanying text.

282. *See supra* notes 7-9 and accompanying text.

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

fetal health.

A. Affirmative Conduct Harming the Fetus

The most common examples of affirmative fetal abuse include excessive alcohol consumption and drug abuse during pregnancy. In these cases, the woman is the direct cause of harm to her fetus. Thus, these cases may be the most morally and legally compelling for injunctive relief.

Duties to refrain from affirmative detrimental conduct are unlikely to be held unconstitutional, even if imposed on a woman before her fetus is viable. Since a state possibly could impose this duty prior to viability without impinging on the woman's constitutionally-protected realm of decision making, it need only demonstrate a legitimate interest in the health of the fetus.[284] Specifically, this prenatal-duty rule does not violate a woman's right to abort, nor does it in any way hinder her long-term self interest. In addition, under the Supreme Court's analysis, a duty to refrain from affirmative conduct does not violate a person's constitutional right to bodily integrity because it is not physically invasive.[285] Finally, this duty would not be likely to implicate a woman's right to practice her religion as the harmful conduct does not involve religious beliefs or practices.[286]

Maternal duties to refrain from adverse conduct would be similar to current child abuse and neglect laws.[287] Where a woman's conduct would likely inflict permanent harm on her fetus, states ought not to protect that conduct.[288] Courts should not, however, intervene whenever a pregnant woman does not conduct herself in a manner beneficial to her fetus. The purpose of a prenatal-duty rule is to protect fetal health. Excessive government intrusions into the lives of pregnant women can impede rather than promote that goal. State intervention should therefore be limited to cases where the mother fails to provide adequate or minimally-acceptable care[289] and where there is strong evidence that serious fetal harm will continue.[290]

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284. *See supra* notes 19-71 and accompanying text.

285. *See supra* notes 72-110 and accompanying text.

286. *See supra* notes 111-27 and accompanying text.

287. *See supra* notes 159-220 and accompanying text.

288. *See supra* notes 210-13 and accompanying text.

289. *See supra* notes 165-68 and accompanying text.

290. *See supra* notes 216-17 and accompanying text. One author has recently stated that:

> The creation of fetal rights that can be used to the detriment of pregnant women is a very recent phenomenon, and thus far has occured in only a relatively small number of cases. Yet absent an increased awareness of the costs to women's autonomy, these rights will almost certainly expand.

Johnson, *supra* note 71, at 605. The author further stated that, "[g]iven the fetus' complete physical dependence on . . . the woman, virtually every act of the pregnant woman has some effect on the fetus." *Id.* at 605-06. The author then listed numerous activities including taking drugs, drinking, smoking and failing to eat properly, as subject to a prenatal-duty rule. *Id.* at 606-07. While this line-drawing concern is legitimate, it is not insurmountable. Provided courts require proof that permanent harm is likely to continue from adverse maternal conduct, and provided women are first warned by doctors and intermediate state agents of the harm they may be causing their fetuses, judicial involvement in all but the most extreme cases will be unnecessary. Moreover, under this more narrowly defined rule which essentially incorporates the minimal care standard

B. Neglect of Own Health Harming the Fetus

A woman may pose risks equal to or greater than those resulting from adverse conduct by failing to care adequately for her own health. The most common examples include diabetics who fail to monitor properly their insulin levels and women who fail to provide themselves with adequate nutrition. Just as parents can harm their children through abuse or neglect, pregnant women can severely harm their fetuses through affirmative conduct or failure to provide themselves with adequate health care. Since proper prenatal care involves providing the fetus with a healthy environment for gestation, a pregnant woman would be no less culpable for hindering that environment through neglecting her own health than she would be through affirmative prenatal abuse. Because a duty to maintain reasonable health during pregnancy is in accordance with state law principles,[291] the distinction between act and omission should not be accorded legal significance in this context.

Maternal duties prohibiting prenatal neglect are no more likely to pose constitutional problems than would those prohibiting prenatal abuse. Whether imposed prior to viability or not, this duty will not violate a woman's constitutional right to make intimate decisions.[292] Similarly, this duty would not impinge on a woman's right to practice her religion for the same reasons it would not in the case of affirmative acts.[293] The only difference between situations involving affirmative acts and failures to act is that imposing a duty on a mother to care for her own health so as not to harm her fetus may implicate

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established under child abuse and neglect laws, an appropriate line can be drawn to exclude state involvement over those types of maternal acts or omissions not likely to result in serious harm.

Thus, while certain acts or omissions are capable of producing fetal harm in rare instances, unless they are actually likely to result in fetal harm, they would not be subject to a prenatal-duty rule. This minimum or adequate care standard, if applied in the prenatal duty context, will prevent state involvement over maternal actions which although not optimal, will not likely produce permanent harm to fetal health.

291. Essentially, state child abuse and neglect law distinguishes minimal or adequate care from optimal care, requiring the former of parents rather than the latter. *See supra* notes 165-68 and accompanying text. This distinction applies whether the parental misconduct is through an affirmative act, namely child abuse, or through an omission, in the case of neglect. Thus, the state will not displace a parental decision to deny medical treatment which would be optimal in some sense but not considered essential to the child's well-being. *See supra* notes 169-207 and accompanying text. Nor will it second-guess a parental decision to discipline a child provided the conduct does not constitute abuse. *See* A. KADUSHIN & J. MARTIN, CHILD ABUSE: AN INTERNATIONAL EVENT 5 (1981). "[T]he problem lies in distinguishing discipline, which is 'legitimate violence' toward children from abuse which is excessive and inappropriate and, hence, unacceptable violence toward children." *Id.*

Just as the distinction between affirmative and negative conduct toward a child is rejected in determining what constitutes unacceptable parenting under child abuse and neglect laws, so too should it be rejected in sanctioning fetal abuse and neglect. *See supra* notes 6-12 and accompanying text. Thus, the distinction between minimal or adequate care on the one hand, and optimal care on the other, should be borrowed from child abuse and neglect law. It should be used to decide when maternal conduct is sufficiently egregious to warrant state intervention on behalf of the fetus, regardless of whether the maternal misconduct is through an affirmative act, or by omission.

292. *See supra* notes 19-71 and accompanying text.

293. *See supra* notes 111-27 and accompanying text.

her right to bodily integrity.[294] For example, controlling insulin levels involves shots which pierce a woman's skin and providing proper nourishment requires a woman to eat food. For two reasons, however, the duty to aid fetal health by not neglecting maternal health will not violate this consitutional right. First, under the Supreme Court's analysis, the state's legitimate interest in fetal health would probably outweigh the relatively slight invasion of privacy from a commonplace shot or court-ordered self feeding.[295] Second, and more importantly, however, even if the intrusion is more than minimal, the Supreme Court would likely uphold the intrusion to the extent that it is medically advisable for the mother.[296] Subject to the same procedural requirements in cases involving prenatal abuse, therefore, maternal duties for neglect of fetal health do not contravene constitutional or state law doctrines.

At a policy level, duties in this context may actually be easier to enforce. Since medical doctors or state agency representatives will be counseling women on how to care for their own health as well as that of their fetuses, women may be less likely to view them as assuming an adversarial posture. Doctors and agency representatives, therefore, can probably cure many cases of prenatal neglect short of judicial intervention. Since judicial intervention itself may exacerbate a woman's anxiety during pregnancy, the result of this intermediate step may benefit both the mother and the fetus.

C. Exogenous Factors Harming the Fetus

Where a woman engages in an affirmative act that harms her fetus or neglects her own health thereby harming her fetus, the woman has deprived the fetus of its opportunity for full development during a properly managed gestation period. The act or omission essentially denies the fetus its own developmental potential. Where a fetus is genetically defective, however, and where the defect can be corrected in utero, this is not the case. Rather than hindering the fetus' development, a woman who declines in utero therapy has decided not to improve its health.

Ironically, the only two courts of record to grant injunctive relief to benefit a fetus did so to remove a barrier to the fetus' well-being which the pregnant women did not cause.[297] Maternal duties in this context, however, impli-

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294. *See supra* notes 72-110 and accompanying text.

295. *See supra* notes 86-92 and accompanying text.

296. *See supra* notes 107-08 and accompanying text.

297. *See Jefferson*, 247 Ga. 86, 274 S.E.2d 457; *Anderson*, 42 N.J. 421, 201 A.2d 537. While medical technology has not developed to the point where fetuses can be treated for exogenously-caused defects medically, rather than surgically, in the future technology may advance to help create a fourth category for this framework. Initially, this category would appear to fall between the cracks since, although the mother did not cause the defect, a highly intrusive procedure would not be required to treat the fetus. Nonetheless, the analysis developed in this article can be used to analyze maternal duties in this context as well.

As indicated in the section on the constitutional right to bodily integrity, requiring a woman to take medicine which poses little or no risk to her health might not be an unconstitutional invasion of her right of privacy. *See supra* notes 72-110 and accompanying text. Nonetheless, since the woman did not cause the fetal harm, it would appear to violate the state law doctrine of rescue. *See supra* notes 221-78 and accompanying text. The rescue doctrine, however, is a creature of state law and has exceptions. *See, e.g.*, Tarasoff v. Regents of University of California, 17 Cal. 3d

cate a range of constitutional rights including the right to make intimate decisions, to bodily integrity and to the free exercise of religion. Moreover, they contravene the fundamental common law tenet generally proscribing affirmative duties to rescue.

To evaluate how a prenatal-duty rule in this context would affect a woman's right to decide to seek an abortion, one must distinguish two situations. In theory, a prenatal-duty rule could require a pregnant woman to engage in an intrusive procedure to save a fetus' life and to bring it to term successfully. Alternatively, the duty could require a pregnant woman to engage in an intrusive procedure to correct or ameliorate a potential birth defect.

The two reported cases imposing maternal duties both involved intrusive procedures intended to save the lives of viable fetuses.[298] Under *Roe v. Wade*,[299] the state's interest in the life of a viable fetus is sufficiently compelling to override the mother's right to abort.[300] While *Roe v. Wade*[301] holds that states may proscribe abortion altogether after viability,[302] these cases indicate that states may go further to impose an affirmative duty to save a viable fetus' life immediately prior to birth.[303] Since a woman has already lost her right to abort at the point of viability, imposing a duty to rescue at this point cannot violate that fundamental right. This duty may be further limited, however, to situations where the procedure in question is medically advisable for the mother as the reported cases involved significant threats to the lives of both the mother and the fetus. In addition, a state may never impose a duty to save the life of a previable fetus.[304] To do so is tantamount to proscribing abortion prior to viability, thus contravening *Roe v. Wade*.[305]

Unlike a duty to save a previable fetus' life, a duty to improve its health does not violate a woman's right to abort. In theory, a pregnant woman could be required to engage in an intrusive procedure to prevent her fetus from a birth defect and then, after going through the procedure, but prior to viability, abort the fetus. A maternal duty in this context does, however, implicate other consitutional and state law rights.

A duty to engage in intrusive procedures to improve fetal health may

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425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), where the court stated:

> [T]here now seems to be sufficient authority to support the conclusion that by entering into a doctor/patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third persons whom the doctor knows to be threatened by the patient.

Id. at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24 (quoting Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CAL. L. REV. 1025, 1030 (1974)). Given the unique relationship between the mother and fetus, an exception in this context may be appropriate. Thus, to determine whether to require medical treatment in a particular case, courts must weigh the potential benefit to the fetus against the inconvenience and potential risk to the mother.

298. *See Jefferson*, 247 Ga. 86, 274 S.E.2d 457; *Anderson*, 42 N.J. 421, 201 A.2d 537.

299. 410 U.S. 113 (1973).

300. *Id.* at 164-65.

301. *Id.*

302. *Id.*

303. *See Jefferson*, 247 Ga. 86, 274 S.E.2d 457; *Anderson*, 42 N.J. 421, 201 A.2d 537.

304. *See* Taft v. Taft, 388 Mass. 331, 446 N.E.2d 395 (1983).

305. 410 U.S. 113 (1973).

violate a woman's constitutional right to bodily integrity.[306] Unlike the duty of pregnant women to maintain their own health during pregnancy, a duty in this context involves far more intrusive procedures which may not be medically necessary or advisable for the mother. Under the Supreme Court's balancing test,[307] the greater the intrusion and hence the greater the invasion of privacy, the more compelling must be the state interest required to overcome it.[308] Court ordered surgical procedures which are neither medically advisable for the mother nor particularly harmful, fall into a grey area on which the Supreme Court has not yet ruled. Given the intrusiveness of such procedures, the Court is likely to apply a high level of scrutiny and probably strike down the duty.

In addition to potentially violating a woman's right to bodily integrity, a duty to engage in certain procedures, including blood transfusions, may impinge upon a woman's right to practice her religion.[309] While this right is not unlimited, when combined with the right to bodily integrity, it may further support a decision holding the rule unconstitutional.

Even if the rule could withstand constitutional muster, it may contravene another fundamental legal doctrine. While a woman may have general duty to protect and nurture fetal health by providing the fetus with a reasonably well-managed gestation period, this duty should be limited to situations in which the mother is the agent causing fetal harm either through acts or omissions. A limitation based on causation both conforms with general legal principles[310] and is sound from the standpoint of policy. Since a woman is under no duty to engage in intrusive surgery to save her child's life or improve its health, she should be under no duty to improve her fetus' health, whether or not the fetus is viable.

From a policy standpoint, duties in the context of exongenously-caused defects are particularly unsound. To avoid surgical procedures, women may forego prenatal testing. A statute requiring such testing would violate a woman's fourth amendment rights as well as her right to privacy.[311] In addition, the rule would not just affect pregnant women with defective fetuses, but rather all pregnant women. Finally, this rule would place pregnant women in an adversarial relationship with their doctors who would become agents of the state even when the women have done nothing wrong.

Therefore, this rule would impose too great an intrusion on the vast majority of pregnant women who are not burdened with defective fetuses and would create a duty at odds with general principles of personal autonomy. Pregnant women should not be subject to different legal standards than the rest of society simply because they are pregnant.

CONCLUSION

While a pregnant woman has the right to abort until viability, she might

306. *See supra* notes 72-110 and accompanying text.
307. *See supra* notes 86-92 and accompanying text.
308. *Id.*
309. *See supra* notes 111-27 and accompanying text.
310. *See supra* notes 221-78 and accompanying text.
311. *See supra* note 278 and accompanying text.

not have the right to engage in acts or omissions which harm her fetus at any point during pregnancy. A woman may have a duty to properly manage the gestation period and to allow her fetus to reach its developmental potential. This duty is unlikely to impinge on a woman's consitutional right to make intimate decisions and is in accordance with state law principles on child abuse and neglect.

States may not, however, impose affirmative duties to undergo surgical procedures to improve fetal health without violating a woman's right to bodily integrity and contravening the traditional common law doctrine eschewing affirmative duties to rescue. Any prenatal-duty rule should therefore be limited by a causation criterion.

In defining a prenatal-duty rule, courts and legislatures must be particularly sensitive to the unique relationship between a pregnant woman and her fetus. While certain maternal acts or omissions can cause a fetus permanent and severe harm thereby justifying state intervention, judicial involvement may in many cases exacerbate fetal harm. Only by restricting maternal duties in this fashion will states ensure that the vast majority of pregnant women will be able to manage their pregnancies without the undue burden of government intrusion.

NOTE

Wrongful Life: Exploring the Development of a New Tort

In response to the current pro-choice attitude accorded abortion, and the public interest in genetics and the competence of health care professionals, torts involving negligence in the reproductive process — wrongful life, wrongful conception and wrongful birth — have developed. Legal developments regarding abortion[1] have resulted in a major shift in public policy regarding the right of a woman to terminate her pregnancy.[2] A woman must now be given a "meaningful opportunity" to decide whether or not to abort.[3] This pro-choice legal stance, combined with medical advances in the fields of genetic counseling and prenatal testing,[4] gives rise to a duty on the part of health care profes-

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1. In 1973, the Supreme Court, in *Roe v. Wade* held that a woman has a constitutional right to have an abortion during the first trimester of her pregnancy. 410 U.S. 113, 163-64 (1973).

2. Robak v. United States, 658 F.2d 471, 475 (7th Cir. 1981); Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 817, 165 Cal. Rptr. 477, 483 (1980); Berman v. Allen, 80 N.J. 421, 436, 404 A.2d 8, 16 (1979).

3. *Robak*, 658 F.2d at 475; *Berman*, 80 N.J. at 427, 404 A.2d at 16.

4. Some courts recognize that society has an interest in preventing the birth of defective children in order to decrease the health care burden. James G. v. Caserata, 332 S.E.2d 872, 879 (W. Va. 1985); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 468, 656 P.2d 483, 491 (1983); *Curlender*, 106 Cal. App. 3d at 817, 165 Cal. Rptr. at 483. *But see* Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). The court hints at the darker side of genetic engineering:

> Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering. Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?

Id. at 406, 386 N.E.2d at 812, 413 N.Y.S.2d at 900. Eugenics is a science directed to "improving the stock." Gleitman v. Cosgrove, 49 N.J. 22, 44, 227 A.2d 689, 701 (1967). A eugenic abortion is sought when the fetus may be born physically or mentally defective. *Id.*

Genetic counseling is a relatively new field. As it develops, it is being shaped by malpractice litigation. Capron, *Tort Liability and Genetic Counseling*, 79 COLUM. L. REV. 618, 625 (1979). The recognition of the liability of a physician for failure to disclose genetic information to pro-

sionals to provide prospective parents with pertinent information as to the probability that their children will be born defective.[5] Such information is necessary if parents are to decide whether to abort or even to avoid conception.[6] The duty to properly advise parents is one owed to the unborn child as well as to the parents.[7] The extension of this duty is premised on the foreseeability of danger to the fetus if the duty to inform the parents is breached.[8] Therefore, a health care professional in such a situation may be liable to the child in a wrongful life cause of action as the child's birth is a foreseeable result of the breach.[9] The resultant suit brought by or on behalf of the child in such an instance is a wrongful life action. Similar causes of action are brought by the parents — wrongful conception, wrongful pregnancy and wrongful birth.

A wrongful conception action, also called wrongful pregnancy, is generally brought by the parents of a healthy but unwanted child born as a result of a negligent sterilization or abortion procedure.[10] This cause of action is widely recognized by courts across the country[11] and is commonly treated in the same

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spective parents has given rise to a theory termed "defensive medicine." *Id.* at 666-67. According to this theory, physicians' conduct is often motivated not by their professional judgment, but by their desire to avoid malpractice litigation. *Id.* at 667. As a result, certain tests, such as amniocentesis, are performed in far greater numbers and very often without good reason. *Id.* at 666. A standard of practice may result, despite scientifically inadequate grounds, simply because of physicians' efforts to avoid litigation. *Id.* at 671. A solution for conservative physicians is the doctrine of informed consent. *Id.* at 671-72. The patients should be given full disclosure of all relevant information regarding available testing procedures, risks, etc. and be allowed to choose the course to follow. *Id.* at 672.

There are also complications regarding confidentiality that accompany genetic counseling. Where a patient has been informed of genetic risks, the physician is generally barred from disclosure to any other relatives unless there is a life threatening or highly contagious disease involved. *Id.* at 675-77. The physician, however, may inform other persons as to risks, if the other person's genetic makeup is implicated. *Id.* at 678. Capron suggests that physicians could avoid a confidentiality issue by telling patients at the outset of the physician's policy of informing relatives at risk. *Id.* at 679. Capron concludes that adoptees should be entitled to information regarding the genetic status of their natural parents. *Id.* at 681.

5. *Harbeson*, 98 Wash. 2d at 472, 656 P.2d at 491; *James G.*, 332 S.E.2d at 879.

6. *See supra* note 5.

7. *See Harbeson*, 98 Wash. 2d at 480-81, 656 P.2d at 495; Turpin v. Sortini, 31 Cal. 3d 220, 226, 643 P.2d 954, 960, 182 Cal. Rptr. 337, 343 (1982).

8. *Harbeson*, 98 Wash. 2d at 480-81, 656 P.2d at 495.

9. *Id. See also Turpin*, 31 Cal. 3d at 226, 643 P.2d at 960, 182 Cal. Rptr. at 343.

10. *James G.*, 332 S.E.2d at 874; Jackson v. Baumgardner, 321 S.E.2d 541, 543 (N.C. Ct. App. 1984). For an in-depth discussion of wrongful conception, see Note, *Recovery for Wrongful Conception: Who Gets the Benefit — The Parents or the Public?*, 14 NEW ENG. L. REV. 784 (1979).

Wrongful pregnancy cases are sometimes referred to as wrongful diagnosis cases. *See* Rajchenbach, *New York Decides Healthy Baby Is No Injury*, 71 A.B.A. J. 102 (June 1985).

11. *See* Coleman v. Garrison, 327 A.2d 757 (Del. Super. 1974); Flowers v. District of Columbia, 478 A.2d 1073 (U.S. App. D.C. 1984); Fulton-Dekalb Hosp. Auth. v. Graves, 252 Ga. 441, 314 S.E.2d 653 (1984); Garrison v. Foy, 486 N.E.2d 5 (Ind. App. 1985); Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984); Byrd v. Wesley Medical Center, 237 Kan. 215, 699 P.2d 459 (1985); Bushman v. Burns Clinic Medical Center, 83 Mich. 453, 268 N.W.2d 683 (1978); Green v. Sudakin, 81 Mich. 545, 265 N.W.2d 411 (1978); Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977); Morse v. Soffer, 101 A.D.2d 856, 476 N.Y.S.2d 170 (1984); O'Toole v. Green-

manner as a medical malpractice action where the physician is negligent and the parents sue him for malpractice.[12] Ascertainable damages are recoverable[13] if the parents can prove such damages, as well as negligence and causation.[14]

A wrongful birth action is similar to a wrongful life action[15] but is brought by the parents of an impaired child. The theory is that the physician or other health care professional breached his or her duty to disclose relevant information to prospective parents necessary to allow them to make an informed decision whether to avoid the conception of a fetus that may be defective or to abort such a fetus.[16] The premise underlying such an action is that the child should not have been born.[17] The majority of courts recognize the right of parents to bring a wrongful birth action.[18] Recovery, however, is gen-

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berg, 98 A.D.2d 814, 470 N.Y.S.2d 31 (1983); *Jackson*, 321 S.E.2d at 543; Miller v. Johnson, 343 S.E.2d 301 (Va. 1986); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

12. *See supra* note 11 and accompanying text.

13. In wrongful conception and wrongful birth claims there are four theories of damages:
1) All damages are denied to the parents on the premise that a normal, healthy child can never be considered an injury to the parents. *Beardsley*, 650 P.2d at 290. No courts have yet denied all damages to the parents. *Id.* at 291.
2) The parents may recover all damages and expenses, even those for rearing the child. *Id.*; *see also* Custodio v. Bauer, 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463, 477 (1967). This is often referred to as the "full damage rule." *Byrd*, 239 Kan. at 216, 699 P.2d at 461.
3) Under the "tort-benefit rule" parents may recover all damages and expenses incurred as well as rearing costs. This amount is then offset by the benefits parents enjoy due to having a healthy child. *Id.*; *Beardsley*, 650 P.2d at 291. A few courts have followed this theory. *Green*, 81 Mich. at 546, 265 N.W.2d at 412; *Sherlock*, 260 N.W.2d at 175-76; *see also* RESTATEMENT OF TORTS, § 920 at 616 (1966). Any benefit conferred by the defendant is considered in mitigation of damages. *Id. See* Note, *Damages: Recovery of Damages in Actions for Wrongful Birth, Wrongful Life, and Wrongful Conception*, 23 WASHBURN L. J. 309, 326 (1983-84) [hereinafter *Recovery of Damages*].
4) The parents have the right to recover all damages and expenses occurring as a result of the pregnancy and birth, but none for the rearing of the child. *Beardsley*, 650 P.2d at 291; *Byrd*, 239 Kan. 216, 699 P.2d at 461. The majority of courts have followed this view. *See supra* note 11 and accompanying text (of the courts listed, only *Green* and *Sherlock* have not adopted this view). *See also* Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974) (policy reasons behind this theory of damages).

14. *Beardsley*, 650 P.2d at 292.

15. Some courts use the terms wrongful life and wrongful birth interchangeably. *See* Speck v. Finegold, 268 Pa. Super. 342, 408 A.2d 496 (1979), *aff'd in part, rev'd in part* 497 Pa. 77, 439 A.2d 110 (1981); *Becker*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895; *Bushman*, 83 Mich. 453, 268 N.W.2d 683.

16. *James G.*, 332 S.E.2d at 875.

17. *Id.*

18. *See Robak*, 658 F.2d 471 (7th Cir. 1981) (applying Alabama law); Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1980) (applying South Carolina law); *James G.*, 332 S.E.2d 872; Bani-Esraili v. Wald, 127 Misc. 2d 202, 485 N.Y.S.2d 708 (N.Y. Sup. Ct. 1985); Blake v. Cruz, 698 P.2d 315 (Idaho 1984); Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982); Schroeder v. Perkel, 87 N.J. 53, 432 A.2d 834 (1981); *Berman*, 80 N.J. 421, 404 A.2d 8; Dumer v. St. Michael's Hospital, 69 Wis. 2d 766, 233 N.W.2d 372 (1975); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985); Goldberg v. Ruskin, 84 Ill. Dec. 1, 128 Ill. App. 3d 1029, 471 N.E.2d 530 (1984); Weintraub v. Brown, 98 App. Div. 2d 339, 470 N.Y.S.2d 634 (1983); Moores v. Lucas, 405 So.2d 1022 (Fla. App. 1981);

erally limited to pecuniary expenses incurred as a result of the care and treatment of the defective child.[19]

This Note will focus on a wrongful life cause of action brought by or on behalf of a physically defective child. The defective child claims that but for the physician's negligent treatment or negligent failure to give relevant information to its parents, it would have been aborted and spared an impaired existence.[20] The physician's negligence may have occurred before or after conception,[21] and is *not* the cause of the impaired condition, but of the birth.[22] Healthy children have, in certain circumstances, brought wrongful life claims.[23] However, this Note will be restricted to wrongful life actions brought on behalf of a child born defective. An examination and analysis of case law and commentaries on this issue indicates that where parental efforts to prevent the conception or birth of a handicapped child are thwarted by the negligence

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Becker, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895; *Speck*, 268 Pa. Super. 342, 408 A.2d 496, *aff'd in part, rev'd in part*, 497 Pa. 77, 439 A.2d 110.

19. *See, e.g., James G.*, 332 S.E.2d at 877; *Bani-Esraili*, 495 N.Y.S.2d at 709; *Moores*, 405 So.2d at 1027; *Goldberg*, 84 Ill. Dec. at 1, 128 Ill. App. 3d at 1029, 471 N.E.2d at 535; *Schroeder*, 87 N.J. at 69, 432 A.2d at 841; *Becker*, 46 N.Y.2d at 407, 413 N.Y.S.2d at 901, 386 N.E.2d at 813; *Dumer*, 69 Wis. 2d at 776, 233 N.W.2d at 377. Some courts have even allowed the parents to recover for emotional distress — this is an exception to the rule that damages for emotional distress are only allowed if they are the result of a tortiously caused injury. *See Blake*, 108 Idaho at 258, 698 P.2d at 320; *Naccash*, 223 Va. at 416, 290 S.E.2d at 831; Eisbrenner v. Stanley, 106 Mich. App. 357, 361, 308 N.W.2d 209, 214 (1981); *Speck*, 497 Pa. at 77, 439 A.2d at 111. *But see Berman*, 80 N.J. at 434, 404 A.2d at 14. The *Berman* Court held that parents in a wrongful life action were allowed to recover for mental and emotional anguish. *Id.*

20. Procanik v. Cillo, 97 N.J. 339, 344, 478 A.2d 755, 760 (1984); Azzolino v. Dingfelder, 322 S.E.2d 567, 573 (N.C. App. 1984).

21. Snyderman, *Wrongful Life and Wrongful Birth Claims: Judicial Recognition and Acceptance*, 23 MED. TRIAL TECH. Q. 15, 16 (Summer 1985) [hereinafter Snyderman].

22. *See Procanik*, 97 N.J. at 348-49, 478 A.2d at 759. This is not a situation where an otherwise normal child is born defective due to the physician's negligent treatment of the fetus. *Id.*

23. *See, e.g.*, Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (illegitimate child brought a wrongful life claim). Such actions are also referred to as wrongful birth actions. *See Becker*, 46 N.Y.2d at 405, 413 N.Y.S.2d at 899, 386 N.E.2d at 811. Generally such actions have been unsuccessful. *See, e.g., Beardsley*, 650 P.2d at 289 (where child was unwanted or unplanned); *Coleman*, 327 A.2d at 757 (child born unplanned); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974) (child sued father for causing her to be born illegitimate); Sala v. Tomlinson, 73 App.Div.2d 724, 422 N.Y.S.2d 506 (1979) (child born unwanted). Being born illegitimate or unwanted is not considered by courts to be an actionable injury. *See Curlender*, 106 Cal. App. 3d at 818, 165 Cal. Rptr. at 486. For a discussion of claims asserted in this area see Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977); Comment, *"Wrongful Life": The Right Not to be Born*, 54 TULANE L. REV. 480 (1980) [hereinafter *The Right Not To Be Born*].

One justification for disallowing a wrongful life cause of action where the child is merely unplanned is to avoid emotional trauma to the child. Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 4 WASH. U.L.Q. 919, 947 (1979). This commentator stated:

> The judgment of liability in a wrongful [life] case would stand as an official, public pronouncement that the child's existence is a net detriment to his parents, despite all the love and joy he offers them. The child's discovery of this judgment could devastate his sense of self-worth and his relationship with his parents.

Id. However, Kelley admits that where the child is defective, there are compelling reasons for liability. *Id.* at 948.

of a health care professional justice demands that a cause of action rest in the burdened child as well as in the parents, for both general and special damages.

II. History and Judicial Development of Wrongful Life

The judicial history of the development of the wrongful life cause of action is perhaps best illustrated by the case law of New Jersey. The issue has been heavily litigated there and the cause of action ultimately recognized by the New Jersey Supreme Court.[24] Furthermore, various cases in the stages of the New Jersey wrongful life progression have been heavily relied upon in wrongful life decisions of other jurisdictions.

One of the first cases to consider the rights of an unborn child was *Stemmer v. Kline*.[25] In *Stemmer*, a malpractice action was brought on behalf of the impaired child against a doctor for injury caused to the child while in the womb.[26] The New Jersey appeals court held that such a child had no cause of action against a tortfeasor that had negligently caused its impairment.[27] The court determined that a doctor owes no duty of care to an unborn child.[28] Eighteen years later in *Smith v. Brennan*,[29] the New Jersey Supreme Court overruled *Stemmer*.[30] In *Smith* the unborn child was injured when his mother was in an automobile collision with a negligent driver.[31] Consequently, the child was born with deformed legs and feet and brought an action against the driver.[32] The Court in *Smith* held that a child may bring suit against a tortfeasor who has negligently inflicted prenatal injuries on the child.[33] The Court reasoned that "a child has a legal right to begin life with a sound mind and body."[34] *Smith* established that a child has a legal existence from the moment of conception and is not merely a part of the mother.[35] Accordingly, if

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24. *See infra* notes 25-74 and accompanying text.

25. 19 N.J. Misc. 15, 17 A.2d 58 (1940), *rev'd*, 128 N.J.L. 455, 26 A.2d 489 (Court of Errors and Appeals, 1941).

26. *Id.*

27. *Id.*; *see also Stemmer*, 128 N.J.L. at 456, 26 A.2d at 491.

28. *See* 128 N.J.L. at 459, 26 A.2d at 490-91.

29. 31 N.J. 353, 157 A.2d 497 (1960).

30. *Id.* at 366, 157 A.2d at 504. The court also concluded that it was immaterial whether the prenatal injury was inflicted before or after viability. *Id.* The court stated "[t]he most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress." *Id.*

31. *Smith*, 31 N.J. at 354, 157 A.2d at 498.

32. *Id.*

33. *Id.* at 354, 157 A.2d at 504.

34. *Id.* at 364, 157 A.2d at 503. Where a tortfeasor interferes with this right, causing harm to the child, then the child should recover for such harm. *Id.* The court did not feel that whether or not a child in a womb is a "person in being" was germane to this issue. *Id.*

35. *See id.* at 362-63, 157 A.2d at 502. This conclusion by the court rests on a number of factors. The court states that "medical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body." *Id.* at 362, 157 A.2d at 502. The court also noted that the criminal law and property law regards the unborn child as a separate entity and that the New Jersey Workmen's Compensation Act considers an unborn child as a child in being. *Id.* at 363, 157 A.2d at 502.

the processes set in motion by conception are disrupted to the detriment of the child when born, then the child may bring suit for damages.[36] Language in *Smith* leads to the conclusion that third parties could owe duties to the unborn child and that breach of these duties could result in liability owed to the child when born.[37] This is significant because general tort principles require the existence of a duty before liability can be found.[38] In a wrongful life claim, it must be established that this duty was owed to the unborn child.[39] The Court in *Smith* noted that where claims brought by children injured while still in the fetal state were defeated, as in *Stemmer*, recovery was denied because the fetus was considered part of the mother rather than a separate entity, a position no longer taken by New Jersey courts.[40]

The landmark case establishing the foundation for the rejection of the wrongful life tort, not only in New Jersey, but also throughout the country, is *Gleitman v. Cosgrove*.[41] This is the first case in which a wrongful life cause of action was brought by a handicapped child.[42] The *Gleitman* reasoning must be overcome as a prerequisite to the recognition of the wrongful life cause of action.[43] In *Gleitman* the court found that a defendant physician negligently failed to warn a pregnant woman of dangers inherent in her pregnancy.[44] The woman had contracted German measles which presented the possibility that her child could be born with birth defects as a result of her condition.[45] The wrongful birth action brought by the parents of the impaired child and the wrongful life action brought by the child itself were both rejected for two reasons.[46] First, the court determined that the defendant did not cause the injury, but only the birth and there was no way to determine whether such a birth was an injury as there was no way to determine that nonexistence was preferable to life with impairments.[47] Second, the court stated that computation of damages was impossible, as it was incapable of weighing the differences between the value of an impaired life and the value of non-existence.[48] Although the court did not repudiate the right of an infant to sue for prenatal torts,[49] the court reaffirmed its belief in the sanctity of life regardless of any detriments suffered by the child.[50] The court further reasoned that if the right to

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36. *See supra* note 34.

37. *See Smith*, 31 N.J. at 364, 157 A.2d at 502. The court recognized that the rights of an individual can be violated before he or she is born. *Id.*

38. Azzolino v. Dingfelder, 71 N.C. App. 289, 298, 322 S.E.2d 567, 574 (1984), *aff'd in part, rev'd in part*, 315 N.C. 103, 337 S.E.2d 528 (1985).

39. *See id.* This is a type of negligence action and must fit within the tort framework. *Id.* There must be a duty, the breach of which is the proximate cause of the injured party's damages. *Id.*

40. *Smith*, 31 N.J. at 362-63, 157 A.2d at 502.

41. 49 N.J. 22, 227 A.2d 689 (1967).

42. *See* Synderman, *supra* note 21, at 22.

43. *See infra* notes 63-65 & 132-231 and accompanying text.

44. *Gleitman*, 49 N.J. at 27, 227 A.2d at 691.

45. *Id.* at 25, 227 A.2d at 690.

46. *Id.* at 28, 227 A.2d at 692.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 30-31, 227 A.2d at 693. The court felt strongly that eugenic interests were not to

life is inalienable, then the denial of the opportunity to terminate a life cannot be the cause of action even where the fetus is defective.[51] *Gleitman's* "sanctity of life policy" was the basis for the court's unwillingness to recognize the wrongful birth cause of action.[52] This policy did not long remain a bar to the parental wrongful birth action.[53] The immeasurability of damages doctrine, however, remains a primary basis for much of the judicial resistance to the wrongful life claim.[54] *Berman v. Allan*[55] was the first step in breaking down this resistance.

In *Berman*, the defendant physicians did not inform Mr. and Mrs. Berman of the prenatal testing procedures available to her.[56] As a result of this failure to inform, the Bermans were unaware that Mrs. Berman was carrying a child with Down's Syndrome until the child was born.[57] The court rejected the wrongful life cause of action, reasoning that life could never be an injury[58] and, in fact, is a fundamental right.[59] Despite this conclusion, the

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be considered. *Id.* The court stated a somewhat emotional appeal:

> It is basic to the human condition to seek life and hold on to it however heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all. 'For the living there is hope, but for the dead there is none.'

Id. at 30, 227 A.2d at 693 (quoting Theorcritus) (footnote omitted). The court went further and asserted that although it had considered the emotional and financial injuries suffered by the parents of this defective child, such injuries do not outweigh the right of the child to live. *Id.* at 31, 227 A.2d at 693.

51. *Id.* at 31, 227 A.2d at 693.

52. *Id.*

53. *See supra* note 18.

54. *See, e.g.*, Becker v. Schwartz, 46 N.Y.2d 401, 411-12, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978). The New York Court of Appeals held that the wrongful life claim necessitated a calculation of damages that the law was not equipped to make as it was dependant upon "a comparison between the Hobson's choice of life in an impaired state and non-existence." *Id.*; *see also Blake*, 108 Idaho at 260, 698 P.2d at 322 (court held damages were impossible to measure and precluded recognition of wrongful life cause of action). In *Dumer*, 69 Wis. 2d at 773, 233 N.W.2d at 376, the Supreme Court of Wisconsin agreed with the *Gleitman* majority as the normal measure of damages is compensatory and the damages are unascertainable, the court cannot weigh the value of impaired life against non-existence. *Id.*

55. 80 N.J. 421, 404 A.2d 8 (1979).

56. *Berman*, 80 N.J. at 424, 404 A.2d at 10. A procedure known as amniocentesis was available to Mrs. Berman. *Id.* This procedure is an accurate method for detecting chromosomal defects such as Down's Syndrome and presents very little risk of harm to the mother or fetus. *Id.* The plaintiffs allege that it would have been sound medical practice to inform Mrs. Berman of the risk of Down's Syndrome in children born to women of her age. *Id.* at 425, 404 A.2d at 11.

57. *Id.* The risk of bearing a child afflicted with Down's Syndrome is significant in a woman of Mrs. Berman's age. *Id.* Sound medical practice required that she be informed of the risk and of the availability of the amniocentesis procedure. *Id.*

58. *Id.* at 429-30, 404 A.2d at 12-13. The New Jersey Supreme Court held that even impaired life is more precious than non-life. *Id.* The court stated that to hold otherwise would require a disavowal of "the basic assumption upon which our society is based." *Id.* at 430, 404 A.2d at 13; Note, *The Treatment of Injury In Wrongful Life Claims*, 20 COLUM. J. L. & SOC. PROBS. 145, 148-49 (1986) [hereinafter *Treatment of Injury*].

59. *Berman*, 80 N.J. at 429, 404 A.2d at 12. The *Berman* court noted that the U.S. Constitution characterizes life as a fundamental right which a person cannot be deprived of without due

court allowed the parental wrongful birth action.[60] The court based this decision primarily upon the constitutional right to have an abortion, guaranteed to women in *Roe v. Wade*.[61] However, it did not explain its inconsistence in declaring that life is at all times a fundamental right and yet allowing a parental cause of action for the deprivation of an opportunity to prevent a life.[62] Despite its reluctance to recognize the child's cause of action, the court acknowledged that damages should not be withheld from a wrongful life infant plaintiff simply due to the difficulty of measuring damages.[63] Moreover, the court stated that if the measure of damages was the only weakness in the wrongful life cause of action, then a judicial remedy would be applied to afford the infant plaintiff at least a partial recovery.[64] Employing this analysis, the *Berman* court effectively denigrated the immeasurability of damages doctrine relied upon in *Gleitman* to disallow the wrongful life cause of action.[65]

The scope of the wrongful birth claim was further delineated in *Schroeder v. Perkel*.[66] There, the New Jersey Supreme Court reaffirmed the *Berman* decision and disallowed the child's wrongful life claim.[67] In *Schroeder*, Mr. and Mrs. Schroeder alleged that the defendant doctors negligently failed to diagnose the Schroeder's first child's illness as cystic fibrosis.[68] As a result, the Schroeders were never advised that they were carriers of this disease and that there was a 25% chance that they would pass it on to any child they bore.[69] Unaware of this risk, the Schroeders relied upon the two physicians' negligent diagnosis and had a second child also afflicted with cystic fibrosis.[70] The

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process. *Id.*

60. *Id.* at 434, 404 A.2d at 15.

61. 410 U.S. 113 (1973); *see also Berman*, 80 N.J. at 431-32, 404 A.2d at 14. The court noted that public policy requires that a woman not be denied a meaningful opportunity to decide whether or not to abort her fetus. *Id.*

62. *See Berman*, 80 N.J. at 429-34, 404 A.2d at 12-15.

63. *Id.* at 428, 404 A.2d at 12. The court asserted that it would be a perversion of justice to deny all damages to the injured party and thereby relieve the tortfeasor of all liability. *Id.* The court in *Berman* did not speculate as to what type of judicial remedy could be employed to award damages. *See id.*

64. *Id.* This is an indication that the court is becoming more open-minded to the wrongful life cause of action. *See id.*

65. *See id.* Immeasurability of damages was not considered of primary importance by the court. *Id.* The court rested its decision upon the fact that the infant plaintiff suffered no legally cognizable injury by being born. *Id.* For further analysis of *Berman*, see Note, *A Reassessment of "Wrongful Life" and "Wrongful Birth"*, 1980 WIS. L. REV. 782.

66. 87 N.J. 53, 68, 432 A.2d 834, 841 (1981). *Id.* Damages sought by the Schroeders were the medical, hospital, and pharmaceutical expenses needed for the defective child's survival. *Id.* They could not recover for services they personally performed in caring for their child without having incurred financial expense. *Id.* at 69, 432 A.2d at 841.

67. *Id.* at 65, 432 A.2d at 840.

68. *Id.* at 57-58, 432 A.2d at 836. Although cystic fibrosis cannot be detected in a fetus, the "sweat test" allows detection after birth. *Id.* at 59, 432 A.2d at 836. This test involves an analysis of the infant's perspiration. *Id.* If the test is positive, this is an indication that both parents are carriers of cystic fibrosis. *Id.* Where both parents are carriers, there is a 25% chance that a child will be normal, a 25% chance that the child will have cystic fibrosis, and a 50% chance that the child will also be a carrier. *Id.* at 58, 432 A.2d at 836.

69. *Id.* at 57-58, 432 A.2d at 836.

70. *Id.* at 59-60, 432 A.2d at 836-37. Children afflicted with cystic fibrosis seldom survive

Schroeder court agreed with *Gleitman* that the measure of damages is "troublesome" but declined to deny recovery to the Schroeders.[71] The court in *Schroeder* attributed the *Gleitman* rationale underlying the immeasurability of damages theory to the illegality of abortion at the time *Gleitman*[72] was decided. Several years before *Schroeder* was decided, abortion was legalized, thereby weakening the *Gleitman* rationale.[73] In *Schroeder*, the court held that a physician is liable if he negligently deprives a woman of the opportunity to decide whether or not to bear a child with genetic defects.[74] By further impairing the *Gleitman* decision, the *Schroeder* court laid the foundation allowing the Supreme Court of New Jersey to recognize a limited wrongful life cause of action in *Procanik v. Cillo*,[75] which will be discussed later in this Note.

The progression in New Jersey has been from no recovery, to parental recovery, to the child's recovery. Most other jurisdictions have progressed as far as parental recovery under a wrongful birth cause of action.[76] Perhaps this is an indication that the next step in many states will be the recognition of the right of a defective child to recover under a wrongful life claim.[77]

Several jurisdictions other than New Jersey have grappled with the issue of wrongful life. Two years before *Berman*, the appellate division of the New York Supreme Court upheld a wrongful life claim in *Park v. Chessin*.[78] The court in *Park* found that defendant physicians gave medically inaccurate genetic advice to the Parks.[79] The Parks sought genetic counseling when their first child was born with polycystic kidney disease, a fatal hereditary disease, and survived after birth for only five hours.[80] Despite known medical knowledge to the contrary, the defendants advised the Parks that there was little risk that any of their future children would be affected with polycystic kidney disease.[81] The court also found that the Parks relied on the defendants' inaccurate advice and conceived a second child, also born with this hereditary disease.[82] The *Park* court upheld both the parental wrongful birth action and the infant plaintiff's wrongful life claim.[83] The court went on to hold that any

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their teens. *Id.* at 59, 432 A.2d at 836.

71. *See id.* at 67-68, 432 A.2d at 840-41.

72. *See id.*

73. *See id.* at 67, 432 A.2d at 840.

74. *Id.* at 70, 432 A.2d at 842.

75. 97 N.J. 339, 478 A.2d 755 (1984). *See infra* text accompanying notes 186-212.

76. *See supra* note 18. *See also Curlender*, 106 Cal. App. 3d at 826, 165 Cal. Rptr. at 486.

77. *See id.* The court in *Curlender* notes that there has been a gradual move away from the "impossibility of measuring damages" argument propounded to refuse recovery to the child plaintiff in wrongful life cases. *Id.*

78. 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977). *Park* was the first New York case in which the wrongful life cause of action was considered. *Id.*

79. *Id.*

80. *Id.* at 83, 400 N.Y.S.2d at 111.

81. *Id.* The birth of a child with polycystic kidney disease is an indication that any future child of the parents will also suffer from the disease. *Id.*

82. *Id.*

83. *Id.* at 87-88, 400 N.Y.S.2d at 114. The parents could not recover for damages derived from emotional distress or mental anguish, but only for the economic damages resulting from provable medical and support injuries the parents incur during the child's life. *Id.* at 86, 400 N.Y.S.2d at 123.

breach of the right of potential parents to decide not to have a child in a situation where the child may be born deformed, also breaches the right of the child to be born a whole, functional human being.[84] Merely one year later, however, New York's highest court overturned the *Park* decision in *Becker v. Schwartz*, holding that a child has no such right and therefore has suffered no legally, cognizable injury.[85]

In *Becker*, Mrs. Becker, engaged the services of the defendant physicians when she conceived a child.[86] The court found that at no time did the defendants warn Mrs. Becker, who was 37 years of age when she conceived, of the high risk of Down's Syndrome in children born by women over the age of 35, nor of the availability of the amniocentesis test[87] that allows detection of Down's Syndrome in a fetus.[88] As a result of this failure to advise, Mrs. Becker gave birth to a child with Down's Syndrome.[89] The Beckers brought suit to recover damages caused by the wrongful birth of the child and, on behalf of the child, brought a wrongful life action.[90] The court recognized the causes of action brought by the Beckers in their own right,[91] but rejected the wrongful life action brought on behalf of the infant plaintiff.[92] The court held that the child suffered no legally cognizable injury.[93] The reasoning proffered by the court was that it is impossible to know whether it is better never to have been born than to have been born handicapped.[94] Becker also established that damages were impossible to measure as the court was not equipped to calculate the difference in value between non-existence and impaired existence.[95] This same theory was propounded in *Gleitman*.[96]

Pennsylvania has also addressed the issue of wrongful life. The state su-

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84. *Id.* at 88, 400 N.Y.S.2d at 114. The court attributed the development of the parental right to decide whether or not to have a child and the child's right to be born a whole, functional human being, to the abrogation of anti-abortion statutes. *Id.*

85. *Becker*, 46 N.Y.2d at 401, 386 N.E.2d at 807, 413 N.Y.S.2d at 895. *Becker* was decided and *Park* overruled in the same decision. *Id.* at 415, 386 N.E.2d at 814, 413 N.Y.S.2d at 903. *See* Note, *The Inequitable Umbrella of Wrongful Life*: Alquijay v. St. Luke's — Roosevelt Hospital, 12 J. CONTEMPORARY L. 137, 144 (Wntr. 1986) [hereinafter *The Inequitable Umbrella*] (flaws in wrongful life action according to *Becker*).

86. *Id.* at 405, 386 N.E.2d at 808, 413 N.Y.S.2d at 896.

87. *See supra* note 56.

88. *Becker*, 46 N.Y.2d at 406, 386 N.E.2d at 808-09, 413 N.Y.S.2d at 897-98.

89. *Id.* at 406, 386 N.E.2d at 808, 413 N.Y.S. 2d at 897.

90. *Id.* at 406, 386 N.E.2d at 809, 413 N.Y.S.2d at 897. Mrs. Becker sought to recover damages for the emotional and physical injury she suffered by reason of having a Down's Syndrome child. *Id.* Mr. Becker sought to recover damages stemming from the loss of his wife's services and from her medical expenses resulting from the birth. *Id.*

91. *Becker*, 46 N.Y.2d at 413, 413 N.Y.S.2d at 901-02, 386 N.E.2d at 813. The court did not allow the Beckers to recover for the emotional damages due to the birth and death of their child. *Id.* The court did sanction recovery for those pecuniary losses already incurred as well as such expenses that will be incurred by the Beckers in the future for the care and treatment of their defective infant. *Id.*

92. *Id.* at 410, 386 N.E.2d at 811, 413 N.Y.S.2d at 899.

93. *Id.* at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900.

94. *Id.* The court rejected the *Park* court's contention that a child has a "fundamental right to be born as a whole, functional human being." *Id.*

95. *Id.*

96. *Id. See also* text accompanying note 45.

preme court rejected the wrongful life tort in *Speck v. Finegold*[97] but was evenly divided.[98] This was a case of first impression[99] and the Pennsylvania Supreme Court with the exception of *Park*, was the closest a state supreme court had yet come to recognizing the wrongful life cause of action.[100] In *Speck*, the plaintiff, Mr. Speck, suffered from neurofibromatosis, as did his two children.[101] For this reason, Mr. Speck sought to have a vasectomy.[102] Despite assurances by the defendant physician that Mr. Speck was sterile, the Specks conceived a third child.[103] The defendant performed an abortion procedure on Mrs. Speck and incorrectly informed her that the child had successfully been aborted.[104] Approximately four months later, however, Mrs. Speck gave birth to a child afflicted with neurofibromatosis.[105] The court recognized the actions brought by the Specks on their own behalf,[106] and held that they could recover the pecuniary expenses for past and future care and treatment of their child.[107] Further, damages for mental distress were held to be recoverable due to their forseeability.[108] However, the court in *Speck* declined to recognize the wrongful life action brought on behalf of the child.[109] The New Jersey Supreme Court affirmed the order of the Superior Court that the wrongful life tort did not state a legally cognizable cause of action.[110] This ruling gave effect to the reasoning of the lower court that a child has no "fundamental right to be born a whole, functional human being."[111] In addition,

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97. 497 Pa. 77, 439 A.2d 110 (1981).

98. Snyderman, *supra* note 21, at 11; 497 Pa. at 80, 439 A.2d at 112.

99. *See Speck*, 497 Pa. at 94, 439 A.2d at 119 (Nix, J., dissenting).

100. *See* Snyderman, *supra* note 21, at 11.

101. *Speck*, 497 Pa. at 81-82, 439 A.2d at 112-13. Neurofibromatosis is a disease of the fibrous structures of the nerves which is both crippling and disfiguring. *Id.* at n.2.

102. *Id.* at 82, 439 A.2d at 113. The New Jersey Superior Court noted that the proper terms for the preventative measures taken by the Specks are "eugenic" or "socio-economic." *Speck*, 268 Pa. Super. 342, at 348, 408 A.2d at 499 n.4, *aff'd*, 497 Pa. 77, 439 A.2d 110 (1981). If the purpose of the measures was to prevent endangering the mother's health by a pregnancy then the correct term would be "therapeutic." *Id.*

103. *Id.*, 497 Pa. at 82, 439 A.2d at 113. The physician had informed Mr. Speck that he could safely have sexual intercourse with his wife without using contraceptive devices. *Id.*

104. *Id.*

105. *Id.* After the abortion procedure, Mrs. Speck informed the defendant that she thought she was still pregnant. *Id.* However, the defendant insisted that her pregnancy had been terminated and took no further medical action. *See id.*

106. *Id.* at 84, 439 A.2d at 114.

107. *Id.*

108. *Id.* The lower court had asserted that allowing the Specks to recover for mental emotional distress would put them in a better position than parents who have handicapped children not resulting from a physician's negligence. *Speck*, 268 Pa. Super. at 366, 408 A.2d at 509. The court refused to allow such damages as it noted that all parents who have disabled children suffer some degree of distress. *Id.* at 367, 408 A.2d at 509.

The lower court allowed the parental claims for pecuniary damages. However, because they were presented in a "traditional tort" framework, there were allegations of a duty owed and breached with resulting damages. *Id.* at 365, 408 A.2d at 508.

109. *Id.* at 80, 439 A.2d at 112. The court affirmed this portion of the superior court decision. *Id.*

110. *Id.*

111. *Speck*, 268 Pa. Super. at 364, 408 A.2d at 508.

the Superior Court argued that there is no method available to the judicial system to determine whether non-existence is preferable to life with handicaps.[112] As a matter of judicial administration the lower court determined that damages cannot be calculated as the court is not equipped to calculate the difference between non-existence and handicapped existence.[113]

The first California court to consider wrongful life was *Curlender v. Bio-Science Laboratories*.[114] Until *Curlender*, no decision, with the exception of *Park*, had recognized this cause of action despite growing challenges. In *Curlender*, the California Court of Appeals surmounted the *Gleitman* obstacles and upheld the wrongful life cause of action.[115] In this case, the Curlenders, who were prospective parents, employed the defendant laboratories to perform genetic tests.[116] The purpose of such tests was to determine if the Curlenders were carriers of the hereditary disease known as Tay-Sachs.[117] The tests were found to have been performed negligently and the Curlenders were given inaccurate information as to their status as carriers.[118] The infant plaintiff was conceived and born with Tay-Sachs disease as a result of the defendants' negligent failure to inform the Curlenders that they were carriers of this disease.[119] The court held that public policy dictates that the defendants had a duty to properly perform the available genetic testing on the prospective parents and accurately inform them of the results.[120] The court asserts that this duty was owed not only to the parents but to the child as well.[121] The court determined that the breach of this duty was the proximate cause of the infant plaintiff's injury.[122] As a result, the court held that this injury was a legally cognizable one.[123] The reasoning proffered for this decision was that

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112. *Id.*

113. *Id.* This was also the *Gleitman* argument. *Supra* text accompanying note 48; *Gleitman*, 49 N.J. at 28, 227 A.2d 692. In a negligence action, the remedy is intended to place the injured party in the position he would have occupied had no negligence occurred. *Speck*, 268 Pa. Super. at 364, 408 A.2d at 508. Therefore, the lower court reasoned that such a remedy requires that damages be awarded to the child on the basis that she should not have been born. *Id.* Thus, the court felt it was not able to make such an award. *Id.*

114. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980), *rev'd in part* Turpin v. Sortini, 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982).

115. *Curlender*, 106 Cal. App. 3d at 830, 165 Cal. Rptr. at 489.

116. *Id.* at 815, 165 Cal. Rptr. at 480.

117. *Id.* Tay-Sachs disease (the medical term is amaurotic familial idiocy) strikes primarily those of Eastern European Jewish descent. *Id.* It is a fatal progressive degenerative disease which affects the nervous system, causing partial or complete loss of vision, mental retardation, muscle atrophy, physicial deformity and convulsions. *Id.* Only where both parents are carriers of Tay-Sachs is there a signficant probability that the disease will occur in the offspring. *Id.* The test to determine whether a parent is a carrier requires only a blood test. *Id.* An amniocentesis test may be performed to determine if a fetus will be born with Tay-Sachs. *Id.*

118. *Id.*

119. *Id.* The *Curlender* court, however, did not appear to weigh heavily the fact that the complaint did not make clear whether the prospective parents relied on the test results in conceiving the infant plaintiff. *See id.*

120. *Id.* at 828, 165 Cal. Rptr. at 488.

121. *Id.*

122. *Id.* The birth of the child with the defect is, according to the court in *Curlender*, the injury that was proximately caused by the defendants. *Id.*

123. *Id.* at 829, 165 Cal. Rptr. at 488. The court's analysis was as follows:

metaphysical determinations of the value of existence are unnecessary as it is enough that the infant plaintiff "exists and suffers" due to another's negligence.[124] The *Curlender* court allowed the defective child to recover for the pain and suffering endured for its limited lifespan[125] as well as for any pecuniary losses attributable to the defect, which are not recovered by the parents in their wrongful birth action.[126] The court even went so far as to indicate that in certain circumstances a plaintiff in a wrongful life action may be awarded punitive damages.[127] The court was not influenced by the immeasurability of

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> The reality of the 'wrongful life' concept is that such a plaintiff both exists and suffers, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights.

Id.; *see also* DeWalt, *Wrongful Life and Wrongful Birth: The Current Status of Negligent Genetic Counseling*, 3 COOLEY L. REV. 175, 183 (Jan. 1985) [hereinafter DeWalt]. The court also determined that a wrongful life action does not require an evaluation of a claimed right not to be born. *Curlender*, 106 Cal. App. 3d at 830-31, 165 Cal. Rptr. at 489.

124. *Id.*; *see Treatment of Injury*, *supra* note 58, at 152.

125. *Curlender*, 106 Cal. App. 3d at 830, 165 Cal. Rptr. at 489. The court recognized that infants experience pain and suffering despite their inability to testify. *Id.* at 831, 165 Cal. Rptr. at 489.

126. *Id.* at 831, 165 Cal. Rptr. at 490. The costs of the infant plaintiff's care may be awarded to either the parents or to the child, but not to both, as such costs may only be awarded once. *Id.*

127. *Id.* Where a plaintiff in a wrongful life action shows oppression, fraud or malice on the part of the defendant, punitive damages will be allowed. *Id.* The court also speculated that parents who have full knowledge of the impairment of the fetus but proceed with the pregnancy may be answerable to the child for "the pain, suffering and misery" that the child subsequently must endure. *Id.* at 829, 165 Cal. Rptr. at 488. In response to this suggestion of parental liability, the California state legislature enacted California Civil Code, section 43.6, to protect parents from liability stemming from their decision to conceive or give birth to handicapped offspring. Turpin v. Sortini, 31 Cal. 3d 220, 228, 182 Cal. Rptr. 337, 342, 643 P.2d 954, 959 (1982). *See* Note, *Parental Liability for Preconception Negligence: Do Parents Owe a Legal Duty to Their Potential Children?*, 22 CAL. W. L. REV. 289 (1986) [hereinafter *Parental Liability*]. This commentator discusses the parental immunity doctrine and the duties prospective mothers owe to the prenatal child. *Id.* at 296-305; *see also* Andrews, *A Delicate Condition*, STUDENT LAWYER 30, 32 (May 1985).

A further concern is that the wrongful life action may lead to the imposition of an affirmative legal duty on prospective parents to prevent the birth of impaired offspring. Note, *The Emerging Status of Wrongful Life and Wrongful Birth*: Goldberg v. Ruskin, 54 UMKC L. REV. 161, 169 (Fall 1985) [hereinafter *The Emerging Status*].

The doctrine of intrafamily immunity, which forbids a child to bring a civil suit against his or her parents, is another obstacle to a wrongful life action brought by a child against his or her parents. Such suits are barred for reasons of public policy on the grounds that family harmony would thereby be disrupted and that families might attempt to defraud insurance companies. Note, *Child v. Parent: A Viable New Tort of Wrongful Life?*, 24 ARIZ. L. REV. 391, 399-400 (1982). In those states where the doctrine of intrafamily immunity no longer exists, parental conduct is considered according to a "reasonable parent" standard on a case by case basis. *Id.* at 406. However, vesting a child with the right to bring a wrongful life action against his or her parents gives rise to complications involving parental constitutional rights. Imposing upon an individual a

the damages argument, but instead asserted that tort law requires a remedy for every wrong.[128] The court weighed the policy considerations in favor of wrongful life heavily, especially the societal interest in genetic counseling as this may decrease the state health care burden.[129] *Curlender* paved the way for *Turpin v. Sortini*,[130] the first state supreme court to recognize a wrongful life cause of action.

III. JUDICIAL RECOGNITION OF WRONGFUL LIFE

The state supreme courts of California, New Jersey and Washington recognize the wrongful life cause of action.[131] The California Supreme Court in *Turpin* upheld *Curlender* in part and was the first state supreme court to recognize some form of the wrongful life tort.[132] In *Turpin*, Mr. and Mrs. Turpin brought their first child to the defendant physician to be tested for a possible hearing defect.[133] The defendant negligently diagnosed this child as having normal hearing although, due to an hereditary ailment, she was completely deaf.[134] The Turpins allege that, had they known of the first child's condition, they would not have continued to have children.[135] Due to the defendant's negligent diagnosis, Mrs. Turpin conceived and gave birth to a second child, also completely deaf, who was the infant plaintiff in the wrongful life cause of action.[136] The state supreme court in *Turpin* denied the infant plaintiff's claim

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legal obligation to practice conception or to have an abortion impinges upon the fundamental right to have a child and therefore is an invasion of privacy. *Id.* at 414-15. Such a legal duty may also interfere with the parents' right to the free exercise of religion. *Id.* at 415. Furthermore, freedom of association is interfered with by depriving parents of the right to determine the composition of their family unit. *Id.* at 416-17; *see also* Tedeschi, *On Tort Liability for "Wrongful Life"*, 1 ISRAEL L. REV. 513 (1966).

128. *Curlender*, 106 Cal. App. 3d at 830, 165 Cal. Rptr. at 489.

129. *Id.* at 826-27, 165 Cal. Rptr. at 486-87. Tort law has commonly been employed to regulate the practice of medicine. *Id.* at 826, 165 Cal. Rptr. at 487.

130. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

131. Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1984); Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Harbeson v. Park-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983). The wrongful life cause of action has also been recognized by appeals courts in Colorado and Illinois. *See also* Continental Casualty Co. v. Empire Casualty Co., 713 P.2d 384 (Colo. Ct. App. 1985); Siemieniec v. Lutheran General Hospital, 134 Ill. App. 3d 823, 480 N.E.2d 1227 (1985). However, as these are not state supreme court decisions, they may be subject to reappraisal in the future. The elements of wrongful life have been established as follows:

> (1) the existence of a duty to use due care in counseling or in performing tests on an expectant or potential mother; (2) a breach of this duty by the physician so that the mother is not made aware of actual or potential defects in the fetus; (3) reliance by the mother on the negligent act or omission in the form of either conceiving or not aborting the fetus; and (4) the birth of a genetically impaired child.

Treatment of Injury, supra note 58, at 145-46 (footnote omitted).

132. *Turpin*, 31 Cal. 3d at 237-38, 643 P.2d at 965, 182 Cal. Rptr. at 348; *see supra* notes 125-26 and accompanying text.

133. *Turpin*, 31 Cal. 3d at 223, 643 P.2d at 956, 182 Cal. Rptr. at 339. The defendant specialized in speech and hearing defects. *Id.*

134. *Id.*

135. *Id.* at 224, 643 P.2d at 956, 182 Cal. Rptr. at 339.

136. *Id.* Mrs. Turpin had conceived her second child before other specialists correctly diag-

for general damages.[137] The court reasoned that there was no way to determine whether the physically impaired child had suffered an injury in fact by being born defective as opposed to having never been born at all.[138] The court stated that where a legally cognizable injury to be found, general damages are too speculative to be measurable.[139] The denial of such damages is further supported, according to the court, by previous California cases which stand for the proposition that damages may be withheld where a monetary award will not compensate the plaintiff in any meaningful way.[140] Further, in the wrongful life situation these courts determined that there is no meaningful way to compensate the child for the loss of nonexistence.[141]

Despite the court's reluctance to state definitively that the infant plaintiff has suffered an injury in fact, the *Turpin* court allowed recovery by either the parents or the physically impaired child for the extraordinary medical and training expenses incurred because of the defect.[142] The *Turpin* court stated poignantly that "it is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life. . .",[143] a notion also suggested by *Speck* and *Berman*.[144] Such damages, the court noted, are certain and measurable, unlike general damages, and often vital to the child's survival.[145] The court contended that it was illogical to allow parents in

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nosed the deafness of her first child. *Id.*

137. *Id.* at 237, 643 P.2d at 969, 182 Cal. Rptr. at 348.

138. *See id.* at 234-35, 643 P.2d at 963, 182 Cal. Rptr. at 346. A jury is not equipped to assign a value to non-existence. *Id.* Here the court is being inconsistent. *Id.* It refuses to definitively state that the child has suffered an injury and yet holds the defendant liable. *Id.* The court appears to find the necessary nexus on the basis of policy reasons. *See id.*

It has been noted that after *Curlender*, *Turpin* returned to "the traditional view that no legally cognizable injury existed." Note, *Public Policy Over Metaphysics: Wrongful Birth and Wrongful Life in* Harebeson v. Parke-Davis, Inc., 8 U. PUGET SOUND L. REV. 511, 528 (1985) [hereinafter *Public Policy Over Metaphysics*].

139. *Turpin*, at 236-37, 643 P.2d at 964, 182 Cal. Rptr. at 347. Jurors can place a value upon pain and suffering and emotional distress in a personal injury suit because this is something within their general knowledge. *Id.* at 236, 643 P.2d at 964, 182 Cal. Rptr. at 347. Such is not the case where an infant plaintiff claims he or she should never have been born. *Id.* The court also asserts that the defendant, by causing the infant-plaintiff to be born, has conferred a benefit on the latter to be considered in mitigation of damages. *Id.* at 236-37, 643 P.2d at 964, Cal. Rptr. at 347.

140. *Id.* The *Turpin* court cited two cases: Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977); Baxter v. Superior, 19 Cal. 3d 461, 563 P.2d 871, 138 Cal. Rptr. 315 (1977).

141. *Turpin*, 31 Cal. 3d at 237, 643 P.2d at 964, 182 Cal. Rptr. at 348. The court in *Turpin* held that there was no meaningful way to compensate the infant plaintiff for having been born. *Id.*

142. *Id.* at 237-38, 643 P.2d at 965, 182 Cal. Rptr. at 348. The infant plaintiff may recover the expenses for the "specialized teaching, training and hearing equipment" which will be necessary because of her deafness. *Id.* at 237, 643 P.2d at 965, 182 Cal. Rptr. at 348. The court recognized that such expenses were incurred due to the defendant's negligence and are of the same type as are regularly awarded in professional malpractice actions. *Id.* at 238, 643 P.2d at 965, 182 Cal. Rptr. at 348.

143. *Id.* at 233, 643 P.2d at 961-62, 182 Cal. Rptr. at 344-45.

144. *See Berman*, 80 N.J. at 430, 404 A.2d at 12-13; *Speck*, 268 Pa. Super. at 342, 408 A.2d at 511-12.

145. *Turpin*, 31 Cal. 3d at 238, 643 P.2d at 965, 182 Cal. Rptr. at 348.

a wrongful birth action to recover the medical expenses necessary to the care of the handicapped child, while denying recovery to the afflicted child.[146] The court was concerned that if the ability to recover was vested only in the parents, then the child would be left without legal recourse if the parents were unavailable to bring suit due to death or legal obstacles.[147] Such a financial burden must then be borne not just by the child but by the whole family.[148]

The *Turpin* court also addressed the premise in *Berman* that life is always preferable to non-life, regardless of defects.[149] The court noted that in some circumstances, public policy and the judicial system favor the right of an individual to decide that he or she prefers non-existence to impaired existence.[150] The court found its support for this contention in the California statute that allows terminally ill patients to have life sustaining treatments stopped.[151] In the wrongful life scenario, the court extends to the parents the right to determine whether it is in the child's best interest to be born with defects or not born at all.[152] Where a defendant negligently deprives the parents of the right to make this choice, both the parents and the child are injured.[153]

The Washington Supreme Court, in *Harbeson v. Parke-Davis Inc.*,[154] became the second state supreme court to recognize the wrongful life cause of action.[155] Mrs. Harbeson learned that she was an epileptic while her husband was in the service.[156] The doctors at the Air Force base where Mrs. Harbeson was stationed gave her Dilantin to control her seizures.[157] Thereafter, she gave birth to a normal, healthy baby.[158] When her husband was transferred to another service base, Mrs. Harbeson was treated by the defendant physicians who continued to prescribe Dilantin for her.[159] Mrs. Harbeson told the defend-

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146. *Id.*

147. *Id.* Further, if such a right to recover were vested only in the parents of the handicapped child, the parents would not be able to recover medical expenses to be incurred by the child after reaching the age of majority. *Id.*

148. *Id.*

149. *See id.* at 233, 643 P.2d at 962, 182 Cal. Rptr. at 345.

150. *Id.*

151. *Id.* CAL. HEALTH & SAFETY CODE section 7186, enacted in 1976, provides that forcing a terminally ill patient to continue on life support machines deprives that person of human dignity and increases suffering. *Id.* Therefore, under the law, life with defects is not always "preferable" to not having life at all. *Id.*

152. *Turpin*, 31 Cal. 3d at 233, 643 P.2d at 962, 182 Cal. Rptr. at 345. There is no way for a fetus to say whether he or she would prefer to live or die. *Id.* Therefore, the law accords the parents the right to make this choice. *Id.* In the *Turpin* case, the court acknowledges that it seems highly unlikely that deafness would be considered a reason to choose non-life. *Id.* at 234, 643 P.2d at 962-63, 182 Cal. Rptr. at 345-46.

153. *Id.* at 233-34, 643 P.2d at 962, 182 Cal. Rptr. at 345. The defendant, by a negligent failure to inform, deprives parents of the opportunity to make a meaningful choice as to the life or non-life of their handicapped child. *Id.* at 233, 643 P.2d at 962, 182 Cal. Rptr. at 345.

154. 98 Wash. 2d 460, 656 P.2d 483 (1983).

155. *Id.* at 462, 656 P.2d at 486.

156. *Id.*

157. *Id.* Dilantin is an anticonvulsant drug and generally it is the drug most often prescribed for epileptics. *Id.*

158. *Id.* Mrs. Harbeson was first prescribed Dilantin while she was pregnant with her first child. *Id.* She took this drug throughout the remainder of her pregnancy. *Id.*

159. *Id.*

ants that she wanted to have more children and inquired about the effects Dilantin would have on any children she might have.[160] Without researching the subject, the defendants informed her only that the child may have hirsutism and cleft palate.[161] Mrs. Harbeson, in reliance upon this inaccurate information, conceived two children and continued to take Dilantin as advised throughout the pregnancies.[162] As a result, both children were afflicted with fetal hydantoin syndrome and suffer from a variety of defects including growth deficiencies and developmental retardation.[163] The Harbesons brought a wrongful birth action against the defendants and on the children's behalf brought a wrongful life action.[164] The Washington Supreme Court recognized both actions.[165]

The *Harbeson* court analyzed the wrongful life action in accordance with a traditional tort framework requiring duty, breach, injury, and proximate cause and allowed the child to recover the extraordinary expenses incurred due to the child's defect.[166] The court held in the wrongful birth action that the defendant owed a duty to the parents to inform them of the possibility that future children may be defective.[167] The court extended this duty to those persons foreseeably endangered by the actions of a negligent defendant.[168] The defendant, therefore, owed a duty to the infant plaintiffs, as these children

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160. *Id.* The Harbesons alleged that had they been made aware of the correlation between Dilantin and birth defects, they would not have had any more children. *Id.*

161. *Id.* The California district court found that an adequate literature search would have revealed the increased risk of birth defects where a woman had been taking Dilantin. *Id.* at 464, 656 P.2d at 487.

162. *Id.* at 463, 656 P.2d at 486.

163. *Id.* The two children also suffer from other manifestations of this disease: wide set eyes, drooping eyelids, low-set hairline, broad nasal ridge, etc. *Id.*

164. *Id.* at 461, 656 P.2d at 483.

165. *Id.* The *Harbeson* court's analysis of the wrongful birth action is very similar to the analysis it employed for the wrongful life claim. *See id.* at 465-78, 656 P.2d at 487-94. In its analysis of the element of duty, the *Harbeson* court considered several factors. *Id.* The development of the doctrine of informed consent imposes a duty upon a physician to inform a patient about the risks associated with a proposed course of treatment. *Id.* at 470, 656 P.2d at 490. The court noted that medical advances often allow health care professionals to predict the occurrence of genetic defects and *Roe v. Wade* guarantees to parents the right to choose whether or not to have a child. *Harbeson*, 98 Wash. 2d at 472, 656 P.2d at 491. As a result, the California Supreme Court, in *Harbeson*, held that prospective parents have a right to avoid bearing impaired children. *Id.* Such a right imposes upon health care professionals a duty to convey pertinent information to prospective parents, regarding the possibility of impaired children. *Id.* The court held that recognizing such a duty requires that the court also recognize that the birth of an impaired child is an actionable injury. *Id.* at 473, 656 P.2d at 492. The court held further that the defendant's negligence was the proximate cause of birth of the impaired child. *See id.* at 476, 656 P.2d at 493. Damages held to be recoverable by Mr. and Mrs. Harbeson included the extraordinary costs attributable to the defects of the two children as well as damages for emotional and mental suffering caused by the births. *Id.* at 477, 656 P.2d at 494. Any emotional benefits accruing to the parents by reason of the births may be considered in mitigation of damages. *Id.*

166. *Id.* at 479-80, 656 P.2d at 495.

167. *Id.* at 480, 656 P.2d at 496. In California, injuries to a fetus are actionable. *Id.* at 480, 656 P.2d at 495. A duty may be extended to persons not even conceived at the time the negligence occurred. *Id.*

168. *Id.* at 480, 656 P.2d at 496.

were foreseeably endangered by the defendants' failure to supply Mrs. Harbeson with accurate information.[169] The *Harbeson* court reaffirmed the *Turpin* court's assertion that recognition of such a duty does not impune the value of life.[170]

There were several policy justifications relied upon by the court in imposing this duty.[171] The court reasoned that the imposition of such a duty would discourage negligent conduct and promote genetic counseling and prenatal testing.[172] The court further contended that recognition of this duty would "provide more comprehensive and consistent compensation" for the handicapped infant plaintiff than if the duty were held to extend to the parents only.[173] This duty was breached by the defendants as they did not, according to the court, adhere to an appropriate standard of care.[174] The court in *Harbeson* noted that *Gleitman* determined that the causation element of a wrongful life negligence action could not be established as the doctor did not cause the defect, but only the birth.[175] The Washington Supreme Court, however, deemed it sufficient proximate cause that the defendants' negligence was the cause of the continuing expenditures for medical care and training of the handicapped child.[176]

The court in *Harbeson* acknowledged that the most troubling elements of the wrongful life action for other jurisdictions have been injury and extent of damages.[177] The court examined specifically the *Berman* decision which denied recovery to a handicapped plaintiff.[178] The Washington Supreme Court agreed with *Berman* that there was no way to measure the value of impaired existence as compared to non-existence,[179] but believed such a computation was unnecessary.[180] The court held that the extraordinary medical and training expenses incurred in caring for the child are readily measurable and may be recovered.[181] Therefore, the court denied only general damages which require resort to metaphysical computations that are beyond the scope of the law.[182] Furthermore, the *Harbeson* court rejected the *Berman* contention that holding

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 480-81, 656 P.2d at 496. The court views the advances in the field of genetic counseling as beneficial to society because these advances avoid "the vast emotional and economic cost of defective children." *Id.* at 481, 656 P.2d at 496; *see also Public Policy Over Metaphysics*, *supra* note 138, at 530.

173. *Harbeson*, 98 Wash. 2d at 481, 656 P.2d at 496. As did the *Turpin* court, the court in *Harbeson* suggested that if the duty is extended only to the parents, then the costs of the impaired child's medical care in his majority may not be recoverable. *Id.*

174. *See id.* at 482, 656 P.2d at 496.

175. *Id.* at 483, 656 P.2d at 497.

176. *Id.* The defendants caused the birth of the infant plaintiff. *Id.* If the child had not been born, the medical expenses resulting from the defect would not have been incurred. *Id.*

177. *Id.* at 482, 656 P.2d at 496.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* This result has been characterized as "problematic." *See Public Policy Over Metaphysics*, *supra* note 138, at 525.

182. *Harbeson*, 98 Wash.2d at 482, 656 P.2d at 496.

a tortfeasor liable to a handicapped child for measurable damages "disavows" the value of life.[183] The *Harbeson* court asserts, as did the *Turpin* court, that allowing the parents, but not the child, to recover the extraordinary medical expenses incurred due to the child's defect is illogical.[184] Both parents and child are vested with the right to recover the damages but the cost of the child's care may be recovered only once.[185]

The third of the three state supreme courts to recognize wrongful life as a cause of action was that of New Jersey. In *Procanik v. Cillo* the New Jersey Supreme Court decision recognized this cause of action.[186] Mrs. Procanik consulted the defendant physician in order to determine whether an illness she had contracted was German measles.[187] The tests indicated that the illness was German measles but the defendant misconstrued the results and erroneously informed her that she had become immune to German measles.[188] The New Jersey Supreme Court found that Mrs. Procanik continued her pregnancy in reliance upon the defendant's negligent determination.[189] The infant plaintiff was born with eye, heart, and auditory defects diagnosed as congenital rubella syndrome.[190] The Procaniks brought a wrongful birth claim and the infant plaintiff brought a wrongful life claim seeking to recover for the extraordinary medical expenses necessitated by the medical defect for pain and suffering and for a diminished childhood.[191]

The decision of the New Jersey Supreme Court in *Procanik* is consistent with the decisions of the California and Washington[192] Supreme Courts. The *Procanik* court held that Mr. and Mrs. Procanik or the infant plaintiff could recover the extraordinary medical expenses incurred during the child's minority due to the defect and that the infant plaintiff could recover those expenses during his majority.[193] The court denied the defective infant's claim for general damages for pain and suffering and for diminished childhood.[194]

The court in *Procanik* deemed it unnecessary to determine that non-life is preferable to impaired life, as recovery of the extraordinary medical expenses

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183. *Id.*

184. *Id.* at 479, 656 P.2d at 495.

185. *Id.*

186. 97 N.J. 339, 356, 478 A.2d 755, 764 (1984).

187. *Id.* at 343, 478 A.2d at 758. Mrs. Procanik was aware that she had contracted measles but was not sure whether the particular strain she had was German measles. *Id.*

188. *Id.* The results of the test administered indicated a past rubella infection. *Id.* The "past infection" was the measles that led Mrs. Procanik to seek medical advice. *Id.* The defendant physician interpreted the results as indicating a German measles infection that had occurred in her childhood. *Id.*

189. *Id.*

190. *Id.* at 344, 478 A.2d at 758.

191. *Id.* at 343-44, 478 A.2d at 757-58. The Procaniks also asserted a claim for malpractice against their former attorneys. *Id.* at 343-44, 478 A.2d at 757-58. They alleged that their attorneys did not inform them that the *Berman* court had recognized a parental cause of action for wrongful birth. *Id.* at 345, 478 A.2d at 758. However, this claim was not addressed by the trial court, so the issue was not before the New Jersey Supreme Court in *Procanik*. *Id.*

192. *Id.* at 352, 478 A.2d at 762.

193. *Id.*

194. *Id.* at 353-55, 478 A.2d 763-64.

is premised on the reality of the child's needs.[195] The infant plaintiff suffered from blindness, deafness, and retardation requiring medical treatment.[196] The court asserted that the expenses related to these abnormalities are ascertainable and measurable, and were incurred due to the defendant's negligence.[197] The Procaniks are barred from recovery under their wrongful birth claim by the statute of limitations.[198] If the infant plaintiff is also barred from recovery, the court noted that the tortfeasor will escape all liability and the entire Procanik family will suffer unaided under a crushing burden of medical expenses.[199] This result was one that the New Jersey Supreme Court sought to avoid, as did the *Turpin* court.[200]

The court in *Procanik* did not recognize the infant plaintiff's claim for general damages.[201] The court noted that the defendant did not cause the child's rubella syndrome.[202] The only result of the defendant's negligence is the child's birth.[203] The court acknowledged that there was no way to determine whether the child's birth was an injury to itself, indicating the same reluctance exhibited by the California and Washington Supreme Courts to diminish the judicial system's high regard for life.[204] Instead, the New Jersey Supreme Court focused primarily on the immeasurability of damages.[205] The court held that general damages are too speculative and, as such, an assessment requires a computation of the difference between non-existence and impaired existence.[206] The court held that such a computation was beyond the scope or the ability of the judicial system.[207]

The court in *Procanik* also declined to recognize the infant plaintiff's claim for a diminished childhood.[208] The gravamen of a claim for diminished

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195. *Id.*; *see Treatment of Injury*, *supra* note 58, at 160-61.

196. *Id.* at 344, 478 A.2d at 762.

197. *Id.* at 351, 478 A.2d at 761-62.

198. *Id.* at 351, 478 A.2d at 762.

199. *Id.* The court in *Procanik* emphasized that the defendant's negligence adversely affects the entire family. *Id.* The court stated: "Money that is spent for the health care of one child is not available for the clothes, food or college education of another child." *Id.*

200. *Id.* at 352, 478 A.2d at 762. The court held that it would be unjust to allow parents to recover under a wrongful birth action, while withholding recovery from the child who actually suffers the defect. *Id.* The court also agreed with the California Supreme Court which stated in *Turpin* that the recovery of the extraordinary medical expenses should not depend upon "wholly fortuitous circumstance of whether the parents are available to sue." *Id.* (citing *Turpin*, 31 Cal.3d at 328, 643 P.2d at 965, 182 Cal. Rptr. at 348).

201. *Id.* at 353, 478 A.2d at 763.

202. *Id.*

203. *Id.*

204. *Id.* at 352-54, 478 A.2d at 762-64; *see supra* notes 138-42 and accompanying text; *see also Harbeson*, 98 Wash. at 482, 656 P.2d at 496-97. The court in *Harbeson* did not directly state that the child suffered an actionable injury by being born, but asserted that allowing the child to recover the costs of required medical care did not "disavow the sanctity of human life." *Id.* The *Harbeson* court did recognize that the birth of an impaired child is an actionable injury to the parents. *Id.* at 473, 656 P.2d at 492.

205. *See Procanik*, 97 N.J. at 353-54, 478 A.2d at 763-64.

206. *Id.*

207. *Id.* at 354, 478 A.2d at 763.

208. *Id.* at 355, 478 A.2d at 764. Justice Handler, in a separate opinion, discussed the claim of impaired childhood in depth. *Procanik*, 97 N.J. at 357-63, 478 A.2d at 765-68 (Handler, J.,

childhood, as delineated by the New Jersey Supreme Court, is that when parents are denied information as to the conditions of the fetus, they are unable to emotionally prepare for the birth of a defective child.[209] As a result, they are less able to care for and love the defective child who thereby suffers an impaired childhood.[210] The court perceived a flaw in such a cause of action.[211] The court contended that if the parents allege that had they possessed the genetic information they would have terminated the pregnancy, then they cannot also state a claim on the basis that they would have used such information to prepare themselves for the birth of a defective child.[212]

The wrongful life cause of action was also recognized by the Colorado Court of Appeals in *Continental Casualty Co. v. Empire Casualty Co.*[213] where a physician negligently failed to detect Mrs. Peeks' RH incompatibility.[214] As a result, her third child was born afflicted with erythroblastosis fatalis.[215] As a consequence of his condition, the child had to be prematurely delivered.[216] This early delivery caused him to have a stroke which resulted in substantial brain damage.[217]

The Colorado appeals court followed the example of other pro-wrongful life courts in its treatment of this action as a negligence action.[218] The Colo-

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concurring in part and dissenting in part). Parents who give birth to an impaired child experience "chronic sorrow." *Id.* at 359, 478 A.2d at 766 (citations omitted). Some of the feelings associated with chronic sorrow are disbelief, fear that they will not be able to cope with the child's handicaps and that the child will be a burden to the family, anger, and inferiority. *Id.* at 360, 478 A.2d at 766. The parents also feel guilt from their desire not to be burdened by the child. *Id.* As a result, the parents are less able to provide the "unfaltering love, constant devotion and extraordinary care" that a defective child needs even more than a normal child. *Id.* at 359, 758 A.2d at 766 (citing *Berman*, 80 N.J. at 442, 404 A.2d at 8 (Handler, J., concurring in part and dissenting in part)). Because the parents have been denied the opportunity to decide their child's fate, they may also suffer from feelings of loss of personal autonomy. *Id.* at 363, 478 A.2d at 768. The term for the corresponding injury to the parents is "impaired parenthood." *Id.*

209. *Id.* at 358-59, 478 A.2d at 766 (Handler, J., concurring in part and dissenting in part).

210. *Id.*

211. *Id.* at 355, 478 A.2d at 764.

212. *Id.* The court also noted that a defective child's claim for diminished childhood may not be divisible from the parental claim of diminished parenthood. *Id.*

213. 713 P.2d 384 (Colo. App. 1985).

214. *Id.* at 388. Mrs. Peek had RH negative blood (undiagnosed by the physician) and her husband had RH positive blood. *Id.* These two factors create a possibility of RH incompatability in their children. *Id.* Mrs. Peek became "sensitized" to her first child's RH positive blood type at birth. *Id.* Sensitization may have a disastrous effect on subsequent offspring. *Id.* Her sensitization could have been prevented by treating her with a drug called RhoGAM within 72 hours after giving birth. *Id.* However, it was not until she gave birth to her third child (her second child was stillborn, but at that time, her physician did not type her blood and failed to inform her of the dire possibilities of further troubled births and afflicted children) that another obstetrician diagnosed the RH incompatibility. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *See supra* text accompanying notes 132-207. The court's analysis of the duty issue rested on the doctrine of informed consent. *Continental Casualty Co.*, 713 P.2d at 392-93. This doctrine "imposes on the physicians a duty to disclose all the facts, including risks and alternatives, that are necessary for the patient to give an intelligent consent to the proposed treatment."

rado decision is unclear on the issue of injury.[219] Instead, the court noted the difficulty other courts have encountered with respect to life as an injury and on its own behalf states only "we are unwilling to say as a matter of law that life, even with the most severe and debilitating of impairments, is always preferable to non-existence."[220] The issue of damages was not before the court in *Continental Casualty Co.* and, therefore, although the court determined that the elements for recovery for wrongful life were established, it declined to indicate whether the limited damages rule of *Turpin* and *Procanik* would be applied.[221]

An Illinois appeals court allowed a wrongful life type of recovery in *Siemieniec v. Lutheran General Hospital.*[222] However, the court did not characterize the action as a claim for wrongful life damages.[223] In *Siemieniec*, the defendant physician incorrectly assured Mr. and Mrs. Siemieniec that there was only a small possibility that their prospective child would have hemophilia.[224] In reliance upon the negligent consultation, Mrs. Siemieniec gave birth to the infant plaintiff who suffers from hemophilia.[225]

The analysis in *Siemieniec*, like other pro-wrongful life decisions, is structured around the elements of negligence.[226] The Illinois Court of Appeals held that a child has a right to be born without "prenatal injuries forseeably caused by a breach of duty to the child's mother."[227] Not only did the court extend this duty to the child, but inherent in such language is an implication that the child has suffered an injury.[228] Further, the court expressly disagrees with the sanctity of life doctrine of *Berman* and characterizes the action as one claiming a "real rather than a theoretical injury."[229] Although the court is ambiguous as to whether this "injury" consists of the birth or the hemophilia, it is clear that the court has determined that the child has suffered a legal injury.[230] Such a conclusion was perhaps facilitated by the fact that the court perceived that it was unencumbered by the philosophical comparison of impaired existence and nonexistence as the infant plaintiff sought only the easily calculable extraordinary medical expenses.[231] Although phrased in terms of general tort law, the court in *Siemieniec* clearly recognized a limited wrongful

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Id. at 393. The court continued to find "that the duty owed to the parents inures derivatively to the child." *Id.*

219. *See Continental Casualty Co.*, 713 P.2d at 393.

220. *Id.*

221. *Id.* at 393-94.

222. 134 Ill. App. 3d 823, 480 N.E.2d 1227 (1985).

223. *Id.* at 835, 480 N.E.2d at 1235.

224. *Id.* at 825, 480 N.E.2d at 1228.

225. *Id.*

226. *Id.* at 833-35, 480 N.E.2d at 1233-35.

227. *Id.* at 833, 480 N.E.2d at 1234 (quoting Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 358, 367 N.E.2d 1250, 1255). One legal commentator stated that a child has a right to be born sound in mind and body. *See Parental Liability, supra* note 127, at 289.

228. *See id.* at 833, 480 N.E.2d at 1234. The rationale revolved around the forseeability of the child's injury. *Id.*

229. *Id.*

230. *See id.*

231. *See id.* at 835, 480 N.E.2d at 1235.

life action.[232]

IV. Overview and Analysis

The majority of American jurisdictions do not recognize the wrongful life cause of action brought by or on behalf of a defective child.[233] Currently, it is an actionable tort only in California, Washington, New Jersey, Colorado and Illinois.[234] Courts that have considered and rejected the wrongful life action generally state two major reasons for their decision — the absence of a legally cognizable injury, and the impossibility of measuring damages.[235] The New Jersey Supreme Court in *Berman* and *Gleitman* laid the foundation for these rationales,[236] which have been widely cited in wrongful life cases since 1967.[237] However, the *Gleitman* and *Berman* decisions have been defused by *Procanik*, leaving the way clear for courts to recognize the wrongful life cause of action.[238] As in other tort cases, juries have the ability to measure both the pecuniary and the less tangible damages suffered by a wrongful life child.[239] The reluctance of courts to consider life an injury should not preclude recovery of

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232. *See id.*

233. *See* White v. United States, 510 F.Supp. 146 (D. Kan. 1981); *Phillips*, 508 F. Supp. 537 (D. S.C. 1980); Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); DiNatale v. Lieberman, 409 So. 2d 512 (Fla. Dist. Ct. App. 1982); *Moores*, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981); *Blake*, 698 P.2d 315 (Idaho 1984); Bruggerman v. Schimke, 239 Kan. Ct. App. 2d 245, 718 P.2d 635 (1986); Dorlin v. Providence Hospital, 118 Mich. App. 831, 325 N.W.2d 600 (1982); Strohmaier v. Associates in Obstetrics & Gynecology, 122 Mich. App. 116, 332 N.W.2d 435 (1982); Eisbrenner v. Stanley, 106 Mich. App. 357, 308 N.W.2d 209 (1981); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985); Alquijay v. St. Luke's — Roosevelt Hospital, 63 N.Y.2d 978, 483 N.Y.S.2d 994, 473 N.E.2d 244 (1984); Rubin v. Hamot Medical Center, 329 Pa. Super. 439, 478 A.2d 869 (1984); Ellis v. Sherman, 330 Pa. Super. 42, 478 A.2d 1339 (1984); *Speck*, 497 Pa. 77, 439 A.2d 110 (1979); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); *James G.*, 332 S.E.2d 872 (W. Va. 1985); *Dumer*, 69 Wis. 2d 766, 233, N.W.2d 372 (1975). No Massachusetts cases have directly addressed this issue. In *Payton v. Abbott Labs*, however, the Supreme Judicial Court of Massachusetts intimated that it would reject the wrongful life action on the grounds that an award of damages requires the measurement of the difference between existence and impaired existence. 386 Mass. 548, 558, 437 N.E.2d 171, 181 (1982). The appellate division of the New York Supreme Court held in *Park* that wrongful life was a cause of action for which relief could be granted. 60 A.D.2d 80, 400 N.Y.S.2d 100 (1977). This decision was overturned when considered on appeal with *Becker*, 46 N.Y. 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978). *See supra* text accompanying notes 78-96. South Dakota, Minnesota and Utah have prohibited by statute any form of the wrongful life cause of action. Minn. Stat. Ann. § 145.424 (1) (West 1984); S.D. Codified Laws Ann. § 21-55-2 (1984); Utah Code Ann. § 78-11-24 (1983); Snyderman, *supra* note 21, at 27; *Public Policy Over Metaphysics*, *supra* note 138, at 533. The legislatures of some states view wrongful life and wrongful birth as mandatory abortion. *Id.* at 535.

234. *See supra* note 131.

235. *See supra* text accompanying notes 25-130; *The Inequitable Umbrella*, *supra* note 85, at 145.

236. *Gleitman*, 49 N.J. at 29-31, 227 A.2d at 692-94; *Berman*, 80 N.J. at 429, 404 A.2d at 12-13.

