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Indirect Popular Election of the Massachusetts House Speaker and Senate President*

Kenneth Bresler**

I. INTRODUCTION

Two of the most powerful elected public officials in Massachusetts are not directly and popularly elected. The Speaker of the House of Representatives ("the House Speaker")[1] and the President of the Senate ("the Senate President")[2] have traditionally been popularly elected to the Massachusetts Legislature[3] by their constituents in their respec-

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1. The Speaker of the House presides over the House of Representatives, *Rules of the [Massachusetts] House of Representatives, in* MANUAL FOR THE USE OF THE GENERAL COURT FOR 1991-1992, Rule 1 (Edward O'Neill & Robert MacGueen eds., 1991); decides parliamentary questions, Rule 2; decides the outcome of voice votes, Rule 3; nominates and may recommend the removal of the majority party floor leadership, and the chair of each standing committee, except the Rules Committee, Rule 17C; makes temporary office assignments, Rule 18; may call caucuses, Rule 19; approves the referral of bills to committees, Rule 24; may declare informal sessions, Rule 44; recognizes representatives wishing to speak, Rule 58; and may declare short recesses, Rule 76.

2. The President of the Senate presides over the Senate, *Rules of the [Massachusetts] Senate*, MANUAL FOR THE USE OF THE GENERAL COURT FOR 1991-1992, Rule 1 (Edward O'Neill & Robert MacQueen eds., 1991); decides parliamentary questions, Rule 2; may cancel sessions, Rule 5A; usually nominates the chairs and members of standing committees, and the majority party floor leadership positions, Rule 13; may call caucuses, Rule 13B; approves the referral of bills to committees, Rule 20; recognizes senators requesting to speak on the senate floor, Rules 39 and 40; decides the outcome of voice votes, Rule 55; and presides over joint sessions of the Legislature. *Joint Rules of the Senate and House of Representatives*, MANUAL FOR THE USE OF THE GENERAL COURT, Rule 24 (1991-92).

3. Although it is officially known as the General Court, MASS. CONST. pt 2. ch. 1 art. I, § 1, this paper will refer to the Legislature or the Massachusetts Legislature.

tive districts—a fraction of the Massachusetts electorate.[4] But they assume their legislative leadership roles only after being elected by their colleagues in the Legislature. During elections for the House Speaker

4. Theoretically, the House Speaker and Senate President need not face *any* Massachusetts voters *ever*, even in individual legislative districts. The House of Representatives can choose a House Speaker who is not a representative, and the Senate can choose a Senate President who is not a senator.

Legislative rules assume that the House Speaker and Senate President are members of their respective chambers. *Rules for the House of Representatives*, MANUAL FOR THE USE OF THE GENERAL COURT FOR 1991-1992, Rule 4 (allowing the House Speaker to vote "[i]n all cases . . . ."); *Rules for the Senate* MAUNAL FOR THE USE OF THE GENERAL COURT FOR 1991-1992, Rule 4; Rule 3 ("The President may vote on all questions"). *But compare Rules for the House of Representatives*, MANUAL FOR THE USE OF THE GENERAL COURT FOR 1991-1992, Rule 18C ("No *person* shall serve more than eight years as House Speaker") (emphasis added) *with, e.g.*, Rule 16A (repeated references to "members" and "member"). However, neither the Massachusetts General Laws, *see* MASS. GEN. L. ch. 3, § 3 (1990), nor the Massachusetts Constitution require that the House Speaker and Senate President be popularly elected legislators.

The Massachusetts Constitution states simply that the "house of representatives . . . shall choose their [sic] own Speaker." MASS. CONST. pt. 2, ch. 1, art. X § 3, and that the "Senate shall choose its own President." MASS. CONST. pt. 2, ch. 1, art. VII, § 2.

These provisions in the Massachusetts Constitution are nearly identical to provisions in the U.S. Constitution, stating that "[t]he House of Representatives shall chuse their Speaker," U.S. CONST. art. I, § 2, cl. 5, and that "[t]he Senate shall chuse . . . a President pro tempore, in the Absence of the Vice President . . . ." U.S. CONST. art. I, § 3, cl. 5. One federal report has suggested that the U.S. Senate appoint a non-senator as a temporary presiding officer during routine Senate sessions. COMMISSION ON THE OPERATION OF THE SENATE, TOWARD A MODERN SENATE: FINAL REPORT OF THE COMMISSION ON THE OPERATION OF THE SENATE, S. DOC. NO. 94-278, 94th Cong., 2d Sess. 34-35 (1976). Doing so would conserve the time of a senator who would otherwise preside over the senate at the request of and in the absence of the Senate President pro tempore. *Id.* at 35. The report also noted that before the election of the Senate President pro tempore, the Secretary of the Senate—a non-senator—has presided over the senate. *Id.* at 34.

Apparently, the House and Senate of the U.S. Congress and the Massachusetts Legislature can elect presiding officers who are not seated members. Therefore, the Massachusetts House Speaker and Senate President can theoretically assume office without receiving a single vote cast by a Massachusetts citizen in the voting booth.

A House Speaker or Senate President could also assume office after having been *rejected* by Massachusetts voters. Consider this scenario: A House Speaker or a Senate President, who is a member of the Legislature, loses a primary or general election in his or her legislative district. During the remainder of his or her term, the lame-duck House Speaker or Senate President uses the office to make extraordinary promises and deals with legislative colleagues who were reelected to the next session of the Legislature. When the next session of the Legislature meets in January, the House Speaker or Senate President has secured reelection to the leadership post, even though he or she is no longer a member of the Legislature.

Although this scenario is hypothetical, it makes it all the more important to establish that Massachusetts voters can choose the House Speaker or Senate President through indirect popular election.

and Senate President, only representatives and senators, respectively, have been enfranchised.

Through constitutional and statutory mechanisms, however, Massachusetts citizens may elect the House Speaker and the Senate President by indirect popular vote. The relevant provisions are Articles 5 and 19 of Part One of the Massachusetts Constitution, and Chapter 53, Sections 19 to 22 of the Massachusetts General Laws. The mechanisms entail citizens as voters instructing their legislators whom to choose as elected legislative leaders.[5]

Questions of instruction[6] can be used to select the House Speaker and Senate President. Voters in November elections in even-numbered years could vote on such questions as:

> Shall the Representative from this District be instructed to vote to elect John Doe as Speaker of the House in the upcoming legislative session, assuming that John Doe is a member of the House of Representatives?[7]

or:

> Shall the Senator from this District be instructed to vote against the reelection of the incumbent President of the Senate in the upcoming legislative session?

If citizens in a majority of House districts instruct their representatives to vote for or against a certain candidate for Speaker, and if the representatives obey as they should,[8] then the people can determine the outcome of the election for House Speaker. The people can similarly choose the Senate President through indirect popular election.

II. QUESTIONS

A. *Is the Choice of House Speaker or Senate President Appropriate for a Question of Instruction?*

The only substantive restriction on questions of instruction is that they "be consistent with the powers of the legislature, and the subject matter must be fit for legislative action."[9] A question of instruction on who serves as House Speaker or Senate President clearly meets this criterion.

Questions of instruction have fewer restrictions than do initiatives

---

5. *See generally* Kenneth Bresler, *Rediscovering the Right to Instruct Legislators*, 26 NEW ENG. L. REV. 355 (1991).

6. Although such ballot questions are usually called "public policy questions," *see, e.g.* 1984/85 Op. Att'y Gen. 75, 77 (1984), this article uses "questions of instruction," the wording from MASS. GEN. L. ch. 53, § 19 (1990), to emphasize that the questions propose instructions, not public policy.

7. Membership in the House of Representatives is apparently not a prerequisite for being elected House Speaker. *See supra* note 4.

8. *See supra* note 5.

9. 1990 Op. Att'y Gen. slip. op. at 3 (Aug. 29, 1990) (citations omitted). For further discussion, see Bresler, *supra* note 5, at 373.

and referendums; they can relate to subject matters that initiatives and referendums cannot.[10] For example, initiatives cannot propose legislative rules governing the Legislature's internal operations, even when the proposed rules are in the format of statutes.[11] Questions of instruction, however, can concern and have concerned legislative rules and internal operations.[12]

In 1984, the Attorney General approved the following questions of instruction, which appeared on the ballots in various representative districts:

> Shall the Representative from this district be instructed to vote in favor of legislation or orders eliminating the extra pay for legislative committee chairmen, requiring legislative committees to act promptly on legislation, and permitting committee chairmen to be elected rather than appointed by the Speaker of the House?[13]
>
> Shall the Representative from this district be instructed to vote in favor of an order requiring the election of committee chairmen by the full membership of the House, substantially reducing the bonus pay given to committee chairmen and other members of the House leadership, and allowing the State Auditor and Inspector General to have access to the records of the Legislature?[14]
>
> Shall the Representative from this district be instructed to vote in favor of an order reforming the rules of the House of Representatives by requiring roll call votes on all legislative pay increases and by providing for elections of the Speaker by secret ballot, election of committee chairmen by committee members, elimination of the additional $7,500 in pay for committee chairmen, and allowance of television coverage of all House sessions?[15]
>
> Shall the Representative from this district be instructed to vote in favor of an order changing the rules of the Massachusetts House of Representatives to eliminate extra pay for legislative committee chairmen, to require legislative committees to act promptly on legislation, and to permit committee chairmen to be elected rather than appointed by the Speaker?[16]

---

10. *E.g.*, 1984/85 Op. Att'y Gen. 75, 77 (1984). *See also* Bresler, *supra* note 5, at 358-60.

11. Paisner v. Attorney General, 390 Mass. 593, 458 N.E.2d 734 (1983).

12. Even in pre-revolutionary times, Massachusetts citizens instructed legislators about the legislature's internal operations. In May 1769, John Adams wrote instructions on behalf of the Boston town meeting instructing colonial legislators to "exert yourselves to remove every thing that may carry the least appearance of an attempt to awe or intimidate" free legislative debate. Adams was referring to the presence of British military cannons and guards and a daily military parade around the courthouse. "Instructions of the Town of Boston to their Representatives, 15 May, 1769," *in* 3 THE WORKS OF JOHN ADAMS 505-06 (Charles F. Adams ed., 1851).

13. 1984/85 Op. Att'y Gen. 75, 79 (1984).

14. *Id.*

15. *Id.*

16. *Id.*

The people have been allowed the option of instructing legislators to vote for specific legislative *rules*. They should be allowed the option of instructing legislators to vote for specific legislative *leaders*.

B. *Do the House and Senate Have a Constitutional Prerogative to Choose Their Own Leaders?*

The Massachusetts Constitution states that the House of Representatives shall "choose" its "own speaker,"[17] and that the Senate "shall choose its own president."[18]

The word "choose" has more than one meaning. It can mean to designate,[19] or to make a choice.[20] If by "choose," the Massachusetts Constitution means "designate," then no constitutional problem arises when the people instruct their legislators whom to *designate* as House Speaker or Senate President. If the word "choose" implies a choice, the people can still instruct their legislators whom to choose as House Speaker and Senate President. Such instructions would be constitutional for five reasons.

1. Legislators' prerogative to choose the House Speaker and Senate President is not absolute. In 1985, the House of Representatives acknowledged that its prerogative is not absolute—and limited its own prerogative. It did so by adopting a rule that "[n]o person shall serve more than eight years as Speaker."[21]

To deny that the House could elect a non-legislator as Speaker or that the Senate could elect a non-legislator as President[22] is to concede that legislators' prerogative to choose their leaders is not absolute.

2. The constitutional articles authorizing the House of Representatives to choose its Speaker and the Senate to choose its President also authorize both houses to adopt internal rules.[23] The Attorney General has approved questions of instruction concerning changes in legislative rules.[24] Since the same constitutional article authorizes the House to choose its rules and its Speaker, it would be an anomaly if citizens could

17. MASS. CONST. pt. 2, ch. 1, art. X, § 3. The full sentence is: "The house of representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the constitution; shall chuse their own Speaker; appoint their own officers, and settle the rules and orders of proceeding in their own House." *Id.*

18. MASS. CONST. pt. 2, ch. 1, art. VII, § 2. The full provision is: "The Senate shall choose its own President, appoint its own officers, and determine its own rules of proceedings." *Id.*

19. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 261 (1983) ("to select from").

20. *Id.*

21. *Rules of the House of Representatives*, MANUAL FOR THE USE OF THE GENERAL COURT (1991-92), Rule 18C.

22. *See supra* note 4.

23. *See supra* notes 17 and 18.

24. *See supra* text accompanying notes 13-16.

instruct their representative about the former but not the latter. The same argument applies to the choice of the Senate President.

3. The right of instruction is guaranteed in Articles 5 and 19 of the Declaration of Rights, which is Part One of the Massachusetts Constitution. The prerogative of legislators to choose their leaders appears in the Frame of Government, which is Part Two of the Constitution. The structure and wording of the Constitution demonstrate that the right of instruction and other substantive rights pre-exist the formation of government, and are more important than how government is organized.[25]

4. The Massachusetts Constitution states that:

> to prevent those, who are vested with authority, from becoming oppressors, the people have a right . . . *in such a manner as they shall establish by their frame of government*, to cause their public officers to return to private life.[26]

If the people may establish mechanisms to remove legislators[27] from the Legislature entirely, they have the lesser right to demote legislators from the Speaker's and President's offices to the Legislature's back benches.

5. The Massachusetts Constitution *twice* states that the people have a right to "alter" their government to ensure their "safety, prosperity, and happiness."[28] If legislators' choice of the House Speaker and Senate President threatens the people's safety, prosperity, or happiness, the people may alter the mechanism of choosing legislative leaders. After all, "[g]overnment is instituted for the Common good . . . and not for the profit, honor, or private interest" of any individual person.[29]

Therefore, in any constitutional conflict between the right of the people to instruct their legislators, and legislators' prerogative to choose their leaders, the people should prevail.

C. *Can Instructions Concern Office-Holders Instead of Issues?*

American history reveals that instructions can concern individual office-holders. One of the biggest uproars in American politics over instructions revolved around a resolution censuring President Andrew Jackson. Virginia's General Assembly instructed the U.S. Senators from Virginia to vote for the resolution in 1834. Jackson's backers captured control of the next General Assembly, which in 1836 instructed Virginia's U.S. Senators to introduce and vote for a resolution *expunging* the previous resolution of censure.[30] The North Carolina General As-

25. RONALD M. PETERS JR., THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT 57-58 (1978); Bresler, *supra* note 5, at 390-91.

26. MASS. CONST. pt. 1, art. VIII (emphasis added).

27. Or non-legislators. *See supra* note 4.

28. MASS. CONST. pmbl.; MASS. CONST. pt. 1, art. VII.

29. MASS. CONST. pt. 1, art. VII.

30. ROBERT LUCE, LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF

sembly also instructed a U.S. Senator from its state to vote for an expunging resolution.[31]

In 1894, the Kentucky House of Representatives instructed the state's U.S. Senators to oppose Wheeler Peckham's nomination to the U.S. Supreme Court.[32] And in 1903, the U.S. Senators from South Carolina complied with the South Carolina General Assembly's instructions to oppose the nomination of an African American named Crum as collector of the Port of Charleston.[33]

In Massachusetts, questions of instruction are not restricted to "questions of law making."[34] They can concern any topic that the Legislature can vote or act on[35]—such as the choice of House Speaker and Senate President.

III. Additional Points

A. The possibility that a proposed question of instruction commands a legislator to vote for unconstitutional legislation or commit an unconstitutional act[36] is not a reason to exclude the proposed question from the ballot.[37] If a proposed question of instruction on the Legisla-

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Lawmaking by Representative Government 468 (1930); George H. Haynes, The Senate of the United States 1027-28 (1960); Bresler, *supra* note 5, at 367.

31. Luce, *supra* note 30, at 469.

32. Haynes, *supra* note 30, at 1030 n.2.

33. *Id.*

34. 1984/85 Op. Att'y Gen. 75, 77 (1984).

35. 1989/90 Op. Att'y Gen. slip. op. at 3 (Aug. 29, 1990) (citations omitted).

36. A proposed question of instruction on who serves as the House Speaker or Senate President does not, for example, violate the prohibitions on bills of attainder, U.S. Const. art. I, § 10, cl. 6; Mass. Const. pt. 1, art. XXV, merely because it may identify a person by name or single out a person to lose the benefit of serving in the Legislature's leadership. Professor Tribe has stated:

> Legislative measures often grant or withhold benefits or burdens from precisely identified individuals and groups. A bailout for Chrysler might be seen as a burden to Ford, a subsidy to Lockheed as a competitive blow to Boeing, a private bill for a favored constituent as a severe disappointment to a neighbor, a tax break for one company as a punishment for a competitor. Yet the bill of attainder ban has, quite properly, never been regarded as an obstacle to all such measures—a guarantee that all lawmaking activity will proceed through majestic generalities.

Laurence H. Tribe, American Constitutional Law § 10-5, at 650-51 (1988) (footnote omitted).

One problem with bills of attainder is that they evade the procedural protections of judicial trials. *Id.* § 10-4, at 641, 643; § 10-6, at 656-57. *See also id.* § 10-6, at 660 (separation-of-powers theory has entailed "the belief that *no* branch of government should be empowered unilaterally to impose a serious penalty or disability on identified *private* individuals") (emphasis added). Determining which *public official* serves as House Speaker or Senate President cannot be done in a trial or by the judicial branch anyway, so the prohibitions on bills of attainder do not apply to instructions regarding the Legislature's leadership.

37. 1986/1987 Op. Att'y Gen. 55, 55 (1986)("in ascertaining whether a

ture's leadership is alleged to be unconstitutional, the question still goes onto the ballot.

B. Even if a proposed question of instruction on the Legislature's leadership were excluded from the ballot under some pretext, the people of Massachusetts could still instruct their legislators on the issue under Articles 5 and 19 in town meetings and public assemblies.[38]

IV. Conclusion

Citizens who wish to revive the right of instruction can use it to create indirect popular election of the House Speaker and Senate President of the Massachusetts Legislature.

question is one of 'public policy,' my review does not and *cannot* extend to a consideration of the constitutionality of any legislation that might eventually be enacted as a result of the voters' instruction") (emphasis added).

38. *See* Bresler, *supra* note 5, at 357 n.11.

The Difference Between Application and Interpretation of the Law as It Applies to SEC Rule 12b-1 Under the Investment Company Act of 1940[1]

William P. Dukes
James B. Wilcox*

I. INTRODUCTION

From the inception of the Investment Company Act of 1940 (the "Act") the Securities and Exchange Commission (SEC) held the view "that it is generally improper under the Act for mutual funds to bear direct or indirect expenses related to the distribution of their shares."[2] The Commission, in fact, following public hearings in November 1976[3] concerning the use of fund assets for distribution, "reiterated its traditional view" of the impropriety of such use of fund assets.[4] In May 1978, however, after examining the matter in view of the public interest, "the Commission issued an Advance Notice of Proposed Rulemaking concerning conditions under which mutual funds might be

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The authors wish to thank *Business Week* for the use of the Mutual Fund Scoreboard disks, Joe Morgan for editorial assistance, and participants in the Finance Area Research seminar at Texas Tech University for most beneficial comments and suggestions.

1. SEC Rule 12b-1, in Investment Company Act of 1940, Release No. 11414, on October 28, 1980, authorized "open-ended management investment companies to bear expenses associated with the distribution of their shares if such companies comply with certain conditions and procedures." Interpretation of the law appears to be clear, but application of the law differs somewhat from expectations stated during hearings held prior to approval of the Rule. The authors provide a comparison of the initial expectations held for the Rule and what actually transpired. Initially, the Rule was perceived as providing benefits to the company and shareholders. Application of the Rule shows that most if not all of the benefits stay with the company and are not shared with the shareholders.

2. SEC Docket Volume 21, No. 5, November 11, 1980, at 326.

3. *Id.*

4. *Id.*

permitted to bear distribution expenses."[5] Following the issuance of May 1978 notice, the Commission, in September 1979, requested public comments on a proposed new Rule 12b-1 which would, in contrast to the original Rule, allow mutual fund assets to cover distribution expenses except those declared unlawful in the proposed Rule.[6]

The Commission received a total of 32 comments.[7] Twenty-two comments, all from persons associated with the mutual fund industry, favored the proposal.[8] Six comments opposed using fund assets for distribution expenses; three of these comments were from persons associated with mutual funds.[9] The other three opposed the Rule because of "irreconcilable conflicts of interest of fund advisers and because the shareholder benefit would not be as discernible as that of advisers, since advisers clearly benefit from increased sales of fund assets."[10] Dreyfus Corporation and Federated Investors "thought that the proposed Rule would destroy the entrepreneurial incentives provided by the Act."[11] Dreyfus further "questioned the ability of the disinterested directors to assume management functions described in Release No. 10862. The board of directors of a fund advised by Dreyfus and a disinterested director from that fund made similar comments individually."[12] After receiving these comments, the Commission adopted the proposed Rule 12b-1, effective October 28, 1980, with the provision, *inter alia*, that "the directors must decide, in the exercise of their reasonable business judgment and in light of their fiduciary duties under state law and under the Act, that there is a reasonable likelihood that a plan will benefit the fund and its shareholders."[13]

Investment Company Act[14] Releases contain discussions of nine factors which should be considered in the decision making process pertaining to the use of fund assets for distribution of shares of the fund[15] (hereinafter referred to as a "12b-1 plan").[16] The SEC did not include

5. *Id.*; Investment Company Act Release No. 10252, 43 Fed. Reg. 23,589 (1978) [hereinafter "Release No. 10252"].

6. SEC Docket Volume 21, No. 5, November 11, 1980, at 326; Investment Company Act Release No. 10862, 44 Fed. Reg. 54,014 (1979) [hereinafter "Release No. 10862"].

7. SEC Docket Volume 21, No. 5, November 11, 1980, at 327.

8. *Id.*

9. *Id.* at 327.

10. *Id.*

11. *Id.*

12. *Id.* at 327.

13. *Id.* at 325.

14. Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to -64 (1988) [hereinafter "the Act"].

15. SEC Docket Volume 21, No. 5, November 11, 1980, at 335; *see also* Investment Company Act Release No. 11414, 45 Fed. Reg. 73898 (1980) [hereinafter "Release No. 11414"]; Release No. 10862, *supra* note 5.

16. The shareholders of the mutual fund own the assets in question. The

the nine factors in Rule 12b-1, but these factors nevertheless form the basis for determining whether fund assets should be used for distribution purposes. The factors are:

1) the need for independent counsel or experts to assist the directors in reaching a determination;
2) the nature of the problems or circumstances which purportedly make implementation or continuation of such a plan necessary or appropriate;
3) the causes of such problems or circumstances;
4) the way in which the plan would address these problems or circumstances and how it would be expected to resolve or alleviate them, including the nature and approximate amount of the expenditures; the relationship of such expenditures to the overall cost structure of the fund; the nature of the anticipated benefits, and the time it would take for those benefits to be achieved;
5) the merits of possible alternative plans;
6) the interrelationship between the plan and the activities of any other person who finances or has financed distribution of the company's shares, including whether any payments by the company to such other person are made in such a manner as to constitute the indirect financing of distribution by the company;
7) the possible benefits of the plan to any other person relative to those expected to inure to the company;
8) the effect of the plan on existing shareholders; and
9) in case of a decision on whether to continue a plan, whether the plan has in fact produced the anticipated benefits for the company and its shareholders.[17]

More than ten years have passed since Rule 12b-1 was promulgated. Accordingly, it seems an appropriate time to compare initial and subsequent expectations of the Rule with what has actually transpired. The objective of this paper, therefore, is to provide such a comparison. First, two papers are reviewed which take somewhat different views of the interpretation of the law.[18] Next, data are provided on the performance of mutual funds which have adopted 12b-1 plans, and those which have not, in order to assess the application of the Rule.[19] Part IV contains a summary of the issues and concluding comments.[20]

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portfolio of a mutual fund generates income, part of which is to be used to help sell additional shares of the mutual fund to investors.

17. SEC Docket Volume 21, No. 5, November 11, 1980, at 335.
18. *See infra* notes 21 & 44, and accompanying text (Part II).
19. *See infra* Part III.
20. *See infra* notes 118-21 and accompanying text.

II. LITERATURE REVIEWS

A. *Haskell*

Derwood Haskell[21] provides an excellent and thorough review of mutual funds regulations,[22] the agency problems surrounding SEC Rule 12b-1,[23] a case history pertaining to the Rule,[24] and an interpretation of Section 36(b) of the Act[25] designed to provide protection for shareholders in mutual funds. In this study, recognition is given to the potential conflict of interest between a mutual fund's management and its shareholders. This view arises because the fund investment adviser frequently is the founder of the fund, appoints the initial board of directors, including the "disinterested" members, and may even provide the initial capitalization.[26] The potential for further conflict is present when the adviser, whose personal goal is to maximize profits, controls a fund which must minimize expenses.[27] The higher the fee necessary to maximize the profit of the adviser, the lower will be the profit for the fund being advised. The 12b-1 fee, then, is the result of the adopting Rule 12b-1; and the higher the asset base the higher the management fee and the higher the distribution (12b-1) fee charged. Because of the potential for a conflict of interest, Section 36(b) of the Investment Company Act of 1940 attempts to avoid any overreaching by the adviser and/or those affiliated with the adviser by imposing fiduciary responsibilities on those in such positions.

1. Problems to Solve

One of the problems present in the 1972-1979 time period that presumably could have been solved by the 12b-1 plan was that of net redemptions (fund redemptions greater than sales).[28] Advocates of 12b-1 plans argue that the use of fund assets to sell shares increases the size of the fund, thereby eliminating the problem of net redemptions. In

21. Derwood J. Haskell, *Mutual Fund Distribution Expenses: Shareholder Investment Costs and the Propriety of 12b-1 Plans*, 22 NEW ENG. L. REV. 453 (1987).

22. *Id.* at 459-61.

23. *Id.* at 454-56.

24. *Id.* at 469-76.

25. *Id.* at 476-79.

26. *Id.* at 454-55.

27. *Id.* at 455. Fund advisors are compensated by the fund by means of a management fee which averages about 1/2 of 1% annually. The expense ratio includes: administration costs of operating fund, cost of promotion and compliance, auditors and legal fees, and management fees. Brokerage fees are *not* included.

28. The decade of the 1970s was a very bad time for the economy. The term "stagflation" was coined to mean that the economy was stagnant and yet inflation was quite high, both of which caused many mutual fund holders to sell their funds, therefore there were more redemptions than new sales. In seven out of the eight years from 1972-1979, investors redeemed (sold back to the fund) a larger dollar amount of fund shares than purchased additional shares. *See id.* at n.57.

addition, the fund's expense ratio will be reduced, thereby providing better performance. This process is termed the economies of scale scenario.[29] If this argument is accepted, the mutual fund shareholder would benefit from a 12b-1 plan.

2. Investment Company Institute Proposal

In August of 1986 the Investment Company Institute (ICI) responded to a May 1986 SEC memorandum concerning disclosure and implementation requirements for those considering the adoption of 12b-1 plans. The issues involved: 1) the use of the title 'no-load' when a 12b-1 plan is adopted; 2) the disclosure of payments made pursuant to 12b-1 plans; 3) the role of independent directors; and 4) the propriety of certain 12b-1 plans.[30]

a. Spread-load

Haskell reviews the ICI proposed amendment to Rule 12b-1,[31] the first part pertains to those funds which use a 12b-1 plan and do not have a front end load charge. Such a fund can no longer claim a "no-load" status and may now be referred to as a "spread-load" fund. Other funds impose a "contingent deferred sales load" (CDSL), which means that a sales charge is deferred until redemption and may be eliminated entirely after a specified number of years.[32] The author illustrates that an investor "who invests $10,000 enjoys greater return in a spread-load fund charging a 1% per annum 12b-1 fee and declining 6% CDSL in lieu of an 8.5% initial sales load."[33] Haskell's illustration shows a higher redemption value for each of the first ten years of life for the spread-load fund.[34]

b. Disclosure

The second point in the proposal, that of disclosure of payments made pursuant to 12b-1 plans, appears to be complied with consistently throughout the industry at this time. The disclosure includes management fees along with the designation and amount of distribution fees pursuant to Rule 12b-1.

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29. Haskell, *supra* note 21, at 466-67.

30. *Id.* at 482-89.

31. *Id.* The Investment Company Institute responded to concerns raised by the Commission pertaining to the impact of Rule 12b-1. The statement proposed a number of safeguards for the Commission to consider. *Id.* at 482 n.201.

32. As an example, Keystone Funds S-1, S-3, S-4, B-1, B-4, K-1 and K-2 all have a 4% CDSL which declines 1% per calendar year until it is eliminated, with no sales charge imposed thereafter, and they have a 12b-1 fee of approximately 1.25% annually. (Keystone Custodian prospectuses).

33. Haskell, *supra* note 21, at 483-84.

34. *Id.* at 484.

c. Role of Directors

The third point under consideration is the role of the directors.[35] Haskell states that "[d]irectors should be afforded a wide set of criteria for determining whether there is a reasonable likelihood the adoption and continuation of a 12b-1 plan will benefit shareholders."[36] Directors should be permitted the opportunity to determine the most desirable means of financing the cost of distributing shares, and to "reasonably conclude that such alternative financing of distribution costs will ultimately benefit the shareholder."[37] "Section 36(b) of the Act provides the shareholders with an adequate source for relief in the event that the adviser or directors fail to exercise their fiduciary standard of care."[38]

d. Propriety of Some Plans

The fourth point concerns the propriety of certain types of 12b-1 plans. Two types of plans have been questioned by the Commission: the first is a compensation plan, in which the fund pays the distributor a percentage of sales or of the average net assets, not the amount of the expenses incurred; the second is called a reimbursement plan, wherein the fund reimburses the distributor for expenses incurred.[39] The Commission's concern stems from the realization of a "profit" in a compensation plan and the carry-over of expenses from one year to the next when distribution expenses are greater than the reimbursement authorized.[40] The author believes that "[s]pread-load compensation plans are simply an alternative to the sales-load method of financing distribution."[41]

3. Conclusions

Haskell's conclusions,[42] listed below, are in two parts: 1) concerns expressed to the Commission and the Commission's own concerns, and 2) benefits of Rule 12b-1:

1. Concerns:
   a) Investor pressure on the Commission for relief from the added expense considered detrimental to their best interest.

35. The Rule states that the 12b-1 plan should be approved by "the directors who are not interested persons of the company and have no direct or indirect financial interest in the operation of the plan." 17 C.F.R. § 270.12b-1(b)(2) (1990).
36. Haskell, *supra* note 21, at 486.
37. *Id.*
38. *Id.* at 487.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 488-90.

b) Commission alarm at the rapid evolution and innovation of distribution plans in the industry.

2. Benefits of Rule 12b-1:
   a) Opportunity to have more money invested immediately;
   b) Economies of scale;
   c) Reduction in expense ratio;
   d) Adviser retains greater profits, providing higher quality service;
   e) Potential for greater total returns; and
   f) More funds adopt 12b-1 plans in lieu of a heavy front-end sales load.[43]

B. *Burgunder*

Burgunder and Hartmann[44] also provide an excellent review of the legal aspects of 12b-1 plans,[45] the fiduciary concerns about distribution plans[46] and the independent directors' role as it pertains to potential conflicts of interest.[47] Rule 12b-1 is treated in depth,[48] to include an evaluation of the innovative application of what was presumed to be an SEC experiment to assist small mutual funds facing the problem of net redemptions.[49] The essential points of Burgunder and Hartmann's article are summarized below.

1. Proposed Amendment

In June 1988, as a result of the ICI proposal, the SEC issued a proposed amendment to Rule 12b-1.[50] This amendment would place restrictions on use of 12b-1 funds, limit some practices pertaining to a carry forward of expenses, and prohibit funds which have no sales charge but do use Rule 12b-1 for distribution from calling themselves "no-load" funds.[51]

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43. *Id.*

44. Lee B. Burgunder & Karl O. Hartmann, *The Mutual Fund Industry and Rule 12b-1 Plans: An Assessment*, 15 SEC. REG. L.J. 364 (1988).

45. *Id.* at 411-18.

46. *Id.* at 373.

47. *Id.* at 396-97.

48. *Id.* at 385-96.

49. *Id.* at 403.

50. Prentice Hall, 1988, *Securities Regulations, Functions and Activities* at 25,614 C to F, June 30, 1988. Investment Company Act Release No. 16431, 53 Fed. Reg. 23258 (1988) [hereinafter Release No. 16431]. At this time, as far as can be determined, the proposed amendment is still under consideration.

51. *Id.*; Don M. Chance & Stephen P. Ferris, *Mutual Fund Distribution Fees: An Empirical Analysis of the Impact of Deregulation*, 5 J. FIN. SERV. RES. 25-42 (1991) [hereinafter *Mutual Fund Distribution Fees*].

2. Role of the Directors

Much has been said about the directors' "fiduciary duties under state law and under sections 36(a) and (b) . . . of the Act."[52] It is clear that protection is provided for mutual fund shareholders in any interpretation of the law. Section 36(a) applies to the enforcement of fiduciary duties imposed and implied by the Act, while Section 36(b) pertains to fiduciary duties with respect to compensation for advisers and their affiliates.[53] The Act requires that 40 percent of the directors of a mutual fund be independent and classified as "disinterested" relative to stock ownership and employment relations with the adviser.[54] Further, the Act provides for an independent role to "ensure that the disinterested directors are not dominated nor unduly influenced by management."[55] Burgunder and Hartmann provide a clear distinction between interpretation and application of the law:

> It is often argued that the board of directors and officers of a mutual fund are essentially captive to the investment adviser. The adviser creates the fund and selects its initial board of directors. Thereafter, as 'management' to the fund, the adviser nominates all subsequent board personnel for shareholder approval. Since the shares to mutual funds are so widely held, approval of these nominees is an empty ritual. Thus, the mutual fund's board of director members, who theoretically guard the interest of the shareholders, are handpicked by the same adviser with whom the fund should have an arm's-length arrangement and from whom the shareholders need protection. Therefore, board approval of an adviser's use of fund assets for distribution may not guarantee the propriety of such actions. Because the fund generally is created, controlled, and managed day-to-day by its adviser, it is an entirely dependent shell in a virtually captive relationship to its adviser. Independent directors may not be able to act with genuine independence in deciding whether to use fund assets for distribution because of the control advisers typically exercise over the funds they advise.[56]

3. Entrepreneurial Risk Considered

Entrepreneurial risk, a factor discussed by representatives of Drey-

52. Investment Company Act of 1940, 17 C.F.R. § 270.12b-1(e) (1990); Haskell, *supra* note 21, at 486, 487; Burgunder & Hartmann, *supra* note 44, at 375-85.

53. Burgunder & Hartmann, *supra* note 44, at 375-85.

54. *Id.* at 376; *see* 15 U.S.C. § 80a-10(a) and 15 U.S.C. § 80a-2(a)(19) (1988) (definition of interested person(s)).

55. SEC Docket Volume 21, No. 5, November 11, 1980, at 325.

56. Burgunder & Hartmann, *supra* note 44, at 375 n.30. The rationale is justified further by the Supreme Court's opinion in Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984), which "clearly establishes the court's suspicions toward the ability of the disinterested directors to protect the interest of shareholders." *Id.* at 397 n.101.

fus Corporation and Federated Investors[57] during the public hearings, appears to have been ignored. Dreyfus and Federated were opposed to using fund assets for distribution because they thought that the "rule would destroy the entrepreneurial incentives provided by the Act."[58] Logically, the shifting of this risk from the adviser to the fund (in the form of use of shareholder assets) should result in a reduction of that part of the adviser's fee which is attributable to the entrepreneurial risk present in a mutual fund of the no-load type. Likewise, when the board of directors of a load fund decides to supplement the dealer's/salesman's revenues by use of the fund's assets, the adviser's fee should be reduced.[59] This statement would indicate that expense ratios should remain unchanged when 12b-1 fees are removed from fund assets.

4. Problem of Equity

Rule 12b-1 has created a serious problem of equity by requiring current shareholders to subsidize new shareholders' sales expense, when the current shareholders have paid their own sales charges, perhaps even when the 8 1/2 percent charge was the standard for the industry.[60] The changing of the rules for current shareholders, whether in a load fund or a no-load fund, is a problem of equity.[61]

5. Net Redemptions[62] For Small Funds

The SEC chose not to list factors for consideration for fear that some advisers would believe that consideration would be restricted to those listed.[63] Discussions and examples of net redemptions, however, have made clear that redemptions could be a problem that needs a resolution.[64] Net redemptions did plague the industry during much of the decade of the 1970's. While there may have been some problematic net redemptions in the 1980's, the practice occurred primarily during the 1972-1979 time period.[65]

Some have argued that net redemptions do not affect perform-

57. SEC Docket Volume 21, No. 5, Nov. 11, 1980, at 327.

58. *Id.*

59. Burgunder & Hartmann, *supra* note 44, at 384-85.

60. The 8.5% sales charge was the standard through the late 1970s. It should be noted, however, that as late as December 1986, about 42.5% of all load funds had a sales charge of 8.5%.

61. Burgunder & Hartmann, *supra* note 44, at 384-86. Some have interpreted this shift to be a violation of paragraph 22(d) (section 270) of the Act by adding a continuing load charge on top of the maximum load.

62. Net redemptions occur when more fund shares are redeemed (sold back to the mutual fund) than are sold to shareholders. In seven out of the eight years 1972-79, redemptions exceeded sales, ranging from $0.3 billion in 1974 to $2.4 billion in 1976. ICI MUTUAL FUND FACT BOOK 20 (1990).

63. Burgunder & Hartmann, *supra* note 44, at 398.

64. *Id.* at 391 n.87.

65. ICI MUTUAL FUND FACT BOOK 20 (1990).

ance.[66] It is even possible that net redemptions could improve performance if the amount redeemed comes from the cash holdings, which normally earn less than the portfolio of securities. In this situation it is possible that investors could see a higher return at the same time that the adviser receives a lower fee.

Additional reasons for net redemptions could be high risk, high cost (expense ratio) and poor investment performance, all of which could be intertwined. Only a cost/benefit analysis of distribution plans can determine who benefits.[67] Can the cost/benefit analysis determine fairness to the shareholder who has paid a load charge to get in and now must continue to pay a distribution fee? This question is not answered easily by advisers and directors with fiduciary duties.

6. Innovative Application of the Rule

"When the SEC promulgated Rule 12b-1 in 1980, it envisioned that a normal scenario would have 12b-1 plans used to alleviate certain difficulties experienced by relatively small mutual funds facing net redemptions."[68] Ruth Simon reports: "Why Good Brokers Sell Bad Funds": "The answer simply put, is annual fees. Chief among them is the investment management fee, typically 0.4% to 1% of fund assets a year"; and, further, "The marketing or distribution charges known as 12b-1 fees, common on brokerage funds, bring in as much as 1% of fund assets a year; the brokerage generally keeps 90%."[69] Trzcinka and Zweig state, moreover, that "it is also possible that 12b-1 expenses may pay for agents whose purpose is to convince investors to place their money in more expensive funds when identical, less expensive alternatives exist."[70] In 1989 at least four one billion-dollar funds with an average asset size of $1.76 billion were permitted to adopt 12b-1 plans. There were no net redemptions, no low or stagnant growth, and no known "appropriate problems to be rectified."[71] "Thus, it is unlikely that many plans were adopted primarily to allow a fund to benefit from economies of scale."[72] The risks of the adviser and/or distributor are reduced by reimbursement and compensation plans, especially if there is a CDSL. These issues, mentioned earlier, may not comply with the SEC intent when 12b-1 was promulgated.[73] Burgunder and Hartmann

66. Burgunder & Hartmann, *supra* note 44, at 398.

67. *Id.* at 399.

68. *Id.* at 405.

69. Ruth Simon, *Why Good Brokers Sell Bad Funds*, MONEY, July 1991, at 96.

70. Charles Trzcinka & Robert Zweig, *An Economic Analysis of the Cost and Benefits of SEC Rule 12b-1*, MONOGRAPH SERIES IN FINANCE AND ECONOMICS 67 (Leonard N. Stern School of Business of New York University 1990).

71. BUSINESS WEEK MUTUAL FUND SCOREBOARD, for years 1988-1990; ICI MUTUAL FUND FACT BOOK 22 (1992).

72. Burgunder & Hartmann, *supra* note 44, at 405.

73. *Id.* at 403-04 n.120. "The S.E.C. has also expressed displeasure of the ways

conclude "that the new forms of reimbursement plans and compensation plans that are evolving are inconsistent with the spirit and objective of Rule 12b-1", and that, therefore, the SEC should study the utility of the various plans especially in view of the detrimental effect they have on the traditional no-load mutual funds.[74] "In addition," they continue, "the SEC has become significantly alarmed about the high fees, and it will undoubtedly begin to concentrate more resources on publicly enforcing fiduciary obligations."[75]

7. Conclusions and Recommendations

Burgunder and Hartmann conclude that "fiduciary safeguards and guidance beyond those required by the Act are necessary."[76] Their recommendations are:

1) Retain Rule 12b-1, subject to modification;
2) The SEC should analyze the impact of the Rule on the competitive structure of the industry;
3) Modify the Rule to permit directors to consider past as well as future benefits of the Rule.
4) The SEC should be active in the identification and prosecution of abuses of those who breach fiduciary standards.[77]

Both Haskell, and Burgunder and Hartmann have expressed concern regarding the fiduciary responsibility of directors and the oversight of funds adopting 12b-1 plans.[78] As a result, each study has recommended changes in the Rule dealing with these issues. It is interesting, however, that while both articles note the potential benefits of the Rule, neither examines the degree to which Rule 12b-1 has met its intended purpose. It would seem that the fundamental question to be addressed is, does it work? Has Rule 12b-1 facilitated the growth of small funds to the benefit of the investor? Has it allowed funds to lower their expense ratios? If Rule 12b-1 is meeting its stated objectives, then fine-tuning, such as that suggested by Haskell and by Burgunder

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funds treat the accounting of some 12b-1 expenses. The S.E.C. is concerned that some funds account for distribution expenses as capital expenses, whereas others treat them as operating expenses. The discrepant effect on fund yield calculations worries the Commission. The Commission proposed a rule requiring all funds to treat distribution payments as operating expenses." Investment Company Act Release No. 14,623, 50 Fed. Reg. 28,953 (1985) (codified as 17 C.F.R. § 274) [hereinafter "Release No. 14623"]. The 12b-1 fee charge against capital practice described in 1988 and questioned by the S.E.C. is presently being used by a new bond fund managed by the Pilgrim Group. Jonathan Clements, *Pilgrim Mutual Fund Gets in Hot Water with Shearson*, WALL ST. J., June 7, 1991, at C1.

74. Burgunder & Hartmann, *supra* note 44, at 415.

75. *Id.* at 418.

76. *Id.* at 419.

77. *Id.* at 420.

78. Haskell, *supra* note 21, at 486-89; Burgunder & Hartmann, *supra* note 44, at 375.

and Hartmann, makes sense. If, however, the Rule is not accomplishing what was intended, adjustment is not the answer; reconsideration of the Rule itself is appropriate. This is an issue of application rather than interpretation and is addressed in the next section.

III. Application of Rule 12b-1

A. *General*

For the first forty years of its existence, the Investment Company Act of 1940 prohibited mutual funds from using shareholder assets for distribution (sales) purposes. After listening to the arguments of those having the most to gain by such a change, Rule 12b-1 was promulgated with a clear statement that all distribution plans must contain benefits for shareholders. Shareholders, furthermore, benefit if they receive something positive that they did not receive before the promulgation of the Rule. Shareholders obviously invest in shares of mutual funds, as in other types of securities, to receive a return on the funds committed. If the returns received by those funds adopting Rule 12b-1 plans are greater than those funds not adopting 12b-1 plans, it is clear that a benefit is present. If the Rule permits "economies of scale" as some argue, the funds become larger, the fixed expenses are spread over more shares, and the expense ratio declines, thereby permitting more of the gross return to flow through to the shareholders and, consequently, to provide a higher return. In this vein, Derwood Haskell concludes that Rule 12b-1 will provide the following benefits for shareholders.[79]

1. Opportunity to have more money invested immediately;
2. Economies of scale;
3. Reduction in expense ratio;
4. Adviser retains greater profits, providing higher quality service;
5. Potential for greater total return; and
6. More funds adopt 12b-1 plans in lieu of a heavy front-end load.

Several of these claimed "benefits" are intertwined, and require joint consideration of their applications. These items will be considered individually, however, under the headings below.

1. More Money Invested Immediately

Haskell illustrates the benefit of a spread-load fund[80] by making a comparison with an 8 1/2 percent load fund, assuming that the two funds are alike in all other ways.[81] Both funds receive an annual return

79. Haskell, *supra* note 21, at 488-90.

80. Haskell, *supra* note 21, at 489. The term "spread-load" refers to an otherwise no-load fund which charges a 12b-1 fee. The suggestion is that the sales charge is being spread over a 1 percent 12b-1 fee.

81. The assumption is that two mutual funds are identical in all respects (such

and, therefore, their accumulated total values grow at an 8 percent rate. The 12b-1 fee on the spread-load fund is 1 percent per annum. An initial investment of $10,000 is made in both funds.

As shown in Table 1, the total accumulated value for the 8 1/2 percent load fund is lower for the first nine years but higher in the tenth year than it is for the spread-load fund.[82] Even in this illustration, investors would choose the load fund from the tenth year on, by a widening margin. As an example, the load fund advantage is $1,435 in the fifteenth year, and $8,390 in the twenty-fifth year. Burgunder and Hartmann suggest that the time value of money be considered.[83] The present value of the 1 percent 12b-1 fee is $888.28 in the tenth year, which is greater than the $850 load charge for the other fund, so that the choice should be the 8 1/2 percent load fund.[84] Curiously, the standard for comparison for the spread-load fund is an 8 1/2 percent load; it *should have* been a true no-load fund, many of which are available.[85] In a comparison between the 1 percent spread-load and a no-load fund, the advantage is with the no-load fund even from the inception, with a $1917 advantage in the tenth year and $14,211 (26.18% advantage) in the twenty-fifth year, as shown in Table 1. This leads to the conclusion that compared with alternatives, more money is not invested immediately under 12b-1 plans.

TABLE 1[86]
ACCUMULATED WEALTH POSITION* PER $10,000 INVESTED FOR MAXIMUM LOAD CHARGE, SPREAD-LOAD, AND NO-LOAD - NON-12b-1

Year	Sales Charge 8.5%	Spread-Load: 12b-1 fee for No-load fund	No-load/Non-12b-1
0	$ 9150	$10000	$10000
1	9882	10700	10800
2	10673	11449	11664

as objectives, policies, turnover) except that one charges an 8.5 percent sales charge and the other charges a 1 percent 12b-1 fee.

82. Haskell, *supra* note 21, at 489. Haskell shows that the parity-year occurs in year 15. It is to be noted, however, that the $10,000 compounded at 7% for 10 years amounts to $19,671.51, not $20,141, as shown in Table IV, in his paper. *Id.*

83. Burgunder & Hartmann, *supra* note 44, at 410.

84. Burgunder and Hartmann assume no growth in the asset base on which the 12b-1 fee is applied, which differs from the Haskell illustration in that regard. If there is no growth and no reinvestment of dividends or capital gains, it will take about 15 years to match the 8 1/2% load. Few mutual funds fit this description.

85. In December 1990, 514 out of a sample of 972 equity mutual funds were not 12b-1 funds; 258 of these were no-load funds. BUSINESS WEEK MUTUAL FUND SCOREBOARDS 1990.

86. The idea for this table came from Haskell, *supra* note 21, Table IV, at 489.

3	11526	12250	12597
4	12448	13108	13605
5	13444	14026	14693
6	14520	15007	15869
7	15681	16058	17138
8	16936	17182	18509
9	18291	18385	19990
10	19754	19672	21589
11	21334	21049	23316
12	23041	22522	25182
13	24885	24098	27196
14	26875	25785	29372
15	29025	27590	31722
16	31347	29522	34259
17	33855	31588	37000
18	36564	33799	39960
19	39489	36165	43157
20	42648	38697	46610
21	46060	41406	50338
22	49744	44304	54365
23	53724	47405	58715
24	58022	50724	63412
25	62664	54274	68485

* Assume an 8% annual return, all funds reinvested.

2. Economies of Scale

The discussion about "economies of scale" is reasonable, but no one has been specific with regard to the consideration of size. The essential issue is the net redemption for *small* funds. What dollar amount of assets is small? The average size for 390 funds in 1975 was about $108,000,000 and in 1990 the average size for 2,362 stock, bond, and income funds was almost $242,000,000.[87] At the end of 1990, there were 289 equity funds with average size of $11,640,000, all of which had assets of less than $25,000,000.[88] Are these firms small? In all cases the adviser has something to gain by the fund's becoming larger, namely, an increased management fee.

Assets of equity, bond and income funds grew at a compound annual rate of 29.64 percent from 1981-1990.[89] Chance and Ferris found significant differences in asset growth in 3 out of 10 comparisons of 12b-1 funds with non 12b-1 funds. In each of the three comparisons with significance, the difference favored non 12b-1 funds. The authors' concluded "that the existence of a 12b-1 plan might reduce the asset

87. ICI MUTUAL FUND FACT BOOK 18-20 (1991).
88. BUSINESS WEEK MUTUAL FUND SCOREBOARD, *supra* note 85.
89. ICI MUTUAL FUND FACT BOOK 20 (1991).

growth rate."[90] In addition, Trzcinka and Zweig state: "We find no evidence that 12b-1 expenses promote growth in total assets. There is no effect of 12b-1 on either the growth of the average fund or on the growth of small funds in any of the years 1986-1988."[91] On the contrary, six to ten years after the beginning of 12b-1 plans, there were more non-12b-1 mutual funds than there were 12b-1 funds, and the average size was larger for non-12b-1 funds in every year of the time period 1986-1991 as shown in Table 2.

In theory the 12b-1 plans would permit funds to avoid net redemptions, thereby holding less cash and, consequently, increase their return. Table 2 shows that in every year of the time period 1986-1991, 12b-1 funds held more cash than did non-12b-1 funds.

TABLE 2[92]
PORTFOLIO CASH AND ASSET SIZE

		Non 12b-1			12b-1		
	Year	Cash	Asset Size ($millions)		Cash	Asset Size ($millions)	
December	1986	9.90%	334.37	(304)	12.38%	163.58	(177)[a]
	1987	10.95	325.11	(451)	12.77	140.00	(253)
	1988	11.19	315.21	(452)	13.98	184.75	(315)
	1989	10.00	363.54	(464)	10.92	222.15	(378)
	1990	13.85	290.95	(474)	16.27	193.22	(451)
	1991	8.63	326.39	(594)	9.17	238.21	(624)

[a] Number of funds in parentheses

In a sampling of 789 funds in March 1989, shown in Panel A of Table 3, those mutual funds electing 12b-1 status decreased in size by 0.32 percent during the same time period that the non-12b-1 funds increased in size by an average of 9.4 percent. The same pattern held for funds with objectives of growth, and of growth and income. The pooled balanced and income funds electing 12b-1 grew at a modest 6.9 percent compared with the 10.77 percent growth for non-12b-1 balanced and income funds. A sample of 943 funds in December 1991, shown in Panel B, Table 3, provided the same relative comparison with 458 non-12b-1 funds growing at a 76.08 percent rate compared with 46.27 percent for 485 12b-1 funds. Comparisons for growth, balanced and income funds showed similar relative patterns. The only exception was the growth and income funds in which the 12b-1 funds grew faster than the non 12b-1 funds. This leads to the conclusion that 12b-1 plans do not lead to "economies of scale" for all funds.

90. Chance & Ferris, *Mutual Fund Distribution Fees*, *supra* note 51, at 38.
91. Trzcinka & Zweig, *supra* note 70, at 67.
92. BUSINESS WEEK MUTUAL FUND SCOREBOARD, December of each year 1986-1991.

TABLE 3
12 MONTH CHANGE IN ASSETS
FROM APRIL 1988 THROUGH MARCH 1989[93]

Panel A

Overall	Non-12b-1	12b-1
12 Mo. % Change	9.40	−0.32
By Objective	**Non 12b-1**	**12b-1**
Growth	9.77	−0.24
Growth and Income	7.28	−3.84
Bal. & Inc.	10.77	6.9

FROM DECEMBER 1990 THROUGH DECEMBER 1991[94]

Panel B

Overall	Non-12b-1		12b-1	
12 Mo. % Change	76.08%	(458)*	46.27	(485)
By Objective	**Non 12b-1**		**12b-1**	
Growth	65.49%	(133)	52.11	(149)
Growth and Income	35.19	(68)	44.32	(84)
Balanced	47.36	(33)	22.27	(51)
Income	42.24	(29)	40.20	(25)

* The number of firms is shown in parentheses

3. Reduction of Expense Ratio

The expense ratio has been viewed in different ways by different authors but all have concluded that 12b-1 plans increase expenses. Ferris and Chance were the first to report the impact of 12b-1 plans on expense ratios and the economic benefit of the 12b-1 plans. Rather than a reduction in the expense ratio, they found an increase in the expense ratio for 12b-1 funds and concluded that "the plan is only a dead-weight cost."[95] Trzcinka and Zweig found that mutual funds using 12b-1 authority have higher expense ratios than other funds and that "there is no evidence that mutual funds use Rule 12b-1 to lower expenses through economies of scale since large funds which use Rule 12b-1 have higher total expenses than identical large funds which do not use Rule 12b-1."[96] Using regression analysis, Chance and Ferris found the 12b-1 variable to be positive and significantly related to ex-

93. BUSINESS WEEK MUTUAL FUND SCOREBOARD March 1989.
94. BUSINESS WEEK MUTUAL FUND SCOREBOARD December 1991.
95. Stephen P. Ferris and Don M. Chance, *The Effect of 12b-1 Plans on Mutual Fund Expense Ratios: A Note*, 42 J. FIN. at 1082 (Sept. 1987) [hereinafter *Mutual Fund Expense Ratios*].
96. Trzcinka & Zweig, *supra* note 70, at 66.

pense ratios, which means that funds with 12b-1 plans have higher expense ratios than non-12b-1 funds. Further, they report that the 12b-1 expense ratio differential rose sharply from 8 basis points in 1984 to 30 basis points in 1987.[97]

If we separate the mutual funds into those with a sales charge and those without, and then in each category compare the expense ratios for non-12b-1 funds with those which use 12b-1 plans, we find that the basis point[98] increase for no-load funds using 12b-1 plans varies from 62 in 1986 to 94 in 1989. On the other hand, the basis point increase for load funds with 12b-1 plans varies from 38 in 1990 to 56 in 1987, as shown in Table 4. It should be noted that the basis point differences are statistically significant. Further, expense ratios in general increased from 1986-1990. As of December 1990, about 70 percent of the funds with expense ratios over 2.0 are 12b-1 funds. This leads to the conclusion that 12b-1 plans do not reduce expense ratios.

TABLE 4[99]
SALES CHARGE AND EXPENSE RATIOS WITH AND WITHOUT 12B-1

A.		No Sales Charge					
		Non-12b-1		12b-1			
	Year	Expense Ratio		Expense Ratio		Diff.	p-value
Dec	1986	1.14%	(154)[a]	1.76%	(57)	−0.62	0.0001
	1987	1.13	(170)	1.89	(65)	−0.76	0.0001
	1988	1.18	(185)	1.84	(57)	−0.66	0.0001
	1989	1.17	(212)	2.11	(60)	−0.94	0.0001
	1990	1.20	(251)	2.06	(74)	−0.86	0.0001
	1991	1.16	(334)	1.93	(97)	−0.77	0.0001

B.		With Sales Charge							
		Non-12b-1			12b-1				
	Year	Expense Ratio			Expense Ratio			Diff.	p-value
Dec	1986	1.08%	[6.79][b]	(248)	1.49%	[5.37]	(120)	−0.41	0.0001
	1987	1.10	[6.02]	(282)	1.66	[4.94]	(195)	−0.56	0.0001
	1988	1.24	[5.82]	(258)	1.69	[4.85]	(248)	−0.45	0.0001
	1989	1.35	[5.50]	(250)	1.76	[4.87]	(311)	−0.41	0.0001
	1990	1.37	[5.29]	(253)	1.75	[4.89]	(367)	−0.38	0.0001
	1991	1.37	[4.85]	(243)	1.71	[4.85]	(497)	−0.34	0.0001

[a] Number of firms in parentheses
[b] % Sales Charge in brackets

97. Chance & Ferris, *Mutual Fund Distribution Fees, supra* note 51, at 39.
98. A basis point is 1/100th of a point or .01.
99. BUSINESS WEEK MUTUAL FUND SCOREBOARD December 1986 through December 1991.

4. Adviser Retains Greater Profits

There appears to be no divergence of opinion on the observation that with 12b-1 plans, the adviser retains greater profits. Ruth Simon, for example, provides support for this position. While commenting on brokerage houses, she points out that individual brokers are given additional compensation to push "in house" funds because the "house" receives management fees of .4 to 1 percent and 12b-1 fees of up to 1 percent of average assets on an annual basis. She comments that the brokerage houses "come up with a product their brokers can easily sell rather than one suited to their customers' risk tolerance."[100] Trzcinka and Zweig suggest that "[I]t is also possible that 12b-1 expenses may pay for agents whose purpose is to convince investors to place their money in more expensive funds when identical, less expensive alternatives exist."[101] Conclusion: The advisor as well as distributor, broker and financial planner receiving the 12b-1 fees are the beneficiaries of the 12b-1 fee.

5. Potential For Greater Total Return

Ferris and Chance state that "if the plan offers economic value to shareholders, its benefits should outweigh its costs and the net effect should be a reduced expense ratio. Our evidence suggests that the plan is only a dead-weight cost."[102] Trzcinka and Zweig found higher net returns for low risk 12b-1 funds, but significantly lower returns for average or high risk 12b-1 funds and conclude that "shareholders of high return 12b-1 funds pay a penalty relative to high return non-12b-1 funds."[103] Chance and Ferris found no significant risk-adjusted returns and concluded that the 12b-1 plan had no effect on risk-adjusted performance.[104]

Annualized average returns for one, five and ten-year time periods are shown in Table 5. Three of the five 1-year returns show statistically significant differences (for the years 1987-1989). During the years when statistical significance was found, non-12b-1 funds had higher returns, ranging from 112 to 149 basis points. In the five-year comparisons,[105] only two were significant (1986 and 1987), with 133 and 305 basis point differences, both favoring non-12b-1 funds. In the ten-year comparisons, three of the five comparisons (1986-1988) were statisti-

100. Simon, *supra* note 69, at 98.

101. Trzcinka & Zweig, *supra* note 70, at 67.

102. Ferris & Chance, *Mutual Fund Expense Ratios, supra* note 95, at 1082.

103. Trzcinka & Zweig, *supra* note 70, at 67.

104. Chance & Ferris, *Mutual Fund Distribution Fees, supra* note 51, at 40.

105. It should be noted that the time periods beyond one-year data do not necessarily correspond to the length of time a fund has elected the 12b-1 plan. Therefore, a fund which elected the 12b-1 option in 1990 but had been in existence for ten years would be considered to be a 12b-1 fund in any time period ending in 1990.

cally significant, with differences ranging from 158 to 319 basis points, all in favor of non-12b-1 funds. In every comparison in which a statistical significance was found, the difference was in favor of non-12b-1 funds.

TABLE 5[106]
ANNUALIZED AVERAGE RETURN ENDING DECEMBER

		One Year					
	Year	Non-12b-1%		12b-1[b]		Diff.	p-value
December	1986	16.36	(389)[a]	16.22	(159)	.14	0.195
	1987	3.24	(434)	2.12	(208)	1.12	0.004
	1988	14.53	(450)	13.04	(317)	1.49	0.0007
	1989	24.21	(466)	23.04	(378)	1.17	0.004
	1990	−6.75	(507)	−7.16	(442)	0.41	0.20
	1991	31.06	(561)	29.49	(586)	1.57	0.1431
		Five Year					
	Year	Non-12b-1%		12b-1[b]		Diff.	p-value
	1986	17.03	(267)	13.98	(70)	3.05	<0.0001
	1987	12.24	(292)	10.91	(96)	1.33	0.01
	1988	10.48	(315)	9.91	(133)	0.57	0.16
	1989	15.82	(325)	15.95	(171)	−0.13	0.39
	1990	9.04	(364)	9.11	(226)	−0.07	0.44
	1991	11.84	(376)	11.77	(342)	0.07	0.8722
		Ten Year					
	Year	Non-12b-1%		12b-1[b]		Diff.	p-value
	1986	15.86	(218)	12.67	(59)	3.19	<0.0001
	1987	15.59	(236)	12.96	(65)	2.63	0.0002
	1988	15.55	(230)	13.97	(87)	1.58	0.014
	1989	15.04	(219)	14.30	(101)	0.74	0.145
	1990	11.12	(210)	10.71	(122)	0.41	0.177
	1991	14.30	(203)	14.34	(157)	−0.04	0.9289

[a] Number of funds shown in parenthesis.
[b] Funds listed as having elected 12b-1 on or before December of the year indicated.

Information contained in Table 6 shows risk-adjusted performance[107]

106. BUSINESS WEEK MUTUAL FUND SCOREBOARD December 1986 through December 1991.

107. The Treynor Index for a risk-adjusted return is: $(R_i-R_f)/b$, where R_i=return on security i, R_f=risk free rate provided by one-, five-, and ten-year yields on constant maturity treasury securities obtained from various issues of Federal Reserve Bulletins, and b=beta; slope of the regression line between returns on security i, regressed against returns of the market which is proxied by the S & P 500 Index of common stocks. Beta is a measure of systematic risk which is used in the

for one-, five-, and ten-year time periods for the funds with and without 12b-1 plans for objectives of growth, growth and income, and a pooled income and balanced. In all comparisons non 12b-1 funds have provided superior performance, and in 8 out of the 9 comparisons statistical significance was evident.

TABLE 6[108]
AVERAGE RISK ADJUSTED PERFORMANCE FOR ONE, FIVE AND TEN YEARS

One-Year Performance (%)						
Fund Objective	Non-12b-1		12b-1		Diff.	p-value
Growth	7.33	(144)	6.24	(82)	1.09	0.34
Growth & Income	10.82	(53)	7.36	(43)	3.46	0.03
Income & Balanced	9.17	(47)	3.22	(20)	5.95	0.02
Five-Year Performance (%)						
Fund Objective	Non-12b-1		12b-1		Diff.	p-value
Growth	7.48	(129)	6.06	(55)	1.42	0.07
Growth & Income	10.50	(45)	7.43	(29)	3.07	0.05
Income & Balanced	14.91	(47)	10.94	(15)	3.97	0.10
Ten-Year Performance (%)						
Fund Objective	Non-12b-1		12b-1		Diff.	p-value
Growth	8.01	(103)	6.02	(33)	1.99	0.02
Growth & Income	8.15	(38)	4.97	(21)	3.18	0.03
Income & Balanced	10.72	(41)	8.37	(13)	2.35	0.06

[a] The number of funds is shown in parentheses.

The results of regressions on risk-adjusted performance are shown in Table 7. In each of six regressions the 12b-1 coefficient is negative and in every case but one, the 12b-1 variable coefficient is significant as well as negative, even after fund objectives and the impact of asset size have been accounted for. The negative 12b-1 coefficient means that 12b-1 funds will show a lower risk-adjusted return than non-12b-1 funds. This indicates that while 12b-1 plans may provide potential for greater returns, this potential has not been realized.

Capital Asset Pricing Model (CAPM) to assist in determining the risk-adjusted return for a security. The beta used is that reported by the *Business Week Mutual Fund Scoreboard* and calculated using five years of monthly data.

108. BUSINESS WEEK MUTUAL FUND SCOREBOARD December 1990.

TABLE 7[109]
REGRESSIONS OF RISK-ADJUSTED RETURN[a]

	Time Period					
Variable	One-Year		Five-Year		Ten-Year	
Intercept	9.68 (5.98)	5.96 (1.53)	17.18 (12.54)	18.10 (5.51)	12.70 (11.04)	9.59 (3.41)
ASSETS	0.001 (0.85)		−0.002 (−1.24)		0.0001 (0.13)	
ASSETS × 12B1	0.00 (0.00)		0.003 (2.24)		0.001 (1.46)	
$\log_e$(ASSETS)	0.79 (1.03)		−0.40 (−0.64)		0.59 (1.11)	
$\log_e$(ASSETS) × 12B1	0.23 (0.43)		1.27 (2.81)‡		0.59 (1.49)	
GROWTH	−0.089 (−0.08)	0.09 (0.09)	−6.65 (−7.11)‡	−6.52 (−7.28)‡	−2.49 (−3.31)‡	−2.56 (−3.59)‡
GROINC	2.04 (1.55)	2.03 (1.57)	−4.80 (4.33)‡	−4.85 (−4.58)‡	−3.38 (−3.80)‡	−3.36 (−4.00)
12B1	−2.24 (−2.33)†	−2.94 (−1.16)	−3.01 (−3.46)‡	−7.90 (−3.48)‡	−2.65 (−3.50)‡	−4.77 (−2.37)‡
R^2	0.05	0.08	0.20	0.26	0.19	0.27
Obs.	389	389	320	320	249	249

[a] Statistics are in parentheses.
† Significant at the 5% level or better.
‡ Significant at the 1% level or better.

6. More Funds Will Adopt 12b-1 in Lieu of a Heavy Front-End Load

Prior to the promulgation of Rule 12b-1, the distinction between load and no-load funds was clear. The load charge or sales commission was paid by the purchaser of the fund shares. The purchaser of shares of a no-load fund paid no sales commission or distribution fee at the time of the purchase nor in any subsequent period. Consequently, load funds were "sold" to the public by those sharing in the sales charge, while no-load funds were "purchased" by investors who responded to advertisements of various descriptions. Prior to the promulgation of Rule 12b-1, no-load funds were much more popular with investors than load funds and were growing more rapidly.[110] While the number of funds calling themselves no-load continued to grow rapidly, the true no-load, non-12b-1 funds suffered as 12b-1 plan elections grew at more than twice the rate of growth of mutual funds in total, during a time of explosive growth in mutual fund assets.[111] The number of stock, bond

109. BUSINESS WEEK MUTUAL FUND SCOREBOARD December 1990.
110. Burgunder and Hartmann, *supra* note 44, at 372-73.
111. *Id.* at 364.

and income mutual funds (excluding money market funds) grew at a rate of about 2.4 percent from 1970 to 1980, and a rate of about 17.8 percent annually from 1980 to 1990. Assets grew at less than 0.7 percent annually from 1971-1980 but grew at a compound annual rate of 25.6 percent during the 1980-1990 time period.[112] The mutual fund industry now boasts of a total of $1.2 trillion in assets.[113] During this explosive growth, "12b-1 plans are actually supplanting traditional no-load funds in the competitive structure of the industry."[114] In conclusion, 12b-1 plans are growing faster among front end load funds, while they are replacing many true no-load funds.

The growth of funds with 12b-1 plans has led to concern among federal regulators. The SEC has stated that "[t]he plans have been abused by the industry."[115] In addition, "[t]he Federal Reserve is watching the actions of banks that invest assets of trust department accounts in 12b-1 funds in exchange for 12b-1 service fees from the fund."[116]

In some cases 12b-1 plans are used to pay what is called a "trail commission" to encourage dealers to provide a service for which they have already received payment and have a duty to perform. "Thus, 12b-1 payments to compensate these efforts would be redundant and illegal under the Rule."[117]

Based on a sample of 945 equity funds, there were more non-12b-1 funds as of December 1990 than there were 12b-1 funds.[118] As shown in Table 4, there has been a tendency for non-12b-1 load funds to reduce the amount of the sales charge. The pattern is not as clear for those load funds electing 12b-1 plans for the 1987-1990 time period, but there is a slight reduction in load charge overall.

In a sample of 972 funds, the average sales charge for all non-12b-1 funds was 2.64 percent in December 1990, whereas the average sales charge for 12b-1 funds was 4.06 percent.[119] Further, as shown in Table 4 the average load charge was 5.29 percent for non-12b-1 load funds and 4.89 percent for 12b-1 load funds. Very clearly the average sales charge has declined from the original standard of 8 1/2 percent years ago.[120]

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112. ICI MUTUAL FUND FACT BOOK 15 (1988); ICI MUTUAL FUND FACT BOOK 20 (1991).

113. Kevin G. Salwen & Jonathan Clements, *SEC Weighing Big Changes for Mutual Funds*, WALL ST.J., June 26, 1991, at C1.

114. Burgunder and Hartmann, *supra* note 44, at 413.

115. *Id.* at 403 n.117.

116. *Id.* at 403 n.118.

117. *Id.*

118. BUSINESS WEEK MUTUAL FUND SCOREBOARD December 1990.

119. BUSINESS WEEK MUTUAL FUND SCOREBOARD December 1990.

120. BUSINESS WEEK MUTUAL FUND SCOREBOARD, 1986-1991; ICI MUTUAL FUND FACT BOOK 22 (1992)(covering the years 1988-1990). While the original source of

IV. Summary and Conclusions

Based on the information available, it appears that the SEC changed its traditional view toward the use of fund assets for distribution purposes because of the comments of those who had much to gain, in spite of the comments from some managers and directors who, in hindsight, appear to have been appropriately concerned about the use of these assets. In view of the innovative plans developed by advisers and managers that were not consistent with the SEC's intent, the monitoring process either did not operate at all or did not take action when questionable practices were identified. Recognition of this poor monitoring was clearly stated in a recent *Wall Street Journal* article "Securities and Exchange Commission Chairman Richard Breeden, in an unusual critique of his agency, called the SEC's regulation of investment advisers completely inadequate."[121]

During the decade of the 1970's the securities market was hit hard by recessions, high inflation and concurrent high interest rates, all of which resulted in negative returns for much of the equity market. This situation would not have been changed by any number of 12b-1 plans. Until the overall market turned up, 12b-1 plans would have had no beneficial effect. In 1972, moreover, investors were offered what have come to be known as money market funds,[122] which provided a safe haven and higher returns than those offered by the equity mutual funds, in particular. Beginning in about the mid 1970's, the problems that caused net redemptions in the traditional mutual funds also caused money market funds to grow rapidly. From 1980 through 1984 the dollar amount of assets in money market funds exceeded the assets in the traditional equity, bond and income funds.[123] Periodically, from 1983 through July 1991, the popular press has highlighted shareholder displeasure over the abuses of the mutual fund industry in response to the SEC's relaxation of the regulations pertaining to distribution expenses.[124] In 1980 the SEC stated that, "[t]he Commission and its staff

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data in Tables 1 through 7 are reported in various ways, much of the analysis is contained in "Rule 12b-1: An SEC Gift to Mutual Fund Managers," by William P. Dukes and James B. Wilcox, an unpublished manuscript (on file with *New England Law Review*).

121. Kevin G. Salwen & Jonathan Clements, *SEC Weighing Big Changes for Mutual Funds*, Wall St.J., June 26, 1991, at C1.

122. Money market funds "seek to maintain a stable net asset value by investing in the short-term, high-grade securities sold in the money market, such as Treasury bills, bank certificates of deposit, and commercial paper." ICI Mutual Fund Fact Book 15 (1992).

123. ICI Mutual Fund Fact Book 15 (1992).

124. Burgunder and Hartmann, *supra* note 44, at 366-67, report financial publications comments during 1983-1987 from *Consumer Reports, Sylvia Porters Personal Finance, Barron's, Mutual Fund Money Guide, Wall Street Journal, Forbes, NY Times, Money, Changing Times, Fortune*, and *Business Week*; more recently, the *Wall Street Journal* and *Money* have carried the banner. Wall St. J. June 7, 1991, at C1; Wall

will monitor the operations of the rules closely and will be prepared to adjust the rules in light of experience."[125]

The following summary of the way in which Rule 12b-1 has been applied, as suggested by Haskell, shows a difference between what was expected to happen, based on an interpretation of the law, and what actually occurred, based on mutual funds managers' application of Rule 12b-1.

(1) The most effective option which would permit "more money to be invested immediately" would be a true no-load, non-12b-1 mutual fund. The advantage begins at inception and compounds each year.

(2) The benefits expected to come from "economies of scale" have not been found to be present for those mutual funds using 12b-1 plans.

(3) Rather than decreasing the expense ratio, as could have been expected by industry arguments presented, the expense ratios for 12b-1 funds were higher and increased more than for non-12b-1 funds.

(4) All evidence indicates that the "adviser is able to retain greater profits" as the expense ratios for 12b-1 funds increase.

(5) No empirical evidence is available that shows a "greater total return" results from 12b-1 plans. Empirical evidence is available to show greater returns for non-12b-1 funds in comparison to 12b-1 funds, especially when the differences are statistically significant.

(6) Evidence does show that the sales charge has declined between 1986 and 1990, but the rate of decline is greater for non-12b-1 funds even though the load charge is smaller for 12b-1 funds during this time period.

In brief, all of the factors which could benefit shareholders, especially those such as immediate investment, economies of scale, expense ratios, and total return, have not been shown to result from 12b-1 plans.

V. RECOMMENDATIONS

The fact that "Mutual-Fund Law Is Under Review by SEC"[126] is good news. The Law as previously written left too much room for abuse. The Rule 12b-1 experiment fell far short of being beneficial for investors. The UNI-FEE[127] approach suggested in the *Wall Street Jour-*

ST. J. June 26, 1991, at C1; WALL ST. J. March 5, 1992, at A16; WALL ST. J. July 15, 1992, at C1; MONEY, July 1991, at 96; MONEY, July 1992, at 122.

125. Burgunder & Hartmann, *supra* note 44, at 366; Investment Company Act of 1940 Release No. 11414, October 28, 1980; SEC Docket Volume 21, No. 5, November 11, 1980, at 331.

126. Kevin G. Salwen & Jonathan Clements, *SEC Weighing Big Changes for Mutual Funds*, WALL ST. J., June 26, 1991, at C8.

127. The UNI-FEE is a single fee that covers the "charge for advisory services, transfer agents, administration, distribution, and the dreaded 'other.' " *Id.* In so doing efficiency of operations or of management would not be known to the public.

nal article would allow advisers to increase and cover up the use of shareholder assets. Rather than condone such use, it is recommended that the SEC return to the clear distinction between load and no load funds. A large number of mutual fund investors are not equipped to understand other distinctions, particularly when assailed by a highly motivated sales force supported by the investors' own investment dollars.

What Went Wrong with the Warren Court's Conception of the Fourth Amendment?

John B. Mitchell*

I. INTRODUCTION

I imagine it as a World War II propaganda film, all in black and white. It portrays the enemy nation, a nation whose values are so odious to our own that we all but literally shiver as we watch. Stronger than the fear and repulsion that we feel, however, is the quiet assurance within each of us that this enemy nation must be stopped, no matter the sacrifice in lives and material.

This film portrays a society in which the police are everywhere, unrestrained by any laws but their own. On street corners and in workplaces they approach citizens asking for identification. In bus, train, and air terminals the police are present, asking to look at tickets and to inspect personal belongings. Airplanes and buses are held under police orders and denied permission to leave for their destinations until groups of armed police board and request the identification papers of each passenger and ask to search their bags. And everywhere the police are looking, searching. Their helicopters, equipped with high powered cameras and viewing devices, hover over neighborhoods and factories. In the countryside, teams of police climb over fences posted "No Trespassing," walk through fields, and peer into outbuildings surrounding farmhouses. In the city, they sift through the garbage citizens have left on the curbs in front of their dwellings. They pore over the bank records of citizens and keep track of the phone numbers of all telephone calls to and from their homes. They send informants with recording devices into private homes and furtively place electronic monitors on vehicles of citizens so they can better trace their movements. And always they are with their sniffing dogs which, looking for the scent of whatever is currently forbidden, are set upon whatever packages or belongings that the citizens take out in public.

All this, however, is not really some WWII propaganda film, and it does not take place in some remote fascist state. This is current

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America.[1] Or, at least, it is the negative that exists behind the picture of what we see as America. And, like all negatives, it is as real as the photograph.

My point, however, is not that under current Supreme Court precedent the police can do everything in this little propaganda film. They can, but that's not the point. No doubt many of these activities would be admirable police practice if based upon some articulated standard of justification which a court could review. Rather, the point is that our own police, like the police in the film, can undertake all these actions unrestrained by any law but their own.[2] I am not saying that America has become a police state yet (albeit a democratic one), though doubtless residents of some neighborhoods would disagree. I am saying that all the legal pieces required for that propaganda film to become our dominant reality are already in place.[3] That is because the post-Warren Supreme Courts have held that none of these police activities are

1. The Supreme Court cases in the order in which they appear in the "propaganda film" are: INS v. Delgado, 466 U.S. 210 (1984) (factory workers not seized when immigration officers were posted at exits while others questioned workers to determine identities and nationality); Florida v. Rodriguez, 469 U.S. 1 (1984) (asking a citizen in an airport to talk is not seizure); Florida v. Royer, 460 U.S. 491 (1983) (merely asking for driver's license and airplane ticket does not constitute a seizure); United States v. Mendenhall, 446 U.S. 544 (1980) (several Justices indicate that a stop for identification might not constitute a seizure); Florida v. Bostick, 111 S. Ct. 2382 (1991) (passengers not seized when police enter bus to ask passengers they have detained for identification and to search bags); Dow Chemical v. United States, 476 U.S. 227 (1986) (helicopter taking aerial photos of factory surrounded by fence and protected by ground security does not constitute a search); California v. Ciraolo, 476 U.S. 207 (1986) (helicopters 1000 feet above fenced backyard specifically trying to spy on that home not a search); Florida v. Riley, 488 U.S. 445 (1989) (surveillance by helicopter from 400 feet into enclosed backyard is not a search); Oliver v. United States, 466 U.S. 170 (1984) (no unreasonable search when police walk through gates and past "no trespassing" signs across citizen's land); United States v. Dunn, 480 U.S. 294 (1987) (no search when police climb over barbed wire fence, cross citizen's fields, and peer into his barn); California v. Greenwood, 486 U.S. 35 (1988) (no search when police go through garbage which citizen left on curb in front of her house); Smith v. Miller, 425 U.S. 435 (1976) (going through citizen's bank records does not constitute a search); Smith v. Maryland, 442 U.S. 735 (1979) (using a "pen register" to keep track of all incoming and outgoing phone numbers is not a search); United States v. White, 401 U.S. 745 (1971) (sending a wired informant into a home is not a search); United States v. Karo, 468 U.S. 705 (1984) (surreptitious planting of "beeper" so authorities can track citizen's car is not a search); United States v. Place, 462 U.S. 696 (1983) (exposing luggage to sniffing dogs is not a search). The Orwellian implications of this pattern of cases has not been lost on commentators. *See, e.g.*, John M. Burkoff, *When Is a Search Not a "Search"? Fourth Amendment Doubletalk*, 15 U. TOL. L. REV. 515 (1984).

2. An analogous concern regarding broadening police powers in conjunction with accountability is expressed in the excellent article, William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981).

3. One author finds the legitimation of a right to privacy in an anti-totalitarian

"searches" and/or "seizures," and in these courts' Fourth Amendment jurisprudence, that means that these activities are not circumscribed by the Fourth Amendment at all. Thus, in terms of the Constitution, the police are without any judicial supervision and subject to no standards but their own whim.

How did all this happen? It is my thesis that to a significant extent the blame lies with the Warren Court. Though no doubt staunch defenders of our civil liberties,[4] I blame the Warren Court for its mishandling of two cases that form much of current Fourth Amendment jurisprudence—*United States v. Katz*[5] and *Terry v. Ohio*.[6]

I can readily imagine a response denying this thesis, contending instead that the Warren Court had little or nothing to do with what has happened to the Fourth Amendment. All that has happened is that the political composition of the Court has drastically changed, and has changed in a direction away from individual rights towards law and order. Also, what we are seeing is the historical tendency to restrict our constitutional rights when our nation comes under stress. Since we are currently experiencing such stress in our "war" on drugs and on crime in general, it is hardly surprising that we should see a broadening of police powers. We did, after all, seize 120,000 Japanese-American citizens without any individualized suspicion and put them in concentration camps to alleviate fears in early WWII.[7]

All that being said, I will still stand by my thesis. That does not mean that I totally reject this "realist" line, or find it to be inaccurate as a descriptive matter. But I find that it is more than coincidence that all the police intrusions in our propaganda film were removed from Fourth Amendment constraints by finding that they did not constitute a "search" under *Katz* and/or that they did not fulfill the standard for a "seizure" under *Terry*. Those two cases left a rhetorical legacy that was ripe and easy for manipulation as soon as political winds blowing through the Court and nation changed from protection of the individual from government to the use of government to protect individuals from each other. As a related matter, the Warren Court in *Katz* and

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principle which prevents the state from making us into standardized, cookie-cutter people who meet the government's definition of normal:

> The very possibility of accountability to a people presupposes that the bodies and minds of the citizenry are not to be too totally conditioned by the state that the citizenry is meant to be governing. If they were, self-government, although it might continue to exist in form, would in fact be wholly illusory.

Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 805 (1989).

4. For a tribute to Justice Earl Warren as a man who did his best to hold back any hint of the Orwellian nightmare, see Bernard Schwartz, *Chief Justice Warren and 1984*, 35 HASTINGS L.J. 975 (1984).

5. 389 U.S. 347 (1967).

6. 392 U.S. 1 (1968).

7. *See, e.g.*, Korematsu v. United States, 319 U.S. 432 (1943).

Terry failed to take advantage of the opportunity presented them to provide clear rhetorical tools that could be used to control the police in our late twentieth century society.[8]

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8. Actually, the blame that I place on the Warren Court for what I see as the ongoing erosion of the Fourth Amendment includes more than *Terry* and *Katz*. Though a full discussion is beyond the scope of this essay, the line of cases begotten by Camera v. Municipal Court, 387 U.S. 523 (1967), merits some mention. *Camera* was decided at a point when the pendulum on the "reasonableness" vs. warrant debate had swung far towards the warrant requirement. The debate is whether the Fourth Amendment is to be enforced by a standard of general reasonableness or whether reasonableness itself means probable cause and a warrant, except in narrowly drawn exceptional circumstances. *See, e.g.*, Chimel v. California, 395 U.S. 752, 758-60 (1969). Though the decision in *Chimel* two years after *Camera* continued this trend, ironically *Camera*, which had required a warrant for an all-area health and safety check of rental apartments, offered a wealth of rhetorical strategies that would eventually be used to move the pendulum the other way. To force the routine, non-individualized administrative search into a warrant with probable cause model, a model which it did not fit, the *Camera* majority made a series of rhetorical moves that would be used by succeeding Courts to alter sections of the Fourth Amendment map. Because traditional "probable cause" did not apply to this situation, the standard that was to equate with probable cause for this particular set of searches was to be derived by *balancing* the government's interest in the intrusion against the individual interests invaded by the intrusion (resulting in *Camera* in a standard of "probable cause" not requiring individualized suspicion); a similar balancing was to be used in the first place to determine whether a "special needs search" like *Camera* was constitutionally unreasonable; and, though the warrant procedure was valuable, "reasonableness [was] still the ultimate standard." *Camera*, 387 U.S. at 539. (*Terry* in fact applied the *Camera* balancing to arrive at its standard of "reasonable suspicion.") The upshot of these rhetorical moves in *Camera* has been a recent rash of "special needs" searches. In these cases the Court has engaged in balancing to justify the searches as falling under this category of special needs in the first place, and/or to justify dispensing with a warrant, and/or to justify full-blown searches on far less than true probable cause, often without any individualized suspicion. Generally the Court in these cases will use *Camera* as the heart of their analysis. *See, e.g.*, O'Conner v. Ortega, 480 U.S. 709 (1987) (special needs search of public employee's desk without warrant or probable cause); Griffin v. Wisconsin, 483 U.S. 868 (1987) (warrantless special needs search of probationer's home on "reasonable grounds"); Skinner v. Railway Labor Executives Assn., 489 U.S. 602 (1989) (drug testing of federal railroad employees without a warrant or individualized cause); New Jersey v. T.L.O., 469 U.S. 325 (1985) (warrantless search of student's purse on "reasonable grounds" because schools have special needs); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (fixed checkpoint where all stopped without warrant, probable cause, or individualized suspicion).

Once *Camera* breached the traditional lines and permitted rebalancing of the Fourth Amendment, where the outcome depended on the particular context in which the search took place, it was inevitable that a court with a different philosophy than the Warren Court would employ this tool to dispense with our traditional protections whenever they believed the particular need of law enforcement would make "the warrant and probable cause requirement impractical." New Jersey v. T.L.O., 469 U.S. at 351. For a similar criticism of *Camera*, see Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camera *and* Terry, 72 MINN. L. REV. 383, 385 (1988). Plainly, however, the

II. THE TWO FAILINGS OF *KATZ*

Let us begin with *Katz* since it came out the year before *Terry*. In finding constitutional protection for a man whom the police had electronically surveyed in a public phone booth, the majority in *Katz* appeared bent on establishing an expansive view of the Fourth Amendment. The Amendment was not to be exclusively tied to such property-bound notions as "protected areas" and "trespass." Modern technology simply presented too great a threat of widespread governmental intrusion into our lives every time we walked out our front door if our Fourth Amendment jurisprudence was bound by spatial metaphors responsive to pre-technological times. The new rhetoric of protecting "people not places" was a good civil libertarian response to this impending threat. Ironically, aircraft armed with high-powered cameras hovering over our homes, pen registers recording numbers on our telephones, and beepers surreptitiously placed on our vehicles are likely idiomatic of the very threat of government intrusion that *Katz* sought to avoid. So, to repeat—what went wrong? Actually, there are two failings in *Katz* (although if they had dealt with one, the other might well not have been a problem)—the failure to contextualize and the failure to articulate a broader conception of the Fourth Amendment.[9]

A. *The Failure to Contextualize* Katz

This failure involves the now classic catch phrase, "reasonable expectation of privacy." As you are probably aware, these words never appeared as such in the majority opinion. The majority rhetoric does

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current Court has taken undue advantage of the *Camera* rhetoric. *See* Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law Abiding Public*, 1989 SUP. CT. REV. 87, 108-09 (1989).

9. Recent authors have taken different tacks to cure what we perceive in common as serious problems in the current direction of Fourth Amendment jurisprudence. In his article, *The World Without a Fourth Amendment*, Professor Slobogin proposes that courts look at the intersection between the "intrusiveness" of particular government conduct and the level of "certainty" that evidence will be discovered as a result of the conduct. Thus, all the activities in our propaganda film would be subject to court supervision but, depending on the perceived quantum of intrusiveness, might be justified on less than traditional probable cause. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991). Professor William S. McAninch expresses a view generally paralleling my own. William S. McAninch, *Unreasonable Expectations: The Supreme Court and the Fourth Amendment*, 20 STETSON L. REV. 435 (1991). His modification of *Katz*, however, goes in a direction of a balancing which considers intrusiveness on the citizen's freedom, whether the citizen has done all we could reasonably ask to insure privacy, and the level of cause that the police have to believe they will find evidence. *Id.* at 463-71. Professor Berner, on the other hand, proposes that our focus shift from the expectations of the individual intruded upon, to the activity of searching. Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 VAL. U. L. REV. 383, 398 (1991).

include "what he seeks to preserve as private"[10] and "the privacy upon which he justified relief."[11] But the classic phrase comes from Justice Harlan's concurrence.[12] No matter, since the majority embraced the phrase a year later in *Terry*[13] and the phrase has since been universally equated with *Katz* and all but unquestioningly accepted as the standard for what may be thought of as the new "protected area"; i.e., the dimension (now defined by expectations rather than property concepts) into which the police may not tread without constitutional consequences. Courts now will ask whether the defendant has "a reasonable expectation of privacy in _____" [fill in where police found incriminating evidence]. If the court's conclusion is "Yes," the Fourth Amendment applies; if "No," the police are constitutionally free to do as they please. So much for what the Warren Court did. More significant is what it did not do.

The Warren Court failed to provide this "reasonable expectation of privacy" with any articulated *context*. Was this to be the "reasonable expectation" of a six-year-old from his mother? Of a prisoner in the Gulag from the former KGB? The reader gets the point. Without a context, the phrase is all but meaningless. Or, more accurately, it is amenable to taking on many alternative meanings, specifically the one(s) of those who can provide the privileged context.[14]

A Supreme Court, of course, is just the kind of entity whose choice of context will be privileged above all others. The Warren Court thus left a rhetorical construct that was open to ready manipulation by succeeding Courts. This was no small matter, for keep in mind that this was no ordinary, garden variety rhetorical construct. This construct would serve as the very gatekeeper to the Fourth Amendment. Set adrift without any articulated contextual constraints, it was obviously pliable enough to *limit*—as it has—the reach of the Fourth Amendment's check on the Executive's use of its police power. In fact, this manipulation is veritable child's play: I know children may sometimes go through my garbage, therefore—imposing the context of "if anyone in the universe can see it, I have no reasonable expectation that every-

10. Katz v. United States, 389 U.S. 347, 351.

11. *Id.* at 353.

12. *Id.* at 361 (Harlan, J., concurring).

13. Terry v. Ohio, 392 U.S. 1, 9 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

14. Professor Burkoff makes much of how the current Courts have twisted *Katz* by manipulating the context. Burkoff, *supra* note 1, at 537-41. In a fascinating piece by Clark D. Cunningham, the author, recognizing the importance of specific legal language, employs linguistic analysis while exploring the vague, unstated, contextual shifts by the various justices in applying *Katz*. In so doing, he finds the case results depend on whether the author contextualizes "search" as "search of" or "search for" or "search out" or "intrude." Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541 (1988).

one in the universe won't do the same"—I have no reasonable expectations remaining upon which to voice my complaint when full-grown, adult police systematically look through my trash to find the traces of my life that will reveal the information they seek about me.

As the reader doubtless surmises, this essay contemplates a context implicit in the very enterprise of *Katz*. Specifically, I am proposing that there is constitutional significance whenever the government intrudes where a citizen has "a reasonable expectation of privacy": 1) from government 2) in keeping with some basic vision of America.

Begin with "from government." Legally, of course, the Fourth Amendment only applies to the government and those who act as its agents or collaborators. That, however, does not logically justify partly defining my "reasonable expectations" in terms of my apprehension of government. As the garbage example above shows, those to whom the constraints of the Amendment apply and whether they apply at all in a particular circumstance are two separate issues. Rather, this first contextual constraint on the *Katz* rhetoric rests on the simple perception that there is something very different between having a child and having a cop go through my garbage, between knowing commercial flights carry vacationers and business people who might strain their eyes to snoop in my backyard for a few moments and knowing a spy helicopter is lurking about.[15] Loose language in *Katz*—such as "knowingly ex-

15. Echoing the same perception are the authors in Christopher Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. CRIM. L. REV. 387, 397 (1981); and Gregory E. Sopkin, Comment, *The Police Have Become Our Nosy Neighbors:* Florida v. Riley *and the Supreme Court Deviation From* Katz, 62 U. COL. L. REV. 407, 427 (1991). *But see*, Aimee Libeu, Note, *What is a Reasonable Expectation of Privacy?*, 12 W. ST. U. L. REV. 849 (1985).

The court has consistently refused to recognize any constitutional distinction between intrusions by police and those by citizens with one possible exception. *See* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), where the Court said:

> Perhaps anticipating our disposition of the case, the State raises a different theory from the one advanced in its opposition to the petition for certiorari and on which it had relied in the state courts. The suggestion is that by virtue of its display of the items at issue to the general public in areas of its store open to them, petitioner had no legitimate expectation of privacy against governmental intrusion, see Rakas v. Illinois, 439 U.S. 128 (1978), and that accordingly no warrant was needed. *But there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees. See* Lewis v. United States, 385 U.S. 206 (1966). *The Town Justice viewed the films, not as a customer, but without the payment a member of the public would be required to make. Similarly, in examining the books and in the manner of viewing the containers in which the films were packaged for sale, he was not seeing them as a customer would ordinarily see them.*

Id. at 328-29 (emphasis added).

Of course, to have held otherwise in *Lo-Ji Sales* would have sanctioned wholesale, unrestrained searches of retail establishments in general and of those purveying classic First Amendment materials (books, videos) in particular.

poses to the public"[16] and "entitled to assume the words he utters into the mouthpiece will not be broadcast to the world"[17]—blurs these distinctions. Yet, if the reader will suspend judgment for the moment, and accept (like an offer of proof regarding evidence to be presented later) that there is an analytically supportable distinction of constitutional significance between police and private citizen intrusions into our lives, we will return to the subject later in this essay and expand in detail upon the basis for this position.

The explanation of the second constraint, "in keeping with some basic vision of America," will not be postponed. At first this constraint might strike the reader as little different from exhorting the Court to do the right thing. After all, this is America. The Court is the Supreme Court of America. How else would they decide? Are they to play God Bless America and the Star Spangled Banner whenever they decide a Fourth Amendment case? Since the phrase is intended to have real meaning and bite, therefore, it is important to explain its source and content.

The source of this contextualizing phrase is underlain by a set of assumptions. The Constitution is far more than the rules for conducting the day-to-day business of the nation. That it is more than a contract or compact or corporate papers of a massive bureaucracy is encoded in Chief Justice John Marshall's phrase that "it is a constitution we are expounding."[18] Taken as a whole, the Constitution has a metaphorical quality.[19] It represents a vision of a country for which "America" is another metaphor. Think about how we talk about The Constitution. To be sure, we discuss the First or Fourteenth Amendments, or Separation of Powers, Checks and Balances, and the like. But we carry a constant idea of the United States Constitution that transcends these parts, a constant idea the very existence of which in a sense defines who we are. We live under the Constitution and, in turn, distinguish ourselves from others as being the kind of people who live under that kind of Constitution. This vision for which the Constitution is a metaphor and by which it is in turn interpretively guided is obviously multi-dimensional, covering various aspects of our lives. Some

16. Katz v. United States, 389 U.S. 347, 351 (1967).

17. *Id.* at 352.

18. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 407 (1819).

19. It is hardly extraordinary at this date to recognize the central role that metaphor plays in our general reasoning processes. *See generally* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980); ANDREW ORTONY, METAPHORS AND THOUGHT (1979); and in the particular world of legal reasoning, *see* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988). Metaphor is even a central rhetorical device of the mathematics-spewing economist. *See* DONALD M. MCCLOSKY, IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE 10-23 (1990).

dimensions of this vision will deal with the relation of the police to the individual so as to be relevant to our concerns here.

In search of the content of this portion of the American vision, the inquiry is aided by converting the focus from what the vision is to "some basic vision of [what is *not*] America."[20] In other words, I know it when I don't see it. At this point the reader might properly point out that "some basic vision of America [or of what is *not* America]" suffers from its own contextual difficulties (Whose vision? At what point in time?), and that there is no obvious, across-the-board consensus on what "America" is, or even is not. How then can "America" provide a useful guide? You will have your vision, I will have mine, and quickly we will arrive at first principles, then bedrock, where further analysis and argumentation will cease. There will be nowhere further to take the debate; the parties will either concur or walk their separate paths. Yet, it is this very bedrock that we should be mutually exploring. We need to make explicit our varying visions, bring forth our images, and discuss them. Far from ending this dialogue, this will afford a beginning. As Americans, our visions likely have far more in common than not. This is particularly so, I believe, when we talk about the relationship of the average citizen to the police. Also, even though there will doubtless be cases where it will be very difficult to find principled, rational bases to choose among descriptions, even in these difficult cases we will be talking about the right thing.[21] For there exists no technical

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20. Actually, Professor Amsterdam considers a somewhat similar concept when discussing *Katz*:

> The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society. That, in outright terms, is the judgment lurking underneath the Supreme Court's decision in *Katz*, and it seems to me the judgment that the Fourth Amendment inexorably requires the Court to make.

Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974). While at least one distinguished commentator believes this accurately captures the essence of *Katz*, Wayne R. LaFave, *The Fourth Amendment Today: A Bicentennial Appraisal*, 32 VILL. L. REV. 1061, 1081 (1987), Professor Amsterdam himself went on to reject the concept as a standard for contextualizing *Katz* because he believed that such a construct was unworkable in practice. Amsterdam, *supra*, at 403-04. For reasons I will offer later, I do not share Professor Amsterdam's concerns. *See infra* text accompanying notes 28-30. Interestingly, a number of cases cited by the dissent in *Bostick*, the bus boarding case, relied on some version of "America" as the rhetorical linchpin in their argument. Florida v. Bostick, 111 S. Ct. 2382, 2390 (1991) (Marshall, J., dissenting).

21. "And talking about the right issues, in our circumstances, is an important contribution." Christopher Wolfe, *Grand Theories and Ambiguous Republican Critique: Tushnet on Constitutional Law*, 15 LAW & SOC. INQUIRY 831, 875-76 (1990). *See also* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 140 (1987); McAninch, *supra* note 9, at 464.

rule or standard for deciding Fourth Amendment issues which are not ultimately tied to some vision of the community. So let us dig through the bedrock and assay whether the film description of the relation of the police to the citizenry in our propaganda film is *not* America.

This film cannot be America. It cannot be America because we fought a bloody world war to make the world free from a nation like that. It cannot be America because we're just in the process of coming out of a Cold War in which all our national energies went to halting the expansion of a government that we envisioned as the embodiment of the state in that film. At this point, however, one can imagine a competing vision of the relationship of the police to the individual: America is the place where the good-guy cops break the rules to get the bad-guy robbers. The good guys succeed in spite of pin-headed bureaucrats and judges who throw hypertechnical rules in their way. That is good because what America is really about is the good guys beating the bad guys. Certainly this is a film playing on screens across our land. Yet, without directly confronting the legitimacy of its vision, one can respond that here we are not talking about the bad guys. It is good citizens who sit on the buses that are being boarded and good citizens who sit in the backyards over which the helicopters fly. It is all of us. Those offering this competing vision surely would not cast us as bad guys in their *Dirty Harry*[22] movies, and it is hard to imagine that they would label the police in our propaganda film as the good guys.

It could of course be that like the famous "Pogo" cartoon of the Sixties, "We have met the enemy and they are us."[23] I do not believe that, however. We have just gotten locked into our own legal categories and analyses, and have followed down their path, as attorneys tend to do, without ever standing back and recalling why we had the categories in the first place. We do have significant shared values, and one of which we can all be confident is that America—in its ideal vision, though not necessarily its reality for all residents—is *not* a "police state."

Looking at the Constitution itself only reinforces this view of what is not and cannot (in the sense of vision) be America. One may confess to not knowing what the Framers or those former colonists who ratified the Constitution thought about police striding through buses, placing beepers on automobiles, flying helicopters with high-powered surveillance equipment, or reviewing computer records of our bank deposits. And one may acknowledge that the word "America" does not appear in any provision, nor does "metaphor." Nonetheless, when looking at the construction of the overall document, when looking at its structure by contemplating the various parts of the document and their relation to

22. *See, e.g.*, DIRTY HARRY (Malpaso Productions 1971).
23. Walt Kelly, Creator of "Pogo" comic strip.

one another,[24] one can gain a great deal of insight. This is a document with a prevailing bias against letting any governmental power, let alone the police, control our lives.[25] Look again at the Constitution yourself. Start with the original Constitution. It is filled to bursting with checks and counterchecks on every conceivable exercise of power by federal and state government which, in turn, drastically impedes the facility of government to act upon us. Now look at the amendments. Focus on the Bill of Rights as a whole, going beyond particular language of particular provisions, and you will confront a set of ideas which collectively transcend a mere mistrust of government and make an actively anti-government statement:

> Mr. Justice Jackson put it well when he described the Bill of Rights as "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself." The Bill of Rights in general and the Fourth Amendment in particular are profoundly anti-government documents. They deny to government—worse yet, to democratic government—desired means, efficient means, and means that must inevitably appear from time to time throughout the course of centuries to be absolutely necessary means, for government to obtain legitimate and laudable objectives.[26]

In short, we are not a society to give any instrumentality of the executive, let alone the police, free rein.

To this point, however, we have not yet talked about the ramifications of my suggested contextualization of *Katz* for the police officer on the streets. Certainly the role of Fourth Amendment jurisprudence is to guide as well as to censure. What possible guidance then can a construct like "some basic vision of America" have for an officer who hears a noise down a garbage strewn, darkened alley, sees a doorway slightly ajar, and must now decide whether he or she can peek through the crack (assuming such behavior is advisable in a practical sense)? Initially, it is hard to conceive that "reasonable expectation of privacy"

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24. For a full articulation of a structural approach to constitutional interpretation, see CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

25. This no doubt also reflects the vision of today's conservatives when considering the economic sphere. In this regard, increased regulation by the state and federal government (the latter via expansion of federal power under the commerce, taxing and spending powers) no doubt deeply intrudes into the lives of individuals in their commercial realms. But health and safety regulations under a general "police power" (or a commerce clause rubric) is different from "the power of the police." Even extreme government intrusion into our economic lives is not the same as a police state. Police are different, as will be discussed in detail later, because they embody state sponsored and legitimated use of violence. *Cf.* Rubenfeld, *supra* note 3, at 806 (explaining why minimum wage or maximum rent laws do not harken the threat of totalitarianism).

26. Amsterdam, *supra* note 20, at 353 (footnotes omitted).

was ever any aid. At best, subsequent court "factorization" (i.e., analyzing the concept according to a list of factors) of the *Katz* standard may have provided raw material for on-the-job rules of thumb.[27] Thus a line of cases where the courts apply *Katz* in terms of "factors" such as, e.g., the specific steps the suspect took to protect his privacy (fences, sign) and who else had free access to this zone (children, meter readers) might be transposed to a rule of thumb on the streets: If the suspect has a high fence and has posted "No Trespassing" signs, don't scale the fence without a warrant; climb a telephone pole and spy with binoculars. In other words, police do not find guidance from a "general standard" (as contrasted with bright-line rules that tell police "you can always" or "you can never") such as *Katz*. Instead, courts' factual applications of the general standard, rather than the standard itself, provide the guidance.[28] Thus, the proposed "basic vision of America" gloss on *Katz* would generate a similar set of factual results which in turn would be converted into operational rules of thumb on the streets.[29] Further, most of the situations that comprise the focus of this essay are not in the nature of fast-moving, on the scene decisions like our officer in the alley. They consist of categories of planned programs of governmental intrusions: use of pen registers, searching bank records, boarding buses, helicopter surveillance flights, etc. Once police get the "message" as to the types of activities that raise Fourth Amendment concerns, they should have little problem in recognizing analogous categories of intrusions that likewise invoke the Constitution. At worst, to the extent they have doubts, the police can first go to the courts. In fact, that is the most this essay seeks. Police may employ the full range of investigative techniques. They simply may not do so accountable to no one but themselves.

With the contextualization of *Katz* that has been offered, the rhetoric of that opinion now has something to bring to our propaganda movie, as intuition tells it should. Why, after all, should one have to endure police routinely invading their private world while sitting on a bus or in their backyards? Starting with the observation that the officers are surely interfering with your privacy, you would assess whether or not you should reasonably expect such privacy by asking: In a basic vision of what we mean by "America," do we have police routinely going through our garbage, flying over our backyards, and boarding planes and buses asking for our "papers"? As to this inquiry, it would seem that one could be justifiedly confident that the answer would have

27. *Cf., e.g.*, James A. Bush & Rece Bly, *Expectation of Privacy Analysis and Warrantless Trash Reconnaissance After* Katz v. United States, 23 ARIZ. L. REV. 283, 287-88 (1981).

28. Whether even these rules of thumb actually guide police on the streets or merely serve as after the fact scripts to justify their actual conduct in court is an open question.

29. *Cf. generally* Slobogin, *supra* note 9, at 71-74.

been in the negative. Thus, proper contextualization would make all the difference; however, contextualization of the *Katz* standard was not the only avenue open to the Warren Court and not necessarily even the best. This leads to the second of *Katz*' failures, the failure to clearly articulate the Court's broader vision.

B. *The Failure to Seize the Opportunity to Articulate a Broader Conception of the Fourth Amendment*

Katz was plainly attempting to put forth a broad conception of the Fourth Amendment. As Professor Amsterdam noted in his classic article, *Perspectives on the Fourth Amendment*:[30]

> *Katz*, in other words, returned to the grand conception of *Boyd v. United States*, a case that Mr. Justice Brandeis said would 'be remembered as long as civil liberty lives in the United States' but which the Supreme Court had largely forgotten in the *Olmstead* era. *Katz* held, as *Boyd* had, that whatever 'is a material ingredient, and effects the sole object and purpose of a search and seizure' *is* a search and seizure in the only sense that the Constitution demands.[31]

All that being said, *Katz* failed completely in expanding upon or even clearly articulating this broad conception beneath the surface. As a result, that vital aspect of the opinion was all but lost over time as *Katz* was sifted over and over again through the legal process, and became synonymous with the rather more narrow and readily manipulated conception of reasonably expected privacy we've spent so much of this essay discussing. Yet it is certain that the Warren Court had not intended to limit *Katz* to "privacy." In fact, right at the beginning of the opinion we find, "[t]hat Amendment protects individual privacy against certain kinds of judicial intrusion, but its protections go further, and often have nothing to do with privacy at all."[32] True, in footnote 4 noted after this quote the Court cites instances of public "seizures" of persons and goods.[33] It is therefore possible to contend that the phrase "and often have nothing to do with privacy at all" is limited to this one context. Following this line of reasoning, "seizures" would not involve privacy, "searches" would. But that would be a rather myopic view of *Katz*. Aside from the fact that there is no reason to believe the examples in footnote 4 are exclusive, that footnote has nothing to do with the previous phrase, "but its protections go further." Perhaps most significant, when discussing in footnote 9 the Court's divergence in *Katz* from its previous reliance on a "protected areas" analysis, the Court states, "but we have never suggested that this concept ['protected areas'] can serve

30. Amsterdam, *supra* note 20.

31. *Id.* at 384 (footnotes omitted) (citing Boyd v. United States, 116 U.S. 616, 622 (1886)).

32. Katz v. United States, 389 U.S. 347, 350 (1967).

33. *Id.* at 350 n.4.

as a talismanic solution to every Fourth Amendment problem."[34] The clear implication is not that "protected areas" is now discarded as a rhetorical tool, but that "privacy" has been added to the rhetorical arsenal as a metaphor better suited for the particular mode of government intrusion before the Court. Harking again to Professor Amsterdam:

> Finally, it is plainly wrong to capsulate *Katz* into a comprehensive definition of fourth amendment coverage in terms of "privacy." *Katz* holds that the fourth amendment protects certain privacy interests, but not that those interests are the only interests which the fourth amendment protects. To the contrary, the *Katz* opinion says in so many words that "its protections go further, and often have nothing to do with privacy at all." In short, the common formula for *Katz* fails to capture *Katz* at any point because the *Katz* decision was written to resist captivation in any formula. An opinion which sets aside prior formulas with the observation that they cannot "serve as a talismanic solution to every Fourth Amendment problem" should hardly be read as intended to replace them with a new talisman.[35]

Professor Amsterdam's view deserves respect, yet one might well ask for more from *Katz*. One might justifiably ask for a deeper exploration of this broader vision; one might want to know how these Fourth Amendment "protections go further." If, as Professor Amsterdam contends, "the *Katz* decision was written to resist captivation in any formula," however, one might be willing to settle for a broader inventory of the Warren Court's rhetorical arsenal and accept that there will be no meta-metaphor. In fact, such an inventory would have gone a long way towards revealing the broader vision beneath *Katz*. Further, there is reason to be confident that there must be more in this inventory than we have been given in *Katz*. After all, the construct of "expectations of privacy" does not seem to capture the full sense of the Fourth Amendment, *even* as to Mr. Katz's phone call. More was at stake than his privacy. Ironically, in a quest for this increased rhetorical inventory to express this something "more," this missing dimension of *Katz*' broader conception, one finds it in, of all places, a rhetorical construct appearing throughout *Terry*—the "right to personal security."[36]

In fact, *Terry* refers to this construct, which also appears in *Boyd*,[37] in ways very similar to, and almost interchangeable with, the *Katz* standard. Near the beginning of the opinion, the Court in *Terry* cites *Katz* as

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34. *Id.* at 351 n.9.

35. Amsterdam, *supra* note 20, at 385 (footnotes omitted). Other commentators agree that *Katz* did not limit the scope of the Amendment to "privacy"; *see, e.g.*, Richard L. Aynes, Note, Katz *and the Fourth Amendment: A Reasonable Expectation of Privacy, Or a Man's Home Is His Fort*, 23 CLEV. ST. L. REV. 63, 80 (1974).

36. Terry v. Ohio, 392 U.S. 1, 8-9, 17 nn.13 & 15, 19 (1968).

37. Boyd v. United States, 116 U.S. 619, 630 (1886) ("the invasion of his indefeasible right of personal security").

the Court equates the Fourth Amendment with protecting citizens against "unreasonable governmental intrusion" whenever they "harbor a 'reasonable expectation of privacy.' "[38] That is the last mention of *Katz*. From then on, it is our "right to personal security" that is being protected (as were our "reasonable expectations of privacy" in the *Katz* formulation) from "governmental invasion"[39] and "intrusions by agents of the public."[40] In fact, the Court commits itself to assessing the "quality of the intrusion" upon "*reasonable expectations* of personal security."[41] Sound familiar? As we will see, the Court has likely chosen the wrong metaphor (i.e., "expectation of privacy") for posterity because, ironically, the *Terry* formulation of "right to personal security" better captures the visions of *Katz* than does *Katz* (or at least the two metaphors should be used in conjunction).[42]

The "right to personal security" adds two dimensions to our Fourth Amendment rhetorical arsenal lacking in "reasonable expectation of privacy." First, it talks in terms of a "right." "Rights" are far more resilient constructs than "expectations." They conjure the image of substantiality. Rights are solid, permanent-type things which carry great importance. Those who intrude on our rights are in the wrong. Rights are something we are proud to stand up for, so our rights do not pass gently into the night. They are lost only if waived or forfeited, and never intruded upon without the best of reasons. "Expectations" are of more gauzy, ephemeral stuff. We are accustomed to expectations being unrealistic, and it is not uncommon to have our expectations disappointed. In short, it is far easier as a rhetorical matter to find our expectations unrealistic or unreasonable than to accept that our rights may be denied us. Professor Amsterdam in fact recognized the importance of such rights-oriented rhetoric when he wrote about *Katz*:

> The key to the [Fourth] Amendment is the question of what interests it protects. Mr. Katz's conversation in a pay telephone booth was protected because he "justifiably relied" upon its being protected—relied, not in the sense of an expectation, but in the sense of a claim of right.[43]

The problem is that the *Katz* metaphor, in its accepted form that focuses on "expectations," was incapable to carry forth any sense of a "right" as opposed to a hope.

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38. *Terry*, 392 U.S. at 9 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).
39. *Id.* at 19.
40. *Id.* at 19 n.13.
41. *Id.* at 19 n.15.
42. In fact, "security" and "privacy" where linked in the same construct by the case that established the exclusionary rule in federal court: "The security of one's *privacy* against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." Wolff v. Colorado, 338 U.S. 25, 27 (1949) (emphasis added).
43. Amsterdam, *supra* note 20, at 385. *Cf.* Note, *From Private Places to Personal Privacy: A Post-*Katz *Study of 4th Amendment Protection*, 42 N.Y.U. L. REV. 968, 981 (1968) (finding positive right of privacy in *Katz*).

Second, "personal security" adds to the construct of "privacy" the crucial notion of "safety." This is a notion that is completely absent from *Katz*, and the one which comprises the additional dimension to the police intrusion, the "more" that was at stake than just Mr. Katz's privacy. This brings us to the discussion promised the reader long ago—the government versus private person distinction; or, why having police rifle through my garbage is very different from having a child remove a broken toy from my trash. Let's start with what seems an undeniable fact: Seeing a police officer snooping around our house or workplace makes us feel different from the "same" (in quotes because in fact it cannot be the same) snooping by a neighbor. Why? It is true that, generally, the government will have far greater capacity and resources for gathering information about us than the neighborhood snoop (although the local grapevine can on occasion outgather wiretaps and informants). But this does not account for the difference. The key has been forestated in the concept of "safety," a concept that is embedded in the construct "personal security." A brief illustration will make this clear. If a neighbor is asking questions around the neighborhood about you and taking notes of your comings, goings, and guests, you will likely feel annoyed and indignant: "How can I get any privacy around here?" "How is it any of his business?" "What a nerve!" "I should go right over there and confront him!"

If, however, you became aware that the "same" thing is being done by the police, you may be indignant, but it is extremely likely you will also feel nervous, anxious, and scared: "What do they want?" "I haven't done anything wrong, have I?" "Does anyone know what's going on, what they want to know about me?"

What is important for our purposes is not just the obvious point that the two situations are dramatically different on a psychological-human level, but that the reason for the difference has little to do with the invasion of your "privacy" in the sense that the police know information about you that you did not wish to disclose. In other words, it is not that in Katz's terms, the information has been "broadcast to the world." Rather, it is *what* the police, in contrast to the neighbor, can do with that information which accounts for the real difference. The police can use the information to justify use of force—make us talk to them, force us to the police station, make us let them into our homes, closets, drawers. Because, ultimately, that's what distinguishes police from the rest of us; they can use force, even deadly force.[44] It does not matter that you are not doing anything wrong. You have absolutely no control over how the police will select, interpret, and use what they see. Why

44. The literal threat of physical violence that lies beneath the surface of formal law has been generally recognized. *See, e.g.*, Anthony D'Amato, *Rethinking Legal Education*, 74 MARQ. L. REV. 1, 29 (1990); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

else are most of us so uncomfortable when passing through customs even though we have nothing to hide?—Or have we? Have we forgotten to declare something? Are we carrying an item from a previous trip? Do we have something made in the country we just visited that we bought last year in a store at home? Doubts set in and we begin to feel unsafe as we anticipate the total power the customs official could exercise over our lives. Again, we think we've done nothing wrong, but who knows?

Several years ago, before the Berlin wall came down, I traveled with my parents through Eastern Europe. As we crossed the Czechoslovakian/Hungarian border our train stopped and a series of dour looking men in increasingly drabber uniforms came into our compartment to check and stamp our papers. All looked like the fascist border guards from every spy movie set in Eastern Europe you've ever seen. It was very scary. We were doing nothing wrong. But we knew that they had all the power and could do whatever they wanted to us. Now, in America, we don't think that police can do whatever they want. There are courts, attorneys, and the press. Yet, when all is said and done, at least in the short run, at the immediate moment of confrontation, is it so different here? For that moment, there is nothing you can do. All your power has been resituated in the other and, as between you and the other, their power is absolute and unchecked. Maybe this person will follow the law, but you can never know that. And if they don't, there is nothing you can do. The formal system of checks and balances will come too late as they did recently for a man stopped for a traffic offense in Los Angeles and for three civil rights workers decades past.[45]

Perhaps that is why the "grand conception" in *United States v. Boyd*[46] to which Professor Amsterdam refers was based upon a close conjunction of both the Fourth *and* Fifth Amendments.[47] While the current Court has eroded the Fifth Amendment underpinning of *Boyd* which led to suppression of a subpoena in that case,[48] the *Boyd* court's reference

45. *See, e.g.*, David K. Shipler, *Khaki, Blue, and Blacks*, N.Y. TIMES, May 26, 1992, at 17; JUAN WILLIAMS, EYES ON THE PRIZE 234-35 (1987).

46. 116 U.S. 616 (1886).

47. *Id.* at 633. In fact, this conjunction of the Fourth and Fifth Amendments played a role in Mapp v. Ohio, 367 U.S. 643, 646-47 (1961); *see also id.* at 662 (Black, J., concurring).

48. *See* Fisher v. United States, 425 U.S. 391 (1976) (holding that subpoena for citizen's papers given his attorney not privileged under Fifth Amendment because government did not compel citizen to create papers in first place); Andresen v. Maryland, 427 U.S. 463 (1976) (holding that Fifth Amendment does not prevent seizure of private papers under a search warrant). In finding that *Boyd*'s Fifth Amendment foundations had been eroded, the *Fisher* court relied heavily on yet another Warren Court case—Schmerber v. California, 384 U.S. 757 (1966). *Fisher*, 425 U.S. at 408, 409. In *Schmerber*, offhandedly noting that "the [Fifth Amendment] privilege has never been given the full scope which the values it helps protect suggest," *id.* at 762, the majority held, regarding a forcible extraction of a blood

to the Fifth Amendment was plainly a recognition that behind the government rummaging lay a threat of incrimination and the accompanying legitimated use of governmental violence. The recent movie, *Boyz 'N the Hood*[49] carries a common understanding with *Boyd*. No one who has seen that movie is likely to forget the ever-present, but unseen, police helicopters that hovered over the neighborhood. The ominousness of those helicopters had little to do with privacy—the intrusion into privacy was a source of annoyance and indignation, just like in the case of the nosey neighbor, but in no way accounted for the sense of ominousness and what might best be described as akin to evil. The latter sense came instead from the constant reminder of government power and the threat that the power could be brought to bear as violent force at any moment. The residents of the "hood" (i.e., neighborhood) had their right to personal security, their sense of safety, as violated by the police as it was by the gangs.

Going back to our propaganda film, possessed with a rhetorical arsenal that employed the "right to personal security" (with or without the *Katz* standard), the Warren Court could have begun a conversation in which it would have been far more difficult to justify much, if not all, in the film. Here is where in *Katz's* underlying conception the Fourth Amendment's "protections [could] go further [than privacy],"[50] i.e., by avoiding offense to our justified right to personal security. In the words of the *Terry* majority, "[i]n our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of the exigencies of the case, a central element in the analysis of reasonableness."[51]

The reader might wonder at this point whether this mode of analysis would place under the Fourth Amendment scrutiny all information gathering by the police which is directed against an individual. After all, talking to the neighbors is as likely to make an individual feel "unsafe" and vulnerable to the police as going through his bank records or garbage. And if the individual does not even know he is a target of investigation, can he still have his sense of personal security violated? To answer, it should first be reiterated that this analysis is merely unearthing another rhetorical tool to aid in application of the Fourth Amendment, one that is not anchored to privacy; it is not proposing a

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sample by police, "[s]ince the blood test evidence, *although an incriminating product of compulsion*, was neither petitioner's testimony nor evidence relating to some communicative act or writing by petitioner, it was not inadmissible on privilege grounds." *Id.* at 765 (emphasis added). This "testimonial" (privileged) versus "nontestimonial" (not privileged) rhetoric was an important tool in eroding the broad, protective sweep of *Boyd*.

49. BOYZ 'N THE HOOD (Both, Inc. & Columbia Pictures 1991).

50. Katz v. United States, 389 U.S. 347, 350 (1967).

51. Terry v. Ohio, 392 U.S. 1, 17-18 n.15 (1968).

single metatheory. This tool in turn requires a context as did the *Katz* construct. As should be no surprise, that context is very similar to the one proposed for *Katz*—the right to personal security "as an American." In other words, is this the kind of police activity that *as Americans* (not this particular individual) makes our lives feel vulnerable to the police? To answer such a question will obviously often be a function of one's judgment of the character, intensity, and such of the particular police procedure. Helicopters and beepers are likely to invoke constitutional concerns under the metaphor "personal security" because, by their very nature, they threaten to place police information gathering all about us in a way that is inconsistent with the idea of "America." Note that this same result would likely follow from the previous contextualization of *Katz*. This *Terry*-derived metaphor merely has the advantage that in adding the two nuances of "rights" and "safety," it rhetorically reinforces that we are talking about a broader conception of the Fourth Amendment than we have been left with by the legacy of *Katz*.

As to talking to the neighbors, it would depend. It might make us nervous as individuals if the police are checking us out with the neighbors, but this activity would not appear to threaten the sense of security we feel as Americans. That is, we may not like it, but this practice does not change the existing relationship between us and the police in this society. It is the kind of thing police do and have always done. It might be very different, however, if the police embarked on a systematic program of checking out everyone. Similarly, while it may be true that one would stay on the bus with or without the police presence, the citizen-commuter's sense of "personal security" is certainly diminished when he or she knows that they might be suddenly confronted with armed police at any leg of their journey.[52]

III. The Failings of *Terry*: Either/Or Bifurcation of Street Encounters and the Fourth Amendment

Yet, there is obviously a paradox when considering "safety" in conjunction with the activities of the police. We have just discussed a potentially valuable concept in *Terry* that was laid by the wayside. In pursuing the paradox of safety, we touch on an equally great failing of the Warren Court in *Terry*, a legacy where a finding of "seizure" (or "search") is predicate to invoking the Fourth Amendment.

The "safety" paradox is clear to us all. While the presence of police in a free society can make us feel unsafe, we also depend upon them for our safety. In the Sixties, this notion was epitomized by the police public relations conceived billboards, "Next time you're in trouble, try calling a hippie." The irony is that, though to this point this essay has

52. Florida v. Bostick, 111 S. Ct. 294 (1987).

made much of the constriction we tend to feel on our sense of personal security when police start snooping around, in fact, snooping around is the very thing we want our police to do. We want them to check out windows that look pried and people who look ill. We want them to go up to citizens, and ask questions: "Are you lost?" "Are you OK?" "Did you see the red car driving away from here?" "Do you need help with that tire?" And if I'm being mugged by three smiling thugs, I want a passing officer to rely upon his or her expert "hunch," and come over with hands on gun asking, "What's going on here?" I admit it.

Still again, and here's the paradox at work, it is unsettling that without any cause, the police can come up to any of us and ask for identification. It's just too much like being asked for our "papers," especially in a society that so values autonomy from government[53] and to just be left alone. And realistically, putting aside for the moment how the courts may talk about our voluntary choices in these situations, it is hard to accept that we are really free to go when such a "request" is made.[54] Even if in fact we are, who among us would take the risk of walking away, take the risk of being confronted with the legitimated use of violence with which we empower our police? A law enforcement officer is not like some street leafleteer who, if you refuse her offering, will go on to the next person. How do you really walk away from the police? "FBI, we'd like to talk to you." "No thank you, I'm really not interested. I have my wife to talk to."

The Warren Court can be blamed for failing to decide *Terry* so as to better protect the citizen within this paradox of safety. That is not to say that they merit blame for ducking the tough issue of defining the constitutional parameter of "street encounters." That they did so is somewhat understandable in light of the myriad forms in which such encounters could arise. Accordingly, there is no quibble that *Terry* only decided the constitutionality of a "frisk" and a "stop" sufficient to conduct the frisk.[55] (*Terry* did not even consider the legitimacy of a forcible stop for investigation or questioning.)[56] The complaint rather is that the rhetoric of *Terry* is so unfocused, so disjointed, that it left an either/or Fourth Amendment universe that *Terry* never intended. There were "searches" (full-blown and frisks) and there were "seizures" (arrests and stops), and there were "the rest." If it was a search (*Katz*) or seizure (*Terry*), police were constrained by the Fourth Amendment. If it fell under "the rest," the police were free to act as they wished. Again,

53. *See* John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 301 (1980).

54. For another author who does not believe that walking away is a realistic option, see Tracey Maclin, *The Decline of the Right to Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1300-01 (1990).

55. *Terry*, 392 U.S. at 16, 19 n.16.

56. *Id.* at 19 n.16.

Terry never intended this result, but one must pick through random passages from text and footnotes to find the contrary evidence.

The majority in *Bostick*, the bus boarding case, supports the crucial first step in its analysis—that merely approaching and questioning the passengers does not implicate the Fourth Amendment—by citing from footnote 16 in *Terry*: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons."[57] This the *Bostick* majority uses to conclude that if such "personal intercourse" does not constitute a seizure, the Constitution does not apply. But that is not logically supportable from this quote. In fact, had *Terry* taken the trouble to get its rhetoric together, the *Bostick* majority's leap in logic would also plainly be at odds with the *Terry* opinion itself; for, while not all street encounters between police and citizens fall under the Fourth Amendment, *Terry* never meant to draw the either/or line with its construct of "seizure." As reflected in *Katz* the year before, this Court had a broad vision of the Amendment. Searches and seizures obviously reflected certain types of concrete police practices, but "search and seizure" was also a metaphor to the Court for the range of police activities that could threaten our personal security.

Early in the opinion, *Terry* recognizes that there are police-citizen street encounters violative of the Fourth Amendment of which the Court is unable to take judicial cognizance, either because these encounters cannot be coherently defined so as to distinguish them from otherwise legitimate practices or because these constitutional violations would not be responsive to the exclusionary rule as they are not motivated by evidence gathering. The "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain"[58] was one example given of this latter category.

Typical of the rhetorical confusion in *Terry*, the Court then almost immediately backs off from this position that such violations of the Constitution will not be remedied:

> Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. . . . However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.[59]

57. Florida v. Bostick, 111 S. Ct. 2382, 2386 (1991) (citing Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).

58. *Terry*, 392 U.S. at 14.

59. *Id.* at 15, 17 n.14.

Here the Court is considering more than some form of "seizure" or "search" as circumscribing the police activity falling under the Fourth Amendment. This again is a broader conception of the Amendment, as implied in *Katz*. Harassing, being overbearing, or arousing community resentment are characteristics totally unrelated to anything we would think of as a seizure. Rather, they represent what one may call aggressive police intrusions. To be sure, seizures by police are covered by the Amendment, but according to *Terry*'s broader, but submerged vision, so are other police encounters with citizens.

There is a further ringing irony in the fact that *Terry* should provide the *Bostick* majority with a springboard for their either/or, "search"/"the rest" view of the Amendment. *Terry* specifically rejected distinctions between stops and arrests because it "suggest[ed] a rigid all-or-nothing model" to control police-citizen encounters.[60] *Terry* also tried to devalue the significance of the terms "search" and "seizure" as describing a clear set of police behaviors that exhaust the subject matter of the Amendment: " 'Search' and 'seizure' are not talismans."[61]

Because the *Terry* majority so fragments this language, only Justice White's concurrence, a perfect sound bite ("There is nothing in the Constitution which prevents a police officer from addressing questions to anyone on the streets.")[62] survives to describe the relationship between the Constitution and "the rest" (i.e., non-seizure) of citizens-police street encounters. It is therefore not surprising that by the time we get to *Bostick*, the routine, systematic questioning by police of all passengers on a bus is seen no differently than the officer who approaches a single individual on the street to ask whether he is lost. Both fall outside the scope of the Fourth Amendment. Yet, there is a very great, and constitutionally significant, distinction between an officer approaching an individual for questioning, even though based on no more than a "hunch," and the widespread, systematic questioning without any basis for individual focus (not even a hunch), such as in *Bostick*.[63]

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60. *Id.* at 17.

61. *Id.* at 19.

62. *Id.* at 34 (White, J., concurring). Justice White's view in turn is likely based on the so-called "right [by police] to inquire." *See* Maclin, *supra* note 54, at 1266-68.

63. The post-Warren Courts have also sanctioned stops of citizens without any individualized suspicion using a balancing test under so-called "special needs" situations. *See supra* note 7. *E.g.*, fixed checkpoints, United States v. Martinez-Fuerte, 428 U.S. 543 (1976); sobriety checkpoints, Michigan State Police v. Sitz, 496 U.S. 444, (1990). Without burdening the reader with my general opinion of these cases or my specific opinion of the emerging rationale that seizing innocent citizens is not so bad if police exercise no discretion in the matter because they do it to everyone, I will just point out the obvious: These cases did deal with very particular "special needs," the perceived harms of drunken driving and illegal immigration. Of course, we can play our game again and claim a "special need" to

This essay does not propose keeping police from investigating suspicious individuals and situations which do not "look right." Though this is an area where potential abuse is great, it is also the one area where police can best use their acquired expertise. Experts recognize patterns, and police "hunches" likely correspond to a perception of a pattern they cannot fully articulate. Police should thus be permitted to approach and direct questions to an individual so long as they had a reason, and their hunches (which would not justify a Terry stop) would be counted as reasons. Since police could always meet this standard of having at least a "hunch" when called to testify at a suppression hearing in court, and are not likely to take the time to approach someone without one anyway, the law should be left as it is, and these encounters therefore not subjected to court supervision (unless, for instance, patterns of harassment are revealed).

Systematic programs of police-citizen encounters like *Bostick* merit different treatment. They really change our lives, make us feel always vulnerable to the police when we go out into the world. Now, maybe it is because I am white, middle-class (and long since being a teenager) that I don't worry when I leave home about the possibility that an officer will approach and question me on a hunch. Maybe I see that as only happening to "them." I don't know. I do know that systematic intrusions like *Bostick* place the cloud of police power over all of us, as did the relentless helicopters in *Boyz 'N the Hood*.[64]

Admittedly, we at times allow, without any individualized suspicion, systematic police intrusions that are arguably as, or even more invasive, than the police conduct on Mr. Bostick's bus, such as roadblocks or airport searches. Roadblocks, however, are narrowly circumscribed by a very limited time frame tied to a specific emergency situation existing within that narrow time frame. Airport searches are ongoing, but are limited to a very restricted area and directly tied to a literally life-and-death danger that could affect the very people being searched on the very aircraft they will board. We attorneys revel in the liquid nature of language and could no doubt convert the bus boarding in *Bostick* into an analogous response to an "emergency" in which those on the bus and their families' very lives are endangered and which is limited to the very limited area, etc. We could do so, but if we did we would have to recognize that we were game playing, making plays on words and then pretending that by our play we could convert make believe to equate with some reality. As a game, it is fun. As a matter of serious decision

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stop drug traffic, but not without casting our rhetorical net so wide as to approach making "stopping crime" a special need and, with it, to all but cast the Fourth Amendment aside.

64. In contrast, the cop on the beat, even if always snooping around, (as might well be consistent with the reemerging concept of community policing), is likely a familiar figure who strikes far less fear than the faceless centurions of the society in our propaganda film.

making, it is dubious. The threat of systematic boarding of buses, trains, and planes by police throughout the country loosens the police into our lives in a way and with a magnitude that isolated, occasional roadblocks and metal detectors at our airports do not even conjure in the wildest of imaginations.[65] Here *Terry* fails us; for, what the disjointed rhetoric of *Terry* only implies, we need articulated with a clear voice—i.e., that aggressive police-citizen street encounters such as in *Bostick*, whether characterized as a "seizure" or not, intrudes on our "personal security" and thus should not be permitted, since it is utterly without some level of articulated suspicion for the Court to review under the Fourth Amendment.

IV. Some Final Thoughts: Removing Much of the Blame

I have now come near the end, and facing the end, perhaps like one contemplating a dying declaration, I feel compelled to be truthful. I have heaped blame on the Warren Court and the world they now leave us. I have said that the Warren Court should have taken control of contextualizing *Katz*, should have articulated the broad conception of the Fourth Amendment underlying *Katz* and *Terry*, and should have made clear in *Terry* that police intrusions not constituting "seizures" could still fall under the Fourth Amendment. But, in fairness, though the Warren Court may have set itself up, it is the subsequent Courts that have taken unfair advantage. But why? Forget labels of radical-conservative and other such knee-jerk responses. Whatever their politics, they are Americans too. Why don't they see the same propaganda film I do? I can imagine only two explanations:

1. The parade of horribles does not scare them because they either trust the police not to abuse the power[66]—i.e., trust in a society of men (in blue) over law—or, they are confident that they can draw the line and take back control at the appropriate time,[67] or at least they are sure that none of this is likely to happen in their neighborhood.

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65. Professor Sundby distinguishes these two situations, applying the traditional probable cause and warrant standard to the former and reasonableness balancing to the latter. *See* Sundby, *supra* note 8, at 418-20.

66. In Daniel M. Harris, *The Supreme Court's Search and Seizure Decisions of the 1982 Term: The Emergence of a New Theory of the Fourth Amendment*, 36 Baylor L. Rev. 41, 71 (1984), the author feels that this trust in police, lacking in the Warren Court, explains much of the subsequent Courts' Fourth Amendment jurisprudence. Professors Whitebread and Heilman see an analogous phenomenon in the current Court which they identify as constitutionally misguided "crime control" philosophy. Charles Whitebread & John Heilman, *The Interpretation of Constitutional Rights Reflections on the Burger Court's Counterrevolution in Criminal Procedure*, 1986 Det. C.L. Rev. 935, 938 (1986).

67. Professor Burkoff characterizes Justice Rehnquist's position in the beeper case as "we'll deal with Orwellian excesses when and if and *after* they occur!" Burkoff, *supra* note 1, at 540 (author's emphasis).

2. They have taken the public relations-created slogans "War on Crime" and "War on Drugs" literally and are interpreting the Fourth Amendment as if we were literally engaging a foreign nation on our own soil.[68]

How is one to respond without dipping into a bag of constitutional platitudes? This is a nation of laws, not men. The nation was born out of a mistrust of powerful government. Constitutional rights are eroded incrementally. The Constitution is most important in times of crisis; it is a document of faith, and is at its most magnificent when that faith is tested.

On the other hand, the fact that one must resort for response to sixth grade civics tells us something. It tells how deeply off-base the current Court is; for these platitudes echo fundamental national "truths," and this Court is totally at odds with those truths.

Near the end of its opinion, the majority in *Bostick* confidentially proclaims that its analysis could not be controverted unless we were prepared to "advocate[] overruling a long, unbroken line of decisions dating back more than 20 years."[69] That is precisely what I am proposing.

68. *See, e.g.*, Doug Bandow, *War on Drugs or War on America*, 3 STAN. L. & POL'Y REV. 242, 250 (1991).

69. Florida v. Bostick, 111 S. Ct. 2382, 2388 (1991).

NOTES

What is Protected by a Program Copyright?

I. INTRODUCTION

Copyright, as the name itself implies, is the right to copy a work.[1] Copyright is a property interest. And, as with most property rights existing in the United States, copyright is not a right which gives the holder absolute control or right to exclusion.[2] The purpose of copyright is to protect the expression of ideas, and to allow the general public the use of those ideas.[3]

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1. The provisions of 17 U.S.C. § 106 govern the exclusive rights in copyrighted works:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical . . . and other . . . works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical . . . or other . . . work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1988).

2. Examples of non-exclusive rights in works protected by copyright are found in 17 U.S.C. § 117:

> Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:
>
> (1) that such new a [sic] copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
>
> (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

17 U.S.C. § 117 (1988).

3. 17 U.S.C. § 102(b) (1988):

> In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Id. Copyright cannot protect an author's idea from being copied or even from in-

This Note highlights the distinction between the expression of an idea and the idea itself in the context of a computer program copyright. This Note will focus upon the changes that have come about in the courts' analyses when dealing with the non-literal elements[4] of a computer program.

Part II will explain basic computer nomenclature for those readers who are unfamiliar with computer programs.[5] Part III traces the authority of Congress and its exercise of authority in the field of copyright.[6] Part IV focuses on the idea/expression dichotomy and its application in leading computer program cases dealing with program structure, screen displays and user interfaces.[7] Part V concludes with a summary of those non-literal elements of a computer program that have been found to be protected expression and suggests an approach to be followed by subsequent programmers seeking to use an idea contained within a previous program.[8]

II. Introduction to Computer Nomenclature

The computer, to many users and nonusers alike, is a mystical box which performs magic. When reduced to its basic components, however, one will find that the computer does not perform magic or even have an independent thought process.[9] What the computer does is perform many tasks at an extremely fast rate.

Today's computers are binary,[10] which means that at their most basic level, computers do not recognize our alphabet or numerical sys-

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dependent development. The proper form of protection for a person's new process or idea is afforded by patent. *See* John P. Sumner, *The Copyright/Patent Interface: Patent Protection for the Structure of Program Code*, 30 Jurimetrics J. 107 (1989) (suggesting that the use of copyright, patent and other methods of intellectual property protection be used conjunctively to afford adequate protection).

4. For examples of non-literal elements protected by a program copyright, see Whelan Assocs. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1234-35 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (sequence, organization and structure of computer program protected by program copyright); Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37 (D. Mass. 1990) (command structure of computer program protected by program copyright); Manufacturers Technologies, Inc. v. Cams, Inc., 706 F. Supp. 984, 993-94 (D. Conn. 1989) (screen display protected by program copyright).

5. *See infra* notes 9-23 and accompanying text.

6. *See infra* notes 24-51 and accompanying text.

7. *See infra* notes 52-192 and accompanying text.

8. *See infra* notes 193-94 and accompanying text.

9. Today's computers do not think in the same way that humans do in that they are limited by their programming. *See* Joseph Weizenbaum, Computer Power and Human Reason: From Judgment to Calculation 202-27 (1976) (examining the field of artificial intelligence).

10. David R. Sullivan et al., Computing Today: Microcomputer Concepts and Applications 421 (1985).

tem.[11] The binary system is the language that computers understand and use to perform their tasks.[12] The binary system has an assigned value for each character that is a series of open and closed switches, expressed as a series of 0s and 1s.[13] Our language and numbers must first be converted to this set of 0s and 1s before the computer can understand them.[14] Therefore, a program must necessarily be translated into this binary code at some point for it to be able to run the computer. The program in its binary form is referred to as object code.[15] Because binary code is cumbersome to work with, programmers do not write their programs in binary code, but rather in a higher level language.[16] An example of a higher level language would be BASIC, which runs on IBM-PC compatible personal computers.[17] Examples of higher level languages include APL, COBOL, EDL, FORTRAN, PASCAL, and others.[18] The programmer chooses a particular higher level language based on several factors, such as which hardware[19] the program will run on and what language has been used in the past.[20] The computer program written in this higher level language is known as the source code.[21]

A program is made up of numerous algorithms which instruct the computer to perform step-by-step functions.[22] Congress has provided in the copyright law that "[a] 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."[23]

III. COPYRIGHT EXISTS AT THE WILL OF CONGRESS

Congress derives its authority to protect or leave unprotected an author's work from the United States Constitution.[24] The framers of

11. THORNE D. HARRIS III, THE LEGAL GUIDE TO COMPUTER SOFTWARE PROTECTION 21-22 (1985); *see* SULLIVAN ET AL., *supra* note 10, at 421.

12. HARRIS, *supra* note 11, at 21-22; SULLIVAN ET AL., *supra* note 10, at 421.

13. HARRIS, *supra* note 11, at 21; SULLIVAN ET AL., *supra* note 10, at 421.

14. *See* HARRIS, *supra* note 11, at 21. For a good example of the binary conversion process and how computers use the binary system, see SULLIVAN ET AL., *supra* note 10, at 422-32.

15. Whelan Assocs. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1230 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

16. *See* HARRIS, *supra* note 11, at 22.

17. *Id.*

18. *Id.* at 20.

19. Hardware refers to the physical computer including the screen and any peripherals. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. 17 U.S.C. § 101 (1988).

24. U.S. CONST. art. I, § 8, cl. 8. This section provides in pertinent part that Congress has the power "[t]o promote the Progress of Science and useful Arts, by

the Constitution recognized the importance of intellectual property and placed the authority to regulate it solely in the federal government.[25] However, it should be noted that the United States Constitution does not grant to authors or inventors the exclusive right to their works, but gives Congress the power to grant such an interest by statute.[26]

Congress first exercised its authority to protect authors by specifically enumerating what types of work were eligible for copyright protection.[27] This cautious approach necessitated that Congress frequently amend the copyright law to include new mediums of expression as they developed.[28] This method of extending protection after a new medium had already been created was analogous to closing the barn door after the cows had escaped. If Congress continued to amend the copyright law reactively, some authors would be left unprotected and the policies of the law would not be fully served.

In 1909, Congress extended copyright protection to "all the writings of an author."[29] Where Congress had previously attempted to create an exclusive list of works that were eligible for copyright, it now listed certain types of works for the purpose of example only.[30] Congress was unwilling to allow this exemplary list to be the only guide for the courts in interpreting the copyright law. Although exemplary, Congress continued to add examples of protected works to the list.[31]

The Copyright Act of 1976 extended copyright protection to "origi-

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securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

25. *Id.*

26. *Id.*

27. Initially, protection was granted to "any map, chart, book or books already printed . . . ." Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831).

28. Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171 (repealed 1831) (Congress added designs, prints, etchings and engravings); Act of Feb. 3, 1831, ch. 16, §§ 1, 14, 4 Stat. 436, 436, 439 (amended 1856) (Congress added "musical composition"); Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139 (amended 1865) (Congress added "dramatic composition"); Act of Mar. 3, 1865, ch. 126, §§ 1, 2, 13 Stat. 540, 540 (repealed 1870) (Congress added "photographs and the negatives thereof"); Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (repealed 1909) (Congress added "statuary" and "models or designs intended to be perfected as works of the fine arts").

29. Act of Mar. 4, 1909, ch. 320, § 4, 35 Stat. 1075, 1076 (repealed 1976).

30. Act of Mar. 4, 1909, ch. 320, § 5, 35 Stat. 1075, 1076-77 (repealed 1976).

> *Provided, nevertheless*, That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act.

Id. at 1077.

31. Act of Aug. 24, 1912, ch. 356, § 5(l)-(m), 37 Stat. 488, 488 (repealed 1976) (Congress added "motion pictures" to its list of examples.); Act of Oct. 15, 1971, Pub. L. No. 92-140, § 1(b), 85 Stat. 391, 391 (repealed 1976) (Congress added sound recordings to its exemplary list).

nal works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[32] Athough the language of the amendment is broad, an exemplary list of protected works of authorship continues to be included in the statute.[33] The present broad language does prevent the problem of not protecting new mediums as they develop. However, the cost of proving eligibility through litigation may be prohibitive for some.

In response to the growth of technology, Congress created a commission to study the adequacy of the copyright laws in 1974.[34] The National Commission on New Technological Uses of Copyrighted Works (CONTU) issued its final report in 1978, which concluded that computer programs are a proper subject for copyright protection.[35] In 1976, prior to the release of the *CONTU Final Report*, Congress expressed its belief that the present copyright law did include the protection of computer programs.[36]

Congress, in response to the *CONTU Final Report*, replaced 17 U.S.C. § 117 in its entirety with a new section 117.[37] Congress also amended 17 U.S.C. § 101 to include verbatim the definition of a "computer program" as proposed by the *CONTU Final Report*.[38] The adoption of the new section 117 and the amendment of section 101 demonstrated clear congressional approval for applying copyright law to computer programs.

The CONTU commissioners could not unanimously agree upon the

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32. 17 U.S.C. § 102(a) (1988). The effect of this amendment was to make the Copyright law proactive in its application to new mediums of expression. *Id.*

33. The present exemplary list of protected works includes:

> (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings.

17 U.S.C. § 102(a)(1)-(7) (1988).

34. Act of Dec. 31, 1974, Pub. L. No. 93-573, § 201(a)-(c), 88 Stat. 1873, 1873-75 (1974).

35. NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT AND RECOMMENDATIONS (1978), *reprinted in* 5 COPYRIGHT, CONGRESS AND TECHNOLOGY: THE PUBLIC RECORD 22 (Nicholas Henry ed., 1980) [hereinafter CONTU FINAL REPORT].

36. H.R. REP. No. 1476, 94th Cong., 2d Sess. 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

37. See *supra* note 2 for the text of the amended 17 U.S.C. § 117 (1988).

38. " '[C]omputer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." Act of Dec. 12, 1980, Pub. L. No. 96-517, 94 Stat. 3015, 3028 (codified at 17 U.S.C. § 101 (1988)).

scope of what a computer program copyright should protect.[39] The commissioners disagreed over how the distinction should be made between the protected expression and the unprotected idea.[40] Commissioner Hersey, in dissent, felt that the mature computer program was not expressive. That is, it did not warrant copyright protection because it was truly a working object.[41] In his view, a program is an idea just as a cam in a drill is an idea—both the program and the cam perform work.[42] The majority opinion in the *CONTU Final Report* attempts to explain this difficult reality by comparing a computer program to a phonograph record.[43] The majority, by analogy, stated that a phonograph record does not become part of the machine when played.[44] The CONTU majority by its analogy did not fully answer the distinction Commissioner Hersey was attempting to illuminate.[45] That is, the offered phonograph contains the method or technology of sound reproduction. The computer, however, does not necessarily contain the method or technology of an application, such as structural analysis or word processing, but rather quite likely relies upon the technology which is derived from the computer program to perform the specific applications.

In his concurring opinion, Vice-Chairman Nimmer, while agreeing with the CONTU majority that computer programs should be protected, suggested that a more pragmatic approach might be appropriate in the future. That is, only protecting programs which yield works which are themselves eligible for protection.[46] This alternate proposal would allow subsequent programmers to build upon the structure of earlier programmers, but would not allow copying the user interface. By protecting the user interface, a company's investment in program

39. CONTU FINAL REPORT, *supra* note 35, at 22.

40. *Id.* at 54.

41. *Id.* at 58.

42. Commissioner Hersey emphasizes that a program is not meant to communicate with humans, its only purpose is to instruct the computer in performing a set of tasks. *Id.* at 60.

43. *Id.* at 41.

44. *Id.* at 42.

45. *Id.* at 59.

46. Commissioner Nimmer's suggestion was not meant to immediately change the nature of how we presently extend copyright protection, but rather as an alternative, if the present system became too restrictive.

> I should like to suggest a possible line of demarcation which would distinguish between protectible and nonprotectible software in a manner more consistent with limiting such protection to the conventional copyright arena, . . . if the Commission's recommendation for protection of all software should prove unduly restrictive. In such circumstances it may prove desirable to limit copyright protection for software to those computer programs which produce works which themselves qualify for copyright protection.

Id. at 54.

development and user training could be protected while allowing the subsequent developer to freely use the underlying ideas of the program.[47]

The opinions of the CONTU commissioners do not explain where idea stops and expression begins.[48] A United States district court in *Lotus Development Corp. v. Paperback Software International*,[49] indicated the distinction by the commissioners but does not serve as legislative authority.[50] Congress did not endorse this section of the *CONTU Final Report* by any action. Therefore, Congress has left to the courts the decision as to what elements of a program are protected expression by applying the idea-expression dichotomy.[51]

IV. IDEA OR EXPRESSION

In *Baker v. Selden*,[52] the United States Supreme Court first distinguished between expression and idea. In *Baker*, the plaintiff sought to protect his book which explained a system of accounting, the now common "T" account method.[53] The plaintiff argued that the copyright in his book was infringed by the defendant's use of substantially similar accounting forms in the defendant's book.[54] The Court held that the copyright which existed in the book protected the way in which the plaintiff explained the accounting system.[55] The system itself, however, remained unprotected and available for public use.[56] The defendant's

47. In describing Lotus Development Corporation's *1-2-3* program, the user interface was said to include "such elements as 'the menus (and their structure and organization), the long prompts, the screens on which they appear, the function key assignment, [and] the macro commands and language.' " Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 63 (D. Mass. 1990) (citing Plaintiff's Post-Trial Brief at 53 (No. 319)). Thus, the user interface includes the screen displays, key assignments, and command structure.

48. CONTU FINAL REPORT, *supra* note 35, at 22.

49. 740 F. Supp. 37 (D. Mass. 1990).

50. *Id.* at 54 (citing Whelan Assocs. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1241-42 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987)). "Thus, courts must not treat the CONTU report as legislative history, in the ordinary sense, much less as an authoritative statement about manifested legislative intent." *Id.*

51. *Id.* "I conclude that, with the Copyright Act of 1976 and the 1980 amendments to that Act, Congress manifested an intention to use the idea-expression distinction as part of copyrightability for computer programs." *Id.*

52. 101 U.S. 99 (1879).

53. *Id.* at 100.

54. *Id.* at 100-01.

55. *Id.*

56. *Id.* at 103.

> The copyright of a book on perspective, no matter how many drawings and illustrations it may contain, gives no exclusive right to the modes of drawing described, though they may never have been known or used before. By publishing the book, without getting a patent for the art, the latter is given to the public.

Id.

book, which also explained the accounting system, but in a different manner, did not infringe plaintiff's copyright.[57] The blank forms in plaintiff's book which illustrated the system could not be protected by the copyright because they were not expressive but rather a "necessary incident" to the use of the system.[58]

The *Baker* Court, in making its distinction between idea and expression, explained that to protect the idea would improperly extend copyright.[59] To qualify for copyright, there is no requirement of novelty, rather, for copyright there must only be independent authorship.[60]

A. *Infringement of Idea*

The distinction between idea and expression is often referred to as a dichotomy.[61] The courts have been unable to articulate a mechanical or definitive test to determine when the idea stops and the expression begins.[62] Judge Learned Hand in deciding the case of *Nichols v. Universal Pictures Corp.*[63] set out his abstractions test.[64] The abstractions test is actually not a legal test but a policy statement that attempts to balance

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57. *Id.* at 102.

58. *Id.* at 103. "And, of course, in using the art, the ruled lines and headings of accounts must necessarily be used as incident to it." *Id.* at 104.

59. *Id.* at 105.

> The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent.

Id.

60. *Id.*

61. Whelan Assocs. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1234 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

62. Judge Learned Hand, an experienced jurist in the field of copyright, stated in determining a case of infringement of a bolt of fabric: "Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc." Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) (citing Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960)).

63. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

64. *Id.* at 121.

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.

Id.

the desire to protect both the prior author and the subsequent author who use the former's ideas.

Congress itself has adopted the *Baker* concept that copyright will protect only the expression, not the idea.[65] The expression of literary works has long been recognized to extend beyond the literal line for line copying of a plagiarist.[66] Plagiarism is difficult to prove, thus it is often established by indirect evidence of copying.[67]

A copyright may be infringed if the works are substantially similar.[68] The court in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*[69] applied a two-part test to determine infringement.[70] First there must be a valid copyright of the work to be protected and second there must be substantial similarity between the expression in the works.[71] A bifurcated test may then be applied to determine whether two works are substantially similar.[72] The first part of this bifurcated test is: "whether there is sufficient similarity between the two works in question to conclude that the alleged infringer used the copyrighted work in making his own. On this issue, expert testimony may be received to aid the trier of fact."[73] The second part of the bifurcated test is to be applied without the aid of expert testimony. "[W]ith the perspective of the 'lay observer' " the court looks to "whether the copying was 'illicit,' or 'an unlawful appropriation' of the copyrighted work."[74]

B. *The Program Structure as Expression*

There is no doubt that copyright extends to the source code[75] and object code[76] which are the literal elements of a program.[77] It is when

65. The codification of the concept that expression may be protected by copyright but not the underlying idea is found in 17 U.S.C. § 102(b) (1988). See *supra* note 3 for the text of § 102(b).

66. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

67. Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) ("[C]opying may be established by proof of access and substantial similarity.").

68. Whelan Assocs. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1242-43 (3d Cir. 1986) (analysis of the substantial similarity of file structure), *cert. denied*, 479 U.S. 1031 (1987).

69. 562 F.2d 1157 (9th Cir. 1977).

70. *Id.*

71. *Id.*

72. *Krofft*, 562 F.2d at 1164-65; Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir.), *cert. denied*, 423 U.S. 863 (1975); Arnstein v. Porter, 154 F.2d 464, 468-69 (2d Cir. 1946).

73. Whelan Assocs. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1232 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

74. *Id.*

75. *Id.* at 1230-31.

76. *Id.*

77. Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1246-47

the non-literal elements of a program are copied that it becomes difficult to decide whether the alleged infringer has taken protected expression or only the unprotected idea.

Whelan Associates v. Jaslow Dental Laboratory, Inc.[78] concerns the reverse engineering of an existing program into a workable copy in a different computer language.[79] Whether the sequence or structure of a computer program is protected by copyright was at issue in *Whelan*.[80] This issue can be further narrowed to whether sequence and structure is an expression or an idea. The court applied Judge Hand's abstractions test[81] which involves some subjective input.[82] The abstractions test requires the court to first decide at what level of abstraction[83] the idea exists. Lesser levels of abstraction are protected because they contain expression of the idea without merging[84] with the idea. If, however, the expression merges with the idea, the expression will not be protected by copyright.[85]

A short story[86] is one example of a work protected by copyright that

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(3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984); Stern Electronics, Inc. v. Kaufman, 669 F.2d 852, 855 n.3 (2d Cir. 1982).

78. 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

79. *Id.* at 1225-27.

80. *Id.* at 1234. "[W]hether a program's copyright protection covers the structure of the program or only the program's literal elements, i.e., its source and object codes." *Id.*

81. *Id.* at 1236. See *supra* note 64 for the text of Judge Learned Hand's abstractions test.

82. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) ("Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be *ad hoc*.").

83. See *supra* note 64 for the text of Judge Hand's abstraction test.

84. Merger occurs when an idea is susceptible to only a limited number of methods of expressing the idea, in which case the law will not protect the expression from being copied. *See* Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 66 (D. Mass. 1990) (examining merger of expression as to key assignment).

85. *Id.* at 59 (citing Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967)):

> When the uncopyrightable subject matter is very narrow, so that "the topic necessarily requires," if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibility of future use of the substance. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter. However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression. We cannot recognize copyright as a game of chess in which the public can be checkmated.

Id. (quoting Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967)).

86. A short story is "[a] brief invented prose narrative usually dealing with a few

may be used to illustrate the way in which courts analyze the level of abstraction in cases of alleged software copyright infringement.[87] Because short stories seek to achieve a single emotional effect, their idea and expression may seem less theoretical than those of a computer program.

An author may copy the idea to write a short story dealing with a homeless person's desperate situation. A subsequent author may even strive to achieve the same feeling of outrage the earlier author achieved if he or she does not improperly borrow the expression from the first author.

The Third Circuit in *Whelan Associates v. Jaslow Dental Laboratory, Inc.*[88] held that the copyright of computer software could extend beyond the literal elements of the program to the structure, sequence and organization.[89] In *Whelan*, a computer program development firm was hired by the defendant to create a program to more efficiently organize its dental laboratory business.[90] Once the program was operational the defendant company honored its contract with the plaintiff and then marketed the program in exchange for thirty-five percent of the gross sales.[91] The plaintiff under the original contract was to be the holder of the copyright for the program.[92] The defendant operated under this marketing scheme for a time, but later decided to terminate it so that it could market its own version of the program in a language that would run on hardware more commonly found in dental laboratories.[93]

The owner of the defendant dental laboratory company, first on his own, and then with the help of an employee, created the infringing work.[94] There was no allegation that the defendant had access at any time to the source code of the original program.[95] In fact, expert testimony was offered to prove that the second program was not a direct translation of the first.[96] Infringement was found to exist, however, on the basis that the second program copied the structure and sequence of the first.[97]

The *Whelan* court's decision, regarding the appropriate level of ab-

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characters and aiming at unity of effect and often concentrating on the creation of mood rather than plot." WEBSTER'S NEW COLLEGIATE DICTIONARY 1073 (5th ed. 1977).

87. The use of a literary work to demonstrate by analogy the level of abstraction was first used by Judge Learned Hand. *See supra* notes 63-64.

88. 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

89. *Id.* at 1239.

90. *Id.* at 1225.

91. *Id.* at 1226.

92. *Id.* at 1225 n.2.

93. *Id.* at 1226.

94. *Id.* at 1227.

95. *Id.* at 1228.

96. *Id.*

97. *Id.* at 1229.

straction to place the idea, was based on a narrow reading of *Baker*.[98] The court placed the idea at a high level of abstraction: *"[T]he purpose or function of a utilitarian work would be the work's idea, and everything that is not necessary to that purpose or function would be part of the expression of the idea."*[99] By placing the idea at such a high level, the court ignored the fact that programs are a symphony of ideas. By ignoring these protected ideas, the court gives the prior author dominion of an idea which rightly belongs to the public. The *Whelan* court's over-protection discourages the use of good ideas by other creative persons that may exist in an original work.[100]

The *Whelan* court's finding that structure and sequence were protected by copyright is at odds with a district court's decision in *Synercom Technology, Inc. v. University Computing Co.*[101] Judge Higginbotham in *Synercom* posed a rhetorical question which can aid in the analysis of whether a non-literal element is in fact expression or idea: "If sequence and ordering is expression, what separable idea is expressed?"[102] This simple question can aid a court in determining if it has placed the idea at a reasonable level of abstraction. The *Whelan* court answered this question by stating that "the idea is the efficient organization of a dental laboratory,"[103] subject, however, to merger of idea and expression. This response by the *Whelan* court assumes that there are no ideas which exist in the original work, other than the plaintiff's expression of how to organize a dental laboratory.

If the rule from *Whelan* is applied to the short story analogy, the rule's inherent overbreadth becomes apparent. Assuming that the short story dealing with the plight of the homeless were a utilitarian work, its function would be to create in the reader a single emotional effect of compassion for homeless persons. According to the *Whelan* rule the "idea" in this hypothetical work would be to create compassion for homeless people. If a subsequent author read this work and was inspired by the idea to write a story of his or her own dealing with a totally dissimilar story leading to homelessness, could the subsequent author be accused of stealing the first author's expression? A reason-

98. Baker v. Selden, 101 U.S. 99 (1879). The overprotection of a work results in ideas being removed from the public domain. *See* Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393, 413-14 (1989).

99. *Whelan*, 797 F.2d at 1236. Labeling the idea as the program's function results in every program which seeks to better organize a dental laboratory as being an infringing work.

100. *See* Yen, *supra* note 98, at 412-20 (suggesting that *Whelan* was too narrow in defining idea); *see also* Peter S. Menell, *An Analysis of the Scope of Copyright Protection for Application Programs*, 41 STAN. L. REV. 1045, 1047-48 (1989).

101. 462 F. Supp. 1003 (N.D. Tex. 1978) (holding that the input formats involved were not proper subjects for copyright protection).

102. *Id.* at 1013.

103. *Whelan*, 797 F.2d at 1240.

able answer to this question should depend on just how similar the works are in detail. According to the *Whelan* rule, however, a finding of impermissible copying would follow if the author could have achieved his or her goal—compassion for the homeless—without copying the author's expression—the life story of a homeless person.

This analogy demonstrates the flaw in the *Whelan* rule. The subsequent author is barred from the expression of using a homeless person's life story because the author could achieve the idea of compassion for the homeless using a different expression, i.e., the story of a Doctor who cares for the homeless. *Whelan* strictly applied would force this second author to use another means of expression because the life story of the one homeless person has already been expressed and may not be expressed again by a subsequent author.

The willingness to create such a wide field of protection in *Whelan* may have been fact driven.[104] Trial testimony indicated the programs, including the screen outputs, operated nearly identically.[105] The initial developer of the infringing work had extensive access to and familiarity with the original work.[106] The facts of the case suggest that it was the infringers' goal to duplicate both the program in its operation and the user interface.[107] A failure to find infringement would have allowed the defendant to intentionally create what would in effect be a wholesale copying of the program into another language.

In his dissent from the *CONTU Final Report*, Commissioner Hersey expressed his concern that extending protection to the way in which the program controls and operates the hardware "would mark the first time copyright had ever covered a means of communication, not with the human mind and senses, but with machines."[108] Modification of the substantially similar test[109] by the *Whelan* court[110] demonstrates that programs at their structural level are not meant to be expressive to humans. The court in *Whelan* reasoned that the ordinary observer portion of the substantial similarity test would not be useful because the fact finder could not understand the complexity of the programs without the aid of expert opinion.[111] The ordinary observer portion of the

104. *See id.* at 1225-27. The defendant in *Whelan* sought to benefit by copying a program which the plaintiff had developed and proven successful. *Id.*

105. *Id.* at 1228.

106. *Id.* at 1226.

107. *Id.*

108. CONTU FINAL REPORT, *supra* note 35, at 56.

109. See *supra* notes 68-74 and accompanying text for a description of the substantial similarity test.

110. *Whelan*, 797 F.2d at 1233. "We therefore join the growing number of courts which do not apply the ordinary observer test in copyright cases involving exceptionally difficult materials, like computer programs, but instead adopt a single substantial similarity inquiry according to which both lay and expert testimony would be admissible." *Id.* (citations omitted).

111. *Id.* "[W]e believe that the ordinary observer test is not useful and is

substantial similarity test has been applied in other cases taking into account the target audience for the work.[112] In *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,[113] a child's perspective and ability to distinguish between two works was considered because the target audience for the work was children.[114] The original work was a children's program set in a fantasy land with imaginary characters.[115] The infringing television commercials were also set in a fantasy land and contained characters similar in appearance to those in the children's program.[116] In *Data East USA, Inc. v. Epyx, Inc.*,[117] the court considered whether a seventeen and one-half-year-old male, the target market, would find the two works to be substantially similar.[118] Both works in that case were computer games which simulated a karate competition.[119]

If the *Whelan* court had applied the target audience standard to the facts of its case, it may not have found infringement. This is because there had not yet been any decisions that the screen displays[120] or command structure[121] could be protected by copyright and the fact finder would be looking merely at the programming code and possibly flow charts of the programs.[122] However, if the user interface were deemed a copyright protected element of the program, the target audience could appreciate the obvious similarities in the two programs.[123]

The *Whelan* court did not consider whether screen output and user interface were proper subjects for copyright protection. The court balanced the equities between a lawful author and a copier who set out to do wholesale copying by placing the idea at a high level of abstraction. In reaching this conclusion, the court modified how it evaluated sub-

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potentially misleading when the subjects of the copyright are particularly complex, such as computer programs." *Id.*

112. *See supra* notes 68-74 and accompanying text.

113. 562 F.2d 1157 (9th Cir. 1977).

114. *Id.* at 1166-67. "The present case demands an even more intrinsic determination because both plaintiff's and defendant's work are directed to an audience of children. This raises the particular factual issue of the impact of the respective works upon the minds of young people." *Id.* at 1166.

115. *Id.* at 1161.

116. *Id.* at 1161-62.

117. 862 F.2d 204 (9th Cir. 1988).

118. *Id.* at 209-10.

119. *Id.* at 208-09.

120. See *infra* notes 127-71 and accompanying text for later cases discussing screen display protection via the program copyright.

121. *See infra* notes 172-92 and accompanying text.

122. Whelan Assocs. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1229-30 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

123. *Id.* at 1243-45. Although screen display similarities were not themselves grounds for copyright infringement, the similarities were ruled admissible for probative value as to structural copying. *Id.* at 1244-45.

stantial similarity.[124] The users of programs were not considered to be compromising the target market because the program structure was not meant to communicate with the user but with the computer itself.

Labeling the program's function as its idea was overly broad and too protective of the original author.[125] In a case like *Whelan* where there has been extensive copying, the courts must find a lower level of abstraction for an idea. Otherwise, the innocent subsequent programmer will be prohibited from using an idea which should rightfully remain in the public domain.

Although the *Whelan* decision has been criticized for its restrictive interpretation of an idea,[126] it did settle the question as to whether the program copyright could extend beyond the literal source and object codes. The *Whelan* decision is valuable for conceiving protection for a non-literal element by a program copyright. More recently, other non-literal elements of computer programs have been found to contain protected expression.

C. *The Screen Display as Expression*

The user interface is what the everyday user of a program recognizes as the program. The user interface includes the screen displays and input formats that the user must become familiar with to use the program effectively.

The decision in *Whelan* did not specifically address the issue of whether a copyright in a computer program also extends to the screen output. *Whelan* did, however, note several cases which supported the practice of separate copyright registration for screen output as "audiovisual works."[127]

Broderbund Software, Inc. v. Unison World, Inc.,[128] did extend the *Whelan* holding to include the screen output, along with the structure of the

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124. *Id.* at 1245-46.

125. *Id.* at 1236.

126. J. Dianne Brinson, *Copyrighted Software: Separating the Protected Expression from Unprotected Ideas, a Starting Point*, 29 B.C. L. REV. 803, 848 (1988). "The *Whelan* court's 'rule' is a blunt instrument. Under this rule, virtually nothing may lawfully be borrowed from a copyrighted program; the rule limits the unprotected idea to program function." *Id.*

127. *Whelan*, 797 F.2d at 1244. The court did allow evidence of the screen similarities to raise the inference of copying, but not as direct evidence of copying of the program. The *Whelan* court noted the cases the defendant relied upon: Stern Electronics, Inc. v. Kaufman, 669 F.2d 852, 855 (2d Cir. 1982) ("[M]any different computer programs can produce the same 'results,' whether those results are an analysis of financial records or a sequence of images and sounds."); and Midway Mfg. Co. v. Strohn, 564 F. Supp. 741, 749 (N.D. Ill. 1983) ("[I]t is quite possible to design a game that would infringe Midway's audiovisual copyright but would use an entirely different computer program."). *Whelan*, 797 F.2d at 1244.

128. 648 F. Supp. 1127 (N.D. Cal. 1986).

program.[129] Specifically at issue in *Broderbund* was whether the plaintiffs' screen output was protected by the software copyright.[130] The court applied the *Whelan* test as to whether the copyright now extended to the screen output as a non-literal element.[131]

The plaintiffs in *Broderbund* had developed a successful program to be used on Apple computers for designing greeting cards and banners.[132] The defendant had initially set out to duplicate the plaintiffs' program for IBM computers in anticipation of a licensing agreement with the plaintiffs.[133] The defendant had not completely finished its efforts to duplicate the program when negotiations for the licensing agreement stopped.[134] The defendant's programmer continued to work on a printing program for the defendant, using what he had already copied from the plaintiff's program, including screen displays.[135]

The *Broderbund* court followed the *Whelan* court's broad concept of expression.[136] Because there were other programs with a differing structure which expressed the idea of a printing program screen, the court concluded that the idea had more than one way that it could be expressed.[137] Therefore, the defendant had infringed upon the expression of the plaintiff. Although the finding of infringement in *Broderbund* appears to be the correct result, since the defendant intentionally copied the plaintiffs' work, the *Broderbund* court made the same mistake as the *Whelan* court by placing the idea's level of abstraction too high. As a result, the *Broderbund* decision overly protects ideas within the screen displays, and prohibits use by subsequent programmers.

In *Digital Communication Associates v. Softklone Distributing Corp.*,[138] the opposite result was reached from that in *Broderbund*. The *Softklone* court specifically held "that copyright protection of a computer program does not extend to screen displays generated by the program."[139]

The *Softklone* court declined to find infringement based upon similarities in screen displays without evidence that the program's "source code, object code, sequence organization or structure" had also been

129. *Id.* at 1133. *Broderbund* applied a *Whelan* type of analysis to the screen output to determine if it should be protected by copyright. *Id.* That is, the court identified the function of the program as the level of abstraction where idea exists. *Id.*

130. *Id.*

131. *Id.* The *Broderbund* court identified the purpose of the program as being the level of abstraction at which idea existed for its analysis. *Id.* See *supra* note 99 and accompanying text for an explanation of the *Whelan* test.

132. *Broderbund*, 648 F. Supp. at 1130.

133. *Id.*

134. *Id.* at 1131.

135. *Id.*

136. *Id.* at 1133.

137. *Id.*

138. 659 F. Supp 449 (N.D. Ga. 1987).

139. *Id.* at 455.

copied.[140] The court's reluctance to follow the *Broderbund* lead was based on the premise that different programs, independently developed, could produce the same screen output.[141] Because different programs can yield the same result, some courts have been more receptive to separate registration for audiovisual copyright of the screen displays.[142]

The *Softklone* court was also dissuaded from protecting screen output via the program copyright because of the statutory definition of "copies."[143] Because a screen display could not necessarily be translated into a specific program, it could not be a "copy" of a specific program as defined by statute.[144] Hence, the copyright of that program would not be infringed. But, if the screen display itself was protected by copyright, then the program which creates it would be considered a copy of the screen output where the program is capable of reproducing the screen display with the aid of a computer.[145]

The *Softklone* decision recognized that there can be both idea and expression in programs and their respective screen displays.[146] If *Softklone* had continued the *Whelan* and *Broderbund* reasoning, it may not have found any idea to have existed in the screen display. Therefore, all subsequent programmers could have been precluded from using any idea existing in the screen display.[147] In *Softklone*, the defendant company set out to copy the screen display[148] and reap the benefits of the plaintiff's work in developing its communications program. The plaintiff had developed its program over the course of many revisions and many years.[149] If the defendant were allowed to copy the screen display they would reap the benefit of the economic investment of the plaintiff in acclimating the computer-user community to its program.

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140. *Id.* at 456. While the court did not find infringement based upon the program copyright, it did find infringement based upon the separate registration of the "status screen." *Id.*

141. *Id.*

142. *Id.* at 449. See *supra* note 72 for cases with separate registration for audiovisual copyright of the screen displays.

143. 17 U.S.C. § 101 (1988). Copies are defined as: "Material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.*

144. *Softklone*, 659 F. Supp. at 455-56. See *supra* note 143 for the statutory definition of copy.

145. *Softklone*, 659 F. Supp. at 455-56.

146. *Id.* at 460.

147. The plaintiff's program allowed a user to access a command by typing two symbols. *Id.* at 459. The defendant's program also used two symbols to access a command, but the court held that this was idea not expression. *Id.*

148. *Id.* at 453. The defendant in this action retained legal counsel and was advised that plaintiff's copyright would not be violated by copying the program's screens. *Id.*

149. *Id.* at 452-53.

The *Softklone* court struck a balance which would allow the plaintiff to use the idea but not to use the expression of the screen.[150] What the plaintiff was really seeking to protect was the screen display. Since other programs could perform the same function, it was the way that this particular program communicated with its user that had made it such a success in the market place.

The communication with the user through the screen display is similar to the prose in the short story analogy. In a short story, no author would expect to use the same characters from another author's work and then claim that there is no infringement because his or her story is different. Just the use of the character's name brings with it some preconceptions of the character from his or her earlier development. In fact, the reader may become so fond of a character that he or she will follow the character through a complete series of stories because of the character's ingenious or ingratiating development. The computer user also develops preferences and familiarity with a program because of past experience. The user becomes so familiar with the intricacies of a program that the time investment needed to learn a new program keeps the user loyal.

Softklone successfully protected the communicative aspect of a program's screen display[151] and, in this sense, aligned itself with Commissioner Hersey's desire to protect what was communicative only to humans.[152] The weakness of *Softklone* is that it required the owner of the program to separately register its audiovisual display to gain protection for the screen output.[153] The court did not make the mistake of *Whelan* and identify the purpose of the program as its idea. The court's reasoning was soundly based on the definition of "copy."[154] Thus, an anomaly exists between the *Softklone* decision and the policies behind extending copyright protection to computer programs. On one hand, the most expressive part of a program—what the user sees—is left unprotected by the device which is supposed to protect the author's expression, while the most incomprehensive part of the program—the structure and sequence—is protected by the expression protection device of copyright.[155]

The disagreement of the *Broderbund* and *Softklone* courts over protection of screen output based upon a copyright in the computer program

150. *Id.* at 457.

151. *Softklone*, 659 F. Supp. at 460.

152. CONTU FINAL REPORT, *supra* note 35, at 56; *see also supra* text accompanying notes 41-50.

153. *Softklone*, 659 F. Supp. at 455-57.

154. *Id.* at 456. See *supra* note 143 for a definition of "copies" under 17 U.S.C. § 101 (1988).

155. *Softklone*, 659 F. Supp. at 455. "[T]his court concludes that copyright protection of a computer program does not extend to screen displays generated by the program." *Id.*

was exacerbated by the Library of Congress Copyright Office's acceptance of separate registration for the programs and the screen displays. The Copyright Office no longer accepts separate registration for the screen display of a computer program.[156] Because the Copyright Office no longer permits a separate registration for the screen displays the protection that would be afforded owners in the screen display under *Softklone* would be non-existent.

The case of *Manufacturers Technologies, Inc. v. Cams, Inc.*[157] followed the Copyright Office decision to stop separately registering the program and the screen display. The *Cams* court recognized the *Broderbund* court's erroneous reading of the *Whelan* decision.[158]

In *Cams*, the plaintiff developed a cost estimating program that would estimate the cost of machining a manufactured part.[159] This program was developed at a high cost and was thus marketed at a high price.[160] Some of the defendants in the case were former employees of the plaintiff.[161] The defendants developed a similar program to that developed by the plaintiff.[162] Many of the screens of the defendant's program were similar to those of the plaintiff's screens.[163] The defendants had set out to copy the screens and sequence of screens from the plaintiff's program.[164]

The *Cams* court recognized the error of the *Broderbund* ruling and could no longer rely upon the *Softklone* analysis because of the Copyright Office's decision not to separately register screen displays.[165] The court did, however, follow the reasoning of *Softklone* by treating the one copyright in the program as two separate copyrights, one in the program and one in the screen displays.[166] This legal fiction of two

156. *Copyright Notice on Computer Screen Registration*, 36 PAT. TRADEMARK & COPYRIGHT J. 152 (1988). "[A]ll copyrightable expression in a single work owned by the same claimant and embodied in a computer program, . . . including computer screen displays, is considered a single work and should be registered on a single application form." *Id.*

157. 706 F. Supp 984 (D. Conn. 1989).

158. *Id.* at 992. "The *Broderbund* court extended the reach of *Whelan* . . . . However, the *Whelan* court said only that, as an evidentiary matter, that screen outputs could be indirect and inferential evidence useful in establishing copying of the underlying computer program." *Id.* (citation and footnote omitted).

159. *Id.* at 988.

160. *Id.* at 988-90.

161. *Id.* at 987-88.

162. *Id.* at 989-90.

163. *Id.* at 993.

164. *Id.* at 1002.

165. *Id.* at 992-93.

166. *Id.*

> The second approach, and one that this court adopts, is to treat the single registration of the computer program as accomplishing two interrelated yet distinct registrations; one of the program itself and one of the screen displays or user interface of that program, to the extent that each contains

copyrights allowed the court to do a thorough analysis of the screen displays and determine what parts of the screen displays were protected expression and what parts were unprotected ideas.[167]

The United States Court of Appeals for the Ninth Circuit in *Johnson Controls, Inc. v. Phoenix Control Systems*[168] is the only Court of Appeals to date to have addressed the issue of screen displays and their eligibility for copyright protection under the program copyright. The *Johnson Controls* court, in reviewing the grant of a preliminary injunction against an alleged copyright infringer, stated that the user interface and other non-literal elements are proper subject for copyright protection and are protected if they are in fact the expression of an idea.[169]

The screen display is an element of a computer program which is eligible for copyright protection if it meets the criteria for a copyright. To be protected, the screen display must be expressive of an idea. The idea must not be obvious and must not have merged with the idea.[170] Accordingly, if there is only a limited number of ways to express an idea, then the courts will not enjoin a subsequent programmer from using the idea simply because the prior programmer already used the only available expression of that idea.[171]

D. *Protecting "Look and Feel"*

The case which was to decide whether "look and feel" could be protected by the program's copyright was *Lotus Development Corp. v. Paperback Software International.*[172] The *Lotus* court recognized that the "look and feel"[173] label should not be used as an aid in its analysis of which non-literal elements of a program were eligible for protection. The "look and feel" label should be used, if at all, only to decide if there has been improper copying of a protected work.[174]

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copyrightable subject matter. This approach creates the legal fiction of two separate registrations.

Id. at 993.

167. *See id.* at 993-98.

168. 886 F.2d 1173 (9th Cir. 1989).

169. *Id.* at 1175.

> Whether the non-literal components of a program, including the structure, sequence and organization and user interface, are protected depends on whether, on the particular facts of each case, the component in question qualifies as an expression of an idea, or an idea itself.

Id.

170. *See supra* notes 84-85 and accompanying text.

171. *See supra* notes 84-85 and accompanying text.

172. 740 F. Supp. 37 (D. Mass. 1990).

173. The *Lotus* court considered the phrase "look and feel" to be synonymous with the "total concept and feel" as used in Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970). *Lotus*, 740 F. Supp. at 63. See *supra* note 47 for plaintiff Lotus' definition of user interface.

174. *Lotus*, 740 F. Supp. at 63.

Whether a program copyright protects the "look and feel" of a program is an issue which strongly divides users and software companies.[175] The desire to have universal user interfaces is favored by many users.[176] This desire for universal interfaces was one of the public policy arguments put forth by the defendant to justify its copying elements of the *Lotus 1-2-3* program. The court refused this argument because the very nature of copyright is to grant a limited monopoly in an author's expression.[177]

The *Lotus* case involved the copying by defendant of Lotus's popular spread sheet program *Lotus 1-2-3*.[178] The issue in *Lotus* was whether the program's copyright protected the user interface and, more specifically, the command structure of the spread sheet program.[179] The defendant had independently developed a spread sheet program.[180] But, before the defendant completed its version, *Lotus 1-2-3* was introduced. *Lotus 1-2-3* subsequently became the *de facto* standard for spread sheet programs.[181] The defendant, to gain acceptance and commercial success, modified its program to be a "work alike" for *Lotus 1-2-3*.[182] The defendant advertised its program as being completely compatible with *Lotus 1-2-3*, "key stroke for key stroke."[183] The defendant's motivation for the compatibility was two-fold. If the program could be sold as a "work alike" of *Lotus 1-2-3*, the customer would have only slight training costs. Moreover, any customers previously using *Lotus 1-2-3* could use any macros[184] already written for a particular task.[185]

The *Lotus* court initially addressed whether the program copyright could protect non-literal elements of the program. The court concluded that non-literal elements are a proper subject for protection if they are expressive of an idea.[186] The court focused on the idea and expression distinction in the context of commands given to the program by the user.[187]

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175. In response to Lotus having filed "look and feel" lawsuits a group of 320 protestors marched on Lotus headquarters this past year. Nathan Cobb, *Power to the Programmer*, BOSTON GLOBE MAGAZINE, Oct. 21, 1990, at 41.

176. *Id.*

177. *Lotus*, 740 F. Supp. at 69.

178. *Id.* at 68.

179. *Id.* at 65.

180. *Id.* at 68.

181. *Id.*

182. *Id.*

183. *Id.*

184. A macro is: "a single computer instruction that stands for a sequence of operations—called also macroinstruction." WEBSTER'S NEW COLLEGIATE DICTIONARY 689 (5th ed. 1977).

185. *Lotus*, 740 F. Supp. at 69.

186. *Id.* at 59. The *Lotus* court specifically rejected a proposal by the defendant that the court adopt a bright line distinction that literal elements be protected by copyright and that non-literal elements remain unprotected. *Id.* at 73.

187. *Id.* at 66-67.

The operation of a spread sheet program can be accomplished by many different command structures.[188] These different structures may share common components that are either ideas or expressions of ideas that have merged with the idea.[189] It is the combination of these ideas that can be expressive.[190] The *Lotus* court found the way the command structure of *Lotus 1-2-3* operated as a whole was copyrightable even if the function or displays would not have been if considered individually.[191]

The *Lotus* holding that structure, sequence, and organization of the command structure are eligible for copyright protection was an extension of protection already given to screen displays.[192] The *Lotus* decision protects what software companies have sought to protect from the start: their economic investment. The court did not use the term "look and feel" but this is what is being protected. If the screen display and command structure are not the "look and feel" of a program, then it would be difficult to imagine what else could be.

V. Conclusion

It has long been settled that the literal elements of a computer program are protected by copyright. More recently, the courts have faced questions concerning what non-literal elements of programs are protected by the program copyright. The first non-literal element that was recognized as eligible for protection was the structure, sequence and organization of the program.[193] The Third Circuit in *Whelan* found that the structure of a program can be expressive and is protected by copyright.

In *Lotus*, similar language was used to describe the "structure, sequence, and organization" of the command system for controlling *Lotus 1-2-3*. These two cases, *Whelan* and *Lotus*, and the many cases between them, leave no doubt that non-literal elements of a program are potentially protected by a program copyright and may not be copied in their organization without permission. Whether these non-literal elements are eligible for copyright depends upon whether the element is expressive of an idea or merely an idea.

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188. The *Lotus* court listed several other spread sheet programs to illustrate the fact that *Lotus 1-2-3's* expression of how to efficiently organize a spread sheet program had not merged into the idea of efficiently organizing an electronic spread sheet. *Id.* at 67.

189. *See supra* notes 84-85 and accompanying text.

190. *Lotus*, 740 F. Supp. at 67. As in a compilation, the individual components of the command structure are potentially subject to copyright protection even if they are obvious or may have merged with the idea. *Id.*

191. See *supra* notes 128-71 and accompanying text for a discussion of copyright protection given to screen displays.

192. *See supra* notes 168-71 and accompanying text.

193. *See supra* notes 88-97 and accompanying text.

The question of whether a screen display is eligible for protection by the program copyright is no longer in dispute since the Copyright Office decided that one copyright registration of a computer program also protects the program's screen display.[194] The challenge for subsequent programmers is determining which part of a successful program's screen is expression and which part is idea. The concept that expression is protected while an idea is not is a difficult guide to follow.

The court decisions, in general, provide that copying individual parts of a screen display or command structure may be acceptable as the copying of an idea. Whereas copying enough of an earlier work so as to make it look like and operate like the earlier program will be unacceptable as the copying of an expression.

*Gary Donahue**

194. *See* text accompanying *supra* note 165.

* For my wife Nancy.

Public Housing Tenants as Third-Party Beneficiaries: Considering *Ayala v. Boston Housing Authority*

I. INTRODUCTION

In April, 1989 the Supreme Judicial Court of Massachusetts decided *Ayala v. Boston Housing Authority*.[1] This case addressed the issue of whether Section 8 public housing tenants[2] can sue as third-party beneficiaries[3] to enforce the provisions of contracts governing public housing programs.[4] In cases involving a variety of underlying issues, several federal courts have held that public housing tenants may not sue as third-party beneficiaries of housing program contracts.[5] The *Ayala* case

1. 404 Mass. 689, 536 N.E.2d 1082 (1989). The opinion was written by then Justice Paul J. Liacos.

2. Section 8 refers to the provisions found in section 8 of the revised United States Housing Act of 1937. United States Housing Act of 1937, ch. 896, 50 Stat. 888, 891 (codified as amended at 42 U.S.C. § 1437f (1988)). Section 8 is comprised of several funding programs, including programs for existing housing, rehabilitated housing, new construction, projects with mortgages held or insured by the U.S. Department of Housing and Urban Development (HUD), and HUD owned projects. 42 U.S.C. § 1437f (1988). Section 8 public housing tenants include individuals living in housing owned or operated by the government and rent-subsidized tenants living in private apartments. Generally, in order to qualify for either type of assistance, a family's income may not exceed 80% of the median income for the surrounding area. *See generally* NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS, 2/30-2/32 (1981) [hereinafter HUD HOUSING PROGRAMS] (explaining income qualifications for public housing tenants). A full description of Section 8 public housing programs is beyond the scope of this Note. For a general description of Section 8 housing programs, see HUD HOUSING PROGRAMS, *supra* at 1/16-1/22. The *Ayala* plaintiffs were rent-subsidized tenants in the program for existing housing. *Ayala*, 404 Mass. at 694, 536 N.E.2d at 1085. See *infra* notes 131-46 and accompanying text for a recitation of the facts surrounding *Ayala* and a description of the contracts involved in the rent-subsidy program.

3. A third-party beneficiary is "[o]ne for whose benefit a promise is made in a contract but who is not a party to the contract." BLACK'S LAW DICTIONARY 1480 (6th ed. 1990); *see also* 4 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 774 (1951) (Third-party beneficiaries include "various persons . . . having enforceable rights created in them by a contract to which they are not parties and for which they give no consideration.").

4. *Ayala*, 404 Mass. at 699, 536 N.E.2d at 1088.

5. *See infra* note 115. Cases concerning federally funded housing programs have been litigated primarily before federal courts. The few such cases litigated in state courts include Ayala v. Boston Housing Authority, 404 Mass. 689, 536 N.E.2d

was the first time the issue arose in the Massachusetts appellate courts,[6] and the Supreme Judicial Court declined to follow the federal courts in this area. The court held that the plaintiffs were intended beneficiaries,[7] and not mere incidental beneficiaries[8] of the housing program contract. As such, they had a cause of action to seek damages against the defendant Boston Housing Authority (BHA), the program administrator.[9]

Although some federal and state courts, analyzing the same housing program contracts, reached the same result as the *Ayala* court,[10] other courts have held to the contrary.[11] At times, different courts have applied similar law[12] to a standardized public housing program contract[13] and arrived at opposite conclusions as to its meaning. The purpose of this Note is to consider how the particular characteristics of cases involving third-party beneficiary claims on public housing program contracts either allow for or encourage such disparate results. Part II of this Note will describe the history and current state of third-party beneficiary law in Massachusetts.[14] Part III will explore some of the problems encountered in applying third-party beneficiary rules and the

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1082 (1989), and Zigas v. Superior Court, 174 Cal. Rptr. 806 (Cal. Ct. App. 1981), *cert. denied*, 455 U.S. 943 (1982).

6. The issue arose before the United States District Court for the District of Massachusetts in a suit seeking to force the improvement of living conditions in Boston housing projects. Boston Pub. Hous. Tenants' Policy Council, Inc. v. Lynn, 388 F. Supp. 493 (D. Mass. 1974). In *Boston Public Housing*, the court, citing no authority, disposed of the issue in a single sentence. *Id.* at 496. The court stated only that the tenants were "mere incidental beneficiaries and thus do not acquire true 'third party beneficiary' status." *Id.* As such, they could not enforce the contractually assumed duties of the housing authority. *Id.*

7. "[A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

8. "An incidental beneficiary is a beneficiary who is not an intended beneficiary." *Id.*

9. *Ayala*, 404 Mass. at 703, 536 N.E.2d at 1090. See *infra* notes 147-58 and accompanying text for a discussion of the court's holding in *Ayala*.

10. *See Ayala*, 404 Mass. at 701, 536 N.E.2d at 1089.

11. *See id.* at 702 n.14, 536 N.E.2d at 1090 n.14.

12. Courts apply either the language from section 302 of the *Restatement (Second) of Contracts* (*Restatement Second*), which makes third-party beneficiary standing dependent on the intention of the parties, or other language which uses the same intention standard. For a discussion of intention standard tests and how the courts apply it, see *infra* notes 59-130 and accompanying text.

13. Several third-party beneficiary claims, like the one in *Ayala*, involved the "Annual Contributions Contract" (ACC) drafted by HUD. *See* HUD HOUSING PROGRAMS, *supra* note 2, at 1/16-1/18; *see infra* notes 135-41 and accompanying text.

14. *See infra* notes 17-58 and accompanying text.

special factors inherent in public housing/government contract cases.[15] Part IV will analyze the holding and reasoning of *Ayala v. Boston Housing Authority* in light of the problems explored in Part III.[16] Lastly, Part V concludes that *Ayala* was decided based upon social policy presumptions reasonably imputed to be the contractual intent of the governmental agencies involved.

II. MASSACHUSETTS THIRD-PARTY BENEFICIARY LAW

A. *The Development of Third-Party Beneficiary Law in Massachusetts*

The development of third-party beneficiary law proceeded along a markedly different course in Massachusetts than it did in the majority of states. Most American courts followed the lead of the New York Court of Appeals decision in *Lawrence v. Fox*.[17] This seminal case established the general rule that a beneficiary of a contract could enforce it against the promisor even though the beneficiary was not a party to the contract.[18] Several years earlier, however, following the English authorities,[19] the Supreme Judicial Court of Massachusetts had decided the opposite in *Mellen v. Whipple*.[20] The court held in *Mellen* "that a plain-

15. *See infra* notes 59-130 and accompanying text.

16. *See infra* notes 131-99 and accompanying text.

17. 20 N.Y. 268 (1859). Variations of the rule of *Lawrence v. Fox* were eventually adopted in nearly every American jurisdiction. *See* Anthony J. Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1148-65 (1985) (discussing the influence of Arthur Corbin on the wide-spread acceptance of the third-party beneficiary rule).

The *Lawrence* decision later became the basis for the "creditor beneficiary" rule in the first *Restatement of Contracts*:

> Where performance of a promise in a contract will benefit a person other than the promisee, that person is . . . (b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds . . . .

RESTATEMENT OF CONTRACTS § 133(1) (1932).

18. Waters, *supra* note 17, at 1112-13. In *Lawrence v. Fox*, one Holly, who owed a sum of money to Lawrence, loaned Fox a sum of money on the condition that Fox repay the money to Lawrence to settle Holly's debt. *Lawrence*, 20 N.Y. at 269. When Fox failed to do so, Lawrence successfully sued Fox on the theory that he was the beneficiary of Fox's promise to Holly. *Id.* at 274. Professor Waters has theorized that the reason Lawrence did not simply sue Holly for his money was that Holly's debt to Lawrence was a gambling debt, unenforceable under New York law at the time. Waters, *supra* note 17, at 1124-27.

19. Mellen v. Whipple, 67 Mass. (1 Gray) 317, 322-23 (1854); *see also* Choate, Hall & Stewart v. SCA Servs., Inc., 378 Mass. 535, 542-45, 392 N.E.2d 1045, 1049-51 (1979) (narrating the evolution of third-party beneficiary law in Massachusetts).

20. 67 Mass. (1 Gray) 317 (1854). *Mellen* was an action by an administratrix (the third party) to force the payment of a mortgage debt voluntarily assumed by the

tiff, in an action on a simple contract, must be the person from whom the consideration of the contract actually moved, and . . . a stranger to the consideration cannot sue on the contract."[21] The court thus established the long-standing Massachusetts rule against third-party beneficiary actions by requiring "privity of contract between the plaintiff and defendant."[22]

The Supreme Judicial Court had not, previous to *Mellen*, developed an absolute prohibition against suits by third-party beneficiaries. Rather, third-party beneficiary suits were sometimes allowed. Previous cases, such as *Felton v. Dickinson*,[23] allowed third-party beneficiary actions with language such as, "when a promise is made to one for the benefit of another, he for whose benefit it is made may bring an action for the breach."[24] In *Brewer v. Dyer*[25] the court held, a mere three years before *Mellen*, that "when one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement."[26] With the formulation of the *Mellen* rule, these cases and others were relegated to the role of exceptions to the general rule.[27]

Despite formal adherence to the *Mellen* rule for 125 years, the court devised and the legislature enacted so many exceptions to the rule[28] that the Massachusetts courts usually reached the same results as those

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defendant (the promisor) when property was conveyed to him, subject to the mortgage, by the original debtor on the note (the promisee). *Id.* at 317-18.

21. *Id.* at 321.

22. *Id.* The Massachusetts courts continued to defend the "citadel of privity" for another 125 years. Waters, *supra* note 17, at 1154-55; *see infra* notes 27-29 and accompanying text.

23. 10 Mass. 287 (1813).

24. *Id.* at 290.

25. 61 Mass. (7 Cush.) 337 (1851).

26. *Id.* at 340. *Brewer* was an action by a commercial property owner (the third-party beneficiary) to recover rent from the defendant (the promisor) who assumed the obligations from the former tenant (the promisee) in exchange for the assignment of the tenancy. *Id.* at 337-38.

27. *See* Alexander A. Bernhard, *Third Party Beneficiary Rights in Massachusetts*, 49 MASS. L.Q. 159, 163-64 (1964). "Such prior cases became then 'exceptions,' an euphemism to preserve *stare decisis*." *Id.* at 164.

28. Judicial exceptions to the requirement of privity of contract included three listed in *Mellen*: an equitable action for money held by the defendant belonging to the plaintiff; a promise made to a third-party child's parent for the child's benefit; and the promise of a sublessee to the lessee made for the benefit of the lessor. Mellen v. Whipple, 67 Mass (1 Gray) 317, 322-24 (1854). Others included the right of a mortgagee to recover on a fire insurance policy purchased by the mortgagor, and the right of an unnamed, non-party beneficiary of an insurance policy to obtain the policy benefits. Additionally, courts occasionally employed the legal fiction of considering the promisee the "trustee" for the third party if the contract was intended wholly for the third party's benefit. One statutory exception permitted a third-party beneficiary of an insurance policy to sue in his own name. Another

in other jurisdictions on third-party beneficiary cases.[29] In the 1979 case of *Choate, Hall & Stewart v. SCA Services, Inc.*,[30] noting that "the handwriting [had] long been on the wall,"[31] the court made what it called "a long anticipated but relatively minor change in the law of the Commonwealth."[32] The court discarded what remained of the *Mellen* rule and held that an intended creditor beneficiary may maintain an action to enforce contractual promises made to the promisee by the defendant promisor.[33] Three years later, in *Rae v. Air-Speed, Inc.*,[34] the Supreme Judicial Court adopted and made part of Massachusetts law the new third-party beneficiary rules of the *Restatement (Second) of Contracts* (*Restatement Second*).[35] Moreover, in *Rae* the court quoted and endorsed the liberal pre-*Mellen* language of *Brewer v. Dyer*.[36] In 1985, the court in *Flattery v. Gregory*[37] again upheld a third-party beneficiary claim by citing *Restatement Second* section 302 and quoting *Brewer*.[38] There were no further developments in third-party beneficiary case law before the Supreme Judicial Court decided *Ayala v. Boston Housing Authority*[39] in 1989.

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allowed a third-party creditor to reach the obligations of a promisor to the debtor/promisee. Bernhard, *supra* note 27, at 164-68.

29. Choate, Hall & Stewart v. SCA Servs., Inc., 378 Mass. 535, 545, 392 N.E.2d 1045, 1050-51 (1979).

30. 378 Mass. 535, 392 N.E.2d 1045 (1979).

31. *Id.* at 546, 392 N.E.2d at 1051.

32. *Id.* at 536, 392 N.E.2d at 1046.

33. *Id.* at 545-46, 392 N.E.2d at 1050-51. The court essentially adopted the position of the original *Restatement of Contracts* on creditor beneficiaries.

34. 386 Mass. 187, 435 N.E.2d 628 (1982).

35. *Id.* at 194, 435 N.E.2d at 632. Section 302 of the *Restatement Second* states:

> (1) Unless otherwise agreed between the promisor and the promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981). Although the *Rae* court did not mention subsection two, it is an implicit part of the rule that the court applied in the case. *Rae*, 386 Mass. at 195, 435 N.E.2d at 632.

36. *Rae*, 386 Mass. at 195, 435 N.E.2d at 632-33 (citing Brewer v. Dyer, 61 Mass. (7 Cush.) 337 (1851)); *see supra* notes 25-26 and accompanying text.

37. 397 Mass. 143, 489 N.E.2d 1257 (1986).

38. *Id.* at 149, 489 N.E.2d at 1260. The court also declared in *Flattery* that it had, in *Rae*, impliedly adopted several other sections of the *Restatement Second* relating to third-party beneficiaries. *Id.* at 150-51, 489 N.E.2d at 1260-61; *see infra* notes 49-56 and accompanying text.

39. 404 Mass. 689, 536 N.E.2d 1082 (1989).

B. *Current Third-Party Beneficiary Law*

With the demise of the *Mellen* rule, and the adoption of section 302 in *Rae*[40] and additional sections of the *Restatement Second* in *Flattery*,[41] modern Massachusetts law regarding third-party beneficiaries is similar to that of other jurisdictions which have adopted section 302. One difference, however, is that with the court having necessarily disposed of *Mellen*, there is no common law, beyond the holdings designed to circumvent the *Mellen* rule, with which to interpret section 302. Other than *Rae* and *Flattery*, Massachusetts third-party beneficiary common law is comprised of only the pre-*Mellen* cases such as *Brewer v. Dyer*.[42]

Brewer is of dubious value as authority, however, as it is a product of a legal culture far different from today's. The case itself was an action of assumpsit,[43] a form of action no longer used in modern pleading. The *Brewer* court, in allowing the third party's action, emphasized that in 1851 a third-party beneficiary's rights, in the absence of privity of contract with the defendant/promisor, rested only upon a legal fiction.[44] The rule allowing recovery by a third-party beneficiary rested on the basis "that the law, operating on the act of the parties, creates the duty, establishes the privity, and *implies* the promise and obligation, on which the action is founded."[45] As such, this 19th century third-party beneficiary rule applied in *Brewer* was actually more like a modern implied-in-law or quasi contract than a contractual duty based on the intent of the parties to the contract.[46] The use of *Brewer* as authority for the modern rule is suspect, as *Brewer* does not require that the parties to the contract *intend* to confer third-party beneficiary status.[47]

Third-party beneficiary law in Massachusetts, therefore, is in a rela-

40. 386 Mass. 187, 194, 435 N.E.2d 628, 632 (1982).

41. 397 Mass. 143, 148-49, 489 N.E.2d 1257, 1260 (1986) (adopting related sections 304, 308, and 315).

42. 61 Mass. (7 Cush.) 337 (1851); *see Rae*, 386 Mass. at 195, 435 N.E.2d at 632; *Flattery*, 397 Mass. at 149, 489 N.E.2d at 1260. Both cases, as well as the *Ayala* case, cite only *Brewer* as authority existing independent of and prior to the adoption of section 302 of the *Restatement Second* in *Rae*.

43. "A common law form of action which lies for the recovery of damages for the non-performance of a parol or simple contract; or a contract that is neither of record nor under seal." BLACK'S LAW DICTIONARY 122 (6th ed. 1990). The literal meaning of assumpsit is "an undertaking." KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 18 (1990).

44. *Brewer*, 61 Mass. (7 Cush.) at 340.

45. *Id.* (emphasis added).

46. A quasi contract is an obligation which the court creates in the absence of an agreement. The obligation is not based on the apparent intentions of the parties. The function of the quasi contract is to create a legal obligation where a party made no promise to another, such as an imputed third-party beneficiary. BLACK'S LAW DICTIONARY 1245 (6th ed. 1990).

47. See *infra* notes 59-130 and accompanying text for a discussion of intent and the modern third-party beneficiary rule.

tively undeveloped state.[48] The Supreme Judicial Court has adopted, as part of Massachusetts common law, section 302 of the *Restatement Second*, as well as sections 304,[49] 308,[50] 309,[51] 315,[52] and perhaps impliedly even more of the *Restatement Second* sections which set forth third-party beneficiary rules.[53] Section 313[54] was briefly addressed in *Ayala*.[55] The court also has shown a willingness to employ the comments and illustrations accompanying the third-party beneficiary sec-

48. *See supra* notes 30-39 and accompanying text. The fact that the Supreme Judicial Court has adopted so many sections of the *Restatement Second* illustrates the lack of common law development of modern Massachusetts third-party beneficiary law.

49. "A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty." RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981).

50. "It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made." RESTATEMENT (SECOND) OF CONTRACTS § 308 (1981).

51. Section 309 of the *Restatement Second* states:

> (1) A promise creates no duty to a beneficiary unless a contract is formed between the promisor and the promisee; and if a contract is voidable or unenforceable at the time of its formation the right of any beneficiary is subject to the infirmity.
>
> (2) If a contract ceases to be binding in whole or in part because of impracticability, public policy, non-occurrence of a condition, or present or prospective failure of performance, the right of any beneficiary is to that extent discharged or modified.
>
> (3) Except as stated in Subsections (1) and (2) and in § 311 or as provided by the contract, the right of any beneficiary against the promisor is not subject to the promisor's claims or defenses against the promisee or to the promisee's claims or defenses against the beneficiary.
>
> (4) A beneficiary's right against the promisor is subject to any claim or defense arising from his own conduct or agreement.

RESTATEMENT (SECOND) OF CONTRACTS § 309 (1981).

52. "An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee." RESTATEMENT (SECOND) OF CONTRACTS § 315 (1981).

53. The court has expressly adopted only *Restatement Second* section 302. However, in applying section 302 in *Flattery*, the court stated that by its holding in *Rae* it had "impliedly adopted related sections . . . *such as* sections 304, 308, and 315." *Flattery*, 397 Mass. at 148, 489 N.E.2d at 1260 (emphasis added). The court's language leaves open the possibility that other third-party beneficiary rules have been impliedly adopted, including section 313, which concerns government contracts such as the one in the *Ayala* case.

54. "The rules stated in this Chapter apply to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach." RESTATEMENT (SECOND) OF CONTRACTS § 313(1) (1981).

55. "Section 313 . . . is not inconsistent with our conclusions . . . . Recognition of the plaintiffs as third-party beneficiaries furthers, rather than contravenes, the policies behind these Federal laws." *Ayala*, 404 Mass. at 702-03 n.16, 536 N.E.2d at 1090 n.16.

tions in the *Restatement Second*.[56] To the extent that the *Restatement Second*, including its comments and illustrations, reflect the majority view on third-party beneficiary law,[57] the court is following this majority view. Therefore, given its relative lack of development beyond the rules of the *Restatement Second*, current Massachusetts third-party beneficiary law does not differ significantly from the law of the majority of jurisdictions, most of which long ago adopted the rule of *Lawrence v. Fox*.[58]

III. The Application of the Third-Party Beneficiary Rule

A. *Contract Interpretation*

There is some disagreement among authorities concerning the application of the *Restatement Second* third-party beneficiary rules.[59] Under the *Restatement Second* the third party's right to enforcement is dependent on the intent of the parties to the contract.[60] Disagreement arises over whose intent should be considered.[61]

Section 302 divides third-party beneficiaries into two classes: intended and incidental.[62] Intended beneficiaries may enforce a contract duty;[63] incidental beneficiaries may not.[64] Two requirements must be

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56. *Flattery*, 397 Mass. at 148-49, 489 N.E.2d at 1261 (citing Restatement (Second) of Contracts § 302 illus. 3, § 308 illus. 2 (1981)); *Rae*, 386 Mass. at 194-95 n.3, 435 N.E.2d at 632-33 n.3 (citing Restatement (Second) of Contracts § 302 cmts. b & d (1981)).

57. *See* Grant Gilmore, The Death of Contract 63-64 (1974) (discussing the development of the *Restatement of Contracts*). *Contra* Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 Wash. L. Rev. 239 (1979).

58. 20 N.Y. 268 (1859); *see supra* notes 17-18 and accompanying text.

59. Orna S. Paglin, *Criteria for Recognition of Third Party Beneficiaries' Rights*, 24 New Eng. L. Rev. 63, 68 (1989); *see also* Kay S. Bruce, Note, Martinez v. Socoma Companies: *Problems in Determining Contract Beneficiaries' Rights*, 27 Hastings L.J. 137 (1975); Note, *Third Party Beneficiaries and the Intention Standard: A Search for Rational Contract Decision-Making*, 54 Va. L. Rev. 1166 (1968).

60. The use of the intention criteria dates back at least to the development of the donee beneficiary category of third-party beneficiaries. The donee beneficiary's rights depended on the intent of the promisee to benefit the third-party claimant. Restatement of Contracts § 133 (1932).

61. The same dilemma existed using the intent criteria approach prior to the development of the section 302 test. *See* Paglin, *supra* note 59, at 68-70. It continues to arise when the intent criteria is applied in those cases which do not use the *Restatement Second* test, as well as those which do. *Id.* This Note focuses on the widely adopted *Restatement Second* formulation, as section 302 was employed in *Ayala* and is consequently the applicable test under current Massachusetts law.

62. Restatement (Second) of Contracts § 302 (1981). See *supra* note 35 for the text of section 302.

63. Restatement (Second) of Contracts § 304 (1981). See *supra* note 49 for the text of section 304.

64. Restatement (Second) of Contracts § 315 (1981). See *supra* note 52 for the text of section 315.

met in order for a claimant to be deemed an intended beneficiary.[65] First, under subsection (1), recognition of the right to the performance of a duty must be an appropriate way to effectuate the intentions of both parties.[66] The second requirement may be met in either of two ways. Under subsection (1)(a) the performance of the promise must satisfy a debt to the beneficiary.[67] Alternatively, and more likely with a public housing contract, under subsection (1)(b) the promisee must intend the beneficiary to have the benefit of the promised performance.[68]

The relationship between subsections (1) and (1)(b), both of which are required for intentional beneficiary status under a public housing contract, is unclear. They appear to be possibly contradictory, with subsection (1) requiring the intent of both parties to the contract and subsection (1)(b) requiring only the intent of the promisee.[69] The case law reflects this confusion. Some courts have required only that the promisee intend that the beneficiary have the benefit of the promised performance.[70] Other courts have held that the promisor's intent is equally important and take into account both parties' intentions.[71]

A second ambiguity in the section 302 test lies in the use of the word 'intent.'[72] The term itself is inconclusive since it does not describe what kind of intent is required to make a third party an intended beneficiary.[73] At least two possible levels of intent could be required of the parties to the contract. One possibility is that the parties specifically intend the third-party beneficiary to have the right to sue the promisor to enforce the contract.[74] One commentator refers to this as "procedural intention."[75] In contrast is the more lenient and widely

65. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

66. *Id.* § 302.

67. *Id.* § 302. A subsection (1)(a) beneficiary is also "referred to as a 'creditor beneficiary.' " *Id.* cmt. b.

68. *Id.* § 302. A subsection (1)(b) beneficiary "is often referred to as a 'donee beneficiary.' " *Id.* cmt. c.

69. *Id.* § 302.

70. *See, e.g.*, Ayala v. Boston Hous. Auth., 404 Mass. 689, 536 N.E.2d 1082 (1989) (interpreting HUD's intent and Congress's intent and holding that the plaintiffs were intended third-party beneficiaries of the Annual Contributions Contract).

71. *See, e.g.*, Holbrook v. Pitt, 643 F.2d 1261, 1270 n.17 (7th Cir. 1981) (declining to adopt the *Restatement's* approach of considering only the intent of the promisee to determine whether a third-party beneficiary is an intended or incidental beneficiary).

72. Paglin, *supra* note 59, at 68.

73. *Id.*

74. *Id.* at 69. This contrasts with an intent that the third party merely enjoy the benefit of the bargain. *See* Harris v. Waikane Corp., 484 F. Supp. 372 (D. Haw. 1980); Chamieleski v. City Prods. Corp., 660 S.W.2d 275 (Mo. App. 1983); MJR Corp. v. B & B Vending Co., 760 S.W.2d 4 (Tex. App. 1988).

75. Paglin, *supra* note 59, at 69. The test under section 302 using this level of intent would require that the court find, within the contract, the intent to confer

used "substantive intention" test.[76] Under the substantive intention test, the parties need only intend to confer the benefit of the promise on a third party in order for the third party to be an intended beneficiary and have the right to enforce the promise.[77] The substantive intention test, however, does not aid a court in determining what the specific nature of the parties' intent must be, other than that it need not be a procedural intention.[78] Nor does the test provide any evidentiary criteria for determining the true intent of the parties when the intent is not spelled out within the four corners of the document.[79]

Scholars have had difficulty establishing what criteria courts actually do use to determine intent in third-party beneficiary cases.[80] Very few evidentiary guidelines have been developed through the case law,[81] and those that exist are difficult to apply and are sometimes misunderstood by courts and commentators.[82] For example, courts tend to use terms indicating third party participation in the performance of a contract as reliable indicators of an intention to confer a benefit on the third party.[83] However, participation by the third party is of limited value in establishing intent to confer a benefit.[84] In many, if not most, contracts made for the benefit of third parties, the third-party beneficiary does not participate in the performance of the contract.[85] Another theory suggests that the third party's participation in the formation of the contract may indicate intended third-party beneficiary status.[86] This approach has the same deficiency as the "participation in the performance" theory in that it does not apply to most contracts which

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upon the third-party beneficiary the right to sue. *See, e.g.*, Brooks v. Land Drilling Co., 564 F. Supp. 1518, 1520 (D. Colo. 1983) ("The right of a third party to sue on a contract made for his benefit requires that the right be apparent from the express provisions of the contract.").

76. Paglin, *supra* note 59, at 69.

77. *Id.; see* 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 10.3, at 13-14 (1990).

78. Paglin, *supra* note 59, at 69. Paglin argues that clause (1) of § 302 embodies the procedural intention test, and that clauses (1)(a) and (1)(b) embody the substantive intention test. *Id.* at 71-72. See *supra* note 35 for the text of section 302. Paglin concludes that due to poor drafting, the restaters promulgated a more restrictive test than had originally been contemplated. Paglin, *supra* note 59, at 72.

79. Paglin, *supra* note 59, at 72.

80. *Id.* at 72-77.

81. Ernest M. Jones, *Legal Protection of Third Party Beneficiaries: On Opening Courthouse Doors*, 46 U. CIN. L. REV. 313, 335-36 (1977), *cited in* Paglin, *supra* note 59, at 72.

82. Paglin, *supra* note 59, at 72-74. "As a result, scholars who attempt to glean guidelines from cases may actually end up inventing them ex post facto." *Id.* at 72.

83. Jones, *supra* note 81, at 334.

84. Paglin, *supra* note 59, at 73-74.

85. Public housing program funding contracts are an example. *See infra* notes 135-38 and accompanying text.

86. Paglin, *supra* note 59, at 74.

have third-party beneficiaries.[87] Moreover, one's participation in the formation of a contract is more likely to make one a party to the contract than a third-party beneficiary.[88]

One criterion courts frequently use to discover the requisite intention is " 'whether the promisor has undertaken to render a performance directly to the third person.' "[89] The proper focus of this test, however, should be on the subject matter of the performance and whether it is to benefit the third party, rather than to whom the performance is to be directed.[90] For instance, a promise of forbearance[91] is not directed to anyone, yet a third party may be the intended beneficiary of the subject matter of the promise—the forbearance itself.[92] Or, a promisor may undertake to render a performance directly to the promisee, rather than to the third party, and parties may still intend that a non-present and even unknown[93] third party benefit. Focusing on the subject matter of the promise rather than the recipient of the performance avoids such difficulties.[94] This test, however, does not provide complete evidentiary criteria for determing the true intent of the parties to a contract, and difficulties in interpretation continue to exist.[95]

Government contract cases present additional problems in applying the intention standard of section 302.[96] Many government benefits programs are operated through contracts with social service agencies or private individuals rather than directly through a statutory scheme.[97] The contracts usually incorporate the government regulations under which the program is to be run.[98] Instead of legislating all of the de-

87. *Id.*

88. *Id.*

89. *Id.* at 74 (quoting Note, *Intent and Benefit in Third Party Beneficiary Contracts: A Justification for Public Policy*, 26 VA. L. REV. 778, 782 (1940)).

90. *Id.* at 74-76; *see infra* note 93.

91. "[A] performance may consist of . . . an act . . . or a forbearance . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

92. Paglin, *supra* note 59, at 75.

93. "It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made." RESTATEMENT (SECOND) OF CONTRACTS § 308 (1981). The beneficiaries of government benefits programs are often unknown at the time the program funding contracts are signed.

94. Paglin, *supra* note 59, at 74-75.

95. *Id.* at 76-77. It can be conceptually difficult to separate the subject matter of a performance from the party to whom the performance is to be delivered.

96. Robert S. Adelson, Note, *Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Governmental Intent*, 94 YALE L.J. 875 (1985).

97. *See* HUD HOUSING PROGRAMS, *supra* note 2, at 1/10-1/12, 1/17-1/18 (describing the operation of public housing programs).

98. *See Ayala*, 404 Mass. at 696-98, 536 N.E.2d at 1086-88 (analyzing duties of the BHA under the Section 8 Housing Assistance Payments Program, 42 U.S.C. § 1437f (1982), and applicable HUD regulations, incorporated into contracts between HUD and the BHA).

tails of a program, Congress or a state legislature often delegates that authority to a government agency.[99] The agency is empowered to enter into contracts with organizations or individuals who administer the program.[100] The provisions of the contracts might be prescribed by legislation, be left to the discretion of the agency, or be a combination of both.[101] Therefore, two levels of intent must often be considered: legislative intent and agency intent.[102] Agencies are often responsible for formulating the policies and drafting the language which form the intent of the contracts.[103] Often agency intent is not adequately distinguished from legislative intent, and courts will ignore agency intent in analyzing a third-party beneficiary claim.[104]

B. *Contract Supplementation*

Where the terms of a contract are either missing or not entirely clear, courts undertake a process of supplementation in order to interpret the contract.[105] If the attempt to determine the intent of the parties from the face of the contract fails, the goal of the court should be to establish what the mutual understanding of the parties was at the formation of the contract.[106] If the court is successful, it may supplement the contract with an additional term in order to honor the original intent of the parties.[107] Often, however, a court will fail to establish intent from either the contract or extrinsic evidence.[108] In this case, the court will need to supplement the contract in some other manner.[109]

As a result of the difficulties in establishing intent in a third-party beneficiary contract,[110] or simply in order to strengthen the force of an opinion,[111] courts often turn to desirable social or economic policies for guidance.[112] These social policies can be used to support findings

99. Adelson, *supra* note 96, at 883-90.

100. *Id.*; *see Ayala*, 404 Mass. at 694, 536 N.E.2d at 1085-86 (describing relationship and contracts between HUD and the BHA).

101. Adelson, *supra* note 96, at 883-90.

102. *Id.* at 882-83.

103. *Id.* at 882.

104. *Id.* at 881-82; *see* Carson v. Pierce, 546 F. Supp. 80, 87 (E.D. Mo. 1982) ("[S]ince the statute did not create an enforceable right, surely HUD in entering into the agreement did not intend to create an enforceable right in the tenants.").

105. Paglin, *supra* note 59, at 77-81. "When the parties . . . have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981).

106. *See* Paglin, *supra* note 59, at 77.

107. *Id.*

108. *Id.* This result may arise from evidentiary problems, difficulties in applying evidentiary criteria, or a combination of the two. *Id.*

109. *Id.*

110. *See supra* notes 59-104 and accompanying text.

111. *See infra* notes 114-19 and accompanying text.

112. Paglin, *supra* note 59, at 81; *see infra* notes 120-30 and accompanying text.

either against or in favor of third-party beneficiary standing.[113] Decisions unfavorable to third-party beneficiary claims sometimes dwell on the need to maintain the efficient operation of government social programs and contain their costs.[114] Often, however, claims are denied simply by declaring the third-party claimant is only an incidental beneficiary.[115] Important social policies supported by decisions favorable to third-party beneficiaries' claims include the provision of nursing home care,[116] racial integration in schools,[117] the availability of public housing,[118] and the health and safety of public housing tenants.[119]

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113. "Faced with the social importance of many statutory programs . . . a court may tend to find supportive 'intent to benefit' rather easily . . . . The court may decline to infer intention only to accommodate conflicting policies if it apprehends that [it] may result in impairment of services and excessive financial burden." Paglin, *supra* note 59, at 81.

114. *See, e.g.*, Price v. Pierce, 823 F.2d 1114 (7th Cir. 1987). In *Price*, the court found that applicants for public housing were not third-party beneficiaries of a contract between the housing developers and HUD. The plaintiffs had attempted to challenge a reduction in the percentage of apartments to be made available to lower-income families. *Id.* at 1121-22. "[T]o give each applicant [standing] would make almost every lower-income person in the United States a potential plaintiff. [S]o wide a net of liability could make developers reluctant to participate in the [Section 8] program." *Id.* at 1121; *see also* Martinez v. Socoma Companies, 521 P.2d 841 (Cal. 1974).

115. Perry v. Housing Auth., 664 F.2d 1210, 1218 (4th Cir. 1981) ("[B]ased on the statutory scheme, the [contract] between HUD and [the housing authority], and the lease between [the housing authority] and the tenants, the plaintiffs are at best incidental beneficiaries to the contract . . . and therefore have no right to sue [the housing authority]."); Falzarano v. United States, 607 F.2d 506, 511 (1st Cir. 1979) ("The regulatory agreements at issue here do not disclose an intent to benefit the tenants, except as they might be incidental beneficiaries . . . ."); Boston Pub. Hous. Tenants' Policy Council, Inc. v. Lynn, 388 F. Supp. 493, 496 (D. Mass. 1974) (The tenants are "mere incidental beneficiaries and thus do not acquire true 'third party beneficiary' status.").

116. Fuzie v. Manor Care, Inc., 461 F. Supp. 689 (D. Ohio 1977). In *Fuzie*, a plaintiff successfully sued Manor Care as a third-party beneficiary to enforce certain Medicaid regulations incorporated in a "Provider Agreement" between Manor Care and the Ohio Department of Public Welfare. *Id.* at 691.

117. Bossier Parish Sch. Bd. v. Lemon, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967). Children living under federal jurisdiction on a military base in Louisiana were found to be third-party beneficiaries of a federal school funding contract. *Id.* at 850. The contract provided that children under federal jurisdiction were to be admitted to schools on the same terms as other children living in Bossier Parish. *Id.* The court found the children had the right to attend racially desegregated schools since the federal funding contract prohibited racial discrimination in the schools receiving funding. *Id.* at 850-51.

118. Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981). Public housing tenants sued the owner of their housing project as third-party beneficiaries of the contract between the owner and HUD. *Id.* at 1265, 1272-73. The tenants were successful in enforcing contract provisions which required the owner to certify the eligibility of tenants for rent subsidy payments within a reasonable time. *Id.*

In Zigas v. Superior Court, 174 Cal. Rptr. 806 (Cal. Ct. App. 1981), *cert denied*, 455 U.S. 943 (1982), plaintiff tenants successfully sued the owner of a HUD

In government contract cases, social policies[120] may drive the court's decision toward the furtherance of goals it considers important.[121] Such goals are not illegitimate considerations on which to base a decision. Some would argue that when a court finds contractual liability through an analysis centered on social policy, it imposes non-consensual liability on one or more of the parties in the case.[122] A general trend in contract law is the shift from bargain-based consensual liability theories toward the imposition of liability through equity and reliance theories;[123] this trend appears to be especially strong in third-party beneficiary law.[124] If so, it may be due to the difficulty in applying the intention criteria to cases involving three parties, or it may be due to a temptation for courts to use the cases to further desired social policies.[125] The fact that a case ends in what one party considers imposed liability, however, does not necessarily mean the court abandoned all principles of legal reasoning in order to reach that result.

When the parties disagree as to the meaning of the terms or provisions of a contract, the court must interpret the contract according to an objective standard.[126] The essence of the objective standard is that the court's inferences and interpretation of the contract must be those of a reasonable person.[127] The *Restatement Second* contemplates a situation where it is reasonable to infer intent to benefit a third party and a beneficiary's consequential right to enforce a contract based on the importance of a social policy.[128] "In some cases an overriding policy,

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financed building as third-party beneficiaries. The owner of the building had charged rents in excess of the amounts agreed upon in the financing contract between the owner and HUD. *Id.*

119. Ashton v. Pierce, 716 F.2d 56 (D.C. Cir. 1983) (public housing tenants were third-party beneficiaries of contract provision requiring removal of lead paint); Concerned Tenants Ass'n of Father Panik Village v. Pierce, 685 F. Supp. 316 (D. Conn. 1988) (ACC exhibits an intention to benefit tenants directly); Ayala v. Boston Hous. Auth., 404 Mass. 689, 536 N.E.2d 1082 (1989).

120. For example, legislative social policies may include the consequences of decisions for people similarly situated to the third-party claimant, the potential for high social and economic costs to society, and the ability of government agencies and program operators to deliver services effectivly and at a reasonable cost. *See* Paglin, *supra* note 59, at 81; Martinez v. Socoma Co., 521 P.2d 841 (Cal. 1974).

121. Paglin, *supra* note 59, at 81-83. "A court may be inclined to identify the desired policy, to make its decision, and only then write into the decision a finding of an intention to benefit the third party." *Id.* at 78 (citing Harris v. American Sur. Co., 24 N.E.2d 42 (Ill. 1939)).

122. *Id.* at 111.

123. *See* GILMORE, *supra* note 57, at 72 (discussing the ascendancy of the reliance principles of *Restatement Second* § 90 as a theory of liability).

124. Paglin, *supra* note 59, at 111.

125. *Id.*

126. 2 FARNSWORTH, *supra* note 77, § 7.9, at 254-55.

127. *Id.*

128. RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d (1981). The comment appears to refer to the "intention of the parties" in a subjectively judged sense.

which may be embodied in a statute, requires recognition of such a right without regard to the intention of the parties."[129] In such cases, the overriding importance of the social policy may make it reasonable for the court to find intent in an objective sense because any reasonable contracting party would intend to support that policy. A decision on a third-party beneficiary claim may well be a combination of a finding on the parties' objectively judged intent to benefit the third party and a need to support a particular social policy.[130]

IV. *AYALA V. BOSTON HOUSING AUTHORITY*

A. *Facts*

The plaintiffs, Betty Ayala and her two children,[131] brought an action against the defendant Boston Housing Authority (BHA) for failure to inspect their apartment for lead paint hazards and ensure the removal of lead paint.[132] The BHA administered a Section 8 Housing Assistance Payments (HAP) program for the United States Department of Housing and Urban Development (HUD).[133] The HAP program provides federal funds to subsidize the rent payments of low income tenants placed in privately owned apartments rather than housing projects.[134] The Ayalas' apartment was subsidized under the Section 8 HAP program administered by the BHA.

Under the regulations of the Section 8 program, the BHA was required to enter into an Annual Contributions Contract (ACC) with HUD.[135] The ACC, a standardized contract, described the rights and duties of HUD and the housing authority, such as the BHA, administering the local program.[136] A standardized Housing Assistance Payments

129. *Id.* See *supra* note 56 and accompanying text for a discussion of the Supreme Judicial Court's willingness to employ the illustrations and comments of the *Restatement Second.*

130. Paglin, *supra* note 59, at 81-83.

131. The plaintiffs in this case were the two Ayala children. The case was brought by Betty Ayala as their mother and next friend. Ayala v. Boston Hous. Auth., 404 Mass. 689, 690 n.2, 536 N.E.2d 1082, 1083 n.2 (1989).

132. The court analyzed the Ayalas' third-party beneficiary claim on the facts as taken from the plaintiffs' undisputed allegations. *Id.* at 693, 536 N.E.2d at 1083.

133. *Id.* at 694, 536 N.E.2d at 1085; *see supra* note 2.

134. *See supra* note 2. "For the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing, newly constructed, and substantially rehabilitated housing in accordance with the provisions of this section." 42 U.S.C. § 1437f(a) (1988); *see* 42 U.S.C. § 1437f(a)-(n) (1988).

135. *Ayala*, 404 Mass. at 694, 536 N.E.2d at 1085. "[HUD] is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section." 42 U.S.C. § 1437f(b)(1) (1988).

136. *Ayala*, 404 Mass. at 694, 536 N.E.2d at 1085.

(HAP) contract was signed by the housing authority and the owner of the subsidized private apartment.[137] The HAP contract described the rights and duties of those two parties.[138]

In consideration for funds used in the Section 8 program, the BHA was obligated under the ACC to inspect the apartments to be used in the program.[139] HUD required this to ensure that the subsidized apartments met the minimum standards set forth in HUD's regulations.[140] Among those regulations is one that requires that all surfaces in the apartment accessible to children under seven years of age be free of lead paint hazards.[141] The court concluded that the BHA had a contractual duty to inspect for lead paint hazards and inform the Ayalas of the results.[142]

While living in the apartment the Ayala children were diagnosed as having high levels of lead in their blood.[143] The apartment was inspected by the City of Boston's Lead Poisoning Prevention Center and found to have dangerously high levels of lead paint.[144] The Ayala children, suffering from lead poisoning, required repeated and painful medical exams, tests and treatments.[145] The Ayalas sought damages as third-party beneficiaries of the BHA's obligation in its contracts with HUD to inspect the apartment for lead paint hazards.[146]

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137. *Id.* at 694, 536 N.E.2d at 1086.

138. *Id.* at 702, 536 N.E.2d at 1090.

139. *Id.* at 696-97, 536 N.E.2d at 1087. "The HUD regulations having been incorporated by reference into the contract, the BHA thus obligated itself to inspect for immediate lead paint hazards and to notify the plaintiffs of its findings." *Id.* at 700, 536 N.E.2d at 1089.

140. *Id.* at 700, 536 N.E.2d at 1089. The contract provided, " '[t]he [BHA] shall inspect . . . prior to commencement of occupancy . . . to assure that Decent, Safe, and Sanitary housing accommodations are being provided . . . .' " *Id.* (quoting the ACC).

141. *Id.* at 697 & n.9, 536 N.E.2d at 1087 & n.9. The lead paint regulations provide, " 'Prior to the occupancy of HUD-associated housing, immediate hazards shall be eliminated by the most practicable means. For this purpose, all defective paint conditions shall be assumed to be immediate hazards.' " *Ayala*, 404 Mass. at 697, 536 N.E.2d at 1087 (quoting 24 C.F.R. § 35.24(a) (1980)).

142. *Ayala*, 404 Mass. at 698-99, 536 N.E.2d at 1088. The BHA had conceded that it had this duty. *Id.* at 698, 536 N.E.2d at 1088.

143. *Id.* at 695, 536 N.E.2d at 1086.

144. *Id.*, 536 N.E.2d at 1086. The owner of the apartment was notified of the lead paint hazard, but for three years the BHA took no action to compel the required removal or covering of the paint. *Id.*, 536 N.E.2d at 1086.

145. *Id.*, 536 N.E.2d at 1086. Lead poisoning in children can cause severe retardation of mental development and cause permanent physical damage in many cases. MASSACHUSETTS ADVOCACY CENTER, STATE OF DANGER: CHILDHOOD LEAD PAINT POISONING IN MASSACHUSETTS *passim* (1973).

146. *Ayala*, 404 Mass. at 691, 536 N.E.2d at 1084.

B. *Holding*

The housing court granted summary judgment to the BHA on the Ayalas' third-party beneficiary claim.[147] On appeal, the Supreme Judicial Court reversed the judgment, finding that the Ayalas had a cause of action to sue as third-party beneficiaries of the contracts.[148] The court analyzed the claim under the framework of section 302, and held that the Ayala children[149] were intended third-party beneficiaries of the lead paint inspection provisions incorporated in the ACC and the HAP contract, not merely incidental beneficiaries.[150]

The Supreme Judicial Court, recognizing that some federal courts had reached the opposite conclusion on the status of the tenants,[151] offered two reasons for its differences with these courts. First, the court stated it was not persuaded by the reasoning of these federal courts.[152] Second, the court emphasized that its decision was based on Massachusetts law, not federal common law or the law of any other jurisdiction.[153]

Yet, in invoking Massachusetts third-party beneficiary law, the court cited only section 302 of the *Restatement Second*, *Flattery v. Gregory*,[154] and *Brewer v. Dyer*.[155] In finding the Ayala children were the intended bene-

147. *Id.* at 691, 536 N.E.2d at 1084. Due to some procedural confusion in the lower court the issue was sent to the Supreme Judicial Court in the form of a reported question. The court, however, treated the matter as if it was on appeal. *Id.* at 691-93, 536 N.E.2d at 1084-85.

148. *Id.* at 705, 536 N.E.2d at 1092. On remand the BHA settled the claim with the Ayalas.

149. The court stated in a footnote that it was expressing no view as to whether adult tenants may be third-party beneficiaries of the contracts. *Id.* at 699 n.12, 536 N.E.2d at 1088 n.12.

150. *Id.* at 703, 536 N.E.2d at 1090. See *supra* notes 35, 49 for definitions of intended and incidental beneficiaries.

151. Perry v. Housing Auth., 664 F.2d 1210 (4th Cir. 1981); *see supra* note 115.

152. *Ayala*, 404 Mass. at 702 n.14, 536 N.E.2d at 1090 n.14. This, of course, is an entirely valid reason for the court to ignore the decisions of other jurisdictions, although some elaboration by the court on this point would have been helpful. The court merely said, "We are not persuaded by their reasoning." *Id.*

153. *Id.*

154. 397 Mass. 143, 489 N.E.2d 1257 (1986).

155. 61 Mass. (7 Cush.) 337 (1851). The 1851 *Brewer* case is cited for the proposition that: " '[W]hen one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement.' " *Ayala*, 404 Mass. at 699-700, 536 N.E.2d at 1088-89 (quoting *Brewer*, 61 Mass. (7 Cush.) at 340). *Brewer* predates Mellen v. Whipple, 67 Mass. (1 Gray) 317 (1854), and Lawrence v. Fox, 20 N.Y. 268 (1859), and was decided during an era of significant restrictions on third-party beneficiary recovery. *See supra* notes 43-47 and accompanying text.

To the extent that the rule from of this quasi-contractual case differs from section 302 of the *Restatement Second*, it could be interpreted as even more liberal than the modern *Restatement Second* view. The language of *Brewer* does not address

ficiaries of the ACC, the court cited only *Flattery* and section 302.[156] *Flattery* was cited only to quote section 302.[157]

The court appears to have endorsed section 302 as the basic statement of Massachusetts third-party beneficiary law. Other Massachusetts common law, at least to the extent the court used it in *Ayala*, appears to have had no effect on the decision at all. To say that *Ayala* was decided solely on the basis of an analysis under section 302 of the *Restatement Second* is not to call into question the reasoning of the decision. Adopted and made law by the court in *Rae*,[158] section 302 is no less a part of the Massachusetts law than any other common law rule.

C. *Third-Party Beneficiary Analysis*

The court's analysis of the Ayalas' third-party beneficiary claim is consistent with the two-level analysis outlined in section 302.[159] First, the court held the provisions of the ACC indicated the intent of the parties was that the apartment be inspected and made safe before occupancy.[160] The court decided that "[r]ecognizing a right to enforce these promises against the BHA 'is appropriate to effectuate the intention of the parties.' "[161] This finding satisfies the first subsection of section 302.[162]

Second, the court held there was an intent on the part of the promisee that the third party, the Ayala children, benefit from the contract.[163] The ACC specifically stated that the HUD funds were to be used to provide "Decent, Safe, and Sanitary dwellings for Families" eligible for public housing.[164] The court noted that to find the Ayalas were not intended beneficiaries would "mock the very goals which Con-

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the issue of intent. It might even be interpreted to permit suits by incidental beneficiaries, contrary to the formulation of the *Restatement Second*. As such, it would have made the adoption of section 302 unnecessary and contradictory to the law of Massachusetts. At best the language might be construed to allow no greater third-party beneficiary rights than section 302, in which case the quoted passage from *Brewer* is law that is not functionally different from that of the *Restatement Second*.

156. *Ayala*, 404 Mass. at 700, 536 N.E.2d at 1089; *see supra* note 35.

157. *Ayala*, 404 Mass. at 700, 536 N.E.2d at 1089.

158. Rae v. Air-Speed, Inc., 386 Mass. 187, 195, 435 N.E.2d 628, 632 (1982).

159. *See supra* notes 35, 62-68 and accompanying text.

160. *Ayala*, 404 Mass. at 700, 536 N.E.2d at 1089.

161. *Id.*, 536 N.E.2d at 1089 (citing Flattery v. Gregory, 397 Mass. 143, 148, 489 N.E.2d 1257, 1261 (1986)).

162. *See supra* note 35.

163. *Ayala*, 404 Mass. at 700, 536 N.E.2d at 1089. "The primary purpose, if not the only purpose, of the ACC was to benefit individuals such as the plaintiffs." *Id.* HUD is the promisee and the BHA is the promisor with respect to the obligations of the BHA in the ACC and the HAP contract, including the obligation to comply with regulations requiring the inspection for and removal of lead paint hazards in Section 8 apartments. *Id.*

164. *Id.* The quoted language is standard in public housing contracts and dates

gress and HUD set out to achieve through the [lead paint provisions of the] Section 8 program."[165] The court relied on the ACC's statement of purpose—to provide decent, safe and sanitary dwellings—in finding the requisite intent on the part of the promisee to satisfy the second subsection of section 302.[166]

In both parts of its analysis, the court employed the widely used substantive intent test.[167] It never addressed whether the ACC specifically provided that the Ayalas would be allowed to sue as third-party beneficiaries, as would be required under the procedural intent test.[168]

The court did not specifically apply the test of " 'whether the promisor has undertaken to render a performance directly to the third person.' "[169] Instead, the court focused on the BHA's obligations in finding an intent to benefit, rather than on to whom the performance was due.[170] Analyzing to whom the performance was due would not have aided the court in reaching a conclusion.[171] It would have been difficult to conclude that the performance was due to the Ayalas since apartments are not usually initially inspected as a service for the specific tenants,[172] but merely to ensure that they are safe before they are included in the Section 8 program.[173] It would also have been difficult to

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back to the stated purpose of the United States Housing Act of 1937, now codified as 42 U.S.C. § 1437 (1988).

165. *Ayala*, 404 Mass. at 700-01, 536 N.E.2d at 1089.

166. *Id.* at 700, 536 N.E.2d at 1089 (citations omitted). "When faced with liability for breach of its contractual duty to inspect for, and oversee the remedying of, lead paint hazards, the BHA will have a strong incentive to achieve the goals of the Federal statutes and regulations." *Id.*, 536 N.E.2d at 1089. See *supra* note 35 for the text of section 302.

167. *Ayala*, 404 Mass. at 699-703, 536 N.E.2d at 1088-90. See *supra* notes 76-79 and accompanying text for a discussion of the substantive intent test.

168. *See Ayala*, 404 Mass. 689, 536 N.E.2d 1082 (1989). See *supra* notes 74-75 for a description of the procedural intent test.

169. Paglin, *supra* note 59, at 74 (quoting Note, *Intent and Benefit in Third Party Beneficiary Contracts: A Justification for Public Policy*, 26 VA. L. REV. 778, 782 (1940)); *see supra* notes 89-95 and accompanying text.

170. *See Ayala*, 404 Mass. at 700, 536 N.E.2d at 1089.

171. *See supra* notes 91-94 and accompanying text.

172. Some inspections are made for tenants already living in apartments when the application is filed to subsidize the rent under the Section 8 program. HUD HOUSING PROGRAMS, *supra* note 2, at 1/16-1/20.

173. The guidelines for inspection are as follows:

> (1) Before approving a Lease, the [BHA] shall inspect the unit for compliance with the [BHA's] housing quality standards as established in accordance with § 882.109, or cause it to be so inspected on the date on which the Owner indicates that the unit will be ready for inspection, or as promptly as possible thereafter.
>
> (2) If there are defects or deficiencies which must be corrected in order for the unit to be Decent, Safe, and Sanitary, the Owner shall be advised by the [BHA] of the work required to be done. Before a Contract is executed, the unit must be reinspected to ascertain that the necessary work has been performed and that the unit is Decent, Safe, and Sanitary.

conclude that performance was due to HUD rather than to the Ayalas since HUD merely established the provisions of the ACC and was not involved in delivery of the services under the contract.[174]

In its analysis under the second subsection of section 302 of the *Restatement Second*, the court focused on the intent of the government, the promisee of the lead paint provisions of the ACC.[175] The court did not address the issue, however, of what governmental intent should be recognized.[176] Both Congress and HUD had a part in devising the provisions of the ACC.[177] Congress legislated the basic outlines of the Section 8 program, but left much of the detail to the discretion of HUD.[178] HUD is therefore likely to have had some degree of intent in entering into the ACC with the BHA separate from Congress' intent in legislating the Section 8 program.[179]

The court invoked the "goals" of the lead paint regulations in its analysis, but never indicated that it undertook any process to discover these goals.[180] Although it may seem obvious that the goal of the regulations is to protect children from lead paint poisoning, it is plausible that Congress and/or HUD intended to pursue other goals, as well, through the lead paint regulations.[181] These other goals may or may not be compatible with allowing public housing tenants to sue an administrator of the Section 8 program. This reliance on the "goals" of the lead paint provisions is to a certain extent a supplementation of the ACC.[182] The court relied on no specific evidence to "prove" that the goal of Congress and HUD was to protect children by implemeting the lead paint provisions of the ACC.[183] Although the court did not explic-

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24 C.F.R. §§ 882.209(h)(1)-(2)(1991).

174. HUD HOUSING PROGRAMS, *supra* note 2, at 1/17.

175. *See supra* notes 139-42 and accompanying text.

176. The court refers to the goals of "Federal statutes and regulations," and to the goals of "Congress and HUD" in the Section 8 program, without differentiating between the legislative goals, expressed through statutes, and the agency goals, expressed through regulations. *Ayala*, 404 Mass. at 700-01, 536 N.E.2d at 1089.

177. Adelson, *supra* note 96, at 888-90.

178. *Id.* Section 1437 specifies much of what must be in the ACC, but leaves HUD with broad discretion to promulgate the regulations which are incorporated in the contract. *Id.*; *see* 42 U.S.C. 1437f (1988). *See generally*, HUD HOUSING PROGRAMS, *supra* note 2, *passim* (describing HUD's role in promulgating housing program regulations).

179. Adelson, *supra* note 96, at 888-90.

180. *See infra* note 183.

181. Arguably, other goals of the lead paint regulations might include a desire to insulate HUD and housing authorities from liability for lead paint injuries, or a desire to reduce the financial burden on society of caring for children injured by lead paint poisoning.

182. *See supra* notes 105-19 and accompanying text.

183. The opinion merely says that "[t]o rule that these plaintiffs were not intended beneficiaries would mock the very goals which Congress and HUD set out to achieve through the Section 8 program, at least as to the lead paint provision: to

itly say so, this appears to be a case where an "overriding policy," the prevention of lead paint poisoning in children, "requires recognition" of third-party beneficiary rights "without regard to the [subjective] intention of the parties."[184]

The need to further this overriding social policy ultimately drives the decision. The court emphasized throughout the opinion that the plaintiffs were the children.[185] In addition, discussion about the goals of Congress and HUD in legislating and administering the Section 8 program are limited by the qualifier "at least as to the lead paint provision."[186] The prevention of lead paint poisoning is an important social policy in Massachusetts, which has some of the most stringent lead paint laws in the nation.[187] It is the magnitude of this social policy which made it reasonable to find the objective intent to benefit the children in *Ayala*.[188] The overwhelming importance of the policy made it entirely reasonable to infer this intent and hold the BHA liable for an intent to benefit the Ayala children.

The *Ayala* court asserted that the holding was limited to children and the lead paint provisions of the ACC, and declined to consider the question of whether an adult tenant may be the intended third-party beneficiary of the ACC.[189] A year after the *Ayala* decision, in *Barranco v. Milford Housing Authority*,[190] the court refused to extend the *Ayala* reasoning to an adult tenant injured due to the lack of a handrail in his rent-subsidized apartment.[191] The court did so in spite of the fact that *Barranco* involved the same kind of three party relationship and the same kind of contract as in *Ayala*.[192] Barranco, like the Ayala children,

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afford children of families of meager means a decent, safe, and sanitary place to live." *Ayala*, 404 Mass. at 700-01, 536 N.E.2d at 1089.

184. RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d (1981); *see supra* notes 128-30 and accompanying text.

185. *Ayala*, 404 Mass. at 690, 699-701, 536 N.E.2d at 1083, 1088-89.

186. *Id.* at 700, 536 N.E.2d at 1089.

187. MASS. GEN. L. ch. 111, §§ 190-99 (1992). Massachusetts first enacted lead paint protection laws in 1971. Penalties for violations include criminal sanctions. *Id.* "According to the [legislative report], the [Massachusetts] statute was enacted to protect young children from the dangers of lead poisoning. The statute itself states that it should be 'strictly construed and enforced so as to best protect . . . children under six years of age . . . .' " Ankiewicz v. Kinder, 408 Mass. 792, 800, 563 N.E.2d 684, 689 (1990) (Liacos, C.J., dissenting) (quoting MASS. GEN. L. ch. 111, § 197(g) (1988)). The Massachusetts lead paint protection laws were not at issue in *Ayala*.

188. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d (1981).

189. *Ayala*, 404 Mass. at 699 n.12, 536 N.E.2d at 1088 n.12.

190. 408 Mass. 502, 562 N.E.2d 74 (1990).

191. *Id.*

192. In *Barranco*, an adult public housing tenant was injured in an apartment covered under a state rental subsidy program known as Chapter 707. Chapter 707 is funded and operated in a similar manner as the Section 8 program in *Ayala*. An Annual Contributions Contract (ACC) was in place between the Massachusetts

was a public housing tenant whose rent was subsidized by a housing authority with funds from a governmental agency. The funds were conditioned, as in *Ayala*, on the apartment conforming to the sanitary code.[193]

The only relevant factual distinctions between *Ayala* and *Barranco* were the age of the plaintiff(s) and the nature of the injury.[194] Arguably, the reason the court found an intent to benefit a third party in *Ayala* but not in *Barranco* was that only *Ayala* invoked an "overriding policy."[195] In *Barranco*, the court again expressed the *Ayala* holding restrictively, as applying only to children and lead paint regulations.[196] The fact that the court would not consider intended third-party beneficiary status for plaintiff Barranco supports the conclusion that it found objective intent in *Ayala* through the importance of a social policy rather than through express, subjective manifestations of intent to benefit a third party.[197]

The need to further the policies of lead paint regulations is not an illegitimate basis for a judicial decision.[198] Recognition of the importance of this particular social policy may help to clarify why the *Ayala* decision, though not alone, is at odds with several other public hous-

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Department of Community Affairs, which funded the program, and the defendant Milford Housing Authority (MHA). The MHA administered the program under which Barranco's apartment was subsidized. In dicta, the court addressed the argument that Barranco was a third-party beneficiary of the ACC. *Id.*

193. Regulations incorporated into the ACC provided that "[d]welling units chosen for the program must be certified by the local Board of Health to conform to the State Sanitary Code." 760 MASS. REGS. CODE tit. 8.01(5)(a) (1986). The State Sanitary Code required that all stairways have handrails. 105 MASS. REGS. CODE tit. 410.503(a) (1986). The court stated that the MHA owed no contractual duty to ensure that the apartment met the Sanitary Code because the regulation provided that the Board of Health, and not the MHA, was to inspect and certify the apartment. *Barranco*, 408 Mass. at 508, 562 N.E.2d at 77. The court did not address the fact that the MHA chose the apartment for the program without obtaining this certification. Nor did it address the problem of how the Board of Health was supposed to know to inspect the apartment if the MHA was not to be responsible for obtaining the certification.

194. *Ayala* involved children poisoned by lead paint. *Ayala*, 404 Mass. at 695, 536 N.E.2d at 1086. *Barranco* involved an adult injured by the more obvious defect of a lack of a hand railing on a stairway. *Barranco*, 408 Mass. at 504, 562 N.E.2d at 75.

195. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d (1981).

196. *Barranco*, 408 Mass. at 508, 562 N.E.2d at 77. "In that case, we held that the *minor children* of a tenant occupying an apartment under the auspices of the Section 8 Housing Assistance Payments Program, 42 U.S.C. § 1437f (1982), were third-party beneficiaries of the contract between the [BHA] and [HUD]." *Barranco*, 408 Mass. at 508, 562 N.E.2d at 77 (emphasis added).

197. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d (1981); *supra* notes 128-30 and accompanying text.

198. *See* Ankiewicz v. Kinder, 408 Mass. 762, 563 N.E.2d 684 (1990) ("We recognize that lead poisoning among children remains an enduring and serious public health danger.").

ing/third-party beneficiary cases.[199]

V. Conclusion

Recent developments in third-party beneficiary law have eliminated any significant uniqueness in this area of Massachusetts contract law. With the adoption of the *Restatement Second* provisions and the abandonment of 125 years of case law, Massachusetts third-party beneficiary law is no longer unique enough to stand alone as the justification for a contrary decision in a case. Except for the very few recent cases since *Rae* in 1982, the *Restatement Second* is effectively the sole source of third-party beneficiary law in Massachusetts. With section 302 of the *Restatement Second* comes the less than clear and difficult to apply intention criteria.

Comment d of *Restatement Second* section 302 can be a powerful tool for promoting important social policies. Properly invoked, however, comment d does not impose non-contractual liability. Because intent must be judged by objective standards, objective findings of intent may reasonably be imposed on government agencies or others charged with promoting social policy. There may be a necessary presumption to reach this conclusion—that government agencies intend to promote important social policies—but the law indulges in many presumptions, and this one is not unreasonable. Imposing contractual liability through reasonable presumptions is a wholly legitimate role for a modern common law court.

Kenneth J. Foster

199. *See supra* notes 114-15.

Secured Lender Liability under CERCLA

I. INTRODUCTION

The issue of lender liability for hazardous substance[1] cleanup has once again been thrust to the forefront of concern for financial institutions. Decisions of the United States Court of Appeals in the Eleventh[2] and Ninth[3] Circuits have further clouded an already tenuous relationship among the Environmental Protection Agency (EPA), debtors, and secured parties.[4] The Eleventh Circuit holding in *United States v. Fleet Factors Corp.*,[5] and the Ninth Circuit holding in *Bergsoe Metal Corp. v. East Asiatic Co.*[6] are particularly significant because they are the first circuits to render opinions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[7] Both de-

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1. 42 U.S.C. § 9601(14) defines hazardous substances as:
(A) any substance designated pursuant to section 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C [§] 6921] . . . , (D) any toxic pollutant listed under section 1317(a) of title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. [§] 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).
42 U.S.C. § 9601(14) (1988).

2. United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

3. Bergsoe Metal Corp. v. East Asiatic Co., 910 F.2d 668 (9th Cir. 1990).

4. U.C.C. § 9-105(1)(m), 3 U.L.A. 160, 161 (1990) defines "secured party" as:
a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party.
Id.

5. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

6. 910 F.2d 668 (9th Cir. 1990).

7. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9675 (1988)). The Internal Revenue Code of 1986 created a $1.6 billion fund referred to as "Superfund." 26 U.S.C. § 9507(a), (b)(2) (1988). CERCLA authorized the government to utilize these funds to clean up hazardous waste sites

cisions, particularly *Fleet Factors*, may be interpreted as greatly expanding lender liability for the cleanup cost of a debtor's contaminated property. Recent activities of the EPA have attempted to administratively clarify ambiguities that now exist as a result of these judicial decisions.

Section II of this Note discusses the pertinent sections of CERCLA as they relate to lender liability for hazardous waste cleanups.[8]

Section III analyzes appropriate case law concerning lender liability under CERCLA. In addition to the *Fleet Factors* and *Bergsoe* decisions, this section analyzes major district court decisions that formed the foundation for the circuit court opinions.[9]

Section IV comments upon the relevant public policy considerations that may affect (1) future court decisions on hazardous waste liability and (2) lending institutions' decisions on whether or not to extend credit to debtors involved in businesses that may generate hazardous waste.[10]

Section V details the current positions of the EPA, creditors, and concerned environmental groups.[11]

Section VI concludes this Note with a recommendation that legislation is needed to clarify the ambiguous language in certain sections of CERCLA. Such clarifying language should limit the presently expanding liability of lenders for hazardous substance cleanup.[12]

II. Lenders as Owners or Participating Managers under CERCLA

The relevant sections of CERCLA as they relate to lender liability for hazardous waste cleanup are 42 U.S.C. § 9601(20)(A) and 42 U.S.C. § 9607(a).[13] Of particular importance to this Note is CERCLA's defini-

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and then to sue the parties responsible for the hazardous substance discharge for reimbursement. 42 U.S.C. §§ 9607(c)(3), 9612(c)(3) (1988).

8. *See infra* notes 13-18 and accompanying text.
9. *See infra* notes 19-130 and accompanying text.
10. *See infra* notes 131-49 and accompanying text.
11. *See infra* notes 150-235 and accompanying text.
12. *See infra* notes 236-38 and accompanying text.
13. The text of § 9607(a) states:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration

tion of "owner or operator."[14]

CERCLA's definition of owner or operator "does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."[15] Once a lender's actions are interpreted as managerial participation, the lender is not entitled to the § 9601(20)(A)(iii) exemption. What actions may a secured lender take to protect its security interest before crossing the invisible line into management participation? Unfortunately, CERCLA itself did not initially define "participating in the management."

Secured lenders, therefore, found themselves in the very unenviable position of relying upon inconsistent case law interpretation as to what constitutes management participation.[16] The resulting unpredictability forced lending institutions to re-evaluate the practice of extending credit to potential hazardous-waste-producing debtors.[17] The ramifica-

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vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607(a) (1988).

14. 42 U.S.C. § 9601(20)(A) defines "owner or operator" as:

The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. § 9601(20)(A) (1988).

15. 42 U.S.C. § 9601(20)(A)(iii) (1988).

16. See *infra* text accompanying notes 19-130 for a discussion of such case law. This Note analyzes four major decisions in Section III that interpret lender liability under CERCLA. *See infra* notes 19-130 and accompanying text.

17. *See infra* text accompanying notes 131-42.

tions of creditors' increased hesitancy to extend credit are indeed far reaching and potentially devastating for small businesses that may be a high credit risk.[18]

III. Case Law and Lender Liability

Before the *Fleet Factors*[19] and *Bergsoe*[20] decisions are analyzed, it is first necessary to discuss the landmark district court cases: *United States v. Mirabile*[21] and *United States v. Maryland Bank & Trust Co.*[22] These two district court cases laid the foundation for the circuit court holdings in *Fleet Factors* and *Bergsoe*.

In *Mirabile II*, the American Bank and Trust Company (ABT), Mellon Bank National Association (Mellon), and the Small Business Administration (SBA), financed a paint manufacturing business referred to as the "Turco site."[23] ABT eventually foreclosed on the Turco site and was the highest bidder at the sheriff's sale.[24] ABT assigned its successful bid to Thomas and Anna Mirabile, the owners of the site at the time of the action.[25] The hazardous condition[26] at the Turco site occurred during the time that ABT, Mellon, and the SBA were involved in financing the operations of the site.[27]

Mellon and ABT argued that any control they exerted over the facility was simply designed to protect their security interest.[28] Therefore, since they only exercised financial control, they were exempt from

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18. *See infra* text accompanying notes 143-49.

19. United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

20. Bergsoe Metal Corp. v. East Asiatic Co., 910 F.2d 668 (9th Cir. 1990).

21. [1985] 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985) [hereinafter *Mirabile II*]. United States v. Mirabile, [1985] 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992 (E.D. Pa. Sept. 4, 1985) [hereinafter *Mirabile I*] was decided on the same day and by the same court, and dealt only with summary judgment for the United States.

22. 632 F. Supp. 573 (D. Md. 1986).

23. *Mirabile II*, [1985] 15 Envtl. L. Rep. at 20,995. The initial involvement of ABT, Mellon, and the SBA with the "Turco site" was indeed of a financial nature. In 1973, ABT loaned funds for a paint manufacturing facility at the Turco site; "[i]n 1976, Girard Bank, the predecessor-in-interest of Mellon Bank . . . advance[d] working capital to Turco[; and in] 1979 the SBA loaned $150,000 to Turco [for] specific debts." *Id.* at 20,996.

24. *Id.* Before and after its successful bid at the sheriff's sale, ABT negotiated with other parties for purchase of the Turco site. Eventually, ABT assigned its bid to Thomas and Anna Mirabile who accepted a sheriff's deed to the property. *Id.*

25. *Id.*

26. *Mirabile I*, [1985] 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992, 20,993 (E.D. Pa. Sept. 4, 1985). An EPA inspection revealed drums containing "benzene, ethylbenzene, naphthalene, toluene and mercury." *Id.* at 20,993.

27. *Mirabile II*, [1985] 15 Envtl. L. Rep. at 20,995.

28. *Id.*

CERCLA liability under 42 U.S.C. § 9601(20)(A).[29] The *Mirabile II* court looked at the CERCLA definition of "owner and operator"[30] and noted:

> Were it not for the underscored exemption from liability, the definition would be a hopeless tautology. Nevertheless, the exemption plainly suggests that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for cleanup costs.[31]

The court further stated: "the participation which is critical is participation in operational, production, or waste disposal activities. Mere financial ability to control waste disposal practices of the sort possessed by the secured creditors in this case is not . . . sufficient for the imposition of liability."[32] ABT's involvement at the Turco site was restricted to protecting the property against vandalism, showing the property to prospective buyers, and inquiring as to disposal costs of certain materials on the property.[33] The *Mirabile II* court considered these "prudent and routine steps"[34] of a secured lender and entered summary judgment in favor of ABT.[35]

The court also granted summary judgment in favor of the SBA.[36] The court noted that although the SBA contemplated active participation at the Turco site, such participation did not occur and mere contemplation did not satisfy CERCLA's definition of owner or operator.[37] As it did when discussing ABT's ability to participate in disposal activities,[38] the court again distinguished between the ability to participate and any actual participation.[39]

The court denied the motion of Mellon for summary judgment since there was evidence that Mellon may have been involved with the Turco site on a day-to-day basis.[40] The court was consistent with its earlier reasoning, noting that had Mellon's participation been financial only (e.g., monitoring cash flows and receivables), CERCLA liability would not have been imposed.[41] However, there was evidence to suggest that

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29. *Id.*
30. 42 U.S.C. § 9601(20)(A). See *supra* note 14 for text of the statute.
31. *Mirabile II*, [1985] 15 Envtl. L. Rep. at 20,995.
32. *Id.*
33. *Id.* at 20,996. "[ABT's] loan officer, Donald Hans, visited the property on various occasions [to] show it to prospective purchasers. [T]hese activities occurred several months after Turco ceased its operations at the site." *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 20,997.
37. *Id.*
38. *Mirabile II*, [1985] 15 Envtl. L. Rep. at 20,995; *see supra* text accompanying note 32.
39. *Mirabile II*, [1985] 15 Envtl. L. Rep. at 20,997.
40. *Id.*
41. *Id.*

Mellon influenced day-to-day operational decisions of the business (e.g., which orders to fill), and thus summary judgment was denied.[42]

The apparently consistent reasoning of the *Mirabile II* court was of some comfort to creditors. As long as the secured creditor[43] did not actively participate in the day-to-day operational functions of its debtor, it was exempt from CERCLA liability. Such comfort, however, was short-lived as courts began to narrowly construe secured lender's exemptions under CERCLA.[44]

United States v. Maryland Bank & Trust Co.[45] illustrates the federal judiciary's willingness to expand CERCLA liability to secured creditors. In this case, Maryland Bank extended credit to Herschel McLeod to operate his two sanitation businesses.[46] In 1972 or 1973, hazardous waste was deposited on McLeod's property.[47] Herschel McLeod's son, Mark McLeod, purchased the property from his father with a loan that he received from Maryland Bank.[48] Upon Mark McLeod's failure to repay the loan, Maryland Bank foreclosed on the property and purchased the property at the foreclosure sale.[49]

The EPA subsequently became aware of the hazardous condition that existed on the property and ordered Maryland Bank to institute cleanup proceedings.[50] Maryland Bank refused to do so. The EPA cleaned up the property and sued Maryland Bank for reimbursement.[51]

Maryland Bank, as did Mellon and ABT before it,[52] argued that it purchased the property merely to protect its security interest and did not participate in the daily operational management of the property.[53] Accordingly, Maryland Bank claimed it fell under the exemption of CERCLA[54] and therefore, was not liable for cleanup costs.[55]

The court, narrowly construing the "owner or operator" exemption, held that the exemption only applied to the entity that held the

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42. *Id.*

43. See *supra* note 4 for definition of secured creditor.

44. *See infra* notes 45-130 and accompanying text.

45. 632 F. Supp. 573 (D. Md. 1986).

46. *Id.* at 575. Herschel McLeod, Sr. operated two sanitation businesses on his property, Greater St. Mary's Disposal, Inc. and Waldorf Sanitation of St. Mary's, Inc. *Id.*

47. *Id.* "The wastes included organics such as toluene, ethylbenzene and total xylenes and heavy metals such as lead, chromium, mercury and zinc." *Id.*

48. *Id.*

49. *Id.*

50. *Id.* The EPA was notified of the hazardous condition at the site by St. Mary's County Department of Health. Interestingly enough, the Department of Health was actually notified by Mark McLeod that hazardous waste sites were on the land. *Id.* CERCLA authorizes remedial action under 42 U.S.C. § 9606.

51. *Maryland Bank*, 632 F. Supp. at 575-76.

52. *See supra* notes 23-42 and accompanying text.

53. *Maryland Bank*, 632 F. Supp. at 579.

54. See *supra* note 14 for text of the statute.

55. *Maryland Bank*, 632 F. Supp at 579.

security interest when the hazardous waste was cleaned up.[56] The court found that when Maryland Bank purchased the property at the foreclosure sale, full title vested in Maryland Bank and the bank no longer simply owned the security interest but rather it owned the entire property.[57] Accordingly, Maryland Bank did not own the security interest at the time of the cleanup and therefore it was not covered by the CERCLA exemption.[58]

Although the *Mirabile II* court was most concerned with the extent of the secured creditors' participation in the contaminated facilities' operations,[59] the *Maryland Bank* court focused on whether the secured creditor had legal title to the property.[60] In effect, the *Maryland Bank* court held that once legal title vested in the secured lender, liability for hazardous waste cleanup costs simultaneously attached.[61] The comfort that secured lenders received from the bright-line approach used in *Mirabile II*[62] was quickly eradicated by the approach used in *Maryland Bank*.[63] As a result of *Maryland Bank*, the secured lender was thrust into a rather precarious situation.[64] The lender, when faced with a defaulting debtor has two options: either purchase the property to protect its interest and incur liability, or do not foreclose on the property and absorb the loss of the loan.

The issue of active participation of a secured lender was recently analyzed for the first time by the United States Court of Appeals for the Eleventh Circuit. In *United States v. Fleet Factors Corp.*,[65] the Eleventh Circuit, when faced with the issue of lender liability under CERCLA, further narrowed the exemptions available to lenders for hazardous waste cleanups.[66] As was the case with *Mirabile II*, the *Fleet Factors* decision focused on the definition of "owner or operator" under section 9601(20)(A) of CERCLA.[67]

Fleet Factors Corporation (Fleet), advanced credit in 1976 to Swainsboro Print Works (SPW) in return for an assignment of SPW's accounts receivable to Fleet.[68] "In early 1981, Fleet ceased advancing

56. *Id.*
57. *Id.*
58. *Id.*
59. *Mirabile II*, [1985] 15 Envtl. L. Rep. at 20,996; *see supra* notes 23-44 and accompanying text.
60. *Maryland Bank*, 632 F. Supp. at 579; *see supra* notes 57-58 and accompanying text.
61. *Maryland Bank*, 632 F. Supp. at 578-79.
62. *Mirabile II*, [1985] 15 Envtl. L. Rep. at 20,996.
63. *Maryland Bank*, 632 F. Supp. at 579-80.
64. *Id.* at 580.
65. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).
66. *Id.* at 1560.
67. *Id.* at 1554-58. See *supra* note 14 for the full text of 42 U.S.C. § 9601(20)(A) (1988) (CERCLA).
68. *Fleet Factors*, 901 F.2d at 1552. Swainsboro Print Works owned and oper-

funds to SPW because SPW's debt to Fleet exceeded Fleet's estimate of the value of SPW's accounts receivable."[69] In December 1981, SPW was declared bankrupt and title and control of the facility was assumed, not by Fleet, but by a trustee.[70]

In 1982, Fleet foreclosed on its security interest and authorized an auction of some of the collateral.[71] In 1984 the Environmental Protection Agency (EPA) discovered toxic contamination at the SPW facility and instituted a $400,000 cleanup program.[72] The government subsequently sued Fleet for reimbursement. Emanuel County, Georgia obtained title to the facility at a foreclosure sale in 1987.[73]

Although the *Fleet Factors* court was primarily concerned with a lender's participation in the operations of the facility, it held that Fleet could not be held strictly liable as an owner because it "neither owned, operated, or controlled SPW immediately prior to Emanuel County's acquisition of the facility."[74] Under the CERCLA standard, liability may be imposed on "any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand."[75] The court reasoned that since Fleet did not control the facility between 1983 and 1987 when Emanuel County obtained title, Fleet could not be held liable as an owner of the facility.[76] Had Fleet obtained title at the foreclosure sale to protect its interest, the court would have followed

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ated a cloth printing facility in Swainsboro, Georgia. In addition to SPW assigning its accounts receivable to Fleet, Fleet was also granted a "security interest in SPW's textile facility and all of its equipment, inventory and fixtures." *Id.*

69. *Id.* On February 27, 1981, the owners and operators of SPW ceased operations and laid off a majority of its employees. Appellant's Brief at 5, United States v. Fleet Factors, 901 F.2d 1550 (11th Cir. 1990) (No. 89-8094), *cert. denied*, 111 S. Ct. 752 (1991). Some employees remained to ship existing inventory to SPW's customers. *Id.* Payment for this inventory was forwarded directly to Fleet with Bankruptcy Court approval. *Id.* at 6. At the time of foreclosure, SPW owed Fleet nearly $2,000,000,000. *Id.* at 10.

70. *Fleet Factors*, 901 F.2d at 1552. The facility became part of the bankruptcy estate and the trustee was authorized to liquidate SPW's assets in order to pay SPW's debts. Appellant's Brief at 6, *Fleet Factors* (No. 89-8094).

71. *Fleet Factors*, 901 F.2d at 1552. This auction was authorized by the Bankruptcy Court pursuant to the Uniform Commercial Code. Appellant's Brief at 6, *Fleet Factors* (No. 89-8094).

72. *Fleet Factors*, 901 F.2d at 1553. The EPA discovered "700 fifty-five gallon drums containing toxic chemicals and forty-four truckloads of material containing asbestos." *Id.*

73. *Id.* The foreclosure sale resulted from SPW's failure to pay state and county taxes. *Id.* "Although Fleet did hold a 'Deed with a Power of Sale to Secure Debt,' it never foreclosed on that 'mortgage' and never took control of or attempted to sell the facility." Appellant's Brief at 7, *Fleet Factors* (No. 89-8094).

74. *Fleet Factors*, 901 F.2d at 1555.

75. 42 U.S.C. § 9601(20)(A)(iii) (1988). See *supra* note 14 for the full text of this section.

76. *Fleet Factors*, 901 F.2d at 1555.

the reasoning of the *Maryland Bank*[77] court and found Fleet strictly liable.

However, Fleet did not pass the court's narrow interpretation of what constitutes managerial participation in the facility. The court held that since Fleet clearly held an "indicia of ownership" to protect its security interest in the facility, the main issue was whether Fleet's involvement in the facility removed it from the § 9601(20)(A)[78] exemption.[79]

Fleet proposed that the court adopt the approach taken by the district court in *United States v. Mirabile*[80] and distinguish between "permissible participation in the financial management of the facility and impermissible participation in the day-to-day or operational management of a facility."[81] The government urged the court to adopt a much stricter interpretation of the statute and to "exclude[] from its protection any secured creditor that participates in any manner in the management of a facility."[82]

The court of appeals noted that the nature of the secured lending business necessarily entails "some involvement in the financial affairs of their debtors in order to insure that their interests are being adequately protected."[83] The court therefore did not adopt the all inclusive approach proposed by the government.[84]

However, the court flatly rejected the *Mirabile II* court's approach.[85] The *Fleet Factors* court chose to adopt an approach that may in effect be more inclusive than the approach suggested by the government. The government's proposal presupposed some participation of the secured creditor in the management of the facility.[86] The *Fleet Factors* court re-

77. United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986); *see supra* notes 45-64 and accompanying text.

78. See *supra* note 14 for text of statute.

79. *Fleet Factors*, 901 F.2d at 1556.

80. *Mirabile II*, [1985] 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,995 (E.D. Pa. Sept. 4, 1985).

81. *Fleet Factors*, 901 F.2d at 1556.

82. *Id.* The government alleged that Fleet "actively participated in the management of, managed, supervised, operated or otherwise controlled activities and operations at the Swainsboro facility at the time of disposal of hazardous substances at the Facility." Appellant's Brief at 13, *Fleet Factors* (No. 89-8094). Fleet contended that any actions taken on its behalf were designed to protect its security interest and that "with the exception of one visit at or near the inception of the factoring relationship in 1976, no Fleet employee ever visited the SPW facility." *Id.* at 14. Fleet, therefore, noted that "if exercise of the secured creditor's rights is construed as 'participation in management,' the 'secured lender exemption' would be self annihilating." *Id.* at 21.

83. *Fleet Factors*, 901 F.2d at 1556.

84. *Id.*

85. *Id.* at 1558 ("We, therefore, specifically reject the formulation of the secured creditor exemption suggested by the district court in *Mirabile*.").

86. *Id.* at 1556. The government requested "any secured creditor that

quired no such active participation before liability may be incurred. The court held "a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose."[87]

The circuit court found the *Mirabile II* court's approach "too permissive"[88] and elected to construe "ambiguous statutory terms"[89] in favor of the government.[90] Although the *Fleet Factors* court claimed, "[n]othing in our discussion should preclude a secured creditor from monitoring any aspect of a debtor's business,"[91] the court did not give secured lenders an indication as to what activities would lead to CERCLA liability. Such a holding once again eradicated any bright line that may have been set out in *Mirabile II*.[92] Secured creditors were once again placed in an interpretational predicament: What type of involvement by the secured lender would infer the ability to affect hazardous waste matters? Unfortunately, the *Fleet Factors* court failed to outline any parameters of participation.

The United States Court of Appeals for the Ninth Circuit decided the issue of secured lender liability under CERCLA in *Bergsoe Metals Corp. v. East Asiatic Co.*[93] Bergsoe Metals (Bergsoe) was a corporation involved in a lead recycling operation in the state of Oregon.[94] The Port of St. Helens (the Port) was the issuer of revenue bonds designed to promote industrial development in Oregon.[95] The purchase of the Bergsoe site and the construction of the facility was financed by the bonds issued by the Port.[96]

In 1979, the Port sold Bergsoe the land in exchange for a promissory note and a mortgage.[97] In 1981, Bergsoe conveyed the land and

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participates in any manner in the management of a facility be excluded from the secured creditor exemption." *Id.* Counsel for Fleet noted:

> [u]nder the interpretation urged by the Government, the 'secured lender exemption' would present a Hobson's choice: a secured lender can avoid CERCLA liability if he declines (i.e., foreclosure) the protections his secured position offers him; but if he seeks to avail himself of his commercial rights by foreclosing, he will be deemed to 'participate in management' and lose the CERCLA exemption.

Appellant's Brief at 29, *Fleet Factors* (No. 89-8094).

87. *Fleet Factors*, 901 F.2d at 1558 (footnote omitted).
88. *Id.* at 1557.
89. *Id.*
90. *Id.*
91. *Id.* at 1558.
92. *Mirabile II*, [1985] 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,995 (E.D. Pa. Sept. 4, 1985).
93. 910 F.2d 668 (9th Cir. 1990).
94. *Id.* at 669.
95. *Id.*
96. *Id.*
97. *Id.* at 669-70.

the facility back to the Port and then entered into leases with the Port for the land and the facility.[98] Under the leases, Bergsoe was to pay rent directly to the United States National Bank of Oregon (the Bank), which was acting as trustee.[99] The leases also gave Bergsoe the option to purchase the land and the facility for $100 once the bonds had been paid off.[100] The Port gave the Bank two mortgages for the leases and assigned to the Bank all of its rights under the leases.[101]

The Bergsoe plant began operations in 1982. In 1983, the Bank declared Bergsoe in default on the leases.[102] In 1986, the Bank put Bergsoe into involuntary bankruptcy.[103] The Oregon Department of Environmental Quality then discovered hazardous substance discharges at the facility.[104]

In 1987, the Bank filed an action for collection of debts against the owners of Bergsoe Stock—The East Asiatic Company, Ltd., The East Asiatic Company, Inc., and Heidelberg Eastern, Inc. (collectively E.A.C.)—which included a request that E.A.C. be found liable for the cost of the cleanup.[105] E.A.C. filed a counterclaim claiming the Port and the Bank were liable for the cleanup costs under CERCLA.[106] The Port was granted summary judgment and E.A.C. appealed to the Ninth Circuit.[107]

The *Bergsoe* court correctly noted that in order for the Port to be entitled to summary judgment under the CERCLA exemption,[108] "the undisputed facts must demonstrate both that the Port holds indicia of ownership primarily to protect its security interest in the Bergsoe plant and that it did not participate in the management of the plant."[109]

First, the court considered the security interest exemption as it noted that Port held legal title to the facility.[110] Before liability could be imposed, however, it had to be determined if Port held indicia of ownership to protect its security interest.[111] The court noted that although the financial transactions between Port and Bergsoe were called leases rather than security agreements, the effect of the arrangement was to grant Port a security interest in the facility.[112]

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98. *Id.* at 670.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. See *supra* note 14 for text of statute.
109. *Bergsoe Metal*, 910 F.2d at 671.
110. *Id.*
111. *Id.*
112. *Id.*

The Ninth Circuit held that with respect to title of ownership, "Port has the deed in the plant primarily to ensure that Bergsoe would meet its obligations under the leases and therefore under the bonds. In other words, the Port has a security in the property."[113]

The court then turned to the issue of what activity by the secured lender would constitute participation in management, thereby negating the § 9601(20)(A) exemption.[114] The court discussed the *Fleet Factors* decision and the "inference of capacity to influence" approach proposed by the *Fleet Factors* court.[115] Although the court stated that it was not establishing a Ninth Circuit rule on this "difficult issue,"[116] the court went on to hold that "whatever the precise parameters of 'participation,' there must be *some* actual management of the facility before a secured creditor will fall outside the exception."[117]

E.A.C. claimed that the Port participated in the management of the Bergsoe plant by negotiating and encouraging the erection of the facility.[118] The court responded that all secured "[c]reditors do not give their money blindly"[119] and that "[a] secured creditor will always have some input at the planning stages of any large-scale project."[120] The court went on to hold that if these preliminary actions by the secured creditor were to be construed as constituting managerial participation, "the [CERCLA] exemption would cease to have any meaning."[121]

E.A.C. next attempted to impose liability upon the Port by referring the court to the Port's rights under the leases.[122] For example, Port's right to repossess upon foreclosure and the right to inspect the facility.[123] This is the ability-to-influence approach adopted by the Eleventh Circuit in the *Fleet Factors* decision.[124]

However, the Ninth Circuit refused to adopt such an approach. The court noted that "[w]hat is critical is not what rights the Port had, but what it did."[125] The court went on to hold that the Port did not exercise these rights and "[m]erely having the power to get involved in

113. *Id.*

114. *Id.* at 672. See *supra* note 14 for text of statute.

115. *Bergsoe Metals*, 910 F.2d at 672 (quoting United States v. Fleet Factors Corp., 901 F.2d 1550, 1557-58 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991)); *see supra* notes 66-93 and accompanying text.

116. *Bergsoe Metals*, 910 F.2d at 672.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991); *see supra* notes 65-92 and accompanying text.

125. *Bergsoe Metals*, 910 F.2d at 672.

management, but failing to exercise it, is not enough."[126] Summary judgment in favor of the Port was therefore affirmed.[127]

Although secured lenders may take some comfort from the *Bergsoe* court holding, a crucial issue was still left unanswered by the court. The *Bergsoe* court found that the Port did not exercise any of its rights in the management of the facility.[128] Since mere ability to influence was not enough to impose liability, the Port was not liable for the cleanup costs. However, the court did not indicate its position if the Port exercised some of its rights.

Although the expansive holding of the *Fleet Factors* court was somewhat tempered by the more narrowly tailored *Bergsoe* opinion, secured creditors were still in a relatively precarious position.[129] The *Bergsoe* court, unlike the *Fleet Factors* court, required the secured creditor to actually participate in the management of the facility before liability would be incurred.[130] However, the *Bergsoe* court failed to determine what level of involvement would be construed to be participation. It is apparent that the first two circuit court decisions on secured creditor liability for hazardous waste cleanups have not given lenders any clear guidelines to follow.

IV. Policy Considerations

Typically, a secured lender's financial risk was limited to the amount of the loan less the monetary value of the collateral.[131] Secured lenders were therefore concerned primarily with the financial status of the debtor and the ability of the debtor to repay the loan. With the recent circuit court decisions, a lender must not only be concerned with the financial status of the debtor, but also with potential environmental liability.[132] The cost of an environmental cleanup may be many times greater than the actual value of the loan.[133]

One of the main purposes of CERCLA is to encourage private parties to conduct and monitor cleanup procedures at hazardous waste ar-

126. *Id.* at 673 n.3.

127. *Id.* at 673.

128. *Id.* at 672-73.

129. *Id.*

130. *Id.* at 671.

131. *See generally* Scott Wilsdon, Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 Hastings L.J. 1261, 1271-74 (1987) (reviewing basic commercial lending practices).

132. *See supra* notes 65-130 and accompanying text.

133. *See* Ann M. Burkhart, *Lender/Owners and CERCLA: Title and Liability*, 25 Harv. J. on Legis. 317, 319 n.3 (1988). For purposes of "its 1988 budget request, the [EPA] estimated an average cleanup cost of $10-$12 million per site." *Id.* EPA also estimated a total cost of $46 billion to clean up abandoned hazardous waste sites. *Id.*

eas.[134] However, if a broad interpretation is given to "participating in the management" language, this may indeed result in secured lenders shying away from potential hazardous waste sites.[135] Conversely, a more narrow interpretation of "participating in the management" language, may actually encourage lenders to monitor potential hazardous waste sites.[136] Accordingly, if secured lenders are not penalized for minimal involvement in their debtor's operations, they are more likely to take a positive role in monitoring waste sites and thus one goal of CERCLA will be furthered.[137] Also, secured lenders are in a position conducive to effective monitoring.[138] Before extending credit, lenders often become very familiar with the background of the debtor.[139] A lender is aware of the type of business the debtor is engaged in. Standard banking practices, such as title examinations, would reveal past owners of the property and the type of business they were engaged in.[140] Such information would be important in determining the possi-

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134. The principle of the statute is to:

> establish liability for costs expended by the government to clean up past disposal practices that today are threatening public health and the environment . . . . The supposition of the Administration's proposal is that society should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer or dumpsite owner or operator who has profited or otherwise benefitted from commerce involving these substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created.

Appellant's Brief at 6, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) (No. 89-8094), *cert. denied*, 111 S. Ct. 752 (1991).

135. *See* Roslyn Tom, Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 928 (1989) (broad interpretation would be "short-sighted" and would discourage banks from effectively monitoring sites); Wilsdon, *supra* note 131, at 1262 n.14. (broad interpretation would discourage lenders "from foreclosing when cleanup costs exceed the value of the security interest"); Appellant's Brief at 30-31, *Fleet Factors* (No. 89-8094) (lenders may refuse to extend credit to any business that disposes of hazardous substances); Michele B. Corash & Lawrence Behrendt, *Lender Liability Under CERCLA: Search for a Safe Harbor*, 43 SW. L.J. 863, 865 (1990) (many lenders would be hesitant to extend funds to businesses that generate hazardous wastes).

136. Tom, *supra* note 135, at 928. If a narrow interpretation is to be employed "[b]anks would be more willing to engage in workouts to recover loans and thus would be more likely to ensure that small waste problems do not increase; at the same time, society would benefit because banks could help prevent future environmental harms through diligent monitoring." *Id.*

137. *Id.* at 927.

138. *See generally id.* at 931-32 (it is in the banks' interest to collect information on debtors' operations); Saul Levmore, *Monitors and Freeriders in Commercial and Corporate Settings*, 92 YALE L.J. 49, 56 (1982) (because of their financial sophistication, commercial banks have excellent monitoring ability).

139. *See* Burkhart, *supra* note 133, at 353. *See generally* Levmore, *supra* note 138, at 56.

140. *See* Burkhart, *supra* note 133, at 353.

bility of hazardous waste on the property.[141] A lender is, therefore, in the position to determine what, if any, hazardous waste may be produced by that business.[142] The monitoring of the hazardous waste may therefore begin at the inception of the operations and may be effectively controlled before any contamination actually occurs.

Conversely, if such monitoring by the lender excludes it from the CERCLA secured lender exemption, the lender is less likely to monitor the debtor's facility.[143] If the lender takes a "hands-off" approach, hazardous waste may be improperly managed and contamination is likely to occur.

If monitoring a debtor's business results in liability of the secured creditor, a lender must choose between monitoring the business or taking a hands-off approach. If the secured creditor does indeed opt for the hands-off approach, hazardous waste producing sites may not be effectively monitored. Also, lenders may choose not to extend credit to any businesses that may produce hazardous wastes as a result of their operations.[144] The immediate effect of this approach will be felt primarily in the small business sector. As noted by Representative John J. LaFalce, a Democrat from New York, "[t]he result for the small business trying to obtain financing has been devastating."[145] Representative LaFalce noted that small businesses have commented that the expanded liability of secured lenders has forced these lenders to reevaluate their loan procedure.[146] The resulting credit squeeze has had a major effect on small businesses seeking loans.[147] For example, secured lenders may require the debtor to conduct an initial environmental assessment of the debtor's property before credit is extended. This initial audit may cost up to $2000.[148] The General Counsel to the Small Business Administration testified that these increased costs may dissuade small businesses from seeking financing since they would be unable to absorb these costs.[149]

The economic ramifications, when multiplied by the number of small businesses that may now fail to obtain financing, will undoubtedly affect the country's economy as a whole. At a time of relative economic stagnation, lenders should be advised to encourage new business ad-

141. *Id.*; *see* Levmore, *supra* note 138, at 56 (efficient monitoring discloses records of debtor and its business associates).

142. *See* Burkhart, *supra* note 133, at 353.

143. *See* Wilsdon, *supra* note 131, at 1295 (liability may impede monitoring efforts of lenders).

144. *See supra* note 135 and accompanying text.

145. 136 CONG. REC. E1023 (daily ed. April 4, 1990) (statement of Rep. LaFalce).

146. *Id.*

147. *Id.* at E1023-24.

148. *Id.* at E1024.

149. *Id.*

ventures. As a result of the recent court decisions, however, a more restrictive lending policy has now become the norm.

V. Interested Parties' Current Positions

A. *Environmental Protection Agency*

1. Proposed Rule

On August 2, 1990, the Assistant Administrator for Enforcement for the EPA, James Strock, testified before the House Energy & Commerce Subcommittee on Transportation and Hazardous Materials.[150] Mr. Strock's testimony outlined the current EPA position on lender liability under CERCLA. For the first time, the EPA supported a clarifying rule as to lender liability.

A clarifying rule was subsequently proposed by the EPA in June of 1991.[151] The proposed rule was designed to interpret § 101(20) and § 101(35) of CERCLA.[152] The proposal was designed to specifically interpret the "security interest exemption" of § 101(20)(A).[153] The proposal was intended to clarify what actions:

> commonly taken by the holder of a security interest—such as monitoring facility operations, requiring compliance activities, refinancing or undertaking loan workouts, providing financial advice, and similar actions that may affect the financial, management, and operational aspects of a business—can be considered to be evidence that the security holder is 'participating in the management of a facility.'[154]

The EPA, in its proposal, noted the lack of uniform judicial opinions concerning what constitutes "participation in the management of a facility."[155] The proposal specifically noted the uncertainty that the *Fleet Factors* and *Bergsoe* decisions created.[156] The EPA also noted that CERCLA's legislative history is of nominal guidance in determining the security interest exemption.[157]

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150. For text of the speech, see Environmental Protection Agency, 4 Inside EPA's Superfund Report, No. 17, Aug. 15, 1990 [hereinafter Superfund Report].

151. 56 Fed. Reg. 28,798 (1991) (to be codified at 40 C.F.R. pt. 300) (proposed June 24, 1991).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 28,799.

156. *Id.*

157. *Id.*

> The history of the exemption indicates only that it was added to the definition of 'owner or operator' out of concern that the definition as initially drafted 'inadvertently' included a person who held title or other ownership interest as security for a loan or other obligation, even though the security holder was not otherwise affiliated with or involved in the management of the facility.

Id.

a. Indicia of Ownership

The proposed rule defined "indicia of ownership" for security interest exemption purposes to mean:

> evidence of interests in real or personal property held as security for a loan or other obligation, including full title to real or personal property held as security for a loan or other obligation, including full title to real or personal property acquired incident to foreclosure and its equivalents.[158]

The proposed rule appropriately included a non-exclusive list of examples as to what constitutes indicia of ownership. This list included "a mortgage, deed of trust, or legal title obtained pursuant to foreclosure or its equivalents."[159]

The proposal then defined the holder of a security interest as "a person who holds indicia of ownership in a . . . facility to protect a security interest."[160]

b. Primarily to Protect a Security Interest

CERCLA has always exempted a person who "holds indicia of ownership primarily to protect his security interest in the vessel or facility."[161] Before the new proposal, lenders had no guidance as to what action constituted protection of their security interests. The proposed rule attempted to clarify this situation.

The proposal utilized legally recognized principles as to what constitutes a security interest:

> [i]n general, a transaction that gives rise to a security interest is one that provides the security holder with recourse against real or personal property of the person pledging the security; the purpose of the interest is to secure the repayment of money, the performance of a duty, or of some other obligation.[162]

Once again, the EPA included a non-exclusive list intended as guidance for the lending community: "[r]ecognized transactions that may create security interests include mortgages [and] certain types of liens."[163] The proposed clarification further stated that whether or not

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158. *Id.* at 28,808 (to be codified at 40 C.F.R. pt. 300, subpt. L, § 300.1100(a) (1991)).

159. *Id.* The EPA specifically stated in its proposed definition of "indicia of ownership" that its list of examples is not an exclusive list. *Id.*

160. *Id.*

161. 42 U.S.C. § 9601(20)(A)(iii) (1988).

162. 56 Fed. Reg. 28,798, 28,802 (1991). U.C.C. § 1-201(37) defines security interest as "an interest in personal property or fixtures which secures payment or performance of an obligation." 56 Fed. Reg. at 28,802 n.5 (quoting U.C.C. § 1-201(37) (1990)).

163. 56 Fed. Reg. 28,798, 28,808 (1991) (to be codified at 40 C.F.R. pt. 300, subpt. L, § 300.1100(b)(1) (1991)).

> Indicia of ownership that are held 'primarily to protect [a] security inter-

a transaction creates a security interest is to be determined on a case-by-case basis.[164]

Although acquiring title through foreclosure alone does not negate the security interest exemption,[165] the security holder must insure compliance with EPA guidelines when it attempts to "foreclose, sell, liquidate, wind up operations, or retain and continue functioning the enterprise in order to protect the value of the secured asset prior to sale."[166] Such EPA guidelines required that the security holder attempt to sell the foreclosed property within twelve months of foreclosure, by listing that property with a broker and properly advertising that property for sale on a monthly basis.[167] The guidelines also required that the security holder, within six months of foreclosure, accept or act upon a "written, *bona fide*, firm offer of fair consideration for the property" within ninety days.[168]

Failure to abide by these requirements would result in negation of the exemption. Such requirements are consistent with EPA's stance that the foreclosure action and liquidation must be designed to protect the security interest and are not designed for investment purposes. Temporary legal ownership of the property coupled with affirmative acts to dispose of the property appear to satisfy the EPA requirements, and thus, the secured party may retain its exemption.

c. Participation in Management

The EPA proposal refuted the dicta in *Fleet Factors* by stating that

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> est' may include full legal title acquired through foreclosure, purchase at foreclosure sale, acquisition or assignment of title in lieu of foreclosure, acquisition of a right to title, or other agreement in settlement of the loan obligation, or other formal or informal manner by which the security holder *temporarily acquires, for subsequent disposition*, possession of the borrower's collateral, and are necessary incidents to protection of the security interest.

Id. (emphasis added).

164. *Id.*

165. 42 U.S.C. § 9601(20)(A) (1988).

166. 56 Fed. Reg. 28,798, 28,809 (1991) (to be codified at 40 C.F.R. pt. 300, subpt. L, § 300.1100(b)(1)(ii) (1991)).

167. *Id.*

168. *Id.* In an apparent attempt to avoid further ambiguity, the EPA defines fair consideration as:

> an amount equal to or in excess of the sum of the outstanding principal owed to the holder, plus any unpaid interest and penalties (whether arising before or after foreclosure), plus all reasonable and necessary costs, fees or other charges incurred by the holder incident to foreclosure, retention, continuing functioning of the enterprise, and sale of the property, less any amounts received by the holder in connection with any partial disposition of the property or net revenues received as a result of continued functioning of the facility.

Id. (to be codified at 40 C.F.R. pt. 300, subpt. L, § 300.1100(b)(1)(B) (1991)).

participation in the management of a facility is "actual participation in the management or operational affairs by the holder of the security interest, and *does not include the mere capacity, or ability to influence*, or the unexercised right to control facility operations."[169]

The EPA further clarified the participation in the management clause by listing, in its proposed rule, action that may and may not be considered participation.[170] Examples of prohibited participation included action by the security holder that give that holder "decision making control over the borrower's environmental compliance, such that the security holder has undertaken responsibility for the borrower's waste disposal or hazardous substance handling practices which results in a release or threatened release."[171] Actions by the security holder such that the holder establishes or implements policies encompassing "day-to-day environmental compliance" of the debtors business would also negate the exemption.[172]

Actions that would not be considered participation in the management included instances where the security holder requires that the debtor undertake an environmental inspection of the facility.[173] Failure to conduct such an inspection is not a basis for liability. It is apparent that the EPA does not consider an environmental inspection to be a prohibited action such as exercising control over the debtors environmental compliance.

Work out activities between the debtor and the security holder to insure the security interest against loss were also allowed under the clarifying rule. Work out activities included, among other things, "specific or general financial advice, suggestions, counseling, guidance, or other actions reasonably necessary to protect the security interest."[174]

2. Final Rule

In April of 1992, after reviewing over three hundred and fifty comments on the proposed rule, the EPA issued its final clarifying rule on the subject of lender liability.[175] The final rule was released on April 24, 1992 at a White House briefing as part of the Bush administration's 90-day regulatory review initiative.[176] Raymond Ludwiszewski, EPA's General Counsel, said that although the final rule retains the same thrust and intent of the 1991 proposed rule,[177] the final rule rectifies an

169. *Id.* (emphasis added).
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. 57 Fed. Reg. 18,344 (1992) (to be codified at 40 C.F.R. pt. 300).
176. *Superfund: Final Lender Liability Rule Released; Keeps Proposal's Structure, Intent, EPA Says*, 23 Env't Rep. (BNA) No. 1, 3 (May 1, 1992) [hereinafter *Rule Released*].
177. *Id.*

" 'inadvertent error on the EPA's part' " that created a "loophole" under CERCLA's security interest exemption.[178]

At the White House briefing, Deputy Treasury Secretary John Robson lauded the efforts of the EPA and forecast that the final rule would make it easier for the lending community to conduct business without being concerned about exposure to environmental liability.[179] The American Bankers Association and the Independent Bankers Association of America both noted that the initiatives released at the briefing will "ease credit restrictions, especially for small businesses."[180]

The final rule, effective upon publication on April 29, 1992,[181] was designed to clarify the security interest exemption of CERCLA § 101(20)(A) and specify a "range of activities" that would not subject the holder of a security interest to CERCLA liability.[182] With ambiguous judicial standards[183] and vague legislative guidelines[184] at its disposal, the EPA has attempted to reconcile its "duty to clean up waste sites and recover public funds spent in remediating these sites"[185] with the needs of a secured party to protect its security interest. The final rule's attempt to clarify the situation is consistent with the approach used in the proposed rule of 1991. That is, the EPA has attempted to define three important statutory terms of CERCLA § 101(20)(A): (1) "[i]ndicia of ownership," (2) "[p]rimarily to protect a security interest" and (3) "[p]articipation in management."[186]

a. Indicia of Ownership

The indicia of ownership language used in the final rule is very similar to that used in the proposed rule. Indicia of ownership is defined as:

> evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title to real or personal property acquired incident to foreclosure and its equivalents.[187]

The EPA notes that there is no limitation as to the type of ownership

178. *Id.* (quoting Raymond Ludwiszewski, EPA's General Counsel). See *infra* text accompanying notes 198-216 for a discussion of the final rule's security interest exemption.

179. *Rule Released, supra* note 176, at 3.

180. *Bush Streamlines Banking Regulations, Clarifies Lender Liability in Superfund*, BNA BANKING DAILY, Apr. 28, 1992, *available in* LEXIS, Banking Library, BNABD File.

181. 57 Fed. Reg. 18,344 (1992).

182. *Id.*

183. *Id.*

184. *Id.* at 18,345.

185. *Id.* at 18,347.

186. *Id.* at 18,382-83.

187. See *id.* at 18,383 for the complete definition of indicia of ownership.

indicia a person must hold, provided that the indicia are held to protect a security interest.[188] Examples of protected ownership indicia include, but are not limited to: "mortgages, deeds of trust, liens, surety bonds and guarantees of obligations . . . ."[189] The final rule, much like the proposed rule, defines a "holder" as a "person who maintains indicia of ownership . . . primarily to protect a security interest."[190]

The "indicia of ownership" language, although helpful, is merely a prelude to the more crucial terms "[p]rimarily to protect a security interest" and the even more debated term, "[p]articipation in management."

b. Primarily to Protect a Security Interest

In order for the ownership indicia to be exempt from CERCLA liability, the indicia must be held primarily to protect a security interest.[191] This is interpreted to mean:

> a transaction that gives rise to a security interest is one that provides the holder with recourse against real or personal property of the person pledging the security; the purpose of the interest is to secure the repayment of money, the performance of a duty, or of some other obligation.[192]

A non-exclusive list is included in the final rule.[193]

The final rule clearly states that the security interest exemption does not apply to "indicia of ownership held primarily for investment purposes, nor ownership indicia held primarily for purposes other than as protection for a security interest."[194] The EPA correctly noted that many security interests contain revenue interests, however, as long as these revenue interests are secondary to the security interest, the exemption will not be nullified.[195]

A major structural difference between the proposed rule and the final rule pertains to the idea that acquiring title through foreclosure does not negate the security interest exemption. Under the proposed rule, this is expressed within the security interest subsection.[196] Under the final rule, the EPA apparently deemed this foreclosure material important enough to warrant its own subsection.[197]

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188. *Id.* at 18,374.
189. *Id.* at 18,382.
190. *Id.*
191. *Id.* at 18,374.
192. *Id.* at 18,375.
193. *Id.* at 18,383. Some examples include: mortgages, deeds of trust, liens and title pursuant to lease financing transactions. *Id.*
194. *Id.*
195. *Id.* at 18,375.
196. *See supra* text accompanying notes 165-66.
197. *See infra* text accompanying notes 215-17.

c. Participation in Management

The proposed rule's participating-in-the-management provisions prompted "numerous and varied" responses during the notice and comment period.[198] Critics of the proposed rule's test for management participation felt that the test would allow lenders to retain the exemption by " 'carv[ing] out' the facility's environmental compliance obligations," while otherwise fully participating in the management of the facility.[199] As noted, the proposed rule established a two-pronged test.[200] It specified that lenders did not receive the exemption if they exercised "decisionmaking control over the borrower's environmental compliance," or if they established policies encompassing day-to-day environmental compliance of the debtor's facility.[201] Some critics of the proposed rule felt that it could be interpreted such that "so long as a holder's participation did not include primary or exclusive responsibility for waste disposal practices, a holder could freely participate in and direct a facility's management."[202]

The final rule also uses a two-pronged format and is designed to rectify this "inadvertent error on EPA's part."[203] The first prong of the test still provides that a holder of a security interest is participating in the management of a facility if it "[e]xercises decisionmaking control over the borrower's environmental compliance, such that the holder has undertaken responsibility for the borrower's hazardous substance handling or disposal practices."[204] The old provision that the holder's control must result in a "release or threat of release of hazardous substances has been deleted from the final rule."[205] Although the first prong of the final test parallels the first prong of the proposed rule, the second prong of the final test is less ambiguous than the second prong of the proposed rule.

The second part of the final rule provides that a holder of a security interest is participating in management if the holder has assumed responsibility for day-to-day decision making over the debtor's (a) environmental compliance or (b) operational "aspects of the enterprise other than environmental compliance."[206] The final rule lists the following positions as operational aspects of a facility: "facility or plant manager, operations manager, chief operating officer, or chief executive officer."[207] A holder will not be deemed to be participating in

198. 57 Fed. Reg. 18,344, 18,355 (1992).
199. *Id.* at 18,358.
200. *See supra* text accompanying notes 169-70.
201. 57 Fed. Reg. at 18,355.
202. *Id.* at 18,358.
203. *Rule Released, supra* note 176, at 3.
204. 57 Fed. Reg. at 18,383.
205. *Id.* at 18,359.
206. *Id.* at 18,383.
207. *Id.*

management if it only participates in the financial or administrative aspects of a facility.[208] This distinction is crucial because it allows a holder to conduct and monitor activities to protect its security investment in the facility. Protected activities include: "credit manager, accounts payable/receivable manager, personnel manager, controller, chief financial officer, or similar functions."[209]

The final rule also comments on the disturbing dicta in *Fleet Factors*.[210] The final rule states that participation in management means "actual participation in the management or operational affairs of the vessel or facility by the holder, and does *not include the mere capacity to influence, or ability to influence*" the operations.[211] Although not an attempt to "administratively overrule"[212] the *Fleet Factors* decision, this clarifying language should allay some of the fears holders had in light of *Fleet Factors*. The EPA noted that:

> The distinction between control and influence is critical because the borrower's behavior may be strongly influenced by a broad array of parties . . . none of whom participate in the day-to-day management of the borrower's facility. . . . Accordingly, it is only where the holder actually exercises decisionmaking control over the facility's operations from within the facility's hierarchy . . . does the holder "participate in management."[213]

The final rule explicitly notes that if a holder "undertakes or requires an environmental inspection" of a facility or requires that the borrower comply with all laws or regulations, this action alone does not constitute participating in management.[214] This section of the final rule should help to ensure the borrower's environmental compliance. The holder is in a position to learn of any possible environmental irregularities at a very early stage in its relationship with the borrower. This section should facilitate such a relationship.

d. Foreclosure

The final rule includes a separate subsection concerning the situation where a holder acquires title to property upon foreclosure. The final rule states that "legal or equitable title acquired through or incident to foreclosure"[215] is indicia of ownership designed to protect a security interest. Provided the holder follows certain guidelines, mere foreclosure will not subject the holder to CERCLA liability. The final

208. *Id.*
209. *Id.*
210. United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).
211. 57 Fed. Reg. 18,344, 18,383 (1992) (emphasis added).
212. *Id.* at 18,369.
213. *Id.* at 18,359.
214. *Id.* at 18,383.
215. *Id.*

rule extends the security interest exemption, post-foreclosure, provided that the holder "undertakes to sell . . . or otherwise divest itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate."[216]

The proposed rule required the holder to attempt to sell the foreclosed property within twelve months of foreclosure by listing that property with a broker.[217] Numerous commentators noted that there are other means to divest of property than the listing requirement. The final rule does not restrict the way in which a holder may divest itself of property. The holder is simply required to use "commercially reasonable means."

The final rule also allows for a panoply of activities that the holder may conduct post-foreclosure without nullifying the security interest exemption. These activities include liquidation, maintaining business activities, and winding up the facility's operations.[218] These activities may be taken to preserve the facility for future disposition.

B. *Secured Lenders*

Although secured lenders support the current initiative of the EPA, they still feel that an administrative clarification does not go far enough and legislation is needed.[219] Secured lenders point to the fact that even if most of the courts abide by the EPA's clarifying rule, such adherence is not mandated.[220] Security holders noted that although the final rule is indeed helpful in "achieving protection from toxic waste costs,"[221] the lending community will not function with comfort unless they are protected by the "shield of legislation."[222] Despite numerous efforts,[223] Congress has yet to act on such requests. A flurry of Congressional activity may be expected in the near future, as Congress considers the reauthorization of Superfund in 1995.[224]

Secured lenders are more apt to favor legislation of the type proposed by Representative John J. LaFalce, a Democrat from New York, in 1990[225] and in 1991.[226] Both proposals, most especially H.R. 1450,

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216. *Id.* at 18,384.
217. *See supra* text accompanying notes 165-68.
218. 57 Fed. Reg. 18,344, 18,384 (1992).
219. SUPERFUND REPORT, *supra* note 150, at 5.
220. *Id.*
221. Marianne Lavelle, *Both Sides Oppose Rule That Limits Liability of Lenders*, NAT'L L.J., May 11, 1992, at 24.
222. *Id.*
223. *See infra* text accompanying notes 225-28.
224. Lavelle, *supra* note 221, at 24.
225. H.R. 4494, 101st Cong., 2d Sess. (1990) (introduced Apr. 1).
226. H.R. 1450, 102d Cong., 1st Sess. (1991) (introduced Mar. 14). A senior legislative counsel for the American Bankers Association stated the Association's support of the LaFalce proposal. *See Senate-Passed Lender Liability Provisions Would*

are similar to the proposed clarification of the EPA in that they attempt to clarify the available exemptions of a security holder. However, neither bill has received sufficient support to survive attacks by opponents.

As recently as November 26, 1991, a banking reform bill was introduced in the Senate that would have amended CERCLA to protect the lending institutions.[227] The proposed Senate bill was comprehensive and closely paralleled the proposed administrative clarification of the EPA. However, after an all-night session on the bank reform bill the "lender liability language was left out of the bill finally agreed to by House and Senate conferees at 5 a.m. Nov. 27."[228] At this writing, Congress has yet to adopt any legislation clarifying the secured creditor provision of CERCLA.

C. *Environmental Groups*

Although both the proposed rule and the final rule were greeted with cautious approval by the lending community, such was not the case with many environmental groups. Environmental groups opposed both the proposed rule[229] and the final clarifying rule.[230] Common environmental critiques of the proposed rule were: (1) the proposal would actually expand, rather than clarify, the exemption afforded security holders; (2) upon foreclosure lenders would have almost absolute immunity from CERCLA liability; and (3) the proposal would unfairly place the burden of proof on the plaintiff where the defendant invoked the security interest exemption.[231]

Although environmental groups may take some comfort in the fact that under the final rule security holders may no longer "carve out" the borrower's environmental compliance activities,[232] many of their concerns remain because the final rule closely parallels the proposed rule. In fact, the final rule may be interpreted as broadening the exemption afforded the holder's post-foreclosure activities. According to the National Resources Defense Council (NRDC), the final rule removes the threat of liability, thereby "reduc[ing] banks' incentive to look at environmental consequences."[233] However, the final rule provides that a holder does not lose the exemption by requiring a borrower to submit

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Have Amended CERCLA to Protect Bankers, 22 Env't Rep. (BNA) No. 31, 1819 (Nov. 29, 1991) [hereinafter *Senate-Passed Lender Liability*].

227. S. 543 Title X, version 4, 102d Cong., 1st Sess. (Nov. 26, 1991); *Senate-Passed Lender Liability, supra* note 226, at 1819.

228. *Senate-Passed Lender Liability, supra* note 226, at 1819.

229. *Comments of EPA's Proposed Lender Liability Rule*, 22 Env't Rep. (BNA) No. 17, 1159 (Aug. 23, 1992).

230. Lavelle, *supra* note 221, at 19 (discussing initial reaction to the rule).

231. *Comments on EPA's Proposed Lender Liability Rule, supra* note 229, at 1159.

232. *See supra* text accompanying notes 198-209.

233. Lavelle, *supra* note 221, at 19 (quoting Doug Wolf, NRDC attorney).

to an environmental inspection.[234] Therefore, the holder's incentive to explore the area of environmental compliances may actually increase. The holder will be more likely to require an inspection of the facility if such activity does not subject it to CERCLA liability. As such, the "policing" of the borrower's facility may occur at an early stage.

Also, if a holder is entitled to conduct certain post-foreclosure activities to ensure future disposition without the threat of liability,[235] environmental inspections and compliance will be more likely to occur. The NRDC's concern of post-foreclosure "absolute immunity" may therefore actually help to ensure compliance. If liability for the holder post-foreclosure existed, the holder would be less likely to attempt to ensure compliance and effective disposition of the facility would be hindered.

VI. CONCLUSION

With recent political developments throughout the world, the global economic community is constantly expanding. If the United States wishes to remain a productive and competitive player in this world forum, all of its resources must be utilized. The small business sector has historically been a vital and prolific member of this nation's economy. To remove it from the economic equation may have a devastating effect on the United States' ability to compete on an international scale.

At a time of torpid economic activity, incentives for the establishment of new business are conspicuously absent. The increasing liability of creditors serves as a disincentive for creditors to extend funds. Without this credit, many small businesses will never be realized.

The current willingness of the EPA to clarify lender liability is a step in the right direction. However, an administrative clarification is not enough. Although courts may indeed give deference to such a clarification, uniformity and certainty may be lacking. What is needed is clarification at the legislative level. Such legislation would enable secured lenders to conduct business with a needed degree of certainty. This stability would directly transfer into greater opportunities for small businesses. Without Congressional action, a degree of uncertainty will still exist. With a national unemployment rate of 7.2%[236] and the federal budget deficit estimated at almost four hundred billion dollars,[237]

234. *See supra* text accompanying note 214.

235. *See supra* text accompanying notes 215-18.

236. Anne Swardson, *Jobless Rate Declined to 7.2 pct. in April*, WASHINGTON POST, May 9, 1992, at C01.

237. James E. Lebherz, *Deficit's Likely Dip Bullish for Bonds*, WASHINGTON POST, May 3, 1992, at L06. Although the Office of Management and Budget estimated the deficit at $399.4 billion, conservative estimates from the investment community are still an alarming $325 billion. *Id.*

this nation cannot afford to ignore a lack of incentives for the small business sector. Congressional action on the issue of lender liability must not wait until Superfund reauthorization in 1995.[238]

Reduced constraints on the lending community need not mean the beginning of the demise of the environmental community. A fund to which secured lenders, borrowers, and the government all contribute may be established. Such an allocation of liability will have a positive effect on both the economic and environmental communities.

Joseph D. Uradnik

238. *See supra* text accompanying note 224.

The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End Its Silence on the Rationale Behind the Contemporary Application of the Privilege

I. INTRODUCTION

The privilege against self-incrimination contained in the Fifth Amendment appears to be simple. The words merely provide that: "[no] person . . . shall be compelled in any criminal case to be a witness against himself."[1] However, the text of the Fifth Amendment is ambiguous in that it fails to specify what constitutes unlawful compulsion[2] or what is meant by a criminal case.[3] As a result of its simplistic wording, much of the substance underlying the Fifth Amendment privilege against self-incrimination has been the product of judicial construction.[4] Through judicial interpretation, this deceptively simple concept has undergone an evolutionary process which has expanded the scope of the privilege far beyond the literal meaning of its wording.[5]

Despite the fact that the United States Supreme Court has been developing, refining and modifying the privilege for centuries, the Court has yet to develop a consistent and comprehensive policy rationale explaining the purpose of the privilege against self-incrimination. Although the Supreme Court has on occasion discussed the policy interests furthered by the Fifth Amendment privilege,[6] these discussions are inadequate to fully justify and explain the current expansive application of the privilege. Consequently, the Supreme Court has failed to articulate and has thus deprived lower courts of the substantive princi-

1. U.S. CONST. amend. V.

2. *See infra* notes 85-88 and accompanying text.

3. *See infra* notes 69-75 and accompanying text.

4. *See infra* notes 59-128 and accompanying text (illustrating how the individual components of privilege have been developed through case law).

5. *See infra* notes 59-215 and accompanying text (discussing the expanded application of privilege).

6. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); Brown v. Walker, 161 U.S. 591, 596-97 (1896).

ples necessary for applying the Fifth Amendment privilege to situations not previously confronted.

In the midst of all this confusion emerge cases like *Baltimore City Department of Social Services v. Bouknight*,[7] where the United States Supreme Court considered the issue of whether a mother may invoke the Fifth Amendment privilege against self-incrimination as justification for her refusal to comply with a juvenile court order to produce her child.[8] Armed with precedent defunct of any meaningful Fifth Amendment policy analysis, the Court proceeded to hold that the privilege against self-incrimination could not be invoked to avoid compliance with the court order by analogizing the compelled production of a child with the compelled production of a document.[9]

This Note will analyze the development of the privilege from its introduction into the common law through its treatment in *Bouknight* in order to demonstrate the present problems with the Supreme Court's Fifth Amendment jurisprudence and to suggest that the historical basis for the privilege has become obsolete. The article analyzes the decision in *Bouknight* as an example of the need to develop substantive principles for the courts to look to for guidance in the application of the privilege and offers an argument for the adoption of a balancing approach to resolve Fifth Amendment privilege problems.

Part II of this Note discusses the history behind the development of the privilege against self-incrimination both in England and the early American Colonies.[10] Part III presents an overview of the privilege; tracing the development of the United States Supreme Court's jurisprudence on the privilege and explaining the weaknesses within that jurisprudence.[11] Part III, likewise, contains a discussion concerning the traditional policy considerations often asserted in support of the existence of the privilege.[12] Part IV discusses the *Bouknight* decision and presents a critical analysis.[13] Part V contains an argument for the adoption of a balancing approach to resolving issues regarding the privilege against self-incrimination.[14] Finally, Part VI concludes this Note with a plea to the United States Supreme Court to explain and clarify its rationale behind the contemporary application of the privilege against self-incrimination jurisprudence.[15]

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7. 493 U.S. 549 (1990).
8. *Id.* at 551.
9. *See id.* at 551, 554-62.
10. *See infra* notes 16-52 and accompanying text.
11. *See infra* notes 53-215 and accompanying text.
12. *See infra* notes 216-91 and accompanying text.
13. *See infra* notes 292-400 and accompanying text.
14. *See infra* notes 401-19 and accompanying text.
15. *See infra* part VI.

II. HISTORY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

A. *The Development of the Privilege in England*

The origin of the privilege against self-incrimination dates back to the thirteenth century.[16] During this time, the ecclesiastical courts of England instituted a procedure known as the oath *ex officio*.[17] For the most part, the oath consisted of a sworn statement by an accused pledging to give truthful answers to whatever questions may be asked by the court.[18] Such a practice was found to be objectionable for several reasons.[19] The accused was required to give the sworn statement while unaware of the substance of the complaint filed against him.[20] Furthermore, when taking the oath, "the accused was ignorant as to the identity of his accusers and the nature of the evidence against him."[21] Subsequent to the administration of the oath, while still ignorant of all the details of his or her alleged unlawful acts, the accused was asked a series of questions. Although disguised as an oath of inquiry, the purpose behind the practice was to extract a confession.[22] During the proceeding, if an accused refused to take the oath, the ecclesiastical court conducting the proceeding had the power to coerce the accused into swearing to the oath by the threat of contempt, conviction of the charge being investigated, or torture.[23] The common law courts utilized the oath *ex officio* in matters over which the king had jurisdiction.[24]

In England, during this period, the Puritans were an extremely outspoken group in opposition to this compulsory interrogation practice.[25] Use of the oath *ex officio* gave the ecclesiastical courts tremendous power to identify religious dissenters and to suppress their

16. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2250, at 267-70 (John T. McNaughton rev. ed., 1961).

17. MARK BERGER, TAKING THE FIFTH 6 (1946). The oath was the creation of Pope Gregory IX and was introduced in England by Cardinal Otho during the reign of King Henry III. Upon arriving in England, Cardinal Otho summoned all the bishops of England to discuss various ecclesiastical matters. As a result of this meeting, several decrees or constitutions were issued, particularly, one dealing with the proper procedure of canon-law to be followed by the English ecclesiastical courts. One of these procedures involved the administration of an inquisitional oath, later known as the oath *ex officio*. *Id.* The constitution provided: " 'that the oath of calumny to tell the truth in ecclesiastical causes, in order that truth may be more easily uncovered and causes more speedily finished, shall henceforth be administered throughout the realm of England, according to the canons and lawful sanctions, notwithstanding any custom to the contrary.' " LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 46 (1968) (quoting Otho's constitution).

18. LEVY, *supra* note 17, at 46-47.

19. *Id.* at 47.

20. *Id.*

21. *Id.*

22. *Id.* at 46-47.

23. BERGER, *supra* note 17, at 25.

24. *Id.* at 7.

25. *Id.* at 11.

activities.[26] The Puritan opposition to the oath reached a climax around 1605.[27] Simultaneously, the English common law courts became increasingly concerned over the expanding authority the oath *ex officio* practice gave the ecclesiastical courts.[28] In response to the tension with the ecclesiastical courts, the common law courts imposed several restrictions upon the use of the inquisitorial process.[29] It is important to note that the common law courts' motive in restricting the use of the oath was their concern for the growing power of the ecclesiastical courts.[30] There was, apparently, no concern over the abhorrent principles involved in the incriminatory procedure.[31] Despite the enactment of these restrictions, there were still questions as to the degree of authority the ecclesiastical courts had in utilizing the oath. The prior restrictive statutes left doubt as to whether merely the *ex officio* procedure had been abolished or whether the concept of compulsory interrogation itself was no longer permissible, regardless of its procedural form.[32] As a result of this confusion, a subsequent statute was enacted which facilitated the complete abandonment of the obligation to answer interrogatories on oath regardless of the form by which the church courts chose to institute the procedure.[33]

Despite its abolition in the ecclesiastical courts, the common law

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26. FRED E. INBAU, SELF-INCRIMINATION: WHAT CAN AN ACCUSED PERSON BE COMPELLED TO DO? 3 (1950).

27. *Id.* at 4.

28. *Id.*

29. *Id.* One statute restricting the authority of the ecclesiastical courts provided that no person:

> exercising spiritual or ecclesiastical power, authority, or jurisdiction, [shall] ex officio, or at the instance or promotion of any other whatsoever, urge, enforce, tender, give, or minister [to any person] any corporal oath, whereby he or they shall or may be charged or obliged to make any presentment of any crime or offence, or to confess or to accuse himself or herself of any crime or offence, delinquency, or misdemeanor, or any neglect, matter, or thing, whereby or by reason whereof he or she shall or may be liable or exposed to any censure, pain, penalty, or punishment whatsoever.

8 WIGMORE, *supra* note 16, § 2250, at 284 n.69 (quoting 16 Car. ch. 11, Section 4 (1641)).

30. INBAU, *supra* note 26, at 4. "In their enforcement of these restrictions, one thing seems plain: There is no feature of objection to the compulsion, in itself, of answering on oath; the objection is as to *who* shall require it, and *how* it shall be required." 8 WIGMORE, *supra* note 16, § 2250, at 285.

31. INBAU, *supra* note 26, at 4.

32. 8 WIGMORE, *supra* note 16, § 2250, at 284.

33. *Id.* The statute which abolished the oath *ex officio* both procedurally and substantively in the ecclesiastical courts provided that "[no person] exercising spiritual or ecclesiastical power, authority, or jurisdiction 'shall tender to any person' the oath usually called the oath *ex officio* or any other oath . . . ." *Id.* at 284 n.70 (quoting 13 Car. II, ch. 12, § 4 (1661)).

courts continued to employ the oath *ex officio* in criminal proceedings.[34] Nevertheless, opposition to the practice remained strong. By the end of the seventeenth century, upon being ordered to take the oath *ex officio*, accused persons began refusing to do so, claiming that "no man is bound to incriminate himself on any charge . . . in any court."[35] Gradually, the common law courts yielded to the claim of the commonality, that no individual should be compelled to give incriminating testimony, and honored such claims when asserted. Thus, through the acceptance of the right as a firm rule of law, the general privilege against self-incrimination was born.[36]

B. *The Development of the Privilege in the American Colonies*

The influence of the English legal tradition of the oath *ex officio* was inconsistent among the American colonies. As would be expected, those groups which had suffered oppression as a result of the administration of the oath denounced the practice and recognized a right against self-incrimination.[37] However, other settlements, which embraced the ideal of the unified religious belief system, adopted the oath as an available means for suppressing divergent religious convictions.[38] Over time, however, all colonists began to sense the same agitation with attempts of some colonial officials to suppress opposition. Consequently, the belief that a person had a right against self-incrimination achieved greater recognition.[39]

Ultimately, the right against self-incrimination would acquire constitutional protection. The failure to create a strong national government at the conclusion of the Revolutionary War left the colonies free to manage their own affairs.[40] The colonists' experiences with England's oppressive government left them in fear of the potential abuses of the common law.[41] As a result, they declined to leave the protection of fundamental rights in the hands of the legislature or judiciary.[42] Accordingly, most states relied on written constitutions in order to preserve those rights which they viewed as fundamental.[43] By this time, resistance to the oath of inquiry had become prevalent and the right to remain silent was addressed in almost every state constitution.[44] De-

34. INBAU, *supra* note 26, at 4.
35. 8 WIGMORE, *supra* note 16, § 2250, at 289.
36. *Id.* at 290.
37. BERGER, *supra* note 17, at 21.
38. *Id.*
39. *Id.*
40. *Id.* at 22.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* Most of the states which enacted a separate bill of rights phrased the right against self-incrimination as "no man could be 'compelled to give evidence

spite differences in the wording of the privilege in the various constitutions, they were all nevertheless directed at one primary purpose: prohibiting the compelled extraction of incriminating statements from the accused.[45]

Eventually, the right against self-incrimination became the common right of a unified nation. The constitutional convention which met in Philadelphia in 1787 failed to incorporate a bill of rights in the draft of the federal constitution establishing the new federal government.[46] During the ratification process, a bill of rights was created in order to ease the fears of many concerning the potential abuse of power by the newly formed national government.[47] The bill of rights provided written protection for these fundamental liberties of the people.[48] The first proposed written version of the right against self-incrimination was framed by Congressman James Madison in 1789 and provided that no person " 'shall be compelled to be a witness against himself.' "[49] As worded, such a provision would have been applicable to both criminal and civil proceedings.[50] However, the House of Representatives amended the provision making the privilege applicable only to criminal matters.[51] The Senate made no further changes to the proposal, and the self-incrimination clause was incorporated into the Fifth Amendment to the Constitution.[52] Today, the clause remains unchanged in

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against himself.' " *Id.* (quoting Va. of 1776, section 8). These states included Virginia, Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire. *Id.* Maryland and Delaware extended the right to encompass civil as well as criminal matters. *Id.* New York, New Jersey, Georgia, and South Carolina did not have separate bills of rights incorporated in their constitutions. *Id.* Nevertheless, such a right was recognized through the adoption of the English common law existing at the time. *Id.* Neither Rhode Island nor Connecticut had a written constitution. *Id.* There was nothing to indicate, however, that the failure of these two states to acknowledge the right to remain silent in writing suggested that they endorsed the practice of compulsory inquisition. *Id.*; *see* LEVY, *supra* note 17, at 408-11.

45. 8 WIGMORE, *supra* note 16, § 2252, at 324.

46. BERGER, *supra* note 17, at 22.

47. *Id.*

48. *Id.*

49. *Id.* at 23 (quoting 1 ANNALS OF CONG. 434 (Joseph Gales ed. 1789)).

50. *Id.*

51. *Id.*

52. *Id.* The Fifth Amendment proscription against forcing an individual to be a witness against himself or herself was made applicable to the states in Malloy v. Hogan, 378 U.S. 1 (1964). Prior arguments attempting to have the Fifth Amendment privilege against self-incrimination made applicable to the states by way of the Fourteenth Amendment were systematically rejected by the Court. It was not until the United States Supreme Court accepted the principles contained in the doctrine of incorporation which made the Bill of Rights binding on the states as part of the broad scope of the Fourteenth Amendment Due Process Clause. BERGER, *supra* note 17, at 46-49. Therefore, in *Malloy*, the United States Supreme Court held that the Fifth Amendment was binding upon the states by reasoning

form but not in substance. The evolution of the right against self-incrimination occurred by way of the common law decisions of the American courts.

III. UNITED STATES SUPREME COURT JURISPRUDENCE ON THE PRIVILEGE AGAINST SELF-INCRIMINATION

A. *Overview*

Little is known regarding what the framers of the federal constitution meant by the particular wording of the privilege; there is little by way of legislative history to serve as indicia.[53] Despite the lack of legislative guidance, the entire language of the Fifth Amendment has never been interpreted literally and the application of the modern privilege extends far beyond the literal meaning of the language embodying it.[54] The United States Supreme Court has failed to develop consistent principles to follow when applying the privilege to various situations. As a result, there are no policy rationales to support the modern application of the privilege in certain circumstances and the case law involving the privilege has become extremely confusing and difficult to apply.

The general proscription against the admissibility of compelled self-incriminating testimony is based upon notions that our country has espoused an accusatorial rather than an inquisitorial system of justice. Such a system requires that the government prove the guilt of an individual with evidence obtained through its own labors and not from the accused's own mouth.[55] It is believed that if the government were allowed to coerce an individual into producing self-incriminating evidence, such practices would lead to abuse.[56] Nevertheless, there are occasions in which coerced self-incrimination may be permitted despite

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that "the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination." 378 U.S. 1, 3 (1964).

53. 8 WIGMORE, *supra* note 16, § 2252, at 324.

54. A narrow interpretation of the privilege would have resulted in merely prohibiting the prosecution from compelling the defendant to testify at his own criminal proceeding. If the privilege was given such a literal interpretation, it would have cast serious doubt on the need and purpose of the privilege since at the time it was adopted, the law of most jurisdictions already barred a defendant from testifying at his own trial. The reason for disqualifying criminal defendants as witnesses was based on the theory that his interest in the outcome of the proceedings rendered his testimony so biased as to be too unreliable. BERGER, *supra* note 17, at 50. Therefore, a narrow construction of the privilege would have rendered it a mere redundancy of the law.

55. Miranda v. Arizona, 384 U.S. 436, 460 (1966). The privilege is intended to require that "the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Id.* (citing Chambers v. Florida, 309 U.S. 227, 235-38 (1940)).

56. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); *supra* notes 16-36 and accompanying text.

the fact that the particular circumstances may implicate the protection of the Fifth Amendment.[57]

B. *Five General Components of the Privilege Against Self-Incrimination*

There are five general components to the privilege against self-incrimination as set forth in the Fifth Amendment. The privilege has been interpreted to "allow[] (1) natural persons (2) to prohibit the introduction in a criminal proceeding (3) of self-incriminating disclosures (4) that were obtained through 'compulsion' by the state and (5) that are testimonial in nature."[58] The scope of the privilege as it exists today is the result of the United States Supreme Court's interpretation of these individual elements.

1. Who May Assert the Privilege?

When determining who has standing to assert the privilege against self-incrimination, the phrase "no person . . . shall be compelled . . . to be a witness against himself"[59] has been interpreted literally. In *United States v. White*,[60] the Supreme Court held that the proscription against self-incrimination is a personal privilege and may only be asserted by natural persons.[61] The Court held that when the privilege is invoked to protect the impersonal interests of an organization, rather than the personal and private interests of an individual within the organization, the protection of the Fifth Amendment is not available.[62] In this context, the privilege will be denied whether it is being asserted by the organization as a distinct legal body or by one of its representatives acting in an official capacity.[63] As a result of this interpretation, the privilege against self-incrimination is not available to corporations,[64] associations,[65] or partnerships.[66] However, "a sole proprietor[] may assert the privilege because [a sole proprietor] acts in a personal rather than representative capacity."[67] Therefore, the practical result of the privilege being personal is that it may only be invoked by the party who is actually being compelled to testify and only when the compelled testi-

57. See *infra* notes 148-215 and accompanying text for a discussion of the required records exception.

58. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE, AN ANALYSIS OF CASES & CONCEPTS §§ 15.01-15.02, 323-24 (1986).

59. U.S. CONST. amend. V.

60. 322 U.S. 694 (1944).

61. *Id.* at 698.

62. *Id.* at 701.

63. WHITEBREAD & SLOBOGIN, *supra* note 58, § 15.02, at 324.

64. *Id.* at 324 n.3 (citing Wilson v. United States, 221 U.S. 361 (1911)).

65. *Id.* at 324 n.4 (citing Rogers v. United States, 340 U.S. 367 (1951)).

66. *Id.* at 324 n.5 (citing Bellis v. United States, 417 U.S. 85 (1974)).

67. *Id.*

mony will incriminate the individual personally.[68]

2. What is a "Criminal Case"?

The requirement that the privilege be asserted only in a criminal case has not been interpreted to mean that the privilege is applicable only when an accused is compelled to testify during the criminal trial. In *Counselman v. Hitchcock*,[69] the United States Supreme Court first addressed the issue of what the "criminal case" component actually was intended to mean. In *Counselman*, the Court was confronted with the issue of whether the Fifth Amendment privilege against self-incrimination gave an individual the right to refuse to testify at a grand jury proceeding.[70] The government argued that the assertion of the privilege should be denied since the grand jury proceeding did not constitute a criminal case for purposes of the Fifth Amendment.[71] The United States Supreme Court rejected this argument and held that the words "criminal case" could not be construed so narrowly as to refer only to the actual prosecution of the offense, but rather, was intended to have a broader scope which included the grand jury proceeding.[72] As a result, the Court went on to hold that since the grand jury inquiry was criminal in nature and the deponent faced the possibility of being charged for the alleged crime, if one was found to have occurred, the proceeding was within the boundaries of a criminal case for Fifth Amendment purposes.[73]

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68. When an attorney asserts the privilege on behalf of his client, the privilege may be invoked even though the attorney himself is not being compelled to disclose information which will be incriminating to himself. The reason for this exception is that the disclosure is protected by the attorney-client relationship. WHITEBREAD & SLOBOGIN, *supra* note 58, § 15.02, at 324-25 (citing Fisher v. United States, 425 U.S. 391 (1976)).

69. 142 U.S. 547 (1892).

70. *Id.* at 562.

71. *Id.* The government was relying on the fact that the deponent had not been indicted or formally charged. Additionally, the government claimed that the proceeding was instead intended to determine whether a crime had been committed and, if so, who should be charged. *Id.* at 563.

72. *Id.* at 563-64. The Court reasoned that when the drafters of the federal Constitution wanted to convey the idea of a criminal proceeding, they used specific qualifying language clearly limiting the applicability of the provision to an actual criminal prosecution. For instance, in the Court's view, the use of the words speedy trial, impartial jury, compulsory process and assistance of counsel in the Sixth Amendment were specifically intended to restrict the applicability of the enumerated rights to criminal trials. The Court found significance in the choice to use different language for the Fifth Amendment and believed that the words "criminal case" encompassed a broader scope beyond the actual criminal prosecution. *Id.*

73. *Id.* The *Counselman* decision was the first time the Court addressed the problem of defining the scope of the Fifth Amendment self-incrimination protection. Because of its decision not to interpret the language creating the

The United States Supreme Court has extended the application of the privilege to any situation where self-incriminatory evidence may be revealed which could be used in future criminal proceedings.[74] Therefore, when deciding whether an individual has standing to assert the privilege against compelled disclosure of information, the dispositive question should be whether there is any risk that the information disclosed will be used by the government in a subsequent criminal proceeding.[75]

3. What is "Self-Incriminating Evidence"?

The Fifth Amendment privilege was intended to prevent the compelled disclosure of information which is incriminating.[76] A relevance test has been developed to determine whether a certain disclosure will be considered incriminating for purposes of the Fifth Amendment privilege.[77] According to this test, information is incriminating if it is relevant to a present or future criminal proceeding.[78] Therefore, the issue of whether certain information is incriminating is closely linked to the issue of whether the individual asserting the privilege has standing to do so.[79] The leading case defining incrimination is *Hoffman v. United States*.[80] According to the Court's decision in *Hoffman*, a witness' response will be considered incriminating whenever it might "furnish a link in the chain of evidence needed to prosecute."[81] However, there are exceptions to the rule concerning the relevancy of the disclosed information. Even where a response would clearly be relevant to a criminal prosecution, if there is no possibility that the respondent could be convicted, the state is entitled to a response.[82] The two possible situations where this exception may be applicable is where the respondent has been granted immunity from prosecution or where the statute

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privilege literally, the United States Supreme Court laid the framework for the expansive application of the privilege.

74. WHITEBREAD & SLOBOGIN, *supra* note 58, § 15.03, at 325. "The privilege is not ordinarily dependant upon the nature of the proceeding in which the testimony is sought or used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).

75. *See* WHITEBREAD & SLOBOGIN, *supra* note 58, § 15.03, at 325 for a discussion on when the right may be asserted.

76. *See* Doe v. United States, 487 U.S. 201, 212 (1988).

77. *Id.* It is important to note, however, that in situations involving the compelled production of documents, the United States Supreme Court has constructed a narrower definition of incrimination than the general test of relevance. *See infra* notes 129-47 and accompanying text.

78. WHITEBREAD & SLOBOGIN, *supra* note 58, § 15.04, at 330.

79. *See supra* notes 59-68 and accompanying text.

80. 341 U.S. 479 (1951).

81. *Id.* at 486.

82. WHITEBREAD & SLOBOGIN, *supra* note 58, § 15.04, at 330.

of limitations for the particular criminal offense has expired.[83] In these two situations, the witness may be compelled to answer because there is no longer a risk that the witness will incriminate himself in a present or future criminal proceeding.[84]

4. What is Compulsion?

The Fifth Amendment privilege against self-incrimination does not prohibit the admission of every incriminating statement made by an accused.[85] The privilege is intended only to bar the admission of self-incriminating statements which were the product of government compulsion.[86] Therefore, if the government does not act to coerce or compel the witness to answer questions, but the witness nevertheless voluntarily chooses to divulge the information, the privilege will not be applicable regardless of whether it proves to be incriminating.[87] Furthermore, even where the government compels or coerces an accused to reveal incriminating information, if the accused has voluntarily waived his right to remain silent, the government is entitled to make use of any information which was obtained.[88]

5. What is Testimonial?

Whether or not a certain disclosure is protected under the Fifth Amendment depends upon whether the evidence is categorized as physical or testimonial.[89] Fifth Amendment protection is extended only to disclosures which reveal testimonial or communicative evidence and not merely real or physical evidence.[90]

In addition to compelled oral testimony, the compelled act of document production can also fall within the purview of the Fifth Amendment.[91] *Boyd v. United States*[92] was the first United States Supreme Court case to consider whether the privilege against self-incrimination applied to court ordered production of documents. At issue in *Boyd* was a court order which sought to compel an importing firm to produce

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83. *Id.*

84. *Id.*

85. United States v. Washington, 431 U.S. 181, 187 (1977). Chief Justice Burger once stated, "[a]bsent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *Id.*

86. *Id.*

87. *See id.*

88. Garner v. United States, 424 U.S. 648, 654 n.9 (1976). "The defendant may waive effectuation of these rights [the right to remain silent and the right to the presence of an attorney during custodial interrogation] provided that the waiver is made voluntarily, knowingly and intelligently." Miranda v. Arizona, 384 U.S. 436, 444 (1966).

89. *See* Holt v. United States, 218 U.S. 245, 252-53 (1910).

90. *Id.*

91. *See, e.g.*, United States v. Doe, 465 U.S. 605 (1984).

92. 116 U.S. 616 (1886).

an invoice for items which allegedly had been imported illegally.[93] The government believed that the defendant partnership had imported cases of glass without paying the required duty.[94] According to the import statute under which the defendant was charged, depriving the United States of import duties carried penalties of substantial fines, imprisonment, or both.[95] The government intended to use the subpoenaed invoice to prove that the defendant partnership neglected to pay the required duty.[96] Therefore, the defendant partnership ran the risk of incriminating itself by producing the invoice.[97] In extending the Fifth Amendment privilege against self-incrimination to the compelled production of the invoice, the Court reasoned that the document production order was simply another form of "forcible and compulsory extortion of a man's own testimony,"[98] since the contents of a document were in effect a substitute for an individual's own oral testimony.[99]

The determination that a compelled act of production is testimonial depends upon whether the act of production amounts to a communication by the accused; where the compelled act of production amounts to an incriminating communication, the disclosure is testimonial and will be protected by the Fifth Amendment privilege against self-incrimination.[100] On the other hand, where the act of production merely rendered the accused the source of real or physical evidence, the evidence will not be protected by the privilege.[101] The leading case in creating this dichotomy was *Holt v. United States*.[102] The issue in *Holt* concerned whether the Fifth Amendment privilege against self-incrimination protected an accused from being compelled to model a blouse for purposes of identification.[103] In its decision, the United States Supreme Court emphasized that the privilege is limited to communications only and rejected the claim that compelling an accused to model a blouse

93. *Id.* at 618.

94. *Id.* at 617-18.

95. *Id.* at 617.

96. *Id.* at 618-19.

97. *Id.* at 617-18 (In order to obtain a conviction, the government needed to prove the quantity and value of the items. This information was contained in the invoices.).

98. *Id.* at 630.

99. *Id.* at 633. The Court stated, "we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.*

100. *See* Holt v. United States, 218 U.S. 245, 252-53 (1910).

101. *See id.* at 253. "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.* at 252-53.

102. 218 U.S. 245 (1910).

103. *Id.* at 252.

violated the Fifth Amendment.[104] The Court reasoned that any decision to the contrary would amount to an "extravagant extension" of the privilege.[105]

The test for resolving Fifth Amendment "act of production" cases enunciated in *Holt* was explained in *Schmerber v. California*.[106] In *Schmerber*, the United States Supreme Court held that: "The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."[107] Therefore, when the compelled act merely produces real or physical evidence, and is nontestimonial and noncommunicative in nature, the compelled cooperation is not violative of the Fifth Amendment.[108] However, when the act amounts to a communication by the accused, regardless of the form it takes, a response will be protected.[109]

An act of production is considered to be testimonial or communicative if the act, in and of itself, "explicitly or implicitly, relates a factual assertion or discloses information"[110] which results in the respondent revealing his knowledge of the facts relating him to the offense or to share his or her thoughts and beliefs.[111] This standard indicates that the suspect's subjective knowledge or beliefs are being protected and not the underlying facts which may be revealed from the compelled act of production.[112] For this reason, the distinction is made between compelled acts which are protected because they are testimonial and those acts which are not protected because they merely result in the disclosure of real or physical evidence.[113]

This dichotomy results in the denial of Fifth Amendment protection to the compelled production of tangible objects or coerced performance of acts such as furnishing blood samples,[114] providing voice[115] or

104. *Id.*
105. *Id.*
106. 384 U.S. 757 (1966).
107. *Id.* at 764.
108. *Id.*
109. The United States Supreme Court noted in *Schmerber* that there may be cases in which application of this analysis may be problematic. *Id.*

> [F]or example, lie detector tests measuring changes in body functions during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.

Id.
110. Doe v. United States, 487 U.S. 201, 208 (1988).
111. *Id.* at 209.
112. *See* Fisher v. United States, 425 U.S. 391, 409-10 (1976).
113. Schmerber v. California, 384 U.S. 757, 764 (1966).
114. *Id.* at 765.

handwriting exemplars,[116] modeling clothing,[117] participating in a lineup,[118] and signing an authorization form for the disclosure of records.[119] When the government demands that an item be produced or an act performed, "the only thing compelled is the act of producing"[120] or performing. In each situation, the act of the accused in no way resembles the rendering of oral testimony, there are no factual assertions made nor thoughts or beliefs revealed.[121] Nevertheless, under certain circumstances, some acts may have testimonial aspects.[122]

In *Fisher v. United States*[123] and *United States v. Doe*[124] the United States Supreme Court was confronted with the issues of whether compliance with a subpoena to produce documents was violative of the Fifth Amendment, despite the fact that the act itself did not amount to the making of any statement. In both cases, the Court concluded that the act of production could constitute a protected testimonial communication because by producing documents, an individual would be admitting to the existence, possession or control, and the authentication of the subpoenaed documents.[125] In the limited cases in which these implicit statements would be relevant, the Fifth Amendment privilege against self-incrimination would be applicable since such acts constitute implied assertions of fact and are therefore testimonial or communicative and not merely the production of real or physical evidence.[126] Therefore, under act of production analysis, an act will not be privileged if it amounts to merely the disclosure of physical evidence or records unless the act of production infers relevant incriminating facts pertaining to the existence, possession, or authenticity of such evidence or records. The *Doe* majority noted "such compulsion is more like 'be[ing] forced to surrender a key to a strongbox containing incriminating documents' than it is like 'be[ing] compelled to reveal the combination to [one's] wall safe.' "[127] Where the government is merely demanding the surrender of the key, there is no violation of the Fifth Amendment because directing someone to do an act does not require the person to make any explicit or implicit factual assertion or disclose

115. United States v. Dionisio, 410 U.S. 1, 7 (1973).

116. Gilbert v. California, 388 U.S. 263, 266 (1973); United States v. Mara, 410 U.S. 19, 22 (1973).

117. Holt v. United States, 218 U.S. 245, 252-53 (1910).

118. United States v. Wade, 388 U.S. 218, 221 (1967).

119. Doe v. United States, 487 U.S. 201, 202-06 (1988).

120. Fisher v. United States, 425 U.S. 391, 410 n.11 (1976).

121. Doe v. United States, 487 U.S. 201, 209-10 (1988).

122. Fisher v. United States, 425 U.S. 391, 410 (1976).

123. *Id.*

124. 465 U.S. 605 (1984).

125. *Fisher*, 425 U.S. at 409-10; *Doe*, 465 U.S. at 613.

126. *Cf.* Fisher v. United States, 425 U.S. 391, 410-11 (1976).

127. *Doe*, 487 U.S. at 210 n.9 (quoting *Doe*, at 219 (Stevens, J., dissenting)).

the contents of his or her mind.[128] Where the government is demanding the disclosure of the combination to a safe, there is a violation of the Fifth Amendment since the deponent is required to make an explicit factual assertion or disclose information.

C. *The State of Uncertainty Concerning Fifth Amendment Jurisprudence*

1. The Sufficiency Requirement

In order for the constitutional right against self-incrimination to be implicated, the compelled disclosure or act of production must be testimonial and incriminating.[129] The United States Supreme Court narrowed the testimonial standard enunciated in *Schmerber v. California*,[130] and the incriminating standard enunciated in *Hoffman v. United States*,[131] by establishing a requirement that the act be sufficiently testimonial and incriminating before the privilege could be invoked. The sufficiency of the testimonial and incrimination test for the Fifth Amendment was first announced in *Fisher v. United States*.[132] In *Fisher*, a taxpayer was served a subpoena to produce papers which were prepared in the course of filing his income tax returns.[133] The Court held that the privilege against self-incrimination did not afford the taxpayer protection against the subpoena by merely asserting that the items requested contained incriminating evidence.[134] The Court noted, however, that the act of producing the records had communicative aspects in that it conceded the existence of the subpoenaed documents and their possession or control by the taxpayer.[135] Under the *Schmerber* testimonial or communicative test,[136] if these assertions proved to be relevant to the case, the taxpayer could have avoided compliance with the subpoena by asserting the privilege against self-incrimination. Nevertheless, the issue which the Court focused on was whether or not the act of producing the documents, the only act the taxpayer was compelled to do, was sufficiently testimonial and incriminating to warrant the protection of the Fifth Amendment.[137]

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128. *Fisher*, 425 U.S. at 411.

129. See *supra* notes 76-84 and 89-128 and accompanying text for a discussion of the standard for determining whether an act is incriminating and testimonial.

130. 384 U.S. 757, 763-64 (1966).

131. 341 U.S. 479 (1951).

132. 425 U.S. 391, 408 (1976).

133. *Id.* at 391.

134. *Id.* at 410.

135. *Id.*

136. *See supra* notes 106-09 and accompanying text.

137. *Fisher*, 425 U.S. at 410-11. In *Fisher*, the Court stated that the determination of whether the communicative aspects of the act of production is both testimonial and incriminating for purposes of the Fifth Amendment would depend on the specific facts and circumstances of each particular case and this issue could not be resolved by applying any predetermined or fixed categorical standard. *Id.* at 410.

As a result of the *Fisher* decision, in order for an act of disclosure to enjoy Fifth Amendment protection, the act must not only be testimonial, but it must also rise to the level of testimony that is within the protection of the Fifth Amendment.[138] However, the Court failed to expressly state the standard for determining whether the compelled act amounts to testimony protected by the Fifth Amendment. The Court did state that the compelled production of the taxpayer's papers did not constitute testimony within the protection of the Fifth Amendment where "the Government is in no way relying on the 'truthtelling' of the taxpayer to prove the existence of or his access to the documents."[139] Furthermore, the Court held that the factual assertions admitted through compliance with the subpoena would add "little or nothing to the sum total of the Government's information"[140] and were therefore merely forgone conclusions and not privileged.[141] The Court's reasoning suggests that where enforcement of the summons results in admissions which have little evidentiary value and do not relate to relevant issues in the case, the compulsion of such information does not amount to compelled testimony. Under these circumstances, the privilege against self-incrimination may not be invoked because "[t]he question is not of testimony but of [the] surrender"[142] of physical evidence and the disclosure of physical evidence does not fall within the purview of the privilege.[143]

According to *Fisher*, the Fifth Amendment protections apply when the act of compliance "represent[s] a substantial threat of self-incrimination."[144] However, the Court again neglected to expressly delineate what would amount to a sufficient threat of incrimination.[145] Based on *Fisher*, it appears the production of an item might be considered sufficiently self-incriminating if the government must rely on this evidence

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138. *Id.* at 411.

139. *Id.*

140. *Id.*

141. *Id.*

142. *In re* Harris, 221 U.S. 274, 279 (1911). In the case where an individual is compelled to submit a handwriting exemplar, he admits his ability to write and impliedly authenticates the writing as his own. However, under the testimonial analysis of *Fisher*, the former would be a near truism and the latter self-evidence. *Fisher*, 425 U.S. at 411. Regardless of the fact that the exemplar may satisfy both the incriminating and compulsion requirements, there is no violation of the Fifth Amendment because nothing said or done will be considered to be sufficiently testimonial to be deserving of protection. *Id.* at 412-14.

143. *See supra* notes 89-128 and accompanying text.

144. *Fisher*, 425 U.S. at 413. The Court concluded in *Fisher* that the tacit averments inherent in the act of production did not pose any realistic threat of self-incrimination on the part of the taxpayer and was insufficiently incriminating to fall within the purview of the Fifth Amendment. *Id.* at 412-14.

145. *Id.* The Court, however, has expressly defined incrimination. *See supra* notes 76-84 and accompanying text.

to prove a particular element of the charge.[146] Because of the Court's failure to define a standard to judge the degree of incrimination required for Fifth Amendment protection, one can only speculate whether or not this requirement is met by a given set of facts.[147]

2. The Required Records Exception

There are certain circumstances in which an individual may be compelled to divulge incriminating information despite the fact that all necessary requirements for invoking the privilege are satisfied. The cases creating these exceptions offer little insight into the Supreme Court's jurisprudence concerning the Fifth Amendment privilege against self-incrimination, making it difficult to understand the reason behind the exceptions.[148] The failure of the Court to adequately explain the reasons why it has chosen to adopt a particular approach leaves it open to a variety of interpretations and makes the privilege difficult to apply.

One area under which the Fifth Amendment protection is denied, despite the fact that all the general components of the privilege are present, concerns disclosure requirements mandated by noncriminal

146. *See* United States v. Karp, 484 F. Supp. 157, 159 (S.D.N.Y. 1980) (production of subpoenaed documents would have assisted government in proving false transactions); Katz v. United States, 623 F.2d 122 (2d Cir. 1980) (business activities essential issue, documents relating to any company owned warranted protection); *In re* Grand Jury Subpoena Duces Tecum, 466 F. Supp. 325 (S.D.N.Y. 1979) (mere acknowledgment of possession sufficiently incriminating to apply privilege). In general, these decisions hold that to be incriminating, the sought-for evidence must in some way aid the government in establishing its case. This represents a broadening of the government's ability to procure evidence previously considered privileged. *See* Hoffman v. United States, 341 U.S. 479, 486-87 (1951) (information incriminating if relevant to present or future criminal proceeding regardless of whether government needed it to prove case). See *supra* notes 76-84 and accompanying text for a discussion of the *Hoffman* decision.

147. The resolution of the issue of whether or not the act of production meets the testimonial self-incrimination standard depends upon the particular facts and circumstances of each individual case and not upon any predetermined category or classes. *Fisher*, 425 U.S. at 410.

148. *See* California v. Byers, 402 U.S. 424 (1971) (finding exception to privilege where the law is regulatory in nature and non-criminal in purpose); Haynes v. United States, 390 U.S. 85 (1968) (upholding privilege in wagering regulatory system because it is an area which is almost entirely criminal in nature); Grosso v. United States, 390 U.S. 62 (1968) (upholding privilege in firearms regulatory system because it is an area which is almost entirely criminal in nature); Marchetti v. United States, 390 U.S. 39 (1968) (upholding privilege in area of federal wagering statutes because gamblers are inherently suspect of criminal activities); Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965) (establishing test for statutorily compelled disclosure); Shapiro v. United States, 335 U.S. 1 (1948) (finding exception to privilege if records are required to be kept for official governmental purposes); United States v. Sullivan, 274 U.S. 259 (1927) (finding exception to privilege if disclosure is mandated by non-criminal statute); Boyd v. United States, 116 U.S. 616 (1886) (upholding privilege where a compelled act of production is essentially testimonial).

statutes. The United States Supreme Court first addressed the role the Fifth Amendment plays in statutory reporting requirements in *United States v. Sullivan*.[149] In *Sullivan*, the defendant had been convicted for failing to file an income tax return.[150] He challenged his conviction on the basis that submission of the return would have been self-incriminating and therefore he was protected from compelled disclosure under the privilege against self-incrimination.[151] The defendant's argument proved unsuccessful.[152] However, the *Sullivan* opinion did indicate that although the required report must be produced, any specific information which presented a substantial risk of self-incrimination could be withheld.[153] The Court failed to explain the basis for its decision and merely asserted that to hold otherwise would be an "extreme if not an extravagant application of the Fifth Amendment."[154] The *Sullivan* Court's opinion lacked any analysis regarding the Fifth Amendment self-incrimination doctrine and compelled acts of production which had been in existence since the Court's 1886 decision of *Boyd v. United States*.[155] Although the decision in *Sullivan* did not completely eliminate the ability to assert the Fifth Amendment privilege against statutory reporting requirements, it did limit the scope of its application by requiring the filing of the report, while allowing the withholding of specific information which proved to be self-incriminating.[156]

Almost twenty years following its decision in *Sullivan*, the United States Supreme Court developed a new doctrine concerning the application of the privilege to governmental reporting requirements. In *Shapiro v. United States*,[157] the Court held that Fifth Amendment protection could not be extended to records that were required to be kept for official governmental purposes.[158] The defendant was convicted under the Emergency Price Control Act of 1942 for making illegal sales of fruit and produce.[159] His conviction was based on information contained in records which the Act required be kept.[160] The Court rea-

149. 274 U.S. 259 (1927).

150. *Id.* at 260.

151. *Id.* Disclosure of his income was incriminating as it had been earned illegally. *Id.*

152. *Id.* at 264.

153. *Id.* at 263.

154. *Id.* at 263-64.

155. 116 U.S. 616, 633-38 (1886). *See supra* notes 92-128 and accompanying text.

156. *Sullivan*, 274 U.S. at 263. "[I]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." *Id.*

157. 335 U.S. 1 (1948).

158. *Id.* at 16.

159. *Id.* at 4.

160. *Id.* at 3-4.

soned that the privilege against self-incrimination did not extend to public documents and that documents required to be kept by government regulations were public rather than private.[161] Although the *Shapiro* Court failed to address the *Boyd* holding, it can be inferred from the *Shapiro* opinion that the availability of the privilege to avoid the production of documents depends on whether the records are characterized as public or private.[162] The *Shapiro* decision appears to carve out an exception to the privilege where records required to be kept pursuant to a government regulation are public records. Since public records are not protected under the Fifth Amendment, required records are not protected by the privilege.[163]

It is not clear what was the logical basis for the Court's decision in *Shapiro*.[164] The Court did not attempt to analyze the case based upon the five general components of the privilege,[165] thereby ignoring issues of whether or not there was a testimonial, incriminating, or compulsory aspect to the specific act of production at issue.[166] This was the same general lack of analysis present in the Court's decision in *Sullivan*. What is even more confusing regarding the public records exception is that, in application, it bestows upon the government the power to render private documents unprotected by the Fifth Amendment simply by enacting a statute requiring their disclosure. Nothing in the Court's decision prevents the government from enacting a reporting or record keeping statute dealing with ordinarily private papers and thereby converting documents, once protected, into public and discoverable records.[167]

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161. *Id.* at 7.

162. *See id.* at 16-19.

163. The reason why it can only be inferred from the Court's decision that the application of the privilege is dependant upon whether the compelled documents are private or public is that the Court never mentioned *Boyd* in its opinion in *Shapiro*. The Court's decision in *Boyd* was based on what has been described as the "property-oriented" view of the Fourth and Fifth Amendments. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 399 (1985). This principle maintains that an individual's right to privacy includes the right to control his possessions without governmental interference. *Id.* Based on this view, it is believed that the Fifth Amendment creates a " 'zone of privacy' surrounding an individual and his personal records from compelled production." WHITEBREAD & SLOBOGIN, *supra* note 58, § 15.05, at 347.

164. WHITEBREAD & SLOBOGIN, *supra* note 58, § 15.05, at 339.

165. *See supra* notes 58-129 and accompanying text.

166. WHITEBREAD & SLOBOGIN, *supra* note 58, § 15.05, at 339-40. In arriving at its decision, the *Shapiro* Court merely relied on its previous holding in *Wilson v. United States*, that a president of a corporation could not invoke the privilege for corporate documents tending to incriminate him. *Shapiro*, 335 U.S. at 32-33 (citing Wilson v. United States, 221 U.S. 361 (1911)). The Court simply reasoned that its *Wilson* decision prohibited the assertion of the privilege with respect to public documents and merely concluded that records required to be kept by government regulations were public documents. BERGER, *supra* note 17, at 184.

167. BERGER, *supra* note 17, at 184. In his dissent, Justice Frankfurter noted his

The decisions in *Sullivan* and *Shapiro* illustrate the contradictory approaches the United States Supreme Court has taken with regard to the Fifth Amendment and regulatory required records. *Sullivan* allowed the production of the required records except for specific disclosures within the record that proved to be incriminating.[168] On the other hand, *Shapiro* barred the assertion of the privilege entirely regardless of the nature of the information contained therein.[169] It is unlikely that the different positions taken in these cases could be attributed to the different regulatory areas involved, one being tax and the other price administration.[170] At least, the Court never offered this argument as an explanation.

The Court again addressed the issue of the Fifth Amendment protection afforded to compelled production of required records in *Albertson v. Subversive Activities Control Board*.[171] In *Albertson*, the petitioners claimed that a provision of the Subversive Activities Control Act[172] requiring Communists to register with the government violated their right against self-incrimination.[173] In its opinion, the Court completely ignored the required records exception enunciated in *Shapiro* to the extent that it was never cited in its decision.[174] Instead, the Court returned to the earlier *Sullivan* line of reasoning.[175] As previously discussed, *Sullivan* did not denounce the entire reporting obligation but instead extended the privilege only to specific items of information which were incriminating.[176] However, the Court held that under the particular facts of this case, the principles of *Sullivan* were inapplicable.[177] The Court distinguished *Sullivan* by contrasting the nature of the information compelled by the two statutes:

> In *Sullivan* the questions in the income tax return were neutral on their

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concern for the ramifications of this exception stating that "whenever Congress requires an individual to keep in particular form his own books dealing with his own affairs his records cease to be his when he is accused of a crime." *Shapiro*, 335 U.S. at 54 (Frankfurter, J., dissenting).

168. United States v. Sullivan, 274 U.S. 259, 263 (1927).

169. *Shapiro*, 335 U.S. at 16.

170. BERGER, *supra* note 17, at 185.

171. 382 U.S. 70 (1965).

172. 50 U.S.C. § 786(d)(4) (1964).

173. *Albertson*, 382 U.S. at 71-74.

174. If the Court had analyzed the case in terms of *Shapiro*, the required registration form probably would have been characterized as a public record, because it was a governmentally imposed reporting requirement. Since the privilege could not be invoked with regard to public documents, the government could have compelled the reporting obligation.

175. *Albertson*, 382 U.S. at 78-79. The *Sullivan* line of reasoning established that the claim of privilege could be asserted against an order to compel a required report but only as to the specific items of information contained within the records which would be self-incriminating. *Sullivan*, 274 U.S. at 263.

176. *Sullivan*, 274 U.S. at 263.

177. *Albertson*, 382 U.S. at 78-79.

face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime.[178]

As a result of the decision in *Albertson*, in determining whether or not the statutorily compelled disclosures themselves violate the Fifth Amendment privilege, the following three inquires must be made:

1. Is the statute directed at a selective group?
2. Is that group inherently suspect of criminal activity?
3. Does the statute deal with an area of the law permeated with criminal statutes?[179]

The Court's decision left the Fifth Amendment self-incrimination jurisprudence with regard to statutorily compelled disclosures in an extreme state of confusion. The decision changed the method of analysis employed in these types of cases from a focus on the consequences the requirement had on individuals faced with incrimination to the incriminatory effect on the group subjected to it.[180] The Court never explained the reason for its change in focus and therefore it is difficult to understand the reasoning for this change in analysis.[181]

The confusion created by this decision was compounded by the fact that it left the status of the doctrine enunciated in *Shapiro* open to question. On the one hand, the failure of the Court to mention the decision could be interpreted as an implicit rejection of the principle that information required by statute becomes public information and is not protected by the privilege against self-incrimination.[182] On the other hand, *Albertson* could have merely been a narrow exception to *Shapiro's* required record doctrine. If the latter interpretation of the decision correctly reflects the intention of the Court, there is no way of knowing from the opinion itself under what circumstances the exception comes into play.[183] Because the Court failed to provide factors for distinguishing *Shapiro* from *Albertson*, it was impossible to determine under what circumstances either of the respective methods of analysis should apply.

Finally, in 1968, a trio of cases applying the *Albertson* line of reasoning explained how *Albertson* could be reconciled with *Shapiro*. In *Marchetti v. United States*,[184] the United States Supreme Court held that

178. *Id.* at 79.
179. WHITEBREAD & SLOBOGIN, *supra* note 58, § 15.05, at 341.
180. BERGER, *supra* note 17, at 186.
181. *Id.* at 186-87.
182. *Id.* at 187.
183. *Id.*
184. 390 U.S. 39 (1968).

the federal wagering tax statutes which required only gamblers to register and pay an occupational tax violated the Fifth Amendment.[185] Based on the *Albertson* method of analysis, the Court concluded that the information was protected because gamblers are a selective group, " 'inherently suspect of criminal activities' "[186] and wagering was an area "permeated with criminal statutes."[187] Using the same reasoning, the Court in *Haynes v. United States*[188] and *Grosso v. United States*[189] found that the privilege against self-incrimination was violated by statutes requiring the registration of firearms possessed by those previously convicted of violating other provisions of the National Firearms Act and the registration of those who paid excise taxes on wagering, respectively. The Court's opinions distinguished these cases from *Shapiro* based on the underlying nature of the regulatory systems involved in each case.[190] The Court found that the wagering and firearms regulatory systems differed from the price administration system in *Shapiro* because the records required by the former were not customarily kept, were not public in the same regard as those in *Shapiro*, and did not involve a noncriminal regulatory scheme but rather an area which was almost entirely criminal in nature.[191] Although this analysis helped to explain why the logic in *Shapiro* differs from that in *Albertson*, it provided little explication as to why these differences support the availability of the privilege in avoiding compliance with the statutory requirements in one context and not in the other. This created a problem in that there was no way to delineate what types of record-keeping or registration schemes would be violative of the Fifth Amendment and which scheme, would not.[192]

The uncertainty created by the United States Supreme Court's decisions in *Sullivan*, *Shapiro*, and *Albertson* became even more evident with the Court's decision in *California v. Byers*.[193] In *Byers*, the Court addressed the issue of whether a California "hit and run" statute violated the constitutional privilege against compelled self-incrimination.[194] The statute required a driver of a motor vehicle involved in an accident which caused property damage to stop at the scene and give his name and address or leave a note with the same information as well as a statement of the circumstances surrounding the accident on the vehicle or

185. *Id.* at 40-42.
186. *Id.* at 57 (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965)).
187. *Id.*
188. 390 U.S. 85, 100 (1968).
189. 390 U.S. 62, 69 (1968).
190. BERGER, *supra* note 17, at 188.
191. *Id.*
192. *See id.*
193. 402 U.S. 424 (1971).
194. *Id.* at 425.

property damaged.[195] The plurality opinion began with the proposition that "[i]n order to invoke the privilege, it is necessary to show that the compelled disclosures will confront the claimant with 'substantial hazards of self-incrimination.' "[196] The plurality utilized the standards enunciated in *Albertson* to assess the incriminating effect of the statutory requirements.[197] In finding that the California Vehicle Code is "essentially regulatory,"[198] not directed at an inherently suspect group but " 'at the public at large,' "[199] and is non-criminal in purpose, the Court concluded that the "disclosures with respect to automobile accidents simply do not entail the kind of substantial risk of self-incrimination involved in *Marchetti*, *Grosso*, and *Haynes*."[200] After dispensing with the *Albertson* rationale, the plurality appeared to analyze the basis for the assertion of the privilege using principles set forth in *Sullivan*.[201] The difficulty in following the logic of the Court's reasoning is that the analysis did not continue with the determination of whether the required disclosures represented specific risks of self-incrimination which would be required by the *Sullivan* method of analysis. Instead, the Court reverted to its traditional act of production analysis and addressed the question of whether the reporting requirement is testimonial for purposes of the Fifth Amendment.[202]

The plurality opinion yielded substantial disagreement among the remaining justices with five of the nine members rejecting the plurality's analysis. Justice Black, with whom Justice Douglas and Justice Brennan joined, argued that *Albertson* standards were applicable.[203] In addition to utilizing the *Albertson* standard, Justice Black went on to analyze the case based on the *Sullivan* line of reasoning.[204] As previously

195. *Id.* at 426 n.1.

196. *Id.* at 429.

197. *Id.*

198. *Id.* at 430.

199. *Id.* (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965)).

200. *Byers*, 402 U.S. at 431.

201. *Id.* The plurality's reliance on the *Sullivan* line of reasoning is consistent with the Court's previous decisions because the basis for distinguishing *Sullivan* from *Albertson* was the fact that the statute in *Albertson* focused on an inherently suspect group and not the public at large and the essentially criminal area to which the statute belonged. *Id.* at 430-31.

202. *Id.* at 431-34. The Court proceeded to decide whether compliance with the statute provided " 'evidence of a testimonial or communicative nature,' " or whether the respondent was merely "the source of 'real or physical evidence.' " *Id.* at 432 (quoting Schmerber v. California, 384 U.S. 757, 761, 764 (1966)). The plurality concluded that the statute did not violate the Fifth Amendment privilege against self-incrimination. *Id.* at 434. *See supra* notes 76-128 and accompanying text for a complete discussion concerning the traditional act of production analysis.

203. *Byers*, 402 U.S. at 460. Under this method of analysis, these dissenters invalidated the statute as violative of the Fifth Amendment. *Id.* at 460-61.

204. *Id.* at 461-63.

noted, the inconsistency in this approach is that *Sullivan* did not invalidate the entire reporting obligation, but rather made the assertion of the Fifth Amendment dependent upon whether or not the specific items required presented valid self-incrimination claims.[205] The Court reasoned that the protection afforded by the Fifth Amendment "did not create an exemption for the entire reporting obligation" because it would be a "frivolous" notion "that a valid self-incrimination claim could be made to every question on the return and to the simple act of filing it."[206] On the other hand, *Albertson* concerned a registration requirement which was directed at a specific class of people and which pertained to an area of criminal law.[207] Because of these particular characteristics, the Fifth Amendment protection against self-incrimination justified an individual from complying with the registration requirements as well as then excusing him from having to comply with specific individual items.[208] As a result of the differing nature of each of these forms of analysis and the outcomes which result, it is impossible to violate the Fifth Amendment based simultaneously on *Sullivan* and *Albertson*.[209]

Justice Harlan, concurring in the judgment only, wrote a separate opinion in which he adopted a balancing theory.[210] This theory was a completely new approach to handling the privilege against self-incrimination in the context of regulatory reporting and record-keeping requirements. His theory called for the balancing of the interests of the individual in resisting the disclosure against the government's interests in obtaining the information for purposes of its regulatory system.[211] Justice Harlan stated that where "the state's interests were strong enough," compelled reporting would be permissible "despite its self-incriminatory character."[212]

As the above discussion indicates, the existing jurisprudence concerning the role of the Fifth Amendment privilege in statutorily re-

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205. *See supra* notes 134-36 and accompanying text.

206. BERGER, *supra* note 17, at 186 (construing Sullivan v. United States, 274 U.S. 259 (1927)).

207. *Id.* (discussing "[t]he focus of the [*Albertson*] decision was the group subject to the registration requirement rather than the individual faced with the self-incrimination risk").

208. *Id.*

209. Justice Brennan also wrote a separate dissenting opinion, in which Justice Douglas and Justice Marshall joined, correctly interpreting *Sullivan*. *Byers*, 402 U.S. at 464-78 (Brennan, J., dissenting).

210. *Id.* at 434-58 (Harlan, J., concurring).

211. BERGER, *supra* note 17, at 190 (construing *Byers*, 402 U.S. at 434-58 (Harlan, J., concurring)).

212. *Id.* at 191. Justice Harlan concluded that in "[c]onsidering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information and the nature of the disclosures involved," the balance weighed in favor of compelling the disclosure. *Byers*, 402 U.S. at 458.

quired record-keeping and reporting procedures is open to several possible analyses. The inability to understand, through appreciation of the Supreme Court's opinions, the reasons for choosing one particular approach over another has left the legal community in a state of confusion. This state of uncertainty has prompted one judge to compare the task of ascertaining the current state of the law to reading tea leaves.[213] The understanding behind the United States Supreme Court jurisprudence cannot be found in an analysis of its applications. Instead, one must look to the policy foundations underlying these applications in order to fully comprehend the values which the privilege attempts to protect and promote.[214] Unfortunately, the policy analysis undertaken by the United States Supreme Court fails to adequately justify the reasons why the privilege reaches far beyond the historical context in which it originated.[215]

D. *The Policy Considerations of the United States Supreme Court in Defining the Scope of the Privilege Against Self-Incrimination*

The scope of the Fifth Amendment privilege against self-incrimination has been extended in ways that the language of the Fifth Amendment and the history of the privilege cannot adequately explain. How can simple words which once were interpreted as merely preventing an accused from being compelled in a court of law to confess his own guilt now be interpreted as protecting an individual involved in a hit and run accident from being compelled to give his name and address?[216] What, therefore, is the justification for the expansion of the privilege?

An understanding of the contemporary privilege against self-incrimination lies in the policy objectives supporting the expansion of the privilege beyond its original narrow focus.[217] Unfortunately, a review of the United States Supreme Court opinions dealing with the privilege reveals that there is an absence of judicial policy analysis adequate enough to meet this demand.[218] Therefore, the doctrine can be characterized as one in search of a reason.[219]

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213. United States v. Karp, 484 F. Supp. 157, 158 (S.D.N.Y. 1980).

214. BERGER, *supra* note 17, at 192.

215. See *supra* notes 16-36 and accompanying text for a discussion on the historical development of privilege.

216. California v. Byers, 402 U.S. 424 (1971).

217. BERGER, *supra* note 17, at 23 (discussing the original focus of the Fifth Amendment).

218. *See* Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case For Constitutional Change*, 37 U. CIN. L. REV. 671, 681 (1968).

219. *Id.* at 685 (quoting JUSTICE WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY, 61 (1967). There is need to justify the privilege against self-incrimination not just to aid the courts in applying the privilege to the variety of cases brought before them, but also because the privilege is contrary to our basic understanding of morality. *Id.* at 60.). Justice Friendly has explained:

> [W]hile the other [evidentiary] privileges accord with notions of decent

One quotation which has been frequently utilized by the United States Supreme Court was a statement uttered by Justice Walter V. Schaefer of Illinois, " '[t]he quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law.' "[220] Generalizations such as this, however eloquent, offer little by way to justify the existence of the privilege and only add to the confusion. As Justice Brennan once stated, "only rivers of confusion can flow from a lake of generalities."[221]

The United States Supreme Court's opinion in *Murphy v. Waterfront Commission*[222] represents the Court's most explicit analysis of the various rationales for supporting the privilege against self-incrimination based on Fifth Amendment policy. In *Murphy*, Justice Goldberg wrote:

> [The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life,"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[223]

This effort has been criticized as being superficial and of no use in helping to develop principles for the application of the privilege.[224] While the opinion answers the question as to what the rationales are, it

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> conduct generally accepted in life outside the court room, the privilege against self-incrimination defies them. No parent would teach such a doctrine to his children; the lesson parents preach is that while a misdeed, even a serious one, will generally be forgiven, a failure to make a clean breast of it will not be. Every hour of the day people are being asked to explain their conduct to parents, employers and teachers. Those who are questioned consider themselves to be morally bound to respond, and the questioners believe it proper to take action if they do not.

Friendly, *supra* note 218, at 680.

220. Friendly, *supra* note 218, at 685 (quoting Justice Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956)). This quote was most notably referred to in the historic opinion in Miranda v. Arizona, 384 U.S. 436, 480 (1966).

221. California v. Byers, 402 U.S. 424, 469 (1971).

222. 378 U.S. 52 (1964).

223. *Murphy*, 378 U.S. at 55 (quoting 8 WIGMORE, *supra* note 16, § 2251, at 317; United States v. Grunewald, 233 F.2d 556, 581-82 (1956) (Frank, J., dissenting); Quinn v. United States, 349 U.S. 155, 162 (1955)).

224. BERGER, *supra* note 17, at 25.

fails to answer the question as to why they support the existence of the privilege. Nevertheless, the above passage has been quoted by many courts when deciding whether an accused person may be compelled to divulge incriminating information. The discussion which follows attempts to outline the "shopping list" of rationales enunciated in *Murphy* which are often used to explain the privilege against self-incrimination and the reasons why many of them fail to accomplish this purpose.

1. Privilege as Preventer of Cruel and Inhumane Treatment

The traditional policy reason supporting the privilege against self-incrimination was to prevent the tyrannical abuse of power by those in charge of the criminal justice system.[225] This rationale stems from the historical practice of the oath *ex officio* which characterized the court systems in England and the earliest colonies in America.[226] In the absence of a privilege against self-incrimination, an individual accused of a crime is under an obligation to answer any questions that may be asked of him or her. Consequently, the State is entitled to any information which the accused may provide. Given the value that this information may have in obtaining a conviction, the government may be inclined to take extreme measures to secure the evidence to which it believes it is entitled.[227] Therefore, there is a fear that if the privilege did not exist, an accused would be subject to torture under the hands of the police and prosecutors.[228]

Furthermore, the privilege against self-incrimination has been said to promote the objective of curbing government oppression by preventing unjust harassment of individuals by criminal justice officials.[229] It is believed that without the restrictions inherent in the privilege, "the government would be free to conduct 'fishing expeditions.' "[230] These expeditions would result in an individual be-

225. This rationale was first enunciated by the United States Supreme Court in Brown v. Walker, 161 U.S. 591 (1896). The Court stated that:

> [I]f an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions . . . made the system so odious as to give rise to a demand for its [the inquisitorial practice] total abolition.

Id. at 596-97. *See also* Ullmann v. United States, 350 U.S. 422, 429-31 (1956) (citing Brown v. Walker, 161 U.S. 591 (1896)).

226. *See supra* notes 16-52 and accompanying text.

227. BERGER, *supra* note 17, at 31.

228. David Dolinko, *Is There A Rationale For The Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1077-78 (1986).

229. *Id.* at 1080.

230. *Id.*

ing dragged in front of a judicial body, required to take an oath, and compelled to answer questions for the purpose of obtaining incriminating information.[231] Therefore, the privilege was seen as a means to prevent this inquisitorial practice.

This policy justification merely supports the theory that the privilege is intended to mean exactly what the words of the Fifth Amendment say. Although this may have been the intent of the framers,[232] the prevention of cruel and inhumane treatment by criminal justice officials has little relevance to the other extensions of the amendment.[233] Furthermore, the privilege against self-incrimination is unnecessary to forestall government tyranny. The Fifth Amendment already imposes upon the federal government and the states, by virtue of the Fourteenth Amendment,[234] a duty to act in accordance with "due process of law."[235] The government is thereby prevented from utilizing inhumane and cruel pressure tactics to secure convictions. Torturing a suspect or defendant or using any coercive tactics, which fall short of torture but nevertheless constitute mistreatment of the individual, violates the individual's constitutional right of due process.[236]

The privilege against self-incrimination is inadequate to protect an individual from being the object of a government "fishing expedition" because under our present criminal justice system, a criminal defendant is not ordinarily brought into court unless there is some evidence to show he has committed a crime.[237] Even though the privilege is no

231. *Id.* The only indication that the United States Supreme Court has taken this view is in its statement that the privilege reflects "our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him.'" Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (quoting 8 WIGMORE, *supra* note 16, § 2251, at 315).

232. Friendly, *supra* note 218, at 683.

233. *Id.*

234. The Fifth Amendment Due Process Clause provides that "[no person shall] be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment applicable to the individual states provides that, "[no state shall] deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

235. U.S. CONST. amend. V.

236. Examples of mistreatment are: beating and hanging accused, Brown v. Mississippi, 297 U.S. 278 (1936); prolonged interrogations without rest or sleep, Ashcraft v. Tennessee, 322 U.S. 143 (1944); stripping defendant and holding him in incommunicado, Malinski v. New York, 324 U.S. 401 (1945); falsely threatening to arrest defendant's ailing wife for questioning, Rogers v. Richmond, 365 U.S. 534 (1961); and using defendant's childhood friend to pressure defendant with false appeals to his sympathy, Spano v. New York, 360 U.S. 315 (1959).

237. Dolinko, *supra* note 228, at 1082. "Generally speaking, in serious criminal cases either a grand jury has found sufficient evidence to bring an indictment, or a magistrate at a preliminary hearing has found probable cause to believe the defendant committed the crime charged." *Id.* at 1082 n.3 (citing YALE KASMISAR ET AL., MODERN CRIMINAL PROCEDURE 20-22 (5th ed. 1980)).

longer needed to protect one accused of a crime from inquisitorial abuses by the government, one modern day purpose of the privilege is to prevent the government from using its investigatory powers to harass people who hold unpopular, dissident political views.[238] In this respect, the privilege serves as a "de facto protection for the freedoms of speech and association guaranteed de jure by the first amendment."[239] However, the privilege against self-incrimination is insufficient to accomplish this objective since it merely prohibits self-incrimination.[240] The privilege fails to prevent the government from harassing individuals by compelling them to reveal information which is "embarrassing, stigmatizing, but nonincriminating."[241]

2. Privilege as a Protector of the Innocent

The United States Supreme Court has proposed that the privilege against self-incrimination prevents an innocent person from being wrongfully convicted; "while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' "[242] The privilege is believed to protect the innocent defendant from convicting himself by a poor demeanor or performance on the witness stand.[243] The United States Supreme Court has recognized that:

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand.[244]

Therefore, a person's innocence alone is no guarantee that any information provided by the accused will not aid the government in securing a conviction.[245] However, there is doubt as to whether the privilege against self-incrimination serves the goal of protecting the in-

238. For example, the government might try to compel an individual to disclose his membership to a legal but unpopular and stigmatized political group like the Communist Party. Wilkinson v. United States, 365 U.S. 399 (1961); Barenblatt v. United States, 360 U.S. 109 (1959). A recent example was the Nixon Administration's use of the federal grand juries to interrogate radicals on their political affiliations and personal lives. *See* David J. Fine, Note, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432 (1972).

239. Dolinko, *supra* note 228 at 1064.

240. *Id.* at 1081.

241. *Id.*

242. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)).

243. BERGER, *supra* note 17, at 28.

244. Wilson v. United States, 149 U.S. 60, 66 (1893).

245. BERGER, *supra* note 17, at 28.

nocent from unjust convictions.[246] The United States Supreme Court has repudiated this view[247] and the justification for the contemporary privilege as a protector of the innocent has been extensively criticized as being groundless.[248] The debate centers around the difficulty in comprehending why a person claiming to be innocent should fear complying with the government's demand for information. Any response or information obtained as a result of an individual's compliance with a governmental inquiry should be consistent with a plea of innocence.[249] It is more logical to conclude that in a situation where an accused invokes the privilege, such an assertion is an implied admission of guilt or at least an indication of guilt.[250] Only where an individual believes himself to be guilty should he fear that any information revealed through government inquiry would be self-incriminating.

The United States Supreme Court has commented on the fact that a juror is more likely to regard a defendant's failure or refusal to testify as evidence of guilt.[251] If this is in fact the case, the privilege might have consequences completely adverse to the purpose for which it is meant to serve. The privilege might lead a jury to find an innocent defendant guilty based on the fact that the defendant, in fearing a poor performance on the stand, chose to invoke his privilege and remain silent. Therefore, the notion that the privilege against self-incrimination is a necessary safeguard for the innocent can not be taken seriously.[252]

3. Privilege as the Promoter of Truth

There is also the view that privilege against self-incrimination promotes the truth-seeking function of our accusatorial system.[253] In the absence of a privilege against self-incrimination, the accused is obligated to answer to any inquiry directed towards him. In fulfilling this obligation, the accused will have three options. First, the accused may remain silent and face being held in contempt of court.[254] Second, the individual can avoid the possibility of being adjudicated in contempt of court by providing any information requested. In so doing, however, the accused is risking the chance that he may be revealing incriminating

246. *Id.* at 27.

247. *See* Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) (privilege hinders rather than promotes chances for accurate decisions); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966) (privilege does not aid ascertainment of truth but rather protects other constitutional values).

248. BERGER, *supra* note 17, at 27.

249. *Id.*

250. *Id.*

251. United States v. Grayson, 438 U.S. 41, 58 n.5 (1978) (Stewart, J., dissenting); Lakeside v. Oregon, 435 U.S. 333, 348 n.10 (1978).

252. Dolinko, *supra* note 228, at 1075-76.

253. BERGER, *supra* note 17, at 29.

254. *Id.* at 30. *See* Cheff v. Schnackenberg, 384 U.S. 373 (1966); Shillitani v. United States, 384 U.S. 364 (1966).

information which will ensure his conviction.[255] Finally, the accused may choose to provide perjurious information. The notion of forcing an individual to choose between harmful disclosure, contempt, or perjury has been labeled the "trilemma."[256] In opting for the perjury alternative, the accused faces the risk of punishment only if the prosection discovers that his responses were in fact perjurious.[257]

An accused would be more apt to choose the least risky alternative of providing perjurious responses, since, by doing so, he would avoid the likelihood that he would incriminate himself by providing truthful testimony.[258] Therefore, there appears to be support for the proposition that the privilege against self-incrimination promotes truthful fact finding at least to the extent that it eliminates the inclination to commit perjury if compelled to testify. However, the Supreme Court does not appear to have adopted the rationale that the privilege serves a truth-seeking function.[259]

The words acknowledging the Court's belief that self-incrimination exposes witnesses to the "trilemma" express not a concern for the likelihood that they will commit perjury but that the practice of subjecting someone to the "trilemma" is somehow "cruel."[260] However, this proposition has been criticized as being groundless since the judicial system routinely compels people to testify in situations which present the same difficult choice of suffering the consequences of being held in contempt or committing perjury.[261] There is no explanation as to why the system needs to reduce the risk that a defendant may commit perjury if compelled to testify without the benefit of the privilege against self-incrimination but sanctions the risk in other situations that force upon other witnesses the same pressures created by the "trilemma."

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255. BERGER, *supra* note 17, at 30.

256. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). Although this "trilemma" exists in its pure form only when disclosures are compelled under oath, since mere lying is not perjury, lying is nevertheless considered immoral and testimony not under oath can be legally punishable. *See* 18 U.S.C. § 1001 (1988). Therefore, a person compelled to reveal incriminating information does not confront this "trilemma" only while testifying in a court of law.

257. *Murphy*, 378 U.S. at 55.

258. *Id.*

259. In fact, the Court has repudiated this view. *See supra* note 248.

260. "[The privilege] reflects . . . our unwillingness to subject those suspected of crime to cruel trilemma of self-accusation, perjury or contempt . . . ." *Murphy*, 378 U.S. at 55.

261. Dolinko, *supra* note 229, at 1093-94. *See, e.g.*, Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961) (petitioner's fear for his life and the lives of his family if required to testify was no defense to contempt citation); *In re* Farrell, 611 F.2d 923 (1st Cir. 1979) (contempt citation affirmed when witness refused to testify for fear of his life and his family's safety); LaTona v. United States, 449 F.2d 121, 122 & n.2 (8th Cir. 1971) (contempt citation affirmed when immunized witness refused to testify to grand jury after cooperative witness at a previous inquiry had been killed).

Furthermore, "[i]t seems perverse . . . that a legal system [would] . . . impose such extremely difficult choices on witnesses who may be innocent but would balk at imposing such a choice on people most of whom face a 'trilemma' only because they broke the law."[262]

Nevertheless, the existence of the privilege against self-incrimination is also justified as tending to promote the truth because it serves as an incentive to the police and prosecutors to conduct exhaustive investigations.[263] If compulsory interrogation were allowed, the prosecution would not be required to depend on its own exertions to obtain evidence sufficient enough to support a conviction. The prosecution would probably rely solely on the incriminating admissions obtainable through less than commendable means.[264] Therefore, there exists a relationship between the Fifth Amendment privilege against self-incrimination and the ascertainment of truth.[265] However, the United States Supreme Court has never expressly stated that the goal of imposing the entire burden of proving guilt in a criminal case upon the government is intended to promote the truth.[266] Therefore, it is not known whether the Court has accepted this view or what the actual goal is in placing such a burden on the government.

4. Protection of Privacy

One of the most popular justifications for the privilege against self-

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262. Dolinko, *supra* note 228, at 1094-95.

263. INBAU, *supra* note 26, at 6-7.

264. *Id.* For an illustration of the potential for the government to neglect its duty of investigation in the absence of the right to remain silent, consider the following:

> Suppose a prosecutor [was] guaranteed the opportunity to interrogate a defendant up hill and down dale, with all the power of the State behind him to compel answers. If the prosecutor [was] lazy, unconscientious, or proud of his ability to turn a witness inside out, he might rely solely upon this opportunity, neglecting the more laborious and less dramatic forms of investigation. Then might follow the conviction of an innocent man, tricked by adroit forensics, or the acquittal of one guilty but nimble-witted, because the prosecutor had not taken pains to build a solid case against him. So we block off by privilege against self-incrimination any sure reliance upon inculpatory admissions from the suspect, and encourage as a more dependable source of truth [sic] the process which may be called that of objective investigation.

John M. Maguire, *A Survey of Blood Grouping Decisions and Legislation in the American Law of Evidence*, 16 S. CAL. L. REV. 161, 170 (1943).

265. Dolinko, *supra* note 228, at 1083. If the reasoning behind this justification was not to promote the truth but was instead meant to preclude the government from introducing any evidence obtained from the defendant against his will, then this reasoning would contradict several decisions rendered by the Supreme Court. The Supreme Court has held that a defendant can be compelled to supply the government with blood samples, fingerprints, and handwriting and voice exemplars which can be admitted by the prosecution at trial. *See supra* notes 114-22.

266. Dolinko, *supra* note 228, at 1083.

incrimination is the claim that compelled self-incrimination is an improper and impermissible invasion of a person's right to privacy.[267] The United States Supreme Court has adopted this view on several occasions.[268] However, the Court has never explained why compelling an accused to answer incriminating questions infringes his right to privacy.[269] As a result, it is questionable whether the privacy argument is a legitimate justification for the privilege against self-incrimination.

A person's privacy is invaded whenever potentially damaging information concerning his personal life is revealed against his wishes.[270] One weakness in the theory that the privilege against self-incrimination protects an individual's privacy is that the privilege only prevents the disclosure of incriminating evidence that is sought from the person himself and not if obtained from anyone else.[271] As a personal privilege, "a party is privileged from producing the evidence but not from its production."[272] One flaw in the privacy theory is that if a primary purpose of the privilege is to protect individual privacy, why should it prevent only an infringement of privacy that is caused by the person whose privacy is being invaded?[273]

The Supreme Court has suggested that the compelling of self-incriminating evidence infringes upon an individual's "mental privacy."[274] However, the government is always delving into a person's thoughts, beliefs and emotions. The majority of crimes contain a mental element which the government must prove beyond a reasonable doubt in order to obtain a conviction.[275] The government usually procures this information by observing the defendant's behavior or by questioning his family and acquaintances.[276] Therefore, why is it considered a more serious invasion of privacy to obtain information about

267. *Id.* at 1107.

268. *See, e.g.*, Fisher v. United States 425 U.S. 391, 399 (1976); Couch v. United States, 409 U.S. 322, 327 (1973); Miranda v. Arizona, 384 U.S. 436, 460 (1966); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). However, the Court has also acknowledged a contrary view. In *United States v. Bryan*, the Court, in enforcing a contempt order states, "[f]or more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence." 339 U.S. 323, 331 (1950).

269. Dolinko, *supra* note 228, at 1107.

270. *Id.*

271. *Id.* at 1108.

272. Johnson v. United States, 228 U.S. 457, 458 (1913).

273. Another way to phrase the problem is, "[w]hy should we think that a person who is legally compelled to reveal incriminating information about himself suffers a loss of privacy different in degree or in quality from that which he would experience if anyone else revealed the same information?" Dolinko, *supra* note 228, at 1109.

274. The privilege against self-incrimination was described as prohibiting the state from intruding into the "private inner sanctum of individual feeling and thought." Couch v. United States, 409 U.S. 322, 327 (1973).

275. *See In re* Winship, 397 U.S. 358, 364 (1970).

276. Dolinko, *supra* note 228, at 1110.

the mental thoughts, knowledge, feelings and beliefs from the individual himself rather than by objective observation or from other people? One explanation is that compelling a person to divulge what he truly knows, feels, and believes is more painful, embarrassing and humiliating.[277] However, this is not always true:

> Being followed and spied on is surely a painful experience, and the more comprehensive the surveillance the more embarrassment it is likely to provoke. Similar discomfort can arise if a person discovers that friends, relatives, or neighbors are being questioned about his conduct and disclosing information he wants kept private. Some people might well feel that these forms of information gathering have a devious "sneaky" quality that makes them even more discomforting than outright interrogation—where at least one knows what is being said and done.[278]

A person's privacy can be invaded with or without his knowledge and regardless of the fact that he feels or doesn't feel humiliated or embarrassed.[279] Therefore, one problem with accepting the privacy theory for justifying the privilege against self-incrimination is that the privilege is strictly limited to situations where information is compelled from the individual himself. No explanation is given, nor can any be conceived, as to why the privilege should be confined to only self-incrimination.

There is another problem with the privacy argument. If the protection of an individual's privacy interest is one of the primary purposes of the privilege against self-incrimination, then why does the privilege bar only compelled disclosure of incriminating information and leave other equally damaging information accessible? The United States Supreme Court has held that the privilege only prevents disclosure of information which is shown to be potentially incriminating to the deponent.[280] If the purpose of the privilege is truly to protect a person's privacy, then this rationale can not justify the privilege given the extremely narrow class of intrusions in which it prevents. It is not intuitively plausible to claim that compelling an individual to reveal incriminating information is a more outrageous invasion of privacy than compelling him to divulge information which would expose him to severe civil penalties,[281] the loss of his livelihood, or public ostracism.[282] If there is an

277. *Id.* at 1101-02.

278. *Id.* at 1112 n.209.

279. *Id.*

280. United States v. Apfelbaum, 445 U.S. 115, 124-25 (1980); Brown v. Walker, 161 U.S. 591, 605-06 (1896).

281. Patrick v. United States, 524 F.2d 1109, 1118-19 (7th Cir. 1975) (the compelling of testimony from an immunized witness did not violate the Fifth Amendment despite the fact that it was used to establish a tax liability of over $800,000).

282. Ullmann v. United States, 350 U.S. 422, 430-31 (1956) (Fifth Amendment did not sustain refusal to answer questions about Communist affiliations despite risk of loss of employment, expulsion from labor unions, and public obloquy). The

explanation for why considerations of privacy prohibit only the compulsion of self-incriminating information neither the Supreme Court nor any legal scholar has bothered to communicate what it is.

The failure of the United States Supreme Court to articulate the conceptual foundation supporting the existence of the privilege against self-incrimination does not mean that the privilege should not continue to exist.[283] Were the privilege not to exist, the government would be free to impose sanctions[284] on an accused who refused to become his own accuser by providing self-accusatory information. Perhaps the only conceptual justification for the privilege is the idea that there is something inherently cruel in such a practice.[285] One of the oldest and most persistent philosophies offered to justify the privilege is that it is simply cruel and inhumane to force an individual to participate in his own personal downfall,[286] that it somehow "degrades the dignity of the man."[287] Unfortunately, this argument offers little explanation of precisely why compelled self-incrimination is cruel and inhumane.

Typically, those who find the practice abhorrent defend their position with an appeal to intuition: "The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration. It is plain to every person who gives the subject a

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subject of a civil commitment proceeding is not privileged to refuse to undergo a court-ordered psychiatric examination. State *ex rel.* Kiritsis v. Marion Probate Court, 381 N.E.2d 1245 (Ind. 1978). An attorney can be called to testify in a disbarment proceeding and could not refuse to answer questions merely because they would lead to his disbarment. Black v. State Bar of California, 499 P.2d 968, 974-75, (Cal. 1972). It is hard to comprehend why requiring a motorist to admit that he exceeded the speed limit is a more serious violation of privacy than compelling a defendant in an annulment suit to testify as to his sexual activity or for a mother to be forced to reveal her son's possession of a murder weapon. Friendly, *supra* note 218, at 689.

283. "A rule whose existence lacks any principled justification may nevertheless come to serve important functions in the legal system as a whole, so that its repeal would do violence to the entire system." Dolinko, *supra* note 228, at 1064.

284. Undoubtedly, these sanctions would fall short of a violation of the individuals' right to the due process of law.

285. "The imposition of harsh penalties in a gentlemanly manner can reflect as much inhumanity as the utilization of overt force . . . both represent the same fundamental tactic of subjecting the suspect to the choice of responding or else." BERGER, *supra* note 17, at 31.

286. *Id.* at 1090-91.

287. BERGER, *supra* note 17, at 32. Justice Douglas expressed this view when considering the importance of the Fifth Amendment when he said that the "evil to be guarded against was partly self-accusation under legal compulsion . . . . The conscience and dignity of man were also involved." Ullmann v. United States, 350 U.S. 422, 445-46 (1956). Justice Fortas has also stated that the privilege, "historically goes to the roots of democratic and religious principle. It prevents the debasement of the citizen which would result from compelling him to 'accuse' himself before the power of the state." United States v. Wade, 388 U.S. 218, 261 (1967).

moment's thought."[288] However, the statement that something is "obvious" or "plain" has been criticized as being "the usual refuge of a judge who cannot articulate a satisfactory reason."[289] A jurisprudence based solely on an unanalyzable intuition is bound to cause more confusion than promote justice. If we do not know exactly what is "cruel" and "inhumane" about compelling an individual to disclose incriminating information, then there is no rational basis for determining whether in a given situation this cruelty exists.[290] As one commentator has noted, one reason for the wavering course of the United States Supreme Court's decisions in this area is due to the Court's inability to identify the principles underlying the privilege against self-incrimination.[291] Therefore, the difficulty in defining the contours of the right to remain silent is the result of the Supreme Court's failure to analyze the policy considerations underlying the ultimate endorsement or rejection of the privilege against self-incrimination.

IV. THE BOUKNIGHT CASE

Baltimore City Department of Social Services v. Bouknight[292] represents the most recent case illustrating the United States Supreme Court's continuing struggle with its current jurisprudence regarding the privilege against self-incrimination. The following sections attempt to outline the Court's decision and to further illustrate the existing state of confusion concerning the Supreme Court's Fifth Amendment jurisprudence.

A. *Facts and Procedural History*

Maurice M. was three months old when he was hospitalized after suffering a fractured left femur.[293] While at the hospital, further examination revealed several other partially healed bone fractures indicating that the infant had been abused.[294] The infant's mother, Jacqueline Bouknight, was suspected of causing her son's injuries after a hospital

288. Brown v. Walker, 161 U.S. 591, 637 (1896) (Field, J., dissenting).

289. Friendly, *supra* note 218, at 683. Even those who indorse this cruelty argument admit that "we cannot demonstrate why it is 'cruel.' We *feel* that it is cruel. Beyond that we cannot go." Dorsey D. Ellis, Jr., *Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment*, 55 IOWA L. REV. 829, 838 (1970).

290. Dolinko, *supra* note 228, at 1092-93. The principles underlying the privilege against self-incrimination must be articulated if we are to decide in every new or doubtful case whether or not the privilege should apply. Marvin Schiller, *On the Jurisprudence of the Fifth Amendment Right to Silence*, 16 AM. CRIM. L. REV. 197, 199-200 (1979).

291. Wallace Mendelson, *Self-Incrimination in American and French Law*, 19 CRIM. L. BULL. 34, 38-39 (1983).

292. 493 U.S. 549 (1990).

293. *Id.* at 551.

294. *Id.*

employee observed her shaking Maurice, dropping him in his crib, and otherwise mishandling the infant while he was in a full body cast.[295]

In February, 1987, the Baltimore City Department of Social Services (BCDSS) was informed of the suspected child abuse and responded by securing a court order authorizing the removal of Maurice from his mother's care.[296] Several months later, the shelter care order was modified and Maurice was returned to his mother's custody.[297] A hearing in the Juvenile Court was held shortly after Jacqueline Bouknight regained custody of Maurice.[298] As a result of this hearing, Maurice was adjudicated a child in need of assistance and he was placed under the continuing supervision of the BCDSS.[299] A court order was issued which provided that Jacqueline Bouknight would continue as the custodian of the child provided that she comply with the extensive conditions of the supervision order.[300] Pursuant to the order, Jacqueline Bouknight was required to continue cooperating with BCDSS, continue in therapy, enroll in parental aid and training programs, and refrain from physically abusing Maurice.[301] Jacqueline Bouknight agreed to retain custody of Maurice according to these terms.[302]

Eight months following the issuance of the protective custody order, BCDSS became concerned for Maurice's safety after Jacqueline Bouknight refused to cooperate with the BCDSS and violated nearly every condition of the protective custody order.[303] BCDSS filed a petition in juvenile court seeking to remove Maurice from his mother's custody.[304] In addition, BCDSS requested that Jacqueline Bouknight be ordered to produce the child or in the alternative, reveal his location.[305] Prior to filing the petition, BCDSS had attempted to ascertain the whereabouts of the child but had been unsuccessful.[306] Jacqueline Bouknight had refused to reveal the location of the child and had stated that the child was being cared for by an aunt whom she refused to identify.[307] Several interviews with relatives of Jacqueline Bouknight revealed that no one had seen the child recently.[308] Having failed to locate Maurice, BCDSS notified the police of Maurice's disappear-

295. *Id.* at 551-52.
296. *Id.* at 552.
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.* at 553.
307. *Id.*
308. *Id.*

ance.[309] The police issued a missing persons report and referred the matter to the homicide division for investigation.[310]

On April 20, 1988, the Juvenile Court granted BCDSS's petition to remove Maurice from his mother's care.[311] Jacqueline Bouknight failed to appear at the hearing.[312] Her attorney indicated that she had planned on attending but had been reluctant to do so for fear that the state would snatch the child.[313] The court issued an order to show cause why Jacqueline Bouknight should not be held in contempt for failing to produce the child.[314] In addition, a bench warrant was issued for her appearance.[315] At a subsequent hearing one week later, Bouknight again failed to produce the child claiming that Maurice was staying with relatives in Dallas, Texas.[316] Unfortunately, an investigation revealed that Maurice was not in Texas and relatives claimed not to have seen him.[317] During a hearing held the next day, Jacqueline Bouknight again refused to produce the child and was subsequently held in civil contempt.[318]

The Juvenile Court rejected Jacqueline Bouknight's claim that her Fifth Amendment right against self-incrimination was violated by the contempt order.[319] The contempt order was vacated by the Court of Appeals of Maryland.[320] Subsequently, the United States Supreme Court granted certiorari.[321]

B. *The Majority Opinion*

The Court was confronted with the issue of whether a mother who had been given custody of her child pursuant to a court order is protected by the Fifth Amendment privilege against self-incrimination from being compelled by a subsequent court order to produce the child. At the outset, the majority[322] addressed the issue of whether compliance with the production order would result in the disclosure of

309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.* at 554.
321. *Id.*
322. Justice Sandra Day O'Connor authored the opinion for the 7-2 majority which included Chief Justice Rehnquist joined by Justices White, Blackmun, Stevens, Scalia, and Kennedy. Justice Marshall filed a dissenting opinion in which Justice Brennan joined. *Id.* at 563-72 (Marshall, J., dissenting).

compelled, incriminating, and testimonial assertions.[323] By applying the act of production doctrine,[324] the Court stated that the Fifth Amendment only prohibits the compulsion of incriminating testimonial communications.[325] In this respect, the Court went on to say that the compliance with the order may implicate the Fifth Amendment privilege because producing the object "testifies to . . . [its] existence, possession, or authenticity."[326] By producing the child, Bouknight would be acknowledging that the child she produced was in fact Maurice and in doing so testifying to his existence and identification. Nevertheless, these assertions were found to be insufficiently incriminating to support her privilege claim.[327] The Court recognized however that there were testimonial aspects to the production of Maurice. At the moment of production, Bouknight would be implicitly communicating her control over her son.[328] Since this communication could aid the state in prosecuting her for child abuse or, if the BCDSS's worst fears proved true, for murder, there was a sufficient possibility that the act of production would amount to an incriminating testimonial communication to justify invoking the privilege.[329]

Despite the fact that Bouknight may incriminate herself if forced to produce her child, the Court continued by noting that its prior decision in *Shapiro v. United States*[330] created a "required records" exception recognizing that the "Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."[331]

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323. *Id.* at 554-55.

324. *See supra* notes 106-122 and accompanying text.

325. Baltimore City Dep't of Social Serv. v. Bouknight, 493 U.S. 549, 554 (1990). "The Fifth Amendment's protection 'applies only when the accused is compelled to make a testimonial communication that is incriminating.' " *Id.* (quoting Fisher v. United States, 425 U.S. 391, 408 (1976)).

326. *Id.* For this reason, the Court explained that Bouknight could not "claim the privilege based upon anything that examination of Maurice might reveal." *Id.* Although not expressly stated by the Court, the most likely justification for this statement is that this information would not be disclosed from the act of production itself and therefore would not be testimonial. *Id.*

327. *Id.* at 555. The State could have easily identified the child as Maurice by means independent of Bouknight's actions in producing the child. *Id.*

328. *Id.*

329. *Id.*

330. 335 U.S. 1 (1948). *See supra* notes 157-63 and accompanying text.

331. *Bouknight*, 493 U.S. at 556. The basic reasoning in *Shapiro* was that:

> [No constitutional violation occurs] when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator.

Shapiro v. United States, 335 U.S. 1, 32 (1948).

The majority acknowledged that since *Shapiro* the Government's access to regulatorily required items or information has been restricted where the requirements were imposed upon "selective group[s] inherently suspect of criminal activities."[332] To enforce its position that the Government is entitled to the production of required records "which the 'defendant was required to keep not for his private uses but for the benefit of the public, and for public inspection,' "[333] the Court relied on its decision in *California v. Byers*.[334] According to *Byers*, the Court reasoned, where a statute is directed at the public at large and is intended to serve a noncriminal civil purpose, compliance with the regulatory requirement could be compelled.[335]

Moreover, the majority reasoned that production may be required not only as part of a generally applicable noncriminal regulatory scheme, but also as a result of an individual's assuming custodial duties over an object in which the government has a legitimate interest.[336] The Court adopted the principle enunciated in *Wilson v. United States*.[337] The principle which emerged from the Court's decision in *Wilson* and quoted with approval in *Bouknight* was:

> [W]here, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.[338]

The Court then went on to hold that the doctrine established in the above line of cases was applicable to the case at bar.[339] The Court began its evaluation of the facts of the case based upon the formal custodial relationship doctrine enunciated in *Wilson*. As a result of Maurice being adjudicated a child in need of assistance (CINA), his safety and welfare became a particular concern of the States.[340] By accepting cus-

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332. *Bouknight*, 493 U.S. at 557 (quoting Marchetti v. United States, 390 U.S. 39, 57 (1968) (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965)). *See supra* notes 171-87 and accompanying text.

333. *Bouknight*, 493 U.S. at 556 (quoting Shapiro v. United States, 32 U.S. 1, 17-18 (1948) (quoting Wilson v. United States, 221 U.S. 361, 381 (1911)).

334. 402 U.S. 424 (1971). *See supra* notes 193-202 and accompanying text.

335. *Bouknight*, 493 U.S. at 557-58 (construing California v. Byers, 402 U.S. 424, 458 (1971)).

336. *Id.* at 558.

337. 221 U.S. 361 (1911). Although *Wilson* involved the custodian of corporate documents, the *Bouknight* Court interpreted *Shapiro* as extending this principle beyond the corporate context. *Bouknight*, 493 U.S. 907 (construing Shapiro v. United States, 335 U.S. 1, 16-20 (1949)).

338. *Bouknight*, 493 U.S. at 558 (quoting *Wilson*, 221 U.S. at 382).

339. *Id.* at 559 ("Once [the court determined] Maurice was . . . a child in need of assistance, his care and safety became the particular object of the state's regulatory interest.").

340. *Id. See* MD. CTS. & JUD. PROC. CODE ANN. §§ 3-801(e), 3-804(a) (Supp. 1991) for a definition of "child in need of assistance" under Maryland law.

tody of Maurice subject to the conditions imposed by the court-approved protective supervision order, the Court concluded that Bouknight had "submitted to the routine operation of the regulatory system and agreed to hold Maurice in a manner consonant with the States's regulatory interests and subject to inspection by BCDSS."[341] This agreement obligated Bouknight to permit examination of Maurice by the BCDSS pursuant to its responsibilities under the child protection statute.[342]

Furthermore, the regulatory scheme governing children adjudicated as CINA, effectuated a state purpose unrelated to the enforcement of its criminal laws.[343] The scheme provides for "the care, protection, and wholesome mental and physical development of children" within the statute's purview.[344]

The majority held that the government could access items and information, regarding a child classified as CINA, since the statute was not directed at a group inherently suspect of illegal activities.[345] A child who qualifies as a CINA is under the supervision of the Department of Social Services and may be placed under a protective order "in his own home or in the custody or under the guardianship of a relative or other fit person, upon terms the court deems appropriate."[346] Further, a parent who falls under the statute's dictates is not criminally sanctioned, "but rather has been deemed . . . simply 'unable or unwilling to give proper care and attention to the child and his problems.' "[347] Therefore, the Court reasoned that the production requirement is not strictly directed at a selective group customarily suspected of criminal conduct.[348]

The Court concluded that the State was entitled to production of

341. *Bouknight*, 493 U.S. at 559.

342. *Id. See* MD. CTS. & JUD. PROC. CODE ANN. § 3-802(a) (1989); Wilson v. United States, 221 U.S. 361, 382 (1911) (custodian of books and papers "held subject to examination by demanding authority," had no privilege to refuse production even though it may be self-incriminating).

343. *Bouknight*, 493 U.S. at 559.

344. MD. CTS. & JUD. PROC. CODE ANN. § 3-802(a)(1) (1989).

345. *Bouknight*, 493 U.S. at 559-60. The Court found persons subject to the provisions of § 3-801(a) did not constitute a "selective group inherently suspect of criminal activities." *Id.* at 559 (quoting Marchetti v. United States, 390 U.S. 39, 57 (1968) (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965))).

346. MD. CTS. & JUD. PROC. CODE ANN. § 3-820(c)(1)(i) (1989).

347. *Bouknight*, 493 U.S. at 560 (quoting MD. CTS. & JUD. PROC. CODE ANN. § 3-801(e)(2) (Supp. 1991)).

348. *Id.* The removal of a child from his parents' care or the retention by parents of custody subject to custodial order conditions is not triggered by accusations of criminal wrongdoing. Instead, the State merely decides that its assistance is needed because the parents are "simply unable or unwilling to give proper care and attention to the child and his problems." MD. CTS. & JUD. PROC. CODE ANN. § 3-801(e)(2) (Supp. 1991).

Maurice because the required governmental access to the child was pursuant to a regulatory regime that was applicable to the public at large and whose purpose was to provide for the health, welfare, and safety of the child and not for reasons related exclusively to criminal law enforcement.[349] Thus, the Court held that Bouknight was not entitled to the protection offered by the Fifth Amendment privilege against self-incrimination and must obey the court order to produce her son.[350]

C. *The Dissent*

The dissent agreed with the majority that the act of producing the child amounted to testimonial self-incrimination.[351] Justice Marshall argued that Bouknight's production of Maurice would prove "her actual and present physical control over him."[352] The dissent concluded that the incriminating aspects of Bouknight's admission of physical control would substantially aid the prosecution in establishing her guilt.[353]

The dissent argued that the required records line of cases relied upon by the majority did not apply to the *Bouknight* case.[354] First, the dissent attacked the majority's analogy of Bouknight's agreement to undertake certain custodial obligations on behalf of the State to that of a custodian of records of a collective entity.[355] The dissent argued that the majority incorrectly categorized Bouknight as the custodian of Maurice.[356] Under Maryland juvenile protection law, a custodian is "a person or agency to whom legal custody of a child has been given by order of the court, *other* than the child's parent or legal guardian."[357] Since the adjudication of a child as one in need of assistance does not automatically terminate a parent's rights to legal and physical custody, the dissent concluded that upon regaining custody of Maurice, Bouknight

349. *Bouknight*, 493 U.S. at 559-61.

350. *Id.* at 561.

351. *Id.* at 563 (Marshall, J., dissenting.)

352. *Id.* (Marshall, J., dissenting).

353. *Id.* (Marshall, J., dissenting). To further support its position, the dissent commented that Bouknight could possibly be charged with criminal abuse and neglect or murder, therefore undercutting the majority's argument that there was no threat of criminal liability regarding her statements. *Id.* (Marshall, J., dissenting).

354. *Id.* at 564 (Marshall, J., dissenting).

355. The dissent disagreed that the custodian of records doctrine established in *Wilson* had been extended beyond the corporate context by *Shapiro*. *Id.* at 564 n.1 (Marshall, J., dissenting). Instead, the dissent read *Shapiro* as belonging to the group of "cases covering testimony required as a part of a noncriminal regulatory regime." *Id.* For a discussion of the required records exception, see *supra* notes 129-47 and accompanying text.

356. *Bouknight*, 493 U.S. at 565.

357. MD. CTS. & JUD. PROC. CODE ANN. § 3-801(j) (Supp. 1991) (emphasis added).

acted in her parental capacity and not as a custodian "*on behalf of the State.*"[358] Additionally, the dissent argued that the rationale behind denying a corporate custodian the protection of the Fifth Amendment is inapplicable to Bouknight[359] The rationale is based on the principle that the corporate custodian is not acting in a personal capacity, as is the case in *Bouknight*, but as an agent or representative of the business entity.[360] The privilege against self-incrimination does not apply to a business organization, and thus the privilege may not be asserted by a custodian of records for a business entity.[361]

Second, the dissent disagreed with the majority's assertion that the state's regulatory scheme was noncriminal in nature.[362] The dissent accused the majority of focusing too narrowly on the essential characteristics of the regulatory scheme; "[v]irtually any civil regulatory scheme could be characterized as essentially non-criminal by looking . . . solely to the avowed non-criminal purpose of the regulations."[363] Instead, the dissent opined that the appropriate inquiry would be to focus on the practical effects of the scheme.[364] In doing so, it found that the purpose of the Maryland juvenile statute overlapped with the purpose underlying the Maryland criminal child abuse statutes.[365] The dissent suggested that through the proceedings enforcing civil regulations, information is often obtained to support criminal convictions.[366] In addition, the dissent argued that the goal of the civil regulatory scheme is related to, and cannot be separated from, the relevant criminal statutes.[367] For this reason, the dissent concluded that where the production of Maurice is compelled pursuant to a civil scheme, which inevitably intersects with criminal statutes, such compelled production is prohibited by the Fifth Amendment privilege against self-incrimination.[368]

The dissent likewise criticized the majority's conclusion that the civil

358. *Bouknight*, 493 U.S. at 565-66 (Marshall, J., dissenting).

359. *Id.* at 566 (Marshall, J., dissenting).

360. *Id.* at 566-67 (Marshall, J., dissenting).

361. *Id.* (Marshall, J., dissenting). *See* Hale v. Henkel, 201 U.S. 43, 69-70 (1906) (Fifth Amendment right is a personal privilege of witness and does not protect a third party); United States v. White, 322 U.S. 694, 701 (1944) (labor unions cannot invoke privilege). For a discussion on who may assert the Fifth Amendment privilege, see *supra* notes 59-68 and accompanying text.

362. *Bouknight*, 493 U.S. at 568 (Marshall, J., dissenting).

363. *Id.* (Marshall, J., dissenting).

364. *Id.* (Marshall, J., dissenting).

365. *Id.* (Marshall, J., dissenting). *See* MD. ANN. CODE art. 27, § 35A (Supp. 1991).

366. *Bouknight*, 493 U.S. at 568. (Marshall, J., dissenting) (citing Lee v. State, 89 A.2d 87 (Md. Ct. Spec. App. 1985)).

367. *Id.* at 569 (Marshall, J., dissenting).

368. *Id.* (Marshall, J., dissenting).

regulatory scheme was targeted at the general public.[369] The dissent saw the regulation as directed not at the general population of parents within the state, but rather at a narrow subset of parents who have so seriously neglected or abused their children as to require state intervention to provide these children with proper care.[370] According to the dissent, these parents were clearly a " 'selective group inherently suspect of criminal activities.' "[371]

After rejecting the analysis extended by the majority, the dissent advocated a new approach for adjudicating issues concerning the applicability of the Fifth Amendment right to self-incrimination.[372] According to this approach, in order " 'to sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' "[373] The dissent continued, stating that "[t]his analysis unambiguously indicates that Bouknight's Fifth Amendment privilege must be respected to protect her from the serious risk of self-incrimination."[374]

In conclusion, the dissent asserted that under the circumstances of this case there was no justification for "riding roughshod over Bouknight's constitutional privilege against self-incrimination."[375]

D. *Critical Comment on the Case*

As the dissent concluded in *Bouknight*, the majority decision comports with the legacy of many of the Court's prior decisions concerning compelled acts of production and the Fifth Amendment privilege against self-incrimination. The Court has been criticized for distorting facts and straining logic in order to uphold the compulsion of self-incriminating disclosures.[376] The majority's entire decision rests on the unacceptable and unconvincing analogy equating the production of an infant child to the production of a document.[377]

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369. *Id.* at 570 (Marshall, J., dissenting).

370. *Id.* at 570-71 (Marshall, J., dissenting).

371. *Id.* at 570 (Marshall, J., dissenting) (quoting Marchetti v. United States, 390 U.S. 39, 57 (1968) (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965))).

372. *Bouknight*, 493 U.S. at 569.

373. *Id.* at 569-70 (Marshall, J., dissenting) (quoting Hoffman v. United States, 341 U.S. 479, 486-87 (1951)).

374. *Id.* at 570 (Marshall, J., dissenting).

375. *Id.* at 571 (Marshall, J., dissenting).

376. *See* Dolinko, *supra* note 228, at 1141; *supra* notes 129-215 and accompanying text.

377. The Court was not dealing with an inanimate object, but with a child who, as one of the "most helpless in our society," deserves to be given "a chance for life, liberty and the pursuit of happiness." Charles D. Gill, *Children Need Bill of Rights of Their Own*, NAT'L L.J., Sept. 3, 1990, at 12.

The majority opinion struggled to apply the standards enunciated in prior "required records" decisions to the facts present in *Bouknight*.[378] The discrepancy between the majority's opinion and that of the dissent illustrates that the standards derived are both ill defined and unworkable.[379] The majority believed that the regime was civil in nature since its intended purpose was to "provid[e] for the care, protection, and wholesome mental and physical development of children coming within [the jurisdiction of the juvenile court]."[380] The majority went further by applying a second element and concluding that the statute was not criminal because it did not "focu[s] almost exclusively on conduct which was criminal."[381] Disagreeing with the majority's description, the dissent characterized the juvenile welfare statute as a criminal regulatory regime by focusing on the practical effects of its enforcement.[382] Furthermore, the dissent pointed out that although the majority concluded that the regulation was civil, it analogized the scheme to a revenue system found to be criminal in nature in *Marchetti v. United States*.[383]

The failure to adequately define factors to be used in evaluating a particular regulatory regime allows a court to make dubious and ad hoc characterizations in order to accomplish a predetermined end. Since the civil investigation was running concurrently with a homicide investigation by law enforcement officials, it is difficult to accept the majority's characterization of the juvenile statute as noncriminal.[384] The ability of the majority to characterize this scheme as civil with such apparent ease gives credence to the dissent's accusation that, the Court will never "find a relationship between the civil scheme and law enforcement goals significant enough to implicate the Fifth Amendment."[385]

The Court's analysis of whether or not the statute was directed at a "selective group inherently suspect of criminal activity" was as ambigously defined as the statute.[386] The disagreement between the majority and the dissent illustrates that this factor can be manipulated so as to achieve the desired result. A regulatory regime which on its

378. Baltimore City Dep't of Social Serv. v. Bouknight, 493 U.S. 549, 559-61 (1990).

379. *See supra* notes 322-75 and accompanying text.

380. *Bouknight*, 493 U.S. at 559 (1990) (quoting MD. CTS. & JUD. PROC. CODE ANN. § 3-802(a) (1984)).

381. *Id.* at 560 (quoting California v. Byers, 402 U.S. 424, 454 (1971) (Harlan, J., concurring in judgment)).

382. *Id.* at 568-69 (Marshall, J., dissenting).

383. 390 U.S. 39, 57 (1968). The dissent noted that in *Marchetti*, even though the principal interest of the regulatory regime was the collection of revenue, it was nevertheless characterized as inherently criminal because of the possibility that compliance with the disclosure requirement would lead to criminal prosecution. *Bouknight*, 493 U.S. at 569 (Marshall, J., dissenting).

384. *Bouknight*, 493 U.S. at 552-53.

385. *Id.* at 568 (Marshall, J., dissenting).

386. *See supra* note 345 and accompanying text.

face does not limit its application to an isolated group of people can always be claimed to be directed at the general public even when, functionally, it only applies to a selected group.

Additionally, the dissent's analysis is unacceptable because it contains unworkable and ill-defined standards. The dissent's approach requires that the invocation of the privilege against self-incrimination be sustained where it is "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[387] The word "evident" is too subjective to allow this approach to function consistently in new and doubtful cases. It appears from the majority's lack of extensive analysis that it was "evident" that the regulatory regime was noncriminal in nature.[388] Furthermore, the requirement that the disclosure merely be "injurious" ignores the fact that the privilege against self-incrimination was intended only to protect against disclosures which were self-incriminating and not simply injurious.[389] Without applying the facts of *Bouknight* to this new approach, the dissent concluded "[t]his analysis unambiguously indicates that Bouknight's Fifth Amendment privilege must be respected to protect her from the serious risk of self-incrimination."[390] However, the dissent's opinion did not contain any such analysis, it merely rejected the line of reasoning adopted by the majority, announced a new analytical approach, and concluded the Fifth Amendment privilege should apply. The dissent's statement that something is "plain" and "obvious," may be criticized as being the "refuge of a judge who cannot articulate a satisfactory reason."[391]

It is also questionable whether the majority and the dissent correctly characterized the production of Maurice as a testimonial communication. The United States Supreme Court has held that when "safe, painless, and commonplace" alternatives exist which do not themselves infringe upon the privilege, no unconstitutional coercion is present.[392] Bouknight had several alternatives which would have complied with the court's order to produce Maurice. She could have made an anonymous telephone call to the police or to the Department of Social Services. She could have given a confidential instruction to her attorney, clergy, or any other privileged confidant.[393] The availability of these "silent" methods of production would enable Bouknight to produce her son

387. *Id.* at 569-70 (Marshall, J., dissenting) (quoting Hoffman v. United States, 341 U.S. 479, 486-87 (1951)).

388. *See id.* at 560-61.

389. *See supra* notes 76-84 and accompanying text.

390. Baltimore City Dep't of Social Servs. v. Bouknight, 493 U.S. 549, 570 (1990).

391. Friendly, *supra* note 218, at 683.

392. South Dakota v. Neville, 459 U.S. 553, 563 (1983).

393. *See* MD. CTS. & JUD. PROC. CODE ANN. §§ 9-108, 9-110, 9-111 (1989).

and purge the contempt order without incurring the risk of self-incrimination because she would have done so without having to openly acknowledge possession or control of Maurice.

Finally, the Supreme Court has held that in order for an act of production to qualify for the protection of the Fifth Amendment, it must rise to the level of testimony.[394] Based upon the court order through which Bouknight regained custody of her son, it can be assumed she had possession and control over Maurice. Therefore, any acknowledgement of these facts as a result of her compliance with the court order of production would not have substantial testimonial value to the government. Where the testimonial information conveyed by producing the items is slight because the legal position of the individual leads one to assume the factual assertions it may disclose, compliance with the order of production does not violate the Fifth Amendment privilege against self-incrimination.[395] Therefore, the majority and dissent were incorrect in holding that under these circumstances the court order directing Bouknight to produce her son does not compel a testimonial communication.

Consistent with precedent, the United States Supreme Court in *Bouknight* failed to examine the policy considerations underlying the privilege against self-incrimination. The policy considerations that have been advanced to justify the privilege do not support its extension under the circumstances presented in *Bouknight*. The order of production does not subject Bouknight to the "cruel trilemma" of having to decide between being held in contempt, lying, or committing perjury.[396] In responding to the order, Bouknight can only choose to produce Maurice or not to produce Maurice. If she were to commit perjury, she would have to produce a child who was not Maurice. This deception would be easily detected and therefore precludes the possibility of making a false production. Bouknight only faced the dilemma of compliance or non-compliance, the same options faced by any individual who is subject to a court order. As a natural aspect of the court process, the options which Bouknight faced did not represent the "cruel trilemma" which the privilege of self-incrimination had been claimed to avoid.

Presently, the most popular justifications for the privilege against self-incrimination are the cruelty and privacy arguments.[397] There is little to say on the issue of whether or not it is inherently cruel to require a mother to produce her previously abused child because of the

394. *See* Fisher v. United States, 425 U.S. 391, 411 (1976); *see also supra* notes 89-128 and accompanying text.

395. *See* Braswell v. United States, 487 U.S. 99 (1988).

396. *See supra* notes 253-66 and accompanying text.

397. Friendly, *supra* note 218, at 687; Dolinko, *supra* note 228, at 1137; *see also supra* notes 225-41, 267-91 and accompanying text.

possibility that she may incriminate herself, especially when there are alternatives available which would eliminate the risk of self-incrimination.

There is no rational explanation for asserting that Bouknight's right to privacy justifies extending her the protection afforded by the privilege against self-incrimination. What argument can seriously be made that Bouknight is constitutionally entitled to remain in her "private enclave" from which there is sufficient reason to believe she has departed in order to do violence to her child?[398] Although there are legitimate privacy interests in intra-familial relations,[399] the Court has recognized that these privacy rights must yield when there is an overriding state interest in protecting the lives of children.[400] Therefore, when a mother is compelled to produce a child she previously abused, none of the policy considerations, which are claimed to underlie the privilege against self-incrimination, justify protecting her from doing so.

V. Use of a Balancing Approach to the Application of the Privilege Against Self-Incrimination

As the Court's decision in *Bouknight* illustrates, the application of present Fifth Amendment jurisprudence to new and different situations results in the Court having to distort facts and forego logic in order to allow the compelled disclosure of self-incriminating information. This results in decisions which are not only more difficult to explain and defend but, more importantly, to understand and apply. An examination of the "required records" cases[401] indicates the principle underlying these decisions is that "under some circumstances a person may be required by law—subject to criminal sanction—to communicate in writing with government officials, even though the communications themselves might be incriminating enough to support a criminal conviction."[402] A balancing approach should be adopted to effectuate the rationale that certain situations exist, which require the compulsion of potentially incriminating information instead of attempting to develop abstract standards to apply to each new case.

Under the balancing approach, in order to defeat a claim of privilege, the government would need to show that it had a sufficiently strong and specific interest which overrides any competing interests the individual may have. The practical effect of such an approach is that the privilege would prohibit only unreasonable compulsion of self-in-

398. *See* Friendly, *supra* note 218, at 689.

399. *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 499 (1977).

400. Roe v. Wade, 410 U.S. 113, 163-64 (1973).

401. *See supra* notes 148-215 and accompanying text.

402. Stephan A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. Chi. L. Rev. 6, 10 (1986).

criminating information.[403] Although the Supreme Court has never adopted a balancing approach to resolving Fifth Amendment self-incrimination issues, the plurality opinion in *California v. Byers*[404] appeared to endorse the approach. The plurality stated that "under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here."[405] It is important to note that this hint of balancing arose in the context of cases involving the disclosure pursuant to governmentally established civil practices and not in the context of the enforcement of criminal law objectives.

Where self-incrimination problems arose in a purely criminal context, the United States Supreme Court has expressly rejected the approach.[406] A balancing approach does not belong in a criminal matter since the fundamental function of the Fifth Amendment is to protect a person from being forced to reveal incriminating information. After all, these were the exact surroundings out of which the privilege grew.[407] Nevertheless, the balancing approach should be applied outside the criminal sphere where, although the individual has interests in protecting himself from compelled self-incrimination, the government also has a legitimate goal (separate from any criminal objectives) to obtain the sought after information.[408]

Therefore, a threshold requirement should be imposed upon the government to prove the information is being compelled pursuant to a valid government regulation enacted for a legitimate governmental purpose. This purpose should be compelling enough to ensure the noncriminal purpose is not a pretext for obtaining information which the government actually intends to use in a criminal prosecution. The potential incriminating effect of disclosing certain information should not prevent the government from overcoming this threshold. A criminal should not escape disclosure when the government has a legitimate compelling interest in obtaining the information.[409]

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403. This individualized inquiry is much more preferable than the structured approach now followed by the courts since it would allow the decision to turn on the unique circumstances of each case rather then the abstract and ambiguous standards currently employed. *See* Baltimore City Dep't of Social Servs. v. Bouknight, 493 U.S. 549, 570 (1990) (Marshall, J., dissenting). The Supreme Court has weighed competing interests in other constitutional areas. *See* Roe v. Wade, 410 U.S. 113 (1973); Tennessee v. Garner, 471 U.S. 1 (1985).

404. 402 U.S. 424 (1971).

405. *Id.* at 428. Although the plurality merely endorsed the balancing approach, only Justice Harlan's concurring opinion actually applied it. *Id.* at 434-58 (Harlan, J., concurring).

406. New Jersey v. Portash, 440 U.S. 450, 459 (1979).

407. BERGER, *supra* note 17, at 190.

408. *Id.*

409. This claim can not seem absurd when one considers that our justice system has already concluded that there are times when society's interests are so strong

In turning to the *Bouknight* case, the state's interest in compelling the production of the child was to protect Maurice.[410] The production of Maurice was compelled pursuant to a Maryland regulatory statute. The statute served the governmental purpose of providing for the health, welfare, and safety of the children who came within the State's jurisdiction.[411] Therefore, the State would have been able to satisfy the threshold requirement.

The Fifth Amendment issue in *Bouknight* presents an intricate set of competing interests: the child welfare system's responsibility for protecting children, Maurice's need for protection, and Bouknight's right against self-incrimination. All of these interests must be balanced in order to resolve the issue of whether or not the privilege against self-incrimination should protect Bouknight from having to produce Maurice. A state has an affirmative obligation to protect Maurice from harm. The United States Supreme Court has recognized that "[t]he State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years."[412] On a broader scale, there is a strong need to combat the ever increasing incidence of child abuse in the United States. The juvenile courts are equipped with limited resources and are unable to adequately deal with this crisis.[413] The ability to compel the production of a child is an effective mechanism to ensure that court orders are obeyed.[414] Given the serious duty imposed on the State in protecting Maurice, the need in general to prevent child abuse, and the importance of the contempt power in accom-

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that it is reasonable to require a person to disclose information which may result in loss of property, damage to reputation, disbarment, deportation, or even death. *See, e.g.*, Smith v. INS, 585 F.2d 600 (3d Cir. 1978)(alleged illegal alien could be required to answer questions about his status and right to remain in the country and his responses could be used to prove deportability).

410. There was some suspicion about whether or not the state's real intentions in *Bouknight* were to protect Maurice. The State had the authority to grant Bouknight the use of immunity with respect to the testimonial aspects of her act of production. Its failure to do so caused the dissent to question whether the State was being sincere in claiming that disclosure was being compelled out of concern for Maurice's well-being. Baltimore City Dept. of Social Servs. v. Bouknight, 493 U.S. 549, 572 n.2 (Marshall, J., dissenting).

411. *See* MD. CTS. & JUD. PROC. CODE ANN. § 3-802(a) (1989).

412. Palmore v. Sidoti, 466 U.S. 429, 433 (1984); *see* Prince v. Massachusetts, 321 U.S. 158, 165 (1944)("[i]t is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.").

413. The Supreme Court commented on the limited resources available to juvenile courts to effectively intervene in family problems. Breed v. Jones, 421 U.S. 519, 537 (1975).

414. A recent survey revealed that 58% of all juvenile court judges used contempt as their primary method of enforcing orders issued against parents. National Council of Juvenile and Family Court Judges, Judicial Authority and Responsibility: 18 *Recommendations on Issues in Delinquency and Abuse/Neglect Dispositions*, 40 JUV. & FAM. L.J. 17-18 (1989).

plishing this objective, the government has a very strong interest in the compelled production of Bouknight's son.

Maurice also has a strong interest in being protected. A substantial amount of time had past since the welfare services had seen Maurice. He was adjudicated a child in need of services in February, 1987 when he was approximately three months old.[415] When the Supreme Court entered its decision, Maurice was approximately three years old.[416] Given the length of time in which Maurice had been concealed, there is a good chance that real and substantial harm might have come to him. Furthermore, when the order of production was originally issued, Maurice's father was dead, killed in a shooting incident, and his mother had a history of drug abuse.[417]

The implications of being relieved of her obligation to produce Maurice are the most important consideration in ascertaining Bouknight's interest in asserting the privilege. There is a minimal risk of incrimination involved in the production of Maurice. At the most, the compelled production would amount to a tacit admission of control and possession of the child at the time of production.[418] Despite this assertion, the government still has the burden of producing further evidence which would prove beyond a reasonable doubt that Bouknight was the cause of any harm discovered. The Supreme Court has acknowledged that criminal child abuse is an extremely difficult crime to prove.[419] Therefore, Bouknight faced a limited risk of incrimination in producing Maurice. Balancing both the strong interests of the State and Maurice in compelling his production and the minimal risk of incrimination inherent in doing so, does not justify Bouknight's Fifth Amendment claim. The court order directing her to produce her son was correctly upheld.

VI. Conclusion

The failure of the United States Supreme Court to justify the privilege against self-incrimination on a functional policy basis has created confusion regarding how the privilege should be interpreted and applied. The privilege has been extended through judicial construction beyond its original representation of a prohibition against forcing an individual to testify against himself at a criminal proceeding. The expanded scope of the privilege and the exceptions which the Court has carved out can not be supported by the historical development or lan-

415. *Bouknight*, 493 U.S. at 551-52.
416. *Id.* at 549.
417. *Id.* at 552.
418. *See id.* at 549.
419. "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987).

guage of the Fifth Amendment. The privilege against self-incrimination still functions as a fundamental protector for the accused in a criminal investigation and proceeding. However, outside the criminal sphere, the role of the privilege and the policies behind it are not always as clear.

Until the privilege against self-incrimination rests on a satisfactory conceptual foundation, it is untenable to suggest that government can never compel self-incrimination regardless of the particular circumstances of each individual case. A balancing test is a reasonable approach to resolving the issue of whether, under the individual circumstances, compelled disclosure constitutes a violation of the constitutional privilege against self-incrimination. This approach achieves a fair state-individual balance by taking into consideration the competing interests and concerns of each individual involved. Where the Supreme Court refuses to adopt the rationale behind the balancing approach, then at the very least, the Court should develop some explanation to support its decisions to extend or deny the claim of privilege. Given the situation regarding Fifth Amendment jurisprudence as it stands today, the United States Supreme Court surely has no right to remain silent.

Lisa Tarallo

Regulating Judicial Misconduct in Massachusetts

In 1978, a wave of public accountability struck Massachusetts' judicial shores with the enactment of the Commission on Judicial Conduct by the Massachusetts Legislature. Since then, the legislature through its statutory creation, has asserted a role in procedure once claimed solely by the Supreme Judicial Court in matters short of removal. Such an intrusion, if that power is inherent in the judiciary, constitutes a violation of the separation of powers principle, and jeopardizes the independence of the state's judiciary. In order to rectify this constitutional issue, it is suggested that Massachusetts re-examine the possibility of passing a constitutional amendment to solve the many unanswered questions concerning the regulation of judicial conduct.

I. INTRODUCTION

Over the last thirty years, according to some scholars in the field of court reform, the most widely accepted and heralded achievement has been the establishment of judicial conduct commissions, councils, and courts to investigate charges of judicial misconduct on both the state and federal level.[1] Doubtless these commissions, insofar as they purport to preserve the integrity of the judicial process and maintain public confidence in members of the judiciary,[2] serve an essential remedial government function,[3] especially in light of the increasing number of

1. Irene A. Tesitor, *Judicial Conduct Organizations*, 1978 AMERICAN JUDICATURE SOCIETY, at 1. Three factors, in particular, provided the foundational "impetus for developing more efficient and effective methods" and procedures for dealing with state judges allegedly guilty of misconduct. *Id.* The first was the "dissatisfaction with the cumbersome legislative removal actions such as impeachment," the bill of address, and the governor's and council's power to retire a judge for advanced age or disability. *Id.* Second, there was a desire arising out of the 1960s and 1970s to institute court reform. *Id.* Finally, there was an ever-increasing demand for the "accountability of all public officials," including members of the judiciary. *Id.*

2. *See* Jeffrey A. Shaman, *State Judicial Conduct Organizations*, 76 KY. L.J. 811 (1987-88). "These [judicial conduct] organizations have become an established and an accepted part of government with the function of ensuring that judges maintain high standards of professional conduct." *Id.* at 811; *see also* STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT 1 (Tent. Draft 1977) [hereinafter A.B.A. STANDARDS].

3. Nearly all commissions are authorized to perform certain basic functions, which are remedial in nature:

> (1) to investigate claims of misconduct and to bring and to prosecute formal charges; (2) to hold an adjudicative hearing and to make findings of fact; and (3) to recommend or to order a final disposition. The sanctions that may be ordered or recommended by conduct organizations include

complaints filed against judges.[4]

Regardless of these commissions' legitimate purposes and the justifiable need for some procedure to regulate judicial conduct, questions concerning the constitutionality of the current commissions established either pursuant to legislative enactment or judicial initiative have never been adequately debated. Generally, proponents of the current systems, including the system established in Massachusetts, argue that there is hardly a threat to the concept of judicial independence,[5] an outgrowth of the separation of powers doctrine,[6] because the current commissions, even if statutorily enacted, "operate[] essentially through judicial self-regulation."[7] Opponents of the current systems argue conversely that attempts to regulate judicial conduct other than through the judicial self-regulation or constitutional procedures[8] may violate principles of separation of powers and have a chilling effect on the independence of the judiciary.[9]

Part II of this Note will discuss the established constitutional procedures for the removal, discipline, and retirement of judges, demonstrating their unsuitability for modern application and outlining the void that exists for misconduct requiring discipline but not removal.[10] The lack of suitable alternatives under the constitution was a major factor in judicial involvement in the regulation of judicial conduct which will be discussed in Part III.[11]

Part III of this Note will also discuss the history of judicial involvement in the regulation of judicial conduct from its outset in 1952 until

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(1) private admonition, reprimand, or censure; (2) public reprimand or censure; (3) suspension; (4) mandatory retirement; and (5) removal from office.

Shaman, *supra* note 2, at 814 (*citing* IRENE A. TESITOR & DWIGHT B. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 12-18 (2d ed. 1980)).

4. *See* John H. Kennedy, *Judicial Conduct Probers Swamped as Complaints Rise*, BOSTON GLOBE, Oct. 1, 1989, at 30. "In 1988 for example, the most recent period for which statistics are available, the commission [the Commission on Judicial Conduct, the Massachusetts version of the nationwide response to judicial conduct] received 166 new complaints, an increase over the 124 filed in 1987. Three years earlier, the commission received only 55 new complaints." *Id.*

5. *See generally* Frank J. Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 CASE W. RES. L. REV. 711 (1975); Joseph R. Weisberger, *Judicial Independence*, 72 MASS. L. REV. 28 (1987).

6. *See* MASS. CONST. pt. 1, art. XXX; ALEXANDER J. CELLA, MASS. PRACTICE SERIES: ADMINISTRATIVE LAW AND PRACTICE § 41 (1988).

7. Shaman, *supra* note 2, at 857.

8. The traditional constitutional procedures for judicial discipline and removal in states that have not amended their constitutions to provide for judicial conduct commissions are impeachment and, in some states, address.

9. *See generally* Battisti, *supra* note 5; *see also* Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765 (1989).

10. *See infra* notes 23-81 and accompanying text.

11. *See infra* notes 82-133 and accompanying text.

1978, when the current Commission on Judicial Conduct was created by statute.[12] In 1952, in *In re Ruby*,[13] the Supreme Judicial Court, acting pursuant to its authority to control the practice of law, made its initial movement towards regulating judicial misconduct when it disbarred an attorney who was also serving as a judge. Since that point, the Supreme Judicial Court has gradually become more entrenched in the regulation of judicial conduct by establishing an investigatory committee by court rule, as well as through judicial self-regulation. In *In re DeSaulnier*,[14] the Supreme Judicial Court clarified its perceived authority and jurisdiction in matters of judicial conduct in order to explain its involvement.

Accordingly, Part IV of this Note will discuss the interrelated principles of independence of the judiciary and separation of powers specifically mandated by the Massachusetts Constitution,[15] discussing their relationship with the concept of regulation of judicial conduct.[16] By tracing the understanding of this constitutional principle back to the date of its incorporation in the Massachusetts Constitution and in the United States Constitution, it may be evident that the Massachusetts legislature and judiciary, in its zeal to respond to the diversities and complexities of state governmental structure and the necessity for accountability of public officials, have both failed to preserve its true meaning. Although a rigid adherence to the original wording of this principle may not be practically desirable or functionally possible in modern state government,[17] neither the independence of the judiciary nor the separation of powers should be sliced away, for they are an integral part of our state government.[18] Some even call it the key to our success.[19] Indeed, it would be unwise for anyone to declare that this principle, no matter what its age, should not remain as one of the cornerstones of future state government.

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12. *See infra* notes 82-133 and accompanying text.

13. 328 Mass. 542, 105 N.E.2d 234 (1952). *See infra* note 82 and accompanying text.

14. 360 Mass. 757, 274 N.E.2d 454 (1971). *See infra* notes 98-105 and accompanying text.

15. *See* MASS. CONST. pt. 1, art. XXIX (independence of the judiciary); MASS. CONST. pt. 1, art. XXX (separation of powers).

16. *See infra* notes 134-218 and accompanying text.

17. *See* Chief Admin. Justice v. Labor Relations Comm'n, 404 Mass. 53, 533 N.E.2d 1313 (1989)(holding that Labor Relations Commission may hold hearing and render a decision on probation officer's prohibited practice complaint against defendant, Chief Administrative Justice, without violating art. XXX of the Massachussets Declaration of Rights, which calls for separation of powers). The courts stated that "[a]n absolute division of the executive, legislative, and judicial functions is neither possible nor always desirable." *Id.* at 56, 533 N.E.2d at 1316 (citations omitted).

18. *See* Weisberger, *supra* note 5, at 31.

19. *See id.*

Part V of this Note will analyze the current Massachusetts Commission on Judicial Conduct, its jurisdiction, and procedural safeguards.[20] It will be demonstrated that this system, although acceptable for temporary operation, violates the separation of powers and judicial independence principles under the Massachusetts Constitution, and therefore, cannot exist on a permanent basis.[21] This part of the Note will also address the question of who has the power to regulate the conduct of judges.

Part VI of this Note will conclude with a brief summary of the article and will recommend that if Massachusetts wishes to have a constitutional judicial conduct commission, it should do so under the direction of a constitutional amendment, which has already been suggested on numerous occasions in the past.[22]

II. The Constitution and Judicial Discipline and Removal

As a guiding principle and initial proposition, Massachusetts judges have been and continue to be granted life tenure subject only to a good behavior limitation imposed by the Massachusetts Constitution which provides that judges "shall hold their offices during good behavior."[23] Article XXIX of the Massachusetts Declaration of Rights also acknowledges that same principle where it provides that "judges [should] hold their offices as long as they behave themselves well."[24] However, there is hardly an indication in the Massachusetts Constitution, or in subsequent case and statutory law, as to what sort of conduct would constitute a breach of the good behavior limitation, except for perhaps "the 'misconduct and mal-administration' standard found in the article on impeachment."[25] The lack of explanation and interpretation of the good behavior standard in particular, unlike the explanation and interpretation which has occurred in countless other formerly misunderstood areas of the law, is a leading factor in the disutilization of the constitutional processes for judicial discipline and removal. The two currently recognized and essentially unmodified constitutional processes for judicial discipline and removal are impeachment[26] and

20. *See infra* notes 221-87 and accompanying text.

21. *See infra* notes 221-87 and accompanying text.

22. *See infra* note 288 and accompanying text.

23. Mass. Const. pt. 2, ch. 3, art. I.

24. Mass. Const. pt. 1, art. XXIX.

25. *See* Traver C. Smith, Jr., Comment, *Constitutional Processes for the Discipline of Judges in Massachusetts*, 1972 Ann. Surv. Mass. Law 679, 680 (citations omitted) [hereinafter Smith, *Mass. Processes*].

26. Impeachment is the only constitutional procedure for the removal of federal judges, and the most well known procedure for the removal of state judges. The relevant provisions of the state constitution are Mass. Const. pt. 2, ch. 1, § 2, art. VIII (power of the Senate to try impeachments by the House) and Mass. Const. pt. 2, ch. 1, § 3, art. VI (power of the House to impeach). *See also* Harriet H.

address.[27] In addition, the constitution has been amended to provide for two additional methods for the retirement of judges most often unassociated with judicial misconduct, retirement for age or disability[28] and mandatory retirement at the age of seventy.[29] Through an analysis of the principles themselves it is apparent that the purposes sought to be achieved by the inclusion of these processes into the constitution is not tailored to meet modern needs or goals. Instead of playing an all or nothing game, having either judicial removal or no action at all, the Massachusetts Supreme Judicial Court presently tailors less severe remedies to fit specific situations.

A. *Impeachment*

The most widely recognized procedure for the discipline and removal of Massachusetts judges is impeachment, most probably due to increased attention given to federal impeachment procedures during the late 1980s. "In 1986, for the first time in fifty years, a federal judge [Nevada District Court Chief Judge, Harry Claiborne] was removed from office through impeachment."[30] Also, in a more publicized case, Florida Southern District Court Judge Alcee L. Hastings was impeached by the House of Representatives, despite being previously acquitted of charges of bribery and perjury.[31] Although there are some significant differences between the federal and state procedures,[32] it is undeniable that the attention these federal cases have drawn has impacted on how judicial discipline and removal should be accomplished, even if only in scholarly debate.

In Massachusetts, while judges hold office during good behavior and are by constitutional amendment required to retire at age seventy, during their formal tenure they can be removed by impeachment for "misconduct and maladministration in their offices."[33] Under the state

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Onello, Note, *The Massachusetts Bill of Address: Due Process Considerations of Judicial Removal*, 13 SUFFOLK U. L. REV. 1319 n.3 (1979) (citing MASS. CONST. pt. 2, ch. 1, § 2, art. VIII) [hereinafter Onello, *Mass. Address*].

27. *See infra* note 65 and accompanying text.

28. *See infra* note 79 and accompanying text.

29. *See infra* note 80 and accompanying text.

30. Edwards, *supra* note 9, at 768.

31. *Id.* at 768-69. However, Hasting's impeachment was overturned and remanded to the Senate. Hastings v. United States, No. 91-1713, 1992 U.S. Dist. LEXIS 13838 (D.D.C. Sept. 17, 1992).

32. Under the United States Constitution, it is provided that a judge may be impeached for treason, bribery, or high crimes and misdemeanors. U.S. CONST. art. II, § 4. However, the Massachusetts Constitution permits a judge to be impeached for misconduct or maladministration in office. MASS. CONST. pt. 2, ch. 1, § 2, art. VIII.

33. Smith, *Mass. Processes*, *supra* note 25, at 680; MASS. CONST. pt. 2, ch. 1, § 2, art. VIII.

John Adams may have included this misconduct and maladministration

constitution, impeachment proceedings are divided among the two houses of the state legislature. The Senate, which takes on a judicial role, is granted the power to "try impeachments made by the House against any public officer on the grounds of misconduct and maladministration in office."[34] "The provision 'against any public officer' includes [members of the judiciary]."[35] The House of Representatives is, in turn, granted the sole power to impeach upon a finding of misconduct or maladministration.[36]

1. The Impeachment of Prescott

The single case in Massachusetts history of impeachment proceedings being used to remove a judge from office is indicative of the fact that such a process is misunderstood, ill-suited, time consuming, and expensive whenever and wherever used.[37] "In 1821, Middlesex Probate Court Judge James Prescott was convicted for extortion in the collection of fees in excess of amounts authorized by statute and removed from office."[38] The two charges upon which Prescott was convicted by the Senate, were part of fifteen articles drawn against him by the House and were said to constitute the requisite misconduct and maladministration in office for impeachment.[39]

Although both the representatives of the House and the respondent Prescott agreed that impeachment was by nature a criminal proceeding

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standard in the 1780 constitution in order to "broaden the definition of judicial misconduct punishable by removal from office by impeachment." Smith, *Mass. Processes*, *supra* note 25, at 681. In 1774, his attempt to have Chief Justice Oliver removed by Governor Hutchinson for accepting his salary from King George III was unsuccessful because Hutchinson found no high crimes and misdemeanors chargeable against the Chief Judge. *Id.*

34. Onello, *Mass. Address*, *supra* note 26, at 1319 n.3 (citing MASS. CONST. pt. 2, ch. 1, § 2, art. VIII).

35. *Id.*

36. *See id.* (citing MASS. CONST. pt. 2, ch. 1, § 3, art. VI). The language from the Massachusetts Constitution provides: "The House of Representatives shall be the Grand Inquest of this Commonwealth; and all impeachments made by them, shall be heard and tried by the Senate." MASS. CONST. pt. 2, ch. 1, § 3, art. VI. " 'The term 'grand inquest' is not unknown, and has, so far as we are advised, no other meaning than 'grand jury.' ' " Smith, *Mass. Processes*, *supra* note 25, at 682 n.14 (quoting Geiger v. United States, 162 F. 844, 845 (1908)).

37. See WILLIAM T. BRAITHWAITE, WHO JUDGES THE JUDGES? 12-13 (1971) for figures relating to the disuse of impeachment across a wide number of states for the years 1900-1960.

38. Smith, *Mass. Processes*, *supra* note 25, at 682 & n.17 (citing *Trial of Prescott*). The report *Trial of Prescott* was noted by Smith to be an unofficial document compiled for, and published by the Boston Daily Advertiser. *Id.* at n.17. Of four copies believed to be in existence, only one was ever located at the Social Law Library in Boston. *Id.*

39. *Id.* at 682-83. The author of *Mass. Processes* arranged the House's fifteen articles into three categories:

based upon the criminal terminology employed[40] and the severity of punishment involved,[41] the Supreme Judicial Court, when it has had the opportunity to comment on the impeachment clause, has been "less than definitive" on this point, leading to a whole host of problems.[42] And further, with regard to the misconduct and maladministration standard, "the Court [has] not rule[d] out the possibility of impeachment for conduct of a tortious nature or [conduct] which is so contrary to the established notions of judicial administration as to arouse the indignation of the general public."[43]

There is equally compelling evidence that impeachment is not criminal at all. "If the framers of the constitution had contemplated that impeachment was to be a criminal proceeding, they would probably not have provided that, notwithstanding impeachment, a person could still be called before a jury upon an indictment and be required to answer."[44] Also, since Prescott was convicted of the charges against him by a simple majority of votes, instead of by the unanimity characteristic of a criminal case,[45] there is apparently no conclusive answer as to the civil or criminal nature of impeachment.

2. The Gap Theory

A problem inherent in impeachment that has become more evident over the years, on occasion rendering it inappropriate as a form of correcting judicial misconduct, could be labelled the "gap" or "hiatus"

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1. Demanding and receiving other and greater fees for performing the duties of his office, than are by law allowed.

2. Transacting the business of the Probate Court at his own private office, and not at any Probate Court held according to law. . . .

3. Acting as counsel, and demanding and receiving fees for advice and assistance in matters upon which he had passed, or might be called to pass, or which were pending before him as a judge.

Id. at 683. Together these acts formed the basis for the House's conclusion that Judge Prescott had committed acts of misconduct and maladministration in office. *Id.* at 683.

40. *Id.* at 682.

41. See *id.* at 683 & n.23 for a reprint of Daniel Webster's argument for the respondent and Lemuel Shaw's argument for the House that impeachment is basically a criminal proceeding.

42. *Id.* at 684. The court has not addressed whether the constitution makes impeachment criminal and therefore implicates the reasonable doubt burden of proof, rules of evidence, and due process rights. *Id.* at 684-86.

43. *Id.* at 685 (footnote omitted).

44. *Id.* at 686 (footnote omitted).

45. *Id.* at 686-87 (footnote omitted). *But see id.* at 687 n.35 (citing Apodaca v. Oregon, 406 U.S. 404 (1972) (United States Supreme Court held Sixth Amendment, applicable to the states through the Fourteenth Amendment, does not require jury unanimity for criminal conviction); Johnson v. Louisiana, 406 U.S. 356 (1972) (United States Supreme Court upheld criminal conviction despite 9-3 jury result)).

theory.[46] The gap theory is developed from logical conclusions about the wording of impeachment standards and is visible in the federal context, and to a lesser, but still significant manner, in state contexts. In Massachusetts, the gap arises in the following manner:

> 1. Under the Massachusetts Constitution, judges hold their offices during "good behavior" as enunciated in chapter 3, article I and in article 29 of the Declaration of Rights. Consequently, there is a broad category of conduct which is "not good."
>
> 2. Also under the constitution, judges may be impeached for behavior that amounts to either misconduct or maladministration, and that conduct would nearly certainly be considered "not good" under the initial principle. (Please note that under the constitution, judges may also be addressed without reason by the governor and council, however, this factor is not important in the theory.)
>
> 3. Judges may also, as alluded to earlier be subject to criminal prosecution for criminal actions, however, only that conduct which amounts to misconduct or maladministration in office (or alternatively triggers address) is removable conduct. (e.g. destruction of a mailbox is a federal felony, but that should not necessarily cause an otherwise competent judge to be removed.)[47]
>
> Conclusion: Therefore, it is possible that there some judicial conduct which is "not good," either because of its criminal nature or bad connotation, but is not serious enough to fall within the grasp of impeachable conduct. Thus, a gap is created.[48]

Under the present constitution, conduct within the gap goes unregulated. There is some merit to such a theory and therefore a genuine problem with impeachment. As a counterpoint to the validity of this theory, one could argue that the misconduct and maladministration standard may be extended through legislative discretion to include nearly every improper or "not good" deed.[49] However, the effect of such an action would likely dissuade many competent persons from ac-

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46. Edwards, *supra* note 9, at 774.

47. *Id.* at 775.

48. The gap theory, as applied to Massachusetts, is an adaptation of the theory that was applied in the federal context by Edwards, *supra* note 9, at 772-76. The validity of the gap theory was impliedly recognized by the Cox Commission in 1976 which stated that "[t]he need for an alternate procedure arises because of cases which are not sufficiently serious or which do not seem sufficiently solid at the outset to warrant gearing up for a full legislative inquiry." GOVERNOR'S SELECT COMMITTEE ON JUDICIAL NEEDS, REPORT ON THE STATE OF THE MASSACHUSETTS COURTS 44 (1976) [hereinafter Cox COMMISSION].

49. Evincing the problem of legislative discretion is the legislature's conflicting interpretations of the good behavior standard in the state constitution:

> The legislature has removed judges for taking the wrong side in a rebellion, for interpreting the laws unacceptably, for performance of official functions off the bench, and for attending a lecture on a controversial issue. Conversely, judges have not been removed after censure for attempting to contribute to a gubernatorial campaign, for failing to report an attempt to influence a judicial decision, for committing a criminal trespass,

cepting a judgeship for fear of error and removal and thus serve no legitimate governmental objective.

3. Due Process Considerations and Impeachment

Even in the most severe case of judicial misconduct, there may be fundamental inequities in the impeachment process itself. For example, in the federal impeachment proceedings during the 1980s,[50] the impeachment proceedings were expectedly "lengthy and difficult" and "an enormous volume of material and evidence" was introduced which in the minds of at least one member of Congress, was difficult to sort out and manage.[51] One can only assume that if an impeachment proceeding was underway in Massachusetts, the same observations would be made by some of our own state legislators and judges.[52] However, judges, as officers of the courts and public employees, have a property right to continued employment[53] and a liberty interest in their personal reputations,[54] and therefore are entitled to due process of law when being terminated. This property interest arises from the textually demonstrable commitment of the Massachusetts Constitution to a permanent, secure judicial tenure where it provides that judges shall hold their offices during good behavior.[55] Moreover, judges possess a liberty interest since removal from office is an injury to character, a protected interest under the Massachusetts Constitution under articles

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or for accepting a $4,000 gift. The only consistent element in these actions is the arbitrary exercise of legislative power.

Onello, *Mass. Address*, *supra* note 26, at 1374 (footnotes omitted).

50. The impeachment proceedings were against Judge Harry Claiborne, Judge Alcee Hastings, and Judge Walter Nixon, Jr. *See* Edwards, *supra* note 9, at 771; *see also supra* notes 30-31 and accompanying text.

51. Howell Heflin, *Impeaching Federal Judges: Making the Case for Change*, TRIAL, Nov. 1990, at 32. Howell Heflin was a former Chief Justice of the Alabama Supreme Court and was elected to the U.S. Senate in 1978. *Id.* At the time of the publication of his article he was the chairman of the Senate Select Committee on Ethics and is also a member of the Senate Judiciary Committee. *Id.*

One of the quasi-conclusions made by Heflin in support of his argument was that "the merits of an alternative system should be on the mind of anyone who has observed the long and arduous process by which special committees take evidence regarding the removal of a federal judge." *Id.* at 33.

52. *Contra*, the statement of Chief Justice Robert M. Bonin: "[I]mpeachment provided the opportunity for 'impartial' treatment." Onello, *Mass. Address*, *supra* note 26, at 1342 n.138 (citing Massachusetts State House News Service, Bonin Press Conference (July 20, 1978)); Judge Elwood McKenney claimed that "impeachment [proceedings] w[ere] necessary to clear his name." *Id.* (citing BOSTON GLOBE, Jan. 19, 1978, at 8, col. 4).

53. Heflin, *supra* note 51, at 32 (citing Cleveland Board of Education v. Loudermill, 480 U.S. 532 (1985)(public employees have a property right to continued employment); *In re* Ruffalo, 390 U.S. 544, 550, *reh'g denied*, 391 U.S. 961 (1968)(disbarment of attorney is punishment warranting due process)).

54. Onello, *Mass. Address*, *supra* note 26, at 1355-57.

55. *See id.* at 1354-55. *See also supra* notes 23-24 and accompanying text.

eleven and twenty-nine of the Declaration of Rights.[56] Exactly how much process is due is dependent upon the private interests at stake, the risk of an erroneous deprivation of such interests through the procedure used, balanced against the probable value of additional or substitute procedural safeguards, and the government's interest, including the function involved and the fiscal and administrative burdens that other procedural safeguards would entail.[57] As with federal judges,[58] state judges have high private interests in continuing to sit as a judge because it too is publicly regarded as a position of respect which carries many intangible benefits, not to mention that their reputations and livelihoods may be at stake.[59] Paralleling the federal system and its time constraints, there is also a substantial risk of an erroneous deprivation of rights on the state level, especially if state legislators constitutionally charged with a specific role in impeachment proceedings delegate their authority to special committees and/or cannot be present for the arguments and reports from those committees due to other legislative obligations. Finally, the state's legislators have a constitutional obligation to impeach a wayward judge and thus have a high interest in doing so, but when weighed down by their other constitutional obligations, they are obviously stretched out beyond that which an alternative procedure might force them to be. Accordingly, impeachment can be construed in the modern setting as time consuming, cost-ineffective and possibly even a highly suspect way of proceeding against a state judge.[60]

B. *Bill of Address*

The second procedure by which judges may be disciplined and removed from office under the Massachusetts Constitution is by Bill of Address. The address procedure had its origins in England's Act of Settlement of 1700 where Parliament, rather than the judiciary,[61] was

56. Onello, *Mass. Address*, *supra* note 26, at 1357 n.226. Article 11 states generally that the "laws provide for redress for wrongs to person, property, or character." *Id.* (citing MASS. CONST. pt. 1, art. XI). Article 29 specifically states that the "rights of every individual are life, liberty, property, and character." *Id.* (quoting MASS. CONST. pt. 1, art. XXIX).

57. Heflin, *supra* note 51, at 33 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

58. *Id.*

59. *See also* Onello, *Mass. Address*, *supra* note 26, at 1361-62. It is worthwhile to note that the scholars writing on the subject of Due Process and the Supreme Court Justices have increasingly required high procedural protection on occasions where they have tackled the question of "revocation of a license to practice a profession." *Id.* at 1362 n.251. *See generally* Harry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975) (for affirmation of this same proposition).

60. This is an adaptation of Howell Heflin's argument and is being used primarily to show why impeachment is a troubling process for Massachusetts to consider using.

61. See Onello, *Mass. Address*, *supra* note 26, at 1322 n.13 for an explanation of

given the express power to remove the King's appointees.[62] In what was likely a compromise between conflicting radical-conservative factions amongst the framers of the Massachusetts Constitution,[63] the state framers, after making the necessary adaptations, provided for the address of judicial officers in the Judiciary article, which reads: "[a]ll judicial officers . . . shall hold their offices during good behavior [p]rovided nevertheless, the Governor, with the consent of the Council, may remove them upon the address of both Houses of the Legislature."[64] The address procedure used with more frequency than its distant cousin impeachment[65] and as late as 1978 with the attempted address of a superior court judge,[66] has an established methodology:

> First, a petition for removal is introduced in either branch of the legislature. Alternatively, the Governor may request the legislature to petition an address. The petition is then referred to a joint committee of both houses of the legislature. Generally, the committee will hold a hearing to entertain arguments for and against removal. During the proceedings, the legislature may allow the judge to speak in his own

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the writ of *scire facias* under which a judicial determination was held, among other things, to review royal grants of office. This was the predecessor to the English form of Address under the Act of Settlement.

62. *See id.* at 1321-23 & n.12.

63. *Id.* at 1327 n.31. The Berkshire farmers, likely anti-Federalists, were considered radicals because of their position that judges had too much power when left unchecked and should therefore be popularly elected, or alternatively, subject to legislative control. *Id.* at 1326 n.27. The Boston merchants, the Federalists, were considered conservatives because of their position that "[t]he judiciary was the passive branch of the government, [not] an initiator of policy, and therefore not . . . requir[ing] direct popular control." *Id.* at 1326 n.28 (citing RONALD M. PETERS, THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT 170 (1978)). John Adams, the mediator in this dispute between the factions, molded a compromise granting judges secure tenure, subject to a form of "unqualified removal power in the legislature and executive." *Id.* at 1327 n.31 (citing CHARLES A. BEARD & MARY R. BEARD, THE RISE OF AMERICAN CIVILIZATION 299-300 (1927)).

64. *Id.* at 1320 (quoting MASS. CONST. pt. 2, ch. III, art. 1).

65. Address has been used much more frequently than the more recognized removal procedure, impeachment, which to date has only been used as a mechanism for removal on one occasion. *See supra* notes 37-38 and accompanying text. The earliest recorded addresses were in 1787, when Judges William Whiting and James Perry were removed for their connection in Shay's Rebellion. *See id.* at 1331. Also removed from office by address were: Judge Theophilus Bradbury (1803); Judge Paul Sargent and Judge William Vinal (1803); Judge Edward G. Loring (1858); Judge Joseph Day (1882); Justice Edward Pierce (1922); and Judge Jerome Troy (1973). *See* Onello, *Mass. Address*, *supra* note 26, at 1332-43. There have also been several attempted addresses, however, for one reason or another (often times retirement), those proceedings were not completed. *See id.*

66. In 1978, the legislature, at the suggestion of the Governor, convened in a joint special session in order to hold an evidentiary hearing on the conduct of Chief Justice Robert M. Bonin. Onello, MASS. ADDRESS, *supra* note 26, at 1341. The Joint Committee on the Judiciary had voted 23-3 in favor of removal, however, Bonin resigned before address proceedings were concluded. *Id.* at 1340-43.

> defense, but nothing in the constitution requires this opportunity. After completing deliberations, the committee reports and makes recommendations to the legislature. Unlike comparable proceedings in other states, the Massachusetts procedure requires only a simple majority vote of both houses of the legislature to resolve a bill of address. If the legislature votes for removal, it presents the address to the Governor. No reasons for the requested removal need be stated in the address. If the Governor and the Executive Council approve, removal is effected.[67]

Interestingly, the bill of address method of removal has been uniquely limited to the states primarily because the framers of the United States Constitution, in considering its incorporation, opined that such a procedure "would place judges at the mercy of Congress."[68] Also, of the several states that have provided for address, "only four states—Maryland, Massachusetts, New Hampshire, and South Carolina—in drafting their constitutions provided for removal of public officers and judges by address without regard to misbehavior."[69]

Recognizing some of the inherent problems of address, during the Massachusetts Constitutional Convention of 1820, delegates debated two amendments to the procedure. The first amendment, which was later defeated at the convention, involved changing the constitution to require a two-thirds majority instead of a simple majority before the bill was sent to the governor and executive council.[70] The second amendment, which was also defeated by popular vote after having been passed by the convention's delegates, involved a "proposal that judicial officers should not be removed on address until the causes of removal were stated and such officers were given a chance to be heard in their own defense."[71] More recent attempts to shift the removal power of address to the Supreme Judicial Court or to the current Commission on Judicial Conduct by constitutional amendment have received negative committee recommendations and/or a lack of legislative support.[72]

While the address procedure has often been attacked due to the potential that exists for arbitrary and unlimited use, thus jeopardizing the independence of the judiciary,[73] such criticism may be a bit premature and undeserving. In fact, in recent cases of address or attempted address, proceedings for judicial removal by address were undertaken only after the case was referred to the legislature and governor by the Supreme Judicial Court which had previously disciplined the judge to

67. *Id.* at 1320 (footnotes and citations omitted); *see also* N. PIDGEON, A MANUAL OF PROCEDURE FOR THE GENERAL COURT 86, 87 (1974).

68. Onello, *supra* note 26, (citing MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428-29 (rev. ed. 1966)).

69. Smith, *Mass. Processes*, *supra* note 25, at 689.

70. *Id.* at 692.

71. *Id.* (citations omitted).

72. Onello, *Mass. Address*, *supra* note 26, at 1384 n.399.

73. *See* Smith, *Mass. Processes*, *supra* note 25, at 692-93.

the extent of its stated authority after a thorough investigation of allegations.[74] The more appropriate criticism is closely related to the due process challenge to impeachment.

The primary problem with address is that "[u]nder the address clause in [the Massachusetts Constitution], there is no provision for notice and a hearing; these may or may not be made available, entirely at the discretion of the legislature."[75] Moreover, unique to address, no standard exists whereby a judge may measure his or her behavior in order to ascertain whether he or she is likely to be addressed, except for the good behavior limitation, which has been arbitrarily interpreted.[76] Since the "state constitution creates a specific entitlement to tenure during good behavior,"[77] present constitutional doctrine mandates that judges be granted certain due process rights depending upon the private interest involved, the likelihood of an erroneous decision, and the government interest involved,[78] there is substantial merit to the argument that such a procedure cannot be constitutionally utilized in the future.

C. *Retirement Provisions*

Under the Massachusetts Constitution there are presently two provisions relevant to the retirement of judges. Following the Massachusetts Constitutional Convention of 1917-1918, the people of the Commonwealth ratified the 58th Amendment which added the following provision to the judiciary article: "the governor, with the consent of the council, may after due notice and hearing retire [judge(s)] because of advanced age or mental or physical disability."[79] In 1972, the 98th Amendment to the Massachusetts Constitution was ratified, providing that "upon attaining [the age of] seventy years of age said judges shall

74. See Onello, *Mass. Address*, *supra* note 26, at 1341 for a discussion of the Supreme Judicial Court's independent hearings and a review of the Committee on Judicial Responsibilities findings and recommendations which were sent to the legislature in the Bonin case. In the matter of Judge Troy, the Supreme Judicial Court's findings, as well as the findings of the Special Grievance Committee, were also forwarded to the legislature where address proceedings were commenced. *Id.*

75. *Id.* at 1385. To elaborate more fully:

> Although the Massachusetts address proceedings may include a hearing, neither constitutional language nor precedent absolutely requires one. Typically, whenever the legislature has conducted a hearing it has denied the judge an opportunity to confront adverse witnesses or to call his own witnesses; the role of the judge has been merely to respond to the inquiries of the committee.

Id. at 1372 (citations omitted).

76. *Id.* at 1373-75.

77. *Id.*

78. *See supra* note 54-57 and accompanying text.

79. MASS. CONST. amend. LVIII, § 188.

be retired."[80] These provisions, unlike the two that proceed them, do not raise the same constitutional questions, and are quite suited to legitimately effect a narrow purpose. Although the governor could act under the guise of the 58th Amendment in an attempt to discipline and remove a judge, the Amendment requires notice and a hearing which increases the possibility of disclosing the governor's true motives. Furthermore, if successful, this procedure would not cause a judge to forfeit his entire salary. Under the Massachusetts Constitution and General Laws ch. 32, § 65A judges may collect up to three-quarters of their salaries after retirement.[81]

III. Judicial Discipline in Massachusetts

A. *1952-1978 Judicial Involvement in the Regulation of Judicial Conduct*

The Supreme Judicial Court took active involvement in the regulation of judicial conduct, in 1952 with *In re Ruby*[82] and in 1961 with *In re Centracchio*.[83] In these cases, the Supreme Judicial Court, recognizing that lawyers of the day were not prohibited from holding judicial office while practicing law, found it well within the parameters of its authority to discipline judges who were also lawyers. "Indeed, [the Supreme Judicial Court] held that the seriousness of an individual's misconduct as an attorney may be aggravated by the very fact that he is also a judge."[84] Since these cases involved what was essentially criminal conduct (bribery and federal tax evasion) by attorneys who were also judges, the legislature and the executive unquestionably would have had the authority to utilize their constitutionally mandated removal procedures of impeachment and address on the judges qua judges had either department so chosen. However, the legislature and governor, through their inactivity on this issue after these decisions, have appeared to have accepted the propriety of the Supreme Judicial Court's

80. Mass. Const. amend. XCVIII, § 244.

81. Smith, *Mass. Processes*, *supra* note 25, at 694. *See also* Mass. Gen. L. ch. 32, § 65A (1990).

82. 328 Mass. 542, 105 N.E.2d 234 (1952) This case involved Judge Israel Ruby, who was a District Court Judge in Williamstown and also a member of the bar. The evidence was heard by a single justice of the Supreme Judicial Court who found that there was sufficient evidence to warrant ordering the judge disbarred for requesting a bribe. *Id.* at 543, 105 N.E.2d at 235. The judge requested a bribe, which he called a loan, from a person whose case could have come before him. *Id.* at 544, 105 N.E.2d at 235. On appeal, the respondent challenged the justice's findings and queried whether there was an error of law in those findings. The Supreme Judicial Court held that there was no error of law in disbarring a lawyer, serving as a judge, guilty of requesting a bribe. *Id.* at 547, 105 N.E.2d at 237.

83. 345 Mass. 342, 187 N.E.2d 383 (1963) (involving federal tax evasion and breach of professional duty to clients).

84. John D. O'Reilly, Jr., *Constitutional Law, Supervision of the Judiciary*, 1971 Ann. Surv. Mass. Law 428, 430 (citing Petition of Centracchio, 345 Mass. 342, 187 N.E.2d 383 (1963)).

action in disciplining the judge as an attorney.[85] Although these cases concerned members of the bar who also happened to be judges, these opinions provided an important precedent for later efforts by the Supreme Judicial Court to impose discipline on all judges, regardless of background.[86]

1. The Committee on Complaints

Again, "faced with the necessity to safeguard the temples of justice,"[87] and the integrity of dedicated members of the judiciary from allegations of misconduct, on July 1, 1969, the Supreme Judicial Court, pursuant to its rule-making authority,[88] established the "Committee on Complaints" under Rule 3:17.[89] Such action by the court, whether or not intended to answer the question of which branch of government—executive, legislative, or judicial—had the power and duty to regulate judicial conduct, certainly indicated a willingness on the part of the Supreme Judicial Court to be involved in that process.

The members of the Committee on Complaints, at least three judges or former judges and two members of the bar, were to be appointed by the full court, to serve at the pleasure of the justices.[90] The executive secretary of the Supreme Judicial Court was charged with serving as the secretary of the committee.[91] The secretary of the committee was authorized to make a preliminary examination of complaints of judicial misconduct from whatever source in order to determine whether further investigation was warranted.[92] If the secretary deemed further action was necessary, the Chief Justice of the Supreme Judicial

85. The legislature and executive may have accepted the Supreme Judicial Court's action on this matter for a number of reasons. First, the Supreme Judicial Court stated in the 1940's that it possessed the power to discipline the attorneys pursuant to their inherent authority to make rules governing the practice of law. Commonwealth v. Jackson, 369 Mass. 904, 921, 344 N.E.2d 166, 177 (1976) (citing LaChapelle v. United Shoe Mach. Corp., 318 Mass. 166, 161 N.E.2d 8 (1945); Collins v. Godfrey, 324 Mass. 574, 87 N.E.2d 838 (1949)). Second, the legislature's and executive's own procedures for removal of judges were cumbersome and used only sparingly in severe cases. *Jackson*, 369 Mass. at 921, 344 N.E.2d at 177.

86. In Massachusetts it is not necessary for a judge to be a member of the bar. *See* Smith, *Mass. Processes*, *supra* note 25, at 696 n.79.

87. 1973 MASS. JUD. COUNC. REP. 39, 40 [hereinafter MASS. JUDICIAL COUNCIL].

88. *See* MASS. GEN. L. ch. 211, § 3 (1990). Through this statute the Supreme Judicial Court has been granted the power of general superintendence of the administration of all the courts of inferior jurisdiction. Under this authority it may "issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, . . . the improvement of the administration of such courts, and the securing of their proper and efficient administration." *Id.*

89. MASS. JUDICIAL COUNCIL, *supra* note 87, at 41.

90. *See id.*

91. *See id.*

92. *See id.*

Court or the full court had the option of referring the complaint "to the Chief Justice of the court or courts concerned, a committee of justices or judges of such court or courts, or to the Committee on Complaints [which could sit as a panel], for investigation or for informal adjustment or for the submission of recommendations to the full court."[93] Unless provided otherwise by the Chief Justice of the Supreme Judicial Court or by the full court, all proceedings under the jurisdiction of the Committee were kept confidential.[94]

The Committee on Complaints, however successful in resolving some complaints, was plagued with theoretical and practical weaknesses. Since there was a constitutional void with regard to which department of government possessed the authority to regulate judicial conduct in matters short of removal, questions surfaced concerning the limits of the court's power to create such a mechanism. In fact, "some [have] contend[ed] that the problem of the judge who is charged with judicial misconduct is a legislative problem not a judicial problem."[95] Also, the Committee which was grounded on court rule depended upon the cooperation of the person under investigation, unlike counterpart systems in other jurisdictions whose authority was derived from either "constitutional amendments or from statutes based on constitutional amendments, or both."[96] Finally, during the tenure of the Committee, the Secretary of the Committee's office was understaffed and ill-suited to carry out the substantial preliminary investigation following allegations of judicial misconduct.[97]

2. *In re DeSaulnier*

In 1971, both as a response to a jurisdictional challenge to the state judiciary's initiatives in the field of investigating allegations of judicial misconduct,[98] and also in what appears to be a logical progression from

93. *Id.*
94. *See id.*
95. *Id.*
96. *Id.*
97. Richard J. Vita, *Judicial Conduct and Professional Responsibility*, ANN. SURV. MASS. L. 670, 679 (1972) [hereinafter Vita, *Mass. Judicial Conduct*]. It is reported here that:

> Although the Executive Secretary's office can effectively handle some complaints, complex inquiries which need substantial preliminary investigative preparation are beyond the capabilities of that office. The office is presently understaffed, and while time expended pursuant to judicial discipline could be more efficiently allocated in other matters affecting the administration of justice, matters of judicial discipline themselves would be more efficiently assigned to a body specifically designed to handle them.

Id.

98. It was reported that the two judges involved in *DeSaulnier*, Judges DeSaulnier and Brogna, filed pleas to the jurisdiction of the court asserting that; (1) the SJC had no jurisdiction to remove them from their office, (2) that under the

its decision to participate in the investigation of judicial misconduct through its role in the Committee on Complaints' procedure, the Supreme Judicial Court boldly expressed in *In re DeSaulnier,*[99] that it possessed the power, authority and jurisdiction to make such inquiries and also to hold hearings on *at least* the following grounds:

> (a) the inherent common law and constitutional powers of this court, as the highest constitutional court of the Commonwealth, to protect and preserve the integrity of the judicial system and to supervise the administration of justice; (b) the supervisory powers confirmed to this court by G.L. c. 211, § 3, as amended; (c) the power of this court to maintain and impose discipline with respect to all members of the bar, either as lawyers engaged in practice or as judicial officers; and (d) the power of this court to establish rules of court for the orderly conduct (1) of officers and judges of the courts and (2) of judicial business and administration.[100]

Thus, after a formal investigation established that there had been some misconduct[101] and that it was so egregious that it rendered him unfit to serve as a judge or as a member of the bar, the Supreme Judicial Court disbarred Judge DeSaulnier and also issued an order restraining him from performing his judicial functions.[102] Even though judges in 1972 were not permitted to practice law,[103] thereby eliminating the duality of the judge-attorney, the Supreme Judicial Court, perhaps inconsistent with its earlier decisions in *Ruby* and *Centracchio,* still maintained it possessed the authority "to impose appropriate discipline upon a member of the bar, who is also a judge, for misconduct or acts of impropriety, whether such acts involved his judicial conduct or other conduct."[104] Not surprisingly, however, "the Supreme Judicial Court "stopped short of ordering the removal of Judge DeSaulnier" in order to avoid a constitutional conflict with the legislature, the governor, and the executive council.[105]

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state constitution, the power to remove a judge rests in either the Senate as the court which has the power of impeachment, or the Governor with the consent of the Council upon address of both houses of the Legislature, and (3) that disciplinary action cannot be taken against them as members of the bar, since as judges, they are not permitted to practice law. *See In re* DeSaulnier, 360 Mass. 757, 758, 274 N.E.2d 454, 455 (1971) [hereinafter *DeSaulnier I*]. These pleas to the jurisdiction of the court were overruled for the reasons stated in the decision. *Id.*

99. *Id.*; *see also In re* DeSaulnier, 360 Mass. 787, 807, 279 N.E.2d 296, 307 (1972) [hereinafter *DeSaulnier II*].

100. *DeSaulnier I*, 360 Mass. at 758-59, 274 N.E.2d at 456.

101. *See generally* Smith, *Mass. Processes, supra* note 25.

102. *See DeSaulnier II*, 360 Mass. at 814, 279 N.E.2d at 311. *See also* Gary R. Greenberg, Comment, *Non-Constitutional Processes: Judicial Self-Discipline in Massachusetts: In Re DeSaulnier*, 1972 ANN. SURV. MASS. LAW. 703, 712 [hereinafter Greenberg, *Judicial Self-discipline*].

103. *See* MASS. GEN. L. ch. 212, § 27 (1972)(repealed 1978).

104. *DeSaulnier I*, 360 Mass. at 759, 274 N.E.2d at 456.

105. *See* Greenberg, *Judicial Self-Discipline, supra* note 102, at 712-13. It is

3. The Power of a Chief Justice

Pursuant to statutory authority of the court reorganization legislation enacted in 1963, a "more limited" disciplinary/investigatory power was utilized by the Chief Justice of the District Courts.[106] The Chief Justice was granted by that statute the authority of general superintendence over all the district courts and their clerks and officers, other than the Boston Municipal Court.[107] Such powers included the power to control the administration of the district courts, the power to issue directives to individual judges, and in a case of disobedience, the power to report to the Chief Justice of the Supreme Judicial Court who could then issue an " 'appropriate order.' "[108] Nevertheless, the power of the Chief Justice of the District Courts was restricted by the statute which provided no "explicit disciplinary or suspension power." [109]

Reminiscent of the deficiencies with Committee on Complaints procedure, the Chief Justice of the District Courts, Chief Justice Flaschner, in his *Report on the Investigation into the Administration of Justice in the Municipal Court of the Dorchester District 9*, acknowledged the deficiencies of this current procedure.[110] In addition to the Chief Justice's lack of time and

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interesting to note the length to which the SJC went to prevent any constitutional problems, while concurrently possessing the intention to be active in judicial conduct. The transcript of the proceeding was sent to both the Governor and the General Court. "Ostensibly, the purpose of sending the transcript to the governor [and the legislature] was to provide a basis for beginning address or impeachment proceedings." *Id.* Also, the court used the word "order" instead of the word "injunction," "probably to bring its action within the scope of G.L. c. 211, § 3, which empowers the court to issue 'orders, directions and rules' necessary for achieving proper and efficient administration of the courts." *Id.* at 713.

Particularly worthy of note is the author's recognition that, in ordering the judge to refrain from performing his duties as a judge, the court may have been in practical effect removing the judge, while masking such a removal with tempered language. *Id.*

106. 1963 MASS. ACTS ch. 810 (codified in MASS. GEN. L. ch. 218, § 43A) (1922)(amended 1987). *See* O'Reilly, *supra* note 84, at 430-31; Smith, *Mass. Processes*, *supra* note 25, at 696-97.

107. *See* Smith, *Mass. Processes*, *supra* note 25, at 696-97.

108. O'Reilly, *supra* note 84, at 430-31 & n.14 (quoting MASS. GEN. L. ch. 218, § 43A (1922)(amended 1987)). *See also* Smith, *Mass. Processes*, *supra* note 25, at 697 & nn.81-2. For example, this power was exercised by the Chief Justice of the District Courts, Chief Justice Flaschner, in the early 1970's when he established his Grievance Committee to investigate and report on allegations of judicial misconduct in the Dorchester District Court. *Id.* at 697. The Grievance Committee, consisting of Chief Justice Flaschner and Judges Garvey and Bacigalupo, "heard from sixty-nine witnesses and examined 117 cases referred to in the complaints" filed by the Boston Legal Assistance Project on behalf of a group of Dorchester residents called "The People First." *In re* Troy, 364 Mass. 15, 19 n.2, 306 N.E.2d 203, 205 n.2. (1973).

109. Smith, *Mass. Processes*, *supra* note 25, at 697 n.82.

110. *Id.* at 698 & n.85 (quoting Report on the Investigation into the Administration of Justice in the Municipal Court of the Dorchester District 9 (Apr.

staff, Flaschner opined that "the disciplinary function in [a case with such attendant circumstances of publicity, complexity, and controversy] is misplaced and counter-productive in an office which should be devoted primarily to working out with judges and other personnel in the District Courts policies and procedures for improvement in the administration of justice."[111]

Closely related to this procedure, was the assumption of disciplinary powers by Superior Court Chief Justice Walter McLaughlin, Sr. in *DeSaulnier*.[112] There, subsequent to testimony by a reputed underworld figure before a Congressional subcommittee revealing possible judicial misconduct by Superior Court justices, but prior to a formal hearing as conducted by the Supreme Judicial Court, Chief Justice McLaughlin conducted an ad hoc confidential investigation.[113] According to some, "[t]he investigatory proceedings, while not illegal, had no statutory basis, and thus represented an outright assumption of disciplinary authority by the Chief Justice." However, that conclusion is misleading since the Chief Justice of the Superior Courts has statutory powers to make rules governing practice and procedure[114] and also possesses inherent authority "to do justice and to adopt procedure to that end."[115]

The Judicial Council of Massachusetts, in its discussion concerning the responsibility of the Chief Justices of the Courts to take action for judicial misconduct in their courts, stated that contrary to public perception and possibly the aforementioned procedures, "nowhere is there any statute or common law rule which vests in the chief justice of any of our courts the authority to call one of his judges, or the judge of some other court, and subject that individual to a proceeding in the nature of a full-scale investigatory proceeding."[116] Instead, the Judicial Council stated that the Chief Justices of the various courts, Chief Justice McLaughlin of the Superior Court, Chief Justice Flaschner of the

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20, 1972), *quoted in* James D. Lynch, Jr., *The President's Page*, 16 BOSTON BAR J. 3, 13 (1972)).

111. *Id.*

112. *DeSaulnier I*, 360 Mass. 757, 759, 274 N.E.2d 454, 456 (1971).

113. *See* Greenberg, *Judicial Self-Discipline*, *supra* note 102.

114. *See* MASS. GEN. L. ch. 213, § 3 (1990).

115. JOSEPH P. NOLAN, MASS. PRACTICE SERIES: CIVIL PRACTICE § 15 (1975) (citing Fanciullo v. B.G. & S. Theatre Corp., 297 Mass. 44, 8 N.E.2d 174 (1937)).

116. MASS. JUDICIAL COUNCIL, *supra* note 87, at 42. The Judicial Council Report indicates that there would be no legal authority for a full scale investigatory proceeding which, for example, would require a judge to take the "witness stand and require him to give testimony under oath, to produce books and papers and other evidence, and to 'defend' himself against charges of wrongdoing." *Id.* Such an assessment of the permissible extent of the Chief Justices' authority, although plausible if it refers to an investigation in the nature of an actual adjudication, is inconsistent with Chief Justice Flaschner's Grievance Committee's actual preliminary investigation because in that investigation, "extensive evidence was presented by the petitioner and the respondent judge." *In re* Troy, 364 Mass. 15, 19, 306 N.E.2d 203, 205 (1973).

District Courts, Chief Justice Podolski of the Probate Courts, and Chief Justice Lewiton of the Boston Municipal Court, followed an entirely different procedure based upon Rule 3:25 of the Rules of the Supreme Judicial Court.[117] Under this rule, all judges are obligated "to act diligently in [their] judicial duties, and if a judge becomes aware of 'unprofessional conduct' on the part of a judge: (a) he shall in the instance of a judge report his knowledge to the Chief Justices of this (Supreme Judicial Court) court and of the court of which the judge in question is a member."[118]

4. The Bar Association's Committee on Judicial Complaints

As an interim, supplementary procedure designed to assist the strained committee of the Supreme Judicial Court in investigating complaints against judges, in October of 1973, the Massachusetts Bar Association established its own "Committee on Judicial Complaints."[119] This committee, consisting originally of three judges and four attorneys, would make a recommendation to the Supreme Judicial Court that disciplinary action be instituted against said judge, if it made a sufficient finding of judicial misconduct based on allegations received from the general populus.[120]

5. The Committee on Judicial Responsibility

In 1976, the Supreme Judicial Court, in an attempt to strengthen its rather ineffective Committee on Complaints and to consolidate the investigatory efforts of the Bar Association and the Chief Justices of the various courts, established the Committee on Judicial Responsibility, again pursuant to Supreme Judicial Court Rule 3:17. Consistent with its new name and purpose, the Committee was different in organization and procedure from its predecessor, although charged with essentially the same duties of investigating judicial misconduct.

Its most apparent change was in its membership. Instead of being comprised of at least five members (three judges and two lawyers) and a

117. MASS. JUDICIAL COUNCIL, *supra* note 87, at 42-43.

118. *Id.*

119. *See id.*, *supra* note 87, at 43. The president of the Massachusetts Bar Association in 1973, Frederick G. Fisher, commenting upon the Bar Association committee, stated:

> Our initiative in this area is designed to provide an interim method for supervising the performance of the judiciary pending the establishment of new procedure designed for that purpose. There should be a simple, clearly-defined process by which citizens may complain about the performance of a judge and expect such complaint to be acted upon promptly and effectively. Until there is a permanent solution to this problem, we will provide the entry mechanism whereby citizens can voice their complaints concerning the operation of the judicial system.

Id.

120. *See id.*

secretary (the Executive Secretary of the Supreme Judicial Court) as was its predecessor, the Committee on Judicial Responsibility consisted of nine members who were to be appointed by the full Supreme Judicial Court.[121] Of those nine, three members were to be judges or former judges, three members were to be members of the bar who were not judges or former judges, and three members were to be lay persons.[122] Although these members could be reappointed after completing their first terms,[123] they were prohibited from serving more than two terms.[124] Either a member of the Office of the Executive Secretary of the Supreme Judicial Court or the Executive Secretary, was to serve as secretary and principal administrative officer of this committee. From the membership, the Supreme Judicial Court was then to appoint a chairman and vice-chairman of the committee.

Substantively, the Committee, upon receiving a complaint or on its own motion, was required to "inquire into" and "investigate" any of the following:

> alleged physical or mental incapacity of any judge; allegations of misconduct or maladministration in office, wilful [sic] or persistent failure to perform duties, habitual intemperance or other conduct prejudicial to the administration of justice that brings the judicial office into disrepute; and any alleged act which may violate the Code of Judicial Conduct (Rule 3:25).[125]

However, the Committee could not review the decision of a judge unless that decision was connected with an allegation of judicial misconduct or incapacity.[126]

"On completion of any inquiry or investigation which [could not] be dealt with fairly or properly on an informal basis," the Committee was obliged to make a recommendation for "appropriate disposition" supported with reasons therefore to the Supreme Judicial Court.[127] Then, under its authority to discipline judges, the Supreme Judicial Court could take further action on the matter, if required.[128] But at no time

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121. *See* S.J.C. Rule 3:17(1), Mass. Dec. 367-369 N.E.2d (Court Rules), at XXXVIII.

122. *See id.*

123. *See id.* The first terms of the members of the Committee, as it was originally selected, were to be varied. "When the Committee is first selected one member in each category [judge, attorney, and lay person] shall be appointed for a term of three years, one in each category for a term of two years, and one in each category for a term of one year." *Id.* Thereafter, successor members or those who were reappointed could serve up to three years. *See id.*

124. *See id.*

125. S.J.C. Rule 3:17(2), at XXXVIII-XXXIX. *See* MASS. JUDICIAL CONDUCT, *supra* note 87, at 676 (discussing the adoption of the Code of Judicial Conduct in Massachusetts).

126. *See infra* note 132 and accompanying text.

127. S.J.C. Rule 3:17(2), at XXXIX.

128. *Id.*

during the committee stage, unless requested by the judge under investigation, was information concerning the investigation to be released to the public.[129]

Procedurally, the Committee on Judicial Responsibility was granted rulemaking authority by its enabling act, although those rules were subject to the approval of the Supreme Judicial Court.[130] This power allowed the Committee to establish rules which illuminate and expand the duties of its membership,[131] promote efficiency and accuracy in the investigation of charges against judges,[132] and also to protect the integrity of judicial system through rules on confidentiality.[133]

IV. The Constitutional Principle

In recent years, there has been a renewed interest in carefully worded provisions of the Massachusetts Constitution,[134] and in provisions in the constitutions of other states.[135] This interest stems from narrow interpretations by the Supreme Court of the United States on

129. *Id.*

130. *See id.* The rules were formally known as the Rules of the Committee on Judicial Responsibility [hereinafter R.C.J.R.]. *Id.* at XXVI.

131. R.C.J.R. 4 provides that a member of the Committee must disqualify himself or herself from any proceeding in which his or her partiality might be reasonably questioned. *Id.* at XXVIII. R.C.J.R. 8 outlines some of the powers of the Chairman, as presiding officer of the Committee, the Vice-Chairman, as the alternate leader, and committee in general. In addition, it repeats the S.J.C. Rule 3:17 requirement that at least six members be present for a quorum, one from each category. *Id.* at XXIX.

132. R.C.J.R. 5 further limited the jurisdiction of the Committee to the investigation of misconduct and incapacity, by providing that the Committee shall not review the judicial decisions unless those decisions are related to a charge of misconduct or incapacity. *Id.* at XXVIII. R.C.J.R. 9-18 provides the procedure by which complaints may be properly filed and screened for validity, procedure for preliminary investigation and informal resolution, rules for conducting an investigation, and procedure for holding a hearing on the matter. *Id.* at XXX-XXXIV. R.C.J.R. 19 discusses the procedural rights of judges under investigation. *Id.* at XXXV. R.C.J.R. 24 provides the methodology for a Committee recommendation as well as its substantive requirements and limitations. *Id.* at XXXVII.

133. R.C.J.R. 3, on confidentiality, states that except as otherwise provided, "all information and materials, written, recorded, or oral, received or developed by the Committee in the course of its work shall be confidential." *Id.* at XXVII. Although on occasion the Committee may make statements concerning its procedures and limitations, and issue bi-annual reports, if it wishes to include specific reference to a judge under investigation, or make an explanatory statement concerning a case, the Committee must usually obtain the consent of the party involved. R.C.J.R. 3(a)-(f). at XXVII-XXVIII.

134. *See* Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 Suffolk U. L. Rev. 887 (1980); Edward F. Hennessey, *The Extraordinary Massachusetts Constitution of 1780*, 14 Suffolk U. L. Rev. 873 (1980).

135. Wilkins, *supra* note 134, at 890.

provisions in the Bill of Rights[136] granting personal freedoms such as freedom of speech, liberty of the press, freedom of religion, substantive due process, and also the rights to criminal defendants.[137] Although the provisions in the Massachusetts Constitution guarantee essentially the same rights as the provisions in the Bill of Rights, due to their unique specificity,[138] state courts are able to interpret them as granting citizens broader rights in these areas.

Unfortunately, the interest in affording greater rights in the states never seemed to reach the latter, fundamentally different provisions in the state constitutions. These provisions did not directly pertain to personal freedoms, but rather to the frame of government.[139] Often these provisions in state constitutions governing the frame of government have no written federal counterpart. Instead, these principles have been said to be implicit in the frame of the federal government and therefore only appear through legislative and judicial interpretation of the United States Constitution.[140] The existence of these provisions in the state constitutions, however, is not a constitutional quirk, but rather an asset or tool through which state citizens can demand broader protection against "big government." Indeed these provisions are more specific, explicitly set forth in writing in the articles of the state constitutions, and predate their federal counterparts which remain unwritten. Therefore, such provisions lay in wait to be called into action and serve as an independent base of authority upon which precedent can be made.

A. *The Independence of the Judiciary and Separation of Powers*

1. The Origins of the Doctrine

For thousands of years, there has been a proud tradition of an independent judiciary reflected in recorded thoughts of the politically minded. The concept of an independent judicial branch, can be traced

136. The Bill of Rights are the first ten Amendments to the United States Constitution.

137. *See generally* Wilkins, *supra* note 134, at 929-30.

138. *Id.*

139. *See generally* Wilkins, *supra* note 134, at 898-91.

140. There are a variety of reasons offered by scholars why these principles were not written into the United States Constitution, as they were in the state constitutions that preceded it. It has been suggested that "[t]he Framers found it either redundant or impossible to sum up their theory of the federal government in a single phrase." E. Donald Elliot, *Why our Separation of Powers Jurisprudence is so Abysmal,* 57 GEO. WASH. L. REV. 506, 508 (1989). This author believes that in addition to the redundancy argument, the framers could have felt that a separation of powers provision in the Constitution might reduce the flexibility essential to the unforeseeable future functioning of the federal government. However, I cannot accept the suggestion that it was impossible for them to devise a singular provision which incorporated all their ideas on separation of powers, because they were entirely too successful in reducing other amorphous matters into writing.

to the days of ancient Greece, where the writings of a political-philosopher, Aristotle, described three separate branches of government, one being the judicial branch.[141] There was also evidence of this concept's existence during the days of the Roman republic.[142] However, the concept experienced a distinct cooling period roughly from the decline of the Roman Empire through the "birth of Parliament" in England in the seventeenth century and into the eighteenth century when the foremost system of government was the hereditary ruler.[143] This monarchical system, by its very nature, was inimical to any division of authority at its source. Moreover, even the more compassionate, progressive, and learned monarchies, were unwilling to release their toeholds on power and recognize any form of separate judiciary branch.[144]

Only the "most advanced and libertarian regime[,] the rule by king and parliament in Great Britain," was able to incorporate any semblance of judicial independence in the frame of government.[145] From this English arrangement of power, other political-philosophers, such as Voltaire, Diderot, Locke, Montesquieu, and Blackstone, were able to extract and refine the increasing centrality of an independent judiciary,[146] providing the framers of both the Massachusetts Constitution and the United States Constitution with an adequate framework on

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141. Sam J. Ervin Jr., *Separation of Powers: Judicial Independence,* 35 LAW & CONTEMP. PROBS. 108 (1970).

142. *Id.*

143. *Id.*

144. *See generally* Weisberger, *supra* note 5.

145. *Id.* at 28. *See* Hennessey, *supra* note 134, at 877. "In the eighteenth century the idea [of judicial independence] was born only by a wrenching intellectual exercise [by the political philosophers], because the King, and especially the Parliament, had for centuries claimed, as at least partly their own, the exercise of what we now allot only to the judiciary." *Id. See generally* Ervin *supra* note 141, at 110-112 (discussing the English precedents in judicial independence).

146. *See* Ervin, *supra* note 141, at 108. In theorizing on the concept of an independent judiciary, Baron de Montesquieu wrote:

> Again, there is no liberty, if the judicial power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Id. at 109. (*quoting* I. B. DE MONTESQUIEU, SPIRIT OF THE LAWS 152 (Nugent ed. 1832)). Additionally, Blackstone noted:

> Were it the judicial power joined with the legislative, the life, liberty and property, of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might be soon an overbalance for the legislative.

Id. (*quoting* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 259-60 (1765)).

which to build.[147]

2. The Incorporation of the Doctrine

In Massachusetts, one of the most outspoken proponents of an independent judiciary, and other specifically enumerated rights and principles was John Adams.[148] Generally speaking, there were three events in particular which had a "dominant effect" on Adams' thoughts: the signing of the Magna Carta,[149] the trial of John Peter Zenger,[150] and the argument of James Otis against Writs of Assistance.[151] However, it was "the arguments of James Otis concerning the judiciary's power of constitutional review brought him to the matter of an independent judiciary: '[M]en cannot live together without contests. These contests require some arbitrator to determine them. The necessity of a common, indifferent and impartial judge, makes all men seek one.' "[152] With his attention focused on including provisions guaranteeing the independence of the judiciary in the Massachusetts Constitution, as it was understood by his mentor political-philosophers, Adams pondered the necessary elements of a provision which would be included in the constitution to insure the independence of the judiciary: (1) that judges salaries should be stable;[153] (2) that "filling judicial offices [should be] by executive appointment rather than by election";[154] (3) that there should be life tenure upon good behavior;[155] and (4) removal only by processes which require the action of both houses of the legislature, the Governor and the Council.[156]

147. *See generally* Hennessey, *supra* note 134; Wilkins, *supra* note 134.

148. *See generally* Hennessey, *supra* note 134. For an excellent discussion of John Adams' influence and impact on the colonial scene see Vernon Parrington, *The Colonial Mind (1620-1800), in* I MAIN CURRENTS IN AMERICAN THOUGHT, 312-325 (1954).

149. For a discussion of the effect that Otis' argument had on Adams see Hennessey, *supra* note 134, at 875-76.

150. For a discussion of the effect that the Zenger Trial had on Adams see Hennessey, *supra* note 134, at 875.

151. For a discussion of the effect of Writs of Assistance on Adams see Hennessey, *supra* note 134, 875-76.

152. Hennessey, *supra* note 134, at 877.

153. *Id.* at 878.

154. *Id.*

155. *See* Ervin, *supra* note 141, at 111. The independence of the judiciary, especially the concept that judges should have tenure during good behavior was viewed as an "essential requisite for judicial independence." *Id.* The origin of this idea comes from the Act of Settlement passed in England by Parliament in 1701, which reflects all the principles of independence. *Id.* It provided, in part that "Judges' commissions be made *quamdiu se bene gesserit* and their salaries ascertained and established but upon the Address of both Houses of Parliament it may be lawful to remove them." *Id.*

156. Hennessey, *supra* note 134, at 878. At one point, around the time of the enactment of the Massachusetts Constitution, Adams wrote the following statement concerning his views on how the judiciary should be framed:

Since Adams was perhaps the most fluent among all the framers[157] in these concepts, it was only "natural that [he] should write the words which were adopted by the Twenty-ninth Article of the Declaration of Rights" which forever mandated not only judicial impartiality, but also judicial independence in the Commonwealth:[158]

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws. [159]

Regrettably, the import of the second sentence of this paragraph has never been recognized in the constitutional dogma of this commonwealth; possibly because it overshadowed the emphasis given to the first sentence and its interpretation to mean that judges should disqual-

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> The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skilful [sic] administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check on both, as both should be checks upon that. The judges, therefore, should be always men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men. To these ends, they should hold estates for life in their offices; or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law. For misbehavior, the grand inquest of the colony, the house of representatives, should impeach them before the governor and council, where they should have time and opportunity to make their defense [sic]; but, if convicted, should be removed from their offices, and subjected to such other punishment as shall be thought proper.

Id. at 878-79.

157. Other leading framers included: Nathaniel Ward, minister of Ipswich and author of the BODY OF LIBERTIES (1641) and a preliminary constitution modeled upon the Magna Carta, which included one hundred laws designed to secure public and private rights. Hennessey, *supra* note 134, at 875; James Otis, a fiery orator and author whose arguments against the Writs of Assistance, which authorized the King's Officers in the colony to conduct searches unlimited in time and scope, inspired the likes of John Adams. *Id.* at 875-76; Samuel Adams, a member of the subcommittee convened at the Constitutional Convention of September 1, 1779 which was appointed to form a draft Constitution. *Id.* at 880; James Bowdoin, also a member of the convention subcommittee. *Id.*; John Hancock, the first governor under the Constitution of 1780. *Id.* at 880; Theophilus Parsons, author of the Essex Result of 1777. *Id.* at 880; and Reverend Thomas Allen and Thomas Paine. *Id.* at 880.

158. *Id.* at 879.

159. MASS. CONST. pt. 1, art. XXIX.

ify themselves where they cannot be impartial. In addition to this constitutional mandate, the Massachusetts framers more definitively incorporated the concept of an independent judiciary into the actual frame of government when they placed the tenure provisions in chapter III, article I of the Massachusetts Constitution, which provides:

> The tenure, that all commissioned officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is a different provision made in this Constitution; provided, nevertheless, the governor, with the consent of the council, may remove them upon the address of both houses of the legislature; and provided, also, that the governor, with the consent of the council, may after due notice and hearing retire them because of advanced age or mental or physical disability; and provided further, that upon attaining the age of seventy years of age said judges shall be retired. Such retirement shall be subject to any provisions made by law as to pensions or allowances payable to said officers upon their voluntary retirement.[160]

This constitutional provision, in both its unamended and amended forms, essentially grants judicial officers the security of lifetime tenure, subject only to the requirements of good behavior, and the two constitutional removal procedures. Despite the clear message of article 29 and the establishment of a separate judicial branch with secure tenure, the concept of an independent judiciary required by these provisions has been obscured by the presence of another provision insuring the division and independence of all three branches of state government.

For Adams, the concept of an independent judiciary was an outgrowth of another important principle: "the political system itself must be structured in such a way as to prevent the abuse of power by those whose duty it is to enact and execute laws."[161] Therefore, John Adams, in preparing the original draft of the Declaration of Rights, felt this principle would be best preserved by wording the separation of powers clause in a fashion certain to indicate that exclusive purpose.[162] "As drafted by John Adams and reported by the committee as art. 31 of the draft, the clause read as follows: 'The judicial department of the State ought to be separate from, and independent of, the legislative and executive powers.' "[163] Though never incorporated into the Massachu-

160. MASS. CONST. pt. 2, ch. 3, art. 1. This article of the Massachusetts Constitution was amended in 1918, by art. LVIII, to include the retirement provision, and subsequently in 1972 by art. XCVIII to include the requirement of a mandatory retirement age of 70. *Id.*

161. PETERS, *supra* note 63, at 163. Adams had realized that the people of Massachusetts had a "primary fear . . . that those men who have the power to make or enforce laws, might be the most inclined to disobey them." *Id.*

162. Opinion of the Justices to the House of Representatives, 365 Mass. 639, 645 n.5, 309 N.E.2d 476, 480 n.5 (1974).

163. *Id.* (*quoting* J. of the Convention for Framing a Constitution of the

setts Constitution in these words, the consideration of such a draft demonstrated how central judicial independence was for many of the framers of the constitution, especially Adams. Accordingly, when the true draft of the separation of powers was approved for incorporation in the Massachusetts Constitution, the rationale behind its inclusion was that "it was not enough merely to demark the limits of authority substantively and procedurally,"[164] by dividing authority between the Legislative,[165] Executive,[166] and Judicial[167] branches and delineating the powers of each. There had to be some secondary mechanism beyond the principle of popular control of the government, which would insure government by law, and not men.[168] Based on this reasoning, Adams and the other framers included an explicit provision requiring the separation of the Legislative, Executive, and Judicial departments in article 30 of the Declaration of Rights of the Massachusetts Constitution which provides:

> In the government of this commonwealth, the legislative department shall never exercise the executive or judicial powers, or either of them: the executive shall never exercise the legislative or judicial powers, or either of them: the judicial shall never exercise the legislative or executive powers, or either of them: to the end that it may be a government of laws and not of men.[169]

These famous words in the Massachusetts Constitution "confirm[] that the three duties of the people . . . must be fulfilled by distinct departments of the government."[170]

Two aspects of the separation of powers clause deserve some particular attention. First, is the "absolute terms in which the separation of powers is delineated."[171] "The phrase 'shall never' is as clear language can be, and it is used in relation to every possible permutation of the

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Government (Mass. Bay) (1779-1780) 197). *See also* Frank W. Grinnell, *The Constitutional History of the Supreme Judicial Court of Massachusetts*, 2 MASS. L.Q. No.5, 383-93 (May 1917).

164. *Id.* The demarcation of authority refers to the organization of Massachusetts government, pursuant to Part II of the Massachusetts Constitution into three departments: the Legislative, Executive, and Judicial, each with their own delineated powers.

165. MASS. CONST. pt. 2, ch. 1.

166. MASS. CONST. pt. 2, ch. 4.

167. MASS. CONST. pt. 2, ch. 3, art. I.

168. Adams felt that there was an "intimate relationship between government by law and popular control." PETERS, *supra* note 63, at 169-70. As evidence of this, Adams offered the English precedent, where people had control over the legislative department by the power of the election. *Id.* Additionally, in the judicial department, then a segment of the executive, the people had an influence when they participated as jurors, acting as a finder of fact, making determinations of guilt or innocence. *Id.*

169. MASS. CONST. pt. 1, art. XXX.

170. PETERS, *supra* note 63, at 57.

171. *Id.*

three powers of government."[172] Secondly, there is the fact that "the separation of powers is required for a specific purpose - that this government may be one of laws and not of men."[173] Although the connection between "normative prerequisites of the government" (that it be a government of laws and not men) and "a specific structural principle" (the separation of powers) cannot be not understood from a mere examination of the text, it is significant that the framers made this connection because it places us "in a better position to understand the relationship between those obligations and the rights derived from the nature of the state."[174] Yet neither of these features dictating a rigid separation of powers and independence of all the branches, explains how the separation, which the framers must have assumed to be either "self-evident or else unnecessary," was to be effected.[175]

B. *A Federal Framers' Perspective on the Doctrine*

Shortly after the ratification of the Massachusetts Constitution in 1780, at the Constitutional Convention of 1787, John Randolph of Virginia offered the first proposal for an independent judiciary, based on essentially the same understanding of the concept of an independent judiciary as Adams.[176] As in Massachusetts, Randolph's and other framers' ideas on an independent judiciary were debated and redefined,[177] until the frame of the federal government adequately preserved this concept like its component state constitutions.

The expression of an independent judiciary, was not placed in any specific mandate, as in Massachusetts, but rather appeared in section I, article III of the United States Constitution. This tenure provision, which resembles the tenure provisions in the Massachusetts Constitution, provides that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[178] "Although the Constitution does not explicitly say that federal judges are appointed for life, the Framers [did] contemplate 'permanency in office' "[179] and emphatically rejected notions that judges should be

172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. Ervin, *supra* note 141, at 114. Randolph's "proposal provided for judges to be chosen by the national legislature, and to hold their offices during good behavior." *Id.*
177. See *id.* at 114-18 for a discussion of the leading players on the independent judiciary.
178. U.S. CONST. art. III, § 1.
179. Edwards, *supra* note 9, at 766.

subject to "reelection or reappointment,"[180] or "monarchical and legislative interference with the courts."[181]

Another important feature of article III, § I was the nondiminishable salary provision which, according to Hamilton, " 'afford[ed] a better prospect of [the judges'] independence than is discoverable in the constitutions of any of the states[] in regard to their own judges.' "[182] Comparatively, Massachusetts had provided for similar stability in its own judicial salaries which were described as "honorable salaries ascertained and established by standing laws."[183] Hamilton, when speaking about the fixed salary provision, also said that " '[n]ext to permanency in office, nothing [would] contribute more to the independence of the judges than a fixed provision for their support.' "[184]

Finally, the federal framers devised a "deliberately cumbersome" removal provision which was not included with this tenure provision, but placed in three different locations in the constitution.[185] To preserve the independence of the judiciary against the winds of politics, "[t]he Senate was chosen as the adjudicator, because, according to Hamilton, the Senate's 'confidence . . . in its own situation' would enable it to be impartial by remaining 'unawed and uninfluenced' by either the accused or his accusers."[186] Hamilton also vehemently opposed the expansion of the reasons for removal from treason, bribery, or other high crimes and misdemeanors to include mental or other incapacity,[187] or the inclusion of a provision requiring a mandatory re-

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180. *Id.*

181. *Id.*

182. *Id.* at 767 (quoting THE FEDERALIST, No. 79, at 532 (J. Cooke ed. 1961)).

183. MASS. CONST. pt. 1, art. XXIX.

184. Edwards, *supra* note 9, at 766 (*quoting* The Federalist, No. 79, at 531 (J. Cooke ed. 1961)).

185. U.S. CONST. art. II, § 4 (federal judge is subject to impeachment upon conviction for "Treason, Bribery, or other high Crimes and Misdemeanors"); U.S. CONST. art. I, § 2, cl. 5 (impeachment by House of Representatives); U.S. CONST. art. I, § 3, cl. 6 (removal only by conviction by two-thirds of Senate).

186. Edwards, *supra* note 9, at 767 (*quoting* THE FEDERALIST 12, No. 65, at 441).

187. These complaints were rebutted by Hamilton in THE FEDERALIST No. 79, where he said:

> The want of a provision for removing the judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose. The mensuration of the faculties of the mind, has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability would be much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. The result, except in the case of insanity, must for the most part be arbitrary; and insanity, without any formal or express provision, may be safely pronounced to be a virtual disqualification.

Ervin, *supra* note 141, at 116 (quoting THE FEDERALIST No. 79).

tirement age in the federal constitution,[188] because those changes would seriously jeopardize the independence of the judicial branch.

In *The Federalist Papers*,[189] Madison and Hamilton defended an independent federal judiciary which was also supported by the classification and assignment of powers amongst three great departments: the legislative, executive, and judicial,[190] not by any written incorporation of the separation of powers doctrine into the constitution. [191] Apparently, the federal framers felt that their system should include some overlapping, because it "served a valuable purpose" of checks and balances[192] and would thus serve as a preferred frame of government for

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188. Hamilton, in THE FEDERALIST No. 79, commenting upon an early New York state constitutional provision requiring mandatory retirement at age sixty, stated:

> I believe there are few present who do not disapprove of this provision. There is no station in relation to which it is less proper than to that of a judge. The deliberating and comparing faculties generally preserve their strength much beyond that period in men who survive it; and when, in addition to this circumstance, we consider how few there are who outlive the season of intellectual vigor and how improbable it is that any considerable portion of the bench, whether more or less numerous, should be in such a situation at the same time, we shall be ready to conclude the limitations of this sort have little to recommend them in a republic where fortunes are not affluent and pensions not expedient, the dimission of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for livelihood, ought to have some better apology to humanity than is to be found in the imaginary danger of a superannuated branch.

Ervin, *supra* note 141, at 116 (quoting THE FEDERALIST, No. 79).

189. "*The Federalist Papers*, offered a contemporary and very reluctant explication of the meaning of the new Constitution." Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707, 713 (1987-88). "In the Federalist Papers, Alexander Hamilton and James Madison expressed their belief that the judiciary, unlike the executive and the legislative branches, should be above the fray, impervious to the shifting political winds." Stanley Mosk, *"Chilling Judicial Independence"—The California Experience*, 3 W. NEW ENG. L. REV.1, 9 (1980). [I]n *The Federalist, No. 78,* Hamilton defended the appointment of judges for tenure during good behavior, which he considered 'the citadel of public justice and the public security.' " Ervin, *supra* note 141, at 117 (quoting THE FEDERALIST No. 78). Additionally, in THE FEDERALIST No. 79, Hamilton "justified the purpose of the framers" on the issue of impeachment as the sole method of removal; "This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges." *Id.* (quoting, THE FEDERALIST No. 79).

190. Ervin, *supra* note 141, at 115.

191. *Id.* at 115 n.39.

192. *Id.* at 115. In support of a limited overlapping of functions, Madison stated:

> The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised by the legislative councils. The entire legislature can per-

the United States. Curiously, Madison noted that even with specific provisions calling for the separation of powers in the several state constitutions, there had not been "a single instance in which the several departments have been kept absolutely separate and distinct."[193]

C. *The Interpretation of the Doctrine*

On its face, "Article 30 of the Massachusetts Declaration of Rights expressly enunciates the doctrine of separation of powers [and therefore judicial independence] in rigid, absolutist, and unyielding terms. . . ."[194] Consistent with the facial mandate, the Supreme Judicial Court, in its interpretations prior to the rise of administrative agencies,[195] held that Article 30 "quite literally" required a " 'sharp and strict separation of the legislative, executive and the judicial departments' of the government of Massachusetts."[196] Thus, for many years, the Court's inclination to maintain a strict separation of powers was evidenced by its written interpretation on the matter.[197]

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form no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power of last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistery, and another, on the impeachment of the third, can try and condemn all the subordinate officers in the executive department.

Id.

193. *Id.* at 114.

194. CELLA, *supra* note 6, at § 43.

195. According to Alexander Cella:

The growth and development of administrative agencies and administrative law with the concomitant blending, merging, and overlapping of all three kinds of cognizable legal and governmental power in administrative agencies, have made it increasingly difficult, if not impossible, for the Supreme Judicial Court to construe and apply the doctrine of separation of powers embodied in Article 30 with complete fealty to its express terms.

Id.

196. *Id.* (quoting Sheehan v. Superintendent of Concord Reformatory, 254 Mass. 342, 345, 120 N.E. 231, 233 (1926)).

197. *See, e.g.*, Lachapelle v. United Shoe Machinery Corp., 318 Mass. 166, 167, 61 N.E.2d 8, 11 (1945); *In re* Opinion of the Justices, 302 Mass. 605, 617, 19 N.E.2d. 807, 815 (1939) (The limitation imposed by said art. 30 upon the exercise by the judicial department of executive powers is not more definitely expressed than is the limitation thereby imposed upon the exercise of such powers by the legislative department. These limitations, though sometimes difficult of application, must be scrupulously observed.); Selectmen of Town of Milton v. Judge of Dist. Court of East Norfolk, 286 Mass. 1, 189 N.E. 607 (1934) (no legislative or executive power can be constitutionally conferred upon the courts; that is strictly forbidden by article 30 of the Declaration of Rights); Attorney General v. Brissenden, 271 Mass. 172, 183, 171 N.E. 82, 87 (1930) (the court is ever solicitous to maintain the sharp division between the three departments of government as declared by article 30 of the Declaration of Rights); *Ex parte* Germain, 258 Mass. 289, 293, 155 N.E. 12, 13 (1927) ("[t]here is in article 30 of the Declaration of Rights of the Constitution of

The Supreme Judicial Court's posture on the separation of powers doctrine gradually evolved, however, and through the late 1960s and into the early 1980s was applied in a manner characterized as "flexible, relativistic and permissive."[198] Underlying this proposition, the Supreme Judicial Court's decisions during this period continually recognized that the framer's view of the separation of powers doctrine would remain fundamental to the frame of government in Massachusetts, but strangely placed it into a position where it became a mere "core principle" subject to expansive qualification.[199] Up until this point, in no place was the Supreme Judicial Court's understanding of the "proper construction and application of Article 30"[200] laid out in more detail than in its first answer to the House of Representatives in the Opinion of the Justices in 1974.[201] This court, charged with rendering a decision on the constitutionality of a proposed bill to centralize in a single commission the data processing and telecommunications of the three branches, delineated what role article 30 served before coming to a conclusion on the constitutional question.[202] In this decision, it initially appeared as if the framer's vision of separation of pow-

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Massachusetts strict separation of the powers of the executive and judicial departments of government."); Sheehan v. Superintendent of Concord Reformatory, 254 Mass. 342, 345, 120 N.E. 231, 233 (1926) (the definition of crimes and the establishment of penalties therefor . . . belong to the Legislature. The trial of those charged with crime and the imposition of sentences upon those convicted are a part of the function of the courts. The execution of sentences . . . is an attribute of the executive department of government. This is in conformity to the sharp and strict separation of the legislative, the executive and the judicial departments of government in article 30 of our Declaration of Rights.); Cosmopolitan Trust Co. v. Mitchell, 242 Mass. 95, 115-16, 136 N.E. 403, 405 (1922);.

198. CELLA, *supra* note 6, at § 43.

199. Opinion of the Justices to the House of Representatives, 365 Mass. 639, 643, 309 N.E.2d 476, 479 (1974). *See also* Opinion of the Justices to the Senate, 372 Mass. 883, 363 N.E.2d 652 (1977); Commonwealth v. Favulli, 352 Mass. 95, 224 N.E.2d 422 (1967); Lachapelle v. United Shoe Machinery Corp., 318 Mass. 166, 61 N.E.2d 8 (1945); Clerk of Superior Court v. Treasurer & Receiver Gen., 386 Mass. 517, 437 N.E.2d 158 (1982).

200. CELLA, *supra* note 6, at § 43.

201. Opinion of the Justices to the House of Representatives, 365 Mass. 639, 643, 309 N.E.2d 476, 479 (1974). In its first question to the Supreme Judicial Court, the House of Representatives inquired whether House Bill No. 5293, which provided for an electronic data processing and telecommunications commission and department which would centralize and operate all of the electronic data processing and telecommunications services needed by the branches of Massachusetts government, would violate Article 30 of the Massachusetts Declaration of Rights. *Id.* at 645, 309 N.E.2d 480. The Supreme Judicial Court answered in the affirmative and asked to be excused from answering the second question posed: whether the same bill, as applied to the housing court of the City of Boston, would violate Article II of the Amendments to the Constitution establishing home rule? *See id.* at 648, 309 N.E.2d at 482.

202. The Supreme Judicial Court's understanding of separation of powers in the

ers would take only a symbolic position in the future jurisprudence of the Supreme Judicial Court and be written off in the name of governmental efficiency and economy, provided only that there was "no interference by . . . [one] department with the power of . . . [another]

Opinion of the Justices began with a note concerning the positioning of the doctrine in Massachusetts:

> Initially, we note that the concept of separation of powers is fundamental to our form of government. While not explicitly delineated in the Federal Constitution it is implicit in the structure of the government there created and it finds expression, in varying forms, in the Constitutions of most of the States. The Massachusetts version, like only a handful of other States, is in a most explicit form, and on its face calls for a complete and rigid division of all powers among the three branches. 'The court is ever solicitous to maintain the sharp division between the three departments of government as declared by art. 30 . . . .' We have stated that '[t]hese limitations, though sometimes difficult of application, must be scrupulously observed.'

Id. at 640-41, 309 N.E.2d at 478 (footnotes and citations omitted). Next, the court explained that our understanding of the Separation of Powers concept, consistent with scholarly writing, has shifted away from a rigid understanding to a more practical understanding:

> Nevertheless, we recognize that an absolute division of the three general types of functions is neither possible nor always desirable. The growth in this century of administrative agencies, called by some a "fourth branch" of government, has sometimes tended to obscure the admittedly indistinct boundary lines between the three branches and led some courts to adopt such descriptions as 'quasi-judicial' or 'quasi-legislative.' Scholars in this field particularly have questioned the strict application of the doctrine. Professor Jaffe argues that complete exclusiveness is absurd as functions cannot be classified executive, legislative or judicial so clearly. He views the logic of the separation of powers as polarity rather than strict classification. Professor Davis urges that the true principle is not the separation of three kinds of power but a system of checks to prevent undue concentration of power.

Id. at 641, 309 N.E.2d at 478-79 (footnotes and citations omitted). Finally, the court disclosed its ultimate understanding of how close one may come to the separation of powers threshold before violating the Massachusetts Constitution:

> [T]he promotion of economy and efficiency in government, often dictate cooperation among coordinate branches. Such efforts must, however, take place within the limitations of art. 30, which was not lightly adopted, and must be complied with. Thus, this court has upheld the assignment of a legislative investigation to an executive officer, as the Legislature may delegate "incidental powers which it may exercise itself in aid of its primary functions but which do not partake of the nature of law-making." We have stated that "[t]here is nothing inherently repugnant to the concept of separation of powers that agents of one branch also act as agents of . . . [an]other." Some flexibility in allocating functions whose classification would be at best ambiguous is no doubt desirable, so long as it "creates no interference by . . . [one] department with the power of . . . [another] department." This latter development is the essence of what cannot be tolerated under art. 30.

Id. at 642, 309 N.E.2d at 479 (footnotes and citations omitted).

department."[203] Nevertheless, the Supreme Judicial Court concluded the appointment segment of the bill was an unconstitutional violation of article 30[204] and that the substance of the bill, the commission itself, constituted an interference with the functioning of the judiciary and therefore a violation of article 30.[205] Proponents of the bill would probably agree with Professor Cella's retrospective view that such interference would probably have been tolerable and sustained under a truly flexible application of the separation of powers doctrine.[206] Although one might have hoped that a clearer understanding of the doctrine would have been the end result of such a decision, the only result is that in close cases uncertainty will remain and "[a]rticle 30 in its absolute, rigid, and unyielding formulation will continue[] to lurk in the background of Massachusetts constitutional jurisprudence waiting to be pressed into service on those occasions when it serves the purposes, desires, or interests of the Supreme Judicial Court."[207]

More recently, in *Chief Administrative Justice of the Trial Court v. Labor Relations Commission*,[208] the Supreme Judicial Court was faced with another separation of powers inquiry when it was asked to decide whether article 30 limitations prohibited the Labor Relations Commission, an executive agency, from holding a hearing and rendering a decision on

203. *Id.* at 642, 309 N.E.2d at 479 (citations omitted).

204. The proposed bill purported to grant the Governor, the President of the Senate, the Speaker of the House, and the Chief Justice of the Supreme Judicial Court two appointments each to the proposed commission. With regard to the appointments by the Governor there was no real controversy. *See id.* at 642-43, 309 N.E.2d at 479 (citing Brown v. Russell, 166 Mass. 14, 43 N.E. 1005 (1896); Sheridan v. Gardner, 347 Mass. 8, 196 N.E.2d 303 (1964)). However, it was not proper that the power of appointment be granted to the judiciary where the " 'officers or boards [were] not exercising a function that is judicial or incidental to the exercise of judicial powers . . . .' " *Id.* at 643, 309 N.E.2d at 480 (quoting Opinion of the Justices, 302 Mass. 605, 622, 19 N.E.2d 807, 818 (1939)). It was also not proper for the heads of the two legislative bodies to make appointments because " 'in our opinion the power of appointing members of such boards is so far executive that it cannot be conferred by fixed law upon such purely legislative officers as senators and representatives, acting in any manner other than that prescribed by the Constitution.' " *Id.* at 644, 309 N.E.2d at 480 (quoting Opinion of the Justices, 303 Mass. 615, 624, 21 N.E.2d 551, 557 (1939)).

205. The Supreme Judicial Court attributed the violation of article 30 in first part to the proposed "manner in which data [would be] collected and stored in a carefully programmed computer" which would give the commission "at least indirect control over the information processed and the activities of the personnel engaged in its collection and use." *Id.* at 646, 309 N.E.2d at 481. Next, the court expressed its concern about the policy-making role which the bill authorized for the commission and the concomitant influence it would then possess. *See id.* at 646-47, 309 N.E.2d at 481.

206. CELLA, *supra* note 6, at § 43 n.9 and accompanying text.

207. CELLA, *supra* note 6, at § 43. (footnote omitted).

208. 404 Mass. 53, 533 N.E.2d 1313 (1989) [hereinafter *Chief Admin. Justice*].

"personal issues arising in the judicial branch."[209] Consistent with the decision in the *Opinion of the Justices* in 1974, the Supreme Judicial Court once again reaffirmed what would not be tolerated under article 30; " 'interference by one department with the functions of another.' "[210] Through this case, in conjunction with *Commonwealth v. Jackson*,[211] the Court offered some additional insight as to what article 30 prohibits with regard to the functioning of the three branches, in particular the judicial branch.

In *Jackson*, the Supreme Judicial Court listed several areas where the court's authority was derived from inherent judicial power.[212] According to the Court in *Chief Administrative Justice v. Labor Relations Comm'n*, as it reflected upon its decision in *Jackson*, "the ability to defer the imposition was 'not necessary to the very existence of a court' and was not an inherent power that could not be restricted or abolished by the Legislature without violating art. 30."[213] Logically, the conclusion is that if an

209. *Id.* at 55, 533 N.E.2d at 1316. The personal issues arising in the judicial branch centered on a probation officer's "prohibited practice" complaint filed with the Labor Relations Commission against the Chief Administrative Justice, as the employer of trial court personnel. *Id.* The complainant charged that in retaliation for the filing of a complaint with the Commission on Judicial Conduct for improper directives by the first justice of the Newton District Court: (1) a judge had berated him; (2) the clerk-magistrate restricted his access to portions of the courthouse and reassigned his cases to other probation officers; and (3) the chief probation officer restricted him to office work. *See id.* at 54, 533 N.E.2d at 1315.

The Supreme Judicial Court held in this case that "a commission *hearing* and *decision* would not violate the limitations of article 30," because such "action would not intrude on a power essential to the performance of judicial functions, essential to the maintenance of a court's authority, or essential to its capacity to decide cases according to law." *Id.* at 60, 533 N.E.2d at 1317.

Also worthy of note is that the Supreme Judicial Court set aside the question of whether an *order* by the commission after the hearing would violate article 30, but forewarned that article 30 "forbids [the commission] from interfering with a judge's physical control over his courtroom." *Id.* at 57, 533 N.E.2d at 1317. For a listing of what the court indicated might amount to an interference with the judicial control, see State v. LaFrance, 471 A.2d 340 (N.H. 1983).

210. *Chief Admin. Justice*, 404 Mass. at 56, 533 N.E.2d at 1316 (quoting Opinion of the Justices, 365 Mass. 639, 642, 309 N.E.2d 476, 479 (1974)).

211. 369 Mass. 904, 344 N.E.2d 166 (1976) [hereinafter *Jackson*]. Where the Supreme Judicial Court held in relevant part that a statute mandating minimum sentencing upon conviction of certain crimes did not interfere with any inherent power of the judiciary, in violation of article 30 of the Massachusetts Declaration of Rights.

212. *Id.* at 921-22, 344 N.E.2d at 177. Here the Supreme Judicial Court stated:

> Among those powers that have been held to be inherent is the power to grant a change of venue in order to secure an impartial trial, to use contempt proceedings to ensure orderly administration of justice, to order the county to pay for adequate resources to ensure the proper operation of the courts, and to make rules governing the internal organization of the courts and to control the practice of law . . .

Id. (citations omitted).

213. *Chief Admin. Justice*, 404 Mass. at 56, 533 N.E.2d at 1316.

inherent power of any branch is being interfered with or being intruded upon by another branch, the limitations expressed in article 30 mandate that the Supreme Judicial Court render it unconstitutional.[214] Such result is expressly supported by *Chief Administrative Justice v. Labor Relations Comm'n,* which positions Article 30 protectional parameters on powers "essential to the performance of judicial functions, essential to the maintenance of a court's authority, or essential to its capacity to decide cases according to law."[215] In summary, since inherent powers are by the court's own definition those which are " 'essential to the performance of their [the courts'] functions . . . ' ",[216] these two decisions have further revealed a recent tendency to hold that an intrusion on an inherent power is constitutionally impermissible.

D. *Conclusion*

The principles of an independent judiciary and separation of powers have strong support in both the State and Federal constitutions. Implicit in the frame of both Federal and State governments and expressly included in the Massachusetts constitution, these principles ensure that there will continue to be an impartial interpretation of the laws and a tripartite constitutional government.

Whether the advanced interpretation of article 30 is a harbinger of predictability in separation of powers jurisprudence and therefore judicial independence is still doubtful however. This is primarily due to rigid, inflexible interpretation the court could rationally resurrect when it serves the purposes, desires, or interests of the Supreme Judicial

214. Perhaps one of the most confusing sentences in the *Jackson* decision is as follows: "While it may have been that judges at early common law, in response to an excessively harsh criminal justice system . . . developed means to avoid its rigidity, we cannot say that these practices have attained a constitutional status." *Jackson,* 369 Mass. at 922, 344 N.E.2d at 177. This sentence is confusing due to the obscure utilization of the words "these practices." *Id.* Absent further clarity, one could draw either of two conclusions. The first ratiocination is that "these practices" refers to the concept of inherent powers of the court as a whole, which implies that such powers of the court, or any branch for that matter, are subject to statutory restriction or eradication. If this is the meaning intended by the Supreme Judicial Court, one can expect that a literal separation of powers jurisprudence will vanish, and that blending of governmental functions will continue virtually without limit. The second, more probable, conclusion is that "these practices" refers merely to judges' ability to defer the imposition of a sentence. This implies first, that other powers which are considered inherent, when interfered with or intruded upon, do enjoy article 30 protection, and second, that the ability to defer the imposition of a sentence is not an inherent power of the judiciary.

215. *Chief Admin. Justice,* 404 Mass. at 56, 533 N.E.2d at 1316 (citing Blankenburg v. Commonwealth, 260 Mass. 369, 373, 157 N.E.2d 693 (1927); Commonwealth v. Jackson, 369 Mass. 904, 922, 344 N.E.2d 166, 177 (1976)).

216. *See* Mass. Gen. L. ch. 211C, §§ 3(1) & (4). See *infra* note 278 for the definitions of inherent powers.

Court.[217] Also, the Supreme Judicial Court has the discretion to expand or contract the list of inherent powers as it did in *Chief Administrative Justice v. Labor Relations Commission*.[218] Moreover, the court has similar discretion in determing the scope of either its statutory or constitutional powers.

From whichever direction we have come, Justice Joseph Weisberger of the Rhode Island Supreme Court has urged the citizens of Massachusetts to keep the concept of judicial independence closely guarded from excessive consumerism in the future.[219] For there, lies "the secret weapon which [has] assured the success of this system of ordered liberty."[220]

V. The Commission on Judicial Conduct and Its Role in Regulating Judicial Conduct

A. *An Overview of the System*

In Massachusetts, current judicial misconduct is regulated in a manner quite different from that envisioned by the framers of the state constitution, due largely to the Supreme Judicial Court's relatively recent, active role in the investigation and discipline of judges[221] as well as the establishment of the Commission on Judicial Conduct, a formal body charged with enforcing standards of judicial conduct.[222] Theoretically, in a case of serious judicial misconduct, it is now possible for each of the three departments of state government as well as lay members of the population to assert some role in regulation under the present procedures. For example, assume Judge X has been involved in some conduct requiring investigation and possibly even some form of discipline if allegations are true. Most likely, the first stage in the regulation of Judge X's conduct will be investigatory. The investigation would most likely be commenced by filing a complaint with the Commission on Judicial Conduct, entirely a creature of statute, which would in turn study, investigate, and offer recommendation for the consideration of the Supreme Judicial Court. The Supreme Judicial Court would then hold its own hearing on the allegations, make its own findings, and issue an order within the parameters of its own authority. Finally, the Court's findings would likely be forwarded to the legislature and/or the governor to determine whether further removal action is warranted. As mentioned before, whether address proceedings would be initiated, and if initiated, whether they would be completed, would be an issue for both

217. Cella, *supra* note 6, at § 43.

218. 404 Mass. 53 (1989).

219. Consumerism is defined as the excessive and instantaneous demand for accountability. Weisberger, *supra* note 5, at 30.

220. *See generally* Weisberger *supra* note 5.

221. *See* infra notes 262-63 and accompanying text.

222. *See* infra notes 224-31 and accompanying text.

the legislative and executive branches. Thus, whereas once the power to regulate judicial conduct was centralized with the legislature and to a lesser extent the executive, there has been a remarkable decentralization to the point where all branches are involved, utilizing different approaches and remedies not provided for in the constitution.

B. *The Commission on Judicial Conduct*

As part of the Court Reorganization Act of 1978,[223] the state legislature created the Commission on Judicial Conduct (Commission) to supersede the Committee on Judicial Responsibility.[224] The Commission in present form consists of nine members: three judges appointed by the justices of the Supreme Judicial Court; three members of the bar appointed by the Chief Administrative Justice of the Trial Court; and three lay persons appointed by the Governor.[225] The Commission's members serve without compensation for six-year terms, unless their memberships terminate because "a member ceases to be qualified for the appointment."[226] In such an event or alternatively where a member resigns or becomes permanently unable to serve, the Commission's rules provide that a vacancy is deemed to have occurred and require the appointing authority to make another appointment.[227] The membership of the Commission is complemented with an executive director, formerly an executive secretary, who is appointed by the Commission to serve at its pleasure.[228] The executive director assists the members of the Commission in the performance of their duties by receiving information on complaints, making preliminary evaluation and screening

223. *See* 1978 MASS. ACTS ch. 478, §§ 1-end. These sections of chapter 478 were known formally as "An Act Providing For The Orderly Administration Of Justice In The Commonwealth" or the Court Reorganization Act of 1978.

224. MASS. GEN. L. ch. 211C, §§ 1-11 (1990)(original version added by 1978 MASS. ACTS ch. 478, § 114; amended by 1987 MASS. ACTS ch. 656, §§ 1-2); *see In re* Scott, 377 Mass. 364, 365 n.1, 386 N.E.2d 218, 219 n.1 (1979).

225. *See* MASS. GEN. L. ch. 211C, § 1 (1990).

226. *Id.* During their tenure on the Commission, the members annually elect a chairman (and a vice-chairman who serves as chairman in the absence of the chairman) who serves as the presiding officer at Commission meetings. RULES OF THE COMM'N ON JUD. COND., Rule 3(A), 3(B) (1988)[hereinafter R.C.J.C.], *reprinted in* 1988 COMM'N JUD. COND. ANN. REP. 23, 24 (app. B). Meetings are held on notice from the chairman or upon written request of at least three members, and in order for most business to be transacted, there must be a quorum of at least five, including one judge, one lawyer, and one lay person. *Id.* Rule 3(B), 3(C).

Also, the Commission's rules require a member whose impartiality might reasonably be questioned in a matter to disqualify himself or herself or be disqualified by a affirmative vote of at least five members of the Commission. *Id.* Rule 2(B). If there is a disqualification, the chairman of the Commission may call (an) alternate(s), who are appointed in the same manner as the members of the Commission. MASS. GEN. L. ch. 211C, § 1 (1990).

227. R.C.J.C. Rule 2(C), *supra* note 226, at 24.

228. MASS. GEN. L. ch. 211C, § 3(3).

complaints, conducting investigations, employing other members of the Commission's staff including special counsel, investigators and other clerical help, and preparing a budget and annual report.[229]

By statute, the Commission has "the authority to receive information, investigate, conduct hearings, and make recommendations to the Supreme Judicial Court concerning allegations of judicial misconduct and allegations of mental or physical disability affecting a judge's performance."[230] Its jurisdiction extends over all state judges, including those who have been recalled for temporary service.[231] However, there are two major jurisdictional limitations placed on the Commission. It is prohibited from taking action on "complaints arising out of acts or omissions occurring more than one year prior to the date the [C]ommission's proceedings are initiated"[232] and it may not take action against a judge for "making findings of fact, reaching a legal conclusion, or applying a law as he [or she] understands it" without there first being a showing of fraud, bad faith, or clear violation of a standard of conduct.[233]

Generally, the statute, as amended, provides some other rules concerning the organization of the Commission, which in addition to being ambiguous, appear to be an attempt to position the Commission within the judicial department and under the control of the Supreme Judicial Court. The first provision states that the Commission is mandated to "report only to the Supreme Judicial Court."[234] This provision was not reflected in the pre-1988 versions of the statute[235] and remains contrary to § 4 in the current chapter 211C which provides that "[t]he commission shall submit annually to the general court and the Supreme

229. *See id.* § 3(4)(a)-(k).

230. *Id.* § 2(1). Under Chapter 211C, § 2(5) the statute outlines five types of conduct that are grounds for discipline, they are as follows:

(a) conviction of a felony;
(b) willful misconduct in office;
(c) willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute;
(d) conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer, whether conduct in office or outside of judicial duties, that brings the judicial office into disrepute; or
(e) any conduct that constitutes a violation of the codes of judicial conduct or professional responsibility.

Id. § 2(5)(a)-(e).

231. *See id.* § 2(2).

232. *Id.* § 2(3). There is an exception to this rule where relevant, past acts or omissions older than a year may be considered by the Commission. They may be considered "when the last episode of an alleged pattern of recurring judicial conduct arises within the one year period." *Id.*

233. *Id.* § 2(4).

234. *Id.* § 3(1).

235. *See* 1978 MASS ACTS ch. 478, § 114 where there is no provision requiring that the Commission report solely to the S.J.C.

Judicial Court a report of its activities together with recommendations."[236] Next, a provision provides that the Commission's budget is appropriated annually by the general court.[237] While the intention of this provision may be to state that the Supreme Judicial Court, as the 'general court' of the judicial branch appropriates money for the operating costs of the Commission and is therefore in control of its budget, the term 'general court' is a recognized colloquialism for the state legislature, which indeed has the only true power of appropriation.[238] Thus, the legislature is not entirely removed from the Commission's operation. Finally, the Commission is granted the authority to promulgate its own operating rules, subject to the approval of the Supreme Judicial Court.[239] This provision unquestionably lends some minor support to the argument that the Commission exists within the judicial branch.

Upon receipt of a complaint of judicial misconduct,[240] under chapter 211C, the Commission must immediately notify the judge so affected by the allegation of the proceedings and their subject matter[241] and then conduct a "prompt, discreet and confidential inquiry, investigation and evaluation."[242] Initially, a complaint is screened to determine whether it "set[s] forth facts which, if true, would constitute misconduct or disability as defined by Chapter 211C."[243] Next, assuming that the complaint was not dismissed, the Executive Director of the Commission conducts a more thorough inquiry, investigation and evaluation in order to determine whether there is sufficient cause to proceed further.[244] The Executive Director's findings are then presented

236. MASS. GEN. L. ch. 211C, § 4. The only consistent way to read these two provisions of the statute is to assume that § 3 refers to a limited report of all its findings and recommendations on each individual matter before the court.

237. *See id.* § 3(1).

238. The argument has been made that since the Supreme Judicial Court controls the purse-strings of the Commission, the evidence is overwhelmingly in favor of the position that the Commission exists within the judicial department. Based on the plain meaning of the words of the statute and the fact that only the legislature has the power of appropriation, that argument lacks foundation.

239. *See id.*

240. The Commission may receive either an oral or written complaint, or may initiate proceedings on its own volition if the commission receives "reasonable information" from a source, including the news media. *See id.* § 5(1). It is also likely, but virtually unconfirmable due to confidentiality requirements, that the members of the state legislature or a person from the governor's office could cause a complaint to be filed and proceedings initiated.

241. *See id.* § 5(1). *But see* § 2(a) & 2(b), where delay in the notification of the judge concerning the proceedings is justified due to the nature of the complaint, the possibility that evidence may be destroyed, or concern for danger of reprisal.

242. *Id.* § 5(1).

243. R.C.J.C. Rule 6(A), *supra* note 226, at 25.

244. *See id.* Rule 6(B)(1). If the Executive Director concludes that the appointment of special counsel is necessary, the Executive Director "shall recommend that the Commission request the appointment of a Special Counsel by

within ninety days from the initiation of the proceeding along with a recommendation to the Commission for a majority vote on "whether there is adequate reason to proceed to the preparation of a detailed complaint or statement of allegations."[245]

If the majority of the Commission finds adequate cause to proceed, the Commission may then in a second round of proceedings request the complainant to file a detailed sworn complaint, or if that cannot be obtained, the Executive Director may prepare a clear statement of allegations with supporting factual basis.[246] This complaint or statement of allegations is immediately served upon the judge who is given "twenty-one days from the receipt of the sworn complaint or statement of allegations to respond in writing to the charges [and] to file a written request for a personal appearance before the Commission."[247] During this stage of the proceeding and before the issuance of formal charges, a judge "becomes entitled to compel by subpoena the attendance and testimony of witnesses through depositions, and to provide for inspection of documents, books, accounts, written or electronically-recorded statements, or other records."[248] If a judge does request to make a personal appearance, he or she has the option of attending the Commission's formal meeting with counsel of choice, and both are entitled to make statements before it votes to issue formal charges.[249] After the judge's appearance, the Commission holds deliberations during which the rules of evidence do not apply and concludes with a vote on how to dispose of the instant case before it.[250] The Commission's rules pro-

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the Supreme Judicial Court." *Id.* "The commission may also take such action upon its own motion." *Id.* At this point, the executive director may "compel by subpoena the attendance and testimony of witnesses, including the judge" and similarly obtain inspection and/or production of documents. MASS. GEN. L. ch. 211C, § 5(4) (1990).

245. MASS. GEN. L. ch. 211C, § 5(5) (1990). *See also* R.C.J.C. Rule 6(E), *supra* note 226, at 25.

246. MASS. GEN. L. ch. 211C, § 5(5) (1990). The detailed complaint or statement of allegations must "clearly set forth each act of misconduct where more than one act of misconduct is alleged, and shall state clearly the provision of statute, code of judicial conduct or code of professional responsibility alleged to have been violated by each act alleged to have been violated by each act of misconduct." *Id.*

247. *Id.* § 5(7). Curiously, during this point of the proceeding (before there has been a determination of sufficient evidence to issue formal charges) the Commission has the authority to present a reasoned recommendation of temporary non-assignment or re-assignment of a judge pending a final determination of the matter to the Supreme Judicial Court. *See* R.C.J.C. Rule 6(M), *supra* note 226, at 26. It is difficult to envision how this provision and its potential penalty can be reconciled with a judge's due process rights, not to mention the confidentiality requirements strictly enforced at this stage of the proceedings.

248. R.C.J.C. Rule 6(K)(1), *supra* note 226, at 26.

249. *See* MASS. GEN. L. ch. 211C, § 5(9) (1990).

250. *See* R.C.J.C. Rules 7(A) & 7(B), supra note 226, at 26. "If at any time prior to the issuance of formal charges the commission determines that it does not have

vide that the case must be disposed of, by vote, in one of the four following ways:

> (1) If it finds that there has been no misconduct, the Executive Director shall be instructed to send the judge and the complainant notice of dismissal.
> (2) If it finds that there has been misconduct for which a private reprimand constitutes adequate discipline, and if the judge consents, it shall issue the reprimand. The complainant shall be notified that the matter has been so resolved.
> (3) If it finds that there has been conduct that is or might be the cause for discipline but for which an informal adjustment is appropriate, it may, with the agreement of the judge, so inform or admonish the judge, direct professional counseling or assistance for the judge, or impose conditions on the judge's future conduct. The complainant shall be notified that the matter has been so resolved. When either conditions or treatment is prescribed, the Commission shall provide for supervision, enforcement thereof, or both.
> (4) If it finds by a preponderance of the credible evidence that there is sufficient cause to believe that there has been misconduct of a nature requiring a formal disciplinary proceeding, the Commission shall issue formal charges against the judge. A copy of the formal charges shall be served promptly upon the judge, and the judge shall have ten (10) days to respond.[251]

After the formal charges are issued and served upon the judge and the judge responds within the ten days prescribed by the statute and Commission rules, the Commission must then file a copy of both documents with the Supreme Judicial Court, which must "promptly appoint a hearing officer."[252] The Commission then schedules a hearing date which must take place "not less than thirty (30) days nor more than sixty (60) days" from the date of the appointment of the hearing officer.[253] It is also at this point in the proceeding that rules governing confidentiality cease to apply and the subject matter becomes public.[254]

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sufficient cause to proceed, the commission shall terminate the proceedings by closing the investigation or dismissing the complaint or statement of allegations." MASS. GEN. L. ch. 211C, § 5(10) (1990).

251. R.C.J.C. Rule 7(B)(1)-(4), *supra* note 226, at 27.

252. MASS. GEN. L. ch. 211C, § 5(14) (1990).

253. R.C.J.C. Rule 8, *supra* note 226, at 27.

254. *See id.* Rule 5, at 24; *see also* MASS. GEN. L. ch. 211C, § 6(1)-(5) (1990). The statute and the rule basically provide that "all proceedings of the commission shall be kept confidential until there has been a determination of sufficient cause and formal charges have been filed with the supreme judicial court." *Id.* § 6(1). A judge may, however, waive his or her rights to confidentiality guaranteed under § 6(1) before a finding of sufficient cause and the issuance of formal charges. *Id.* at § 6(2). Also, the Commission may make some limited statements concerning a case notwithstanding the provisions of § 6(1) in the following circumstances:

> in any case in which the subject matter becomes public, through independent sources or through a waiver of confidentiality by the judge, the commission may issue such statements as it deems appropriate in order to

The final stage of the proceedings under the Commission's jurisdiction is the formal hearing. Before the formal public hearing is held before the hearing officer appointed by the Supreme Judicial Court, the judge and the commission are entitled to additional discovery[255] and are given the opportunity to amend the formal charges and written response respectively.[256] "At the hearing, all testimony shall be under oath, the rules of evidence applicable to civil proceedings shall apply, and the judge shall be accorded due process of law."[257] At the hearing, the commission through its staff attorneys or by special counsel has "the burden of proving the charges by clear and convincing evidence."[258] After the formal hearing, the hearing officer submits to both the judge and the commission "a report containing proposed findings and recommendations, the transcripts of all testimony and all exhibits" to which both parties are allowed to submit timely objections that become a part of the record.[259] Before the Commission is given the opportunity to make conclusions and recommendations for discipline which are reported to the Supreme Judicial Court and must be made within ninety days from the date of the hearing, a judge is entitled to one last opportunity to appear and be heard before the Commission regarding its recommendation for discipline.[260] Finally, a vote is taken; "if a majority of all the members of the commission concur that discipline is warranted," a recommendation and the entire record[261] compiled from the formal hearing will be sent to the Supreme Judicial Court.[262] Alternatively, "if a majority of the members of the commission concur that discipline should not be recommended, the matter shall be dismissed, and the judge and complainant, if any, shall be noti-

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confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of a judge to a fair hearing without prejudgment, or to state that the judge denies the allegations.

Id.

255. MASS. GEN. L. ch. 211C, § 7(2) (1990).

256. See § 7(1) of Chapter 211C which details a judge's right to amend his written response before the formal hearing. See § 7(6) of Chapter 211C for the Commission's right to amend the statement of charges after the commencement of the hearing, provided permission is sought from the hearing officer and/or judge, and that the judge is granted an opportunity to respond.

257. MASS. GEN. L. ch. 211C, § 7(3) (1990). The judge has the right "to present evidence and to cross-examine witnesses, subject to the rules of evidence applicable to civil proceedings." *Id.* § 7(4).

258. *Id.* § 7(4).

259. *Id.* § 7(8).

260. *Id.* § 7(9).

261. The entire record includes transcripts, exhibits, the hearing officer's reports, any objections to the hearing officer's reported findings, as well as any dissent in the Commission's recommendation following the formal hearing.

262. *See id.* § 7(10).

fied of such dismissal."[263]

C. *The Commission on Judicial Conduct and the Constitutional Test*

Before the Commission on Judicial Conduct was established by legislative act in 1978, Massachusetts was headed down a decidedly different path with regard to the regulation of judicial conduct. The Supreme Judicial Court, although it never held that it had the exclusive power to discipline members of the judiciary in matters short of removal, asserted a prominent role in that area to the exclusion of the other departments of state government.[264] Indeed from the late 1960s through 1978, investigations into alleged judicial abuses almost always began with investigation by groups established by the Supreme Judicial Court: the Committee on Complaints; special ad hoc commissions; and the Committee on Judicial Responsibility. Nonetheless, from an analysis of the Cox Commission recommendations, Annual Reports of the Chief Justice on the State of the Judiciary, and even case law, this judicial action seemed only to be a temporary solution to a problem requiring constitutional action, i.e. a constitutional amendment.

In December of 1976, the Cox Commission, more formerly known as the Governor's Select Committee on Judicial Needs, released its findings on the organization, management and financing of the judicial system after a thorough study of all its aspects.[265] In its thirty-first recommendation, the Cox Commission stated:

> The Massachusetts Constitution should be amended to establish a Judicial Conduct Commission to receive and investigate complaints against judges and to recommend appropriate action, including removal from office, to be taken by the Supreme Judicial Court.[266]

According to the Cox Commission such a constitutional amendment would necessarily serve at least four important purposes: (1) a commission would help to maintain confidence in the judicial system for as of now there is no effective forum in which a complaint can be heard with a view towards some definite action;[267] (2) a commission can deal with problems of judicial incapacity with dignity and minimal affront;[268] (3) the commission and the Supreme Judicial Court would be empowered to take formal public action in cases not warranting removal from

263. *Id.* § 7(11). Please note that this section does not preclude the Commission from informally resolving a complaint or allegations against the judge. *See id.* § 7(12).

264. *See In re* DeSaulnier, 360 Mass. 757, 274 N.E.2d 454 (1971).

265. For a description of the study by the Cox Commission, see Archibald Cox, *The Report of the Governor's Committee on Judicial Needs*, 62 MASS. L.Q. 23, 27-29 (1977).

266. Cox Commission, *supra* note 48, at 45.

267. *Id.*

268. *Id.*

office;[269] and (4) the commission procedure would relieve the Legislature of a time-consuming and sometimes divisive function, the performance of which is all too likely to interfere with more important duties.[270] The commission's call for a constitutional amendment echoed in the ears of the Chief Justice Hennessey of the Massachusetts Supreme Judicial Court who in commenting about the Committee on Judicial Responsibility and the proposed Commission stated that "the combined experiences the Committee and the Commission, if established, will demonstrate the desirability and wisdom of the adoption of a constitutional amendment establishing a judicial conduct system similar to that in California."[271]

However, prior to either of these calls for a constitutional amendment, the Supreme Judicial Court suggested in its is decision in *In re Morrissey*,[272] what course of action should be taken and the position it supported in the regulation of judicial conduct. The Court stated:

> It is in this spirit [of assuring the public that judicial misconduct will not be tolerated by the Supreme Judicial Court] that this court has supported the concept of a constitutional amendment for the formation of a commission with the power necessary to investigate and establish facts concerning possible misconduct. As an interim procedure, pending a constitutional change, this court has supported legislation having, within constitutional limits, the same purpose and aim.[273]

This statement calling for a constitutional amendment in 1974, could not more accurately and concisely describe the direction that Massachusetts was heading toward during this time period. Unfortunately for this state, Massachusetts legislators have dismissed the *Morrissey* court's goal of amending the constitution and have become complacent with an interim statutory procedure, the Commission on Judicial Conduct,

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269. *Id.*

270. *Id.*

271. Edward F. Hennessey, *The State of the Judiciary: [Second] Annual Report of the Chief Justice of the Massachusetts Supreme Judicial Court*, 63 MASS. L.Q. 101, 106-7 (1978). *See also* Edward F. Hennessey, *The State of the Judiciary: Fourth Annual Report of the Chief Justice of the Massachusetts Supreme Judicial Court*, 65 MASS. L.Q. 104, 106 (1980) (for indication that the Commission's powers are controversial in light of state constitution and reiteration that constitutional amendment has been proposed and endorsed); Edward F. Hennessey, *Eleventh Annual Report to the Bar on the State of the Massachusetts Judiciary*, 72 MASS. L.Q. 3 (1987) (delineating the task of court is not to undermine judicial independence through judicial accountability).

272. 366 Mass. 11, 313 N.E.2d 878 (1974). In this case, Judge Francis X. Morrissey was the target of allegations that he improperly attempted to influence the outcome of a case in Federal Court and that he engaged in the practice of law after being appointed a judge. *See id.* The Supreme Judicial Court held that "Judge Morrissey did not . . . attempt improperly to influence the outcome of a case . . . . Nor did he . . . engage in the practice of law after his appointment to the bench." *Id.* at 17, 313 N.E.2d at 882. However, the court ordered his censure and issued a fine against him. *See id.*

273. *Id.* at 17, 313 N.E.2d at 882.

which is pushing the constitutional limits of its authority to regulate judicial conduct.

1. The Problem

In the Massachusetts Constitution, there is simply no provision granting any governmental department the authority to investigate judicial misconduct, when the goal of that investigation is merely to discipline a judge short of removal.[274] Twenty years ago this problem was resolved by the Supreme Judicial Court which interpreted its inherent and constitutional authority to extend over such matters.[275] Since then, the court has adopted the Code of Judicial Conduct which provides a new litany of conduct standards for judges to follow,[276] created committees to do all the preliminary research and investigation of violations, and has fashioned appropriate remedies in cases where judges have violated those standards of judicial conduct less severely than warranted for the judicial death penalty—removal from office by impeachment or address. Through the creation of the Commission on Judicial Conduct, the legislature has re-aggravated the constitutional deficiency in discipline short of removal by implicating concern over whether other constitutional issues such as judicial independence and separation of powers are being violated.

2. The Constitutional Test[277]

The constitutional test most recently used by the Supreme Judicial Court to determine whether there has been a violation of Article 30 and its separation of powers principle is whether there is an interference or intrusion by one department of government on a power inherent in another department of government. This test is divided into three parts: (1) whether the power allegedly interfered with or intruded upon is inherent to that department of government; (2) whether there are two departments involved; and (3) whether there is an interference or intrusion upon that inherent power.[278]

Throughout the recent history of the regulation of judicial conduct, there has been one constant principle central to whether the legislation

274. *See supra* notes 33-36 and accompanying text.

275. *See supra* notes 98-105 and accompanying text.

276. The Code of Judicial Conduct was adopted into the S.J.C. Rules in Massachusetts on December 4, 1972. *See* Vita, *supra* note 97, at 676 (containing a concise account of the adoption of the Code of Judicial Conduct by the S.J.C.).

277. The Massachusetts Judicial Council has alluded to the fact that the legislation establishing the Commission has not been subject to the Massachusetts Constitutional test; the test they are apparently referring to, however, is whether the Commission has so far exceeded its role that there is an interference with the power of the General Court to remove a judge. This would be a separation of powers violation.

278. *See supra* notes 203-211 and accompanying text.

creating the Commission on Judicial Conduct is constitutionally suspect because of a violations of Article 29 and Article 30 of the Massachusetts Declaration of Rights; that is, the authority of the Supreme Judicial Court, as the nerve center of the judicial branch, to regulate the conduct of judges under the rationale of the *DeSaulnier* opinion. Even the legislature has been willing to concede that such authority can lawfully exist in the judiciary and has ironically demonstrated this through the placement of a clause in the enabling legislation of the Commission on Judicial Conduct which provides: "[t]he foregoing shall not be construed to derogate the inherent authority of the supreme judicial court to supervise and discipline judges. . . ."[279] Moreover, many formal actions taken by the Commission are ultimately sent to the Supreme Judicial Court where records and recommendations are reviewed before a final decision on appropriate judicial discipline, if any, is made by the court.

Substantially more controversial and difficult to prove is that the Commission on Judicial Conduct is a legislative body which is interfering with the inherent power of the judiciary to supervise and discipline judges. Indeed, there are several provisions which obscure the proper characterization of the Commission. For example, the Commission's rules recommendations are required to be submitted to the Supreme Judicial Court which has essentially veto power and de novo review over its rules and recommendations, respectively.[280] Next, three of the members of the Commission are also members of the judiciary, however, this provision grants the judicial branch relatively limited voting strength. Also, as alluded to earlier, the Commission is mandated to report only to the Supreme Judicial Court, but conversely it must make annual reports to both the General Court and the Supreme Judicial Court.[281] Despite the presence of such provisions which tend to favor the conclusion that the Commission is judicial in nature thereby nullifying any separation of powers argument, the statutorily created Commission, when contrasted with its court enacted predecessor, the Committee on Judicial Responsibility, takes a form of legislative-independence from the judicial branch. Under the current statute, the Commission's budget is appropriated annually by the General Court,[282] whereas before the Committee on Judicial Responsibility was funded through appropriations made generally to the judiciary. Also, the current Commission "draws its powers and mandate solely from the

279. MASS. GEN. L. ch. 211C, § 2(2) (1990). See COX COMMISSION, *supra* note 48, at 44 for evidence that the recommended constitutional amendment would confirm the authority of the Supreme Judicial Court over such matters.

280. *See* MASS. GEN. L. ch. 211C, §§ 3(1) & 7(10) (1990).

281. *See id.* §§ 3(1) & 4.

282. *See id.* § 3(1).

statutory enactment,"[283] whereas the Committee on Judicial Responsibility drew its powers and mandate solely from the constitutional and statutory authority vested in the Supreme Judicial Court.[284]

Since the power to supervise and discipline is inherent in the Supreme Judicial Court and judiciary, and the Commission is by its very nature legislatively-independent of the judicial department, the remaining question is whether there is any interference or intrusion upon the inherent power in question. Whether such an intrusion actually exists cannot be proven by documentary evidence due to the confidentiality requirements imposed upon the Commission's informal proceedings,[285] however, the authority of the Supreme Judicial Court is systematically susceptible to such interference and intrusion by the Commission. This systematic susceptibility emanates from the broad, independent base of authority to investigate allegations of judicial conduct that is granted by statute to the Commission and also from the decreased role of the Supreme Judicial Court in investigatory procedures after the Committee on Judicial Responsibility was superseded. First, due to its broad authority and constant immersion in misconduct for which it conducts detailed fact finding hearings as thorough as any before the Supreme Judicial Court, the Commission's rhetorical "eyes" might perchance wander from its investigatory authority on to the disciplinary authority of the Supreme Judicial Court, which is itself primarily concerned with other business. But the mere possibility of such an occurrence would not in all likelihood be sufficient to trigger constitutional review. Second, the Commission's actual procedures are edging ever closer to the point where their actions are unquestionably disciplinary rather than investigatory. No where is this point more apparent than with the Commission's authority to make informal adjustment. Under this power the following is permissible:

> (1) With the agreement of the judge, the commission may by informal adjustment dispose of a complaint at any stage of the proceedings by:
>
> (a) informing or admonishing the judge that his conduct is or may be cause for discipline;
>
> (b) directing professional counseling and assistance for the judge;
>
> (c) imposing conditions on the judge's conduct;

283. McKenney v. Commission on Judicial Conduct, 380 Mass. 263, 273, 402 N.E.2d 1356, 1363 (1980)(Liacos, J., concurring).

284. The Committee on Judicial Responsibility was created by court rule and thus directly depended on the support of the Supreme Judicial Court for its authority.

285. Confidentiality requirements block access to exactly how much of an opportunity, if any at all, the Commission allows the Supreme Judicial Court to consider the fairness of informal adjustments which do not require a recommendation to the Supreme Judicial Court. *See, e.g.*, MASS. GEN. L. ch. 211C, §§ 8(1) & §§ 8(3) (1990). For details of the confidentiality requirements, see *supra* note 254.

(d) persuading a judge to retire voluntarily.

(3) The commission may issue a private reprimand with the consent of the judge.[286]

Although couched in terms of consensual discipline, these actions, which the Commission is justified in taking under the statute, are beyond what ordinary persons might call investigation. While these actions are relatively minor in comparison with some of the actions that the Supreme Judicial Court has the authority to take when circumstances warrant,[287] one cannot escape the conclusion that a judicial reprimand, whether public or private, or restriction on a judge's behavior is nonetheless, discipline. Thus, in theory and in practice the system permits interferences and infringements on the inherent authority of the judiciary, thereby implicating separation of powers and judicial independence concerns.

VI. CONCLUSION

In 1978, members of the Massachusetts legislature and judiciary ap-

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286. MASS. GEN. L. ch. 211C, §§ 8(1) & 8(3) (1990).

287. In general, it has been held that the power to discipline judges is inherent in the state's highest court. The inherent power of the court includes the power to:

(a) Recommend impeachment;

(b) Impose discipline on a judge as an attorney;

(c) Suspend with salary;

(d) Censure;

(e) Reprimand;

(f) Impose administrative sanctions, including transfer or reassignment; and

(g) Take other action, as appropriate, including summary action in an emergency.

A.B.A. STANDARDS, *supra* note 2, § 1.1. In addition, the concept of inherent powers may be better understood by the more precise definition which follows:

> Inherent power may be described as "implied," "essential," "incidental," or "necessary." It is essential to the existence, dignity and operation of the court as a separate but equal part of government. The authority is implied because it is indispensable to the court if the court is to perform the duties specifically assigned to it. This inherent power includes the authority to discipline judges independent of any express constitutional grant. The court has this power because it is responsible for the operation of the judicial branch and because the power has not usually been granted to either of the other two branches. The power to remove a judge from office is specifically omitted from the list of inherent powers of the court; inherent power does not include the power to remove.

Id. commentary to § 1.1 at 3. *See also* James D. Cameron, *The Inherent Power of a State's Highest Court To Discipline the Judiciary*, 54 CHI.-KENT L. REV. 45 (1977) (discussing the historical sources of the inherent powers doctrine).

The Massachusetts Supreme Judicial Court defined an inherent power as "one 'essential to the performance of [the court's] functions, to the maintenance of their authority, and to their capacity to determine the rights of parties according to law.' " Commonwealth v. Jackson, 369 Mass, 904, 922, 344 N.E.2d 166 (1976) (quoting Blankenburg v. Commonwealth, 260 Mass. 369, 373, N.E. 2d (1927)).

parently decided to compromise with regard to the regulation of judicial misconduct which was not sufficiently egregious to warrant dismissal, an area not provided for under the Massachusetts Constitution. The Supreme Judicial Court, ridden with fiscal and organizational problems, would ultimately keep the power it asserted in *DeSaulnier* to supervise and discipline judges. The legislature would also keep its practically useless and outdated constitutional powers of impeachment and address. The Supreme Judicial Court would then therefore release somewhat its former toehold on the investigation stage of regulating judicial conduct to the statutorily created Commission on Judicial Conduct, in return for a legislative guarantee that such a commission will be funded. Such a solution would satisfy critics pending a constitutional amendment, which would follow with the real teeth.

As originally designed, the Commission on Judicial Conduct was enacted as an investigatory unit for the Supreme Judicial Court and the legislature. Today, the Commission pushes the limits of its authority to investigate by informally resolving cases and imposing private and public fines and other punishment. Through informal adjustment and the other punishment mechanisms, the Commission is interfering with the inherent power of the Supreme Judicial Court to discipline judges, and is therefore violating separation of powers and judicial independence principles. Furthermore, it is questionable whether the constitutional procedures of impeachment and address shall ever be needed again because of the capacities of the Commission to adequately punish the members of the judiciary.

Accordingly, it is recommended that Massachusetts' judges and legislators demand a constitutional amendment similar to the one outlined in the 1976 Cox Commission report[288] which would firmly establish a Judicial Conduct Commission and answer the constitutional question on who possesses authority to regulate judicial misconduct in matters not requiring removal.

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288. *See generally* COX COMMISSION, *supra* note 48, at 45-46.

Third-Generation-DES Claims

I. INTRODUCTION

In 1947, the Federal Food and Drug Administration (FDA) approved diethylstilbestrol (DES) as a prescription drug to be used in the care of pregnant women.[1] Between 1947 and 1971, DES was widely prescribed as a miscarriage preventative.[2] An estimated three million pregnant women used DES.[3] Pregnant women were commonly prescribed doses "that were roughly equivalent to taking 2,000 of today's birth control pills each day."[4] In 1971, the FDA banned the use of DES by pregnant women[5] in response to scientific evidence that DES caused cancer and other deformities in the offspring of women who were prescribed the drug.[6] Today, further scientific evidence suggests that the harmful effects of DES extend beyond the children of women who used the drug. Another generation, the grandchildren of those treated with DES, apparently is inflicted with its injurious effects.[7]

Some third-generation-DES plaintiffs have already looked to the law for compensation for their injuries.[8] Undoubtedly, more suits will be

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1. Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 963 (1978).

> Diethylstilbestrol . . . [is a] nonsteroid[al] manufactured (synthetic) chemical that has the properties of estrogen, a female sex hormone. It is used to treat problems of menopause and menstruation and to limit milk production in the breasts, as well as in the treatment of prostate cancer. It was formerly used in cases of threatened abortion but was found to be associated with a higher-than-normal incidence of vaginal cancer (and other cancers of the reproductive tract) in the daughters of women so treated during pregnancy. Also called stilbestrol.

MIKEL A. ROTHENBERG & CHARLES F. CHAPMAN, DICTIONARY OF MEDICAL TERMS 127 (2d ed. 1989).

2. Note, *Market Share Liability—An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668, 668 (1981).

3. Rorie Sherman, *New DES Front*, NAT'L L.J., Mar. 12, 1990, at 1, 26.

4. *Id.*

5. New Drugs Notice, 36 Fed. Reg. 21,537-38 (1971) (contradicting DES use by pregnant women).

6. Peter Greenwald et al., *Vaginal Cancer After Maternal Treatment with Synthetic Estrogens*, 285 NEW ENG. J. MED. 390, 392 (1971) ("There can no longer be doubt that synthetic estrogens are absolutely contraindicated in pregnancy."); Arthur L. Herbst et al., *Adenocarcinoma of the Vagina*, 284 NEW ENG. J. MED. 878, 880 (1971) ("Although the chance of development of these tumors appears to be very small, the results of this study suggest that it is unwise to administer stilbestrol to women early in pregnancy.").

7. *See infra* notes 38-43 and accompanying text.

8. McMahon v. Eli Lilly & Co., 774 F.2d 830, 831 (7th Cir. 1985); Grover v. Eli

brought. The injuries complained of are of tragic proportions, the factual issues involve complex questions of medical science, and the legal theories argued require the identification of the outer limits of tort law. This note examines whether a cause of action should be recognized for the third-generation-DES plaintiff.

Part II addresses the history of DES and its attendant litigation.[9] Part III examines the judicial decisions from four jurisdictions that have addressed the third-generation-DES plaintiff's cause of action.[10] Part IV is an argument favoring the recognition of the third-generation claim.[11] Part V is the conclusion.[12]

II. BACKGROUND

A. *Medical History of DES*

DES is a synthetic form of the naturally occurring female sex hormone estrogen.[13] Research of the English scientist E.C. Dodds, in 1938, led to the ability to create synthetic estrogen.[14] Its discovery was expected to be beneficial in treating a number of conditions believed to be associated with low estrogen levels.[15] More importantly, it was expected to be useful in the prevention of miscarriages among pregnant women.[16]

After the acclaimed discovery of this unpatented drug, several drug companies immediately prepared to market DES.[17] Pursuant to the Federal Food, Drug, and Cosmetic Act of 1938,[18] a number of companies sought FDA approval to begin marketing efforts.[19] Application for FDA approval was made on a New Drug Application (NDA).[20] NDAs are reports made by drug manufacturers to the FDA requesting ap-

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Lilly & Co., 591 N.E.2d 696, 698 (Ohio 1992); Enright v. Eli Lilly & Co., 570 N.E.2d 198, 199 (N.Y. 1991); DeMayo v. Schmitt, No. 625, 1989 Phila. Cty. Rptr. LEXIS 73 at *3 (C.P. Philadelphia County Dec. 28, 1989); Paul Marcotte, *DES Legacy*, A.B.A. J., June 1990, at 14; Sherman, *supra* note 3, at 1.

9. *See infra* notes 13-92 and accompanying text.

10. *See infra* notes 93-165 and accompanying text.

11. *See infra* notes 166-353 and accompanying text.

12. *See infra* notes 354-370 and accompanying text.

13. ROTHENBERG & CHAPMAN, *supra* note 1, at 127.

14. Ferrigno v. Eli Lilly & Co., 420 A.2d 1305, 1310 (N.J. Super. Ct. Law Div. 1980).

15. Sheiner, *supra* note 1, at 976.

16. *Id.* at 967. Studies done during the 1930s had indicated a causal connection between lower-than-normal levels of naturally occurring estrogen and problem pregnancies. *Id.*

17. Martin v. Abbott Lab., 689 P.2d 368, 373-74 (Wash. 1984).

18. Chapter 675, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301-392 (1988)).

19. *Martin*, 689 P.2d at 373.

20. Federal Food, Drug, and Cosmetic Act of 1938, § 505, 21 U.S.C. § 355 (1988).

proval of a new drug.[21] NDAs contain clinical evidence of the safety and effectiveness of the proposed drug.[22]

In 1940, the FDA requested ten drug companies that had already filed NDAs for DES to pool their data and jointly resubmit the information normally included in individual manufacturers' NDAs.[23] The FDA took this step because it decided that the NDAs already filed to date were insufficient to establish the criteria for approval.[24]

After the cooperative efforts of the ten drug companies, the FDA first approved DES in 1941.[25] The initial approval was for uses unrelated to pregnancy.[26] Six years later, in 1947, the FDA approved DES for use in the treatment of pregnant women.[27] By 1952, 123 NDAs for DES had been approved.[28] In that year, the "new drug" status of DES was lifted, relieving all companies that wished to market DES in the future from filing an NDA.[29] "About 300 pharmaceutical companies manufactured DES during the time it was on the market for use by pregnant women."[30]

By 1971, scientific studies indicated a statistically significant association between DES use by pregnant women and rare forms of cancer and other illnesses in their daughters.[31] The most devastating effect of prenatal DES exposure is believed to be adenocarcinoma, an extremely malignant form of cancer that attacks the reproductive organs of women.[32] Signs of adenocarcinoma and some of the other harmful effects

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21. *Id.*

22. *Id.* A "new drug" is defined as:

> [A]ny drug the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of drugs, as safe for use under the conditions prescribed, recommended, or suggested in the labeling thereof.