237. Note, *Wrongful Life: A Modern Claim Which Conforms to the Traditional Tort Framework*, 20 Wm. and Mary L. Rev. 125, 129 (1978).

238. *See infra* note 343.

239. *See infra* notes 288-92.

general and special damages in the wrongful life context. Allowing full recovery to a defective child will not abrogate the "sanctity of life doctrine." On the contrary, such recovery will demonstrate judicial recognition of the right of an individual to avoid unnecessary suffering.

A. Absence of a Legally Cognizable Injury

First, courts disfavoring wrongful life have determined there is no legally cognizable injury to the infant plaintiff.[240] The view of such courts is that the comparison is not between a healthy childhood and an impaired one, but rather between an impaired existence and no existence.[241] These courts generally assert that the determination as to whether a child would be better off not having been born is necessary to find that the child's birth is an injury and is beyond the ability of the judicial system.[242] These same courts also contend that allowing a defective child to recover on the theory that its birth is an injury would undermine the judicial "sanctity of life doctrine."[243] In *Berman v. Allen*, the New Jersey Supreme Court advances the theory that there is a societal and legislative policy that life is more precious than non-life, regardless of defects.[244] The court in *Berman* finds support for this theory in the fifth and fourteenth amendments of the United States Constitution, where life is characterized as a "fundamental" right.[245] The *Berman* court finds further evidence of this policy in the severe criminal sanctions imposed on persons who have taken another's life.[246] Such penalties, noted the court, are not varied according to the presence or absence of physical or mental defects in the victim.[247]

While the supreme courts of California, Washington and New Jersey ad-

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240. *See, e.g., Blake*, 698 P.2d at 322; *Becker*, 46 N.Y.2d at 441, 386 N.E.2d at 812, 413 N.Y.S.2d at 900; *Nelson*, 678 S.W.2d at 929; *Speck*, 268 Pa.Super. at 364, 408 A.2d at 508; *Ellis*, 478 A.2d at 1342-43. A cause of action for negligence requires that the plaintiff show that he or she has suffered an injury. *See Becker*, 46 N.Y.2d at 410, 386 N.E.2d at 811, 413 N.Y.S.2d at 889.

241. *See, e.g., Blake*, 698 P.2d at 322; *Becker*, 46 N.Y.2d at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900; *Nelson*, 678 S.W.2d at 929; *Ellis*, 478 A.2d at 1342-43; *Treatment of Injury*, *supra* note 58, at 146-47.

242. *See, e.g., Nelson*, 678 S.W.2d at 929. When addressing the issue of whether the infant plaintiff had suffered an injury by being born impaired, the court stated "to determine whether Mark Nelson has suffered an injury in fact, then, his life with physical impairments must be compared to the alternative of nonexistence. This calculation cannot be rationally made, as man knows nothing of nonexistence, and can assign it neither a positive nor a negative value." *Id.*

243. *See, e.g., Berman*, 80 N.J. at 430, 404 A.2d at 13; *Becker*, 46 N.Y.2d at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900; *Blake*, 698 P.2d at 322.

244. *See, e.g., Berman*, 80 N.J. at 429, 404 A.2d at 12-13. Furthermore, a parallel theory propounded is that courts disallow the wrongful life cause of action partly because of "moral reprehension towards a cause of action that allows a plaintiff to sue [a health care professional] who, because of his negligence, prevents the plaintiff from terminating the life of an impaired fetus before birth." *The Inequitable Umbrella*, *supra* note 85, at 147.

245. *Berman*, at 429, 404 A.2d at 12.

246. *Id.* at 430, 404 A.2d at 13. The court in *Berman* maintains that the infant plaintiff, who suffers from Down's Syndrome, will be able to experience love, happiness and pleasure — emotions which outweigh any suffering which she may endure. *Id.*

247. *Id.*

mit there is a wrong perpetrated on the child, they appear to embrace the *Berman* determination that the plaintiff in a wrongful life cause of action has suffered no legally cognizable injury, because there is no way to establish that a child would be better off unborn.[248] These decisions generally imply that such a finding is not necessary as it is sufficient that the child is impaired and suffering.[249] This is a confusing rationale as these states expressly or impliedly require that a wrongful life action fit the traditional tort framework — duty, breach, proximate cause, and injury for which damages may be awarded.[250] If the court has not found an injury, on what basis is recovery allowed? Tort law dictates that negligence is only actionable if someone has been harmed.[251] The allowance of pecuniary damages by the supreme courts of California, Washington and New Jersey despite their failure to settle the injury issue definitively, implies that there has been an injury that these courts seek to redress.[252] However, the three courts seem to rest their disallowance of general damages on their ambivalence as to the existence of an injury.[253] The inconsistance existing in these decisions can be interpreted as an indication that the court is balancing policies.

At the time of *Gleitman* the illegality of abortion was an expression of the public policy regarding life as precious no matter how defective.[254] However, a

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248. *See Turpin*, 321 Cal. 3d at 235-36, 653 P.2d at 961, 182 Cal. Rptr. at 346-47; *Procanik*, 97 N.J. at 353-54, 478 A.2d at 761; *Harbeson*, 98 Wash. 2d at 481, 656 P.2d at 496 (court disagreed with *Berman* determination that allowance of damages would "disavow the value of life," however, court avoided issue of cognizable injury); *see also Berman*, 80 N.J. at 429, 404 A.2d at 12-13; *Treatment of Injury*, *supra* note 58, at 155.

249. *See, e.g.*, *Turpin*, 31 Cal. 3d at 233, 563 P.2d at 961, 182 Cal. Rptr. at 345; *Harbeson*, 98 Wash. 2d at 81, 656 P.2d at 496 (court avoided issue of injury but was influenced by *Turpin* characterization of infant plaintiff as "handicapped or suffering").

250. *See Turpin*, 31 Cal. 3d at 229, 563 P.2d at 960, 138 Cal. Rptr. at 348; *Procanik*, 97 N.J. at 348-51, 478 A.2d at 760-62 (the New Jersey Supreme Court does not state that its analysis is based on negligence elements, however, the court deals with all four elements); *Harbeson*, 98 Wash.2d at 480, 656 P.2d at 495. One commentator suggests that courts should not be restricted to this traditional tort framework, maintaining that equitable principles should be considered. Note, *A Cause Of Action For Wrongful Life: [A Suggested Analysis]*, 55 MINN. L. REV. 58, 67 (1970).

251. Prosser, TORTS 143 (4th ed. 1971) Prosser lists as an element of negligence "actual loss or damage resulting to the interests of another." *Id.* He goes further and states:

> Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action where no actual loss has occurred. The threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.

Id. at 143-44 (footnotes omitted).

252. *See Treatment of Injury*, *supra* note 58, at 150.

253. *See supra* text accompanying notes 132-218.

254. *Curlender*, 106 Cal. App. 3d at 819, 165 Cal. Rptr. at 482. The court in *Gleitman* states: "[f]or our discussion of this case we will assume that somehow or somewhere Mrs. Gleitman could have obtained an abortion that would not have subjected participants to criminal sanctions, and that she did not do so because she relied on the incorrect advice of the defendants,"

woman now has a legal right to choose to terminate her pregnancy.[255] One commentator asserts that the *Gleitman* disallowance of wrongful life was an attempt to discourage abortion — a policy no longer in effect.[256] Furthermore, a number of cases have held that in certain instances individuals are allowed to choose termination of life-sustaining treatment or machinery — an indication that the judicial system no longer believes life is always preferable to nonexistence, regardless of defects.[257] "Right to die" cases are an illustration that in certain circumstances, to curtail suffering and preserve human dignity, the state's interest in the preservation of life is secondary to the right of personal autonomy regarding control of one's own body.[258] Where an individual is unable to make such a choice the court or a guardian may make it.[259] Therefore, by recognizing the wrongful life cause of action, the court is not determining when a defective life is worth less than nonexistence, but merely guaranteeing that an individual may make this determination.[260]

Justice Handler, dissenting in *Procanik*, posited that it is unnecessary to determine whether the child has suffered an injury in being born.[261] The injury can be characterized as "the consequences of the deprivation of his parents' right to determine on his behalf whether he should have been born."[262] The court then only needs to determine that the parents were deprived of making a decision concerning the child's best interest.[263] In this manner, the court is not governed by philosophical or religious beliefs, as feared by the *Curlender* court, but by a legal right.[264] Were such a characterization to be employed in a wrongful life claim, the parents must allege that they would have avoided conception, or had an abortion, if they had been given all the relevant infor-

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in what appears to be an attempt to downplay the presumption that the illegality of abortion in New Jersey influenced the court's decision. 49 N.J. at 27, 227 A.2d at 691. However, toward the conclusion of the decision, the court noted that "[o]ur statute provides criminal sanctions for abortions which are performed 'without lawful justification.'" *Id.* at 31, 227 A.2d at 693-94. Clearly the anti-abortion status of the law was a consideration concerning the wrongful life cause of action. *See Recovery of Damages*, *supra* note 13, at 329; Peters & Peters, *Wrongful Life: Recognizing the Defective Child's Right to a Cause of Action*, 18 DUQ. L. REV. 857, 859 n.11 (1980).

255. *See supra* note 1. The legality of abortion is significant in wrongful life actions. *Treatment of Injury*, *supra* note 58, at 161.

256. Note, *Wrongful Life: A Modern Claim Which Conforms to the Traditional Tort Framework*, 20 WM. AND MARY L. REV. 125, 153 (1978) [hereinafter *Wrongful Life: A Modern Claim*].

257. *See, e.g.*, *In Re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, 429 U.S. 922 (1976); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

258. Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C.L. REV. 713, 736 (1982); *Procanik*, 97 N.J. at 364-65, 478 A.2d at 769 and cases cited therein.

259. *Id.* Where this right exists, the court will seek to effectuate it if the person lacks the ability or desire. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Curlender*, 106 Cal. App. 3d at 826, 165 Cal. Rptr. at 486.

mation by the physician.[265]

The New Jersey Supreme Court in *Berman* and the North Carolina Appeals Court imply another test to determine whether a child has suffered an injury. In *Berman*, the court noted that the child has the capacity to experience love and happiness and reasoned, therefore, that her defective life was preferable to nonexistence.[266] A North Carolina appeals court acknowledged that the *Berman* infant plaintiff was not foreclosed from such satisfying emotions, but asserted that that is not always the case, intimating that a defect may be so severe as to preclude any pleasure in existing.[267] These courts imply

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265. *See* Peters & Peters, *supra* note 254, at 866.

266. *Berman*, 80 N.J. at 430, 404 A.2d at 13; DeWalt, *supra* note 123, 181. The court emphatically stated that happiness, pleasure, and love are the essence of life and outweigh any suffering that the infant plaintiff may experience. *Berman*, 80 N.J. at 430, 404 A.2d at 13.

267. Azzolino v. Dingfelder, 71 N.C. App. at 300, 322 S.E.2d at 576 (1984), *affirmed in part, rev'd in part*, 315 N.C. 103, 337 S.E.2d 528 (1985) (wrongful life rejected by North Carolina Supreme Court).

The wrongful life cause of action was recognized by a North Carolina appeals court in *Azzolino v. Dingfelder*. 71 N.C. App. 289, 322 S.E.2d 567. Although this decision was reversed regarding wrongful life, 315 N.C. 103, 337 S.E.2d 528 (1985), it remains significant due to the straightforward tort analysis employed by the court.

Mrs. Azzolino became pregnant at the age of 36. *Azzolino*, 71 N.C. App. at 296, 322 S.E.2d at 573. Although she consulted the defendant health care professionals, they neglected to inform her that prenatal testing was advisable due to her age and of the availability of genetic counseling. *Id.* As a result of the defendant's negligent failure to so inform Mrs. Azzolino, she never learned that the fetus was defective. *Id.* at 296, 322 S.E.2d at 574. She gave birth to a Down's Syndrome child, the infant plaintiff, who then brought a wrongful life action alleging that but for the defendant's negligence, he would not have been born to suffer his defect. *Id.* at 297, 322 S.E.2d at 567. Mr. and Mrs. Azzolino brought an action for wrongful birth and the infant plaintiff's minor siblings brought an action for damages for hardships they suffered as a result of the wrongful birth. *Id.* at 303, 322 S.E.2d at 578-80.

The appeals court in *Azzolino* implemented a tort anlysis in allowing the infant plaintiff recovery, as special damages of the extraordinary medical expenses necessitated by his defect. *Id.* at 297-301, 322 S.E.2d at 574-77. It held that the defendants owed a duty to Mr. and Mrs. Azzolino to provide them with accurate genetic information and that this duty extended to the infant plaintiff. *Id.* at 297-98, 322 S.E.2d at 574. The North Carolina appeals court rejected the defendant's argument that their breach of this duty did not cause the child's defect. *Id.* at 299, 322 S.E.2d at 575. Instead, the proximate cause requirement was considered satisfied as the birth of the defective child was a forseeable result of the defendant's alleged negligence. *Id.* Unlike the supreme courts of California, New Jersey, and Washington, the North Carolina appeals court in *Azzolino* showed no reluctance in stating that the infant plaintiff had suffered a legally cognizable injury. *Id.* at 299, 322 S.E.2d at 575-76; *see supra* notes 138, 177-85 & 200 accompanying text. The *Azzolino* lower court disagreed with the *Berman* contention that life, even where severely impaired, is always preferable to nonexistence. *Azzolino*, 71 N.C. App. at 300, 322 S.E.2d at 576. It was implied that where a child is so severely defective that it has no capacity to experience love, happiness, or pleasure, nonexistence may be preferable. *See id.*

The appeals court in *Azzolino* agreed with the *Turpin*, *Procanik* and *Harbeson* courts that general damages are too speculative to be recovered. *See id. See also supra* text accompanying notes 137, 182 & 194. The extraordinary medical expenses are held to be recoverable by the infant plaintiff because such damages are readily measured and do not require a comparison of impaired life and nonexistence. *Azzolino*, 71 N.C. App. at 301, 322 S.E.2d at 576. The North Carolina Appeals Court in *Azzolino* agrees with prior pro-wrongful life decisions that it is illogical and potentially disastrous to the child to vest recovery only in the parents when it is the child who

that a defect, if very extreme, may rise to the status of a legally cognizable injury.[268] Such a test would not be equally desirable for all wrongful life plaintiffs. For example, if this test were applied in *Turpin*, where the infant plaintiff suffers only from deafness, it is very likely that recovery would be barred. Few people would be convinced that it would be better to be nonexistent than to go through life unable to hear. Moreover, there are three drawbacks to such a test. First, the court, instead of the individual or the individual's guardian, makes the determination of severity.[269] Second, in some instances a tortfeasor will escape liability (as in the example above). Third, determining when a defect makes life not worth living is no less a metaphysical determination than assigning a value to nonexistence.[270]

There appear to be a number of justifications for finding a legally cognizable injury, yet the state supreme courts favoring wrongful life hesitate to do so. There are several possible explanations for this reluctance. If a court definitively states that an injury has been visited upon the infant plaintiff in the wrongful life context, then there is no basis for refusal of general damages. The pro-wrongful life courts seem to have taken a middle-of-the-road approach by only allowing the infant plaintiff to recover the extraordinary medical expenses engendered by its defect. The plaintiff is not reimbursed for pain and suffering but does not have to struggle with medical expenses. On the other hand, the defendant physician is not crushed by a burden of liability. Neither party suffers the entire weight of the defect. However, the effect of such a determination is to require the innocent plaintiff to endure without redress, pain and suffering which could have been avoided but for defendant's negligence.

Perhaps the courts' reluctance to consider birth an injury also reflects the uncertain mores of our society. The courts may in their indecision reflect the antagonism between pro-life activists and those favoring abortion, as well as the distrust many people still foster regarding genetic engineering. To deem that life can be wrongful may be interpreted by more conservative individuals

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is burdened with the defect. *Id.* at 302, 322 S.E.2d at 577. This court, however, differed from *Turpin*, *Harbeson* and *Procanik*, and provided additional protection to the child by vesting recovery only in the infant plaintiff in order to make certain that such recovery is used only to pay for the medical care required by the defective child and not applied to other purposes by the parents. *Id*; *see supra* text accompanying notes 142, 184, 185 & 193.

In addition to a tort analysis, the North Carolina appeals court in *Azzolino* rested its decision on the same policy considerations regarded as significant by the Washington Supreme Court. *Azzolino*, 71 N.C. App. at 302-03, 322 S.E.2d at 577; *see also supra* text accompanying notes 170-72. The North Carolina Appeals Court believed that recognition of the wrongful life cause of action would foster the societal objective of promoting genetic counseling and prenatal testing, deter medical negligence, and provide at least some relief to an individual who has been injured by another's negligence. *Azzolino*, 71 N.C. App. at 303, 322 S.E.2d at 577. For a more in-depth decision of the appeals court decision in *Azzolino, see* Case Note, *Wrongful Life — The Ultimate Tort*, Azzolino v. Dingfelder, 1985 DETROIT COL. OF L. REV. 921 [hereinafter *The Ultimate Tort*].

268. The court said "[w]e believe that a child, who is as severely impaired as [the infant plaintiff], has suffered a legally cognizable injury." *Treatment of Injury*, *supra* note 58, at 158-59.

269. *See Treatment of Injury, supra* note 58, at 159.

270. *See id. See also The Emerging Status*, *supra* note 127, at 169. How would this affect the infant plaintiff in *Turpin* who suffered from deafness only? *Id.*

as active encouragement of eugenic abortion rather than simply the judicial deferment to individual choice that such a stance reflects.

A third explanation, propounded by two legal commentators, is something called "cultural lag."[271] According to this theory, the court system and the legislature has simply not caught up with the advances in medicine and genetics.[272] When genetic counseling was new, there was little ability to accurately predict genetic disorders, therefore courts could not impose liability on physicians who could not do so.[273] Science has, without impediment, continued to move forward. However, because the court system is an adversarial one, lawyers frequently try to maintain the status quo. Consequently, the judicial system moves at a slower pace.[274] Fortunately, this theory indicates that the period of lag is only temporary, that eventually science and the courts will be in harmony and wrongful life will be fully recognized.[275]

B. Immeasurability of Damages

The second obstacle offered by courts as justification for rejecting a wrongful life cause of action is the difficulty in measuring damages.[276] In general, the remedy afforded a plaintiff is compensatory, placing the plaintiff back in the position he or she occupied prior to suffering a wrong.[277] Computing such a remedy in a wrongful life action is viewed as requiring the court to weigh the difference between the value of the infant plaintiff's impaired existence against non-existence.[278] Courts withholding recognition of the wrongful life tort maintain that such a calculation is beyond the ability of the court or jury, as there is no way to measure non-existence.[279]

This attitude is also reflected in pro-wrongful life jurisdictions, where the wrongful plaintiff, may only recover special damages — the extraordinary expenses for medical care and training that the child will incur in his lifetime as a result of his defect.[280] Courts supporting the wrongful life action reason that

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271. *See* Peters & Peters, *supra* note 254, at 870-71.

272. *Id.* at 872.

273. *Id.* at 874.

274. *Id.* at 872.

275. *Id.* at 876. Wrongful life is about 10 years behind the abortion issue. *See The Ultimate Tort*, *supra* note 267, at 934.

276. *See, e.g., Gleitman*, 49 N.J. at 28-29, 227 A.2d at 692; *Nelson*, 678 S.W.2d at 925; *Dumer*, 69 Wis. 2d at 272-73, 233 N.W.2d at 376; *see also* Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513 (1966); Note, *Tort Liability for Wrongful Life*, 7 J. FAM. L. 465 (1967).

277. *See, e.g., Gleitman*, 49 N.J. at 27-28, 227 A.2d at 692;*Treatment of Injury*, *supra* note 58, at 155.

278. *Id.*

279. *See, e.g., Phillips*, 508 F. Supp. at 541; *Elliot*, 361 So. 2d at 548; *Blake*, 698 P.2d at 322; *Nelson*, 678 S.W.2d at 925; *Caserta*, 332 S.E.2d at 881; *Dumer*, 69 Wis. 2d at 273. 233 N.W.2d at 376.

280. *Turpin*, 31 Cal. 3d at 238, 643 P.2d at 965, Cal. Rptr. at 348; *Procanik*, 97 N.J. at 356, 478 A.2d at 762; *Harbeson*, 98 Wash. 2d at 479-80, 656 P.2d at 495. One theory with respect to the limited recovery rule propounded in *Turpin* and *Harbeson* is that the damages allowed are perceived by these courts as "different in kind" from any offsetting benefit the defendant conferred through his negligence. *Treatment of Injury*, *supra* note 58, at 156-57. A critic of

such expenses are readily measureable[281] and would not have been incurred but for the negligent act or omission of the defendant.[282]

General damages for pain and suffering and an impaired childhood currently remain unobtainable.[283] The courts endorsing the wrongful life tort assert that an award of general damages requires the comparison of the value of an impaired life with non-existence.[284] This calculation, as in those jurisdictions that adhere to *Gleitman*, is held to be a philosophical one beyond the capabilities of the judicial system.[285] Such speculative damages are held to be incalculable as there is no rational basis for assigning a value to non-existence.[286] The pro-wrongful life courts avoid this calculation altogether by allowing recovery of only the pecuniary losses.[287]

Some proponents of the wrongful life action, however, contend that general damages are not immeasurable. Justice Mosk dissenting in *Turpin*, felt that the majority was unjustified in denying general damages.[288] He contended that compensating the infant plaintiff for pain and suffering involved a difficult calculation but one the jury was capable of.[289] The majority in *Procanik* exhibited a skeptical attitude regarding the capabilities of juries intimating that pain and suffering in a wrongful life action is far too emotional an issue for juries to deal with in any coherent manner.[290] However, assigning a value to pain and suffering has been a common practice for courts.[291] The pain and suffering of a child should be no more difficult to measure than that of an adult in any other situation. Furthermore, wrongful life is treated as a tort action and tort law demands that an injured person be compensated for all damage the tortfeasor has proximately caused him.[292] It follows that difficulty

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this view points out that this doctrine is relevant only to the determination of damages and not to the establishment of injury. *Id.* at 157.

281. *See, e.g., Harbeson*, 98 Wash. 2d at 482, 656 P.2d at 496-97.

282. *See, e.g., id.* at 478, 656 P.2d at 494.

283. *See, e.g., Turpin*, 31 Cal. 3d at 237, 643 P.2d at 965, 182 Cal. Rptr. at 347; *Procanik*, 97 N.J. at 353, 478 A.2d at 763; *Harbeson*, 98 Wash. 2d at 482, 656 P.2d at 496-97.

284. *Turpin*, 31 Cal. 3d at 235, 643 P.2d at 963-64, 182 Cal. Rptr. at 346-47; *Procanik*, 97 N.J. at 353, 478 A.2d at 763; *Harbeson*, 98 Wash. 2d at 482, 656 P.2d at 496.

285. *Turpin*, 31 Cal. 3d at 236, 643 P.2d at 964, 182 Cal. Rptr. at 347; *Procanik*, 97 N.J. at 354, 478 A.2d at 763; *Harbeson*, 98 Wash. 2d at 482, 656 P.2d at 496.

286. *Turpin*, 31 Cal. 3d at 236-37, 643 P.2d at 964, 182 Cal. Rptr. at 347; *Procanik*, 97 N.J. at 353, 478 A.2d at 763; *Harbeson*, 98 Wash. 2d at 482, 656 P.2d at 495.

287. *Turpin*, 31 Cal. 3d at 237, 643 P.2d at 965, 182 Cal. Rptr. at 348; *Procanik*, 97 N.J. at 356, 478 A.2d at 762; *Harbeson*, 98 Wash. 2d at 479-80, 656 P.2d at 496-97.

288. *Turpin*, 31 Cal. 3d at 240, 643 P.2d at 966, 182 Cal. Rptr. at 349. Justice Mosk was in agreement with *Curlender*. *Id.*

289. *Id.*

290. *Procanik*, 97 N.J. at 354, 478 A.2d at 763. In reference to a wrongful life claim the court stated that "[s]uch a claim would stir the passions of jurors about the nature and value of life, the fear of non-existence, and about abortion." *Id.*;*see also Treatment of Injury, supra* note 58, at 160.

291. Those favoring wrongful life have been quick to point out that the judicial system has often allowed damages for pain and suffering. Note, *A Cause of Action for "Wrongful Life":[A Suggested Analysis]*, 55 MINN. L. REV. 58, 66 (1971) [hereinafter *Wrongful Life*]; *Wrongful Life: A Modern Claim, supra* note 256, at 149.

292. *Curlender*, 106 Cal. App. 3d at 830, 165 Cal. Rptr. at 489.

of measurement should not preclude an award of general damages.[293]

Those favoring wrongful life contend that general damages for pain and suffering may be awarded without resorting to comparing nonexistence with impaired existence. One such method suggested is a balancing test.[294] This test requires no consideration of nonexistence[295] but only a balancing of the benefits of a normal life against the disadvantages of living with deformities.[296] This balancing allows the court to award the defective child damages according to the severity of his impairment and still maintain that life with defects is not without value.[297]

In a similar test, one commentator addresses the possibility that the comparison of nonexistence to impaired existence can be utilized in a tort framework and should not preclude a wrongful life action.[298] To employ such a comparison, the court would have to assign plus or minus values to life, life with defects, and non-existence.[299] This commentator reflects that such an analysis is similar to that employed by the judicial system whenever it places a monetary value on intangibles such as pain and suffering.[300] He theorizes that with the aid of this formula, a court should be able to determine that life with minor defects is worth more than nonexistence (as where the person is still going to have the ability to function in society) and life with severe defects is worth less than nonexistence.[301] A monetary value reflecting nonpecuniary damages could thereby be arrived at.[302]

C. *The Traditional Tort Framework*

Courts that recognize the wrongful life cause of action analyze it in terms of the elements of negligence.[303] However, the state supreme courts of Califor-

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293. *See Berman*, 80 N.J. at 428, 404 A.2d at 12; *Procanik*, 97 N.J. at 368, 478 A.2d at 771 (Handler, J., concurring in part and dissenting in part).

294. *See Wrongful Life: A Modern Claim*, *supra* note 28, at 149; Rogers, *supra* note 258, at 738-39. Justice Handler, in his *Procanik* dissent, also discussed this approach. *Procanik*, 97 N.J. at 368, 478 A.2d at 771. Primarily, Handler advocated measuring damages according to how much of a diminished childhood the infant plaintiff must endure due to decreased parental capacity to love and care for him. *Id.* at 358-63, 478 A.2d at 765-68. Such a calculation was rejected by the majority because it contemplated that the parents would not have avoided plaintiff's birth had they been properly advised. *Id.* at 355, 478 A.2d at 764. *See supra* text accompanying notes 208-12.

295. Comment, *Wrongful Life: The Right Not To Be Born*, 54 TUL. L. REV. 480, 495-97 (1980) (footnote omitted).

296. *Id.* at 497. The commentator recognizes that the defendant physician may in some circumstances, have conferred both a benefit and a detriment on the plaintiff. *Id.*

297. *Id.* at 497. A reasonableness test would be applied — would a reasonable person with such a defect have chosen not to be born. *Id.* at 498.

298. *See Wrongful Life*, *supra* note 291, at 64-66.

299. *Id.* at 66. Life without defect would be assigned a plus value, life with defect would be assigned a minus value, and nonexistence would be assigned a zero value. *Id.* A case by case consideration is the best approach to such a test. *Id.*

300. *Id.*

301. *Id.* at 65.

302. *Id.* at 66.

303. *See supra* text accompanying notes 137-227. Discussion of the elements of negligence is considered necessary to the wrongful life analysis by one legal writer. *See Public Policy over*

nia, Washington and New Jersey are still troubled by the issues of injury and damages.[304] The court in *Procanik* stated that law is more than logic and should not be instrumental in producing an unjust result.[305] This statement could be interpreted as recognition by the court that existence of a wrongful life tort may not require that this cause of action fit perfectly into a tort framework.[306] Tedeschi, a commentator relied upon by *Gleitman*, proposed that wrongful life could not fit the traditional tort framework.[307] Another author suggests that in some wrongful life situations equity principles should determine the approach to granting relief to a defective infant plaintiff.[308]

Taken together, these views indicate that courts could justifiably be flexible regarding the approach to wrongful life, as they have already demonstrated that it is not imperative that all the elements of a tort framework be established. Yet, those courts allowing a wrongful life action strain to do just that, even where policy considerations are discussed at length. There are two possible alternatives to such contrived analysis. The first alternative is to definitively state that the plaintiff in a wrongful life action has suffered an injury, following the example of the Illinois Court of Appeals[309] in accordance with Justice Handler's dissenting position in *Procanik*.[310] Such a holding would dissipate the present confusion surrounding this issue. The other alternative is to abandon the attempt to force wrongful life into a traditional tort context and find as a matter of public policy that wrongful life is an actionable tort.[311] Policy considerations are significant in either decision.

D. Policy

There are a number of policy considerations involved on both sides of the wrongful life issue. A balancing of these considerations indicates the form the action must take. The "floodgates of litigation" theory was first propounded in *Zepeda v. Zepeda*,[312] a wrongful life action brought by a healthy but illegitimate child. The *Zepeda* court reasoned that recognition of such a cause of action would be followed by claims protesting every possible disadvantage at

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Metaphysics, *supra* note 138, at 518.

304. *See supra* notes 138, 200 and accompanying text; text accompanying notes 177-85. Only the North Carolina appeals court definitively stated that the infant plaintiff had suffered a legally cognizable injury. *See supra* note 267.

305. *Procanik*, 97 N.J. at 351, 478 A.2d at 762.

306. *See id.*

307. *See Wrongful Life*, *supra* note 291, at 63.

308. *Id.* at 67. One theorist refers to the wrongful life analysis in *Harbeson* as the "practicable cause of action approach." *The Inequitable Umbrella*, *supra* note 85, at 146. The proposition is that notwithstanding the tort discussion, limited recovery resulted because the court in *Harbeson* felt it was a "fair" outcome. *Id.*

309. *See supra* text accompanying note 223.

310. 97 N.J. at 356-69, 478 A.2d at 762-72. Justice Handler noted that the majority "expressly rejects any claim that a cognizable tort has been committed on the infant." *Id.* at 357, 478 A.2d at 765.

311. Considerations of fairness and deterrance of medical malpractice lead to an abrogation of the injury requirement according to some proponents of this cause of action. *Treatment of Injury*, *supra* note 58, at 152.

312. 41 Ill. App. 2d 240, 259-60, 190 N.E.2d 849, 858 (1963).

birth.[313] However, the present wrongful life action is limited to those plaintiffs born with physical defects.[314] The pro-wrongful life courts consider such damages both tangible and measureable.[315]

Another concern is that malpractice insurance costs will increase and these costs will be passed on to the public in the form of health care costs.[316] The field of obstetrics and gynecology have been especially hard hit by the insurance crisis.[317] On the other hand, if wrongful life is not recognized, then health care costs may rise due to the increased number of impaired children that society may have to care for where the parents are financially unable to do so.[318] The financial disadvantages will be accompanied by an emotional toll, the terrible emotional suffering parents experience when they bear mentally or physically handicapped children, as well as the suffering often endured by the impaired child.[319] Society's interest in promoting a healthier populace through genetic counseling clearly weighs more heavily than the societal interest in lower malpractice insurance premiums. Furthermore, the burden on the medical profession is slight compared to that born by the handicapped infant plaintiff.[320]

One critic is concerned with the "emotional bastard theory" that children will believe they were unwanted because a wrongful life action was brought.[321] Courts have already recognized the right of a parent to bring a wrongful birth action.[322] Recognition of a wrongful life action should not significantly increase any emotional impact on the child. Furthermore, as in cases previously discussed, plaintiffs in wrongful life actions are frequently so severely impaired that it is improbable that the child will be cognizant enough to form such an opinion.

Recognizing the wrongful life tort will remedy a serious wrong.[323] The infant plaintiff is alive to bear this burden of suffering due to the defendant health care professional's negligence.[324] It is unfair to allow the defendant to escape liability for his wrongful act, while innocent parties bear the burden.

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313. *Id.*

314. See *supra* note 23 regarding actions brought by unwanted or illegitimate children.

315. *See, e.g., Harbeson*, 98 Wash. 2d at 482, 656 P.2d at 496-97.

316. *See* Snyderman, *supra* note 21, at 29. Birth related medical malpractice suits are increasing. Frank, *Wrongful Life*?, 71 A.B.A.J. 26 (Feb. 1985). At least one commentator has noted that the trend is toward greater liability of physicians. *See* Nicolson, *supra* note 13, at 340; *Treatment of Injury, supra* note 58, at 164.

317. "Sorry Your Policy Is Canceled," TIME, March 24, 1986, at 16, 20. Seventy-three percent of the members of the American College of Obstetricians and Gynecologists have been sued for malpractice at least once. *Id.*

318. *See Parental Liability, supra* note 127, at 306. Impaired children may become wards of the state. *Id.*

319. *See supra* note 208.

320. Comment, *The Legal Recognition of Medical Malpractice Tort Claims Based Upon Theories of Wrongful Birth and Wrongful Life*, 15 N.C. CENT. L.J. 274, 290 (Wntr. 1985).

321. *See* Snyderman, *supra* note 21, at 29. Snyderman theorizes that this action may lead to a society of alienated, unwanted individuals. *Id.*

322. *See supra* note 11 and accompanying text.

323. *See Curlender*, 106 Cal. App. 3d at 819, 165 Cal. Rptr. at 482; *Wrongful Life, supra* note 291, at 79-80.

324. *See, e.g., Curlender*, 106 Cal. App. 3d at 829, 165 Cal. Rptr. at 488.

Allowing recovery by the infant plaintiff will also serve a deterrant function - professional carelessness is discouraged.[325] In addition, society has an interest in genetic counseling and prenatal testing.[326] The wrongful life action will ensure that these procedures are performed and interpreted responsibly.[327]

E. The Present Form of the Wrongful Life Action

The duty to provide accurate genetic counseling owed to prospective parents is extended to the child through foreseeability and public policy.[328] It is foreseeable that the deprivation of the parental constitutional right to choose whether to have a child harms not only the parents but also the child.[329] A breach of this duty may occur either before or after conception.[330] This duty encompasses the duty to properly perform relevant medical procedures undertaken, such as an abortion or a vasectomy,[331] as well as the duty to inform.[332] The Washington Supreme Court in *Harbeson* emphatically stated that physicians morally opposed to abortion are under no duty to perform this operation, but once undertaken, the physicians may not carelessly perform the procedure.[333] Existence of a breach is contingent upon a finding that the defendant's performance fell below the standard of care imposed upon his or her peers in the medical profession.[334] A showing of foreseeability of harm to the infant

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325. *But see* Rogers, *supra* note 258, at 753. One commentator opined that preconception/prenatal malpractice is deterred by the existence of a wrongful birth action allowing recovery of the extraordinary medical expense and thus, a wrongful life action which merely vests recovery of these damages in the child has no further deterrant value. *Treatment of Injury*, *supra* note 58, at 163-64. However, this is a persuasive argument for allowing a wrongful life plaintiff to recover general damages as well as special damages.

326. *See, e.g.*, *Harbeson*, 98 Wash. 2d at 481, 656 P.2d at 496.

327. *Id*; *see also The Right Not To Be Born*, *supra* note 23, at 499.

328. *See, e.g.*, *Turpin*, 31 Cal. 3d at 233-34, 643 P.2d at 962, 182 Cal. Rptr. at 345 (parents have right to act in their child's interests, therefore interests of both child and parents are involved); *Harbeson*, 98 Wash. 2d at 480-81, 656 P.2d at 495-96 (the court discussed both foreseeability and public policy).

329. *See, e.g.*, *Turpin*, 31 Cal. 3d at 234, 643 P.2d at 962, 182 Cal. Rptr. at 345.

330. *E.g.*, *Turpin*, 31 Cal. 3d at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343 (negligence occurred before conception — when Turpin's first child was improperly diagnosed); *Procanik*, 97 N.J. at 343-44, 478 A.2d at 758 (negligence occurred during pregnancy — when Mrs. Procanik's german measles were incorrectly diagnosed as roseola).

331. *E.g.*, *Harbeson*, 98 Wash. 2d at 492, 656 P.2d at 491.

332. *Id.*

333. *Id.*

334. *Id.* at 482-83, 656 P.2d at 496-97; *see also* Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488 (1978). This author discusses criteria courts can employ to determine appropriate standards of care to be met by physicians in the genetic counseling field. *Id.* at 1504-08. The author asserts that all physicians should be compelled to be knowledgeable about the genetic disorders they can expect to occur in their field and about the techniques available to discover the likelihood of defects. *Id.* at 1504-05. To determine whether a physician has remained negligently uninformed, the court should consider the number of articles on the subject that have appeared in medical journals. *Id.* at 1505. An inadequate level of practice in a physician's community should not render him immune from liability. *Id.* at 1506. The author further urges that a physician should, when engaging in genetic counseling, inform the prospective parents concerning all risks and options that a rea-

plaintiff satisfies the element of proximate cause.[335] The child would not be alive and suffering "but for" the negligence of the defendant.[336] A defendant in a wrongful life action will not prevail by claiming that he did not cause the defect.[337]

Courts that recognize the wrongful life action persist in employing a tort analysis, despite their ambiguity as to the issues of injury and damages.[338] These courts have had less difficulty establishing the elements of duty, breach, and proximate cause.[339]

At the present time, this cause of action disallows recovery of general damages and only those extraordinary medical expenses that are the result of the defect are recoverable.[340] Those expenses incurred during the child's minority may be recovered either by the child's parents or by the child.[341] Expenses incurred after the child has reached its majority may be recovered only by the child.[342] General damages and the issue of injury are interdependent. Both involve a consideration of nonexistence. Once the courts have determined that the infant plaintiff has suffered an injury by being born, then a reasonable analysis should lead to an award of general damages, as tort law requires that the plaintiff "be compensated for all damages proximately caused by the wrongdoer."[343]

CONCLUSION

Every court confronted with a wrongful life action has analyzed it according to the elements of negligence. Wrongful birth suits, the parental action, are widely recognized, but most courts withhold recognition of the wrongful life cause of action brought on behalf of a defective child. Courts disfavoring wrongful life generally argue that one or more of the negligence elements are missing. Such courts articulate two major obstacles to this action: lack of a legally congizable injury, and immeasurability of damages. Many courts contend that a holding that the child's birth is an injury in fact will undermine the "sanctity of life" policy of the judiciary and the legislature. Furthermore, damages are held to be too speculative as no one can determine whether life with defects is worth less than nonexistence.

Most courts that have denied a recovery for wrongful life have done so in reliance upon early New Jersey rationale as expressed in *Gleitman* and *Berman*. New Jersey has now recognized a limited form of the wrongful life

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sonable person would need to know in deciding whether or not to have children. *Id.* at 1508 (footnote omitted).

335. *See Turpin*, 31 Cal. 3d at 230, 643 P.2d at 960, 182 Cal. Rptr. at 343.

336. *See supra* text accompanying notes 122, 176, 202-03, 220-21.

337. *See Harbeson*, 98 Wash. 2d at 483, 656 P.2d at 497.

338. *See supra* text accompanying notes 137-227.

339. *Id.*

340. *See, e.g., id.*

341. *Turpin*, 31 Cal. 3d at 238, 643 P.2d at 965; 182 Cal. Rptr. at 348; *Procanik*, 97 N.J. at 352, 478 A.2d at 762; *Harbeson*, 98 Wash. 2d at 479-80, 656 P.2d at 495.

342. *Turpin*, 31 Cal. 3d at 238, 643 P.2d at 965, 182 Cal. Rptr. at 348; *Procanik*, 97 N.J. at 352, 478 A.2d at 762; *Harbeson*, 98 Wash. 2d at 479-80, 656 P.2d at 495.

343. *Curlender*, 106 Cal. App. 3d at 830, 165 Cal. Rptr. at 489.

tort and thereby weakened the significance of these two cases.[344] Moreover, due to the pro-choice abortion decision in *Roe*, one of the legal objections to wrongful life is no longer in effect.[345] Thus, courts that have accorded a negative reception to the wrongful life cause of action, in reliance upon the analysis propounded by the New Jersey Supreme Court or upon the illegality of abortion, must now reassess their positions and concede that policy, justice and logic dictate recognition of this heretofore controversial tort.

Wrongful life is now actionable only in California, Washington, New Jersey, Colorado and Illinois. These courts analyze wrongful life in terms of the elements of negligence. However, such reasoning has highlighted a puzzling inconsistency in the rationale of pro-wrongful life courts. Such courts award pecuniary damages despite their failure to determine that the infant plaintiff has suffered an injury in the form of its birth. This omission notwithstanding, public policy has been of great significance in the development of this cause of action. Courts favoring wrongful life acknowledge that society benefits from the availability of genetic testing and counseling. Further, these jurisdictions recognize that such recovery is a deterrent to malpractice and is harmonious with concepts of justice. These courts should go one step further to round out the analysis by finding that the child has suffered an injury in being born, or that the tort frame is unnecessary as matters of public policy render wrongful life actionable.

Pro-wrongful life courts permit recovery only of special damages, those extraordinary medical expenses incurred by the child as a result of the defect. With the exception of North Carolina, either the parents or the child may recover these expenses, but there may not be a double recovery. These courts evince their ambiguity concerning this cause of action by disallowing general damages for pain and suffering or for a diminished childhood, professing that calculation of such damages are beyond the capabilities of juries. These courts maintain that measurement of wrongful life damages is contingent upon a comparison of nonexistence with handicapped existence. Such a proposition is unconvincing and ignores precedent. The only factor that need be considered is the pain and suffering of the infant — subject matter that juries have considered repeatedly in other negligence or malpractice suits. Moreover, as Justice Handler points out in his dissent to the majority decision in *Procanik*, the court has considered such an issue before and held that in some circumstances life is not preferable where a person is hopelessly ill, and allowed life support systems to be discontinued. In a wrongful life situation, the measurement of pain and suffering of a defective child is surely no more beyond the abilities of the judicial system than is a decision to allow a terminally ill patient to die.[346] Both considerations encompass the concept of nonexistence. Clearly, man's ignorance of nonexistence should not be an obstacle to an award of general damages to a suffering infant plaintiff. Useful formulas have been proposed by commentators to aid juries in the types of damage calculations associated with the wrongful life cause of action. Recovery by a defective child for both spe-

344. *See The Inequitable Umbrella of Wrongful Life, supra* note 85, at 142.

345. *Id.* at 140.

346. Procanik, 97 N.J. at 366-67, 478 A.2d at 770-71.

cial and general damages is small compensation for the burden he or she must bear. The time is ripe for full recognition of the wrongful life cause of action.

Christina C. Duddy

COMMENT

AFSCME v. State of Washington: The Future of Equal Pay for Comparable Worth

An analysis of the existing wage disparity between men and women[1] reveals that job related sex discrimination[2] and segregation[3] continue to act as

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1. In 1986, women earned 64 cents for every $1.00 a man earned. *See NOW Notes Twenty Years of Feminism*, Boston Globe, Dec. 1, 1986, at p.2, col. 1.

In 1980, men in the managerial and administerial job category had median earnings of $25,000, while women in this category had median earnings of $13,000. *See Retirement Equity Act of 1983: Hearings on S.19 Before the Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 23 (1983).

Of the 2.38 million women who work full-time, 53% earn less that $5,000 a year. *Poverty Rate Increase: Hearings Before the Subcomm. on Oversight and Subcomm. on Public Assistance and Unemployment Compensation of the Comm. on Ways and Means House of Representatives*, 98th Cong., 1st Sess. 6 (1983). Of all income earners making $15,000, only nine percent are women, and 21% of the female-headed households with the head-of-household working full-time still fall below the poverty line. *Id.*

The average female head of a household with no spouse present in 1981 earned an income of $10,960. *See Women and Children in Poverty: Hearing Before the Task Force on Entitlements, Uncontrollables and Indexing of the Committee on the Budget*, 98th Cong., 1st Sess. 1 (1983). The average male in a similar position earned $19,889. *Id.*

Regardless of the job description or educational attainment, wage disparity between men and women continue to exist. In 1981, women workers with four or more years of college had the same income as men who had only three years of high school — $12,085 and $11,936, respectively. *See* Pauley, *The Exception Swallows the Rule: Market Conditions as a "Factor Other Than Sex" In Title VII Disparate Impact Litigation*, 86 W. VA. L. REV. 165, 166 (1983) (citing Women's Bureau: Office of the Secretary, U.S. Department of Labor, Facts On Women Workers, 1 (1982)).

2. *See* Blumrosen, *Wage Discrimination, Job Segregation and Title VII of The Civil Rights Act of 1964*, 12 U. MICH. J. L. REF. 397, 403-04. Sex discrimination has existed in the United States since the Industrial Revolution. *Id.* at 403. This is not only evidenced by a disproportional concentration of women into typical female jobs, but also by restrictive statutes that banned women from certain occupations and limited the number of hours they could work. *Id.* After 1964, with the advent of Title VII, this practice is no longer legally acceptable. *Id.* at 404. *See also infra* note 4.

3. *See infra* note 4 and accompanying text.

major demarcations in our society.[4] The ramifications of this demarcation,[5] in view of Title VII[6] and its congressional mandates,[7] illustrate that recent judicial holdings will curtail Title VII's imported meaning.[8] As such, the Court's reluctance to adhere to such mandates,[9] and to the judicial interpretations set out in previous Title VII litigation,[10] indicates that the Court continues to rely

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4. *See* Blumrosen, *supra* note 2, at 415-16. "Sex discrimination as represented by job segregation remains the most common characteristic of women's work, and continues to be a major factor in the work situation of minorities. Furthermore, these segregated jobs are concentrated in the lowest paying of the occupations. It is this concentration in lower paying segregated jobs which accounts for most wage differentials between men and women." *Id.*

"Twenty-five percent of the female labor force is employed in the same five jobs: waitress, secretary, stenographer, bookkeeper, household worker and elementary school teachers." *Id.* at 407.

5. *See supra* note 1 and accompanying text.

6. 42 U.S.C. § 2000e-2(a) (1976) states in pertinent part: "It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin." *Id.* § 2000e-2(a)(1).

Today, in order to successfully charge an employer with sex discrimination, one must prove either disparate impact or disparate treatment. Under a disparate impact theory, "discrimination may be established by showing a facially neutral employment practice, not justified by business necessity, [which] has a disproportionately adverse impact upon members of a group protected under Title VII." American Federation of State, County & Municipal Employees v. Washington, 770 F.2d 1401, 1405 (9th Cir. 1985) [hereinafter AFSCME]; *see also* Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978); Dothard v. Rawlenson, 433 U.S. 321 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Under the disparate treatment theory, an employer's intent or motive in adopting a challenged policy is an essential element of liability for violation of Title VII. AFSCME, 770 F.2d 1401; *see also* County of Washington v. Gunther, 452 U.S. 161 (1980); *Manhart*, 435 U.S. 702.

7. The congressional mandate of Title VII has been interpreted by several courts. *See, e.g., Gunther*, 452 U.S. at 178 (citing S. REP. NO. 867, 88th Cong., 2d Sess. 12 (1964)). "As Congress has itself indicated, a 'broad approach' to the definition of equal employment opportunity is essential to over-coming and undoing the effect of discrimination." *Id*; *see also Manhart*, 435 U.S. at 709 (focus on fairness to individuals rather than fairness to classes); Franks v. Bowman Transportation Co., 42 U.S. 747, 764 (1976) (courts' wide discretion fashions the most complete relief possible); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (persons made whole for injuries suffered through past discrimination); *Griggs*, 401 U.S. at 429-30 (achieve equality of employment opportunities).

8. *See supra* note 7 and accompanying text.

9. *See supra* note 7.

10. *See, e.g.*, Arizona v. Norris, 463 U.S. 1073 (1983) (violation found when women pay same amount to state retirement plan but receive lower monthly benefits than men); Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Commission, 462 U.S. 669 (1983) (disparate impact found where male employees' health insurance coverage for spousal pregnancy unequal to female employees' coverage); *Manhart*, 435 U.S. 702 (disparate treatment found where actuarian tables utilized sex differentials as basis for calculating benefits); Barone v. Hackett, 602 F. Supp. 481 (1st Cir. 1984) (liability under Title VII for treating pregnancy differently under the state's Temporary Disability Act); *see also* Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076 (1978) (prohibits sex discrimination under Title VII on the basis of pregnancy); Brelmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980);

on ill-reasoned notions[11] that Title VII does not purport to eradicate discrimination through broad socio-economic readjustments.[12] Moreover, this reluctance to follow through with the underlying intent[13] of Title VII ultimately results in the Court's effectuating its own economic policy.[14] This reticence is further exacerbated in view of the distinction between private industry and public interest[15] in that the Court has frequently intervened in those areas of

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Genthner, *Arizona v. Norris: Supreme Court Death Knell For Sex Segregated Mortality Tables*, 52 INS. COUNS. J. 295 (1985).

11. These ill-reasoned notions can be illustrated by the Court's reliance on the prevailing market rate as being indicative of economic policy free from objective, quantifiable sex discrimination. Brief for Appellees at 25, American Federation of State, County and Municipal Employees (AFSCME) v. State of Washington, 578 F. Supp. 846 (9th Cir. 1983); see also *infra* notes 20, 35, 123 & 152 for a discussion of prevailing market rates.

12. *See Manhart*, 435 U.S. 702 (1978). "Neither Congress nor the Court have recognized [a cost-justification] defense under Title VII." *Id.* at 716-17.

13. *See* 110 CONG. REC. 2577 (1964) (Representative Smith of Virginia, the proponent of the addition of the word "sex" to the Civil Rights Act of 1964 stated that, "I think we all recognize and it is an indisputable fact that all throughout industry women are discriminated against in that just generally speaking they do not get as high compensation for their work as do the majority sex.") *Id*; *see also* H.R. REP. NO. 238, 92d Cong., 1st Sess. 4-5.

> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone. Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964.

Id.

14. By allowing discrimination to remain pervasive within economic society, its ramifications result in the loss of wages to women. Studies indicate that between the years of 1967 to 1975, women's loss in wages due to discrimination amounted to 371 billion dollars. *See* Note, *Proving Title VII Sex-Based Wage Discrimination After* County of Washington v. Gunther, 4 CARDOZO L. REV. 281, 282 (1983) (citing U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION RESEARCH REP. NO. 56, WOMEN: THE PATH TO EQUAL EMPLOYMENT 15 (1977)); *see also* S. REP. NO. 867, 88th Cong. 2d Sess. 9 (1964) (estimation that the black labor force, if fairly and fully utilized, the gain in the gross national product would reach 13 billion dollars).

15. The public versus private distinction is currently being challenged by legal scholars as an artificial allocation of rights, among individuals and the state. Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PENN. L. REV. 1296 (1982). According to Brest, with private rights, "citizens retain certain inalienable rights held in the pregovernmental state of nature, that the state may not abridge." *Id.* at 1296-97. The public distinction is defined as "citizens entering into civil society relinquish all natural rights and possess only those rights granted by legislatures and other law-making institutions." *Id.* at 1297. This distinction is further advanced by Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PENN. L. REV. 1429. According to Mnookin private "carries with it a strong presumption that it is not legitimate for the government to be paternalistic or highly regulatory, [whereas] . . . within the public sphere, there would be no such presumption." *Id.*

The public/private distinction is seen as collapsing in Casebeer, *Toward a Critical Jurisprudence — A First Step by Way of the Public — Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 425 (1983) who states: "the surrender of personal will to public will shall go unchallenged where the governmental control is seen as responsible and its actions compelling." *Id.*

the private economy which are affected with public awareness.[16] Consequently, the Court's failure to adequately address the public policy issue of equal pay for comparable work[17] has resulted in the perpetuation of sex discrimination and segregation by denying women their equitable compensation.[18]

In the recent case of *American Federation of State, County And Municipal Employees (AFSCME) v. State of Washington*,[19] the Ninth Circuit Court of Appeals evaluated the doctrine of equal pay for comparable worth.[20] Under this doctrine, plaintiffs may seek additional remuneration for jobs by comparing the intrinsic worth[21] of those jobs with others in the community.[22] The comparison would be based with those jobs requiring similar skills, experience, education and responsibility.[23] Plaintiffs seeking relief could do so under Title VII using the theories of disparate impact[24] and disparate treatment[25] as their basis for recovery.[26]

In *AFSCME* the appellees sought to prove that the state's reliance on the traditional policy of paying employees the prevailing market rates of pay resulted in a twenty percent wage disparity for those jobs employing primarily women.[27] The appellees first utilized the theory of disparate impact as their basis of recovery.[28] Under this theory a plaintiff must prove that the defendants' neutral employment practice adversely affects a disproportionate number of the protected class.[29] Here the petitioners sought to prove that the State of Washington's reliance on the market as its basis for setting wages has an adverse impact on women because women have historically received lower com-

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16. *See infra* note 212.

17. See *infra* notes 20 & 91 for a discussion of the Court's failure to address the public policy issue of equal pay for comparable worth.

18. *See* Blumrosen, *supra* note 2, at 415; Pauley, *supra* note 1, at 168; Note, *supra* note 14, at 289.

19. *AFSCME*, 770 F.2d 1401 (9th Cir. 1985).

20. *AFSCME*, 770 F.2d at 1403; *see also* Note, *supra* note 14, in which the author states:

> The premise of the comparable worth doctrine is that entire job classifications are undercompensated because they are traditionally filled by women, rather than because of any rationally based determinations of the value of such jobs. The measure of a job's worth should be determined without regard to the depressed value placed on it by a society in which employers capitalize on women's acceptance of lower pay. Thus, jobs requiring similar levels of skill, education, experience and responsibility should be considered comparable in value; this value should determine remuneration. If the intent of Title VII is to be effectuated, depressed wages which result from discriminatory stereotyping and historical undervaluation of 'women's work' should be unlawful, regardless of whether the discrimination is intentional and regardless of whether the situation is one of unequal pay for the same work or unequal pay for comparable work.

Id. at 319.

21. *Id.*

22. County of Washington v. Gunther, 452 U.S. 161, 166 (1981).

23. *See supra* note 20.

24. *See supra* note 6.

25. *Id.*

26. *Id.*

27. *AFSCME*, 770 F.2d at 1403.

28. *Id.* at 1405.

29. *Id.*

pensation than men in the labor market.[30] The Court's response to this argument was to classify the free market as being too complex for disparate impact analysis and, thus, discounted the appellee's claim.[31]

Second, under the theory of disparate treatment, in which a plaintiff must prove discriminatory intent[32] by the employer, the appellees contended that the State's reliance on the market system perpetuated sex discrimination because the market reflects historical patterns of sex discrimination and segregation.[33] The Court rejected this argument and stated that the "State did not create the market disparity and has not been shown to have been motivated by impermissible sex-based considerations in setting salaries."[34]

The Court based its holding on the belief that the State of Washington's current wage structure, which is based on existing free market conditions,[35] does not violate Title VII even though "male-dominated jobs are compensated at a higher rate than employees in dissimilar female-dominated jobs. . . ."[36]

The court of appeals failed to recognize that employment evaluations, when based on the free-market economy for purposes of salary distributions, are inherently discriminatory.[37] In effect, the court refused to recognize the market economy issue as a prima facie element for Title VII litigation.[38]

This Comment examines the doctrine of equal pay for comparable worth as delineated in *AFSCME*. Part I traces the history and interelationship among Title VII, the Equal Pay Act and the Bennett Amendment as put forth in the landmark case of *County of Washington v. Gunther*.[39] Part II focuses specifically on the holding and reasoning in the *AFSCME* case. In Part III, this Comment analyzes the *AFSCME* case and demonstrates that although the court held that segregation is not a "factor other than sex" for purposes of Title VII, it did not hold that Title VII should be utilized to effect economic readjustments, or that public interest necessitated judicial intervention. This Comment concludes with a discussion that continued reliance on the competitive market economy as a viable criteria for wage disparity will have a dramatic deleterious effect upon the future economic and social opportunities of all individuals.

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30. *Id.*

31. *Id.* at 1406.

32. *See supra* note 6.

33. *AFSCME*, 770 F.2d at 1406.

34. *Id.*

35. *Id.* at 1403-08; *see also* Blumrosen, *supra* note 2, at 488. Wage setting practices based on free market conditions indicate a reliance on an economic structure in which salaries are a reflection of the availability of jobs, the opportunity for employers to fill these jobs and the educational and vocational demands needed to perform the various tasks required. *Id.* These factors must be shown as being independent of any adverse, discriminatory factors, such as segregation, in order to justify wage differentials. *Id.* In effect, the law of supply and demand must prevail, absent a showing of discrimination. *Id.*

36. *AFSCME*, 770 F.2d at 1408.

37. *See* Blumrosen, *supra* note 2, at 415; Pauley, *supra* note 1, at 168; Note, *supra* note 14, at 289.

38. *See supra* note 6; *see also* Christensen v. State of Iowa, 563 F.2d 353, 356 (8th Cir. 1973); Norris, *Comparable Worth Disparate Impact, and The Market Rate Salary Problem: A Legal Analysis and Statistical Application*, 71 CA. L. REV. 730 (1983).

39. *Gunther*, 452 U.S. 161 (1981).

I. History of the Doctrine of Equal Pay for Comparable Worth

The major vehicle for incorporating equal pay for comparable worth has been Title VII litigation.[40] Title VII, as drafted in 1964, is the appropriate mechanism for addressing employment discrimination when one examines the legislative history surrounding its enactment,[41] the textual implications within its pronouncements that were foreshadowed by the EPA,[42] as well as, the judicial interpretations embodied in case law.[43] Taking each component separately, one begins to see how comparable worth proponents can utilize Title VII as a viable instrument toward the elimination of discrimination in employment.

Title VII was enacted to eliminate the egregrious effects of discrimination in employment.[44] It was implemented by Congress to prevent employers from discriminating against individuals based on their race, color, religion, sex or national origin.[45] Although initially created to protect blacks,[46] the House amended the bill to include the word sex before its final approval.[47] When it finally was approved by the House and later sent to the Senate, some feared that the expansive language of Title VII would conflict with earlier legislation,[48] specifically the Equal Pay Act.[49] The Equal Pay Act was enacted in 1963 to remedy hourly wage discrimination based on sex in specific employment situations requiring "equal skill, effort and responsibility."[50] Because many felt that the Equal Pay Act was limited to claims where the jobs were equal in nature, the major concern of Congress was whether the broad language of Title VII would exceed that of the Equal Pay Act[51] and thus allow petitioners relief where their work was comparable and not equal to those of the opposite sex.[52]

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40. *See supra* notes 2, 6 and accompanying text.

41. *See* H.R. 8898, 87th Cong. 1st Sess. (1962); H.R. 10226, 87th Cong., 2d Sess. (1962).

42. *See* 29 U.S.C. § 206 (d)(1) (1978). The Equal Pay Act states in pertinent part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishments at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. . . .

Id.

43. *See Gunther*, 452 U.S. 161 (1981).

44. *See supra* note 6.

45. *Id.*

46. *Gunther*, 452 U.S. at 190 n.4.

47. *Id.* "It has been speculated that the amendment [of the word sex] was added as an attempt to thwart passage of Title VII." *Id.*

48. *Id.* at 171-73.

49. *See supra* note 42.

50. *Gunther*, 452 U.S. at 184.

51. *Id.* at 172.

52. *Id.* at 168.

The debate among congressional members concerning the inconsistencies between the Equal Pay Act and Title VII ended with the inclusion of the Bennett Amendment[53] to Title VII. The Bennett Amendment was added as a "technical amendment"[54] to allow employers to differentiate upon the basis of sex if such differentiation was authorized by the Equal Pay Act.[55] The Equal Pay Act authorizes pay discrepencies based on bona fide occupational differences between individuals.[56] These differences are incorporated into four affirmative defenses which are based on (1) seniority (2) merit (3) quantity or quality of production, and (4) any other factor other than sex.[57] Thus, under Title VII, if an individual had a claim of sex discrimination against an employer, it would fail, via the Bennett Amendment, if such discrimination was authorized by the Equal Pay Act.[58]

Although the addition of the Bennett Amendment secured the passage of Title VII,[59] its ambiguous language continued to cause confusion as to whether its insertion limited Title VII to claims of equal pay for equal work[60] or whether it allowed the incorporation of the four affirmative defenses of the Equal Pay Act as a basis for pay differentials.[61]

The first case to interpret the meaning of the Bennett Amendment as to whether or not it does in fact "authorize" the limitation of Title VII litigation to those claims based on equal work[62] was the *County of Washington v. Gunther*.[63] In that case, the respondents, female prison guards, maintained that they had been intentionally discriminated against because they were compensated at a lower rate than were the male prison guards.[64] The County of Washington denied having a discriminatory motive and stated that the disparity in pay was due to the dissimilar nature of the jobs between the male and female guards.[65] The County further contended that Title VII litigation was

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53. *Id.* at 171. The Bennett Amendment states in pertinent part:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) (the Equal Pay Act). . . .

42 U.S.C. § 2000e-2(h).

54. *Gunther*, 452 U.S. at 173.

55. *Id.* at 192.

56. *Id.* at 172 n.12.

57. *See supra* note 42 and *infra* notes 70 & 74.

58. *Gunther*, 452 U.S. at 173.

59. *Id.* at 192.

60. *Id.* at 168.

61. *Id.*

62. *Gunther*, 452 U.S. at 178-80.

63. 452 U.S. 161 (1981).

64. *Id.* Respondents state that they were paid only 70% of their valued worth while men were paid 100% of their valued worth. *Id.* at 180-81. The County of Washington evaluated the worth of the jobs of those held by females and determined that they should be paid approximately 95% as much as male correctional officers. *Id.* at 180.

65. *Id.* at 165. "[T]he district court found that the male guards supervised more than 10 times as many prisoners per guard as did the female guards, and that the females devoted much of their time to less valuable clerical duties." *Id.*

restricted to those claims in which the employment was similar.[66] Thus, the only issue before the Court was "whether respondents' failure to satisfy the equal work standard of the Equal Pay Act in itself precludes their proceeding under Title VII."[67]

The controversy in the *Gunther* case surrounded the word "authorized" in the Bennett Amendment.[68] The Supreme Court interpreted it as not being restricted to cases involving "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[69] Instead, the Court interpreted it as incorporating only the affirmative defenses[70] of the Equal Pay Act. Barring an employer's defense based on "seniority, merit, quantity or quality of production, or any other factor other than sex," a claim of sex discrimination under Title VII could be valid even though the jobs were dissimilar in nature.[71] Thus, even though the jobs were dissimilar in nature, the Court espoused the view that Title VII should be read broadly in order to remedy the effects of discrimination.[72]

Finally, the Supreme Court affirmed the appellate court's finding that the County's devaluation of wages among female guards based on their sex violated Title VII.[73] The Court concluded in the *Gunther* case that the respondents could maintain a valid claim under Title VII and that it would not be barred by the Bennett Amendment.[74]

Although the *Gunther* decision and its progeny established controlling law with respect to future Title VII litigation,[75] the Court in *AFSCME* chose to

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66. *Id.* at 168-69.

67. *Id.* at 166 n.8.

68. *See supra* note 53.

69. *Gunther*, 452 U.S. at 168.

70. The Court stated:

> The Equal Pay Act is divided into two parts: a definition of the violation, followed by four affirmative defenses. The first part can hardly be said to 'authorize' anything at all: it is purely prohibitory. The second part, however, in essence 'authorizes' employers to differentiate in pay on the basis of seniority, merit, quantity or quality of production, or any other factor other than sex, even though such differentiation might otherwise violate the Act. It is to these provisions, therefore, that the Bennett Amendment must refer.

Id. at 169.

71. *Id.* at 161.

72. *Id.* at 178 (citing S. REP. No. 867, 88th Cong., 2d Sess. 12 (1964)).

73. *Id.* at 180-81. The failure to fully compensate female officers resulted in the Court finding that the county had intentionally discriminated against the women employees. *Id.*; *see also supra* notes 63-64.

74. The Court held:

> The Bennett Amendment does not restrict Title VII's prohibition of sex-based wage discrimination to claims for equal pay for 'equal work.' Rather, claims for sex-based wage discrimination can also be brought under Title VII even though no member of the opposite sex holds an equal but *higher* paying job, provided that the challenged wage rate is not exempted under the Equal Pay Act's affirmative defenses as to wage differentials attributable to seniority, merit, quantity or quality of production, or any other factor other than sex.

Id. at 161.

75. *See supra* note 10.

rule inconsistently with these precedents.[76]

II. AFSCME v. WASHINGTON

A. *Facts of AFSCME*

In 1982,[77] a class action[78] suit was brought against the State of Washington pursuant to Title VII of the Civil Rights Act of 1964.[79] In this action, the plaintiffs alleged that the twenty percent wage disparity between female-dominated jobs and male-dominated jobs[80] resulted in intentional discrimination[81] and had a disparate impact[82] upon the class. The plaintiffs maintained that the State's reliance on the prevailing market rates[83] as a basis for salary setting "perpetuated a segregated workforce,"[84] and thus, resulted in intentional and unfavorable treatment of employees in female dominated job classifications.[85]

The trial court in this case recognized that this was a case of first impression whereby the plaintiffs sought to implement a comparable worth compensation system under Title VII.[86] The plaintiffs sought this relief after it was determined that jobs of comparable worth based on knowledge, skill, mental demands, accountability, and working conditions, reflected a wage disparity

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76. *AFSCME*, 770 F.2d at 1401-02 (9th Cir. 1985).

77. In 1981, the plaintiffs had first filed charges with the Equal Employment Commission alleging discrimination, although the EEOC did not take any action at that time. *Id.* at 1403.

78. The members of the class numbered approximately 15,000 and were comprised from two unions, American Federation of State, County and Municipal Employees (AFSCME) and Washington Federation of State Employees (WFSE). *Id.*

79. *See supra* note 6.

80. The distinction between female-dominated jobs and male-dominated jobs as made by the State itself in 1974 when it contracted with the independent consulting firm of Norman Willis and Associates who were to evaluate the comparable worth of jobs in the state. American Federation of State, County & Municipal Employees v. Washington, 578 F. Supp. 846, 861 (W.D. Wash. 1983) [hereinafter Am. Fed'n]. The firm determined that those jobs that were comprised of 70% women were paid approximately 20% less than jobs dominated by men. *Id.* at 861-62. The criteria utilized to compare the two classifications were based on factors such as "knowledge and skills, mental demands, accountability and working conditions." *Id.*

81. In order to establish a prima facie case under a disparate treatment theory, a plaintiff must show, via the use of direct, circumstantial or statistical evidence, an inference of intent to discriminate. Once a plaintiff establishes a prima facie case, the defendant must rebut the presumption of discrimination by producing evidence establishing that the defendant's actions were legitimate. If the defendant carries his burden of proof, a plaintiff could still prevail by showing that the practice was used as a pretext for discrimination. *Id.* at 857-58.

82. A prima facie case under a disparate impact theory is established by a plaintiff when it can be shown that a challenged practice had a discriminatory impact upon the protected class; it is not necessary to show intent to discriminate. Also, a prima facie showing shifts the burden of proof upon the defendant to justify his policy. *Id.* at 857.

83. In 1977, Washington revised a law (1977 Wash. Laws ch. 157, RCW 28 B.16.110) and required that the salaries of state employees reflect the prevailing rates of private and other governmental employers. Brief for Appellant at 5, AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).

84. *Am. Fed'n*, 578 F. Supp. at 846-50.

85. *Id.* at 863.

86. *Id.* at 865.

between those jobs held primarily by women and those jobs held by men.[87]

The trial court acknowledged the precedent set out in the *Gunther* case which allowed plaintiffs alleging sex discrimination relief under Title VII even though the comparison of jobs revealed that they were dissimilar in nature.[88] As such, the *AFSCME* Court viewed the plaintiffs' claim as valid.[89] However, for the plaintiffs to prevail the court would have to find that the State of Washington's maintenance of a wage structure based on the prevailing market had a discriminatory effect upon the plaintiff's class.[90]

First, the Court determined that the defendants' failure to pay female employees the evaluated worth of their jobs was intentional discrimination because the State knew of the wage disparity yet failed to compensate the petitioners adequately.[91] Second, the Court found that the defendants' reliance on the market as a guideline for the determination of salaries had an adverse impact on women because it perpetuated wage differentials between men and women.[92]

In rebuttal, the defendants argued from a textual standpoint by claiming that the fourth affirmative defense in the Equal Pay Act, i.e., differential based on any factor other than sex, was applicable to them.[93] The defendants claimed that utilization of a wage-setting methodology that evaluated the market should be viewed as "a legitimate and overriding business justification" and, thus, a "differential based on any factor other than sex."[94]

Under the Equal Pay Act the fourth affirmative defense may be utilized where the discriminatory business practice can be shown to be related to job performance.[95] In *Griggs v. Duke Power Co.*,[96] the respondents, operators of a generating plant, argued that the required high school diploma or the passing of intelligence tests as pre-conditions to employment were related to job performance.[97] However, the petitioners, black employees who were excluded from working at the plant because of the requirement, stated that the business practice was discriminatory and bore no significant relationship upon the abil-

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87. *See supra* notes 80 & 83.

88. *Gunther*, 452 U.S. at 169.

89. *See supra* note 74.

90. *Am. Fed'n*, 578 F. Supp. at 857.

91. The Court found that the "economic consequences of comparable worth were predictable and foreseeable by the State" because the State knew that Title VII prohibited discrimination in employment and when studies indicated that there was a wage disparity among employees, it was on notice to pay workers commensurate with their evaluated worth. *Id.* at 870. The Court also found that the "implementation and perpetuation of the [defendant's] system of compensation is intentional and results in unfavorable treatment of employees in predominately female job classifications in violation of Title VII . . . ." *Id.* at 864.

92. The trial court held that the objectively neutral practice of the defendant's system of compensation has "a disparate impact upon employees in predominately female job classification in violation of Title VII of the Civil Rights Act." *Id.* at 864.

93. *Id.* at 863-64.

94. *Id.* at 863.

95. *See* Antonio v. Wards Cove Packing Co., 703 F.2d 329, 330 (9th Cir. 1982); *see also* Dothard v. Rawlinson, 433 U.S. 321 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Gregory v. Litten System, 472 F.2d 631 (9th Cir. 1972).

96. 401 U.S. 424 (1971).

97. *Id.* at 426.

ity of blacks to satisfactorily perform their jobs.[98] The Court agreed and concluded that the neutral practices employed by employers must demonstrate a close correlation to an individual's job performance.[99]

In *AFSCME* the challenged practice was the respondent's reliance on the free market.[100] Reliance on the market effectively works to discriminate against women because it reflects historical employment segregation which ultimately results in women being paid less.[101] The court refused to accept the defendants' argument, that dependence upon the market was a legitimate business practice, as credible.[102] Instead, the court stated that the defendants' evidence did not rebut the plaintiffs' prima facie showing of disparate impact nor did it outweigh the "countervailing national interest in eliminating employment discrimination."[103] Thus, the trial court in *AFSCME* was unwilling to acknowledge the market as a viable affirmative defense because of its adverse impact upon the plaintiffs and because it directly conflicted with the remedial intent of Title VII legislation to eradicate discrimination.[104]

B. Appellate Review

On September 4, 1985, the appellate court reversed the decision of the trial court.[105] This reversal was based on several factors which were both doctrinal[106] and textual[107] in nature.

Initially reviewing the issue of disparate impact,[108] the appellate court found that the trial court erred in ruling that liability was established under a disparate impact analysis. The court held that the criteria establishing discrimination, i.e., prevailing market rates, did not lend itself to a cohesive, quantifiable measurement definitive of sex discrimination.[109] Instead, the court stated that the disparate impact analysis is better demonstrated by a clearly delineated employment practice applied at a single point in the job selection process, such as height/weight requirements that disproportionately exclude women.[110] Thus, compensation based on a fluid system[111] such as one deemed

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98. *Id.* at 429.

99. *Id.* at 436. The Court concluded that "Congress has forbidden . . . giving these devices . . . [any] controlling force unless they are demonstrably a reasonable measure of job performance . . . [and] any tests used must measure the person for the job and not the person in the abstract." *Id.*

100. *AFSCME*, 770 F.2d at 1403.

101. *See supra* note 37.

102. *Am. Fed'n*, 578 F. Supp. at 863-64.

103. *Id.* at 855-57.

104. *Id.* at 867-70.

105. *AFSCME*, 770 F.2d at 1401-03.

106. *Id.* at 1407-08.

107. *Id.* at 1404-07.

108. *Id.* at 1405; *see supra* notes 6 & 82.

109. *AFSCME*, 770 F.2d at 1406. The court stated that disparate impact analysis should be limited to cases in which the challenged practice was confined to "a specific, clearly delineated employment practice applied at a single point in the job selection process." *Id.* at 1405 (citation omitted).

110. *Id.* at 1405-06.

111. *See supra* note 35.

responsive to fluctuating market conditions, would not "constitute a single practice that suffices to support a claim under disparate impact theory."[112]

With the disparate impact theory considered impermissible, the court then evaluated the appellees' claim of disparate treatment. The court concluded that the appellees in *AFSCME* failed, by a preponderance of the evidence, to prove a discriminatory intent on behalf of the State of Washington.[113] The appellate court stated that the State of Washington's reliance on the free-market economy was not "in and of itself a violation of Title VII . . . [and] [a]bsent a showing of discriminatory motive . . . the law does not permit the federal courts to interfere in the market-based system for the compensation of Washington's employees."[114]

In furthering its contention that the appellees failed to prove disparate treatment, the court stated that "evaluation studies and comparable worth statistics alone are insufficient to establish the requisite inference of discriminatory motive critical to the disparate treatment theory."[115] As such, the appellees' reliance on statistics and other isolated incidents of discrimination were found to be inadequate to meet the burden of proof regarding discriminatory intent.[116] Instead, the court stated that more "support," other than isolated incidents, was needed to find it in the appellees' favor.[117] However, the court did not specify exactly how much more support would be needed or precisely what form the support should take.

Additionally, the court rejected *AFSCME*'s belief that the State of Washington was obligated to invoke the new system of compensation as recommended by the Willis study.[118] This new system would have raised the salaries of employees based on their comparable worth.[119] However, the court stated that such an imposition would "penalize rather than commend employers for their efforts and innovation in undertaking such a study."[120] Also, "[t]he employer should be able to take into account market conditions, bargaining demands, and the possibility that another study will yield different results."[121]

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112. *AFSCME*, 770 F.2d at 1406.

113. *Id.* The court reasoned that an inference of discriminatory motive could not be inferred from the state's use of the market in spite of the Willis study because the state did not create the wage disparity between the sexes. *Id.*

114. *Id.* at 1408.

115. *Id.* at 1407.

116. The appellees presented evidence that between 1960 and 1973 the State of Washington placed newspaper advertisements in the help-wanted ads that were catagorized as "help-wanted male" and "help-wanted female." *AFSCME*, 770 F.2d at 1407-08. The court stated that this practice had largely been eliminated in 1972 when Title VII became applicable to the states. *Id.* at 1408. Although at this juncture, the appellees sought to connect this previous practice with present sex-segregation, the court refused by stating that "the isolated incidents . . . are insufficient to corroborate the results of the Willis study and do not justify an inference of discriminatory motive by the State. . . ." *Id.*

117. *Id.*

118. *Id. See also supra* note 80.

119. Brief for Appellants at 11, Am. Fed'n v. Washington, 578 F. Supp. 846 (W.D. Wash. 1983).

120. *AFSCME*, 770 F.2d at 1408.

121. *Id.*

Thus, the court refused to acknowledge any culpability on the part of Washington because although the state legislature may wish to implement a comparable worth plan, Title VII did not impose upon it the obligation to eliminate an economic inequality which it did not create.[122] As such, the court appears to view the state's reliance on the prevailing market rate as one innocuous method in which to measure compensation.[123] Further, the court appears to espouse the view that because Washington did not create the economic disparity within the market, it should be absolved from those liabilities resulting from relying on it as a viable measurement to determine compensation.[124]

III. ANALYSIS OF AFSCME

A. The Market Is Not A Proper Affirmative Defense

The appellate court denied the appellees' contention that the appellants' reliance on the labor market for job evaluations[125] has a disparate impact upon women.[126] As stated earlier,[127] the court reasoned that the use of the market involved numerous complex factors which could not be attributed to a specific practice engaged in by the employer.[128] However, disparate impact analysis[129] has often involved cases in which the discriminatory practice of the employer involved subjective components.[130] In *Rowe v. General Motors Corp.*,[131] a General Motors procedure for promoting blacks included subjective recommendations and evaluations by foremen.[132] The court concluded that although

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122. *Id.* at 1407.

123. *Id.* "Economic reality is that the value of a particular job to an employer is but one factor influencing the rate of compensation for that job. Other considerations may include the availability of workers willing to do the job and the effectiveness of collective bargaining." *Id.* (quoting Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977)).

124. *Id.* at 1407; *see also supra* note 113.

125. *See supra* note 80.

126. *See supra* note 109.

127. *See supra* notes 109-12 and accompanying text.

128. *See supra* notes 109-12 and accompanying text.

129. *See supra* notes 6 & 82.

130. Subjective elements of discrimination were acceptable in Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984) ($3,000 wage disparity between black and white agents found to be attributable to employer's use of subjective evaluations of employees' performance).

In Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985), the disparate impact theory was upheld where it was used "to challenge the end results of a multi-component promotion process and to challenge the subjective elements of . . . [that] process." *Id.* at 1523. The *Griffin* Court further stated:

> Exclusion of such subjective practices from the reach of the disparate impact model of analysis is likely to encourage employers to use subjective, rather than objective, selection criteria. . . . It could not have been the intent of Congress to provide employers with an incentive to use such devices rather than validated objective criteria. Likewise, limiting the disparate impact model to situations in which a single component of the process results in an adverse impact completely exempts the situation in which an adverse impact is caused by the interaction of two or more components.

Id. at 1525.

131. 457 F.2d 348 (5th Cir. 1972).

132. *Id.* at 358.

these standards for promotion were "vague and subjective" they had a disparate impact on blacks.[133] The court further stated that these standards were found to be a "ready mechanism for discrimination against blacks much of what can be covertly concealed . . . ."[134]

Thus, it appears that to disqualify the claim of disparate impact in *AFSCME* on the basis of the subjective nature engendered by the free market was improper.[135] Use of the market, although deemed subjective and complex,[136] should be viewed as an inappropriate business practice utilized by employers.[137] However, the court in *AFSCME* treats this issue with impunity as evidenced by its reliance on the case of *Spaulding v. University of Washington*.[138] In that case the court refuted the petitioner's contention that the respondent's use of the market for compensational purposes had an adverse impact on their wages.[139] They held that use of the market did not fall within the realm of a "clearly delineated neutral policy"[140] utilized by employers. The court in *AFSCME* appeared to give great deference to the reasoning espoused by the court in *Spaulding* when recognizing that employers are sometimes restricted to setting wages based on vague policies, one of which is the market, upon which they have no control.[141]

The court in *AFSCME*, however, misdirected its approach when it applied the reasoning of the *Spaulding* case instead of that set out by the *Rowe* court.[142] It did so because the *Rowe* court clearly allows for judicial condemnation of business practices that are not clearly delineated.[143] This latitude is allowed because the elimination of discrimination is a priority upon which the court must defer.[144] To allow sexual discrimination to escape judicial examination merely because the business practices of employers are vague, is contrary to both the case law[145] and congressional intent behind Title VII.[146] Moreover, the *Spaulding* case focuses on the issue of "control."[147] The court in *Spaulding* effectively states that if an employer utilizes an employment practice which he or she does not personally create or incorporate, they should be able

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133. *Id.*

134. *Id.* at 359.

135. *See supra* notes 130-34 and accompanying text.

136. *AFSCME*, 770 F.2d at 1406.

137. *See supra* notes 130-34 and accompanying text.

138. 740 F.2d 686 (9th Cir. 1984). In this case, the petitioners, who were nurses, claimed that the use of the market contributed to the wage disparity between nurses and those from other academic disciplines. *Id.* at 697. The court held that "allowing plaintiffs to establish reliance on the market as a facially neutral policy for Title VII purposes would subject employers to liability for pay disparities with respect to which they have not, in any meaningful sense, made an independent business judgement." *Id.* at 708.

139. *Id.*

140. *Id.*

141. *AFSCME*, 770 F.2d at 1407.

142. Brief for Appellees at 39-49, Am. Fed'n v. Washington, 578 F. Supp. 846 (W.D. Wash. 1983).

143. *Rowe*, 457 F.2d at 358.

144. *See supra* notes 6-7.

145. *See supra* notes 6 & 31.

146. *See supra* notes 6-7.

147. *AFSCME*, 770 F.2d at 1407.

to implement it without judicial scrutiny. However, the ramifications of such a judicial stance are manifestly incorrect because it indirectly allows the use of the market to become "a factor other than sex."[148] It then becomes an acceptable affirmative defense to claims involving Title VII litigation.[149]

The incorrectness of allowing the market to become a "factor other than sex" was examined by the court in *Corning Glass Works v. Brennan*.[150] In this case the Court acknowledged that the use of the market as a model for wage compensation was inherently discriminatory[151] in that the market perpetuates sex-segregation and, ultimately, wage disparity.[152] Thus, if employers are allowed to continue the practice of using the existing market without judicial sanctions, then sex-segregation will continue to go unchallenged.[153] Title VII will then lose its remedial value and the wage gap between men and women will continue to grow.

It is clear that the courts will allow claims of disparate impact to stand when the challenged discriminatory business practice is complex and subjective.[154] Arguably, the market economy is complex, but it is not beyond judicial determination. As the case law indicates, the market "as a factor other than

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148. *See supra* note 42.

149. *See* Note, *supra* note 14; *see also* Pauley, *supra* note 1 ("employers deem market conditions to be a 'factor other than sex' isolating them from liability in wage discrimination suits. Considering the purpose of Title VII along with the legislative history of this and other remedial legislation, courts should reject market conditions as a defense."). *Id.* at 168.

150. Corning Glass Works v. Brennan, 417 U.S. 188 (1974). In this case Corning attempted to pay night inspectors, who were mostly men, more than day inspectors, who were mostly women, by continuing to pay a higher rate to individuals hired prior to 1969. This practice, in effect, perpetuated wage differentials in that women were only allowed to work the night shift in 1966. As such, the majority of men continued to receive higher compensation. The court held in this case:

> The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

Id. at 205.

151. *Id.* For other cases that reject the labor market as a defense as a "factor other than sex," see Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974) (women's willingness to work for less than men not valid consideration under equal pay provision of Fair Labor Standard Act; Hodgson v. Brookhaven General Hosp., 436 F.2d 719, 726 (5th Cir. 1970) (greater bargaining power enjoyed by employers of women not factor Congress had in mind); Marshall v. Georgia Southwestern College, 489 F. Supp. 1322, 1330 (M.D. Ga. 1980) (market force theory not factor within catch-all exception, especially where females have been willing to accept lower salaries than males).

152. *See* Blumrosen, *supra* note 2, at 501. "The underlying forces which restrict opportunities of minorities and women to segregated jobs also assure that the wages of those jobs will reflect their low status. Thus, job segregation encompasses wage discrimination." *Id.*

153. *See* Pauley, *supra* note 1. The current labor market reflects wage disparities inherent to a structure based on discriminatory factors such as sex. *Id.* at 168. Without judicial intervention, employers will continue to segregate women into lower paying jobs. *Id.*

154. *See supra* notes 130-31.

sex" is an improper basis for wage distribution.[155] It is improper because the market reflects historical sex-segregation in which women continue to be paid less than men[156] particularly when they are concentrated in less prestigious jobs[157] and when they are denied the same opportunities as men.[158] Thus, any evaluation based on the open market will have an adverse effect on women because their diminished value will be reflected in lower wages.[159] As such, the court in *AFSCME* should have affirmed the trial court's ruling.

B. Statistical Analysis: Proof of Circumstantial Intent

In *AFSCME* the appellees offered extensive statistical analysis, such as that proffered by the Willis study, to prove that the appellants intentionally discriminated against them.[160] The court, however, stated that "job evaluation studies and comparable worth statistics alone are insufficient to establish the requisite inference of discriminatory motive critical to the disparate treatment theory . . . [absent] independent corroborative evidence of discrimination."[161] Thus, the court required that the appellees provide more circumstantial proof of intent.[162] However, in the case of *Segar v. Smith*,[163] the petitioners successfully challenged, via the use of complex statistical analysis, the respondent's use of grade assignments which had a discriminatory effect upon black em-

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155. *See supra* notes 149-51.

156. *See supra* notes 1-2.

157. *See supra* notes 2 & 4 and accompanying text.

158. *See supra* notes 1, 2 & 4.

159. *See supra* note 153.

160. *See supra* note 80; *see also* Brief for Appellees at 24, American Federation of State, County and Municpal Employees v. Washington, 578 F. Supp. 846 (W.D. Wash. 1983). Appellees, in addition to the statistics furnished by the Willis study, also utilized other statistics generated by Herbert Tyson and Stephen Michelson, who prepared statistics by using regression analysis. By the use of regression analysis Dr. Michelson found that when an increase of the total number of women in a job classification increased by 1%, the result was a $4.51 decrease per employee in monthly pay. *Id.* For a fuller discussion on regression analysis, see Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COL. L. REV. 737 (1980). The use of regression analysis involves the introduction of employee personnel records in which salary is the dependent variable and education, work experience, other productivity factors, and race or sex are explanatory variables. The equation is linear and the value of the dependent variable is the sum of the productivity factors. *Id.* at 738-39.

161. *AFSCME*, 770 F.2d at 1407. For further analysis of the use of statistics in Title VII litigation, see Peterson, 46 LAW & CONTEMP. PROB. No. 4, at 1 (1983). "Except for certain blatant instances (e.g., 'no Irish need apply'), employment discrimination is usually a matter not of overt and total exclusion . . . [i]f a practice does tip slightly, but systematically, in favor of a particular group of employees, that tendency is often apparent only when the impact of many applications of the practice is viewed. Preparation of the information, numerical and otherwise, that permits such a viewing is inherently a statistical task." *Id*; *see also* Boardman & Vining, *The Role of Probative Statistics in Employment Discrimination Cases*, 46 LAW & CONTEMP. PROB. No. 4, at 189 (1983); Follett & Welch, *Testing for Discrimination in Employment Practices Cases*, 46 LAW & CONTEMP. PROB. No. 4, at 171 (1983); Shoben, *The Use of Statistics To Prove Intentional Employment Discrimination*, 46 LAW & CONTEMP. PROB. No. 4, at 221 (1983).

162. *AFSCME*, 770 F.2d at 1407-08.

163. Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984).

ployees.[164] The court held that the statistical proof was sufficient in and of itself and that to require additional proof was unnecessary.[165]

However, if one was to placate the appellate court's desire to have the appellees provide more circumstantial proof[166] in addition to statistical analysis, one could utilize those circumstantial elements of evidence as set out by the trial court in *AFSCME* to establish a prima facie case of disparate treatment.[167]

The first such element which the court found circumstantially probative of intentional discrimination is that of the historical context out of which the challenged practices arise.[168] Here the appellants reliance on the market historically reflects past and present discrimination.[169] Throughout history and in every society, the allocated value of work identified with women has always been considered less valuable than that done by men, regardless of its difficulty or its contribution to society.[170] Although discrimination in education appears to be lessened, it too has not remedied the historical wage disparity that currently exists.[171]

The second element of proof in a claim for intentional discrimination as espoused in *AFSCME* is that of "subjective employment practices utilized by the Defendant resulting in [a] pattern disfavoring females."[172] As stated earlier,[173] the subjective practice engaged in by the appellants is that of relying on the market to determine wages.[174] This practice clearly disfavors women in

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164. *Id.* at 1263.

165. The court stated:

> [The] plaintiff's statistical methodology focuses on the appropriate labor pool and generates evidence of discrimination at a statistically significant level, no sound policy reason exists for subjecting the plaintiff to the additional requirement of either providing anecdotal evidence or showing gross disparities. Such a rule would reflect little more than a superstitious hostility to statistical proof, a preference for the intuitionistic and individualistic over the scientific and systemic.

Id. at 1278.

166. *AFSCME*, 770 F.2d at 1407-08.

167. The court in *Am. Fed'n*, 578 F. Supp. at 858 stated:

> Circumstantial evidence which courts have found probative of intentional discrimination, includes the following: the historical context out of which the challenged practices arise; obstacles confronting applicants and/or employees; subjective employment practices utilized by the Defendant resulting in a pattern disfavoring females; the foreseeable adverse impact of those practices; the increase in pay to the Plaintiffs since filing of the instant suit; discriminatory treatment in other areas of employment; and, perhaps most telling, recognition of disparate treatment by responsible State officials.

Id.

168. *Id.*

169. *AFSCME*, 770 F.2d at 1405.

170. *See* Blumrosen, *supra* note 2, at 399-429.

171. "Even with similar education and experience, men and women do not earn similar wages; in fact, at each educational level, men earn substantially more than women." Comment, *Equal Pay for Comparable Work*, 15 HARV. C. R.— C.L.L. REV. 475, 476 n.9 (1980).

172. *Am. Fed'n*, 578 F. Supp. at 858.

173. *See supra* note 130.

174. *AFSCME*, 770 F.2d at 1406.

that it results in a twenty percent wage disparity between men and women.[175] Previous subjective practices have lended themselves to judicial interpretation so that to allow industry to continue to rely on the market is unfounded.[176]

The third element stated by the trial court as being circumstantially determinative of discrimination is whether the plaintiffs have had "an increase in pay since filing their suit."[177] For such an increase would be indicative of the institutional recognition of discrimination and their attempt to correct such economic inequalities.[178] In *AFSCME* the state itself had recognized the wage disparity between men and women.[179] In 1983, the legislature proposed a ten year phase-in for a comparable worth system for which 1.5 million dollars was appropriated for salary distribution.[180] Thus, by the appellants own action, they, in effect, acknowledge sex discrimination in employment.

Finally, the last criteria recognized by the trial court was the acknowledgement of disparate treatment by state officials.[181] State officials did acknowledge disparate treatment when legislation was passed in which the annual salaries of individuals working in certain underpaid job classifications were increased.[182] Additional proof that the state officials knew of the intentional discrimination aimed at women is evidenced by the fact that the state of Washington commended itself for implementing comparable worth studies.[183] By taking the initiative to implement such studies indicates that state officials were aware of the existing sex discrimination.

Thus, given the ample circumstantial evidence,[184] in addition to the direct evidence offered by the appellees,[185] along with the statistical analysis,[186] disparate treatment should have most certainly been found. However, the court in *AFSCME* refused to find that the appellants intentionally discriminated

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175. *See supra* note 80.

176. *See supra* note 130.

177. *Am. Fed'n*, 578 F. Supp. at 858.

178. *Id.* at 866-67.

179. Brief for Appellees at 12, Am. Fed'n v. Washington, 578 F. Supp. 846 (W.D. Wash. 1983).

180. *Id.* at 13-21.

181. *Am. Fed'n*, 578 F. Supp. at 858.

182. *See supra* note 180. In 1983, the State Legislature passed two bills to eliminate sex-based disparities. *Id.* at 20. One would increase annual salaries by $100 for all occupants of job classifications which are most underpaid. The second proscribed salary changes necessary to achieve comparable worth by a bi-ennium schedule consistent with the Willis study. *Id.*

183. *Am. Fed'n*, 578 F. Supp. at 846. "No matter what Defendant elects to call it — disparity, pay equity or whatever, the only effect is sex discrimination. What other logical reason can there be for the Defendants [sic] adoption of the 'comparable worth' theory of compensation." *Id.* at 868 n.19.

184. *See supra* notes 169-83.

185. *See supra* note 116.

186. *See supra* notes 160, 161 & 165. Further, in International Bro. Of Teamsters v. United States, 431 U.S. 324, 339 (1977), the court noted that "statistical analyses have served and will continue to serve an important role." *Id.* (quoting Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620 (1974)).

In Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1982), the court noted that most discrimination cases are established "by the use of statistics demonstrating a disparity in selection rates." *Id.* at 94 (citation omitted).

against the appellees.