Id. § 201, 21 U.S.C. § 321 (1988).

23. Ferrigno v. Eli Lilly & Co., 420 A.2d 1305, 1311 (N.J. Super. Ct. Law Div. 1980).

24. Martin v. Abbott Lab., 689 P.2d 368, 374 (Wash. 1984).

25. *Ferrigno*, 420 A.2d at 1311.

26. *Id.* The uses for which DES was originally approved included "treatment of menopausal symptoms, senile vaginitis, gonorrheal vaginitis, and suppression of lactation." *Id.* It is still used for these and other conditions unrelated to pregnancy. *Id.* at 1312.

27. *Martin*, 689 P.2d at 374.

28. Sindell v. Abbott Lab., 607 P.2d 924, 932 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

29. *Martin*, 689 P.2d at 374.

30. Sherman, *supra* note 3, at 27.

31. Greenwald et al., *supra* note 6, at 391; Herbst et al., *supra* note 6, at 880.

32. Sherman, *supra* note 3, at 26.

> The National Institute for Cancer has estimated the chance a DES daughter will develop clear cell adenocarcinoma is about 1 in 1000. Plaintiffs claim that as many as two-thirds of all DES daughters also suffer from malformed reproductive organs: uteruses that are so small they often cannot accommodate a growing fetus; cervixes that are too weak to hold the fe-

of DES on the users' daughters do not appear until 10-to-20 years after birth.[33] The only available treatment for this disease is the removal of the infected organs resulting in the inability of DES victims to bear children or engage in sexual activity.[34] As a result of these findings, in 1971 the FDA banned the use of DES by pregnant women.[35]

Although to this day drug manufacturers deny that conclusive evidence of the harm caused by DES exists,[36] scientific studies and the legal community seem to agree that certain of the alleged DES-linked injuries have been established as arising out of DES use.[37] The more recent scientific evidence of the effects of DES on alleged third-generation victims is sparse. From the evidence that does exist, two distinct categories of injuries to the third generation are suggested.[38] One type is injuries to the third generation associated with premature birth caused by the "anatomical alteration" of the second generation's (the DES daughter's) reproductive tract.[39] These injuries are expected to be limited to the children of DES daughters and not affect future generations.[40] The other type of injury is genetic mutations.[41] These injuries arise out of damage done to the genes of both DES sons and daughters.[42] This damage presumably can cause adenocarcinoma in third and future generations.[43]

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tuses in place for nine months; as well as other abnormalities rendering some infertile and causing others to give birth prematurely.

Id.

33. Sheiner, *supra* note 1, at 964-67.

34. Bichler v. Eli Lilly & Co., 436 N.E.2d 182, 184 (N.Y. 1982).

35. New Drugs Notice, 36 Fed. Reg. 21,537-38 (1971) (contradicting DES use by pregnant women).

36. Sherman, *supra* note 3, at 27; *see infra* note 56.

37. *Bichler*, 436 N.E.2d at 184; Arthur L. Herbst et al., *Epidemiologic Aspects and Factors Related to Survival in 384 Registry Cases of Clear Cell Adenocarcinoma of the Vagina and Cervix*, 135 AM. J. OBSTETRICS & GYNECOLOGY 876, 880 (1979).

38. Marcotte, *supra* note 8, at 14.

39. Sherman, *supra* note 3, at 27.

40. *Id.* "DES 'preemies' suffer from the same disorders all other premature babies can, including cerebral palsy, deafness and blindness. None of these disabilities is associated with the reproductive tract, therefore, none is expected to give rise to future generations' lawsuits." *Id.*

41. Marcotte, *supra* note 8, at 14. Third-generation plaintiffs claiming damages for genetic mutations are expected to rely on a study done by Dr. Bruce Walker at Michigan State University which showed "higher numbers of uterine adenocarcinomas and ovarian cystadenocarcinomas in third generation mice." *Id.*; *see* Bruce E. Walker, *Tumors of Female Offspring of Mice Exposed Prenatally to Diethylstilbestrol*, 73 J. NAT'L CANCER INST. 133, 133-40 (1984). Another article by Dr. Herbert Cox of Georgetown University Hospital for the *New England Journal of Medicine* is undergoing peer review. Sherman, *supra* note 3, at 26.

42. Sherman, *supra* note 3, at 26.

43. *Id.* at 27. "The number of genetically damaged DES people should grow less with time as abnormalities are diluted in the general gene pool or the affected people simply die . . . before they reproduce." *Id.*

B. *The DES-Daughter Cases*

The connection between DES and adenocarcinoma and other biological defects in the children of DES users gave rise to substantial litigation.[44] The majority of these suits were brought by the daughters of DES users against one or several drug manufacturers.[45] The plaintiffs in these actions are commonly referred to as "DES daughters."[46] The DES-daughter cases have three common characteristics.

First, alternative causes of action in negligence and strict liability form the basis of the suit.[47] Plaintiffs commonly allege that the defendant drug companies did not adequately test DES for use by pregnant women and that, if appropriate tests had been conducted, the hazards DES posed to the offspring of pregnant women would have been discovered.[48]

Alternatively, plaintiffs commonly allege that the defendants did not provide adequate warnings to inform DES users of the potential risks.[49] The defendant drug companies' failure to test and failure to warn are the bases on which the breach of the drug manufacturers' duty is premised under a negligence theory.[50] The DES-daughter complaint also alleges, based on the harmful effects the drug is now believed to have caused, that the drug companies produced a defective product and are

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44. Marcotte, *supra* note 8, at 14 (thousands of suits have been filed).

45. Tidler v. Eli Lilly & Co., 851 F.2d 418, 419 (D.C. Cir. 1988); McCormack v. Abbott Lab., 617 F. Supp. 1521, 1523 (D. Mass. 1985); Pipon v. Burroughs-Wellcome Co., 532 F. Supp. 637, 637 (D.N.J.), *aff'd*, 696 F.2d 984 (3d Cir. 1982); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1006 (D.S.C. 1981); Brown v. Superior Court, 751 P.2d 470, 473 (Cal. 1988); Murphy v. E.R. Squibb & Sons, Inc., 710 P.2d 247, 249 (Cal. 1985); Sindell v. Abbott Lab., 607 P.2d 924, 925 (Cal.), *cert. denied*, 449 U.S. 912 (1980); McCreery v. Eli Lilly & Co., 150 Cal. Rptr. 730, 732 (Ct. App. 1978); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 69 (Iowa 1986); Payton v. Abbott Lab., 437 N.E.2d 171, 173 (Mass. 1982); Abel v. Eli Lilly & Co., 343 N.W.2d 164, 166 (Mich.), *cert. denied*, 469 U.S. 833 (1984); Ferrigno v. Eli Lilly & Co., 420 A.2d 1305, 1309 (N.J. Super. Ct. Law Div. 1980); Kaufman v. Eli Lilly & Co., 482 N.E.2d 63, 66 (N.Y. 1985); Bichler v. Eli Lilly & Co., 436 N.E.2d 182, 184 (N.Y. 1982); Martin v. Abbott Lab., 689 P.2d 368, 371 (Wash. 1984).

46. *Tidler*, 851 F.2d at 419; Sherman, *supra* note 3, at 26.

47. *McCormack*, 617 F. Supp. at 1523; *Ryan*, 514 F. Supp. at 1006; *Sindell*, 607 P.2d at 926; *McCreery*, 150 Cal. Rptr. at 732; *Mulcahy*, 386 N.W.2d at 69; *Abel*, 343 N.W.2d at 168; Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 244 (Mo. 1984); *Ferrigno*, 420 A.2d at 1309; *Martin*, 689 P.2d at 371; Collins v. Eli Lilly & Co., 342 N.W.2d 37, 42 (Wis.), *cert. denied*, 469 U.S. 826 (1984).

48. *McCormack*, 617 F. Supp. at 1523; *Sindell*, 607 P.2d at 926; *McCreery*, 150 Cal. Rptr. at 732; *Payton*, 437 N.E.2d at 173; *Zafft*, 676 S.W.2d at 244; *Ferrigno*, 420 A.2d at 1309.

49. *McCormack*, 617 F. Supp. at 1523; *Payton*, 437 N.E.2d at 173; *Zafft*, 676 S.W.2d at 244; *Ferrigno*, 420 A.2d at 1309.

50. *McCormack*, 617 F. Supp. at 1523; *Payton*, 437 N.E.2d at 173; *Zafft*, 676 S.W.2d at 244; *Ferrigno*, 420 A.2d at 1309.

therefore liable in strict liability.[51]

Second, plaintiffs generally concede that they cannot prove that one or any of the defendant drug companies manufactured the particular DES ingested by their mothers.[52] To circumvent this problem, the plaintiff's case usually rests on various theories of joint and several liability.[53]

Third, the DES-daughter cases normally proceed to state appellate courts for review of rulings on defendants' motions to dismiss or for summary judgment.[54] This characteristic is the reason why so little is available in the way of knowledge and experience of how issues of proof are presented and received at trial.[55] When appellate courts have ruled in favor of DES plaintiffs, undisclosed out-of-court settlements usually follow.[56]

1. The Causes of Action

As stated above, alternative causes of action are pled in negligence and in strict products liability in DES cases.[57] The motivation for rely-

51. Brown v. Superior Court, 751 P.2d 470, 473 (Cal. 1988); *McCreery*, 150 Cal. Rptr. at 732; *Collins*, 342 N.W.2d at 42-43.

52. Tidler v. Eli Lilly & Co., 851 F.2d 418, 421 (D.C. Cir. 1988); Pipon v. Burroughs-Wellcome Co., 532 F. Supp. 637, 637 (D.N.J.), *aff'd*, 696 F.2d 984 (3d Cir. 1982); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1007 (D.S.C. 1981); *Sindell*, 607 P.2d at 925; *McCreery*, 150 Cal. Rptr. at 732; Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 69 (Iowa 1986); *Payton*, 437 N.E.2d at 173; Abel v. Eli Lilly & Co., 343 N.W.2d 164, 167 (Mich.), *cert. denied*, 469 U.S. 833 (1984); *Ferrigno*, 420 A.2d at 1310.

53. *Tidler*, 851 F.2d at 421; *Brown*, 751 P.2d at 473; *Sindell*, 607 P.2d at 928; *McCreery*, 150 Cal. Rptr. at 732; *Payton*, 437 N.E.2d at 173-74; *Abel*, 343 N.W.2d at 167; *Ferrigno*, 420 A.2d at 1310.

54. *Tidler*, 851 F.2d at 419-20; Murphy v. E.R. Squibb & Sons, Inc.,, 710 P.2d 247, 249 (Cal. 1985); *McCreery*, 150 Cal. Rptr. at 732; *Abel*, 343 N.W.2d at 167; *Zafft*, 676 S.W.2d at 242; *Collins*, 342 N.W.2d at 41.

55. *See Abel*, 343 N.W.2d at 177.

56. Sherman, *supra* note 3, at 27. "Squibb Corp., Abbott Laboratories, Merch & Co., Inc. and Eli Lilly—have settled DES-daughter cases by the hundreds, almost always with the stipulation that the settlement remain confidential." *Id.* These companies point to the costs of litigation as their motivation for settlement and stress that evidence of DES-caused illnesses is inconclusive. *Id.*

57. McCormack v. Abbott Lab., 617 F. Supp. 1521, 1523 (D. Mass. 1985); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1006 (D.S.C. 1981); *Sindell*, 607 P.2d at 926; *McCreery*, 150 Cal. Rptr. at 732; Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 69 (Iowa 1986); *Abel*, 343 N.W.2d at 168; *Ferrigno*, 420 A.2d at 1309; Martin v. Abbott Lab., 689 P.2d 368, 371 (Wash. 1984); *Collins*, 342 N.W.2d at 42. In many of the DES-daughter cases, the plaintiff's complaint also includes causes of action in breach of express- and implied-warranties, fraud, and misrepresentation. *McCormack*, 617 F. Supp. at 1523; *Ryan*, 514 F. Supp. at 1006; *Sindell*, 607 P.2d at 926; *Abel*, 343 N.W.2d at 168. Since the reported decisions in the DES-daughter cases have focused mainly on negligence and strict liability principles in evaluating DES-related claims, this note will concentrate on those causes of action. *But see McCormack*, 617 F. Supp. at 1524 (holding that there is no requirement of privity of

ing on both theories may be partly attributable to the tendency of lawyers to include all possible causes of action that may apply "in order to avoid the risk of omitting the one theory that the court or jury may find appropriate."[58] Two other reasons may explain why DES actions are brought in both negligence and strict liability.

First, the inability of plaintiffs to discover evidence of the drug companies' conduct or knowledge at the time they manufactured DES likely presents an "onerous evidentiary burden[]."[59] This factor is often one reason products liability plaintiffs seek recovery under a strict liability theory.[60]

Second, despite the less onerous evidentiary burden, a special problem arises for DES plaintiffs, though, when seeking redress based on strict liability. Despite DES plaintiffs' ease of establishing all that is required in most products liability cases, namely injury caused by the dangerous condition of the product, an exception to strict liability applicable to prescription drugs may bar the action.[61]

Despite these obstacles, some DES-daughter plaintiffs have been allowed to proceed under both negligence and strict products liability theories and presumably third-generation plaintiffs have some hope of prevailing on both grounds.[62]

2. The Identification Problem

The inability of DES-daughter plaintiffs to identify the manufacturer involved in particular cases has been the plaintiffs' greatest obstacle to recovery.[63] Thus, the plaintiffs seek recovery employing several alternative theories of liability. These alternative theories are concerted action liability, alternative liability, enterprise liability and market share liability.[64] Third-generation-DES plaintiffs face the same identification

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contract for a DES daughter to proceed on a breach-of-warranty claim); *Brown*, 751 P.2d at 484 (holding that the market share theory cannot be employed in a fraud or breach-of-warranty case).

58. W. PAGE KEETON ET AL., PRODUCTS LIABILITY AND SAFETY 177-78 (2d ed. 1989).

59. *See McCreery*, 150 Cal. Rptr. at 735.

60. *See* Phipps v. General Motors Corp., 363 A.2d 955, 958 (Md. 1976); McCormack v. Hankscraft Co., 154 N.W.2d 488, 500 (Minn. 1967); Dippel v. Sciano, 155 N.W.2d 55, 63 (Wis. 1967).

61. *Brown*, 751 P.2d at 475; RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 99, at 701 (5th ed. 1984) [hereinafter PROSSER]. See *infra* notes 309-19 and accompanying text for a discussion of the prescription drug exception to strict products liability.

62. Bichler v. Eli Lilly & Co., 436 N.E.2d 182, 189 (N.Y. 1982); Collins v. Eli Lilly & Co., 342 N.W.2d 37, 52 (Wis.), *cert. denied*, 469 U.S. 826 (1984).

63. *See, e.g.*, Pipon v. Burroughs-Wellcome Co., 532 F. Supp. 637, 637-38 (D.N.J), *aff'd*, 696 F.2d 984 (1982); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1006 (D.S.C. 1981); *McCreery*, 150 Cal. Rptr. at 723.

64. *Bichler*, 436 N.E.2d at 185.

problem as DES daughters and, like DES daughters, will only prevail in jurisdictions that validate one of the alternate theories of recovery.[65] A brief review of the different justifications for joint and several liability is therefore warranted.

a. Concerted Action Liability

Concerted action liability is a widely accepted doctrine of tort law.[66] It allows a plaintiff to proceed against any one of a number of potential defendants despite others' potential responsibility for the plaintiff's injury.[67] Concerted action liability applies when more than one person acts "in pursuance of a common plan or design to commit a tortious act."[68] If a common plan or design can be demonstrated, the injured plaintiff can proceed against any responsible party who, in turn, can seek contribution from the other tortfeasors.[69]

The classic concerted action case is where two drivers participate in a drag race and one of the two cars involved strikes a third party.[70] The injured party's remedy is not limited to suing the driver of the car that actually caused the damage; recovery may be sought from the driver of the other car.[71] Despite a few isolated applications of the doctrine in DES cases, concerted action liability has been for the most part rejected by the courts.[72] The main objection to the application of the theory has

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65. Sherman, *supra* note 3, at 27.

66. *See Bichler*, 436 N.E.2d at 186; PROSSER, *supra* note 61, § 52, at 346.

67. *Bichler*, 436 N.E.2d at 186.

68. *Id.* (quoting WILLIAM L. PROSSER ET AL., PROSSER AND KEETON ON TORTS § 46, at 292 (4th ed. 1971)).

69. *Id.*

70. *Id.*

71. *See, e.g.*, DeCarvalho v. Brunner, 119 N.E. 563, 563-64 (N.Y. 1918).

72. *See, e.g.*, Lyons v. Premo Pharmaceutical Lab., 406 A.2d 185, 190-91 (N.J. Super. Ct. App. Div. 1979); Collins v. Eli Lilly & Co., 342 N.W.2d 37, 46 (Wis.), *cert. denied*, 469 U.S. 826 (1984).

Only two cases, Bichler v. Eli Lilly & Co., 436 N.E.2d 182 (N.Y. 1982) and Abel v. Eli Lilly & Co., 343 N.W.2d 164 (Mich.), *cert. denied*, 460 U.S. 833 (1984), have allowed DES plaintiffs to argue concerted action liability. *Bichler* resulted in a jury verdict for a DES plaintiff after the trial judge gave jury instructions on concerted action liability. *Bichler*, 436 N.E.2d at 187-88. Two theories of concerted action were conveyed to the jury, concerted action by implied agreement and concerted action by substantial assistance. *Id.* at 188 n.6.

Both theories given to the *Bichler* jury focused on the drug manufacturers' failure to adequately test for problems associated with the use of DES during pregnancy. *Id.* at 188. Under concerted action by implied agreement, the jury was instructed that it could base liability on an inference of implied agreement among DES manufacturers merely upon proof of parallel conduct. *Id.* Under concerted action by substantial assistance, liability could be imposed if an individual drug manufacturer's failure to test "substantially aided or encouraged other DES manufacturers to do the same." *Id.* The jury verdict was upheld because the issue

been that DES manufacturers acted independently.[73]

b. Alternative Liability

Alternative liability, also borrowed from other tort contexts,[74] allows full recovery from any one of a number of potentially responsible parties.[75] Under this theory, liability is imposed if there is uncertainty as to which of two or more persons, each of whom have acted tortiously, caused the plaintiff's harm.[76] The doctrine had its origin in a case where two hunters negligently shot in the direction of the plaintiff and one of their bullets hit and injured the plaintiff.[77] The biggest obstacle to DES plaintiffs arguing alternative liability is its requirement that the plaintiffs join all potentially responsible parties.[78]

As with concerted action liability, only a few courts have been willing to impose alternative liability on DES manufacturers. The most common objection to alternative liability is the plaintiff's inability to ensure that the responsible manufacturer is among the defendants before the court.[79]

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of the adequacy of the jury instructions was not properly reserved for appeal. *Id.* at 187.

The *Bichler* decision was severely limited in Kaufman v. Eli Lilly & Co., 482 N.E.2d 63 (N.Y. 1985), where the New York Court of Appeals held that Eli Lilly was not collaterally estopped from denying concerted action liability because of the *Bichler* court's failure to address the issue. *Id.* at 67.

To the extent *Bichler* had any precedential value after *Kaufman*, it was overruled by Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989), where the New York Court of Appeals adopted market share liability. *Id.* at 1078.

In the other concerted action case, Abel v. Eli Lilly & Co., 343 N.W.2d 164 (Mich.), *cert. denied*, 469 U.S. 833 (1984), the only issue decided was whether the plaintiffs' allegations could withstand summary judgment. Very little was offered by the Michigan Supreme Court in the way of how the merits of the case would support a concerted action recovery. *Id.* at 176-77.

73. *See, e.g.*, Collins v. Eli Lilly & Co., 342 N.W.2d 37, 46 (Wis.), *cert. denied*, 469 U.S. 826 (1984).

74. *See Bichler*, 436 N.E.2d at 185 n.5.

75. *Id.*

76. *Id.*

77. Summers v. Tice, 199 P.2d 1, 2 (Cal. 1948).

78. *Bichler*, 436 N.E.2d at 185 n.5.

79. As with concerted action, only two decisions have allowed alternative liability in a DES case. In addition to permitting plaintiffs to advance on a concerted action theory, the Supreme Court of Michigan in Abel v. Eli Lilly & Co., 343 N.W.2d 164 (Mich.), *cert. denied*, 469 U.S. 833 (1984), denied defendant's summary judgment motion which sought to bar recovery under an alternative liability theory. *Id.* at 176-77. In its decision, the *Abel* court noted three criteria plaintiff must satisfy to go forward on an alternative liability claim. *Id.* at 173. Plaintiffs must show defendants acted tortiously, they must demonstrate that harm was caused by at least one of the defendants, and they must be unable to identify the particular manufacturer who made the DES that caused them harm. *Id.* The *Abel* court allowed the alternative liability claim because plaintiffs' pleadings alleged facts that would satisfy these elements. *Id.* at 174. The court implied that proof of

c. Enterprise Liability

Enterprise liability also allows recovery against all potentially responsible parties.[80] The theory and rationale for this cause of action arose in a case involving dynamite caps that were defective and caused personal injury.[81] Because the caps had exploded, it was impossible to identify who manufactured them.[82] All companies that made dynamite caps were joined as party defendants.[83] This theory of recovery has been advanced numerous times by DES plaintiffs but it has not been adopted in any reported decision.[84]

d. Market Share Liability

Market share liability was fashioned specifically in response to the DES identification dilemma by the Supreme Court of California in *Sindell v. Abbott Laboratories.*[85] It was derived primarily from alternative liability, the only traditional doctrine that provided for recovery where it is impossible to identify the actual tortfeasor.[86] The most significant deviation from alternative liability is that market share liability does not require joinder of all parties.[87] As defined by the California Supreme Court, the market share theory requires joinder of a substantial share of the DES market.[88] Once a substantial market share is established, the burden of proof shifts to the defendant manufacturers who must exculpate themselves or be responsible for their proportionate share of damages based upon their share of the product's market.[89] The approach is theoretically justified on the grounds that the injuries caused by each manufacturer are likely to be proportionate to each manufacturer's market share, and, if the theory is applied in all DES cases, each

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the elements at trial was doubtful saying "we explicitly reserve judgment concerning the validity of any verdict that may result." *Id.* at 177.

In Ferrigno v. Eli Lilly & Co., 420 A.2d 1305 (N.J. Super. Ct. Law Div. 1980), a New Jersey superior court ruled that alternative liability may be applied in a DES case. The court analogized the DES identification dilemma to the "single and indivisible injury." *Id.* at 1315. That rule governs "pile up" collisions in automobile-accident cases. *Id.* The *Ferrigno* decision has no precedential value given the New Jersey Superior Court Appellate Divisions' decision in Shackil v. Lederle Lab., 530 A.2d 1287 (N.J. Super. Ct. App. Div. 1987), which adopted the market share theory for drug-exposure cases. *Id.* at 1302.

80. *Bichler*, 436 N.E.2d at 185 n.5.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See, e.g.*, Sindell v. Abbott Lab., 607 P.2d 924, 935 (Cal.), *cert. denied*, 449 U.S. 912 (1980); Martin v. Abbott Lab., 689 P.2d 368, 380 (Wash. 1984); Collins v. Eli Lilly & Co., 342 N.W.2d 37, 47 (Wis.), *cert. denied*, 469 U.S. 826 (1984).

85. 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

86. *Id.* at 929, 936-37.

87. *Id.* at 936-37.

88. *Id.* at 937.

89. *Id.*

company will ultimately pay the approximate amount of damages it caused.[90]

Many jurisdictions have yet to consider the identification problem and the various theories of recovery discussed above. A number of courts have considered the alternate theories and have rejected the extension of liability,[91] although acceptance of market share liability is

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90. *Id.* at 937 & n.28.

> Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. Some minor discrepancy in the correlation between market share and liability is inevitable; therefore, a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify. It is probably impossible, with the passage of time, to determine market share with mathematical exactitude. But just as a jury cannot be expected to determine the precise relationship between fault and liability in applying the doctrine of comparative fault or partial indemnity, the difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against the rule we adopt. As we said in *Summers* with regard to the liability of independent tortfeasors, where a correct division of liability cannot be made the trier of fact may make it the best it can.

Id. (quoting Summers v. Tice, 199 P.2d 1, 5 (Cal. 1948)).

91. In Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984), for instance, the Missouri Supreme Court rejected all of the alternative forms of recovery. Plaintiffs were DES daughters alleging they suffered "cancerous or precancerous conditions" resulting from their mothers' ingestion of DES while pregnant. *Id.* at 243. The complaint alleged "breach of implied warranty; negligence per se in failing to comply with federal drug laws; common law negligence in failing to test or inadequately testing the product, and in failing to warn of its potential harm; and strict liability in tort." *Id.* at 244. The case was brought alternatively on all of the above theories of recovery. *Id.*

First, the *Zafft* court found that the DES-identification problem did not present the typical alternative liability situation. *Id.* at 244. Most significant to the court was the failure on the part of the plaintiffs to join all potential tortfeasors, a precondition to recovery under the rule's formulation in Summers v. Tice, 199 P.2d 1 (Cal. 1948), and its adoption in *Restatement (Second) of Torts* § 433B. *Zafft*, 676 S.W.2d at 244.

Second, concert of action was rejected because of that theory's traditional requirement that the alleged tortfeasors act in unison to commit the tort. *Id* at 245. The *Zafft* court found that DES manufacturers had acted similarly but independently. *Id.* The court rejected the argument that the defendants' pooling of data in 1941 to seek FDA approval constituted cooperation sufficient to support recovery under a concerted action theory. *Id.* The court rejected the argument because the pooling of data was to the investigation of uses of DES unrelated to pregnancy. *Id.* The court also pointed to the underlying justification of concerted action as being a vehicle to impose liability on "co-participants" in "anti-social behavior" and not a means to ease the plaintiff's burden of proof. *Id.*

Third, enterprise liability was rejected because the DES-identification problem was distinguishable from the dynamite cap situation in which the enterprise theory of liability was first suggested. *Id.* In Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972), enterprise liability was premised on industry-wide misconduct evidenced by each dynamite-cap manufacturer's reliance on allegedly

gaining momentum.[92] The market share theory is a fair and logical approach to the DES identification problem. The doctrine is a justifiable expansion of the alternative theory notion that an injured party ought not be denied recovery solely because, due to the nature of the tortious act and through no fault of the plaintiff, it is impossible to determine which of several tortfeasors caused the harm in question.

III. THE THIRD-GENERATION-DES CASES

A. *McMahon v. Eli Lilly & Co.*

The first reported appellate decision involving a third-generation-DES claim was *McMahon v. Eli Lilly & Co.*[93] There, the United States Court of Appeals, Seventh Circuit, reversed a district court order granting Eli Lilly a directed verdict.[94] The case was brought on behalf of a DES daughter and her husband in "their individual representative capacities and as representatives of their deceased son."[95] The plaintiff's son had died of complications relating to his premature birth which was allegedly caused by his mother's *in utero* exposure to DES which had been ingested by his grandmother.[96] Jurisdiction was based upon diversity of citizenship and Illinois law applied.[97] The plaintiff's theory was that Eli Lilly was liable in strict products liability for failure to warn of DES's dangerous propensities.[98] After the jury was unable to reach a verdict, the district court judge granted Eli Lilly's motion for a directed verdict holding that the plaintiffs had failed to establish a prima facie case.[99]

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inappropriate safety standards promulgated by the industry's trade organization. *Id.* at 371-78. The *Zafft* court concluded enterprise liability does not apply in the DES context "because of the large number of drug manufacturers involved, the lack of evidence of delegation of responsibility for safety standards to a trade association, and the pervasive role of the FDA in setting industry-wide standards." *Zafft*, 676 S.W.2d at 245.

Fourth, the *Zafft* court also rejected market share liability mainly by attacking the rationale used in *Sindell*. The court found the *Sindell* decision unsatisfactory in that it did not provide a basis for determining what constituted a substantial market share or the relevant market. *Id.* at 246. The *Zafft* court also objected to the market share theory because it did not guarantee that the responsible defendant was before the court as does enterprise liability, the extension of which the *Sindell* court claimed to be advancing. *Id.* Finally, the court termed market share liability as "unfair, unworkable, and contrary to Missouri law, as well as unsound public policy." *Id.*

92. *See, e.g.*, McCormack v. Abbott Lab., 617 F. Supp. 1521, 1526 (D. Mass. 1985); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1073 (N.Y. 1989).

93. 774 F.2d 830 (7th Cir. 1985).

94. *Id.* at 838.

95. *Id.* at 831.

96. *Id.* at 832.

97. *Id.*

98. *Id.*

99. *Id.*

The district court's order found that plaintiffs had not "made out a prima facie showing that the defendant Lilly manufactured the drug she took" and that plaintiffs had failed to "establish a prima facie case that Lilly knew or should have known of a risk of pre-term labor or prematurity among children of those women who in 1955 had ingested DES during pregnancy."[100]

The court of appeals decided that the evidence at trial presented a jury question and reversed the district court's order.[101] In overruling the trial judge on the sufficiency of evidence connecting Lilly with the DES ingested by the grandmother, the court looked to the deposition of a witness who had been manager of the drug store which sold the DES and the affidavit of a witness who had worked for the wholesaler that had supplied the DES.[102] Both the deposition and the affidavit tended to show that the DES ingested by the grandmother was produced by Lilly.[103]

As for the trial court's second finding that plaintiffs failed to show that Lilly knew or should have known of the dangers posed by DES, the court of appeals looked to plaintiff's evidence of "expert testimony reviewing and summarizing published medical research available prior to 1955 [which] . . . reported experiments showing that exogenous estrogens (including DES) could cause physical abnormalities in the reproductive tracts of animals exposed to the drug *in utero*."[104] This literature apparently explicitly suggested that the results of these studies indicated potential dangers to humans as well as animals.[105] The court concluded that this evidence was more than sufficient to support a jury verdict for the plaintiffs and remanded the case for a new trial.[106]

The only significance the *McMahon* court placed on the preconception nature of the claim was a consideration of whether liability could be based upon the defenant's knowledge of the general risk of injury to the second generation, or whether knowledge of the specific risk to the third generation is required. Lilly had argued that, despite the medical evidence suggesting harm to the second generation, it could not have foreseen the injury to the third generation. In addressing this argument, the court stated:

> This [argument] frames the question of foreseeability far too narrowly. Under Illinois precedent, to prevail on a failure to warn claim, a plaintiff must show "that the manufacturer knew or should have known of the danger presented by the use or consumption of the product" and that the manufacturer did not warn of the product's "dangerous

100. *Id.*
101. *Id.* at 835-36, 838.
102. *Id.* at 833.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 835-36, 838.

propensities." Plaintiffs need not prove that Lilly should have anticipated the precise injuries allegedly suffered, so long as the injuries lay within the scope of the known dangerous propensities of DES.[107]

The *McMahon* court did not explicitly address the larger policy issue, suggested in the cases surveyed below, of whether the law should extend liability to those unborn and unconceived at the time of a tortious act. Nonetheless, *McMahon* stands as the sole precedent for the recognition of a third-generation-DES claim.

B. *Enright v. Eli Lilly & Co.*

The first reported appellate level state court opinion involving a third-generation-DES claim was *Enright v. Eli Lilly & Co.*[108] The plaintiffs were a DES daughter, her husband, and their daughter, a "DES granddaughter."[109] The complaint alleged injuries to the reproductive organs of the DES daughter caused by her mother's prescribed use of DES.[110] The complaint further alleged that the harm to the DES daughter resulted in her giving birth prematurely to her daughter.[111] The consequences of the premature birth were "cerebral palsy, grand mal seizures and various related congenital defects."[112]

As the plaintiffs were not able to identify the manufacturer of the DES alleged to have caused their respective injuries, they brought their negligence and strict liability actions requesting recovery based alternatively on concerted action liability, alternative liability, enterprise liability, and market share liability.[113]

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107. *Id.* at 835.

108. 570 N.E.2d 198 (N.Y. 1991), *rev'g*, 553 N.Y.S.2d 494 (App. Div. 1990), *rev'g*, 533 N.Y.S.2d 224 (Sup. Ct. 1988).

109. *Id.* at 199.

110. *Id.* The second-generation plaintiff suffered "a malformed uterus, cervical and uterine dysfunction and squamous metaplasia as a consequence of her mother's ingestion of DES." Enright v. Eli Lilly & Co., 533 N.Y.S.2d 224, 225-26 (Sup. Ct. 1988). It was also alleged that the second-generation plaintiff "suffered four spontaneous abortions before and after" the third-generation plaintiff's birth. *Id.*

111. *Id.* at 226.

112. *Id.*

113. *Id.* For a discussion of these alternative theories of recovery, see *supra* notes 66-92 and accompanying text.

The complaint stated:

If Plaintiffs are unable to identify the specific manufacturer and/or manufacturers of the specific DES ingested by Rosemary Whitmore Hickson, same causing injuries as aforesaid to Plaintiffs herein, then Plaintiffs will rely on the theory of concerted action in that the Defendants, their agents, servants and/or employees, in pursuance of a common plan or design committed tortious acts as aforesaid in consciously paralleling each other, in failing to test and/or warn due to some implied understanding of defendants, their agents, servants, and/or employees, acting independently of each other, failed to properly test said DES, having the effect of sub-

The facts of *Enright* demonstrate the remoteness in time between the defendant's act and the manifestation of the resulting injuries and the difficulties of proof involved in third-generation-DES claims. In 1959 and 1960, the grandmother ingested DES.[114] On January 29, 1960, the DES daughter was born.[115] One August 9, 1981, the DES granddaughter was born.[116] The case was originally heard in 1988 and was recently decided on appeal more than thirty years after the ingestion of DES. "The exact dates of ingestion of DES by [the grandmother], the names of the dispensing pharmacy and pharmacist, the prescription, the instructions for ingestion and the manufacturer of the drug ingested [were] all 'unknown' to Plaintiffs."[117]

Although the trial court's decision was not the final disposition of the case,[118] its opinion illustrates some of the arguments opposing the allowance of a preconception DES cause of action.[119] The trial court granted defendant's summary judgment motion as to the granddaughter, holding that a preconception tort was not a viable cause of action in New York.[120] The trial court relied principally on two New York preconception tort cases in granting the defendant's motion.[121]

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stantially aiding or encouraging the failure to adequately test and warn by the others.

Alternatively, Plaintiffs will rely on the theories of alternative liability, and/or enterprise liability, and/or market share liability.

Enright, 533 N.Y.S.2d at 226.

At the time of the trial court's ruling on defendants' motion to dismiss in *Enright*, the recognition of any of these alternative theories of recovery under New York law was unsettled.

In Bichler v. Eli Lilly & Co., 436 N.E.2d 182 (N.Y. 1982), the New York Court of Appeals had upheld a jury verdict for a DES daughter whose case had been based on concerted action but, in so doing, determined that the issue of the existence of a concerted action cause-of-action had not been preserved for appeal. *Bichler*, 436 N.E.2d at 188.

Subsequent to the *Enright* trial court's decision and prior to the Appellate Division's and the Court of Appeals' decisions of *Enright*, the New York Court of Appeals decided Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1068 (N.Y. 1989), in which it adopted market share liability in a DES-daughter case. *Id.* at 1073.

114. *Enright*, 533 N.Y.S.2d at 225.

115. *Id.*

116. *Id.*

117. *Id.* at 226.

118. *See* Enright v. Eli Lilly & Co., 570 N.E.2d 198 (N.Y. 1991), *rev'g* 553 N.Y.S.2d 494 (App. Div. 1990), *rev'g* 533 N.Y.S.2d 224 (Sup. Ct. 1988).

119. *See infra* notes 120-32 and accompanying text.

120. *Enright*, 533 N.Y.S.2d at 228.

Other issues ruled on by the trial court in *Enright* were the recognition of the available alternative theories of recovery, the constitutionality of New York's Toxic Tort Revival Statute, the application of the revival statute to a cause of action for loss of consortium, and the availability of recovery for emotional distress caused by the birth of a handicapped child. *Id.* at 226, 228-30.

121. *Id.* at 226-28.

While the two cases relied on, *Albala v. City of New York*[122] and *Catherwood v. American Sterilizer Co.*,[123] were not DES cases, the trial judge reasoned "[t]o the extent, however, that *Albala* and *Catherwood* discuss 'preconception tort in an exposure case,' they are useful in furnishing instruction on policy considerations as well as the differentiation between tort liability and strict products liability cases."[124]

Albala had barred a medical malpractice cause of action of a plaintiff who was brain damaged due to an alleged negligently performed abortion on her mother four years prior to plaintiff's birth.[125] The policy considerations articulated in *Albala* and relied on by the *Enright* trial judge were: 1) allowing the cause of action would extend "traditional tort concepts beyond manageable bounds"; 2) no precedent existed at common law or by statute for the recognition of a preconception tort; 3) "unlimited hypotheses accompanied by staggering implications are manifest" in allowing recovery for harm arising out of wrongs done against prior generations; and 4) "[w]hile the temptation is always great to provide a form of relief to one who has suffered, it is well-established that the law cannot provide a remedy for every injury incurred."[126]

Catherwood, also relied on by the trial judge in *Enright*, had denied recovery for preconception tort under a strict liability theory on the grounds that the same policy considerations involving the negligence cause of action in *Albala* applied to strict liability claims.[127] The plaintiff in *Catherwood* was the child of a woman who, prior to the plaintiff's conception, had been exposed to carcinogens in the workplace.[128] The appellate division in *Catherwood* held that the policy considerations laid down in *Albala* prohibited the recognition of the cause of action.[129]

The trial judge in *Enright* also pointed to the inability of the plaintiff granddaughter to identify the manufacturer of the DES taken by her grandmother.[130] The judge reasoned that, since some twenty years had elapsed between the grandmother's ingestion of DES and the granddaughter's conception, the case was exemplary of the inordinate problems of proof that policy considerations of tort law should seek to avoid.[131]

The plaintiffs in *Enright* pointed to dictum in *Albala* that indicated

122. 429 N.E.2d 786 (N.Y. 1981).
123. 511 N.Y.S.2d 807 (App. Div. 1987).
124. *Enright*, 533 N.Y.S.2d at 226-27.
125. *Albala*, 429 N.E.2d at 787.
126. *Id.* at 788.
127. Catherwood v. American Sterilizer Co., 498 N.Y.S.2d 703, 706 (Sup. Ct. 1986), *aff'd*, 511 N.Y.S.2d 805 (App. Div. 1987).
128. *Id.* at 704.
129. *Id.* at 706.
130. Enright v. Eli Lilly & Co., 533 N.Y.S.2d 224, 227 (Sup. Ct. 1988), *rev'd*, 553 N.Y.S.2d 494 (App. Div. 1990), *rev'd*, 570 N.E.2d 198 (N.Y. 1991).
131. *Id.* at 228.

the policy considerations underlying strict products liability differed from the policy considerations that barred the negligence cause of action in that case. The *Enright* court noted that *Catherwood* had rejected a similar argument and further suggested that the plaintiff's reliance on alternative liability limited her cause of action to negligence.[132]

The New York Appellate Division reversed.[133] The appellate division held that the plaintiff granddaughter should be allowed to proceed on the strict liability count.[134] In so doing, the court relied heavily on the *Albala* dictum[135] that indicated the policy considerations stated therein may not apply in the strict liability context.[136] The appellate division noted, as *Albala* had, that the policy considerations that required denial of a negligence preconception action were not present in the strict liability cases where there is "liability without fault."[137]

In dealing with the *Catherwood* court's rejection of this same rationale, the appellate division focused on what it termed "special circumstances in the DES context." The genesis of these "special circumstances" was the apparent endorsement of DES-daughter claims by the New York state legislature through its enactment of a Toxic Tort Revival Statute, which had adopted the discovery rule for New York in DES and certain other toxic tort cases.[138]

The appellate division also relied on two New York DES-daughter cases, *Bichler v. Eli Lilly & Co.*[139] and *Hymowitz v. Eli Lilly & Co.*,[140] which

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132. *Id.* at 227.

> Judge Wachtler in a footnote distinguishes between tort liability and products liability. That distinction, although relied upon by Plaintiff here, was held to be inapplicable to this type of case by the Appellate Division Fourth Department in the *Catherwood* case . . . . Indeed, the theory of liability in this case becomes blurred of necessity when Plaintiff cannot identify the responsible drug manufacturer. The cause of action reverts to a tort claim when coupling all Defendants in a common plan to commit a tortious act, rather than relying upon a strict-products-liability cause-of-action.

Id.

133. Enright v. Eli Lilly & Co., 553 N.Y.S.2d 494, 497 (App. Div. 1990), *rev'd*, 570 N.E.2d 198 (N.Y. 1991).

134. *Id.* at 497.

135. *Id.* at 495-96.

136. *Id.* at 496.

137. *Id.* (quoting Albala v. City of New York, 429 N.E.2d 786, 788 (N.Y. 1981)).

> The third preconception tort case . . . [Jorgensen v. Meade Johnson Lab., 483 F.2d 237 (10th Cir. 1973)] was decided on a products liability theory for which there is strict liability without fault. Under a products liability theory, once a defect manufacture or design is established or there has been a failure to give adequate notice of foreseeable potential hazards, the liability of the manufacturer is extended to the entire class of persons thereby affected regardless of privity, foreseeability or due care.

Id.

138. *Id.* at 496-97.

139. 436 N.E.2d 182 (N.Y. 1982).

the appellate division thought demonstrated that DES plaintiffs constituted a favored class, to be afforded expanding notions of tort liability because of the unique circumstances surrounding their injuries.[141] *Bichler* had upheld a jury verdict for a DES daughter under a concerted action theory.[142] *Hymowitz*, decided after the trial court's decision in *Enright*, had adopted the market share theory of recovery for New York DES-daughter cases.[143]

Thus, the appellate division held that the allowance of a third-generation-DES claim under a strict products liability theory was in accord with legislative and judicial authority.[144] *Hymowitz* had indeed provided that the legislature's enactment of the toxic tort revival statute signified a legislative policy which "lies in the clear manifestation of deep concern for those injured by toxic substances in general and DES in particular."[145] *Bichler* had concluded that "[p]roducts liability law cannot be expected to stand still where innocent victims face inordinately difficult problems of proof."[146]

The New York Court of Appeals reversed.[147] The thrust of the Court of Appeals' decision was that the issue in *Enright* invoked the same policy considerations as *Albala*, and that the reasoning of the appellate division in *Enright* was unsound.[148]

As for the appellate division's rationale, the Court of Appeals viewed the legislature's enactment of the Toxic Tort Revival Statute as merely the extinguishment of a procedural barrier and the judicial adoption of market share liability as a relaxation of a burden of proof standard. The Court of Appeals did not see either development as the impetus for an expansion of substantive tort law.[149]

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140. 539 N.E.2d 1069 (N.Y. 1989).

141. *Enright*, 553 N.Y.S.2d at 496-97.

142. *Bichler*, 436 N.E.2d at 188.

143. *Hymowitz*, 539 N.E.2d at 1072.

144. *Enright*, 553 N.Y.S.2d at 497-98.

145. *Hymowitz*, 539 N.E.2d at 1072.

146. *Bichler*, 436 N.E.2d at 185.

147. Enright v. Eli Lilly & Co., 570 N.E.2d 198, 204 (N.Y. 1991), *rev'g* 553 N.Y.S.2d 494 (App. Div. 1990), *rev'g* 533 N.Y.S.2d 224, 228 (Sup. Ct. 1988).

148. *Id.* at 201-04. "A different rule is justified, therefore, only if that distinction alters the policy balance we struck in *Albala*." *Id.* at 201.

After discussing the various justifications for strict products liability the court stated:

> Despite these considerations, the countervailing ones remain strong enough to preclude us from recognizing a cause of action here. To begin, the concerns we identified in *Albala* are present in equal measure here. The nature of the plaintiffs' injuries in both cases—birth defects—and their cause—harm to the mothers' reproductive systems before the children were conceived—are indistinguishable for these purposes. They raise the same vexing questions with the same "staggering implications."

Id. at 203 (quoting Albala v. City of New York, 429 N.E.2d 786, 788 (N.Y. 1981)).

149. *Id.* at 202.

Thus, although the *Enright* Appellate Division allowed a claim in strict products liability and rejected the alternative claim in negligence, the Court of Appeals' decision, by rejecting both theories of liability, precludes recovery for third-generation claimants in New York at the present.

C. *DeMayo v. Schmitt*

Another published opinion in a DES third-generation case comes from the Court of Common Pleas of Philadelphia County, Pennsylvania.[150] In *DeMayo v. Schmitt*,[151] the plaintiff alleged birth defects arising out of her grandmother's ingestion of DES thirty years prior to her birth.[152] The defendant drug companies moved for summary judgment claiming no cause of action existed for preconception torts.[153]

The summary judgment was denied as to the negligence cause of action and granted as to the strict liability cause of action.[154] The trial judge decided that recovery would be allowed if the plaintiff could prove a negligent failure to test or if the defendant manufacturers knew or through adequate testing should have known that DES would cause harm in the offspring of DES users.[155] In this regard, the trial judge held, as a matter of law, that if damage to the second generation should have been known, damage to a third generation was foreseeable.[156] The judge conditioned this holding upon proof of actual or constructive knowledge of injury to the second generation's reproductive organs.[157]

> For example, the Legislature's enactment of a "discovery" Statute of Limitations was directed at opening up traditional avenues of recovery by removing a procedural barrier that was unreasonable given the nature of DES injuries . . . .
>
> Similarly, our adoption of market-share liability was not prompted by some uncontrolled momentum favoring recovery by all DES plaintiffs; rather, it was justified because identification of the DES manufacturer was an insurmountable barrier in the "singular case [where] manufacturers act[ed] in a parallel manner to produce an identical, generically marketed product, which causes injury many years later."

Id. (quoting *Hymowitz*, 539 N.E.2d at 1072).

150. DeMayo v. Schmitt, No. 625, 1989 Phila. Cty. Rptr. LEXIS 73, at *1 (C.P. Philadelphia County Dec. 28, 1989).

151. *Id.*

152. *Id.*

153. *Id.* at *3.

154. *Id.* at *4-5.

155. *Id.* at *4.

156. *Id.* at *13-14.

157. *Id.*

> In the instant circumstance, if the manufacturers, using due care, could not have known that ingestion of D.E.S. causes genital track injury to daughters of D.E.S. mothers, they could not have anticipated defects in the third generation . . . . For example, if there were a tendency of chil-

In denying recovery under strict liability, the trial judge pointed to "the remoteness and lack of foreseeability of an injury to the third generation" and that "it is unfair to place such a burden on a manufacturer that is free from fault."[158]

Recognizing that it was drawing an arbitrary line by cutting off strict liability at the second generation, the *DeMayo* court noted that comment k to *Restatement (Second) of Torts* Section 402A also established an arbitrary line by limiting strict liability of drug manufacturers to responsibility for failure to "test for efficacy."[159] The court also reasoned that allowing liability in negligence but not strict liability was of little consequence since comment k limits strict liability in the pharmaceutical context to failure to "reasonably test for efficacy."[160]

Thus, in Philadelphia, a third-generation-DES claimant is entitled to recovery in negligence but not strict liability.[161]

D. *Grover v. Eli Lilly & Co.*

The most recent case addressing the third-generation-DES claim is *Grover v. Eli Lilly & Co.*[162] In *Grover*, the Supreme Court of Ohio, in a 4-to-3 decision, held that a third-generation-DES claimant has no cause

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dren of D.E.S. mothers to develop kidney cancer, this would not indicate any kind of problems in the third generation.

Id. at *6.

158. *Id.* at *4.

With respect to the claim under Section 402A of the Restatement of Torts, liability should stop with the second generation. Again, there must be a balancing test. It may be proper in some circumstances to impose liability on an innocent manufacturer on a "share the risk" theory. At the same time, there must be some line drawn to allow manufacturers freedom to experiment with new products without risking bankruptcy if there is some adverse result they could not have foreseen even if exercising all due care. The offspring of those exposed to the product seems an appropriate place to stop.

Id. at *7.

159. *Id.* at *7-8.

It should be noted that establishing an arbitrary limit for 402A liability is not new to the area of pharmaceutical products. Comment K of Section 402A of the *Restatement [Second] of Torts* points out that because of the desire to bring new products to the market that could save lives, one does not want to place such an onerous burden on manufacturers that research will be discouraged. "The seller of such [unavoidably unsafe] products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product . . . ."

Id. at *7 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965)).

160. *Id.* at *8.

161. *Id.*

162. 591 N.E.2d 696 (Ohio 1992).

of action.[163] Although the *Grover* court stated "[w]e find the reasoning applied by the New York Court of Appeals [in *Enright*] persuasive," the decision was based primarily on the determination of the issue raised in *McMahon v. Eli Lilly & Co.*[164] Recognizing that it was applying a more restrictive standard than the *McMahon* court, the *Grover* court based its holding on a requirement that the DES manufacturer must have known of the potential for danger to the third generation before liability would attach and that knowledge of the potential for harm to the second generation did not impute knowledge of harm to future generations.[165]

IV. ANALYSIS

The third-generation-DES claim exemplifies one of the most difficult questions in law. The issue of how far liability will extend is as old as tort law itself. Since centuries of developing legal doctrine have failed to arrive at a suitable singular approach to the issue, it is recognized that any present attempt to do so would undoubtedly fail. Dean Prosser wrote:

> There 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 . . . . Often . . . the legal limitation on the scope of liability is associated with policy—with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient.[166]

What follows are some observations, analogies, and arguments on how this issue should be resolved in the DES context based on what has come before and based on what should ensue according to this author's "idea[] of what justice demands."[167]

As the examination of the cases in Part III shows, the issue of whether a cause of action exists for a third-generation-DES plaintiff has thus far been examined in terms of broad policy considerations. Notions of keeping tort law within manageable bounds and discouraging false claims have been offered as reasons for denying liability.[168] Fundamental fairness and justice, the compensatory goal of tort law, and the desirable deterrent effects of imposing liability upon drug companies have been offered in support of allowing the third-generation-DES

163. *Id.* at 700-01.

164. *Id.* (citing McMahon v. Eli Lilly & Co. 774 F.2d 830 (7th Cir. 1985)). For a discussion of *McMahon*, see *supra* notes 93-107 and accompanying text.

165. *Grover*, 591 N.E.2d at 700.

166. PROSSER, *supra* note 61, § 41, at 263-64.

167. *Id.*

168. Enright v. Eli Lilly & Co., 570 N.E.2d 198, 203 (N.Y. 1991); Albala v. City of New York, 429 N.E.2d 786, 789 (N.Y. 1981); Catherwood v. American Sterilizer Co., 498 N.Y.S.2d 703, 705 (Sup. Ct. 1986), *aff'd*, 511 N.Y.S.2d 805 (App. Div. 1987).

cause of action.[169] While all of these are guiding principles of tort law,[170] a more exacting analysis would be helpful. A number of the same policy considerations pointed to in the third-generation-DES cases have been considered by the several courts that have addressed the alternative theories of recovery offered to solve the identification problem.[171] An abundant line of case law has examined recovery for prenatal injuries,[172] some precedent exists for the allowance of preconception torts, and the recent development of strict products liability law demonstrates a strong societal interest in extending liability for product hazards, especially for those that cause the deleterious effects evidenced in the DES context.[173]

A. *Evolution of the Prenatal/Preconception Tort*

1. The Prenatal Tort Cases

Although the *Enright* and *DeMayo* courts did not find the analogy compelling, the prenatal cases should be examined when deciding whether to extend liability to preconception torts.

Early in American common law, no tort liability was owed to persons not yet born.[174] The first case to consider prenatal torts was *Dietrich v. Northhampton*[175] decided in 1884. Judge Holmes, writing for the Massachusetts Supreme Judicial Court, held that no cause of action in tort existed for injuries sustained prior to birth.[176] *Dietrich* was adopted in nearly all other jurisdictions and remained the law for more than fifty years.[177]

In 1946, the United States District Court for the District of Columbia held that a cause of action existed for prenatal injuries to a viable fetus brought on behalf of the child after birth.[178] In 1949, the Minnesota Supreme Court held that a cause of action for wrongful death existed where a stillborn child was viable at the time of the injury.[179] These decisions sparked a complete turn-around in the law.[180] There

169. Enright v. Eli Lilly & Co., 553 N.Y.S.2d 494, 497 (App. Div. 1990), *rev'd*, 570 N.E.2d 198, 204 (N.Y. 1991); DeMayo v. Schmitt, No. 625, 1989 Phila. Cty. Rptr. LEXIS 73, at *7 (C.P. Philadelphia County Dec. 28, 1989).

170. PROSSER, *supra* note 61, at 5-7.

171. *See supra* notes 63-92 and accompanying text.

172. *See infra* notes 174-202 and accompanying text.

173. *See infra* notes 203-37 and accompanying text.

174. PROSSER, *supra* note 61, § 55, at 367.

175. 138 Mass. 14 (1884), *overruled by* Keyes v. Construction Serv., Inc., 165 N.E.2d 912 (Mass. 1960).

176. *Id.* at 17.

177. Horace B. Robertson, Jr., *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1402.

178. Bonbrest v. Kotz, 65 F. Supp. 138, 143 (D.D.C. 1946).

179. Verkennes v. Corniea, 38 N.W.2d 838, 841 (Minn. 1949).

180. Robertson, *supra* note 177, at 1402.

are now cases from various jurisdictions that have allowed recovery in tort for injuries sustained during all periods of gestation.[181] The majority rule at present is that tort liability attaches for injuries to viable fetuses later born alive.[182]

The arguments originally advanced against prenatal torts were that no duty of care is owed to a fetus which is part of its mother;[183] that the legislature and not the courts should extend liability;[184] that the problems of proof in establishing causation justified the denial of the cause of action;[185] that no precedent existed for the recognition of liability;[186] and that the recognition of liability would be an incentive for fictitious claims.[187] These arguments were in time unanimously rejected by the courts.[188] The fetal viability requirement, in recent times, has also been increasingly rejected.[189] The arguments originally ad-

181. *Id.* at 1412. "In 1972, the Alabama Supreme Court made American jurisdictions unanimous in recognizing that one who intentionally or negligently injures an unborn fetus may be liable in damages." *Id.* at 1402.

182. PROSSER, *supra*, note 61, § 55, at 368-69.

183. *Id.* § 55, at 367 (citing Dietrich v. Northampton, 138 Mass. 14, 17 (1884), *overruled by* Keyes v. Construction Serv., Inc., 165 N.E.2d 912 (Mass. 1960)); Robertson, *supra* note 177, at 1403 (citing Gorman v. Budlong, 49 A. 704 (R.I. 1901), *overruled by* Sylvia v. Gobeille, 220 A.2d 222 (R.I. 1966); Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944 (Tex. 1935), *overruled by* Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967)).

184. *See* Smith v. Brennan, 157 A.2d 497, 501 (N.J. 1960); Woods v. Lancet, 102 N.E.2d 691, 694-95 (N.Y. 1951).

185. PROSSER, *supra* note 61, § 55, at 367 (citing Walker v. Great Northern Ry., 28 L.R.Ir. 69, 81-82 (Q.B. 1891) (O'Brien, J., concurring)); Robertson, *supra* note 177, at 1403 (citing Standford v. St. Louis & S.F. Ry., 108 So. 566 (Ala. 1926), *overruled by* Huskey v. Smith, 265 So.2d 592 (Ala. 1972); Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944 (Tex. 1935), *overruled by* Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967)).

186. *See Smith*, 157 A.2d at 500; *Woods*, 102 N.E.2d at 694.

187. PROSSER, *supra* note 61, § 55, at 367 (citing Walker v. Great Northern Ry., 28 L.R.Ir. 69, 81-82 (Q.B. 1891) (O'Brien, J., concurring)); Robertson, *supra* note 177, at 1403 (citing Stanford v. St. Louis & S.F. Ry., 108 So. 566 (Ala 1926), *overruled by* Huskey v. Smith, 265 So.2d 592 (Ala. 1972)); Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944 (Tex. 1935), *overruled by* Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967).

188. *See, e.g.*, White v. Yup, 458 P.2d 617, 623 (Nev. 1969) (rejecting argument that fetus is part of the mother); *Smith*, 157 A.2d at 501 (rejecting argument that courts could not rule in this area because it was within the province of the legislature); Hall v. Murphy, 113 S.E.2d 790, 793 (S.C. 1967) (rejecting various arguments for the denial of prenatal torts as "unsound, illogical, and unjust").

189. PROSSER, *supra* note 61, § 55, 368-69 (citing Bennett v. Hymers, 147 A.2d 108 (N.H. 1958); *Smith*, 157 A.2d at 497; Sinkler v. Kneale 164 A.2d 93 (Pa. 1960); Sylvia v. Goeille, 220 A.2d 222 (R.I. 1966)).

> Most of the cases allowing recovery have involved a fetus which was then viable, meaning capable of independent life, if only in an incubator. Many of them have said, by way of dictum, that recovery must be limited to such cases, and, others have said that the child, if not viable, must at least be 'quick.' But when actually faced with the issue for decision, most courts

vanced in opposition to the recognition of the prenatal tort bear a marked similarity to the arguments now advanced to preclude recovery for preconception torts in both the DES cases and other contexts.[190] The rationale that ultimately defeated these arguments in the prenatal context seems equally applicable in the third-generation cases. The contention that no duty was owed to a fetus was originally based on the idea that a fetus was not a separate person.[191] When this position was later reversed, much emphasis was placed on advances in the scientific community's understanding of the development of the fetus as a separate life capable of surviving outside the womb.[192] A narrow construction of this rationale would preclude a preconception tort because no life is in existence at the time of the defendant's act. The later prenatal cases, though, can be understood as holding that the duty of the defendant is premised either on a duty to a " 'separate organism' or on a contingent duty that matured when the infant was born alive."[193] It would appear, therefore, that in jurisdictions allowing recovery for injuries occurring prior to viability, the recognition of a preconception tort is "only a modest extension of the duty of care to the unborn."[194]

As for the denial of liability because of problems of proof that accounted for early hostility to prenatal torts, the significant problems that did exist were largely attributable to the medical knowledge of the times.[195] Advances in science in the 20th century have given rise to highly credible scientific evidence not available at the turn of the century.[196] Though much of the mystique about prenatal development

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have allowed recovery, even though the injury occurred during the early weeks of pregnancy, when the child was neither viable nor quick.

Id.

190. Enright v. Eli Lilly & Co., 570 N.E.2d 198, 204 (N.Y. 1991); Albala v. City of New York, 429 N.E.2d 786, 788 (N.Y. 1981); Catherwood v. American Sterilizer Co., 406 N.Y.S.2d 703, 706 (Sup. Ct. 1986), 511 N.Y.S.2d, *aff'd*, 805 (App. Div. 1987).

191. Dietrich v. Northhampton, 138 Mass. 14, 17 (1884), *overruled by* Keyes v. Construction Serv., Inc., 165 N.E.2d 912 (Mass. 1960).

192. Bonbrest v. Kotz, 65 F. Supp. 138, 141 (D.D.C. 1946).

193. Robertson, *supra* note 177, at 1417.

194. *Id.* at 1438.

> Conceptually, once one accepts the proposition that a fetus—even a viable one— is not fully a legal person and only becomes one upon live birth, then [the recognition of a preconception tort] does not present a significant extension of the principles of liability for prenatal injuries. The interest protected in such cases is the *potentiality* of human life in a healthy and whole condition. The duty of care imposed on other persons is imposed to protect that interest and no other. If a living infant suffers pain or disability from the wrongful act of another, liability should not depend on whether the wrongful act occurred during life, during prenatal life or prior to conception.

Id.

195. *Bonbrest*, 65 F. Supp. at 141.

196. *Id.*

that existed at the time Judge Holmes wrote *Dietrich* has disappeared, problems of proof are still a grave concern to prenatal plaintiffs in general and third-generation-DES plaintiffs in particular. The problems of proof do not justify a complete bar to recovery though. As a leading commentator in the law of torts has observed, "[a]s far as causation is concerned, there will certainly be cases in which there are difficulties of proof, but this should be no more frequent, nor the difficulties any greater, than as to many other medical problems."[197] Moreover, the main problem of proof in the DES context is the inability to identify the responsible manufacturer, and the several courts that have adopted market share liability have already made the policy choice to remove that obstacle to the DES plaintiff's chances of recovery.[198] There is no apparent reason why a jurisdiction that allows a second-generation plaintiff to advance an alternative form of liability would deny the same opportunity in a third-generation case.

Another objection to liability common to preconception torts and the early prenatal decisions is that the extension of liability is a matter for the legislature.[199] Neither early nor recent prenatal cases should be read to mean that this argument in itself precluded allowing recovery for injuries sustained prior to birth. Tort law is in large part common law. While offered as support for decisions reached on other grounds, this contention alone seems never to have prohibited the development of case law except where the subject matter involved had been in some way acted upon by the legislature.[200] When the courts became predisposed to recognize the prenatal tort, this argument was easily set aside through cursory references to our common law system of jurisprudence.[201]

As for the early concerns about adherence to precedent, no departure from precedent would be necessary at this time. The sparse authority that does exist supports the recognition of preconception claims.[202]

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197. PROSSER, *supra* note 61, § 55, at 368.

198. *See supra* notes 63-92 and accompanying text.

199. Enright v. Eli Lilly & Co., 570 N.E.2d 198, 204 (N.Y. 1991); Albala v. City of New York, 429 N.E.2d 786, 788 (N.Y. 1981); Dietrich v. Northhampton, 138 Mass. 14, 17 (1884), *overruled by* Keyes v. Construction Serv., Inc., 165 N.E.2d 912 (Mass. 1960).

200. PROSSER, *supra* note 61, at 18.

201. Smith v. Brennan, 157 A.2d 497, 502 (N.J. 1960); Woods v. Lancet, 102 N.E.2d 691, 698 (N.Y. 1951).

202. Bergstresser v. Mitchell, 577 F.2d 22 (8th Cir. 1978); Jorgensen v. Meade Johnson Lab., 483 F.2d 237 (10th Cir. 1973); Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977); Monusko v. Postle, 437 N.W.2d 367 (Mich. 1989). For a discussion of these cases, see *infra* notes 203-37 and accompanying text.

2. The Preconception Tort Cases

Following the decisions allowing recovery for prenatal torts, another line of cases began to evolve. In 1973, the issue of a preconception tort first arose. In *Jorgensen v. Meade Johnson Laboratories*,[203] the Court of Appeals for the Tenth Circuit, applying Oklahoma law, overturned a federal district court decision dismissing a preconception tort action.[204] Suit had been filed on behalf of two Mongoloid children whose physical condition had resulted from their mother's use of birth control pills.[205] The birth control pills, taken prior to the twins' conception, caused damage to the mother's chromosome structure and ultimately to her children while they were developing fetuses.[206]

The suit was brought on the theories of strict liability, negligence, breach of express and implied warranties of fitness and safety in the manufacture and sale of the birth control pills, and in the failure to warn of their potential harmful effects.[207] The district court had dismissed the complaint because the extension of the law to preconception torts, was, in its view, a matter for the legislature.[208]

The Tenth Circuit reversed.[209] The court considered the issues involved to be factual questions of causation to be determined by medical evidence.[210] Preconception torts were held to be analogous to prenatal torts and to be a reasonable extension thereof.[211]

In a rather extensive examination of the preconception tort issue, the Supreme Court of Illinois, in *Renslow v. Mennonite Hospital*,[212] upheld a cause of action brought on behalf of a child suffering damage to her hemolytic processes, and from jaundice and hyperbilirubinemia.[213] The defendants were the plaintiff's mother's doctor and the director of laboratories at the hospital where the plaintiff's mother had been treated.[214] When the plaintiff's mother was 13 years old, she was given a transfusion of Rh-positive blood by the defendants.[215] The plaintiff's mother had Rh-negative blood and the transfusion caused her blood to be sensitized.[216] The damage to the plaintiff's hemolytic processes resulted from premature birth induced by the mother's blood condi-

203. 483 F.2d 237 (10th Cir. 1973).
204. *Id.* at 238.
205. *Id.*
206. *Id.* at 239.
207. *Id.* at 238-39.
208. *Id.* at 239.
209. *Id.*
210. *Id.* at 240.
211. *Id.*
212. 367 N.E.2d 1250 (Ill. 1977).
213. *Id.* at 1255-56.
214. *Id.* at 1251.
215. *Id.*
216. *Id.*

tion.[217] Taking notice of the medical fact that the mixing of Rh-positive and Rh-negative blood can foreeseeably result in damage to offspring and that established medical practice called for blood typing before transfusion, the court held that the defendants reasonably could have foreseen that a thirteen-year-old woman would eventually have children who, although not yet conceived, might be injured by their negligent act.[218]

Jorgensen was pointed to as having focused on causation,[219] but the *Renslow* court reasoned that the extension of the duty element of negligence is the real issue in preconception negligence cases.[220] Duty, the court observed, is a policy line drawn to limit liability for causation.[221] The court went on to say that duty, despite its limitations under the common law, is not a static concept.[222] The law of products liability and prenatal torts were offered as examples of where the law had developed to extend liability beyond traditional duty concepts.[223] In the court's view, it was sound policy to extend liability in this case largely because of advances in medical science.[224] The court conceded the potential for far reaching results as may affect future generations but concluded that "[l]ogic and sound policy require a finding of legal duty in this case."[225] The holding was to be applied to the plaintiff and

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217. *Id.*

218. *Id.*

219. *Id.* at 1254.

220. *Id.*

> It has been aptly observed, however, that '[c]ausation cannot be the answer; in a very real sense the consequences of an act go forward to eternity, and back to the beginning of the world. Any attempt to impose responsibility on such a basis would result in infinite liability for all wrongful acts, which would "set society on edge and fill the courts with endless litigation."

Id. (quoting William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 24 (1952)).

221. *Id.*

222. *Id.*

> We reaffirm the utility of the concept of duty as a means by which to direct and control the course of the common law. But the examples of changing notions of products liability, as well as the progressive expansion of duty in prenatal cases already documented, demonstrate that duty is not a static concept.

Id.

223. *Id.*

224. *Id.* at 1255.

225. *Id.*

> The defendants assert that the need for an end to responsibility, short of perpetual liability for a single wrongful act, dictates that a duty for preconception torts not be imposed. They raise the specter of successive generations of plaintiffs complaining against a single defendant for harm caused by genetic damage done an ancestor in a nuclear accident. While we are aware that there may be similar potential for perpetual claims arising from

prospectively.[226]

Bergstresser v. Mitchell[227] involved a plaintiff born brain damaged as a result of premature birth attributable to an injury to his mother's uterus, caused by a negligently performed Caesarean section, upon the birth of an earlier child.[228] The doctor that performed the Caesarean, and the hospital for which he worked, appealed the trial court's order denying their motion for dismissal of the complaint.[229] The court recognized that the preconception tort was a logical extension of the prenatal tort.[230] "We agree with the district court that, under the circumstances, the case law on prenatal injuries is the best available means of predicting the rule which the Missouri courts would apply to claims for preconception injuries."[231]

Monusko v. Postle involved a plaintiff suffering from rubella syndrome.[232] The theory of the case was that the plaintiff's mother's doctors should have tested for rubella in accordance with prevailing medical standards when she had the doctor remove her IUD with plans to have a child.[233] The defendants argued that no duty was owed to persons not yet conceived under the principles of *Albala v. City of New York*.[234] The court applied general negligence standards noting that whether a duty existed depended on whether the injury was foreseeable.[235] It rejected the reasoning of *Albala*[236] and held that policy con-

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chemical accident or long-term radiation exposure, the case at bar is clearly distinguishable.

The damage alleged is not, by its nature, self-perpetuating, nor is the plaintiff a remote descendant. We feel confident that when such a case is presented, the judiciary will effectively exercise its traditional role of drawing rational distinctions, consonant with current perceptions of justice, between harms which are compensable and those which are not. The problem of defending stale claims is also asserted by defendants. They remind us that it is possible that a woman, herself a child when injured by the tortfeasor, could late in life bear an injured child, and that this child, under the present statute of limitations, could wait until majority to bring suit. We think the likelihood of these circumstances occurring is not sufficient reason to bar all suits for reasonably foreseeable injury from preconception torts.

Id. (citing Comment, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law*, 28 Sw. L.J. 414 (1974)).

226. *Id.* at 1256.

227. 577 F.2d 22 (8th Cir. 1978).

228. *Id.* at 24.

229. *Id.*

230. *Id.* at 25.

231. *Id.*

232. Monusko v. Postle, 437 N.W.2d 367, 368 (Mich. 1989).

233. *Id.*

234. *Id.* at 369. For a discussion of Albala v. City of New York 429 N.E.2d 786 (N.Y. 1981), see *supra* text accompanying notes 125-26.

235. *Id.*

236. *Id.* at 372.

siderations should not bar recovery where the injury was foreseeable, especially since the defendant's acts specifically violated accepted medical standards.[237]

Whether evaluated in terms of legal duty or the less burdensome threshold of foreseeability, the third-generation-DES claim seems viable under the time-honored elements of negligence examined in the cases surveyed above. This is especially true where there is a special relationship like that traditionally recognized in the doctor-patient context and in modern times as between manufacturer and consumer. The line of decisions discussed above demonstrates that some courts are prepared to rely principally on foreseeability as a means for measuring tort responsibility and are unwilling to regress to the arbitrary distinctions originally drawn and later unanimously rejected in the prenatal cases. This approach is a responsible formulation of policy by the courts consistent with the underlying compensatory goals of tort law given that one lesson learned from the evolution of the prenatal tort is that modest extensions of legal liability do not necessary lead to insurmountable administrative burdens on the courts.

B. *Products Liability Law*

While the battle was being fought over the validity of prenatal and preconception claims, another body of law was developing that bears heavily on the DES issue. An examination of products liability law and a consideration of its underlying justifications illustrates the operation of modern policy considerations that favor the imposition of manufacturer liability even to future generations.

1. History

The historical development of products liability is necessary for an accurate understanding of where it stands today. The extent to which courts have been willing to impose liability on producers of goods has changed dramatically over the 18th, 19th, and 20th centuries, although most of current products liability law was formulated in the last 30 years. This constant state of development has been largely the result of changes in the complexion of society over that period.[238]

Prior to the 18th century, the responsibilities to society of the makers of goods was regulated not by the courts but by standards imposed by the guilds of skilled craftsmen that evolved during the Middle Ages.[239] The character of the market place was such that consumers were protected by a strong interest of the guilds to establish good repu-

237. *Id.* at 369.

238. *See* CHARLES L. KNAPP & NATHAN M. CRYSTAL, PROBLEMS IN CONTRACT LAW 994 (2d ed. 1987).

239. PETER A. ALCES & NATHANIEL HANSFORD, SALES, LEASES AND BULK TRANSFERS 211 (1989).

tations and thereby gain advantage in the marketplace.[240] The local nature of the markets and the absence of any significant technological and scientific complexity of products was the reason this system was adequate in the Middle Ages.[241] The emphasis in these times was on the quality of the product and not safety.[242]

Beginning in the 1700s the courts took control of commercial law because the nation-states of the time depended on commerce for their wealth and power.[243] The rule that governed the period was *caveat emptor*, let the buyer beware.[244] A producer was not subject to liability for any type of damage caused by a manufactured product in the absence of fraud or an express guarantee of safety.[245] The case most often cited for this proposition is *Chandler v. Lopus*.[246] The rule of *Chandler* was justified on the ground that " 'every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action.' "[247] Thus, "[i]t was assumed as a matter of course that every seller of goods will lie," and it was up to the buyer to be aware of the safety of goods.[248] This was the rule in the United States as well as England.[249]

Two bodies of law then began to develop, one in contract and one in tort, addressing the interests of consumers in the quality of goods.[250]

In the 19th century, a shift began from the representational-based notion of express guarantees adopted in *Chandler* to a more expectation-based theory that recognized the warranty of products through manufacturer's descriptions, samples, and representations.[251]

This body of law developed into the express and implied warranties codified in the Uniform Sales Act and then later in the Uniform Commercial Code.[252]

The advent of warranties did much to increase the responsibility of manufacturers but in many ways it was inadequate to address the plight of many who were being injured by products. Since warranties were based on contract, anyone pursuing recovery against a producer had to be in privity with the producer or else the whole expectation rationale

240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. PROSSER, *supra* note 61, § 95A, at 679.
245. *Id.*
246. 79 Eng. Rep. 3 (1603).
247. KNAPP & CRYSTAL, *supra* note 238, at 994 (quoting Chandler v. Lopus, 79 Eng. Rep. 3 (1603)).
248. PROSSER, *supra* note 61, § 3, at 19.
249. KNAPP & CRYSTAL, *supra* note 238, at 994 (citing Seixas v. Woods, 2 Cai. R. 48 (N.Y. 1804)).
250. PROSSER, *supra* note 61, § 95A, at 679-83.
251. ALCES & HANSFORD, *supra* note 239, at 239.
252. U.C.C. §§ 2-313, 2-314, 2-315 (1990).

for the imposition of warranties would break down.[253]

The inability of plaintiffs to seek redress in contract made many turn to tort but courts were not quick to impose liability. In the mid-1800s, the rule evolved, from the case of *Winterbottom v. Wright*,[254] that no recovery in negligence was allowed for damages caused by manufactured goods because the liability of manufacturers was thought to be limited to contract.[255] Liability to anyone but the party with whom the producer contracted was rejected because the harm caused to the consumer could not have been foreseeable by the manufacturer.[256] Another justification for the rule was that "[i]t would place too heavy a burden upon manufacturers and sellers to hold them responsible to hundreds of persons at a distance whose identity they could not even know, and that it was better to let the consumer suffer."[257]

Given the widely accepted *Winterbottom* rule, the only recovery cognizable by the law for injuries caused by manufactured products were by those who were in privity with the manufacturer.[258] In 1852, the New York Court of Appeals first recognized liability in negligence for defectively produced goods. The rule of *Thomas v. Winchester*[259] allowed recovery in tort for harm done by products " 'imminently' or 'inherently' dangerous to human safety."[260] The justification for the rule was that the dangerous nature of some products somehow imputed the foreseeability of harm to the manufacturer.[261] *Thomas* sparked a sixty-four year debate in the courts over what products were "imminently or inherently dangerous to human safety."[262]

While the courts were struggling over that question, societal pressures for imposing liability on product manufacturers persisted as industrial development continued to widen the gap between the producer and the consumer. Although a few cases began to allow recovery in contract in the absence of privity, significant obstacles continued to burden products liability plaintiffs.[263] The abolition of the privity requirement was not widely accepted[264] and, where it was accepted, other problems arose including the commercial law requirement of notice[265] and the use of disclaimers of warranties by product

253. PROSSER, *supra* note 61, § 95, at 681.
254. 152 Eng. Rep. 402 (1842).
255. PROSSER, *supra* note 61, § 96, at 681.
256. *Id.*
257. *Id.* at 682.
258. *Id.* § 95, at 681.
259. 6 N.Y. 397 (1852).
260. PROSSER, *supra* note 61, § 96, at 628.
261. *Id.*
262. *Id.*
263. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1127-34 (1960) [hereinafter *Citadel*].
264. *Id.* at 1127-28.
265. *Id.* at 1130-31.

manufacturers.[266]

In 1916, the problem was presented to Judge Cardozo in the case of *MacPherson v. Buick Motor Co.*[267] Judge Cardozo extended the *Thomas v. Winchester* rule to the point where the "asserted general rule of nonliability" was swallowed by the exceptions, "leaving nothing upon which that rule could operate."[268] In deciding a case involving a faulty automobile wheel Judge Cardozo declared:

> We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger . . . . If [the manufacturer] is negligent where danger is to be foreseen, a liability will follow.[269]

MacPherson was an extraordinary victory for products liability plaintiffs and the rule was quickly adopted throughout the country.[270] The negligence cause of action was not adequate incentive to abandon the battle over products liability based on contract, though, since the uncertainty of establishing that manufacturers breached their duty of care still caused plaintiffs to seek the strict liability protection of contract law. Increasingly, courts engaged fictions to get around the traditional contract obstacles.[271] Those harmed by goods made by producers with whom they were not in privity were labeled third-party beneficiaries of the manufacturer's contract with the retailer. The notice requirement was ignored or found to be artificially satisfied by the courts.[272] Warranty disclaimers were invalidated on a number of grounds.[273] Although this development began as early as 1916, the case commonly pointed to as abolishing the traditional bars to recovery in contract, *Henningsen v. Bloomfield Motors, Inc.*,[274] was decided in 1960. Under *Henningsen*, a manufacturer is liable for foreseeable harms to consumers under a warranty of safety despite the absence of privity, a lack of notice, or a disclaimer of warranty by the manufacturer.[275] "What followed was the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts."[276]

Despite that contract law now provided an unobstructed strict liabil-

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266. *Id.* at 1131-32.
267. 111 N.E. 1050 (N.Y. 1916).
268. PROSSER, *supra* note 61, § 96, at 683 (quoting Carter v. Yardley & Co., 64 N.E.2d 693, 700 (Mass. 1946)).
269. *MacPherson*, 111 N.E. at 1053.
270. PROSSER, *supra* note 61, § 96, at 683.
271. *Id.* § 97, at 691-92.
272. *Id.* at 691.
273. *Id.* at 691-92.
274. 161 A.2d 69 (N.J. 1960).
275. *Id.* at 84, 97.
276. PROSSER, *supra* note 61, § 97, at 690.

ity avenue for products liability plaintiffs, the legal fictions necessary to reach that result so distorted the application of contract principles that courts and legal commentators criticized the use of contract law to impose strict products liability.[277] This situation prompted Dean Prosser's often quoted assessment of the status of warranty in 1960 as "a freak hybrid born of the illicit intercourse of tort and contract."[278] In 1962, Chief Justice Traynor of the California Supreme Court solved the problem by declaring strict liability outright in tort for product related injuries.[279]

Chief Justice Traynor's notion of strict liability in tort was based on the idea "that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings."[280] The justification was that the manufacturer, unlike the public, can anticipate or guard against product hazards and that the cost of injury can be overwhelming to the person injured whereas the manufacturer can insure against the risk and distribute the cost among all consumers.[281] Another policy reason for the imposition of liability was that it is in the public interest to discourage the marketing of unsafe products.[282] Justice Traynor's concept was quickly adopted in *Restatement (Second) of Torts* Section 402A and in many jurisdictions.[283]

Despite the widespread adoption of strict products liability in tort, problems persist for prescription drug plaintiffs because of a utility based exception to strict liability for prescription drugs contained in comment k to the *Restatement (Second) of Torts* Section 402A.[284]

2. Current Products Liability Law

Despite the fact that strict liability in tort for injuries caused by manufactured products has gained universal acceptance, recovery in negligence and in contract continues to be an option open to products-liability plaintiffs. There are strategic reasons for pursuing recovery based on negligence and warranty. A more sympathetic case can be made to a jury if the manufacturer's misconduct, required to make out a case in negligence, can be proven. Contract law still provides an opportunity to seek the imposition of strict liability in jurisdictions that reject strict tort liability for prescription drug manufacturers based on

277. *Id.* § 98, at 692.
278. *Citadel, supra* note 263, at 1126.
279. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1962).
280. Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).
281. *Id.* at 440-41.
282. *Id.* at 441.
283. PROSSER, *supra* note 61, § 98, at 694.
284. *See infra* notes 309-19 and accompanying text.

the comment k notions of unavoidable risks.[285] And some indications by the courts that the application of the alternative theories of recovery are limited to the negligence context provide an incentive for DES plaintiffs to seek recovery on bases other than strict liability.[286] Below is an examination of the elements of recovery for negligence, strict liability, and breach of warranty which together constitute modern products liability law.[287]

a. Tort Based Recovery

i. The Defective Product

The initial inquiry in any tort based products liability claim is whether the product in question was defective. In this regard, three general categories of defects have emerged, product flaws, design defects, and inadequate warnings.[288]

A product flaw exists when a particular manufactured good is not made to specification.[289] The automobile tire that comes apart under ordinary use,[290] the safety device that fails,[291] and the soft drink bottle that explodes are examples of product defects.[292]

A design defect occurs when the condition of a product as intended by the manufacturer is unsafe.[293] These defects are present when a product design does not protect against hazards that will result from the ordinary use of the product or when a product is unreasonably dangerous in terms of other available and safer design alternatives.[294] A prime example is a design of fuel for a kerosene lamp that is an explosive mixture of kerosene and gasoline.[295]

Warning defects arise from the duty the law places on manufacturers to warn of potential dangers inherent in the foreseeable uses of the product.[296] These types of defects include, for instance, the failure to instruct another as to the proper dosage of a drug to be taken.[297]

ii. Negligence

A cause of action in negligence against a product manufacturer is

285. *See infra* notes 307-08 and accompanying text.
286. Enright v. Eli Lilly & Co., 533 N.Y.S.2d 224, 227 (Sup. Ct. 1988), *rev'd*, 553 N.Y.S.2d 494 (App. Div. 1990), *rev'd*, 570 N.E.2d 109 (N.Y. 1991).
287. PROSSER, *supra* note 61, § 95, at 678.
288. Barker v. Lull Engineering Co., 573 P.2d 443, 458 (Cal. 1978).
289. *Id.*
290. MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).
291. Agostino v. Rockwell Mfg. Co., 345 A.2d 735, 737 (Pa. 1975).
292. Escola v. Coca Cola Bottling Co., 150 P.2d 436, 437 (Cal. 1944).
293. *Barker*, 573 P.2d at 454.
294. *Id.* at 455-56.
295. RESTATEMENT (SECOND) OF TORTS § 389 cmt. f (1965).
296. *Id.* § 388.
297. *Id.* cmt. g.

not unlike most negligence cases in other contexts. The manufacturer is potentially liable for any breach of a duty, generally owed to the public as a whole, to produce products that are reasonably safe, taking into account the foreseeable uses of the product, the potentiality for harm that the product may cause, and the utility that the product offers to the consuming public.[298] If such a breach of duty does in fact cause injury to the plaintiff in a manner the law recognizes as a legal or proximate cause, then recovery on a negligence theory is allowed.[299]

Like all other negligence cases, the extent of a product manufacturer's duty is arrived at by balancing the risk of harm, the utility of the product, and the costs associated with remedying the product condition or defect in question.[300] Manufacturers are thus under a duty to protect against product conditions that either pose a high risk of slight injury, a low risk of serious injury, or any risk of injury that can be avoided at minimal cost.[301] These duties apply to all aspects of the manufacturer's activities including design, production, and distribution and are owed to all those who may reasonably be expected to be impacted by the product including nonpurchaser users and innocent bystanders.[302] The types of duties, depending on the circumstances, usually take the form of reasonable research in the design, reasonable testing in the production, and reasonable directions, labeling, and warning in the packaging and marketing of the product.[303]

The proximate cause element is also reflective of general negligence principles and usually involves an inquiry into whether the harm caused by the product was a foreseeable consequence of the defect, whether the injury was too remote in time and place in a way that would make it unjust to impose liability, and whether any superseding or intervening cause, like negligent mishandling by a wholesaler or retailer, should bar the imposition of manufacturer liability.[304]

iii. Strict Liability

Strict products liability in tort eliminates the requirement that the plaintiff prove negligence on the part of the manufacturer.[305] It focuses on the product and not on the conduct of the manufacturer. If the item contains a product flaw or design defect, or is not accompanied by an adequate warning, manufacturer liability follows regardless of the degree of care exercised by the manufacturer or the knowledge

298. PROSSER, *supra* note 61, § 96, at 683.
299. *Id.* at 684.
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. Brown v. Superior Court, 751 P.2d 470, 474 (Cal. 1988).

of the manufacturer at the time the product was made.[306]

b. Contract/Warranty Liability

The contract/warranty prong of products liability law is still a viable route for many plaintiffs. Its presence in this area is largely the result of the historical development of the law that ultimately led to the recognition of strict liability in tort.[307] In the context of claims for personal injuries, it is often indistinguishable from strict tort liability and negligence.[308]

c. Strict Product Liability for Prescription Drugs

As already noted, the principle embodied in comment k to *Restatement (Second) of Torts* Section 402A that prescription drugs are exempt from strict products liability principles will be and has been an obstacle for second- and third-generation-DES plaintiffs. Comment k provides that "unavoidably unsafe products . . . [if] properly prepared, and accompanied by proper direction and warnings, [are] not defective, nor [are they] unreasonably dangerous."[309] In defining what constitutes "unavoidably unsafe products" comment k goes on to say:

> These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve.[310]

A number of courts have interpreted comment k as providing an exception from strict liability for all prescription drugs. Two DES cases, *Brown v. Superior Court*[311] and *Collins v. Eli Lilly & Co.*,[312] considered the status of DES as an unavoidably unsafe product and reached opposite results.[313] In *Brown*, the Supreme Court of California failed to extend strict liability to DES manufacturers based on an interest in avoiding the imposition of disincentives to medical research.[314] In *Collins*, the Supreme Court of Wisconsin found that the rationale of comment k did not support its imposition in the DES context, concluding

306. *Id.*
307. *See supra* notes 238-84 and accompanying text.
308. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 387-89 (3d ed. 1988).
309. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).
310. *Id.*
311. 751 P.2d 470 (Cal. 1988).
312. 342 N.W.2d 37 (Wis.), *cert. denied*, 469 U.S. 826 (1984).
313. *Brown*, 751 P.2d at 479-80 (holding that comment k prohibits recovery of strict liability claims in the prescription drug context); *Collins*, 342 N.W.2d at 52 (holding that comment k does not apply to DES cases).
314. *Brown*, 751 P.2d at 479-80.

that comment k "is too restrictive and, therefore, not commensurate with strict products liability law in Wisconsin."[315]

While the *Brown* and *Collins* decisions create a seemingly all-or-nothing approach suggesting that comment k, if adopted, precludes strict liability for prescription drugs, a more rational and systematic analysis is possible.

The utility of the defendant's conduct has long been recognized as a proper subject for consideration by the courts. It is clearly the law that conduct which constitutes negligence under certain circumstances is entirely justified in other situations. For instance, under negligence law, behavior that is dangerous and therefor normally unlawful is justified when undertaken by a law enforcement official in the performance of the official's duties.[316] Moreover, many actions that are clearly unreasonable in most cases do not subject the actor to liability when the conduct is in reaction to a sudden emergency.[317]

The concept of utility as justification for limiting tort liability is also justified in the strict liability context for the precise reasons stated in comment k. By establishing an exclusion from strict products liability for "unavoidably dangerous products," comment k sets forth a convincing rationale for the necessity of the acceptance by society of certain risks that are unavoidable in the pursuit of products that have, in some cases, an extraordinary amount of social utility.[318]

However, comment k should be reserved for a very limited category of prescription drugs. It should not be enough to say that a product is a prescription drug and therefore within the rule of comment k, rather, a case-by-case examination needs to be conducted to determine whether a particular drug used in particular circumstances constituted an unavoidably dangerous product.

In this regard, a higher standard should be imposed to determine whether a prescription drug manufacturer is afforded the protection of comment k. The standard is discernable directly from the language of comment k itself. The comment gives the rabies vaccine as its primary example. It also discusses the "lack of time and opportunity for sufficient medical experience" involved in the marketing of many experimental drugs.[319] While both of these justify the rule comment k embodies, the particular drug in a given case should have the characteristic pointed to in that language before comment k is invoked. That is, if the marketing of the drug is justified in terms of the relationship of its side effects to its potential to prevent imminent death, like the rabies vaccine, or if an experimental drug is marketed before "sufficient medi-

315. *Collins*, 342 N.W.2d at 52.
316. PROSSER, *supra* note 61, § 125, at 1057.
317. *Id.* § 33, at 196.
318. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).
319. *Id.*

cal experience" is able to predict harmful side effects, like the many experimental drugs being offered for treatment of AIDS, then the protection afforded drug manufacturers by comment k should apply. On the contrary, if the drug is not justified on these grounds, no exception from strict liability should follow. As DES did not have any of these characteristics the exception of comment k should not be applied.

C. *A Response to Enright and DeMayo*

1. The *Albala* Reasoning

As the first state court ruling on the issue, *Enright* will undoubtedly be looked to by most courts considering the validity of a third-generation claim. The *Enright* decision is questionable on a number of grounds. The *Albala* decision, relied on heavily in *Enright*, is not in line with the other case law involving preconception torts.

The *Albala* court's concern for the extension of tort law beyond "manageable bounds" and the "staggering implications" of allowing preconception claims, while long recognized as proper considerations in formulating rules of law, are normally an independent bar to recovery only when the injuries complained of are either negligible, impossible to prove, or incapable of remedying. Thus, it has been said that "[t]rivialities must be left to other means of settlement, and many wrongs which in themselves are flagrant—ingratitude, avarice, broken faith, brutal words, and heartless disregard of the feelings of others—are beyond any effective legal remedy, and any practical administration of the law."[320]

These considerations are not, therefore, designed to bar recovery for injuries of the magnitude suffered in the DES cases; on the contrary, they are intended to afford more serious injuries access to the courts at the expense of less deserving or less justified claims.[321] Where the underlying legal claims have involved serious injury to those who in fairness ought to recover, holdings that these claims would extend tort law beyond manageable bounds are ultimately reversed.[322] Such has been the course of claims for emotional distress, recovery in warranty for consumer injury in the absence of privity, the tort-based right-to-privacy, and, most important to this analysis, prenatal torts.[323]

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320. PROSSER, *supra* note 61, at 23.

321. *Id.* at 24.

322. *Id.* at 23-24.

323. *Id.*

> The courts always have stood more or less in dread of a "flood of litigation" involving problems which they are not prepared to deal with. At one time they refused to permit any inquiry as to the state of a person's knowledge, or belief or intentions, upon the ground that "they cannot be known." For many years they all denied recovery in cases of "mental suffering" involving fright or shock without physical impact, for fear that it

The problem with the application of the *Albala* policy arguments against the recognition of otherwise warranted claims was aptly explained in Judge Fuchsberg's dissent:

> Such actions, which cut across what conceptually would otherwise be meritorious and legally cognizable cases, are, it seems to me, best addressed to the Legislature. All the more is this so since experience has proved the prophesies of doom and gloom rarely, if ever, come to pass.[324]

Furthermore, the *Albala* court's view of a third-generation claim as a novel theory that would require a significant extension of the law is not supported by the various courts that have considered the issue.[325] The other third-generation decisions have examined the question within the existing framework of negligence and strict products liability doctrine.[326] These cases have scrutinized third-generation claims applying the principles of duty, foreseeability, and causation to the circumstances in which the claims arise rather than hypothesizing over eventualities that may never "come to pass."[327] Noticeably absent is the elusive *Albala* threshold requirement that recovery be premised only on a theory that does not give rise to the extension of tort liability beyond manageable bounds.[328]

While the need to confine the boundaries of the law within manageable limits is a policy consideration deeply embedded in the law of torts,[329] the other preconception cases demonstrate that the proper application of the principle is through the scope and limitations inherent

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> would "open a wide door for unjust claims, which cannot successfully be met." The refusal to extend the obligation of a contract to third parties was based upon the "infinity of actions" and the "most absurd and outrageous consequences" which might ensue, and this long continued to be the chief obstacle to holding some contractors liable to third persons.
>
> The reluctance of many courts for so many years to recognize the so-called "right of privacy" rested upon the same objection and many similar instances of hesitation in the face of an expected deluge of questionable claims or troublesome problems of proof might be mentioned. Such difficulties of administration are perhaps most significant in new developments of the law, and are overcome slowly as the courts find some workable method of affording redress where it is clearly merited and justified as a matter of policy.

Id.

324. Albala v. City of New York, 429 N.E.2d 786, 789 (N.Y. 1981) (Fuchsberg, J., dissenting).

325. Bergstresser v. Mitchell, 577 F.2d 22 (8th Cir. 1978); Jorgensen v. Meade Johnson Labs., 483 F.2d 237 (10th Cir. 1973); Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977); Monusko v. Postle, 437 N.W.2d 367 (Mich. 1989). For a discussion of these cases, see *supra* notes 203-37 and accompanying text.

326. *Bergstresser*, 577 F.2d at 25-26; *Jorgensen*, 483 F.2d at 240-41; *Renslow*, 367 N.E.2d at 1253-56; *Monusko*, 437 N.W.2d at 369-70.

327. *Albala*, 429 N.E.2d at 789 (Fuchsberg, J., dissenting).

328. *Id.* at 789 (majority opinion).

329. PROSSER, *supra* note 61, at 23.

in the elements of tort.[330] Foreseeability, as a means of identifying legal duties and determining the requisite level of proximity of causation the law will require, is confined by considerations of establishing appropriate outer limits on the law.[331] The duty to act in accord with a reasonable, ordinary, and prudent standard of care also embodies the principle.[332] The validity of a count in a plaintiff's complaint has historically been tested through the application of these elements of tort.[333]

2. Negligence Versus Strict Products Liability

The New York trilogy of *Albala*, *Catherwood*, and *Enright* struggle over what significance the difference between negligence and strict liability should be afforded when weighing the policy arguments for and against the recognition of actions for preconception torts.[334] The origin of the issue is in Judge Waltcher's footnote in *Albala* which reasoned that *Albala* could be distinguished from *Jorgensen v. Meade Johnson Laboratories*,[335] a third-generation strict products liability case, because policy considerations limiting tort liability may not necessarily bar preconception claims brought in strict products liability.[336]

This question was ultimately answered in the negative by the Court of Appeals but their reasoning is not particularly clear. After a relatively thorough review of the various policy considerations that justify the imposition of strict liability, all of which the court presumably recognized as supporting the arguments for the recognition of preconception torts, the court reverted to its policy concerns over the inability of the courts to "confine[] liability [for preconception torts] without the drawing of artificial and arbitrary boundaries."[337]

The Philadelphia county court's conclusion, in *DeMayo*, that a third-generation claim is cognizable in negligence but not in strict liability[338] is particularly interesting given the New York Appellate Division's decision in *Enright*, which concluded that liability should attach for strict products liability but not for negligence.[339] It is especially interesting

330. *See, e.g., Jorgensen*, 483 F.2d at 240.
331. Monusko v. Postle, 437 N.W.2d 367, 369 (Mich. 1989).
332. *Id.*
333. PROSSER, *supra* note 61, § 30, at 164-65.
334. Enright v. Eli Lilly & Co., 570 N.E.2d 198, 202-03 (N.Y. 1991); Albala v. City of New York, 429 N.E.2d 786, 788 n. (N.Y. 1981); Catherwood v. American Sterilizer Co., 498 N.Y.S.2d 703, 705 (Sup. Ct. 1986), *aff'd*, 511 N.Y.S.2d 805 (App. Div. 1987).
335. 483 F.2d 237 (10th Cir. 1973).
336. *Albala*, 429 N.E.2d at 788 n.
337. *Enright*, 570 N.E.2d at 203.
338. DeMayo v. Schmitt, No. 625, 1989 Phila. Cty. Rptr. LEXIS 73, at *13 (C.P. Philadelphia County Dec. 28, 1989).
339. Enright v. Eli Lilly & Co., 553 N.Y.S.2d 494, 497 (App. Div. 1990), *rev'd*, 570 N.E.2d 198 (N.Y. 1991).

since both courts used the same rationale to arrive at these totally opposite results. The *Demayo* court reasoned that strict liability should not extend to future generations since there is no showing of fault on the part of the defendant.[340] The Appellate Division in *Enright* concluded that the interest in avoiding the overextension of tort liability in the negligence context was not an issue in the product's liability area "where there is strict liability without fault."[341]

While premised on a very narrow view of comment k, the *DeMayo* court's result is more justified in terms of clearly defined legal principles than the New York Court of Appeals' decision in *Enright*. In holding that a negligence action would lie if the plaintiff could establish that, through proper testing, the drug manufacturer could have known of the potential for injury to the DES daughter's reproductive tract, the *DeMayo* court was applying a reasonable requirement of proximate cause.[342] The reasoning is if an injury to the DES daughter's reproductive tract was foreseeable, harm to the third generation was likewise foreseeable because of the obvious relationship between the condition of a woman's reproductive organs and the likelihood of her giving birth to a healthy child.[343] If some type of harm other than damage to the second generation's reproductive tract was foreseeable, harm in future generations would be too remote to impose liability.[344] This formulation is in accord with general principles of proximate cause.[345]

The *DeMayo* court's result on the strict-liability issue, though, represents an unnecessarily restrictive application of comment k. The court apparently interpreted comment k as limiting recovery under strict liability for pharmaceuticals to situations where the drug manufacturer was negligent in failing to test for the efficacy of the product, that is, the effectiveness of the product in achieving its intended result.[346] This view of comment k is far too narrow for a number of reasons. First, although imposing an exception to strict liability, comment k still should be understood as establishing standards, albeit narrow ones, where strict liability, not negligence, is imposed in the prescription drug area.[347] Second, neither the language of comment k nor the meaning given it by the courts support the contention that it limits strict liability to recovery for failure to test for efficacy as opposed to

340. *DeMayo*, 1989 Phila. Cty. Rptr. LEXIS 73, at *13.

341. *Enright*, 553 N.Y.S.2d at 496 (quoting Albala v. City of New York, 429 N.E.2d 786, 788 n. (N.Y. 1981)).

342. PROSSER, *supra* note 61, § 31, at 172.

343. *DeMayo*, 1989 Phila. Cty. Rptr. LEXIS 73, at *13-14.

344. *Id.*

345. PROSSER, *supra* note 61, § 31, at 172.

346. *DeMayo*, 1989 Phila. Cty. Rptr. LEXIS 73, at *8.

347. Collins v. Eli Lilly & Co., 342 N.W.2d 37, 41 (Wis.), *cert. denied*, 469 U.S. 826 (1984).

safety.[348] Third, this rationale ignores the threshold requirement that DES would have to be first identified as an "unavoidably dangerous product" before the protection of comment k can be invoked.[349]

3. The Element of Foreseeability

As already noted, the focus of the *McMahon* and *Grover* decisions was limited to an examination of whether the evidence of DES-related injury to the second generation, which apparently was suggested in medical journals very early during the period DES was marketed as a miscarriage preventative, is sufficient to impute constructive knowledge, on the part of DES manufacturers, that injury to the third generation might be expected.[350] In *McMahon*, the United States Court of Appeals for the Seventh Circuit concluded that, under Illinois law, evidence of injury to the second generation's reproductive tract was sufficient to raise a jury question as to whether the third-generation injury was foreseeable.[351] The Supreme Court of Ohio reached the opposite result in *Grover*, concluding that "[k]nowledge of a risk to one class of plaintiffs does not necessarily extend an actor's liability to every potential plaintiff."[352]

The inconsistent results are not surprising since they are just another demonstration of the age-old problem of defining the boundaries of proximate cause. The more persuasive of the decisions is *McMahon*. As the dissent in *Grover* pointed out,

> it would appear that DES manufacturers knew or should have known that the human fetus exposed *in utero* might have a defect in the female reproductive system. . . [I]s it not then foreseeable that that female fetus would at some point seek to employ the defective reproductive system? The answer must be a resounding "yes." Hence, there can be no logic to the holding of the majority that "because of the remoteness in time and causation, . . . Charles Grover does not have an independent

348. *Id.* at 42.

349. *Id.*

350. McMahon v. Eli Lilly & Co., 774 F.2d 830, 825 (7th Cir. 1985); Grover v. Eli Lilly & Co., 591 N.E.2d 696, 700 (Ohio 1992). For a discussion of these cases, see *supra* notes 93-107 and accompanying text and *supra* notes 162-65 and accompanying text.

351. *McMahon*, 774 F.2d at 835.

352. *Grover*, 591 N.E.2d at 700.

> Even if knowledge of the drug's "dangerous propensities" is sufficient to create liability to the women exposed to the drug *in utero*, this same knowledge does not automatically justify the extension of liability to those women's children. It is one thing to say that knowledge of a propensity to harm the reproductive organs is sufficient to impose liability for a variety of different injuries to the reproductive organs. It is yet another thing to say that this generalized knowledge is sufficient to impose liability for injuries to a third party that occur twenty-eight years later.

Id.

cause of action."[353]

V. CONCLUSION

The recognition of a third-generation-DES claim is not as novel as the New York Court of Appeals envisions. Nor are the policy considerations that ought to control these cases as undefined as claimed. Rather, the confines of liability to those unborn at the time of the defendant's act have been well laid down in the prenatal and preconception cases.[354] And the scope and context of the responsibility of product manufacturers has been well developed, especially in recent years.[355] Both bodies of law have evolved despite initial reluctance on the part of judges to extend liability. Both were initially rejected for the very same reasons now offered to justify the prohibition of third-generation-DES claims.

The concerns over the staggering implications of extending liability into the future, warned of by Judge Holmes in *Dietrich*,[356] is the same concern now raised by the *Enright*[357] and *DeMayo*[358] courts. If Judge Holmes' concerns have been universally rejected in favor of the recognition of prenatal torts,[359] why is this tired old argument brought to bear once again in the third-generation-DES cases?

Lord Abinger's warnings in *Chandler* of placing an undue burden on manufacturers by imposing responsibility to persons who the manufacturer did not know has long been rejected.[360] Why do these same considerations arise again in the third-generation-DES context?

The interest in promoting careful and competent medical treatment, the battleground on which the prenatal cases was fought,[361] is equally applicable in the prescription drug field. The consequences of negligence of the prescription drug industry can touch millions of people and has so in the DES context. The danger seems even greater in the prescription drug field than in the medical malpractice context. The protection against foreseeable harms that motivated the recognition of prenatal and preconception liability[362] is equally present in the third-generation-DES context. It is difficult to imagine how the potential harm to the offspring of a woman whose genes have been altered by

353. *Id.* at 703 (Resnick, J., dissenting).
354. *See supra* notes 174-237 and accompanying text.
355. *See supra* notes 238-319 and accompanying text.
356. Dietrich v. Northhampton, 138 Mass. 14, 16 (1884), *overruled by* Keyes v. Construction Serv., Inc., 165 N.E.2d 912 (Mass. 1960).
357. Enright v. Eli Lilly & Co., 570 N.E.2d 198, 203 (N.Y. 1991).
358. DeMayo v. Schmitt, No. 625, 1989 Phila. Cty. Rptr. LEXIS 73, at *7 (C.P. Philadelphia County Dec. 28, 1989).
359. *See supra* notes 174-202 and accompanying text.
360. *See supra* notes 238-319 and accompanying text.
361. *See supra* notes 174-202 and accompanying text.
362. *See supra* notes 174-237 and accompanying text.

the introduction of synthetic estrogen is any less foreseeable than the damage to future generations caused by the sensitizing of blood[363] or the negligent infliction of physical damage to a woman's reproductive organs.[364]

The recognition that technological developments created a need to call upon manufacturers to insure the safety of products that justified the imposition of negligence liability for product defects[365] is nowhere more compelling than in the prescription drug field, where the scientific complexities of products are beyond the knowledge of nearly all in society. The inability of any one person to bear the loss caused by defective products, which serves as the justification for the cost-spreading notions of strict products liability,[366] is even greater in the DES context where the injuries are so drastic that no person in society can bear the cost alone.

The case for providing a deterrent against the faulty design of products[367] is strong in the prescription drug context. The propensity of the harm to lie latent over many years should be a reason for promoting the deterrence of unsafe drugs and not a justification for denying responsibility. The only doctrine that the courts risk extending beyond manageable bounds is the immunity granted drug manufacturers based on notions about the utility of their products.[368] Although consideration of the benefits to society of promoting an efficient and uninhibited drug industry are meritorious, it is not sound policy to pursue this objective through the creation of absolute bars to drug manufacturer liability. It is one thing to say that the rabies vaccine, which prevents imminent death, is justified despite its painful side effects;[369] but it is quite another to say that DES, a drug for which alternative therapy was available and that posed great danger to millions, is justified on the grounds it helps decrease the odds of a miscarriage. Nor does it satisfy justice to say that because certain situations arise in which the drug industry must respond quickly to epidemics without time for adequate research[370] that drug manufacturers are not responsible for the harm caused by a miscarriage preventative they marketed for twenty-four years in spite of evidence of its potential to do harm. The drug companies ability to point to instances where their efforts to offer drugs were inhibited by fear of legal liability is no answer to these concerns. This

363. *See* Renslow v. Mennonite Hosp., 367 N.E.2d 1250 (Ill. 1977). For a discussion of *Renslow*, see *supra* notes 212-226 and accompanying text.

364. Bergstresser v. Mitchell, 577 F.2d 22 (8th Cir. 1978). For a discussion of *Bergstresser*, see *supra* notes 227-31 and accompanying text.

365. *See supra* notes 238-84 and accompanying text.

366. Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. 1944).

367. *Id.* at 441.

368. *See supra* notes 309-19 and accompanying text.

369. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

370. *Id.*

only makes one wonder about the fate of the millions of DES victims if those same inhibitions were present in 1947.

Once the tired old arguments about the opening of the floodgates of litigation are stripped away; once the sound justification for imposing a reasonable duty of care on drug manufacturers is recognized; and once the exaggerations about the inhibitions of medical researchers are put in perspective, it should be the law that the third-generation-DES claim presents a valid cause of action deserving of a remedy.

John B. Maynard

Democracy and Human Rights: Developing a South African Human Rights Culture*

Kader Asmal**

INTRODUCTION

There is a certain element of irony in my being asked to speak on the need to develop a human rights culture in South Africa. You will therefore forgive me if I begin with a personal observation. My return to South Africa after an absence of over 30 years has been made possible by the heroism, sacrifice and leadership of our movement of liberation which has destroyed the credibility of apartheid. Many of you have played a leading role in this process. Others have courageously used the legal space allowed in the margins of apartheid law and practice to defend the rights of countless individuals during the worst period of apartheid repression. As a lawyer, I salute your contribution to the struggle for the removal of this criminal system and for the collapse of one of the central pillars of apartheid, the homelands policy.

As we return to the excitement of a South Africa on the verge of a breakthrough, many of us are going to find the transition to our new and highly conditional and insecure legality very difficult. Many of our compatriots remain in jail. In a real sense, none of us is truly free until they are. And the heart of the entire country remains cordoned by apartheid.

Racism remains as the core of our country. But racism today is the hatred that dare not speak its name. Instead, it finds voice in propositions of sweet reasonableness in which the message of exclusion hangs only by implication through notions such as group rights, veto powers for minorities and "orderly and civilized" government. Conditional and insecure liberty—regulated by the draconian Internal Security Act

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of 1982 and the myriad pieces of other "security" legislation and the prevalence of race legislation-contradict the essence of human rights, based as they are on a common definition of human dignity and ethical values.

Another source of irony is the lack of recognition by those who consider apartheid to be "outdated" or "irrelevant" of the enormity of the crimes committed in the name of apartheid. In Eastern Europe, the past is being exhumed so that the grave and awful acts committed in the thirties and forties can provide insights into the degradation and perversion which gripped these societies. In both Germanies, the roots of anti-semitism which resulted in the "crime of crimes"—the Holocaust—are now being systematically assessed.

Yet, in South Africa, no senior minister in the apartheid regime nor the Law Commission in its 1989 document on the bill of rights acknowledges the extent to which apartheid has resulted in untold misery, violence and suffering. Individual and collective responsibility for crimes against humanity is to be separated from questions of guilt. The former provides a sure basis for the prospective respect for human rights. Liability for gross violations of human rights such as apartheid, and reparations for past wrongs, are firmly established in international law and now clearly reflected in the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973.

All the major human rights developments in the world—from the Declaration of Independence and the Bill of Rights in the United States to the French Declaration of the Rights of Man and the Citizen—were serious claims for the removal of prior injustices and protection from real, not academic or imaginary wrongs. In order to build the new, there had to be a recognition of the rottenness of the old.

Like the beneficiaries of slavery and colonialism, the practitioners of apartheid have shown no moral or political responsibility for policies akin to genocide, slavery and crimes against humanity or for fundamental breaches of the right to self-determination of the entire people of South Africa, the legal basis for the rejection by the international community of the fraudulent independence of the bantustans since 1976.

Such individual responsibility invoked through a Nuremberg Tribunal-type trial may appear to be inconsistent with the process of negotiations but is necessary if grievous wrongs are to be corrected in future.

An adequate culture of human rights for the future presupposes an understanding of these grievous wrongs committed in the name of the law against the vast majority of the population. To what extent, for example, should property rights be properly protected in a future constitution of a free South Africa if the system cannot provide redress to the three and one half million people who have been dispossessed and "resettled" since 1952, in flagrant abuse of rights of tenancy and ownership? As for the 100,000 people who have been removed under the

Group Areas legislation to ghettoes chosen for them under racist legislation or the former residents of the Sophiatowns and District Sixes whose houses were bulldozed under the designs of Grand Apartheid: who will demand their rights under any future constitutional dispensation? To what extent will the millions of Africans who were denationalized under the bantustan legislation, in breach of international law, receive compensation for violations of their national rights?

There are those, also without any sense of irony, who believe that apartheid institutions such as the present tricameral parliament could be instrumental in passing a bill of rights and who like the Law Commission, want a campaign of education in support of such a bill. Public relations and the mores of Madison Avenue will not assist in developing a human rights culture which requires a close understanding of the reason as to why rights should be treated as trumps (in Ronald Dworkin's striking phrase) and why a society which is in effect lawless (because of its lack of legitimacy) needs the primacy of a rights culture.

Human rights which are enforced and which can be invoked against public and private power cannot be reconciled with a racial or caste society. They presuppose a breach, in the South African context, with the terrible past. The continuity of the legal order which some desire will have to give way to the presumption of unconstitutionality of existing legislation as we enter the new legal order of human rights.

Rights as Trumps

There is now general acceptance in South Africa that there will be a bill of rights identifying certain basic human rights which will be "entrenched." However, it is interesting to note that as late as 1986, the apartheid regime rejected the notion of constitutional protection of human rights. The motivation for a change of heart provides a striking insight into the way ideology is replaced by pragmatism.

The Indaba Kwa Zulu/Natal proposals, recent policy statements by the State President and the Minister for Constitutional Affairs and the Law Commission explicitly adopt such an approach. The content of these proposed rights varies, with the Law Commission list including items which have no parallel anywhere and which exclude some important human rights.

In the South African context it is important that a negative culture of human rights is not encouraged which sees the adoption of such rights as simply a restriction or limitation on a future government. There is a positive or affirmative approach which is seen as inherent in our nature and without which we cannot live as human beings or, secondly, as comprising those rights which have won general if not universal recognition and which are considered as vital for the development of the human personality.

There are two very important reasons why lawyers in South Africa

should be involved in developing a human rights culture. Firstly the history of the African National Congress is deeply imbued with a rights approach, bearing testimony to the statement that the oppressed or victims can only rely on rights, while the violators of these rights rely on power. The second reason is that our contemporary notions of human rights have been influenced and affected by the developments in international law. Apart from a limited number of constitutions - beginning with the US and France - states used not to recognize any restrictions on their sovereign rights to treat their nationals in the way they saw fit. Genocide, pogroms, racial and ethnic discrimination and gross violations of the right to free speech, association and assembly were accepted as part of the sovereign right to domestic jurisdiction as South African foreign ministers, up to and including the present one, have consistently claimed. And, of course, the existence of colonialism was incompatible with the concept of human rights.

Since 1945, there have been major developments, using the seven references in the Charter of the United Nations, toward an International Bill of Rights. Drawing on the seminal Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations in December 1948 and which established a common standard of achievement for all peoples and all nations in respect of human rights, the United Nations and regional and international organizations have adopted various binding instruments which list the three categories of rights which are now part of the patrimony of humankind - the traditional civil and political rights (the "blue rights") or first generation of rights; economics, social and cultural rights (the "red" rights) deeply influenced by the socialist tradition of rights; and the third generation of collective or "green" rights, the right to self-determination, to development, to peace and an environment free of pollution.

Concepts such as equality and freedom from discrimination on grounds of race or sex, affirmative action to undo structured or historic discrimination owe a great deal to such international developments which have also deeply influenced the basis for international action against the apartheid system and ideology. In a precise sense, therefore, South Africa has reached the legal and constitutional cross-roads at the present time partly because the international legal order of human rights has enabled the political and legal organs of the UN to emphasize the criminality of the illegality or the illegitimacy of the regime with all that such characterization implies.

These developments have been pioneered by the third world and their allies and the new international democratic order has been part of the struggle waged on behalf of George Orwell's "great unwashed" and very much form part of our human rights inheritance. They also offer to white South Africans the protection of clearly established standards which any new dispensation must obviously take on board not

only because a future South Africa must respect a core of basic, indispensable rights but also because they form part of the international legal order which, unlike apartheid South Africa, a free South Africa must respect.

There are, therefore, precedents which we can draw upon if we are to build a new democratic order. Human rights are integral to democracy.

Liberation and Human Rights

Commentators at home and overseas have not really grasped the extent to which the liberation movement, throughout its history, has used the language of rights as part of its vocabulary of protest and action. Ken Owen of *Business Day* has recently appealed for a "language of liberty". He will find it not in the documents of Anglo-American or the Law Commission but from 1912 onwards, in the archives of the African National Congress, particularly the invocation of President Wilson's 14 points after 1917 with its emphasis on self-determination and self-government. President Tambo's statement in 1987 identifies the strength and richness of this tradition in our movement:

> As in almost every other field of human endeavor in South Africa, there has emerged a definable alternative culture - the People's Culture, permeated with and giving expression to the deepest aspirations of our people's struggle, immersed in democratic and enduring human values.

Such an approach is reflected not only in the Freedom Charter but more recently in the Harare Declaration adopted by the Organization of African Unity in 1989 and in the important UN General Assembly Declaration on Apartheid of December 1989, the results of initiatives taken by the ANC, which emphasize the need for representation and democratic government and the right of all to "enjoy universally recognized human rights, freedoms and civil liberties, protected under an entrenched bill of rights," as part of the "fundamental principles" of a future, free South Africa.

In its introduction to the Constitutional Guidelines published by the African National Congress in 1988, the National Executive Committee refers to the Freedom Charter, adopted in 1955 by the Congress of the People, as the "first systematic statement in the history of the country of the political and constitutional vision of a free, democratic and non-racial South Africa."

The Charter's adherence to the notion of legitimacy ("[n]o government can justly claim authority unless it is based on the will of the people") and its emphasis that only a "democratic state based on the will of the people" can "secure to all their birthright without distinction of color, race, sex or belief" are aspects which have usually been ignored by those who do not recognize, as one commentator put it, that it pro-

vides an existing basis for a "genuine dispensation for peace and freedom". A right to take part in the government of a country is now recognized as a basic human right because without it, there can be no involvement in determining one's own destiny.

Long before the International Bill of Rights had crystallized and identified the liberal rights of freedom of speech, conscience and association, of religion and privacy, as well as the economic and social rights, such as the right to education, social security, and food, and the third generation of rights, the oppressed through their representative organization had expressed their demands by invoking human rights standards and the idea of fundamental law, contrasting their claims to the very denial of those rights by apartheid society.

In fact, reliance on rights discourse has a much earlier provenance than the Freedom Charter as a program of rights was adopted by the ANC as early as November 1943 when its annual conference adopted a document entitled "Africans' Claims in South Africa, including the Atlantic Charter from the standpoint of Africans within the Union of South Africa". The remarkable aspect of this document was not that it was a racial or chauvinist document, which it was not, as it simply referred to the disabilities which blacks suffered from. The truly extraordinary aspect was that a Bill of Rights was an integral part of the document and this covered both civil and political rights, as well as cultural and economic rights, and represented what one commentator described as a "precocious anticipation of a larger and more comprehensive agenda of fundamental human rights." The 1943 list included the right to choose the form of government, abandonment of the use of force, land, labor, and educational rights, full citizenship rights and the removal of discriminatory legislation.

In its review of the tradition of human rights in South Africa, the South African Law Commission does not ever refer to the 1943 *African Claims'* document, although it relies very heavily on the 1854 Constitution of the Orange Free State, preferring to ignore that the basic assumption of this document forbade any form of equality in "Church or in State!"

The oppressed do not have to *develop* a culture of human rights as a rich vein exists in the fabric of the political life of the liberation movement. The 1943 document, together with the Freedom Charter and the 1988 Constitutional Guidelines present a humanistic alternative to the paradigm of apartheid. This emphasis on universal values associated with human rights standards, the urgent need to replace apartheid structures (in the law, in the government and civil service and in law enforcement) by democratic ones and active opposition to racism in all its forms (the constitutional duty to eradicate racism and to forbid the advocacy and practice of racism etc., as prescribed by the Guidelines)

counterpose the basic values of human rights as understood in international law to the illegitimate doctrine of institutionalized racism.

Where these documents are all-embracing and inclusive ("South Africa belongs to all who live in it, black and white"), apartheid and the regime's structures are limiting and exclusive. While they espouse the legitimate and concrete demands of the people based on the International Bill of Rights, the regime and its organs such as the Law Commission in its 1988 proposals selectively invoke norms which apartheid up to now has totally betrayed, in order to protect racial privilege.

The claims based on human rights standards project a vision of a free and democratic South Africa based on the rule of law. They will liberate white South Africa also, as whites have never known a society based on rights, rather than privilege, a society which ensures that it is made safe for diversity (culturally and linguistically) and pluralism (through open political activity).

Which Rights?

Among those who have very recently been converted to the idea of human rights, there is an expectation that only the traditional or liberal notion of human rights is worthy of protection by law and the Constitution. The "blue" rights are limitations on state interference, it is suggested, and therefore are eminently worthy of the protection of the law as South Africa has suffered from a surfeit of parliamentary sovereignty. As a contrast, they would argue that those rights which place positive obligations on the State to enact laws to protect social and economic rights cannot be constitutionally protected. This has been the approach of the Namibian Constitution of 1990, although a word of warning is not out of place: this Constitution was discussed and adopted without reference back to the constituencies represented by the parties in the constituent assembly.

Lack of time forbids a discussion as to why such a bifurcated approach has been adopted in various constitutions and in the International Bill of Rights. The arguments turn on such matters as to whether both sets of rights can be equally enforced and the legitimacy of enforcing rights which imply redistribution of resources in a country which may be committed to a market economy.

My purpose in raising this issue is to initiate a debate on the extent to which human rights (first and second generation) are interdependent and indivisible or, as the Indian Supreme Court has described their relationship as "two wheels of a chariot." Put in another way, neither the old saw, "men cannot live by bread alone" nor Shelley's "freedom is bread on a comely table spread" provide an adequate explanation.

South African lawyers understandably emphasize the body of individual rights because of the notorious record of apartheid in violating these accepted rights. But the individualistic tradition is not the only

tradition; many rights can only be expressed or enjoyed in association with others and the collective tradition of rights, building on the African and socialist parts of our patrimony, should not be excluded.

The division between the first and second generation of rights is neither philosophically or legally clear-cut as opponents of the rights enshrined in the UN International Covenant on Economic, Social and Cultural Rights would have us believe. Some of these economic rights are indispensable tools for the realization of social justice in South Africa.

A superficial study will show that even liberal courts elsewhere have recognized the inter-relationship between the first and second generation of rights and judicial hostility to the second generation rights has been overcome by insisting that, for example, legal aid must be provided by the State in order to ensure equality before the law; additional courts must be built and staff appointed in order to fulfil the requirements of speedy trial and due process; that pavement dwellers or squatters cannot be evicted without provision of alternative housing; that the notion of a right to life (a first generation right) cannot be limited simply to freedom from being killed or maimed by the State but also includes the right to food.

In any event, a culture of human rights must take into account the actual needs of the people and the extent to which a society based on inequalities will tackle the problems of poverty, lack of housing, inadequate medical and social services and education based on racial discrimination. The rights of workers, as they develop their Workers' Charter, must be reflected in the Constitution. Apart from entrenching those rights that fall under the heading of freedom of association, including the right to join a union of one's choice - now accepted as a basic democratic demand - there must be constitutional protection of rights relating to workplace conditions, worker participation, skills-upgrading, training and adjustment programs upon losing one's job. Equal pay for work of equal value must surely be an element of the larger right to equality and specific content must be given to social rights so as to reflect concerns of gender. The right to strike - not the gnomic reference to withdrawal of labor as in the Namibian Constitution - must be clearly recognized, to reflect the inequality inherent in the market economy.

Building on the provisions of the Freedom Charter, the ANC's Constitutional Guidelines of 1988 have identified those areas of importance to South Africa's multi-cultural society which require specific mention. The Bill of Rights will entrench cultural, linguistic and religious rights for all as a recognition of the diversity of South African society and the need to promote - as a demand on the government - such rights which have either been demeaned or ignored by apartheid as far as the majority of the population are concerned.

The Guidelines also trench on an important and developing notion of participation in public life which is increasingly seen as a human right. Human rights must not be formal rights and, therefore, the Guidelines refer to the need of the future constitution to "promote conditions for the active involvement of all sections of the population at all levels in government and in the economic and cultural life." This approach has serious implications concerning the nature of local government (where the emphasis must be on participation and democracy), on access to radio and television and the right to receive and impart information freely.

Formal equality has the result of freezing the *status quo*. The Freedom Charter, the Harare Declaration and the Constitutional Guidelines attempt to provide an element of justice by ensuring that "[t]he effects of racial discrimination and inequality must be overcome by constitutional provisions for corrective action which guarantee a rapid and irreversible redistribution of wealth and the opening up of facilities to all." This can only be done in an orderly and systematic way in the South African context and the proposals concerning affirmative action in the Constitutional Guidelines have been adopted because of the experience of other countries where minorities - because of ethnic or racial or gender prejudices-have suffered a pattern of discrimination. The validity of such an approach - which is concerned with substantive justice - is justified by international law as reflected in the provision of the UN International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on the Elimination of All Forms of Discrimination against Women.

Such positive measures are to be distinguished from proposals for special treatment for minorities. Positive measures to remove economic, social and educational disabilities and to buttress and develop the language, religious and educational rights of ethnic or linguistic minorities are consistent with the equality principle.

The protection of minorities lies in the effective application of the law which cannot permit *individual* acts of discrimination on the grounds of race, ethnic background, sex or social status. Article 27 of the UN International Covenant on Civil and Political Rights encourages this approach. In passing, it is worthwhile noting that France, a developed democracy, made the reservation to Article 27, when ratifying the International Covenant on Civil and Political Rights of 1966, that it did not have any minorities as identified in Article 27. The true opponents of democracy are those who demand special legal and constitutional arrangements for minorities in order to protect privileges.

Majority rule does not, of course, imply rejection, exclusion or the repudiation of the rights of minorities. The Constitutional Guidelines refer to the need to "promote the habits of non-racial and non-sexist thinking, the practice of anti-racist behavior and the acquisition of gen-

uinely shared patriotic consciousness." Such an approach is necessitated because of the chauvinism, racism and exclusivism instilled in us in our homes, schools and by the state. An attempt to create or instil unity is consistent with a recognition of diversity. Recognition of the basic human rights of individuals is the only way to aspire to, if not guarantee, such diversity.

But we must reject the "local option" proposal made as recently as August 1990 by the Minister for Education and Culture that school communities would be able to "choose for themselves if they want to compete with other groups or if they want to integrate with them."

Apart from the unhappy use of language, this approach gives a racial veto to integrate education in the school sector. Such local options have been proposed for local authorities and for residential areas. We must recognize these stratagems for what they are: apartheid under another name, under the guise of protecting "social" rights.

In attempting to develop a culture of rights, we must guard against the temptation of easy acceptance of every claim for rights which is made. The function of a Constitution is to vindicate fundamental and agreed societal values, not to entrench claims which are controversial or which can only be resolved at the level of political decision-making. This is important in relation to the way the economy of a free South Africa is to be organized. Individual property, for personal use and consumption - your house, car, tools, your shop and the right to follow your trade and profession - must be constitutionally protected, as the ANC Guidelines clearly set out.

What is categorically not part of what is meant by "economic rights" are traditional economic rights like freedom of contract, commercial rights (and the rights of corporations generally) or classically conceived rights of property, as the Law Commission would like us to accept; nor, in an extreme example, the proposals of those who believe that the "principles" of the free market economy should be constitutionally protected.

When constitutionally entrenched, these kinds of rights often work to frustrate the realization of social and economic rights and, in the South African context, will assist in what Albie Sachs has described as the "privatization of apartheid". Traditional economic rights are excluded from the international human rights Covenants and, in my view, should not be part of any constitutional provision. Even in the European Convention on Human Rights, there was no agreement in 1950 on such a right. Later on, a carefully-worded and muted reference to property was adopted.

WHO JUDGES?

The Constitutional Guidelines refer to the need for a Bill of Rights. It was not the intention of the drafters to identify *all* the rights which

would be protected as this was a consultative document. It is now time that such a process of identification should be seriously undertaken and the internal discussions on the Women's Charter of Rights, the Workers' Charter, the Educational and Health and Sports' Charters, are part of the process of giving greater content to the Guidelines. Even if these Charters are programmatic in approach, there is no reason as to why some of their provisions should not be included in a Bill of Rights section of the Constitution of a free South Africa.

But rights of such a basic nature require mechanisms for their protection and enforcement and cannot be left to the whims and fancies of chance parliamentary majorities. It is now recognized that some rights are *absolute*, in that they can never be amended or abolished, even in times of a national emergency or war. Such rights are especially important in the South African context as they have never enjoyed protection. Freedom from torture, cruel or unusual punishment or treatment, retrospective legislation or retrospective increase in penalties, the right to life, or discrimination on grounds of race, color, sex or language can never be derogated from. What happens in a state of emergency also requires careful drafting.

But it is a different matter in relation to other rights. Lawful restrictions may be imposed. Who is to judge the extent of the restriction? Who is to protect the rights of the individual as against the state in the event of a breach? Who is to judge whether legislation infringes fundamental human rights?

Consideration of time precludes a full discussion of this topic but a debate must now begin in South Africa as to the most satisfactory way of ensuring protection of human rights. The Guidelines open up such a debate by referring to the fact that a future Constitution shall provide "appropriate mechanisms for their protection and enforcement."

Nearly all proposals for constitutional protection of human rights in South Africa vest the powers of enforcement in the judiciary, on the basis that it will become more "representative" and remain "independent." But it is necessary to remember that tension between democracy and judicial review is endemic to all systems of government that vest power to strike down laws in the judiciary. There *are* other methods of enforcement and protection of human rights which can be found in democratic countries such as Canada, Italy, France and West Germany which are worthy of analysis and assessment and which may be more suited to the needs of a democratic South Africa committed to reconstruction. A Constitutional Court may provide for greater participation by interests other than the judiciary and may enjoy greater legitimacy.

Factors which must be taken into account in South Africa are: the background and training of our judges, the social milieu in which they operate, and their receptiveness to a rights' culture encompassing both individual and collective rights.

Innovation and Creativity

The protection of human rights in a new legal order requires a positive attitude to innovation where the interests of the community at large are involved, rather than the aspirations of the elite only. Traditional forms of law-making and interpretation must be re-assessed in order to encourage participation. Participation in law-creating through a Constituent Assembly must entail consultation with the various constituencies (very much in the way the Freedom Charter was adopted).

As far as the courts are concerned, reliance on outdated concepts relating to *locus standi*, the division of the profession and access to legal education require urgent attention.

Access to dispute settling machinery is vital to an adequate protection of human rights. Important changes in the way the courts operate will have to be considered: rights of intervention in courts for observers and groups not intimately connected with the dispute allow for greater degree of participation in debates concerning the potential interpretation of constitutional guarantees; legal aid for disadvantaged individuals and groups will enable interest groups to develop national litigation strategies; lay-advocates who may come from the same community as the victim may be better placed than many lawyers to put the victim's case forward and this could be seen as an extension of the right of the victim to plead her own case without a lawyer; courts could be made more accessible, especially in human rights cases, through a relaxation of rules of procedure that serve to exclude people, through informal communications (as in India) which allow the court to accept jurisdiction; court appointed commissions of inquiry and expert advisers could provide more of an independent vantage point if the governments' or the parties' own experts are not up to standard; the pool from which members of the judiciary are chosen and the method of appointment must be widened as the politically sensitive task of constitutional interpretation and human rights enforcement should not be the exclusive domain of a legal elite; remedies for violations of constitutional guarantees must take into account not only the individual's right which may be violated but the effect on other individuals and groups.

A rights culture, especially in the South African context, requires a dynamic response from the legal profession and provides a challenge to received or orthodox opinion.

The Convention for a Democratic South Africa

The publication of the Bill of Rights by the African National Congress in November 1990 and the revised version by the South African Law Commission in 1991 has provided the impetus for a debate on a rights-based culture in South Africa. Further, the convening of the Convention for a Democratic South Africa - Codesa - has provided

hope that a negotiated settlement based on the participation of all parties will not be far away.

The Convention for a Democratic South Africa adopted a Declaration of Intent which is a clarion call for a free South Africa. The parties and organizations - representing the vast majority of the people of South Africa - subscribed to a statement which commits them to a united, non-racial, non-sexist South Africa, based on the rule of law in a multi-party democracy with an independent, non-racial judiciary which will interpret a justiciable Bill of Rights. All that is now necessary is to agree on who or what will draft the Constitution and how the interim period before elections is to be organized.

Violence, especially politically-motivated violence, demolishes consensus and demobilizes social structures and community organizations. It is incompatible with developing a culture of democracy.

A culture develops over a period when attitudes of mind, practices and processes become part of a habit and are secreted in the everyday behavior of people. On this basis, official attitudes to democracy and tolerance have been deeply antagonistic and hostile towards participation by the people in the processes of democracy.

We have had a racist structure of government which has excluded the vast majority from any form of effective participation, the hallmark of democracy. Government at national, regional or local level has been based neither on the consent nor the will of the people, either in South African or in the TBVC states. Legitimate grievances of our people - from the demands of students, women, workers, tenants - have been met with bureaucratic obstructions, indifference or, in most cases, with violence. Racial discrimination and apartheid have played havoc with our family life, respect for the authority of teachers, parenthood and respect for the dignity of our people. Demands for negotiations for over 80 years have been treated as criminal or treasonable conspiracies.

We have effectively been living under a state where there has been rule *by* law where the rules were not only illegitimately made but were in pursuit of an anti-human and vile philosophy. Simply to move to a society where there is a rule *of* law will neither establish nor confirm democratic values and tolerance.

The issue facing us cannot be dismissed by referring to the need to educate the masses or the "uneducated." Apart from the offensive and patronizing tone of such an approach, it is inaccurate and dangerous.

Our society is deeply authoritarian, bureaucratic and secretive. It has served the purpose of those who have wielded power at the top to work in this way. Decisions are handed down or prescribed, reasons are rarely given and questioning is treated as subversive.

Democracy requires openness, participation and accessibility. The commitment by Codesa I to common citizenship, universal suffrage and genuine negotiations is a historic move in the right direction but it will

remain a dead-letter unless there is a deep commitment by those who have exercised power-large or small - to open up, in the interim period, decision-making and to involve people at all levels in issues that affect them.

Active Support for Democracy

The working of democracy and respect for political tolerance are inextricably bound together. Democracy demands forbearance of the other person's viewpoint. In practical terms, this means that there must be a recognition of the right to associate, which is the active guarantee of democracy. For the interim, all parties must reiterate support for the Code of Conduct for Political Parties drafted under the auspices of the National Peace Convention and support the proposed provisions for its enforcement. Parties must have a genuine right to organize, not simply a formal dispensation to do so. If the reality does not coincide with the legal promise, such a democratic right is brought into contempt, with an increase in cynicism.

The African National Congress therefore opposes the banning of parties, whether under the Internal Security Act of 1982 (as amended) or under the Bophuthatswana Internal Security Act of 1979 as such draconian powers - which have been used in the latter case to ban the Black Sash and the Transvaal Rural Action Committee - are incompatible with a culture which we are trying to instil. If crimes are committed in pursuit of political objectives, the courts must be used to charge individuals with offenses.

More fundamentally, if tolerance, stability and understanding are to be the preferred values, no advantage must be enjoyed under the law or practice by any political party or organization, no administration or government organ must be seen as an arm of a party. No one, such as chiefs, teachers and civil servants must be forced to swear allegiance to a chief minister and his cabinet (resolution of the Kwa Zulu Assembly) or to give precedence to a political party when there is a clash with the decision of a legislative assembly (KLA Debates 7:721-2).

It is the contention of the ANC that Codesa must come up clearly in support of the independence of organs of civil society. The encouragement, development and flourishing of bodies independent of State power is the sure guarantee of democracy as they ensure that power is not concentrated in the State and that individuals, by joining organizations of their choice, are not only exercising their right to associate but are creating a focus of social power, independent of the State.

In the transitional period, it is therefore important that trade unions, tenants' organizations, the churches, sporting and cultural bodies are actively involved through mobilization in defence of democracy and must be freed from unnecessary and limiting constraints which inhibit their freedom of action. The "total onslaught" philosophy, which has

caused so much damage and suffering may be dead but it is not buried in our country. The ANC therefore considers that legislation such as the Security Clearance and Public Service Act in Bop, which permits the President to dismiss any employee of the state, parastatal or education authority where he considers that such a person "endangers or constitutes a threat to the public safety or national security or the maintenance of law and order" is a dictatorial form of intervention affecting a freedom of information, free speech and free association and not conducive to political tolerance or respect for democracy.

It is easier to organize for democracy in urban areas. The ANC is therefore conscious of the need to ensure that the terms of reference being discussed here apply equally to rural areas where power may be limited in fewer hands. It is our view that all sources of power - from the police to traditional authorities - subscribe to a new approach, a presumption in favor of free participation and democracy. We therefore oppose any reorganization or restructuring which would limit that authority of authentic local bodies and increase the power of undemocratically elected or discredited individuals. Such is the case with the "headman" who play an important part in authorizing meetings, with the changes introduced in the Ciskei in June 1991.

Meetings should not require the consent of traditional or any other authority, providing the provisions of the National Peace Accord are followed.

Law and practice should assist rather than impeded free expression opinion, if tolerance is to be encouraged. There should therefore be no-go areas where the law artificially restricts such an expression or where there are spatial no-go areas because certain political parties cannot organize. Police and administrative bodies in the rural areas in particular must be instructed that their approach to controlling and supervising meetings, assemblies and demonstrations must take into account the changes in law and practice since February 2, 1990.

Free political activity entails *inter alia*, the holding of meetings, assemblies and marches at any place and the dissemination of information through the distribution of pamphlets, posters and papers in any community. The respect for and observance of these political rights will primarily be a function of the culture of tolerance within society. Where such a culture is lacking, the only acceptable guarantor of free political activity is in the final analysis the State because of its monopoly coercive of force. The police are thus bound to play an important role in the enforcement of the political rights. This will require, however, a drastic reorientation and organization of the present Force.

The practice of repressing political activity must give way to the active defence of democracy. At present the police do monitor major marches but the aim is usually to prevent participants of the marches from committing illegal actions. With heightened political activity

before an election, the police role should change. They should then concentrate on the guaranteeing of, for example, the right to hold meetings in no-go areas. This the South African Police (SAP) have done on numerous occasions for the National Party (for example Ventersdorp in 1991). This service, which they are duty-bound to provide, must be made available to all political parties.

For the SAP to be an affective guarantor of political rights, it may be necessary to earmark a specific section in the Force for this purpose. Such a section or unit will thus be at the guaranteeing of any part wishing to use its services. The guaranteeing of political rights should also as far as possible occur through the language of democracy - negotiations and dialogue. The use of force should be reserved only for extreme cases of violent intolerance. This section should receive special education to appreciate the values of the democratic process and training in negotiating skills. The Riot Squad, in terms of its style and objectives, is an example of a unit which will not be able to provide this service.

National Council for Democracy

For an active defence of democracy, all sections of our society should be involved in a vast process of education. It is not enough to say that Codesa should resolve that schools, in their civics programes, universities in their re-drawing of syllabi and some well-meaning organs of civil society should be encouraged to include education for democracy in their work in general and the proposed Bill of Rights in particular. Codesa should consider the establishment of an all-party National Council for Democracy which would assist private bodies engaged in such work, to draw up a programe of action for education for the transition and to encourage concrete project in this area. Such a Council would also provide for organized and systematic representation to the mass media for the drawing up of a coherent programe of voter education and respect for democratic values.

Elections for Democracy

The imminence of elections on a non-racial basis in an undivided South Africa is a consummation which million have awaited for generations, and for which much sacrifice has been made. The promise is as important as the concrete realization as it allows for preparation and organization which should, especially for the disenfranchised, include their own participation in the pre-election process.

The elections will play a dynamic role in the training for democracy. The first-ever election will be an act of individual self-determination as our fellow citizen will for the first time have a right to determine his or her future. Secondly, there will be the collective act of self-determina-

tion as the whole of an undivided South Africa will exercise its patrimony to decide the future steps of our constitutional order.

To develop respect for the future constitutional order, it is vital that the elections are not only free and fair, but also seen to be so. There is now general agreement that elections in future will be organized, not on the present first-past-the post, winner-takes-all basis but by proportional representation. The ANC's view is that the fairest system is the List System of proportional representation as it is easy to understand, especially in a country with high illiteracy. Minorities, providing those are able to obtain 5% of the vote, will be guaranteed representation.

The elections will therefore be on the principle of inclusiveness as everyone's vote will count. In order to develop public confidence, the ANC has announced that the first election should be conducted by an Independent Election Commission, made up of truly independent South Africans of the highest reputation and integrity who will be responsible for the entire organization, scrutiny and reporting of the election process. This is a radical departure from the present position where the Government of the day organizes the election.

We need to discuss whether the Independent Election Commission should not be the body to which breached of the Code of Conduct for Political Parties should be reported and whether refusal of access to political parties to venues and to their members and voters should not be resolved by the Commission. In addition, complaints against the police for irregular action might usefully be investigated by the Commission. The main point here is confidence in the democratic process: unless complaints are investigated quickly and to the satisfaction of all parties, there will be no faith in the fairness of the process.

Peace is necessary for democracy to prevail. But there can be no peace without democracy in our land. For too long stability has been invoked, while participation and freedom have been denied. Codesa had the opportunity to assist in the development of the culture of rights. But we must remember that the foundations of the constitutional order already exists in the day-to-day behavior of millions of our people: when people marched in the streets without asking for permission, they were asserting the fundamental right to peaceful assembly, when they defied the bans and obstructions imposed under emergency regulations, they were affirming that as South African citizens, they had basic rights.

Democracy means that government must not only be accountable to the people, rather than people to the government; it also establishes the idea of people having rights and of people being equal. It is up to Codesa to ensure that our work materializes and secures the transition from the anti-apartheid phase to the pro-democracy one.

CONCLUSION

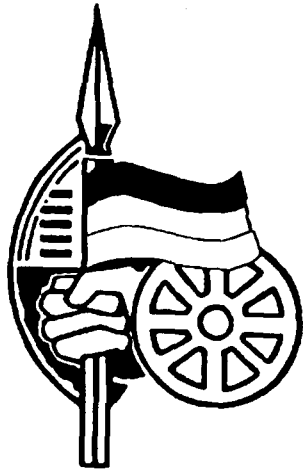
I have tried to show that in a country such as South Africa, the development of a culture of human rights is a revolutionary concept. Recognition of the rights of individuals is a way of recognizing their autonomy and empowering them. But there is also a communitarian tradition in human rights reflected in the African Charter of Human and People's Rights where duties to the community and collective rights are identified and protected. We must take these on board too.

Human rights are vital to a democracy and a shield against oppression. A democratic government, firmly attached to a charter of rights, will show a commitment to recognizing the dignity of the individual which we have never enjoyed in South Africa.

Finally, I should refer to the fact that law reflects the outcome of struggle in the economic, social and political fields. To develop a culture of human rights, we must encourage all of our people to join in this struggle and provide democratic machinery for its pursuit. Lawyers must continue to play an active role, as they have done in the struggle against apartheid. For the struggle for human rights is a struggle for justice and we must remind ourselves of Edmond Cahn's appeal: "For what gives justice its special savour of nobility? Only the divine wrath that arises in us, girds us and drives us to action whenever an injustice affronts our sight."

APPENDIX

A Bill of Rights for A New South Africa



A Working Document by the
ANC CONSTITUTIONAL COMMITTEE

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A BILL OF RIGHTS FOR A NEW SOUTH AFRICA - WORKING DOCUMENT

Introductory Note

Towards a new constitution

After a long and painful struggle, in which millions participated over the generations, and many gave their lives, South Africa is at last about to get a new Constitution. There are still heavy battles ahead, but the achievement of non-racial democracy in our country cannot be too far away. The dream of the founders of the ANC, namely, to end the colonial status of the African people and accord full citizenship rights to all South Africans on an equal basis, is about to be realised.

A Constitution defines the rights of the people, the powers of the government, the way it functions and the manner in which it is chosen.

The 1910 Constitution of South Africa gave no rights to the majority of the people. It provided for an all-powerful government, but a government consisting only of whites elected virtually only by whites; the minimal voting

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rights which black South Africans had were finally taken away by constitutional trickery. Its only good result was to lead directly to the unity of its opponents and the formation of the ANC. The 1961 Constitution which declared South Africa to be a Republic, ushered in the period of most bitter oppression and denial of rights for our people. The 1983 Constitution attempted to co-opt the Coloured and Indian people as subaltern participants in the white-controlled Tricameral Parliament, leaving Africans out altogether. Its only virtue was to lead to the creation of the UDF.

The new Constitution which our struggles have placed on the agenda, will for the first time in the history of South Africa provide for all people to have rights, and for all people to choose the country's government.

The Rights of the people

The rights of the people will be recorded in a Bill of Rights, which will be an integral part of our Constitution, as Bills of Rights are in most constitutions in the world. We want these rights to be guaranteed, so that our people will always enjoy them, and know that they can never be taken away. We look forward to a strong and

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effective Parliament capable of dealing with the great tasks facing the nation, but a Parliament that will operate within an agreed set of fundamental principles based upon universally held ideas of freedom and justice.

The idea of basic rights and freedoms means the most to those who have suffered the most. In South African conditions, a Bill of Rights becomes the fundamental anti-apartheid document. It guarantees equal rights for all citizens, and defends each and every one of us against the kinds of tyranny and abuse which have flowed daily from the apartheid state. It is not the Constitution which creates the rights. Rather, the Constitution recognises and protects the rights which have been gained in struggle, struggle by the people of South Africa and struggle by people the world over.

Human Rights

The Universal Declaration of Human Rights was adopted in 1948 as a direct result of the struggle against the racist and inhuman ideas of nazism and fascism. The International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, were adopted by the United Nations in 1966 when the de-col-

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onisation process was at its height and when new and more wide-ranging concepts of human rights were being accepted.

In preparing the draft text which follows, we have relied heavily on these great documents. We have also drawn upon the European Convention of Human Rights and the African Charter of Human and People's Rights, as well as provisions dealing with protection of human rights in a great many Constitutions, ranging from those of India to West Germany to the USA to Namibia.

The Freedom Charter - The Source

Above all, we have relied on the texts which have emerged from our own freedom struggle in South Africa. The Freedom Charter, adopted at Kliptown in 1955, is the great source of any Bill of Rights in our country. It did not deal with the institutions of government, nor did it indicate how the rights it proclaimed were to be guaranteed, but it did set out a firm vision of an apartheid-free future. In its January 8 statement of 1987, the ANC declared its commitment to a Bill of Rights that would be justiciable, that is, that would be protected by the courts. In 1988, the

NEC issued its Constitutional Guidelines which gave an important position to a Bill of Rights.

The Constitutional guidelines

The Guidelines were extensively discussed inside and outside of the organisation, and a number of seminars were held specifically to analyse and enrich the text. The comments received ranged from insistence that the issue of women's rights be treated more extensively, to vigorous proposals that social and economic rights be spelt out more explicitly and that the question of access to the land receive fuller attention. We have tried to incorporate these observations into the text set out below.

We have also benefited from receiving proposals from a wide range of organisations associated with the UDF, including those concerned with such issues as ecology, social welfare, gay and lesbian rights and rights of the disabled, and we have consulted draft proposals on workers' rights from COSATU, the Communist Party and other organisations involved with workers' struggles.

There is accordingly nothing essentially new and nothing secret in the document. It does not deal with issues such as the electoral system,

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how Parliament should be constituted, the territorial division of the country, the way the government should be composed and the many other themes related to the institutional arrangements of democracy. A Bill of Rights to some extent stands on its own. Possibly its enforcement mechanisms have to mesh in with or be adapted to the specific way in which government and the judiciary are structured, but its basic principles should be capable of incorporation into any democratic system.

Accessibility

We have aimed at open and accessible language. This is in the tradition of the first great modern Bill of Rights, namely, that contained in the Amendments to the American Constitution adopted immediately after the Revolution against the British Crown. In our view, a Bill of Rights should set out general principles and not attempt to deal with each and every eventuality in advance. Moreover, its terms should be such that any person can understand them. It might be that other parts of the Constitution will be more technical; the Bill of Rights is the Chapter in the Constitution that should be capable of the most direct comprehension.

Response

What follows is a draft text for consideration at this stage by the members of our organisation. We look forward to receiving the fullest commentaries possible from the regions, so that we can amend and enrich the text before submitting it in finalised form for consideration by the NEC. We would appreciate comments on the overall shape and presentation of the document as well as on the detailed clauses. If there are any essential matters appropriate for a Bill of Rights that we have left out, we would like to be advised of them. We hope in due course, together with the ANC's allies and other interested persons, to organise a workshop or a series of workshops on the document.

What is contained in a Bill of Rights?

In the meanwhile, for the information of those members not familiar with Bills of Rights, we offer a few prefatory remarks on certain specific features of the document.

In the first place, in keeping with the approach of most contemporary human rights documents, we do not feel that it is necessary to make a constitutional choice between having

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freedom or having bread. We do not want freedom without bread, nor do we want bread without freedom. We want freedom, and we want bread. The document thus opts firmly and unequivocally for the fundamental rights and freedoms associated with a democratic society. Indeed, abhorrence of any form of arbitrary or oppressive behaviour is underlined in a whole series of articles which not only affirm classic civil, political and legal rights, but which assert the claims made in modern society for freedom of information, freedom from censorship, and freedom from surveillance and secret political files. Members will notice too that the draft proposes the abolition of capital punishment and the ending of detention without trial.

At the same time, the document gives considerable attention to social, economic and educational rights. There are some lawyers who argue that these rights should not appear in a Bill of Rights at all, since they are not enforceable through recourse to the courts. We do not agree. These rights are contained in nearly all contemporary human rights documents. In Europe they appear in the Charter of Social Rights. In the Irish, Indian and Namibian Constitutions, they appear as Directives of State Policy. Our ap-

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proach has been to identify certain needs as being so basic as to constitute the foundation of human rights claims, namely, the rights to nutrition, education, health, shelter, employment and a minimum income. In South Africa, it is not just a question of dealing with poverty such as you might find in any country, but with responding to the social indignities and inequalities created as a direct result of State policies under apartheid. The strategy proposed for achieving the realisation of these rights is to acknowledge them as basic human rights, and require the State to devote maximum available resources to their progressive materialisation.

The State's role in enforcing the bill of rights

In particular the document envisages the State establishing a minimum floor of enforceable statutory rights in relation to each area. Thus, with regard to nutrition, there can be the compulsory furnishing of a minimum diet to children; in the case of education for all, free and compulsory primary education, and a duty on local authorities to provide access to literacy classes; in respect of shelter, there could be the duty to furnish electricity or other forms of

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energy and as well as access to clean water for every home, and also the need to take account of the availability of alternative accommodation before ordering eviction.

Economy

In other words, whichever government is in office, there will be a constitutional duty progressively to expand the floor of basic human rights in these areas. Exactly how the economy is to be organised and how revenue is to be raised is a matter for the parties to argue about and for the electorate to decide upon. Governments and Oppositions will come and go, but all will have to ensure that resources are devoted to providing the minimum elements of a decent life for all South Africans.

Language, Culture and Religion

A second feature of the document is the attention it pays to securing language, cultural and religious rights. Extensive recognition is given to the right of people to organise their own associations in keeping with the principles of a vigorous civil society existing autonomously of the State. Bearing in mind the importance of religion to many South Africans, considerable

attention is paid to the question of religious freedom. Similarly, the question of language rights is dealt with on the basis not of taking away language rights that already exist, but of giving recognition to the many South African languages that have been marginalised or recognised only in the context of Bantustans.

Gender and Family

Thirdly, and in direct response to the recommendations of the ANC in-house Seminar on Gender Rights and on the Family, the principle of equal rights between men and women is referred to throughout the document and not just in a special clause tacked on near the end, and there are a number of articles which seek to protect the constitutional right of women not to be abused or assaulted or treated as inferior, whether in the home, or at work or in public places. Attention is also given to the principle of non-discrimination against single-parent families or against children born out of wedlock, or on the grounds of persons being gay or lesbian.

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Workers' Rights

In the fourth place, there are a number of Articles devoted to the theme of workers' rights. This is a complicated area in which many of the rights claimed have to be understood against the background of anti-Union rulings by the courts in this country and others. The opinions of union members will be especially valuable in this area.

The Disabled

Fifthly, there is a special section dealing with the rights of disabled persons which takes into account proposals made by the UDF affiliate, Disabled Persons of South Africa.

Children

Sixthly, there is a section on children's rights which draws heavily on the provisions of the International Convention on the Rights of the Child.

Property

Seventhly, the document attempts to give an equitable framework for dealing with the emotive question of property rights. Since a Bill of Rights is a document for all South Africans, and

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not a manifesto or programme of the ANC alone, the issue has to be looked at from all points of view, but without sacrificing the just claims of the people. In the past, successive racist governments have trampled deliberately and relentlessly on property rights of blacks. The question of access to land cannot be ignored. In the Namibian Constitution the formula was used of just compensation for land expropriated in the public interest. The proposal made here is somewhat more textured, and draws extensively on the formula used in the post-World War II Constitution in West Germany which sought to reconcile in an equitable way the interests of the individual owner in receiving compensation with the interests of the larger community.

Environment

In the eighth place, there are several clauses which deal with the importance of protecting the environment, a theme not found in older Constitutions, but one which is achieving increasing recognition today.

Affirmative Action

Ninthly, the importance is highlighted of providing a clear constitutional framework for

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affirmative action to overcome race and gender discrimination, and for positive action to overcome the institutional patterns of apartheid and to restructure governmental and other institutions so as to make them more balanced.

Limitations

Tenthly, the limitations clause does not set out in detail the limitations that might be imposed in relation to the exercise of rights. Instead, the formula is used of permitting legislation to regulate or limit the exercise of rights to the extent that such limitations would be acceptable in democratic societies. The question of the suspension of rights during a state of emergency is not dealt with in the document, since it cannot be adequately treated without knowing what the organs of government will be [for example, who will declare a state of emergency, the President or the Prime Minister, and to what body would he or she be accountable].

It follows from the whole approach adopted in the document, however, that any suspension of rights should be strictly controlled, with well-defined limits and explicit accountability and subject to be treated in a later document.

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Constitutional courts and Ombudsman

Finally, attention must be drawn to three particular aspects of the enforcement mechanisms: the need to set up a constitutional court, to establish a Human Rights Commission and to create the office of Ombudsman.

There are many other aspects which members might find interesting or controversial. We welcome comments on every aspect of the document. The voice of the members is vital if a correctly balanced and appropriately formulated text is to be presented to the NEC for its consideration.

Zola Skweyiya

(Chairperson of the Constitutional Committee)

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A BILL OF RIGHTS FOR A DEMOCRATIC SOUTH AFRICA - WORKING DRAFT FOR CONSULTATION

Article 1.
GENERAL

1. All South Africans are born free and equal in dignity and rights.
2. No individual or group shall receive privileges or be subjected to discrimination, domination or abuse on the grounds of race, colour, language, gender, creed, political or other opinion, birth or other status.
3. All men and women shall have equal protection under the law.

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Article 2.
PERSONAL RIGHTS

The Right to Life

1. Every person has the right to life.
2. No-one shall be arbitrarily deprived of his or her life.
3. Capital punishment is abolished and no further executions shall take place.

The Right to Dignity

4. No-one shall be subjected to slavery, servitude or forced labour, provided that forced labour shall not include work normally required of someone carrying out a sentence of a court, nor military service or national service by a conscientious objector, nor services required in the case of calamity or serious emergency, nor any work which forms part of normal civil obligations.
5. The dignity of all persons shall be respected.
6. No-one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

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7. Everyone shall have the right to appropriate protection by law against violence, harassment or abuse, or the impairment of his or her dignity.

The Right to a Fair Trial

8. There shall be no detention without trial.
9. No persons shall be arrested or detained for any purpose other than that of bringing them to trial on a criminal charge.
10. Arrest shall take place according to procedures laid down by law, and persons taken into custody shall immediately be informed of the charges against them, shall have access to a legal representative of their choice, and shall be brought before court within 48 hours or, where that would be a Sunday or a public holiday, on the first working day thereafter.
11. Bail shall be granted to awaiting-trial persons unless a court rules that in the interests of justice they should be kept in custody.
12. No-one shall be deprived of liberty or subjected to other punishment except after a fair trial in public by an independent court.
13. Trials shall take place within a reasonable time.

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14. Everyone shall be presumed innocent until proven guilty.

15. No conduct shall be punished if it was not a criminal offence at the time of its occurrence, and no penalty shall be increased retrospectively.

16. No-one shall be punished twice for the same offence.

17. Accused persons shall be informed in writing of the nature of the allegations against them, and shall be given adequate time to prepare and conduct their defence.

18. Everything that is reasonable shall be done to ensure that accused persons understand the nature and the import of the charges against them and of the proceedings, that they are not prejudiced through illiteracy or lack of understanding, and that they receive a fair trial.

19. Accused persons shall have the right to challenge all evidence presented against them, to be defended by a legal practitioner of their choice, and if in custody, to have access to a legal practitioner at all reasonable times.

20. If a person is unable to pay for legal representation, and the interests of justice so require,

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the State shall provide or pay for a competent defence.

21. No persons shall be required to give evidence against themselves, nor, except in cases of domestic violence or abuse, shall persons be required to give evidence against their spouses, whether married by civil law or custom, their parents or their children.

22. No evidence obtained through torture or cruel, inhuman or degrading treatment shall be admissible in any proceedings.

23. Juveniles shall be separated from adult offenders.

The Right to Judicial Review

24. Any person adversely affected by an administrative or executive act shall have the right to have the matter reviewed by an independent court or tribunal on the grounds of abuse of authority, going beyond the powers granted by law, bad faith, or such gross unreasonableness in relation to the procedure or the decision as to amount to manifest injustice.

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The Right to Home Life

25. No-one shall be deprived of or removed from his or her home on the grounds of race, colour, language, gender or creed.

26. The privacy of the home shall be respected, save that reasonable steps shall be permitted to prevent domestic violence or abuse.

27. People shall have the right to establish families, live together with partners of their choice and to marry.

28. Marriage shall be based upon the free consent of the partners, and spouses shall enjoy equal rights at and during the marriage and after its dissolution.

The Right to Privacy

29. No search or entry shall be permitted except for reasonable cause, as prescribed by law, and as would be acceptable in an open and democratic society.

30. Interference with private communications, spying on persons, and the compilation and keeping of secret files about them without their consent, shall not be permissible save as auth-

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orised by law in circumstances that would be acceptable in an open and democratic society.

The Right of Movement

31 .Everyone shall have the right to move freely and reside in any part of the country, to receive a passport, travel abroad and to emigrate or return if he or she so wishes.

The Right to Conscience

32. The right to conscience shall be inviolate, and no-one shall be penalised for his or her beliefs.

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Article 3.
POLITICAL RIGHTS

1. South Africa shall be a multi-party democracy in which all men and women shall enjoy basic political rights on an equal basis.
2. Government at all levels shall be subject to the principles of accountability to the electorate.
3. Elections shall be conducted in accordance with an electoral law which shall make no distinction on the grounds of race, colour, language, gender or creed.
4. Elections shall be regular, free and fair and based on universal franchise and a common voters' roll.
5. All men and women entitled to vote shall be entitled to stand for and occupy any position or office in any organ of government or administration.
6. All citizens shall have the right to form and join political parties and to campaign for social, economic and political change, either directly or through freely chosen representatives.

Article 4.

FREEDOM OF SPEECH, ASSEMBLY AND INFORMATION

1. There shall be freedom of thought, speech, expression and opinion, including a free press which shall respect the right to reply.
2. All men and women shall have the right to assemble peacefully and without arms, and to submit petitions for the redress of grievances and injustices.
3. All men and women shall be entitled to all the information necessary to enable them to make effective use of their rights as citizens or consumers.

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Article 5.
RIGHTS OF ASSOCIATION, RELIGION, LANGUAGE AND CULTURE

Freedom of Association

1. There shall be freedom of association, including the right to form and join trade unions, religious, social and cultural bodies, and to form and participate in non-governmental organisations.

Freedom of Religion

2. There shall be freedom of worship and tolerance of all religions, and no State or official religion shall be established.
3. The institutions of religion shall be separate from the State, but nothing in this Constitution shall prevent them from co-operating with the the State with a view to furthering the objectives of this Constitution, nor from bearing witness and commenting on the actions of the State.
4. Places associated with religious observance shall be respected, and no-one shall be barred from entering them on grounds of race.

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Language Rights

5. The languages of South Africa are Sindebele, Sepedi, Sesotho, Siswati, Setswana, Afrikaans, English, Tsonga [Shangaan], Venda, Xhosa, and Zulu.
6. The State shall act positively to further the development of these languages, especially in education, literature and the media, and to prevent the use of any language or languages for the purpose of domination or division.
7. When it is reasonable to do so, one or more of these languages may be designated as the language to be used for defined purposes at the national level or in any region or area where it is widely used.
8. Subject to the availability of public and private resources, and limitations of reasonableness, primary and secondary education should wherever possible be offered in the language or languages of preference of the students or their parents.
9. The State shall promote respect for all the languages spoken in South Africa.

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Creative Freedom

10. There shall be freedom of artistic activity and scientific enquiry, without censorship, subject only to such limitations as may be imposed by law in accordance with principles generally accepted in open and democratic societies.

The Right to Sporting, Recreational and Cultural Activities

11. Sporting, recreational and cultural activities shall be encouraged on a non-racial basis, drawing on the talents and creative capacities of all South Africans, and autonomous organisations may be established to achieve these objectives.

Article 6.
WORKERS' RIGHTS

1. Workers shall have the right to form and join trade unions, and to regulate such unions without interference from the State.

2. Workers shall be free to join trade unions of their choice, subject only to the rules of such unions and to the principles of non-discrimination set out in this Constitution, and no worker shall be victimised on account of membership of a union.

3. The right to organise and to bargain collectively on any social, economic or other matter affecting workers' interests, shall be guaranteed.

4. In the furtherance of these rights, trade unions shall be entitled to reasonable access to the premises of enterprises, to receive such information as may be reasonably necessary, and to deduct union subscriptions where appropriate.

5. No law shall prevent representative trade unions from negotiating collective agreements binding on all workers covered by such agreements.

6. Workers shall have the right to strike under law in pursuance of their social and economic interests subject to reasonable limitations in respect

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of the interruption of services such as would endanger the life, health or personal safety of the community or any section of the population.

7. Workers shall have the right to peaceful picketing, subject only to such reasonable conditions as would be acceptable in a democratic society.
8. Trade unions shall have the right to participate in lawful political activities.
9. Trade unions shall have the right to form national federations and to affiliate to international federations.
10. Employers shall be under a duty to provide a safe, clean and dignified work environment, and to offer reasonable pay and holidays.
11. There shall be equal pay for equal work and equal access to employment.
12. The State shall make provision by way of legislation for compensation to be paid to workers injured in the course of their employment and for benefits to be paid to unemployed or retired workers.

Article 7.
GENDER RIGHTS

1. Men and women shall enjoy equal rights in all areas of public and private life, including employment, education and within the family.
2. Discrimination on the grounds of gender, single parenthood, legitimacy of birth or sexual orientation shall be unlawful.
3. Positive action shall be undertaken to overcome the disabilities and disadvantages suffered on account of past gender discrimination.
4. The law shall provide remedies for sexual harassment, abuse and violence.
5. Educational institutions, the media, advertising and other social institutions shall be under a duty to discourage sexual and other types of stereotyping.

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Article 8.
DISABLED PERSONS

1. There shall be no discrimination against disabled persons.
2. Legislation shall provide for the progressive opening up of employment opportunities for disabled men and women, for the removal of obstacles to the enjoyment by them of public amenities and for their integration into all areas of life.

Article 9.
CHILDREN

1. All children shall have the right to a name, to health, to security, education and equality of treatment.
2. The State shall, to the maximimum of its available resources, seek to achieve progressively the full realisation of these rights.
3. No child shall suffer discrimination or enjoy privileges on the grounds of race, colour, gender, language, creed, legitimacy or the status of his or her parents.
4. In all proceedings concerning children, the primary consideration shall be the best interests of the child.
5. Children are entitled to be protected from economic exploitation and shall not be permitted to perform work that is likely to be hazardous or harmful to their education, health or moral well-being.
6. It shall be unlawful to oblige children to work or perform services for the employers of their parents or other family members.

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Article 10.

SOCIAL, EDUCATIONAL, ECONOMIC AND WELFARE RIGHTS

General

1. All men and women have the right to enjoy basic social, educational, economic and welfare rights.
2. The State, shall, to the maximum of its available resources, undertake appropriate legislative and executive action in order to achieve the progressive realisation of basic social, educational, economic and welfare rights for the whole population.
3. Such State action shall establish standards and procedures whereby all men, women and children are guaranteed by law a progressively expanding floor of enforceable minimum rights, with special attention to nutrition, shelter, health care, education and income.
4. In order to achieve a common floor of rights for the whole country, resources may be diverted from richer to poorer areas, and timetables may

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be established for the phased extension of legislation and minimum standards from area to area.

5. The State may collaborate with non-governmental organisations and the private sector in achieving these goals, and may impose appropriate responsibilities on all social and economic bodies with a view to their materialisation.

6. In circumstances where persons are unable through lack of means to avail themselves of facilities provided by the State, the State shall, wherever it is reasonable to do so, give appropriate assistance.

Freedom from Hunger

7. In order to guarantee the right of freedom from hunger, the State shall ensure the introduction of minimum standards of nutrition throughout the country, with special emphasis on pre-school and school feeding.

The Right to Shelter

8. In order to guarantee the right to shelter, the State shall, in collaboration with private bodies where appropriate, dismantle compounds, single-sex

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hostels and other forms of accommodation associated with the migrant labour system, and embark upon and encourage an extensive programme of house-building.

9. The State shall take steps to ensure that energy, access to clean water and appropriate sewage and waste disposal are available to every home.

10. No eviction from homes or from land shall take place without the order of a competent court, which shall have regard to the availability of alternative accommodation.

The Right to Education

10. In order to guarantee the right to education, the State shall, in collaboration with non-governmental and private educational institutions where appropriate, ensure that:

there shall be free and compulsory primary education for all, with a school-leaving age of sixteen,

there shall be progressive expansion of access by all children as a right to secondary education,

there shall be progressive increase in access to pre-school institutions and institutes of vocational training and of higher learning,

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there shall be increasingly extensive facilities to enable adults to overcome illiteracy and further their education.

11. Education shall be directed towards the full development of the human personality and a sense of personal dignity, and shall aim at strengthening respect for human rights and fundamental freedoms, and promoting understanding, tolerance and friendship among all South Africans and between nations.

The Right to Health

12. In order to guarantee the right to protection of health, the State shall establish a comprehensive national health service linking health workers, community organisations, State institutions, private medical schemes and individual medical practitioners so as to provide hygiene education, preventative medicine and health care delivery to all.

The Right to Work

13. In order to guarantee increasing enjoyment of the right to work, the State shall, in collaboration

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where appropriate with private bodies and non-governmental institutions:

make technical and vocational training available to all,

remove the barriers which keep large sections of the population out of technical, professional and managerial positions,

and promote public and other works with a view to reducing unemployment.

The Right to a Minimum Income and Welfare Rights

14. In order to guarantee the achievement of a minimum income for all, the State shall introduce a scheme of family benefits and old age pensions financed from general revenue.

15. In order to guarantee the enjoyment of basic social welfare rights, in particular unemployment benefits, compensation for injury, superannuation or retirement pensions, the State shall, in collaboration where appropriate with private bodies, establish a system of national insurance based upon contributions by employers, employees and other interested persons.

Article 11.
THE ECONOMY, LAND AND PROPERTY

1. Legislation on economic matters shall be guided by the principle of encouraging collaboration between the State and the private, co-operative and family sectors with a view to reducing inequality, promoting growth and providing goods and services for the whole population.
2. All men and women and lawfully constituted bodies are entitled to the peaceful enjoyment of their possessions, including the right to acquire, own, or dispose of property in any part of the country without distinction based on race, colour, language, gender or creed.
3. All natural resources below and above the surface area of the land, including the air, and all forms of potential energy or minerals in the territorial waters, the continental shelf and the exclusive economic zone of South Africa, which are not owned by any person at the time of coming into force of this Constitution, shall belong to the State .

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4. The State shall have the right to regulate the exploitation of natural resources, grant franchises and determine royalties, subject to payment of appropriate compensation in the event of interference with any lawfully vested interest.

5. The State may by legislation take steps to overcome the effects of past statutory discrimination in relation to enjoyment of property rights.

6. There shall be no forced removals of persons or communities from their homes or land on the basis of race, colour, language, gender or creed.

7. No persons or legal entities shall be deprived of their possessions except on grounds of public interest or public utility, including the achievement of the objectives of the Constitution.

8. Any such deprivation may be effected only by or pursuant to a law which shall provide for the nature and the extent of compensation to be paid.

9. Compensation shall be just, taking into account the need to establish an equitable balance between the public interest and the interest of those affected.

10. In the case of a dispute regarding the amount of compensation or its mode of payment, provision

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shall be made for recourse to a special independent tribunal, with an appeal to the courts.

11. The preceding provisions shall not be interpreted as in any way impeding the right of the State to adopt such measures as might be deemed necessary in any democratic society for the control, use or acquisition of property in accordance with the general interest, or to preserve the environment, or to regulate or curtail monopolies or to secure the payment of taxes or other contributions or penalties.

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Article 12.
ENVIRONMENTAL RIGHTS

1. The environment, including the land, the waters and the sky, are the common heritage of the people of South Africa and of all humanity.
2. All men and women shall have the right to a healthy and ecologically balanced environment and the duty to defend it.
3. In order to secure this right, the State, acting through appropriate agencies and organs shall conserve, protect and improve the environment, and in particular :

   i. prevent and control pollution of the air and waters and degradation and erosion of the soil;

   ii. have regard in local, regional and national planning to the maintenance or creation of balanced ecological and biological areas and to the prevention or minimising of harmful effects on the environment;

   iii.promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability;

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iv. ensure that long-term damage is not done to the environment by industrial or other forms of waste;

v. maintain, create and develop natural reserves, parks and recreational areas and classify and protect other sites and landscapes so as to ensure the preservation and protection of areas of outstanding cultural, historic and natural interest.

4. Legislation shall provide for co-operation between the State, non-governmental organisations, local communities and individuals in seeking to improve the environment and encourage ecologically sensible habits in daily life.

5. The law shall provide for appropriate penalties and reparation in the case of any direct and serious damage caused to the environment, and permit the interdiction by any interested person or by any agency established for the purpose of protecting the environment, of any public or private activity or undertaking which manifestly and unreasonably causes or threatens to cause irreparable damage to the environment.

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Article 13.
AFFIRMATIVE ACTION

1. Nothing in the Constitution shall prevent the enactment of legislation, or the adoption by any public or private body of special measures of a positive kind designed to procure the advancement and the opening up of opportunities, including access to education, skills, employment and land, and the general advancement in social, economic and cultural spheres, of men and women who in the past have been disadvantaged by discrimination.
2. No provision of the Bill of Rights shall be construed as derogating from or limiting in any way the general provisions of this Article.

Article 14.
POSITIVE ACTION

1. In its activities and functioning, the State shall observe the principles of non-racialism and non-sexism, and encourage the same in all public and private bodies.
2. All benefits conferred and entitlements granted by the State shall be distributed on a non-racist and a non-sexist basis.
3. The State and all public and private bodies shall be under a duty to prevent any form of incitement to racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide the population on grounds of race, colour, language, or creed.
4. With a view to achieving the above, the State may enact legislation to prohibit the circulation or possession of materials which incite racial, ethnic, religious, gender or linguistic hatred, which provoke violence, or which insult, degrade, defame or encourage abuse of any racial, ethnic, religious, gender or linguistic group.

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5. All organs of the State at the national, regional and local levels shall pursue policies and programmes aimed at redressing the consequences of past discriminatory laws and practices, and at the creation of a genuine non-racial democracy in South Africa.

6. Such policies shall include the implementation of programmes aimed at achieving speedily the balanced structuring in non-racial form of the public service, defence and police forces and the prison service.

7. Without interfering with its independence, and with a view to ensuring that justice is manifestly seen to be done in a non-racial way and that the wisdom, experience and judicial skills of all South Africans are represented on the bench, the judiciary shall be transformed in such a way as to consist of men and women drawn from all sectors of South African society.

8. In taking steps to correct patterns or practices of discrimination, special attention shall be paid to rectifying the inequalities to which women in South Africa have been subjected, and to ensuring their full, equal, effective and dignified participation in the political, social, economic and cultural life of the nation.

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9. Legislation may be enacted requiring non-governmental organisations and private bodies to conduct themselves in accordance with the above principles.

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Article 15.
LIMITATIONS

1. Nothing in the Constitution shall be interpreted as implying for any group or person the right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the the Constitution, or at their limitation or suppression to a degree other than is authorised by the Constitution itself.
2. Nothing in this Constitution should be interpreted as impeding the right of the State to enact legislation regulating the manner in which fundamental rights and freedoms shall be exercised, or limiting such rights, provided that such regulation or limitation is such as might be deemed necessary in an open and democratic society.
3. Any restrictions permitted under the Constitution to fundamental rights and freedoms shall not be applied to or used as a cover for any purpose other than that for which they have been expressly or by necessary implication authorised.
4. Any law providing for any regulation or limitation of any fundamental right or freedom shall:

    i. be of general application;

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ii. not negate the essential content of the right, but simply qualify the way that right is to be be exercised or the circumstances in which derogation from the right is permitted;

iii.as far as practicable, identify the specific clauses of the Constitution relied upon for the limitation of the right and the specific clauses of the Constitution affected by the legislation; iv.specify as precisely as possible the exact reach of the limitation and the circumstances in which it shall apply.

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Article 16
ENFORCEMENT

General

1. The fundamental rights and freedoms contained in this Bill of Rights shall be guaranteed by the courts.
2. Provision shall be made for the establishment of a constitutional court.
3. The terms of the Bill of Rights shall be binding upon the State and organs of government at all levels, and where appropriate, on all social institutions and persons.
4. All persons who claim that rights guaranteed them by the Bill of Rights have been infringed or threatened, shall be entitled to apply to a competent court for an order for the declaration or enforcement of their rights, or for the restraining of any act which impedes or threatens such rights.
5. Any law or executive or administrative act which violates the terms of the Bill of Rights shall be invalid to the extent of such violation, save that the Court shall have the discretion in appropriate

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cases to put the relevant body or official to terms as to how and within what period to remedy the violation.

Human Rights Commission

6. Parliament shall have a special responsibility for ensuring that the basic social, educational, economic and welfare rights set out in this Bill of Rights are respected.
7. Parliament shall establish by legislation a Human Rights Commission to promote observance of the Bill of Rights.
8. Such Commission shall have the right to establish agencies for investigating patterns of violation of any of the terms of the Bill of Rights and for receiving complaints and bringing proceedings in court where appropriate.
9. The Commission shall monitor proposed legislation with a view to reporting to Parliament on its impact on the realisation of the rights set out in the Bill of Rights.

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Ombudsman

10. With a view to ensuring that all functions and duties under the Constitution are carried out in a fair way with due respect for the rights and sentiments of those affected, the office of Ombudsman shall be created.

11. The Ombudsman shall be independent in the carrying out of his or her functions and may open offices in different parts of the country.

12. The Ombudsman shall receive and investigate complaints from members of the public concerning abuse of power or unfair, insensitive, capricious, harsh, discourteous or unduly delayed treatment of any person by any official of government at national, regional or local level, or any attempt by such official to extort benefits or corruptly to receive favours.

13. In accordance with his or her findings, the Ombudsman may initiate legal proceedings, refer the matter for prosecution, negotiate a compromise, or make a report to the department or organ concerned containing recommendations with a view to remedying the improper conduct, preventing repetition, and, where appropriate, making amends, including compensation.

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14. Recourse to the Human Rights Commission or to the Ombudsman shall not oust the jurisdiction of the courts to hear any matter.

(Working draft prepared by the Constitutional Committee set up by the NEC).

Pornography and Group Libel: How To Solve the *Hudnut* Problem

Jerome O'Callaghan*

> A legislature "may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."[1]

In a recent article on pornography and law, Professor MacKinnon concluded that group defamation laws are useful in the battle against pornography only to the extent that they are part of a larger argument about discrimination. Thus, legal guarantees of equality become the prerequisite for any claim of group defamation:

> Considered as defamation, the harms [of pornography] are comparatively trivialized, and the state interest is obscured, disabling the constitutional defense of such laws against First Amendment attack. When the equality interest is recognized, focusing on lived consequences rather than message content, practices like lynching, cross-burning, and pornography are revealed as expressive forms inequality takes, and the constitutional balance shifts.[2]

This article will examine in detail the potential for group defamation laws to achieve the goals of the anti-pornography movement. It suggests that such laws, standing alone, can withstand First Amendment attack. Further, the Supreme Court can, consistent with its own precedent, allow states the power to prohibit at least some of the pornography that is widely available today.

In 1952 the Supreme Court upheld the power of state government to punish an individual for committing a group libel.[3] In 1985 a federal court of appeals found unconstitutional an Indianapolis ordinance that sought to limit the availability of pornography by regulating it as a practice of discrimination.[4] Though seemingly unconnected, these two de-

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1. Justice Frankfurter in Beauharnais v. Illinois, 343 U.S. 250, 263 (1952).

2. Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 811 (1991).

3. Beauharnais v. Illinois, 343 U.S. 250 (1952).

4. Hudnut v. American Booksellers Ass'n, 771 F.2d 323 (7th Cir. 1985), *summ. aff'd*, 475 U.S. 1001 (1986). The Indianapolis ordinance was based on a similar law authored by Professor MacKinnon and Andrea Dworkin in 1983. The earlier version was passed by the Minneapolis City Council but a Mayoral veto ended its ad-

cisions point the way to a new approach in the regulation of pornography. The failure of the Indianapolis ordinance to pass First Amendment muster marked the end of the most prominent legal reform aimed to curb pornography in the last decade.[5] Those who have sought to attack the prevalence of pornography have been frustrated by Supreme Court standards set out in landmark free speech/press cases. In particular, the Court's definition of obscenity, though seemingly flexible and far-reaching, appears to have protected the expansion of the mainstream pornography industry.[6]

This article argues that the problems that have plagued obscenity cases can be avoided by reliance on the group libel concept established in *Beauharnais v. Illinois*. The first part of this article will examine the *Beauharnais* decision and its subsequent treatment by the Supreme Court. The second part will illustrate how group defamation[7] laws could address the problem of pornography. The third section will suggest how such laws could appeal to a conservative Supreme Court. Finally, part four will give consideration to the question of defining pornography and the place of this reform in the context of First Amendment guarantees.

I. THE SUPREME COURT'S TREATMENT OF *BEAUHARNAIS*

On January 7, 1950, members of the White Circle League of America distributed a leaflet in the downtown streets of Chicago.[8] The leaflet called for local government action to prevent further encroach-

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vance. Both ordinances took a civil rights approach to the problem of pornography and involved no criminal sanctions. For more on the history of this law, see DONALD A. DOWNS, THE NEW POLITICS OF PORNOGRAPHY (1989).

5. It has been argued that the ordinance was in fact a group libel law. *See* William E. Brigman, *Pornography as Group Libel: The Indianapolis Sex Discrimination Ordinance,* 18 IND. L. REV. 479 (1985). However, nothing in its history indicates that its framers saw it in those terms. Likewise, nothing in its content resembles the language typically used in defamation laws. Further, the two courts that examined the ordinance did not refer to it or treat it as a group libel law. While the ordinance served the same purpose as the law proposed herein, the methodology was substantially different. As Professor MacKinnon asserts, "The civil rights approach to pornography does not center on its defamatory aspects any more than the civil rights approach to segregation centered on its defamatory aspects, although they are there in both cases." MacKinnon, *supra* note 2, at 807.

6. It was conflict with the obscenity standard laid out in Miller v California, 413 U.S. 15 (1973), that led to the *Hudnut* decision. For details on the increasing prevalence of pornography in the U.S. over the last 20 years see U.S. ATT'Y GEN. COMM'N ON PORNOGRAPHY, FINAL REPORT 1351-1367 (1986)[hereinafter FINAL REPORT].

7. Group defamation is the more accurate term, as defamatory material can come in a wide variety of forms, including still and moving pictures. Nevertheless the term "group libel" is more widely known, and will be used in this article to refer generally to material that is defamatory of groups.

8. Beauharnais v. Illinois, 343 U.S. 250, 257 (1952).

ment by "the Negro" into white neighborhoods. "If persuasion and the need to prevent the white race from becoming mongrelized by the Negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the Negro, surely will."[9] Joseph Beauharnais, the man responsible for distribution of the leaflet, was subsequently convicted of violating the Illinois Penal Code and fined $200.[10] Under Illinois law it is an offense to present in a public place a publication which "portrays depravity, criminality, unchastity or lack of virtue of a class of citizens, of any race, color, creed or religion" and "[e]xposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy . . . ."[11] On appeal, the U.S. Supreme Court rejected Mr. Beauharnais' claim that Illinois had violated his liberty of speech as protected by the Due Process Clause of the Fourteenth Amendment.[12] Writing for the majority, Justice Frankfurter upheld the Illinois law, stating that the Supreme Court would not deny a state the "power to punish [a libelous] utterance directed at a defined group, unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the state."[13] The majority opinion found that Illinois had reason, by virtue of many tragic episodes in its race-relations history, to conclude that speech of this type promoted civic strife.[14] Relying on *Chaplinsky v. New Hampshire*[15] and *Cantwell v. Connecticut*,[16] the Court reiterated this general statement on the limits of the First Amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[17]

The Court described criminal libel as "defined, limited and constitutionally recognized time out of mind."[18] Rejecting procedural claims related to libel defenses and the void for vagueness doctrine, the Court

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9. *Id.* at 252 (quoting WHITE CIRCLE OF AMERICA LEAFLET).
10. *Id.* at 251.
11. *Id.*
12. *Id.* at 266.
13. *Id.* at 258.
14. *Id.* at 258-59.
15. 315 U.S. 568 (1942). The standard used in *Beauharnais* at 257, is identical to the one used in *Chaplinsky*.
16. 310 U.S. 296 (1940).
17. *Beauharnais*, 343 U.S. at 255-57.
18. Id. at 258.

concluded that libelous utterances are not "within the area of constitutionally protected speech."[19]

There were four dissents to this opinion, two of which accepted the constitutionality of criminal statutes protecting groups from libelous attacks. Justice Reed argued that the statute was too broad and the wording too vague, but agreed that a state has the power to pass group libel laws to protect the public peace.[20] Justice Jackson's dissent relied on the view that First Amendment guarantees are less extensive when applied to the states as part of the Fourteenth Amendment, than when applied to the federal government.[21] Despite the greater freedom of states to regulate speech,[22] the Illinois law had denied the defendant the traditional defenses to a libel charge.[23] Thus, Justice Jackson concluded that Illinois had run afoul of the Due Process Clause.[24] Only Justices Black and Douglas saw the need for substantial analysis of the issue in First Amendment terms.[25] Interpreting the leaflet as an attempt to persuade government to change policy, the Justices cast the issue in terms of the First Amendment right to petition government for a redress of grievances.[26] The majority opinion, in their view, had diluted the First Amendment by allowing states to pass "reasonable" laws that abridged fundamental liberties.[27] According to Black and Douglas, the only criminal libel law that might withstand the First Amendment is one that punishes attacks made "against individuals, not against huge groups. . . . Every expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment."[28]

The *Beauharnais* decision is a landmark because it established group libel as an exception to the reach of the First Amendment's freedom of speech guarantee. Despite its significant alteration of the First Amendment landscape, *Beauharnais* largely disappeared from scholarly comment in the 1960s. Supreme Court decisions that make reference to

19. *Id.* at 266. Along with the rule that libel is beyond the reach of the First Amendment, Justice Frankfurter cautioned that the Supreme Court would not tolerate encroachment by the state on freedom of utterance under the guise of punishing libel. *Id.* at 263-64. Subsequent decisions favoring a broad view of First Amendment rights emphasized this aspect of the opinion.

20. *Id.* at 283-84 (Reed, J., dissenting).

21. *Id.* at 288 (Jackson, J., dissenting).

22. This greater freedom does extend to enacting group libel laws. "I agree with the Court that a State has power to bring classes 'of any race, color, creed or religion' within the protection of its libel laws." *Id.* at 299.

23. *Id.* at 299-300.

24. *Id.* at 305.

25. *Id.* at 268 (Black, J., dissenting).

26. *Id.* at 274.

27. *Id.* at 269.

28. *Id.* at 272.

Beauharnais totalled forty-four between 1952 and 1989.[29] None of these decisions feature lengthy discussion of the case. *Beauharnais* was used most often to illustrate either a general proposition concerning the First Amendment, or the difficulties of incorporation doctrine. A brief survey of those cases reveals what subsequent courts took to be the import of the decision.

Three themes unify the majority of *Beauharnais* citations in the Supreme Court. The first is the proposition that libel falls outside the protection of the First Amendment.[30] While the majority opinion clearly makes that assertion, some scholars argue that subsequent decisions have undone much of this assertion.[31] Yet the most recent citations of *Beauharnais* by the Court indicate that this central holding remains good law. "[T]here are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend . . . . Libelous speech has been held to constitute one such category, see *Beauharnais v. Illinois*."[32]

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29. Bose v. Consumer's Union, 466 U.S. 485, 504 (1984); New York v. Ferber, 458 U.S. 747, 763 (1982); Central Hudson v. Public Serv. Comm'n, 447 U.S. 557, 592 (1980); Herbert v. Lando, 441 U.S. 153, 158 (1979); Brown Transp. v. Atcon, 439 U.S. 1014, 1021 (1979); Smith v. Collin, 436 U.S. 953 (1979); First Nat'l Bank v. Belotti, 435 U.S. 765 (1978); Whalen v. Roe, 429 U.S. 589 (1977); Time Inc. v. Firestone, 424 U.S. 448 (1977); Buckley v. Valeo, 424 U.S. 1 (1976); Gertz v. Robert Welch, 418 U.S. 323 (1974); Wainwright v. Stone, 414 U.S. 21 (1973); Pittsburgh Press v. Pittsburgh Comm'n on Human Rights, 413 U.S. 376 (1973); Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); New York Times v. United States, 403 U.S. 713 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Stanley v. Georgia, 394 U.S. 557 (1968); Ginsberg v. New York, 390 U.S. 629 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time Inc. v. Hill, 385 U.S. 374 (1966); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Rosenblatt v. Baer, 383 U.S. 75 (1966); El Paso v. Simmons, 379 U.S. 497 (1965); Garrison v. Louisiana, 379 U.S. 64 (1964); A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); New York Times v. Sullivan, 376 U.S. 254 (1964); Gibson v. F.L.I.G., 372 U.S. 539 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Garner v. Louisiana, 368 U.S. 157 (1961); Communist Party v. Control Board, 367 U.S. 1 (1961); Cohen v. Hurley, 366 U.S. 117 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961); Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Uphaus v. Wyman, 364 U.S. 388 (1960); Eaton v. Price, 364 U.S. 263 (1960); Smith v. California, 361 U.S. 147 (1959); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Green v. United States, 356 U.S. 165 (1958); Perez v. Brownell, 356 U.S. 44 (1958); Roth v. United States, 354 U.S. 476 (1956); Morey v. Doud, 354 U.S. 457 (1956); Poulos v. New Hampshire, 345 U.S. 395 (1952); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

30. *See* New York v. Ferber, 458 U.S. 747 (1982); Central Hudson v. Public Serv. Comm'n, 447 U.S. 557 (1980); Herbert v. Lando, 441 U.S. 153 (1979); Time Inc. v. Firestone, 448 U.S. 494 (1976); Gertz v. Robert Welch, 418 U.S. 323 (1974); Garrison v. Louisiana, 379 U.S. 64 (1964); Konigsberg v. State Bar, 366 U.S. 36 (1961); and Roth v. United States, 354 U.S. 476 (1957).

31. *See infra* notes 44-50 and accompanying text.

32. Bose v. Consumer's Union, 466 U.S. 485, 504 (1984). *See also* New York v. Ferber, 458 U.S. 747, 763 (1982).

The second theme concerns the division within the court over the incorporation of Bill of Rights' guarantees into the Fourteenth Amendment. Justice Jackson had argued in his dissent that the First Amendment has a different impact on state government than it has on the federal government.[33] This position evoked comment, on both sides, in eleven cases between 1952 and 1978.[34] The majority of these decisions occurred before 1966. In recent years, only Chief Justice Rehnquist has relied on the Jackson position.[35]

The third theme also arises from the dissent in *Beauharnais*, where Justices Black and Douglas adopted a relatively extreme view of the extent of First Amendment freedoms. Both viewed the *Beauharnais* decision as a dangerous erosion of First Amendment freedoms. In sixteen subsequent cases these Justices reiterated their views.[36] In ten of those cases the Justices were in dissent.[37] Their principle complaint was that the Supreme Court had invented a new standard, at variance with the clear wording of the First Amendment, that protected speech only from *unreasonable* legislation.[38] In their view, the Court had relied on a balancing test which has no place in the protection of fundamental freedoms.[39]

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33. 343 U.S. 250, 288 (Jackson, J., dissenting).

34. *See* First Nat'l Bank v. Belotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Rosenblatt v. Baer, 383 U.S. 75 (1966); Gibson v. F.L.I.G., 372 U.S. 335 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Cohen v. Hurley, 366 U.S. 117 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961); Eaton v. Price, 364 U.S. 263 (1960); Roth v. United States, 354 U.S. 476 (1956); and Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

35. *See* Buckley v. Valeo, 424 U.S. 1, 291 (1976)(Rehnquist, J., concurring and dissenting).

36. *See* New York Times v. United States, 403 U.S. 713 (1971); Rosenblatt v. Baer, 383 U.S. 75 (1966); El Paso v. Simmons, 379 U.S. 497 (1965); Garrison v. Louisiana, 379 U.S. 64 (1964); A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964); Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Uphaus v. Wyman, 364 U.S. 388 (1960); Smith v. California, 361 U.S. 147 (1959); Kingsley Pictures v. Regents, 360 U.S. 684 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Green v. United States, 356 U.S. 165 (1958); Perez v. Brownell, 356 U.S. 44 (1958); Roth v. United States, 354 U.S. 476 (1956); Morey v. Doud, 354 U.S. 457 (1956); and Poulos v. New Hampshire, 345 U.S. 395 (1952).

37. *See* El Paso v. Simmons, 379 U.S. 497 (1965); Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Uphaus v. Wyman, 364 U.S. 388 (1960); Uphaus v. Wyman, 360 U.S. 72 (1959); Green v. United States, 356 U.S. 165 (1958); Perez v. Brownell, 356 U.S. 44 (1958); Roth v. United States, 354 U.S. 476 (1956); Morey v. Doud, 354 U.S. 457 (1956); and Poulos v. New Hampshire, 345 U.S. 395 (1952).

38. *See, e.g.*, Uphaus v. Wyman, 360 U.S. 72, 108 (1959)(Brennan, J., dissenting); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 698 (1959)(Douglas, J., dissenting); Green v. United States, 356 U.S. 165, 197 (1958)(Black, J., dissenting).

39. *See, e.g.*, Uphaus v. Wyman, 360 U.S. 72, 108 (1959)(Brennan, J., dissent-

The remaining *Beauharnais* citations are extremely diverse in nature. In three cases *Beauharnais* was used to illustrate contemporary standards on the void-for-vagueness doctrine.[40] Other citations occurred to support assertions about the dangers of book burning[41] and the intimate relationship between groups and their members.[42] Suffice it to say that in the last decade, no Supreme Court Justice has challenged *Beauharnais* as precedent, nor has any majority opinion intimated that the rationale of *Beauharnais* is in conflict with contemporary First Amendment standards.[43]

Nevertheless, some scholars have alleged that *Beauharnais* is no longer good law: "[A]s a matter of technical precedent *Beauharnais* comes to us as damaged goods. Its reasoning was crippled by *New York Times Co. v. Sullivan*, and its holding was unmistakably undone by *Philadelphia News v. Hepps*."[44]

While it is true that *Sullivan*, unlike *Beauharnais*, put libel law under direct First Amendment scrutiny, that is the extent of the disparity between the two cases. *Sullivan* and *Hepps* radically altered standards in those libel cases where the reputation of a public official or the discussion of a matter of public concern was at stake. There is no doubt that *Sullivan* and its progeny, including *Garrison v. Louisiana*[45] and *Hepps*, created an exception to the general principle that defamatory speech is not protected by the First Amendment. The general principle however, still holds true. Justice White made this clear in a majority opinion in

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ing); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 698 (1959)(Douglas, J., dissenting); Green v. United States, 356 U.S. 165, 197 (1958)(Black, J., dissenting).

40. *See* Wainwright v. Stone, 414 U.S. 21 (1973); Dyson v. Stein, 401 U.S. 200 (1971); Garner v. Louisiana, 368 U.S. 157 (1961).

41. Pittsburgh Press v. Pittsburgh Comm'n on Human Rights, 413 U.S. 376, 403 (1973).

42. Communist Party v. Control Board, 367 U.S. 1, 184 (1961).

43. This conclusion has also been reached by others. *See* Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 32-37 (1985). *See also* Smith v. Collin, 436 U.S. 953 (1978) (Rehnquist, J. and Blackmun, J., dissenting). Chief Justice Rehnquist explicitly endorsed the *Chaplinsky* standard in Texas v. Johnson, 491 U.S. 397, 429-32 (1989). While the court in R.A.V. v. St. Paul rejected one attempt to limit hate speech, it still found no reason to doubt the legitimaty of *Beauharanis*. 120 L. Ed. 2d at 305, 317 (1992).

44. Robert C. Post, *Cultural Heterogeneity and Law: Pornography Blasphemy and the First Amendment*, 76 CAL. L. REV. 297, 330 (1988)(footnotes omitted). For similar comments see Jeffrey H. Gamso, *Sex Discrimination and the First Amendment*, 17 TEX. TECH L. REV. 1577, 1598 (1986); William E. Brigman, *Pornography as Group Libel: The Indianapolis Sex Discrimination Ordinance*, 18 IND. L. REV. 479, 484-85 (1985); and THOMAS IRWIN EMERSON, THE SYSTEM OF FREE EXPRESSION 396 (1970).

45. 379 U.S. 64 (1964). A careful reading of *Garrison* reveals that the opinion discredited the use of group libel by *public officials* to defeat the Court's ruling in *New York Times v. Sullivan*. *See id.* at 70. Further, the *Garrison* Court implicitly approved the *Beauharnais* decision and "narrowly drawn" group libel statutes in general. For more support of the contention that *Garrison* had a marginal impact on group libel law see Lasson, *supra* note 43 at 36-37.

1982: "leaving aside the special considerations when public officials are the target, *New York Times Co.* v. *Sullivan,* a libelous publication is not protected by the Constitution. *Beauharnais v. Illinois.*"[46]

Another version of the imagined demise of *Beauharnais* holds that *Ashton* v. *Kentucky*[47] made all criminal libel law unconstitutional.[48] However, a close reading of *Ashton* reveals that the majority opinion focused entirely on the indefinite and vague language of the offense.[49] There is no indication in the opinion of the Court that all criminal libel laws are inherently vague and uncertain. Indeed, twelve years after *Ashton,* Justices Blackmun and Rehnquist pointed out that *Beauharnais* "has never been overruled or formally limited in any way."[50]

II. Group Libel Laws Can Meet Feminist Concerns

While discussion of group libel issues has been rare since 1952, some state laws still afford punishment for such speech. Justice Frankfurter noted in *Beauharnais* that all the states had criminal libel statutes.[51] Estimates suggest that forty states provide criminal sanctions for libel in general.[52] At least five of these state laws make explicit reference to groups as victims.[53] In other states the law provides for punishment of defendants who publish a "libel of another which may tend to provoke a breach of the peace"[54] or expose "one who is alive . . . to public hatred, contempt, or ridicule."[55] Whether that articulation of the law allows prosecution when the "other" is a group is not immediately clear. In any case, reformers seeking to expand the scope of criminal libel sanctions have at least five states that will serve as models for their proposals.

A statute addressing the concerns of feminists/reformers could rely

46. New York v. Ferber, 458 U.S. 747, 763 (1982)(citations omitted).

47. 384 U.S. 195 (1966).

48. David M. O'Brien, Consitutional Law and Politics 447 (1991).

49. The Kentucky courts defined criminal libel as any writing "calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable." *Ashton,* 384 U.S. at 198. Justice Douglas found that the elements of the crime were unconstitutionally "indefinite" and "uncertain." *Id.*

50. Smith v. Collin, 436 U.S. 953, 953 (1978) (Blackmun, J., dissenting). Justices Blackmun and Rehnquist dissented from a denial of a stay of a Court of Appeals order. *Id.*

51. Beauharnais v. Illinois, 343 U.S. 250, 255 (1952).

52. *See* 4 Wharton's Criminal Law and Procedure §§ 570-85 (1981)[hereinafter Wharton's].

53. Lasson, *supra* note 43, at 30, refers to Illinois (Ill. Ann. Stat. ch. 38 ¶ 27-1 (Smith-Hurd 1992)), Connecticut (Conn. Gen. Stat. § 53-37(1990)), Massachusetts (Mass. Ann. Laws ch. 272 § 98C (Law Co-op 1992)), Montana (Mont. Code Ann. § 45-8-212(1992)) and Nevada (Nev. Rev. Stat. § 200.510 (1991)). Minnesota also has a group libel law (Minn. Stat. Ann. § 609.765 (West 1991)).

54. Wharton's, *supra* note 52 at 291.

55. *Id.*

on an amended version of the Illinois legislation upheld in *Beauharnais*. The first, and obvious change is to add sex to the list of protected groups (race, color, creed and religion). The second change is to ensure that the law clearly states that, regardless of the medium of expression, defamatory speech of the type specified is subject to criminal sanction. For example, the Montana Code defines criminal defamation as "anything which exposes a person, or a group, class, or association to hatred, contempt, ridicule, degradation, or disgrace in society or injury to his or its business or occupation."[56] In order to survive constitutional challenge, this law must also accommodate recent Supreme Court precedent concerning commentary on public affairs. Thus, the law would not apply to:

i) speech concerning the conduct of government or its officials; or

ii) fair comment on a matter of public concern.

These exceptions are essential, as the Court has expressed particular concern about commentary on public officials[57] and government actions that limit discussion of matters of public concern.[58] The Montana Code includes explicit provisions in this regard.[59] A law which includes the various components listed here is also likely to survive a constitutional challenge of overbreadth.[60]

There are two other possible reforms to consider. The first concerns the relevance of the defense of truth to the charge of libel. This is a difficult matter as far as common law history and Supreme Court precedent are concerned. Authorities agree that in the common law "the truth of the defamatory statement is no defense."[61] Indeed, early Eng-

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56. MONT. CODE ANN. § 45-8-212 (1985).

57. *See* Garrison v. Louisiana, 379 U.S. 64 (1964).

58. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

59. Communication is exempt from prosecution if it i) "consists of fair comment made in good faith with respect to persons participating in matters of public concern," MONT. CODE ANN. § 45-8-212(3)(c) (1992) or ii) "consists of a fair and true report or a fair summary of any judicial, legislative, or other public or official proceedings." *Id.* § 45-8-212(3)(d).

60. The problem of overbreadth was one reason for the defeat of the Louisiana criminal libel law in Garrison v. Louisiana, 379 U.S. 64 (1964). Other challenges alleging overbreadth present greater problems. While it may be difficult for a court to conclude that pornography in general creates an evil that outweighs First Amendment concerns, *see* DONALD A. DOWNS, THE NEW POLITICS OF PORNOGRAPHY Ch. 5 (1989), there can be little doubt that studies of violent pornography strongly suggest that such an evil exists. Thus, a court following the *Beauharnais* model might find the proposed formulation overly broad because it does not single out *violent* content in pornography. However, such a conclusion assumes that an empirical link between pornography and injury is essential for such a statute to survive—there is reason to believe that the Court will not demand proof of an empirical link. *See infra* notes 82-83 and accompanying text.

61. Beauharnais v. Illinois, 343 U.S. 254 (1952); WHARTON'S, *supra* note 52, § 579; 50 AM. JUR. 2d *Libel* § 513 (1970).

lish courts were responsible for the axiom "the greater the truth, the greater the libel."[62] Many contemporary statutory provisions do allow truth as a defense.[63] Nevertheless, State courts have upheld statutes that do *not* allow truth as a defense.[64] In *Beauharnais,* the majority noted that truth was a defense to a libel charge under the Illinois constitution.[65] However, the majority opinion is not clear as to whether such a defense is a necessity in constitutional analysis.[66] In fact, the defendant had been denied any opportunity to rely on the defense. As Justice Jackson was quick to point out in his dissent: "it is clear that the defense [truth] was ruled out as matter of law and defendant was never allowed to present it for decision . . . ."[67] "Society has an interest in preserving truth as a justification, however obnoxious the effort may be."[68] Jackson's account was not disputed by the majority opinion.[69]

If the defense of truth is adjudged a necessary component of a group libel law, its impact is likely to be minor. On what basis could Mr. Beauharnais prove that only the Negro race caused crime in Chicago? While it may be embarrassing for a court to have to listen to a defendant attempt to prove the truth of his/her claim, it is likely that the truth defense will have little significant effect.

The second optional change concerns the relevance of a potential breach of the peace. Some authorities suggest that the tendency of speech to provoke a breach of the peace is the gravamen of the group libel offense.[70] The Illinois statute upheld by the Court referred to matter which "exposes the citizens . . . to contempt, derision, or obloquy *or* which is productive of breach of the peace or riots."[71] Justice Frankfurter, writing for the majority, noted with approval that the Illinois Supreme Court had limited the application of the statute to words

62. *See* Janet B. Jones, Annotation, *Validity of Criminal Defamation Statutes,* 68 A.L.R. 4th 1018 (1989) (quoting State v. Brown, 206 A.2d 591 (N.J. Super. 1965)); John Kelly, *Criminal Libel and Free Speech,* 6 KAN. L. REV. 295 (1958).

63. WHARTON'S, *supra* note 52, § 584; 50 AM. JUR. 2D *Libel* § 497 (1970).

64. Jones, *supra* note 62, at 1020.

65. 343 U.S. at 254.

66. The issue is different when the speech involved concerns a matter of public concern. The Court states: "[T]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

67. 343 U.S. at 300 (Jackson, J., dissenting).

68. 343 U.S. at 301 (Jackson, J., dissenting).

69. Others have argued that under the Constitution the truth must always count as a defense in libel cases. *See* Mark S. Campisano, Note, *Group Vilification Reconsidered,* 89 YALE L.J. 308 (1979).

70. WHARTON'S, *supra* note 52, §§ 570, 579, and Lasson, *supra* note 43, at 31 n.134. Counter-examples do exist; some states make no reference to breach of the peace, and some state precedents, likewise, see no necessity in such a requirement. *See, e.g.,* CONN. GEN. STAT. § 53-37; MONT. CODE ANN. § 45-8-212; and COLO. REV. STAT. § 18-13-105. For state precedent see WHARTON'S, *supra* note 52, § 574 n.26.

71. 343 U.S. at 251 (quoting ILL REV. STAT. ch 38, ¶ 471)(emphasis added).

"liable to cause violence and disorder."[72] At the same time he acknowledged, without comment, that in some states "injury to reputation . . . is the gravamen of the offense."[73] Thus, the decision in *Beauharnais* is equivocal about the significance of a tendency to create a disturbance.

The subsequent decision in *Garrison* v. *Louisiana* strongly suggests that a tendency to create a breach of the peace is a constitutional requirement.[74] The Court found Louisiana's group libel law unconstitutional in part because it was not limited to speech calculated to cause breaches of the peace.[75] Again, it must be noted that *Garrison* was a case concerning a public official. At its core were questions about the reach of the *Sullivan* doctrine. Thus, it may be argued that the link to a breach of the peace is necessary when the plaintiff is a public official. Leaving aside matters of public concern and public officials, injury to reputation alone may still suffice as the gravamen of the offense.[76]

If it is necessary to justify group libel legislation[77] on breach of the peace grounds, the burden on a prosecutor becomes only slightly more difficult. The prosecutor will have to show, i) that the matter (magazine, book, movie, lyric, etc.) exposes women to contempt, ridicule, degradation or disgrace in society; and ii) that the state interest is related to protection of the public peace. Such a prosecution provides an

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72. *Id.* at 254 (citations omitted).

73. *Id.* at 254 n.3. This approach to the problem matches the language in *Chaplinsky* which was cited with approval by Frankfurter: the first amendment does not protect words "which by their very utterance inflict injury *or* tend to incite to an immediate breach of the peace." *Id.* at 256 (emphasis added).

74. 379 U.S. 64, 67-68 (1964).

75. *Id.* at 70. The state law was also found to be overbroad. *See supra* note 60 and accompanying text.

76. One commentator suggests that there is reason to separate the offense of incitement to hatred from the offense of incitement to a breach of the peace:

> If we have found these signs ['No Syrians, Jews or dogs allowed'] offensive, it is because of the embarrassment or hurt they have caused through the public demeaning of a whole group. The point is that one could accept the right of private individuals to preserve their own standards of private choice, and yet object to this cavalier willingness to inflict public insult. The two issues are separate, and to recognize their separateness is to recognize that our aversion to discriminatory advertising has its own foundation, quite apart from any other harm that may result from discrimination itself, and that our objections, at their root rest on group libel grounds.

Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 321 (1975).

77. Curiously, the few scholarly articles on the pros and cons of group libel pay scant attention to pornography. Instead, the issues of primary concern are race and fascism. *See, e.g.*, Lasson, *supra* note 43, Arkes, *supra* note 76, and Group Vilification Reconsidered, *supra* note 69. State statutes often reflect the same bias. *See Beauharnais*, 343 U.S. 251 (1952); CONN. GEN. STAT. § 53-37; MASS. GEN. L. ch. 272, § 98c (1990).

ideal opportunity for a court examination of what pornography says about women, and the effect of pornography on the daily lives of women.

Under these circumstances, seminal theoretical and empirical analysis of pornography and its effects could be introduced at trial.[78] Even critics of the anti-pornography movement acknowledge some harmful social effects.[79] Though a passionate debate on the effects of pornography continues in many scholarly journals, there is important evidence that violent pornographic images do affect men's attitudes and behavior.[80] This is not to say that violent pornography *per se* causes violence against women, but only that it is a significant stimulus to such action. The Supreme Court may choose to agree with the court of appeals in *Hudnut* in its conclusion that "depictions of subordination tend to perpetuate subordination, the subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets."[81]

Even if the Court were to find that the empirical evidence was not enough to link pornography to violence against women, it could still uphold a group libel law. Here, the reasoning used in an obscenity case, *Paris Adult Theatre v. Slaton*,[82] demonstrates the relatively low value of empirical research:

> [The] sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.[83]

When Justice Frankfurter examined the alleged deprivation of liberty under the Fourteenth Amendment in *Beauharnais*, he asked under what circumstances the Court could deny to a state the power to pass

78. *See* FINAL REPORT, *supra* note 6; SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1989); SUSAN GRIFFIN, PORNOGRAPHY AND SILENCE (1981); LAURA LEDERER, TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY (1980); DONALD DOWNS, THE NEW POLITICS OF PORNOGRAPHY 165-72 (1989); Symposium, *Seventh Annual Conference of the National Association of Women Judges and Conference Presentations*, 4 LAW & INEQ. J. 17 (1986).

79. *See, e.g.*, DOWNS, *supra* note 78, at 23.

80. EDWARD DONNERSTEIN, ET AL., THE QUESTION OF PORNOGRAPHY Ch. 5 (1987). For an extensive listing of authorities on this point, *see* MacKinnon, *supra* note 2, at 799-801.

81. Hudnut v. American Ass'n of Booksellers 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) *reh'g denied*, 475 U.S. 1132 (1986).

82. 413 U.S. 49 (1973).

83. *Id.* at 63.

such a law. His answer was that under the Fourteenth Amendment such a law would be unconstitutional only if it was held to be "a willful and purposeless restriction unrelated to the peace and well-being of the State."[84] He then recounted in great detail the evidence of racial strife in Illinois that gave rise to the challenged legislation. Likewise, there is evidence of substantial civil strife promoted, at least in part, by pornography.[85] Wife abuse "has been identified by the FBI as probably the most frequently occurring crime in the United States today."[86] Thus, a court that takes Justice Frankfurter's analysis to heart will find many parallels between the reform of racial inequality and the reform of sexual inequality. As already indicated, the seventh circuit in *Hudnut*, conceded the danger of pornography while invalidating the Indianapolis ordinance.[87] "Indianapolis justifies the ordinance on the grounds that pornography affects thoughts . . . ."[88] The Court went on to state "In this view, pornography is not an idea; pornography is the injury. There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them."[89] Likewise, the district court in *Hudnut* accepted the proposition that pornography posed a specific evil to the public good. "It is difficult to quarrel either with the Council's underlying concern (that pornography and sex discrimination are harmful, offensive and inimical to and inconsistent with enlightened approaches to equality) or with its premise that some legislative controls are in order."[90]

The fact that a revised group libel law would expand the category of unprotected speech to include at least some pornography does not hinder its acceptability to the Supreme Court. Obviously, libel itself is an exception to the reach of the First Amendment because of the injurious nature of its content, regardless of the potential for a breach of the peace.[91] "It is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case by case adjudication is required."[92] From a feminist

84. 343 U.S. at 258.

85. This is certainly the case for violent pornography. *See supra* note 77.

86. Laura L. Crites, *Wife Abuse: The Judicial Record, in* WOMEN, THE COURTS AND EQUALITY 39 (Laura L. Crites & Winifred L. Hepperle eds., 1987).

87. Hudnut v. American Ass'n of Booksellers, 771 F.2d 323, 329 (7th Cir. 1985).

88. *Id.* at 328.

89. *Id.* at 328-29.

90. American Ass'n of Booksellers v. Hudnut, 598 F. Supp 1316, 1327 (S.D. Ind. 1984).

91. If falsely shouting "Fire!" in a crowded theatre is beyond the protection of the First Amendment, it makes little sense to protect speech where the injury is even less speculative.

92. New York v. Ferber, 488 U.S. 747, 763-64 (1982).

perspective the real issue is how long it will take the Supreme Court to recognize pornography as an "evil to be restricted."

A. Can Pornography Count as Group Libel?

Two problems appear to obstruct the connection between group libel and pornography. The first concerns the size of the group that can claim to have been libeled. The second involves the form that a libel can take.[93]

In civil law, "the guiding principle is that defaming a large group does not give an individual a cause of action 'unless he can show special application of the defamatory matter to himself' or unless every member of the group is defamed by the statement."[94] For practical purposes "the courts will not find actionable libel if the size of the group is greater than twenty-five."[95] The civil law standard is a response to two difficult questions: i) what is the standing of any one plaintiff to present an injury inflicted on a group? and ii) what damages can a court award to any one plaintiff so injured?

In criminal law, this issue does not arise as the government, representing a public interest, brings the suit. Thus, in criminal law, the size of the group is generally not significant. "The victim of a libel may be a living person, a private corporation, or an identifiable class or group of persons, such as a family or a society . . ."[96] Restrictions based on group size are minimal.

> A denunciation of all mankind cannot amount to libel because, the group being so large, no particular member of the human race should feel defamed. But a race, religious group, or political body may be the victim of a libel; since each member of such a group may take offense, the larger the group the greater the probability for a breach of the peace.[97]

Aside from this general statement on criminal liability is the example set by *Beauharnais*. If the Supreme Court can uphold a libel verdict where the victim was the entire negro race, why would it not uphold a verdict in favor of the entire female sex? In addition, common sense suggests that the larger the group, the greater the injury inflicted.[98]

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93. Because criminal libel cases are rare, the discussion in this section relies on civil libel cases and authorities. As the decision in *Beauharnais* made clear, the Supreme Court has not seen the difference between the two as significant in constitutional analysis.

94. BRUCE SANFORD, LIBEL AND PRIVACY: THE PREVENTION AND DEFENSE OF LITIGATION (1985 & Supp. 1987).

95. *Id.* at 83.

96. WHARTON'S, *supra* note 52, § 578.

97. *Id.*

98. Common sense appears to be in conflict with civil law standards. "Most courts and commentators suggest that members of a group larger than 25 cannot bring suit." JOHN J. WATKINS, THE MASS MEDIA AND THE LAW 60 (1990).

The second issue that might obstruct the use of group libel law by anti-pornography reformers is the form that the libel takes. As pictures are reputed to paint a thousand words, there is no limit in the law of defamation to words alone. Moving and still pictures have been the basis of successful libel suits.[99] According to a federal district court: "a drawing or photograph may libel as easily as a writing."[100] Likewise, Hanson states: "It is sufficient if the communication is embodied in some physical form of a more or less permanent nature. Thus libel includes defamation embodied in pictures, photographs, cartoons or caricatures, as well as by a statute [sic], effigy or symbol, or by mechanical image such as movies."[101]

Thus, the fact that pornography often takes the form of visual presentations is no bar to the application of libel law. The television or movie producer who creates the visual equivalent of the statement "women are whores" commits the offense of libel. Indeed there would be little sense in denying a libel suit on the grounds that the form was only visual. To suggest that libel should somehow be limited to *words* alone would be to deny that the visual arts have the power to convey messages.

III. THE APPEAL OF *BEAUHARNAIS* TO A CONSERVATIVE SUPREME COURT

There are two reasons to believe that a conservative Supreme Court would support the extrapolation of *Beauharnais* from race to gender libel. The first reason is that *Beauharnais* has impeccable credentials as precedent. Its authority in the Supreme Court has not been challenged in fourty years. The most recent citations have all approved the general principle of the case.[102] The most vocal critics of the case, Justices Black and Douglas,[103] are no longer on the Court, and could easily be cast as "idiosyncratic" in their First Amendment views. In the lower

99. *See, e.g.*,, Duncan v. WJLA-TV, 10 MEDIA L. REP. (BNA) 1395 (1984); Crump v. Buckley Newspapers, 320 S.E.2d 70 (W. Va. 1984); and Gill v. Curtis Publishing Co., 239 P.2d 630 (Cal. 1952).

100. Mullenmeister v. Snap-On Tools Corp., 587 F. Supp. 868, 872 (S.D.N.Y. 1984). *See also* Robert Sack & Stuart Karle, *Common Law Libel and the Press: A Primer*, *in* COMMUNICATION LAW, 20-21 (1991).

101. ARTHUR B. HANSON, LIBEL AND RELATED TORTS 43 (1969).

102. See, e.g., R.A.V. v. St. Paul 120 L. Ed. 2d 305, 317 (1992); Bose v. Consumer's Union, 466 U.S. 485, 504 (1984); New York v. Ferber, 458 U.S. 747, 763 (1982); and Herbert v. Lando, 441 U.S. 153, 158 (1979). The *R.A.V.* decision indicates that the current Court is unlikely to support the extrapolation of group libel law to gender cases. Ironically, the groups protected by the legislation that were rejected in *R.A.V.* are almost identical to the protected groups upheld in *Beauharnais*. For reasons best known to Justice Scalia, the Court in *R.A.V.* chose to leave *Beauharnais* undisturbed.

103. Both favored overruling *Beauharnais*. *See* A Quantity of Books v. Kansas, 378 U.S. 205, 214 (1964).

courts, criticism of *Beauharnais* has been more common.[104] The gist of the commentary is twofold: i) *Beauharnais* lost critical support in the Supreme Court after the 1950s, and ii) its rationale depended on the tendency of the speech to cause violence. The first contention has clearly been repudiated by supportive comments in the 1980s.[105] The second view, which narrows the application of *Beauharnais*, is plainly open to challenge as the statute upheld by the Court was not so limited. However, even if that interpretation is correct, the rationale can still be easily transposed to pornographic speech. Much of the social science research into pornography is specifically devoted to discovering its link to violence against women.[106]

Further enhancing its credentials is the authority of Justice Frankfurter. Few Justices in the twentieth century have been as eloquent an advocate of judicial restraint as Justice Frankfurter, and by most accounts, judicial restraint is an ideal common to conservative judges. Anyone challenging a group libel statute of the type considered here would present the Court with the perfect opportunity for discourse on the reason for judicial restraint: the non-legislative function of the courts, the responsibility of the elected branches to protect the interests of the people, the importance of federalism, etc.

The second reason to believe that *Beauharnais* may be extrapolated to the issue of pornography is the striking similarity between the issues raised in a race libel case and those raised in a gender libel case. First, the state interests run parallel. The history of racial strife can be matched by the history of violence and discrimination against women.[107] Second, the connection between the defamatory material and the injury suffered is no less clear.

> Whatever the arguments about the extent of pornography's influence on violence and rape, it is certainly true that pornography is not as harmless as some suggest. The greater proportion of pornography perpetuates images of women as anonymous panting playthings, adult toys, dehumanized objects to be used, abused, broken and discarded. Pornography can have a powerful impact on adolescent boys and adult men. It promotes sexual stereotypes and depicts male domination and rape as sexually desirable. Its continuing existence must therefore be regarded with the utmost pessimism.[108]

Finally, the importance of group identification, as a matter that the state may protect, can hardly be any different.

> It would . . . be arrant dogmatism, quite outside the scope of our au-

104. *See, e.g.*, Collin v. Smith, 578 F.2d 1197, 1204-05 (7th Cir. 1978); American Ass'n of Booksellers v. Hudnut, 598 F. Supp. 1316, 1335 n.2 (S.D. Ind. 1984).

105. On this general point see Lasson, *supra* note 43, at 35-37.

106. *See generally* CLIFTON O. LAWHORNE, THE SUPREME COURT AND LIBEL (1981).

107. *See generally supra* notes 85-90 and accompanying text.

108. LLOYD VOGELMAN, THE SEXUAL FACE OF VIOLENCE: RAPISTS ON RAPE 90 (1990).

> thority in passing on the powers of a State, for us to deny that the Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits.[109]

IV. Critics, Definitions and the Limits of the First Amendment

Critics of the proposed reform will likely argue that it adds insulting or unpopular views to the list of exceptions to the First Amendment. Thus, offensive speech will lose First Amendment protection, despite memorable declarations to the contrary in *Texas v. Johnson*,[110] *Cohen v. California*,[111] and *West Virginia State Board of Education v. Barnette*.[112] The critics will argue that this reform signifies majoritarian needs overwhelming First Amendment rights. To a large extent the critics are correct. But the damage to any broad view of the First Amendment lies not in the expansion of group libel to protect women, but in earlier decisions such as *Schenck v. United States*,[113] *Miller v. California*,[114] *Chaplinsky v. New Hampshire*,[115] and *Beauharnais* itself.[116] Each of these cases allowed the punishment of speech despite the forbidding language of the First Amendment.[117] The reform of the law suggested here capitalizes on reasoning already used to create exceptions to freedom of speech. That is why the *Chaplinsky* reasoning, relied on in *Beauharnais*, is so important. In *Chaplinsky*, the Court agreed that a state may punish words "which by their very utterance inflict injury *or* tend to incite to an immediate breach of the peace."[118] Critics who balk at extending group libel this far will have to explain why free speech has been limited for several groups other than pornographers.

Another criticism that this reform is likely to face concerns definition. Nowhere in this article has pornography been defined, nor need it

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109. Beauharnais v. Illinois, 343 U.S. 250, 263 (1952).

110. 491 U.S. 397 (1989). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414.

111. 403 U.S. 15 (1971).

112. 319 U.S. 624 (1943).

113. 249 U.S. 47 (1971).

114. 413 U.S. 15 (1973).

115. 315 U.S. 568 (1942).

116. 343 U.S. 250 (1952).

117. These cases suggest that Judge Easterbrook erred in *Hudnut* when he stated: "[o]ne of the things that separates our society from [totaliarian societies] is our absolute right to propogate opinions that the government finds wrong or even hateful." *Hudnut*, 771 F.2d at 328. Similarly, to assert that under the First Amendment "speech cannot be restricted because of its political or social implications" is to ignore First Amendment history from *Schenck* onward. Donald Downs, The New Politics of Pornography xi (1989).

118. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (emphasis added), *cited with approval in* Beauharnais v. Illinois, 343 U.S. 250, 256 (1952).

be. To search for a precise definition of the term, one that will withstand constitutional scrutiny, is to wander down a dangerous and frustrating path. What matters in this proposal is the meaning of group libel, not pornography. Certainly not all material commonly called pornographic will correspond to group libel. Yet if one stops to consider what is available in an adult bookstore, that material does appear to expose women as a group to "degradation in society." While the publication of a photograph of a naked woman would not necessarily constitute the offense of group libel, a few years of *Hustler* is likely to be a different matter. The relentless portrayal of women as sexual playthings reveals both the publisher's intent, and a perception of a woman's place in society that is narrow to say the least. It is this practice of pornography that has aroused such hostility from conservatives and feminists. It is this practice of pornography that amounts to defamation of the group. "[I]n the case of Beauharnais, the concern is with the injuries that may occur in the aggregate when more people are circulating leaflets that resemble Beauharnais's and when the ideas represented by Beauharnais come to be regarded as more respectable and plausible."[119] The goal of reformers who seek to regulate pornography is to have a court alter that statement by substituting, say, *Hustler* for *Beauharnais*, and magazine for leaflet. It will not be easy to find a court willing to make that change. In the case of pornography, the very size of the industry suggests that pornographic ideas are already "more respectable and plausible."

As noted already, the question that proponents of reform must ask is: when will the Supreme Court recognize pornography as "an evil to be restricted?" Under the Court's First Amendment jurisprudence the threats of communists and street proselytizers, the criticism of socialists, and libel itself have already been recognized as sufficiently evil to outweigh free speech concerns. In many of those cases the Court's concern was the potential for harm resulting from the speech, not the actual incidence of harm. Thus, even if the Court were to dismiss the empirical claim that pornography encourages discrimination and violence against women, it could still uphold a law punishing its publication.[120]

> It may be hard to make a precise connection in any case between the suffering of a harm and any particular publication that might have helped to sustain (or create) a climate of prejudice from which injuries

119. Arkes, *supra* note 76, at 294.

120. The absence of empirical evidence linking speech to harm/injury has not been a determinative problem in the past. "[While] there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding *Roth*, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' " Paris Adult Theatre v. Slaton, 413 U.S. 49, 60-61 (1973).

> may arise. In the nature of things, the lines of causation here cannot be drawn with exactness between particular events, and many of the harms that result from the defamation of groups may not crop up until years after the fact. The lines of connection may be impossible to chart empirically, and yet reasonable men understand that the connections exist.[121]

The position of the Supreme Court has been that words which inflict injury do not fall within the protection of the free speech guarantee. The application of this principle to the problem of pornography deserves close consideration.

121. Arkes, *supra* note 76, at 293.

COMMENTS

Arizona v. Fulminante: Accusation or Inquisition?

I. INTRODUCTION

On March 26, 1991, the United States Supreme Court held that the erroneous admission of an unconstitutional coerced confession could be deemed harmless error.[1] This decision extended the scope of the harmless error rule established in *Chapman v. California*[2] concerning constitutional violations. By so holding, the Supreme Court has "overrule[d] [a] vast body of precedent"[3] in which the Court had invariably held that coerced confessions erroneously admitted at trial required automatic reversal of the conviction below.[4]

This Comment focuses on the impact this case has levied on our criminal justice system. Part II of this Comment discusses the various approaches of harmless error analysis employed by the courts since the *Chapman* decision.[5] Part III explains the factual events which brought Fulminante's case before the United States Supreme Court[6] and examines the issues presented by Fulminante's case, the arguments advanced by the respective parties, and the decisions reached by the different Supreme Court justices.[7] Finally, Part IV provides a broader perspective of the future effects this decision will have on our criminal justice system as a whole.[8]

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1. Arizona v. Fulminante, 111 S. Ct. 1246, 1261 (1991) [hereinafter *Fulminante I*].

2. 386 U.S. 18 (1967).

3. *Fulminante I*, 111 S. Ct. at 1254 (White, J., dissenting).

4. "[T]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 (1967). Included in the constitutional violations requiring automatic reversal were: (1) coerced confessions; (2) deprivation of the right to counsel; and (3) absence of an impartial judge. *Id.* at 23 n.8.

5. *See infra* notes 9-66 and accompanying text.

6. *See infra* notes 67-112 and accompanying text.

7. For a discussion of the issues presented by Fulminante's case, the arguments advanced by the respective parties, and the decisions of the Supreme Court justices, see *infra* notes 113-132 and accompanying text, *infra* notes 133-190 and accompanying text, and *infra* notes 191-240 and accompanying text, respectively.

8. *See infra* notes 241-271 and accompanying text.

II. Approaches to the Harmless Error Doctrine

A. Chapman v. California *and the Harmless Error Doctrine*

Prior to 1967, any violation of a defendant's constitutional rights, committed during trial, resulted in the automatic reversal of a conviction.[9] However, in *Chapman v. California*,[10] the United States Supreme Court held "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless, not requiring the automatic reversal of the conviction."[11] The purpose of the harmless error rule is to promote judicial efficiency and the finality of judgments.[12] The rationale behind the harmless error rule is that it " 'focus[es] on the underlying fairness of the trial rather than on [the] virtually inevitable presence of immaterial error.' "[13] Ultimately, the burden of proof rests on the prosecution to show that the error was "harmless beyond a reasonable doubt."[14]

The Supreme Court did state, however, "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless."[15] The admission of a coerced confession was the first example listed to support this proposition.[16] The reasons for the per se reversal rule have been suggested as: protecting individual privacy; preventing abusive police tactics and brutality; and securing the rights of the accused.[17] Arguably, this rationale could apply to any illegally obtained evidence, but this has not prevented the courts from extending the harmless error doctrine to include other confessions obtained in violation of a defendant's constitutional rights.[18]

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9. Congress had enacted harmless error statutes, such as 28 U.S.C. § 2111 (1970) and Fed. R. Crim. P. 52(a), but the federal courts had only applied these statutes to non-constitutional errors. Robert Pondolfi, Note, *Principles for Application of the Harmless Error Standard*, 41 U. Chi. L. Rev. 616, 617 (1974).

10. 386 U.S. 18 (1967).

11. *Id.* at 22. In *Chapman*, the prosecutor commented extensively on the defendant's failure to testify at trial. This was permitted at the time by California's constitution. Chapman was convicted. On appeal, the United States Supreme Court held that it had the power to formulate a harmless error rule that could be applied to constitutional violations. The Court then applied this new rule to the facts of *Chapman* and found the prosecutor's comment on the defendant's failure to testify to be harmful, thereby requiring reversal of the conviction. *See generally id.*

12. Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 85 (1988).

13. *Id.* at 86 n.37 (quoting Delaware v. Van Arsdall, 475 U.S. 673 (1986)).

14. *Chapman*, 386 U.S. at 24.

15. *Id.* at 23.

16. *Id.* at 23 n.8 (citing Payne v. Arkansas, 356 U.S. 560 (1958)).

17. Stacy & Dayton, *supra* note 12, at 103.

18. *See, e.g.*, Milton v. Wainwright, 407 U.S. 371 (1972) (confession admitted in violation of Fifth and Sixth Amendments); Schneble v. Florida, 405 U.S. 427 (1972) (confession admitted in violation of the Sixth Amendment Confrontation Clause); Lego v. Twomey, 404 U.S. 477 (1972) (admission of involuntary confession in-

In *Chapman*, the Court, relying on *Fahy v. Connecticut*,[19] noted that an error at trial would not be considered harmless if the "error . . . possibly influenced the jury adversely to a litigant."[20] Under this standard, any illegally obtained confession should be considered harmful because it could not be determined how much weight a particular juror may have given the tainted evidence.[21] Thus, because the evidence could have influenced the jury, and in order to ensure fairness, the conviction would have to be vacated and a new trial ordered. However, as the next section illustrates, the courts have adopted several approaches which allow the conviction to stand regardless.

B. *Theoretical Approaches to Harmless Error Application*

Since *Chapman*, the courts have faced the problem of determining when a constitutional violation should be categorized as unimportant or insignificant to be amenable with the harmless error rule.[22] Three different approaches have been recognized: (1) focusing only on the erroneously admitted evidence; (2) determining whether admissible overwhelming evidence exists to support the conviction; and (3) determining whether the erroneously admitted evidence is merely cumulative.[23] No single approach has been adopted by the courts. Rather, the courts are able to choose which approach disposes of the case in the most convenient manner.[24]

1. Focusing Only on the Erroneously Admitted Evidence

Under this approach, the reviewing court focuses only on the erroneously admitted evidence.[25] The court should not be concerned with any other evidence, but rather with "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[26] If the court determines that the erroneous admission of the unconstitutionally obtained evidence is prejudicial to the defend-

duced by improper police conduct); Null v. Wainwright, 508 F.2d 340 (5th Cir. 1975) (admission of statement in violation of Fifth Amendment).

19. 375 U.S. 85 (1963).

20. *Chapman*, 386 U.S. at 23-24.

21. This proposition is particularly true in cases in which the jury returns a general verdict.

22. *See* David M. Skoglind, Comment, *Harmless Constitutional Error: An Analysis of Its Current Application*, 33 BAYLOR L. REV. 961, 961-62 (1981); Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976-77).

23. Skoglind, *supra* note 22, at 962; Field, *supra* note 22, at 16.

24. *See, e.g.*, United States v. Carson, 969 F.2d 1480, 1501 (3d Cir. 1991) (the district court may apply "whatever harmless error standard is appropriate").

25. Skoglind, *supra* note 22, at 962; Field, *supra* note 22, at 16.

26. Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963) (pre-*Chapman* case); *see also supra* text accompanying notes 20-21.

ant, the error cannot be considered harmless.[27]

The problem for the reviewing court is determining whether the tainted evidence prejudiced the defendant in the eyes of the jury.[28] Usually, this results in the reviewing court examining the effect of the tainted evidence upon the other evidence adduced at trial.[29] The reviewing court then must make a subjective determination of the record which could result in inconsistent and unfair applications of the approach.[30] A solution to this problem could be to force the reviewing court to employ the *Fahy* standard of "possible influence."[31]

2. The Overwhelming Evidence Approach

The second approach can be regarded as a direct converse to the first.[32] A court using the overwhelming evidence approach will only consider the admissible evidence otherwise presented at trial.[33] If the admissible evidence would "support the verdict on its own," the test is satisfied.[34] The problems with this approach include: (1) the jury's role is usurped by the judge; (2) the defendant's constitutional rights do not "apply equally to all people," and (3) the power of the reviewing court is diminished.[35]

The first problem, usurping the jury's function, is present in any doctrine of harmless error, regardless of whether a constitutional violation is analyzed.[36] Essentially, "the Court allows a conviction to stand despite the constitutional error."[37] A solution to this problem could be for the reviewing court to order a retrial, without the constitutional error, to determine whether a reasonable jury might have been influenced by the error.[38] However, the Court has determined "[t]he cost and the imperfection of retrial"[39] and a concern for judicial economy

27. *Fahy*, 375 U.S. at 86; *see also* Bumper v. North Carolina, 391 U.S. 543, 550 (1968) ("Because the [unconstitutionally obtained evidence] was plainly damaging evidence against the petitioner . . . its admission at trial was not harmless error.").

28. Skoglind, *supra* note 22, at 964; Field, *supra* note 22, at 18.

29. Skoglind, *supra* note 22, at 965; Field, *supra* note 22, at 18.

30. Skoglind, *supra* note 22, at 965; Field, *supra* note 22, at 18.

31. *See* Chapman v. California, 386 U.S. 18, 23-24 (1967); *see also supra* note 20 and accompanying text.

32. "The impact of illegally admitted evidence in a particular case is sometimes apparent only after examining its interaction with properly admitted evidence." Field, *supra* note 22, at 17.

33. Skoglind, *supra* note 22, at 962.

34. *Id.*; *see, e.g.*, Milton v. Wainright, 407 U.S. 371 (1972); United States v. DeParias, 805 F.2d 1447 (11th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987).

35. Skoglind, *supra* note 22, at 965.

36. Field, *supra* note 22, at 33.

37. Skoglind, *supra* note 22, at 965.

38. "[I]f the error truly was not determinative, the jury could find the defendant guilty again." Field, *supra* note 22, at 33 n.61.

39. *Id.* at 33.

are significant public policies to sustain the harmless error rule.[40]

The second problem, disparaging "the notion that all accused individuals, both guilty and innocent, are entitled to a fair trial" protected by the Constitution, approves a blatant violation of the accused's constitutional right.[41] The effect of the rule is that "less deference is paid to the Constitution in the case of the person whose guilt is more evident."[42] "[This] practice is difficult to reconcile with the accepted rule that a trial judge may not direct a verdict against a defendant in a criminal case, regardless of the strength of the evidence against him."[43]

The final problem, diminishing the reviewing court's power, is that the cases in which the overwhelming evidence approach is used lack precedential value because they are more factually oriented.[44] The scope of the review is increased to include the entire record. The vindication of the rights of the accused then rest in the hands of the trial judge.[45]

3. The Cumulative Evidence Approach

The third approach for determining harmless error considers whether the unconstitutional evidence is "merely cumulative"; that is, whether that evidence duplicates other admissible evidence.[46] The concept of the cumulative approach is that the unconstitutional evidence adds nothing new to the prosecution's case and is therefore harmless.[47] The rationale for this approach is that if this tainted evidence influenced the jury, the duplication of admissible evidence prevails over any trial error.

Harrington v. California[48] is the primary case in support of the cumulative error test.[49] In *Harrington*, the United States Supreme Court, using language which also gave support to the "overwhelming evidence" approach, held the unconstitutional evidence was cumulative of other evidence placing the defendant at the scene of the crime and an admissible confession of a codefendant.[50] Although the approach used by the Supreme Court might be confused with an "overwhelming evi-

40. *Id.* at 33-34 n.62; *see also* Kotteakos v. United States, 328 U.S. 750, 759 (1946).
41. Field, *supra* note 22, at 35.
42. Skoglind, *supra* note 22, at 966.
43. Field, *supra* note 22, at 35.
44. *Id.* at 36.
45. Skoglind, *supra* note 22, at 966.
46. *Id.* at 963; Field, *supra* note 22, at 37.
47. Field, *supra* note 22, at 37.
48. 395 U.S. 250 (1969).
49. Field, *supra* note 22, at 37; *see also* Skoglind, *supra* note 22, at 963.
50. In *Harrington*, four defendants were charged with armed robbery and first degree murder. Three of the defendants confessed to the crime. The fourth, Harrington, made a statement placing him at the scene of the crime, along with other corroborating evidence. The United States Supreme Court held that Harrington's

dence" approach, "the opinion suggests there may be something about the way the tainted evidence relates to the untainted evidence that is pertinent to the finding of harmlessness."[51] This approach would seem to require not only "overwhelming evidence," but also some type of duplication.

Several problems exist under this approach. The first is that this approach can vary significantly depending on how the court defines "cumulative."[52] Consequently, the approach is "based on a subjective determination by the Court."[53] The court might require evidence that relates to the same ultimate fact, or merely the same type of evidence.[54]

Another danger rests in the weight the jury might give particular evidence depending on its source.[55] An example of this danger might prove helpful. Suppose a confession made by the defendant is determined to have been coerced, but is then erroneously admitted at trial. Further suppose that other constitutional evidence is also admitted, but this evidence is speculative. The jury could determine that on the admissible evidence alone, the defendant is innocent. Instead, having heard the defendant's coerced confession from the defendant's own mouth, the jury finds the defendant guilty. On appeal, the reviewing court looks at the entire record and may determine that the coerced confession was "merely cumulative" of the admissible evidence. The conviction would be upheld even though the jury would have acquitted the defendant without the coerced confession.[56]

Additionally, another problem exists concerning the probative value

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tainted confession was "cumulative" of other admissible evidence and affirmed the conviction. *Harrington*, 395 U.S. at 254.

51. Field, *supra* note 22, at 39.

52. *Id.* at 41.

53. Skoglind, *supra* note 22, at 966. The court would determine whether the harm referred to an ultimate fact or whether other specific facts disclosed were identical, or cumulative, to the evidence declared unconstitutional. Field, *supra* note 22, at 42.

54. Field, *supra* note 22, at 42.

55. *Id.*

56. [F]rom the total record it is assumed that the jury rationally relies upon the most direct and persuasive evidence to decide an issue and retreats to more remote and less credible evidence only if it is needed to meet strong evidence on the other side. If the evidence against the defendant is overwhelming, the jury needs only the best evidence to resolve its doubts. The weaker the character and quality of the tainted evidence relative to other evidence on the issue, the more probable the jury was able to and did ignore it in reaching the verdict. Under this model the issue is not whether there is overwhelming evidence to convict, but rather whether there is overwhelming evidence of a quality better than that erroneously admitted.

Michael R. Fruehwald, Note, *Miranda Warnings and the Harmless Error Doctrine: Comments on the Indiana Approach*, 47 IND. L.J. 331, 333-34 n.16 (1971).

of the evidence.[57] The cumulative evidence might be substantially less probative than the tainted evidence. However, this problem can be overcome if "the factfinder must necessarily have believed the untainted evidence."[58] In this situation, however, the reviewing court usurps the jury's function even more so than under the "overwhelming evidence" approach.[59] Moreover, the cumulative evidence might have been derived from the tainted evidence.[60] However, this problem can be solved by applying the "fruit of the poisonous tree" doctrine to the cumulative evidence obtained as such.[61]

C. *Comparing the Approaches*

Apparently, the first approach, focusing only on the tainted evidence, is much different than the other two approaches, the "overwhelming evidence" and "cumulative evidence" approaches. Under the first approach, the reviewing court should never look at other evidence; whereas, the court must look to other evidence in the other two approaches.

The "overwhelming evidence" approach and the "cumulative evidence" approach are similar in that both permit "a finding of harmlessness despite the conclusion that the error itself is prima facie incriminating."[62] Thus, under both these approaches, a court can find an error, which would ordinarily be considered harmful, to actually be considered harmless.[63] Moreover, the "overwhelming evidence" and "cumulative evidence" approaches can be applied concurrently.[64] However, they can also be applied separately, leading to disparate results.[65] This often leads the courts to make broad assertions that the evidence is both "overwhelming" and "merely cumulative."[66]

57. For a thoughtful discussion of the probative value problem, see Field, *supra* note 22, at 44-54.

58. *Id.* at 44. This may be called the "indisputable" standard. *Id.*

59. "The encroachment on the jury's function is even greater here than under the overwhelming evidence test because the court is substituting its judgment . . . to say not only what conclusion the jury would have reached but also which evidence it would have believed and disbelieved in reaching that conclusion." *Id.* at 53.

60. *Id.* at 54.

61. *Id.*

62. *Id.* at 39-40.

63. *Id.* at 40.

64. *Id.*

65. *Id.*

66. *See, e.g.*, Harrington v. California, 395 U.S. 250 (1969) (overwhelming *and* cumulative evidence to support conviction); Brown v. United States, 411 U.S. 223 (1973) (evidence found to be overwhelming *and* merely cumulative).

III. *ARIZONA V. FULMINANTE*: THE DEPARTURE

A. *Factual History*

On December 19, 1985, Oreste C. Fulminante was convicted for the first degree murder of his stepdaughter, Jeneane Michelle Hunt.[67] The jury had returned a verdict of guilty, but only after having heard evidence of a tainted confession defendant Fulminante had made to Anthony Sarivola.[68] The admission of this confession would ultimately bring Fulminante's case before the United States Supreme Court.[69]

The body of Fulminante's stepdaughter had been discovered by the Mesa Police Department in the desert in the fall of 1982.[70] Fulminante's stepdaughter had been shot in the head twice, and a cloth rag used as a ligature was found around her neck.[71] Fulminante had reported the victim missing two days earlier.[72] The Mesa Police suspected Fulminante of the murder.[73] Further investigation by the police revealed that Fulminante had traded his rifle for a large caliber handgun[74] and had a past criminal record.[75] Sometime later, Fulminante left Arizona.[76]

Subsequently, Fulminante was arrested in New Jersey for the "possession of a firearm by a felon."[77] He was sent to the Ray Brook Federal Correctional Institution in New York.[78] While there, Fulminante befriended Anthony Sarivola, another inmate.[79] Unbeknownst to Fulminante, Sarivola was also a paid informant for the Federal Bureau of Investigation.[80]

Sarivola was told by an FBI agent to unearth information from

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67. State v. Fulminante, 778 P.2d 602, 606 (Ariz. 1989) *aff'd* 111 S. Ct. 1246 (1991) [hereinafter *Fulminante II*].

68. *Id.; see also infra* notes 79-80 and accompanying text.

69. *See infra* notes 88-112 and accompanying text.

70. *Fulminante II*, 778 P.2d at 605.

71. *Id.* Although law enforcement officials originally suspected sexual assault, no traces of "spermatazoa and seminal fluids" were found. *Id.*

72. *Id.*

73. The police investigation had revealed discrepancies between Fulminante's statement and that of his wife. *Id.* Specifically, the defendant's statement that he had had a good relationship with his stepdaughter and that she had been "instructed in the use of firearms" conflicted with his wife's statement. *Id.* at 605-06.

74. *Id.* at 606.

75. Fulminante had been convicted "for impairing the morals of a child" and "uttering a check with a forged endorsement" in the state of New Jersey. *Id.*

76. *Id.*

77. *Id.* Fulminante had previously been released from prison in New Jersey only two months earlier after completing a sentence for a comparable offense. *Id.*

78. *Id.*

79. Sarivola, a former police officer, "was serving a 60-day sentence for extortion" and posing as an organized crime figure in Ray Brook. *Id.*

80. *Id.*

Fulminante concerning the death of Jeneane Hunt.[81] Sarivola offered Fulminante protection from the "rough" treatment he had been receiving from other inmates in exchange for the truth surrounding Jeneane's death.[82] On October 20, 1983, Fulminante confessed to Sarivola that he, in fact, killed Jeneane.[83]

When Fulminante was released from Ray Brook, he was picked up by Sarivola and Sarivola's fiancee, Donna.[84] Fulminante reiterated his confession to Donna.[85] The following month after being released, Fulminante was arrested for another firearms violation in New York.[86] He was then indicted in Arizona for the murder of his stepdaughter.[87]

B. *Procedural History*

In a pretrial motion, Fulminante moved to suppress the statements he had made to both Sarivola and Sarivola's fiancee, Donna.[88] He argued that his confession to Sarivola had been coerced, and that the second confession to Sarivola's fiancee was the "fruit" of this first confession.[89] The trial court denied this motion.[90] The evidence was admitted at trial, and on December 19, 1985, Fulminante was convicted of first degree murder and sentenced to death.[91]

On appeal before the Arizona Supreme Court, Fulminante raised several issues concerning his conviction.[92] In order to determine whether Fulminante's confession could have been harmless error in the trial below, the Arizona Supreme Court first had to conclude that the confession to Sarivola had indeed been coerced.[93] Applying the "total-

81. Sarivola had heard rumors in Ray Brook that Fulminante had murdered Jeneane. *Id.*

82. *Id.* Crimes against children are detested by inmates, and other inmates who are suspected of these types of crimes are often the target of violence. *See id.* at 608-09. Because Fulminante believed Sarivola was still connected to organized crime, he believed Sarivola was in the position to protect him from harm. *Id.*

83. *Id.* at 606. Fulminante told Sarivola he had taken Jeneane out to the desert, choked her, sexually assaulted her, and made her beg for her life before killing her. *Id.* He also disclosed the location of the murder weapon. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Arizona v. Fulminante, 111 S. Ct. 1246, 1250-51 (1991).

90. The court specifically found the confessions to be voluntary. *Id.* at 1251.

91. *Fulminante II*, 778 P.2d at 606.

92. The Arizona Supreme Court separated these issues into two categories: trial issues and death penalty issues. *Id.* at 604-05. The issues of whether Fulminante's confession was coerced and whether his second confession was the "fruit of the poisonous tree" were classified as trial issues. *Id.* at 605.

93. *See id.* at 608. Fulminante argued the confessions were in violation of his due process rights guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and article 2, § 4 of the Arizona Constitution. *Id.*

ity of circumstances" test,[94] the court agreed with Fulminante that "Sarivola's promise was 'extremely coercive' because the 'obvious' inference from the promise [to be protected from the other inmates] was that his life would be in jeopardy if he did not confess."[95] However, the court also concluded that Fulminante's confession to Sarivola's fiancee was not the "fruit of the poisonous tree" and, therefore, admissible.[96] Concluding the first confession was "merely cumulative"[97] of the second and other "overwhelming evidence" existed to support the conviction,[98] the court originally held "[t]he admission of the first confession was . . . harmless error beyond a reasonable doubt."[99]

However, the court reversed this holding in a supplemental opinion following Fulminante's motion for reconsideration.[100] Relying on "an unbroken line of authority,"[101] the court found the harmless error doctrine inapplicable to coerced confessions.[102] Ironically, the Arizona Supreme Court noted: *"[U]ntil and unless the [United States] Supreme Court changes the law*, we must order the defendant retried without the use of the coerced confession."[103]

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94. Under the "totality of circumstances" test, the reviewing court looks to all relevant information concerning the defendant and the circumstances surrounding the confession. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

95. *Fulminante II*, 778 P.2d at 608. "[T]he confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant's life was in jeopardy if he did not confess. This is a true coerced confession in every sense of the word." *Id.* at 627 (citing Oregon v. Elstad, 470 U.S. 298, 312 (1985) (recognizing coercion may exist even absent the presence of physical violence)); *see also supra* note 82 and accompanying text.

96. *Fulminante II*, 778 P.2d at 611. The court determined that because the second confession was made six months after the first, and had been made "in the course of a casual conversation" with a person "who was not an agent of the state," Fulminante's need for protection no longer existed, and, therefore, the fruit of the poisonous tree doctrine did not apply. *Id.*

97. *See supra* notes 46-61 and accompanying text (explaining the cumulative evidence approach).

98. See *supra* notes 32-45 and accompanying text for a discussion of the overwhelming evidence approach.

99. *Fulminante II*, 778 P.2d at 611.

100. *Id.* at 626-27. The supplemental opinion was appended to the end of the original opinion in the case reporter.

101. *Id.* at 626. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978); Chapman v. California, 386 U.S. 18 (1967); Jackson v. Denno, 378 U.S. 368 (1964); Payne v. Arkansas, 356 U.S. 560 (1958); Miller v. Dugger, 838 F.2d 1530 (11th Cir.), *cert. denied*, 486 U.S. 1061 (1988); Johnstone v. Kelly, 808 F.2d 214 (2d Cir. 1986), *cert. denied*, 482 U.S. 928 (1987); United States v. DeParias, 805 F.2d 1447 (11th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987); Williams v. Maggio, 727 F.2d 1387 (5th Cir. 1984); United States v. Davis, 617 F.2d 677 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980).

102. "It is clear that federal constitutional law . . . compels us to conclude that the receipt of the original coerced confession may not be considered harmless error." *Fulminante II*, 778 P.2d at 627.

103. *Id.* (emphasis added). Adhering to its original holding, the court also held

One Arizona Supreme Court justice, Justice Cameron, dissented from the majority's supplemental opinion.[104] The dissent categorized coerced confessions into two categories: confessions obtained as a result of abusive police conduct and confessions which were coerced only in a "technical sense."[105] According to Justice Cameron, the former category would require automatic reversal while the latter could be analyzed under the harmless error doctrine.[106] Furthermore, confessions which are of the latter type should be considered harmless error "if the record reveals overwhelming evidence of defendant's guilt,"[107] or the coerced confession "is merely cumulative to other admissible statements made by the defendant."[108] In Fulminante's case, the dissent found the admission of Fulminante's confession constituted harmless error.[109]

The state of Arizona appealed from the Arizona Supreme Court's supplemental opinion directly to the United States Supreme Court.[110] The United States Supreme Court granted certiorari.[111] On October 10, 1990, Fulminante's case was argued before the Supreme Court.[112]

C. *The Issues*

1. Whether Fulminante's Confession Was the Product of Coercion

In determining whether a defendant's confession is the product of coercion, the applicable standard of review, as announced in *Schneckloth v. Bustamonte*,[113] is the "totality of the circumstances," surrounding the confession.[114] Although the Supreme Court normally defers factual findings to the state court, "the ultimate issue of 'voluntariness' is a

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the use of Fulminante's second confession would not be precluded at a new trial, if offered. *Id.*

104. *See id.* at 628-34 (Cameron, J., dissenting).

105. " '[I]f the word 'coerced' is read to include deception, as opposed to physical or mental compulsion . . . the harmless-error analysis [would] be inappropriate in the present case.' " *Id.* at 632 (Cameron, J., dissenting) (quoting United States v. Carter, 804 F.2d 487 (8th Cir. 1986)).

106. *Id.* (Cameron, J., dissenting).

107. *Id.* at 632-33 (Cameron, J., dissenting). For a discussion of the "overwhelming evidence" approach, see *supra* notes 32-45 and accompanying text.

108. *Fulminante II*, 778 P.2d at 633 (Cameron, J., dissenting). For a discussion of the "cumulative evidence" approach, see *supra* notes 46-61 and accompanying text.

109. "[I]n light of all [the] facts and the absence of coercive police tactics in this case, I believe that the erroneous admission of defendant's involuntary confession to Sarivola was harmless beyond a reasonable doubt." *Fulminante II*, 778 P.2d at 633 (Cameron, J., dissenting).

110. Arizona v. Fulminante, 494 U.S. 1055 (1990).

111. *Id.*

112. Arizona v. Fulminante, 111 S. Ct. 1246 (1991).

113. 412 U.S. 218 (1973).

114. *Id.* at 226.

legal question requiring independent federal determination."[115] An involuntary confession by the defendant is said to be coerced.[116] Actual physical violence is not the only way coercion can occur; coercion can also be based on deception.[117] Additionally, a confession uttered to a government informant or agent does not, by itself, render a confession involuntary.[118] Thus, the question presented was whether Fulminante voluntarily confessed to Sarivola, a government informant,[119] or whether Fulminante's will had been overborne by threats of physical violence.

2. Whether a Coerced Confession Can Ever be Considered Harmless Error

In *Payne v. Arkansas*,[120] the Court held "[t]he use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment."[121] The holding in *Chapman*, that some constitutional errors could be analyzed under the harmless error doctrine,[122] significantly undermined this traditional view. However, the Court had specifically excluded coerced confessions from the harmless error analysis.[123]

Since *Chapman*, the Court has reaffirmed the automatic exclusion of a coerced confession in at least five different cases.[124] The basic rationale behind the automatic reversal rule is that "where . . . a coerced confession constitutes a part of the evidence before the jury and a gen-

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115. Arizona v. Fulminante, 111 S. Ct. 1246, 1252 (1991) (quoting Miller v. Fenton, 474 U.S. 104, 110 (1985)). "[T]he Court is under a duty to make an independent evaluation of the record." *Id.* at 1261 (citing Mincey v. Arizona, 437 U.S. 385 (1978)).

116. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

117. "Coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackmun v. Alabama, 361 U.S. 199, 206 (1960). A credible threat of physical violence is all that is required. *Fulminante I*, 111 S. Ct. at 1252-53.

118. *Fulminante I*, 111 S. Ct. at 1262-63.

119. Both sides stipulated the fact that Anthony Sarivola was, indeed, a government informant and agent. *Id.* at 1253 n.4.

120. 356 U.S. 560 (1958).

121. *Id.* at 561 (citing 10 cases "illustrat[ing] the settled view . . . that the admission in evidence over objection of a coerced confession vitiates a judgment of conviction").

122. *See supra* note 11 and accompanying text.

123. Chapman v. California, 386 U.S. 18, 23 n.8 (1967).

124. *See* Rose v. Clark, 478 U.S. 570 (1986); Connecticut v. Johnson, 460 U.S. 73 (1983); New Jersey v. Portash, 440 U.S. 450 (1979); Mincey v. Arizona, 437 U.S. 385 (1978); Lego v. Twomey, 404 U.S. 477 (1972).

eral verdict is returned, no one can say what credit and weight the jury gave to the confession."[125] This is true regardless of the other evidence against the defendant, whether overwhelming or cumulative.[126]

However, since *Chapman*, "the Court has applied harmless error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless."[127] The basic rationale behind the findings of harmlessness since *Chapman* is that "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promote[] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."[128] The ultimate question, therefore, before the Court in *Fulminante*, was whether the justices were willing to extend the *Chapman* rule to coerced confessions even though coerced confessions had historically required automatic reversal of a conviction below.

3. Whether Fulminante's Coerced Confession Was Harmless Error so that His Conviction Might Stand

Because a majority of the Court determined coerced confessions could be analyzed under the harmless error doctrine, the Court was forced to evaluate Fulminante's confession under that ruling.[129] The appropriate standard of review is the coerced confession must have been harmless beyond a reasonable doubt.[130] The burden of proof falls on the beneficiary of the rule—here, the state.[131] Although this issue is factually oriented, the Court did not remand the case for a determination on this issue. Instead, the Court heard the arguments and ruled that the confession in this case was not, in fact, harmless beyond a reasonable doubt.[132]

D. *The Arguments*

1. State of Arizona, Petitioner

The State of Arizona first argued that the Arizona Supreme Court applied the wrong test in determining the voluntariness of Fulminante's confession.[133] The State then argued that under the correct

125. Payne v. Arkansas, 356 U.S. 560, 568 (1958).
126. *See id.*
127. Arizona v. Fulminante, 111 S. Ct. 1246, 1263 (1991) (citations omitted).
128. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (citation omitted).
129. *Fulminante I*, 111 S. Ct. at 1257.
130. *Id.* (citing Chapman v. California, 386 U.S. 18, 24 (1967)).
131. *Id.*
132. *Id.*
133. "The court misread [Bram v. United States, 168 U.S. 532 (1897)] as requiring a simple 'but for' analysis where a confession follows a promise. Although the court acknowledged that the proper test to be applied . . . is the 'totality of circumstances' test, it is evident that the court failed to apply the correct test . . . ." Peti-

test, which embraces the 'totality of circumstances,' Fulminante's confession was voluntary and thus not coerced.[134] The thrust of the State's argument was based on the fact that "[n]o evidence that Fulminante's life was in danger was presented at trial."[135] The State relied on three criteria to support its argument: (1) the characteristics of the accused; (2) the circumstances of the interrogation; and (3) the conduct of the law enforcement officials.[136]

Arguing "nothing in Fulminante's character traits or background [suggested] that he is a man whose will could be easily overborne,"[137] the State concluded Fulminante "knew how to take care of himself."[138] Despite conceding Fulminante possessed "average or low average intelligence" and received no formal education beyond the fourth grade,[139] the State relied on Fulminante's past criminal record to support its conclusion.[140] Furthermore, the State argued the circumstances surrounding Fulminante's confession were not coercive in nature.[141] The State reasoned Fulminante confessed to Sarivola because "[t]he two men were on friendly terms," not because he felt compelled to do so.[142] The State implied that a significant difference in settings, between a confession uttered in prison and one uttered in a police interrogation room, sufficiently justified a finding that the circumstances surrounding Fulminante's confession were not coercive.

Moreover, the State argued that the law enforcement officials involved in eliciting Fulminante's confession did not conduct themselves improperly.[143] The State argued that neither the Mesa Police Department nor any federal law enforcement officials were directly involved in any attempts made by Sarivola to elicit a confession.[144] Furthermore, although Fulminante argued "Sarivola's promise to protect him from other inmates was 'extremely coercive' and compelled him to confess," the State argued Fulminante did not state Sarivola's conduct was "especially reprehensible."[145]

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tioner's Brief on the Merits at 9, Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (No. 89-839) (footnote omitted) [hereinafter Petitioner's Brief].

134. *Id.* at 16-22.

135. *Id.* at 16.

136. *Id.* at 17-22.

137. *Id.* at 18.

138. *Id.*

139. *Id.*

140. "Fulminante was well-schooled in the intricacies of the criminal justice system." *Id.*

141. *Id.*

142. *Id.* at 18-19.

143. *Id.* at 19.

144. *Id.* "Further, although Sarivola's promise of protection was objectively coercive, it does not rise to the level of conduct that has been condemned by [the United States Supreme Court] on the basis that it is revolting or shocking to the conscience." *Id.* at 31.

145. *Id.* at 19.

Combining the above arguments, the State reasoned Sarivola's mere promise of protection could not have overborne Fulminante's will. Furthermore, the State argued Fulminante did not rely on Sarivola's promise.[146] Therefore, according to the State, Fulminante's confession was voluntary and not coerced.

The next argument advanced by the State (in which it assumed arguendo that the Court found Fulminante's confession was coerced) was for the expansion of *Chapman's* harmless error rule to include coerced confessions.[147] The State claimed that the reason for an automatic reversal rule lay in the courts' concern that coerced confessions were "inherently unreliable."[148] Distinguishing a confession obtained through "physical mistreatment" from one obtained through "trickery, deceit, or promises," the State argued that the former was certainly unreliable, while the latter was not necessarily so.[149] Thus, the State argued, a confession which was coerced through trickery or deceit should be subject to harmless error analysis.

Furthermore, the State argued the affect a coerced confession has on a jury is not a legitimate concern because past decisions have permitted application of the harmless error rule to other constitutional errors which could have affected the jury.[150] Relying on *Stein v. New York*,[151] the State argued "[t]he mere appearance that a defendant has been denied his right to a fair trial does not justify exempting coerced confessions from a harmless-error analysis."[152] Therefore, the State concluded that any argument that a coerced confession pervades the jurors' deliberation process fails because other unconstitutional confessions have been deemed amenable to harmless error analysis.

Additionally, the State argued an application of the harmless error doctrine to a coerced confession erroneously admitted at trial would be consistent with the central purpose of a criminal trial.[153] In *Delaware v. Van Arsdall*,[154] the United States Supreme Court stated:

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather

146. *Id.* at 20.
147. *Id.* at 22-32.
148. *Id.* at 25; *see, e.g.*, Jackson v. Denno, 378 U.S. 368 (1964).
149. Petitioner's Brief, *supra* note 133, at 25.
150. *See, e.g.*, Milton v. Wainwright, 407 U.S. 371 (1972); Harrington v. California, 395 U.S. 250 (1969).
151. 346 U.S. 156 (1953).
152. Petitioner's Brief, *supra* note 133, at 27.
153. *Id.* at 28-29. "Requiring automatic reversal of a conviction where erroneously-admitted evidence has not had any effect whatsoever on the jury's determination of guilt does not comport with the central purpose of a criminal trial." *Id.* at 31.
154. 475 U.S. 673 (1986).

than on the virtually inevitable presence of immaterial error.[155]

The State admitted the Court traditionally held coerced confessions were not subject to the harmless error doctrine, but argued that the reasons for such a rule should be reexamined.[156] The State, relying on *United States v. Mechanik*,[157] argued that the cost of a retrial and "society's 'interest in the prompt administration of justice' " outweighed the rights of the accused "when an error has had no effect on the outcome of the trial."[158]

Finally, the State argued Fulminante's confession, in particular, should be deemed harmless, if the Court found it to be coerced.[159] The State claimed that Fulminante's second confession to Donna Sarivola duplicated the evidence heard by the jury through the admission of Fulminante's first confession to Anthony Sarivola.[160] Thus, the State contended the first confession was "merely cumulative."[161] In conclusion, the State respectfully requested the Court to reverse the decision of the Arizona Supreme Court.[162]

2. Oreste C. Fulminante, Respondent

The first argument advanced by Fulminante was that his confession was erroneously admitted at trial because it had been the product of extreme coercion.[163] Fulminante argued that his case was indistinguishable from *Payne v. Arkansas*.[164] In *Payne*, the United States Supreme Court held the confession of defendant Payne had been coerced by the conduct of the chief of police.[165] Fulminante analogized the promise of the chief of police to protect Payne from an angry mob with Sarivola's promise to protect Fulminante from the "rough treatment" from the other inmates, and Fulminante concluded that his confession, like Payne's, was coerced.[166]

Furthermore, Fulminante argued that the United States Supreme

155. *Id.* at 681 (citation omitted).
156. Petitioner's Brief, *supra* note 133, at 31.
157. 475 U.S. 66 (1986).
158. Petitioner's Brief, *supra* note 133 at 32 (quoting *Mechanik*, 475 U.S. at 72).
159. *Id.* at 30.
160. *Id.*
161. See *supra* notes 46-61 and accompanying text for a discussion on cumulative evidence approach.
162. Petitioner's Brief, *supra* note 133, at 33.
163. Respondent's Brief on the Merits at 13-23, Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (No. 89-839) [hereinafter Respondent's Brief].
164. *Id.* at 16 (citing Payne v. Arkansas, 356 U.S. 560 (1958)). In *Payne*, the defendant had been convicted of first degree murder after the jury had heard a confession which was later determined to be the product of coercion. *Id.* at 561, 567.
165. The police chief had promised the defendant protection from "30 or 40 people . . . that wanted to get him." *Payne*, 356 U.S. at 567. Payne had denied his guilt in the murder even after he had been held "incommunicado for three days . . . [and] was denied food for long periods." *Id.*
166. Respondent's Brief, *supra* note 163, at 17.

Court had adopted a " 'per se' reversal rule where a suspect has been confronted with the threat of direct physical harm."[167] Quoting *Stein v. New York*,[168] Fulminante argued that this rule was substantiated by a history of judicial precedent.[169] Therefore, Fulminante argued, the per se rule did not require the Court to look to any other "circumstances."[170]

Fulminante then rebutted the State of Arizona's argument that under the "totality of the circumstances" his confession was not coerced.[171] Although the State concluded Fulminante "knew how to take care of himself,"[172] Fulminante pointed out that he had placed himself in protective custody during his earlier imprisonment, and was committed to a psychiatric hospital because of the affect the isolation had had on him emotionally.[173] Additionally, Fulminante argued that he was physically vulnerable to the "rough treatment from the other inmates."[174] Moreover, Fulminante argued that the conduct of the law enforcement agents was, indeed, reprehensible.[175]

Fulminante next argued that a coerced confession could never be considered harmless error.[176] Fulminante argued that the United States Supreme Court "has been unequivocal for over 90 years in holding that a conviction cannot be allowed to stand if a 'coerced' confes-

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167. *Id.* (citing Beecher v. Alabama (I), 389 U.S. 35 (1967)). The Court has also applied this per se rule in cases in which the defendant had been threatened with mob violence. *See, e.g.*, Chambers v. Florida, 309 U.S. 227 (1940); Ward v. Texas, 316 U.S. 547 (1942); Payne v. Arkansas, 356 U.S. 560 (1958).

168. 346 U.S. 156 (1953).

169. Respondent's Brief, *supra* note 163, at 17-18 (quoting *Stein*, 346 U.S. at 182). In *Stein*, the Court stated:

> When [physical violence or the threat of it is] present, there is no need to weigh or measure its effects on the will of the individual victim. The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.

Stein, 346 U.S. at 182.

170. "[The] Court need not look at other 'circumstances.' This Court should hold, *per se*, that the confession was coerced." Respondent's Brief, *supra* note 163, at 18.

171. *Id.* at 18-21.

172. Petitioner's Brief, *supra* note 133, at 18.

173. Respondent's Brief, *supra* note 163, at 19.

174. *Id.* at 17-18. Fulminante was 5 feet 3 inches tall, weighing 118 pounds, and forty-two years old when he served his sentence at Ray Brook. *Id.* at 18.

175. *Id.* at 20. Fulminante argued that FBI Agent Ticano knew Sarivola obtained previous information through force and violence. *Id.* Thus, "[i]t was certainly foreseeable that Sarivola would use the threat of force to obtain a confession." *Id.* at 21.

176. *Id.* at 23-32.

sion is admitted at trial."[177] Fulminante argued that this is true even when other confessions were properly admitted at trial.[178]

Furthermore, Fulminante argued that the basic premise of our criminal justice system cannot tolerate an application of the harmless error doctrine to coerced confessions.[179] Quoting *Rogers v. Richmond*,[180] Fulminante argued that applying the harmless error doctrine to coerced confessions was not consistent with our accusatorial system for enforcing the criminal law.[181] Moreover, Fulminante denied that a new trial would unduly inconvenience the judicial system.[182] In conclusion, Fulminante respectfully requested the judgement of the Arizona Supreme Court be affirmed.[183]

Assuming that the Court might hold that the harmless error doctrine could be applied to coerced confessions, Fulminante advanced an argument in the alternative. Fulminante recognized that the Court utilized the "overwhelming evidence" and "cumulative evidence" approaches,[184] but denied that these approaches justified a holding that his confession was harmless.[185] First, in an attempt to prove that no overwhelming evidence existed, Fulminante argued that the State did not have a case against him without the coerced confession.[186] Second, Fulminante argued his confession to Donna Sarivola could not consti-

177. *Id.* at 23. Fulminante cited twenty-five cases to support this proposition. *Id.* at 24 n.5.

178. Respondent's Brief, *supra* note 163, at 26-27. "[W]here a coerced confession is admitted at trial, it is irrelevant if there are other properly admitted confessions." *Id.* (citing Haynes v. Washington, 373 U.S. 503 (1963) (two admissible confessions); Spano v. New York, 360 U.S. 315 (1959) (one admissible confession); Payne v. Arkansas, 356 U.S. 560 (1958) (one admissible confession); Stroble v. California, 343 U.S. 181 (1952) (five admissible confessions); Malinski v. New York, 324 U.S. 401 (1945) (three admissible confessions)).

179. Respondent's Brief, *supra* note 163, at 32-40.

180. 365 U.S. 534 (1961).

181. Respondent's Brief, *supra* note 163, at 34-35. In *Rogers*, the Court stated:

> Our decisions under [the Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Rogers, 365 U.S. at 540-41 (citations omitted) (emphasis added).

182. Respondent's Brief, *supra* note 163, at 37. "A week long trial seems a slight inconvenience in a capital case. It is particularly unfair to consider any inconvenience to the prosecutor when he, knowing the confession had been coerced, produced it at trial." *Id.*

183. *Id.* at 41.

184. *See supra* notes 32-61 and accompanying text.

185. Respondent's Brief, *supra* note 163, at 27-32.

186. *Id.* at 28.

tute overwhelming evidence because it was subject to substantial doubt.[187] Fulminante argued that Donna had corroborated with Anthony Sarivola concerning her testimony so that the prosecutor would not have doubts about the sincerity of Fulminante's confession.[188]

Furthermore, Fulminante argued that at least six items of prejudicial evidence had been admitted in conjunction with his coerced confession.[189] Therefore, Fulminante argued, because he did not testify at trial, his confession to Sarivola could not be "cumulative."[190]

E. *The United States Supreme Court Lineup*

The United State Supreme Court, "in a patchwork of shifting coalitions,"[191] affirmed the decision of the Arizona Supreme Court, requiring a new trial without the use of the coerced confession.[192] In deciding the issues, the Court was actually comprised of three different 5-4 majority memberships. The first issue, whether Fulminante's confession had been coerced,[193] was written by Justice White, joined by Justices Marshall, Blackmun, Stevens, and Scalia, and upheld the finding of the Arizona Supreme Court that the confession was, indeed, coerced.[194] However, this decision was undermined by the court's affirmation of the second issue; whether a coerced confession erroneously admitted at

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187. *Id.* The Court must find that the constitutional error was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). However, "[Donna's] entire testimony comprise[d] only twenty-nine transcript pages and [was] highly suspect." Respondent's Brief, *supra* note 163, at 28.

188. Respondent's Brief, *supra* note 163, at 29-30. If the prosecutor had reservations concerning the truthfulness of Fulminante's confession, the Sarivola's re-approvement in the Federal Witness Protection Program may have been in jeopardy. *Id.* at 30.

189. *Id.* at 31-32. Fulminante argued:

> The following items of evidence were admitted solely in conjunction with the prison setting in which the confession to Sarivola was made:
>
> 1. That Fulminante had a prior felony conviction for being a felon in possession of a firearm.
> 2. That Fulminante had a prior felony conviction for uttering false instruments.
> 3. That Fulminante had been sent to prison on two separate occasions.
> 4. That Fulminante had a reputation in prison for being untruthful.
> 5. That Ticano vouched for the fact that Sarivola had been truthful.
> 6. That Fulminante knowingly associated with a member of an organized crime family.

Id.

190. *Id.* at 32.

191. *High Court Cuts Back on Ban on Use of Coerced Confessions*, 205 N.Y. L.J. 1 (1991) [hereinafter *High Court*].

192. *Fulminante I*, 111 S. Ct. at 1261.

193. *Id.* at 1251.

194. *Id.* at 1246; *see also High Court*, *supra* note 191, at 1.

trial could constitute harmless error.[195] This decision was written by Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Souter.[196] With respect to the third issue, determining whether in this particular case the coerced confession constituted harmless error,[197] the Court, in Justice White's opinion, joined by Justices Marshall, Blackmun, Stevens, and Kennedy, held Fulminante's confession did not constitute harmless error, thereby affirming the holding of the Arizona Supreme Court that the conviction be set aside, and a new trial ordered without the use of the original coerced confession.[198] Justice Kennedy, in his concurring opinion,[199] provided the swing vote which granted Fulminante a new trial while departing from one of the traditional concepts of our criminal justice system.

F. *The Decisions*

1. Justice White's Opinion

After setting out the facts of the case,[200] Justice White addressed the issue of whether Fulminante's confession had been coerced.[201] Justice White first determined that the Arizona Supreme Court had applied the correct "totality of circumstances" test.[202] Justice White then noted that although the Court usually defers factual findings to the state court, "the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination."[203] After examining the "totality of circumstances," the majority affirmed the Arizona Supreme Court's

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195. *Fulminante I*, 111 S. Ct. at 1266.

196. *Id.* at 1246; *see also High Court*, *supra* note 191, at 1.

197. "Since five Justices have determined that harmless error analysis applies to coerced confessions, it becomes necessary to evaluate under that ruling the admissibility of Fulminante's confession to Sarivola." *Fulminante I*, 111 S. Ct. at 1257.

198. *Id.* at 1261.

199. *Id.* at 1266 (Kennedy, J., concurring in the judgment).

200. The facts of the case were set out in Part I of Justice White's opinion. *Id.* at 1250-51.

201. *Id.* at 1251. Part II of Justice White's opinion is the majority opinion on this issue. *See supra* notes 193-94 and accompanying text.

202. Justice White disagreed with the State of Arizona's argument that the Arizona Supreme Court had merely applied a "but for" test:

> Although the [United States Supreme] Court noted in *Bram* that a confession cannot be obtained by " 'any direct or implied promises, however slight, nor by the exertion of any improper influence,' " it is clear this passage from *Bram* . . . was not relied on by the Arizona court in reaching its conclusion. Rather, the court cited this language as part of a longer quotation from [State v. Thomas, 714 P.2d 395, 397 (Ariz. 1986)] which accurately described the State's burden of proof for establishing voluntariness.

Fulminante I, 111 S. Ct. at 1251 (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897) (quoting 3 H. SMITH & A. KEEP, RUSSELL ON CRIMES & MISDEMEANORS 478 (6th ed. 1896))).

203. *Id.* at 1252 (quoting Miller v. Fenton, 474 U.S. 104, 110 (1985)).

finding of coercion as to Fulminante's confession to Sarivola.[204]

In Part III of Justice White's opinion, a minority of the justices agreed that the harmless error doctrine did not apply to the erroneous admission of a coerced confession.[205] The minority admonished the majority's application of the harmless error doctrine to coerced confessions as "dislodg[ing] one of the fundamental tenets of our criminal justice system."[206] The minority argued that an admission of a coerced confession, even when supported by other overwhelming evidence, is " 'an impermissible doctrine,' "[207] because "a coerced confession is fundamentally different from other types of erroneously admitted evidence."[208]

The minority reasoned that no one knows with certainty what weight or credit the jury may have given a coerced confession when it returns a general verdict of guilty.[209] Thus, the minority asserted, a coerced confession defies harmless error analysis.[210] Moreover, the minority argued that because a criminal defendant's confession is " 'probably the most probative and damaging evidence that can be admitted against him' "[211] a jury could not ignore it even if instructed to do so.[212] Therefore, the minority concluded the harmless error doctrine simply could not be applied to coerced confessions.

Furthermore, the minority argued that an accusatorial system of criminal justice such as ours demands that certain constitutional rights, such as the right of a criminal defendant not to have a coerced confession used against him, can never be the subject of harmless error analysis.[213] The minority argued that the majority did not offer any convincing rationale for overturning years of stare decisis.[214]

Finally, in Part IV of Justice White's opinion, a majority of the Court affirmed the judgment of the Arizona Supreme Court reversing Fulmi-

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204. The majority concluded that several factors supported this finding of coercion: (1) Fulminante was "in danger of physical harm;" (2) Fulminante received "rough treatment" from the other inmates; (3) Fulminante possessed a lower level of intelligence and formal education; (4) Fulminante was not "adapted well to the stress of prison life;" and (5) Fulminante was "particularly susceptible to [Sarivola's] entreaties." *Id.*

205. *Id.* at 1253-57 (White, J., dissenting).

206. *Id.* at 1254 (White, J., dissenting).

207. *Id.* at 1253 (White, J., dissenting) (quoting Lynumn v. Illinois, 372 U.S. 528, 537 (1963)).

208. *Id.* at 1254 (White, J., dissenting).

209. *Id.* (White, J., dissenting) (relying on Payne v. Arkansas, 356 U.S. 560, 568 (1958)).

210. *Id.* (White, J., dissenting).

211. *Id.* at 1255 (White, J., dissenting) (quoting Cruz v. New York, 481 U.S. 186 (1987) (White, J., dissenting)).

212. *Id.* (White, J., dissenting) (citing Bruton v. United States, 391 U.S. 123, 140 (1968) (White, J., dissenting)).

213. *Id.* at 1257 (White, J., dissenting).

214. *Id.* (White, J., dissenting).

nante's conviction on the grounds that his coerced confession was not harmless beyond a reasonable doubt.[215] In reaching this conclusion, the majority relied on three considerations: (1) the trial record revealed that a verdict of guilty depended on the jury's belief of both confessions to Anthony Sarivola and to Donna Sarivola; (2) the second confession depended on the admission of the first; and (3) the admission of the coerced confession led to the admission of other prejudicial evidence.[216] Addressing the first concern, the Court concluded that "because the physical evidence from the [murder] scene and other circumstantial evidence would have been insufficient to convict," it was unlikely Fulminante would even have been prosecuted without the use of the coerced confession.[217] The Court's second concern culminated in the conclusion that "[a]bsent the admission . . . of the first confession, the jurors might have found Donna Sarivola's story unbelievable," and that the two confessions were not "merely cumulative" of one another because the jury could easily have believed "the two confessions reinforced and corroborated each other," rather than simply duplicating each other.[218] Additionally, the confession to Donna Sarivola significantly affected the defendant's ability to impeach the credibility of the coerced confession.[219] Finally, the Court concluded certain prejudicial evidence would not have been admitted at trial but for the admission of the coerced confession.[220]

2. Chief Justice Rehnquist's Opinion

In Part I of his opinion, Chief Justice Rehnquist first addressed the issue of whether Fulminante's confession had been coerced.[221] The justices, who were in the minority on this issue, first established the proper criteria to determine the admissibility of the confession as that of voluntariness.[222] The minority concluded Fulminante's confession

215. *Id.* at 1257-61; *see also* Chapman v. California, 386 U.S. 18, 24 (1967).

216. *Fulminante I*, 111 S. Ct. at 1258-60.

217. *Id.* at 1258. Indeed, even the prosecutor himself stated: "[W]hat brings us to Court, what makes this case fileable, and prosecutable and triable is that later, Mr. Fulminante confesses this crime to Anthony Sarivola and later, to Donna Sarivola, his wife." *Id.*

218. *Id.* at 1259; *see also supra* notes 186-88 and accompanying text.

219. *Fulminante I*, 111 S. Ct. at 1259 n.9.

220. *Id.*; *see also supra* notes 189-90 and accompanying text.

221. *Fulminante I*, 111 S. Ct. at 1261-63 (Rehnquist, J., dissenting).

222. The Court noted the proper test as follows:

> "The ultimate test remains . . . the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

Id. at 1261 (Rehnquist, J., dissenting) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

had been made voluntarily.[223] Essentially, the minority claimed that because Fulminante's trial attorney had failed to offer evidence that Fulminante possessed the requisite fear of physical harm, the Arizona Supreme Court had erred in holding Fulminante's confession involuntary.[224] However, the minority agreed with Fulminante that the "'"obvious" inference from [Sarivola's] promise was that [Fulminante's] life would be in jeopardy if he did not confess.'"[225] It is hard to justify the minority's rationale in light of this acknowledgement.

In Part II of Chief Justice Rehnquist's opinion,[226] the majority of the Court[227] held that the harmless error doctrine could be applied to coerced confessions.[228] The majority provided several reasons for rejecting Justice White's contention that stare decisis required the Court to reject the application of the harmless error doctrine to coerced confessions.[229]

The first reason, the majority opined, was that the language which the Court had used in *Chapman*[230] did not necessarily establish a rule which precluded the use of the harmless error doctrine to coerced confessions.[231] Rather, the majority urged, the language was merely "a historical reference to the holdings of these cases."[232]

The second reason advanced by the majority was that the admission of an involuntary confession should be regarded as a "trial error."[233] The majority argued that a "trial error" is so significantly unlike a "structural defect"[234] that an analysis under the harmless error doctrine is permitted in the presence of the former, but requires automatic reversal when the latter is present.[235]

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223. *Id.* (Rehnquist, J., dissenting).

224. *Id.* at 1262 (Rehnquist, J., dissenting).

225. *Id.* (Rehnquist, J., dissenting) (quoting State v. Fulminante, 778 P.2d 602, 608 (1989)).

226. *Id.* at 1261-66.

227. *See supra* notes 195-96 and accompanying text.

228. *Fulminante I*, 111 S. Ct. at 1265.

229. *See id.* at 1264-66.

230. The language, coupled with the footnote which lists the constitutional rights, to which the Court is referring is: "[a]lthough our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 (1967).

231. *Fulminante I*, 111 S. Ct. at 1264.

232. *Id.*

233. *Id.* The majority defined a "trial error" as an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.*

234. The majority defined a "structural defect" as a defect in which "[t]he entire conduct of the trial from beginning to end is obviously affected." *Id.* at 1265. An example of a "structural defect" would be the lack of an impartial judge.

235. *Id.*

The third reason advanced by the majority was that a coerced confession was indistinguishable from confessions obtained in violation of other constitutional amendments which the Court has previously held subject to the harmless-error doctrine.[236] Thus, the majority argued, the Court should not apply the harmless-error doctrine inconsistently to constitutional violations which have identical evidentiary impact.[237]

Finally, in Part III, Chief Justice Rehnquist, and a minority of the justices, would have affirmed the original opinion of the Arizona Supreme Court in which that court applied the harmless-error doctrine to Fulminante's confession and, in fact, found it to be harmless beyond a reasonable doubt.[238]

3. Justice Kennedy's Concurrence

Justice Kennedy's concurring opinion proved to be the swing vote in Fulminante's case. Justice Kennedy, concurring with the opinions set forth by Chief Justice Rehnquist, agreed that Fulminante's confession was voluntary and that the harmless error doctrine should apply to coerced confessions.[239] However, he could not agree with the Chief Justice in the application of the harmless error doctrine to Fulminante's confession, but rather, joined in Justice White's coalition reversing Fulminante's conviction.[240]

IV. The Effects of *Arizona v. Fulminante*

It has been said, " 'ours is an accusatorial and not an inquisitorial [criminal justice] system.' "[241] The question becomes, then, whether applying the harmless error doctrine to a coerced confession offends this basic principle of our law enforcement system. Focusing on the reactions of the Supreme Court justices, legal scholars, and the Congress, this section will discuss the probable effects which the holding in *Arizona v. Fulminante* will likely have on our criminal justice system.

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236. *See, e.g.*, Milton v. Wainwright, 407 U.S. 371 (1972) (violation of Sixth Amendment harmless error in light of overwhelming evidence to support guilty finding).

237. *Fulminante I*, 111 S. Ct. at 1266. "This is especially true in a case such as this one where there are no allegations of physical violence on behalf of the police." *Id.*

238. *Id.* (Rehnquist, J., dissenting). The minority believes Fulminante's coerced confession was harmless beyond a reasonable doubt because it was "merely cumulative" of his second confession. *Id.* (Rehnquist, J., dissenting).

239. *Id.* at 1266 (Kennedy, J., concurring in the judgment).

240. *Id.* (Kennedy, J., concurring in the judgment). "I agree with a majority of the Court that admission of the confession could not be harmless error when viewed in light of all the other evidence." *Id.* at 1267 (Kennedy, J., concurring in the judgment).

241. *Id.* at 1256 (White, J., dissenting) (quoting Rogers v. Richmond, 365 U.S. 534, 540-41 (1961)).

A. *The Supreme Court Justices*

On its face, the holding in *Arizona v. Fulminante*, that coerced confessions may be subjected to a harmless error analysis, is a natural progression of the law since *Chapman v. California* was decided in 1967.[242] Indeed, prior to *Fulminante*, the United States Supreme Court stated:

> We have emphasized, however, that while there are some errors to which *Chapman* does not apply, they are the exception and not the rule. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis.[243]

The blatant omission of coerced confessions in the above quotation by Justice Powell[244] suggests that the Court had already begun to contemplate the application of the harmless error doctrine to coerced confessions.

Prior to 1991, the Court had already extended *Chapman*'s harmless error standard to include violations of a defendant's rights guaranteed by the Sixth Amendment.[245] In *Fulminante*, the majority of the Court reasoned that there was no difference between the erroneous admission of these types of violations and that of a coerced confession.[246] However, the minority rejected this proposition on the grounds that "a coerced confession is fundamentally different from other types of erroneously admitted evidence to which the [harmless error] rule has been applied."[247] Instead, the minority urged, the Court should consider "the nature of the right at issue and the effect of an error upon the trial."[248] Thus, the minority concluded, by rejecting stare decisis, the Court, without convincing reason, has left little guidance for the lower courts to follow when applying the harmless error doctrine.[249]

The primary purpose of the harmless error rule can be said to be a

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242. *See id.* at 1263-64.

243. Rose v. Clark, 478 U.S. 570, 578-79 (1986) (citations omitted).

244. Justice Powell delivered the opinion in *Rose*, 478 U.S. at 570, deciding the issue whether *Chapman* applied to jury instructions which violated the Constitution. *Id.* at 571-72.

245. *See, e.g.*, Milton v. Wainwright, 407 U.S. 371 (1972) (confession obtained in violation of Sixth Amendment); Schneble v. Florida, 405 U.S. 427 (1972) (admission of confession by co-defendant in violation of the Sixth Amendment Confrontation Clause); Harrington v. California, 395 U.S. 250 (1969) (violation of the Sixth Amendment Confrontation Clause).

246. "The evidentiary impact of an involuntary confession, and its effect upon the composition of the record, is indistinguishable from that of a confession obtained in violation of the Sixth Amendment . . . ." *Fulminante I*, 111 S. Ct. at 1265. "The inconsistent treatment of statements elicited in violation of the Sixth and Fourteenth Amendments, respectively, can be supported neither by evidentiary or deterrence concerns nor by a belief that there is something more 'fundamental' about involuntary confessions." *Id.*

247. *Id.* at 1254 (White, J., dissenting).

248. *Id.* at 1255 (White, J., dissenting).

249. *Id.* at 1257 (White, J., dissenting).

compromise between judicial economy and the protection of a criminal defendant's constitutional rights.[250] However, because the Court has stated that " 'the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence,' "[251] and the rights of an accused are secured by a "fair trial,"[252] it seems the Court has determined that judicial economy now outweighs an individual's constitutional right to be free from coercive police tactics. Thus, "[b]y effectively treating all constitutional rights as designed to promote only factual accuracy, the Court undermines those rights that promote values other than the reliability of guilty verdicts."[253]

B. *Legal Scholars*

The main issue over which the legal experts who have considered the effects of *Arizona v. Fulminante* debate is whether the decision will encourage law enforcement officials to engage in abusive tactics in order to secure a conviction. On one side of the issue, libertarians predict that this case will "encourage the police to coerce confessions, lead judges to admit those confessions, and alter defense strategy and plea-bargaining to take those confessions into account."[254] However, on the other side, legal scholars predict that this decision will "have relatively little effect in criminal justice."[255] These experts believe that the appellate courts will "continue to reverse convictions based mainly on coerced confessions" under the harmless error analysis.[256]

Many experts are concerned with the possible effect this decision will have on police. Professor Laurence Tribe of the Harvard University Law School said, "[t]he police now have little incentive not to be fairly brutal in extracting a confession since they are likely to be convinced that they will have other evidence of guilt."[257] Moreover, "[b]y blurring what had been a clear prohibition, the Court has sent police a message—intended or not—that coercing confessions may sometimes pay."[258] Some legal scholars believe that while the Court has maintained "the appearance of condemning police coercion," it has also sent "a signal to lower courts that if they really want to uphold a tainted

250. *See* Charles F. Campbell, Jr., *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L. REV. 499, 524 (1990).

251. *Fulminante I*, 111 S. Ct. at 1264 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

252. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (A "fair trial" is "a trial whose result is reliable.").

253. Stacy & Dayton, *supra* note 12, at 81.

254. Martin Tolchin, *Defense Lawyers Assail Court Ruling on Coerced Confessions*, N.Y. TIMES, Mar. 28, 1991, at B10.

255. *Id.*

256. *Id.*

257. *Id.*

258. Stuart Taylor, Jr., *High Court in a Police State of Mind*, LEGAL TIMES, May 27, 1991, at 21.

conviction, the painless excuse of 'harmless error' is always available."[259] While the decision in *Arizona v. Fulminante* does not revoke the obligation of a trial judge to exclude a coerced confession from admission at trial, it may cause a trial judge to be more likely to admit a questionable confession "knowing the 'harmless error' rule may save him on appeal."[260]

However, other experts believe the decision is only a modest change in preexisting law, and the police will continue to be deterred from coercing a confession:

> When constitutional error originates with the police . . . the *Chapman* rule will ensure that error does not aid these officials in obtaining a conviction. In this situation, because virtually all violations are detected, reversal will always occur when law enforcement officials needed the fruits of a violation to convict; reversal will not occur when it is clear beyond a reasonable doubt those fruits were not needed.[261]

Additionally, the case itself "demonstrates that the harmless-error test in coerced-confession cases will seldom be satisfied."[262] As the Rehnquist majority conceded, "an involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors—in particular cases it may be devastating to a defendant"[263] thereby almost always requiring reversal of a conviction in which a coerced confession was admitted as part of the evidence.[264] This is so because "[n]o conviction can stand if there is any reasonable doubt that it rests on a coerced confession."[265] Finally, because of the possibility of a retrial, which carries with it significant time and expenses and the possibility of the defendant being found not guilty, "it seems reasonable to suppose that *Chapman* . . . gives law enforcement officials a disincentive to commit error and use its fruits."[266]

Therefore, although the legal community is not in uniformed agreement concerning the effects of *Arizona v. Fulminante*, coerced confessions will still be excluded from trial, and those that are not must still survive a harmless error analysis, which requires the error to be harmless beyond a reasonable doubt.[267]

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259. Ira Mickenberg, *Criminal Rulings Granted the State Broad New Power*, NAT'L L.J., Aug. 19, 1991 at 510.

260. Editorial, *Miranda and You, Perfect Together*, 127 N.J. L.J. 8 (1991).

261. Stacy & Dayton, *supra* note 12, at 96.

262. Bruce Fein, *Crying Wolf on Police Practices*, LEGAL TIMES, Apr. 15, 1991, at 30 [hereinafter *Crying Wolf*].

263. *Fulminante I*, 111 S. Ct. at 1266.

264. In some cases, the Court may conclude that other overwhelming evidence exists, or the confession was merely duplicative of other admissible evidence to sustain the conviction. However, see *supra* notes 32-61 and accompanying text for a discussion of the problems with these approaches.

265. *Crying Wolf*, *supra* note 262, at 32.

266. Stacy & Dayton, *supra* note 12, at 97.

267. *See Chapman*, 386 U.S. at 24.

C. *The Legislature*

Congress reacted quite extremely to the decision reached by the Court in *Arizona v. Fulminante*. In September 1991, only six months after the Court had decided this case, the House Judiciary Committee voted to overturn the decision.[268] Representative Jack Brooks, Democratic chairman of the House Judiciary Committee, said the reason the committee voted to negate the decision was that the decision "defies our common understanding of fairness."[269] The proposed bill would reinstate the traditional view that the admission of a coerced confession over objection automatically requires reversal of the conviction below.[270] As of the last action date, the proposed bill, which is part of a larger, more comprehensive criminal justice bill, has not been amended.[271] It will be very interesting to note the progress of this bill as it will certainly determine whether *Arizona v. Fulminante* will have any effect at all on our criminal justice system.

V. CONCLUSION

While *Arizona v. Fulminante* can be viewed as a natural extension of preexisting law since *Chapman v. California*, because it overturned a traditional concept of our criminal justice system, it has left little guidance for the lower courts when analyzing coerced confessions under the harmless error doctrine. The United States Supreme Court has now placed emphasis on judicial economy while deemphasizing those rights usually reserved for protection of the accused. Although the legal experts are not unanimous, it is unlikely that the police will now feel they can obtain a confession from an accused in any manner they choose. However, a prosecutor now has little disincentive to attempt to enter a questionable confession into evidence. This will cause defense attorneys to alter their strategies to make certain the confession is not admitted at the trial and heard by the jury. In the end, *Arizona v. Fulminante* might not have any effect on our criminal justice system as it might be overturned by a Congressional enactment.

*Jason Cenicola**

268. *Court Challenged on Confessions*, BOSTON GLOBE, Sept. 24, 1991, at 31.
269. *Id.*
270. *See* H.R. 3371, 102d Cong., 2d Sess. (1991).
271. *See generally id.*.

* I would like to thank my mother and father and my brother, Justin, for their continuing love and support throughout all my endeavors.

County of Riverside v. McLaughlin: The "Promptness" of a Probable Cause Determination

I. INTRODUCTION

It is fairly easy to imagine a situation where, by a strange sequence of events, you find yourself unjustifiably under arrest and in the local jail; perhaps you were mistaken for a suspect in a crime.[1] Once the lack of justification for the arrest was detected by a judicial officer at your probable cause hearing, the mistaken identity apparent, you would be free to leave; a clear inconvenience to you, the arrestee, but a trade-off most reasonable citizens would arguably accept in exchange for the protections provided by a vigilant police force.

A recent United States Supreme Court ruling, however, could change what could fairly be described as a harmless case of mistaken identity into a disastrous situation for those who are unjustifiably arrested. According to the holding in *County of Riverside v. McLaughlin*,[2] states have forty-eight hours from the time of a warrantless arrest to provide judicial review of the facts and circumstances giving rise to the arrest.[3] At the probable cause hearing, the judicial officer is to determine whether probable cause existed for the arrest in the first place. If no probable cause existed for the arrest, the arrest was unjustified; consequently, further detention of the one-time suspect is unconstitutional under the Fourth Amendment to the United States Constitution.

This Comment examines the Fourth Amendment requirements as addressed by the Supreme Court in *County of Riverside v. McLaughlin*.[4] This class action[5] was brought by individuals who were arrested with-

1. A recent Boston Globe article discussing the lack of meaningful reviews for arrests contained the accounts of three persons held in jail over the 1991 Labor Day weekend. The three held were: one man, for receiving a stolen car, which he contended was a rental; a woman, with no prior convictions who could not post $25.00 bail, for assault and battery on a police officer; and a man who was charged with public drinking whose case was later dismissed at his arraignment. Doris Sue Wong, *Judge May Ask SJC to Speed Review of Warrantless Arrests*, BOSTON GLOBE, Oct. 4, 1991 at 67.

2. 111 S. Ct. 1661 (1991) [hereinafter *McLaughlin*].

3. In this Comment, the focus is primarily upon warrantless arrests.

4. 111 S. Ct. 1661 (1991).

5. The class action was brought under 42 U.S.C. § 1983 (1992) ("Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights,

out warrants in Riverside County, California.[6] It was that county's policy to conduct probable cause determinations at the suspect's arraignment, which had to be held, under state statute, within two days of arrest, excluding weekends and holidays.[7] The respondents claimed that possible delays up to seven days (over the Thanksgiving Holiday) violated their Fourth Amendment right to a "prompt" judicial determination of probable cause.[8] Sixteen years prior to *McLaughlin*, the Court had held in *Gerstein v. Pugh* that judicial reviews of warrantless arrests must be provided to arrestees "promptly" after arrest.[9] The *Gerstein* Court stopped short, however, of defining "prompt" in terms of hours. The Supreme Court remained silent on this issue until *McLaughlin*, where the Court held that a forty-eight hour lapse between a warrantless arrest and a probable cause hearing was constitutionally "prompt."[10]

Both the *Gerstein* and *McLaughlin* opinions are based upon the Fourth Amendment; specifically, that amendment's protection against unreasonable searches and seizures.[11] The Fourth Amendment strikes a balance between individual liberty rights and the state's right and duty to effectively enforce the law.[12] By demanding that searches and seizures be "reasonable," the Fourth Amendment limits the power and discretion of those who enforce the law.[13] One of the amendment's

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privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .").

6. *McLaughlin*, 111 S. Ct. at 1665.

7. *Id.*

8. *Id.*

9. Gerstein v. Pugh, 420 U.S. 103 (1975).

10. *McLaughlin*, 111 S. Ct. at 1664.

11. The Fourth Amendment reads:

> The right of 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.

12. *See infra* notes 250-64 and accompanying text.

13. *See* Terry v. Ohio, 392 U.S. 1, 11 (1967) ("authority of the police must be strictly circumscribed by the law of arrest and search"); Brinegar v. United States, 338 U.S. 160, 176 (1949) ("These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and unfounded charges of crime."); Johnson v. United States, 333 U.S. 10, 13-14 (1948) ("The point of the Fourth Amendment, which is not often grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence."); United States v. Di Re, 332 U.S. 581, 595 (1947) ("[T]he forefathers . . . designed our Constitution to place obstacles in the way of a too permeating police surveillance."); Weeks v. United States, 232 U.S. 378, 391-92 (1913) ("effect of the Fourth Amendment is to put the courts . . . and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority").

requirements is that probable cause exist to justify an arrest.[14] In *Gerstein*, the Court expressed a preference for warrants prior to arrests, but stated that to require a warrant as a prerequisite to every arrest would prove an intolerable handicap to law enforcement.[15] By requiring a review of all warrantless arrests *promptly* after the arrest, the Fourth Amendment right to be free from unreasonable seizures would be insured.[16] In *McLaughlin* the Supreme Court revisited and refined the seemingly murky *Gerstein* standard.

Section II of the Comment examines the legal analysis of *Gerstein v. Pugh* and the interpretations of *Gerstein* forwarded by the lower federal courts in the years leading up to the *McLaughlin* opinion.[17] The majority and dissenting opinions of *McLaughlin* are outlined in Section III.[18] Section IV of this comment critiques the majority opinion of *McLaughlin*.[19] This section also addresses the *McLaughlin* majority's reading of *Gerstein*.[20] In addition, Section IV explores the clear guidance provided on this issue by the framers' intent, the early common law, and recent case law precedent.[21] Justice Scalia's dissenting opinion in *McLaughlin* is then probed, and suggested as the legally appropriate reasoning.[22]

II. BACKGROUND

A. Gerstein v. Pugh

To fully understand the legal analysis in *McLaughlin*, it is necessary to examine the case of *Gerstein v. Pugh*. In *Gerstein*, the Supreme Court decided whether an individual arrested without a warrant must, under the Constitution, be afforded a judicially rendered probable cause determination as a prerequisite to an extended pre-trial detention.[23]

The respondents in *Gerstein* were arrested in Dade County, Florida and each charged with a number of offenses upon a prosecutor's information.[24] A class action was initiated by the respondents requesting

14. Probable cause exists when the existence of "facts and circumstances within officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been . . . committed." BLACK'S LAW DICTIONARY 1201 (6th ed. 1990); *see infra* notes 28-35 and accompanying text.

15. *Gerstein*, 420 U.S. at 113 (citing Beck v. Ohio, 379 U.S. 89, 96 (1964); Wong Sun v. United States, 371 U.S. 471, 479-82 (1963)).

16. *Id.* at 113-14.

17. *See infra* notes 23-110 and accompanying text.

18. *See infra* notes 111-216 and accompanying text.

19. *See infra* notes 217-88 and accompanying text.

20. *See infra* notes 217-88 and accompanying text.

21. *See infra* notes 234-88 and accompanying text.

22. *See infra* notes 289-311 and accompanying text.

23. Gerstein v. Pugh, 420 U.S. 103, 105 (1974).

24. *Id.* A prosecutor's information operated as:

> An accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead

declaratory and injunctive relief, averring a violation of their constitutional right to a judicially decided probable cause hearing.[25]

Under Florida statutory law, at the time, an individual arrested without a warrant could only *legally* demand a probable cause determination after thirty days.[26] As a result, a person arrested upon a prosecutor's information could be detained for up to thirty days solely on the discretion of that prosecutor.[27]

1. The Probable Cause Requirement

The *Gerstein* Court cited the Fourth Amendment and the common-law as the basis upon which the "standards and procedures for arrests and detention" rest.[28] Earlier United States Supreme Court cases, such as *Beck v. Ohio*,[29] *Henry v. United States*,[30] and *Brinegar v. United States*,[31] had established that the validity of an individual's arrest is to be measured by whether or not probable cause existed for his or her arrest.[32] In 1964, the Court held, in *Beck v. Ohio*, that probable cause exists where the facts and circumstances apparent to the arresting officer are "sufficient to warrant a prudent man in believing that the [individual has] committed or was committing an offense."[33] This standard was

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> of a grand jury on their oath . . . [the f]unction of an "information" is to inform defendant of the nature of the charge made against him and the act constituting such charge so that he can prepare for trial . . . [i]n most states the information may be used in place of [a] grand jury indictment to bring a person to trial.

BLACK'S LAW DICTIONARY 779 (6th ed. 1990).

In Florida, at the time, indictments were required only for the prosecution of capital offenses, leaving all other crimes open to be charged by information "without a prior preliminary hearing and without obtaining leave of court." *Gerstein*, 420 U.S. at 105 (citing FLA. R. CRIM. P. 3.140(a); State v. Hernandez, 217 So. 2d 109 (Fla. 1968); DiBona v. State, 121 So. 2d 192 (Fla. Dist. Ct. App. 1960)).

25. *Gerstein*, 420 U.S. at 106-07 (footnote omitted).

26. FLA. STAT. ANN. § 907.045 (West 1973). Florida courts had held that "the filing of an information foreclosed the suspect's right to a preliminary hearing." *Gerstein*, 420 U.S. at 106 (citing State *ex rel* Hardy v. Blount, 261 So. 2d 172 (Fla. 1972)). Florida courts had also held that habeas corpus was not an appropriate mechanism by which to force a probable cause hearing for an arrest on information except in an "exceptional circumstance." *Id.*

27. *Gerstein*, 420 U.S. at 106.

28. *Id.* at 111.

29. 379 U.S. 89, 91 (1964) (where probable cause was not shown for the arrest, the arrest itself, as well as the search and seizure, was invalid under the Fourth Amendment).

30. 361 U.S. 98, 100 (1959) ("The requirement of probable cause has roots that are deep in our history.").

31. 338 U.S. 160, 176 (1949) ("The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . opposing interests.").

32. *Gerstein*, 420 U.S. at 111.

33. *Beck*, 379 U.S. at 91.

created, according to the *Gerstein* Court, to strike a balance "between the individual's right to liberty and the State's duty to control crime."[34] The probable cause standard marked an attempt to allow for some degree of flexibility in enforcing the law, while affording individuals protection from "rash and unreasonable interferences with privacy and from unfounded charges of crime."[35]

The *Gerstein* Court built its opinion around these notions, focussing on the probable cause requirement.[36] Probable cause determinations, carried out by a neutral judicial officer after a warrantless arrest, would function to protect individuals from any abuses of police discretion.[37] While individuals' rights might be best protected if it was required that an arrest warrant be secured by police prior to *every* arrest, such a requirement, the Court stated, would impermissibly bind the hands of law enforcement.[38] As a result, no arrest has ever been invalidated by the Court based exclusively upon a failure by arresting officers to obtain a warrant prior to arrest.[39] In this context, however, the risk of arbitrary or erroneous police action is diminished by the requirement that probable cause exist to justify the arrest; the requirement of probable cause was therefore a "practical compromise" between the individual's right to be free from unreasonable seizures and the state's ability to control crime effectively.[40]

The *Gerstein* Court held that arrests based on prosecutor's information, untested by judicial oversight, did not provide any of the protections outlined above and did not justify the prolonged detention of an

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34. *Gerstein*, 420 U.S. at 112.

35. *Brinegar*, 338 U.S. at 176.

36. *Gerstein*, 420 U.S. at 111-12.

37. *Id.* at 113.

38. *Id.* The Court noted their "preference for the use of arrest warrants when feasible" but also noted that "an arrest supported by probable cause [has never be invalidated] solely because the officers failed to secure a warrant." *Id.; see Beck*, 379 U.S. at 96; Wong Sun v. United States, 371 U.S. 471, 479-82 (1963); Ker v. California, 374 U.S. 23 (1963); Draper v. United States, 358 U.S. 307 (1959).

39. *Gerstein*, 420 U.S. at 113; *see also* Ker v. California, 374 U.S. 23 (1963); Draper v. United States, 358 U.S. 307 (1959).

40. *Gerstein*, 420 U.S. at 113. The Court continued:

> [A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once a suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. [T]he detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.

Id. at 113-14.

individual.[41] On the contrary, the Court asserted, "a prosecutor's responsibility to law enforcement [was] inconsistent with the constitutional role of a neutral and detached magistrate."[42] In fact, the Court stressed, the separation of prosecutorial and judicial functions had traditionally been accepted as a requirement in a democratic society:

> [A separation of these functions] naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. . . . [S]afeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts . . . .[43]

2. Common Law Traditions

The *Gerstein* Court also relied on common law traditions to support its holding.[44] At common law, arrested persons were routinely presented to a justice of the peace after arrest.[45] This common law practice, according to the Court, "furnished a model for criminal procedure in America immediately following the adoption of the Fourth Amendment."[46] It was both a practical necessity and a well-grounded historical practice to bring arrested individuals before a judicial officer after arrest.[47]

3. The Nature of the Probable Cause Determination

Having declared that probable cause determinations are a constitutionally required antecedent to extended pretrial detentions, the Court set out to define the nature and timing of such determinations. While the *Gerstein* Court held that probable cause determinations were necessary to effectuate the Fourth Amendment's prohibition of unreasonable seizures, the Court held that states were not required to provide probable cause determinations that were replete with the entire range of adversarial safeguards such as "counsel, confrontation, cross-examination, and compulsory process for witnesses."[48] The Court noted that adversary probable cause proceedings *could* possibly make the determi-

41. *Id.* at 117. See *supra* note 24 for a discussion of arrests upon a prosecutor's information.

42. *Gerstein*, 420 U.S. at 117 (citing Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971) (holding a prosecutor's role incongruent with that of the judiciary)).

43. *Id.* at 118 (quoting McNabb v. United States, 318 U.S. 332, 343 (1943)).

44. *Id.* at 114-16.

45. *Id.* (citing 2 M. Hale, Pleas of the Crown 77, 81, 95, 121 (1736); 2 W. Hawkins, Pleas of the Crown 116-17 (4th ed. 1762)).

46. *Id.* at 115-16.

47. *Id.* at 114 ("At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest.").

48. *Id.* at 119.

nation more accurate and reliable in some instances.[49] These benefits, according to the Court, would be too marginal to justify requiring that adversarial safeguards, like those guaranteed at trial, should also attach to probable cause hearings.[50] Such safeguards are not necessary elements in assessing the validity of an arrest and would likely work to retard the process because "as the hearing assumes increased importance and the procedures become more complex, the likelihood that it can be held promptly after arrest diminishes."[51]

4. The Timing of the Probable Cause Determination

The *Gerstein* Court, however, did not place a finite time limit upon state procedures for providing probable cause determinations. The Justices noted "the desirability of flexibility and experimentation by the States" and thus allowed the states to time their probable cause determinations "to accord with a State's pretrial procedure viewed as a whole."[52] The Court, however, was reluctant to ascribe any specific pretrial procedural framework for the states:

> It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer, or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, such as acceleration of existing preliminary hearings.[53]

The Court concluded by directing states to structure their procedures so that probable cause determinations are carried out "promptly"; in doing so, they will "provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty . . . by a judicial officer either before or promptly after arrest."[54]

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49. *Id.* at 122.

50. *Id.* (footnote omitted). The Court noted that probable cause determinations serve a very limited function. *Id.* Because they are non-adversarial in nature, the determination of probable cause is not deemed a "critical stage" in the suspect's prosecution; as a result, the Sixth Amendment right to counsel does not attach. *Id.* Critical stages in pretrial procedures have been defined as those "that would impair defense on the merits if the accused is required to proceed without counsel." *Id.* (citing Colemen v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218, 226-27 (1967)). *See infra* note 309 and accompanying text.

51. *Gerstein*, 420 U.S. at 120. The Court noted that probable cause, by definition, " 'deal[s] with probabilities. [It is a] factual and practical consideration[] of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.' " *Id.* (quoting *Brinegar*, 338 U.S. at 174-75).

52. *Id.* at 123.

53. *Id.* at 123-24 (citations omitted).

54. *Id.* at 124-25 (footnotes omitted).

B. *The Federal Courts' Response to* Gerstein

In the years since *Gerstein* a number of challenges to state and county pretrial procedures made their way into the federal courts. These challenges came in the form of both class actions[55] and individual claims.[56] Many of the resultant decisions reflected somewhat different readings of the *Gerstein* opinion. It was this "flurry of systematic challenges to city and county practices" that induced the Supreme Court to elucidate the "promptness" question in *McLaughlin*.[57] What follows is a sample of different approaches taken by the federal courts in applying the *Gerstein* "promptness" standard.

1. Lively v. Cullinane, 1978

In *Lively v. Cullinane*,[58] a class action was brought against the District of Columbia Police Department seeking to enjoin that department from detaining arrestees without promptly affording them judicial determinations of probable cause.[59] The plaintiffs presented the court with data that indicated that while it took, on average, no more than one-and-a-half hours to fully process an arrestee after an arrest,[60] the District of Columbia Police Department failed to present many arrestees to a judicial officer until as late as one full day after arrest.[61]

The *Lively* court held that delays between an individual's arrest and the presentment of that individual to a judicial officer for a determination of probable cause could only be justified upon demonstration that there was a "substantial administrative need" for such a delay.[62] The

55. Williams v. Ward, 845 F.2d 374 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989); Barnard v. City of Palo Alto, 699 F.2d 1023 (9th Cir. 1983); Sanders v. City of Houston, 543 F. Supp. 694 (S.D. Tex. 1982), *aff'd without opinion*, 741 F.2d 1379 (5th Cir. 1984); Lively v. Cullinane, 451 F. Supp. 1000 (D.D.C. 1978); Dommer v. Hatcher, 426 F. Supp. 1040 (N.D. Ind. 1975), *rev'd in part sub nom.* Dommer v. Crawford, 653 F.2d 289 (7th Cir. 1981).

56. Robinson v. City of Chicago, 868 F.2d 959 (7th Cir. 1989); Gramenos v. Jewel Cos., 797 F.2d 432 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987); McGaughey v. City of Chicago, 690 F. Supp. 707 (N.D. Ill. 1988); Katona v. City of Cheyenne, 686 F. Supp. 287 (D. Wyo. 1988); O'Brian v. Borough of Woodbury Heights, 679 F. Supp. 429 (D.N.J. 1988); Doulin v. City of Chicago, 662 F. Supp. 318 (N.D. Ill. 1987), *rev'd on other grounds sub nom.* Mabry v. City of Kalamazoo, 626 F. Supp. 912 (W.D. Mich. 1986).

57. *McLaughlin*, 111 S. Ct. at 1669.

58. 451 F. Supp. 1000 (D.D.C. 1978).

59. *Id.* at 1002. The plaintiff was arrested on charges of disorderly conduct. *Id.* He claimed that he was not allowed to post bond and was not taken before a judicial officer promptly. *Id.* The plaintiff also alleged that he suffered a broken wrist as a result of being shoved by a policeman while in custody. *Id.*

60. *Id.* at 1006-08.

61. *Id.* at 1006-09; *see* Wendy L. Brandes, *Post-Arrest Detention and the Fourth Amendment: Redefining the Standards of* Gerstein v. Pugh, 22 COLUM. L.J. & SOC. PROBS. 445, 458-59 n.83 (1989).

62. *Lively*, 451 F. Supp. at 1005.

plaintiffs showed that the police department had perpetuated a system in which arrested individuals were consistently presented to a magistrate only after significant delays.[63] Those delays could not be justified by any "administrative or safety" needs on the part of the police department.[64] The court granted the requested injunction, prohibiting the District of Columbia from holding arrestees without affording them a prompt presentation before a magistrate.[65] The *Lively* court, in effect, interpreted *Gerstein* to mean that arrestees must be presented to a judicial officer as soon as the administrative steps following arrest are completed. They concluded that, in the District of Columbia, those administrative steps should take no longer than one-and-a-half hours.[66] The court also noted that while "a police officer *may* take a greater length of time to process an arrestee than one-and-a-half hours and still be acting within constitutional bounds . . . the average time to process an arrestee should *normally* take no longer than one-and-a-half hours."[67]

2. Bernard v. City of Palo Alto, 1983

In *Bernard v. City of Palo Alto*,[68] the plaintiff was arrested without a warrant and held for 51 hours before release; the plaintiff was *never* given a judicial determination of probable cause while under arrest.[69] The plaintiff initiated a class action suit against Santa Clara County, California in which he claimed that the county's policy, which tolerated the incarceration of individuals arrested without a warrant for longer that forty-eight hours without a probable cause hearing, violated the Fourth Amendment as defined in *Gerstein*.[70]

The *Bernard* court held that a probable cause hearing should take place no longer than twenty-four hours after arrest.[71] According to *Bernard*, the Supreme Court *had* "provided a definition of a 'prompt' determination by a magistrate" in *Gerstein*.[72] The *Bernard* court interpreted *Gerstein* to mandate that pretrial detention, for any period longer than the time needed to take the administrative steps incident to arrest, be tested by the determination of probable cause for the arrest by a judicial officer.[73] In *Bernard*, the evidence demonstrated that Santa Clara County required "no more than 10 hours to complete the admin-

63. *Id.* at 1008-09.
64. *Id.*
65. *Id.* at 1002.
66. *Id.* at 1009.
67. *Id.* at 1003 (emphasis added).
68. 699 F.2d 1023 (9th Cir. 1983) (per curiam).
69. *Id.* at 1024.
70. *Id.*
71. *Id.* at 1025.
72. *Id.*
73. *Id.*

istrative steps incident to arrest."[74] Therefore, the court concluded, twenty-four hours would provide ample time for police to complete the administrative steps incident to arrest in most cases and deliver suspects to a judicial officer for a probable cause hearing.[75]

The twenty-four hour mark, according to the court, was not intended to define an absolute constitutional right: "Detention for less than 24 hours would violate the Constitution in a particular case if the circumstances were such that the administrative steps leading up to a magistrate's determination reasonably could have been completed in less than 24 hours."[76] While *Gerstein* permitted local government to set its own procedures,[77] those procedures, according to the *Bernard* court, would be "subject . . . to the requirement that the detention of persons arrested without a warrant be justified by a magistrate reasonably close to the time required to prepare and make the necessary showing to a magistrate."[78]

3. Sanders v. City of Houston, 1984

In *Sanders v. City of Houston*,[79] arrestees commenced a class action suit claiming that the "policy of the Houston Police Department which authorize[d] the police to detain arrestees on 'investigatory hold' violat[ed] the Fourth and Fourteenth Amendments to the United Stated Constitution."[80] Individuals detained for an "investigatory hold" in Texas could be held for up to seventy-two hours without being formally charged with any crime.[81] The court noted that the question left open in *Gerstein* was: What is a constitutionally permissible length of time in which "the administrative steps incident to arrest" can be carried out?[82]

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74. *Id.*

75. *Id.* ("[I]t was sensible Judicial Administration to fix as a benchmark the passage of a period shown by the evidence to provide ample time to complete these steps in all but extreme cases.").

76. *Id.*

77. *Gerstein*, 420 U.S. at 124.

78. *Bernard*, 699 F.2d at 1025.

79. Sanders v. City of Houston, 543 F. Supp. 694 (S.D. Tex. 1982), *aff'd by*, 741 F.2d 1379 (5th Cir. 1984).

80. *Sanders*, 543 F. Supp. at 696. The plaintiffs also claimed that the city's procedure violated Article I, § 11 of the Texas Constitution and Articles 14.06 and 15.17 of the Texas Code of Criminal Procedure. *Id.*

81. *Id.* at 697.

82. *Id.* at 699. The plaintiffs claimed that the "administrative steps" allowed by Gerstein "includ[ed] only transportation to the station, booking into jail, and filing charges." *Id.* The court was faced with the issue of what sorts of administrative steps justify a prolonged pretrial detention. For guidance the court looked to Rule 5(a) of the Federal Rules of Criminal Procedure and cases where pretrial delay was at issue. *Id.* Rule 5(a) reads, in part: "An officer . . . making an arrest without a warrant shall take the person without unnecessary delay before the nearest available magistrate . . . ." FED. R. CRIM. P. 5(a) (1990). Under cases where Rule 5(a)

The *Sanders* court held that investigatory holds violated the Fourth Amendment.[83] To combat their use, the *Sanders* court fixed a twenty-four hour limit for the post-arrest detention of those arrested without a warrant.[84] The *Sanders* court recognized the "disastrous toll" that detention could have on an individual's life, and hoped to minimize such harm by requiring that "when a person has been arrested on a policeman's assessment of probable cause, the person must be brought before a judicial officer as soon as possible [and] not later than twenty-four (24) hours after the arrest."[85] Noting that there are certain post-arrest administrative steps[86] that may be necessary and valid, the court stated that "[t]he Constitution dictates that the individual's interest once in custody is paramount, and such interest cannot be undercut by arbitrary and protracted police procedures."[87] The *Sanders* court based its holding on "general guidelines" given in the *Gerstein* opinion,[88] asserting that *certain* administrative steps may be undertaken prior to an arrestee's presentation to a judicial officer, but the twenty-four hour time limit must be met regardless of whether or not these potentially valid steps have been taken.[89]

4. Gramenos v. Jewel Companies, 1986

In *Gramenos v. Jewel Companies*,[90] the plaintiff was arrested for shoplifting and held for over four hours by the police; during this time the plaintiff was not taken before a magistrate.[91] The police claimed that this period of detention was justified by the need to carry out certain administrative steps, such as the fingerprinting and photographing of the suspect.[92]

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was implicated, the court noted that "the following procedures [were allowed] to be completed before the accused was taken before the judicial officer: questioning the suspect, taking handwriting samples, tracking down a codefendant, fingerprinting and photographing, completing a search of the premises where the arrest was effected, [and] checking the suspect's story or alibi." *Sanders*, 543 F. Supp. at 699-700 (citations omitted). The *Sanders* court concluded that "administrative steps" include more than those averred by the plaintiffs. *Id.* at 700.

83. *Sanders*, 543 F. Supp. at 703.

84. *Id.* at 702, 705.

85. *Id.* at 702.

86. See *supra* note 82 for the *Sanders* court's discussion of permissible post-arrest administrative steps.

87. *Sanders*, 543 F. Supp. at 701.

88. *Id.*

89. *Id.* at 700-01; *see also* Brandes, *supra* note 61, at 463. It has been noted that the City of Houston has been able to successfully operate under the *Sanders* court's mandate. *Id.* at 463-64.

90. 797 F.2d 432 (7th Cir. 1986). Another issue in this case was whether there was probable cause to arrest the plaintiff in the first place. *Id.* at 437.

91. *Id.* at 436.

92. *Id.* The police "point[ed] out that they need to do a lot of things after an arrest—take fingerprints and mug shots, check for outstanding warrants, fill out

This justification was rejected by the *Gramenos* court.[93] In recognizing that the *Gerstein* Court had never defined *precisely* how long a permissible "brief period" of detention would be, the *Gramenos* court remanded the case to determine exactly "what must be done after an arrest for shoplifting and why reasonably diligent officers need more than four hours to do it."[94] Favorably citing the ALI-Model Code of Pre-Arraignment Procedure,[95] the *Gramenos* court questioned the need for keeping a suspect in custody for even *four* hours without presenting that suspect to a magistrate for a neutral determination of probable cause.[96]

The *Gramenos* court concluded by stating that the rights of the suspect outweigh the police's need for administrative convenience: "If the police choose to perform time-consuming tasks after an arrest, perhaps they [should] do so on their own time rather than the suspect's, issuing a citation rather than keeping a suspect locked up in the interim."[97]

5. Williams v. Ward, 1988

In *Williams v. Ward*, the post arrest procedures of New York City were the subject of a class action suit.[98] The appellees claimed that the city had violated their Fourth and Fourteenth Amendment rights as defined in *Gerstein*.[99] The appellees also sought an injunction that would have required that probable cause hearings be granted "prompt[ly after] completion of the necessary administrative steps incident to arrest."[100]

The district court had found that warrantless arrestees in New York City could be fully processed, on average, within seventeen hours of arrest.[101] Based on this finding, the district court held that twenty-four hours provided sufficient time for the city to process warrantless

countless forms." *Id.* The court also noted "that there was some evidence that the police held [the plaintiff] out of spite—or perhaps to impose the real punishment for shoplifting—rather than out of a need to complete essential tasks." *Id.* at 436-37 (citation omitted).

93. *Id.* at 437.

94. *Id.*

95. ALI-MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.2(1) (1975). This provision of the Model Code provides that two hours should provide ample time for the police to bring a suspect before a judicial officer for a determination of probable cause. *Id.*

96. *Gramenos*, 797 F.2d at 437.

97. *Id.*

98. Williams v. Ward, 671 F. Supp. 225 (S.D.N.Y. 1989).

99. *Id.* at 226.

100. *Id.*

101. *Id.* at 226-28. The city initially requested a stay, claiming that with additional time it could cut back the amount of time it took to process arrestees. *Id.* at 227. The action was stayed by the district court, but the city's attempts to speed up post arrest procedures never came to pass. Brandes, *supra* note 60, at 466. The stay was lifted by the district court and the case was tried. *Id.*

arrestees.[102]

On appeal, the Second Circuit carefully detailed the New York City arrest-to-arraignment procedure.[103] Under New York law, arrestees are permitted to have legal assistance at arraignment.[104] At the arraignment proceeding, the judge assesses probable cause for the arrest and often sets the conditions for pretrial release.[105]

The Court of Appeals for the Second Circuit reversed the district court's decision, holding that "the procedural benefits provided to arrestees under New York City's arraignment system justif[ied] constitutionally arrest-to-arraignment periods of seventy-two hours in length.[106] The court relied on the *Gerstein* Court's recognition of the need for " 'flexibility and experimentation by the States.' "[107] In addition, the implication in *Gerstein* that "a probable-cause determination might be made at the first appearance before a judicial officer or incorporated into procedure for pretrial release,"[108] according to the *Williams* court, justified the detention of arrestees for up to seventy-two hours after arrest.[109] It must be noted, however, that the *Williams* court

102. *Williams*, 671 F. Supp. at 226-28. It has been noted that the district court judge deciding *Williams* took an approach similar to that taken by the *Lively* court. *See* Brandes *supra* note 61, at 468. Both decisions distinguished between procedures that were necessary to arrest and those that were not essential post-arrest procedures. *Williams*, 671 F. Supp. at 226-28; *Lively*, 451 F. Supp. at 1003. These two decisions indicate that unnecessary procedures should be forfeited in exchange for protecting Fourth Amendment rights.

103. Williams v. Ward, 845 F.2d 374, 376-80 (2d Cir. 1988). Under New York City's post-arrest procedure, the arrestee is taken to the officer's precinct where the officer and a supervising police official assess whether the arrest was proper. *Id.* at 376. A "complaint arrest" form and other necessary forms are then filled out. *Id.* The arrestee is then transferred to a "central booking facility" where fingerprinting and booking are carried out. *Id.* at 377. The arrestee's fingerprints are then sent to a central computer where they are analyzed and a "rap sheet" for the suspect is compiled, consisting of the suspect's "criminal record and outstanding warrants" if any. *Id.* The collected information is then sent to the "complaint room" where the district attorney assesses the merits of the case and interviews the arresting officer "in order to . . . [prepare the] accusatory instrument." *Id.* At this point, the district attorneys decide whether the case should proceed or should be dismissed on the basis of this collected information. If the district attorney finds that there is no basis for prosecution, the suspect is released. *Id.* If, however, the district attorney decides to proceed with the case, the collected information and a sworn complaint from the arresting officer are filed in the docket room of the Criminal Court and the arrestee is then transported to the "feeder pen" adjacent to the Criminal Court. *Id.* at 378. Here, the arrestee is allowed to confer with defense counsel for the first time. *Id.* at 379.

104. N.Y. CRIM. P. LAW § 170.10(3) (McKinney 1982).

105. *Williams*, 845 F.2d at 387.

106. *Id.*

107. *Id.* at 383 (quoting *Gerstein*, 420 U.S. at 123).

108. *Id.* at 385.

109. *Id.* at 387.

relied heavily upon the holding of *Schall v. Martin*,[110] a case dealing primarily with the rights of juvenile detainees.

III. *County of Riverside v. McLaughlin*

In *County of Riverside v. McLaughlin*,[111] the Supreme Court was forced to reexamine the seventeen-year-old holding of *Gerstein v. Pugh*, discussed above. Because the *Gerstein* Court had not quantified its meaning of "prompt" in hourly terms, the Supreme Court endeavored to define what is "prompt" for the purpose of post-arrest probable cause determinations.

A. *Procedural History*

In August of 1987 respondent Donald Lee McLaughlin instituted an action in the United States District Court for the Central District of California seeking injunctive and declaratory relief under 42 U.S.C. § 1983[112] on behalf of himself and "all others similarly situated."[113] In his complaint, McLaughlin maintained that he was confined in the Riverside County Jail and had not received a "prompt" judicial determination of probable cause[114] as mandated by the holding of *Gerstein v. Pugh*.[115] McLaughlin claimed that all individuals who were then incarcerated in the Riverside County Jail as the result of warrantless arrests were entitled to prompt probable cause determinations, bail, and arraignment hearings.[116]

Riverside County's policy, at that time, mandated that "arraignments be conducted without unnecessary delay and, in any event, within two days of arrest."[117] The county's two-day timetable excluded weekends and holidays in computation.[118] As a result, those arrested without a warrant could be held for up to five days if she or he was arrested late in the week and was not brought before a judicial officer

110. Schall v. Martin, 467 U.S. 253 (1984). For a discussion of *Schall*, and the *Williams* Court's reliance on that case, see *infra* notes 234-49 and accompanying text.

111. 111 S. Ct. 1661 (1991).

112. The class action was brought under 42 U.S.C. § 1983 (1988) ("Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."). *McLaughlin*, 111 S. Ct. at 1665.

113. *McLaughlin*, 111 S. Ct. at 1665.

114. *Id.* at 1663.

115. 420 U.S. 103 (1975).

116. *McLaughlin*, 111 S. Ct. at 1665.

117. *Id.* The county policy, in fact, mirrored the California Penal Code in effect at the time. CAL. PENAL CODE ANN. § 825 (West 1985). At arraignment "the accused is brought before the court to plead to the criminal charge against him." BLACK'S LAW DICTIONARY 109 (6th ed. 1990).

118. *McLaughlin*, 111 S. Ct. at 1665.

for a probable cause determination by the Friday immediately following their arrest.[119]

Shortly after instituting the action, McLaughlin moved for class certification.[120] The district court certified the class in November of 1988 as one consisting of " 'all present and future prisoners in the Riverside County Jail . . . and all such future detainees who have been or may be denied prompt probable cause, bail or arraignment hearings.' "[121] In March of 1989 the district court issued a preliminary injunction which compelled the County of Riverside to grant all individuals probable cause determinations "by a judge (or magistrate or other judicial officer) within thirty-six hours of arrest."[122] This issuance demanded that the county comply with the thirty-six hour deadline, unless it could demonstrate mitigating exigent circumstances to justify any prolonged delays.[123] The county appealed to the United States Court of Appeals for the Ninth Circuit,[124] challenging the thirty-six hour requirement set forth by the lower court.[125]

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119. *Id.* The Court also noted that an individual could be faced with a possible delay of seven days over the Thanksgiving holiday. *Id.* The parties disputed whether the probable cause/arraignment procedure was available to all those arrested without a warrant. *Id.* (citation omitted). The District Attorney for the county testified at the district court that persons arrested without warrants for felonies did not receive probable cause determinations until their preliminary hearing, which could be up to ten days after their arraignment. *Id.* Before the Supreme Court, however, the county's policy was set out as one in which all persons arrested without warrants were provided with a probable cause determination, notwithstanding the level of the charge brought against them. *Id.* The Court accepted the county's assertions. *Id.*

120. *Id.*

121. *Id.* at 1666 (citation omitted).

122. McLaughlin v. County of Riverside, 888 F.2d 1276, 1277 (9th Cir. 1989). The injunction also stated "the detainees be present for such determinations unless the detainees choose not to attend or circumstances [made] attendance impracticable." *Id.*

123. *McLaughlin*, 111 S. Ct. at 1666 (citation omitted).

124. *McLaughlin*, 888 F.2d at 1277. The case was combined with a factually similar case in which the same type of injunction was issued against the County of San Bernardino. *Id.*

125. *Id.* The county also challenged the standing of the class. *Id.* The Ninth Circuit first addressed this standing challenge. *Id.* This argument was rejected by the court on the grounds that the plaintiffs were actually in the Riverside County Jail at the time they filed suit and, therefore, had standing; they were not merely "complaining of a past constitutional violation . . . [they] were actually suffering the harm for which they sought injunctive relief." *Id.* When McLaughlin and the other members of the class commenced the action they were incarcerated in the Riverside County Jail on the basis of a warrantless arrest. *Id.* Not one of the plaintiffs had yet received a probable cause hearing. *Id.* To establish Federal jurisdiction, the plaintiffs were required to show that they had a "personal stake in the outcome" of the case. Baker v. Carr, 369 U.S. 186 (1962). The county also relied on the case of City of Los Angeles v. Lyons, 461 U.S. 95 (1983). The *Lyons* Court held that "[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining

The County of Riverside argued before the Ninth Circuit Court of Appeals that their procedure for conducting probable cause determinations, in compliance with the California Penal Code §§ 825 and 991,[126] met the standards set out by the Supreme Court in *Gerstein v. Pugh*.[127] The Ninth Circuit rejected this argument, holding that the policy, despite its parallel provisions in the California Penal Code, was "not in accord with *Gerstein's* requirement of a determination 'promptly after arrest.' "[128]

The Ninth Circuit cited a number of federal appeals court cases[129] as supportive of this holding.[130] The court also deferred to the district court's assessment of Riverside County's abilities to afford detainees with a probable cause hearing within thirty-six hours.[131] The district court judge, according to the Ninth Circuit "considered the size of the county and the location of the detainees . . . . [and] concluded that thirty-six hours provided the county with ample time to complete its administrative procedures."[132]

The United States Supreme Court granted certiorari[133] "to resolve this conflict among circuits as to what constitutes a 'prompt' probable cause determination under *Gerstein*."[134]

B. *The Majority Opinion*

Riverside County reasserted its lack-of-standing argument before the Supreme Court.[135] The Court flatly rejected the argument, holding

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some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate.' " *Id.* at 101-02.

126. Section 825 of the California Penal Code states that an individual "must in all cases be taken before the magistrate (for arraignment) without unnecessary delay, and, in any event within two days after his arrest excluding Sundays and holidays." CAL. PENAL CODE § 825 (West 1990).

127. *McLaughlin,* 888 F.2d at 1278.

128. *Id.*

129. Llaguno v. Mingey, 763 F.2d 1560, 1568 (7th Cir. 1985) (a delay of "almost two days . . . was too long"); Bernard v. City of Palo Alto, 699 F.2d 1023, 1025 (9th Cir. 1983) (probable cause hearings should be conducted *no more than* 24 hours after arrest); Fisher v. Washington Metro Transit Auth., 690 F.2d 1133, 1133-41 (4th Cir. 1982) (probable cause determination must be held as soon as the completion of "the administrative steps incident to arrest") (citation omitted).

130. *McLaughlin,* 888 F.2d at 1278.

131. *Id.*

132. *Id.*

133. County of Riverside v. McLaughlin, 111 S. Ct. 40 (1990).

134. *McLaughlin,* 111 S. Ct. at 1667.

135. *Id.* The county again argued that the plaintiffs lacked standing because it was too late for them to actually receive a prompt judicial determination of probable cause and that, as required by *Lyons*, the plaintiffs could not show that they would again be subjected to unconstitutional conduct by the county. *Id.* During oral argument Justice Scalia called Riverside County's standing argument "ridiculous" and "picky." 59 U.S.L.W. 3533, Feb. 12, 1991.

that the respondents had insulated their claim against mootness by obtaining class certification for their claim.[136] This issue disposed of, Justice O'Connor, writing for the majority, set out to clarify the *Gerstein* holding.[137]

Justice O'Connor noted that the *Gerstein* holding marked an attempt by the Court to balance the right to be free from unreasonable seizures under the Fourth Amendment and the ability of law enforcement officials to effectively control crime.[138] However, she added, the Court did not place strict limits on post-arrest procedures:

> [T]he Court stopped short of holding that jurisdictions were constitutionally compelled to provide a probable cause hearing immediately upon taking a suspect into custody . . . [noting] the burden that proliferation of pretrial proceedings places on the criminal justice system and recogniz[ing] that the interests of everyone involved, including those persons who are arrested, might be disserved by introducing further complexity into an already intricate system.[139]

These considerations prompted the *Gerstein* Court to "[leave] it to the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures."[140]

By allowing states to maintain their own procedural systems in this respect, O'Connor opined, *Gerstein* had given "proper deference to the demands of federalism."[141] She went on to state that the "purpose in *Gerstein* was to make clear that the Fourth Amendment requires every State to provide prompt determinations of probable cause, but that the Constitution does not impose on the State a rigid procedural framework . . . [instead it allows] individual States [to] choose to comply in different ways."[142] In holding that "a probable cause determination [must] be made as soon as the administrative steps incident to arrest [are] completed,"[143] Justice O'Connor claimed that *Gerstein's* mandate, for a balanced flexibility between the individual interests and the realities of effective law enforcement, was ignored by the Ninth Circuit below.[144] In addition, she noted that the *Gerstein* opinion reflected a theme of "flexibility and experimentation by the States"; to hold, as the Ninth Circuit did, that "a probable cause determination is constitutionally compelled the moment a suspect is finished being 'booked,' [would

136. *McLaughlin*, 111 S. Ct. at 1667.
137. *Gerstein* had held that the states "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either *before* or *promptly after* arrest." *Gerstein*, 420 U.S. at 125 (emphasis added).
138. *McLaughlin*, 111 S. Ct. at 1668 (citing *Gerstein*, 420 U.S. at 113).
139. *Id.* (citing *Gerstein*, 420 U.S. at 119-23).
140. *Id.* (citing *Gerstein*, 420 U.S. at 123-24).
141. *Id.*
142. *Id.*
143. *McLaughlin*, 888 F.2d at 1278.
144. *McLaughlin*, 111 S. Ct. at 1669.

leave] no room whatsoever for 'flexibility and experimentation.' "[145]

In recognizing the theme of flexibility embedded in *Gerstein*, the *McLaughlin* majority also noted that certain pretrial postponements were "inevitable."[146] Such postponements, while unavoidable, must, however, be of reasonable length.[147] Reasonable types of postponements include the reviewing of records, the drafting of documents, coping with the number of arraignments, and arranging the appearance of counsel.[148] In the majority's view, under the Fourth Amendment, reasonable postponements are permissible, as the police must "cope with the every day problems of processing suspects through an overly burdened criminal justice system."[149] The question for the Court, however, was how this need for flexibility affected *Gerstein's* "promptness" requirement?

The *Gerstein* Court's requirement that probable cause hearings be granted *promptly* to warrantless arrestees necessarily constrains the state's flexibility in conducting pretrial procedures,[150] but *Gerstein's* "prompt" standard had provided less than precise guidance to the states, according to Justice O'Connor, resulting in a "flurry of systematic challenges to city and county practices [which put] federal judges in the role of making legislative judgements."[151] As a result, the majority set out to define the temporal limits allowed by the Fourth Amendment.[152]

While declining to hold that the Constitution mandates a *specific* time limit, the majority attempted to create a definite outer hourly limit upon which the states and counties could rely in formulating their post-arrest procedures.[153] With these considerations in mind, and while attempting to balance the interests discussed in *Gerstein*, the majority held that jurisdictions that afford judicial probable cause determinations within forty-eight hours of arrest "will, as a general matter, comply with

145. *Id.* at 1668 (citing *Gerstein*, 420 U.S. at 123).

146. *Id.* at 1669.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* ("But flexibility has its limits; *Gerstein* is not a blank check.").

151. *Id.* Justice O'Connor here cited a number of cases in which lower federal courts had interpreted the *Gerstein* standard: McGregor v. County of San Berdardino, decided with McLaughlin v. County of Riverside, 888 F.2d 1276 (9th Cir. 1989); Scott v. Gates, Civ. No. 84-8647 (C.D. Cal. Oct. 3, 1988); Bernard v. City of Palo Alto, 699 F.2d 1023 (9th Cir. 1983); Sanders v. Houston, 543 F. Supp. 694 (S.D. Tex. 1982), *aff'd*, 741 F.2d 1379 (5th Cir. 1984); Lively v. Cullinane, 451 F. Supp. 1000 (D.D.C. 1978). See *supra* notes 55-110 and accompanying text for a discussion of federal cases that address the *Gerstein* standard.

152. *McLaughlin*, 111 S. Ct. at 1670.

153. *Id.* The Court set out to "provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds." *Id.*

the promptness requirement of *Gerstein.*"[154] In addition, the forty-eight hour computation could not exclude weekends and holidays.[155] As a functional matter, any jurisdiction that complied with this mandate would be "immune from systemic challenges."[156]

The *McLaughlin* rule, however, would not bar an individual from challenging a less than forty-eight hour delay in their probable cause determination if that individual could show that their "probable cause determination was delayed unreasonably";[157] unreasonable delays, even if amounting to less than forty-eight hours, will not necessarily be protected under *McLaughlin.*[158] Types of delays that would be unreasonable would be "delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will . . . or a delay for delay's sake."[159] In making this assessment courts must, however, allow the state, county, or city procedure at issue "a substantial degree of flexibility."[160] Under the standard set out in *McLaughlin,* "[c]ourts cannot ignore the often unavoidable delays" that occur during pretrial procedure.[161]

Once an individual's detention passes the forty-eight hour mark without a judicial determination of probable cause "the calculus changes";[162] there is a shift in who bears the burden of proof in the case.[163] In such a situation, the individual does not have to show that they were subject to an unreasonable delay, conversely, the burden will be upon the state to demonstrate that some sort of "emergency or other extraordinary" circumstance existed to justify the delay.[164] Absent such a justification by the state, the individual would carry a valid claim under *McLaughlin.*[165]

According to the majority opinion, the twenty-four hour rule, as advocated by the dissent,[166] would force local criminal justice entities to

154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* The Court cited examples of reasonable delays, such as delays in transporting individuals from one facility to another, booking when a magistrate is not available, and "other practical realities." *Id.*
162. *Id.*
163. *Id.*
164. *Id.* The Court stated that "[t]he fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends." *Id.*
165. *Id.* at 1670-71.
166. For a discussion of the dissenting opinion see *infra* notes 173-216 and accompanying text.

"speed up [their] criminal justice mechanisms."[167] While many states had, at the time, instituted systems that provided arrested individuals with probable cause determinations immediately after the completion of "the administrative steps incident to arrest,"[168] the Constitution "does not *compel* so rigid a schedule."[169] The majority challenged any such assertion; *Gerstein* permits jurisdictions to "combine probable cause hearings with other pretrial proceedings, so long as they do so promptly."[170] Even if the state elects to combine their proceedings, the Court cautioned, "every effort must be made to expedite the combined proceedings."[171]

Upon the above reasoning, the Court held that the County of Riverside, while allowed to combine pretrial determinations of probable cause with arraignment proceedings, exceeded *Gerstein's* mandate by failing to provide all warrantless arrestees with a probable cause determination within forty-eight hours of their arrest.[172]

C. *The Dissent*

Justices Marshall, Blackmun, Stevens, and Scalia dissented in *McLaughlin.* Justice Marshall was joined by Justices Blackmun and Stevens in his terse, one paragraph dissent.[173] Justice Marshall stated that a "probable cause hearing is only sufficiently 'prompt' under *Gerstein* when provided immediately upon the completion of the 'administrative steps incident to arrest.' "[174]

The thorough, lengthy dissent of Justice Scalia characterized the majority's opinion as one that "eliminates a very old right indeed."[175] *Gerstein* marked an attempt by the Court to recognize the "practical compromise" between the interests of the states and those of the individual. The main issue of the *McLaughlin* case, as framed by Justice Scalia, was "what *factors* determine whether the post-arrest determination of probable cause has been (as the Fourth Amendment requires)

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167. *McLaughlin,* 111 S. Ct. at 1670. "[While] there may be times when the Constitution compels such direct interference with local control . . . this is not one." *Id.*

168. *Id.* at 1670-71. Such steps typically include booking, fingerprinting and photographing of the suspect. *Id.* at 1671.

169. *Id.* at 1671 (emphasis added).

170. *Id.* According to the Court, such a combination of proceedings can naturally only include proceedings "that arise very early in the pretrial process—such as bail hearings and arraignments." *Id.*

171. *Id.* (citing *Gerstein,* 420 U.S. at 124 ("the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release")).

172. *Id.* The County of Riverside failed to provide probable cause determinations on weekends and holidays, thus in many cases could not meet the forty-eight hour time limit set out by the Court. See *supra* notes 117-19 and accompanying text for a discussion of Riverside County's policy.

173. McLaughlin, 111 S. Ct. at 1671 (Marshall, J., dissenting).

174. *Id.* (Marshall, J., dissenting) (quoting *Gerstein,* 420 U.S. at 114).

175. *Id.* at 1672 (Scalia, J., dissenting).

'reasonably prompt.' "[176]

The Fourth Amendment, and the Bill of Rights as a whole, according to Justice Scalia, "[functioned] . . . to preserve that judgment, not only against the changing views of Presidents and Members of Congress, but also against the changing views of Justices whom Presidents appoint and Members of Congress confirm" to the Supreme Court.[177] *Gerstein* merely recognized, Scalia argued, the "practical compromise" inherent in the Fourth Amendment; law enforcement may "seize" individuals, but that seizure must be *reasonable*.[178] The reasonableness of *all* seizures must be tested at the probable cause hearing of the warrantless arrestee.[179]

Justice Scalia outlined the history of Fourth Amendment jurisprudence, examined common law cases, commentaries, early American cases, the cases leading up to *Gerstein*, and *Gerstein's* federal court progeny.[180] Central to the issue at hand, he noted, was the Fourth Amendment's prohibition against "unreasonable seizures."[181] The Fourth Amendment was designed to provide individuals with "the traditional protections against unlawful arrest afforded by the common law."[182]

Justice Scalia set out the common law propositions that had shaped the development of Fourth Amendment jurisprudence and had served as the foundation for the *Gerstein* holding.[183] At common law, it was traditionally accepted that arrested individuals be brought before a judicial officer as soon as reasonably possible.[184] Citing this as one of the "most important" protections afforded by the Fourth Amendment, he noted its longstanding tradition in English common law.[185] Early American cases also required that individuals be presented to a judicial officer as soon as possible.[186] Under English common law and early American cases, Scalia argued that it was clear that "the only element bearing upon the reasonableness of delay was . . . the arresting officer's ability, once the prisoner had been secured, to reach a magistrate who

176. *Id.* at 1675 (Scalia, J., dissenting) (emphasis added).
177. *Id.* at 1672 (Scalia, J., dissenting).
178. *Id.* (Scalia, J., dissenting).
179. *Id.* (Scalia, J., dissenting).
180. *Id.* at 1672-73 (Scalia, J., dissenting).
181. *Id.* at 1672 (Scalia, J., dissenting).
182. *Id.* at 1672-73 (Scalia, J., dissenting).
183. *Id.* (Scalia, J., dissenting); *see Gerstein*, 420 U.S. at 114.
184. *Gerstein*, 420 U.S. at 114 (citing 2 M. Hale, Pleas of the Crown 77, 81, 121 (1736); 2 W. Hawkins, Pleas of the Crown 116-17 (4th ed. 1762)).
185. *McLaughlin*, 111 S. Ct. at 1672 (Scalia, J., dissenting) (citing 2 M. Hale, Pleas of the Crown 95, n.13 (1st Am. ed. 1847)). Justice Scalia cited additional English common law discussions concerning the treatment of arrestees. *See* 4 W. Blackstone, Commentaries *289, *293; Wright v. Court, 107 Eng. Rep. 1182 (K.B. 1825); 1 R. Burn, Justice of the Peace 276-77 (1837).
186. *McLaughlin*, 111 S. Ct. at 1672 (Scalia, J., dissenting).

could issue a warrant for further detention."[187]

According to Scalia, the *Gerstein* majority relied upon these common law propositions to arrive at their holding.[188] The *Gerstein* opinion, he claimed, embodied these common law notions, and can only be interpreted to mean that "the period of warrantless detention must be limited to the time necessary to complete the arrest and obtain the magistrate's review."[189] He quoted a key passage from *Gerstein* in support of this contention:

> [A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of a crime, and for a brief period of detention to take the administrative steps incident to arrest. Once a suspect is in custody, however, the reasons that justify dispensing with a magistrate's neutral judgement evaporate.[190]

While the *Gerstein* Court did not define what is sufficiently "prompt," Justice Scalia maintained that it was "plain enough that the requirement left no room for intentional delay unrelated to the completion of 'the administrative steps incident to arrest.' "[191] In fact, Scalia noted that the meaning of *Gerstein* was clear enough that all federal court decisions on the issue, except for one,[192] understood *Gerstein's* holding in this way.[193]

The majority, according to Justice Scalia, ignored the command of English common law, early American cases and *Gerstein* itself, relying primarily on "the *implication* of a later dictum in [*Gerstein*]."[194] The ma-

187. *Id.* (Scalia, J., dissenting) (citations omitted).

188. *Id.* at 1673 (Scalia, J., dissenting). *See Gerstein*, 420 U.S. at 114-16. Justice Scalia noted that the majority had dismissed any common law foundation on the purported grounds that the common law provided only a "vague admonition." *McLaughlin*, 111 S. Ct. at 1669. Justice Scalia disputed the majority's contention that the common law provided no guidance, stating that the common law provides the basis for assessing what sorts of delays are constitutionally reasonable. *Id.* at 1673 n.1 (Scalia, J., dissenting).

189. *McLaughlin*, 111 S. Ct. at 1673 (Scalia, J., dissenting).

190. *Gerstein*, 420 U.S. at 113-14.

191. *McLaughlin*, 111 S. Ct. at 1673.

192. Williams v. Ward, 845 F.2d 374 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989).

193. *Id.*; *see* Gramenos v. Jewel Cos., 797 F.2d 432, 437 (7th Cir. 1986) (probable cause determination must be given after the "brief period of detention to take the administrative steps incident to arrest"), *cert. denied*, 481 U.S. 1028 (1987); Bernard v. City of Palo Alto, 699 F.2d 1023, 1025 (9th Cir. 1983) (per curiam) (probable cause determinations must be given following "a brief period of detention to take the administrative steps incident to arrest"); Fisher v. Washington Metro Transit Auth., 690 F.2d 1133, 1140 (2d Cir. 1982) (arrestee must be afforded a probable cause determination upon "the administrative steps incident to arrest"); Mabry v. County of Kalamazoo, 626 F. Supp. 912, 914 (W.D. Mich. 1986) (arrestee must be brought before a neutral magistrate upon completion of the "administrative steps incident to arrest"); Sanders v. Houston, 543 F. Supp. 694, 699-701 (S.D. Tex. 1982); Lively v. Cullinane, 451 F. Supp. 1000, 1004 (D.D.C. 1978).

194. *McLaughlin*, 111 S. Ct. at 1673 (Scalia, J., dissenting).

jority focused only on *Gerstein's* recognition for the need of flexibility in the formulation of state criminal justice procedures:

> Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole . . . . [W]e recognize the desirability of flexibility and experimentation by the states . . . . Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.[195]

The majority, he charged, distorted the meaning of this passage, allowing for post-arrest delays to be "attributable to something other than completing the administrative steps incident to arrest and arranging for the magistrate—namely, to the administrative convenience of combining the probable-cause determination with other state proceedings."[196] This assumption was erroneous, he contended, because *Gerstein* referred to the "*nature* of the hearing and not its *timing*."[197] The time factor is a "constant"; all pre-trial detainees, despite the structure of the state's criminal procedures, must be granted a probable cause hearing *promptly*, that is, "upon completion of the 'administrative steps incident to arrest.' "[198]

The Justice also took issue with the majority's contention that the incorporation of probable cause determinations "into the 'procedure for setting bail or fixing other conditions of pretrial release'. . . would be impossible."[199] He contended that the holding of *Gerstein* made it clear that "the procedural 'experimentation,' rather than the Fourth Amendment's requirement of prompt presentation to a magistrate, would have to yield."[200]

Justice Scalia maintained that the mission of the Fourth Amendment was to "put this matter beyond time, place and judicial predilection, incorporating the traditional common-law guarantees against unlawful arrest."[201] Scalia pointed out that the majority was silent about these guarantees and that to stretch *Gerstein* "into an authorization for 48-hour detention related neither to the obtaining of a magistrate nor the administrative 'completion' of the arrest seems . . . utterly unjusti-

195. *Gerstein*, 420 U.S. at 123-25 (footnotes omitted).
196. *McLaughlin*, 111 S. Ct. at 1674 (Scalia, J., dissenting).
197. *Id.* (Scalia, J., dissenting).
198. *Id.* (Scalia, J., dissenting).
199. *Id.* (Scalia, J., dissenting) (quoting *McLaughlin*, 111 S. Ct. at 1668).
200. *Id.* at 1673-74 (Scalia, J., dissenting).
201. *Id.* at 1675 (Scalia, J., dissenting).

fied."[202] He interpreted *Gerstein* to mean that delays in providing an arrestee with a probable cause hearing can only be reasonable if they result from the completion of the administrative functions that are necessitated by any arrest or time needed to "obtain[] . . . a magistrate."[203] Scalia charged that the majority, however, erroneously added a third factor that would justify post-arrest delays—the combination of probable cause determinations with other pre-trial proceedings.[204] This "novel justification for delay," that is, delay resulting from the combination of probable cause determinations with other judicial proceedings, Justice Scalia termed wholly inconsistent with the *Gerstein* holding.[205] The Justice asserted that the forty-eight hour outer time limit set forth by the majority ran afoul of *Gerstein*.[206] He surmised that possibly "the Court simply decided that, given the administrative convenience of 'combining,' it is not so bad for an utterly innocent person to wait 48 hours in jail before being released."[207] From the facts at hand, he observed, the "data available [was] enough to convince [him] that certainly no more than 24 hours is needed."[208]

Justice Scalia cited a number of federal court cases that supported his call for a twenty-four hour time-frame; these courts had found twenty-four hours a sufficient amount of time to complete post-arrest administrative steps and provide the arrestee with a determination of probable cause.[209] He also noted that many states had also set forth statutory twenty-four hour limits.[210] Twenty-nine states had statutes that mandated probable cause hearings to be conducted "without unnecessary delay" or "forthwith."[211] Eight states had set out a twenty-

202. *Id.* (Scalia, J., dissenting).
203. *Id.* (Scalia, J., dissenting).
204. *Id.* (Scalia, J., dissenting).
205. *Id.* (Scalia, J., dissenting).
206. *Id.* (Scalia, J., dissenting).
207. *Id.* (Scalia, J., dissenting).
208. *Id.* at 1676 (Scalia, J., dissenting).
209. *Id.* (Scalia, J., dissenting); *see* Gramenos v. Jewel Cos., 797 F.2d 432, 437 (7th Cir. 1986) (probable cause determination must be given after the "brief period of detention to take the administrative steps incident to arrest"), *cert. denied*, 481 U.S. 1028 (1987); Bernard v. City of Palo Alto, 699 F.2d 1023, 1025 (9th Cir. 1983) (per curiam) (probable cause determination must be given following "a brief period of detention to take the administrative steps incident to arrest"); Fisher v. Washington Metro Transit Auth., 690 F.2d 1133, 1140 (4th Cir. 1982) (arrestee must be afforded a probable cause determination upon "the administrative steps incident to arrest"); Mabry v. County of Kalamazoo, 626 F. Supp. 912, 914 (W.D. Mich. 1986) (arrestee must be brought before a neutral magistrate upon completion of the "administrative steps incident to arrest"); Lively v. Cullinane, 451 F. Supp. 1000, 1004 (D.D.C. 1978); Dommer v. Hatcher, 427 F. Supp. 1040, 1045 (N.D. Ind. 1975) (arrestee must be brought before a magistrate within twenty-four hours of arrest). *But see* Williams v. Ward, 845 F.2d 374 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989) (arrestee must be brought before a magistrate within seventy-two hours of arrest).
210. *McLaughlin*, 111 S. Ct. at 1676.
211. *Id.* (Scalia, J., dissenting) (citing Brandes, *supra* note 61, at 478 n.230).

four hour time limit, and only seven states, according to Scalia, had statutes which allowed for pretrial detention absent a determination of probable cause for longer than twenty-four hours.[212] He also made a note of the American Law Institute (ALI), Model Code of Pre-Arraignment Procedure,[213] which proposes a twenty-four hour time limit.[214]

Justice Scalia rounded out his dissent by stating that the majority had "repudiate[d] one of [the Fourth Amendment's] core applications so that the presumptively innocent may be left in jail."[215] He conjured the image of an innocent arrestee lost in a slow, unsympathetic system:

> Hereafter a law abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own.[216]

IV. ANALYSIS

A. McLaughlin: *An Overemphasis Upon "Flexibility"*

At first glance, it may seem that the *Gerstein* Court left lower federal courts with a nebulous standard by declining to establish a clear temporal definition of "prompt." Upon close examination of that opinion, however, it becomes clear that *Gerstein's* directive was not as murky as the *McLaughlin* majority contended. What also becomes clear is that the *Gerstein* Court did not envision a forty-eight hour lapse between a suspect's arrest and that suspect's probable cause hearing.

1. *"Nature v. Timing":* A Crucial Distinction

In *Gerstein*, the Court struck a "practical compromise" between the interests of the individual and those of law enforcement.[217] Post-arrest procedure will pass constitutional muster only if the warrantless arrestee is promptly brought before a judicial officer to receive a judicial determination of probable cause.[218] Writing for the majority in *McLaughlin*, Justice O'Connor noted that the *Gerstein* Court did not require that the state provide probable cause determinations to warrantless arrestees *immediately* upon taking a suspect into custody.[219] She asserted

212. *Id.* (Scalia, J., dissenting) (citing Brandes, *supra* note 61, at 478 n.230).
213. ALI-MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 310.1 (1975).
214. *McLaughlin*, 111 S. Ct. at 1676-77 (Scalia, J., dissenting).
215. *Id.* at 1677 (Scalia, J., dissenting).
216. *Id.* (Scalia, J., dissenting).
217. *Gerstein*, 420 U.S. at 113.
218. See *supra* notes 28-54 and accompanying text for a discussion of the *Gerstein* holding.
219. *McLaughlin*, 111 S. Ct. at 1668.

that such a mandate would place undue burden upon the respective criminal justice systems of the states.[220]

According to Justice O'Connor, the states must be allowed flexibility in both the nature and timing of their respective post-arrest procedures.[221] Herein lies a fault in Justice O'Connor's reading of *Gerstein*. A close look at the passages she cites from *Gerstein* reveals that the *Gerstein* Court allowed for flexibility in the *nature* of the states' pretrial procedures only.[222]

The *Gerstein* holding clearly dispersed with any requirement that a probable cause determination be an adversarial hearing.[223] The *Gerstein* Court also recognized that state procedures "vary widely," that there is "no single preferred pretrial procedure and the *nature* of the probable cause determination usually will be shaped to conform with the State's pretrial procedure as a whole."[224] The *Gerstein* Court then affirmed the desirability of allowing the states to set their own procedures.[225] While the "nature" of the probable cause determination could be the subject of flexibility and experimentation by the states, the "timing" of the hearing, however, was to remain a constant:

> [W]e recognize the desirability of flexibility and experimentation by the States, . . . [but w]hatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.[226]

The promptness of the probable cause determination is not to be compromised in order to allow states to retain flexibility in their procedures.[227] The "timing" requirement was clearly stated by the *Gerstein* Court: The probable cause determination must be made "either before or promptly after arrest."[228] It is clear that flexibility will be afforded state procedures, but that flexibility is to be curtailed by the promptness requirement. Dissenting in *McLaughlin*, Justice Scalia makes the

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220. *Id.*

221. *Id.*

222. *Gerstein*, 420 U.S. at 123-25; *see infra* notes 223-33 and accompanying text.

223. *Gerstein*, 420 U.S. at 120-21; *see supra* notes 48-51 and accompanying text.

224. *Gerstein*, 420 U.S. at 123 (emphasis added). The Court noted: "It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer, or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release." *Id.* at 123-24 (footnotes and citations omitted).

225. *Id.* at 123.

226. *Id.* at 124-25.

227. *See McLaughlin*, 111 S. Ct. at 1674 (Scalia, J., dissenting) ("[I]t is clear that . . . *Gerstein* envisioned that the procedural 'experimentation,' rather than the Fourth Amendment's requirement of prompt presentation to a magistrate, would have to yield.").

228. *Id.* (Scalia, J., dissenting).

same point.[229] The *Gerstein* Court's "desirability for flexibility and experimentation," he stated, "refers to the *nature* of the hearing and not to its *timing*."[230] The timing of the probable cause determination must be prompt, regardless of the type of criminal procedure adopted by the state.[231] This reading of *Gerstein* was also advanced by all but one federal court.[232] The only federal court case which did not adhere to this reading of *Gerstein* was *Williams v. Ward*,[233] decided by the Second Circuit.

2. Unfounded Reliance on *Williams v. Ward*

Williams v. Ward, decided by the Court of Appeals for the Second Circuit in 1988, is cited favorably by the *McLaughlin* majority[234] and negatively in Justice Scalia's dissent.[235] The petitioners in *McLaughlin* cited both *Williams* and *Schall v. Martin*[236] as supportive of their claim that the County's procedures met the *Gerstein* requirement.[237] The *Williams* holding represents the most leeway allowed by law enforcement in dealing with a warrantless arrestee. In *Williams*, the Second Circuit held that "the procedural benefits provided to arrestees under New York City's arraignment system justify constitutionally arrest-to-arraignment periods of up to *seventy-two hours* in length."[238] The *Williams* Court was the first to hold that administrative convenience and efficiency justify an infringement on the promptness of the probable cause determination.[239]

The *McLaughlin* majority used *Williams* in comparison with other federal cases to illustrate a conflict among the circuits over what is "prompt" under *Gerstein*.[240] The resolution of this perceived conflict among the circuit courts is cited by the majority as the reason the Court granted certiorari to the case.[241] The *Williams* holding, however,

229. *Id.* at 1674 (Scalia, J., dissenting).
230. *Id.* (Scalia, J., dissenting).
231. *Id.* (Scalia, J., dissenting).
232. *See supra* note 209 and accompanying text.
233. Williams v. Ward, 845 F.2d 374 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989). See *supra* notes 98-110 and accompanying text for a discussion of the facts of the *Williams* case.
234. *McLaughlin*, 111 S. Ct. at 1666-67.
235. *Id.* at 1673. (Scalia, J., dissenting).
236. 467 U.S. 253 (1984).
237. Brief for Petitioners at 36-38, County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991) (No. 89-1817).
238. *Williams*, 845 F.2d at 378 (emphasis added).
239. *See* Jane H. Settle, Williams v. Ward, *Compromising the Constitutional Right to Prompt Determination of Probable Cause Upon Arrest*, 74 MINN. L. REV. 196, 214 (1989).
240. *McLaughlin*, 111 S. Ct. at 1666-68.
241. *Id.* at 1667 ("We granted certiorari to resolve this conflict among the Circuits as to what constitutes a 'prompt' probable cause determination under *Gerstein*.").

should not have been relied upon by the *McLaughlin* majority. The *Williams* case has questionable precedential value, as it relies on the legally non-analogous decision of *Schall v. Martin*[242] and a misunderstanding of the *Gerstein* opinion.

In *Schall*, the Court upheld a statute that allowed juvenile arrestees to be brought before a family court judge for a determination of probable cause as many as *six days* after the juvenile's arrest in order to provide that juvenile with adversarial safeguards.[243] This reliance has fallen under the criticism of commentators because *Schall* focused on the rights of juveniles; those rights differ significantly from those of adults.[244]

The *Williams* Court stressed that New York City's post-arrest procedures provided suspects with the benefits of adversarial safeguards, analogizing their procedure to the one approved in *Schall*.[245] This directly counters *Gerstein*.[246] In *Gerstein*, the Court stated clearly that adversarial safeguards were not constitutionally required at the probable cause hearing; the probable cause inquiry can be resolved without adversary proceedings and in the majority of cases, the value of such safeguards would be low.[247] In fact, according to the *Gerstein* Court, a process that includes such adversary hearings "could exacerbate the problem of pretrial delay."[248] The *Williams* reasoning ignores the problems, clearly addressed in *Gerstein*, inherent in increasing the complexity of pretrial proceedings, the main expense being further restraints on the presumptively innocent suspect's liberty. Because of this clear deviation from the careful considerations set out by the *Gerstein* Court, and a reliance upon *Schall*, a case dealing specifically with juvenile detainees, *Williams* is a poor case with which to illustrate any conflict among lower federal courts.[249]

3. The Framers' Intent Frustrated

The Fourth Amendment reads as follows:

> *The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall*

242. 467 U.S. 253 (1984).

243. *Id.* at 270.

244. *See* Brandes, *supra* note 61, at 472-74; Settle, *supra* note 239, at 218-20; *see also Williams*, 845 F.2d at 395 (Stewart, J., dissenting).

245. *Williams*, 845 F.2d at 385.

246. *Gerstein*, 420 U.S. at 123 (The value of adversarial safeguards would be too "slight to justify holding . . . that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause.").

247. *Id.* at 120-22; *see also* Settle, *supra* note 239, at 220. The benefits of the adversary safeguards in the city's system were actually non-existent. *Id.*

248. *Gerstein*, 420 U.S. at 122, n.23.

249. *See also* Brandes, *supra* note 61, at 472-74; Settle, *supra* note 239, at 215-22.

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.[250]

The Fourth Amendment safeguards were aimed to counter the colonists' experience with British-issued general warrants and writs of assistance in the colonies.[251] General warrants were utilized against the colonists to enforce British trade restrictions.[252] The warrants did not specify the person or thing to be seized or the place to be searched.[253] Writs of assistance were also employed by the British, allowing customs officers to get assistance from constables and the militia in carrying out general warrants.[254] Probable cause was not required for these warrants and they remained in effect for the life of the issuing sovereign.[255] This unchecked sovereign power created an atmosphere in which there was complete disregard for an individual's right to privacy; as a result the colonists developed a hostility towards their use.[256]

Early manifestation of this hostility is apparent in the Virginia Bill of Rights of 1776, considered to be "[t]he first American precedent of a constitutional character for the Fourth Amendment."[257] The Virginia Bill of Rights section 10 required that "general warrants . . . are grievous and oppressive and ought not to be granted."[258] Early state constitutions reflected a similar distaste for general warrants.[259]

The United States Constitution of 1787, however, did not include a Bill of Rights. In their efforts to improve the Articles of Confederation, the Framers created a novel system of government, characterized by a strong centralized sovereign power.[260] This new structure of government gave rise to the greatest objection to the ratification of the Constitution: The omission of a Bill of Rights.[261] The Fourth Amendment,

250. U.S. CONST. amend. IV.

251. Ronald J. Bacigal, *Fourth Amendment Jurisprudence*, 16 SETON HALL L. REV. 597, 604-05 (1986). For an excellent and thorough discussion see NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51-79 (1932).

252. *See* Bacigal, *supra* note 251, at 605.

253. *Id.*; *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 709-10 (5th ed. 1987); JOHN TUCKER, 2 CONSTITUTION OF THE UNITED STATES 672 (1981).

254. *See* Bacigal, *supra* note 251, at 605.

255. *See* LASSON, *supra* note 251, at 54.

256. *See* Bacigal, *supra* note 251, at 605.

257. *See* LASSON, *supra* note 251, at 79.

258. *Id.* at 79 n.3.

259. *Id.* at 80-82; *see* ZECHARIAH CHAFFEE, 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 194-243 (1963).

260. *See* LASSON, *supra* note 251, at 83-84.

261. *Id.*; *see* LASSON, *supra* note 251, at 83-85 for an excellent discussion as to why the Bill of Rights was not affixed to the Constitution itself. According to Lasson, the idea of a Bill of Rights did not emerge until five days before the Constitutional Convention was adjourned as "an incidental matter." *Id.* at 83. It seems that the Framers were satisfied that each individual states' own bill of rights would provide adequate protections for individual rights. *Id.* at 85.

eventually adopted as part of the Bill of Rights in 1789, reflected the wariness felt among the colonists toward a strong centralized government as well as the fear of the government's ability to diminish the liberty and autonomy of individuals.

The *McLaughlin* holding frustrates the very essence of the Fourth Amendment and the protections afforded therein. By allowing a forty-eight hour delay to precede a probable cause hearing for the sake of administrative efficiency and flexibility,[262] the Court has failed to protect individuals who are presumptively innocent.[263] The Framers were loath to create a central government that was too powerful.[264] The Bill of Rights was designed to constrain the government's ability to violate individual autonomy. The Fourth Amendment, specifically, forces law enforcement to act reasonably and under the watchful eye of the judiciary. By allowing forty-eight hours to elapse between a warrantless arrest and the determination of probable cause, the Court has undercut the protections of the Fourth Amendment.

4. Common Law Guidance Ignored

The *Gerstein* majority itself noted that the common law "has guided the interpretation of the Fourth Amendment."[265] Justice Scalia, dissenting in *McLaughlin*, also noted that "the Fourth Amendment prohibition of 'unreasonable seizures,' insofar as it applies to seizure of the person, preserves for our citizens the traditional protections against unlawful arrest afforded by the common law."[266] Justice O'Connor, writing for the majority in *McLaughlin*, conversely, claiming that the common law offered but "vague admonition" in this interpretation.[267]

Despite Justice O'Connor's claim to the contrary, the common law provides much insight into the interpretation of the Fourth Amendment and has been the legal foundation of many Fourth Amendment cases. The common law was also relied upon in *Gerstein*, where the Court stated that "[b]oth the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents."[268] Early American cases follow much the same

262. A pre-trial detention of less than forty-eight hours can also be constitutionally suspect: "This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within forty-eight hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." *McLaughlin*, 111 S. Ct. at 1670.

263. *See McLaughlin*, 111 S. Ct. at 1677 (Scalia, J., dissenting).

264. *See supra* notes 251-61 and accompanying text.

265. *Gerstein*, 420 U.S. at 114.

266. *McLaughlin*, 111 S. Ct. at 1672 (Scalia, J., dissenting); *see also* California v. Hodari D., 111 S. Ct. 1547 (1991) (Fourth Amendment prohibition of unreasonable seizures based in the common law).

267. *McLaughlin*, 111 S. Ct. at 1669.

268. *Gerstein*, 420 U.S. at 111 (citations omitted). It was regular practice at com-

line.[269]

The Supreme Court first addressed search and seizure under the Fourth Amendment in 1886 in *Boyd v. United States*.[270] In *Boyd*, a case involving an order for a specifically described document issued by a judicial officer, the Court considered whether the compelled production of a document amounted to an unreasonable seizure under the Fourth Amendment.[271] The Court stated "a party[ ] is protected by the law from being compelled to give evidence that tends to criminate him, or to subject his property to forfeiture" and found the order unreasonable.[272] The *Boyd* Court also held that the Fourth and Fifth Amendments were "intimately related" and together mandate that a person's private possessions may not be so seized and, in turn, used against that person.[273]

The *Boyd* Court, in addition, asserted that the amendments must be liberally construed.[274] The Court stated "a close and literal construction deprives [the amendments] of half their efficacy and leads to gradual deprecation of the right, as if it consisted more in sound than in substance."[275] The *Boyd* Court continued, "[i]t is the duty of the courts to be watchful for the constitutional rights of the citizen, and against stealthy encroachment thereon."[276]

Commentators have noted that *Boyd* may be an example of unsound reasoning,[277] however, the principles upon which the *Boyd* holding rests provided the foundation for the modern "exclusionary rule."[278] The exclusionary rule developed as a method by which to discourage arbitrary and unfounded searches for and seizures of items by law en-

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mon law for a suspect arrested without a warrant to be brought before a judicial officer "as soon as he reasonably" could be. 2 M. Hale, Pleas of the Crown 95 n.13 (1st Am. ed. 1847). See also Justice Scalia's dissenting opinion in *McLaughlin*, 111 S. Ct. at 1672, for an excellent summary of English common law and early American cases.

269. *See* Venable v. Huddy, 72 A. 10, 11 (1909); Johnson v. Mayor & City Council of Americus, 46 Ga. 80, 86-87 (1872); Tubbs v. Tukey, 57 Mass. 438, 440 (1849).

270. 116 U.S. 616 (1886). The Supreme Court heard few such cases until 1891 because until that time criminal cases were not appealable to the Supreme Court. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 49 (1969). *Boyd* itself was not a criminal case, but a civil one. *Boyd*, 116 U.S. at 617.

271. *Boyd*, 116 U.S. at 622.

272. *Id.* at 638.

273. *Id.* at 633-35. "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.* at 633.

274. *Id.* at 635.

275. *Id.*; *see also* Ker v. California, 374 U.S. 23, 33 (1962) (Fourth Amendment is to be liberally construed so as to effectuate its protections).

276. *Boyd*, 116 U.S. at 635.

277. *See* Bacigal, *supra* note 251, at 611.

278. *See* Weeks v. United States, 232 U.S. 383, 385 (1914).

forcement.[279] Goods illegally seized are excluded from introduction into evidence under the exclusionary rule.[280]

The *Gerstein* holding and the exclusionary rule share a common goal. While the exclusionary rule prohibits indiscriminate searches and seizures in order to deter abusive police practices, *Gerstein* furthers a similar policy; prompt judicial determinations of probable cause will force police to act prudently in arresting suspects, and will ensure that any mistaken or unfounded arrest is quickly detected and remedied through the release of the wrongly arrested individual.

The *Gerstein* opinion seeks to ensure that arrestees get a fair assessment of probable cause. Zealous law enforcement is bound to lead to mistakes at the scene of arrest because police are required to act in a reactionary manner; a deliberate, reasoned judicial determination of probable cause is, therefore, the antidote, serving a vital part of an evenhanded criminal justice system.[281] Because the functions required of law enforcement personnel are inherently inconsistent with providing arrestees a fair, reliable assessment of probable cause for arrest, the *Gerstein* Court held that the probable cause determination must be made by a judicial officer.[282] This notion is a well-founded one:

> Zeal in tracking down crime is not in itself an assurance of soberness of judgement. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic . . . . The complicated process of criminal justice is therefore divided into different parts . . . .[283]

The Supreme Court has traditionally been concerned with individual liberty[284] and has been cautious in tempering that liberty in the name of augmenting the efficiency of the law enforcement process.[285] The Court has held that a warrant should be procured prior to arrest

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279. Mapp v. Ohio, 367 U.S. 643 (1961).

280. *See id.*; Weeks v. United States, 232 U.S. 383 (1914).

281. *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948). The *Johnson* 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 out crime.

Id.

282. *Gerstein*, 420 U.S. at 112; *see also* Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971) (noting inherent difference between executive and judiciary in ability to assess probable cause).

283. McNabb v. United States, 318 U.S. 332, 343 (1943).

284. *See supra* notes 265-83 and accompanying text.

285. *See supra* notes 265-83 and accompanying text.

when feasible.[286] Where it is impossible to secure a warrant before an arrest, the Court has stated that "once the suspect is in custody . . . the reasons that justify dispensing with the magistrate's neutral judgement evaporate."[287] The suspect, once in state control, poses little threat to the community; it is now the arrestee that needs and deserves the protections of the criminal justice system.[288]

B. *Justice Scalia's Dissent Represents The Proper Application of the Fourth Amendment Requirements*

In *McLaughlin*, Justice Scalia parted ways with the conservative members of the Court, writing a sharp-tongued, almost scolding, dissent.[289] The majority opinion, he charged, ignored the directives of *Gerstein*, the common-law, and the purpose behind the Fourth Amendment.[290] Each of these factors was addressed by Justice Scalia in his dissent.[291] The majority, conversely, limited its analysis to what Scalia termed "the *implications* of a later dictum [in *Gerstein*]"; i.e., *Gerstein's* recognition that the states need some flexibility in structuring their criminal procedures.[292]

The Fourth Amendment probable cause requirement was designed to balance the interests of the individual and those of the state.[293] According to *Gerstein*, the amendment, which was founded on common law ideals of protecting the wrongly or arbitrarily accused,[294] " 'requires a judicial determination of probable cause as a prerequisite to an extended restraint on liberty.' "[295] The *Gerstein* Court did not define exactly how "promptly" this determination must be provided. According to Scalia, "it was plain enough that the requirement left no room for intentional delay unrelated to the completion of 'the administrative steps incident to arrest.' "[296] Delays are permissible only if they are related to either securing a judicial officer to review the arrest or if they are related to completing the "administrative steps incident to arrest."[297] Justice Scalia posited that post-arrest delays in affording

286. Beck v. Ohio, 379 U.S. 89, 96 (1964); *see also* Wong Sun v. United States, 371 U.S. 471, 479-82 (1963).

287. *Gerstein*, 420 U.S. at 114.

288. *Id.* Once in custody, "the suspect's need for a neutral determination of probable cause increases significantly." *Id.*

289. *McLaughlin*, 111 S. Ct. at 1671 (Scalia, J., dissenting).

290. *Id.* at 1672 (Scalia, J., dissenting).

291. *Id.* at 1672-75 (Scalia, J., dissenting).

292. *Id.* at 1672 (Scalia, J., dissenting).

293. *Id.* (Scalia, J., dissenting).

294. *Id.* (Scalia, J., dissenting). See *supra* notes 250-88 and accompanying text for a discussion of the common law and intent of the Framers.

295. *McLaughlin*, 111 S. Ct. at 1673 (quoting *Gerstein*, 420 U.S. at 114) (Scalia, J., dissenting).

296. *Id.* (Scalia, J., dissenting).

297. *Id.* at 1675 (Scalia, J., dissenting).

probable cause hearings to arrestees should extend no longer than twenty-four hours.[298]

This analysis provides the proper deference to the policies and purposes behind the Fourth Amendment. The amendment was designed to shield the presumptively innocent arrestee from the abuse of power by law enforcement.[299] By providing quick review of arrests, a speedy release would be thus ensured in the case of a mistaken or unjustified arrest. To allow the "desirability for flexibility" to outweigh this important individual right is to give law enforcement too wide a berth in the post-arrest detention of arrestees.

Similar readings of *Gerstein* have been forwarded by lower federal courts.[300] The federal courts have actually been, with one notable exception,[301] quite consistent in their interpretation of the *Gerstein* standard.[302] Scalia's proposal for a twenty-four hour timeframe also has the support of many commentaries.[303]

One of the primary arguments forwarded by the respondents in *McLaughlin* was that an extended post-arrest detention allows police to gather additional information to justify the arrest;[304] probable cause determinations only address the facts and circumstances of an arrest, not the justification for detention.[305] If the arrest itself was not justified, the post-arrest detention cannot be.[306] In addition, extended post-arrest detention of arrestees may "imperil the suspect's job, interrupt his income, and impair his family relationships."[307] Of the post-arrest detainees in the County of Riverside surveyed in March of 1989, nearly 35% were held for forty-eight hours or longer without a probable cause determination, arraignment, or charge.[308]

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298. *Id.* at 1676 (Scalia, J., dissenting).

299. *See supra* notes 250-64 and 281-88 and accompanying text.

300. See *supra* notes 235-49 for a discussion of *Williams*.

301. Williams v. Ward, 845 F.2d 374 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989). See *supra* notes 98-107 for a discussion of the facts in *Williams*. See *supra* notes 234-49 for an analysis of the *Williams* decision.

302. *See supra* note 55-97 and accompanying text.

303. George C. Thomas, III, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U. L. REV. 413, 451-52 (1986); James F. Powers, *Constitutional Limitations on Postarrest, Prehearing Detention*, 40 WASH. & LEE L. REV. 1555, 1559 n.21 (1983); Settle, *supra* note 239, at 223-25; Brandes *supra* note 61, at 476-88.

304. Brief for Respondents at 33-36, County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991) (No. 89-1817).

305. *Gerstein*, 420 U.S. at 113-14.

306. The District Attorney for Riverside County admitted that "in nearly 90 percent of all cases in Riverside the procedures needed to complete arrest reports can be completed in 24 hours." Brief of Amicus Curiae in Support of Petitioners Filed on Behalf of the District Attorney, County of Riverside, State of California at 16, County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991) (No. 89-1817).

307. *Gerstein*, 420 U.S. at 114.

308. Brief for Respondents at 32-33, County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991) (No. 89-1817).

It is also important to note that, because the probable cause determination is not considered a "critical stage,"[309] the suspect is not entitled to the protections of the Sixth Amendment right to counsel.[310] Because post-arrest detention pending a probable cause determination is deemed non-adversarial, as there are no charges yet brought against the suspect, the rights that attach during adversarial proceedings are not afforded to the suspect. This observation only stresses the importance of a quick determination of probable cause. The protections afforded by the Constitution, however, have been weakened as it is now within constitutional bounds for a presumptively innocent arrestee, according to the *McLaughlin* majority, to sit in jail for forty-eight hours prior to the determination of probable cause for his or her arrest.[311]

V. CONCLUSION

The protections afforded by the Fourth Amendment, and reinforced by *Gerstein*, are not designed to allow individuals an easy escape from criminal penalties through loopholes. Conversely, the Fourth Amendment is designed to protect individuals who should not have been arrested in the first place. If there is no probable cause to arrest an individual, there is no legal justification for detaining that individual. The requirement of probable cause for arrest forces law enforcement to act prudently, and protects innocent individuals from over-eager and erroneous police action. The *McLaughlin* majority has eroded these very basic constitutional tenets by undercutting the Fourth Amendment rights of post-arrest detainees in order to enhance the administrative convenience and efficiency of law enforcement.

Elizabeth J. Morahan

309. Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearings serve to determine whether going to trial under information or presenting the case to the grand jury is a critical stage in the prosecution which requires the presence of counsel); United States v. Wade, 388 U.S. 218 (1967) (presence of counsel at line-up ensures fairness at confrontation and is therefore a critical stage requiring the presence of counsel). See *supra* note 49 and accompanying text for a discussion of "critical stages" in the prosecution.

310. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel.").

311. *See* Powers, *supra* note 303, at 1572.

California v. Hodari D.: An Evolving Definition of Seizure Under the Fourth Amendment

I. INTRODUCTION

The Fourth Amendment provides that the "right of the people to be secure . . . against unreasonable searches and seizures shall not be violated."[1]

The Amendment, originating as a response by the framers to the perceived injustices of the British use of general warrants and writs of assistance,[2] has been called both "profoundly anti-government"[3] and the "very essence of constitutional liberty and security."[4] At the same time, its meaning within the parameters of American Constitutional law has been the subject of wide debate.[5]

Generally, there are two questions which must be asked when addressing a Fourth Amendment problem.[6] First, the Fourth Amendment must be found to apply to the facts. The Amendment prohibits seizures that are "unreasonable";[7] therefore, it will not apply to con-

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1. U.S. CONST. amend. IV.

2. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 368 n.1 (5th ed. 1883) (referring to writs of assistance as the " 'worst instrument[s] of arbitrary power' ").

A writ of assistance is a general warrant that describes the crime committed, but not the suspected perpetrator. *Id.* Constables armed with writs of assistance had the legal authority to arbitrarily arrest citizens and search their personal effects. *Id.*

3. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1973). It denies the government "desired means, efficient means, and means that must . . . appear . . . for government to obtain legitimate and laudable objectives." *Id.*

4. Boyd v. United States, 116 U.S. 616, 630 (1886).

5. Amsterdam, *supra* note 3, at 353-54. "[The Constitution is a] brief, vague, general, unilluminating text." *Id.*

6. Charles E. Moylan & John Sonsteg, *Fourth Amendment Applicability*, 16 WM. MITCHELL L. REV. 209, 210 (1990); *see also* Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 VAL. U. L. REV. 383, 383-84 (1991). Professor Berner analyzes Fourth Amendment search "hypotheticals" under what he refers to as a "reach-grasp" analysis. *Id.* at 383. The Fourth Amendment "reaches" a case only when the activity is defined as a search. *Id.* at 398. Once the court determines the Fourth Amendment has "reached" the government's conduct, the court then analyzes whether the Fourth Amendment "grasps" the conduct, making that conduct unreasonable under Fourth Amendment standards. *Id.* at 405.

7. U.S. CONST. amend. IV.

duct that does not, in fact, amount to a seizure.[8] By finding that a particular set of facts does not indicate a seizure, the court removes that police conduct from the scope of review under the Fourth Amendment.[9]

Only after the facts indicate that a seizure has occurred will the court examine whether the reasonableness requirements of the Fourth Amendment have been satisfied.[10]

This Comment will focus on defining what action constitutes a seizure of the person under the Fourth Amendment, thereby triggering the Fourth Amendment's requirement that the action be reasonable.

Part II of the Comment will outline the development of the Supreme Court's definition of seizure under the Fourth Amendment.[11] The discussion will focus on how police conduct can rise to a sufficient "show of authority"[12] to communicate to a "reasonable person"[13] that he is not "free to walk away,"[14] thereby turning a police-citizen encounter into a Fourth Amendment seizure requiring justification.[15]

Part III will discuss the Supreme Court's recent decision in *California v. Hodari D.*,[16] which establishes a significant new legal standard for what constitutes a seizure under the Fourth Amendment.[17] Under the *Hodari* test, a citizen must actually submit to the police authority in order for the Fourth Amendment to be implicated.[18]

Part IV will analyze the Court's decision which arguably creates a definition that is not only unworkable and bad policy, but significantly expands the scope of police activity that does not fit under the umbrella of the Fourth Amendment and therefore falls outside the review powers of the courts.[19] Part V concludes that the *Hodari* decision unwisely

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8. Moylan & Sonsteg, *supra* note 6, at 210. Additionally, the seizure must be executed under government authority. Burdeau v. McDowell, 256 U.S. 465, 475 (1921); *see also* New Jersey v. T.L.O., 469 U.S. 325 (1985) (holding that seizures by public school teachers are subject to Fourth Amendment analysis).

9. Marjorie E. Murphy, *Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification*, 1986 ARIZ. ST. L.J. 207 (1986). " 'Brief' encounters [to identify an individual] are largely unregulated, constitutionally unrestricted, and, in fact, judicially unrecognized unless and until police conduct triggers the protections of [the Fourth Amendment] . . . . Nor have such brief encounters triggered review under any other constitutional provision." *Id.* at 208-09 (footnotes omitted).

10. Moylan & Sonsteg, *supra* note 6, at 210.

11. *See infra* notes 21-106 and accompanying text.

12. *See infra* notes 50-98 and accompanying text.

13. *See infra* notes 50-98 and accompanying text.

14. *See infra* notes 33-49 and accompanying text.

15. Once there is a seizure, the police must be able to justify it under the Fourth Amendment. *See infra* note 32.

16. 111 S. Ct. 1547 (1991).

17. *See infra* notes 107-59 and accompanying text.

18. *See infra* text accompanying notes 106-07.

19. *See infra* notes 160-231 and accompanying text.

shifts the Fourth Amendment focus from the government's action to the citizen's reaction.[20]

II. BACKGROUND

With its underlying principle being the protection of individual rights against arbitrary and capricious invasion under governmental authority,[21] the Fourth Amendment protects citizens from unreasonable searches and seizures by government officials.[22] The difficulty arises, however, when this protection of individual liberty conflicts with the legitimate and compelling state interest in effective law enforcement.[23] The state, through its police force has an obligation to ferret out and prosecute criminals; the Constitution, however, provides all citizens with certain protections from police action.[24] Much of the Fourth Amendment jurisprudence involves a balancing of these competing interests.[25]

The resolution of this balancing test becomes especially important to all parties—the government, the criminally accused and the citizens at large—because, when the balancing of interests favors the accused, any evidence obtained as a result will be excluded from the criminal trial.[26] By excluding such evidence the Court protects the judiciary

20. *See infra* notes 232-44 and accompanying text.

21. Wolf v. Colorado, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by police . . . [is the] core of the Fourth Amendment."); Byars v. United States, 273 U.S. 28, 33 (1927) ("The Fourth Amendment was adopted in view of long misuse of [government] power in the matter of searches and seizures."). For a discussion of whether the Fourth Amendment was intended to protect individual rights or to act as an affirmative restraint on government conduct, see Amsterdam, *supra* note 3, at 367 (Amsterdam concludes that the Court interprets the amendment as a protection of individual rights rather than as a restraint on government action.).

22. *See supra* notes 7-8 and accompanying text; *see also* New Jersey v. T.L.O., 469 U.S. 325 (1985) (rejecting an argument that the Fourth Amendment applies only to unreasonable *police* searches and seizures); Murphy, *supra* note 9, at 212 ("[W]here the government seizes an individual, the intrusion must be warranted by probable cause or not at all.").

23. Christopher Slogobin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 5 (1991). Professor Slogobin also argues that although maintaining order will benefit the government through a continuing allegiance from the citizens, government excesses, in the name of ensuring stability, will tend to cause the people to distrust the government, thereby having a countervailing effect. *Id.*

24. *E.g.*, U.S. CONST. amend. IV.

25. Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619, 620 (1991) (citing United States v. Leon, 468 U.S. 897, 901-14 (1984); Delaware v. Prouse, 440 U.S. 648, 654 (1979); Terry v. Ohio, 392 U.S. 1, 21-27 (1968)) ("The essence of [the Fourth Amendment] is a balancing test, weighing the individual expectation of privacy against the governmental interest in investigating and preventing crime.").

26. Although the text of the Fourth Amendment provides no remedy for a vio-

from officially sanctioning actions which violate constitutional protections and simultaneously deters future police misconduct.[27]

All encounters between police and citizens must lie somewhere on a continuum between purely consensual and purely adversarial.[28] Purely consensual contacts occur when the citizen voluntarily cooperates with the police and, therefore, the Fourth Amendment prohibition against unreasonable seizures does not apply.[29] Similarly, police officers, like all citizens, may approach people on the streets and ask questions of them.[30] The difficulty arises, however, when the courts are asked to draw a line between this consensual encounter, requiring no justification,[31] and a Fourth Amendment seizure, which must be reasonable.[32]

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lation of its provisions, the Court has held that since both state and federal officials are bound by the Fourth Amendment, allowing tainted evidence to be admitted in a criminal proceeding would amount to a condonation by the courts of the prohibited conduct. Weeks v. United States, 232 U.S. 383, 393-94 (1904) (excluding evidence in a federal criminal proceeding when the evidence was obtained in violation of the Fourth Amendment); Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (extending the federal exclusionary rule to exclude improperly obtained evidence in actions in state courts) See EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 164-184 (3d ed. 1984) for a more thorough discussion of the exclusionary rule.

27. *Terry*, 392 U.S. at 13. This assumes that the motivating factor behind police conduct is the securing of a conviction through obtaining admissible evidence. *Id.; see also* United States v. Calandra, 414 U.S. 338, 347 (1974) ("prime purpose [of excluding unlawfully obtained evidence] is to deter future unlawful police conduct"); Elkins v. United States, 364 U.S. 206, 217 (1960) (excluding unconstitutionally obtained evidence "compel[s] respect for the [Constitution] . . . by removing the incentive to disregard it").

28. *Terry*, 392 U.S. at 13. "Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life." *Id.*

29. Florida v. Bostick, 111 S. Ct. 2382 (1991) (police officers approaching citizen seated on an interstate bus); Florida v. Rodriguez, 469 U.S. 1 (1984) (approaching citizen in public airport); Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210 (1984) (immigration officers approaching workers in a factory); Sibron v. New York, 392 U.S. 40 (1968); *see also* United States v. Armstrong, 722 F.2d 681 (11th Cir. 1984) (police officer approaching citizen in public airport).

> The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but rather, the voluntary cooperation of the citizen is elicited through non-coercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of [F]ourth [A]mendment protection.

Armstrong, 722 F.2d at 684.

30. *Terry*, 392 U.S. at 34 (1968) (White, J., concurring) ("There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.").

31. *Compare* United States v. Mendenhall, 446 U.S. 544, 554-55 (1980) (airport encounter between police and suspect was consensual) *with* Florida v. Royer, 460 U.S. 491, 501-02 (1983) (airport encounter between police and suspect held to be nonconsensual). See *infra* text accompanying notes 55-83 for a more thorough discussion of *Mendenhall* and *Royer*.

A. *The "Freedom to Walk Away" Standard*

In *Terry v. Ohio*,[33] the Court chose to draw the line between consensual encounter and seizure at a point where a "police officer accosts an individual and restrains his freedom to walk away."[34] Freedom to walk away can be restrained through either "physical force or [a] show of authority."[35]

In *Terry*, a police officer, after observing suspicious activity,[36] approached a citizen and asked some questions.[37] Still suspicious and concerned the citizen might be armed, the officer grabbed the citizen, spun him around and patted the outside of his clothes.[38] Feeling what he believed to be a gun, the officer reached inside the coat and did in fact find a gun.[39]

In its analysis, the Court recognized that the police officer involved had thirty-nine years experience and his decision to investigate the citizen was based on a reasonable suspicion that criminal activity was afoot.[40] While the officer would not have had the authority to arrest the suspect,[41] the minimal invasion of the citizen's freedom was outweighed by the officer's interest in protecting himself and others from the possibility of harm which might be a result of the suspect's possessing a gun.[42]

The Court felt that although the citizen's freedom to walk away had been temporarily restrained when the officer turned him around and searched him, the minimal intrusion was justified under the Fourth Amendment.[43] In so holding, the Court rejected an argument that the

32. Elkins v. United States, 364 U.S. 206, 222 (1960) ("[W]hat the [Fourth Amendment] forbids is not all . . . seizures, but unreasonable . . . seizures."). Generally, a seizure must be based on probable cause in order to be considered reasonable. Dunaway v. New York, 442 U.S. 200, 210 (1979). Certain seizures, called investigatory stops and considered less intrusive, require at least an articulable suspicion of criminal activity in order to be considered reasonable. Terry v. Ohio, 392 U.S. 1, 27 (1968); *see also Dunaway*, 442 U.S. at 212-14 (noting that the *Terry* exception should be narrowly construed).

33. 392 U.S. 1 (1968).

34. *Id.* at 16.

35. *Id.* at 19 n.16.

36. The defendant and another man alternately walked past a particular store and stared in the window. They conferred with each other between trips and at one point conferred with a third man who had approached. The police officer suspected that they were planning to rob the store. *Id.* at 5-6.

37. *Id.* at 6-7.

38. *Id.* at 7.

39. *Id.*

40. *Id.* at 23. In fact, "[i]t would have been poor police work indeed . . . to have failed to investigate this behavior further." *Id.*

41. The officer only had "reasonable grounds" to believe that the citizen might be armed; he did not have probable cause to make an arrest. *Id.* at 30.

42. *Id.*

43. *Id.* at 31.

Fourth Amendment applies only to seizures which eventuate in a trip to the police station.[44] The Court reasoned that such a holding would isolate from scrutiny the initial stages of police-citizen contact[45] and would preclude the Court from reviewing a seizure for reasonableness.[46]

The *Terry* decision offered an expansive view of seizure—loss of the freedom to walk away. At the same time, the Court expanded the realm of justifiable seizures by allowing a limited seizure, to be justified under less than probable cause.[47] Furthermore, the *Terry* decision focused on the lesser justification required for a limited seizure and did not expand on the concept of seizure beyond stating that a seizure occurred when a person's freedom to walk away had been terminated through either physical force or through a show of authority.[48] As a result, the Court has subsequently had to struggle with adequately defining when a person's freedom to walk away has been restrained.[49]

B. *The Mendenhall-Royer Reasonable Citizen Test*

The Court has had little difficulty recognizing a seizure that has occurred through the use of physical force, hereinafter referred to as a "physical seizure."[50] However, according to *Terry*, a seizure can also occur when a citizen's freedom to walk away has been restrained through a show of authority.[51] The result is that police officers may claim that they were merely exercising their right to approach a citizen and ask questions, while the aggrieved citizen may claim that this police action amounted to a "show of authority" which restrained his "freedom to walk away" and therefore amounted to a seizure.

In 1980 and in 1983, the Court faced two very similar cases, *United*

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44. *Id.* at 16, 25-26. "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology." *Id.*

45. *Id.* at 17. If the Court had refused to recognize that the officer's actions constituted a seizure, then the Fourth Amendment's requirement that the actions be reasonable would not be applicable and the Court could not review the actions, at least under the Fourth Amendment. *See supra* notes 6-10 and accompanying text.

46. *Terry*, 392 U.S. at 17.

47. *Id.* at 24.

48. *Id.* at 19 n.16.

49. *See infra* notes 52-103 and accompanying text.

50. Brower v. County of Inyo, 489 U.S. 593 (1989) (seizure occurred when suspect crashed into a police-erected roadblock); Tennessee v. Garner, 471 U.S. 1 (1981) (seizure occurred when the officer shot a fleeing suspect). Likewise, the *Terry* decision involved a situation in which the suspect was physically grabbed, spun around and searched. *Terry*, 392 U.S. at 7; *see also* Clancy, *supra* note 25, at 623 ("[T]o hold that a seizure has occurred [through the use of physical force] is a mere recognition of the verifiable fact that the person was not free to go.").

51. *Terry*, 392 U.S. at 19 n.16.

States v. Mendenhall[52] and *Florida v. Royer*,[53] in which officers, as part of drug interdiction efforts, would greet arriving flights at airports and selectively approach and question passengers. Part of the difficulty in interpreting *Mendenhall* and *Royer* is that the government argued that the officers had reasonable suspicion to justify a seizure because the individual suspects had fit a "profile" of suspected drug smugglers.[54]

In *United States v. Mendenhall*,[55] for instance, Justice Powell, joined by Chief Justice Burger and Justice Blackmun, did not reach the issue of seizure. In their concurring opinion, they concluded the agents' reliance on the drug courier profile provided an adequate justification.[56] The defendant was approached by officers after they had determined that she fit certain characteristics of a drug courier: she had arrived on a flight from Los Angeles; she was the "last person to leave the plane, 'appeared very nervous,' and 'completely scanned the whole area' "; she did not claim any luggage; and she changed airlines.[57]

The officers identified themselves and asked to see the defendant's airplane ticket and some other identification, which she provided.[58] The officers then asked her to accompany them to the airport offices of the D.E.A., and she complied.[59] Once there, the officers asked and received the defendant's permission to search her effects and her person.[60] A female officer took the defendant into another room, again asked if she consented to the search, and then told her to disrobe.[61]

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52. 446 U.S. 544 (1980).

53. 460 U.S. 491 (1983).

54. *See, e.g.*, United States v. Sokolow, 490 U.S. 1 (1989). In *Sokolow*, the Court addressed the issue of whether drug courier profiles could provide a reasonable suspicion of criminal activity to justify a seizure. The majority held that a reasonable suspicion must be based on articulable facts that are probative of criminal conduct, even though the facts might have entirely innocent explanations. *Id.* at 10. It was not relevant whether the factors on which the agent relied might have been set out in a drug courier profile. *Id.* The Court's examination focussed solely on whether the facts observed provided a reasonable suspicion of criminal activity. *Id.*

Justice Marshall wrote a strong dissent, however, criticizing the majority for allowing police officers to rely on profiles which have a " 'chameleon-like way of adapting to any particular set of observations.' " *Id.* at 12 (Marshall, J., dissenting) (quoting United States v. Sokolow, 831 F.2d 1413 (9th Cir. 1987)). Justice Marshall cited to a number of cases in which "drug courier profiles" were used to provide justification for a stop: when the suspect was the first off the plane or the last off the plane or deplaned somewhere in the middle; or, the suspect did carry luggage or the suspect did not carry luggage; or, the suspect traveled alone, or with someone else; or, the suspect appeared too nervous or appearerd too calm. *Id.* (Marshall, J., dissenting) (citations omitted).

55. 446 U.S. 544 (1980).

56. *Id.* at 560 (Powell, J., concurring).

57. *Id.* at 547 n.1.

58. *Id.* at 547-48.

59. *Id.* at 548.

60. *Id.*

61. *Id.* at 548-49.

After expressing concern that she would miss her connection, to which the officer replied she could make her next flight if she did not have drugs on her, the defendant disrobed, removed two packages of heroin from her underwear and gave them to the officer.[62] The defendant was then arrested for possesing heroin.[63]

If Mendenhall had been seized when she accompanied the officers to the D.E.A. offices, and if that seizure were unreasonable, then the heroin obtained as a result would be inadmissible.[64] Although three justices felt that the heroin should be admissible because the seizure would have been reasonable,[65] Justice Stewart, joined by Justice Rehnquist, felt that the heroin should be admissible because there was, in fact, no seizure.[66]

Justice Stewart proposed that a citizen "has been 'seized' within the meaning of the Fourth Amendment *only if* in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[67] For instance, indicia of a seizure might be "the threatening presence of several officers, the display of a weapon by an officer, some physical touching . . . or the use of language or tone of voice indicating that compliance with the officer's request might be compelled"[68] because all of these factors might indicate to a reasonable person that she was not free to leave.[69] In applying this test to the facts, Justice Stewart found that a reasonable person in Mendenhall's position would have felt free to leave and, therefore, she was not seized under the Fourth Amendment.[70] Since the encounter was not classified as a seizure, it was classified as a consensual encounter in which Mendenhall had accompanied the officers voluntarily,

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62. *Id.* at 549.

63. *Id.*

64. *See supra* note 26 and accompanying text.

65. *Mendenhall*, 446 U.S. at 560 (Powell, J., concurring).

66. *Id.* at 554.

67. *Id.* (emphasis added).

68. *Id.*

69. *Id.* at 555. Justice Stewart mentioned the following factors as indications that Mendenhall had voluntarily accompanied the officers and was therefore not seized: The officers were not in uniform and were therefore less intimidating; the officers merely requested and did not demand that she accompany them; and, the contact was in a public airline terminal as opposed to a secluded area. *Id.*

See also United States v. Palmer, 603 F.2d 1286 (8th Cir. 1989) (repeating a request for the suspect to stop held to be a seizure); Revels v. State, 666 P.2d 1298 (Okl. Crim. 1983) (yelling "Stop, Police" held to be a seizure); Hughes v. State, 588 S.W.2d 296 (Tenn. 1979) (asking suspect to sit in rear of police car with no exit handles held to be a seizure).

For a general discussion as to what factors should be evaluated in applying the reasonable person test, see Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest"*, 43 OHIO ST. L.J. 771, 792-97 (1982).

70. *Mendenhall*, 446 U.S. at 555.

in " 'a spirit of apparent cooperation.' "[71]

Although Chief Justice Burger, Justice Powell and Justice Blackmun agreed that the evidence of heroin should not be suppressed as violative of the Fourth Amendment, Justice Powell noted that the issue of whether Mendenhall had been seized was "extremely close."[72] The issue was not material, however, because a seizure would have been justified.[73] Justice Powell did not, however, indicate that he disagreed with Justice Stewart's formulation of the reasonable person test.[74] As a result, the Court reached no clear consensus on what would constitute a seizure through a police show of authority.

Three years after *Mendenhall*, in *Florida v. Royer*,[75] the Court affirmed the Florida Court of Appeal's finding of a Fourth Amendment seizure of a suspected drug smuggler in circumstances similar to those in *Mendenhall*. Royer, like Mendenhall, was approached by police officers in an airport terminal.[76] Royer was asked preliminary questions and then asked to accompany the agents to an airport office.[77] The officers in *Royer*, however, did not return Royer's airplane ticket or driver's license before requesting that he accompany them to the office, which was described as "a large storage closet."[78]

Under these facts, five Justices[79] agreed that Royer was seized under the Fourth Amendment in that "[t]he circumstances surely amount[ed] to a show of official authority such that a 'reasonable person would

71. *Id.* at 557 (quoting Sibron v. New York, 392 U.S. 40, 63 (1968)). Justice Stewart categorized the police-citizen contact as falling closer to the purely consensual end of the continuum of possible police-citizen contacts and, therefore, was not a seizure. *Id.* at 558; *see supra* note 28.

72. *Mendenhall*, 446 U.S. at 560 n.1 (Powell, J., concurring).

73. *Id.* at 561 (Powell, J., concurring).

74. *Id.* at 560 n.1 (Powell, J., concurring) ("I do not necessarily disagree with the views expressed [by Justice Stewart]. For me, the question whether [Mendenhall] reasonably could have thought she was free to 'walk away' [under the circumstances] is extremely close.").

75. 460 U.S. 491 (1983).

76. *Id.* at 494.

77. *Id.*

78. *Id.*

79. The opinion of Justice White, in which Justices Marshall, Powell and Stevens joined, argued that although a seizure did not occur when the officers initially approached Royer, the officers effectively "seized" Royer when they asked him to accompany them to the small room without returning his ticket or license. *Id.* at 501.

Justice Brennan, concurring in the judgment, argued that a seizure occurred as soon as the officers approached Royer, identified themselves as police officers, and informed him that he was suspected of trafficking in narcotics. *Id.* at 511-12. According to Justice Brennan, whenever police officers approach a citizen and identify themselves as police officers investigating criminal activity, the citizen has had his liberty restrained. *Id.*

have believed that he was not free to leave.' "[80] The Court found that a reasonable person in Royer's position would not have felt free to leave because the officers had kept his airline ticket and driver's license and the DEA offices in this case were small and confined, which created more of a coercive atmosphere.[81]

In a concurring opinion, Justice Brennan noted that, although police are free to approach citizens without seizing them, a seizure should be held to occur any time a police officer identifies himself and demands identification or other papers from a citizen.[82]

In neither of these two cases, *Royer* and *Mendenhall*, was the citizen physically seized; rather, both citizens argued that their freedom to walk away had been restrained through a show of authority. Reading the two cases together it is apparent that the majority accepts that a seizure through a police show of authority occurs whenever a reasonable person would feel that this show of authority would have restrained his freedom to walk away.[83]

In *Michigan v. Chesternut*,[84] a majority applied the reasonable person standard from *Mendenhall* and *Royer* to a police-citizen contact on the streets of Michigan.[85] The police officers in *Chesternut* were riding in a marked police car when they observed a man approach Michael Chesternut, standing alone on a street corner.[86] When Chesternut observed the police car, he began to run.[87] The police officers, still in their car, accelerated to catch up with Chesternut and then followed alongside him without attempting to communicate, but only "to see where he was going."[88] As the officers followed Chesternut, he threw

80. *Id.* at 501-03 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)); *see also id.* at 512 (Brennan, J., concurring).

81. *Royer*, 460 U.S. at 502-03; *see also* United States v. Werking, 915 F.2d 1404 (10th Cir. 1990) (encounter classified as a seizure while police officer held suspect's driver's license but became consensual once the driver's license was returned).

82. *Royer*, 460 U.S. at 511 (Brennan, J., concurring). "It is simply wrong to suggest that a traveler feels free to walk away when he has been approached by individuals who have identified themselves as police officers and asked for, and received, his airline ticket and driver's license." *Id.* at 512 (Brennan, J., concurring).

83. *See supra* notes 52-81 and accompanying text.

84. 486 U.S. 567 (1988).

85. *Id.* at 569. "We conclude that the police conduct in this case did not amount to a seizure, for it would not have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Id.*

In a concurring opinion, however, Justice Kennedy, joined by Justice Scalia, wrote that "it is at least plausible to say that whether or not the officers' conduct communicates to a person a reasonable belief that [the officers] intend to apprehend him, such conduct does not implicate Fourth Amendment protections *until it achieves a restraining effect.*" *Id.* at 577 (Kennedy, J., concurring) (emphasis added).

86. *Id.* at 569.

87. *Id.*

88. *Id.*

some packets to the ground.[89] One of the officers retrieved the packets, realized they were codeine, and arrested Chesternut, who had stopped a few feet away.[90]

The Court held that the "police conduct . . . did not amount to a seizure, for it would not have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."[91] Significantly, the Court rejected the state's argument that a seizure is not effected until a citizen submits to a police officer's show of authority.[92] The Court stated that no such bright line rule could be implemented, but rather the existence of a seizure would have to be determined by examining all the circumstances on a case by case basis.[93] Otherwise, police conduct, "no matter how coercive, as long as the police [do] not succeed in actually apprehending the individual" would not be subject to analysis under the Fourth Amendment.[94]

C. *The Subjective Intentions of the Police Officers*

Significantly, under the *Mendenhall-Royer* test, the subjective intent of the police officers is irrelevant except to the extent that the officer's intentions "may have been conveyed to the [defendant]."[95] In other words, a police officer's admission that he would have restrained a suspect if the suspect had attempted to walk away is relevant only to the extent that his intentions may have contributed to the suspect's reasonable belief that he was not free to walk away.[96]

This analysis does not apply, however, when a citizen may not feel that he is able to leave through external factors outside the control of the government agents.[97] In this case, the seizure, as defined by the

89. *Id.*

90. *Id.*

91. *Id.* In effect, the Court held that the police were exercising their authority to investigate crime by "observing" Chesternut in a public area. Chesternut was free to go about his business as the officers had not indicated a desire to apprehend, but only to observe, and, therefore, a reasonable person would *not* have felt that he was *not* free to walk away.

92. *Id.* at 572-73.

93. *Id.* at 572.

94. *Id.; see also infra* note 167 and accompanying text.

95. *Mendenhall*, 446 U.S. at 554 n.6.

96. *See* People v. Pancoast, 659 P.2d 1348 (Colo. 1982) (error for the trial court to determine that suspect had been seized based on officer's testimony as to what he would have done had suspect attempted to leave); People v. Dowdell, 401 N.E.2d 295, 297 (Ill. App. Ct.), *cert. denied.*, 449 U.S. 974 (1980) (seizure does not "depend on the uncommunicated ideas or intentions of the police officers."); Commonwealth v. Holmes, 393 A.2d 397 (Pa. 1978) (seizure did not occur when officer decided suspect was no longer free to leave). *See also* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.2(h), at 407 (2d ed. 1987) (noting the practical difficulties in asking officers to hypothesize what they subjectively would have done had the suspect attempted to walk away).

97. Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210 (1984) (em-

citizen's belief that he is not free to walk away is not caused by the government action.[98]

D. Brower v. County of Inyo: *The Definition of Seizure in Transition*

In *Brower v. County of Inyo*,[99] the Court held that a seizure had occurred when a vehicle being chased by police crashed into a police-erected roadblock.[100] The Court noted that a "seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . nor even whenever there is a governmentally *desired* termination of an individual's freedom of movement . . . but only when there is a governmental termination of freedom of movement *through means intentionally applied*."[101] Since a roadblock "is designed to produce a stop by physical impact if voluntary compliance does not occur,"[102] the means applied were intentional and, therefore, Brower was "seized" under the Fourth Amendment when he crashed.[103] The case itself involved a civil rights claim in which Brower's estate alleged that the "seizure" was unreasonable and therefore violated his constitutional rights.[104] As such, the issue of whether Brower had been seized during the chase itself was not directly addressed.

However, the Court's language in defining a seizure as a "termination of freedom of movement *through means intentionally applied*"[105] led some commentators to conclude that the *Mendenhall* reasonable person standard had been abrogated in favor of a termination of movement standard.[106]

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ployees able to freely move about factory, any restraint felt from leaving factory not attributable to the government agents stationed at factory exits); Florida v. Bostick, 111 S. Ct. 2382 (1991) (objective belief that citizens were not free to walk away attributable to citizens voluntarily placing themselves on interstate bus and not to police actions).

98. See 3 LAFAVE, *supra* note 96, § 9.2, at 81-83, for a strong criticism of the *Bostick* opinion. Professor Lafave argues that a passenger, awaiting departure on an interstate bus, should be considered seized when the police board the bus to conduct a suspicionless sweep: 1) the police must use their official authority to gain access to the bus, an average citizen would not be able hold up the bus and ask questions and 2) unlike a citizen in other settings, who may refuse to cooperate and walk away, the bus passenger cannot walk away, for to do so would draw too much attention in his direction, and the passenger will feel obliged to cooperate because others sitting around him will be cooperating. *Id.* § 9.2, at 82-83.

99. 489 U.S. 593 (1989).

100. *Id.* at 599.

101. *Id.* at 596-97.

102. *Id.* at 598.

103. *Id.* at 599.

104. *Id.* at 594.

105. *Id* at 597.

106. Clancy, *supra* note 25 at 640-45. "The Court . . . embraced the literalist concept of a seizure . . . [and] went further and, at least implicitly, rejected the use

As a result, the *Brower* opinion created uncertainty as to whether a seizure under the Fourth Amendment would require actual termination of movement or whether a constructive termination of movement could occur through circumstances which would convey to a reasonable person that he was not free to leave.

III. *California v. Hodari D.*

The Court answered this question in *California v. Hodari D.*,[107] by explaining that the *Mendenhall-Royer* reasonable person test[108] would determine whether a necessary show of authority had occurred, but that actual termination of movement would also be necessary for a seizure effected by this show of authority.[109]

A. *Facts*

The defendant, Hodari, had been arrested on cocaine charges after police officers, without reasonable suspicion,[110] chased him, cutting him off in a pincer move. The officers, dressed in civilian clothes except for jackets emblazoned with "Police" on the front and back, were patrolling in an unmarked police car in a high crime area of California.[111] Rounding a corner, they noticed four or five teenagers congregating around an automobile; the youths fled at the sight of the police officers.[112] One officer remained in the police car and headed south;

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of the reasonable person test. . . . [The Court] proffered a new definition of a seizure: '[I]ntentional acquisition of physical control.' " *Id.* at 640-41. See *supra* note 85 for Justice Kennedy's concurring opinion in *Michigan v. Chesternut*, which Professor Clancy presents as a precursor to the *Brower* holding. *See also* Kathryn R. Urbonya, *The Constitutionality of High Speed Pursuits Under the Fourth and Fourteenth Amendment*, 35 St. Louis U. L.J. 205, 276 (1991) (recognizing *Brower* as presenting a third definition of seizure).

107. 111 S. Ct. 1547 (1991).

108. *See supra* notes 55-83 and accompanying text.

109. *Hodari D.*, 111 S. Ct. at 1551.

110. *Id.* at 1549 n.1. The state stipulated that the officers did not have reasonable suspicion to justify an investigative stop under Terry v. Ohio, 392 U.S. 1 (1968). The officers initiated pursuit when Hodari and others, surrounding an automobile in a high-crime area, fled at the sight of the officers. *Hodari D.*, 111 S. Ct. at 1549. Therefore, under the exclusionary rule, if the Court determined that Hodari had been seized when the chase began, the resulting evidence would be excluded. *See supra* note 26 and accompanying text.

111. *Hodari D.*, 111 S. Ct. at 1549.

112. *Id.* There is some dispute as to whether flight alone will provide the officers with reasonable suspicion to seize the suspects in order to investigate; nonetheless, the state had stipulated that the officers did not have justification to seize Hodari until Hodari had discarded the cocaine. *Id.* at 1549 n.1 ("That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident . . . . We do not decide that point here, but rely entirely upon the state's concession.").

the other officer headed north, circling the block on foot.[113] The defendant, Hodari, cut through an alley and headed north on the parallel street, but, because Hodari was looking over his shoulder, he did not see the pursuing officer "until the officer was almost upon him."[114] At this point, Hodari threw what appeared to be a rock, and was later found to contain cocaine.[115] Immediately thereafter, the officer tackled and handcuffed Hodari.[116]

B. *Procedural Posture*

Hodari's motion to suppress the evidence of the cocaine was denied in the juvenile proceeding,[117] but the California Court of Appeals applied the *Mendenhall-Royer* test and reversed, holding that Hodari had been seized under the Fourth Amendment when he saw the police officer running towards him.[118] The Supreme Court of California declined to review the case and the United States Supreme Court granted certiorari.[119]

C. *The Majority Opinion*

Justice Scalia, writing for the majority, held that a seizure under the Fourth Amendment is effected only when 1) a reasonable person would feel that he was not free to leave[120] and 2) the police use physical force to restrain the citizen or the citizen submits to a show of police authority.[121]

Under the facts in *Hodari*, there was no physical seizure as Hodari had not been touched by the pursuing officer.[122] Therefore, if a seizure existed, it would necessarily have to have resulted from a police

113. *Id.* The officer was not merely following Hodari to see where he was going, but was chasing with the intent to stop him and see "what [he was] about." Joint Appendix at 44, California v. Hodari D., 111 S. Ct. 1547 (1991) (No. 89-1632). In this respect, the facts are different than in *Chesternut*, where the officers were merely following. *See supra* notes 84-90 and accompanying text.

114. *Hodari* D., 111 S. Ct. at 1549.

115. *Id.*

116. *Id.*

117. *Id.* The trial court held that since Hodari had not been actually constrained prior to his releasing the drugs, the drugs were not the fruit of an unlawful seizure and therefore should not be suppressed. Joint Appendix at 94, California v. Hodari D., 111 S. Ct. 1547 (1991) (No. 89-1632).

118. *In re* Hodari D., 265 Cal. Rptr. 79 (Cal. Ct. App. 1989). The evidence should have been suppressed because the court found that the officer did not have reasonable suspicion to make the seizure under the Fourth Amendment.

119. *Hodari D.*, 111 S. Ct. at 1549.

120. *Id.* at 1551-52. The reasonable person standard from *Mendenhall* is still a necessary condition for a seizure, but it is not in itself sufficient. *Id.*

121. *Id.* In order to find a Fourth Amendment seizure, there must also be either a physical restraint or a submission to police authority. *Id.* A suspect who flees has not submitted to police authority and has therefore not been seized. *Id.*

122. *Id.* at 1550.

show of authority.[123]

The Court accepted the defendant's contention that the officer's conduct was a show of authority for the purpose of their decision, so the sole question for review became whether a seizure is effected through a show of authority alone when the citizen chooses to flee rather than to submit.[124]

The Court first examined a physical seizure by focusing on the related concepts of "possession" and "arrest."

1. Seizure as a Taking of Possession

The Court noted that "[f]rom the time of the founding to the present, the word 'seizure' has meant a 'taking possession,' "[125] and this meaning has continued into the present.[126] For most purposes at common law, for animate or inanimate objects, seizure requires that the object be brought under the physical control of the one doing the seizing.[127] Although the physical control may be temporary in nature,[128] a seizure will not continue if the physical control is relinquished.[129]

2. Arrest as a Fourth Amendment Seizure

In defining a Fourth Amendment seizure, however, the Court chose to expand on the "taking possession" definition by turning to the law of arrest, the "quintessential 'seizure of the person' under the Fourth Amendment."[130] Arrest can be effected by "*either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority."[131] The physical force need not succeed in restraining the arrestee; rather, the common law recognizes a "constructive detention," which is accomplished by "merely touching"[132] or "laying [the officer's] hand on [the arrestee] for the purpose of arresting him," even if the attempt is unsuccessful.[133]

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123. *Id.; see supra* notes 33-49 and accompanying text.

124. *Hodari D.*, 111 S. Ct. at 1550.

125. *Id.* at 1549 (citations omitted).

126. *Id.*

127. *Id.* at 1550 (citing The Josefa Segunda, 23 U.S. (10 Wheat.) 312, 325-26 (1825) ("A ship still fleeing, even though under attack, would not be considered to have been seized as a war prize."); Pelham v. Rose, 76 U.S. (9 Wall.) 103, 106 (1870) ("As applied to subjects capable of manual delivery, [seizure] means . . . the physical taking into custody.")).

128. *Id.* at 1550 (analogizing to a purse snatcher who can be seized momentarily before he breaks free).

129. *Id.* (citing Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 471 (1874) ("A seizure is a single act and not a continuous fact.")).

130. *Id.* at 1550.

131. *Id.* at 1551.

132. *Id.* at 1550 (quoting ASHER L. CORNELIUS, THE LAW OF SEARCH AND SEIZURE 163-64 (2d ed. 1930)).

133. *Id.* (quoting RESTATEMENT OF TORTS § 41 cmt. h (1934)). Apparently, how-

3. Seizure Effected through a Police Show of Authority

Although the Court was willing to expand the concept of a physical seizure beyond the "taking possession" definition to include any form of touching, whether successful or not, it was unwilling to hold that words alone, or a show of authority without submission to that authority, could constitute an authoritative seizure.[134] In fact, the Court stated, the Fourth Amendment does not even "remotely apply, however, to the prospect of a policeman yelling . . . at a fleeing form that continues to flee."[135]

As authority for the proposition that a seizure is not effected until a suspect is actually stopped, the Court cited two prior police chase cases: *Brower v. County of Inyo*,[136] and *Hester v. United States*.[137] In *Brower*, the Court found that a suspect had been seized when he crashed into a police roadblock but did not address the issue of whether a seizure might also have occurred during the chase itself.[138]

The facts in *Hester*[139] are somewhat similar to those in *Hodari*: revenue agents chased and shot at a bootlegger causing him to discard a bottle of whiskey.[140] The *Hodari* Court quoted from *Hester*: "the defendant's own acts . . . disclosed the jug . . . and there was no [Fourth Amendment] seizure . . . when the officers examined the contents . . . ."[141] The majority noted that "[t]he same is true here."[142]

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ever, the physical force in the form of a mere touching would effect a seizure only during the time when there is actual physical contact. *Id.* The Court noted:

> To say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that . . . there is a *continuing* arrest . . . . If, for example, [the officer] had laid his hands upon [the suspect] to arrest him, but [the suspect] had broken away and *then* cast away the cocaine, it would hardly be realistic to say that the disclosure had been made during the course of an arrest.

Id.

134. *Id.* at 1551.

135. *Id.* at 1550. Additionally, the Court noted that requiring a suspect to submit to police authority before a seizure can occur will further public policy goals by encouraging citizens to obey the police since "[s]treet pursuits always place the public at some risk." *Id.* at 1551. At the same time, the deterrent effect of the exclusionary rule would not be served because when the citizen decides to run, the officer has already decided to initiate an unlawful seizure. *Id.* In effect, the Court employs a balancing test by deciding that encouraging citizens to submit to police shows of authority outweighs the non-existent deterrent effect of finding a seizure.

136. 489 U.S. 593 (1989).

137. 265 U.S. 57 (1924).

138. *See supra* notes 98-103 and accompanying text.

139. 265 U.S. 57 (1924).

140. *Id.* at 58.

141. *Hodari D.*, 111 S. Ct. at 1552 (quoting *Hester*, 265 U.S. at 58).

142. *Id.* The *Hester* opinion touches on two closely related concepts in Fourth Amendment law: the doctrine of abandonment and the doctrine of "open fields." Edward G. Mascalo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 BUFF. L. REV. 399, 404 n.29 (1970). Under the

D. *The Dissent*

Justice Stevens, writing for the dissent, criticized the majority's "significant, and . . . unfortunate, departure from prior case law."[143] He argued that the objective test established in *Mendenhall*[144] had been accepted by the Court in *Chesternut* as the " 'test to be applied in determining whether a person has been "seized" within the meaning of the Fourth Amendment.' "[145] Focusing on an objective interpretation of police action removes the suspect's response from the equation and allows police to determine in advance whether their actions will constitute a Fourth Amendment seizure.[146] Justice Stevens noted that the majority's holding would not be limited to the unique situation in which police chase and surround a suspect, but would also include police actions such as firing a warning shot, yelling "freeze" or activating a patrol car's flashing lights.[147] He cited with approval Professor Wayne LaFave's example of a potential abuse if a Fourth Amendment seizure were defined by the suspect's reaction to an attempted seizure: police could attempt to scare a subject by chasing in a menacing manner, at the same time not actually chasing fast enough to catch the subject, and legitimately acquire any evidence that the suspect may dispose, thereby providing the officers with reasonable suspicion required for an investigative stop.[148]

Furthermore, Justice Stevens relied on the Court's holding in *Katz v. United States*,[149] that telephone conversations overheard by electronic eavesdropping techniques are subject of a seizure under the Fourth Amendment even though no actual trespass into a private area occurs.[150] Although the electronic recording of sounds "could not possibly have been the subject of a common law seizure" the Court in *Katz*

"open fields" doctrine, the Fourth Amendment protection of a person's home extends away from the home to include the immediately surrounding "curtilage," but does not extend outside of the "curtilage" to include the "open fields." Olmstead v. United States, 277 U.S. 438, 466 (1928). Because the officers in *Hester* examined the jugs in the "open fields," there was no Fourth Amendment violation solely because they were on Hester's land without a warrant. *Hester*, 265 U.S. at 58-59.

More important to the *Hodari* opinion, however, is the concept of "abandonment," which occurs when a citizen voluntarily gives up his right to property. *Hester*, 265 U.S. at 58; *see also* Vincent v. United States, 337 F.2d 891, 897 (8th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965) (no seizure because suspect abandoned his rights in the property when he threw it in a trash can).

143. *Hodari D.*, 111 S. Ct. at 1552.

144. *See supra* notes 67-70 and accompanying text.

145. *Hodari D.*, 111 S. Ct. at 1558 (Stevens, J., dissenting) (quoting United States v. Mendenhall, 446 U.S. 544, 583 (1980)).

146. *Id.* (Stevens, J., dissenting).

147. *Id.* at 1559 (Stevens, J., dissenting).

148. *Id.* (Stevens, J., dissenting) (citing 3 LAFAVE, *supra* note 96, § 9.2, at 61 (Supp. 1991)).

149. 389 U.S. 347 (1967).

150. *Hodari D.*, 111 S. Ct. at 1554 (Stevens, J., dissenting).

nonetheless held that a seizure had occurred.[151] Justice Stevens saw this as a significant expansion of the term seizure and a foreshadowing of the Court's holding the following year in *Terry v. Ohio*.[152] He interprets the *Terry* decision as one which not only allows a lesser Fourth Amendment justification for seizure, but expands the concept of seizure to include a police-citizen contact which does not rise to the level of an arrest.[153]

Additionally, Justice Stevens argued that the majority was misguided in applying the principles of the common law concept of arrest to a Fourth Amendment seizure.[154] He points out that although a common law arrest required a touching, the common law also prohibited an "unlawful attempt to take a presumptively innocent person into custody."[155] Similarly, a physical touching was required for the common law tort of battery, but an attempted or threatened battery (assault) was also prohibited.[156] Therefore, Justice Stevens concluded, if the Court had wanted to apply common law precepts to the Fourth Amendment analysis, it should have analyzed whether an attempted arrest, and not just an actual arrest, should be considered a seizure under the Fourth Amendment.[157]

The primary dispute in *Hodari*, therefore, was whether an actual termination of movement should be required for a seizure effected through a show of authority. The majority felt that to allow a seizure to occur when a suspect flees police authority would contravene the common law meaning of seizure and encourage citizens to lead the police on chases of potential danger to all parties.[158] The dissent, on the other hand, argued that the common law would have allowed a "constructive seizure" under these facts and applying the Fourth Amendment reasonableness requirements will serve to protect the citizens from unreasonable police actions.[159]

IV. Analysis: The Submission Requirement of *California v. Hodari D.*

The central issue addressed in *California v. Hodari D.*[160] was whether a police show of authority sufficient to communicate to a reasonable person that he is not free to leave will effect a Fourth Amendment seizure where the citizen attempts to flee rather than submit to that

151. *Id.* at 1555 (Stevens, J., dissenting).
152. 392 U.S. 1 (1968).
153. *Hodari D.*, 111 S. Ct. at 1555 (Stevens, J., dissenting).
154. *Id.* at 1553 (Stevens, J., dissenting).
155. *Id.* (Stevens, J., dissenting).
156. *Id.* (Stevens, J., dissenting).
157. *Id.* at 1554 (Stevens, J., dissenting).
158. *See supra* notes 122-33 and accompanying text.
159. *See supra* notes 152-54 and accompanying text.
160. 111 S. Ct. 1547 (1991).

authority.[161]

Some may argue that a police officer, on patrol in a high-crime area, should have the right to chase and apprehend for questioning suspicious youths who flee at the sight of police. That issue alone was not the subject of the holding in *Hodari*, however.[162] The Court did not address the issue of whether the flight alone would "justify" a seizure,[163] but held that there was no seizure until Hodari was actually tackled.[164] Remembering that the state stipulated that the police had no justification to seize Hodari,[165] and that the Exclusionary Rule will exclude any evidence obtained as a result of an unjustified seizure,[166] determining whether Hodari was seized before or after he dropped the cocaine became very important.[167] The admissibility of the cocaine is predicated solely on the fact that the arbitrary police action prior to Hodari's being tackled does not require justification under the Fourth Amendment because there was no "seizure"; on the other hand, the Court did not need to address whether Hodari's being tackled, clearly a seizure, was justified because it did not produce any additional physical evidence that could be excluded.[168] Therefore, the Court's holding can be interpreted as refusing to apply the Fourth Amendment protections from arbitrary police shows of authority in situations where the citizen, for

161. *Id.* at 1549.

162. *Hodari D.*, 111 S. Ct. at 1549 n.2 ("That it would be unreasonable to stop . . . young men who scatter in panic upon the mere sighting of the police is not self-evident . . . . We do not decide that point here, but rely entirely upon the state's concession [that seizure prior to the release of the cocaine would have been unreasonable].").

For a discussion of reasons, other than a guilty conscience, that the youths might have fled from the police, see Brief of *Amicus Curiae*, Marvin Cahn, California v. Hodari D., 111 S. Ct. 1547 (1991) (No. 89-1632) (citing numerous highly publicized instances of police brutality in the Oakland area involving questionable police chases of drug "suspects").

In fact, one year prior to the arrest of Hodari, the same officer from whom Hodari was fleeing had choked another suspect under similar circumstances. Brief of *Amicus Curiae* of California Attorneys for Criminal Justice, California v. Hodari D. 111 S. Ct. 1547 (1991) (No. 89-1632). *Amicus* notes that, "[w]hile the . . . evidence was suppressed, [People v. Jones, 257 Cal. Rptr. 500, 501 (Cal. Ct. App. 1989),] it is fair to say that the word on the street . . . was not." *Id.* at 23 n.5.

163. *Hodari D.*, 111 S. Ct. at 1549 n.2.

164. *Id.* at 1552.

165. *See supra* note 108.

166. *See supra* note 26.

167. *Hodari D.*, 111 S. Ct. at 1549. If Hodari were "seized" when the officers gave chase, then the discarded cocaine would be the fruit of the seizure and would, therefore, be inadmissible. *Id.* If Hodari were not seized until *after* he discarded the cocaine, then the cocaine was simply abandoned and would not be the fruit of an illegal seizure. *Id.* See *supra* note 139 for a discussion of abandonment under the Fourth Amendment.

168. *Hodari D.*, 111 S. Ct. at 1549.

whatever reason,[169] does not submit.[170]

Since the Court's holding in *Terry v. Ohio*[171] that Fourth Amendment seizures do not require all of the elements of a full-scale arrest, but will occur any time a citizen's freedom to walk away has been restrained,[172] the courts have struggled to adequately define what type of police conduct constitutes a Fourth Amendment seizure through a show of authority.[173] Although the *Mendenhall-Royer* test has its drawbacks,[174] the Court's decision in *California v. Hodari D.*[175] to impose an additional requirement of actual restraint runs counter to the purposes of the Fourth Amendment by allowing arbitrary police conduct to go unchecked via the Exclusionary Rule. The Fourth Amendment, and therefore the Exclusionary Rule, only applies when there is a search or seizure,[176] and therefore police conduct that does not amount to a seizure will not be reviewed to determine whether it is reasonable and non-arbitrary.[177]

A. *The Rejection of the* Mendenhall-Royer *Test*

As the dissent in *California v. Hodari D.* notes, at the very least, prior case law intimated that the *Mendenhall-Royer* standard was not only a necessary criterion, but the sole criterion for determining a seizure under the Fourth Amendment.[178] In *Michigan v. Chesternut*,[179] where the police followed the suspect but did not attempt to intercept him,[180] the Court specifically rejected the state's argument that a seizure

169. *See supra* note 159.

170. *Hodari*, 111 S. Ct. at 1549.

Professor Bruce Berner provides an illustrative analogy: In reviewing whether a five dollar parking fine is cruel and unusual punishment under the Eighth Amendment, the Court can determine that the five dollars is neither cruel nor unusual and still reserve its right to later review a ten thousand dollar fine. If, on the other hand, the Court determines that a monetary fine does not fall within the definition of "punishment," a ten thousand dollar fine becomes unreviewable. Berner, *supra* note 6, at 383-84, 400.

171. 392 U.S. 1 (1968).

172. *Id.* at 16; *see also supra* note 34 and accompanying text.

173. *See supra* notes 52-94 and accompanying text.

174. *See infra* notes 222-29 and accompanying text.

175. 111 S. Ct. 1547 (1991).

176. Arbitrary police conduct is one of the "misuses of power" against which the Fourth Amendment was designed to protect. *See supra* note 12. In *Hodari*, the police acted arbitrarily in that they would not have been able to justify their decision to chase Hodari had the chase been determined to be a seizure requiring justification under the Fourth Amendment. *Hodari D.*, 111 S. Ct. at 1549.

177. *See supra* note 10.

178. *Hodari D.*, 111 S. Ct. at 1558 (Stevens, J., dissenting); *see also supra* note 6. Only if the Court finds that a seizure has occurred will it examine whether the officer's actions were justified and reasonable. Murphy, *supra* note 9, at 208-09.

179. 486 U.S. 567 (1988).

180. *Id.* at 569.

should require *submission* to police authority.[181] At the same time, the Court rejected the defendant's argument that *any police chase* should implicate the Fourth Amendment.[182] Instead the Court reaffirmed its commitment to the *Mendenhall-Royer* test, a test which it considered more imprecise but more adaptable than either of the "bright line" standards proposed by the parties.[183]

Rather than relying on the *Mendenhall-Royer* line of cases, the *Hodari* court felt compelled to rely on *Hester* and *Brower*,[184] two cases only remotely related to the issue at hand. *Hester* did involve a police chase,[185] but the *Hester* Court concerned itself with the *location* of the chase, the "open fields" surrounding Hester's property.[186] While the "open fields" doctrine remains good law,[187] the issue in *Hodari* was not whether the officers had a legal right to be on the streets of California without a warrant.

Once it was determined that the officers did not need a warrant to search objects in the "open fields," the *Hester* Court held that the discarded jug was fair game because it had been "voluntarily" discarded.[188] The *Hester* Court did not address whether the suspect had been "seized" when the officers chased and shot at the suspects.[189] Likewise, the *Hester* Court did not address whether the disclosure of the jug was a result of this police conduct.[190] It is significant that *Mendenhall* and its progeny do not refer to *Hester* in determining whether evidence retrieved in those cases was the result of illegal police conduct.[191]

Similarly, in *Brower*, the issue was not whether there was a seizure

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181. *Id.* at 572; *see supra* note 91 and accompanying text.

182. *Chesternut*, 486 U.S. at 572-73. The Court reasoned that Fourth Amendment cases should be reviewed on a case-by-case basis by reviewing all of the relevant circumstances and determining whether a reasonable person facing those circumstances would consider himself free to walk away. *Id.*

183. *Id.* at 572-73.

184. *Hodari D.*, 111 S. Ct. at 1552; *see supra* notes 137-42.

185. Hester v. United States, 265 U.S. 57, 58 (1924). "[When Hester observed the police,] he . . . ran. One of the officers pursued, and fired a pistol. Hester dropped his jug [of moonshine whiskey]." *Id.*

186. *Id.* at 59. "The only shadow of a ground for bringing up the case is . . . that the examination . . . took place upon Hester's father's land." *Id.* However, the protection of the Fourth Amendment "is not extended to the open fields." *Id.*

187. Oliver v. United States, 466 U.S. 170, 180-83 (1984) (holding that the open fields doctrine announced in *Hester* legitimized a warrantless police search of farm land in spite of a fence and "no trespassing" signs).

188. *Hester*, 265 U.S. at 58.

189. *Id.* The Court noted that a Fifth Amendment claim that Hester had been "compelled to give evidence [by dropping the jug] against himself does not require an answer." *Id.* at 58-59.

190. *Id.*

191. Michigan v. Chesternut, 486 U.S. 567 (1988); Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980).

effected during the *chase*, but rather, whether there was a seizure effected by the roadblock.[192] The plaintiff in this civil rights claim did not allege that a "seizure" effected during the chase would have been unjustified, but that a "seizure" effected when the suspect crashed into the roadblock was unreasonable in its magnitude—the suspect was killed.[193]

Furthermore, by reverting to the analysis of a seizure as a common law arrest, the Court fails to recognize the intimidating and coercive nature of a police officer's arbitrary decision to chase with the obvious intent to seize a citizen.[194] No longer is the police officer merely observing a citizen in a public area by following him;[195] the officer is intimidating the suspect by running directly at him, clearly indicating an intention to "seize" the citizen. The Court points out that a physical touching, while unsuccessful in restraining the suspect, was sufficient at common law to constitute a "constructive detention;" this concession becomes less meaningful, however, when the citizen breaks free and the seizure ceases.[196] The police can surround and trap a subject; but no seizure will occur until that person is touched by or has submitted to an officer. Thus, the officers' actions are unreviewable under the Fourth Amendment.[197]

While a formal touching may have been necessary at common law to constitute a formal arrest, the common law did recognize that a pursuit would be sufficient to take possession of a wild animal if "the pursuer manifests an unequivocal intention of appropriating the animal . . . has deprived him of his natural liberty, and brought him within his certain control."[198] While pursuit of a wild animal may not be directly analo-

192. Brower v. County of Inyo, 489 U.S. 593, 598-99 (1989). The Court held that the roadblock did constitute a "seizure" under the Fourth Amendment. *Id.* at 599.

193. *Id.* at 594; *see* Tennessee v. Garner, 471 U.S. 1 (1985).

194. Many commentators have argued that even in applying the *Mendenhall-Royer* reasonable person test, the Supreme Court has failed to recognize this intimidating and coercive nature of a police-citizen encounter by holding that a reasonable person would have felt free to leave, when in fact a truly reasonable person would not have felt free to leave. *See infra* notes 223-26.

195. *See supra* text accompanying note 88 (discussion of Michigan v. Chesternut, 486 U.S. 567 (1988)).

196. *Hodari D.*, 111 S. Ct. at 1550; *see supra* note 130. Apparently, the physical touching component of an arrest is relevant only when there is no show of authority that would make a reasonable person feel that he was not free to leave, and the officer actually touches the suspect. Otherwise, physical touching does not, as the majority purports, serve to expand the concept of seizure. *Hodari D.*, 111 S. Ct. at 1550 n.2 ("We have consulted with the common law to explain the meaning of seizure and . . . to expand . . . that meaning (since one would not normally think that the mere touching of a person would suffice).").

197. *See supra* notes 120-21 and accompanying text.

198. Pierson v. Post, 3 Cai. R. 175, 178 (N.Y. Sp.Ct. 1805). Additionally, the rights of possession will accrue when through other means, criminals are "inter-

gous to pursuit of a citizen, armed only with the protection of his constitutional rights, the relationship is arguably similar to the Court's analogy to warships and "things capable of manual delivery."[199]

Although the majority contends that the Fourth Amendment "does not even remotely apply to the prospect of a policeman yelling . . . at a fleeing form that continues to flee,"[200] the officers in the case took two additional steps: they decided to physically pursue and effectively cut off all avenues of escape for the fleeing suspect, thereby making seizure all but inevitable.[201] While it may not have recognized this scenario as an arrest, the common law would have acknowledged a constructive possession which occurs when liberty is denied and escape is all but inevitable.[202] As the dissent points out, this could lead to police officers being trained to exhibit significant shows of authority in the hopes that the citizen will react not by submitting but by fleeing and discarding incriminating evidence.[203]

B. *The Adoption of the Brower "Termination of Movement" Standard*

By rejecting the *Mendenhall-Royer* test[204] and requiring that a pursued citizen submit to a police show of authority before finding a "seizure," the Court implicitly adopts the "termination of movement" standard from *Brower v. County of Inyo*[205] as the applicable legal stan-

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cept[ed] . . . in such a manner as to deprive them of their natural liberty, and *render escape impossible.*" *Id.* (emphasis added).

199. *See supra* note 91 and accompanying text; *see also* Brief of Wayne County Prosecuting Attorney as *Amicus Curiae*, California v. Hodari D., 111 S. Ct. 1547 (1991) (No. 89-1632) (arguing that the British army was not "seized" when surrounded at Dunkirk; a fox is not seized during a foxhunt, in fact, "many foxes actually seem to enjoy their role"; and that mere pursuit would not result in a football player being declared "seized" during a dash towards the goal line).

200. *Hodari D.*, 111 S. Ct. at 1550.

201. *Id.* at 1548-49.

202. *See supra* note 197.

203. *See supra* notes 144-45 and accompanying text; *see also* United States v. Byrom, No. 91-5669, 1992 U.S. App. LEXIS 532 (6th Cir. Jan. 10, 1992) (not recommended for publication). Federal agents met an arriving flight at the Nashville airport, noticed a "suspicious" passenger, and began to follow him. *Id.* at *2-*3. When the suspect stopped in a snack bar, the officers stopped also, sat opposite the suspect, and one officer began to stare at the suspect, "a technique [the officer] ha[d] been taught." *Id.* at *3. The defendant, feeling "intimidated and nervous," left the snack bar and was eventually stopped by all of the officers. *Id.* The officer's staring tactic was not significant in the Court's ultimate decision because no evidence was discovered until the officers had actually approached the suspect. However, it is significant that the officer was trained to stare at suspects in public areas to cause them to reveal evidence through intimidation.

204. The majority indicates that the *Mendenhall-Royer* test is still applicable to determine whether a police action rises to the level of a "show of authority," but the test is no longer determinative of a "seizure." *Hodari D.*, 111 S. Ct. at 1551.

205. 489 U.S. 593 (1989).

dard to apply in Fourth Amendment seizure cases.[206] In so doing, the Court fails to recognize the restraining effect on liberty that a police chase may have, and at the same time sanctions arbitrary police conduct as long as the citizen does not submit.[207]

C. *The Framers' Intent*

In attempting to fathom the meaning of the word "seizure" as used in the Fourth Amendment, the majority mistakenly relied on dictionary definitions and other common law concepts related to a taking of possession.[208] In countering the majority interpretation, the dissent presented the related theory of an "attempted arrest," proscribed at common law, and indicated that the framers may have also intended to include attempted arrests within the rubric of Fourth Amendment seizures.[209]

The result is that examples can be found in the common law which would support a definition of seizure that either includes or excludes police chase scenarios.[210] Rather than taking part in this semantic exercise, the Court should have examined the broader intentions of the framers in adopting the Fourth Amendment.[211] Historically, the Fourth Amendment has been considered a protection against arbitrary police actions and misuses of police power.[212]

By stipulating that the officers had no justification to chase

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206. *Hodari D.*, 111 S. Ct. at 1552. "We did not even consider [in *Brower*] the possibility that a seizure could have occurred during the course of the chase because . . . that *'show of authority' did not produce his stop. Id.* (emphasis added). Likewise, "since Hodari did not comply with [the show of authority], he was not seized until he was tackled." *Id.; see also* Michigan v. Chesternut 486 U.S. 567, 577 (1988) (Kennedy, J., concurring) (stating that a show of authority must "achieve[] a restraining effect" in order for a seizure to occur).

207. No good faith argument can be made that a citizen who has been surrounded by police officers running full-speed directly at the citizen will feel free to ignore the officers and go about his normal business.

208. *See supra* notes 125-29 and accompanying text.

209. *See supra* notes 153-54 and accompanying text.

210. If an attempted arrest can be considered a seizure, then a police chase would fall within the protections of the Fourth Amendment.

211. Although the Fourth Amendment was adopted specifically to prevent the abuses of the British general warrants providing officers the right to randomly break into and ransack citizens' homes, the Amendment must be given a broader interpretation. Amsterdam, *supra* note 3, at 361-62. "The [F]ourth [A]mendment is not limited to protection against physical trespass, although the preconstitutional history of the amendment was concerned with trespasses." *Id.* at 385.

212. *See supra* note 21 and accompanying text. Professor Amsterdam, however, presents an interpretation of the Fourth Amendment as a protection of individual "spheres" of privacy and only an individual whose sphere has been invaded may claim relief. Amsterdam, *supra* note 3, at 362. Even under this interpretation, though, Hodari will have standing because it is his "sphere" which the police invaded.

Hodari,[213] the state acknowledged that the officers' actions were arbitrary and a misuse of police power.[214] Hodari faced two choices: he could flee or he could stay and allow the police to question him. If he had stayed, the Court's analysis would have followed the *Mendenhall-Royer* line of cases and focused on whether a reasonable person in Hodari's position would have felt free to leave.[215] The Supreme Court has been very reluctant, however, to find a seizure where the officers "merely" approach a citizen to ask questions of him.[216] A seizure might not have been found even if the officers had asked Hodari to accompany them, he had and then he had "consented" to a strip-search revealing cocaine.[217] Only if the officers' actions would have clearly communicated to a reasonable person that he was not free to leave would Hodari have been seized.[218]

By chasing Hodari, the officers clearly communicated to Hodari that he was not free to leave.[219] The majority decided, however, that this communication is irrelevant unless the suspect submits.[220]

If the framers intended to prevent arbitrary police actions against particular individuals,[221] then the Court should recognize and restrict that action even in situations where the citizen reacts to the government by fleeing.

D. *Policy Arguments*

The *Mendenhall-Royer* test has drawn criticism from some commentators. One criticism is that, under the test, a person who subjectively feels that he has been seized will not be protected if a reasonable person under the same circumstances would not have felt that his liberty had been restrained.[222] Under these circumstances, an individual citi-

213. *Hodari D.*, 111 S. Ct. at 1549.

214. If the officers could have justified their actions with even a reasonable suspicion of criminal activity, then the issue of whether their actions amounted to a seizure would have been moot, as the Fourth Amendment would have been satisfied. *See supra* note 32.

215. *Hodari D.*, 111 S. Ct. at 1551-52; Terry v. Ohio, 392 U.S. 1, 16 (1968).

216. *E.g.*, United States v. Mendenhall, 446 U.S. 544 (1980) (no seizure where police identified themselves and asked some questions, asked suspect to accompany them and asked suspect to submit to a strip search).

217. In *Mendenhall*, the Court found that Mendenhall had voluntarily accompanied the police to their office and had "voluntarily" agreed to be strip-searched in spite of her knowledge that she was carrying heroin in her underwear. *Mendenhall*, 446 U.S. at 549-50.

218. The *Hodari* decision recognizes that the reasonable person standard is still used to determine whether a show of authority sufficient to establish a seizure has occurred. *See supra* note 120.

219. *Hodari D.*, 111 S. Ct. at 1550.

220. *Id.*

221. *See supra* note 21.

222. Williamson, *supra* note 69, at 790.

zen who subjectively believes that he has no choice but to forfeit his liberty will not be protected by the "justification" requirement of the Fourth Amendment if his subjective belief is not reasonable.[223]

Related to this argument is the recognition by most commentators that the *Mendenhall-Royer* reasonable person standard is an artificial standard with "little contact with reality."[224] Even Professor Wayne Lafave, a proponent of the reasonable person test, recognizes that all police-citizen encounters are coercive and that citizens often feel compelled to cooperate.[225] Professor Lafave argues that police should be allowed to take advantage of this subtle pressure and the reasonable person test should only account for a reasonable interpretation of police actions after the initial approach.[226]

Another criticism is the inherent difficulty in applying the test.[227] The only relevant factual distinction between *Mendenhall* and *Royer* is that the officers in *Royer* did not return the citizen's airline ticket,[228] whereas the officers in *Mendenhall* did.[229] Yet the Court seems willing to find that Mendenhall had not been seized whereas Royer had.

E. *Adoption of the Termination of Movement Standard*

Appending the termination of movement requirement to the *Mendenhall-Royer* test will not alleviate the criticisms of the reasonable person standard.[230] Now, however, police action will remain outside the scope of review unless and until the citizen's movement has actually been stopped.[231]

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223. For example, an analysis under *Mendenhall-Royer* might indicate no seizure because a reasonable person would not have felt that his freedom had been restrained even though, under the facts: (1) the suspect subjectively believed that his freedom was being restrained, and (2) the officer subjectively intended to restrain the individual in that he would not have allowed the citizen to leave had the citizen so attempted. Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 451 (1988) ("The result of [*Mendenhall-Royer*] in many cases is a characterization of police-citizen encounters that is pure fiction.").

224. *Id.* at 455.

225. 3 LAFAVE, *supra* note 96, § 9.2(h), at 410.

226. *Id.* § 9.2(h), at 411.

227. Butterfoss, *supra* note 223, at 451. "[S]light factual variations often determine important [F]ourth [A]mendment rights." *Id.* at 456.

228. Florida v. Royer, 460 U.S. 491, 501 (1983).

229. United States v. Mendenhall, 446 U.S. 544, 548 (1980). For a thorough discussion of the application of the *Mendenhall-Royer* test in the lower courts, see Butterfoss, *supra* note 223, at 455-63.

230. Courts will still have to apply the reasonable person standard, but only *after* there has been a termination of movement.

231. For instance, the Court's holding in Tennessee v. Garner, 471 U.S. 1 (1984), declares it unreasonable to seize a fleeing felon by shooting him. *Id.* at 7. If the officer shot and missed, however, and the suspect dropped some contraband but otherwise continued to flee, there would be no seizure, therefore the actions,

V. CONCLUSION

Since the Court's decision in *Terry v. Ohio*,[232] courts have recognized that the Fourth Amendment protects citizens from police action which restrains their freedom to walk away unless the police can justify their actions with some degree of reasonable suspicion.[233] The *Terry* decision also recognized that the police action did not have to be physical in nature, but could be simply a show of police authority. In *United States v. Mendenhall*,[234] and subsequent cases,[235] the Court defined a sufficient show of authority as occurring whenever a citizen reasonably felt that his freedom to walk away had been restrained.[236] In adopting this approach, the Court reasoned that the examination should focus on the police activity in question and what that activity would communicate to a reasonable person.[237] This approach is consistent with either interpretation of the Fourth Amendment—that it protects individuals or that it restrains police conduct[238]—since both the police conduct and its effect on a reasonable person are examined.

By requiring that a citizen's movement be actually terminated,[239] the *Hodari* Court shifts the focus from the police conduct to the citizen's reaction to the police conduct. As a result the same police conduct, which would communicate to a "reasonable person" that he was not free to walk away, may or may not be a seizure requiring justification or exclusion of resulting evidence, depending solely on how the individual citizen reacts to the police.

Because individuals may react in different ways for different reasons,[240] the result is police will not be able to determine in advance whether their actions require justification. Additionally, Fourth Amendment protections will be contingent on a citizen's reaction rather than a police action.

Furthermore, police will be encouraged, and possibly even trained,[241] to demonstrate significant shows of authority in the hope that a citizen will flee and discard incriminating evidence.[242] As a re-

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although unreasonable, would not be reviewable and the contraband could be used in evidence. Clancy, *supra* note 25, at 644-45.

Under this scenario, the majority's contention that the streets will actually be safer if citizens are encouraged to submit would seem to be controverted. *See supra* note 135.

232. 392 U.S. 1 (1968).
233. *Id.* at 21-22.
234. 446 U.S. 544 (1980).
235. *See supra* notes 75-94 and accompanying text.
236. *See supra* notes 75-94 and accompanying text.
237. *See supra* notes 95-96 and accompanying text.
238. *See supra* note 21.
239. *See supra* notes 107-09 and accompanying text.
240. *See supra* note 162.
241. *See supra* note 203.
242. *See supra* notes 147-48 and accompanying text.

sult, the streets may not be safer because citizens are encouraged to submit to police authority,[243] but may actually be more dangerous because police will be encouraged to intimidate citizens to the point that they flee but not to the point that they submit.

These actions by police will be especially dangerous because the *Hodari* decision makes them unreviewable by the Court unless the citizen submits.[244]

Richard W. Zahn

243. *See supra* note 135.
244. *See supra* text accompanying note 168.

First Amendment Protections Stripped Bare: *Barnes v. Glen Theatre, Inc.*

I. INTRODUCTION

Free speech is one of the rights protected by the First Amendment of the United States Constitution.[1] This right has been characterized as "one of the preeminent rights of Western democratic theory, the touchstone of individual liberty."[2]

Free speech has been extended beyond the protection of words alone.[3] Yet, it is not an absolute right.[4] The United States Supreme Court has held that free speech protection applies to the burning of the American flag,[5] the wearing of a black arm band in protest,[6] the act of entertaining,[7] and sexual expression.[8] This protection has not been extended to include obscenity,[9] child pornography,[10] fighting words,[11] or

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I. The United States Supreme Court has ruled that the First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

2. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 830 & n.1 (3d ed. 1986).

3. *E.g.*, Stromberg v. California, 283 U.S. 359 (1931) (First Amendment protects display of a red communist flag); *see also* Brief *Amicus Curiae* of the American Civil Liberties Union, Indiana Civil Liberties Union, ACLU of Ohio, and Volunteer Lawyers for the Arts, in Support of Respondents at 6, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26). *See generally* Robert E. Rigby, Jr., Comment, *Balancing Free Speech in a Public Forum vs. Residential Privacy:* Frisby v. Schultz, 24 NEW ENG. L. REV. 889, 889-92 (1990) (a review of First Amendment protection in regards to picketing).

4. NOWAK, *supra* note 2, at 838; *see also* Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961) (freedom of speech is not absolute); Jones v. Opelika, 316 U.S. 584, 593-94 (1942) (freedom of speech may be limited by other rights of equal stature).

5. Texas v. Johnson, 491 U.S. 397, 420 (1989) (First Amendment protects burning of the American flag as a political message).

6. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505-06 (1969) (wearing black arm band in protest is protected expression).

7. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977) (entertainment enjoys First Amendment protection).

8. Sable Communications of California Inc. v. FCC, 492 U.S. 115, 125-26 (1989) (complete ban on sexually explicit telephone messages violates the First Amendment).

9. Miller v. California, 413 U.S. 15 (1973) (reaffirmed First Amendment does not protect obscene material); *see also* Roth v. United States, 354 U.S. 476 (1957)

social dancing.[12]

In that freedom of speech is not an absolute right,[13] its application is subject to a balancing of interests.[14] This balancing approach, as stated by Justice Harlan, is not ad hoc[15] but rather decisions "of law with precedential effect."[16] Thus, when a court is deciding whether First Amendment protection should be extended to a particular speech activity, it must initially look to past First Amendment case law to determine whether protection applies.[17]

In the development of First Amendment free speech protection case law, the United States Supreme Court has established a "two-tiered approach" for determining whether governmental regulations that restrict expression are constitutional.[18] This "two-tiered approach" is used to determine the proper level of judicial scrutiny which must be given to a governmental regulation when ruling whether the regulation is an unconstitutional infringement upon the First Amendment.[19] The first tier is used for regulations which are deemed content based[20] and

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(obscene material not protected by the First Amendment). The *Miller* Court set forth the following guidelines to determine whether material is obscene:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (citations omitted).

10. New York v. Ferber, 458 U.S. 747 (1982) (child pornography not protected by the First Amendment); *see also* Osborne v. Ohio, 495 U.S. 103 (1990) (First Amendment does not protect child pornography).

11. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (certain classes of speech intended to inflict injury do not warrant First Amendment protection).

12. Dallas v. Stanglin, 490 U.S. 19 (1989) (age ban on dance hall admittance does not infringe First Amendment associational rights).

13. NOWAK, *supra* note 2, at 838-39. "It is not 'speech' which is absolutely protected from restriction but only 'free speech.' " *Id.* at 839.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Cf.*, Susan J. Rice, *The Search for Valid Governmental Regulations: A Review of the Judicial Response To Municipal Policies*, 63 NOTRE DAME L. REV. 561 (1988) (a discussion of municipal regulation impacting the First Amendment and a chart of the results of previous First Amendment decisions).

18. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 313 (1984) (Marshall, J., dissenting) (review of levels of judicial scrutiny afforded the First Amendment).

19. *Id.* (Marshall, J., dissenting).

20. *Id.* (Marshall, J., dissenting). "Content based" regulations are regulations which prohibit some but not all of certain types of First Amendment protected activities. Victor V. Vicinaiz, *The Content Distinction and Freedom of Expression:* Arcara v. Cloud Books, Inc., 20 CREIGHTON L. REV. 893, 897 (1986-87).

applies strict judicial scrutiny.[21] The second tier is used for regulations which are deemed content neutral[22] and applies a lower, intermediate level of judicial scrutiny.[23]

In *Barnes v. Glen Theatre, Inc.*,[24] the United States Supreme Court addressed whether nude dancing was protected by the First Amendment and whether this form of expression could be prohibited by an Indiana public indecency statute.[25] This Comment examines the constitutional history of the First Amendment as it pertains to nude dancing as a form of expression.[26] The Court's decision in *Barnes v. Glen Theatre, Inc.*, which allowed Indiana to use its public indecency statute to prohibit nude dancing, is reviewed and analyzed.[27] The Comment concludes that the right to dance nude has been stripped bare of First Amendment protection by the Court's decision to uphold the Indiana public indecency statute as constitutional.[28]

II. CONSTITUTIONAL HISTORY

In 1981, the United States Supreme Court in *Schad v. Borough of Mount Ephraim*[29] addressed First Amendment protection as applied to nude dancing. The Court stated " '[n]udity alone' does not place otherwise protected material outside the mantle of the First Amendment."[30] Yet, the constitutional protection granted nonobscene nude dancing in the *Schad* decision has not been clearly identified by the United States Supreme Court.[31] The Court has stated that erotic expression does not warrant the same level of First Amendment protection as does political debate or philosophical discussion.[32] Thus, the

21. *Clark*, 468 U.S. at 313 (Marshall, J., dissenting).

22. *Id.* (Marshall, J., dissenting). "Content neutral" regulations are regulations which prohibit expressive conduct regardless of the content of the expression. Vicinaiz, *supra* note 20, at 898.

23. *Clark*, 468 U.S. at 313 (Marshall, J., dissenting). This lower, intermediate level of judicial scrutiny was set forth in United States v. O'Brien, 391 U.S. 367, 377 (1968). Vicinaiz, *supra* note 20, at 900.

24. 111 S. Ct. 2456 (1991).

25. *Barnes*, 111 S. Ct. at 2458. *See infra* note 122.

26. *See infra* notes 29-115 and accompanying text.

27. *See infra* notes 116-251 and accompanying text.

28. *See infra* notes 252-70 and accompanying text.

29. 452 U.S. 61 (1981).

30. *Id.* at 66 (citations omitted); *see also* Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975) ("the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression"); California v. La Rue, 409 U.S. 109, 118 (1972) (nude dancing entitled to First and Fourteenth Amendment protection under some circumstances).

31. Lisa Malmer, *Nude Dancing and the First Amendment*, 59 U. CIN. L. REV. 1275, 1277-78 (1991) (a review of nude dancing as a form of expression entitled to constitutional protection).

32. Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976). The Court stated:

government may be afforded more discretion in the regulation of these types of expression.[33] However, because nude dancing is afforded some degree of First Amendment protection, regulations restricting this form of expression must be developed through First Amendment case law.[34]

A historical perspective of the requirements for restricting nude dancing as well as the constitutional provisions and legal treatment of nude dancing will facilitate an understanding of the United States Supreme Court's decision in this area.[35] First, the time, place, or manner restrictions, licensing procedures, and the overbreadth and void-for-vagueness doctrines will be presented.[36] Next, the Twenty-First Amendment, as it applies to nude dancing, will be discussed as it grants a state broad power to regulate the times, places and circumstances under which liquor is sold.[37] Finally, a brief review of the legal treatment of nude dancing by the federal circuit courts is offered.[38]

A. *First Amendment Protection*

1. Time, Place, or Manner Restrictions

a. Distance Requirement

State and local governments may constitutionally regulate nude dancing by proper time, place, or manner restrictions.[39] These time, place, or manner restrictions[40] are exercised in two forms: (1) distance requirements which regulate the distance between the nude dancer and the patron, and (2) zoning ordinances which restrict nude dancing es-

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> Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every school child can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.

Id.

33. *Id.* at 70-71.

34. Malmer, *supra* note 31, at 1277-78.

35. *See infra* notes 39-115 and accompanying text.

36. *See infra* notes 39-90 and accompanying text.

37. *See infra* notes 91-98 and accompanying text.

38. *See infra* notes 99-115 and accompanying text.

39. Malmer, *supra* note 31, at 1293.

40. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981). The Court set forth a four prong test to judge whether a time, place, or manner restriction was constitutional. The four prongs are:

1. the restriction must be content neutral;
2. the restriction could not be covertly discriminatory;
3. the restriction must serve an important government interest; and,
4. the enactor of the regulation must provide alternative forums for the regulated speech.

Id. at 648-54.

tablishments to certain areas within a municipality.[41]

In *Kev, Inc. v. Kitsap County*,[42] the Ninth Circuit reasoned that a county ordinance,[43] which regulated the manner in which nude dancing could be performed, did "not significantly burden first amendment rights."[44] The ordinance set forth distance requirements that nude dancers had to comply with while performing.[45] The county's purpose for such distance requirements was to deter patrons and dancers from negotiating for drugs and prostitution on the premises of nude dancing establishments.[46]

b. Zoning Regulations

Zoning regulations that restrict the time, place, or manner of expression[47] have been upheld as a constitutional means of regulating nude dancing.[48] In *City of Renton v. Playtime Theatres, Inc.*,[49] the United States Supreme Court reviewed the constitutionality of a zoning ordinance that specifically restricted adult entertainment.[50] The Court held the ordinance[51] constitutional[52] because it was content neutral.[53] The ordinance was enacted to address the negative secondary effects associ-

41. Malmer, *supra* note 31, at 1293.

42. 793 F.2d 1053 (9th Cir. 1986); *see also* BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986) (First Amendment scrutiny of county's distance from nude dancer requirement).

43. *Kev*, 793 F.2d at 1061. "The ordinance: (1) prohibits dancers and patrons from fondling and caressing each other; (2) requires that all dancing take place at least ten feet from the patrons and on stage raised at least two feet from the floor; and (3) prohibits patrons from tipping dancers." *Id.* (footnote omitted).

44. *Id.*

45. *Id.*

46. *Id.*

47. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (zoning ordinance was a constitutional means to regulate adult entertainment); *see also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 70-71 (1976) (zoning ordinance constitutional means to regulate placement of adult theaters). In 1926, zoning was first identified as a proper use of the state's police power. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926). In order to preserve its rural character, the Village of Euclid enacted a zoning ordinance to block Cleveland's industrial expansion from crossing its border. *Id.* at 389. This police power was clarified by the United States Supreme Court when it ruled that the power to zone must be related to the general welfare or the public health, safety, or morals of a community. Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).

48. *See, e.g.*, International Food & Beverage Sys. v. City of Fort Lauderdale, 794 F.2d 1520, 1525 (11th Cir. 1986) (zoning ordinance regulating nude bars is constitutional).

49. 475 U.S. 41 (1986).

50. *Id.* at 43.

51. *Id.* The ordinance did not permit adult theaters "from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." *Id.*

52. *Id.* at 54-55.

53. *Id.* at 47-48.

ated with adult entertainment establishments[54] and it did not completely ban adult theaters from the municipality.[55] Thus, zoning is a constitutional tool which municipalities may use to restrict adult entertainment, and the associated negative secondary effects can be the justification for such regulation.

2. Licensing Procedures

Municipalities may also regulate adult entertainment, including nude dancing, by way of licensing procedures.[56] Although licensing of nude dancing establishments has been held to be constitutionally permissible,[57] the potential for governmental abuse is greater than that found in other regulatory models[58] because licensing functions as a prior restraint of a protected activity.[59]

In *FW/PBS, Inc. v. City of Dallas*,[60] the United States Supreme Court evaluated licensing procedure requirements for regulating a "sexually oriented business."[61] The licensing procedures[62] were incorporated

54. *Id.* at 47. The City of Renton was able to rely on the experiences of other cities as justification for its secondary effects argument which was used to support the adoption of the ordinance. *Id.* at 51. The negative secondary effects caused by adult entertainment establishments were classified as "neighborhood blight." *Id.*

55. *Id.* at 54.

56. *See, e.g.*, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) (licensing procedures ruled unconstitutional due to discretionary characteristics); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560-62 (1975) (live theater licensing unconstitutional as a prior restraint); Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986) (county could require nude dancing establishments to obtain licenses because of likely impact to law enforcement services).

57. *See, e.g.*, Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986) (nude dancing licensing scheme constitutional).

58. The leading case addressing the licensing of adult entertainment establishments is Freedman v. Maryland, 380 U.S. 51 (1965). The *Freedman* Court ruled that three procedural safeguards were required to be followed by a censorship board: (1) a prejudicial review restraint can only be imposed for a brief and specified period of time during which the status quo must be maintained; (2) there must be a process for expeditious judicial review of the decision to censor; and (3) the censor bears the burden of showing the material to be displayed is not protected by the First Amendment. *Id.* at 58-60.

59. *FW/PBS Inc.*, 493 U.S. at 225. "While '[p]rior restraints are not unconstitutional *per se* . . . [a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity.' " *Id.* (citation omitted); *see also* Near v. Minnesota, 283 U.S. 697 (1931) (state could not ban future publication of a newspaper based on past publications of illegal material).

60. 493 U.S. 215 (1990).

61. *Id.* at 220. "The [Dallas] ordinance defines a 'sexually oriented business,' as 'an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.' " *Id.* (citing Dallas City Code, Ch. 41A, Sexually Oriented Businesses § 41A-2(19) (1986)).

62. *Id.* at 227. The Court noted:

Although the ordinance states that the "chief of police shall approve the

with zoning and inspection regulations in order to eradicate the negative secondary effects which the city identified as being associated with sexually oriented businesses.[63] The United States Supreme Court granted certiorari[64] on the issue of whether the licensing scheme of the City of Dallas was constitutional.[65] The Court ruled the Dallas licensing scheme unconstitutional[66] as a prior restraint[67] upon protected expression without adequate procedural safeguards.[68]

The Court, in determining adequate procedural safeguards,[69] concluded that the government "must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained and there must be the possibility of prompt judicial review in the event that the license is erroneously denied."[70]

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issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application," the license may not issue if the "premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances."

Id. (citing Dallas City Code, Ch. 41A, Sexually Oriented Businesses § 41A-5(a)(6) (1986)).

63. *Id.* at 220. The secondary effects were increased criminal activities such as prostitution. *Id.* at 236.

64. *Id.* at 223.

65. *Id.*

66. *Id.* at 217.

67. For discussion of prior restraints, see *supra* note 59 and accompanying text.

68. *FW/PBS, Inc.*, 493 U.S. at 217. The Court stated, "[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provisions of unbridled discretion. A scheme that fails to set reasonable time limits on the decision maker creates the risk of indefinitely suppressing permissible speech." *Id.* at 227.

69. *Id.* at 228.

70. *Id.*

The Court in *Freedman* also placed the burdens on the censor, because otherwise the motion picture distributor was likely to be deterred from challenging the decision to suppress the speech and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech. The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court. Because of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court. Limitation on the time within which the censor must issue the license as well as the availability of prompt judicial review satisfy the "principle that the freedoms of expression must be ringed about with adequate bulwarks."

Id. at 229-30 (citing Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 66 (1963)). For discussion of *Freedman*, see *supra* note 58 and accompanying text.

3. The Overbreadth and Void-for-Vagueness Doctrines

An overbroad statute is intended to prohibit constitutionally unprotected activities; but, as applied, the statute also prohibits protected activities[71] such as nude dancing.[72] The overbreadth doctrine requires that statutes be narrowly drawn when addressing areas which include free speech rights.[73]

The overbreadth doctrine has been used to invalidate an ordinance directed at proscribing topless dancing.[74] In *Doran v. Salem Inn, Inc.*,[75] the United States Supreme Court recognized that nude dancing enjoyed First Amendment free expression protection[76] and concluded that the district court was correct in granting a preliminary injunction to enjoin enforcement of the ordinance on the basis that the statute, as applied, was overly broad.[77]

The overbreadth and void-for-vagueness doctrines are closely related and extremely important in the analysis of First Amendment issues.[78] Both doctrines prevent governmental regulations from being

71. NOWAK, *supra* note 2, at 840; *see also* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970) (a review of the overbreadth doctrine as it applies to First Amendment protected activities).

72. For a discussion of nude dancing First Amendment protection, see *supra* notes 29-34 and accompanying text.

73. *See* NAACP v. Button, 371 U.S. 415, 438 (1963) (laws touching fundamental freedoms must be narrowly drawn); *see, e.g.*, Kunz v. New York, 340 U.S. 290 (1951) (ordinance giving officials power over citizens' freedom to speak about religion on city streets unconstitutionally overbroad).

74. *See infra* notes 75-77 and accompanying text.

75. 422 U.S. 922 (1975).

76. *Id.* at 932. "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue, 409 U.S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment Protection under some circumstances." *Id.*

77. *Id.* at 934. The district court stated:

> The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in 'any public place' with uncovered breasts. There is no limit to the interpretation of the term 'any public place.' It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the 'Ballet Africans' and a number of other works of unquestionable artistic and socially redeeming significance.

Salem Inn, Inc. v. Frank, 364 F. Supp. 478, 483 (E.D.N.Y. 1973), *aff'd* 501 F.2d 18 (2d Cir. 1974), *aff'd in part, rev'd in part sub nom.* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); *see also* Chase v. Davelaar, 645 F.2d 735 (9th Cir. 1981) (county resolution prohibiting topless entertainment in all non-theatrical establishments selling food or beverages for consumption on premises overly broad); BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986) (county ordinance prohibiting nudity except as part of expressive dance or in the context of a drama work, science, education, or athletic changing facility overly broad).

78. NOWAK, *supra* note 2, at 840.

exercised in a manner which infringes upon protected freedoms even when the government legally has the power to so regulate.[79]

Several principal methods are used to determine whether a statute, as applied to free speech, is constitutionally vague.[80] The enacted law must place individuals on notice as to precisely the activity which is being prohibited.[81] The notice requirement is especially important "when the activity distinguishes between criminal activity and activity which constitutes a fundamental constitutional right."[82] Explicit guidelines must be established so that enforcement of the enacted law is not carried out too broadly.[83] Finally, because the First Amendment needs "breathing space," for a "governmental regulation [to be] tolerated [it] must be drawn with 'narrow specificity.' "[84]

The operator of a Kitsap County erotic dance establishment challenged the constitutionality of a county ordinance which regulated non-alcoholic topless dancing.[85] The ordinance provided that an erotic dance studio is " 'a fixed place of business which emphasizes and seeks, through one or more dancers, to arouse or excite the patron's sexual desires.' "[86] In seeking to have the ordinance struck down as unconstitutional, the operator argued that the adopted ordinance's definition of erotic dance studio was void for vagueness.[87] The court disagreed with the operator and ruled that the definition was not unconstitutionally vague because the ordinance provided for a standard which was adequate for enforcement and gave fair warning to those businesses which would be so impacted.[88]

Nude dancing is entitled to First Amendment protection and therefore may only be governmentally regulated as long as the regulations are a proper time, place, or manner restriction, valid licensing procedures, or not constitutionally overbroad or vague.[89] Yet, when nude

79. *Id.*
80. *Id.* at 846.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 846-47. This "narrow specificity" is of great importance because the First Amendment is especially vulnerable to the "existence of a penal statute susceptible of sweeping and improper application." *Id.* at 847.
85. Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1055 (9th Cir. 1986).
86. *Id.* at 1057.
87. *Id.*
88. *Id.* The court stated:

> The ordinance classifies erotic dance studios according to the manifest intent of the operator of the studio. Thus, one who exhibits erotic dancing with an intent to arouse the sexual desires of his patrons would know that his business falls within the purview of the ordinance. The fact that the prosecutor must prove the intent of the operator of the business does not by itself render the statute void for vagueness.

Id.
89. *See supra* notes 39-88 and accompanying text.

dancing is performed in state sanctioned liquor serving establishments, the state's power to regulate nude dancing is expanded by the Twenty-First Amendment.[90]

B. *The Twenty-First Amendment*

States may regulate nude dancing through the Twenty-First Amendment, which grants the states broad power to control the times, places, or circumstances under which liquor may be sold.[91] With less fear of First Amendment infringement, the states may regulate nude dancing when it occurs on the premises of liquor-serving establishments.[92] In *California v. LaRue*,[93] the United States Supreme Court allowed the regulation banning nude dancing from liquor serving establishments in California to survive constitutional challenge based on the police power of the Twenty-First Amendment.[94] California wanted to eliminate nude dancing in liquor-serving establishments in order to prevent the crimes of prostitution, rape, and indecent exposure which took place in the vicinity of such businesses.[95]

The application of the Twenty-First Amendment to nude dancing

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90. *See infra* notes 91-98 and accompanying text.

91. New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 715 (1981) ("[A] state has broad power under the Twenty-First Amendment to regulate the times, places, and circumstances under which liquor may be sold."); California v. LaRue, 409 U.S. 109, 114 (1972) ("[T]he Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.").

The Twenty-First Amendment states:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. CONST. amend. XXI, §§ 1-2.

92. *See, e.g.*, California v. LaRue, 409 U.S. 109 (1972).

93. 409 U.S. 109 (1972).

94. *Id.* at 114-19.

95. *Id.* at 111. The California Department of Alcohol Beverage Control regulatory hearings disclosed that:

> Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.
>
> Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.

Id.

was strengthened by *New York State Liquor Auth. v. Bellanca.*[96] In *Bellanca*, the United States Supreme Court allowed New York to prohibit topless dancing in businesses holding state liquor licenses.[97] The Court stated that "[a]lthough we recognized that not all of the prohibited acts would be found obscene and were therefore entitled to some measure of First Amendment protection, we reasoned that the statute was within the State's broad power under the Twenty-first Amendment to regulate the sale of liquor."[98] Thus, the Twenty-First Amendment has been upheld as a constitutional means to regulate nude dancing in liquor-serving establishments.

C. *Circuit Courts' Approach to Nude Dancing as Protected Expression*

The Eighth,[99] Ninth,[100] and Eleventh[101] Circuits have all rendered decisions regarding the level of First Amendment protection available to nude dancing.[102] The Ninth Circuit in *BSA, Inc. v. King County,*[103] held "[w]here a regulation places a substantial restriction on free expression, as does this ban on nude dancing, it is subject to strict scrutiny."[104] The court reasoned that the county had not met the strict scrutiny test[105] and, as such, the ordinance was unconstitutional.[106]

The Eleventh Circuit has similarly decided that nude dancing is afforded First Amendment protection.[107] The court cited *Schad v. Mount Ephraim*[108] to support its decision that "[w]e may take it for granted that nude dancing is constitutionally protected expression, at least if performed indoors before paying customers and not in a street or park

96. 452 U.S. 714 (1981).
97. *Id.* at 718.
98. *Id.* at 716.
99. Walker v. City of Kansas City, 911 F.2d 80 (8th Cir. 1990).
100. BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986).
101. International Food & Beverage Sys. v. City of Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986).
102. *See infra* notes 103-13 and accompanying text.
103. 804 F.2d 1104 (9th Cir. 1986).
104. *Id.* at 1108. For a discussion of strict scrutiny, see *supra* notes 20-21 and accompanying text.
105. *BSA, Inc.*, 804 F.2d at 1108-09.
106. *Id.* at 1109.

> In summary, Pierce County has not shown that the topless clubs present more of a law enforcement problem than other establishments, or that the prohibition on nude dancing is necessary, or will abate the problem. Furthermore, the County has not carried its burden of showing the lesser restrictive alternatives would be inadequate. We, therefore, agree with the district court's finding that the ordinance violates the First Amendment.

Id.

107. International Food & Beverage Sys. v. City of Fort Lauderdale, 794 F.2d 1520, 1525 (11th Cir. 1986).
108. 452 U.S. 61 (1981). See *supra* text accompanying notes 29-30 for the standard applied in *Schad.*

before casual viewers."[109]

In opposition to the Ninth and Eleventh Circuits is the decision of the Eighth Circuit in *Walker v. City of Kansas City*.[110] The *Walker* court not only refused to extend First Amendment protection to nude dancing,[111] it also "raise[d] the specter" that nude dancing should be ruled obscene.[112] By classifying it as obscene, nude dancing would be stripped of all First Amendment protection.[113] It is with this constitutional background[114] that the United States Supreme Court approached its decision in *Barnes v. Glen Theatre, Inc.*[115]

III. BARNES V. GLEN THEATRE, INC.

A. *Facts*

Barnes v. Glen Theatre, Inc.[116] was a constitutional challenge to the State of Indiana's public indecency statute.[117] The owners of two establishments in South Bend, Indiana wanted to provide totally nude dancing as entertainment.[118] The owners and individual nude dancers claimed in federal court that Indiana's public indecency law was unconstitutional because it prevented nude dancing.[119] Their claim identified dancing as protected expression, guaranteed by the First Amendment.[120]

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109. *International Food*, 794 F.2d at 1525.

110. 911 F.2d 80 (8th Cir. 1990).

111. *Id.* at 90.

112. *Id.* at 87, 90. The court applied the three part *Miller* test to determine whether nude dancing was obscene and thus not protected by the First Amendment. *Id.* For a discussion of the *Miller* test, see *supra* note 9.

113. For a discussion of obscenity, see *supra* note 9.

114. For a discussion of constitutional background, see *supra* notes 29-113 and accompanying text.

115. 111 S. Ct. 2456 (1991).

116. *Id.*

117. *Id.* at 2458. IND. CODE ANN. § 35-45-4-1 (Burns 1984) provides:
Public indecency—Indecent Exposure.

(a) A person who knowingly or intentionally, in a public place:
(1) Engages in sexual intercourse;
(2) Engages in deviate sexual conduct;
(3) Appears in a state of nudity; or
(4) Fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.

(b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernible turgid state.

Id.

118. *Barnes*, 111 S. Ct. at 2458.

119. *Id.*

120. *Id.*

One of the establishments, The Kitty Kat Lounge, Inc., sold alcoholic beverages and provided "go-go dancing."[121] The owner wanted to provide totally nude dancing in violation of the Indiana public indecency statute which required the dancers to wear at least "pasties" and a "G-string."[122] Darlene Miller, a dancer at the Kitty Kat Lounge, joined in the suit.[123] She wished to dance totally nude, believing that she would be able to make more money than by dancing partially clothed.[124]

Glen Theatre, Inc., the second establishment, is also located in South Bend, Indiana.[125] The principal business of Glen Theatre, Inc. is the Chippewa Bookstore which supplies "so-called adult entertainment through written and printed materials, movie showings and live entertainment" in a fully enclosed building.[126]

The patrons of the Chippewa Bookstore view nude and semi-nude dancers from coin operated booths.[127] The bookstore does not serve alcoholic beverages nor does it allow such to be consumed on the premises.[128] Only persons over the age of eighteen are allowed to view the bookstore's live entertainment.[129] Additionally, non-paying, non-consenting patrons are not able to view the nude or semi-nude performances.[130] Chippewa Bookstore's actual presentation of totally

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121. Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 420 (N.D. Ind. 1988), *rev'd sub nom* Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989), *rev'd* Barnes v. Glen Theatre, Inc. 111 S. Ct. 2456 (1991).

122. *Barnes*, 111 S. Ct. at 2458-59.

> On July 27, 1985 [the owner] decided to present some nude entertainment. Kitty Kat dancers danced nude until about 2:50 a.m., when South Bend police officers informed [the owner] that arrests would be made if the nude dancing continued. The nude dancing stopped; no arrests were made. The Kitty Kat has never been engaged in a criminal case, at least not since [the owner] purchased the business in 1981.

Glen Theatre, 695 F. Supp. at 420.

123. *Glen Theatre*, 695 F. Supp. at 420.

124. *Id.* The dancers at the Kitty Kat Lounge are not paid by the hour but by commission which is based on drinks sold during their performance. *Id.*

> Ms. Miller sells drinks and dances at the Kitty Kat. She has worked at the Kitty Kat for about two years and currently makes $250.00 to $300.00 per week. When she dances, Ms. Miller perceives herself as "just entertaining, just dancing." The avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later.

Id.

125. Glen Theatre, Inc. v. Civil City of South Bend, 726 F. Supp. 728, 729 (N.D. Ind. 1985).

126. *Id.*

127. *Id.* "The customers would sit in a booth and insert coins in a timing mechanism that permitted them to observe the live nude and semi-nude dancers for a period of time." *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

nude dancing resulted in approximately eleven arrests within a two year period for violations of Indiana's public indecency statute.[131] Because of the arrests, the bookstore ceased providing live nude entertainment.[132] Gayle Ann Marie Sutro, a dancer at the Chippewa Bookstore, joined in the suit.[133] Sutro was not able to perform at the bookstore due to the store's suspension of live nude entertainment.[134]

B. *Procedural History*

In *Glen Theatre, Inc. v. Civil City of South Bend*,[135] the plaintiff's sought preliminary and permanent injunctive relief[136] to restrain the state from further arrests or prosecutions under the Indiana public indecency statute.[137] The plaintiffs also sought a judgment declaring the Indiana public indecency statute unconstitutional on its face, or, in the alternative, as applied.[138] The district court granted a preliminary injunction and enjoined the state from enforcing the public indecency statute until further order of the court.[139] In *Glen Theatre, Inc. v. Pear-*

131. *Id.*; *see also* IND. CODE ANN. § 35-45-4-1 (Burns 1984). For the text of the statute, see *supra* note 117.

> All those who have been arrested have been prosecuted and at least five of those persons have been convicted of violating the Indiana public indecency statute and have unsuccessfully appealed their conviction to the Indiana Court of Appeals and Indiana Supreme Court. The latest arrests occurred on March 27, 1985 at which time two females were arrested by the South Bend Police Department and charged by the prosecuting attorney with violating I.C. § 35-45-4-1. None of the plaintiffs in this case are the subject of criminal charges pertaining to the issues in this case.

Glen Theatre, 726 F. Supp. at 729.

132. *Glen Theatre*, 726 F. Supp. at 729.

133. *Id.*

> Sutro is a professional actress, stunt woman and ecdysiast and has studied acting, dancing, speech and language. She has danced, modeled and acted professionally for more than fifteen years and is a current member in good standing of the Screen Actors Guild, the Screen Extras Guild and AFTRA. In her affidavit, Sutro stated that her nude dances are appropriately choreographed and are an attempt to communicate as well as to entertain.

Id. at 729-30.

134. *Id.* at 729. Sutro's performances were to run concurrently with the showing, at a nearby theater, of a pornographic movie in which she acted. *Barnes*, 111 S. Ct. at 2459.

135. 726 F. Supp. 728 (N.D. Ind. 1985).

136. *Id.* at 730. The court stated:

> The issuance of a preliminary injunction is an extraordinary remedy and involves the exercise of a far reaching power. Therefore, it should not be used except in a case clearly warranting it and will not be available unless the plaintiffs carry their burden of persuasion as to all the prerequisites.

Id. (citations omitted).

137. *Id.* at 729.

138. *Id.*

139. *Id.* at 733. The court, in its ruling, relied on the following four part test:

son,[140] the court of appeals reversed the district court's permanent injunction and remanded the case for further consideration.[141] On appeal, the state successfully argued that the public indecency statute had been sufficiently narrowed by the Indiana Supreme Court and thus was not an unconstitutionally overbroad statute.[142]

On remand, the district court[143] applied the *Baysinger* test[144] to the

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> To be entitled to preliminary injunctive relief, the plaintiffs must establish that (1) they have no adequate remedy at law or will be irreparably harmed if the preliminary injunction does not issue; (2) the threatened injury to the plaintiffs outweighs the threatened harm the preliminary injunction may inflict upon the defendants; (3) the plaintiffs have a reasonable likelihood of success on the merits; and (4) the granting of the preliminary injunction will not disserve the public interest.

Id. at 730.

The court ruled that, because the Chippewa Bookstore had ceased exhibiting live nude dancing for fear of prosecution, the plaintiffs had shown that the statute would cause irreparable harm if the injunction was not granted. *Id.* at 732-33. In balancing the potential harms between plaintiff and defendant, the court stated that "[t]he legislative intent would . . . not be undermined nor ignored by an injunction restraining arrest and prosecution" under the public indecency statute. *Id.* at 733. The court reasoned that the plaintiffs had a reasonable likelihood of success on the merits because the public indecency statute was not limiting, but imposed sanctions on all persons who appeared in any public place. *Id.* at 731. Thus, the statute could be ruled unconstitutionally overbroad. *Id.* The court concluded that granting the injunction was in accordance with public interest because the public has a substantial interest in vindicating an individual's constitutional rights. *Id.* at 733.

140. 802 F.2d 287 (7th Cir. 1986).

141. *Id.* at 291.

142. *Id.* at 289. For a discussion of the overbreadth doctrine, see *supra* notes 71-79 and accompanying text.

The Indiana Supreme Court narrowed the state's public indecency statute in State v. Baysinger, 397 N.E.2d 580 (Ind. 1979):

> The *Baysinger* court held that nudity must be allowed when it is part of some larger form of expression that merits First Amendment protection. So construed, it held that the statute was constitutional. The court went on to reject the argument that nude dancing is protected by the First Amendment reasoning that the activity was simply conduct.

Glen Theatre, 802 F.2d at 289 (citations omitted). After the *Baysinger* decision, two cases (Clark v. State, 446 U.S. 931 (1980) and Dove v. State, 449 U.S. 806 (1980)) that were consolidated with *Baysinger* were separately appealed to the United States Supreme Court. *Glen Theatre*, 802 F.2d at 289. The United States Supreme Court summarily dismissed both of these cases for lack of a federal question. *Id.* Each of the cases' statements of jurisdiction raised the overbreadth argument. *Id.* Thus, the United States Supreme Court, by summarily dismissing these two cases, ruled that Indiana's public indecency statute, as interpreted by *Baysinger*, was not unconstitutionally overbroad. *Id.*

143. Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414 (N.D. Ind. 1988).

144. *Id.* at 418-19. The court in *Baysinger* set forth two major factors to be used when ruling on whether nude dancing is expressive activity. *Id.* at 418. First, "the context of the dance presentation" must be reviewed. *Id.* Under this review, "[t]he fact that the dancing [is] not part of a play or dramatic performance [is] deemed

nude dancing performed at the Chippewa Bookstore and the Kitty Kat Lounge to determine whether it was protected expression.[145] Upon application of the test, the district court held that the nude dancing performed at the Chippewa Bookstore and the Kitty Kat Lounge was not protected expression but mere conduct; thus, the Indiana public indecency statute was not unconstitutional.[146]

Glen Theatre and the Kitty Kat Lounge appealed the district court's remanded decision.[147] On appeal, the circuit court held that Indiana's public indecency statute was unconstitutional as applied.[148] The court reasoned that "nude-dancing as expression falls within the protection of the First Amendment."[149] Thus, Indiana may regulate nude dancing but it must do so only within the bounds of the First Amendment.[150] The state requested that the decision in *Miller v. Civil City of South Bend*[151] be reheard en banc.[152] On rehearing, the court of appeals, in a very lengthy and detailed discussion, reviewed the history of nude dancing as protected expression.[153] The court upheld its previous de-

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highly significant." *Id.* Second, any claim for the allowance of nude dancing must not be associated solely with economic reasons. *Id.* at 419.

145. *Id.* at 418. The district court "consolidated the *Glen Theatre* case with Miller v. City of South Bend, Cause Number S 85-598." *Id.* at 415.

146. *Id.* at 418.

> Unlike the Baysinger dancers, the dancers in this case have claimed that their First Amendment rights have been violated. They contend that their dancing is a form of expressive activity protected by the First Amendment. After viewing the proffered evidence, this court must conclude that in light of the Indiana Supreme Court decisions, the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States. These strip tease dances are not performed in any theatrical or dramatic context. Further, their conduct falls squarely within the prohibitions of Indiana's public indecency statute which has been found constitutional.

Id. at 419.

147. Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989).

148. *Id.* at 830.

149. *Id.* The court stated "no matter how little artistic value may be found in such performances, [nude dancing] is entitled to limited protection under the first amendment." *Id.*

150. *Id.*

> A government may impose reasonable time, place, and manner restrictions on protected expression. Similarly, it may regulate the nonexpressive conduct for reasons unrelated to the suppression of speech. It may also regulate nude dancing under the power granted it by the Twenty First Amendment. And it may totally ban obscene nude dancing.

Id. (citations omitted). For a discussion of governmental regulations of nude dancing, see *supra* notes 40-89 and accompanying text.

151. 887 F.2d 826 (7th Cir. 1989).

152. Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990) (en banc).

153. *Id.*; *see also* R. George Wright, *Judge Richard Posner on the Scope of the Free Speech Clause*, 21 CUMB. L. REV. 225 (1991) (essay which focuses on Judge Posner's concur-

cision, by a seven to four vote,[154] reaffirming the proposition that nude dancing is constitutionally protected expression.[155] Accordingly, the court affirmed its previous ruling that the Indiana public indecency statute was not a legitimate regulation and thus unconstitutional as applied to nude dancing.[156] Indiana appealed the Seventh Circuit's en banc decision to the United States Supreme Court in *Barnes v. Glen Theatre, Inc.*[157]

C. *The Plurality's Decision*

In an opinion delivered by Chief Justice Rehnquist, the United States Supreme Court reversed the decision by the court of appeals and held Indiana's public indecency statute constitutional as applied to nude dancing.[158] The Court agreed with the court of appeals that non-obscene nude dancing is a form of expression entitled to First Amendment protection.[159] However, unlike the court of appeals, the Court interpreted Indiana's public indecency statute as being a legitimate government regulation of a First Amendment right.[160] Because the Court had granted First Amendment protection to nude dancing, it then needed to determine the level of judicial scrutiny this protection would be afforded.[161] The plurality reasoned that Indiana's public indecency statute was a valid opportunity for application of the time, place, or manner test.[162] In scrutinizing whether the public indecency statute was a proper time, place, or manner restriction, the Court followed the standards enunciated in *United States v. O'Brien*.[163]

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ring opinion in Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990) (en banc)).

154. *Miller*, 904 F.2d at 1082.

155. *Id.*

156. *Id.*

157. 111 S. Ct. 2456 (1991).

158. *Id.* at 2460.

159. *Id.* The Court cited several cases which supported this conclusion: Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) ("nude dancing is not without its First Amendment protections from official regulation"); Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975) ("although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression . . . this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances"); and California v. LaRue, 409 U.S. 109, 118 (1972) (nude dancing is not "without the protection of the First and Fourteenth Amendments"). *Id.*

160. *Barnes*, 111 S. Ct. at 2460.

161. *Id.* For a discussion of judicial scrutiny afforded to First Amendment protection, see *supra* notes 18-23 and accompanying text.

162. *Barnes*, 111 S. Ct. at 2460. For a discussion of time, place, or manner restrictions, see *supra* notes 39-55 and accompanying text.

163. *Barnes*, 111 S. Ct. at 2460-61 (citing United States v. O'Brien, 391 U.S. 367 (1968)).

In *United States v. O'Brien,*[164] the Court rejected the idea that symbolic speech is entitled to the highest level of First Amendment scrutiny.[165] The *O'Brien* Court adopted the rule that an intermediate level of scrutiny could be allowed in symbolic speech cases.[166] The test the *O'Brien* Court applied is as follows:

> Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[167]

The *Barnes* Court applied the four part test to Indiana's public indecency statute.[168] The Court reasoned that the statute was "clearly" within the state's constitutional power[169] and furthered a substantial government interest, the protection of societal "order and morality."[170] The Court determined that the third prong of the *O'Brien* test was satisfied because the State of Indiana was not proscribing nude dancing by enforcement of its public indecency statute; rather, it was proscribing public nudity.[171] The Court concluded "[i]t is without cavil

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164. 391 U.S. 367 (1968) (burning draft card in protest violated federal statute).

165. *Id.* at 376. The *O'Brien* Court stated:

> [E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong.

Id. at 376-77 (footnotes omitted).

166. *Id.* at 377. The *O'Brien* Court could not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 376.

167. *Id.* at 377.

168. *Barnes*, 111 S. Ct. at 2461.

169. *Id.* "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." *Id.* at 2462.

170. *Id.* The Court rationalized this conclusion by discussing the history of public indecency statutes. *Id.* Public indecency was a crime at common law and at least forty-seven states have statutes similar to Indiana. *Id.* The Court also cited Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (the law is based on notions of morality) and Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973) (a legislature may act to protect society's interest in morality). *Id.* at 2462.

171. *Barnes*, 111 S. Ct. at 2463.

> [T]he requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes

that the public indecency statute is 'narrowly tailored'; Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose."[172] Having met the *O'Brien* test, Indiana's regulation of nude dancing, by a public indecency statute, was held to be a constitutional time, place, or manner restriction.[173]

D. *Justice Scalia's Concurrence*

Justice Scalia agreed with the plurality that Indiana's public indecency statute was constitutional.[174] He opined that nude dancing is conduct; thus, not afforded any First Amendment protection.[175]

Justice Scalia reasoned that Indiana's public indecency statute was constitutional because it is applied generally to all public nudity, consensual or nonconsensual.[176] He also based his rationale for upholding the statute as constitutional on the government's interest in regulating morality.[177]

Justice Scalia further asserted that nude dancing is not entitled to any heightened judicial scrutiny based on its First Amendment attributes.[178] He classified Indiana's public indecency statute as a general law; thus, not directed at impeding free speech.[179] Therefore, he would have applied only a rational basis test to determine if the statute is constitutional.[180] Since "moral opposition to nudity supplies a ra-

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> the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the state still seeks to prevent it. Public nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity.

Id.

172. *Id.*

173. *Id.* at 2461.

174. *Id.* at 2463 (Scalia, J., concurring).

175. *Id.* (Scalia, J., concurring). Justice Scalia was the only justice in the decision to deny First Amendment protection to nude dancing. *Id.* (Scalia, J., concurring); Linda Greenhouse, *Supreme Court Rules that States may Ban Erotic Nude Dancing*, N.Y. TIMES, June 22, 1991, at 1, 8.

176. *Barnes*, 111 S. Ct. at 2464-65 (Scalia, J., concurring). Justice Scalia stated that "[t]he purpose of Indiana's nudity law would be violated if 60,000 fully consenting adults crowded into the Hoosier dome to display their genitals to one another, even if there were not an offended innocent in the crowd." *Id.* at 2465 (Scalia, J., concurring).

177. *Id.* (Scalia, J., concurring). Justice Scalia stated, "[t]he purpose of the Indiana statute, as both its text and the manner of its enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified." *Id.* (Scalia, J., concurring).

178. *Id.* at 2467-68 (Scalia , J., concurring).

179. *Id.* (Scalia, J., concurring).

180. *Id.* at 2468 (Scalia, J., concurring).

tional basis for its prohibition,"[181] according to Justice Scalia, the government may regulate public nudity.[182]

E. *Justice Souter's Concurrence*

Justice Souter cast the deciding vote.[183] He agreed with the plurality that nude dancing was entitled to a degree of First Amendment protection[184] and that the *O'Brien* test was the proper test to be used in determining whether Indiana's public indecency statute was constitutional as applied to nude dancing.[185] However, Justice Souter defined the government's substantial interest differently from the plurality.[186] He did not regard the state's interest as protecting society's moral beliefs, but as combating the secondary effects caused by nude dancing establishments.[187] Upon successful application of the *O'Brien* test, Justice Souter opined that Indiana's statute was not unconstitutional as applied to nude dancing.[188]

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181. *Id.* (Scalia, J., concurring).

182. *Id.* (Scalia, J., concurring).

> Indiana may constitutionally enforce its prohibition of public nudity even against those who choose to use public nudity as a means of communication. The State is regulating conduct, not expression, and those who chose to employ conduct as a means of expression must make sure that the conduct they select is not generally forbidden.

Id. (Scalia, J., concurring).

183. Paul M. Barrett, *Justices Ruling on Nude Dancing Disturbs Free-Speech Advocates*, WALL ST. J., June 24, 1991 at B5.

184. *Barnes*, 111 S. Ct. at 2468 (Souter, J., concurring). "[W]hen nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the forces of expression, and a dancer's acts in going from clothed to nude, as in a strip-tease, are integrated into the dance and its expressive function." *Id.* (Souter, J., concurring).

185. *Id.* (Souter, J., concurring).

186. *Id.* at 2468-69 (Souter, J., concurring).

187. *Id.* at 2469 (Souter. J., concurring). The secondary effects as asserted in the state's brief are prostitution, sexual assaults, and other criminal activity. Brief for Petitioners at 37, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

188. *Barnes*, 111 S. Ct. at 2469-71 (Souter, J., concurring). In the application of the test, Justice Souter stated, "it is clear the prevention of such evils falls within the constitutional power of the State, which satisfies the first *O'Brien* criterion." *Id.* (Souter, J., concurring). He reasoned that the second prong of the test was satisfied by an analysis of previous United States Supreme Court cases where comparable government interests were ruled constitutional. *Id.* at 2469 (Souter, J., concurring). Justice Souter reviewed the decisions of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (zoning ordinance which was designed to prevent secondary effects was constitutionally upheld) and Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (deconcentration of adult theatres was constitutionally allowed to limit secondary effects) in order to determine that Indiana had similar government interests as that found in previous cases. *Id.* at 2469-70 (Souter, J., concurring). The third prong of the test was fulfilled because the government's interest in regulating secondary effects is not at all related to expression. *Id.* at 2470 (Souter, J., concurring). Justice Souter concluded that the fourth prong of the

F. *Dissenting Opinion*

The dissenting opinion, authored by Justice White and joined by Justices Marshall, Blackmun, and Stevens,[189] did not view the Indiana public indecency statute as a general prohibition of public nudity.[190] The dissent regarded the statute, as applied by the State of Indiana, to be directly related to the suppression of the expressive qualities that nude dancing intends to convey.[191]

The dissent disagreed that either morality or the secondary effects of nude dancing can be a sufficient purpose for justifying the proscription of an expressive activity.[192] Furthermore, the dissent reasoned that the enforcement of the public indecency statute was related to the expressive qualities of the nude dance.[193] "It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity . . . ."[194] According to the dissent, the Indiana statute did not satisfy the *O'Brien* Test.[195] Additionally, the dissent reasoned that the statute, as a content based restriction, required the most exacting level of judicial scrutiny.[196] Under this strict scrutiny test, a regulation must be "narrowly drawn to accomplish a compelling government interest" in order to be held constitutional.[197] In the dissent's view, Indiana did not meet this heightened test.[198] Thus, the dissent

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test was met in that the wearing of pasties and a G-string only slightly moderated the erotic expression. *Id.* at 2471 (Souter, J., concurring).

189. *Barnes*, 111 S. Ct. at 2471. (White, J., dissenting).

190. *Id.* at 2473 (White, J., dissenting).

191. *Id.* (White, J., dissenting). The dissent also granted First Amendment protection to nude dancing. *Id.* at 2471 (White, J., dissenting).

192. *Id.* at 2473 (White, J., dissenting). The dissent stated:

> The purpose of forbidding people from appearing nude in parks, beaches, hot dog stands, and like places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in the theatres and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the state believes is the harmful message that nude dancing communicates.

Id. (White, J., dissenting).

193. *Id.* at 2474 (White, J., dissenting).

194. *Id.* (White, J., dissenting). Nudity, as an element of nude dancing, cannot be separated from the expressive qualities of the dance into the category of "mere 'conduct.' " *Id.* (White, J., dissenting).

195. *Id.* at 2474-75 (White, J., dissenting).

196. *Id.* at 2474 (White, J., dissenting).

197. *Id.* (White, J., dissenting) (quoting United States v. Grace, 461 U.S. 171, 177 (1983); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989)). For a discussion of levels of judicial scrutiny, see *supra* notes 18-23 and accompanying text.

198. *Barnes*, 111 S. Ct. at 2474-75 (White, J., dissenting). The statute was not narrowly drawn because the result could have been accomplished by other less restrictive actions. *Id.* at 2475 (White, J., dissenting). To prevent the secondary ef-

agreed with the court of appeal's decision that the Indiana public indecency statute, as applied to nude dancing, was unconstitutional.[199]

IV. ANALYSIS

A. *Content Neutral or Content Based*

Barnes established that nude dancing is a form of expression which is entitled to First Amendment protection.[200] The question then becomes at what level should this First Amendment protection be scrutinized.[201] If a regulation that applies to protected expression is content based, the expression is afforded the most exacting level of judicial scrutiny.[202] If the regulation is content neutral, a lower, intermediate level of judicial scrutiny will suffice.[203] The *Barnes* Court ruled that Indiana's public indecency statute was enacted to prohibit "public nudity across the board."[204] Therefore, because the statute was not based on banning nude dancing, it was not content based.[205]

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fects associated with nude dancing establishments the state could enforce its criminal statutes with more fervor, adopt proper time, place, or manner restrictions, or impose regulations under the state's Twenty-First Amendment powers. *Id.* (White, J., dissenting). For a discussion of time, place, and manner restrictions and the state's power under the Twenty-First Amendment, see *supra* notes 39-55, 91-98 and accompanying text.

199. *Barnes*, 111 S. Ct. at 2476 (White, J., dissenting).

200. *Id.* at 2460. "[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment. . . ." *Id.*

201. For a discussion of the levels of judicial scrutiny applied to the First Amendment, see *supra* notes 18-23 and accompanying text.

202. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 313 (1984) (Marshall, J., dissenting).

203. *Id.* (Marshall, J., dissenting); *see also* Vicinaiz, *supra* note 20, at 900.

204. *Barnes*, 111 S. Ct. at 2460.

205. *Id.* at 2461. This conclusion is supported by "[t]he history of Indiana's public indecency statute [which] shows that it predates barroom nude dancing and was enacted as a general prohibition." *Id. But see* Justice Marshall's dissenting opinion in *Clark*, 468 U.S. at 301.

> The Court's salutary skepticism of governmental decisionmaking in First Amendment matters suddenly dissipates once it determines that a restriction is not content-based. The Court evidently assumes that the balance struck by officials is deserving of deference so long as it does not appear to be tainted by content discrimination. What the Court fails to recognize is that public officials have strong incentives to overregulate even in the absence of an intent to censor particular views. This incentive stems from the fact that of the two groups whose interests officials must accommodate—on the one hand, the interests of the general public and, on the other, the interests of those who seek to use a particular forum for First Amendment activity—the political power of the former is likely to be far greater than that of the latter.

Id. at 314-15 (Marshall, J., dissenting).

The expression a nude dancer conveys is one of eroticism.[206] In that it is precisely this erotic message that Indiana is targeting,[207] the statute could be deemed content based as applied.[208] The public indecency statute is a general prohibition of public nudity;[209] yet, enforcement is specifically applied in situations where the erotic messages of nude dancing are perceived to create negative moral and societal effects.[210] The definition and application of the statute conflict. Indi-

206. *Barnes*, 111 S. Ct. at 2468 (Souter, J., concurring); *see also* Miller v. Civil City of South Bend, 904 F.2d 1081, 1091 (1990) (Posner, J., concurring).

207. Petitioner's Reply Brief at 11-12, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26);

> The "content-neutral goals" in this case, as previously argued, are deterrence of prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure . . . . It does not take much insight to recognize that the "secondary effects" of nude dancing are more likely to be prevalent at places like the Kitty Kat Lounge or the Chippewa Bookstore than at a production of *Ballet Africains*, regardless of the message or content of each performance. It seems obvious, for example, that productions of *Salome* or even *Hair* would be unlikely to inspire patrons to solicit sex from performers or contemplate rape or adultery, or would degrade women, in the same way that would bartop or booth nude dancing.

Id. (citations omitted).

208. Brief for Respondents at 33, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26):

> There can be no other conclusion, therefore, but that the statute discriminates among nude dancing *specifically* on the basis of the *content* of a performance. As such, it is *not*, by definition, content-neutral. If a dance is performed in a context in which the state finds agreeable, it will not be prosecuted. However, if the state disagrees with the content of the performance, it will not be protected.

Id. "Timothy J. Corbett, a sergeant with the South Bend Police Department and stationed in the South Sector of South Bend where all arrests at Chippewa Bookstore have occurred, stated in his affidavit that no arrests have ever been made for nudity as part of a play or ballet." *Glen Theatre*, 726 F. Supp. at 730. At least five persons had been arrested for nude dancing at the Chippewa Bookstore. *Id.* at 729.

The following are examples of activities that could be held in violation of the public indecency statute, but there is no record that Indiana has so targeted:

> [A] woman wearing a thong bikini on a beach, which does not "totally" cover the buttocks, is a criminal act. A model in an art class at a University, if totally nude or "nude" within the statute, can be prosecuted. A male dancer in a ballet, wearing tights in which his genitalia may be in a "discernibly turgid state" can be prosecuted, even though fully and opaquely dressed, and, of course, anyone caught nude as statutorily defined in the Y.M.C.A. shower had better seek out legal counsel immediately.

Brief for Respondents at 31 n.19, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

209. *Barnes*, 111 S. Ct. at 2460.

210. *Id.* at 2474. The state contends that nude dancing increases adultery and divorce. Brief for Petitioners at 31, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

ana's public indecency statute is not content neutral.[211]

B. *Proper Time, Place, or Manner Test*

The *Barnes* Court agreed with the State of Indiana that the public indecency statute requiring nude dancers to wear pasties and a G-string is a proper content neutral time, place, or manner restriction.[212] In order for a time, place, or manner restriction to be constitutional, the restrictions must be "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."[213]

The *Barnes* Court cites *Clark v. Community for Creative Non-Violence,*[214] *Ward v. Rock Against Racism,*[215] and *City of Renton v. Playtime Theatres, Inc.*[216] to support its decision.[217]In *Clark*, overnight camping on national park service property was restricted to only such areas as had been specifically designated.[218] In *Ward*, the City of New York adopted guidelines to be required of all users of the bandshell in Central Park.[219] A zoning ordinance that restricted adult entertainment establishments to specific areas within the City was challenged in *Renton*.[220]

In *Clark*, *Ward,* and *Renton*, each of the government regulations was

211. Brief for Respondents at 36, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26). Content neutral restrictions are those that "are justified without reference to the content of the regulated speech." Boos v. Barry, 485 U.S. 312, 320 (1988). "By narrowly limiting its concern to whether a given regulation creates a content based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 313 (1984) (Marshall, J., dissenting).

212. *Barnes*, 111 S. Ct. at 2460-63. For a discussion of time, place, or manner restrictions, see *supra* notes 39-55 and accompanying text.

213. *Clark*, 468 U.S. at 293; *see also supra* note 40.

214. 468 U.S. 288 (1984).

215. 491 U.S. 781 (1989).

216. 475 U.S. 41 (1986).

217. *Barnes*, 111 S. Ct. at 2460.

218. *Clark*, 468 U.S. at 290-91. The Community for Creative Non-Violence was granted a permit to erect two tent cities in LaFayette Park and the Mall in Washington D.C. to symbolize and demonstrate the plight of the homeless. *Id.* at 292. The Park Service denied the request to occupy these tents in accordance with their no overnight camping in nondesignated area policy. *Id.*

219. *Ward*, 491 U.S. at 784. The Use Guidelines required "bandshell performers to use sound amplification equipment and a sound technician provided by the City." *Id.* The guidelines were adopted to prevent excessive noise from bandshell performers. *Id.* at 784-85.

220. *Renton*, 475 U.S. at 43. The zoning ordinance did not ban adult entertainment, but restricted it to only those areas of the city which were specifically so designated. *Id.* Adult entertainment establishments were prohibited "from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." *Id.*

upheld as constitutional time, place, or manner restrictions.[221] Yet, none of these regulations totally banned the activity being regulated.[222] Each of the activities could still exist; however, they were simply restricted as to the actual time, place, or manner in which they were conducted.[223] In *Clark*, an individual could camp overnight as a form of demonstration in a park service designated camping area;[224] the performers in *Ward* could still use the bandshell;[225] and, in *Renton*, the adult entertainment establishments could still be operated within the city limits.[226]

The Indiana public indecency statute, as applied, is not a proper time, place, or manner restriction. Rather, it is a total ban on nude dancing.[227] The nude dancers must perform wearing "pasties" and a "G-string" to meet the requirements of the statute.[228] Nude dancers have no alternative. They cannot dance in a designated zone of the city or at an establishment complying with appropriate distance requirements, both examples of proper time, place, or manner restrictions.[229] While the volume of music can be adjusted, nudity either exists or does not exist.[230] To take the nudity out of nude dancing is to completely ban that form of expression.[231]

Only if narrowly tailored may a statute completely ban a First Amendment protected activity .[232] "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil."[233] Indiana's public indecency statute is a general proscription directed at the evils of public nudity.[234] In that

221. *Clark*, 468 U.S. at 298-99; *Ward*, 491 U.S. at 803; *Renton*, 475 U.S. at 55.

222. For a discussion of these decisions, see *supra* notes 214-20 and accompanying text.

223. For a discussion of the application of the time, place, and manner restrictions in *Clark*, *Ward*, and *Renton*, *see infra* notes 224-226 and accompanying text.

224. *Clark*, 468 U.S. at 290.

225. *Ward*, 491 U.S. at 781 n.2.

226. *Renton*, 475 U.S. at 46-47.

227. *See, e.g.*, Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 420 (N.D. Ind. 1988) (Kitty Kat Lounge erotic dancer "wears 'pasties' and a 'G-string' when she dances, for fear of arrest").

228. *Barnes*, 111 S. Ct. at 2463.

229. For a discussion of zoning and distance requirements, see *supra* notes 39-55 and accompanying text.

230. For a discussion of time, place, or manner restrictions as applied to the performance of music, see *supra* note 219 and accompanying text.

231. Brief for Respondents at 41, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26). Indiana's regulation of nude dancing by way of its public indecency statute is not comparable to a restriction on the volume of music because the statute serves to totally prohibit a particular expression. *Id.*

232. Frisby v. Shultz, 487 U.S. 473, 485 (1988) (picketing ordinance not facially invalid under the First Amendment).

233. *Id.*

234. *Barnes*, 111 S. Ct. at 2461.

the statute, as applied, targets nude dancing and not nudity associated with other performances,[235] the justification for a complete ban is not warranted.

C. *The O'Brien Test*

The *Barnes* Court applied the *O'Brien* test to the Indiana statute in order to determine whether it was a constitutional time, place, or manner restriction.[236] The *O'Brien* test has been stated to be "the most troubling illustration of the Court's modern approach to content neutral restrictions."[237] The test provides for an intermediate level of judicial scrutiny to be applied to content neutral regulations.[238]

In *O'Brien*, the regulation generally proscribed the burning of draft cards.[239] This regulation was an extension of "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end."[240] O'Brien challenged the regulation as unconstitutional for it prevented him from burning his draft card in protest which he argued was First Amendment protected speech.[241] The *O'Brien* Court held the regulation constitutional because the government had a "sufficiently important governmental interest in regulating the non-speech element [which] can justify incidental limitations of First Amendment freedoms."[242]

The burning of the draft card in *O'Brien* "dealt with conduct that was

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235. *See supra* notes 209-10 and accompanying text. *See, e.g.*, Brief for Respondents at 22 n.13, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26):

> Examples of dance companies which perform in America abstract content ("plotless") dance with nudity, which under the Indiana public nudity statute is proscribable, include: Bill T. Jones/Arnie Zane Co. - at present on tour of 22 U.S. cities including some in the Midwest, (one piece is "52 Handsome Nudes" which has 52 nudes on stage); Paul Taylor Co. (New York); Endangered Species Co. (New York); Carbone 14 (Canada); Mark Morris (New York); John Kelly (New York); Jennifer Monson Co. (New York); Ann Carlson Co. (New York); Ellen Fisher; Eric Ryan; Jennifer Miller/Susan Seizer; Pilobolus Dance Theatre (New York); Netherlands Dance Theatre (New York); Folies Bergere (Paris); Anna Halprin Co. (San Francisco); Martha Graham Dance Co. (New York); Susan Marshall Dance Co. (New York); Martha Clark Groups (New York); Garth Fagan Bucket Dance Theatre (New York).

Id.

236. *Barnes*, 111 S. Ct. at 2460-61. For a discussion of the Court's application of the *O'Brien* test, see *supra* notes 164-72 and accompanying text.

237. Vicinaiz, *supra* note 20, at 900.

238. *Id.* at 900-01.

239. United States v. O'Brien, 391 U.S. 367, 370 (1968).

240. *Id.* at 377. "Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system." *Id.*

241. *Id.* at 376.

242. *Id.*

not implicitly integral to the expression."[243] However, the nudity proscribed by the Indiana statute is " 'intimately related to expressive conduct' in that it is an integral part of the dance performance and the expression therein, and, as such cannot be sustained upon an *O'Brien* type analysis."[244]

The second prong of the *O'Brien* test states "that a government regulation is sufficiently justified if it furthers an important or substantial governmental interest."[245] The interest to be furthered by the public indecency statute was societal order and morality.[246] The Court relied on *Bowers v. Hardwick*[247] to support the use of the preservation of morality as a proper governmental interest.[248] In *Bowers*, the Georgia statute which criminalized public or private homosexual sodomy was upheld as constitutional due to the sexual act being defined as immoral.[249] *Barnes*'s use of morality as a justification for the furtherance of an important governmental interest is not parallel to that found in *Bowers* because the statute does not proscribe private nudity but only public nudity.[250] If nudity is such an inherent societal evil, why does the state allow it at all?[251]

V. CONCLUSION

Nude dancing has been stripped of First Amendment protection.[252] The *Barnes* Court granted nude dancing only a bare shield of lower

243. Brief for Respondents at 42 n.26, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (No. 90-26).

244. *Id.* (citations omitted).

245. *O'Brien*, 391 U.S. at 377.

246. *Barnes*, 111 S. Ct. at 2461-62.

247. 478 U.S. 186 (1986).

248. *Barnes*, 111 S. Ct. at 2462. " 'The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated . . . the courts will be very busy indeed.' " *Id.* (quoting *Bowers*, 478 U.S. at 196).

249. *Id.*

250. *Id.* at 2473 (White, J., dissenting).

251. *Id.* at 2476 (White, J., dissenting). The dissent stated:

> We agree with Justice Scalia that the Indiana statute would not permit 60,000 consenting Hoosiers to expose themselves to each other in the Hoosierdome. No one can doubt, however, that those same 60,000 Hoosiers would be perfectly free to drive to their respective homes all across Indiana and, once there, to parade around, cavort, and revel in the nude for hours in front of relatives and friends. It is difficult to see why the State's interest in morality is any less in that situation, especially if as Justice Scalia seems to suggest, nudity is inherently evil, but clearly the statute does not reach such activity.

Id. at 2475-76 (White, J., dissenting).

252. *Id.* at 2460. By ruling Indiana's public indecency statute as a content neutral general prohibition, nude dancing was only afforded a lower, intermediate level of judicial scrutiny. *Id.*

level judicial scrutiny.[253]

Analysis has revealed that while the definition of Indiana's public indecency statute may appear to be content neutral,[254] the application of the regulation is actually content based.[255] Thus, nude dancing should be afforded the most exacting level of judicial scrutiny because the statute is specifically applied in a content based manner.[256]

The *Barnes* Court held that Indiana's public indecency statute is a proper time, place, or manner restriction.[257] However, the regulation functions as a total ban on nude dancing.[258] Because the dancers must wear "pasties" and a "G-string" in order to conform to the statute, they are prohibited from dancing nude.[259] A proper time, place, or manner restriction rarely totally bans the expression; rather, it allows the expression to occur under certain circumstances.[260] There are no alternatives available for Indiana's nude dancers.[261] While a partially clothed dancer may still express an erotic message, the dancer is prohibited from performing an erotic nude dance. To take the nudity out of the performance is to completely ban this form of expression.[262] Thus, Indiana's public indecency statute is not a proper time, place, or manner restriction.

The Court's conclusion that "the public indecency statute furthers a substantial government interest in protecting [societal] order and morality"[263] has far reaching effects. Morality, never consistently or easily defined, is not a substantial governmental interest when used to regulate an activity that "concededly reaches a significant amount of protected expressive activity."[264] Morality, justified as a governmental interest, could be expanded into areas currently unimaginable. Thus, the *O'Brien* test was not satisfactorily applied in *Barnes* because the regu-

253. *Id.* For a discussion of the application of lower, intermediate level of judicial scrutiny, see *supra* notes 22-23 and accompanying text. *See also* Commonwealth v. Sees, 373 N.E.2d 1151 (Mass. 1978) (nude dancers performing on stage granted same right of free speech as any other work of unquestionable artistic or social value).

254. *Barnes*, 111 S. Ct. at 2460-61.

255. *See supra* notes 200-11 and accompanying text.

256. *See supra* notes 200-11 and accompanying text. For a discussion of levels of judicial scrutiny, see *supra* notes 18-23 and accompanying text.

257. *Barnes*, 111 S. Ct. at 2463.

258. *See supra* notes 227-35 and accompanying text.

259. *Barnes*, 111 S. Ct. at 2463.

260. *See supra* notes 227-35 and accompanying text.

261. *See supra* notes 227-31 and accompanying text.

262. *See supra* notes 227-35 and accompanying text.

263. *Barnes*, 111 S. Ct. at 2462. An example of a substantial governmental interest is drafting men for military service. United States v. O'Brien, 391 U.S. 367, 377 (1968). Nude dancing regulation does not appear to be on the same level of governmental interest as military service conscription.

264. *Barnes*, 111 S. Ct. at 2473 (White, J., dissenting).

lation of morality should not be a substantial governmental interest.[265]

It is possible for Indiana to properly regulate nude dancing. A state can regulate nude dancing by means of proper time, place, or manner restrictions such as distance requirements and zoning,[266] licensing schemes,[267] or policies relating to the Twenty-First Amendment.[268] All three of these types of regulations, if implemented correctly, would be constitutional.[269]

The regulation of nude dancing does not appear to be a significant constitutional issue. Yet, if the Court continues to make rulings, such as *Barnes*, on the basis of morality, increasing governmental regulation of First Amendment rights is a likely outcome. In the words of a juror from another First Amendment case: "You take away one freedom, and pretty soon they're all gone."[270]

*Teno A. West**

265. *Id.* (White, J., dissenting).

266. For a discussion of time, place, or manner restrictions, see *supra* notes 39-55 and accompanying text.

267. For a discussion of licensing schemes, see *supra* notes 56-70 and accompanying text.

268. For a discussion of Twenty-First Amendment related policies, see *supra* notes 91-98 and accompanying text.

269. *See supra* notes 39-70, 91-98 and accompanying text:

270. Temma Ehrenfeld & Todd Brewster, *First & Foremost*, LIFE, Fall Special 1991, at 66.

* To Jennifer, without her support, dedication, and assistance it would have been impossible to author this article.

Carden v. Arkoma Associates: The Citizenship of Limited Partnerships, Associations, and Juridical Entities—A Chilling Future for Federal Diversity Jurisdiction

I. INTRODUCTION

The United States Constitution, Article III, Section 2 grants to the federal judiciary the power to adjudicate "Controversies . . . between Citizens of different States."[1] With enactment of the Judiciary Act of 1789,[2] the "inferior" federal courts[3] were created and empowered with original subject matter jurisdiction[4] to decide disputes arising under state laws that are complicated solely by the fact that the parties are citizens of different states.[5] This federal court power, to adjudicate

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1. U.S. CONST. art. III, § 2, cl. 1.

2. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

3. U.S. CONST. art. III, § 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* The term *inferior* was used to denote that the lower federal courts were courts from which appeal could be taken to the one constitutionally mandated Supreme Court. MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 8 (2d ed. 1990).

4. The term *original subject matter jurisdiction* conveys two important concepts as to a court's ability or competency to hear a case, that is, review a controversy, and render a judgement therein. First, a court has original jurisdiction of a case when it may "take cognizance of a cause at its inception, try it, and pass judgment upon the law and facts." BLACK'S LAW DICTIONARY 1099 (6th ed. 1990). Second, subject matter jurisdiction "is the legal authority of a court to hear and decide a particular type of case." ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.1, at 217 (1989).

"[F]ederal courts have limited subject matter jurisdiction; that is, they are restricted in what cases they may adjudicate and may exercise jurisdiction only if it is specifically authorized." *Id.* The two most notable areas of federal subject matter jurisdiction are federal question jurisdiction—controversies *arising under* the laws of the United States—and diversity of citizenship jurisdiction—the subject of this comment. *Id.* at 220.

5. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. The Judiciary Act states in pertinent part:

> That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . an alien is a party, or the suit is

cases that are substantively and legally indistinguishable from controversies regularly decided by state courts, has come to be known as federal diversity of citizenship jurisdiction.[6] It has been modified since its original statutory grant, in 1789, but today remains essentially unchanged.[7] Presently, statutory authority for federal diversity jurisdiction is found in 28 U.S.C. § 1332.[8]

From its genesis diversity jurisdiction has posed special problems of interpretation and application for federal courts, because neither the constitutional provision[9] nor statutory grant[10] that empowers the federal courts to sit in diversity cases adequately defines *citizen*. The citizenship of the adverse parties is the operative element for a

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between a citizen of the State where the suit is brought, and a citizen of another State.

Id.

The "circuit courts" created in the Judiciary Act were courts with appellate power that also had original jurisdiction in diversity cases. CHEMERINSKY, *supra* note 4, § 1.4.3, at 22. In 1911, the "circuit courts" were disbanded and their original jurisdiction in diversity cases was vested in the district courts. *Id.* at 23.

6. The terms *diversity*, *diversity jurisdiction*, and *diversity of citizenship jurisdiction*, as used throughout this Comment, refer specifically to the jurisdiction of federal courts to hear cases that arise from a state law dispute between adverse parties who are citizens of different states; it is presently authorized by 28 U.S.C. § 1332 (1988). Diversity jurisdiction is also historically linked in jurisdictional statutes to cases where an alien is a party. Those cases lie under alienage jurisdiction and will not be discussed in this Comment.

7. In 1988, Congress made its most recent changes to the diversity statute including a raise in the jurisdictional amount from $10,000 to $50,000. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, secs. 201-203, § 1332(a)-(c), 102 Stat. 4642, 4646 (1988) (codified at 28 U.S.C. § 1332 (1988)). *See* PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1656-58 (3d ed. 1988 & Supp. 1992) (quoting and describing significant changes to the diversity statute, beginning with the Judiciary Act of 1789).

8. 28 U.S.C. § 1332 (1988). The diversity statute states in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between —
>
> (1) citizens of different States;
>
> . . . .
>
> (c) For the purposes of this section and section 1441 of this title—
>
> (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business . . . .

Id.

9. U.S. CONST. art. III, § 2, cl. 1; *see supra* note 1 and accompanying text.

10. 28 U.S.C. § 1332 (1988); *see supra* note 8.

determination of whether jurisdiction will lie in a particular controversy.

The citizenship of natural persons proved fairly easy to ascertain and clear rules developed to determine when diversity jurisdiction attached to cases involving natural persons.[11] However, the extension of diversity of citizenship jurisdiction to disputes involving business entities has proved difficult.[12] In an age when there are many forms of business organizations coming before the courts, and in the abscence of congressional guidance—Congress has only defined citizenship for the corporation in the diversity statute[13]—the federal courts have been called upon to decide what a *citizen* is in the context of controversies involving noncorporate business entities. One such decision was necessary as to the citizenship status of the limited partnership.[14] An increasingly favored business organization,[15] the limited partnership is a creature of statute[16] that consists of two classes or types of members,

11. *See infra* notes 35-47 and accompanying text.

12. *See infra* notes 61-210 and accompanying text.

13. 28 U.S.C. § 1332(c)(1) (1988); *see supra* note 8.

14. A limited partnership is a business entity, a creature of statute, organized to carry on any lawful business that a general partnership is permitted to engage in. *See generally* REVISED UNIFORM LIMITED PARTNERSHIP ACT §§ 101-1106 (1976 & 1985 amendments), 6 U.L.A. 270-415 (Supp. 1991) [hereinafter, without cross-reference, RULPA]; UNIFORM LIMITED PARTNERSHIP ACT §§ 1-31 (1916), 6 U.L.A. 561-621 (1969) [hereinafter, without cross-reference, ULPA]. It is "formed by two or more persons . . . having one or more general partners and one or more limited partners." RULPA § 101(7); *see* ULPA § 1. For a discussion of general and limited partners see *infra* notes 17-18.

15. *See* ALFRED F. CONARD ET AL., ENTERPRISE ORGANIZATION 24 (4th ed. 1987) (noting increased use of limited partnerships during the 1970s and 1980s). A Reagan Administration official called Research and Development Limited Partnerships " 'essential' " for the Administration's goal of "continued technological innovation in sustaining the nation's economic recovery and keeping U.S. industry competitive in the world market." Gordon J. Dickey, *The Private Investor and Research and Development Limited Partnerships: An Unintended Casualty of Tax Reform?*, 22 NEW ENG. L. REV. 235, 238 (1987) (footnotes omitted).

16. HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 264 & n.1 (2d ed. 1990); 2 REED ROWLEY & DAVID SIVE, ROWLEY ON PARTNERSHIP § 53.0 (2d ed. 1960); Ames v. Downing, 1 N.Y. Surrogate (1 Bradf.) 321, 329-30 (Sur. Ct. 1850), see *infra* notes 364, 419.

The limited partnership has been a staple business organization in civil code countries for centuries. The French, who particularly favored this business vehicle, naming it "*La Societé en Commandité*," brought it to Florida and Louisiana. ROWLEY & SIVE, *supra*, § 53.0. In Louisiana, a civil code jurisdiction, it is called "partnership in commendam," *id.*, and is still recognized in Louisiana's statutes. LA. CIV. CODE ANN. art. 2837-2844 (West Supp. 1992).

New York became the first common law jurisdiction to pass a limited partnership statute in 1822, based upon the French Commercial Code of 1807. REUSCHLEIN & GREGORY, *supra*, § 264 n.1.; ROWLEY & SIVE, *supra*, § 53.0. Connecticut also passed such a statute in 1822, and Pennsylvania came into the fold in 1836. REUSCHLEIN & GREGORY, *supra*, § 264 n.1.

The essential characteristic of these statutes was that they gave the limited

general[17] and limited partners.[18]

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partner a shield from liability, a scheme unknown to the common law. REUSCHLEIN & GREGORY, *supra*, § 264; ROWLEY & SIVE, *supra*, § 53.0. To retain this shield the limited partner had to remain a mere investor and not exercise control over the business; additionally, the limited partner was required to register as such, with the appropriate state agency, to put creditors on notice of the limited partner's shield from liability. REUSCHLEIN & GREGORY, *supra*, § 264; ROWLEY & SIVE, *supra*, § 53.0. These and other requirements were strictly construed. REUSCHLEIN & GREGORY, *supra*, § 264 n.1.; ROWLEY & SIVE, *supra*, at § 53.0; FRANCIS M. BURDICK, THE LAW OF PARTNERSHIP: INCLUDING LIMITED PARTNERSHIPS 390-91 (2d ed. 1906) (noting courts gave "harsh and technical construction to limited partnership statutes" because they "are in derogation of the common law"); *e.g.*, Pierce v. Bryant, 90 Mass. (5 Allen) 91, 94 (1862).

Because of strict judicial interpretation of these statutes, and in an effort to both correct the "defects of the early limited partnership statutes" and to protect squeamish investors, fearful of losing the shield, the Uniform Limited Partnership Act of 1916 (ULPA) was drafted. ROWLEY & SIVE, *supra*, § 53.0. The ULPA was eventually adopted, as modified, in nearly every state. ULPA—TABLE OF JURISDICTIONS, 6 U.L.A. 559 (1969). In 1976, the ULPA was "modernized" by the Revised Uniform Limited Partnership Act (RULPA), which itself was amended in 1985. REUSCHLEIN & GREGORY, *supra*, § 264. As of September 1, 1992 only eight states and the Virgin Islands retain the ULPA exclusively or in conjunction with the RULPA. ULPA—TABLE OF JURISDICTIONS, 6 U.L.A. 190 (Supp. 1991). Collectively the RULPA, in both its 1976 and 1985 incarnations, has been adopted in 46 states and the District of Columbia. RULPA—TABLE OF JURISDICTIONS (1976 & 1985 amendments), 6 U.L.A. 239-40 (Supp. 1991).

17. The modern limited partnership has two classes or types of members, general partner(s) and limited partner(s). Each has a separate role in the business for which it was formed. General partners are distinguished from limited partners in that their involvement with the limited partnership is managerial; they have all "the rights and powers and [are] subject to the restrictions of a partner in a partnership without limited partners." RULPA § 403(a); *see* ULPA § 9. The general partner, unlike the limited partner, *see infra* note 18, "has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and other partners." RULPA § 403(b); *see* ULPA § 9. Limited partners are mere investors and enjoy a shield from personal liability similar to that of a corporate shareholder. *See infra* note 18.

18. Limited partners are essentially silent investors in limited partnerships. They may exercise no control over the business nor do they incur liability, beyond the extent of their capital investment, for the actions of the general partners. The RULPA provides that a "limited partner is not liable for the obligations of a limited partnership unless he [or she] is also a general partner or, in addition to the exercise of his [or her] rights and powers as a limited partner, he [or she] participates in the control of the business . . . ." RULPA § 303(a). Additionally, § 303(b) enumerates activities that do not give rise to the level of participation in the control of the business that would result in a limited partner losing its shield from liability. RULPA § 303(b). The ULPA states that "limited partners as such shall not be bound by the obligations of the partnership." ULPA § 1. It further refines this rule by stating a "limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." ULPA § 7. Unfortunately, the ULPA did not enumerate what activities constituted control of the business. Thus courts relied upon strictly construed precedent which often led to the loss of limitation of liability for

When the United States Courts of Appeals took up the issue of diversity of citizenship treatment for limited partnerships, severe disagreement resulted among the circuits. The Second and Fifth Circuits held that the citizenship of the general partners was determinative in the diversity equation[19] when a limited partnership was involved.[20] The Third, Fourth, Seventh, and Eighth Circuits held that all members of a limited partnership must be examined in the diversity equation for diversity jurisdiction to attach.[21]

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the limited partner. One of the most striking ULPA sections provides that a limited partner, "[a] contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership." ULPA § 26. Thus a synthesis of these uniform provisions shows that limited partners exercise a very modest role in the limited partnership entity: they simply provide the capital.

19. Throughout this Comment the the term *diversity equation* is used to describe the process of ascertaining and then comparing the citizenship of adverse litigants to determine whether they are citizens of different states—that is that they are diverse from one another. Should there be state co-citizenship between adverse parties then diversity jurisdiction would not lie. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); *see infra* notes 48-60 and accompanying text.

20. The Second Circuit created a rule that the citizenship of the limited partnership was to be determined by analyzing only the citizenship of the general partners, as they are the only members authorized by statute to have control over the assets, management, and litigation of the limited partnership. Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966). Subsequently, the Fifth Circuit adopted this result, but by a slightly different analysis, employing the real party to the controversy analysis, used by the Supreme Court in Navarro Savings Ass'n v. Lee, 446 U.S. 458 (1980), *see infra* notes 150-168 and accompanying text. Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp., 797 F.2d 238 (5th Cir. 1986); Arkoma Assocs. v. Carden, 874 F.2d 226 (5th Cir. 1988), *rev'd*, 494 U.S. 185 (1990).

Several district courts within the Sixth, Tenth, and District of Columbia Circuits apparently have also adopted this rule. District courts of the Sixth Circuit: Namco, Inc. v. Davidson, 725 F. Supp. 1148 (D. Kan. 1989); Watson v. S.G.M., Ltd., 722 F. Supp. 648 (D. Kan. 1988) (holding limited partners who assume management and control will be included; all other limited partners excluded); Petroleum Data Servs. v. First City Bancorporation of Tex., Inc., 622 F. Supp. 1022 (D. Kan 1985); Wroblewski v. Brucher, 550 F. Supp. 742 (D. Okla. 1982); Sixth Geostratic Energy Drilling Program 1980 v. Ancor Exploration Co., 544 F. Supp. 297 (N.D. Okla. 1982). *Contra see infra* note 21. District courts of the Tenth Circuit: Winn v. Seidman Fin. Servs., 726 F. Supp. 170 (W.D. Mich. 1989); Williams v. Sheraton Inns, Inc., 514 F. Supp. 22 (E.D. Tenn. 1980). *Contra see infra* note 21. District Court for the District of Columbia: Gordon-Maizel Constr. Co. v. Leroy Prod., Inc., 643 F. Supp. 188 (D.D.C. 1986). *Contra see infra* note 21.

21. The Third, Fourth, Seventh and Eighth Circuits decided that the citizenship of a limited partnership was to be determined by looking to all its members, both general and limited partners. Additionally, it appears that the Eleventh Circuit reached this result. This view is predicated on a belief that diversity jurisdiction taxes the federal judiciary, depleting its time, space, energy, and budget. Therefore, it is incumbent upon the party seeking the jurisdiction to conclusively prove it has a right to this jurisdiction, and where one party to the action is an unincorporated association, and cannot plead corporate citizenship, all members of the lim-

Recently, in *Carden v. Arkoma Associates*,[22] the United States Supreme Court, in a markedly divided five-to-four decision, held that the citizenship of all members of a limited partnership, both general and limited partners, must be considered in diversity actions involving limited partnerships.[23] In reaching its decision, the *Carden* Court relied on the "oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all the members.' "[24] Undeniably, the impact of the decision is to preclude many limited partnerships from federal court in diversity cases. This result led to Justice O'Connor's criticism that the majority intended its decision to curtail federal court jurisdiction "at a time when our federal courts are already seriously overburdened."[25]

This Comment analyzes the *Carden* decision in light of Supreme Court precedent, with particular focus on the various methodologies employed by the Court to determine diversity citizenship for artificial beings. Part II of this Comment discusses general principles of diver-

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ited partnership must be assessed in the diversity equation. This view, advocating the inclusion of limited partners in the diversity equation, was first articulated in a Third Circuit decision. Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n., 554 F.2d 1254 (3d Cir. 1977); *see also* Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n, 657 F.2d 29 (3d Cir. 1981) (following *Carlsberg*). Other circuits soon followed this reasoning. Stouffer Corp. v. Breckenridge, 859 F.2d 75 (8th Cir. 1988); New York State Teachers Retirement Sys. v. Kalkus, 764 F.2d 1015 (4th Cir. 1985); Elston Inv., Ltd. v. David Altman Leasing Corp. 731 F.2d 436 (7th Cir. 1984).

The Eleventh Circuit, in a removal case, stated, in a footnote, that the citizenship of limited partners must be positively averred "because partnerships are deemed citizens of all states in which the limited partners are citizens." Alexander Proudfoot Co. World Headquarters L.P. v. Thayer, 877 F.2d 912, 916 n.9 (11th Cir. 1989) (citing *Elston*). The issue of the limited partners' citizenships had been raised in oral argument. *Id.* After the circuit court permitted Proudfoot to amend its removal petition diversity was found to attach; the court subsequently decided the substantive issues brought on appeal. *Id.*

Several district courts within the First, Sixth, Ninth, Tenth, and District of Columbia Circuits decided cases in a similar fashion. District court in the First Circuit: Nelson & Small, Inc. v. Polaris Indus. Partners, L.P., 768 F. Supp. 382 (D. Me. 1989). District court in the Sixth Circuit: Kansas Baptist Convention v. Mesa Operating Ltd. Partnership, 703 F. Supp. 73 (D. Kan. 1989). *Contra see supra* note 20. District courts in the Ninth Circuit: Sage Investors v. Group W. Cable, Inc., 666 F. Supp. 186 (D. Ariz. 1986); Windward City Ctr. of Hawaii v. Transamerica Occidental Life Ins., Co., 613 F. Supp. 1216 (D. Haw. 1985). District courts of the Tenth Circuit: Bedell v. H.R.C. Ltd., 522 F. Supp. 732 (E.D. Ky. 1981). *Contra see supra* note 20. District Court for the District of Columbia: Conroy v. Winn, 581 F. Supp. 1280 (D.D.C. 1984). *Contra see supra* note 20.

22. 494 U.S. 185 (1990).

23. *Id.* at 195-96.

24. *Id.* at 195 (quoting Chapman v. Barney, 129 U.S. 677, 682 (1889)). The Court was referring to the citizenship rule for unincorporated associations as applied to the complete diversity requirement set out in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), *see infra* notes 48-60.

25. *Carden*, 494 U.S. at 207 (O'Connor, J., dissenting).

sity jurisdiction and explains basic application concepts.[26] Part III traces the historical citizenship treatment of corporations, other juridical entities, and unincorporated associations for the purposes of diversity jurisdiction.[27] Part IV presents the facts and procedural history of the *Carden* dispute.[28] Part V discusses the majority opinion of the Supreme Court.[29] Part VI discusses the dissenting opinion.[30] Part VII critiques the Court's decision and analyzes the citizenship issue.[31] Part VIII is the conclusion.[32]

II. Diversity of Citizenship Jurisdiction: General Principles

Two fundamental and conjunctive requirements have developed to determine whether diversity of citizenship jurisdiction attaches in a particular case. The federal courts must answer the following predicate questions, in the affirmative, before diversity jurisdiction will attach. First, whether the parties are citizens.[33] Second, whether the citizens are diverse.[34] Each of these requirements will be discussed in turn.

A. *The Meaning of* Citizen *as Applied to Natural Persons*

The Judiciary Act of 1789 empowered federal courts to sit in diversity jurisdiction cases.[35] Diversity jurisdiction, unlike most forms of federal subject matter jurisdiction,[36] has at its core a dispute involving state law.[37] The controversy becomes one for a federal court due solely to the separate state citizenships of the various parties involved. Thus, this form of federal subject matter jurisdiction is party dependent.[38] Because the diversity statute did not set out the mechanics for exercising this form of subject matter jurisdiction,[39] the Supreme Court has often been called upon to interpret its meaning and decide methodolgies for its application.

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26. *See infra* notes 33-60 and accompanying text.
27. *See infra* notes 61-210 and accompanying text.
28. *See infra* notes 211-51 and accompanying text.
29. *See infra* notes 252-323 and accompanying text.
30. *See infra* notes 324-66 and accompanying text.
31. *See infra* notes 367-462 and accompanying text.
32. *See infra* notes 463-64 and accompanying text.
33. *See infra* notes 35-47 and accompanying text.
34. *See infra* notes 48-60 and accompanying text.
35. *See supra* note 5 and accompanying text.
36. For a definition of subject matter jurisdiction see *supra* note 4.
37. Joseph W. Glannon, Civil Procedure: Examples and Explanations 55 (2d ed. 1992).
38. *Id.* Federal subject matter jurisdiction, as in diversity cases, and several other types of cases delineated in Article III, § 2 (e.g., where the United States is a party, or an ambassador, minister, or foreign citizen is a party, or where the case is between states) "is defined by who the parties to the suit are, rather than the subject matter of the underlying dispute." *Id.* & n.1.
39. For the text of the Judiciary Act of 1789 see *supra* note 5.

Citizenship is the *sine qua non* of asserting federal diversity jurisdiction.[40] Because this jurisdiction relies on citizenship of the litigants, the party seeking the jurisdiction must make an affirmative statement as to the citizenships of the parties to the controversy.[41] The definition of citizenship is one that has proved troublesome. However, the Supreme Court has determined that where the parties are natural persons, i.e., human beings, citizenship has two components. First, a natural person must be domiciled in a state,[42] not merely residing there.[43] Second, the person must be a citizen of the United States.[44] These requirements are conjunctive.[45] Thus, a domiciliary of a state who is a foreign national can not invoke diversity of citizenship jurisdiction.[46] Likewise, a citizen of the United States who has no state domicile will not be accorded diversity jurisdiction.[47]

B. *The Complete Diversity Requirement*

While Section 11 of the Judiciary Act of 1789 gave the federal courts the right to hear diversity cases, it was silent as to the means by which federal courts would determine whether "the suit is *between* a citizen . . . and a citizen of another State."[48] Chief Justice John Marshall took up the task in 1806, in the fabled case of *Strawbridge v. Curtiss*.[49] There the Supreme Court decided that § 11 of the 1789 Act required "complete

40. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.6, at 31 (1985).

41. 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3611, at 516 & n.26 (1984) (citing, inter alia, Wolfe v. Hartford Life & Annuity Ins. Co., 148 U.S. 389 (1893); Robertson v. Cease, 97 U.S. (7 Otto) 646 (1878)).

42. WRIGHT ET AL., *supra* note 41, § 3611, at 507 & n.2 (citing, inter alia, Gilbert v. David, 235 U.S. 561 (1915); Robertson v. Cease, 97 U.S. (7 Otto) 646 (1878)). A domicile is the state where one actually resides with the intent to remain there for an "indefinite period." FRIEDENTHAL ET AL., *supra* note 40, § 2.6, at 31 (citing *Gilbert*); WRIGHT ET AL., *supra*, § 3612.

43. WRIGHT ET AL., *supra* note 41, § 3612; FRIEDENTHAL ET AL., *supra* note 40, § 2.6, at 31.

44. WRIGHT ET AL., *supra* note 41, § 3611 (citing e.g., Scott v. Sandford, 60 U.S. (19 How.) 561 (1857)); FRIEDENTHAL ET AL., *supra* note 40, § 2.6, at 31 (citing same).

45. WRIGHT ET AL., *supra* note 41, § 3611; FRIEDENTHAL ET AL., *supra* note 40, § 2.6, at 31.

46. FRIEDENTHAL ET AL., *supra* note 40, § 2.6, at 31. However, a foreign national domiciled in a state may be able to invoke alienage jurisdiction. *Id.* (citing 28 U.S.C. 1332(a)(2) (1988)).

47. WRIGHT ET AL., *supra* note 41, § 3611, at 509 & n.4 (citing Sadat v. Mertes, 464 F. Supp. 1311 (D. Wis. 1979)); FRIEDENTHAL ET AL., *supra* note 40, § 2.6, at 31 (citing Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D.N.Y. 1965)).

48. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 73 (emphasis added); *see supra* note 5.

49. 7 U.S. (3 Cranch) 267 (1806).

diversity"[50] or "total diversity"[51] of all adverse parties.[52]

The parties in *Strawbridge* were joint plaintiffs and joint defendants, all of whom were natural persons and Massachusetts citizens, save for defendant Curtiss, who was a Vermont citizen.[53] Chief Justice Marshall, in an extraordinarily brief opinion, cryptically and without any predicate reasoning held the statute to mean:

> that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.[54]

Thus, because there was co-citizenship among the Massachusetts plaintiffs and defendants the Court affirmed the circuit (trial)[55] court's denial of jurisdiction, due to lack of diverse citizenship between the adverse parties.[56]

The *Strawbridge* Court was merely interpreting the jurisdictional limits imposed upon the federal courts by Congress in the Judiciary Act of 1789,[57] and not the constitutional limits of jurisdiction set out in Article III.[58] The application of the complete diversity requirement to natural persons as parties with joint interests has been consistent and

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50. WRIGHT ET AL., *supra* note 41, § 3605, at 398.

51. 32A AM. JUR. 2D *Federal Practice and Procedure* § 1288, at 527 (1982).

52. *Strawbridge*, 7 U.S. (3 Cranch) at 267. It should be noted that the complete diversity requirement "does not prevent co-plaintiffs (or co-defendants) from being from the same state; rather, it requires that all of the plaintiffs be from different states than all of the defendants." CHEMERINSKY, *supra* note 4, § 5.3.3, at 247.

53. *Strawbridge*, 7 U.S. (3 Cranch) at 267.

54. *Id.*

55. *See supra* note 5.

56. *Strawbridge*, 7 U.S. (3 Cranch) at 267.

57. Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497, 554-56 (1844) ("It is true, that under these words 'between citizens of different states,' [the jurisdictional grant of Article III], Congress may give the courts jurisdiction between citizens in many other forms than that in which it has been conferred, [by Article III]."); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 n.13 (1978) ("complete diversity is not a constitutional requirement"); State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 531 & n.6 (1967) (citing *Letson*); AMERICAN LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1301(b)(2), Supporting Memorandum A (1969) [hereinafter ALI, STUDY] (Constitution does not require complete diversity); *see* James W. Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1, 27-28 (1964) (generally constitutional grants are broader than those of statutes).

58. The statutorily created interpleader and the Court promulgated rules for class actions and ancillary jurisdiction (now supplemental jurisdiction) bear this theory out. If *Strawbridge* was delimiting the constitutional boundaries of diversity jurisdiction, these legislative and judicial creations would be unconstitutional, as they would extend jurisdiction beyond the storehouse of Article III powers. *See* Carden v. Arkoma Assocs., 494 U.S. 185, 199-200 (O'Connor, J., dissenting). For a discussion of interpleader see *infra* note 59.

unremarkable.[59] However, the *Strawbridge* decision left open many questions as to how the complete diversity requirement would be applied in cases where the parties are not natural persons, but rather are corporations, associations, and other similar artificial entities. For these reasons and other problems created by application of the complete diversity requirement, the *Strawbridge* decision has been strongly criticized.[60]

III. History of the Diversity Citizenship Treatment of Business Organizations

The rules for determining diversity citizenship for natural persons are generally sensible and clear.[61] However, the identification or definition of citizenship for corporations,[62] and unincorporated associations,[63] including joint stock companies,[64] limited partnership associations,[65] labor unions,[66] business trusts,[67] and Puerto Rican civil law limited partnerships[68] has proven to be much more difficult and far more controversial. The development of citizenship for these artificial entities is detailed in the following sections.

A. *Citizenship of Corporations*

Three years after settling the issue of how diversity of citizenship would be applied between natural persons, the Supreme Court turned its attention to the citizenship of corporations for purposes of the diversity statute. Interestingly, prior to 1809, the citizenship of corporations

59. Wright et al., *supra* note 41, § 3605. One recognized deviation from the *Strawbridge* requirement of complete diversity is in statutory interpleader cases, where the statute requires minimal diversity, that is where "two or more adverse claimants [are of] diverse citizenship." *Id.*; 28 U.S.C. § 1335 (1988); *see also* Fed. R. Civ. P. 22 (interpleader rules).

60. *See supra* note 57; David P. Currie, *The Federal Courts and the American Law Institute* (pt. 1), 36 U. Chi. L. Rev. 1, 18-34 (1968) (arguing *Strawbridge* was poorly decided and is the source of most application problems with diversity jurisdiction; advocating that Congress ought to pass a minimal diversity statute to correct *Strawbridge*); Moore & Weckstein, *supra* note 57, at 27-33 (arguing *Strawbridge* leads to harsh results; advocating the need for a minimal diversity statute). Indeed, according to Justice James M. Wayne, Chief Justice Marshall "repeatedly expressed regret" that the decisions in *Strawbridge* and Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809), *see infra* notes 69-83 and accompanying text, had been rendered. *Letson*, 43 U.S. (2 How.) at 555.

61. *See supra* notes 42-47 and accompanying text.

62. *See infra* notes 67-118 and accompanying text.

63. *See infra* notes 119-210 and accompanying text.

64. *See infra* notes 120-28 and accompanying text.

65. *See infra* notes 129-39 and accompanying text.

66. *See infra* notes 140-49 and accompanying text.

67. *See infra* notes 150-68 and accompanying text.

68. *See infra* notes 169-210 and accompanying text.

was not challenged in federal courts.[69] It was assumed that a corporation was a *citizen* within the meaning of Section 11 of the Judiciary Act of 1789.[70] The issue of corporate citizenship was joined in *Bank of the United States v. Deveaux*,[71] in the first application of the diversity statute to an "incorporeal"[72] or artifical entity.

Chief Justice Marshall began his analysis by noting that the jurisdiction of the Court was limited to a controversy where both parties were citizens.[73] Further, he stated the Court's duty was to "exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred."[74] It was of great import to him that the citizenship of a corporation be properly characterized so that the Court neither extend nor unduly restrict federal jurisdiction. He thus embarked upon a review of the English authorities to "ascertain[] its character."[75] His research satisfied him that a corporation was the totality of its members and not its own separate and distinct entity. Hence, he returned to the position from which he started:

> That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, *is certainly not a citizen*; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union.[76]

Chief Justice Marshall was concerned that the term *citizen*, in the 1789 Act, be applied as it was intended in the Constitution.[77] "That is to describe the real persons who come into court, in this case, under their corporate name."[78] Thus, although the corporation was not a citizen in its own right, the corporate members or investors "could sue and be sued in the corporate name."[79] The natural persons composing or

69. Frederick Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202, 211 (1946); Charles Warren, *Corporations and Diversity of Citizenship*, 19 VA. L. REV. 661, 663 (1933); *see* Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 88 (1809).

70. Green, *supra* note 69, at 211. John Quincy Adams argued that Congress intended that corporations be considered citizens for diversity purposes with passage of the Judiciary Act of 1789. Warren, *supra* note 69, at 663-64 (citing Hope Ins. Co. v. Boardman, 9 U.S. (5 Cranch) 57 (1809)).

71. 9 U.S. (5 Cranch) 61 (1809).

72. *Id.* at 88-89.

73. *Id.* at 86.

74. *Id.* at 87.

75. *Id.* at 88-90 (citations omitted).

76. *Id.* at 86-87 (emphasis added).

77. *Id.* at 91.

78. *Id.*

79. James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1427 (1964).

making up the corporation were the citizenships a federal court would ascertain and then review for complete diversity.[80]

This decision set up an uncertain future for "widely held corporations" because diversity jurisdiction could easily be destroyed by diasporous investors.[81] Dissatisfaction arose with the *Deveaux* rule for, when coupled with the complete diversity requirement, corporations had a back door out of federal court, by merely alleging the existence of an investor from the same state as the plaintiff.[82] One commentator noted that "almost all" of the diversity cases involving corporations were against the corporations, thus, this rule caused "great hardship and injustice" to individual plaintiffs.[83]

By the mid-nineteenth century, with these faults apparent and a burgeoning corporate populace,[84] the Supreme Court recognized that the judicial characterization of corporate citizenship needed change. In *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*,[85] the Court reversed its position and decided that a corporation was a "person."[86] The Court's analysis necessarily began with the statute that created the corporation, and, as the Court soon determined, also gave it personhood.[87] It was this statutory corporate birth, coupled with the simple fact that both corporations and persons could engage in lawful activities, such as contracting, bringing suit, and being sued, that led Justice James M. Wayne to hold:

> [A] corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, *capable of being treated as a citizen of that state, as much as a natural person*. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued.[88]

Thus, a corporation, by virtue of its artificial personhood and inhabitance of the state of its creation, was elevated from the depths of "mere legal entity"[89] to jurisdictional citizenship in its own right.[90]

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80. *Id.*
81. *Id.* at 1428.
82. Warren, *supra* note 69, at 667.
83. *Id.*
84. WRIGHT ET AL., *supra* note 41, § 3623, at 590.
85. 43 U.S. (2 How.) 497 (1844).
86. Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497, 555, 557 (1844).
87. *Id.* at 555.
88. *Id.* at 558 (emphasis added).
89. *Deveaux*, 9 U.S. (5 Cranch) at 86.
90. *Letson*, 43 U.S. (2 How.) at 558; *see* Moore & Weckstein, *supra* note 79, at 1428.

Nine years later the Court returned to the corporate citizen problem in *Marshall v. Baltimore & Ohio Railroad Co.*[91] There the Court set about to affirm the idea of diversity citizenship for corporations.[92] However, it employed a new methodology. Rather than treat the corporation as a citizen in its own right, by virtue of its birth by statute,[93] it engaged a "presumption" that its shareholders were citizens of the state of the corporation's charter.[94] Thus, a corporation need only aver that it was a corporation formed under the laws of its chartering state, and with the conclusive presumption as to the members' citizenships, the corporate entity was given its own citizenship.[95]

Justice Robert O. Grier began the Court's analysis with a reaffirmation of Chief Justice Marshall's reasoning, in *Deveaux*, that a corporation was a "mere legal entity."[96] The Court noted that this premise led to the logical inference that a corporation "cannot be a citizen."[97] However, while Justice Grier accepted the *Deveaux* entity characterization as "metaphysically true," he went on to note that corporations *do* engage in activities that may give rise to controversies.[98] The corporate activity that might result in controversy is not the result of second parties dealing with a "mere metaphysical abstraction."[99] Rather, the commercial transactions or tortious activities are the result of interaction between natural persons acting on behalf of the corporate creature, "as the legal representatives of numerous unknown associates, or secret and dormant partners," and the natural actors for the other parties.[100] Therefore, Justice Grier would not tolerate the destruction of the substantial right of individual citizens to bring diversity actions against a collection of individuals, joined together under "a factitious or collective name," based solely upon "a syllogism, or rather sophism, which deals subtly with words and names, without regard to the things or persons they are used to represent."[101] Hence, *citizen* must encompass more than natural personhood, and yet was inextricably linked to the concept of natural actors.

Justice Grier stated that the individual shareholders were represented by the corporate "juridical person," which acted through and by

91. 57 U.S. (16 How.) 314 (1853). The Court raised the issue *sua sponte*. *Id.* at 324.

92. *Id.* at 325. The Court was attempting to reconcile the dichotomous holdings in *Deveaux* and *Letson* without disturbing the decisions of the past decade made in reliance on *Letson*. *Id.* at 325-26.

93. *Letson*, 43 U.S. (2 How.) at 555; *see supra* notes 85-90 and accompanying text.

94. Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314, 328-29 (1853).

95. *Id.* at 328-29; Moore & Weckstein, *supra* notes 79, at 1428.

96. *Marshall*, 57 U.S. (16 How.) at 327.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 327-28.

its "representatives or curators."[102] Although the corporation, as a mere legal entity, could not stand before the Court, its natural person members could.[103] But to haul each natural person composing the corporation into court, to answer for the corporation, would be unduly burdensome to the judiciary and be disruptive to commerce.[104] Thus, the Court engaged in a fiction, it "presumed" that the members or shareholders composing the entity were citizens of the state of the corporation's charter.[105]

This fiction effected the goal of bringing the corporation before the federal court. This was possible because all the potentially nondiverse shareholders were conclusively presumed to be citizens of the same state as the corporation.[106] The only party that could forthwith be nondiverse, and upset diversity, would be an adverse party that was a citizen of the corporation's state of incorporation. The corporation lost its citizenship of right as *Letson* had held. In its place the Court created a legal fiction of a corporate citizenship, based upon its natural members' citizenships, with the further fiction of their citizenships being presumed to be that of the incorporating state. The clarity of *Letson* was replaced by the fiction of *Marshall*; however, taken together these decisions made corporations juridical entities, citizens of right, with the ability to stand before a federal court.

At the time *Marshall* was decided, corporations were not intended to be the beneficiaries of federal diversity jurisdiction citizenship.[107] Rather, the *Marshall* fiction was created to allow individuals to sue corporations, in federal courts, without undue hardship.[108] However, by the 1870s corporations were favoring the use of federal fora, particularly in removal actions.[109] Many were angered by corporations retreating from state fora in favor of the federal courts. Thus, a flurry of unsucessful legislation was introduced during the late 1800s and early

102. *Id.* at 328.

103. *See id.*

104. *See id.* "The individual or personal appearance of each and every corporator would not be a compliance with the exigency of the writ of summons or distringas. Though, nominally, they are not really parties to the suit or controversy." *Id.*

105. *Id.* "The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the State which is the necessary *habitat* of the corporation." *Id.*

106. It was the Court's intention to prevent corporations from appointing "director[s]" in "other States," where potential plaintiffs resided, in order to defeat diversity jurisdiction in potential suits arising from the corporations dealings within those states. *Id.*

107. Warren, *supra* note 69, at 670.

108. *Id.*

109. *Id.* at 672. Removal actions are cases initially brought to a state forum, a choice made by the the plaintiff, over which a federal court would have had cognizance, and that the defendant decides to remove to a federal court. CHEMERINSKY, *supra* note 4, § 5.5. Presently, statutory authority for removal cases involving diversity subject matter jurisdiction is found in 28 U.S.C. § 1441 (1988).

1900s, to deny corporations citizenship in diversity and removal cases, and thereby prevent their access to federal fora.[110] Problems continued to develop with corporate diversity citizenship. For example, many local businesses that were incorporated elsewhere were using the federal court located in the forum state to decide local disputes.[111] Congress finally acted and corrected this, and other problems, with the passage of the 1958 amendments to the Judicial Code of 1948, 28 U.S.C. § 1332.[112] The 1958 Act corrected this pernicious problem when it declared that a corporation would possess citizenship in both its state of incorporation and in the state of its principal place of business.[113] Thus, a corporation not chartered in the forum state, but with extensive business dealings there, was no longer able to exploit the use of the federal court within the forum state, because diversity no longer existed between the dual citizenship corporation and its local customers.

The *Marshall* rule was superseded by the 1958 Act, presently codified at 28 U.S.C. § 1332(c)(1),[114] in the respect that the act bestowed outright citizenship, without employing a fiction, on the corporation.[115] It must be noted, however, that the 1958 Act was intended to restrict diversity jurisdiction and reduce the docket load of the federal court system.[116] In those cases arising from local disputes, where a corporation had a principal place of business in one state and was incorporated in another state, the intended effect of the 1958 Act was to create a lack of diversity of citizenship. Although the 1958 Act effected a restriction on diversity jurisdiction, by giving the corporation a dual citizenship, it did not disturb the central judicial pronouncement of corporate entity citizenship in the *Marshall* and *Letson* decisions.[117] Those decisions, creating entity citizenship in the corporation, remain the conclusive rule today.[118]

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110. Warren, *supra* note 69, at 673-84; FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 89-93, 136-41 (Johnson Reprint Corp. 1972) (1928).

111. WRIGHT ET AL., *supra* note 41, § 3624.

112. Act of July 25, 1958, Pub. L. No. 85-554, sec. 2, § 1332, 72 Stat. 415, 415 (current version at 28 U.S.C. § 1332(c)(1) (1988), *see supra* note 8).

113. *Id.* "[A] corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." § 1332(c), 72 Stat. at 415 (current version at 28 U.S.C. § 1332(c)(1) (1988)).

114. 28 U.S.C. § 1332(c)(1) (1988); *see supra* note 8.

115. When debating § 1332(c), the Senate Judiciary Committee stated: "It is now an established doctrine that a corporation, for the purposes of jurisdiction, is deemed a citizen of the State in which it is incorporated." S. Rep. No. 1830, 85th Cong., 2d Sess. 5, *reprinted in* 1958 USCAAN 3099, 3101.

116. Moore & Weckstein, *supra* note 79, at 1431-32.

117. WRIGHT ET AL., *supra* note 41, § 3623, at 592.

118. *See, e.g.*, United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 148 (1965) ("a compromise destined to endure for over a century"); Thomas v. Board of Trustees, 195 U.S. 207, 210 (1904).

B. *Citizenship of Unincorporated Associations*

Having established the entity citizenship status of the corporation, the Supreme Court then focused its attention on the citizenship status of business entities collectively known as unincorporated associations, which include, among others, general partnerships.[119] Generally, these business organizations share the following characteristics: unified membership, no corporate-like statutory birth, and no limitations on liability for a certain segment of its membership.

The first opportunity the Court had to apply diversity to an unincorporated association came in *Chapman v. Barney*.[120] There the Court held that a joint stock company[121] was not a "citizen" of its state of origin, as it was not a corporation.[122] The issue of entity citizenship was raised *sua sponte*.[123] The action was brought in the name of Ashbel H. Barney, the president of The United States Express Company, a joint stock company.[124] The joint stock company had merely alleged it was created by and under the laws of New York, and that it could bring the cause of action in the name of its president.[125] This pleading of citizenship was unsatisfactory to the Court because it did not categori-

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119. Unincorporated associations are defined by the characteristic that they need no formal creation under state laws, as is the case for the formation of the general partnership. *See generally* SYDNEY R. WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS AND SIMILAR RELATIONS §§ 1-4 (1916).

120. 129 U.S. 677 (1889).

121. A joint stock company is created by agreement providing for centralized management and transferable shares. It does not give limited liability (except by agreement with creditors) and has therefore fallen into disuse. Although it is often spoken of as a partnership, it more closely resembles a corporation (except for liability), and is usually so taxed and regulated.

ALAN R. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP, § 34 (1968). Additionally, this unincorporated association has these further characteristics:

> [I]t has a capital stock contributed by its members . . . . Such shares commonly are transferable by the owner. . . . [It] is governed by articles of association . . . [which often] provide that its business shall be under the control of selected individuals who are called "managers" or "directors."

REUSCHLEIN & GREGORY, *supra* note 16, § 282, at 489-90.

122. *Chapman*, 129 U.S. at 682.

123. *Id.* at 681.

124. *Id.* at 679. The action was originally commenced by and in the name of The United States Express Company. *Id.* at 678. The court below allowed the plaintiff to amend its pleading as follows:

> Ashley H. Barney, president of the United States Express Company, a joint-stock company organized under and by virtue of a law of the state of New York, and which said company is authorized by the laws of the state of New York to maintain and bring suits, in the name of its president, for or on account of any right of action accruing to said company, and a citizen of the state of New York, the plaintiff in this suit . . . ."

Id. at 679.

125. *Id.* at 682.

cally state that the plaintiff was a corporation.[126] "In fact, the allegation is, that the company is *not* a corporation, but a joint-stock company—that is, a mere partnership."[127] The Court noted that New York law may permit the company to sue in the name of its president, but "that fact cannot give the company power, by that name, to sue in a [f]ederal court."[128] This seemed to establish a rule that diversity citizenship was not to be dependent upon state laws relating to an entity's ability to bring suit, i.e., its capacity to sue.

Eleven years later a different unincorporated entity came before the Court in *Great Southern Fire Proof Hotel Co. v. Jones*.[129] There, limited partnership associations,[130] which the Court characterized as "*quasi* corporation[s],"[131] were denied diversity citizenship akin to that of a corporation.[132] Justice John M. Harlan[133] distinguished the *Marshall* entity citizenship rule as applicable only to those groups that incorporated under statutes—that is, corporations.[134] In *Great Southern*, the entity involved was considered an unincorporated association.[135] The *Great Southern* Court looked to the decision in *Chapman* for precedent, and ruled that a limited partnership association, like a joint stock company, would be treated as a collection of individuals, each of whom's citizenship must be evaluated to apply the *Strawbridge* complete diversity rule.[136] Therefore, the *Great Southern* Court decided that the jurisdictional citizenship rule for corporations "must not be extended" to "embrace partnership associations."[137] The Court's "unwilling[ness] to extend" the rule was because the association was a mere congregation of natural persons, without those added characteristics that enabled the *Marshall* Court to fictionalize personhood for corporations.[138]

126. *Id.*
127. *Id.*
128. *Id.* The Court went on to note that where there was neither an affirmative allegation made that Barney, nor the other members of the joint stock company, were diverse from Chapman, diversity jurisdiction could not lie. *Id.* Diversity jurisdiction requires the plaintiff to make affirmative allegations of citizenship for the parties involved. *Id.*
129. 177 U.S. 449 (1900).
130. The limited partnership association was an anomaly of Pennsylvania law, as well as a few other states, in use from 1874 to 1966, and is still available to those professional associations unable to incorporate under the present laws of Pennsylvania. REUSCHLEIN & GREGORY, *supra* note 16, § 265, at 447 & n.4. This business entity has lost favor and has been replaced principally by the corporate and business trust models of business enterprise. *Id.* at 447.
131. Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 457 (1900).
132. *Id.* at 456-57.
133. The grandfather of the Warren Court era justice, John M. Harlan.
134. *See Great Southern*, 177 U.S. at 454, 457.
135. *Id.*
136. *Id.*
137. *Id.* at 457.
138. *See id.* at 457-58.