Another similar case recently handed down by the Seventh Circuit is that of *American Nurses Association v. State of Illinois*[187] which also takes a negative view upon the burden of proof necessary to establish disparate treatment under Title VII.[188] In this case the court declined to accept the premise that discriminatory intent may be inferred on the basis of an employer's reliance on the market to calculate wages.[189] The court stated that even if the employer is made aware that its pattern of wages disadvantages women's knowledge of a disparity is not the same thing as an intent to cause or maintain it. . . ."[190] However, this reasoning, although supportive of the decision in *AFSCME*, is faulty in that it allows the market to become an accessible mechanism which an employer may use without fear of recrimination. By doing so, without finding the intent needed to establish treatment, this allows the court to assume an inactive role in structuring the market. This lack of judicial activism is inconsistent with roles previously assumed by the court in other Title VII litigation.[191]

C. *Title VII: A Vehicle to Restructure the Economy*

The court in *AFSCME* concluded that "Title VII [was not] . . . intended to abrogate fundamental economic principals."[192] This is not an accurate view of the role of Title VII in light of the recent litigation involving insurance compensation.[193] Specifically, the Supreme Court has acknowledged that Title

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187. American Nurses' Ass'n. v. State of Illinois, 783 F.2d 716 (7th Cir. 1986). In this case the plaintiffs, nurses and other state-employed workers, charged the state with sex discrimination in violation of Title VII. *Id.* The complaint was the result of the state's "[u]se of a sex-biased system of pay and classification which results in and perpetuates discrimination in compensation against women employed in historically female-dominated sex-segregated job classifications." *Id.* at 15.

188. In *American Nurses'* the plaintiffs attempted to avoid summary judgment against them by amending their complaint to establish the necessary proof needed to demonstrate disparate treatment beyond the inference from the results of comparable worth studies. *Id.* at 31-32. The court in *American Nurses'* refused to acknowledge comparable worth as a legal concept. *Id.* at 3. The court stated that a finding of discrimination could not be found "merely because [the state] pays market wages. . . even if the employer is made aware that its pattern of wages departs from the principle of comparable worth to the disadvantage of women . . . ." *Id.* at 10. As such, the court required that the plaintiffs introduce evidence establishing that the state intentionally depressed a woman's salary because she is a woman. *Id.* at 7.

189. *See supra* note 188.

190. *American Nurses'*, No. 85-1766, slip op. at 11.

191. *See infra* notes 195 & 200.

192. *AFSCME*, 770 F.2d at 1407.

193. *See* Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983); Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1980).

> The fact is that Title VII has significantly interfered with the operation of the labor market. [It] has upset recruitment . . . procedures, . . . struck down . . . pre-employment tests . . . and . . . has required psychological adjustments by millions of workers . . . . [T]he suggestion that Title VII was not intended to interfere with the operation of the wage setting process is without foundation.

Blumrosen, *supra* note 2, at 471-72.

VII can be used to restructure retirement benefits in order to eliminate sexual discrimination.[194] In the landmark case of *City of Los Angeles Dept. of Water and Power v. Manhart*,[195] the Court held that defendants reliance on actuarian tables to determine contributions to a pension fund violated Title VII via the Equal Pay Act.[196] It violated the Equal Pay Act because it required women to contribute more than men based on their projected life span.[197] By equalizing contributions, the Court recognized that it would be interfering in the private economy because it would be redistributing wealth.[198] The Court realized that it would be affecting approximately fifty million Americans with retirement assets of more than 400 billion dollars.[199] As such, it is clear that the Court is willing to affect the economy in order to eradicate discrimination.

Another landmark case in which the Court saw fit to judicially intervene in order to implement pervasive economic change is the case of *Arizona Governing Committee v. Norris*.[200] The Court held that "[t]he . . . retirement plan discriminates on the basis of sex in violation of Title VII, and all retirement benefits derived from contributions made after this decision must be cal-

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194. *See infra* notes 195-99.

195. City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978). In *Manhart*, a class action suit pursuant to Title VII was initiated by female employees of the Los Angeles Department of Water and Power alleging that the Department's requirement that female employees contribute 14.84% more to its pension fund than men resulted in discrimination against women. The Department's response to this allegation was that, based on mortality tables, female employees lived longer than men. As such, the "cost of a pension for the average female retiree was [more] because more monthly payments had to be made to the female [retirees] . . . ." *Id.* at 702. The Court held in this case that the acturarian table used by the defendant unfairly stereotyped females, and that "classifications based on sex, like those based on national origin or race, are unlawful." *Id.* at 709. The Court further dispelled the defendant's argument that the wage differential was necessary for its business operation by stating that Title VII did not contain a cost-justification defense. *Id.* at 716.

196. The Court concluded that the Department violated Title VII via the Equal Pay Act:

> An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' It constitutes discrimination and is unlawful. . . .

Id. at 711.

197. *Id.*

198. The Court in *Manhart* stated:

> Nor can we ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. . . .Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, . . . must be given time to adjust gradually to Title VII's demands.

Id. at 721-22.

199. *Id.*

200. *Norris*, 463 U.S. 1073 (1983). In this case, the petitioner, a female employee of the State of Arizona, filed a class action suit alleging that the state's retirement plan violated Title VII. This allegation arose because of the state's policy of limiting employee's choice of companies from which to receive retirement benefits to those which paid lower monthly benefits to women than men even though both made equal contributions. *Id.*

culated without regard to the beneficiary's sex."[201]

As in *Manhart*, the Court based its holding on the fact that the mortality tables used in *Norris* impermissibly classified longevity on the basis of sex[202] and did not take into account other pertinent factors correlating with longevity such as smoking, drinking alcohol, and obesity.[203] The Court again recognized that its decision would have broad economic ramifications.[204] They deduced that equalizing annuity payments would cost between 85 to 93 million dollars each year.[205] The Court also speculated that costs could go as high as 676 million dollars each year.[206] The Court was well aware that the termination, in insurance law, of the use of actuarian tables, and consequently the end of sexual discrimination, would have drastic economic effects.[207] However, the Court did not refrain from interfering in the market. Although the argument can be made that to transpose these decisions to the arena of equal pay for comparable worth would have a drastic economic effect,[208] it is equally apparent that to refrain from imposing judicially guided economic postulations will also have pernicious monetary effects.[209] If the Court continues to deflect its responsibility, the societal affects will not only be economically costly, but may also promote skepticism concerning the ability of the court to adhere to legislative pronouncements as enunciated in Title VII. Thus, not only will individu-

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201. *Id.*

202. *Id.* at 1081-92.

203. *Id.* at 1077.

204. The Court stated in pertinent part:

> If employers are required to 'top up' benefits — i.e., calculate women's benefits at the rate applicable to men rather then apply a unisex rate to both men and women — the cost . . . will . . . be passed on — in large part — to the annuity beneficiaries or, in the case of state and local governments, to the public.

Id. at 1096 n.1 (Powell, J., dissenting).

205. *Id.* at 1095.

206. *Id.* at 1096.

207. *See supra* notes 204-06.

208. *See* Vierra, *Comparable Worth and The Gunther Case: The New Drive for Equal Pay*, 18 U.C. DAVIS L. REV. 449 (1985):

> Even if the problem of measuring relative worth is satisfactorily resolved, serious questions will arise over the costs inherent in comparable worth analysis. The cost of raising the median pay of full-time female employees to that of males was estimated in 1978 to be 150 billion dollars a year, and the figure, corrected for inflation, would now be considerably higher. Critics have said that 'the gravest consequences' to free competition and the balance of payments deficits 'would inexorably flow from such a drastic imposition of liability upon employers.'

Id. at 482.

209. *See supra* note 14; *see also* Reynard, *supra* note 14, at 328:

> In reality, however, society as a whole pays more in the long run when the market fails to tap the potential capabilities of individual workers because of perpetuated stereotypes. The underutilization of black workers, for instance, has resulted in an economic cost of billions of dollars. According to one commentator, a market that favors or promotes discriminatory decisions based on group characteristics like race and sex is defective because these traits are not related to the capabilities of individual workers. Interference with the market is therefore warranted, and consistent with promotion of economic interests, when discrimination occurs.

Id.

als be subjected to wage disparities, they will also be subject to a non-responsive court system that could perhaps provide those very remedies needed to end discrepencies in pay.

D. Private v. Public

An argument that supports court involvement in the market is that of the private versus public distinction,[210] particularly within the labor market.[211] Previous case law indicates that the courts often interfere in the private market when such a market affects public interests.[212]

In *Shelley v. Kraemer*,[213] the Court refused to judicially enforce a private contract which restricted the sale of property to white people.[214] The Court believed that to do otherwise would constitute state action.[215] As such, to have enforced this contract would have contravened the fourteenth amendment's declaration of equal protection under the laws.[216] The Court sought to protect the petitioner's basic right to enjoyment of property because this fundamental right far outweighed any private policy for discrimination.[217] This case was one of the first cases which broke down the artificial barrier between private and public rights.[218] In so doing, it set a precedent for future courts in which the judiciary could impose the public will upon private enterprises.

In a later case,[219] a neighborhood association sought to stop an "economic development corporation" from constructing an assembly plant at or near their property.[220] The Supreme Court held against the private individuals, stating that the project had a public purpose whereby "the state was attempting to provide for the general health, safety and welfare through alleviating unemployment, providing economic assitance to industry, assisting rehabilitation of blighted areas, and fostering urban development."[221] In this case, the Court concluded that the legislative statute governing economic development, and thus, condemnation of property, must be upheld because "when the legislature speaks, the public interest has been declared in terms 'well-neigh conclusive.' "[222]

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210. *See supra* note 15 and accompanying text.

211. *See* Klare, *The Public/Private Distinction in Labor Law*, 130 U. PENN. L. REV. 1358 (1982). Although the distinction between public and private is often blurred, according to Klare "[t]he public/private distinction poses as an analytical tool in labor law, but it functions more as a form of political rhetoric used to justify particular results." *Id.* at 1361.

212. *See* Shelley v. Kraemer, 334 U.S. 1 (1948); Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981).

213. 334 U.S. 1 (1948).

214. *Id.* at 4-5.

215. *Id.* at 4. Actions by state courts and judicial officers in their capacities as officials are considered actions of the state within the meaning of the fourteenth amendment. *Id.*

216. *Id.*

217. *Id.* at 21-22.

218. *Id.* at 22-23.

219. *See* Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981).

220. *Poletown*, 410 Mich. at 616, 304 N.W.2d at 455.

221. *Id.* at 617, 304 N.W.2d at 456.

222. *Id.* at 633, 304 N.W.2d at 459 (citing Berman v. Parker, 348 U.S. 26 (1954)).

The prior case law indicates that the public/private distinction is being eroded.[223] Since the public policy of eradicating sexual discrimination and effectuating the general welfare of the public was prevalent in *AFSCME*,[224] the court should have interfered in the private economy. Equal pay for comparable worth appeared to be a viable option in order to effect these social goals.[225] Title VII is the appropriate avenue upon which the courts can systematically regulate the private business interests that impede public goals.[226] To allow the private market place to take precedence over legislative enunciations is, in effect, allowing the private/public distinction to become dangerously more pronounced. As such, remedies for discrimination are severely curtailed.

E. The Ramifications of Continued Sex Discrimination

The egregarious consequences of sex discrimination and sex segregation that currently exist can be found in many facets of our demographic makeup.[227] For instance, because of the continued wage disparity between men and women, there are emerging disturbing statistics indicating a phenomenon called the "feminization of poverty."[228] This phenomenon is the result of figures that indicate that among whites, the proportion of the poverty population living in families maintained by women increased from 15% to 26% during the past two decades.[229] Concurrently, the poor accounted for by women living alone or with non-relatives, rose from 10% to 17%.[230] Data for blacks indicate the 59% of the black poverty population lived in families headed by women in 1980.[231] Also, more than 50% of children in families maintained by women are living at or below the poverty level compared to only 8% of children in husband-wife families.[232] Of the more than 8 million women nationwide who had custody of their children, less than half had been awarded child support. Out of those entitled to child support payments, only 47% received the full amount, an average of $40, per week.[233]

According to one study,[234] if wives and female heads of households were paid the wages that similarly qualified men earn, about half the families now living in poverty would not be poor.[235] This study attributed the plight of

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223. *See supra* note 212.

224. *Am. Fed'n*, 578 F. Supp. at 870-71.

225. *See supra* notes 20 & 22.

226. *See supra* notes 195-206.

227. *See supra* notes 1-2 and accompanying text.

228. *Women in Transition: Hearing Before the Comm. on Labor and Human Resources United States Senate*, 98th Cong., 1st Sess. 2 (1983).

229. *American Women: Three Decades of Change Hearing Before the Joint Economic Comm. Congress of the United States*, 98th Cong., 1st Sess. 7 (1983).

230. *Id.*

231. *Id.*

232. *See supra* note 229. "[I]f the proportion of the poor who are in female-headed households were to increase at the same rate as it did in the years from 1967 to 1977, the poverty population would be composed almost entirely of women and their children by about the year 2000." *Id.*

233. *Id.*

234. *Woman in Poverty*, 15 CLEARINGHOUSE REV. 925 (1981-82).

235. *Id.* at 927.

women to the fact that employment opportunities are limited by occupational segregation and discrimination.[236] It further stated that occupational segregation, in which women are paid 59% of what men are paid,[237] confines women to jobs which provide little mobility.[238] Further, it appears that the social welfare programs do little to alleviate the problems faced by women.[239]

These disparaging statistics are further exacerbated when one looks further into the systematic discrimination that plagues women. For example, women comprise 60% of the elderly who receive Social Security benefits yet the average monthly benefit for women was $308 as compared to $430 for adult men.[240]

These consequences, as exemplified by these discouraging statistics,[241] are sufficiently compelling reasons for which the court should apply equal pay for comparable worth.[242] Once this concept is implemented, perhaps the "feminization of poverty" can be eliminated.[243] The court in *AFSCME* should have examined the public welfare of women and children. The magnitude of the deleterious effect of economic wage disparity can no longer be allowed to exist. Implementing comparable worth will most certainly aid in alleviating the insidious effects of sex discrimination. Once female-dominated jobs begin to economically reflect their true value, then the effects of discrimination and segregation can be minimized.

CONCLUSION

It is clear that the Court's decision in *AFSCME*, if allowed to pervade current economic tenets via judicial passivism, will undoubtedly provide fertile ground for continued sex discrimination and segregation. The Equal Pay for Comparable Worth doctrine is the conduit towards the equalization of all individuals in that it will insure that everyone's worth is measured by their educational and vocational contributions, not their sex. The courts must adhere to the legislative enactments that fervently disallow employers to discriminate against employees. The courts must also align themselves with the precedential laws that also discredits employer's use of the market as an acceptable guideline for compensation. Society's interest, both economically and socially, overrides the existing judicial avoidance of this contemporary issue. As such, the decision in *AFSCME* should be overruled.

Sharon D. Entel

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236. *Id.* at 930.

237. *Id.*

238. *Id.*

239. *Id.* at 925.

240. *Inequities Toward Women in the Social Security System: Hearing Before the Task Force on Social Security and Women*, 98th Cong., 1st Sess. 48 (1983).

241. *See Woman in Poverty*, *supra* note 234, at 927-28.

242. *See* Blumrosen, *supra* note 2, at 415.

243. *See Woman in Poverty*, *supra* note 234, at 931-34.

Guidelines For Consumer Debt Collection By Attorneys Under the 1986 Amendment to the Fair Debt Collection Practices Act

*Michael K. Sweig**

> Plaintiff asserts that the notice sent to her . . . is abusive and insulting. . . . I agree. The letter implies that plaintiff removes her head when she receives letters from the defendant [bill collector], that she ignores her mail and her bills, and lacks the common sense to handle her financial matters properly. . . . I hold that this communication violates 15 U.S.C. § 1692(d).[1]

> Your failure to pay this judgment in full, or to contact my office within five days from date with an arrangement to pay this judgment will result in the judicial sale of your home, automobile, or any other personal property necessary to satisfy the judgment. This action will be costly to you, as well as embarassing. I hope that you will not force me to take this very drastic action.[2]

INTRODUCTION

Congress enacted the Fair Debt Collection Practices Act (FDCPA) [hereinafter Act] in 1977. The Act purports to eliminate unfair, deceptive and abusive practices used by debt collectors while collecting consumer debts owed to third parties.[3] The Act limits communication between the collector, the

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1. Harvey v. United Adjusters, 509 F. Supp. 1218, 1221 (D. Or. 1981).

2. *In re* Robert Singer, 1 Mass. Atty. Discipline Reports 263, 266 (1978), *cited in*, Lewis, *Regulation of Attorney Debt Collectors — The Role of the FTC and the Bar*, 35 HASTINGS L.J. 669, 701 n.218 (1984).

3. Congress has declared that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual

debtor and third parties, creates notice and debt validation provisions, and prohibits numerous forms of deception and harassment. The Act provides private rights of action and authorizes Federal Trade Commission (FTC) enforcement.

The Act originally exempted attorneys acting on behalf of their clients, since Congress considered debt collection by attorneys as incidental to the general practice of law. Congress previously believed that local bar associations would adequately police abusive collection practices by attorneys.[4] However, under the Act's attorney exemption, many lawyers apparently have engaged solely or primarily in debt collection activities under the guise of a "law firm."[5]

In July 1986, Congress amended the Act to eliminate the attorney exemption,[6] because local bar associations were not adequately regulating attorneys acting primarily as collectors.[7] The amendment became effective on July 9, 1986.[8] Although Congress apparently has aimed the new amendment at attorneys or law firms whose *primary* business is debt collection, the language of the statute is broad, and includes all attorneys or general practice firms that collect debts on behalf of third parties with *any* regularity. The Act has survived recent constitutional challenge.[9]

I. Definitions and Scope of the FDCPA

The Act applies to "debt collectors" attempting to collect "debts" from "consumers." The Act defines these terms in section 1692a.

A. Debt Collector

A debt collector is any person whose primary business is debt collection, or "who *regularly* collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."[10] The Act does not apply

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privacy." Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified at 15 U.S.C. §§ 1692a-1692o (1982)). *See* Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979). Congress has recognized that both the states and the federal government have an interest in regulating consumer debt collection. *See* 15 U.S.C. § 1692e (1982). Accordingly, the Act annuls inconsistent state laws only to the extent that they are inconsistent with the Act. 15 U.S.C. § 1692n (1982). Thus, state laws which are more stringent than the Act are considered consistent with the Act. *Id.*

4. H.R. Rep. No. 99-405, 99th Cong., 1st Sess. 3-7 (1985).

5. *Id.*

6. Fair Debt Collection Practices Act Amendment, Pub. L. No. 99-361, 100 Stat. 766 (1986).

7. H.R. Rep. No. 99-405, 99th Cong., 1st Sess. 6 (1985).

8. Fair Debt Collection Practices Act Amendment, Pub. L. No. 99-361, 100 Stat. (1986).

9. As economic legislation, the Act does not restrict fundamental constitutional rights. United States v. ACB Sales & Service, Inc., 590 F. Supp. 561, 576 (D. Ariz. 1984).

10. 15 U.S.C. § 1692a(6) (1982) (emphasis added). *See also* FTC v. Shaffner, 626 F.2d 32 (7th Cir. 1980) (pre-amendment case in which attorney whose primary activity was bill collection was considered debt collector within meaning of Act). *But see* Winslow v. Bauer, 585 F. Supp. 1048 (D. Col. 1984) (county executives and judicial officers not debt collectors); Spilman v. Crebo, 561 F. Supp. 652 (D. Mon. 1982) (I.R.S. not a debt collector); Heredia v. Green, 504 F. Supp. 896 (E.D. Pa. 1980) (court ordered official activities of landlord and tenant officer of municipal court exempt and not within prohibitions of the Act); Gary v. Spires, 473 F. Supp. 878

to attorneys who collect debts for themselves (as creditors), or to persons who collect debts incidental to bona fide fiduciary obligations or escrow arrangements, or as secured parties in commercial credit transactions.[11] However, the Act applies when attorneys "regularly" collect debts for clients or third parties.

Congress has not defined "regularly," but the legislative history indicates that attorneys must interpret this term broadly:

> [t]he requirement that debt collection be done 'regularly' would exclude a person who collects a debt for another in an isolated instance, but would include those who collect [debts] for others in the regular course of business.[12]

Thus, any law firm collecting debts for its clients on more than an "isolated" basis (which theoretically could mean *once*) probably falls within the language of the statute.

B. Consumer Debt

The Act does not regulate business collections, but applies only to consumer debts. A consumer debt is "any obligation . . . of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes. . . ."[13]

Consumer debts include, but are not limited to, retail purchase of goods or services, installment loans, credit card purchases, professional fees, limited partner notes or personal investments (e.g., margin calls, stock subscription agreements), residential mortgages, residential leases, NSF personal checks,[14] hospital and medical bills, utility bills, insurance related debts, and any sort of security interest related to a personal debt.

C. Consumer

A consumer is any "natural person" who owes or allegedly owes a debt.[15]

(D.S.C. 1979) (administrator of county check clearing house not subject to Act as state employee); Kizer v. Finance America Credit Corp. Inc., 454 F. Supp. 937 (N.D. Miss. W.D. 1978) (in-house employees of creditors exempt when not collecting "debts" on behalf of others).

11. The term "debt collector" does *not* include "[a]ny person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (ii) concerns a debt which was originated by such person [or] (iii) concerns a debt which was not in default at the time it was obtained by such person . . . ." 15 U.S.C. § 1692a(6)(G) (1982). *See, e.g.*, Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985). The court in *Perry* explained that "[T]he legislative history of § 1692a(6) 'indicates conclusively' that a debt collector does not include . . . creditors, a mortgage servic[e] company, or an assignee of a debt, as long as the debt was not in default . . . [when] assigned." *Id.* at 1209 (citations omitted).

12. S. REP. No. 95-382, 95th Cong., 1st Sess. 3 (1977).

13. 15 U.S.C. § 1692a(5) (1982).

14. *In re* Schrimpsher, 17 Bankr. 999, 1010 (Bankr. N.D.N.Y. 1982) (as a matter of law, dishonored check is a debt within meaning of FDCPA).

15. 15 U.S.C. § 1692a(3) (1982). For clarity, the term "consumer" is hereafter referred to as "debtor."

It is important for the collector to analyze whether the debtor is a consumer from the debtor's perspective, and not just by analysis of the merchandise, instrument or service from which the debt arises. For instance, a "natural person" may, for "personal, family, or household purposes,"[16] invest in limited partnerships, speculate in stocks or commodities on margin, contract to purchase corporate stock, or make any other investment or commitment which requires a future payment. Under these circumstances, the debtor probably would be a "consumer," as defined by the Act, whereas a business entity (even a sole proprietor) may undertake similar obligations for business purposes and consequently fall beyond the scope of the Act.[17]

D. Communications

A communication is any direct or indirect conveyance of information regarding a debt through any medium.[18] Attorneys probably need not construe the term "communication" as a blanket prohibition to the representation of creditors. Recently, it has been suggested that even the filing of a lawsuit might fall within the definition of "communication" under the Act.[19] However, this suggestion is probably overcautious. Subsection 1692a(2), which defines "communication," must be read together with the other provisions of the Act. Specifically, subsection 1692(c) (discussed *infra*) provides attorneys and other collectors the opportunity to notify debtors that the creditor intends to invoke specific remedies, which include the filing of a complaint. Additionally, the FTC has stated in a non-binding commentary that the filing of a complaint is not a "communication" under the Act.[20]

Read together, the definitions in subsection 1692a limit the scope of the Act, though not significantly. The Act does not apply to corporate debtors, commercial debt, or the collection of debt directly by a creditor.[21] The Act does not distinguish the role of the attorney as collector, but distinguishes only between the consumer's purpose for having incurred specific debts.[22] Thus, the Act clearly applies to attorney debt collectors hired by third parties to collect debts incurred by natural persons for personal, family, or household purposes.[23]

II. PROVISIONS OF THE ACT

A. Prohibited Practices Under the Act

The Act prohibits four types of practices: harassment or abuse, the use of false or misleading representations, unfair practices, and furnishing deceptive

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16. 15 U.S.C. § 1692a(5) (1982).
17. *See id.*
18. 15 U.S.C. § 1692a(2) (1982).
19. Bingham, *Lawyers Beware: Small Change in Collection Act Bodes Big Impact*, Nat'l L.J., Oct. 27, 1986, at 26, col. 1.
20. 51 Fed. Reg. 8021, 8028 (1986) (to be codified at 16 C.F.R. § 803).
21. 15 U.S.C. § 1692a (1982).
22. 15 U.S.C. § 1692a(5) (1982).
23. Bingham, *supra* note 19, at 26, col. 1.

forms.[24] The courts may also "proscribe other improper conduct which is not specifically addressed."[25]

1. Harrassment or Abuse (section 1692d)

Section 1692d prohibits "any conduct the natural consequence of which is to harass, oppress or abuse any person in connection with the collection of the debt."[26] Collectors must not use obscene or profane language, threaten violence or publish lists of nonpaying debtors. They may not advertise the sale of any debt to coerce payment, or make harassing or anonymous phone calls.

2. False or Misleading Representations (section 1692e)

A collector may not use false, misleading or deceptive representations.[27] Specific prohibitions include, *inter alia*, implications or representations that the collector is someone she is not or that she has authority she does not actually have. Further, the collector may not misrepresent the debtor's legal rights,[28] falsely threaten legal action which the collector does not intend to take, or likewise, simulate legal process.

To determine whether a representation was misleading or deceptive, courts will apply a "least sophisticated consumer" standard, and will not assess consumer testimony to evaluate the misleading tendency of specific lan-

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24. *See* 15 U.S.C. §§ 1692d, 1692e, 1692f & 1692j (1982).

25. S. REP. No. 95-382, 95th Cong., 1st Sess. 4 (1977).

26. *See, e.g.*, Bingham v. Collection Bureau, Inc., 505 F. Supp. 864 (D.N.D. 1981) (no liability for harassment when collector discussed possibility of civil action in effort to collect debt, but collector immediately recalling debtor after debtor hung up phone constituted harassment); Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980, 982 (N.D. Ill. 1979) (letter threatening investigation or embarrassment violates harassment provision). However, the burden of proving harassment is always on the plaintiff. Harvey v. United Adjusters, 509 F. Supp. 1218, 1221 (D. Or. 1981).

27. *See, e.g.*, *Harvey*, 509 F. Supp. at 1221 (statement that person who paid their bills would retain good credit rating does not violate § 1692e and is not misleading); *Bingham*, 505 F. Supp at 872 (notice stating that debtor's account is in jeopardy but does not articulate consequences, is not, without more, considered misleading).

28. Among the sixteen false or misleading representations enumerated in § 1692e, the following are probably most applicable to attorneys:

> (2) The *false* representation of —
> (A) the character, amount, or legal status of any debt . . . .
> . . .
> (4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.
> . . .
> (6) The *false* representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to —
> (A) . . . lose any claim or defense to payment of the debt . . . .
> . . .
> (12) The *false* representation or implication that accounts have been turned over to innocent purchasers for value . . . .

15 U.S.C. § 1692e (1982) (emphasis added).

guage.[29] Rather, the analysis will focus simply on whether it is more likely than not that debtors on the low end of reasonable capacity who read a given notice or hear a given statement will infer from that message oppressiveness, falsehood or threat.[30]

3. Unfair Practices (section 1692f)

Section 1692f prohibits the use of "unfair or unconscionable means" to collect debts. Specific prohibited practices include the collection of more money than the debtor legally owes,[31] misuse of postdated checks[32] or the use of any symbol or language in communications (even a return address) that indicates that the communication concerns debt collection.[33]

4. Furnishing Deceptive Forms (section 1692j)

Section 1692j prohibits the collector from furnishing forms or letterheads to creditors for use in their collection efforts. This proscription is intended to protect debtors from a creditor creating the false impression that a third party is involved in the collection process.

B. Communications with the Debtor

1. Validation of the Debt (section 1692g)

Within five days after the collector's first communication with the debtor concerning a debt, or in the first communication, the collector must "validate" the debt.[34] The collector must provide *written notice* of the debt so the debtor may dispute the debt.[35] Proper notice must contain:
(a) the amount of the debt;
(b) the creditor's name;
(c) a statement that the collector will assume the debt is valid unless the

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29. Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1175 (11th Cir. 1985); Bingham v. Collection Bureau, Inc., 505 F. Supp. 864 (D.N.D. 1981) (citing older FTC cases, *e.g.*, Exposition Press, Inc. v. FTC, 295 F.2d 869, 873 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962)).

30. *See supra* note 29.

31. *See Bingham*, 505 F.Supp. 864, 870 (D.N.D. 1981) (no violation where creditor's form called for interest charges and collector merely calculated proper charges).

32. Section 1692f(4) prevents a collector from depositing or threatening to deposit postdated checks or other instruments prior to their respective dates. Subsection (2) limits the time on postdated checks to five days unless the debtor is notified in writing that the collector intends to make a deposit not more than ten nor less than three days prior to the deposit.

33. *See Rutyna*, 478 F. Supp. at 982 (no defense for collector to claim he was unaware that return address indicating debt collection business could violate any statute).

34. 15 U.S.C. § 1692g(a) (1982).

35. Attorneys presumably will not be held liable for failure to validate alleged debts before the effective date of the 1986 amendment. *See* Carrigan v. Central Adjustment Bureau, Inc., 502 F. Supp. 468, 470 (N.D. Ga. 1980) (collector not liable for failing to validate debt under § 1692g before subsection became effective). *But see* Drumright v. Collection Recovery, Inc., 500 F. Supp. 1 (M.D. Tenn. 1980) (suit will be timely regarding validating violations, which do not ripen until five days after initial communication). Thus, attorneys are subject to liability for validation violations arising from communications made on or after July 4, 1986.

debtor disputes its validity within thirty days after receipt of the notice;
(d) a statement that the collector will verify the debt if the debtor disputes the debt, or any portion thereof, in writing within thirty days, and;
(e) a statement that if requested in writing within thirty days, the collector will provide the debtor with the name and address of the original creditor or a copy of the judgment.[36]

If the debtor disputes the debt or requests the name of the original creditor within thirty days, the collector must cease collection efforts until the collector provides verification and/or the name and address of the original creditor.[37] The debtor's failure to dispute the debt is not an admission of liability.[38] Section 1692g can be read to create an implied thirty day "waiting period," during which an attorney could not proceed with a pre-judgment remedy. However, careful compliance with this section should avoid the practical problems a thirty day waiting period could cause.

In the first communication with the debtor, the attorney should "validate" the debt with proper notice of the information stated above. Additionally, the attorney ideally would verify the debt *before* the first communication, and include all such documentation with the first communication, or within five days thereof.[39] This procedure would not "short-circuit" the Act, but instead would relieve the attorney from engaging in prolonged communications with the debtor. If the attorney first validates and verifies the debt and subsequently encloses such documentation in the first communication, full compliance with this subsection will have been achieved, even if the debtor subsequently disputes the debt.[40] It is then only upon receipt of a dispute from the debtor that a collector must cease collection efforts and verify the debt.[41] Under this procedure, however, the attorney will already have verified the debt and upon notice of dispute, could proceed to file a complaint in full compliance with the Act.

There is currently no case law that interprets this subsection as applied to attorneys and the filing of complaints. However, the FTC has stated that section 1692(g) does *not* create an implied waiting period. In a non-binding Proposed Official Staff Commentary to the Fair Debt Collection Practices Act,[42] the FTC stated:

> A debt collector's institution of formal legal action against a consumer is not a 'communication in connection with collection of any debt,' and this does not confer . . . notice-and-validation rights on the consumer . . . .
> A debt collector need not cease normal collection activities within the consumer's 30-day period to give notice of a dispute until he

36. 15 U.S.C. § 1692g(a) (1982).
37. 15 U.S.C. § 1692g(b) (1982).
38. 15 U.S.C. § 1692g(c) (1982).
39. Validation of the debt, if not clearly printed on the *front* of the letter, must be identified as being on the back. Additionally, all validation information must be separately addressed to or reference the specific debtor. Ost v. Collection Bureau Inc., 493 F. Supp. 701 (D.N.D. 1980).
40. *See* 15 U.S.C. § 1692g(a) & (b) (1982).
41. 15 U.S.C. § 1692g(b) (1982).
42. 51 Fed. Reg. 8021, 8026 (1986) (to be codified at 16 C.F.R. § 803).

> receives a notice from the consumer . . . . A debt collector may report a debt to a credit bureau within the 30-day notice period, before he receives a request for validation or a dispute notice from the consumer.[43]

Further, to avoid confusing a debtor, it is probably wise to state in the first communication or within five days thereof, *in addition to* validation and verification of the debt, that:

> the Federal Trade Commission suggests in a non-binding commentary that the Fair Debt Collection Practices Act permits institution of legal action prior to the expiration of the aforementioned thirty-day period. If you do not pay this debt in full or make other satisfactory payment arrangements, we intend to commence legal action immediately.[44]

Initially, the extra validation and verification work required by the Act appears onerous and time consuming. However, verification and validation *ab initio* would accomplish three objectives. First, it would ensure full compliance with the Act and avoid the risk of future oversights. Secondly, it would avoid potential malpractice liability in the event a client-creditor should ever sue the attorney for non-compliance with the Act. Thirdly, *ab initio* compliance would avoid suits against attorneys by debtors for violations of the Act. Under current case law, an attorney may incur liability up to $1,000.00 for *each* violation, even if all violations occurred in the collection of just one debt.[45]

2. Restrictions on Communication (section 1692c)

Unless the collector has the prior consent of the debtor or the express permission of a court, a collector may not communicate with the debtor: a) at any unusual or inconvenient place or time, b) if the debtor is represented by an attorney, unless such attorney fails to respond to the collector within a reasonable time or unless such attorney permits direct communication with the debtor, or c) at the debtor's workplace, if the collector knows or should know that the employer prohibits such communications.[46]

If a debtor notifies a collector in writing that the debtor refuses to pay a debt or wishes the collector to cease communication, the collector must immediately cease communication with the debtor except: a) to inform the consumer that further collection efforts are being terminated, or b) to notify the debtor that the collector or creditor may invoke or intends to invoke specific remedies (e.g., filing a complaint).[47] For purposes of communicating with the debtor/consumer, the term "consumer" *includes the consumer's spouse, parent, guardian, executor or administrator.*[48]

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43. *Id.* at 8028.

44. *See id.* at 8028.

45. *See infra* note 72.

46. 15 U.S.C. § 1692c(a) (1982).

47. *See* Blackwell v. Professional Business Services of Georgia, Inc., 526 F. Supp. 535, 537 (N.D. Ga. 1981) (collection letter stating "final notice before legal referral" in bold print not a violation of the Act).

48. Whatley v. Universal Collection Bureau, Inc., 525 F. Supp. 1204, 1206 (N.D. Ga. 1981)

3. Communication with Third Parties (sections 1692b & 1692c(b))

The Act severely restricts communications with third parties concerning the debt, in order to protect the debtor's privacy. If the collector knows the debtor is not represented by an attorney, the collector may communicate with third parties to acquire location information, (e.g., address, telephone number, etc.). The collector must identify herself, state that she is confirming "location" information about the debtor and must *not* state the existence of an alleged debt.[49] The collector must identify her employer only if expressly requested.[50] The collector must not communicate with the same third person more than once, unless so requested by the third party or to correct erroneous or incomplete information.[51] Also, the collector may not communicate with third parties by postcard or use any "language or symbol" on an envelope or a telegram which indicates the communication relates to debt collection.[52]

Except for obtaining location information, unless the collector has the prior consent of the debtor or a court, the collector is prohibited from all communications with third parties concerning the debt.[53] Specifically, the collector may not communicate with any person except the debtor, the debtor's attorney, a consumer reporting agency if otherwise permitted by law, the creditor, creditor's attorney, or the collector's attorney.[54]

C. Venue and Legal Action by Collectors: (section 1692i)

A collector may file suit only in specified courts.[55] If real property secures the debt, the creditor must sue in the judicial district where the real property is located.[56] If the debt is not secured by real property, the creditor may sue *only* in the judicial district where the debtor signed the contract or where the debtor resides upon commencement of the action.[57]

The FDCPA is apparently the only federal statute in which Congress has prescribed local venue provisions. The venue provisions of section 1692i(a) attempt to minimize the perceived imbalance of power between debtors and creditors by requiring venue for consumer debt actions in a locale convenient to the debtor. Though no case to date has so held, attorneys should assume that courts other than those specified in section 1692i(a) cannot exercise jurisdiction over a consumer debt action, despite otherwise valid jurisdiction and state conferred venue.[58] Similarly, attorneys should assume that judgments entered by courts without section 1692i(a) venue are void.

The FDCPA venue provisions raise interesting questions related specifi-

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(any person damaged by violation of Act, including debtor's parents, has standing to sue).

49. 15 U.S.C. § 1692b(1) (1982).

50. *Id.*

51. 15 U.S.C. § 1692b(3) (1982).

52. 15 U.S.C. § 1692b(5) (1982).

53. 15 U.S.C. § 1692c(b) (1982).

54. 15 U.S.C. § 1692c(b) (1982).

55. 15 U.S.C. § 1692i(a) (1982).

56. 15 U.S.C. § 1692i(a)(1) (1982).

57. 15 U.S.C. § 1692i(a)(2)(A) & (B) (1982).

58. *See* 15 U.S.C. §§ 1692i(a), 1692n (1982) (preempting state law inconsistent with the Act).

cally to the enforcement of a security interest in residential property which, under state law, is classified as an interest in personal property. For example, in Illinois residential properties are commonly held in land trusts.[59] Under Illinois common law, beneficial interests in land trusts are considered *personal* property.[60] Though section 1692a(1) requires that a creditor *shall* commence suit in the judicial district in which the real property is located, most Illinois lenders' secured interests are assignments of the debtors' beneficial interest in their land trust, and not a security interest in real property.[61]

In states that characterize a beneficial interest in a land trust as personal property, a creditor whose secured interest is an assigned beneficial land trust interest, may follow subsections 1692i(2)(A) and (B), which confer proper venue in the judicial district where the debtor resides or where the debtor signed the contract from which the debt arose.[62]

On the other hand, an attorney who files suit pursuant to subsections 1692i(2)(A) and (B) must consider the prospect of defeating the debtor's motion to dismiss for lack of proper venue. A debtor sued in a district other than where the land trust corpus is allocated might argue that for FDCPA venue purposes, the beneficial interest in the land trust is properly considered real property, and not personal property.[63] Subsection 1692n declares that the Act preempts inconsistent state laws.[64] Arguably, the Illinois common law land trust doctrine is inconsistent with the 1692i(a)(1) venue provision relating to property, especially since permitting a creditor to sue in a district other than where the real property is located might tend to inconvenience the debtor. However, it is also arguable that the term "state law" as it appears in section 1692n refers only to state statutes relating to debt collection practices, and not to other common law property doctrines.[65]

The proper characterization of an Illinois land trust for FDCPA venue purposes raises further questions. If a land trust is real property for venue purposes, would that characterization also grant the debtor a right of redemption in the beneficial interest? Generally, a debtor retains no right of redemption when the beneficial interest is characterized as personal property. Certainly such a result would be unfair to the creditor, who would consequently have its secured interest in the beneficial interest impaired by operation of a federal venue statute. Most importantly, for venue purposes, the attorney must

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59. *See infra* notes 60-61.

60. Hutter v. Lake View Trust & Sav. Bank, 54 Ill. App. 3d 653, 370 N.E.2d 47, 12 Ill. Dec. 424 (1st Dist. 1977), *cert. denied*, 439 U.S. 1004 (1978); Sterling Sav. & Loan Ass'n v. Schultz, 71 Ill. App. 2d 94, 218 N.E.2d 53 (1966); *In re* Peters' Estate, 34 Ill. 2d 536, 217 N.E.2d 3 (1966).

61. *See* Sheridan v. Park Nat'l Bank of Chicago, 97 Ill. App. 3d 589, 422 N.E.2d 1130, 52 Ill. Dec. 921 (1981) (principles applicable to security interest in land trust are those applicable to security interest in personality); First Fed. Sav. & Loan Ass'n of Chicago v. Pogue, 72 Ill. App. 3d 54, 389 N.E.2d 652, 27 Ill. Dec. 588 (Ill. App. Ct. 1979).

62. 15 U.S.C. § 1692i(a)(2)(A) & (B) (1982).

63. *See* ILL. REV. STAT. ch. 148 § 81(5)(b) (1985). Legislative Findings — Purpose (Legislative approval of trustee and lender as same person "to foster and encourage the availability of financing for owners and developers of *real estate*." *Id.* (emphasis added).

64. 15 U.S.C. § 1692n (1982).

65. *See* S. REP. NO. 382, 95th Cong., 1st Sess. 2, *reprinted in*, U.S. CONG. & ADMIN. NEWS 1695, 1696-97.

distinguish whether the foreclosure is on just a beneficial interest or on the actual real property.

Finally, attorneys must consider the characterization of land trusts in terms of the validity of subsequent judgments. Obviously if the debtor resides, or executed the mortgage and note, in the same district where the property is located, no venue problems will arise. However, it is certainly possible that attorneys will confront a debtor who resides in one district, executed the note in a second district, and owns secured land trust property in a third district. It is this situation that will remain problematic until the courts address whether an Illinois land trust, or an interest similar in nature, is real or personal property for FDCPA venue purposes.

D. Civil Liability of Debt Collectors: (section 1692k)

A debtor must commence an action for violation of the Act, if at all, within one year of the violation.[66] However, the debtor need not assert violations of the Act as a counterclaim in the creditor's collection suit.[67] The debtor may commence suit in any appropriate federal district court[68] or in any other court of competent jurisdiction. The debtor may recover actual damages, costs, attorneys' fees and any additional damages the court deems appropriate, not to exceed $1,000 for an individual action or $500,000 for a class action.[69]

To determine damages under the Act, the courts will consider the frequency and persistence of violations by the collector, the nature of the violations, and whether the collector intended the violation.[70] It should be noted

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66. 15 U.S.C. § 1692k(d) (1982).

67. *See* Peterson v. United Accounts, Inc., 638 F.2d 1134, 1137 (8th Cir. 1981) (claim for damages under FDCPA is not a compulsory counterclaim in state action to collect underlying debt, even if federal claim might arise from same transaction; thus, prior state action does not preclude federal jurisdiction).

68. The Act's venue provisions do not apply where the debtor sues the collector for violations of the Act. Collectors must realize that debtors have a rather wide choice of forum, especially in terms of where a debtor receives mail. The courts will look to section 1391 of Title 28 of the United States Code to determine whether a debtor's choice of forum is appropriate, i.e., where all defendants reside or where the claims arose. 28 U.S.C. § 1391(b) (1980). It has been held that a claim for violation of the FDCPA arises where the debtor *receives* a letter that allegedly violates the Act. *See, e.g.*, Murphy v. Allen County Claims & Adjustments, Inc., 550 F. Supp. 128 (S.D. Ohio 1982); Gachette v. Tri-City Adjustment Bureau, 519 F. Supp. 311 (N.D. Ga. 1981). In Lamont v. Haig, the court determined that where " 'the claim arose' should . . . be ascertained by advertence to events having operative significance in the case, and a common sense appraisal of the implications of those events for accessibility to witnesses and records." 590 F.2d 1124, 1134 (D.C. Cir. 1978) (citation omitted). The court also remarked that "the forum court should not oppose the plaintiff's choice of venue if the activities that transpired in the forum district were not insubstantial in relation to the totality of events giving rise to the plaintiff's grievance . . . ." *Id.* at 1134 n.62. *See also* Lachman v. Bank of Louisiana in New Orleans, 510 F. Supp. 753, 758 (N.D. Ohio 1981). "Congress intended . . . to provide consumers with effective remedies . . . . This purpose would be frustrated if consumers had to travel long distances to file and prosecute lawsuits . . . particularly in light of the limited liability established by the acts [15 U.S.C. §§ 1666(b) & 1692k(a)(2)(A)]." *Id.*

69. 15 U.S.C. § 1692k(a)(2)(A) & (B) (1982).

70. 15 U.S.C. § 1692k(b)(1); *In re Schrimpsher*, 17 Bankr. 999, 1017 (Bankr. N.D.N.Y. 1982).

that recent decisions construing this sub-section suggest in dicta that a plaintiff can recover up to $1,000 for each violation of the Act, even if the debtor brings only one action.[71]

A collector has two possible defenses to an action under the Act. First, a collector is not liable if the alleged violation was unintentional and occurred despite the maintenance of procedures designed to avoid such violations.[72] Second, there is no liability if the debt collector has relied in good faith on an FTC advisory opinion.[73]

III. GUIDELINES FOR COLLECTION OF CONSUMER DEBT UNDER THE FDCPA

The following guidelines should be helpful when collecting consumer debts:

A) Advise clients to insist that debtors sign consumer debt contracts in the creditor's jurisdiction, if possible, to avoid potential venue problems.[74]

B) If the debtor is represented by an attorney, deal only with that attorney concerning debt collections, unless given permission to deal directly with the debtor.[75]

C) Provide *written notice* to the debtor pursuant to § 1692g *within five days* after or along with the initial communication concerning the debt. If you do not verify and validate the debt *first*, be sure to include:

1) the amount of the debt;

2) the name of the creditor;

3) statements that the consumer may dispute the debt, ask for verification and the name and address of the original creditor or a copy of the judgment;

4) a statement that the debt will be assumed valid if not disputed within 30 days;

5) a statement that the FTC has informally stated that the Act does not preclude the filing of a complaint within 30 days.

D) Avoid using any language or communication which a "least sophisticated" consumer might interpret as misleading, threatening or harrassing.[76]

E) Avoid communication with third parties concerning the debt except as authorized by the Act or by the debtor.[77]

F) Never use postcards or other means by which the purpose of the debt

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71. *See Harvey*, 509 F. Supp. 1218. Additionally, a debtor has standing to sue collectors for violations of the Act regardless of whether a valid debt exists, and may collect statutory damages plus attorneys' fees despite proof of actual damages. Baker v. G.C. Services Corp., 677 F.2d 775, 780 (9th Cir. 1982).

72. 15 U.S.C. § 1692k(c) (1982). However, mistakes of law, ignorance or reliance upon counsel will not support the bona fide error defense. *Baker*, 677 F.2d at 779. *See also* Hulshizer v. Global Credit Services, Inc., 728 F.2d 1037, 1038 (8th Cir. 1984) (FTC "staff enforcement position" is informal and does not justify reliance thereon as defense to violations of the Act).

73. 15 U.S.C. § 1692k(e) (1982). There are currently no existing FTC Advisory Opinions regarding the 1986 Amendment to the Act.

74. 15 U.S.C. § 1692i (1982).

75. 15 U.S.C. § 1692c(a)(2) (1982).

76. 15 U.S.C. § § 1692d-f (1982).

77. 15 U.S.C. § 1692c(b) (1982).

collection communication is discernible.[78]

G) If the debtor so requests, immediately cease all communication concerning the debt, except to inform the debtor that the creditor may or will invoke specific remedies, including filing a complaint.[79]

CONCLUSION

The 1986 Amendment to the FDCPA does not change one very basic point. The Act itself is intended to prevent abusive and unlawful debt collection practices. The 1986 Amendment does impose an affirmative obligation upon attorneys to follow the requirements of the Act. However, in general practice law firms, for whom most consumer debt collection is an ancillary or a small part of their practice, the 1986 Amendment should not considerably increase the risk of incurring liability for the use of abusive collection techniques. Attorneys in general practice law firms cannot afford such liability or bad publicity, and presumably would avoid abusive collection techniques *with or without* the 1986 Amendment.

78. 15 U.S.C. § 1692b(4) (1982).
79. 15 U.S.C. § 1692c(c) (1982).

Ideology in the Courtroom

Howard Zinn * *& Laura Stewart* **

We are witnessing, in the mid 1980's, a number of criminal trials around the country, involving charges of criminal trespass and related offenses, where the defendants are attempting to exonerate their acts with the claim of "necessity."[1] This claim asserts that the defendant's conduct was legitimate because it was aimed at preventing some greater harm, like nuclear war, or military involvement in Central America. It is an argument that has some foundation in common and statutory law, which have sometimes recognized the validity of a defense based on "competing harms" or "justification" or "self-defense" or "defense of others."[2] However, while the necessity defense has been accepted by some judges and some juries, it has been most frequently excluded from the courtroom, or, where included, treated with hostility by the judge.[3] A common complaint of unfriendly judges and some legal commentators is that the defendants are introducing "political ideology" into the judicial arena.

This essay is a rejoinder to such arguments. It insists on the inevitable presence of political ideology, sometimes overt, sometimes covert, in the judicial process. Further, finding a common thread of elitist values dominating that ideology, it supports, in criminal trial defense of protesters, the open declaration of counter values: the rejection of militarism and the furtherance of economic and social equality.

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1. By July of 1985, the Peace Law & Education Project of the Meiklejohn Civil Liberties Institute, Box 673, Berkeley, California 94701, had compiled over 100 such cases, and summarized their outcomes.

2. *See* LAFAVE & SCOTT, CRIMINAL LAW 379 (1972).

3. For cases typical of such outcomes see California v. Brannon, (Munic. Ct., Livermore - Pleasanton Judicial Dist., Alameda Cty. 1983), *aff'd*, Superior Ct. Appellate Dept. (Jan. 17, 1985), where the trial court rejected the necessity defense; Oregon v. Ahrens, No. 78-260 (Columbia Cty. Dist. Ct. July 22, 1979), where such evidence was excluded; Missouri v. Levering, 661 S.W.2d 792 (Mo. App. 1983), where the district court's exclusion of a necessity defense was upheld by the Court of Appeals September 6, 1983; Rhode Island v. Champa, 494 A.2d 102 (1985), where the judge rejected the necessity defense and was upheld by the Supreme Court of Rhode Island.

The myth of neutrality in law is only one aspect of ideology in modern liberal society. I use the term "ideology" as Karl Mannheim used it[4] to describe the structure of ideas promoted by ruling groups in any society, distorting reality for their own interest. As Karl Marx pointed out, such thinking, having behind it the resources and force of the dominant class, is spread throughout the society, becoming the "false ideology" of the ruled.[5] It is termed "false" because it does not correspond to the interests of the majority, but is nevertheless widely held, internalized, and mystified to the point where its class origins and skewed effects are not readily visible.

Modern states depend on ideology, even more than on force, to maintain their stability, to retain the support of their citizens. Modern societies require mass participation in the economy, and in wars, and so invite public involvement in politics through elections in order to legitimize foreign policy and the economic status quo. Such legitimization is aided by the comforting thought that one lives in a society whose institutions are class-neutral: that bad consequences (poverty, war, etc.) are the result of chance, God, human nature, or personal inadequacy.

The myth of institutional neutrality is at the core of an ideology aimed at the stabilization of existing arrangements of wealth and power. It incorporates the idea that government is a neutral referee among pluralistic interests, that all persons are equal before the law, that the arts are innocent of political bias, that the media of communications are factual and objective, that education is value-free. It is a perfect formula to disarm an educated population facing a state which is armed, both physically and ideologically. Alex de Tocqueville, that keen observer of the United States in its early decades, spoke of "servitude of the regular, quiet, and gentle kind"[6] which "might even establish itself under the wing of the sovereignty of the people."[7] In such a case, he wrote: "The will of man is not shattered but softened, bent, and guided . . . till each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd."[8]

In this softening for timidity, the law is well-equipped. Its claim to neutrality is even more staunchly advanced than that of other institutions. We see this in John Adams' phrase, repeated through the centuries, that we are "a government of laws and not of men," and in law professor Herbert Wechsler's writing almost two hundred years later: "Toward Neutral Principles of Constitutional Law."[9] The claim is given weight by the physical accoutrements of the courts: the marble pillars, the gowns, the high seat of the judge, the reverential atmosphere. The interests of the mighty, and the desperation of the aggrieved, are both contained and concealed. Herbert Read in his essay "Chains of Freedom"[10] wrote:

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4. *See* K. MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE (1955).

5. *See* K. MARX & F. ENGELS, THE GERMAN IDEOLOGY (C.J. Arthur ed. 1970).

6. A. DE TOCQUEVILLE, II DEMOCRACY IN AMERICA 319 (1948).

7. *Id.*

8. *Id.*

9. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

10. H. READ, ANARCHY AND ORDER (1971).

> The independence of the judiciary is symbolized in various ways. By means of wigs and gowns, the participants are dehumanized to an astonishing degree. If by chance, in the course of pleading, a hot and flustered barrister lifts his wig to mop his brow, an entirely different individual is revealed. It is as if a tortoise had suddenly dispensed with its shell. The whole business is carapaceous: a shell of custom and formality against which life, plastic and throbbing, beats in an effort to reach the light.[11]

A law which is neutral can be obeyed without pang of conscience, just as God, who is beyond favoritism, must be obeyed whether the result is balm or plague. Tertullian, a church father of the 3rd century, wrote that it is our duty to obey the edicts of God, without considering whether they are right or wrong, simply because they have been issued by God.[12] Obedience to law has a similar status in modern society. As Robert MacIver wrote: "We obey the law not necessarily because we think the law is right, but we think it right to obey the law."[13]

Legal positivism is the doctrine which advocates strict adherence to stick to the letter of the law, whatever injustice may result, because there is a higher justice in order. It fears subjectivity, uncertainty, and welcomes predictability, stability, and the honoring of expectation. Jeremy Bentham's formula for doing right, his Utilitarian criteria, held stability in high esteem, and on that count was suspicious of attempts to change the distribution of wealth and property: "Property and law are born together and die together."[14] Marx said of Bentham: "With the dryest of naivete he takes the modern shopkeeper, especially the English shopkeeper, as the normal man. Whatever is useful to this queer normal man, and to this world, is absolutely useful."[15] Unquestioning obedience to law, which is the implication of legal positivism, grants the stability which guarantees existing property relationships.

The pretense of law to neutrality goes back very far, even before modern parliamentary liberalism. Lon Fuller cited the statement of Supreme Court Justice Keen of Newgarten in England, in the year 1300, that whether the defendants before the court were "right or wrong" is "a question that is irrelevant to the discharge of my office as judge sworn to apply, not my conceptions of morality, but the law of the land."[16]

The positivist doctrine was challenged in the 20th century by "legal realism," which Oliver Wendell Holmes expressed[17] in suggesting that "social advantage" must be considered in applying the law, and that the consequences of judicial decisions must be considered along with their legal bases. Although that doctrine became prominent in the 1920's and 1930's in the world of academic discourse about law, and led — under the impetus of economic crisis —

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11. Read, *Chains of Freedom*, in ANARCHY AND ORDER 188 (1977).

12. APOLOGETICS — EARLY CHURCH, TERTULLIANUS, QUINTUS SEPTIMUS FLORENS (Ernest Evans ed. & trans. 1972).

13. R. MACIVER, THE MODERN STATE 154 (1964).

14. W. SEAGLE, THE HISTORY OF LAW 50 (1946).

15. CAPITAL 668 (1906).

16. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 632 (1949).

17. Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 467 (1897).

to legal innovation by the Supreme Court in the New Deal era, for the most part the practical application of law in the real world has remained centered in positivism.

Holmes himself embodied the convenient ambiguities of modern liberalism, in which the pluralism praised in theory is thwarted by the singularity of power in the real world. He could say: "The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, had had a good deal more to do than the syllogism in determining the rules by which men should be governed."[18] But his own prejudices led him to the conservative caution expressed in his belief that "imitation of the past, until we have a clear reason for change, no more needs justification than appetite."[19]

This line of self-deception — that moral questions can be separated from legal ones — can be traced to our own time. William E. Rehnquist, before he was appointed to the Supreme Court, and while he was a clerk for Justice Robert Jackson in the early 1950's, commented favorably on an appeals court ruling that denied blacks the right to vote in a Texas Democratic Club election, saying the decision was correct "to a lawyer rather than a crusader."[20] Is Rehnquist's consistent conservatism simply an adherence to neutral legal positivism, or is Rehnquist's legal positivism inherently conservative and therefore useful to those opposing liberal ideas? Was it just strict adherence to law that led Rehnquist, as a law clerk, to say that the doctrine of "separate but equal" was "right and should be affirmed?"[21]

It is inherent in the idea of law — a body of written principles constantly referred to for guidance — that the past rules the present. As Richard Wasserstrom has commented: "The law is conservative in the same way in which language is conservative. It seems to assimilate everything that happens to that which has happened."[22] Thus the sanctification of law is itself ideological (that is, biased toward the status quo) even before it is examined for its particular content or its specific applications. That is why all modern states, whether monarchies or military dictatorships or socialist "dictatorships of the proletariat," or parliamentary democracies, have in common the stern admonition to "obey the law."[23]

The concealment of ideology in the law is helped by a panoply of procedures which have the look of neutrality — the concept of "due process." But procedural rules have substantive origins and their application has substantive effects. Judges deceive themselves if they are unaware of this. Even the victims deceive themselves, as Aharon Appelfeld demonstrated in his novel,

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18. Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1835 (quoting O.W. HOLMES, THE COMMON LAW 1 (1963)).

19. Wechsler, *Toward Neutral Prinicples of Constitutional Law*, 73 HARV. L. REV. 1, 17 (1959) (quoting Holmes, *Holdsworth's English Law*, in COLLECTED LEGAL PAPERS 285, 290 (1920)).

20. Jenkins, *The Partisan: A Talk With Justice Rehnquist*, N.Y. TIMES MAGAZINE 28, 32 (March 3, 1985).

21. *Id.*

22. Richard Wasserstrom, *Lawyers and Revolution*, Speech to the National Lawyers Guild Annual Convention, July, 1986.

23. Zinn, *The Conspiracy of Law*, in THE RULE OF LAW 19 (R. Wolff ed. 1971).

Badenheim Nineteen Thirty-Nine, about Jewish visitors to a sanitarium near Vienna. Told they must register with the sanitation department and get ready to leave, they are pleased with the orderliness, the efficiency. A deportee who wasn't pleased, and tried to run away, was pacified by being told he could appeal to a committee and the words *procedure* and *appeal* seemed to satisfy him.[24]

It is instructive to study, in the atmosphere of the 1980's, the substantive evil that arose from the application of "law" to the Japanese evacuation cases of World War II. Wechsler, writing in the 1950's, happily found a substantive justification for what he claimed was a purely legal opinion on the correctness of the round-up and detention of 110,000 Japanese-Americans: "Only the other day I read that the Japanese evacuation, which I thought an abomination when it happened, though in the line of duty as a lawyer I participated in the effort to sustain it in the Court, is now believed by many to have been a blessing to its victims, breaking down forever the ghettos in which they had previously lived."[25] Thus, it was his legal "line of duty" to support "an abomination," for which he also found, after the fact, a moral justification. Was this supposedly "legal" reasoning not a rationalization of the nationalism — tinged with a bit of racism — that dominated the United States during and after World War II?[26]

How can law be neutral, how can procedures be neutral, when applied in a world of rich and poor? The inherent fallacy of the notion of equality before the law in an unequal world was expressed by the French writer Anatole France: "The law in its majesty draws no distinction but forbids rich and poor alike from begging in the streets or from sleeping in the public parks."[27]

The class nature of law in American society goes back to the Constitution itself, and even farther back to the 180 years of history that preceded the making of the Constitution. In those years, a society of class and caste was formed, of slaves and slaveowners, servants and masters, miserably poor tenants and landlords of enormous estates. It was a time of slave revolts, servant rebellions, tenant uprisings, in which mobs of the poor ransacked docks and mansions in Boston, and angry farmers engaged in full-scale war against the rich, from Bacon's Rebellion in Virginia in 1676, to the Regulator Movement in the Carolinas a hundred years later.[28] That class conflict was overshadowed by the Revolutionary War, but when the war ended, Shays Rebellion in Massachusetts frightened the post-war elite into the quick decision for a Constitutional Convention.

The document that emerged as our national legal framework came out of a political ideology that was essentially conservative, as Charles Beard showed in his intellectual portrait of the Founding Fathers.[29] Madison's argument for the Constitution in Federalist X made plain the kind of rebellion he (and

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24. A. APPELFELD, BADENHEIM NINETEEN THIRTY-NINE (1981).

25. Wechsler, *supra* note 9, at 27 (footnote omitted).

26. *See* ZINN, POSTWAR AMERICA 1945-1971 ch. 2 (1983).

27. M. COHEN, REASON AND LAW 101 (1950).

28. See the early chapters in ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES (1981) as well as THE AMERICAN REVOLUTION (A. Young ed. 1976).

29. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1935).

Hamilton and John Jay and the rest of their class) wanted to prevent with a federal constitution: "A rage for paper money, for an equal division of property, for an abolition of debts, or for any other improper or wicked object . . . ."[30]

The Constitution, born of a class society, conceived by a rich, white, male elite, legitimized slavery and created a national government with the requisite powers of taxation and military mobilization to maintain the stability of the existing order. That order was of rich and poor, buffered by the existence of a substantial group of small landholders and city mechanics, who, if allied to the rich, could stand between them and the underclass of slaves and Indians, and the propertyless. Even when sweetened with a Bill of Rights, the Constitution deferred to the reality of the society outside the walls on which it hung. In that society, those who held economic and political power could play with its provisions: they could ignore the First Amendment (as in the Sedition Act of 1798) but enforce the Whiskey Tax against rebellious Pennsylvania farmers, all in the same decade.[31]

Morton Horwitz has shown how, in the thirty years leading up to the civil war, court decisions deferred to the necessities of business growth and profit.[32] Could a mill owner destroy someone's property by flood to get the water power he needed? English common law would have said no. But the requirements of capitalism dictated that the answer was now yes. The old idea of fair price was succeeded in the courts by the idea of *caveat emptor* — let the buyer beware — a decision not dictated by the strictures of legal precedent, but by the new capitalist ethos in which the consumer became prey to the profiteer. Horwitz concluded:

> By the middle of the nineteenth century the legal system had been reshaped to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society . . . . [I]t actively promoted a legal redistribution of wealth against the weakest groups in the society.[33]

When, in the late 19th century, the organization of trade unions had proceeded so far that a nationwide boycott of the railroads, the Pullman Strike of 1894, could be organized with devastating effect, the federal courts went to work, granting the injunctions asked by the railroads against the strikers, helping to break the strike.[34] Were the courts as neutral in applying criminal penalties to employers as to employees? Hardly. In the Colorado Coal Strike of 1913-14, no killer of miners, whether private detectives of the Baldwin Felts Agency, or National Guardsmen, and certainly not Rockefeller himself, was indicted for murder. But a union leader, John Lawson, was.[35] No one can read a history of the labor movement and still claim that class prejudice was not rife in the ideology of the courtroom when labor and capital came into

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30. THE FEDERALIST No. 10 (J. Madison).
31. Zinn, *supra* note 23, at 25.
32. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977).
33. *Id.* at 253-54.
34. *In re* Debs, 158 U.S. 564 (1894).
35. G. WEST, REPORT ON THE COLORADO STRIKE (1915).

conflict.[36]

Courts do sometimes decide against the rich. As Edgar Friedenberg put it, they are like pharmacies; they occasionally give out something good.[37] The Supreme Court decision that affirmed the constitutionality of the National Labor Relations Board Act can be seen as such an occasion.[38] But it can also be seen as an attempt to quiet the labor turmoil of that tumultuous era. And when workers went so far as to challenge the sanctity of private property, as in the sit-down strikes, the court made clear its position,[39] and in a series of decisions weakened the initially pro-labor National Labor Relations Act.[40] When Friedenberg's kindly pharmacist does do his occasional good deed, he may endanger his license.

In Minnesota in 1984, while settling a case involving the Dalkon Shield, an intrauterine device which thousands of women claimed injured them, Federal District Judge Miles Lord delivered an extraordinarily powerful accusation, unprecedented in a courtroom, against the A.H. Robins Company, which manufactured the device. He said the company was continuing to allow tens of thousands of women to wear the device, which he called an "instrument of death, mutilation and disease."[41] He continued by stating that the company's failure to recall the product constituted "corporate irresponsibility at its meanest."[42] It is common for judges in criminal trials to deliver blistering attacks on the character of convicted defendants. They are not charged with dereliction of duty for doing so. But Judge Lord, after his speech against the A.H. Robins Company, was investigated by a panel of judges of the Eighth Circuit Court of Appeals.[43] Not long thereafter, he resigned from the bench.

The investigation of Judge Lord in Minneapolis illustrates an important fact about the existence of ideology in modern liberal society: when that society's pretense to neutrality is challenged, it becomes indignant; when its partisanship on behalf of the elite is countered with a partisanship on behalf of the victims of society, the indignation turns to fury. Denunciations fill the air, charging that "bias" or "propaganda" or "politics" have entered the pure air of the culture.

The idea that judges and courts are neutral, fair, unbiased and objective is made immediately suspect by the fact that judges are appointed by politicians, or elected within the rules of a money-dominated two-party system. The alternation of Democrats and Republicans on the bench is a poor disguise for the elitist biases of judges in general. Whitney North Seymour conducted a study over a five-year period of ninety-seven judges elected to the New York State Supreme Court and found that 88 of them had received the nomination

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36. *See* S. YELLEN, AMERICAN LABOR STRUGGLES (1969).

37. Friedenberg, *The Side Effects of the Legal Process*, in THE RULE OF LAW 25 (R. Wolff ed. 1971).

38. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

39. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

40. Klare, *Judicial Deradicalization of the Wagner Act*, 62 MINN. L. REV. 265 (1978).

41. *A panel tries to judge a judge; a jurist is challenged for his blunt courtroom remarks*, TIME July 23, 1984, at 88.

42. Seigel, *Stinging Dalkon Shield Rebuke Struck From Record but Judge Is Not Disciplined*, L.A. Times, Nov. 3, 1984, at § 1, p.2, col. 1.

43. *See id.*

of both the Republican and Democratic Parties in order to guarantee their election. "[T]he arrangement was simply a part of a deal between political leaders to divide up the available vacancies."[44]

Federal judges have always been appointed with due regard to their political views, whether Democrats or Republicans were in office. In the Reagan Administration, this became more blatant. When a Legal Aid Society lawyer was proposed for a federal judgeship in 1985, administration officials agreed he was qualified but White House counsel Fred Fielding said Reagan wanted nominees "who share his understanding of proper judicial philosophy — that is, who view the courts as interpreting law rather than enacting it."[45] Of course, those judges simply "interpreting" the law turned out to be consistently conservative in matters or race, economic policy, and criminal law.

When President Richard Nixon nominated Warren E. Burger as Chief Justice of the Supreme Court, the press reported that the nomination "drew warm praise from conservative members of the Senate Judiciary committee, particularly [by] Southerners."[46] Not long after that, Burger told the American Law Institute:

> At the drop of a hat we find adrenal fueled lawyers cry out that theirs is a 'political trial' . . . . Someone must teach that good manners, disciplined behavior, and civility — by whatever name — are the lubricants that prevent lawsuits from turning into combat . . . .[47]

Burger spoke against "insolence and arrogance" and praised "English barristers" who he said were "the most tightly regulated and disciplined in the world."[48]

It should be noted that Burger was speaking in the aftermath of a series of political trials of protesters against the Vietnam War, in which lawyers again and again challenged the nationalist ideology of the courts. Indeed, it can be said that nationalism, in the sense of humble obedience to war policy, has always been the ideology dominating the courts. Was Oliver Wendell Holmes' "clear and present danger" doctrine simply a neutral application of law, when it described a man who distributed leaflets against conscription and against World War I.[49] Why was it inconceivable to him or to other members of that unanimous court that the war itself, sending young men daily to their deaths, was a much clearer and more present danger than any person criticizing the war?

The ideology of militarism, of jingoism, of unquestioning acceptance of whatever war is decided on by the government — that ideology has always pervaded the judicial system. Thus, the requirements of war could obliterate the liberties of 110,000 Americans of Japanese ancestry, with the blessing of

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44. W. SEYMOUR, WHY JUSTICE FAILS 29 (1973).

45. Werner, *Judicial Nominee's Rejection Assailed*, N.Y. Times, Apr. 2, 1985, at B2, col. 4.

46. Semple, *Warren E. Burger Named Chief Justice By Nixon; Now On Appeals Bench*, N.Y. Times, May 22, 1969, at 1, col. 8.

47. W. Burger, C.J., Speech to the American Law Institute (reported in N.Y. Times, May 19, 1971, at 28, col. 1).

48. *Id.*

49. Schenck v. United States, 249 U.S. 47, 52 (1919).

the Court, in a decision in which Justice Murphy, dissenting, said "falls into the ugly abyss of racism."[50] Moreover, despite a number of opportunities during the Vietnam War, the Supreme Court refused even to hear cases challenging the constitutionality of that undeclared war. Appellants could not find four judges willing to buck the tide of nationalism.

When the Vietnam War was challenged by protesters who dared to organize a demonstration of that holy ceremony, and to do so in that unholy city, Chicago, the police turned a raucous demonstration into a violent "police riot"[51] and eight anti-war spokesmen were put on trial in the extraordinary "Chicago Eight" case. Judge Julius Hoffman, a prototype of a "neutral" judge caught up in the ferocious ideology of nationalism, treated the defendants as if they were already guilty. Enraged by their refusal to be subordinate, he had one of them, the black defendant, Bobby Seale, chained and gagged for stubbornly insisting on his right to be his own lawyer. Hoffman cited the defense lawyers for contempt, and gave them prison terms, for their vigorous support of their clients.[52]

It was not the first time lawyers defending radical clients had been punished for speaking boldly in court. The trial of the Communist leaders under the Smith Act, in 1949, produced jail sentences for two of their lawyers, Harry Sacher and Abraham Lesserman, and disbarment proceedings which stretched out over twelve years, in an action which legal historian Jerold Auerbach wrote "can only be described as diabolic." Auerbach showed how the letter of the contempt law itself was violated by the district court and the court of appeals in order to avoid challenging the fairness of the trial.[53] If American courts are non-ideological, how is it that the first American lawyers known to have been disbarred for conduct in the courtroom were attorneys for Communists? The Smith Act trials began a wave of punitive actions against lawyers for representing left-wing clients. It was thus no wonder that Communist Party leader Steve Nelson, accused of sedition in Pennsylvania, approached local bar associations, visited twenty-five lawyers in Pittsburgh, wrote to fifty others in Philadelphia, New York and Chicago, and could find no lawyer to defend him, so he defended himself.[54] One of the attorneys in a Smith Act trial, Richard Cladstein, spent six months in a federal penitentiary at Texarkana, Texas, after being transported from New York, manacled and in leg irons, over a seven week period.[55]

The severe treatment of dissidents is one side of the ideological use of the courts. The other side is the lenient treatment of corporations and government officials. It is rare to find criminal penalties for corporate fraud, even where huge sums of money are involved. In eighty years of violations of the Sherman Antitrust Act, executives received prison sentences in only three cases.[56] When in 1978, two chief officers of the Fruehauf Corporation were convicted of con-

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50. *Korematsu*, 323 U.S. 214 (1944) (Murphy, J., dissenting).

51. D. WALKER, RIGHTS IN CONFLICT (1968).

52. J. EPSTEIN, THE GREAT CONSPIRACY TRIAL (1970).

53. J. AUERBACH, UNEQUAL JUSTICE 242-43 (1976).

54. *Id.* at 249.

55. S. KUTLER, THE AMERICAN INQUISITION (1982).

56. *See generally* Green & Berry, *Capitalist Punishment; Some Proposals*, THE NATION, June 15, 1985.

spiring to defraud the Federal government of $12 million in excise taxes, the federal judge sentenced them not to jail, but to community work for eighteen months.[57]

Typically, we find fines for corporate offenders, prison for lower-class offenders. The *Boston Globe* reported one day, in 1983, that five officials of a leather company, who had pleaded guilty of illegally dumping untreated pollutants into the Ashuelot River in New Hampshire, and of storing hazardous wastes, were fined $500,000, with jail sentences suspended. On the same page was a report that Frank Wills, the black security guard who had discovered the burglary of the Democratic Party headquarters in the Watergate Apartments, was sentenced to a year in jail for shoplifting a $12 pair of sneakers from a discount store in Augusta, Georgia.[58] When the Gulf Corporation was found to have overstated the cost of crude oil by $79.1 million dollars, in violation of 1973-74 price controls, no one was jailed in that very grand larceny. Gulf Oil made a deal with the government, to pay back 42.2 million to consumers.[59] Can one imagine a judge making a deal with a bank robber to let him go for repayment of half of his take?

Is it naivete or hypocrisy when some legal observers suggest that anti-war protesters are sullying the purity of the judicial process by introducing "political ideology" into criminal trails.[60]

A crime is a crime, such observers intone, when political protesters are in the dock. But the very definition of crime is determined by one's political ideology, one's standing in the world of wealth and power. This is a use of "standing" one does not find in the law books, and it suggests that when an ordinary citizen does not have "standing" — in the legal sense — to sue the CIA,[61] something deeper is involved than the Supreme Court's definition of that word. Thus, the CIA may commit murder on a mass scale, as in Operation Phoenix in Vietnam, involving, by its own admission, the killing of thousands of civilians.[62] This was a clear violation of United States law, since the United States signed the London Charter, annexed to the London Agreement of August 8, 1945,[63] Article 6 of which makes the murder of civilians a war crime and a crime against humanity. Not one, however, was prosecuted.

Compare the prison term given to any ordinary defendant found guilty of "breaking and entering" into a home or a business to the non-penalty given to the United States government (or any government for that matter since we find the same ideological double-standard operating in all nation states) for "breaking and entering" into a country through military invasion (Guatamala, 1954; Cuba, 1961; Vietnam, 1965; Domincan Republic, 1965; Cambodia, 1970; Laos, 1971).

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57. *Id.*

58. Boston Globe, Apr. 30, 1983, at 1, col. 1.

59. N.Y. Times, July 27, 1978, at D12, col. 8.

60. *See* Rothenberg, *The "Necessity" to Restrict Appeals to Judicial Prejudice*, 21 NEW ENG. L. REV. 581 (1986).

61. United States v. Richardson, 418 U.S. 166 (1974).

62. T. POWERS, THE MAN WHO KEPT THE SECRETS: RICHARD HELMS AND THE C.I.A. 230-31 (1979).

63. O'Brien, *The Vietnam War and International Law*, in THE NUREMBERG PRINCIPLES 193-94 (Falk ed. 1972).

When the Watergate scandals were resolved in 1974 by the resignation of President Richard Nixon, followed by the trials of a number of government officials, there was widespread self-satisfaction that "the system works." However, an essential element in "the system" is the double-standard of justice for crimes committed by ordinary citizens and those committed by government officials. One of those trials involved the Director of the C.I.A., Richard Helms, who lied to a Senate committee in 1973 about the involvement of the U.S. government in the military coup that overthrew the Allende government in Chile. He was fined and a two-year prison sentence was suspended.[64] This was in 1977 when Jimmy Carter was President. Carter, running for office the previous year, had said: "it is time for our government leaders to respect the law no less than the humblest citizens, so that we can end the double standard of justice in America. I see no reason why big-shot crooks should go free while the poor ones go to jail."[65] But Carter's Attorney General, Griffin Bell, thought the Helms sentence was "fair" and "just."[66]

In early 1978, a staff member of the American Bar Association's Commission on Correctional Facilities and Services took note, in a memorandum to the Commission, of the special treatment for government officials involved in the Watergate scandals. "I feel compelled to bring to your attention what appears to be a blatant example of how our criminal justice system accords unequal and disparate treatment to offenders. I refer specifically to the paroling of Mr. G. Gordon Liddy and the reduction of sentences for Messrs. Haldeman, Erlichman, and Mitchell."[67] (Liddy, in prison, had been found to possess a 14-inch length of pipe and a club; Haldeman and Erlichman were Nixon aides, and Mitchell was Nixon's Attorney General.) President Nixon himself escaped the possibility of serious criminal charges by being pardoned by his successor, Gerald Ford. His Vice-President, Spiro Agnew, convicted of tax evasion, was fined and his three-year jail sentence suspended.[68]

Such instances, suggesting the endemic ideological basis of judicial decisions in criminal cases can be multiplied indefinitely. We might cite the indictments handed down in the military assault on Attica Prison in September, 1971, in which thirty-nine people were killed in that attack, and none of the attackers were convicted of any crime. Or the National Guard shooting of four students at Kent State University, Ohio, in the spring of 1970, in which no criminal charges were brought against those who ordered the charge, or did the shooting. Or the multiple violations of criminal law by the FBI and the CIA reported in the Senate hearings of 1975, resulting in no jail sentences for violators.[69]

We find a special ferocity coming from the supposedly neutral bench when defendants assert, against the nationalism of the dominant ideology, the values of internationalism, non-intervention, and disobedience to immoral au-

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64. *See* POWERS, *supra* note 61, at 391.

65. Boston Globe, Nov. 2, 1977, at 18, col. 2.

66. *"Fair, Just Disposition," says Attorney General*, Boston Globe, Nov. 2, 1977, at 1, col. 4.

67. *Fortune News*, Jan. 1978, at 2, col. 1.

68. *Watergate: Chronology of a Crisis*, 2 CONG. Q. WEEKLY 6-7 (1974).

69. *Intelligence Activities and the Rights of Americans: Hearings from Select Committee to Study Governmental Operations*, 94th Cong., 1st Sess. (1976).

thority. The "necessity defense" has become widely used in recent years, starting with the case of the Ploughshares Eight, when Daniel and Philip Berrigan, Anne Montgomery, and five others entered a General Electric plant at King of Prussia, Pennsylvania, in September 1980, and damaged the nose cones of several thermonuclear missiles. Despite a Pennsylvania statute recognizing justification as a possible defense, the trial judge would not allow the defendants to testify concerning the danger of nuclear war, or the relationship of their action to averting such a war. They were convicted and sentenced to prison terms up to ten years.[70]

It was a classic example of a political trial, in which a judge guarantees a verdict by foreclosing testimony that would oppose the political ideology of the judge and of the national Establishment. The judge can then use the jury system to claim that a politically neutral and objective verdict was rendered. However, in the case of the Ploughshares Eight, members of the jury themselves exposed the way in which ideology determined the verdict. Interviewed after the trial, two jurors said that "they felt the judge's narrow charge to them made a conviction on some of the counts practically mandatory."[71] One of the jurors told the reporter: "We convicted them on three things and we really didn't want to convict them on anything. But we had to, because of the way the judge said that the only thing you can use is what you get under the law."[72] The jury had not been allowed to hear testimony about necessity. And they had not been allowed to hear about jury nullification — the doctrine, which has some basis in legal tradition, that a jury can decide an issue on moral grounds, invoking justice rather than the letter of the law.[73] Another juror said: "These people are not criminals. Here are people who are trying to do some good for the country. But the judge said nuclear power wasn't the issue."[74]

In a number of cases in the past few years involving civil disobedience against the arms race or against military intervention in Central America, where judges have permitted the defense of necessity, juries have acquitted.[75] One such outcome was in Burlington, Vermont, in 1984, in the case of the "Winooski 44," a group that had conducted a sit-in in the office of a U.S. Senator to protest his support of Reagan's Central American policy.[76] Over the objections of the prosecutor, the judge allowed the defense to present testimony by refugees from El Salvador, telling of atrocities committed there by a military regime armed by the United States government, as well as testimony about the historical efficacy of civil disobedience in changing government pol-

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70. *Berrigans Get 3 Years In Protest at G.E. Plant*, N.Y. Times, July 29, 1981, at A12, col. 1; Robbins, *Berrigans See a Reawakening For Antiwar Activists*, N.Y. Times, Dec. 13, 1980, at 8, col. 1.

71. Moore, *Jury Anquished Over Berrigans, 2 on Panel Say*, Boston Globe, Mar. 11, 1981, at 6, col. 1.

72. *Id.*

73. *See* Scheflin, *Jury Nullification: The Right to Say No*, 45 So. Cal. L. Rev. 168 (1972).

74. Boston Globe, Mar. 11, 1981, at 6, col. 2.

75. *See* Peace Law Case File Summaries, Meiklejohn Civil Liberties Institute, Feb., 1986.

76. Schoch, *Stafford Sit-in Defendants Cleared: 'Necessity Defense' Accepted By Jurors*, Burlington Free Press, Nov. 17, 1984, at 1, col. 4.

icy.[77] The jury deliberated less than two hours and acquitted all the defendants.[78]

In April, 1987, a six-person jury in Northampton, Massachusetts acquitted a group of defendants on charges of trespassing and disorderly conduct. The charges arose from the occupation of a building and the blocking of an arrest bus as part of a protest against CIA recruiters on the campus of the University of Massachusetts in Amherst. The judge permitted a number of expert witnesses to testify about the operations of the CIA in support of the defendants' claim that the CIA had engaged in such criminal activities that minor infractions of law were necessary to arouse public attention. The judge instructed the jury that the necessity defense was legal. Interviews with jurors after the verdict indicated that the open airing of the political issues persuaded them that the defendants were justified in their actions.[79]

Such victories for protestors suggest the importance, even for revolutionaries, of victory in the courtroom. The Italian theorist Antonio Gramsci pointed to the need to sieze "cultural hegemony" from the Establishment by using every opportunity to do battle in the realm of ideas.[80] Marx and Engels, in their brief preface to *The German Ideology*, expressed disdain for the "innocent and childlike fancies" of German philosophers who thought they could eradicate distorted ways of thinking by counter-thinking. To change thinking, Marx and Engels insisted, you must change the real conditions of life. This gave rise to a notion among some Marxists that ideological struggle in the courtroom was pointless. Rebelling against this as a mechanical interpretation of Marxism, British historian E. P. Thompson insists on the importance of utilizing even "bourgeois legality" for human ends.[81] This is supported by Mark Tushnet, an American Legal theorist, who stated that Bourgeois law must be an effective weapon, and even a reference point essential to the development of a humane society.[82] While this formulation may be a bit too rhapsodic about "bourgeois law," it is a useful admonition to those few super-radicals who do not see the value of the courtroom for ideological struggle. Surely, real change requires a complex interaction between political activism and changing ideas.

The prevailing ideology of unquestioning acceptance of wars and military interventions has been more boldly challenged since the Vietnam War, when a strong surge of public opinion against the war began to affect the atmosphere in the court. The convictions of the Chicago Seven, (Bobby Seale's case was severed) as well as the contempt citations against them and their lawyers, were overturned. The harsh sentences against the Baltimore Four and the Catonsville Nine in the early part of the war turned first into more lenient sentences and then into acquittals for exactly the same offenses — breaking into draft boards.[83] The regular use of the necessity defense in recent years

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77. *Id.*

78. *Id.*

79. N.Y. Times, Apr. 16, 1987, at 1, col. 1.

80. A. GRAMSCI, SELECTION FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Q. Hoare & G. Smith eds. & trans. 1972); *see also* G. RUDE, IDEOLOGY AND POPULAR PROTEST 9 (1980).

81. E. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975).

82. M. Tushnet, *A Marxist Analysis of American Law*, MARXIST PERSP. (1978).

83. *See* Zinn, *The Camden Trial*, LIBERATION (June 1973).

has boldly brought the largest political issues of our time into the courtroom. Far from introducing ideology into the judicial process, the necessity defense has countered the dominant ideology with pacifist and humanist values. By doing so, it has incurred the bizarre accusation that the neutrality of the courtroom is being violated.

Some critics of the use of the necessity defense by anti-war activists have sought to tarnish these cases by lumping them with other instances where people have committed terrorist acts (bombings, for instance) on behalf of a cause. This is a simplistic way of dealing with a complex issue. The necessity defense is based on a balancing of means and ends. The end must be vital to human rights; the means must be humane, and any destruction, must be only of property, not people. Proportionality is crucial. Non-violent acts of civil disobedience, directed against the monstrosities of war and military action, meet this criterion. Acts of terrorism, even when the end is just, cannot.

What we are seeing with the use of the necessity defense is the occasional introduction of honesty into the judicial system. This system claims to be free of politics and ideology, while acting, in every instance where it could do so successfully, on behalf of a corporate-military elite. Let the pretense of neutrality fall, and let there be open debate of political issues in the courtroom, so that deep matters of justice are not settled on shallow grounds of technical law (concealing substantive prejudice), and so that human values, beyond simple acceptance of authority, can begin to determine the decisions of judges and juries. In this way, the developing political education of the American people can begin to be reflected in the courtroom. If democracy involves a truly free marketplace of ideas, then it should allow a movement of our country towards that democracy promised in the Declaration of Independence and struggled for over the centuries by generations of citizens.

NOTES

"Justified" Nuclear and Abortion Clinic Protest: A Kantian Theory of Jurisprudence

> There is no First Amendment right to commit criminal trespass. There is no First Amendment right to block public entry to either public or private property . . . . The First Amendment does [not] guarantee someone a right to break the criminal law. Freedom of expression does [not] mean freedom to make, ignore or violate the criminal law.[1]

Such a conflict is acutely pronounced in cases where protesters opt to trespass on land belonging to a military base,[2] a nuclear power plant,[3] or an abortion clinic.[4] Protesters know that they are in violation of the law whenever they enter any such properties, and yet they disregard the laws of the society in which they live, to impose their own moral value judgment.[5] With respect to civil disobedients, protesters violate the law in order to debate publicly what they believe are serious issues, in hopes of affecting a change in government policies.[6] The use of the necessity defense by these protesters has had a dual function. Defendants in such cases have attempted to utilize the necessity defense both as a vehicle for making political statements and as a means to justify their violations of the law.[7] By definition, the necessity defense is avail-

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1. United States v. Best, 476 F. Supp. 34, 41 (D. Colo. 1979).

2. United States v. Dorell, 758 F.2d 427 (9th Cir. 1985) (protesters entered military base to spray paint political slogans decrying MX missile program and threat of nuclear war).

3. *Best*, 476 F. Supp. 34 (D. Colo. 1979) (protesters blocked entry to nuclear plant).

4. Gaetano v. United States, 406 A.2d 1291 (D.C. 1979) (sit-in at private abortion clinic).

5. Abortion clinic protesters attempt to avoid criminal liability for trespass by convincing the court that abortion constitutes the killing of human life. City of St. Louis v. Klocker, 637 S.W.2d 174, 176 (Mo. Ct. App. 1982). Nuclear protesters attempt to argue that the immorality of nuclear weapons or power may give them a duty to trespass. *See Best*, 476 F. Supp. at 48, 49.

6. J. RAWLS, A THEORY OF JUSTICE 364 (9th ed. 1978); Cohen, *Law, Speech, and Disobedience*, in CIVIL DISOBEDIENCE: THEORY AND PRACTICE 176 (H. Bedau ed. 1969).

7. Abortion clinic protesters trespass to avoid the "killing" of fetuses, which they believe is murder, despite the constitutionality of abortion. *See* Sigma Reproductive Health Center v. State,

able when a defendant commits what would otherwise be a crime, but the harm that would result from complying with the letter of the law is outweighed by the harm that would occur from the defendant's non-compliance.[8]

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297 Md. 660, 467 A.2d 483 (1983). Nuclear protests have been aimed at the morality of nuclear war and dangers of nuclear power. *See Best*, 476 F. Supp. 34 (D. Colo. 1979) (evidence inadmissible to prove immorality or morality of nuclear weapons or power); Commonwealth v. Averill, 12 Mass. App. 260, 423 N.E.2d 61 (1981) (informational protest on general dangers of nuclear power).

Jury nullification is another mechanism by which a protester's unlawful conduct is exempted from criminal liability. Jury nullification recognizes the power of a jury to acquit, even though such a determination goes against the weight of the evidence. United States v. Leach, 623 F.2d 1337, 1341 n.12 (5th Cir. 1980). While the necessity defense asks a jury to consider whether the value asserted justified a defendant's violation of the law, jury nullification allows the jury to nullify the law itself in a given situation. When a jury acts in this capacity it is seen as a "community conscience" that opts not to apply the strict requirements of the law when it finds that the requirements cannot justly be applied in a given situation. *See* Washington v. Watkins, 655 F.2d 1346, 1374 n.54 (5th Cir. 1981). The jury is seen as acting as a "safety valve" for the most pressing cases without letting exception carving get excessive. *See* United States v. Dougherty, 473 F.2d 1113, 1143 (D.C. Cir. 1972). Despite the benefits that accrue by having built-in flexibility, it was recognized that policy considerations required that the application of the necessity doctrine be limited. *See* People v. Weber, 162 Cal. App. 3d Supp. 1, 6, 208 Cal. Rptr. 719, 722 (1984). It has been suggested that a legal system could not survive if it allowed every individual the ability to disregard any laws that were morally inconsistent with her standards. *E.g.*, United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970). Rather than furthering democracy, toleration of such conduct furthers anarchy. *Id*; *see also Best*, 476 F. Supp. at 45 (encouragement of civil disobedience invited chaos). See *infra* text accompanying notes 113-20 for an explanation of the influence of policy considerations against widescale exception carving on the judiciary's narrow construction of the necessity defense.

Defendants trying to invoke jury nullification request that the jury be instructed that they have the right to acquit if they find the defendant's conduct not to be blameworthy under community standards. *See, e.g.*, United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983); The majority of the courts have held that there is no such right to a jury nullification instruction. *See* Sparf v. United States, 156 U.S. 51, 102 (1895); United States v. Trujillo, 714 F.2d 102, 105 (11th Cir. 1983); United States v. Drefke, 707 F.2d 978, 982 (8th Cir. 1983); *Washington*, 705 F.2d at 494; United States v. Wiley, 503 F.2d 106, 107 (8th Cir. 1974); *Dougherty*, 473 F.2d at 1130-37; *Moylan*, 417 F.2d at 1006-07; People v. St. Cyr, 129 Mich. App. 471, 341 N.W.2d 533, 534 (1983); State v. Perkins, 353 N.W.2d 557, 562 (Minn. 1984); *cf. Dougherty*, 473 F.2d at 1139-44 (Bazelon, C.J., concurring in part and dissenting in part) (arguing in favor of allowing such instructions). These cases recognize that it is the right and duty of the judge to instruct the jury on the law and imposes a duty on the jury to apply such law to the facts. *See Trujillo*, 714 F.2d at 105-06; *Drefke*, 707 F.2d at 982; United States v. Burkhart, 501 F.2d 993, 996 (6th Cir. 1974). Only Maryland and Indiana permit jury instructions on jury nullification. *See* Wyley v. Warden, Maryland Penitentary, 372 F.2d 742, 746-47 (4th Cir. 1967); *see also* Stevenson v. State, 289 Md. 167, 423 A.2d 558 (1980) (Maryland Constitution making jury judge both law and fact does not interfere with defendant's sixth amendment right to trial by jury); Cobb v. State, 27 Ind. 133, 412 N.E.2d 728 (1980), *cited in Desmond*, 670 F.2d at 417 n.2 (instruction properly given noting jury was judge of law as well as fact under Indiana's state constitution). The policy consideration of avoiding anarchy suggests that the growth of the doctrine of jury nullification will remain limited. It will not be impossible, however, for a jury to invoke its powers in future cases; a jury will merely not be so assisted via the enlightenment of the court. As a result, prospective jurors will either have to have prior knowledge that a jury has this power, or simply do so in accordance with some innate sense of equity.