With the decisions in *Chapman* and *Great Southern*, the Court had crafted strict doctrines for association citizenship resulting in harsh decisions upon application of the *Strawbridge* test. By looking to the citizenship of all of the association's members, diversity would rarely be found, because these associations typically performed business of a specialized nature and in a limited region.[139]

With the one exception of the decision in *Puerto Rico v. Russell & Co.*,[140] to be discussed separately,[141] the strict interpretation of unincorporated association citizenship remained nearly inviolate for 65 years. In 1965, the Court was called upon to revisit these diversity rules in *United Steelworkers v. R.H. Bouligny, Inc.*[142] There the Court held that labor unions, unincorporated associations, were not to be accorded entity citizenship status. Thus, the Court required that the citizenship of all union members must be ascertained and considered in the diversity equation.[143] The *Bouligny* Court noted that unlike the rules for corporate citizenship, there were no practical means by which to determine a state of incorporation for a labor union.[144]

Justice Abe Fortas's analysis briefly reviewed diversity history and corporate diversity citizenship treatment,[145] but it returned to *Chapman* for controlling precedent.[146] The *Bouligny* Court distinguished *Russell*, the one decision extending corporate-like citizenship to a noncorporate entity, as a decision fitting the *sociedad en comandita*, an "exotic creation of the civil law" in Puerto Rico, "into a federal scheme which knew it not."[147] With those declarations, it dismissed any notion that *Russell* had "breached the doctrinal wall of *Chapman v. Barney*," and thus, found *Russell* was inapposite to the issue of union citizenship.[148] The *Bouligny* Court found appealing the idea of defining unions as entities, but declared that the precedent against expansion of diversity was too overwhelming, and left to Congress the fate of the future citizenship status of unions.[149]

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139. Early in the nineteenth century the dominant forms of business were local proprietorships and partnerships. *See* ROBERT C. CLARK, CORPORATE LAW § 1.1 (1986).

140. 288 U.S. 476 (1933).

141. *See infra* notes 169-210 and accompanying text.

142. 382 U.S. 145 (1965).

143. *See id.* at 147.

144. *Id.* at 152.

145. *Id.* at 147-48.

146. *Id.* at 149-50.

147. *Id.* at 151-52.

148. *Id.* The Court rejected petitioner's claim, and the reasoning of the the Second Circuit in a different case the previous year, that *Russell* had effectively done away with the *Chapman* principle. *Id.* at 151-52 & n.10; *see* Mason v. American Express Co., 334 F.2d 392, 397-99 (2d Cir. 1964). For a discussion of *Mason* see *infra* note 210.

149. United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 153 (1965).

The next notable decision came in the 1980 case of *Navarro Savings Ass'n v. Lee*.[150] In that case, an eight-to-one majority affirmed a Fifth Circuit decision[151] and held that, in a diversity action brought by eight individual trustees of an express business trust,[152] a court should look exclusively to the citizenship of the trustees to determine whether diversity of citizenship existed.[153] The defendant bank had argued successfully, in the district court, that a Massachusetts business trust, like any other unincorporated association, must have its citizenship determined by looking to the citizenships of all its members, that is, both the trustees and the beneficial shareholders.[154]

Justice Lewis F. Powell discerned that the business trust entity was not the party before the Court. Rather, the eight individual trustees were the named party plaintiffs, and it was their citizenships that would be determinative of whether diversity would lie.[155] Where the individual trustees brought the action on their own behalf, the Court did not employ the *Chapman* line of cases, because it was not the entity's citizenship that was at issue.[156] Thus, the only issue for the Court was whether or not the trustees were truly the real parties in interest to the dispute. The *Navarro* Court concluded that "these respondents are active trustees whose control over the assets . . . is real and substantial."[157]

The Court found that the trustees were the real parties in interest by applying the law of trusts. The Court noted that trust law instructs that the trustee and beneficiary have separate and distinct roles and responsibilities.[158] The trustees, as legal entities, substantially differ from the beneficiaries: "[t]hey have legal title; they manage the assets; they control the litigation. In short, they are the real parties to the controversy."[159] Because of these powers, the Court declared that the trustees were the real parties to the controversy, and as such were the

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150. 446 U.S. 458 (1980)

151. Lee v. Navarro Sav. Ass'n, 597 F.2d 421 (5th Cir. 1979), *aff'd*, 446 U.S. 458 (1980).

152. The business trust, or "Massachusetts Trust," is . . . [a]n unincorporated business organization created by an instrument by which property is to be held and managed by trustees for the benefit and profit of . . . the holders . . . [of] the beneficial interests of the trust estate.

REUSCHLEIN & GREGORY, *supra* note 16, § 288, at 494 (footnote omitted).

153. Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 465-66 (1980).

154. Lee v. Navarro Sav. Ass'n, 416 F. Supp. 1186, 1187-89 (N.D. Tex. 1976), *rev'd*, 597 F.2d 421 (5th Cir. 1979). The defendant was granted its motion to dismiss for lack of subject matter jurisdiction. *Id.* at 1191.

155. *Navarro*, 446 U.S. at 459-62.

156. *See id.* at 462 ("[T]his case involves neither an association nor a corporation."), *implicitly agreeing with*, *Lee*, 597 F.2d at 427.

157. *Navarro*, 446 U.S. at 465.

158. *Id.* at 462-65.

159. *Id.* at 465.

true and proper party-entities before the Court.[160] The trustees of an express trust had long had the ability to bring "diversity actions in their own names and upon the basis of their own citizenship."[161] Thus, the beneficial shareholders were not included in the diversity equation,[162] because "a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of the real parties to the controversy."[163]

Justice Blackmun's dissent criticized the Court for deviating from established unincorporated association precedent by "treat[ing business trusts] differently from other functionally analagous business associations—partnerships, limited partnerships, joint stock companies, and the like."[164] The *Navarro* dissent noted that by application of a real-party-in-interest test[165] "one cannot ignore the pervasive measure of control that [the trust's] shareholders possess over the trustees' actions taken in their behalf."[166] However, the dissent's principal criticism was of the majority's narrow and exclusive application of the real-

160. *See id.* at 464-65.

161. *Id.* at 462 (citing Chappedelaine v. Dechenaux, 8 U.S. (4 Cranch) 306, 308 (1808) (Marshall, C.J.)).

162. *Id.* at 465-66.

163. *Id.* at 461 (citing McNutt v. Bland, 43 U.S. (2 How.) 9, 14 (1844)).

164. *Id.* at 475 (Blackmun, J., dissenting).

165. The dissent stated that it preferred the "*approach*" of the Fifth Circuit, in Lee v. Navarro Savings Ass'n, 597 F.2d 421 (5th Cir. 1979), the case below, "to the simplistic approach the Court now adopts," even though both courts held that the citizenship of the trustees is determinative in diversity cases. *Navarro,* 466 U.S. at 475 (Blackmun, J., dissenting). The dissent noted that the Fifth Circuit had distinguished *Bouligny's* all-members rule as inapposite, because the business trust entity was not the party seeking diversity. *Id.* Additionally, the Fifth Circuit had adopted the view of a "law review commentary, that *Bouligny* did not decide *who* the relevant members are when a court determines the citizenship of an unincorporated association." *Id.* n.6 (citing Robert J. Kopecky, Comment, *Limited Partnerships and Federal Diversity Jurisdiction,* 45 U. CHI. L. REV. 384 (1978)). Justice Blackmun concluded that the Fifth Circuit's real-party-in-interest approach was "consistent with this Court's prior decisions." *Id.* at 475.

The dissent also noted the possible applicability of the real-party approach to determinations of citizenship for limited partnerships. Justice Blackman stated that the Second Circuit's decision in Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir. 1966), *cert. denied,* 385 U.S. 817 (1966), which held that "the citizenship of the general partners alone [was] determinative," in diversity cases involving limited partnerships, was neither supported nor overturned by the majority's opinion. *Navarro,* 446 U.S. at 475, n.6 (Blackmun, J., dissenting). "I read the Court's opinion in this case as expressing no view on the diversity of citizenship issue that is presented when one of the parties is a limited partnership." *Id.* However, it is reasonable to assume that the dissent favored a real-party-in-interest approach where a limited partner is involved in a diversity case brought by or against its limited partnership, from Justice Blackmun's comments in this case, and from the fact that he joined Justice O'Connor in the *Carden* dissent.

166. *Navarro,* 446 U.S. at 476 (Blackmun, J., dissenting).

party-in-interest test to the trustees of a business trust.[167] The dissent was particularly bothered by the Court's application of the real-party-in-interest test in this case, and yet had not employed it in similar cases dealing with a broad spectrum of unincorporated associations.[168]

C. *An Exception—The Citizenship of a* Sociedad en Comandita

It would appear that the corporate/noncorporate dichotomy developed in *Chapman* provided courts with a neat, bright-line citizenship rule for business entities. But the law of federal jurisdiction left a gap in the determination of citizenship for entities that were neither traditional unincorporated associations, such as limited partnership associations or joint stock companies, nor corporations. Thus, jurisdictional citizenship treatment of a hybrid entity was unsettled.[169]

The Supreme Court first tackled the issue of such a hybrid entity in *Puerto Rico v. Russell & Co.*[170] In *Russell* the Court held that a *sociedad en comandita*,[171] a business entity created under Puerto Rican law, and considered an unincorporated association, should be granted citizenship status like that of a corporation.[172] Puerto Rico's civil law traditionally gave to the *sociedad* the fiction of personhood or "juridical person" given corporations in the United States.[173] The *Russell* Court distinguished most unincorporated associations as being mere partnerships, as in *Great Southern*, and joint stock companies, as in *Chapman*, organizations run by and for the inurement of their members, and thus not sufficiently corporate-like to be entitled to juridical citizenship status.[174] The *sociedad*, on the other hand, was an organization set up and run like a corporation. Its characteristics, though not fully corporate, were corporate-like and thus totally dissimilar from those organizations in *Chap-*

167. *Id.* at 475-76 (Blackmun, J., dissenting).

168. *See id.* at 476-77 (Blackmun, J., dissenting); Richard J. Colella, Note, *The Citizenship of Limited Partnerships for Federal Diversity Jurisdiction*—New York State Teachers Retirement System v. Kalkus, 21 WAKE FOREST L. REV. 989, 998 & n.91 (1986).

169. The term *hybrid*, referring to entities that are neither corporation nor association, but a mixture of both, was coined to describe the limited partnership, but has equal applicability to the *sociedad*. *See* Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp., 797 F.2d 238, 240 (5th Cir. 1986).

170. 288 U.S. 476 (1933).

171. Essentially a Puerto Rican limited partnership. *See infra* notes 194-205 and accompanying text (discussing the business characteristics and juridical properties of this business organization).

172. Puerto Rico v. Russell & Co., 288 U.S. 476, 477-82 (1933).

173. *Id.* at 482. The term "juridical person" was used by the Court to reflect the metaphysical aspects of equating an intangible entity with a natural person for the purpose of extending diversity citizenship rights to a corporation, and then to a *sociedad en comandita*. *See id.* The Court's conclusion that a *sociedad* was a juridical entity was reached by examining the similarities between an American corporation and the *sociedad*. *Id.* at 481-82.

174. *Id.* at 482.

man and *Great Southern.*[175] Hence, *Russell* stood as an exception to the Court's restraint on extending the *Marshall* entity rule.

Russell involved a suit brought by the People of Puerto Rico against Russell & Co., Sucesores, S. en C., in the Insular District Court of San Juan, Puerto Rico, to collect irrigation tax assessments on the lands of Russell & Co.[176] Russell & Co. was a *sociedad en comandita* duly created under the laws of Puerto Rico.[177] The suit was brought against the *sociedad*, as a juridical entity, without naming its members as defendants,[178] much like a suit against an American corporation would be brought in any state or federal court.[179] However, the members of the *sociedad* "appeared specially" in the Insular Court, and successfully "removed the cause" to the United States District Court for the District of Puerto Rico.[180] The grounds alledged for removal were that the members of the *sociedad* were neither domiciliaries nor citizens of Puerto Rico, and this gave the federal court jurisdiction over the matter, essentially because they were diverse from the plaintiff Puerto Rico.[181] In the federal district court the *sociedad* successfully defended the ac-

175. *Id.* at 480-81.

176. *Id.* at 477.

177. *Id.*

178. *Id.*

179. See 28 U.S.C. § 1332(c)(1) (1988) for the citizenship test applied to corporations for purposes of determining whether a diversity suit, or a removal action under 28 U.S.C. § 1441 (1988), will lie.

180. *Russell*, 288 U.S. at 478.

181. *Id.* (citing Organic Act of Puerto Rico, ch. 145, § 41, 39 Stat. 951, 965-66 (1917)). The Court noted that the statute conferred upon the U.S. District Court of Puerto Rico:

> "jurisdiction of all cases cognizable in the district courts of the United States," and also "jurisdiction of all controversies where all of the parties on either side of the controversy are citizens of a foreign State or States, or citizens of a State, Territory or District of the United States not domiciled in Puerto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3,000."

Id. (quoting § 41, 39 Stat. at 965). This provision, coupled with the provision adopting federal removal laws, apparently made it permissible for the defendants to remove the case to federal court due either to their diverse citizenship or because the members of the *sociedad* were contemplated as "parties" under the act. *Id.* (citing Organic Act of Puerto Rico, ch. 145, §§ 41-42, 39 Stat. 951, 965-66 (1917)). The Organic Act allowed removal to federal court:

> "the laws of the United States relating to . . . removal of causes, and other matters or proceedings as between the courts of the United States and the courts of the several States, shall govern in such matters and proceedings as between the district court of the United States and the courts of Porto Rico . . . ."

Id. (quoting § 42, 39 Stat. at 966). The Court admitted that if the *sociedad* members were " 'parties' within the meaning of [§ 41 of] the Organic Act" then the district court had cognizance of the suit "because of their nonresidence," without reliance on diversity jurisdiction. *Id.*

tion.[182] The First Circuit Court of Appeals affirmed that decision, in *Porto Rico v. Havemeyer*.[183] The *Havemeyer* Court held that diversity jurisdiction attached in the case because none of the members of the *sociedad* were domiciliaries of Puerto Rico, and thus were all diverse from the party-plaintiff Puerto Rico.[184]

The Supreme Court agreed that removal of civil actions "begun in the Insular Court over which the federal court has original jurisdiction"[185] was contemplated by the Organic Act,[186] and effectuated in accordance with the removal statute codified in the Judicial Code of 1911.[187] However, the tougher issue before the Court was whether the *sociedad* or its members were the proper parties to the dispute, and which of the various natural and artificial entities' citizenships would control, either, in the diversity equation or the "parties" provision of the act.[188] Puerto Rico argued that the original suit was "not removable because of citizenship for the reason that the *sociedad* is a juridical entity under Puerto Rican law and, as in the case of a corporation, its domicile rather than that of its members determines citizenship for purposes of federal jurisdiction."[189]

Puerto Rico's argument unwittingly and succinctly laid out the prob-

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182. *Id.* at 477-78.

183. Porto Rico v. Havemeyer, 60 F.2d 10, 16 (1st Cir.), *rev'd sub nom.* Puerto Rico v. Russell, 288 U.S. 476 (1933).

184. In reaching its decision the *Havemeyer* Court relied upon the holding in Porto Rico v. Fortuna Estates, 279 F. 500 (1st Cir.), *cert. denied*, 259 U.S. 587 (1922) (incidentally the same parties):

> "where the jurisdiction of a federal court over a suit brought against a partnership depends upon diversity of citizenship, the question is to be determined by the citizenship of its members, whether under the law of the place of its origin it is regarded as an entity and may sue or be sued in its partnership name."

Havemeyer, 60 F.2d at 12 (quoting *Fortuna Estates*, 279 F. at 505). The court noted that the *Fortuna Estates* decision was supported by *Chapman* and *Great Southern*, among others. *Havemeyer*, 60 F.2d at 12-13. The *Havemeyer* Court further noted that the *Fortuna Estates* decision was upheld in Goico v. Russell & Co., 4 F.2d 7, 8 (1st Cir. 1925). The *Goico* court stated "[t]he defendant partners are domiciled in the United States and Great Britain. It is immaterial that under the law of Porto Rico the partnership is an entity referred to in the singular number. . . . [The] decisions are conclusive of the right of the defendant to remove." *Goico*, 4 F.2d at 8. Thus, the members seemed to have a reasonable claim that, under the *Chapman* line of precedent, a suit against the entity, where diversity or removal jurisdiction was alleged, would involve the citizenships of the *sociedad* members to determine the entity's citizenship.

185. *Russell*, 288 U.S. at 478.

186. *Id.* (citing Organic Act of Puerto Rico, ch. 145, § 42, 39 Stat. 951, 966 (1917)).

187. The removal statute of that era was 28 U.S.C. § 71 (1929).

188. *Russell*, 288 U.S. at 478-79 (citing Organic Act of Puerto Rico, ch. 145, § 41, 39 Stat. 951, 965-66 (1917)); *see supra* note 181.

189. *Russell*, 288 U.S. at 479.

lem for the *Russell* Court: two legal systems with very different approaches to business entity citizenship. The Supreme Court had its own precedent involving corporations and unincorporated associations in the United States.[190] The Court noted that "[t]he tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships."[191] But here the Court was faced with the laws of Puerto Rico, and a rich history of law from civil law nations, that regarded *sociedads* and like organizations as juridical entities.[192] The *Russell* Court stated, in unequivocal terms, that: "to call the *sociedad en comandita* a limited partnership in the common law sense, . . . is to invoke a false analogy. In the law of its creation the *sociedad* is consistently regarded as a juridical person."[193] At this point, the Court could simply have declared the *sociedad* was a juridical entity, thereby respecting its status under the civil code and putting to rest the jurisdictional issue. Rather, the Court felt compelled to embark upon an analysis of the *sociedad's* nature, by examining its essential characteristics, in an effort to determine what entity or juridical person a *sociedad* most closely resembled in federal jurisdictional law.

The *Russell* Court began its analysis with an examination of the corporation, an entity "composed of a plurality of individuals, themselves legal persons," which nonetheless is considered a fictional person because of its "complete legal personality."[194] The Court then looked to the characteristics of the *sociedad* that made it a juridical person, similar to a corporation.[195] The analysis of the *sociedad* began with its legal rights and obligations. "It may contract, own property and transact business, sue and be sued in its own name and right."[196] The *sociedad* is created by articles of association filed as public records.[197] The articles can provide a date of dissolution for the *sociedad* that "endures," until the prescribed time, despite the demise or withdrawal of its constituent members.[198] Management powers and authority to enter into legal

190. *Id.* at 479-80; *see supra* notes 67-139 and accompanying text.

191. *Russell*, 288 U.S. at 480 (citing *Chapman* and *Great Southern*); *see supra* notes 120-39 and accompanying text.

192. *Russell*, 288 U.S. at 480 & n.1., 481-82.

193. *Id.* at 480-81. It would appear the common-law type, limited partnership the Court was referring to was, in fact, the limited partnership association the Court reviewed in *Great Southern*. *See id.*

194. *Id.* at 479-80. The Court cited the leading cases in this area, and noted that the corporate personality "is a fiction created by law with intent that it should be acted on as if true." *Id.* at 480 (citing Klein v. Board of Supervisors, 282 U.S. 19, 24 (1930)).

195. *Id.* at 481-82.

196. *Id.* at 481 (citing CIVIL CODE OF PORTO RICO §§ 27-30 (1930); CODE OF COMMERCE OF PUERTO RICO §§ 95, 97, 123, 124 (1932)).

197. *Id.* (citing CIVIL CODE OF PORTO RICO §§ 1558, 1560 (1930); CODE OF COMMERCE OF PUERTO RICO §§ 95, 98 (1932)).

198. *Id.* (citing CIVIL CODE OF PORTO RICO §§ 1591, 1596, 1598 (1930); CODE OF COMMERCE OF PUERTO RICO § 141 (1932)).

agreements binding the *sociedad* "may be vested in managers designated by the articles from among the members whose participation is unlimited."[199]

The Court further explored the *sociedad's* nature by examining the responsibilities, liabilities, and rights of its constituent members.[200] The members were not considered to be real parties to the controversy in actions against the *sociedad*, and thus could not "intervene as parties defendant."[201] Members of the *sociedad* have a personal property stake in the association, as one would have in a corporate stock, and are in the first instance insulated from judgments on debts and acts of the entity.[202] Creditors of the entity have priority to the entity's assets and property above that of the "creditors of the individual members, although the latter may reach the interests of the individual members in the common capital."[203] The general partners, i.e., "the members whose participation is unlimited," are "contingently liable" for the entity's debts when "its assets are insufficient to satisfy them."[204] However, the Court characterized this contingent liability as insignificant, and noted that some states had made corporate shareholders similarly liable.[205] Having examined these characteristics created by the Puerto Rican Codes and decisions of the Insular Courts the *Russell* Court held: "That the personality is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a different status for purposes of federal jursidiction than a corporation organized under that law."[206] Thus, the Court would not allow the individual members of the *sociedad*, or for that matter a Puerto Rican corporation, to remove a case to federal court that had been brought against the entity, because the entity was a complete and distinct legal personality competent to stand before the bar.[207]

Justice Stone had created a brilliant analytical construct to determine a business entity's essential nature and capacity for juridical citizenship. There were contemporary predictions that the Court's holding had signalled the death knell for the *Chapman* corporate/

199. *Id.* (citing CIVIL CODE OF PORTO RICO §§ 1583, 1589 (1930); CODE OF COMMERCE OF PUERTO RICO §§ 102, 106, 125 (1932)).

200. *Id.*

201. *See id.* (citing People v. Zayas, 29 P.R.R. 423, 430 (1921)).

202. *Id.* (citing CODE OF COMMERCE OF PUERTO RICO § 156 (1932)).

203. *Id.* (citing CIVIL CODE OF PORTO RICO § 1590 (1930); *see* Quintana Bros. v. S. Ramírez & Co., 22 P.R.R. 707, 716 (1932) (assets and property of the entity do not transfer to the members until dissolution)).

204. *Id.* (citing CODE OF COMMERCE OF PUERTO RICO §§ 125, 156 (1932); *see* Successors of M. Lamadrid & Co. v. Torrens, Martorell & Co., 28 P.R.R. 824 (1920)).

205. *Id.*

206. *Id.* at 482.

207. *Id.*

noncorporate test.[208] Unfortunately, the Court's decision in *Bouligny*[209] forestalled any extension of the *Russell* methodology to other unincorporated associations.[210]

IV. PROCEDURAL HISTORY OF THE *CARDEN* DISPUTE

On May 23, 1985, plaintiff Arkoma Associates (hereinafter Arkoma), filed a complaint in the United States District Court for the Eastern District of Louisiana against defendants C. Tom Carden (herinafter Carden) and Leonard L. Limes (hereinafter Limes), as guarantors of an equipment lease.[211] Carden and Limes were residents of the State of Louisiana.[212] Arkoma was a limited partnership duly certified under the laws of the State of Arizona.[213] Arkoma alleged federal subject matter jurisdiction under 28 U.S.C. § 1332(a), the diversity statute.[214]

Arkoma executed an equipment lease agreement with Magee Drilling Company, Inc. (hereinafter MDC), on June 27, 1984, contracting to

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208. Recent Decision, 33 COLUM. L. REV. 540, 541 (1933); Recent Case, 47 HARV. L. REV. 135, 136 (1933).

> The present case thus appears to represent not merely the overruling of a long course of decision in the lower federal courts but carries with it the germ of the overturn of basic Supreme Court doctrine. . . . Attempt to confine the instant holding to civil law companies would involve the acknowledgement of greater respect for foreign law than for the law of the union, a distinction which, in the extremely rare instances in which it has been recognized, has been taken the other way.

Recent Decision, *supra*, at 541 (footnotes omitted).

209. United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 151-52 & n.10 (1965); *see supra* notes 147-49 and accompanying text.

210. Prior to the decision in *Bouligny*, the Second Circuit, in Mason v. American Express Co., 334 F.2d 392 (2d Cir. 1964), argued that the *Russell* holding meant that the *Chapman* principle had been abandoned. *Id.* at 397-99. In discussing the *Russell* analytical construct the Second Circuit stated:

> This systematic appraisal of an organization's essential features under the law of its creation, in order to determine whether these features entitled it to the same treatment as a juridical person for diversity purposes as that accorded a corporation, must be regarded as representing a clear departure from *Chapman v. Barney's* basic assumption that only corporations were entitled to treatment as separate citizens for diversity purposes, and a departure from that cases's consequent mechanical determination of the issue of capacity for citizenship on the basis of whether a state had or had not pinned on an organization the corporate label.

Id. at 397-98.

211. Joint Appendix at 1, 14, Carden v. Arkoma Assocs., 494 U.S. 185 (1990) (No. 88-1476).

212. *Carden*, 494 U.S. at 186.

213. *Id.* The relevant statute certifying Arkoma as a limited partnership was Arizona Revised Statute § 29-302A (1980), it was later recodified at Arizona Revised Statutes Annotated § 29-308 (1989). See *infra* notes 233, 237 and accompanying text for a discussion of the application of this statute to Arkoma.

214. *Carden*, 494 U.S. at 186. For the text of 28 U.S.C. § 1332(a) see *supra* note 8.

lease MDC two oil drilling rigs.[215] Defendants Carden and Limes, along with Don Magee, MDC's president, executed personal guarantees for MDC's lease obligations in favor of Arkoma.[216]

After MDC employees had inspected the equipment, and it was subsequently shipped to MDC's site in Texas, it was discovered there were "damaged and missing parts" as well as the "wrong drill pipe."[217] The parties amended the lease and credited MDC's obligation on the lease.[218] MDC operated the rigs for five months and drilled 19 wells.[219] Soon thereafter, a dispute arose when MDC asserted the rigs were defective and incapable of drilling to the desired depth of 7,500 feet.[220] MDC charged Arkoma with knowledge both of the defects and of the incapacity of the rig to operate to MDC's requirements.[221] Arkoma countered that there was no indication that the rigs were either defective or ineffective.[222] Finally, five months and 19 wells after executing the lease, MDC notified Arkoma it was unable to meet its obligations under the lease.[223] Thereupon, in mid-January 1985, MDC tendered back the equipment to Arkoma.[224] Without waiving its rights, against the other parties to the lease, Arkoma took possession of the equipment to safeguard it.[225] MDC failed to make the quarterly rental payment due in February 1985.[226] Arkoma notified Carden and Limes of a default in MDC's lease payments, accelerated the rent, and demanded payment from them as guarantors.[227]

Carden and Limes failed to cure the alleged default, so Arkoma, by and through general partner David A. Hepburn, instituted the above action against the defendants[228] demanding $560,000 in damages.[229] The defendants denied the allegations and filed a counterclaim with

215. Arkoma Assocs. v. Carden, 874 F.2d 226, 228 (5th Cir. 1988).
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. Joint Appendix at 15, *Carden* (No. 88-1476); *see Arkoma*, 874 F.2d at 228.
227. *Arkoma*, 874 F.2d at 228; *see* Joint Appendix at 15, *Carden* (No. 88-1476).
228. *Arkoma*, 874 F.2d at 228; Joint Appendix at 14, *Carden* (No. 88-1476). There is no indication in the record why fellow guarantor Don Magee, a Texas citizen, was not sued by Arkoma. *Arkoma*, 874 F.2d at 228 n.1; *see generally* Joint Appendix at 1-13, *Carden* (No. 88-1476).
229. Joint Appendix at 16, *Carden* (No. 88-1476). The alleged damages consisted of: $432,000 in accelerated rent; $63,000 for drill pipe and equipment replacement; $10,000 estimate for storage charges; $50,000 estimate for attorneys fees; and $5,000 estimate for costs. *Id.*

their answer.[230] The counterclaim charged, inter alia, "intent to defraud," and defendants demanded judgment of $999,272.[231] Carden and Limes moved for dismissal due to lack of subject matter jurisdiction.[232] They contended that the district court lacked jurisdiction based on two arguments. First, Arkoma was a "general partnership rather than a limited partnership," due to its failure to comply with the Arizona limited partnership statutes.[233] And, under the *Great Southern* rule,[234] because one of Arkoma's "partners" was a Louisiana citizen, as were Carden and Limes, there was no diversity of citizenship between the plaintiff and defendants.[235] Second, even if Arkoma was a limited partnership, diversity jurisdiction required looking at the citizenships of both general and limited partners.[236]

The district court denied the motion for dismissal, holding that Arkoma's perceived irregularities in its creation were not fatal to its continued existence as a limited partnership.[237] Further, the court held that *Lee v. Navarro Savings & Loan Ass'n*[238] was controlling on the issue of what partners are included in the diversity equation.[239] Thus, the court held that the limited partner's citizenship was of no consequence and diversity jurisdiction did attach.[240] However, the court certified the defendants' questions for interlocutory appeal.[241] The United

230. Joint Appendix at 18-22, *Carden* (No. 88-1476).

231. *Id.* at 21-22. The defendants alleged MDC incurred a business loss of $676,172, in 1984, that continued to grow in 1985, causing Carden and Limes to lose their investments, and ultimately requiring exercise of their guarantees. *Id.*

232. *Arkoma*, 874 F.2d at 228; Joint Appendix at 58, *Carden* (No. 88-1476).

233. Joint Appendix at 59-60, *Carden* (No. 88-1476) (citing AZ. REV. STAT. ANN. § 29-302A(1)(d) (recodified at AZ. REV. STAT. ANN. § 29-308(a)(4) (1989))). Arkoma apparently failed to list the names and addresses of each of its limited partners on the original limited partnership certificate. *Id.* at 60 & n.2.

234. *See supra* notes 129-139 and accompanying text.

235. Joint Appendix at 59, *Carden* (No. 88-1476). The "partner" involved was in fact a limited partner. *Id.* at 60 n.1.

236. *Id.* at 61.

237. *Id.* at 60-61. The court stated that it "finds that the Plaintiff in good faith, substantially complied with the provisions of the statute and therefore is a valid limited partnership under Arizona law." *Id.* (citing AZ. REV. STAT. ANN. § 29-302B (recodified at AZ. REV. STAT. ANN. § 29-308(b) (1989))).

238. 597 F.2d 421 (5th Cir. 1979).

239. Joint Appendix at 61-62, *Carden* (No. 88-1476). The court noted that *Lee* "indirectly addressed" the issue as to the effect of the citizenship of limited partners in the diversity analysis. *Id.* at 61. Further, the court stated that the Supreme Court's decision in Navarro Savings & Loan Ass'n v. Lee, 446 U.S. 458 (1980), *see supra* notes 150-68 and accompanying text, did not reject the Fifth Circuit's analysis as to limited partners. Joint Appendix at 62 & n.4, *Carden* (No. 88-1476).

240. Joint Appendix at 61-62, *Carden* (No. 88-1476).

241. *Id.* at 62-63. Judge A.J. McNamara stated that:

> because I find that my order denying Defendants' Motion to Dismiss involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court

States Court of Appeals for the Fifth Circuit, citing its own precedent, denied the defendants' interlocutory appeal.[242] Having failed to get interlocutory relief from the Court of Appeals, the defendants petitioned the Supreme Court for a Writ of Certiorari. The Supreme Court denied the petition.[243] With all appeals having failed, the case proceeded in the district court. MDC was allowed to intervene and file a counterclaim, which, along with the amended counterclaims of Carden and Limes, charged Arkoma with fraudulent acts under Texas law.[244]

Following a trial on the merits in the district court, Arkoma was awarded $467,806.25 in damages, on September 17, 1987.[245] Additionally, the counterclaims of Carden, Limes, and MDC were dimissed with prejudice, at their cost, as was MDC's intervention.[246] Carden, Limes, and MDC appealed the district court decision to the United States Court of Appeals for the Fifth Circuit.[247] The appeal was based upon the jurisdictional issues raised in the motion to dismiss for lack of subject matter jurisdiction as well as some commercial law and fraud issues.[248] The Fifth Circuit affirmed the district court on all counts.[249]

On the request of petitioners, Carden and Limes, the United States Supreme Court granted certiorari to review the denial of defendant's motion to dismiss for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).[250] The questions presented to the Court for review were: (1) whether the Fifth Circuit's decision in *Arkoma* was in conflict with *Navarro*; (2) whether the citizenship of the limited partners of a limited partnership are relevant to a determination of diversity jurisdiction; and, (3) whether diversity jurisdiction exists when the citzen-

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hereby certifies this matter for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b).

Id.

242. *Id.* at 64-65. The Fifth Circuit citing Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp., 797 F.2d 238 (5th Cir. 1986), *see supra* note 20, as the controlling precedent, held that limited partners were not to be included in the diversity equation. The court of appeals, obviously realizing the importance of the matter, had held Carden's and Limes's motion in abeyance until it had rendered a decision in *Mesa*. Joint Appendix at 64, *Carden* (No. 88-1476).

243. Carden v. Arkoma Assocs., 479 U.S. 1035 (1987).

244. Joint Appendix at 5, 35 *Carden* (No. 88-1476). Initially, MDC's motion was denied by a magistrate. *Id.* at 3.

245. Petition for Writ of Certiorari at C-2, *Carden* (No. 88-1476).

246. *Id.*

247. Arkoma Assocs. v. Carden, 874 F.2d 226 (5th Cir. 1988).

248. *Id.* at 228-30. The appellants charged the district court with the following additional alleged errors in its findings of facts and conclusions of law: (1) that Texas law allowed Arkoma the dual remedies of both repossession of the equipment, and acceleration of rental payments; (2) that Arkoma did not act fraudulently, under Texas common law; and (3) that Arkoma did not act fraudulently, under the Texas Deceptive Trade Practices Act. *Id.* at 229-30.

249. *Id.* at 229-30.

250. Petition for Writ of Certiorari at 1-2, *Carden* (No. 88-1476).

ship of a limited partner is the same as that of the defendant.[251]

V. The Majority Opinion

In a five-to-four decision, Justice Antonin Scalia, writing for the majority,[252] held that, for federal diversity jurisdiction to lie, the citizenship of both limited and general partners of a limited partnership must be diverse from the citizenships of the parties on the opposite side of the lawsuit.[253]

In its opinion, the majority identified three main issues. First, does a limited partnership, of its "own right," enjoy citizenship in its state of organization for purposes of the diversity statute?[254] Second, may a federal court look only to the citizenship of the general partners in a limited partnership—essentially employing a real party to the controversy test—in diversity disputes?[255] Third, is it proper for the Supreme Court to give artificial entities citizenship status akin to that of corporations, or is this a policy decision best left to Congress?[256]

A. *Is a Limited Partnership a Citizen in Its Own Right?*

The Court began the diversity jurisdiction analysis by addressing the first issue: whether a limited partnership is a citizen in its own right, by virtue of the state laws bringing about its existence.[257] Justice Scalia stated that the diversity statute, 28 U.S.C. § 1332(a),[258] requires " 'complete diversity' of citizenship" under the doctrine established in *Strawbridge v. Curtiss*.[259] The Court was compelled by the requirements of the diversity statute and the *Strawbridge* complete diversity mandate, to determine whether the limited partnership entity that had brought

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251. *Id.* at i.

252. Chief Justice Rehnquist and Justices White, Stevens, and Kennedy joined in the opinion of the Court. Carden v. Arkoma Assocs., 494 U.S. 185, 186 (1990). Justice O'Connor filed a dissenting opinion in which Justices Brennan, Marshall, and Blackmun joined. *Id.* at 198 (O'Connor, J., dissenting).

253. *See id.* at 195-96.

254. *Id.* at 187-92.

255. *Id.* at 187, 192-96.

256. *Id.* at 196-97. A fourth nondispositive issue addressed by the Court was raised by respondent Arkoma's request that the Court affirm the judgment against intervenor MDC, because "complete diversity indisputably exists between Magee and Arkoma." *Id.* at 197 (citing Brief for Respondent at 37, *Carden* (No. 88-1476)). "Federal courts have long held that an intervention will be treated as a separate action if it is permissive and there is an independent basis for jurisdiction of the intervenor's claim." Brief for Respondent at 38, *Carden* (No. 88-1476). The Court chose not to decide the issue, because it had not been addressed by the court of appeals, and remanded the issue to the Fifth Circuit. *Carden*, 494 U.S. at 197.

257. *Carden*, 494 U.S. at 187.

258. See *supra* note 8 for the text of the statute.

259. *Carden*, 494 U.S. at 197 (citing Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806)).

suit, Arkoma Associates, "may be considered a 'citizen' of the State under whose laws it was created."[260]

The Court embarked upon an entity analysis to determine the limited partnership's citizenship in diversity matters. It began this analysis by stating that a "corporation is the paradigmatic artificial 'person.' "[261] The Court summarized the precedent that led to the corporation's evolution toward entity citizenship, analagous to that of a natural person, for purposes of federal diversity jurisdiction.[262] In *Bank of the United States v. Deveaux*,[263] the Supreme Court originally held that a corporation " 'is certainly not a citizen.' "[264] This holding necessitated the affirmative pleading of the citizenships of all the corporation's members to determine the diversity citizenship of the entity.[265] The *Deveaux* rule was overturned in *Louisville, Cincinnati, & Charleston Railroad v. Letson*.[266] The *Letson* Court "held that a corporation is 'capable of being treated as a citizen of [the State which created it], as much as a natural person.' "[267] Justice Scalia went on to explain that this rule was "reaffirmed," in *Marshall v. Baltimore & Ohio Railroad*,[268] on a "somewhat different theory that 'those who use the corporate name, and exercise the faculties conferred by it,' should be presumed conclusively to be citizens of the corporation's State of incorporation."[269] These three cases "firmly established" corporations as citizens.[270]

The analysis then shifted to the citizenship of noncorporate entities.

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260. *Id.* This simple statement regarding the essential nature of the party that brought the action in the district court caused an acrimonious debate to ensue between the majority and the dissent. *See id.* n.1 (Scalia, J.); *id.* at 198-99 (O'Connor, J., dissenting). Justice Scalia charged that the dissent had entirely ignored the fundamental question posed in the case: whether a limited partnership had entity citizenship in its own right. *Id.* at 197 n.1. Rather than answer that question, he charged that the dissent had assumed Arkoma Associates was a citizen. *Id.* By this "fallacy" the dissent went on to the wholly unrelated issue of who among the parties before the Court were necessary to the litigation and ought to be included in a determination of diversity of citizenship. *Id.* In Justice Scalia's view there was but one party-plaintiff before the Court, Arkoma Associates, and its citizenship, however ascertained, was determinative in the diversity equation. *Id.* Thus, Justice Scalia argued that whether individuals making up the limited partnership were not parties to the controversy is irrelevant to the diversity equation, because they are not before the Court as parties, rather the entity is the party-plaintiff to the controversy. *Id.*

261. *Id.* at 187-88.

262. *Id.* at 188.

263. 9 U.S. (5 Cranch) 61 (1809).

264. *Carden*, 494 U.S. at 188 (quoting *Deveaux*, 9 U.S. (5 Cranch) at 89).

265. *Id.* (citing *Deveaux*, 9 U.S. (5 Cranch) at 91-92).

266. 43 U.S. (2 How.) 497 (1844).

267. *Carden*, 494 U.S. at 188 (alteration in original) (quoting *Letson*, 43 U.S. (2 How.) at 558).

268. 57 U.S. (16 How.) 314 (1853).

269. *Carden*, 494 U.S. at 188 (quoting *Marshall*, 57 U.S. (16 How.) at 329).

270. *Id.* at 189.

By Justice Scalia's reasoning, the Supreme Court through most of its history had "firmly resisted extending that treatment [of corporations] to other entities."[271] Three cases were reviewed to support this contention. In *Chapman v. Barney*,[272] diversity jurisdiction was found wanting, because entity citizenship had never been accorded to "an unincorporated 'joint stock company.' "[273] The *Chapman* Court held that the United States Express Company, a joint stock company, " 'cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation.' "[274] Eleven years later, in *Great Southern Fire Proof Hotel Co. v. Jones*,[275] the Court was presented with another unincorporated association seeking diversity citizenship. There the Court held that a " 'limited partnership association,' "[276] although similar in many respects to a corporation, "and deemed a 'citizen' by the law creating it," was not a corporate citizen.[277] Lastly, in *United Steelworkers v. R.H. Bouligny, Inc.*,[278] a case involving the citizenship status of a labor union, the Court "reiterated that 'the doctrinal wall of *Chapman v. Barney*' would not be breached."[279] Thus, even "[a]s recently as 1965," the Court was unwilling to fashion entity status for an unincorporated labor union.[280]

The Court was forced to wrestle with "[t]he one exception to the admirable consistency of our jurisprudence on this matter,"[281] *Puerto Rico v. Russell & Co.*[282] The *Russell* Court held that a *sociedad en comandita* was a juridical entity and thus could assert its own citizenship.[283] The *Russell* Court equated the *sociedad*'s "juridical personality" to that of a corporation.[284] Arkoma "fairly" argued that many of the same factors the Court looked to in determining the outcome in *Russell* were present in the instant case.[285] Arkoma took this as an indication that the Court was willing to pierce the simple "incorporated/unincorporated dichot-

271. *Id.*
272. 129 U.S. 677 (1889).
273. *Carden*, 494 U.S. at 189 (citing *Chapman*, 129 U.S. at 682).
274. *Id.* (quoting *Chapman*, 129 U.S. at 682).
275. 177 U.S. 449 (1900).
276. This form of business enterprise was *limited* only in the respect that no one partner owned 100% of the stock. This was essentially a statutory general partnership; not a limited partnership in today's sense, with two types of members, limited and general partners, and with the shield from liability enjoyed by the limited partners. *See supra* notes 129-39 and accompanying text.
277. *Carden*, 494 U.S. at 189 (quoting *Great Southern*, 177 U.S. at 456).
278. 382 U.S. 145 (1965).
279. *Carden*, 494 U.S. at 189 (citation omitted) (quoting *Bouligny*, 382 U.S. at 151).
280. *Id.*
281. *Id.*
282. 288 U.S. 476 (1933).
283. *Carden*, 494 U.S. at 189-90.
284. *Id.* at 190.
285. *Id.* (citing Brief of Respondent at 14, *Carden* (No. 88-1476)).

omy" test developed in the late nineteenth and early twentieth centuries.[286] However, the *Carden* Court stated that the same argument was made in *Bouligny* and was forthrightly rejected.[287]

The Court also rejected Arkoma's claim that *Navarro Savings Ass'n v. Lee*,[288] wherein the Court employed a real party to the controversy test to the trustees of a business trust, lended credibility to the argument that a limited partnership is an entity, by way of the same analysis.[289] The *Carden* Court noted that, in *Navarro,* the parties at issue were the trustees of a Massachusetts business trust and not the trust itself.[290] Thus, because real persons were the parties before the Court, the Court was forced to discern whether they were the proper parties to the suit, i.e., real parties to the controversy.[291] The analysis in *Navarro* included an examination of the business trust's characteristics for the exclusive "purpose of establishing that the respondents were 'active trustees whose control over the assets held in their names is real and substantial.' "[292] Justice Scalia argued that the entity characteristics were never examined with the intent of bestowing citizenship on the trust.[293] Hence, arguments that the Court should likewise engage in an examination of the "business reality" of an artificial entity, to determine its citizenship, are "to put it mildly, less than compelling."[294]

Having distinguished the anomalies of *Russell* and *Navarro*, Justice Scalia summed up the entity discussion, in an unequivocal fashion:

> There could be no doubt, after *Bouligny*, that at least common-law entities (and likely all entities beyond the Puerto Rican *sociedad en comandita*) would be treated for purposes of the diversity statute pursuant to what *Russell* called "[t]he tradition of the common law," which is "to treat as legal persons only incorporated groups and to assimilate all others to

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286. *Id.* (quoting Brief of Respondent at 14, *Carden* (No. 88-1476)).

287. *Id.*

> The problem with this argument lies not in its logic, but in the fact that the approach it espouses was proposed and specifically rejected in *Bouligny*. There, in reaffirming "the doctrinal wall of *Chapman v. Barney*," we explained *Russell*, as a case resolving the distinctive problem "of fitting an exotic creation of the civil law . . . into a federal scheme which knew it not."

Id. (ellipsis in original) (citing *Bouligny*, 382 U.S. at 151).

288. 446 U.S. 458 (1980).

289. *Carden*, 494 U.S. at 191-92.

290. *Id.* at 191.

291. *Id.*

292. *Id.* (quoting *Navarro*, 446 U.S. at 465-66). Once the *Navarro* Court found the trustees to be in active control of the business trust, they would be brought in "under the rule, 'more than 150 years' old, which permits such trustees 'to sue in their own right, without regard to the citizenship of the trust beneficiaries.' " *Id.* (quoting *Navarro*, 446 U.S. at 465-66).

293. *Id.*

294. *Id.* at 192.

partnerships."[295]

Thus, the *Carden* Court determined that a limited partnership, a noncorporate entity, had no citizenship in its own right.

B. *Real Party to the Controversy Issue*

Having determined that limited partnerships were not juridical entities with concomitant citizenship, the Court proceeded to the second query: whether a federal court may look only to the citizenship of the general partners in a limited partnership to determine the citizenship of this type of unincorporated association.[296] Arkoma advocated this approach,[297] essentially employing the real party to the controversy test as exposited in *Navarro Savings Ass'n v. Lee*.[298] The Fifth Circuit had extended the analysis to limited partnerships to determine who among the several members composing the limited partnership were in control of the enterprise.[299] Once the circuit court determined the parties controlling the entity, the court would exclusively apply their citizenships to the diversity equation.[300]

Justice Scalia, in reference to the real party to the controversy test, and Arkoma's assertions that it ought to be extended to limited partnerships, categorically stated:

> We have never held that an artificial entity, suing or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members. No doubt some members of the joint stock company in *Chapman*, the labor union in *Bouligny*, and the limited partnership association in *Great Southern* exercised greater control over their respective entities than other members. But such considerations have played no part in our decisions.[301]

The Court concluded that Arkoma's argument might be true, that "[o]nly the general partners . . . 'manage the assets, control the litigation, and bear the risk of liability for the limited partnership's debts,' "[302] resulting in their " 'exclusive and complete management and control of the operations of the partnership.' "[303] However, notwithstanding the logic of the analysis, and its similarity to that undertaken in *Navarro,* it was innappropriate to the determination of the

295. *Id.* at 190 (quoting *Russell*, 288 U.S. at 480).

296. *Id.* at 192-96.

297. Brief of Respondent at 34-37, *Carden* (No. 88-1476); *see id.* at 25-32.

298. 446 U.S. 458 (1980).

299. Mesa Operating Ltd. Partnership v. Louisiana Gas Corp., 797 F.2d 238 (5th Cir. 1986).

300. *Id.* at 241-42.

301. *Carden*, 494 U.S. at 192.

302. *Id.* (citing Brief of Respondent at 30, *Carden* (No. 88-1476)).

303. *Id.* (citing Brief of Respondent at 36, *Carden* (No. 88-1476) (citing Limited Partnership Agreement of Arkoma Associates, art. 6.1)).

citizenship of a limited partnership.[304] *Navarro* was inapposite, because it did not deal with a suit by the business trust entity, rather it was a suit by the eight individual trustees of the Massachusetts business trust.[305] The trustees were indeed the real parties to the controversy, not the beneficiaries of the business trust, because trustees have their own legal right to litigate a claim involving the trust.[306] The *Navarro* Court's inquiry into the characteristics of the Massachusetts business trust, was to facilitate a determination of whether the trustees were in active control of the business trust.[307] That was the critical issue in determining whether the trustees had the power to sue in their own right.[308]

Having distinguished *Navarro*, the *Carden* Court attacked the dissent's grafting of the real-party analysis to the determination of an entity's citizenship.[309] The Court stated there was no authority upon which to base such a determination.[310] Furthermore, the dissent's attempt to argue the real-party test relied exclusively upon "scholarly commentary," regarding the general characteristics of the business associations and powers of their respective members, involved in *Chapman* and *Great Southern*, and its own observations of the management powers of the union members in *Bouligny*, without any such characterizations being made in the cases themselves.[311]

Justice Scalia concluded this discussion by rejecting any citizenship analysis of an artificial entity that looked to "less than all the entity's members."[312] Thus, the Court upheld its "oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all the members,' *Chapman*, 'the several persons composing such association,' *Great Southern*, [and] 'each of its members,' *Bouligny*."[313]

C. *Congress Should Determine the Status Of Artificial Entities*

The *Carden* Court acknowledged that its decision "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization."[314] Further, it admitted, that "Arkoma is undoubtedly correct

304. *Id.* at 192-93.
305. *Id.* at 191.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at 193.
310. *Id.* at 195.
311. *Id.* at 194-95. Justice Scalia stated "it is inconceivable that the existence of equivalency [of members' powers], *or at least the absence of any reason to suspect nonequivalency*, would not have been mentioned in the opinions." *Id.* at 195.
312. *Id.* at 195.
313. *Id.* at 195-96 (citations omitted).
314. *Id.* at 196.

that limited partnerships are functionally similar to 'other types of organizations that have access to federal courts,' and is perhaps correct that '[c]onsiderations of basic fairness and substance over form require that limited partnerships receive similar treatment.' "[315] However, the Court noted that similar meritorious arguments had been offered in *Bouligny* and forthrightly rejected.[316] This was not due to the caliber of the arguments, but rather to the Court's concerns regarding extension of diversity jurisdiction to hitherto unknown parties.[317]

Since the decision in *Letson*, the Court has deferred entity citizenship questions to Congress, which responded with the corporate citizenship rules now codified at 28 U.S.C. § 1332(c).[318] The Court did not believe Congress overlooked other artificial entities, but rather made a conscious decision not to extend citizenship to them.[319] Therefore, with the possibility that the states would continue to create new forms of business entities, the Court made a policy judgment to limit entity citizenship to the corporation, in the absence of contrary legislation.[320] The Court was less concerned with "accomodating diversity jurisdiction to the changing realities of commercial organization," than respecting the legislature's deliberative abilities to access the needs of federal jurisdiction.[321] Thus, like the Third Circuit in *Carlsberg Resources Corp v. Cambria Savings & Loan Ass'n*,[322] the concerns of federalism, judicial economy, abhorrance of judicial legislation, and steadfast application of ancient precedent seemed to dominate the Court's decision-making process.[323]

VI. Dissenting Opinion

Justice Sandra Day O'Connor, writing for the four justices dissenting,[324] began with a simple pronouncement: "The only potentially nondiverse party in this case is a limited partner."[325] Thus, the dis-

315. *Id.* (quoting Brief of Respondent at 33, *Carden* (No. 88-1476)).
316. *Id.*
317. *Id.* "[H]aving entered the field of diversity policy with regard to artificial entities once (and forcefully) in *Letson*, we have left further adjustments to be made by Congress." *Id.*
318. *Id.*
319. *See id.* at 196-97.
320. *Id.* at 197.
321. *Id.*
322. 554 F.2d 1254 (3d Cir. 1977). The Third Circuit was the first circuit to require all members of a limited partnership to be included in the diversity equation. *See supra* note 21. However, it based its decision on inflated concerns of the increased caseload that would be visited upon the federal court system, if limited partnerships were to be accorded entity citizenship akin to that of a corporation. *See Carlsberg*, 554 F.2d at 1256-57.
323. *See Carden*, 494 U.S. at 197.
324. *Id.* at 198-209 (O'Connor, J., dissenting).
325. *Id.* at 198 (O'Connor, J., dissenting).

sent's focus was on the "single" issue of "whether the citizenship of a limited partner must be counted for purposes of diversity jurisdiction."[326] Justice O'Connor approached this question by employing the real party to the controversy test[327] and decided that the general partners of a limited partnership are the parties that control the entity.[328] Therefore, the dissent concluded that only the citizenship of the general partners "and the limited partnership (assuming it should be considered a citizen)" should be assessed to determine diversity of citizenship between the adverse parties, when a limited partnership is involved.[329] Secondarily, the dissent briefly tackled the issue of whether a limited partnership should be considered a "juridical person," by discussing *Puerto Rico v. Russell & Co.* and the history of the limited partnership enterprise.[330] Justice O'Connor concluded that the *sociedad en comandita* was virtually identical to the limited partnership, and thus both enterprises should be treated as juridical entities.[331]

A. *Real Party to the Controversy Analysis*

Justice O'Connor began the dissent's analysis with a discussion of the "complete diversity" requirement of *Strawbridge v. Curtiss*.[332] It noted that "complete diversity" is not a constitutional provision.[333] Hence, the Court and Congress developed several doctrines to escape its harsh results in all cases.[334] One of these exceptions to strict, complete diversity, is the real party in interest (real party to the contro-

326. *Id.*

> The Court first addresses whether the limited partnership is a "citizen." I do not consider that issue, because even if we were to hold that a limited partnership is a citizen, we are still required to consider which, if any, of the other citizens before the Court as members of Arkoma Associates are real parties to the controversy, *i.e.*, which parties have control over the subject of and litigation over the controversy. Application of that test leads me to conclude that limited partners are not real parties to the controversy and, therefore, should not be counted for purposes of diversity jurisdiction.

Id. (citation omitted) (citing *Marshall*, 57 U.S. (16 How.) at 328).

327. *Id.*

328. *See id.* at 205-06 (O'Connor, J., dissenting).

329. *Id.* at 207 (O'Connor, J., dissenting); *see id.* at 198 (O'Connor, J., dissenting).

330. *See infra* notes 358-66 and accompanying text.

331. *Id.* at 209 (O'Connor, J., dissenting).

332. 7 U.S. (3 Cranch) 267 (1806).

333. *Carden*, 494 U.S. at 199-200 (O'Connor, J., dissenting) (citing State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967) (statutory interpleader merely requires minimal diversity); ALI, STUDY, *supra* note 57, § 1301(b)(2), Supporting Memorandum A, at 426-36).

334. *Id.* (O'Connor, J., dissenting). In class action suits diversity of citizenship is required only between the defendant and the named class representative. *Id.* (citing Snyder v. Harris, 394 U.S. 332, 340 (1969)). Additionally, the citizenships of parties joined under ancillary jurisdiction are not included in the diversity equation.

versy) test. It is an approach to diversity that seeks out the party with the real interest at dispute.[335]

From the nineteenth century onward, federal courts sitting in diversity, have looked to the parties involved to see if they have a " 'real interest' in the suit or, in other words, [are] 'real part[ies]' to the controversy."[336] In 1823, the Court held that mere formal parties to an action would not destroy federal jurisdiction.[337] The dissent stated that the real party to the controversy test was employed in the evolution of corporate citizenship.[338] The decisions in *Marshall*, *Letson*, and *Deveaux* indicate that the Court should not stop the jurisdictional analysis at the point it is determined that an entity is the real party to the controversy.[339] "Rather, the Court engaged in a two-part inquiry: (1) is the corporation a 'juridical person' which can serve as a real party to the controversy; and (2) are the shareholders real parties to the controversy." [340]

The real party to the controversy analysis was similarly used in a series of cases dealing with unincorporated associations. In *Chapman v. Barney*,[341] the Court concluded that all members of a joint stock company had essentially the same degree of power to control the associa-

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Id. at 200 (citing Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375 & n.18 (1978)).

335. *Id.* at 200-01 (O'Connor, J., dissenting).

336. *Id.* at 200 (O'Connor, J., dissenting).

337. *Id.* (citing Wormley v. Wormley, 21 U.S. (8 Wheat.) 421 (1823)).

> "This Court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done without prejudice to the rights of others."

Id. (quoting *Wormley*, 21 U.S. (8 Wheat.) at 451 (footnote omitted)). " 'It has been repeatedly decided by this [C]ourt, that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction . . . .' " *Id.* (quoting Wood v. Davis, 59 U.S. (18 How.) 467, 469 (1856)).

338. *Id.* at 201-02 (O'Connor, J., dissenting) (citing Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 91-92 (1809) (shareholder is the real party to the controversy); Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497, 558-59 (1844) (corporate entity is a legal person, shareholders not real parties to the controversy); Marshall v. Baltimore & O.R.R., 57 U.S (16 How.) 314, 328 (1853) (corporate juridical person had control, as representative of the shareholder collective, thus it is the real party to the controversy)).

339. *Id.* at 201 (O'Connor, J., dissenting).

340. *Id.* (citations omitted) (citing *Marshall*, 57 U.S. (16 How.) at 327-29). It was determined by the *Marshall* Court that because the shareholders could not act as individuals, on behalf of the corporation, they were not the real parties to the controversy. *Id.* The entity was the real party to the controversy and its citizenship was that of its incorporating state by the adoption of the presumed or fictitious citizenships of the shareholders. *Id.*

341. 129 U.S. 677 (1889).

tion.[342] Because each member had control of the " 'mere partnership' " their citizenships would make up the citizenship of the entity.[343] Later, in *Great Southern Fire Proof Hotel Co. v. Jones*,[344] a limited partnership association was not accorded entity citizenship, principally because this form of association had only one class of interested members, i.e., partners.[345] Lastly, in *United Steelworkers v. R.H. Bouligny, Inc.*,[346] the Court held that the citizenship of a labor union was comprised of the aggregate citizenships of its members, because there was no evidence that any member or group of members exercised more control over the union than the other members.[347]

The real party to the controversy test was also applied to a Massachusetts business trust in *Navarro Savings Ass'n v. Lee*.[348] There, the Court held that the beneficiaries of a business trust were not the real parties to the controversy, because they could not control the business of the trust.[349] Justice O'Connor noted that Justice Scalia's opinion discussed the real-party analysis but misconstrued the concept.[350]

The dissent determined that a limited partnership should be treated as was the trust in *Navarro*, in that, a limited partner, much like a trust beneficiary " 'can neither control the disposition of this action nor intervene in the affairs of the trust except in the most extraordinary situations.' "[351] Justice O'Connor noted that the modern limited partnership is created and regulated by statutes that make the limited partner a nominal party, a mere investor, with limited liability from both the entity's debts and judgments rendered against the general partners.[352] The Arkoma Associates Limited Partnership Agreement included such limitations[353] on the role of limited partners in the association.[354]

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342. *Carden*, 494 U.S. at 202-03 (O'Connor, J., dissenting).
343. *Id.* at 203 (O'Connor, J., dissenting).
344. 177 U.S. 449 (1900).
345. *Carden*, 494 U.S. at 203 (O'Connor, J., dissenting).
346. 382 U.S. 145 (1965).
347. *Carden*, 494 U.S. at 204 (O'Connor, J., dissenting).
348. 446 U.S. 458 (1980).
349. *Carden*, 494 U.S. at 204 (O'Connor, J., dissenting).
350. *See id.* at 205 (O'Connor, J., dissenting).

> The Court attempts to distinguish *Navarro* on the ground that it involved not a juridical person, but rather the 'distinctive common-law institution of trustees.' Such a view is consonant with the Court's new diversity jurisdiction analysis announced in this case, but fails to take into account the actual language and analysis in *Navarro*.

Id. at 204-05 (O'Connor, J., dissenting) (citations omitted).
351. *Id.* at 205 (O'Connor, J., dissenting) (quoting *Navarro*, 446 U.S. at 464-65).
352. *Id.* at 205-06 (O'Connor, J., dissenting) (citing ULPA § 26 (limited partner not proper party to a suit against the limited partnership); RULPA § 1001 (limited partners limited to derivative actions)).
353. *See* Brief of Respondent at 34-37, *Carden* (No. 88-1476).
354. *Carden*, 494 U.S. at 205 (O'Connor, J., dissenting).

After considering the real party to the controversy analysis, the dissent found that a limited partner is a nominal party to a suit by or against a limited partnership.[355] Justice O'Connor speculated that the Court did not follow this reasoning, but rather the "all the members" approach, because the majority feared that the minority's approach "will expand jurisdiction at a time when our federal courts are already seriously overburdened."[356] However, Justice O'Connor pointed out that such a "concern is more illusory than real in the context of unincorporated business associations."[357]

B. *Limited Partnership as a Juridical Entity*

The majority raised the issue of the inapplicability of *Puerto Rico v. Russell & Co.*, and the dissimilarity of the common law limited partnership to the *sociedad en comandita*.[358] Thus, the dissent was compelled to illustrate that a limited partnership shares the same parentage as the *sociedad*.[359] Although the issue in *Russell* involved citizenship for purposes of removal, the analysis is similar to that used to determine diversity jurisdiction.[360] The analytical construct used to prove a *sociedad* was a juridical entity created a portrait of a business organization strikingly similar to that of the modern limited partnership.[361] The dissent stated that a limited partnership, like the *sociedad*, was not a creature of the common law,[362] but rather of the civil code.[363] Both entities evolved from ancient times and more particularly from the French " *'la Société en comandite.'* "[364] The dissent argued that for the *Carden* Court to hold that a limited partnership should be treated differently from its "virtually identical Puerto Rican counterpart" "severely marred" the " 'admirable consistency of our jurisprudence,' " in the diversity field.[365] Thus, Justice O'Connor concluded: "The Court's decision today, endorsing treatment of a Puerto Rican business association as an entity while refusing to treat as an entity its virtually identical stateside counterpart, is justified neither by our precedents nor by historical and

355. *See id.*

356. *Id.* at 207 (O'Connor, J., dissenting).

357. *Id.* (noting that unincorporated associations can defeat the majority's ruling by bringing a class action suit, under FED. R. CIV. P. 23).

358. *Id.* at 190 (Scalia, J.).

359. *Id.* at 207-09 (O'Connor, J., dissenting).

360. *Id.* at 190 n.2 (Scalia, J.).

361. *Id.* at 208-09 (O'Connor, J., dissenting).

362. *Id.* at 208 (O'Connor, J., dissenting) (citing BURDICK, *supra* note 16, at 384-85).

363. *Id.*

364. *Id.* (quoting Ames v. Downing, 1 N.Y. Surrogate (1 Bradf.) 321, 329 (Sur. Ct. 1850); *see supra* note 16 (discussing statutory development of the limited partnership in the United States).

365. *Id.* at 208-09 (O'Connor, J., dissenting) (quoting *id.* at 189 (Scalia, J.)).

commercial realities."[366]

VII. ANALYSIS

The opinion of the Court in *Carden v. Arkoma Associates* does not take into account the realities of the modern business world, the essential nature of the statutorily created limited partnership, and the state laws that created these entities. The analyses used by the Court in the *Chapman, Great Southern, Russell*, and *Bouligny* decisions, dealing with artificial entities that were unincorporated associations, are facially of marginal value to a determination of citizenship for limited partnerships. The minority's approach is superior, because it seeks to include in the diversity equation only the real parties to the controversy. The analysis of the decision is in four parts. First, there is a discussion of how the Court should ascertain the citizenship of an entity.[367] Second, is a discussion of the proper application of the real parties to the controversy analysis in a determination of entity citizenship, and a conclusion that only the general partners of a limited partnership should be included in the diversity analysis.[368] Third, although barely touched upon by the dissent, this Comment concurs with Justice O'Connor that a limited partnership should have citizenship in its own right based upon its status under the state law creating it and in light of Supreme Court precedent.[369] Fourth, the analysis concludes with the observation that restrictive jurisdictional policy, consistent with remarks by the Chief Justice calling for curtailment of federal diversity jurisdiction, may have significantly guided the majority's decision not to extend entity citizenship, beyond that accorded corporations, in the absence of a congressional mandate.[370]

A. *Ascertaining Diversity Citizenship for Entities*

Justice Scalia's opinion, particularly footnote one,[371] exhibits the

366. *Id.* at 209 (O'Connor, J., dissenting).
367. *See infra* notes 371-93 and accompanying text.
368. *See infra* notes 394-407 and accompanying text.
369. *See infra* notes 408-43 and accompanying text.
370. *See infra* notes 444-62 and accompanying text.
371. *Carden*, 494 U.S. at 187 n.1.

> The dissent reaches a conclusion different from ours primarily because it poses, and then answers, an entirely different question. It "do[es] not consider" "whether the limited partnership is a 'citizen,' " but simply "assum[es] it is a citizen," because even if we hold that it is, "we are still required to consider which, if any, of the *other citizens before the Court* as members of Arkoma Associates are real parties to the controversy." Furthermore, "[t]he only potentially nondiverse *party* in this case is a limited partner" because "[a]ll *other parties*, including the general partners and the limited partnership itself, assuming it is a citizen, are diverse."
>
> That is the central fallacy from which, for the most part, the rest of the dissent's reasoning logically follows. The question presented today is not

stark division between the majority's and dissent's interpretations of the nature of diversity citizenship for business organizations,[372] and the technique by which diversity jurisdiction attaches to disputes involving those entities. It appears that Justice Scalia, in but one footnote, powerfully upstaged the dissent and rendered Justice O'Connor's minority position meaningless. At first blush, Justice Scalia's analysis seems hard to criticize and has the intended effect of making one wonder if the minority joined the issue before the Court. Hence, an exposition of the meaning of footnote one, a fascinating, incredibly erudite, and seemingly flawless piece of logic, creating a high steeple to hurdle, is neccessary to form an intelligent opinion as to the value of the dissent's reasoning and position.

Justice Scalia premised the Court's decisional role on his unequivocal statement that a limited partnership, as entity, was the party who prosecuted this dispute and stood before the Court.[373] This is the central argument and most profound reasoning in the *Carden* decision. For, notwithstanding the Court's decision that the entity had no citizenship of right,[374] Justice Scalia incontravertibly recognized that an unincorporated organization was an entity separate and distinct from its constituent members.[375] This foundational principle had been ignored or glossed over in the written opinions in *Chapman*, *Great Southern*, and *Bouligny*. The Court had treated the entities in those cases within the construct of a corporate/noncorporate dichotomy.[376] All corporate organizations were given citizenship. All organizations that were not corporations, with the exception of the *sociedad*, were treated as

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> which of various parties before the Court should be considered for purposes of determining whether there is complete diversity of citizenship, a question that will generally be answered by application of the "real party to the controversy" test. There are *not*, as the dissent assumes, multiple respondents before the Court, but only *one*: the artificial entity called Arkoma Associates, a limited partnership. And what we must decide is the quite different question of how the citizenship of that single artificial entity is to be determined—which in turn raises the question whether it can (like a corporation) assert its own citizenship, or rather is deemed to possess the citizenship of its members, and, if so, which members. The dissent fails to cite a single case in which the citizenship of an artifical entity, the issue before us today, has been decided by application of the "real party to the controversy" test that it describes.

Id.; *see supra* note 260 and accompanying text.

372. For a discussion of Justice O'Connor's view on the issue presented to the Court see *supra* notes 325-29 and accompanying text.

373. *Carden*, 494 U.S. at 187 n.1. The Court steadfastly rejected Justice O'Connor's characterization of the case that, in essence, the entity and its constituent general and limited partners stood before the Court. *Id.*

374. *See supra* note 295 and accompanying text.

375. *Carden*, 494 U.S. at 187 & n.1. "There are *not* . . . multiple respondents before the Court, but only *one*: the artificial entity called Arkoma Associates, a limited partnership." *Id.* at 188 n.1.

376. *See supra* notes 120-49 and accompanying text.

associations of individuals, with the organizational citizenship derived by an amalgam of its constituent members' citizenships.[377] Before *Carden*, no middle ground or jurisdictional equation had been recognized other than the simple binary corporate/noncorporate dichotomy used in the *Chapman* line of cases.

If the citizenship of the limited partnership entity was to be determinative of whether diversity jurisdiction would attach, the critical issue before the Court was the identification of that citizenship of the limited partnership entity. However, unlike the corporation[378] and *sociedad en comandita*,[379] which each have a juristic personality, and hence citizenship in their own right, the Court had never determined the citizenship of the limited partnership. Therefore, a new analysis was necessary to determine the citizenship of this new "animal"[380] before the Court.

The Court purported to proceed to this analysis when it stated that the "precise question posed under the terms of the diversity statute is whether such an entity may be considered a 'citizen' of the State under whose laws it was created."[381] The Court went on to determine that a limited partnership had no such citizenship status based upon state law.[382]

At this juncture, the Court froze the entity analysis. However, when the entity before a court is not considered a juridical person under state law, and the court looks to the citizenships of the constituent members composing the entity for its citizenship, the diversity equation apparently enters a second level of analysis. Justice Scalia also recognized there is a second level of analysis, wherein the Court determines the entity's citizenship.[383] However, by determining the entity was not a corporation, and by finding a limited partnership was not a citizen under state law, the Court presumed that the second level analysis was complete and the jurisdictional question answered. No inquiry into the animal's essence was made as the Court had done in *Deveaux, Letson, Marshall*, and *Russell*. Rather, the Court derived the entity's citizenship through incantations of allegiance to the *Chapman* line of precedent—precedent hardly fitting the entity-as-entity citizenship problem the Court stated was the issue presented in *Carden*.[384] Here is where the

377. *See supra* notes 120-49 and accompanying text.

378. *See supra* notes 84-118 and accompanying text.

379. *See supra* notes 169-210 and accompanying text.

380. Official Transcript Proceedings Before the Supreme Court of the United States at 51, *Carden* (No. 88-1476) (Nov. 7, 1989) (Scalia, J.; questioning Mitchell J. Hoffman, Esq., New Orleans, Louisiana; on behalf of the Respondent, Arkoma Associates).

381. *Carden*, 494 U.S. at 187 (footnote omitted); *see supra* note 260 and accompanying text.

382. *See supra* note 295 and accompanying text.

383. *Carden*, 494 U.S. at 188 n.1; *see supra* note 352.

384. *Carden*, 494 U.S. at 188 n.1; *see supra* note 260 and accompanying text.

Court is subject to criticism.

The second level analysis was recognized by Justice O'Connor as an historical fact, although it had not been explicitly described in the precedent involving unincorporated associations until *Carden*.[385] The dissent noted that the Court had long required, in diversity cases, that only true parties to the controversy were to be brought before the Court.[386] Justice O'Connor showed that the Court had historically engaged the real party to the controversy analysis to determine the parties with a true interest in the action, from whose citizenships the entity would derive its citizenship, at this second level analysis.[387] But Justice Scalia derided the use of the real party to the controversy analysis, when the entity, or real party to the controversy, Arkoma Associates, had already been determined.[388] The majority believed that the real party to the controversy analysis could only be employed at the inceptional or first stage of the jurisdictional question.[389] Both the minority and majority agreed that the real party to the controversy analysis is useful in a determination of the proper parties that are before the Court.[390] Thus, the Court was unanimous in holding the real party to the controversy analysis is a predicate to the determination of whether complete diversity between the parties exists. However, the majority deemed the real party to the controversy analysis to be exclusive to the determination of what person or entity-party is before the Court, and inapplicable at the second level where the artificial entity's citizenship is determined.[391]

The Court's bar to the use of the real party to the controversy analysis at the second level appears inconsistent with the goals of diversity jurisdiction. This is because the policy concerns underlying the grant of diversity jurisdiction, and the Court's prohibitions on bringing into court nominal, formalistic, nonessential, and dispensible parties pervade the entirety of the case. These dictates are inescapable, and yet the Court abruptly halted these concerns at the inceptional level of the jurisdictional analysis. While the Court may not have discovered a formal, two-level approach articulated by the Court in the past, this test is

385. *Carden*, 494 U.S. at 202-05 (O'Connor, J., dissenting). Even in cases where the entity was determined to have its own citizenship, this determination "did not signal the end of the diversity jurisdiction signal." *Id.* at 201 (O'Connor, J., dissenting) (citing *Marshall*, 57 U.S. (16 How.) at 328).

386. *Id.* at 200-02 (O'Connor, J., dissenting).

387. *See id.* at 201 (O'Connor, J., dissenting) (citing *e.g.*, *Marshall*, 57 U.S. (16 How.) at 327-29). Justice O'Connor instructed that the *Marshall* Court had "engaged in a two-part inquiry: (1) is the corporation a 'juridical person' which can serve as a real party to the controversy; and (2) are the shareholders real parties to the controversy." *Id.* (citing *Marshall*, 57 U.S. (16 How.) at 327-29).

388. *Id.* at 188 n.1.

389. *See id.*

390. *Id.* at 200 (O'Connor, J., dissenting).

391. *See id.* at 188 n.1.

both consistent with the results adopted in *Chapman*, *Great Southern*, and *Bouligny* and promotes fairness in jurisdictional matters. In those cases there was no need to distinguish which members' citizenships were important at the second level analysis, because each was a relative equal in the organization's structure, that is, each was a real party to the controversy. Thus, the second level analysis could easily have be glossed over by the expediency of the corporate/noncorporate dichotomy that made the Court appear to engage in a one step jurisdictional analysis. A construct where analogy to the corporate form was the most expedient way of determining those particular entities' citizenships.[392]

When the Court engaged the citizenships of the natural persons making up the entity to give the entity a fictitious form of citizenship, the Court transpierced the entity. And, at least for purposes of jurisdiction, it figuratively brought all its constituent members into court. If the Court did not treat the entity as the distinct representative of its collective members, then it must have treated the entity as a group of individuals standing before the Court. Hence, with the entity transpierced and individuals being before the Court, the rules pertaining to nominal and formal parties and the real party to the controversy analysis seem appropriate to employ. While Justice O'Connor may appear to have ignored Justice Scalia's entity concerns, in reality, she merely went to the second level of the jurisdictional analysis to apply the real party to the controversy analysis because it was there that the only potentially nondiverse parties could be found.[393] Real parties to the controversy, that is, individual members, were central to the analyses that led to the *Letson* and *Marshall* rules for corporate citizenship, and later, without labelling them as such, the unincorporated association citizenship rules. Thus, jurisdictional rules relating to natural persons, such as the real party to the controversy analysis, are properly attached to

392. Indeed this seems to be the whole point of the Court's decisions in the twentieth century: expediency of determining citizenship. The Court seems to be attempting to adopt Professor Currie's view of jurisdiction that it "should be as self-regulating as breathing; the principal job of the courts is to decide whether the plaintiff gets his money, and litigation over whether the case is in the right court is essentially a waste of time and resources." Currie, *supra* note 60, at 1 (footnote omitted).

393. Whether Justice O'Connor would have proceeded in the particular fashion she adopted had a general partner, instead of a limited partner, been nondiverse might be interesting to consider. There is little doubt that a general partner has great control over the entity. Thus, a general partner is a real party to the controversy both in a general and limited partnership. The question of a limited partner being a real party to the controversy would have been irrelevant in the diversity equation, where there was this hypothetical diversity of citizenship between the limited partner and the adverse litigants. Therefore, it was fortunate that it was the limited partners that were the only nondiverse citizens, so that Justice O'Connor could focus exclusively on their particular powers and responsibilities.

the second level analysis when a corporation, unincorporated association, or similar hybrid entity is involved.

The Court's accusation that the dissent posed and answered an irrelevant question as to whether limited partners need to be included in the diversity equation was neither helpful to resolving the conflict nor consistent with the results of the precedent the Court relied on. The dissent's approach is both relevant and practical when the citizenship of an entity must be determined by looking to the citizenships of its constituent members. It is relevant to the proper determination of the parties in interest, and it is practical because it gives the Court a construct by which to determine the citizenship of other hybrid entities that may seek to invoke diversity jurisdiction. All analyses that explore who or what is the real party to the controversy are both apposite and incumbent upon the Court for the fair ordering of justice at both the first and second stages of the jurisdictional analysis.

In *Carden*, the focus was briefly taken off the limited partnership's noncorporate status. Justice Scalia was invariably correct to explore entity citizenship. When the Court retreated to the shadows of *Chapman*, *Great Southern*, and *Bouligny* for guidance, and resurrected the corporate/noncorporate dichotomy distinction for determining unincorporated association citizenship, it essentially repudiated its previous analysis. For when the Court recognized the limited partnership as entity, and proceeded to create Arkoma's citizenship from the citizenship of the several persons composing the party-entity-Arkoma, the Court appeared to have glossed over the entity distinction it had so skillfully pronounced. The majority's recognition of the distinction and separation between entity and constituency makes *Carden* a singularly important decision in unincorporated association diversity jurisdiction case law, despite its result.

B. *Limited Partners Are Not the Real Party to the Controversy and Should Not Be Included in the Determination of Diversity Jurisdiction*

Justice O'Connor forcefully and brilliantly argued that since limited partners are not the real parties to the controversy, they should not be included in the determination of diversity jurisdiction.[394] Justice O'Connor came to this conclusion after reviewing jurisdiction decisions of the past two centuries in the area of diversity jursidiction. This review led her to believe there is a consistent, underlying, analytical construct, wherein the Supreme Court has reviewed the essences of artifical business entities and examined the relative organizational control of the members to determine whether they are real parties in interest to the suit.[395] The previous discussion explained that the majority

394. *See supra* notes 351-55 and accompanying text.
395. *See supra* notes 332-50 and accompanying text.

may have been mistaken by limiting the real party to the controversy analysis to the first level analysis determination of what actual parties were prosecuting and defending the actions.[396] Thus, Justice O'Connor's determination that the limited partners are not the real parties to the controversy, the ones that control the entity, is of value to explore.

The real party to the controversy analysis is an in-depth analysis that looks beyond party names and titles to determine what effect the various named parties have upon a suit, and more importantly, upon the standing of federal court jurisdiction. This effort invariably leads to the identification of the real parties in interest to the suit, those parties with the ability to control the entity and its litigation.[397] These are the parties who are personally exposed to liability for the actions or omissions of the entities; the parties the court wants before it. The link to the jurisdictional questions comes about due to the fact that the artificial entity has no self-executing citizenship that allows it to plead to a certain state citizenship. Rather, it must plead the citizenships of its constituent members as its own. Arising from the use of the natural members' citizenships to create the entity citizenship comes the cloud of the Court's owns prohibitions on using the citizenship of any party that is a mere formality. Thus, a review of the constituent member makeup to determine if the various members or classes of members are real parties to the controversy is inescapable.

The dissent contended that each decision rendered by the Court, as to the citizenship of corporations and unincorporated associations, was made and justified based upon the level of control exercised by the membership of the entities involved in those suits.[398] Justice O'Connor determined that by employing the real party to the controversy analysis, the Court found in each instance the party in control of the association.[399] It was this party who was properly included in the diversity equation and whose citizenship was subjected to the strict "complete diversity" requirement of *Strawbridge*.

Turning to the facts of *Carden*, the dissent concerned itself with the entity formation and the agreements, duties, and obligations of its members to one another and the entity itself. Here the certificate of limited partnership and limited partnership agreement of the Arkoma Associates and their relevance under the ULPA and RULPA was of particular import.[400] The dissent specifically noted that the ULPA § 26 provides that a limited partner is not a proper party to a suit against the

396. *See supra* notes 371-93 and accompanying text.
397. *See supra* notes 338-55 and accompanying text.
398. *See supra* notes 336-55 and accompanying text.
399. *Carden*, 494 U.S. at 202-04 (O'Connor, J., dissenting); *see supra* notes 342-50 and accompanying text.
400. *Carden*, 494 U.S. at 205 (O'Connor, J., dissenting); *see supra* notes 351-55 and accompanying text.

limited partnership, except when a limited partner is suing to enforce its rights.[401] Similarly, the RULPA § 1001 provides that the only action a limited partner may bring on behalf of the entity is a derivative suit.[402] Arizona law provided that the general partners of the limited partnership had all the rights, duties, and obligations of a partner in a general partnership.[403] It also deemed general partners to be agents of the limited partnership.[404] These factors, along with the observation that a limited partner has less control over the entity than a corporate shareholder has over the corporation, show that a limited partner can neither control the litigation nor manage the property and assets of the entity.[405] Without such powers, the limited partner can hardly be considered in control of the entity. Because the natural entity is not in control of the artificial entity, he or she is not a real party to the controversy.[406] Thus, where the limited partner is not a real party to the controversy it ought to be excluded from the diversity equation.[407]

C. *A Limited Partnership Should Be Considered a Juridical Entity*

The Supreme Court has traditionally been unwilling to extend the juridical entity status of a corporation to an unincorporated assocation.[408] A synthesis of those decisions shows that the Court was readily able to discern that those various unincorporated assocations were mere collections of individuals, with the members having both an ownership and management interest in the various business enterprises.[409] Conversely, in the corporate structure the directors manage the corporation, create the profit, decide legal matters, and appoint corporate officers who run the day-to-day affairs of the entity.[410] The shareholders are the owners whose input in corporate matters is principally limited to the election of corporate directors and voting on "extraordinary matters," like mergers and dissolutions.[411] This separation of equity ownership and control makes the corporate creature distinguishable from the unified membership entity generally found in unincorporated associations. Thus, at a very basic level, but nonetheless profound, the Court correctly discerned in *Chapman*, *Great Southern*, and *Bouligny* that

401. *Carden*, 494 U.S. at 205 (O'Connor, J., dissenting); *see also supra* notes 352-54 and accompanying text.
402. *Carden*, 494 U.S. at 205 (O'Connor, J., dissenting); *see also supra* notes 352-54 and accompanying text.
403. *Carden*, 494 U.S. at 205 (O'Connor, J., dissenting) (citing ARIZ. REV. STAT. ANN. § 29-324 (1989)).
404. *Id.* (citing ARIZ. REV. STAT. ANN. § 29-356 (1989)).
405. *Id.* at 205-06 (O'Connor, J., dissenting).
406. *Id.*
407. *Id.*
408. *See supra* notes 120-49 and accompanying text.
409. *See supra* notes 120-49 and accompanying text.
410. CLARK, *supra* note 139, §§ 3.2-.3.
411. *Id.* § 3.1.

these unincorporated association entities were essentially mere collections of individuals. The corporation, a creature of statute, has a distinct identity apart from its members (shareholders) and, therefore, is entitled to the status of juridical person with concomitant citizenship that first the Court and then Congress accorded it.[412]

The corporate citizen model was developed from analogy to the natural person.[413] Therefore, analogy to the corporation, as a model artificial citizen, would seem philosophically and juristically consistent for determining the citizenship of other artificial entities. However, *Chapman* and its progeny seem to have treated the corporation not as the prototype, a model from which other artifical persons can evolve, but rather as a static mold from which only exact, replicated artificial persons can claim lineage. This treatment is inconsistent with the precedent and policies that brought about the corporation's juridical entity status.[414]

In *Puerto Rico v. Russell & Co.*,[415] the Supreme Court determined that the Puerto Rican *sociedad en comandita* was traditionally treated as a juridical entity under the civil law.[416] However, despite the civil law tradition, its citizenship for purposes of removal jurisdiction was fashioned from its similarity in nature to an American corporation.[417] In *Russell*, Justice Stone developed an analytical construct that examined the essential characteristics and juristic nature of the *sociedad*. The analysis then proceeded to compare the *sociedad*, by its characteristics, to the legal entity it most closely resembled in federal jurisdictional law. As the corporation was the only recognized artificial entity with juridical citizenship, analogy to it was both proper and logical. By examination of its essential characteristics, and comparison of these to the characteristics of the corporation, the Court determined that the *sociedad* had jurisdictional citizenship.[418] Justice Stone's analytical construct could similarly have led the *Carden* Court to a far more enlightened approach to the entity issue. This analytical approach would have been particulary appropriate, in *Carden*, because the *sociedad* and limited partnership share the same lineage.[419]

412. *See supra* notes 84-118 and accompanying text.
413. *See supra* notes 84-106 and accompanying text.
414. *See supra* notes 84-106 and accompanying text.
415. 288 U.S. 476 (1933).
416. *See supra* note 193 and accompanying text.
417. *See supra* notes 194-95 and accompanying text.
418. *See supra* notes 194-206 and accompanying text.
419. One court masterfully discussed the history of limited partnerships:

> The system of limited partnerships which was introduced by statute into this State, and subsequently very generally adopted in many other States of the Union, was borrowed from the French Code. Under the name of *la Societe en commandite*, it has existed in France from the time of the middle ages; mention being made of it in the most authentic commercial records, and in the early mercantile regulations of Marseilles and Montpelier. In

The *Russell* construct would have shown that just as the *sociedad* was a juridical person,[420] comparison of the limited partnership's juristic characteristics to those of the *sociedad* or corporation would also have led the Court to a similar decision. Both the *sociedad* and the limited partnership are created by articles of association filed as public records.[421] The existence of the *sociedad* was not threatened by the death or withdrawal of a member.[422] Likewise, the limited partnership entity does not neccessarily dissolve upon the death or withdrawal of a general or limited partner, but may remain a viable entity due to protective provisions, permitting the entity to carry on, having been memorialized in the limited partnership certificate and agreement.[423] By registering as a *sociedad*, and conforming to the rules set out in the Puerto Rican codes, the *sociedad* was considered to have legal rights and obligations arising out of its creation, which also gave it the ability to contract, own property, and engage in litigation.[424] These properties are similarly true of limited partnerships organized under the particular state-amended versions of the ULPA or RULPA,[425] and in particular

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> the vulgar Latinity of the middle ages it was styled *commenda*, and in Italy *accommenda*. In the statutes of Pisa and Florence, it is recognized so far back as the year 1166; also in the ordinance of Louis-le-Hutin, of 1315; the statutes of Marseilles, 1253; of Geneva, 1588. In the middle ages it was one of the most frequent combinations of trade, and was the basis of, the active and widely-extended commerce of the opulent maritime cities of Italy. It contributed largely to the support of the great and prosperous trade carried on along the shores of the Mediterranean, was known in Languedoc, Provence, and Lombardy, entered into most of the industrial occupations and pursuits of the age, and even travelled under the protection of the arms of the Crusaders to the city of Jerusalem. At a period when capital was in the hands of nobles and clergy, who, from pride of caste, or canonical regulations, could not engage directly in trade, it afforded the means of secretly embarking in commercial enterprises, and reaping the profits of such lucrative pursuits, without personal risk; and thus the vast wealth, which otherwise would have lain dormant in the coffers of the rich, became the foundation, by means of this ingenious idea, of that great commerce which made princes of the merchants, elevated the trading classes, and brought the Commons into position as an influential estate in the Commonwealth.

Ames v. Downing, 1 N.Y. Surrogate (1 Bradf.) 321, 329 (Sur. Ct. 1850) (citations omitted), *cited in*, *Carden*, 494 U.S. at 208 (O'Connor, J., dissenting). It is apparent that both the *sociedad* and the modern American limited partnership were born of the civil code. *See Carden*, 494 U.S. at 208 (O'Connor, J., dissenting).

420. *See supra* notes 206-07 and accompanying text.

421. *Compare* RULPA § 201; ULPA § 2 *with supra* note 197 and accompanying text.

422. *See supra* note 198 and accompanying text.

423. RULPA § 801(4); ULPA §§ 2(1)(a)(XIII), 20(a).

424. *See supra* note 196 and accompanying text.

425. Both the RULPA and ULPA permit the limited partnership to "carry on any business that a partnership without limited partners may carry on," except statutorily prohibited activities. RULPA § 106; ULPA § 3; *see supra* note 14. A general

Arkoma Associates, organized under Arizona's version of the RULPA.[426] The legal rights of a limited partnership are exercised by the general partners of the limited partnership.[427] Similarly, the *sociedad* carried out its legal affairs through the managers picked from among the members with unlimited liability, essentially the general partners.[428]

The powers, responsibilities, and obligations of the membership of both the limited partnership and the *sociedad* are strikingly similar. The articles of association that were filed at the creation of the *sociedad* designate the powers and responsibilities of the group and its members.[429] Likewise, the limited partnership's certificate of limited partnership and its limited partnership agreement delineate these powers and duties.[430] Members of both a *sociedad* and a limited partnership have a personal property stake in the association,[431] just as one would have in a corporate stock; thus, they are insulated from a suit brought against the entity.[432]

The *Russell* Court understood these characteristics to mean that the *sociedad's* "personality is so complete in contemplation of the law" that it must be treated as a juridical entity, like the corporate citizen.[433] A similar result would not have been unwarranted in *Carden*. There is a consistent nucleus in the evolution of limited partnerships that treats them as special creatures separate and distinct from their constituent members.[434] Failure to comply with the statutes bringing them into

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partnership, i.e., a "partnership without limited partners," is defined and controlled by the provisions of the Uniform Partnership Act (UPA) promulgated in 1914. UNIFORM PARTNERSHIP ACT §§ 1-45 (1914), 6 U.L.A. 1-558 (1969) [hereinafter, without cross-reference, UPA]. The general partnership is "an association of two or more persons to carry on as co-owners a business for profit." UPA § 6(1). The UPA provides that general partnerships may engage in business that includes "every trade, occupation, or profession." UPA § 2. Thus, unless limited by statute, the limited partnership may similarly engage in these lawful activities.

426. AZ. REV. STAT. ANN. §§ 29-100 to -358 (1989) (adopting RULPA).

427. RULPA § 403(a); ULPA § 9.

428. *See supra* note 199 and accompanying text.

429. *See supra* notes 197-99 and accompanying text.

430. REUSCHLEIN & GREGORY, *supra* note 16, § 264; *see* RULPA § 201; ULPA § 2.

431. *Compare* ULPA § 701; ULPA § 18 *with supra* notes 202-05 and accompanying text.

432. General partners, in a limited partnership, are the individuals personally liable for the debts and acts of the entity and its agents. RULPA § 403(b); ULPA § 9; *see supra* note 17. Limited partners are not liable for the same, unless they exercise too much control over the entity. RULPA § 303; ULPA § 7; *see supra* note 18. In the *sociedad* there are two types of members, limited and unlimited, and from among the members with unlimited participation come managers, the individuals with control of the entity and also the liabilities for its debts and acts. *See supra* notes 199-205 and accompanying text.

433. *See supra* note 206 and accompanying text.

434. REUSCHLEIN & GREGORY, *supra* note 16, § 264; ROWLEY & SIVE, *supra* note 16, § 53.0.

existence causes the entity to devolve to mere partnership.[435] The course of the law was to set them apart from other business organizations by giving them a statutory birth. Thus, to treat the limited partnership in a manner that essentially denied its essential nature is neither justified by precedent nor jurisdictional policy.

The modern limited partnership is an important business vehicle, whether in its form as a small business enterprise,[436] a research and development vehicle,[437] or as a large business traded on stock exchanges.[438] Its utility in our economy, as a capital raising device, is very important.[439] Of the many and varied organizations utilized in business, the limited partnership, excepting for the moment the *sociedad*, comes closest to the corporation both in its nature and membership practices. One commentator who compared the nature of the limited partnership and corporation, by looking to each business's statutory priovisions, concluded that the limited partnership is a "pseudo-corporation."[440] A limited partnership, particularly the master limited partnership, can be widely held, like a corporation. It potentially may have limited partners in all 50 states making diversity of citizenship jurisdiction an impossibility. This was the same concern that led the Court to reexamine *Deveaux* in both *Letson* and *Marshall*.[441] Such treatment of the limited partnership neither advances the noble goals of diversity jurisdiction, principally that out-of-state litigants be protected

435. REUSCHLEIN & GREGORY, *supra* note 16, § 264; ROWLEY & SIVE, *supra* note 16, § 53.0; *see generally supra* note 16.

436. REUSCHLEIN & GREGORY, *supra* note 16, § 264.

437. Dickey, *supra* note 15, at 238-41.

438. ALAN GUNN, PARTNERSHIP INCOME TAXATION 145-46 (1991) (these are known as " 'master limited partnerships' " and were used in the mid-1980s to spread tax losses generated by activities in such fields as the oil and gas industries).

439. *See* REUSCHLEIN & GREGORY, *supra* note 16, § 264; *supra* note 15.

440. G. David Porter, *"Incorporating" Limited Partnerships into Federal Diversity Jurisdiction: Correcting* Carden v. Arkoma Associates, 65 NOTRE DAME L. REV. 287, 300-04 (1990). The author compared provisions of the ULPA and RULPA with comparable provisions of the Revised Model Business Corporation Act and Delaware's corporation statutes and concluded that limited partnerships were so corporate-like that they ought to be considered pseudo-corporations. *Id.* This conclusion came about after attention was placed on particular similarities in four areas of commonality: filing requirements; the passivity of limited partners and corporate shareholders in the control of the respective entities; the lack of capacity to sue for the entity of the limited partners and shareholders, unless by way of a derivative suit; and most compellingly, in the estimation of the commentator, the security status of publically traded shares of corporations and master limited partnerships. *Id.* Additionally, the author proposed an amendment to 28 U.S.C. § 1332, a new subsection (e), stating:

> *For purposes of this section and section 1441 of this title, a limited partnership, filed and existing in compliance with applicable state law, shall be deemed a citizen of its state of organization and the state of its principal place of business.*

Id. at 304 n.120.

441. *See supra* notes 81-83, 101 and accompanying text.

from bias in the forum state-court,[442] nor does it make common sense considering the business reality that the limited partnership is a highly visible and utilized entity. Less than entity citizenship for the limited partnership mocks state law that created it, and does great disservice to the spirit of *Erie Railroad v. Tompkins*.[443] A Court that once was willing to look to state law to fashion corporate citizenship ought to do the same for limited partnerships, another creature of state statutes.

D. *A Desire to Close the Federal Courthouse Door May Have Influenced the Decision*

Despite the corporate-like qualities exhibited by limited partnerships, the Court decided to essentially preclude many limited partnerships from the federal court access enjoyed by corporations. This result caused Justice O'Connor to query whether the Court's motivation in deciding not to extend limited partnerships juridical entity status was really an effort to curtail federal court jurisdiction "at a time when our federal courts are already seriously overburdened."[444] The Court's response was merely to state that an extension of outright entity citizenship, or even a broader citizenship based on less than all the entity's members, was a decision that would affect jurisdiction and was therefore the province of Congress.[445]

This expression by the Court can simply be characterized as an embracement of nondecision. The issue presented to the Court was the determination of whether a limited partnership was contemplated as a citizen under the diversity statute.[446] There was nothing aberrant in this task. Indeed, the interpretation of statutes is a "pre-eminently judicial function."[447] And, the Court did decide, after all, without any congressional guidance, to extend citizenship to the corporation in *Letson*, and again in *Marshall*.[448] It is within this framework that one ques-

442. WRIGHT ET AL., *supra* note 41, § 3601 (citing inter alia *Deveaux*, 9 U.S. (5 Cranch) at 87; THE FEDERALIST No. 80 (Alexander Hamilton)).

443. 304 U.S. 64 (1938).

444. *Carden*, 494 U.S. at 207 (O'Connor, J., dissenting); *see supra* note 356 and accompanying text.

445. *See supra* notes 316-21 and accompanying text.

446. *See supra* note 260 and accompanying text.

447. Currie, *supra* note 60, at 35. While discussing the *Bouligny* Court's unwillingness to extend juridical entity status to a labor union, Professor Currie shared these words of wisdom:

> In view of the Court's initial willingness to find a niche for corporations in the diversity statute this deference to Congress is remarkable. The application of statutes to situations not anticipated by the legislature is a *pre-eminently judicial function*, and the Court's refusal to decide constituted a decision against jurisdiction without considering the relevant arguments.

Id. (emphasis added).

448. *Id.*

tions whether the Court indeed deserved Justice O'Connor's harsh remarks,[449] and whether a dynamic such as this may properly be regarded as one influenced by jurisdictional politics.[450]

Federal diversity jurisdiction remains one of the most controversial areas of federal jurisdiction[451] and the singularly most preyed upon by those seeking to restrict federal jurisdiction.[452] The arguments in favor of abolishing this form of federal subject matter jurisdiction principally involve the premise that state courts are competent to handle these disputes, and, therefore, diversity jurisdiction is duplicative, wasteful, and an affront to state sovereignty.[453] Fundamentally, the modern debate as to diversity's utility comes down to a fight over forum choice and fiscal policy.[454] Recently, the Federal Courts Study Committee pro-

449. *See supra* notes 356, 459 and accompanying text.

450. *See generally* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 3-10, 137-39 (1991). The term jurisdictional politics, as used herein, is not one that attributes nefarious motives to the Court. Nor does it imply that the Justices are overtly political creatures that consider issues and engage in decision making in dimly-lit, smoke-filled backrooms where they are influenced by special interest groups; a setting where honorable characters like Jimmy Stewart's, Mr. Jefferson Smith, or a Supreme Court justice have no place. *See* MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939) (starring James Stewart as Senator Jefferson Smith; directed by Frank Capra). Rather, the term takes cognizance of the role of the Court as a co-equal political branch of government. Decisions by that branch, which effect its ability to engage in activity, that is, hear certain types of cases, or abstain from others, are properly considered political decisions, i.e., jurisdictional politics. *See generally* REDISH, *supra*, at 3-10, 137-39.

451. CHEMERINSKY, *supra* note 4, § 5.3.2, at 243.

452. For a good briefing of the issues involved in the attack on diversity jurisdiction, see FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38-43 (Apr. 2, 1990) [hereinafter COURTS STUDY, REPORT] (proposing legislation to abolish or curtail most forms of diversity jurisdiction); 1 FEDERAL COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 417-67 (July 1, 1990) [hereinafter COURTS STUDY, WORKING PAPERS] (presenting arguments for the abolition of diversity jurisdiction as well as arguments for its retention).

453. Perhaps the most noble and often stated argument against diversity, that state courts should decide matters of state law, raises the specter of federal court infringement upon state sovereignty. The Federal Courts Study Committee stated: "Federal courts are certainly capable of deciding state law questions, but they offer no special advantages in such cases; on most issues, and especially when it comes to interpreting state statutes, the state courts have greater expertise and are probably better." COURTS STUDY, WORKING PAPERS, *supra* note 452, at 429; *see* DEPARTMENT OF JUSTICE COMM. ON REVISION OF THE FED. JUDICIAL SYS., U.S. DEP'T OF JUSTICE, THE NEEDS OF THE FEDERAL COURTS 14 (Jan. 1977) (arguing federal courts are disadvantaged and susceptible of error in diversity cases when applying state law). Thus, the argument would proceed that not only does the federal judiciary's attachment of the dispute raise sovereignty concerns, but that the sovereign's laws might not be interpretted and applied correctly in a federal forum, thus adding insult to the perceived injury of usurpation of the sovereign's power.

454. *See* Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 305-06 (1979) (proposing solutions to lessen the federal judiciary's caseload).

posed that Congress eliminate diversity jurisdiction.[455] As an alternative approach, it favored legislation to severely curtail the diversity jurisdiction grant.[456] Among diversity jurisdiction's most notable and staunchest opponents is Chief Justice William H. Rehnquist, who has called for modifications and restrictions to diversity jurisdiction, and has suggested it be abolished.[457] Interestingly, however, the author of the *Carden* opinion, Justice Antonin Scalia, seems to favor structural changes to the federal judiciary rather than the elimination of diversity.[458] Despite these and other calls for the demise of diversity jurisdiction, the grant remains intact and essentially unchanged today.

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455. COURTS STUDY, REPORT, *supra* note 452, at 39; *see also* COURTS STUDY, WORKING PAPERS, *supra* note 452, at 458-67 (presenting arguments and proposals for the abolition of diversity jurisdiction).

456. COURTS STUDY, REPORT, *supra* note 452, at 42; COURTS STUDY, WORKING PAPERS, *supra* note 452, at 458-67.

457. As recently as January 1992, Chief Justice William H. Rehnquist, renewed his call from 1987, for the elimination of diversity jurisdiction, although he noted "elimination of diversity jurisdiction has proved difficult to accomplish." CHIEF JUSTICE WILLIAM H. REHNQUIST, U.S. SUPREME COURT, 1991 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (Dec. 1991) (additionally advocating the recommendation of the Federal Courts Study Committee to prohibit in-state plaintiffs from using the home-state federal forum in diversity suits). He advocated "adopting even the very modest recommendation of the [Federal Courts Study Committee—of April 2, 1990]—raising the jurisdictional amount [from $50,000.00] to $75,000.00 and indexing that figure—would result in substantial benefit to the federal system without noticeable impact on the state courts or harm to litigants' rights." CHIEF JUSTICE WILLIAM H. REHNQUIST, U.S. SUPREME COURT, 1990 YEAR-END REPORT OF THE FEDERAL JUDICIARY 7 (Dec. 1990). He argued that the increase of the jurisdictional amount from $10,000.00 to $50,000.00, Omnibus Courts Improvement Act, Pub. L. No. 100-702, § 201, 102 Stat. 4642, 4646 (codified at 28 U.S.C. § 1332 (1988)), reduced diversity filings from 67,000 in 1989 to 57,000 in 1990. 1990 REPORT, *supra*, at 2. He noted that diversity cases "require a substantial amount of judge time and result in trial more frequently than other types of civil cases." CHIEF JUSTICE WILLIAM H. REHNQUIST, U.S. SUPREME COURT, 1988 YEAR[-]END REPORT ON THE JUDICIARY 2 n.3 (Dec. 1988). Additionally, to show the burden diversity jurisdiction poses for the federal judiciary, he stated that in 1988 diversity cases represented 25% of the federal caseload as compared with 18% ten years previously. *Id.* His strongest pronouncement came in 1987 when he stated:

> It is not clear that the need for diversity jurisdiction is as strong today as it may have been in the past. In a time of budgetary austerity when the federal judiciary must find ways to economize on its resources, the elimination of diversity jurisdiction would result in significant savings. . . . I believe that the elimination or curtailment of diversity jurisdiction is an idea that merits serious consideration.

CHIEF JUSTICE WILLIAM H. REHNQUIST, U.S. SUPREME COURT, 1987 YEAR-END REPORT ON THE JUDICIARY 7 (Dec. 1987).

458. Justice Antonin Scalia has advocated greater specialization in the federal court system to unleash the burden of an overloaded federal judiciary. No part of his recommendations to cure the judiciary's ills called for the elimination of diversity jurisdiction. *See, e.g.*, Antonin Scalia, To Preserve Elite Federal Courts, Speech to the American Bar Association convention held in New Orleans, La. (Feb. 1987), *reprinted in* L.A. DAILY J., Feb. 20, 1987, at 4.

The concerns of the Chief Justice and other foes of diversity jurisdiction are not unfounded; there is a true problem of an overburdened federal court system.[459] They view the survival of the courts, through the elimination and deemphasis of certain forms of federal jurisdiction, as a prerogative within the political dynamic of jurisdiction. However, they may be misguided in their perspective that elimination or curtailment of diversity jurisdiction will substantially reduce the federal docket load.[460] An underfunded, understaffed, and overcrowded federal court system and a Congress unwilling to curtail diversity jurisdiction creates in some a malaise over diversity that inevitably leads them to the elimination of diversity jurisdiction as their panacea to correct all the ills besetting the courts. At best, restrictions on diversity jurisdiction will reduce a marginal volume of cases. However, in the process the citizenry of the United States will lose a valuable right and a tactically important dispute resolution tool. The dilution of rights and powers enumerated in the Constitution has not been the overarching history of the United States Supreme Court's efforts. Unfortunately, if Justice O'Connor's fears are founded, the Court, by focusing on pres-

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> Another common prescription for the ills of the federal courts is the elimination of the diversity jurisdiction. That again will reduce the docket, to be sure—but it will not do so by eliminating the routine, relatively unimportant cases. To the contrary, I find it somewhat ironic, given my view of what the real crisis in the federal courts happens to be, that we should be talking about eliminating *wholesale* that category of business which *made* them preeminently important courts—and far and away *not* the category that has federal judges muttering about trivial cases. It would be much more sensible, it seems to me, to raise the jurisdictional amount for diversity cases substantially. (It was set at its current $10,000 level in 1958.) But that would not make much of a dent in the problem.

Id.

459. The Federal Courts Study Committee recently released these illuminating figures:

> In 1988, 68,224 cases were filed in the district courts based on the diversity of citizenship: 28.5% of the district courts' civil docket and 24.1% of the total district court docket. During this same year, 4,504 of the 32,686 appeals filed were diversity cases: 13.7% of the docket of the courts of appeals. In 1987, 67,071 diversity cases were filed, comprising 28% of the federal courts' civil docket and 23.8% of the total federal docket. In that year, 13.2% of the docket of the courts of appeals were diversity cases (4,065 of the 30,798 appeals filed). Since at least the early 1970's diversity cases have consistently accounted for 25% of the district courts' civil docket, 20% of the total district court docket, and 10-14% of the docket of the courts of appeals.

COURTS STUDY, WORKING PAPERS, *supra* note 452, at 422-23 (footnotes omitted). The Committee concluded that district court diversity cases "are more demanding than the average case on the docket as a whole." *Id.* at 423.

460. As Justice Scalia pointed out, elimination of diversity jurisdiction may marginally improve the federal judiciary's workload, but it would also have a deleterious effect upon the judiciary, by taking from federal judges the more interesting cases that appear before them. *See, e.g., supra* note 458.

ent case volume, and not on diversity's mature and noble grant of jurisdiction, has done a grave disservice to the founding fathers, and the living documents they bequeathed to us, which Chief Justice Rehnquist and the rest of the Court so honorably and rightfully love. By not deciding a logical citizenship for the limited partnership, the Court in essence legislated away an entire class of diversity cases. Thus, taking upon itself a legislative task it discerned, and eloquently spoke of, as the dominion of Congress.[461]

Against this backdrop, and with particular cognizance of the apparent distaste of the Supreme Court leadership for this jurisdiction, it is possible, as Justice O'Connor intimated, that factors, such as the concern for an overburdened court system, may have guided the Court toward its unwillingness to extend citizenship to a limited partnership.[462] The fact that Justice O'Connor suggested that the decision might have been guided by these political, administrative concerns speaks volumes to the need for a coherent policy statement from Congress on the matter of federal diversity jurisdiction. This Comment joins the scores of others advocating the retention of diversity jurisdiction. This position is based on a belief that diversity jurisdiction is a necessary tool to effectuate the principles attendant to one's national citizenship as juxtapositioned against the more parochial interest of state or local citizenship.

VIII. CONCLUSION

The modern limited partnership is and will continue to be an important form of business enterprise. Its essential nature, like that of the corporation, should have guided the Court to grant it juridical entity status for the purpose of establishing federal diversity jurisdiction. However, the *Carden* Court ignored the analysis that had guided the Court to define the juridical existence and citizenship of the corporation 150 years ago.[463] Rather, it read into its decisions in *Chapman*, *Great Southern*, and *Bouligny* absolute prohibitions on the extension of citizenship to any entity other than a natural person or corporation. This adherence to precedent, precedent undeniably dealing with mark-

461. *Carden*, 494 U.S. at 197; *see supra* notes 318-21 and accompanying text.

462. Chief Justice Rehnquist has noted that there are often extra-judicial factors, beyond the resolution of the particular problem presented to the Court, that may influence a judge's decision:

> There is no Newtonian law, however, that can put in the form of a mathematical equation all of the forces which bear on judges when they make decisions; we must decide for ourselves after consulting what evidence there is, what factor played a part in the decision of a particular case.

William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 754 (1986) (discussing the political decision rendered by the Court in the famous *Steel Seizure Case*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).

463. Louisville, C & C.R.R. v. Letson, 43 U.S. (2 How.) 497 (1844).

edly different business vehicles, is a decision one would not expect from such decisive and scholarly justices as sit on the Rehnquist Court.

Absent an outright grant of entity citizenship, the Court should only have engaged the citizenships of the real parties to the controversy in the diversity equation. Justice O'Connor determined that limited partners are not real parties to the controversy; rather, the general partners control the entity and are the real parties to the controversy. Justice Scalia, again relying on the same precedent, held that the Court had never manufactured noncorporate entity citizenship from less than all the members of the entity. The Court found an absolute prohibition on delving into the nature of hybrid entities on their first appearances before the Court. However, the precise precedent for this prohibition went unmentioned. Apparently, blind allegiance to stare decisis again prevented the Court from ultimately joining the issue and digging into the nature of the entity at dispute. Thus, an illusion was created, as Justice Scalia alluded to in footnote one, that the dissent and majority appear to have written on diverse legal topics without engaging each other on the issue that was before the Court.

Justice O'Connor's charge that the Court used this decision to reduce jurisdiction is a serious one. If she is correct, the Court in its apparent zeal to chip away at diversity jurisdiction seems to have forgotten the basic rule of fairness. To allow business trusts, corporations, and *sociedads* access to a federal court in diversity cases and not extend the privilege to limited partnerships is unreasonable and unjust. Jurisdictional matters are often mundane but they deserve the same thoughtful attention and diligence that substantive law decisions require. To decide to leave to Congress that which the Court had the power to decide neither advances the course of jurisdictional law nor pays homage to Congress's superiority as a public deliberative body. Rather, it promotes additional work for a legislative body that appears to have its own difficulties articulating clear policy directives and getting its work done. President Harry Truman knew the buck stopped on his desk. The Supreme Court should likewise be willing to make tough decisions on matters of jurisdiction by defining *citizen*. The decision in *Carden* not to create a new citizen did in fact do what the Court thought was Congress's role, but in an offhanded manner. Thus, by requiring a limited partnership to take on the citizenships of all its members, the Court effectively failed in its self-imposed proscription on entity citizenship decisions.

Taken as a whole, this decision seems to mechanically fit Justice Holmes's famous maxim: "The life of the law has not been logic: it has been experience."[464] In *Carden*, the Court put a chill on the natural evolution of diversity citizenship for business entities. It accomplished

464. OLIVER W. HOLMES, THE COMMON LAW 5 (Mark D. Howe ed., Harv. Univ. Press 1963) (1881).

this by strict application of ill-fitting precedent, the experience of the law, and by ignoring logical arguments for the extension of diversity citizenship to limited partnerships. Should Justice O'Connor be correct, that the Court effectuated an administrative policy to reduce the caseload, rather than crafting a sound judicial decision, *Carden v. Arkoma Associates* may be a harbinger of further judicial attempts to curtail diversity jurisdiction or at least freeze its natural development.

John McCormack

NOTE

The Physician's Duty to Treat Persons with AIDS

Acquired Immunodeficiency Syndrome (AIDS)[1] raises some of the most compelling medical and legal questions of the 1990s. The fear with which society has responded to this disease has made it difficult for many of those infected with the human immunodefiency virus (HIV) to obtain basic services, such as health care.[2] The Presidential Commission on the HIV epidemic concluded in 1988 that discrimination against those who suffer from AIDS is impeding the nation's ability to stop the spread of the disease.[3] Such discrimination hinders the United States Public Health Service from early identification of HIV infected persons, a function which is crucial in arresting the spread of AIDS.[4]

This Note will examine the legal duty of a physician to treat persons with AIDS. Section I will explain the disease, the risk of transmission in the health care setting, and the increasing instances of discrimination.[5] The duty of a physician to treat all patients, both under the common law and the American Medical Association Standards will be discussed in Section II.[6] The duty of physicians to specifically treat AIDS patients pursuant to the Federal Rehabilitation Act of 1973[7] will be examined in Section III, as well as subsequent judicial decisions interpreting the Act.[8] Section IV will examine the duty of physicians to treat HIV infected persons under Massachusetts law as enforced by the Massachusetts Commission Against Discrimination.[9] The impact of the Centers

1. The Acquired Immunodeficiency Syndrome (AIDS) encompasses those individuals who are suffering from one of the various medical conditions associated with AIDS, those suffering from AIDS Related Complex (ARC) and those persons who have tested positive for the human immunodeficiency virus (HIV) but are not yet exhibiting any symptoms of the disease.

2. Lawrence O. Gostin, *The AIDS Litigation Project: A National Review of Court and Human Rights Commission Decisions, Part II: Discrimination*, 263 JAMA 2086, 2086 (1990).

3. *Id.* (citing *Report of the Presidential Commission on the Human Immunodefiency Virus Epidemic* (U.S. Gov't Printing Office 1988)).

4. *Id.*

5. *See infra* notes 13-60 and accompanying text.

6. *See infra* notes 61-79 and accompanying text.

7. 29 U.S.C. § 794 (1988).

8. *See infra* notes 80-176 and accompanying text.

9. *See infra* notes 177-94 and accompanying text.

for Disease Control Guidelines,[10] which prohibits an HIV infected physician from treating a patient under certain circumstances, will be examined in Section V.[11] Section VI will focus on a critical analysis of current law.[12]

I. AIDS: THE DISEASE

A. *Background*

AIDS is a condition which weakens the immune system and reduces the body's ability to fight infection.[13] The cause of AIDS is the HIV.[14] After infection with HIV, a person may remain healthy for years without exhibiting any signs of illness.[15] The incubation period, that is the time from infection to illness, ranges from two to fifteen years.[16] Researchers are not certain of the percentage of HIV infected persons who go on to develop symptoms, however, the percentage is now much higher than original estimates.[17]

AIDS is not one disease, but a syndrome encompassing a number of illnesses[18] classified by the Centers for Disease Control (CDC) under the blanket term of AIDS.[19] Those persons who have tested positive for the HIV and are exhibiting signs of one of the classified diseases, are diagnosed as having AIDS.[20] The length of survival varies according to the type of infection and previous physical condition of the individual, however, over eighty percent of persons diagnosed with AIDS die within three years.[21]

The first signs of AIDS in the United States surfaced in May of 1981, when five cases of Pneumocystis carinii pneumonia[22] and 26 cases of Kaposi's sarcoma[23] were reported in previously healthy homosexual

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10. *Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures*, MMWR July 12, 1991, at 1-9 [hereinafter *CDC Guidelines*].

11. *See infra* notes 195-212 and accompanying text.

12. *See infra* notes 213-38 and accompanying text.

13. SUE PERDEW, FACTS ABOUT AIDS: A GUIDE FOR HEALTH CARE PROVIDERS 6 (1990).

14. *Id.*

15. Dennis Osmond, *Definitions and Codes for HIV Infection and AIDS, in* THE AIDS KNOWLEDGE BASE 1.1.1-1, 1.1.1-2 (P.T. Cohen et al. eds., 1990).

16. PERDEW, *supra* note 13, at 54.

17. Osmond, *supra* note 15, at 1.1.1-2.

18. *Id.* at 1.1.1-1.

19. *Id.*

20. PERDEW, *supra* note 13, at 6-8.

21. *Id.* at 8.

22. *Id.* at 15. Pneumocystis carinii pneumonia is caused by either a parasite or fungus. *Id.* This type of pneumonia affects persons with damaged immune systems. *Id.* The symptoms are similar to other types of pneumonia. *Id.*

23. *Id.* Kaposi's sarcoma was considered a rare form of cancer prior to AIDS. *Id.*

men.[24] By the fall of 1982, over 100 cases were reported to the CDC.[25] In September of 1982, the CDC published a definition for the syndrome, known as AIDS.[26] Since that time, AIDS cases have been reported from every state, although the majority of cases remain in large metropolitan areas.[27] As of December 31, 1991, the number of cases of AIDS reported to the CDC has risen to 206,392.[28]

B. *Transmission*

HIV is primarily transmitted through intimate sexual contact or through direct exposure to infected blood.[29] The most common forms of transmission are through sexual,[30] parenteral,[31] and transplacental exposure.[32] Although unprotected sex and the sharing of needles by intravenous drug users account for the largest number of HIV transmissions, there have been some cases of transmission in the health care setting.[33] As of May 1990, only twenty-seven cases of HIV transmission to a health care worker through occupational exposure have been reported.[34] Currently, a number of studies evaluating the risks of occu-

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The cancer is manifested by a malignant tumor which kills by attacking a vital organ. *Id.*

24. Dennis Osmond, *Growth of the Epidemic in the U.S.: Rates for Incidence and Mortality, in* THE AIDS KNOWLEDGE BASE 1.1.5-1, (P.T. Cohen et al. eds., 1990). The first cases were reported from the Los Angeles, San Francisco and New York areas in May of 1981; however, in retrospect, researchers have now found cases of AIDS as early as 1978. *Id.*

25. *Id.*

26. *Id.* (citing *Update on Acquired Immunodeficiency Syndrome (AIDS)—United States,* MMWR Sept. 24, 1982, at 507-14).

27. *Id.*

28. *The Second 100,000 Cases of Acquired Immunodeficiency Syndrome—United States, June 1981-December 1991,* 128 ARCH. DERMATOL 316, 316 (1992).

29. PERDEW, *supra* note 13, at 18-21.

30. *Id.* at 18.

31. Parenteral transmission refers to transmission through intact skin usually by means of a needle stick. *Id.* This form of transmission may also be referred to as percutaneous. *Id.*

32. *Id.* Transplacental refers to transmission from mother to child in utero. *Id.*

33. *Id.* at 6-8.

34. Marsha F. Goldsmith, *Even 'In Perspective,' HIV Specter Haunts Health Care Workers Most,* 263 JAMA 2413, 2413 (1990).

As of June 30, 1990, there were 5425 cases of AIDS reported by health care workers in the United States. Mary E. Chamberland et al., *Health Care Workers With AIDS: National Surveillance Update,* 266 JAMA 3459, 3459 (1991). However, HIV exposure was non-occupational in 94.4% of this group, and therefore were determined to have received the virus through a source other than a health care setting. *Id.* Nevertheless, the possibility of occupational exposure still exists. *Id.*

Determination of the exact percentage of health care workers with AIDS, who received the virus in a health care setting is difficult to track unless there is a well documented instance of occupational exposure and seroconversion is detected in a later follow up. *Id.* Difficulties in the follow up process due to death, unavailability or unwillingness of the HIV infected person and reliance on self reported medical

pational exposure of health care workers are underway in several medical centers across the United States.[35] Preliminary findings indicate that only a small number of those individuals who have been exposed to the virus have actually been infected.[36] One study conducted at San Francisco General Hospital, evaluated over 500 accidental parenteral exposures.[37] Only one health care worker, who sustained an unusually deep needlestick, seroconverted.[38] Even in situations where health care workers are consistently exposed to HIV infected individuals and a large number of accidents have occurred, the rate of infection is low.[39]

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information, further complicates the estimates. *Id.* In addition, the surveillance process only includes those individuals suffering from AIDS and not other HIV related diseases. *Id.*

35. J. Louise Gerberding, *Transmission of HIV in Health-Care Workers, in* THE AIDS KNOWLEDGE BASE 1.2.8-1, 1.2.8-1 (P.T. Cohen et al. eds., 1990). Eighty-five health care workers in Massachusetts, who sustained needle sticks or similar injuries, were tested for exposure to HIV and none of the workers have tested positive. *Id.* at 1.2.8-3.

At San Francisco General Hospital, 275 health care workers, from otherwise low risk groups, were studied for their occupational exposure to HIV. *Id.* These individuals had extensive contact with persons with AIDS and had suffered a total of 500 accidental exposures. *Id.* Of this group only one health care worker, who had sustained a deep needlestick, has tested positive for HIV. *Id.*

Four hundred and fifty-one health care workers enrolled in the CDC Cooperative Needlestick study. *Id.* Only two health care workers, who had no other established AIDS risk factors, tested HIV positive. *Id.* One sustained a deep puncture from a large needle attached to a syringe containing contaminated blood, the other had been exposed prior to enrolling in the study. *Id.*

Five hundred and thirty-one health care workers enrolled in a study conducted at the National Institute of Health. *Id.* One hundred and fifty individuals had been exposed to contaminated blood through either needlesticks or mucous membrane exposure. *Id.* Only one health care worker, who lacked established risk factors, has seroconverted. *Id.* Two hundred and forty-six individuals were prospectively followed for nine to twelve months. *Id.* Despite extensive HIV exposure, no other health care workers have seroconverted. *Id.*

36. *Id.* at 1.2.8-1.

37. *Id.* at 1.2.8-3.

38. *Id.* Seropositivity denotes HIV infected blood, while seronegative blood shows no sign of infection. The process of converting from seronegative to seropositive is called seroconversion. PERDEW, *supra* note 13, at 54.

39. Gerberding, *supra* note 35, at 1.2.8-1. Over 4000 health care workers have enrolled in studies evaluating the risks of occupational exposure to HIV. *Id.* More than 1200 of the subjects have sustained accidental parenteral exposure, resulting in five cases of HIV infection. *Id.* Cumulative evidence of these studies has shown the risk of HIV transmission through needlestick exposure is less than 1%. *Id.*

An additional twelve studies are underway evaluating mucous membrane exposures. Goldsmith, *supra* note 34, at 2471. Six hundred and seventy health care workers have enrolled in the studies and have reported over 1000 exposures. *Id.* There have been no seroconversions. *Id.*

Another study was conducted in the New York metropolitan area evaluating the risk of HIV transmission to surgeons. Albert B. Lowenfels et al., *Frequency of Puncture Injuries in Surgeons and Estimated Risk of HIV Infection,* 124 ARCH. SURG. 1284,

The instances of transmission of HIV from a health care worker to a patient have been even fewer.[40] To date, the only recorded cases of transmission are from an HIV positive Florida dentist to five of his patients.[41] Whether the transmission occurred through exposure to the dentist's infected blood or through inadequate sterilization procedures, is unknown.[42] One study following subsequent testing of patients treated by HIV infected surgeons, has shown no instances of transmission from doctor to patient.[43] These doctors routinely performed surgical procedures involving contact with the patient's blood.[44] The fact that none of the patients have since tested HIV positive illustrates the low risk of doctor-to-patient transmission in a health care setting. However, despite the statistics, the fear of contracting AIDS persists for both health care workers and patients.

C. *Discrimination*

Studies have not yet revealed the extent of discrimination by health care workers against HIV infected individuals.[45] However, an indication of its scope is illustrated by a variety of sources, such as news arti-

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1284 (1989). Of the 202 surgeons surveyed, 86% reported at least one puncture injury in the last year. *Id.* The study estimates that the risk of transmission over a 30-year period is less than 1% for 50% of the group, 1%-2% for 25% of the group, 2%-6% for 15% of the group and over 6% for 10%. *Id.*

40. *Update: Transmission of HIV Infection During Invasive Dental Procedures—Florida* 127 ARCH. DERMATOL 1126, 1126 (1991).

41. *Id.* at 1126-27.

42. *Id.*

43. Ban Mishu et al., *A Surgeon With AIDS: Lack of Evidence of Transmission to Patients*, 264 JAMA 467, 467 (1990). A Tennessee surgeon who had performed approximately 300 surgical procedures per year, was diagnosed with AIDS in January 1989. *Id.* It was estimated that he had been HIV positive since 1982, but was not aware that he had the disease until 1989. *Id.* Of the 2160 patients treated, 264 were already dead but not from any AIDS related causes. *Id.* at 468. Thirty-seven percent of the remaining patients were tested and the only person who tested positive was an IV drug user. *Id.* at 468-69. Of the remaining number of patients who were not tested, none reported to the Tennessee Department of Health as testing HIV positive, a procedure required by Tennessee law. *Id.* at 469.

A retrospective study was performed on an HIV positive urologist. *Id.* The names of 400 patients who had been treated in the five years prior to the doctor's death were compared to the Florida state AIDS registry. *Id.* None of the patients names were found in the registry. *Id.*

An air force surgeon had contracted AIDS. *Id.* Although the officers conducting the investigation were not authorized to contact previous patients, many voluntarily sought testing as a result of the publicity following the surgeon's death. *Id.* No instances of seropositivity were found. *Id.*

In 1988, an English surgeon contracted AIDS. *Id.* As result of the publicity, 76 of his patients sought testing. *Id.* None were found to be seropositive both immediately following the testing and after a one month follow up. *Id.*

44. *Id.* at 467-70.

45. Gostin, *supra* note 2, at 2086.

cles,[46] complaints filed,[47] and decisions by both courts and human rights commissions.[48] HIV infected individuals must not only endure the irrational fear that they present a health menace, but also face moral judgment of their behavior.[49] The fact that AIDS has traditionally been associated with intravenous drug users and homosexuals has only compounded this discrimination.[50]

The judgmental attitudes of society in general are mirrored in the attitudes of many health care workers.[51] In addition, the futility of the patients' chance of recovery may also affect a health care provider's motivation to care for AIDS patients.[52] The health care professionals that work in closest proximity with AIDS patients are nurses.[53] A survey conducted at a major New York medical center revealed that one-half of the nurses interviewed would request a transfer if asked to care for AIDS patients on a regular basis.[54] A survey of residents at another major medical center rendered similar results.[55] One third believed that the decision to care for AIDS patients was personal and not compelled by medical ethics.[56]

Cases of AIDS discrimination have also been reported in nursing homes.[57] A study conducted by the Federal Office of Civil Rights revealed a reluctance to provide services for HIV infected persons.[58] Hospital discharge planners have experienced such widespread denial of admissions of HIV infected patients, that many have stopped trying to place them in nursing homes.[59] In addition, nursing homes that do

46. *See Long-Term Care,* HOSP., Nov. 20, 1990, at 20; John Picone, *Caring for HIV Infected Patients Should Not be Required,* 261 JAMA 1358, 1358-59 (1989); *Discrimination: Human Rights Commissioner Permitted to Investigate Dentist's Refusal to Treat AIDS Patient,* J. HEALTH & HOSP. L., June 1989, at 200.

47. *See* Gostin, *supra* note 2, at 2086.

48. *Id.*

49. *Id.*

50. *Id.*

51. Rosalind D. Gagliano, *When Health Care Workers Refuse to Treat AIDS Patients,* J. HEALTH & HOSP. L., Oct. 1988, at 255.

52. *Id.*

53. *Id.*

54. *Id.* The survey also revealed that the fear of caring for AIDS patients was higher than the fear of caring for hepatitis patients and 85% believed that pregnant nurses should be prohibited from caring for AIDS patients. *Id.*

55. *Id.* at 256. Two hundred and fifty physicians in residence were surveyed. The group included medical residents and pediatric residents. *Id.*

56. *Id.* The physicians stated that by referring an AIDS patient to another doctor and claiming lack of expertise, a doctor could escape ethical criticism. *Id.*

57. *See Long-Term Care, supra* note 46, at 20; Gostin, *supra* note 2, at 2088.

58. Gostin, *supra* note 2, at 2086. A report was also issued by the American Civil Liberties Union of New York based on 13,000 AIDS discrimination incidents occurring between 1983 and 1988. The report revealed that public accommodations, including nursing homes, account for 16% of AIDS discrimination cases. *Long Term Care, supra* note 46, at 20.

59. Gostin, *supra* note 2. Unfortunately, many AIDS patients seeking admission

admit HIV infected patients have experienced discrimination against the homes themselves in the form of zoning permit denials and refusal to rent premises.[60]

II. Common Law Duty to Treat

At common law, there is no legal duty imposed upon doctors to accept a patient for treatment.[61] Once a doctor agrees to accept a patient, however, a contractual relationship is implied and care must be continued until that patient no longer requires treatment for that particular illness.[62] If the physician terminates the doctor/patient relationship while the patient is still in need of care, the physician may be liable for abandonment.[63]

The doctrine of abandonment, however, does not necessarily provide protection to persons suffering from AIDS related illnesses.[64] Since AIDS tends to "smolder then flare with a new opportunistic infection," a doctor would be free to withdraw from the relationship while the patient was in stable condition.[65] The opportunity to withdraw from treating an HIV seropositive patient is even greater.[66] An HIV carrier is often completely asymptomatic, allowing the physician to withdraw from treatment at any time after providing adequate notice.[67]

A. *The Ethical Duty of Physicians*

The ethical requirements of the medical profession are governed by

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to nursing homes are too ill to pursue a remedy or die before the issue is adjudicated. *Id.*

60. *Id.*

61. Troyen A. Brennan, *Ensuring Adequate Health Care for the Sick: The Challenge of the Acquired Immunodeficiency Syndrome as an Occupational Disease,* 1988 Duke L.J. 29, 35. The private doctor may refuse to treat an individual in a non-emergency environment. *Id.* The legal duty may differ for a hospital. *Id.* Several jurisdictions have established a common law duty to treat a patient in an emergency room, provided a genuine emergency exists. *Id.* at 38.

62. *Id.* at 35. Some cases have held that the duty to treat a patient may arise when a physician accepts an appointment to treat an individual for a specific problem. *Id.* at 36 (citing Lyons v. Grether, 239 S.E.2d 103, 105 (Va. 1977)).

A duty to treat may also arise when a physician accepts a referral from another physician. *Id.* (citing Davis v. Weiskopf, 439 N.E.2d 60, 64-65 (Ill. 1982)).

63. *Id.* at 35-36. A physician may terminate the doctor/patient relationship without liability if the patient is medically stable and the physician has given adequate notice, allowing the patient to arrange alternative care. *Id.* at 35.

64. *Id.* at 37.

65. *Id.* The duty of a hospital to treat an AIDS patient, as opposed to a private physician, would only extend to an emergency situation. *Id.* When the emergency ceases and the patient is stable, a hospital may sever the doctor/patient relationship. *Id.* at 39.

66. *Id.* at 37.

67. *Id.*

the American Medical Association's (AMA) ethics code.[68] The AMA's Code of Ethics has often been used in the legal community by both legislatures and courts, in determining whether a physician has practiced in an ethical manner.[69]

The Code was established at the first meeting of the AMA in 1847.[70] In 1858, the Committee on Ethics was established to implement the Code.[71] The AMA Code of Ethics is now divided into three major components: the Principles of Medical Ethics,[72] the Current Opinions of the Council on Ethical and Judicial Affairs,[73] and the Reports of the Council on Ethical and Judicial Affairs.[74]

The Principles of Medical Ethics state that "when an epidemic prevails, a physician must continue his labors without regard to the risk to his own health."[75] Consequently, a physician may not refuse to treat a patient solely because that person is HIV infected, unless the patient's condition is not within the expertise of the physician.[76] The Council on Ethical and Judicial Affairs has mandated that those who are infected with HIV may not be discriminated against by any member of the health care profession.[77] In its *Statement on AIDS*, however, the Council on Ethical and Judicial Affairs recognized that not all health care professionals are "emotionally able to care for [persons] with AIDS."[78] In that case, a health care worker may request a transfer from the case, and alternative arrangements should be made for the care of the patient.[79]

III. The Federal Rehabilitation Act of 1973[80]

The federal government's interest in rehabilitation began shortly after World War I when President Woodrow Wilson signed the Smith

68. Report of the Council on Ethical and Judicial Affairs of the American Medical Association, *Leadership in Medical Ethics: The American Medical Association*, 1, 2 (Dec. 1984).

69. *Id.* at 1.

70. *Id.*

71. *Id.* at 1-2. The Committee on Ethics is now the Council on Ethical and Judicial Affairs. *Id.*

72. *Id.* at 2. The Principles consist of a broad outline of a physician's duties. *Id.*

73. *Id.*

74. *Id.* The Current Opinions and Reports on Ethical Affairs address specific medical issues. *Id.* at 2-3.

75. Report of the Council on Ethical and Judicial Affairs of the American Medical Association, *Ethical Issues Involved in the Growing AIDS Crisis*, at 1-2 (Sept. 1988) (quoting from the Principles of Medical Ethics, 1847, 1903, 1912, 1947, 1955).

76. *Id.* at 1.

77. *Id.* at 2.

78. Report of the Council on Ethical and Judicial Affairs of the American Medical Association, *Statement on AIDS*, 1, 2 (Dec. 1986).

79. *Id.* at 2-3.

80. 29 U.S.C. § 794 (1988).

Fess Act, providing for a national program of job training and counseling for the disabled.[81] This interest was largely fueled by public sympathy for returning war veterans.[82] In 1943, amendments to the Smith Fess Act expanded the definition of disabled to include those suffering from mental, as well as physical, illnesses.[83] Further amendments in 1954 and 1965 expanded the scope of the program to reach a larger number of handicapped persons, while the 1968 amendment expanded service coverage to include job counseling and increased job opportunities for the disabled.[84]

With the Federal Rehabilitation Act of 1973,[85] Congress abandoned the use of the word "disabled" for the more general term of handicapped.[86] Section 504 of the Rehabilitation Act of 1973[87] (the Act), provides that:

> [n]o otherwise qualified individual with handicaps in the United States. . .shall, solely by reason of her or his handicap, be excluded in the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[88]

In 1974, Congress passed an amendment to the Act[89] which expanded the definition of a handicapped person to include someone who "(i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[90] The significance of the 1974 amendment was twofold. First, the scope of the Act changed from having a purely vocational purpose to include access to other services.[91] Second, the definition of handicap was derived from Title

81. SENATE COMM. ON LABOR AND PUBLIC WELFARE, REHABILITATION ACT OF 1973, S. REP. No. 318, 93d Cong. 1st Sess. 9 (1973), *reprinted in* 1973 U.S.C.A.A.N. 2076, 2082.

82. *Id.*

83. *Id.* The amendment authorized medical and surgical services aimed at reducing the extent of a person's disability. *Id.* The amendment also stressed job rehabilitation for the disabled. *Id.* at 2083.

84. *Id.* at 2084.

85. 29 U.S.C. § 503 (1973).

86. Neil L. Albert, *A Right to Treatment for AIDS Patients?*, 92 DICK. L. REV. 743, 760 (1988).

87. 29 U.S.C. § 794 (1988).

88. Section 504 of The Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (1988).

89. Albert, *supra* note 86, at 762. The previous definition of handicapped person was described in terms of employment. *Id.* A person was considered handicapped for the purpose of the Act, if he or she would derive an employment benefit from receiving vocational services. *Id.*

90. 29 U.S.C. § 706(7)(B) (1974).

91. Albert, *supra* note 86, at 762.

VI of the Civil Rights Act,[92] recognizing the handicapped as a minority whose civil rights had been violated, rather than "objects of charity or a potential workforce."[93]

A. *Judicial Interpretation of the Federal Rehabilitation Act*

1. *School Board of Nassau County v. Arline*[94]

In *School Board of Nassau County v. Arline*, the United States Supreme Court found that tuberculosis and other contagious diseases were considered handicaps within the protection of Section 504 of the Federal Rehabilitation Act.[95] In this case, the respondent, Gene Arline, had taught elementary school from 1966 until 1979 in Nassau County, Florida.[96] Arline had been hospitalized for tuberculosis in 1957, but had remained in remission for 20 years.[97] She was suspended from her teaching position after her second relapse in the spring of 1977.[98] After her third relapse in 1979, she was permanently dismissed.[99] The school board admitted that her dismissal was due solely to her diagnosis of tuberculosis.[100] After exhausting administrative remedies, Arline filed suit in the United States District Court for the Middle District of Florida.[101]

The district court found that although Arline was handicapped by virtue of her illness, she was not protected by the Federal Rehabilitation Act.[102] The court held that Congress had not intended the Act to extend to contagious diseases.[103] The Court of Appeals for the Eleventh Circuit[104] reversed, holding that persons with contagious diseases were protected by the Act.[105] The United States Supreme Court affirmed.[106]

The Supreme Court held that in the enactment and subsequent amendments of the Act, Congress had intended to address the broad problem of discrimination against handicapped people by patterning

92. 42 U.S.C. § 2000d (1964).
93. Albert, *supra* note 86, at 762-63.
94. 480 U.S. 273 (1987).
95. *Id.* at 277. The Court did not specifically reach the issue of AIDS as a physical impairment or a handicap under Section 504. However, much of the Court's discussion in finding that tuberculosis did fall with Section 504, is applicable to AIDS related illnesses. *Id.* at 285-86.
96. *Id.* at 276.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 276-77.
101. *Id.* at 277.
102. *Id.*
103. *Id.*
104. 772 F.2d 759 (11th Cir. 1985).
105. *Id.*
106. *Arline*, 480 U.S. at 277.

Section 504 after Title VI of the Civil Rights Act of 1964.[107] The Court also noted that the broadened definition of handicap was intended to combat discrimination against not only those who are actually handicapped, but also those who are merely perceived as having a handicap, regardless of their physical condition.[108] Additionally, the Court acknowledged the regulations promulgated by the Department of Health and Human Services, further clarifying the term handicapped.[109] Included among the definition of physical impairment was, " 'any physiological disorder or condition . . . affecting one or more of the following body systems . . . respiratory . . . reproductive . . . hemic[110] and lymphatic[111] . . . .' "[112] The Department refused to specifically list the diseases encompassed by the Act due to the difficulty of comprising a completely comprehensive list.[113]

The Court went on to find that Arline was a handicapped individual within the meaning of Section 504.[114] However, the Court rejected the Petitioner's argument that Arline was fired due to the contagiousness of her disease[115] rather than the effect of the disease upon her ability to perform her job.[116] The Court refused to distinguish the effect of a disease upon an individual from the threat of contagion, instead holding that it was the underlying disease that qualified an individual for

107. *Id.* at 277-78. The similarity of the Federal Rehabilitation Act to Title VI is evidenced by comparing the language of both statutes. The language of Section 504 is clearly patterned after Title VI. *See* 42 U.S.C. § 2000d (1964); *see also Arline*, 480 U.S. at 277-78.

108. *Arline*, 480 U.S. at 279. The Court noted the Congressional intent to include within the definition of handicapped, those individuals who are simply perceived as having an impairment regardless of whether a major life activity is actually affected. The purpose of this expanded definition was to help combat the archaic and insensitive attitudes toward handicapped individuals. *Id.* at 279 n.4.

109. *Id.* at 279-80.

110. A hemic disorder is one pertaining to the blood. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 590 (26th ed. 1981).

111. A lymphatic disorder pertains to a lymph, a transparent, slightly yellow fluid found in lymphatic vessels and derived from tissue fluid. *Id.*

112. *Arline*, 480 U.S. at 280 (quoting 45 C.F.R. § 84.3(j)(2)(i) (1985)). The regulations also broadened the definition of "major life activity" to include " 'functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.' " *Id.* (quoting 45 C.F.R. § 84.3(j)(2)(ii) (1985)). This expanded definition has resulted in a broader application of the Act to include all those whose impairments affect any of the functions encompassed under "major life activity." *Id.*

113. *Id.* at 280 n.5.

114. *Id.* at 280-83.

115. *Id.* at 281.

116. *Id.* at 282. The Court held that Arline's history of hospitalization for tuberculosis was sufficient to establish that one or more major life activities were affected, thereby qualifying her as handicapped within the definition of the Act. *Id.* at 281.

protection against discrimination.[117] The Court noted that an impairment, while not affecting a person's physical or mental capabilities, may in fact limit their ability to function purely from the negative reaction of others.[118] The Court acknowledged that "[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness,"[119] and some individuals without contagious diseases suffer discrimination as a result of an irrational fear that they might be contagious.[120]

The Court held that the fact that some persons with contagious diseases could pose a serious health threat, did not justify the per se exclusion of all those with a contagious disease from the protection of the Act.[121] The effect of this exclusion would be to subject those persons with a contagious disease to the same irrational fear that the Act sought to prevent.[122] Instead, the Court stated, each case must be individually evaluated to determine whether a person has been denied a benefit or service as a result of discrimination or legitimate health concerns.[123] The Court adopted the standards submitted by the American Medical Association in their *Amicus Curiae* Brief, finding that each inquiry should include:

> "[Findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm."[124]

It is important to note that the Court found that contagiousness accompanied by a physical impairment does not prohibit protection under the Act.[125] However, the Court refused to address the issue of whether a person who is simply contagious would qualify as handicapped under the Federal Rehabilitation Act.[126] In fact, the Court spe-

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117. *Id.* at 282. The Court reserved the issue of whether an individual was considered handicapped solely by virtue of their contagiousness. *Id.*

118. *Id.* at 282-83.

119. *Id.* at 284 (footnote omitted).

120. *Id.*

121. *Id.* at 285.

122. *Id.*

123. *Id.* at 286-88. Once an individual has qualified as handicapped within the definition of the Act, they must then establish that they are "otherwise qualified" to receive the benefit denied. *Id.* at 288. In establishing that qualification, the plaintiff must show that the denial of the benefit was the result of discrimination and not based on legitimate health concerns. *Id.* at 286-88.

In this case, the Court determined that further findings of fact were necessary to decide whether Arline was "otherwise qualified" to teach school. *Id.* at 289.

124. *Id.* at 288 (quoting Brief for American Medical Association as *Amicus Curiae* 19).

125. *Id.* at 285-86.

126. *Id.* at 282 n.7.

cifically reserved judgment on the issue of AIDS and whether a person who is HIV positive and asymptomatic, would be protected purely on the basis of contagiousness.[127]

2. Decisions Interpreting the Federal Rehabilitation Act as Applied to HIV Infected Persons

In *Leckelt v. Board of Commissioners of Hospital District No. 1*,[128] the Fifth Circuit, while denying a nurse's claim for relief, extended the protection of Section 504 of the Federal Rehabilitation Act to include HIV seropositivity,[129] as well as persons suffering from AIDS.[130] The appellant, Kevin Leckelt, had been employed as a practical nurse at Terreborne General Medical Center (TGMC), in Houma, Louisiana.[131] In April 1986, an infection control committee was formed to review procedures at TGMC.[132] The chairperson of the committee reported that she was aware of a TGMC employee who may have been at risk for carrying the AIDS virus.[133] It was later revealed that this employee was Leckelt.[134] Dr. Smith, the executive director of TGMC, requested that Leckelt submit to an HIV test.[135] Leckelt refused and was subsequently dismissed from his position.[136] Leckelt then filed an action in district court,[137] claiming *inter alia*, a violation of the Federal Rehabilitation

127. *Id.* This issue is directly relevant to the protection of HIV infected persons under the Act. Although these individuals are not yet suffering from any AIDS related diseases, they are discriminated against purely on the issue of contagiousness. *See supra* note 54 and accompanying text.

128. 909 F.2d 820 (5th Cir. 1990).

129. *Id.* at 825.

130. *Id.*

131. *Id.* at 821. Leckelt's duties included administering medication, both orally and through injection, changing dressings, administering intravenous medication, and performing catheterizations. *Id.*

132. *Id.* at 822.

133. *Id.* Leckelt's roommate had been a patient at TGMC and was treated for AIDS. In addition, Leckelt was a known homosexual. *Id.*

134. *Id.*

135. *Id.* Dr. Smith had conducted preliminary research concerning infection control guidelines, specifically the applicable guidelines from the Centers for Disease Control and the American Hospital Association. *Id.* He believed that in order to comply with these guidelines, Leckelt would have to submit to the HIV test. *Id.*

136. *Id.* at 823-24. Prior to his dismissal, Leckelt had been contacted by the hospital's infection control practitioner, Dr. Growe, who requested that Leckelt submit to an HIV test out of concern for his health. *Id.* at 822-23. Leckelt stated that he had already submitted to the test but had not yet received the results. However, he stated that he would notify the hospital of the outcome of the test. *Id.* Leckelt later refused to notify the TGMC of his HIV results for fear of losing his job. *Id.* at 823. It is not clear from the facts whether Leckelt actually had received the results of the test, however, the reason for his dismissal was insubordination for failure to deliver the results of the HIV test to TGMC. *Id.* at 824.

137. Leckelt v. Board of Comm'rs of Hosp. Dist. No.1, 714 F. Supp 1377 (E.D. La. 1989).

Act.[138] The district court found that Leckelt had failed to prove that he was perceived as handicapped under Section 504 or that he was discriminated against solely as a result of being handicapped.[139]

On appeal, the Fifth Circuit Court of Appeals found that HIV infection was an impairment under Section 504 and that Leckelt was discriminated against solely on this basis.[140] Nevertheless, the court denied Leckelt relief on the grounds that he had failed to prove he was "otherwise qualified" to perform his job.[141]

In the case of *Doe v. Centinela Hospital*,[142] the United States District Court for the Central District of California held that HIV seropositivity was a handicap for the purposes of the Federal Rehabilitation Act, but clearly limited the application to the facts of that case.[143] The plaintiff in *Doe* had entered a resident drug rehabilitation clinic, operated by the defendant, Centinela Hospital.[144] As a prerequisite to the program, all patients were required to submit to an HIV test.[145] Upon testing positive for the virus, the plaintiff was asked to leave the program.[146] The plaintiff subsequently filed an action in district court, claiming that as an HIV infected individual, he was protected as a handicapped person under the Federal Rehabilitation Act.[147] In granting the motion for summary judgment,[148] the court held that the plaintiff was perceived as

138. Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820, 825 (5th Cir. 1990).

139. *Id.* at 824. The district court held that Leckelt also failed to prove that he was otherwise qualified to perform his duties as a practical nurse, as required under the Act. *Id.* at 825.

140. *Id.* at 827. The court "assumed" that HIV seropositivity was an impairment under Section 504 for the purposes of this case. Consequently, this issue was not discussed at length in the opinion. *Id.* at 825.

141. *Id.* at 830. The court held that it was necessary for TGMC to know the HIV status of Leckelt in order to determine which procedures he could safely perform in the course of duties. *Id.* Without this information, it would have been impossible for the hospital to determine which functions he could safely perform and those that would put his patients at risk. *Id.* Consequently, the hospital could not determine whether Leckelt was "otherwise qualified" to perform his job, as required under the Federal Rehabilitation Act. *Id.* On this basis, the Fifth Circuit held that the district court was not clearly erroneous in finding that Leckelt could not perform his functions as a nurse within the infection control guidelines of the hospital. *Id.* at 828.

142. 1988 WL 81776 (C.D. Calif. 1988).

143. *Id.* at *6. The court stated that according to the record in this case, it was not necessary "to reach the broader question whether asymptomatic HIV carriers are in all cases protected by section 504." *Id.* at *4.

144. *Id.* at *1.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* This action was before the court on a motion for summary judgment concerning the Federal Rehabilitation Act claim. There were additional pendent claims that were dismissed without prejudice prior to this motion. *Id.*

being handicapped and, therefore, fell under the protection of the Act.[149] The plaintiff was found to have been excluded from the drug rehabilitation program solely on the basis of his HIV seropositivity.[150] The court, citing the *Arline* case, held that this fear of contagiousness was precisely the type of discrimination that the Act was designed to protect.[151] The *Doe* court went on to state that the plaintiff was entitled to protection in light of the fact that his handicap substantially limited a major life function pursuant to the requirement of the Act.[152]

3. Application of Section 504 of the Federal Rehabilitation Act as a Remedy for Health Care Discrimination in Massachusetts

In the case of *Glanz v. Vernick*,[153] the United States District Court for the District of Massachusetts held that a hospital that received Medicaid payments was prohibited from refusing medical treatment to HIV infected patients under Section 504.[154] In April 1989, Raymond Vadnais brought suit against Beth Israel Hospital and Dr. David Vernick, a staff member at the ear, nose, and throat clinic at the hospital, for the failure to perform elective ear surgery.[155] Dr. Vernick had been treating Vadnais for severe pain in his right ear.[156] The doctor had recommended surgery to repair a perforation in Vadnais's ear.[157] Vadnais had consented to the surgery, however, when Dr. Vernick discovered that Vadnais was HIV positive, he refused to perform the surgery.[158] Vadnais subsequently had the surgery performed by another physician who was unaware of his HIV status.[159] Vadnais then brought suit against Dr. Vernick and Beth Israel Hospital alleging discrimination under Section 504.[160] The court held that HIV seropositivity qualified

149. *Id.* at *6.

150. *Id.*

151. *Id.*

152. *Id.* The court held that since learning was considered a major life function, denial of access to the program served as a limitation on that function. *Id.* The court also held that this limitation was substantial. *Id.* at 6-7.

153. 756 F. Supp. 632 (D. Mass. 1991).

154. *Id.* at 639.

155. *Id.* at 634.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Glanz v. Vernick, 750 F. Supp. 39 (D. Mass. 1990). Mr. Vadnais died from an AIDS related illness prior to the suit. *Id.* at 40. A motion was then filed to substitute Mr. Vadnais' estate as plaintiff. *Id.* The court granted the substitution of the estate, but held that only an action for compensatory damages, as opposed to punitive damages, survived Mr. Vadnais's death. *Id.* at 45. The substantive issues were then decided in a motion for summary judgment. Glanz v. Vernick, 756 F. Supp. 632 (D. Mass. 1991).

as a handicap within the meaning of Section 504.[161]

The court went on to define the meaning of a program which receives federal financial assistance as encompassed within Section 504.[162] They agreed with the reasoning of the Fifth Circuit in the case of *United States v. Baylor University Medical Center*,[163] in which it was held that it was Medicare and Medicaid payments that triggered the applicability of Section 504.[164] However, the court in *Vernick* took this applicability one step further, finding that any Medicaid or Medicare payment to a specific program at a health care facility precluded that program from discriminating against a handicapped person regardless of whether their specific procedure was covered.[165] As a result, the court did not hold Dr. Vernick personally liable under Section 504, since it was actually the hospital that received the Medicaid payments.[166] Instead, Beth Israel Hospital was held vicariously liable[167] for the actions of Dr. Vernick.[168]

The court then defined "otherwise qualified" pursuant to Section 504.[169] In order to be found liable for discrimination under Section 504, the handicapped person must be "otherwise qualified" to receive the benefit which they were denied.[170] The decision of whether an individual is "otherwise qualified" is determined on a case by case basis.[171] In a case where the benefit denied is health care, the court in

161. 756 F. Supp. at 635. This case was before the court on a motion for summary judgment. The court allowed the motion in part and denied it in part. *Id.*

162. *Id.*

163. 736 F.2d 1039 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

164. *Glanz*, 756 F. Supp. at 636 (citing United States v. Baylor Univ. Med. Ctr. 736 F.2d 1039, 1047-48 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985)).

165. *Id.* The defendants had argued that since the surgery in this case was elective and therefore not covered by Medicaid, the discrimination was not covered by Section 504. *Id.*

166. *Id.*

167. *Id.* The court held that the test to determine whether the hospital was vicariously liable for the actions of their physicians turned on whether the hospital exercised "any power or control over" the physician's decision not to treat the patient. *Id.* In this case, Beth Israel Hospital had an AIDS coordinator on staff who had contacted Dr. Vernick to discuss his decision not to treat Mr. Vadnais. *Id.*

168. *Id.* The court relied on United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986), in which the Supreme Court stated that Congress limited the applicability of Section 504 only to those persons who make the decision whether or not to accept federal funds. *Glanz*, 756 F. Supp. at 637. In his position as a resident teacher at Beth Israel Hospital, Dr. Vernick was not in a position to accept or reject federal funds paid to Beth Israel. *Id.* The fact that he chose to work at an institution which accepted the funds was not a sufficient basis on which to impose liability. *Id.*

169. *Glanz*, 756 F. Supp. at 638.

170. *Id.*

171. *Id.* (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987)).

Vernick recognized the need to defer to medical opinion.[172] However, complete deference to medical opinion would allow doctors to refuse medical treatment to HIV infected persons under the guise of a sound medical decision.[173] Consequently, the court held that the plaintiff must initially present a *prima facie* case that he was "otherwise qualified" to receive the medical procedure before the burden will shift to the defendant to prove that he was not qualified.[174]

The case of *Glanz v. Vernick* has served to define the scope of the applicability of Section 504. It has broadened the definition of federal financial assistance to include any recipient of Medicaid, regardless of whether the specific procedure is covered.[175] This decision is viewed as a "powerful precedent for the use of Section 504 to combat the growing problem of discrimination against persons with HIV in the health care field."[176]

IV. THE MASSACHUSETTS ANTI-DISCRIMINATION LAW

Section 98 of Chapter 272 of the General Laws of Massachusetts (Section 98), provides in pertinent part:

> All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable to all persons. The right is recognized and declared to be a civil right.[177]

The penalties for violation of Section 98 include a fine of not more than $2500.00 and/or imprisonment of not more than one year.[178] In addition, the party in violation may be liable for damages to the aggrieved party.[179]

A. *Procedure for Relief*

Section 5 of Chapter 151B of the General Laws of Massachusetts (Chapter 151B) requires a person alleging discrimination under Section 98 to file a complaint with the Massachusetts Commission Against

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172. *Id.*
173. *Id.*
174. *Id.* The court cited Pushkin v. Regents of the Univ. Colo., 658 F.2d 1372 (10th Cir. 1981), in finding that the plaintiff has the right to show that the medical reason for the refusal to treat is a pretext for discrimination or that the defendant based their decision on an "unjustified consideration of the handicap itself." *Glanz*, 756 F. Supp. at 638-39.
175. *Glanz*, 756 F. Supp. at 638.
176. 4 AIDS UPDATE 5 (Mar. 1991).
177. MASS. GEN. L. ch. 272, § 98 (1991).
178. *Id.*
179. *Id.* Under Section 98, damages are determined pursuant to Mass. Gen. L. ch. 151B, § 5 (1991).

Discrimination (MCAD).[180] A complaint may also be filed by the Attorney General, the MCAD, or an employer whose employees threaten or refuse to cooperate with the provisions of Chapter 151B.[181] Upon receipt of a complaint, the MCAD conducts a prompt investigation to determine if there is probable cause for the complaint.[182] In the event that probable cause is found, after either an investigation or preliminary hearing, both the respondent and complainant have the right to pursue a judicial determination on the issue of discrimination.[183] A civil suit may then be brought by the Attorney General.[184] If the parties elect not to pursue the complaint in court, a hearing is held by the MCAD.[185] At the same time, the MCAD may file for injunctive relief in Superior Court pending a determination resulting from the hearing process.[186] If a violation is found, the MCAD may make an order to cease and desist the discriminatory practice and may require a report of the method of compliance.[187] The MCAD may also award costs and reasonable attorney fees.[188] The complaint of discrimination must be filed within six months of the discriminatory act.[189] The final determination by the MCAD may be appealed by filing an action in Superior Court.[190]

B. *Application of the Procedure to Persons with AIDS*

In January of 1986, the MCAD promulgated an AIDS policy which extended the protections guaranteed under Chapters 151B and 272 of

180. MASS. GEN. L. ch. 151B, § 5 (1991). The term "commission" is established as a reference to the Massachusetts Commission Against Discrimination (MCAD) in Section 1. MASS. GEN. L. ch. 151B, § 1 (1991). The MCAD was established in accordance with Mass. Gen. L. ch. 6, § 56 (1946).

181. MASS. GEN. L. ch. 151B, § 5 (1991).

182. *Id.* If the MCAD determines that there is no probable cause, the complainant may request a preliminary hearing with the Commission to re-examine the issue of probable cause. *Id.*

183. *Id.* If a judicial determination is elected, the complaint is dismissed from the MCAD without prejudice and the complainant is barred from filing the same complaint at a later date. *Id.*

184. *Id.* The Attorney General must file suit in Superior Court within 30 days of the dismissal of the complaint by the MCAD. *Id.* The complainant may intervene in the suit as a matter of right. *Id.*

185. *Id.* Prior to the hearing, if probable cause has been found, the MCAD will attempt to eliminate the unlawful practice by "conference, conciliation and persuasion." *Id.* If these methods are unsuccessful, then a hearing will take place. *Id.* The MCAD is not bound by the rules of evidence in the hearing. *Id.*

186. *Id.*

187. *Id.* The MCAD may require subsequent reports from the respondent which affirm that cease and desist orders are obeyed. The reports must also include the manner in which the respondent complied with the order. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* § 6.

the General Laws of Massachusetts to include persons with AIDS and those persons who may be perceived as at risk for contracting AIDS.[191] This policy, among other practices, makes it illegal "to make any distinction, discrimination or restriction relative to the admission of any person to, or his treatment in, any place of public accommodation because the person has AIDS or is perceived to be at risk of having AIDS."[192] A place of public accommodation has been defined to include "a hospital, dispensary or clinic operating for profit."[193] Consequently, a patient who is HIV infected or is suffering from an AIDS related illness, may bring an action pursuant to Chapter 272, Section 98. At the time of this writing, only five cases have been filed with the MCAD for the failure of a physician to treat an HIV infected person.[194]

V. The Impact of the New Centers for Disease Control Guidelines

On July 12, 1991, the Centers for Disease Control (CDC) issued guidelines for the control of HIV transmission in the health care setting.[195] The guidelines state that HIV infected health care workers (HCW) who follow universal precautions and who do not perform invasive procedures pose no threat of HIV transmission.[196] The CDC strongly recommends early training and scrupulous adherence to universal precautions.[197] Although the CDC recognizes a risk of transmission in a health care setting, in particular the extremely low risk of doctor to patient transmission as opposed to patient to doctor transmission, the following measures were recommended:[198]

1. All HCWs should follow universal precautions and those who suf-

191. AIDS Policy of the Massachusetts Commission Against Discrimination, 8 Mass. Discrimination L. Rep. 2001, 2001 (1986).

192. *Id.*

193. Mass. Gen. L. ch. 272, § 92A (1991).

194. Interview with Jane Braxton, attorney for Massachusetts Commission Against Discrimination, Boston, MA (Oct. 11, 1991). One case has been administratively closed, while the remaining four are in the process of adjudication. *Id.*

While one would like to think that the relatively few health care discrimination cases are due to the compassion of physicians in Massachusetts, it is equally likely that many people who are suffering from AIDS are reluctant to spend their time pursuing a claim. *Id.* Instead, many simply find another physician who will treat them. *Id.*

195. *CDC Guidelines*, *supra* note 10, at 1-9.

196. *Id.* at 1. Universal precautions pertain to standard infection-control procedures which assume that all blood carries HIV. *Id.* Universal precautions include: washing hands at appropriate times, the use of protective barriers, the proper care and disposal of needles and other sharp objects which have come into contact with a patient's blood, and the use of appropriate disinfection and sterilization procedures for medical equipment. *Id.* at 2.

197. *Id.*

198. *Id.* at 5.

fer from lesions or "weeping dermatitis"[199] should refrain from any invasive procedures.[200] HCW's should also follow proper disinfection and sterilization procedures.[201]

2. HIV infected HCWs may perform invasive procedures not defined as exposure prone if they follow universal precautions.[202]

3. Health care institutions should identify exposure prone procedures performed at their institution.[203]

4. HCWs who perform procedures which are exposure prone should be aware of their HIV status.[204]

5. Seropositive HCWs should refrain from performing exposure prone procedures unless they have sought advice from a review panel who would recommend the circumstances, if any, under which the HCW could continue to perform exposure prone procedures.[205] Under no circumstances can an HIV infected HCW perform an exposure prone procedure without the patient's informed consent.[206]

6. Mandatory testing of HCWs is not recommended.[207]

On July 11, 1991, the Senate passed an amendment sponsored by Senators Dole, Hatch, Mitchell and Kennedy which provided that within one year of the enactment of this amendment, each state must adopt the CDC Guidelines as law.[208] The amendment was signed into law on October 28, 1991.[209] Under the law, if a state already has relevant legislation in effect, that state must certify that their laws conform

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199. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 361 (26th ed. 1981). Weeping dermatitis is also known as eczema, "a superficial inflammatory process involving primarily the epidermis, characterized early by redness, itching . . . weeping, oozing, and crusting." *Id.*

200. *CDC Guidelines*, *supra* note 10, at 5.

201. *Id.*

202. *Id.*

203. *Id.* The CDC has not specifically listed the procedures that are defined as exposure prone. However, the CDC has stated that procedures which involve either "digital palpitation of a needle tip in a body cavity" or the presence of a HCWs fingers and a needle or other sharp object in a "poorly visual" or highly confined anatomic area, are considered exposure prone. *Id.* at 4.

Some examples of exposure prone procedures include "tooth extractions and other dental procedures, vaginal and Caesarian deliveries; hysterectomies; operations on bones, joints, colon and rectum, and X-rays and tests of the heart and blood vessels during techniques known as cardiac catheterization and angiography." Lawrence K. Altman, *U.S. Would Curtail Doctors with AIDS*, N.Y. TIMES, July 16, 1991, at A1.

204. *CDC Guidelines*, *supra* note 10, at 5.

205. *Id.*

206. *Id.* The CDC recommends that the review panel be comprised of "experts who represent a balanced perspective." *Id.* Those individuals could include the HCWs personal physician, an expert in HIV transmission, a HCW with experience in the type of procedures performed by the infected HCW, and a local health official. *Id.*

207. *Id.* at 6.

208. H.R. 2622, 102d Cong., 1st Sess. (1991).

209. Treasury, Postal Service, and General Government Appropriations Act, 1992, Pub. L. No. 102-141, § 633, 105 Stat. 834, 876-77 [hereinafter The Act].

to the CDC Guidelines.[210] A HCW who does not adhere to the guidelines, except in emergency situations where the patient's life is in danger, is subject to disciplinary action by the state licensing board.[211] The penalty to a state for failure to enact the guidelines is ineligibility for federal financial assistance under the Public Health Service Act.[212]

VI. CONCLUSION

Although the ethical standards promulgated by the American Medical Association impose a duty upon physicians to treat all patients regardless of the personal risk to the doctor, there is no absolute legal duty.[213] The common law imposes no duty to care for a patient unless an ongoing doctor/patient relationship exists.[214] Even if a relationship has already been established, a doctor may withdraw from treatment after adequate notice when the patient is medically stable.[215]

Although there is no statutory duty placed upon physicians to treat, some anti-discrimination statutes have recently been interpreted to include mandatory treatment of HIV infected persons.[216] The Federal Rehabilitation Act of 1973 was originally promulgated for the purpose of ending discrimination against handicapped persons.[217] In the *Arline* case, the United States Supreme Court found that the term handicap, as defined by the Act, may include those suffering from contagious diseases.[218] Although many of the aspects of this case were directly applicable to seropositive individuals, the Supreme Court specifically reserved the issue of whether they were protected under the Act.[219] Nevertheless, in several recent cases, courts have cited the *Arline* case in finding that both persons suffering from AIDS and those who are HIV infected are considered handicapped for the purpose of the Act.[220] A number of these courts, while finding that seropositivity is considered a handicap for the purpose of the Act, have been reluctant to extend its protection to HIV infected individuals.[221] Other courts have been re-

210. *Id.*
211. *Id.*; 42 U.S.C. §§ 301-306 (1988).
212. The Act, *supra* note 209.
213. *See supra* notes 68-79 and accompanying text.
214. *See supra* notes 61-63 and accompanying text.
215. *See* Brennan, *supra* note 61, at 35. Some jurisdictions have imposed a common law duty of a hospital to treat a patient in an emergency situation. *Id.* Subsequent withdrawal of treatment is permissible once the emergency situation ceases. *Id.*
216. *See supra* notes 80-194 and accompanying text.
217. *See supra* notes 80-93 and accompanying text.
218. School Bd. of Nassau County v. Arline, 480 U.S. 273, 282 n.7 (1987). Those individuals would be afforded the protection of the Act in the event that they could prove that they were "otherwise qualified" to receive the benefit denied. *Id.* at 287.
219. *Id.*
220. *See supra* notes 128-76 and accompanying text.
221. See *supra* notes 128-76 and accompanying text.

luctant to specifically find HIV seropositivity as a handicap within the definition of the Act.[222]

The *Leckelt* court simply "assumed" that HIV infection was a handicap, but then denied the plaintiff the protection of the Act on the grounds that he was not "otherwise qualified" to receive the benefit denied.[223] The *Centinela* court relied on the *Arline* case in finding that a seropositive individual was unfairly denied access to a drug rehabilitation program.[224] This court was the first to specifically find that seropositivity was a handicap protected by the Federal Rehabilitation Act.[225] The court also found that the handicap affected a major life activity and that the complainant was otherwise qualified to receive the benefit denied, thus extending the protection of the Act to him.[226] Unfortunately, the facts of the case do little to establish a precedent for cases involving denial of health care to HIV positive individuals. To date, the *Vernick* case has been the only one in which the issue of whether the Federal Rehabilitation Act imposes a duty of a physician to treat HIV infected persons was specifically addressed.[227] The court specifically found that seropositivity qualified as a handicap under the Act.[228] This case was also significant because it broadened the applicability of the Act by holding that any program, individual, or institution that accepted Medicaid payments was subject to Section 504.[229] How-

222. *See supra* note 141.

223. Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820 (5th Cir. 1990). The plaintiff in this case was a practical nurse. *Id.* at 821. The court held that the fact that he refused to disclose his HIV status was adequate grounds for his dismissal. *Id.* at 833. The court did not consider the fact that even if the plaintiff was HIV positive, he may have been otherwise qualified to continue as a nurse. *Id.* at 830. The case stated that his duties included administering injections and intravenous medication, tasks which have been proven to pose an insignificant risk to the patient. *See supra* notes 39-43 and accompanying text. A more appropriate analysis may have been to apply the standards submitted by the AMA in their *Amicus Curiae* brief in the *Arline* case. Brief of the American Medical Association as *Amicus Curiae* in Support of Petitioners at 16, School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (No. 85-1277). This standard considers the degree of risk to the patient based on reasonable medical knowledge. *Id.*; *see supra* note 124 and accompanying text.

224. Doe v. Centinela Hosp., No. CV 87-2514, 1988 WL 81776 (C.D. Calif. June 30, 1988).

225. *Id.* at *6.

226. *Id.* at *7. The plaintiff in this case was not denied access to health care but rather admission to a drug rehabilitation program. *Id.* at *3. The care in this type of setting would be far less intimate than treatment under a doctor involving possible contact with contaminated body fluids. Consequently, this decision could hardly be relied upon as significant precedent in establishing the right of seropositive individuals to health care.

227. Glanz v. Vernick, 756 F. Supp. 632 (D. Mass. 1991).

228. *Id.* at 635.

229. *Id.*

ever, the impact of this decision is limited.[230]

The lack of consistency in federal court decisions regarding the applicability of the Federal Rehabilitation Act to seropositive individuals calls for a clear mandate from the Supreme Court concerning this issue or, in the alternative, an amendment to the Act.[231] Although the small number of cases that have been filed appear to indicate a lack of discrimination in the health care industry, the number of cases may also be due to the serious health conditions of the potential plaintiffs.[232] Many may be content to simply find a physician who is willing to treat them, rather than spend the time necessary to pursue a claim.[233]

The recent promulgation of the new CDC guidelines may serve to increase discrimination. The guidelines prohibit seropositive physicians from continuing to perform exposure-prone procedures. In some specialties may severely limit a seropositive doctor's ability to continue in his or her profession.[234] Consequently, physicians may be faced with a dilemma where AMA standards, state anti-discrimination laws, and arguably the Federal Rehabilitation Act, require the physician to care for HIV infected patients, yet, if a physician becomes infected, he or she may be barred from his or her profession, despite the fact that studies have shown that the risk of HIV transmission from patient to doctor is far greater than doctor to patient transmission risk. This dichotomy in the law may unfortunately serve to fuel existing prejudices.[235] There may be many instances when an HIV infected physician should no longer be able to continue performing certain procedures, however, this decision should be made by a hospital committee on a case by case basis, rather than by a list of procedures in the CDC guidelines. To date, the only documented cases of HIV transmission from doctor to patient, has been from a Florida dentists to five of his patients.[236] It is still not clear whether the transmission occurred through faulty sterili-

230. Since the case was a motion for summary judgment, many of the crucial issues, although decided by the court, were not fully litigated. Also, the case was only at the district court level, and thus has only limited persuasive authority.

231. The fact that the Court specifically did not decide this issue in the *Arline* case, may indicate the intention of granting certiorari to a similar case in the future. An overriding problem with this approach is the lack of cases concerning this issue. Consequently, it may take years for such a case to reach the Supreme Court.

232. *See*, Gostin, *supra* note 2, at 2088.

233. *See supra* note 194.

234. *See supra* note 203. The CDC has not actually listed those procedures which they consider exposure prone, however they have been outlined in the guidelines. In effect, exposure prone would include many types of surgical and dental procedures. *See supra* note 203.

235. The CDC guidelines prohibit HIV positive physicians from performing exposure prone procedures. *See supra* note 203 and accompanying text. However, the guidelines also call for a hospital committee to oversee each physician on a case by case basis.

236. *See supra* notes 195-207 and accompanying text.

zation procedures or directly from the dentist. Regardless of the method, this case illustrates the importance of effective precautions against HIV transmission. Guidelines have already been issued by the CDC.[237] The legal focus in the future should the prevention of HIV transmission. Consequently, strict infection control should be mandatory. One solution could be the codification of universal precautions with mandatory training for all health care professionals. Failure to comply with the precautions could result in disciplinary action by a state licensing board, as well as denial of federal funds.

As the AIDS epidemic continues to grow, so may the instances of health care discrimination. This problem is compounded by the ethnographic shift of the disease.[238] Nevertheless, accessible health care is crucial to identification and treatment of AIDS.

Lynn Deitzer

237. *See supra* note 195.
238. Gostin, *supra* note 2, at 2091.

A SYMPOSIUM ON CHARLES HAMILTON HOUSTON

FOREWORD

Genna Rae McNeil*

The New England School of Law initiated its Charles Hamilton Houston Lectureship at the recommendation and with the guidance of Professor Charles Walker in 1988. At that time, little had changed since 1983, when the Honorable A. Leon Higginbotham Jr., Circuit Judge in the United States Court of Appeals for the Third Circuit and author of *In The Matter of Color*,[1] observed that "most [students] were unaware of [Charles Houston's] . . . role in constructing the road toward racial freedom . . . . Most colleges and law schools g[a]ve students no exposure to the black heroes in the law who built the foundation for the later successes of blacks in the 1960s, 1970s, and the 1980s."[2] Happily, the interest of students and faculty has resulted in the growing success of this annual program, which has expanded to include the study of both Houston and members of the bar whom he influenced.

This Symposium issue of the *New England Law Review* is dedicated to Charles Hamilton Houston (3 September 1895 - 22 April 1950) and has as its theme Charles Houston's impact on the judiciary and the legal analyses of his proteges. As we commemorate the forty-third anniversary of Houston's death, and mark with a deep sense of loss the January 1993 passing of Houston's most famous student, Mr. Justice Thurgood Marshall, reflection and criticism are fitting. Perhaps more than any other time in our nation's history, many among the masses are keenly aware of the limitations of litigation, laws, and judicial decisions in bringing justice to the poor and racially-oppressed. As Houston expressed it: "Law [is] . . . effective . . . always within its limitations."[3] "[W]e are fighting a system. . . ."[4]

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1. A. Leon Higginbotham Jr., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978).

2. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS xviii (1983) (quoting A. Leon Higginbotham Jr.).

3. *Id.* at 134.

4. *Id.* at 208 (citation omitted).

This special issue is best read remembering that it is written from the perspective of Houston's African-American students and colleagues for whom higher education and professional status were no significant buffer against racism. As such, the historical context of a pre-*Brown* America—racially separate, unequal, violent, characterized by the majority's belief in the inferiority of persons of African descent, and African Americans' insistence upon their human equality and dignity—must be assumed for each personal account. The recollections of the contributors are influenced not only by their negative experiences, but also by their positive ones. With justifiable pride, therefore, some of Houston's contemporaries who are interviewed recall that Houston was not the only African-American attorney of the era committed to the establishment of African Americans' rights, and refer to William Hastie, A. Leon Ransom, James Nabrit and others. (Although not named, such advocates as Z. Alexander Looby of Tennessee and Arthur Shores of Alabama, whose homes were bombed during the course of the civil rights struggle, also immediately come to mind.) Others interviewed recognized that fairness or justice, equal rights, education, and excellence were also valued among significant numbers of African Americans who were not lawyers and who transmitted these values to their children and community.

This issue examines not only the personality, philosophy, and principles of Charles Hamilton Houston, as recalled by students and former colleagues, but also the values inherited from previous generations. The reader may be surprised by what is not included. No former student placed emphasis on Houston's creation of a *long-term* strategy for attacking segregation and his early insistence that African-American lawyers be used by the NAACP in the vanguard of the struggle. No reference is made to the impact that the birth of his son had on Houston's pre-existing sense of urgency toward creating a society free of racial segregation. Houston's questioning of the unjust system in the United States, his identification of endemic problems related to the economics of capitalism as well as racism, and his belief that the legal system could not be viewed as sacrosanct (but that the written Constitution could be used as an accessible weapon for those who could not hold the nation accountable through other means, such as voting) were not articulated with sufficient frequency to greatly impress these proteges and colleagues. No testimony includes Houston's analysis of white supremacy or his views regarding the necessity of mass involvement in the legal strategy and direct action (protests, boycotts, and demonstrations). Houston's contemporaries did not identify his philosophy as "Houstonian Jurisprudence," (it was labeled in the 1970s by J. Clay Smith Jr., Professor of Law at Howard Law School and author of a recent major historical study on African-American lawyers). Not one person experienced every aspect of Charles Houston; nor was Houston all things to each person. The multiple voices provide elements of the

truth from unique perspectives, and they have value in themselves for that. How each experienced Charles Houston has enormous significance toward enlarging our understanding of the person.

This issue includes interviews with the Honorable Thurgood Marshall, Oliver Hill, Esquire, the Honorable Margaret Haywood, the Honorable William Bryant, and the Honorable Juanita Kidd Stout. Also included are a 1980 speech by the Honorable A. Leon Higginbotham Jr., recently retired Circuit Judge for the U.S. Court of Appeals for the Third Circuit, and salient comments on the Houston legacy by Representative Eleanor Holmes Norton (D., District of Columbia). Collectively, these provide accounts of the impression Charles Hamilton Houston made on the contributors, and the impression he made on the philosophy and strategy of his cadre of lawyers, as well as others whose lives he affected. These contributions and Harvard Law School Professor Charles Ogletree's interview with Mr. Justice Thurgood Marshall, comprise a vigorous, diverse, and enlightening discussion of an underinvestigated subject. The contributors offer data, informed opinion, and personal testimony. From among those who knew "Charlie" Houston (as he was affectionately addressed), the reader is privileged to hear the voices of Bryant, Haywood, Hill, Marshall, and Stout.

From Bryant and Marshall, Houston's students at Howard from two different graduating classes, come verification of a "demanding" professor. It was not merely "rhetoric" when Houston advised students to "look at the man on your left and look at the man on your right" because two will not be in the class the next year. Yet, as Bryant, Stout and Hill also recalled, Houston was a "perfectionist" who "loved people" and was "determined to challenge the *status quo*." As recalled by Marshall and Hill, Houston's pronouncement that a lawyer was either a "social engineer or a parasite on society" was not made in the wake of a successful legal assault upon the bastions of segregation, but rather in the context of Houston's teaching his first full-time law students about the obligations of a law professional. It was actually more than pronouncement, Hill explains - it was a "credo." The exponent of this non-traditional view of the lawyer's duty was described by his former colleagues, students, and proteges as a role model in regard to their legal perspective and ethical considerations. This was particularly true for Haywood and Stout (who at different times provided secretarial services to Houston's firm, but became lawyers before his death). Houston was remembered by Bryant as having *one* standard, namely "excellence."

In these accounts is a man for whom "use of the legal system to seek . . . rights and maintain them," as Haywood expressed it, was an impetus to a life of a particular kind of social activism. Norton rightly emphasized the historical significance of what she called the "Houston group" and their "affirmative strategy." At Howard, students and

faculty of the law school had opportunities to be involved in cases; and as Hill noted, for some major cases, "we'd go to the law school and hold dry runs." These accounts provide rare insights into the feelings of Houston's proteges/students regarding his life and work. For so many, "work" was the operative word. "I have never known anyone who was a harder worker," observed Stout. "[H]e was always working," "*everyday*," remembered Haywood and Marshall, respectively. Poignantly, Bryant allowed: "I attributed [Houston's] early death to just work . . . I knew his grandmother . . . [H]is father was well about 90 when he passed away. Charlie was young when he died . . . . He burned the candle at both ends. You know what folks say about that. The light [is] twice as bright, but it doesn't last half as long . . . ."

Clearly, these testimonies establish that each—Bryant, Haywood, Hill, Marshall, and Stout— made his or her choice to become a lawyer as an acknowledgment of what he or she felt personally was best. Equally clear, however, was that they had options after their encounters with Houston. They were persuaded, nonetheless, that his "social engineering" suited their spirits more than material acquisitiveness. His commitment to the use of the law in the struggle for recognition of African-Americans' equality, and in establishment of freedom as well as justice, was more to be emulated than use of the law for personal fame and fortune. As a whole, the ideas herein presented stem from the particular recollections of persons who knew Charles Hamilton Houston as each struggled to gain greater freedom and justice for African Americans. What is read herein ought to be complemented by reading several of Houston's writings — articles in the *Crisis* and *Afro-American*, speeches, NAACP reports, and legal briefs. His commitment to the struggle for freedom and justice, his preoccupation with sacrificial work, his intentionality in regard to praxis for the good of others, are further elucidated by his public words. Beyond this, insight must come from that which a private Houston was willing to share. Shortly before his death, minimizing the favorable judicial decrees, the occasions for excitement, and moments of joy, Charles Hamilton Houston offered a rare glimpse of his precious interior, believing he owed that to his son. He admitted, in 1949, that he was no longer worried about U.S. law eventually recognizing the African American entitlement to civil rights and the unconstitutionality of racial segregation. His anxiety had roots in another, far deeper issue:

> I am . . . concerned about . . . the fact that the Negro shall not be content simply demanding an equal share in the existing system. It seems to me that his fundamental responsibility and his historical challenge is to use his weight, since he has less to lose in the present system . . ., to make sure that the system which shall survive in the United States of America—I don't care what system you call it—shall be a system which guarantees justice and freedom for everyone . . . . [W]e are fighting a system . . . . I regard what I am doing and my work as a

lawyer . . . as the means of a technician probing in the courts . . ., how far the existing system will permit the exercise of freedom before it clamps down . . . . So that in this day, while there is still little time, the primary task is to probe, to struggle, . . . to teach the masses to think for themselves[,] . . . to recognize their power and to apply it intelligently[5]. . . . and in any fight some fall[6].

5. *Id.*
6. *Id.* at 212 (citation omitted).

Charles Hamilton Houston

INTRODUCTION

In 1776, when the Continental Congress stated the reasons why the colonies should be separate and independent from England, one of the first statements made was that "[w]e hold these truths to be self evident, that *all men* are created equal and are endowed by their Creator with certain inalienable rights that among these rights are Life, Liberty and the pursuit of happiness."[1] Despite this statement, American history does not show these "self evident truths" to have been realized. Extending basic rights to all has been a long, protracted, and ever present struggle. During the twentieth century, one man's life epitomized the struggle to extend basic rights to all people. That man was Charles Hamilton Houston (1895-1950).

BACKGROUND

Charles Hamilton Houston graduated magna cum laude from Amherst College in 1915.[2] Two years later, he enlisted in the segregated U.S. army. The pervasive racism of army life lead Houston to comment: "I made my mind that I would never get caught again without knowing something about my rights; that if . . . I got through this war, I would study law and use my time fighting for men who could not strike back."[3] Charles Hamilton Houston survived the war, and began the study of law at Harvard University during the 1919-20 academic year.[4]

Charles Houston's innate intelligence, drive, and the determination instilled in him by his family enabled him to excel at Harvard.[5] After his second year, Charles was elected to the prestigious editorial board at the Harvard Law Review: the first black man so honored.[6] In spite of the rigors attendant to being an editor of the Law Review, Charles Houston received his law degree graduating cum laude in 1922.[7] Hous-

1. DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

2. RICHARD KLUGER, SIMPLE JUSTICE 106-07 (1975) [hereinafter SIMPLE JUSTICE].

3. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 42 (1983) (citing Charles H. Houston, Saving the World for Democracy, Pittsburgh Courier, August 24, 1940) [hereinafter Groundwork].

4. *Id.* at 52-53. *See also* JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1964 4 (1987).

5. GROUNDWORK, supra note 2 at 50; WILLIAMS, *supra* 3 note at 4.

6. *Id.* at 52-53. *See also*, WILLIAMS, *supra* note 9 at 4.

7. GROUNDWORK, *supra* note 2 at 53. Houston graduated in the top 5 percent of his class; SIMPLE JUSTICE, *supra* note 1 at 116.

ton's work so impressed Harvard's faculty and administration, that they awarded him a graduate scholarship to remain at Harvard and continue his education. In 1923, Houston received his Doctor of Juridical Science degree.[8] Houston's passion for learning continued when he was awarded the Sheldon Travelling Fellowship, allowing him to study for a year at the University of Madrid's Civil Law program.[9] While there, he earned a Doctorate of Civil Laws.[10]

PRACTICING LAW

Following his return from overseas in 1924,[11] Charles Hamilton Houston was admitted to the practice of law in the District of Columbia, where he entered his father's law firm.[12] Charles' father, William Houston, had been in practice a number of years and already enjoyed a sterling reputation in the Washington, D.C. area.[13] William managed the office[14] and believed that there should be no such thing as free legal advice.[15] Charles, however, was of a different view. Although William and Charles differed slightly where fees and monies were concerned, they both agreed with each other on nearly every other aspect of their legal practice. For example, the Houstons each believed in a strict code of ethics, hard work, and meticulous preparation for each case.[16]

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8. *Id.* While working towards his Doctorate, Houston's advisor was Felix Frankfurter who was later to become an Associate Justice on the United States Supreme Court. *Id.* Frankfurter, a founding member of the American Civil Liberties Union, stressed the importance of the relationship between law and social science (e.g., sociology, history, economics); a lesson he learned from his mentor, Louis Brandeis. SIMPLE JUSTICE, *supra* note 2 at 116.

9. *Id.*; GROUNDWORK, *supra* note 3 at 53-54. At the University of Madrid Houston was able to see, firsthand, the differences between the curricula of Spanish and American law schools. *Id.* In Spain, all students were required to have a broad liberal arts background—including courses in philosophy. *Id.* Having just finished his studies at Harvard under Professor Frankfurter, this was a curriculum that Houston was already familiar with. *See supra* note 21 and accompanying text.

10. SIMPLE JUSTICE, *supra* note 2 at 116.

11. Also significant to Charles Houston during this time was a trip he took to Africa. As he wrote to his grandmother Katherine Houston, "Thank God one of the Houston clan stands back on native soil. I count it a happy privilege." GROUNDWORK, *supra* note 3 at 55 (citing an interview with Houston's aunt, Clotill Marconier Houston).

12. *Id.* at 56. The firm of Houston and Houston worked primarily on civil cases—personal injuries, estates, and small businesses. SIMPLE JUSTICE, *supra* note 2 at 116.

13. *See* GROUNDWORK, *supra* note 3 at 59.

14. The elder Houston also taught an office management course at Howard Law School. GROUNDWORK, *supra* note 3 at 60. William Houston was fiscally conservative. During these years, William Houston ran the law office on a tight budget. GROUNDWORK at 60 (citing an interview Judge Margaret Haywood). *See also*, SIMPLE JUSTICE *supra* note 2 at 5.

15. *See* GROUNDWORK, *supra* note 3 at 60.

16. *See* GROUNDWORK, *supra* note 3 at 59-61.

HOWARD UNIVERSITY

While practicing in his father's firm, Charles Houston's application for a teaching position at Howard University School of Law was accepted.[17] For the first few years at Howard, Charles taught part-time, instructing students in Agency, Surety Mortgages, Jurisprudence, and Administrative Law.[18] At that time, Howard's law school was primarily an unaccredited, part-time evening institution. Charles Houston, however, had bigger plans for the school and showed a commitment to improving the institution.[19]

This commitment, coupled with the reform goals of Howard President Dr. Mordecai Johnson,[20] led to Charles' appointment as the Vice-Dean of the Law School in 1929.[21] From the outset of his tenure as Vice-Dean, Houston sought to improve the reputation of Howard and obtain full accreditation from the ABA and AALS.[22] This meant the elimination of the school's evening division, increased admission requirements, a changed curriculum,[23] and the hiring of new, full-time

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> The secret of [Houston's] success was a combination of careful analysis, thorough research and intensive preparation in everything he did. . . . As much for himself as for his former students, Charlie was a perfectionist . . . [s]till another ingredient was indispensable to Charlie's achievements. It was his firm determination—indeed, a fierce determination—to succeed in all that he undertook to accomplish.

Spottswood W. Robinson, III, *No Tea for the Feeble: Two Perspectives On Charles Hamilton Houston*, 20 How. L.J. 1, 6 (1977).

17. GROUNDWORK, *supra* note 3 at 64. In fact, Charles Houston's application to become a faculty member at Howard was endorsed 'without qualification' by Dean Roscoe Pound and Professor Felix Frankfurter of Harvard Law School. Leland Ware, *A Difference in Emphasis: Charles Houston's Transformation of Legal Education*, 32 How. L.J. 479, 480 (1989).

18. GROUNDWORK, *supra* note 3 at 65; Ware, *supra* note 16 at 480.

19. *Ware, supra* note 17 at 480-81. See also, GROUNDWORK, *supra* note 2 at 64. Also significant during the 1920's was the drive to force increased standards upon law schools by the professional accrediting bodies—the American Bar Association (ABA) and the Association of American Law Schools (AALS). *Id.*

20. Dr. Johnson had a vision for Howard Law School. "This was a vision of superior professional training and extraordinary motivation calculated to prepare the professional cadres needed to lead successful litigation against racism as practiced by government and sanctioned by law." Robinson, *supra* note 16 at 3-4.

21. SIMPLE JUSTICE, *supra* note 2 at 125; GROUNDWORK, *supra* note 2 at 70; Ware, *supra* note 16 at 482 (citation omitted).

The Dean of the Law School was a white man named Fenton Booth. When Booth was appointed as Chief Justice for the U.S. Court of Claims, Howard's Board of Trustees named Houston as Vice-Dean. GROUNDWORK, *supra* note 3 at 69; Ware, *supra* note 17 at 481-82.

22. At the time, Howard Law School was not accredited by either the ABA or the AALS, the bodies responsible for overseeing legal education. See GROUNDWORK, *supra* note 3 at 74-75 for the then-in-place standards for accreditation.

23. One of the changes made was to extend the length of the school terms. GROUNDWORK, *supra* note 3 at 78-79.

faculty members.[24] All of these drastic changes, however, were not embraced by everybody who had an interest in Howard.[25] Despite these unfavorable reactions, Charles Houston and Mordecai Johnson moved forward with their plans to improve the quality of Howard's Law School and to seek full accreditation. Through the hard work and dedication of both Johnson and Houston, Howard University School of Law was given full accreditation by both the ABA and the AALS by the end of 1931.[26]

Social Engineering at Howard

As Vice-Dean and law professor, Houston pushed his students to excellence[27] and tried to instill within them his view that lawyers are meant to be "social engineers."[28]

Houston stressed the connections between law, race, and class within society.[29] He felt this to be especially important for African-

24. *See* Simple Justice, *supra* note 2 at 126; *Groundwork, supra* note 3 at 72-74; Ware, *supra* note 17 at 482-83.

25. For example, the elimination of the evening program, despite declining enrollment, meant that a legal education became beyond the reach of many people who had to work during the day. Houston's father, William, had received his degree in this very same program. Ware, *supra* note 17 at 483. The outcry against this move lead to a compromise. All students then enrolled in the evening program were allowed to complete their degrees. *Id.* at 482.

Another consequence of eliminating the evening program was that some professors worked during the day and similarly were unable to continue their duties in a day program. *Id.* at 483.

26. Groundwork, *supra* note 3 at 75. See *id.* at 74-75 for the then-in-place standards for accreditation.

27. Charles Houston, the law teacher, was an unremitting taskmaster. He rejected out of hand all complaints that work was too difficult or assignments too long. . . . His students soon learned that he was interested only in first rate achievements, not in excuses for shortcomings.

Robinson, *supra* note 16 at 4.

28. Genna R. McNeil, *Charles Hamilton Houston*: 1895-1950, 32 How. L.J. 469, 472 (1989). A 'social engineer' is "a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in solving of 'problems of . . . local communities' and in 'bettering conditions of the underprivileged citizens.' " *Id.*

A social engineer "was to be 'the mouthpiece of the weak and a sentinel guarding against wrong.' " Groundwork, *supra* note 3 at 85 (quoting Charles H. Houston, *Law as a Career*, manuscript dated 27 July 1932, to be found in the papers of Charles Hamilton Houston in the files of the Houston & Gardner Law Firm).

Furthermore, the black social engineer was required to "not only . . . 'use . . . the law as an instrument available to [the] minority unable to adopt direct action to achieve its place in the community and nation,' but also consistently and competently to interpret the race's rights, grievances, and aspirations." *Id.* (quoting Charles H. Houston, *Outline of Lecture, New School*, manuscript dated 12 December 1946, to be found in the papers of Charles Hamilton Houston in the files of the Houston & Gardner Law Firm).

29. Groundwork, *supra* note 3 at 67. This teaching philosophy for teaching the

American lawyers because these lawyers were needed to eradicate the vestiges of slavery and to bring their constituents to full citizenship within the ideals espoused at the founding of the nation.[30] In order to bring these goals to fruition, Houston believed that an African-American lawyer could use the law to achieve precedents favorable to minorities and use these as building blocks to further their cause.[31]

Charles Houston's aim in altering Howard's curriculum was to train Black law students "to fulfill the race's need for 'capable and socially alert Negro lawyers.' "[32] Having Black lawyers who would actively and aggressively represent and advocate for the rights of the Black citizenry were vital to the struggle for the equality of Blacks within American society.[33] Because Houston believed White lawyers were unable to fully understand and appreciate the plight of Blacks in America, Houston felt that it was the responsibility of Black lawyers to wage the battle for racial equality.[34] Towards this end, Houston, as both Vice-Dean and professor, unremittingly strove for perfection in his students.[35] This attitude derived from Houston's belief that the lawyers being trained at

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law was directly attributable to Houston's educational experiences at Harvard and the University of Madrid. Although he incorporated both the Spanish idea of a liberal arts background and Frankfurter's ideas about the interrelation of the social sciences to the law, Houston used these ideas with a singularity of purpose that would profoundly impress his students. Houston's mixing of the social and legal sciences ultimately was the driving force behind the decision in Brown v. Board of Education, 347 U.S. 483 (1954). For an in depth discussion of the use of social science in *Brown*, *see generally* SIMPLE JUSTICE, *supra* note 2.

30. *See e.g.*, ROBINSON, *supra* note 16 at 4; Ware, *supra* note 16 at 481. One of Houston's star pupils, Thurgood Marshall, recalls Houston's educational philosophy. "The main point was, 'You have got to be better than the white lawyer or you will lose.' " Ken Gormley, *A Mentor's Legacy*, 78 A.B.A J. 64 (June 1992).

31. *See generally*, GROUNDWORK, *supra* note 3. One example of this theory, put into practice, was Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938). In this case, Houston and other lawyers from the NAACP argued, and the Supreme Court agreed, that a state may not, within the strictures of the Equal Protection Clause of the Fourteenth Amendment, exclude a black student from a state-sponsored law school. The Gaines case was one of the first in which the Supreme Court required a state to afford equal educational opportunity, within an all white University, to black students seeking an education not provided by the state sponsored black schools. This decision lead to a number of other such victories, *see e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950), and was a basis for bringing the public school desegregation cases, *see e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954). For a detailed discussion of the interrelationship between these cases see generally SIMPLE JUSTICE, *supra* note 2.

32. GROUNDWORK, *supra* note 3 at 71.

33. *Id.* at 70.

34. Ware, *supra* note 17 at 484 (citing Charles H. Houston, *The need for Negro Lawyers*, 4 J. NEGRO EDUC. 49-52 (1935). As Ware relates, "Houston did not trust white lawyers to protect the legal rights of Black citizens because of their inherent conflict of interest. They were themselves the beneficiaries of the discriminatory practices that Houston intended to eliminate." *Id.*

35. GROUNDWORK, *supra* note 3 at 80-83. Dean Houston constantly warned stu-

Howard needed to be " 'not only good but superior.' "[36]

While Charles Houston was relentless where his students legal education was concerned, once outside the classroom, he earned their respect and admiration.[37]

Although classroom instruction formed the core of Houston's new curriculum, he was among the first legal educators to appreciate the importance of practical, real-life experience. This combined approach to legal education provided Houston's students with the necessary tools to fight racism in the courts. Houston not only made his mark on Howard Law School, but his presence could also be felt outside of the school.

THE NAACP

The National Association for the Advancement of Colored People ("NAACP") was formed in the first decade of the twentieth century, primarily by liberal or radical whites, to fight discriminatory and segregationary practices in the United States.[38] By the 1920s, the NAACP had evolved to such a point that it was able to speak out against racism with an effective national voice.[39]

During the early 1930s, the NAACP called on Charles Hamilton Houston to lead the fight against racial segregation.[40] While he had been marginally active in the NAACP prior to this time, Houston became increasingly involved on behalf of the NAACP, eventually becoming its Special Counsel in 1935.[41] In order to assume his new responsibilities, Houston took a leave of absence from Howard Univer-

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dents that any person showing such traits would be dealt with swiftly and severely. *Id.*

36. GROUNDWORK, *supra* note 3 at 83 (citations omitted). Justice Marshall recalls that "[t]he main point was 'You have got to be better than the white lawyer or you will lose.' " Gormley, *supra* note 30 at 63, 64.

37. GROUNDWORK, *supra* note 3 at 84. His students found Houston to be "sociable and humane." *Id.* As Marshall has noted, "[H]e was a sweet man once you saw what he was up to. He was absolutely fair, and the door to his office was always open." SIMPLE JUSTICE, *supra* note 2 at 128 (citation omitted).

38. The NAACP was organized earlier in the century, primarily by liberal whites, to fight the unequal treatment of blacks. *See* SIMPLE JUSTICE, *supra* note 2 at 95-99. *See also*, HERBERT HILL & JACK GREENBERG, CITIZEN'S GUIDE TO DESEGREGATION 23-24 (1955).

39. By this time, the NAACP had, among other things, argued against residential segregation laws before the U.S. Supreme Court. Buchanan v. Warley, 245 U.S. 60 (1917). The Court declared such restrictions unconstitutional. *Id.* The NAACP would also press Congress for federal anti-lynching legislation repeatedly over the course of the next forty years. *See generally*, GROUNDWORK, *supra* note 3.

40. *See e.g.*, GROUNDWORK, *supra* note 3 at 86. Houston served on the NAACP's National Legal Committee. *Id.* Also during this period, Houston travelled throughout the south with a movie camera to document the plight of Negro public schools. Williams, *supra* note 4 at 9.

41. GROUNDWORK, *supra* note 3 at 121, 127.

sity and moved to New York where he could direct the NAACP's legal efforts against discrimination.[42]

The NAACP was able to carry out its campaign because of a generous donation from Charles Garland, a wealthy white man who set-up a fund to promote humanitarian causes.[43]

The NAACP's campaign took shape after Nathan Margold, a Harvard educated attorney, was hired by the NAACP to investigate and report on possible strategies to use to fight racial discrimination.[44] Margold's report focussed on attacking the 'separate but equal' doctrine of *Plessy v. Ferguson*,[45] by showing that facilities were separate but unequal.[46] After presenting his report to the NAACP, Margold announced that he would be unable to direct the campaign. In his place, the NAACP chose Charles Hamilton Houston to serve as its Special Counsel.[47]

Once he arrived at the NAACP's headquarters in New York, Houston began mapping the course of the legal campaign.[48] In particular, Houston set out a three pronged attack on discrimination: (1) racially based differences in the pay given equally qualified teachers; (2) ine-

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42. *Id.* at 121, 127.

43. This fund was known as the American Fund for Public Service, or the Garland Fund. *See* Hill, *supra* note 64 at 56; SIMPLE JUSTICE, *supra* note 1 at 132; GROUNDWORK, *supra* note 3 at 113; WILLIAMS, *supra* note 4 at 9. The Garland Fund granted $100,00 to the Association's campaign. SIMPLE JUSTICE, *supra* note 2 at 132. Due to the Stock Market Crash of 1929, the NAACP actually received only a fraction of the original grant. WILLIAMS, *supra* note 4 at 9.

44. SIMPLE JUSTICE, *supra* note 2 at 133. Margold was, in fact, nominated for the position by Charles Houston. *Id.*

Margold's report was an update of a previous study on the potential strategies done for the NAACP a number of years earlier. The prior report had called for the use of taxpayer suits to fight unequal school spending policies. *Id.* at 133; GROUNDWORK, *supra* note 3 at 114.

45. 163 U.S. 537 (1896).

46. Margold's targets were to be public school funding, jury exclusion, transportation and disfranchisement. GROUNDWORK, *supra* note 3 at 114.

47. SIMPLE JUSTICE, *supra* note 2 at 139; GROUNDWORK, *supra* note 3 at 115. Prior to his being chosen to succeed Margold, Houston had prepared a memorandum outlining his views on the strategies to use. In 1934, Houston had told the Association that he viewed the exclusion of Negroes from professional and graduate educational institutions to be of primary importance. *Id.* at 116. This exclusion was vital because of the deleterious effect it was having on an entire generation of Negroes. *Id.* Houston also opined as to how discrimination in transportation could be challenged simultaneously. *Id.* Charles Houston also believed that the campaign would require an educational component. The Association would have to use its resources to educate the Negro public about both the rights involved and the campaign. *Id.* at 116-17.

48. The attack on segregation was to be against how it was then practiced. In other words, it was going after separate but unequal facilities.

The strategy was aimed at taking cases, step-by-step, to high courts to establish precedents and to use these precedents to whittle away at segregation. *See e.g.*, Williams, *supra* note 4 at 10-11.

qualities in school transportation; and (3) exclusion of Negroes from state-supported graduate and professional education facilities.[49] Between the legal and peripheral duties of his position, Houston began to realize that he needed help. In 1936, the NAACP appointed Thurgood Marshall as Assistant Special Counsel.[50]

By 1938, Charles Houston's drive and work habits were beginning to take a toll on him and he was on the verge of nervous exhaustion.[51] Due to his health and other concerns, Charles Houston decided to return to Washington, D.C. to continue the campaign.[52] In July of 1938, Houston moved to Washington and began working both for the NAACP and his father's firm.[53] In 1940, Houston resigned from his position as Special Counsel to the NAACP and returned to the Association's National Legal Committee in Washington, D.C.[54]

Following his return to Washington, Charles Houston continued his fight for equality for Blacks.[55] Because of the notoriety he had received from his tenure at the NAACP, he was constantly sought out by persons

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49. GROUNDWORK, *supra* note 3 at 136 (citation omitted).

50. SIMPLE JUSTICE, *supra* note 2 at 197; GROUNDWORK, *supra* note 3 at 145.

51. SIMPLE JUSTICE, *supra* note 1 at 204. Houston had suffered a breakdown in 1928 which had required him to be hospitalized for a time. *Id. See also, Groundwork, supra* note 2 at 68-69. The earlier illness stemmed from a tubercular condition received while serving in Europe during World War I. *Id.*

52. SIMPLE JUSTICE, *supra* note 1 at 204-05; GROUNDWORK, *supra* note 2 at 147. The 'other concerns' which influenced his decision related to his father's law firm, Houston & Houston. The firm had undergone radical changes. William Houston had been named as an Assistant Attorney General of the United States. *Id.* The other senior partner, William H. Hastie, had been appointed as a judge on the U.S. District Court for the Virgin Islands—the first Negro to sit on the federal bench. *Id.* This left the firm in need of someone who could maintain it.

Charles Houston also believed that there may come a time when his civil rights lawyers would need a place to retreat to. He felt that Houston & Houston could be just such a place. SIMPLE JUSTICE, *supra* note 1 at 205. This belief was largely due to the perpetual scarcity of funding at the NAACP. Interview with Justice Marshall, *supra* note 42. To alleviate some of this perennial concern about money, the NAACP, in 1939, established the Legal Defense and Educational Fund (later known as the Inc. Fund). GROUNDWORK, *supra* note 3 at 152.

53. GROUNDWORK, *supra* note 3 at 149.

54. Houston's restless spirit and desire made it impossible to be confined within a structure for any period of time. As he wrote to his father, "I have had the feeling all along that I am much more of an outside man than an inside man[.] I usually break down under too much routine. Certainly for the present, I will grow much faster and be of much more service if I keep free to hit and fight wherever circumstances call for action." SIMPLE JUSTICE, *supra* note 2 at 205; GROUNDWORK, supra *note* 3 at 149 (citation omitted).

When Houston left New York, Thurgood Marshall took over the NAACP's national headquarters. *See e.g.*, SIMPLE JUSTICE, *supra* note 2 at 214; WILLIAMS, *supra* note 4 at 15.

55. *See* GROUNDWORK, *supra* note 3 at 156-57.

needing help.[56] He threw himself headlong into various civil rights activities in the District.[57]

Late in 1949, Charles Houston's frenetic pace began to catch up with him. He suffered a heart attack and was hospitalized that October.[58] Even from his hospital bed, and in direct disobedience of his doctor's orders, Charles Houston continued to work toward advancing the cause of equal rights.[59] Sensing his inevitable mortality, Houston began tape recording his thoughts for his son, Charles, Jr., who was then five years old.[60] On 22 April 1950, Charles Hamilton Houston died.[61] A final message to his son was found in a book at his hospital bedside: "Tell Bo (Charles, Jr.) I did not run out on him but went down fighting that he might have better and broader opportunities than I had without prejudice or bias operating against him, and in any fight some fall."[62]

CONCLUSION

Charles Hamilton Houston's life is a study in altruism. He gave everything he had, indeed his life, to force America to live up to its creed—that all men are created equal. Wherever he saw racism and discrimination, from education to labor to transportation to the military, Charles Houston sought to eradicate those very evils. By bringing his talent and dedication into the fray, he enabled future generations to enjoy significantly better lives. He has inspired those future generations to claim what is theirs by right. Although the battle that he fought is far from over, without Charles Hamilton Houston the plight of minorities in America would be far worse than it is today.

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56. *Id.* These people included both attornies and laypeople. As Judge Robinson has stated:

> Unfailingly he responded to calls from others for guidance—and those calls were frequent, for on important matters we always wanted to know what Charlie would say. . . Unselfishly he was available to lend a helping hand, simply for the asking. . . . There was a friendly, gentle, unassuming individual, totally unaffected and unspoiled by the many accolades his illustrious career had so fully earned him. There was, too, an unbounded compassion for those less fortunate than he, and an irresistible urge to use his talents—both God-given and self-developed—to better their lot.

Robinson, *supra* note 16 at 7-8.

57. For example, Houston served on and assisted a number of ad hoc committees that were formed to protest disparate treatment of blacks in everything from restaurants to taxis. *Id. See also,* SIMPLE JUSTICE, *supra* note 2 at 229.

58. *Id.* at 194.

59. *Id.* at 209-10.

60. *Id.* at 207-08. In these tapes, Houston related the stories of the struggles he had been involved in over the years and his views of the future. *Id.*

61. *Id.*

62. GROUNDWORK, *supra* note 3 at 212 (citation omitted).

Reflections on the Impact of Charles Hamilton Houston— From a Unique Perspective

Hon. A. Leon Higginbotham, Jr. *

We come together this morning in the name of a great man: Charles Hamilton Houston. To this day, his life remains relatively unknown, his story mostly untold and his achievements sadly unappreciated. Yet Charles Hamilton Houston was a "founding father" of this country and in some ways he was a truer "founder" of our nation than Thomas Jefferson, George Washington, or Patrick Henry. I make this — to my mind modest but perhaps to others outrageous — statement at a time when this country is both flushed with the recent self-congratulatory celebration of the bicentennial of the Declaration of Independence and breathless with the anticipation of what promises to be an even more self-righteous celebration of the bicentennial of the Constitution. So in order to justify this statement I will ask you this morning to temper your pride and give me your imagination.

Imagine that at this moment I have in my possession a machine invented by a scientist with extraordinary talents. This machine has three buttons: each with a specific function. The first button allows me to cut through the folds of time so that you can slip out of the present and fall into the past or the future. The second button allows me to pull together the distances of space so that you can jump from this place and arrive at other places far and away. The third and final button allows me to take apart your sense of self so that you may inhabit a different self or a different soul.

As I push the first button, the time clock is turned back 204 years so that you are now living in colonial America 1776. As I push the second button, you are removed from the privileged community of Amherst College and are now residing on Thomas Jefferson's plantation in Monticello, Virginia. As I push the third button, each of you becomes black. All of you are now slaves working on the plantation of Master Jefferson.

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* This is a slight revision of a speech delivered by A. Leon Higginbotham, Jr., recently retired Chief Judge of the United States Court of Appeals for the Third Circuit in Philadelphia, PA. The speech was delivered in April, 1980 as part of Men of Amherst: Charles Hamilton Houston Forum at Amherst College. Printed with permission.

Your master has just drafted the Declaration of Independence. That document states that "We hold these truths to be self-evident, that all men are created equal."[1] These self-evident truths do not apply to you. That document also states that all men "are endowed by their creator with certain unalienable rights, that among these rights are Life, Liberty, and the Pursuit of Happiness."[2] These rights do not extend to you. In a few years, your Master Jefferson and his fellow slave holder George Washington will fight for their freedom against what they consider to be the tyranny of the British for taxing them without representation. This fight for freedom will not benefit you. In a few more years your master Jefferson will consult with fellow slave holder James Madison in helping to draft the Constitution of the United States. That document will begin with the words: "We the people."[3] The "we the people" will not include you. Instead, you are now, and as far as you can tell you will remain, a slave. Your work does not belong to you. Your life does not belong to you. You pick the cotton, hoe the fields, drain the swamps, build the railroads, drive the horses, clean the house, cook the food, nurse your master's children when they are born, and tend to your master when he is old and sick. You do all this for free. Your children, your grandchildren, and your great-grandchildren will inherit the burdens and the badges of slavery forever and forever. The Declaration of Independence and the Constitution do not mean anything to you. The President of the United States does not speak for you. The Congress does not represent you. The Courts do not defend you. And the founding fathers are not "fathers" to you.

Let us push the clock forward a bit to 1857. The United States Supreme Court is now in *Dred Scott v. Sanford*[4] directly confronted with the question of the meaning of the words "We the People" in the Declaration of Independence. Chief Justice Taney, writing for the Supreme Court, concludes: "blacks have no rights which the white man is bound to respect."[5] With this pronouncement the Supreme Court virtually assures that only a civil war will bring you your freedom. The war comes and passes. And with the ending of the war so too ends slavery. The Thirteenth Amendment is passed in 1865, the Fourteenth in 1868 and the Fifteenth in 1870. But if you are now relieved of the immediate burdens of slavery, the badges remain like indelible signs stamped on your skin and etched on the American psyche. So, in 1896, when the false rumor spread that President Grover Cleveland had a "colored man" attend an official White House function, the President could confidently respond: "It so happens that I have never in my offi-

1. THE DECLARATION OF INDEPENDENCE para. 1 (1776).
2. *Id.*
3. U.S. CONST. pmbl.
4. 60 U.S. 393 (1856).
5. *Id.* at 407.

cial position, either when sleeping or waking, alive or dead, on my head or on my heels, dined, lunched, or supped, or invited to a wedding reception any colored man, woman or child." Or in 1884, Mark Twain, the greatest novelist of his time, could write in *Huck Finn* as fiction what most of your fellow Americans must have felt in reality:

"Good gracious. Anybody hurt"
"No'm. Killed a nigger."
"Well, it's lucky because sometimes people do get hurt."[6]

Before I deactivate our imaginary machine and return you to the warm comfort of Amherst and before I begin to speak directly to the Houston Legacy, I ask you to stop and look around as if all of us at this moment were sitting in a shack in the slave quarters of the Monticello plantation in Virginia in 1776. A philosopher once said: "The eye cannot see what the mind cannot comprehend." Remember that you are black. Understand that now the slave is you, the nigger is you. If your mind can comprehend that this is your life then your eye might begin to see why Charles Hamilton Houston, a son of Amherst, deserves the accolades usually reserved for Thomas Jefferson, George Washington, Patrick Henry, James Madison and Chief Justice John Marshall.

In 1935, Charles Hamilton Houston began a lonely and dangerous crusade to bring equal education to children in the south. Houston believed that education was the key for blacks achieving equal rights and equal opportunities in this country. You might say that in a real sense in 1935 Houston began to complete the Declaration of Independence and to correct the United States Constitution. Armed with a hand held camera he traveled the back-roads of small southern towns recording the horrendous conditions in which black children lived and learned. In the 1930s, Hamilton created a legal strategy to attack the vestiges of slavery and defeat the effects of segregation. With the help of a small but talented pool of lawyers he brought to the courts cases such as *Missouri v. Gaines*.[7] Among the lawyers that Houston trained personally were Judge William Henry Hastie and Thurgood Marshall. These lawyers in the future would themselves train more soldiers in the fight against segregation such as Judges Robert Carter and Constance Baker Motley. The centerpiece of Houston's strategy and perhaps the centerpiece of his life was to invalidate the separate but equal doctrine the Supreme Court had established in *Plessy v. Ferguson*.[8] In 1954, Thurgood Marshall, Houston's ideological son, argued and won *Brown v. Board of Education*,[9] overturning *Plessy* and invalidating the separate but equal doctrine.

Houston never lived to see the decision in *Brown v. Board of Educa-*

6. MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN (1884).
7. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
8. 163 U.S. 537 (1896).
9. 347 U.S. 483 (1954).

tion. But, you must understand this: without *Brown* there would have been no civil rights movement, no civil rights act and no voting rights act. Without Houston there would have been no *Brown*. And so, although Houston did not write the Declaration of Independence, he made life, liberty and the pursuit of happiness a far more meaningful option than Thomas Jefferson ever did for any of "your fellow blacks" who are now working on his plantation or residing in any section of the colonies. Although Houston was never commander-in-chief of our armed forces, as was George Washington, he led the small company of legal troops that fought many of the critical early battles of the twentieth century in which equality for black Americans was sought. Although Houston never shouted as Patrick Henry "give me liberty or give me death," he gave his entire professional life to extending the cloak of liberty so that it embraced and protected those Americans - blacks - whom Patrick Henry enslaved on his plantation. Although Houston did not have the exceptional judicial power of Chief Justice John Marshall, he made the Constitution an evolutionary document for you blacks whose aspirations of liberty John Marshall so frequently, and needlessly, ruled against in several significant court decisions. In short, Houston made certain that this nation honored its creed in the Declaration of Independence that all men and women are created equal, and he assured that the phrase "we the people" in the Constitution included *all* and not just *some* Americans.

I have been asked to speak today on slavery, the work of the founding fathers and the shaping of the Constitution. One might ask, what is the relevance of the evil of slavery or the greatness of the founding fathers to this distinguished audience of Amherst students, scholars and friends? Since Houston was neither a slave nor a forefather, what is the relevance of this topic to Houston's life? Houston himself would probably disapprove of the phrase "work of the founding fathers." The enveloping scope of that phrase masks much of the human suffering experienced in the slavery that the forefathers implicitly and explicitly sanctioned by their work. For what does the term "work" imply? Who did the work? Who was affected by it and who gained from it? Did the work of the founding fathers include solely their skill in drafting a declaration of independence or a constitution or did their "work" also include the profitable management of their plantations at the expense of "you blacks."

Wouldn't it be more accurate to describe some of the events of two centuries ago not as "work" but as "the evil and cruel acts of our forefathers?" I submit that by calling the experiences of the forefathers merely work, we close our eyes to the reality of the slaves' lives. For their owners were not merely raising crops in an environment devoid of people. Those forefathers who owned slaves were also profiting pri-

marily because of their studied and skilled exploitation and enslavement of fellow human beings.

Charles Houston would probably challenge the assigned topic in a second way. He would suggest that some of the deep problems in this country stem from the fact that in the formulation of policy in the eighteenth century we had only forefathers. There were no foremothers who had any role in directly shaping the public policies of our nation. The absence of foremothers was a profound omission and failure of American history. Some of you undoubtedly have read the letter Abigail Adams sent to her husband John when he was in Philadelphia drafting the Declaration of Independence. It began simply: "John you know how I feel about slavery. . ." and concluded with "don't forget the women."[10] Maybe if in 1776 there had been foremothers who had the sensitivity and the concerns of Abigail Adams, America would have started off on a more positive course.

Charles Houston would surely argue that the subject of slavery and the forefathers is, and should be, relevant to any audience in the Amherst community. After all, there will still be some qualities found in our forefathers that many of you have - not because any of you are slave holders or evil or intentionally unjust. You would concede that the faculty, staff, students and friends of Amherst represent "the best and brightest" this nation has to offer. Yet, the same could be said of our forefathers - and you like them could also fail to become sensitive enough to solve the racial and gender pathologies of our era, just as they failed to solve the racial and gender pathologies of their era.

Former President Nixon called the Declaration of Independence "the greatest achievement in the history of mankind." It may or it may not be. I will not get involved in that debate. Nixon spoke often of the preamble "We the people." But, without Houston that phrase would not have described black Americans or women. In his frequent, and often lonely crusades for civil rights, Houston often referred to the relevance of slavery to modern life. In 1935, during an effort to raise both funding and manpower to continue the litigation battles, he reminded listeners of what Frederick Douglas had said: "to make a contented slave, you must make a thoughtless one, darken his moral and mental vision, annihilate his power of reason, he must be able to detect no inconsistencies in slavery, it must not depend upon mere force, the slave must know no higher law than his masters will."[11] Houston continued his plea by saying we must demand equality of opportunities for all citizens regardless of race, color or creed.

If Houston could speak today, I think he would ask: how is it that

10. L.H. BUTTERFIELD ET AL. eds., ADAMS FAMILY CORRESPONDENCE, vol. I (1963).

11. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 133 (1983)(citation omitted).

individuals as profound as a Jefferson, as brave as George Washington and as eloquent as Patrick Henry could treat blacks so differently, with such special harshness, solely because of the different color of their skin? I fear that some persons in this audience of 1980 may not grasp, within their minds, the meaning of what happened two centuries ago or even thirty years ago to what happens today. Charles Hamilton Houston fought and litigated against the legacy of that distorted mentality that even today is blind to the existence or consequences of racism during this century. Houston's legacy is the foundation he built almost single-handedly to deter and eliminate some of the racial oppression which others had enforced through the legal system, societal values and often through violence. His career serves as an extraordinary counter-balance to the forefathers' failures in the racial human rights era. We owe him our gratitude for his leadership in assuming human rights, for his vision as a lawyer, for his power as an advocate, for his skill as a strategist, and for his compassion for all humanity. So, if as former President Nixon asserts, the Declaration of Independence is "the greatest achievement in the history of mankind," we must understand today that, from the perspective of blacks, the Declaration of Independence was not great when Jefferson drafted it. It became great through the work of individuals such as Houston, Marshall and Hastie.

Shortly before he died, Charles Houston said, "We are fighting a system, we're trying to remove the lid off the oppressed people everywhere. So, that in this day while, there is still time, the primary task is to probe, to struggle, . . . to teach the masses to think for themselves. . . . recognize their power and to apply it intelligently."[12] And he concluded by saying, "We insist that the system which shall survive in the United States of America—I don't care what you call it—shall be a system which guarantees justice and freedom for everyone."[13]

Justice and freedom for everyone is what Charles Houston's life was all about. And his accomplishments did not merely aid Blacks; he helped to save the soul of America, and to give our nation and world a broader vision of justice.

Shakespeare wrote "the evil that men do lives after them, the good is oft interred with their bones."[14] Today, by the focus of your symposium, we partially repudiate and partially sanction that Shakespearian dictum. We partially sanction that dictum because, by acknowledging the evil that the founding fathers engendered through slavery, we can begin to see how that evil has "lived after them." However, we also repudiate the same dictum because, by recognizing Charles Hamilton Houston's genius and profound contributions to all humanity, we are ensuring that his goodness will not be "interred with his bones."

12. *Id.* at 208.
13. *Id.*
14. WILLIAM SHAKESPEARE, JULIUS CAESAR, act III, sc. 2.

The more relevant question for those of you who enjoy the splendor of this college is, will Amherst nurture future Charles Houstons, both black and white, male and female, Jew, Muslim, Christian or atheist? Charles Hamilton Houston's goals are far from full implementation. I hope that all of you will have a commitment similar to Houston's, as I deactivate this machine, and that you will go forward and seek as he did, "justice and freedom for everyone."

We note our indebtedness to his herculean effort to eradicate racism from American society. However, because Charles Hamilton Houston had to fight these battles against racism, and because racism is still a persistent force, we must acknowledge the truth in Shakespeare's prophecy that "the evil that men do lives after them," and that for centuries those evils created the sequelae to slavery that will plague generations still to come.



Hon. Margaret A. Haywood

Hon. Margaret A. Haywood

The Honorable Margaret Austin Haywood, Senior Judge of the Superior Court of the District of Columbia, was born on October 8, 1912 in Knoxville Tennessee. Judge Haywood received her law degree, with honors, from the Robert H. Terrell Law School, located in Washington, D.C., in 1940. Judge Haywood was admitted to the District of Columbia Bar in 1942. Immediately after her admission to the D.C. Bar, Judge Haywood began working for the law firm of Houston, Houston & Hastie. She remained with the Houston firm for two years. Upon leaving the firm, she began a general practice in the District of Columbia and remained in private practice for thirty years.

In 1972, President Richard M. Nixon nominated Margaret Haywood to the Superior Court for the District of Columbia as an Associate Judge. The United States Senate confirmed her nomination on July 30, 1972. Although she retired from the Bench in October 1982, Judge Haywood sat as Senior Judge during most of 1984, following which she became a consultant with the United States Department of Education. She returned to the Court as Senior Judge in 1986, and since then has given service regularly, but on a part-time basis. Judge Haywood is also a member of the Board of Judges of Judicate, a national private court system, and when not sitting at the Superior Court, hears matters for Judicate litigants and for the American Arbitration Association.

In addition to her law practice, Judge Haywood was a member of the District of Columbia Council from 1967-72. While a Member of the City Council, Judge Haywood served as Chairwoman of its Manpower, Economic Development and Labor Committee, and was appointed by the Honorable Walter E. Washington, then Mayor-Commissioner, to serve on the Mayor's Economic Development Committee, the Mayor's Manpower Advisory Committee, and the District of Columbia Commission on the Status of Women. From January 1970 until July 1972, she was an Alternate Member of the Board of Directors of the Washington Metropolitan Area Transit Authority and currently serves as a member of Transit Officials Emeritus (TOE).

Judge Haywood is a member of the American Judicature Society and the following Bar Associations: Bar Association of the District of Columbia; National Bar Association; Washington Bar Association; Women's Bar Association; and, the American Bar Association. She was also admitted and qualified to practice before the local courts in the District of Columbia; the United States Court of Appeals for the District of Columbia Circuit; and, the United States Supreme Court. Moreover, she was admitted to practice before the Treasury Department and the Veterans Administration.

Judge Haywood has been especially praised for guiding the Superior Court's Probate and Tax Division through a turbulent period in the late 1970s and early 1980s, when the District's probate law was redrafted and implemented. Judge Haywood is particularly proud of her participation as a lawyer in the litigation against Thompson's Restaurant, which resulted in the Supreme Court decision prohibiting racial discrimination in restaurants and similar establishments within

the District of Columbia[1].

Judge Haywood's contributions of time and dedication on behalf of her community and country have been felt through her active membership with the following business and professional organizations: Gamma Delta Epsilon Legal Sorority; Lambda Kappa Mu, Inc., where she served as Grand Basileus and as National Parliamentarian; and, the Cosmopolitan Business and Professional Women's Club, which is a part of the State and National Federations. Currently, she holds, once again, the national office of Parliamentarian in Lambda Kappa Mu Sorority, Inc., as well as in her local Chapter, Theta. She is a Member and Treasurer on the Board of the D.C. Women's Commission for Crime Prevention; a Charter Member and former Parliamentarian of Executive Women in Government, an organization of federally appointed women; and, a Member of the Zonta Club of Washington, D.C., a worldwide active service organization.

During her professional life, Judge Haywood has been extremely active in community service. She has served on the Boards of the United Givers Fund (formerly Community Chest); Health and Welfare Council; Washington Urban League, Inc.; Southeast Neighborhood House; Family and Child Services of Washington, D.C.; and, the Girl Scouts Council of the Nation's Capital, among others.

A Protestant, Judge Haywood is active in Peoples Congregational Church, United Church of Christ in Washington, D.C. Judge Haywood has held several positions including Chairperson of the Church Council. Nationally, she was a member of the National Executive Council, United Church of Christ, Inc., the Interim Governing Board, from March 1969 until her election as Moderator of the then two-million-member Denomination at the General Synod at St. Louis, Missouri, in June 1973. She served for the biennium, terminating her services as Moderator at the close of the General Synod in 1975, having successfully addressed every item on the Synod agenda. She was the first African-American woman to be so elected by a major denomination.

Judge Haywood's numerous citations, awards and honorary degrees are testaments to her success in all her areas of involvement, and include, most notably, being named, in 1972, Woman Lawyer of the Year by the Women's Bar Association, and in 1980, she became the first woman to receive the Charles Hamilton Houston Medallion of Merit awarded by the Washington Bar Association for her contribution to jurisprudence.

Judge Haywood's immediate family consists of her daughter, Mrs. Geraldine H. Hoffman, of Escondido, California, and her granddaughter, Mrs. Denise A. Richmond, of Fremont, California.

Law School

I obtained my law degree at the Robert H. Terrell Law School. This was a private school organized about 1931 by a group of practitioners because there were no evening schools available to Negro students (Charlie, as much as I loved him, had decided not to have evening classes at Howard Law School). Of course, in the '30's, there were no opportunities for Negro students to go to Georgetown, American, and so on. So this group of practitioners, thinking about us, started their

1. District of Columbia v. Thompson Co., 346 U.S. 100 (1953).

own law school. And for approximately twenty-odd years, it produced a number of graduates who are practitioners in the District of Columbia and elsewhere, some of whom are on the Bench in many jurisdictions.

The Law Firm of Houston, Houston & Hastie

I was hired as a secretary by his father, William L. Houston, before I even met Charlie. I happened to be coming out of the building where the law offices were, 615 F Street N.W. I had been to see either Augustus W. Gray, who was one of the instructors at Terrell, or Richard Atkinson, who practiced upstairs with three or four other lawyers. At that time I was a waitress. As I was leaving the building, Mr. Houston saw me and spoke to me. When I turned around he apologized because he said he thought I was someone else. Then he said he was looking for a secretary, and I said I was looking for a job. That is how I started working for his firm.

When I was there as a secretary, Charlie was not actually in practice. I'd say that he was more at Harvard University.

Years later, I returned to the firm as an attorney right out of law school, as soon as I passed the Bar. Charlie was very happy to have me. He said I was brilliant, I was not. I am not. And I always knew that.

What caused me to want to leave the firm was that I didn't recognize such a thing as what we call "male chauvinism." I didn't recognize it then, because that wasn't something that had the exposure that it has now. But I was a victim of that. The firm wanted me to handle just domestic relations. Charlie even addressed the notion that I try to become a judge of the juvenile court. I didn't want to do that because I, having gone to law school four years in the evening, in addition to working in the daytime, and raising a daughter whose father had taken off six months after she was born, I felt that I had put too much into the study of law to want to limit myself just to domestic relations. I began to see that I was not going to have the opportunity to get into other things. So I decided that I would leave. I left and opened my own office after two years.

Charles Houston's Father: William L. Houston

Well, we called him W.L., he was William LePre Houston, and his practice was largely civil, largely negligence work. He had little, if anything, to do with any race issues. During the time I was the firm's secretary, and for the first two years of my law practice, which was as long as I was with the firm, during that time, I don't recall William L. Houston having tried many cases. With negligence work, he was remarkably successful with settling claims. I can't even recall what kind of a case he might have had that actually went to trial. I can remember only maybe a couple or so instances when he was in trial. I just don't remember what kind of trials they were. Not very long trials, as I recall. So, I

would say that Charlie's style and expertise in trial work did not come from his father.

I'll give you a bit of a notion of how W.L. was about money with this little story. Mr. Houston had a book, similar to a diary, where the secretary was required to note, in addition to giving the person a receipt, note the payment, how much it was for, and leave the money in the book. When Mr. Houston came in, when he took the money, he would initial the book to indicate that he received the money. He had a case involving *Glascoe v. Glascoe*, and it resulted in an order for $15 a week child support. Mr. Glascoe worked at the White House, doing what, I don't know. He came in and he paid $15 dollars. I later came to understand that the order also called for $75 attorney's fees. When Mr. Houston came in, it was long after I had gone home. I don't know where he was, but he did not get to the office before I left. It was about 11 o'clock at night when my phone rang. I answered the phone and he said:

"Mrs. Haywood?"

"Yes, Mr. Houston."

"This is W.L. Houston, speaking."

"Yes, Mr. Houston."

"Did you receive some money?"

"Yes, Mr. Houston, I received 15 dollars from Mr. Glascoe. It's noted in the book."

"Well, where is it?"

"Well, Mr. Houston, I'm not the first one in the office in the morning, I did not want to leave it, so I have it with me."

"Well?" he said as a question.

And I said, "Mr. Houston, if you think I'm going to get out of my bed to bring you 15 dollars, you have another think coming. Good night!"

Of course he got his 15 dollars the next day. But then we had a big argument because he said that Mr. Glascoe was supposed to pay 75 dollars, and I said I knew nothing about that. We had a big fuss because he said, "You always hear my telephone conversations. You know I talked about that." I replied, "No, I don't know anything about your telephone conversations, when I put you on the line, I'm off." But anyway, that will give you a little insight into how William Houston was. He was a real, real taskmaster.

If one typed a letter for him and it had an error, he would not give it back and say make this correction, you might be able to erase if you had a comma that didn't belong there. He wouldn't allow that — he would use red ink to correct it — with red ink you had to do it all over again. So I decided that if he was looking for perfection, he would get it. He never had much of an opportunity to mark up my letters because I insisted upon their being perfect before I put them in front of him. I

have to say, although I called him things under my breath, I have to thank him for making me strive for perfection, I really do.

Father and Son

William didn't have to worry too much about Charlie. Charlie's intent was to be as near perfect as possible. That was Charlie's intent anyway. And as I say, W.L. loved this, and he indulged Charlie, but he was always after him about not getting into something that made more money. W.L. was like that with other people that worked for him. Charlie said that his father had an employer's psychosis — he had to "dog" you if you worked for him. And he did. He had a maid that worked for him, and he treated her very badly, verbally. Whenever she did anything wrong, he called her dumb. He was totally opposite from Charlie. I mean in the way he dealt with people. Charlie was gentle.

W.L. Houston loved Charlie, there's no question about that, but he was constantly castigating him because Charlie was "wasting his time" trying to save the race. "You aren't going to get anywhere like that, you'll never make any money." And, of course, he didn't make any money to speak of. Charlie didn't even have a savings account until Juanita Kidd Stout came to be his secretary. She insisted on deducting part of his money and putting it into a savings account. Throughout their relationship, Charlie would borrow money from his father and give his father an IOU. His father kept all of those in a safe — he had this huge safe as tall as a filing cabinet. He was constantly reminding Charlie of the IOU's that he had. I'm sure they didn't really make any difference, and Charlie never really made any effort to pay them.

William and Charlie got along fine, they didn't have arguments.

Charles Hamilton Houston

Charlie, as I understand it, never had a job. He was a remarkable student. He went straight through and finished Amherst when he was in his teens. He came into the firm never having had a job working for anybody.

I went to trials with Charlie, it was a general practice, and ultimately I was assigned the domestic relations work. But originally, I would go with Charlie or Joe Waddy, who was a member of the firm. Joseph, who later became first a judge of the then Municipal Court, Domestic Relations division — because that's how you got appointed in those days — and then was reappointed to the U.S. District Court.

At a point in time, we had a case in the office addressing the racially restrictive covenants on housing in the District, and I remember working with Charlie on that one[2]. He broke the covenant in that suit. I

2. Hurd v. Hodge, 337 U.S. 24 (1948) (companion case to Shelley v. Kraemer, 334 U.S. 1 (1948)).

remember working with him on another case, I think it was *Hartman v. Ross*[3], that established, in the District of Columbia, negligence on the part of an owner of an automobile who would leave the keys, and leave the car unattended, and thereby make it possible for someone to take the car and have an accident. In that case, there was a recovery against the owner of the car. As a result, that became the law in the District of Columbia. It was a case that was ultimately appealed and affirmed.

My Impressions of Charles Hamilton Houston

Charlie was first, ahead of Thurgood Marshall, to represent the NAACP, which is how I was exposed to some of the early school cases. I helped with the — of course, I was not a lawyer then — they hired me to do the typing of their rough drafts for the cases going to the Supreme Court. They did this at Howard University Law Library. There was Thurgood, Robert Weaver, Leon A. Ransom, [and] Jim Nabrit, I think — certainly later, if not then. I would do the typing of the rough drafts, and I would sit there while they tore them up, [and] started over. I would fuss, and they would butter me up. Sometimes it was all night, and I would have just enough time to go home, shower and have breakfast, and go to the law office to be his father's secretary. I have to say that the experience of doing that over a period of time gave me an insight into service to humanity that I had not previously had. It made me want to do some of the same things that they did.

Charles Hamilton Houston-Legacy

I have to say that Charlie was a mentor for all of us, me as well as Thurgood, and all those who worked around him. Oh, absolutely, definitely we were all his progeny.

Malcom X wasn't on the scene during Charlie's time — Charlie died in 1950, but if they had lived at the same time, I think that Malcom X's original penchant for condemning members of the White race would have been antithetical to Charlie. While Charlie did not hesitate to speak out against the behavior, I don't think Charlie harbored any racial animosity, as such. I don't think Charlie was willing to blame our own lack of accomplishment, necessarily on the White race, in totality. Charlie believed in preparation, and he believed you could accomplish almost anything if you were prepared. That's not to say that he believed that was the be-all and end-all. Quite the contrary. But preparation was a requisite before you were able to say, "Give me what I am due." You had to be prepared and you had to be willing to work. With Charlie it was a total commitment. That's probably why his life ended as soon as it did — because he was always working. He took little time for recreation.

3. 139 F.2d 14 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944).

Margaret Haywood: Teacher

I taught at Terrell for five years before it closed around 1951-52. My husband was a member of my class that I was teaching — that is, he became my husband afterwards. After he graduated, he was a government employee, he left his job with the government, and we had a partnership with the law practice. That lasted thirteen years. Just coincidentally, or incidentally, that ended because my husband somehow couldn't adjust to the idea that I was making more money. Which is only natural — and I couldn't convince him that I didn't regard it as my money — it was our money — we can forget that issue and just concentrate on the facts. Anyway, that was something we were never able to overcome.

I taught Wills and Administration. I mentioned Augustus W. Gray earlier. He became ill and asked me to take over his class. I taught Personal Property — I had an excellent teacher in property — Philip W. Thomas. I taught Ethics. Louis Mehlinger, who died in the last few years, at something over a hundred years old, was one of my favorite teachers, and I happened to be one of his favorite students. I guess because I was working then in a law office, I could always recite the jurat or an affirmation, so I sort of became his star pupil. So, somehow I got to teaching Ethics. Insurance I taught, also.

I have always been very strict about the matter of ethics. I remember an incident about a lawyer of my acquaintance; he had a secretary and he paid her an amount of money that was less than what would be a salary, because he allowed her to take in typing and use equipment in the office, charge and retain the money she got for that, and she was supposed to make the rest of her salary. I guess he was struggling — there were times when she didn't get paid her salary on Saturday, when she was supposed to be paid. There would be this terrible conflict because she would be sitting in his office on Saturday, waiting for him to come back, and he wouldn't be coming because he didn't have her money. Something about the ethics came up in a discussion about that between me and another lawyer. He said, "The trouble with you is that you're too ethical." And I said, "What's *too* — how can you be *too* ethical? You're either ethical or you're unethical." But, to answer your question, yes, again, as a product of Charles Houston, as well as my own upbringing I think, I, in my approach to ethics and my approach to how you deal with the inequities and injustices, have — would have been undergirded by my experience with Charlie because I believe in addressing those problems through litigation. When you get a verdict or a court judgment that says it's so — it's so.

Margaret Haywood's Law Practice

My father was a public accountant. I didn't have to worry about finding office space when I left the Houston firm. I decided to open my

law office in the same office where my father had accounting services. Because my father was not a lawyer, he couldn't be a partner with me, so I took over the ownership of the accounting service, and made him manager of that. From then on, it was Austin Haywood Audit Service that was being operated by my father, and a law practice by myself. I was also teaching then at Terrell Law School.

I practiced mostly in the District. I've had maybe a case, now and then, in nearby Virginia, maybe a case, now and then, in the state of Maryland. I was admitted on motion to the District Court for the District of Maryland, but had only one case there. I did not feel that I could stretch myself to three jurisdictions. There are a lot of lawyers who do maybe two jurisdictions. But I didn't seek to establish any practice, and was not admitted to any Bars, outside the District of Columbia.

Charlie and Thurgood, as he got more involved with NAACP cases, well the two of them in particular, they were in practice in federal courts in many jurisdictions. Because, wherever there was a case such as Lincoln University, in Lincoln, Missouri, which would send a student to Lincoln University in Pennsylvania, rather than admit that student into the White population of the school within the state, pay the tuition at the foreign school — that was challenged in the cases that Charlie and Thurgood handled.[4] They were successful in breaking that practice and requiring that a state educate its own at its own school. So yes, they practiced in other jurisdictions. I did not.

Judge Margaret Haywood

I am never going to be quite sure how I got to be a judge. Well, that's very interesting. I did apply for the position at the Juvenile Court. Marjorie McKenzie Lawson had been appointed. My objective was to be the first Negro woman judge in the District of Columbia. When Marjorie Lawson got that job, I wasn't going to be the first, and I wasn't particularly interested. I thoroughly enjoyed the practice. I had a general practice, I had a lot of family practice, I had a lot of probate work. Although I knew better, my clients thought I was the only lawyer in Washington — and the best. So, I was having a wonderful time.

But apparently there were others interested in my becoming a judge, and efforts were made on my behalf. At the time, we didn't have a commission that nominates to the President as we have now. The Attorney General was the person who made the recommendation to the President. Apparently the Attorney General was informed who I was and what I was doing. He sent my name to the President. The Women's Bar Association, at a point before he sent the nomination, sent a committee to sit down with him and discuss me, which I'm sure was also

4. *See e.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

very helpful. I think that the people who made a direct approach to the Attorney General were really supporting my getting appointed. The reason I say — it had to be that people wanted me, because the policy was then unspoken, but it seemed that people who contributed to the political party got the appointments. I was too poor, I didn't do that much contributing, so I'm sure it wasn't my money. I was attending — I was a member of the Executive Council of the United Church of Christ, which had meetings of the Executive Council twice a year. In an April meeting, in New York City, I got a call from someone saying my name was in the paper as having been one of sixteen sent to the President. After that, the process of getting ready for confirmation hearings — submitting all the financial data and a copy of every speech you ever made, interview with the FBI, every address you've ever had — goes on.

Interestingly enough, some people don't know it, but before you get to the stage of that public hearing, you have already taken an oath, and said all the things that they want to know. When they have that public hearing, that's a total waste of money, as far as I'm concerned, because they already know everything about you. They already know what you have to say. You've said it under oath, so you're already vulnerable to any misstatements. Which is why I don't understand the crucifixion of Clarence Thomas, although it was pretty clear in that there were some things that were said to the FBI that didn't go as far as some of the things that were said publicly. It seems that the FBI had not been told some of those things that were testified to. But that's beside the point. Anyway, in my case, that process went on from April to July. The hearings were in June, and I actually was confirmed about June 30th, and sworn in on the 21st of July of 1972. Since that time, we now have a nominating commission, we have the Commission on Judicial Tenure and Disabilities, which oversees any complaints against judges, and we have the Board of Professional Responsibility, of course.

Houstonian Jurisprudence

You have to ask the question as to what I think Houstonian Jurisprudence is. I think it was the early commitment to use litigation to establish rights, rather than some of the other kinds of approaches such as sit-ins, or picketing, and so on. I think it is the use of the legal system to seek your rights and maintain them. Yes, I'm definitely a product of that sort of thinking.

We had picketing on the Committee — D.C. Coordinating Committee for the Enforcement of the D.C. Antidiscrimination Laws. I never picketed, but I was an attorney for the Committee. That was the case that went into court, through the system to the Supreme Court, and back to the Circuit Court, upholding the 1873 Antidiscrimination Laws in the District of Columbia, which had fallen into disuse. There was

seldom a restaurant that would serve a racially mixed group. And in fact, I guess I only know of one — that was Reeves.

I did go on a couple of interviews. One was with the general manager of Woodward and Lothrop department store. I spoke of Judge Atkinson, who, before he became a judge, was one of the lawyers on the second floor in that building where the Houston office was. His wife and I interviewed the general manager of the department store about opening up their restaurant. He told us that "the day would never come." And we said, "Thank you very much, we'll see you in court." Some others went to the Hecht Company. The Hecht Company had this big ad about brotherhood in the month of February. But when they were approached with, "you have this treatise here about brotherhood in the paper but you're refusing to serve in this restaurant." They replied, "Oh, well, that's just some of our public relations." It was that kind of attitude. So, these tests from different places in the city were leading up to finding a restaurant against whom a complaint could be filed in Municipal Court. As attorney, I escorted the group to Child's Restaurant, which then was located on Pennsylvania Avenue, West of 14th Street, near the Willard Hotel. I think also, in that neighborhood was Occidental Restaurant. When we went into Child's, the waitresses said that they would be glad to serve us, but they would lose their jobs if they did. We were not looking for someone to lose their jobs, so we went around to 14th Street, to Thompson's Restaurant. The manager of Thompson's came out to the group in the line, which was headed by Mary Church Terrell, who was the widow of Robert H. Terrell, for whom my law school was named. Mr. Terrell was the first African-American judge in the Municipal Court. He was already deceased at that time. The minister of my church, Arthur F. Elmes, was at the head of the line along with Mrs. Terrell. It was quite a line because there were a number of people who were willing to go make the test. The manager came to them and said he would not serve them, specifically because of the fact that there were Negroes in the group. We thanked him, and came down to court. There are not many people, if any, who remember that there was an Assistant Corporation Counsel on duty named Clark King, from somewhere in nearby Maryland. He said, "I'd be glad to take your complaint, but it's lunchtime, and I don't have anybody to type up the Information." I thought he was stalling. So I said, "Well, Mr. King, typing is how I used to make my steak, taters and tea, and I'd be glad to type your Information for you." He said, "Fine, here's a typewriter." He gave me the Information. I typed the Information which ultimately went up to the Supreme Court and back, upholding that 1873 law.

I would say that in today's courts, there is not as much, and I guess, in this day and time, [a need for litigation to establish rights]. Since the Civil Rights Acts, and since federal interventions in many ways, there is

not as much occasion for what is equivalent to the highest trial court of a state, which is what the Superior Court is, to come face-to-face with those issues. Today there isn't that kind of arena in this court.

Houstonian Jurisprudence and the Future

I always felt Charlie meant that you had to do more than just want to make a living practicing law — you had to want the practice to mean something to society as a whole. That would mean that he took on unpopular causes, if that's where justice lay, and you took them on even if you weren't going to get what you felt would be an appropriate monetary award. I know I could look at my books, when I was in practice, and see all of the money that I did not make because I was out doing what W.L. Houston said; "Saving the Race." But fortunately, I came — and nobody told me we were poor — but I did come from a poor background, so I never needed very much. I didn't want a fancy house. You should see the house I live in. I had some insulation work done in the cellar. While the man was sitting there talking to me about it, he said, "Why do you live in this house? Is it is an old family hand-me-down?" I said, "Well, yes." When my uncle died, my aunt said, "I'll either sell the house and give you part of the money, or if you want to take over the balance on the note, I'll give it to you." And I said "I'll take the house, because if you give me the money I'll probably spend it." I said to the man, that's one reason why I still live here. I said I never needed *things*. I'm not a person who has to have a fancy house, a fancy car, fancy clothes — I just need the comforts of home. But there's another reason. This is funny, but it's true. I'd rather die than move. If I had another house, I'd have to move. That's a trauma. I am going to have to go through it because I want to go into a life-care type of retirement situation out near my daughter in California. I just never needed much — there's so much that is more important in the world than things.



Courtesy NAACP Public Relations

JUSTICE THURGOOD MARSHALL

Justice Thurgood Marshall

Thurgood Marshall, former Associate Justice of the United States Supreme Court, has been justifiably lionized for his life-long efforts to secure basic civil rights for *all* United States citizens.[1] From his days at Howard Law School, to his years with the National Association for the Advancement of Colored People ("NAACP"), through his terms on the United States Supreme Court, Justice Marshall had been a consistent voice espousing the same philosophical message as his mentor, Charles Hamilton Houston: that the principles upon which this country were founded apply to each and every member of society, regardless of race.

THE EARLY YEARS

Thurgood Marshall was born to Norma A. and William Canfield Marshall in Baltimore, Maryland in July, 1908.[2] Norma was a schoolteacher[3] and William was an amateur writer who also worked as a waiter on the railroad.[4] While Marshall was growing-up, his parents never insisted that he become a lawyer, even though his father had a penchant for oratory and debate. Recalls Marshall: "He never told me to become a lawyer, but he turned me into one. He did it by teaching me to argue, by challenging my logic on every point, by making me prove every statement I made."[5]

After completing high school, Marshall attended Lincoln University in Oxford, Pennsylvania.[6] Lincoln was an all black University which was referred to as the "black Princeton."[7] At Lincoln, Marshall first began to question segregation and demonstrate his ability to lead the fight against racism. In fact, Marshall's hatred for segregation motivated him to join other students in desegregating the local theater.[8] Marshall's

1. *See e.g.*, William J. Brennan, Jr., *A Tribute to Thurgood Marshall*, 105 HARV. L. REV. 23 (1991); Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992).

2. RANDALL BLAND, PRIVATE PRESSURE ON PUBLIC LAW, *in* THURGOOD MARSHALL: JUSTICE FOR ALL 22, 22 (Roger Goldman & David Gallen, eds., 1992) [hereinafter PRIVATE PRESSURE].

3. *Id.* at 23. In fact, his parents made sure that Thurgood attended the very school in which his mother taught, so that she would be able to keep an eye on him. *Id.* at 24.

4. *Id.* at 23.

5. *Id.*

6. *Id.* at 24; Gary A. Hengstler, *Looking Back: Reflections on a Life Well Spent*, A.B.A. J. June 1992, 57.

7. PRIVATE PRESSURE, *supra* note 2 at 24.

8. *Id.* Students at the University, such as Cab Calloway and Langston Hughes,

conduct at Lincoln evidenced the beginning of a sixty-year career dedicated to fighting racism and segregation.[9] Marshall relates that: "I guess that's what started the whole thing in my life."[10] In June of 1930, Marshall graduated from Lincoln with honors with an A.B. degree in the Humanities.[11]

TRAINING

Immediately after graduating from Lincoln, Marshall decided to attend Howard Law School in Washington, D.C.[12] At the time, Howard was in the midst of a campaign to upgrade its law school and obtain accreditation from the governing bodies for law schools—the American Bar Association (ABA) and the American Association of law schools (AALS).[13] The job of overseeing this monumental project was given to Charles Hamilton Houston, who had been appointed Vice-Dean of the Law School a year earlier in 1929.[14] It was here, at Howard, that Thurgood Marshall first came into contact with Houston; the man who would influence and change Marshall's life forever. As Marshall remembers "I think that my first experience was when I saw him in law school. I never heard of him before. And . . . we got pretty close."[15]

Charles Houston took his responsibilities of improving Howard's reputation seriously and began what has been dubbed "the Harvardization of Howard."[16] Justice Marshall remembers that in his class:

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questioned why they had to put up with the rampant discrimination of the day. *Id.* at 57-58.

9. Hengstler, *supra* note 6 at 58.

10. *Id.*

11. PRIVATE PRESSURE, *supra* note 2 at 25. During his senior year, Marshall was a star debater in the Lincoln Forensic Society. *Id.*

12. *Id.* It is, perhaps, ironic that Marshall's first choice of law schools was the University of Maryland, which at that time, did not admit Blacks. One of Marshall's first cases for the NAACP was to win entry for a black man to that very same school. *See* Pearson v. Murray, 182 A. 590 (Md. 1937).

13. *See e.g.*, RICHARD KLUGER, SIMPLE JUSTICE 123-27 (1975) [hereinafter SIMPLE JUSTICE]. Dr. Mordecai Johnson was appointed President of Howard University in 1926 and embarked upon a program to improve the entire University. *Id.* One aspect of this program was implementing the suggestions for the law school which were given to Dr. Johnson by his unofficial advisor, U.S. Supreme Court Justice Louis Brandeis. *Id.* at 125.

14. *Id.* at 125. *See also* Genna Rae McNeil, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 70 (1989) [hereinafter GROUNDWORK].

15. Interview between Thurgood Marshall, retired Associate Justice of the U.S. Supreme Court, and Charles Ogletree, Jr. in Washington, D.C. (Jan. 29, 1992) [hereinafter, *Interview*]. Mr. Ogletree is an Assistant Professor of Law and the Director of the Criminal Justice Institute at Harvard Law School. Due to the recent death of Justice Marshall, this oral history incorporates Prof. Ogletree's interview with an overview of the life of Thurgood Marshall.

16. *See e.g.*, GROUNDWORK, *supra* note 14 at 74; Leland Ware, *A Difference in Emphasis: Charles Houston's Transformation of Legal Education*, 32 How. L.J. 479, 481

> Thirty-some [students] started, thirty-two, three, or four started, and six finished. . . . In our second year, the Association of American Law Schools [sic] set out a policy of counteracting the fact that if you finished two years of law school, you'd automatically pass the third one. . . . [T]hey decided they were going to stop that by bearing down in the second year. . . .
> I remember in Charlie's evidence [class] in the second year, if I remember correctly, it ran from 9:00 until 4:00 with an hour for lunch . . . and that's how it ended up we had six left in the class.[17]

Vice-Dean Houston's strict academic curriculum had a twofold goal. First, Houston required each of his students to have a solid understanding of the basic law so they would be competent lawyers to advise their clients. Second, "the Negro lawyer must be prepared to anticipate, guide and interpret his group advancement."[18] Most importantly though, Howard's graduates had to be "Social Engineers,"[19] and " 'use . . . the law as an instrument available to [the] minority unable to adopt direct action to achieve its place in the community and nation,' . . . [and] also consistently and competently to interpret the race's rights, grievances, and aspirations."[20]

In the study of law, Houston would accept nothing less than the full attention and commitment of his students; egos and self-satisfaction had no place in his classroom. At one point Marshall recalls:

> [G]uys were sitting there with their [fraternity] keys and everything and he (Houston) said one day, "You know, man, I get no pleasure out of punching out a stupid man, or somebody who didn't know what they were doing. But the happiest days of my life is [sic] when I flunk key people. Those are the ones I love to flunk." And . . . all the keys

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(1989). Houston immediately raised admission standards, improved the law library, made significant personnel changes, and abolished the evening program—the very program that had enabled his father to become a lawyer. *Id.* at 482. One effect of these actions was the accreditation of Howard by both the ABA and the AALS by the end of 1931. GROUNDWORK at 75. Marshall recalls:

> One of the first things [Houston] did was to put in the cutback system. . . . [I]t was a number of points, that I think was five, that a professor could take off of your mark for no reason at all. . . . [The professor] didn't have to give a reason.

Interview, *supra* note 15.

17. *Interview*, *supra* note 15.

18. GROUNDWORK, *supra* note 14 at 71 (quoting Charles H. Houston, *Personal Observations on the Summary of Studies in Legal Education as Applied to the Howard University School of Law*, 1929) (this report was compiled by Houston for the Trustees of Howard University).

19. *See e.g.*, GROUNDWORK, *supra* note 14 at 85. "A social engineer by definition was to be 'the mouthpiece of the weak and a sentinel guarding against wrong.' " *Id.* (quoting Charles H. Houston, *Law as a Career*, a manuscript dated 27 July 1932 from the papers of Charles Houston and the Houston & Gardner Law Firm).

20. *Id.* (quoting Charles H. Houston, *Outline of Lecture, New School*, manuscript dated 12 December 1946, to be found among the papers of Charles Houston and the Houston & Gardner Law Firm).

disappeared.[21]

Houston's desire to prepare superior Black attorneys was relentless. His zeal and determination earned him nicknames such as "Iron Shoes" and "Cement Pants," among others.[22] When asked about Charles Houston as a teacher, Justice Marshall replies that Houston was:

> [u]nbelievably good as a teacher; well-prepared and very considerate. . . . [O]ne time he really lost his temper. I don't remember who it was, but he said he was in the middle of teaching, and he had this guy on the questions. . . . [Charlie] said, "I have worked with you and worked with you and, damn it, you just don't have it. You need to be re-educated, and what I mean by re-educated is re-educated from the beginning. Repeat after me— A, B."[23]

Houston's vision to train highly skilled Black lawyers led him to become one of the first legal educators to implement and appreciate the value of clinical programs. In 1930, Houston instituted an innovative program called the 'Criminal Law Laboratory.' Justice Marshall explains:

> What you did on Saturdays each week, for one or two hours, you went through the entire criminal procedure—starting with the crime and the complaint, to the arrest . . . to an autopsy, and everything up to the electric chair. . . .
>
> And then I remember the autopsy. [The doctor] said, "This is rough. Most people can't take it, but if you think you can't take it, you can leave now." And, of course, what man could leave? He wouldn't be a man. So, everybody stayed. We watched very carefully what he was doing and . . . I was on the floor. . . . Dead faint.
>
> And then one time we went to the penitentiary. That's when we sat in the electric chair, and it's the funniest thing. It's a wooden chair, and it's not connected. There's no electricity in there-you know that. And you take turns just sitting there . . . and, you know, you can't sit there more than a minute. . . . It's the fear.[24]

Justice Marshall further recalls:

> It was the first year he (Houston) did it (the criminal law laboratory), and the Association of American Law Schools [sic] monitored it and vetoed it. [The AALS] said it shouldn't be used because "it taught lawyers how to manufacture evidence."
>
> [O]ne of my first cases was a criminal case. . . . I wasn't in any law firm or anything . . . and I found it (the laboratory) very valuable. I raved about it to some of my friends, big-shot judges—they've never been through it. They don't know what goes on.[25]

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21. *Interview*, *supra* note 15.

22. *Interview*, *supra* note 15; *see also*, Ken Gormley, *A Mentor's Legacy*, A.B.A. J., June 1992, 63.

23. *Interview*, *supra* note 15.

24. *Id.*

25. *Id.*

Additionally, to help supplement the education of his students, Houston established a lecture seris comprised of prominent attorneys and educators.[26] Among the notables Houston recruited to speak were Clarence Darrow, Arthur Garfield Hayes, and Harvard Law School Deans Roscoe Pound and Erwin Griswold.[27] Houston also used his connections with Harvard Law School to provide opportunities for Howard students and faculty members to obtain further legal education.[28]

During the early 1930s, while overhauling Howard's legal program, Charles Houston continued taking on cases involving the disparate treatment of Blacks within American society. When working on these cases, many of which were for the NAACP, Houston used his students from Howard in place of paid legal assistants.[29] This arrangement worked well for both the students and the NAACP because the students gained practical legal experience to complement their harsh academic schedule, while the NAACP received free legal assistance. Indeed, while Thurgood Marshall was at Howard, Marshall was given the opportunity to work on a number of highly publicized cases such as the Texas White Primary Cases,[30] *Hollins v. Oklahoma*,[31] the *Crawford* case,[32] and actions

26. *See* GROUNDWORK, *supra* note 14 at 76-77.

27. *Id.*; *Interview*, *supra* note 15.

28. *See* GROUNDWORK, *supra* note 14 at 76.

29. *See e.g.*, Gormley, *supra* note 22 at 64.

30. Nixon v. Condon, 286 U.S. 73 (1932). In *Nixon*, the U.S. Supreme Court held that the empowerment of the State Executive Committee of the Democratic Party to decide who shall be qualified to vote was state action within the Fourteenth Amendment's requirement that the equal protection of the laws not be denied. *Id.* at 89. *See also*, Grovey v. Townsend, 295 U.S. 45 (1935). Grovey had complained that the only reason he was denied an absentee ballot, to cast his vote in a Texas Democratic primary election, was due to his being of the Negro race. In this case, the Supreme Court found no constitutional violation in the denial of an absentee ballot. *Id.* at 55

31. 295 U.S. 394 (1935). Hollins had challenged his conviction on rape charges due to the practice, in Oklahoma, of excluding Negroes from jury service, solely on the basis of their color. This, said petitioner Hollins, deprived him of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the U.S. Constitution. The Court remanded the case, citing its decision in Norris v. Alabama, 294 U.S. 587 (1935). *Norris* was one of the cases associated with the 'Scottsboro Boys,' a group of nine black men charged with raping two white women. The prosecution of the 'Boys' raised the anger of the Black community in the U.S. The Supreme Court held that the exclusion of all persons of the African race from serving on juries, when some members of the race were qualified to serve was a denial of the equal protection of the laws. *Id.* at 596. In the *Norris* case, Charles Houston argued a motion for the substitution of counsel before the Court. GROUNDWORK, *supra* note 14 at 119.

32. *See* Hale v. Crawford, 65 F.2d 739 (1st Cir. 1933), *cert. denied*, 290 U.S. 674 (1933). George Crawford, a black man, was charged with the murder of a white woman and her maid in Loudon County, Virginia. He was extradited from Massachusetts to Virginia. The U.S. District Court in Massachusetts had originally held that the indictment was void, due to the exclusion of blacks from Loudon County

involving the "Scottsboro Boys."[33] These cases left an indelible impression on Marshall and influenced his thinking for the rest of his legal career.

Throughout their legal careers, both Houston and Marshall were pioneers of change in legal thinking, but the *Crawford* case was especially notable because it was the first time that a major case in the courts of Virginia was argued by a team of Negro attorneys.[34] It was also Houston's first double-murder case, and one of his first criminal trials.[35] The *Crawford* trial rasied tensions between blacks and whites so much, that the Negro residents of the County were afraid to house the lawyers for fear of reprisal. As a result, the defense team had to travel from Washington, D.C. to the trial in Leesburg, Virginia.[36] The defense team, led by Houston, vigorously attacked the exclusion of Negroes from the all white male juries which indicted and tried Crawford. Although Houston's arguments failed to acquit Crawford, Houston was able to save Crawford from the death penalty.[37] When asked whether he thought it surprising that Houston would take on such a significant

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Grand Juries. *See e.g.*, Ware, *supra* note 16 at 487. The First Circuit Court of Appeals reversed, and Crawford was returned to Virginia to stand trial. Charles Houston, under the aegis of the NAACP, became counsel for Crawford. GROUNDWORK, *supra* note 14 at 90-91. Motions to quash the indictment, upon exclusion grounds, proved fruitless. *Id.*

33. *See e.g.*, Norris v. Alabama, 284 U.S. 587 (1935). This case involved a group of transient black men accused of raping two white women. The men were summarily convicted without having been given counsel. The U.S. Supreme Court reversed the convictions because of the speed of the convictions and the lack of counsel in a capital trial. *Id.* Later, one of the alleged victims recanted her testimony.

Houston and his students attended marches in support of the "Scottsboro Boys," sent donations to the defense teams, and submitted lists of authorities that could be used in the defense efforts. GROUNDWORK, *supra* note 14 at 108-09.

A number of groups came to the defense of the "Boys," including the NAACP, the International Labor Defense (ILD)—a radical organization—and the Communist Party. *See generally*, GROUNDWORK, at 109-10.

Charles Houston's goals for society did not preclude his attention to groups that may have aims similar to his own. Among such groups was the Communist Party. Marshall recalls Houston's attitude in dealing with the Communists:

> Charlie understood them. He was not against them—he was not against them and he wasn't for them. There was no way he was for them, but he was for listening to them, though.

Interview, supra note 15.

34. GROUNDWORK, *supra* note 14 at 90-91; SIMPLE JUSTICE, *supra* note 13 at 149. The defense team consisted of Charles Houston, Leon Ransom, and Edward Lovett. *Id.* Also present was Howard student Thurgood Marshall. *Interview, supra* note 15.

35. *See e.g.*, GROUNDWORK, *supra* note 14 at 90-91.

36. *See*, Ware, *supra* note 16 at 487.

37. SIMPLE JUSTICE, *supra* note 13 at 153. Members of the jury later related that it was Houston's appeal for Crawford that saved Crawford's life. *Id.*

case so early in his career, Marshall replied in the negative.[38]

PRACTICING LAW

In 1933, Thurgood Marshall graduated from Howard Law School with his LL.B degree and as the valedictorian of his class. Following graduation, Marshall returned to his native Baltimore where he set-up a small private practice after passing the Maryland Bar Examine.[39] Marshall hoped to use his ties with the community to establish his law practice, but the country was in the grips of the Depression and paying clients were difficult to find. Thus, Marshall began representing clients without pay, simply to gain experience.[40] Marshall also volunteered his legal services to the Baltimore branch of the NAACP.[41] In 1934, Marshall was asked by his good friend and former law professor Charles Houston to assist him in prosecuting one of the first cases seeking[42] the admission of blacks into graduate schools.[43]

Over the next few years, Marshall's friendship and professional relationship with Houston became stronger and, in 1936, Houston convinced the NAACP[44] to appoint Thurgood Marshall as Assistant Special Counsel.[45] This appointment eased the countless demands on Houston's time and helped seal the special relationship the two men already enjoyed from their days at Howard. Now, Houston and Marshall could

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38. *Interview, supra* note 15. Marshall recalls such actions to be 'typical Houston':

> [I]t just hit him. . . . He wanted to raise a jury question, and it ended up he did. *Id.*

39. PRIVATE PRESSURE, *supra* note 2 at 27.

40. In fact, Marshall has stated that those pro bono cases were what ultimately lead him to work for and with the NAACP. *Id.*

41. PRIVATE PRESSURE, *supra* note 2 at 29.

42. GROUNDWORK, *supra* note 14 at 131; PRIVATE PRESSURE, *supra* note 2 at 30. Houston was appointed Special Counsel to the NAACP in 1935. This appointment was to enable Houston to oversee the NAACP's campaign to attack segregation in the areas of graduate and professional education, transportation facilities, and, eventually, public education. *See e.g.*, GROUNDWORK, *supra* note 14 at 116-18. In fact, Houston had been the architect and driving force behind this campaign. *Id.*

43. Pearson v. Murray, 182 A. 590 (Md. 1936). In this case, Murray, a black man, sought admittance to the law school of the University of Maryland, a school that had a policy of not allowing Blacks into their program. Murray was ordered to be admitted to the University. Here the court said that requiring Blacks to go out of state to receive professional education, where the state provided such training for white state citizens denied blacks the equal protection of the laws required under the U.S. Constitution. *Id.* at 592. It is ironic that Marshall was denied entrance to this very law school years earlier. *See* PRIVATE PRESSURE, *supra* note 2 at 25.

44. *See* GROUNDWORK, *supra* note 14 at 144-45 (citations omitted). Houston was then responsible for the oversight of the legal campaign as well as trying to drum up public support, both moral and financial. *Id.*

45. *Id.*; PRIVATE PRESSURE, *supra* note 2 at 31.

work side-by-side on the NAACP's campaign to uproot prejudice in the United States.

From the outset, Marshall's work schedule was frantic. Marshall was responsible for implementing the NAACP's campaign to eradicate segregation[46] which required him to perform every facet of the NAACP's work: from writing briefs,[47] to travelling the southern countryside seeking plaintiffs to further the legal strategies being forwarded by the NAACP.[48]

As a black attorney travelling through the south in the 1930s and 40s, Marshall often experienced the ugliness of racism and discrimination first-hand. For example, while trying a case in Texas, he was forced to drive twenty or thirty miles each day to the courthouse, "[u]nless you wanted to get your head chopped off."[49] On other occasions, Justice Marshall remembers confronting some local officials dedicated to keeping Jim Crow laws in place.[50] Despite this attitude among some officials, Marshall recalls that:

> [s]ome of them were very polite and decent. We had one I remember in deposition in one of the school cases in South Carolina . . . none of the [stenographers] would take [the deposition], and the clerk, who was a mean son of a bitch but he sort of would do things for me, says, "I got a lady who will take it." And he sent for this woman, who said, "You got money?" I said, "Yeah, I got cash money." And, she took the deposition . . . [T]he second or third question, she stopped and she says, "Excuse me, what was that word?" I said, "Negro." She said, "How do you spell it?" She had never heard the word.
>
> I had another guy in Austin, Texas . . . where the court stenographer called me in New York and says, "I've got the order to prepare this record, and the Attorney General has requested that I copy into the record all of the exhibits . . . ." I said, "How the hell can you do that? I only used one paragraph." He says, "I know, but he just wants to sock you with a good bill." I says, "Gee, what am I going to do about that?" He says, "All you gotta do is tell me no." I says, "You gotta be kid-

46. For a discussion of the NAACP's legal strategy *see* PRIVATE PRESSURE, *supra* note 2 at 39-40 and GROUNDWORK, *supra* note 14 at 114-18.

47. One of the first tasks assigned to the new Assistant Special Counsel was to write the brief for a case seeking admittance of a black man to the University of Missouri Law School. This case eventually went all the way to the U.S. Supreme Court as Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). In *Gaines*, the Court held that the denial of admission to Gaines solely because of his race, and without providing separate but equal facilities within the state, denied the equal protection of the laws mandated by the Fourteenth Amendment of the U.S. Constitution. *Id.* at 345.

48. For example, in October of 1937, Marshall made a trip through Virginia and North Carolina trying to line up plaintiffs for suits to force the equalization of teachers' salaries. SIMPLE JUSTICE, supra note 2 at 198.

49. *Interview, supra* note 15.

50. For a number of stories showing the danger Marshall faced from local officials, *see* SIMPLE JUSTICE, *supra* note 13 at 224-26.

> ding?" He said, "No, I'll do it for you." And he did. . . . So, I mean, some of those people down there were good.[51]

Also during this early period, both Marshall and Houston would travel by car to the site of their case(s) to interview people about their problems. Since most of these sites were located in remote, rural areas, food was scarce. To ensure they had enough to eat, the attorneys would carry bags of fruit with them.[52] Each person present would do whatever the circumstances called for—lawyer, investigator, witness, or paymaster.[53] The team even carried a typewriter in their car to complete any documents necessary for a case.[54]

Justice Marshall remembers many episodes from these times travelling with Houston. In one:

> We were talking to some local people . . . in this little town, and the little kids were standing around, and I was eating an orange. This little kid's eyes were getting bigger and bigger, so I said, "Here fella, you want one of these?" So I gave it to him. He didn't peel it. He had never seen an orange. And then you wonder how . . . rickets and all that stuff the kids got [happened]. I mean, those days were rough down there. But Charlie insisted on going through it. . . .[55]

CONTINUING THE FIGHT

In 1938, Charles Hamilton Houston decided to leave his position with the NAACP and return to his father's law firm in Washington, D.C.[56] Although personal reasons were primarily responsible for Hous-

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51. *Interview, supra* note 15.
52. *Id.*
53. *Id.*
54. *Id. See also*, SIMPLE JUSTICE, *supra* note 2 at 198.
55. *Interview*, *supra* note 15.
56. The two mainstays of the Houston & Houston firm had been appointed to positions within the federal government. William Houston had been appointed an Assistant Attorney General for the United States. William Hastie had been chosen to be a judge in the U.S. District Court for the Virgin Islands. SIMPLE JUSTICE, *supra* note 2 at 205; GROUNDWORK, *supra* note 14 at 147. Justice Marshall also recalls Charlie's father, William LePre Houston:

> a practicing lawyer and highly recognized as such. . . . Privately, [he] . . . used to say, "you know, Thurgood, you and Charlie and I, I don't know why you fuss with me cause [sic] I agree with everything you say. We [sic] all in the same boat, we all want to save the Negro race and the only difference is method, procedure. You want to save the whole damn race and I want to save the race one by one, and when I get to be a millionaire, I'll get to work on all the other ones. . . .
>
> [William] taught a lot of stuff. . . . [E]yeglasses, swivel chairs, and brief cases have made more damn fools than anything else in the world. Number two: Never work[] on Saturdays and Sundays. Those who did was because they didn't do their work Monday, Tuesday. . . . . Charlie had part of that too, I think. But Charlie worked every day.

Interview, *supra* note 15.

ton's decision to return to Washington, his health was deteriorating. Marshall believes other factors, such as a lack of funding, played a part:

> Charlie left the NAACP to go back to that law firm so there was a place for all of us to run when we lost our jobs. That's why he went back. . . . [T]hey (the NAACP) didn't have enough money to eat back in those days. . . . And the most I ever paid a lawyer was $25.00 a day.[57]

After Houston's departure, Thurgood Marshall was appointed to succeed Charles Houston as Special Counsel.[58]

Although Houston left his official position with the NAACP, he remained in close contact with the NAACP as a member of the NAACP's National Legal Committee[59] and through his collaboration with Thurgood Marshall.[60] While Houston's departure was a great loss, the NAACP's assault against discrimination continued and escalated on all fronts: schools, transportation, and employment. By 1939, the NAACP found it necessary to establish a fund to assist Negroes with soaring litigation costs in their fight for equality. In direct response to this need, the NAACP founded the Legal Defense and Educational Fund, Inc. ("the Fund").[61] Now, Marshall was responsible not only for finding support for the Fund, but he also had to prepare and argue cases on behalf of the NAACP and the Fund.[62]

In 1940, as a result of Marshall's expanded duties, the NAACP created the position of Director-Counsel and selected Thurgood Marshall to hold the post;[63] a position he continued to serve in for more than twenty years. While the United States moved towards its entry into

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57. *Interview*, *supra* note 15.

58. PRIVATE PRESSURE, *supra* note 2 at 42; SIMPLE JUSTICE, *supra* note 13 at 214.

59. GROUNDWORK, *supra* note 14 at 155.

60. For example, Houston and Marshall worked together in prosecuting the cases against the railroad Brotherhoods, the all-White collective bargaining units for railroad employees. *See* Steele v. Louisville & Nashville RR Co., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen & Engineermen, 323 U.S. 210 (1944). These cases required the Brotherhoods to represent all the railroad employees, both members of the union and non-members, equally and nondiscriminatorily. *See Steele*, 323 U.S. at 205.

61. This Fund was incorporated under the laws of New York to provide free legal aid to Negroes who needed it, to ensure equal educational opportunities for Negroes, and to try to better the plight of Negroes in America. PRIVATE PRESSURE, *supra* note 2 at 43. The incorporation rendered contributions to the Fund non-taxable. This was possible because the corporate charter stated that the Fund's activities would not involve propaganda. *Id. See also*, SIMPLE JUSTICE, *supra* note 13 at 221-26.

62. *See e.g.*, SIMPLE JUSTICE, *supra* note 13 at 222.

63. PRIVATE PRESSURE, *supra* note 2 at 44. The duties of the new position were to carry out the policies of the board of directors and supervising the legal staff of the Association. *Id.* This necessarily involved weighing whether or not to accept a case presented to the Fund. *Id.* The fiscal abilities and practices of the Association and the Fund are, understandably, a source of pride for Marshall:

> That's another thing, there's never been any scandal about money in the NAACP. Which, isn't it unbelievable? With that much money.

Interview, *supra* note 15.

World War II, the country's racial problems continued apace.[64]

During the 1940s, Marshall and the NAACP continued their unyielding attack on Jim Crow laws and practices. When an Election Judge in the state of Texas refused to allow a qualified black man to vote, the NAACP took up his cause.[65] The victory in *Smith* lead to further fights because a number of southern states passed laws and constitutional amendments aimed at keeping blacks disfranchised.[66] The precedent from *Smith*, however, gave the NAACP the ammunition it needed to fight these southern efforts. The *Smith* decision also raised the spirits of the NAACP staff and was hailed throughout the country as a milestone.

Buoyed by their success in *Smith*, Marshall and his colleagues at the NAACP decided that the time had come to attack segregation directly.[67] This challenge was to be prosecuted against any place where segregation appeared: in housing,[68] transportation, public facilities,[69]

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64. Two areas in particular show the discriminatory practices rampant at that time.

First, in the armed services, the draft and officer training procedures were altered to try to reflect the population of Blacks in the country. *See* SIMPLE JUSTICE, *supra* note 13 at 226-27. This can be contrasted with the treatment of Blacks in the First World War—the treatment which lead to Charles Houston's decision to pursue the law to vindicate the rights of minorities. *See* GROUNDWORK, *supra* note 14 at 42 (citation omitted). Although there were more opportunities for Blacks within the services, segregation was the rule. Black units may fight alongside their white counterparts, but foxholes were still segregated. SIMPLE JUSTICE, *supra* note 13 at 226.

Second, with the need for increased production due to the war, there was an increasing need for workers. Suddenly, Black workers were found to be a necessary and integral part of wartime production. The increased opportunities for Blacks within the war industries lead to white resistance. For example, in Detroit in 1943, the movement of Blacks into federal housing and their promotion to responsible positions in industry lead to White violence. *Id.* at 227. This lead to mob violence, in which over thirty people were killed—the majority of them black. *Id.* Marshall, and the NAACP, sped to the scene to try to diffuse the situation. *Id.*

The treatment of Blacks within the war industries lead President Franklin Roosevelt to create the Fair Employment Practices Commission in 1941. Charles Hamilton Houston was to serve on this Commission during 1944 and 1945. *See* GROUNDWORK, *supra* note 14 at 166-69.

65. Smith v. Allwright, 321 U.S. 649 (1944). In *Smith*, the lower court had held, relying on Grovey v. Townsend, 295 U.S. 45 (1935), that the state democratic party was a private entity and membership in the organization was not subject to the restraints of the U.S. Constitution. The Supreme Court distinguished this argument, having earlier decided that primary and general elections are a "a single instrumentality for choice of officers." *Smith*, 321 U.S. at 660. In holding that a primary election is subject to Constitutional strictures, specifically the Fifteenth Amendment, the Court decided that "the great privilege of the ballot may not be denied a man by the State because of his color. *Id.* at 662.

66. *See e.g.*, PRIVATE PRESSURE, *supra* note 2 at 52. *See generally*, SIMPLE JUSTICE, *supra* note 13 at 237.

67. *See*, PRIVATE PRESSURE, *supra* note 2 at 57. This decision was reached in a private meeting between Marshall, NAACP Executive Secretary William White, and fellow counsel William Hastie. *Id.*

68. *See infra* notes 72-81 and accompanying text.

employment,[70] or in education.[71]

HOUSING

Responding to the NAACP's new directive, a number of test cases challenging restrictive covenants[72] was instituted around the country.[73] Since 1926, the United States Supreme Court had held that private individuals could, constitutionally, enter into contracts which contained restrictive covenants.[74] The NAACP brought together a group of attorneys to decide upon a strategy that would challenge the *Corrigan* decision.[75] At first, Marshall and Houston[76] favored continued attempts to win in the lower courts,[77] but when the plaintiff's attorney in the Detroit case was granted review by the U.S. Supreme Court, Marshall and Houston decided to bring their cases forward.[78] These cases marked the first time that either Houston or the NAACP used a so-called 'Brandeis Brief,'[79] incorporating sociological and economic information to show the adverse racial and societal effects of the restrictive cove-

69. *See e.g.*, Morgan v. Virginia, 328 U.S. 373 (1946). In this case the Supreme Court overturned the conviction of a black woman who refused to move to the back of a bus, as required under state law. The Court held the statute was invalid interference by the state on interstate commerce precluded by Article I, Section 8, Clause 3 of the Constitution. *Id.* at 386.

70. *See supra* note 60.

71. *See infra* notes 83-133 and accompanying text. While Thurgood Marshall's achievements span the entire spectrum of segregationary practices, this article focuses mainly on the public school desegregation cases—the final aim of the campaign espoused and begun by Charles Hamilton Houston and the NAACP.

72. These covenants are defined as "[p]rovision[s] in a deed limiting the use of the property and prohibiting certain uses." BLACK'S LAW DICTIONARY 1182 (5th ed. 1979). Specifically, these test cases challenged restrictions in deeds which sought to prohibit the sale or rental of property to blacks.

73. These cases involved a number of cities. They included the cases that were eventually decided as Shelley v. Kraemer, 334 U.S. 1 (1948) (from St. Louis), its companion case, McGhee v. Sipes (from Detroit), and Hurd v. Hodge, 334 U.S. 24 (1948) (from the District of Columbia).

74. Corrigan v. Buckley, 271 U.S. 323 (1926). The Court only decided the question of whether the restrictive covenants were valid since there was no constitutional question properly before the Court.

75. *See* PRIVATE PRESSURE, *supra* note 2 at 70-71; SIMPLE JUSTICE, *supra* note 13 at 249. The conference was held at Howard University and it was here that it was decided to use sociological data in their challenges. PRIVATE PRESSURE at 70-71.

76. Charles Houston was prosecuting the District of Columbia case, Hurd v. Hodge, *supra* note 74.

77. SIMPLE JUSTICE, *supra* note 13 at 249.

78. *See supra* note 74.

79. This is named for a brief filed by then-attorney Louis Brandeis in the case of Muller v. Oregon, 208 U.S. 412 (1908), where he used social science data to convince the Court to sustain a law limiting the number of hours women could work in a factory or laundry.

nants.[80] In its decision, the Court agreed with Houston's and Marshall's argument and struck down the covenants on the theory that enforcement entailed 'state action' and was subject to constitutional restrictions.[81]

EDUCATION

The other important area where the NAACP increased its challenge to the practice of segregation was education. Although this battle had been progressing over the years,[82] it was far from over. The precedents established to allow blacks to enter graduate and professional schools was being circumvented by the states and when the University of Oklahoma refused entry to Ada Sipeul, a black women, the NAACP brought suit.[83]

In a half-hearted effort to comply with the "separate but equal" doctrine, Oklahoma school officials hastily opened a vastly inferior law school for Blacks. Not surprisingly, the Supreme Court upheld Oklahoma's actions and the NAACP's need to further challenge segregation became imperative. As it turned out, another case was ripe for litigation in Texas.

In 1946, Heman Sweatt, a black man, applied to the University of Texas Law School. He was denied entry because of his race and he filed suit.[84] In response to the suit, Texas took steps similar to those taken by Oklahoma; it set up an interim Black law school. Sweatt remained undeterred in his desire to enter the state university and refused to en-

80. *See* PRIVATE PRESSURE, *supra* note 2 at 71-72; SIMPLE JUSTICE, *supra* note 13 at 253-54; GROUNDWORK, *supra* note 14 at 180-81.

81. The Fourteenth Amendment precludes any 'state' from denying equal protection or due process to its citizens. *See* U.S. CONST. amend. XIV, sec. 1. *See also* Shelley v. Kraemer, 334 U.S. 1 (1948). The Court held that the judicial enforcement of the covenants was state action restricted by the Constitution. *Id.* at 14.

In Charles Houston's case, the Court held that the covenants were unenforceable under the Civil Rights Act of 1866, Hurd v. Hodge, 334 U.S. 24, 33-34 (1948), which guaranteed the right to own and maintain property to all citizens of the United States. *See* The Civil Rights Act of 1866, ch. 31, sec. 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (1978)).

82. *See e.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Pearson v. Murray, 182 A. 590 (1937).

83. Sipuel v. Oklahoma State Board of Regents, 332 U.S. 631 (1948). Here the Court held that the state, under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, had to provide Sipuel with a legal education "and provide it as soon as it does for applicants of any other group." *Id.* at 633. Upon remand, the Oklahoma Supreme Court mandated that Sipuel be admitted to the University or the state set up a Black law school. When the state created a law school by cordoning off a part of the state capital and providing three part-time teachers, Sipuel protested. When Marshall returned to the U.S. Supreme Court, the Court stated that the state had, in effect, satisfied the 'separate but equal' requirements mandated by the Constitution.

84. The case was eventually decided as Sweatt v. Painter, 339 U.S. 629 (1950).

roll in the new law school. Arguing the case before the U.S. Supreme Court, Marshall and his team of attorneys challenged, for the first time, the constitutionality of segregation as a practice. This was a direct assault on the separate but equal doctrine.[85] At the time, the University of Texas Law School was considered one of the premier law schools in the country and there was no way, Marshall argued, that the new, segregated school, could possibly be made equal. The U.S. Supreme Court agreed, finding that the new law school was not substantially equal.[86] The Court, however, made clear that their decision in *Sweatt* did not overrule *Plessy*.[87]

Shortly before the Supreme Court handed down the *Sweatt* and *McLaurin* decisions, tragedy struck. Charles Hamilton Houston, who months earlier had suffered a heart attack, succumbed to a second attack and died on April 22, 1950.[88] This left Thurgood Marshall as the sole champion of the cause to eliminate segregation. Armed with the precedents from the higher education cases, and their requirement of real equality, Marshall now turned his attention and energies to the next step in the campaign against segregation, the public schools.

THE SCHOOL CASES

In the summer of 1950, a conference was called by the NAACP to discuss the strategy for fighting segregation in public education.[89] Ultimately, the conference members adopted a plan to prosecute only those cases which attacked segregation itself.[90] This is not to say that all

85. During the same time frame, the NAACP represented a sixty-eight year old black man, George McLaurin, who wanted to pursue his doctorate in education at the University of Oklahoma—the same University which denied Ada Sipuel admittance. McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 877 (1950). In that case, Oklahoma allowed McLaurin to enter the school, but forced him to remain in completely segregated areas within classrooms, the library, and the cafeteria. This became a companion case to *Sweatt*. In *McLaurin*, the Court held that McLaurin, "having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races." 339 U.S. at 642.

86. Sweatt v. Painter, 339 U.S. 629, 633 (1950). In fact, the Court accepted the argument that intangible factors, such faculty reputation and tradition, were also to be weighed in making a decision as to the equality of education. *Id.* at 634.

87. 339 U.S. at 636. The Court stated that they were adhering to the practice of deciding constitutional questions as narrowly as was necessary for the case. *Sweatt*, 339 U.S. at 631.

88. GROUNDWORK, *supra* note 14 at 211.

89. SIMPLE JUSTICE, *supra* note 13 at 293-94; PRIVATE PRESSURE, *supra* note 2 at 93.

90. *See e.g.*, PRIVATE PRESSURE, *supra* note 2 at 93. As William Coleman, Jr., a member of the strategy planning sessions, recalls:

> We were saying that we'd still hedge on the strategy—that is, in any given case we'd argue that at the very least these facilities are unequal and therefore unconstitutional—but equality, so long as these facilities were sepa-

of the members of the conference agreed with the strategy. In fact, some felt that the strategy was likely to end in setbacks.[91] Resistance to bringing cases to equalize public education was also found in the academic community. Justice Marshall recalls an earlier incident:

> Thomas Reed, [ ] Powell, and another one that I think [was] [Roscoe] Pound, together told Charlie in my presence when we were up there, to drop the school thing—cause [sic] you don't have a chance of winning. . . .
>
> Charlie had a hard time cause [sic] Charlie had faith in those guys. Charlie said, "this really pushes it." And the only one thing I can give [as an] excuse is they're not colored. He said, "Let that be a lesson." [They don't feel it the same way.][92]

Eventually, the NAACP's strategy lead to the filing of cases against 'dual' school systems in four different parts of the country.[93] Although

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> rate, was not equality at all. . . . We'd ask for integration forthwith, not at some vague future date, because that was the only way to grant equality—now. We never brought a case after that where we'd concede equality without integration, but it was done within the traditional framework so that at the very least we could fall back on the equal-facilities argument. The point was that if we didn't win on constitutional grounds by getting Plessy reversed, we'd at least get the remedy we sought: integrated schools forthwith.