8. W. LaFave & A. Scott, Handbook of Criminal Law 381 (1972). Traditionally, the

The rationale underlying the defense is grounded in public policy.[9]

By invoking the defense, protesters attempt to carve categorical exceptions into the law. As used within this Note, the term categorical exceptions denotes those exceptions whose qualifying criteria serve to exempt a specific category of defendants from liability.[10] Some courts have allowed such exception carving into the literal criminal law.[11] However, more often than not, the concern has been that the invocation of such exceptions will ultimately subsume and nullify the laws of society, thus motivating courts to disallow the necessity defense in all but the most pressing of circumstances.[12] This concern has been compounded by the classification of the defense as a justification, which negates criminal liability by giving any member in society the right to act as the defendant had if placed in the same circumstances.[13] Restated, once an act is justified, the court creates an exception to the law that may be invoked by any member in society faced with the same situation as was the defendant. It may seem that by granting an exception through justification, a court grants preferred treatment to a defendant. Moreover, such is done at the expense that the laws should be applied equally to everyone ("equal applica-

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necessity defense dealt with threats from physical forces of nature (storms, shipwrecks, acts of God) rather than from a human source. *Id.* Threats coming from a human source traditionally came under the ambit of the duress defense (pressure on defendant's will by others) and was treated as a separate defense. *Id.* at 383. Recent prison escape cases have "blurred this distinction" by extending the necessity defense to prisoners threatened by fellow inmates. *See, e.g.*, United States v. Bailey, 444 U.S. 394, 410 (1980); *infra* text accompanying notes 45-52. The necessity defense has also experienced an expansion with regard to the identity of the party threatened by the harm. Traditionally, the necessity defense was used to justify a defendant's acts in avoiding a harm personally threatening her. *See e.g.*, *Bailey*, 444 U.S. at 409-10 (escaping prisoners faced with threats from fellow prisoners); *Commonwealth v. Brugmann*, 13 Mass. App. Ct. 373, 379, 433 N.E.2d 457, 461 (1982) (element of necessity defense deals with harms with which defendant is faced). In abortion clinic protests, protesters act to avert a harm to third parties, namely fetuses and even mothers. *See generally* Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. CIN. L. REV. 501, 511 (1979). Nuclear protesters invoke the defense in the broadest way, by attempting to avert a harm to society. *See, e.g., In re* Weller, 164 Cal. App. 3d 44, 210 Cal. Rptr. 130 (1985); Commonwealth v. Berrigan, 325 Pa. Super. 242, 472 A.2d 1099 (1984).

9. W. LAFAVE & A. SCOTT, *supra* note 8, at 382. "[T]he law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." *Id.* This principle is referred to as the "choice of evils." *Id.*; *see also infra* note 52.

10. In the case of protesters, the exempted category consists of defendants in violation of trespass statutes for reasons grounded in moral duty.

11. *See generally* Northern Va. Women's Medical Center v. Horan, No. 78-94-A. (E.D.Va. June 23, 1978) (abortion clinic protesters acquitted), *cited in*, Note, *supra* note 8 at 502 and n.13; People v. Bloch, No. C.R. 3235 (South Sacramento Munic. Ct., Galt. Branch, 1979) (cited in Leland, *infra* note 79, at 21) (nuclear protesters allowed to present defense).

12. While it is true that courts generally must apply the law as written, the existence of the necessity defense allows judges to consider exceptions to the law in truly extraordinary situations. In cases where a judge is given this discretion, the consequences of allowing too many exceptions and possibly nullifying the applicable law, must be kept in mind. *See* W. MOBERLY, LEGAL RESPONSIBILITY AND MORAL RESPONSIBILITY 12-13 (1965).

13. Comment, *Necessity Defined: A New Role in the Criminal Defense System*, 29 UCLA L. REV. 409, 413-14 (1981).

tion"). The idea of "equal application" arguably is not undercut by exception carving resulting from justifying an act, since all similarly situated defendants are entitled to the same exception. In fact, one may say that the necessity defense is applied within the framework of a judiciary generally concerned with furthering equal application concerns.

In cases attempting to justify illegal nuclear and abortion clinic protest, the necessity defense arguably furthers the equal application of the laws. Whether that is so from the perspective of Immanuel Kant's philosophy, is explored within this Note. The core of Kant's philosophy focused on the Categorical Imperative.[14] The Categorical Imperative was an attempt to establish an objective universal law that could be applied equally to all persons.[15] It was the overarching framework within which society's moral laws were to fit, by providing the means of measuring the degree to which these subordinated laws furthered equal application of the laws.[16] With respect to judicial decision-making, it will be demonstrated in this Note that the notion of equal application can serve as a Categorical Imperative for the judiciary when considering the necessity defense in cases of nuclear and abortion clinic protest.[17] It will be seen that the defense's classification as a justification provides all members of society, who are confronted with the same exigent circumstances facing the defendant, with the right to violate the applicable rule of law.[18] The way in which justification via the necessity defense creates a new rule of law for society, applying equally to all members, functions much like Kant's Categorial Imperative.

The functioning of equal application as a Categorical Imperative is maintained even when the necessity defense is rejected in illegal protest cases, where it might seem that the balance of evil favors the defendant.[19] To explain how this function is maintained, proposed within this Note is a theory of jurisprudence, referred to as the *bifurcated necessity analysis*, which can be derived from necessity defense cases. The *bifurcated necessity analysis* explains

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14. The Categorical Imperative was the ethical "rule of Immanuel Kant that one must do only what one can will that all others should do under similar circumstances." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 233 (unabridged ed. 1966). The Categorical Imperative embodied a supreme principle of morality for Kant's theory of moral action. III & IV THE ENCYCLOPEDIA OF PHILOSOPHY 317 (P. Edwards ed. 1972).

15. I. KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 31 (Harper Torchbooks ed. 1964) (analysis by H. Patton).

16. The Categorical Imperative meant to test the morality of a proposed action by asking whether, if everyone were allowed to do the same act, anarchy would result. If anarchy was a result, then the act was immoral.

17. Just as the Categorical Imperative acts as a yardstick to compare the results of a proposed course of action, the theory of this Note determines whether a particular exception asked for by a protester could be extended equally to all similarly situated defendants without chaotic results. If such an extension could be made, the necessity defense would be allowed.

18. Comment, *supra* note 13, at 413-14.

19. Balance of evils is used to refer to the evaluation of the evils confronting a defendant. The abortion clinic or nuclear protester claims confrontation with a choice between trespassing and a life threatening situation. Abortion clinic protesters attempt to avoid the death of fetuses, while nuclear protesters attempt to avoid a nuclear radiation threat. The necessity defense may be allowed where a defendant successfully demonstrates that she avoided a greater evil by committing the lesser evil. W. LA FAVE & A. SCOTT, *supra* note 8, at 381-82.

the restrictive shift given the necessity defense in cases of abortion clinics and nuclear protests by evaluating the judiciary's analytical process. The limited allowance of the defense here should not be taken to mean that the judiciary's analysis is purely subjective. Equal application provides an objective touchstone that demonstrates why the courts must be conservative in allowing recourse to the defense.

The *bifurcated necessity analysis* consists of two parts. An examination of case law explicitly reveals only the first part: the evaluation of the balance of evils confronting the defendant. The second part, involving concerns of universal applicability, is a matter of theoretical construction implied from both the results courts have reached and the classification of the defense as a justification. When the necessity defense is rejected in illegal protest cases, it is argued that the courts go beyond the balancing of evils called for by this defense. The end results imply that Kantian concerns about the universal application of allowing the defense perpetuate the judiciary's infrequent allowance of this defense in illegal protest cases.[20] The way in which justification negates criminal liability may cause the judiciary to employ a form of Kantian analysis. When a court considers this universal applicability, it examines whether a given result best furthers the notion of equal application of the laws. Equal application becomes the yardstick by which judges analyze the universal consequences of allowing the defense. If a court were to find that a given exemption could be applied equally without anarchical results to all protesters similarly situated as defendants, the defense would be allowed. Under the *bifurcated necessity analysis*, the principle of equal application of the laws is seen as a supreme universal law that provides the framework within which judges administer the law.[21] For this reason, under the *bifurcated necessity analysis* equal application is considered to be a Categorical Imperative for the judiciary.

As a theory of jurisprudence, the *bifurcated necessity analysis* is premised upon an objective principle of equal application, yet allows the possibility that judges will sometimes depart from this model of objective decisionmaking, and act subjectively. The *bifurcated necessity analysis* represents a synthesis between two theories of jurisprudence: reasoned elaboration, with its emphasis on the objectivity of judicial decisionmaking and critical legal theory which focuses on the subjective character of judicial decisionmaking. Reasoned elaboration rested upon a belief in a "shared social value [of the] institutional competenc[y] [of judges]."[22] Judicial competence was revealed

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20. Since justification extends the same exception to all similarly situated defendants, the judiciary must consider the consequences of carving such an exception, and insure that anarchy and chaos do not result. *See infra* text accompanying notes 113-20.

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

22. Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE 30 (D. Kairys ed. 1982). Reasoned elaboration was the prevailing theory of jurisprudence during the fifties and sixties. White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 293 (1973). The phrase 'reasoned elaboration' was coined by Henry Hart and Albert Sacks in 1958. *Id.* at 286. *See generally* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958). Unlike reasoned elaboration, the *bifurcated necessity analysis* rests upon a framework of equal application, within which a judge might possibly act incompetently. This is not to

through a process wherein judges justified their decisions "by reference to general, articulated standards which could be applied in all like cases."[23] The articulation process was seen as a means for the public to evaluate a judge's performance.[24] The social upheaval of the late 60's and early 70's undermined the belief of many in institutional competencies, especially those who maintained that reasoned elaboration "favored institutional conservativism in the judiciary."[25] The limitations of reasoned elaboration may have led in part to the birth of critical legal theory.

One strand of critical legal theory conducted "a Marxist analysis of the ways in which law and legal traditions have supported and/or perpetuated existing economic and social relations[hip] and class domination . . . ."[26] Marxist analysis, critical legal theory deconstructs objective theories of decision-making by considering them to be masks behind which judges hide their subjective political and economic biases. Critical thinkers such as Edward Thompson and David Trubek, differ from this interpretation by allowing the existence of some legal principles that at least appear to be universal.[27]

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mean the *bifurcated necessity analysis* encourages incompetence, but only that when incompetence occurs, the analysis remains intact because it is not premised upon the notion of institutional competence, as is reasoned elaboration. In other words, if a "judge plays by the rules," he sees to it that his results conform to equal application. When a bad judge acts subjectively it does not deconstruct the supremacy of a system predicated on equal application. Due to the fraility of humans, it is entirely possible that judges could utilize their legal reasoning to obscure their subjectivity.

23. Mensch, *supra* note 22, at 30. By resting on general and neutral principles, decisions were held to transcend any immediate and biased results. Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 19 (1959).

24. White, *supra* note 22, at 285. "Judgments turn[ing only] on the immediate result, and lacking explanation were seen as carte blanche for courts to be 'free to function as a naked power organ.' " Wechsler, *supra* note 23, at 12. Wechsler saw reasoned elaboration as a way to prevent a constitution from "becom[ing] the partisan of a particular set of ethical or economical opinions . . . ." *Id.* at 19 (quoting Otis v. Parker, 187 U.S. 606, 609 (1903)). "The institutional theories of Reasoned Elaboration attempted to reconcile an elitist judiciary with the egalitarian premises of our American society." White, *supra* note 22, at 291. Simply stated, this theory attempted to ensure that the judiciary, which was not a representative institution, did not usurp the powers of the duly elected branches. *Id.*

25. White, *supra* note 22, at 290; *see* Mensch, *supra* note 22, at 30; Gorden, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 283-84 (D. Kairys ed. 1982).

26. Polan, *Towards a Theory of Law and Patriarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 294 (D. Kairys ed. 1982). Polan expands critical legal theory by adding a feminist analysis that sees men using the legal system to oppress woman as a class. *Id.*

27. Gorden, *supra* note 25, at 286. Such principles are perceived as "operat[ing] to some extent independently . . . from concrete economic interests or social classes." *Id.* The legal system's need for legitimacy, under this theory, made "it possible for other classes to [force] the system . . . to make good on its utopian promises." *Id.* The *bifurcated necessity analysis* is somewhat analogous to Thompson and Trubek's theory with respect to allowing the existence of universal legal principles, yet places more emphasis on the nature of one universal principle as building a structure within which judges should operate. *See* E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975); Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW AND SOC'Y REV. 527 (1977).

Part I will present a historical tracking of the origins and development of the necessity defense. Part II examines the attempts of protesters to justify unlawful trespass via the defense in the context of abortion clinic and nuclear protest. Part III isolates the courts' analyses used to continue the restrained use of this defense and develops a theory of jurisprudence therefrom that encourages judges to make their decisions conform with the principle of equal application of the laws.

I. Common Law Origins of the Necessity Defense and Development in Anglo-American Law

The necessity defense traces its origins in the English common law back to 1551, in *Reninger v. Fagossa*.[28] Later English cases accepted necessity as a defense,[29] while one, *Regina v. Dudley*,[30] rejected it in the extreme circumstance of a shipwreck and subsequent food shortage which led the survivors to resort to cannibilism.[31] England also rejected a defense of economic necessity based upon hunger or the need for clothing.[32] The current state of the neces-

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28. 1 Plowd., 75 Eng. Rep. 1 (1551), *cited in* Arnolds & Garland, *The Defense of Necessity in Criminal Law, The Right to Choose the Lesser Evil*, 65 Crim. L. C. 289, 291 (1974). "A man may break the words of the law, and yet not break the law itself . . . where the words of them are broken to avoid greater inconvenience or through necessity or by compulsion." *Id.* at 291.

29. Mouse's Case, 7 Co. Rep. 63, 77 Eng. Rep. 1341 (K.B. 1608); Vantandillo, 4 M. & S. 73, 105 Eng. Rep. 762 (K.B. 1815) (no criminal liability for carrying infectuous person through public streets if on way to doctor).

30. Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884), *reprinted in* J. Bonsignore, E. Katsch, P. D'Errico, R. Pipkin, S. Arons, and J. Rifkin, Before The Law: An Introduction To The Legal Process 37-42 (2d ed. 1979) [hereinafter Before the Law].

31. *Id.*; *cf.* United States v. Holmes, 26 F. Cas. 360, 367 (C.C.E.D. Pa. 1842) (No. 15,383) (suggesting necessity defense may support taking life of fellow survivor in shipwreck to provide a food source, if choice of victim is selected by lot).

> When this ship is in no danger of sinking but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is referred to as the fairest mode, and in some sort, as an appeal to God for selection of the victim.

Id.

In the leading case of *Dudley*, three able-bodied seamen were tried and sentenced to death for cannibalizing a seventeen year -old cabin boy in a lifeboat to provide a food source until they were rescued. Before the Law, *supra* note 30, at 42 n.2. "This sentence was, [however], commuted by the Crown to six months imprisonment. *Id.* The necessity defense was rejected because of the fear that it could become a legal shield for serious crime, and that it would be too difficult for judges to apply. *Id.* at 42. The court was concerned about the lack of a clear standard by which to judge the comparative value of lives. *Id.*

The combination of life being a supreme value, and society's revulsion against deliberate homicide, led one modern English scholar to say "we are [therefore] loath to consider utilitarian reasons for it." G. Williams, Textbook of Criminal Law 604 (2d ed. 1983). This feeling in current English law influences English courts to give the defense a very narrow scope when it is allowed. *Id.* at 603.

32. *Dudley, reprinted in* Before the Law, *supra* note 30, at 39. Lord Hale denied the existence of any such rule in England, and considered theft due to economic necessity as "a felony and a crime by the laws of England, punishable with death." G. Williams, *supra* note 31, at 608. Blackstone supported a similar denial on two accounts: 1) a defendant's subjective assessment of economic necessity fosters insecurity in the property rights of others; 2) social assistance plans

sity defense in English law is uncertain.[33]

The English necessity defense was introduced to American law in the early nineteenth century. Many of the cases in the nineteenth century involved ships and threats from non-human sources like alleged distress at sea.[34] One American case allowed for the possibility of justified homicide in *United States v. Holmes*.[35] This case required that the survivors in an overcrowded lifeboat choose the individuals to be sacrificed by lot if there was adequate time to do so.[36]

Unlike the English common law, American common law recognized two variant forces of necessity: moral and physical.[37] Justice Story defined "moral necessity" as imposing a duty on an actor to act in a given way.[38] The actor confronted with moral necessity chooses whether or not to act in accord with moral law or conscience,[39] while physical necessity does not involve any

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obviated the need for the poor to steal to support themselves. 4 W. BLACKSTONE, COMMENTARIES 31 (12th ed. 1975). The notion's only supporter was Lord Bacon, but his position was attacked as lacking authority. BEFORE THE LAW, *supra* note 30, at 40-41. The disallowance of economic necessity is still recognized in England today. G. WILLIAMS, *supra* note 31, at 608. Blackstone's second policy reason has gained greater reality in modern times because of England's pervasive social welfare program. *Id.*

This applies to situations where hunger arises from economic and not physical causes. Necessity may be a defense to theft in an extraordinary situation where a group of miners are trapped underground and stole the rations of their comrades who have either escaped or died. *Id.* Blackstone called the doctrine of economic necessity "antiquated." W. BLACKSTONE, *supra* at 1.

33. *See* Wasik, *A Case of Necessity?*, CRIM. L. REV. 544 (1984). This uncertainty is spawned by a conflict between views about the structure of the necessity defense. One view holds that "necessity is not a general defense, but is recognized within the definitions of some particular offense." G. WILLIAMS, *supra* note 31, at 598. The other view maintains that "necessity or lesser evil is a general defense in the criminal law like non-age, insanity, self-defense and duress." *Id.* at 599. The English Law Commission's rejection of the Working Party's recommendation to recognize the necessity defense in a new penal codification contributed to this uncertainty. *Id.* at 601-03. The Law Commission in England is analogous to the American Law Institute; both devised a penal code.

34. United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383) (male crewmember's act in throwing survivors in crowded lifeboat overboard under orders of mate held unjustified); United States v. Ashton, 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,470) (crew could insist that captain turn ship around if ship became unseaworthy and unfit for voyage and avoid liability for mutiny); The William Gray, 29 F. Cas. 1300 (C.C.D.N.Y. 1810) (No. 17,694) (neutral ship's entering a blockaded port in violation of embargo act justified where variety of storms blew ship off course, and damaged so badly it could be described as 'wreck').

35. 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).

36. *Id.* at 367. England rejected any consideration of justified homicide, because of a fear that it could become a legal shield for serious crime, and that it would be too difficult for judges to apply. *See supra* note 31.

37. *See infra* notes 38-40 and accompanying text.

38. The Fortitude, 9 F. Cas. 479, 486 (C.C.D. Mass. 1838) (No. 14,953) (moral necessity justified master's decision to repair damaged ship); *see also* The Yarkand, 117 F. 336, 341 (D.C.S.D. Ala. 1902) (moral necessity extended to justify selling stranded ship).

39. Moral law is the culmination of all rules and principles of ethics, relating to right and wrong conduct, which offer guidance to a person faced with a pre-defined situation, by determining his course of action. *See* BLACK'S LAW DICTIONARY 909 (5th ed. 1979). Moral law recommends what the appropriate action should be. It is up to the actor to choose to act either in accordance with the recommendation or disregard it.

choice.[40] Unlike in England, the necessity defense thrives in the United States, although it has been given narrow application in cases of abortion clinic and nuclear protest.[41]

The following four elements of the necessity defense were assembled in *Commonwealth v. Brugmann*[42] from the available state case law:

> 1) [T]he defendant is faced with a clear and imminent danger, not one which is debatable or speculative;
> 2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger;
> 3) there is no legal alternative which will be effective in abating the danger; and
> 4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.[43]

The past two decades have witnessed expansion of the common law necessity defense to include the avoidance of threats coming from both natural and human sources.[44] Cases involving prisoners who escaped prison to avoid threats from fellow prisoners provided the context within which this expansion occurred.[45] The traditional rule was that escapees could claim neither duress nor necessity for escape from unsanitary, unhealthy, or inhumane conditions.[46]

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40. With physical necessity, "a person is absolutely compelled to act in a particular way by [an] overwhelming superior force . . . ." *Id.* at 1033. Unlike moral necessity, physical necessity or impossibility is an excuse for a failure to perform a duty. *See* J. MILLER, HANDBOOK OF CRIMINAL LAW 170 (1934).

41. *See infra* notes 54-120 and accompanying text.

42. 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982).

43. *Brugmann*, 13 Mass. App. Ct. at 379, 433 N.E.2d at 461. Many states have responded to the development of the defense by adopting statutes which defined a necessity or "choice of evils" defense. *See* N.H. REV. STAT. ANN. § 627.3 (1974); OR. REV. STAT. § 161.200 (1977); 18 PA. CONS. STAT. ANN. § 503 (Purdon 1983); TEX. CODE CRIM. PROC. ANN. § 9.22 (Vernon 1974). Wisconsin specifically limited the defense to threats arising from natural sources. WIS. STAT. ANN. § 939.47 (West 1980). New York, Colorado, and Delaware specify that a defendant's conduct must have been actually necessary to avoid imminent public or private injury. COLO. REV. STAT. § 18-1-702 (1978); DEL. CODE ANN. tit. 11, § 463 (1979); N.Y. PENAL LAW § 35.05 (McKinney 1980). Contrasted with this are the Arkansas and Illinois versions which only require that the defendant "reasonably believe" that her conduct was necessary. ARK. STAT. ANN. § 41-504 (1979); ILL. ANN. STAT. ch. 38, para. 7-13 (Smith-Hurd 1979). Some states explicitly state that reckless or negligent conduct by a defendant which brings about the threatening situation will bar the defense. ARK. STAT. ANN. § 41-504 (1979); HAW. REV. STAT. § 703-302 (1976). Other states only imply this bar. COLO. REV. STAT. § 18-1-702 (1978); DEL. CODE ANN. tit. 11, § 463 (1979); N.Y. PENAL LAW § 35.05 (McKinney 1980).

44. *See supra* note 8.

45. *See* People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974) (granting necessity defense to escapee who fled prison to avoid explicit threat of lesbian rape by fellow prisoner).

46. State v. Hodge, 131 Ariz. 63, 638 P.2d 730 (1981) (evidence that defendant escaped because of belief that she had cancer held irrelevant and properly excluded); State v. Cahill, 196 Iowa 486, 194 N.W. 191 (1923) (court rejected contention that escape was justified from vermin and worm infested cell, lacking furniture, and containing toilet that flushed onto floor); State v. Battles, 585 S.W.2d 213 (Mo. 1979) (necessity defense denied to defendant who had vomited, believed she had hepititis, was denied access to either phone, doctor or medical treatment, and was

Both federal and state courts were reluctant to interfere with prison administration and affairs,[47] and felt that the legislatures were better equipped to deal with these issues. The traditional rule was premised on two rationale.[48] First, sufficient dangers were generated either to the public or to prison guards by prison escape to warrant refusal of a defense to escape.[49] Second, the allowance of the defense would encourage each prisoner to decide for himself the adequacy of the conditions justifying escape.[50]

Court dissatisfaction with the traditional rule was influenced by a growing recognition that prisoners had some personal rights which they did not leave at the jailhouse door.[51] The problem of homosexual rape was examined and held

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fearful of her safety in jail). For an expansive list of cases, see Annotation, *Duress, Necessity, or conditions of confinement as justification for escape from prison*, 69 A.L.R. 3d 678, 689-92 (1976 & Supp. 1985).

One court impliedly rejected the traditional rule, however, and explicitly reversed an escape conviction by saying that the escape statute was inapplicable because defendant did not escape from a state authorized prison as defined by the statute. Cantrell v. State, 21 Ala. App. 558, 559, 110 So. 54, 55 (1926). The lockup in question was a cell that sheriffs used to detain drunks overnight. *Id.* It was an "informal" jail. *Id.*

A few recent cases have allowed the defense from poor conditions on a theory of medical necessity. An adequate showing of medical necessity was made out where the defendant had shown he had sufficient medical difficulties, his complaints went unheeded, he was foreclosed from seeking legal alternatives due to his illiteracy and lack of legal counsel, no force was used in his escape and he was on his way to another prison's hospital when he was arrested. *See, e.g.*, People v. Martin, 100 Mich. App. 447, 298 N.W.2d 900 (1980). State v. Worley, 265 S.C. 551, 554, 220 S.E.2d 242, 243 (1975), set out guidelines for the availability of this defense, which parallel elements set out in the precedential necessity escape case. *See infra* text accompanying note 52.

47. Gardner, *The Defense of Necessity and the Right to Escape from Prison: A Step Towards Incarceration Free From Sexual Assault*, 49 S. CAL. L. REV. 110 (1975).

48. State v. Palmer, 45 Del. 308, 310, 72 A.2d 442, 444 (1950) (defendants not allowed to introduce evidence of extremely bad food, brutal guards, inadequate medical provisions, and lack of recreational and educational programs). *Palmer* discussed at length the policy behind denying the necessity defense for prison escape:

> Jail breaks are extremely disruptive of prison routine. They are frequently accompanied by serious injury to guards who attempt to prevent the escape or, thereafter to the police whose duty it becomes to apprehend the fugitives. Not infrequently, as in this case, a mass escape is just cause for great public alarm and a long drawn out manhunt by authorities of several states. To make it the province of every prisoner in every jail in the land to decide for himself whether conditions were so unbearable as to justify his escape would only serve to increase the number of attempts to break jail with all the attendant disturbance to prison routine and morale and subsequent likelihood of injury and bloodshed. Sound reasons of public policy have therefore dictated that a plea of justification for escape based upon intolerable prison conditions, if permissible at all, would be recognized only in the most extreme situations.

Id.

49. These dangers encompassed disruption of prison routine, as well as the threat of serious injury to the guard attempting to thwart an escapee's objective and to the members of the public. *Id.*

50. *Id.*

51. Comment, *Intolerable Conditions as a Defense to Prison Escape*, 26 UCLA L. REV. 1126, 1138 (1979). The allowance of the defense of intolerable conditions arose in part because of the weakness of the arguments in support of the traditional rule. *Id.* With respect to the rights of prisoners, one court noted that "[a] prisoner retains all the rights of an ordinary citizen except

to pose a justifiable excuse to an inmate so threatened, especially when he received no protection from prison guards.[52]

The expansion of the necessity defense to human threats has inspired a re-evaluation of the theoretical foundations upon which justifications and excuses rest that will be relevant to the *bifurcated necessity analysis* promoted within this Note.[53] This movement has had special significance for abortion

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those expressly, or by necessary implication, taken from him by law." Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

52. Gardner, *supra* note 47, at 113. The key case which broke away from the traditional rule was *Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974). *Lovercamp* allowed a limited defense of necessity if these criteria were met:

> 1) The prisoner [was] faced with a specific threat of death, forcible sexual attack, or substantial bodily injury;
>
> 2) There [was] no time for a complaint to the authorities or there exist[ed] a history of futile complaints which [made] any result from such complaints illusory;
>
> 3) There [was] no time or opportunity to resort to the courts;
>
> 4) There [was] no evidence of force or violence used towards prison personnel or other innocent persons in the escape; and
>
> 5) The prisoner immediately report[ed] to the proper authorities [once] he ha[d] attained a position of safety from the immediate threat.

Id. at 831-32, 118 Cal. Rptr. at 115 (footnote omitted). As time passed, a number of courts began to find that the *Lovercamp* conditions, particularly the fourth and fifth, often resulted in the exclusion of meritorious evidence. Comment, *supra* note 51, at 1143. The fourth condition, forbidding use of force during an escape, was found by some courts to be inconsistent with the common law necessity defense which made no *a priori* limitation on the sorts of acts that warrant the defense. Gardner, *supra* note 47, at 130. The fifth condition of the *Lovercamp* test, imposing a duty to return once the averted danger has been avoided, has posed some problems because prisoners may face a continuing threat which does not abate once he has returned. Comment, *supra* note 51, at 1144.

53. Comment, *Necessity Defined: A New Role in the Criminal Defense System*, 29 UCLA L. REV. 409 (1981). While both justification and excuse admit that a defendant did commit a criminal act, a distinction is made in the way in which both negate the imposition of criminal liability. *Id.* at 413.

Justification negates criminal liability by suggesting that a defendant's act was not wrongful and society as a whole would have a right to do what he did given the circumstances. *Id.* at 413-14. Indeed, it has been noted that justifiable conduct "is conduct that we applaud or at least do not actively seek to discourage . . . ." Gardner, *supra* note 47, at 116 n.29 (citing H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 113 (1968)). A limitation on the use of punishment of those who have voluntarily broken the law is inexplicable on purely utilitarian grounds. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 18-22 (Oxford ed. 1968). Society simply makes a moral choice in the interest of justice to allow excusing conditions. *Id.* At common law, and by statute, necessity was considered a justification. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 430 (2d ed. 1960); Gardner, *supra* note 47, at 118 (citing Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1282 (1974)); *cf.* Glazebrook, *The Necessity Plea in English Criminal Law*, 30 CAMBRIDGE L.J. 87, 91 (1972) (suggesting that English courts may treat necessity as an excuse since it focuses on the blameworthiness of the defendant and not the morality of the act).

Excuse, on the other hand, concedes that a defendant's act was wrongful, but owing to special circumstances the defendant should not be held accountable for it. Comment, *Necessity Defined*, *supra* note 53, at 413-14. Unlike justification, which focuses on the correctness of a defendant's act, excuse considers the state of mind that led the defendant to the commission of that act. Gardner, *supra* note 47, at 117. The practical effect of this change in focus is that no general rule

clinic and nuclear protesters attempting to justify illegal trespass. It is now theoretically possible for a defendant to claim that her acts were necessary to avoid harm emanating from man-made nuclear plants and weapons, as well as harms created by those perfoming abortions. A survey of cases dealing with such scenarios will not only reveal the restrictive treatment courts have given the necessity defense, but will lead to the establishment of a jurisprudential theory that supports this treatment by using the notion of equal application of the laws as an objective touchstone.

II. NECESSITY AND THE ATTEMPT OF CIVIL DISOBEDIENTS TO JUSTIFY UNLAWFUL TRESPASS

A. Abortion Clinic Protest

In the area of abortion clinic protest, protesters have been known to gain entrance to clinics illegally,[54] to attempt to dissuade patients from having abortions,[55] and to hold sit-ins to block doorways.[56] Some protesters have even chained themselves to doors and examining tables.[57] Typically, these clinics have called the police, who have then arrested the protesters and charged them with criminal trespass.[58] At trial, these defendants have raised the necessity defense, claiming that the harm they caused by trespassing was outweighed by the harm they were attempting to avoid, primarily the killing of fetuses.[59] The argument could be made that the balance of evils should favor giving the

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of conduct is created for society as a whole. *Id.*; *see also* Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 UCLA L. REV. 1355, 1359-65 (1979). The duress defense is generally regarded as an excuse, although there is much confusion on the issue. Comment, *supra* note 51, at 1127 n.9 (citing H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 16 (1968)); Gardner, *supra* note 47, at 121-23; *cf.* W. LAFAVE & A. SCOTT, *supra* note 8, at 374, 378-79. LaFave and Scott speak about acts being "justified" by duress, although an inconsistent use of the term "excuse" does appear. *Id.* at 376. One judge argued that the "affirmative defense[s] of coercion, [duress] and necessity [are] based on the same principle." State v. Green, 470 S.W.2d 565, 570 n.2 (Mo. 1971) (Seiler, J., dissenting), *cert. denied*, 405 U.S. 1073 (1972) (stating that other legal scholars maintain distinction between coercion and necessity has no merit because both share common element of no choice of action).

54. *See, e.g.*, People v. Krizka, 92 Ill. App. 3d 288, 416 N.E.2d 36 (1981) (demonstrators interposed themselves between patients and clinic employees about to perform abortions).

55. *See, e.g.*, *Klocker*, 637 S.W.2d 174 (Mo. Ct. App. 1982) (defendants sat in doorway after efforts to dissuade patients failed).

56. *See, e.g.*, *Gaetano*, 406 A.2d 1291 (D.C. 1979) (sit-in at private abortion facility); People v. Stiso, 93 Ill. App. 3d 101, 416 N.E.2d 1209 (1981) (protesters barred access to rooms where abortion performed).

57. *See, e.g.*, Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981) (two of appellants chained selves to door of operating room); *Gaetano*, 406 A.2d at 1292 ("well orchestrated" sit-in protest where co-actors chained selves to treatment tables).

58. *See Cleveland*, 631 P.2d at 1075; *Klocker*, 637 S.W.2d 174 (Mo. Ct. App. 1982).

59. *See, e.g.*, *Gaetano*, 406 A.2d 1291 (D.C. 1979) (protesters at abortion clinic believed their actions necessary to save human life, and under color of right); *Krizka*, 92 Ill. App. 3d 288, 416 N.E.2d 36 (1981) (defendants believed they would save fetuses by entering clinics and peaceably placing themselves between females seeking abortions and those about to perform abortions); *Klocker*, 637 S.W.2d 174 (defendants contended injury avoided by entering clinic was the "killing of human life" by aborting fetuses).

protesters the defense, because the evil of the illegal trespass was less than the evil that might have resulted from the killing of a life; provided one defined a fetus as a "life."[60] Despite this seemingly favorable balance, only a few unreported county court cases have allowed the defense to get to the jury,[61] or have acquitted protesters of abortion clinics.[62] A recent court suggested that necessity was not a valid defense to criminal trespass charges.[63] It found this to be particularly true with respect to abortion clinic cases after reviewing past cases which rejected the defense.[64]

The restrictive application of the necessity defense in trespass cases suggest that the courts do not confine their necessity analysis to the prima facie balance of evils the defense requires. Explicitly, these courts cite particular grounds for rejecting the necessity defense: the availability of legal alternatives,[65] no true confrontation with evil since trespassers intentionally placed themselves in the situation,[66] and a lack of imminency where protesters attempt to intervene in a legally protected activity.[67]

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60. The definition of a fetus as a "life" is difficult given the current legality of abortion. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (until viability, fetus potential life not legally protected); *see infra* note 77.

61. Ohio v. Rinear, No. 78CRB-3706 (Mun. Ct. Hamilton County, Ohio dismissed May 2, 1978), *cited in* Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. CIN. L. REV. 501, 502 n.11 (1979). It is interesting to note that after the court allowed the defense, the clinic dropped prosecution. *Id.* The prosecution feared that once protesters are allowed to introduce evidence that life began at conception, it would be very difficult to rebut. *Id.* Clinics would prefer that this precedent not be set, because it would strike at the very heart of a woman's unqualified privacy right to abort in the first trimester. *Id.* After the county prosecutor was unable to get convictions, and thereafter told police not to arrest protesters any more, the medical center got a permanent injunction against persistant trespassing protesters. *Id.*

62. *See* Note, *supra* note 61, at 502 n.12 (citing *Gaetano*, No. 13974 (Dist. Ct. Fairfax County, Va. Oct. 17, 1977)); Northern Virginia Woman's Medical Center v. Horan, No. 78-94-A (E.D. Va. June 23, 1978).

63. *Sigma*, 297 Md. at 681, 467 A.2d at 493.

64. *Id.* at 682-83, 467 A.2d at 494-97. The *Cleveland* court recognized three common law elements of the necessity defense: 1) defendant's act must have been committed to thwart a substantial evil; 2) there was a lack of legal alternatives; 3) defendant's act must not have been the greater of two evils. *Cleveland*, 631 P.2d at 1078. A reasonable but mistaken belief was allowed with respect to the first two elements, but the court held that defendant's belief as to the balance of evils was insufficient for the third element. *Id.* The third element required an objective determination by the judge. *Id.* The necessity defense was rejected primarily because the court found that legal forms of protest were available, and, the protester's acts were not reasonably calculated to avoid the greater harm. *Id* at 1079. These grounds of rejection are also echoed in cases of general informational nuclear protest. *See infra* text accompanying notes 79-108. Another court based its rejection on the grounds that the protesters intentionally trespassed, and therefore, did not engage in illegal conduct because of a confrontation with a choice of evils. *Krizka*, 92 Ill. App. 3d at 290, 416 N.E.2d at 36. *Klocker*, 637 S.W.2d at 176-77 (rejection focused in *Klocker* on a lack of imminency of injury where protesters try to intervene in legally protected activity). The *Klocker* court argued that an injury presupposed the "actionable invasion of some right." *Id.* Since abortion was a legally protected activity, the court concluded that there could be "no actionable invasion of rights." *Id.*; *see infra* notes 73-77 and accompanying text.

65. *Cleveland*, 631 P.2d at 1079.

66. *Krizka*, 92 Ill. App. 3d at 290, 460 N.E.2d at 36.

67. *Klocker*, 637 S.W.2d at 176-77; *see infra* note 77.

These grounds for rejection do not provide the most complete explanation, in jurisprudential terms, of the analysis judges engage in while considering the defense. The *bifurcated necessity analysis* not only offers a possible explanation, but supports the restrictive application of the defense. Under the *bifurcated necessity analysis*, judicial concerns about the universal consequences of allowing exception carving via the defense may provide an implicit reason behind the rejection of the defense.[68] Such concerns may arise out of the defense's classification as a justification, which grants the same exception to all similarly situated defendants.[69]

Apart from the universal concerns highlighted by the *bifurcated necessity analysis*, judicial reluctance to allow the defense for abortion clinic protesters can be underscored by a judicial belief that the "exercise of a moral judgment based upon individual standards does not carry with it legal justifications or immunity from punishment for breach of the law."[70]

Clinic protesters' lack of success in raising the necessity defense can also be attributed to the current legality of abortion.[71] In so evaluating the defense, the court in *Cleveland v. Municipality of Anchorage*[72] explicitly drew upon the expanded necessity defense created prison escape cases.[73] As a result, the necessity defense was extended to cover man-made threats where such conduct was illegal.[74] Although clinic protesters have attempted to avoid man-made threats from abortionists, the *Cleveland* court argued that the protesters could not satisfy the illegality element of the defense because abortion was legal.[75] Restated, in light of *Roe v. Wade*,[76] the object of the man-made conduct is, in fact, legal.[77] Other courts, rather than focusing on the illegality of the threat,

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68. For a discussion of disallowing justified civil disobedience to avoid chaotic results, see *infra* note 166.

69. *See supra* text accompanying note 13.

70. *Cleveland*, 631 P.2d at 1084 (Dimond, J., concurring) (quoting United States v. Moylan, 417 F.2d 1002, 1008 (4th Cir. 1969)); *see infra* notes 171-72.

71. Abortion was legalized in Roe v. Wade, 410 U.S. 113 (1973). The legality of abortion negates abortion clinic protester's claim that the killing of fetuses is a harm greater than trespass, by legally making abortion a "non-harm."

72. 631 P.2d 1073.

73. *Id.* at 1078 n.10.

74. *See supra* notes 45-52 and accompanying text.

75. *Cleveland*, 631 P.2d at 1078-79 n.10.

76. 410 U.S. 113 (fetus's potential life is not entitled to legal protection before viability).

77. Because the Supreme Court legalized abortion in *Roe*, this conduct cannot be classified as illegal. *Cleveland*, 631 P.2d at 1080 (citing Roe v. Wade, 410 U.S. 113 (1973)). By definition, if conduct is legally protected it is legal and causes no injury. *Klocker*, 637 S.W.2d at 177. The usual balance of harms analysis also yields the same results, because it cannot be said that "the trespass which interferes with a fundamental [constitutional] right" is the lesser harm. *Id.* Therefore, the defendant did not choose the lesser harm. In either case, the act of trespass would go unjustified. All of this, of course, rests on the constitutional validity of abortion. This is a validity that the Burger Court is increasingly circumscribing. *See* Harris v. McRae, 448 U.S. 297 (1980) (Title XIX does not require state to fund abortions not covered by Medicaid due to the Hyde Amendment); *cf.* Akron v. Akron Center for Reproductive Health Inc., 462 U.S. 416 (1983) (reaffirming *Roe*). The argument that *Roe* is inapposite here because it only prohibits actions by the states, and not individuals, has been held to be without merit. *Krizka*, 92 Ill. App. 3d at 288-91, 416 N.E.2d at 37. Such an argument has been criticized as overlooking "the fact that defendant's convictions did not arise from the violation of the constitutional rights of pregnant women,

reach the same result by requiring the threat to be a legally recognizable injury, which abortion is not under *Roe*.[78] Of all the reasons cited by the courts for rejecting the defense, the current legality of abortion is the most preclusive for abortion clinic protesters since it can negate the justification of the defense. The constitutional argument is dependent upon the continued constitutionality of abortion.

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but rather, were the result of defendants' acts of criminal trespass." *Id.*

A unique approach towards attempting to establish a necessity defense was used in *Sigma*, for the first time. 297 Md. at 689, 467 A.2d at 497. The defendant in *Sigma* argued that her actions of obstruction and trespass were not only justified by attempting to protect the lives of the unborn, she was also protecting the right of patients from dangerous clinic practices. *Id.* To date, this is the only case using this argument. *Id.* Although the defendant had no factual evidence of this claim of malpractice, she did attempt to use a *subpoena duces tecum* to obtain medical files after she had been arrested. *Id.* This motion was quashed. *Id.* at 690, 467 A.2d at 498. The court observed that the defendant's claim failed for these reasons: the practices at the clinic posed no immediate harm to the defendant personally, and she had other alternatives that would not risk criminal charges such as handing out information on public streets. *Id.* at 689, 467 A.2d at 497.

However, the defendants in *Gaetano* raised a collateral defense labelled the "bona fide belief defense." 406 A.2d at 1294. As a defense to trespass, this different approach exonerates trespassers who have reason to believe they have a right to remain on the property not owned or possessed by that individual. *Id.* At the heart of this evaluation lies the requirement that the individual has no reason to know she was trespassing on the rights of others." *Id.* The use of this defense by abortion protesters is unsuccessful because "they intentionally trespassed on complainant's property in order to interfere with the rights of others." *Krizka*, 92 Ill. App. 3d at 290-91, 416 N.E.2d at 37. Furthermore, the "bona fide belief" defense was never meant to exculpate individuals who felt compelled by duty or ethics "to violate the law in order to effect a moral, social or political change, regardless of the genuineness of the belief." *Gaetano*, 406 A.2d at 1284. The court in *Gaetano*, recognized the importance of the defendant's first amendment rights while at the same time giving credence to the complainant's right to be free from criminal interference. *Id.* at 1295.

Despite the seeming fact that abortion clinic protesters may be foreclosed from effecting change through demonstration at abortion clinics, other legal alternatives are available. Foremost among such alternatives, is for protesters to achieve their goals by working through the political process. *Cleveland*, 631 P.2d at 1086 (Dimond, J., concurring). One judge, however, has suggested that the necessity defense may be used to justify conduct to prevent a particular abortion, as opposed to the protesting of abortions in general. *Id.* at 1086 n.1. A husband going to a clinic to stop his wife from procuring an abortion is an example. *Id.* This approach compromises between not allowing the defense and allowing too general an exception, one that is liable to subsume the rule at issue. If an exception were too general, the rule against trespass would have little merit because there would be so many circumstances that could circumvent it. In support of narrowly construing the application of necessity to abortion clinic trespass, one can analogize Blackstone's rationale for disallowing economic necessity as a defense to theft, that is, to promote security in one's personal property and effects. *See supra* note 32. If trespass at abortion clinics were allowed generally, clinic owners would continually be in fear of an invasion of their property rights, and would be greatly infringed upon in their enjoyment thereof.

78. "Under *Roe*, an abortion during the first trimester of pregnancy is not a legally recognizable injury, and therefore, defendant's trespass was not justified by reason of necessity." *Krizka*, 92 Ill. App. 3d at 290-91, 416 N.E.2d at 37. Other courts have preferred the "injury" terminology over that of legality. *Stiso*, 93 Ill. App. 3d at 103, 416 N.E.2d at 1211; *Klocker*, 637 S.W.2d at 176-77.

B. Anti-Nuclear Protest

Compared to nuclear protesters, abortion clinic protesters can demonstrate a more direct causal link between their trespass and the harm to be avoided because of a greater likelihood that clinic protesters can prevent the abortion.[79] Nuclear protesters have been known to rally at the gates of nuclear power plants in an attempt to prevent repairmen from placing a damaged nuclear plant "on-line."[80] They have blocked streets and sidewalks near U.S. Navy submarine bases,[81] and passed out leaflets decrying the arms race to employees at a technological lab.[82] One protester, intending to turn an MX missile into "scrap metal" came well prepared, by equipping himself with a sledgehammer, two screwdrivers, one pair of bolt cutters, a crescent wrench, and a can of spray paint.[83] Many nuclear protest cases have involved the application of the common law necessity defense, the elements of which resemble those discussed in *Brugmann*.[84] Nuclear protesters claim they are confronted with a choice of evils forcing them to select trespass over the greater public harms or evils presented by nuclear energy, or the threat of nuclear holocost. Nuclear protesters seemingly avoid the greater evil but nevertheless are denied the necessity defense.

As in the area of abortion clinic protest, only a few anti-nuclear cases have allowed the defense to even get to the jury.[85] Two such cases, *Commonwealth v. Capitolo*[86] and *Commonwealth v. Berrigan*,[87] involved an interpretation of Pennsylvania's necessity defense which required that a defendant have a reasonable belief that his/her act was necessary[88] and that the harm was Both *Capitolo* and *Berrigan* held that the defendants had to be allowed to prove that their belief had a basis in fact before the court or jury could determine whether such belief was reasonable.[89] In 1974, shortly after the Three Mile Island accident, anti-nuclear protesters trespassing at the Rancho Seco nuclear power plant in California were allowed to present the defense.[90] It has

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79. " 'It seems that "right-to-lifers" blocking an abortion clinic have a better case . . . . If they stop one person from going in to get an abortion, they have effectively prevented an immediate act that they think is wrong.' " Leland, *Necessity Defense Comes of Age*, 4 CAL. LAW. 20, 21 (Mar. 1984)(quoting Almeda County Deputy District Attorney Joseph R. Hurley).

80. State v. Warshow, 138 Vt. 22, 410 A.2d 1000 (1979).

81. *See, e.g.*, *Weber*, 162 Cal. App. 3d Supp. 1, 208 Cal. Rptr. 719 (1984).

82. Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188 (1983).

83. *Dorell*, 758 F.2d at 429.

84. Commonwealth v. Brugmann, 13 Mass. App. 373, 379, 433 N.E.2d 457, 461 (1982). *See supra* text accompanying note 43.

85. Commonwealth v. Capitolo, 324 Pa. Super. 61, 471 A.2d 462 (1984) (statutory interpretation did not bar presentation to jury); Commonwealth v. Berrigan, 325 Pa. Super. 242, 472 A.2d 1099 (1984) (statutory interpretation did not bar presentation of defense to jury). Other sources reveal that courts in Oregon have also allowed this. Low, *Appellate Court Rejects Necessity Defense in Nuclear Protest*, L.A. Daily J., Jan. 29, 1985, at 20, col. 2.

86. 324 Pa. Super. 61, 471 A.2d 462 (1984).

87. 325 Pa. Super. 242, 472 A.2d 1099 (1984).

88. 18 PA. CONS. STAT. § § 501, 503, 510 (1973) (enacted 1972).

89. *Berrigan*, 325 Pa. Super. at 251, 472 A.2d at 1106; *Capitolo*, 324 Pa. Super. at 73, 471 A.2d at 470-71.

90. Leland, *supra* note 79, at 21. Leland cited an unreported case, People v. Bloch, No. C.R. 3235 (South Sacramento Mun. Ct., Galt Branch, 1979), but failed to explain why the court al-

been suggested that courts may be particularly slow to recognize the defense for nuclear weapons protest because a political question may be involved.[91]

Besides the special issues that may be raised by nuclear weapons protest, the courts have articulated particular grounds for generally denying the defense to nuclear protesters. Three primary grounds arise from a reading of these cases: the failure to show an immediate danger that will occur,[92] the lack of a direct casual relationship between a defendant's action and the avoidance of harm,[93] and the availability of other legal alternatives to trespassing.[94]

The first ground, dealing with immediacy, arises from a view that the necessity defense was designed to deal with real, not theoretical harms.[95] Defendants staging general informational protests as to the dangers of nuclear war or energy have been unsuccessful in raising the defense, primarily due to courts holding that such protests are not aimed at a specific danger about to occur.[96] The Supreme Court, in *United States v. Bailey*,[97] established an imminency standard which required that the threat must be so imminent that violation of the law becomes the only reasonable alternative.[98] The requisite

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lowed the necessity defense. Leland, *supra* note 79, at 21.

91. Leonard Post, defense counsel in *Bloch*, suggests that the issue of nuclear weapons, especially first strike weapons is new; one that "courts may not be ready to deal with." Leland, *supra* note 79, at 21. A political question is not an issue in only nuclear weapons protest, it may arise whenever a protest questions a policy of government. Joseph R. Hurley, Alameda County Deputy District Attorney, posits that a political question arises when the issue focuses on a defendant's political motivation for breaking the law rather than whether she did in fact break the law. *Id.* He maintains that any determination of how society feels about a given topic must be made by counting ballots, and not through jury determination, because we cannot pick jurors to be society's conscience. *Id.* The political question alluded to would be the military defense policies of the United States. One court expressly held evidence inadmissible to prove the morality or immorality of nuclear weapons or power to establish a defendant's duty, or to evaluate government policy for purposes of establishing the necessity defense. *Best*, 476 F. Supp. at 48-49.

In a case of Trident submarine protest, one court feared that the defense could be used as a "back door" attempt to attack government programs in a manner foreclosed by the standing requirement of Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) and United States v. Lowe, 654 F.2d 562, 566-67 (9th Cir. 1981), *cert. denied*, 449 U.S. 984 (discussing United States v. May, 622 F.2d 1000 (9th Cir. 1980)). This analysis would not explain court reluctance to extend the defense to protests of nuclear plants; however, this Note along with the current case law, demonstrates that these defendants do not meet the required elements of necessity.

92. *Averill*, 12 Mass. App. Ct. at 262-63, 423 N.E.2d at 7-8.

93. United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972).

94. United States v. Quilty, 741 F.2d 1031, 1033-34 (7th Cir. 1984).

95. The necessity defense "[does] not deal with nonimminent or debatable harms; nor [does] it deal with activities that the legislative branch of government [has] expressly sanctioned and found not to be harms." State v. Dorsey, 118 N.H. 844, 846, 395 A.2d 855, 857 (1978). Other courts have echoed this emphasis on real and threatened harms. *Averill*, 12 Mass. App. Ct. at 262-63, 423 N.E.2d at 7-8 (informational protest on general dangers of nuclear power); *Warshow*, 138 Vt. at 522, 410 A.2d at 1002 (possible effects of nuclear accidents and effects of low level radiation and nuclear waste were long term and danger must reasonably appear to be threatening to occur immediately).

96. *Averill*, 12 Mass. App. Ct. at 262, 423 N.E.2d at 7.

97. 444 U.S. 394 (1980).

98. *Id.* at 410-11.

level of immediacy may be reached, hypothetically, where a group of demonstrators have advance knowledge of a dangerous condition, like that at Three Mile Island, and their pleas to the utility company go unheeded. Successful application of the *Bailey* imminency standard to this hypothetical would require that other legal alternatives, such as a preliminary injunction, would have to have been unavailable either because of court refusal to grant one, or insufficient time before the imminent disaster.[99] Such a case has not yet come before the courts.

Closely related to the requirement of immediacy is the requirement "that a direct causal relationship be reasonably anticipated to exist between the defendent's action and the avoidance of harm."[100] These requirements are interdependent because as a danger increases in imminency, the expectation in an act's effectiveness to prevent such danger becomes more reasonable.

The application of the causation requirement to general informational protest highlights another explanation for judicial reluctance to justify general informational protest. Since general protests are aimed at a general harm, the causation between the harm to be avoided and the protest becomes less distinct and increasingly indirect. Other causes combining with the protest may be beyond the protester's control. Intervening causes could arise independent of a protester's actions, and therefore, not even be attributed to his actions. An example of such an intervening cause would be a combination of market forces making nuclear energy unprofitable and, therefore, encouraging power companies to change their methods of energy production.

When compared to nuclear protest, the causal relationship in abortion clinic protest is typically stronger, because if abortion protesters prevent one of the clinic's patients from having an abortion the protesters succeed in preventing the harm they sought to avoid.[101] Despite this stronger showing of causation, clinic protesters have been defeated by the current legality of abortion.[102] On the other hand, the focus of general informational protests on general harms of broad scope increases the opportunity of intervening causes, thus diluting the effect a protester's acts have on avoiding the confronted evil.

A third reason for rejection of necessity in nuclear protest cases pertains to the argument that since the necessity defense is predicated upon real emergency, the defense may not arise from a choice of several courses of action.[103] This standard implies that a defendant must be faced with a real either/or situation. Some courts have explicitly stated that the defense fails in the presence of reasonable legal alternatives to violating the law.[104]

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99. *See infra* note 104 and accompanying text.

100. *Simpson*, 460 F.2d at 518; *see also Dorrell*, 758 F.2d at 433-34 (no showing that trespass into military base and spray painting of political slogans on government property could reasonably be anticipated to lead to end of MX Missile Program and avoidance of nuclear war and world starvation); *Best*, 476 F. Supp. 34 (question of whether blocking entry to nuclear plant would terminate official U.S. policy on nuclear weapons is for court).

101. *See Leland, supra* note 79, at 21.

102. *See supra* notes 76-78.

103. *Quilty*, 741 F.2d 1031 (peaceful prayer meeting on arensal grounds); *In re* Weller, 164 Cal. App. 3d 44, 210 Cal. Rptr. 130 (1985) (illegal conduct to influence policy not necessary where legal alternatives available).

104. *Bailey*, 444 U.S. at 410; *accord Quilty*, 741 F.2d at 1033; *see also Dorrell*, 758 F.2d at

The application of this third ground to general informational protest may again explain the failure of employing the necessity defense with this form of protest. By protesting to inform the public of the general harms of nuclear energy or arms, the protesters are not faced with an imminent either/or situation. There are other legal alternatives which could be pursued. The requirement of legal alternatives underscores a conflict between the first amendment right to protest political decisions,[105] and the property rights of others.[106] Trespassing protesters are frustrated by a court-held view that the political process and lawful protest are considered inexhaustible legal alternatives for an unwise policy decision.[107] In light of such alternatives, defendants wishing to protest unlawfully are frequently perceived as undeserving of the necessity defense because they are impatient with less notorious and more time-consuming alternatives.[108]

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431. John Rawls disagreed with the notion that legal alternatives had to be exhausted before civil disobedience could be engaged in. J. RAWLS, *supra* note 6, at 373. While calling civil disobedience a "last resort" that should be used only when necessary, Rawls recognized that further legal means could be pursued contemporaneously with it. *Id.*

105. *Weber*, 162 Cal. App. 3d Supp. at 4, 208 Cal. Rptr. at 720. There is no constitutional right to make political speeches at a military base; use by other civilian speakers does not convert it into a public forum. *Quilty*, 741 F.2d at 1033 (citing Greer v. Spock, 424 U.S. 828 (1976)). Businesses are not public forums merely because members of the public are allowed on their property. *Hood*, 389 Mass. at 586, 452 N.E.2d at 192.

106. *Hood*, 389 Mass. at 586, 452 N.E.2d at 192.

107. *See, e.g., In re* Weller, 164 Cal. App. 3d at 49, 210 Cal. Rptr. at 133. In fact, lawful demonstrations and protests which are conducted without arrest are "almost a daily occurrence." *Weber*, 162 Cal. App. 3d Supp. at 6, 208 Cal. Rptr. at 721-22. One court noted that "there are thousands of opportunities" for advocating the anti-nuclear message, including: "[t]his nation's electoral process, . . . speech on public streets, in parks, in auditoriums, in churches, and lecture halls; and . . . the release of information to the media, to name only a few." *Quilty*, 741 F.2d at 1033. Howard Zinn critiqued the effectiveness of legal alternatives as a means of policy change. H. ZINN, DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER (1968).

> It is very hard, in the comfortable environment of middle-class America, to discard the notion that everything will be better if we don't have the disturbance of civil disobedience. If we confine ourselves to voting, writing letters to our Congressmen, speaking our minds politely. But those outside are not so comfortable. Most people in the world are hungry, have no decent place to sleep, no doctor when they are sick; and some are fleeing from attacking airplanes.

Id. at 123. Generally, it was held that the use of the necessity defense was precluded when there has been a "deliberate legislative choice as to the values at issue." *Warshow*, 138 Vt. at 27, 410 A.2d at 1003 (Hill, J., concurring) (citing United States v. Kroncke, 459 F.2d 697, 701 (8th Cir. 1972)); *see also* W. LAFAVE & A. SCOTT, *supra* note 8, at 382. Some courts argue that by virtue of state and federal regulations of nuclear power, governments have made a choice in favor of the benefits of nuclear power despite its dangers. *Warshow*, 138 Vt. at 27-28, 410 A.2d at 1003; *Brugmann*, 13 Mass. App. 373, 433 N.E.2d 457 (finding it unnecessary to consider legislative preemption). Contrast this with the view in two cases that rejected findings that the Atomic Energy Act and Energy Reorganization Act had "clear and manifest purpose to supersede Pennsylvania's justification statute in cases of nuclear protest." *Berrigan*, 325 Pa. Super. at 255, 472 A.2d at 1107-08; *Capitolo*, 324 Pa. Super. at 61, 471 A.2d at 476-78. Both cases held that the federal nuclear power statutes did not so preclude the necessity defense in lieu of express preemption. *Berrigan*, 325 Pa. Super. 242, 472 A.2d 1099; *Capitolo*, 324 Pa. Super. at 61, 471 A.2d at 462.

108. *Dorell*, 758 F.2d at 432. The abundance of possible alternatives moved one court to say that necessity was not a defense to trespass arising from a typical protest. United States v.

In addition to claiming necessity as a defense, protesters have attempted to raise a version of the necessity defense which seeks to justify conduct on the grounds that international law compelled their actions.[109] Defendants making this argument consider that the development, possession, or use of nuclear weapons is in violation of international law.[110] Protesters argue that an American citizen violates international law whenever he consents to cooperate with a government involved with nuclear weapons.[111] In order to avoid such liability, that citizen is duty-bound to take affirmative measures to prevent the commission of the crime.[112] The courts have been unreceptive to such arguments,[113] because this would allow the individual to usurp the powers the Constitution provides for Congress and the President.

Seward, 687 F.2d 1270 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983) (imposing duty of knowledge and pursuit of legal alternatives, yet allowing defendant opportunity to show such alternatives to be futile in given circumstances).

The suggestion has been made that the pursuit of legal alternatives by nuclear protesters may be thwarted. Russell, *Civil Disobedience and the Threat of Nuclear War*, in CIVIL DISOBEDIENCE: THEORY AND PRACTICE 157 (H. Bedau ed. 1969). Nuclear protesters' pursuit of legal alternatives is thwarted because "the law is not neutral when one of the disputants is the state, and [the] government [is] likely to be misleading as to the actual dangers and imminence of nuclear war." *Id.* In order to circumvent this obstacle, Russell maintains that civil disobedience is needed to "compel governments to allow their subjects to continue to exist." *Id.*

109. *Weber*, 162 Cal. App. 3d Supp. at 5-6, 208 Cal. Rptr. at 722; *In re* Weller, 164 Cal. App. 3d at 49, 210 Cal. Rptr. at 133.

110. *In re* Weller, 164 Cal. App. 3d at 49, 210 Cal. Rptr. at 133.

111. *Weber*, 162 Cal. App. 3d Supp. at 5-6, 208 Cal. Rptr. at 722.

112. *Id.* Defendants base this on the authority of the Nuremburg Charter and the Tokyo War Crimes Decision. *Id.* Compare this with the position held by one commentator, arguing that the deliberate violation of the trespass statute is beyond the scope of first amendment protection, and is not supported by the principles of the Nuremberg convictions which "justify and protect even conduct in deliberate violation of state law, when that conduct is the protest of a citizen against the illegal acts of his government." Cohen, *supra* note 6, at 172.

113. *Lowe*, 654 F.2d at 566-67; United States v. May, 622 F.2d 1000, 1009 (9th Cir. 1980), *cert. denied*, 449 U.S. 984 (1980) (rejecting international law argument because it allows individual to usurp powers Constitution gave to Congress and President); *In re* Weller, 164 Cal. App. 3d at 49, 210 Cal. Rptr. at 133 (compliance with interational law must be sought through ballot box, or where appropriate, by court action). The international law argument can also be undermined by the typical necessity requirements of imminency and causation. The imminency of nuclear war is speculative and is not real in the sense that the defense contemplates. Contrast this with the Three Mile Island scenario, where the protesters know that the reactor is ready to explode. Further, individual defendants choosing to supersede American law with international law, may be lacking the requisite direct causal relation mentioned earlier. On this point, it is conceded that Vietnam War protesters arguably have been said to have exerted a strong influence on American policy to withdraw in the early 1970's.

One court ruled that a state has a legitimate interest in the conduct of individuals within its jurisdiction and may impose reasonable regulations upon them irrespective of international law. State v. Marley, 54 Haw. 450, 468, 509 P.2d 1095, 1107 (1973). This seems to be sound policy in light of the fact that international law is the applicable law of nations and not of individuals. In lieu of a rule saying defendants were justified in acts that sought to make the United States conform with international law, defendants are left with affecting change via the ballot box, court action or legal avenues of protest. *In re* Weller, 164 Cal. App. 3d at 49, 210 Cal. Rptr. at 133.

III. ANALYSIS

The reasons the courts give for denying the necessity defense do not fully address why the necessity defense is only rarely allowed. The precluding of abortion clinic and nuclear protesters from raising the necessity defense, despite their apparent choice of the lesser evil, suggests that the courts consider another factor while analyzing necessity cases. Under the *bifurcated necessity analysis*, this factor is a concern for the universal ramifications of allowing all similarly situated defendants the necessity defense.[114] At least one judge in a nuclear protest case openly expressed his concern about the universal consequences of allowing the necessity defense too liberally. Judge Weiand, in *Berrigan*,[115] believed that anarchy and chaos would result from widescale exception carving.[116] He argued that short of an immediate harm, "private citizens [could not be allowed] to take and destroy their neighbors' property because of a belief that at some unascertained future time the property may be used to achieve a greater evil."[117] The policy against exception carving is premised on a concern that if exception carving were carried to its logical extreme, the applicable law would be nullified by judicial fiat and social chaos would ensue.[118] In view of the strong policy considerations against widescale exception carving, it is likely that the courts will continue to construe the necessity defense narrowly whenever raised by either nuclear or abortion clinic protesters.[119]

The *bifurcated necessity analysis* provides for a possible explanation, in theoretical terms, of how the courts incorporate these policy considerations in their analysis of protest cases. It also supports the narrow construction given the necessity defense, on objective grounds. The fact that the defense is rarely allowed, should not be equated with prosecutorial favoritism. If defendants insist on using unlawful methods to effectuate change, courts have held that they must bear the consequences of their actions, as in the tradition of true civil disobedience.[120]

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114. *See infra* text accompanying notes 135-39.

115. *Berrigan*, 325 Pa. Super. 242, 472 A.2d 1099 (Weiand, J., concurring in part and dissenting in part).

116. *Id.* at 270, 472 A.2d at 1121.

117. *Id.* Without any limits on exception carving, Judge Weiand believed that even the theft and destruction of guns and ammunition by well-meaning citizens who believed in the gun's future potential to kill would be justified. *Id.*

118. *See infra* note 146.

119. The destabilizing effect on society of exception carving leads judges to be suspicious of attempts to carve out exceptions in any situation other than the truly extraordinary. W. MOBERLY, *supra* note 12, at 12-13. Because abortion clinic and nuclear protesters rarely meet truly unavoidable circumstances, it is likely that courts will extend the defense to protesters only rarely.

120. *Best*, 476 F. Supp. at 45 (quoting *Moylan*, 417 F.2d at 1008). "While in restricted circumstances a morally motivated act contrary to law may be ethically justified, the action must be non-violent and the actor must accept the penalty for his action." *Id. cf.* ZINN, *supra* note 107, at 43 (suggesting that civil disobedience need not be non-violent, and use of violence is a matter of social tactic); *see also Dorell*, 758 F.2d at 435-36 (Ferguson, J., concurring); *Quilty*, 741 F.2d at 1034-52. Gandhi told his British judge that he should sentence him for his non-compliance with evil. *Capitolo*, 324 Pa. Super. at 78, 471 A.2d at 473-74 (citing Ghandi, *A Plea for the Severest Penalty Upon Conviction for Sedition*, Mar. 23, 1923, *reprinted in* THE LAW AS LITERATURE

A. Kant's Categorial Imperative and the Necessity Defense

The philosophy of Immanuel Kant addressed the consequences of exception carving. Utilizing a Kantian principle called the Categorical Imperative, a manner will be suggested in which one could argue that the necessity defense furthers the principle of equal application of the laws despite the defense's narrow construction. Kant's Categorical Imperative was a supreme principle of moral law that acted as a yardstick for evaluating the desirability of a given cause of action.[121] The principle of equal application provides a Categorical Imperative for the judiciary, because judges consider the consequences of equally applying the rule they are about to derive.

The Categorical Imperative attempts to provide a foundation for society's system of objective laws, and to become the cement for a "systematic union of [independent] rational beings."[122] It seeks to create the proper moral law to guide individuals and society, as it "is *based on no* [personal] *interest* and consequently can alone among all possible imperatives be *unconditioned*."[123]

459, 465-66 (E. London ed. 1960)); *infra* notes 171-72.

121. *See supra* note 14.

122. E. CASSIRER, KANT'S LIFE AND THOUGHT 249 (1981) (quoting I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS, (IV, 285 f.) (Ak. IV, 426 ff.)). The Categorical Imperative provides the touchstone for the "resolution of all moral questions." J. FISHKIN, BEYOND SUBJECTIVE MORALITY 87 (1984). The rationality of man was a concept which held Kant's moral system together, and gave each person the power to think for himself. I. KANT, *supra* note 15, at 34.

> The Categorical Imperative bids us not merely to follow universal law, but to follow a universal law which we ourselves make as rational agents, and one which we ourselves particularize through our maxims. This is for Kant the most important formulation of the supreme principle of morality, since it leads straight to the idea of freedoms.

Id. The virtue of human rationality has long been argued by philosophers as giving rise to the highest good. Aristotle saw the life of the mind in contemplation as the only end that was free from external conditions, and therefore, represented the supreme good. Aristotle, *Nicomachean Ethics* in ARISTOTLE bks. I (ch. vii) & X (ch. viii) (P. Wheelwright ed. 1951). In recent times, Stuart Hampshire saw rationality as providing "an overall coherence between [conflicting] moral claims and between the most sought after and praised dispositions of men." Hampshire, *Public and Private Morality*, in PUBLIC AND PRIVATE MORALITY 41 (S. Hampshire ed. 1978). One commentator suggested that Kant's use of rationality as a way to insure the autonomy of individvuals was an attempt to "deepen and to justify Rousseau's idea that liberty is acting in accordance with a law that we give to ourselves." J. RAWLS, *supra* note 6, at 256. Rousseau saw the nature of moral obligation as arising when people decided to substitute the wild state of nature, ruled by instinct, for a civil state, ruled by justice. J. Rousseau, The Social Contract 18 (Hafner Press ed. 1947).

Rawls combined strains of thought from both Kant and Rousseau in arriving at a formal model of society based on a bargaining game theory. The aim of this game envisioned rationally self-interested players "arriv[ing] at unanimous agreement on a set of principles that will henceforth serve as the criteria for evaluating the institutions or practices within which the players interact." R. WOLFF, UNDERSTANDING RAWLS 17 (1977). By arriving at universal principles which the players make as rational agents, the bargaining game parallels the Categorical Imperative. *Id.* When the players come to an agreement in order to form their society, they do so much in the manner of Rousseau's Social Contract.

123. I. KANT, *supra* note 15, at 99. Rousseau's concept of law was similar to Kant's by holding that "the object of the laws is always general . . . [and] views its subjects collectively and their actions abstractly." J. ROUSSEAU, *supra* note 122, at 34.

Being unconditional, this imperative is called categorical because it "has no need to borrow its validity from some further end, but instead possesses its own validity in that it presents an ultimate, self-evident value."[124] The Categorical Imperative takes the general form of "I ought [as a rational member of the society in which I live] to do such and such."[125] The actions that this imperative commands are morally good and represent a person's moral duty.[126] In its specific formulation, the Categorical Imperative is phrased in this way: "*Act only on that maxim through which you can at the same time will that it should become a universal law.*"[127] This formulation tests the principle of any proposed action by asking "whether, if universally adopted, it would further a systematic harmony of purposes in the individual and in the human race."[128] If answered in the affirmative, such action would be willed as a universal moral law.[129] Since such universal laws are not based on subjective feelings but rather represent objectively valid commands of the *a priori* reason, Kant's theory holds that they apply equally to all rational beings. "*A priori*" refers to "that which can be known by reason alone, . . . and is presupposed by experience in general."[130] Kant recognized the frailty of man by

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A variant formulation of the Categorical Imperative arguably appears in the work of Rawls. Rawls, *Justice as Fairness*, in JUSTICE AND SOCIAL POLICY 88 (F. Olafson ed. 1961). Rawls analogized morality "to having made a firm commitment in advance; for one must acknowledge the principles of morality even when to one's disadvantage." *Id.* Rawls' use of the "constraint of commitment" as a way to arrive at objective laws of justice, has been challenged for "[not placing limits] on *what* principle shall be adopted, nor [requiring players] to adopt their principle for ethical rather than self-interested reasons." R. WOLFF, *supra* note 122, at 20. These concerns are inapposite in the jurisprudential context of this Note. The jurisprudential scope of this Note is much narrower than the ethical scope philosophers are concerned with. In the judicial system, the principle of equal application is a predetermined core of Anglo-American jurisprudence. Under the *bifurcated necessity analysis* it is the framework within which judges administer the law. *See infra* note 136. Contrast this to the world of ethics where philosophers create differing theories of morality containing a wide variety of principles that may be adopted.

124. E. CASSIRER, *supra* note 122, at 245. Kant uses the terminology "*a priori*" to characterize the non-empirical nature of the categorical imperative. I. KANT, *supra* note 15, at 57; *cf.* R. WOLFF, *supra* note 122, at 111 (claiming Kant failed to establish the theory that there is an end that all rational beings strive for, "and which therefore gives content to the empty formula of the categorical imperative").

125. I. KANT, *supra* note 15, at 27.

126. *Id.* at 82-84. An action, Kant argued, has moral worth only if it is done from a sense of duty. *Id.*; *cf.* Thoreau, *Civil Disobedience*, in CIVIL DISOBEDIENCE: THEORY AND PRACTICE 28 (H. Bedau ed. 1969)(arguing that respect for the law does not make men more just; even "the well-disposed" can be made the agents of injustice because of it). One of the harshest critics of Kant called him a "fanciful visionary of the concept of duty; sensualist with the backdrop of the pampering of dogmatism." F. NIETZSCHE, THE WILL TO POWER 60 (Vintage Books ed. 1967).

127. I. KANT, *supra* note 15, at 88.

128. *Id.* at 31.

129. *Id.* Contrast this to the view of one philosopher who called universally valid laws "*armchair moralizing*" in absence of the ability to study people to discover the criteria common to every conceivable case. F. NIETZSCHE, *supra* note 126, at 150. *See supra* note 128 and accompanying text.

130. WEBSTER'S NEW INTERNATIONAL DICTIONARY 134 (2d ed. 1956). The concept of *a priori* truths has not been without its critics. Nietzsche criticized them for lacking verifiability, and argued that the philosophers who supported them did not have the "intellectual integrity" for

allowing the possibility that "imperfect rational" beings may choose not to abide by such universal laws.[131]

One may raise the argument that every time a defendant is exempted from criminal liability, by successfully raising the necessity defense, our laws seem merely conditional and therefore unjust. Specifically, a defendant is enjoying a benefit that few others enjoy: exemption where others violating the same law would experience liability.

A closer look into the theoretical underpinnings of the necessity defense not only dissipates the perception of our laws as being conditional, but reveals a rationale reminiscent of Kant's Categorical Imperative. Classification of the necessity defense as a justification suggests that the laws do apply equally.[132] A justification recognizes that a defendant has broken the law, but negates criminal liability by asserting that, given the special exigency facing the defendant, his acts were not wrongful.[133] Justified acts create an exception to the law that must then be extended to all similarly situated defendants.[134]

The thrust of the legal justification theory, creating a universal rule of

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such support, but merely reverse these values via a love of "the good." F. NIETZSCHE, *supra* note 126, at 252. *A priori* knowledge faced its greatest attack at the hands of logical positivists after the first world war. The logical positivists "maintain that all cognitively significant statements are either analytic — in which case they elucidate the meanings of words but convey no information about the world — or else empirical — in which case they make assertions about the world, but can be determined as true/false only by experience, not *a priori* ." Pap, *Introduction to Chapter VIII: Meaning Verification and Metaphysics*, in A MODERN INTRODUCTION TO PHILOSOPHY 750 (3d ed. 1975). These attacks on *a priori* principles had their predecessor in the empiricism of Locke, Berkeley, and Hume during the Enlightenment of the Eighteenth Century. *See* THE EMPIRICISTS: LOCKE, BERKELEY, AND HUME (Anchor Books ed. 1974) (reprinting G. BERKELEY, PRINCIPLES OF HUMAN KNOWLEDGE; G. BERKELEY, THREE DIALOGUES; D. HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING; D. HUME, DIALOGUES CONCERNING NATURAL RELIGION; J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING). Modern philosophers have continued to question the validity of *a priori* principles. Ayer, *Demonstration of the Impossibility of Metaphysics*, in A MODERN INTRODUCTION TO PHILOSOPHY 760 (3d ed. 1975). In an effort to rebut the criticism of a lack of verifiability one philosopher notes that there is no more need to specially explain *a priori* knowledge than does the "ability to attain knowledge empirically by observation." Erving, *The 'A Priori' and the Empirical*, in A MODERN INTRODUCTION TO PHILOSOPHY 740 (3d ed. 1975). "Human beings certainly cannot explain everything whether there is ultimately an explanation for it or not." *Id.* Other works have defended the existence of *a priori* values. *See* Erving, *Meaninglessness*, in A MODERN INTRODUCTION TO PHILOSOPHY 770 (3d ed. 1975); Warnock, *Verification and the Use of Language*, in A MODERN INTRODUCTION TO PHILOSOPHY 780 (3d ed. 1975).

131. I. KANT, *supra* note 15, at 33. The frailty of man led one scholar to comment that procedural rights were a necessary device to protect equality from the decisions of judges that were influenced by their subjective preferences. Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 135 (S. Hampshire ed. 1978).

132. Since justification holds that society as a whole would have a right to act as defendant did, the same exception is extended to all similarly situated defendants. In other words, the same "law," (i.e. exception) is now applied equally to all. *See supra* note 53.

133. *See supra* note 53.

134. Whenever justification is allowed in a given context it "creates a new rule of law instructing future actors, faced with the same conflict of values, how to act. Any actor faced with the same conflict . . . may choose — indeed should choose — the value the court has preferred even if this may mean apparently violating the law." Gardner, *supra* note 47, at 117.

law applying equally to all, is analogous to Kant's Categorical Imperative. Namely, the justified protester would be acting on a maxim[135] that could at the same time be a universal law without drastic results. The maxim involved may generally sound like this: "When faced with these specific and exigent circumstances, my violation of the applicable law will be negated." Since everyone has the same right to invoke the justification devices under similar factual circumstances, the maxim can then be deemed "universal." The difference between the Categorial Imperative and the justification theory is that under the Categorial Imperative, the maxim maker is the actor considering his own actions, while under justification, the judge is the maxim maker considering the actions of others. The analysis remains the same; both persons consider the universal consequences of allowing the questioned act.

Equal application provides a basis for judicial analysis that underlies both the classification of the necessity defense as a justification and the *bifurcated necessity analysis*. The impact of justification in creating a universal law requires judges to evaluate the practicality of applying that law universally and equally, before allowing it. When judges engage in this evaluation they are acting in accordance with the second part of the *bifurcated necessity analysis*. The classification of the necessity defense as a justification may very well be the reason for a judge's concern for universality under the *bifurcated necessity analysis*.

The *bifurcated necessity analysis* consists of two parts: first, a utilitarian balancing of the evils faced by the defendant; and second, an implicit application of equal application as a species of the Categorical Imperative. The application of the *bifurcated necessity analysis* thus creates universal laws, just like justification, that apply equally to all persons. For this reason, it is argued that the *bifurcated necessity analysis* uses equal application as a basis for considering the consequences of universal application. Under the *bifurcated necessity analysis*, the principle of equal application constitutes a supreme universal law that provides a framework within which a judge should administer the law.[136]

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135. "A maxim is a principle upon which we act." I. KANT, *supra* note 15, at 20.

136. On speaking of how judges should administer the law, Hare envisioned a process that is somewhat analogous to the one this Note advocates. On one level, prima facie moral principles define for judges the issues and results at conflict. R. HARE, MORAL THINKING 162 (1981). Among these principles are legislated laws that Hare held to be a product of a critical moral thinking on the part of legislators, that is "a very close analogue" to the form used by Kant in arriving at maxims. *Id.* On another level, judges select among such principles on utilitarian grounds. *Id.* In doing so, they "observe formal justice, giving equal weight to the equal interests of all the parties affected, without favouring any individual as such." *Id.* Quite simply, while the principles may reflect Kantian concerns, their selection is utilitarian. *Id.*

Hare's analysis serves to explain a judge's selection among principles from which she is given discretion to choose. However, under the bifurcated necessity analysis the principle of equal application is not discretionary. Equal application is a universal law which is impervious to utilitarian calculation. Judges do not decide whether or not to apply it, as they do when allowing necessity or convicting for trespass. Hare throws in equal application concerns in his utilitarian calculation by saying selection should not "[favour] any individual as such." *Id.* This would have the result of never allowing necessity, because by definition, the defense gives favored treatment. Hare reiterates this by saying "[t]he good judge will not consider the possibility of the case [where a breach of the prima facie principles, like trespass, would be for the best]." *Id.* at 163-64. The notion of equal application supersedes Hare's analysis and provides the framework within which judges ad-

In other words, this principle provides a Categorical Imperative for the judiciary.

The *bifurcated necessity analysis* helps to explain how the necessity defense is disallowed in abortion clinic and nuclear protest cases where it would seem that the balance of evils favor defendant.[137] The *bifurcated necessity analysis* still accommodates an equitable consideration that the laws be compromised in special circumstances.[138] This consideration is in tension with the courts' recognition of the consequences of universality and the need for fairness in the law.[139]

The first part of the *bifurcated necessity analysis* involves a utilitarian calculation which resolves the values defendant has placed in conflict; property rights and alleged threats to life. The same calculation is employed in the finding of a justification.[140] Utilitarianism was a philosophical moral theory holding "that the aim of [ethical] action is the largest possible balance of pleasure over pain or the greatest happiness of the greatest number."[141] In other words, a utilitarian calculation promotes results which foster the greatest good for the greatest number. Under a Kantian moral theory calculation, by contrast, utilitarian considerations have no moral value, and only actions done from a sense of moral duty should be of import.[142] Such a calculation is used

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minister the laws. By separating out equal application, the bifurcated analysis demonstrates the Kantian notion of hierarchy of the laws wherefrom we derive society's system of objective laws, like trespass and the necessity defense, from the universal law of equal application. By being the supreme universal law for the judiciary, equal application may be considered to be a reformulation of the Categorical Imperative.

137. The balance seems to favor defendant where he or she chooses trespass over the greater evils of killing a fetus, nuclear energy, or nuclear war.

138. This equitable consideration may be analogized to the limited policy recognizing a jury's right to decide against the weight of the evidence, via jury nullification, because it imparts some flexibility in the law for a "community conscience." *See supra* note 7.

139. See *supra* text accompanying notes 114-20 for discussion of policy considerations against widescale carving out of exceptions. "Even those holding different conceptions of justice can, . . . still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life." J. RAWLS, *supra* note 6, at 5.

140. Gardner, *supra* note 47, at 117.

141. WEBSTER'S NEW COLLEGIATE DICTIONARY 978 (7th ed. 1969). The leaders of the utilitarian school were Jeremy Bentham and John Stuart Mill. *See* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1876) (important exposition of utilitarian thought); J. S. MILL, UTILITARIANISM (1863) (major reading on utilitarian theory). The general definition of utilitarianism is made more specific by a division between "act" utilitarianism and "rule" utilitarianism. VII & VIII THE ENCYCLOPEDIA OF PHILOSOPHY 206 (P. Edwards ed. 1967). Act utilitarianism "assess[es] the rightness or wrongness of each individual action directly by its consequences." *Id.* Rule utilitarianism "does not consider the consequences of each particular action but considers the consequences of adopting some general rule . . . ." *Id.* While rule utilitarianism bears resemblance to Kant's Categorical Imperative, it differs because rule utilitarianism appeals to an individual's subjective feelings in arriving at its rules. *Id.*

142. Actions motivated by inclinations, including by implication those motivated by promoting the greatest good for the greatest number (utilitarianism), have no moral worth for Kant. I. KANT, *supra* note 15, at 65-67. Kant's use of the rationality of practical reasons to arrive at universal moral principles in the abstract has been seen as contrasted to the utlilitarian's connection of rationality to a scientific method that "yields definite results in particular cases." Hamp-

whenever a defendant claims to have chosen the lesser evil under the necessity defense, and courts are then asked to resolve the conflict of values that she faced. A defendant's conduct will be justified, in theory, when it can be found that the benefit to society, caused by her violation of the law, outweighed that which would have resulted had she not acted, and instead endured the harm she originally sought to avoid.[143] The utilitarian calculation would seem to justify abortion clinic and nuclear protesters because the benefit to society of avoiding threats to life outweigh the harm flowing from a non-violent trespass. As with the reasons courts give for denying the defense, the utilitarian calculation fails to fully explain the frequent denial of necessity claims.

The explicitly utilitarian analysis of the first part of the *bifurcated necessity analysis* does not preclude a judge from taking into account the effect of the ruling on society as a whole.[144] Judge Weiand, in *Berrigan*, demonstrated this by considering the strong policy considerations against exception carving in a nuclear protest case.[145]

A common concern with exception carving is that society, along with its legal system, would be threatened with anarchy and chaos if individuals were allowed the option of disregarding any law that ran contrary to their conscience.[146] Because exception carving could make social life and the administration of the law impossible, judges have been directed to be suspicious of attempts to widen the area of exception, and limit exceptions to situations that are truly extraordinary.[147] The creation of a universal exception to the law, via the second part of the *bifurcated necessity analysis*, offers a judicial recognition of these policy considerations as an additional reason for court reluctance to apply the necessity defense widely in protest cases. This occurs despite the impression that the defendants have avoided the greater evil.[148]

The outcome in protest cases is the same as if Kantian concerns of universality were applied. Both the Categorical Imperative and the second part of the *bifurcated necessity analysis* result in a universal law that is designed to maintain society's harmony.[149] The *bifurcated necessity analysis* derives its

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shire, *supra* note 122, at 37-38. Compare this with the view of Hare which saw Kant as developing "a system of moral reasoning whose conclusions have a content identical with that of a certain kind of utilitarianism." R. HARE, *supra* note 136, at 4-5.

143. If it can be found that the benefit to society caused by a defendant's violation of the law outweighs that which would have resulted had the defendant endured the harm, defendant's conduct will be justified. Gardner, *supra* note 47, at 117.

144. *See supra* notes 115-17 and accompanying text.

145. *Berrigan*, 325 Pa. Super. at 280, 472 A.2d at 1121 (Weiand, J., concurring in part and dissenting in part).

146. *See supra* text accompanying notes 114-20. The law has been viewed as being premised upon a series of presumptions which could lead to social chaos if held invalid. W. MOBERLY, *supra* note 12, at 12-13. If exception carving is carried to its logical extreme, the applicable law is nullified by judicial fiat. Without laws to provide guidance, society runs the risk of becoming like Plato's rudderless "ship of fools" aimlessly adrift. PLATO, THE REPUBLIC 145-46 (G. Grube trans. 7th ed. 1981).

147. W. MOBERLY, *supra* note 12, at 12-13.

148. *See supra* notes 113-20 and accompanying text.

149. See *supra* note 128 and accompanying text discussing relation of Categorical Imperative to furthering societal harmony. The *bifurcated necessity analysis* leads to a similar result since it asks judges to consider the effect on society, before allowing the defense. Universal laws

similarity to Kantian analysis from the influence of the legal justification theory underlying the necessity defense. It has been noted that every time a court allows a justification, a form of universal law is made, which creates an exception to the law broken.[150]

This effect supports the judiciary's concerns with the consequences of universality called for under the second part of the *bifurcated necessity analysis*. Negation of criminal liability via justification, gives the judiciary a directive to consider the facts of a case in a particular way; a way that involves an assessment of the consequences flowing from having to extend the same exception to all future similarly situated defendants.[151] Where the consequenses border on anarchy, one would expect justification under the necessity defense to be rejected.[152] Since the defense is a justification, the same concern with universality must be present when judges evaluate the defense. The concern with universality is consistent with the hypothesis of the second part of the *bifurcated necessity analysis*.

Equal application is used in this second part as the basis for comparison under the *bifurcated necessity analysis*, and thus provides a Categorial Imperative for the judiciary. If a court finds that a given exception could be allowed, it has determined that the exception may be applied equally to all similarly situated without chaotic results. If chaos results, a court should disallow a proposed exception. In an analogous manner, the driving force behind the Categorical Imperative is a desire to foster a systematic harmony of purposes via universal laws calculated to apply equally to all.[153] In its entirety, the *bifurcated necessity analysis* acts as a "judicial Categorical Imperative" which supersedes the utilitarian balancing in which a court engages. As a result, the judicial Categorical Imperative requires that all decisions be made consistently with it. The other reasons given by a court for rejecting the defense occupy the same position as utilitarian calculation, because a judge could choose whether or not they apply. Equal application is a universal law which is impervious to calculation. Judges do not decide whether or not it is to apply. Their results must conform to the goal of advancing the notion of equal application. That is why equal application is called an objective foundation for judicial analysis under the necessity defense.

The model of jurisprudence suggested by the *bifurcated necessity analysis* is not a rigid one, despite its emphasis on objective principles. The furtherance of equal application is the end towards which all judges should strive. Yet, in the real world, it is entirely possible that judges could depart from being rule-oriented in order to become result-oriented. When a judge acts subjectively, this act does not deconstruct the supremacy of a system predicated on equal application, because the ideal remains. The *bifurcated necessity analysis* helps to explain what happens when judges act competently. It does not ignore the possibility of incompetence. The incompetent judge will either have to answer to his conscience or to public censure, but his existence does not eliminate the possibility of objective decisionmaking on the part of competent

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maintain societal harmony because all citizens are given equal treatment under them.

150. *See supra* text accompanying notes 131-37.

151. *See supra* text accompanying note 134.

152. *See supra* text accompanying note 147.

153. *See supra* note 128 and accompanying text.

judges. Under the *bifurcated necessity analysis* model, the two types of judges exist independently. The model supports the limited allowance of the defense despite possible fears that the restrictive treatment given the defense unduly favors the prosecution.

When the defense is denied under the model, it is done so on objective grounds, i.e., that defendants have not made a requisite showing of confrontation with truly exceptional circumstances, or that the consequences of justification are too chaotic. All defendants showing the same degree of confrontation, should ideally obtain the same results. The necessity defense imparts systematic flexibility and promotes the attainment of a higher value at the expense of the lesser value as defined in the statutory law.[154] It should not be used to such an extent that it subsumes and nullifies this statutory law. To do so promotes anarchy by making each individual defendant a legislator unto himself, rather than a member of society striving toward the common purpose of seeing that the laws apply equally to all.

Under the *bifurcated necessity analysis* the courts can be said to have engaged in a *de facto* application of Kantian moral analysis because, while not explicitly admitting to this, the justification analysis is consistent with Kantian precepts. Thus, it is argued that the influence of Kant's philosophy on the judiciary is implicit but evident.[155] The existence of the *bifurcated necessity analysis* is most apparent when a court rejects the necessity defense, despite a choice of evils that apparently seems to favor defendants. To illustrate this point, consider the way in which the courts have dealt with the issue of justifiable homicide, and justifiable trespass in the context of abortion clinic and nuclear protest.

Justifiable homicide is raised by the *Dudley* shipwreck scenario[156] where one person was killed to save the lives of three.[157] The utilitarian calculations of the *bifurcated necessity analysis*, with its focus on maximizing the greatest good for the greatest number, most easily justifies the defendant's conduct.[158] Applying the utilitarian calculus, one would argue that the killing of one weakened and starving person, to save the lives of three others, results in the greatest good to society. The other alternative, not to kill, would result in the death of all four. Since the saving of three lives arguably results in a greater good to society than the saving of none, the utilitarian calculation would justify the defendant's conduct.

Kantian ethics would reject justification in such a case. Kant used an ends/means rationale which stated: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."[159] For Kant,

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154. *See supra* notes 9 and 53.

155. A question which is raised and needs further analysis is: Whether Anglo-American jurisprudence, including its process of legal education, somehow touched with Kantian considerations, and propagated by the jurists, is a product of that education?

156. *See supra* note 31 and accompanying text.

157. *Id.*

158. *See* Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) (hypothetical opinion reflecting various judicial interpretations, premised upon cannibalism case involving trapped explorers in cave).

159. I. KANT, *supra* note 15, at 96.

humans had an absolute and unconditional value because of their having rational capacity, and therefore, they are ends in themselves.[160] Simply stated, Kant never felt it to be morally correct to "use" one human being to further another's purposes.[161] The *Dudley* scenario remains unjustifiable under this ends/means rationale because a human's life should never be used as a means to further the lives of others.

As mentioned earlier,[162] the courts have generally rejected the necessity defense in homicide cases. A compelling factor for rejection has been a revulsion toward deliberate killing which is so strong that judges are loath to consider utilitarian reasons for justification.[163] Even if they were to consider utilitarian reasons, it seems that a concern for the universality of such a proposed justification fosters a rejection of it. There seems to be something inherently wrong with the judiciary sanctioning murder, even if subject to the proposed limitations of special circumstances. The *Dudley* scenario demonstrates that a court's necessity analysis cannot be confined merely to utilitarian calculation; sometimes the utilitarian calculation would appear to justify a defendant's conduct, yet universal considerations arguably preclude the allowance of justification.

The lack of success that the defense has realized when raised by those protesting abortion clinics, nuclear power plants, or weapons again reveals this bifurcated analysis. In resolving the conflict of values, if the protester's act represented the greatest good to society, under the utilitarian calculus it should be justified. Both types of protesters claim to save lives; abortion clinic protesters allege to save the lives of fetuses, while nuclear protesters allege to save lives from nuclear harm. In evaluating this conflict, courts could balance the value of life as the supreme value, against the fundamental rights of privacy, procreational choice, and the need for therapeutic abortions in abortion clinic cases, or in nuclear protest cases, against the property rights guarded by trespass statutes.[164] In favoring any of the latter values, justification would be denied outright. In choosing the former value as the greatest good, justification would be allowed. One may think that the courts would say that since life is a supreme value, nothing can supersede it in being the greatest good. The reality is that these cases are only rarely allowed the justification defense.[165] This would not help explain why cases that arguably appear to further the greatest good are denied justification because of concerns of universality. In those cases, universal application of such a justification fosters results so chaotic[166]

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160. *Id.* at 32-33. "A moral agent in a 'Kingdom of Ends' is to regard the ends of every other rational being in precisely the way he regards his own . . . . Such a morality is . . . 'impartial.' " Fishkin, *supra* note 122, at 88.

161. I. KANT, *supra* note 15, at 32-33.

162. *See supra* notes 31-36 and accompanying text.

163. G. WILLIAMS, *supra* note 31, at 604.

164. The values a court will ultimately balance depends on the issues raised and the parties involved.

165. *See supra* text accompanying notes 61-62 and 85-90.