SIMPLE JUSTICE, *supra* note 2 at 293.

Such a policy had always been within the scope of the NAACP's plans. *See* GROUNDWORK, *supra* note 14 at 116-17. When Charles Houston originally set forth his plans for fighting segregation in 1934, his memorandum to the NAACP showed his concern that the maintenance of 'dual' schools systems was adversely affecting an entire generation of children. Only by making these 'dual' systems financially untenable would segregation be eradicated. By the time of the NAACP conference in 1950, inroads had been made into these systems and the NAACP could take the next step.

91. As a result of this dispute, a number of the attorneys present resigned in protest, among them was Oliver Hill who had brought actions throughout Virginia under the aegis of the NAACP. PRIVATE PRESSURE, *supra* note 2 at 194. A year later, Hill would rejoin the NAACP and eventually participate in one of the five cases which were decided in Brown v. Board of Education, 347 U.S. 483 (1954).

Even Marshall was unsure of the appropriate course of action. If the Supreme Court rejected the argument that segregation was per se unconstitutional, the NAACP would be set back many years and the small victories already gained would be lost or curtailed. *See* SIMPLE JUSTICE, *supra* note 13 at 291. On the other hand, some members of the conference believed that the time was ripe to attack segregation. For example, James Nesbrit, who set up the first civil rights course at Howard Law School and who took over as President of the institution after Mordecai Johnson, believed that a loss in the Supreme Court would merely relegate the NAACP back to arguing the separate but equal doctrine of *Plessy*. *Id.* at 291-92.

92. *Interview, supra* note 15.

93. These were Prince Edward County, Virginia, Davis v. County School Bd., 103 F. Supp. 337 (D. Va. 1952); Clarendon County, South Carolina, Briggs v. Elliott, 98 F. Supp 529 (D. S.C. 1951); Topeka, Kansas, Brown v. Bd. of Education, 98 F. Supp 797 (D. Kan. 1951); and Washington, D.C., Bolling v. Sharpe, 347 U.S. 497 (1954). *See* PRIVATE PRESSURE, *supra* note 2 at 93. The actions in the states were

these cases originated from different areas of the country, they all had one thing in common: Black students and parents had decided that they would no longer put up with inferior education and educational facilities.[94] Predictably, the cases wound their way through the judicial system without success until the United States Supreme Court combined

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class actions under the Equal Protection clause of the Fourteenth Amendment. *See Brown*, 347 U.S. at 488.

A fifth case was brought in Delaware, Gebhart v. Belton, 87 A.2d 862 (Del. Ch. 1952), *aff'd*, 91 A.2d 137 (Md. 1953). The Delaware action was not brought under the aegis of the NAACP, although it was handled by attornies who had been affiliated with the NAACP previously. Also, the Delaware case was the only one brought in state court. Because the Delaware Supreme Court affirmed the lower court ruling requiring Black children to be admitted to the school of their choice, due to the inequality of the facilities, these cases were not consolidated with the other state cases in *Brown*.

Following the *Plessy* decision in 1896, Delaware adopted a constitutional amendment requiring racially separate schools. The Black schools were inferior and often lacked transportation. After the Supreme Court's higher education decisions, *see supra* notes 82-88 and accompanying text, parents brought suits seeking transportation and physical equality. *Belton*, 87 A.2d 862. *See* Hill, *infra* note 94 at 81-82.

94. *See* HERBERT HILL & JACK GREENBERG, CITIZEN'S GUIDE TO DESEGREGATION, 78-86 (1955).

In the Virginia case, *Davis v. County School Bd.*, the parents of Black school children had made a number of complaints over the years about the status of their children's education. Although the parents were told that change was coming, none had. Finally, the students decided to stage a strike in protest of the conditions. It was because of this strike that lawyers associated with the NAACP came to Prince Edward County and began the suit. *See* Hill, *supra* at 83-84.

Similar to the Virginia situation was that in Clarendon County, South Carolina. As early as 1949, parents and community leaders had petitioned for equal schools for Black children. The school board found the schools to be substantially equal and denied the petition. Despite authorization by the state legislature to fund a program to equalize schools, the parents continued their suit. *Elliott*, 98 F. Supp. 797. *See* Hill, *supra* at 78-79.

In Kansas, the segregation of elementary schoolchildren was left to the local school authorities. Roughly three quarters of the school districts actually segregated elementary school children. Conversely, segregation in junior high schools, high schools, or universities was outlawed. Further, discrimination in either housing or state employment was considered to be contrary to state policy. In spite of the Topeka school board's decision to abandon segregation, the suit persisted. *Brown* 98 F. Supp. 797. *See* Hill, *supra* at 79-81.

Just prior to the bringing of the school desegregation suit, Washington, D.C. ended the practice of separating the races in other public accommodations. The laws enacted by the U.S. Congress for the District did not require racial separation in the schools, yet separate schools were provided for by the same Congress. Suit was brought to challenge an earlier court finding that segregation was allowable (citation omitted). *Sharpe*, 347 U.S. 497. *See* Hill, *supra* at 84-86.

For in-depth coverage regarding the genesis and prosecution of these cases, *see generally* SIMPLE JUSTICE, *supra* note 2.

the four state cases for argument.[95] The combined state cases became known as Brown v. Board of Education, 347 U.S. 483 (1954).[96]

The mainstay of the NAACP's argument, in addition to the Constitutional questions presented,[97] was the introduction of significant social science data designed to show that 'dual' school systems were inherently and irremediably unequal.[98]

Instead of handing down an opinion,[99] the Court submitted a list of questions to counsel to be considered at the second round of oral arguments scheduled for late 1953. The Court's questions related to the history behind the ratification of the Fourteenth Amendment, and the relation between the views of the framers of the Amendment to its purpose and the segregation of public schools. The questions also included what relief the parties believed was proper, should segregation be found unconstitutional.[100]

In response to the Court's questions, the NAACP solicited the help of a number of eminent historians and experts during the summer of 1953.[101] Upon examination, the history from both the federal and state legislatures proved inconclusive; at least from the standpoint of segregated public education.[102] After an exhausting whirlwind of discussion, another conference was called by the NAACP to pinpoint the arguments to be presented to the Court.[103]

Arguments to the Court began on December 7, 1953, and lasted three days. Justice Marshall recalls:

> I sat out there in the 'well,' right out here in the Supreme Court, waiting for my oral argument. And I remember I looked around at all the lawyers present—from the NAACP from all across the country who had worked on this case.

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95. The cases were originally argued before the Court in December, 1952. PRIVATE PRESSURE, *supra* note 2 at 96.

96. The District of Columbia case, *Sharpe*, 347 U.S. 497, had to be argued separately because it involved a different theory, that of the applicability of the Due Process Clause of the Fifth Amendment. *See* PRIVATE PRESSURE, *supra* note 2 at 498-99.

97. The cases from the States centered on the application of the Equal Protection Clause of the Fourteenth Amendment. *See Brown*, 347 U.S. at 488.

98. *Id.*

99. For a discussion of the machinations of the Court in its deliberations on these cases, *see* SIMPLE JUSTICE, *supra* note 13 at 589-615.

100. *Id.* at 615-16.

101. *See id.* at 618-36; PRIVATE PRESSURE, *supra* note 2 at 100-01.

102. *See e.g.*, SIMPLE JUSTICE, *supra* note 13 at 634.

103. The conference was held in New York City in late September, 1953. *Id.* at 637. Prior to this, the parties and the Court had agreed to postpone the re-argument until December of that year after the U.S. Attorney General had requested the postponement in order to complete his brief on the subject. *Id.* at 636.

Shortly before this time, another event of major significance occurred. Supreme Court Chief Justice Vinson died. *Id.* at 656. President Dwight Eisenhower selected California Governor Earl Warren for the post. *Id.* at 665.

> And I realized there wasn't a single one of them who hadn't been touched by Charlie Houston. Either taught by him, or friendly with him, or guided in their careers by him. Every one of them, including me. . . .[104]

In addition to the actual parties to the suits, the United States government also argued that segregated schools violated the Fourteenth Amendment.[105]

On May 17, 1954, the U.S. Supreme Court announced its decision on the segregation cases in *Brown v. Board of Education*.[106] A unanimous Court stated its conclusion that education "is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship."[107] Furthermore, the Court found that the forced separation of children of differing races was a denial of equal protection of the laws.[108] Chief Justice Warren went on to vindicate the position that Thurgood Marshall and his NAACP associates espoused in bringing these suits when he opined that, "[w]e conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[109] Since the scope of the Court's decision would impact a large number of school systems, the Court restored the cases to its docket for the following year to hear arguments on how to fashion an appropriate remedy.[110]

The reaction to the *Brown* decision by the NAACP, and its team of attorneys was understandably jubilant. Marshall readily gives credit for the *Brown* victory where he deems it to be due: "The school case was really Charlie's [Houston] victory. He just never got a chance to see it. . . . Don't worry . . . Charlie will thank me."[111] Despite the Court's favorable ruling, the most difficult and challenging work for the NAACP lay ahead.

The issue of the appropriate remedy now had to be addressed. Marshall and the NAACP steadfastly argued that desegregation must occur immediately.[112] In contrast, most of the southern states who participated in the argument maintained the belief that desegregation should

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104. *Gormley, supra* note 22 at 66.

105. *See e.g.*, SIMPLE JUSTICE, *supra* note 13 at 675; PRIVATE PRESSURE, *supra* note 2 at 105.

106. 347 U.S. 483. That same day the Court handed down its opinion in the District of Columbia case in *Sharpe*, 347 U.S. 497.

107. 347 U.S. at 493.

108. *Id.* at 495.

109. *Brown* 347 U.S. at 495.

110. *Id.* at 495. The Court further requested all interested parties, including the U.S. Attorney General and the states which either allowed or required segregation of their schools, to submit briefs on the subject. *Id.* at 495-96.

111. *Gormley, supra* note 22 at 66.

112. *See* PRIVATE PRESSURE, *supra* note 2 at 109; SIMPLE JUSTICE, *supra* note 13 at 726.

be reflective of the communities' attitudes.[113] Finally, the United States government urged the Court to be flexible, and allow the district courts to safeguard the rights of minority children.[114]

On May 31, 1955, the Supreme Court decided what has become known as *Brown II*.[115] The Court first declared unconstitutional any provisions in state or federal laws which allow or require racial discrimination. Next, the Court assigned the responsibility for implementing *Brown I*[116] to the local district courts.[117] The Court imposed the primary responsibility for desegregation upon local school authorities, while federal district courts were charged with the duty of ensuring that these local authorities made good faith efforts to desegregate.[118] These efforts were to "make a prompt and reasonable start towards full compliance" with *Brown I*.[119]

The Court then ordered the district courts to take actions that would result in the admission of children to "public schools on a racially nondiscriminatory basis *with all deliberate speed* . . . ."[120] This phrase became the most cryptic in the opinion. As Marshall recalls:

> [T]he day after the decision came down, we were all sitting in the library of [the NAACP] office, and we were trying to figure this thing somehow . . . my secretary Alice . . . went out to the dictionary . . . And she came back and put her hand on my shoulder. . . . She said, "I would like to add a little to the discussion. Webster's Dictionary has a definition for deliberate—slow."[121]

THE AFTERMATH OF *BROWN*

Despite the edicts of the Court in *Brown I* and *Brown II*, many states still opposed desegregating their schools and designed programs to maintain 'dual' school systems. These programs ranged from the adoption of constitutional amendments to dismantle the school systems[122] to the adoption of 'choice' plans.[123]

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113. *See e.g.*, SIMPLE JUSTICE, *supra* note 13 at 723-25. Here, Kluger shows the reactions of two states, Virginia and Florida, to *Brown*. Each of these states stated their beliefs that the Court had wrongly decided the case and predicted major difficulties, if not impossibility, in implementing the decision. *Id.*

The southern states also predicted hostility and bloodshed over the enforcement of desegregation. *Id.* at 729.

114. *Id.* at 726-27.

115. 349 U.S. 294 (1955).

116. 347 U.S. 483.

117. *Brown II*, 349 U.S. at 299.

118. *Id.* The lower courts, said Chief Justice Warren, were to be guided by the flexibility provided by their equity jurisdiction. *Id.* at 300.

119. *Id.*

120. *Id.* at 301 (emphasis supplied).

121. *Interview, supra* note 15.

122. HILL, *supra* note 94 at 126.

123. 'Choice' plans allowed students and parents to choose which school the stu-

To counter this resistance, the NAACP brought suit to force the desegregation of public schools.[124] The NAACP's enforcement program often ran into stiff and uncompromising opposition.[125]

The battle to overcome resistance to desegregation has continued throughout the past forty years. Resistance has not, however, been confined to the south.[126]

Although the *Brown* decision applied only to public schools, the Court's opinion provided for the eradication of the "separate but equal doctrine" in all areas of American society when the Court stated that

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dent was to attend. SIMPLE JUSTICE, *supra* note 13 at 751-52. These plans, also known as 'local option' or 'open enrollment' plans, were given the imprimatur of the courts when, on remand, the Fourth Circuit in Briggs v. Elliott held that the *Brown* opinions merely precluded the government from discriminating, rather than requiring integration. *Briggs*, 132 F. Supp. 776. *See also,* SIMPLE JUSTICE *supra* note 13 at 751-52.

124. *See* PRIVATE PRESSURE, *supra* note 2 at 120.

125. One case in particular shows the entrenchment of resistance to desegregation and the lengths to which local officials were willing to go to stop the process. *See* Cooper v. Aaron, 358 U.S. 1 (1958).

School officials in Little Rock, Arkansas had developed a desegregation plan before the *Brown II* decision. *See e.g.,* PRIVATE PRESSURE, *supra* note 2 at 122. In response to that decision, the Arkansas legislature passed a constitutional amendment calling for resistance to the *Brown* decisions in every constitutional manner. *Cooper*, 358 U.S. at 8-9.

When school officials attempted to implement their plan, the Governor sent the state National Guard to stop the Black children from entering the high school. *Id.* The school board then petitioned the U.S. District Court for an order temporarily suspending the program. The petition was denied, but the court enjoined state officials from denying the students access to the school. *Id.* at 11-12.

After intervention by federal law enforcement agencies, the children were allowed to enter the school. The children, however, had to be removed from the school because of an unruly mob had assembled outside the school. *Id.* In response to these events, President Eisenhower sent federal troops to ensure the children's safety. *Id.*

The school board again petitioned the courts to allow postponement of its program. The District Court granted the petition. The Eighth Circuit reversed, but stayed its decision to allow the Supreme Court to hear the case. *Id.*

The Supreme Court affirmed the Eighth Circuit's decision, holding that the rights of the children could not be denied because of adverse public sentiment that was fostered by the actions of public officials. *Id.* at 14.

Following this decision, the Governor tried to withhold funds from any racially mixed schools. The District Court held this to be a denial of Due Process, and the Supreme Court affirmed. Aaron v. McKinley, 173 F. Supp 944, 950-51 (E.D. Ark. 1959), *aff'd sub nom.* Faubus v. Aaron, 361 U.S. 197 (1959). As a result of this second decision, the schools in Little Rock were desegregated without further incident. PRIVATE PRESSURE, *supra* note 2 at 126.

126. *See e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974) (school desegregation plan in Detroit, Michigan, which crossed district lines not valid absent a cross-district wrong); Keyes v. School District, 413 U.S. 189 (1973) (Court held that actions of Denver, Colorado officials to violate Constitution even though no statutes required segregation).

"[s]eparate educational facilities are inherently unequal."[127] Armed with the *Brown* precedent, the attack on segregation began on all fronts.[128]

The Civil Rights Movement

The months following the Court's decision in *Brown II* saw the advent of a broad-based civil rights movement in America.[129] Justice Marshall, himself a veteran of the town-by-town and county-by-county fight against segregation since the 1930s, received accolades for his efforts against Jim Crow laws.[130] Without his decades-long efforts, the protests that began in Montgomery would not have been possible.[131] Despite this, Marshall attributes his achievements directly to one man: Charles Hamilton Houston.[132] Musing about the civil rights movement that blossomed in the 1950s and 60s, Marshall says:

> I don't believe you can name one thing that Charlie didn't have something to do [with] when the whole thing started to go. . . . But, Charlie would have been right behind Martin Luther King . . . He'd [have] been out there fighting.[133]

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127. *Brown*, 347 U.S. at 495. *See also* Plessy v. Ferguson, 163 U.S. 537 (1896).

128. *See e.g.*, Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956) (holding that a statute requiring separation of the races violates both the Due Process and Equal Protection clauses of the Fourteenth Amendment).

129. Six months after the Court handed down its opinion in *Brown II*, a black woman named Rosa Parks refused to give up her seat on a bus in Montgomery, Alabama. Her subsequent arrest lead to one of the first direct, non-violent protests by Black Americans against segregationary practices. Under the leadership of Parks' pastor, Rev. Martin Luther King, Jr., blacks in Montgomery staged a boycott of the bus company.

After the boycott began, Rev. King was arrested and his life threatened. In response, the NAACP, and Thurgood Marshall, committed to provide King with whatever legal help he may need. The non-violent resistance movement, bolstered by the successes in Montgomery, spread throughout the country.

130. *See e.g.*, Brennan, *supra* note 1 at 23; O'Connor, *supra* note 1 at 1217.

131. It is unlikely that the protests would have engendered the popular support of the Black communities throughout the country if Marshall and the NAACP had not secured from the courts a recognition that black citizens were entitled to basic human and civil rights. *See e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Shelley v. Kraemer, 334 U.S. 1 (1948); Alston v. School Bd. of Norfolk, 112 F.2d 992 (1940), *cert. denied*, 311 U.S. 693 (1940); Pearson v. Murray, 182 A. 590 (1936).

132. " 'We were just carrying the bags, that's all,' says Marshall, motioning toward a row of Supreme Court Reports behind his desk . . . 'That was Charlie.' " *Gormley, supra* note 22 at 63.

Other people echo the same sentiments. Senior Judge William Bryant states that, "[t]here's no denying that Thurgood is a direct bequest to us from Charlie Houston . . . He convinced Thurgood and the rest of us that the key to closing the gap between our rhetoric and actions was the law." *Id.*

133. *Interview, supra* note 15.

Then, in 1962, after more than a quarter century with the NAACP, with the bulk of his time spent directing the legal campaign against segregation, President John F. Kennedy appointed Thurgood Marshall to the Second Circuit Court of Appeals in New York. Three years later, President Lyndon Johnson named Marshall to the post of United States Solicitor General.

The culmination of Thurgood Marshall's career came in 1967, when President Johnson selected Marshall to fill a vacancy on the United States Supreme Court: the first African-American appointed to the Court. Until he retired from the Supreme Court in July, 1991, Marshall was a steady voice for the powerless in society, consistently arguing for the protection of those people who could not protect themselves.

Thurgood Marshall died of heart failure on January 24, 1993, at the age of eighty-four.

CONCLUSION

The Supreme Court decisions removing governmental sanction for the separate but equal doctrine, and thereby fostering racial segregation, justified the strategy which Charles Hamilton Houston espoused to the NAACP nearly three decades earlier,[134] and which Thurgood Marshall had been leading since the 1930s.[135] Although the problem of enforcement and changing public opinion remain, the fact that the Supreme Court ruled segregation unconstitutional is a lasting memorial to Charles Hamilton Houston, and to his star pupil, Thurgood Marshall. Their courage and relentless pursuit of equality has allowed every American, especially the less fortunate members of our society, to go forward and claim rights which are said to be fundamental.*

134. *See* GROUNDWORK, *supra* note 14 at 116-17.

135. *See* SIMPLE JUSTICE, *supra* note 13 at 214.

* *Douglas A. Aube*, Symposium Editor, prepared the preceding article borrowing portions of Prof. Ogletree's interview. *See supra* note 15.



Hon. Juanita Kidd Stout

Hon. Juanita Kidd Stout

Juanita Kidd was born March 7, 1919, in Wewoka, Oklahoma. She was the only child of schoolteachers Henry and Mary A. Kidd. Her parents left indelible impressions upon Justice Stout, impressions that were later to be reinforced by such people as Charles Hamilton Houston and the Honorable William H. Hastie. Her parents instilled in young Juanita two important traits; a desire to strive for perfection in all that she did, and an understanding that being able to properly speak and write English is a prerequisite to being successful.

Justice Stout began her secondary education at Lincoln University in Jefferson City, Missouri, majoring in music. She finished her A.B. degree at the University of Iowa. Upon graduation from the University, Juanita Kidd returned to Oklahoma and began teaching music. Also at this time, Juanita Kidd married a fellow teacher, Charles O. Stout.

Following America's entry into World War II, Charles Stout joined the U.S. Army. During the term of her husband's service in the military, Juanita Kidd Stout moved to Washington, D.C., where she worked as a secretary for the federal government. She later worked as a secretary for the law firm of Houston, Houston and Hastie. It was there that she came into personal contact with both Charles Houston and William Hastie, two lawyers who were to have a profound effect upon Justice Stout in her later life. While in Washington, she also took a number of classes at Howard University School of Law. From a very early age Justice Stout had developed a deep fascination with the law.

When Charles returned from the War, each of the Stouts decided to further their education. Charles pursued his doctorate in education. Juanita went to Indiana University Law School, earning a J.D. in 1948 and an LL.M. in 1954. Upon the completion of their advanced degrees, the Stouts returned to teaching. Charles taught at what is now the University of Maryland, Eastern Shore. Juanita taught at various institutions, among them Florida A&M in Tallahasee, Florida.

In December of 1949, Juanita Kidd Stout was asked by William Hastie, a former partner at Houston, Houston and Hastie who had been seated upon the U.S. Court of Appeals for the Third Circuit, to come to Philadelphia to become his 'administrative assistant.' Justice Stout has described that position as a cross between secretary and law clerk.

Juanita Kidd Stout joined the Philadelphia District Attorney's office in 1956. Within the District Attorney's office, Justice Stout was the chief of the office's division of Appeals, Pardons and Paroles. While there, she also maintained a private law practice. This practice was limited to civil cases due to her position with the government.

Juanita Kidd Stout became the first African-American woman to be popularly elected to the bench in 1959, when she won a seat on the Philadelphia Municipal Court. Justice Stout was subsequently elected to two terms on the Court of Common Pleas in Philadelphia. During the 1960's, a time when the city of Philadelphia was facing increasing gang violence, Justice Stout earned a reputation as a tough

but fair jurist. The hallmarks of her decisions from the bench are education, discipline, and honesty. When gang members were brought before Justice Stout, she swiftly delivered her brand of justice, sending the gang members to facilities where they would be forced to continue, or finish, their education. This type of 'tough love' has helped to transform a large number of young lives that might otherwise have resulted in tragedy and violence.

Justice Stout's actions on the bench have not been without controversy. Following her sentencing of the gang members during the 60's, she received many threats upon her life. Characteristically, Justice Stout was more offended by the spelling of the threats than she was concerned for her own safety. About this same time, the American Civil Liberties Union (ACLU) questioned her actions. The ACLU received so many responses from the Philadelphia Bar Association praising Justice Stout's actions, that they were forced to withdraw their criticism.

Juanita Kidd Stout has served in all divisions of the trial court in Philadelphia, presiding over criminal, juvenile, and civil cases. She also has established an enviable record on the bench. Justice Stout estimates that, of the cases she has decided, less than ten out of some six hundred have been reversed.

Governor Casey appointed Juanita Kidd Stout to a position on the Pennsylvania Supreme Court in 1988. She was the first African-American woman to be appointed to the highest court of any state. Unfortunately, a little more than one year later, and with approximately one year left for the appointed term, Justice Stout was forced to retire from the state Supreme Court due to a state law mandating judicial retirement at age 70. Since that forced retirement, Justice Stout has returned to the Court of Common Pleas as a Senior Judge.

Justice Stout is a member of a number of organizations, both professional and charitable. Among these entities are the American Bar Association, the National Bar Association and the Bar Associations of the State of Pennsylvania and the City of Philadelphia.

In addition, Justice Stout has received a number of awards and honors, including honorary degrees from, among others, Ursinus College in Pennsylvania (1965), Indiana University (1966), Drexel University in Philadelphia (1972), the University of Maryland, Eastern Shore (1980), Morgan State University (1985), and Fisk University (1989). She was inducted into the Oklahoma Hall of Fame in 1981 and she was named a Distinguished Daughter of Philadelphia in 1988.

My Initial Contact with Charles Hamilton Houston

I first saw Charles Hamilton Houston in the Spring of 1937, when he came to Jefferson City, Missouri to argue the case, before the Missouri Supreme Court, in which Lloyd Gaines sought admission to the law school of the University of Missouri.[1] That is the only day in my educational career that I cut classes, but I had read that this great lawyer was coming to Jefferson City and I who, since the age of 3, had dreamed of becoming a lawyer, and felt compelled to hear him. For that reason, I cut my classes at Lincoln University, where I was a sophomore, and found my way up the hill to the Supreme Court of Missouri.

1. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

Mr. Houston's argument was brilliant; the Missouri Supreme Court was courteous and most attentive. Despite this, however, the Court decided against him and Mr. Houston had to go to the United States Supreme Court in order to obtain a favorable decision.

During the argument, I sat spellbound but, being a seventeen-year-old country girl from Wewoka, Oklahoma, I was too timid, and was without the courage to speak to this great man. Instead, I silently returned to the campus of Lincoln University and mulled over the argument which he so brilliantly had made.

Literally by accident, I again met Mr. Houston in Washington, D.C., five years later.

The Law Firm of Houston, Houston & Hastie

At that time, I was doing secretarial work for the United States Government and my roommate was teaching typing and shorthand. On her way to work one morning, my roommate was injured in a trolley car accident. She then went to the law firm of Houston, Houston and Hastie for legal assistance. Upon their learning of my roommate's area of teaching, they asked if she could recommend one of her students since they needed an additional secretary. She told them she could not recommend a student, but she could recommend a good secretary who wanted to become a lawyer. She recommended me. I went to see William Houston, Charles Houston and William Hastie. They all liked me and I liked them and I have been following them ever since. The only other destination I have now is the graveyard inasmuch as, regrettably, both Houstons and Hastie now are there.

The first thing Charles Hamilton Houston did during my first morning at the firm was to take me to the bank where he made deposits in several escrow accounts. He lectured to me all the way to and from the bank on only one subject — the danger of commingling funds. I can hear him now saying, "Never, never, never mix mine with thine!" He explained that keeping clients' funds separate from your own not only was the right and ethical thing to do, but that the failure to do so was the major cause of disbarment of lawyers.

While working at the firm, I heard him talk and I saw his efforts. For example. I was his secretary when he was doing the *Steele and Tunstall* cases, two landmark decisions in labor relations.[2] They held that the Railway Labor Act created an implied duty on the part of the union not to discriminate among members of the craft based on race. I was his secretary when he won a case involving the integration of a library in Maryland.[3] I could see that he was having a great impact. Moreover,

2. Steele v. Louisville and Nashville Railroad Co, 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944).

3. Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212 (4th Cir., 1945).

he fashioned the first Civil Rights course that was ever taught in any law school. There was no such thing as a Civil Rights course in any law school before he started one at Howard University School of Law. Now those courses are taught in most, if not all, law schools in America.

Impressions of Charles Hamilton Houston

I do know that Mr. Houston turned many people's lives around. In addition, Charlie had such a magnetic personality. He was the type of person who "lit up" a room merely by walking in. He had a magnetic personality. Charlie was just great.

I have never known anyone who had a higher standard of ethics than Charles Hamilton Houston. I also have never known anyone who was a harder worker than he. Both my mother and father stressed those principles and Mr. Houston reinforced them. He would say, "You should prepare every case, even if it is simple assault and battery, as if it were going to be heard in the Supreme Court of the United States."

He emphasized that you must strive for perfection. You don't handle any case lightly, however simple it may be. He said that you should do a thorough job of investigation, a thorough job of research, and a thorough job of writing, regardless of how small the case might be. You should prepare even the smallest case with the same zeal you would prepare a case going to the United States Supreme Court. That I have never forgotten.

Houstonian Jurisprudence

As much as I love Charles Hamilton Houston, I cannot give him full credit for my striving for excellence because I had such a great background of education from my mother and father, both of whom insisted on excellence. Charles Hamilton Houston reinforced it. I am not egotistical, but many people have said that, in their opinion, my work in the District Attorney's Office and on the Bench has been good. At least I have tried to make it so.

Charles Hamilton Houston was a perfectionist. He loved people and he wanted to do the very best for people. For example, in his practice — and I do not suggest that everybody can do this — if someone came to Charles Hamilton Houston with a worthy case and did not have the filing fee, that did not make any difference. He paid the filing fee.

[Today's attorneys] can't take on a worthy case that may not pay to the extent that Charlie did, but I think they should keep the concept in mind and do it in some exceptional cases, if the occasion warrants.

Juanita Kidd Stout's Background and Jurisprudence

Yes, I too was a teacher. I taught music in grade school and high

school for three years and then I went to law school. Thereafter, I taught business law and insurance for almost a year. I also taught a summer and a semester at Florida A & M in Tallahassee, and I started teaching a semester at Texas Southern University in Houston. In December 1949, however, Judge William H. Hastie, formerly of the firm of Houston, Houston and Hastie, was appointed to the United States Court of Appeals for the Third Circuit in Philadelphia, and he asked me to come to Philadelphia to work for him. That's how I got here.

During my tenure with Judge Hastie, I was his administrative assistant; a combination secretary and law clerk. I would sit in on the arguments and draft the Opinions assigned to me. I shall never forget the joy I had the day I handed him a draft of an Opinion, an insurance case, and he didn't even change a comma, I felt I had "arrived." My experience with him was very good.

I haven't done that much community service because, if you really do your work, you don't have that much time for anything else. I have served on a few boards and have done a few things in the community, but I can't say that I've been a community activist. Reading, writing, and researching the law has occupied most of my time and energy.

I suppose that I translated social engineering to the bench. In the 33 years on the Bench, I think I was in Juvenile Court something like three or four months. I received extensive publicity because my tenure in the Juvenile Division of the Court was during the era of youth gangs in Philadelphia. I believe that where you have discretion, you must try to do that which is most helpful, not only to the defendant but also to society. In the short time I was in Juvenile Court, I stressed that juvenile defendants should achieve education, good manners, work, getting little jobs, and things like that. At that level, that probably was an implementation of what Mr. Houston would have called social engineering.

In Criminal Court, I feel I tried to stress the same things in the same way. Certainly, people must pay for the crimes they have committed, but, by the same token, I do not think they should waste the years during which they are paying for the committed crime. For example, in Pennsylvania, and in many states, inmates can work in what is called prison industry. In Pennsylvania, that means making uniforms for the guards and prisoners. The alternative is going to school. Oddly enough, in Pennsylvania, they are paid more to work in prison industry than they are to take classes, which does not make sense to me. If, however, upon imposition of sentence the judge indicates that the prisoner must take classes rather than work in prison industry, the prisoner has to go to school. I advise everyone I sentence that he will not be looked upon with favor when he comes up for parole unless he has taken classes. If you or I, educated as we are, were locked up for ten

years and were not given additional education, we too would be able to do very little but steal.

It is my belief that a person should pay for any crime committed, but he should also improve himself so that when he gets out of prison he will not have to commit another crime just to live. I have seen that happen. I also have seen some criminals do very well upon their release from prison because of their educational experience while incarcerated.

I'll just cite one case. There was one young man who appeared before me in Juvenile Court years ago, he was fifteen years of age and was one of the best little gang leaders Philadelphia ever produced. I sent him, for 18 months, to the best institution I could find; the one that had the best educational program. About three or three-and-a-half years later, a probation officer came to my chambers with a young man in a collegiate jacket. He asked me if I knew the young man. I said, "No , I've never seen him before." The probation officer said, "Oh yes you have," and he identified the young man. The probation officer said the young man had asked him to bring him in to see me. When he stepped into my chambers, he said, "Judge Stout, ever since that day you sent me away, I have been wanting to thank you." "I was going the wrong way fast," he said and then he told me about some of his buddies who were either dead or in prison for serious crimes. He continued by saying "I promised myself if I ever got out of this, I would make something of myself." He finished high school and got himself a $5,000 a year scholarship to Wesleyan University in Connecticut and got himself a $5,000 a year job. Ten thousand dollars a year, back in the '60s, for a little boy from the projects, was an awful lot of money. He was very smart. He finished college in three years with honors. He also was precocious in other ways. He married a young lady who was getting her masters in biology. They came back to Philadelphia and she started teaching and he started in law school. They had been in Philadelphia less than a year when his mother died leaving three children. This young couple took those children and continued to rear them. I tease his wife and tell her she started having babies between semesters, because they had three children of their own.

When this young man finished law school, I hired him as my law clerk and then his wife stopped teaching and went to medical school. Now she is a certified psychiatrist. He has one of the biggest practices in Philadelphia. He has bought his own building, has one of the most modern and well-equipped offices in Philadelphia, hires several attorneys, paralegals, secretaries, investigators, etc., and is one of the most well-respected attorneys in Philadelphia. His oldest child is a senior at Wesleyan and he is a member of the Board of Trustees of Wesleyan. His family is one of the most beautiful I have ever known.

That's one, that's one case — but I have had many people — at least

50, or perhaps 75, stop me on the street and say, in essence, "You don't remember me, but I was before you once and you made a difference in my life. You turned my life around." That's worth more than money.

Houstonian Jurisprudence and the Future

The first thing one should do as students of the law — and you may think this is a terrible thing for me say — the first thing one should do is learn how to read, write, speak and spell the English language correctly. I am a stickler for that and so was Mr. Houston. Words are the only means by which a lawyer can make his views known. If you cannot speak, write and spell correctly, you cannot be effective. You cannot blame anyone but yourself if you can't do those things.

A young lawyer once wrote me a letter and described himself as "one of the new 'attornies' in town" When I called and asked him to spell the word "attorneys," he misspelled it again. A young lady who is a judge in another state wrote me a letter and spelled the word jurisprudence "Juris Prudence." One of my ex-colleagues thinks "in spite" is one word, "inspite." You cannot make mistakes like that and be successful and respected. Many times, lawyers have said to me, "Your Honor, I want to 'appraise' you." I stop them immediately, tell them that I know exactly how much I am worth, and suggest that if they want to 'apprise' me of something, they are free to do so. Charles Hamilton Houston was a perfectionist in the use of the English language and I try to be too. Again, I give my mother and father the original credit for that. I try to speak and write correctly but my mother could, and did, correct my English until her dying day and would cite the rule covering my error. That sort of tradition should be carried on.

The next thing I would like to suggest is that we do as Charlie did — work, work, work. He would draft and redraft and when he had finished, the writing would be excellent and concise.

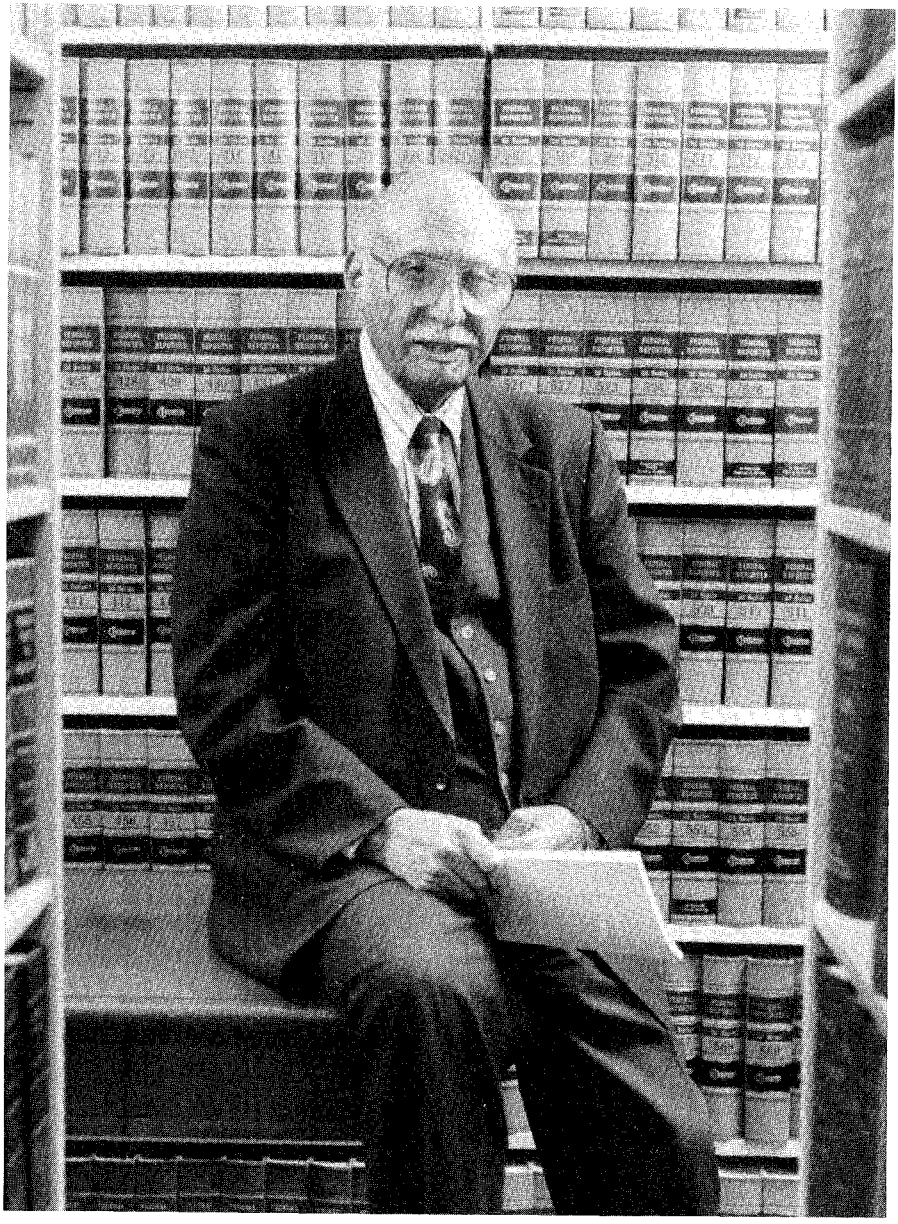
I do the same.

I should like students to know the things I have said. First and foremost, you must be absolutely honest. I don't mean you can be a little bit wrong. Judge Hastie always said, "Half right is always wrong and half wrong is never right." You cannot take chances. If you have any doubt as to whether the action you are contemplating is right or wrong, do not do it. You must strive to be right and never knowingly do wrong.

I have been on the Bench over 33 years and have never dreamed about a single case. I do not claim perfection. I'm only human and I am sure I have made some errors, but they were errors of which I was not aware.

The next thing I would suggest is that you work hard and treat everybody right and with courtesy. There is a joy in life if you do that. You don't have to go through life worrying. It is the saddest thing to

see young people who have spent all the time, money and effort to go through college and law school and then come out and stupidly throw their whole career away. It's just stupid; makes no sense. If you just do right, work hard, remain honest, do the best you can do, and have respect and care for other people, you will live a happy life.



OLIVER W. HILL, SR., ESQ.

Oliver W. Hill, Sr., Esq.

Oliver W. Hill was born on May 1, 1907, in Richmond, Virginia. He was born to William H. and Olivia (Lewis) White-Hill. After receiving his early education in Roanoke, Virginia, Hill went to Washington, D.C. to attend high school. Following high school, Mr. Hill enrolled at Howard University.

Oliver Hill's experiences at Howard were to change the course of his life, as well as affect the lives of countless other people. It was here that he came into contact with a number of other African Americans who were preparing to fight the segregationary and discriminatory practices rampant throughout American society. Among the persons Hill encountered were Dr. Mordecai Johnson, then President of Howard, Dr. Charles Hamilton Houston, the Vice-Dean of Howard Law School, William Hastie, a professor at Howard and later Judge for the U.S. Court of Appeals for the Third Circuit, and Thurgood Marshall, who was to become Hill's classmate and fellow civil rights attorney.

While in the undergraduate program at Howard, Hill discovered that American law provided rights to Negroes and that those rights were being ignored. Mr. Hill then investigated the possibility of attending the law school at Howard. The program enabled Hill to complete his undergraduate degree requirements while attending the law school. Oliver Hill was awarded an A.B. degree from Howard in 1931.

Oliver Hill was a member of Howard Law School's first day class. The conversion of Howard's law program from evening to day classes was but one of Houston's steps to better the program. Under the direction of Charles Houston, and to a lesser extent Mordecai Johnson, Howard Law School sought to teach a 'cadre' of young Negro lawyers, like Oliver Hill, to fight segregation. Hill heartily embraced this philosophy. He received a J.D. from Howard in 1933.

Oliver Hill was admitted to the Virginia Bar in 1934, and started a law practice in Roanoke, Virginia. In September of that year he married Beresenia Ann Walker. Like most Americans at that time, Oliver Hill did his best to survive the Great Depression. During his time in Roanoke, Oliver Hill became active in the National Association for the Advancement of Colored People (NAACP). His involvement with the NAACP has continued for more than half a century.

In 1936, Oliver Hill returned to Washington, D.C., where he continued his association with the NAACP and Howard Law School. He later moved to Richmond, Virginia and began a solo practice in 1939. During that year he was admitted to the Bar of the U.S. District Court for the Eastern District of Virginia. The next year, 1940, Oliver Hill began a pair of important, official positions with the NAACP. He became a member of the Board of Directors of the Richmond branch and the chairman of the legal committee of the Virginia State Conference of NAACP branches. He was to hold each of these positions for more than two decades. Also, at this time, he was admitted to practice before the U.S. Court of Appeals for the Fourth Circuit. World War II interrupted Oliver Hill's professional career. He entered the U.S. Army and served as a Staff Sergeant from 1943

to 1945. After mustering out of the Army, Hill returned to Richmond and the fight against Jim Crow laws.

The same year he entered the Army (1943), Oliver Hill joined two other Howard Law School graduates in starting the firm of Hill, Martin and Robinson. As Hill recalls, this firm handled most of the Virginia desegregation cases for the NAACP. The firm handled cases challenging everything from the exclusion of Blacks from juries to the eradication of segregated public schools. In addition to the firm representing the NAACP, Spottswood Robinson became the NAACP Inc. Fund's Southeast Regional Counsel. During this period, members of the firm tried desegregation cases southward from the District of Columbia to Georgia, including two of the five cases that were consolidated and decided as Brown v. Board of Education, *347 U.S. 483 (1954).*

Oliver Hill has also served in local (Richmond) and federal governments while continuing his private practice. In 1948, he became the first African American since the Reconstruction Era to be elected to the Richmond City Council. He served in this capacity until 1950. In 1950, he was appointed as a public member of the President's Committee on Government Contract Compliance. Oliver Hill has also had two terms on the Richmond Democratic Committee. During the 1960s, he held a federal post as an Assistant to the Commissioner of the Federal Housing Authority from 1961-66, which later became a component of the Department of Housing & Urban Development. In 1966, Hill returned to the practice of law in Richmond as a partner in the firm of Hill, Tucker and Marsh, where he continues to practice today.

Oliver Hill has received numerous honors. These include honorary degrees from Virginia State University (1982) and Virginia Commonwealth University (1991). His many awards include: the Howard University Alumni Award in 1950; the Virginia State Conference of the NAACP Award in 1957; the NAACP's Annual Convention Award in 1964; the Distinguished Service Award from the Virginia State Teachers Association, also in 1964; the Charles Hamilton Houston Medallion of Merit from the Washington Bar Association in 1976; the Simple Justice Award from the NAACP Legal Defense Fund in 1986; and, the University of Richmond School of Law—William A. Green Award for Professional Excellence in 1991. In addition, a Pre-Law Society of the University of Virginia has been named for Oliver Hill.

Attorney Hill is a member of numerous Bar Associations, among them are: the Virginia Bar Foundation; the Old Dominion Bar Association, where he has served as its President; the Richmond Bar Association; the National Bar Association; and, the American College of Trial Lawyers.

Oliver Hill and his family live in Richmond, Virginia. He has one son, Dr. Oliver W. Hill, Jr., a professor at Virginia State University, and one granddaughter, Jananda I. Hill, a student at the Massachusetts Institute of Technology.

My Experiences at Howard Law School

I was in the first day class. The Howard Law School operated as an unaccredited evening school until 1930, when Dr. Mordecai Johnson, President of Howard, expanded it into a three-year day school. Dr. Charles Hamilton Houston was selected to become the Vice Dean of the Law School and he developed it into a first-class accredited institu-

tion. The curriculum was designed to train Black lawyers who would be dedicated to removing segregation, and be prepared to take cases through all the courts, including the Supreme Court of the United States.

The first-year day class included several students who were already motivated toward giving Negroes first-class citizenship status. Among these were Thurgood Marshall, Lorenzo Henderson, Henry W. Sweet and me.

This is rather a series of coincidences. My step-father's brother worked for the Post Office and practiced law in the evening. After his death, his widow gave me one of his books—"An Annotated Constitution of the United States, 1924." I read the Constitution, especially the 13th, 14th and 15th Amendments, and wondered why the courts had determined that segregation was valid. I went to the Library of Congress and read all of the early cases interpreting these post Civil War amendments. Based on my interpretation of those amendments, I felt that the courts were wrong. At this time, also, Congress refused to pass laws making it a crime to lynch Negroes.

I discovered later that Congress had passed laws that gave Negroes all the rights that White people had, but it was the courts, state and federal, that had taken them away. I concluded that the logical procedure was to go back to the courts and try to get them to redress their previous errors. This was my motivation for entering Howard Law School: to prepare myself to participate in such an endeavor.

After studying my transcript at Howard, I found that I could enter Law School in the senior year of undergraduate school, and get my A.B. degree at the conclusion of my first year in Law School.

During the 1920s, Henry Sweet's brother, a doctor in Detroit, had moved into a home, in what was known in those days as "changing neighborhoods." His White neighbors objected, and ordered him to leave. When he refused, a mob came up and started shooting into Dr. Sweet's home. Someone in the house retaliated and shot back at the mob. A person in the mob was killed, and Dr. Sweet was indicted for murder. The NAACP employed the most famed lawyer of those days, Clarence Darrow, to defend Dr. Sweet and he was acquitted. As a result of that experience, Henry Sweet decided to study law.

Several of the other members of the first day class had also had special incidents that gave them motivation to study law, but we were all dedicated to the aims and goals set up by Dr. Charles Hamilton Houston. It was a fortuitous circumstance; that this little clique arrived in law school at the same time similarly motivated.

My Recollections of Charles Hamilton Houston as Vice-Dean at Howard Law School

Justice Fenton Booth had been Dean of the evening Law School. To

retain the support of Congress, the source of Howard University's financial support, he was retained as titular head of the Law School. Charles Houston, however, was in charge and administered all of the affairs of the Law School. Dr. Houston covered up the situation by stating that he took the title of Vice-Dean because he couldn't dignify his small salary as worthy of the title of Dean. However, he was the Dean; in fact, he operated in that capacity. He was determined to challenge the status quo, segregation, and all laws demeaning to Negroes. Before the establishment of the day school, the instructors were lawyers who practiced during the day and taught classes at night. Under the new organization, the added responsibilities of the professors required them to give full time to the Law School. This action generated much discussion and opposition, but Charlie stuck to his guns. He kept a few of the former teachers, among whom were his father, William L. Houston, George E.C. Hayes, a brilliant trial lawyer, Judge James Cobb and Judge Nathan Clayton, Municipal Judges in the District of Columbia. To these senior lawyers and judges, he added several bright young instructors, most notably, William H. Hastie and Leon A. Ransom.

Charles Houston's father, William LePre Houston, taught a class or two. Judge Clayton handled moot court. The faculty was considered well-rounded, knowledgeable, liberal and progressive.

Guest Speakers at Howard Law School Under Charles Hamilton Houston

Because Charles Hamilton Houston was so well-respected and widely recognized by his peers, he had the ability to secure their cooperation in the pursuit of his objectives.

During our tenure at Howard, we had lectures by many very outstanding members of the Bar, both White and African-American. The speakers included: Samuel Leibowitz; Clarence Darrow, Darrow spoke several times; the founder of the American Civil Liberties Union, William Ballwin; and, James Morris, a very prominent Black lawyer who represented one of the railroads in the Chicago area. We also had Raymond Pace Alexander, a trial lawyer in Philadelphia, and Walter Wheeler Cook, an outstanding authority in conflict of laws. I can't think of all the names, but one or two members of Congress talked to us. All in all, very stimulating lectures were held during each of our three years in Law School.

These speakers did not limit their discussions to segregation, they also discussed economic and social issues. They talked about whatever things they felt were important. Darrow told us how he came along; how he studied law and about his law office. Darrow told us, in one of the lectures, about how his enemies in California brought disbarment proceedings against him and forced him to a trial before he was acquitted.

The lectures were, for the most part, down-to-earth. Samuel Leibo-

witz, at the time he talked to us, was handling the Scottsboro case. Ballwin told us some of his experiences, discussed some of his cases, and what had motivated him. They were all very interesting speakers.

Programs at Howard Law School

Charlie knew that his students hadn't been exposed to any of the facets of the criminal justice system or even, by that point, to any of the adjunct things to the criminal justice system. So, in addition to our normal course studies, he elected to carry us on field trips every Saturday. We visited the FBI, and the St. Elizabeth's Hospital for the insane. We went to the penitentiary for the District of Columbia at Lorton, Virginia and to the jail in Occuquan, Virginia. We visited the United States District Attorney's office. We even visited with the coroner. I can't remember all the things we did do. I know, as far as Charlie was concerned, attending school was a six-day matter.

Then the other thing that we did was planning. We did a lot of research and held interviews, to plan on how we were going to do things when we got out of law school. Fortunately, in our senior year in law school, the graduates of the final year for the evening school started their program of action in Washington, D.C. They were the ones that established the right of Negroes to picket, peacefully, for employment opportunities.[1] So there was a whole lot going on at the law school.

Charles Houston earlier developed a practice that, after a case was prepared, but before the day for argument (these were all appellate court cases), we'd go to the law school and hold dry runs of the arguments. I attended several of those. I particularly remember that in the Gaines[2] case, we had an extensive dry run; likewise in Dr. Andy Ransom's case, *Hale v. Kentucky*,[3] involving jury discrimination. The principal objective was to sharpen the arguments for Charlie, or whoever was going to argue the case. We tried to be a strong devil's advocate, as strong as we possibly could. That was the purpose of the dry run.

Charles Houston's Father; William LePre Houston

Charlie's father [William LePre Houston] wasn't anything like Charlie. W.L. Houston was rather conservative. For example, I remember, William taught us Law Office Management. He said, "Keep a record. You make a telephone call, put down five cents." Well, of course, I don't think many of us bought his thoroughness in that respect.

However, W.L. Houston supported his son. He was very proud of Charlie, as he naturally would be. It wasn't his idea to challenge segre-

1. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).
2. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).
3. Hale v. Kentucky, 303 U.S. 613 (1938) (holding the systematic exclusion of Negroes from jury lists, solely due to race, was an unconstitutional denial of the equal protection of the laws).

gation in the same manner in which his son did, but he wasn't going to cut him loose because Charlie didn't follow his father's ideas.

The Legal Career of Oliver Hill

I finished law school in June, 1933. I took the bar examination in December and passed it. In September of 1934, I started my practice in Roanoke, Virginia, where I had lived until I left to go to High School in Washington, D.C. We were right in the middle of the Depression when I was in Roanoke. There were more people walking the streets than working. I was sharing an office with a lawyer, and he took no interest in me whatsoever. The Depression put it on him and he let me share his office space. But that was it. I don't remember him ever giving me any constructive advice.

My original goal was to bring a suit to challenge the jury discrimination in Roanoke. I never got it started because I felt I should wait until I got a paying client. I didn't realize that the best way to have done the thing was to have gone on and raised the issues and gotten some publicity.

I stayed in Roanoke for about a year and a half. Then I left, and went back to Washington. I guess what I needed was a little more get up, and a little more know-how—because you don't learn anything in law school about practicing law. The lawyer with whom I was sharing an office attended the Police Courts every morning. I didn't want to be in competition with him down at the Police Courts, so I stayed away. In retrospect, I should have gotten some of this work and gotten the experience, if nothing else.

I got assigned once with another lawyer named Thomas Reed, to defend a murder case. The assignment by the court was good practice; it didn't mean anything financially. For example, in the murder case, the fee was $25. In the other cases to which I was assigned, I didn't get anything unless the penalty exceeded ten years in the penitentiary. In all of my assigned cases, ten years was the maximum, so there was no fee.

I did get a case, just before I left Roanoke. Some people called the Roanoke branch of the NAACP one night, and said that they were afraid there was going to be a lynching in Wytheville, Virginia. They requested that a lawyer should come over. This was in conjunction with the Virginia State Conference of the NAACP; I was active with the local branch of the NAACP. I don't know how I figured I was going to stop a lynching. However, the next day, I borrowed a car and drove over to Wytheville. A Negro had shot a Deputy Sheriff.

Now in those days, in small towns and counties, the local Negroes could usually arrange for you to visit some genteel White person, after dark, and, upon an assurance that they would not be called upon to testify, such persons would be willing to give you extensive information

about the people and the community. Sometimes such visits were of no value, but in many instances what you learned did prove to be very valuable.

Although the Negroes were disturbed, and there was a lot of fear in the community, I did not believe that there was any likelihood of an attempt to lynch my client. I wanted to raise the question of the exclusion of Negroes from jury service, but I could not get my client's consent. The day I appeared in the Circuit Court, the weekly paper came out with a big headline; 'Negro Lawyer in Wytheville Circuit Court.' I tried to get the case held before a judge, but the Commonwealth's Attorney insisted upon a jury. The defendant got three years, or something like that. Before I left Roanoke, we were able to persuade the Governor to commute the sentence to time served and release the prisoner.

I stayed in Washington from June of '36 until May of '39—that's when I came back to Richmond. Originally, I had planned to return to Roanoke. However, a young man who had been in the law class ahead of me, named Byron Hopkins, and a young lawyer, named Thomas Hewin, Jr., whose father was also a lawyer, called Andy Ransom and arranged to come to the law school to discuss some legal questions involving a pending murder trial. Andy called me and invited me to participate in the discussion. I attended, and we discussed the case. Then came the question from Hopkins or Hewin, "What are *you* going to do?" This was February of 1939. I said I was planning on going back to Roanoke. They said, "Why don't you come down to Richmond and we'll form the firm Hopkins, Hewin and Hill?" That sounded appealing to me because I'd always wanted to be in a law firm. I went down to Richmond during the Easter period and we discussed the foundation of a firm. We agreed to form this law firm. I left with the idea that they were going to get quarters, and I agreed to come back May 1st. On May 1st, when I returned, Hopkins and Hewin had had a falling out. I had no basis for siding with either one of them. I ended up going back to Roanoke, getting my desk and a few books that I had there and bringing them here. I opened an office as a sole practitioner. Although I worked with both Hopkins and Hewin on some cases, the firm never developed, even though that was what got me to Richmond.

My Experience with the NAACP

When I got back to Richmond in 1939, I had already been active with the NAACP. I never worked for the NAACP as a salaried employee. By this time Charles Houston and Thurgood Marshall had developed a working relation between the Virginia State Conference of the NAACP and the Virginia Teachers Association. These organizations formed what was known as the Joint Committee. I took over as the Counsel for the Joint Committee. I'd drive around the state making

speeches and trying to drum up sentiment and support for the program to challenge the unequal salaries for teachers. That was our first big issue.

When I arrived in Richmond in May, a suit had been filed challenging unequal salaries for Negro teachers the previous year. The state had delayed. The court was holding a hearing around the end of May. The court dismissed the suit, deciding that, since the teacher had signed the contract, she had waived her right to challenge its terms at a later date. In the meantime, the school board didn't re-elect her. In those days, the teachers were on annual contracts. This teacher had been in the system for twelve years, now she was dismissed.

I had been doing some studying concerning class actions. These were new in those days. Thurgood and I decided we would bring the next suit, challenging unequal teacher salaries, in federal court under a class action. That's what we did. We found our plaintiff and, in August, I filed the suit. That's an interesting story.

The Alston Case[4] *and Fighting Segregation*

At that time, I was not a member of the federal bar, but I had applied for admission to the Bar of the U.S. District Court. In those days, you had to be admitted to every court in which you practiced—state court or federal court. I had filed my application in the clerk's office of the U.S. District Court at Richmond, and scheduled my appearance to be sworn in on a Tuesday, ten days later. The ten day delay was a Rule of the court.

On a Sunday, my mother, who lived in Washington, D.C., was carrying me around to some of her old friends in Richmond. I remember one elderly lady who said, "I've got some legal work I've been looking for some lawyer to do for me. How about Thursday?" I said, "Oh, can't we make it some other day? I can't make it Thursday, because Thursday I'm going to Norfolk to file suit against the school board there." She threw up her hands and said, "Lord child, don't you do nothing like that. The White folks will run you away from here before six months." I never saw her again after that. Whatever work she had, I didn't get it.

And, following a practice we had adopted on important cases, this Complaint, in addition to the signatures and addresses of Mr. Hewin and me, of Richmond, Virginia, bore the signatures and addresses of Thurgood Marshall and Robert Carter of New York, Robert Ming of Chicago, William H. Hastie and Leon A. Ransom of Washington, D.C., as being "of counsel."

On Thursday, as planned, I presented my Bill of Complaint to the

4. Alston v. School Board of Norfolk, 112 F.2d 992 (1940), *cert. denied*, 311 U.S. 693 (1940).

clerk in Norfolk. He checked the rolls and stated that Mr. Hewin's name was not listed. I repeated that I had been assured that Mr. Hewin was a member of the District Court Bar. I told him my application was on file, but I would not be sworn in until the next Tuesday. At the same time, very convincingly, I informed him that there was nothing to worry about, that William Hastie had been a United States District Judge for the Virgin Islands and, as a former Federal Judge, was a member of the Federal Bar all over the United States. The clerk couldn't tell me I was wrong because he didn't know either, but it didn't sound right to him. The clerk said, "Well, you say you're going to be admitted on Tuesday. You sure about that?" I said, "Yes." He said, "Alright, I'm going to let you file this bill today on the assumption that Tuesday you're going to go down and be sworn in." I filed my bill and got our case started.[5] I was particularly interested in getting it filed that day because I wanted to get it to the *Norfolk Journal and Guide* that afternoon, for the Saturday edition. The *Norfolk Journal and Guide* came out weekly, it was one of the Negro papers. That Saturday there was a big headline, "Suit Filed." We were showing that we were continuing the fight against unequal teacher salaries. The mere fact that the other teachers had been fired didn't stop us. The authorities tried to play the same delay tactics on us, even though we filed in federal court. We didn't get a hearing until February. As a matter of fact, we were before Judge Way in February, and he ruled against us. Thurgood Marshall and I were supposed to argue the motion. Judge Way gave Thurgood such a hard time that Judge Hastie turned to me and said, "Let me go up there and see what I can do with this." I agreed to it and the judge gave Hastie as hard a time as he gave Thurgood.

This was in February. The next term of the court of the Fourth Circuit was in April. The next one after that would be in June. Under the circumstances, it was impossible for us to get our brief filed for the April term. So we had a meeting in the Howard Law School. Bill Hastie, Thurgood Marshall, Andy Ransom, a couple of other people and I were there. It was a Sunday evening. We were chewing the fat and trying to come up with ideas. Nobody could come up with anything. This was the last week of that term for the Fourth Circuit. Finally I said, "Look, suppose I go down and ask them to hold a special term of the court to hear our case. I know we'll get the hearing." Hastie said, "Who's going to make the motion? Are you going to do it?" I said, "Yes." Judge Hastie replied, "Whoa, that settles it then!" It didn't dawn on me, what I had undertaken. As I say, I was naive about a lot of these things.

I hustled on back to Richmond, typed the petition and notice, and put it in the mail to the City Attorney down in Norfolk. I called the City Attorney's office that Monday morning and told him this motion was in

5. *Id.*

the mail and that he'd get it the next day. I gave him notice that I was going to appear before the court on Thursday.

On Thursday, I appeared before the Fourth Circuit. I had been previously admitted to this court. The bench of the Fourth Circuit, in those days, had just three judges: Judge Soper was from Maryland; Judge Dobie was a Virginian; and, Judge Parker, the Chief Judge, was from North Carolina.

They called my case. I made my motion, and Judge Parker leaned forward and said, "Wait a minute young man, do I understand you want the government to go to the expense of bringing this court, and all of its entourage, all that distance just to hear your case? What's so special about your case?" Then they gave me an opportunity to run off at the mouth about what had happened the year before, and what we anticipated would happen to our client this time. I remember Judge Soper said, "Maybe what you want us to do is enjoin them, right?" Well, I didn't care what they did, as long as it stopped the school authorities from firing our plaintiff. The City Attorney jumped up and said, "Your Honors, an injunction will not be necessary." The end result was that the court didn't take any action, except to say that if my client was discharged, I should come back to them and they would do something about it. The real result was that no member of the school board personnel was given a contract until after the Fourth Circuit had heard our appeal and had decided our case, in 1940.

The court decided that the payment of unequal salaries, based on race, was unconstitutional.[6] As a result of our favorable decision in *Alston v. School Board of Norfolk*,[7] we then filed suits in a number of school districts—wherever we could get a plaintiff. From that point on, our firm, Hill, Martin & Robinson, handled most of the cases in Virginia. Occasionally, Bob Carter, from the NAACP's national office, came down. I think that the only case in Virginia that the national people came in on was the Prince Edward case.[8] As a matter of fact, we had the firm of Hill, Martin & Robinson, all three of us were Howard graduates. Spottswood Robinson is still the holder of the highest scholastic record for any student at Howard Law School. He was a Chief Judge of the Court of Appeals for the U.S. for District of Columbia. He retired recently. Martin A. Martin had been an attorney in the Department of Justice during the early part of World War II.

About everything our firm did in Virginia was under the auspices of the Virginia State Conference of the NAACP branches. We had a working relationship with the national office, but we didn't rely on it for

6. *Id.*

7. *Id.*

8. Davis v. County School Board of Prince Edward County, 103 F. Supp. 337 (1952). This case was consolidated and decided as Brown v. Board of Education, 347 U.S. 483 (1954).

financial support. We were of counsel in the *Briggs* case[9] in South Carolina. Spottswood Robinson from our office participated in the trial. At the time, he was the Southeastern Regional Counsel for the NAACP Legal Defense and Education Fund. Martin and I represented the NAACP in practically all matters that involved the NAACP—within our office, we handled everything together.

The next case I tried after Norfolk[10] was in Newport News. I actually had to try that case. The defendants came up with the same waiver defense as was used in the *Alston* case. Judge Way said, "No, we're not going to run up that blind alley again. I went along with you on that in Norfolk. It went to the Court of Appeals, and I got spanked. They're not going to spank me any more." He had learned quickly and this time ruled in our favor.

After winning cases in Norfolk, Newport News, Richmond, and Chesterfield County, we were able to negotiate with school authorities to equalize teachers' salaries without litigation.

We had a wide range of cases. Something else that was taking lots of our time were cases involving bus and railroad transportation. Negroes would refuse to move and the authorities would arrest them. They would be tried and convicted, in Police Court, of violating the segregation statutes. We would appeal the cases to the Court of Record. In Richmond, Judge Ingram, of the Hustings Court, would try each case and take the case under advisement. That was the end of it. I remember one time, we had about 60 cases with him. I asked him, "Why don't you decide some of these cases?" He said, "You know damn well the Supreme Court, one of these days, is going to decide against us. You might as well forget about it, don't worry about it." This was his device to prevent us from appealing the case. He did not want to acquit the defendants and he did not want to be reversed, so he held them.

My Thoughts on the Civil Rights Movement

Charles Hamilton Houston was the architect of the legal strategy in the modern era of the Civil Rights Movement.

Without the NAACP attorneys having developed a playing field, the civil rights leaders and protesters of the 1960s and 70s wouldn't have gotten to first base with these sit-ins and any of the protest marches. The legal work for keeping the civil rights protesters out of jail was all done by the same lawyers who had handled the court cases before. The sit-ins were alright, I had no problem with the sit-ins, but the militant people with that "burn, baby, burn" business hindered and inhibited progress that otherwise might have been made.

9. Briggs v. Elliott, 98 F. Supp. 529 (1951). This case was consolidated and decided as Brown v. Board of Education, 347 U.S. 497 (1954).

10. *Alston*, 112 F.2d 992 (1940), *cert. denied*, 311 U.S. 693 (1940).

One of the great tragedies of our time was that Charles Hamilton Houston died without having the opportunity to portray his immense talents through the television media. Not only would there have been a wider awareness of his talents and accomplishments, but I earnestly believe that his visual presence, speeches, and wise counsel would have counteracted some of the irrelevant actions that slowed down the forward progress of the Civil Rights Movement in the United States during the 1960s and 1970s.

Charles Houston's Cadre of Lawyers

Let us first reflect upon the times and circumstances that prevailed when Charles Hamilton Houston entered the Civil Rights struggle and accepted a leadership role. Racial segregation was considered to be as immutable as the ancient laws of the Persians and the Medes. In the general communities, legal racial segregation was regarded as something that had always been and always would be. Racial segregation was so firmly entrenched in American society that the Congress of the United States would not, and could not, enact a statute making it a crime to lynch a Negro, male or female. Even in the Negro community there were divergent views as to how Negroes should react to, and accept or reject racial segregation.

We recognized from previous experience that it was important to make sure that when we carried a case to the Supreme Court, that it was well-prepared and that we had a full expectation that we would be successful. You've got to bear in mind that *Plessy*[11] was not a case to really challenge segregation. Plessy was 80% white, and [what] he was objecting to was being classified as a Negro. That was his biggest gripe; he wasn't really challenging the law, per se. The case down in Mississippi—the Chinese girl—she wasn't challenging segregation per se, she just didn't want to be classified as second-class, along with Negroes.[12] All those cases came up to the Supreme Court with practically no record of any consequence.

All they did was to get some bad decisions established and reinforced. The first case involving schools was down in Georgia,[13] shortly after *Plessy*. Negro plaintiffs tried to close the White school. This case didn't attempt to bring Negroes into the mainstream, it attacked the problem from the opposite point of view, i.e., to deny Whites the services denied to Negroes.[14] This idea was poorly thought out and all it did was to create bad court precedents. We made sure we had good

11. Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that the Fourteenth Amendment was not violated where separate facilities were provided for Blacks and Whites, so long as the separate facilities were 'equal').

12. Gong Lum v. Rice, 275 U.S. 78 (1927).

13. Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

14. *Id.*

records and we recognized the fact that we had to utilize every available means to educate the White and Negro public, and especially the courts and other public officials, to the justness of our cause. We approached the problem from that point of view.

We didn't get to the social science people until after we filed the suits to challenge segregation per se. As I have stated, racial segregation in the United States was, and still is, so firmly entrenched that, at that time, there was no hope of succeeding by attacking segregation per se. During the whole period up to that time, remember, we were dealing with *Plessy*, and we were bringing suit on the "Separate but Equal" doctrine.

A part of Charlie's game plan was to force the public officials to provide the equal facilities called for in the *Plessy* decision, and, thereby produce the elimination of the dual system by making it economically infeasible.

We made the mistake and, of course, all of us should have known better than this by virtue of the fact that we'd come through the '20s and Prohibition. Not only Prohibition, but also with respect to discrimination against Negroes, the attitude of the public towards traffic violations, Prohibition and even the income tax laws. In the United States, there was an enormous disrespect for the law; it was common practice to violate the law. I remember, as a young person, I would hear all kinds of jokes about breaking the law. For example: a guy was charged with speeding, and the judge fined him $25. So he said, "Judge, here's $50, because I'm going out like I came in." That was the attitude towards laws the majority did not like.

As I stated, we should have known better, but I guess we didn't. In the first place, many White people would not even discuss segregation with you. It was just 'it.' That was it, that's the law. Even those who would discuss it with us would say, "Well, it's the law." This constant reference to the law built up in our minds that maybe what was inhibiting White people from doing what was right was the law. So, we thought that if we changed the law, then the majority of Whites would promptly do what was right and abide by it. We were misled.

Then there was the other aspect of the problem. Some Negroes just had certain things so ingrained in them that all they could see was that challenging segregation was going to make bad matters worse. This made them hesitant about challenging the segregation laws and about supporting us.

I remember one time, I carried a bunch of schoolchildren down to the White school in Sussex County, Virginia and demanded their admission, which was denied. These children lived forty miles from the nearest school for Negroes and the school board would not provide them with transportation. Despite this flagrant unequal treatment, we had to take them to court to compel the school board to provide bus

transportation for the Negro children, even though for years bus transportation had been provided for the White children.

Another time, Spottswood Robinson and I carried some Negro schoolchildren to Gloucester High School. When we got on the campus of the White school, one little Negro girl got so hysterical we had to calm her down. We had to tell her, "You don't have to get out of the car, you just stay right there." The idea of going on the campus of this White school, it was just more than she could take.

The Prince Edward County case was our first attack on segregation per se in the public schools.[15] When the attorneys for the defendant school board introduced their first witness, it was Colgate Darden. He was a former Congressman, former Governor, and former President of the University of Virginia. He testified that for White children and Negro children to go to school together would create violence in the streets. Sheriffs and public officials, local public officials, all swore there would be violence in the streets, if segregation was eliminated. As a matter of fact, the Attorney General, Lindsay Almond, had filed a brief in a case, during the late 1940s, where a Negro passenger was denied seating in a railroad dining car. The brief stated that for Negroes to ride through the state, in interstate travel, in a dining car, was going to create social unrest in Virginia. This was an amicus brief Attorney General Almond filed, he wasn't even involved in the case. That shows you that they were fanatical about this segregation business. Dr. Kenneth Clark and his wife, Mamie, with their dolls and other psychological evidence produced by other social scientists, carried the day for us in helping to get the U.S. Supreme Court to declare that racial segregation in public schools was unconstitutional.[16]

I remember we filed suit against King George County for better school facilities. I subpoenaed the local superintendent of schools and I introduced the State Superintendent's Annual Report. Between the cross-examination of the local superintendent and using the figures from the State Superintendent's Report, I was able to establish my case. During the course of the trial, for example, I remember one question I asked him. Why was it that, in all the rural areas of Virginia, the Negro secondary school was known as a County Training School, but for Whites it was the County High School. I asked him, "What's the difference, why King George Training School for Negroes, and why a high school for Whites?" He said, "Well, it's just a practical matter, you train them to do things they can get a job doing." He didn't want to give them any courses they wouldn't get any benefit from. That was the general attitude. What Negroes needed was a little training to perform menial tasks, as too much education wasn't needed to work in the fields.

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15. *See supra* note 8.

16. *See* Brown V. Board of Education, 347 U.S. 483 (1954). *See generally*, RICHARD KLUGER, SIMPLE JUSTICE (1975).

He didn't say it, but I am sure it was in his thoughts that if Negroes were taught to perform skilled labor jobs, they would be in competition with White labor.

Judge's Receptiveness to Equality Arguments

When we tried the Gloucester County School case, challenging unequal school facilities, the judge ruled with us and ordered the school authorities to equalize the facilities. In response to the school board's request, the Board of Supervisors ordered a vote on a bond issue. The school board then ran around the county telling people to defeat it. The voters did defeat the bond issue. We had witnesses to the fact the school officials had campaigned against the bond issue. We brought a motion for further relief in the case. The Board defended on the grounds that they had tried to get the bond issue passed and the people had voted against it. We countered with the fact that they had defeated the bond issue by their own action. The judge agreed with us, and fined each one of the school board members five hundred dollars, and ordered them had to pay it out of their own money, not from the school's public fund. He was a good judge, as long as we operated within the *Plessy* decision.

In the Prince Edward School desegregation case, after the *Brown* decision, we had a hearing before Judge Sterling Hutchinson. He took the matter under advisement. We pressed him and pressed him until, finally, he wrote a long opinion holding against us. We appealed to the Fourth Circuit Court of Appeals, and the Court of Appeals ordered him to desegregate the schools. I waited for Judge Hutchinson to come back to Richmond, but several weeks passed and he failed to show up. I drove down to Mecklenburg County, where he lived, to see him. He came out, "Hey Oliver, what are you doing down here?" "Hello Judge, I dropped down here to see you." We sat there chewing the fat for a minute or two. He said, "What really did you come down here for?" I said, "I have the Court of Appeal's order." He said, "You know I'm not going to sign this damn order. I'm not going to do it." He didn't. We finally had to get the court to bring in another judge to sign a decree ordering Prince Edward County's School Board to desegregate the schools. Judge Hutchinson took early retirement. He would try cases regularly in Newport News, but he never came back to Richmond. He didn't want to deal with the aftermath of the order.

Judge Hutchinson was as fine a judge as you want, right down the line. Not on Civil Rights, but on other matters. He just could not bring himself to order White children to attend desegregated schools. The mental block that people had on this issue was terrific.

Charles Houston's Belief in Lawyers as Social Engineers

Charlie's credo was that "Any lawyer that was not a social engineer

was a parasite on society." That was one of his favorite statements. His idea that we could be social engineers had a tremendous impact for those of us that actually participated strongly in these cases. As a matter of fact, I never got over it.

My class, and those that were in law school during my time there, were the only students that Charlie had actual contact with as students. He left to join the NAACP as Special Counsel in 1933 or '34. Charles Hamilton Houston became involved in an impressive array of Civil Rights cases, including discrimination in the impanelment and selection of juries, admission to elementary and secondary public schools, as well as admission to schools of higher education. While he was Special Counsel for the NAACP, no case involving human rights was too arduous or too hazardous for him to handle. When he returned to private practice, no client with a valid case was too poor to get the unstinting benefit of his services.

During the 1930s, Charlie became the attorney for a struggling labor organization of Negro Railroad Trainmen and Firemen. Before his death he had developed this weak and struggling group into a vibrant organization. The labor unions representing the various classifications of workers on the railroads were known as Brotherhoods.[17] However, they limited their membership to White men, and established as one of their main objectives the elimination of Negroes from employment in all of the operating positions on the railroads. In these endeavors, the Brotherhoods enjoyed the tacit and active cooperation of the Railroad companies.[18] Charlie took up the cause of the Negro workers, and through litigation and Congressional hearings, exposed these nefarious activities and saved the employment opportunities for a great number of Negro railroad workers.

My Mentor; Charles Hamilton Houston and his Legacy

I have had opportunities to see and hear General Colin Powell make speeches and testify before Congressional Committees. Since he has become a national figure, I have become quite a fan of the General.

It was not long before I noticed the number of similarities between General Powell and Charlie Houston. They were both articulate and demonstrated complete command of the subject matter under discussion. Charlie possessed, in his day, and General Powell now possesses, the ability to convince their listeners that they were speaking not only from their minds, but also from their hearts. Charlie, like General Powell, was handsome and well-groomed. Although I do not know him and have never met General Powell, from television he comes across as a

17. Steele v. Louisville & N. R.R., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944).

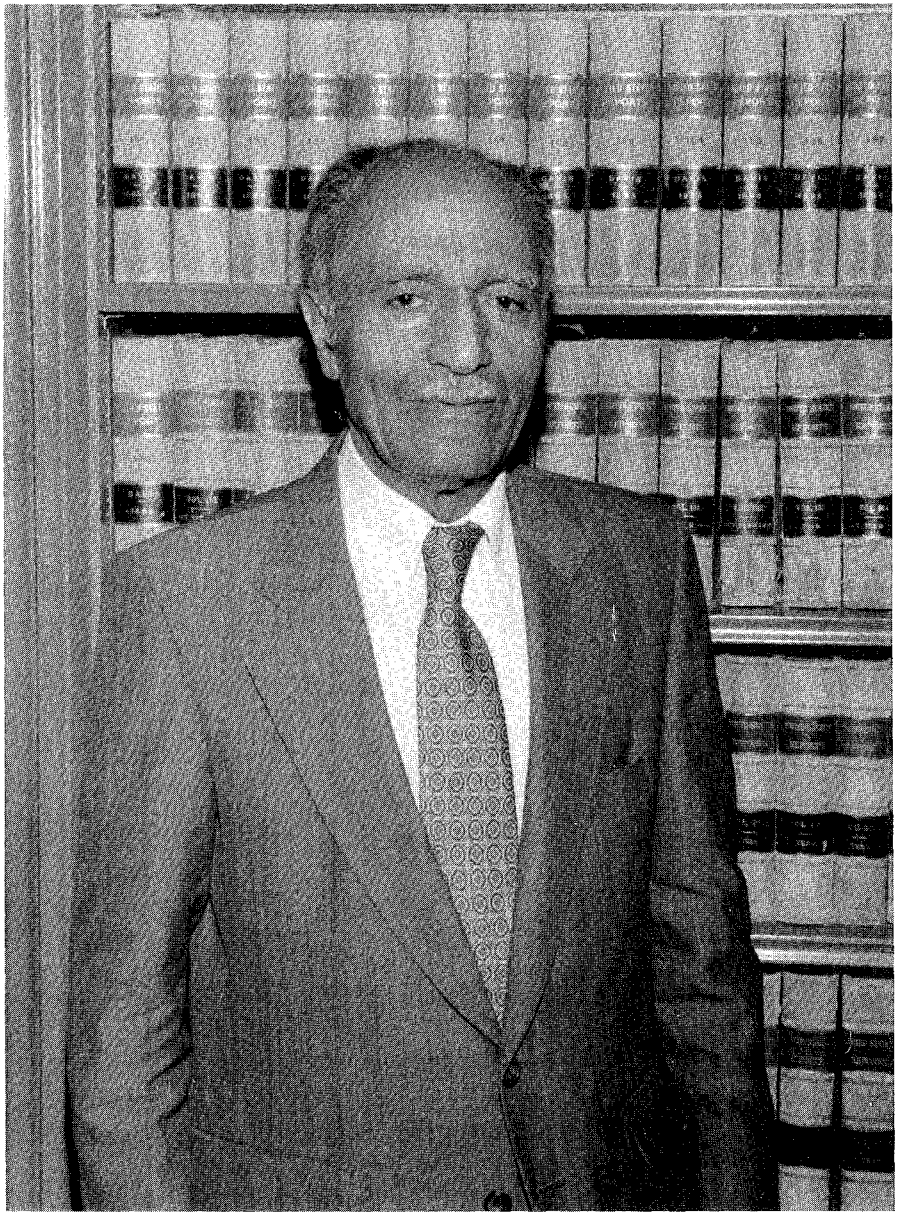
18. For a discussion of the secret agreement between the unions and the railroads, see SIMPLE JUSTICE, *supra* note 16 at 230-32.

person with the abilities and the character of Charles Hamilton Houston. So when you see General Powell, you are looking at a person who appears to have the qualities of Charles Hamilton Houston—which, in reality, I believe the General does have.

Charles Hamilton Houston, was a brilliant lawyer, a distinguished scholar, and a great teacher, who emerged in a leadership role around 1930. He soon became a fearless leader, who mapped a course of action and started a non-violent revolution with such momentum that his untimely death, in 1950, did not deter its relentless forward motion. A comprehensive view of the life of Charles Hamilton Houston reveals a portrait of the truly civilized human being of the future.

During our personal relationship, Dr. Houston insisted that we call him "Charlie."

Charlie and I were very close. Charlie was really my idol; he was my ideal and my mentor.



HON. WILLIAM B. BRYANT

Hon. William B. Bryant

Judge William Benson Bryant was born on September 18, 1911 in Wetumpka, Alabama. Judge Bryant matriculated at Howard University where he received an A.B. in 1932. Judge Bryant attended Howard University Law School and received his LL.B. in 1936.

Judge Bryant served in the United States Army from 1943-1947. During the three years between 1951 and 1954, Judge Bryant was an Assistant U.S. Attorney for the District of Columbia. From 1954-1965, Judge Bryant engaged in private practice at the law firm of Houston, Bryant & Gardner, in Washington, D.C. President Lyndon B. Johnson appointed Judge Bryant to the U.S. District Court for District of Columbia, in July 1965, where he served from 1965-1977. Judge Bryant served as Chief Judge of the U.S. District Court for the District of Columbia from 1977-1982. Since 1982, Judge Bryant has served as a Senior Judge of the same court.

Judge Bryant has been a Professor of Law at Howard University School of Law since 1965. He has also been selected by the judicial panel on Multidistrict Litigation to serve on the special court on Regional Rail Reorganization. Additionally, Judge Bryant presently serves as Secretary of the District of Columbia Board of Education.

Judge Bryant has held membership in various civic organizations during the course of his legal career. He was a member of the Committee on Admissions and Grievances of U.S. District Court District of Columbia from 1959-1965. Presently, Judge Bryant holds Membership in the American Bar Association, the Bar Association of the District of Columbia, the District of Columbia Board of Appeals and Review and the District of Columbia Special Police Trial Board. Judge Bryant is also an honorary Member of the National Lawyers Club.

Judge Bryant and his wife, Astaire A. Gonzalez, have two children, Astaire and William, Jr.

Charles Hamilton Houston's Family

Charles Hamilton Houston was the son of a man whose family came to Washington from someplace in Illinois. Charles Houston's father was William L. Houston, who had two brothers and a sister. One brother, Ulysses Houston was a doctor; an ear, eye, nose and throat man. The other brother, Theophilus Houston, was a lawyer. Miss Clotill Houston was a schoolteacher. Aunt Clotill was a wonderful woman who taught me in the fifth grade and I loved her like I loved my mother. All of the Houstons were employed at a time when lots of Blacks did not have a good economic background. Of that group, one sister and three brothers, there was only one offspring, and that was Charlie, and he was the apple of everyone's eye.

[Charlie's] whole family were long livers. I knew his grandmother. I didn't know his grandfather, but his grandmother was a long liver. All

his uncles and his father were close to, or over, 80 when they passed away, and Aunt Clotill was 99.

My Initial Contact with Charles Hamilton Houston

I think Charlie had a pretty broad intellectual thrust. He was well-trained and, as you know, when you go to Amherst and Harvard and the University of Madrid and other places, you get a pretty thorough education in Anglo-European concepts.

I never worked with Charlie; never worked with him on his projects. But I was in Howard Law School. Now come to think of it, my exposure to Charles Houston in the law school was limited to the first and third years. I actually had this limited exposure to Charles Houston because he took leave [from Howard during my second year]. It was the Crawford case[1]. He represented George Crawford, a fellow who killed some woman over in the Hunt country over in Virginia. He took some leave on that, and another fellow became the dean or the acting dean of the law school while I was there. Charlie came back to the law school I think at the end of my third year so my contact with him was limited in that respect.

Impressions of Charles Hamilton Houston

I knew him. When I say I knew him, I mean I knew him by sight because my relationship with him [and his family] goes back a long ways . . . .

When I called [Howard Law School] and wanted to know about any scholarship aid, I was told that there was no scholarship aid. Scholarships were awarded on the basis of merit alone, that I should read the catalogue and I would see what the scholarship arrangement was. I did and the catalogue offered nothing to a first-year student. The highest ranking student in the second and third-year classes, got room, board and tuition. The second highest ranking student got tuition.

At the time I was talking to Charlie about that, I was working as a laborer. Thereafter, I got a job working at Howard University on the switchboard from 12:00 midnight till 8:00 in the morning. I went to work at 12:00 p.m. and there might be a few calls, but after about 1:00 in the morning, you could hear a pin drop. Nothing ever happened in that office until around 6:30, 7:00 in the morning, when people would begin to wake up.

So there I was with all of that time on my hand and nothing to do but study, if I had sense enough to sleep in the daytime and be alert. So when I got that job, I applied to Howard University Law School and I went on in. I was doing that work when Charlie wanted to know how

1. Hale v. Crawford, 65 F.2d 739 (1st Cir. 1933), *cert. denied*, 290 U.S. 674 (1933).

many students were working and how long you worked. So he asked how many were employed and we raised our hands. He wanted to know how long did we work. A lot of these guys were waiting tables three or four hours a night and so forth. He got to me, I worked eight hours and then I was targeted. Charlie said, "You can't do that!" It wasn't consistent with the image [Charlie] was trying to build at the university, having some student working eight hours in his law school . . . you couldn't do that and he didn't want that. You went to school in the daytime, studied and you did your work. Working was not compatible with being a student. And that was when we had our first 'confrontation' — I stayed in the law school.

Charlie never had to work, he never had to do it while in law school. He went to Amherst, he went to Harvard, he went to Madrid and at no time during that period was he called upon to do any work or worry about what was going to happen to him. I wasn't that fortunate; and he told me that.

Charles Hamilton Houston: Teacher

I remember Charlie. He wasn't a magical teacher. He was thorough, but he was not a dramatic teacher. You had to have a little interest in the subject matter because he was not a teacher, you know some teachers can kind of light a fire under you, I didn't think he did that. Not in any particular class, but I think over a period of time, your exposure to Charlie resulted in some kind of lasting impression. He would tell you to look to the right and look to the left, and at the end of the year one of you will not be here. All that sort of business which was kind of frightening. But he wasn't just engaging in rhetoric. He meant it and he imposed it. Out of a class of 15 or 16, we had one person graduating.

In those days, exams were marked on the basis of A, B and C and failing and they weren't marked on the curves. I was out of the law school, as a matter of fact I had completed all of my schooling, when I found out that people were marking on the curve. I wondered what the hell they were talking about. I didn't know what they meant, really.

I had a history of law class, I remember very well. A pleadings class, what they call Common Law Pleadings. I remember it very well. He was a very thorough teacher. As I say, Charlie had a standard, he only had one standard and that was excellence. He could only perform at that level. When I say that, I mean that.

Charles Hamilton Houston: Dean

Charles Hamilton Houston was a perfectionist. His standards were the highest and he saw no reason or justification for deviating one inch. When you tripped over the Vice-Dean, Charlie was never the Dean of Howard University Law School, he was the Vice-Dean. When he took

over the headship of the school, it was a small school. The President of the University gave him carte blanc to . . . the law school which, up to that time, was not a famous place, gave him carte blanc to make of it whatever he could; the best institution he could make of it. And Charlie, as might be expected of him, brought to the Howard University Law School, what were apparently Harvard standards, and imposed them right then and there. He had a handful of top-notch instructors in that law school and everyone of them was geared in the scholars' determination to make those standards very high. That is what he did. He left his mark on that law school. Sometimes I think that later on his influence on the school kind of dissipated, but he left a mark on it, that is a fact.

The Houston Law Firm

A library is all you are looking for as a lawyer. I went over to this office, with Mr. Waddy and Mr. Gardner, and they had what I considered a very good library. They had the Federal Supplement up to date, Fed. 2nd up to date, and also the U.S. Court of Appeals for the District of Columbia, advance sheet service. They had A.L.R. up to date, the Lawyer's Edition of Supreme Court Reports up to date and that is a tremendous library when you stop to think, plus the Code. Those are terrific research tools. I mean the Lawyer's Edition of the Supreme Court Reports, that is a valuable thing. When that came in here and they had the . . . reports, I used it. But when I really want to do some research, I go downstairs to the library and get Lawyer's Edition because they give the annotations and stuff like that. It is much more complete, it seems to me, than these things here.

But at that time, to walk into a library of a Black law firm with just three people in it, plus the Harvard Law Review was up-to-date. That was on account of the fact that Charlie was the Editor of the Law Review. But that is a terrific library, that is a terrific facility. I was attracted to that and I knew they were there because of Charlie. He would not settle down in a place where he could not expand.

I was in the U.S. Attorney's office and Charlie had argued a case in the Supreme Court of the United States. On the day that the Court rendered its decision, I was working and I didn't know that the decision had come down. I saw Charlie walking past our courthouse. His office was in the 600 block of F Street, our court was on 5th St. between E and F, and he was walking past our court on the way to his office. He had just picked up his opinion from the Supreme Court. When I looked at him walking across the street, he looked like he was walking on air. He was a pretty stern fellow, but he appeared to be very, very happy about something. I didn't know what the hell was going on. I didn't know why until that evening, when I found out that the court had come down

with an important decision[2]. We owe a lot to him.

Charles Hamilton Houston's Vision

I think that Charlie realized that the very structure of our government afforded the opportunity for the court, the Supreme Court, to really be that in-place instrument to do something about it [segregation]. He and other people thought that a reasonable interpretation of the Constitution would ultimately prevail. So he took the founders at their word, you know, and when you look at the Constitution, you must marvel of the wisdom of those young people. They were relatively young when they got together and whipped it up. It's a pretty effective instrument. Charlie had the same idea that Ralph Bunche had, and people like Bill Hastie and people of their day, that something had to be done to close that hiatus, to narrow that hiatus between what came out of our mouths and how our arms and legs behaved. Charlie just assumed, he recognized, identified the law as the only feasible instrument [to fight segregation], and with that in mind he tried . . . a wave of opportunities. When he could strike, he tried to . . . [use his] intellect. I guess that's Charlie in a nutshell.

You see, there are people who thought the way Charlie thought. He wasn't the only one. There were a lot of them over the years. If it weren't for those kind of people, you just shudder to think of where you or I would be.

I think Charlie had that vision. He came under the influence of some pretty profound people, Justice Frankfurter and people like that. He had an extraordinary intellectual grasp and understanding, a full appreciation of the broad policy considerations that underlie such things as the Constitution and Declaration of Independence and thought that they should be honored . . . .

If you studied constitutional law, and you follow the threads of it, you can see that concept in action. In various cases in the current Supreme Court, or others over the years, the Court(s) have sort of put some clothes on these constitutional ideas and amendments and what not. You have seen the Courts fashion and mold, and otherwise breathe some life into the Constitution, so that it becomes a live thing that lives all of the time with us. That is the way I like to think of it. Charlie understood that.

I understood and appreciated the extent to which the Supreme Court had shaped and put some clothes on these constitutional horses we had. I understood that concept, so Charlie did not have a hard time convincing me of that.

As I told you . . . so far as Charlie was concerned, there was only one way to do it, and that was the *right* way. There were only two ways, the

2. Hurd v. Hodges, 334 U.S. 24 (1948).

right way and the wrong way, and the only one that was acceptable to him was the right way. When you get involved in the practice of law, it calls for, you get a lot of . . . training. You get a sense of personal involvement. If you are a lawyer, it is the only profession it seemed to me, other than athletics, where you really are competing. Especially because you have a plaintiff and you have a defendant. You've got opposition and that means that you are pitting your skills against somebody else. If you've got a competitive spirit, don't want to be embarrassed, don't mind working, and have a whole lot of other personal weaknesses like that, you get sucked into it.

No one likes to lose and the law is designed to uncover your weaknesses. If you are deficient, it comes through. But I think that really your competitive spirit, your natural tendency to want to prevail . . . the good Lord has given all mankind, the will [and] the power. Someone told me once, if you are a doctor, you bury your mistakes. But if you are a lawyer, they write about them, talk about them, and that's true. What I am saying to you is your mistakes are memorialized.

I don't think perfection was a family trait so much as it was a generational trait. I thought about Charlie's aunt, Aunt Clotill, this woman who taught me fifth grade. She was the same kind of person — Perfection was her goal. But then I look back on it and that's true of a lot of people during that generation.

I didn't have any reason to respect any different views [about fighting segregation]. I didn't have any reason to disagree with him or not. As I say, I appreciated Charlie's effort, I think, probably a little better than most people in my class because I had been exposed to Ralph Bunche, who was truly a great American.

Houstonian Jurisprudence

The only logical instrument for it [social change], by the very nature of the governmental structure, would be a courthouse. A courthouse is where ultimate fairness is supposed to be dispensed and that is what I try to do. I try to do that. I am not looking for any results except that. I guess it is hand-me-down from the British: the discipline of law has been something of a hallmark and the very structure of our government.

Sometimes unfairness is an acceptable proposition to the rank and file. It isn't acceptable to a handful of folk, and I think that's why they broke this government down into three separate branches. The people who will determine whether it is fair or not are given life tenure so that they will be removed from the heat, so to speak, and can take those positions, like during the 60's when we had the massive resistance and the riots during school desegregation and those tragedies. Those were things that cut at the very heart of the southern culture and they had judges down there in the Fifth Circuit who were just trojans, you know;

John Wisdom, Elbert Tuttle, Waitis Warin, Frank Johnson, Skelly Wright and John Brown. They were down there in Louisiana, Georgia and Alabama. They were calling them like they were supposed to be called and what was happening; they were burning crosses in their yards, they were knocking their windows out, they were threatening them with death and everything else. But they recognized their roles and they were not taking those positions because they were thinking, "I am going to be a big guy." That wasn't the thing that motivated them. They took them because they understood the system and they had taken an oath to uphold the law. They thought that they would abide by it. They were given that immunity from popular reprisal and Charlie understood that. Charlie recognized that. He felt at home in a courtroom because he felt that he could espouse these things, these standards of fairness, and that he could throw them out on sort of a receptive ground, you know, judges and lawyers.

a. CONCEPT OF FAIRNESS

Somebody comes into the courthouse with a dispute. The resolution of that dispute is governed by certain rules, either a certain law or a certain regulation or something. All these governmental concepts and rules are designed to establish fairness. If you think about the Constitution, about the Declaration of Independence, and all of the rules and regulations that people go to the trouble of adopting, if you think about, for instance, the rules of criminal procedure, the rules of civil procedure, all rules that mankind has designed because . . . the necessity of rules, rules are designed to make it right. You would see that these rules are designed to assure fair play.

I mean all rules are designed for that purpose, to eliminate unfairness. That permeates all of our legal theory: procedural due process, due process and ultimate justice. The bottom line is "is it fair?" We know that it is either fair or unfair. It is the same thing whether a man has a short leg or a long leg, or a black face or a white face, that isn't a relevant issue. Fairness is determined by the facts, you know, how a thing postures itself. It's either compatible with human decency or it isn't. It offends you or it doesn't offend you. If you smell it, it either smells all right or it stinks. You don't have to be a genius to deal with that. That is why you have jurors. Jurors come from all cultural, economic and social levels. You put them in a jury box and, regardless of where they come from, they have a basic sense of fairness. That is the reason they return those verdicts. I think, and I am not including myself because I don't include myself with these people, the people I am talking about like Lou Boudin, Charlie Houston, Clarence Darrow, and Thurgood Marshall, these are people that are set apart on a pedestal.

I think Charlie captured it all with this concept: if you had rules, you had rules and if you applied them, if you made any difference in the

application of the rules to somebody because he wasn't white, well that on its face was unfair. I think that was the whole concept. If it was unfair, it was unlawful. If it was unfair, it ought not be. And, if it was unfair, I am going to do what I can to make it right. The law in our society is designed to eliminate unfairness. So that if I treat you unfairly on the basis of race, I am outside the law. Charlie took that as a concept and made it stick, because it stuck everywhere else. In all areas of litigation, that was a guiding principle.

To the extent that fundamental fairness prevails, the thing that you call Houstonian Jurisprudence, I think that it is a jurisprudence for all lawyers.

Charlie can't lay claim to it. The only thing that Charlie can lay claim to is that he had an indefatigable determination; if he had a chance, he was going to make it right. Some people have that basic understanding of what the law is, what it is designed to do, what it's objective ought to be, and have a relatively diligent attitude towards it. But they don't have the stubborn attitude that Charlie had.

I guess [Houstonian Jurisprudence] was something he sort of left with you. I wasn't conscious of it, even if I look back on it in hindsight. I wasn't conscious of doing anything extraordinary with these cases. As a lawyer and as a judge, in most cases I knew what the law was and I tried to see to it that it was followed. In one or two cases, I knew what the law was and I knew it should not be that way. I tried to change it and in one or two cases I did. I think that the only thing that was motivating me was the same thing that was motivating Charlie, the same thing that he sort of passed on to everybody: if it wasn't fair, it ought not be. He was of that opinion. If it wasn't fair it should not survive. I think a lot of lawyers are that way.

When Earl Warren became the Chief Justice of the United States Supreme Court, he had no reputation as a brilliant jurist or lawyer beforehand. As a matter of fact, the reason that he had any notoriety at all, was that out in California he had been instrumental in interning the Japanese[3], which was a horrible thing. And we know it was unfair. When Earl Warren came to the Supreme Court of the United States, time to time again, he would ask a lawyer from the bench . . . a lawyer would be down there earnestly pursuing a certain point and Chief Justice Warren would say, "Is that fair?" He would ask that question, "Is that fair?" I used to think of Charlie, that question would thrill him. If it wasn't fair, it's a target right away. If it wasn't fair, you'd do something about it right away. That was the fuel . . . if you are dealing with that concept and you want to use the law as an instrument, then you have to be alert to seize upon the likely vehicle . . . allowing you to make a sufficient record to do what you want to do. [Establishing new

3. *See* Korematsu v. United States, 323 U.S. 214 (1944).

ground] really is fun when you get involved, you kind of enjoy it, and I think that he enjoyed it very much. I think Charlie had a lot of fun.

Charles Hamilton Houston's Imprimatur on his Students—A Legacy

Oliver Hill and Thurgood Marshall were with him for three years. Afterwards they were with him at the NAACP and on some of its projects. So they really marinated in the Houstonian mold. Oliver Hill and Thurgood Marshall were very close in school and, of course, they knew Charlie very, very well and worked with him. Charlie and his colleagues were doing a lot of their work when I was in the Army.

The rest of the guys who were close to him like Eddie Lovett, Pete Tyson and Andy Ransom, and one or two others, are gone. The only ones that are left that were close to Charlie that I know of are Thurgood Marshall and Oliver Hill. They were his students and they worked with him and . . . see, I finished law school in 1936. I didn't start practicing law until 1948 or 1949.

I knew Oliver Hill in college and he was always a practical, rational man. I'm not surprised at his success in the law. I did not know Thurgood Marshall, because he went to Lincoln College. I did know this, I'm satisfied that there wasn't much difference between Thurgood Marshall and Oliver Hill. They fell under the influence of Charlie and came out, I think, equally influenced. Oliver Hill is an excellent lawyer.

I read some of the tributes; they've [the ABA Journal] got an issue here devoted to Thurgood Marshall. I was reading through it and, you know, Charlie left a stamp on him. He'd ask him every minute, "Is that fair? Is that fair? If it's not fair, that's the end of it." I mean no ifs, ands or buts about it. If it's not fair that's the end of it. You notice that those people who want to make something right that really isn't right, they have a hell of a time doing it. You read their opinions and they are struggling and they are meeting themselves coming back. But when a guy writes an opinion and draws the bottom line and says this is it, it is not convoluted, it is not complex. A ninth grader can read it and understand it just like a guy who has four masters in law. You read some of the opinions that come out by courts that mangle the system. You read them three or four times to understand what they are talking about, and then you cannot understand them. You read it and then the paragraph is a non-sequitur, you read it again and it does not make any sense. They are trying to build some platform underneath themselves, but it's all sawdust. And they fizzle, they don't hold up for long.

Judge Bryant's Jurisprudence

Whether something is fair or not depends on what the facts are. If you know what the facts are and you have a certain result that is complained about, you know whether it is fair or not. You don't have to go to Amherst or Harvard or junior high school to know when something

is fair. Even little kids who haven't graduated from grade school from time to time will say, "Oh Mom, that's not fair."

I was appointed to represent [a defendant named] Mallory who was charged with a capital offense. He was tried, convicted and he was sentenced to the electric chair. That is an awful thing. I know what the law is and I knew that the law had been violated in his case. They had an involuntary confession from him as a result of incarcerating him and interrogating him several hours, until he confessed. I made that record in the lower court. I knew I had to make that record. You had to protect yourself. It was a case where I anticipated that he might very well be found guilty and that if he was found guilty, they might impose the death penalty on him. If that happened I wonder if I would have been able to survive. I pursued his case in the light of the prevailing law. I didn't make any new law, I was not on the cutting edge of any constitutional concept, but I asked the court to apply the rules that they set out in two previous Supreme Court cases: McNabb v. United States[4] and Upshaw v. the United States[5]. Those two cases declared that an involuntary confession was not admissible in a criminal case some years before I got the Mallory case. That was the reason that was a successful case. I wasn't making any new ground. I wasn't doing the things that Charlie did from time to time. Charlie got the great thrill out of establishing new grounds, out of making the court come out and say for the first time, so and so. That's a great thrill.

The Death of Charles Hamilton Houston

Charlie was young when he died; he died when he was 56 [sic]. I don't know, but I think he died in 1950. I don't know if he was much older than that. I attributed his early death to just work, because he really worked like hell. He burned the candle at both ends. You know what folks say about that: the light is twice as bright, but it lasts only half as long. And that is what he did. I don't have any doubt in my mind that he worked himself to death.

He had been weakened on account of tuberculosis and, of course, it was during a time when medical advances weren't as they are now. He never spared himself. I think he was driven; I know he was driven. I know that because ultimately I worked (in the U.S. Attorney's Office) in this building. Charlie Houston died when I was in the United States Attorney's Office. But his father was still there, his father and Judge Waddy, who has since passed away, and a young man named Gardner, who is retired now, from the Superior Court across the street. When I left the U.S. Attorney's Office I went over there [Houston's firm] in their office in 1954. Charlie had already passed away and a couple of

4. 318 U.S. 332 (1943).
5. 335 U.S. 410 (1948).

years later, Old Man Houston died. That was when Joe Gardner came over and talked to me. I left here and went over there in the office.

I was so sorry, and I've often thought of this, I am sorry Charlie died so young because some pretty dramatic things occurred within fifteen years after his death. I know, I can visualize right now, how pleased and how happy he would be. But he wouldn't work any less . . . and he was right. There is always work left to do.

Houstonian Jurisprudence and the Future

Society hadn't eradicated it [segregation], society had ignored it. Society had ignored restraints and, you had the pronouncement that the Black man had no right that a White man was bound to respect. But the law is a progressive thing. The law is a kind of moving monitor of our lives. Somebody told me once that if it is old enough to be in a hardback book, it is probably no longer the law. If it is, it ought not be and some enterprising lawyer ought to be busy trying to change it. I always remembered that and, as I look back over the development of the law, that is pretty much a truism.

That sense of fairness is kind of instinctive in the human being, from this size (indicating) until my age. I'm 80 years old and I still think I have some sense of what it is. But that's something, if you stop to think of it, that if you can keep that alive in people [that sense of fairness], it makes a difference. I listened to the convention last night. I looked at some of the people. I am old enough to remember some of these people. For instance, I'm old enough to remember Al Gore's father, the old Senator from West Virginia. A terrific guy. The thing we are talking about was the same thing that promoted him and made him take the stand that he took from time to time that was politically dangerous and generally unpopular, but right and fair. Sometimes, unfairness is an acceptable proposition to the rank and file. It isn't acceptable to a handful of folk and that is why, I think, you just can't afford to let that kind of skullduggery prevail. You can't do it. It will worry you down the line. You'll never get it out of your head. There are some things as a lawyer you just can't do. You can't let rules that are designed to result in fair play to people, you can't sit by and see somebody bastardize those rules. As a lawyer you just can't do that and live with yourself. I don't mean to sound moralistic or anything like that, but that's true. You just cannot sit idly by and see somebody in a high place, in a responsible position, deliberately mangle the rules for the purpose of producing the result that ought not be. You know, you can't do that. If you do, and let's put it this way, if everybody did that, the world would be one hell of a place.

Black Legacy and Responsibility

Hon. Eleanor Holmes Norton*

I want to begin with criticism of my own African American community, especially the intellectual leadership, for the failure to develop a strategy for moving the community forward in the post-peak years of the civil rights movement. Then I want to draw on examples from this period to make a point about the uses and misuses of strategy and from black history, especially from the work of Charles Hamilton Houston and his colleagues at Howard University, to illustrate what is possible when lawyers and legal scholars insist upon a strategy of empowerment. Finally, I want to address the special responsibility of black intellectuals to recreate the Houston model for these times.

The only explicit strategy that black leadership and intellectuals have used during the most recent period, especially the 1980s, has been a strategy of response. This strategy of reaction, uncharacteristic of American blacks, has been inadequate and frustrating. Response is by definition reactionary; and it is awkward and often ineffective and inappropriate for disempowered people. To act largely in response to the initiatives of our adversaries is to be without a strategy equal to today's challenges.

As a child growing up in the segregated schools of Washington, it seemed to me that black people were on the offense while whites were in a constant posture of defense, despite the great power they had. From the time of *Brown v. Board of Education*[1] and before, I felt a part of a strategy of offense of my community. I felt it even in segregated classrooms. I felt it when I was a student in the sit-in movement. I felt it in the marches and demonstrations I joined. I felt it in the court cases that I thought would be difficult to win. I felt it when I was Chair of the Equal Employment Opportunity Commission. I felt it during my entire adolescence and during most of my adult life until 1980.

Since 1980 I have felt very differently. The people on my side of the great issues have been on the defensive. The intellectuals, the civil rights movement, the women's rights movement, the labor movement,

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1. 347 US 483 (1954).

the liberals, the environmentalists, the blacks, the Hispanics and other people of color, not to mention the Democrats-all have been running to catch up.

It is too facile to conclude that the victory of conservative forces in 1980 made this result inevitable, that they won, automatically assumed the offensive, and therefore forced their opponents on the defensive. Precisely because they won, we needed a strategy of offense. Instead we took a defensive posture. They took the offensive. In football, a team plays to its strength. In a social struggle, defense is not the strength of those who want to expand rights and opportunity. Yet during the Reagan and Bush presidencies we were always responding to their initiatives, answering their program cuts, their tax cuts, their trashing of the environment, their contempt for civil rights and women's rights. We have been playing defense, and for us this has been a losing strategy.

There is little in the recent history of progressive movements that contradicts this experience. The movement of gay men and lesbians, however, is noteworthy for its refusal to take a defensive posture, despite the devastation of AIDS, or perhaps, because of it. Gays and lesbians have made significant progress by staying on the offense. Today, public opinion and public officials are far more inclined to oppose discrimination based on sexual orientation than they were in 1980, despite the official homophobia of the Reagan and Bush years. Polls show that almost 65% of Americans think that gays and lesbians ought to be able to serve in the armed forces.[2] This historic shift occurred during the most conservative period in my lifetime. It did not happen spontaneously, however. It happened because gays and lesbians took the offense, both intellectually and with determined action, insisting on telling their story, challenging others, and inventing their own affirmative strategy. As a result, gays and lesbians apparently have convinced the majority in this country that they should be treated fairly. This is a striking change, given the nature of the issue and the political climate during the period when the change in public attitudes has occurred.

In the same way, black history is replete with examples that demonstrate that neither power nor public receptivity is necessary to the success of an affirmative strategy. Charles Hamilton Houston and his colleagues at Howard University Law School had no power. What they did have was a decidedly proactive strategy that resulted in the liberation of black people from inequality under law. The Houston group and the NAACP, led by Thurgood Marshall, developed a masterful strategy of offense. The paradigm of this strategy was *Brown,* the cases leading to it, and the movement that followed. The NAACP lawyers and the Houston group of legal scholars moved incrementally, system-

2. Poll conducted by Penn & Schoen Associates, Inc., April 18, 1991. Distributed by the Human Rights Campaign Fund, Washington, D.C.

atically and willfully to demonstrate that the inferior public schools of the South were in violation of the Supreme Court's separate but equal mandate until their skillful offense destroyed the doctrine itself.

A failure of enormous dimensions from the present period demonstrates with special force the importance of a strategy of offense. President George Bush lost the 1992 election in no small part because his major domestic strategy was one of defense. His consistent strategy of vetoing the bills passed by the Democratic Congress enabled him to win almost every battle but was a major factor in his loss of the election. In contrast to his highly successful and pointedly pro-active Persian Gulf War strategy, President Bush had no affirmative domestic strategy. He left no signature on domestic policy largely because of his marked reliance on vetoes of Congressional initiatives with which he disagreed. Instead, he might have assumed an affirmative posture, making an alliance with Southern and other conservative Democrats and reshaping some bills more to his liking. Bush will probably not be remembered even for the bills he signed because he put so little effort into making them his own or contributing to them. His over-reliance on response and reaction was very successful in the short term, but it left the President with no domestic record. By contrast, Bush's approach to the Iraqi invasion of Kuwait that resulted in the Persian Gulf War was characterized by initiative and boldness that created a coalition of nations and shaped both U.S. and world opinion. The contrast between Bush's foreign policy success and his domestic policy failure is a case study in the importance of a strategy of offense.

Black leaders and intellectuals have as much to lose as President Bush did if response or reaction becomes the habit of their social imagination and strategy. Black lawyers and legal scholars, in particular, have inherited the benefits of the brilliant strategy of the Houston group and the NAACP. Where is the comparable strategy for today? To be sure the obvious targets, such as legally segregated facilities, are gone. More diffuse and difficult challenges have appeared, but they provide all the more reason to study and follow the Houston model and to embrace a strategy of offense.

However, many of the most pressing problems of the black community do not admit of remedy by lawsuit, and the link between problem and solution often is far more elusive than it was for the Houston group. The most serious and complicated problems are social and economic. Family disintegration and crime are among the most vexing and painful. Young black men as children grow up without fathers in crime and drug-ridden slums close to areas of greater abundance; commit crimes, mostly in their own communities; are warehoused in jails; and come out with records and without skills, ill equipped for work or for helping to raise families. In this conundrum is buried the most bewildering problems of the African-American community. They include

the decline of both marriage and family as institutions; structural unemployment; welfare dependency; poor education; and declining inner cities. These problems require changes in policy and forthright community action more than changes in law, but these issues are well within the range that lawyers can and often do address. These urgent concerns must command the attention of the educated elite, who are direct beneficiaries of the work of the Houston group and surely are among those best equipped to think through a more coherent approach to the problems of the black community.

However, a combination of daunting problems and years of passive or hostile governmental response has produced frustration and alienation rather than a determined and systematic strategy among blacks. The Houston model has gone into history.

Some black legal scholars have buried themselves in sometimes fascinating legal theory and new forms of legal expression. The turn to theory and abstraction is inevitable and welcome in a period when law faculties are making important intellectual contributions to legal thinking and scholarship. The law and our society itself have much to gain from this flowering that is taking legal theory and writing in new and important directions. Black intellectuals, however, must go further. The pursuit of scholarly abstraction should be encouraged. At the same time, black scholars must produce work in the Houston tradition that contributes to the empowerment of their beleaguered community. Black people and their struggle have produced the new black intellectuals. African Americans, still far from their rightful place in this society, are entitled to benefit from the thinking and the work of the intellectual class that the struggle has made possible.

Black lawyers and law professors, have a special responsibility because the profession is over-represented among blacks with advanced degrees. Especially considering the far smaller number of blacks with doctorate degrees, the thinking of lawyers and legal scholars must be committed to the elusive search for workable solutions to the urgent concerns of black people.

The work of Charles Hamilton Houston is a challenge to this generation of black intellectuals. The issues facing blacks are too important to be left to members of Congress or the President of the United States. Black scholars and intellectuals, by virtue of the opportunity for education and the time for penetrating thought, have inherited the responsibility that the Houston group forged. It is a unique and historic model. We must use it and adapt it to these times.

COMMENTS

Toibb v. Radloff: Chapter 11 Relief Now Available to Individual Debtors

I. INTRODUCTION

On June 13, 1991, the Supreme Court of the United States held, in *Toibb v. Radloff*[1] that an individual non-business debtor can reorganize under Chapter 11 of the Bankruptcy Code. Prior to the Court's decision, an individual debtor was allowed to file for protection under Chapters 7 (liquidation) and 13 (consumer rehabilitation) of the Bankruptcy Code.[2] However, until *Toibb* it was not clear whether an individual debtor was also entitled to protection under Chapter 11 (reorganization) of the Bankruptcy Code.[3]

Different circuits had come down on opposite sides of the question.[4] As a result, Chapter 11 availability was previously determined by an individual debtor's place of residence. For example, individuals residing within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit were allowed to file for Chapter 11 protection,[5] while individual debtors living within the jurisdiction of the Court of Appeals for the Eighth Circuit were denied Chapter 11 relief.[6]

The purpose of this comment is to illustrate that the Court's decision was well supported by the language, history and policy of the code, despite the fact that the decision may initially appear absurd or contradictory to the average person who knows Chapter 11 only as the "Busi-

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1. 111 S. Ct. 2197 (1991).

2. 11 U.S.C. § 109(b), (e) (1988).

3. *See* Rabea J. Zayed, Note, *Individual Consumer Debtors Are Eligible for Chapter 11 Relief*, 1988 U. ILL. L. REV. 785 (1988).

4. *See* Wamsganz v. Boatmen's Boat of DeSoto, 804 F.2d 503 (8th Cir. 1986) (individual debtors denied Chapter 11 relief); *In re* Moog, 774 F.2d 1073 (11th Cir. 1985) (individual debtor allowed to file for Chapter 11 protection); *In re* Lange, 75 Bankr. 154 (Bankr. N.D. Ohio 1987) (Chapter 11 not available to individual debtors); *In re* Warner, 30 Bankr. 528 (Bankr. 9th Cir. 1983) (individual debtor permitted to file for Chapter 11 relief).

5. *See infra* notes 24-44 and accompanying text for a discussion of a decision allowing Chapter 11 protection to an individual.

6. *See infra* notes 45-72 and accompanying text for a discussion of a decision denying Chapter 11 protection to an individual.

ness Reorganization" Chapter.[7] Section II provides a brief explanation of Chapters 7, 11 and 13. Section III sets out the conflicting decisions which gave rise to this Supreme Court Case. Section IV presents the historical and factual detail of *Toibb v. Radloff*. Section V analyzes the majority and dissenting opinions of *Toibb*. Section VI provides additional analyses, followed by a conclusion in Section VII.

II. Overview of Chapters 7, 11 and 13

There are several chapters of the Bankruptcy Code that provide relief to qualifying debtors. The following is a brief overview of the chapters available to individual debtors.

Under Chapter 7,[8] the debtor's assets[9] are liquidated by a court appointed trustee[10] and the proceeds are distributed to claimants.[11] After the liquidation process, the debtor is generally discharged of most of his or her debts.[12]

In a Chapter 13 proceeding, individuals who satisfy the Code's requirements[13] are provided much of the relief available under Chapter 11 but with simplified procedures.[14] The debtor retains his/her assets and pays his/her debts out of future earnings as set forth by the court

7. Michael J. Herbert, *Consumer Chapter 11 Proceedings; Abuse or Alternative?*, 91 Com. L.J. 234, 235 (1986).

8. 11 U.S.C. §§ 701-766 (1988).

9. 11 U.S.C. § 522 (1988). Section 522 of the Bankruptcy Code exempts specific property, owned by the debtor, from the liquidation process. This exempt property, therefore, cannot be sold for the benefit of unsecured creditors. 11 U.S.C. § 522(e) (1988).

10. A trustee is appointed by the court to assume control of the debtor's estate. 11 U.S.C. §§ 701-704 (1988). The trustee will reduce the property of the estate to money "as is compatible with the best interests of [the] parties in interest." 11 U.S.C. § 704(1) (1988).

11. The proceeds are distributed to claimants according to the priorities established by the Code. 11 U.S.C. § 726 (1988).

12. 11 U.S.C. § 727(a) (1988). Several debts cannot be discharged under Chapter 7, including: certain tax obligations; debts for money obtained by false pretenses; alimony obligations; liabilities from fraud; embezzlement or larceny; liabilities for intentional torts; and fines penalties owed to the Government. 11 U.S.C. § 523(a) (1988).

13. Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000.00 and noncontingent, liquidated secured debts of less than $350,000.00 or an individual with regular income and such individual's spouse, except a stockholder or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000.00 and noncontingent, liquidated, secured debts of less than $350,000.00 may be a debtor under Chapter 13 of this title."

11 U.S.C. § 109(e) (1988).

14. 11 U.S.C. § 1325 (1988). General debts that are not *dischargeable* under Chapter 7 are *dischargeable* under Chapter 13. 11 U.S.C. § 1328 (1988).

approved plan.[15] The debtor need not receive creditor approval if the unsecured creditor's recovery will be at least equal to any alternative recovery under a Chapter 7 liquidation.[16]

In a Chapter 11 proceeding, as in Chapter 13, the debtor usually retains possession of his assets.[17] Soon after a Chapter 11 petition is filed, the court will appoint an unsecured creditors' committee.[18] The debtor has the exclusive right, for 120 days, to propose a reorganization plan.[19] A majority of creditors must approve the plan filed by the debtor.[20] However, before seeking creditor approval, the debtor must provide creditors with a disclosure statement.[21] The plan is confirmed if each class of Chapter 11 creditors holding at least two-thirds in amount and more than one-half of the claims, in their class, vote in favor of the plan.[22] However, even if a class of creditors rejects the plan, the court may still approve the plan if it satisfies the "cram-down" provisions.[23]

III. Decisions Giving Rise to Supreme Court Review

A. *Decision Supporting an Individual's Rights to Chapter 11 Relief*

Prior to *Toibb*, the leading case supporting a debtor's right to Chapter 11 relief was *In re* Moog.[24] In *Moog*, the debtor was a housewife whose only significant assets consisted of her home and some household furniture.[25] Ms. Moog had non business debt totaling $16,000.00.[26] Having no regular income, Moog could not qualify for relief under Chapter 13.[27] In addition, since Moog wanted to retain her home, relief under Chapter 7 was not feasible.[28] As a result, Moog

15. 11 U.S.C. § 1322 (1988).
16. 11. U.S.C. § 1325(a)(4) (1988).
17. 11 U.S.C. § 1104 (1988).
18. 11 U.S.C. § 1102(a) (1988).
19. 11 U.S.C. § 1121(b) (1988).
20. 11 U.S.C. § 1126 (1988).
21. 11 U.S.C. § 1125 (1988).
22. 11 U.S.C. § 1126(c),(d) (1988).
23. 11 U.S.C. § 1129 (1988). The "cram-down" provision requires that each dissenting creditor receive at least as much as it would have in a Chapter 7 liquidation. In addition, before any subordinate claims can be paid, the senior debt must be paid in full. *Id.*
24. 774 F.2d 1073 (11th Cir. 1985).
25. *Id.* at 1074.
26. *Id.*
27. *In re* Anderson, 21 B.R. 443, 445-46 (Bankr. N.D. Ga. 1981); *see also* sections 109(e) and 101(24) of the Bankruptcy Code. Section 109(e) provides: "Only an individual with regular income . . . may be a debtor." Section 101(24) defines an individual with regular income as "[a]n individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under Chapter 13 of the title, other than a stocks broker or a commodity broker."
28. 774 F.2d at 1075. "[A] Chapter 7 liquidation proceeding . . . would . . . entail the loss of the home . . . ." *Id.*

filed a petition for Chapter 11 relief.[29]

The Court of Appeals for the Eleventh Circuit reversed the lower court's sua sponte dismissal of the debtor's Chapter 11 petition[30] and remanded the case for further action.[31] The Court of Appeals concluded that individual debtors were permitted to file for relief under Chapter 11.[32] In reaching its decision the court relied on the plain language of the Code[33] as well as the legislative history of the Code.[34]

Another case supporting an individual's right to Chapter 11 relief was *In re Cook*.[35] In this case the debtor, Benjamin A. Cook, was treasurer, director and ten percent shareholder of Advance Coatings Company.[36] Cook personally and unconditionally guaranteed the Advance Coating Company indebtedness to the First Safety Fund National Bank.[37] Subsequently, Cook pledged $200,000.00 worth of bonds as security for his guarantee.[38] Several years later, with Advance in default on about $1.2 million, First Safety requested that Cook provide additional security.[39] Cook refused this request, and sometime later both Cook and Advance Coating Company filed Chapter 11 petitions.[40]

The creditor sought dismissal of the Chapter 11 petition, asserting that Chapter 11 was "designed exclusively for the reorganization of a business" and hence was not available to Cook.[41] The bankruptcy

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29. *Id.* at 1073. The Bankruptcy Court dismissed the Chapter 11 petition, and this decision was affirmed by the District Court. *In re* Moog, 46 B.R. 466 (Bankr. A. Ga. 1985).

30. 774 F.2d at 1074.

31. *Id.*

32. *Id.*

33. The court stated: "[N]othing in 11 U.S.C. § 109(d) . . . which identifies debtors eligible for Chapter 11 relief suggests that petitioner is not qualified to be a debtor for Chapter 11 purposes." *Id.* at 1075 (footnote omitted).

34. The court stated: "Chapter 11, Reorganization is primarily designed for businesses, although individuals are eligible for relief under the chapter. The procedures of chapter 11, however, are sufficiently complex that they will be used only in a business case and not in the consumer context." *Id.* at 1074, (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 3 (1978)). The court further stated:

> Chapter 11 under the current code represents a consolidation of the three reorganization chapters under the previous Bankruptcy Act; Chapter X, Chapter XI, and Chapter XII. Under the Bankruptcy Act individuals and partnerships could file for reorganization under Chapter XI. . . . Thus, under the prior Bankruptcy Act, the petitioner would have been eligible for relief under Chapter XII.

Id. at 1075.

35. 98 B. R. 624 (Bankr. D. Mass. 1989).

36. *Id.* at 625.

37. *Id.* First Safety Fund National Bank is the creditor in this action.

38. *Id.*

39. *Id.*

40. *Id.* Cook listed personal property worth $233,750.00, and debt in the amount of $1,715,000.00. *Id.*

41. *Id.*

court refused to dismiss the Chapter 11 petition solely because the petitioner was not a business.[42] As in *Moog*, the bankruptcy court based its decision on the language and legislative history of the Code.[43] In doing so, the court stated: "[t]he conclusion seems obvious. Congress intended an individual not engaged in business to be eligible for Chapter 11, while at the same time assuming that such an individual would be an infrequent Chapter 11 petitioner because of the complexity of its procedure which was 'primarily' designed for business."[44]

B. *Decisions Denying an Individual the Right to Chapter 11 Relief*

Wamsganz v. Boatmen's Bank of DeSoto[45] illustrates a courts refusal to extend Chapter 11 to individuals. In this case, Mr. and Mrs. Wamsganz, the debtors, having twice previously filed and been denied Chapter 13 petitions, sought protection under Chapter 11 from the scheduled foreclosure of their non-residential real estate.[46] Boatmen's Bank of DeSoto, the creditor, moved to dismiss the Chapter 11 petition, asserting that an individual not operating a business does not qualify for relief under Chapter 11.[47]

The Court of Appeals for the Eighth Circuit affirmed the dismissal of the Chapter 11 petition[48] and, agreeing with the decisions of the Fifth and Sixth Circuits[49] and several other bankruptcy courts,[50] held "that persons who are not engaged in business may not seek relief under Chapter 11 of the Bankruptcy Code."[51] Like the above mentioned courts, this court realized that the code did not provide an ex-

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42. *Id.* at 626.

43. *Id.* The court stated:

> Congress could have denied Chapter 11 relief to those who do not operate a business, and it can be argued that it should have. But these considerations are not the province of a court. Both the statute and its legislative history make it plain that Congress did not do so. A nonbusiness entity with little disposable income is certainly able to consummate a Chapter 11 plan if permitted to file, in light of the permissibility of a [Chapter 7] liquidating plan.

Id.

44. *Id.* at 625.

45. 804 F.2d 503 (8th Cir. 1986).

46. *Id.* at 504.

47. *Id.*

48. *Id.* at 505. The bankruptcy court had previously dismissed the Chapter 11 petition, holding that "to qualify for relief under Chapter 11, a person must be a business enterprise or operate a business." *In re* Wamsganz, 54 B.R. 759, 763 (Bankr. E.D. Mo. 1985). The bankruptcy court's decision was affirmed by the district court. *Wamsganz*, 804 F.2d at 505.

49. *In re* Winshall Settlor's Trust, 758 F.2d 1136, 1137 (5th Cir. 1985).

50. *In re* Mogul, 17 B.R. 680, 681 (Bankr. M.D. Fla. 1982); *In re* Ponn Realty Trust, 4 B.R. 226, 231 (Bankr. D. Mass. 1980).

51. *Wamsganz*, 804 F.2d at 505.

plicit exclusion of individuals from Chapter 11 protection.[52] As a result, the court looked to the purpose of Chapter 11, through legislative history, to support its finding of such a limitation.[53] The Eighth Circuit concluded that "the legislative history of the Bankruptcy Code, taken as a whole, shows that Congress meant for the Chapter to be available to businesses and persons engaged in business, and not to consumer debtors."[54]

Another case denying Chapter 11 protection to individual debtors was *In re* Ponn Realty Trust.[55] Here, the sole asset of the debtor, Ponn Realty Trust, was a single family dwelling.[56] The home was occupied by the trustee of Ponn Realty Trust, who was the mother of Stephen Cantor, the sole shareholder of Ponn Realty Trust.[57] The home in question was valued at $150,000 with mortgage debts listed at approximately $400,000.[58] In an attempt to prevent foreclosure on the home, the debtor filed a Chapter 11 petition.[59]

The creditor, Debral Realty, sought to have the Chapter 11 petition dismissed because "the Trust is not an entity entitled to be debtor under the Bankruptcy Code."[60] The debtor contended that as a Trust it was entitled to Chapter 11 relief.[61] The court defined the issue as "whether Chapter 11 is an appropriate vehicle for the adjustment of mortgage indebtedness on a single-family residence."[62] The court concluded Chapter 11 was not appropriate for such an action.[63]

The court based its decision primarily on its interpretation of congressional intent. Looking beyond the plain language of the Bankruptcy Code, the court reviewed the legislative history[64] and determined that Chapter 11 was meant to be utilized for the reorganization of businesses.[65] In addition to congressional intent, the court

52. *Id.* at 504.

53. *Id.* at 505. The court, quoting the Senate Report, stated: "Chapter 11 deals with the reorganization of a financially distressed business enterprise and refers to Chapter 11 as a single chapter for all business reorganization." *Id.* (quoting S. REP. No. 989, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5795).

In addition, the court in quoting the House Report, stated: "The House Report contains a chapter on 'consumer debtors' giving no 'reorganization' likewise excludes any discussion of consumer debtors and refers to Chapter 11 as 'a consolidated chapter for all business reorganizations'." *Id.* at 505.

54. *Id.*

55. 4 B.R. 226 (Bankr. D. Mass. 1980).

56. *Id.* at 227.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 227.

61. *Id.* at 228.

62. *Id.* at 229.

63. *Id.* at 231.

64. *Id.* at 230.

65. *Id.*

suggested that several procedural provisions within Chapter 11 itself suggest it was meant exclusively for business purposes.[66] The court also pointed to Chapter 13 of the Bankruptcy Code, which expressly prohibits the adjustment of mortgages on a principal residence,[67] to suggest that if individuals were allowed to utilize Chapter 11, which contains no such restriction, they would be allowed to circumvent the explicit restriction set forth in Chapter 13. As such, the court concluded that Congress did not intend such a loop-hole.[68]

Given the diametrically opposed results of the Eleventh Circuit in *In re Moog*[69] and the Eighth Circuit in *Wamsganz*,[70] the United States Supreme Court granted a Writ of Certiorari[71] to resolve the conflict as to "whether an individual debtor not engaged in business is eligible to reorganize under Chapter 11 of the Bankruptcy Code."[72]

IV. HISTORY OF *TOIBB V. RADLOFF*[73]

Petitioner, Sheldon Baruch Toibb, a licensed attorney previously employed with the Federal Energy Regulatory Commission (FERC), was employed as a consultant by Independence Electric Corporation (IEC).[74] Toibb and two others formed IEC in 1983 to produce and market electric power.[75] After Toibb's employment was terminated in 1985 by IEC, he was unable to find work in the energy field and as a

66. *Id.* at 231.

67. *Id.* 11 U.S.C. § 1322(b)(2) states that a Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims."

68. *Id.*

69. *See supra* notes 30-34 and accompanying text.

70. *See supra* notes 45-54 and accompanying text.

71. *Toibb*, 111 S. Ct. at 2199.

72. *Id.* at 2198.

73. 111 S. Ct. 2197 (1991). The Supreme Court provided background information about the parties:

> The named respondent, Stuart J. Radloff, was dismissed as Chapter 7 Trustee when the Bankruptcy Court converted petitioner's case to one under Chapter 11. Mr. Radloff did not participate in the proceedings before the Court of Appeals and refrained from responding to Mr. Toibb's petition for certiorari filed with this Court. We therefore specifically requested the United States Trustee, see 28 U.S.C.§ 581(a)(13), to respond. In doing so, the United States Trustee indicated his agreement with petitioner's position and suggested that, if this Court decided to review the case, it might wish to appoint counsel to defend the Eighth Circuit's judgment. We then invited James Hamilton, Esq., of Washington, D.C., a member of the Bar of this Court, to serve as *amicus curiae* in support of the judgment of the Court of Appeals.

Id. at 2199, n.4.

74. *Id.* at 2198.

75. *Id.* Petitioner received 24% of IEC's stock and the other two investors received the remaining 76% of IEC's stock. *Id.*

result had been supported by family and friends ever since.[76]

In November of 1986, Toibb voluntarily filed a petition for protection under Chapter 7 of the Bankruptcy Code[77] in the United States Bankruptcy Court for the Eastern District of Missouri.[78] The schedule of Assets and Liabilities[79] accompanying petitioner's filing, disclosed that his debts exceeded what he believed to be the value of his assets.[80]

During the summer of 1987, the Chapter 7 Trustee who was appointed to liquidate petitioner's estate learned that the Board of Directors of IEC had offered to purchase petitioner's stock for $25,000.00.[81] The Trustee then notified creditors that the offer would be accepted unless there was a valid objection.[82] Having learned of the value of the IEC stock, Toibb filed a petition in the bankruptcy court to convert his Chapter 7 case to a Chapter 11 case.[83] In converting his case, Toibb sought to avoid liquidation of his assets, specifically his IEC stock, by reorganizing under Chapter 11.[84]

The Bankruptcy Court granted Toibb's motion to convert his Chapter 7 case to Chapter 11.[85] On February 1, 1988, Toibb filed a plan of reorganization and a disclosure statement.[86] According to Toibb's Plan and Disclosure Statement, Toibb had obtained a commitment for an unsecured loan of $25,000.00 which he would use to fund the plan.[87] According to the plan, Toibb would use the $25,000.00 loan, less administrative expenses and priority tax claims, to pay his unsecured creditors.[88] In addition, Toibb proposed to pay, for a six year period, his unsecured creditors until the principle amount of their claims had been paid in full.[89] For the same period of time, Toibb also agreed to pay his unsecured creditors 50% of any dividends petitioner

76. *Id.*

77. 11 U.S.C. § 701-66 (1988).

78. *Toibb*, 111 S. Ct. at 2198.

79. A schedule of Assets and Liabilities is a list of all of the debtor's property and debts.

80. *Id.* Petitioner had unsecured debt of $170,605.00 and an outstanding disputed tax claim of $11,000.00. The only non exempt assets the petitioner listed were his IEC shares and a possible claim against his former associates, the value of which was unknown. *Id.*

81. Brief for Petitioner at 3, Toibb v. Radloff, 111 S.Ct. 2197 (1991) (No. 90-368) [hereinafter Petitioner's Brief].

82. *Toibb*, 111 S. Ct. at 2198.

83. *Id.*

84. *Id.*

85. *Id.*

86. Petitioner's Brief, *supra* note 81, at 5. Section 1121 of the Bankruptcy Code permits the debtor to file a plan of reorganization. Section 1125(b) requires court approval, after notice and a hearing, of a written disclosure statement before acceptance or rejection of a plan may be solicited. 11 U.S.C. § 1125 (1988).

87. Petitioner's Brief, *supra* note 81, at 5.

88. *Toibb*, 111 S. Ct. at 2198.

89. Petitioner's Brief, *supra* note 81, at 5.

received on his IEC shares and/or 50% of the proceeds of the sale of his IEC stock should he decide to sell.[90] Under the plan, Toibb would also pay 100% of any award received in connection with any claim he filed against his two former IEC associates.[91]

On March 8, 1988, without providing creditors the opportunity to approve or disapprove Toibb's plan of reorganization, the Bankruptcy Court, on its own motion, ordered Toibb to show cause why his petition should not be dismissed for failure to qualify as a Chapter 11 debtor.[92] At the hearing to show cause, Toibb attempted to demonstrate that he had a business to reorganize.[93] In addition, Toibb argued that Courts other than the Eighth Circuit Court[94] had held that individual debtors not engaged in business are entitled to Chapter 11 protection, and therefore his petition should not be dismissed.[95]

The Bankruptcy Court nevertheless held that Toibb failed to qualify for Chapter 11.[96] The court rejected Toibb's argument that he had a business which could be reorganized.[97] In addition, the court refused to follow the decision of the Eleventh Circuit,[98] and instead followed the authority of the Eighth.[99]

Relying on *Wamsganz*, the United States District Court for the Eastern District of Missouri upheld the Bankruptcy Court's dismissal of Toibb's Chapter 11 case.[100] The United States Court of Appeals for the Eighth Circuit affirmed, concluding not only that the Bankruptcy Court had the authority to dismiss the proceeding sua sponte, but in addition, the Eighth Circuit's earlier *Wamsganz* decision controlled.[101]

V. The Toibb Decision

A. *The Majority Opinion*

In a decision written by Justice Blackmun, the Supreme Court by an eight to one majority reversed the Eighth Circuit Court of Appeal's decision, holding that an "individual debtor not engaged in business is

90. *Id.*
91. *Id.*
92. *Toibb*, 111 S. Ct. at 2198. According to the Eighth Circuit Court of Appeals in the *Wamsganz* case, Chapter 11 was available to businesses and persons engaged in business, and not to individuals. *See supra* note 53 and accompanying text.
93. *Toibb*, 111 S. Ct. at 2198.
94. See *supra* notes 45-72 and accompanying text.
95. *Toibb*, 111 S. Ct. at 2198-99.
96. *Id.* at 2199.
97. *Id.* It was also noted that the petitioner did not seek further review as to whether he did or did not have a business to reorganize. *Id.* at 2198, n.2.
98. See *supra* notes 30-44 and accompanying text.
99. See *supra* notes 45-72 and accompanying text.
100. *Toibb*, 111 S. Ct. at 2199.
101. *Id.*

eligible to reorganize under Chapter 11 of [the] Bankruptcy Code."[102] The Court determined that the statutory language itself, without question, provided all individuals with the right to proceed under Chapter 11 of the Bankruptcy Code.[103] The vital and controlling language is provided in section 109 of the Code, which sets forth eligibility for relief under each Chapter of the Bankruptcy Code.[104] Specifically, eligibility for Chapter 11 relief is defined in section 109(d) of the Code,[105] which reads: "Only a person that may be a debtor under Chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under Chapter 11 of this title."[106] Chapter 7 eligibility is set forth in section 109(b), which provides that any "person" is eligible for Chapter 7 relief, except a railroad, insurance company, bank or other financial institution.[107] The word "person" is defined under section 101(41) of the Code[108] as an "individual, partnership or corporation."[109] As discussed within, the Code clearly indicates that Toibb in this case qualified for relief under both Chapter 7 and 11.[110]

"Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, [the Court looks] first to the statutory language and then to the legislative history if the statutory language is unclear."[111] Since section 109 is clear and unambiguous,

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102. *Id.* at 2197.
103. *Id.* at 2199.
104. *Id.* (citing 11 U.S.C. § 109 (1988)).
105. *Id.* (citing 11 U.S.C. § 109(d) (1988)).
106. *Id.*
107. *Id.* (citing 11 U.S.C. § 109(b) (1988)). Section 109(b) provides:

> A person may be a debtor under Chapter 7 of this title only if such person is not—
>
> (1) a railroad;
>
> (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3 (h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); or
>
> (3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan associations, homestead association, or credit union, engaged in such business in the United States.

Id.
108. 11 U.S.C. § 101(41) (1988).
109. 11 U.S.C. § 101 (41) provides:

> 'person' includes individual, partnership, and corporation, but does not include governmental unit, Provided, *however*, That any governmental unit that acquires an asset from a person as a result of operation of a loan guarantee agreement, or as receiver or liquidating agent of a person, will be considered a person for purposes of section 1102 of this title.

Id.
110. *Toibb*, 111 S. Ct. at 2199.
111. *Id.* at 2200 (quoting Blum v. Stenson, 465 U.S. 886, 896 (1984)). *See also* KMart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("If the statute is clear and

the Court need not venture beyond the Code into the legislative history.[112] "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, the language must ordinarily be regarded as conclusive."[113] Although unnecessary in this case, given the plain language of the Code, the Court nevertheless considered the legislative intent and history.[114] Looking for *clear* intent by Congress to deny Chapter 11 relief to individuals, the Court considered the legislative comments of the House of Representatives as presented by the Amicus.[115] Specifically, the Amicus referred to the following statement: "Some consumer debtors are unable to avail themselves of the relief provided under Chapter 13. For these debtors, straight bankruptcy is the only remedy that will enable them to get out from under the debilitating effects of too much debt."[116] The Court then considered the following legislative comment of the Senate, which was advanced by Toibb: "Chapter 11, Reorganization, is primarily designed for businesses, although individuals are eligible for relief under the chapter. The procedures of Chapter 11, however, are sufficiently complex that they will be used only in a business case and not in the consumer context."[117]

Based on these conflicting views, the Court could not possibly conclude that Congress had a *clear* intent to deny Chapter 11 relief to individuals,[118] and was thereby precluded from ruling contrary to the plain language of section 109. Rather, the Court's review led it to conclude that the intent of Congress plus the legislative history supports the plain language of the Code.[119]

As the Court pointed out, the Code in general and Chapter 11 in particular both embody the "policy of maximizing the value of the bankruptcy estate."[120] The rationale of Chapter 11, and of reorganization in general, is that a debtor may be worth more if allowed to man-

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unambiguous, 'that is the end of the matter, for the court must give effect to the unambiguously expressed intent of Congress' . . . ." (internal citations omitted)); Mills Music, Inc. v. Snyder, 469 U.S. 153, 164 (1985) (in ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole); United States v. Turkett, 452 U.S. 576, 580 (1981); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

112. *Toibb*, 111 S. Ct. at 2200.

113. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

114. *Toibb*, 111 S. Ct. at 2200.

115. *Id.*

116. *Id.* (quoting H.R. REP. No. 595, 95th Cong., 1st. Sess. 125 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6086).

117. *Id.* (quoting S. REP. No. 989, 95th Cong., 2d Sess. 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5789).

118. *Id.*

119. *Id.*

120. *Id.* at 2201.

age his assets, as opposed to liquidating them and distributing the proceeds.[121] If the reorganization is successful, the creditor will likely realize a greater return than would result through plain Chapter 7 liquidation.[122] To deny this relief to individual debtors able to satisfy the requirements of Chapter 11 would be inconsistent with the language and spirit of the Code.[123]

B. *The Dissenting Opinion*

Justice Stevens, the lone dissenter, rejected the majority's opinion, primarily because it was based on the absence of an explicit prohibition of Chapter 11 use by individual non-business debtors.[124] Justice Stevens contended that the plain language of the Code is not clear and unambiguous, and therefore a review of legislative history is justified.[125] Stevens relied on the word "only" within section 109(d), which sets forth who may be a debtor under Chapter 11.[126] Although section 109(d) limits the class of debtors eligible for Chapter 11 relief,[127] Stevens contended that it does not specifically allow every person entitled to Chapter 7 protection to seek Chapter 11 protection.[128]

Justice Stevens relied heavily on the repeated reference in the various sections of the Code,[129] as well as in the legislative history,[130] to the words "business," "business organization" and "management" to conclude that individual debtors may not avail themselves of Chapter 11.[131] In addition, Justice Stevens asserted that the limitations carefully constructed and implemented within Chapter 13 by Congress would have little meaning or effect if individuals were allowed to utilize

121. *Id.*

122. 11 U.S.C. § 1129(a)(7) (1988). Under a Chapter 11 reorganization, creditors must approve the plan or receive not less than the amount they would have received under a liquidation proceeding. *Toibb*, 111 S. Ct. at 2201. Realistically, creditors will not approve a plan in which they would receive less than they would from liquidation of the debtor's estate. *Id.*

123. *Toibb*, 111 S. Ct. at 2200.

124. *Id.* at 2202 (Stevens, J., dissenting). Justice Stevens contends that "when the statute is read as a whole . . . it seems quite clear that Congress did not intend to authorize a 'reorganization' of the affairs of an individual consumer debtor." *Id.* (Stevens, J., dissenting).

125. *Id.* (Stevens, J., dissenting).

126. *Id.* (Stevens, J., dissenting); *see also supra* note 107 and accompanying text.

127. *Toibb*, 111 S. Ct. at 2202 (Stevens, J., dissenting). In part, section 109(d) provides: "Only a person that may be a debtor under Chapter 7 of this title." 11 U.S.C. § 109(d) (1988); *see also supra* note 107 and accompanying text.

128. *Toibb*, 111 S. Ct. at 2202 (Stevens, J., dissenting).

129. *Id.* at 2203 (Stevens, J., dissenting). Justice Stevens relied on the "repeated references to the debtor's 'business,' 'the operation of the debtor's business,' and the 'current or former management of the debtor.' " *Id.* (Stevens, J., dissenting); *see, e.g.*, 11 U.S.C. §§ 1101(2)(b), 1103(c)(2), 1104(b), 1105, 1106(a)(3), 1108 (1988).

130. *See supra* notes 117-19 and accompanying text.

131. *Toibb*, 111 S. Ct. at 2202 (Stevens, J., dissenting).

Chapter 11, thereby circumventing the Chapter 13 limitations.[132]

Finally, Justice Stevens maintained that, by allowing individual debtors to utilize Chapter 11, the Court indirectly would allow a creditor to institute an involuntary proceeding against an individual with regular income under Chapter 11.[133] He pointed out that such a proceeding conflicts with the express provisions of the Code, which provide that an involuntary proceeding can only be instituted under Chapter 7 and Chapter 11.[134] He thereby concluded that it is "highly unlikely that Congress intended to subject individual consumer debtors, such as pensioners, to involuntary Chapter 11 proceedings while at the same time prohibiting involuntary Chapter 13 proceedings against the same class of debtors".[135]

VI. ANALYSIS

The majority's decision is well supported by the language of the Bankruptcy Code, congressional intent, legislative history, and the policy reasons supporting the Code.[136] On review it is apparent that this decision is consistent with the underlying principles of the various bankruptcy laws: 1) to treat creditors fairly, and 2) to assist debtors in emerging from difficult, if not impossible, financial situations.

A. *The Plain Language of the Bankruptcy Code*

Both the majority and the dissent relied on section 109 of the Code, the eligibility provision of Chapter 11, to support their position. Generally, section 109 limits Chapter 11 relief to debtors qualifying for Chapter 7 relief, with the specific exclusion of stockbrokers, commodity brokers and railroads.[137]

Justice Stevens argued that, although section 109 limits the availability of Chapter 11 relief to Chapter 7 debtors, it does not explicitly set forth eligibility for Chapter 11 relief.[138] Therefore, since the Code does not specifically allow every qualified Chapter 7 debtor Chapter 11 relief, the Code is unclear and ambiguous.[139] As a result, Justice Stevens insisted that the Court look beyond the specific section of the Code in question and examine the "statute as a whole," as well as the legislative history, to determine legislative intent and hence eligibility under Chapter 11.[140]

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132. *Id.* at 2203-04 (Stevens, J., dissenting).
133. *Id.* at 2204 (Stevens, J., dissenting).
134. *Id.* (Stevens, J., dissenting).
135. *Id.* (Stevens, J., dissenting).
136. *Id.* at 2199-2202.
137. *See supra* notes 104-07 and accompanying text.
138. *Toibb*, 111 S. Ct. at 2202 (Stevens, J., dissenting).
139. *Id.* (Stevens, J., dissenting).
140. *Id.* (Stevens, J., dissenting).

Justice Blackmun, also relying on section 109 of the Code, concluded that the Code clearly indicates and defines which debtors are entitled to seek relief under the provisions of Chapter 11.[141] Holding that the Code does not provide an "ongoing business" requirement, the Court refused "to infer the exclusion of certain classes of debtors from the protection of Chapter 11 . . . ."[142] Given the express and specific limitations Congress created in defining debtors under the various chapters of the Code, the Court concluded that Congress possessed the knowledge and ability to specifically exclude individuals from Chapter 11 relief, if it desired to do so.[143] For example, Chapter 13 is limited to individuals who meet specific requirements,[144] Chapter 12 relief is limited to farmers,[145] and Chapter 9 relief is limited to municipalities.[146] In addition, section 109(d), which defines Chapter 11 eligibility, provides for specific exclusions of certain classes of debtors from Chapter 11 protection.[147] More importantly, there is no indication that Congress meant to exclude individual debtors from Chapter 11 relief despite the detailed limitations it set forth in the Code.[148] Therefore, since the statutory language is clear and unambiguous, a review of the legislative history was unnecessary.

B. *Legislative History and Congressional Intent*

Justice Stevens relied heavily on the repeated legislative references to the terms "the debtor's 'business,' 'the operation of the debtor's business,' and the 'current or former management of the debtor' " in arguing that the main focus of Chapter 11 is the reorganization of businesses.[149] In addition, Justice Stevens cited language in the House Report, which specifically limits consumer debtors to Chapter 7 and Chapter 13 relief, to conclude that legislative intent to exclude consumer debtors from Chapter 11 is clear.[150] Therefore, Justice Stevens concluded that Chapter 11 relief is limited to business debtors and hence unavailable to individuals like Toibb.[151]

Although unnecessary given the plain language of the Code, Justice Blackmun, in the majority opinion, nevertheless examined the legisla-

141. *Toibb*, 111 S. Ct. at 2199.
142. *Id.*
143. *Id.*
144. 11 U.S.C. § 109(e) (1988).
145. 11 U.S.C. § 109(f) (1982).
146. 11 U.S.C. § 109(c) (1988).
147. 11 U.S.C. § 109(d) (1988) (excludes stockbrokers, commodity brokers and railroads).
148. *Toibb*, 111 S. Ct. at 2199.
149. *Toibb*, 111 S. Ct. at 2203 (Stevens, J., dissenting).
150. *Id.* (Stevens, J., dissenting) (citing H.R. REP. No. 595, 95th Cong., 1st Sess. 125 (1977)).
151. *Id.* at 2204 (Stevens, J., dissenting).

tive history to determine if there was a clear legislative intent to deny Chapter 11 relief to individuals.[152] The Court reviewed and considered several statements in the Senate and House Reports, including those relied on by Justice Stevens.[153] In addition, the Court reviewed statements relied on by Toibb.[154] Such review and consideration demonstrated that the legislative history contained conflicting views.[155] Thus, at the very least, there was no clear Congressional intent contrary to the language of the Code.[156]

The Court's conclusion is further supported by the following excerpt from the House Report: "Though this Report is divided between consumer debtors and business debtors, the bill itself makes no such distinction."[157] The original Bankruptcy Act [prior to the adoption of the existing Bankruptcy Code], also supports the courts' conclusion, for it specified that only a "wage earner," that is, "an individual whose principal income is derived from wages, salary, or commissions,"[158] may file a Chapter XIII case.[159] As noted in the House Report, this limitation unnecessarily excludes small businessmen from the cheap and expeditious remedy of a wage earner plan. The distinction between a barber, grocer, or worm digger who is self-employed from one who is an employee is slight; H.R. 8200 eliminates the distinction in order to afford small sole proprietorsas well as wage earners, an alternative to Chapter 11.[160]

In addition to the legislative history, the Court's position was further strengthened by bankruptcy rules in effect under the Bankruptcy Act prior to the codification of the existing Bankruptcy Code.[161] The Supreme Court previously held that "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."[162] Chapter 11 of the Bankruptcy Code replaced the three reorganization chapters of the Bankruptcy Act,[163] [namely Chapter X,[164]

152. *See supra* note 114 and accompanying text.

153. *See supra* notes 131-32 and accompanying text.

154. *See supra* note 117 and accompanying text.

155. *See supra* note 118 and accompanying text.

156. *Toibb*, 111 S. Ct. at 2200.

157. H.R. REP. No. 595, 95th Cong., 1st Sess. 6 (1977).

158. Bankruptcy Act § 606(8), 11 U.S.C. § 1006(8) (1970) (repealed 1979).

159. Bankruptcy Act §§ 606(3), 621, 622, 11 U.S.C. §§ 1006(3), 1021, 1022(1970) (repealed 1979).

160. H.R. REP. No. 595, 95th Cong., 1st Sess. 7 (1977).

161. Petitioner's Brief, *supra* note 81, at 13.

162. Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 501 (1986); *accord* Pennsylvania Dep't of Pub. Welfare v. Davenport, 110 S. Ct. 2126, 2133 (1990) ("We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.").

163. S. REP. No. 989, 95th Cong., 2d Sess. 4 (1978).

utilized for the reorganization of corporations;[165] Chapter XI,[166] utilized for the reorganization of corporations,[167] partnerships and individuals; and Chapter XII,[168] utilized for the reorganization of certain non corporate real estate entities,][169] Chapter X was the only provision used exclusively for business reorganization, thus excluding individuals.[170] Chapter XI was available to individuals, but was rarely used.[171] As with the existing Chapter XI, the previous Chapter XI contained no express restriction to business proceedings.[172] Neither did it contain an explicit eligibility provision. Eligibility, however, was provided by Section 306(3)[173] which defined "debtor", with regard to a Chapter XI petition, to include anyone who could become a bankrupt under section 4 of the Act.[174] Section 4(a) provided: "Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this title as a voluntary bankrupt."[175]In addition, filings by individual nonbusiness debtors are found in the text prohibiting the filing of an involuntary Chapter XI petition against specific "wage earners."[176] A wage earner was defined, under section 1(32), as:

> an individual who works for wages, salary or hire, at a rate of compensation not exceeding $1,500.00 per year. It is virtually inconceivable that many persons who met the definition of a wage earner would be engaged in business, and yet these individuals if in Chapter XI, were protected against involuntary adjudication. The obvious implication of this protection is that a Chapter XI debtor did not have to be engaged in business.[177]

Absent " 'Congressional intent to depart from [previous judicial] practice', it should be presumed that Congress intended to continue that practice in the codification of Chapter 11 and that Congress intended that Chapter 11 be made available to nonbusiness individual debtors."[178] The legislative history indicates that the current Chapter 11, like its predecessor, would continue to be available to individuals

164. Bankruptcy Act §§ 101-276, 11 U.S.C. §§ 501-676 (1976) (repealed 1979).
165. Petitioner's Brief, *supra* note 81, at 13-14.
166. Bankruptcy Act §§ 301-99, 11 U.S.C. §§ 701-99 (1976) (repealed 1979).
167. Petitioner's Brief, *supra* note 81, at 13-14.
168. Bankruptcy Act §§ 401-526, 11 U.S.C. §§ 801-926 (1976) (repealed 1979).
169. Petitioner's Brief, *supra* note 81, at 13-14.
170. Michael J. Herbert, *Consumer Chapter 11 Proceedings: Abuse or Alternative?*, 91 COM. L.J. 234, 241 (1986).
171. *Id.*
172. *Id.*
173. *Id.*
174. Bankruptcy Act § 306(3), 11 U.S.C. §§ 706 (3) (1976) (repealed 1979).
175. Bankruptcy Act § 4(a), 11 U.S.C. § 22(a) (1976) (repealed 1979).
176. Bankruptcy Act § 379, 11 U.S.C. § 779 (1976) (repealed 1979).
177. Herbert, *supra* note 170, at 241-41 (footnotes omitted).
178. Petitioner's Brief, *supra* note 81, at 13.

not engaged in business. At the very least, the history does not produce a *clear* legislative intent to exclude individuals who are not engaged in business from seeking relief under Chapter 11.

C. *Policy Considerations*

Justice Stevens argued that Chapter 13 was established with specific limitations and provisions.[179] One such limitation discussed by Justice Stevens is the requirement that Chapter 13 limit availability to "individuals whose unsecured debts amount to less than $100,000 and whose secured debts are less than $350,000.[180] In comparing these Chapter 13 limitations to Chapter 11, the latter containing no similar limitations, Justice Stevens reasoned that Congress would not have imposed such limitations under Chapter 13 if they could easily be circumvented or negated under Chapter 11.[181] Therefore, Justice Stevens concluded that the only way limitations set forth in Chapter 13 have meaning is if Chapter 11 is held to be unavailable to consumer debtors.[182]

Justice Blackmun's majority opinion, however, held that the "differences in the requirements and protection of each Chapter reflect Congress' appreciation that various approaches are necessary to address effectively the disparate situations of debtors seeking protection under the Code."[183] The Court went on to say that "[a]bsent some showing of harm to the creditors of a non-business debtor allowed to reorganize under Chapter 11, we see nothing in the allocation of 'burdens' and 'benefits' of Chapter 11 that warrants an inference that Congress intended to exclude a consumer debtor from its coverage."[184]

Although it is true that individuals are provided relief under Chapters 7 and 13 of the Bankruptcy Code, it does not follow that such individuals are automatically precluded from protection under Chapter 11. The Code consists of several chapters, all of which have separate requirements, and particular advantages and disadvantages.

> This [Bankruptcy] Court believes that remedies under the Bankruptcy Code are designed in the alternative. Debtors are given a choice of either a reorganizational process . . . or liquidation by trustee . . . . The court believes that debtors must choose their remedy carefully and must then expect to shoulder the burdens as well as the benefits of the particular remedy selected.[185]

Overall, Chapter 7 provides the debtor relief with the advantages of speed and low cost.[186] However, the debtor will suffer the loss of non-

179. *Toibb*, 111 S. Ct. at 2202-03 (Stevens, J., dissenting).
180. *Id.* at 2203 (Stevens, J., dissenting).
181. *Id.* at 2203-04 (Stevens, J., dissenting).
182. *Id.* (Stevens, J., dissenting).
183. *Id.* at 2201 (Stevens, J., dissenting).
184. *Id.* (Stevens, J., dissenting).
185. *In re* Ross, 95 B.R. 509, 510 (Bankr. S.D. Ohio 1988).
186. Herbert, *supra* note 170, at 240.

exempt assets.[187] Chapter 13 provides the petitioner the broadest discharge of debt while allowing the debtor to retain assets.[188] The cost of Chapter 13 is the payment of a significant portion of the debtor's future income to creditors.[189] Chapter 11 allows the debtor to retain assets, while providing a greater flexibility in structuring a plan of reorganization.[190] However, in addition to the costs associated with Chapter 13, Chapter 11 requires costly creditor participation in the proceeding.[191]

Given the complexities associated with a Chapter 11 petition, most individual debtors will seek relief under Chapter 7 or 13.[192] However, in limited circumstances, it may be more advantageous for an individual debtor to seek Chapter 11 relief.[193] If individuals, unable to qualify for Chapter 13 relief, are prevented from obtaining Chapter 11 protection, their only remedy will be Chapter 7 liquidation. Liquidation may in fact provide creditors with a lower return than would reorganization, and therefore would violate the underlying principle of the Code.[194]

The Court also disposed of the argument that the dollar limits on eligibility in Chapter 13 provide an exclusive reorganization remedy for consumer debtors.[195] Petitioners possessing debt in excess of that allowed by Chapter 13, are made ineligible under Chapter 13 in order "to make Chapter 13 available to most consumer debtors and many small business debtors, leaving to Chapter 11 cases involving larger amounts of debt."[196] The dollar limitations were established by Congress to provide creditors more participation and greater protection, for larger amounts owed to them, than were provided by Chapter 13.[197] Therefore, one may infer that individuals who have amassed substantial debt and who are thus ineligible for Chapter 13 relief are entitled to Chapter 11 relief, which will provide creditors with a greater amount of protection.[198]

Finally, the Court dispensed with the Amicus' concern that permit-

187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *See generally* Rabea J. Zayed, *Individual Consumer Debtors Are Eligible For Chapter 11 Relief*, 1988 U. ILL. L. REV. 785.
193. *Id.* at 786-90.
194. *See id.* at 786 n.8.
195. *Toibb*, 111 S. Ct. at 2201.
196. ROBERT L. JORDAN & WILLIAM D. WARREN, BANKRUPTCY 661, 671 (2d ed. 1989).
197. H.R. REP. NO. 595, 95th Cong., 1st Sess. 20 (1977) (eligibility) provides: "The bill places dollar limitations on the amount of debts of the proprietor who may use Chapter 13, in order to prevent sole proprietors with large businesses from abusing creditors by avoiding Chapter 11." *Id.*
198. Petitioner's Brief, *supra* note 81, at 27.

ting individual debtors not engaged in business to seek Chapter 11 relief would result in a "flood" of such petitions.[199] The Court noted that the Code provides the bankruptcy courts with substantial discretion to dismiss a Chapter 11 case in which the debtor files an untenable plan of reorganization.[200] In addition, the Court referenced the complexity and expense associated with Chapter 11 petitions, which in and of itself would limit the number of Chapter 11 petitions.[201]

VII. CONCLUSION

After considering the language of the Code, Congressional intent, Legislative history and policy reasons, it is clear that the Court rendered a proper decision in *Toibb v. Radloff*. The Bankruptcy Code and it's congressional history overwhelmingly support the majority's decision to allow individual non-business debtors to seek Chapter 11 protection.

The arguments set forth by the dissent are unconvincing and weak. The plain language of the Code is clear and unambiguous thus making an analysis of legislative history unnecessary. Yet, even an analysis of the legislative history supports the Court's decision. In no way can one rationally conclude that legislative history displays or illustrates a clearly expressed legislative intent in opposition to the plain language of the Code.

The dissent's concern with possible abuses of Chapter 11 by both creditors and debtors is unsubstantiated. The Code provides the bankruptcy courts with a multitude of provisions and substantial discretion to protect all of the parties involved.

Mark A. Davis

199. *Toibb*, 111 S. Ct. at 2201.
200. *Id.*
201. *Id.*

Payne v. Tennessee: The Effect of Victim Harm at Capital Sentencing Trials and the Resurgence of Victim Impact Statements

I. INTRODUCTION

In *Payne v. Tennessee*,[1] the United States Supreme Court held that the Eighth Amendment[2] did not erect a *per se* bar prohibiting victim impact evidence relating to the victim's personal characteristics and the emotional impact on the victim's family from consideration at a capital sentencing hearing.[3] The Court also held that the Eighth Amendment did not preclude the prosecutor from arguing the victim impact evidence to the capital sentencing jury.[4] In reaching this decision, the Court overruled two recent cases,[5] *Booth v. Maryland*[6] and *South Carolina v. Gathers*,[7] to the extent that they held to the contrary.[8]

This decision is important for more than the holding permitting the introduction of victim impact evidence into the sentencing phase of the trial. The Court's eagerness to overturn *Booth* and *Gathers* was criticized in Justice Marshall's dissent.[9] Justice Marshall opined that *Payne* was a

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1. 111 S. Ct. 2597 (1991).

2. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

3. *Payne*, 111 S. Ct. at 2609.

4. *Id.*

5. *Id.* at 2611.

6. 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991). In *Booth*, the Court held that the introduction of a victim impact statement during the sentencing phase which related to the characteristics of the victim, the effect of the murders on the victim's family, and the family's characterizations of the crime, violated the Eighth Amendment. *Id.* at 507, 508-09.

7. 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991). In *Gathers*, the Court held that the prosecutor's argument based on the victim impact statement was inadmissible at a sentencing hearing. *Id.* at 811-12.

8. *Payne*, 111 S. Ct. at 2611 n.2. The Court in *Booth* also held that the victim's family's beliefs and characterizations about the crime and the defendant, offered at the sentencing hearing, violated the Eighth Amendment. *Booth*, 482 U.S. at 508-09. The Court in *Payne* did not address these issues. *Payne*, 111 S. Ct. at 2611 n.2.

9. *Payne*, 111 S. Ct. at 2619, 2621-25 (Marshall, J., dissenting). Neither the petitioner's brief nor the respondent's brief addressed whether *Booth* and *Gathers* should be overturned until the Court ordered the parties to brief this point. Payne

"preview of an even broader and more far-reaching assault upon this Court's precedents."[10] As noted by at least one commentator, it shows that the Court is very willing to reconsider precedent if a majority of the Court does not concur with the previous decision.[11] Victim rights during the criminal trial are very important not only for the victims of crime but also for the justice system. However, those rights cannot come at the expense of the criminal defendant's Eighth Amendment constitutional rights. Victim impact evidence which is unforeseeable to the defendant at the time of the crime and which does not relate to the circumstances of the crime is not relevant to the sentencing decision and is too prejudicial to be allowed at the capital sentencing hearing.

It is time to restore compassion to the capital sentencing process by allowing only relevant testimony. However, if victim impact evidence is allowed, the jury should be guided in the use of this evidence and instructed that they can be merciful while also ensuring that justice is served.

Part II of this Case Comment gives an overview of the recent developments in the victim rights movement.[12] Part III reviews the development of victim impact evidence at the sentencing phase of capital trials including the two cases of *Booth v. Maryland*[13] and *Gathers v. South Carolina*.[14] Part IV examines the facts of *Payne v. Tennessee*[15] and the previous proceedings of the case.[16] Part V considers the majority and dissenting Supreme Court opinions in *Payne*.[17] In Part VI, this Comment explores the *Payne* opinions and concludes that there were no 'special justifications' which warranted overruling recent precedent and that, the Court incorrectly held that victim impact evidence is relevant to the capital sentencing proceeding.[18] Part VI also examines alternatives available to capital defendants to mitigate or exclude emotional or

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v. Tennessee, 111 S. Ct. 1031 (1991) (granting certiorari and ordering parties to brief the overruling of *Booth* and *Gathers*).

10. *Payne*, 111 S. Ct. at 2625 (Marshall, J., dissenting).

11. Marcia Coyle, *Complete Control*, NAT'L L.J., Aug. 19, 1991, at S1; *see also*, Parisis G. Filippatos, Note, *The Doctrine of Stare Decisis and the Protection of Civil Rights and Liberties in the Rehnquist Court*, 11 B.C. THIRD WORLD L.J. 335 (1991). "[T]he cases of *Patterson* and *Webster* illustrate the propensity of the Rehnquist Court to strike blows against the foundations of *stare decisis*, in the contexts of statutory and constitutional interpretation, by rendering unnecessarily broad decisions that weaken established civil rights and liberties." Filippatos, *supra*, at 362 (citations omitted).

12. *See infra* notes 21-32 and accompanying text.

13. 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

14. 490 U.S. 805 (1989), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991); *see infra* notes 33-93 and accompanying text.

15. 111 S. Ct. 2597 (1991).

16. *See infra* notes 94-129 and accompanying text.

17. *See infra* notes 130-271 and accompanying text.

18. *See infra* notes 272-305 and accompanying text.

prejudicial victim impact testimony from capital sentencing hearings.[19] Part VII reviews the conclusions.[20]

II. Recent Developments in the Victim Rights Movement

As noted by Justice Scalia, "[r]ecent years have seen an outpouring of popular concern for what has come to be known as 'victims' rights.' "[21] This concern for victims' rights coincides with a period of rising crime and violence in our society.[22] The early 1980s saw increased political consideration of the concerns and needs of victims.[23] In 1982, President Ronald Reagan appointed a Task Force on Victims of Crime.[24] Their final report, issued in December 1982, lists sixty-eight recommendations for addressing the needs of crime victims.[25] Judiciary Recommendation number six states: "Judges should allow for, and give appropriate weight to, input at sentencing from victims of violent crime."[26] In support of this view the Task Force stated:

> Victims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized . . . .
>
> Victims of violent crime should be allowed to provide information . . . . Any recommendation on sentencing that does not consider such information is simply one-sided and inadequate. [E]very victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice. When the court hears, as it may, from the defendant, his lawyer, his family and friends, his minister, and others, simple fairness dictates that the person who has borne the brunt of the defendant's crime be allowed to speak.[27]

President Bush showed his support for the victims' rights movement by proclaiming the week of April 25, 1990 "National Crime Victims'

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19. *See infra* notes 306-19 and accompanying text.

20. *See infra* note 320 and accompanying text.

21. Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991); *see also* Robert C. Davis et al., *Expanding the Victim's Role in the Criminal Court Dispositional Process: The Results of an Experiment,* 75 J. Crim. L. & Criminology 491 (1984).

22. Frank Carrington & George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come,* 11 Pepp. L. Rev. 1, 4 (1984).

23. Jane N. Burnley, *Foreward* to Albert R. Roberts, Helping Crime Victims: Research, Policy and Practice 11 (1990) (the passage of the Victim Witness Protection Act of 1982 and the Victims of Crime Act of 1984 is evidence of how far the field has come in a short time).

24. Roberts, *supra* note 23, at 21.

25. *Id.*

26. President's Task Force on Victims of Crime, Final Report 76 (Gov't Printing Office 1982) [hereinafter Task Force].

27. *Id.* at 76-77.

Rights Week."[28] Comparable Presidential Proclamations were delivered in seven of the last ten years.[29] Betweem 1980 and 1986, victim advocacy services within the justice system doubled.[30] Funding for these services, many of which were previously staffed with volunteers, has come from local appropriations as well as both the Federal Victims of Crimes Act of 1984[31] and the Justice Assistance Act of 1984.[32]

III. Victim Impact Evidence Caselaw: As It Pertains to Capital Sentencing Hearings

Advocates for crime victims have tried to make the criminal justice system more responsive to the needs of the victim through increased influence in sentencing decisions.[33] By 1988, forty-four states had allowed the sentencing authority to consider the impact of a crime on the victim through testimony or written victim impact statements (VIS).[34] In addition, the federal government has allowed the VIS to be admitted at federal sentencing trials.[35]

Many reasons have been given in support of using the VIS: it has been argued that the use of the VIS encourages cooperation between victims and the prosecutors; that equity dictates that the victim should be given a role in the prosecution of defendants; and that their involve-

28. Proclamation No. 6121, 55 Fed. Reg. 17747 (1990) (National Crime Victims' Rights Week).

29. *See, e.g.*, Proclamation No. 5953, 54 Fed. Reg. 15157 (1989) (Crime Victims Week, 1989); Proclamation No. 5797, 53 Fed. Reg. 13094 (1988) (Crime Victims Week, 1988); Proclamation No. 5322, 50 Fed. Reg. 15859 (1985) (Victims of Crime Week, 1985); Carrington & Nicholson, *supra* note 22, at 2 n.7 (lists Presidential Proclamations for 1981-1984 including the text of Presidential Proclamation for 1981).

30. Roberts, *supra* note 23, at 31 (citations omitted).

31. 42 U.S.C. §§ 10601-04 (Supp. 1991). The statute instituted the Crime Victims Fund which provides grants to subsidize appropriations to state victim compensation programs and locally administered victim assistance programs. Roberts, *supra* note 23, at 22. The contribution is fixed at 100 million dollars annually and is funded by federal fines, penalty assessment fees, forfeited bail bonds and criminal literacy profits. *Id.*

32. 42 U.S.C. § 10603 (Supp. 1991) (provides a grant program for states to use in certain law enforcement services including victim assistance programs); Roberts, *supra* note 23, at 32, and text accompanying notes 26-27.

33. *See supra* text accompanying notes 26-27; *see infra* text accompanying notes 34-35 text.

34. Brief of Respondent at 16 n.1, Payne v. Tennessee, 111 S. Ct. 2597 (1991) (No. 90-5721) (citing Appendix to Brief Amici Curiae Washington Legal Foundation, The Reverend Dorothy Haynes, The Sunny Von-Bulow National Victim Advocacy Center, The Stephanie Roper Committee, Inc., The Crime Victims Legal Clinic, Parents of Murdered Children, The Unity Group, Inc., and the Allied Educational Foundation, South Carolina v. Gathers, 490 U.S. 805 (1989)).

35. Victim Witness and Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. §§ 1512-15, 3579-80 (Supp. 1991)).

ment is necessary to the victim's esteem.[36]

Victim impact statements generally provide four categories of information: 1) the circumstances of the crime and the manner in which it was committed, 2) identification and information about the victim, 3) the harm caused to the victim and their family and 4) the victim's opinion of the defendant and the sentence that should be imposed.[37]

Prior to the Supreme Court addressing the issues in *Booth v. Maryland*, jurisdictions were divided on whether the attributes of the victim, as well as the harm caused to the victim's family, were admissible.[38]

A. Booth v. Maryland

John Booth was sentenced to death by a Maryland jury for the first-degree murder of Mr. Bronstein.[39] The State Division of Parole and Probation (DPP) prepared a VIS, as required by Maryland law, with information supplied by the victims' family.[40] At the sentencing hearing, the prosecutor read the VIS prepared by the DPP to the jury.[41] The VIS described characteristics of the victims, the effect of the crime on

36. Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 199-200 (1988) (citing Maureen McLeod, *Victim Participation at Sentencing*, 22 CRIM. L. BULL. 501, 504-07 (1986) (helps victims regain of control over their lives, fulfills desire for retributive justice and enhances system efficiency by encouraging cooperation of witnesses)); *see also* Karyn E. Polito, Note, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241 (1990).

37. Talbert, *supra* note 36, at 203; *see also* Maureen McLeod, *An Examination of the Victim's Role at Sentencing: Results of a Survey of Probation Administrators*, 71 JUDICATURE 162 (1987) (discusses methodology variations in VIS preparation and form and content of VIS; victims usually do not participate at sentencing even when the option is available).

38. Talbert, *supra* note 36, at 205-10. Talbert compares People v. Free, 447 N.E.2d 218, 236 (Ill.), *cert. denied*, 464 U.S. 865 (1983) ("[c]ommon sense tells us that murder victims do not live in a vacuum") with People v. Holman, 469 N.E.2d 119, 135 (Ill. 1984) (testimony about victim and his family "had potential for distracting the jurors from their task"). Talbert, *supra* note 36, at 205 n.34; *see also* Williams v. New York, 337 U.S. 241 (1949) (upheld death penalty based on undisclosed presentence report); Clemans v. State, 680 P.2d 1179, 1188 (Alaska App. 1984) ("To disregard the practical consequences that a homicide might have on members of a victim's family would be wholly unrealistic . . . . [T]he impact of a homicide . . . can furnish a sound and realistic measure of the seriousness of the harm occasioned by the particular offense."). *But see* People v. Foster, 518 N.E.2d 82, 90 (Ill. 1987) ("Evidence indicating that the victim left a family is improper, as it is without bearing on the guilt or innocence of the accused.").

39. Booth v. Maryland, 482 U.S. 496, 501 (1987) *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991). Booth also received a life term for the murder of Mrs. Bronstein. *Id.*

40. *Id.* at 499. The VIS was based on interviews with the victims' son, daughter, son-in-law, and granddaughter. *Id.*

41. *Id.* at 501.

the individual family members and the fact that at least one member of the family could not forgive the defendant for what he had done, stating she felt the defendant could " '[n]ever be rehabilitated.' "[42] Booth received the death penalty for the murder of Mr. Bronstein and life imprisonment for the murder of Mrs. Bronstein.[43]

On automatic appeal to the Maryland Court of Appeals, the defendant argued that the "VIS injected an arbitrary factor into the sentencing decision."[44] However, the court noted that it had previously rejected a similar argument in *Lodowski v. State*.[45] In *Lodowski*, the Court of Appeals concluded that the "VIS serves an important interest by informing the [sentencing authority] of the full measure of harm caused by the crime."[46] Based on this, the Maryland Court of Appeals, in *Booth*, rejected the defendant's argument and upheld the death sentence.[47] The United States Supreme Court granted certiorari[48] to determine "whether the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence."[49]

In deciding the issue, the United States Supreme Court relied on previous case law dealing with the imposition of the death penalty.[50] In a 5-4 decision, Justice Powell, writing for the Court, maintained that in determining the death penalty, the jury must consider factors which are pertinent to the defendant's " 'personal responsibility and moral guilt.' "[51] First, the Court looked to the admission of the VIS evidence which focused on the personal attributes of the victim and the emotional ordeal experienced by the family.[52]

Addressing the State's argument that there is a direct and foreseeable connection between the crime and the harm suffered by the family, the Court acknowledged that the foreseeable consequences of a defendant's actions may be relevant in some circumstances.[53] However, fearing a 'mini-trial' on the character of the victim which would distract

42. *Id.* at 499-500 (quoting the VIS).

43. *Id.* at 501.

44. *Id.*

45. *Id.* (citing Lodowski v. State, 490 A.2d 1228 (Md. 1985), *vacated on other grounds*, 475 U.S. 1078 (1986)).

46. *Id.* (citing Lodowski v. State, 490 A.2d 1228 (Md. 1985), *vacated on other grounds*, 475 U.S. 1078 (1986)).

47. *Id.*

48. Booth v. Maryland, 479 U.S. 882 (1986) (granting certiorari).

49. *Booth*, 482 U.S. at 501-02.

50. *See infra* notes 51, 55, 56 & 58 and accompanying text.

51. *Booth*, 482 U.S. at 502 (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)). The Court stated that "death is a 'punishment different from all other sanctions.' " *Id.* at 509 n.12 (quoting Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (plurality opinion)). Consequently, the factors that influence the sentencing determination in a death penalty case may be different from those which are relevant in a non-capital case. *Id.*

52. *Id.* at 503.

53. *Id.* at 503-04.

the jury from its constitutional duty,[54] the Court stated that the victim impact statements are not appropriate in the context of a capital sentencing because "the jury is required to focus on the defendant as a 'uniquely individual human bein[g].' "[55] In particular, "the jury must make an '*individualized* determination' whether the defendant in question should be executed, based on 'the character of the individual and the circumstances of the crime.' "[56]

The Court next considered the VIS evidence which focused on the family members' beliefs about the crime. The Court stated that this type of evidence can only serve "to inflame the jury and divert it from deciding the case based on the relevant evidence concerning the crime and the defendant."[57] The majority restated the principle that the jury's decision to impose the death penalty must " 'be[] . . . based on reason rather than caprice or emotion.' "[58] Finding that the imposition of the death penalty after the admission of VIS evidence would create a "constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner,"[59] the Court held that the Eighth Amendment prohibits a capital sentencing jury from considering VIS evidence.[60]

Although jury sentencing is not constitutionally mandated in order to impose the death penalty, the Court has sanctioned the use of a jury as the sentencer in capital cases.[61] The jury has been cited frequently by the Court as the "link between contemporary community values and the penal system."[62] The imposition of the death penalty is the preeminent indication of "society's moral outrage."[63] However, there must

54. *Id.* at 507.

55. *Id.* at 504 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

56. *Id.* at 502 (quoting Zant v. Stevens, 462 U.S. 862, 879 (1983)). *Accord*, Tison v. Arizona, 481 U.S. 137, 149 (1987) ("criminal sentence must be directly related to the personal culpability of the criminal offender").

57. *Booth*, 482 U.S. at 508.

58. *Id.* at 508 (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)). In *Gregg v. Georgia*, the Court noted that the jury's decision to impose the death penalty must "minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion). Even though the Court customarily yields to state legislatures' judgments as to which factors are relevant to the sentencing decision, the Constitution establishes some limits on this determination. *Booth*, 482 U.S. at 502 (citing California v. Ramos, 463 U.S. 992, 1000-01 (1983), *cert. denied*, 471 U.S. 1119 (1985)).

59. *Booth*, 482 U.S. at 502-03.

60. *Id.* at 509.

61. Spaziano v. Florida, 468 U.S. 447, 458-60 (1984); *see also* Hildwin v. Florida, 490 U.S. 638, 640-41 (1989); Cabana v. Bullock, 474 U.S. 376, 385 (1986).

62. Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968); *see also Gregg*, 428 U.S. at 181 ("[T]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.").

63. *Gregg*, 428 U.S. at 183 (plurality opinion).

be standards for the jury to follow so that the death penalty is not imposed in an "arbitrary and capricious" manner.[64]

Justice White, in his dissent, argued that the harm suffered by the family is relevant to the sentencing authority's decision.[65] Justice White was troubled by the majority's distinction between capital cases and non-capital cases; in non-capital cases punishment can be enhanced based on the harm caused.[66] Since he found the VIS evidence relevant in a capital sentencing trial, Justice White dismissed the argument that this evidence will "inflame the jury" and concluded that it should not be "*per se* unconstitutional."[67]

Justice Scalia's dissent also argued that the harm that the defendant caused, as well as the defendant's moral guilt, should be relevant to the sentencing authority.[68] Justice Scalia found it unjust that the defendant could "parade . . . witnesses . . . to testify to the pressures beyond normal human experience that drove the defendant to commit his crime" while the victim was unable to testify to the harm that had befallen him and his family.[69]

After *Booth* was decided, some courts concluded that *Booth* restricted only evidence and testimony of the impact on the victim and not the reference to such impact by the prosecutor.[70]

B. South Carolina v. Gathers

Two years later, the issue of victim impact evidence at a capital sentencing hearing again came before the Court. This time the issue was whether the prosecutor was precluded from commenting on the contents of the victim's pockets which included a religious tract and a voter registration card.[71]

Demetrius Gathers was convicted of murder in the Court of General Sessions for Charleston County, South Carolina and sentenced to death for killing Richard Haynes, an unemployed mentally handicapped man.[72] The South Carolina Supreme Court vacated the death penalty based on *Booth v. Maryland* and remanded for a new sentencing

64. *Id.* at 189 (citing Furman v. Georgia, 408 U.S. 238 (1972)).
65. *Booth*, 482 U.S. at 516-17 (White, J., dissenting).
66. *Id.* at 516-17 (White, J., dissenting).
67. *Id.* at 518-19 (White, J., dissenting).
68. *Id.* at 519 (Scalia, J., dissenting).
69. *Id.* at 520 (Scalia, J. dissenting).
70. *See* Brief of the Appellate Committee of the California District Attorneys Association Amicus Curiae in Support of the State of Tennessee at 13, Payne v. Tennessee, 111 S. Ct. 2597 (1991) (No. 90-5721) (citing People v. Siripongs, 754 P.2d 1306 (Cal. 1988), *cert. denied*, 488 U.S. 1019 (1989); People v. Rich, 755 P.2d 960 (Cal. 1988), *cert denied*, 488 U.S. 1051 (1989)) [hereinafter Brief of the California District Attorneys Association].
71. South Carolina v. Gathers, 490 U.S. 805, 807-10 (1989).
72. *Id.* at 806-07.

hearing.[73] During the guilt phase of the trial, a religious tract and a voter registration card were admitted into evidence without objection.[74] All testimony and exhibits, including the religious tract and voter registration card, were readmitted into evidence at the sentencing phase of the trial.[75] During the prosecutor's closing arguments, he referred to the tract and voter registration card at length, which " 'conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter.' "[76]

Justice Brennan, writing for a 5-4 majority, concluded that the prosecutor's characterization of the victim as a religious man and a registered voter was not "relevant to the 'circumstances of the crime.' "[77] He did agree that the fact that Gathers had gone through the pockets of Haynes "looking for something to steal was certainly a relevant circumstance of the crime, and thus a proper subject for comment."[78] However, reading the cards to the jury and drawing inferences from them was not relevant to a circumstance of the crime and, therefore, was not an appropriate subject for comment.[79] Justice Brennan reiterated that the death sentence must be based on the defendant's " 'personal responsibility and moral guilt.' "[80] Justice Brennan noted that the prosecutor's closing argument was analogous to the statements which were deemed inadmissible in *Booth*[81] in that they introduce factors which were " 'wholly unrelated to the blameworthiness of a particular defendant' "[82] and " 'could [have] result[ed] in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill.' "[83] Therefore, the Court held that the Eighth Amendment precludes a prosecutor from commenting on the attributes of a victim at the penalty stage of a capital trial.[84]

Justice O'Connor's dissent argued that the holding in *Booth* should be narrowly construed.[85] She maintained that a broad reading of *Booth* would impose "a rigid Eighth Amendment rule [which would] eliminat[e] virtually all consideration of the victim at the penalty phase."[86] She stated that "nothing in the Eighth Amendment pre-

73. *Id.* at 810.
74. *Id.* at 807.
75. *Id.* at 808.
76. *Id.* at 810 (quoting State v. Gathers, 369 S.E.2d 140, 144 (S.C. 1988), *aff'd*, South Carolina v. Gathers, 490 U.S. 805 (1989)).
77. *Id.* at 811 (quoting Booth v. Maryland, 482 U.S. 496, 507 n.10 (1987)).
78. *Id.*
79. *Id.* at 811-12.
80. *Id.* at 810 (quoting Edmund v. Florida, 458 U.S. 782, 801 (1982)).
81. 482 U.S. 496 (1987); *see supra* notes 40-42 and accompanying text.
82. *Gathers*, 490 U.S. at 810 (quoting *Booth*, 482 U.S. at 504).
83. *Id.* at 811 (quoting *Booth*, 482 U.S. at 505).
84. *Id.* at 810-12.
85. *Id.* at 814 (O'Connor, J., dissenting).
86. *Id.* (O'Connor, J., dissenting).

cludes the prosecutor from conveying to the jury a sense of the unique human being whose life the defendant has taken."[87]

Additionally, Justice O'Connor argued that one factor in determining the defendant's personal culpability was the degree of the harm caused, therefore, such information was relevant to the sentencing decision.[88] Thus, she would have reversed the judgment of the South Carolina Supreme Court.[89]

Justice Scalia, in his dissent, argued that *Booth* should be overruled since it "imposed . . . restriction[s] upon state and federal criminal procedures that [have] no basis in the Constitution."[90] Regarding the overruling of recent precedent, Justice Scalia pointed out that, *because* it is a recent decision, the public has not revised it's laws and practices to comply with the decision and, therefore, the erroneous decision can be easily corrected.[91] Justice Scalia maintained that because this decision is not firmly rooted in the Constitution, society or the laws, then the harm caused by a criminal defendant should be used to assess responsibility.[92]

Subsequent to the *Booth* and *Gathers* decisions, attempts to enter victim impact evidence during the sentencing phase of a capital trial resulted in findings that *Booth* had been violated; however, courts of appeal have consistently held that the error was harmless beyond a reasonable doubt.[93]

IV. Factual Background and Prior Proceedings

A. *Facts of* Payne v. Tennessee

Pervis Tyrone Payne was in Millington, Tennessee to visit his girlfriend.[94] While waiting for her to come home, he entered the apartment of Charisse Christopher and her two children.[95] After Charisse resisted Payne's sexual advances, he became violent.[96] A neighbor tes-

87. *Id.* at 817 (O'Connor, J., dissenting).

88. *Id.* at 818 (O'Connor, J., dissenting). Justice O'Connor cites Tison v. Arizona, 481 U.S. 137 (1987), where two brothers who participated in their father's jailbreak and a related killing were sentenced to death based on the harm that they helped cause. *Gathers*, 490 U.S. at 818 (O'Connor, J., dissenting).

89. *Gathers*, 490 U.S. at 814.

90. *Id.* at 823 (Scalia, J., dissenting).

91. *Id.* at 824-25 (Scalia, J., dissenting).

92. *Id.* at 825 (Scalia, J., dissenting).

93. *See* Brief of the California District Attorneys Association, *supra* note 70, at 14 (citing nine cases where the California Supreme Court found that *Booth* had been violated but that the error was harmless beyond a reasonable doubt). The trend shows that *Booth* is being honored "more in the breach than in the observance." *Id.*

94. Payne v. Tennessee, 111 S. Ct. 2597, 2601 (1991).

95. *Id.*

96. *Id.*

tified that Charisse screamed " "Get out, get out' as if she were telling the children to leave.' "[97] After the neighbor heard a loud scream from the Christopher apartment she called the police.[98]

When a policeman arrived at the apartment building, Payne, who was covered with blood, struck the officer with an overnight bag and fled.[99] Later in the day, he was arrested while hiding in the attic of a former girlfriend's home.[100]

Inside the Christopher apartment, the police found Charisse and her two children on the kitchen floor.[101] Blood covered the walls and floors throughout the apartment.[102] Charisse and her two-year-old daughter, Lacie, had died of multiple stab wounds from a butcher knife.[103] Her three-year-old son, Nicholas, survived after seven hours of surgery despite receiving multiple stab wounds which penetrated his body from front to back.[104] The butcher knife, which was determined to be the murder weapon, was found at Lacie's feet.[105] Payne's baseball cap was found snapped to Lacie's arm.[106] Four cans of malt liquor with Payne's fingerprints were also found near the bodies and on the apartment landing.[107]

When Payne was arrested later in the day, a packet containing cocaine residue and a hypodermic syringe wrapper and cap were found in his pockets.[108] Payne protested his innocence on the stand and stated that a man had raced past him as he was walking up the stairs to the apartment building.[109] Payne claimed that he went into the apartment to help Charisse and the children and while there he got blood on his clothes.[110]

B. *Prior Proceedings*

Pervis Tyrone Payne was convicted of two counts of first degree murder and one count of assault with intent to commit murder in the first degree by a jury in the Shelby Criminal Court in Tennessee.[111] The jury, in the sentencing phase of the trial, sentenced him to death

97. *Id.*
98. *Id.* (citing Brief of Respondent, *supra* note 34, at 3).
99. *Id.* at 2601-02.
100. *Id.* at 2602.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 2601.

for each of the murders and to thirty years for the assault.[112]

During the sentencing hearing Payne was allowed to enter mitigating evidence presented in the form of testimony from four character witnesses.[113] Payne's girlfriend testified that he was a caring person, that it was not in his character to have done these crimes, and that he was kind to her children.[114] She also testified that he did not drink or use drugs.[115] Payne's parents gave similar testimony.[116] Dr. John T. Huston, a clinical psychologist, testified that Payne was "mentally handicapped."[117] He predicated that observation on a low IQ score.[118] He also testified that Payne was a polite prisoner and that he was not psychotic or schizophrenic.[119]

After this mitigating evidence was offered by the defendant, the State presented the following testimony from Nicholas' grandmother on how the boy had been affected by the murders:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.[120]

During the closing arguments of the penalty phase of the trial, the prosecutor argued for the death penalty.[121] In part, he had this to say about the continuing effects on Nicholas:

> Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and baby sister.[122]
>
> . . . .
>
> There is obviously nothing you can do for Charisse and Lacie Jo. But there is something that you can do for Nicholas. Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and mother. He is going to want to know what kind of jus-

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112. *Id.*

113. State v. Payne, 791 S.W.2d 10, 17 (Tenn. 1990).

114. *Payne*, 111 S. Ct. at 2602.

115. *Id.*

116. *Id.* at 2602-03.

117. *Id.* at 2602.

118. *Payne*, 791 S.W.2d at 17. Dr. Huston's determination was based on the scores obtained after evaluation using the Wechsler Adult Intelligence Scale (WAIS) revised version. *Id.*

119. *Id.* Dr. Huston's opinion was based on his interpretation of the defendant's responses to 566 questions from the Minnesota Multiphasic Personality Inventory (MMPI). *Id.*

120. *Payne*, 111 S. Ct. at 2603 (citing App. at 30).

121. *Id.* at 2603.

122. *Id.* (citing App. at 9).

> tice was done. He is going to want to know what happened. With your verdict, you will provide the answer.[123]

In rebuttal to the defense counsel's closing argument, the prosecutor stated in part:

> [Petitioner's attorney] wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who love Charisse Christopher, her mother and daddy who loved her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever.[124]

After the jury sentenced the defendant to death on both counts, he appealed to the Supreme Court of Tennessee which affirmed both the conviction and the sentence.[125]

Payne argued that the death sentence should be vacated since the testimony offered by Nicholas Christopher's grandmother was inflammatory victim impact evidence entered in violation of *Booth v. Maryland*.[126] In *Booth*, the United States Supreme Court held that descriptions of the victim's characteristics; the effect of the crime on the family; and the family's opinions of the crime and the defendant, created a constitutionally unsatisfactory risk that the jury may call for the death penalty in an arbitrary and capricious manner.[127]

The Supreme Court of Tennessee stated that the testimony in *Booth* was more extensive and inflammatory than the testimony offered in Payne's sentencing trial.[128] Therefore, the Supreme Court of Tennessee held that the testimony offered by Nicholas' grandmother was not so inflammatory that it created "a constitutionally unacceptable risk of an arbitrary imposition of the death penalty, and was harmless beyond a reasonable doubt."[129]

V. OPINIONS IN *PAYNE v. TENNESSEE*

A. *Majority Opinion*

Chief Justice Rehnquist's majority opinion stated that *Booth* and *Gathers* were based on the misguided principles that: (1) the "blameworthiness" of a capital defendant is not based on the characteristics of a certain victim or the harm caused by the defendant and; (2) only evi-

123. *Id.* (citing App. at 12).
124. *Id.* (citing App. at 13-15).
125. State v. Payne, 791 S.W.2d 10 (Tenn. 1990).
126. See *supra* note 120 and accompanying text for grandmother's testimony.
127. *See supra* notes 50-64 and accompanying text.
128. *Payne*, 791 S.W.2d at 18.
129. *Id.*

dence pertaining to "blameworthiness" is relevant to the capital sentencing determination.[130] He maintained that the level of harm caused by the defendant is relevant, not only to determine the elements of the offense, but in ascertaining the just punishment.[131] Chief Justice Rehnquist reasoned that "two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm."[132] He recalled Justice Scalia's hypothetical in Scalia's dissent from *Booth*: " 'If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun accidently misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater.' "[133]

Chronicling the sentencing philosophy over our judicial history, Chief Justice Rehnquist noted that the trend is toward a more determinate sentencing structure as evidenced by the Federal Sentencing Guidelines.[134] He observed that the Federal Sentencing Guidelines provide for very explicit determination of sentences depending on "the subjective guilt of the defendant and . . . the harm caused by his acts."[135] In addition, the sentencing authority has always been at liberty to ponder a broad range of relevant material, including the harm caused, regardless of the prevailing sentencing philosophy.[136] He concluded this thought by stating that "[e]ven in the context of capital sentencing, prior to *Booth* the joint opinion of Justices Stewart, Powell, and Stevens in *Gregg v. Georgia*, had rejected [the defendant's] attack on the Georgia statute because of the 'wide scope of evidence and argument allowed at presentence hearings.' "[137]

Chief Justice Rehnquist noted that while this evidence was not admitted pursuant to a Tennessee statute, Congress and most of the States have recently enacted statutes that allow victim impact evidence at sentencing hearings.[138] He opined that although this practice is fairly new, this does not cause it to be unconstitutional.[139]

Although the Court has required a sentencing authority to treat the defendant as a 'unique individual' and consider all mitigating circumstances, Chief Justice Rehnquist stated that the Court has never required the sentence be considered entirely separate from the crime

130. *Payne*, 111 S. Ct. at 2605.
131. *Id.*
132. *Id.*
133. *Id.* (quoting Booth v. Maryland, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting)).
134. *Id.* at 2605-06.
135. *Id.*
136. *Id.* at 2606.
137. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 203-04 (1976) (plurality opinion)).
138. *Id.; see supra* notes 34-35 and accompanying text.
139. *Payne*, 111 S. Ct. at 2606 (citing Williams v. Florida, 399 U.S. 78 (1970); United States v. DiFrancesco, 449 U.S. 117, 142 (1980)).

which was committed.[140] In support of his position, the Chief Justice asserted that the language from the *Woodson* opinion, concerning evidence that must be received was misread by the *Booth* Court.[141] "The language quoted from *Woodson* in the *Booth* opinion was not intended to describe a class of evidence that *could not* be received, but a class of evidence which *must* be received."[142] The result is that while there are no confines to the mitigating evidence that a defendant may produce, the State is prevented from proffering " 'a glimpse of the life' which a defendant 'chose to extinguish' or demonstrating the loss to the victim's family."[143] To illustrate his point, the Chief Justice compared *Woodson* to *Gregg v. Georgia*[144] which was decided the same day.[145]

According to Chief Justice Rehnquist, the view that victim impact evidence should be excluded since it is difficult and perhaps ill-advised to rebut, is misplaced.[146] Usually evidence about the victim is already admitted by virtue of its relevance in determining the defendant's guilt.[147] Even if the evidence was not before the jury in the guilt phase, the tactical reasons for not rebutting this evidence is not sufficient to rule it inadmissible.[148] Rather, " 'the evidence should be admitted, and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party.' "[149]

Next, the Chief Justice addressed the concern that this type of evidence could lead to a comparative judgment on victims where victims were assets to their community. Defendants convicted of harming these victims may be perceived as more deserving of the death penalty

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140. *Id.* at 2606-07.

141. *Id.* at 2607; *see supra* note 55 and accompanying text; *infra* note 142 and accompanying text.

142. *Payne*, 111 S. Ct. at 2607. The *Booth* Court stated: "the jury is required to focus on the defendant as a 'uniquely individual human bein[g].' " Booth v. Maryland, 482 U.S. 496, 504 (1987) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

143. *Payne*, 111 S. Ct. at 2607 (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, J., dissenting)).

144. 428 U.S. 153 (1976).

145. *Payne*, 111 S. Ct. at 2607. The language that the Chief Justice refers to in Gregg v. Georgia is:

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument . . . . *So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant,* it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Gregg, 428 U.S. at 203-04 (plurality opinion) (emphasis added).

146. *Payne*, 111 S. Ct. at 2607 (citing *Booth*, 482 U.S. at 506-07).

147. *Id.*; *see infra* note 283 and accompanying text.

148. *Payne*, 111 S. Ct. at 2607.

149. *Id.* (quoting Barefoot v. Estelle, 463 U.S. 880, 898 (1983) (expert testimony on future dangerousness should be admitted and its weight left to the factfinder)).

than those whose victims are discerned to be less valuable to the community.[150] The Chief Justice asserted that this evidence is not being presented to foster comparative judgments but rather to show "*each* victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community . . might be."[151] To embody this point, he noted that the victim in *Gathers*, a case where the defendant was given the death penalty, was an unemployed mentally handicapped individual.[152]

The states, subject to the Constitution, have the principal obligation of establishing the punishment for violations of their state laws.[153] States have the freedom to create new criminal procedures to meet their needs within Constitutional limits and victim impact evidence is just an additional means of apprising the sentencer of the harm caused by the defendant.[154] Unless the victim impact evidence is so unduly prejudicial that it violates the Due Process Clause of the Fourteenth Amendment, Chief Justice Rehnquist asserts that it is an appropriate method to inform the jury of the harm caused by the defendant.[155] Therefore, the Court held that the Eighth Amendment does not erect a *per se* bar against victim impact evidence.[156]

Addressing the concern that the Court should adhere to the doctrine of *stare decisis* and not overrule *Booth* and *Gathers*, the Chief Justice agreed that "[*s*]*tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[157] However, when decisions become difficult to implement or are poorly reasoned, the Court is not obligated to comply with precedent.[158] He stated that

150. *Id.* (citing *Booth*, 482 U.S. at 506 n.8).

151. *Id.*

152. *Id.; see supra* text accompanying note 70.

153. *Id.*

154. *Id.* at 2608. State courts which impose the death penalty have special limitations under the Eighth Amendment. *Id.* at 2607-08 (citing McClesky v. Kemp, 481 U.S. 279, 305-06 (1987)). The *McClesky* Court stated that there is a threshold below which the death penalty cannot be exacted. *McClesky*, 481 U.S. at 305. The state must establish reasonable criteria so the factfinder can make a determination as to whether the crime exceeds that threshold. *Id.* Furthermore, if the penalty is disproportionate to the offense according to public consensus it cannot be imposed. *Id.* at 305-06. In addition, the states cannot limit any mitigating factors to be heard by the factfinder. *Id.* at 306.

155. *Payne*, 111 S. Ct. at 2608.

156. *Id.* at 2609.

157. *Id.*

158. *Id.* (citing Smith v. Allwright, 321 U.S. 649, 665 (1944)). The general rule is that the Court needs "special justification" overturn precedent. Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1346 (1990) (citing Arizona v. Rumsey, 467 U.S. 203, 212 (1984)). The "special justifications" for overruling a constitutional case are usually vague. *Id.* The "special justification" rationale has not been devel-

"[*s*]*tare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.' "[159] Furthermore, he opined that *stare decisis* is less favored in constitutional cases, such as the current one encompassing procedural and evidentiary rules, since "correction through legislative action is practically impossible."[160] To support this point, the Chief Justice listed thirty-five constitutional decisions that had been overruled in whole or in part over the last twenty years.[161] Moreover, he took the position that since *Booth* and *Gathers* have been challenged in later decisions,[162] applied incongruously by the lower courts,[163] and "were decided by the narrowest of margins, over spirited dissents," that they were wrongly decided and are now overruled.[164]

B. *Concurring Opinion of Justice O'Connor*

Justice O'Connor, in a concurring opinion, agreed that a state may decide victim impact evidence is relevant to the sentencing decision to

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oped because most cases are overturned based on three other justifications. *Id.* These include when changes in the law erode the court's previous reasoning, *id.* at 1346 n.18, to make current case law compatible with current wisdom and facts, when prior case law can no longer be applied effectively, or when prior cases conflict. *Id.* at 1346; *see also* Filippatos, *supra* note 11, at 348-57 (tracing the history of the doctrine of *stare decisis* from Cook v. Moffat, 46 U.S. (5 How.) 295 (1847), the first case on the subject, through the current cases).

159. *Payne*, 111 S. Ct. at 2609-10 (quoting Helvering v. Hallock, 309 U.S. 106 (1940)).

160. *Id.* at 2610 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)); *see also* Webster v. Reproductive Health Services, 492 U.S. 490, 518 (1989) ("*Stare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes."). *But see* Filippatos, *supra* note 11, at 351 (arguing that the distinction between the statutory and constitutional cases are not entirely precise since statutory cases are overruled almost as often as constitutional cases). The allotment of overrulings is equivalent between these two types of cases. *Id.* (citing Roland L. Trope, *Double Standard in Stare Decisis: Should Stare Decisis Be Less Applicable in Constitutional Cases Than in Statutory Cases?*, 20 BEV. HILLS B. ASS'N J. 85, 92 (1986)). "Those minimizing the doctrine of *stare decisis* would . . . argue that the practice of judicial review requires that constitutional questions remain open to reinterpretation . . . because only the Court can correct its own mistakes given the laborious nature of the amendment process." *Id.*

161. *Payne*, 111 S. Ct. at 2610 n.1.

162. *Id.* at 2610-11 (citing South Carolina v. Gathers, 490 U.S. 805, 813 (1989) (O'Connor, J., dissenting); Mills v. Maryland, 486 U.S. 367, 395-96 (1988) (Rehnquist, J., dissenting)).

163. *Id.* (citing State v. Huertas, 553 N.E.2d 1058, 1070 (Ohio 1990) (Moyer, C.J., concurring)).

164. *Id.* at 2610-11. *Booth* was only partially overruled since it also held that the victims' family members' beliefs about the crime and the defendant violated the Eighth Amendment. *Id.* at 2611 n.2. That issue was not addressed in this opinion. *Id.*

show the harm caused by the crime.[165] Because she viewed this evidence as relevant, she concluded that it should not be treated any differently than other relevant evidence for Eighth Amendment purposes.[166]

Pointing out that most states have enacted legislation to allow victim impact evidence, she concluded that there is strong societal consensus to allow evidence of harm to the victim's family.[167] Addressing the possibility of unduly prejudicial testimony being brought before the jury, she pointed out that trial courts regularly exclude inflammatory evidence.[168] In the event that the trial court does allow such evidence, the appellate court would review the record for prejudicial error.[169] Therefore, since there is relief under the Due Process Clause of the Fourteenth Amendment, Justice O'Connor could not justify a constitutional *per se* exclusion for victim impact evidence.[170] She did, however, point out that this holding is limited to evidence concerning the victim's personal attributes, or the impact of the crime on the victim's family and society.[171] The Court did not reach the issue of whether the victim's family could give their opinion of the crime, the defendant or the appropriate sentence as that issue was not before the Court.[172]

C. *Justice Scalia's Concurring Opinion*

Justice Scalia wrote a two-part concurring opinion.[173] In Part I, Justice Scalia stated that, under current sentencing jurisprudence, it is unfair to bar admission of relevant aggravating evidence, and at the same time admit all relevant mitigating evidence.[174] However, even if this was not required, he would still allow the State to decide "what is a crime and what constitutes aggravation and mitigation of a crime."[175]

In Part II, he responded to the criticism that the Court should not

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165. *Id.* at 2611 (O'Connor, J., concurring).
166. *Id.* (O'Connor, J., concurring).
167. *Id.* at 2612 (O'Connor, J., concurring).
168. *Id.* (O'Connor, J., concurring).
169. *Id.* (O'Connor, J., concurring).
170. *Id.* (O'Connor, J., concurring).
171. *Id.* (O'Connor, J., concurring).
172. *Id.* (O'Connor, J., concurring).
173. *Id.* at 2613 (Scalia, J., concurring).
174. *Id.* (Scalia, J., concurring). Scalia's stance is consistent with his previous position in *Walton v. Arizona*:

> [T]he Woodson-Lockett principle has prevented States from imposing all but the most minimal constraints on the sentencer's discretion to decide that an offender eligible for the death penalty should nonetheless not receive it. . . . It would misdescribe the sweep of this principle to say that 'all mitigating evidence' must be considered by the sentencer. That would assume some objective criterion of what is mitigating.

Walton v. Arizona, 110 S. Ct. 3047, 3062 (1990).
175. *Payne*, 111 S. Ct. at 2613 (Scalia, J., concurring).

overrule such recent caselaw.[176] Using Justice Marshall's own words, that *stare decisis* " 'is not an 'imprisonment of reason,' " Justice Scalia proclaimed that *Booth* is a case that resists reason.[177] Moreover, recalling the victim's rights movement, Justice Scalia stated that public confidence in the courts is eroded by following precedent that is discordant with the public's perception of justice.[178]

Stare decisis, according to Justice Scalia, is "the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts."[179] Justice Scalia cautioned that a case announcing a new rule which is incompatible with prior practice is also a violation of *stare decisis* and should be advanced with great forethought.[180] He stated that it was *Booth* that undermined *stare decisis* and not *Payne*; therefore, he concurred with the decision of the Court.[181]

D. *Justice Souter's Concurring Opinion*

Central to Justice Souter's concurring opinion is the premise that unforeseeable consequences of a criminal act are not irrelevant to the sentencing decision because an act of homicide always has foreseeable consequences.[182] Every defendant is aware that family members are left behind when a person is murdered.[183] It is not necessary to show that the defendant was aware of the exact details of a victim's life or the identities of those who may survive the victim and be harmed by the criminal act.[184] Therefore, it is "appropriate to consider [victim impact] evidence when penalizing a murderer, like other criminals, in light of common knowledge and the moral responsibility that such knowledge entails."[185] When a court rules victim impact evidence

176. *Id.* (Scalia, J., concurring).

177. *Id.* (Scalia, J., concurring) (quoting Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting)).

178. *Id.* (Scalia, J., concurring).

179. *Id.* at 2613-14 (Scalia, J., concurring).

180. *Id.* at 2614 (Scalia, J., concurring). *But see* Filippatos, *supra* note 11, at 341-42 (arguing that prospective judicial activism, creation of new civil rights and liberties, is not contrary to the doctrine of *stare decisis*; however, retrospective judicial activism, which diminishes established civil rights and liberties, undermines the doctrine of *stare decisis*).

181. *Payne*, 111 S. Ct. at 2614 (Scalia, J., concurring).

182. *Id.* at 2615 (Souter, J., concurring).

183. *Id.* (Souter, J., concurring).

184. *Id.* at 2616 (Souter, J., concurring). Justice Souter states: "[The] foreseeability of the killing's consequences imbues them with direct moral relevance, and evidence of the specific harm caused . . . is . . . evidence of the risk that the defendant . . . chose to run . . . ." *Id.* (Souter, J., concurring) (citation omitted).

185. *Id.* (Souter, J., concurring). "[C]riminal conduct has traditionally been categorized and penalized differently according to consequences not specifically intended, but determined in part by conditions unknown to a defendant when he acted." *Id.* at 2614 (Souter, J., concurring).

inadmissible, this should be viewed as an act of compassion rather than a requirement of the Constitution.[186] In any event, the Due Process Clause of the Fourteenth Amendment protects the defendant from a fundamentally unfair trial due to unduly inflammatory evidence.[187]

Justice Souter argued that "*Booth* sets an unworkable standard of constitutional relevance that threatens . . . to produce such arbitrary consequences and uncertainty of application."[188] Not only does Justice Souter believe the prohibition in *Booth* is overbroad, he also recognizes the fact that much of this evidence will be revealed during the guilt phase of the trial, to the same jury who is sentencing the defendant.[189] Thus, to fulfill *Booth's* mandate to exclude consideration of facts not known to the defendant, jurors would have to be deprived of facts which enable them to understand exactly what occurred.[190] Conversely, if these facts were allowed, *Booth's* objectives would not be accomplished without empaneling a new jury for the penalty phase of the trial.[191]

Justice Souter contended that, even if all facts not known by the defendant were excluded or a separate jury was empaneled for sentencing, *Booth* may lead to arbitrary sentencing results.[192] Under *Booth*, since the defendant likely has no knowledge of the victim's family during the killing, all evidence concerning the victim's family must be excluded from the penalty phase.[193] However, if the defendant was made aware of a family member's existence prior to the decision to kill, that information is relevant for sentencing.[194] Therefore, if a family member of the victim identified themselves as such, this would be admissible under *Booth*.[195] According to Justice Souter, predicating the sentencing decision on this chance occurrence is arbitrary, further indicating that the rule in *Booth* is unworkable.[196]

Overruling precedent must be supported by some "special justifica-

186. *Id.* at 2616 (Souter, J., concurring).
187. *Id.* at 2614-15 (Souter, J., concurring).
188. *Id.* at 2616 (Souter, J., concurring).
189. *Id.* (Souter, J., concurring). Justice Souter gave an example to illustrate his point. If a minister dressed in street clothes, walks down a street and is robbed and killed while his wife and daughter are watching from a nearby car, which facts could be admitted to the jury? *Id.* at 2616-17 (Souter, J., concurring). The fact that the victim was a minister with a family is not a "circumstance of the crime." Under *Booth*, these facts should be barred from the sentencing phase of the trial. *Id.* at 2617. (Souter, J., concurring). However, these facts are admissible at the guilt phase of the trial and will be known to the jurors at sentencing. *Id.* (Souter, J., concurring).
190. *Id.* at 2617 (Souter, J., concurring).
191. *Id.* (Souter, J., concurring).
192. *Id.* (Souter, J., concurring).
193. *Id.* (Souter, J., concurring).
194. *Id.* (Souter, J., concurring).
195. *Id.* (Souter, J., concurring).
196. *Id.* (Souter, J., concurring).

tion."[197] For Justice Souter, the "special justification" is that "*Booth* promises more than it can deliver."[198] Therefore, rather than continue with a rule which is inconsistent and difficult for the lower courts to apply, Justice Souter agreed that the only logical option was to overrule *Booth* and *Gathers*.[199]

E. *Justice Marshall's Dissent*

"Power, not reason, is the new currency of this Court's decisionmaking."[200]

With these words Justice Marshall set the tone for his last dissent before retirement. Justice Marshall predicted that many of the Court's precedents may be subject to renewed scrutiny under this Court's new *stare decisis* reasoning.[201] He stated that "[t]he majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration."[202]

Reviewing the rationale for the decisions in *Booth* and *Gathers*,[203] Justice Marshall proclaimed that there is nothing new in the majority's arguments and that each point was persuasively and adequately countered in the *Booth* and *Gathers* opinions.[204] Justice Marshall agreed the rule laid out in *Booth* deviated from the freedom usually given to a sentencing jury to consider the harm caused by the defendant.[205] However, since " 'death is a 'punishment different from all other sanctions,' "[206] procedures from the non-capital sentencing trial cannot be transferred readily to capital sentencing.

The rationale behind Justice Marshall's support of *Booth* and *Gathers* is that the effect of victim impact evidence in the sentencing proceeding is unfairly prejudicial.[207] Justice Marshall asserted that the law is full of similar *per se* inadmissible evidence where the probative effect is out-

197. *Id.* at 2618 (Souter, J., concurring) (citing Arizona v. Rumsey, 467 U.S. 203, 212 (1984)); *see supra* note 157 and accompanying text.

198. *Payne*, 111 S. Ct. at 2618 (Souter, J., concurring); *see supra* text accompanying notes 191-94.

199. *Payne*, 111 S. Ct. at 2618 (Souter, J., concurring).

200. *Id.* at 2619 (Marshall, J., dissenting).

201. *Id.* (Marshall, J., dissenting); *see also* Filippatos, *supra* note 11, at 344-45 (arguing that precedents of the Warren Court, which were weakened during the Burger Court are now imperiled by narrow interpretation of the Constitution which diminishes established civil rights and liberties).

202. *Payne*, 111 S. Ct. at 2619 (Marshall, J., dissenting).

203. *Id.* at 2619-21 & n.1 (Marshall, J., dissenting); *see supra* text accompanying notes 50-64 and 77-84.

204. *Payne*, 111 S. Ct. at 2621 n.1 (Marshall, J., dissenting); *see supra* text accompanying notes 50-64 and 77-84.

205. *Payne*, 111 S. Ct. at 2620 n.1 (Marshall, J., dissenting).

206. *Id.* (Marshall, J., dissenting) (quoting *Booth*, 482 U.S. at 509 n.12; Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (plurality opinion)).

207. *Id.* (Marshall, J., dissenting).

weighed by its unfair prejudice.[208] The idea that the Eighth Amendment would exclude evidence that has the ability to subvert individualized sentencing which current death penalty caselaw mandates is not exceptional.[209]

In answer to the majority's argument that exclusion of victim impact evidence denies the State the opportunity to present evidence of the harm caused by the defendant,[210] Justice Marshall stated that the Court must first resolve whether victim impact evidence is compatible with current death penalty jurisprudence under the Eighth Amendment.[211] Justice Marshall asserted that the majority offered no satisfactory answer to the argument that victim impact evidence is generally irrelevant and turns the jury's attention to prohibited factors such as the worth of a particular victim.[212]

However, regardless of the arguments advanced by the majority, the real issue was "whether [the] majority [had] come forward with the type of extraordinary showing that this Court has historically demanded before overruling one of its precedents."[213] In Justice Marshall's opinion, the majority had not and, indeed, he proclaimed such a showing was not even necessary in the majority's view.[214] Justice Marshall restated that the Court had regularly emphasized that loyalty to precedent is axiomatic to " 'a society governed by the rule of law.' "[215] He cautioned that "[t]he overruling of one of this Court's precedents ought to be a matter of great moment and consequence."[216] Hence, the Court has never retreated from *stare decisis* absent " 'special justifica-

208. *Id.* at 2620-21 n.1 (Marshall, J., dissenting) (citing FED. R. EVID. 404, 407-12).

209. *Id.* at 2621 n.1 (Marshall, J., dissenting).

210. *See supra* text accompanying note 143.

211. *Payne*, 111 S. Ct. at 2621 n.1 (Marshall, J., dissenting).

212. *Id.* at 2620 (Marshall, J., dissenting); *see* Brief of Southern Christian Leadership Conference as Amicus Curiae in Support of the Petitioner at 6, Payne v. Tennessee, 111 S. Ct. 2597 (1991) (No. 90-5721) (arguing that the "[a]dmission of victim worth and victim impact evidence will result in a capital sentencing process in which the difference between a sentence of death or life imprisonment may turn on the race and social prominence of the victim . . . and other factors". Not only is *Payne* contrary to prior death penalty caselaw, but also, due to the range of discretion in the sentencing process, it would depart from the Court's attempts to remove racial prejudice from the criminal justice system. Brief of Southern Christian Leadership Conference as Amicus Curiae in Support of the Petitioner at 6-7, 10, Payne v. Tennessee, 111 S. Ct. 2597 (1991) (No. 90-5721) (citing Batson v. Kentucky, 476 U.S. 79, 80 (1986)).

213. *Payne*, 111 S. Ct. at 2621 (Marshall, J., dissenting).

214. *Id.* (Marshall, J., dissenting).

215. *Id.* (Marshall, J., dissenting) (quoting Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 420 (1983), *overruled on other grounds by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992)).

216. *Id.* (Marshall, J., dissenting).

tion' "[217] such as, changes in the law which erode the Court's reasoning,[218] the necessity of caselaw to correspond with current wisdom and new facts,[219] and a demonstration that a prior case has become " 'a detriment to coherence and consistency in the law.' "[220]

Based on the above criteria, the only possible but unconvincing justification that the majority offered, according to Justice Marshall, to support the decision to overrule *Booth* and *Gathers* was contradictory application in the lower courts.[221] He stated that the division in the lower courts over whether *Booth* allowed prosecutorial comment relating to the victim's attributes was offered by the majority to support this position; however, that issue was resolved in *Gathers*.[222] *State v. Huertas*[223] did indicate inconsistent application of *Booth* but Justice Marshall noted that "if a division among members of a single lower court . . . were sufficient to demonstrate that a particular precedent was a 'detriment to coherence and consistency in the law,' there would hardly be a decision in United States Reports that we would not be obliged to reconsider."[224]

Justice Marshall was troubled that the majority afforded only limited protection of *stare decisis* to cases involving civil liberties, as opposed to cases involving contract and property rights, " 'decided by the narrowest of margins, over spirited dissents.' "[225] He then enumerated over a dozen cases which are included on his "endangered precedents" list.[226]

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217. *Id.* (Marshall, J., dissenting) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

218. *Id.* (Marshall, J., dissenting) (citing Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).

219. *Id.* at 2621-22 (Marshall, J., dissenting) (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).

220. *Id.* at 2622 (Marshall, J., dissenting) (quoting *Patterson*, 491 U.S. at 173).

221. *Id.* (Marshall, J., dissenting).

222. *Id.* (Marshall, J., dissenting); *see supra* text accompanying notes 77-84.

223. 553 N.E.2d 1058 (Ohio 1990), *cert. dismissed as improvidently granted*, 111 S. Ct. 805 (1991).

224. *Payne*, 111 S. Ct. at 2622 (Marshall, J., dissenting) (quoting *Patterson*, 491 U.S. at 173).

225. *Id.* (Marshall, J., dissenting) (quoting *Payne*, 111 S. Ct. at 2610).

226. *Id.* at 2623 & n.2 (Marshall, J., dissenting). In fact, in the term following *Payne*, one of the decisions on Justice Marshall's list was overruled. Justice Marshall's "endangered precedents" list includes: Metro Broadcasting v. FCC, 110 S. Ct. 2997 (1990); Rutan v. Republican Party of Illinois, 110 S. Ct. 2729 (1990); Peel v. Attorney Registration and Disciplinary Comm'n, 110 S. Ct. 2281 (1990); Grady v. Corbin, 110 S. Ct. 2084 (1990); Zinermon v. Burch, 494 U.S. 113 (1990); James v. Illinois, 493 U.S. 307 (1990); Mills v. Maryland, 486 U.S. 367 (1988); United States v. Paradise, 480 U.S. 149 (1987); Rankin v. McPherson, 483 U.S. 378 (1987); Rock v. Arkansas, 483 U.S. 44 (1987); Gray v. Mississippi, 481 U.S. 648 (1987); Ford v. Wainwright, 477 U.S. 399 (1986); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), *overruled by* Planned Parenthood v. Casey 112 S. Ct. 2791 (1992); Aguilar v. Felton, 473 U.S. 402 (1985); Maine v. Moulton, 474 U.S. 159 (1985); Garcia v. San Antonio Metropolitan Transit Auth.,

Although loyalty to precedent is necessary for individuals to organize their business activities, Justice Marshall urges that similar loyalty to precedent is even more pressing when dealing with constitutional liberties.[227] Justice Marshall stated that "the Bill of Rights and the Fourteenth Amendment . . . require[] this Court to rein in the forces of democratic politics."[228] This can only be accomplished if citizens are able to view " 'the judiciary as a source of impersonal and reasoned judgments' "[229] implementing " 'principles . . . founded in the law rather than in the proclivities of individuals.' "[230] Additionally, Justice Marshall warned that "[i]f [the] Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind."[231] By allowing the state court to defy constitutional precedent without distinguishing the previous caselaw, the majority encourages flagrant disregard for the holdings of the court.[232] This encourages state courts to challenge procedures which were deemed unconstitutional in the prospect that the United States Supreme Court will change its view.[233]

Additionally, he faulted the Tennessee Supreme Court's application of the constitutional harmless error rule in this case.[234] The court based its finding of harmless error on the heinous nature of the crime, which was apparent from the evidence adduced at trial.[235] However, since the court did not assess the impact of the error on the jury, it cannot deem the error to be harmless beyond a reasonable doubt.[236]

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469 U.S. 528 (1985); Pulliam v. Allen, 466 U.S. 522 (1984). Payne, 111 S. Ct. at 2623 & n.2.

227. *Payne*, 111 S. Ct. at 2623 (Marshall, J., dissenting).

228. *Id.* at 2623-24 (Marshall, J., dissenting).

229. *Id.* at 2623 (Marshall, J., dissenting) (quoting Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970)).

230. *Id.* at 2624 (Marshall, J., dissenting) (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).

231. *Id.* (Marshall, J., dissenting).

232. *Id.* at 2624-25 (Marshall, J., dissenting). Justice Marshall quoted from the lower court case to make his point:

> It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or harm imposed, upon the victims.

Id. at 2624 (Marshall, J., dissenting) (quoting State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990)).

233. *Id.* at 2624 (Marshall, J., dissenting).

234. *Id.* at 2624-25 n.4 (Marshall, J., dissenting). In order to find constitutional harmless error, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).

235. *Payne*, 111 S. Ct. at 2624-25 n.4 (Marshall, J., dissenting).

236. *Id.* at 2624-25 n.4 (Marshall, J., dissenting). In order to impose the death sentence, the jury must balance the aggravating and mitigating circumstances. *Id.* (Marshall, J., dissenting). The state cannot make the death penalty mandatory. *Id.*

Justice Marshall stated that the Court must be able to conclusively resolve conflicts between the powerful, in this case the State of Tennessee, and the powerless.[237] By redefining the rules for overturning the Court's precedent, he foresaw the demise of other cases under the Court's new justification for overturning previous caselaw.[238] The "powerless" individual in this case is a criminal defendant facing the death penalty, but the next victims of the Court's reinterpretation of constitutional liberties may be "minorities, women, or the indigent."[239]

F. *Justice Stevens' Dissent*

Although he felt Justice Marshall was appropriately disturbed by the Court redefining the doctrine of *stare decisis*, Justice Stevens rested his opinion on the thesis that, even if *Booth* and *Gathers* had not been decided, *Payne* deviated from a long line of death penalty caselaw.[240] Victim impact evidence is not relevant to the issue of guilt or moral culpability and only invites jurors to decide the appropriate sentence based on their emotional response to this testimony.[241]

Noting Justice Black's opinion in *Williams v. New York*,[242] Justice Stevens stated that the practice since before the American Revolution has been "the relevant evidence of harm to society consisted of proof that the defendant was guilty of the offense charged in the indictment."[243] The Court reviewed the scope of evidence that should be considered in capital sentencing in *Lockett v. Ohio*,[244] where it was held that the sentencing authority must consider mitigating evidence that the defendant offers.[245] Referring to the *Lockett* opinion, Justice Stevens stated that "[a]s in *Williams*, the character of the offense and the character of the

(Marshall, J., dissenting). The sentencer must have the discretion to impose a lesser sentence. *Id.* (Marshall, J., dissenting) (citing Woodson v. North Carolina, 428 U.S. 280 (1976)); *see supra* notes 51, 54-58 and accompanying text.

237. *Payne*, 111 S. Ct. at 2624 (Marshall, J., dissenting).

238. *Id.* at 2625 (Marshall, J., dissenting). The new justification to which Justice Marshall refers is cases "decided by the narrowest margins, over spirited dissents." *Id.* at 2610-11.

239. *Id.* at 2625 (Marshall, J., dissenting).

240. *Id.* at 2625 (Stevens, J., dissenting).

241. *Id.* at 2625-26 (Stevens, J., dissenting). Evidence which only appeals to the emotions of the jurors has never been admissible. *Id.* (Stevens, J., dissenting). Justice Stevens gave an example of a defendant who had murdered a convenience store clerk. *Id.* at 2626 (Stevens, J., dissenting). It would be obvious that evidence of the victim's immoral character would be irrelevant and inadmissible. *Id.* (Stevens, J., dissenting). "Evenhanded justice requires that the same constraint be imposed on the advocate of the death penalty." *Id.* (Stevens, J., dissenting).

242. 337 U.S. 241 (1949).

243. *Payne*, 111 S. Ct. at 2626 (Stevens, J., dissenting) (citing *Williams*, 337 U.S. at 246).

244. 438 U.S. 586 (1978).

245. *Payne*, 111 S. Ct. at 2626 (Stevens, J., dissenting) (citing *Lockett*, 438 U.S. at 604).

offender constituted the entire category of relevant evidence,"[246] and concluded that the opinions in *Booth* and *Gathers* were wholly compatible with previous death penalty caselaw.[247] Yet, "relying on nothing more than [*Booth's* and *Gather's*] dissenting opinions, the Court abandons rules of relevance that are older than the Nation itself, and ventures into uncharted seas of irrelevance."[248]

Justice Stevens found fault with the majority's argument that the State is disadvantaged by not allowing the admission of victim impact statements.[249] He reasoned that the State is able to rebut any mitigating factors proffered by the defendant and may introduce relevant evidence as an aggravating factor which may militate in favor of the death penalty.[250] The rationale behind allowing the defendant to introduce any relevant mitigating evidence and restricting evidence that the State may introduce is to prevent "overreaching by the disproportionately powerful State."[251] This undercuts the majority's argument that there should be a balance of power between the State and the criminal defendant.[252]

In addition, since unforeseeable characteristics of the victim are irrelevant to the issue of the defendant's "personal responsibility and moral guilt,"[253] and discretion to impose the death penalty must be "directed and limited so as to minimize the risk of wholly arbitrary and capricious action,"[254] the admission of victim impact evidence is contrary to the Eighth Amendment demand that death sentences are not to be imposed arbitrarily or capriciously.[255] Victim impact evidence cannot be applied objectively and consistently in different cases since the type of evidence necessary to rise to the level warranting the death sentence is subject to the unguided discretion of the jury and cannot be determined until after the crime.[256]

Justice Stevens conceded that "there is a rational correlation between moral culpability and the *foreseeable* harm caused by [the defend-

246. *Id.* (Stevens, J., dissenting).
247. *Id.* at 2626-27 (Stevens, J., dissenting).
248. *Id.* at 2627 (Stevens, J., dissenting).
249. *Id.* (Stevens, J., dissenting).
250. *Id.* (Stevens, J., dissenting).
251. *Id.* (Stevens, J., dissenting).
252. *Id.* (Stevens, J., dissenting). "The premise that a criminal prosecution requires an even-handed balance between the State and the defendant is also incorrect." *Id.* (Stevens, J., dissenting).
253. *Id.* at 2628 (Stevens, J., dissenting) (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).
254. *Id.* (Stevens, J., dissenting) (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976)).
255. *Id.* (Stevens, J., dissenting).
256. *Id.* (Stevens, J., dissenting). In short, there is no objective way to apply this evidence consistently. "Without objective standards, then, the prejudicial tendency of such evidence outweighs its probative value." Talbert, *supra* note 36, at 210.

ant]."[257] Therefore, it is constitutionally permissible that aggravating factors identified by the legislature may justify the death penalty.[258] Evidence of *unforeseeable* and indirect harm to a victim's family, however, cannot be justified since it would encourage arbitrary and capricious sentencing in violation of the Eighth Amendment.[259]

In addition, Justice Stevens stated that the majority could find no support for their argument to allow victim impact evidence in the leading case of *Gregg v. Georgia*.[260] "The *Gregg* plurality endorsed the sentencer's consideration of a wide range of evidence '[s]o long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant.' "[261] However, evidence of harms that the defendant could not have foreseen are irrelevant and inherently prejudice a defendant by diverting the sentencing authority from their obligation and by advocating reliance on sympathy and other subjective factors.[262]

Addressing Justice Souter's argument that every defendant knows that the victim has surviving family who will suffer from the victim's death, Justice Stevens countered that every other member of society knows this as well; therefore, it is unnecessary to inform the sentencing authority of the harms suffered by the victim's family.[263] The sole purpose of allowing this evidence at the sentencing phase of the trial is to "divert the jury's attention away from the defendant's background and record and the circumstances of the crime."[264] Justice Stevens contin-

257. *Payne*, 111 S. Ct. at 2628 (Stevens, J., dissenting) (emphasis added).

258. *Id.* (Stevens, J., dissenting).

259. *Id.* at 2628-29 (Stevens, J., dissenting). Justice Stevens distinguished this case from the examples cited by the majority. *Id.* at 2629 (Stevens, J., dissenting). The legislature imposes different punishments on defendants based on the crime which they commit. *Id.* (Stevens, J., dissenting). For example, the penalties imposed for murder differ from the penalties imposed for attempted murder. *Id.* (Stevens, J., dissenting). Also, if a person drives while intoxicated and someone is killed as a result, the penalty is different than if no death results. *Id.* (Stevens, J., dissenting). However, Justice Stevens stated this only indicates that the harm to the victim may warrant enhanced punishment if the harm is foreseeable to the defendant and clearly identified by the legislature as a harm which results in an increased penalty. *Id.* (Stevens, J., dissenting).

260. *Id.* at 2629 (Stevens, J., dissenting). (citing Gregg v. Georgia, 428 U.S. 153 (1976)); *see supra* note 145 and accompanying text.

261. *Payne*, 111 S. Ct. at 2629 (Stevens, J., dissenting) (quoting Gregg v. Georgia, 428 U.S. at 203-04).

262. *Id.* at 2629 (Stevens, J., dissenting). Justice Stevens believed that the majority misconstrued Justice Powell's argument in *Booth* to mean that the evidence was inadmissible because it was difficult to rebut and created a "tactical" "dilemma." *Id.* at 2629-30 (Stevens, J., dissenting). He stated, however, that Justice Powell found impact evidence objectionable because the jury would focus on the prejudicial and irrelevant evidence rather than constitutionally permissible factors. *Id.* at 2630 (Stevens, J., dissenting); *see also Booth*, 482 U.S. at 506-07 (Powell, J., concurring).

263. *Payne*, 111 S. Ct. at 2630 (Stevens, J., dissenting).

264. *Id.* (Stevens, J., dissenting) (quoting *Booth*, 482 U.S. at 505).

ued by stating:

> What is not obvious, however, is the way in which the character or reputation in one case may differ from that of other possible victims. Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others. Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black.[265]

Much of the victim impact evidence admitted in *Payne* was relevant and "properly admitted during the guilt phase of the trial."[266] Justice Stevens stated that as long as the evidence is relevant it is not objectionable from the standpoint of the holding in *Booth*.[267] Recognizing that and the atrocity of the crime in *Payne*, Justice Stevens found that the Tennessee Supreme Court may have been justified in finding harmless error.[268] However, Justice Stevens cautioned the Court to be concerned with the cases in which the admission of victim impact evidence may not rise to the level of harmless error.[269] Justice Stevens warned, in cases where the victim impact evidence is irrelevant and inadmissible at the guilt phase of the trial, defendants may be sentenced to death in direct contravention to the Eighth Amendment's prohibition against arbitrary and capricious sentencing.[270]

Justice Stevens, believing the case should have been decided without reaching the Constitutional question, lamented the fact that public pressure, which plays a proper role in the political branches but not in the judiciary, was involved in the Court's decision to hear and decide this case.[271]

VI. Analysis and Discussion

A. Stare Decisis

Adherence to stare decisis is usually favored to promote predictable and unwavering development of legal principles, to encourage confidence in judicial opinions and to uphold the soundness of the judicial

265. *Id.* at 2631 (Stevens, J., dissenting) (citing McClesky v. Kemp, 481 U.S. 279, 366 (1987) (Stevens, J., dissenting)).

266. *Id.* at 2630 (Stevens, J., dissenting).

267. *Id.* (Stevens, J., dissenting). "[E]vidence that is admissible for a proper purpose may not be excluded because it is inadmissible for other purposes and may indirectly prejudice the jury." *Id.* (Stevens, J., dissenting) (citing 1 J. Wigmore, Evidence § 13 (P. Tillers rev. 1983 & Supp. 1991)).

268. *Id.* (Stevens, J., dissenting).

269. *Id.* (Stevens, J., dissenting). "We should be concerned instead with the cases in which [victim impact evidence] will make a difference." *Id.* (Stevens, J., dissenting).

270. *Id.* at 2630-31 (Stevens, J., dissenting).

271. *Id.* at 2631 (Stevens, J., dissenting).

process.[272] Most commentators would agree that the Court needs "special justification" to depart from precedent.[273] However, "[*s*]*tare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.' "[274] The majority stated that this reasoning carries more force in constitutional cases, such as the current one encompassing procedural and evidentiary rules, since " 'correction through legislative action is practically impossible."[275]

However, as Justice Marshall discussed in his dissent, the majority did not bring forth sufficient justification to overrule one of its precedents.[276] In fact, he claimed they have eroded the doctrine of *stare decisis*, at least when applied to constitutional cases, by not attempting to come forward with the extraordinary showing traditionally required.[277] According to Justice Marshall, this "impoverished conception of *stare decisis*" signals that the Court is willing to reconsider any 5-4 constitutional decisions that were decided "over spirited dissen[t]."[278]

Stare decisis acknowledges that the Court cannot erase the perceived errors of the previous court simply because there is a personnel change and ideological shift on the Court. To do so would move the Court away from the central principles which permit it to implement the rule of law rather than the "mere exercise of judicial will, with arbitrary and unpredictable results."[279] Unless "special justification" can be shown, the Court should refrain from overruling precedent with which it simply disagrees.[280]

However, regardless of whether or not *Booth* and *Gathers* had been decided, the decision in *Payne* is contrary to previous death penalty law and Eighth Amendment jurisprudence and, therefore, was wrongly decided.[281]

B. *Admission of Victim Impact Evidence*

It is well settled in Eighth Amendment jurisprudence that a capital

272. *Id.* at 2609.

273. *See* Note, *supra* note 158, at 1346 and accompanying text.

274. *Payne*, 111 S. Ct. at 2609-10 (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

275. *Id.* at 2610 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)); *see also supra* note 160 and accompanying text.

276. *Payne*, 111 S. Ct. at 2621 (Marshall, J., dissenting).

277. *Id.* (Marshall, J., dissenting).

278. *Id.* at 2623 (Marshall, J., dissenting) (citing *id.* at 2610).

279. Thornburg v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 787 (1986) *overruled on other grounds by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

280. *See* Filippatos, *supra* note 11, at 360. "Departures from established Constitutional precedents which uphold civil rights or liberties should be countenanced only when equipped with valid and explicit reasoning." *Id.*

281. *See infra* text accompanying notes 282-305.

defendant must be given an individualized sentencing determination based on the defendant's moral culpability and blameworthiness.[282] The disagreement between the majority and the dissent in *Payne* focuses on whether the harm reflected in the VIS is indicative of the defendant's moral culpability or his blameworthiness and whether this type of testimony diverts the jury's attention from constitutionally permissible sentencing factors. The majority found that evidence of harm to the victim's family is relevant to the defendant's blameworthiness and is therefore, appropriate to consider in determining the sentence.[283] In support of their argument that victim impact evidence is relevant to the sentencing decision, the majority stated "consideration of the harm caused by the crime has been an important factor in the exercise of [sentencing] discretion."[284] One often cited example in support of this proposition is that attempted crimes and completed crimes are legislatively treated as two different offenses and are subjected to two different punishments.[285] Another legislative example used by the Court is laws which authorize the death penalty for assassinations of the President, Vice President, Cabinet officials or other high ranking government officials.[286] However, these legislative examples of punishment enhancement are fully compatible with the Eighth Amendment since there is a legitimate government interest and the chosen harm to receive enhanced punishment is specifically described.[287] Conversely, punishment enhancement based on victim characteristics and harms that have not been specifically identified by the legislature results in arbitrary imposition of the death sentence contrary to the Eighth Amendment.[288] To allow this irrelevant and prejudicial testimony simply encourages jurors to make a determination based on their emotions, rather than on a reasoned moral response.[289]

Justice Stevens agreed that "[t]here is a rational correlation between moral culpability and the *foreseeable* harm caused by criminal conduct."[290] However, most victim impact evidence details harm which is subsequent to the crime and, therefore, is *unforeseeable* to the defend-

282. Lockett v. Ohio, 438 U.S. 586, 605 (1978); *see supra* notes 50-51 and accompanying text.

283. *Payne*, 111 S. Ct. at 2605; *see also Booth*, 482 U.S. at 516 (White, J., dissenting); *Gathers*, 490 U.S. at 817-18 (O'Connor, J., dissenting).

284. *Payne*, 111 S. Ct. at 2606.

285. *Id.* at 2605; *see also Booth*, 482 U.S. at 519 (Scalia, J., dissenting).

286. *See Booth*, 482 U.S. at 517 n.2 (White, J., dissenting).

287. *Payne*, 111 S. Ct. at 2629 (Stevens, J., dissenting); *see also* Petitioner's Reply Brief at 8-10, Payne v. Tennessee, 111 S.Ct. 2597 (1990) (No. 90-5721) (citing Zant v. Stevens, 462 U.S. 862, 877 (1983)).

288. *Payne*, 111 S. Ct. at 2629 (Stevens, J., dissenting); *see also* Petitioner's Reply Brief, *supra* note 287, at 11.

289. *Payne*, 111 S. Ct. at 2629 (Stevens, J., dissenting).

290. *Id.* at 2628 (Stevens, J., dissenting) (emphasis added).

ant.[291] The argument that every defendant knows his victim will leave behind survivors who will be harmed by the defendant's conduct does not necessarily make the harm foreseeable.[292] However, as noted by Justice Stevens, since judges and juries are also aware that victims have left behind survivors who have suffered a loss, the only purpose of victim impact evidence is to "divert the jury's attention away from the defendant's background and record, and the circumstances of the crime."[293] It is the sentencing jury's domain to " 'express the conscience of the community on the ultimate question of life or death.' "[294] In order to do this, the jury must focus on the characteristics and the background of the defendant and the circumstances of the crime.[295] Since the focus of the victim impact evidence is on the victim and the resulting harm suffered by the victim's family, the sentencing jury's attention is diverted to the victim instead of being focused on the "defendant's background and record and the circumstances of the crime."[296]

Diverting the jury's attention from the characteristics of the defendant to the character of the victim not only distracts the jury from proper and relevant sentencing considerations, but it also runs the risk that a jury will make a value judgment as to which victims' lives are more worthy.[297] Considering the emotional nature of victim impact evidence, it

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291. *Booth*, 482 U.S. at 504-05 & n.7 (citing People v. Levitt, 203 Cal. Rptr. 276, 287-88 (1984) (defendant does not make a deliberate choice based on effect on the victim's family members, contrary to decision to kill while on probation, to act callously or with premeditation; VIS relevant to civil damages but has no place in criminal trial)).

292. *Contra Payne*, 111 S. Ct. at 2615 (Souter, J., concurring) ("Murder has foreseeable consequences).

293. *Id.* at 2630 (Stevens, J., dissenting) (quoting *Booth*, 482 U.S. at 505).

294. *Booth*, 482 U.S. at 504 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

295. *Id.* at 504 (citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

296. *Id.* at 505; *see* Charlton T. Howard III, Note, Booth v. Maryland—*Death Knell for the Victim Impact Statement?*, 47 MD. L. REV. 701, 727 (1988) (because focus of VIS is on victim, introduction of it during sentencing phase of trial acts as another aggravating factor in determining punishment); Susan A. Jump, Comment, Booth v. Maryland: *Admissibility of Victim Impact Statements During Sentencing Phase of Capital Murder Trials*, 21 GA. L. REV. 1191, 1210-11 (1988) (VIS focuses on victim and victim's family and not on defendant's background and character; therefore, not relevant in determining punishment). *But see* Richard L. Slowinski, Comment, South Carolina v. Gathers: *Prohibiting the Use of Victim-Related Information in Capital Punishment Proceedings*, 40 CATH. U. L. REV. 215, 242 (1990) (individualized sentencing determination requires due regard for both defendant's and victim's background).

297. *Payne*, 111 S. Ct. at 2631 (Stevens, J., dissenting) "The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support. What is not obvious . . . [is how we differ.] Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others." *Id.* (Stevens, J., dissenting); *see also* Petitioner's Reply Brief, *supra* note

is likely that the life or death decision may well turn on how eloquently the victim's family members expresses their grief.[298] Determining the sentence of a capital defendant based on the eloquence of the victim's family members and the victim's status in society is arbitrary and capricious under the Eighth Amendment and would be offensive to our system of justice.

It has been suggested, in support of overruling *Booth* and *Gathers*, that the lower courts have had difficulty in determining testimony and argument contrary to the Constitution when it is joined with proof and circumstances of the crime.[299] However, this only supports the argument that a *per se* exclusion of victim impact evidence is the most workable rule. Since the majority did not offer any guidance as to the limits on the introduction or jury's use of the victim impact evidence, a *per se* exclusion would ensure that the jury only considers constitutionally permissible evidence in reaching their sentencing decision.

Another serious criticism of the *Booth* rule was that courts consistently applied the harmless error doctrine of *Chapman v. California*[300] as a "detour around the obstacle posed by *Booth*."[301] Although often criticized, Constitutional harmless error can be found during sentencing proceedings.[302] However, in many of the cases where the *Booth* error was found to be harmless, one of two factors was important: either the victim impact evidence was in the form of brief comments to the jury by the prosecutor, or the defendant had waived his right to a jury trial and the sentencing judge's report made it clear that the victim impact evi-

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287, at 1, Payne v. Tennessee, 111 S. Ct. 2597 (1991) (No. 90-5721) (1991). "The inevitable result of permitting a capital sentencing decision to be based upon the worth of the victim is that some lives will be considered worth more than others." Petitioner's Reply Brief, *supra* note 287, at 1.

298. *See generally* J. Alexander Tanford, Note, *A Political-choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 837 (1989) (jurors' decisions in criminal cases may be affected by their awareness of the harm suffered, resulting in increased penalties).

299. Brief of Respondent, *supra* note 34, at 43-44. There was testimony in the guilt phase of the trial that when the grandfather last saw his granddaughter alive she was playing on a swing. *Id.* at 44 n.9. It was argued that this uncontested testimony emphasizes the confusion as to what evidence is impermissible because the defense counsel did not contend that this testimony violates *Booth*. *Id.; see also* State v. Heurtas, 553 N.E.2d 1058 (Ohio 1990), *cert. granted*, 111 S. Ct. 39, *dismissed as improvidently granted*, 111 S. Ct. 805 (1991).

300. 386 U.S. 18 (1967) ("[T]he court must be able to declare a belief that [the Constitutional error] was harmless beyond a reasonable doubt."). *Id.* at 24.

301. Brief of the Appellate Committee of the California District Attorneys Association *Amicus Curiae* in Support of the State of Tennessee at 15, Payne v. Tennessee, 111 S. Ct. 2597 (1991) (No. 90-5721).

302. Clemons v. Mississippi, 494 U.S. 738, 754 (1990). *But see* James C. Scoville, Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 740, 754-58 (1987) (the ability to ascertain the impact of the error on the decision maker is unavailable; therefore, harmless error review is inappropriate in context of capital sentencing trials).

dence had no effect on his sentencing decision.[303] In *Payne*, not only was the testimony emotional and orally given by the victim's family, but the sentencing decision was made by a jury.[304] It is difficult enough to determine which factors were considered by a judge in determining the sentence but it is impossible to say beyond a reasonable doubt that a jury did not rely on impermissible and irrelevant considerations in deciding the proper sentence.[305] Since the majority viewed the testimony as relevant, the issue of harmless error was not addressed in the Court's opinion.

C. *In View of* Payne v. Tennessee: *What Avenues are Available to a Capital Defendant to Exclude or Mitigate Victim Impact Statements?*

It is unlikely that *Payne* will be overturned as readily as its predecessors. Capital defendants facing the death penalty will have to find other avenues to mitigate emotional and prejudicial victim impact testimony. This is especially crucial when the testimony is emotional and verbally given in the courtroom. Emotional testimony about the harm suffered by the victim's family is very effective in swaying the jury from a life sentence to the death penalty.[306]

One method for defense counsel to exclude victim impact evidence

303. *See, e.g.*, People v. Marshall, 790 P.2d 676, 686 (Cal. 1990) (brief remarks made to jury by prosecutor); People v. Burton, 771 P.2d 1270, 1287 (Cal. 1989), *cert. denied*, 111 S. Ct. 1023 (1990) (prosecutor's brief remarks to jury were harmless error); State v. Paz, 798 P.2d 1, 15-17 (Idaho 1990), *cert. denied*, 111 S. Ct. 2911 (1991) (surviving victim expressed opinion that the defendant should get the death penalty, however, since it was a bench trial and judge considered aggravating factors before imposing the death penalty, error was harmless) *overruled on other grounds by* State v. Card, 825 P.2d 1081 (Idaho 1991); People v. Crews, 522 N.E.2d 1167, 1177-78 (Ill. 1988), *cert. denied*, 492 U.S. 925 (1989) (improper testimony regarding impact on victim's family but judge did not refer to the victim impact evidence in his findings; therefore, harmless error); People v. Phillips, 538 N.E.2d 500, 516 (Ill. 1989), *cert. denied*, 110 S. Ct. 3290 (1990) (defendant waived jury trial and there was nothing in the record to rebut the presumption that the judge only considered competent and relevant evidence; therefore, harmless error). *But see* People v. Simms, 520 N.E.2d 308, 313-14 (Ill. 1988), *cert. denied*, 112 S. Ct. 870 (1992) (trial court indicated that the victim impact statement played a role in sentencing; therefore, reversible error since the emotional testimony was too powerful to ignore).

304. *See supra* text accompanying notes 120-126.

305. Scoville, *supra* note 302, at 740 (harmless error doctrine should not be used to uphold faulty capital sentencing proceeding).

306. *See* Tanford, *supra* note 298 and accompanying text. "Research by psychologists shows that jurors' decisions in criminal cases can be affected by their perception of the amount of suffering felt by victims. Evidence of suffering can increase the severity of the sentence." *Id.* at 837 (citing Francis C. Dane & Lawrence S. Wrightsman, *Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts*, in THE PSYCHOLOGY OF THE COURTROOM 83, 99-100 (Norbert L. Kerr & Robert M. Bray eds. 1982)); *see also* Coyle, *supra* note 11, at S1 (a death-sentenced inmate retried and received life sentence because highly prejudicial evidence kept out on retrial).

was suggested by the majority in *Payne*. Courts often exclude testimony or evidence when the probative value is substantially outweighed by the prejudicial effect. In any event, review is available in the appellate courts.[307] However, given the same fact situation, judges vary in their rulings on whether certain evidence is too prejudicial to be admitted.[308]

Another avenue for a capital defendant is if the state constitution provides for protection from prejudicial and emotional victim impact statements. At least one state, New Jersey, prior to *Payne* had suggested that victim impact evidence is not relevant to the sentencing proceeding based on their state constitution.[309] Although they have not ruled on the question since *Payne*, Justice Handler has opined that the New Jersey Supreme Court should make it clear that the state constitution prevents such fundamentally unfair testimony.[310] However, most states are likely to adopt *Payne* if they do not have a clear constitutional basis for exclusion.[311]

The defense bar may want to try to mitigate the damage posed by victim impact evidence by requesting jury instructions to guide the jury's use of the victim impact evidence.[312] These instructions may also instruct the jury that sympathy and emotion should not influence their verdict. Anti-sympathy instructions have been held constitutional in *California v. Brown*[313] and *Saffle v. Parks*.[314] Although the defense bar

307. *Payne*, 111 S. Ct. at 2608 ("In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism of relief."); *see also id.* at 2612 (O'Connor, J., concurring) ("Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial."). *But see id.* at 2620-21 n.1 (Marshall, J., dissenting) ("The law is replete with *per se* prohibitions of types of evidence the probative effect of which is generally outweighed by its unfair prejudice.") (citing FED. R. EVID. 404, 407-12)).

308. *See* Tanford, *supra* note 298, at 833 ("Some courts approve excluding relevant evidence to prevent prejudicing jurors against a party, while others say that harm to a party can never be grounds for exclusion.").

309. State v. Williams, 550 A.2d 1172, 1204 (N.J. 1988); *see also* State v. Harvey, 581 A.2d 483 (N.J. 1990), *cert. denied*, 111 S. Ct. 1336 (1991); State v. Clausell, 580 A.2d 221, (N.J 1990); State v. Coyle, 574 A.2d 951 (N.J. 1990).

310. State v. Erazo, 594 A.2d 232, 258 (N.J. 1991) (Handler, J., concurring in part and dissenting in part) ("[in light of *Payne*,] we should make clear that our standard is fixed firmly on state constitutional principles of due process and reasonable punishments and independent precepts of fundamental fairness."). *Id.*

311. *See* People v. Edwards, 819 P.2d 436, 465-67 (Cal. 1991), *cert. denied*, 113 S. Ct. 125 *rehearing denied*, 113 S. Ct. 642 (1992) (specific harm caused by defendant is a circumstance of the crime and is allowed as a statutory aggravating circumstance); State v. Card, 825 P.2d 1081, 1089 (Idaho 1991) (presentence report detailing harm to family does not violate the Constitution).

312. *See* Petitioner's Reply Brief at 6-7, Payne v. Tennessee, 111 S. Ct. 2597 (1991) (No. 90-5721) for suggested instruction to guide the jury's use of victim impact evidence.

313. 479 U.S. 538, 541 (1987). The court instructed the jury that it "must not be

has consistently opposed anti-sympathy instructions on the grounds that a juror may conclude that he or she must ignore mitigating evidence if the evidence evokes sympathy from the juror, the defense bar may want to reconsider their objection after *Payne*.

The holding in *Payne* seems to be contrary to *Brown's* admonishment to avoid "reliance on extraneous emotional factors."[315] On the one hand, the Court in *Brown* upheld the anti-sympathy instruction since it cautions the jury to avoid sympathy that is not based on the evidence presented at trial. However, the *Payne* Court's admission of very emotional and usually irrelevant evidence on the crime's effect on the victim's family, the allows a jury to make a life or death decision based on these irrelevant factors. The defense bar cannot allow emotional victim impact testimony to be admitted in a capital sentencing hearing without requesting jury instructions to guide the jurors in evaluating the proper role for such inflammatory and prejudicial testimony. It is not enough, in light of *Brown* and *Parks*, to object to an anti-sympathy instruction. It will probably be given to the jury over the defense attorney's objection and the jury may construe the instruction to negate any mitigating evidence that has been presented on the defendant's behalf. Moreover, in light of *Payne* and the introduction of emotionally charged victim impact evidence in the proceedings, the defense attorney may want a jury instruction on the proper role of sympathy in the jurors' deliberations. However, the anti-sympathy jury instruction should not be delivered as currently written.[316] As noted by Justice Brennan in his dissent in *Brown*, "[t]he Court . . . suggests that an anti-sympathy instruction . . . benefits a defendant in that it prevents the sentencer from being influenced by sympathy for the *victim*. [However,] . . . the language of the instruction draws no distinction between these two types of sympathy."[317]

In order to be effective the defense bar must draft an instruction which informs the jury that they can show compassion and spare the life of the defendant.[318] In order to pass muster under *Brown*, the jury should be instructed that any mercy shown should be based on the evidence, including mitigating evidence offered at trial. The instruction will also need to guide the jury's use of the victim impact evidence, if

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swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id.* at 540.

314. 110 S. Ct. 1257, 1259 (1990).

315. *Brown*, 479 U.S. at 543.

316. For text of instruction, *see supra* note 313.

317. *Brown*, 479 U.S. at 551 n.2.

318. *See generally* Paul Whitlock Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389 (1989) (advocating revival of mercy in an increasingly bureaucratic death penalty system); Miriam S. Mazel, Note, *No More Tears: Anti-Sympathy Jury Instructions Attempt to Disallow Impulsive Emotion*, 66 DENV. U. L. REV. 645 (1989).

offered by the State, so it is not used for a Constitutionally impermissible purpose.[319]

VII. Conclusion

Victim rights during the criminal trial are very important not only for the victims of crime but also for the justice system. However, those rights cannot come at the expense of the criminal defendant's constitutional rights. Victim impact evidence which is unforeseeable to the defendant at the time of the crime and which does not relate to the circumstances of the crime is not relevant to the sentencing decision and is too prejudicial to be allowed at the sentencing process.

As noted by one commentator, "the element of mercy is being squeezed out of capital punishment in the United States by a death penalty bureaucracy."[320] Recent decisions of the United States Supreme Court have all but eradicated the element of compassion from the death penalty decision. It is time to restore mercy to the capital sentencing process by allowing only relevant testimony during the capital sentencing trial; however, if victim impact evidence is allowed the jury should be instructed that they can show compassion for the defendant while also ensuring that justice is served.

Carole Mansur

319. *See* Petitioner's Reply Brief, *supra* note 312, at 6-7.
320. Cobb, *supra* note 318, at 404.

Harmelin v. Michigan: Contemporary Morality and Constitutional Objectivity

> Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[1]

I. INTRODUCTION

Chief Justice Rehnquist and Justice Scalia, in *Harmelin v. Michigan*[2] announced that the "general principle of proportionality"[3] for Eighth Amendment review,[4] which was embraced by *Solem v. Helm*,[5] "was simply wrong; [that] the Eighth Amendment contains no proportionality

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1. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

2. 111 S. Ct. 2680 (1991) (plurality decision). The Court voted five to four to affirm the decision of the Court of Appeals of the State of Michigan in People v. Harmelin, 440 N.W.2d 75 (Mich. App. 1989), affirming the defendant's conviction for possession of a controlled substance, and his sentence of life in prison without the possibility of parole. For a complete discussion of the facts of the case, see *infra* notes 197-204 and accompanying text.

Five opinions were authored: Justice Scalia announced the judgment of the Court and delivered the opinion of the Court with respect to part V, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy and Souter joined, *Harmelin*, 111 S. Ct. at 2701-02 (plurality opinion), and an opinion with respect to Parts I, II, III, and IV, in which Chief Justice Rehnquist joined, *id.* at 2684-2701 (Scalia, J.).

Justice Kennedy filed an opinion concurring in part and concurring in the judgment, in which Justices O'Connor and Souter joined. *Id.* at 2702-09 (Kennedy, J., concurring).

Justice White filed a dissenting opinion in which Justices Blackmun and Stevens joined. *Id.* at 2709-19 (White, J., dissenting). Justice Stevens also filed a separate dissenting opinion in which Justice Blackmun joined. *Id.* at 2719-20 (Stevens, J., dissenting). Justice Marshall filed a separate dissenting opinion. *Id.* at 2719 (Marshall, J., dissenting).

3. Solem v. Helm, 463 U.S. 277, 288 (1983). The American Heritage Dictionary defines proportionality as "[h]aving a constant ratio." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1049 (William Morris ed., 1978). Generally, proportionality will be used throughout this article to discuss the analysis of the ratio of a crime to the punishment inflicted for its commission. In other words, the doctrine of proportionality is the doctrine that the punishment must fit the crime.

4. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. 463 U.S. 277, 288 (1983). The Court in *Solem* articulated three criteria for proportionality review: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii)

guarantee."[6]

Justice Kennedy stated that the Eighth Amendment "encompasses a narrow proportionality principle."[7] In Justice Kennedy's elaboration of what a "narrow proportionality principle" means, he "asserts that the Eighth Amendment's proportionality principle is so 'narrow' that *Solem's* analysis should be reduced from three factors to one."[8] In doing so, Justice Kennedy has "eviscerate[d]"[9] *Solem's* proportionality review.[10]

The principle of proportionality has a long history in Anglo-Saxon law.[11] The first written expression of the principle of proportionality was recorded by the ancient Hebrews in the old testament.[12]

"Aristotle taught that inequality, whether in favor of or against the offender, meant injustice."[13] A similar relationship of justice and equality is found in the laws of the Angles and the Saxons of pre-Norman England.[14] The Magna Carta,[15] called the father of the English and American Bills of Rights,[16] regulated excessive amercements.[17]

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the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292; *see infra* notes 188-96, 291-321 and accompanying text.

6. *Harmelin*, 111 S. Ct. at 2686 (Scalia, J.). See *infra* notes 205-323 and accompanying text for a complete analysis and criticism of Justice Scalia's opinion.

7. *Id.* at 2702 (Kennedy, J. concurring).

8. *Id.* at 2709 (White, J., dissenting). Justice Kennedy's concurring opinion stated that "one factor may be sufficient to determine the constitutionality of a particular sentence." *Id.* at 2707 (plurality opinion) (Kennedy, J., concurring). Justice Kennedy then applied the first factor used in *Solem* and found that, "[i]n light of the gravity of the petitioner's offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence with others in Michigan and across the Nation need not be performed." *Id.* (Kennedy, J., concurring).

9. *Id.* at 2714 (White, J., dissenting). "While Justice Scalia seeks to deliver a swift death to *Solem*, Justice Kennedy prefers to eviscerate it, leaving only an empty shell." *Id.* (White, J., dissenting).

10. See *infra* notes 205-323 and accompanying text for a complete analysis and criticism of the Justice Kennedy's opinion.

11. *See generally* FREDERICK W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND (1974).

12. "And if a man maim his neighbour, as he hath done, so shall it be done to him: breach for breach, eye for eye, tooth for tooth; as he hath maimed a man, so shall it be rendered unto him." *Leviticus* 24:19-20. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 844 (1969).

13. Granucci, *supra* note 12, at 844 (citing ARISTOTLE, ETHICS 148-49 (Penguin Classics ed., 1955)).

14. *Id.*

15. MAGNA CARTA (1215).

16. FAITH THOMPSON, MAGNA CARTA, ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION 1300-1629, at V (1948).

17. Granucci, *supra* note 12, at 845-46. An amercement was a "mandatory sum imposed in punishment of some misdeed—the equivalent of a modern fine." *Id.* at 845 n.27. Chapter 14 of the Magna Carta stated:

To opine that the doctrine of proportionality is not an essential characteristic of Eighth Amendment review,[18] is to shun nearly a century of Supreme Court jurisprudence,[19] and more than 750 years of Anglo-Saxon precedent.[20]

This Comment will review the historical underpinnings of the guarantees embodied in the Eighth Amendment and will analyze the Supreme Court's evaluation of the liberties granted by the Amendment in the *Harmelin* case, in light of its history. Part II of this Comment will attempt to clarify the historical background of the Eighth Amendment guarantee against cruel and unusual punishment, discussing both pre- and post-Bill of Rights analyses.[21] Part III will describe the facts upon which *Harmelin* was decided.[22] In Part IV, the opinions of the Justices in the principle case, *Harmelin v. Michigan*,[23] will be critically analyzed in

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> A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforsaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.

Id. at 846 (citing J. HOLT, MAGNA CARTA 323 (1965) (quoting MAGNA CARTA)).

18. The Justices joining in the judgment of the Court stated that proportionality is not the basis of reviewing a claim that a punishment is cruel and unusual under the Eighth Amendment. *See generally Harmelin*, 111 S. Ct. at 2684-2709. Some of the Justices believed that proportionality was a decision left to the legislatures of the individual states. *See Harmelin*, 111 S. Ct. at 2702-09 (Kennedy, J., concurring). Other Justices believed that proportionality was a doctrine altogether left out of the Bill of Rights. *See* the opinion of Justice Scalia and Chief Justice Rehnquist, *Harmelin*, 111 S. Ct. at 2684-2702 (Scalia, J.). In support of the proposal that proportionality has no place in Eighth Amendment jurisprudence, it is opined that the provisions of the United States Constitution and the English Constitution of 1689, provisions that are nearly identical, were read and interpreted entirely differently. *Harmelin*, 111 S. Ct. at 2687 (Scalia, J.). The English document did indeed encompass a doctrine of proportionality, but, according to Justice Scalia, the drafters of the Bill of Rights in 1791, who copied the provision nearly word for word, meant something else. *Harmelin*, 111 S. Ct. at 2691 (Scalia, J.). For a complete analysis, see *infra* notes 245-64 and accompanying text.

19. *See, e.g.*, O'Neil v. Vermont, 144 U.S. 323 (1892); *see* Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 793 (1975). For a complete analysis of the United States Supreme Court's treatment of Eighth Amendment review, see *infra* notes 139-96 and accompanying text.

20. The doctrine of proportionality and its history will be treated in greater detail in Part II, *infra* notes 26-196 and accompanying text. This cursory treatment is merely an introduction to the long and rich history underlying the Eighth Amendment.

21. *See infra* notes 26-196 and accompanying text.

22. *See infra* notes 197-204 and accompanying text.

23. 111 S. Ct 2680 (1991) (plurality opinion).

light of the history of Eighth Amendment jurisprudence.[24] Part V will conclude with the future role of the Court in the constitutional review of sentencing.[25]

II. History of the Eighth Amendment

The following summary of the history of the Eighth Amendment is divided into four critical periods in the Amendment's development. The first period covers, in a rather cursory fashion, the Amendment's English history, beginning in the year 1215 A.D. with the signing of the Magna Carta, and ending in the year 1685, with the affirmation of the English Bill of Rights.[26]

The second period tracks the Amendment through its development in the American Colonies, beginning in the year 1606 with the Virginia Charter, and ending in the year 1791 with the ratification of the American Bill of Rights.[27]

The third period discusses the process and contemporaneous understanding of the American Bill of Rights, tying the Amendment's English and Colonial history into the Eighth Amendment as it was ratified, and as it persists.[28]

The fourth period reviews the treatment of the Eighth Amendment by the Supreme Court of the United States, analyzing the major decisions interpreting the Amendment.[29]

It is important to note, at the outset, that these historical divisions are not meant to advocate a paradigmatic theory of the development of the Amendment. Rather, the four periods provide a structure for convenient and logical presentation. It is also important to note that the historical summary to follow introduces chronological events interpreted by this author, and other commentators, to be significant in the development of the ideology and interpretation of the Eighth Amendment. Such development and ideology is exemplified by the event presented, and the event is meant to represent, as the contemporaneous understanding, the period of time it includes.

A. *The Magna Carta and the English Bill of Rights: 1215-1689. Secundum Modum Delecti*[30]

The origin and history of the Eighth Amendment has been traced to provisions of the Magna Carta.[31] As stated in the introduction, the pro-

24. *See infra* notes 205-323 and accompanying text.
25. *See infra* notes 324-326 and accompanying text.
26. *See infra* notes 30-93 and accompanying text.
27. U.S. Const. amends. I-X; *see infra* notes 94-125 and accompanying text.
28. *See infra* notes 126-38 and accompanying text.
29. *See infra* notes 139-96 and accompanying text.
30. Amercement in proportion to the offense. Thompson, *supra* note 16, at 44.
31. Schwartz & Wishingrad, *supra* note 19, at 787. *See also* note 8. For the rele-

hibition of excessive punishments pre-dates the Magna Carta going back to the beginning of documented history.[32] However, for the purposes of this Comment, the Magna Carta will be treated as the beginning of legal history;[33] all that preceded this historic document will be treated as incidental to it.[34]

Chapter 14 of the Magna Carta expressly banned excessive fines and banned, altogether, any fine for a "trivial offence."[35] The Chapter authorized fines only "according to [the] gravity" of the offense.[36] Thus, the greater the offense, the greater the fine that could be imposed.[37] If the offense was determined to be trivial, there could be no fine imposed.[38] This language, invariably, leads to the conclusion that the fine must be in proportion to the offense.

A writ for the enforcement of Chapter 14 emerged, designed to set aside excessive fines if imposed.[39] The writ *de moderata misercordia*[40] is

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vant provision of the Magna Carta, *see supra* note 17. Schwartz & Wishingrad cite to the original Magna Carta, while Granucci cites to the third issuance of the Magna Carta by Henry III in 1225. Granucci, *supra* note 12, at 845 n.29; RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 4 (1959). Chapter 20 of the Magna Carta was renumbered Chapter 14. Granucci, *supra* note 12, at 845 n.29. In order to be codified, the Magna Carta had to be confirmed with each new session of parliament and on many occasions it was changed, renumbered or adjusted. *See generally* THOMPSON, *supra* note 16.

32. *See supra* notes 11-13 and accompanying text.

33. Historians actually believe that the first English laws put into writing were those of Ethelbert, King of Kent. These laws were probably published around the year 600. It is hypothesized that this is about the time that Roman law came to an end. MAITLAND, *supra* note 11, at 1. This law persisted until the Norman Conquest (1066-1154), at which time Norman law ruled. *Id.* at ix. From 1154-1215, the law of Henry II developed, and in 1215, the Magna Carta was adopted. *Id.*

34. "The Magna Carta is well called the oldest of 'liberty documents.' It has come to serve as the prototype of all bills of rights, a symbol, a slogan that comes readily to the tongue of a public speaker." Thompson, *supra* note 16, at V. The Magna Carta was promulgated as a Royal compromise of King John. LOUIS B. WRIGHT, MAGNA CARTA AND THE TRADITION OF LIBERTY 11, 29-37 (1976). The document was negotiated as a quasi-peace treaty between the King and the Barons. *See* PERRY, *supra* note 31, at 9. That the document contained guarantees of liberties is not a result of Royal forethought and wisdom, but rather as a result of fear of the threats of continued war and retribution. *Id.* at 3. The document contains codified guarantees of liberties never before formally documented and given up by the crown in England. *Id.* at 5. Therefore, the Magna Carta is the first comprehensive bill of liberties, and rightfully holds the place as the starting point of this analysis. *Id.* The Magna Carta is a compilation of common law and legal guidelines in existence at the time of its writing, and therefore, can be utilized here as a tool to sum all relevant English law predating it. *Id.* at 1; Granucci, *supra* note 12, at 846.

35. MAGNA CARTA, Ch. 14 (Henry III, 1225); *see supra* note 17.

36. *Id.*

37. *See generally* FAITH THOMPSON, THE FIRST CENTURY OF THE MAGNA CARTA: WHY IT PERSISTED AS A DOCUMENT (1925).

38. MAGNA CARTA, Ch. 14. "A free man shall not be amerced for a trivial offence . . . ." *Id.*

39. Granucci, *supra* note 12, at 846.

found in judicial records as early as 1253.[41] This writ provided a cause of action against the imposition of a disproportionate amercement. The writ enabled challenges to excessive fines based on the liberties granted by the Magna Carta, much like the challenges brought before the Supreme Court based on the liberties granted in the Bill of Rights,[42] specifically, the Eighth Amendment's guarantee against "Cruel and Unusual Punishments."[43]

A fourteenth century document extended the policy of Chapter 14 of the Magna Carta to bar excessive physical punishments, as well as excessive fines.[44] But there was still evidence that imprisonment was viewed differently, and separately from amercements.[45] This difference was apparently due to the severity of the offense necessary to impose

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40. The Writ of Moderata Misericordia lieth in Case where a Man is amerced in a Court Baron, or other Court which is not a Court of Record, outragiously for Trespass or other Offence; then he may sue this Writ directed unto the Lord of the Courtor unto his Bailiffs, commanding them, that they moderately amerce the Party according unto the Quantity of the Trespass, Ec. And this Writ is founded upon the Statute of *Magna Charta*, cap. 14 . . . .

THOMPSON, *supra* note 16, at 45 (quoting FITZHERBERT, NOTORA BREVIUM (1537)).

41. *Id.* "A writ *de moderata misercordia* was directed to the sheriff of Northhampton to see to it that neither a certain Paine nor his bailiffs [were to] distrain John Le Franceys 'for any amercement contrary to the tenor of the great charter of liberties . . . .' " THOMPSON, *supra* note 37, at 46 (quoting Close Roll 66 M. 7d). The monastery of St. Albans successfully petitioned for such a writ to set aside an amercement of 100 pounds. The fifth heading of its petition read:

> Fifthly, they had injured the liberty against the common charter, where it is said that free men should be amerced according to their offences, and their reputation saved, and the amercement of a hundred pounds, as manifest to everybody, exceeded the just penalty of the offence . . . .

Granucci, *supra* note 12, at 846 (citing THOMPSON, *supra* note 16, at 47).

42. U.S. CONST. amends. I-X.

43. U.S. CONST. amend. VIII.

44. Granucci, *supra* note 12, at 846. That document purportedly read: "We do forbid that a person shall be condemned to death for a trifling offense. But for the correction of the multitude, extreme punishment shall be inflicted according to the nature and extent of the offense." *Id.* (citing B. BARRINGTON, THE MAGNA CARTA AND OTHER GREAT CHARTERS OF ENGLAND, 181, 199 (1900)).

45. Hereof also *Fine* tooke firste his name, of the Latine *Finis*, because it maketh an end with the Prince, for the imprisonment for the offence committed against his Law. And in that respect cheifly doth it differre from an *Amercement*: For when the offender hath not so deeply trespassed, that thereby he deserveth any bodily punishment at all (as if he be nonsuit in an action, or do commit any such like fault) he is said to fall into the Kinges *Mercie*, because he is therein mercifullye to be dealt with: and by the *Great Charter* (ca. 14) that Amercement and summe of money which he is to paye for the same, ought to be asseased and affeered by the good and lawfull men of the neighburhoode . . . .

THOMPSON, *supra* note 16, at 185 (quoting WILLIAM LAMBARDE, EIRENARCHA, BK. II, CH. XVI. (1581)); *see also id.* at 199 n.4 and accompanying text.

imprisonment.[46]

"Thus by the year 1400, we have the expression of 'the long standing principle of English law that the punishment should fit the crime. That is, the punishment should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.' "[47]

In 1487, a statute purported to create the Star Chamber[48] recited common offenses to be within the jurisdiction of the Star Chamber, empowering it to punish the offenders "according to their demerits as they ought to be punished."[49] The Star Chamber, later known as the Court of the Star Chamber,[50] was a judicial body, not a legislative one.[51] This is clear evidence of the proportionality doctrine used in judicial review.

The principle of proportionality of punishments was later bolstered by a Sixteenth Century statute.[52] According to the statute, "the kingdom depended more upon the love of the subject toward the king than upon the dread of the laws imposing rigorous penalties and that laws made for the preservation of the commonwealth without great penalties were more often obeyed and kept than laws made with extreme punishments."[53] The punishment, to be less "extreme,"[54] had to be lessened. Therefore, each punishment was lessened and offenses were

46. As is discussed in note 275, *infra*, imprisonment was not popular until the early to the middle of the 18th century. Prior to this time, imprisonment was viewed only as a temporary measure before sentencing, transporting, or execution. *See infra* note 277.

47. Granucci, *supra* note 12, at 846 (citing PERRY, *supra* note 31, at 236).

48. 3 Hen. VII, c.1. MAITLAND, *supra* note 11, at 219.

> [The statute] empower[ed] the chancellor, treasurer, and keeper of the privy seal, calling to them a bishop and a temporal lord of the council, and the two chief justices or other two justices in their absence, to call before them persons accused . . . . The statute says nothing of the Star Chamber; but for a long time past a room in the palace of Westminster bearing that name had been commonly used by the council for its judicial sessions.

Id. at 219-20.

49. *Id.* at 220.

50. *Id.*

51. *See generally id.* Few records are available documenting the 15th century and therefore it has been conspicuously omitted, for the most part, from this analysis. *See* BRYCE LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 571 (2d ed. 1980). Also, no narrative sources were written by contemporary authors of the period. *Id.*

52. 1 MARY, stat. 1, c.1 (1553); *see* Granucci, *supra* note 12, at 847; PERRY, *supra* note 31, at 236.

53. PERRY, *supra* note 31, at 236; *see* 1 *Mary*, stat. 1, c.1 (1553). The statute read, in pertinent part:

> [T]he State of every King, Ruler and Governor of any Realm, Dominion or Commonwealth, standeth and consisteth more assurred by the Love and Favor of the Subject toward their sovereign Ruler and Governor, than the Dread and Fear of Laws made with rigorous Pains and extreme Punishment . . . .
>
> And Laws also justly made for the preservation of the Commonwealth, without extreme Punishment or great Penalty, are more often for

static. The proportion of the offense to the punishment was analyzed to determine its impact on how often the law was "obeyed and kept."[55] The statute required that the punishment be lessened enough in proportion to the crime to achieve its purpose.

Hodges against Humkin, the Maior of Liskerret,[56] is cited by legal historians as the confirmatory case of the proportionality doctrine. In *Hodges against Humkin,* the King's Bench barred the mayor from using a "malicious kind of imprisonment."[57] The court stated that the [i]mprisonment ought always be according to the quality of the offence . . . the punishment ought to be, and correspondent to the same, the which is not here in this case . . . the imprisonment [is] unjust and unlawful."[58]

Few instances can be cited in which a "mode"[59] of punishment was prohibited for its cruelty or barbarity.[60] "[P]unishments involving tor-

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the most Part obeyed and kept, than Laws and Statutes made with great and extreme Punishments . . . .

Id. (quoted in Granucci, *supra* note 12, at 847).

54. *See* 1 MARY, stat. 1, c.1 (1553).

55. *Id.* That is, this statute created a framework for proportionality review. The punishment had to be in such a proportion to the offense that the subject would not dread and fear the law, but rather, would love and favor the king. While the standard is vague and, ultimately, subjective, it provides an important backdrop for the more modern "common decency" standard. *See infra* notes 311-23 and accompanying text.

56. 80 Eng. Rep. 1015 (1615).

57. *Id.* at 1016. In *Hodges,* the mayor of Liskerret thrust Hodges into the dungeon to be kept without bread or meat. *Id.* The imprisonment was for an indeterminate amount of time for the crime of insulting and directing indecent speech at Humkins. *Id.* In the action by Hodges for habeas corpus, the mayor failed to justify the imprisonment by setting forth in detail the speech that lead to Hodges' imprisonment. *Id.* at 1015. The relief was granted on the basis that, there being no justification for imprisonment given, imprisonment of such a malicious kind was not in proportion to the offense and the imprisonment in August for an offense in June was not timely. *Id.* at 1016.

58. *Id.*

59. *See Harmelin,* 111 S. Ct. at 2691 (Scalia, J.).

60. Granucci, *supra* note 12, at 848; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES 376 (9th ed. 1783) *cited in* PERRY, *supra* note 31, at 236-37. Blackstone's account of the punishments used as late as the eighteenth century is as follows:

> the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savour of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there being few instances (and those accidental or by negligence) of any person's being embowelled or burned, till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, by abjuration of the realm, or transportation: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation of dismembering, by

ture and mutilation continued to be legal in cases where such punishments were deemed proportionate to the crime."[61] Torture was being used to extract confessions.[62] In a book published in 1583, Sir Robert Beale[63] criticized the imposition of fines, imprisonment, and torture by the Crown.[64] Beale's campaign against cruelty and torture was not rewarded by his contemporaries. He was banished from the Royal Court in 1593.[65] The focus, therefore, was not on the mode of the punishment, it was on the proportion of the punishment to the crime for which it was imposed.

According to William Blackstone,[66] the provision of the Bill of Rights forbidding cruel and unusual punishments[67] "had a retrospect to some unprecedented proceedings in the court of the king's bench, in the reign of King James the Second."[68]

Following an unsuccessful rebellion in 1685,[69] Lord Jeffreys took

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cutting off the hand or ears; others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or cheek. Some are merely pecuniary, by stated or discretionary fines: and lastly there are others, that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for such crimes, as either arise from indigence, or render even opulence disgraceful. Such as whipping, hard labour in the house of correction or otherwise, the pillory, the stocks, and the ducking-stool.

Id. at 376.

61. PERRY, *supra* note 31, at 236.

62. *See generally*, P. DAWLEY, JOHN WHITGIFT AND THE ENGLISH REFORMATION (1954).

63. Sir Robert Beale was a "diplomatist and antiquary, was clerk of the privy council, sat in five parliaments, and served on a number of commissions and diplomatic missions." THOMPSON, *supra* note 16, at 216.

64. SIR ROBERT BEALE, A BOOK AGAINST OATHS MINISTERED IN THE COURTS OF ECCLESIASTICAL COMMISSION FROM HER MAJESTY, AND OTHER COURTS ECCLESIASTICAL (1583) *cited in* THOMPSON, *supra* note 16, at 217 n.58.

65. THOMPSON, *supra* note 16, at 218.

66. 4 WILLIAM BLACKSTONE, COMMENTARIES 370 (9th ed. 1783).

67. The Bill of Rights, enacted December 16, 1689, 1 Will. and Mary. sess. 2, c.2, provided, *inter alia*: "10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." PERRY, *supra* note 31, at 247.

68. *Id.*

69. A brief history of the rebellion was recounted by Granucci:

After Charles II died in February 1685, his brother succeeded him as James II. Charles' eldest illegitimate son, the new King's nephew, James, Duke of Monmouth, was in exile in Holland at the time. Monmouth, a fervent Anglican, had been associated with the Whigs of the Country Party. An invasion was planned and executed from Holland, where Monmouth was allowed to use the Dutch ports by William, Prince of Orange.

A small force led by Monmouth landed in western England on June 11, 1685. He proclaimed himself King, but his army was quickly defeated at the Battle of Sedgemoor. Within a month Monmouth was taken prisoner and was executed in London. The abortive rebellion had caused the cancellation of the autumn assize of 1685 and the King appointed Chief

the western circuit, at the special request of the king, to try persons who had participated in the rebellion or aided the rebels.[70] These trials, called the "Bloody Assize,"[71] are referred to by historians as arousing the bitterness of the nation.[72] History has incorrectly assigned the cruel and unusual punishments clause of the English Bill of Rights as an answer to the "Bloody Assize."[73] Although many historians believe that the atrocities committed during the "bloody assize" were the direct incite of the English Bill of Rights provision forbidding cruel and unusual punishments,[74] this is an unlikely theory.

First, cruel punishment persisted.[75] Second, the chief prosecutor of the "Bloody Assize" was on the leading committee in the drafting of the Bill of Rights.[76] Third, the "Bloody Assize" was mentioned only once in the House of Commons debate.[77] Fourth, it is unlikely that any event or series of isolated events was the sole causal factor of such a protective provision of the English Bill of Rights.[78] "The history of [English] public law regarded as a whole is very continuous: the very greatest events that occur in it do not constitute what can fairly be

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Justice Jeffreys of the King's Bench to head a special commission to travel the western circuit and try the captured rebels.

Granucci, *supra* note 12, at 853 (footnotes omitted).

70. Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233 (1987).

71. The name "Bloody Assize" came from a published criticism of the assize by Titus Oates, entitled *The Western Martyrology or, The Bloody Assize.* Granucci, *supra* note 12, at 854.

72. Some of the atrocities recited by history are as follows:

Alice Lisle, the 71 year-old widow of John Lisle, President of Cromwell's High Court of Justice, had sheltered two vanquished soldiers of the insurrection. Mrs. Lisle was sentenced to be burned alive, which was later commuted to beheading. PERRY, *supra* note 31, at 236; Granucci, *supra* note 12, at 853.

Tutchin, a young boy, was convicted of uttering seditious words and sentenced to imprisonment for seven years during which time he was to be flogged through every market town in Dorsetshire every year. Jeffreys refused to change the sentence even after it had been pointed out that the sentence amounted to a whipping once a fortnight for seven years. Tutchin petitioned for the death sentence instead. Jeffreys later remitted the sentence for a large bribe. PERRY, *supra* note 31, at 236.

The chief prosecutor and Jeffreys plea-bargained with the defendants and convinced over 500 to plead guilty on a promise that they would not be executed. Those who plead not guilty and were subsequently found to be guilty were executed. Two-hundred of those who plead guilty were eventually executed. PERRY, *supra* note 31, at 236; Granucci, *supra* note 12, at 854.

73. Granucci, *supra* note 12, at 854.

74. *See* Granucci, *supra* note 12; L. SCHWOERER, DECLARATION OF RIGHTS, 1689, 93 (1981); 4 BLACKSTONE, *supra* note 60, at 372; PERRY, *supra* note 31, at 236 n.103; Schwartz & Wishingrad, *supra* note 19, at 788-89; *Harmelin*, 111 S. Ct. at 2697.

75. MAITLAND, *supra* note 11, at 237.

76. *Id.*

77. *Id.*

78. *Id.*

termed revolutionary."[79] In discussing the evolution of the law in England, and the distinctions between the law under the separate monarchs, Maitland, a noted commentator on the constitutional history of England, commented that "there has been no great change in the law, but there has been a slow change in the working of the law."[80]

"By 1689 . . . a general policy against excessiveness was expressed repeatedly . . . when [punishments] were disproportionate to the crime involved."[81] Therefore, it is more likely that the general policy against excessiveness, deeply imbedded in the legal history of England, led to the prohibition against cruel and unusual punishments demanded by the parliament of 1689.

Shortly after the enactment of the English Bill of Rights, the lawyers of England had an opportunity to apply its prohibition against cruel and unusual punishments. Subsequent to the *Second Trial of Titus Oates*,[82] the House of Lords was petitioned to set aside Oates' sentence as illegal.[83] The House of Lords refused the petition.[84] "A minority of the Lords dissented however, and their statement sheds light on the meaning of the 'cruell and unusuall Punishments' clause . . . ."[85] The Lords cited six reasons to reverse the sentence.[86] The second of these reasons merits repeating here:

> 2. For that the said judgments are barbarous, inhuman, and unchristian; and there is no precedents to warrant the punishments of whipping and committing to prison for life, *for the crime of perjury;* which yet were but part of the punishments inflicted upon him."[87]

The "punishments of whipping and committing to prison for life" were

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79. *Id.*

80. *Id.* at 238.

81. Granucci, *supra* note 12, at 848.

82. 10 How. St. Tr. 1227 (K.B. 1685).

83. 2 T. MACAULAY, HISTORY OF ENGLAND 204 (1899). Titus Oates made false accusations which caused the executions of 15 prominent Catholics. "Oates was convicted of murder." "The court then decreed that he should pay a fine of '1000 marks upon each Indictment,' that he should be 'stript of [his] Canonical Habits,' that he should stand in the pillory annually, . . . that on May 20 he should be whipped . . . from 'Aldgate to Newgate,' that . . . on May 22 [ ] he should be whipped 'from Newgate to Tyburn,' and that he should be imprisoned for life." *Harmelin*, 111 S. Ct. at 2688-89 (citing Second Trial of Titus Oates, 10 How. St. Tr. 1227, 1316 (K.B. 1685)).

84. MACAULAY, *supra* note 83, at 204.

85. *Harmelin*, 111 S. Ct. at 2689 (Scalia, J.).

86. Second Trial of Titus Oates, 10 How. St. Tr. at 1325.

87. *Id.* (emphasis added). The first reason stated was the Lords believed that the Kings Bench did not have jurisdiction to punish an ecclesiastic. The third reason was that Oates' testimony was unfairly impeached. The fourth reason stated that this would set a dangerous precedent. The fifth reason stated that the punishments had no precedent in the common law. Finally, the sixth reason stated that it was contrary to the English Bill of Rights provision prohibiting cruel and unusual punishments, but no elaboration was given. *Id.*

common,[88] but were not ordinarily imposed upon persons guilty of perjury.[89] Therefore, this clause can be interpreted to mean that the punishments were disproportionate to the crime of perjury (but not other crimes). Oates' sentence was ultimately set aside by the House of Commons.[90] The House of Commons annulled the sentence for being "cruel and illegal.[91] The meaning of "illegal" being "contrary to Law and ancient practice."[92] Thus, the ultimate decision was based on the illegality of the punishment.[93]

B. *The American Colonies: 1606-1791.*

A proper understanding of the English history and precedents of the Eighth Amendment are essential in order to understand the intent of the framers of the American Constitution in enacting the Eighth Amendment. Having laid the groundwork in the last section,[94] it will become clear that the terms of the Eighth Amendment were meant to mimic those in the the English Bill of Rights, and those in the colonial charters.[95]

Starting in the early 17th Century, written declarations of individual rights were being promulgated in the American Colonies.[96] Among the colonies most active in the pursuit of personal liberties was Virginia, contemporaneously considered the most progressive and often looked to by the other colonies as an example.[97]

Written law in the colonies was first attempted by the Virginia Charter of 1606.[98] The charter guaranteed the settlers all the rights of En-

88. *See* BLACKSTONE, *supra* note 60.
89. *See* 10 How. St. Tr. at 1325.
90. MACAULAY, *supra* note 83, at 143-45.
91. *Id.* at 204.
92. 10 Journal of the House of Commons 247 (Aug. 2, 1689).
93. *Accord Harmelin*, 111 S. Ct. at 2690.
94. *See supra* notes 30-93 and accompanying text.
95. It is asserted by some historians that the framers of the American Constitution misinterpreted the meaning of the cruel and unusual punishments clause of the English Bill of Rights of 1689. *See, e.g.,* Granucci, *supra* note 12, at 860. The clause was not misunderstood, nor was it meant differently than it was shown to mean in the English Bill of Rights.
96. *See generally* Granucci, *supra* note 12; PERRY, *supra* note 31; ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 (1962).
97. RUTLAND, *supra* note 96, at 46. " 'Virginia has hitherto taken the lead in great affairs, and many now look to her with anxious expectation.' " *Id.* at 39 (*quoting* a letter from Richard Henry Lee to Patrick Henry, Apr. 20, 1776, *reprinted in* THE LETTERS OF RICHARD HENRY LEE 176 (James C. Ballagh ed., 1914)).
98. PERRY, *supra* note 31, at 33. The charter was more a commercial charter, probably based on the charter of the East India Company of 1600, than it was a legal code for the protection of rights. *Id.* It was primarily drafted based on the desire to spread christianity to the Native Americans, to establish England's presence in the new world, and to relocate England's population. *Id.* The charter provided for a government in the colonies that was wholly appointed by the King, and

glishmen.[99] Following Virginia's example, other colonies began to draft laws setting forth the liberties of the inhabitants and the structure of government.[100]

In 1641, the Massachusetts Bay Colony enacted the first colonial pronouncement which directly addressed punishments.[101] The Body of Liberties[102] provided: "bodilie punishments we allow amongst us none that are inhumane Barbarous or cruel."[103] Nathaniel Ward, the author of the Body of Liberties was well trained in the common law of England.[104] Therefore, Ward's understanding of this provision of the Body of Liberties was most likely corroborative of the popular English understanding: that the punishment should be in proportion to the crime.[105]

In 1650, the Connecticut General Court had enacted laws borrowed largely from the Massachusetts Body of Liberties.[106] That the enactments of the colonies, excepting the Massachusetts Bay Colony, neglected to include express provisions prohibiting excessive punishments is not dispositive of a predisposition against such a doc-

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served at his discretion. *Id.* The charter had no provision for local government and it is said that it had "not one ray of popular rights." *Id.* at 34.

99. *Id.* at 35. At that time, there was no written document in England granting rights of the subject but for the Magna Carta and its progeny. *Id.* at 35-36. For a general discussion of what the English subjects were guaranteed under the English laws, particularly the protection against excessive punishments, *see supra* notes 30-93 and accompanying text.

Similar guarantees, granting colonists all the rights of an English subject, were "found in the Charter of New England, 1620; the Charter of Massachusetts Bay, 1629; the Charter of Maryland, 1632; the Charter of Maine, 1639; the Charter of Connecticut, 1662; the Charter of Rhode Island, 1663; the Charter of Carolina, 1663; and the Charter of Georgia, 1732." *Id.*

100. The colonies, Virginia included, drafted and redrafted Charters for their protection and growth. *See, e.g.*, Ordinances for Virginia, 1621; Mayflower Compact, 1620; Petition of Right, 1628; The Charter of Massachusetts Bay, 1629; The Charter of Maryland, 1632; Act for the liberties of the people, 1639; Fundamental Orders of Connecticut, 1639; Massachusetts Body of Liberties, 1641; The Connecticut Code, 1650; The New Haven Code, 1656; Charter of Rhode Island, 1663; The Duke's Laws, 1664; Concessions and Agreements of West New Jersey, 1677; The New Hampshire Charter, 1680; Frame of Government of Pennsylvania, 1682; Pennsylvania Charter of Privileges, 1701. *See* RUTLAND, *supra* note 96, at 23-32; PERRY, *supra* note 31, at 47-260; Granucci, *supra* note 12, 860-63.

101. The Body of Liberties were adopted by the Massachusetts Bay Company on December 10, 1641, by the General Court. 1 Mass. Rec. 346. *See* THE LAWS AND LIBERTIES OF MASSACHUSETTS XI-XVI (Thomas G. Barnes ed., 1982).

102. The Body of Liberties was purportedly written by Reverend Nathaniel Ward of Ipswich. RUTLAND, *supra* note 96, at 25.

103. *Id.* In 1661, the Body of Liberties was expanded to articulate, in more detail than the 1641 version, the rights of the people to elect their public officials. *Id.* at 26.

104. *Id.* at 26.

105. *See supra* notes 30-93 and accompanying text.

106. RUTLAND, *supra* note 96, at 26.

trine.[107] Most of these charters were drafted prior to 1689, the year in which the English Bill of Rights was enacted.[108] The doctrine prohibiting excessive punishments was deeply rooted in the English Common Law,[109] not in English statutory law.[110] The charters were enacted to guarantee that the settlers would be afforded the same protections as their fellow subjects in England.[111] The more closely that the charters expressly advanced these goals by echoing the statutory guarantees of England, the stronger the assertion that the colonists were granted the statutorily unstated guarantees of the common law and common understanding of the law.[112] Therefore, that the excessive punishments doctrine was not expressly included in the colonial charters is evidence that the doctrine was implicitly embodied in the common law of the new world.[113]

The most significant precursor to, and influence on, the American Bill of Rights found in colonial history is the 1776 Constitution of Virginia.[114] Drafted by George Mason,[115] the Constitution of Virginia and its annexed Bill of Rights, were adopted in reaction to, and in support of, a circular letter sent by Massachusetts, which recited certain oppressions inflicted by the British Parliament.[116]

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107. *Contra* Granucci, *supra* note 12, at 861.

108. *See supra* note 100 for a partial list of these charters.

109. *See supra* notes 30-93 and accompanying text.

110. The statutory law addressing excessive punishments, cited in *supra* notes 30-93, was scarce in the scope of the 474 years of English history discussed. The statutes were cited as the only written history available to corroborate the thesis that the excessive punishments doctrine was deeply rooted in English legal understanding; they were not cited to assert that parliament considered it an important topic for statutory codification until the English Bill of Rights. *See supra* notes 30-93 and accompanying text.

111. *See supra* note 100 and accompanying text.

112. For a full text of many of these charters, *see* PERRY, *supra* note 31.

113. One author implies that the charters of the colonies did not provide any protections against excessive punishments because such provisions were not expressly made in the charters. Granucci, *supra* note 12, at 861.

114. PERRY, *supra* note 31, at 309; RUTLAND, *supra* note 96, at 33-48; *see also* Granucci, *supra* note 12, at 860-61; Schwartz & Wishingrad, *supra* note 19, at 816, 819-21.

115. George Mason was a "well-to-do planter of Fairfax County, Virginia." PERRY, *supra* note 31, at 302.

116. *Id.* at 301. The "Massachusetts Circular Letter" was approved by the Massachusetts General Court in 1768. The letter stated, in pertinent part:

> That in all free States the Constitution is fixed; & as the supreme Legislative derives its Power & Authority from the Constitution, it cannot overleap the Bounds of it, without destroying its own foundation; That the constitution ascertains & limits both Sovereignty and allegiance, &, therefore, his Majesty's American Subjects, who acknowledge themselves bound by the Ties of Allegiance, have and equitable Claim to the full enjoyment of the fundamental Rules of the British Constitution: That is an essential, unalterable Right, in nature, ingrafted into the British Constitution, as a fundamental Law, & ever held sacred & irrevocable by the Sub-

The Virginia Bill of Rights adopted, in whole, the provision of the English Bill of Rights prohibiting cruel and unusual punishments.[117] Thomas Jefferson, prominent in the Virginia legal community, in correspondence with Edmund Pendleton, the President of the Virginia Convention,[118] wrote:

> The fantastical idea of virtue and the public good being a sufficient security to the state against the commission of crimes, which you say you have heard insisted on by some, I assure you was never mine. It is only the sanguinary hue of our penal laws which I meant to object to. Punishments I know are necessary, and I would provide them, strict and inflexible, but *proportioned to the crime*. Death might be inflicted for murther and perhaps for treason if you would take out the description of treason all crimes which are not such in their nature. Rape, buggery & c. punish by castration, all other crimes by working on high roads, rivers, gallies & c. a *certain time proportioned to the offense*. But as this would be no punishment or change of condition to slaves . . . let them be sent to other countries. By these means we should be freed from the wickedness of the latter, and the former would be living monuments of public vengeance. Laws thus *proportionate* and mild should never be dispensed with.[119]

At the suggestion of the Continental Congress of May 10-15, 1776, the colonies began the process of the formation of systems of government.[120] Most of the conventions looked to the Virginian example and adopted Constitutions and Bills of Rights modeled on those adopted by Virginia.[121] Many of the resultant Bills of Rights contained provisions similar to Virginia's Section 9.[122] It is appropriate, therefore, to assume

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> jects within the Realm, that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent: That the American Subjects may, therefore, exclusive of any Consideration of Charter Rights, with a decent firmness, adapted to the Character of free men & subjects assert this natural and constitutional Right.

Id. at 276-77.

117. *Id.* at 312. The Virginia Constitution of 1776 provided in section 9: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

118. *See* DAVID JOHN MAYS, EDMUND PENDLETON 1721-1803 (1952).

119. Letter from Thomas Jefferson to Edmund Pendleton, August 26, 1776, *in* 1 THE PAPERS OF THOMAS JEFFERSON 490, 505 (J. Boyd ed., 1950) (cited in Schwartz & Wishingrad, *supra* note 19, at 817-18) (emphasis added).

120. PERRY, *supra* note 31, at 332.

121. *Id.* at 309.

122. *See supra* note 117 and accompanying text. *See, e.g.*, the Delaware Declaration of Rights ("SECT. 16. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."), PERRY, *supra* note 31, at 339; the Constitution of Maryland ("XIV. That sanguinary laws ought to be avoided, as far as is consistent with the safety of the State: and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter."), *id.* at 347; Constitution of North Carolina ("X. That excessive bail

that the provisions prohibiting[123] cruel and unusual punishments[124] in all constitutions subsequent to the Virginia Constitution, had the same understanding of the provision as the framers of the Virginia Constitution. It is appropriate also to assume that the understanding of the provision was the same in American Bills of Rights as it was in the English Bill of Rights.[125]

C. *The American Bill of Rights: 1791.*

The idea of a Federal Bill of Rights was not popular at the Constitutional Convention of 1787.[126] In fact, many attempts to add a Bill of Rights to the Constitution were defeated.[127] Those opposed to the Bill of Rights felt that it was not necessary, that the state bills of rights were enacted to protect the individual from imposition by the English monarchs, and since the United States was independent, the protection

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should not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."), *id.* at 355; the Constitution of Massachusetts ("XXVI. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."), *id.* at 377; the Constitution of New Hampshire ("XVIII. All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason . . . ."), *id.* at 384; the Northwest Ordinance ("All fines shall be moderate; and no cruel or unusual punishment shall be inflicted."), *id.* at 395.

123. Some of the constitutions use the language "ought not" and some, like the U.S. Constitution, use the language "shall not." Both of these uses are prohibitions, differing only in degree. *See supra* note 122.

124. Some of the constitutions use the phrase "cruel and unusual punishments," and some use the phrase "cruel or unusual punishments." If the words cruel and unusual each had independent legally technical significance, the difference would be more than trivial, but there is little empirical evidence that has considered the words to be important in their application individually. Therefore, the phrase "cruel and unusual" has the same legal meaning as the phrase "cruel or unusual." But see People v. Bullock, 485 N.W.2d 866 (Mich. 1992), in which the Michigan Supreme Court struck down under the Michigan Constitution the very statute under which Ronald Harmelin was sentenced to life without parole. The *Bullock* Court found that the Michigan language, "cruel or unusual," was more expansive than the language in the United States Constitution, "cruel and unusual." *See infra* note 204.

125. This assumption is appropriate in light of all the evidence presented herein. The English understanding of the laws and liberties of the subject were transported to the colonies with the colonists. These guarantees were codified in the colonial charters. *See supra* notes 95-113 and accompanying text. The understanding of these guarantees was perpetuated by learned men in the colonial and English Laws. *See supra* notes 102, 118, 121. The guarantees were then reasserted in a format against English oppression in the colonial constitutions, such understanding being preserved by recorded debate and correspondence of contemporary lawyers. *See supra* notes 114-22 and accompanying text. *But see* Granucci, *supra* note 12, at 860-65.

126. Schwartz & Wishingrad, *supra* note 19, at 826.

127. *Id.*

was no longer necessary.[128] Eventually, it was generally conceded that a Bill of Rights would be adopted.[129] The federalists were forced to endorse the Bill of Rights in order to retain a majority in the Congress.[130]

James Madison began the work of drafting the Bill of Rights for ratification.[131] Madison viewed the goals of a Bill of Rights as two-fold: 1) "to counteract the impulses of interest and passion [to restrain oppressive majorities]; and 2) to restrain arbitrary acts of a strong central government."[132] There is little recorded debate on the meaning of the Eighth Amendment.[133] Therefore, what little debate was recorded has been accorded heavy weight.[134] For example, in Massachusetts, the only recorded debate on the subject yielded a statement by Mr. Holmes that, due to the lack of a bill of rights, there was nothing to restrain the Federal Government from "inventing the most cruel and unheard of punishments, and annexing them to crimes."[135]

Patrick Henry, in lobbying for the addition of a Bill of Rights, asserted that the lack of a prohibition against the Federal Government in this respect would allow them to use as examples the torture prevalent in France, Spain and Germany at the time.[136]

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128. *Id.* at 826-27.

129. *Id.* at 829.

130. *Id.* The federalists, in order to retain their seats in Congress, had to promise in their campaigns to endorse a Bill of Rights. *Id.*; *see also* RUTLAND, *supra* note 96, at 194-221.

131. Schwartz & Wishingrad, *supra* note 19, at 829.

132. RUTLAND, *supra* note 96, at 197.

133. Schwartz & Wishingrad, *supra* note 19, at 830. The first Congress seemed concerned only that the phrase was vague, and that its meaning was uncertain. Granucci, *supra* note 12, at 842. That the provision was approved by a "considerable majority" is a strong indication that it was understood by the first Congress, and discussion of it was not necessary. *Id.* (quoting 1 ANNALS OF CONG. 782-83 (1789)).

134. *See, e.g.*, Harmelin v. Michigan, 111 S. Ct. 2680, 2693-96 (plurality opinion).

135. Schwartz & Wishingrad, *supra* note 19, at 828 n.214 (quoting *Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution*, January 30, 1788, *reprinted in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 111 (Jonathan Elliot ed., 1901).

136. *See* Granucci, *supra* note 12, at 841 (citing 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1881)):

> In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your [Virginia] declaration of rights. What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of

Patrick Henry's vehement complaint is not dispositive of his attitude, nor any of his peers', concerning the meaning of the words used in the Eighth Amendment. Viewed in an historical vacuum, such an inference may be the only one possible, but in light of the contemporaneous political atmosphere, his statement could be no more than a political convulsion.[137] The statement also supports the thesis that the common law understanding of the prohibition contained in the Eighth Amendment, as set out in part III.A of this Comment, should be attributed to the framers of the Bill of Rights.[138] That is, that the Eighth Amendment embodies the proportionality doctrine.

D. *The Supreme Court of the United States:* Wilkerson v. Utah to Solem v. Helm

The Supreme Court has shown nothing but confusion on the meaning of the Eighth Amendment. For its first century, the Court was virtually silent with regard to constitutional review of punishments.[139] Perhaps the silence was due to the relative silence of the Framers of the Constitution regarding the true meaning of the Amendment.[140] Perhaps the silence was due to the fact that the members of the Court believed that the Eighth Amendment only prohibited cruel and barbarous methods, or "modes" of punishment, as many commentators,[141] including the Chief Justice and Justice Scalia in *Harmelin v. Michigan*,[142] have hypothesized. The Court's silence could also be due to its uncertainty about its jurisdiction to enforce the Eighth Amendment against the states.[143] Consequently, this relative silence has perpetuated the

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strengthening the arm of government, that they must have a criminal equity and extort confessions by torture . . . .

137. The federalists, vehemently opposed to a bill of rights, feared it would weaken the central government to a point of incapacitation. The anti-federalists were lobbying ardently to obtain from the Federal Government guarantees of individual liberties already granted by most states. *See* THE FEDERALIST No. 85 (Alexander Hamilton); RUTLAND, *supra* note 96, at 194-221.

138. Patrick Henry entreats the Congress to adopt the common law, not the civil law (of France, Germany, and Spain). "But Congress may introduce the practice of civil law, in preference of that of the common law." 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1881), *reprinted in* Granucci, *supra* note 12, at 841 n.10.

139. Research for this article disclosed that between 1789 and 1878, fewer than five reported Supreme Court challenges were based on the Eighth Amendment.

140. *See supra* notes 133-35 and accompanying text.

141. *See, e.g.*, Granucci, *supra* note 12; *see also* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1896 (1970).

142. 111 S. Ct. 2680 (1991).

143. This very issue was raised by two early cases. In *In re* Kemmler, 136 U.S. 436 (1890), the Court was asked to apply the amendment against a state and prohibit it from executing, by electrocution, a convicted felon. *Id.* The Court held, unanimously, that the Eighth Amendment was not directly applicable to the states, neither through the privileges and immunities clause, nor through the due process

mystery of Eighth Amendment review, and bolstered the conservative inaction of the current members of the Court.[144] The history of the Court's Eighth Amendment review is not particularly enlightening, but it will be explored in order to lay a framework for the Court's current conundrum.

In its attempts to define the proper scope of Eighth Amendment review, the Supreme Court has consistently examined the Amendment's English origins.[145] This examination has caused the Court to vacillate between the interpretations ascribed to the language of the Amendment (that is, between proportionality and mode).[146]

In *Wilkerson v. Utah*,[147] drawing on William Blackstone's treatise on the meaning of the prohibition in the English Bill of Rights,[148] the Court interpreted the language to prohibit "punishments of torture, such as [where the prisoner was drawn or dragged to the place of execution, embowelled alive, beheaded and quartered, publicly dissected, or burned alive], and all others in the same line of unnecessary cruelty."[149] In *In Re Kemmler*,[150] the Court again indulged this interpretation, stating that "[p]unishments are cruel when they involve torture or

clause. *Id.* at 448-49; *see also* Joseph E. Browdy & Robert J. Saltzman, Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846, 857 (1961). Two years later, in O'Neil v. Vermont, 144 U.S. 323 (1892), the Court reexamined the question. The majority upheld the position stated in *Kemmler*, *Id.* at 332, but Justice Field dissented, implying that the privileges and immunities of being a citizen of the United States could otherwise be abridged by the states. *Id.* at 360-71 (Field, J., dissenting). *See also* Browdy & Saltzman, *supra*, at 857. For an analysis of *O'Neil*, see *infra* notes 153-55 and accompanying text. In Howard v. Fleming, 191 U.S. 126 (1903), the Court "mentioned the problem in passing, and seemed to regard it as an open question." Browdy & Saltzman, *supra*, at 857-58 (citing *Howard*, 191 U.S. at 136). In subsequent cases, until Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), the Court refused to apply the Eighth Amendment to the states. *See, e.g.*, Collins v. Johnston, 237 U.S. 502 (1915); 24 C.J.S. Criminal Law § 1178, 1186 n.78 (1941). In *Resweber*, a divided Court, without deciding on the question, applied the Eighth Amendment to a state action. *Resweber*, 329 U.S. at 462. The Court has never authoritatively announced that the Eighth Amendment is applicable against the states, but since *Resweber* it has not hesitated to impose its review upon the states. *See* Browdy & Saltzman, *supra*, at 858-59.

144. *See* Gregory Bassham, *Rethinking the Emerging Jurisprudence of Juvenile Death*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467, 468 (1991).

145. Schwartz & Wishingrad, *supra* note 19, at 789; Stanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 332 (1957).

146. *See* Bassham, *supra* note 144.

147. 99 U.S. 130 (1878). Here, the defendant was convicted of wilful, malicious, and premeditated murder. It was then ordered that the defendant be shot until dead. *Id.*

148. *See* Schwartz & Wishingrad, *supra* note 19, at 789; *supra* notes 66-74 and accompanying text.

149. 99 U.S. at 135-36.

150. 136 U.S. 436 (1890).

a lingering death; but the punishment of death is not cruel . . . [i]t [must] imply there something inhuman and barbarous, something more than the mere extinguishment of life."[151] The Court reviewed only the mode of the punishment.[152]

Two years later, the Court expanded their view of the Eighth Amendment.[153] In *O'Neil v. Vermont*,[154] three dissenters believed that the Eighth Amendment proscribed excessive punishments.[155] By 1910, eighteen years and six justices later, the majority had adopted the proportionality doctrine *en toto*.[156] In *Weems v. United States*,[157] the Court pronounced that a sentence of 15 years at hard labor, to be performed in chains, was disproportionate to the offense of making a false entry in government payroll books,[158] and was therefore barred by the Eighth Amendment.[159] "The crux of the Court's position can be stated as a condemnation of the state terrorism expressed through the threat of excessive terms of imprisonment."[160] The dissenters, Justices Holmes and White, "believed that they were being faithful to the interpretation of the English Puritans who had first drafted the cruel and unusual punishments clause in 1689."[161]

In *Louisiana ex. rel. Francis v. Resweber*,[162] the Court swung back to the interpretation which prohibited the mode of the punishment's infliction.[163] In interpreting the Eighth Amendment to prohibit only cruel

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151. *Id.* at 447; *see* Schwartz & Wishingrad, *supra* note 19, at 790.

152. Schwartz & Wishingrad, *supra* note 19, at 790.

153. Granucci, *supra* note 12, at 842.

154. 144 U.S. 323 (1892). In *O'Neil*, the defendant was convicted of the illegal sale of alcohol in Vermont. O'Neil filled 307 separate mail orders for liquor and was fined for each. When he could not pay the fines, he was sentenced to serve 54 years in prison. *Id.*

155. *Id.* at 340. *See* Granucci, *supra* note 12, at 842.

156. *See* Weems v. United States, 217 U.S. 349 (1910); *Granucci, supra* note 12, at 843.

157. *Weems*, 217 U.S. at 349.

158. *Id.* at 381-82. Like the sentence in Harmelin v. Michigan, 111 S. Ct. 2680, the sentence was mandatory.

159. *Weems*, 217 U.S. at 382.

160. Schwartz & Wishingrad, *supra* note 19, at 798. "In this regard, Justice McKenna writes: 'With power in a legislature great, if not unlimited . . . to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power?'" *Id.* (quoting Weems v. United States, 217 U.S. at 372-73). This view comports with that of the drafter of the Bill of Rights, James Madison, of the purpose of the amendments. *See supra* text accompanying note 131-32.

161. Granucci, *supra* note 12, at 843 (citing Weems v. United States, 217 U.S. 349, 389-90, 394-95 (1910) (White, J., dissenting)).

162. 329 U.S. 459 (1947).

163. Schwartz & Wishingrad, *supra* note 19, at 790-91.

> Mr. Justice Reed, in stating the opinion of the Court . . . pointed to the "traditional humanity of modern Anglo-American law [which] forbids the infliction of unnecessary pain in the execution of the death sentence."

and unusual methods of punishment, the court upheld the sentence of death by electrocution.[164] The Court did not find it necessary to mention the doctrine of proportionality in this case.[165] Therefore, while *Resweber* stands for the interpretation that prohibits modes of punishment, it does not stand in the way of an added interpretation prohibiting disproportionate punishments.

In *Trop v. Dulles*,[166] the penalty of denationalization for wartime desertion was struck down as a prohibited method of punishment.[167] The Court looked to the English Declaration of Rights for guidance and found that a punishment must be consistent with the "dignity of man."[168] As in *Resweber*, the *Trop* Court did not implicitly or explicitly discount the proportionality doctrine. In fact, Chief Justice Warren implicitly sustained the doctrine when he stated that "imprisonment and even execution may be imposed depending upon the enormity of the crime."[169] The Chief Justice actually applied proportionality review and found that, since death can be imposed for desertion, denationalization, being a lesser punishment, must not be excessive.[170]

A general confusion of issues is prevalent in the frequently cited case, *Robinson v. California*.[171] The appellant was convicted for the crime of addiction to the use of narcotics.[172] The Court invalidated the statute[173] since it punished a status, not an act.[174] The Court stated that it "would doubtless be universally thought to be an infliction of cruel and unusual punishment"[175] to impose a penalty upon someone for having a disease.[176] The confusion arises in the question of whether the person was being punished for a disease, or for a crime. The decision could stand for the proposition that having a disease is

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> [329 U.S. at 463] That "[p]rohibition against the wanton infliction of pain," [*id.*] he derived from the English Bill of Rights of 1689. "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment . . . ."

Id. at 464.

164. *Resweber*, 329 U.S. at 465-66. Willie Francis managed to survive the state's first attempt to execute him by electrocution and was challenging the state's issuance of a second death warrant. *Id.* at 460-61.

165. *See generally id.*

166. 356 U.S. 86 (1958).

167. *Id.* at 99.

168. *Id.* at 100.

169. *Id. Contra* Schwartz & Wishingrad, *supra* note 19, at 800 n.70.

170. *Trop*, 356 U.S. at 99.

171. 370 U.S. 660 (1962).

172. *Id.* at 660-61.

173. CAL. HEALTH & SAFETY CODE § 11721 (West 1964) (repealed 1972).

174. 370 U.S. at 666.

175. *Id.*

176. *Id.* at 666.

not a volitional act, and therefore an element of the crime is lacking;[177] or it could stand for the proposition that any penalty for the crime of having a disease is disproportionate and prohibited by the Eighth Amendment.[178]

The court next focused on capital punishment in its Eighth Amendment context. As the Court stated in *Coker v. Georgia*,[179] its decisions in *Furman v. Georgia*,[180] *Gregg v. Georgia*,[181] *Proffitt v. Florida*,[182] *Jurek v. Texas*,[183] *Woodson v. North Carolina*,[184] and *Roberts v. Louisiana*,[185] "settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; it is not inherently barbaric or an unacceptable mode of punishment for crime; neither is it always disproportionate to the crime for which it is imposed."[186] In *Coker*, the Court "firmly embrace[s]" the proportionality doctrine (at least for review of capital punishments).[187] In concluding that the death sentence is disproportionate to the offense of rape, the Court states that a rapist should not be "punished more heavily than the deliberate killer."[188] In other words, in comparison to the sentence for murder, the sentence of death for rape is disproportionate.[189]

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177. *See* JOSEPH G. COOK & PAUL MARCUS, CRIMINAL LAW § 1.02[B], 72-84 (2d ed. 1988).

178. *Robinson*, 370 U.S. at 667. Justice Stewart stated for the majority that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id. See also* Schwartz & Wishingrad, *supra* note 19, at 800-01.

179. 433 U.S. 584 (1977). In *Coker*, the Court was faced with the decision that it put off deciding in Gregg v. Georgia, 428 U.S. 153, 187 n.35 (1976), whether the death penalty is constitutional for crimes other than deliberate murder. *Coker*, 433 U.S. at 592. Namely, the *Coker* Court had to decide whether a person convicted of rape could be executed. *Id.*

180. 408 U.S. 238 (1972).

181. 428 U.S. 153 (1976).

182. 428 U.S. 242 (1976).

183. 428 U.S. 262 (1976).

184. 428 U.S. 280 (1976).

185. 428 U.S. 325 (1976).

186. Coker v. Georgia, 433 U.S. 584, 591 (1977).

187. *Id.* at 592.

188. *Id.* at 600.

189. But for cursory mention, and this footnote, this comment is avoiding the examination of capital punishments in relation to their review under the Eighth Amendment. It is undeniable that the Court has firmly embraced proportionality review under capital punishment schemes.

It is anomolous and counterintuitive to conclude that the Eighth Amendment embodies a proportionality doctrine for capital punishments, but not for imprisonment. Punishment by death persisted for hundreds of years as a favored scheme for even trivial offenses in England, and in the Colonies and the early history of the United States. *See supra* note 60. The prohibition of cruel and unusual punishments found in England, in the colonial charters, and in the United States Constitution has only one history. Historically, a punishment was a punishment, and the dichotomy between the death penalty and imprisonment has only emerged in this

Finally, after a few more years of resistance, the Court adopted the proportionality doctrine in non-capital cases. The test announced in *Solem v. Helm*,[190] was specifically rejected by the Court's earlier decisions in *Rummel v. Estelle*[191] and *Hutto v. Davis*.[192] Jerry Helm was sentenced under a South Dakota recidivist statute[193] providing a maximum penalty of life imprisonment without the possibility of parole.[194] The Court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."[195] The Court held further that Eighth Amendment proportionality analysis "should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for the commission of the same crime in other jurisdictions."[196]

III. STATEMENT OF THE FACTS

Early in the morning of October 12, 1986, Ronald Harmelin was pulled over by two police officers for failing to stop his car at a red light in Oak Park, Michigan.[197] He was eventually arrested for possession of

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century. Therefore, if the Court persists in interpreting the historical understanding of the Eighth Amendment to include a proportionality doctrine for capital punishment, it must include a proportionality doctrine for imprisonment.

190. 463 U.S. 277 (1983).

191. 445 U.S. 263 (1980). The Court in *Rummel* held that it did not violate the Eighth Amendment to "impose a life sentence, under a recidivist statute, upon a defendant who had been convicted, successfully, of fraudulent use of a credit card to obtain $80 worth of goods or services, passing a forged check in the amount of $28.36, and obtaining $120.75 by false pretenses." *Harmelin*, 111 S. Ct. at 2684 (Scalia, J.) (citing *Rummel*, 445 U.S. at 274).

192. 454 U.S. 370 (1982). In *Hutto*, the Court "rejected an Eighth Amendment challenge to a prison term of 40 years and $20,000 for possession and distribution of approximately nine ounces of marijuana." *Harmelin*, 111 S. Ct. at 2684-85.

193. S.D. CODIFIED LAWS ANN. § 22-7-8 (1979) (amended 1981).

194. S.D. CODIFIED LAWS ANN. § 24-15-4 (1979).

195. *Solem*, 463 U.S. at 290.

196. *Id.* at 292. See also *infra* notes 293-323 and accompanying text for a critical analysis of *Solem*.

197. People v. Harmelin, 440 N.W.2d 75, 77 (Mich. App. 1989). The defendant had been observed in the parking lot of the Embassy Motel at 2:45 A.M., 4:00 A.M., and again at 5:00 A.M. *Id.* After being stopped by the police cruiser and surrendering his driver's license, registration, and proof of insurance, the defendant volunteered that he had a pistol in an ankle holster and that he possessed a permit for the gun. *Id.* An officer observed several bulges in the defendant's coat. *Id.* The officers then conducted a pat-down of the defendant and found marijuana cigarettes. *Id.* The defendant was then arrested and searched. *Id.* A pouch was found in another coat pocket which contained percodan pills, three vials of white powder, and drug paraphernalia. *Id.* Ten small bags of white powder and a beeper were also found. *Id.*

marijuana.[198] The "defendant's car was impounded and an inventory search was conducted."[199] During the inventory search, the police discovered $2,900 in cash and 672.5 grams of cocaine in the trunk.[200] Harmelin was charged with violating section 7403 of the Michigan Controlled Substances Act, which provides that "[a] person shall not knowingly or intentionally possess a controlled substance."[201] Harmelin was convicted and sentenced to life in prison without the possibility of parole.[202] The appeal to the Supreme Court challenged section 7403[203] as violative of the Eighth Amendment's protection against cruel and unusual punishments.[204]

IV. *HARMELIN V. MICHIGAN*: ANALYSIS

Ronald Harmelin petitioned the Court to reverse his sentence of life in prison without the possibility of parole.[205] In a five to four plurality

198. *Id.*

199. *Id.* at 77-78.

200. *Id.* at 78. During the inventory search, a satchel containing a shaving bag was found in the trunk. *Id.* The shaving kit contained two bags in which was a large amount of white powder, subsequently found to be 672.5 grams of cocaine. *Id.*

201. MICH. COMP. LAWS ANN. § 333.7214(a)(iv) (West 1991). Cocaine is classified as a controlled substance in § 7214(a)(iv) of the Michigan Controlled Substances Act.

202. *See* People v. Harmelin, 440 N.W.2d 75 (Mich. App. 1989). In addition, Harmelin received a mandatory sentence of two years imprisonment under Michigan's felony-firearm statute. MICH. COMP. LAWS ANN. § 750.227b (West 1991).

203. [Section 7403] imposes a mandatory sentence of life in prison for possession of 650 grams or more of "any mixture containing [a schedule 2] controlled substance." MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West Supp. 1990-1991); § 333.7214(a)(iv) defines cocaine as a schedule 2 controlled substance. Section 791.234(4) provides eligibility for parole after 10 years in prison, except for those convicted of either first-degree murder or "a major controlled substance offense"; § 791.233b[1](b) [includes the violation of § 333.7403 in its definition of a "major controlled substance offense."]

Harmelin, 111 S. Ct. at 2684 n.1 (Scalia, J.).

204. The Michigan Court of Appeals initially set aside Harmelin's conviction on Fourth Amendment grounds. Upon reconsideration, that decision was reversed. People v. Harmelin, 440 N.W.2d 75, 78 (Mich. App. 1989). The Michigan Court of Appeals rejected the Eighth Amendment claim in one sentence. *Id.* at 80. The Michigan Supreme Court denied the Defendant leave to appeal, and the United States Supreme Court granted certiorari solely on the Eighth Amendment challenge. Harmelin v. Michigan, 110 S. Ct. 2559 (1990).

The Michigan Supreme Court has subsequently decided that the penalty of life without parole for simple possession constitutes cruel or unusual punishment under the Michigan Constitution. People v. Bullock, 485 N.W.2d 866 (Mich. 1992). The *Bullock* Court apparently based this finding on the fact that the Michigan Constitution uses the term "cruel or unusual" rather than "cruel and unusual." This holding is limited to mere possession, and has not been extended to controlled substance violations that involve an intent to distribute.

205. *See supra* notes 202-04 and accompanying text.

decision, the Court refused to overturn the sentence as cruel and unusual under the Eighth Amendment of the United States Constitution.[206] The following is a critical analysis of the reasoning behind the Court's denial, viewed both in light of the history of the Eighth Amendment, as set forth above, and in light of the doubtless future need for a workable standard of review.

The [E]ighth [A]mendment Contains No Proportionality Guarantee[207]

Justice Scalia, joined by Chief Justice Rehnquist, concluded in Parts I, II, III, and IV of his opinion that the Eighth Amendment contains no proportionality guarantee.[208] Justice Scalia wrote that, for any felony, " 'the length of the sentence imposed is purely a matter of legislative prerogative.' "[209]

Proportionality Review Should Be "Eviscerated"[210]

Justices Kennedy, Souter and O'Connor, concurring in the judgment, adduce that a determination must first be made whether the sentence imposed was disproportionate before applying proportionality review.[211] They conclude that "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."[212]

It Would Be Both Cruel and Unusual To Impose Any Punishment That Is Disproportionate

Justices White, Marshall, Stevens and Blackmun, in the dissenting opinion would uphold *Solem*.[213] Justice White states that it would be

206. *Harmelin*, 111 S. Ct. at 2701 (plurality opinion); U.S. CONST. amend. VIII.

207. *Harmelin*, 111 S. Ct. at 2686 (Scalia, J.).

208. *Harmelin*, 111 S. Ct. at 2684-2701 (Scalia, J.). Parts I, II, III, and IV of Justice Scalia's opinion will hereinafter be referred to as Justice Scalia's opinion or writing. Justice White's dissenting opinion, which was joined by Justices Blackmun and Stevens, directly rebuts Justice Scalia's. *Id.* at 2709-19 (White, J., dissenting). Therefore, the two opinions will be presented together, with further analysis following, in order to juxtapose the dissenting opinion.

209. *Id.* at 2684 (Scalia, J.) (quoting Rummel v. Estelle, 445 U.S. 263, 274 (1980)).

210. Justice White, in his dissenting opinion, believed that the concurring opinion eviscerated proportionality review. *Id.* at 2714 (White, J., dissenting).

211. *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring); *see also infra* notes 311-13 and accompanying text.

212. *Id.* at 2705 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S. at 288).

213. *Harmelin*, 111 S. Ct. at 2712 (White, J., dissenting). Justice Marshall authored a separate dissent, agreeing with Justice White, but reiterating his stand "that capital punishment is in all instances unconstitutional." *Id.* at 2719 (Marshall, J., dissenting). As one of Justice Marshall's last dissents, it deserves particular reverence. Justice Stevens, writing for himself and Justice Blackmun, also wrote a separate dissent agreeing with Justice White. Justice Stevens highlights the particular disparity between Michigan's sentence and any other for the same offense and comments that "the notion that this sentence satisfies any meaningful requirement of proportionality is itself both cruel and unusual." *Id.* at 2720 (Stevens, J., dissent-

unconstitutional to "impose any punishment that is grossly disproportionate to the offense for which the defendant has been convicted."[214]

A. *Stare Decisis*

Justice Scalia, concerned with the precedential value of the pronouncements of the Supreme Court, concludes that a decision contrary to *Solem v. Helm*[215] would not violate the doctrine of *stare decisis*.[216] In support, Justice Scalia points out that *Solem* was "scarcely an expression of clear and well accepted constitutional law."[217] Justice Scalia notes that "[the Court's] 20th-century jurisprudence has not remained entirely in accord with the proposition that there is no proportionality requirement in the Eighth Amendment, but neither has it departed to the extent that *Solem* suggests."[218] Justice Scalia points out that the case advocating the proportionality doctrine and welcoming it into the 20th century, *Weems v. United States*,[219] "did not produce a decision implementing such a [proportionality] requirement, either [in the Supreme Court] or in the lower federal courts, for six decades."[220]

Justice White strenuously disagreed with the proposal that proportionality is not embodied in the Court's 20th-century jurisprudence, stating that "[n]ot only is it undeniable that our cases have construed the Eighth Amendment to embody a proportionality component, but it is also evident that none of the Court's cases suggest that such a construction is impermissible."[221]

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ing). For a discussion of the *Solem* decision, see *supra* notes 190-96, *infra* notes 293-324.

214. *Id.* at 2709 (White, J., dissenting).

215. 463 U.S. 277 (1983). See *supra* notes 190-96, 293-323 and accompanying text for an analysis of *Solem*.

216. *Harmelin*, 111 S. Ct. at 2686 (Scalia, J.).

217. *Id.*

218. *Harmelin*, 111 S. Ct. at 2699 (Scalia, J.).

219. 217 U.S. 349 (1910); *see supra* notes 157-61 and accompanying text; *see Harmelin*, 111 S. Ct. at 2710-11 (White, J., dissenting).

220. *Harmelin*, 111 S. Ct. at 2700 (Scalia, J.). Justice Scalia states that "the proof of the pudding is in the eating." *Id.* His assertion is that proportionality, as announced in *Weems* was not used in the Federal Courts until Coker v. Georgia, 433 U.S. 584 (1977). See *supra* notes 179-89 and accompanying text for a discussion of *Coker*.

221. *Harmelin*, 111 S. Ct. at 2711 (White, J., dissenting). In support of this statement, Justice White cites to Solem v. Helm, 463 U.S. 277 (1983); Enmund v. Florida, 458 U.S. 782 (1982); Rummel v. Estelle, 445 U.S. 263 (1980); Coker v. Georgia, 433 U.S. 584 (1977); Gregg v. Georgia, 428 U.S. 153 (1976); Robinson v. California, 370 U.S. 660 (1962); Weems v. United States, 217 U.S. 349 (1910); and O'Neil v. Vermont, 144 U.S. 323 (1892).

Justice White points out the dual jurisprudential scheme that Justice Scalia has presented. *Id.* at 2712-13 (White, J., dissenting). See *supra* note 189 for a discussion of the dichotomous jurisprudential schemes (capital punishment versus imprisonment). In Rummel v. Estelle, 445 U.S. 263 (1980), the Court observed that death penalty cases are different in kind from all other sentences, and thus death

The Supreme Court's Eighth Amendment jurisprudence has been unclear.[222] Therefore, upholding *Solem* on grounds of *stare decisis* may be inappropriate. Rather, *Solem* should be upheld in principle as its jurisprudence clearly embodies what the law should be, in light of the history of the Amendment.[223]

B. *The Meaning of the English Bill of Rights*

Justice Scalia states that the arbitrary sentencing power exercised by Lord Chief Justice Jeffreys led to the English Declaration of Rights provision prohibiting cruel and unusual punishments.[224]

Justice Scalia relies heavily on the Trial of Titus Oates[225] and its contemporaneous explanations to support the notion that the English Bill of Rights prohibited only cruel and unusual modes of punishment.[226] Justice Scalia bases his reliance on the Titus Oates petition on three grounds: 1) that the House of Lords dissent did not embody a proportionality argument;[227] 2) that the House of Lords meant to exclude proportionality by interpreting the Titus Oates case as "contrary to Law and ancient practice;"[228] and 3) that the interpretation, if accurate, is dispositive of the whole of the contemporaneous English legal interpretation of the provision prohibiting cruel and unusual punishments.[229]

As to the first of these assumptions, the statements of the dissenters in the House of Lords can readily be interpreted to embody a proportionality argument. The dissenters stated that "there is no Precedent to warrant the Punishments of whipping and committing to Prison for Life, for the Crime of Perjury."[230] The words "for the Crime of Perjury," after the description of methods of punishments used regularly and readily in 1685,[231] points to the conclusion that the punishment,

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penalty eighth amendment jurisprudence is of limited utility in analyzing an Eighth Amendment imprisonment claim. *See supra* note 189.

222. *See supra* notes 139-96 and accompanying text.

223. *See* Solem v. Helm, 463 U.S. 277 (1983). The analysis proposed for proportionality review in *Solem* has many shortcomings, *see infra* notes 293-323 and accompanying text, but the doctrine of proportionality is well rooted in Anglo-Saxon Law. *See supra* part II.A. Justice White asserts in his dissent, "there is no justification for overruling or limiting *Solem*." *Harmelin*, 111 S. Ct. at 2716 (White, J., dissenting).

224. *Harmelin*, 111 S. Ct. at 2688 (Scalia, J.).

225. See *supra* notes 82-83 and accompanying text for an analysis of the trials of Titus Oates.

226. *Harmelin*, 111 S. Ct. at 2688-90 (Scalia, J.).

227. *See id.* at 2689 (Scalia, J.).

228. *Id.* at 2689-90 (Scalia, J.).

229. *See id.* at 2690 (Scalia, J.).

230. 1 Journals of the House of Lords 367 (May 31, 1689) *cited in Harmelin*, 111 S. Ct. at 2689 (Scalia, J.)).

231. *See* BLACKSTONE, *supra* note 60.

otherwise unimpeachable, would have to be considered in light of the crime for which it was imposed.[232]

It is clear that the House of Commons referred to the English Bill of Rights when it examined the sentence imposed upon Titus Oates.[233] It is equally evident, as Justice Scalia adeptly demonstrates, that the House of Commons' decision turned on the illegality of the sentence.[234] But, as was revealed by the sojourn into English legal history in Part II above,[235] the doctrine of excessive punishments and proportionality was deeply rooted in English common law,[236] as well as statutory law.[237] Therefore, disproportionate sentences were illegal.[238]

The *Titus Oates* case may very well have embodied the contemporaneous understanding of the prohibition against cruel and unusual punishments. If this were true, however, it is unfortunate that a dispositive interpretation laying to rest all ambiguities cannot be made from the available records.[239]

Next, in support of the contention that the English Bill of Rights did not contain a proportionality doctrine, Justice Scalia points out that "in 1791, England punished over 200 crimes with death,"[240] and two prominent commentators on English law never mentioned the cruel and unusual punishments clause.[241] There is little doubt that the standard of proportionality is evolving with the moral indignation felt for

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232. *Cf. supra* notes 81-93 and accompanying text.

233. " '[T]he Commons had hoped, [t]hat, after the Declaration [of Rights] . . . [the People of England] should not be subjected to *cruel and unusual Punishments*.' " *Harmelin*, 111 S. Ct. at 2689 (Scalia, J.) (quoting 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

234. *Id.* at 2689-90 (Scalia, J.).

235. *See supra* notes 30-93 and accompanying text.

236. *See supra* notes 30-93 and accompanying text.

237. *See supra* notes 30-93 and accompanying text. The proportionality doctrine has its statutory roots in the Magna Carta, promulgated, in part, as a result of the accepted liberties at the time of its drafting (1215). *See supra* notes 30-43 and accompanying text.

238. This contention is supported by Justice Scalia's statement that, in the common-law context, cruel and unusual punishments were contrary to law (implicit in the statement that "[w]renched out of its common-law context . . . the word 'unusual' could hardly mean 'contrary to law.' ") *Harmelin*, 111 S. Ct. at 2691 (Scalia, J.).

239. If, by analogy, the meaning of Eighth Amendment of the United States Constitution were to be reposed in any of the Supreme Court's early interpretations of it, the states would be free from its embrace. *See, e.g.*, In re Kemmler, 136 U.S. 436 (1890). *See also supra* note 143 and cases cited.

240. *Harmelin*, 111 S. Ct. at 2691 (Scalia, J.) (citing Woodson v. N. Carolina, 428 U.S. 280, 289 (1976)).

241. *Harmelin*, 111 S. Ct. 2691 (Scalia, J.). "It is notable that, during his discussion of English capital punishment reform, Stephen does not once mention the Cruell and Unusuall Punishments Clause, though he was certainly aware of it. Likewise, in his discussion of the suitability of punishments, Blackstone does not mention the Declaration. *Id.* (Scalia, J.) (citations omitted); *see also supra* notes 188, 220.

the institution of capital punishment.[242] This is as it should be.[243] Justice Scalia points out that James Fitzjames Stephen and William Blackstone, influential commentators, were silent on the subject of the cruel and unusual punishments clause.[244] This is peculiar, but not, in itself, proof of the absence of the doctrine.

C. *The Framers' Misinterpretation*

Concluding that the term "unusual" used in the English Bill of Rights meant "contrary to law,"[245] Justice Scalia reasons that this meaning could not have been transported into the American Bill of Rights because there were no federal common laws, at the time of its ratification, to which to be contrary.[246] Therefore, a "direct transplant of the English meaning to the soil of American constitutionalism would in any case have been impossible."[247] Admitting that unusual means contrary to law does not "wrench[]" the term out of context.[248] The meaning assigned to the term by Justice Scalia is "contrary to law"[249] not "contrary to common-law." Therefore, the term does not have to be "[w]renched out of its common-law context,"[250] it can remain within the common law context. It is true that in 1791, there was no federal common law, but the Bill of Rights was intended to persist long after the day of its ratification.[251] This point can be applied, with equal meaning, to other constitutional provisions.[252]

Moreover, Justice Scalia asserts that, applied to the actions of the legislature, "the word 'unusual' could hardly mean 'contrary to

242. *See* Coker v. Georgia, 433 U.S. 584 (1977).

243. The dangers of capital punishment, without subjecting the debate to personal morality, are displayed by the current debate. That there is heightened sensitivity for issues involving execution is hardly a debatable issue. This heightened sensitivity erupts into moral indignation, as defined here, that indignation is displayed equally by advocates, as by opponents of capital punishment.

244. *Harmelin*, 111 S. Ct. at 2689 (Scalia, J.).

245. *Id.* (Scalia, J.).

246. *Id.* (Scalia, J.).

247. *Id.* (Scalia, J.).

248. *Id.* (Scalia, J.).

249. *Id.* (Scalia, J.).

250. *Id.* (Scalia, J.).

251. *See generally* RUTLAND, *supra* note 96.

252. Other provisions in the Bill of Rights can be traced, with almost parallel history, through the English Bill of Rights, back to the Magna Carta, just as has been done here for the Eighth Amendment. In the context of these amendments, it has never been suggested that the drafters wanted to depart from the meaning attributed to them by centuries of common law and affix to them new, and different meaning. *See, e.g.*, U.S. CONST. amends. V-VII, IX. The Seventh Amendment refers specifically to the rules of common law. If this Amendment were to have any meaning at the time of its ratification, the common law meaning for these suits must have been transplanted from somewhere. U.S. CONST. amend. VII.

law.' "[253] In other words, the Eighth Amendment could not prohibit acts of the legislature contrary to law. But, "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[254] not the legislature, and a pronouncement that the legislature has acted contrary to the law would not be novel in Supreme Court jurisprudence.[255] That the constitution would enumerate a guarantee, to be enforced by the Court, against unlawful acts of legislatures is also not novel, and comports directly with the purpose of the Bill of Rights envisioned by its drafters. One of those purposes was to restrain arbitrary acts of a strong central government.[256] Surely the strong central government that they feared was the legislature, not the judiciary.[257]

Justice Scalia continues by resorting to Webster's definition of unusual to support the notion that the term only forbids the "[l]egislature from authorizing certain 'modes' of punishment."[258] Justice Scalia assumes that this is the meaning that the framers must have attributed to the word unusual, since it had no legal meaning (per his reasoning above). The framers of the Bill of Rights were not novices at the law,[259] and without evidence to the contrary, words in the Bill of Rights probably imparted to the framers their common legal meaning, not their common meaning found in Webster's Dictionary thirty-seven years later.[260]

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253. *Harmelin*, 111 S. Ct. at 2691 (Scalia, J.).

254. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). As Justice White notes, "the suggestion that a legislatively mandated punishment is necessarily 'legal' is the antithesis of the principles established in Marbury v. Madison." *Harmelin*, 111 S. Ct. at 2713 (White, J., dissenting).

255. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). "[A] legislative act contrary to the constitution is not law . . . . [A]n act of the legislature repugnant to the constitution, is void." *Id.* at 177.

256. James Madison, the drafter of the Bill of Rights, believed this to be one of the major goals of the Bill of Rights. *See supra* notes 130-32 and accompanying text.

In his work, Democracy and Distrust, Professor John Hart Ely pondered the constitutionality of a hypothetical statute prohibiting gall bladder operations. He concluded that the statute could not pass, and that if it did, it would be repealed and the representatives who passed it would be impeached.

Professor Ely concluded that "It is an entirely legitimate response to the gall bladder law to note that it couldn't pass and refuse to play any further." In fact, he continued, "it can only deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted, since constitutional law appropriately exists for the situations where representative government cannot be trusted, not those where we know it can." JOHN HART ELY, DEMOCRACY AND DISTRUST 183 (1980).

257. *See Harmelin*, 111 S. Ct. at 2714 (White, J., dissenting) ("[I]t is as much our duty to assess the constitutionality of the punishments enacted by state legislative bodies as it is our obligation to review congressional enactments.").

258. *Id.* at 2691 (Scalia, J.) (quoting Websters 1828 edition: " 'such as [does not] occu[r] in ordinary practice' "; Webster's 2d International: " '[s]uch as is [not] in common use' ").

259. *See generally* RUTLAND, *supra* note 96; PERRY, *supra* note 31.

260. *Harmelin*, 111 S. Ct. at 2691 (Scalia, J.).

Justice Scalia concedes that the cruel and unusual punishments clause tracks the English Bill of Rights[261] and the Virginia Bill of Rights.[262] Justice Scalia contends that, notwithstanding the incorporation of the language of those documents, the Framers of the Constitution and the American Bill of Rights misunderstood the language of the Amendment.[263] Contrary to Justice Scalia's opinion, it is clear that at least some prominent and influential lawmakers at the time of the drafting of the Eighth Amendment understood the prohibition of the words of the Amendment (namely, Thomas Jefferson and Edmund Pendleton.)[264]

D. *The Framers' Understanding*

Justice Scalia outlined his interpretation of the framers' understanding of the Eighth Amendment. The rationale developed by Justice Scalia condenses statutory construction and historical analysis which efficiently corrals the analysis to the conclusion that proportionality was not intended by the framers. First, Justice Scalia reasons that the framers could have used the word "disproportionality" and because they did not, proportionality must not have been intended.[265] In support of this reasoning, Justice Scalia cites examples of when the language of proportionality was used.[266]

According to Justice White, in his dissenting opinion, the absence of the specific words of proportionality does not exclude the doctrine, but rather "could reasonably be construed to include it."[267] In a lengthy footnote, Justice Scalia rebuts Justice White's reasoning.[268] In his rebuttal, Justice Scalia urges that the court's "task is not merely to identify various meanings that the text 'could reasonably' bear, and then impose the one that from a policy standpoint pleases [it] best. Rather, [the court is] to strive as best [it] can to select from among the various 'reasonable' possibilities *the most plausible* meaning."[269]

To Justice Scalia, the absence of the explicit words of proportionality used, for example, in the state constitutions of some states, and the

261. *See supra* notes 66-93 and accompanying text.
262. *See supra* notes 114-25 and accompanying text.
263. *Harmelin*, 111 S. Ct. at 2687, 2691 (Scalia, J.).
264. *See* Thomas Jefferson's letter to Edmund Pendleton, President of the Virginia Convention, *supra* notes 118-19 and accompanying text.
265. *Harmelin*, 111 S. Ct. at 2692 (Scalia, J.).
266. *Id.* (Scalia, J.). Justice Scalia cites to a "Bill for Proportioning Punishments" introduced by Thomas Jefferson, and defeated in the Virginia Legislature. *Id.* (Scalia, J.). He also cites to provisions in the Pennsylvania, South Carolina, Ohio, and New Hampshire constitutions which use words that are more clearly meant to convey the existence of a proportionality doctrine. *Id.* (Scalia, J.).
267. *Id.* at 2710 (White, J., dissenting).
268. *Id.* at 2692 n.6 (Scalia, J.).
269. *Id.* (Scalia, J.).

fact that the framers had access to these constitutions,[270] is dispositive that the doctrine, if intended, would have been presented in a way that was not "exceedingly vague and oblique."[271] Such an assumption turns on its head accepted standards of constitutional and statutory construction.[272] The words of the Amendment, "Cruel and Unusual," are identical to the words used in the English Bill of Rights of 1689.[273] Justice Scalia advocates an interpretation which would be contrary to the common understanding and usage of the words as used by the English Bill of Rights.[274] Such an interpretation would mean that the framers of the American Bill of Rights meant to change the legal understanding of these words when they were transported from English common-law (and the English Bill of Rights) into the Eighth Amendment.[275]

One cannot infer from the framers' silence that they intended to effect such a change.[276] Rather, their silence convincingly implies the framers' intent to transplant the English meaning, embodying the proportionality doctrine, directly into the Eighth Amendment.[277]

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270. *Id.* at 2692 n.7 (Scalia, J.).

271. *Id.* at 2692 (Scalia, J.).

272. *See* 3 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 61.02, at 81 (5th ed. 1992) ("An interpretation which preserves rights or benefits enjoyed under the common law is favored . . . .").

273. *Id.* at 2710 n.1 (White, J., dissenting). This assumption is appropriate in light of all the evidence presented herein. The English understanding of the laws and liberties of the subject were transported to the colonies with the colonists. These guarantees were codified in the colonial charters. *See supra* notes 96-113 and accompanying text. The understanding of these guarantees was perpetuated by men learned in the colonial and English Laws. *See supra* notes 101, 118, 121. The guarantees were then reasserted in a format against English oppression in the colonial constitutions, such understanding being preserved by recorded debate and correspondence of contemporary lawyers. *See supra* notes 113-121 and accompanying text. *But see* Granucci, *supra* note 12, at 860-65.

274. *Harmelin*, 111 S. Ct. at 2710 n.1 (White, J., dissenting).

275. *Id.* (White, J., dissenting).

276. *Id.* (White, J., dissenting).

277. *See id.* at 2710 & n.1 (White, J., dissenting). It is important to note, in interpreting the language of the Eighth Amendment, that imprisonment was an historically novel form of punishment. Schwartz & Wishingrad, *supra* note 19, at 835.

> In earlier eras imprisonment was mainly a period in limbo, a way-station in the legal process where the suspected offender looked forward to the hangman's noose or the lash. As late as 1771 the French jurist Jousse could claim that imprisonment was simply a means of holding the suspected criminal before trial and not a method punishment; and not until the 19th century did imprisonment achieve its present eminence as a major penal sanction.

GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES xi (1958).

Imprisonment has been assigned as a "punishment" under Eighth Amendment review, rather than as an "amercement" or "fine." It can equally be hypothesized that imprisonment as penal sanction evolved from the imposition of fines, not from the imposition of physical punishments. This is a plausible explanation because

Second, Justice Scalia argues that because there were no previously defined crimes to which a punishment need be proportional, "it would seem quite peculiar to refer to cruelty and unusualness *for the offense in question*."[278] This reasoning assumes that the framers did not have the foresight to anticipate that the new government would define "new and peculiarly national [offenses],"[279] and therefore a need would arise for the new Bill of Rights to protect the individual from over-zealous lawmakers.[280] Also, as pointed out by Justice White, "the people of the new Nation had been living under the criminal law regimes of the States, and there would have been no lack of benchmarks for determining unusualness."[281] If such an interpretation were adopted, it would make many modern interpretations of the Eighth Amendment, as well as the balance of the Bill of Rights, nugatory, as none would have had laws to which to be applied; this includes many interpretations of other amendments expounded by Justice Scalia himself.[282]

Justice Scalia interprets, as conclusive, that certain mentions of cruel modes of punishments in the state ratifying conventions (noting the lack of a bill of rights) include only "modes" of punishment, and excludes proportionality.[283] It is clear from the passages of the conven-

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those who were subject to penal fines, when they could not be paid, would be imprisoned until they could pay. It is also relevant that fines and imprisonment are interchangeable, subject to a sentencing judge's discretion, as penal sanctions in most criminal statutes.

If imprisonment as an institution did grow out of fines, rather than out of punishments, the words of the Eighth Amendment would clearly and undeniably impose the doctrine of proportionality upon terms of imprisonment. The Amendment clearly states that "excessive fines [shall not be] imposed." U.S. CONST. amend. VIII. Justice Scalia agrees, as do the other justices, that "excessive fines" meant disproportionate fines. See *Harmelin*, 111 S. Ct. at 2693, n.9 (Scalia, J.).

278. *Harmelin*, 111 S. Ct. at 2693 (Scalia, J.).

279. *Id.*

280. *See* RUTLAND, *supra* note 96, at 197. James Madison, the framer of the Bill of Rights, viewed the goals of a Bill of Rights as two-fold: 1) "to counteract the impulses of interest and passion [(that is, to restrain oppressive majorities)]; and 2) to restrain arbitrary acts of a strong central government." *Id.*

281. *Harmelin*, 111 S. Ct. at 2710 (White, J., dissenting).

282. *Id. See, e.g.*, United States v. Stanley, 483 U.S. 669, 685 (1987) (Fourth and Fifth Amendments); Anderson v. Creighton, 483 U.S. 635, 664 (1987) (Fourth Amendment).

283. *Harmelin*, 111 S. Ct. at 2693 (Scalia, J.). Justice Scalia cites the Granucci article, *supra* note 12, at 842, and other articles, Charles W. Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummell*, 71 J. CRIM. L. & CRIMINOLOGY 378, 378-382 (1980) and B. Welling & L.A. Hipfner, *Cruel and Unusual?: Capital Punishment in Canada*, 26 U. TORONTO L.J. 55, 61 (1976), to bolster this argument. *Harmelin*, 111 S. Ct. at 2693 (Scalia, J.). He uses as examples the 1788 Massachusetts Convention:

> [T]he objection was raised that Congress was "nowhere restrained from inventing the most *cruel and unheard-of* punishments, and annexing them to crimes; and there is no constitutional check on [it], but that *racks* and *gibbits* may be amongst the most mild instruments of [its] discipline."

tions cited, as Justice Scalia asserts, that the state delegates were concerned with modes of punishments. It is even a plausible interpretation that those delegates understood the provisions of their state constitution's limiting fines and punishments only pertained to modes of punishments. However, in light of the overwhelming history of the cruel and unusual punishments clause, interpreting these soliloquies as dispositive of the colonial understanding of the clause ignores the political and historical context vital in constitutional interpretation.[284]

Political rhetoric can be found supporting almost any position.[285] It is the political rhetoric, analyzed within a faithful interpretation of its historical context, that provides an accurate snapshot of societal understanding. Attaching a Bill of Rights to the federal constitution was vehemently opposed by the Federalists, and advocated by the Anti-federalists with equal intensity.[286] Ratification debates, therefore, were not sterile polemics of reason and logic, but rather were contests of intuition and emotion. Debates of the early state legislatures and the Congress are important in judicial interpretation of the framers' intent, but scattered examples fall short of revealing pervasive political understanding, especially when the examples are contrary to other evidence of contemporary understanding.[287]

Proportionality inherently involves the balancing of the social impacts of a crime with those of its punishments.[288] Balancing tests dealing with emotional issues, such as punishment, are subject to social

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Id. (Scalia, J.) (quoting 2 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1984)); and the Virginia Convention:

> "What says our [Virginia] Bill of Rights? — 'that excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' "
>
> . . .
>
> "In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment."

Id. at 2693-94 (Scalia, J.) (quoting 3 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (2d ed. 1984)).

284. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). It is impossible to interpret the words of the framers, and of the early jurists in a vacuum. The political dissension from the early days of the revolution was intense. *See, e.g.*, THE FEDERALIST No. 10 (James Madison); GEOFFREY R. STONE, *et al.*, Constitutional Law 5-7, 25-26 (1986).

285. *See generally* AMERICAN DISSENT FROM THOMAS JEFFERSON TO CESAR CHAVEZ: THE RHETORIC OF REFORM AND REVOLUTION 1-30 (Thomas E. Hatchey & Ralph E. Weber eds., 1981).

286. THE FEDERALIST No. 85 (Alexander Hamilton); RUTLAND, *supra* note 96, at 194-221.

287. *See supra* notes 30-196.

288. *See* Solem v. Helm, 463 U.S. 277, 288 ("(i) the gravity of the offense and the harshness of the penalty").

development. "The Court . . . has recognized that a punishment may violate the Eighth Amendment if it is contrary to the 'evolving standards of decency that mark the progress of a maturing society.' "[289] Justice Scalia argues that the proportionality doctrine must not have been contemplated by the First Congress because it "punished forgery of United States securities, 'run[ning] away with [a] ship or vessel, or any goods or merchandise to the value of fifty dollars,' treason, and murder on the high seas with the same penalty: death by hanging."[290] Justice Scalia further argues that "the law books of the time are devoid of indication that anyone considered [the law] disproportiona[te]."[291]

289. *Harmelin*, 111 S. Ct. at 2712 (White, J., dissenting) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). See *supra* notes 166-70 for an analysis of *Trop*. The modern justification for imprisonment and other modes of punishment, both as espoused by the legal community and the sociopsychological community has not been static. It can hardly be said that the same justifications and tolerance for punishment exists today as existed in 1791; nor can it be said that the same justifications and tolerance existed in 1791 as in medieval times.

290. *Harmelin*, 111 S. Ct. at 2694 (Scalia, J.) (quoting 1 Stat. 114 (1790)).

291. *Id.* (Scalia, J.). Justice Scalia also cited to passages of legal commentators of the 19th century that gave examples of cruel and unusual modes of punishment that they interpreted were barred by the Eighth Amendment (JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (2d ed. 1840); BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN, 186 (1832); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 10-11 (1827); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1896 (1833)). *Harmelin*, 111 S. Ct. at 2694-95 (Scalia, J.). Conspicuous about these works is that they all were published between the years 1827-1840. Also, even if these commentators believed the Eighth Amendment prohibited certain modes of punishment, it is not conclusive that they believed that prohibition was exclusive of proportionality. As Justice White points out, Benjamin L. Oliver, cited by Justice Scalia, apparently did interpret the Eighth Amendment to include a proportionality doctrine:

> No express restriction is laid in the constitution, upon the power of imprisoning for crimes. But, as it is forbidden to demand unreasonable bail, which merely exposes the individual concerned, to imprisonment in case he cannot procure it; as it is forbidden to impose unreasonable fines, on account of the difficulty the person would have paying them, the default of which would be punished by imprisonment only, it would seem, that imprisonment for an unreasonable length of time, is also contrary to the spirit of the constitution. Thus in cases where the courts have a discretionary power to fine and imprison, shall it be supposed, that the power to fine restrained, but the power to imprison is wholly unrestricted by it? In the absence of all express regulations on the subject, it would surely be absurd to imprison an individual for a term of years, for some inconsiderable offence, and consequently it would seem, that a law imposing so severe a punishment must be contrary to the intention of the framers of the constitution.

Harmelin, 111 S. Ct. at 2710 (White, J., dissenting) (quoting BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 185-86 (1832)).

If, in fact, they convey the popular understanding at the time, these 13 years must be poised against 700 years of history and commentators supporting the doctrine of proportionality. *See supra* notes 30-138.

This reasoning simply confirms the fact that social standards of morality, and justification and tolerance of punishment naturally develop over time. Justice Scalia admits that "in 1791, England punished over 200 crimes with death."[292] That the United States Congress decided to impose severe punishments comports with the contemporary proportionality of England. Therefore, that is not evidence that the doctrine was not embraced by the First Congress.

E. *A Meaning for Our Time*

1. The *Solem* test

The Court last debated the proper role of the Eighth Amendment in *Solem v. Helm*.[293] *Solem* involved an Eighth Amendment challenge to a sentence of life imprisonment without the possibility of parole.[294] The sentence was imposed as a result of respondent Jerry Helm's guilty plea to a charge of uttering a "no account" check.[295] Under normal circumstances, the maximum penalty for uttering a "no account" check in the state of South Dakota would have been five years imprisonment in the state penitentiary and a $5,000 fine.[296] Due, however, to six prior convictions,[297] Helm was subject to the South Dakota recidivist statute.[298] All seven of Helm's convictions were characterized by the court as "nonviolent."[299] Helm sought a writ of habeas corpus, charging that his sentence violated the Eighth Amendment as it was greatly disproportionate to his crime and therefore was "cruel and unusual."[300] The Supreme Court affirmed the Eighth Circuit Court of Appeals' decision to reverse the District Court's denial of habeas relief to Solem.[301]

The court held that as a matter of principle, a criminal sentence

292. *Harmelin*, 111 S. Ct. at 2691 (Scalia, J.).
293. 463 U.S. 277 (1983).
294. *Id.* at 282.
295. *Id.* at 281, 282.
296. S.D. CODIFIED LAWS ANN. § 22-6-1(6) (1967 & Supp. 1978) (now codified at S.D. CODIFIED LAWS ANN. § 22-6-1(7) (Supp. 1988)).
297. "In 1964, 1966, and 1969 Helm was convicted of third-degree burglary. In 1972 he was convicted of obtaining money under false pretenses. In 1973 he was convicted of grand larceny. And in 1975 he was convicted of third-offense driving while intoxicated." *Solem*, 463 U.S. at 279-80 (footnotes omitted).
298. S.D. CODIFIED LAWS § 22-7-8 (1979) (codified as amended at S.D. CODIFIED LAWS § 22-7-8 (1988)). The recidivist statute provides in relevant part: "When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." *Id.* The maximum penalty for a Class 1 felony was life imprisonment and a $25,000 fine. S.D. COMP. LAWS ANN. § 22-6-1(2) (1967 & Supp. 1978) (now codified at S.D. COMP. LAWS § 22-6-1(3) (1988)). Once sentenced to life imprisonment, parole was unavailable. S.D. CODIFIED LAWS § 24-15-4 (1979).
299. *Solem*, 463 U.S. at 280.
300. *Id.* at 283.
301. *Id.* at 283-84.

must be proportionate to the crime for which the defendant has been convicted.[302] The court then outlined the three factors that should act as objective guidance for proportionality review.[303]

2. *Criticisms of Solem*

Although the test announced in *Solem* provides some "objective factors" to guide courts in their proportionality analysis,[304] the test is not without its plausible criticisms.[305]

(i) The gravity of the offense and the harshness of the penalty[306]

As to the first factor, Justice Scalia noted that with regard to sentencing statutes, there is "enormous variation — even within a given age, not to mention across the many generations ruled by the Bill of Rights."[307] His reaction is to throw his hands in the air, and exclaim, "[w]ho are we to say [how grave the offense is]?"[308] "The members of the [state] [l]egislature[s], and not [the members of the court], know the situation on the streets of Detroit."[309] While it is true that the Michigan legislature is in a better position to assess the deterrent force of its sentencing schemes, it is the judiciary's job to determine if the legislature has exceeded its constitutional boundaries. The Michigan Legislature knows and understands the facts and the causes, and may have socio-criminological solutions, but it is the judiciary that is obligated to "assess the constitutionality of the punishments enacted by state legislative bodies."[310]

Justice Kennedy writes that, before a determination can be made whether to use the objective factors in *Solem* to measure proportionality, a determination must be made whether the sentence imposed was grossly disproportionate. This oxymoron is stated more epigrammatically by Justice Kennedy: "[I]ntra- and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality . . . . The proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime."[311] Thus, a judge must first

302. *Id.* at 290; *see supra* note 195 and accompanying text.
303. *Id.* at 292; *see supra* note 196 and accompanying text; *supra* note 5.
304. *Solem*, 463 U.S. at 290-91.
305. *See Harmelin*, 111 S. Ct. at 2697-98 (Scalia, J.); 2707 (Kennedy, J., concurring). See *infra* Part V for a discussion of alternatives to the *Solem* factors.
306. *Solem*, 463 U.S. at 292.
307. *Harmelin*, 111 S. Ct. at 2697 (Scalia, J.).
308. *Id.* at 2698 (Scalia, J.).
309. *Id.* (Scalia, J.).
310. *Harmelin*, 111 S. Ct. at 2713-14 (White, J., dissenting).
311. *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring).
A court is not expected to consider the interaction of [the two elements of the first prong in the *Solem* test] and determine whether 'the sentence im-

conclude that the sentence is disproportionate, and then the objective analysis is applied to substantiate that conclusion. Consequently, Justice Kennedy concludes that "[c]omparative analysis of [Harmelin's] sentence with others in Michigan and across the Nation need not be performed."[312]

> (ii) The sentences imposed on other criminals in the same jurisdiction.[313]

Justice Scalia points out an inherent problem with the second *Solem* factor. The sentence cannot be compared with others in the jurisdiction because there is no objective standard by which to determine that one crime is comparable to another. Justice Scalia states that "[o]ne cannot compare the sentences imposed by the jurisdiction for 'similarly grave' offenses if there is no objective standard of gravity . . . what follows is not that the harsher penalty is unconstitutional, but merely that the legislature does not share the judges' view that the offenses are similarly grave."[314] When applying this factor, a judge may inadvertently replace the legislature's judgment as to the societal apprehension of a certain crime, with his or her own.

> (iii) The sentences imposed for commission of the same crime in other jurisdictions.[315]

Justice Scalia writes that the character of the sentences imposed by other States for the same crime "has no conceivable relevance to the Eighth Amendment."[316] In support, he asserts that, in fact, some states criminalize behavior that other states have not made criminal at all.[317] The *Solem* factors are meant to give empirical weight to the validity or invalidity of a punishment. What other states are doing provides

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> posed was grossly excessive punishment for the crime committed.' Were a court to attempt such an assessment, it would have no basis for its determination that a sentence was—or was not—disproportionate, other than the 'subjective views of individual [judges],' which is the very sort of analysis our Eighth Amendment jurisprudence has shunned.

Id. at 2715 (White, J., dissenting) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion)).

312. *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring).

313. *Solem*, 463 U.S. at 292.

314. *Harmelin*, 111 S. Ct. at 2698 (Scalia, J.). But in *Rummel v. Estelle*, the Court noted that it was critical that the "Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices." *Rummel*, 445 U.S. at 275; *see also* Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.").

315. *Solem*, 463 U.S. at 291-92.

316. *Harmelin*, 111 S. Ct. at 2698 (Scalia, J.).

317. *Harmelin*, 111 S. Ct. at 2699 (Scalia, J.): "[F]or example, [some states may criminalize] the killing of endangered wild animals for which other States are offering a bounty."

a picture of societal norms. A picture of Thomas Jefferson, for example, is not in fact Thomas Jefferson, but by viewing the picture, one is better able to perceive what Jefferson might have looked like in person. By analogy, a picture of the punishments imposed in other jurisdictions is not conclusive of the Nation's evolving standards of decency, but by viewing this data, one is better able to perceive those standards of decency.

Society must find some way to express its views. In *Rummel,* the Court believed that it was "competent to judge the gravity of an offense" just as a legislature must "in the first instance."[318] The dissent warned that the majority opinion could mean "that a sentence is unconstitutional if it is more severe than five Justices think appropriate. In short, all sentences of imprisonment are subject to appellate scrutiny to ensure that they are 'proportional' to the crime committed."[319] The issue is whether a punishment in the circumstances of a case is contrary to "evolving standards of decency that mark the progress of a maturing society."[320] The crucial question, therefore, is what enables a court to overrule society's expression of its "standard of decency," communicated through its legislature. The courts must be mindful of imposing a different standard than that imposed by legislation in light of the fact that, " 'those institutions which the Constitution is supposed to limit' include the Court itself."[321] The Court has reasoned that its role is not to create an evolving standard of decency but rather to discover what it is.[322]

A problem with judicial review of whether sentence terms fall within "standards of decency" under a proportionality review, is that the test is a one-way ratchet. This is true, despite Justice Rehnquist's observations in *Rummel* that while all would, of course, "like to think that we are 'moving down the road toward human decency'. . . . [W]e have no way of knowing in which direction that road lies."[323] That the ratchet can only turn one way is compelled after an analysis of other penalties within the State and penalties from other States.

The sense of society as to the decency of a particular punishment for a class of criminal conduct sometimes turns the other way, becoming more harsh. *Solem v. Helm* prevents a State from becoming a leader in this regard, because then it will fail a proportionality review when compared with other States, and when compared with the view of the judiciary as to the seriousness of the crime, at least where that view

318. *Solem*, 463 U.S. at 292.
319. *Id.* at 305.
320. Stanford v. Kentucky, 492 U.S. 367, 369 (1989).
321. *Id.* at 379.
322. *Id.*
323. Rummel v. Estelle, 445 U.S. 263, 283 (1980) (citing Furman v. Georgia, 408 U.S. 238, 410 (1972)).

differs from that of society (as expressed through its elected representatives).

V. Conclusion

Concluding that proportionality is embodied in the Eighth Amendment, a workable standard must be devised to apply the doctrine. The following proposed modification of the *Solem* factors may resolve some of the inherent problems. A court, in assessing whether a punishment was proportional to the crime for which the defendant was convicted must consider the following:

(i) The gravity of the offense and the harshness of the penalty:
   1. Does the offense inherently, or has it in the manner of its commission caused imminent threat to the life or liberty of others?
   2. Does the harm to the individual offender enduring the sentence imposed, bear a reasonable relationship to the harm suffered by the victim, or by society or both?
   3. Does the sentencing authority have a compelling reason to believe that the sentence will abate the commission of the crime, either by this offender, or by others deterred by the threat of such a punishment as has been imposed?
   4. Has the frequency, severity, or manner of commission of the offense increased or decreased the likelihood of causing an imminent threat to life or liberty of others?
   5. If the harshness of the penalty has increased, does the sentencing authority have a compelling reason to believe that the frequency, severity, or manner of commission of the offense is increasing the likelihood of causing an imminent threat to life or liberty of others?

(ii) The sentences imposed on other criminals in the same jurisdiction:
   1. Do the offenses compared cause an equal or comparable threat to life or liberty of others?
   2. Do the offenses compared cause equal or comparable harm to the victim or to society as a whole, or both?

(iii) The sentences imposed for commission of the same crime in other jurisdictions:
   1. Is the imminent threat to life or liberty caused by the commission of the offense in this jurisdiction less than, equal to, or greater than the threat to life or liberty in other jurisdictions?
   2. Do the punishments imposed in the other jurisdictions satisfy all of the elements above?

The doctrine of proportionality is an essential characteristic of Eighth Amendment review. Crucial in implementing proportionality review is the use of objective standards, or the objective use of the standards set forth in *Solem v. Helm*. The *Solem* factors are dangerous if not applied objectively. More dangerous, is a legislature not restrained by

the Eighth Amendment. As noted by Justice Brandeis, "[m]en born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[324]

The debate over the proper role of the court in assessing and reviewing severity of punishments is not a new one.[325] That the debate will continue is not a particulary prophetic outlook. As "Mr. Justice Holmes noted in his dissenting opinion in *Lochner v. New York*, our Constitution 'is made for people of fundamentally differing views.' "[326] It is one role of the Constitution to spur debate and, thereby, provide a forum for people of fundamentally differing views. Justice Scalia would repose the debate in the legislative bodies of each state, leaving proportionality review as a purely democratic function. This is contrary to thousands of years of history, and contrary to the role of the Court in carrying out its obligation to assess the constitutionality of legislative enactments.

Stephen E. Meltzer

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324. Olmstead v. United States, 277 U.S. 438, 479 (1928).

325. *See, e.g.*, THOMPSON, *supra* note 16, at 63:

> Chapter 14 had not lost its popularity of value. In an action for debt brought against a tithing man, amerced because he had refused to "do his office" (make presentments) in court leet and had left the court, the question was raised as to the autority of the steward "then judge of the same time being-a court of record-the steward has power to amerce at his discretion one who will not do his office. To the contrary one of the barons held that the plaintiff would be barred:
>
> > "for the Statute of Magna Charta wills that no one be amerced but according to the quantity of the offence, and such has not been done in this case, for the amercement ought to have been affeered by the suitors and this was not done. Wherefore the action can not be upheld, otherwise the statute would be void."
>
> 10 Hen. VI.

326. Rummel v. Estelle, 445 U.S. at 281-82 (quoting Lochner v. New York, 198 U.S. 45 (1905) (Holmes, J., dissenting)).

Gilmer v. Interstate/Johnson Lane Corporation: When Is an Employee's Right to a Judicial Forum Precluded by an Arbitration Agreement?

[W]e have long recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated. . . ."
[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . [T]he resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary . . . .[1]

I. INTRODUCTION

The flood of lawsuits promulgated by our increasingly litigious society has stressed our judicial system to its breaking point.[2] The demand for judicial relief exceeds the court's ability to efficiently and effectively

1. Alexander v. Gardner-Denver Co., 415 U.S. 36, 56-57 (1974) (citations ommitted) (quoting U.S. Bulk Carriers v. Arguelles, 400 U.S. 351, 358-60 (1971) (Harlan, J., concurring)).

2. In 1982 there were 219,872 cases pending in the federal courts. NATIONAL CENTER FOR STATE COURTS, GUIDEBOOK TO THE USE OF STATE COURT CASELOAD STATISTICS 9 (1991). By 1991, this number had risen to approximately 280,000. Kevin Cullen, *Chief Justice Warns of a Court Overload; Presses Bush Administration to Fill Vacancies*, BOSTON GLOBE, Jan. 1, 1992, at 3. This reflects an increase of approximately 27% over a nine year period. Chief Justice Rehnquist has said that the courts are "overburdened" and that if this problem remains unchecked "the result will be a degradation in the high quality of justice the nation has long expected of the federal courts." *Id.* at 3. The Bush administration, citing what it called the "litigation crisis" facing our nation, has urged congress to amend the federal anti-discrimination laws to cause arbitration to be a more attractive alternative to litigation. David G. Savage, *Justices Rule Arbitration Preempts Suits in Bias Cases*, L.A. TIMES, May 14, 1991, at A20. One commentator has observed that the increase in litigation has been attributed to changing social attitudes toward litigation in addition to an increase in the number of substantive rights recognized by american law. William E. Craco, Note, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 FORDHAM L. REV. 483, 483-84, n.3 (1988) (citing Thomas D. Lambros, *The Future of Alternative Dispute Resolution*, 14 PEPP. L. REV. 801, 802 (1987); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 3 (1984)). Also cited as contributing to the glut of civil filings are: discovery rule abuse, misuse of pretrial motions, laissez-faire judicial management, insufficient pretrial management and resources. Craco, *supra*, at 483 n.3 (citing Richard McMillan, Jr. & David B. Siegel, *Creating a Fast-track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431, 432-33 (1985)).

manage their dockets.[3] As court dockets clog and legal fees for protracted litigation skyrocket, litigants have sought alternate forums for dispute resolution.[4] Consequently, many would-be litigants now favor arbitration as an alternate means of settling disputes.[5]

The recent United States Supreme Court case of *Gilmer v. Interstate/Johnson Lane Corp.*[6] challenged the binding effect of a prior agreement to arbitrate disputes in actions where violations of civil rights are alleged.[7] When Robert Gilmer was required by his employer, Interstate/Johnson Lane Corporation (Interstate), to register with the New York Stock Exchange (NYSE), he became obligated to sign an application which contained a clause agreeing to the arbitration of any disputes between himself and his employer.[8] Six years later, at the age of sixty-two, Gilmer was retired by Interstate.[9] He filed an age discrimination claim under the Age Discrimination Enforcement Act (ADEA)[10] in federal court.[11] Interstate attempted to invoke the arbitration clause of Gilmer's NYSE application pursuant to the Federal Arbitration Act (FAA).[12] Gilmer challenged the clause's validity asserting that it "deprive[d] claimants of the judicial forum provided for by the ADEA."[13]

The United States Supreme Court held that the FAA may preclude ADEA claimants from pursuing claims in their forum of choice where there has been a prior agreement to adjudication before an arbitral.[14]

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3. Settlement of cases as a means of relieving court congestion has won favor with the judiciary, the academic community, and legislators. Craco, *supra* note 2, at 483. *But see* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 388 (1986) (out-of-court settlements leave no precedent, thus cause more future litigation).

4. Roger L. Anderson & James W. Robinson, *Is Arbitration the Answer in Wrongful Termination Cases?*, 42 LAB. L.J. 121, 121 (1991).

5. *Id.* James A. Burstein & Kenneth D. Schwartz, Gilmer v. Interstate/Johnson Lane Corporation: *The Supreme Court Endorses Arbitration of Age Discrimination Claims*, 17 EMPLOYEE REL. L.J. 173, 174 (1991).

6. 111 S. Ct. 1647 (1991).

7. *Id.* at 1650.

8. *Id.*

9. *Id.* at 1651.

10. 29 U.S.C. §§ 621-634 (1988 & Supp. I 1989). The ADEA prohibits discrimination in employment on the basis of age. Since the *Gilmer* Court never reached the substantive question of whether Robert Gilmer's termination constituted a violation of the ADEA, detailed discussion of the statute is beyond the scope of this comment. For further consideration of the ADEA, see Peter M. Panken & Stacey B. Babson, *Willful Violations Under the ADEA: Easy Cases Make Confusing Law*, C517 ALI-ABA 95 (1990); Thomas P. Hustoles, *ADEA Challenges to Early Retirement Plans*, 68 MICH. BUS. L.J. 614 (1989); Ralph D. Mawdsley, *Protecting Older Workers: Enforcement of ADEA*, 54 W. EDUC. L. REP. 399 (1989).

11. *Gilmer*, 111 S. Ct. at 1651.

12. The United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended 9 U.S.C. §§ 1-14 (1988 & Supp. II 1990)).

13. *Gilmer*, 111 S. Ct. at 1653.

14. *Id.* at 1657.

Thus, the Court has indicated a willingness to allow other civil rights claims to be disposed of in forums other than the courts.[15] This Comment analyzes the *Gilmer* decision and discusses the Supreme Court's current acceptance of arbitration as a form of alternate dispute resolution (ADR).

Section II of this Comment discusses the background of both arbitration and the FAA.[16] Section III outlines the facts of the *Gilmer* case and sets forth the case's procedural history.[17] Section IV examines the opinion of the majority.[18] The opinion of the dissent is examined in Section V.[19] Section VI analyzes the case and discusses the Supreme Court's acceptance of arbitration.[20] Section VII concludes the Comment with the assertion that the *Gilmer* Court purposefully violated congressional intent in favor of greater acceptance of arbitration as an alternative to litigation.[21]

II. BACKGROUND

A. *Arbitration Procedure*

1. The Basic Concept

Arbitration is a form of alternate dispute resolution in which one or more disinterested persons, known as arbitrators, investigate and determine a resolution to a disputed matter which has been submitted to them for adjudication by the contending parties.[22] All parties to an action must expressly agree that their dispute will be subject to an arbitration hearing in lieu of a judicial proceeding, as the decisions of an arbitrator are binding on the parties.[23] Arbitration may be preferred to a judicial proceeding since it allows the contending parties to achieve a final resolution of their differences in a less expensive, more expeditious, and less formal manner than is normally available in ordinary court proceedings.[24]

The decision of the arbitrators is termed an "award" which is either enforced as a legally binding contract or, in some instances, summarily entered as a judgment and enforced by the courts.[25]

Arbitrators may or may not have had formal legal instruction.[26]

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15. *See infra* notes 118-24 and accompanying text.
16. *See infra* notes 22-98 and accompanying text.
17. *See infra* notes 99-114 and accompanying text.
18. *See infra* notes 115-88 and accompanying text.
19. *See infra* notes 189-213 and accompanying text.
20. *See infra* notes 214-34 and accompanying text.
21. *See infra* notes 235-39 and accompanying text.
22. 5 AM. JUR. 2D *Arbitration and Award* § 1 (1962).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* § 2.

They are not required to write an opinion or otherwise give the reasoning behind their decisions and there is no requirement that a complete record of arbitrated proceedings be maintained.[27] "The arbitrator need not follow the law, may disregard the evidence and published legal or arbitration decision precedents, and may decide the case according to his own concept of fairness, justice, or equity. Moreover, there is no appeal, except within very limited and restricted bounds."[28] The judicial appealability of an arbitration award is very limited and such an award will be set aside only where a clear case of illegality, fraud, misconduct, gross mistake or error is demonstrated.[29]

2. Arbitration Compared to Other Forms of Alternate Dispute Resolution

Arbitration differs from other forms of ADR such as mediation, negotiation, and summary jury trials in that, unlike the latter methods, arbitration is an adjudicatory process and the decisions of an arbitrator binds the parties.[30] Mediation and negotiation are similar to arbitration in that they are informal processes where each party is given the opportunity to present its case.[31] But, unlike arbitration, mediation and negotiation are used solely to open the lines of communication between the litigants via a neutral third party whose conclusions have no legal effect.[32]

In summary jury trials, the trial experience is simulated; evidence is given in the form of statements by attorneys to a six-member jury.[33] Unlike arbitration, live testimony is forbidden.[34] The jurors "are not told that their verdict is non-binding on the parties, who will simply use the damage 'award' as a guide for settling the case."[35]

Thus, the greatest difference between arbitration and most other methods of alternate dispute resolution is that the decision of the arbitrator is legally conclusive, unlike other forms of ADR in which the triers of fact are generally not empowered to decide disputes, but only to

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27. *Id.*

28. Joseph Brandschain, *Preparation and Trial of a Labor Arbitration Case*, 18(7) PRAC. LAW 17, 24 (1972).

29. 6 C.J.S. *Arbitration* §§ 149-50 (1975).

30. For a more detailed comparison of arbitration to mediation and negotiation, see Deborah A. Schmedemann, *Reconciling Differences: The Theory and Law of Mediating Labor Grievances*, 9 INDUS. REL. L.J. 523, 526-30 (1987).

31. *Id.* at 526.

32. *Id.*

33. Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 471 (1984).

34. *Id.*

35. Christi Harlan, *Asbestos Backlog Moving: Controversial System Clears Cases*, TEX. LAW., Sept. 29, 1986, at 1.

facilitate settlements.[36]

3. Advantages and Disadvantages of Arbitration

Proponents of arbitration maintain that the benefits which it affords causes it to be an attractive alternative to litigation.[37] One of arbitration's prime advantages is its expediency: whereas a claim may take years to be resolved in the courts, arbitrators typically adjudicate claims within a matter of months.[38] A second advantage to arbitration is that it is generally less expensive than litigation. Although legal counsel is not required, if a party elects to retain such counsel, arbitration's expediency and limited discovery keep costs to a minimum.[39]

Opponents of arbitration focus on four key concerns: 1) *The lack of access to information in arbitrated proceedings*.[40] Unlike judicially available mechanisms for obtaining information, a complainant bringing his or her case before an arbitrator is typically not given the right to engage in extensive discovery or compel production of documents.[41] 2) *The narrow scope of arbitration*.[42] Arbitrated complaints are often dealt with on an individual basis so that the outcome affects only the individual bringing the action.[43] Conversely, actions brought in federal courts often evolve into class actions whereby the decisions affect far more potential claimants.[44] Likewise, written opinions do not become generally available as a result of arbitrated claims so that decisions cannot be used as precedent.[45] 3) *Lack of public accountability*.[46] Arbitration may shield unfair employers from public accountability as arbitrated disputes are typically held in confidential forums.[47] As a result, employers who engage in unfair employment practices may be able to escape the adverse publicity which would otherwise hold them accountable for their actions.[48] 4) *Bias*.[49] It has been suggested that arbitrators may be biased

36. See AM. JUR. 2D NEW TOPIC SERVICE *Alternate Dispute Resolution* §§ 7-16 (1985), for a detailed discussion of the various forms of ADR.

37. W. John Moore, *Business Sees Victory in Court Ruling*, NAT'L L. J., July 13, 1991, at 1751.

38. Savage, *supra* note 2, at A20.

39. Anderson & Robinson, *supra* note 4, at 121.

40. *Id.*

41. *Id.* Discovery is typically severely limited in arbitration proceedings. Thus, the claimant in an action which is to be arbitrated must have clear and convincing evidence to support her case already in her possession as she will not be given the opportunity to extract such information which might tend to prove her case. Brief on the Merits for Petitioner at 6-7, Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (No. 90-18) (1991) [hereinafter Brief for Petitioner].

42. Savage, *supra* note 2, at A20.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* There are measures which may be taken in order to increase public ac-

in favor of an industry since a favorable decision may prompt the industry to use the same arbitrator in subsequent proceedings.[50]

B. *Legislative History and Interpretation of the Federal Arbitration Act of 1925*

The Federal Arbitration Act (FAA) was enacted in 1925.[51] Its purpose was to counteract the judiciary's hostility toward arbitration[52] and to cause arbitration agreements to be accorded equal status with other contractual provisions.[53] The FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[54]

The FAA additionally provides for both a stay of proceedings in the

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countability. One commentator has observed that michigan courts have looked favorably upon those arbitration agreements in which public accountability is preserved. Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 300 (1987). One case held accountability to be preserved because:

> (1) the chairman of the arbitration panel had been selected by the michigan public employment relations commission, a publicly accountable body; (2) the arbitration was conducted pursuant to extensive statutory standards and could be subjected to judicial review at the request of a party; (3) community interest in the dispute was likely to place the arbitration panel under public scrutiny, making the arbitrators publicly accountable to some extent; and (4) the powers exercised by the arbitrators were limited and well defined.

Id. (discussing Dearborn Fire Fighters Union Local No. 412 v. City of Dearborn, 231 N.W.2d 226 (Mich. 1975)). For further discussion of the public accountability dilemma in arbitration, see David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986).

49. Savage, *supra* note 2, at A20.

50. *Id. But see* Michael L. Taviss, *Adventures in Arbitration: The Appealability Amendment to the Federal Arbitration Act*, 59 U. CIN. L. REV. 559, 561 n.11 (1990) (recent studies show securities arbitration awards tend to favor claimants and not industry).

51. The United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended 9 U.S.C. §§ 1-14 (1988 & Supp. II 1990)).

52. C. Edward Fletcher, *Learning to Live with the Federal Arbitration Act—Securities Litigation in a Post-McMahon World*, 37 EMORY L.J. 99, 101 (1988). The judiciary has traditionally been hostile toward arbitration clauses because such provisions were seen as attempts to usurp the courts of jurisdiction over the contracted matter. *Id.*; *see also* Alison Overby, *Arbitrability of Disputes under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1139 (1986) (discussing the roots of judicial hostility evolving from the English courts which received fees for cases heard and were thus reluctant to lose their fees to an arbitrator).

53. *See* H.R. REP. No. 96, 68th Cong., 1st sess. 1-2 (1924) ("[A]rbitration agreements are simply matters of contract, and the effect of the [FAA] is simply to make the contracting party live up to his agreement.").

54. 9 U.S.C. § 2 (1925).

federal courts when one or more of the issues in the proceeding are referable to arbitration[55] and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement.[56] Subsequent to the enactment of this statute, binding arbitration has been commonly used to settle commercial disputes.[57] Prior to *Gilmer*, however, it was unsettled whether arbitration could also be used as a substitute for formal adjudication of civil rights violations.[58] The federal circuits were split on the issue of whether a prior agreement to arbitrate constituted a waiver of judicial forum in cases of discrimination arising under federal law.[59]

C. *The Constitutionality of the Federal Arbitration Act*

1. Congressional Authority to Enact The FAA

The congressional authority to enact the FAA is derived from the Commerce Clause.[60] Congressional power to enact such laws under the Commerce Clause for the purpose of regulating interstate com-

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55. *Id.* § 3.

56. *Id.* § 4.

57. Anderson & Robinson, *supra* note 4, at 121 ("virtually all collective bargaining agreements provide for arbitration").

58. The Supreme Court, prior to *Gilmer*, had not considered the issue and the federal circuits were not in agreement. *See infra* note 59.

59. The First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits ruled that such an agreement did not constitute waiver. Horne v. New England Patriots Football Club, Inc., 489 F. Supp. 465 (D. Mass. 1980) (ADEA claim held not arbitrable); Borenstein v. Tucker, 757 F. Supp. 3 (D. Conn. 1991) (ADEA claim held not arbitrable); Nicholson v. CPC Intern., Inc., 877 F.2d 221 (3d Cir. 1989) (ADEA claim held not arbitrable); Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990) (Title VII sex-discrimination claim held not arbitrable). However, the Supreme Court granted certiorari, 111 S. Ct. 2050 (1991), and seven days after *Gilmer* was decided the Court vacated and remanded *Alford* for further consideration in light of *Gilmer*. On remand, the Fifth Circuit reversed its earlier decision and held that the claim would go to compulsory arbitration pursuant to an earlier agreement between the parties. Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991)); Swenson v. Management Recruiters Intern., Inc., 858 F.2d 1304 (8th Cir. 1988), *cert. denied sub nom.* Management Recruiter Intern., Inc., v. Swenson, 493 U.S. 848 (1989) (sex discrimination claim not arbitrable); Bierdeman v. Shearson Lehman Hutton, Inc., 744 F. Supp. 211 (N.D. Cal. 1990), *rev'd*, 963 F.2d. 378 (9th Cir. 1992) (sex discrimination claim not arbitrable); Benestad v. Interstate/Johnson Lane Corp., 752 F. Supp. 1054 (S.D. Fla. 1990), *rev'd in part vacated in part*, 946 F.2d 1546 (11th Cir. 1991) (sex discrimination claim not arbitrable). However, Interstate appealed this case for consideration in light of *Gilmer*. Subsequently, the appeals court reversed and held that the claim was arbitrable. Benestad v. Interstate/Johnson Lane Corp., 946 F.2d 1546 (11th Cir. 1991)).

Prior to *Gilmer*, only two jurisdictions held that an arbitration a provision constituted a waiver of choice of forum, namely, the Fourth Circuit, which upheld the arbitration provision in *Gilmer*, and the Seventh Circuit, which upheld the arbitrability of an ADEA claim in Garfield v. Thompson Mckinnon Securities, Inc., 731 F. Supp. 841 (N.D. Ill. 1988). The tenth Circuit has been silent on this issue.

60. Article I of the U.S. Constitution gives Congress the power to "regulate

merce has been held to be plenary.[61] The Court held in *NLRB v. Jones & Laughlin Steel Corp.*,[62] that Congress need only demonstrate that its actions bear a "close and substantial relation to interstate commerce."[63] This is not a heavy burden as activities having only a remote impact on interstate commerce have been held to comply with the *Jones & Laughlin* test, even though the test required an immediate relation to interstate commerce in order to bring the activity within the province of congressional control.[64]

The Court in *Prima Paint Corp. v. Flood & Conklin Manufacturing Corp.*,[65] directly addressed the issue of the constitutionality of the FAA and concluded that the statute "is based upon . . . the incontestable federal foundations of 'control over interstate commerce' " and is therefore constitutional.[66]

2. The Opportunity for Appellate Review of Arbitration Decisions

The FAA provides for judicial review of arbitrated decisions in specific instances.[67] Generally, a court will only alter the decision of an

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commerce with foreign nations, and among the several states, and with the indian tribes." U.S. CONST. art. I, § 8, cl. 3.

61. Gibbons v. Ogden, 22 U.S. 1, 196 (1824).

62. 301 U.S. 1 (1937).

63. *Id.* at 37.

64. Farming wheat for one's personal use has been held to affect interstate commerce by removing the wheat farmer from the pool of those in the interstate market to buy wheat. Wickard v. Filburn, 317 U.S. 111 (1942). Operating a 216 room motel has been held to affect interstate commerce by profiting from out-of-state patrons. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). A restaurant with primarily in-state patrons was held to be engaging in interstate commerce because 46% of its supplies were bought from a local supplier which procured its goods from out-of-state. Katzenbach v. McClung, 379 U.S. 294 (1964).

65. 388 U.S. 395 (1967).

66. *Id.* at 405 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)).

67. The FAA states at 9 U.S.C. § 10 (Supp. III 1991):

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made

arbitrator where bias or defects in the arbitration proceeding are clearly demonstrated.[68] Allegations of dubious reasoning on the part of the arbitrator alone are generally not grounds for appeal.[69]

In a 1953 case, the United States Supreme Court raised the concern that the limited appealability of arbitrated decisions might deny parties their constitutional right to judicial review.[70] The Court was troubled that the "interpretations of the law by the arbitrators . . . are not subject, in the federal courts, to judicial review for error in interpretation."[71] This issue of whether arbitration circumvents the Article III right to judicial review was readdressed in *Thomas v. Union Carbide Agricultural Products Co.*[72] Justice Brennan, in his dissent, observed that "Congress has substantial latitude to make use of Art. I decisionmakers,"[73] and therefore the power to create alternate forums, such as arbitration, for the adjudication of disputes.[74] However, Congress' ability to authorize parties to engage in arbitration did not estop

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(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(B) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.

And at 9 U.S.C § 11 (1988):

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

68. 6 C.J.S. *Arbitration* §§ 149-50 (1975).

69. *Id.*

70. Wilko v. Swan, 346 U.S. 427, 436-37 (1953), *overruled by* Rodriguiz de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477 (1989). Article III of the United States Constitution states: "The judicial power shall extend to all cases, in law and equity, arising under this constitution . . . ." U.S. CONST. art. III, § 2, cl. 1.

71. *Wilko*, 346 U.S. at 436-37.

72. 473 U.S. 568 (1985).

73. *Thomas*, 473 U.S. at 601 (Brennan, J., dissenting). Article I of the United States Constitution permits Congress "[t]o constitute tribunals inferior to the [S]upreme [C]ourt." U.S. CONST. art. I, § 8, cl. 9.

74. *Thomas*, 473 U.S. at 601, (Brennan, J., dissenting).

the courts from reviewing such decisions.[75] One commentator has interpreted the *Thomas* opinion to suggest that "courts will review at least the facial consistency of an arbitral award with statutory criteria and constitutional norms."[76]

D. *The Evolution of the Supreme Court's Acceptance of Arbitration as an Acceptable Form of Alternate Dispute Resolution*

1. *Wilko*: The Court Holds Arbitration to be Inadequate in Most Instances

The 1953 United States Supreme Court case of *Wilko v. Swan*,[77] concerned the validity of an agreement to arbitrate where a misrepresentation claim was brought under the Securities Act of 1933.[78] The Court declared that arbitration proceedings were inadequate in cases requiring "subjective findings on the purpose and knowledge of an alleged violator."[79] It was further held that arbitration is generally inferior to judicial review because arbitrators render decisions "without judicial instruction on the law,"[80] and decisions "may be made without explanation of . . . reasons and without a complete record of their proceedings."[81] Although the *Wilko* Court recognized the merits of arbitrating disputes, the Court clearly expressed its opinion that arbitration is inferior to judicial process and inadequate in most instances:

> Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative

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75. *Id.* (Brennan, J., concurring). Justice Brennan noted that "the question remains whether the Constitution . . . [i]mposes some requirement of art. III supervision of the arbitrator's decisions under this scheme." *Id.* However, the Court concluded that the language of the particular act at issue in *Thomas*, the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136(a)-(y) (1988)), did specifically provide for an opportunity for review and thus that "[t]he court therefore need not reach the difficult question whether congress is always free to cut off all judicial review of decisions respecting such exercises of art. I authority." *Id.*

76. Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 477 (1989).

77. 346 U.S. 427 (1953) *overruled by* Rodriguez de Quijas v. Sherson/American Exp., Inc., 490 U.S. 477 (1989).

78. *Id.* at 420. The Securities Act of 1933 is a federal law which mandates the registration of securities which will be offered for public sale and for complete and accurate information to be provided as to the issuer and the stock offering. 15 U.S.C. §§ 77a-77aa (1988 & Supp. II 1990).

79. *Wilko*, 346 U.S. at 435-36. The Court expressed concern that an arbitration proceeding would be inadequate to resolve cases which require the trier of fact to make determinations which are less objective (such as where it is necessary to merely determine which party's position is more clearly supported by the facts), and more subjective (such as inferring a party's intent from that party's conduct). *Id.* In *Wilko*, the trier of fact was to determine whether there was an invidious attempt to defraud. *Id.*

80. *Id.* at 436.

81. *Id.*

> power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.[82]

2. *The* Alexander *Trilogy: Right to Judicial Forum For Statutory Claims is Not Waived Where an Agreement to Arbitrate is Pursuant to a Collective-Bargaining Agreement*

In the United States Supreme Court case of *Alexander v. Gardner-Denver*,[83] a unanimous Court held that an employee who had agreed to arbitration under a collective-bargaining agreement[84] was still entitled to litigate his statutory (race discrimination) claim.[85] The *Alexander* Court reasoned that "[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."[86] The Court reaffirmed its contention that arbitration is generally inferior to litigation: "the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable . . . . [A]rbitration [is] a less appropriate forum for final resolution of Title VII issues than the federal courts."[87]

After *Alexander*, the United States Supreme Court heard two similar cases involving arbitration agreements contained as part of a collective-bargaining agreement. In both *Barrentine v. Arkansas-Best Freight System, Inc.*[88] and *McDonald v. City of West Branch*,[89] it was held that the right to a judicial forum is not waived by agreeing to an arbitration clause as part

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82. *Id.* at 438 (citing Wilkov v. Swan, 201 F.2d 439, 444 (2d Cir. 1953)).

83. 415 U.S. 36 (1974).

84. A collective-bargaining agreement is an "[a]greement between an employer and a labor union which regulates terms and conditions of employment . . . . Such is enforceable by and against union in matters which affect all members alike or large classes of members." BLACK'S LAW DICTIONARY 263 (6th ed. 1990).

85. *Alexander*, 415 U.S. at 59-60.

86. *Id.* at 56.

87. *Id.* at 57-58 (citations and footnote omitted).

88. 450 U.S. 728 (1981). *Barrentine* involved a claim brought under the Fair Labor Standards Act of 1938 (FLSA), which sets a minimum wage and maximum work week requirement. 29 U.S.C. §§ 201-219 (1988 & Supp. I 1989, Supp. II

of a collective-bargaining agreement.[90]

3. The *Mitsubishi* Trilogy: The Court Favors Arbitration in a Commercial Context and Overrules *Wilko*

In *Mitsubishi v. Soler Chrysler-Plymouth*,[91] the United States Supreme Court set out a two-part test for deciding whether a statutory claim will be arbitrable.[92] A statutory claim is arbitrable as long as: (1) there is a valid agreement to arbitrate disputes; and (2) there is no expressed congressional intent to preclude arbitration of the statutory claim.[93] The Court affirmed its acceptance of arbitration by stating "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[94]

The Court followed the *Mitsubishi* rule in two decisions by upholding agreements to arbitrate federal statutory claims. In *Shearson/American Express, Inc. v. McMahon*,[95] and *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[96] the Court held that predispute agreements to arbitrate claims under the Securities Acts and the RICO Act are bind-

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1990). Gilmer noted that "The ADEA is part of the FLSA." Brief for Petitioner, *supra* note 41, at 8.

89. 466 U.S. 284 (1984). In *McDonald*, a police officer filed an action under 42 U.S.C. § 1983 (1988), alleging that he was discharged for exercising his First Amendment rights of freedom of speech, freedom of association, and freedom to petition the government for redress of grievances. *McDonald*, 466 U.S. at 286.

90. *Barrentine*, 450 U.S. at 745-46; *McDonald*, 466 U.S. at 292.

91. 473 U.S. 614 (1985). *Mitsubishi* involved claims under the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988), which prohibits unreasonable interferences with free-market economy pricing and distribution. *Mitsubishi*, 473 U.S. at 616.

92. *Mitsubishi*, 473 U.S. at 628.

93. *Id.*

94. *Id.* at 626-27.

95. 482 U.S. 220 (1987). *McMahon* involved claims alleging violations of the anti-fraud provisions of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. §§ 78a-78ll (1988 & Supp. II 1990), and of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1988 & Supp. II 1990), brought by customers of a brokerage firm registered with the Securities and Exchange Commission (SEC). *McMahon*, 482 U.S. at 222-23. The Exchange Act governs the operation of stock exchanges and requires publication of stock information. 15 U.S.C. §§ 78a-78ll. The RICO Act authorizes investigation, control, and prosecution of organized crime. 18 U.S.C. §§ 1961-1968. The claimants were under an agreement to arbitrate disputes pursuant to the FAA. *Gilmer*, 111 S. Ct. at 1651.

96. 490 U.S. 477 (1989). *Rodriguez* involved securities investors who brought suit alleging violations of the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1988 Supp. II 1990) and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78ll. *Rodriguez*, 490 U.S. at 478-79. These securities acts provide for the regulation of securities: offering, registration, sale, etc. 15 U.S.C. §§ 77a-77aa; 15 U.S.C. §§ 78a-78ll. The claimants had previously signed a standard customer agreement which included an agreement to arbitrate disputes. *Rodriguez*, 490 U.S. at 478.

ing.[97] In *Rodriguez,* the Court also overruled its decision in *Wilko* and expressed its current approval of arbitration: "To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[98]

III. Facts of the Case and Procedural History

Gilmer v. Interstate/Johnson Lane Corp.[99] examined the binding effect of arbitration agreements in the context of an age discrimination case.[100] In 1987, Robert Gilmer, then a sixty-two-year-old man, was dismissed by his employer, Interstate/Johnson Lane Corp., and replaced by a twenty-eight-year-old.[101] Gilmer had been hired by Interstate in May, 1981 as Manager of Financial Services.[102] At the outset of his employment, Gilmer had been required to register as a securities representative with the New York Stock Exchange (NYSE).[103] The NYSE application mandated that an applicant agree to the arbitration of any disputes between the applicant and his or her employer arising out of the applicant's employment or termination thereof.[104]

Upon his dismissal, Gilmer filed an age discrimination claim with the Equal Employment Opportunity Commission (EEOC).[105] Gilmer subsequently brought suit in federal court alleging that he had been discharged due to his age, in violation of the Age Discrimination in Employment Act of 1967 (ADEA).[106] In response, Interstate invoked the arbitration clause of the NYSE registration application and filed a mo-

97. *McMahon,* 482 U.S. at 242; *Rodriguez,* 490 U.S. at 485-86.
98. *Rodriguez,* 490 U.S. at 481.
99. 111 S. Ct. 1647 (1991).
100. *Id.* at 1650.
101. Brief for Petitioner, *supra* note 41, at 4.
102. *Gilmer,* 111 S. Ct. at 1650.
103. *Id.*
104. *Id.* at 1650-51. The securities registration application provided: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register . . ." Brief on the Merits for Respondent at 1, Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991) (No. 90-18) [hereinafter Brief for Respondent]. Rule 347 of the NYSE clarifies what shall be subject to arbitration pursuant to the securities registration application:

> Any Controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

New York Stock Exchange Rule 347(1979) [hereinafter NYSE Rule].
105. *Gilmer,* 111 S. Ct. at 1651.
106. *Id.* (referring to 29 U.S.C. §§ 621-634 (1988 & Supp. I 1989)).

tion to compel arbitration asserting that the Federal Arbitration Act (FAA) required Gilmer to submit to arbitration.[107] The Federal District Court for the Western District of North Carolina, relying on the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*,[108] denied the motion and concluded that "arbitration procedures are inadequate for the final resolution of rights created by the ADEA . . . Congress intended to protect ADEA plaintiffs from waiver of the judicial forum."[109] The appeals court, however, disagreed and reversed the lower court's decision.[110] The appeals court held that it found "no congressional intent to preclude enforcement of arbitration agreements in the ADEA's text, its legislative history, or its underlying purposes."[111] The appeals court also stated that "[c]ourts should be reluctant . . . to imply in a statute an intention to preclude enforcement of arbitration agreements where Congress has not expressed one, particularly in light of the countervailing intention expressed by Congress in the FAA."[112]

The Supreme Court granted certiorari[113] "to resolve a conflict among the Courts of Appeals regarding the arbitrability of ADEA claims."[114]

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107. *Id.* (referring to 9 U.S.C. §§ 1-14 (1988 & Supp. II 1990)).

108. 415 U.S. 36 (1974); *see supra* notes 83-87, for a discussion of the *Alexander* opinion.

109. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 196 (4th Cir. 1990).

110. *Id.* at 203.

111. *Id.* at 196.

112. *Id.* at 197. The court reasoned that "the act standing alone mandates enforcement of arbitration agreements, but that Congress can override this mandate by indicating that it is precluding waiver of the judicial forum for the particular statutory right at issue," and:

> nothing in the text, legislative history, or underlying purposes of the ADEA indicat[es] a congressional intent to preclude enforcement of arbitration agreements . . . nor is there any statement on the part of Congress to indicate that a federal judicial forum is the only appropriate forum for vindication of the rights created by the ADEA.

Id. The court therefore ruled that this silence should be interpreted to be Congressional acquiescence to the resolution of ADEA claims in forums other than the courts. *Id.*

113. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990), *cert. granted*, 111 S. Ct. 41 (1990).

114. *Gilmer*, 111 S. Ct. at 1651. In its opinion, the Supreme Court noted that the appeals court decision was *contra* to Nicholson v. CPC Int'l Inc., 877 F.2d 221 (1989). *Gilmer*, 111 S. Ct. at 1651 n.1. In *Nicholson*, the United States Court of Appeals for the Third Circuit was presented with a substantially similar issue. An employer sought to compel arbitration of an age discrimination claim where the employee had previously signed an agreement to arbitrate any dispute or controversy. *Nicholson*, 877 F.2d at 222-23. The United States Court of Appeals for the Third Circuit held that, while state law claims must be arbitrated pursuant to the prior agreement, "Congress did not intend that the right under the ADEA to a judicial forum for protection against age discrimination would be subject to dis-

IV. The Majority Opinion

The United States Supreme Court, by a vote of seven to two,[115] affirmed the appeals court decision that Gilmer's ADEA claim was subject to compulsory arbitration pursuant to the NYSE agreement.[116] Writing for the majority, Justice White announced the Court's holding that Gilmer had not sufficiently demonstrated a congressional intent to preclude arbitration of claims brought under the ADEA.[117]

A. *The Burden of Demonstrating Congressional Intent to Preclude Arbitration*

In *Mitsubishi,* the Court created a rebuttable presumption in favor of upholding arbitration agreements stating that "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has envinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[118] The *Gilmer* Court thus noted that the burden was on the petitioner (Gilmer) to demonstrate that "Congress intended to preclude a waiver of a judicial forum for ADEA claims."[119] The Court also stated that Gilmer's arguments would be viewed in a light most favorable to the respondent and the federal policy favoring arbitration.[120]

1. Congressional Intent to Further Broad Social Policies Through the ADEA

Gilmer maintained that Congress' intent in enacting the ADEA was not only to allow individual claimants to seek redress for unique instances of discrimination, but to establish a broad social policy aimed at eliminating such discrimination altogether.[121] The Court did not discuss Gilmer's argument at length but concluded that there was no conflict between arbitration's procedures and the goal of furthering

placement." *Id.* at 222. Thus, the *Nicholson* court denied the employer's motion to compel arbitration with respect to the ADEA claim. *Id.* at 231.

115. The seven justice majority included Chief Justice Rehnquist as well as Justices White, Blackmun, O'Connor, Scalia, Kennedy, and Souter. Justice Stevens filed a dissenting opinion joined by Justice Marshall. *Gilmer,* 111 S. Ct. at 1650.

116. *Id.*

117. *Id.* at 1657.

118. Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985).

119. *Gilmer,* 111 S. Ct. at 1652.

120. The Court quoted its previous decision in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), stating that "[t]hroughout [this] inquiry, it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.' " *Gilmer,* 111 S. Ct. at 1652 (quoting *Moses H. Cone,* 460 U.S. at 24).

121. Brief for Petitioner, *supra* note 41, at 15. The stated goal of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1988).

important social policies stating "[w]e do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. . . . Both [arbitration and the judiciary] can further broader social purposes."[122]

The Court referred to its previous holdings in *Mitsubishi*, *McMahon*, and *Rodriguez*[123] and asserted that their ruling in *Gilmer* was consistent with the rulings in those cases as the *Mitsubishi* trilogy involved arbitration of claims brought under the Sherman Act, the Securities Exchange Act of 1934, RICO and the Securities Act of 1933, all of which were designed to advance important public policies and all of which were deemed to be appropriate for arbitration.[124]

2. Congressional Intent to Preclude Forum Waiver for ADEA Claimants

In arguing that Congress intended to preclude forum waiver for ADEA claimants, Gilmer noted that while there is no language in the ADEA which addresses arbitration, the potential for a claimant to be bound to arbitration is severely limited in more recent legislation aimed at eliminating discrimination (the Civil Rights Act of 1990).[125] Gilmer explained Congress' failure to address the issue of arbitration in the ADEA by noting that the ADEA was passed in 1967, at which time *Wilko* was controlling and precluded the arbitration of all statutory claims.[126] He then proceeded to conclude that because Congress evidenced an intent to preclude waiver of a judicial forum of Title VII claims in passing the Civil Rights Act of 1990, "one can assume with confidence that Congress intended the same for ADEA claims. Based on this clear expression of congressional intent, this Court should hold that ADEA claims are not subject to compulsory arbitration."[127]

The Court rejected Gilmer's argument by stating "Gilmer concedes that nothing in the text of the ADEA or its legislative history explicitly precludes arbitration"[128] and that "Congress . . . did not explicitly pre-

122. *Gilmer*, 111 S. Ct. at 1653.

123. For a discussion of the *Mitsubishi* trilogy, *see supra* notes 91-94 and accompanying text.

124. *Gilmer*, 111 S. Ct. at 1653.

125. Gilmer referred the Court to the Civil Rights Act of 1990 which was passed by Congress but vetoed by President Bush. Brief for Petitioner, *supra* note 41, at 13-14. In this Act, Congress stated its intent that arbitration of Title VII claims should be encouraged but that "any agreement to submit disputed issues to arbitration . . . in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." *Joint Explanatory Statement of the Committee of Conference*, CONF. REP. No. 856, 101st Cong., 2d Sess. 26 (1990).

126. Brief for Petitioner, *supra* note 41, at 13. For a discussion of *Wilko*, see *supra* notes 77-82 and accompanying text.

127. Brief for Petitioner, *supra* note 41, at 14.

128. *Gilmer*, 111 S. Ct. at 1652.

clude arbitration or other non-judicial resolution of claims, even in its recent amendments to the ADEA."[129]

The Court went on to observe the latitude Congress has given ADEA claimants in allowing ADEA claims in either federal or state court.[130] The Court also observed that the EEOC, the agency Congress created to monitor such claims, "is directed to pursue 'informal methods of conciliation, conference, and persuasion,' . . . which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress."[131]

3. Undermining the Role of the EEOC

The majority opined that the role of the EEOC in enforcing the ADEA, would not be undermined by allowing statutory claims to be submitted to arbitration.[132] Gilmer noted that a statutory claim brought under either Title VII or the ADEA cannot be filed with the courts without the claimant first filing a charge with the EEOC.[133] He argued that causing such a claim to be submitted to arbitration would undermine the congressional intent of involving the EEOC in all such proceedings and would allow the claim to be disposed of without the involvement of the federal body which Congress created to handle these claims.[134]

The Court disagreed and asserted that there was no indication that Congress intended the EEOC to be involved in all disputes concerning discrimination in employment. According to the Court, an individual claimant who submits to arbitration may still file a charge with the EEOC, and that the EEOC need not wait until a charge is filed but may investigate alleged discrimination based on information received "from any source."[135] In its final basis for rejecting this argument, the Court emphasized that "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration."[136]

B. *The Issue of the Adequacy of Arbitration for Dispute Resolution*

The Court next dealt with several of Gilmer's challenges to the adequacy of arbitration as an alternative to litigation. The Court indicated its unwillingness to find merit in any such challenges from the onset

129. *Id.* at 1653-54.
130. *Id.* at 1654.
131. *Id.* (quoting 29 U.S.C. § 626(b) (1988)).
132. *Id.* at 1653.
133. Brief for Petitioner, *supra* note 41, at 15 (referring to 29 U.S.C. § 626(d) (1988)).
134. *Id.*
135. *Gilmer*, 111 S. Ct. at 1653 (citing 29 C.F.R §§ 1626.4, 1626.13 (1990)).
136. *Id.*

stating: "[i]nitially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration . . . ."[137]

1. The Claim of Bias

The Court considered Gilmer's contention that arbitration panels will be biased.[138] In rejecting this argument, the Court quoted its ruling in *Mitsubishi* which it stated that it would " 'decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.' "[139] The Court further noted that there are several protections against biased panels afforded by the NYSE arbitration rules,[140] all of which would be applicable in resolving the dispute between Gilmer and Interstate.[141] Additionally, the Court recognized that, under the FAA, there is the opportunity for appeal of decisions where there is evidence of bias.[142]

2. The Claim that Arbitration Affords Insufficient Discovery

The Court addressed Gilmer's challenge that the limited discovery allowed in arbitration proceedings would make a subtle discrimination claim almost impossible to prove.[143] The Justices were not persuaded by Gilmer's assertion that the "subtlety of discrimination makes liberal

137. *Id.* at 1654. The court further reiterated its support of arbitration as an effective alternative to litigation by classifying Gilmer's challenges as "attacks an arbitration [which] 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.' " *Id.* (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)).

138. *Id.*

139. *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985)).

140. *Id.* The court recognized the following protections against biased panels afforded by the NYSE arbitration rules: Rule 608: "[T]he parties [must] be informed of the employment histories of the arbitrators, and that they [must] be allowed to make further inquiries into the arbitrators' backgrounds." Rule 609: "[E]ach party is allowed one peremptory challenge and unlimited challenges for cause." Rule 610: "[T]he arbitrators are required to disclose '[those circumstances] which might preclude [them] from rendering an objective and impartial determination.' " *Id.* (citing 2 CCH New York Stock Exchange Guide ¶¶ 2608-2610 (1991) [hereinafter 2 N.Y.S.E. Guide]).

141. *Id.*

142. *Id.* (citing 9 U.S.C. § 10(b)(1988) (current version at 9 U.S.C. § 10(a)(2) (Supp. III 1991)).

143. *Id.* at 1654-55. Gilmer pointed out that "taking a deposition is at the discretion of the arbitrator . . . The claimant must demonstrate that the deposition is necessary to develop his case . . . . [there is] no specific sanctions for failure to meet discovery deadlines." Brief for Petitioner, *supra* note 41, at 16.

discovery vital to a plaintiff's case."[144] The Court responded to this argument by stating that "there has been no showing in this case that the NYSE discovery provisions, which allow for document production, information requests, depositions, and subpoenas . . . will prove insufficient to allow ADEA claimants such as Gilmer a fair opportunity to present their claims."[145]

Although the Court did recognize that discovery is more limited in an arbitration proceeding than one which is litigated, it concluded that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.' "[146]

3. The Lack of Written Opinions in Arbitrated Proceedings

The Court considered Gilmer's argument that arbitration is inferior to judicial process because arbitrators do not issue written opinions.[147] Gilmer argued that the closed-door proceedings and lack of written opinions weaken the incentive for employers to avoid the adverse publicity which is promulgated by publicly accessible actions, that appellate review becomes extremely difficult, and that the development of the law becomes stifled.[148] The Court discounted the charges by noting that the NYSE rules require a written decision which includes the names of the parties, a summary of the issues in controversy, and a description of the award issued.[149] The Court further noted that under NYSE rules, these award decisions are made available to the public.[150] Concerning the issue of the difficulties which the absence of a detailed opinion presents for judicial review, the Court quoted its decision in *McMahon*: " 'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue.' "[151] The Court also dismissed Gilmer's concerns that the development of the law will be stifled by observing that "judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA

144. Brief for Petitioner, *supra* note 41, at 17; *see also Gilmer*, 111 S. Ct. at 1654-55.

145. *Gilmer*, 111 S. Ct. at 1654-55.

146. *Id.* at 1655 (quoting Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 628 (1985)).

147. *Gilmer*, 111 S. Ct. at 1655; *see also* Brief for Petitioner, *supra* note 41, at 18-19.

148. *Gilmer*, 111 S. Ct. at 1655; *see also* Brief for Petitioner, *supra* note 41, at 18-19.

149. *Gilmer*, 111 S. Ct. at 1655 (quoting 2 N.Y.S.E. Guide, *supra* note 140, at ¶ 2627(a), (e), at 4321 (Rule 627(a) (e)) (1991)).

150. *Id.* (citing 2 N.Y.S.E. Guide, *supra* note 140 at ¶ 2627(f), at 4322 (Rule 627(f))).

151. *Id.* at 1655 n.4 (quoting Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987)).

claimants will be subject to arbitration agreements."[152]

4. The Inability of Arbitration Proceedings to Provide Broad Equitable Relief

The Court dismissed Gilmer's assertion that, because, they do not provide for broad equitable relief and class actions, arbitration proceedings are inadequate by concluding that "arbitrators do have the power to fashion equitable relief."[153] The Court observed that the NYSE rules, applicable in *Gilmer*, do not restrict the types of awards which may be given, "but merely refer to 'damages and/or other relief.' "[154] The Court further noted that "[t]he NYSE rules also provide for collective proceedings"[155] and that "arbitration agreements will not preclude the EEOC from bringing actions seeking classwide and equitable relief."[156]

C. *The Issue of Unequal Bargaining Power*

Gilmer urged that the arbitration provision should not be binding because there was a disparity of bargaining power since all employees were required to agree to the contract terms and thus he had not entered into the contract freely.[157] The Court, however, was unpersuaded that the disparity in bargaining power should effect the agreement's validity stating that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are

152. *Id.* at 1655.

153. *Id.*

154. *Id.* (quoting 2 N.Y.S.E. Guide, *supra* note 140, at ¶ 2627(e), at 4321 (Rule 627(e))).

155. *Id.* (quoting 2 N.Y.S.E. Guide *supra* note 140, at ¶ 2612(d) (Rule 612(d))).

156. *Id.*

157. Brief for Petitioner, *supra* note 41, at 10. Gilmer noted that there is not opportunity for negotiation in such a clause, stating that "a job applicant's very livelihood may depend on his agreeing to the arbitration clause." *Id.* It has been suggested that arbitration agreements should not be upheld where such an agreement is "the product of unequal bargaining power, or of unequal transaction costs that make it likely that one party will draft an agreement that the other will sign without first questioning or reviewing the agreement's arbitration clause." Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 486-87 (1981). Gilmer brought to the Court's attention the fact that the NYSE application which he signed "is four pages long and written in six-point type." Brief for Petitioner, *supra* note 41, at 3. Gilmer also pointed out the NYSE Rule 347, *supra* note 104, which "provides for the arbitration of 'any controversy . . . arising out of the employment or termination of employment' of a registered securities representative" was not reproduced on his application. Brief for Petitioner, *supra* note 41, at 3. "Neither the application nor Rule 347 make any specific reference to age or other employment discrimination claims. Moreover, neither spells out precisely what arbitration means." Brief for Petitioner, *supra* note 41, at 3.

never enforceable in the employment context."[158] In rejecting Gilmer's argument, the Court reasoned that Gilmer was "an experienced businessman" and thus able to negotiate his contract terms.[159]

The Court indicated, however, that its decision in this case is not dispositive of all challenges to contractual clauses based on unequal bargaining power. Justice White, writing for the Court, noted that "this claim of unequal bargaining power is best left for resolution in specific cases."[160] Yet, despite this suggestion that unequal bargaining power might be a sufficient justification for non-enforcement of an arbitration clause, the Court noted that in *Rodriguez* and *McMahon* relationships existed involving unequal bargaining power[161] and it was "nevertheless held . . . that agreements to arbitrate in that context are enforceable."[162]

The Court went on to suggest that its steadfast enforcement of arbitration provisions resulted from its adherence to the FAA.[163] The Court explained that "the FAA's purpose was to place arbitration agreements on the same footing as other contracts. Thus, arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.' "[164] However, the Court reiterated its position that in some instances arbitration provisions may not be upheld by referring to its opinion in *Mitsubishi* which stated: " 'Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' ' "[165]

D. *The Relationship of Gilmer to Claims Brought Where the Agreement to Arbitrate is Pursuant to a Collective-Bargaining Agreement*

The final argument which the majority addressed concerned Gilmer's attempt to analogize his case to the *Alexander* line of cases, where the Court held that employees who had agreed to arbitration pursuant to collective-bargaining agreements were not bound to arbitrate their statutory claims.[166] The *Gilmer* Court held that the petitioner's "reli-

158. *Gilmer*, 111 S. Ct. at 1655.
159. *Id.* at 1656.
160. *Id.*
161. *Id.* at 1655. *Rodriguez* and *McMahon* both concerned the relationship between securities dealers and investors. *See supra* notes 95-98 and accompanying text.
162. *Gilmer*, 111 S. Ct. at 1655 (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987)).
163. *Id.* at 1655-56.
164. *Id.* at 1656 (quoting 9 U.S.C. § 2 (1988)).
165. *Id.* (quoting *Mitsubishi*, 473 U.S. at 627 (quoting 9 U.S.C. § 2 (1988))).
166. *Gilmer*, 111 S. Ct. at 1656-57; *see also* Brief for Petitioner, *supra* note 41, at 7-

ance on these cases . . . is misplaced"[167] and left the decisions in *Alexander* and its progeny intact by distinguishing the *Alexander* line in three ways.

The Court first distinguished the *Alexander* line as involving employees who had not agreed to arbitrate their statutory claims whereas *Gilmer* involved a general agreement to arbitrate.[168] The claimants in the *Alexander* line had agreed not to general arbitration clauses providing for the arbitration of all grievances, but instead to collective-bargaining arrangements under which *contract-based* claims common to all employees in the bargaining unit are adjudicated by labor arbitrators.[169] Conversely, Gilmer had agreed to arbitrate "any dispute" arising between him and his employer.[170] The *Gilmer* Court noted that "a labor arbitrator has authority only to resolve questions of contractual rights."[171] The Court thus emphasized that the assertion of a statutory right falls outside the scope of what may be adjudicated by a labor arbitrator pursuant to a collective-bargaining agreement, yet falls within the scope of a general agreement to arbitrate.[172]

The Court next distinguished the *Alexander* line of cases as involving the contemplation of arbitration of an individual claim under collective representation, as opposed to *Gilmer* which contemplated the arbitration of an individual claim under individual representation.[173] Under a collective-bargaining agreement, an accredited representative of all employees in the bargaining unit negotiates agreements with the employer regarding interests common to the organization such as wages, hours, and other conditions of employment.[174] Should a statutory claim be brought to arbitration by an employee pursuant to a collective-bargaining agreement, there would be a "disparity in interests between a union and an employee."[175] Conversely, such disparity is not present where an employee brings an action as an individual.[176] The Court thus distinguished the *Alexander* line from *Gilmer* by stating that "[a]n important concern [in the *Alexander* line] was the tension between collective representation and individual statutory rights, a concern not applicable to

12. For a discussion of the *Alexander* line of cases see *supra* notes 83-90 and accompanying text.

167. *Gilmer*, 111 S. Ct. at 1656.

168. *Id.* at 1657.

169. *Id.*; *see McDonald*, 466 U.S. at 285-87; *Barrentine*, 450 U.S. at 730-31; *Alexander*, 415 U.S. at 38-42.

170. Brief for Respondent, *supra* note 104, at 1.

171. *Gilmer*, 111 S. Ct. at 1656 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 53-54 (1974)).

172. *Id.* at 1656-57.

173. *Id.* at 1656.

174. BLACK'S LAW DICTIONARY 263 (6th ed. 1990).

175. *Gilmer*, 111 U.S. at 1656-57.

176. *Id.* at 1657.

the present case."[177]

The final distinction which the Court drew between the *Alexander* line and *Gilmer* was that, unlike *Gilmer*, none of the cases in the *Alexander* line were decided under the FAA.[178] As noted above, in the *Alexander* line the Court held that arbitration provisions pursuant to collective-bargaining agreements were not applicable to statutory claims.[179] Thus, in the *Alexander* line the Court never reached the issue of whether the FAA dictates enforcement of an agreement to arbitrate where a statutory claim is brought.[180] The Court thus concluded that "those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate."[181]

E. *The Dictum of the Court in* Gilmer

In *dictum*, the majority acknowledged, not the argument advanced the petitioner or the respondent, but that put forth by several *amici curiae* in support of Gilmer.[182] The *amici* observed that the exclusionary

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177. *Id.*

178. *Id.*

179. *See supra* notes 166-77.

180. *Gilmer*, 111 S. Ct. at 1657.

181. *Id.*

182. *See* Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* at 16-24, *Gilmer*, (No. 90-18); Brief for American Association of Retired Persons as *Amicus Curiae* at 7-15, *Gilmer* (No. 90-18); Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* at 17-18, *Gilmer* (No. 90-18).

Footnote two of the *Gilmer* opinion states:

> Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Several *amici curiae* in support of Gilmer argue that that section excludes from the coverage of the FAA *all* "contracts of employment." Gilmer, however, did not raise the issue in the courts below, it was not addressed there, and it was not among the questions presented in the petition for certiorari. In any event, it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. The FAA requires that the arbitration clause being enforced be in writing. *See* 9 U.S.C. §§ 2,3. The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts addressing the issue uniformly have concluded that the exclusionary clause in § 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications . . . We choose to follow the plain language of the FAA and the weight of authority, and we therefore hold that § 1's exclusionary clause does not apply to Gilmer's arbitration agreement. Consequently, we leave for another day the issue raised by *amici curiae*.

Gilmer, 111 S. Ct. at 1651-52 n.2 (citations omitted).

clause of section one of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[183] The *amici* then argued that that section excludes from the coverage of the FAA all "contracts of employment" and that Gilmer's agreement with Interstate to register with the NYSE as a condition of his employment was in essence an agreement to submit to the NYSE's arbitration provision.[184] Therefore, the arbitration agreement was among the terms contemplated in Gilmer's employment agreement and as such was barred by the FAA's exclusionary clause.[185] The Court dismissed the argument for several reasons: Gilmer did not raise the issue in the courts below; it was not among the questions presented in the petition for certiorari; and it was not applicable to the instant case as the *Gilmer* arbitration clause was not contained directly in an employment contract but Gilmer was instead bound by the NYSE to arbitrate disputes with his employer.[186] In writing for the majority, Justice White opined that the issue of whether an arbitration clause contained in an employment contract would be enforced was separate from the issue at bar and concluded "we leave for another day the issue raised by *amici curiae*."[187] Although the majority ruled that a *third-party's* attempt to bind employees to arbitrate grievances with employers will be upheld, the *amici* raised the scepter of doubt as to whether an *employer's* attempt to bind its employees to arbitrate grievances—through an agreement other than an employment contract—would be upheld and formed the basis for the dissenting opinion.[188]

183. 9 U.S.C. § 1 (1988); *see* Brief for the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) as *Amicus Curiae* at 6, *Gilmer* (No. 90-18); Brief for American Association of Retired Persons as *Amicus Curiae* at 3, *Gilmer* (No. 90-18); Brief for Lawyer's Committee for Civil Rights Under Law as *Amicus Curiae* at 17, *Gilmer* (No. 90-18).

184. Brief for the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) as *Amicus Curiae* at 16-24, *Gilmer* (No. 90-18); Brief for American Association of Retired Persons as *Amicus Curiae* at 7-15, *Gilmer* (No. 90-18); Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* at 17-18, *Gilmer* (No. 90-18).

185. Brief for the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) as *Amicus Curiae* at 16-24, *Gilmer* (No. 90-18); Brief for American Association of Retired Persons as *Amicus Curiae* at 7-15, *Gilmer* (No. 90-18); Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* at 17-18, *Gilmer* (No. 90-18).

186. *Gilmer*, 111 S. Ct. at 1651-52 n.2.

187. *Id.* at 1652 n.2.

188. *See id.* at 1657-61 (Stevens, J., dissenting). One commentator has observed that "most employers are 'waiting for the other shoe to drop' with respect to the issues left undecided by *Gilmer*, particularly whether the Court ultimately will validate arbitration clauses in bona fide employment contracts." Stephen G. Hirsch, *Counsel Weigh Effects of Arbitration Ruling*, REPORTER, Nov. 13, 1991, at 2 (quoting Catherine Hagen, Address to the California State Bar's Labor and Employment Law Section Annual Meeting (Oct. 1991)).

V. THE DISSENTING OPINION

Unlike the majority, Justice Stevens, in his dissent joined by Justice Marshall, opined that it was irrelevant that the arbitration clause to which Gilmer agreed was not contained in a contract of employment since it achieved the identical result of binding Gilmer to arbitrate his statutory claim.[189] The dissent maintained that "arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA, and for that reason respondent Interstate/Johnson Lane Corporation cannot, pursuant to the FAA, compel petitioner to submit his claims arising under the Age Discrimination In Employment Act of 1967 . . . to binding arbitration."[190]

A. *The Issue of the Scope of the FAA's Exclusionary Clause is Antecedent to the Disposition of This Case*

Justice Stevens took issue with the majority's failure to adequately address the issue, raised by the *amici*, of the scope of the FAA's exclusionary clause.[191] He argued that "resolution of the question is . . . clearly antecedent to [the] disposition of this case."[192] Stevens rejected the majority's assertion that it would be improper to address the issue because it was not raised by either the petitioner or the respondent. He cited a number of cases, including two cases decided in the same term as *Gilmer,* in which the Court decided cases on grounds which were not raised by either party in the courts below or in petitions for certiorari.[193] Stevens opined that "the considerations in favor of reaching an issue not presented below or in the petition for certiorari are more compelling in this case than in the cited cases."[194]

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189. *Gilmer*, 111 S. Ct. at 1657 (Stevens, J., dissenting).

190. *Id.* (Stevens, J., dissenting) (citation omitted).

191. *Id.* at 1657-58 (Stevens, J., dissenting).

192. *Id.* at 1658 (Stevens, J., dissenting).

193. *Id.* (Stevens, J., dissenting). Justice Stevens cited the cases of Teague v. Lane, 489 U.S. 288 (1989); Batson v. Kentucky, 476 U.S. 79 (1986); Mapp v. Ohio, 367 U.S. 643 (1961); all decided on grounds not raised by the parties. *Gilmer*, 111 S. Ct. at 1658 (Stevens, J., dissenting).

Justice Stevens also cited the case of Arcadia v. Ohio Power Co., 111 S. Ct. 415 (1990), decided in the same term as *Gilmer*, in which the court "decided the case on an issue that not only was not raise below or in any of the papers in this Court, but that also was not raised at any point during oral argument before the Court." *Gilmer*, 111 S. Ct. at 1658 (Stevens, J., dissenting). Justice Stevens further noted that the *Arcadia* Court stated " '[i]n our view, however,' the decided question was 'antecedent to these [issues presented] and ultimately dispositive of the present dispute.' " *Id.* (Stevens, J., dissenting) (quoting *Arcadia*, 111 S. Ct. at 418 (1991)).

Stevens also observed that in McCleskey v. Zant, 111 S. Ct. 1454 (1991), "the court issued a decision on a question which the parties had not argued below and evidently had not anticipated would be at issue in this Court." *Gilmer*, 111 S. Ct. at 1658 (Stevens, J., dissenting).

194. *Gilmer*, 111 S. Ct at 1658 (Stevens, J., dissenting).

Stevens argued that reaching "the issue of the applicability of the FAA to employment contracts" would be appropriate because the issue was raised by *amici* in support of Gilmer.[195] Additionally, "respondent and its *amici* had full opportunity to brief and argue the issue in opposition . . . [and] . . . 'the Court amply raised the issue with the parties at oral argument, at which both sides were on notice and fully prepared to argue the merits of the question.' "[196]

B. *The Scope of the FAA's Exclusionary Clause*

Justice Stevens next challenged the majority's assertion that the exclusionary clause of section one of the FAA did not apply because the exclusion is limited to arbitration agreements "contained in contracts of employment."[197] The arbitration agreement which Gilmer signed was not contained in a contract of employment.[198] Stevens expressed his opinion that:

> the Court too narrowly construes the scope of the exclusion contained in § 1 of the FAA.
>
> . . . .
>
> [I]n my opinion the exclusion in § 1 should be interpreted to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment.[199]

Stevens based his argument on the legislatures' intent in enacting the FAA.[200]

Justice Stevens noted that, in enacting the FAA, Congress had devoted considerable attention to the idea that the FAA should not apply to labor disputes.[201] He referred to the statements of the chair of the American Bar Association committee responsible for drafting the bill who assured the Senate that the FAA "is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it."[202] From examining this and other statements of congressional intent in enacting the FAA, Stevens concluded that the FAA was specifically "intended to exclude arbitration agreements between employees and employers, [and saw] no reason to limit this exclusion from coverage to arbitration

195. *Id.* (Stevens, J., dissenting).
196. *Id.* (Stevens, J., dissenting) (citations omitted).
197. 9 U.S.C. § 1 (1988); *Gilmer*, 111 S. Ct. at 1659 (Stevens, J., dissenting).
198. *Gilmer*, 111 S. Ct. 1659 (Stevens, J., dissenting).
199. *Id.* (Stevens, J., dissenting).
200. *Id.* (Stevens, J., dissenting).
201. *Id.* (Stevens, J., dissenting).
202. *Id.* (Stevens, J., dissenting) (quoting *Federal Arbitration Act: Hearings on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess., 9 (1923)).

clauses contained in agreements entitled 'Contract of Employment.' "[203]

C. *Conflict of Compulsory Arbitration with the Purpose of the ADEA*

In addition to disagreeing with the majority's assertion that Congress intended for the FAA to allow for arbitration of an employee's statutory claim, Justice Stevens also argued that compulsory arbitration conflicted with the legislative intent in enacting the ADEA.[204] He noted that the act was to be utilized to eliminate age discrimination on a broad level, not merely an individual level.[205] Justice Stevens embraced the criticism that arbitrated proceedings are narrow in scope and can only affect the individual complaintant by noting that "commercial arbitration is typically limited to a specific dispute between the particular parties,"[206] and that "authorizing the courts to issue broad injunctive relief is the cornerstone to eliminating discrimination in society."[207]

Stevens concluded that the larger purposes of the ADEA, mainly eliminating employment discrimination, were frustrated by removing cases such as *Gilmer* from the judiciary.[208] Such cases, Stevens argued, have the potential for precedential value in eliminating discrimination rather than simply individual value in vindicating the rights of a single employee.[209] He expressed his opinion that "[t]he Court's holding [in *Gilmer*] clearly eviscerates the important role played by an independent judiciary in eradicating employment discrimination."[210]

D. *The Majority's Broad Application of the FAA*

In Stevens's concluding comments, he suggested that the majority,

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203. *Id.* (Stevens, J., dissenting).
204. *Id.* at 1660 (Stevens, J., dissenting).
205. *Id.* (Stevens, J., dissenting).
206. *Id.* (Stevens, J., dissenting).
207. *Id.* (Stevens, J., dissenting) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)). For discussion of this and other criticisms of arbitration see *supra* notes 40-50 and accompanying text.
208. *Gilmer*, 111 S. Ct. at 1660 (Stevens, J. dissenting).
209. *Id.* (Stevens, J., dissenting). Justice Stevens referred to the remarks of Chief Justice Burger who, dissenting in *Barrentine*, stated:

> Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.

Id. (Stevens, J., dissenting) (quoting *Barrentine*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting)).
210. *Id.* at 1660-61 (Stevens, J., dissenting).

by broadly construing the FAA, had invaded the province of Congress.[211] He stated that the Court "has effectively rewritten the statute."[212] Stevens also speculated that he doubted "any legislator who voted for [the FAA] expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship."[213]

VI. ANALYSIS

This analysis is divided into two sections: Part A discusses the majority's broad application of provisions of the FAA and narrow application of the FAA's exclusionary clause and asserts that while the Court has stayed within the letter of the FAA, it has violated the spirit. Part B discusses the categories which the Court has created for evaluating the validity of arbitration agreements and argues that the Court has given employers a powerful tool with which to bind their employees to such agreements.

A. *The Court Broadly Applies the FAA and Narrowly Applies Its Exclusions to Broaden the Scope of Disputes Which May Be Subject to Compulsory Arbitration Beyond the Horizon of Congressional Intent*

It appears that the majority has interpreted the coverage of the FAA as broad, and the exclusionary clause as narrow, in an effort to broaden the scope of disputes which may be subject to compulsory arbitration.[214] The dissent noted that Congress did not intend this broad application of the FAA to labor disputes.[215]

The dissent's criticism of the majority's failure to address the issue of the scope of the FAA's exclusionary clause, which was raised by the *amici* and referred to in footnote two of the opinion, is fitting.[216] The Court has contradicted itself by allowing issues raised by *amici*, and not the parties themselves, to provide the basis for the Court's rulings in cases heard at one point in a term, and then asserting later in the term that it would be inappropriate to consider such issues.[217] The principle

211. *Id.* at 1661 (Stevens, J., dissenting).
212. *Id.* (Stevens, J., dissenting).
213. *Id.* (Stevens, J., dissenting).
214. *See supra* notes 182-88 and accompanying text. Although the FAA stipulates that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (1988), the Court nevertheless held that the FAA could be applied to Gilmer's employment contract under which he was engaged in interstate commerce. *Gilmer*, 111 S. Ct. at 1657.
215. *Gilmer*, 111 S. Ct. at 1659 (Stevens, J., dissenting).
216. *See id.* at 1657-58 (Stevens, J., dissenting).
217. *See, e.g.*, McCleskey v. Zant, 111 S. Ct. 1454 (1991); Arcadia v. Ohio Power

of *stare decisis* is completely neglected.[218] Further, as the dissent notes, the issue of "whether the FAA even covers employment disputes" is "clearly antecedent to disposition of this case."[219]

The exclusionary clause in section one of the FAA clearly states that its provisions are not intended to apply to employment contracts.[220] This language leads to the conclusion that Congress intended that an arbitration provision contained as a condition of employment should not be upheld. Supporting this conclusion are the congressional debates noted by the dissent.[221]

Although the arbitration clause at issue in *Gilmer* was not contained in an employment contract, Gilmer was required under his employment agreement to register with an organization (the NYSE) which compelled him to arbitrate disputes with his employer.[222] Thus, implicit in Gilmer's agreement with Interstate was his submission to the arbitration provision contained in the NYSE registration.

In sum, Gilmer signed a contract which did not contain an agreement to arbitrate which could not be upheld under the FAA, but he instead agreed as a condition of his employment to register with an organization which did require such an agreement.[223] As such, Interstate was able to satisfy the congressional mandate that no employment contract contain an agreement to arbitrate, while still bringing about the result which Congress intended to prohibit: binding an employee to arbitration. In upholding this scheme, the Court has violated congressional intent by broadly interprating the FAA to encompass labor disputes.[224] At the same time, the Court has strictly construed the FAA's exclusionary clause to bar only those agreements which violate the precise terms of the exclusion and not those which violate its spirit.

Co., 111 S. Ct. 415 (1990). In both of these cases, decided the same term as *Gilmer*, the Court rendered decisions on issues not argued by the parties themselves.

218. *Stare decisis* is the doctrine that "when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where facts are substantially the same." BLACK'S LAW DICTIONARY 1406 (6th ed. 1990)

219. *Gilmer*, 111 S. Ct. at 1658 (Stevens, J., dissenting).

220. 9 U.S.C. § 1 (1988).

221. *Gilmer*, 111 S. Ct. at 1659 (Stevens, J., dissenting).

222. *Id.* at 1650.

223. *Id.* The FAA states that it excludes those arbitration provisions contained in "contract of employment." 9 U.S.C. § 1 (1988). Conversely, the arbitration provision which Gilmer agreed to was contained in an application for an industry organization with which Gilmer's employer required him to register. *Gilmer*, 111 S. Ct. at 1650-51.

224. *See also supra* notes 197-203 and accompanying text (discussing Justice Steven's dissenting opinion which asserts that the *Gilmer* ruling is in violation of congressional intent).

B. *A Formalistic Approach Is Taken By the Majority to Facilitate Employers' Binding Their Employees to Arbitrating Grievances*

It appears that in deciding whether an agreement to arbitrate will be upheld, three categories have evolved. First is the instance where an employee, who has agreed to participate in arbitration through a collective-bargaining agreement, wishes to bring a statutory claim. Such an employee is not bound to arbitrate the statutory claim.[225] Second is the instant case where an agreement to arbitrate is contained not in a contract of employment, but provided for in an agreement with a third party.[226] *Gilmer* holds that such a provision is binding.[227] Third is where there is a contract between an employer and an employee,[228] and that contract contains an agreement to arbitrate. The issue then arises of whether that agreement will be enforced as outside the scope of the FAA's exclusionary clause, or if it will be held to be within the scope of the FAA's exclusionary clause and thus will not be enforced.[229]

Whereas Congress had sought to prevent employees from being compelled to arbitrate their grievances, the second category, created by the Court in *Gilmer*, has given employers a powerful tool with which to circumvent congressional intent and bind their employees to arbitration agreements via a third party. Considering the strong influence which employers exert over commissions and associations within their industry in relation to the influence of individual employees,[230] it is clearly foreseeable that the employers in an industry could influence such organizations to include arbitration provisions in their registration agreements. Subsequently, an employer could require its employees to join such commissions or associations as a condition of employment. The employer/employee relationship, with respect to forum selection for disputes, would thus be shifted from the yet to be decided third category—where an employee's selection of forum is waived in a contract with his or her employer (other than an employment contract)—to the now pro-waiver second category created by *Gilmer*. The burden then falls on the employee alleging a statutory violation to prove that the primary purpose of requiring registration with the industry organization was to estop the employee from bringing any such claims to the

225. *Gilmer*, 111 S. Ct. at 1656-57; *see also supra* notes 83-90 and accompanying text (discussing the *Alexander* line of cases which establishes this principle).

226. *Gilmer*, 111 S. Ct. at 1648.

227. *Id.* at 1657.

228. Although raised by the *amici*, the Court did not address this example. *Id.* at 1651-52. The contract would have to be one other than a contract for employment which the FAA specifically excludes from its provision of all "contracts of employment." 9 U.S.C. § 1 (1988).

229. 9 U.S.C. § 1, excludes from the provisions of the FAA all "contracts of employment."

230. Brief for Petitioner, *supra* note 41, at 10.

forum of his or her choice. This is a difficult—if not impossible—burden to meet as, ostensibly, a requirement that an employee join a recognized industry organization is not unreasonable.

Further, such an employee's case necessarily rests on the presumption that the employee did not agree to the arbitration clause of his or her own free will but instead was not in a position to bargain with the employer or organization and chose to sign the agreement rather than forego the opportunity for employment. The *Gilmer* Court has already indicated a reluctance to accept such an argument by stating that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[231] In reaching this conclusion, the *Gilmer* Court relied on *Mitsubishi* to leave open the exception of "well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.' "[232] Yet the Court was clear in expressing what a difficult burden this would be to meet.[233] This difficulty was also demonstrated in *Gilmer*; although Gilmer was an aging man in a competitive industry, the majority reasoned that there was "no indication . . . that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause."[234] Thus, it appears that the Court has set such a high standard for proving the unconscionability of an arbitration provision that it is a virtually impossible burden to meet.

VII. Conclusion

The issue in *Gilmer* pitted judicial preference against congressional intent: the Court has come to favor arbitration as a means of relieving the overburdened judicial system,[235] yet Congress has expressed a clear intent to prevent employees from being bound to arbitrate their claims.[236] *Gilmer* presented to the Court an opportunity to rule on a thinly veiled attempt at circumventing congressional intent. Gilmer's employment agreement was constructed in a way that satisfied the statutory requirements, yet brought about a result contrary to that which Congress sought to produce. It appears that in an effort to widen the scope of those matters which may be disposed of outside the judicial forum, the Court legitimized Interstate's scheme by holding it not to

231. *Gilmer*, 111 S. Ct. at 1655.

232. *Id.* at 1656 (quoting Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614, 627 (1985)).

233. *See supra* notes 157-65 and accompanying text.

234. *Gilmer*, 111 S. Ct. at 1656.

235. *See id.* at 1656 n.5.

236. 9 U.S.C. § 1 (1988); *see also Federal Arbitration Act of 1923: Hearing on S.4213 and S.4214 before a Subcommittee of the Senate Committee on the Judiciary*, 67th Cong., 4th Sess., 9 (1923).

violate the congressional intent of preventing employees from being compelled to waive their right to a choice of forum. To allow this result, which is so clearly at odds with congressional intent, is at best Machiavellian; at worst it is judicial activism.[237]

It is presently unclear whether *Gilmer* is to be read broadly as indicative of the Court's willingness to allow all statutory claims to be adjudicated by an arbitral[238] or if it is to be read narrowly as a decision which "will become a distinguished anomaly in the case law."[239] However, at

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237. Judicial activism is:

> Judicial 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. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions into legislative and executive matters.

BLACK'S LAW DICTIONARY 847 (6th ed. 1990).

238. In a related action, the Court vacated and remanded for consideration in light of *Gilmer*, the judgment of the Fifth Circuit Court of Appeals which ordered that a sex-based discrimination claim brought under Title VII could not be arbitrated pursuant to a prior agreement. Alford v. Dean Witter Reynolds, 905 F.2d 104 (5th Cir. 1990), *cert. granted, vacated, remanded*, 111 S. Ct. 2050 (1991). On remand, the fifth circuit found the ADEA and Title VII to be similar civil rights statutes and held that there was "little trouble concluding that Title VII claims can be subjected to compulsory arbitration." Alford v. Dean Witter Reynolds, 939 F.2d 229, 230 (5th Cir. 1991). In a case factually similar to *Alford*, the United States Court of Appeals for the Sixth Circuit reached an identical conclusion: that a sex-based discrimination case was arbitrable pursuant to a prior agreement. Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) In *Willis*, the sixth circuit also interpreted *Gilmer* as "indicat[ing] [] a rejection of the assertion that employment discrimination claims are inappropriate for arbitration because they involve or impact public rights and policies." *Id.* at 310.

239. Burstein & Schwartz, *supra* note 5, at 173. In a case decided in the wake of *Gilmer* and *Alford*, Fletcher v. Kidder, Peabody & Co., N.Y.L.J., Dec. 9, 1991, at 25, 29 (N.Y. Sup. Ct. Dec. 8, 1991), the New York Supreme Court was presented with an action factually similar to the *Gilmer* case in that an employee alleged a violation of a statutory right (racial discrimination) and the employer moved to stay the action and compel arbitration as required by the employee's NYSE application. The court held that an action alleging racial discrimination was distinguishable from one alleging age discrimination under the ADEA and as such was not arbitrable:

> Unlike age discrimination or sex-based discrimination, racial discrimination resulting from state action is prohibited by the Constitution of the United States. The question then is whether the waiver of the right to a judicial forum should be permitted to include alleged violations of federal law which implicate basic constitutional rights. Such a result is untenable.
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> . . . There is nothing wrong with conditioning employment upon an agreement to arbitrate employment disputes. To interpret such an agreement to constitute acquiescence for that forum to hear racial discrimination claims is immoral. As racial discrimination is never excusable it would be against public policy to contract in advance for a limited forum to hear such claims.

Fletcher, N.Y.L.J., Dec. 9, 1991, at 29. The order was reversed by Fletcher v. Kidder, Peabody & Co., 584 N.Y.S. 2d 838 (1992).

the present time it is certain that for the employee who challenges a boilerplate clause precluding his or her right to a judicial forum, the outlook is grim.

Carol-Teigue J. Thomas

Florida v. Bostick: The Fourth Amendment Takes a Back Seat to the Drug War

I. INTRODUCTION

The government of the United States is currently engaged in a self proclaimed "War on Drugs."[1] This war reflects the desire of the American people to end the use, sale, and proliferation of illegal narcotics.[2] To fight this war, federal and local governments have dedicated in-

1. Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 890 (1987). On October 2, 1982 then President Ronald Reagan announced the entrance of the United States in the "War on Drugs." *Id.* In his radio address to the nation he stated, "The mood toward drugs is changing in this country, and the momentum is with us. We're making no excuses for drugs—hard, soft, or otherwise. Drugs are bad, and we're going after them." *Id.* President's Radio Address to the Nation, 18 Weekly Comp. Pres. Doc. 1249, 1250 (Oct. 2, 1982). "President Reagan continued this hard-line rhetoric in another speech that month, pledging an 'unshakable' commitment 'to do what is necessary to end the drug menace' and 'to cripple the power of the mob in America.' " Wisotsky, *supra* (quoting President's Message Announcing Federal Initiatives Against Drug Trafficking and Organized Crime, 18 Weekly Comp. Pres. Doc. 1311, 1313-14 (Oct. 14, 1982)). Upon taking office, President Bush declared his intention to continue the battle and stated in his inaugural address:

> There are few clear areas in which we as a society must rise up united and express our intolerance. The most obvious now is drugs. And when that first cocaine was smuggled in on a ship, it may as well have been a deadly bacteria, so much has it hurt the body, the soul of our country. And there is much to be done and to be said. But take my word for it: This scourge will stop.

Kathleen Ravotti, *Caplin & Drysdale*, Chartered v. United States *and* United States v. Monsanto*: The "War on Drugs" Gets a New Recruit*, 22 LOY. U. CHI. L.J. 297, 297 n.2 (1990) (quoting Inaugural Address to the Nation, 135 CONG. REC. S68-69 (daily ed. Jan. 20, 1989)). President Bush would later state that illegal drugs were " 'the gravest domestic threat facing our nation today' ". *Id.* at 297 n.4 (quoting Tom Morganthau et al., *Now It's Bush's War*, NEWSWEEK, Sept. 18, 1989, at 22).

2. Ravotti, *supra* note 1, at 297 n.1. (quoting Michael R. Kagay, *Deficit Raises as Much Alarm as Illegal Drugs, a Poll Finds*, N.Y. TIMES, July 25, 1990, at A9). A 1989 Gallup poll "indicated that the American public viewed illegal drugs as the most important problem facing the country." *Id.* Another poll showed that 85% of the American public supported penalties "such as the temporary suspension of a driver's license, seizure of cars used to buy or carry drugs, and community service sentences against even casual users of illegal drugs." *Id.* (citing A Newsweek Poll: *Get Tough on Users*, NEWSWEEK, Sept. 18, 1989, at 18, 23). The poll published in *Newsweek* also showed that 34% of Americans would support a 1% surtax on personal income to raise money to fight the drug war. *Id.*

creasingly vast amounts of human and monetary resources.[3] Unfortunately, the war is far from won.[4]

Due to its inherent unfairness, the battle is, at best, difficult. While its enemy is under no constraints in forming strategy,[5] law enforcement agencies must be certain that its efforts do not infringe upon constitutionally protected rights.[6]

The recent Supreme Court decision in *Florida v. Bostick* [7] highlights the conflict between the government's attempt to win the "war on drugs" and its responsibility to act within the mandates of the United States Constitution. In *Florida v. Bostick,* the Court again addresses the definition of a Fourth Amendment seizure and the circumstances under which a person will be considered seized by law enforcement officials.[8] The *Bostick* decision is significant because it represents the most recent example of the Court's willingness to narrow Fourth Amendment pro-

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3. *Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations for 1991: Hearings on H.181-44 Before the Subcomm. on the Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies,* 101st Cong., 2d Sess. pt. 2 at 61 (1990). The continued commitment of the U.S. to the "drug war" can be seen by following the expansion of the budgetary authority granted to the Drug Enforcement Agency (DEA) over the last several years. This authority has risen from $534,450,000 in 1989 to $700,000,000 in 1990. *Id.* Furthermore, this amount only reflects increases in the DEA's budget and not those of other government agencies participating in the effort. *Id.* The State Department, the CIA, NASA, the FBI, the Department of Defense, and the Coast Guard are a few of the agencies counted on by the government to curtail the production and distribution of illegal drugs. Wisotsky, *supra* note 1, at 892-95. The total cost of President Bush's proposed 1989 plan to fight the "drug war" was 7.9 billion. Ravotti, *supra* note 1, at 297 n.4 (citing Morganthau, *supra* note 1, at 22).

4. Gordon Witkin, *The Drug Warriors Blues,* U.S. NEWS & WORLD REPORT, Apr. 30, 1990, at 25. Even though the number of total drug related arrests and seizures has increased dramatically, the average street price of illegal narcotics has decreased, indicating that the supply of illegal drugs in America has risen. *Id.* Furthermore, "[s]tate and local cops say they are outmanned and outspent as well. The drug trade, they say, is like a hydra: strike down one dealer and two more pop up to take his place." Tom Morganthau, *Losing The War,* NEWSWEEK, Mar. 14, 1988, at 16-17.

5. For a discussion of various methods used to import and transport illegal drugs and of how these methods are often one step ahead of law enforcement, *see generally* David Boaz, *A Drug Free America—Or a Free America?,* 24 U.C. DAVIS L. REV. 617, 622-24 (1991).

6. The Fourth Amendment sets out "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . ." U.S. CONST. amend. IV. Furthermore, the Supreme Court has held that any evidence collected in a manner which violates a person's constitutional rights must be excluded when offered to prove the defendant's guilt at trial. FRANK W. MILLER ET AL., THE POLICE FUNCTION 13 (1986); *see also* Mapp v. Ohio, 367 U.S. 643 (1961).

7. 111 S. Ct. 2382 (1991).

8. *Id.* at 2389.

tections in order to address a societal problem.[9]

This comment will review the *Bostick* decision, its relationship to the Fourth Amendment, and its relationship to prior Supreme Court decisions on this issue. Section II will discuss the protection provided to individuals by the Fourth Amendment as well as the Supreme Court cases which have laid the foundation for the Court's definition of a seizure.[10] Section III will summarize these background cases to prepare for an examination of *Florida v. Bostick*,[11] while Section IV will set forth the relevant facts of the case at hand.[12] Section IV also will examine the majority opinion[13] and the dissenting opinion.[14] In Section V the reader will be provided with an analysis of the *Bostick* decision together with an examination of its relationship with prior Supreme Court decisions in this area of the law.[15] Finally, Section VI will also consider the effect of the Court's decision on the protections afforded by the Fourth Amendment.[16]

II. WHAT IS A SEIZURE? FOURTH AMENDMENT CONSIDERATIONS AND CASE LAW

A. *The Protection of the Fourth Amendment*

Prior to discussing the Supreme Court's handling of *Bostick*, it is important to consider some of the underlying principles of the Fourth Amendment[17] and relevant case law. It is beyond the scope of this

9. *See* Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210 (1983); *see also infra* notes 60-67. In *Delgado*, the Court upheld investigative surveys of factories where it was suspected that illegal aliens where working. *Delgado*, 466 U.S. at 212. During these surveys, agents were posted at the exits while others circulated throughout the workplace. *Id.* These agents approached workers and questioned them regarding their citizenship. *Id.*; Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990). In *Sitz*, the Court upheld the use of roadblocks by the state police to apprehend drunk drivers. *Sitz*, 496 U.S. at 455. The Supreme Court, in *California v. Hodari D.*, held that an individual who has been chased by a police officer was not seized until the officer physically tackled him. California v. Hodari D., 111 S. Ct. 1547, 1552 (1991). This cleared the way for the admission of some crack cocaine which the defendant had attempted to discard while he was being chased. *Id.* Since he was not seized when he discarded the crack, he, in effect, abandoned it, making it available as evidence against him. *Id.*

10. *See infra* notes 17-100 and accompanying text.

11. *See infra* notes 101-09 and accompanying text.

12. *See infra* notes 110-35 and accmpanying text.

13. *See infra* notes 159-86 and accompanying text.

14. *See infra* notes 187-226 and accompanying text.

15. *See infra* notes 227-85 and accompanying text.

16. *See infra* notes 286-92 and accompanying text.

17. The Fourth Amendment to the Constitution of the United States provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath

commentary to discuss the application of the Fourth Amendment in its entirety. Therefore, this case comment will be limited to examining the extent to which the government may come in contact with the general public, without having any suspicion of criminal activity, before such an encounter will be deemed an unreasonable seizure.

By reading its text, it is apparent that the Fourth Amendment protects individuals from those searches and seizures which are deemed to be unreasonable.[18] At the core of the Fourth Amendment is a balancing test which "[weighs] the individual expectation of privacy against the governmental interest in investigating and preventing crime."[19] For the amendment's reasonableness test to come into play it must first be determined that a seizure has actually occurred.[20] If a seizure is found, the Fourth Amendment is applied and the examining court will review the officers' actions to determine whether or not they were reasonable.[21] If unreasonable, any evidence produced by the officers' actions will be excluded at trial under the exclusionary rule.[22] The definition of a seizure and its reasonableness is, therefore, crucial[23] in examining police/citizen encounters.

B. *Case Law*

In order to properly examine the decision in *Bostick*, it is also necessary to review the Supreme Court's prior holdings in this area. This section will examine previous cases where the Court has been asked to consider the reasonableness of a police/citizen encounter. As in *Bostick*, these cases arise from police initiated encounters where the police lack probable cause to believe that the individual has engaged or is about to engage in illegal activity. These decisions provide insight into the Court's standard of review for police/citizen encounters. Furthermore, they depict the level of contact the Court will allow between the police and an individual before they will deem the individual to be seized and, hence, protected by the Fourth Amendment. Reviewing these decisions will provide the background necessary for an analysis of *Florida v. Bostick*.

A review of prior Supreme Court decisions must begin with the

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or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

18. *Id.*

19. Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619, 620 (1990).

20. *Id.*

21. *Id.*

22. *Id.* For definition of the exclusionary rule see *infra* note 109.

23. Clancy, *supra* note 19, at 620.

Court's opinion in *Terry v. Ohio*.[24] In *Terry*, the Supreme Court upheld a police officer's pat-down for weapons of three individuals thought to be "casing a job"[25] even though the officer lacked probable cause for an arrest.[26] The Court began its analysis of the case by pointing out that:

> [I]t [was] necessary first to 'focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'[27]

In *Terry*, the Court also noted that not every encounter between a police officer and a citizen resulted in the citizen being seized.[28] The majority in *Terry* held that a seizure occurs when a policeman restrains the liberty of a person either by a show of authority or by physical force.[29]

Using this definition of seizure and the balancing test described above, the Court held that the pat-down in *Terry* was not unreasonable.[30] The Supreme Court recognized that a pat-down is a significant intrusion on personal security[31] and that Terry had been seized by Officer McFadden.[32] However, the Court held that McFadden had reasonable cause to believe the men were armed and dangerous and, therefore, it was "necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized."[33]

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24. 392 U.S. 1 (1968).

25. *Id.* at 6.

26. *Id.* at 27, 30. Officer Martin McFadden observed three men malingering in front of several stores. *Id.* at 5-6. The men appeared to be interested in one store in particular. *Id.* at 6. Officer McFadden, based on almost 40 years of experience, felt that the men were planning to rob the store. *Id.* at 5-6. He decided to further investigate by approaching the men and asking for their names. *Id.* at 6-7. When all he received was a mumbled response, Officer McFadden grabbed one of the men (Terry) and placed him between himself and the other two suspects. *Id.* at 7. He then patted down the outside of Terry's clothes. *Id.* While he was conducting the pat down of Terry, he felt and removed a pistol from Terry's coat. *Id.* He subsequently patted down the other two men and found one of them to be carrying a pistol as well. *Id.* The men carrying the pistols were later charged with carrying concealed weapons. *Id.* at 5-7.

27. *Id.* at 20-21 (quoting Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967)).

28. *Id.* at 19 n.16.

29. *Id.* "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.*

30. *Id.* at 30-31.

31. *Id.* at 24-25.

32. *Id.* at 19.

33. *Id.* at 30.

In *United States v. Mendenhall*,[34] the Supreme Court again looked at the definition of a seizure and the reasonableness of an investigatory stop made with less than probable cause. In its opinion, the Supreme Court considered the use of "drug courier profile[s]" by agents of the United States Drug Enforcement Agency (DEA).[35] The Court defined a drug courier profile as "an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs."[36]

In *Mendenhall*, the defendant was approached and questioned by DEA agents stationed at the Detroit Metropolitan Airport.[37] The agents had observed Mendenhall after she disembarked from her flight and judged her conduct to fit that of a drug courier profile.[38] The agents approached Mendenhall, identified themselves, and asked for her identification and plane ticket.[39] Mendenhall complied with their requests.[40] The officers noted that the name on her ticket did not match that on her identification and that Mendenhall became increasingly nervous.[41] For these reasons, the officers asked her to accompany them to the DEA office in the airport for further questioning.[42] Mendenhall complied with this request as well.[43] Upon arriving at the office, the agents asked to search her purse and her person for illegal drugs.[44] Again, Mendenhall agreed.[45] Mendenhall was brought to a private room by a female agent for the search.[46] After entering the small room, she disrobed and handed the agent two packages of heroin.[47]

The Supreme Court relied heavily on the definition of seizure provided in *Terry* and determined that, based on the facts presented, Mendenhall was not seized.[48] The Court supported this position by citing Justice White's concurring opinion in *Terry* stating, "[t]here is nothing

34. 446 U.S. 544 (1980).

35. *Id.* at 547 n.1.

36. *Id.* For a discussion of drug courier profiles, *see* Alexandra Coulter, *Drug Couriers and the Fourth Amendment: Vanishing Privacy Rights for Commercial Passengers*, 43 VAND. L. REV. 1311, 1322-27 (1990).

37. *Mendenhall*, 446 U.S. at 547-48.

38. *Id.* at 547 n.1. Mendenhall was arriving from Los Angeles, a location considered to be a "source city" for much of the heroin in Detroit. *Id.* She was the last person to exit the plane, appeared very nervous, and scanned the entire area around the agents. *Id.* The agents also noticed that she changed airlines for her outbound flight and that she did not claim any baggage. *Id.*

39. *Id.* at 547-48.

40. *Id.* at 548.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 549.

48. *Id.* at 555.

in the constitution which prevents a policeman from addressing questions to anyone in the street."[49] The Court in *Mendenhall* also cited Justice Harlan's concurring opinion in *Terry*, which noted: "ordinarily the person addressed has an equal right to ignore his interrogator and walk away."[50]

The *Mendenhall* Court combined the above two statements and reasoned that a "seizure" requiring Fourth Amendment analysis does not occur unless a reasonable person would have felt that he was not free to leave.[51] The Court stated that the totality of the circumstances should be considered when making this determination.[52]

In applying this test to the facts of *Mendenhall*, the Court determined that Mendenhall had not been seized[53] and that her subsequent consent to be searched was valid and not coerced.[54] In making this determination, the Court found the following facts important: (1) the officers were in plain clothes;[55] (2) the officers properly identified themselves and did not exhibit weapons;[56] (3) the officers only requested Mendenhall's cooperation and did not demand it;[57] and (4) the encounter took place in a public area of the airport.[58] The Court summarized its position as follows:

> In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure.[59]

Another notable case in the evolution of the Supreme Court's reasonable person test is *Immigration & Naturalization Service v. Delgado*.[60] *Delgado* examined the Immigration & Naturalization Service's (INS)

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49. *Id.* at 553 (citing Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring)).

50. *Id.* (citing Terry v. Ohio, 392 U.S. 1, 31, 32-33 (1968) (Harlan, J., concurring)).

51. *Id.* at 554.

52. *Id.* The Court stated, "[W]e conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*

53. *Id.* at 555.

54. *Id.* at 559-60.

55. *Id.* at 555.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* The Court gave the following examples of circumstances that might constitute a seizure even where the individual did not attempt to leave: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554.

60. 466 U.S. 210 (1983).

practice of conducting investigative surveys of factories or other workplaces where there was reason to believe illegal aliens were working.[61] The survey in *Delgado* was conducted by posting agents of the United States Department of Immigration and Naturalization at the exits of a suspected factory while other agents circulated throughout the interior of the factory.[62] The agents approached workers and requested information regarding their citizenship.[63] The agents had badges, were armed, and carried walkie-talkies.[64] "If the employee gave a credible response, the agents moved on; if not, the employee was asked to produce immigration papers."[65] During the surveys, the employees were allowed to continue working and moving about inside the factory.[66] Surveys, such as the one conducted in *Delgado*, generally resulted in the arrest of anywhere between 20% and 50% of the employees.[67]

The Supreme Court rejected the court of appeals' holding that the INS procedure, in effect, seized the entire factory and those in it.[68] The Court held that the investigative stops of the employees were not seizures, but rather "classic consensual encounters."[69] The Court pointed out that the agents did not restrict the movement of the employees inside the factory and that the employees were allowed to go about their business.[70] The Court also refused to find that a seizure was created by the positioning of agents at every exit.[71] The Court stated that the "obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned,"[72] thereby rejecting the court of appeals' decision that "the stationing of the agents near the doors meant that 'departures were not to be contemplated,' and thus, workers were 'not free to leave.' "[73] The Court held that any meaningful restriction of movement that may have occurred was not the result of any direct action of the agents and, therefore, the employees could not have had any reasonable belief that they were not free to leave.[74] In applying the "free to leave test" of *Mendenhall*, the Court found that the mere possibility of being questioned at

61. *Id.* at 211-212.
62. *Id.* at 212.
63. *Id.*
64. *Id.* at 212-13.
65. Clancy, *supra* note 19, at 633.
66. *Id.*
67. *Id.* at 634.
68. *Delgado*, 466 U.S. at 218.
69. *Id.* at 221.
70. *Id.* at 218.
71. *Id.*
72. *Id.*
73. *Id.* at 217 (quoting Immigration & Naturalization Serv. v. Delgado, 681 F.2d 624, 634 (1982)). The *Bostick* Court stated that the restriction of movement was created by the employees' obligation to their employer. *Id.*
74. *Id.* at 218-19.

the exits should not have conveyed to the reasonable person that he was seized and not free to leave.[75]

Two recent Supreme Court cases which apply the "reasonable person/free to leave test" and help to further demonstrate the Court's definition of a seizure are *Michigan v. Chesternut*[76] and *California v. Hodari D.*.[77] In *Chesternut*, two police officers driving in a marked police cruiser observed a car pull over to the side of the curb.[78] After the car pulled over, a man exited the vehicle and approached the defendant Chesternut, who was standing alone on the curb.[79] When the defendant spotted the police car, he turned and ran away.[80] The officers testified that they decided to follow the defendant to "see where he was going."[81] After catching up to the defendant, the officers drove alongside him as he ran.[82] While the officers were driving beside Chesternut, they observed him discard several packages, which the officers later discovered contained codeine.[83] The officers subsequently arrested Chesternut for possession of narcotics.[84]

The Supreme Court, citing *Terry* and *Mendenhall*, stated that the test to be applied in determining whether a Fourth Amendment seizure had occurred was "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[85] In applying this test to the facts of *Chesternut*, the Court found

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75. *Id.* at 219. The Court held:

> [T]he mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way. Since most workers had no reasonable fear that they would be detained upon leaving, we conclude that the work forces as a whole were not seized.

Id.

76. 486 U.S. 567 (1988).

77. 111 S. Ct. 1547 (1991).

78. *Chesternut*, 486 U.S. at 569.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 573 (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)). The Court further noted:

> While the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police. The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.

Id. at 574 (citation omitted).

no seizure had occurred.[86] The Court held that the actions of the police "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement."[87] The Court based its finding on the following facts: (1) the police neither activated sirens or flashers nor did they demand that Chesternut stop;[88] (2) the police officers' conduct was absent any aggressive act to block the path or "otherwise control the direction or speed of his movement;"[89] and (3) neither officer displayed his weapon.[90] In summary, the Supreme Court found that "[w]ithout more, the police conduct here—a brief acceleration to catch up with respondent, followed by a short drive alongside him—was not 'so intimidating' that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business."[91]

A similar result was reached in *California v. Hodari D.* where the Court held that Hodari, who was being chased by a police officer, was not seized until the officer actually tackled him.[92] The Supreme Court rejected the defendant's argument under *Mendenhall* that he had been seized while being chased because a reasonable person in his position would not have felt free to leave.[93] The Court pointed out that the *Mendenhall* definition created a necessary but not a sufficient condition for a seizure.[94] Furthermore, the *Hodari* Court stated that the *Mendenhall* test is only applicable to those seizures effected through a citizen's compliance with a show of authority by the police,[95] and that under the common law definition, seizures may occur not only by a show of authority, but also by a show of force (the physical restraint of the suspect's movement).[96] In its decision, the Supreme Court established that, absent either compliance with a show of authority or actual physical restraint, no seizure could have occurred.[97] In other words, the fact that a reasonable person did not feel free to leave is not sufficient to

86. *Id.*
87. *Id.* at 575.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 576.
92. *Hodari D.*, 111 S. Ct. at 1552.
93. *Id.* at 1551.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1550. The Court also noted:

> Mere words will not constitute an arrest, while on the other hand, no actual physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest. There can be no arrest without either touching or submission.

Id. at 1551 (citation omitted).

prove that a seizure occurred.[98] The person must not have actually left either because she complied with a show of authority or because she was physically prevented from doing so.[99] Therefore, after reviewing the facts of *Hodari*, the Supreme Court held that since Hodari failed to comply with the officer's show of authority, he was not seized until he was tackled and physically restrained.[100]

III. Summary of Background Case Law

The Supreme Court cases examined in the preceding section reveal some general principles about the Court's definition of a seizure. To begin, it is clear that the Court does not find that a seizure occurs at every encounter between police officials and private citizens.[101] Police officials are permitted, as is everyone else, to approach others and ask questions.[102] Such investigation is a necessary part of their job.[103] Furthermore, the Court has found that a seizure can only occur through actual physical restraint or through compliance with a show of authority by a law enforcement official.[104] If the seizure is created by compliance with a show of authority, the test for its constitutionality is that of the reasonable person.[105] This test suggests that a seizure occurs only if the reasonable person would have felt that he was not free to leave.[106]

Furthermore, the Supreme Court in *Immigration & Naturalization Services v. Delgado* suggested that officers will not be held responsible for restrictive characteristics of an encounter if they are not the result of the officers' direct action.[107] The Court also recognizes that a permissive investigative stop may evolve into an illegal seizure if the nature of the encounter becomes sufficiently intrusive, and the officer lacks probable cause to believe the suspect has engaged, or is about to engage, in illegal activity.[108] Finally, it is an established principle of law that once

98. *Id.* at 1551.

99. *Id.*

100. *Id.* at 1552.

101. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968); *see supra* notes 24-33 and accompanying text.

102. Mendenhall, 446 U.S. at 553 (quoting Terry v. Ohio, 392 U.S. 1, 31-34 (1967) (Harlan, J., concurring)).

103. *Id.* at 554 (Harlan J., concurring).

104. *Hodari D.*, 111 S. Ct. at 1551; *see generally* notes 92-100 and accompanying text.

105. *Hodari D.*, 111 S. Ct. at 1551; *see supra* notes 85-87 and accompanying text.

106. *Mendenhall*, 446 U.S. at 554; *see supra* notes 48-52 and accompanying text.

107. *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 218 (1984); *see also supra* notes 68-74 and accompanying text.

108. Florida v. Royer, 460 U.S. 491, 501 (1982). In *Royer*, the defendant was approached by detectives at Miami International Airport because his behavior conformed to a "drug courier profile." *Id.* at 493. The detectives approached Royer and asked for his identification and ticket. *Id.* at 494. After examining these items,

a seizure becomes illegal, any evidence derived from the encounter must be excluded under the exclusionary rule.[109] With these principles in mind, we can now address the Court's decision in *Florida v. Bostick*.

IV. *FLORIDA V. BOSTICK*

A. *Statement of Facts*

The facts, as accepted by the lower courts as well as the Supreme Court, are as follows: On August 27, 1985, Terrance Bostick was a passenger on a Greyhound bus traveling from Miami to Atlanta.[110] While the bus was stopped for a layover in Fort Lauderdale, it was boarded by Officers Joseph Nutt and Steven Rubino of the Broward County Sheriff's Department.[111] The two officers were participating in a drug interdiction program adopted by the Broward County Sheriff's

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the officer noticed that the names did not match. *Id.* The detectives then requested that Royer accompany them to their office. *Id.* Royer did not verbally respond but did follow the detectives to the office. *Id.* The detectives kept his ticket and identification, and one of them went and picked up his luggage and brought it to the office without Royer's permission. *Id.* Furthermore, the detectives never advised Royer that he was free to leave if he desired. *Id.* at 503. One of the detectives then asked Royer for permission to search the bags. *Id.* at 494. Again without verbally responding, Royer took out a key and unlocked one of the suitcases where marihuana was found. *Id.* Royer claimed not to know the combination to the second bag, and when one of the detectives suggested that it may have to be pried open, he did not object. *Id.* at 494-95. Subsequently, the bag was pried open and more marihuana was found. *Id.* at 495. In applying the "free to leave" test of *Mendenhall*, the Supreme Court found that the confinement of Royer exceeded the permitted investigatory stop of *Terry*. *Id.* at 501. Royer was therefore illegally seized, and the consent he gave to the search of his luggage was tainted by this illegality. *Id.* The Court found the following facts as dispositive in determining that Royer had been seized:

> The officers had Royer's ticket, they had his identification, and they had seized his luggage. Royer was never informed that he was free to board his plane if he so chose, and he reasonably believed that he was being detained. At least as of that moment, any consensual aspects of the encounter had evaporated, and we cannot fault the Florida District Court of Appeal for concluding that *Terry v. Ohio* and the cases following it did not justify the restraint to which Royer was then subjected. As a practical matter, Royer was under arrest.

Id. at 503.

109. The exclusionary rule refers to the legal requirement that any evidence obtained in an illegal manner be excluded at trial regardless of how reliable the evidence may be. MILLER, *supra* note 6, at 13; *see also*, Terry v. Ohio, 392 U.S. 1, 12 (1968). The Court in *Terry* pointed out that the exclusionary rule is recognized as a deterrent to police misconduct. *Terry*, 392 U.S. at 12. The *Terry* Court stated "[e]ver since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principle mode of discouraging lawless police conduct." (citing Weeks v. United States, 232 U.S. 383, 391-93 (1914)).

110. Petitioner's Brief at 4-5, Florida v. Bostick, 111 S. Ct. 2382 (1991) (No. 89-1717) [hereinafter Petitioner's Brief].

111. *Id.* at 4.

Department,[112] whereby officers "routinely board buses at scheduled stops and ask passengers for permission to search their luggage."[113] The officers testified that they were wearing plain clothes at the time of the boarding[114] and that each was wearing a green windbreaker with a patch bearing the sheriff's insignia.[115] Officer Nutt also testified that, at the time of the boarding, his police firearm was contained in a hand carried pouch and was zipped closed throughout the entire encounter with Bostick.[116] "Eyeing the passengers, the officers, admittedly without articulable suspicion, picked out the defendant passenger and asked to inspect his ticket and identification."[117] When the officers approached Bostick, he was lying down on the very last bench-style seat at the rear of the bus.[118]

After returning Bostick's identification and ticket, both of which matched the information provided verbally by Bostick,[119] Officer Nutt identified himself and Officer Rubino as narcotics agents and explained that they were looking for illegal drugs.[120]

Officer Nutt asked Bostick if the red bag that he was using as a cushion was his, and if so, could he have permission to search it.[121] Bostick responded in the affirmative to both questions, and the bag was subsequently searched with no contraband being discovered.[122] Officer Nutt testified that following the search of the red bag, Officer Rubino noticed a blue bag in the overhead storage area near Bostick.[123] Again, Bostick was asked if he owned the bag and if he would give permission for its search.[124] Officer Rubino testified that he had informed Bostick of his right to refuse the search[125] and noted that Bostick was spoken to in a normal, conversational tone of voice.[126] In addition, Officer Rubino testified that "Bostick was free to go, there was no intimidation, no show of force against Bostick, and his path was not blocked."[127]

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112. Florida v. Bostick, 111 S. Ct. 2382, 2384 (1991).
113. *Id.*
114. Petitioner's Brief, *supra* note 110, at 4.
115. *Id.*
116. *Id.*
117. Bostick v. State, 510 So. 2d 321, 322 (Fla. Dist. Ct. App. 1987) (Letts, J., dissenting in part) [hereinafter *Bostick I*].
118. Petitioner's Brief, *supra* note 110, at 5.
119. *Bostick I*, 510 So. 2d at 322 (Letts, J., dissenting in part).
120. Petitioner's Brief, *supra* note 110, at 5.
121. *Id.* at 4.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 5.
126. *Id.*
127. *Id.* The officers testified that Bostick was in the last seat in the rear of the bus on the driver's side, Officer Rubino was standing in front of the seat directly ahead of Bostick's seat, and Officer Nutt was standing next to Bostick, half on the seat and halfway in the aisle. *Id.*

The officers stated that Bostick consented to the search of the blue bag[128] and that the search subsequently yielded 400 grams of cocaine.[129]

Bostick's recollection of the event is somewhat different. Bostick testified that he was asleep in the rear of the bus and that he was woken up when something came in contact with his feet.[130] He soon discovered that it was, in fact, Officer Nutt.[131] Officer Nutt asked for his bus ticket and identification.[132] Bostick stated that, upon the officer's request, he consented to the search of the red bag,[133] but that he did not consent to the search of the blue bag.[134] Furthermore, Bostick denied that either officer ever informed him that he had the right to decline their requests.[135]

B. *Procedural History*

Following the discovery of the cocaine, Bostick was arrested and charged with cocaine trafficking.[136] At trial, Bostick moved to suppress the cocaine on the ground that it was the product of an illegal search and seizure in violation of his Fourth Amendment rights.[137] The motion was denied by the trial court,[138] and the denial was affirmed on appeal.[139] However, as Judge Letts pointed out in his dissenting opinion, the Florida Court of Appeals recognized that there was conflicting testimony on the issues of Bostick's consent to the search and whether Bostick was informed that he was not required to cooperate with the officers.[140] Judge Letts noted that since the trial court made findings of fact regarding these issues, any conflict must be decided in favor of the state.[141]

The Court of Appeals realized the significance and public impor-

128. *Id.* at 4. The officers testified that Bostick responded to the request to search the blue bag by saying, "Okay, go ahead." *Id.*

129. Margaret F. Montalvo, Florida v. Bostick: *Voluntary Encounter or the Power of Police Intimidation?*, 15 NOVA L. REV. 1435 (1991) (citing Larry Lipman, *Broward Drug Case Hinges on Permission for Search on Bus*, PALM BEACH POST, Feb. 26, 1991, at 3A, col.5).

130. Respondent's Brief at 2-3 n.2, Florida v. Bostick, 111 S. Ct. 2382 (1991) (No. 89-1717) [herinafter Respondent's Brief].

131. *Id.*

132. *Id.*

133. *Id.* at 4.

134. *Id.* at 4 n.3.

135. *Id.* at 2-3 n.2.

136. Florida v. Bostick, 111 S. Ct. 2382, 2383 (1991).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Bostick I*, 510 So.2d at 322 (Letts, J., dissenting in part).

141. *Id.* (Letts, J., dissenting in part).

tance of this case[142] and decided to certify the following question to the Florida Supreme Court:

> May the police without articulable suspicion board a bus and ask at random, for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?[143]

The Florida Supreme Court rephrased the question:

> Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage?[144]

The Florida Supreme Court answered the above question in the affirmative[145] and reversed the decision of the district court.[146] The court held that, due to the unique nature of this police/citizen encounter, Bostick was "seized"[147] and since the police had neither probable cause nor articulable suspicion, the seizure was unlawful and unjustified.[148]

In its decision, the Florida Supreme Court relied on the holding of *United States v. Mendenhall*.[149] In *Mendenhall*, the Supreme Court held that a seizure has occurred when, during a police/citizen encounter, a reasonable person would have felt that he was not free to leave.[150] Using this test, the Florida Supreme Court found that a reasonable person in Bostick's position would not have felt free to leave.[151]

The court found the following factors as dispositive on this issue. First, the court stated that there was, in fact, no place for the defendant to go.[152] The defendant was traveling to Atlanta and was a passenger on an imminently departing bus stopped in Florida.[153] Clearly, if he left the bus to avoid the police encounter, there was a possibility that he would miss its departure.[154] Second, the officers were partially blocking the aisle.[155] In the court's opinion, the fact that one of the officers

142. *Id.* (Letts, J., dissenting in part).
143. *Id.* (Letts, J., dissenting in part).
144. Bostick v. State, 554 So. 2d 1153, 1154 (Fla. 1989) [hereinafter *Bostick II*].
145. *Id.*
146. *Id.* The court stated: "Accordingly, we find that under the circumstances presented here, government has exceeded its power to interfere with the privacy of an individual citizen who is not even suspected of any criminal wrongdoing." *Id.* at 1158. The court later stated: "The intrusion upon privacy rights caused by the Broward County policy is too great for a democracy to sustain." *Id.*
147. *Id.* at 1156.
148. *Id.* at 1158.
149. *Id.* at 1157 (citing United States v. Mendenhall, 446 U.S. 544 (1980)).
150. United States v. Mendenhall, 446 U.S. 544, 554 (1980).
151. *Bostick II*, 554 So. 2d at 1157.
152. *Id.*
153. *Id.*
154. *Id.* (quoting Alvarez v. State, 515 So. 2d 286, 289 (Fla. Dist. Ct. App. 1987)).
155. *Id.*

was apparently armed only underscored the reasoning that, in these cramped quarters, a reasonable person would not have felt free to leave.[156] Based on these facts, the court held that Bostick had been detained and that this detention was illegal because the officers had no articulable suspicion that the defendant had engaged in any illegal activity.[157] Following this decision, the State of Florida filed a writ of certiorari to the Supreme Court of the United States which was subsequently granted.[158]

C. *The Majority Opinion*

The Supreme Court, in a 6 to 3 decision, held that the bus boarding procedure of the Broward County Sheriff's Department was not, per se, illegal.[159] The Court found the fact that the encounter occurred in the cramped confines of a bus was just one relevant factor to be considered in determining if a seizure had occurred.[160]

The majority opinion pointed out that, under *Terry* and *Royer*, not all encounters between police officers and private citizens trigger Fourth Amendment analysis.[161] The protection of the Fourth Amendment, Justice O'Connor explained, is triggered when the encounter "loses its consensual nature."[162] Citing Justice Rehnquist's dissenting opinion in *Royer*, the Court wrote:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.[163]

In applying this to the facts of *Bostick*, the Court noted that if the same encounter had taken place outside of the bus (e.g., in the bus station), it would not have risen to the level of a seizure.[164]

In so noting, the Court rejected Bostick's assertion that this encounter should be treated differently because it took place in the cramped confines of a bus.[165] Bostick argued that a police encounter on a bus is

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156. *Id.*

157. *Id.* at 1158.

158. *Bostick*, 111 S. Ct. at 2382.

159. *Id.* Justice O'Connor delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices White, Scalia, Kennedy, and Souter. Justices Blackmun and Stevens joined Justice Marshall in his dissenting opinion. *Id.*

160. *Id.* at 2383.

161. *Id.* at 2386.

162. *Id.*

163. *Id.* (quoting Florida v. Royer, 460 U.S. 491, 497 (1983)).

164. *Id.*

165. *Id.* at 2386-2389. For Bostick's argument see *id.* at 2386.

much more intimidating.[166] Bostick noted that the lack of room to move around combined with having the officers tower over him as he remained seated made this situation one in which a reasonable person would not have felt free to leave.[167] Compounding his inability to leave, Bostick argued, was the imminent departure of the bus.[168] Were Bostick to disembark to avoid the officers, he most likely would have missed its departure and lost his stowed luggage.[169] In summary, Bostick argued that these factors combined to create, under *Chesternut*[170] and *Mendenhall*, a situation where the reasonable bus passenger would not have felt free to leave.[171]

The Supreme Court disagreed and compared the fact pattern to that found in *Delgado*,[172] where the restriction on mobility was found not to be a result of any particular police action.[173] The Court in *Delgado* held that the fact that the workers at the factory did not feel free to leave was a result of their obligation to their employer and not of police action.[174] For Justice O'Connor, the facts of *Bostick* created an indistinguishable situation.[175] She reasoned: "Bostick's movements were 'confined' in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive."[176]

In situations involving a restriction on mobility not resulting from police conduct, the Court reasoned that the "free to leave" test of *Mendenhall* was inapplicable.[177] The Court held that the better suited test for this situation was "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[178] This test was found to be appropriate because it has been consistently held that "a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."[179] Basically, the Court stated that since the failure of an individual to cooperate or comply with police questioning, without more, does not allow the police to lawfully detain that individual, the real test

166. *Id.* at 2386.
167. *Id.*
168. *Id.*
169. *Id.*
170. Michigan v. Chesternut, 486 U.S. 567 (1988); *see also supra* notes 76-91 and accompanying text.
171. *Bostick*, 111 S. Ct. at 2386.
172. *Id.* at 2387. For a description of Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210 (1983), see *supra* notes 60-75 and accompanying text.
173. *Bostick*, 111 S. Ct. at 2387.
174. *Id.*; *see also supra* note 74 and accompanying text.
175. *Bostick*, 111 S. Ct. at 2387.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*

of whether or not a seizure has occurred is whether that individual would feel free not to cooperate.[180] For these reasons, the Court reversed what it found to be a per se ruling by the Florida Supreme Court against the bus boarding practice.[181] The majority held the fact that this encounter took place on a bus is just one factor to be considered when examining the police/citizen encounter.[182] This factor is to be weighed along with the totality of the circumstances to determine whether or not a reasonable person would have felt free to ignore the officer.[183]

Also weighing into the Court's analysis was the fact that "the officers did not point guns at Bostick or otherwise threaten him and that they specifically advised Bostick that he could refuse consent [for the search of his bags]."[184] Despite these findings, the Supreme Court did not decide the issue of whether or not Bostick was seized.[185] The Supreme Court remanded the case for a determination of whether or not a seizure had occurred based on the test developed in its opinion.[186]

D. *The Dissenting Opinion*

The dissenting opinion in *Florida v. Bostick* agreed with the finding of the Florida Supreme Court and concluded that "the law-enforcement technique with which we are confronted in this case—the suspicionless police sweep of buses in intrastate or interstate travel—bears all of the indicia of coercion and unjustified intrusion associated with the general warrant."[187] The dissenters vehemently attacked the reasonableness of the bus boarding procedure conducted in this case.[188] After reviewing the procedure described in the facts of *Florida v. Bostick*, as well as similar cases, the dissenting justices concluded that "[t]o put it mildly, these

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180. *Id.* at 2389.

181. *Id.*

182. *Id.*

183. *Id.* The Court held:

> We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus.

Id.

184. *Id.* at 2388.

185. *Id.*

186. *Id.* at 2389.

187. *Id.* (Marshall, J., dissenting).

188. *Id.* at 2390 (Marshall, J., dissenting).

sweeps 'are inconvenient, intrusive, and intimidating.' "[189]

The only issue agreed upon in the majority and the dissenting opinions was the test to be used to determine the reasonableness of police/citizen encounters.[190] The dissenting opinion agreed with the majority that the test to be applied to this situation was whether or not a reasonable person "would feel free to decline the officers' requests or otherwise terminate the encounter." [191] The dissent, however, stated that it could not comprehend how the majority could possibly believe that a reasonable person in Bostick's position would have felt free to refuse to cooperate with the officers.[192]

The dissenting opinion asserted that the officers in the bus sweep created an intimidating show of authority[193] and, therefore, exhibited elements of coercion.[194] To support this conclusion, it pointed out that the officers displayed their badges, wore raid jackets with a sheriff's insignia, and that one of the officers displayed a gun.[195] The dissenting judges also noted that when Bostick was approached and questioned by the officers, he was seated in the rear of the bus.[196] In addition, the

189. *Id.* (Marshall, J., dissenting) (quoting United States v. Chandler, 744 F.Supp. 333, 335 (D.C. 1990).

> [T]he evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers-in short a *raison d'etre*-is foreign to *any* fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains("that time permits") and check identification [and] tickets, [and] ask to search luggage-all in the name of "voluntary cooperation" with law enforcement. . . .

Id. at 2391 (Marshall, J., dissenting) (quoting Bostick v. State, 554 So. 2d 1153, 1158 (1989) (quoting State v. Kerwick, 512 So. 2d 347, 348-49 (Fla. Dist. Ct. App. 1987))).

190. *Id.* at 2391 (Marhsall, J., dissenting).

191. *Id.* (Marshall, J., dissenting).

192. *Id.* at 2393 (Marshall, J., dissenting).

193. *Id.* at 2392 (Marshall, J., dissenting).

194. *Id.* (Marshall, J., dissenting).

195. *Id.* (Marshall, J., dissenting).

> These facts exhibit all of the elements of coercion associated with a typical bus sweep. Two officers boarded the Greyhound bus on which respondent was a passenger while the bus, en route from Miami to Atlanta, was on a brief stop to pick up passengers in Fort Lauderdale. The officers made a visible display of their badges and wore bright green "raid" jackets bearing the insignia of the Broward County Sheriff's Department; one held a gun in a recognizable weapons pouch. These facts alone constitute an intimidating "show of authority".

Id. (Marshall, J., dissenting) (citations omitted).

196. *Id.* (Marshall, J., dissenting).

officer questioning him stood in front of Bostick's seat[197] while the other officer partially blocked the aisle and, therefore, access to the exit.[198]

The dissenting opinion stated that this situation gave Bostick two options if he did not want to comply with the officers' requests.[199] First, he could just sit there and ignore them. [200] The dissenters contend, however, that the reasonable person could only conclude that such a response would be met with an intensified interrogation from the police[201] as the police would have, undoubtedly, viewed the refusal to cooperate as suspicious.[202] Furthermore, the dissenting judges were not persuaded by the majority's conclusion that the passenger is protected because a refusal to answer "without more, does not give rise to a reasonable basis for seizing a passenger."[203] The dissenting opinion reasoned that a passenger, unadvised of his rights, has no reason to know that his lack of cooperation cannot be held against him.[204]

The second option available to Bostick, according to the dissenters, would be for him to actually leave the bus.[205] This would require Bostick to leave his seat and walk directly past two officers, all within the narrow confines of a bus aisle.[206] The dissenting opinion described this act as having to "squeeze past the gun wielding inquisitor who was

197. *Id.* (Marshall, J., dissenting).

198. *Id.* (Marshall, J., dissenting).

199. *Id.* at 2393 (Marshall, J., dissenting).

200. *Id.* (Marshall, J., dissenting).

201. *Id.* (Marshall, J., dissenting). The dissent points out citing United States v. Cothran, 729 F. Supp. 153, 156 (D.D.C. 1990) *rev'd* United States v. Lewis, 921 F.2d 1294 (D.C. Cir. 1990) and United States v. Felder, 732 F. Supp. 204, 205 (D.D.C. 1990) that officers who engage in bus sweeps like that in *Bostick* admit that the effect of a passenger's refusal to cooperate is often increased suspicion and a referral to the authorities where the passenger is going that the passenger is suspected of carrying drugs. *Cothran*, 729 F. Supp. at 156.

> Detective Hairston testified that if a passenger refuses to permit a search of his or her bags or claims not to have identification, he "might be suspicious" and, depending on the conversation with the passenger, would notify authorities at the next stop that he suspected the passenger of carrying drugs.

Id. In *Felder*, Detective Hanson testified that:

> [W]hen passengers who appear nervous refuse to consent to an interview, certain members of his unit then take it upon themselves to notify authorities at the next stop. These "refuseniks" may then be approached, again by officers further down the line, in order to obtain their consent to undergo a search for drugs.

Felder, 732 F. Supp. at 205.

202. *Bostick*, 111 S. Ct. at 2393 (Marshall, J., dissenting).

203. *Id.* (Marshall, J., dissenting).

204. *Id.* (Marshall, J., dissenting).

205. *Id.* (Marshall, J., dissenting).

206. *Id.* (Marshall, J., dissenting).

blocking the aisle of the bus."[207] Justice Marshall observed that even if Bostick felt that leaving the bus was possible, it was still not a viable option.[208] Bostick would have been forced to exit the bus leaving any luggage that was stowed[209] and risk missing the bus's departure.[210] The fact the Bostick would have been leaving himself in the middle of an unfamiliar area only aggravates the situation, according to the dissenting opinion.[211] In short, the dissenting judges concluded that Bostick really had no other choice than to cooperate with the requests of the officers.[212] Accordingly, the coercive nature of the bus sweep encounter makes it unreasonable and in violation of the Fourth Amendment.[213]

The dissenters also took issue with the majority's application of *INS v. Delgado*.[214] In the dissenting opinion Justice Marshall attacked the majority's reasoning that Bostick's "freedom of movement was restricted by a factor independent of police conduct".[215] Such reasoning, he stated, "borders on sophism and trivializes the values that underlie the Fourth Amendment."[216] Furthermore, the very reason these sweeps occur on buses, the dissenters concluded, is to take advantage of the lack of options available to the passenger.[217] Justice Marshall also noted that just because a person puts "himself in a room with only one exit does not authorize the police to force an encounter upon him by placing themselves in front of the exit."[218]

Another major issue highlighted by Justice Marshall is that the officers in these sweeps are admittedly approaching people without any articulable suspicion that the individual has done anything wrong.[219] Moreover, although not every person on the bus is approached, it does not follow that the selection process is completely random.[220] After reviewing the testimony of officers in other cases examining bus sweep procedures, Justice Marshall challenged that it is not that these officers did not have articulable suspicion, but rather that they have "unspeakable suspicion."[221] Justice Marshall pointed out that "[a]t least one officer who routinely confronts interstate travelers candidly admitted that

207. *Id.* (Marshall, J., dissenting).
208. *Id.* (Marshall, J., dissenting).
209. *Id.* at 2393-94 (Marshall, J., dissenting).
210. *Id.* at 2393 (Marshall, J., dissenting).
211. *Id.* (Marshall, J., dissenting).
212. *Id.* at 2394 (Marshall, J., dissenting).
213. *Id.* (Marshall, J., dissenting).
214. *Id.* (Marshall, J., dissenting).
215. *Id.* (Marshall, J., dissenting).
216. *Id.* (Marshall, J., dissenting).
217. *Id.* (Marshall, J., dissenting).
218. *Id.* (Marshall, J., dissenting).
219. *Id.* at 2390 n.1 (Marshall, J., dissenting).
220. *Id.* at 2390 (Marshall, J., dissenting).
221. *Id.* (Marshall, J., dissenting).

race is a factor influencing his decision whom to approach."[222] To prevent officers from using impermissible criteria such as race, the dissenting opinion proposed that the officers be required to explain their decision to single out a particular passenger.[223]

The dissenting opinion concluded that while the bus sweep at issue here is clearly in violation of the Fourth Amendment,[224] its defects could be cured.[225] The dissenting judges stated that the sweeps would not be so coercive if (1) the officers advised the passenger being questioned that he has the right to refuse to cooperate, or (2) if the officers only approach those passengers for which they have articulable suspicion of criminal activity.[226]

V. ANALYSIS

The majority opinion in *Bostick* makes a strained and unrealistic interpretation of the circumstances surrounding Bostick's "consensual search." The Court, as the dissenting opinion points out, applied the proper test to the facts, but came out with the wrong answer.[227] The majority modified the test devised in *Mendenhall*[228] and stated that the proper test to examine a police/citizen encounter was whether or not the reasonable person would feel free to terminate the encounter or otherwise ignore the requests of the officer.[229] However, by its failure to affirm the Florida Supreme Court's per se prohibition of the bus boarding procedure, the Court suggests that it is possible for a reasonable person, in Bostick's situation,[230] to have known that he could have remained seated and ignored the officers' requests without fear of further harassment.[231]

There are two problems with this premise. First, it gives the so called "reasonable person" far too much credit for knowledge of his rights and his ability to feel free to completely disregard the requests of a law enforcement officials. "In the real world . . . few people are aware of their Fourth Amendment rights, many individuals are fearful of the police, and police officers know how to exploit this fear."[232] Further-

222. *Id.* (Marshall, J., dissenting)
223. *Id.* at 2394 n.4 (Marshall, J., dissenting).
224. *Id.* at 2394 (Marshall, J., dissenting).
225. *Id.* (Marshall, J., dissenting).
226. *Id.* at 2394-95 (Marshall, J., dissenting).
227. *Id.* at 2391 (Marshall, J., dissenting); *see also supra* notes 180-83 and accompanying text.
228. United States v. Mendenhall, 446 U.S. 544, 554 (1980); *see also supra* notes 51-52 and accompanying text.
229. *Bostick*, 111 S. Ct. at 2387; *see supra* note 178 and accompanying text.
230. Petitioner's Brief, *supra* note 110, at 6-7. Bostick was a passenger on an interstate bus, approached and questioned by multiple officers at a layover stop. *Id.*; *see supra* notes 101-135.
231. *Bostick*, 111 S. Ct. at 2387.
232. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on*

more, the portrayal of the reasonable person in the *Bostick* decision is inconsistent with previous portrayals of the Supreme Court. For example, *Bostick* presents factors mentioned in earlier cases as indicative of a coercive police atmosphere. Bostick was confronted by two officers, both displaying badges and police jackets, and one displaying a firearm.[233] In *Mendenhall,* the Court stated that facts such as these might create a seizure type situation even where the individual did not attempt to leave.[234]

Another Supreme Court case which contradicts the Court's holding in *Bostick* is *Florida v. Royer.*[235] In *Royer*, the defendant was approached by two detectives who asked him for his plane ticket and identification.[236] After examining these and noting a discrepancy, the agents identified themselves and requested that Royer accompany them to their office.[237] Royer's ticket and identification were not returned, and he was not informed that he could leave if he wished.[238] The agents then brought Royer into a room, with one exit, which the Court described as a "large storage closet."[239] Without Royer's permission, the agents had used his baggage claim tickets to pick up his luggage and bring it into the room as well.[240] The Court found that these circumstances ended any "consensual aspects" of the encounter and that Royer was illegally detained.[241]

These facts are very close to the situation presented in *Bostick*. In *Bostick*, the defendant was similarly confronted by multiple officers in a

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the Streets, 75 CORNELL L. REV. 1258, 1301 (1990). Professor Maclin stated this point by making note of the observations of Professor H. Richard Uviller in his book H. RICHARD UVILLER, TEMPERED ZEAL (1988). Professor Maclin elaborates:

> Professor Uviller's observations reveal that the "[m]anifest confidence [exuded by the police] begets submission, and the cops learn the firm tone and hand that informs even the normally aggressive customer of the futility of resistance. It's effective. In virtually every encounter I have witnessed, the response of the person approached was docile, compliant, and respectful."

Id. at 1294 n.172 (quoting H. RICHARD UVILLER, TEMPERED ZEAL 16 (1988)).

233. Petitioner's Brief *supra* note 110, at 4-5; *see also supra* notes 101-06 and accompanying text.

234. United States v. Mendenhall, 446 U.S. 544, 554 (1980); *see also supra* note 51 and accompanying text. In addition, if the defendant's story is believed (Bostick maintained he was sleeping and was awakened by one of the officers who made physical contact with his person), there is more evidence of a seizure as *Mendenhall* lists physical touching as a factor which could be indicative of a seizure type encounter. *Mendenhall*, 446 U.S. at 554.

235. 460 U.S. 491 (1983); *see also supra* note 108.

236. *Royer*, 460 U.S. at 494.

237. *Id.*

238. *Id.* at 494, 503.

239. *Id.* at 494.

240. *Id.*

241. *Id.* at 503.

very small area.[242] The only difference is that in *Royer*, the encounter occurred in an office, whereas, in *Bostick*, it occurred in the cramped confines of a bus.[243] In addition, instead of having to retrieve Bostick's luggage, it was already next to him.[244] In *Bostick*, there is also conflicting testimony as to whether or not the defendant was informed that he had the right to refuse to cooperate.[245]

It appears that the only factual difference between the two cases is that in *Royer*, the officers had to bring the defendant to a confined and coercive area,[246] whereas in *Bostick*, the defendant was already in such a setting when he was approached by the officers.[247] The Court, however, seems willing to overlook its earlier holdings and find, in *Bostick*, that the reasonable person should be able to tolerate these conditions and not feel coerced.[248] The situation confronting Bostick was made worse by the fact that his only alternative, other than sitting and simply ignoring the officers, was to physically remove himself from the bus.[249] This choice is not as easy as it might appear. Bostick was seated in the rear of a bus with two police officers standing in close proximity and partially blocking a bus aisle that is only 14 inches wide.[250] Such conditions make it awkward and more difficult to walk away or "escape" the encounter as would otherwise be the case if the event occurred off the bus.

The majority argues, under *Delgado*, that this constraint is not the result of any police conduct and therefore cannot, by itself, cause the passenger to be seized.[251] However, this restriction of movement appears to be precisely why the police engage in this procedure. [252] The sweeps allow the passenger few choices. S/he may cooperate with the officer's requests or physically extract herself/himself from the bus.[253]

Exacerbating this dilemma further is the police tactic of waiting until

242. Petitioner's Brief, *supra* note 110, at 4-5; *see also supra* notes 110-118.

243. Petitioner's Brief, *supra* note 110, at 4-5.

244. *Id.* at 4.

245. Respondent's Brief, *supra* note 130, at 2-3 n.2; *see also supra* notes 121-135.

246. As the Brief for the American Civil Liberties Union as Amicus Curiae states: "Numerous scientific studies confirm that cramped spaces make people anxious and thus readier to assent to the requests of others." Brief for the American Civil Liberties Union as Amicus Curiae at 11-12, Florida v. Bostick, 111 S. Ct. 2382 (1991) (No. 89-1717) (citations omitted) [hereinafter Brief for the ACLU].

247. *See* Bostick v. State, 510 So. 2d 321, 322-24 (Fla. Dist. Ct. App. 1987) (Letts, J., dissenting in part); *see also* Respondent's Brief, *supra* note 130 at 8.

248. *Bostick*, 111 S. Ct. at 2389 (Marshall, J., dissenting).

249. *Id.* at 2393 (Marshall, J., dissenting).

250. Bostick v. State, 554 So. 2d 1153, 1157 (Fla. 1989); United States v. Felder, 732 F. Supp. 204, 207 (D.D.C. 1990) (Greyhound bus 2000 series aisle approximately 14 inches wide.)

251. *Bostick*, 111 S. Ct. at 2387; *see also supra* notes 163-67.

252. *Bostick*, 111 S. Ct. at 2394 (Marshall, J., dissenting).

253. *Id.* (Marshall, J., dissenting).

the bus is about to depart before initiating the sweep.[254] If the passenger chooses to leave the bus, there is a great possibility he will miss the departure and be separated from any luggage that has been stowed on the bus.[255] Furthermore, the person may well be left stranded in the middle of an unfamiliar area without alternative means of transportation.[256]

Finally, it is reasonable to believe that a person who leaves a bus, immediately after being confronted by police officers, will create suspicion in the minds of the officers and the other passengers. The passenger will feel that he is proclaiming guilt to all those around him.[257]

The situation in *Bostick* presents a restriction of movement, which the officers used to their advantage. This restriction is not unlike the circumstances in *Royer*, where the officer retained the defendant's ticket and identification. In both cases, serious barriers to the defendant's freedom of movement existed which would lead the reasonable person to believe that he was not free to leave. Citing *United States v. Mendenhall* in the *Royer* opinion, Justice White stated: "These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.' "[258]

Moreover, the Court and those who support the *Bostick* decision completely overlook the extent to which a person's freedom is restricted and intruded upon in a bus sweep. To illustrate this point, one

254. *Id.* at 2393; *see also* Brief for the ACLU *supra* note 246; United States v. Flowers, 912 F.2d 707, 708 (4th Cir. 1990); United States v. Rembert, 694 F. Supp. 163, 168 (W.D.N.C. 1988). In *Rembert*, one of the agents who conducted bus sweeps testified that the sweep would not begin until the bus driver announced that all passengers should now board and then only after the passengers had in fact boarded. *Rembert*, 694 F. Supp. at 168-69. Such an announcement must lead the reasonable passenger to believe that the bus will depart shortly.

255. United States v. Cothran, 729 F. Supp. 153, 155-56 (D.D.C. 1990), *rev'd* United States v. Lewis, 921 F.2d 1294 (1990); *see also* Brief for the ACLU, *supra* note 246, at 10.

256. Cothran, 729 F. Supp. at 158. Defendant in this case was a passenger on a bus traveling to South Carolina from New York. *Id.* The bus underwent a *Bostick* like sweep at a stop in Washington D.C.. *Id.* at 154. The following quote from Judge Gesell illustrates the restriction placed on bus passengers when the bus makes scheduled stops prior to their point of destination: "Defendant, a resident of Connecticut, was in transit to South Carolina. She had no intention of visiting Washington, nor is there any indication that she knew her way around the Washington area or would have known what to do had she missed the bus departure." *Id.* at 155.

257. As argued in the Respondent's Brief:

> The close confines of the bus, the officers' physical interposition of themselves between Bostick and the exit, and the fact that the door was closed made the option of removing oneself from the encounter at best a highly speculative gauntlet that only a person with something to hide would even consider running.

Respondent's Brief, *supra* note 130 at 17.

258. Florida v. Royer, 460 U.S. 491, 502 (1982).

need only refer to the Brief for the United States as Amicus Curiae where it is actually suggested that a passenger, if desirous of ending the police encounter, could get up and go into the bus's restroom.[259]

Is this all the protection the Fourth Amendment affords the interstate traveler? Must a citizen extract himself from his seat on a cramped and crowded bus and hide in the minuscule bathroom to seek refuge from police questioning? The Respondent's Brief logically points out that an officer would probably have increased suspicion of anyone who spent a long period of time in the restroom, given the possibility that the person could be disposing of drugs in the toilet.[260] The point is that the majority in *Bostick* completely undervalues the level of intrusion experienced by the reasonable passenger in the bus sweep situation. When people travel they undoubtedly carry items which, though not illegal, are private and not intended for public display.[261] Nonetheless, these items will be viewed by police officers and fellow passengers if the traveller is unfortunate enough to be selected by the officers for "a consensual encounter." As stated by the American Civil Liberties Union Brief as Amicus Curiae: "The compelled exposure of such items to police gaze is not an insignificant intrusion."[262]

Presented with the above two choices (i.e., stay seated and ignore the officers' requests or leave and possibly create further suspicion, as well as miss the bus), it is clear, as the dissenting opinion argues, this "choice" is no choice.[263] Based on the facts of *Florida v. Bostick*, the Court gives the reasonable person too much credit for his fortitude, nerve, and legal knowledge by concluding that this reasonable person would not feel compelled to cooperate and would know that he did not have to do so.[264] The reasonable person as set forth in the *Bostick* decision sounds more like superperson!

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259. Brief for the United States as Amicus Curiae at 20, Florida v. Bostick, 111 S. Ct. at 2382 (1991) (No. 89-1717).

260. Respondent's Brief, *supra* note 130 at 16 n.16.

261. *See generally* Brief for the ACLU, *supra* note 246 at 6.

262. *Id.* at 6, 111 S. Ct. at 2382 (1991) (No. 89-1717). " 'Unwanted attention from the local police need not be less discomforting simply because one's secrets are not the stuff of criminal prosecutions.' " *Id.* (quoting Michigan v. Department of State Police, 110 S. Ct. 2481, 2493 (1990) (Stevens, J., dissenting)).

263. Florida v. Bostick, 111 S. Ct. 2382, 2394 (1991) (Marshall, J., dissenting).

264. As Judge Letts observed in his dissent:

> [M]y version of common sense tells me that a paid and ticketed passenger will not voluntarily forfeit his destination and get up and exit a bus in the middle of his journey, during a temporary stopover, while two policemen, one with a pouched gun in his hand, are standing over him in a narrow aisle asking questions and requesting permission to search luggage. It is not a question of whether he actually *was* free to leave, as all of us trained lawyers know he was. The test is whether a layman would reasonably be expected to believe he was free to leave under these circumstances. I conclude he would not.

Bostick v. State, 510 So. 2d 321, 323 (Fla. Dist. Ct. App. 1987).

The second problem with the holding of the Court is that the testimony of officers, who actually conduct bus sweeps, contradicts the majority's conclusion that an individual is free to ignore the officers. In *United States v. Cothran*[265] and *United States v. Felder*,[266] for example, officers testified that a passenger's refusal to cooperate often raised their level of suspicion and increased the intensity of their interrogation.[267] Officers have also testified that failure to cooperate may result in their phoning ahead to the authorities of the suspect's final destination so that they may further scrutinize his activity.[268] It is clear that a person's failure to cooperate is more likely to enhance rather than end the encounter. Therefore, even if the average passenger knows that his refusal to cooperate, without more, cannot be held against him,[269] he is mistaken if he believes that this will always be the case.

Another aspect of the *Bostick* decision, which creates Fourth Amendment concerns, is its random nature. Passengers are being approached, subjected to interrogation, and, as argued above, seized without any articulable suspicion that they have engaged in illegal activity. This unsystematic procedure gives the officer complete discretion over whom he will approach and question. As the dissenting opinion in *Bostick* points out, it is probable that the officer is making his selections based on "unspeakable" rather than "articulable suspicions."[270] Officers who conducted similar sweeps admitted that race can play a part in their decisions of whom to approach.[271] In addition, "[s]tudies have suggested that such discretion may be exercised in a fashion that disproportionately affects minorities."[272] In summary, this procedure places

265. 729 F. Supp. 153 (D.D.C. 1990), *rev'd by*, United States v. Lewis, 921 F.2d 1294 (D.D.C. 1990).

266. 732 F. Supp. 204 (1990).

267. *Felder*, 732 F. Supp. at 205, 208 (1990); *Cothran*, 729 F. Supp at 156; *see also supra* notes 201-202 and accompanying text.

268. *Felder*, 732 F. Supp. at 205, 208; *Cothran*, 729 F. Supp. at 156; *see also supra* notes 201-02 and accompanying text.

269. *See Bostick*, 111 S. Ct. at 2386-87 (citing Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210, 216-17 (1983); Florida v. Royer, 460 U.S. 491, 498 (1982); Brown v. Texas, 443 U.S. 47, 52-53 (1979)).

270. *See Bostick*, 111 S. Ct. at 2390 n.1 (1991) (Marshall, J., dissenting); *see also supra* note 221 and accompanying text.

271. *Bostick*, 111 S. Ct. at 2390 n.1 (Marshall, J., dissenting); *see also supra* note 222. For a discussion of discriminatory law enforcement practices, *see generally* John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557, 580-614 (1991).

272. Brief for the ACLU, *supra* note 246, at 18 (citing Marjorie E. Murphy, *Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification*, 1986 ARIZ. ST. L.J. 207 (1986)). The Murphy article discusses the results of research done on the vagrancy observation forms filed by members of the District of Columbia Police Department from November 30, 1978 through December 1, 1979. Murphy, *supra*, at 235-37. Vagrancy observation forms are forms officers must fill out whenever they contact or stop an individual. *Id.* at 236. The forms must identify the person approached and the reason why they were stopped. *Id.* The data showed that over-

complete discretion with the officer and opens the gates for police abuse. "To allow police to initiate encounters on whim, caprice, or prejudice, where the citizen's behavior is innocuous, invites wholesale government-sponsored arbitrariness."[273]

This type of complete discretion has been previously struck down by the Supreme Court. In *Delaware v. Prouse*,[274] the Court struck down random stops made by the Delaware Highway Patrol in their efforts to apprehend unlicensed drivers and unsafe vehicles.[275] In so doing, the Court stated that random stops involved the "kind of standardless and unconstrained discretion [which] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent."[276] The Court in *Bostick* makes no mention of the problem presented by giving officers absolute discretion to approach whomever they please. Furthermore, it does not hold the officers accountable for explaining their choice because of the supposedly consensual nature of the encounter. This procedure is inconsistent with the protections of the Fourth Amendment.

The most serious deficiency of the *Bostick* holding is its failure to properly balance the governmental and societal need for the bus sweep procedure with the level of intrusion on an individual's privacy. The Court does not, in any depth, consider the value of the procedure as a law enforcement tool. The statistics regarding the ratio of bags searched to arrests effected is not impressive.[277] In addition, no evidence was presented to establish that the procedure has had any noticeable effect on the interstate movement of drugs. In short, the State of Florida failed to establish the necessity and value of this procedure in light of the level of personal intrusion and inconvenience it created. Failure to address this issue is contrary to the Court's analysis in cases

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all 80% of the people approached were non-white. *Id.* Furthermore, in a police district where roughly 96% of the citizens were white, 60% of the individuals stopped were non-white. *Id.* In reviewing the citizen encounters labelled "stops," John Kramer, a former Assistant U.S. Attorney and a law professor, concluded that 39.2% of the stops were unconstitutional due to the improper reason listed by the officer. *Id.* at 237. Professor Kramer defined the following reasons as unconstitutional; "no explanation given, meaningless justification, harmless activity, in the area of criminal activity, and status." *Id.*

273. Murphy, *supra* note 261, at 272.

274. 440 U.S. 648 (1979).

275. Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 454 (1990).

276. *Id.* (quoting Delaware v. Prouse, 440 U.S. 648, 661 (1979)).

277. In United States v. Rembert, 694 F. Supp. 163 (W.D.N.C. 1988), Special Agent Jack Davis testified that in the first six to seven months following his department's implementation of a bus sweep procedure that he had boarded forty to fifty buses and had made three or four narcotics seizures. *Id.* at 177. United States v. Flowers, 912 F.2d 707 (4th Cir. 1990), disclosed that "Officer Sennett of the Charlotte Police Department boarded approximately one hundred buses, resulting in fifteen seizures of bags containing illegal drugs and approximately seven arrests." *Id.* at 710.

such as *Terry v. Ohio*, *Michigan Dept. of State Police v. Sitz*, and *Brown v. Texas*.[278] In each of these cases, the Court balanced the governmental need against the intrusion on privacy. In *Bostick*, no such balancing was attempted.

In the dissenting opinion of *Delgado*, Justice Brennan raised an important point on this subject, which is relevant to the Court's decision in *Bostick*. In his opinion, Justice Brennan wrote that the INS surveys at issue were "more the product of expedience than of prudent law enforcement policy."[279] He argued that the magnitude of the illegal alien problem had "mesmerized" the Court into allowing "Fourth Amendment freedoms to be sacrificed."[280] He further noted that the alien problem had become so severe that the Court allowed itself to lessen the privacy rights of law-abiding citizens and resident aliens in order to solve the problem.[281]

The same reasoning applies to the Court's decision in *Bostick*. The Court, in its efforts to maintain the "war on drugs," has allowed Fourth Amendment rights to be diminished. Furthermore, its opinion seems to have shifted the burden from the government having to prove the necessity of such bus sweeps as a strategy for stopping the interstate movement of drugs to the government only showing that it is an effective or easy strategy, regardless of its effect on individual rights. In summary, the government has failed to show why its goal (preventing the interstate movement of drugs) could not be accomplished in a less intrusive manner.

Yet another concern arising from the Supreme Court's decision in *Bostick* is its future ramifications. By its decision, the Court has cleared the way for law enforcement officials to continue to create new procedures designed to take advantage of situations, in which people voluntarily put themselves, in order to search for illegal drugs. It also signals approval of procedures that involve mass interrogation of people who

278. In Terry v. Ohio, 392 U.S. 1 (1968), the Court stated that to determine the reasonableness of police action, it was necessary to balance the government's "need to search [or seize] against the invasion the search [or seizure] entails." *Id.* at 21; *see also supra* note 27. In Brown v. Texas, 443 U.S. 47 (1978), the Court stated "[c]onsideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* at 50-51. This test was applied in Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990), where the Court examined the constitutionality of Michigan's highway sobriety checkpoint program. The Court weighed the State's interest in preventing drunk driving against the degree of intrusion experienced by the drivers who go through the checkpoints. *Id.* at 457. The Court, in *Sitz*, found the level of intrusion to be minimal and outweighed by the government interest. *Id.* at 455.

279. Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210, 240 (1983) (Brennan, J., dissenting).

280. *Id.* at 239-40 (Brennan, J., dissenting).

281. *Id.* at 241 (Brennan, J., dissenting).

have not engaged in any criminal conduct. The holding can only lead one to ask what will be next?[282]

Another point to be considered is that the Court, in its reasonable person test, only considers the reasonable innocent person. This analysis does not tell the whole story. If the bus sweep procedure used in *Bostick* is not coercive, why would any person who was in possession of an illegal substance give consent to a search of his luggage by a police officer? It would seem that a guilty person would only grant permission in two cases: (1) to try to bluff the officer into not continuing his investigation by acting innocent and hoping the officer will never actually conduct the search,[283] and (2) when the person felt compelled to grant permission and felt there was no other choice. If, as the majority in *Bostick* states, the reasonable person is aware that he has the right to refuse consent, then the individual would have no need to risk being caught trying to bluff and would simply refuse consent.[284] If, however, he did not feel free to refuse consent, he would grant it because he felt compelled to do so. In short, if the environment in *Bostick*, and cases like it, is not coercive, how could it be an effective law enforcement tool? In other words, why would it ever work?

A final point not raised by either the majority or the dissenting opinion in *Bostick* is that of public safety. The stated purpose of these sweeps is the location of illegal drugs and the apprehension of those who carry them. While not always the case, it is certainly possible that an individual carrying illegal drugs is armed and dangerous.[285] When such a person is approached by law enforcement officers while seated on a bus full of people, he has few options. Clearly, one option might very well involve the use of a weapon in order to effectuate an escape. Furthermore, it is possible that an innocent passenger could be taken hostage for the same purpose. Either way, the public is put at serious

282. *See* United States v. Grant, 920 F.2d 376 (6th Cir. 1990) (agents boarded planes to look for illegal aliens and drug traffickers); *see also*, United States v. Tavolacci, 895 F.2d 1423 (D.C. Cir. 1990) (police detectives boarded a train to approach a suspected drug trafficker). The passenger was approached because he was travelling under an assumed name. *Id.* at 1424. It would appear that it is only a matter of time before all major means of transportation are subject to sweeps or similar procedures. Will inner-city buses and trains be next in order to combat gangs and local drug trafficking?

283. *Id.* at 1424 ("Doubtless drug couriers often 'cooperate' in the hopes of simulating the reasonable innocent person and thereby shaking the police.").

284. *See supra* notes 177-80 and accompanying text.

285. *See* United States v. Flowers, 912 F.2d 707, 709 (4th Cir. 1990) (unclaimed bag was found to contain a fully loaded .38 caliber pistol and crack cocaine having a street value of $25,000); *see also* United States v. Rembert, 694 F. Supp. 163, 165 (W.D.N.C. 1988) (search of the defendant and his bags yielded a .38 caliber snubnosed revolver); Morganthau, *supra* note 4, at 16 (Savannah, Georgia Police Department seized 13 handguns over a 4 month period while carrying out its own interdiction program at local bus station.).

risk due to the inherently confrontational situation created on the bus. It is apparent that the reasonable police officer could easily imagine this scenario. Therefore, an officer is on notice each time he boards a bus that he is putting every person at risk of being in the middle of a dangerous and possibly life threatening incident.

VI. CONCLUSION

In *Florida v. Bostick*, the Court employed a valid and logical test to determine, for Fourth Amendment purposes, whether a person has been seized. The test was whether the reasonable person would feel free to refuse an officer's requests or otherwise terminate a police/citizen encounter.[286] The Court, however, in applying this test to the facts of *Bostick* allowed itself to be influenced by the pressure placed on law enforcement agencies to fight and win the "war on drugs."

Consequently, the Court erroneously decided that it is possible for a reasonable person in Bostick's position to have felt free to leave or terminate the encounter with the officers. The Court's error stems from its unrealistic portrayal of the reasonable person. The reasonable person, according to the *Bostick* Court, is able to endure being approached and questioned by two officers with badges and police jackets (one with a weapon displayed), while seated on a crowded bus, without feeling that he must cooperate.[287] In addition, this reasonable person does not find it coercive that his only options are to ignore these two officers or exit the bus.[288] He knows full well that he can disregard the officer's requests and that his refusal to cooperate cannot and will not be held against him. It is this reasonable person that the Court feels rides the interstate buses of the United States. This conclusion is both farfetched and inconsistant with prior depictions of the reasonable person by the Court.

Furthermore, the bus sweep practice of *Bostick* offends the protections of the Fourth Amendment. It allows officers to approach and question people in a highly uncomfortable and coercive environment, with no reason to believe the person has engaged in any criminal activity.[289] In addition, the officer has complete discretion over whom to approach and is not required to justify his selections.[290] This procedure is the type of unreasonable police/citizen encounter that the Fourth Amendment is intended to prevent.

In conclusion, the Supreme Court's statement that "there is no

286. *Bostick*, 111 S. Ct. at 2387; *see also supra* notes 177-80 and accompanying text.

287. Petitioner's Brief, *supra* note 110, at 4-5; *see also supra* notes 110-120.

288. *See supra* notes 199-213.

289. Bostick v. State, 510 So. 2d 321, 322 (Fla. Dist. Ct. App. 1987) (Letts, J., dissenting in part).

290. *See supra* notes 219-26, 263-69.

doubt that if the same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure"[291] summarizes the extent to which the Court trivializes the level of intrusion experienced by the bus passenger. The fact is, this encounter occurred on a bus, a significantly more constrained and coercive environment. It was cases like *Florida v. Bostick* that Justice Blackmun had in mind when he stated "what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs."[292] In *Bostick,* it was not the police conduct which was overly offensive, rather it was the conduct coupled with the setting which made this police/citizen encounter unreasonable and, therefore, in violation of the Fourth Amendment. For these reasons, the Supreme Court should have affirmed the holding of the Florida Supreme Court and held the bus sweep procedure in *Bostick* to be unlawful.

Michael J. Reed, Jr. *

291. *Bostick*, 111 S. Ct. at 2386.

292. Michigan v. Chesternut, 486 U.S. 567, 573 (1987).

* To my wife Cindy, my parents Michael and Harriet Reed, Annette and Michael Lambert, James Costello and Malcolm Patterson. Thank you for all of your support and assistance in the writing of this article. Special thanks to my wife and family for always being there throughout my study of law.

NOTES

Prejudicial Publicity in Criminal Trials: Bringing *Sheppard v. Maxwell* Into the Nineties

I. INTRODUCTION

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .[1]

Since the ratification of the Sixth Amendment in 1791,[2] the right of a criminal defendant to a fair trial has become a cornerstone of American jurisprudence.[3] Inherent in the right to a fair trial is the right to an impartial jury.[4] As early as the 1807 treason trial of Aaron Burr, the United States Supreme Court recognized the possibility that pretrial publicity might impair a court's ability to impanel an impartial jury.[5]

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1. U.S. CONST. amend. VI.

2. *Id.*

3. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 540 (1965). "[T]he preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." *Id.*

4. U.S. CONST. amend. VI.

5. Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 639 (1991) (citing United States v. Burr, 25 F. Cas. 49, 49-51 (C.C.D. Va. 1807)), [hereinafter *Impartial Jurors*]. Aaron Burr was the former Vice-President of the United States who was tried for treason in 1807 because of his attempts to colonize the southwest. THE CONCISE COLUMBIA ENCYCLOPEDIA 121 (Judith S. Levey & Agnes Greenhall eds., 1983). Burr was infamous as the man who killed Alexander Hamilton in a duel in 1804. *Impartial Jurors*, *supra* at 631-32. His involvement in a personal feud with President Thomas Jefferson served to intensify public interest in his trial. *Id.* at 639. His attorneys contended that because of negative publicity, including "inflammatory" newspaper articles, "the public mind had been so filled with prejudice against [Burr] that there was some difficulty in finding impartial jurors." *Burr*, 25 F. Cas. at 49. Chief Justice John Marshall held that while jurors who had formed strong impressions as to the guilt of the defendant should be excluded, *Impartial Jurors*, *supra*, at 639 (citing *Burr*, 25 F. Cas. at 50), those jurors who merely held "light impressions" should not necessarily be excluded. *Id.* at 639-40 (citing *Burr*, 25 F. Cas. at 51). Marshall noted, "[w]ere it possible to obtain a jury without *any* prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore *will not be required*." *Burr*, 25 F. Cas. at 50-51 (emphasis added).

The potential danger of prejudicial publicity is vastly multiplied in today's technological age.[6] More and more cases attract a level of publicity such that the impartiality of the jury comes into question.[7] In late 1991, the appeal of Pamela Smart's accomplice to murder conviction in New Hampshire, and the pretrial motions in the William Kennedy Smith rape case in Florida revolved around the effects of pretrial publicity. The many legal difficulties of former Heavyweight Boxing Champion Mike Tyson have also attracted much media attention, and his status as a celebrity will likely make the publicity a factor when his case comes to trial.

This article will discuss the state of the law regarding publicity and its effect on a fair trial. Part II[8] will discuss the evolution of the law to 1966, when the lead case of *Sheppard v. Maxwell* was decided. Part III[9] will explore in depth the lead case of *Sheppard v. Maxwell*,[10] Part IV[11] will examine some issues which remain unresolved after *Sheppard*, and Part V[12] concludes.

II. Evolution of the Law to 1966

In the five years prior to the *Sheppard*[13] decision, the United States Supreme Court decided a number of cases which set the stage for the reversal of Sheppard's conviction. Each involved the reversal of a conviction on the grounds that the defendant did not receive a fair trial by an impartial jury, without a showing of actual prejudice.[14]

In *Irvin v. Dowd*,[15] the defendant was convicted of murder after the prosecution issued press releases claiming that the defendant had confessed to six murders.[16] Because of the widespread publicity, the defendant requested and received a change of venue from Vanderburgh

6. *Impartial Jurors*, *supra* note 5, at 635. The authors note that since 1980, the percentage of American homes with cable television has risen from 21% to more than 57%; the percentage with VCRs has risen from less than 1% to 70%; average daily television use is approximately 7 hours per day; radio use almost 3 hours per day; and percentage of American households which read newspapers is more than 64%. *Id.* (citations omitted).

7. Judge Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls—A Theory of Procedural Justice*, 65 U. Det. L. Rev. 169, 172 (1988), [hereinafter *Procedural Justice*]; *see also Impartial Jurors*, *supra* note 5, at 636 ("explosion in claims by criminal defendants . . . of juries biased by press reports").

8. *See infra* notes 13-51 and accompanying text.

9. *See infra* notes 52-126 and accompanying text.

10. 384 U.S. 333 (1966).

11. *See infra* notes 127-251 and accompanying text.

12. *See infra* note 252 and accompanying text.

13. *Sheppard*, 384 U.S. 333 (1966).

14. *See, e.g.*, Estes v. Texas, 381 U.S. 532 (1965); Turner v. Louisiana, 379 U.S. 466 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

15. 366 U.S. 717 (1961).

16. *Id.* at 719-20.

County, Indiana, to neighboring Gibson County.[17] Defense counsel sought a second change of venue, claiming that the prejudicial publicity had also infected Gibson County.[18] This motion was denied because of an Indiana statute limiting defendants to one change of venue.[19] Eight of the twelve jurors who heard the case had admitted on voir dire that they believed the defendant was guilty, but they could set aside this belief and vote based on the evidence.[20] The Supreme Court held that a " 'pattern of deep and bitter prejudice' "[21] existed in the community, and held that the trial court erred in not granting the second change of venue, despite the language of the statute.[22] Irvin's conviction was reversed.[23]

In *Rideau v. Louisiana*,[24] the Supreme Court again held that a due process violation may be found, and a conviction reversed, without a showing of actual prejudice.[25] In *Rideau*, the defendant was convicted of murder after his filmed, pre-arraignment confession was aired three times on local television.[26] Defendant's motion for change of venue was denied, despite the statements of three jury members that they had seen the taped confession.[27] The Court, recognizing the impossibility of a fair trial in Calcasieu Parish, where the murder took place and where the taped confession was aired,[28] reversed Rideau's conviction,[29] over the dissent of Justice Clark, who argued that the conviction should be affirmed "[u]nless the adverse publicity is shown by the record to have fatally infected the trial . . . ."[30]

While the preceding cases involved prejudicial circumstances which

17. *Id.* at 720.

18. *Id.*

19. *Id.*

20. *Id.* at 727. The Supreme Court noted, "[w]ith such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations" despite their statement that they could be fair and impartial. *Id.* at 727-28.

21. *Id.* at 727 (quoting Stroble v. California, 343 U.S. 181 (1951)). The Court pointed out that in a previous case, the Indiana Supreme Court had contravened the statute, granting a second change of venue in order to ensure a fair trial by an impartial jury. *Id.* at 721 (citing Gannon v. Porter Circuit Court, 159 N.E.2d 713, 715 (Ind. 1959)).

22. *Irvin*, 366 U.S. at 721.

23. *Id.* at 728-29.

24. 373 U.S. 723 (1963).

25. *Id.* at 727. "[W]e . . . hold, without pausing to examine a . . . transcript of the voir dire examination of the members of the jury, that [defendant's rights were violated]." *Id.*

26. *Id.* at 724.

27. *Id.* at 724-25.

28. *Id.* at 723-26. "[T]he conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial - at which he pleaded guilty to murder." *Id.* at 726.

29. *Id.* at 727.

30. *Id.* at 729 (Clark, J., dissenting).

occurred prior to trial,[31] in *Turner v. Louisiana*[32] the Supreme Court found inherent prejudice in the State's conduct during the trial.[33] During the trial, two deputy sheriffs, who were the key prosecution witnesses,[34] had also "freely mingled and conversed with the jurors in and out of the courthouse during the trial."[35] The trial court denied defense motions for a mistrial,[36] and allowed the contact among the witnesses and the jurors to continue.[37] Turner was convicted of murder and sentenced to death.[38] The Supreme Court of Louisiana upheld the conviction, holding that a showing of actual prejudice was required for reversal.[39] The United States Supreme Court, again acknowledging the existence of an inherent prejudice standard, reversed the conviction.[40]

Finally, in *Estes v. Texas*,[41] the Supreme Court again reversed a conviction because of inherently prejudicial circumstances.[42] In this case, the obtrusive presence of television cameras in the courtroom was prejudicial.[43] The presence of television, the Court said, could distract the jurors,[44] or unconsciously effect the way they vote.[45] It could also dam-

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31. *See supra* notes 15-30 and accompanying text.

32. 379 U.S. 466 (1965).

33. *Id.* at 473. While *Turner* did not involve pretrial publicity, it is nonetheless important to the evolution of the law regarding the inherent prejudice standard. *See Sheppard*, 384 U.S. at 352 (citing *Turner*, 379 U.S. at 473).

34. *Turner*, 379 U.S. at 467.

35. *Id.* at 468. The jury was sequestered during the three day trial. As such, the jurors were in constant contact with deputy sheriffs of Tangipahoa Parish, who provided transportation, ran errands, and accompanied the jurors at meals. The two deputies who testified also served in this capacity. *Id.* at 467-69.

36. *Id.* at 468-69.

37. *Id.* at 470.

38. *Id.*

39. *Id.* at 470-71.

40. *Id.* at 473. "[I]t would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution." *Id.*

41. 381 U.S. 532 (1965). Like *Turner*, Estes did not involve pretrial publicity. *See infra* notes 93-100 and accompanying text. It is, however, further evidence of the willingness of the United States Supreme Court to overturn convictions without a showing of actual prejudice. *See Sheppard*, 384 U.S. at 352 (citing *Estes*, 381 U.S. at 542-43).

42. *Estes*, 381 U.S. at 544.

43. *Id.* "Television . . . reaches into a variety of areas in which it may cause prejudice to an accused." *Id.* It is interesting to note that a television camera was allowed at the trial of William Kennedy Smith in West Palm Beach, Florida, despite the protestation of his attorney. However, unlike *Estes*, there was only one small camera "with no lights or other intrusions." Steven Brill, *How The Willie Smith Show Changed America*, AM. LAW., Jan./Feb. 1992, at 3, 100 [hereinafter *Willie Show*]. Forty-six states now allow cameras in the courts, provided they are unobtrusive. *Id.*

44. *Estes*, 381 U.S. at 546.

45. *Id.* at 544.

age the quality of testimony,[46] or overburden the trial judge.[47] The Supreme Court, in reversing the conviction, did not require that any of these possible effects be proven,[48] but held that they "inherently prevented a sober search for the truth."[49]

It was in the wake of the above decisions that the United States Supreme Court agreed to hear the *Sheppard* case.[50] While each of these cases seemed to hinge on a specific prejudicial situation or event, *Sheppard* was decided on a combination of factors which occurred both before and during trial.[51]

III. *SHEPPARD V. MAXWELL* AND TOTALITY OF THE CIRCUMSTANCES

A. *Overview*

In the 1966 decision in *Sheppard v. Maxwell*,[52] the United States Supreme Court reversed the denial of the habeas petition of Dr. Samuel Sheppard, a prominent Cleveland doctor who was convicted of murdering his wife in a highly publicized and controversial trial.[53] The Court looked at the totality of the circumstances in determining that the virulent publicity against Sheppard both before and during the trial was such that prejudice could be presumed without a showing of actual prejudice to the defendant.[54]

The *Sheppard* decision has come to be regarded as a leading case in the area of pretrial publicity, and is often relied upon by petitioners attempting to reverse convictions based upon these grounds.[55] The Court in *Sheppard* enumerated a wide variety of events and situations taking place both before and during the trial which, taken as a whole, satisfied the inherent prejudice standard and resulted in the reversal of

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46. *Id.* at 547.

47. *Id.* at 548.

48. *Id.* at 554.

49. *Id.* at 551.

50. 382 U.S. 916 (1965).

51. *See infra* notes 57-118 and accompanying text.

52. 384 U.S. 333 (1966).

53. *Id.* at 363. For a first-hand discussion of the Sheppard case, see F. LEE BAILEY, THE DEFENSE NEVER RESTS 53-92 (1971).

54. *Sheppard*, 384 U.S. at 351-52 (citing Estes v. Texas, 381 U.S. 532, 542-43 (1965); Turner v. Louisiana, 379 U.S. 466, 473 (1965); Rideau v. Louisiana, 373 U.S. 723, 726 (1963); *In re* Murchison, 349 U.S. 133, 136 (1955); Adams v. United States *ex rel* McCann, 317 U.S. 269, 281 (1942)).

55. *See, e.g.*, Defendant's Motion for New Trial—Failure of Due Process, State of New Hampshire v. Pamela Smart, Superior Court Case (No. 90-S-1370; 90-S-1371; 90-S-1372). In this motion, defendant, through her attorneys, provided the court with an 11-page "comparison chart," attempting to demonstrate numerous similarities between the pervasive prejudicial atmosphere of *Sheppard* and the *Smart* proceedings. *Id.* (appendix following p.18).

Sheppard's conviction.[56]

In order to fully appreciate the combination of factors which led to the reversal, the events noted by the court will be divided into the following categories: the prejudicial conduct of law enforcement officials prior to Sheppard's arrest, including their relationship with (and apparent willingness to be manipulated by) the news media;[57] the release by the press, prior to and during trial, of incriminating "evidence" which was never introduced at trial;[58] the chaos which resulted from the trial judge's eagerness to accommodate the media;[59] the events which caused jurors to find themselves in the role of celebrities;[60] and the inaction by the trial judge on many occasions when he had the opportunity to mitigate the effects of the above factors.[61]

B. *Conduct of the Investigation Prior to Sheppard's Arrest*

Almost immediately following the July 4, 1954 murder of Marilyn Sheppard, her husband, Dr. Sam Sheppard, became the primary suspect.[62] From the outset, law enforcement officials investigating the case engaged in a number of practices which were subsequently held to have prejudiced Sheppard's right to a fair trial.[63] Convinced of Sheppard's guilt,[64] investigators subjected him to repeated interrogations without an attorney being present.[65] The investigation was marked by an inordinate amount of cooperation between law enforcement officials and the media.[66] At times, the relationship between the press and in-

56. See *infra* notes 57-118 and accompanying text for discussion of factors leading to reversal.

57. *See infra* notes 62-76 and accompanying text.

58. *See infra* notes 77-82 and accompanying text.

59. *See infra* notes 83-91 and accompanying text.

60. *See infra* notes 92-107 and accompanying text.

61. *See infra* notes 108-118 and accompanying text.

62. *Sheppard*, 384 U.S. at 337.

63. *See infra* notes 65-76 and accompanying text.

64. *Sheppard*, 384 U.S. at 337. "After a search of the house and the premises on the morning of the tragedy, Dr. Gerber, the Coroner, is reported—and it is undenied—to have told his men, 'Well, it is evident the doctor did this, so let's get the confession out of him.' " *Id.*

65. *Id.* at 337-38. These included two separate interviews on the day of the murder, while Sheppard was hospitalized and sedated. *Id.* Sheppard was also repeatedly asked to submit to a lie detector test, and his refusal to do so was met with extensive media disapproval. *Id.* at 338-39. The media pressure on Sheppard to take the test was fueled by the public comments of investigators. *Id.* at 339. "[S]ubsequent newspaper articles reported that the Coroner was still pushing Sheppard for a lie detector test." *Id.* Ironically, post-conviction attempts by the defense to administer such a test while Sheppard was incarcerated were opposed by both the media and Ohio authorities. BAILEY, *supra* note 53, at 62-65.

66. The eagerness of law enforcement officials to cooperate with the press is evidenced by a number of events during the investigation. At the outset of the investigation, the Sheppard property was sealed off, Sheppard v. Maxwell, 384 U.S. 333, 337 (1966), "[b]ut newspaper photographers and reporters were permitted

vestigating officials went beyond one of mere cooperation to a situation where the investigation was actually manipulated by media coverage.[67]

The way in which the coroner's inquest[68] was conducted provides still more evidence of questionable conduct during the investigation.[69] Held in a crowded gymnasium, the inquest was attended by a "swarm of reporters and photographers"[70] and "several hundred spectators."[71] Despite the fact that Sheppard had not yet been arrested,[72] he was searched by police in full view of the media and the spectators.[73] Sheppard's attorneys, although present, were prevented from participating in the proceedings,[74] during which Sheppard was interrogated for over five hours.[75] The inquest lasted three days and was broadcast live on television.[76]

C. *Release of "Evidence" Not Introduced at Trial*

Sensing the widespread public interest in Marilyn Sheppard's murder, the news media seized every available opportunity to provide the public with details about the investigation, the trial, and of Sheppard

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access . . . and took pictures throughout the premises." *Id.* at 337 n.4. When Sheppard agreed to re-enact his version of the crime, the Coroner invited members of the press to observe the proceedings. *Id.* at 338. When Sheppard was finally arrested at 10:00 p.m. on July 30, 1954, "[h]e was taken to Bay Village City Hall where hundreds of people, newscasters, photographers and reporters were awaiting his arrival." *Id.* at 341.

67. On at least three occasions, official action so closely followed media criticism of inaction that it would not be illogical to infer that the criticism may have played a role in prompting the action. *Sheppard*, 384 U.S. at 339, 341. In one instance, Dr. Gerber, the Coroner, "called an inquest . . . and subpoenaed Sheppard" on the same day that an editorial appeared criticizing Gerber for the lack of an inquest up to that time. *Id.* at 339. Likewise, Sheppard was arrested the same day that a local newspaper printed a front-page editorial demanding his arrest. *Id.* at 341. The article was accompanied by the headlines " 'Why Isn't Sam Sheppard in Jail' " and " 'Quit Stalling-Bring Him In.' " *Id.* Moreover, editorials criticizing the handling of the investigation by Bay Village officials were closely followed by two meetings, one of the investigating agencies involved in the case, and the other of the Bay Village council. The latter meeting resulted in a resolution directing the Bay Village mayor to request that the Cleveland police take over the investigation. BAILEY, *supra* note 53, at 60.

68. *See supra* note 64.

69. *Sheppard*, 384 U.S. at 339-40.

70. *Id.* at 339.

71. *Id.*

72. *Id.* at 339, 341. The inquest was held July 21, 1954 and Sheppard was arrested nine days later. *Id.* at 339, 341.

73. *Id.* at 339.

74. *Id.* at 339-40. "When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner. . . ." *Id.* at 340.

75. *Id.* at 340.

76. *Id.* at 354.

himself.[77] Some of this information included incriminatory "evidence" against Sheppard,[78] much of which was leaked to the press by the prosecution.[79] At least some of this evidence which presumably reached some jurors,[80] was never introduced at trial.[81] The Court noted that evidence which reaches the jury in this manner is dangerous, because "the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' "[82]

D. *Accommodations to Media at Trial*

As pervasive as the press coverage of the trial was, the way in which the media was allowed to dominate the courtroom during trial was perhaps even more prejudicial.[83] Almost all of the available seats in the

77. *Id.* at 356-57. "Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public." *Id.* (citations omitted).

78. *Id.* at 357. "As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony." *Id.*

79. *Id.* at 361.

80. *Id.* at 357.

81. *Id.* at 356. Among evidence released by law enforcement personnel were the claims of a detective that "scientific tests" done at the crime scene contradicted Sheppard's version of the events surrounding the murder. *Id.* at 340. This evidence was published prior to the beginning of the trial, and was never introduced at trial. *Id.* When Sheppard testified that he had been mistreated by Cleveland Police, "Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard's allegations." *Id.* at 349. The headlines labeled Sheppard a " 'Barefaced Liar,' " and attributed that characterization to Captain Kerr, who was never called to testify at trial. *Id.*

Sheppard's personal and family life was also of great interest to the media. *Id.* at 340. The newspapers claimed that Sheppard had numerous extramarital affairs, and emphasized his infidelities as a suggested motive for the murder of his wife. *Id.* Sheppard had acknowledged an affair with one Susan Hayes. *Id.* "The testimony at trial never showed that Sheppard had any illicit relationships besides the one with Susan Hayes." *Id.* at 340-41. One report, broadcast over television and radio during the trial, recited allegations of a woman who claimed that Sheppard had fathered her illegitimate child. *Id.* at 348. In addition, reports surfaced that Marilyn Sheppard had described her husband as having a " 'Dr. Jekyll and Mr. Hyde' " personality, *Id.* (citation omitted), and that a witness would testify about Sheppard's "fiery temper," contrary to defense's attempts to portray Sheppard as " 'a gentle physician with an even disposition.' " *Id.* The jury was also subjected to press allegations "that Sheppard had purposely impeded the murder investigations and must be guilty since he had hired a prominent criminal lawyer; [and] that Sheppard was a perjurer." *id.* at 356-57. None of these allegations were elicited from witnesses in open court. *Id.* at 356.

82. *Sheppard*, 384 U.S. at 351 (quoting Marshall v. United States, 360 U.S. 310, 313, (1959) (setting aside federal conviction because jurors heard news accounts of information were not admitted at trial)).

83. *Id.* at 354-55. "[W]e believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of 'the judicial serenity and calm

courtroom were assigned by the trial judge to members of the media.[84] An extra table "was set up *inside the bar*, in back of the single counsel table."[85] This table, which seated approximately twenty people, was also assigned to media representatives.[86] All rooms on the courtroom floor were made available for use by the press, with special telephone and telegraph equipment installed for their convenience.[87] One radio station was assigned a room adjacent to the jury room, and was allowed to broadcast from this room while the jury deliberated.[88] The trial judge even allowed himself to be interviewed on the court house steps.[89] Instead of preventing media interference, the trial judge seemed to go out of his way to allow this matter to be tried by the press.[90] The trial judge had an affirmative duty to control the atmosphere in the courtroom. He clearly failed in this regard, allowing the trial to become a media circus.[91]

E. *Jurors as Celebrities*

The impartiality of a jury can be greatly affected by the jurors' per-

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to which [he] was entitled.' " *Id.* at 355 (quoting Estes v. Texas, 381 U.S. 532, 536 (1965)).

84. *Id.* at 343.

85. *Id.* at 242-43 (emphasis added).

86. *Id.* at 343. "The erection of a press table for reporters inside the bar is unprecedented." *Id.* at 355.

87. *Id.*

88. *Id.*

89. *Id.* While the overwhelming presence of the media in the courtroom was probably enough on its face to allow a presumption of prejudice, *id.* at 355, the resulting disruption of the trial provides further evidence that Sheppard was deprived of " 'the calmness and solemnity of the courtroom' " to which every defendant is entitled. *Id.* at 350-51 (quoting Cox v. Louisiana, 379 U.S. 554, 583 (1965) (Black, J., dissenting)). For example, the special media table inside the bar was conspicuously close to both the counsel table and the jury box. *Id.* at 343. The close proximity to the counsel table made private conversation among Sheppard and his attorneys virtually impossible, requiring them to leave the courtroom to converse in private. *Id.* at 344. Likewise, whenever counsel wished to speak to the judge out of the jury's hearing, the conversation had to be moved to the judge's chambers. *Id.* Even this measure was ineffective, however, because of the presence of media members in the judge's anteroom, who "vied with each other to find out what . . . had [been] discussed, and often these matters later appeared in newspapers accessible to the jury." *Id.* At times, the media were allowed to "handle and photograph trial exhibits lying on the counsel table during recesses." *Id.* at 358. Some of these photographs were subsequently published in the newspapers. *Id.* at 345.

90. *Id.* at 355. "[W]e believe that the arrangements *made by the judge* with the news media caused Sheppard to be deprived of [a fair trial]." *Id.* (emphasis added). The Supreme Court also noted that "the [*Sheppard*] case came on for trial two weeks before the November general election at which . . . the trial judge, Judge Blythin, was a candidate to succeed himself." *Id.* at 342.

91. See *infra* notes 108-18 and accompanying text for a discussion of the trial judge's duty to control the conduct of the trial.

ception of their role in the proceedings.[92] In *Estes v. Texas*,[93] the Supreme Court discussed the effect on jurors of television cameras in the courtroom.[94] The presence of cameras immediately escalates the sensational aspects of the trial.[95] This special attention is bound to have an effect on the jurors' perceptions of their roles, whether or not they are even aware of it.[96] Moreover, not only is the extensive media presence distracting,[97] the jurors' awareness of public feeling in a sensational trial may cause them to "feel the pressures of knowing that friends and neighbors have their eyes upon them."[98] This knowledge of public sentiment may have an impact on the way jurors vote.[99]

The Court in *Estes* reversed the defendant's conviction based almost exclusively upon the obtrusive presence of television cameras in the courtroom.[100] In *Sheppard* the impact of media presence on the jurors was even greater.[101] The media pressure on the jurors in the Sheppard trial was not nearly as subtle or unconscious as that in *Estes*.[102] More than three weeks prior to trial, the names of seventy-five prospective jurors were published in the local newspapers, resulting in anonymous contact, by mail and telephone, of all of the veniremen.[103] The prospective jurors were photographed during jury selection, and those selected were photographed entering and leaving the courtroom.[104] This constant attention was not only allowed, but in some cases facilitated by the trial court.[105] If, as in *Estes*, the mere likelihood that jurors would be part of a televised broadcast was found to be prejudicial,[106] the inherent prejudice in the court-sponsored celebrity status accorded the

92. Estes v. Texas, 381 U.S. 532, 545-46 (1965).

93. 381 U.S. 532 (1965). *See supra* notes 41-49 and accompanying text.

94. *Estes*, 381 U.S. at 545-46.

95. *Id.* at 545. "From the moment the trial judge announces that a case will be televised it becomes a *cause célèbre*. The whole community *including prospective jurors*, becomes interested in all the morbid details surrounding it." *Id.* (emphasis added).

96. *Id.*

97. *Id.* at 546.

98. *Id.*

99. *Id.*

100. *Id.* at 550-52.

101. *Sheppard*, 384 U.S. at 353-54. "The press coverage of the Estes trial was not nearly as massive and pervasive as the attention given by the Cleveland newspapers and broadcasting stations to Sheppard's prosecution." *Id.*

102. *Id.* at 353. "[T]he jurors were thrust into the role of celebrities . . . ." *Id.*

103. *Id.* at 342.

104. *Id.* at 343-44.

105. *Id.* at 345. "The court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room." *Id.* "The day before the verdict was rendered . . . the jury was separated into two groups to pose for photographs which appeared in the newspapers." *Id.*

106. *Estes*, 381 U.S. at 545-46.

Sheppard jurors is readily apparent.[107]

F. *Trial Judge's Failure to Mitigate*

Many of the problems outlined above could have been avoided had the trial judge been more cognizant of the potential effect on the jury, and his responsibility to control the prejudicial atmosphere.[108] Despite many requests by defense counsel, the judge consistently failed to take the appropriate steps "to reduce the appearance of prejudicial material and protect the jury from outside influences."[109] The United States Supreme Court criticized the trial judge's failure to protect the jury from prejudicial media coverage;[110] to control the conduct of newsmen in the courtroom during the trial;[111] to "control the release of leads, information and gossip to the press by police officers, witnesses, and the counsel for both sides;"[112] and to employ the remedial measures of continuances, change of venue, and/or sequestration of the jury.[113] Even after the jury was sequestered, controls were inadequate, as the jurors were allowed to make telephone calls during the five days of deliberations.[114] The judge again took no action, despite the requests of defense counsel.[115] The Supreme Court felt that even the trial judge's instructions to the jury were lacking.[116] Based upon the foregoing fac-

107. *Sheppard*, 384 U.S. at 353. The trial judge's role in controlling this situation is discussed *infra*, notes 108-18 and accompanying text.

108. *Sheppard*, 384 U.S. at 357. "The court's fundamental error is compounded by the holding that it lacked the power to control the publicity about the trial." *Id.*

109. *Id.* at 358. Examples of judicial inaction included denial of defense motions designed to mitigate the prejudicial effects of such press releases as the Jekyll-Hyde article; the characterization of Sheppard as a perjurer by a Cleveland police officer; the claim that Sheppard had fathered an illegitimate child; the allegation that Sheppard had intentionally impeded the investigation; and the suggestion that Sheppard's hiring of a prominent criminal lawyer was a concession of guilt. *See supra* note 81. The judge also refused to take action following a newspaper article which accused the defense of "mass jury tampering". *Sheppard*, 384 U.S. at 345-46.

110. *Sheppard*, 384 U.S. at 357. "From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts." *Id.* The Supreme Court disagreed, noting, "reporters who wrote or broadcast prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings. The judge was put on notice of such events by defense counsel." *Id.* at 362.

111. *Id.* at 358. The court further noted, "[t]he judge's awareness of his power in this respect is manifest from his assignment of seats to the press." *Id.* at 358 n.12.

112. *Id.* at 359. "That the judge was aware of his responsibility in this respect may be seen in his warning to Steve Sheppard . . . who had apparently made public statements in an attempt to discredit testimony for the prosecution." *Id.*

113. *Id.* at 363.

114. *Id.* at 349.

115. *Id.*

116. *Id.* at 353. "[Jurors] were allowed to go their separate ways . . . without adequate directions not to read or listen to anything concerning the case." *Id.*; *see*

tors, the Court held that "the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom,"[117] and ordered a new trial.[118]

G. *Summary—When is* Sheppard *Triggered?*

As indicated above, the reversal of Sheppard's conviction was mandated by an overwhelming combination of factors which indicated that Sheppard's right to a fair trial was severely impaired.[119] While *Sheppard* stands for the proposition that pervasive publicity can result in a violation of defendant's right to a fair trial without a showing of actual prejudice,[120] defendants attempting to apply the *Sheppard* totality of the circumstances analysis face a Herculean task.[121] The factors enumerated in *Sheppard* involve impropriety in almost every aspect of the investigation and the trial.[122] If *Sheppard* is a minimum standard of the prejudicial circumstances required to satisfy the totality of the circumstances test, it is unlikely that this standard will ever be satisfied.[123] De-

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also id. at 360-61 n.14 (describing the inadequacy of the judge's instruction regarding the inadmissibility of lie detector tests).

117. *Id.* at 363.

118. *Id.* Sheppard was acquitted at his second trial on November 16, 1966, but, arguably, the damage had already been done. By the time of his acquittal, Sheppard had been abusing both alcohol and drugs, and his personal and professional life had deteriorated. He died in April, 1970, from an overdose of sleeping pills. BAILEY, *supra* note 52, at 84, 91-92.

119. *See supra* notes 52-118 and accompanying text.

120. *Impartial Jurors*, *supra* note 5, at 643 n.67 (citing Sheppard v. Maxwell, 384 U.S. 333, 358 (1966)).

121. *Procedural Justice*, *supra* note 7 at 171 (commenting that since 1966, only one case has been overturned based upon a "presumed prejudice" analysis (citing Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 2289 (1986))). Judge O'Connell further notes, "[m]ost cases that have discussed this standard have refused to apply it. Other cases have addressed the standard, but granted relief on other grounds." *Id.* (citations omitted); *see also Impartial Jurors*, *supra* note 5, at 643-44 (noting that the Supreme Court may be backing away from a presumption of prejudice standard (citing Patton v. Yount, 467 U.S. 1025 (1984); Murphy v. Florida, 421 U.S. 794 (1975)).

122. *See supra* notes 52-118 and accompanying text.

123. *See, e.g.*, Murphy v. Florida, 421 U.S. 794 (1975). In *Murphy*, petitioner's convictions for breaking and entering and assault with intent to commit robbery were affirmed despite the fact that the jurors were exposed to extensive press coverage of petitioner's notorious nature, including his prior convictions for robbery and murder. The United States Supreme Court distinguished *Murphy* from *Sheppard*, noting:

> *Sheppard* arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival. . . . [It] cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process. To

fendants, as well as the courts, are faced with the problem of determining how closely the facts in a particular case must mirror *Sheppard* in order to trigger a Sixth Amendment violation.[124] A requirement that the publicity be massive and pervasive before the inherent prejudice standard will warrant a reversal is not necessarily an unjustifiable burden. As the Supreme Court noted in *Delaware v. Van Arsdall*,[125] "we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one."[126]

IV. Issues Remaining After *Sheppard v. Maxwell*

A. *What is an "Impartial Juror"?*

As previously noted, the right to an impartial jury is a fundamental right of all criminal defendants, and the effect of pervasive publicity on that right has long been acknowledged by American courts.[127] However, an exact definition of an impartial jury has been an elusive concept.[128] "Defining and impaneling 'impartial' juries have proven to be daunting tasks with which the United States' judicial system has struggled since before the founding of the nation."[129] Quite often, in high-

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resolve this case, we must turn, therefore, to any indications in the totality of the circumstances that petitioner's trial was not fundamentally fair.

Id. at 799.

124. One federal judge has offered the opinion that belief in the petitioner's innocence may be a factor. Judge David S. Nelson of the United States District Court for the District of Massachusetts commented:

> An appellate tribunal that senses a possibility that a factually innocent person may have been wrongfully convicted may be more likely to reverse the conviction even if the reversal were predicated on procedural grounds alone. Procedural grounds might simply be the hook upon which the court may hang its hat in reversing a verdict that appears to be a substantive miscarriage of justice.

David S. Nelson, *A Judge's Reaction*, *in* Janice Schuetz & Kathryn Holmes Snedaker, Communication And Litigation: Case Studies Of Famous Trials 213 (1988).

125. 475 U.S. 673 (1986).

126. *Id.* at 681 (citing United States v. Hasting, 461 U.S. 499, 508-09 (1983); Bruton v. United States, 391 U.S. 123, 135 (1968)).

127. *See supra* notes 3-5 and accompanying text.

128. *Impartial Jurors*, *supra* note 5, at 646. The authors note:

> [a] central problem . . . is that, irrespective of more than a century of Supreme Court guidance on the issue, there appears to be little consensus on what an impartial jury really is. Is it a panel of people without biases or opinions? Is it a panel on which the court has sought to place a representative sample of biases, or an equal number of jurors biased in favor of and against the defendant? Or is it a panel of people who believe that they can be fair and can follow the law, in spite of their opinions? If so, must that belief be supported by any evidence?

Id.

129. *Id.* at 632; *see also Procedural Justice*, *supra* note 7, at 182. Judge O'Connell offers two diametrically opposed perspectives on bias, one by American Theologian

publicity trials, judges attempting to seat impartial jurors seek individuals who have been shielded from any exposure to the facts of the case.[130] This attitude has been extensively criticized, both because it excludes potentially qualified jurors,[131] and because it may make seating a jury an impossible task.[132] While most defense attorneys argue that exposure to extensive media coverage should automatically disqualify a prospective juror,[133] most courts have held that "some knowledge of the facts and issues alone will not necessarily disqualify a person from jury service,"[134] unless the level of exposure reaches a saturation point similar to that delineated in *Sheppard*.[135]

When a crime is particularly sensational, or the accused is a public figure, exposure to extensive media coverage—often on a national level—is inevitable.[136] Thus, it is virtually impossible to find responsible jurors who have not been exposed to such coverage.[137] The role of the courts is to assess the damage caused by the exposure through the process of voir dire,[138] the goal being to identify, through questioning by the court and/or counsel for both parties, those prospective jurors who are so significantly biased by media exposure that they cannot be

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Tyron Edwards ("He that is possessed with a prejudice is possessed with . . . one of the worst kinds of devils, for it shuts out the truth and often leads to ruinous error."); and the second by Charles Curtis, an early twentieth century American lawyer ("There are two ways to be quite unprejudiced and impartial. One is to be completely ignorant. The other is to be completely indifferent. Bias and prejudice are attitudes to be kept in hand, not attitudes to be avoided."). *Id.* (citations omitted).

130. *Impartial Jurors*, *supra* note 5, at 633. "[Courts] search unnecessarily for jurors who know nothing about the case to be heard." *Id.*

131. *Id.* at 633-34. "Such a quest may exclude qualified citizens from the jury. . . ." *Id.* at 633.

132. *Id.* at 635. "[The] proliferation of the mass media in American life makes it impossible for any responsible citizen to be unaware of alleged major crimes in the local community." *Id.*

133. *Impartial Jurors*, *supra* note 5, at 636. "The public is being inundated with . . . claims by defense lawyers that 'my client can't get a fair trial because of pre-trial publicity.' In the decade just ended, the national newspapers and wire service alone carried over 3,100 such claims." *Id.* (citations omitted).

134. *Id.* at 641 (citing Irwin v. Dowd, 366 U.S. 717 (1961)); *see also* Murphy v. Florida, 421 U.S. 794, 800 (1975). "Qualified jurors need not, however, be totally ignorant of the facts and issues involved." *Murphy*, 421 U.S. at 799-800.

135. *See supra* notes 57-118 and accompanying text.

136. *Impartial Jurors*, *supra* note 5, at 635-36. "Even on a national level, Lieutenant Colonel Oliver North, District of Columbia Mayor Marion Barry, *Exxon Valdez* tanker captain Joseph Hazelwood, billionaire Leona Helmsley, or Panamanian leader Manuel Noriega are household names." *Id.* (citations omitted).

137. *Id.* at 636.

138. *Id.* at 649-50. "The . . . primary means through which most courts seek to determine the qualifications to sit on a jury, is voir dire." *Id.*; *see also Procedural Justice*, *supra* note 7, at 173. "The voir dire examination is the preferred way to judge the effect that prejudicial publicity has had on the community." *Procedural Justice*, *supra* note 7, at 173 (citations omitted).

impartial.[139] It is important at this point that the courts recognize the difference between "impartial" and "unaware."[140] There are, however, doubts as to the effectiveness of voir dire in achieving its desired purpose.[141]

B. *How Effective Is Voir Dire in Determining Prejudice?*

One of the most widely relied upon tools for assessing the effects of pretrial publicity on prospective jurors is the voir dire examination.[142] Voir dire gives attorneys the opportunity to screen prospective jurors and challenge "for cause" if the venire person demonstrates that he cannot overcome preconceived notions and render an impartial verdict.[143] Seating an impartial jury should be the sole goal of voir dire,[144] but its effectiveness in this area has been frequently questioned.[145]

Several factors combine to cloud the effectiveness of voir dire in identifying prejudice. Some involve the perceptions of the participants in the process,[146] while others concern the procedure itself.[147] The at-

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139. *Impartial Jurors*, *supra* note 5, at 650, *Procedural Justice*, *supra* note 7, at 173.

140. *See supra* note 124 for a discussion of this distinction.

141. *See infra* notes 142-93 and accompanying text.

142. *See, e.g.*, Application of Cohn, 332 F.2d 976, 977 (2d Cir. 1964) ("Only upon the *voir dire* of the prospective jurors can it be determined whether an impartial jury can be selected."); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 208 (1988) ("[I]t is clear that the ideal of an impartial jury rests heavily on the shoulders of an effective voir dire."); Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases With Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 667 (1991) [hereinafter *Voir Dire*] ("[T]here is widespread confidence that . . . voir dire is highly effective in eliminating bias created by pre-trial publicity."); *Impartial Jurors*, *supra* note 5, at 649-50; *Procedural Justice*, *supra* note 7, at 178.

143. PAULA DIPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 92-93 (1984); ALFRED FRIENDLY & RONALD L. GOLDFARB, CRIME AND PUBLICITY: THE IMPACT OF NEWS ON THE ADMINISTRATION OF JUSTICE 102 (1967); VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 67 (1986); PAUL B. WESTON & KENNETH M. WELLS, THE ADMINISTRATION OF JUSTICE 235 (3d ed. 1977); *Voir Dire*, *supra* note 138, at 666.

144. KASSIN & WRIGHTSMAN, *supra* note 142, at 50 ("The voir dire is designed by law to serve only one purpose: to enable counsel to probe jurors for information . . . that might provide grounds for their removal."); *see also* HANS & VIDMAR, *supra* note 143, at 68 ("primary purpose of *voir dire* is to discover prejudiced jurors."); WESTON & WELLS, *supra* note 143, at 235 ("purpose of *voir-dire* examination is to discover prejudice and bias"); *Impartial Jurors*, *supra* note 5, at 650; *Procedural Justice*, *supra* note 7, at 184.

145. HANS & VIDMAR, *supra* note 143, at 68 ("[T]he difficulties in [determining prejudice] are legion."); KASSIN & WRIGHTSMAN, *supra* note 142, at 55-56; WESTON & WELLS, *supra* note 143, at 234 ("Jury selection is the 'Russian roulette' of the administration of justice."); *Voir Dire*, *supra* note 142, at 700-01; *Impartial Jurors*, *supra* note 5, at 650 ("The research that is available suggests that voir dire is ill-suited to [its] important task." (citations omitted)); *Procedural Justice*, *supra* note 7, at 178 ("[S]ome studies conclude that the voir dire examination is grossly ineffective in eliciting data that would indicate juror prejudice." (citations omitted)).

146. *See infra* notes 148-63 and accompanying text.

titudes and strategies of attorneys, for example, consciously or unconsciously subvert the examination.[148] Although finding impartial jurors is the purported goal of voir dire, most attorneys would admit that they would prefer a jury that is biased in their favor.[149] Moreover, many attorneys attempt to use voir dire to educate and establish a rapport with the jurors;[150] defuse the impact of damaging evidence;[151] expose flaws in the opposition;[152] and generally "pre-try" their case.[153] Such abuses of voir dire are common, with the result being that the ultimate goal, an impartial jury, becomes less important than the skill of the respective attorneys to skew the bias their way.[154] While a skillful lawyer may win the jury over to his side, a less adroit attorney may alienate the jurors and push them the other way.[155]

In jurisdictions where questioning of prospective jurors is carried out by the judge,[156] additional difficulties have been encountered.[157] "Judges ask leading questions, suggest appropriate replies, and do not probe fully for the existence of bias."[158] In addition, some prospective jurors may be so intimidated by the judge that they do not or cannot answer questions appropriately.[159]

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147. *See infra* notes 164-80 and accompanying text.

148. DIPERNA, *supra* note 143, at 90 ("[Jury selection] is where the idea of an impartial jury . . . takes the most abuse."); *see also* FRIENDLY & GOLDFARB, *supra* note 143, at 102; HANS & VIDMAR, *supra* note 143, at 68-74; KASSIN & WRIGHTSMAN, *supra* note 142, at 50-51; WESTON & WELLS, *supra* note 143, at 235 ("[O]pposing attorneys make use of [voir dire] to establish a few preliminary points of advantage."); *Procedural Justice*, *supra* note 7, at 184.

149. DIPERNA, *supra* note 143, at 90 ("[T]he selection process is used by lawyers, not to select the most impartial . . . body, but the one most likely to be amenable to the lawyers' view of the case."); *see also* FRIENDLY & GOLDFARB, *supra* note 143, at 102 ("[A]ctually, each side wants a favorable panel more than a totally impartial one."); KASSIN & WRIGHTSMAN, *supra* note 143, at 50; *Procedural Justice*, *supra* note 7, at 184 ("[T]hroughout [history] lawyers have sought to impanel the most favorable possible jurors for their clients.").

150. HANS & VIDMAR, *supra* note 143, at 68; KASSIN & WRIGHTSMAN, *supra* note 142, at 50-52; WESTON & WELLS, *supra* note 143, at 235.

151. HANS & VIDMAR, *supra* note 143, at 68; KASSIN & WRIGHTSMAN, *supra* note 142, at 50-51; WESTON & WELLS, *supra* note 143, at 235.

152. KASSIN & WRIGHTSMAN, *supra* note 138, at 50-51.

153. *Id.*; *see also* HANS & VIDMAR, *supra* note 143, at 68.

154. *See supra* notes 144-48 and accompanying text.

155. DIPERNA, *supra* note 143, at 94; *Procedural Justice*, *supra* note 7, at 184 ("If one side possesses superior skill in the jury selection process, inequality may result.").

156. ABA STANDARDS FOR CRIMINAL JUSTICE § 8-3.5 (1978) ("In federal courts, under rule 24 of the Federal Rules of Criminal Procedure, and in many state courts, the trial court has discretion to conduct voir dire.").

157. HANS & VIDMAR, *supra* note 143, at 71; KASSIN & WRIGHTSMAN, *supra* note 142, at 52; *Impartial Jurors*, *supra* note 5, at 652-53.

158. HANS & VIDMAR, *supra* note 143, at 71; *see also Impartial Jurors*, *supra* note 5, at 652 ("[J]udges . . . often indicate the answers they want.").

159. HANS & VIDMAR, *supra* note 143, at 71 ("[J]urors are so awed by the judge that they shape their answers to please the judge rather than tell the truth."); *see also*

The perception of the prospective jurors themselves may have an effect on the recognition of bias.[160] Jurors may not even realize that they are prejudiced, or may be embarrassed to acknowledge their biases publicly.[161] Some may consciously lie about their opinions, in order to be chosen to sit for a case in which they have an interest.[162] Conversely, jurors may falsely claim a bias so that they will be excused from service.[163]

The logistical manner in which voir dire is conducted may have an impact on successfully selecting an impartial jury.[164] One issue is whether it is more appropriate that questioning of prospective jurors be done by the judge or by counsel.[165] Attorneys claim that their greater familiarity with the case, their skill in selecting appropriate questions, and their interest as advocates make them the logical choice.[166] Furthermore, they argue that the judges' tendencies to ask leading questions, suggest appropriate responses, and intimidate prospective jurors,[167] indicate that judges are not the appropriate questioners.[168] Judges counter these arguments by pointing to the notion that attorneys often abuse the process and sometimes alienate the venire.[169] One study indicates that attorney questioning is more effective in discovering bias in terms of the number of prospective jurors dismissed for prejudice.[170]

KASSIN & WRIGHTSMAN, *supra* note 143, at 55; *Impartial Jurors*, *supra* note 5, at 653 ("Judicial questioning often inhibits juror candor."); *Procedural Justice*, *supra* note 7, at 183 ("The pressure of the voir dire examination sometimes causes jurors to temporarily forget their own names.").

160. DIPERNA, *supra* note 143, at 93; FRIENDLY & GOLDFARB, *supra* note 143, at 103; HANS & VIDMAR, *supra* note 143, at 68-69; KASSIN & WRIGHTSMAN, *supra* note 142, at 51-52; *Impartial Jurors*, *supra* note 5, at 650-53.

161. DIPERNA, *supra* note 143, at 93 ("After all, the jurors are being asked to bare their souls. . . and reveal their prejudices to people they have never seen before."); FRIENDLY & GOLDFARB, *supra* note 143, at 103 ("It seems unlikely that a prejudiced juror would recognize his own personal prejudice—or, knowing it, would admit it."); HANS & VIDMAR, *supra* note 143, at 69 ("There are obvious social pressures not to admit either to oneself or to others that one is prejudiced."); *Impartial Jurors*, *supra* note 5, at 651 ("[I]t is unlikely that someone will admit publicly to being a bigot." (citations omitted)).

162. HANS & VIDMAR, *supra* note 143, at 69; *Procedural Justice*, *supra* note 7, at 178-79.

163. *Impartial Jurors*, *supra* note 5, at 650-51 (citing Reynolds v. United States, 98 U.S. 145, 156 (1878) (indicating juror confession of bias may be a tool to avoid jury duty)).

164. *See infra* notes 165-80 and accompanying text.

165. HANS & VIDMAR, *supra* note 143, at 71; KASSIN & WRIGHTSMAN, *supra* note 142, at 52.

166. KASSIN & WRIGHTSMAN, *supra* note 142, at 52.

167. HANS & VIDMAR, *supra* note 143, at 71.

168. *See supra* note 156-59 and accompanying text.