166. Such a result would support the right to protest and trespass whenever a threat was posed to any life, not just a specific life. In the case of abortions, this would then support the right at all times that abortions were being performed. The clinic's property rights would be continually subordinated to the trespassers' rights during every business hour. Nuclear protesters' rights

that courts generally will not allow it.[167]

The disallowance of the necessity defense in cases attempting to justify homicide, abortion clinic and nuclear protest, where the balance of evils arguably favors defendants, underscores the court's attentiveness to universality and equal application as a Categorical Imperative. Quite possibly, this attentiveness could be an outward collective manifestation of the *a priori* reason.[168] If, in fact, the Categorical Imperative is a transcendental principle flowing from human rationality, the possibility is present that it leaves behind its indelible mark whenever judges concerned with maintaining universal application of laws exercise their rationality in making judgments. Characterized in this way, judicial reluctance regarding the justification of trespass via necessity is consistent with Kant's Categorical Imperative, as is the bifurcated necessity defense analysis employed by the courts.[169]

B. The Future of Exemption in Cases of Civil Disobedient Trespass by Nuclear and Abortion Clinic Protesters

The recourse to the necessity defense by trespassing abortion clinic and nuclear protesters has been shown to be conditioned upon the necessity claim

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would be even broader, especially in the case of a general informational protest. With general informational protests, the threat continues so long as nuclear plants or weapons remain in existence. When threatened with a nuclear protest, this property right would be perpetually subordinated to the protesters' rights 24 hours a day. Under either abortion clinic or nuclear protest, what was once a private forum would then be converted into a public forum without judicial expansion of the public forum doctrine. Such a result, was hardly contemplated by the framers of the first amendment, and borders on the absurd. The fact that the public is allowed to pass through a "business" property does not convert it into a public forum. *Hood*, 389 Mass. at 586, 452 N.E.2d at 192. "Operating a business is not a public function, but rather, is a traditionally private endeavor." *Id.*

The policy of disallowing justified civil disobedience to avoid chaotic results has been called "essentially confused." Wasserstrom, *The Obligation to Obey the Law*, in CIVIL DISOBEDIENCE: THEORY AND PRACTICE 257 (H. Bedau ed. 1969). In fact, it has been argued that civil disobedience may prevent chaos by providing an outlet for rebellion. H. ZINN, *supra* note 107, at 18. Rawls maintained that the danger of anarchy is non-existent as long as citizens generally agree on a concept of justice and resort to civil disobedience is respected. J. RAWLS, *supra* note 6, at 390. Despite this position, he sees no way to entirely rule out the possibility of chaos. *Id.* Whenever chaos does occur as a result of civil disobedience, Rawls places the responsibility on those whose abuse of power warranted disobedience, and not the protesters. *Id.* at 390-91.

In the case of abortion clinic protest, the policy set by justification is equally unacceptable in light of *Roe*. Justification would promote the saving of fetal lives, that as yet, are not a part of the world we live in, at the expense of constitutional rights and democratic means to affect political and social change for people currently a part of that world. A "per se" rule would be established that abortions are the greater evil and can always be prevented by trespass. If this were so, a woman's constitutional right to an abortion in the first trimester would be taken away by implication. Such a change in a constitutional right would not be affected by constitutional means, but by a tyranny of the minority, or in the most objective light, an unduly constituted body lacking the authority to legislate. *See supra* notes 77-78.

167. *See supra* notes 146-48 and accompanying text.

168. *See supra* text accompanying notes 129-30.

169. See *supra* text accompanying *supra* notes 137-39 for a definition of the *bifurcated necessity analysis.*

successfully withstanding the court's *bifurcated necessity analysis*: first, a utilitarian qualification of the exigent circumstances, and second, the implicit evaluation of a Kantian principle of universality.[170] Despite the fact that this analysis poses a formidable barrier to most defendant protesters seeking exculpation, the avenue is not entirely foreclosed in either the anti-abortion or anti-nuclear protest context.

Besides the *bifurcated necessity analysis*, there is one final factor with which abortion clinic and nuclear protesters will have to contend. Judicial skepticism over protester's characterization of themselves as civil disobedients, in contravention of the fundamental precepts that historical leaders in such movements have abided by,[171] poses another barrier to protesters. As interpreted by these leaders, while civil disobedience encourages the violation of an unjust law, it does not support immunity from punishment.[172] Such leaders hoped that the imposition of punishment on a civil disobedient by a judge would force the judge into a hard ethical choice, and thereby influence public policy.[173] The barrier of court skepticism in this area points out the conflict between an individual's personal liberties as defined by law, and the state's interest in maintaining orderly government.[174]

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170. *See supra* text accompanying notes 135-39.

171. The suggestion has been made that violations of law, "committed under claim of a legal right with the intention of seeking redress in the courts . . . can hardly be termed civil disobedience." Taylor, *Civil Disobedience: Observations on the Strategies of Protest*, in CIVIL DISOBEDIENCE: THEORY AND PRACTICE 99 (H. Bedau ed. 1969). It may be argued that the trespass violations incurred by nuclear and clinic protesters fall into this category, because the necessity defense, when granted, gives a person a right to enter and avoid the greater harm. *See supra* note 53. Other philosophers questioned the depth and completeness of a protester's commitment where "after having disobeyed the law to make a dramatic self-sacrifice, he then seeks to avoid the penalty which makes it a sacrifice." Cohen, *supra* note 6, at 176-77. The *Capitolo* court defined civil disobedience in a way which produces the expectation that when a court chooses to uphold the law a protester violated, the protester "is willing, perhaps eager, to accept the punishment prescribed by law." *Capitolo*, 324 Pa. Super. at 76, 471 A.2d at 473.

172. The willingness to accept penalties has been called the "principle crucial to the philosophy of civil disobedience . . . ." Taylor, *supra* note 171, at 99. Dr. Martin Luther King Jr. once said that "one who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty." M.L. King, Jr., "*Letter from Birmingham Jail*," *excerpt reprinted in* BEFORE THE LAW, *supra* note 30, at 357. King notes the ever-presence of civil disobedience in our civilization, and cites as examples Socrates, who died for academic freedom, the martyred Christians dying for a new faith, the Boston Tea Party as an act of massive civil disobedience, and the Hungarian freedom fighters who resisted Adolf Hitler. *Id.* Rawls recognized the importance of accepting the legal consequences of a disobedient's conduct. J. RAWLS, *supra* note 6, at 366; *see also* Thoreau, *supra* note 126; and *supra* note 171.

173. *See* Ghandi, *A Plea for the Severest Penalty Upon Conviction for Sedition*, Mar. 23, 1933, *reprinted in* THE LAW AS LITERATURE 459, 465-66 (E. London ed. 1960) (cited in *Capitolo*, 324 Pa. Super. at 76, 471 A.2d at 473).

174. Protesters will have to contend with two other conflicts. The first is that of the tensions between the function of the judge as law interpreter, and the jury as a finder of the facts. On the one hand is the value of the jury as the conscience of society. On the other hand is the power of the judge to rule on a defense as a matter of law. *Bailey*, 444 U.S. at 435. This tension is highlighted in cases where the judge determines that the defendant's showing on the necessity defense is insufficient to reach the jury. This is sometimes seen as imposing an "especially strict burden of proof on defendants . . . ." *Id.* This is countered by the notion that such a defense should get to

CONCLUSION

Protesters interested in truly affecting change in nuclear policies or abortion rights hope to find an effective tool in the necessity defense because it creates a new rule which can be referred to in the future. Yet, it has been seen that the necessity defense has generally been given restrictive readings. The nature of the restrictive readings given should not be taken to mean that trespassing protesters are foreclosed from successfully invoking either doctrine, but only that they will be required to show a confrontation with truly exceptional circumstances.

The cases cite particular reasons for denying the necessity defense including the lack of immediacy, the lack of causation, or the availability of other legal alternatives. None of these grounds go to the issue of the policy behind the limited allowance of the defense in cases which appear to be advancing a greater good to society. To a subordinate degree, the justification theory involves a utilitarian balancing of the evils faced by protest defendants. This does not explain the frequent disallowance of the defense in these cases; a further explanation is needed. The *bifurcated necessity analysis* helps demonstrate how concerns for the universality of wide scale exception carving enter into the judiciary's analysis of protest cases. Such concerns arise out of the way in which the necessity defense negates criminal liability via justification.

Under the *bifurcated necessity analysis* this concern is characterized as a form of Kantian analysis, which makes equal application a Categorical Imperative for the judiciary. By using equal application as an objective touchstone, a court determines whether a particular exception could be applied equally to all similarly situated defendants without chaotic results. If chaos would be avoided, the exception would be allowed and the defense granted. The defense would be denied if chaos were enhanced. The limiting reasons cited by courts in denying the defense, may in fact constitute a policy choice as to the particular situation that does not result in chaotic results, or at least, is of exception status. The arrival at such a policy would still imply a judicial consideration of universal consequences at some point in time.

As a process of judicial decisionmaking, the *bifurcated necessity analysis* makes the notion of equal application supersede all other legal principles and

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the jury, providing the defendant can argue all the necessity elements. *Brugmann*, 13 Mass. App. at 379, 433 N.E.2d at 462. If the evidence falls short, the judge should correct this via curative instruction. This represents a conflict between those who want to preserve the status quo, and those who want to change the law on an ad hoc basis by exception carving.

A second conflict that lurks behind the policy considerations in this area is a separation of powers issue. This conflict is characterized by the judicial branch creating legislation via judicial fiat when it applies the necessity defense. Every time a court does this, it goes contrary to what either the legislatures, or the executive through agency regulation, intended. This concern of "judicial activism" may move courts to apply the necessity defense even more miserly. Judicial activism is defined as a "[j]udicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with the restraint expected of appellate judges." BLACK'S LAW DICTIONARY 760 (5th ed. 1979). However, it may encourage use of the necessity defense if the court is an activist one. The considerations posed by both of these conflicts may implicitly influence the courts to maintain the status quo, especially when combined with the principles of universality raised by the Kantian dialectic.

provides the framework within which judges administer the law. Society's system of objective laws, like trespass and the necessity defense, are derived from this superseding principle. A judge is given the discretion to choose, via utilitarian calculation, which among these objective laws will prevail in a given case. On a further level, the necessity defense itself has been shown to involve utilitarian calculation as to a choice of evils. Since equal application supersedes all other rules in the judicial world, under the *bifurcated necessity analysis*, it is impervious to utilitarian calculations.

By using equal application as an objective touchstone, it is hoped that the judiciary can best insure that their withholding of the defense in most cases will not be arbitrary and capricious. The necessity defense has a place in Anglo-American jurisprudence to act as a "safety valve" for truly exceptional cases. The defense was not intended to be liberally used, lest the exceptions swallow up the statutory law. To allow widescale exception carving would have the effect of promoting anarchy. When the law promotes favoritism, its citizens become restless and disrespectful of law. The resulting discord would be at odds with the principle tenet of Kantian philosophy that intended to bind all members of society via laws that apply equally and fairly to all. The promotion of anarchy would likewise stray from the policy considerations upon which the necessity defense and justification rest. This is a result we cannot have in a democracy, as it implies judicial incompetence in not carrying out or obeying the law's mandate.

Diana P. Nowezki

Addressing Computer Crime in Massachusetts: The Problems with Comprehensive New Criminal Statutes — The Advantages to a Multifaceted Approach

The Massachusetts legislature has been asked on several occasions in recent years to enact a comprehensive computer crime bill.[1] Two proposed bills were considered in 1986.[2] Many states have enacted comprehensive computer crime legislation in the past ten years[3] in response to the general perception that computer abuse is a major problem in our society.[4] This Note suggests that the Massachusetts legislature has acted reasonably and responsibly to date by hesitating to enact such a bill. The computer crime issue is poorly defined; the perceived computer abuse crisis is for the most part unsubstantiated.[5]

Those statutes which have been enacted in other states are used rarely,[6] and are criticized often as ill-defined and overbroad.[7] Quick enactment of a comprehensive computer crime bill is not the most effective response to the documented evidence of computer abuse. A multifaceted approach is needed, including: improved computer security, specific tailoring of traditional crime statutes as warranted to encompass computer technology, computer law train-

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1. Mass. H. 708, 1st Sess. (1983); Mass. H. 709, 1st Sess. (1983); Mass. H. 2671, 1st Sess. (1983); Mass. H. 1952, 1st Sess. (1983); Mass. H. 6129, 1st Sess. (1983); Mass. S. 240, 2nd Sess. (1984); Mass. H. 4844, 2nd Sess. (1984); Mass. H. 5671, 2nd Sess. (1984); Mass. S. 1471, 1st Sess. (1985); Mass. H. 4585, 1st Sess. (1985); Mass. H. 5420, 1st Sess. (1985).

2. Mass. H. 2567, 2nd Sess. (1986); Mass. H. 3497, 2nd Sess. (1986).

3. *See, e.g.*: ARIZ. REV. STAT. ANN. § § 13-2301, 13-2316 (West 1978 & Supp. 1982-83); CAL. PENAL CODE § 502 (West Supp. 1983); COLO. REV. STAT. § § 18-5.5101, 102 (Supp. 1982); FLA. STAT. ANN. § § 815.00-.07 (West Supp. 1983); ILL. ANN. STAT. ch. 38, § § 15-1, 16-9 (Smith-Hurd Supp. 1983-84); MINN. STAT. ANN. § § 609.87-.89 (West Supp. 1983); N.M. STAT. ANN. § § 30-16A-1-4 (Supp. 1983); N.C. GEN. STAT. § § 14-453-457 (1981); R.I. GEN. LAWS § § 11-52-1-4 (1981); UTAH CODE ANN.§ § 76-6-701-704 (Supp. 1981).

4. *See infra* notes 16-18 and accompanying text.

5. See *infra* notes 25-40 and accompanying text discussing the lack of valid statistics on the incident of computer abuse in our society.

6. *See infra* note 54.

7. *See infra* notes 87-95 and accompanying text.

ing throughout the legal community.

Part I of this Note presents background on computer crime. Part II discusses problems with state computer crime laws currently in use. Part III outlines the bills that have been proposed to the Massachusetts legislature. Part IV proposes an approach to computer abuse focusing on a multifaceted approach rather than on the enactment of comprehensive new crime legislation.

I. COMPUTER CRIME

A. Background

The first computer began operating in 1946[8] spurring a technological revolution that explosively has invaded all aspects of our society — economic, social, political.[9] Computers are everywhere: in industry, supermarkets, banks, schools, and homes. These machines seem impenetrably complex to all but the computer specialist,[10] yet they efficiently calculate, monitor, and increasingly control our lives.[11] As business and government move rapidly forward with computerization, new opportunities for white collar crime have arisen.[12]

In the broadest sense, this new computer technology simply involves more efficient equipment for processing information.[13] For example, a bank now stores, retrieves, and transmits records (information processing) by computer disk or tape (new equipment), rather than by paper and ink. Computer crimes are directed either at the equipment or, more commonly, at the information. A programmer secretly arranging sheet music for his second job on his employer's computer is abusing the equipment.[14] He has misappropriated computer time and space without interfering with his employer's business information. More typical of the serious abuses, however, are the wide range of actions directed not at the equipment itself, but at the computer information. Such abuses range from unauthorized scanning of personal credit files to fraudulent

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8. Sokolik, *Computer Crime - The Need For Deterrent Legislation*, 2 COMPUTER L. J. 354 (1980). This original model, of course, predates the silicon chip and contained instead eighteen thousand vacuum tubes. *Id.*

9. Note, *Computer Abuse: The Emerging Crime and the Need for Legislation*, 12 FORDHAM URBAN L. J. 73 (1983-84).

10. "Because of their complexity, computer-based products are often not well understood in detail by their developers, vendors, users, or other participants." Kling, *Computer Abuse and Computer Crime in Organizational Activities*, 2 COMPUTER L.J. 409, n.16 (1980). Indeed the public's capability to comprehend computers would seem to be lesser still.

11. Each of us, for instance, has been held captive of the inevitable computer glitch, to be released only when the computer so wills.

12. S. NYCUM & D. PARKER, PROSECUTORIAL EXPERIENCE WITH STATE COMPUTER CRIME LAWS - FINAL REPORT TO BUREAU OF JUSTICE STATISTICS 1 (U. S. Dept. of Justice, Feb. 1985). By 1985 the "government of most developed countries and virtually all large corporations will be reliant on computers." Volgyes, *The Investigation, Prosecution, And Prevention Of Computer Crime: A State-Of-The-Art Review*, 2 COMPUTER L.J. 386 (1980).

13. *See generally* Statement of Roy N. Freed, Regarding Criminal Laws Applicable to Crimes that Involve Computer Technology 3-6 (Sept. 1982).

14. United States v. Kelly, 507 F. Supp. 495 (E.D. Pa. 1981). *See also* United States v. Curtis, 537 F.2d 1091 (10th Cir. 1976), *cert. denied*, 429 U.S. 962 (1976) where the defendant set up a dating service on his employer's computer system.

manipulation of data for monetary gain.[15]

In some criminal trials the courts have had problems resolving computer abuse issues under traditional criminal statutes.[16] Coupled with extensive news media coverage of spectacular individual computer abuse cases,[17] this has created an image that computer abuse is a major problem, perhaps a crisis.[18] In response federal and state legislatures have been proposing and enacting computer crime statutes since the mid-1970s.[19] The scope and wording of these statutes vary widely, yet no model computer crime bill has evolved.[20] Many of these statutes are criticized as inappropriate or ineffective[21] and the debate on how to deal with computer crime continues.

The first step in dealing with computer abuse is defining the problem. Despite the image that computer crime is a major problem, hard evidence of the types of computer abuse and their incidence in our society is lacking. Good definitions[22] and valid statistics[23] are not available even though substantial

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15. Examples: 1. Creating a false account for the deposit of legitimate accounts receivable. United States v. Jones, 414 F. Supp. 964 (1976), 6 COMP. L. SERV. REP. 197 (D. Md. 1976), *rev'd*, 553 F.2d 351, 6 COMP L. SERV. REP. 209 (4th Cir. 1977). 2. Using a computer terminal to send a copy of a software program to a competitor. Ward v. Superior Court, 3 COMP. L. SERV. REP. (Callaghann) 206 (Cal. Super. Ct. 1972). 3. Intentionally erasing computer-stored records. People v. Lyle, No. 38990 (Sacramento Mun. Ct. 1977); *discussed in* Becker, *The Trial of a Computer Crime*, 2 COMPUTER L. J. 451 (1980). 4. Falsifying computerized credit records. United States v. Alston, 609 F.2d 531 (D.C. Cir. 1979), *cert denied*, 445 U.S. 918 (1980).

16. In United States v. Seidltz, 589 F.2d 152 (4th Cir.), *cert. denied*, 441 U.S. 922 (1978), defendant, without authorization, transmitted a computer program from his former employer to himself. The charge of interstate transmission of stolen property was dismissed by the trial court because nothing was carried away — the program was copied with the original never leaving the employer's computer. The Appeals Court affirmed dismissal of this charge. *Id.* at 155 n.12. Defendant was convicted of intent to defraud by the use of interstate wires, under the federal wire fraud statute. *Id.* at 160. In Ward v. Superior Court, 3 COMP. L. SERV. REP. (Callaghan) at 208 (Cal. Super. Ct. 1972), the court held that under that statutory definition of theft of a trade secret in California, the article taken must be tangible. *Id. See* CAL. PENAL CODE § 499(c) (1965). Telephonic impulses would not constitute an article representing a trade secret. *Ward*, 3 COMP. L. SERV. REP. (Callaghan) 208 (Cal. Super. Ct. 1972); *see also* Commonwealth v. Yourawski, 384 Mass. 386, 425 N.E.2d 298 (1981); text accompanying *infra* notes 101-06.

17. A computer crime is far more likely to receive publicity than a comparable, non-computer crime even when the amount taken is not overwhelming and the method used not particularly novel. Becker, *supra* note 15, at 449.

18. S. NYCUM & D. PARKER, *supra* note 12, at 3.

19. *Id.* at 4. In 1978, Florida, Arizona, and Virginia became the first states to enact computer crime legislation. *Id.*

20. Although many state statutes were modeled after an early federal bill S. 240, 96th Cong., 1st Sess. (1979). This bill was far from a model piece of legislation. It was heavily criticized and failed enactment. *See infra* note 90 and accompanying text.

21. The statutory wording is viewed as overbroad and ambiguous. *See infra* notes 84-95 and accompanying text. The penalties can be too harsh. *See infra* notes 96-100 and accompanying text. The statutes are rarely used. *See infra* note 54 and accompanying text.

22. See *infra* notes 84-100 and accompanying text for a discussion of the problems in formulating computer crime definitions generally. See *infra* notes 107-73 and accompanying text to see how these general problems have affected attempts in Massachusetts to formulate and enact comprehensive computer crime laws.

23. *See infra* note 40 and accompanying text.

time and effort have been invested in this area. At least two comprehensive studies of computer crime have been attempted.[24]

The first study was done by the United States General Accounting Office (GAO).[25] Ten federal agencies[26] were ordered by the GAO to search their files for cases of computer crime. These ten agencies combined, netted a mere seventy-four cases[27] even though the United States government is the single largest user of computers in the world.[28] This result caused the GAO to examine whether they may have missed cases, perhaps because the federal government does not use computer crime as a category header when filing cases.[29] Whatever the possible limitations of this study, however, the GAO believes that their search was "reasonably thorough."[30]

A second study was made by Standard Research Institute International (SRI) under grants from the National Science Foundation.[31] SRI collected, and continues to collect, data on computer abuse incidents[32] and their information is cited as a major source of case data for numerous articles, books, etc., concerning computer crime.[33] Yet the advantage of this study in having exposed numerous computer-related crime incidents is offset by the questionable quality and accuracy of the information gathered. SRI's own senior management system consultant[34] states that much of the data comes from potentially inaccurate and superficial newspaper articles.[35] In an extensive analysis

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24. A third study done in the early 1970s by the Institute for the Future was actually an opinion survey. Computer specialists were asked to anticipate the types and amounts of losses society could expect from computer-based systems abuse in the coming years. See generally Taber, *A Survey of Computer Crime Studies*, 2 COMPUTER L. J. 275 (1980) for an analysis of this study, and of the GAO and SRI studies herein discussed.

25. GENERAL ACCOUNTING OFFICE, COMPUTER-RELATED CRIMES IN FEDERAL PROGRAMS 1 (1976).

26. The ten agencies were: 1. Army Criminal Investigations Division; 2. Navy Investigation Service; 3. Air Force Office of Special Investigations; 4. Department of Agriculture Office of Investigation; 5. Department of Interior Division of Investigation; 6. Social Security Administration; 7. Veterans Administration Investigative and Security Services; 8. Internal Revenue Service; 9. Executive Office for United States Attorneys; 10. Federal Bureau of Investigation. Taber, *supra* note 24, at 280-81.

27. *Id.* at 281. The GAO rejected five of these cases as not meeting their criteria for "computer-related" crime, leaving only sixty-nine cases for actual analysis. *Id.* Furthermore, most of these incidents simply involved falsified, manually-prepared input forms by employees untrained in computer technology. *Id.* at 282. Little or no computer experience or expertise was needed or used.

28. *Id.* at 282.

29. *Id.* The cases were found instead filed under traditional headings. *Id.* This is not surprising since case law reporters do not categorize computer crimes separately either.

30. *Id.* at 280. "[T]he GAO nowhere implies that the file search was cursory." *Id.* at 282.

31. This is an ongoing research project, not a one-time study. Reports are issued periodically. For an overview of the project, see generally Parker, *Computer Abuse Research Update*, 2 COMPUTER L. J. 329 (1980).

32. *Id.* at 330.

33. "This study is unquestionably the major source of the computer crime cases that have appeared in the literature." Taber, *supra* note 24, at 287.

34. Parker, *supra* note 31, at 329. Donn B. Parker is the Senior Management Systems Consultant, at SRI International, Menlo Park, California, 94025. *Id.*

35. The study is "*not* a rigorous, sociological, statistically based crime study." *Id.* at 330.

of this study[36] one commentator noted at the time that 208 of the 375 cases had their source in newspaper articles[37] and that SRI had been less than diligent in following up to verify their accuracy.[38]

Despite such criticisms the SRI study has been a primary source of case facts and statistics used to buttress comments classifying computer crime as a major problem.[39] However, in truth, although many estimates of the extent of the computer crime problem have been published and quoted, valid statistics simply do not exist.[40]

The absence of substantial case history statistics is partially compensated in computer literature by discussions of theoretical computer crimes. Sophisticated, highly technical programming techniques for computer abuse are hypothesized such as:

> *Trojan horse* - the instructions to commit a fraud are secretly embedded within a seemingly innocent computer program.
> *Salami* - the slicing off of a little money from each of many accounts.
> *Time bomb* - programmed instructions to, when certain conditions occur, damage or destroy the computer system.[41]

Although such concepts are intriguing, care is needed to keep the theoretical distinct from the actual.

One of the best and most important examples of a sophisticated computer crime is the round-off fraud, which employs the "salami" technique mentioned above. Briefly, this scheme involves a computer programmer skimming a portion of the interest paid on savings bank accounts. At some decimal point every bank must round-off the interest payable to an account, leaving a tiny sum of interest unaccounted. The perfidious programmer simply instructs the computer to pay this tiny sum (from perhaps thousands of accounts) into his own account. He realizes a fortune in ill-gotten gain, yet no one misses the loss. This scheme is plausible and familiar to most programmers.[42] Knowledge of it has spread throughout the business world, the law enforcement community, state legislatures, and even Congress.[43] It is cited as evidence of the wide-

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The "[i]nformation varies considerably in accuracy, precision, and thoroughness." *Id.* at 332. "Information in the news media represents a significant source of computer abuse cases." *Id.*

36. *See generally* Taber, *supra* note 24, at 287-310.

37. *Id.* at 300.

38. "[Out of] 375 cases, at that time the total of SRI's cases, only 77 had been verified." *Id.* at 305. "Their verification attempts . . . are spasmodic with little or no follow up." *Id.* "The lack of adequate verification of data is one of the most serious defects of the study." *Id.* at 306.

39. Despite the disclaimers by SRI previously mentioned as to the validity of the data, this study is used in articles as evidence that computer crime is growing at an alarming rate; that known cases of computer crime are only the "tip of the iceberg" of actual incidents of abuse. *See* Parker, *supra* note 31. SRI's statistics and speculations often are uncritically accepted as facts and the frequency of their appearance in computer crime literature has greatly influenced the field. *Id.* at 287-88.

40. S. NYCUM & D. PARKER, *supra* note 12, at 2.

41. D. PARKER, CRIME BY COMPUTER ch. 12 (1976).

42. Taber, *supra* note 24, at 311.

43. *Id.* The Department of Justice mentioned this particular crime in testimony before the Senate in support of a federal computer crime bill. *Id.* at 312.

spread problem of computer abuse by programmers.[44] Unfortunately, one fact too often is overlooked: "It has never happened."[45]

B. Lack of Case Data

Several explanations may account for the lack of case data and valid statistics on the extent of the computer abuse problem: i) computer abuse is seldom detected; ii) computer abuse is seldom reported; iii) computer abuse is rare. Some evidence exists to support each of these postulates.

First, it is possible and often suggested that many computer abuse incidents are never detected.[46] Two advantages to the computer criminal, and disadvantages to detection, are speed — a computer transfers funds in microseconds; and anonymity — there are no eyewitnesses to internal computer activity which later may be erased without a trace.[47] Furthermore, computer systems emit a television-like signal that with a bit of low-cost electronic equipment and know-how can be picked up on a standard TV screen. These signals can be captured and displayed up to two miles away with a low risk of detection. Government spy agencies apparently have been using such techniques for years to keep track of each other.[48]

Second, there is evidence that large industry, presumably a key theater of computer abuse, does not report every incident of computer crime to the police.[49] Practical reasons support an understandable preference for in-house handling of these problems. There is a risk that to obtain needed evidence the investigators will have to go into the computers, thereby interfering with and tying up normal computer operations.[50] This loss of expensive computer time in the investigation might outweigh the costs of the crime.[51] Also, publicity of the crime, particularly if perpetrated by an employee, may suggest a business vulnerability that could weaken customer confidence with a resultant loss of goodwill.[52]

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44. *Id.*

45. *Id.* Nor is it ever likely to happen. The potential payoff is miniscule — $45 per year, and the scheme in fact can be detected easily by standard banking practices. *Id.* at 325-26. Though these "sophisticated" computer crimes are technically possible, practical considerations make many of them improbable. *Id.* at 307.

46. Because it is entirely speculative, the extent of undetected computer crime is difficult to quantify. Usually detection has been a matter of sheer accident, rather than a result of planned security or audit measures. Sokolik, *supra* note 8, at 359. Many commentators feel this leads to a logical inference that in many, even most cases, the crime is never detected.

47. Wargames: The Face Off Against Computer Crime, presented to the National Conference of State Legislatures in Boston, Massachusetts in July, 1984, at 2-3.

48. Wall Street Journal, Oct. 18, 1985, at 31, col. 6.

49. *See, e.g.*, Sokolik, *supra* note 8, at 359.

50. 22 AMER. CRIM. L. REV. 501 (1984).

51. *Id.* Component parts of the computer system may constitute required evidence at trial, possibly necessitating a complete shutdown of business operations.

52. The company fears that publicly exposing the incident would be tantamount to admitting the computer is vulnerable to still further abuses. Sokolik, *supra* note 8, at 359. Business organizations have little hope of keeping an incident quiet once it has been reported. A computer crime case is far more likely to receive publicity than a comparable, noncomputer crime situation. Becker, *supra* note 15, at 449. The public enjoys reading of computer crime and is often sympa-

Third, the lack of hard evidence may mean that despite the image of a major problem, there are in fact few actual incidences of computer crime. Since the first state computer crime law was enacted in 1978,[53] only 56 indictments (32 convictions) have been made nationwide in the 34 states that now have computer crime statutes.[54] Some commentators argue that whatever the problems with computer abuse seem to be, they can be handled adequately under traditional crime laws.[55]

C. *Judicial Response*

Many incidents of computer abuse have been prosecuted successfully under such traditional statutes as larceny, embezzlement, and criminal mischief.[56] Problems have arisen, however, in cases where the crime involves intangible items.[57] Traditional property laws and business records statutes were designed with paper records in mind.[58] Prosecutions for theft of computer information via electronic transmission have failed to gain convictions due to the inability of some courts to find that the owner had been deprived of a tangible item.[59] In some cases courts have included intangible property within common law and statutory definitions by implication; in other cases they have not.[60]

A second problem is the difficulty faced by prosecutors in selecting the appropriate criminal statute for prosecution. As many as forty federal statutes such as mail fraud, banking laws, the Trade Secrets Act, the Privacy Act, and the Federal Credit Reporting Act can be considered for federal prosecution,[61] as well as a wide range of state laws.[62]

Proper charging of the crime is essential to successful prosecution[63] and the first step in charging is the determination of precisely what was done.[64] Unfortunately, detectives often have little idea how to investigate computer

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thetic to the criminal for having out-witted the impersonal industrial giant and its computers. *Id.* Rather than risk the mileage newspapers will get out of the story at their expense, companies elect to handle these incidents quietly within house.

53. *See supra* note 19.

54. S. NYCUM & D. PARKER, *supra* note 12, at 3.

55. *See generally Freed*, *supra* note 13. "[E]xisting laws are usually entirely adequate to accomodate the transactions, activities, and situations that involve computer technology. . . ." *Id.* at 2; *see* Ingraham, *On Charging Computer Crime*, 2 COMPUTER L. J. 429 (1980). "The advent of the computer did not create a new crime, anymore than the automobile created a new form of larceny." *Id.* at 429. "Most computer crimes are, at their core, the same crimes that have been prosecuted since the apple was plucked and Cain was banished." *Id.* at 438.

56. Prosecutors have used either crimes involving habitation and occupancy such as arson (burning with malice) and burglary, or the various property-theft offenses such as larceny, embezzlement, false pretenses, extortion, malicious mischief, forgery, and receipt of stolen property. Sokolik, *supra* note 8, at 375-76.

57. *See supra* note 16.

58. S. NYCUM & D. PARKER, *supra* note 12, at 4.

59. Note, *supra* note 9, at 91.

60. *Id.* at nn.106-07.

61. Volgyes, *supra* note 12, at 396-97.

62. *See supra* note 56 and accompanying text.

63. Ingraham, *supra* note 55, at 437.

64. *Id.* at 438.

crimes and are untrained in how computers function.[65] A detective might require special training to understand a particular computer crime, yet local law enforcement agencies frequently are reluctant or unable to pay for this training.[66] Hence, the charging process can be hampered significantly at the outset of the investigation.

The lack of necessary computer knowledge extends generally to prosecutors and judges throughout the legal community.[67] The immaturity of the computer abuse field, combined with this computer illiteracy among legal professionals, makes it difficult to charge properly and prosecute a computer crime under any law, traditional or new.

D. In-house Response

Industry and government, the largest users of computer systems, have the most to lose to computer criminals. Computers and computer information, like all valuable assets, require a system of protection.[68] Yet computer users generally have failed to institute proper security measures.[69] Efforts by industry to protect itself have been sluggish and inconsistent from company to company.[70]

Lack of awareness by management of the considerable potential for loss contributes to this laxity.[71] However, even when aware of the risks, management often is unwilling to invest the resources necessary to safeguard properly their computer systems.[72] As a result, computer manufacturers have little incentive to spend money on research and development of built-in security systems.[73] Manufacturers will supply only the computer features for which users are willing to pay and security technology currently is lagging well behind data processing technology.[74]

II. ENACTED LEGISLATION

Without valid statistical data or sound definitions of the problems, lawmakers have had difficulty establishing rational legislative priorities in

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65. Ribicoff, *Introduction*, 2 COMPUTER L. J. xvii (1980).

66. Note, *A Suggested Legislative Approach to the Problems of Computer Crime*, 38 WASH. & LEE L. REV. 1173, 1177 (1981).

67. *See infra* notes 196-206 and accompanying text.

68. Legislation alone cannot adequately deter property crimes. The harshest auto-theft statute offers little assistance to the motorist who insists on leaving his keys in the ignition. "Organizations have learned on their own to use safes and vaults to protect money and valuable property; law did not make it happen." W. Ware, Keynote Speech: Information Technology, Crime and the Law, The Rand Corporation — Presented at National Issues Seminar on Computer Crime and Privacy, The Brookings Institution 4 (November 10, 1982) (available in the New England Law Review Office).

69. Note, *supra* note 66, at 1182-83.

70. Ware, *supra* note 68, at 12-15.

71. Note, *supra* note, 66 at 1183.

72. *Id.*

73. *Id.* at 1185-86.

74. *Id.* at 1185. Ideally, computers should to a great extent police themselves. *Id.* Security would require no human maintenance with the computer monitoring its surrounding physical environment and controlling all human access. *Id.* at 1185 n.99.

dealing with computer abuse.[75] The inability to conceptualize computer crimes, to determine which actions are criminal and thus to set appropriate penalties, has led to "a terrible patchwork"[76] of state statutes of limited use and effectiveness.

This legislation is of two general types. First, existing statutes are modified to include computer technology within their ambit.[77] For instance, a business records statute is amended to include records "kept by means of electronic data processing,"[78] that is, computer records. Or property subject to larceny is redefined to include "electronically processed or stored data, either tangible or intangible."[79] Such changes are made to close obvious loopholes in existing laws which have been created by the new technology.

Second, wholly new statutes are created which either focus on a single offense such as bank card fraud,[80] or seek to secure an all-encompassing act aimed at covering every incident of computer abuse.[81] The remainder of this section discusses this type of legislation. Much of this legislation has been criticized with no such bill gaining acceptance as a model act.[82] This criticism focuses mainly on the technical definitions of the offenses that appear in the statutes.[83]

Offenses must be defined as precisely as possible when formulating proscriptive criminal statutes.[84] This difficult task in all statutory drafting has proven virtually insurmountable in the field of computer crime. Proscriptive statutes typically are defined according to the result or intended result of the act; that is, the *harm* done or intended by the offensive behavior — for example, theft over $100, property damage, and privacy violations. In formulating computer crime statutes, however, lawmakers have focused instead on the act itself; that is, the *methods* used to commit the offense[85] — for example, unauthorized access to a computer, or access to a computer for fraudulent purposes. Because the statutes focus on the technology used (the computer), they necessarily include a section on definitions in which such terms as computer, computer access, computer program, and computer services are defined. Herein lies much of the difficulty.[86]

The computer industry itself has yet to pose a working definition of a

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75. S. NYCUM & D. PARKER, *supra* note 12, at 3.

76. Comment, *The Challenge of Computer-Crime Legislation: How Should New York Respond?*, 33 BUFFALO L. REV. 777, 804 (Fall 1984).

77. Sokolik, *supra* note 8, at 377.

78. *Id.* (Modification of a Florida Statute).

79. *See infra* note 129 (modification of a Massachusetts statute).

80. S. NYCUM & D. PARKER, *supra* note 12, at 6.

81. Sokolik, *supra* note 8, at 373.

82. *See supra* note 20.

83. S. NYCUM & D. PARKER, *supra* note 12, at 8.

84. The perpetrator must be given adequate notice of what specific behavior constitutes an offense. Each ambiguity in a proscriptive statute is a potential defense for the accused, a potential weakness in the prosecutor's case.

85. S. NYCUM & D. PARKER, *supra* note 12, at 17.

86. See generally S. NYCUM & D. PARKER, *supra* note 12, at 8-13, for a good discussion of the "inconsistencies, inaccuracies, and limitations in the definitions of important terms used in the computer crime statute of different states." *Id.* at 13.

computer.[87] The pace of technological advance is simply too rapid to submit to static delimitation.[88] Lawmakers have fared no better.[89] For example, many computer crime statutes define the computer as "an electronic device which performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses."[90] This definition unintentionally is broad enough to include handheld calculators, hightech wristwatches, new kitchen stoves.[91] Recognizing the problem of overbroad wording of computer definitions, several states expressly and specifically exclude automatic typewriters and portable calculators in their statutory definition of a computer.[92] However, this approach tends to exacerbate rather than resolve the difficulty. The definitions problem expands to include the need to define the excluded item. The meaning of the term "automated typewriter," for instance, is no less ambiguous than the meaning of computer.[93] It might include an electric typewriter, a word processor, perhaps even a computer keyboard.[94] Furthermore, terms accepted as adequate today quickly could become obsolete by technological advances such as voice data entry and output, digitized voice, knowledge-based systems, advances in lasers and optics, and moleculer-based logic.[95]

This statutory defining of offenses by methods used, rather than by harm

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87. Taber, *supra* note 24, at 275. "Satisfactory definitions of computers and of computer crime are probably impossible." *Id.* at 276.

88. Comment, *Legislative Issues in Computer Crime*, 21 HARV. J. ON LEGIS. 239, 242-43 (1984).

89. "There are now as many different and conflicting definitions of computer crime as there are states with computer crime statutes." S. NYCUM & D. PARKER, *supra* note 12, at 14. Furthermore, some of the statutes are ambiguous in their wording of precisely what actions are wrongful. J. Marcellino, Computer Crime, Remarks at the National Conference of State Legislatures in Boston, Massachusetts 19 (July 26, 1984).

90. This language is adapted from S. 240, 96th Cong., 1st Sess. (1979), a comprehensive computer crime bill introduced by Senator Abraham Ribicoff. Although not enacted, this bill has been a model for most of the states' comprehensive computer crime bills. Becker, *supra* note 15, at 447. Notably, the overbreadth of its definitions was a major reason for its defeat. Note, *Addressing Computer Crime Legislation, Progress and Regress*, 4 COMPUTER L. J. 203 (1983). These definitions have been carried over to the state bills and predictably have suffered the same criticisms. *See, e.g.*, Marcellino, *supra* note 89, at 19.

The Congress has been actively proposing and debating comprehensive computer crime bills at the national level, yet to date no such bill has been enacted. Comment, *supra* note 76, at 798. A narrowly tailored bill, focusing on three very specific computer abuses — i.e., unauthorized computer access to national defense or foreign relations secrets; unauthorized computer access to bank records; unauthorized access to a federal government computer — was enacted in 1984. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § § 2101-3, 98 Stat. 1837, 2190 (1984) (codified at 18 U.S.C. § 1030 (1984)). The official title is "Counterfeit Access Device and Computer Fraud and Abuse Act of 1984." For the text and an analysis of this limited scope law, including comment on its unclear definition of key computer terms, see generally, Tompkins & Mar, *An Analysis of the 1984 Federal Computer Crime Provisions*, 18 LAW & TECHNOLOGY 1 (Spring 1985). *See also* Comment, *Computer Crime*, 26 IDEA 163 (Winter 1986). To date, no prosecutions have been made under this statute.

91. S. NYCUM & D. PARKER, *supra* note 12, at 10.

92. *Id.*

93. *Id.* at 11.

94. *Id.*

95. *Id.* at 13.

done, has led to harsh penalty provisions in some states.[96] For example, the commonplace computer abuse of unauthorized use of computer services[97] is a felony under some statutes regardless of the amount of harm done, and even in the absence of criminal intent.[98] Thus, an honest, conscientious employee playing video games or printing out trivial personal correspondence for fun at lunch time is classified a felon. This is so, though no monetary gain or harm was intended or realized and normal computer operations were unaffected. A common activity, normally viewed as a harmless job perquisite,[99] is transformed into criminal behavior.[100]

III. Legislative Proposal in Massachusetts

The 1981 decision in *Commonwealth v. Yourawski*[101] drew attention in Massachusetts to the computer crime issue. In *Yourawski* the defendant, in possession of two duplicated video cassette tapes of the movie *Star Wars*, stood charged of larceny by receipt of stolen property.[102] Because the cassettes themselves had not been stolen, the charge centered on the intellectual property on the tapes — the movie which had been duplicated without owner authorization.[103] The Supreme Judicial Court, in affirming the lower court's dismissal of the charges, agreed that the images and the sounds captured on the tape were not property subject to larceny.[104] Stolen property at common law,[105] and by Massachusetts statute,[106] concerned only physical, articles. Nothing tangible had been taken; therefore, no theft had been committed.

Since this decision, several computer crime bills have been offered to the Massachusetts legislature for enactment. Of the four bills introduced in 1983, three called for wholly new criminal statutes with broad definitions of the offenses and of the computer terms. These definitions focused on the methods used to commit the offense, not on the harm done.[107] Proposed House Bill 2671[108] would have imposed a maximum five year sentence and $19,000 fine

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96. Marcellino, *supra* note 89, at 19.

97. Comment, *supra* note 76, at 794.

98. For example, "[a] person commits computer fraud in the second degree by intentionally and without authorization . . . accessing . . . any computer . . . data . . . ." ARIZ. REV. STAT. ANN. § 13-2316c. Neither damage nor criminal intent are required for a conviction.

99. Comment, *supra* note 76, at 794.

100. Technologists believe that the criminalization of such behavior would be a crime itself. Many computers have unused computer time and space available that otherwise would be completely wasted. More than simply playing around, these programmers or technicians often are building skill and computer confidence during these free use periods. *Id.*

101. 384 Mass. 386, 425 N.E.2d 298 (1981).

102. *Id.* at 387, 425 N.E.2d at 298.

103. Marcellino & Kenfield, *Legislative Developments in High-Tech*, 28 BOSTON BAR J. 19 (1984).

104. *Yourawski*, 384 Mass. at 388, 425 N.E.2d at 299.

105. The material on the tape (intellectual property) was not the type of material subject to larceny at the common law. *Id.* at 388, 425 N.E.2d at 299.

106. *Id.*

107. See *supra* notes 85-86 and accompanying text, for a discussion of the problems inherent in this approach.

108. Mass. H. 2671, 1st Sess. (1983).

on anyone knowingly gaining, or attempting to gain, unauthorized access by any means to any information in a computer.[109] This bill defined the offenses too broadly. The definition of a computer included, but was not limited to, any electronic repository of information.[110] Virtually anything that plugs into an electrical outlet or carries batteries arguably might be a repository of information.[111] Furthermore, wholly innocent behavior would have been criminalized because intended wrongdoing was not required.[112]

Proposed House Bill 708[113] defined three new criminal offenses: i) intentional computer access with intent to defraud;[114] ii) unauthorized access to alter, damage, or destroy computer equipment or data;[115] iii) unauthorized access to maliciously harm an individual's reputation.[116] The definition of terms section defined the computer as an "electronic device which performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses. . . ."[117] Violation under any of the offenses would be punishable by a maximum ten year sentence and $5,000 fine.[118] The definitions of offenses, though narrower than those in House Bill 2671, were still too broad. This definition of a computer, one used in several of the enacted state statutes elsewhere,[119] has been criticized generally as being over inclusive.

Proposed House Bill 1952[120] would have punished those who *prepared* to access, accessed, or caused to be accessed a computer with intent to defraud, by a maximum ten year sentence, or five years and a $5,000 fine.[121] This bill presented the broadest definition of criminal behavior yet, by including preparation to access a computer for fraudulant purposes within the range of felonious activity. A second section of this bill sought two modifications to existing statutes. Property subject to larceny would be extended to include "electronically processed or stored data, either tangible or intangible, data while in transit, computer programs in either machine or human readable form and any original or copy of a document associated with computers."[122] Also, the definition of a trade secret would be amended to cover secrets which are "electronically kept or stored in or for a computer system."[123] These two modifications would close loopholes in existing traditional criminal statutes which defined property to include only tangible items.[124]

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109. *Id.*

110. *Id.*

111. See *supra* notes 87-95 and accompanying text for related discussion.

112. See *supra* notes 96-100 and accompanying text for related discussion.

113. Mass. H. 708, 1st Sess. (1983).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Modeled after federal S. 240 96th Cong., 1st Sess. (1979); *see supra* notes 90-91 and accompanying text.

120. Mass H. 1952, 1st Sess. (1983).

121. *Id.*

122. *Id.*

123. *Id.*

124. Loopholes made painfully obvious by the *Yourawski* holding; *see supra* notes 101-06 and accompanying text.

House Bill 709[125] proposed no new criminal statutes. The definition of a trade secret would be modified to include "anything tangible or intangible which consitutes [a trade secret]."[126] As with other proposals to modify existing statutes, House Bill 709 was aimed at closing a loophole opened by the new computer technology.

These four 1983 bills together were referred to the Committee on Criminal Justice for consideration and action. After research and deliberation the committee recommended, in House Bill 6129,[127] enactment only of the two property definition modifications to existing statutes as proposed in House Bill 1952,[128] but with some changes in the wording. Property subject to larceny would include "electronically processed or stored data either tangible or intangible" and "data while in transit."[129] Trade secrets subject to larceny would include those which are "electronically kept or stored."[130] All specific references to computers were dropped. In so doing, the Criminal Justice Committee wisely avoided the need to draft definitional wording of computer terms.[131] The committee did not recommend enactment of any of the proposed new criminal statutes on computer offenses.[132] The Massachusetts legislature adopted the Criminal Justice Committee's recommendations by enacting House Bill 6129 into law.[133]

In 1984, three new computer crime bills were offered to the legislature. Proposed House Bill 4844[134] would have made it a crime to: i) access a computer to commit fraud;[135] ii) maliciously access a computer to obtain unauthorized credit information of another;[136] iii) maliciously access, alter, delete, damage, or destroy a computer system.[137] Pocket calculators were excluded expressly from the definition of computer system.[138] In addition to the typical problems of overbroad definitions and the risk of harsh results, some looseness of language was present. For example, "anyone who maliciously deletes . . . a computer network . . . ."[139] commits a crime. This highlights the difficulties of drafting statutory offenses with a focus on the methods used, rather than on the harm done or intended.[140]

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125. Mass. H. 709, 1st Sess. (1983).

126. *Id.*

127. Mass. H. 6129, 1st Sess. (1983).

128. *See supra* notes 122-23 and accompanying text.

129. Mass. H. 6129, 1st Sess. (1983).

130. *Id.*

131. Thus, the problems outlined in *supra* notes 90-95 of statutorily defining the computer and computer-related terms was avoided.

132. Mass. H. 6129, 1st Sess. (1983).

133. 1983 MASS. ACTS 147 § 2. See MASS. GEN. LAWS ANN. ch. 266 § 30(2) (West 1970) for the expanded definition of general property subject to larceny. See MASS. GEN. LAWS ANN. ch. 266 § 30(4) for the expanded definition of a trade secret subject to larceny.

134. Mass. H. 4844, 2d Sess. (1984).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See supra* notes 85-95 and accompanying text.

Proposed House Bill 5671,[141] filed by the governor of Massachussetts,[142] was another "comprehensive"[143] plan to combat computer crime. First degree computer crime was defined as: i) access to commit fraud or obtain money;[144] or ii) unauthorized access causing damage to the computer equipment or information.[145] Second degree computer crime was defined as: i) intentional unauthorized access;[146] or ii) intentional unauthorized access to obtain computer equipment or information;[147] or iii) intentional unauthorized access to obtain property or services (computer or otherwise).[148] This categorizing of offenses by degree appropriately recognized and attempted to remedy the risk of harsh results present in earlier bills.[149] In addition, a unique provision of this bill allowed civil enforcement of computer abuse with court-ordered restitution of losses to the plaintiff.[150] Civil liabilities seem particularly appropriate in the event of unauthorized use of computer services.[151] Compensation makes the injured party whole and deters the abuser from committing the wrongful behavior again.[152] Despite these particular improvements, however, House Bill 5671 contained many of the same problems of overbroad wording seen in other bills.[153]

Proposed Senate Bill 240[154] was an ambitious, comprehensive, 460 line bill with a focus on bank service cards,[155] in addition to computer crimes generally.[156] Great effort was taken to define each offense as specifically as possible.[157] A clause was included to hold the owner responsible for protecting the

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141. Mass. H. 5671, 2d Sess. (1984).

142. *Id.* at 1. Page one of H.R. 5671 is a letter by Governor Michael S. Dukakis in which he detailed his reasons for filing the bill.

143. *Id.*

144. Mass. H. 5671, 2d Sess. (1984).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *See supra* notes 96-100 and accompanying text.

150. Mass. H. 5671, 2d Sess. (1984).

151. Comment, *supra* note 76, at 794-95.

152. *Id.*

153. For example, the bill's definition of computer, as well as the definitions of the various computer crimes, uses language very similar to the words used and criticized in other bills. *See supra* notes 87-95.

154. Mass. S. 240, 2d Sess. (1984).

155. The new offense included financial transaction card forgery, criminal possession of financial transaction card forgery devices, financial transaction card fraud, financial transaction card theft. *Id.*

156. *Id.*

157. The following, for example, defined bank card theft:

> A person is guilty of financial transaction card theft when:
>
> (1) He takes, obtains, or witholds a financial transaction card from the person, possession, custody, or control of another without the cardholder's consent and with the intent to use it; or who, with knowledge that it has been so taken, obtained, or witheld, receives the financial transaction card with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder; or
>
> (2) He receives a financial transaction card that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder,

computer "by instituting acceptable physical security and computer system/network security controls."[158] The database owner was made responsible for safeguarding the database, as was the individual user during periods of use.[159] Thus, for the first time, a proposed Massachusetts bill recognized the role computer users hold in properly protecting their computer equipment and information.[160] However, notwithstanding the obvious pains taken to specifically define each offense, this bill could not overcome the overbreadth in wording common to every other comprehensive computer crime bill.[161] None of these three 1984 bills were enacted.

House Bill 4844 and Senate Bill 240 were reintroduced in 1985 as House Bill 4585[162] and Senate Bill 1471,[163] respectively. A third bill, House Bill 5420,[164] was offered as another comprehensive computer crime bill defining four new statutory offenses: i) using a computer to defraud;[165] ii) willfully accessing a computer without authorization and damaging the system or misusing the information;[166] iii) willfully exceeding authorized limits and damaging the system or misusing the information;[167] iv) willfully accessing a computer without authorization.[168] House Bill 5420 seems notably harsh in its criminalization of simple unauthorized access with no requirement of criminal intent or of harm, and of damage caused when exceeding authorized access limits with no criminal intent.[169] Otherwise, this bill is similar to many other comprehensive bills.[170] These three bills, referred together to the Criminal Justice Committee, as House Bill 6039,[171] were not enacted.[172] Thus, with the excep-

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and who retains possession with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder; or

(3) He, not being the issuer, sells a financial transaction card or buys a financial transaction card from a person other than the issuer; or

(4) He, not being the issuer, during any 12-month period, receives financial transaction cards issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of [other sections of the bill].

Id.

158. *Id.*

159. *Id.*

160. See *supra* notes 68-74 discussing the current failure by computer users to properly safeguard their equipment and information.

161. The definitions of computer, computer network, computer system, etc. closely resemble those of other heavily criticized bills. *See supra* notes 84-95 and accompanying text.

162. Mass. H. 4585, 1st Sess. (1985).

163. Mass. S. 1471, 1st Sess. (1985).

164. Mass. H. 5420, 1st Sess. (1985).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. See *supra* notes 96-100 and accompanying text discussing the problem of harsh penalties in computer crime bills.

170. The wording of the offenses and computer-related terms suffer the seemingly unavoidable problems of overbreadth.

171. Mass. H. 6039, 2d Sess. (1985).

172. In the 1986 session, House Bill 4585 was refiled as House Bill 2567 and House Bill 5420 was refiled as House Bill 3497. Neither bill was enacted.

tion of two revisions to the larceny statutes,[173] no computer crime legislation to date has been adopted by the Massachusetts legislature.

IV. ANALYSIS

Many states have responded to the computer crime issue by enacting all-encompassing criminal legislation embracing wholly new statutory offenses.[174] These statutes generally have been heavily criticized,[175] rarely used,[176] and have not provided the hoped for panacea to the wide-ranging problems of computer abuse. The Massachusetts legislature, when asked to pass such statutes, has wisely denied enactment since experience in other states shows that they are likely to be of little use. Model legislation is no closer today than it was ten years ago[177] and a wider focus for addressing computer crime is required. New legislation, however concise and comprehensive, is but one tool of the many tools necessary and available to counteract the potential for widespread computer abuse in our society.

A. Computer Security Safeguards

To the extent that management abrogates its role in establishing and monitoring security controls, industry exposes their computer equipment and information to a greater temptation of abuse than is necessary, or warranted.[178] A great deal of computer abuse involves unauthorized computer access or misuse by employees.[179] In many of these cases inadequate computer security safeguards provided the vulnerability window through which the perpetrator acted.[180] Technically adequate safeguards could be made available to those who choose to install them, but each organization must decide how much security it is willing to pay.[181] Protective techniques in software are improving and audit firms are developing sophisticated computer audit programs to aid detection.[182] However, overall response by industry in implementing these safeguards has been slow and inconsistent.[183] Even so, as the computer abuse issue has gained attention, so has the subject of computer security safeguards.[184] As managers begin to realize the risk of exposing themselves to negligence suits by their stockholders,[185] industry undoubtedly will take greater

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173. *See supra* note 133.

174. *See supra* note 3.

175. *See supra* notes 83-100 and accompanying text.

176. *See supra* note 54.

177. *See supra* note 20 and accompanying text.

178. *See supra* notes 68-74 and accompanying text.

179. Gilbert, Computer Fraud, Targets-Legal Aspects-Prevention, Consideration for Reviewing Security, for "Coopers & Lybrand," (manuscript available at New England Law Review).

180. Ware, *supra* note 68, at 14.

181. *See supra* notes 68-74 and accompanying text.

182. Gilbert, *supra* note 179, at 14.

183. *See supra* note 70 and accompanying text.

184. Increased awareness of the computer abuse problem has "dramatically increased" the activities of internal auditors toward computer systems and the interest of audit committees of boards of directors. Note, *supra* note 66, at 1183 n.86.

185. Gilbert, *supra* note 181, at 19.

advantage of state-of-the-art safeguards. As computers increasingly are designed and used to police themselves[186] many of the current problems and incidents of computer abuse will simply disappear.[187]

B. Modify Current Law

Efforts to combat computer abuse by legislating wholly new criminal statutes have not produced the desired result. They have been heavily criticized and rarely used. Such statutes should be enacted only if a careful analysis reveals some new crime that can only be committed with a computer.[188] This analysis must focus on the nature of the crime, the harm inflicted, and not on the particular method used.[189] If at its core the incident involves but a difference in magnitude,[190] or is merely a carefully wrought version of an existing crime,[191] a new law would seem unwarranted.[192]

Traditional criminal statutes must be scrutinized to ensure they have kept pace with technological advances. Our laws have had to deal with new technologies in the past, such as the handgun, the telegraph, the automobile.[193] How can computers be similarly handled; how must they be handled differently? These questions are left unanswered. For example, there are no statutes pertaining to fraud by use of an automobile.[194] Such an incident would be prosecuted with a legal focus on the crime, — the fraud, not on the method of committing the crime — the automobile. On the other hand, traditional theft laws might not recognize computer records as physical objects of value. In such an event the theft statutes could be newly interpreted, or as already done by the Massachusetts legislature,[195] redefined to include computer capabilities.

C. Computer Literacy in the Legal Community

The entire legal community must upgrade its training and knowledge in computer law.[196] Certainly, those individuals involved in drafting and enacting statutes must strive for computer literacy, to lessen the prospect of cluttering our statute books with superfluous or confusing laws.[197] Additionally, law enforcement officers, lawyers, and judges must seek computer literacy from a legal perspective, if we are to integrate computer technology into our legal

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186. *See supra* note 74 and accompanying text.

187. Ware, *supra* note 68, at 13.

188. "It appears to be rare to learn that an existing rule of law is not available for an ostensibly new situation when the correct analytical approach is taken." Freed, *supra* note 13, at 13.

189. To date the focus of computer crime legislation has been on the methods. The result has been highly criticized laws which quickly may become obsolete. *See* S. NYCUM & D. PARKER, *supra* note 12, at 17; *see also supra* notes 84-95 and accompanying text.

190. Ware, *supra* note 68, at 5-6.

191. *Id.* at 7.

192. *Id.*

193. Freed, *supra* note 13, at 2-3.

194. Ware, *supra* note 68, at 3-4.

195. *See supra* note 133.

196. Freed, *supra* note 13, at 1-2.

197. *Id.* at 2.

proceedings.[198]

Investigators often are untrained in how computers function and have no idea how to investigate computer crimes, or how to collect computer-related evidence.[199] Although investigators do not need to be computer experts, they must understand the computer well enough to cooperate effectively with computer experts.[200] Some businesses and government agencies have formed fraud teams as a method of handling computer abuses. To ensure adequate computer expertise such teams may include data processors, accountants, and auditors, as well as criminal investigators.[201]

Prosecutors and judges also must achieve a level of computer literacy if computer related crimes are to be successfully prosecuted.[202] This education can be a rewarding professional activity[203] and is not very difficult to achieve.[204] From a legal perspective, computer technology is very simple despite the jargon and seeming complexity surrounding it.[205] Computer technology is largely an extension of the pervasive information processing activities of businesses and individuals.[206] Some computer knowledge has become necessary for people to function in a variety of businesses and professions. This is no less true of individuals in today's legal community.

CONCLUSION

Quick enactment of a comprehensive computer crime bill in Massachusetts would not be the best response to the perceived problems of computer abuse. The experience of other states shows that these broadscope bills suffer heavy criticism and are used infrequently. The general apprehension that a crisis exists is not well documented. Verified incidences of computer crime are notably few, though it is possible, much abuse exists under the surface — undetected, unreported. Even if this is true, however, it is unlikely detection and reporting problems will be solved by legislating new criminal offenses.

The caution exercised to date by the Massachusetts legislature in deciding not to pass an all-encompassing computer crime bill is reasonable. This time spent in researching and considering the proposed bills fosters sorely needed expertise. In the meantime, there is much to be done. Industry and government must attend to and upgrade their computer security safeguards. Current crime statutes must be analyzed for their ability to handle computer crime and modified as necessary to include computer technology. The legal community must strive for computer literacy from a legal perspective. Although the com-

198. *Id.*

199. *See supra* note 65 and accompanying text.

200. Volgyes, *supra* note 12, at 395.

201. *Id.*

202. New legislation is an inappropriate substitute for the failure of our legal and judicial community to understand and appreciate computer technology. Ware, *supra* note 68, at 7. This "temporal" problem would best be addressed by training courses, seminars, and similar means. *Id.* at 8.

203. Freed, *supra* note 13, at 3.

204. *Id.*

205. *Id.* at 3-4.

206. *Id.* at 4.

puter industry has attained adolescence, the control of computer abuse remains in its infancy. Mere legislation will not soon close this gap.

Edward F. Patch

Necessity: The Right to Present a Recognized Defense

> Even some laws of God, although stated in general terms, carry a tacit exception in case of extreme necessity.[1]

I. The Present Situation

The necessity defense has been asserted in a variety of modern cases, including the trials of prison escapees, "deprogrammers," and the unlicensed possessors of firearms. This article, however, considers primarily a group of about a hundred reported decisions[2] made during the past twenty years, and based upon similar facts. These facts, with small variations, describe a peaceful act of opposition or petty incursion that has been planned and performed, sometimes individually, often by a group, as the means to protest the conduct of an assertedly wrongful activity being carried on by government or large scale industry, often as the agent or servant of government.[3]

Defendants in these matters, typically, are those who sit in front of the

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1. I. H. Grotius, De Jure Belli Ac Pacis Libri Tres, 148 (F. Kelsey trans. 1925).

2. Many of these opinions are cited and described in Annotation, *Trespass: Demonstration — Business Lands*, 41 A.L.R. 4th 773 (1985). Several of the more significant nuclear plant cases may be found cited in Kessler, *Antinuclear Demonstrations And The Necessity Defense*: State v. Warshow, 5 Vt. L. Rev. 103 (1980).

3. In some cases acts of minor destruction have been performed; for example, blood has been poured on files or other papers. In some anti-weapons protests by particularly radical defendants, missile nose cones have been hit with hammers. These cases nevertheless can be considered within this group, even if they are not at the center of it, because they are more accurately described as "protests" — even protests causing some physical damage — and not sabotage, espionage, or military subversion. There are a few defendants who have been convicted of sabotage. *See* United States v. Kabat, 797 F.2d. 580 (8th Cir. 1986). However, as Senior Circuit Judge Bright pointed out in a dissenting opinion, defendants who chipped away at the N11 missle silo lid with a star drill and three point hammer for less than fifteen minutes, "did not, and could not, damage [or threaten] the missile launch capabilit[ies]" of the respective missiles. *Id.* at 594 (Bright, J., dissenting). Obviously, no precise line can be drawn between acts of military hostility against the nation and acts of symbolic protest, but from the totality of the circumstances present, and our own ability to discern the true nature of deeds, we should be able to distinguish between those who petition to redress grievances and those who are hostile and would harm our common interests.

gates of nuclear power plants and sing songs. Arrested and prosecuted, the defendants do not deny the facts of the particular violation, nor the specific legality of their arrest.[4] At trial, defendants seek to describe their acts as a legally justified response both to threats of harm and to actual harm.

The recent nuclear plant disaster at Chernobyl may somewhat compel a re-examination of the legal rights afforded those who act in dissent of dangerous governmental conduct or the use of dangerous instrumentalities. However, even prior to trying to learn the lessons to be taught by that particular catastrophe, one may observe that our legal system has made confused and illogical responses to those who protest against or resist enterprises they find greatly more threatening than beneficial. In the faith that the present confused condition can be remedied, it seems propitious to make an effort to discover and consider the law of the necessity defense.

To be sure, this Article is partly informed by political views, as are all discussions of any substance. In addition, one must concede that the distinction between law and politics is not precise. Some of what will here be said may be colorably "political." However, the main focus of this Article is upon the law of necessity. If "politics" is to be considered, in the courtroom, there must be a set of rules, which govern its admission. These rules should be based upon understood principles of law. This Article does not attempt to determine the outcomes of cases, rather to set forth certain specific and deeply felt ideas about the principles of our law and the manner in which cases should be tried. These ideas are not novel. Historically, they are embodied in the common law, and a more recent statement of several of the salient principles regarding the determination of necessity is contained in the Model Penal Code of the American Law Institute and in the commentary accompanying it.

Two courtroom methods are commonly used to prevent defendants from making the claim that their actions were necessary, and therefore justified. The two are functionally comparable. First, defendants may be told they may not assert any justification defense, typically by means of the bald announcement by a court that any such defense is "unavailable." Second, they may be prevented from introducing any evidence relating to justification because the prosecution has obtained information that a justification defense may be offered by defendants and has responded with a motion "in limine," which the court has granted, to exclude the evidence. The use of these two methods conflicts with the values inherent in our legal traditions and impedes present realization of the rule of law.

II. The History of the Law of Necessity

The notion that acts may be justified by reason of necessity did not come newly born from the minds of nuclear plant protesters. The idea has long held

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4. Some of the defense claims made in United States v. Seward, 687 F.2d 1270 (10th Cir. 1982), and in United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978), do question prosecutorial jurisdiction, but such claims do not, in any event, appear to survive in reports of appellate decisions in most other cases. No reported case presently known to the author squarely addresses a defense claim that law enforcement officials committed a specifically illegal act by effecting the arrest of the particular defendants.

a place in the structure of our law and persistently recurs in legal history.[5]

An articulation of necessity as part of the law which may create an exception to other parts of the law can be found in our own legal tradition as far back as the mid-thirteenth century when Bracton explained, "necessity makes that allowable which otherwise is not allowable."[6] A later rendition of the same idea appears in a 1551 case, *Reniger v. Fogossa*[7] in which the court declared:

> [I]n every law there are some things which when they happen a man may break the words of the law and yet not break the law itself; and such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter of it, for breaking the words of the law is not breaking the law, so as the intent of the law is not broken . . . and when laws or statutes are made, yet there are certain things which are exempted and excepted out of the provisions of the same by the law of reason, although they are not expressly excepted.[8]

Similarly, in an early sixteenth century action for waste for the cutting of trees, the opinion of the court observed:

> Yet we will well agree that in some cases a man may justify the commission of a tort, and that is in cases where it sounds for the public good; as in time of war a man may justify making fortifications on another's land without license; also a man may justify pulling down a house on fire for the safety of the neighboring houses; for these are cases of the common weal.[9]

Still wider statements regarding the fundamental influence and impor-

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5. *See, e.g.*, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 416 (1960) (describing the principle of justification from necessity as "anciently woven into the fabric of our culture"); Hall, *Comment on Justification and Excuse*, 24 AM. J. COMP. L. 638, 639 (1976). " 'Justification' and 'excuse' are very old concepts. Indeed these words have long been parts of everyday speech; Anglo-American law has used them for centuries with some sophistication since Bacon's 1630 treatise on the common law . . . ." *Id.*

6. BRACTON DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE f. 93b, f. 247b (G. Woodbine ed. 1942).

7. 1 Plowden 1, 75 Eng. Rep. 1 (1550). This case involved a Portuguese master of a ship who had jettisoned some of his cargo of woad in a storm, and therefore paid customs duty on an estimated amount with the agreement he would make up whatever difference he owed when the precise amount of the remaining cargo was known. *Id.* at 1, 75 Eng. Rep. at 1. Although this arrangement contravened the letter of the customs law, it was upheld by the court. *Id.*

8. *Id.* at 18, 75 Eng. Rep. at 29, *quoted in* Glazebrook, *The Necessity Plea in English Criminal Law*, 30 CAMBRIDGE L. J. 87, 94 (1972).

9. Maleverer v. Spinke, 1 Dyer 35b, 36b, 73 Eng. Rep. 79, 81 (1538); *see also* Manby and Richards v. Scott, 1 Lev. 4, 83 Eng. Rep. 268 (1672) ("All laws admit certain cases of just excuse, when they are offended in letter, and where the offender is under necessity, either of compulsion or inconvenience."). Obviously a claim "for waste" is a civil, not a criminal matter, and it should not be blithely suggested that the correct treatment of modern criminal cases can be determined by means of a review of a history of tort actions. Nonetheless, even if certain purposes of the criminal law (confinement and physical retribution) are not the subject of civil cases, both tort and civil law require a comparable determination of the responsibility of the actor.

tance of necessity in the law can be found, and in more recent sources. Sir William Scott, in an 1801 case, makes the sweeping statement that "necessity creates the law; it supercedes rules; and whatever is reasonable and just is likewise legal."[10] Glanville Williams, in 1953, explained: "In a manner of speaking the whole law is based upon social necessity; it is a body of rules devised by the judges and the legislature to provide for what are felt to be reasonable needs."[11]

The defense of necessity, in its long history, has been proffered in answer for a remarkably wide range of acts. Sir Francis Bacon, recites the situation presented by the fourth century B.C. Greek moralist Hecato concerning two shipwreck victims on the sea with between them one plank which will support only one of them, and refers to reported cases which present the issue of necessity. In his treatise, *The Elements of the Common Laws of England*,[12] Bacon proclaims his view that "of conservation of life, if a man steale viands to satsifie his present hungers is no felony nor larceny," and adds "if divers felons bee in a Jaile, and the Jaile by casualty is set on fire, whereby the prisoners get forth, this is no escape, nor breaking of prison."[13] Similar declarations concerning stealing were made by Noy in 1641 and by Hawke in 1657.[14]

The history of the defense of necessity since Bacon is usually begun with *Mouse's Case*.[15] That case involved a ferry trip from Gravesend to London, in which:

> a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger to be drowned, if a hogshead of wine and other ponderous things were not cast out . . . .
>
> It was also resolved, that although the ferryman surcharge the barge, yet for the safety of the lives of passengers in such a time and accident of necessity, it is lawful for any passenger to cast the things out of the barge . . . but if no surcharge was, but the danger accrued only by act of God, as by tempest, no default being in the ferryman, everyone ought to bear his loss for the safeguard and

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10. *The Gratitudine*, 3 C. Rob. 266, 165 Eng. Rep. 246 (1801).

11. Williams, *The Defense of Necessity*, 6 CURRENT LEGAL PROBS. 216, 217 (1953).

12. F. BACON, THE ELEMENTS OF THE COMMON LAWS OF ENGLAND 25-32 (1636).

13. This rule may be taken from 15 Henry VII 2a (1500) (cited with approval in Reniger v. Fogossa, 1 Plowden at 13, 75 Eng. Rep. at 21 ("for he is not to be hanged because he would not stay to be burnt")).

14. *See* HAWKE, GROUNDS OF THE LAWS OF ENGLAND 430 (1657); W. NOY, MAXIMS OF THE LAWS OF ENGLAND 25 (1641). The rule carefully limited by Hawkins, writing in 1716, to hunger not caused by poverty and unthriftiness. Some later writers, Hale and Blackstone among them, have dismissed hunger entirely as a cause of necessity. Hale stated that: "Men's properties would be under a strange insecurity, being laid open to other men's necessities." 1 HALE, PLACITORUM CORONAE 54 (1847). However, no authority to the author's knowledge, has denied the existence of the defense.

15. 12 Co. Rep. 63, 77 Eng. Rep. 1341 (1608). This well known case is cited in the great majority of the texts on necessity. We do not know whether "Mouse" was his first name or his last, only that he brought an action of trespass against a ferryman *de injuria sua propria absque tali causa*, for the loss of a casket and money, perhaps contained within the casket, and placed in the boat to be carried from Gravesend to London. *Id.* at 1342.

life of a man.[16]

Since *Mouse's Case* there has appeared a variety of cases of justification by necessity. Courts have regularly found that tearing down buildings to prevent the spread of fire is justified.[17] With equal consistency, courts have found that petty trespasses upon the immediately adjoining land because a road has been washed out and become impassible are lawful,[18] as is rescuing a boat from a private beach upon which it has been stranded.[19] In addition, certain regulations involving embargo and quarrantine have been found to yield to specific and immediate emergencies.[20] It has been held that one may lawfully kill a mink in defense of one's geese, a statute providing a penalty for mink killing not withstanding.[21] It has been held that a child "in feeble health" can be withdrawn from school in "apparently reasonably necessary defense of her life," contrary to a statute requiring attendance.[22]

While some authorities, Prosser among them,[23] have commented upon the likeness between self-defense and necessity, several have also distinguished the two. Wharton explains that unlike self-defense, "necessity justifies the invasion of a right."[24] This theory is supported by the case law of his time and since. Two examples clearly demonstrate that a legal privilege, a right to intrude upon the rights of others, may obtain upon a demonstrated necessity, even though the other person has done nothing that would suspend any right in him. First in *Ploof v. Putnam*,[25] plaintiff was sailing on Lake Champlain when a storm arose. In order to save his boat he tied it to defendant's private dock on defendant's private island. The defendant, through his servant, untied it, causing it to be driven by the storm upon the shore, destroying it, and injuring

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16. *Id.* at 63, 77 Eng. Rep. at 1241-42. We note that whether the barge was surcharged or not things may be cast out by *any* passenger, and that the question of overloading only goes to assignment of liability in damages.

17. *See, e.g.*, Surrocco v. Geary, 3 Cal. 70 (1853) (decided under the law of Mexico); Owen v. Cook, 9 N.D. 134, 81 N.W. 285 (1899); Hale v. Lawrence, Howe v. Lawrence 21 N.J.L. 714 (1848), *aff'd sub. nom.*, American Print Works v. Lawrence, 23 N.J.L. 590 (1851).

18. Henn's Case, 82 Eng. Rep. 157, 296 (1633); Hyde v. Town of Jamaica, 27 Vt. 443 (1855).

19. Proctor v. Adams, 113 Mass. 376 (1873).

20. The Ship Argo and Appurtenances, 1 Gall 150 (Mass. 1812); R. v. Vantandillo, 150 Eng. Rep. 762 (1815).

21. Aldrich v. Wright, 53 N.H. 398 (1873). Indeed the opinion in that case is quite a remarkable dissertation upon the subjects of self-defense, defense of property, and the necessity upon which lawful acts of defense are to be based.

22. State v. Jackson, 71 N.H. 552, 557, 53 A. 1021, 1024 (1902).

23. W. PROSSER & W. KEETON, THE LAW OF TORTS (5th ed. 1984). "[P]rivilege considered here is in fact closely related to that of self-defense." *Id.* § 24, at 145.

24. 1 F. WHARTON, CRIMINAL LAW § 128, at 180 (1932).

> The distinction between necessity and self-defense consists principally in the fact that while self-defense excuses the repulse of a wrong, necessity justifies the invasion of a right. It is, therefore, essential to self-defense that it should be a defense against a present unlawful attack while necessity may be maintained though destroying conditions that are lawful. In self-defense the attack must be upon interests which it is the duty of the party assailed to defend.

Id. at 179-80 (footnote omitted).

25. 81 Vt. 471, 71 A. 188 (1908).

plaintiff, his wife, and his children. The court held that the defendant dock owner was liable to the plaintiff for his injuries. Plaintiff had a right to tie his boat to defendant's dock and defendant did not have the right to untie it.

The second example which supports the proposition that a legal privilege is created can be found in *Morey v. Fitzgerald*.[26] This case involved an obstructed roadway which forced the defendant to travel *extra viam*.[27] The defendant's right to passage is not absolute, however, the courts clearly find that passage, including an incursion onto private land, may be contemplated by the defendant in advance and then performed without the defendant thereby becoming guilty of trespass. It is worthy of note that these cases involve no statement that the defendant needs to be personally at hazard, "threatened," or "in peril."

Nor must personal hazards which may occasion necessity be unnatural or unusual. In the English case, *R. v. Bourne*[28] an abortion was found to be medically necessary due to the female's emotional and social condition, although she was not expected to be physically jeopardized by carrying and delivering. In addition, the defendant does not need to be a natural person. The necessity defense has been held to be available to a railroad which violates a regulation as the result of a landslide.[29] With the exception of the recent "protest" cases one may conclude that, as a matter of common law, a defendant may invoke the defense if he has made a choice which would produce a greater net social benefit, even though the choice meant breaking the law.[30]

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26. *See* Morey v. Fitzgerald, 56 Vt. 487 (1884).

27. *Id.* at 488. The court stated that "although the defendant knew of the founderous condition of the road before he attempted to pass over it, he was not thereby deprived of the right he otherwise would have had to travel it." *Id.*

28. 281 K.B. 687 (1939).

29. Chesapeake & O.R. Co. v. Commonwealth, 119 Ky. 519, 84 S.W. 566 (1905). This is so notwithstanding that the regulation violated was a Jim Crow statute requiring the provision of separate facilities for the different races. (Interestingly, a railroad which violated a regulation by remaining too long at a crossing because of tampering with the brake controls by unknown people, not connected with the railroad, while the train was properly stopped, was denied the necessity defense. Commonwealth v. N.Y.C.H.R.R.R., 202 Mass. 394, 88 N.E. 764 (1909)).

30. For a description of the common law involving the necessity defense see W. LAFAVE & A. SCOTT, CRIMINAL LAW 442 (2d ed. 1972).

> The matter is often expressed in terms of choice of evils: When the pressure of circumstances presents one with a choice of evils the law prefers that he avoid the greater evil by bringing about the lesser evil. Thus the evil involved in violating the terms of the criminal law (taking another's property; even taking another's life) may be less than that which would result from literal compliance with the law (starving to death; two lives lost.)

Id. To the extent that the choice made may impose costs on a particular party, however, that party has civil remedies even if the defendant is not found criminally liable. The person who takes a fire extinguisher to put out a fire would not be guilty of larceny, but liable for recharging the extinguisher and returning it to its owner. Such civil remedies are not diminished under statutory formulations. *See* MODEL PENAL CODE § 3.01 comment 2 (1985). "Although conduct is justifiable for purposes of the penal law, any civil remedies that may have existed under prior law are unaffected." *Id.*

III. NECESSITY AS AN INTEGRAL PART OF MODERN DOCTRINE

In addition to the inherited common law principles of necessity, modern American jurisprudence provides several discrete forms each of which have developed and extended the role of necessity in the law. For example, there has emerged a distinct concept of "medical necessity" which has been authority for the hospitalization of the unwilling, for abortion when it was otherwise forbidden,[31] for the sterilization of the mentally incompetent,[32] for growing and using marijuana to treat glaucoma,[33] and for other similar ends dictated by medical or social practice.

Somewhat more fascinating is the notion of "business necessity," which the United States Supreme Court has held is a viable defense to allegations of discriminatory employment practice.[34] Although the defense is not always presented, and often unsuccessful, the burden required of that defense is not especially difficult to meet. In order to interpose the "business necessity" defense in one particular Title VII case, the Court of Appeals for the 7th Circuit found that "the defendant need only introduce evidence to show that accommodation would create a hardship on his business. This hardship has been construed as anything more than a de minimis cost to the employer."[35] A related concept is the "market necessity defense" which has been argued by firms engaged in practices that could otherwise be considered price-fixing.[36]

Another group of claims of necessity surrounds the activities and prerogatives of government. Thus, we have court opinions that make reference to "public necessity,"[37] "military necessity,"[38] and "the necessity of maintaining discipline in an organization such as [a] police department"[39] interposed in modern cases. The Japanese internment cases[40] held that "public necessity

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31. *See* Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169 (1986); Simopoulos v. Virginia, 462 U.S. 506 (1983).

32. *See In Re* Mary Moe, 385 Mass. 555, 432 N.E.2d 712 (1982).

33. *See* Note, *Medical Necessity as a Defense to Criminal Liability*, 46 GEO. WASH. L. REV. 273 (1978) (citing U.S. v. Randall, 104 Daily Wash L. Rep. 2249 (1976); *see also* State v. Diana, 24 Wash. App. 908, 604 P.2d 1312 (1979). *But see* State v. Tate, 194 N.J. Super. 622, 477 A.2d 462 (1984), 198 N.J. Super. 285, 486 A.2d 1281 (1984), *rev'd and remanded*, 102 N.J. 64, 505 A.2d 941 (1986); *see also* Spillers v. State, 145 Ga. App. 809, 245 S.E.2d 54 (1978); Rutherford v. U.S., 399 F. Supp. 1208 (W.D. Okla. 1975).

34. *See, e.g.*, Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 598 (1983) (citing Griggs v. Duke Power, 401 U.S. 424, 431 (1971)); *see also* Annotation, *What Constitutes "Business Necessity" Justifying Employment Practice Prima Facie Discriminatory under Title VII of Civil Rights Act of 1964*, 36 A.L.R. FED. 9 (1978).

35. Baz v. Walters, 782 F.2d 701, 706 (7th Cir. 1986) (citing Trans World Airlines v. Hardison, 432 U.S. 63 (1977)).

36. *See, e.g.*, Op. Att'y Gen. Texas H-1260 (October 31, 1978); *see also* C.B.S. v. A.S.C.A.P., 562 F.2d 130, 137 (2d Cir. 1977).

37. *See East Tennessee Natural Gas*, 8 FPC 836, 837 (1949) "[R]equired by public convenience and necessity . . . ." *Id.*

38. Greer v. Spock, 424 U.S. 828 (1976); Hohri v. United States, 782 F.2d 227, 251 (D.C. Cir. 1986); *see also* Mondelli v. United States, 711 F.2d. 567, 569 n.5 (3d Cir. 1983) (describing one of three rationales for the *Feres* doctrine as "the necessity for maintaining discipline in the military services").

39. Saye v. Williams, 452 U.S. 926, 928 (1981) (Rehnquist, J., dissenting).

40. Hirabayashi v. U.S., 320 United States 81 (1943); Korematsu v. U.S., 323 United States

may sometimes justify" confinement of the kind there imposed.

These ideas are not purely modern. There was, of course, a doctrine of "state necessity" historically part of the law of England, and as Glanville Williams observed: "It was under the plea of State necessity that the Star Chamber used the rack to extract information not only from the accused but even from witnesses."[41] Although the modern varieties of governmental claims of necessity are not as brutal as this, they are interestingly diverse.

In the United States, in addition to sprouting irregularly from among the trodden ground of court opinions, the majority of states have codified necessity as a defense to criminal prosecution. The clear majority of state statutes concerning the necessity defense are based upon section 3.02 of the Model Penal Code.[42] Section 3.02 therefore, can usefully be taken as a general modern statutory formulation, and will be considered as such in this article. Although only two states, Pennsylvania and New Jersey, have adopted the Model Penal Code in toto, all fifty states have adopted some portion of it, most a significant portion. The pedigree of the Code and its authors is beyond question, for the officers, council members, and consultants who contributed to its writing were distinguished and respected legal scholars. Drafts of the Code were subjected to extensive local and national scrutiny prior to adoption. Thus, the Section 3.02 formulation may be taken seriously.

Section 3.02 of the Code provides, in toto, as follows:

> (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
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> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification does not otherwise plainly appear.
>
> (2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.[43]

From the commentaries to the Code, it may fairly be said that this section is intended to state a defense which may be asserted against any criminal

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214 (1944); Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986).

41. Williams, *Defense of Necessity*, 6 J. CUR. LEGAL PROBS. 216, 224 (1953).

42. MODEL PENAL CODE § 3.02 (1985). At present, about 34 states have codified the necessity defense in a form resembling § 3.02. A more precise and detailed review of present state treatment of this section can be found in 10 UNIFORM LAWS ANNOTATED 38 (Supp. 1986). A listing of state adoptions of section 3.02 as of 1975, a time when many state criminal law provisions were being re-codified, can be found in Tiffany & Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DENVER L. J. 839 (1975), and in Heberling, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 1914 (1975).

43. MODEL PENAL CODE § 3.02 (1985).

charge. The introduction to Article 3 states quite simply: "Section 3.02 (choice of evils) does state a principle applicable to all crimes . . ."[44] as does Comment 3, which states: "the principle of necessity is one of general validity. It is widely accepted in the law of torts and there is even greater need for its acceptance in the law of crime."[45] Comment number 4, titled "Generality of Section," elaborates the same theme.[46]

Such generality should fairly be expected, in any case, given the width of the use of the idea of necessity in the modern law.[47] And such generality can be observed, for example, in the dissenting opinion of Chief Justice Dixon of the Louisiana Supreme Court in *In re LSBA Committee File No. 6784*.[48] The Chief Justice discusses the nature of forms of rules, including legal rules, in a few swift strokes:

> It is my view that it was more important, in every respect, to record the evidence against crooked witnesses than to stop the phone conversation until he could obtain the consent of the party's lawyer.
>
> Sports rules are interpreted literally. Rules of law and ethical conduct are not. A highly developed sense of discrimination is required. Literal interpretation of the Canons of Ethics can lead to the same irrational conclusions as literal interpretation of scripture.
>
> The lawyer violated a rule of ethical conduct. That violation should be excused under the doctrine of necessity, a defense almost universally recognized, even to charges of violation of criminal statutes. Section 3.02, A.L.I. Model Penal Code.[49]

IV. Nuclear Plant Cases

The case of *Commonwealth v. Capitolo*[50] provides an interesting example regarding the contemporary application of the necessity defense. On July 15th, 1979, six people crawled under a fence surrounding the Shippingport Nuclear Power Plant in Pennsylvania, sat down, held hands, and refused to leave when asked. They were arrested for trespass by a deputy sheriff.[51] Upon trial the defendants sought to introduce evidence tending to prove, *inter alia*, that defects in the design and construction of the Shippingport Plant presented an immediate threat of the release of deadly radiation, that even the purportedly normal operation of the plant introduced contaminants into the surrounding environment, seriously threatening life and health, and that the defendants

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44. I Model Penal Code and Commentaries, art. 3, at 1 (1985).

45. *Id.* at 14.

46. *Id.* at 17. "The principle formulated in the section is general. There is room for disagreement on what constitutes an evil, and which of the two evils is the greater. This, however, is not a serious objection to the rule." *Id.*

47. In New York Energy Authority v. Nuclear Fuel Serv. 561 F. Supp. 954 (W.D.N.Y. 1983), the court states that "defendants . . . [urge] that necessity justifies their refusal to remove their spent [nuclear] fuel from the Center, that there exists no [other] place where the spent fuel may be stored . . . ." *Id.* at 973.

48. 483 So. 2d 1008 (La. 1986).

49. *Id.* at 1008 (Dixon, C.J., dissenting).

50. 324 Pa. Super. 61, 471 A.2d 462 (1984).

51. *Id.* at 67, 471 A.2d at 464.

had reasonably exhausted available administrative remedies.[52] The defendants' offer of proof was refused, the trial court declared any justification defense unavailable, and all the defendants were convicted.[53] The convictions were reversed in a 4 to 3 opinion of the Pennsylvania Superior Court.[54] The Pennsylvania Supreme Court, all justices concurring, reinstated the convictions.[55]

Capitolo resembles nearly every other case of this kind in its facts and in the ultimate result obtained from adjudication. Literally a hundred other appellate opinions find that such defendants are not to be allowed to claim that they were justified in their actions.[56] *Capitolo*, however, may be distinguished from these other decisions by the opinion of Judge Spaeth, writing for the majority in the Superior Court. Thus, the case is noteworthy in two respects: (1) the trial court and Supreme Court results demonstrate the shallow dismissal so commonly given the claim of justification; and (2) the Superior Court opinion demonstrates that a conscientious judge reasonably can find that defendants should be entitled to present the defense of necessity.

The Pennsylvania Supreme Court in *Capitolo*, without much deliberation, held that "[t]he trial court was correct in ruling that, as a matter of law, justification was not an available defense to [defendant] Appellees."[57] Such a conclusion begs at least two questions: (1) What does it *mean* to say that a particular defense is not "available" in a given criminal case? (2) What law was employed to arrive at the conclusion that this defense is unavailable? Merely stating that our system of law employs an "adversary process" for determining the truth of a matter, must mean we understand that there exists a right to present defenses at least as fundamental as the right to accuse.

In 1977 the Hawaii Supreme Court decided *State v. Horn*.[58] In that case, which involved a prison escapee who raised the defense of justification, the court stated clearly:

> An accused is entitled to a jury determination of his guilt or innocence, and it is his constitutional right to present any and all competent matters in his defense. A right to a trial by jury and the right to adduce evidence in his behalf are two of the fundamentals inherent in the due process guarantee of a fair trial. *In re Oliver*, 333 U.S. 257 (1948). Thus, where the accused asserts a defense sanctioned by law to justify or to excuse the criminal conduct charged, and there is some credible evidence to support it, the issue is one of fact that must be submitted to a jury.[59]

This right is so basic to our law it is hard to imagine a court properly exercis-

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52. *Id.* at 69-70, 471 A.2d at 466.

53. *Id.* at 67, 471 A.2d at 464.

54. *Id.* at 90, 471 A.2d at 481.

55. Commonwealth v. Capitolo, 508 Pa. 372, 382, 498 A.2d 806, 811 (1985).

56. *See* Annotation, *Trespass: Demonstration — Business Lands*, 41 A.L.R. 4TH 773, 777 (1985). "Virtually all courts which have ruled on necessity and like defenses in cases within the scope of this annotation have found them to fail." *Id.*

57. *Capitolo*, 508 Pa. at 379, 498 A.2d at 809.

58. 58 Haw. 252, 566 P.2d 1378 (1977).

59. *Id.* at 255, 566 P.2d at 1380; *see also* State v. Brechon, 352 N.W.2d 745, 750 (Minn. 1984) (Wahl, J., concurring).

ing a prerogative to declare any recognized defense "unavailable" in a given case. May a court, for example, also say that the defense of self-defense is not "available" to a defendant on trial for assault and battery? May a judge, prior to trial, also decide that he can say that a particular defendant was not entrapped or that a particular victim did not consent and thereby forbid trial upon those theories? However, a variety of courts[60] have declared justification defenses "not available," and it is prudent to endeavor to understand what they are doing.

It can be argued that the courts, in these cases, are granting summary judgment motions *sua sponte* in criminal matters, not upon evidence made part of the record, but rather upon the court's opinion of defendant's offer of proof even before that proof has been made. Judge Spaeth, in the Superior Court opinion in *Capitolo* recognized this, stating:

> [W]hat the trial court's statement comes down to [is] . . . that it could refuse to permit evidence offered to prove that certain courses of action were futile and at the same time justify its refusal on the ground that *it* knew, not only *despite* the offered evidence, but without any evidence, that those courses were *not* futile . . . . [T]he trial court's statements disclose that *it* has made the choice of values that should be made by the jury. . . .[61]

Courts seem to find themselves entitled to test a defendant's offer, not merely for sufficiency, but for persuasiveness, against a four or five part matrix of elements of the court's own composition, and to refuse to admit the evidence, instructing the jury accordingly when the court feels unpersuaded. Neither Section 3.02 of the Model Penal Code, which parallels the law adopted in many states, nor the common law, permits declaring the defense "unavailable."

The jury may convict a defendant who claims justification. But we cannot say the defendant may not present his case to the jury. Where section 3.02 and statutes modeled after it would apply, no known statutory prohibition of trespass provides exceptions or defenses where nuclear plant sites are involved. There is no legitimate legislative purpose which would otherwise exclude justification concerning acts of trespass. It is not the defendant who has recklessly or negligently brought about the emplacement of the nuclear plant. The judicial declaration that the defense is unavailable is made precisely to avoid the law. The declaration prevents fulfillment of the exact purpose of the trial, which is none other than to determine whether defendant was, in truth, justified.

Further, the commentaries to the Model Penal Code, including those surrounding Section 3.02, frequently emphasize the properly close connection between crimes and genuine moral wrongs, and the intention not to convict those who have not done something morally bad. "The penal law promotes the gen-

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60. Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982); Commonwealth v. Averill, 12 Mass. App. Ct. 260, 423 N.E.2d 6 (1981); State v. Kee, 398 A.2d. 384 (Me. 1979); State v. Greene, 5 Kan. App. 2d 698, 623 P.2d. 933 (1981); State v. Levering, 661 S.W.2d 792 (Mo. 1983); State v. Dorsey, 118 N.H. 844, 395 A.2d 855 (1978); *see also* Annotation, *Trespass: Demonstration — Business Lands*, 41 A.L.R. 4TH 773 (1985).

61. *Capitolo*, 324 Pa. Super. at 75, 77, 471 A.2d at 469-70.

eral security," says one Model Penal Code Commentary, "not only by repressing conduct that is properly condemned as criminal but also — and no less importantly — by building confidence that those whose conduct does not warrant moral condemnation will not be convicted of a crime."[62] Even if there were no question of legal propriety, any preliminary declaration regarding the "unavailablity" of a defense which prevents the fair determination of the wrongfulness of defendant's act would be, at best, inadvisable. As shall be further argued in this article, trial of justification indeed benefits society as a whole, perhaps more than it helps the individual defendant.

The common law was quite clear in the matter of the availability of jury trial upon the issue of justification, although the defense would avoid literal application of the law. With very few exceptions,[63] one body of case law historically considers necessity a question of fact to be presented to the jury. A statement to that effect appears, for example, in *Hale v. Lawrence*:[64]

> The law esteems all private property sacred from the violent interference of others, and he who takes, injures, or destroys it, will be held a trespasser, until he shows a justification. A necessity extreme, imperative or overwhelming, will constitute such a justification, but mere expediency, or public good, or utility, will not answer. The public interest or welfare is not left in the keeping of private individuals. This justification, therefore, under a plea of necessity, is always a question of fact, to be tried by a jury and settled by their verdict . . . .[65]

V. UNAVAILABILITY: REASONS STATED AND EXAMINED

The matrix which courts, in the aggregate of their decisions, have applied in order to declare the justification defense "unavailable" can be summarized as follows. The defense will be deemed unavailable:

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62. MODEL PENAL CODE § 1.02, comment 2(c) (proposed Official Draft 1962).

63. Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884). Sailors who had been on the sea for twenty days in a small lifeboat killed the ailing cabin boy and ate parts of his body before being rescued four days thereafter. *Id.* at 273. *Dudley*, although very well known, is an especially unusual case, procedurally as well as substantively. Facts in the case, for example, were found upon a special verdict by a jury which did not then resolve the question of guilt or innocence. *Id.* The defendants were convicted in a proceeding without a jury subsequent to trial. Generalizations as to the common law are to be made from *Dudley* only with extreme caution. There is no other case in history handled in quite the same manner as *Dudley*. For a well-conducted discussion of some of the singular features of that case, see Comment, *In Warm Blood: Some Historical and Procedural Aspects of* Regina v. Dudley and Stephens , 34 U. CHI. L. REV 387 (1966-67); *see also* A. SIMPSON, CANNIBALISM AND THE COMMON LAW: THE STORY OF THE TRAGIC LAST VOYAGE OF THE MIGNONETTE AND THE STRANGE LEGAL PROCEEDINGS TO WHICH IT GAVE RISE (1984); Chase, Book Review, 94 YALE L.J. 1253 (1985).

64. 21 N.J.L. 714 (1848), *aff'd sub nom.*, American Print Works v. Lawrence, 23 N.J.L. 590 (1851).

65. *Id.* at 730; *see also* Commonwealth v. Blodgett, 53 Mass. 56 (1846) (containing a jury instruction: "necessity, or probable cause of necessity . . . the jury and not the State of Rhode Island, was the proper judge."); Comment, *The Law of Necessity as Applied in the* Bisbee *Deportation Case*, 3 ARIZ. L. REV. 264 (1963) (discussing State v. Wooten, 17 Am. Trials 1 (1920)).

1. If any "alternative" to the complained of act existed. For example in *United States v. Seward*[66] the court held that the necessity defense did not apply because "there were courses of action open to the defendants other than criminal trespass."[67]

2. If, in the court's estimation, the complained of act would not likely be efficacious in fully abating the greater harm. Because the court believes the defendant could not have succeeded, the defendant cannot claim he was justified trying. In *State v. Marley*[68] the court stated that "[u]nder any possible set of hypotheses, defendants could foresee that their actions would fail to halt Honeywell's production of the war material . . . [therefore] . . . it was not error for the judge to have omitted an instruction on the 'necessity defense.' "[69]

3. If, in the opinion of the court, the danger is not of the type the court is willing to describe as "imminent." For example, in *Commonwealth v. Capitolo*[70] the court stated that "[e]ven if low-level radiation and nuclear waste were emanating from the shutdown plant (as Appellants believed), we do not find this to be the type of danger classified as an emergency sufficient to justify . . . ."[71] In addition, the court in *State v. Warshow*[72] held that "radiation and nuclear waste are not the types of imminent danger classified as an emergency sufficient to justify . . . ."[73] The defense is also unavailable where the danger is not from a "force of nature." In *State v. Olsen*[74] the court held that "actions of private industry in shipping spent [nuclear] fuel did not constitute a 'natural physical force'. . . ."[75]

4. When the danger creating the necessity does not occur in the "presence" of the defendant. For example, in *State v. Marley*[76] the court stated: "a justification defense [exists] only when the crime to be prevented occurs in the 'presence' of defendant, regardless of the type of conduct, or degree of violence therein . . . ."[77]

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66. 687 F.2d 1270 (10th Cir. 1982).

67. *Id.* at 1275; *see also* United States v. Quilty, 741 F.2d 1031 (7th Cir. 1984); *In re* David Weller, 164 Cal. App. 3d 44, 210 Cal. Rptr. 130 (1985); People v. Weber, 162 Cal. App. 3d 1, 208 Cal. Rptr. 719 (1984); Commonwealth v. Brugmann, 13 Mass. App. 373, 433 N.E.2d 457 (1982); Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188 (1983).

68. 54 Haw. 450, 509 P.2d 1095 (1973).

69. *Id.* at 473, 509 P.2d at 1109; *see also* United States v. May, 622 F.2d 1000 (9th Cir. 1980); Commonwealth v. Averill, 12 Mass. App. 260, 423 N.E.2d 6 (1981); Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188 (1983); State v. Diener, 206 S.W.2d 582 (Mo. Ct. App. 1986).

70. 508 Pa. 372, 498 A.2d 806 (1985).

71. *Id.* at 379, 498 A.2d at 809.

72. 138 Vt. 22, 410 A.2d 1000 (1979).

73. *Id.* at 25, 410 A.2d at 1002; *see also* Linnehan v. State, 454 So. 2d 625 (Fla. Dist. Ct. App. 1984); State v. Greene, 5 Kan. App. 2d 698, 623 P.2d 933 (1981); State v. Kee, 398 A.2d 384 (Me. 1979); Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982).

74. 99 Wis. 2d 572, 299 N.W.2d 632 (1980).

75. *Id.* at 576, 299 N.W.2d at 634; *see also* Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981).

76. 54 Haw. 450, 509 P.2d 1095 (1973).

77. *Id.* at 451, 509 P.2d at 1098 (followed and cited in United States v. Best, 476 F. Supp. 34, 46 (D. Colo. 1979)).

5. When the agency, business, or actor causing the alleged greater harm has been established under the aegis of legislative action. The Court in *State v. Warshow*[78] found decisive the fact that "both the state of Vermont and the federal government have given their imprimatur to the development and normal operation of nuclear energy . . . ." Implicit within these statutory enactments is the policy choice that the benefits of nuclear energy outweigh its dangers.[79]

None of the above methods for declaring the defense unavailable finds any substantial support either in the common law or in Section 3.02 of the Model Penal Code.

First, it may be said that there are always alternatives to any act. Let us say that one pulls down a building to save other structures from a fire. Nothing has finally compelled the actor — he could have let them all burn or not as chance might have provided. Or let us say that one has travelled outside of a roadway, "extra viam," and has trespassed upon adjoining property because the roadway was impassable. There can be no question, that the alternative of turning around existed. Yet the defense of necessity has been consistently available at common law in each of those two situations without reference to the supposition of any alternatives available to defendant. Neither the text nor comments to Model Penal Code Section 3.02 suggests that the lack of an alternative, in the sense in which the courts would impose the requirement, is preliminary to the claim of justification.

Williams, in his discussion of the necessity defense explains that it does not really make sense to speak of an act without alternatives.

> An act dictated by necessity is still an exercise of the will, as Hobbes pointed out: 'There is nothing there involuntary, but the hardness of the choice.' Strictly speaking, there is perhaps no such thing as necessity, in the context in which lawyers speak of it. A particular act is never necessary, in the sense that there is literally no option, even though the only alternative is one's own death. One is reminded of the Comte d'Argenson's reply to the Abbe who had excused himself for writing scurrilous attacks, on the ground that 'he must live' — 'I do not see the necessity.'[80]

The degree to which alternatives are available certainly contributes much to determine whether a particular act was in fact, necessary, as the commentaries to the Model Code explain. The courts, however, overreach their prerogative when they deny the right to present the defense due to the claimed existence of an "alternative." The analysis of the actual necessity, and therefore the analysis of alternatives, is within the province of the jury.

Second, the requirement of certain efficacy is inherently bizarre and illogical as well as without legal support. The proper question concerns not the

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78. 138 Vt. 22, 410 A.2d 1000 (1979).

79. *Id.* at 27-28, 410 A.2d at 1003 (Hill, J., concurring); *see also* United States v. Best, 476 F. Supp. 294 (1979); People v. Hubbard, 115 Mich. App. 73, 320 N.W.2d 294 (1982); State v. Diener, 106 S.W.2d 582 (Mo. Ct. App. 1986); State v. Levering, 661 S.W.2d 792 (Mo. Ct. App. 1984).

80. Williams, *The Defense of Necessity*, 6 J. CURRENT LEG. PROB. 216 (1953) (footnotes omitted).

power of defendants surely to conquer the greater harm; the correct question concerns defendants' purpose to alleviate it. This question is sometimes phrased as whether a sufficient "nexus" exists between defendants' act and the goals the court assumes that the defendants sought to achieve.[81]

If one took seriously, as a precept of law, the courts' claim that defendants' acts could not have been necessary because those acts were not likely to be successful in removing the nuclear plant or eliminating the threat of the use of weapons, one would also be compelled to say that a person who had a loaded gun pointed at him should be convicted of battery for throwing a walnut at his assailant, because the thrown object was not sufficiently likely to disarm the attacker. Such has never been the law.[82] The walnut may have been the only means at hand.

Do the courts really intend to suggest that if instead of crawling under a fence, sitting down and singing songs, defendants' chose to mount an attack on a nuclear plant by means of a thousand large bulldozers in formation, the defense would then be available? It has not been, and clearly should not be, a principle of law, that one is justified only if he uses a blunderbuss rather than a slingshot.

The correct rule is one we all know even without citation. So long as defendant's purpose in throwing the walnut was to repel the unlawful attack, he may claim self-defense, and should not be convicted of battery. The introductory comment to Model Penal Code Article 3 describes the same principle:

> The point is that what the law should deal with primarily is that nature and *purpose* of the force employed; the basic rule determining whether its use was justified ought not to vary with the result of the crime that may be charged.[83]

Third, although the word "imminent" appears in many formulations of the necessity defense and in reported decisions in cases of necessity, the degree to which the threatened harm is imminent is properly determined as a means to evaluate the actual severity of the threatened greater harm, and not as a means to preclude the claim of the defense. Most treatise writers explain, for example, that one may commit what would otherwise be a technical trespass to another in order to save his property from "imminent" danger.[84] Imminence

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81. Obviously the court, in declaring the defense "unavailable," and in forbidding the presentation of evidence regarding the specific evils or hazards sought to be avoided, is increasing the distance between defendants' purposes and their achievement, which the court may then observe is so wide that the "nexus requirement" is not met.

82. *See, e.g.*, 3 W. BLACKSTONE, COMMENTARIES 3 (1st ed. 1768) (discussion concerning the nature and scope of self-defense).

83. I MODEL PENAL CODE AND COMMENTARIES art. 3, at 5 (1985) (emphasis added).

84. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 50 (2d ed. 1972). It is "sometimes said that the defense of necessity does not apply except in an emergency — when the threatened harm is immediate, the threatened disaster imminent." *Id.* (citing G. WILLIAMS, CRIMINAL LAW § 232 (1961) and N.Y. PENAL LAW § 35.05). For a discussion of imminence see Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908). *See also* Williams, *The Defense of Necessity*, 6 J. CURRENT. LEG. PROB. 216 (1974). *But see* Aldrich v. Wright, 53 N.H. 398 (1873).

> The immense value at which the law appraises human life makes it legally reasonable that the destruction of it, as a means of averting danger, should be resorted to only when the danger is immense in respect of consequences, and exceedingly immi-

may be a component considered by the trier of fact in aid of determining the actual necessity of the case. That is not to say only those necessities which a judge shall find sufficiently imminent may be tried to a jury.

> This section does not require . . . that the evil that the actor seeks to avoid be imminent. Such a requirement unduly emphasizes one ingredient in the judgment that is called for at the expense of others just as important . . . it is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A's car to a remote mountain location for a month's stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A's car although the threatened harm would not occur for three weeks.[85]

It could also be said that, even in the example given in the comment, B was exposed to the arguably "imminent" harm of being in a remote location with someone who proposed to kill him, at whatever time, and therefore had the right to procure his own escape. The point, again, is that these are principally issues of fact to be decided by the jury, not matters for preliminary decision by the court.

The Model Code commentary is as decisive regarding the sometimes stated rule that necessity must be occasioned by a force of nature.[86]

> This section does not demand that the event that triggers the choice among evils be a "natural physical force." A claim of justification is possible when an actor responds to human threats of harm. In many such situations a claim of duress can also be made, but it is proper to recognize that if B steals money in response to A's credible threat to kill C immediately if B does not act, B's conduct is not only excusable but justified.[87]

Fourth, despite a careful reading of the court's opinion in *State v. Marley*[88] the court's imposition of a requirement that the occasion for the justification be committed in the "presence" of the defendant appears without support

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> nent in point of time. But the extent of danger and the degree of imminence requisite to justify a deadly defense against a human aggressor, were not requisite to justify the act of the defendant in this case.

Id. at 407 (killing four mink that were chasing his geese).

> The term "imminent" does not describe the proximity of the danger by any rule of mechanical measurement . . . . The law does not fix the distance of time between the justifiable defense and the mischief, for all cases, by the clock or calendar. The chronological part of the defense, like the rest of it, is a matter of reasonableness; and reasonableness depends upon circumstances.

Id. at 401-02.

85. I MODEL PENAL CODE AND COMMENTARIES art. 3, at 16-17 (1985).

86. *See, e.g.*, W. LAFAVE & A. SCOTT, CRIMINAL LAW 381 (2d ed. 1972) "With the defense of necessity the pressure must come from the physical forces of nature (storms, privations) rather than from other human beings." *Id.*

87. I MODEL PENAL CODE AND COMMENTARIES art. 3, at 16 (1985).

88. 54 Haw. 450, 509 P.2d 1095 (1973).

in the law and without reason. The court in its decision finds:

> Each of these justification defenses obviously and inevitably requires that the criminal act to be counteracted occur in the presence of the actor. A presence requirement is the concomitant of the "immediate harm" requirement. The inevitable requirement of presence stands, even where the criminal acts done to prevent harm to self, others, or property do *not* involve force.[89]

As concerns defendants' justification defense, the court thereby claims to state a rule "firmly founded on case law,"[90] but cites as authority only a passage in LaFave and Scott, *Criminal Law* within a section entitled "Law Enforcement" and a subsection entitled "Crime Prevention and Termination"[91] which states: "One who reasonably believes that a felony, or a misdemeanor amounting to a breach of the peace, is being committed, or is about to be committed, in his presence may use reasonable force to terminate or prevent it."[92] A fair reading of this sentence and the subsection as a whole would find it to state a rule concerning the circumstances in which there is a privilege to use force rather than a requirement which, if not satisfied, would prevent any claim of justification.

A few examples manifest the absurdity of the contention that acts, not involving the use of force, done to prevent harm to one's self, other people, or property can be undertaken only if a prior criminal act has been done in the presence of the defendant. Suppose a person comes upon a place where a fire has been illegally started, although not in his presence. Will his taking an extinguisher from an adjoining property be larceny because he was not there when the fire was set? Suppose a motorist comes upon a car and driver which have suffered an accident prior to his arrival. Will he be guilty of obstructing traffic if he holds up the oncoming line of cars in order to extract the hurt driver from his damaged car? The answer to such questions clearly is no. The "presence" formulation of the court is directed at a particular case the court wants to decide in a predetermined fashion; it is not directed toward a viable principle of law.

It may be said, however, that those who act to save persons or property owned by persons who are not in a position which intrinsically demands help or who have not asked for help will have a difficult time arguing the necessity of their acts. But this is not a requirement of "presence." There is a properly imposed requirement of legitimacy for the interest on behalf of which defendant acts in order for him to be justified, and juries are certainly entitled to find that defendant's act, even if colorably from good motive, has simply not been done on behalf of a legitimate right. My neighbor may be, in my view, painting his house a terribly ugly color, but I may fairly be convicted of larceny if I steal his paint and brushes to prevent him from doing it. The Hawaii court in *Maorely* would prevent "vigilante society," and "government by vigilantes"[93] by imposing the requirement of "presence." But the problem is not really

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89. *Id.* at 470, 509 P.2d at 1108.
90. *Id.*
91. W. LAFAVE & A. SCOTT, *supra* note 86, at 406.
92. *Id.*
93. *Marley*, 54 Haw. at 470, 509 P.2d at 1108.

"presence." By stealing the paint I am usurping my neighbor's right rather than doing anything actually necessary, and the jury is certainly entitled to so find. The differences which it is perceived may be drawn between justifiable actions and usurpations (or outright wrongs), are discussed further in the next sections.

Other technical requirements have been mistakenly imposed by courts hearing these cases. Even the Pennsylvania Superior Court in *Capitolo* appears to find that defendant's conduct can only be found justified under the statute corresponding to Model Penal Code section 3.02 if it is also found justified under section 3.10.[94] There is no authority anywhere in the Code or accompanying commentary for this proposition. Indeed, the comment to section 3.02 illustrates the proper application of the section through a number of hypotheticals, several of which involve intrusion upon property, and yet contains no suggestion that section 3.10 is, in any respect, relevant.[95]

Fifth, the fact that a business may operate under the "imprimatur" of the legislature does not mean that the business has been given an unreviewable license to wreak any and every sort of harm. The scope of a legislatively created license can be exceeded, just as can the scope of any other right. Further, the legislative power itself does not extend to the licensing of every sort of act. Because the legislature may license garbage collection in a particular jurisdiction does not necessarily mean that the legislature has licensed the dumping of that garbage in public parks in the area, nor may the legislature lawfully license burglary among certain holders of permits, even were it to label the activity "garbage collection." Such truths are too simple to dispute.

It is true that the Model Penal Code section 3.02(c) provides that the necessity defense cannot be asserted if there does "plainly appear" to be a legislative purpose to exclude the particular claim of justification.[96] Such a plain purpose cannot fairly be found by a court, however, from extant state statutes, for example, licensing nuclear plants. Such statutes would have to say first, that the plant was licensed to release harmful radiation and radioactive waste, and/or to melt down under certain circumstances, and, second, that citizens of the state were specifically not justified in acting in any manner to prevent these things when done by the plant. No state or federal law says anything of the sort, nor could it.

There are certainly statutes which provide that a particular utility may build a nuclear plant on a given site. But to find in such laws a plain purpose to exclude the justification for acts done with the stated intention of preventing harms emanating from the plant is a kind of wildly liberal sort of statutory construction in which a responsible court will not engage. One of the most unfortunate examples of the commission of this error appears in the concurrence of Justice Hill in *State v. Warshow*[97] in which it is suggested:

> If we were to allow defendants to present the necessity defense in this case we would, in effect, be allowing a jury to redetermine questions of policy already decided by the legislative branches of

94. MODEL PENAL CODE § 3.10 (1985).
95. *Id.* § 3.02 comment 1.
96. *Id.* § 3.02(c).
97. 138 Vt. 22, 26-29, 410 A.2d 1000, 1003-04 (1979).

> the federal and state governments. This is not how our system of government was meant to operate.
> I express no opinion as to the relative merits or demerits of nuclear energy, nor do I question the sincerity of the defendants' beliefs. All that I would hold is that this court is not the proper forum to grant defendants the relief they seek.[98]

The defendants have been charged with committing a crime. The "relief" defendants seek is to be aquitted. If the court is not the proper forum in which to seek that relief, none is.

It is certainly likely that the defendants do not believe the "policy choice" made by the legislature to have been correct. If they had, they probably would not be spending their time sitting in front of the gates of the Vermont Yankee power plant. The "policy choices" made by the legislature, without question, loom large in the background, and more or less provide the reason that a criminal trial is underway, but the rights of the accused in a criminal trial are not to be diminished or suspended thereby.

Justice Billings, dissenting in *Warshow*, understands as much, and explains:

> But, where, as here, the defendants offer to prove an emergency which the regulatory scheme failed to avert, the inference of preclusion is unwarranted. The defendants are entitled to show that although there is a comprehensive regulatory scheme, it has failed to such an extent as to raise for them the choice between criminal trespass and the nuclear disaster which the regulatory scheme was created to prevent.[99]

Similarly, Judge Brosky writing for the Pennsylvania Superior Court, in *Commonwealth v. Berrigan*,[100] explains: "It is the criminal liability of appellants that is at issue, not the merits of our nuclear policy. The jury need not agree with the appellants' views in order to acquit them."[101]

VI. Necessity Needs to be "Objectively" Shown, Before a Jury

It must be emphasized that necessity cannot be based upon a merely subjective, or private belief. The question of necessity does turn on the facts as they appeared to the defendant at the time, but the comparison of harms the defendant is understood to have made must be found to have an objective basis. Justification, generally, is said to be "subjective as to facts and objective as to values."[102] So saying does not reveal the entire truth of the matter, but the statement may serve as a useful guide.

The person who has received information which leads him reasonably to believe that a car contains a bomb set by others, threatening to injure or kill

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98. *Id.* at 28, 410 A.2d at 1003.

99. *Id.* at 32, 410 A.2d at 1006.

100. 325 Pa. Super. 242, 472 A.2d 1099.

101. *Id.* at 260, 472 A.2d 1099, 1108 (1984).

102. G. Williams, The Criminal Law § 229 (2d ed. 1970); *see also* Arnolds & Garland, *infra* note 103, at 294.

surrounding innocents, and therefore pushes the car off a cliff before it explodes, may assert the defense and be acquitted of the crime of destroying the car even if it later turns out that the bomb would not have gone off for hours or even days. The person who strangles a child in order to save his butterfly collection with which the child was toying will not be found justified by a jury, for they will not unanimously share his belief, however genuinely he may hold it, that the benefit of his collection outweighs the benefit of the child's life.

It does not matter how sincerely a particular defendant may hold a subjective belief concerning which of two evils is the lesser, if that belief is not found by the jury to be objectively reasonable the defendant should not be found to have been justified. He may be insane, and found not guilty for that reason, but he is not to be found justified. As explains the commentary to the Model Penal Code, "The balancing of evils cannot, of course, be committed to the private judgment of the actor; it is an issue for determination in the trial."[103] The defendant who would claim necessity, then, has the burden of convincing the jury that the jury's own sense of values would justify what he did, but he therefore must also have the right to present to the jury the substantive basis of his claim.[104]

For several reasons, the motion *in limine* to exclude, rarely, if ever, should be granted against defendants in justification cases, but this reason is principal among them. The law should not demand that defendant demonstrate his act was objectively reasonable and then preclude him from introducing any evidence to prove that fact. The motion, so used, is illogical, cruel, and unjust.

The motion *in limine* is a procedural device of recent origin, despite its Latin name, generally applicable to civil cases, but sporadically employed in criminal cases since once first used in 1937.[105] Until the recent group of justifi-

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103. MODEL PENAL CODE § 3.02 (Tent. Draft No. 8, at 5 (1958)). No one disputes this point. Arnolds and Garland in their frequently cited article on the subject say what has been above said and sum up the rule as follows: "Mere subjective good motive, as where one acts purely on a religious belief, is no defense to a criminal act. Whether society will consider a particular form of opposition to its government's policies justified is a different question, and one that can really only be answered by the jury which acts as the spokesman for society." Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 301 (1974).

104. *See* Commonwealth v. Berrigan, 325 Pa. Super. 242, 254, 472 A.2d 1099, 1105 (1984) (citing Commonwealth v. Capitolo, 324 Pa. Super. 61, 471 A.2d 462 (1984)). "By rejecting appellants' offer of the expert testimony and documentary evidence summarized in their offer of proof, the trial court precluded appellants from proving that their beliefs did have a basis in fact. Thus the court precluded appellants from proving that their beliefs were reasonable." *Id.*

105. State v. Smith, 189 Wash. 422, 65 P.2d 1075 (1937); *see also* F. BAILEY & H. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS 123 (1985). The motion *in limine* began as a defense device to perform the function now served by the exclusionary rule developed in Mapp v. Ohio, 367 U.S. 643 (1961). For a general discussion of the motion, see Ghent, Annotation: *Modern Status of Rules as to Use of Motion in Limine or Similar Preliminary Motion to Secure Exclusion of Prejudicial Evidence or Reference to Prejudicial Matters*, 63 A.L.R. 3d 311 (1975). (Ghent finds the earliest use of the motion in any case to have been in Bradford v. Brimingham, 227 Ala. 285, 149 So. 729 (1933)). For judicial observation of some of the difficulty with the use of the motion in justification cases, see Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188 (1983) (Liacos, J., concurring). It should also be noted that there is more recently decided law in Massachusetts which indicates that a motion *in limine* may not be used to chal-

cation cases, the motion *in limine* was directed against the introduction of matters so inherently prejudicial that no jury could, having been exposed to them, render a fair verdict. In the recent group of trespass/justification cases, however, the motion has been used to exclude from trial offers of proof deemed "irrelevant." None of these decisions which deny the right to present evidence claim that the presentation would invade a recognized legal privilege, invite prejudice, create inequity, or perpetrate a wrong. Indeed, the prosecution's motion has typically claimed that the proffered evidence is irrelevant exactly because it is related to justification. Many appellate reports strongly affirm lower court exclusion upon such motions, and comprise a significant number of the decisions here reviewed.

The motion *in limine* may have its occasional proper uses in the criminal law, although most have probably been supplanted by the exclusionary rule. A defendant certainly should not be allowed, for example, to try to exculpate himself by introducing a third party's confession to the crime charged if that confession has been brought about by torture. But in the justification cases there is no suggestion that defendants' evidence has been obtained by means of illegality. Instead, we have the court rightly saying, from one side of its mouth that the defendant must persuade the jury of the objective reasonableness of his act, and then saying, from the other side that defendant may not introduce any evidence on the subject.

Indeed, evidence is deemed relevant in modern law if it addresses any element of any claim made by either party. The Federal Rules of Evidence deem relevant evidence having "any tendency"[106] either to prove or disprove a fact in issue. Evidence given by expert scientists tending to show that the design or construction of a particular nuclear plant included faults which could physically cause the plant to emit harmful radiation or to melt down must be considered evidence tending to show defendants' acts were reasonably necessary, and therefore squarely meets the test of relevance when applied to defendants' claim of justification.

The actual relevance of the evidence notwithstanding, however, the motion *in limine* is also a procedurally unjust method by which to accomplish exclusion. The defendant has no obligation to make any presentation to the court whatsoever, and is entitled to a directed verdict of acquittal, unless and until the prosecution has first presented a sufficient case against him. The due process right, the right to trial, and the right to be presumed innocent, taken together, can mean nothing less. The hearing of the motion *in limine* effectively compels defendant to state the nature of his defense before the state has made out a *prima facie* case. In so doing, it violates the defendant's basic procedural rights.

Even if there was no procedural injustice, the relevance of evidence cannot fairly be determined or ruled upon in a criminal matter prior to trial. The state's allegations in its complaint or indictment do not establish a fence line of facts beyond which the defendant may not go in the presentation of his defense. The defendant, if he choses, may do more than deny. The defendant

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lenge the sufficiency of a proffered defense. Commonwealth v. O'Malley, 14 Mass. App. Ct. 314, 323-25, 439 N.E.2d 832, 838 (1982).

106. FED. R. EVID. 401.

is entitled, at a minimum, to present evidence related to any issue the state has raised in its case, even without regard to the appearance of that issue on the face of the state's complaint.

Further, even if the evidence were irrelevant, and its irrelevance could be determined before trial, and without procedural injustice, irrelevance, as suggested above, is not proper grounds for grant of the motion *in limine*. Prejudice may be, yet no appellate court upholding a motion *in limine* in a protest justification case has described any likely jury prejudice in its opinion. All of the reported decisions name "irrelevance" as reason for the motion.

Finally, exclusion of the evidence in justification cases disserves the fundamental purposes of law. If the "whole law is based on necessity," as Williams declares,[107] it is significantly because the law serves society's need for an alternative to the resolution of questions by resort to the method of violence. Violence, however thoughtless, unlike the contemporary judicial system, does not refuse to entertain particular claims, and it is procedurally simple. Exclusion of the evidence in justification cases is a way of forcing the resolution of such issues toward less reflective and considerate methods than judicial hearing. Basic to the law, however, is the common effort to become generally emancipated from unreasoned solutions to societal problems.

Other social needs the law must serve are education and description. Society requires that its members be given clear and convincing notice of the division between acceptable and unacceptable behavior. Very little is done to convince the public that a particular behavior is of the sort that is clearly unacceptable if the court has refused to hear the reasons that those who are accused of committing that behavior would advance on their behalf. The distinction created is no longer that between acceptable and unacceptable behavior, it is instead between the acceptable and the unexamined. Further, the observant public suspects that the court refuses to hear the evidence precisely because the evidence is true, that denial of defendants' right to present evidence is what, in psychiatric parlance, would be called a "neurotic" denial.

The legal syllogism at the core of the question, however, is simple and indisputable: The objective reasonableness of defendant's act is properly in issue; all evidence having any tendency to prove or disprove a fact in issue is relevant; all relevant evidence is admissible; therefore, evidence tending to prove or disprove the objective reasonableness of defendant's act should be admissible.

Yet it is clear that law and logic do not motivate all of the courts that have considered the issue. The sort of inspiration which guided the trial court in *United States v. Seward*[108] may be seen in the following statement by the court:

> I will let any defendant who cares to testify that the defendant did not think he or she was violating the law, but I won't let them [sic] give any reasons. I won't let them give any arguments. But if they wish to testify to the lack of intent, they are more than welcome to do so. I am not going to let them explain why.[109]

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107. *See supra* note 102.

108. 687 F.2d 1270 (10th Cir. 1982).

109. *Id.* at 1277.

VII. The Necessity Defense Is Not Based Upon Breaking the Law

The fact that these defendants are protesters notwithstanding, a distinction may properly be drawn between cases asserting the justification defense and cases of civil disobedience. In both instances a provision of the law is willfully broken. Those who act in civil disobedience argue that their moral duty compels them. Those who claim the defense of justification, however, argue that in addition to its moral force, their conduct is specifically permitted by a separate provision of the law.

Those who act in civil disobedience claim the particular law they have broken is morally offensive. Those who assert the defense of necessity may do so while conceding the propriety of the particular statute they have violated. This difference is widely recognized and remarked upon. As one law review commentary explains it:

> The doctrine of necessity is generically inappropriate to justify acts of civil disobedience, since the defendant's conduct, rather than attempting to directly avoid [sic] a specific harm . . . seeks to change a political decision of society . . . .[110]

The nuclear power plant demonstrator may freely concede that, without more, his acts would have been a punishable wrong. He says, in effect, that such wrong as done was necessary in the light of the fact that he was being threatened with irradiation.

The distinction, of course, is not perfect and rigid.[111] But the claim of necessity has a different thrust than that of civil disobedience. The person who claims necessity says, in effect, that every person in the society, were he to be presented with the same situation and to realize it, would do as the defendant did and that the existing law of society says that he acted rightly. The person who acts in civil disobedience agrees that present society will condemn what he has done, but claims that society's condemnation is morally wrong.

The distinction is not obliterated because defendants who assert they were justified may be "protesters" or may have motives to institute social change that would correspond to the aims of civil disobedience. It cannot be said that once wishing an enemy would die, precludes any rightful claim to self-defense one would have when he comes and points a loaded gun at one's head. Similarly, although defendants may long have desired that the resources which go into nuclear plants be used for something else, they are not thereby prevented from claiming they are harmed by the present operation of a particular nuclear installation.[112]

One of the reasons the superior court in *Capitolo* was able to hold that

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110. Tiffany & Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DEN. L. J. 839, 844 (1975).

111. The distinction between the "facts" and "law" in any case is well known, not perfect and rigid. The sit-in demonstrator at a segregated lunch counter might say his action was made necessary by the fact that he was being treated differently because of his race, and that a separate provision of the law, the fourteenth amendment to the Constitution, permits his present action.

112. For a discussion of the settled law concerning this principle see 2 F. WHARTON, CRIMINAL LAW § 129 (1932). "The fact, however, that an attack has been expected does not preclude me from repelling it when it comes." *Id.*

defendants should be permitted to present evidence was that the court understood the difference between civil disobedience and justification reasonably well in its opinion. Judge Spaeth explained:

> To characterize appellants' trespass an act of civil disobedience confuses the *effect* of an act with its *legal nature*. To be sure, a trespass committed under religious, or other individual moral, compulsion may have the same *effect* as a trespass committed under a claim of legal justification: both may lead to "a heightened public awareness" of a particular situation. But that does not mean that the *legal nature* of the two acts is the same. A kills X and B kills Y. The effect of the act of each is the same, but it cannot be determined whether each, or either, is a murderer without knowing why each killed. For the trial court to dismiss appellants' trespass as directed toward heightening public awareness of the dangers of nuclear power was to ignore appellants' offer of proof.[113]

In addition to the difference in legal status, a difference may be found between the kind of behavior justified by necessity and behavior we would describe as "civilly" disobedient, a label which we would not attach to acts of rebellion or terrorism. Many commentators, when describing civil disobedience, discuss the non-violent, careful, loving way in which disobedience must be done. Since civil disobedience is, indeed, law breaking, there is a special meditation with which it must be done if it is to be understood by others.[114] Considerable violence, however, may be justified and necessary as a matter of law. The law permits its subjects to kill in justified self-defense, and such killings cannot always have the generous and pacific qualities of legitimate civil disobedience.

That the law should permit exception to the literal terms of the law should not be surprising. Throughout all of recorded history, the law has contained provisions which specifically exempt conduct that would be sanctioned against by other rules. For example, all law has permitted self-defense.[115] In all civilized societies, going back to the earliest Hebrews and Hittites, it has been unlawful to kill. It has never been illegal, however, to kill to save one's own life when it has been genuinely threatened.

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113. Commonwealth v. Capitolo, 324 Pa. Super. 61, 83, 471 A.2d 462, 474 (1984).

114. Several articles and commentaries on civil disobedience have recently appeared, in addition to many from the late 1960's and early 1970's. The opportunity to address that body of literature directly cannot, unfortunately, be had here. One might note, as an example, Rosen, *Civil Disobedience and Other Such Techniques: Law Making Through Law Breaking*, 37 GEO. WASH. L. REV. 435 (1968). The person practicing civil disobedience must "undertake his acts of protest expecting that he will be subjected to whatever sanctions are provided to enforce the laws he violates in his protest." *Id.* at 455; *see also* Smith, *The Legitimacy of Civil Disobedience as a Legal Concept*, 36 FORDHAM L. REV. 707 (1968).

115. An examination of Hebrew, Greek, Roman, early Lombard, Visigothic, Sicilian, Romanian, as well as early English law demonstrates that this is not a mere generalization. *See, e.g.*, A. PHILLIPS, ANCIENT ISRAEL'S CRIMINAL LAW, 92ff (B. Blackwell ed. 1970); 2 PLATO, LAWS 257 (R.G. Bury trans. 1984); LIBER AUGUSTALIS (J. Powell trans. 1971) (Book I, Title XVI); P. TOPPING, FEUDAL INSTITUTIONS AS REVEALED IN THE ASSIZES OF ROMANIA 13 (U. Penn. 1949).

The recently reported opinions attempt to divorce the modern cases from the former suits on the basis of purported material differences in the circumstances which occasioned the necessity.[116] Apparently, there is to be one law applied, for example, to the necessity created by a volcanic eruption, which could not be applied to the necessity brought about by a nuclear plant meltdown. Such a distinction is quite flimsy, and its weakness is apparent with a little thought. There has not been one law of self-defense for those who have been threatened by a rifle and another for those who are confronted with a pistol. There has not been one law of larceny for those who steal televisions and another for those who steal silverware. There is no reason the law should be bifurcated upon such incidental circumstances. Nor is there reason to draw narrow distinctions between that which may constitute necessity and that which comprises duress, or between what will be labeled a "justification" and what will be called an "excuse."[117] Because one justification may be available should not mean any other is, per se, unavailable.

The modern reality is that we have conquered many of the effects of nature that were frightening to our forbears; we have built against the ravages of storms, but in so doing we have revealed great dangers of our own making. The law that can recognize only past threats is, at best, archaic.

There is a second line of argumentation which could be adopted in some of these cases, and which would address the theory of trespass. The legal claim of trespass, from the time of the early common law, proceeds upon a two part notion: 1) that the plaintiff has an exclusive right (typically to entire physical possession of land) that society will recognize and the law will protect, and 2) that the defendant has somewhat deprived the plaintiff of that right.[118] There are many modern trespass/justification cases in which defendants argue that the complaining agency has not sufficiently proved its title to the premises or has not proved notice, and therefore has not made out all the elements of a case.[119] All of these arguments have failed. To the courts they have sounded in uninspiring technicalities. However, a slightly different argument, saying not that the complainant lacks standing upon the technical grounds of ownership or title, but that the complainant is without a right that society will recognize, should be thoughtfully considered.

Discussing "justifiable" trespass, Blackstone states that some things can

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116. *See, e.g.*, State v. Olsen, 99 Wis. 2d 572, 576, 299 N.W.2d 632, 635 (1980). The court stated that "[s]torms, fires and shipwrecks can rarely be controlled, often only after the fact. The transportation of spent fuels can be and is controlled." *Id.*

117. The distinction has been invested with great significance in some academic writing, particularly in the work of George Fletcher of U.C.L.A., but has been generally ignored in legal practice. Something of a short-form discussion of the issue of the "status" of necessity may be found in Conde, *Necessity Defined: A New Role in the Criminal Defense System*, 29 U.C.L.A. L. REV. 409 (1981).

118. *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW 40-53 (1959).

119. *See, e.g.*, State v. Green, 5 Kan. App. 2d 698, 623 P.2d 933 (1981) (defendants sat on train tracks, argued tracks were a public way not owned or possessed by Kansas Gas and Electric); Commonwealth v. Averill, 12 Mass. App. Ct. 260, 423 N.E.2d 6 (1981) (defendants occupied a park, owned by Boston Edison, but open to the public, argued that Edison's "ownership" was insufficiently proved).

be done on the property of another, and are not to be considered trespass.[120] The idea is different from the notion of justification that was previously discussed in this article. Rather than conceding that the act committed was a trespass, and then claiming it was justifiable and therefore should not be punished, the notion is that certain acts, because they are justifiable, (or useful, valuable, or worthwhile) are not trespass. Blackstone states that the reversioner may enter property to examine for waste. The act is not deemed a trespass because of its purpose. Similarly, it could be argued, by reason of its purpose, particularly its public purpose, the nuclear plant demonstration is not a trespass. It could also be argued that our society should not recognize a right against demonstrators in public utility nuclear plant operators.

The suggestion may not be so ridiculous as it might at first sound. The law of trespass which regards private land bounded by a close, not to be broken, comes from a time when there was very little that could be done on one parcel of private land that would impinge upon the well-being of any neighbor.

VIII. The Courts Are the Appropriate Institution Within Our Scheme of Government For Defendants' Presentation of Their Case

The argument that the defense of justification has been precluded either because the legislature has once acted or, in the more extreme form of the argument, because the subject matter of the case concerns an area in which the legislature is empowered to act, further misinterprets the values and virtues of our system of justice. Not only are there rights the legislature must not infringe upon and results the legislature should not produce, but also the legislature cannot be expected to address the particularities specific to instances, conditions, and events, even if the particular circumstances could have the far reaching effect that a design defect in a nuclear power plant can have. In our system we have traditionally placed the responsibility for the determination of the specific facts in a particular matter in the courts. Recently, we have transferred to bureaucracies some of the traditionally judicial tasks, but we maintain, at least theoretically, that the work of the bureaucracies is, upon particular cases, nevertheless still subject to judicial review.

Judicial review may ultimately be what defendants claiming justification seek. We should not close our eyes to the reality that these people are protes-

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120. 3 W. Blackstone, Commentaries 212 (1983).

> [E]ntry on another's land or house shall not in those cases be accounted trespass: as if a man comes there to demand or pay money, there payable; or to execute in a legal manner, the process of the law. Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked . . . . So a landlord may justify entering to distrein for rent; a commoner to attend his cattle, commoning on another's land; and a reversioner, to see if any waste be committed on the estate; for the apparent necessity of the thing. [fn: 2 Roll. Abr. 545.] Also it hath been said, that by the common law and custom of England the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of trespass: which humane provision seems borrowed from the mosaical law. [fn. Glib. Ev. 253. Trials *per pais* ch.15] In like manner the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land; because the destroying of such creatures is profitable to the public.

Id.

ters, that they are saying that something wrong has been done and they would like the court's participation in their effort to right that wrong. Such ultimate aims, however, clearly are not so abusive that we should refuse to recognize that these defendants ask the courts to perform the traditional judicial function in a way that cannot be relegated to regulatory agencies. Whether seen as demonstrators or protesters, these defendants ask the court to adjudicate the specific facts of a case, and to make a societal, not a governmental, determination regarding those specific facts. The court and the jury are the one means available for making that kind of a determination. The Commentaries to the Model Penal Code clearly recognize that particular cases can be decided only by adjudication, and advocate that the issue of necessity, when genuinely presented, be tried to a court.[121]

It is fundamental to our law and basic to our sense of justice that only those who are genuinely culpable can be called criminals and subjected to criminal sanctions. It is not possible to achieve a precise definition of culpability, but in our system of justice we rely on juries to recognize culpability and to acquit when appropriate. Criteria of culpable conduct is given by Wechsler, Reporter for the American Law Institute for the Model Penal Code, in a law review article written prior to the drafting of the code. Wechsler describes two kinds of behavior he believes should be sanctioned:

> (1) conduct that is so harmful that the social force should make an effort to deter it by its condemnation under threat of penal sanctions; and
> (2) conduct that shows the individual sufficiently more likely than the rest of men to be a menace in the future to justify official intervention to measure and meet the special danger he presents.[122]

Correspondingly, confidence in society as an enterprise, in its decency, in its justice, depends upon acquitting those who are not genuinely culpable. The question, simply stated, is whether the jury determines that the defendant's behavior is culpable by employing Wechsler's, or some other equally suitable criteria. Notwithstanding arguments about "jury nullification," every defendant is entitled to the simple jury instruction: that the essence of the jury's function is to decide whether the defendant has indeed acted "wrongly." Society has an interest in this basic understanding of the jury's role even if for no other reason than to render guilty verdicts. The jury can only fairly be asked to decide culpability in these cases after being informed by a discussion of the

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121. I MODEL PENAL CODE AND COMMENTARIES art. 3, at 17 (1985).

> In the second place, the lack of precision in the general rule is unavoidable if the rule is not to be improperly constricted; the situation is akin to such concepts as recklessness and negligence, which also call in part of weighing of conflicting values. Deep disagreements are bound to exist over some moral issues, such as the extent to which values are absolute or relative and how far desirable ends may justify otherwise offensive means. Thus, even when a specific legislative resolution is theoretically possible, it may be quite unattainable in practice. *The alternative of submitting such issues to adjudication, as they arise in concrete cases, therefore has much strategic virtue.*

Id. (emphasis added).

122. Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

legal principles of justification.[123]

However the jury may be instructed; the defendants in a typical nuclear power plant trespass case will likely face a very difficult burden of persuasion.[124] Prejudice, particularly "political prejudice," will work against these defendants. If the prevailing political structures, official or unofficial, were prejudiced in their favor, they would not need to be conducting protests.

Defendants' act does not superficially seem appropriate. Judge Johnson, of the Superior Court, dissenting in *Capitolo*, puts forth his sense of the apparent strangeness of defendants' argument rather well, saying:

> I remain unconvinced that one *avoids* low-level radiation by journeying from Pittsburgh, New Castle, Ambridge, or Beaver Falls to the Borough of Shippingport with the express intention of situating oneself on private premises where nuclear reactors are located.[125]

It is a sensible argument, "If you are threatened by radiation, why get closer to its source?"

To that argument defendants must respond that the nuclear plant exerts substantially as great a threat at the distance from which defendants have come, and yet that they could not satisfactorily defend themselves from the threat but needed to come to the plant site and trespass upon it in order to avert the harm.

However carefully juries are selected, the trial will likely be held in a court located near the plant site, and the jurors there will, by and large, tend to have some predispositions. If the jurors don't see the demonstrators entirely as carpetbaggers, they may perceive defendants as having come from remote places to tell them, in effect, how to run their town and what industries to operate in it. Even if the jurors cannot be excluded for cause if they are employed by the plant, they may be biased by having received proximate economic benefits from the construction of the plant. A "local appliance salesman" juror may, for instance, be selling more dishwashers than he otherwise would to people who have had jobs and made money pouring concrete for the reactor building. In addition, the number of people who are willing to admit that they have been ignorant of a grave risk is small. The defendants are, in

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123. Possible instructions to the jury in a justification case are presented in the conclusion to this Article.

124. The commentaries to the MODEL PENAL CODE disfavor placing the burden of proof on the defendant to prove justification, and would instead have the prosecution prove, beyond a reasonable doubt, that defendant was not justified. The reasonable doubt standard is fundamental to our law, and should certainly be required for all elements of the prosecution's prima facie case. It should not be eroded. Nevertheless, in most justification cases, the defendant is in a better position to describe the reasons for which he was justified, than is the prosecution. Further, the "fair preponderance of the evidence" standard is more compatible with the right of defendant to take the facts as they reasonably appeared to him and apply the "balancing of the harms" test of necessity than is the doubt standard. The person who takes a fire extinguisher to put out a small fire may have properly balanced harms, but he may not have been *convinced* that the fire would go out of control and that the extinguisher was necessary.

125. Commonwealth v. Capitolo, 324 Pa. Super. at 110, 471 A.2d at 487 (Johnson, J., dissenting).

effect, saying that the jurors and their community are being exposed to the same, or greater, hazards as the defendants, but without having had the sense to realize it or accomplish a remedy. Everyone surely likes to think he knows what he is doing. The juror who is raising his family in a home only a few hundred yards away from the plant will be no exception.

This sort of amorphous prejudice cannot be eliminated from the jury box, and therefore, any of the accepted methods used to achieve impartiality would be futile. The jury is intended, in our system of law, to answer on behalf of society. In the present context it is sufficient to note that giving the case to the jury is by no means giving the case away.

IX. The Very Evidence Refused in Trespass/Justification Cases is Admitted in Other Cases

Merely because particular evidence is admissable in a tort action does not mean it should also be admissible in a criminal action, or vice versa. However, the studied and persistent refusal of the courts to permit, in criminal cases, the introduction of evidence regarding the effects of the operation of nuclear power plants is so often accompanied by bald, conclusory assertions. There does not seem to be any regard paid to prior findings by the same court or others. To the criminal trespass defendants the courts say: "The plant where you staged a sit-in is not imminently dangerous."[126] However, the same plants, when actually examined by courts, have been found otherwise.

Perhaps the best known case in which the hazards of nuclear power were found and described by a court is *Carolina Environmental v. United States*.[127] In that case the Price-Anderson Act was determined to be unconstitutional. The United States Supreme Court reversed the decision on direct review.[128] However, the Supreme Court did not determine the district court's findings of fact to have been incorrect. The district court found:

> Operation of the nuclear power plants will have *immediate* or present effects and *potential* or future possible effects on plaintiffs and their environment.
>
> *Immediate Effects*
> Immediate effects include the following:
> 1. It will, despite the stout construction of the containment building, produce immediate additional, nonnatural radiation . . . .

126. *See supra* note 70-75 and accompanying text.

127. 431 F. Supp. 203 (W.D.N.C. 1977).

128. Duke Power Co. v. Carolina Environmental Study, 438 U.S. 59 (1978). A questionable result, particularly when compared to the opinions and votes in Silkwood v. Kerr-McGee, 464 U.S. 238 (1984). One may suspect that *Carolina*, if heard today, rather than producing the unanimous result it did, would be decided 5 to 4, in any event, the concurrences from which the majority was built would not genuinely agree, and the substance of the dissents would range from: the new Chief Justice dusting off and propping up *Louisville & Nashville R.R. Co. v. Mottley* in order to deny jurisdiction, to Justice Powell finding another "disquieting example of how the jury system can function as an unauthorized regulatory medium." *Silkwood*, 464 U.S. at 283 (Powell, J., dissenting).

> 2. It will produce a sharp increase in the temperature of several square miles of two lakes . . . . [water temperature over 95 degrees Fahrenheit on warm days in summer].
>
> 3. It will produce present fear and apprehension, objectively reasonable, on the part of the plaintiffs and others as to the effect of the increased radioactivity in air, land, and water upon them and their property, and the genetic effects upon their descendants.
>
> 4. It will interfere with the normal use of the waters of the Catawba River.
>
> 5. [It] threatens to . . . reduce the value of neighboring lands.
>
> 6. [There is a] distinct possibility that the plaintiffs may suffer a taking or destruction of their land or their health or their property or their lives, all without . . . compensation.
>
> *Potential Effects*
>
> Core melt could penetrate the earth and reach underground water courses and local rivers . . . pressurized breach of the containment building and discharge of large volumes of hot radioactive dust or vapor . . . cancers, thyroid illnesses, genetic effects . . . deaths.[129]

Upon these and other similar determinations, the opinion states: "The court finds as a fact that the probability of a major nuclear accident producing damages exceeding the $560,000,000 limit of the Price-Anderson Act is not fanciful but real."[130]

When the courts in *Warshow, Best, Dorsey, Green, Capitolo*, and the many similarly-decided cases upheld the allowance of motions *in limine* to prevent the introduction of evidence congruent to that found as facts by the federal district court in *Carolina Environmental*, those courts sustained the trial court result by finding, without the introduction of any evidence, that the nuclear plants in question were not imminently dangerous, explaining: "To be imminent, a danger must be, or must reasonably appear to be threatening to occur immediately, near at hand, and impending."[131] Measured by precisely that standard, the court in *Carolina Environmental* must be said to have found the nuclear plants there in question posed an imminent danger.

The district court's conclusions, both concerning the danger of nuclear power and the extent to which Price-Anderson Act fostered plant construction which otherwise would not have occurred were not wildly aberrant results, obtained by the court alone. In an article in 1973, Professor Green analyzed the risks of nuclear plant installations and made an effort to determine who had been called upon to bear them. Green concludes:

> Price-Anderson encourages and permits industry to employ an extremely hazardous technology, fraught with the potential for catastrophe . . . . [T]he public is forced to accept the hazard in the same manner as it is forced to pay taxes to further [the] public

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129. *Carolina Environmental*, 431 F. Supp. at 209-10.

130. *Id.* at 214.

131. *Warshow*, 138 Vt. at 25, 410 A.2d at 1002 (citing State v. Huett, 340 Mo. 934, 950, 104 S.W.2d 252, 262 (1937)).

> interest. Significantly, however, the public is compelled to bear this risk, however remote, which industry itself is not prepared to bear, and is offered only the solace that, if a catastrophic accident in fact occurs, a fund exists . . . .[132]

Perhaps it is not extraordinarily significant that a federal district court and the diverse collection of judicial forums that have heard trespass/justification cases, could emerge with differing factual results. However, when the United States Court of Appeals for the Tenth Circuit finds, on the one hand, that sufficient evidence concerning hazards resulting from the operation of the Rocky Flats Nuclear Plant was properly introduced in the federal district court precluding summary judgment against plaintiffs in a civil nuisance action in 1983,[133] and, on the other hand, having decided in 1982, that defendants in trespass/justification cases[134] could not present evidence of the same hazards produced by the same Rocky Flats plant, one must suspect indeed that a kind of court politics, rather than the principles of law, has begun to guide determinations of the admissibility of evidence. The 1983 opinion of the district court in the civil suit by the surrounding landholders finds, for example, that several plutonium fires had occurred at the Rocky Flats Plant, and that there is "a significant correlation between cancer incidence in the Denver area and exposure to radioactivity from the Rocky Flats Plant."[135] A motion *in limine* excluded evidence tending to show exactly such facts in the same district court in the trespass cases *United States v. Seward, United States v. Thompson*, and the other trial-group companion cases.[136]

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132. Green, *Nuclear Power: Risk, Liability, and Indemnity*, 71 MICH. L. REV. 479, 506 (1973).

133. McKay v. United States, 703 F.2d 464 (10th Cir. 1983).

134. United States v. Seward, 687 F.2d 1270 (10th Cir. 1982) (affirming, in effect, the refusal to hear evidence in United States v. Best, 476 F. Supp. 34 (D. Colo. 1979)).

135. The Good Fund Ltd.-1972 v. Church, 540 F. Supp. 519, 525 (D. Colo. 1982), *appeal sub nom.*, McKay v. United States, 703 F.2d 464 (10th Cir. 1984). One may also find a court summary of evidence concerning the hazards produced by Rocky Flats in Johnson v. Jefferson County Bd. of Health, 662 P.2d. 463, 467 (Colo. 1983) (en banc).

> [The court] uncovered evidence which . . . [indicates] . . . an explosion and fire took place at the plant which blew out hundreds of industrial filters and released large amounts of plutonium, an event which he claimed was largely unreported. His study of local cancer rates led him to conclude that radiation from the plant had caused an excess rate of 24% in males and 10% in females for all types of cancer.

Id.; *see also* Krumback v. Dow Chemical Co., 676 P.2d 1215 (Colo. App. 1983).

> Leroy A. Krumback worked from January 1959 until December 1973 at the Rocky Flats Nuclear Weapons Plant, a Dow Chemical Company facility. During the course of his employment, Leroy was exposed to over 45 rems of external radiation. He was also involved in a number of industrial accidents as a result of which he sustained internal radiation contamination. Leroy retired from Dow Chemical in December 1973. On January 7, 1974, he died of cancer of the colon.

Id. at 1217.

136. See the description and discussion by the appeals court of the motion *in limine* granted by the trial court in United States v. Seward, 687 F.2d at 1273.

X. Recognition of the Defense of Necessity Ultimately Works to Increase the Legitimacy of the Law and Improves the Judicial Process

If the jury does find defendants' acts necessary and does acquit in a particular case, that result will not be, as it is so widely feared, "open season for terrorism."[137] The terrorist, unlike the typical nuclear plant protester, usually commits substantial violence and wreaks considerable harm. With that he will be unable to advance the claim his acts were clearly outbalanced by a specific harm he was trying to avert. The nuclear protester's claim that he was relatively peaceful while trying to avert a great harm is not so incredible. The law clearly does recognize a right not to be irradiated,[138] or to have one's property, possessions and surroundings become radioactive. The person who trespasses at a nuclear plant site makes a claim, whether or not actually true which is cognizable as a matter of present law. His defense must be heard.

Those who say that the necessity defense, when asserted, would serve to "legitimate the illegal" are exactly wrong. The law of necessity is instead, like the rest of our law, a method for discriminating between acts which are lawful and acts which are not. As self-evident as such a statement may seem, no more important single point can be made. There is nothing legally justified about terrorism, and our law of justification serves precisely to reveal that as true.

This does mean that those who damage or destroy abortion clinics in protest against them may fairly be considered differently from those who sit-in at a nuclear installation. First, many abortion clinic protesters proceed by bombing, thus threatening greater, rather than lesser, harm, and therefore forfeiting the benefit of the defense. More importantly, however, the law does not at present recognize a legitimate right to prevent other unrelated persons from having an abortion. Legally, irradiation is an injury in a sense that a chosen abortion is not. The declaration that the defense of necessity is "unavailable," therefore, may make more sense in abortion clinic protest cases.[139] One might suggest, however, that the motion *in limine* to exclude offered evidence is not appropriate in those cases either. All other things being equal, it is better to hear evidence than to prejudge it. Nevertheless, defendants in such cases usually will be subject, after having presented their claimed defense, to a directed verdict motion (or a "required finding" as it is called in some jurisdictions), because as a matter of presently decided law, one is not injured when other persons have abortions. A court may legitimately, on these grounds, rule that someone who has bombed a clinic may not have a defense of "justification by

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137. *See, e.g., Capitolo*, 324 Pa. Super. 61, 98, 471 A.2d 462, 481 (Wieand, J., concurring in part and dissenting in part).Today we are concerned with trespassing demonstrators; tomorrow we may be required to deal with fanatic terrorists." *Id.*

138. *See, e.g.*, Allen v. United States, 588 F. Supp. 247 (D. Utah 1984); Maughan v. SW Servicing, Inc., 758 F.2d 1381 (10th Cir. 1985).

139. *See* Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981); Gaetano v. United States, 406 A.2d 1291 (D.C. 1979); People v. Krizka, 92 Ill. App. 3d. 288, 416 N.E.2d 36 (1980); Sigma Reproductive Health Center v. State, 297 Md. 483, 467 A.2d 660 (1983); Grogan v. United States, 435 A.2d 1069 (1981); *see also*, Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. Cin. L. Rev. 501 (1979).

reason of abortion prevention" go to the jury.

The law of justification, in general, and the law of necessity in particular, do not legitimate the illegal, but they do work to demonstrate the gross insufficiency of legal "positivism," as it is often called. "Positivism" here stands for the proposition that the only determinative law is contained in rules in the form in which they are specifically enacted. Positivism is a kind of 'literalism.' Positivism, in the strict form, interprets a law which says that it is a crime to break into another person's house as meaning that it is equally a crime to break into his house to save the life of his child. Our law is not so rigid, although some of our courts may be.

Our society has a great interest in maintaining the flexibility and openness of our law. The questions which courts today must decide demand a law which is much more sensitive and sophisticated than positivist structures could ever hope to provide. Equally, modern realities demand that the decisions of courts be recognized as legitimate, and the court that closes itself to arguments of justification will seem to have so narrowed its purview as to lose the respect of its audience.

The audience to which the court presents its decisions is necessarily wide, because there is so much law and we are each so much affected by it. No court can long afford to claim narrow irrelevancies to so many different interests. Courts, in the modern world, have a didactic function, and have a responsibility to conduct a dialogue in which particular and precise questions are answered accurately and honestly. Appellate courts, especially, which seem so often to complain about the size of their dockets, must realize that no method can better serve to reduce their workload than to attain responsible and exemplary results in the cases they hear. Such results are not easily achieved, but upholding motions to exclude evidence *in limine* in cases such as these, typically a bad result in itself, makes any other useful result that much more unlikely.

Because defendants' acts may be principally symbolic does not, of itself, prove those acts unnecessary. The converse may be true. Some defendants may claim that the danger of nuclear plants is not so much that they exist but that they are so little understood. Symbols are important because of their common meaning. These defendants would claim that their symbolic acts are as meaningful and necessary as the ringing of an old-time fire bell, that they are sounding the same sort of alarm that was once utilized to keep people from burning while asleep in their beds. Denied the right to present the defense, judicial intrasigence is the symbol made prominent instead.

Defendants frequently come to court prepared to discuss with a great deal of scope, attention and precise scientific detail, the harms posed by the threat which they claim justifies their actions. The court is somewhat less interested in those who do not arrive so well prepared, but does itself a great disservice by turning away those who have adequately educated themselves and are willing to discuss what they have learned in the legal forum.

No one can promise that denial of the next motion *in limine* will forestall a nuclear accident of the kind that occurred at Three Mile Island or at Chernoble. However, a more open, more respectful, and more serious policy regarding the admission and consideration of evidence in justification cases, however, will go a long way toward improving the quality of our law and our society.

XI. Proposed Jury Instructions

Conversations with members of the Massachusetts judiciary reveal that one of the difficulties with proper handling of justification cases concerns instruction of the jury. It is necessary to avoid suggesting to the jury that the defendant was entitled to do anything the defendant might have thought justifiable. Equally, the instruction should be presented in terms comprehensible to persons of ordinary understanding who would comprise the jury. Perhaps the situation can be best addressed by the combined effect of an instruction at the commencement of trial and another as the jury is given the case for deliberation.

Instructions need to be tailored to each case. One cannot create or rely on a 'model,' but one may suggest an outline from which others might want to work. At the opening of trial:

> The court has been informed by the defendant in this case that the defendant will offer a defense of justification. I will discuss the law of justification with you in detail, along with other law relevant to this case, at the close of trial. Now, before trial begins, however, I would like briefly to outline some of the legal requirements of the defense. The defense is, indeed, legally subject to these requirements. We do not sit here to hold political referanda or to conduct small-scale popularity polls. This court sits to decide matters of law and this case but before the court should be decided justly, according to law. By describing some of the requirements of the justification defense I hope to inform you concerning your duties as jurors in this case, but I do not intend to prejudice you in your performance of those duties. By your oath, you have agreed to decide this case fairly, and to hear all of the evidence presented with an open and conscientious mind.
>
> All law throughout all of recorded history has contained provisions which exempt from the sanctions of the law particular conduct that contravenes the express provisions of the law, but which is not wrongful conduct. Technically, to push another person, using, for example, one's hands, is to commit a battery, and a battery is an illegal act. But it is not a battery to push someone out of the way of an oncoming freight train if that is the only reasonable means by which that other person can be saved from being run over by it.
>
> Our state legislature has enacted a statutory provision[140] which considers what kinds of acts may be exempt from the sanctions of the law because they are justified. I would like to read it to you now.
>
> (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
>
> (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

140. This assumes enactment of Model Penal Code § 3.02.

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

If, during the present trial, the defendant introduces evidence addressed to the terms of this statute, I will discuss this law more fully with you at the close of trial after you have heard all the evidence. I only note at this time that after the prosecution has presented its case in chief, by which the prosecution seeks to show beyond a reasonable doubt that defendant committed each and every element of the offense charged, the defendant is entitled to introduce evidence by which he seeks to prove that if he committed the offense charged, he was justified in committing it, according to the terms of our law . . . .

Then, assuming that the defense has indeed proffered evidence relating to justification, a more complete instruction is included in the charge to the jury. Again, here follows a possible approach; again it is emphasized this is a method more than a model, and that models cannot responsibly be provided.[141]

As you have heard, the defendant has offered evidence addressed to the issue of justification, and, as I have indicated I would at the commencement of trial, I will now discuss with you the law regarding justification somewhat more fully.

Our law seeks to punish only those who have acted culpably, those who have done something wrong. The very thrust of the defense of justification is that, although the defendant may have done something that violated the literal provision of the law, what he did was not wrong, because in the situation in which he found himself, violating the law in the way in which he may have violated it wrought less harm than adherence to the literal terms of the law. Therefore, he says, he should not be punished. Obviously, we must all seek to be guided by the provisions of our law in all ordinary circumstance, and thus the situation in which it is better to break the law than obey it must be unusual. The law would disintegrate were we to permit it ordinarily to be broken. Yet, too, the law would fracture from brittleness if it were so inflexible as to make no accomodation when presented with extreme and unusual

141. Since there are some differences in state law regarding the scope of presumptions and the allocation of burdens of proof in criminal cases, although the states are bound by the constitutional limitations set forth in *Mullaney v. Wilbur* and *Patterson v. New York*, we arbitrarily assume that, in the particular jurisdiction, defendant has the burden of going forward and proving a justification defense by means of a fair preponderance of the evidence.

conditions.

By way of example, and only as an example, I would tell you of a case decided in 1608, in which a ferry, crossing from Gravesend to London, England, was beset by a storm, and the ferryman, in order to lighten the boat to survive the storm, threw some of the cargo overboard. The ferryman was breaking the law regarding his keeping of the cargo. Yet the lives of everyone on the boat were at stake, and the ferryman was found to have been justified by reason of necessity.

Obviously, in that case, as in any case of claimed necessity, were it not for the seriousness of the threat, there would have been no justification. The ferryman legally could not have thrown the cargo overboard if he were merely in a hurry and had wanted the boat to go faster.

I should like to read again to you the statute I read to you before and which contains our modern law:

(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification does not otherwise appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section in unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

To find the defendant justified by reason of necessity, you must find, essentially, five ultimate facts. First, that defendant was faced with a real harm, not a merely speculative or uncertain harm, but a serious, impending harm. Second, that the defendant was not at fault in creating the harm, that he was not faced with a choice between evils as a result of his own prior wrongdoing. Third, that the acts committed by the defendant have not been demonstrated to have been specifically excluded from the scope of the law of justification. Fourth, that defendant genuinely believed his acts necessary, that his belief was reasonable, and held in good faith. And fifth, that defendant's acts produced less harm than the harm defendant sought to avoid by means of his acts.

The defendant is entitled to have you consider the facts of the situation as he may have shown the facts reasonably appeared to him at the time. Let me explain what that means through the use of another example — which is, again, intended only to serve as an example of this principle, and nothing more. If one person comes upon another with what, to anyone, would appear to be a loaded

gun, and points this at the other and treats it, in every respect, as if it were a loaded gun capable of firing a bullet into the other person, then that other person is entitled to defend himself as if he were faced with a loaded gun, even if it later turns out that what appeared to live bullets when he saw them in the gun were in fact dummy cartridges, which could not have seriously harmed him. Conversely, however, even though a person faced with a wooden stick may have believed it was a gun, he will not likely have reasonably so believed. Defendant's actual belief as you may find it is controlling, but it may be limited by what you find any other reasonable person in similar circumstances would believe.

The beliefs the defendant may hold are not relevant, however, to deciding whether his acts were, in fact, necessary. You, the jury, must decide whether the defendant was, in fact, justified.

You must decide that question by determining whether defendant has proved, by a fair preponderance of the evidence, that his conduct meets the terms of the law embodied in the statute. The balance of harms described in the law as I have read to you is not committed to the private judgment of the defendant. It is committed to your judgment. It is not sufficient that defendant thought himself justified. Defendant's guilt or innocence before this court shall be determined according to whether you, the jury, find as a fact that he was justified doing what you find he did, in the circumstances you find he reasonably believed himself to be.

If you find as fact that the defendant, although he be proven to have committed the offense charged beyond a reasonable doubt, did so having chosen the lesser of two evils, and that he did not cause the condition that forced the choice, and that his choice was not specifically prohibited by the legislature, then you should find the defendant not guilty. If, however, you find that beyond a reasonable doubt the defendant committed the offense charged, and the wrong perpetrated by the defendant was equal to, or greater than, the wrong you find he reasonably sought to avoid, or that he has not met the other requirements of the defense, then you must find the defendant guilty. This is our law, and upon it you must decide the facts in the case . . . .

Benjamin Reeve*

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Strategies For School Finance Reform Litigation In The Post-*Rodriguez* Era

I. INTRODUCTION

In recent years, and particularly under the Reagan administration, there has been a heightened national interest in literacy and the quality of public elementary and secondary education.[1] With this awareness has come critical examination of the problems inherent in our school systems and public focus on the causes of some of these inadequacies.[2] Some authorities have claimed that the poor levels of student achievement which have recently been brought to the public's attention can generally be attributed to lack of adequate financial resources available for education.[3]

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1. In 1981, President Reagan created the National Commission for Excellence in Education. General Education Provisions Act Pub. L. No. 90-247 (as amended 20 U.S.C. § 1233) and the Federal Advisory Committee Act Pub. L. No. 92-463 (5 U.S.C. Appendix I). One of its purposes was to study problems faced by the nation's schools. In April 1983, the National Commission for Excellence in Education published *A Nation At Risk: The Imperative for Educational Reform* [hereinafter *Nation at Risk*] (reported in N.Y. Times, Apr. 27, 1983, B6, col. 1). This often-cited study asserted that the educational foundations of American society are "being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people." *Id.* at 5. The study cited statistics pertaining to declining high school and college student achievement levels as measured by standardized tests, and soaring rates of high school student and adult illiteracy. *Id.* at 8-9. The report particularly pointed out the impact of declining levels of basic educational skills in the context of the "information age" which characterizes the present, and more so the future. The study focused on four areas in outlining its plan for reform; (1) curriculum content; (2) trend toward diminished expectations for student performance; (3) quality and quantity of time in school; and (4) teacher quality. Other well-publicized studies on the country's elementary and secondary schools which have been conducted over the past several years include: Carnegie Foundation for the Advancement of Teaching, *High School: A Report on Secondary Education in America* (1983); National Task Force on Education for Economic Growth; Education Commission of the States, *Action for Excellence: Comprehensive Plan to Improve Our Nation's Schools* (1983). For a summary of findings and recommendations of several popular studies see N.Y. Times, Nov. 13, 1983, § 12 (Fall Survey of Education), at 28.

2. *See supra* note 1.

3. This question of cost/quality relationship is highly relevant to any school financing policy discussion, and equally as controversial. *See generally* D. KIRP, *infra* note 4, at 571-74; *see also* J.

Historically, local school districts have borne the burden of providing funding for their schools.[4] More recently, states have acquired a much more significant role in funding public elementary and secondary education,[5] while a variety of federal programs have been introduced to provide aid to the nation's schools in specific ways.[6] However, most school systems have been and remain heavily dependent on local funds, primarily raised through a tax levy on local real property, for support of their schools.[7]

GUTHRIE, SCHOOLS AND INEQUALITY (1971); Hanushek & Kain, *On the Value of Equality of Educational Opportunity as a Guide to Public Policy*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY (F. Mosteller & D. Moynihan eds. 1972); Cain & Watts, *Problems in Making Policy Inferences from the Coleman Report*, 35 AMER. SOC. REV. 242-49 (1970).

4. D. KIRP, M. YUDOF, T. VON GEEL & B. LEVIN, EDUCATIONAL POLICY AND THE LAW 566 (2d ed. 1982) [hereinafter D. KIRP]; *see also infra* note 8. Kirp notes that until the 19th century, quality education was primarily found at private academies. Because of the inadequacy of the public schools which existed, some public education reformists called for each state to administer a general tax for its schools. However, what evolved in all states was the requirement that local communities tax residents for school funding; control of public education was thus established at the local level. *Id.*

5. D. KIRP, *supra* note 4, at 566; *see also* P. BURRUP & V. BRIMLEY, FINANCING EDUCATION IN A CLIMATE OF CHANGE 125-52 (3d ed. 1982); *States Widen Role in School Financing*, N.Y. Times, Nov. 13, 1983, § 12 (Fall Survey of Education), at 30 [hereinafter *States Widen Role*]. The N.Y. Times survey indicated that as of 1982-83, over one-half of public schooling expenses came from state governments. *Id.* at 30.

6. P. BURRUP & V. BRIMLEY, *supra* note 5, at 158-79. Despite the early Northwest Ordinance of 1787 (requiring new territories to set aside land for school construction and making provision of public education national policy), the federal role in public elementary and secondary education has been minimal until recently. D. KIRP, *supra* note 4, at 566. The mid and latter part of this century, however, has witnessed an observable trend of an increased federal role in the public elementary and secondary schools, characterized chiefly by special programs and grants to states and local districts, and ensuing controversy regarding the proper role of the federal government in education. P. BURRUP & V. BRIMLEY, *supra* note 5, at 158.

A limited overview of some significant federal legislation follows. The 1958 National Defense Education Act, 20 U.S.C. § 401, provided assistance to state and local school systems to strengthen instruction in science and math, *inter alia*, and also provided for improvement in state school counseling and testing services. U.S. Dept. of Education, National Center for Education Statistics; *Digest of Education in Statistics* 1983-84, 166 (1984) [hereinafter *Education Statistics*].

The 1965 Elementary and Secondary Education Act, 20 U.S.C. § § 236-46, 351-55, 441-592, 841-48, 880-900 (1965), authorized grants for elementary and secondary school programs for children from low-income families, for school libraries, textbooks and other instructional materials, and provided for remedial centers and other services for the schools. *Education Statistics*, *supra*, at 167.

In terms of special needs populations, The Education For All Handicapped Children Act of 1975, 20 U.S.C. § 1400-33 (1975), assured that state and local education agencies would receive funds to aid in providing necessary services and programs for handicapped students. P. BURRUP & V. BRIMLEY, *supra*, at 172.

As a more direct example of federal aid and substantive control, the Education Amendments of 1978, 20 U.S.C. § 47 (1978), established a comprehensive basic skills program aimed at improving student achievement in reading, math, and written and oral communication skills. It also authorized a broad study of school finance methods, efficiency, equalization, and the role of the federal government in education. *Education Statistics*, *supra*, at 171.

7. D. KIRP, *supra* note 4, at 566. The most recent estimates identifying funding sources for

Although taxpayers express their desire to channel more public monies into the schools by voting for local, state and federal legislators who have similar priorities, the courts have also become involved in the issues of school financing and the adequacy of students' educational opportunities. A problem which many courts have been asked to address stems from the fact that virtually every state has a wide range of per pupil expenditures among its local school districts.[8] This is due to state school financing statutes which provide for financing local schools through a variable property tax.[9] This revenue may vary to a large extent within a state, as property tax based on assessed value of real property within the district may vary significantly.[10] These disparities may remain substantial despite state legislation designed to equalize such expenditures.[11]

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the public schools published by the National Education Association indicate that more than one-half of the $116.3 billion spent on schools was provided by the states, 42.5% by local governments, and 7.4% from the federal government. *See States Widen Role*, *supra* note 5, at 30. Figures from the early 1970's indicate that 98% of the localities' revenues were derived from local property taxation. D. KIRP, *supra* note 4, at 566. This situation appears largely unchanged. P. BURRUP & V. BRIMLEY, *supra* note 5, at 77.

The first step in raising revenue from property is assessing the value of the property within the district, i.e. land and buildings, to be taxed. D. KIRP, *supra* note 4, at 566-67. However, assessment of property can present technical and political problems. First, it may be difficult to establish the market value of such various types of property as residences, factories, utilities, farmland, private recreational areas, etc. *Id.* In addition, there may be political pressure to hold down assessments on residential property in relation to commercial property. *Id.* Once the total assessed value of property within the district is determined, the local government (school board) adopts a budget. The school board's projected expenditures (less income from other sources) is the amount to be raised by the tax levy. The tax rate to be applied is then determined by dividing the amount to be raised by the assessed valuation. *Id.* at 567. Dividing the total value of assessed property by the number of pupils in the district provides for a way of measuring a district's ability to raise revenues in terms of "assessed valuation per pupil." *Id.* The tax rate, as a measure of the districts "willingness" to support its schools, can be multiplied by the assessed valuation per pupil to calculate the amount of local revenue available per pupil, or per pupil expenditure. D. KIRP, *supra* note 4, at 567.

8. D. KIRP, *supra* note 4, at 574. Hawaii is the one exception, constituting a single school district. *Id.*

9. *Id.* at 566.

10. *Id.*

11. *Id.* at 569. State aid aimed at supplementing local revenue for schools generally comes in three varieties. The basic or flat grant represents a fixed number of dollars per pupil allocated to all districts equally. *Id.* at 568-69. This type of aid assumes that discrepancies in revenue-raising ability of local districts is minimal and that the state has a limited responsibility in helping each district provide for their schools. *Id.* The flat grant program is usually supplemented by a "foundation" program. The theory behind this aid program is that every district should be guaranteed a minimum level of expenditure per pupil, provided that the district contributes what it is able to *vis-à-vis* the imposition of a stipulated minimum property tax rate. *Id.* Thus, if a district cannot meet the state-wide minimum per pupil expenditure level from locally raised revenue, the state makes up the difference. *Id.* The third method of distributing state monies to the schools uses a "percentage equalizing" formula. *Id.* Under a program of this type, the state may financially assist a school district which cannot provide for the equality and quantum of education which the district deems appropriate. The equalizing effects of these programs or a combination of them may, however, be encumbered by "save harmless" provisions. *Id.* This assures a district that it will receive at least the amount of aid it received the previous year, although strict application of the

Thus, in the past two decades, complaints have been filed by residents of comparatively poorly funded school districts (i.e. those with less taxable property and thus less basic or supplemental revenue to be channeled into the schools), opposing the state's school financing scheme. These complainants typically allege that they are guaranteed a "right" to equal educational opportunity as reflected by equalized per pupil expenditures within the state or district under the equal protection clause of the federal constitution.

Such was the case in *San Antonio Independent School District v. Rodriguez*.[12] However, the United States Supreme Court upheld the Texas statutory scheme which allowed for substantial disparities in intrastate public educational expenditures over the plaintiff's equal protection objections.[13] The Court applied the two-tiered mode of equal protection analysis which has evolved in this area of the law.[14] Specifically, the "right" to an education was not found to have Constitutional status as a "fundamental" right and thus the state may regulate education and its financing as long as there is a minimum level of rationality to support its statutory scheme. However, it is this author's purpose to show that *Rodriguez* does not wholly resolve the question of the propriety of school financing schemes of this type for the following two reasons. First, the *Rodriguez* Court was deeply concerned with impinging on the decision-making which had traditionally been controlled by the states and their localities regarding educational financing. The *Rodriguez* decision implied that the statutory scheme might be successfully attacked at the state level, i.e. according to state constitutional (or statutory) provisions. Thus, initial analysis in this Note will address state constitutional challenges as the first "loophole" in *Rodriguez*. This section will overview different tactics applied by the statutory opponents in various states and different courts' interpretation of state constitutional law.

Assuming, however, that school finance challenges are still to be litigated to some extent in federal forums under the fourteenth amendment's equal protection clause, the second section of the Note focuses on equal protection analysis and content since *Rodriguez*. First, it seems apparent that the rigid fundamental right/suspect class inquiry traditionally applied by the high court is becoming disfavored by a majority on the bench. This two-tiered traditional model is discussed more fully with the later discussion of *Rodriguez*. The majority seems to favor a case-by-case balancing approach to equal protection or may formulate an application for an intermediate level of scrutiny. Substantively, the Court has demonstrated an increased sensitivity toward, and intolerance for, educational deprivation. To this end, the 1982 case *Plyler v. Doe*[15] is pertinent and may in fact import new content to the fourteenth amendment.

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formula would mandate a reduction in aid. Other political factors may also allow one district to receive financial aid while another deserving district does not. *Id.* A more detailed and historical explanation of common state equalization theories and schemes is found in J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 45-95 (1970).

12. 411 U.S. 1 (1973).

13. *Id.* at 19.

14. *Id.* at 24-26. For a discussion of this two-tiered mode, see *infra* note 58 and accompanying text.

15. 457 U.S. 202 (1982).

II. THE COURSE OF SCHOOL FINANCE LITIGATION BEFORE RODRIGUEZ: TRADITIONAL EQUAL PROTECTION ANALYSIS

The first court to rule on a fourteenth amendment equal protection challenge to a state's school financing statute was an Illinois Federal District Court in 1968.[16] *McInnis v. Shapiro* involved a suit by high school and elementary school students residing in four school districts in Illinois on behalf of themselves and others in their districts.[17] Plaintiffs alleged that the state's school financing scheme, which heavily depended on the local district's ability to raise property tax revenue, violated the federal constitution's equal protection and due process guarantees in permitting wide variations in per pupil expenditures between districts.[18] Plaintiffs claimed that the result of the system

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16. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.*, McInnis v. Ogilvie, 394 U.S. 322 (1969).

Technically, the case of Hobsen v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) [Hobsen I] addressed similar issues prior to *McInnis*. In *Hobsen*, plaintiffs challenged many types of interdistrict inequalities, including per pupil expenditures, within the District of Columbia School System, but particularly addressed the system's discriminatory effects on the black school population. *Id.* at 406, 436-38. The District Court ordered the abolition of the school's track system and optional attendance zones, and called for integration of school faculties. *Id.* at 407. Assuming that compliance with the decree would have the secondary effect of equalizing overall resource distribution, the *Hobsen I* court avoided directly addressing the problem of the substantial disparities in per pupil expenditures. *Id.* at 514-15.

In 1971, Hobsen, an original plaintiff in the 1967 action, filed an amended motion for further relief under the previous decree. Hobsen v. Hansen, 327 F. Supp. 844 (D.D.C. 1971) [Hobsen II]. Plaintiff requested that per pupil expenditures for the D.C. school budget not be allowed to deviate by more than 5% from the average for all elementary schools in the system, with provisions for certain adequately justified exceptions. *Id.* at 845. The court found that a "striking differential" in per pupil expenditures for teachers' salaries and benefits existed between schools east and west of Rock Creek Park; the area west of the park was 74% white, where as urban schools in the eastern area were 98% black in 1970-71. *Id.* at 847-48. The predominantly white schools had the advantages of a 15.5% smaller pupil/teacher ratio, 9.7% greater average teacher cost, and overall 26.8% greater teacher expenditures per pupil in fiscal 1971. *Id.* at 849. The *Hobsen II* court concluded from statistical studies presented by the plaintiff that lower class size and greater teacher expenditures (representing employment of more experienced teachers), were both functions of available revenue per pupil, and that these factors contributed to the quality of the education. *Id.* 859-60. The District of Columbia had continued to offer higher quality education to the white and wealthier students west of the park. *Id.* at 860. The court reasoned that the school system discriminated on the basis of race, even if discrimination was *de facto*, in violation of the fourteenth amendment's equal protection clause. The court also stressed that it had an especially high duty to scrutinize alleged racial discrimination affecting educational opportunity, citing the *Brown* decision of 1954. *Id.* at 860 (citing Brown v. Board of Education, 347 U.S. 483 (1954)). Thus the relief requested was granted. *Id.* at 863-64.

The *Hobsen II* court distinguished *McInnis* on two grounds. Primarily at issue in *Hobsen II*, and not specifically in *McInnis*, was a case of racial discrimination in the context of educational opportunity which courts have been particularly sensitive to since *Brown*. *Id.* at 860 n.27. Second, the court noted that judicial remedy was easier to fashion in *Hobsen II* since it involved only a single district's allocation disparities. *Id.*

17. *Id.* at 328-29.

18. *Id.* at 329. In Illinois, the state common school fund supplemented local property tax revenue to guarantee a foundation spending level of $400 per pupil. *Id.* In addition, each school district received a flat grant allocated per pupil. *Id.* The court noted that while the common school

was that some students received a good education while others with equal or greater educational "needs" did not.[19] They sought to declare the financing scheme unconstitutional vis-a-vis a permanent injunction forbidding further distribution of tax funds according to the the statutory scheme.[20] Defendants, state officials responsible for administration of the pertinent legislation, claimed that no cause of action was stated.[21] The court, acknowledging a case of first impression,[22] ruled for the defendants.[23] The court gave several significant reasons for denying the petitioners' claim.[24] The first was the rationale of institutional incompetency.[25] The *McInnis* court was hesitant to interfere in resource allocation and policy decisions that it considered more appropriately and knowledgeably handled by the legislature.[26] As a corrollary, the court supported the legislatively dictated and historical policy of allowing local control of the schools by each community.[27]

The *McInnis* court also found that the plaintiffs were arguing in terms of abstract and judicially unmanageable concepts.[28] The court reasoned that arguing in terms of educational "needs" did not involve a justiciable question due to lack of discoverable or manageable standards.[29] Specifically, the court held that the petitioners failed to show that all students within the state would have their educational "needs" satisfied if per pupil expenditures within the state were equalized.[30] The thrust of the court's position was that increasing educational expenditures did not necessarily increase educational quality.[31]

The *McInnis* decision and the issue of a correlation between educational expenditures, and quality and opportunity can be viewed as precipitating from the social and political climate of the time.[32] Generally, the late sixties and early seventies produced an abundance of research and reports documenting school expenditure patterns and outcomes in terms of educational achievement and status.[33] This concern for equal educational opportunity, which was beginning to manifest itself in the courtroom, was to some extent an outgrowth of the Civil Rights movement and the search for equal rights in a variety of

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fund tended to compensate for interdistrict inequalities in levels of assessed valuation per pupil, expenditures in elementary schools were in some instances three times greater in one district than another. For high schools the expenditures were up to 2.6 times higher in some districts as compared to others within the state. *Id.* at 331.

19. *Id.* at 329.

20. *Id.*

21. *Id.*

22. *Id.* at 333-35.

23. *Id.* at 335-37.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*; *see* D. KIRP, *supra* note 4, at 566. For a detailed account of the historical pattern of locally funded and controlled public schooling, see P. BURRUP & V. BRIMLEY, *supra* note 5, at 77, 98-121.

28. *McInnis*, 293 F. Supp. at 335-36.

29. *Id.* at 329.

30. *Id.* at 335-36.

31. *Id.*

32. J. GUTHRIE, SCHOOL FINANCE POLICIES AND PRACTICES 6 (1980).

33. *Id.* at 6-11.

social contexts.[34]

The 1964 Civil Rights Act, [35] *inter alia*, authorized a large scale research endeavor to assess equality of educational opportunity.[36] This study, published in 1966, came to be known as the Coleman Report, named after noted sociologist James S. Coleman.[37] The Coleman Report focused on the achievement gap between white and black students, asserting that this gap was primarily due to social background and was not significantly linked to disparities in educational resources of schools attended.[38]

After the Coleman Report, many lay observers, as well as the *McInnis* court, espoused the view that increase or equalization of school expenditures was not the way to achieve equal educational opportunity, or more generally, equality.[39] What flourished in the aftermath of the Coleman Report was intense debate regarding the correlation between expenditures and achievement known as the "input-output relationship,"[40] numerous challenges to the techniques utilized in the Coleman Report,[41] and a continued search for equity in the school setting.[42]

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34. *Id.* at 6.

35. 42 U.S.C. §§ 1981 - 2000h-6 (1964).

36. J. GUTHRIE, *supra* note 32, at 6 (citing 42 U.S.C. § 2000c-2 (1964)).

37. *Id.* The report is officially entitled *U.S. Office of Education, Equality of Educational Opportunity* (1966).

38. J. GUTHRIE, *supra* note 32, at 7. The social factors that this research attributed to inferior achievement by black students included quality and pressures of the home, neighborhood, and students' peer environment. *See* Coleman Report, *supra* note 36, at 325, *cited in* McDermott & Klein, *The Cost Quality Debate in School Finance Litigation: Do Dollars Make a Difference*? 38 J. L. & CONTEMP. PROB. 415, 423 n.41 (1974).

39. J. GUTHRIE, *supra* note 32, at 7.

40. *Id.* at 7. These concepts were analyzed early on by a team of researchers, John E. Coons, William H. Clune and Stephen D. Sugarman, and also by another scholar, Arthur Wise, researching independently. *Id.*; see J. COONS, *supra* note 11, at 25-33. A. WISE, RICH SCHOOLS: POOR SCHOOLS (1968). The terminology and ideas of these researchers catalyzed further study and debate regarding educational opportunity and expenditures.

Some of the major authorities of the time include: E. COHN & S. MILLMAN, INPUT-OUTPUT ANALYSIS IN PUBLIC EDUCATION (1975); J. GUTHRIE, SCHOOLS AND INEQUALITY (1971); C. JENCKS, INEQUALITY (1972), ON EQUALITY OF EDUCATION OPPORTUNITY (D. Moynihan & F. Mosteller eds. 1972); Billings & Leglar, *Factors Affecting Educational Opportunity and Their Implication for School Finance Reform: An Empirical Study*, 4 J.L. & ED. 633 (1975), McDermott & Klein, *supra* note 38. *See generally* Preovolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75-76 n.4 (1980). For a more recent summary of fact-finding and varied conclusions see ROSSMILLER, RESOURCE ALLOCATION AND ACHIEVEMENT IN SCHOOL FINANCE AND SCHOOL IMPROVEMENT 171 (A. Odden & L. Webb eds. 1983) (using a scientific analysis of the input/output relationship). *See also* Harvith, *Education Law*, 34 SYRACUSE L. REV. 215, 224 (1983).

41. J. GUTHRIE, *supra* note 32, at 7, *citing* J. GUTHRIE, SCHOOLS AND INEQUALITY (1971); Cain & Watts, *Problems in Making Policy Inferences from the Coleman Report*, 2 AM. SOC. REV. 35, 228-42 (1970); Coleman, *Reply to Cain and Watts*, 2 AM. SOC. REV. 35, 242-49 (1970); Hanushek & Kain, *On the Value of Equality of Educational Opportunity as a Guide to Public Policy*, in ON EQUALITY OF EDUCATIONAL OPPORTUNITY (F. Mosteller & D. Moynihan eds. 1972) (criticisms of the Coleman report); *see also* the comprehensive discussion of the controversy that surrounded the Coleman Report findings in D. KIRP, *supra* note 4, at 571-74.

42. D. KIRP, *supra* note 4, at 571-74; *see also supra* notes 39-41 and accompanying text.

During this period of much fervor and discourse regarding equality and educational opportunity, several scholars were responsible for developing the principle of fiscal neutralityin public school financing.[43] This was to become central to the school finance reform movement during this period.[44] Fiscal neutrality is based on the premise that education is of sufficient importance to be protected as a "fundamental" right deserving constitutional protection.[45] The quality of public education, therefore, should not be a function of wealth other than the total wealth of the state.[46]

With the development of more specific and manageable constitutional theories, and research which tended to support the premise that educational expenditures did affect educational quality, opponents of school financing schemes proceeded to bring legal complaints invoking federal constitutional claims. The legal framework for their argument involved three major steps.[47] The first step was to document the extent of the inequalities, including property valuation and revenue raising differentials, differences in per pupil expenditures, and disparities which existed even after applying state aid formulas.[48] The second step was to link inferior resources to inferior achievement.[49] The third step, perhaps the most crucial and what was to become the most difficult obstacle to surmount, was demonstrating that achievement, or specifically, educational opportunity, was to be afforded constitutional protection that would invoke strict judicial scrutiny upon review of the state's statutory scheme.[50]

In 1971, the case of *Rodriguez v. San Antonio Independent School District*[51] was initiated in Texas. Plaintiff Rodriguez brought a fourteenth amendment equal protection action "on behalf of Mexican-American school children and their parents" who resided in a particular Texas school district, and "on behalf of all other children throughout Texas who lived in school districts with low property valuations."[52] Public schools in Texas were highly dependent on local funds raised by taxation on the assessed property within the district.[53] These funds were to some degree supplemented by state aid, and to a much lesser degree, federal aid.[54] Plaintiffs did not claim that the fourteenth amend-

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43. J. Guthrie, *supra* note 32, at 7.

44. *Id.*

45. *Id.* at 8.

46. *Id. See generally* Coons, Clune, & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305 (1969) (later published as part of J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970); A. WISE, RICH SCHOOLS POOR SCHOOLS (1968)).

47. J. GUTHRIE, *supra* note 32, at 8.

48. *Id.*

49. *Id.*

50. *Id.*

51. 337 F. Supp. 280 (W.D. Tex. 1971). This was to become the landmark case of San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

52. *Rodriguez*, 337 F. Supp. at 281.

53. *Id.*

54. *Id.* While federal funds contributed to less than ten percent of the school's overall expenditures, state aid was granted through the Available School Fund on a per capita basis, determined by average daily attendance rates. *Id.* Under the State Minimum Foundation Program, local school districts were empowered and obligated to finance their school expenditures above the

ment entitled them to equal educational expenditures according to the "judicially unmanageable" concept used in *McInnis*.[55] Rather, plaintiffs, advocating the concept of "fiscal neutrality,"[56] called for the court to invalidate the state's school financing scheme which allegedly discriminated on the basis of wealth and affected a fundamental interest in education.[57]

The court applied what has become a traditional equal protection analysis: where there is a regulation by the state which affects a "fundamental interest" or which is based on a "suspect" classification of persons, the statutory scheme is subject to close judicial scrutiny, or "strict scrutiny."[58] The court in

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state minimum (granted through the School Fund) through *ad valorem* property taxation. *Id.* The plaintiffs claimed that the system assumed the value of property within the state's school districts was "sufficiently equal to sustain comparable" per pupil "expenditures from one district to the another." *Id.* Educational expenditures and resources the plaintiffs claimed, were "a function of the local property tax base," with glaring disparities in how many districts were able to provide for their school children. *Id.* at 282.

Data for 1967-68 showed that the market value of property per student in the Edgewood School District was $5,429 as compared to $45,095 in the Alamo Heights district. *Id.* Accordingly, as a percentage of property market value, tax rates were highest in Edgewood and lowest in Alamo Heights. *Id.* Despite the high property tax rate in Edgewood, however, that district raised merely $21 per pupil from property revenue. *Id.* Alamo Heights, with its significantly lower tax rate, raised $307 per pupil. *Id.* The court also noted that the aid provided from the state financing scheme to Edgewood was roughly $231 per pupil while $543 was allocated to each pupil in Alamo Heights. *Id.* Thus, the court concluded that the state's efforts to minimize the expenditure discrepancies were illusory. *Id.*

55. *See supra* notes 28-31 and accompanying text.

56. *Rodriguez*, 337 F. Supp. at 283-84; see *supra* notes 43-50 and accompanying text.

57. *Rodriguez*, 337 F. Supp. at 282-84.

58. *Id.* at 282. When violation of equal protection of the laws is claimed under the fourteenth amendment of the Federal Constitution, the Supreme Court most notably in the Warren era has developed a rigid two-tiered analysis. The Court inquires as to: 1) whether the right or privilege that is allegedly being denied or infringed upon is a "fundamental" right, i.e. one explicitly or implicitly guaranteed in the text or Bill of Rights of the Constitution; and 2) whether there is a class of persons being affected which is politically powerless or "suspect". *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000-03 (1978). If either of these two questions is answered in the affirmative, the Court will look at the regulation in question under strict judicial scrutiny. *Id.* Generally, this standard will allow the regulation to be upheld only if it is supported by an overriding or compelling state interest which cannot be accomplished by less drastic alternatives. *Id.* If the complainants cannot demonstrate that either of the aforementioned classifications apply, the law is presumed valid and the court requires that there be only a minimum level of rationality to justify its creation and imposition by the legislature. *Id.* at 994. The regulation must be rationally related to some legitimate governmental interest. *Id.*

Thus far, the list of fundamental rights includes: 1) the right of privacy and personal autonomy, *see, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); 2) the right to marry, *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); 3) the right to vote, *see, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); 4) the right to interstate travel, *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969). "Suspect" classifications, affecting "discrete and insular" minorities, *see, e.g.*, United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938), which have been held impermissible include classifications based on race and national origin, *see, e.g.*, *Loving*, 388 U.S. at 1; Bolling v. Sharpe, 347 U.S. 497 (1954), and may include classifications based on alienage, *see, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Ambach v. Norwick, 441 U.S. 68 (1979). Arguably, classifications based on gender have been treated as suspect, *see, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677

Texas found that both factors called for application of the strict scrutiny/compelling state interest test.[59] The district court concluded that the state was unable to demonstrate a compelling interest in applying a suspect classification based on wealth and impinging upon the fundamental interest in education.[60] The court also noted that the reasonable basis or rational relationship test traditionally applied in an equal protection analysis would not have supported the state scheme.[61] The court ordered that the state legislature find a new form of financing the public schools which did not make the quality of education a function of wealth other than the wealth of the state as a whole.[62]

While the *Rodriguez* petitioners were awaiting their appeal to the U.S. Supreme Court, a similar school finance case came to trial in California. In *Serrano v. Priest*,[63] a class action was brought by elementary and secondary school students and their parents against certain state and county officials.[64] The plaintiffs sought to invalidate California's school financing scheme which relied heavily on local property valuation and the corresponding ability to raise property revenue for the schools.[65] Plaintiffs claimed that the scheme caused substantial and impermissible disparities in the amount of revenue available per pupil in different districts.[66] Specifically, plaintiffs claimed that the system discriminated against the poor districts and violated the fourteenth amendment's equal protection clause and the California Constitution.[67]

The California Supreme Court held that the state's financing system discriminated against residents of certain school districts as a class solely on the

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(1973); Reed v. Reed, 404 U.S. 71 (1971); *Craig*, however, may represent a different type of equal protection analysis altogether, i.e. "intermediate scrutiny." *See infra* note 155 and accompanying text.

59. *Rodriguez*, 337 F. Supp. at 282.

60. *Id.*

61. *Id.* at 284. The defendants argued that the state had a legitimate interest in allowing local districts and parents to determine how much they desire to spend educating their children. *Id.* Though the court implied that local school decision-making power may be a rational basis to support a financing scheme of this sort, the court concluded the goals of local choice and control are limited and not furthered where some districts are fiscally constrained to the degree these districts were. *Id.*

62. *Id.* at 285. For a discussion of the judiciary's remedial process of "agenda setting" for the legislature, see *infra* notes 133-37 and accompanying text.

63. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) [hereinafter Serrano I].

64. *Id.*

65. *Id.* at 589-90, 487 P.2d at 1244, 96 Cal. Rptr. at 604. For fiscal 1968-69, California's educational revenues came from the following sources: 55.7% local property taxes, 35.5% state aid, 6.1% federal aid and 2.7% miscellaneous sources. *Id.* at 591-92 n.2., 487 P.2d at 1246, 96 Cal. Rptr. at 606.

66. *Id.* at 590, 487 P.2d at 1244, 96 Cal. Rptr. at 604. Specifically, statistics for 1969-70 showed that assessed valuation of property per unit of average daily attendance for elementary school children ranged from a low of $103 to a high of $952,156 — a ratio of roughly 1/10,000. *Id.* at 592, 487 P.2d at 1246, 96 Cal. Rptr. at 606. See *id.* at n.4 for an explanation of calculation technique. The statistics also revealed that, despite state aid in the form of the foundation grant and equalization aid, there were still substantial disparities in per pupil expenditures. For example, during 1968-69, one district spent $577.49 to educate each of its pupils while a wealthier district spent $1,231.72 per child. *Id.* at 594, 487 P.2d at 1247-48, 96 Cal. Rptr. at 607-08.

67. *Id.*

basis of property wealth.[68] Thus, according to the *Serrano* court, the underprivileged petitioners were found to be within a suspect classification, triggering strict judicial scrutiny under the traditional fourteenth amendment equal protection analysis.[69] The court also held that education is protected as a "fundamental interest."[70] The court did not find that local control of the schools was a compelling interest.[71] Thus, a state's financing scheme was again invalidated on fourteenth amendment grounds.[72] *Serrano* was then remanded to the lower court.[73]

While *Serrano* was awaiting retrial in the lower court, the U.S. Supreme Court decided the *Rodriguez* case.[74] The Supreme Court held that the Texas plaintiffs were not disadvantaged as a suspect class[75] and that education, per se, was not afforded explicit or implicit constitutional protection in the context of equal protection analysis.[76] Thus, the *Rodriguez* majority saw the minimum

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68. *Id.* at 597-604, 487 P.2d at 1250-55, 96 Cal. Rptr. 610-15. The court noted that in California, over one half of all revenue for the schools is raised by real property tax levies by individual districts. Though to some extent dependent on the rate that a district is willing to tax itself, districts with small tax bases (low assessed valuation of property) simply cannot levy taxes at a sufficient rate to compete with the more affluent districts. *Id.* at 598, 487 P.2d at 1250, 96 Cal. Rptr. at 610.

69. *Id.* at 610-15, 487 P.2d at 1259-63, 96 Cal. Rptr. at 619-23. For a discussion of traditional equal protection analysis, see *supra* note 58.

70. *Id.* at 608-09 & n.26, 487 P.2d at 1258-59 & n.26, 96 Cal. Rptr. at 618-19 & n.26. The court gave five reasons supporting this contention as follows. First, education is essential to preserve "free enterprise democracy" and supports an individual's opportunity to compete successfully in the economic marketplace. The court found this to be true particularly with regard to those from disadvantaged backgrounds. *Id.* at 609, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19. Second, education is "universally relevant"; it is needed at many times and for many purposes throughout a lifetime. *Id.* Third, education is a unique government "service" in its "sustained (10-13 years) and intensive contact with the recipient." *Id.* Fourth, education plays a critical role in the emotional and psychological development of a child. *Id.* at 609-10, 487 P.2d at 1259, 96 Cal. Rptr. at 619. Fifth, education is so important to the state that it has been made compulsory. *Id.*

71. *Id.* at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620. The state asserted its interest in promotion of local control of the schools, specifically regarding administrative decision making and fiscal control. *Id.* The court noted that the individual districts were potentially in the best position to make decisions regarding local educational administration, but that the present financial system was not necessary to further this potentially "compelling" interest. *Id.* Regarding "fiscal freewill" advocated by the state, the court noted that such autonomy was a "cruel illusion" for the poor school districts. "[S]o long as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education." *Id.* at 611, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

72. *Id.* at 614-15, 487 P.2d at 1263, 96 Cal. Rptr. at 623.

73. *Id.* at 619, 487 P.2d at 1266, 96 Cal. Rptr. at 626.

74. 411 U.S. 1 (1973).

75. *Id.* at 29. In finding no suspect classification, the Court distinguished the *Serrano* cases as based on different factual assumptions. *Id.* at 24. In the *Serrano* cases, the correlation between a district's per pupil assessed valuation and the wealth of its residents was accepted by the court and not disputed by the state. 5 Cal. 3d at 600-01, 487 P.2d at 1252, 96 Cal. Rptr. at 612. In contrast, the *Rodriguez* Court asserted that there was no basis in the record for assuming that the "poorest" school districts were comprised of the least wealthy residents of the state. 411 U.S. at 24.

76. 411 U.S. at 36-39. Primarily, the Court noted that education is not explicitly mentioned

rationality test as the proper standard of review.[77] The Court found that preservation of local control of the schools was a legitimate state interest served by the financing methods[78] and that the thrust of the state's whole scheme was "affirmative and reformatory" and thus rationally related to promoting stated educational objectives.[79] In echoing the *McInnis* court's rationale,[80] the Supreme Court asserted that local taxation and use of such revenues has traditionally been solely within the control of the states and their local districts.[81] Along with these Federalism concerns regarding taxation and local control of

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in the Constitution. *Id.* The Court also recognized that "fundamental" rights can be implied by other rights, as are the right of privacy, reproductive autonomy, marriage, voting, and interstate travel. *Id. See also supra* note 58 and accompanying text. The plaintiffs/appellees, however, asserted that education would be considered "fundamental" because of its "nexus" with other constitutionally protected rights. *Id.* Appellees first argued that education is essential to effective exercise of the first amendment right of free speech. *Id.* at 36. They argued, in essence, that the marketplace of ideas which characterizes our society is an empty forum for those lacking basic communicative skills. *Id.* Secondly, appellees asserted that exercise of the voting right could not be divorced from the necessary educational foundation of the voter and that the electoral process was dependent on an informed and certainly literate electorate. *Id.* However, the Court rebutted both aspects of the "nexus" argument. Conceding that informed representative government and intelligent expression of ideas through speech are desirable goals, the Court asserted that the government possesses neither the ability nor the authority to guarantee the *most effective* speech or the *most effective* informed electoral choice. *Id.* at 37. Justice Brennan adopted the voting nexus theory and would have mandated infringement on this implicitly fundamental education right as invoking strict scrutiny. *Id.* at 62-63 (Brennan, J., dissenting). Justice Marshall also supported this theory, advocating his sliding scale model for equal protection and rejecting the majority's "rigified" analysis. *Id.* at 99 (Marshall, J., dissenting). Justice Marshall proposed that:

> As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

Id. at 102-03 (Marshall, J., dissenting). Justice Marshall asserted that education is of fundamental importance on two levels. *Id.* at 113. First, education directly affects a child's ability to exercise his/her first amendment rights of free speech, as both "a source and a receiver of information and ideas. . . ." *Id.* at 113 (Marshall, J., dissenting). Moreover, education instills an understanding and appreciation for operation of the political process. *Id.* at 114 (Marshall, J., dissenting). Of most immediate concern to Justice Marshall, however, was the effect of education on the constitutionally protected right to vote. *Id.* at 115. To this end, Justice Marshall cited statistics showing a direct relationship between participation in the electoral process and levels of education. *Id.* (Marshall, J., dissenting). For Justice Marshall, "any substantial degree of scrutiny" would not have supported the state's financing scheme and purported interest in local fiscal control in light of the essential function of education. *Id.* at 130 (Marshall, J., dissenting).

77. *Id.* at 41. This standard requires that only a minimally rational state objective need to be advanced as the justification for a challenged statute and that the statute be directly related to this objective. L. TRIBE, *supra* note 58, at 994.

78. *Rodriguez*, 411 U.S. at 49-56. Rebutting the *Serrano* I rationale (*see supra* note 61), the *Rodriguez* majority asserted that "even those districts that have reduced ability to make free decisions with respect to how much they spend on education still retain . . . a large measure of authority as to how available funds will be allocated . . . [and] the power to make numerous other decisions with respect to the operation of the schools." 411 U.S. at 52 (footnote omitted).

79. *Id.* at 40.

80. *See* text accompanying notes 26-27.

81. *Rodriguez*, 411 U.S. at 41-42.

revenues, the *Rodriguez* Court recognized that any reform in the state's financial policy would call for expert consideration of (1) the proper goals of a system of public education, (2) the most effective balance of control and responsibility between state and local education boards, and (3) the controversy as to direct correlation between education expenditures and quality.[82] The Court demonstrated an unwillingness to participate in these decisions which it considered best left to education experts and legislators at the local level.[83] Thus, when *Rodriguez* was decided, California and other states which had similar cases pending in their courts[84] had a seemingly clear message from the Supreme Court regarding school finance challenges and the fourteenth amendment. To wit, the highest court in the land had ruled that a state's school financing scheme which is substantially dependent on each district's varying ability to raise revenue from the amount of taxable real property within the district does not violate the federal equal protection clause.

The California Supreme Court's decision in *Serrano I* is significant in that it referred to, if only briefly, the rights involved under its state constitution.[85] In a footnote, the court construed the California constitution's privileges and immunities clause[86] as providing essentially the same guarantees as the fourteenth amendment equal protection clause in order to invalidate the scheme on state grounds.[87] The case was then remanded to the trial court.[88] When *Serrano* was again decided in the lower court (*Serrano II*), and later appealed to the state supreme court after *Rodriguez*,[89] the California Supreme

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82. *Id.* at 43-44. This correlation is discussed *supra* note 40.

83. *Id.* at 41-45.

84. These states include Arizona, New Jersey, Oregon, Idaho, and Washington. Respectively, the cases are: Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973) (filed 1971); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, [*Robinson* I], *cert. denied sub nom.*, Dickey v. Robinson, 414 U.S. 976 (1973) (filed 1970), *after remand*, 69 N.J. 449, 355 A.2d 129 (1976); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976) (filed 1972); Thompson v. Engleking, 96 Idaho 793, 537 P.2d 635 (1975) (filed 1972); Northshore School District v. Kinnear, 84 Wash. 2d 685, 530 P.2d 178 (1974) (filed 1972) (overruled in part by Seattle School Dist. No. 1 of King County v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978)).

85. *Serrano* I, 5 Cal. 3d at 596, 487 P.2d at 1249, 96 Cal. Rptr. at 609. At the outset, the court discarded plaintiffs' theory that the California constitutional requirement for the legislature to provide "a system of common schools" was being violated in that the current financing method produced separate and distinct systems due to large discrepancies in available resources. *Id.* at 595-96, 487 P.2d at 1248-49, 96 Cal. Rptr. at 608-09, *citing* CAL. CONST. art. IX, § 5. The court refused to interpret the California Constitution to require equal educational spending and saw article IX, § 5 as requiring uniformity in prescribed course of study only. *Id.* However, the court's reliance on the privileges and immunities clause of the state constitution is significant. *See infra* notes 96-98 and accompanying text.

86. CAL. CONST. art. I, § 21, *cited in* 5 Cal. 3d at 596, n.11, 487 P.2d at 1249, 96 Cal. Rptr. at 609. "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which upon the same terms, shall not be granted to all citizens." *Id.* The court also took into account section 11 of the state constitution which provides: "All laws of a general nature shall have a uniform operation." *Id.*, *citing* CAL. CONST. art. I, § 11.

87. 5 Cal. 3d at 596 n.11, 615, 487 P.2d at 1249, 1263, 96 Cal. Rptr. 609, 623.

88. *Id.* at 619, 487 P.2d at 1266, 96 Cal. Rptr. at 626.

89. Serrano v. Priest, 18 Cal. 3d 729, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) [hereinafter *Serrano* II].

Court strategically focused on the state's constitutional provisions to invalidate the statutory scheme.[90] Thus, the *Serrano* "saga" is important in the history of school finance litigation in that it showed other state courts that there was a means and perhaps a mandate to address these types of complaints, without squarely opposing the *Rodriguez* decision, or looking to the state's constitution.[91]

III. State Constitutions and Post-Rodriguez Litigation in State Forums

Typically, a state's constitution may require that the state merely provide for a school system, while some constitutional provisions go further to qualify that the system must be established and maintained.[92] For example, seven

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90. *Id.* at 762-68, 557 P.2d at 949-52, 135 Cal. Rptr. at 365-69.

91. This "mandate" for a state to interpret its own constitutional provisions where appropriate and not to exclusively rely on Federal Constitutional interpretation was called for by Justice Brennan in his influential 1977 essay. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Justice Brennan noted and praised the "highly significant development" that more and more state courts are construing their state's constitutional counterparts to the Bill of Rights guarantees and interpreting them to afford their citizens greater protection than Federal constitutional provisions, even where identically phrased. *Id.* at 495. Previously, several courts faced with school finance challenges and interpreting state constitutional provisions had recognized that their own constitutions secured greater rights than the Federal Constitution, and thus regarded federal decisions only as "persuasive authority." *Serrano* II, 18 Cal. 3d at 764-65, 557 P.2d at 950-51, 135 Cal. Rptr. at 366-67 (1976); Horton v. Meskill, 172 Conn. 615, 641, 376 A.2d 359, 371 (1976).

The assertion that state constitutional provisions do and should provide different substantive guarantees follows from the fact that protection of those rights guaranteed in the Bill of Rights was predated by various state constitutional provisions; the distinct provisions may be aimed at different social evils. *See generally* Introduction in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW xviii (B. McGraw ed. 1985). The editor also notes the general trend in the post-Warren court era to take state constitutions seriously and also attempts to explain the judiciary's past reluctance to do so. *Id.*

92. This distinction is emphasized in Comment, *San Antonio Independent School District v. Rodriguez: A Study of Alternatives Open to State Courts*, 8 U.S.F.L. REV. 90, 105-10 (1973). The author proposes that the constitutional references to education in the fifty states can be divided into two major categories, with a minor subcategory and a few exceptions. Broadly speaking, these categories represent, first, the "system" states, i.e. those without qualitative requirements for a school system but merely require that the state provide for a free public school system. *Id.* at 107-10. Second, are the "thorough and efficient" states, for example, those that qualify what type of school system is to be established by use of the words "thorough and efficient" or alternatively "suitable," "adequate," "uniform" or something similar. *Id.* at 105-07. The states in the first category — "system" states — are:

> ALASKA CONST. art VII, § 1 ("establish and maintain a system of public schools . . . ."); CALIF. CONST. art. IX, § 5 ("a system of common schools"); HAWAII CONST. art. IX, § 1 ("provide for the establishment, support and control of a statewide system of public schools"); IOWA CONST. art. IX, § 12 ("a system of common schools"); KAN. CONST. art. 6, § 1 ("establishing and maintaining schools"); LA. CONST. art. XII, § 1 ("provide for the education of all the school children of the state"); MAINE CONST. art. VIII, § 1 ("support and maintenance of public schools"); MICH. CONST. art. 8, § 2 ("maintain and support a [school] system"); MO. CONST. art. IX, § 11(a) ("establish and maintain free public schools"); NEB.

states require the educational system to be "thorough and efficient,"[93] while a similar mandate is embodied in qualifications of "suitable," "adequate" or "uniform" found in nineteen other constitutions.[94] Some courts have recognized that a fundamental right to education may be found under state law by mandating state-sponsored education in the state constitution.[95] By this route,

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CONST. art. VII, § 6 ("Provide for the free instruction in the common schools of this state"); N. MEX. CONST. art. XXI, § 4 ("establishment and maintenance of a system of public schools"); N.Y. CONST. art. XI, § 1 ("provide for the . . . support of a [school] system"); OKLA. CONST. art. XIII, § 1 ("a [school] system"); VT. CONST. ch. II, § 64 ("a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth"); VA. CONST. art. VIII, § 1 ("provide for a [school] system"). States falling into the second category are further subdivided.

Id. at 108 n.117; *see also infra* note 94 and accompanying text.

93. *State Courts, supra* note 92, at 107. These seven states are; Maryland (MD. CONST. art VIII, § 1); Minnesota (MINN. CONST. art. VIII, § 3); New Jersey (N.J. CONST. art. VIII, § 4); Ohio (OHIO CONST. Art VI, §2); Oregon (OR. CONST. art. 8, § 3); Pennsylvania (PENN. CONST. art. 3, § 14); West Virginia (W. VA. CONST. art. XII, § 1).

94. *State Courts, supra* note 92, at 107. States using terminology similar to "thorough and efficient" in their education clauses are as follows:

ARIZ CONST. art. II, § 1 ("establishment and maintenance of a general and uniform public school system" II); ARK. CONST. art. XIV, § 1 ("maintain a general, suitable and efficient system of free schools"); COLO. CONST. art. IX, § 2 ("establishment and maintenance of a thorough and uniform system"); DEL. CONST. art. X, § 1 ("establishment and maintenance of a general and efficient system. . ."); FLA. CONST. art. IX, § 1 ("adequate public education for the citizens shall be a primary obligation"); GA. CONST. art. VIII, § 1 (same as Florida); IDAHO CONST. art. IX, § 1 ("a general, uniform and thorough system"); ILL. CONST. art. X, § 1 ("an efficient system of high quality public educational institutions and services."); IND. CONST. art. XIII, § 1 ("general and uniform system. . ."); KY. CONST. § 183 ("provide for an efficient system"); MONT. CONST. art. XII, §1 ("a general uniform and thorough system"); NEV. CONST. art. XI, § 2 ("a uniform system"); N.C. CONST. art. IX, § 2 ("a general and uniform system"); N.D. CONST. art. VIII, § 1 ("a uniform [system]"); S.D. CONST. art. VIII, § 1 ("a general and uniform [system]"); TEX. CONST. art. VII, § 1 ("an efficient system"); UTAH CONST. art. X, § 1 ("a uniform system"); WASH. CONST. art. IX, § 1 ("a general and uniform system"); WIS. CONST. art X, § 3 ("a nearly uniform [system] as practicable"); WYO. CONST. art. VII, § 1 ("a complete and uniform system. . .").

Id. at n.113.

95. *See Serrano* II, 18 Cal. 3d at 762-68, 557 P.2d at 949-53, 135 Cal. Rptr. at 365-71; Dupree v. Alma Sch. Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1976); Seattle Sch. Dist. No. 1 of King Cty. v. State of Washington, 90 Wash. 2d 476, 585 P.2d 71 (1978); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Buse v. Smith, 74 Wisc. 2d 550, 247 N.W.2d 141 (1976); Washakie Co. Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wy. S. Ct. 1980).

The Washington Supreme Court's rationale is somewhat distinct in its philosophical underpinnings and terminology. The court reasoned that the state constitution creates a supreme "duty" of the state to amply educate its children. Seattle Sch. Dist. No. 1 of King Cty. v. State, 90 Wash. 2d at 498, 585 P.2d at 91. The "jural correlative" of this duty, the court asserted, is the "correspondent right" of all school children to be provided with an adequate education. *Id.* Since the "duty" is characterized as "paramount," the correlative "right" enjoys equal stature. *Id.* Although technically distinguishable from the concept of a "fundamental rights," *see supra* note 58, the

the state may use its own equal protection guarantee, found in some form in nearly all states,[96] to invoke strict judicial scrutiny[97] and invalidate the scheme due to its impingement on the exercise of a fundamental right.[98] This is analogous to a traditional fourteenth amendment analysis.[99] A majority of states, however, have asserted that the qualified or unqualified mention of a mandatory school system does not in and of itself provide education with the status of a fundamental right.[100]

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high value placed on the educational process echoes the discussion of education as a "fundamental" right. *Id.* at 513 n.13, 585 P.2d at 92 n.13.

96. *State Courts, supra* note 92, at 109. The majority of states have either an equal protection guarantee or a privileges and immunities clause similar or identical to those found in the fourteenth amendment. Privileges and immunities clauses have been construed to be essentially the equivalent of an equal protection guarantee. *See* text accompanying notes 86-87. Those 25 constitutions providing a guarantee against invocation of special privileges and immunities are:

> ALA. CONST. art. I, § 22; ARIZ. CONST. art. II, § 15; CALIF. CONST. art. I, § 21; COLO. CONST. art. II, § 11; CONN. CONST. art. I, § 1; IND. CONST. art. I, § 23; IOWA CONST. art. I, § 6; KY. CONST. Bill of Rights, § 3; LA. CONST. art. IV, § 4; MASS. CONST. art. VI; MINN. CONST. art. V, § 2; MONT. CONST. art. III, § 17; NEB. CONST. art. I, § 16; N.J. CONST. art. IV, § 7; OHIO CONST. art. I, § 17; OKLA. CONST. art. I, § 2; OR. CONST. art. I, § 20; PA. CONST. art. I, § 17; S.D. CONST. art. VI, § 18; TENN. CONST. art. XI, § 8; TEX. CONST. art. I, § 3; VA. CONST. art. I, § 4; WASH. CONST. art. I, § 12; W. VA. CONST. art. III, § 19; WYO CONST. art. III, § 27.

State Courts, supra note 92, at 109 n.121.

Those constitutions providing for "equal protection" are:

FLA. CONST. art. I, § 2; ME. CONST. art. I, § 6A; MICH. CONST. art. I, § 2; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 11; R.I. CONST. art. I, § 2; UTAH CONST. art. I, § 2. Those with both provisions are: ALASKA CONST. art. I, § § 1, 22; ARK. CONST. art. II, § § 3, 18; GA. CONST. art. I, § § 1, 3; HAW. CONST. art. I, § § 4, 19; IDAHO CONST. art. I, § 2; ILL. CONST. art. I, § § 2, 16; KAN. CONST. BILL OF RIGHTS § 2; MO. CONST. art. I, § § 2, 6; N.C. CONST. art. I, § § 19, 32; N.D. CONST. art. I § § 1, 11, 20; S.C. CONST. art. I, § 5.

97. *See supra* note 58 and accompanying text. As an alternative to invoking strict scrutiny to invalidate a state's school financing scheme, the Supreme Court of Arkansas found it did not even have to approach the issue of whether education was a "fundamental" right. The court in Dupree v. Alma Sch. Dist. No. 30, 279 Ark. 340, 343, 651 S.W.2d 90, 93 (1983) ruled that their state's *Rodriguez*-like school financing scheme did not even bear a minimally rational relationship to the educational needs of the district or a legitimate state purpose, and thus could not be supported. *Id.* This analysis avoids the complex state (or Federal) constitutional inquiry and controversy as to whether education is protected as a "fundamental" right. However, it does not appear to be a popular approach in this type of litigation.

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

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

100. Education Commission of the States, School Finance Reform in the States, at 37 (1983). Decisions which have reflected this position included: Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (1981); Thompson v. Engleking, 96 Idaho 793, 537 P.2d 635 (1975); Knowles v. State Bd. of Educ., 219 Kan. 271, 547 P.2d 699 (1976); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972), *vacated mem.*, 390 Mich. 389, 212 N.W. 2d 711 (1973); Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 452 N.Y.S.2d 643 (1982), *appeal dismissed*, 459 U.S. 1139 (1985); Board of Educ. of the City Sch. Dist. of Cincinnati v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied*, 444 U.S. 1015 (1980); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976); Dansen v. Casey, 33 Pa. Comm. 614, 382 A.2d 1238 (1978).

Despite this unfavorable majority interpretation, plaintiffs bringing challenges where the state has a qualified provision for the school system may invoke a constitutional argument on the basis of the state education provision alone without using an equal protection or similar guarantee.[101] If opponents of the financing scheme can successfully argue that the school system is not "thorough," "efficient," "suitable," "uniform" or "adequate" according to its state constitutional mandate,[102] the scheme may be invalidated.[103]

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101. *State Courts*, *supra* note 92, at 98, 106-07. This approach was originally adopted by the Supreme Court of New Jersey in Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied sub. nom.*, Dickey v. Robinson, 414 U.S. 976 (1973), *after remand*, 69 N.J. 449, 355 A.2d 129 (1976). The *Robinson* I court refused to recognize infringement on a state constitutional "fundamental" right or a classification drawn on suspect grounds in the context of a challenge to a *Rodriguez*-type financing scheme. *Id.* at 499, 303 A.2d at 282-86. The New Jersey court interpreted its constitutional mandate for a thorough and efficient system of education to embrace a guarantee of equal education opportunity and a basic education to the extent it is "needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." *Id.* at 515, 303 A.2d at 295 (citing N.J. CONST. art. 8, § 4). The court, however, was not especially lucid in spelling out specifically what was required under the state constitutional mandate, in part because of the lack of clear precedent. *Id.* at 519-20, 303 A.2d at 297. The court invalidated the financing scheme which produced large disparities in per pupil expenditures, explaining that "dollar input is plainly relevant" and "because we have been shown no other viable criterion for measuring compliance with the constitutional mandate." *Id.* at 515-16, 303 A.2d at 295. The New Jersey legislature responded to the *Robinson* problem in 1975 by enacting a statute intended to help equalize and supplement public school resources. Public School Education Act of 1975, ch. 212, N.J.S.A. 18A:7A-1. This Act authorized state financial assistance for the schools for some of the following purposes: 1) equalization support for current school budgets; 2) support for specific remedial programs; 3) to give the State Commissioner of Education the administrative power to monitor educational quality and remedy problems, especially those due to inadequate financial resources of the schools. *Id.*; *see also* Abott v. Burke, 195 N.J. Super. 59, 63, 477 A.2d 1278, 1280 (1984). However, the new statutory scheme was again challenged, with complainants alleging that the funding system still fostered gross disparities in inter-district educational financial resources. *Abott*, 195 N.J. Super. 59, 477 A.2d 1278. Plaintiffs in *Abott* claimed that the scheme violated the New Jersey Constitution's education and equal protection clauses, as well as the federal equal protection clause of the fourteenth amendment. 195 N.J. Super. at 61, 477 A.2d at 1279. However, the Supreme Court of New Jersey ruled that the plaintiffs' challenges should first be considered by the state education agency according to the specific mandate of the 1975 statute, and considering the complexity of the issues at hand. *Abott*, 100 N.J. 263, 301, 495 A.2d 376, 393 (1985).

102. *See supra* notes 93-94 and accompanying text.

103. *State Courts*, *supra* note 92, at 107. *See* Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979). In *Pauley*, the Supreme Court of Appeals of West Virginia surveyed and applied "legally recognized components" of "thorough and efficient" school systems and found Lincoln County schools "woefully inadequate" by those standards. *Id.* at 707, 255 S.E.2d at 878. The court found further findings necessary, specifically to determine that if these standards were not being met, the situation was a product of the statutory scheme, and not a result of mere inefficiency or disregard of existing law. *Id.* In *Pauley*, the court also found that education was protected as a "fundamental" right and thus the state equal protection clause was violated. *Id.*

There is, however, much authority that suggests that a "thorough and efficient" or otherwise qualified constitutional mandate for a state's school system does *not* import substantive requirements or require measures of equal educational opportunity throughout the state. *See* Lujan v. Colo. St. Bd. Of Educ., 64 P.2d 1005 (Colo. 1982); State v. Olsen, 248 Ga. 632, 285 S.E.2d 156 (1981); Hornbeck v. Somerset Co. Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983).

The argument that the constitutional requirement for a school system or even a qualified school system is not being met may be especially persuasive in the context of urban schools. In New York, where the constitution requires only the establishment of an unqualified school "system,"[104] opponents of the financing scheme marshalled forceful arguments as to the shortcomings of the school system and its financial structure.[105] In *Board of Education v. Nyquist*,[106] the town of Levittown argued that the state's school financing scheme violated the equal protection guarantee of the federal and state constitutions[107] and the state constitutional mandate for maintenance and support of a system of free common schools.[108] Four of the state's largest cities, including New York City, intervened supporting Levittown's arguments.[109]

The intervenors, adhering to the original plaintiffs' assertion that great disparities in educational opportunity existed within the state,[110] specifically argued that the education received by children in inner city schools was inferior to that offered to children in extra-metropolitan districts due to the following factors constituting "municipal overburden":[111]

(1) unique demands on city budgets for non-educational expenses making less

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The court in *Hornbeck* distinguished *Robinson* and *Pauley* by noting that Maryland, unlike New Jersey and West Virginia, had already established comprehensive statewide qualitative standards pertaining to all facets of education in the public elementary and secondary schools as a prescribed measure of a "thorough and efficient" education. *Hornbeck*, 295 Md. at 639, 458 A.2d at 779-80. Moreover, no claim was made challenging these standards, alleging that these standards were not being met, or could not be met by any school district. *Id.* at 639, 458 A.2d at 780. The dissent, however, highlighted examples of poorer districts' special and greater educational problems and the competitive disadvantage born as a result of the substantial inequalities in educational opportunity. *Id.* at 660-61, 458 A.2d at 791 (Cole, J., dissenting). Claiming that the majority misinterpreted the significance of the history of the education article, the dissent found that the article's purpose was to ensure an "effective and universal school system." *Id.* at 672, 458 A.2d at 792 (Cole, J., dissenting).

104. N.Y. CONST. art. XI, § 1.

105. Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Supreme Court, Nassau Cty. 1978), *modified and aff'd*, 83 A.D.2d 217, 443 N.Y.2d 843 (1981).

106. 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), *appeal dismissed*, 459 U.S. 1139 (1983) (dismissal for lack of substantial federal question).

107. *Id.* at 35-36, 439 N.E.2d at 361-62, 453 N.Y.S.2d at 646-47.

108. *Id.*

109. Buffalo, Syracuse, Rochester and New York City were represented as intervening parties. *Id.* at 35, 439 N.E.2d at 361, 453 N.Y.S.2d at 646.

110. *Id.* The original plaintiffs and intervenors asserted that property-rich districts were able to raise greater local tax revenue, enabling them to offer an enriched education opportunity exceeding the fiscal ability of the property poor districts. *Id.* They also claimed that state aid perpetuated and exacerbated the disparities. *Id.* The original plaintiffs cited statistics which revealed that in 1974-75, per pupil expenditures ranged from $8,884 in the poorest district to $412,370 in the wealthiest district. *Levittown*, 408 N.Y.S.2d at 606, 615, 94 Misc. 2d at 486. Whereas the average unit of district wealth spent per pupil was $49,000, a substantial number of districts varied greatly from that level of spending. Specifically, over one-half of New York state's pupils lived in school districts where expenditures were 25% above or below the state average. *Id.*

111. *Levittown*, 57 N.Y.2d at 36, 439 N.E.2d at 362, 453 N.Y.S.2d at 646. The municipal overburden theory was also used in Robinson v. Cahill, 69 N.J. 449, 466, 355 A.2d 12 (1976).

funding available for education;[112]
(2) diminished purchase power of the municipal education dollar due to higher costs of living within the city;[113]
(3) greater absenteeism in the city schools — relevant because state aid calculations are based not on number of children enrolled but on average daily attendance figures;[114]
(4) larger concentration of pupils with special educational needs in the cities.[115]

However, the state's highest court interpreted New York's education clause to require only that all schools comply with technical prescriptions for minimum number of days of school attendance, required course of study, textbooks, qualification and certification of teaching and non-teaching personnel, pupil transportation and other quantitative matters.[116] The court perfunctorily concluded that because the average per pupil expenditure in New York was among the highest in the nation[117] and because New York has long been regarded as a leader in free public education,[118] there was "no difficulty" in determining that the constitutional requirement was being met.[119] The court reasoned that its state aid programs assured uniform minimum expenditures per pupil and thus guaranteed a basic education.[120]

The majority rebutted the municipal overburden argument on three grounds.[121] First, the court cited an opinion of the appellate division explaining that the fiscal inequalities existing in cities are a function of demographic, political and economic factors intrinsic to cities themselves and cannot be attributed to action or inaction of the legislature.[122] Second, the court noted that certain revenues were available to cities which were not available to non-municipalities.[123] Third, decisions regarding propriety of budget allocations were beyond the purview of the judicial function.[124]

Significantly, what the plaintiffs and intervenors in *Levittown* did not stress was the quality and adequacy of the education provided, as opposed to the quantum of the disparities in per pupil expenditure.[125] The lone dissent in *Levittown* emphasized perhaps a more critical and potentially successful issue as to the adequacy of the education provided.[126] Citing distressing statistics,

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112. *Levittown*, 57 N.Y.2d at 36, 439 N.E.2d at 362, 453 N.Y.S.2d at 646.
113. *Id.*
114. *Id.*
115. *Id.* New York City has 47% of the state's pupils with special education needs although only 31% of the total school population. *Id.* In 1980-81, figures rose so that the city (having 51% of the special needs students) only 33% of the school population, received only 29% of the state's operating aid. *Id.* at 53, 439 N.E.2d at 372, 453 N.Y.S.2d at 656 (Fuchsberg, J., dissenting).
116. *Id.* at 48, 439 N.E.2d at 368-69, 453 N.Y.S.2d at 653.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 45-46, 439 N.E.2d at 367, 453 N.Y.S.2d at 651.
121. *Id.* at 41-42, 439 N.E.2d at 365, 453 N.Y.S.2d at 649.
122. *Id.* at 41, 439 N.E.2d at 365, 453 N.Y.S. 2d at 649.
123. *Id.*
124. *Id.* at 42, 439 N.E.2d at 365, 453 N.Y.S.2d at 649-50.
125. *Id.* at 38, 439 N.E.2d at 363, 453 N.Y.S.2d at 647-48.
126. *Id.* at 53-60, 439 N.E.2d at 371-76, 453 N.Y.S.2d at 656-60 (Fuchsberg, J., dissenting).

Justice Fuchsberg noted that "unconscionable" numbers of school children fail to acquire basic skills in reading and math.[127] The dissent also argued that an acceptable or adequate level of education in the country had risen, implying that what was once perhaps an acceptable level of education in the state was no longer so.[128]

Though plaintiffs' municipal overburden argument in *Levittown* was not ultimately successful,[129] the case is significant for the following reason. At least one vehement justice on New York's highest tribunal, and a majority below, ruled that a constitution which provides no qualitative guarantee would not permit either the inequities and/or the inadequacies inherent in the state's school financing program and acknowledged the urgency of municipal educational overburden. The door is open for other states, with more demanding constitutional educational guarantees, to acknowledge the realities of the legislative financing scheme and review them in light of state constitutional conceptions of justice.

Though the present discussion focuses on certain theoretical approaches to school finance reform litigation in state courts, an issue which cannot be completely ignored is the method by which reform may be achieved once the problem has been judicially recognized. Indirectly, pervasive litigation in this area has led some state legislatures to enact statutory provisions designed to alleviate effectively substantial disparities in intrastate levels of per pupil spending or address the needs of specific school populations in anticipation and fear of a judicial challenge in their state.[130] When judicial relief is sought and a decision is rendered in favor of the plaintiffs, the task of fashioning an effec-

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127. *Id.* at 54-55, 439 N.E.2d at 372-73, 453 N.Y.S.2d at 657. In Rochester, standardized tests administered in 1975 showed that 45% of its high school students were "educationally disadvantaged" — not performing at grade level and 2 years or more below in reading skills; 58% were below their level in math; 16% of Rochester's 12th grade pupils read at 5th grade level or below. *Id.* at 54-55, 439 N.E.2d at 372, 453 N.Y.S.2d at 657. In New York City, in 1976, 12% of the city's 9th grade students were found to be at or below 4th grade reading levels. *Id.* at 55, 439 N.E.2d at 373, 453 N.Y.S.2d at 657.

128. *Id.* at 57, 439 N.E.2d at 374, 453 N.Y.S.2d at 658.

129. *Id.* at 49-50, 439 N.E.2d at 369-70, 453 N.Y.S.2d at 654. After an unfavorable decision by the state's highest court, the original plaintiffs' and intervenors' case was dismissed by the U.S. Supreme Court for lack of a substantial federal question. *Levittown*, 459 U.S. 1139 (1983).

130. J. GUTHRIE, *supra* note 32, at 38, 116. At least 19 states to date have enacted school finance reform legislation intended to increase equity in public elementary and secondary school funding within the state since the early 1970s. *Id.* at 116. Reform legislation was judicially catalyzed in California, New Jersey, and Texas. *Id.* However, in Kansas, Michigan, Colorado, Florida, Illinois, Minnesota, New Mexico, Utah, and Wisconsin, legislative action was more a direct result of social, economic and political pressure. *Id.* Regarding implementation of recent school reform legislation in Texas, see Reinhold, *Smile When You Say 'School Reform' Pardner*, N.Y. Times, Jan. 4, 1987, § 12 (Education Life), at 60, col. 1. More recent school finance legislation may also be seen as part of a larger thrust toward improving schools in general. In other words, the recent trend is toward promoting "excellence" rather than simply equity in education. *See Nation At Risk, supra* note 1 and the following reports cited therein: NATIONAL COMMISSION FOR EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983); NATIONAL TASK FORCE ON EDUCATION FOR ECONOMIC GROWTH; EDUCATION COMMISSION OF THE STATES, ACTION FOR EXCELLENCE: COMPREHENSIVE PLAN TO IMPROVE OUR NATION'S SCHOOLS (1983); *see also* N.Y. Times, Nov. 13, 1983, § 12 (Fall Survey of Education), at 28.

tive remedy has proven arduous.[131] Where a state court has invalidated a school financing system, one of two general scenarios may occur.[132] Once the court has defined the infirmity, the more popular and seemingly more appropriate approach is for the court to order the legislature to find a solution to the problem adhering to guidelines set by the court.[133] This is known as "agenda setting."[134] The alternative is for the court itself to design a remedy, characterized as an "adjudicatory" solution.[135] The agenda-setting model appears to be more effective because legislative bodies generally have greater human and financial resources for information gathering and analysis required for remedying the problem, and also more policymaking flexibility.[136] Using this approach, several state legislatures have moved toward eliminating disparities in per pupil expenditures using creative and complex legislation while permitting schools to remain operative and avoiding interference with the educational process.[137] The adjudicatory remedial model, lacking the assets described above, appears to be less appropriate to this situation[138] though it has been

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131. *Id.*; *see also* J. GUTHRIE, *supra* note 32, at 38. See generally S. CARROLL & R. PARK, THE SEARCH FOR EQUITY IN SCHOOL FINANCE (1983) for a study of the effects of reform legislation in five states — California, Kansas, Michigan, Florida, and New Mexico.

132. J. GUTHRIE, *supra* note 32, at 39.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* Agenda-setting, though perhaps the better alternative, has not provided a satisfactory remedy in some cases. *Id.* For example, in Connecticut and California, the subsequent legislation was again challenged by plaintiffs, i.e. equal protection "idealists," but has been accepted by most as at least working toward equitable goals. *Id.* The cases this authority refers to are, respectively: Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), followed by Serrano v. Priest 180 Cal. App. 3d 1187, 226 Cal. Rptr. 584 (1986). New Jersey ran into more substantial complications. There, the state legislature was reluctant to enforce the judicial decree of *Robinson* V, 693 N.J. 449, 355 A.2d 129 (1976). In May of 1976, the state supreme court was forced to close the state's public schools in order to compel compliance. D. KIRP, *supra* note 4, at 612 (citing *Robinson* VI, 70 N.J. 155, 358 A.2d 457 (1976)). The state legislature was then forced to enact a state income tax providing necessary funding to implement the judicial mandate. J. GUTHRIE, *supra* note 32, at 20. However, the order mandating closing of the schools was reversed in July of 1976. D. KIRP, *supra* note 4, at 612 (citing *Robinson* VII, 70 N.J. 464, 360 A.2d 400 (1976)). The revised statutory scheme has come under further attack in New Jersey, however. *See* Abbott v. Burke, 195 N.J. Super. 59, 477 A.2d 1278, *rev'd*, 100 N.J. 269, 495 A.2d 376 (1985) (transferred to State Education Agency).

The long-term effects of school financial reform legislation, entailing a lengthy and detailed analysis beyond the scope of this Note, are essential to examine from a practical standpoint. Though the 1970's precipitated much reform legislation, there is some authority to suggest redistribution goals effectuated by states in this period are not being maintained. *See* Friendly, *Efforts Are Failing to Close Gaps Separating Rich and Poor Schools*, N.Y. Times, Feb. 19, 1985, at 1, col. 4 [hereinafter *Efforts Are Failing*]. This may be attributed to economic recession, internal political pressures, and "save harmless" provisions, according to authorities cited by this source. *Id.* at C15, col. 3. "Save harmless" provisions assure a school district that it will not receive any less funding than in the previous year. D. KIRP, *supra* note 4, at 569. This serves to limit the amount of resources available for redistribution and tends to maintain interdistrict disparities. *Id.*

137. *Id.*

138. J. GUTHRIE, *supra* note 32, at 39. This authority cites the outcome in Hobsen v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) [hereinafter *Hobsen* I] as an example of the problems

useful in other judicial settings.[139]

Along with the difficulty in fashioning an effective remedy, a study of school finance litigation is further complicated by the fact that there is little uniformity in state court approaches and analyses of the school financing problem, even where the state's constitutional provisions for public education are similar or identical.[140] Also, there are a few states which lack explicit educational guarantees in their constitutions.[141] Still other states merely establish education as a high priority. For example, a state constitution may provide that the state shall "cherish" the interests of literature and science[142] without guaranteeing that a free or adequate education will be provided to all school children.[143] In sum, reform at the state level is possible, though not necessarily assured.

As an alternative to relying on state constitutional provisions to invalidate a school financing scheme, the second part of this discussion looks to the contemporary Supreme Court approach to equal protection analysis and the content of the fourteenth amendment. Based on observations that there may be new substantive guarantees in the fourteenth amendment specifically regarding basic public education, opponents of a state's *Rodriguez*-type school financing scheme may be able to claim infringement on this particular new "right" which results from the statutory scheme under the fourteenth amendment. The existence, formulation, and extent of this "right" are the focus of

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resulting from an adjudicatory remedy. *See supra* note 16. Four years after the original decision in *Hobsen*, and in order for the district itself to remedy the impermissible disparities, the plaintiffs asserted that these disparities had not been substantially alleviated. *See* Hobsen v. Hansen, 327 F. Supp. 844 (D.D.C. 1971) [hereinafter *Hobsen* II]. Thus, in 1971 the court ordered specific steps to be taken to remedy the situation, including the transfer of highly paid teachers to mostly poor black schools. J. GUTHRIE, *supra* note 32, at 11. However, problems arose when teachers were transferred but no classes in their subject areas were formed due to lack of student enrollement *Id.* Eventually, federal legislation helped remedy the problem which was essentially drawn along racial lines. See *id.*, at 12, for a discussion of how guidelines for distribution of federal aid under Title I of the Elementary and Secondary Education Act, worked to speedily reduce intradistrict per pupil expenditure disparities.

139. *See, e.g.*, Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971) (interim remedial techniques may be formulated by the district court, in order to achieve constitutionally mandated school desegregation, however awkward and inconvenient).

140. EDUCATION COMMISSION OF THE STATES, SCHOOL FINANCE REFORM IN THE STATES: 1983, at 32-35 (1983). Diverging approaches under similar constitutional provisions for education are demonstrated, for example, by comparing *Serrano*, 18 Cal. 3d 729, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), and Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983) with Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973).

141. *State Courts*, *supra* note 92, at 111. The states that do not provide a guarantee for a school system in their constitutions are: Mississippi and Alabama. *Id.* The Mississippi Constitution was amended in 1960, to provide that "the Legislature *may*, in its discretion provide for the maintenance and establishment of free public schools . . . ." MISS. CONST. art. 8, § 201 (emphasis added). The Alabama Constitution provides that the state shall "establish, organize and maintain a liberal [school] system . . . ." ALA. CONST. art. XIV, § 256. It also clearly indicates that there is "no right to education or training at the public expense . . . ." *Id.* at amend. 111, § 256.

142. *State Courts*, *supra* note 92, at 110-11. The "cherish" states include Massachusetts, New Hampshire, Rhode Island, and Tennessee. *Id.* at 110. At this time, school finance cases are pending in state courts in Massachusetts and New Hampshire.

143. *State Courts*, *supra* note 92, at 110-11.

the next section.

IV. Departure From Traditional Equal Protection Analysis: Implying the "Right" to a Basic Education under *Plyler v. Doe*

Though the *Rodriguez* Court appeared to state that education was not a fundamental right for purposes of equal protection,[144] there is dictum in *Rodriguez* which implies that there may be a constitutional right to "an opportunity to acquire basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process."[145] This may further imply that an absolute denial of educational opportunity to any children would not be permissible.[146] However, in *Rodriguez*, the state's repeated assertion that it fulfilled its "desire" to assure "every child in every school district an adequate education"[147] was not refuted by the plaintiffs.[148] Thus *Rodriguez* did not directly address the existence of a right to an adequate or basic education.

Nearly a decade after *Rodriguez*, the Supreme Court was faced with a case that inadvertently relied on the above mentioned *Rodriguez* dictum. In *Plyler v. Doe*,[149] the Supreme Court was asked to decide whether a Texas statute which denied free public education to undocumented alien children within the state violated the equal protection component of the fourteenth amendment.[150] In a 5-4 opinion,[151] the majority speaking through Justice Brennan found the statute unconstitutional.[152] In coming to this decision the Court initially recognized that the equal protection clause of the fourteenth amendment applied to all persons, including unlawfully present aliens.[153] Secondly, the Court found that the state must show a *substantial*, as opposed to a

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144. 411 U.S. at 36-37; *see supra* note 76 and accompanying text.

145. 411 U.S. at 36-37.

> Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, [of free speech or voting)] we have no indication that the present levels of educational expenditures in Texas, provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where — as it is true in the present case — no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Id.

146. *See id.*

147. *Id.* at 24; see also *supra* note 54 for a description of the Texas state aid program.

148. *Id.*

149. 457 U.S. 202 (1982).

150. *Id.* at 205.

151. Justice Brennan articulated the majority position with Justices Marshall, Blackmun and Powell writing separate concurring opinions. Justice Marshall advocated his sliding scale approach to equal protection as he did in *Rodriguez*. *See supra* note 76. Chief Justice Burger filed a dissenting opinion with which Justices White, Rehnquist, and O'Connor joined.

152. *Plyler*, 457 U.S. at 230.

153. *Id.* at 211.

merely rational, interest that is furthered by the statute[154] and rejected such interests asserted by the state.[155]

A. Standard of Review in "Plyler"

The Court in *Plyler* acknowledged at the outset that undocumented aliens could not be treated as a suspect classification,[156] and that education is not explicitly or implicitly protected by the Constitution as a fundamental right.[157]

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154. *Id.* at 225.

155. *Id.* at 225-26. Using this elevated standard, the court rejected the State's first argument that the undocumented status of these illegal alien children "*vel non*" established a sufficient basis for denying them benefits afforded to legal residents. *Id.* The Court countered the state's asserted interest in expending their limited resources on lawful residents by noting the lack of evidence on the record that illegal aliens posed a significant burden on the economy or on the state's educational process. *Id.* at 228-30.

The Court cited precedent for this "intermediate" standard of review; *see id.* at 218-19 n.16, (citing Craig v. Boren, 429 U.S. 190 (1976)) (invalidating more permissive drinking laws for women over men); Lalli v. Lalli, 439 U.S. 259 (1978) (classification based on illegitimacy only invalid if not related to a permissible state interest). The Court explained that the technique of intermediate scrutiny (or the substantial interest test) "permits us to evaluate the rationality of the legislative judgment with reference to well-settled constitutional principles." *Plyler*, 457 U.S. 218 n.16. The Court noted that:

> [C]ertain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a *substantial* interest of the State.

457 U.S. at 218-19 (footnote ommitted) (emphasis added). The substantial interest test has been applied when strict scrutiny is inappropriate due to lack of a traditionally recognized suspect classification or infringement on a "fundamental" right, as in *Craig* and *Lalli*. More recently, the substantial interest test has been applied primarily in gender-based discrimination cases as in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (male could not be excluded from state nursing school on basis of sex, no substantial government interest served). *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 70-77 (1986), *citing* Orr v. Orr, 440 U.S. 268 (1979), *on remand*, 374 So. 2d 895 (1979), *writ denied*, 374 So. 2d 898 (1979), *appeal dismissed, cert. denied*, 444 U.S. 1060 (1980) (restricting alimony only from husbands to wives impermissible because gender-classification did not substantially promote important government objective); Califano v. Westcott, 443 U.S. 76 (1979) (gender-based classification under Social Security Act which gave benefits to families where father but not mother was unemployed invalidated because did not substantially advance government interest); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980), *on remand to*, 601 S.W.2d 8 (1980), *appeal after remand*, 616 S.W.2d 859 (1981) (state workmen's compensation law with different criteria for allocating death benefits to widow or widower was not tailored to achieve a substantial government interest in aiding needy widowed spouses); Rostker v. Goldberg, 453 U.S. 57 (1981) (exempting women from draft registration would survive scrutiny under substantial interest test); Michael M. v. Superior Court, 450 U.S. 464 (1981) (statutory rape law which punished male and not female perpetrators did support substantial state interest in preventing teenage pregnancies).

156. 457 U.S. at 220 n.19. The Court precluded this categorization in recognizing that illegal aliens established their status voluntarily, as opposed to other groups recognized as suspect classifications. *Id.*

157. *Id.* at 221-22. The Court strictly cited *Rodriguez* for this proposition, but asserted moreover that "neither is it [education] merely some governmental 'benefit' indistinguishable from

Thus, if the Court were to apply the traditional two level mode of equal protection analysis,[158] it would probably have held that Texas' asserted interest in expending its limited school resources on its own citizens and deterring the influx of illegal immigrants were legitimate. In terms of traditional equal protection analysis, these interests would be rationally related to their purpose, and thus the law could not be struck down.

However, the Court in *Plyler* chose a relatively different approach, in the form of intermediate scrutiny.[159] In its analysis, the *Plyler* Court balanced a number of factors[160] which included: (1) the minimal savings that might be acheived by denying the alien children entry to the schools;[161] (2) the children's own powerlessness in altering their situation;[162] (3) the "special constitutional sensitivity" to educational deprivation;[163] (4) the nature and extent of the disadvantage these children would bear;[164] (5) the economic and social

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other forms of social welfare legislation." *Id.*

158. *See supra* note 58.

159. *See supra* note 152. For a well justified suggestion that the *Plyler* standard of review is more appropriately characterized as a balancing test. *See* Note, *Alternative Models of Equal Protection Analysis*: Plyler v. Doe, 24 B.C.L. REV. 1363, 1394 (1983) [hereinafter *Alternative Models*]; *see also* Harvith, *Education Law*, 34 SYRACUSE L. REV. 215 (1983). Roots of this balancing approach can be traced to Dandridge v. Williams, 397 U.S. 471 (1970) (Marshall, J., dissenting). *See supra* note 76. Justice Marshall asserted that the method the Court had used and should use in reviewing equal protection challenges to legislative classifications relies on three factors: (1)"the character of the classification in question," (2) the "relative importance to individuals in the class discriminated against of the governmental benefits they do not receive," and (3) "the asserted state interest in support of the classification." *Dandridge*, 397 U.S. 521-22 (Marshall, J., dissenting) (cited in *Alternate Models*, *supra*, at 1391).

160. 457 U.S. at 223-25, 218-19 & n.16; *see also supra* note 155.

161. *Plyler*, 457 U.S. at 229-30. The Court first pointed out that there was no evidence on the record which suggested that illegal aliens are a significant burden on the economy of the state. *Id.* at 229. The Court also concluded, in agreement with the district court, that barring undocumented aliens from the schools would not necessarily improve the educational quality of the schools. *Id.* at 230. The Court reasoned that even if the schools and students would benefit from barring some children from attending school, such as limiting class size, the state could not justify barring *this* group of children from the schools as they were indistinguishable from legal resident aliens. *Id.*

162. *Id.* at 220-21. The Court noted the harshness of punishing children for their parent's misdeeds, namely illegal entry into the country. "Even if the state found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Id.* at 221.

163. *Id.* at 227. The Court noted the enduring language of *Brown* in which the Supreme Court expounded that:

> [e]ducation is perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship. [Today] it is the principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

457 U.S. at 224 (citing Brown v. Board of Education, 347 U.S. 483, 493 (1954)).

164. *Id.* at 223-24. The Court noted that to uphold the statute would be to impose a "lifetime of hardship" on a group of children who were not accountable for their "disabling status." *Id.* This denial would brand the children with the enduring "stigma of illiteracy" and deny to

costs to be borne by the state and nation in essentially refusing to educate a particular segment of its population.[165] Weighing these interests, the Court found that Texas' interests were not as significant as the societal costs to be suffered.[166] In holding that no national policy supported the state's denial of elementary and secondary education to these children, the statute was struck down.[167]

In terms of traditional equal protection rubric, the *Plyler* majority stopped short of recognizing education as a fundamental right[168] which would

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them "the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." *Id.* at 224.

165. *Id.* at 229-30.

> It is difficult to understand . . . what the State hopes to achieve by promoting the creation and perpetutation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime . . . . [W]hatever savings might be achieved by denying these children an education . . . are wholly insubstantial in light of the costs to these children, the State, and the Nation.

Id. at 231.

166. *Id.*

167. *Id.* at 227.

168. Arguing that education, or some quantum thereof, is indeed a "fundamental" right, is another option or strategy for *Rodriguez*-type plaintiffs. The Supreme Court itself has indicated that neither *Rodriguez* nor *Plyler* has settled the question as to whether a minimally adequate education is a fundamental right. Papasan v. Allain, 54 U.S.L.W. 4939, 4945 (U.S. July 1, 1986)(No. 85-499). *Papason* involves the disparities in appropriations to Mississippi public schools, as a result of federal land grants donated in the 19th century. Resolution of *Papasan* may turn on: 1) factual support of the allegation that petitioners have been denied a minimally adequate education as a result of the state's appropriations; and 2) whether the federal policy appropriating the lands requires the state to strictly allocate economic benefit tied to these lands to townships where these lands are located. *Id.* at 4946. The Supreme Court indicated it is the federal policy that may be subject to an equal protection challenge on remand to the district court. *Id.* at 4946-47.

Along with the value accorded to *stare decisis*, the Supreme Court has shown reluctance in expanding the notion of a fundamental right. See Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); Note, *Developments in the Law of Equal Protection*, 82 HARV. L. REV. 1065, 1087 (1969). Specifically, the majority in *Rodriguez* had difficulty discerning why education was more "fundamental" than rights to food or shelter, which the Court has never recognized as "fundamental." 411 U.S. at 38; *see also Plyler*, 457 U.S. at 248-49 (Burger, C.J., dissenting). This argument may be rebutted on two grounds. First, the government may and does attempt to provide for those who are incapable or providing for themselves (i.e., welfare, Medicaid, etc.) to the extent it is financially able. Obviously there are limitations and competing concerns that accompany federal budget-making decisions, and the federal government providing all the necessities of life for every needy citizen is a financial absurdity. However, providing a minimally adequate education for all is not such an absurdity, as schools are community resources that are already established, and maintaining schools as resources to the point that each child has at least an opportunity to be educated is not unrealistic. Secondly, on a more esoteric level, since our political structure is created by the people via the government, then educating all citizens to the point of understanding that government on a basic level is arguably a function of that government if the government purports to be morally accountable.

Defining the quantum of education that may warrant constitutional protection, however, may be

expressly undermine *Rodriguez*. However, in recognizing the "fundamental role" of education in our society, using carefully tailored language to avoid the *Rodriguez* conflict, the *Plyler* Court recognized that some instances of educational deprivation may not be tolerated under the fourteenth amendment.

B. Analysis of Plyler

The *Plyler* majority has been criticized for its effective disregard of well-established equal protection guidelines in order to make a "noble and compassionate" decision.[169] The *Plyler* dissent and other commentators have implied that *Plyler* indicates the Court is again willing to utilize the result-oriented, substantive due process approach within the framework of the equal protection clause.[170] However, whether the *Plyler* decision represents an unjustifiable de-

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seen as problematic. *See* Harvith, *Education Law*, 34 SYRACUSE L. REV. 215, 236-42 (1983). According to the *Rodriguez* dictum, 411 U.S. at 36-44 (cited in *supra* note 144) constitutional protection might be afforded broadly to the opportunity to acquire basic minimum skills necessary for the enjoyment of the rights of speech and of full participation in the political process. This position also finds support in J. Blackmun's concurrence in *Plyler*, 457 U.S. at 234 (Blackmun, J., concurring). Ostensibly, this may include education to the point of literacy, for the first function. One commentator suggests that meeting a test of eighth grade reading ability or performance on other high school competency tests, may demonstrate "literacy." Preovolos, *Rodriguez Revisited: Federalism, Meaningful Access, and The Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 115 (1980). She argues that either of these standards are simple, comprehensible, and well-suited to judicial enforcement based on the fact that most school systems already administer such competency tests, and judicial intervention into state educational or fiscal policy would be limited. *Id.* On the issue of what level of education is necessary to guarantee meaningful participation in the political process, see Harvith, *supra* at 241. Finally, those against formulation of an explicit (or implicit) constitutional right to some form of education cite strict construction of the Constitution. This position is that areas of control not specifically granted to the federal government such as education, are within the province of state law under the tenth amendment. U.S. CONST. amend. X. *See*, e.g., *McInnis*, 293 F. Supp. at 335-37; *supra* text accompanying note 27; *Rodriguez*, 411 U.S. at 41-42; *see also* P. BURRUP & V. BRIMLEY, FINANCING EDUCATION IN A CLIMATE OF CHANGE 77, 98-121 (3d ed. 1982). However, the distinction can be made between as to how the revenue for the local school system is *raised* and how it is *spent*, in reference to "local control." *See* Silard & Goldstein, *Toward Abolition of Local Funding in Public Education*, 3 J. LAW & ED. 307, 331 (1974). Though it is arguable that state or local decision-making as to raising revenue for the schools does fall within the realm of "controlling" the school system, *id.* at 333, a number of experts have found that local education funding is unnecessary for retaining local "control" regarding curriculum content and educational policy. *Id.* at 332; *see also Serrano* II, 18 Cal. 3d at 769, 557 P.2d at 953, 135 Cal. Rptr. at 369; Dupree v. Alma School Dist. No. 30, 279 Ark. 340, at 345-46, 651 S.W.2d 90, 93.

169. *Plyler*, 457 U.S. at 243-44 (Burger, C.J., dissenting). The dissent recognized that the importance of education is "beyond dispute." *Id.* at 247 (Burger, C.J., dissenting). However, "[W]ere it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children — including illegal aliens — of an elementary education." *Id.* at 242 (Burger, C.J., dissenting). The dissent continued to assert that the Court was abusing the fourteenth amendment in an attempt to become an "omnipotent and omniscient problem-solver," distorting the judicial function to make amends for the default of the legislature. *Id.* at 243.

170. *Id.* at 244-45 (Burger, C.J., dissenting). The dissent referred to the "justly criticized judicial tendency to attempt speedy and wholesale formulation of 'remedies' for the failure — or simply the lagard pace — of the political processes of our system of government." *Id.* at 243

parture from the traditional mode of equal protection analysis or is unfaithful to the original intent of the constitutional framers, is beyond the scope of the present discussion.

Despite criticism, the *Plyler* majority opinion suggests that the Supreme Court is willing, or perhaps more willing than it has been, to afford constitutional protection to the "right" or interest in acquiring a basic education for all children within this country. Whether the "right" is explicitly guaranteed as a "fundamental" right invoking strict judicial scrutiny, or whether the Court invokes a balancing approach or intermediate scrutiny in derogation of the traditional two-tiered approach to equal protection as in *Plyler*, the results may be the same. Namely, the Court is recognizing that education at least to some level, is more than a privilege but a necessity in the American political system and within our increasingly technological and complex economic and social structure. If this "right" applies to those who are unlawfully present in the country, surely it applies with equal force to each and every resident American school child.[171]

C. *Plyler and School Finance Litigation*

Plyler may of course be distinguished from the *Rodriguez*-type of school financing challenge in that the scheme held unconstitutional in *Plyler* resulted in an absolute denial of basic free public education for the affected children in Texas, in violation of the equal protection principle.[172] The plaintiffs in *Rodriguez*, however, claimed that different levels of school expenditures per pupil resulted in disparate educational quality and opportunity as per student within

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(Burger, C.J., dissenting). The Court is likely though not explicitly referring to the overextension of constitutional principles to substantively protect rights that the Court considers worthy which characterizes the now-discredited substantive due process era. *See generally* L. TRIBE, *supra* note 58, at 434-36. The dissent also cited classic criticism of an overzealous judiciary by noted Professor Bickel. 457 U.S. at 254 & n.15 (Burger, C.J., dissenting) (citing 1 A. BICKEL, THE LEAST DANGEROUS BRANCH 21 (2d ed. 1962)). One of Professor Bickel's tenets is that when judicial review attempts to correct legislative mistakes or inaction, not only is the constitutional separation of powers violated but, the political process and the public faith in the political structure are significantly weakened. *Id.*

It is noted that predictability in the judicial process is vital to its credibility and that this is defeated by a retreat from the traditional two-tiered mode of equal protection analysis. *See, e.g.* Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting). *See generally* Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 234-40 (1965). However, more supportive commentators suggest, as implied by the *Plyler* majority, that fairness mandates the consideration of equal protection claims on the merits of each case and should allow for deviation from an overly rigid traditional analysis. *See generally* Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on and Beyond*, Plyler v. Doe, 44 U. PITT. L. REV. 329 (1983). *See also Alternate Models, supra* note 158, at 1395 and Note, *Constitutional Law: The Equal Protection Clause: The Effect of* Plyler v. Doe *on Intermediate Scrutiny*, 36 OKLA. L. REV. 329, 336-37 (1983). The positions taken in these discussions imply that the conflict between fairness in the flexible case-by-case approach and the desired predictability by use of formally set guidelines is an inherent conflict in any judicial review system, and as a broad question in legal philosophy, is not subject to simple resolution.

171. *See Harvith, supra* note 168, at 244.

172. *Plyler*, 457 U.S. at 206, 231.

the state, and that existing levels of funding and the resulting quality of schooling should be equalized throughout the state.[173] In other words, the *Plyler* situation resulted in total deprivation of a basic education, whereas the plaintiffs in *Rodriguez* did not seek to prove that an adequate basic education was lacking in the property-poor districts as compared to the property-rich districts.[174] But the fact remains that both *Rodriguez* and *Plyler* are cases where the plaintiffs asserted that the right to be educated, at some level, is constitutionally protected under the fourteenth amendment equal protection guarantee. Thus, *Plyler's* analysis regarding education, and deprivation thereof, indicates a marked departure from the traditional equal protection approach applied in *Rodriguez*.

For opponents of *Rodriguez*-type school financing schemes, this may have substantial implications. Plaintiffs who may not have successful claims under their state constitutions may once again have the option of litigating under federal constitutional principles. Plaintiffs may claim under *Plyler* that a right to a minimally adequate education exists, and may establish that the financing scheme provides some children with a below adequate education using simple, school-mandated and imposed literacy and achievement standards.[175] In light of distressing statistics on literacy and academic achievement from inner-city and some non-city schools,[176] this approach does not seem at all infeasible.

The federal courts maybe bound by *Plyler* to approach their decisions applying intermediate scrutiny, by requiring the state to demonstrate a *substantial* interest in promulgating the financing scheme. This elevated standard may provide favorable treatment for *Rodriguez*-type plaintiffs in contrast to the mere minimum rationality test which has been applied in the past. In addition, state courts interpreting their own equal protection clauses may not be strictly bound but may choose to mirror the Supreme Court's balancing approach and move away from the traditional rigid equal protection analysis.

There is also the remote possibility that the Supreme Court will explicitly recognize that the right to a mimimally adequate or basic education is a fundamental right, that is, fundamental to the exercise of basic political rights and implied in the penumbra of the Constitution as an implicitly guaranteed right. The Court might then return to the strict two-tiered equal protection approach, appeasing the formalists who support judicial precedent using strict classifications and value predictablity in application of a precise standard of review.

CONCLUSION

In any event, it is possible that in the near future the Supreme Court will be asked to reconsider school finance cases and the *Rodriguez* holding in light of *Plyler* and the emerging intermediate scrutiny. As indicated by the recent reopening of cases in states such as California[177] and New Jersey,[178] and the

173. *Rodriguez*, 337 F. Supp. at 283-84.

174. *Rodriguez*, 411 U.S. at 24.

175. *See Prevuolos supra* note 168.

176. *See supra* notes 127 and accompanying text.

177. Serrano v. Priest, 180 Cal. App. 3d 1187, 226 Cal. Rptr. 584 (1986).

178. Abott v. Burke, 195 N.J. Super 59, 477 A.2d 1278 (1984), *rev'd*, 100 N.J. 269, 495

possibility of new cases emerging in other state courts, this type of litigation continues to evolve and reflect important and controversial issues. However, in the interim, *Rodriguez* does not prevent success to plaintiffs in the herein discussed type of school finance litigation. *Rodriguez* clearly left open options for state courts. In addition, *Plyler* may be interpreted in the future to modify *Rodriguez*, if not to overrule it.

Tamar L. Sobel

A.2d 376 (1985) (transferred to state education agency).

COMMENT

United States v. Montoya de Hernandez: At the Border of Constitutional Uncertainty

The fourth amendment of the Constitution grants many protections to people within the United States. The purpose of the fourth amendment is to prevent governmental overreaching by protecting the people against unreasonable searches and seizures.[1] It further limits governmental intrusion by setting out specific warrant requirements. First, warrants may only be issued upon probable cause supported by oath or affirmation.[2] Second, the warrant must describe with some specificity the place to be searched and the persons or things to be seized.[3] If this fundamental right has been violated, the victim has a remedy under the exclusionary rule, whereby evidence seized illegally is excluded from criminal trials.[4]

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1. The fourth amendment provides:

> 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.

2. *Id.* The Court in *Johnson* v. *United States* stated the correct procedure for obtaining a warrant. 333 U.S. 10 (1948). The officer seeking to obtain a warrant must appear in person before the court or body having the power to issue the warrant. *Id.* The purpose of the procedure is to ensure that the warrant was issued by a neutral and detached magistrate who properly determined that probable cause existed. *Id.* The officer must bring with him an affidavit setting forth the facts and other information on which the police officer relied for obtaining the warrant. *Id.* The affidavit must establish probable cause and the magistrate must be able to determine whether probable cause exists. Shadwick v. Tampa, 407 U.S. 345 (1972).

3. U.S. CONST. amend. IV.

4. It was first held in *Weeks v. United States*, that:

> The Fourth Amendment . . . put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

Over the years, the Supreme Court has carved out various exceptions to the fourth amendment probable cause and warrant requirements.[5] One such

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232 U.S. 383, 391-92 (1914).

In referring to the use of evidence seized in an unconstitutional manner, the Court stated:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Id. at 393. The Court in *Wolf* v. *Colorado* held that "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." 338 U.S. 25, 28 (1949). The *Weeks* Court was the first court to establish the exclusionary rule; however, it only barred the evidence from federal prosecutions. "[T]he *Weeks* exclusionary rule would not then be imposed upon the States as 'an essential ingredient of the right.'" Mapp v. Ohio, 367 U.S. 643, 650 (1961).

The Court in *Mapp* extended the exclusionary rule to the state courts when it was held that:

> We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court. Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.

Id.

5. There are a few narrowly defined situations where a search may be made without a warrant. One situation is a search incident to a valid arrest. Such a search is legal if it is reasonable in scope and made pursuant to a lawful arrest. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969). A warrantless search is valid as long as the arresting officer was present at the commission of the crime or if the officer had probable cause to believe that the individual committed the crime. *Id.* at 755. In such a situation, the officer is allowed to search both the person and the areas under the individual's control. *Id.* at 756. *See generally* Henry v. United States, 361 U.S. 98 (1959).

Another situation in which officers may make a warrantless search is a search made in hot pursuit. *See* Warden v. Hayden, 387 U.S. 294 (1967). Police in pursuit of an individual whom they believe has committed a crime may enter a private building during the pursuit. *Id.* at 298-300. Further, they may search that building while they are on the premises and may seize any evidence that might aid in the apprehending of the pursued individual. *Id.* at 306-07. A third situation in which a warrantless search may be conducted involves the search of premises subject to regulatory licenses. United States v. Biswell, 406 U.S. 311 (1972). The rationale for these searches is that they are reasonably necessary to aid the regulatory agency in carrying out its responsibilities. *Id.*

A fourth situation where a search warrant is not required pertains to items which are in long-term official custody. The property may be searched for items closely connected with the reason for the forfeiture and for inventory purposes. *See* Cooper v. California, 386 U.S. 58 (1967). *But see* Walter v. United States, 447 U.S. 649 (1980); Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977); South Dakota v. Opperman, 428 U.S. 364 (1976) for limitations to such searches.

An additional situation in which a warrant is not required is when an individual consents to a search. It may also be conducted without probable cause in such a case because by consenting to the search, the individual has waived his fourth amendment rights. However, to be valid, the consent must have been voluntarily given. *See* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); United States v. Watson, 423 U.S. 411 (1976); Schneckloth v. Bustamonte, 412 U.S. 218

exception pertains to the international border searches.[6] Recently, in *United States v. Montoya de Hernandez*[7] the Court far exceeded the relaxed probable cause and warrant requirements and virtually abolished almost all fourth amendment protections at international borders. In *Montoya*, the United States Supreme Court held that customs agents may detain travelers at the border beyond a routine customs search and inspection, based upon a reasonable suspicion that the traveler is smuggling contraband in his or her alimentary canal.[8]

The opinion represents an example of an overzealous desire for law and order.[9] While the decision provides an effective preventive measure to the

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(1973); Bumper v. North Carolina, 391 U.S. 543 (1968).

The following situations, involving the seizure of items from an automobile, are valid without a warrant: (1) items observed in plain view, (2) when an individual is lawfully arrested, all areas within his immediate control may be searched including his automobile, (3) when an automobile is in official custody it may be subject to a routine inventory search. *See* United States v. Johns, 469 U.S. 478 (1985); United States v. Ross, 456 U.S. 798 (1982); South Dakota v. Opperman, 428 U.S. 364 (1976); Cady v. Dombrowski, 413 U.S. 433 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

Another exception is recognized for emergency situations. A search is valid without a warrant whenever there is a reasonable apprehension that the delay required in obtaining a warrant would frustrate the search. *See* Winston v. Lee, 470 U.S. 753 (1985); Schmerber v. California, 384 U.S. 757 (1966).

Finally, school officials do not have to obtain a warrant to search a student under their authority, nor do they need probable cause, if the school officials have reasonable grounds for suspecting that the student has violated the law or school rules. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985).

6. *See infra* notes 13-20 and accompanying text. *See generally* United States v. Martinez-Fuerte, 428 U.S. 543 (1976). When referring to border searches, it should be noted that " '[b]order searches' is a term of art used to 'distinguish official searches which are reasonable because made solely in the enforcement of Customs laws from other official searches made in connection with general law enforcement.' " Note, *At the Border of Reasonableness: Searches By Customs Officials*, 53 CORNELL L. REV. 871, 871 n.1 (1968) (citing Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966)). *See* 3 W. LAFAVE, SEARCH AND SEIZURE — A TREATISE ON THE FOURTH AMENDMENT § 10.5, at 276 (2d ed. 1987). LaFave stated that the term "border searches" includes "searches conducted at other ports of entry, searches conducted because of suspicious circumstances near the border, searches of persons or things known or believed to have recently crossed the border, and searches conducted by roving patrols or at fixed checkpoints in the interior." *Id.*

This article focuses strictly upon international border searches. This term encompasses actual borders and any "functional equivalent" of a border. An example of a functional equivalent of a border would be an inspection station located some distance from a border or a post office. *See* United States v. Ramsey, 431 U.S. 606 (1977).

7. 473 U.S. 531 (1985).

8. *Id.* at 541. The Court in *Montoya* stated:

> [T]he detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.

Id.

9. An example of an overzealous desire for law enforcement is found in United States v. Sharpe, 470 U.S. 675 (1985), where the Court upheld a 20 minute detention without probable

problem of alimentary canal drug smuggling,[10] it entirely ignores both the reasonableness and probable cause requirements of the fourth amendment.[11] This Comment analyzes the implications of *Montoya* in light of prior decisions of the various circuit courts allowing searches and seizures based on a standard less than probable cause.[12] Part I reviews the background and requirements of the border exception. Part II presents the facts and holding of *Montoya*. Part III analyzes the Court's decision in light of the international border exception to traditional fourth amendment requirements. The Comment then concludes that through *Montoya*, the Court has, in effect, removed most fourth amendment protections at international borders.

I. THE BORDER EXCEPTION

A. Introduction

The fourth amendment probable cause and warrant requirements usually necessary to conduct a search do not exist at the border.[13] Customs officials,

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cause or a warrant based only upon a reasonable suspicion. The Supreme Court reversed the court of appeals, which had held that the investigative stop failed to meet the fourth amendment's brevity requirement and was without probable cause, therefore the evidence seized should have been suppressed as fruits of unlawful seizure. *Id.* at 682-86. Justice Marshall in his concurrence stated:

> To those who rank zealous law enforcement above all other values, it may be tempting to divorce *Terry* from its rationales and merge the two prongs of *Terry* into the single requirement that the police act reasonably under all the circumstances when they stop and investigate on less than probable cause.

Id. at 691 (Marshall, J., concurring).

10. The Court in *Montoya* stated:

> These cases reflect longstanding concern for the protection of the integrity of the border. This concern is, if anything, heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics . . . and in particular by the increasing utilization of alimentary canal smuggling.

Montoya, 473 U.S. 531, 538.

For examples of internal drug smuggling see United States v. DeMontoya, 729 F.2d 1369 (11th Cir. 1984) (swallowed 100 cocaine-filled condoms); United States v. Pino, 729 F.2d 1357 (11th Cir. 1984) (swallowed 120 cocaine filled pellets); United States v. Vega-Barvo, 729 F.2d 1341 (11th Cir. 1984) (swallowed 135 cocaine filled condoms); United States v. Mejia, 720 F.2d 1378 (5th Cir. 1983) (swallowed 75 balloons); United States v. Quintero-Castro, 705 F.2d 1099 (9th Cir. 1983) (swallowed 120 balloons); United States v. Couch, 688 F.2d 599 (9th Cir. 1982) (swallowed 36 capsules).

11. *See supra* notes 1-3; see also *supra* note 8 for a statement of the reasonable suspicion requirement.

12. *Montoya*, 473 U.S. at 538.

13. Carroll v. United States, 267 U.S. 132, 154 (1925). "[T]ravelers may be . . . stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may be lawfully brought in." *Id.* In United States v. Ramsey, 431 U.S. 606 (1977), it was held by the Supreme Court that border searches are exempt from the fourth amendment probable cause and warrant requirements. *See* United States v. Mosquera-Ramirez, 729 F.2d 1352, 1356 (11th Cir. 1984); United States v. Castaneda-Castaneda, 729 F.2d 1360, 1362 (11th Cir. 1984); United States v. Couch, 688 F.2d 599 (9th Cir. 1982); United States v. Ek, 676 F.2d 379, 381 (9th Cir. 1982); United States v. Himmelwright, 551 F.2d 991, 993 (5th Cir.), *cert. denied*, 434 U.S. 902

with neither probable cause nor a warrant, may stop, search and examine any vehicle, person or luggage that they suspect contains merchandise which is subject to duty or which cannot legally be brought into the United States.[14] Customs agents are also given ample authority to search for contraband, in vehicles or vessels present in the United States.[15] Similarly, within a reasonable distance from the border, immigration authorities are given the power to conduct searches for aliens being illegally transported into the United States.[16] Regardless of their intrusiveness, searches designated as "border" searches are exempt from the probable cause requirements.[17] However, the fourth amendment reasonableness guarantee has been held to apply to border searches.[18]

Although probable cause and a warrant are not necessary, customs officials must adhere to certain requirements. The official conducting the search is required to possess a specific level of suspicion, depending on whether the type of search involved is a routine border search, strip search, or body cavity search.[19] Generally, the greater the intrusiveness of the search, the higher the

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(1977); United States v. Guadaluape-Garza, 421 F.2d 876 (9th Cir. 1970); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967); W. LAFAVE, *supra* note 6, § 10.5, at 276.

14. *See* 19 U.S.C. § 482 (1964). In *Montoya*, the Court ruled that, "Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *Montoya*, 473 U.S. at 537; *see also Ramsey*, 431 U.S. at 616-17.

15. See *Almeida-Sanchez* v. *United States*, where the Supreme Court found a warrantless search of a Mexican citizen's automobile 25 miles from the Mexican border to be invalid. 413 U.S. at 274-75. The search, which uncoverd marijuana, was without probable cause or consent *Id.* at 273. The search was unconstitutional because it was not within a reasonable distance from the border. *Id.* Section 1357 of Title 8 of the United States Code allows warrantless searches of automobiles and other vehicles within a reasonable distance from external border of the United States. 8 U.S.C. § 1357(a)(3) (1964).

16. *See* 8 U.S.C. § 1357(a) (1964); *see also* Note, *Border Searches and The Fourth Amendment*, 77 YALE L.J. 1007, 1008 n.4 (1968) [hereinafter *Border Searches*].

17. *Border Searches*, *supra* note 16, at 1007. *See also supra* note 13 (discussion of border searches). It should be noted that this comment applies to all travelers at the border and makes no distinction as to whether the traveler is an alien or a United States citizen. This point was raised by the petitioners and addressed by the respondent but the Court chose not to focus on it. *See* Brief for Respondent at 32-36, *Montoya de Hernandez*, 473 U.S. 531 (1985) [hereinafter Brief for Respondent].

18. It has been held by the Supreme Court that although border searches are exempt from both the probable cause and warrant requirements, they are not exempt from the fourth amendment reasonableness requirement. *See supra* note 1; *see also Ramsey*, 431 U.S. at 617. "[B]order searches were not subject to the warrant provision of the Fourth Amendment and were 'reasonable' within the meaning of that Amendment, has been faithfully adhered to by this Court." *Id.* It was further noted in *Ramsey* that the fourth amendment "does not denounce all searches or seizures, but only such as are unreasonable . . . ." *Id.* at 617-19 (citing Carroll v. United States, 267 U.S. 132 (1925)). *Ramsey* therefore recognizes that searches at the border must be reasonable within the fourth amendment. *See* W. LAFAVE, *supra* note 6, at 280. *See also* Brief for Respondent, at 9.

19. In *United States* v. *Vega-Barvo*, it was held that "personal indignity suffered by the individual searched controls the level of suspicion required to make the search reasonable." 729 F.2d 1341, 1346 (11th Cir. 1984). The dissent explained the Fifth and Eleventh Circuits' basic two-tier standard in border search cases: "[T]he first tier is termed 'mere suspicion.' The second

level of suspicion that must be attained by the official.[20]

B. Routine Border Searches and Detentions

Routine border searches are those in which no element of suspicion[21] is required to conduct the search and where all people crossing the border may be subjected to them.[22] The basic premise is that a routine search is reasonable under the fourth amendment if it is based upon a mere or unsupported suspicion, or even a subjective hunch.[23] Routine border searches have been deemed reasonable because they have occurred at the border.[24]

Although the standards for a routine border search are relaxed, customs officials may perform only certain acts. They are empowered to stop the traveler and require him to identify himself,[25] and to examine both the traveler's visa and entry documents.[26] Under a routine border search or detention, the customs officials may question the traveler as to both the purpose and length of his trip.[27] They may also search his luggage, require him to empty his pock-

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tier is termed 'reasonable suspicion.' Within the second tier, the amount of 'reasonable supicion' required increases with the intrusiveness of the search." *Id.* at 1351. See *Vega-Barvo*, 729 F.2d at 1351; *Quintero-Castro*, 705 F.2d at 1100; *Couch*, 688 F.2d at 604; *Ek*, 676 F.2d at 382; *Henderson*, 390 F.2d at 808, for examples of cases which have followed this approach. *See* W. LAFAVE, *supra* note 6, at 281-295.

20. *See* United States v. Sandler, 644 F.2d 1163 (5th Cir. 1981). In *Sandler* it was held that the invasion of privacy and dignity of the individual were key variables to be examined when assessing reasonableness of the search. *Id.* at 1167. Also, in *Mejia*, it was held "intrusion is keyed to embarrassment, indignity and invasion of privacy." 720 F.2d at 1382. "As intrusiveness increases, the amount of suspicion necessary to justify the search correspondingly increases." *Vega-Barvo*, 729 F.2d at 1344. *See also supra* note 17 (regardless of intrusiveness, border searches are exempt from probable cause).

21. *Carroll*, 267 U.S. at 153-54; *see also Himmelwright*, 551 F.2d at 993-94; *Almeida-Sanchez*, 413 U.S. at 272.

22. *Sandler*, 644 F.2d 1163 (en banc). The Court has held that:

> [E]xamination of a person by ordinary pat down or frisk, the requirement that outer garments such as coat or jacket, hat or shoes be removed, that pockets, wallet or purse be emptied, are part of the routine examination of a person's effects which require no justification other than the person's decision to cross our national boundary. The . . . fact that such a search occurs at a border makes it reasonable within the meaning of the fourth amendment.

Id. at 1169. In *Vega-Barvo* the dissent stated that "no suspicion other than the subjective response of a customs official who considers that the circumstances make such a search appropriate is necessary." 729 F.2d at 1351; *see also* W. LAFAVE, *supra* note 6, at 276-81.

23. *See Sandler*, 644 F.2d at 1166; Cervantes v. United States, 263 F.2d 800, 803 n.5 (9th Cir. 1959); *see also* Brief for Respondent. *See generally* W. LAFAVE, *supra* note 6, at 276-81 (discussion of routine border searches).

24. *See supra* notes 13 & 23; *see also* United States v. Carter, 592 F.2d 402, 404 (7th Cir.), *cert. denied*, 441 U.S. 908 (1979).

25. *Guadalupe-Garza*, 421 F.2d at 878; *see also* W. RINGEL, SEARCHES & SEIZURES ARRESTS AND CONFESSIONS 15-10, 15-11 (2d ed. 1986).

26. *Castaneda-Castaneda*, 729 F.2d at 1362; United States v. Henao-Castano, 729 F.2d 1364, 1365 (11th Cir. 1984); *Himmelwright*, 551 F.2d at 993. *See generally* W. RINGEL, *supra* note 25, at 15-10, 15-11 (discussing routine border searches).

27. *Castaneda-Castaneda*, 729 F.2d at 1362; *Henoe-Castano*, 729 F.2d at 1365; *Quintero-Castro*, 705 F.2d at 1100; *Himmelwright*, 551 F.2d at 993; *Henderson*, 390 F.2d at 808; *see also*

ets or remove outer garments.[28] The officials may conduct either a patdown or a frisk.[29] They may also ask the traveler to produce for inspection the contents of a purse or wallet.[30] Customs officials may not exceed the scope of this specific conduct under routine border searches.

The reason officials may engage in such conduct under the guise of a routine border search is that it presents only a minimal intrusion upon the traveler's actual privacy.[31] Furthermore, since all travelers crossing international borders may be subject to this search or detention, they are on notice of this procedure. As a result of this notice, a traveler's reasonable expectation of privacy is reduced at the border.[32]

C. Nonroutine Border Searches and Detentions: Prolonged Detentions, Strip Searches and Body Cavity Searches.

Prolonged detentions, strip searches and body cavity probes are labeled as non-routine because they constitute a greater invasion of privacy on the individual.[33] Generally, the official conducting the search must have an increased level of suspicion to justify a more intrusive search.[34] Non-routine searches and seizures, unlike routine searches and seizures, are evaluated in terms of whether they are reasonable under the fourth amendement.[35]

1. Prolonged Detentions

Prolonged detentions are evaluated in terms of their purpose, as the *pur-*

W. RINGEL, *supra* note 25, at 15-10, 15-11.

28. *Vega-Barvo*, 729 F.2d at 1345. "Both a luggage search and a pat-down or frisk fall within this category and these searches can be legitimately carried out on no more than a generalized 'mere suspicion' or 'subjective response' of the customs inspector." *Id.* But, to conduct a pat down or frisk, customs officials must possess a certain, although minimal, amount of suspicion. *See Quintero-Castro*, 705 F.2d at 1100 (where this minimal level of suspicion was required). *See also* United States v. Klein, 592 F.2d 909, 912 (5th Cir. 1979).

29. *Vega-Barvo*, 729 F.2d at 1345.

30. *Sandler*, 644 F.2d at 1166; *Himmelwright*, 551 F.2d at 993; *Guadalupe-Garza*, 421 F.2d at 878; *see* Brief for Respondent, at 10-11.

31. *Vega-Barvo*, 729 F.2d at 1345. "No articulable suspicion is required for routine border searches which only intrude slightly on a person's privacy." *Id. See Himmelwright*, 551 F.2d at 994; *see also* Brief for Respondent, at 11.

32. *See supra* note 31; *see also* United States v. King, 517 F.2d 350, 353 (5th Cir. 1975) (customs agent's opening envelope containing cocaine considered reasonable search). One author has stated:

> Since, ostensibly all travellers may be uniformly searched, no opprobrium attaches to the execution of this search. Moreover, the traveller stands on notice that he will be searched upon his return. Arguably, this diminishes the invasion of privacy suffered by the prospective entrant.

Note, *From Bags to Body Cavities: The Law of Border Search*, 74 COLUM. L. REV. 53, 56 (1974) [hereinafter *From Bags to Body Cavities*]. In *Katz* v. *United States* the Court stated that a search occurs when the governmental activities violate the defendants' reasonable expectation of privacy. 389 U.S. 347 (1967).

33. *See Mejia*, 720 F.2d at 1381-82; *Quintero-Castro*, 705 F.2d at 1100.

34. *See supra* note 33.

35. *See supra* note 20.

pose of the detention determines whether the *length* of the detention is reasonable.[36] Prolonged detentions incident to searches are evaluated in terms of the ultimate search contemplated by the official.[37] Neither probable cause nor a warrant is usually required for such detentions.[38] Prolonged detentions which are not incident to a search require the additional element of reasonable suspicion.[39] To determine the reasonableness of the prolonged detention, the purpose of the detention is balanced against the infringement it has placed upon the individual's rights.[40]

2. Strip Searches

Non-routine searches are evaluated in terms of the level of articulable suspicion possessed by the official performing the search.[41] The level of articulable suspicion will vary according to the type of search involved.[42] A strip search is an example of a non-routine search. The traveler must completely undress, removing his undergarments.[43] For a strip search to be constitutionally valid, the official performing the search must meet the *Terry v. Ohio*[44]

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36. *See* W. LAFAVE, *supra* note 6, at 281-95; *see also* Brief for Respondent, at 10-11. For example, if T, a traveler, is detained for 20 minutes to determine whether T's detention was reasonable, the court will look to the reasons that the customs officer detained T. The customs officer could detain T for the purpose of further questioning, a strip search, an internal search, or an x-ray. If, in this example, T was detained because the customs officer wanted to x-ray him, the court would determine whether the customs officer had the necessary level of suspicion to conduct an x-ray and whether 20 minutes was a reasonable length of time to hold someone to conduct an x-ray.

37. *See* W. LAFAVE, *supra* note 6, at 281-95. Generally, prolonged detentions have occurred pursuant to a search contemplated by the official. *See* United States v. Padilla, 729 F.2d 1367 (11th Cir. 1984); *Mosquera-Ramirez*, 729 F.2d at 1352; *Henae-Castano*, 729 F.2d at 1364; *Couch*, 688 F.2d at 599; *Ek*, 656 F.2d at 379; United States v. Erwin, 625 F.2d 838 (9th Cir. 1980).

38. *See supra* note 37. Because prolonged detentions usually occur pursuant to a search:

> [D]etentions incident to border searches are permissible so long as they are reasonably related to the search . . . . Neither a warrant nor probable cause is needed to detain persons for a search at the border, so long as the period of detention does not exceed what is reasonably necessary to conduct a valid search.

Ek, 676 F.2d at 381 (citation omitted); *see also* United States v. Perez-Esparza, 609 F.2d 1284, 1286-87 (9th Cir. 1979) (search conducted at San Clemente checkpoint not controlled by principles applied to border searches).

39. W. RINGEL, *supra* note 25, at 15-A.

40. *Guadalupe-Garza*, 421 F.2d at 878. In *Cameron*, the court held that "in determining whether a search comports with the requirements of the fourth amendment '[t]he scope of the particular intrusion, the manner of its conduct, and the justification for initiating it must all be considered.'" *Cameron*, 538 F.2d at 258 (quoting *Guadalupe-Garza*, 421 F.2d at 876, 878).

41. See *supra* notes 13, 29 & 34 for the generally applied rules that for a routine search or detention, no articulable suspicion is required, for a frisk or pat-down, the official must possess a minimal suspicion. Furthermore, "[a]s a search becomes more intrusive, it must be justified by a correspondingly higher level of suspicion of wrongdoing." *Ek*, 676 F.2d at 382 (citing United States v. Aman, 642 F.2d 911, 912-13 (9th Cir. 1980)); *see* W. LAFAVE, *supra* note 6, at 276-95.

42. *See Ek*, 676 F.2d 379; *supra* notes 13, 29 & 34.

43. Brief for Respondent, at 11.

44. 392 U.S. 1 (1968).

reasonable suspicion standard.[45] The official must possess a reasonable suspicion that the traveler is engaged in wrongdoing.[46] Under this standard, customs officials are required to have more than just a subjective suspicion or hunch.[47] The official must be able to point to specific, objective facts which

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45. The reasonable suspicion standard was first established by the Supreme Court in *Terry v. Ohio*. *Id.* In *Terry*, the Court upheld a warrantless seizure conducted by an officer who possessed only a reasonable suspicion that the petitioners were involved in criminal activity and armed and dangerous. *Id.* at 26-27. The police officer observed three men who appeared to be casing a store for a robbery. *Id.* at 5-6. The officer approached the respondents and asked for their names. *Id.* Upon an inaudible response and believing the men to be armed, the officer spun the petitioner around and patted down his outer clothing. *Id.* The officer, as a result of his patdown, seized a pistol. *Id.* The Court viewed the warrantless search and seizure as reasonable under the fourth amendment. *Id.* at 30-31.

Chief Justice Warren, writing for the Court, emphasized that this decison did not grant police officers unlimited authority to search and seize the individuals without a warrant. *Id.* at 24-25. The search and seizure "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion." *Id.* at 26. The officer's conduct in terms of reasonableness must be evaluated. *Id.* at 27.

As to how to do so, the Court stated:

> The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger . . . [a]nd in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id. (citations omitted). The standard of review the Court established to judge these searches was whether the officer's conduct was reasonably related in scope to the circumstances which justified the interference in the first place. *Id.* at 19-20.

For the pat-down to be regarded as reasonable under the fourth amendment, the officer must conform to certain requirements. The officer must identify himself as a policeman and then make limited inquiries as to the individual's suspicious behavior. *Id.* at 28. When responses by the individual under scrutiny do not dispel the officer's fear for his life or safety, he may perform a patdown, limited to the suspect's outer clothing. *Id.* The purpose of the pat-down is limited to the discovery of weapons which may be used to assault the officer. *Id.* The particular limitations directed by the fourth amendment were not developed in this decision. As illustrated in *Terry*, the rationale for the exception is that the search and seizure authorized must be minimally intrusive on the fourth amendment rights of the suspect. At the same time, the results of such an intrusion must confirm or dispel the suspicions of the law enforcer. *See* W. LAFAVE, *supra* note 6, at 281-86.

46. See *supra* notes 13 and 20 for cases discussing reasonable suspicion. It should also be noted that the Ninth Circuit has adopted the standard called "real suspicion" as opposed to the other circuits which use the "reasonable suspicion" standard. See *Guadalupe-Garza*, where real suspicion was defined as:

> subjective suspicion supported by objective articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our borders is concealing something on his body for the purpose of transporting it into the United States contrary to law.

421 F.2d at 879; *see also From Bags to Body Cavities*, *supra* note 32, at 75. " '[R]eal suspicion' unfortunately lies between mere suspicion and probable cause." Brief for Respondent, at 12.

47. *See* United States v. Asbury, 586 F.2d 973, 975-76 (2d Cir. 1979); United States v. Diaz, 503 F.2d 1025, 1026-27 (3d Cir. 1974); United States v. Stornini, 443 F.2d 833, 834-35

indicate that the indivdual is engaged in criminal activity.[48]

3. Body Cavity Searches

A body cavity search involves probing beyond the body's surface and into orifices.[49] A search of the stomach through stomach pumping or forced regurgitation is also characterized as a body cavity search.[50] Additionally, x-ray examinations also fall within the category of body cavity searches.[51]

The circuit courts have not applied a uniform standard in upholding body cavity searches. This is so because some courts differentiate between strip and body cavity searches and x-ray examinations, while other courts lump them together. The manner in which a court categorizes the searches is determinative of the standard of suspicion required. For instance, the Ninth Circuit has differentiated between strip searches and body cavity searches[52] and has grouped x-ray examinations under the category of body cavity searches.[53] To conduct a strip search the Ninth Circuit requires a "real suspicion" by customs officials;[54] however, to conduct a body cavity search, there must be a

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(1st Cir.), *cert. denied*, 404 U.S. 861 (1971); *Guadalupe-Garza*, 421 F.2d at 879; *see also supra* notes 13, 20.

48. *See supra* note 47.

49. *See* Brief for Respondent, at 12. For examples of body cavity searches see *Henao-Castano*, 729 F.2d at 1364; *Castaneda-Castaneda*, 729 F.2d at 1360; *Pino*, 729 F.2d at 1357; *Himmlwright*, 551 F.2d at 991; *Cameron*, 538 F.2d at 254; Morales v. United States, 406 F.2d 1298 (9th Cir. 1969); *Henderson*, 390 F.2d at 809. *See generally* W. LAFAVE, *supra* note 6, at 286-95 (discussion of body cavity searches).

50. Rochin v. California, 342 U.S. 165 (1952). In *Rochin* respondent was forced to drink a substance which caused him to regurgitate the contents of his stomach for purposes of examination for illegal narcotics. *Id.* at 166; *see also* United States v. Briones, 423 F.2d 742 (5th Cir. 1970), *cert. denied*, 399 U.S. 933 (1970) (search of defendant's stomach by administration of emetic held reasonable). *See generally* W. LAFAVE, *supra* note 6, at 293 (discussion of body cavity searches).

51. *Ek*, 676 F.2d at 381-82. In *Ek* the Ninth Circuit first addressed the issue of the standard to be applied to x-ray searches. The court held that:

> [T]he stricter standard required for a body cavity search also applies to an X-ray search. An X-ray search, although perhaps not so humiliating as a strip search, nevertheless is more intrusive since the search is potentially harmful to the health of the suspect. It goes beyond the passive inspection of body surfaces. We think that the use of such medical procedures should be restricted to situations where there is a clear indication that the suspect is concealing contraband within his body.

Id. at 382 (footnote omitted). For other examples of cases where x-ray examinations have been categorized as body cavity searches see *Castaneda-Castaneda*, 729 F.2d 1360; *Vega-Barvo*, 729 F.2d 1341; *Padilla*, 729 F.2d 1367; *Mendez-Jimenez*, 709 F.2d 1300; *Quintero-Castro*, 705 F.2d 1099; *Couch*, 688 F.2d 599; *Erwin*, 625 F.2d 838.

52. *See Ek*, 676 F.2d at 382; *Cameron*, 538 F.2d at 258; *Henderson*, 390 F.2d at 808.

53. *See Mendez-Jimenez*, 709 F.2d 1300; *Quintero-Castro*, 705 F.2d at 1099; *Couch*, 688 F.2d 599; *Ek*, 676 F.2d 379; *Erwin* 625 F.2d. 838.

54. *See supra* notes 45-46. See also *Guadalupe-Garza*, 421 F.2d at 876, where it was stated:

> 'Real suspicion' justifying the initiation of a strip search is subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our borders is concealing something on his body for the purpose of transporting it into the United States contrary to law.

"clear indication" or "plain suggestion" that the evidence will be found.[55] Clear indication has been defined as a level of suspicion higher than reasonable suspicion but less than probable cause.[56] Under the Ninth Circuit analysis, once it is determined that the customs official possessed the requisite level of articulable suspicion,[57] the conduct of the search itself is then evaluated in

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> The objective, articulable facts must bear some reasonable relationship to suspicion that something is concealed on the body of the person to be searched; otherwise, the scope of the search is not related to the justification for its initiation, as it must be to meet the reasonableness standard of the Fourth Amendment.

Id. at 879 (citation omitted).

55. See *supra* note 52 for cases dealing with body cavity searches and the clear indication standard; *see also Morales*, 406 F.2d 1298; Rivas v. United States, 368 F.2d 703 (9th Cir. 1966). The clear indication standard comes from Schmerber v. California, 384 U.S. 757 (1966), where it was stated that:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundmental human interests require law officers to suffer the risk that evidence may disappear unless there is an immediate search.

Id. at 769. *See generally* W. LAFAVE, *supra* note 6, at 286-95 (discussing clear indication standard).

56. *Mendez-Jimenez*, 709 F.2d at 1302. It was stated that "clear indication" means more than real suspicion but less than probable cause. *Id*; *see also, From Bags to Body Cavities*, *supra* note 32. "There must exist facts creating a clear indication, or plain suggestion, of the smuggling. . . . Those facts [need not] reach the dignity of nor be the equivalent of 'probable cause' necessary for an arrest and search at a place other than a border." *Id.* at 80 (quoting United States v. Rivas, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967)). In *Rivas*, the use of a rectal probe was upheld based on confirmation by a physician that the defendant was under the influence of a narcotic, nervous manner exhibited by the defendant and the fact the defendant was registered as a narcotic user at the border. 368 F.2d at 705, 710. *See also* Brief for Respondent, at 23.

57. *See* United States v. Faherty, 692 F.2d 1258 (9th Cir. 1982). In *Faherty*, the court first determined whether the customs agent possessed " 'real suspicion' supported by objective, articulable facts." *Id.* at 1260. The court then analyzed whether the detention following the search was reasonable. *Id.*; *see also Erwin*, 625 F.2d at 841; *Cameron*, 538 F.2d at 257-58. In *Cameron*, the court, upon determining that the customs official possessed suspicion, evaluated the search performed and found the doctor's conduct to be unreasonable and therefore violative of the fourth amendment. *Id.* Upon a determination by the court that the official conducting the search did not possess the appropriate level of suspicion, the search is held to violate the fourth amendment and any evidence obtained as a result of that search is excluded. Furthermore, the court will not even inquire whether the search was reasonable. *See Henderson*, 390 F.2d at 805. The *Henderson* court held that "there does not exist the 'clear indication,' the 'plain suggestion,' that *Schmerber* and *Rivas* require. At most, there is mere suspicion, which is not enough. It follows that . . . [the] search violated appellant's fourth amendment rights." *Id.* at 809 (footnote omitted). The court further held that the "subsequent search, by the doctor, is 'fruit of the poisonous tree.' " *Id.* at 809-10 (footnote omitted). For examples of findings that customs officials did not possess the requisite level of suspicion to conduct body cavity searches, see *Quintero-Castro*, 705 F.2d at 1101; *Morales*, 406 F.2d at 1300; *Guadalupe-Garza*, 421 F.2d at 880. The *Guadalupe* court held that "the heroin recovered from appellant was the product of an illegal search, and the refusal to grant appellant's motion to suppress it was error. It is therefore unnecessary for us to decide whether the body cavity search would have been legal. . . ." *Id. See generally* W. LAFAVE, *supra* note 6, at 286-95 (discussing the above mentioned approach).

terms of whether it was reasonable under the fourth amendment.[58]

Other circuit courts, outside the Ninth Circuit, have not adopted the clear indication standard as they do not differentiate between strip, body cavity and x-ray searches.[59] Instead, circuit courts outside the Ninth Circuit have adopted a flexible reasonable suspicion standard.[60] These courts group strip

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58. *See Guadalupe-Garza*, 421 F.2d at 878, where it was stated that:

> official action must meet the standard of reasonableness. The scope of the particular intrusion, the manner of its conduct, and the justification for initiating it must all be considered. The test of reasonableness is incapable of comprehensive definition or of mechanical application; in each case the need for the particular search is balanced against the invasion that the search entails.

Id.; *see also Mendez-Jimenez*, 709 F.2d at 1304; *Cameron*, 538 F.2d at 258. "[A] clear indication that the suspect is concealing contraband does not authorize government officials to resort to any and all means at their disposal to retrieve it." *Id.* Factors other than whether the official attained the requisite level of suspicion which are considered in the Ninth Circuit's reasonableness analysis include: conduct, manner and scope of search. *Id.* This analysis includes whether the search was conducted with regard for the individual's privacy. *Id.* The court stated: "Any body search, if it is to comport with the reasonableness standard of the fourth amendment, must be conducted with regard for the subject's privacy and be designed to minimize emotional and physical trauma." *Id.* The court in *Cameron* further stated "a reasonable search will include, beyond the usual procedural requirements, reasonable steps to mitigate anxiety, discomfort, and humiliation that the suspect may suffer." *Id.* It should be further noted that the procedures used in conducting the search in *Cameron* were found not to meet the above standard. *Id.* Therefore, the search violated the fourth amendment. *Id.* The court will also see if "less intrusive means of obtaining the evidence [were] properly considered." *Id.* The court also considers whether the search is pursuant to the procurement of a warrant. *Id.* In considering the warrant requirement it should be noted that there is "no per se requirement for a warrant to conduct a body search in border crossing cases." *Id.*; *see also* United States v. Mason, 480 F.2d 653, 564 n.1 (9th Cir.), *cert. denied*, 414 U.S. 941 (1973). The rationale for use of a warrant has been stated as:

> A warrant can dispel . . . apprehensions. It advises the suspect that authorization for the search has been obtained from a judicial officer, and hence that the search is presumptively lawful. The warrant defines the scope of the search, so that the suspect will know what procedure he faces. A warrant serving these purposes may well secure the cooperation of an otherwise reluctant suspect, thus rendering the search less painful.

Cameron, 538 F.2d at 259. The court further stated that "[w]e do not hold that a warrant must be obtained prior to all body cavity searches. However, the absence of a warrant is an important factor in assessing the reasonableness with which the authorities acted." *Id.*

59. Cases that have not adopted the Ninth Circuit's clear indication standard include: *Vega-Barvo*, 729 F.2d at 1348; *Mosquera-Ramirez*, 729 F.2d at 1356; *Castaneda-Castaneda*, 729 F.2d at 1363; *Pino*, 729 F.2d at 1359; *Himmelwright*, 551 F.2d at 995. In *Himmelwright*, the court rejected the Ninth Circuit clear indication requirement and stated: "[I]nstead, we feel that the 'reasonable suspicion' standard is flexible enough to afford the full measure of protection which the fourth amendment commands." *Id.* at 995.

60. *See, e.g.*, *Vega-Barvo*, 729 F.2d at 1344. In *Vega-Barvo*, the court stated, "[t]his [circuit] has applied this reasonableness requirement by adopting a flexible test which adjusts the strength of suspicion required for a particular search to the intrusiveness of that search. As [the] intrusiveness increases, the amount of suspicion necessary to justify the search correspondingly increases." *Id.*; *see also Sandler*, 644 F.2d at 1167 (pat down border search does not require reasonable suspicion); United States v. Nieves, 609 F.2d 642, 646 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980) (search of shoes is an acceptable routine border inspection); United States v. Wardlaw, 576 F.2d 932, 934 (1st Cir. 1978) (reasonable for inspectors to require defendant to

searches, body cavity searches and x-ray examinations together as non-routine searches.[61] This approach is typified by the Eleventh Circuit's combined intrusiveness/indignity analysis.[62] Under this approach, the level of reasonable suspicion required increases with the intrusiveness of the search.[63] The intrusiveness of the search is determined according to the level of indignity suffered by the suspect searched.[64] Factors that the court considers include physical contact, exposure of the body, and the force involved.[65] Thus, although strip searches, body cavity searches and x-ray examinations are grouped together, the courts recognize that body cavity searches are more intrusive and require a greater amount of suspicion to perform.[66] Therefore, to conduct a body cavity search requires that customs officials possess "more reasonable suspicion" than that required for a strip search.[67] The Fifth Circuit similiarly follows the in-

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raise skirt); United States v. Brown, 499 F.2d 829, 833 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974) (border seach consisting of raising defendant's skirt above knees is reasonable); Brief for Respondent, at 11.

61. *Vega Barvo*, 729 F.2d at 1351 (Hatchett, J., dissenting).

62. *See id.* at 1346, where it was stated: "This court [the eleventh circuit]. . . in applying the Fourth Amendment to border searches has been guided by its perception of the indignity of government actions." *Id.*

63. *Id.* at 1344.

64. *Id.* "We hold . . . that personal indignity suffered by the individual searched controls the level of suspicion required to make the search reasonable." *Id.*

65. *Id.* The Eleventh Circuit has isolated three factors which "contribute to the personal indignity endured by the person searched: (1) physical contact between the searcher and the person searched; (2) exposure of intimate body parts; and (3) use of force. These factors tend to control the level of insult to personal privacy visited upon the victim of a search." *Id.* The court further noted that "[t]he embarassment caused by the exposure of intimate body parts is often a determinative factor in the constitutionality of border searches." *Id.* at 1347. "As drug smugglers have become more ingenious, courts have also had to distinguish between different body orifices according to the indignity caused by peering into them." *Id.* (citing *Himmelwright*, 551 F.2d at 995 n.11; United States v. Holtz, 479 F.2d 89 (9th Cir. 1973)). "Force, or the lack thereof, remains a factor to be considered in Fourth Amendment cases." *Vega-Barvo*, 729 F.2d at 1348. Finally, as opposed to the Ninth Circuit, the Eleventh Circuit does not require customs inspectors to procure a warrant to perform a body cavity search or x-ray. *Id.* at 1349.

66. *Vega-Barvo*, 729 F.2d at 1344. The Court stated, "Fifth Circuit cases . . . together with Eleventh Circuit cases, establish a hierarchy of intrusiveness of searches." *Id*; *see also supra* note 64.

67. *See supra* note 66. "Thorough research does not reveal the exact degree of suspicion required for body cavity searches, but we know that due to the greater degree of intrusion involved, the standard demands a greater degree of suspicion than does a strip search." *Vega-Barvo*, 729 F.2d at 1352 (Hatchett, J., dissenting). The cases in the Eleventh and Fifth Circuit have generally followed this analysis. *See, e.g.*, the cases in note 59, *supra*; *see also Vega-Barvo*, 729 F.2d at 1344 ("[a]s intrusiveness increases, the amount of suspicion required. . . correspondingly increases"); *Mejia*, 720 F.2d at 1382 ("[t]he greater the level of suspicion, the more intrusive the search may be"); *Sanders*, 663 F.2d at 3 ("more extensive invasions of a person's bodily privacy. . . require greater jusitifcation"); *Sandler*, 644 F.2d at 1167-68 (body cavity search requires more than mere suspicion to justify it); United States v. Afanador, 567 F.2d 1325, 1328 (5th Cir. 1978) (the more intrusive the search, the greater the reason must be to justify that search). "The greater the intrusion, the greater must be the reason for conducting a search that results in such invasion . . . . Thus, what constitutes 'reasonable suspicion' to justify a more intrusive or demeaning search." Brief for Respondent, at 14 (quoting *Sandler*, 644 F.2d at 1166).

trusivenss/indignity analysis.[68]

II. Statement of the Case

On March 5, 1983, the respondent, Ms. Rosa Elvira Montoya de Hernandez, a Colombian citizen, arrived at Los Angeles International Airport from Bogota, Colombia.[69] Ms. de Hernandez passed through immigration and proceeded to the customs desk according to the usual procedure.[70] At the customs desk her papers were examined and she was then referred to the secondary customs desk for further questioning.[71] This was due to the fact that she had made eight recent trips to either Miami or Los Angeles, two cities known for narcotics importation.[72]

At the secondary customs desk Ms. de Hernandez was questioned about herself and the purpose of her trip.[73] She stated that she did not speak any English and that she did not know anybody in the United States.[74] She also revealed that the purpose of her trip was to purchase goods for her husband's store in Bogota, Colombia.[75] Upon further questioning, Ms. de Hernandez disclosed that she had made no appointments in the city and had planned to ride in a taxi to various stores throughout Los Angeles to buy the goods.[76] She then stated that she did not have a hotel reservation and planned to stay at a Holiday Inn.[77] Ms. de Hernandez also indicated that she could not remember the manner of payment for her plane ticket.[78] She could not produce any checks, credit cards, or letters of credit.[79] However, she did possess a business card, old receipts, waybills, and fabric swatches in a photo album.[80] She also had $5,000 in cash but no billfold.[81] Her suitcase contained four changes of clothing and she had only one pair of shoes which she wore.[82] The customs inspector, based upon that information, as well as his own past experience and the fact that Bogota was a "source city" for narcotics, suspected Ms. de Her-

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68. *See, e.g.*, *Vega-Barvo*, 729 F.2d at 1351 (Hatchett, J., dissenting). In *Vega-Barvo*, Judge Hatchett stated:

> The Fifth Circuit and this circuit have utilized a two-tier standard in border search cases. The first tier is termed "mere suspicion." The second tier is termed "reasonable suspicion." Within this second tier, the amount of "reasonable suspicion" required increases with the intrusiveness of the search. More "reasonable suspicion" is required for a body cavity search . . . than a strip search . . . .

Id. (Hatchett, J., dissenting).

69. United States v. Montoya de Hernandez, 473 U.S. 531, 533 (1985).

70. *Id.*

71. *Id*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 543.

80. *Id.*

81. *Id.*

82. *Id.*; *see* text accompanying *supra* note 72.

nandez of smuggling narcotics in her alimentary canal.[83]

Grounded on this suspicion, a female inspector conducted a patdown and strip search which revealed no contraband.[84] It revealed only a firm fullness in respondent's abdomen and the fact that she was wearing two pair of elastic underwear with a paper towel lining in the crotch area.[85] The inspector informed Ms. de Hernandez that she was suspected of smuggling contraband in her alimentary canal.[86] She was asked if she would submit to an x-ray examination. Ms. de Hernandez agreed to the x-ray but also informed the inspector that she was pregnant.[87] When the customs officials approached Ms. de Hernandez to handcuff her she declined the x-ray exam,[88] claiming that she felt the handcuffs were an insult to her dignity.[89]

At that point a customs inspector suggested to his superior that he obtain a court order for an x-ray examination.[90] The superior informed him that there was not sufficient evidence to support one.[91] Ms. de Hernandez was then offered the option of either returning to Colombia, submitting to an x-ray examination, or producing an observed bowel movement into a waste basket.[92] Ms. de Hernandez chose to return to Colombia and was placed in a customs office under observation.[93] She was also informed that if she had to use the bathroom, she was required to excrete in the waste basket while in the presence of two female matrons.[94]

Due to visa problems, customs officials could not readily place Ms. de Hernandez on a flight to Colombia.[95] Rather, Ms. de Hernandez was informed that she would be detained until she produced a monitored bowel movement or submitted to an x-ray examination.[96] She was denied any communications with her family or an attorney.[97] She refused to eat, drink or use the toilet.[98] The room in which she was placed was an office and had no bed to accomodate her.[99] She was told by an agent that if she wanted to lie down she could lie on the floor.[100] At a shift change, she was strip searched once again "to

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83. *Montoya*, 473 U.S. at 533-34; *see also infra* note 121 (discussion of this type of smuggling).

84. *Montoya*, 473 U.S. at 534.

85. *Id.* Two pairs of elastic underpants lined with paper toweling provides support for suspicion that a traveler is engaged in alimentary canal smuggling. The purpose in wearing these layers is to prevent discovery of any discharge of narcotics within the smugglers digestive tract. *See* Brief for the United States at 41-42, United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

86. *See supra* note 85; *see also infra* note 121.

87. *Montoya*, 473 U.S. at 534.

88. *Id.*

89. *Id.* at 546 (Brennan, J., dissenting).

90. *Id.* at 547 n.13 (Brennan, J., dissenting).

91. *Id.*

92. *Id.* at 534-35 (Brennan, J., dissenting).

93. *Id.* at 535 (Brennan, J., dissenting).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 547 (Brennan, J., dissenting).

98. *Id.* at 535.

99. *Id.* at 546 (Brennan, J., dissenting).

100. *Id.*

ensure the safety of the surveilling officers."[101] This search again proved negative.[102]

The inspector repeated his suggestion to obtain a court order for an x-ray.[103] Again this suggestion was denied.[104] Finally, after sixteen hours, the customs officer sought a court order.[105] The supervisor contacted the federal magistrate eight hours later.[106] A telephonic court order was issued which allowed for an x-ray and rectal examination; however, a pregnancy exam was to be performed first.[107] The order was based primarily upon imformation on Ms. de Hernandez's behavior observed by officials during her detention.[108]

Ms. de Hernandez's pregnancy examination proved negative.[109] Subsequent to the pregnancy examination but *before* its results, the doctor performed a rectal examination which yielded a balloon filled with an unknown substance.[110] After the negative results of the pregnancy exam became known, the doctor then took an x-ray. After a twenty-seven hour warrantless detention an officer finally placed Ms. de Hernandez *formally* under arrest.[111] Over the next four days, Ms. de Hernandez passed eighty-eight balloons containing a total of 528 grams of cocaine.[112]

At trial, Ms. de Hernandez moved to suppress the narcotics based on an illegal detention.[113] Her motion was subsequently denied.[114] As a result, the narcotics were admitted into evidence and Ms. de Hernandez was convicted of possession of cocaine with intent to distribute and unlawful importation of cocaine pursuant to federal statutes.[115]

The United States Court of Appeals for the Ninth Circuit reversed the district court, based on the standard articulated in *Schmerber v. California*[116] requiring a "clear indication" or "plain suggestion" for an intrusive search.[117]

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101. *Id.*; see *infra* notes 269-76 for the purpose of showing that this procedure was not needed. Ms. de Hernandez had been under observation so she could not have obtained anything new since that the last search. *Id.*

102. *Id.*

103. *Id.* at 547 n.13 (Brennan, J., dissenting).

104. *Id.*

105. *Id.*

106. *Id.* The court ordered x-ray and internal examination could have been obtained earlier. *See infra* notes 269-276.

107. Montoya, 437 U.S. at 547 n.13 (Brennan, J., dissenting).

108. *Id.* The behavior observed by custom officials included sitting in a chair and leaning to one side, resisting food or drink and refusing to use the bathroom for an extended period of time. *Id.*

109. *Id.* at 535.

110. *Id.*

111. *Id.* at 536.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* Possession of cocaine with intent to distribute is a felony under title 21 of the United States Code, section 841(a)(1) (1984). Unlawful importation of cocaine is a felony under title 21 of the United States Code sections 952(a) and 960(a) (1982).

116. 384 U.S. 757 (1966).

117. United States v. Montoya de Hernandez, 731 F.2d 1369, 1371 (9th Cir. 1984). The court of appeals stated within its opinion that "[x]-ray and body cavity searches are more intru-

The court concluded that under a clear indication standard, the customs agents had insufficient evidence when they decided to detain Ms. de Hernandez for sixteen hours.[118] The government challenged this decision and the Supreme Court granted certiorari.[119]

III. MAJORITY OPINION

In *United States v. Montoya de Hernandez*, the Supreme Court addressed the issue of the level of suspicion necessary to justify the seizure of an incoming traveler for purposes other than a routine border search.[120] The Court held that customs agents who reasonably suspect that a traveler is smuggling contraband in his or her alimentary canal[121] may detain the traveler at the border for a period beyond the scope of a routine customs search and inspection.[122] The Court then determined that the prolonged border detention suffered by Ms. de Hernandez was justified under the reasonable suspicion standard established in *Terry v. Ohio*.[123]

The Court first outlined the *Terry* argument and then applied the facts of *Montoya* to the *Terry* probable cause exception.[124] It then determined that a balancing approach should be used to assess whether a particular law enforcement procedure was warranted.[125] Many factors were taken into consideration

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sive than a strip search. Such searches require a 'clear indication' or 'plain suggestion' that the person is carrying contraband within his body." *Id.* The court went further to state that "if the facts apparent upon arrival would not authorize the issuance of a warrant, it is difficult to hold that the same facts would authorize the long period of detention which eventually did produce some additional evidence in support of a warrant." *Id.* at 1372. Therefore the court was requiring the same level of suspicion that would support an x-ray to uphold a prolonged detention. *Id.*

118. *Montoya*, 731 F.2d at 1372. The court of appeals stated that previous cases "turn upon the sufficiency of the original evidence which establishes in the customs officer's mind the belief that the incoming passenger 'fits the drug courier profile.' " *Id.* Based on the above analysis the court held "in the instant case, the evidence available to the customs officers when they decided to hold de Hernandez for continued observation was insufficient to support the 16-hour detention." *Id.* at 1373.

119. *Montoya*, 473 U.S. 531 (1985).

120. *Id.*

121. Alimentary canal smuggling is becoming a popular technique to smuggle narcotics. *See Couch*, 688 F.2d at 600. The individual first takes laxative to clean out their system. *Id.* They next swallow either capsules, condoms or balloons filled with the narcotic they want to smuggle. *Id.* Next they take a drug which inhibits the normal digestive process. Once they reach their final destination, another laxative is taken to retrieve the substance. *Id.*

122. *Montoya*, 473 U.S. at 544.

123. 392 U.S. 1 (1968).

124. *Montoya*, 473 U.S. at 543. The opinion began with a fourth amendment analysis. The Court relied on *New Jersey v. T.L.O.*, and the reasonableness requirement of the fourth amendment to assess the constitutionality of searches and seizures. *Id.* at 542. From this standpoint, the Court concluded that the constitutionality of a search or seizure is dependent on the surrounding circumstances involved and the nature of the search or seizure. *Id.*

125. *Montoya*, 473 U.S. at 543. The Court's approach, relied on the *Terry* exception. This approach institutes a balance between the intrusion the procedure placed on the fourth amendment concerns of the individual versus the legitimate governmental interests promoted by the particular intrusion. *Id.* The Court then set up a balance in accordance with the above reasoning between the United States interest at the border versus the fourth amendment rights of Ms. Her-

when employing this test. Included in the Court's analysis of this issue was the underlying purpose of the border exception[126] and Ms. de Hernandez's reasonable expectation of privacy at the border.[127] The Court considered the nation's interest in security at the border and weighed this interest against Ms. de Hernandez's fourth amendment rights.[128] After balancing these factors, the Court concluded that the government interest outweighed her fourth amendment rights.[129]

The Supreme Court reversed the court of appeals which held that the customs agents must possess a clear indication of alimentary canal smuggling in order to engage in a prolonged detention.[130] The court of appeals had relied on the decision in *Schmerber v. California*[131] which held that a search below the body surface could only be performed if there was a *clear indication* that the desired evidence *would* be found.[132] Without applying *Schmerber*, the *Montoya* Court found that the court of appeals misinterpreted the intent of *Schmerber* which merely requires that there exist a *particularized suspicion* that the evidence sought *might* be found.[133] The Court determined that the

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nandez. *Id.*

126. *Id.* at 537-38.

127. *Id.* at 539-40. Because the seizure occurred at the border, the Court relied on the border exception. *Id.* Under the border exception, the fourth amendment reasonableness requirements at an international border vary from the requirements in the interior of the United States. *Id.* at 538. Routine searches and seizures of entrants may be conducted without probable cause or a warrant because of the concern for protection of the integrity of the border. *Id.* This concern is further intensified by the nationwide problem of the smuggling of narcotics at the border. *Id.* (citing United States v. Mendenhall, 466 U.S. 544, 561 (1980)).

128. *Montoya*, 473 U.S. at 537-38. The Court felt that in light of the border exception, Ms. de Hernandez had a lower expectation of privacy at the border. *Id.* In its analysis the Court also took into consideration that under section 482 of title 19 of the United States Code, Ms. de Hernandez was entitled to be free from unreasonable search and seizure.

129. *Montoya*, 473 U.S. at 539-40.

130. *Id.*; *see also* United States v. Montoya de Hernandez, 731 F.2d 1369, 1373 (9th Cir. 1984).

131. 384 U.S. 757 (1966).

132. *Montoya*, 473 U.S. at 540 n.3 (citing Schmerber v. California, 384 U.S. 757, 769 (1966)).

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion [beyond the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Id. The court of appeals adjudged "clear indication" to be an intermediate standard between "reasonable suspicion" and "probable cause." *Id.* at 536 (citing United States v. Montoya de Hernandez, 731 F.2d. 1369 (9th Cir. 1984)).

133. *Montoya*, 473 U.S. at 540. The Supreme Court reversed, believing that the standard relied upon by the court of appeals was incorrect because it had resulted from a misinterpretation of *Schmerber*. *Id.*

Based upon the results obtained by invoking the *Terry* balance, and interpreting border exception and *Schmerber's* requirements, the majority felt justified in holding that a traveler could be detained for purposes other than a routine search if customs agents in considering the surrounding circumstances possessed an objectively reasonable and articulable suspicion that the traveler is

Terry reasonable suspicion standard was the appropriate standard to be applied.[134]

In further delineating its reasons for selecting the *Terry* standard, the Court stressed the fact that the standard had previously been used to confront the conflicts between private and public interests resulting from *limited* intrusions made by law officials without probable cause.[135] The Court stated that since suspicions of alimentary canal smuggling could not be discovered through the usual *Terry* procedures,[136] a thorough search or lengthy detention was required to discover whether an individual was engaged in this crime.[137] The Court then stated that the *Terry* standard fit well into situations where alimentary canal smuggling was suspected and, thus, a reasonable suspicion of alimentary canal smuggling justified a prolonged detention at the border.[138]

Looking to the facts of the case at bar, the Court then found that the customs agents had possessed the requisite reasonable suspicion that Ms. de Hernandez was smuggling narcotics in her alimentary canal.[139] The customs agents possessed a "particularized and objective" basis for their suspicions based on their experience with such smugglers in the past and the behavior by Ms. de Hernandez.[140] In light of this reasoning, the Court concluded that the stop was justified at its inception, as required under the first prong of the *Terry* analysis.[141]

The final issue the Court confronted was whether the scope of Ms. de Hernandez's detention was reasonably related to the circumstances upon which it was initially justified.[142] The Court admitted that the detention of Ms. de Hernandez was longer than any previously approved detention.[143] The Court refused to impose any sort of time constraints on the length of a detention and stated that "common sense and ordinary criteria of human experience must govern over rigid [time constraints]."[144]

One justification for the lengthy detention was the fact that alimentary canal smuggling could not be discovered by brief *Terry* type intrusions.[145] Fur-

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smuggling contraband in her alimentary canal. Id.

134. *Id.* at 541.

135. *Id.*

136. *Id.* at 543. The usual *Terry* procedure is basically a brief search characterized as a frisk or pat-down and a very brief, minimally intrusive, detention characterized as a stop. *See Terry*, 392 U.S. at 16.

137. *Montoya*, 473 U.S. at 543.

138. *Id.*; see *infra* notes 188-92 and accompanying text for a discussion of the application of the *Terry* standard to alimentary canal smuggling.

139. *Id.* at 542.

140. *Id.* The court explained that the agent did not possess just a "hunch" or a chance that Ms. de Hernandez was an alimentary canal smuggler but the requisite "particularized and objective" belief based in his past experience with such smugglers. *Id.*

141. *Id.* at 541.

142. *Id.*

143. *Id.* at 542. The Court stated: "This length of time undoubtedly exceeds any other detention we have approved under reasonable suspicion." *Id.*

144. *Id.* (citation omitted); see *infra* notes 225-31 and accompanying text for a discussion of this standard and the Court's finding on this point.

145. *Id.* at 543; *see supra* text accompanying notes 137-38.

ther delay was attributed to Ms. de Hernandez's refusal to cooperate.[146] The Court reasoned that she was primarily responsible for the duration and discomfort of her detention.[147] It found that when Ms. de Hernandez refused to submit to the options offered to her, the customs agents were left with only the choice of detaining her until their suspicions were disproved, or allowing her to enter the country potentially carrying illegal narcotics.[148] Additionally, the Court considered the fact that the detention occurred at an international border and, accordingly, that customs officials are charged with protecting the nation from those entering the country armed with harmful substances.[149] Consistent with the above determinations, the Court concluded that the detention of Ms. de Hernandez was not unreasonably long under the second prong of the *Terry* analysis.[150]

IV. Dissenting Opinion

Justice Brennan and Justice Marshall strongly disagreed with the majority's opinion.[151] Justice Brennan, initially commented on the unusual facts of the case, stating that the treatment of Ms. de Hernandez was a "disgusting and saddening episode."[152] Despite this, however, he interjected his view that Ms. de Hernandez "degraded herself as to offend the sensibilities of any decent citizen."[153] Next, the dissent noted that the issue presented in the case should have been whether the fourth amendment authorizes a customs officer to subject a traveler to the type of treatment received by Ms. de Hernandez without authorization of a judicial officer and based only upon a reasonable suspicion of "low ranking officers."[154] According to the dissent, that scenario

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146. *Montoya*, 473 U.S. at 543 (citing United States v. Sharpe, 470 U.S. 675 (1985)). The Court stated: "But her visible efforts to resist the call of nature, which the court labeled 'heroic' disappointed this expectation and in turn, caused her humiliation and discomfort." *Id.*

147. *Id.* The Court also refused to "charge police with delays in investigatory detention attributable to the suspect's evasive actions." *Id.*

148. *Id.* at 543. It should be noted that the original options afforded to the respondent were the choice of submitting to an x-ray, returning to Columbia or excreting in a wastebasket while being observed by two customs matrons. *Id.* Ms. de Hernandez refused both the x-ray and excreting in a wastebasket. *Id.* Due to visa problems, she could not return to Columbia for a few days. *Id.* The Court claimed that customs officials were left with only the choice of detaining her until their suspicions were dispelled or allowing her to enter the country. *Id.* The Court then reasoned, through this analysis, that officials are not charged with delays in detentions that are due to the suspect. *Id.* Therefore, Ms. de Hernandez is wholly responsible for the duration of the detention suffered by her. *Id.*

149. *Id.* at 544.

150. *Id.*

151. *Id.* at 545 (Brennan, J., dissenting).

152. *Id.* Justice Brennan stated: "We confront a 'disgusting and saddening episode' at our nation's border." *Id.* (footnote omitted).

153. *Id.* at 548 (Brennan, J., dissenting).

154. *Id.* at 549 (Brennan, J., dissenting) Justice Brennan opined that:

> [T]he issue, instead, is simply this: Does the Fourth Amendment permit an international traveler, citizen or alien, to be subjected to the sort of treatment that occurred in this case without the sanction of a judicial officer and based on nothing more than the 'reasonable suspicion' of low-ranking investigative officers that something might be amiss?

did not comply with fourth amendment requirements for various reasons.[155]

In finding that the treatment of Ms. de Hernandez did not comply with the requirements of the fourth amendment, Justice Brennan noted that non-routine detentions and searches at the border are reasonable under the fourth amendment only if authorized by a judicial officer.[156] Justice Brennan justified this finding stating that that requirement was consistent with the underlying purpose of the fourth amendment,[157] and that the fourth amendment warrant clause must be more than a mere inconvenience which could be outweighed by the need for effective law enforcement.[158] Rather, Justice Brennan stressed that it is a fundamental principle that police should obtain a warrant with judicial approval whenever possible.[159] Further, Justice Brennan found no reason why that fundamental principle should not be applied to "lengthy and intrusive criminal investigative detentions occurring at the nation's border."[160] Justice Brennan suggested that the border exception to the warrant requirement should be re-examined.[161]

Id.

155. *Id.* at 562 (Brennan, J., dissenting).

156. *Id.*

157. *Id.* at 552 (Brennan, J., dissenting). Justice Brennan cited *Johnson v. United States*, for the proposition that:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Id. (citing Johnson v. United States, 333 U.S. 10, 14 (1948)).

158. *Id.* Justice Brennan stated that the:

> Fourth Amendment's Warrant Clause is not mere 'dead language' or a bothersome 'inconvenience' to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check to 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement.

Id.

159. *Id.* at 553 (Brennan, J., dissenting).

160. *Id.* at 554 (Brennan, J., dissenting).

161. *Id.* Justice Brennan stated that border search cases should be analogized to the administrative search cases where a warrant is required. *Id.* at 555 (Brennan, J., dissenting). The purpose of the administrative warrant is to safeguard the privacy and security of individuals against arbitrary invasions of governmental officials. *Id.* He then stated that:

> something has gone fundamentally awry in our constitutional jursiprudence when a neutral and detached magistrate's authorization is required before the authorities may inspect the plumbing, heating, ventilation, gas and electrical systems in a person's home, investigate the backrooms of his workplace, or poke through the charred remains of his gutted out garage, but not before they may hold him in indefinite involuntary isolation at the nation's border to investigate whether he might be engaged in criminal wrongdoing.

Id. at 555-56 (Brennan, J., dissenting). Justice Brennan added further that administrative searches present a limited invasion of the individual's privacy and a warrant is still required. *Id.* at

According to Justice Brennan, one reason why the border exception to the warrant requirement should be re-examined is that the number of highly intrusive border searches performed on innocent travelers is very high.[162] The judicial approval requirement of the fourth amendment would prevent the harrassment of many innocent people.[163] Justice Brennan pointed out that in most instances there are no exigent circumstances which exist to allow claims of police efficiency to outweigh fourth amendment claims.[164] Furthermore, in those exigent situations, the government's concerns with expedience could be resolved by obtaining a telephonic warrant.[165]

Additionally, Justice Brennan stated that to allow warrantless detentions at the border would imply that "authorities might hold a person on suspicion for however long it takes to get him to cooperate . . . ."[166] To allow this type of intrusion threatens to swallow basic warrant and probable cause requirements.[167]

Justice Brennan then criticized the majority analysis which attributed the length and discomfort of the detention to Ms. de Hernandez's refusal to cooperate and the method in which she chose to smuggle the narcotics.[168] He pointed out that although it was subsequently determined that Ms. de Hernandez was in fact guilty of alimentary canal smuggling, the fourth amendment still demands that "we prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure."[169] Justice Brennan then added that there was no support for allowing a "petty" government official to require an individual to "excrete on command."[170] Furthermore, he argued that it would not be unrealistic for an innocent traveler, confronted with the same set of circumstances as Ms. de Hernandez, to be unable to cooperate.[171]

Justice Brennan then disagreed with Justice Stevens' concurrence[172]

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556 (Brennan, J., dissenting).

162. *Id.* Justice Brennan stated that:

> [O]ne physician who at the request of customs officials conducted many 'internal searches' — rectal and vaginal examinations and stomach pumping — estimated that he had found contraband in only 15 to 20 percent of the persons he had examined. It has similarly been estimated that only 16 percent of women subjected to body cavity searches at the border were in fact found to be carrying contraband.

Id. (citations omitted).

163. *Id.* (citing Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971)).

164. *Id.*

165. *Id.* at 557-58 (Brennan, J., dissenting). Justice Brennan stated that:

> the Government's interest in proceeding expeditiously could have been achieved by obtaining a telephonic search warrant — a procedure 'ideally suited to the peculiar needs of the customs authorities' and one that ultimately was used in this case a full day after de Hernandez was first detained.

Id.

166. *Id.* at 559 (Brennan, J., dissenting).

167. *Id.* (citing Davis v. Mississippi, 394 U.S. at 726 and Dunaway v. New York, 442 U.S. at 213).

168. *Id.*

169. *Id.* (citation omitted).

170. *Id.* at 560 (Brennan, J., dissenting).

171. *Id.*

172. *Id.* at 561 (Brennan, J., dissenting).

where Justice Stevens had stated that since Ms. de Hernandez was given the choice of an x-ray examination, the detention was justified.[173] Justice Brennan disagreed with that proposition primarily because of the medical dangers associated with x-rays,[174] and additionally, since search warrants are required to search dwellings without exigent circumstances, warrants should be required to search the human body.[175]

Justice Brennan also criticized the government's argument that customs officials had only the choice of forcing the traveler to submit to the available procedures or allow Ms. de Hernandez's entry into the United States with the contraband.[176] Justice Brennan recognized that a third, and less intrusive, alternative could be accomplished by allowing the traveler to leave the country.[177] He stated that "[i]f the traveler does not wish to consent to prolonged detentions or intrusive examinations, the nation's customs and immigration interests are fully served by sending the traveler on his way elsewhere."[178]

Lastly, Justice Brennan stated that Ms. de Hernandez's detention violated the fourth amendment because it was supported by only a reasonable suspicion, and not by probable cause.[179] He stated that since a detention inside the United States would only be permissible based on probable cause, then the same should apply to border searches carried out for the purpose of criminal investigation.[180] Justice Brennan argued that the "probable cause standard rests on 'a practical, non-technical conception affording the best compromise that has been found for accommodating' the 'often opposing' interests of law enforcement and individual liberty."[181] This standard had not been met by the drug courier profile.[182] As a result of this analysis, Justice Brennan disagreed with the majority holding and stated that he would affirm the judgment of the court of appeals.[183]

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173. *Id.*

174. *Id.*

175. *Id.* at 562 (Brennan, J., dissenting). Justice Brennan stated:

> Rather, the crux of my disagreement is this: We have learned in our lifetimes, time and again, the inherent dangers that result from coupling unchecked 'law enforcement' discretion on with the tools of medical technology. Accordingly, in this country at least, '[t]he importance of informed, detached and deliberate [judicial] determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great . . . . Because '[s]earch warrants are ordinarily required for searches of dwellings, . . . *absent an emergency*, no less could be required where intrusions into the human body are concerned.

Id. (citing Schmerber v. California, 384 U.S. 757, 770) (emphasis added).

176. *Id.* at 565 (Brennan, J., dissenting).

177. *Id.*

178. *Id.*

179. *Id.* at 562 (Brennan, J., dissenting). Justice Brennan stated: "I believe that de Hernandez' detention violated the Fourth Amendment for an additional reason: it was not supported by probable cause." *Id.*

180. *Id.* at 563 (Brennan, J., dissenting).

181. *Id.* at 566 (Brennan, J., dissenting).

182. *Id.*

183. *Id.* at 566-67 (Brennan, J., dissenting). Justice Brennan elaborated further that:

> In my opinion, allowing the Government to hold someone in indefinite involuntary *incommunicado* isolation without probable cause and a judicial warrant violates our

V. ANALYSIS

A. *Introduction*

The Supreme Court's decision is without justification for a number of reasons. One reason is that the Court confined its holding too narrowly by dealing only with prolonged detentions. Typically, customs officials first must possess the requisite suspicion in order to hold a suspect for a brief detention incident to an intrusive search.[184] If consent cannot be obtained from the suspect to conduct such a *search*, the customs officials then will hold the suspect for a *prolonged detention*.[185] In *Montoya*, the Court virtually ignored this "search" issue by ruling only on prolonged "detentions."[186]

Another reason why the *Montoya* decision is unsound is because the Court validated such a detention based upon the *Terry* reasonable suspicion standard.[187] Since alimentary canal smuggling cases involve a delicate situation,[188] such a detention should not have been upheld by the *Terry* standard. Rather, the Court should have employed a higher standard given the degree of the invasion of privacy involved.[189] Furthermore, the Court held that Ms. de Hernandez's detention was reasonable under the fourth amendment.[190] Instead, the Court should have held that Ms. de Hernandez's detention violated the fourth amendment because the detention was more intrusive than a custodial arrest and reasonable suspicion was insufficient to uphold such a detention.[191] Finally, the Court failed to consider the humanitarian concerns of Ms. de Hernandez's ordeal and the future ramifications of such a holding.[192] The decision by the Court is therefore without sufficient foundation.

> constitutional charter whether the purpose is to extract ransom or to investigate suspected criminal activity. Nothing in the Fourth Amendment permits an exception for such actions at the nation's border.

Id.

184. *Id.* at 541; *see supra* note 171.

185. *See supra* notes 172-73.

186. *Montoya*, 473 U.S. at 541. It is noted by the Court that no view on the level of suspicion required for non-routine border searches since that issue was not presented. *Id.* at 541 n.4.

187. *Id.* at 542; see *supra* note 45 for a description of the reasonable suspicion standard.

188. Alimentary canal smuggling presents a special circumstance in which individuals will be subjected to a prolonged detention, as well as a search. Since the detention will probably always lead to a search, the court in actuality has also relied upon a search. For examples of cases in which individuals suspected of internal smuggling have been searched incident to a detention see *supra* note 10.

189. Because of the invasion of privacy involved, a higher standard such as clear indication or even probable cause, should be required. See *supra* notes 54-55 for a definition of the clear indication standard. See *infra* notes 206-15 for a full discussion of this issue.

190. *Montoya*, 473 U.S. at 551 (Brennan, J., dissenting).

191. See *supra* note 45 for the type of detention that a reasonable suspicion validates. See *Florida* v. *Royer* for the theory that detentions which go beyond the scope that a reasonable suspicion validates can be labeled as a custodial arrest and as violative of the fourth amendment. 460 U.S. 491 (1981).

192. *See infra* notes 265-69 and accompanying text.

B. Failure to Deal with the Search Issue

The Supreme Court has explicitly limited its holding in *Montoya* to prolonged detentions at the border based on a reasonable suspicion of alimentary canal smuggling.[193] This holding is not based on sound reasoning. In light of the border exception and the manner in which alimentary canal smuggling is performed, both intrusive searches and prolonged detentions must be given equal consideration.[194] Once customs officials possess a reasonable suspicion of alimentary canal smuggling, there are only a few methods available to confirm or dispel the official's suspicions. First, the official could detain the suspect for the purpose of obtaining a confession.[195] Second, the official could determine

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193. *Montoya*, 473 U.S. at 539-544. The Court stated: "It is also important to note what we do *not* hold. Because the issues are not presented today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity or involuntary x-ray searches." *Id.* at 541 n.4.

194. In order to illustrate this rationale, the process that leads officials to possess a reasonable suspicion of alimentary canal smuggling must be reviewed. When a traveler crosses the border, the first place the individual must go to is Immigration where the traveler's visa, passport and other documents are reviewed. As long as these documents are in order the traveler's next stop is customs. It is at customs where suspicions of criminal activity beyond the scope of fraudulent documents is usually supected. *Montoya*, 473 U.S. at 533-35. The cases illustrate within their facts that it is customs officials whose suspicions are aroused by suspicious behavior.

In the case of internal smuggling, suspicions are usually aroused when the traveler proceeds through customs. Customs officials look for something in the suspect's manner. In the past, various things have aroused customs officials suspicions. They include: 1) a South American woman traveling alone, carrying poor quality luggage, *see, e.g., Vega-Barvo*, 729 F.2d at 1343; 2) wearing inexpensive clothing, *see, e.g., Pino*, 729 F.2d at 1358; 3) extreme passivity, *see, e.g., Castaneda-Castaneda*, 729 F.2d at 1362; 4) fitting the drug courier profile, *see, e.g., Henao-Castano*, 729 F.2d at 1365; 5) wearing platform shoes, *see, e.g., Himmelwright*, 551 F.2d at 992; 6) nervousness, *see, e.g., Smith* 557 F.2d at 1208; *Mendez-Jimmenez*, 709 F.2d at 1304; 7) ducking officials, *see, e.g., Guadalupe-Garza*, 421 F.2d at 877; 8) paying cash for airline ticket, *see, e.g., Quintero-Castro*, 705 F.2d at 1100; 9) and bodily stiffness and restrictions in walking, *see, e.g., Erwin*, 625 F.2d at 838.

If the customs officer's suspicions are sufficiently aroused, the traveler will be sent to the secondary desk for further investigation. See cases cited above for examples of suspicious travelers sent to secondary customs desk for further questioning.

If the officer's suspicion has not been affirmed or dispelled through this procedure, a strip search is usually ordered. See cases cited in *supra* note 19, and cases cited in the above examples. The above investigation will uncover most forms of drug smuggling but will not uncover whether an individual is engaged in a form of internal smuggling. See cases cited above for examples of where suspicions of internal smuggling have not usually been dispelled through a routine search and seizure. Sometimes though, suspicions have been affirmed. See *Himmelwright*, where customs officials noticed a tab protruding from a traveler's vagina. 551 F.2d at 993. The traveler upon request of the official pulled it out. The object turned out to be six rubber condoms containing cocaine. *Himmelwright*, 551 F.2d at 993.

But, from the above process, customs officers may gather enough information to reasonably suspect that a traveler is engaged in internal smuggling. *See* above cases and *Montoya*, 473 U.S. at 541. This suspicion is usually met due to the fact that the traveler fits into the profile of an internal drug smuggler. *Id.* at 539 n.2 (discussing factors comprising drug courier profile). See *Florida* v. *Royer*, which held that a suspect who fits the drug courier profile amounts to a reasonable suspicion 460 U.S. 491, 502-03.

195. *See infra* notes 164-69 and accompanying text.

whether the narcotics are inside the suspect.[196]

As to the first option, custodial detentions for the purpose of a forced confession are unlawful in the United States,[197] because "indefinite involuntary *incommunicado* detentions for investigation are the hallmark of a police state, not a free society."[198] Custodial detentions, unlike investigative stops, may not be made based merely upon a reasonable suspicion.[199] As soon as an investigative stop exceeds the scope of *Terry*, officers must have probable cause to uphold the detention.[200] Therefore, an interrogation for the purpose of a forced confession is not a feasible alternative.[201]

As to the second option, cases prior to *Montoya* illustrate the procedure customs officials follow to determine whether the suspect has narcotics inside his or her body.[202] Officials first attempt to obtain consent from the suspect for an x-ray or a body cavity probe.[203] If the suspect will not consent, the official will then engage the suspect in a prolonged detention.[204] The purpose of the detention is to hold the suspect until the suspect empties his or her alimentary canal.[205] The excrement is then examined for narcotics.[206] From the above

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196. *See infra* notes 170-79 and accompanying text.

197. W. RINGEL, *supra* note 25, at 13-57 to 13-58. "Unlike investigative stops, custodial detentions may not be made of suspects based solely on reasonable suspicion."

198. *Montoya*, 473 U.S. at 550 (Brennan, J., dissenting) (emphasis in original).

199. *See supra* note 164 and accompanying text.

200. In *United States v. Chamberlin*, it was stated by the court that a reasonable suspicion of criminal activity justified a brief detention and inquiry but a twenty minute detention was improper without probable cause. 644 F.2d 1262, 1266 (9th Cir. 1980); *see also* W. RINGEL, *supra* note 25, § 13.9, at 13-57 to 13-60.

201. *See supra* notes 164 & 167. However, some states have adopted temporary detention orders issued by a magistrate based on a reasonable cause that an individual is related to a criminal offense. W. RINGEL, *supra* note 25, § 13.9.

202. *See supra* notes 164 & 167 and accompanying text. As further support, the Supreme Court held in *Royer*, that "reasonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative." 460 U.S. at 500.

203. *See* United States v. Sharpe, 470 U.S. 675 (1985).

204. Officers first attempt to obtain consent from the suspect for an x-ray or body cavity probe. *See* cases cited in *supra* note 9. To perform this search, officials must have possessed the requisite level of suspicion. *See supra* notes 54, 55, & 60-62 and accompanying text; *see also Quintero-Castro*, 705 F.2d at 1101; *Faherty*, 692 F.2d at 1371; *Mosquera-Ramirez*, 729 F.2d at 1355; *Montoya*, 731 F.2d at 538. Depending on the circuit, the officer may be required to obtain a warrant. *See supra* note 58.

205. The reason custom officers follow this procedure is that under *Terry*, a detention based on a reasonable suspicion should be the least intrusive means available to obtain evidence. *See supra* note 45. Custom officers under this standard are also required to act diligently in conducting their investigation. *See supra* note 45. Further to be considered is the detainee's treatment and events occurring during the detention. *See Dunaway*, 442 U.S. at 212. In view of the time constraints and dignity, this is the best approach. It is far more expedient to perform an x-ray or a body cavity probe than to detain an individual until he or she has emptied his or her alimentary canal. It should also be kept in mind that the individual must be kept under observation while in the process of excreting to insure that the evdience will not be lost. This practice may represent a humiliating experience for the suspect. *See generally Montoya*, 473 U.S. at 545-67 (Brennan, J., dissenting).

206. *See Quintero-Castro*, 705 F.2d at 1100; *Faherty*, 692 F.2d at 1260; *Mosquera-Ramirez*, 729 F.2d at 1355.

procedure, it may be concluded that a prolonged detention is proper only if the officials possess the requisite level of suspicion to perform an intrusive search and the officials cannot obtain consent from the suspect to go forward with the search.[207]

The *Montoya* holding implies that only upon a reasonable suspicion of alimentary canal smuggling, a suspect may be held for a brief detention while an x-ray examination is conducted.[208] If the suspect declines the x-ray exam, only then may the suspect be held for a prolonged detention.[209] Although the Court has stated that the *Montoya* holding is limited to a prolonged detention, the Court implicitly has ruled on the level of suspicion required for an intrusive search — an x-ray examination.[210] This is due to the fact that the validity of the detention hinged on whether the officials possessed the requisite suspicion to perform an intrusive x-ray search.[211]

If the *Montoya* holding is applied in accordance with its literal interpretation, many innocent travelers will be required to endure the same treatment as Ms. de Hernandez.[212] It appears to hold that a prolonged detention to await a monitored bowel movement by a suspect may be upheld based upon the same level of evidence required for a strip search.[213] Such a detention appears not to

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207. *See supra* note 206.

208. It should be noted that this procedure is not a hard and fast rule. It is the procedure that has been used in past cases of suspected alimentary canal smuggling. One author has given the following interpretation of the *Montoya* opinion:

> [t]he majority opinion implies what Justice Stevens, concurring makes explicit: What is permissible on a reasonable suspicion is a brief detention while an x-ray examination is conducted, except that if the suspect declines the x-ray, then and only then may the suspect be kept in custody to await a bowel movement. The majority opinion does stress that the agents offered her the alternative of submitting herself to [the x-ray] procedure and opted for the lengthier their detention only when she refused the other alternative. But the court never states specifically that this is the necessary step in the process.

W. LAFAVE, *supra* note 6, § 10.5, at 157.

The *Montoya* case though does illustrate this procedure. Officers were contemplating an x-ray. *Montoya*, 473 U.S. at 534-36. When Ms. de Hernandez would not consent to an x-ray officials held her for the purpose of gathering enough evidence to obtain a court ordered x-ray or until her bowels moved. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* Because officials must obtain enough evidence to perform an x-ray before the suspect may be detained, both the search and the detention will require the same level of suspicion. By ruling on the level of suspicion required for the detention, and that the detention is hinged upon the search, the Court has ruled on the level of suspicion required for a search too. For support for this rationale see Comment, *Intrusive Border Searches — Is Judicial Control Desirable*?, 115 U. PA. L. REV. 276, 282-84 (1966) [hereinafter *Intrusive Searches*].

212. *See supra* note 211.

213. Justice Stevens stated in his concurring opinion: "If a seizure and a search of the person of the kind disclosed by this record may be made on the basis of a reasonable suspicion, we must assure that a significant number of innocent persons will be required to undergo similar procedures." *Montoya*, 473 U.S. at 545 (Stevens, J., concurring).

When considering the reasonableness of a law enforcement procedure, the frequency with which the particular law enforcement procedure is likely to invade the dignity and privacy of the innocent is relevant. *Brignoni-Ponce*, 422 U.S. at 883-84; Brief for Respondent, at 39. In *Henderson*,

require the higher level of evidence needed to validate a body cavity search.[214] Pursuant to this holding, customs officials, based only upon the level of suspicion required for a *Terry* stop, may simply engage the suspect in a prolonged detention without the need to gather the level of suspicion necessary for an x-ray exam, as previously required.[215]

C. *Misuse of the* Terry v. Ohio *Standard*

In light of the above rationale, the Court should not have selected the *Terry v. Ohio* reasonable suspicion standard.[216] The *Terry* exception represents a narrowly drawn exception to the probable cause requirement pertaining to specific limited detentions that do not rise to the level of a full scale arrest.[217] Therefore, to apply this exception to a prolonged or indefinite warrantless detention, is completely at odds with the rationale for the exception and its required analysis.[218]

Further fault can be found in applying the reasonable suspicion standard to a prolonged detention incident to a non-routine search. The Court's rationale for applying the reasonable suspicion standard is inherently inconsistent with the aim of the *Terry* exception.[219] The Court noted that in the past the

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it was noted that of the thousands of women that crossed the border, the "vast majority" were not smuggling narcotics internally. 390 F.2d at 808.

214. W. LAFAVE, *supra* note 6, § 10.5, at 156-57.

215. *Id.*

216. *Id.*

217. *See supra* note 45; *see also*, Montoya, 473 U.S. at 541-42. *Montoya* provides: "[U]nder this standard, officials at the border must have a 'particularized and objective basis for suspecting the particular person' of alimentary canal smuggling." *Id.* (citations omitted).

218. In *Terry v. Ohio*, the court stated: "Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest is not justified by a need to prevent the disappearance or destruction of evidence of crime." 392 U.S. 129 (1968).

The Court in *United States v. Sharpe*, stated that "*Terry* must be justified, not because it makes law enforcement easier, but because a *Terry* stop does not constitute the sort of arrest that the Constitution requires be made upon probable cause." 470 U.S. 675, 691 (1985); *see also supra* note 45 (discussing *Terry*).

219. In reviewing whether warrantless detention can be categorized as a constitutional *Terry* exception, the Court first determines whether the invasion was unduly intrusive. *Terry*, 392 U.S. at 21. If the invasion is determined as not unduly intrusive, the Court then weighs the government's legitimate interest versus the individual's fourth amendment rights. *Id.* For the seizure to be valid under *Terry*, the government's legitimate interest must outweigh the individual's fourth amendment rights. *Id.*

If the government's interests outweigh the individual's, the seizure itself is analyzed through a two-prong test. *Id.* at 20. The initial stop must be reasonable at its inception. *Id.* The law enforcer must be able to point to "reasonable and articulable" facts that amount to a reasonable suspicion of criminal activity. *Id.* at 21. If the stop is determined to be reasonable in its inception, the detention is then reviewed as to whether it was "reasonably related in scope to the circumstances which justified it initially; the second prong." *Id.* In analyzing the second prong, the details of the detention are all considered as a whole to determine whether the detention was a custodial arrest or an investigative stop. The fourth amendment analysis and the two prong test are considered together to determine whether the detention could be categorized as a *Terry* investigative stop. The *Terry* rationale and procedure is at odds with a prolonged detention incident to a non-routine intrusive search.

reasonable suspicion standard had been applied in numerous instances to balance private and public interests when a law officer was to make a limited intrusion without probable cause.[220] After explaining that this exception is to be employed in situations involving a *limited* intrusion Justice Rehnquist then created a paradox. He completely contradicted his previous statement by proclaiming that it "fit well into situations involving alimentary canal smuggling"[221] which requires a much more *intrusive* search or seizure. The facts of *Montoya* are further alienated from the rationale of *Terry* because such a crime could not be discovered by the usual brief *Terry* searches.[222] This again is incongruous with *Terry* because one of the main rationales behind allowing this warrantless intrusion is that suspicions possessed by a law enforcer can be confirmed or dispelled thorough this limited stop and search.[223] By stating that suspicions of alimentary canal smuggling could not be dispelled through ordinary *Terry* procedures, the Court actually presented an important reason for *not* applying the *Terry* reasonable suspicion standard to the detentions presented by these facts.[224]

The Court's selection of the *Terry* standard was also based upon an oversimplification of the border exception which resulted in a miscalculation of a traveler's expectation of privacy at the border.[225] Under the border exception, travelers are deemed to possess a diminished expectation of privacy as com-

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220. *See supra* note 45 & 217 for an analysis of the *Terry* exception. The basis of the exception is to allow a search and seizure of the most minimal intrusiveness. In *Montoya*, the Court used this same standard to uphold an intrusive search and prolonged detention. This is why it is incongruous and inconsistent with the rationale behind *Terry* to apply it to the facts of the case at bar — using an exception which applies to searches and seizures of the most minimal intrusion to uphold prolonged detention incident to a non-routine intrusive search.

221. *Montoya*, 473 U.S. at 541.

222. *Id.* at 543. This is a contradiction because in one instance, the Court explained that the *Terry* exception is to be adopted in situations which involve a "limited intrusion." *Id.* Justice Rehnquist continued, stating that it fit well into situations involving alimentary canal smuggling which requires a prolonged detention and intrusive search. *Id. See supra* notes 45 & 217. However, the majority of the circuits uphold body cavity searches based on a reasonable suspicion when they occur at the border. See *supra* note 58 for the standard set out by the Ninth Circuit. For the clear indication standard, see *supra* notes 48, 49, 53-55. It is sensible to require a higher standard than reasonable suspicion for a search and seizure which is more intrusive in scope. *See supra* note 33.

223. *Montoya*, 473 U.S. at 543; *see supra* note 33. This is a further alienation of the facts from the *Terry* standard. The usual *Terry* procedures will not even confirm or dispel the agent's suspicions of alimentary canal smuggling, which is the rationale behind *Terry*. *See supra* notes 45 & 158.

224. *See supra* notes 45 & 158; *see also Sharpe*, 470 U.S. at 698. In explaining *Terry's* brevity requirement, Justice Marshall stated that "if the initial encounter provides no greater grounds for suspicion than existed before the stop, the individual must be free to leave after the few minutes permitted for the initial encounter." *Id.* (Marshall, J., concurring in judgment).

225. *See supra* notes 219-23; *see also Montoya*, 473 U.S. at 544. It should be noted that the holding in *Terry* allowed a brief detention incident to a minimally intrusive search, based on the rationale that through such tactics, the officer was able to "verify or dispel the official's suspicion in a short period of time." *Terry*, 392 U.S. at 20. But, in *Montoya* it was stated that suspicions of alimentary canal smuggling could not be disregarded through ordinary *Terry* procedures. *Montoya*, 473 U.S. at 543. Therefore, since proscribed *Terry* procedures will not dispel suspicions of alimentary canal smuggling, it is at odds with the *Terry* holding to apply it in this case.

pared with when they are within the interior of the country.[226] Even though travelers possess a diminished expectation of privacy at the border, it is not reduced to the point of extinction.[227] Under the border exception, the traveler still possesses fourth amendment privacy rights.[228] Nothing under the border exception should lead a traveler to believe that he or she would receive the same treatment as Ms. de Hernandez received — thrown into a private room, strip searched, and subjected to a body cavity search without compelling reasons supporting it.[229] This miscalculation of the traveler's privacy rights represents a further reason why the *Terry* standard is not the appropriate standard to be invoked to uphold a prolonged detention and intrusive search.[230]

Another problem involved in applying the flexible reasonable suspicion standard is that the level of suspicion required to validate the search becomes nebulous. Under the flexible standard, the greater the intrusiveness of the

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226. In light of the border exception, the traveler possesses a reduced expectation of privacy because of the notoriety of routine customs procedures. United States v. King, 517 F.2d 350, 353 (5th Cir. 1975); *see also* Brief for Respondent, at 11 (reduced level of privacy expected when passing through customs).

227. The border exception allows custom agents to conduct routine searches and seizures on travelers entering the United States without probable cause or virtually any prerequisites. *See supra* notes 21-32; *see also* United States v. Espercuta Reyes, 631 F.2d 616 (9th Cir. 1980) (travelers aware of inspections conducted by customs officials).

In *Brignoni-Ponce*, the Court stated that only a modest stop is upheld and any further detention or search must be based on consent or probable cause. 422 U.S. at 873. In *Montoya*, Justice Brennan stated that:

> Travelers at the national border are routinely subjected to questioning, pat-downs and thorough searches of their belongings. These measures, which involve relatively limited invasions of privacy . . . do not violate the Fourth Amendment . . . . At some point, however, further investigation involves such severe intrusions on the values the Fourth Amendment protects that more stringent safeguards are required.

Montoya, 473 U.S. at 551 (Brennan, J., dissenting) (citations omitted). For a non-routine search or seizure customs agents must possess a reasonable suspicion. *See supra* notes 44-48. In the interior, an individual cannot be subject to the same conduct as a routine search and seizure without probable cause and a warrant. *See supra* notes 1-3 and accompanying text.

228. *See supra* note 20. The fourth amendment reasonableness requirement applies at the border.

229. *See supra* note 20.

230. It was stated in *Guadalupe-Garza*, that:

> nothing leads a person to anticipate that, on reaching our border, he will be singled out, removed to a private examination room, undressed, and subject to a skin search. No one should be subjected to the indignity of such a search unless there are compelling reasons to do so.

421 F.2d at 878. *See also Border Searches*, *supra* note 16, at 1013.

> [A]lthough individuals are likely to expect non-intrusive searches of their baggage and perhaps their outer clothing at the border, they will not be prepared for intrusive personal searches or extended border searches. Since such searches also tend to separate the parties searched from the morally neutral class of international travelers, they will be more insulting as well as more invasive of privacy. Intrusive personal searches are particularly suspect in this regard: in addition to singling out and surprising the person such searches by their very nature insult and affront the dignity of any member of our society.

Id.

search, the more reasonable suspicion is required to validate it.[231] For example, a customs official must possess "more reasonable suspicion" to conduct an x-ray examination than to perform a strip search.[232] An even greater level of reasonable suspicion is required to perform a body cavity search.[233] In theory, the flexible standard works well. The standard acts as a balance between the traveler's privacy interests and the government's interest in curtailing the influx of contraband into the United States.[234] In practice though, the standard is too imprecise. The haziness exists in distinguishing different levels of reasonable suspicion.[235] In reviewing cases involving non-routine searches and seizures, it is difficult to distinguish between the levels of reasonable suspicion required to perform a strip search, an x-ray, a body cavity search, and a prolonged detention.[236] The net result is an arbitrary decision made by the Court.[237]

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231. *See supra* note 33 and accompanying text.

232. *See supra* notes 45, 54-56, 60 & 65-67.

233. *Id.*

234. *Id.*

235. In *Vega-Barvo*, it was stated: "This approach [the flexible test] attempts to balance the privacy interests of the international traveler and the government's interest in controlling the flow of contraband." 729 F.2d at 1344; *see also* United States v. Sandler, 644 F.2d 1163, 1165 (5th Cir. 1981) (en banc) (stating the hierarchy of intrusiveness test); United States v. Afanador, 567 F.2d 1325, 1328 (5th Cir. 1978); (more intrusive searches require more suspicion) *Himmelwright*, 551 F.2d at 99; Brief for Respondent, at 11; *Intrusive Searches*, *supra* note 211, at 279.

236. In *Vega-Barvo* the appellant received an x-ray examination. 729 F.2d at 1347. The level of suspicion required to support an x-ray in the Eleventh Circuit is reasonable suspicion. *Id.* The facts that led officials to the reasonable suspicion was that the appellant was a South Amercian woman traveling alone. She was conservatively dressed and her luggage was of poor quality. The appellant was asked what the purpose of her trip was. She replied that she owned a travel agency and was promoting tours. However, the appellant damaged her crediblity in response to more specific questions. She had poor handwriting, her ticket was not obtained through her travel agency, but purchased with cash. She had no business cards and little cash. She was also very nervous throughout questioning. She was patted down and that did not uncover anything. She was then x-rayed. The court ruled that based on the above facts, under flexible standards, the officials possessed enough reasonable suspicion to conduct an x-ray. *Id.* at 1343-47.

In *Pino*, a rectal probe and x-ray were performed on the appellant. 729 F.2d at 1359. As to the level of suspicion required to perform those searches: "A rectal probe is more intrusive than either a strip or x-ray search . . . . Correspondingly a greater amount of suspicion is necessary to justify a rectal exam." *Id.* at 1359. The standard illicited was that "facts as to the individual involved . . . would cause these inspectors to reasonably believe that contraband was being carried internally and would be revealed in a rectal search: an articulably, particularized suspicion as to the person, and a particularized suspicion as to the location of the drugs." *Id.* In other words, a reasonable suspicion that the suspect was carrying narcotics internally. The facts that lead officials to suspect internal smuggling included: the appellant was a South American male traveling alone, he was wearing inexpensive clothing, and he claimed that the purpose of his trip was to buy television parts. More questioning revealed that he did not know anything about television parts. *Id.* The court held that the search was reasonable. *Id.* at 1360.

In looking at the above cases, the problem of measuring levels of reasonable suspicion is exemplified. There does not seem to be any more reasonable suspicion in *Pino* to perform a rectal probe than in *Vega-Barvo* to perform an x-ray.

237. *See From Bags to Body Cavities*, *supra* note 32, at 54.

> Because of the broad reach of the customs laws - literally they allow a search of any person or vehicle suspected of carrying contraband no matter how far from the bor-

In light of the above reasoning, the reasonable suspicion standard does not appear to be the appropriate level of suspicion to validate a detention of this sort.[238] In the circumstances presented by the facts of *Montoya*, a higher level of suspicion should be required.[239] Two viable alternatives are available: the Ninth Circuit's approach, and the *Montoya* dissent's approach.

The Ninth Circuit's approach, like the *Terry* standard, also balances the traveler's privacy interests along with the government's interest in curtailing the influx of contraband into the United States.[240] At the same time though, the Ninth Circuit recognizes that in circumstances in which body cavity examinations are required, the scales tilt in favor of the traveler's privacy interest.[241] Thus, a higher level of suspicion — a clear indication — is required to sustain such searches.[242]

Alternatively, the approach suggested by the *Montoya* dissent requires probable cause, and at the very least, authorization by a detached and neutral magistrate to uphold such a detention.[243] The rationale for the warrant requirement presents additional support.[244] The purpose of the warrant require-

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> der, either temporally or spatially - the courts must carefully determine when a border search transgresses constitutional bounds of reasonableness. This inquiry is of enormous practical significance for each day thousands of travellers are subjected to customs searches and interrogations of varying intensities and types. The problem is largely one of standard setting. It is imperative that the constitutional restraints placed upon customs agents in the discharge of their duties be clearly defined; otherwise, travellers' rights are subject to arbitrary and discriminatory abridgement.

Id.

238. *See supra* notes 184-204 and accompanying text.

239. See *Intrusive Searches*, *supra* note 211, at 282-284; *From Bags to Body Cavities*, *supra* note 32, at 82-86; Note, *At The Border of Reasonableness: Searches By Customs Officials*, 53 CORNELL L. REV. 871, 881-885 (1968) [hereinafter *Border of Reasonableness*] for agreement of this position.

240. See *supra* notes 52-58 and accompanying text for an explanation of the clear indication standard.

241. *See supra* notes 52-58 and accompanying text.

See *Intrusive Searches*, *supra* note 211 at 283. "The requirement of 'clear indication that . . . evidence will be found protects the citizen's privacy by ensuring that only those searches will proceed in which there is a great likelihood of success." *Id.*

242. *See supra* notes 208-09. It should be noted that the *Montoya* Court has rejected this standard. *Montoya*, 473 U.S. at 540-41. LaFave agrees with this rejection and states "one can hardly fault the Court for not embracing the 'clear indication' language . . . that term was originated and used by the Supreme Court in circumstances where clearly there was no intention to refer to some level of suspicion on the down side of the traditional quantum of probable cause." W. LAFAVE, *supra* note 6, § 10.5, at 156.

243. It is true that under the border exception, routine searches and seizures of the border are not subject to any level of suspicion, probable cause, or a warrant. But, if at some point further investigation will severly intrude upon the individual's fourth amendment rights, more stringent safeguards are required. *See id*; *see also Esperuta-Reyes*, 631 F.2d 616 (9th Cir. 1980).

244. In *Johnson v. United States*, the Court stated:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting our crime . . . .

ment is to provide a check against overzealous officers.[245] The requirement of a warrant in this instance would be consistent with the weight of existing fourth amendment law.[246] It also would lessen the possibility of innocent travelers receiving the same treatment as Ms. de Hernandez.[247]

Additionally, the Court should not have concluded that Ms. de Hernandez's detention adhered to the reasonableness requirement of the fourth amendment.[248] A detention is reasonable only if it is valid at its inception.[249] There is a further requirement that the detention itself be reasonable.[250] Accordingly, Ms. de Hernandez's detention should not have been deemed reasonable. It may be concluded that the detention of Ms. de Hernandez was unreasonable at its inception.[251] To detain an individual beyond the scope of a routine search and seizure, customs officials must possess a reasonable suspicion that the individual is smuggling contraband within his/her alimentary

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> When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

333 U.S. 10, 14 (1948) (footnote omitted). Justice Brennan has further stated that:

> Accordingly the Court repeatedly has emphasized that the Fourth Amendment's Warrant Clause is not mere 'dead language' or a bothersome 'inconvenience to be somehow weighed' against the claims of policy or efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are part of any system of law enforcement.

Montoya, 473 U.S. at 552 (Brennan, J., dissenting).

245. *See supra* note 244.

246. LaFave stated that nothing is said about a warrant requirement in the border exception when the scope of the detention goes beyond the bounds of routine. *See* W. LAFAVE, *supra* note 6, at 155. LaFave further stated that the dissenters' position squares with existing fourth amendment law. *Id.* This is illustrated in Camera v. Municipal Court, 387 U.S. 523 (1967) and further enunciated in the dictum of Davis v. Mississippi, 394 U.S. 721 (1969) which follows the rationale that when something less than probable cause will allow a detention, it presents sufficient reason when, absent exigent circumstances, the judgment on the evidence should be made by a judicial officer instead of a policeman in the field. It has been suggested that:

> [w]hile it is dogma among the lower courts that border searches are immune from the traditional warrant requirement, there is no particular reason why this should be. Border search is but one of several exceptions to the general rule that no search shall occur absent a magistrate's imprimatur. But these exceptions are not absolute; they are at least purportedly limited by the principal that police must whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure. Intrusive body cavity searches present a situation in which it is both practical and desirable for a warrant to be obtained.

From Bags to Body Cavaties, *supra* note 32, at 82.

247. *See supra* notes 211 & 214.

248. *Montoya*, 473 U.S. at 545-50 (Brennan, J., dissenting); *see supra* notes 142-50.

249. In evaluating a detention, the Court considers first whether the detention was valid at its inception; *see supra* notes 142-50. In considering this, the Court determines whether customs officials possessed the level of suspicion required to sustain the detention. *Id.*; *see also Intrusive Searches*, *supra* note 211, at 285.

250. The Court considers the purpose of the detention and the scope of the intrusion as well as whether there is a less intrusive means to obtain the evidence. *See supra* notes 52-68; *see also Intrusive Searches*, *supra* note 211, at 285.

251. *See infra* note 253.

canal.[252] Officials met this required level of suspicion by determining that Ms. de Hernandez fit the drug courier profile.[253] It previously has been held by the Court that an agent who determines that a suspect fits the drug courier profile has complied with the reasonable suspicion standard.[254] Since the customs official possessed a reasonable suspicion that Ms. de Hernandez was smuggling drugs in her alimentary canal, the detention was justified at its inception.[255]

The Court, however, should not have concluded that Ms. de Hernandez's detention was further validated under the second prong of *Terry*.[256] The structure of her detention was in direct opposition to that required of a detention based upon a reasonable and articulable suspicion.[257] First, the duration of the detention went beyond the scope of *Terry*.[258] While courts do not confine themselves to hard and fast time constraints,[259] a detention for an indefinite period of time will not meet the framework of a *Terry* investigative stop.[260] The standard invoked to measure reasonableness of the time period of the detention is one of common sense.[261] Ms. de Hernandez was detained sixteen hours before an order to search was obtained, and was confined for a total of twenty-seven hours. Even though there are no requisite time limitations, this lengthy detention under a common sense analysis certainly did *not* conform to the requirement of a brief detention,[262] especially since it has been the longest detention ever endured by a suspect based upon *only* a reasonable suspicion.[263]

The customs agents did not exercise diligent behavior during the course of the detention.[264] Ms. de Hernandez declined an x-ray examination offered to her,[265] and at that point, officials believed they had only two available options left to them. These were either to engage her in a prolonged detention to con-

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252. *Montoya*, 473 U.S. at 541-44.

253. *Id.* at 542 (Brennan, J., dissenting). For factors comparing the drug courier profile, see United States v. Mendenhall, 446 U.S. 544, 547 n.1 (1979). Factors that comprise the drug courier profile for individuals suspected of smuggling drugs internally include: Nervousness exhibited upon questioning, plane tickets purchased in cash or means of purchase is unknown to the traveler, leaving from a source city, poor dress, a women traveling alone, contradictive answers to questions, stiffness in holding body, no hotel reservations, etc. For examples of the drug courier profile see the cases cited in *supra* notes 12 & 18.

254. Florida v. Royer, 460 U.S. 491, 492 (1983).

255. *See supra* notes 249-50.

256. *See infra* notes 259-94.

257. *See supra* note 45. In *Terry*, the Court stated, "[t]he manner in which the seizure . . . [was] conducted is, of course, as vital a part of the inquiry as whether it was warranted at all." 392 U.S. at 2; *see* Kremen v. United States, 353 U.S. 346 (1947); United States v. Place, 462 U.S. 696 (1983); Brief for Respondent, at 123. In the Brief for Respondent it is stated that "the lawfulness of the search often turns on the propriety of the manner in which it was carried out." *Id.*

258. *See Terry*, 392 U.S. at 26; *see also Royer*, 460 U.S. at 500 (investigatory detention must be temporary and last no longer than necessary to effectuate the suspicions).

259. *Sharpe*, 470 U.S. at 685; *see Montoya*, 473 U.S. at 558 (Brennan, J., dissenting).

260. *See supra* note 259.

261. *See supra* note 259.

262. *Montoya*, 473 U.S. at 242-43. The Court stated that a 16 hour detention is the longest detention upheld on a reasonable suspicion. *Id.*

263. *See Terry*, 392 U.S. at 24; *Place*, 462 U.S. at 699.

264. *Montoya*, 473 U.S. at 243.

265. *Id.* at 534.

firm their suspicions, or allow her entry into the United States carrying the reasonably suspected narcotics internally.[266] In actuality, a perfectly feasible third alternative existed. Ms. de Hernandez should have been free to leave the country.[267] This option, although offered to Ms. de Hernandez, was neither followed by the officials nor addressed by the majority.[268]

Instead of exercising diligent behavior, the officials were abusive in their conduct toward Ms. de Hernandez. She was thrown into a bare room until she produced a monitored bowel movement.[269] She was repeatedly searched and probed.[270] She was denied any communication with her family or an attorney as she requested.[271] Ms. de Hernandez was detained for sixteen hours before customs officials even *considered* obtaining a warrant.[272] It took officials an additional eight hours to ultimately obtain one.[273] A telephonic warrant could have been obtained in a matter of minutes.[274] This behavior did not qualify as the "least intrusive means reasonably available to verify or dispel the official's suspicion in a short period of time."[275] Therefore, it can be concluded that this detention far exceeded the limited intrusion permitted by a *Terry* investigative stop.[276]

The conduct pursuant to Ms. de Hernandez's detention was not only beyond the scope of a *Terry* detention but was also more intrusive than a full scale custodial arrest.[277] An individual under arrest is afforded more rights

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266. *Id.* at 534-35. See *also* W. LAFAVE, *supra* note 6, § 10.5, at 154 where this option is discussed. It was the belief of the majority that this was not a practical alternative. *Montoya*, 473 U.S. at 534-35. The rationale for this belief was that first "the government's manifest interest in preventing potentially excludable individuals carrying potential contraband from crossing our borders is fully vindicated if those individuals voluntarily decide not to cross the borders." *Id.* The second claim of the government is that it will allow the suspect to "escape apprehension and return to repeat his smuggling efforts another day." *Id.* Both LaFave and dissenters strike down this argument. *Id.* The rationale for rejecting this argument is that at the border, documentation must be presented of a traveler's identity. Upon returning, identification can be quickly picked up by computer. *Id.*

267. *Montoya*, 473 U.S. at 564 (Brennan, J., dissenting); *see* W. LAFAVE, *supra* note 6, § 10.5 at 154.

268. *Montoya* 473 U.S. at 564-65 (Brennan, J., dissenting)

269. *See supra* notes 90-100.

270. *See supra* notes 90-100.

271. *See, e.g., Montoya*, 473 U.S. at 546-47 (Brennan, J., dissenting).

272. *See supra* notes 90-100.

273. *See supra* notes 90-100.

274. *See supra* note 58.

275. *See supra* notes 266-77 and accompanying text (describing how respondent's detention went beyond the scope of a *Terry* detention).

276. Ms. de Hernandez's detention went beyond the scope of a detention based on a reasonable suspicion. *See supra* notes 266-77. Justice Brennan stated in his dissent that "the length and nature of a detention may at least when conducted for criminal investigative purposes, ripen into something approximating a full scale custodial arrest . . . ." *Montoya*, 473 U.S. at 551 (Brennan, J., dissenting). "The conditions of de Hernandez's detention in this case — indefinite confinement in a squalid back room cut off from the outside world, the absence of basic ameneties that would have been provided to even the vilest of hardened criminals, and repeated strip-searches— in many ways surpassed the conditions of a full custodial arrest." *Id.* at 556 (Brennan, J., dissenting).

277. *Montoya*, 473 U.S. at 551 (Brennan, J., dissenting). *See generally* W. LAFAVE, *supra*

than those that were afforded to Ms. de Hernandez.[278] If Ms. de Hernandez had been arrested, she would have been read her *Miranda* rights.[279] She would have been at least on notice not to offer any confessions.[280] Ms. de Hernandez would also have been afforded a phone call to her family or an attorney which was denied to her.[281] Additionally, she would have also been taken to a cell where she would have been provided with a bed.[282] Instead, Ms. de Hernandez was left in a room full of office furniture and was told that if she wanted to lie down she could lie on the hard floor.[283] Furthermore, if Ms. de Hernandez had been arrested she would have been immediately brought before the federal magistrate.[284] Once there, she would have been advised by a judicial officer of the charges brought against her.[285] An attorney would also have been appointed for her if she could not have afforded one.[286] Ms. de Hernandez was not afforded any of the above options.[287] Therefore, in view of the surrounding circumstances, the detention in fact was more intrusive than a custodial arrest.[288] The detention of Ms. de Hernandez therefore violated her fourth amendment rights.[289] Although the detention was valid at its inception, the manner of the detention classified it in the category of a custodial arrest.[290] A reasonable suspicion of a crime is insufficient to justify a custodial arrest.[291]

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note 6, § 10.5; *From Bags to Body Cavities*, *supra* note 32; *Intrusive Searches*, *supra* note 211; *Border Searches*, *supra* note 16.

278. *See* Brief for Respondent, at 18.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Montoya*, 473 U.S. at 546 (Brennan, J., dissenting).

283. *See supra* note 277 and accompanying text.

284. *Id.*

285. *Id.*

286. *Montoya*, 473 U.S. at 547 (Brennan, J., dissenting).

287. *See supra* notes 266-77 and accompanying text.

288. *See Royer* 460 U.S. at 503-04. In *Royer*, the petitioner was taken to an interrogation room which turned the stop into a custodial arrest because he "reasonably believed he was being detained" and was not free to go. *Id.* In *Dunaway*, 442 U.S. at 224, the petitioner was suspected of homicide through a lead given to the police. *Id.* There was not enough information to procure a warrant for the petitioner's arrest even though a police detective ordered the petitioner to be picked up. *Id.* Petitioner was then taken into custody though not formally arrested. *Id.* He was then interrogated and made incriminating statements. *Id.* The Supreme Court held this amounted to a custodial arrest and intruded on the fourth amendment for it lacked probable cause:

> [W]hat made the police tactics so egregious in Dunaway . . . was not the seizure or the asportation or the length of the detention, but the fact that the police seized an individual they had no cause to arrest for purposes of further investigation.

Id. at 224; *see also Brignoni-Ponce*, 422 U.S. at 881-82. "The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." *Id. See also Brown*, 422 U.S. at 590 (where arrest made for investigation purposes without probable cause was disapproved). The above represents prevailing law: detentions which evolve into custodial arrests, and are based only on a reasonable suspicion, violate the fourth amendment. *See* W. RINGEL, *supra* note 25, § 13.9, at 13-57 to 60.

289. *See supra* notes 251-55 and accompanying text.

290. *See supra* notes 245-55.

291. *See supra* note 4.

As a result, the narcotics discovered from the search incident to the prolonged detention should have been excluded as fruits of the illegal detention.[292]

Justice Stevens suggested a solution to the problem of alimentary canal smuggling. This solution would allow the customs agents to order an x-ray based on a reasonable suspicion of alimentary canal smuggling. Although this appears to be more humane than a twenty-seven hour detention, this would still not be the optimal solution. Jurisdictions do not yet agree on the standard to be set for an x-ray.[293] A further problem with this result is the inherent medical dangers associated with x-rays.[294] A final problem with Justice Steven's solution is that it would discriminate against pregnant travelers. Women claiming to be pregnant would probably be subject to a pregnancy exam because it is doubtful that customs agents would rely on a positive statement of pregnancy by the traveler.[295] Further, women claiming pregnancy could then be subjected to the same treatment received by Ms. de Hernandez.[296] Therefore, allowing customs agents to prescribe an x-ray based on a reasonable suspicion of alimentary canal smuggling is not a viable alternative.[297]

D. Failure to Consider Humanitarian Concerns

Lastly, the Court also failed to assess the humanitarian concerns of such a detention.[298] A traveler approached with the options offered to Ms. de Her-

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292. *See supra* notes 52-68 and accompanying text.

293. *See supra* notes 49-68.

294. *Montoya*, 473 U.S. at 561 n.32. (Brennan, J., dissenting) "[I]t [has] been estimated that a routine medical x-ray takes about 6 days off a person's life-expectancy." *Id.* at 561; *see also Ek*, 676 F.2d at 382 ("[a]n x-ray search, although perhaps not so humiliating as a strip search, never the less is more intrusive since the search is potentially harmful to the health of the suspect". *Id.*

In *Vega-Barvo* the court stated:

> [S]everal weeks after she was x-rayed, Vega-Barvo discovered she was pregnant. Not knowing this fact at the time of the x-ray, she had answered no to the doctor's inquiry on this matter. Since the question was asked, it must be assumed the x-ray would not have been conducted if the doctors knew she was pregnant. When she advised the same doctors of her condition, they suggested she abort the fetus because it may have been damaged by x-rays. She followed the doctor's advice.

729 F.2d at 1348.

295. It should be noted that a pregnancy examination is the equivalent of a body cavity search, and would adhere to the same standard, so it therefore is not a viable solution.

296. *See* Brief for Respondent at 25. "[F]or a woman who stated she was four weeks pregnant, the 'choice' could well be described as: sixteen hours of torture or a dose of poison." *Id.*

297. *See supra* notes 261-64.

298. The Supreme Court noted that Ms. de Hernandez detention was "long, uncomfortable, indeed humiliating." *Montoya*, 473 U.S. at 544. The Court then dismissed those circumstances by stating that "both its length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country." *Id.* LaFave has stated that "such rationalization is contrary to established Fourth Amendment doctrine." W. LAFAVE, *supra* note 6, at § 10.5. The dissent noted that "such post hoc rationalizations have no place in our Fourth Amendment jurisprudence, which demands that we 'prevent hindsight from coloring the evaluation of the reasonableness of a search and seizure.' " *Montoya*, 473 U.S. at 559 (Brennan, J., dissenting); *see also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976). It should be noted that customs agents

nandez may be thrown into an extremely difficult and stressful situation upon entering a new country. The traveler could be confronted with the choice of either submitting to an x-ray and if the traveler is pregnant, a pregnancy examination during which she will be handcuffed en route to the hospital.[299] If the traveler refuses the x-ray examination, she may be compelled to produce a monitored bowel movement.[300] If the traveler refuses those options as Ms. de Hernandez did, he or she might be thrown into an office and denied all communication with the outside world. The traveler could be detained there until either nature takes its course, or until enough evidence is gathered together to support probable cause for an involuntary x-ray and internal examination.[301] As Justice Brennan has stated, "The nature and duration of the detention here may well have been tolerable for spoiled meat or diseased animals, but not for human beings held on simply a suspicion of criminal activity."[302]

CONCLUSION

It does not appear that the Court assessed the possible ramifications of the *Montoya* decision. Presently, there are almost non-existent requirements for officials conducting a routine search and seizure at the border. In *Montoya*, a non-routine detention was upheld without probable cause or a warrant.

The result of the Court's decision was to confer no fourth amendment rights to travelers at the border. This decision has severely undermined the fourth amendment warrant and reasonableness requirements. A holding as broad as this has the potential to subject travelers suspected of the most minor immigration violations to the type of treatment encountered by Ms. de Hernandez. It represents an overzealous desire for law enforcement which may "blind us to the peril of our free society . . . ."[303]

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detained Ms. de Hernandez with the expectation that she would produce a bowel movement in a short amount of time. They had this belief because she had just completed a 10 hour trip and had a full, stiff abdomen. *Montoya*, 473 U.S. at 543. A traveler's failure to produce a bowel movement may be due to an illness or fear. *See* W. LAFAVE, *supra* note 6, at 157. The Court of Appeals recognized these concerns by referring to the options offered to Ms. de Hernandez as "Hobson's choice." *Montoya*, 731 F.2d at 1372.

299. *Montoya*, 473 U.S. at 560 (Brennan, J., dissenting).

300. *Id.*

301. *Id.*

302. *Id.* at 550 (Brennan, J., dissenting).

303. Florida v. Royer, 460 U.S. 491, 513 (1983) (Brennan, J., concurring in the result).