169. KASSIN & WRIGHTSMAN, *supra* note 142, at 52.

170. HANS & VIDMAR, *supra* note 143, at 72.

Other logistical issues in the voir dire context involve questions of how the interviews should be conducted. Should potential jurors be questioned individually or as a group?[171] Should the questions be posed in the presence of the other venire members?[172]

Although most jurisdictions have *en masse* voir dire,[173] some commentators feel that such a system is counterproductive.[174] In general, people are much less likely to admit a weakness of character, such as prejudice, in public than they would if questioned in confidence.[175] In addition, after seeing other potential jurors dismissed, those questioned subsequently learn which answers will be rewarded with a favorable response from the judge.[176] Individual questioning is especially advantageous in high publicity trials[177] because it avoids the danger that those who have not been exposed to prejudicial publicity will learn of it from hearing the comments of those who have been exposed.[178] Studies suggest that individual, private voir dire results in more granted challenges, indicating that this is the preferable method.[179] Even more successful challenges result when wide ranging, open-ended questions are asked.[180]

While most commentators acknowledge that the voir dire process is not perfect,[181] few are willing to suggest eliminating it entirely.[182]

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171. ABA STANDARDS FOR CRIMINAL JUSTICE § 8-3.5 (1978); HANS & VIDMAR, *supra* note 143, at 71; KASSIN & WRIGHTSMAN, *supra* note 142, at 209-210; *Impartial Jurors*, *supra* note 5, at 651; *Procedural Justice*, *supra* note 7, at 178.

172. ABA STANDARDS FOR CRIMINAL JUSTICE § 8-3.5(a) (1978); HANS & VIDMAR, *supra* note 143, at 71; KASSIN & WRIGHTSMAN, *supra* note 142, at 209-10; *Impartial Jurors*, *supra* note 5, at 651; *Procedural Justice*, *supra* note 7, at 178.

173. KASSIN & WRIGHTSMAN, *supra* note 142, at 209.

174. *Id.*; *see also* HANS & VIDMAR, *supra* note 143, at 69; *Impartial Jurors*, *supra* note 5, at 651; *Procedural Justice*, *supra* note 7, at 178.

175. KASSIN & WRIGHTSMAN, *supra* note 142, at 209 ("[J]urors are more willing to admit their prejudices when questioned individually . . . than when queried in open court in front of their peers."); *see also supra* note 161.

176. *Impartial Jurors*, *supra* note 5, at 651 (citing Copeland v. State, 457 So. 2d 1012, 1014-15 (Fla. 1984)). "In *Copeland* four out of the first nine people questioned said that they could not be impartial. Of the remaining fifty-two, only one admitted to bias." *Id.* (citations omitted). Apparently, those interviewed later learned from the earlier dismissals.

177. ABA, FAIR TRIAL AND FREE PRESS § 8-3.5(a) (1978) ("If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors.").

178. *Id.* § 8-3.5, cmt. ("[O]nce exposure . . . has been established, further inquiry . . . should proceed [privately].").

179. HANS & VIDMAR, *supra* note 143, at 71-72; KASSIN & WRIGHTSMAN, *supra* note 142, at 209-10.

180. HANS & VIDMAR, *supra* note 143, at 71-72.

181. *Id.* at 78; *see also* DIPERNA, *supra* note 143, at 85-98; KASSIN & WRIGHTSMAN, *supra* note 142, at 49-56; *Procedural Justice*, *supra* note 7, at 178.

Many courts feel that it is the best system we have for identifying and eliminating prejudice.[183] Consistent application of some of the changes mentioned above may help to make voir dire more effective in ferreting out biased jurors.[184] Additional suggestions to improve the process include public opinion polls separate from voir dire[185] and/or written questionnaires as a part of the voir dire.[186]

Public opinion polls which are separate from voir dire can provide indicia as to the effect of pretrial publicity on the community as a whole.[187] While not really part of the jury selection process, these polls can help a court determine the mood of a community and determine if an impartial jury can be impaneled.[188] If it appears from the poll that publicity has significantly tainted the community, the judge can change the venue and avoid an expensive and fruitless voir dire.[189]

Questionnaires as a part of the voir dire process can be beneficial for a number of reasons.[190] Because they can be given to large groups at once, without sacrificing privacy, they would be more economical in terms of time and money.[191] They may elicit even more honest responses than individual verbal interviewing because the prospective juror's answers will not be affected by even the non-verbal cues of the questioner.[192] Further, attorneys would be able to make more reasoned selections after having studied the responses thoroughly.[193]

C. *How Effective Are the Remedial Measures Espoused in* Sheppard v. Maxwell?

In reversing Sheppard's conviction because of "the inherently prejudicial publicity which saturated the community,"[194] the United States Supreme Court set forth three remedial measures designed to mitigate the effect of the publicity which the trial judge failed to utilize.[195] The Court admonished future courts that these measures, change of

182. HANS & VIDMAR, *supra* note 143, at 78; KASSIN & WRIGHTSMAN, *supra* note 142, at 208-10; *Impartial Jurors*, *supra* note 5, at 650; *Procedural Justice*, *supra* note 7, at 178.

183. *Impartial Jurors*, *supra* note 5, at 650 ("The Supreme Court has repeatedly lauded the benefits of voir dire."); *see also* KASSIN & WRIGHTSMAN, *supra* note 142, at 208.

184. *See supra* notes 165-80 and accompanying text.

185. *Procedural Justice*, *supra* note 7, at 183.

186. KASSIN & WRIGHTSMAN, *supra* note 142, at 210.

187. *Procedural Justice*, *supra* note 7, at 183.

188. *Id.* at 194.

189. *Id.*

190. KASSIN & WRIGHTSMAN, *supra* note 142, at 210.

191. *Id.*

192. *Id.*

193. *Id.*

194. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

195. *Id.*

venue,[196] continuance,[197] and sequestration,[198] should be applied by judges confronted with issues of pervasive media exposure.[199] However, these remedial measures may not be effective in all cases, nor are they always logistically feasible.[200]

1. Change of Venue

The Court in *Sheppard* indicated that when pretrial publicity is so pervasive that it may reasonably be expected to affect the defendant's right to a fair trial, the trial judge should "transfer [the proceedings] to another county not so permeated with publicity."[201] However, a number of considerations make courts reluctant to grant changes of venue in cases involving pervasive publicity.[202] First, judges do not wish to admit that another jurisdiction is better able to fairly try a defendant than their own.[203] Also, a defendant requesting a change of venue is sacrificing his right to a local trial in favor of the right to an impartial jury.[204] Further, this remedial measure is contrary to "the local community's legitimate interests in resolving the case."[205] Changing venue will also necessarily result in a delay in the trial.[206] Perhaps more significantly, the effectiveness of a change of venue in

196. *See infra* notes 201-10 and accompanying text.
197. *See infra* notes 211-18 and accompanying text.
198. *See infra* notes 219-26 and accompanying text.
199. *Sheppard*, 384 U.S. at 363. The Court warned:

> [W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.

Id.
200. *See infra* notes 201-26 and accompanying text.
201. *Sheppard*, 384 U.S. at 363.
202. *Impartial Jurors*, *supra* note 5, at 647.
203. *Id.* (citation omitted).
204. *Id.* (citing Scott Kafker, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729, 731-34 (1985)); *see* U.S. CONST. amend. VI, *supra* text accompanying note 1. *But see* FRIENDLY & GOLDFARB, *supra* note 143, at 97. The authors note that the alteration of the right to a local trial is justified because the change of venue is intended to benefit the defendant, and "it is a means to a Constitutional end—trial by an impartial jury." *Id.* (citation omitted).
205. *Impartial Jurors*, *supra* note 5, at 647 (citing J. Alexander Tanford, *Racism in the Adversary System: The Defendant's Use of Peremptory Challenges*, 63 S. CAL. L. REV. 1015, 1049-52 (1990)); *see also* FRIENDLY & GOLDFARB, *supra* note 143, at 100 (suggesting that prosecutors opposing motions to change venue will argue that the defendant is engaging in "forum shopping."); Mark R. Stabile, *Free Press—Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L.J. 337, 344 (1990) ("The Supreme Court has recognized that local communities . . . have an interest in settling disputes locally . . . ." (citing Gulf Oil v. Gilbert, 330 U.S. 501, 508-09 (1947))) [hereinafter *Free Press—Fair Trial*].
206. *Free Press—Fair Trial*, *supra* note 205, at 344.

achieving its desired purpose has been questioned.[207] In an age where methods of communication are so advanced and so readily accessible,[208] if a community becomes so inflamed by publicity that an impartial jury cannot be impaneled, it is probable that the publicity has reached, and similarly inflamed, surrounding communities.[209] However, in spite of these apparent shortcomings, change of venue is still regarded by some judges as a viable option to mitigate the prejudicial effects of pretrial publicity.[210]

2. Continuance

In addition to endorsing change of venue as a method of shielding the jury from the prejudicial effects of pretrial publicity, the *Sheppard* Court instructs trial judges faced with this problem to "continue the case until the threat abates."[211] Continuance has been criticized both in its logistics and its effect.[212] Like change of venue, continuance necessitates a clash between two Sixth Amendment rights; in this case, the right to a speedy trial and the right to an impartial jury.[213] By granting a continuance, the court also runs the risk of inconveniencing or even losing witnesses.[214] At the very least, there is the possibility that "wit-

207. *Impartial Jurors*, *supra* note 5, at 647.

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

209. This point is illustrated in Rideau v. Louisiana, 373 U.S. 723 (1963) (venue changed from one community to an equally prejudiced neighboring county); *see also Impartial Jurors*, *supra* note 5, at 647 ("Where in the United States can a jury unfamiliar with the acts of Manuel Noriega and the United States invasion of Panama be impaneled?"). This situation was recognized as early as 1964, when advances in communications were nowhere near what they are today. *See* FRIENDLY & GOLDFARB, *supra* note 143, at 98 (" 'Modern means of news communication have taken away many of the reasons for the transfer of the *cause celebre*, which may have existed 50 years ago.' ") (quoting Application of Cohn, 332 F.2d 976, 977 (2d Cir. 1964)); *Free Press—Fair Trial*, *supra* note 205, at 344. ("[P]rejudicial information is likely to be disseminated nationally.").

210. *Procedural Justice*, *supra* note 7, at 179-80. "When extensive pretrial publicity may have tainted the community . . . the trial judge should rise to the occasion and grant a motion to change venue." *Id.* at 181 (acknowledging the reluctance of most trial judges to change venue.); *see also id.* at 181 n.93. Judge O'Connell further argues that "[a]ny doubts concerning the motion for change of venue should be resolved in favor of the defendant." *Id.* at 196.

211. *Sheppard*, 384 U.S. at 363.

212. *See, e.g.*, *Impartial Jurors*, *supra* note 5, at 647; *Procedural Justice*, *supra* note 7, at 177-78.

213. *Procedural Justice*, *supra* note 7, at 177; *Impartial Jurors*, *supra* note 5, at 648. *See* U.S. CONST. amend. VI, *supra* text accompanying note 1; *see also Free Press—Fair Trial*, *supra* note 201, at 343-44. *But see* FRIENDLY & GOLDFARB, *supra* note 143, at 97. The authors point out "[t]he rationale behind the continuance is that the right to delay *for good reasons* is part of the inherent power of courts to hear and determine cases." *Id.* (emphasis added). That the continuance is for the defendant's protection is reason enough to abridge his/her right to a speedy trial. *Id.*

214. *Impartial Jurors*, *supra* note 5, at 648 (citing Morris v. Slappy, 461 U.S. 1, 15

nesses' memories may fade as time passes, thereby jeopardizing the . . . right to a fair trial."[215] These problems, particularly the problem of fading memories, become more significant in light of the notion that continuances do little to negate the effects of pretrial publicity.[216] The anomaly of this situation is readily apparent. A court granting a continuance in the hopes that time will erode potential jurors' memories of what they have read and heard runs the risk that the witnesses' memories will be equally eroded. Moreover, there is no guarantee that there will be no resurgence of media attention when the case finally comes to trial.[217] Finally, "[d]elay may also increase the backlog in an already crowded court system."[218]

3. Sequestering the Jury

After criticizing the trial judge's failure to change venue and/or grant a continuance, the *Sheppard* court noted, "sequestration of the jury was something the judge should have revised [by his own motion] with counsel."[219] However, the effectiveness of sequestration as a judicial control to pretrial publicity is limited by the fact that "the most dramatic revelations occur. . . long before there is a trial . . . ."[220] and well before a jury is even impaneled.[221] While sequestration might prevent some outside influences, it would do little towards shielding the jury from the glare of the television cameras as in *Estes*;[222] the exposure to a broadcast confession as in *Rideau*;[223] or, the "bedlam" that characterized the *Sheppard* proceedings.[224] It is ironic that in *Turner*, the events which led to reversal were the *result* of the sequestration of the

(1983)); *Procedural Justice*, *supra* note 7, at 177 n.57 (noting that witnesses "may . . . move, [or] otherwise be unavailable for trial.") *Id.*

215. *Procedural Justice*, *supra* note 7, at 177.

216. *See, e.g.*, *Procedural Justice*, *supra* note 7, at 177 ("Psychologists . . . are skeptical about the contention that time will erode the harmful effects of pretrial publicity.") (citing Michael T. Nietzel & Ronald C. Dillehay, *Psychologists as Consultants for Changes of Venue: The Use of Public Opinion Surveys*, 7 L. & HUM. BEHAV. 309, 310-11 (1983)); *see also Impartial Jurors*, *supra* note 5, at 647-48 ("Granting a continuance . . . is a[] . . . dubious remedy.") (citations omitted).

217. LEWIS R. KATZ, THE JUSTICE IMPERATIVE: AN INTRODUCTION TO CRIMINAL JUSTICE 295 (1980) ("Once the rescheduled date nears, extensive follow-up coverage of the case will also resume.").

218. *Free Press—Fair Trial*, *supra* note 201, at 344.

219. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

220. *Impartial Jurors*, *supra* note 5, at 633; *see also* Morris A. Shenker & Cordell Siegel, *The Cause Celebre: The Problem and the Solutions*, 11 ST. LOUIS U. L.J. 152, 160 (1967) ("[I]t is obvious that the juror becomes biased at a point in time long before he is sequestered.") [hereinafter *Cause Celebre*].

221. *Free Press—Fair Trial*, *supra* note 205, at 345.

222. Estes v. Texas, 381 U.S. 532, 545 (1965).

223. Rideau v. Louisiana, 373 U.S. 723, 724 (1963).

224. Sheppard v. Maxwell, 384 U.S. 333, 355 (1966).

jury.[225] Further, "[s]equestration forces jurors to bear the burden of compensation for the highly publicized acts of the trial participants."[226]

D. *The Role of the Media*

1. Balancing "Free Press" with "Fair Trial"

Whenever pretrial publicity threatens the right to a fair trial, the First Amendment right to freedom of the press inevitably becomes an issue.[227] The Supreme Court has historically been reluctant to suggest that this right be abridged[228] because of the important role which the media often plays in the furtherance of justice.[229] However, in *Nebraska Press Assn. v. Stuart*,[230] the Court acknowledged that there may be circumstances where restraint of the press may be warranted.[231] Before such restraint will be allowed the record must clearly illustrate that additional publicity would make it impossible to impanel an impartial jury.[232] Furthermore, restraint would be acceptable only after the remedial measures exposed in *Sheppard*[233] have been exhausted.[234] These stringent conditions, coupled with the fact that only five of the nine Justices of the Supreme Court accepted the possibility of allowing restraint of the press, indicate that "it is unlikely that [the *Nebraska Press Assn.* decision] will serve as the basis for future restraints."[235]

While "gag orders" on the press are unlikely to be approved, such orders may be imposed on the law enforcement officials and lawyers involved in the case, in order to prevent leaks to the press.[236] The ef-

225. Turner v. Louisiana, 379 U.S. 466, 467-71 (1965).

226. *Free Press—Fair Trial*, *supra* note 205, at 345. The author indicates that the resentment jurors may feel as a result of this burden may in fact create juror bias, rather than eliminate it. *Id.* (citations omitted).

227. *See* U.S. CONST. amend. I.

228. *See, e.g.*, *Sheppard*, 384 U.S. at 350; *see also* KATZ, *supra* note 217, at 294.

229. *Sheppard*, 384 U.S. at 350. The Court noted:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the mis-carriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Id. (citing Craig v. Harvey, 331 U.S. 367, 374 (1947); Bridges v. California, 314 U.S. 252, 265 (1941)).

230. 427 U.S. 539 (1976).

231. *Id.* at 562-65.

232. *Id.* at 569.

233. See *supra* notes 201-26 and accompanying text.

234. *Nebraska Press Assn.*, 427 U.S. at 563-64.

235. KATZ, *supra* note 217, at 294. Restraints may be placed, however, on media presence at pretrial hearings, if a balancing of defendant's Sixth Amendment rights with First Amendment freedom of the press shows that barring the press is necessary to achieve justice. Gannett Co. v. DePasquale, 443 U.S. 368, 392-93 (1979).

236. *Sheppard*, 384 U.S. at 360-61. "[I]t is obvious that the judge should have . . .

fect of these orders is minimized by the fact that most reporters will refuse to divulge their sources of information.[237] Thus, those leaking information may do so in spite of the gag order, because they can rely on confidentiality.[238] Another problem with gag orders is that the prosecution may have leaked information prior to the order, at which point the order denies the defense an opportunity to counter the negative effects by releasing information favorable to them.[239] This does not suggest, however, that such orders are completely ineffective.[240] They may not prevent all publicity, but they may limit the damage.[241] Once a jury has been impaneled, the judge's instructions, if properly made, can help to negate the effects of whatever information has been leaked.[242]

2. How Much Effect Does the Media Really Have?

While it is clear that pretrial publicity has an effect on jurors, there is some question as to just how strong that effect is.[243] While there have been reversals based upon inherent prejudice, and in the case of *Sheppard*, his subsequent acquittal indicates that he may have been unjustly convicted,[244] is this always the case? The trials of John Delorean,[245] Washington, D.C. Mayor Marion Barry,[246] John Hinck-

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impos[ed] control over statements made . . . by counsel, witness, and especially the Coroner and police officers." *Id.* at 360. "Effective control of these sources—concededly within the court's power—might well have prevented the divulgence of inaccurate information. . . that made up much of the inflammatory publicity. . . ." *Id.* at 361; *see also* KATZ, *supra* note 217, at 295.

237. KATZ, *supra* note 217, at 296.

238. *Id.* "[L]awyers and police can avoid a gag order with impunity virtually because they know that few reporters are willing to divulge valuable sources of information." *Id.*

239. *Id.* "The order is generally not made until the trial court has jurisdiction . . . . By that time, the news may well have been filled with information provided by police and lawyers." *Id.*

240. *Id.*

241. *Sheppard*, 384 U.S. at 361; *see also* KATZ, *supra* note 217, at 296.

242. KATZ, *supra* note 217, at 296.

243. *See generally*, Annenberg Washington Program Conference, May 11, 1990, *Selecting Impartial Juries: Must Ignorance Be a Virtue in Our Search for Justice, Panel One: What Empirical Research Tells Us, and What We Need to Know About Juries and the Quest for Impartiality*, 40 AM. U. L. REV. 547 (1990) [hereinafter *Panel One*]; Annenberg Washington Program Conference, May 11, 1990, *Selecting Impartial Juries: Must Ignorance Be a Virtue in Our Search for Justice, Panel Two: Current Judicial Practice, Legal Issues, and Existing Remedies*, 40 AM. U. L. REV. 573 (1990) [hereinafter *Panel Two*]; Edith Greene, *Media Effects on Jurors*, 14 L. & HUM. BEHAV. 439 (1990) [hereinafter *Media Effects*]; Robert K. Takasugi, *Jury Selection in a High Profile Case*: United States v. DeLorean, 40 AM. U. L. REV. 837 (1990) [hereinafter *Jury Selection*].

244. See *supra* note 118.

245. *See generally, Jury Selection*, *supra* note 243.

246. *Impartial Jurors*, *supra* note 5, at 636 n.19 (of 14 counts against Marion Barry, he was convicted of only one misdemeanor count for cocaine possession).

ley[247] and, recently, William Kennedy Smith,[248] indicate that defendants can be acquitted despite the presence of intensive publicity.[249] This suggests that those convicted in the wake of negative publicity may have been convicted even without the publicity. While there is no clear answer, some in the legal community feel that the effects of publicity on juror partiality are overblown. This doubt as to the effects that the media has brings bearing to the above discussion of what makes an impartial juror.[250] This notion is perhaps best summed up with the following:

> Courts need neither ignore the impact of media coverage on the selection of an impartial jury nor become hopelessly enmeshed in examining the amount and type of media coverage through extended and far-reaching voir dire. The language of the sixth amendment, the dictates of the Supreme Court, and the realities of modern society require that courts impanel juries which are impartial, but not without knowledge and opinions.[251]

V. CONCLUSION

Publicity and its effects on defendants' rights has long been an important issue in American courts. The United States Supreme Court held in *Sheppard v. Maxwell* that publicity that is massive and pervasive could inherently prejudice a defendant's Sixth Amendment rights to a fair trial. Courts use various remedial measures in an attempt to negate the effects of negative publicity. The effectiveness of these measures; voir dire, continuance, sequestration, and change of venue, have been questioned both in logistics and effect.

Much of the controversy surrounding the attempts to find impartial jurors involves the premise that a person needs to be uninformed in

247. *Panel One*, *supra* note 243, at 550 (statement of Joseph E. diGenova). "[Hinckley's trial] was one of the most extensively covered cases in history. I do not think any of us . . . on the prosecution team anticipated that his defense would succeed." *Id.* Hinckley had attempted to assassinate President Ronald Reagan. He was found not guilty by reason of insanity. *Id.* at 550 n.7 (citing United States v. Hinckley, 529 F. Supp. 520 (D.D.C. 1982)).

248. *See Willie Show*, *supra* note 43 at 99 ("[Smith's acquittal] put the lie to the myth that pre-trial publicity irrevocably taints jurors. . . .").

249. *See, e.g.*, *Media Effects*, *supra* note 243, at 448 ("[Media effects] [a]lone . . . are unlikely to determine jurors' verdicts."); *Panel Two*, *supra* note 243, at 575 (statement of Honorable Stanley Sporkin: "[When jurors are asked about exposure to media,] jurors will volunteer . . . that everybody knows you cannot believe everything you read in the press or hear on television. There is a great skepticism about the press. . . ."); *Panel Two*, *supra* note 243, at 579 (statement of Ronald Olson: "There is some demonstrated skepticism of the press among jurors. The jury interviews that came out of the recent trial of Captain Joseph J. Hazelwood indicated that in spades.") (citing State v. Hazelwood, No. 3-ANS-89-7217,-7218 Crim. (Alaska Sup. Ct. 1990)).

250. *See supra* notes 128-41 and accompanying text.

251. *Impartial Jurors*, *supra* note 5, at 664.

order to be impartial. Many commentators, however, feel that this is not the case, and that we need to put more faith in the people we select as jurors. While pretrial publicity is a problem, there is some sentiment that the problem is exaggerated.

Further complicating the issue of pretrial publicity is the First Amendment right of freedom of the press. Often the First Amendment and the Sixth Amendment clash in the pretrial publicity context. Courts are reluctant to limit the rights of the press and will only do so when the *Sheppard* remedial measures have been exhausted and proven ineffective. Some restraint may be allowed in the form of barring the press from pretrial conferences if, in balancing the rights provided by the First and Sixth Amendments, the furtherance of justice dictates their removal. The most appropriate judicial control over the publishing of information is a "gag order" directed not at the press, but at the public officials, witnesses, and attorneys involved in the trial.

There is no clear ruling on just how pervasive media coverage must be in order to be deemed inherently prejudicial. *Sheppard* was an extreme case, and there have been few reversals subsequent to *Sheppard*. Some experts hold the opinion that publicity does not have a strong effect on jurors, except in extremely high profile cases, and that the results may be the same in the absence of publicity. Defendants who have been acquitted despite extensive media coverage lend credence to this theory. One judge offers the opinion that courts are more likely to reverse a conviction if they believe in the innocence of the defendant.[252]

Defendants concerned over the amount of publicity their cases attract should avail themselves of the remedial measures, however flawed, available to them. They should participate effectively in voir dire, request a change of venue to a jurisdiction not inundated with publicity, seek a continuance until the publicity abates, and move to sequester the jury during the trial. They should also request that a "gag order" be placed on the trial participants, and conscientiously honor the order if it is granted. At the very least, they will have preserved their right to appeal.

Defendants should also be mindful that reversals are few, and that the *Sheppard* standard appears to be a difficult standard to meet. They should further know that courts have tremendous faith in the system of selecting impartial jurors, and that the Supreme Court has repeatedly held that a fair trial does not necessarily mean a perfect trial.

Joseph F. Flynn *

252. *See supra* note 124 and accompanying text.

* To my wife, Joanne O'Brien Flynn, whose love, understanding and tolerance made this article possible, and to my parents, Robert and Barbara Flynn, who made me a person Joanne could love.

Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment

I. INTRODUCTION

Justice White has characterized rape as being "the 'ultimate violation of self.' "[1] Unfortunately, this "violation" is one of the fastest growing crimes in America.[2] Nevertheless, rape is also one of the most underreported felonies in the nation.[3] The Federal Bureau of Investigation estimates that only half of all rapes committed each year are reported to the police.[4] One reason victims give for not reporting this crime to the police is the fear of a resulting loss of privacy.[5]

For some victims this loss of privacy results from the wide-spread dissemination of their identity through the mass-media.[6] When this occurs, the inevitable conflict between the First Amendment guarantee of a free press[7] and the individual right to personal privacy arises.[8]

With the recent disclosure by the media of the identity of the al-

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1. The Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (White, J., dissenting) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).

2. 136 CONG. REC. S16,090-91 (daily ed. Oct. 19, 1990) (statement of Sen. Biden). According to statistics: One in five women will be raped within her lifetime, a woman is raped in this country every six minutes, and "the assault rate against women is rising [at least] twice as fast as the assault rate against men." *Id.* The rate of forcible rape has risen 13% since 1987. U.S. DEP'T OF JUSTICE, 1991 F.B.I. UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES (Aug. 1992).

3. Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1020, 1049-50 (1991).

4. U.S. DEP'T OF JUSTICE, Bureau of Justice Statistics, Annual Report 1986 (Apr. 1987). Some estimate that a full 90% of rapes are never reported. 136 CONG. REC. E2723 (daily ed. Aug. 15, 1990) (statement of Hon. Louise M. Slaughter).

5. Marcus & McMahon, *supra* note 3, at 1050. The woman who accused William Kennedy Smith of raping her stated through her lawyer: "[h]ad I known that my name was going to be released, it might have dissuaded me from [reporting the crime]." *A.B.C. World News Tonight* (ABC television broadcast, May 9, 1991).

However, the woman subsequently chose to identify herself on *ABC's Prime Time Live*. During the broadcast she stated, "I have nothing to be ashamed of." Richard Zoglin, *Was She Right to Go Public?*, TIME, Dec. 30, 1991, at 61.

6. *See* Marcus & McMahon, *supra* note 3, at 1020.

7. The First Amendment states: "Congress shall make no law . . .abridging the freedom. . .of the press. . . ." U.S. CONST. amend. 1.

The First Amendment has never been held to be absolute however. *See* Branzburg v. Hayes, 408 U.S. 665, 682 (1972) ("[The] First Amendment does not

leged victim in the "Palm Beach Rape Case"[9], debate over the rights of the press versus the privacy right of the individual has resurfaced.[10] This is so despite the fact that the Supreme Court has twice, in the last sixteen years, held the rights of the press to be paramount over the individual rights of the rape victim.[11] In both cases, however, the Court made clear that the holdings were limited to the specific facts of each case.[12] This caveat has left open the possibility that the media could be held civilly or criminally[13] liable for revealing the identity of a

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invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.").

8. The right to personal privacy, also characterized as "invasion of privacy" by the Restatement (Second) of Torts, must be distinguished from the constitutional right to privacy first recognized by the Court in Griswold v. Connecticut. Griswold v. Connecticut, 381 U.S. 479 (1965); Restatement (Second) of Torts § 652 (1977).

The constitutional right to privacy, created to protect certain individual rights from "governmental intrusion", was found by the Court to emanate from specific guarantees of the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments. *Griswold*, 381 U.S. at 483-84 (constitutional right to privacy encompasses an individual's right to use contraceptives); *see also* Roe v. Wade, 410 U.S. 113, 152-53 (1972) (woman's decision of whether or not to terminate a pregnancy is protected by the constitutional right to privacy).

The right to personal privacy, on the other hand, was first articulated by Warren and Brandeis in 1890. Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890). The concept has since been incorporated into a common-law tort and serves as a basis for a number of state statutes protecting individuals from invasion of privacy from sources other than governmental. *See infra* notes 20 to 43 and accompanying text.

9. William Kennedy Smith was subsequently acquitted of the rape charges. *See* David Margolick, *Smith Acquitted of Rape Charge After Brief Deliberation by Jury*, N.Y. TIMES, Dec. 12, 1991, at A1.

10. *See* Judy Keen, *Tabloid Reveals Name of Woman in Kennedy Case*, USA TODAY, Apr. 16, 1991, at 3A; *Nightline: NY Times, NBC Name Palm Beach Rape Victim* (ABC television broadcast, Apr. 17, 1991); Karen DeCrow, *Name Rape Victims; End Sexist Stereotyping*, USA TODAY, Apr. 18, 1991, Final Ed. at 10A; Carolyn Pesce, *In Florida, Charging The Media Considered*, USA TODAY, Apr. 19, 1991, Final Ed. at 3A; Alice N. Lucan, *Should There Be A Law?*, NAT'L. L.J., May 6, 1991, at 13; William P. McKenna, *Protect Rape Victims With Force of Law*, USA TODAY, May 9, 1991, Final Ed. at 10A; Andrew Blum, *Palm Beach Rape Case Bolsters Privacy Efforts*, NAT'L. L.J., May 27, 1991, at 9; Mark Hansen, *Privacy and a Free Press: Tabloid Prosecuted For Revealing Name of Alleged Rape Victim*, ABA J., July 1991, at 14.

11. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Florida Star v. B.J.F., 491 U.S. 524 (1989).

12. *Cox Broadcasting Corp.*, 420 U.S. at 491; *Florida Star*, 491 U.S. at 541.

> Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense.

Id.

13. At least three states have statutes that make it illegal for the media to identify a victim of sexual assault. *See* FLA. STAT. § 794.03 (1987); GA. CODE ANN. § 16-6-23 (1988); S.C. CODE ANN. § 16-3-730 (Law Co-op 1976); *see also infra* note 34.

rape victim.[14]

This note will discuss the statutory and common law methods used by individuals and states to limit the press' right to publish truthful information about a private individual.[15] Next, the note will analyze the reasoning of the Court in holding media rights above individual rights in the *Cox Broadcasting* and *Florida Star* decisions.[16] Finally, the note will discuss the test derived from the Court decisions.[17] Each element of the Court's test will be discussed in the context of a balancing between the respective interests of the media, the state, and the individual. Attention will be paid to whether the Court, in their previous decisions, accorded too much weight to the side of the press.[18] Concluding that the Court fails to strike an appropriate balance between the privacy rights of rape victims and the media's right to reveal private information, an alternative method of weighing the respective interests is urged.[19]

II. Limiting Public Disclosure Of Private Facts

The concept of an individual "right to privacy" was originated in 1890 by Samuel D. Warren and Louis D. Brandeis.[20] Warren and Brandeis articulated the idea that the "right to be let alone" is as much a part of personal liberty as is the right to be free from physical restraint and the right to possess property.[21] The pair proposed that a legal remedy in tort be imposed for "invasion of the right to privacy."[22]

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14. The "trend in 'modern' jurisprudence has been to eclipse an individual's right to maintain private any truthful information that the press wished to publish." *Florida Star*, 491 U.S. at 553 (White, J., dissenting).

However, two of the more outspoken advocates for an unlimited press, Justices Marshall and Brennan, are no longer on the Court. It remains to be seen how the newer members of the Court will weigh the privacy rights of the individual against the media's right to print or broadcast truthful information. *See* Hansen, *supra* note 10, at 14.

15. *See infra* notes 20-43 and accompanying text.

16. *See infra* notes 44-157, and accompanying text.

17. *See infra* notes 158-250, and accompanying text.

18. *See infra* notes 158-250 and accompanying text.

19. *See infra* part V.

20. Warren & Brandeis, *supra* note 8.

21. *Id.* at 193.

The authors recognized that technological advances in society threaten to "make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' "

Id. at 195.

22. *Id.* at 219.

Warren and Brandeis compared the damage which may result from an invasion of privacy to that which would result from physical harm, writing, "modern enterprise and invention have, through invasions upon [man's] privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."

The tort of "invasion of privacy"[23] is now recognized by the majority of states in the nation.[24] Disclosure of the identity of a rape victim is considered to be an "invasion of privacy" through public disclosure of private facts, or, in the words of the Restatement, "publicity given to private life."[25] In order for a plaintiff to recover damages in such a tort action, she[26] must prove the following: "(1) public disclosure (2) of a private fact [not privileged] (3) which would be offensive and objectionable to the reasonable person, and (4) is not newsworthy."[27]

Truth of a fact is not a valid defense against an action for public disclosure of a private fact.[28] However, legitimate defenses do arise in public disclosure actions when the information revealed is already a matter of public record[29] or is of significant public interest (newsworthy).[30] It is here that the tension between the media's first amend-

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Id. at 196.

23. THE RESTATEMENT (SECOND) OF TORTS specifies that an individual's privacy is invaded by:

> (a) unreasonable intrusion upon the seclusion of another, . . . ;
> (b) appropriation of the other's name or likeness, . . . ;
> (c) unreasonable publicity given to the other's private life, . . . ; or
> (d) publicity that unreasonably places the other in a false light before the public . . . .

RESTATEMENT (SECOND) OF TORTS § 652A (1977).

This note is limited to the "unreasonable publicity given to the other's private life," also known as the tort of public disclosure. *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977).

24. RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (1977); *see also* STUART M. SPEISER ET. AL., THE AMERICAN LAW OF TORTS § 30:1, at 845 n. 2 (1991).

25. *See* Philip E. Hassman, Annotation, *Propriety of Publishing Identity of Sexual Assault Victim,* 86 A.L.R. 3d 80, 81 (1978).

THE RESTATEMENT (SECOND) OF TORTS defines the tort of public disclosure as follows:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that:
> (a) would be highly offensive to a reasonable person, and
> (b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D (1977).

26. Although men, too, are victims of sexual assaults, the vast majority of sexual assault victims are women. *See* SUPREME JUDICIAL COURT, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS 98 (1989). According to the Massachusetts' study, close to 90% of all sexual assault cases handled from 1987-1989 involved women as victims. *Id.* at 110 n.10.

27. Kimberly Wood Bacon, Comment, Florida Sun [sic] v. B.J.F.: The Right of Privacy Collides with the First Amendment, 76 IOWA L. REV. 139, 143 (1990) (citing WILLIAM L. PROSSER, THE LAW OF TORTS § 117, at 809 (4th ed. 1971)).

28. SPEISER ET AL., *supra* note 24, § 30:24 at 955; Warren & Brandeis, *supra* note 8, at 218.

29. *See Cox Broadcasting,* 420 U.S. at 496; Warren & Brandeis, *supra* note 8, at 216; *see also infra* text accompanying notes 62-67.

30. *See* Ross V. Midwest Communications, Inc., 870 F.2d 271 (5th Cir. 1989); Warren & Brandeis, *supra* note 8, at 214.

ment right and the individual's privacy right arises.[31] Because of the potential conflict between these individual rights, states extend a privilege to media institutions to disclose private information that the institution may deem to be newsworthy.[32] Therefore, when a media institution has information that it believes to be newsworthy, the institution will argue that it has a first amendment right to reveal the information.[33] When a state tries to limit this first amendment privilege, civilly or criminally,[34] the state must demonstrate that it has a compelling reason for doing so and that the chosen means are narrowly tailored to achieving an interest of the highest order.[35] The Court, in the

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31. *See Florida Star*, 491 U.S. at 530.

32. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 300 n.34 (1983).

33. *See* Harry Kalven, Jr., *Privacy in Tort Law—Were Warren & Brandeis* Wrong?, 31 LAW & CONTEMP. PROBS. 326, 336 (1966) ("[T]here is force to the simple contention that whatever is in the news media is by definition newsworthy, that the press must in the nature of things be the final arbiter of newsworthiness.").

Michael Gartner, NBC News President, when asked why NBC chose to air the name of the woman who accused William Kennedy Smith of rape, stated: "We are not in the business of keeping secrets. Every newsroom has to decide this on its own, but those are decisions that should be made in newsrooms, not in courtrooms or not in legislative halls." *Nightline: NY Times, NBC Name Palm Beach Rape Victim* (ABC television broadcast, Apr. 17, 1991). On the same broadcast, Nadine Strossen, president of the ACLU, stated that, "the press has the right to make the decision whether a particular piece of information, including the identity of the victim,. . .is newsworthy. . . . That's a decision that should be entrusted to the press. . . ." *Id.*

However, in a poll conducted by USA Today, 91% of those polled said that the victim, not the media, should decide whether or not to reveal her identity. Sandra Sanchez, *Rape Poll: No Names Say 91%*, USA TODAY, Apr. 18, 1991, at 1A (60% said victims shouldgive consent, 31% said that names should never be made public).

34. At least three states have enacted legislation that criminalizes disclosure of a rape victim's identity in an instrument of mass communication: under Florida, South Carolina, and Georgia law, publication of this information constitutes a misdemeanor. FLA. STAT. § 794.03 (1987) reads:

> No person shall print, publish, or broadcast, or cause or allow to be printed, published or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor. . . .

Id.; see also S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1976); GA. CODE ANN. § 16-6-23 (1988). Both of the public disclosure cases that have been before the Supreme Court invloved such privacy statutes. *See Florida Star*, 491 U.S. at 526 (brought under FLA. STAT. § 794.03 (1987)); *Cox Broadcasting*, 420 U.S. at 471-72 (involving GA. CODE ANN. § 26-9901 (1972)).

35. *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 102-03 (1979). For a discussion of the Supreme Court's ad-hoc balancing of competing private and public interests, *see* Melville B. Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968). *See also, Florida Star*, 491 U.S. at 537; and *infra* notes 219-240 and accompanying text, for a discus-

course of resolving such conflicts, has developed a balancing test in which the competing interests of each party are weighed separately to determine which value requires greater protection.[36]

Among the interests that the public disclosure doctrine purports to protect is that of human dignity.[37] "The ultimate value at stake has been described as human dignity, individuality, and autonomy, but the primary point is that control of personal information about oneself is the essence of privacy."[38] In other words, private individuals, in order to retain their own personalities, should at least have the right to control personal information about themselves.[39] A sexual assault victim's interest in keeping her identity private during a very personal healing process "lies at the heart of this right."[40]

Although the Court recognizes that "[p]ress freedom and privacy rights are both 'plainly rooted in the traditions and significant concerns of our society' "[41], the most recent decisions have ignored the privacy right of the individual and have, without exception, focused on the rights of the media.[42] Justice White, dissenting from the majority's opinion in the most recent privacy case before the Supreme Court, noted his concern with this trend, stating "by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court . . . obliterate[s] one of the most noteworthy legal inventions of the 20th century: the tort of the publication of pri-

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sion of state interests argued in favor of keeping a sexual assault victim's identity private.

36. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 106 (1979) (Rehnquist, J., concurring) ("[W]e have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented."); *see also* Marcus & McMahon, *supra* note 3, at 1038.

37. *See* Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 185 (1979).

38. Marcus & McMahon, *supra* note 3, at 1037.

39. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-14, at 650 (1978). Tribe argues that if the point is reached that courts allow private information about individuals to be disseminated without limitation, "above the deeper concerns of personhood," it will serve to "deprive individuals of liberty or property without due process of law. . . ." *Id.* Therefore, if the court fails to provide a remedy for an injured plaintiff in a privacy case, no remedy, and no due process, may be had at all. *See also* Nimmer, *supra* note 35, at 961 (Professor Nimmer argues that unlike defamation, injuries arising from invasion of privacy cannot be cured by "more speech" because in privacy cases the injury results "from the mere fact of publication.").

40. Marcus & McMahon, *supra* note 3, at 1037.

41. The Florida Star v. B.J.F., 491 U.S. 524, 533 (1989) (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975)).

42. *Florida Star*, 491 U.S. at 530 ("[A]lthough our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context.").

vate facts."[43]

III. Important Supreme Court Decisions

The Supreme Court has twice, in the last two decades, held that the imposition of damages upon a media defendant for publishing the identity of a rape victim was violative of the first amendment.[44] In *Cox Broadcasting Corp. v. Cohn,* the Court overwhelmingly sided with the press in refusing to impose liability for revealing a rape victim's identity.[45] However, the Court based its decision on the fact that the media defendant obtained its information legally, from public court records.[46] The Court noted that it was not addressing the "broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments."[47] In a more recent decision, *Florida Star v. B.J.F.,* the Court created a balancing test designed to address this "broader question" and to serve as a test for future public disclosure actions.[48] The Court derived the test from a synthesis of law gathered from a "trilogy of cases [that addressed] the conflict between truthful reporting and state-protected privacy interests."[49]

The *Cox Broadcasting* Court examined a regulation that required the media to keep truthful information, already on the public record, private. The other two cases in the trilogy, *Oklahoma Publishing Co. v. District Court*[50] and *Smith v. Daily Mail Publishing Co.*[51], involved private information revealed that was *not* part of a public record.[52] In order to understand the Court's formulation of the *Florida Star* test, the reasoning behind the decisions in the "trilogy cases", especially *Cox Broadcasting*, must first be examined.

A. Cox Broadcasting Corp. v. Cohn[53]

In *Cox Broadcasting,* the father of a deceased rape victim brought an action for invasion of privacy against Cox Broadcasting after the company identified his daughter during a television news broadcast of the rape trial.[54] The plaintiff relied on a Georgia statute which made it a

43. *Id.* at 550 (White, J., dissenting).
44. *See* The Florida Star v. B.J.F., 491 U.S. 524 (1989); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).
45. *Cox Broadcasting Corp.*, 420 U.S. at 496-97.
46. *Id.* at 491.
47. *Id.*
48. *Florida Star,* 491 U.S. at 533; *see also* Bacon, *supra* note 27, at 147.
49. *Florida Star,* 491 U.S. at 530, 533.
50. 430 U.S. 308 (1977).
51. 443 U.S. 97 (1979).
52. *See infra* notes 77-102 and accompanying text.
53. 420 U.S. 469 (1975).
54. *Id.* at 474.

misdemeanor to reveal the identity of a rape victim, claiming that the statute impliedly created a civil remedy for an injured party.[55] The Georgia Supreme Court held that the statute did not create a civil cause of action, but the plaintiff could proceed under the tort of public disclosure which is recognized in Georgia.[56]

The media defendant raised the two defenses available in arguing against a public disclosure claim: (1) that the information was obtained from indictments in the courtroom that were essentially public records open for public inspection, and (2) that the name of the victim was of public significance and therefore disclosure of the information was protected by the media's first amendment privilege.[57] The Georgia Supreme Court found for the plaintiff relying on the existence of the statute as proof that Georgia, as a matter of policy, does not consider the name of a rape victim to be a matter of public significance.[58]

The United States Supreme Court reversed the decision.[59] Justice White, writing for the majority, acknowledged that "there *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press . . . ."[60] With this in mind, White declined to hold, as the appellant wanted him to, that the media may never, constitutionally, be held civilly or criminally liable for disclosing accurate information.[61] White instead chose to focus on the narrow issue as presented by the facts of this particular case, namely "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records - more specifically, from judicial records . . . which themselves are open to public inspection."[62] The majority held that the state may not do so.[63]

Justice White reasoned that the media has a responsibility to provide complete coverage of official government proceedings so that individuals may complete their civic duties intelligently.[64] By supplying

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55. *Id.* GA. CODE ANN. § 26-9901 (1972) reads in relevant part:
"It shall be unlawful for any news media . . . to disseminate . . . the name or identity of any female who may have been raped . . . ."

56. Cox Broadcasting Corp. v. Cohn, 200 S.E.2d 127, 129-30 (Ga. 1973), *rev'd*, 420 U.S. 469 (1975); *see also* Dorman v. Aiken Communications, Inc., 398 S.E.2d 687, 689 (S.C. 1990) (holding that S.C. CODE ANN. § 16-3-730 (Law Co-op 1976) does not create a private cause of action).

57. *Cox Broadcasting*, 420 U.S. at 475.

58. Cox Broadcasting Corp. v. Cohn, 200 S.E.2d 127, 134 (Ga. 1973), rev'd, 420 U.S. 469 (1975) ("[N]o public interest. . .about the identity of a victim of such a crime. . .will make the right to disclose the identity of the victim rise to the level of First Amendment protection.").

59. *Cox Broadcasting*, 420 U.S. at 476.

60. *Id.* at 487.

61. *Id.* at 489, 491.

62. *Id.* at 491.

63. *Id.*

64. *Id.* at 492.

accurate information about judicial proceedings in particular, "the function of the press serves to guarantee the fairness of trials . . . ."[65] Justice White relied heavily on the longstanding acceptance of the media privilege to accurately report information surrounding judicial proceedings.[66] Since the reporter obtained the victim's name from an official report related to the trial, the media privilege applied.[67]

The majority was also concerned with the fact that Cox Broadcasting Corporation was being held liable for reporting information that was already available to the public at large.[68] Justice White noted that the existing body of privacy law recognizes that "the interests in privacy fade when the information involved already appears on the public record."[69] "By placing the information in the public domain on official court records," White argued, "the State must be presumed to have concluded that the public interest was being served."[70] In this manner, the majority rejected the plaintiff's argument that his privacy was invaded by the publication of wholly private facts. Information that is deemed to be of public significance is not private, and "[p]ublic records by their very nature are of interest to [the public]."[71]

Justice White expressed concern that "timidity and self-censorship" would result if the media was held liable for disclosing public information simply because it may be "offensive to the sensibilities of the supposed reasonable man."[72] White further stated that, "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information."[73] White cautioned that once information is put into the public domain, whether or not it will be published "must rest upon the judgement of those who decide what to publish or

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65. *Id.*

66. *Id.; see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (Massachusetts statute excluding the press and public from courtroom during testimony of minor victims of sexual assaults unconstitutional); Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980) ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment . . . ."); Warren & Brandeis, *supra* note 8, at 216-17.

67. *Cox Broadcasting*, 420 U.S. at 492 ("[J]udicial proceedings arising from . . . prosecutions . . . are without question events of legitimate concern to the public . . . .").

68. *Id.* at 495; *see also* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) ("[T]here is no liability for giving publicity to facts about the plaintiff's life that are matters of public record . . . .").

69. *Cox Broadcasting*, 420 U.S. at 494-95.

70. *Id.* at 495.

71. *Id.*

72. *Id.* at 496.

73. *Id.* This dicta would figure prominently in The Florida Star v. B.J.F. *See Florida Star*, 491 U.S. at 534-36, 538. *See also infra* notes 106-07 and accompanying text.

broadcast."[74]

The eventual holding in *Cox Broadcasting Corp. v. Cohn* was narrow. The majority simply held that "States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."[75] The Court emphasized the narrowness of their holding by specifically rejecting the defendant's invitation to prohibit the sanctioning of the media on privacy grounds regardless of the source of information.[76]

1. *Oklahoma Publishing Co. v. District Court*[77]

In *Oklahoma Publishing Co.*, the United States Supreme Court held that a pre-trial order of a state court prohibiting the press from publishing the name or photograph of a juvenile defendant violated the First and Fourteenth Amendments.[78] In the case below, the Oklahoma Supreme Court upheld the order, relying on state statutes providing that "juvenile proceedings are to be held in private 'unless specifically ordered by the judge to be conducted in public,' and that juvenile records are open to public inspection 'only by order of the court to persons having a legitimate interest therein.' "[79]

The Supreme Court reversed, relying mainly on its reasoning in *Cox Broadcasting Corp. v. Cohn,* that the media may not be sanctioned for publishing information open to the public through judicial proceedings.[80] Although the trial judge in this case did not expressly open the juvenile hearing to the public, as required by the Oklahoma statute, the Court noted that "members of the press were in fact present at the hearing with the full knowledge of the presiding judge, the prosecutor, and the defense counsel."[81] Therefore, even though the information that the press wished to publish would normally not have been considered to have been in the public domain, by initially allowing the press into the courtroom, the judge implicitly approved of their presence.[82] On the basis of this fact, the Court held that the information was indeed in the public domain and under *Cox Broadcasting*, the press could not be constitutionally sanctioned from disclosing it.[83]

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74. *Cox Broadcasting Corp.*, 420 U.S. at 496.

75. *Id.* at 495.

76. *Id.* at 497 n.27 ("Because appellants have prevailed on more limited grounds, we need not address this broader challenge to the validity of § 26-9901 and of Georgia's right of action for public disclosure.").

77. 430 U.S. 308 (1977).

78. *Id.* at 311-12.

79. *Id.* at 309-10 (quoting OKLA. STAT. ANN. tit. 10, §§ 1111, 1125 (West Supp. 1976).

80. *Id.* at 310.

81. *Id.* at 311.

82. *Id.*

83. *Id.* at 311-12. As in *Cox Broadcasting,* the Court avoided specifically ruling on

2. *Smith v. Daily Mail Publishing Co.*

In *Smith v. Daily Mail Publishing Co.*,[84] the Court examined a West Virginia statute[85] that prohibited the press from publishing the name of any child involved in a juvenile proceeding.[86] The state's interest in enacting the statute was to "protect the anonymity of the juvenile offender . . . [in order to] further his rehabilitation."[87]

The defendant in *Daily Mail,* after learning of a shooting incident at a junior high, discovered the name of the juvenile offender simply by interviewing witnesses at the scene.[88] The paper subsequently published the juvenile's name in a story about the incident, after learning that his identity had already been revealed in several other media outlets, including three radio stations.[89] As a result of the publication, criminal charges were brought against the defendant.[90]

The Supreme Court agreed with the lower court that the "State's interest in the anonymity of a juvenile offender is not sufficient to overcome [the] presumption [against the constitutional validity of the statute]."[91] Chief Justice Burger, writing for the majority, relied on the Court's previous opinions in *Landmark Communications, Inc. v. Virginia*,[92] *Cox Broadcasting,* and *Oklahoma Publishing*.[93] The Chief Justice acknowledged that the three decisions did not directly control *Daily Mail,* but noted that "all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[94]

The Court explained that the precedential cases addressed situations in which "the government itself provided or made possible press

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the constitutionality of the Oklahoma statute prohibiting the press and public from attending juvenile proceedings. *Id.* at 310.

84. 443 U.S. 97 (1979).

85. W. VA. CODE § 49-7-3 (1976). The statute states that "the name of any child in connection with any proceedings under this chapter [shall not] be published in any newspaper without a written order of the court . . . ." *Id.* W. VA. CODE § 49-7-20 (1976) provides that "[a] person who violates . . . a provision of this chapter . . . shall be guilty of a misdemeanor, and upon conviction shall be fined . . . or confined in jail . . . ."

86. *Daily Mail,* 443 U.S. at 98.

87. *Id.* at 104.

88. *Id.* at 99.

89. *Id.* at 99-100.

90. *Id.* at 100.

91. *Id.* at 101, 102.

92. 435 U.S. 829 (1978) (reversing the conviction of a newspaper that accurately reported pending judicial review of commission proceedings). *Landmark Communications, Inc.* is not considered in detail in this note because it does not involve disclosure of an individual's identity.

93. *Daily Mail,* 443 U.S. at 102-03.

94. *Id.* at 103.

access to the information."[95] Pointing out that this was not a controlling factor, the Court announced that as long as the information was "lawfully obtained" the media may not be sanctioned for publishing it absent a need to further an important state interest.[96]

In *Daily Mail*, the Court found that the imposition of criminal penalties on newspapers did not further the state interest of preserving the anonymity of juvenile offenders, regardless of whether the interest was important.[97] The Court reasoned that since the statute did not prohibit electronic media from reporting juvenile identities,[98] the declared purpose of the state in enacting the statute was not accomplished.[99] In addition, the Court pointed out that forty-five other states requiring anonymity in juvenile proceedings "have found other ways of accomplishing their objective" besides the imposition of criminal penalties.[100]

The Court, as in their previous decisons, stated that the holding in *Daily Mail* is narrow.[101] "At issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper."[102] This same issue came before the Court a second time in *Florida Star v. B.J.F.*,[103] the only differences being that the name lawfully obtained was that of a rape victim, and the interest sought to be protected was privacy.

B. Florida Star v. B.J.F.

This trilogy of cases left states with a set of guidelines to follow in order to successfully regulate publication of private facts. Apparently, in order to constitutionally regulate what the media publishes, a state may not sanction publication of information that is obtained from open public records or proceedings,[104] or that is otherwise publicly avail-

95. *Id.*

96. *Id.* at 104. The Court explained that "[a] free press cannot be made to rely solely upon the sufferance of goverment to supply it with information." *Id.* (citing Houchins v. HQED, Inc., 438 U.S. 1, 11 (1978); Brazenburg v. Hayes, 408 U.S. 655, 681 (1972)).

97. *Id.* at 104-05. Justice Rehnquist, in his concurring opinion, agreed that the state's interest in prohibiting publication of a juvenile offender's name was of the "highest order." *Id.* at 107 (Rehnquist, J., concurring). However, he also agreed that the state's statute, as written, failed to "achieve its purpose." *Id.* at 110 (Rehnquist, J., concurring). Justice Rehnquist concluded by stating that "a generally effective ban on publication that applied to all forms of mass communication, electronic and print media alike, would be constitutional." *Id.* (Rehnquist, J., concurring).

98. *See supra* note 85 for the text of the statute.

99. *Daily Mail*, 443 U.S. at 105.

100. *Id.*

101. *Id.*

102. *Id.*

103. 491 U.S. 524 (1989).

104. *Cox Broadcasting*, 420 U.S. at 496.

able.[105] In addition, all media institutions must be regulated even-handedly.[106] With any regulation that burdens the press, the state's purpose must be to "further a[n]. . . interest of the highest order" with the means being strictly tailored to accomplishing the stated purpose.[107] Finally, a state must use other methods to safeguard information it wishes to keep private besides simply burdening the press, or in other words, use less drastic alternatives.[108]

The state of Florida thought that it was following these guidelines when it enacted two statutes that worked to protect the identity of sexual assault victims.[109] By enacting the statutes, particularly section 794.03, Florida attempted to reflect "popular sentiment" that protection of the privacy of a rape victim is considered by the state to be an interest of the highest order.[110] When a Florida newspaper was found liable for revealing the identity of a rape victim, however, the Supreme Court overturned the damage award after applying the legal test that was formulated in *Daily Mail*.[111]

B.J.F.[112] filed a suit against The Florida Star after the newspaper revealed her full name in a one paragraph article concerning her rape.[113] The newspaper obtained her name after a reporter-trainee

105. *Daily Mail*, 443 U.S. at 103.

106. *Id.* at 106.

107. *Id.* at 103, 105.

108. *Cox Broadcasting*, 420 U.S. at 498; *see also* Landmark Communications v. Virginia, 435 U.S. 829, 845 (1978).

109. FLA. STAT. ch. 794.03 (1987); *see supra* note 34 for the text of ch. 794.03. FLA. STAT. ch. 119.07 (3)(h) (1987) provides that "[a]ny . . . information . . . which reveals the identity of the victim of the crime of sexual battery . . . including those portions of court records . . . is exempt from the provisions [requiring mandatory disclosure of such public records]." *Id.*

Section 119.07 ensured that the identity of a rape victim would not be considered a matter of public record and showed that the state was requiring protection in other forms beside the burdening of the press, as was required from *Cox Broadcasting*. 420 U.S. at 496. In addition, section 794.03, made sure that the media would not be solely responsible for protecting a victim's identity by providing that "[n]o person shall print . . . or *cause* or *allow* to be printed . . ." the identity of a victim. FLA. STAT. ch. 794.03 (1987) (emphasis added). Section 794.03 also specifically applied to all forms of media so as not to be underinclusive. *Id.*

Justice White, dissenting in *The Florida Star v. B.J.F.*, agreed that Florida had followed the guidelines stating "Florida has done precisely what we suggested, in *Cox Broadcasting*, that States wishing to protect the privacy rights of rape victims might do: 'respond [to the challenge] by means which *avoid* public documentation or other exposure of private information' " 491 U.S. 524, 547 (1989) (White, J., dissenting) (quoting *Cox Broadcasting*, 420 U.S. at 496) (alteration in original).

110. *See* The Florida Star v. B.J.F., 491 U.S. 524, 548 (White, J., dissenting).

111. *Id.* at 541.

112. The Supreme Court noted that only B.J.F.'s initials were used in their opinion, in deference to her privacy interests. *Id.* at 527 n.2.

113. *Id.* at 528.

copied a police report on the incident verbatim.[114] The report had been placed in the police department pressroom in which signs were posted that contained clear warnings against the publication of a rape victim's identity.[115] The Florida Star subsequently published the story containing the victim's name, in violation of the Florida statute and its own "internal policy." [116]

After the publication, B.J.F. filed a public disclosure claim[117] against The Florida Star arguing that since her identity was published in contravention of a state criminal statute, civil liability could be implied under the negligence *per se* theory.[118] At trial she argued that she suffered from emotional distress and required mental health counseling as a result of her name being published.[119] Among other things "her mother had received several threatening phone calls from a man who stated that he would rape B.J.F. again . . . forc[ing] B.J.F. to change her phone number and residence, [and] to seek police protection . . . ."[120]

The state trial court found in favor of B.J.F., ruling § 794.03 was constitutional because it reflected a proper balance between the First Amendment and privacy rights."[121] The Florida First District Court of Appeal affirmed the lower court's decision, adding that pursuant to the Florida statute, the identity of a rape victim is "of a private nature and not to be published as a matter of law."[122] The Supreme Court

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114. *Id.* at 527. B.J.F. also filed suit against the police department pursuant to FLA. STAT. ch. 794.03 (1987) for negligently "caus[ing] or allow[ing] [her name] to be printed . . . ." *Id.* This claim was settled between the parties before trial. *Florida Star,* 491 U.S. at 528.

115. *Florida Star,* 491 U.S. at 546 (White, J., dissenting). The reporter admitted that she knew that "she '[was not] allowed to take down that information'. . . and that she '[was] not supposed to take the information from the police department.' " *Id.* (citation omitted).

116. *Id.* at 528.

117. *See supra* notes 25-27 and accompanying text.

118. *Florida Star,* 491 U.S. at 528.

> When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate . . . . The fact that such legislation is usually penal in character, and carries with it a criminal penalty, will not prevent its use in imposing civil liability, and may even be a prerequisite thereto.

W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 220 (5th ed. 1984).

119. *Florida Star,* 491 U.S. at 528.

120. *Id.*

121. *Id.*

122. The Florida Star v. B.J.F., 499 So.2d 883, 884 (Fla. 1986), *rev'd,* 491 U.S. 524 (1989). The court cited Doe v. Sarasota-Bradenton Florida Television Co., which stated that "section 794.03 could be applied to protect privacy interests without running afoul of the first amendent. The same view has been espoused in an opinion of the attorney general that this statute would protect citizens when the information was *not yet available* for public inspection." 436 So. 2d 328, 330 (1983)

reversed.[123]

Justice Marshall, writing for the majority, acknowledged that although several "cases involving government attempts to sanction the accurate dissemination of information as invasive of privacy," had been before the Court in recent times, they had not "exhaustively considered this conflict."[124]

Both the plaintiff and the media defendant relied on *Cox Broadcasting Corp v. Cohn* in arguing their positions.[125] B.J.F. argued that the decision in *Cox Broadcasting* should be "overruled and replaced with a categorical rule that publication of the name of a rape victim never enjoys constitutional protection."[126] The Florida Star, on the other hand, argued that *Cox Broadcasting*, read in conjunction with the Court's subsequent decisions, should stand for the broad constitutional principle the the "press may never be punished, civilly or criminally, for publishing the truth."[127]

The Court, however, stated that *Cox Broadcasting* could not be "read as controlling" and refused to rely on its holding.[128] Justice Marshall noted that in *Cox Broadcasting*, the name of the rape victim had been obtained from judicial records open to public inspection.[129] In the instant case, "the information in question comes from a police report prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified."[130] Therefore, the principle that the press has a responsibility to accurately cover judicial proceedings does not figure in *Florida Star*.[131]

The Court also declined to hold broadly that the First Amendment gives unconditional protection to the press to publish all truthful information.[132] The Court focused instead on the particular facts of the case, stating "[w]e continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment

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(television station not liable to rape victim for revealing her identity because her name was obtained from a public trial).

123. *Florida Star*, 491 U.S. at 529.

124. *Id.* at 530.

> The tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other, is a subject we have addressed several times in recent years.

Id.

125. *Id.* at 531.

126. *Id.* at 531-32.

127. *Id.* at 531.

128. *Id.* at 532.

129. *Id.*

130. *Id.*

131. *Id.; see supra* text accompanying notes 61-67.

132. *Id.*

and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."[133] The Court referred to the trilogy of cases discussed above[134] and stated that the principle garnered from these decisions[135] directly applied to the instant conflict.[136]

Marshall, acknowledging that the principle would accord the press "ample protection", cited three reasons for the adoption of the test.[137] First, as the test protects only publication of lawfully obtained information, governments are not precluded from safeguarding their interests through "less drastic means" than by sanctioning the press.[138] Second, in situations where the published information is already available, punishing the press for further distribution would be "unlikely to advance the interests" of the state.[139] Third, the Court restated the *Cox Broadcasting* concern that " 'timidity and self-censorship'. . . may result from allowing the media to be punished for publishing certain truthful information."[140]

The *Daily Mail* test, adopted by the *Florida Star* Court, requires two inquiries to be made: (1)"whether the newspaper 'lawfully obtain[ed] truthful information about a matter of public significance' "[141] and (2)

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133. *Id.* at 533.

134. *See supra* text accompanying notes 53-103.

135. The Court adopted the test formulated in Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979): "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Florida Star*, 491 U.S. at 533 (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)).

136. *Florida Star*, 491 U.S. at 533. The dissenters strongly disagreed with the Court's adoption of this test as a means to resolve conflicts between individual privacy rights and media First Amendment rights. *Id.* at 545 (White, J., dissenting). Justice White argued that the test,

> was introduced in *Daily Mail* with the cautious qualfier that such a rule was "suggest[ed]" by our prior cases, "[n]one of [which] . . . directly control[led]" in *Daily Mail*. The rule the Court takes as a given was thus offered only as a hypothesis in *Daily Mail*: it should not be so uncritically accepted as constitutional dogma.

Id. at 545 (White, J., dissenting) (alterations in original) (citations omitted). In addition, White pointed out that at issue in *Daily Mail* was the right of a perpetrator of a crime to keep his identity secret. "Surely the rights of those accused of crimes and those who are their victims must differ with respect to privacy concerns." *Id.*

137. *Florida Star*, 491 U.S. at 533.

138. *Id.* at 534.

139. *Id.* at 535; *see also Cox Broadcasting*, 420 U.S. at 494-95; *Daily Mail*, 443 U.S. at 103.

140. *Id.* (quoting *Cox Broadcasting*, 420 U.S. at 496). "A contrary rule . . . would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication." *Id.* at 536.

141. *Florida Star*, 491 U.S. at 536 (quoting *Daily Mail*, 443 U.S. at 103) (alteration in original).

"whether imposing liability on [the media] pursuant to [a state regulation] serves 'a need to further a state interest of the highest order.' "[142] Applying the facts of *Florida Star* to the test, the Court held that Florida's imposition of damages on the media defendant in this case did not comport with the First Amendment.[143]

Under the first inquiry, the Court found that The Florida Star did indeed lawfully obtain B.J.F.'s name.[144] The Court noted that "the fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them when furnished by the government."[145] In addition, the Court stated that it was "clear" that the news article contained information that was newsworthy.[146] The Court considered it adequate that the "article *generally*, as opposed to the *specific identity* contained within it, involved a matter of paramount public import: the commission . . . of a violent crime . . . ."[147]

In their analysis of the second inquiry of the test, the Court acknowledged that the interests of the state in protecting the identity of a rape victim were "highly significant."[148] However, the Court, for three reasons, decided that Florida's method of regulating the press failed to further those interests.[149] The Court focused on Florida's statute and determined that it was not "narrowly tailored" to accomplishing its purpose, which was—anonymity.[150]

The Court first discussed the manner in which The Florida Star obtained B.J.F.'s name. Marshall reasoned that since the government it-

142. *Id.* at 537 (quoting *Daily Mail*, 443 U.S. at 103).

143. *Id.* at 539.

144. *Id.* at 536.

145. *Id.* (referring to FLA. STAT. § 119.07(3)(h) (1983); *see supra* note 109 for text of statute).

146. *Id.*

147. *Id.* at 536-37 (emphasis added). The Court does not give further explanation for their reasoning on this point. The suit was brought against The Florida Star for the negligent publication of B.J.F.'s *name*, there was no attempt on the part of the plaintiff, or the state, to preclude the press from publishing an account of the incident itself. The Court seems to ignore this fact in their inquiry. See *infra* notes 181-218 and accompanying text for a discussion of the Court's faulty reasoning regarding the "public significance" of a rape victim's name.

148. *Id.* at 537. The state named three reasons for keeping the identity of a rape victim private: (1) to ensure the personal privacy of the victim; (2) to guard the "physical safety" of rape victims; and (3) to encourage rape victims to report such crimes to police. *Id.* See *infra* notes 219-40 and accompanying text for a discussion of these state interests.

149. *Id.*

150. *Id.* at 538. The dissent strongly criticized the Court for its "myopic focus on § 794.03," noting that the issue in the case "is not an action for violating the statute . . . but is, more accurately, for the negligent publication of [B.J.F.'s] name." *Id.* at 549-50 (White, J., dissenting). Justice White pointed out that section 794.03 "merely provided the standard of care." *Id.* at 550. He argued that the Court should examine "the whole of Florida privacy tort law . . . [as the state] does recognize a tort of publication of private facts." *Id.*

self failed to abide by its own policy of protecting disclosure of rape victim's identities, "imposition of damages against the press . . . can hardly be said to be a narrowly tailored means of safeguarding anonymity."[151] The Court stated further that since the government basically issued the release, the defendants must have "considered dissemination lawful . . . ."[152]

The Court next was troubled by the fact that under the civil cause of action implied from section 794.03, "liability follows automatically from publication."[153] "Unlike claims based on the common-law tort of invasion of privacy . . . civil actions based on § 794.03 require no case-by-case findings that the disclosure of a fact about a person's private life was one that a reasonable person would find highly offensive."[154]

Finally, the Court stated that since the Florida statute prohibited the disclosure of identifying information only in "instrument[s] of mass communication," doubts could be raised whether the statute was truly serving victims' interests.[155] The Court pointed out that an individual gossip could cause as much harm to a rape victim as could a "media giant."[156]

Based on these findings, the Court concluded that "Florida's selective ban on publication by the mass media [does not] satisfactorily accomplish[] its stated purpose."[157]

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151. *Florida Star*, 491 U.S. at 538. Marshall continued stating that at this point victims must look to the "willingness of the government to compensate [them] for their loss of privacy and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence." *Id.*

152. *Id.* at 538-39.

153. *Id.* at 539.

154. *Id.* Marshall pointed out that this would occur even in situations where "the identity of the victim is already known throughout the community; . . . the victim has voluntarily called public attention to the offense; or . . . the identity of the victim has otherwise become a reasonable concern." *Id.*

The majority again ignores an important factor that in this case the victim herself, not the state, brought a civil action against the defendant. If the victim had, for example, consented to publication of her name, she would not have brought a suit.

In addition, the dissent points out that the enactment of the statute by the legislature "reflect[ed] popular sentiment" that the disclosure of the name of a rape victim *is* offensive to the reasonable person. *Id.* at 548 (White, J., dissenting). Furthermore, White notes that the jury did find that the defendant acted "with reckless indifference towards the rights of others." *Id.*

155. *Id.* at 540 (citing FLA. STAT. ch. 794-03 (1987)).

156. *Id.* The dissent again found fault with this portion of the Court's analysis noting that "Florida wanted to prevent the widespread distribution of rape victims' names, and therefore enacted a statute tailored almost as precisely as possible to achieving that end." *Id.* at 549 (White, J., dissenting).

157. *Id.* at 541.

IV. Analysis Of The Court's Balancing Test

The impact of the *Florida Star* decision goes beyond the holding itself since the test adopted by the Court will most likely be used in future public disclosure actions.[158] The same test will apply whether an action is brought under a state statute forbidding specific conduct, as in the *Florida Star* case,[159] or under a state statute generally protecting a person's privacy.[160] The *Florida Star* Court's insistence on case-by-case examination of public disclosure claims is sure to result in an increase of privacy litigation at the state level.[161] The *Florida Star* Court's application of the *Daily Mail* test accorded great weight to the media's First

158. *See* Marcus & McMahon, *supra* note 3 at 1029; Bacon, *supra* note 27 at 147. This is so despite Justice White's criticism of the adoption of this test. *See supra* note 136.

159. The plaintiff in *Florida Star* brought her suit under an implied theory of liabilty derived from FLA. STAT. ch. 794.03 (1987). *Florida Star*, 491 U.S. at 528. The Court did not hold the statute itself unconstitutional, but held that the result of imposing civil penalties on a media defendant *through* the statute did not comport with the First Amendment. *Id.* at 526. The Court did not exclude, however, the possibility that a valid civil statute protecting the identity of a rape could conceivably be drafted. *Id.* at 541; see *also* MARCUS & MCMAHON, *supra* note 3, at 1052, for a proposed statute that the authors feel would pass constitutional muster.

Subsequent court decisions have similarly held that civil liability could not be imputed from criminal statutes. *See e.g.*, Dorman V. Aiken Communications, Inc., 398 S.E.2d 687 (S.C. 1990) (S.C. CODE ANN. § 16-3-730 (Law Co-op 1976) does not create a private cause of action for a rape victim whose identity was revealed by newspaper); *but see* KEETON ET. AL., *supra* note 118.

In its *Florida Star* decision, the Court noted that "categorical prohibitions upon media access" are generally impermissible. *Florida Star*, 491 U.S. at 539-40. The constitutionality of section 794.03 is currently under examination in the Florida Court system. *See* Larry Rohter, *Charges Dropped Against Paper That Named Woman in Rape Case*, N.Y. TIMES, Oct. 25, 1991, at 16A. Judge Robert V. Parker dismissed all criminal charges against The Globe tabloid for naming the "Palm Beach Rape" accuser. *Id.* He ruled the statute "unconstitutional on its face and as applied." *Id.* The state said an appeal would be filed. *Id.*; *see supra* notes 9-10 and accompanying text.

Even if a rape victim whose privacy has been violated does not have a specific statute under which to bring a charge, she can bring suit under the state's general privacy statute. *See infra* note 160.

160. *See e.g.*, MASS. GEN. L. ch. 214, § 1B (1974), which reads in part, "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." *Id.*; *see also* Doe v. Sarasota-Bradenton Florida Television Co., 436 So.2d 328, 330 (Fla. 1983) ("Florida's constitutional right of privacy could provide . . . a means of further protection for those wishing 'to be let alone.' ") (footnote omitted).

Most states currently have some sort of privacy statute that provides for public disclosure claims. *See* RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (1977); SPEISER ET AL., *supra* note 24, § 30:1 at 845 n.2. See also *supra* note 150 for a discussion of Justice White's criticism of the *Florida Star* Court for not considering the whole of Florida privacy law in their analysis.

161. Marcus & McMahon, *supra* note 3, at 1029; *see generally* Comment, *Bad News: Privacy Ruling to Increase Press Litigation*, 23 AKRON L. REV. 561 (1990).

Amendment right and virtually ignored the individual's privacy right.[162] If state courts adhere to the Supreme Court's analysis of such public disclosure claims the result will be, in the words of Justice White, "to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts."[163]

The Supreme Court's analysis must be critically examined with the goal of discovering the proper balance between First Amendment and privacy rights. The Court acknowledged that in a "proper case," holding the press liable for identifying a rape victim may be necessary to further important state interests.[164] This note suggests that if the Court had viewed the *Florida Star* scenario under the whole of Florida privacy law, it would have been seen as the "proper case."[165]

This note, using the facts from the *Florida Star* case, will demonstrate under the Court's balancing test, that little burdening of the press will occur by keeping a rape victim's identity private, a privacy concern which *is* a state interest of the highest order.

A. *Did The Media Institution Lawfully Obtain Information Of Public Significance?*

The test's first query is composed of two elements: (1) whether the rape victim's identity was "lawfully obtained," and (2) whether the name is a "matter of public significance."[166] Each element of the first prong of the Court's test will be examined separately in order to illustrate that the Court's merging of the two elements is faulty.

1. Was the information lawfully obtained?

The *Florida Star* Court placed great emphasis on this inquiry. They mentioned it no less than three times; first when defending their use of the *Daily Mail* standard,[167] second when actually applying the first inquiry of the test,[168] and third in determining whether Florida's method

162. *See Florida Star*, 491 U.S. at 551, (White, J., dissenting). Justice White noted, "[t]he Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the latter." *Id.* at 547 n.2 (White, J., dissenting).

163. *Id.* at 550 (White, J., dissenting).

164. *Id.* at 537.

165. One cannot think of a more horrifying fact pattern than B.J.F.'s where, after publication of her name with her assailant still at large, she was actually threatened with rape again, required to obtain police protection, and eventually driven out of her own home—all because the public had a "right" to know her name. *Florida Star*, 491 U.S. at 528.

166. *Id.* at 536 (citing Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)).

167. *Id.* at 534; *see also supra* notes 137-40 and accompanying text.

168. *Florida Star*, 491 U.S. at 536; *see also supra* notes 141, 144-45 and accompanying text.

of regulation actually accomplished its stated purpose as required by the second prong of the test.[169] The Court was troubled greatly by the fact that the media could possibly be punished for disclosing information that was initially, although mistakenly, disclosed by a state agency.[170] The Court did not address the fact that the police department had been made to pay for their mistake.[171]

Marshall suggested that, in lieu of burdening the press, states take alternate precautions to ensure the protection of a rape victim's identity.[172] The Court failed to recognize that Florida had taken these steps with the enactment of the statute exempting names of rape victims from the public record.[173] Justice Marshall noted that even though Florida had such a statute, it did not make it unlawful for the press to *receive* such information.[174] With this standard, the Court is setting dangerous precedent that allows the media, short of breaking the law, to freely print any truthful information that it receives. Even if a state enacts what it feels to be full-proof legislation protecting disclosure of victim identity, mistakes can happen.[175] If a mistake *does* happen, the media should not be so freely allowed to capitalize on the situation in order to further their own interests.[176] Justice White expresses society's best interests stating, "it is not too much to ask the press, in instances such as this, to respect simple standards of decency and refrain from publishing a victim's name."[177] The Court places the whole of the victim's interests in the sufficiency of the state public record accessibility

169. *Florida Star*, 491 U.S. at 538-39; *see also supra* notes 148-57 and accompanying text.

170. *See Florida Star*, 491 U.S. at 538.

171. *Id.* at 528. The police department settled with B.J.F. prior to trial for $2500. *Id.*

172. *Id.* at 534-35; *see also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975).

173. *Id.* at 547 (White, J., dissenting) ("[T]he State has taken virtually every step imaginable to prevent what happened here."). See also *supra* note 115 and accompanying text regarding the police department's posted warning against publishing rape victim's names.

174. *Florida Star*, 491 U.S. at 536.

175. A number of states have enacted legislation that provides for a private right of action if the name of a sexual assault victim is wrongly disclosed by a public agency. *See, e.g.*, N.Y. CIV. RIGHTS LAW § 50-c (McKinney 1991); 1991 Mich. Pub. Acts 175 (procedure established for rape victims to use a pseudonym if they so choose). If these statutes are to have full force, the press also must be held accountable for wrongly revealing victim identities.

176. In a poll of 633 adults, 39% believed that the media printed victim's names to sell newspapers. Sandra Sanchez, *Rape Poll: No Names, Say 91%*, USA TODAY, Apr. 18, 1991, at 1A.

177. *Florida Star*, 491 U.S. at 547 (White, J., dissenting). The media industry has imposed such standards on itself: "Journalists should respect the rights of people involved in the news, observe the common standards of decency and stand accountable to the public for the fairness and accuracy of their news reports." ASNE STATEMENT OF PRINCIPLES Art. VI (1975), *reprinted in* Note, *Standards Governing the*

laws.[178] The media too should be made to consider the consequences should they publish everything they get their hands on.[179]

Since the Court affords the media a great deal of leeway in the consideration of whether information is lawfully obtained,[180] the second element of the Court's first inquiry becomes all the more critical.

2. Is the information a matter of public significance?

The *Florida Star* Court overstepped its bounds by holding that B.J.F.'s name was a matter of public significance.[181] The Court considered only the fact that the *article* containing B.J.F.'s name was newsworthy without analyzing the very issue at stake: whether the *name itself* was a matter of public significance.[182] The Court's analysis of this element of the test is greatly flawed for three broadly-based reasons. First, the Court has no constitutional precedent for offering such a general declaration of newsworthiness regarding a rape victim's name.[183] Second, the Court, after criticizing Florida for its negligence per se standard regarding press liability, basically applied a newsworthy per se standard regarding victim identity without considering the specific facts of the case.[184] Finally, the Court fails to consider whether media identification of rape victims comports with the societal interests of First Amendment protection of the press.[185]

In *Cox Broadcasting Corp. v. Cohn*, the Court determined that the rape victim's identity was a matter of public significance because it was a matter of public record.[186] The Court noted the important purposes of

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News: Their Use, Their Character, and Their Legal Implications, 72 IOWA L. REV. 637, app. b at 696 (1987) (ASNE stands for American Society of Newspaper Editors).

178. *Florida Star*, 491 U.S. at 534.

179. The media's love of sensationalism was apparently as prevalent in 1890 as it is today—Warren & Brandeis commented:

> Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effontry. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.

Warren & Brandeis, *supra* note 8, at 196.

180. The Court obviously considered the Florida Star reporter-trainee's procurement of B.J.F.'s name lawful even though she knew she was not supposed to take the information. *Florida Star*, 491 U.S. at 536. The Court specifically states that they are not addressing the issue of what would occur if a newspaper *unlawfully* obtained information. *Id.* at 535 n.8.

181. *Florida Star*, 491 U.S. at 536.

182. *Id.*

183. *See infra* text accompanying notes 186-89.

184. *See infra* text accompanying notes 190-201.

185. *See infra* text accompanying notes 202-18.

186. *Cox Broadcasting*, 420 U.S. at 492; *see also* Poteet v. Roswell Daily Record, Inc., 584 P.2d 1310 (N.M. Ct. App. 1978) (newspaper not liable for publishing

allowing the press access to such information.[187] The *Florida Star* case is an example of a situation where it cannot be said that the victim's name was a matter of pulic record. Rape victim's identities were specifically excluded from the public records act, no judicial proceedings had begun, and no suspect had even been detained.[188] Nowhere in its opinion does the Court try to deny this fact. The Court had no precedential basis for simply holding that a victim's identity is of significant interest.

Since the Court had no precedential basis for declaring a rape victim's identity to be newsworthy, they had the responsibility of showing why they thought it to be so.[189] The Court faulted Florida's method of regulating the press because it required no case-by-case finding that disclosure of a victim's name was offensive.[190] The Court engaged in exactly the type of behavior it criticized by categorically holding victim identity to be a matter of public significance.[191] Balancing the privacy interest of the individual against the First Amendment interest of the press is "the real linchpin" in resolving public disclosure actions.[192] Most public disclosure actions turn on the determination of whether or not the revealed private fact was newsworthy.[193] The Court fails to consider several reasons why a rape victim's identity may not be a matter of public significance.

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name of fourteen-year-old rape victim because information was obtained at open judicial hearing).

The *Oklahoma Publishing* and *Daily Mail* cases did not involve the privacy interests of victims. Whether or not there is an interest in revealing the identity of a perpetrator of a crime is a separate argument. *See supra* note 136.

187. *Cox Broadcasting*, 420 U.S. at 492. *See supra* text accompanying notes 64-71.

188. *See supra* notes 104-05, 129 and accompanying text.

189. *See* Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462, 1468 (1973).

> A court cannot dispose of the First Amendment issue by deciding merely that the name of an individual is 'of legitimate public interest'; if it so decides, it must then balance the resulting First Amendment interest in publication of the name with the . . . interest in protecting the privacy of the individual.

Id.

190. *Florida Star*, 491 U.S. at 539.

191. *Id.* at 536-37.

192. 43 AM. JUR. 2d *Invasion of Privacy by Public Disclosure of Private Facts* § 6.

193. *See* Ross v. Midwest Communications, Inc., 870 F.2d 271 (5th Cir. 1989). The plaintiff in *Ross*, a rape victim, brought a suit for invasion of privacy after her identity was revealed on a television broadcast. *Id.* at 271. The court, applying Texas law, examined the case according to public disclosure tort law. *Id.* at 273. Half of the court's analysis involved the question of whether, in this particular case, the identity of the rape victim was newsworthy. *Id.* at 274-75. The court held that in this case, the name happened to be a matter of public interest, but cautioned that the result would not always hold to be true. *Id.*; *see also*, Virgil v. Time, Inc., 527 F.2d 1122, 1129, 1131 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976) (court considered whether personal facts about plaintiff were so offensive so as not to constitute newsworthiness); Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.

First, the Court failed to consider that the State of Florida, by virtue of their enacting a statute protecting victim privacy, did not believe the information to be of public significance.[194] The Court gave no deference to the State legislature, which is representative of the people.[195] The Court should not have favored its own views over the views of the community in this case.[196] Second, the fact that The Florida Star itself had a policy of not revealing the identities of rape victims gives credance to the view that the information is not something the public *needs* to know.[197]

Third, the Court criticized Florida's policy because it provided for liability even where the victim had consented to disclosure, her name was already widely known, or her identity was important "otherwise."[198] By not heeding their own advice of examining a case as to the particular facts, the Court had no opportunity to debate whether one of these situations actually existed.[199] As Justice White noted, the Court was so preoccupied with finding the statute itself unconstitutional that they overlooked the actual issue at hand: was the matter of B.J.F.'s name so significant as to preclude an action for disclosure of private facts?[200]

1940) (inquiry into whether information about former child prodigy was newsworthy).

For a thorough discussion of newsworthiness analysis in public disclosure cases, see Zimmerman, *supra* note 32, at 344-62; Bacon, *supra* note 27, at 151 n.103.

194. *See* FLA. STAT. ch. 794.03, 119.07 (3)(h) (1987). See *supra* notes 34, 109 for text of statutes.

195. Studies show that a majority of people favor keeping victim identity private unless the victim consents. *See* Sanchez, *supra* note 33 (91% polled favor victim privacy).

196. *See* Nimmer, *supra* note 35, at 941. Nimmer quoted the view of Justice Frankfurter:

> [H]ow are competing interests to be assessed? . . . . [W]ho is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are *not* representative bodies . . . .
>
> Primary responsibility for adjusting the interests which compete in [society] of necessity belongs to the Congress . . . . are to set aside the judgment of those whose duty it is to legislate *only if there is no reasonable basis for it.*

Id. (quoting Dennis v. United States, 341 U.S. 494, 525 (1951)) (Frankfurter, J., concurring) (emphasis added) (Nimmer notes that Justice Frankfurter's position has never been adopted by a majority of the Court).

197. *Florida Star*, 491 U.S. at 528. Ninety to ninety-five percent of media institutions have similar self imposed policies and have not, in the past, complained that their news-gathering abilities were burdened. *See* Marcus & McMahon, *supra* note 3, at 1046-47, *citing* Jones, *Naming Rape Victim is Still a Murky Issue for the Press*, N.Y. TIMES, June 25, 1989, at 18.

198. *Florida Star*, 491 U.S. at 539.

199. *See id.*

200. *Id.* at 549-50 (White, J., dissenting) (noting that the statute merely provided a standard of care for the civil action); *see also* Bacon, *supra* note 27, at 151.

If a state has a policy or statute mandating the identity of a rape victim as not publicly significant, the Court should accept it as the prevailing view of the community unless there are mitigating circumstances. The Court's holding that the name of a rape victim in an article about rape is, as a matter of law, significant, basically eliminates the "newsworthy" consideration in the balance between the press' right to publish, and the private individual's right "to be let alone."[201]

If the Court had considered the question, they would have discovered that the interests in keeping B.J.F.'s name private, outweighed the interest the press may have had in publishing the information. Besides the basic premise of retaining one's human dignity,[202] the interests in keeping a sexual assault victim's identity private include: physical safety of the victim; encouragement of the reporting of rapes; and the general concerns of being able to control private information about one's self.[203]

On the other hand, it is hard to argue that the release of a victim's name in conjunction with a news story about a crime does anything to further society's valid interest in a free press.[204]

The Court in the past has stressed the interest in "self-governance" as basis of the First Amendment protection of the press' right to publish truthful information.[205] The First Amendment assists society in *making* informed decisions about governmental processes and in *becoming* informed about important events of the day.[206] Meiklejohn espoused the theory that speech that does not assist in the goal of self

201. See *supra* note 25 and accompanying text for the RESTATEMENT (SECOND) OF TORTS' public disclosure claim elements; *see also* Warren & Brandeis, *supra* note 8, at 193.

202. *See* Woito & Mcnulty, *supra* note 37, at 185; *see also supra* text accompanying notes 37-40.

203. *Florida Star*, 491 U.S. at 537. See *infra* text accompanying notes 219-38 for a thorough discussion of these interests.

204. *See* Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974); Nimmer, *supra* note 35, at 962-67; Note, *supra* note 189, at 1463-72; Comment, *Privacy: The Search For A Standard*, 11 WAKE FOREST L. REV. 659 (1975) for theses that the purpose of the First Amendment is not furthered through unnecessary invasions of privacy.

205. Rosenbloom v. Metromedia, 403 U.S. 29, 41 (1971). The Court adopted this premise from the works of Alexander Meiklejohn. *See* Note, *supra* note 189, at 1464 (citing William Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965)). Meiklejohn formulated the theory that:

> The First Amendment does not protect a "freedom to speak." It protects the freedom of those activities of thought and communication by which we "govern." It is concerned, not with a private right, but with a public power, a governmental responsibility.

Id. (citing Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 255 (1961)).

206. *See* Comment, *supra* note 204, at 671.

governance could be regulated.[207] If the Court continued its pattern of following Meiklejohn's theses and applied the self-governance theory to privacy cases, they would simply have to ask whether the information in question was "useful to citizens in making them better able to govern themselves," in order to determine whether the information was a matter of public significance.[208]

Specifically naming the victim of a sexual assault in an article about the crime does nothing to further the goals of the First Amendment.[209] In the case of *Doe v. Sarasota-Brandenton,*[210] the court reluctantly affirmed dismissal of an action against a television station for disclosure of a rape victim's identity, because the name was broadcast from an open judicial proceeding.[211] The *Doe* court stated:

> [W]e . . . reluctantly [affirm] because the information disclosed during the television broadcast appears to us to have been completely unnecessary to the story being presented. Witholding the name and photograph of the victim in this case would in no way have interfered with or restricted publication and dissemination of [the daily news].[212]

The *Doe* court stressed the fact that prior to trial, the victim was a private citizen, only after she had "the unhappy circumstance of becoming a victim of . . . crime" did her identity become a matter of "curiosity."[213] A rape victim should not have to fear the possibility that by reporting the crime, she may become a figure of public interest and, therefore, newsworthy. In a society where the incidents of rape are

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207. *Id.* at 672.

208. *Id.* at 682.

209. *See id.* at 683. The author states:

> When public interest is measured by the usefulness of information in helping citizens to govern themselves, the names of the persons involved in the events are in large measure outside the scope of matters of public interest. In other words, the names do not provide useful information which furthers the ability to self-govern.

Id.

210. 436 So. 2d 328 (Fla. Dist. Ct. App. 1983).

211. *Id.* at 330. The court was compelled to follow the Supreme Court's reasoning in *Cox Broadcasting Corp. v. Cohn. Id.* at 329; *see also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975); *supra* text accompanying notes 59-67.

212. *Doe*, 436 So.2d at 330 (citations omitted). Justice White shared this opinion stating, "[t]here is no public interest in publishing the names, addresses, and phone numbers of persons who are victims of crime - and no public interest in immunizing the press from liability in the rare cases where a State's efforts to protect a victim's privacy have failed." The Florida Star v. B.J.F., 491 U.S. 524, 553 (1989) (White, J., dissenting).

213. *Doe*, 436 So. 2d at 331. The court was alluding to Supreme Court defamation standards in which private citizens are offered more protection than public personalties. *See* Gertz v. Robert Welsh, Inc., 418 U.S. 323, 344 (1974); *see also* Nimmer, *supra* note 35, at 948-67 for a discussion on the difference between privacy claims and defamation. Nimmer states that "[d]efamation protects a man's interest in his reputation . . . . The right of privacy protects not reputation, but the interest in maintaining the privacy of certain facts. Public disclosure of such facts can create

vastly underreported,[214] the public interest should lie in *encouraging* reporting, not discouraging it.[215]

The Court should not have determined that a rape victim's name was a matter of public significance. The only factor of significance is that a crime had been committed, and this fact can be adequately relayed to the public without including the victim's name. The only reason for blindly revealing the name of a rape victim is to satisfy the "voracious appetite of the public for scandal."[216] If there is a reason that a victim's identity should be considered "significant," that reason should be debated in the courtroom. Only when the identity is found to be newsworthy in this manner, should "public significance" serve as a defense to a public disclosure claim.[217] In future public disclosure claims, courts *must* consider the "public significance" element more thoroughly than the Court did in *Florida Star*.[218]

B. *Is The Limitation On The Media Necessary To Further A Compelling State Interest?*

In considering the second prong of their test, the Court summarily recognized the valid interests of the state in keeping a rape victim's identity private.[219] The Court's concern, however, was that Florida's statutory attempt to protect rape victims did not adequately further this goal.[220] With the Court's focus, again, on the statute rather than the individual claim, they did not consider just how compelling the privacy interest is. In order to understand that the privacy interests *do*, in most circumstances, outweigh the public interest in knowing a victim's name, they must be individually examined.

The state named three separate interests in keeping a victim's name private: "the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure."[221]

There are a variety of reasons why states have an interest in gener-

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injury regardless of whether such disclosure affects the subject's reputation." *Id.* at 958.

For a thesis that the Court should follow the defamation standard in privacy cases *see* Bacon, *supra* note 27, at 153-56.

214. *See supra* notes 3-4 and accompanying text.

215. *See* Bloustein, *supra* note 204, at 63 (the author asks "[s]hould serving the public curiosity and lust for scandal be more important than having rape victims come forward?").

216. *Doe*, 436 So.2d at 331.

217. *See supra* notes 30-33 and accompanying text.

218. *Florida Star*, 491 U.S. at 536-37.

219. *Id.* at 536 ("It is undeniable that these are highly significant interests.").

220. *Id.* at 537-41.

221. *Id.* at 537.

ally protecting the privacy of rape victims. A victim's interest in privacy stems from the right to control information about herself.[222] Laurence Tribe explained the consequences of this right being intruded upon, stating:

> [s]uch control constitutes a central part of the right to shape the "self" that any individual presents to the world. It is breached most seriously when intimate facts about one's personal identity are made public against one's will . . . in defiance of one's most conscientious efforts to share those facts only with close relatives or friends.[223]

This interest is defeated when facts about a victim are disseminated through the media along with her name. The victim is no longer able to choose who she will inform about the crime that was committed against her. The fact that "sexual crime[s] intrude[] upon a very private part of the victim's personality" makes selective disclosure all the more important to the victim.[224]

Because of the unfortunate stigma our society places on being raped, victims may have personal reasons for wanting to keep their trauma private.[225] The victim may have to reconcile her own feelings about the experience before going public.[226] Each victim has a unique

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222. *See* TRIBE, *supra* note 39, § 12-14 at 648-49.

223. *Id.*

224. Kim Ruckdaschel-Haley, Comment, The Florida Star v. B.J.F.: *Balancing Freedom Of The Press And The Right To Privacy Upon Publication Of A Rape Victim's Identity,* 35 S.D. L. REV. 94, 114 (1990).

Nancy Ziegenmeyer, a rape victim who later went public, in response to the question of whether she was fearful of having her friends find out about her rape, stated, "Yeah. I didn't even want to have the hospital call my husband and tell him, because I was afraid that he would just hate me." *Nightline: Protecting Rape Victims' Identities: Helping or Hurting?* (ABC television broadcast, Mar. 28, 1990) [hereinafter *Nightline 1990*].

225. Among the reasons victims give for wishing to remain private, are fear of revictimization by society, personal guilt, and fear of being blamed themselves for the crime. *See Nightline 1990, supra* note 224. One rape victim interviewed during this broadcast stated, "it's such a humiliating experience, it was so painful. And to be blamed for it, and have people talk about you and say, 'well, she asked for it, because she did this' or 'she did that' or whatever, becomes a sensational story." *Id.* The fact that victims are often blamed themselves for being raped largely contributes to the victim's feelings of being stigmatized. *See* Marcus & McMahon, *supra* note 3, at 1030-31, for a full discussion of the stigma that society places on rape. The authors note that "[d]epending on the victim's attributes - whom she was with, how she was dressed, how she lives - the victim may be seen as more responsible for her actions than the rapist is for his actions." *Id.* at 1031.

226. *See Nightline 1990, supra* note 224 (statement of Veronica Ryback, rape counselor). Ryback stated that after being raped, victims generally say they feel "helpless" and "out of control."

> [W]hat they try to do is to regain that sense of being back in control, and not feeling helpless any longer. And the idea of the press publishing their name prior to the time that they might be willing to have that done only adds to that feeling of being out of control.

Id.; *see also* Marcus & McMahon, *supra* note 3, at 1048-49 (During the period imme-

healing process and the public disclosure of her identity could disrupt that process before the victim is ready.[227] Although some commentators argue that the stigma would be removed by routinely revealing rape victims' identities,[228] consideration is not paid to the fact that the victims in the transitionary period would be unduly harmed while the stigma still exists.[229] The state, therefore, has a great interest in protecting a rape victim's privacy in order to further her healing process, her emotional well being, and basic human dignity.

The state also has an interest in ensuring the physical safety of victims who may fear retaliation from their attackers. This is aptly illustrated by the facts surrounding the *Florida Star* decision where the plaintiff's assailant had yet to be identified.[230] B.J.F. was even threatened with rape again by a man claiming to be her attacker.[231] Where suspects have yet to be apprehended, releasing a victims name could be especially hazardous. The perpetrator could possibly locate the victim, threatening more harm if she was to identify him.[232] In fact "[a]n estimated 16% of the victims who did not report sexual assaults to the police between 1973 and 1982 did not report because of fear of reprisal by their assailants."[233] In view of these facts, one can safely say that the state has a great interest in policing the safety of victims of crime.

Finally, in view of the low number of rapes that are actually reported to the authorities, the state's interest in encouraging victims to report

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diately after the rape "each victim is forced to make many personal choices about how to contend with the effects of the assault.").

227. *See Nightline 1990*, *supra* note 224 (statement of Nancy Ziegenmeyer) ("[T]here was a great amount of healing that had to happen before I was strong enough to [go public]"); *see also* Marcus & McMahon, *supra* note 3, at 1032, 1048-49 ("Research shows that for most victims the trauma caused by rape lasts a minimum of three years and, depending on the circumstances, can be permanent.").

228. *See* Karen DeCrow, *Name rape victims: end sexist stereotyping*, USA TODAY, Apr. 18, 1991, at 10A (protecting rape victim identity gives credence to the idea that "a woman who is raped is damaged goods.").

229. *See* Marcus & McMahon, *supra* note 3, at 1032 ("[I]t is fitting to ask why DeCrow, society, or the media should determine for the victim when publicizing her name will no longer be insensitive, will no longer cause her emotional harm, or will no longer create further physical danger."); *Nightline 1990*, *supra* note 224, (statement of Nancy Ziegenmeyer) ("I would like to see a day when we can routinely print victims' names, but I don't ever want to see that day come unless the victim has the choice to do that."); Sanchez, *supra* note 33, at 1A ("68% [polled] said rape would not be less humiliating if victims were regularly identified.").

230. *Florida Star*, 491 U.S. at 528.

231. *Id.*

232. This is not too unrealistic a scenario—"a rapist is more likely to escape conviction for his crime than a car thief. The conviction rate for rapists has fallen 30 percent since the mid-sixties." 136 CONG. REC. § 16,091 (daily ed. Oct. 19, 1990) (statement of Sen. Biden).

233. Ruckdaschel-Haley, *supra* note 224, at 114 n.208 (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REPORT ON CRIME 5 (March 1989)).

the crime is of paramount importance.[234] Rape is considered to be one of the fastest growing crimes in America with estimates of yearly rapes reaching over 900,000.[235] Rape victims who do not report the crime often mention fear of a resulting loss of privacy as a major reason.[236] If states could ensure anonymity to victims when they report their crime, or provide for a remedy if the name is released, an increase in reported offenses would most likely result.[237] However, the form of remedy must not lie solely in an agency that mistakenly allows a name to be released as Justice Marshall suggests.[238] The media must be *discouraged* from disseminating a name once they obtain it. Providing rape victims with a remedy against the media, as well as the state, will encourage rape victims to report because they know that the media will be discouraged from disclosing.

The state's interests and the individuals' interests, in keeping a rape victim's identity private, far outweigh any interest the public may have in knowing a victim's name. Senator Biden expresses this view in his proposed legislation combating violence against women, "the public's interest in knowing the identity of a rape victim is small compared with the interests of maintaining the privacy of rape victims and encouraging rape victims to report and assist in the prosecution of the crime of rape."[239] The Court should heed this view and adhere to the notion that "an absolutist view of the public interest leads to insensitivity to a victim's privacy interest."[240]

The *Florida Star* Court, acknowledging these compelling state interests, still denied B.J.F. recovery against the newspaper for invasion of privacy.[241] They based their decision on the premise that Florida's rape victim privacy statute did not meet constitutional requirements.[242] Indeed, the second part of the Court's balancing test states that any burdening of the press must *further* a compelling state interest.[243] The *Florida Star* Court held that Florida's means of regulation did not further the State's compelling interest test because of the per se imposition of liability[244], the underinclusiveness of the statute,[245] and the fact

234. *See supra* notes 211-212 and accompanying text.
235. *See supra* note 2 and accompanying text.
236. *See* Marcus & McMahon, *supra* note 3, at 1050 (citing Nancy F. Biele, *Don't Pressure Victims in Disclosing Names*, USA TODAY, Apr. 4, 1990, at 8A).
237. *Id.*
238. *Florida Star*, 491 U.S. at 538.
239. S. 15, 102d Cong., 1st Sess. § 303(a)(8) (1991).
240. *Id.* § 303(a)(7).
241. *Florida Star*, 491 U.S. at 541.
242. *Id.* at 537-41.
243. *Id.* at 537 (emphasis added).
244. *Id.* at 539; *see also supra* notes 150, 156-57 for the dissent's view.
245. *Florida Star*, 491 U.S. at 540.

In his dissent, Justice White noted that in the past privacy cases, the Court found a statute to be underinclusive only when it singled out a specific segment of

that the press obtained the information through a government agency.[246] On this basis, the Court held that Florida's imposition of liability on the media was unconstitutional.[247] Justice White was correct in criticizing the Court for its "myopic focus" on the Florida statute.[248] The Court should have examined B.J.F.'s claim under the "whole of Florida privacy tort law."[249] Only then would the interests of B.J.F. have been properly weighed against the competing First Amendment interests of the press.[250]

V. CONCLUSION

The interests in protecting the privacy of a rape victim outweigh the public's interest in needing to know her name, unless there are significant extenuating circumstances. The Court's decision in *Florida Star* accords undue deference to the press, at the expense of the individual. The Court clouded the true issue in the case, whether the specific identity of a victim was significant under the First Amendment, by focusing wholly on the Florida statute that protected individual identity. Even if the Court was correct in determining that the statute was faulty, their method of weighing the respective interests of the parties under the balancing test sets a dangerous precedent that will make unworkable any attempt to protect a rape victim's privacy. After the *Florida Star* decision, courts will have precedential authority to declare a rape victim's name significant simply because she happened to be raped. Courts must continue to thoroughly consider the public significance element of public disclosure analysis. There *is* a great need to protect rape victims' privacy, and, as long as an individual's identity is not part of a public record, in most cases there will be little, if any, public benefit in disclosing this wholly private information.

Suzanne M. Leone

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the media. *Id.* at 549 (White, J., dissenting). The *Florida Star* Court found FLA. STAT. § 794.03 underinclusive because it applied to *only* the mass media and not the public at large. *Id.* at 540-41; *see also supra* note 154 and accompanying text.

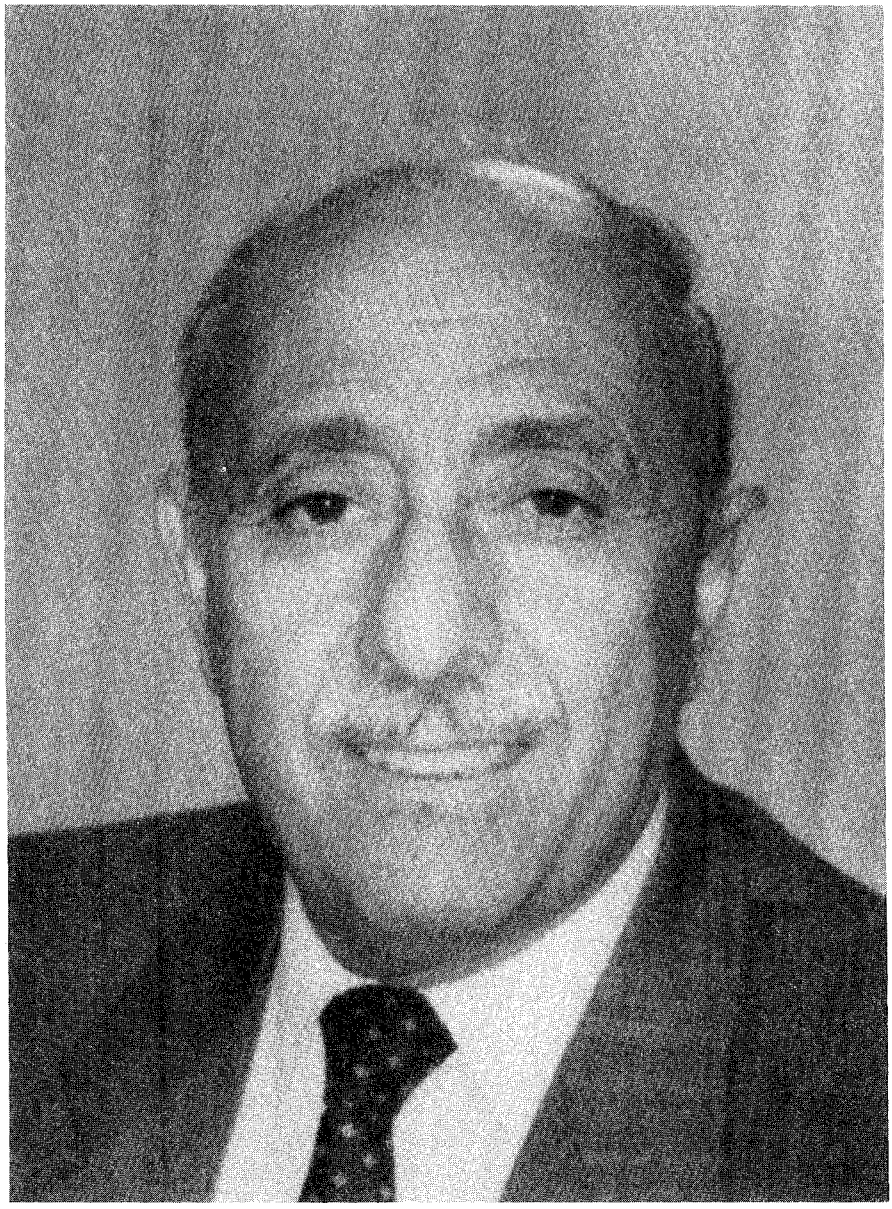
246. *Florida Star*, 491 U.S. at 537-41; *see also supra* notes 167-80 and accompanying text for a critique of the Court's application of this element of the test.

247. *Florida Star*, 491 U.S. at 541.

248. *Id.* at 549-50; *see also supra* notes 150, 156-57 and accompanying text.

249. *Florida Star* 491 U.S. at 549-50 (White, J., dissenting).

250. *See* Bloustein, *supra* note 204, at 65. Bloustein puts the proper inquiry into perspective stating, "for the purpose of deciding privacy rights under the first amendment, the only relevant question is whether the impairment of [an individual's] privacy serves the public need to be informed for governing purposes." *Id.*



HON. JAMES N. GABRIEL
Member, Board of Trustees
1977-1991
New England School of Law

Dedication

The New England School of Law honored United States Bankruptcy Court Chief Justice, James N. Gabriel at our Commencement on June 8, 1975. He was honored on that occasion because of his distinguished career of service as the United States Attorney for the District of Massachusetts. It was in that year that his daughter, Attorney Gail S. Gabriel began her law school studies at New England. It was in that year as well, that the Corporation extended an invitation to Judge Gabriel to serve as a member of our Board of Trustees. That service as a trustee continued until the date of his death on Tuesday, November 26, 1991.

A life long resident of Cambridge, Judge Gabriel, graduated from the public schools of that city and went on to pursue his legal career at Boston College and Boston College Law School. Admitted to practice in 1949, he passed his bar examination prior to his graduation from law school. Judge Gabriel received his Masters in Law degree from New York University School of Law.

A disabled veteran of the United States Air Force during World War II, Judge Gabriel won his pilots wings in 1944 and retired from the Air Force Reserves with the rank of Lieutenant Colonel.

An active practitioner for over forty-nine years, Judge Gabriel served for seven years as an Assistant Attorney General and served during many of those years as the Chief of the Eminent Domain Division. Appointed as an Assistant United States Attorney in August 1969, Judge Gabriel served as Chief of the Land Division and Chief of the Civil Division prior to his promotion to First Assistant United States Attorney and as Interim United States Attorney. In November 1972, James N. Gabriel was nominated by President Richard M. Nixon as the United States Attorney for the District of Massachusetts and he was confirmed by the United States Senate in April of 1973.

A warm, compassionate and scholarly individual, he wore his many hats well. A man of firm but gentle persuasion, he enjoyed a wide circle of friends and admirers. He performed each job assigned to him with that rare talent and skill which inspired universal trust and confidence.

During Judge Gabriel's sixteen years on the Board of Trustees, he rarely missed a meeting, he was meticulous as well concerning the demands placed upon him as a member of the Committee on Faculty Retentions and Tenure as well as the Budget Committee. Judge Gabriel was often outspoken during budget deliberations but we all enjoyed the give and take of discussions with him. There was never a spark of animosity as the result of Judge Gabriel's years on the Board. He genuinely cared about all the members of the Board and they had a deep

respect for him. We were all saddened with his passing as we had been during his long and difficult illness which concluded his life and his brilliant career as a lawyer and judge.

I was truly touched when I learned that the Law Review intended to honor Judge James N. Gabriel in one of its future editions. His career was an inspiration to all of us, but his relationships with people in all walks of life and with his wonderful family in particular were the qualities of goodness and honor and decency which truly set him apart. Judge Gabriel's wife, Helen and his five daughters share with me in expressing our thanks to the Law Review of New England School of Law for your remembrance in honor of this remarkable man, dear friend, father and husband.

HON. JAMES R. LAWTON
Chairman, Board of Trustees
New England School of Law
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S.C.A.R.F.A.C.E.: A Speculation on Double Jeopardy and Compound Criminal Liability

Susan W. Brenner*

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> Last week, Congress enacted SCARFACE as the latest weapon in the federal arsenal for use against complex criminal activity. The statute resulted from findings that criminal activity has so increased in complexity that it can no longer be dealt with by existing means. Congressional inquiries revealed that criminal entities, once known as "gangs," are cooperating on a national and even international level and so are evading the reach of conventional law enforcement. The purpose of the new statute is to provide a weapon to be used against this new kind of "organized crime."[1]

I. INTRODUCTION

This article explores a relatively new phenomenon in criminal law—imposing "compound" liability for a course of conduct.[2] It uses SCARFACE, the fictitious statute described above, as a device for examining the nature of this liability and its relationship to the constitutional prohibition on "double jeopardy."

Compound liability has been an aspect of federal law at least since adoption of the RICO statute in 1970,[3] but has not been analyzed as a distinct phenomenon.[4] RICO has received a great deal of attention,

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1. Sarah Warren, *SCARFACE: New Bane of Organized Crime?*, N.Y. TIMES, Mar. 4, 1999, § 1 at 1. The statute described is of course entirely hypothetical. The statute was created as a device to be used in exploring the constraints which the constitutional prohibition on double jeopardy do, and do not place upon compound criminal liability. The acronym derives from the statute's title: the "Syndical Crime and Racketeering Forces Act—Compound Enforcement." It was crafted to honor a perhaps apocryphal story about the RICO ("Racketeer Influenced and Corrupt Organizations") statute: RICO lore holds that G. Robert Blakey, who drafted the statute, contrived a title that would produce the acronym "RICO." Allegedly, his purpose was to include an ironic reference to the character—"Rico Bendello"—that Edward G. Robinson portrayed in Little Caesar, (First National 1930) a 1930 gangster movie. *See, e.g.*, Peter Gunst & Robert Levin, *RICO: A Runaway Anticrime Law*, 78 NATION'S BUSINESS, January 1990 at 61; Fred Strasser, *RICO and the Man 'Dr. Frankenstein' Tireless Pushes a Monster of a Law*, NAT'L L.J., Mar. 20, 1989, at 1; *see generally* in this story, the statute hypothesized in this article was titled to produce the acronym SCARFACE, a reference to the gangster portrayed in the two movies by that name. *See* SCARFACE: THE SHAME OF THE NATION (Universal 1932); SCARFACE (Hughes/United Artist 1983)

2. "Compound" denotes the phenomenon by which a single act or course of conduct gives rise to liability for multiple offenses. *See infra* parts II, IV(B)(1).

3. For a discussion of RICO, *see infra* parts III(A)(1).

4. For an article tracing the expansion of federal criminal law, *see* Craig Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213 (1984). *See generally* George Thomas III, *RICO Prosecutions and the Double Jeopardy/Multiple Punishment Problem*, 78 NW. U. L. REV. 1359 (1984); Linda Koenig & Doris Godinez-Taylor, *The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions*, 70 CAL. L. REV. 724 (1982); Ramona McGee, *Criminal RICO and Double Jeopardy Analysis in the Wake of Grady v. Corbin: Is This RICO's Achilles' Heel?*, 77 CORNELL L. REV. 687 (1992); Tat Man J. So, *Double Jeopardy, Complex Crimes and Grady v. Corbin*, 60 FORDHAM L. REV. 351 (1991); Earle A. Partington, *RICO, Merger, and Double Jeopardy*, 15 U. PUGET SOUND L. REV. 1 (1991).

but all of those discussions focus on its unique intricacies.[5] No articles have considered the generic import of compound liability.[6]

This article argues that compound liability is an historic departure from the "one act, one crime" model that dominated Anglo-American law until recently. It also contends that extant double jeopardy analysis cannot address issues raised by compound liability because it relies on premises derived from the old model. It explores the limitations of this analysis as applied to compound liability and proposes an alternative which eliminates the problems inherent in the present analysis while preserving its substance.

The article proceeds in this fashion: Section II defines the old model of criminal liability and explains its relationship to double jeopardy prohibitions. Section III describes the existing federal compound offenses and shows how they resist analysis under present double jeopardy standards. Section IV postulates forces that could prompt adoption of statutes which further expand this liability and offers SCARFACE as a logical next step; it also suggests an analysis that resolves the difficulties noted in section III. Finally, section V presents a brief conclusion.

II. "ONE ACT, ONE CRIME"

> Like RICO, SCARFACE departs from traditional principles of criminal liability. . . .[7]

For most of its history, Anglo-American criminal law tacitly assumed that *an* act constituted commission of *a* crime, so that each act sustained liability for only one offense.[8] Since this assumption seldom became problematic, it is difficult to locate instances in which it was explicitly articulated.[9]

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5. RICO jurisprudence is far too extensive to itemize here, but some articles analyzing the statute include: Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM. L. REV. 165 (1980); G. Robert Blakey & Brian Gettings, *Racketeer Influenced & Corrupt Organizations (RICO): Basic Concepts—Criminal & Civil Remedies*, 53 TEMP. L.Q. 1009 (1980); Craig M. Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); Barry Tarlow, *RICO Revisited*, 17 GA L. REV. 291, 298-300 (1983); *see also* JED S. RAKOFF & HOWARD W. GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY (1991).

6. *See supra* notes 4-5. *See generally* Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 802 (1988) (RICO "added a new dimension to criminal jurisprudence: a concern with 'enterprise criminality.' "). For a description of federal compound liability, *see infra* part III(A)(1).

7. WARREN, *supra* note 1.

8. References to a criminal "act" denote instances in which all the requisites for imposing criminal liability—a voluntary act or omission, *mens rea*, causation and resultant harm, if required—are present. *See, e.g.*, WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW §§ 3.1-3.12 (2d ed. 1986).

9. *But see infra* notes 28-29 and accompanying text. *See also* Note, *Double Jeop-*

The correlation between act and offense is implicit in many definitions of "crime," as when Blackstone said a crime was "an act committed, or omitted, in violation of a public law".[10] Definitions such as this incorporate two distinct premises: One that no crime exists absent commission of a wrongful act; the other that there is a necessary coincidence between act and liability which makes each act a separate "crime."[11]

Subsumed within the second premise is a notion that the correlation between "act" and "crime" is one of exclusion, so that an act supports liability for only one offense.[12] Historically, this idea inhered in the structure of the criminal law, which is a device for controlling socially disfavored conduct.[13] Criminal law accomplishes this by defining certain behaviors as unacceptable and imposing sanctions on those who engage in these behaviors; each outlawed behavior is *a* crime and the class of interdicted behaviors is a society's "crimes"—the fabric of its

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ardy and the Concept of Identity of Offenses, 7 BROOK. L. REV. 79, 87 (1937) (state "really wants to punish a criminal but once for every injury he inflicts upon society. Hence, if the state has been injured but once, any offenses connected with that one injury are identical"); *see generally* Gunter v. State, 111 Ala. 23, 20 So. 632 (1895) (one act which caused two deaths "constituted but one crime, which could not be subdivided and made the basis of two prosecutions"); Frank Horack, Jr., *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805, 814-18 (1937).

10. IV WILLIAM BLACKSTONE, COMMENTARIES *5. *See also* 1 WILLIAM L. BURDICK, THE LAW OF CRIME § 70 (1946) (act "in violation of a public law"); I JOEL P. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW § 32 (8th ed. 1892) ("wrong which the government deems injurious to the public . . . and punishes"); WILLIAM L. CLARK, HAND-BOOK OF CRIMINAL LAW § 1 (2d ed. 1902) ("act which the law forbids . . . under pain of a punishment to be imposed by the state"); I FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 14 (8th ed. 1880) (act "in violation of public law").

11. For a discussion of the first premise, *see* LAFAVE & SCOTT, *supra* note 8, at §§ 3.1-3.3. Historically, the second premise became relevant only when it was necessary to determine if a course of conduct constituted the commission of multiple criminal acts. *See, e.g.*, I BISHOP, *supra* note 10, at § 793 (whether "transaction is separable into more crimes than one"). *See also* WILLIAM L. CLARK, HANDBOOK OF CRIMINAL PROCEDURE 324 (2d ed. 1918) ("transaction constituting one offense"); *see generally* Jay Sigler, *A History of Double Jeopardy*, 7 AM. J. LEG. HIST. 283, 289 n.31 (1963) ("tendency to incriminate more . . . aspects of . . . behavior serves to increase the opportunity for the prosecution to select alternative formulae to proceed against the accused").

12. *See, e.g., infra* note 29 and accompanying text. *See generally* I WHARTON, *supra* note 10, at § 27 ("to strike A. and B. at one blow is but one offence.") *Cf.* FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE § 468(3) (8th ed. 1880) [hereinafter CRIMINAL PLEADING].

13. *See, e.g.*, LAFAVE & SCOTT, *supra* note 7, at § 1.5 (criminal law makes "people do what society regards as desirable"); *see also* Note, *The Identity of Criminal Offenses*, 20 HARV. L. REV. 642 (1920) (offenses as an injury to the state); Note, *Former Jeopardy*, 37 HARV. L. REV. 912 (1924) ("The true criterion of identity of offenses is the number of injuries to the state").

"criminal law."[14]

For centuries, criminal law operated on the pragmatic, albeit implicit, assumption that it was sufficient to establish a single prohibition directed at specific conduct.[15] Since the goal was to discourage certain conduct by defining it as unacceptable, the architects of the law of crimes supposed that it was sufficient to articulate one such definition for each undesirable behavior.[16] The operative premise was that *a* definition sufficed because it provided a means for sanctioning those who engaged in that conduct. In a correlative undertaking, the criminal law sought to establish appropriate punishments for each offense; the theory was that identifying behavior as *a* crime would accomplish the goals of the criminal law as long as an adequate punishment was prescribed and administered for engaging in that behavior.[17]

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14. *See, e.g.*, CLARK, *supra* note 10, at 3 (act "prohibited because of its wrongful nature and injurious effect"); *see also* I WHARTON, *supra* note 10, at § 15 (offenses policy "requires to be prosecuted"); IV BLACKSTONE, *supra* note 10, at *7 (protects public by punishing "violation of those laws, which the sovereign power has thought proper to establish"); ROLLIN M. PERKINS, CRIMINAL LAW 4 (2d ed. 1969) (defines "socially intolerable conduct" and keeps conduct within "reasonably acceptable" limits); *see generally* II JAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 75-93 (1883).

15. *See, e.g.*, *infra* note 20; *see also* Ashe v. Swenson, 397 U.S. 436, 445 n.10 (1970) (few common law offenses so one course of conduct "likely to yield but a single offense"); Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 279, 279 n.75 (1965)[hereinafter *Twice in Jeopardy*] (offenses "few and distinct"); *accord* Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 342 n.14 (1956)[hereinafter *Double Jeopardy Clauses*] (given limited number of offenses, "a man was not apt to commit more than" one in a given course of conduct).

16. *See generally* Horack, *supra* note 9, at 819 (punishment "when offenses were chiefly capital placed pressure on the courts to restrict liability," as if a defendant was convicted he "was hanged"); *see, e.g.*, CLARK, HAND-BOOK OF CRIMINAL LAW, *supra* note 11, at 21-22; MODEL PENAL CODE § 1.05(1) (no crime unless defined by "this Code or another statute"); *see also* Horack, *supra* note 9 at 820 (few capital offenses today, so "demand for singularity of offense" to protect defendant "against excessive punishment has lost much of its significance"). Crimes were once defined by common law, but now are creatures of statute.

17. Historically, there has been consensus on the need to punish, but different theories as to what it is meant to accomplish. *See, e.g.*, IV BLACKSTONE, *supra* note 10, at *11-*12 (to avoid future crimes "by the amendment of the offender;" "deterring others by the dread of his example" or depriving him "of the power to do future mischief"); *accord* LAFAVE & SCOTT, *supra* note 8, at 22-29. Punishment theories consistently include the notion that there should be some equivalence between the harms inflicted and the penalties imposed. *See* IV BLACKSTONE, *supra* note 10, at *12-*17. The Eighth Amendment incorporates this concept, at least to some extent. *See* Harmelin v. Michigan, 111 S. Ct 2680, 2705 (Kennedy, J., concurring). *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873), held that the Fifth Amendment double jeopardy clause precludes multiple punishments for a course of conduct, as well as subsequent prosecution: "Why is it that, having once been . . . found guilty, he can never be tried again for that offence? . . . It is the punishment. . . . [T]he Constitution was designed as much to prevent the criminal from being twice punished for

A. *"Double Jeopardy"*

From all this there arose an understanding—which Blackstone described as a "universal maxim of the common law"—that "no man is to be brought into jeopardy of his life, more than once, for the same offence."[18] English common law implemented this proposition by recognizing two pleas—*autrefois acquit* and *autrefois convict*—which sought to bar a prosecution on the grounds that the conduct at issue had been the subject of an earlier proceeding.[19] The Fifth Amendment incorporates this concept, providing that no one shall "be subject for the same offence to be twice put in jeopardy of life and limb."[20]

Like the pleas, the Fifth Amendment's "double jeopardy" clause has two related, albeit distinct, purposes: It prevents the state from using repetitive prosecutions to obtain a conviction, and from imposing multiple punishments for one crime.[21] The prohibitions are related in that

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the same offence as from being twice tried for it." *Id.* at 173. *See also infra* note 20; Otto Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 YALE L.J. 513, 520-21 (1949) (improper to cumulate punishment for one act); *see generally* Sigler, *supra* note 11, 302-03 (response to severity of available punishments); Eli Richardson, *Matching Tests for Double Jeopardy Violations with Constitutional Interests*, 45 VAND. L. REV. 273 (1992).

18. IV BLACKSTONE, *supra* note 10, at *335. "Jeopardy" is the "danger of conviction and punishment which the defendant . . . incurs when a valid indictment has been found, and a petit jury has been impaneled and sworn to try the case". BLACK'S LAW DICTIONARY 969 (rev. 4th ed. 1969). *See also infra* note 19.

19. *See, e.g.*, CRIMINAL PLEADING *supra* note 12, at § 435; I JOEL P. BISHOP, NEW CRIMINAL PROCEDURE § 808 (4th ed. 1895) (*autrefois convict* asserted that one had been "convicted of the same offence;" *autrefois acquit* that he had been acquitted); *see also* United States v. Wilson, 420 U.S. 332, 339-40 (1975). The pleas were used in this country until the revision of criminal procedure earlier this century. *See* FED. R. CRIM. P. 12 advisory committee's note.

20. U.S. CONST. amend. V; *see also Ex Parte* Lange, 85 U.S. (18 Wall.) 163 (1873) (meant to prevent second punishment "for the same crime, so far as the common law gave that protection"); Sigler, *supra* note 11; Clark, *supra* note 10, at 441; JUSTIN MILLER, HANDBOOK OF CRIMINAL LAW 534 (1934). The first draft provided that there should be " 'one punishment or one trial for the same offence' " but this was changed to protect a defendant's right to seek "a new trial on appeal." United States v. Wilson, 420 U.S. 332, 340-42 (1975). *See also* 1 ANNALS OF CONG. 451-52 (1789-1791) (J. Gales ed. 1834). The change was not intended to alter the substance of the first version. Sigler, *supra* note 11; *Twice in Jeopardy*, *supra* note 15 at 266 n.13. The clause binds the states, each of which also has law to this effect. *See also* Benton v. Maryland, 395 U.S. 784, 795 (1969).

21. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 717 (1969). *See* Richardson, *supra* note 17, at text accompanying notes 22-26, for the distinct interests furthered by the clause. One source explained that when the protections originated, the high conviction rate created

> little incentive for prosecutors . . . to subject an accused to two trials or double punishment by making one . . . transaction the subject of several indictments. . . . [A]n indictment could charge only a single felony, and since only one sentence was awarded on any indictment, two penalties could be imposed only as a result of two trials. Therefore . . . prohibiting a

successive prosecutions can be used to cumulate punishments.[22] They are distinct in that multiple punishments can be imposed in a single proceeding,[23] and successive prosecutions can be used for purposes other than imposing multiple punishment.[24] Though they reflect distinct policy concerns, the permissibility of imposing multiple offense liability for a single act arises under both prohibitions.[25]

Since the Fifth Amendment and the *autrefois* pleas only limit prosecution for the "same offence,"[26] it was necessary to determine when, and why, a course of conduct constituted commission of more than one offense.[27] As this passage from a century-old treatise illustrates, many equated "act" and "offense:"[28]

> [I]t might be assumed . . . competent for legislation to make out of one transaction any number of crimes. . . . But . . . while the legislature may pronounce as many combinations of things as it pleases criminal, resulting . . . in a plurality of crimes in one transaction or even in one act, . . . "it is . . . a fundamental rule of law that out of the same facts a series of charges shall not be preferred." To give our constitutional provision the force evidently meant, . . . "the same offence" must be interpreted as equivalent to the same criminal act.[29]

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second trial for the same 'offense' operated to bar multiple punishment as well as multiple prosecution.

Double Jeaopardy Clauses, *supra* note 15, at 342-43 (footnotes omitted). *Accord* Note, *Double Jeopardy and the Multiple-Count Indictment*, 57 YALE L.J. 132 (1947).

22. *See, e.g.*, Richardson, *supra* note 17, at 277 ("Barring successive prosecutions . . . in the case of a prior conviction, prevents a second punishment when the law authorizes only one.") (citing Garrett v. United States, 471 U.S. 773, 778 (1985)).

23. *See, e.g.*, Elizabeth Jahncke, Note, *United States v. Halper, Punitive Civil Fines, and The Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. REV. 112, 116 (1991).

24. *See, e.g.*, Green v. United States, 355 U.S. 184, 187 (1957); Tibbs v. Florida, 457 U.S. 31, 41 (1982) (state barred from "honing its trial strategies and perfecting its evidence through successive attempts at conviction") ("repeated attempts to convict" cause "embarrassment, expense and ordeal" resulting in "continuing state of anxiety and insecurity").

25. *See generally, Twice in Jeopardy*, *supra* note 15, at 267; *see also* § III(C)(1), *infra*.

26. *See supra* notes 17, 19 & 20; *see also* Bishop, *supra* note 10, at § 1049 ("jeopardy must be for the 'same offense' as the first"). *See generally Ex Parte* Lange, 85 U.S. (18 Wall.) 163 (1873); BLACKSTONE, *supra* note 10, at *336 (*autrefois* pleas "must be upon a prosecution for the same identical act and crime").

27. *See, e.g.*, Note, *Double Jeopardy*, 24 MINN. L. REV. 522, 546 (1940) (difficulty of deciding if offenses "are sufficiently similar to be within the prohibition or sufficiently distinct to be prosecuted separately").

28. For a discussion of the term "act," *see* Horack, *supra* note 9, at 814-18 ("ambiguous" and "often used" to denote both " 'physical act' . . . and the 'consequence' which results.").

29. BISHOP, *supra* note 10, at § 1060 (footnotes omitted) (quoting Regina v. Elrington, 9 Cox C.C. 86, 90, 1 B. & S. 688); *see also* Gore v. United States, 357 U.S. 386, 396 (1958) (Douglas, J., dissenting) (approving this interpretation); *see generally* State v. Cooper, 13 N.J.L. 361, 25 Am. Dec. 490 (1833) (unjust to punish for arson and murder based on one fire). An English case, *Wemyss v. Hopkins*, L.R. 10 Q.B. 378, vacated an assault conviction based on facts used to convict for driving a car-

Others rejected this equation and asserted that one act could constitute the commission of multiple offenses.[30]

Those who adopted the latter view maintained that multiple liability was constitutionally permissible when an act could be divided into a series of component acts and/or inflicted multiple legally proscribed harms.[31] This perspective focused on the *factual* identity of offenses that were derivable from an act, maintaining that it was impermissible to use precisely the same facts to establish liability for more than one offense.[32] It came to be known as the "same evidence" test.[33]

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riage into a horse and rider, holding that conviction "under one act of Parliament for what amounted to an assault is a bar to a conviction under another act of Parliament for the same assault." Kepner v. United States, 195 U.S. 100, 126-27 (1904) (quoting L.R. 10 Q. B. 378) (Blackburn, J.). Some courts have allowed only "one punishment for one criminal transaction," but the Supreme Court has rejected this test. *See* Grady v. Corbin, 495 U.S. 508, 523 n.15 (1990); Garrett v. United States, 471 U.S. 773, 790 (1985). It is also possible to regard a series of acts as one continuing offense; *see, e.g.*, *Crepps v. Durden*, 98 Eng. Rep. 1283 (K.B. 1777), quoted in *re parte* Snow, 120 U.S. 274, 283 (1887) (selling four loaves of bread on Sunday was one offense of doing "worldly labor" on Sunday); *accord* MODEL PENAL CODE § 1.07(1)(e) (continuing course of conduct as one offense); *see also infra* note 43.

30. This soon became the rule in "dual sovereignty" cases, which involve prosecutions for violating the laws of two different sovereignties. *See* Moore v. State, 55 U.S. (14 How.) 13 (1852) ("Eels. . . violated a law of this State. . . . He also violated a law of Congress. . . . The one act constitutes two distinct offences against the several laws of distinct jurisdictions."); *accord* United States v. Lanza, 260 U.S. 377, 381-83 (1922); *see also* discussion *infra* Part III(B).

31. On the first issue, *see, e.g.*, Horack, *supra* note 9, at 808 ("If by a single act D produces several consequences to a single person in a fashion which would constitute separate offenses if done singly, most courts find D guilty of separate offenses."). *See also id.* at 810 (not twelve larcenies to take sack containing dozen eggs with "one muscular contraction" but are to take them "by twelve muscular contractions"). On the second issue, *see, e.g.*, *Double Jeopardy, supra* note 23, at 550 (prosecutions "for each hand of poker where seventy-five hands were played at one sitting, for two thefts when property belonging to different owners was taken" at once and for cutting "six mail bags in one robbery." *Id.* (footnotes omitted). *See also* CRIMINAL PLEADING, *supra* note 12, at § 468; Horack, *supra* note 9, at 806-19.

32. *See supra* note 31; *see also* State v. Fredlund, 273 N.W. 353 (Minn. 1937) (two prosecutions for collision that caused two deaths permissible, as proof of one did not prove the other). This test developed several permutations:

> *Required evidence tests* hold that offenses are "the same" if the elements of one are sufficiently similar to the elements of another. *Alleged evidence tests* find offenses the same if there is sufficient similarity between the allegations of the two indictments. *Actual evidence tests* find the offenses the same if there is a similarity between the evidence presented at the two trials.

Twice in Jeopardy, *supra* note 15, at 269-70 (footnotes omitted).

33. *See* AMERICAN LAW INSTITUTE, ADMINISTRATION OF THE CRIMINAL LAW § 5 (Tentative Draft March 1, 1932) (same offense if based on same facts). *See also supra* note 29; Crane v. State, 39 Okla. Cr. 40 (1928) (possessing still "same" as possessing liquor); State v. Price, 103 N.W. 195 (Iowa 1905) (incest and statutory rape "same"); Clem v. State, 42 Ind. 420 (1873) (murders "same" given identical proof). For the test's origins in "an absurdity of common law pleading," *see Twice in Jeopardy*, *supra* note 15, at 270-71. The first American case to use it was *Morey v. Common-*

The Supreme Court cited the test several times before finally adopting it in 1932, in *Blockburger v. United States*.[34] The issue in the case was whether a sale of narcotics constituted one offense or two.[35] Applying the "same evidence" test, the Court held that there were two offenses:

> [W]here the same act . . . constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. . . . Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed.[36]

The Court has used this test, now known as "the *Blockburger* test," ever since.[37]

B. *"Legal Identity"*

Even before *Blockburger*, some commentators began to suggest that the proper inquiry in imposing multiple liability for a single act was to consider the extent to which the available offenses were *legally* identical.[38] Legal identity was not a consideration under the "same evi-

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wealth, 108 Mass. 433, 434 (1871) (judgment does not bar another prosecution unless evidence required to convict on one "would have been sufficient to warrant a conviction upon the other"). In Gavieres v. United States, 220 U.S. 338, 343 (1911), the Court quoted *Morey* "with approval".

34. 284 U.S. 299 (1932). *See, e.g.*, *Gavieres*, 220 U.S. 338; Ebeling v. Morgan, 237 U.S. 625, 630-31 (1915); Morgan v. Devine, 237 U.S. 632, 641 (1915) (does same evidence "sustain them"); Burton v. United States, 202 U.S. 344, 381 (1906) (distinct if same evidence would not prove both); Carter v. McClaughry, 183 U.S. 367, 394-95 (1902) (test is that "same evidence is required").

35. 284 U.S. at 303-04. A statute prohibited selling drugs except in "the original stamped package" and "in pursuance of a written order." *Id.* The issue was "whether, both sections being violated by the same act, the accused committed two offenses or only one." *Id.* at 304.

36. 284 U.S. at 304 (citation omitted). The Court recently characterized *Blockburger* as something other than a "same evidence" test. *See* Grady v. Corbin, 495 U.S. 508, 521 n.12 (1990) ("misnomer" to describe it this way); *see generally* United States v. Felix, 112 S. Ct. 1377, 1385 (1992) ("*Grady* eschewed a 'same evidence' test and *Garrett* rejected a 'single transaction' test") (citation omitted). It was, however, enunciated as such a test. *See* 284 U.S. at 304; *supra* note 32; *see also* Jeffers v. United States, 432 U.S. 137, 144 (1977) (" 'same evidence' rule of *Blockburger*") *accord id.* at 147; Illinois v. Vitale, 447 U.S. 410, 416 (1980) (*Blockburger* test "focuses on the proof necessary" for each offense); Whalen v. United States, 445 U.S. 684, 693 (1980) (rape and attendant murder same since "not the case that 'each provision requires proof of a fact which the other does not' "); Garrett v. United States, 471 U.S. 773, 778 (1985) (predicate offenses "same" as a Continuing Criminal Enterprise offense because predicate "does not require proof of any fact not necessary to the CCE offense").

37. *See, e.g.*, *Grady*, 495 U.S. 508, 517 n.8. (*Blockburger* used in multiple punishment analysis but not the standard for successive prosecution claims). *Cf.* 495 U.S. at 528 (Scalia, J., dissenting); *see also* discussion *infra* Part III(B)(3).

38. *See, e.g.*, Recent Case, *Former Jeopardy*, 37 HARV. L. REV. 912, 912 (1924)("An offense is not simply a criminal act; for one act may be two offenses. . . . And one

dence" test.[39] Critics of that test pointed out that it developed in response to an idiosyncrasy of common law pleading that has been eliminated by modern criminal codes,[40] and maintained that it ignores the increasing importance of policy as a factor in determining criminal liability.[41]

These criticisms are well taken: Because of its origins, the "same evidence" test implicitly assumes that a discrete course of criminal conduct produces only one socially undesirable "harm" or "consequence."[42] It is, therefore, sufficient, both legally and morally, if an offender is convicted of and punished for *an* offense arising from a given course of conduct.[43] Making a single criminal act the predicate

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offense may be made up of two criminal acts. . . . The true criterion of identity of offenses is the number of injuries to the state") (citation omitted). *See also Twice in Jeopardy, supra* note 15, at 269 (each offense "is a distinct standard, and each failure to comply with a standard . . . [is] an offense").

39. As to the reasons for this, *see infra* note 40. Some cases spoke of "legal" identity, but actually analyzed factual identity. *See, e.g.*, Commonwealth v. Roby, 29 Mass. 496, 504 (1832) (*autrefois* pleas not available if offenses different in "law, however nearly they may be connected in fact"); Note, *Double Jeopardy as Applied to Two Acts Included in the Same Transaction*, 13 COLUM. L. REV. 60, 60-61 (1913) (if "facts alleged in the second indictment would have sustained a conviction under the former one, (i.e.) the offenses . . . [are] indentical in Law").

40. *See, e.g.*, Ashe v. Swenson, 397 U.S. 436, 453 (1970) (Brennan, J., concurring) (English law restricted joinder of charges). At common law, indictments could charge only one felony. 1 JAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 508 (1883); *see also* McElroy v. United States, 164 U.S. 76, 80 (1896) ("it is the settled rule in England to confine the indictment to one distinct offense"). Since there were relatively few offenses and multiple felonies could not be joined, prosecutors put "everything the accused had . . . or might have done" in an indictment. *Double Jeopardy Clauses, supra* note 15, at 342 n.15. *See also supra* note 15. Consequently, the common law notion of "offense" was a factual concept. *See supra* note 21; *see also Double Jeopardy Clauses, supra* note 15, at 342 n.15 (by comparing indictments, judges could determine if "the accused had previously been tried for any of these facts; and if he had, the plea was held good"); Rex v. Segar, 90 Eng. Rep. 554 (1696) (could not be "indicted a-new for the same fact"); *see generally* Horack, *supra* note 9, at 820 (confusion between jeopardy rule as protection against severe punishments and "proposition that the defendant had committed but one offense."); (rules derived from common law pleading produced confusion "concerning the exact character of an offense.") *Id.* at 822. Modern pleading allows multiple offenses to be charged in one indictment. *See* FED. R. CRIM. P. 8(a) ("Two or more offenses may be charged in the same indictment.").

41. *See, e.g, Double Jeopardy Clauses, supra* note 15, at 344 ("judicial failure to recognize that new rules must be devised to cope with the fact that a single factual situation may today give rise to a number of substantive offenses"); *Double Jeopardy and the Multiple-Count Indictment, supra* note 21, at 134 ("old tests . . . designed to meet an entirely different problem") (noting defects in "same evidence" test and arguing for policy-based test). *Id.* at 135-38.

42. *See, e.g.*, Horack, *supra* note 9, at 819-20; *Twice in Jeopardy, supra* note 15, at 269-73. This assumption results from the test's historical antecedents and purposes. *See supra* note 40.

43. This usually unarticulated premise arises from our conception of the pur-

for multiple convictions is improper, according to this perspective, because it allows the imposition of liability which exceeds the "harm" produced by that act.[44] This approach is satisfactory as long as the number of offenses is relatively small and the imposition of single-offense liability satisfies the aims of the criminal law.[45] That is, single-offense liability suffices when the criminal law is regarded as a device for redressing personal injuries and simple violations of property

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poses of punishment. *See supra* note 17; *see also supra* notes 8-12. The inquiry implicit in the "same evidence" test is examining the facts offered to sustain liability for discrete offenses to determine if the conduct at issue has been appropriately sanctioned. *See* discussion *infra* part IV(B)(2). This discussion uses the term "liability" to denote the acts of imposing substantive liability for an offense (conviction) and of imposing punishment (sentencing). Double jeopardy jurisprudence distinguishes "multiple punishment" cases, which involve the imposition of cumulative punishments for a single course of conduct in one proceeding, from "successive prosecution" cases, which involve repeated efforts to use the same conduct as predicate upon which to impose liability for offenses that may or may not be the same in each case; *see generally supra* notes 21-25 and accompanying text. As noted above, the issue of cumulative liability can arise under either alternative. *See supra* note 24 and accompanying text. Since this discussion is concerned with the generic permissibility of cumulating liability under both, it uses "liability" to subsume both conviction and sentencing. Later sections discuss the distinct issues raised by multiple punishment cases and successive prosecutions. *See* discussion *infra* parts III(B), III(C), IV(B).

Multiple punishments cannot be imposed in the absence of multiple convictions, but conviction on multiple counts does not necessarily implicate multiple punishment, as courts can impose concurrent sentences on multiple counts. Compound liability is important even when concurrent sentencing is utilized, however, because any finding of liability has consequences that exist independently of the punishments imposed thereon. *See, e.g.*, Ball v. United States, 470 U.S. 856, 864 (1985) ("The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences" such as delaying parole eligibility or resulting in an increased sentence "under a recidivist statute for a future offense.")

44. *See, e.g.*, *supra* note 17. This proposition is most overt in the "unit of prosecution" cases. *See infra* note 49; *see, e.g., Ex parte* Snow, 120 U.S. 274 (1887):

> [T]he charge . . . is . . . cohabit[ing] with . . . seven women. . . . [D]efendant is . . . to be imprisoned for six months and to pay a fine of $300. The division of the two years and eleven months is wholly arbitrary. . . . [T]here might have been an indictment covering each of the thirty-five months, with imprisonment for [17 1/2 years] and fines amounting to $10,500, or . . . covering every week, with imprisonment for seventy-four years and fines amounting to $44,400; and so on, *ad infinitum*. . . . *Id.* at 281-82.

See also Ladner v. United States, 358 U.S. 169, 177 (1958) (discharge of shotgun one assault on federal officer though several were affected); *see generally* State v. Comm'rs, 2 Murphy (N.C.) 371 (1818) ("monstrous" to charge commissioners who did not repair streets for every street "when upon one indictment a fine can be imposed adequate to the real estimate of the offence"); *see also* Crepps v. Durden, 98 ENG. REP. 1283 (K.B. 1777).

45. *See generally* Horack, *supra* note 9, at 817 ("single act theory" based on premise "that only one breach of the peace has occurred, and for that breach there *should be* only one liability") (footnote omitted); *see* also discussion *infra* part IV(B).

interests.[46]

Single-offense liability ceases to be satisfactory once society comes to regard the criminal law as a device for regulating more complex behaviors, because controlling such behaviors requires that the diverse legal consequences they produce must each be sanctioned.[47] This can be done by enhancing the penalties imposed for extant offenses and/or by creating new offense categories.[48] New offense categories can address behaviors that have not previously been defined as offenses; they can also combine and/or subdivide behavior that has already been proscribed into a series of new, discrete offenses.[49]

This process commenced in federal criminal law around the end of the nineteenth century and is still ongoing, accelerating dramatically in the last few decades.[50] Because this transition was well advanced by 1932, the "same evidence" test was, if not already hopelessly out of date, rapidly becoming so when the United States Supreme Court adopted it in *Blockburger*. This accounts for much of the confusion that exists in the jurisprudence of double jeopardy, since the Court was applying an antedated standard to statutes that increasingly departed

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46. *See generally* Horack, *supra* note 9, at 819-21 (criminal law evolves to address policy concerns, however, many historical policies responsible for double jeopardy prohibitions no longer apply).

47. This proposition is at least implicit in most theories of punishment as a device for controlling anti-social behavior. *See, e.g.*, JAMES Q. WILSON & RICHARD J. HERNSTEIN, CRIME & HUMAN BEHAVIOR 507 (1985) ("Avoiding punishment provides a major incentive for noncrime"); *see also id.* at 489-507. *See generally* Horack, *supra* note 9, at 820-21. In 1937, Horack noted that many historic concerns that gave rise to double jeopardy prohibitions "are now of little significance" because "criminal law constantly grows toward the protection of individual interests as an auxiliary of tort liability." *Id.* at 820; *see also id.* at 821 ("criminal offenses as a means of control where civil liability has become ineffective.")

48. *See generally* Bradley, *supra* note 4 (tracing development of new offense categories and enhanced sentencing strategies to be used against "organized crime"); *see also* discussion *infra* part IV(B).

49. These alternatives implicate two aspects of the prohibition on multiple punishments. *See, e.g.*, Tarrant v. Ponte, 751 F.2d 459 (1st Cir. 1985):

> First, there are the . . . "double-description" cases, in which the issue is whether two statutes describe two separate offenses or are "merely different descriptions of the same offense". . . . Second, there are "unit of prosecution" cases. . . . Here, . . . a defendant's continuing course of conduct is fragmented into more than one violation of a single statutory provision.

Tarrant, 751 F.2d at 461 n.3 (citations omitted); *see also supra* note 43. For cases involving the division of a course of conduct into discrete offenses, see *Albrecht v. United States*, 273 U.S. 1, 11 (1927) ("[n]othing in the Constitution . . . prevents Congress from punishing separately each step leading to the consummation of a transaction" and punishing the completed transaction); *see also* discussion *infra* part IV(B).

50. Delineating this transformation is outside the scope of this article. *See* Bradley, *supra* note 4 (tracing federal efforts to combat "organized crime" and noting how they modified the definition of criminal behavior.)

from traditional images of criminal liability.[51]

Though it has chosen not to discard *Blockburger*, the Court has been redefining the test so that it is, at the very least, well on its way toward becoming a "legal identity" test.[52] The difference between "legal identity" and older tests is this: "Legal identity" tests are based on an explicit recognition that the nature and extent of criminal liability is a function of social policy; they can, therefore, easily deal with the often intricate evidentiary permutations that arise in prosecutions for complex crimes. In contrast, "same evidence" and "same transaction" tests operate on the premise that there must be a one-to-one correlation between a course of conduct and criminal liability.[53] That is, they assume single-offense liability.[54] Consequently, neither of these tests can resolve double jeopardy issues that arise in prosecutions for complex crimes because, these offenses are crafted to compound the liability that is imposed for a given criminal act.[55]

"Legal identity" tests can resolve these issues because they focus on the *consequences* of criminal conduct: Their operative assumption is that there should be a correlation between the liability that is imposed and

51. *See, e.g., supra* notes 34, 40, 41; *see generally* Garrett v. United States, 471 U.S. 773, 789 (1985) (caution against transposing traditional double jeopardy tests to complex offenses); *see also* discussion *infra* section III(C). Given the ever-increasing complexity of federal criminal law, it is interesting that the Court's double jeopardy decisions almost all involve simple crimes. *See* Grady v. Corbin, 495 U.S. 508 (1990) (driving while intoxicated and failing to keep to right of median versus manslaughter, negligent homicide and assault); *see also*, United States v. Felix, 112 S. Ct. 1377 (1991) (attempting to manufacture methamphetamine versus drug conspiracy and substantive offenses); Brown v. Ohio, 432 U.S. 161, 162-63 (1977) (joyriding versus auto theft); Missouri v. Hunter, 459 U.S. 359, 361 (1983) (robbery, armed criminal action and assault); Illinois v. Vitale, 447 U.S. 410, 411 (1980) (involuntary manslaughter and failure to reduce speed); Whalen v. United States, 445 U.S. 684, 685 (1980) (rape and murder). It has considered double jeopardy and complex crimes in only two cases. Jeffers v. United States, 432 U.S. 137 (1977), *see* discussion *infra* part III(b). The court has declined other opportunities to do so. *See, e.g.*, David v. United States, 940 F.2d 722 (1st Cir. 1991), *cert denied*, 60 U.S.L.W. 3738 (April 28, 1992) (No. 91-1380) (is it double jeopardy to convict both for CCE and predicate offense); Arnoldt v. United States, 947 F.2d 1120 (4th Cir. 1991), *cert denied*, 60 U.S.L.W. 3711 (April 20, 1992) (No. 91-1125) (is it double jeopardy to prosecute for RICO after conviction for predicates); Gambino v. United States, 920 F.2d 1108 (2d Cir. 1990), *cert. denied* 112 S. Ct. 54 (Oct. 7, 1991) (No. 90-1689) (RICO and CCE). The Court has granted review in a contempt case. *See* United States v. Dixon, 598 A.2d 724 (D.C. App. 1991), *cert. granted* 60 U.S.L.W. 3729 (April 28, 1992) (No. 91-1231) (can criminal contemnor be convicted of substantive crime if prosecution uses same conduct to prove that crime).

52. *See* discussion *infra* parts III(c), IV.

53. *See supra* notes 7-11 and accompanying text.

54. *See supra* notes 41-46 and accompanying text.

55. *See* discussion *supra* part III(A). These statutes define criminal "acts" in a rather more expansive fashion than did the common law; *see generally* People v. Robideau, 355 N.W.2d 592, 597 (Mich. 1984) (difficulties in applying *Blockburger* test to complex crimes).

the consequences, or "harms," that arise from a course of conduct.[56] Though "legal identity" tests share this idea of a correlation with the older tests, "legal identity" tests eliminate the proposition that the correlation should be one of exclusion in which each criminal act triggers liability for only one offense.[57]

As is explained later, the shift to this standard fundamentally alters the prohibition on "double jeopardy" insofar as it constrains the imposition of cumulative liability.[58]

In tracing the Court's progress toward this standard, it is necessary to consider the import of *Blockburger*: It established the "same evidence" test as the standard used to decide if conduct constitutes the commission of more than one offense.[59] But what is the purpose of this inquiry? Does *Blockburger* implicitly embody the proposition that using a single course of conduct as the basis for imposing cumulative criminal liability and punishment violates the Fifth Amendment prohibition on double jeopardy?

It has been interpreted this way.[60] Those who subscribe to this interpretation usually find support for it in *Lange*, which held that double jeopardy bars multiple liability for a "single offence."[61] In recent years, however, the Court has rejected this interpretation of *Blockburger* and held that the Fifth Amendment is no impediment to imposing multiple liability for a single course of conduct if the legislature has authorized such liability.[62]

The Court explicitly embarked upon this approach in 1980, with *Whalen v. United States*.[63] After noting that the propriety of multiple liability "cannot be resolved without determining what punishments" a legislature has authorized,[64] the Court described *Blockburger* as merely

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56. *See, e.g.*, Horack, *supra* note 9, at 821 (" 'consequence' " may become "an element of equal significance with act and intention").

57. *See, e.g.*, *supra* note 11 and accompanying text.

58. *See* discussion *infra* part IV(B).

59. *Blockburger*, 284 U.S. at 304; *see also* discussion *supra* part II(A).

60. *See, e.g.*, Missouri v. Hunter, 459 U.S. 359, 374 (1983) (Marshall, J., dissenting) (Court "long assumed" *Blockburger* is "a rule of constitutional stature in multiple-punishment cases"); Simpson v. United States, 435 U.S. 6, 12 (1978) (used to decide if "cumulative punishments . . . are constitutionally permissible"); Brown v. Ohio, 432 U.S. 161, 166 (1977).

61. *Lange*, 85 U.S. (18 Wall.) at 173; *see also* Albernaz v. United States, 450 U.S. 333, 345 (1981) (Stewart, J., concurring) ("Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not . . . .")

62. Missouri v. Hunter, 459 U.S. 359, 366 (1983) ("Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended"); *see, e.g.*, Whalen v. United States, 445 U.S. 684, 693 (1980) (when offenses "same" under *Blockburger* cumulative sentences not permitted unless "specially authorized by" legislature).

63. 445 U.S. 684 (1980).

64. *Id.* at 688.

"a rule of statutory construction . . . to determine whether Congress has" authorized cumulative punishments for two offenses.[65] Whatever its position had been on multiple liability, since *Whalen* the Court has declined to regard such liability as a matter of constitutional import.[66] Under the evolving standard, such liability is a matter of legislative intent.[67] The Court does not regard the Fifth Amendment as an obstacle to aggregating liability for a given course of conduct.[68]

III. Compound Liability

> Also like RICO, SCARFACE is based on a theory of liability in which committing a set number of 'predicate' crimes is the commission of the greater offense. In other words, you commit SCARFACE by committing X number of SCARFACE's predicate crimes. . . .[69]

This section describes the two most sophisticated federal compound offenses and considers how they implicate double jeopardy principles.[70]

A. *Extant Compound Liability*

Around the middle of this century, "organized crime" began to be perceived as a serious problem in this county.[71] The perception originated earlier, but was significantly enhanced by events of the

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65. 445 U.S. at 691-92:

> [W]e have . . . often hedged our bets with veiled hints that a legislature might offend the Double Jeopardy Clause by authorizing too many separate punishments for any single 'act.'. . . To the extent that this . . . assumes that any particular criminal transaction is made up of a determinable number of constitutional atoms that the legislature cannot further subdivide into separate offenses, "it demands more of the Double Jeopardy Clause than it is capable of supplying."

Id. at 701 (Rehnquist, J., dissenting).

66. *See, e.g.*, Missouri v. Hunter, 459 U.S. 359, 368 (1983): "[B]ecause two criminal statutes . . . proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes. . . cumulative punishments. . . . Legislatures, not courts, prescribe the scope of punishments." *Accord* Grady v. Corbin, 495 U.S. 508, 517 (1990); Ohio v. Johnson, 467 U.S. 493, 499 (1984) (confines sentencing courts "to the limits established by the legislature"); Albernaz v. United States, 450 U.S. 333, 337, 344 (1981) ("whether Congress intended . . . offenses be punished cumulatively"). If Congress intended "multiple punishments" their imposition "does not violate the Constitution." *Id.* at 344; *see also infra* note 178.

67. *See, e.g.*, Grady v. Corbin, 495 U.S. 508, 516-17 (1990) ("simply . . . a guide to determining whether the legislature intended multiple punishments"); *see also supra* note 65.

68. *See, e.g.*, *supra* notes 65-66; *see also* discussion *infra* part III(B)(3).

69. Warren, *supra* note 1.

70. There are other "compound offenses" in federal law, but the most sophisticated are the two described in this section. *See generally* United States v. Powell, 469 U.S. 57 (1984) (compound offense of using telephone to commit felonies).

71. Craig M. Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65

1950s and 1960s,[72] including the Kefauver Committee hearings and the revelations of Joseph Valachi.[73] The hearings convinced the American public "that there was a 'nationwide crime syndicate' " and Valachi's testimony before a Senate Subcommittee provided insight into its organization and operations.[74] All this led to demands for the elimination of "racketeering."[75]

1. RICO

"Racketeering" is an historic term of variable import, but after Valachi's testimony it came to connote "*organized*" criminal activity.[76] To attack this phenomenon, the "Racketeer Influenced and Corrupt Organizations" statute, commonly known as "RICO," was enacted as Title IX of the Organized Crime Control Act of 1970 and codified as 18 U.S.C. §§ 1961-1968.[77] Ostensibly designed as a weapon against "organized crime" in the Valachi sense, RICO is routinely used against those who have no ties to "the mob."[78] Its defenders contend this implements Congress' directive that RICO be construed liberally "to effectuate its remedial purposes."[79] Its critics disagree, but concede that the statute is admirably adapted for use in a variety of factual contexts.[80]

RICO's flexibility results from a novel conception of criminal behavior—"enterprise criminality."[81] The phrase denotes criminal activity

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IOWA L. REV. 837 (1980) ("[n]ationwide fear that . . . basic institutions were being eroded by this evil force").

72. *See* Bradley, *supra* note 5, at 213 and text accompanying notes 84-198.

73. *See, e.g.*, Bradley, *supra* note 5 and text accompanying notes 149-61; *see also* ESTES KEFAUVER, CRIME IN AMERICA 1-18 (1951); *infra* note 74.

74. Bradley, *supra* note 5, at 232; *see also* KEFAUVER, *supra* note 73; DONALD R. CRESSY, THEFT OF THE NATION: THE STRUCTURE AND OPERATIONS OF ORGANIZED CRIME IN AMERICA 17-21, 43-44, 309-10 (1969).

75. *See, e.g.*, Bradley, *supra* note 5, at 213; *see also infra* text accompanying notes 235-39.

76. *See, e.g.*, PRESIDENT'S COMM. ON ORGANIZED CRIME, THE IMPACT: ORGANIZED CRIME TODAY 511 (1986) ("No generally applicable legal definition of . . . 'racketeering' "); CRESSY, *supra* note 74, at 306-08.

77. Act Oct. 15, 1970, Pub. L. No. 91-452, Title IX, § 901(a), 84 Stat. 941. *See id.* at § 1, 84 Stat. at 923 (meant to eradicate organized crime "by providing enhanced sanctions and new remedies"); *accord* United States v. Russello, 464 U.S. 16, 26 (1983) ("intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots").

78. *See, e.g.*, Bradley, *supra* note 5, at 257; Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 298-300 (1983). *Cf.* Blakey & Gettings, *supra* note 5, at 1013 n.15 ("not limited" to organized crime).

79. Act Oct. 15, 1970, Pub. L. No. 91-452, Title IX, § 904, 84 Stat. 947.

80. For critiques, *see* sources cited in *supra* note 76. For a defense, *see* Paul E. Coffey, *The Selection, Analysis and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1049 (mandate "that RICO be liberally construed"); Craig W. Palm, Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980).

81. *See* Blakey & Gettings, *supra* note 5, at 1013-14.

occurring "in the context of an organization," which can be a corporation, a Mafia family or almost anything in between.[82] The statute creates both criminal sanctions and civil remedies for such activity.[83]

There are four RICO offenses—three substantive offenses and a conspiracy.[84] To commit a substantive offense, a "person" must do one of the following to an "enterprise:"[85] acquire or maintain an interest in it; acquire or maintain control of it; establish it; operate it; or conduct or participate in conducting its affairs.[86] A RICO "person" is an individual or entity "capable of holding a legal or beneficial interest in property."[87] An "enterprise" is an "individual, partnership, corporation, association, or other legal entity" and a "group of individuals associated in fact".[88] RICO reaches purely illegal enterprises, such as traditional "crime families."[89]

A "person" violates RICO by using the collection of unlawful debt or a pattern of racketeering activity to engage in one or more of the activities listed above.[90] "Unlawful debt" is the product of illegal gambling or "loan-sharking."[91] This option is seldom used.[92] Most RICO actions allege that defendant(s) used a pattern of racketeering activity to engage in the proscribed activities.[93]

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82. Thomas S. O'Neil, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646, 649 n.12 (1989).

83. *See* 18 U.S.C. § 1963 (1988) (fine, imprisonment & forfeiture); § 1964 (civil remedies).

84. *See* 18 U.S.C. § 1962 (1988). As opposed to conspiracy and complicity offenses, substantive offenses are complete in themselves and do not depend on the conviction of another person. United States v. Cadwallader, 59 F. 677, 681-82 (W.D. Wisc. 1893) (citing State v. Smith, 61 ME 386, 389 (1872)); BLACK'S LAW DICTIONARY 1597 (rev. 4th ed. 1968).

85. For the terms "person" and "enterprise," *see infra* notes 87-91 and accompanying text. For RICO's conspiracy offense, *see infra* note 103 and accompanying text.

86. *See* 18 U.S.C. § 1962(a) (1988) (using income from racketeering or collection of unlawful debt to acquire interest in, establish or operate enterprise); § 1962(b) (using rackettering or the collection of unlawful debt to acquire or maintain interest in or control of enterprise); § 1962(c) (using same to "conduct or participate" in conducting enterprise).

87. 18 U.S.C. § 1961(3) (1988). The categories are illustrative, as the definition says that it "includes" these entities. *See* Blakey & Gettings, *supra* note 5, at 1022-23.

88. 18 U.S.C. § 1961(4) (1988). Again, the definition only "includes" these entities. *See* Blakey & Gettings, *supra* note 5, at 1023 ("definition works by illustration, not by limitation"). The enterprise must engage in or its activities affect interstate or foreign commerce. *See* 18 U.S.C. § 1962 (a)-(c) (1988).

89. United States v. Turkette, 452 U.S. 576, 583 (1981).

90. *See supra* note 85, and accompanying text.

91. 18 U.S.C. § 1961(6) (1988).

92. *See, e.g.*, Tarlow, *supra* note 78, at 370-371.

93. *Id.* Civil and criminal RICO cases contribute to RICO law, so this section uses the term "actions" to include both. *See generally* Edward Dennis, Jr., *Current*

A "pattern of racketeering activity" requires committing "at least two acts of racketeering activity" within ten years of each other.[94] "Racketeering activity" is defined by incorporating the prohibitions of other statutes and includes "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion . . . " obscenity or drug dealing that is "chargeable under State law and punishable by imprisonment for more than one year".[95] It also encompasses a variety of federal offenses.[96] The offenses that constitute "racketeering activity" are known as "predicate offenses."[97] To commit a substantive RICO offense, one must engage in a pattern of racketeering activity by committing at least two "predicate offenses" within ten years of each other and use this pattern to affect an "enterprise" in one of the ways proscribed by 18 U.S.C. §§ 1962(a)-(c).[98]

The Supreme Court has held that acts must exhibit "continuity plus relationship" to constitute a "pattern."[99] A "relationship" exists when acts "have the same or similar purposes, results, participants, victims, or methods of commission" or are otherwise related and not isolated.[100] "Continuity" denotes repetition.[101]

There are three substantive RICO offenses, but most actions alleging substantive violations are brought under section § 1962(c), which makes it an offense to use a pattern of racketeering activity to conduct or participate in conducting an enterprise's affairs.[102] The other widely-used provision is § 1962(d), which makes it a crime to conspire to commit a substantive RICO offense.

RICO conspiracy is based on an agreement to violate RICO, not merely to commit predicate offenses.[103] Many courts hold that the offense is complete once this agreement has been made, but others re-

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RICO Policies of the Department of Justice, 43 VAND. L. REV. 651 (1990) (text accompanying notes 30-44).

94. 18 U.S.C. § 1961 (5) (1988) ("excluding any period of imprisonment.").

95. 18 U.S.C. § 1961 (1)(A) (1988).

96. 18 U.S.C. § 1961 (1)(B)-(E) (1988).

97. *See, e.g.*, Coffey, *supra* note 80, at 1036.

98. *See supra* note 86 and accompanying text. Substantive offenses based on the "collection of unlawful debt" have an analogous structure: The "predicate offense" is the collection of debt resulting from illegal gambling or "loan-sharking." *See supra* note 91 and accompanying text. The RICO offense is using this to engage in an activity prohibited by the statute. *See supra* notes 86, 90 and accompanying text.

99. Sedima v. Imrex Company, Inc., 473 U.S. 479, 497 n.14 (1985).

100. H.J., Inc. v. Northwestern Bell Telephone, 492 U.S. 229, 239 (1989) (quoting 18 U.S.C. § 3575 *et seq.*).

101. *Id.* at 241.

102. *See also* Tarlow, *supra* note 78, at 324; RAKOFF & GOLDSTEIN, *supra* note 5, at 1-36.

103. *See, e.g.*, RAKOFF & GOLDSTEIN, *supra* note 5, § 1.04(4); Seville Indus. Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 792 n.8 (3d Cir. 1984) ("mere agreement to commit the predicate acts is not sufficient.").

quire an overt act in furtherance thereof.[104] Most circuits hold that one need only agree that some member(s) of the conspiracy will commit the predicate acts,[105] but others require that the defendant have personally agreed to commit them.[106] One can be convicted of, and punished for, both RICO conspiracy and substantive offenses, as this implements Congress' desire to enhance the sanctions that are imposed on "racketeers."[107]

In one sense, RICO did not increase the available categories of prohibited conduct, since the conduct that sustains substantive RICO charges has already been outlawed by other statutes.[108] What was unique about RICO is that it uses extant offenses to create a new, "compound" offense.[109] To understand the importance of this, it is necessary to consider the general structure of a RICO case: a prosecutor proves substantive RICO offenses by showing that the defendants used a pattern of racketeering activity to have some impact on an enterprise.[110] She proves the pattern of racketeering activity by establishing the commission of predicate offenses that were "related" and "continuous."[111] Aside from proving that the enterprise existed and was affected by the racketeering, the proof used for the substantive RICO violation is the same as that used for the predicate offenses.[112]

The consequence of this is that prosecutors can use RICO to "compound" the liability that results from a course of conduct: when a case involves predicates that are crimes under federal law, the defendants can be convicted of (a) the predicate crimes which comprise the pattern(s) of racketeering activity involved in substantive RICO charges,

104. *See, e.g.*, United States v. Glecier, 923 F.2d 496 (7th Cir. 1991) (no overt act required) *citing* United States v. Lopez, 851 F.2d 520, 525 (1st Cir. 1988); *but see* United States v. Kimble, 719 F.2d 1253, 1256 (5th Cir. 1983) (overt act required) *citing* United States v. Phillips, 664 F.2d 921 (5th Cir. 1991).

105. *See* Prybu v. United States, 900 F.2d 748, 760 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 305, 306 (1990) (White, J., dissenting). James Clann Minnis, *Clarifying RICO's Conspiracy Provision: Personal Commitment Not Required*, 62 TUL. L. REV. 1399 (1988).

106. *See* United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir. 1984), *cert. denied*, 469 U.S. 831 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983); *supra* note 104.

107. *See, e.g.*, United States v. Coonan, 938 F.2d 1553, 1566 (2d Cir. 1991), *cert. denied sub nom.* Kelly v. United States, 112 S. Ct. 1486 (1992); *accord* United States v. Rone, 598 F.2d 564, 572 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (consecutive sentences). *See also supra* note 74, and *infra* note 113.

108. *See* Blakey & Gettings, *supra* note 5, at 1021 n.71. *Cf.* 18 U.S.C. § 1962 (d) (RICO conspiracy).

109. Some courts call it a "compound-complex" offense. *See infra* note 289.

110. *See supra* notes 94-98 and accompanying text.

111. *See, e.g., supra* notes 99-102 and accompanying text.

112. *See generally*, United States v. Pungitore, 910 F.2d 1084, 1105-15 (3d Cir. 1990) *cert. denied*, 111 S. Ct. 2010 (1991); United States v. Crosby, 789 F. Supp. 440, 443-45 (D.D.C. 1992).

(b) RICO substantive offense(s) and (c) one or more RICO conspiracy offenses if, as is often the case, the prosecution can show that the defendants agreed among themselves and/or with others to commit the substantive RICO offense(s).[113] The court can impose cumulative sentences for these offenses.[114] If the predicates are state offenses and the defendants are convicted, the federal court can impose consecutive sentences for the RICO offenses; it will be up to the state to prosecute them for the crimes used as RICO predicates, but the RICO convictions and sentences are no impediment to the state's doing so.[115]

RICO's innovation is that it allows a prosecutor to structure charges

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113. This has been true because federal courts have held that under *Blockburger*, predicates are not the "same" as RICO offenses. *Blockburger*, 284 U.S. at 299; *see, e.g.*, United States v. Gonzalez, 921 F.2d 1530, 1538 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 178 (1991). *Cf.* discussion *infra* part III(C). State predicates are not only considered to be distinct under *Blockburger*, but also fall under the "dual sovereignty" exception. *See, e.g.*, United States v. Cerone, 452 F.2d 274, 286 (7th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972) (RICO conviction not conviction for state predicate offenses). Using state crimes to obtain a federal RICO conviction does not bar a subsequent state prosecution for them as offenses in their own right; also, one who has been acquitted of federal RICO charges based on state predicates can be prosecuted for those offenses in a state court; *see also* United States v. Giovanelli, 945 F.2d 479, 492 (2d Cir. 1991). As the text suggests, defendants can be convicted of multiple RICO offenses if each involved distinct conduct. United States v. Licavoli, 725 F.2d 1040, 1047 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984). *See, e.g.*, United States v. Pungitore, 910 F.2d 1084, 1113 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2010 (1991) (double jeopardy violation as to substantive offenses only if "there is no material difference between the 'enterprise' and the 'pattern of racketeering activity' ")(quoting United States v. Ciancaglini, 858 F.2d 923, 924 (3rd Cir. 1988)); United States v. Ciancaglini, 858 F.2d 923, 928 (3d Cir. 1988) (same as to RICO conspiracy charges).

114. *See, e.g.*, United States v. Licavoli, 725 F.2d 1040, 1049-50 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984); United States v. Walsh, 700 F.2d 846, 856 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983) ("well settled" that Congress meant cumulative sentences for RICO and its predicates); United States v. Hartley, 678 F.2d 961, 992 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); United States v. Boylan, 620 F.2d 359, 361 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980). As to sentences for RICO substantive and conspiracy offenses; United States v. Aleman, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Anderson, 626 F.2d 1358, 1367 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); United States v. Rone, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1978), *cert. denied*, 444 U.S. 846 (1979); United States v. Frumento, 563 F.2d 1083, 1086-89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); United States v. Persico, 620 F. Supp. 836, 839-46 (S.D.N.Y.), *aff'd*, 774 F.2d 30 (2d Cir. 1985); see United States v. Coonan, 938 F.2d 1553, 1566 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1486 (1992); United States v. Pungitore, 910 F.2d 1084, 1115-17 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2010 (1991); United States v. Thomas, 757 F.2d 1359, 1370 (2d Cir.), *cert. denied*, 474 U.S. 819 (1985); United States v. Marrone, 746 F.2d 957, 959 (3d Cir. 1984).

115. *See supra* note 109; *see generally Pungitore*, 910 F.2d 1105-07 (unsuccessful double jeopardy challenge to RICO prosecution following acquittal on predicate offenses in state court).

so as to multiply the liability that results from a course of conduct without running afoul of the constitutional prohibition on multiple punishments. There were experiments to this effect prior to the enactment of RICO, but they focused either on carving a course of conduct up into discrete offenses or on construing such conduct as the simultaneous commission of several offenses.[116] While these approaches admittedly enhanced liability in instances in which they were appropriate, they were of limited utility because of their relatively narrow factual focus, and were not designed to address the unique problems posed by "criminal organization." RICO introduced the concept of compounding liability by creating a "greater" offense from the commission of a series of "lesser" ones.[117]

2. Continuing Criminal Enterprise

The "Continuing Criminal Enterprise" statute, 21 U.S.C. § 848, is commonly known as "CCE" and has been described as "the 'RICO drug statute.' "[118] Like RICO, it was enacted in 1970, the product of concerns about organized crime, but unlike RICO, it is limited to organized activity involving drug offenses.[119]

CCE was designed to target drug "kingpins" and "deter the creation of new criminal enterprises."[120] It proscribes engaging in a "continuing criminal enterprises."[121] To engage in a continuing criminal enterprise, one must commit a "continuing series" of federal drug felo-

116. *See, e.g., supra* notes 33-35, 43 and accompanying text.

117. "Greater" and "lesser" are included in quotations to indicate that this comment is made in a qualitative sense, to denote a specific relationship between the offenses, and is not meant to implicate the double jeopardy constraints on convictions for lesser-included offenses. For a discussion of these issues, *see* discussion *infra* parts III(B) and III(C) . For comments on the structure of compound offenses, *see, e.g.,* United States v. Martinez-Torres, 556 F. Supp. 1255, 1267 (S.D.N.Y. 1983) (CCE "is a compound offense because it incorporates by reference other offenses and compounds those offenses if certain additional elements are present"). *See generally* Mortell v. Mortell Co., 887 F.2d 1322, 1325 (7th Cir. 1989) ("RICO is a compound offense"); United States v. Neapolitan, 791 F.2d 489, 498 (7th Cir. 1986), *cert. denied,* 479 U.S. 939, 940 (1986) (RICO's "compound crime-within-a-crime nature").

118. Dawn Cartwright, Comment, *Constitutionality without Wisdom: Caplin & Drysdale and Monsanto Examined,* 17 HASTINGS CONST. L.Q. 659, 663 (1990).

119. See H.R. REP. No. 1444, 91st Cong., 2d Sess. pt. 1, at 1 (1970) (provide "more effective means" of "drug abuse prevention and control"). It was enacted by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

120. William G. Skalitzky, *Aider and Abettor Liability, The Continuing Criminal Enterprise, and Street Gangs: A New Twist In An Old War On Drugs,* 81 J. CRIM. L. & CRIMINOLOGY 348, 352 (1990); *see also* Garrett v. United States, 471 U.S. 773, 781 (1985) (meant "to reach the 'top brass' in the drug rings").

121. 21 U.S.C. § 848(a) (1988). CCE is a compound offense. *See, e.g.,* United States v. Martinez-Torres, 556 F. Supp. 1255, 1267 (S.D.N.Y. 1983).

nies "in concert with five or more others" as to whom one occupies a managerial role and from which one "obtains substantial income or resources."[122] The "series" element is intended to identify a pattern of violations that indicate "a propensity for continued criminal activity."[123] The "in concert with" and "substantial income" requirements were meant to limit CCE prosecutions to large-scale operations, and the restriction to "managers" was designed to target the "executives" of such operations.[124]

Like RICO substantive offenses, the CCE offense is distinct from its predicates, so one can be convicted of, and punished for, both.[125] The predicates are the "series" of federal drug offenses, which include a drug conspiracy defined in 21 U.S.C. § 846.[126] While it can be used to obtain a CCE conviction, punishment cannot be imposed for the conspiracy and CCE because this does not appear to have been Congress' intention.[127]

CCE includes RICO's compound offense structure but is far less flexible: It applies only in the limited context of federal drug offenses, while RICO can be used in almost any context; also, CCE can be used only against "drug executives," while RICO can be used against anyone who commits, facilitates or agrees to the commission of "racketeering activity." Given these limitations, CCE might properly be termed a "minor RICO statute." For this discussion, it is of interest primarily because it perpetuates RICO's "compound crime-within-a-crime" offense structure; as noted above, it is the only other federal offense to do so.

CCE is also of some interest in another respect: The question has arisen as to whether one can be convicted of *both* RICO and CCE or whether they are somehow the "same offence" for double jeopardy purposes.[128] The few cases to address this have held that they are dis-

122. 21 U.S.C. § 848(c) (1988). A "series" is three or more drug felonies. *See* United States v. Young, 745 F.2d 733, 747 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1842 (1985). Penalties are imprisonment plus a fine and forfeiture of property obtained from the offense. 21 U.S.C. § 848(a) (1988). It can be a capital offense. 21 U.S.C. § 848(e) (1988).

123. Skalitzky, *supra* note 120, at 356.

124. *See id.* at 356-63.

125. Garrett v. United States, 471 U.S. 773, 785 (1985) ("Congress intended separate punishments for the underlying substantive predicates and for" CCE); *see also* United States v. Burt, 765 F.2d 1364, 1369 (9th Cir. 1985).

126. *See, e.g.*, United States v. Paulino, 935 F.2d 739, 750 (6th Cir. 1991) (conspiracy under 21 U.S.C. § 846 can be CCE predicate), *cert. denied*, 112 S. Ct. 660 (1992); *accord* United States v. Davis, 809 F.2d 1194, 1203 (6th Cir.), *cert. denied*, 483 U.S. 1007 (1987).

127. *See, e.g.*, Jeffers v. United States, 432 U.S. 137, 157 (1977) (plurality opinion); *see also* discussion *infra* part III(B).

128. *See* discussion *infra* part III(C)(1)(b)(ii).

tinct offenses.[129]

B. *Double Jeopardy Issues*

Though the Supreme Court has yet to address the double jeopardy implications of compound offenses as such, it has twice considered double jeopardy challenges to CCE convictions. This section examines those decisions and then considers how the Court's other double jeopardy decisions impact on compound offenses. 1. Double Jeopardy and CCE

The first CCE case, decided in 1977, involved Garland Jeffers' challenge to his convictions for CCE and conspiracy under 21 U.S.C. § 846.[130] Jeffers argued that the convictions were improper because the crimes constituted the "same offence" under the double jeopardy clause.[131] He initially made this argument to the Seventh Circuit, which found that under traditional principles, the conspiracy was a lesser included offense of CCE.[132]

A lesser included offense is an offense the elements of which are subsumed by those of another, "greater" offense.[133] Common law regarded such offenses as alternatives, so punishment could not be imposed for both.[134] In *Brown v. Ohio*,[135] decided the same day as *Jeffers*, the Supreme Court held that "the Fifth Amendment forbids . . . cumulative punishment for a greater and lesser included offense" because they are the "same offence" under *Blockburger*.[136] It noted, however,

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129. *Id.*

130. *Jeffers*, 432 U.S. 137. *See also supra* note 127 and accompanying text.

131. *Jeffers*, 432 U.S. at 144, 146.

132. *See* United States v. Jeffers, 532 F.2d 1101, 1106 (7th Cir. 1976); *see also id.* at 1109 (under *Blockburger*, "punishment could not be imposed for two offenses, one of which contains all the elements of the other"); *accord Jeffers*, 432 U.S. 137 at 145 ("all the elements of the § 846 offense had to be proved for § 848, in addition to . . . a supervisory position and the obtaining of substantial income"); *see also* discussion *infra* part III(C)(1). *Cf. infra* note 141 and accompanying text.

133. *See* Richardson, *supra* note 17, at n.155 ("a subset of the elements of the greater offense") (citations omitted); *see also infra* note 134; Janis Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191, 195 (1984) (adopted in federal system by 1872 statute); FED. R. CRIM. P. 31(c) (may be convicted of "offense necessarily included in the offense charged"); Sansone v. United States, 380 U.S. 343, 350 (1965) (lesser included offense is "completely encompassed by the greater").

134. *See, e.g.*, Richard Finacom, Comment, *Successive Prosecutions and the Continuing Criminal Enterprise: The Double Jeopardy Analysis in Garrett v. United States*, 13 HASTINGS CONST. L.Q. 785, 795 (1986); *see also* MODEL PENAL CODE § 1.07(1)(a) (cannot convict of two offenses if one "is included in the other"); *supra* note 130. The doctrine also applies to successive prosecutions, as "the possibility of punishment on the lesser-included offense at the trial for the greater offense precludes a second jeopardy on the lesser offense." Finacom, *supra*, at 795.

135. 432 U.S. 161 (1977).

136. *Id.* at 161, 166 n.6, 168. The issue was whether, under Ohio law, "joyrid-

that the double jeopardy clause does not limit a legislature's ability "to define crimes and fix punishments."[137]

Since *Whalen*, of course, the Court has held that there is no constitutional impediment to imposing multiple punishments for a single criminal act.[138] In this approach, *Blockburger* is used to parse the respective elements of two offenses to determine if they define the "same offence."[139] If they do not, then there is no reason why cumulative punishments cannot be imposed.[140] If they define the "same offence," then cumulative punishment cannot be imposed unless it is clear that this was Congress' intention.[141]

But *Whalen* was decided in 1980, and so was not available to the *Jeffers* courts.[142] The Seventh Circuit relied on *Iannelli v. United States*,[143] which it understood as creating "a new double jeopardy rule" for complex crimes, i.e., that "if Congress intends that two offenses be . . . independent," they may be prosecuted and punished separately "even though these offenses meet the included offense test."[144] The Seventh Circuit held that Congress intended section 846 conspiracy and CCE to be distinct offenses, so there was no impropriety in punishing

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ing" was a lesser included offense of "auto theft." *Id.* at 164. The Court held that it was because joyriding consisted of "operating a vehicle without the owner's consent, and auto theft consists of joyriding with the intent permanently to deprive the owner of possession." *Id.* at 168. Therefore, a "prosecutor who has established auto theft necessarily has established joyriding as well." *Id.* Since joyriding was a lesser included offense of auto theft, conviction of the former barred prosecution for the latter. *See id.* at 168-69.

137. *See Jeffers*, 432 U.S. at 165, 169 n.8.

138. *See* discussion *supra* part II(B).

139. *See, e.g.*, Finacom, *supra* note 134, at 796-97.

140. *See id.*

141. *See id.*; *see also Jeffers*, 432 U.S. 137, 155; *supra* part II(B).

142. *See* Whalen v. United States, 445 U.S. 684 (1980).

143. 420 U.S. 770 (1975).

144. *Jeffers*, 532 F.2d at 1101, 1108-10. The court explained that while the lesser included offense analysis of *Blockburger* suffices for "simple" crimes such as homicide, for complex crimes it is "often not appropriate . . . because often, even though these offenses meet the included offense test, they are directed at quite different results." *Id.* at 1110.

Iannelli involved convictions for operating a gambling business in violation of 18 U.S.C. § 1955 and conspiring to operate such a business in violation of 18 U.S.C. § 371. Ianelli v. United States, 420 U.S. 770, 771-72. Defendants argued that punishing both violated double jeopardy, but the Court found that they were not the "same offence" under *Blockburger*. *Id.* at 785 n.17 (distinct elements). It also found that Congress intended each "offense as an 'independent curb'. . . against organized crime." *Id.* at 791 (citing Gore v. United States, 87 U.S. 396, 389 (1958)). The § 1955 offense was created by Title VIII of the Organized Crime Control Act of 1970, Title IX of which created RICO. *See Iannelli*, 420 U.S. at 786-90. The Seventh Circuit construed *Iannelli* as shifting the focus of a "same offense" inquiry, "at least in regard to complex statutory crimes, . . . to center on the congressional intent with regard to such crimes." *Jeffers*, 532 F.2d at 1109.

both.[145]

In a plurality opinion, the Supreme Court reversed.[146] It assumed that since both CCE and section 846 required concerted action, the latter was a lesser included offense of CCE, but this was not part of the holding.[147] The opinion stated that *Iannelli* did not create a special rule for complex crimes, but in assessing the propriety of cumulative punishments the Court looked to legislative intent, holding that because "Congress did not intend to impose cumulative penalties" for CCE and section 846 conspiracy, it was improper to punish Jeffers for both.[148]

Eight years later, Jonathan Garrett claimed that his CCE conviction violated double jeopardy because facts at issue in a prior conviction were used to prove the predicates.[149] He relied on *Blockburger*, arguing that the first conviction was for a lesser included offense of CCE, so the CCE conviction was improper under *Brown v. Ohio*.[150] Garrett invoked both the multiple punishment and successive prosecution prongs of double jeopardy.[151]

The Court began its analysis with the successive prosecution claim, noting that when conduct violates two statutes it is first necessary to determine if the legislature meant to create separate offenses.[152] *Blockburger* is used in this inquiry but does not control if "legislative intent is clear."[153] Conceding that Garrett would prevail under *Blockburger*, the

145. *Jeffers*, 532 F.2d at 1111 ("Congress did not intend that continuing criminal enterprise be just another degree of conspiracy, but intended that it be a substantially separate crime.")

146. *Jeffers*, 432 U.S. at 137. Four justices supported the Court's opinion and Justice White concurred as to the conviction because he believed *Iannelli* controlled the issue. *Id.* at 158.

147. *Id.* at 149-50 (assuming CCE requires proof of agreement among those involved in enterprise, § 846 is a lesser included offense "because § 848 requires proof of every fact necessary to show a violation under § 846 as well as proof of several additional elements"). *Cf. id.* at 155 ("unnecessary" to reach lesser included offense issue because Congress did not intend cumulative punishment for CCE and § 846 conspiracy).

148. *See id.* at 157. This, of course, anticipated the approach the Court would later adopt in *Whalen*. *See supra* notes 63-67 and accompanying text.

149. Garrett v. United States, 471 U.S. 773, 775 (1985). After pleading guilty to importing marijuana in Washington, he was indicted in Florida for conspiring to and/or possessing marijuana, using the telephone to facilitate drug offenses and CCE. *Id.* at 775-76. To prove the CCE predicates, the government used evidence of the smuggling that led to the Washington charges. *Id.* at 776-77. He was convicted of CCE and his sentence was consecutive to the sentence on the Washington plea. *Id.* at 777.

150. *Id.* at 775 (citing Brown v. Ohio, 432 U.S. 161 (1977)). *See also id.* at 777-78 (*Garrett's* argument that predicates are lesser included offenses).

151. *Id* at 777. *See generally supra* note 21.

152. *Id.* at 778 ("If Congress intended that there be only one offense . . . there would be no statutory authorization for a subsequent prosecution after conviction of one of the two provisions, and that would end the double jeopardy analysis.").

153. *Id.* at 778-79. *See also supra* notes 63-67 and accompanying text.

Court concluded that CCE's legislative history "show[ed] in the plainest way" that Congress intended it to be "punishable in addition to, and not as a substitute for, the predicate offenses."[154] Despite this, the Court assumed — "for purposes of decision" — that predicates are lesser included offenses.[155]

It based its decision on two premises, one being that the CCE prosecution did not violate the successive prosecution prong of double jeopardy because that offense was not complete when Garrett was convicted of its predicate.[156] The other was that " 'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.' "[157] Since Congress intended CCE and its predicates to be distinct crimes, the Court assumed it also intended to allow cumulative sentences for them.[158] It distinguished *Jeffers* on the basis that the dangers of conspiracy and CCE were sufficiently similar that "there would be little purpose in cumulating the penalties", but this was not true of CCE and its substantive predicates.[159]

Garrett was decided in 1985.[160] Since then, the Court has not heard any double jeopardy challenges to the use of CCE or RICO.[161]

2. Other Double Jeopardy Decisions

Though they do not involve CCE or RICO, several of the Court's double jeopardy decisions are pertinent to a consideration of the issues

154. *Id.* at 779. *See generally id.* at 779-86.

155. *Id.* at 790. *See also id.* at 790 ("serious doubts" that predicate is lesser included offense); *id.* at 788 (comparing conduct charged in two indictments "does not lend itself to the simple analogy of a single course of conduct . . . comprising a lesser included misdemeanor within a felony"). In analyzing CCE's relationship with its predicates, the Court considered the facts in *Brown* and in *Garrett* and cautioned against "ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation presented in *Brown* to the multilayered conduct, both as to time and to place, involved in this case." *Id.* at 789. *See also id.* ("Every minute . . . Brown . . . possessed the stolen automobile he was simultaneously committing both the lesser included misdemeanor and the greater felony, but the same simply is not true of Garrett.").

156. *Id.* at 791. This holding was based on Diaz v. United States, 223 U.S. 442 (1912), which held that double jeopardy did not bar a prosecution for homicide after a conviction for assaulting the same victim. *Diaz* held that this was permissible because when the assault was tried, "the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense." *Id.* at 448-49.

157. *Garrett*, 471 U.S. at 793 (quoting *Hunter*, 459 U.S. at 366, and *Albernaz*, 450 U.S. at 344).

158. *Id.* at 794-95.

159. *Id.* at 794.

160. *Id.* at 773.

161. For lower court opinions on this issue, *see* discussion *infra* parts III(B)(2), III(C).

raised by compound offenses. The first of these is also the oldest—*Pinkerton v. United States*.[162]

(a) Pinkerton

Pinkerton enunciated two propositions that arguably provided the foundation for the development of compound offenses: First, it held that a conspiracy and substantive offenses that are the object of that conspiracy are not the same offence for double jeopardy purposes.[163] This premise is an essential component of compound offenses, because they multiply the liability that arises from a course of conduct.[164] If *Pinkerton* had held that conspiracy merged into substantive offenses, as an attempt merges into a completed crime, compound offenses would not have been possible. Instead of imposing liability for the predicates and the resulting "compound" offense, the latter could have been used only to enhance penalties, letting prosecutors elect between multiple predicates or a compound offense carrying greater penalties than a single predicate.[165]

Pinkerton also held that since "conspiracy is a partnership in crime,"

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162. 328 U.S. 640 (1946). Walter and Daniel Pinkerton were convicted of conspiracy to violate the Internal Revenue laws and substantive violations of those laws. *Id.* at 641.

163. *Id.* at 643. The Pinkertons relied on a variant of the common law doctrine of merger, under which conspiracy merged into a completed substantive offense, and argued that they could be convicted only of conspiracy, not of both conspiracy and the substantive offenses. "Petitioners . . . contend that the substantive counts became merged in the conspiracy." *Id.* at 642; *see also* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 687-88 (3d ed. 1982) (a misdemeanor, common law conspiracy merged in a completed felony); *see also infra* note 160. The Court held that "the substantive offense and a conspiracy to commit it are separate and distinct." *Perkins*, 328 U.S. at 643. Though not citing *Blockburger*, the opinion held that double jeopardy was "no defense to a conviction for both offenses" because they were not identical. *Id.* at 643-44 (conspiracy "has ingredients . . . distinct from the completion of the unlawful project"); *see also id.* at 644 ("The agreement to do an unlawful act is . . . distinct from the doing of the act.").

164. *See* discussion *supra* part II(A). *Garrett* sought to distinguish CCE from conspiracy and thereby avoid the *Pinkerton* holding. *See Garrett*, 471 U.S. 773, 777-78.

165. CCE was originally proposed as such a measure. *See Garrett*, 471 U.S. at 782-88 (initially, enhanced sentences for offenders deriving substantial income from drug offenses). At common law, "if by the same act the defendant committed both a misdemeanor and a felony, the misdemeanor was merged in the felony and the defendant was liable for the latter alone." MILLER, *supra* note 20, at 50. Merger did not apply to crimes of the same degree, i.e., both misdemeanors or felonies. *Id.* The rule has been attributed to idiosyncrasies of common law criminal procedure, but survives in the lesser included offense doctrine. *See, e.g., id.* at 50-51 (procedural origins); PERKINS & BOYCE, *supra* note 163, at 614-15; *see generally* discussion *supra* part III(B)(1). For example, a defendant could not be convicted of murder and attempting to commit the same murder because the latter is a lesser included offense of the former, i.e., all elements of the attempt are subsumed by the completed offense. *See* discussion *supra* part III(B)(1). As explained later, both the merger rule and the lesser included offense doctrine derive from a "legal identity"

conspirators are liable for each other's acts if those acts are a foreseeable consequence of their joint criminal endeavor.[166] Federal criminal law uses this aspect of *Pinkerton* to hold members of a conspiracy "vicariously" liable for crimes committed by their colleagues.[167] It contributed to the development of offenses such as RICO and CCE because this holding introduced the idea that liability can derive from involvement in a criminal nexus, as well as establishing that the act of joining a conspiracy can support liability for multiple offenses.[168]

(b) Other Decisions

Only two other aspects of the Supreme Court's rather extensive double jeopardy jurisprudence are relevant to the issues under consideration in this article: One consists of decisions analyzing felony-murder, the other of the Court's most recent decisions in this area.

Felony-murder is a compound offense, perhaps the oldest such offense in our criminal law.[169] The Court first considered it in *Harris v.*

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approach to offense definition. *See* discussion *infra* part IV; *see also* discussion *supra* part II(B).

166. 328 U.S. at 644. *See also id.* at 646-47 ("partners act for each other"); *id.* at 647-48 (no liability for act that was not "in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement").

167. *See, e.g.*, Susan W. Brenner, *Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions*, 56 MO. L. REV. 931 (1991). *Cf. id.* at 960-61 (not a rule of vicarious liability). Most states reject this aspect of *Pinkerton*. *See id.* at 932. *See also id.* at 949 (Model Penal Code rejection).

168. For sources of the holding, *see id.* at 937-44. To appreciate the novelty of this aspect of *Pinkerton*, it is necessary to distinguish it from complicity. *See id.* at 932-35. Rules of complicity impose substantive liability on those who encourage or assist the commission of offenses even though the offenses were physically perpetrated by another. *See id. Pinkerton* is analogous insofar as it predicates substantive liability on encouraging another to commit a crime, although involving a distinctly attenuated form of "encouragement." *See id.* at 944-74. The two differ in that complicity holds one liable for the offenses she encouraged but do not impose any additive liability for her having done so. *See generally id.* at 932-35. That is, assume that A encourages B to commit murder and B does so; under complicity, A can be convicted of murder as an "accomplice" but is not subject to liability *both* for the murder and for being an accomplice to its commission. *See id. Pinkerton* departed from this model by allowing a conspirator to be held liable both for acts that promote commission of substantive offenses, i.e., joining a conspiracy, and for the substantive offenses themselves.

169. *See supra* note 70 (compound offense). *See also* 4 BLACKSTONE, *supra* note 10, at *200 ("if one intends to do another felony, and undesignedly kills a man, this is . . . murder"); LAFAVE & SCOTT, *supra* note 8, § 7.5(a) (at common law, one who caused death while committing or attempting a felony "was guilty of murder"); WHARTON, *supra* note 10, § 319, at 384 (discussing felony-murder). In its brief in *Whalen*, the government argued that felony-murder and the felonies on which it is premised stand in the relationship of "compound" and "predicate" offenses, analogizing them to the structure of RICO and certain other federal offenses. *See* Brief

Oklahoma, a per curiam opinion which held that the double jeopardy clause barred prosecution for the underlying felony after it was used to convict for felony-murder, because conviction of the greater bars prosecution for a lesser included offense.[170] Decided shortly after *Jeffers* and *Brown*, *Harris* cited *Brown*.[171]

Three years later, the Court decided *Whalen v. United States*[172] Whalen received consecutive sentences for rape and felony-murder.[173] He argued that this was improper because these were greater and lesser included offenses.[174] A majority of the Court agreed, finding that the offenses were the "same" for double jeopardy purposes and that Congress had not authorized cumulative punishments.[175] According to this opinion, the compound nature of an offense does not alter the "same offence" determination, which uses *Blockburger*.[176] As noted earlier, *Whalen* seemed to characterize *Blockburger* as a rule of statutory construction and the "punishment" prong of double jeopardy as merely a check on sentencing courts.[177] Justices White, Blackmun and Rehnquist each wrote separately to specify that the double jeopardy clause

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for the United States at 15 n.6, Whalen v. United States, 445 U.S. 684 (1980) (No. 78-5471) ("Rather than calling these 'greater' and 'lesser included' offenses, it is more accurate to call them 'compound' and 'predicate' offenses."). *See also id.*

170. 433 U.S. 682 (1977) ("When . . . conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one.").

171. *Id.* at 683. *Brown*, of course, held that conviction for a lesser-included offense barred prosecution for the greater offense. *See* discussion *supra* part III(B)(1).

172. 445 U.S. 684 (1980); *see also* discussion *supra* part II(B).

173. *Whalen*, 445 U.S. at 686 (felony-murder based on killing in the course of rape). *See also id.* at 685 ("20 years to life" for murder and "15 years to life" for rape).

174. *See id.* at 686 ("petitioner's position that his sentence for . . . rape must be vacated because that offense merged for purposes of punishment with the felony-murder offense"). *See also* Brief for Petitioner at 11, Whalen v. United States, 445 U.S. 684 (1980) (No. 78-5471) ("since an offense and its lesser included offense are the same for Fifth Amendment purposes, consecutive punishment for each violates the double jeopardy guarantee against multiple punishment"). *See generally supra* note 163 (merger doctrine).

175. *Whalen*, 445 U.S. at 693 (permissible if crimes not the "same offense" under *Blockburger* but if they are, "cumulative sentences are not permitted, unless . . . specially authorized by Congress"). Congress was responsible for the statutes at issue because this was a District of Columbia case. *See id.* at 686.

176. *See Whalen*, 445 U.S. at 694 ("In the present case . . . proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense.").

177. *See supra* notes 63-68 and accompanying text. *See also Whalen*, 445 U.S. at 689 (Congress has sole power to define punishments). *Accord id.* at 697 (Blackmun, J., concurring) (only function of double jeopardy clause in multiple punishment cases is preventing a "court from imposing greater punishments than the Legislative Branch intended"). *See generally supra* note 65.

does not limit the assessment of punishment; each understood the majority opinion as implying that it does.[178] Justice Rehnquist also asserted that *Blockburger* is not suited for analyzing "compound and predicate" offenses.[179]

Since *Whalen*, the Court has decided approximately thirty cases implicating double jeopardy but none involved compound offenses.[180] *Harris* and *Whalen* suggest the following analysis: Double jeopardy (a) bars prosecution for a predicate after conviction of a compound offense of which it was a constituent, and (b) bars cumulative punishment for predicates and compound offenses except when a legislature specifically authorized such punishment.[181] If predicates are lesser included offenses of a compound offense, *Brown* would prohibit prosecution for the latter after conviction of a predicate.[182] And since legislatures can

178. *See Whalen*, 445 U.S. at 696 (White, J., concurring in part & concurring in the judgment) (issue "of statutory construction," not double jeopardy); *id.* at 697 (Blackmun, J., concurring in the judgment) ("what punishments are constitutionally permissible is not different from" punishments legislature intended); *id.* at 705 (Rehnquist, J., dissenting) ("Unlike the Court, I believe that the Double Jeopardy Clause should play no role whatsoever in deciding whether cumulative punishments may be imposed."). A year later, the Court adopted the position advanced by these Justices. *See Albernaz*, 450 U.S. at 344 ("the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed").

179. *Whalen*, 445 U.S. at 708, 710-11.

180. *See* United States v. Felix, 112 S. Ct. 1377 (1992); Grady v. Corbin, 495 U.S. 508 (1990); Dowling v. United States, 493 U.S. 342 (1990); Jones v. Thomas, 491 U.S. 376 (1989); United States v. Halper, 490 U.S. 435 (1989); Lockhart v. Nelson, 488 U.S. 33 (1988); Ricketts v. Adamson, 483 U.S. 1 (1987); Mont. v. Hall, 481 U.S. 400 (1987); Smalis v. Pa., 476 U.S. 140 (1986); Poland v. Ariz., 476 U.S. 147 (1986); Morris v. Mathews, 475 U.S. 237 (1986); Heath v. Ala., 474 U.S. 82 (1985); Pa. v. Goldhammer, 474 U.S. 28 (1985); Garrett v. United States, 471 U.S. 773 (1985); Ball v. United States, 470 U.S. 856 (1985); United States v. Woodward, 469 U.S. 105 (1985); Richardson v. United States, 468 U.S. 317 (1984); Thigpen v. Miss., 468 U.S. 27 (1984); Oh. v. Johnson, 467 U.S. 493 (1984); Ariz. v. Rumsey, 467 U.S. 203 (1984); Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984); United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); Mo. v. Hunter, 459 U.S. 359 (1983); Tibbs v. Fla., 457 U.S. 31 (1982); Or. v. Kennedy, 456 U.S. 667 (1982); Bullington v. Mo., 451 U.S. 430 (1981); Albernaz v. United States, 450 U.S. 333 (1981); Hudson v. La., 450 U.S. 40 (1981); Ill. v. Vitale, 447 U.S. 410 (1980). As noted earlier, the Court has agreed to review another double jeopardy case, but has declined to consider a case involving either RICO or CCE. *See supra* note 51.

181. For support of this interpretation, *see, e.g.*, Jones v. Thomas, 491 U.S. 376 (1990) (resentencing to avoid cumulative penalties for predicate and felony-murder when this was not legislature's intent); Morris v. Mathews, 475 U.S. 237 (1986) (court could remedy improper conviction of felony murder and predicate felony by resentencing on lesser included offense of nonfelony murder); *see also* discussion *infra* note 182.

182. *See supra* notes 170-71 and accompanying text; *see also* Ill. v. Vitale, 447 U.S. 410, 421 (1980) ("Under *Brown*, . . . a conviction on a lesser-included offense bars subsequent trial on the greater offense."). *Brown* held that "[w]hatever the se-

apparently establish cumulative punishments for the "same offence," there should be no constitutional impediment to punishing both predicates and a resulting compound offense; indeed, it should be permissible to impose cumulative penalties for multiple predicates and multiple compound offenses arising from a single course of conduct as long as the legislature has authorized such punishment.[183]

The Court cast doubt on aspects of this analysis in 1990, when it decided *Grady v. Corbin*.[184] After pleading to the misdemeanors of driving while intoxicated and failing to keep to the right of the median, Thomas Corbin was indicted for manslaughter, negligent homicide and assault; all the charges arose from one incident.[185] He argued that the felony charges represented a second prosecution for the "same offence."[186] The Court held that though the felonies and misdemeanors were not the "same offence" under *Blockburger*, the prosecution was barred because the state would use the conduct at issue in the misdemeanors to prove the felonies.[187]

Grady created a great deal of confusion: Most courts found that it

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quence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown*, 432 U.S. at 169.

183. *See, e.g., Albernaz*, 450 U.S. at 344 (if "Congress intended . . . multiple punishments, imposition of such sentences does not violate the Constitution"); *see also Hunter*, 459 U.S. at 368 ("because two criminal statutes . . . proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments").

184. 495 U.S. 508 (1990).

185. *Id.* at 511-14. *See also* discussion *infra* note 195 and accompanying text.

186. *Grady*, 495 U.S. at 514.

187. *Id.* at 523. *See also id.* at 521 (prosecution barred if "government, to establish an essential element of an offense charged . . . will prove conduct that constitutes an offense for which the defendant has already been prosecuted"). *See also id.* at 521 ("a subsequent prosecution must do more than merely survive" *Blockburger*). *Grady* is a collateral estoppel rule, as is illustrated by this comment from Brown v. Ohio, 432 U.S. 1161:

> [*Blockburger*] is not the only standard for determining whether successive prosecutions . . . involve the same offense. Even if two offenses are sufficiently different to permit . . . consecutive sentences, successive prosecutions will be barred . . . where the second prosecution requires the relitigation of factual issues already resolved by the first.

Id. at 155 n.6. In the remainder of this note, the Court discussed collateral estoppel as an aspect of double jeopardy but found that since joyriding was a lesser included offense of auto theft, it was not necessary to decide if "the repetition of proof required by the successive prosecutions" would have entitled Brown to "the additional protection offered by" collateral estoppel. *Id.* It resolved this issue in *Grady*. *See also* discussion *infra* note 205 and part III(C)(1)(b)(ii). This is why the *Grady* Court noted that prosecution of the felonies would not have been barred if they had been based on conduct other than that for which he had been convicted, "i.e., if the State relied solely on Corbin's driving too fast in heavy rain." *Grady*, 495 U.S. at 523. As is explained later, collateral estoppel only precludes the relitigation of "ultimate facts" that were determined in a prior proceeding. *See infra* notes 259-67 and accompanying text. Conduct which was not "determined" by Corbin's plea to

created a "two-tiered" approach in which *Grady* governed simple crimes and *Blockburger* governed compound offenses.[188] A few decided that it governed all successive prosecution cases.[189]

The Supreme Court returned to this issue in 1992.[190] Frank Felix was convicted of attempting to manufacture methamphetamine in Missouri, based on his receiving a shipment of supplies there.[191] He had been making the drug in Oklahoma and was indicted there on conspiracy and substantive charges arising from that activity.[192] The indictment encompassed facts that were at issue in the Missouri charge, and at trial the government used "much of the same evidence . . . introduced in the Missouri trial."[193] Felix was convicted but the Tenth Circuit reversed all but two counts, relying on *Grady*.[194]

The Supreme Court set aside the reversals, first holding that none of the substantive counts charged the "same offence" as the Missouri count and then addressing the "more difficult" conspiracy count.[195]

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the misdemeanors was not encompassed by the doctrine and so was available for use in prosecuting additional charges. *See id.*

188. *See, e.g.*, United States v. O'Connor, 953 F.2d 338, 342 (7th Cir. 1992) (*Grady* governs simple crimes but not "complex felonies such as RICO"); *accord* United States v. Evans, 951 F.2d 729, 737 (6th Cir. 1991) (complex offenses governed by *Garrett*, not *Grady*); United States v. Lequire, 943 F.2d 1554, 1559 (11th Cir. 1991); United States v. Esposito, 912 F.2d 60, 65 (3d Cir. 1990), *cert. denied*, 112 S. Ct. 3037 (1992), *reh'g denied*, 1990 WL 106249, (3d Cir. 1990), and *cert. dismissed*, 111 S. Ct. 806 (1991); United States v. Gonzalez, 921 F.2d 1530, 1537 (11th Cir.) ("*Grady* should not be 'transposed to the RICO context' "); United States v. Pungitore, 910 F.2d 1084, 1111 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2010 (1991) (*Grady* inapplicable to complex crimes); *see also* United States v. Coonan, 938 F.2d 1553, 1566 (2d Cir. 1991), *cert denied*, 112 S. Ct. 3037 (1992) (*Grady* only not applicable "to the protection against multiple punishments in the same proceeding"); United States v. Crosby, 789 F. Supp. 440. (D.D.C. 1992).

189. *See, e.g.*, United States v. Felix, 926 F.2d 1522, 1527 n.5 (10th Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 1377 (1992); *see also infra* notes 253-57 and accompanying text; *accord* United States v. Calderone, 917 F.2d 717, 721 (2d Cir. 1990) (*Grady* applies to all successive prosecution claims); United States v. Standefer, 948 F.2d 426, 430 (8th Cir. 1991) (dicta: "we would have to hold that *Grady v. Corbin* is fully applicable to conspiracies and other complex or continuing crimes").

190. United States v. Felix, 112 S. Ct. 1377 (1992).

191. *Id.* at 1379.

192. *Id.* at 1380. He was named in eight counts, the first of which charged conspiracy "to manufacture, possess and distribute methamphetamine." *Id.* Felix was named in nine overt acts alleged in the count, two of which were based on conduct at issue in the Missouri prosecution. *Id.* The substantive counts were based on 21 U.S.C. § 841 and the conspiracy count on 21 U.S.C. § 846. *Felix*, 926 F.2d at 1524, 1524 n.1. *See also* discussion *infra* note 196; *see generally supra* notes 138-45 and accompanying text.

193. *Felix*, 112 S. Ct. at 1381.

194. *Id.* at 1380; *see also Felix*, 926 F.2d at 1530-31.

195. *Felix*, 112 S. Ct. at 1382-83; *id.* at 1385 (reversing Tenth Circuit); *id.* at 1385 (conspiracy). The Court found that the Tenth Circuit erroneously interpreted *Grady* as a "same-evidence-at-trial" test. *See id.* at 1382("mere overlap in proof . . .

The difficulty was that two overt acts alleged in this count reiterated conduct proved in the Missouri case.[196] Conceding that a literal reading of *Grady* supported reversal of the count,[197] the Court declined to construe it "so expansively, because of the context in which *Grady* arose and because of difficulties which have already arisen in its interpretation."[198] "Context" was important because *Grady* implicated a " 'species of lesser-included offense' ", a phrase denoting instances in which prosecutions are barred by factors other than the technical constraints of *Blockburger*.[199] As to interpretation, the *Felix* Court explained that *Grady* applies only when one has been prosecuted for an offense based on certain conduct and that same conduct would be used in another prosecution.[200]

Grady involved Thomas Corbin, who killed a woman because he drove while intoxicated.[201] In analyzing the state's effort to pursue felony charges after he pled to misdemeanors, the Court found that *Blockburger* does not always protect against multiple prosecutions, since it would permit Corbin to be tried for failing to keep right of the median, driving while intoxicated, assault and homicide.[202] To avoid this, the Court held that Corbin could not be prosecuted for a crime which fell within "the entirety of conduct" at issue in a prior criminal proceed-

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does not establish a double jeopardy violation"). Here, it was distinguishing *Grady* from an "actual evidence" test, which is distinct from *Blockburger's* "required evidence" test. *See supra* note 36.

196. *Felix*, 112 S. Ct. at 1380. Overt act 17 alleged that Felix paid for the purchase of drug supplies; overt act 18 alleged that he possessed the supplies "at a location in Missouri." *Id.* The Missouri charge was based on his receiving these supplies. *See supra* notes 191-92 and accompanying text.

197. 112 S. Ct. at 1363.

198. *Id.* at 1384.

199. *Id.* at 1384 (quoting Illinois v. Vitale, 447 U.S. 410, 420 (1980)). *Vitale* described the holding in *Harris* as treating "a killing in the course of a robbery as itself a separate . . . offense, and the robbery as a species of lesser-included offense." *Id.* at 420; *see also infra* note 301. The issue in *Vitale* was whether conviction for failure to reduce speed to avoid an accident barred a manslaughter prosecution based on that failure. 447 U.S. at 411. The Court found that, under Illinois law, manslaughter could be proven by showing that death resulted from recklessly failing to slow a vehicle to avoid a collision, and that this "would also prove careless failure to slow," the offense "for which Vitale has already been convicted." *Id.* at 418. In dicta, it noted that if this were to occur, Vitale would have a "substantial" claim of double jeopardy under *Brown* and *Harris* because he had "been convicted for conduct that is a necessary element of the more serious crime for which he has been charged." *Id.* at 420. According to *Felix*, *Grady* adopted this dicta from *Vitale*. *See Felix*, 112 S. Ct. at 1384.

200. *See, e.g., id.* at 1384-85.

201. *See* Grady v. Corbin, 495 U.S. 508, 511 (1990). He crossed a highway median and ran into two other vehicles; the victim was driving one of them and died of her injuries. *Id.*

202. *Id.* at 520. *See also supra* note 185.

ing.[203] In other words, the felony charges against Corbin were barred because they relied on the same conduct involved in the misdemeanors.[204] Under *Grady*, therefore, a prosecution is barred if it relies on *nothing more* than the conduct involved in a prior criminal proceeding.[205]

In *Felix*, the Court held that the Oklahoma conspiracy charge was not barred, though it encompassed the conduct involved in the Missouri case, because it relied on conduct *in addition to* that used in Missouri.[206] To prove conspiracy, the government had to prove that Felix agreed to manufacture, possess and distribute methamphetamine; the overt acts alleged were not elements of the offense, but were used to establish the agreement.[207] The conduct at issue in Missouri was *part* of the proof of this offense, but the two were not identical; aside from using other overt acts to prove the agreement, the Oklahoma prosecutor had to establish conduct—the act of agreeing—that was *not* at issue in the prior case.[208]

3. After Felix

Though unsettled, double jeopardy law clearly encompasses two distinct analyses—one for multiple punishment claims, another for successive prosecution claims.[209] Each entails a "same offence" inquiry

203. *Corbin*, 495 U.S. at 523. *See also* discussion *infra* part III(C)(1)(b)(ii).

204. *Corbin*, 495 U.S. at 523 (state "admitted that it [would] prove the entirety of the conduct for which Corbin was convicted . . . to establish essential elements of the homicide and assault offenses").

205. *See Grady*, 495 U.S. at 514; *see also* discussion *infra* part III(C)(1)(b)(ii).

206. *See* United States v. Felix, 112 S. Ct. 1377, 1383-85 (1992) ("A conspiracy to commit a crime is a separate offense from the crime itself.").

207. *See Felix*, 926 F.2d at 1529 n.7 ("21 U.S.C. § 846 does not require proof of an overt act.").

208. 112 S. Ct. at 1382-85. The opinion quoted *Garrett*'s caveat about applying standards devised for simple crimes to complex offenses. *See id.* at 1385 (quoting 471 U.S. at 788-89); *see also supra* note 155 and accompanying text.

209. As noted above, double jeopardy also incorporates the doctrine of collateral estoppel. *See supra* note 187. The Court has applied this principle to criminal cases since 1916, but did not define it as a constitutional doctrine until Ashe v. Swenson, 397 U.S. 436, 445-47 (1970). *See* 397 U.S. at 445-47 (double jeopardy clause encompasses collateral estoppel); *see also id.* at 443 (means "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit"); *see generally* United States v. Oppenheimer, 242 U.S. 85, 87 (1916) (first application of collateral estoppel); Anne Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence after Acquittal*, 58 U. CIN. L. REV. 1 (1989). Like res judicata, collateral estoppel concerns the effect a judgment has in precluding further litigation: Traditionally, "res judicata" referred to the preclusion of a "claim or cause of action", and "collateral estoppel" referred to the preclusion of issues. RESTATEMENT SECOND OF JUDGMENTS Introduction at Cmt. d; *see also* RESTATEMENT FIRST OF JUDGMENTS § 45. *See generally* RESTATEMENT SECOND OF JUDGMENTS, Introduction at Scope Note (preclusion limits ability "to litigate claims or issues that were litigated, or could have

based on *Blockburger*, but they diverge in other respects.

The multiple punishment analysis is the simpler: Assume that a defendant is convicted of two offenses arising out of the same conduct, one defined by statute X, the other by statute Y, and sentenced to serve five years for each, the sentences to run consecutively. She appeals, arguing that the sentences unconstitutionally impose multiple punishment for the "same offense."

In analyzing her argument, the court uses *Blockburger* to parse the statutes into their respective elements; if each requires proof of a fact which the other does not, they do not define the "same offence" and the argument fails.[210] But if the proof of one encompasses the other, they do define the "same offence" under the Fifth Amendment.[211] Courts assume that legislatures do not mean for one offense to be punished under several statutes, so this creates a presumption that the sentence is improper.[212] It is overcome by demonstrated legislative intent

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been litigated, in a prior action"). The Restatement replaced "collateral estoppel" with "issue preclusion." *Id.* The old term survives in criminal law, presumably because the Restatement was not intended to apply in this context. *Id.* at Comment a (Restatement "does not deal with res judicata in criminal proceedings"). For the distinction between "claim" and "issue," *see* RESTATEMENT SECOND OF JUDGMENTS § 24(1) (claim includes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose"); *id.* § 17 ("issue of fact or law"). *See also id.* at cmt. c:

> One of the most difficult problems . . . is to delineate the issue on which litigation is . . . foreclosed by the prior judgment. . . . When there is a lack of total identity between the particular matter presented in the second action and . . . the first, there are several factors that should be considered in deciding whether . . . the 'issue' in the two proceedings is the same, for example: Is there a substantial overlap between the evidence . . . to be advanced in the second proceeding and that advanced in the first? Does the new evidence . . . involve application of the same rule of law as that involved in the prior proceeding?

As opposed to double jeopardy, which is a highly technical inquiry, the Court has said that "collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444. (footnote omitted). *Ashe* held that collateral estoppel barred a second prosecution of a defendant for robbing any of five poker players when he had already been tried for, and acquitted of, robbing a sixth. *Id.* at 445 ("The single . . . issue in dispute . . . was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not.").

210. *See, e.g.*, Ball v. United States, 470 U.S. 856, 861 (1985); *see also* discussion *supra* Part II(A). Cumulative punishment "can presumptively be assessed after conviction for two offenses that are not the 'same' under *Blockburger*." Missouri v. Hunter, 459 U.S. 359, 367 (1983).

211. *See, e.g., Ball*, 470 U.S. at 862: "Applying this rule to the firearms statutes, it is clear that Congress did not intend to subject felons to two convictions; proof of illegal receipt . . . necessarily includes proof of illegal possession of that weapon."

212. *See id.* at 861: "The assumption underlying the *Blockburger* rule is that Con-

to the contrary.[213] Since the Court has held that the double jeopardy clause does not limit the amount of punishment that can be imposed, a legislature can authorize cumulative punishments for the same act or course of conduct.[214] In the example above, even if statutes X and Y define the "same offence," the sentences are proper if the legislature meant to allow punishment to be imposed under each.

The successive prosecution analysis is unsettled but clearly more complex, the product of distinct policy concerns.[215] It also begins with *Blockburger*, as this hypothetical illustrates: Fred Smith caused an accident that killed someone; he pled guilty to a misdemeanor, driving while intoxicated, before being charged with manslaughter, a felony.[216] To prove manslaughter, the prosecutor must show that Smith recklessly caused the death. Assume she intends to do this by proving that he drove while intoxicated.

Smith argues that the manslaughter charge involves the "same offence" and, as such, is barred by double jeopardy. In analyzing the argument, the Court uses *Blockburger* to compare the offenses at issue.[217] If they are the "same" under that standard, the second prosecution is barred by double jeopardy.[218] Here, the offenses require different proof and so are distinct: Manslaughter requires proof of reckless conduct that caused a death; the misdemeanor requires proof that one operated a vehicle under the influence of an intoxicant.[219] Since they are not the same under *Blockburger*, it does not bar the second prosecution.[220]

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gress ordinarily does not intend to punish the same offense under two different statutes."

213. *See, e.g.*, Albernaz v. United States, 450 U.S. 333, 344 (1981): "[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution."

214. *See* discussion *supra* part III(B)(2).

215. *See Grady*, 495 U.S. at 518: "Successive prosecutions . . . raise concerns that extend beyond merely the possibility of an enhanced sentence." *See also* discussion *supra* part II(A).

216. *Cf. supra* notes 185, 201 and accompanying text.

217. *See Grady*, 495 U.S. at 510; "[T]he Double Jeopardy Clause . . . prohibits successive prosecutions for the same criminal act . . . under two criminal statutes whenever each statute does not 'requir[e] proof of a fact which the other does not.' " (quoting *Blockburger*, 284 U.S. at 304).

218. *See id.*

219. *See generally* Illinois v. Vitale, 447 U.S. 410, 418-19 (1980) (manslaughter was not the "same offence" as failure to reduce speed because the former "required proof of a death," which the latter did not, and "failure to slow was not a statutory element of" manslaughter).

220. *See id.*; *see also Felix*, 112 S. Ct. at 1382 (substantive crimes charged in Oklahoma indictment not the "same offence" at issue in Missouri prosecution); *Grady*, 495 U.S. at 515.

Grady, however, bars a subsequent prosecution for an offense that is distinct under *Blockburger* if, to establish that offense, the prosecutor will "prove the entirety of the conduct" that was at issue in an earlier criminal case.[221] On the facts set out above, *Grady* bars the manslaughter charge because the prosecutor intends to prove nothing more than the conduct involved in the misdemeanor, i.e., that Smith operated a motor vehicle while intoxicated.[222]

Assume, however, that the prosecutor intends to prove not only that Smith drove while intoxicated, *but also* that he was speeding at the time and that his speeding was at least a contributing cause of the accident. Under *Felix*, the manslaughter prosecution should not be barred by *Grady* because now it is based on conduct in addition to that at issue in the earlier criminal proceeding.[223]

C. *Double Jeopardy and Compound Offenses*

However torturous double jeopardy analysis is when it involves simple crimes, it becomes even more difficult when compound crimes are at issue, which may be why the Court has as yet taken no cases involving these offenses. This section explains how the analyses summarized above have been applied to CCE and RICO.

1. Analysis of CCE and RICO

As compound offenses, CCE and RICO require that a perpetrator execute appropriate predicate offenses in a context which satisfies the distinct elements of each.[224] When this occurs, a prosecutor can charge for predicates and compound offenses: If the predicates are federal crimes, all charges are prosecuted in federal court; if they are crimes under state law, RICO charges can be prosecuted in federal court but the predicates must be pursued, if at all, in a state court.[225] This offense structure gives rise to two issues:

(1) Does it violate the multiple punishment prong of double jeopardy to impose liability for predicates and compound offenses in one federal proceeding?[226]

(2) Does it violate the successive punishment prong of double jeopardy to impose liability for predicates and compound offenses in

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221. *Grady*, 495 U.S. at 523; *see also id.* at 510.

222. *See supra* text accompanying note 205.

223. *See supra* text accompanying note 206; *see generally Felix*, 112 S. Ct. at 1384.

224. For a discussion of the elements which comprise these offenses see discussion *supra* part III(A).

225. *Id.*

226. Under the "dual sovereignty" doctrine, double jeopardy does not bar the imposition of cumulative punishments in state and federal proceedings. *See, e.g.*, United States v. Pungitore, 910 F.2d 1084, 1117-20 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2010 (1991); *see generally supra* notes 114-15 and accompanying text.

subsequent federal proceedings?[227]

(a) Multiple Punishment

Compound offenses appear to have a lesser included greater offense relationship with their predicates.[228] The Supreme Court has held that imposing cumulative punishment for lesser included and greater offenses violates this aspect of double jeopardy.[229] These decisions rest on two propositions: (a) a lesser included offense is the "same" as the offense of which it is a constituent; and (b) Congress can authorize cumulative punishments for the "same offence" but had not done so in these instances.[230] It follows, therefore, that the prohibition on multiple punishments does not bar cumulative punishments for predicate and compound offenses if either of two conditions are met: They are not the "same offence" under the double jeopardy clause; or they are the "same offence" but Congress has authorized cumulative punishment in this context.

Under *Blockburger,* offenses are the same when "the same act or transaction" violates two statutes, neither of which requires proof of a "fact which the other does not."[231] This test indicates that RICO/CCE predicates are included offenses for the same reason that predicate felonies are included in felony-murder:[232] One proves a CCE/RICO offense by proving its predicates; the former requires proof of elements in addition to those required for the predicates, but they require no proof that is distinct from the former.[233]

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227. The "dual sovereignty" doctrine allows prosecution of federal compound offenses and constituent state predicates in distinct proceedings. *See supra* notes 111-13 and accompanying text. *See also Pungitore,* 910 F.2d at 1105-07.

228. *See* discussion *supra* parts III(A), III(B)(2).

229. *See* discussion *supra* part III(B)(2).

230. *See id.*

231. *Blockburger,* 284 U.S. at 304; *see also supra* note 36 and accompanying text; discussion *supra* parts III(B)(2), (3).

232. *See infra* note 234; *see also* United States v. Rivera-Martinez, 931 F.2d 148, 154 (1st Cir.), *cert. denied,* 112 S. Ct. 184 (1991) (noting, as to CCE predicates, "[w]ere we to . . . woodenly apply the *Blockburger* test, the argument for double jeopardy would be a powerful one"); *see generally* People v. Wilder, 308 N.W.2d 112, 117 (Mich. 1981) (felony murder "[R]equires proof of the underlying lesser included felony" so they are the "same offence"); *supra* note 166 and accompanying text. *Cf.* discussion *infra* part IV(B).

233. *See, e.g.,* United States v. Hartley, 678 F.2d 961, 991-92 (11th Cir. 1982), *reh'g denied,* 668 F.2d 852 (11th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983):

> [I]t would appear that the predicate offenses and the RICO violation run afoul of the *Blockburger* test. Conviction under RICO does require "proof of a fact" not required by . . . the predicate acts; namely, the existence of an enterprise. The predicate offenses, however, fail to possess the requisite "additional element" to satisfy the edict of *Blockburger.*

Accord United States v. Kragness, 830 F.2d 842, 863-64 (8th Cir. 1987) (RICO conspiracy same as predicate conspiracies). *See also* Koenig & Godinez-Taylor, *supra*

Lower federal courts agree that CCE/RICO predicates are not included offenses, one theory being that a compound offense does not rest on the "same act or transaction" as its predicates.[234] The rationale for this approach has not been articulated; many of these decisions rely on *Garrett's* caveat about applying ordinary included offense tests to compound offenses, assuming that since the latter require complex, "multilayered" conduct, they do not share an "act or transaction" with their predicates.[235] But even if this applies to CCE cases like *Garrett*, it may not hold for RICO cases, especially when they involve a "pattern of racketeering activity."[236] RICO pattern of racketeering activity requires not only commission of a requisite number of predicate acts, but also that the acts share a distinct relationship.[237] The relationship among the predicates distinguishes RICO from CCE, suggesting that *Garrett* may be an inadequate basis for holding that RICO predicates and substantive offenses do not share a common "act or transaction"

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note 4, at 744 (RICO "includes the two predicate crimes, or lesser included offenses"); *id.* at 745 ("same proof of each underlying crime as would be required to prove that crime in a separate prosecution"); Tarlow, *supra* note 5, at 264 (predicates lesser included offenses); *see generally* People v. Robideau, 355 N.W.2d 592, 616 (Mich. 1984) (Cavanagh, J., dissenting in part) (predicate "always included within . . . compound offense which relies on it for a conviction"), *reh'g denied sub nom*, People v. Griffin, 362 N.W.2d 219 (Mich. 1984).

234. *See, e.g.*, United States v. Hawkins, 658 F.2d 279, 288 (5th Cir. 1981) (RICO and underlying predicate offense do not arise from "same act or transaction"); United States v. Scotto, 641 F.2d 47, 56 (2d Cir. 1980), *cert. denied sub nom*, Anastasio v. United States, 452 U.S. 961, (1981) (RICO and predicates not based on "same act or transaction"); United States v. Boylan, 620 F.2d 359, 361 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980) (RICO and predicate offense are seperate crimes). *See also* United States v. O'Connor, 953 F.2d 338, 344 (7th Cir.), *cert. denied*, 112 S. Ct. 1979 (1992) (RICO charge based on "complex series of transactions often spanning many years and many states"); *see generally* United States v. Hartley, 678 F.2d at 991 n.51 (11th Cir. 1982) (declining to reach the issue); United States v. Licavoli, 725 F.2d 1040, 1050 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984) (court did not reach this issue). *Cf.* United States v. Jefferson, 714 F.2d 689, 703 (7th Cir. 1983), *cert. granted and remanded*, 474 U.S. 806 (1985), *op. on remand*, 782 F.2d 697 (7th Cir. 1986) ("cumulative sentences may not be imposed upon the predicate substantive offenses of a § 848 conviction").

235. *See supra* note 151; *see, e.g.*, United States v. Giovanelli, 945 F.2d 479, 492 (2d Cir. 1991) (RICO); United States v. Evans, 951 F.2d 729, 738 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1966 (1992) (RICO); *O'Connor*, 953 F.2d at 342 (RICO); United States v. Guthrie, 789 F.2d 356, 358-60 (5th Cir. 1986), *reh'g denied en banc*, 793 F.2d 1287 (5th Cir. 1986) (CCE); United States v. Crosby, 789 F. Supp. 440, 441-45, (D.D.C. 1992) (RICO).

236. *See* discussion *supra* part III(A)(1). "Collection of unlawful debt" cases might involve a different analysis since they do not require a "pattern" of activity. *See id.* Arguably, however, the existence of the "enterprise" would differentiate even these cases from CCE offenses; *see generally* United States v. Love, 767 F.2d 1052, 1061 n. 13 (4th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986) (enterprise distinguishes CCE and RICO offenses).

237. *See* discussion *supra* part III(A)(1).

under *Blockburger*.[238] Logically, there is no reason why the acts that give rise to "multilayered" criminal activity are not lesser included components of that activity.

Federal courts have not resolved these issues because they have been able to rely on an alternative approach—that Congress explicitly authorized cumulative punishments for CCE and RICO and their respective predicates.[239] If offenses are the "same" under *Blockburger*, this gives rise to a presumption against cumulative punishments, but that presumption is overcome by clear legislative intent to the contrary.[240] Courts have concluded that Congress manifested such an in-

238. CCE requires the commission of a "continuing series" of drug offenses in concert with five or more others; the "series" consists of "at least three felony violations of the federal narcotics laws." United States v. Markowski, 772 F.2d 358, 360-62 (7th Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986); *see also* United States v. Sophie, 900 F.2d 1064, 1077 (7th Cir. 1990), *cert. denied sub nom.* Duave v. United States, 111 S. Ct. 124 (1991); *see also* discussion *supra* part III(A)(2). *Cf. Garrett*, 471 U.S. at 786 (not the "same" as its predicates). CCE is analogous to conspiracy in that it targets "concerted" action, which is why a § 846 conspiracy has been held to be a lesser included offense of CCE. *See* discussion of Jeffers v. United States, *supra* part III(B)(1); *see also* United States v. English, 925 F.2d 154, 160 (6th Cir.), *cert. denied*, 111 S. Ct. 2812 (1991) ("may not impose cumulative punishments for CCE and conspiracy"). *Cf.* United States v. McHan, 966 F.2d 134, (4th Cir. 1992); United States v. Grayson, 795 F.2d 278, 284-85 (3d Cir. 1986), *cert. denied sub nom*, Robinson v. United States, 479 U.S. 1054 (1987) and *cert. denied sub nom.* Grayson v. United States, 481 U.S. 1018. Since it is based on the distinct phenomenon of concerted activity, CCE might seem to be encompassed by *Pinkerton*, under which the act of confederating to commit crimes is itself an offense separate and distinct from those crimes. *See* discussion *supra* part III(B)(2). Under *Pinkerton*, one can be convicted of both conspiracy and offenses that result from it, which would suggest that CCE predicates are not lesser included offenses. *See id.* CCE is, however, distinct from generic conspiracy in that CCE requires commission of substantive offenses. *See* United States v. Phillips, 664 F.2d 971, 1013 (5th Cir. 1981), *cert. denied sub nom.* Meinster v. United States, 457 U.S. 1136 (1982) ("Unlike a typical conspiracy statute. . . § 848 requires that the defendant commit a federal narcotics violation which is part of a continuing series of such violations committed . . . in concert with" five or more others.) *Id.* Since CCE requires both concerted action and the commission of substantive violations, the latter would seem to be lesser included offenses.

RICO substantive offenses based on patterned racketeering have a different structure: It is the pattern of racketeering activity itself, along with using it to affect an enterprise, that constitutes the offense; the predicates must join together in a distinct relationship to constitute the pattern, so it is difficult to see why they are not lesser included components of the offense that results from it. *See generally* United States v. Love, 767 F.2d 1051, 1061 n.13 (4th Cir. 1985) (distinction between CCE and RICO). *Cf.* United States v. Boldin, 772 F.2d 719, 729 (11th Cir. 1985), *modified, reh'g denied in part*, 779 F.2d 618 (11th Cir. 1985), *cert. denied sub nom*, Scarborough v. United States, 475 U.S. 1089, and *cert. denied sub nom.* Crump v. United States, 475 U.S. 1048 (1986) (citing United States v. Thomas, 757 F.2d 1359 (2nd Cir. 1985)) (RICO and its predicates "are intended to deter two different kinds of activity . . . .").

239. *See supra* notes 113-15 and accompanying text.

240. *See* discussion *supra* part III(B)(3).

tent as to both CCE and RICO and have used this to reject multiple punishment arguments, thereby avoiding the need to decide if either is the "same offence" as its predicates.

(b) Successive Prosecution

Since legislative intent does not override a "same offence" finding here, it is necessary to resolve the issue left open in multiple punishment analysis, i.e., the nature of the relationship between a compound offense and its predicates. Unfortunately, the *Felix-Grady* sequence enhanced the complexity of this endeavor.[241]

Before *Grady*, courts agreed that *Blockburger* controlled all "same offence" determinations.[242] Since *Grady*, they are divided as to the standard governing compound offenses: some apply both *Blockburger* and *Grady*; others only use *Blockburger*, limiting *Grady* to simple offenses.[243] The courts that use *Grady* employ it as part of a two-stage inquiry, applying it only if they find that offenses are *not* the "same" under *Blockburger*.[244] Both tests, therefore, include a *Blockburger* analysis.[245] Other courts apply a test based on *Garrett*. Sections (i)-(iii), below, examine each of these tests.

But before proceeding, it is necessary to explain how successive prosecution claims arise in CCE/RICO cases. They involve any of three allegations: (1) a CCE/RICO charge is based on predicates which were at issue in an earlier prosecution; (2) a CCE/RICO charge reiterates the substance of a CCE/RICO charge at issue in an earlier prosecution; or (3) the offenses at issue in a case were used as CCE/RICO predicates in an earlier prosecution. Allegations #1 and #3 are based on the proposition that a CCE/RICO violation is the "same offence" as its predicates; the analysis in the remainder of this section concerns itself with allegations of this type because they implicate the legal relationship between predicates and compound offenses.

Allegation #2 is analytically distinct, relying on the alleged factual identity of particular charges. When confronted with such a challenge, a court resolves it by determining the extent to which charges are based

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241. *See, e.g., id.*

242. *See id.*

243. *See supra* notes 188-89 and accompanying text. In *Felix*, the Tenth Circuit noted that it had rejected the bifurcated *Grady* and applied the same standard to all offenses. *See* 926 F.2d at 1527, 1527 n.5. The Supreme Court did not address this issue in its *Felix* opinion; *see generally* discussion *supra* part III(B)(2).

244. *See, e.g.*, United States v. Evans, 951 F.2d 729, 738 (6th Cir. 1991); *Esposito*, 912 F.2d at 63-65 . Under this approach, if the court determines that two offenses are not the "same" under *Blockburger*, it then applies *Grady* to determine if the prosecution relies on the same conduct that was used in a former proceeding. *Id. See also infra* note 249 and accompanying text.

245. *See infra* notes 284-95 and accompanying text for a different test.

on distinct factual allegations.[246] The sections below are not concerned with challenges of this type because they do not implicate the unique substantive configuration of compound offenses. Finally, it is irrelevant, for this discussion, whether an earlier proceeding terminated in acquittal or conviction, since the prohibition bars "jeopardy," not a particular result.[247]

(i) Blockburger Analysis

Almost all of these decisions hold that predicate crimes are not the "same" as a resulting compound offense, but the analysis is flawed: Most find that a CCE/RICO offense is distinct because it requires proof of elements not included in the predicates.[248] This, however, ignores half of the *Blockburger* test in that it does not explain how the proof of the predicates differs from that of the compound offense.[249]

Other opinions use a *Pinkerton* analogy, one court noting that if the agreement in conspiracy is "sufficiently distinct from the substantive offense for double jeopardy purposes," the "even more complex conduct needed to support a RICO charge" must represent an offense separate from the predicates.[250] This analogy also eludes *Blockburger*'s

246. *See, e.g.*, United States v. Pungitore, 910 F.2d 1084, 1112-15 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2010 (1991); United States v. Ciancaglini, 858 F.2d 923, 926-28 (3d Cir. 1988). In other words, the analysis is functionally identical to that which would be involved if a defendant were to challenge a prosecution for murdering A on the grounds that he had already been prosecuted for murdering B. The issue is the factual identity of the respective charges.

247. *See generally supra* note 18.

248. *See, e.g.*, United States v. Dean, 647 F.2d 779, 785 n.14 (8th Cir. 1981); United States v. Boylan, 620 F.2d 359, 361 (2d Cir. 1980), *cert. denied*, 449 U.S. 833 (1981); United States v. Stratton, 583 F. Supp. 1234 (S.D.N.Y. 1984), *aff'd*, 751 F.2d 373 (2d Cir. 1984); United States v. Hansen, 422 F. Supp. 430, 433 (E.D. Wis. 1976), *aff'd*, 583 F.2d 325 (7th Cir. 1978); United States v. White, 386 F. Supp. 882, 884 (E.D. Wis. 1974); United States v. Stofsky, 409 F. Supp. 609, 617 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). *See also* United States v. Persico, 620 F. Supp. 836, 841 (S.D.N.Y. 1985) (since RICO requires proof of "a second predicate offense . . . the predicate . . . and the RICO offense are not the same offense under the *Blockburger* standard"). RICO is usually distinguished as requiring proof of an "enterprise" and a "pattern of racketeering activity", and CCE as required concerted action and that a defendant have occupied a managerial role. *See, e.g.*, *Boylan*, 620 F.2d at 359 (RICO); United States v. Jefferson, 714 F.2d 689, 705 (7th Cir. 1983) (CCE); *see generally* discussion *supra* part III(A). *Cf. infra* note 246.

249. *See* Koenig & Godinez-Taylor, *supra* note 4, at 744 (*Blockburger* not satisfied unless the "predicate offenses require proof of a fact that the RICO count does not require"); *see also supra* note 228 and accompanying text.

250. *Esposito*, 912 F.2d at 65. *Accord*, United States v. Smith, 963 F.2d 892, (6th Cir. 1992) ("Just as a defendant may be tried for both an agreement to commit substantive offenses and for committing those offenses, a defendant may be tried for committing substantive offenses and for engaging in conduct that directs a continuing criminal enterprise").

requirement that proof be distinct for each offense: Conspiracy is distinct because (a) it includes an element not found in substantive offenses *and* (b) substantive offenses include elements not needed for conspiracy.[251] Though a CCE/RICO offense may be distinct from its predicates, predicates are not distinct unless they include elements in addition to those required for the CCE/RICO offense.

The courts that have applied *Blockburger* to CCE/RICO ignored this aspect of the test because it cannot be satisfied: Predicates clearly do not require any proof that is distinct from that needed for a CCE/RICO offense and, therefore, are lesser included offenses under *Blockburger*.[252] The *Pinkerton* analogy fails because unlike conspiracy, compound offenses require the commission of substantive crimes and thereby subsume the elements of those crimes. Federal courts realize that a correct application of *Blockburger* would not allow sequential prosecutions of compound offenses and their predicates, so they distort the *Blockburger* test to achieve this result.

(ii) Blockburger-Grady Analysis

Courts that apply *Grady* to compound offenses use it as part of a two-stage analysis:

> First, the court must apply the *Blockburger* test . . . to determine whether the offense charged in the subsequent prosecution "requires proof of a fact which the other does not". . . . If the indictment survives this . . . the court must apply *Grady's* 'same conduct' test, which "bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[253]

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251. *See, e.g.*, discussion *supra* part III(B)(2)(a); *see also supra* note 158.

252. *See, e.g.*, United States v. Michel, 588 F.2d 986, 1001 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979) (§ 846 conspiracy is a lesser-included offense of CCE); *accord* United States v. Johnson, 575 F.2d 1347, 1354 (5th Cir. 1978). *See also supra* notes 226-27 and accompanying text. This conclusion sustains both the first and third category of successive prosecution claims identified in discussion *supra* part III(C)(1)(b); *see also supra* notes 176-77 and accompanying text.

253. United States v. Calderone, 917 F.2d 717, 720 (2d Cir. 1990), *cert. granted* 112 S. Ct. 1657 (1992); *accord* note 239, *supra* United States v. Gambino, 920 F.2d 1108 (2d Cir. 1990), *cert. granted* 112 S. Ct. 1657 (1992) (applying *Calderone* to CCE/RICO case); United States v. Ladner, 941 F.2d 356, 359 n.8 (5th Cir. 1991) (" 'Blockburger phase' " and " 'Grady phase' "). *Calderone* was not a CCE/RICO case, but held that this analysis applies to all cases. 917 F.2d at 721. *Gambino*, a CCE/RICO case, followed *Calderone*. 920 F.2d at 112. The Court granted government petitions for certiorari in *Calderone* and *Gambino*, vacating the judgments in each and remanding them for further consideration in light of *Felix*. *Gambino* held that two conspiracy counts based "at least partially" on conduct at issue in an earlier prosecution were barred under *Grady*. 920 F.2d at 112. *Calderone* reached the same conclusion as to a conspiracy count and substantive counts. 917 F.2d at 720-22. In each, the government intended to use evidence of conduct at issue in a prior

Not surprisingly, successive prosecution claims in CCE/RICO cases consistently fail both parts of this test.[254]

The failure of the first part of the test is attributed to the reasons explained above.[255] This requires the application of *Grady*, and decisions offer varied explanations as to why claims fail under that test: most simply find that the "conduct" at issue in a CCE/RICO charge is not the same as that involved in a prosecution for a predicate.[256] These decisions tend to distinguish "conduct" from "evidence," often holding that the former is implicated only if specific conduct was the basis of an offense charged in a prior proceeding.[257] Other courts reject *Grady* arguments on the grounds that the government relied on conduct in addition to that at issue in an earlier prosecution.[258] All these decisions are analytically inadequate because none approach *Grady* as the rule of collateral estoppel that it is.[259] To understand *Grady*, it is necessary to clarify its relationship to double jeopardy as a generic construct. Double jeopardy functions as the criminal law analogue of the civil doc-

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prosecution to prove the conspiracy charge(s). Therefore, it is not surprising that the Court remanded the cases for reconsideration in light of *Felix*.

254. *See, e.g., Esposito,* 912 F.2d at 63-66; *see also infra* note 256. *Cf.* United States v. Russo, 906 F.2d 77, 78 (2d Cir. 1990) (prosecution for obstruction of justice, predicate in RICO charge on which defendant was acquitted was "inconsistent with the 'conduct' test announced in *Grady*").

255. *See* discussion *supra* part III(C)(1)(b)(i).

256. *See, e.g., Esposito,* 912 F.2d at 64 ("Esposito was not prosecuted for the narcotics violations but for participating in a racketeering enterprise through a pattern of racketeering activity consisting of narcotics distributions."). *See also* United States v. Bloome, 784 F. Supp. 23, 33 (S.D.N.Y. 1992) ("In the first case, the relevant 'conduct' . . . was his endeavor to commit a felony affecting the ALSB; in the second case, [it] . . . was his participation in an enterprise that engaged in a pattern of racketeering activity.").

257. *See, e.g.*, United States v. Johnson, 1992 WL 122253 *2 (9th Cir.):

> The government argues that *Grady* is inapplicable here because it will not, for the purpose of establishing an essential element in the case, prove conduct that constituted an offense for which Johnson and Contreras have already been prosecuted. *Grady*, it contends, does not bar successive use of the same evidence in different prosecutions for different purposes. We agree.

Id. Accord United States v. Evans, 951 F.2d 729, 738 (6th Cir. 1991) (to prove CCE predicates, government intended to use "evidence of conduct" used in an earlier proceeding, but the "fact that the same evidence would be used did not create a double jeopardy problem"). *See also id.* ("*Grady* only bars the prosecution . . . from proving 'conduct that constitutes an offense for which the defendant has already been prosecuted' ").

258. *See, e.g., Bloome*, 784 F. Supp. at 34 ("the government introduced substantial additional evidence of the existence of the charged enterprise and of Zappola's participation in that enterprise[ ]"); *see also id.* (*Grady* bars a "second prosecution only when the conduct previously prosecuted is to be used to 'establish' the element of the second crime, which I think must mean 'constitute the entirety of the element'"); *see generally supra* note 200 and accompanying text.

259. *See supra* note 187. *See also supra* note 203; *infra* note 265.

trine of res judicata; both implement the principle of finality in litigation.[260] Each proscribes relitigating the same transgression: civil law in its rule of "claim preclusion," criminal law in prohibiting repetitive prosecutions for the "same offence."[261] The civil rule of "issue preclusion," formerly known as collateral estoppel, extends this proscription to encompass an issue of law or fact resolved by an earlier action.[262]

Long before *Grady*, the Supreme Court applied collateral estoppel to criminal cases, eventually holding that it is part of the protection against double jeopardy.[263] Compared to the other components of double jeopardy, collateral estoppel has not been frequently litigated and, as a result, is not well defined.[264] The rule enunciated by the Court is that if "an issue of ultimate fact" was determined in one prosecution, it cannot be litigated in another.[265] This, of course, creates the need to identify issues of "ultimate fact."

Civil law traditionally distinguished between "ultimate" and "evidentiary" facts; the former result from applying law to facts, the latter merely "evidence" ultimate facts.[266] Civil collateral estoppel includes both but its criminal counterpart does not apply to evidentiary facts,

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260. *See, e.g.*, United States v. Goodwin, 457 U.S. 368, 376 (1982) (double jeopardy and res judicata both reflect "the institutional bias inherent in the judicial system against the retrial of issues that have already been decided"); *accord Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 168-69 (1873); *see also* ROLLIN PERKINS, CRIMINAL LAW AND PROCEDURE 7650 (1952) (both arose from common law maxim that "no one ought to be twice vexed for the same cause"); *see generally Introduction* to RESTATEMENT SECOND OF JUDGMENTS, cmt. a (1980) ("the rules in the Restatement . . . are commonly referred to as the rules of res judicata"); United States v. Jorn, 400 U.S. 470, 479 (1971) (double jeopardy is "a constitutional policy of finality" benefiting defendants).

261. *See generally supra* notes 209, 260.

262. *See* RESTATEMENT SECOND OF JUDGMENTS § 27 (1980). *See generally supra* note 203. The rule was known as "collateral" estoppel to denote that it applied outside the confines of the "claim" that was litigated in the first action. *See* RESTATEMENT SECOND OF JUDGMENTS § 27, cmt. b (1980) ("Issue preclusion in a second action on the same claim is . . . direct estoppel. If . . . on a different claim, . . . [it] is . . . collateral estoppel"). Because the Restatement does not apply to criminal law, the latter retains the old terminology. *See supra* note 209.

263. *See supra* note 209. *See generally supra* note 187.

264. *See generally* Poulin, *supra* note 209. Though collateral estoppel has been refined in civil law, those principles do not apply in criminal cases. *See supra* note 299. *Cf. Introduction* to RESTATEMENT SECOND OF JUDGMENTS, cmt. a (1980) ("the analysis . . . herein may have application to cognate problems arising in criminal litigation").

265. Ashe v. Swenson, 397 U.S. 436, 443 (1970) ("when an issue of ultimate fact has been determined by a valid and final judgement, that issue connot again be litigated between the same parties in any future lawsuit."); *see also supra* note 209.

266. *See* RESTATEMENT SECOND OF JUDGMENTS, § 27, cmt. c (1980); *see also* The Evergreens v. Nunan, 141 F.2d 927, 928 (2d Cir. 1944) (" 'Ultimate' facts are those which the law makes the occasion for imposing its sanctions."); BLACK'S LAW DICTIONARY 658 (Rev. 4th ed. 1968) ("evidentiary facts").

making it even more imperative to be able to distinguish the two.[267] The Court did not address this problem until it decided *Grady, Felix* and a third case, *Dowling v. United States*.[268] Only *Dowling* was explicitly couched in collateral estoppel terms, but this was the operative premise of all three.[269]

From them one can derive this standard for applying collateral estoppel under the double jeopardy clause: it does not encompass evidentiary facts, which are probative matter submitted to prove one or more ultimate facts.[270] It does encompass ultimate facts, which are the product of applying legal principles to evidentiary facts.[271] Criminal law uses this process to determine two types of issues, offense liability and defenses to such liability; when a set of legal principles is applied to specific facts to decide either, the resulting determination is a finding of

267. *See* Yates v. United States, 354 U.S. 298, 338 (1957) (judgment "given no conclusive effect at all unless it establishes one of the ultimate facts in issue. . . . So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative"). *Cf.* RESTATEMENT SECOND OF JUDGMENTS § 27, cmt. c (1980) ("An issue on which relitigation is foreclosed may be one of evidentiary fact, of 'ultimate fact' . . . or of law.").

268. 493 U.S. 342 (1990). *Dowling* was decided a few months before *Grady* and reaffirmed the *Yates* holding. *See supra* note 267 and accompanying text. *See also Dowling*, 493 U.S. at 342; *Grady*, 495 U.S. at 508. In *Dowling*, the Court refused to hold that collateral estoppel "in all circumstances bars the later use of evidence relating to prior conduct which the government failed to prove violated a criminal law." *Dowling*, 493 U.S. at 350. At his trial for bank robbery, Dowling argued that collateral estoppel barred the prosecution from using evidence of his "conduct" that had been introduced in an earlier prosecution for different charges, on which he was acquitted. *Id.* The Court rejected the argument because it found that Dowling had not established that the acquittal represented a jury determination on the conduct in question. *See id.* at 349-50. *Grady* distinguished *Dowling*. *See Grady*, 495 U.S. at 521-22 ("As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding."). Collateral estoppel was argued in both *Grady* and *Felix*. *See, e.g.*, Brief for Respondent at 21-26, Grady v. Corbin, 495 U.S. 508 (1990) (No. 89-474); Brief of Amicus Curiae National Association of Criminal Defense Lawyers On The Merits In Support of The Respondent at 15-17, United States v. Felix, 112 S. Ct. 1377 (1992) (No. 90-1599).

269. *See generally supra* note 268; Pettaway v. Plummer, 943 F.2d 1041, 1046-47 (9th Cir. 1991) (discussing *Grady* in collateral estoppel analysis).

270. This proposition is derived from *Dowling* and from *Felix*: Both distinguished between using the same proof as evidence in two different prosecutions and bringing two prosecutions for the "same offence." *See Felix*, 112 S. Ct. at 1382-83 ("introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct"); *Dowling*, 493 U.S. at 348-49 (distinguishing use of evidence from situation in which prior prosecution determined "an ultimate issue"); *see also Felix*, 112 S. Ct. at 1383 n.3 (declining to adopt a rule that "admission of evidence concerning a crime . . . constitutes prosecution for that crime"); *supra* note 267.

271. *See, e.g.*, United States v. Seley, 957 F.2d 717, 721-23 (9th Cir. 1992) (analyzing ultimate facts resolved by verdict). *Id.* at 722 ("jury decided as ultimate fact that Seley lacked knowledge of the presence of the marijuana").

ultimate fact that has preclusive effect under criminal collateral estoppel.[272] But since the doctrine does not encompass evidentiary facts,

272. The proposition that offenses are ultimate facts for criminal collateral estoppel derives from *Grady* and *Felix*. *See Grady*, 495 U.S. at 510 and *Felix*, 112 S. Ct. at 1384-85). In *Grady*, the state meant to use the conduct at issue in the misdemeanors to convict on the felonies; since that conduct had already provided the basis for a determination of ultimate fact, i.e., that Corbin drove while intoxicated and crossed the median, it could not be litigated in another prosecution. This logically follows from *Ashe* and from civil collateral estoppel principles: Ashe's acquittal on a charge of robbing one poker player estopped the government from prosecuting him for robbing other members of that poker party. *See supra* note 209. It did so, the Court suggested, because the acquittal determined the ultimate issue of Ashe's conduct on the occasion in question. *See Ashe*, 397 U.S. at 446; *supra* note 209. *Accord* Turner v. Arkansas, 407 U.S. 366, 370 (1972) (acquittal on felony-murder based on armed robbery collaterally estopped prosecution for that robbery, as it established Turner was not present at it).

Ashe is easier to understand than *Grady* because *Ashe* can be seen as determining an issue that negated liability for the offense at issue in the subsequent prosecution, while the conviction in *Grady* clearly established a proposition that would have facilitated the imposition of liability in the felony proceedings. *See supra* notes 184-87 and accompanying text. But *Grady* applied collateral estoppel in the defendant's favor, holding that the prior convictions estopped further prosecutions for the same "conduct." *See id.* This result is perfectly consistent with *Ashe* if both are construed as involving a prior adjudication on the "ultimate fact" at issue in a second prosecution: In *Ashe*, the ultimate fact was Ashe's robbing six poker players; in *Grady*, it was Corbin's driving while intoxicated and not keeping to the right of the median. *See id.*; *supra* note 209. Both are based on the proposition that the proscription on successive prosecutions for the "same offence" encompasses not only prosecutions for offenses with the same or fewer legal elements, but also those involving distinct charges based on the same conduct.

The first option is premised on *Blockburger*, a test of legal drafting created to implement the prohibition on multiple punishments. *See supra* notes 36-39 and accompanying text. If this were the only constraint on prosecutions, a prosecutor could make a course of conduct the occasion for a series of prosecutions, each involving an offense that was technically distinct under *Blockburger*. This would effectively defeat the constitutional prohibition on successive prosecutions. *See Brown*, 432 U.S. at 169 (double jeopardy "is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units"). To prevent this, the Court has chosen to use collateral estoppel as an additional constraint on successive prosecutions, rather than replacing *Blockburger* with a standard specifically devised to address the distinct problems posed by this aspect of double jeopardy. (Criminal law does not require a concept of direct estoppel, as *Blockburger* suffices to prevent relitigation of the same "claim.")

Since it is intended to overcome the technical limitations of *Blockburger*, collateral estoppel must encompass (a) "issues" rather than "claims" and (b) factual rather than legal issues. It is possible to predicate criminal collateral estoppel on a "same evidence" test, in which "issues" are defined by the evidence presented. *See generally Introduction* to RESTATEMENT SECOND OF JUDGMENTS, (1980) (common law estoppel equated "issue" and "evidence"). The Court has rejected this tactic for an approach that equates "issue" with "ultimate fact," the latter being the application of a set of legal standards to a course of conduct. Once this application has been made, the prosecution may not relitigate this same "issue," i.e., may not have *an-*

merely using certain facts in a determination has no preclusive effects, so those facts can be used as part of the evidence involved in making another such determination.[273]

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other set of legal principles applied to this same conduct. *See Grady*, 495 U.S. at 510; *see also* Sealfon v. United States, 332 U.S. 575, 580 (1948) (second prosecution barred because "the core of the prosecutor's case was in each case the same"); *see generally supra* note 257; Poulin, *supra* note 209, at text accompanying note 50; MODEL PENAL CODE § 1.09(1)(c) (second prosecution barred when it is for "the same conduct" as the first); *accord* People v. Matheson, 671 P.2d 968, 971 (Colo. App. 1983) ("a subsequent prosecution is barred when it is for the same conduct").

The first application is not a bar when the second prosecution involves a distinct issue; an issue is distinct when it arises from (a) entirely different conduct or (b) a course of conduct that includes all or part of that at issue in the first proceeding. See *Felix*, 112 S. Ct. 1384-85. This analysis encompasses the *Diaz* rule, which holds that a prior proceeding is not bar to a prosecution for an offense which was not completed at the time of the first prosecution. *See supra* note 156 and accompanying text.

One problem in applying collateral estoppel is the distinct effects of acquittal and conviction. A conviction clearly establishes all conduct encompassed by the offense charged, but issues involving convictions have been rare because the Court has indicated that defendants are not collaterally estopped from litigating issues determined thereby. *See* Simpson v. Florida, 403 U.S. 384, 386 (1971) (per curiam) (prosecutor could not have used conviction to demand "an instruction to the jury that, as a matter of law, petitioner was one of the armed robbers in the store that night"). Issues involving acquittals have arisen more frequently and been more problematic: In *Ashe*, the Court seemed to assume that an acquittal establishes that a defendant did not engage in the conduct charged. *See Ashe*, 397 U.S. at 445-46. This, however, exaggerates the effect of an acquittal, which is more properly interpreted as establishing that the state failed to prove its charges beyond a reasonable doubt. *See, e.g., Dowling*, 493 U.S. at 348-49; *Seley*, 957 F.2d at 723 (*Dowling* "introduced a new perspective on the meaning of the 'ultimate fact' decided in the first trial. Instead of meaning that certain acts did not happen, an acquittal means that they were not proved beyond a reasonable doubt.").

Under the analysis set out in the text above, collateral estoppel should also encompass the determination of defenses to criminal liability. While this may be true, its utility is likely to be limited by the Court's apparent determination to limit the scope of collateral estoppel in criminal cases. *See, e.g.*, Standefer v. United States, 447 U.S. 10, 23-24 (1980) (declining to apply nonmutual estoppel in criminal cases).

273. This was the situation in *Felix*: the Missouri prosecution for attempting to manufacture methamphetamine was based on Felix's receiving a shipment of supplies in that state. *See supra* notes 191-93 and accompanying text. He was convicted; that conviction was a preclusive determination of the ultimate fact involved in the charge, i.e., that Felix attempted to manufacture methamphetamine by taking delivery of supplies needed for its manufacture. *Felix*, 112 S. Ct. at 1380. It did not, however, preclude the ultimate fact at issue in the Oklahoma conspiracy charge, which alleged that Felix conspired to, *inter alia*, manufacture the same drug. *Id.* at 1385. To establish this ultimate fact, it was necessary to apply a different set of legal principles to facts which were distinct even though they included the facts used in the Missouri case. *Id.* at 1382-85. The Oklahoma prosecution would have been precluded if it had been based on (a) the same legal principles at issue in the first prosecution, or (b) only the facts at issue in that prosecution. *Id.* If the second prosecution had been for the same crime, attempting to manufacture

Applying this analysis to CCE/RICO prosecutions produces the following results:[274] First, assume that a defendant is prosecuted for mail fraud, a federal crime and a RICO predicate.[275] After the conclusion of this prosecution, an indictment is returned charging her with a substantive RICO offense and using the facts at issue in the mail fraud prosecution as one of two predicates for the charge; the other involves another offense and different facts. She argues that the mail fraud prosecution collaterally estops the government from proceeding on the RICO charge because it relies on conduct at issue in the first case. Her argument will fail because the RICO prosecution is based on conduct in addition to that which was at issue in the first case. Therefore, it involves a determination of ultimate fact distinct from that involved in the mail fraud case, and the latter does not preclude the former.[276]

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methamphetamine, it would have been barred by *Blockburger* as a second prosecution for the "same offence." *Id.* at 1382. If it had been based on nothing but the facts at issue in the first case, it would have been barred by collateral estoppel as construed in *Grady* because both cases involved the same "ultimate fact," i.e., application of a set of criminal law principles to one set of facts. *Id.* at 1382-85; *see generally Grady*, 495 U.S. at 540 (Scalia, J., dissenting) (means "that prosecutors who wish to use facts sufficient to prove one crime . . . to establish guilt of another crime must bring both prosecutions simultaneously; but that those who wish to use only *some of* the facts establishing one crime . . . can bring successive prosecutions").

This interpretation of "ultimate fact" is based on the current Restatement of Judgments, which provides that when "an issue of fact or law is actually litigated and determined by a valid and final judgment, *and the determination is essential to the judgment*, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT SECOND OF JUDGMENTS § 27 (1982) (emphasis added). *See also id.* at cmt. j (question "is whether the issue was actually recognized . . . by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action, unless there is a basis for an exception."). *Cf.* Ashe v. Swenson, 397 U.S. 436 (1970) (adopting ultimate fact standard without including the "essential to" language); *but see* Sealfon v. United States, 332 U.S. 575, 578 (1948) ("conclude[s] those matters in issue which the verdict determined though the offenses be different"). Though *Ashe* did not include the present Restatement's language, it adopted this aspect of the test. *See Ashe*, 397 U.S. at 444; *see generally* United States v. Head, 697 F.2d 1200, 1205 (4th Cir. 1982) (under *Ashe*, double jeopardy is "not engaged by collateral estoppel which, if applied, would merely restrict proof but not make conviction impossible").

274. This discussion implicitly assumes, for analytical purposes, that predicates are not lesser included offenses of a CCE/RICO charge. *Cf.* discussion *supra* part III (C)(1)(b)(i). For the use of collateral estoppel in civil RICO cases, *see, e.g.*, J.M. Muniz, Inc. v. Mercantile Texas Credit Corp., 833 F.2d 541, 543 (5th Cir. 1987); Anvan Realty & Management Co. v. Marks, 680 F. Supp. 1247, 1249-50 (N.D. Ill. 1988).

275. *See* 18 U.S.C. § 1961(1)(B) (1988); *see generally* discussion *supra* part III(A)(1).

276. *See, e.g.*, United States v. Jenkins, 902 F.2d 459, 462-69 (6th Cir. 1990); United States v. Ruggiero, 754 F.2d 927, 935 (11th Cir.), *cert. denied*, 471 U.S. 1127 (1985); United States v. Russotti, 717 F.2d 27, 35 (2d Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); United States v. Bloome, 784 F. Supp. 23, 32-34 (E.D.N.Y. 1992).

Now assume the sequence is reversed: The government prosecuted this defendant on the substantive RICO charge hypothesized above and then, after that prosecution was concluded, indicted her for mail fraud; the mail fraud charge was based on the conduct that was used as evidence of a predicate offense in the RICO case. She argues that the RICO prosecution collaterally estops the government from pursuing the mail fraud charge because the latter is based on the "entirety" of conduct that was at issue in the first case.[277] She would prevail under the analysis presented above because the first prosecution involved a determination of ultimate fact based on all of the conduct at issue in the second prosecution.[278]

As with *Blockburger*, however, the lower federal courts have distorted this analysis to avoid finding that prosecution of the predicate is foreclosed by prosecution of a CCE/RICO offense.[279] The Seventh Circuit evaded the issue by relying on policy, finding that it is "not realistic to

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Cf. United States v. Bailin, No. 89 CR 668, 1991 WL 126279, *2 (N.D.Ill. at 1991) ("collateral estoppel precludes use of the acquitted counts as RICO predicate acts in a further prosecution"). This hypothetical assumes that the RICO offense was complete at the time the mail fraud charges were brought, so that the *Diaz* exception does not apply. *See supra* note 156 and accompanying text.

277. *See supra* notes 203-04 and accompanying text.

278. The success of the argument is also supported by the fact that there would be no reason why the government could not have pursued the mail fraud charges in the first prosecution. *See generally Ashe*, 397 U.S. at 447 (prosecution conceded first case was "a dry run for the second. . . . But this is precisely what the constitutional guarantee forbids"); *see also* Brown v. Ohio, 432 U.S. 161, 169 n.7 (1977)(exception to double jeopardy "may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not . . . [yet] been discovered despite the exercise of due diligence"); United States. v. Maza, 764 F. Supp. 1451 (M.D. Fla. 1991) (CCE count dismissed for lack of due diligence).

The hypothetical above is not subject to the rule that allows an issue to be relitigated in "a subsequent action [involving] a lower standard of proof." *Dowling*, 493 U.S. at 348; *see also* United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361-62 (1984). The cases require proof beyond a reasonable doubt and the following findings: To convict on the RICO charge, the government would have to prove beyond a reasonable doubt that the defendant engaged in the conduct constituting mail fraud, although it would also have to prove other elements; to convict of mail fraud, the government would have to prove the same conduct under the same evidentiary standard. Therefore, the "lower standard of proof" principle does not apply in this instance. And whether the defendant was convicted or acquitted, each prosecution would require application of a set of criminal law principles to the facts at issue in the mail fraud charge; this application results in a determination of ultimate fact that precludes relitigation of the matters encompassed thereby.

279. *See, e.g.*, *Esposito*, 912 F.2d at 65. *Cf.* United States v. Russo, 906 F.2d 77 (2d Cir. 1990) (prosecution of predicate following acquittal of RICO charge precluded under *Grady*). The scenario hypothesized may arise less often than the first scenario because in this version the prosecutor has everything she needs to know to bring charges for the mail fraud offense. In the first scenario, it may not have been possible to pursue the RICO charge at the time the mail fraud charge was brought, as

expect a responsible prosecutor dealing only with a single predicate offense . . . to determine at that time that it is . . . prudent to proceed" under RICO.[280] Other courts have found that such prosecutions are not barred because predicates involve conduct distinct from that at issue in a compound offense and/or because *Grady* applies only when the conduct will be used to prove "the entirety of an element" at issue in the latter proceeding.[281]

An even more interesting permutation of *Grady* arises if the government brings ensuing prosecutions for CCE and RICO charges.[282] No reported case analyzes this scenario, probably because of the practical difficulties involved in bringing such prosecutions. Assume, however, that the government prosecuted defendant Y for CCE, alleging that she committed six drug offenses (#1-6) in concert with 8 other people (A-H). After that prosecution ended, the government charged her with a substantive RICO violation based on the allegation that she had engaged in a pattern of racketeering activity comprised of the commission of four federal drug offenses, one murder and one arson.[283] The drug

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the investigation may not have uncovered evidence of the additional predicate act(s) and/or of the relationship to the enterprise. *See generally supra* note 278.

In an interesting pre-*Grady* case, the Sixth Circuit held that collateral estoppel did not bar the government from pursuing a RICO charge using state bribery offenses as predicates when, in a prior proceeding, the jury had acquitted the defendant of Hobbs Act charges that were based on the same conduct at issue in six of ten bribery charges used as predicates in the RICO count. United States v. Jenkins, 902 F.2d 459, 462-69 (6th Cir. 1990).

280. United States v. O'Connor, 953 F.2d 338, 344 (7th Cir. 1992), *cert. denied*, 112 S. Ct. 1979 (1992); *see also Esposito*, 912 F.2d at 67 (applying *Grady* would create "a constitutional requirement that the prosecution must include in a compound offense indictment all of the possible charges on substantive offenses arising out of each of the predicate offenses. As a practical matter, this would make a RICO trial, which frequently is brought against multiple defendants and contains multiple counts, unwieldy.").

281. *See, e.g.*, United States v. Bloome, 784 F. Supp. 23, 33-34 (E.D.N.Y. 1992). *Bloome* found that *Grady* did not bar using conduct at issue in a prior prosecution as a predicate in an ensuing RICO prosecution because it was used as evidence of the RICO enterprise but did not, itself, prove the "entirety" of that element. *See supra* note 258. *Accord* United States v. Calderone, 917 F.2d 717, 724 (2d Cir. 1990) (Newman, J., concurring) (*Grady* bars prosecution when "conduct previously prosecuted is to be used to 'establish' the element of the second crime, which I think must mean 'constitute the entirety of the element.").

282. When CCE and substantive RICO convictions are secured in a single proceeding, courts uphold cumulative sentences on the premise that Congress intended the offenses to be distinct. *See, e.g.*, United States v. Muhammad, 824 F.2d 214, 219 (2d Cir. 1987), *cert. denied*, 484 U.S. 1013 (1988); United States v. Love, 767 F.2d 1052, 1061 (4th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986); United States v. Phillips, 664 F.2d 971, 1010-14 (5th Cir. 1981), *cert. denied sub nom.* Myers v. United States, 457 U.S. 1136 (1982); Meinster v. United States, 457 U.S. 1136 (1982), *sub nom.* Platshorn v. United States, 459 U.S. 906 (1982); *see also* discussion *supra* part III(A)(2).

283. *See generally* discussion *supra* part III(A)(1).

offense predicates reiterate conduct that was at issue in the first prosecution; the murder and arson predicates do not. The enterprise is alleged to have been an illegal "association in fact" made up of defendant Y plus A, C, E and G, all individuals involved in the first case, and individuals M, O, S, and W, none of whom were involved in that prosecution. Y challenges the RICO charge, arguing that it violates double jeopardy. Under *Blockburger*, RICO is clearly an offense distinct from CCE, so the court turns to the *Grady* analysis presented above. The critical inquiry, of course, is whether the second prosecution involves the relitigation of any ultimate fact determined in the first case. Since the second prosecution is based on conduct in addition to that involved in the first, her argument fails under this analysis. If it were based on "the entirety" of the conduct at issue in the CCE case, her argument would prevail because the RICO case would involve nothing more than a redetermination of the same ultimate fact, i.e., did Y engage in specified conduct which violated CCE or RICO? The only difference between the two would be the application of a different legal standard in each, and this, of course, was held insufficient in *Grady*.

(iii) Garrett Analysis

Some courts apply a test based on *Garrett*, which proceeds in this fashion:

> The first step is to determine whether Congress intended that each . . . be a separate offense. If such was not Congress' intent, there is no statutory grounds for two prosecutions . . . . [I]f Congress intended there to be separate offenses, and hence separate prosecutions, the second step is to determine whether the second prosecuted offense is . . . the 'same offense' . . . within the . . . Double Jeopardy Clause.[284]

To illustrate this analysis, assume that a defendant was convicted of crimes which qualify as RICO predicates and then indicted for substantive RICO violations.[285] He contends that the RICO charges violate *Grady*'s "conduct" test.[286]

A court that employs the *Garrett* test will find, first, that Congress intended RICO and its predicates to be separate offenses because it authorized cumulative punishments for them.[287] This requires the court to decide if the RICO offenses involved in the second prosecution are the "same" as the predicates at issue in the first; it does this by applying *Garrett*, not *Grady*.[288] These courts limit *Grady* to "simple"

284. United States v. Gonzalez, 921 F.2d 1530, 1535-36 (11th Cir.), *cert. denied*, 112 S. Ct. 178 (1991) (citations omitted).

285. *See, e.g.*, *Gonzalez*, 921 F.2d at 1537.

286. *See id.* *See also* discussion *supra* part III(C)(1)(b)(ii).

287. *See Gonzalez*, 921 F.2d at 1536; *see also id* at n.5; *see generally supra* note 107 and accompanying text.

288. *See Gonzalez*, 921 F.2d at 1536.

crimes and use *Garrett* to analyze CCE and RICO.[289] The rationale is that while the latter are not exempt from double jeopardy constraints, they involve conduct that is far more complex—temporally, spatially and behaviorally—than that which is at issue in simpler, more traditional offenses.[290] For that reason, these courts find that *Garrett* was not overruled by *Grady* but, instead, survives as the analysis to be employed for crimes involving "multilayered" conduct.[291]

While the distinction between "simple" and "complex" crimes may be reasonable for double jeopardy purposes, there are problems with this analysis. First, not only did *Garrett* not analyze the relationship between compound offenses and their predicates, it assumed, albeit "for purposes of decision," that predicates are lesser included offenses.[292] Second, in applying *Garrett*, which addressed successive prosecution and multiple punishment arguments, some courts seem to conflate the *Blockburger*-multiple punishment analysis with a successive prosecution analysis, coming perilously close to suggesting that successive prosecutions are permissible if Congress authorizes them.[293] Third, though these courts agree that complex offenses are governed by a distinct analysis, they do not agree on how that analysis proceeds; some rely, at least in part, on pragmatic considerations such as the difficulty of as-

289. *See* United States v. Pungitore, 910 F.2d 1084, 1109 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2010 (1991) (Court did not mean to bar "successive prosecutions in cases of compound-complex felonies such as RICO, which involve . . . acts occurring at different times in different places"); *accord* United States v. Evans, 951 F.2d 729, 735 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1966 (1992); Ladner v. Smith, 941 F.2d 356, 363 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1665 (1992).

290. *See, e.g.*, United States v. LeQuire, 943 F.2d 1554, 1559 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 3037 (1992): "*Garrett* is more appropriate . . . in RICO situations, which can run over an extended period of time and involve a large number of individuals. *Grady* . . . is more applicable in single offense situations, such as drunk driving"; *see also* United States v. Arnoldt, 947 F.2d 1120 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1666 (1992) (*Grady* governs "paradigmatic 'single course of conduct' " cases but RICO and CCE target " 'multilayered' instances of criminal conduct invariably occurring at different places and times [and] call for a calculus reflecting the concerns expressed in *Garrett*"); *accord* United States v. McHan, 966 F.2d 134, 139-41 (4th Cir. 1992); United States v. Smith, 963 F.2d 892, 894 (6th Cir. 1992); United States v. Giovanelli, 945 F.2d 479, 492 (2d Cir. 1991); United States v. Crosby, 789 F. Supp. 440, 444 (D.D.C. 1992).

291. *See supra* note 288 and accompanying text; *see also supra* note 154 and accompanying text.

292. *See supra* note 154 and accompanying text. Its holding on the successive prosecution claim was based on the premise that the CCE offense was not yet completed when the first prosecution was brought. *See supra* note 156 and accompanying text.

293. *See, e.g.*, *Gonzalez*, 921 F.2d at 1535-36; *Esposito*, 912 F.2d at 64. This results from the confusion that exists as to *Blockburger's* role in successive prosecution analysis; *compare Grady*, 495 U.S. at 517 n.8 *with* 495 U.S. at 526-29 (Scalia, J., dissenting). For older cases exhibiting the same confusion, *see, e.g.*, *Phillips*, 664 F.2d at 1009 n.55 (finding successive prosecution permissible under RICO because Congress authorized cumulative punishment for RICO and predicate offenses).

sembling a CCE/RICO prosecution.[294] Finally, none of the decisions offer any explanation as to why the Court established a dichotomous test for successive prosecutions, aside from an implicit recognition that *Grady* poses a significant obstacle to the successive prosecution of compound offenses and their predicates.[295]

2. Assessment

Double jeopardy principles are complex, uncertain and difficult to apply, even when offenses as straightforward as those at issue in *Grady* are involved. These difficulties multiply when it becomes necessary to analyze offenses such as CCE and RICO, which depart from the traditional model of criminal liability.

As explained earlier, until recently, criminal law generally assumed that there was a one-to-one correlation between an "act" and a "crime."[296] This assumption may derive from ancient rules of equivalence, such as the *lex talionis*' insistence on an "eye for an eye."[297] Whatever its origins, it served as a measure of the "harm" inflicted by

294. *See, e.g., Arnoldt*, 947 F.2d at 1127 (quoting *Garrett*, 471 U.S. at 790) ("contrary result would unduly infringe prosecutorial discretion and. . . 'force the Government's hand' with respect to" such prosecutions); *accord McHan*, 966 F.2d at 140 ("Because the conduct is layered in time, any different rule would frustrate the important governmental interest in prosecuting crimes.").

295. *See, e.g., Esposito*, 912 F.2d at 62 ("[p]rosecution on the . . . offenses which were listed as predicate acts in the earlier RICO indictment against him could implicate some of the concerns underlying the Double Jeopardy Clause, such as . . . the need to protect a defendant from prosecutorial overreaching . . . ."); *see also e.g., id.* at 63 ("Despite our unease about the turn of events presented by this case, we cannot translate it into a double jeopardy violation unless the two offenses . . . are 'the same offense . . . .' "); *see also supra* note 288. In *Felix*, the Court quoted *Garrett*'s caveat on applying traditional lesser included offense principles to CCE prosecutions, and then noted that most conspiracy cases,

> involve similar allegations of multilayered conduct. . . . Reliance on the lesser included offense analysis, however useful in the context of a 'single course of conduct,' is therefore much less helpful in analyzing subsequent conspiracy prosecutions that are supported by previously prosecuted overt acts, just as it falls short in examining CCE offenses that are based on previously prosecuted predicate acts.

112 S. Ct. at 1385 (citing *Garrett*, 471 U.S. at 788-89). After these remarks, however, the Court stated that it was relying on *Pinkerton*'s distinction between conspiracy and the substantive offense that is its target. *Id. See also* discussion *supra* part III(B)(2)(a); *supra* note 206.

296. *See* discussion *supra* part II.

297. *See, e.g.*, Carmona v. Ward, 576 F.2d 405, 426 (2d Cir. 1978) (footnotes omitted), *cert. denied*, 439 U.S. 1091 (1979):

> England had . . . a policy against disproportionate punishment . . . which can be traced to the laws of Moses. The *lex talionis*—an eye for an eye, a tooth for a tooth—was often a harsh law, but it did demand an equivalency between the offense and the punishment. A similar concept can be found in the law . . . of the early Greeks, the Angles and Saxons of pre-Norman England . . . and the Norse Vikings.

an act at a time when offenses were relatively few and each tended to target a distinct "harm."[298] *Blockburger* embodied this premise, using a "fact-element" test to catalog the offenses resulting from a course of conduct; proof of a distinct element is an indicia of additive "harm" warranting the imposition of further liability. *Brown* explicated the corollary that the absence of such an element precludes additional liability.

Blockburger's utility declines as criminal law moves from a "one act-one crime" model to a more complex paradigm: The turmoil in double jeopardy law results from the Supreme Court's efforts to adapt *Blockburger* so that it can respond to this shift, the onset of which has brought two radical changes in federal criminal law—a proliferation of offenses and the use of compound offenses.[299]

The *Blockburger-Brown* rules posit an identifiable hierarchy of offenses arrayed in order of decreasing "harms," with lesser offenses serially "nested" inside the greatest offense that has been articulated for a given category of "harm."[300] In this system, an offender's liability is limited to one offense from such an array for a given course of conduct. This is considered to be sufficient because each offense represents a

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Id. (footnotes omitted). For the *lex talionis*, *see Exodus* 21:24; *Leviticus* 24:20; *Deuteronomy* 19:21.

298. *See* discussion *supra* part II..

299. *See, e.g.*, United States v. Martinez-Torres, 556 F. Supp. 1266-67 (S.D.N.Y. 1983)(modification of *Blockburger* a "reaction to the recent proliferation of voluminous, vague, and overlapping statutes in our criminal justice system. . . . [S]uch a pervasive change has rendered inadequate judicial doctrines developed when . . . 'offense categories were relatively few and distinct' "). *See also* discussion *supra* part II(B).

300. For example, the MODEL PENAL CODE defines "homicide" as causing the death of another human being and divides it into murder, manslaughter, and negligent homicide, depending on the intent involved. Purposely causing death is murder, recklessly causing death is manslaughter and negligently causing a death, is negligent homicide. MODEL PENAL CODE arts. 210.1, 210.2-210.4 (1985). This ordering of offenses is logical because each represents a varying degree of "harm." Since criminal law is intended to discourage socially undesirable behaviors, it is reasonable to use such a device to ensure that liability can be adjusted to reflect the extent to which an offender's conduct departed from acceptable parameters. The lesser included offense rule implements this ordering by giving fact-finders the option of convicting of an offense that is less than, but encompassed by, the offense charged in an indictment.

This system works quite well when, as is true of the Model Penal Code, the draftsmen established a recognizable hierarchy of offenses. It encounters difficulties, however, when offenses in one hierarchy must compete with those from another. Under traditional tests, it is likely that neither will be the "same offence" because they were designed to target distinct "harms." When this occurs, it is necessary to decide if it is permissible to convict the defendant of an offense from each hierarchy; while the lesser included offense doctrine would not allow her to be convicted of multiple offenses from the same hierarchy, the issue becomes more complicated when the question is whether she can be convicted of multiple offenses consisting of one from each hierarchy.

gradient of the same "harm." This proposition becomes problematic (a) when offenses cannot be arrayed hierarchically and/or (b) when the legislature incorporates compound offenses, which impose liability for several components of such a hierarchy.

Grady presented the first problem as it implicated offenses that targeted the distinct "harms" of violating traffic laws and injuring others.[301] Though it has at least suggested that the double jeopardy

301. *See supra* discussion part III(B)(2)(b). *Grady* sought to solve the problem identified in *supra* note 294, by looking to the conduct that was at issue, implicitly equating "conduct" with "offense." In so doing, it followed a line of decisions refusing to allow imposition of liability for offenses when one was what this article terms a "lateral included offense" of the other. *See, e.g., Harris*, 433 U.S. at 682-83; *see also supra* note 193. The Court has called these offenses a " 'species of lesser-included offense.' " *See e.g., Grady*, 495 U.S. at 520; *Vitale*, 447 U.S., at 420.

Lateral included offenses are not "included" in the sense that all their elements are subsumed by another offense; they are "included" because both reach identical "harms," although not necessarily to the same extent. "Lateral" denotes that these offenses cannot be arrayed on a linear offense hierarchy but, instead, share a more complex relationship. The nature of this relationship is best illustrated by means of an example.

In *Grady*, Thomas Corbin had been convicted of driving while intoxicated and failing to keep to the right of the median when he was charged with manslaughter, negligent homicide and assault. As explained above, negligent homicide is a lesser included offense of manslaughter, so he could not have been convicted of both; assault is defined as inflicting bodily injury on another and, as such, is a lesser included offense of any form of homicide. *See, e.g.*, MODEL PENAL CODE art. 211.1 (1985). Each of these offenses is part of a "personal injury" hierarchy, which creates a series of increasingly harsh sanctions for conduct that injures another person. If the charges against Corbin had been limited to these offenses, it would have been clear that they represented a series of alternatives of descending import and consequences.

The included offense analysis becomes problematic, however, when it is necessary to cross hierarchies which, in this instance, meant comparing the "personal injury" offenses with offenses from a "traffic hierarchy" that included driving while intoxicated and failing to keep to the right. Offenses from the two hierarchies are not included in each other in the traditional sense because their respective elements are discrete. One can, for example, drive while intoxicated without causing the death of/or bodily injury to another person, and one can cause such injury or death without driving while intoxicated. Therefore, under *Brown*, 432 U.S. 161, the offenses are discrete and liability can presumably be imposed for each.

Grady sought to avoid this by relying on a new "species of lesser included offense"—the lateral included offense—that is based on conduct rather than technical offense elements. Though not identified as such in the opinion, the implicit rationale of this included offense is the equation of "act" and "crime" described earlier in this article. *See supra* discussion part II(A). *Grady*'s outcome is sensible only if one assumes that there is a one-to-one correlation between "conduct" and "offense": Corbin committed two criminal acts—driving while intoxicated and failing to keep to the right; by pleading guilty to two misdemeanors, he incurred liability for each act. Since the homicide-assault charges were based on no conduct other than these two acts, imposing liability for one of those charges would have allowed these acts to sustain liability for more than one offense in violation of the equation noted above. This conclusion holds whether the homicide/assault liability would have

clause does not bar making one act the predicate for multiple liability imposed in one proceeding, the Court held that such liability could not be pursued in sequential proceedings under the facts in *Grady*.[302] While it did not articulate an identifiable standard for implementing this result, the collateral estoppel analysis presented above accurately characterizes that outcome, or, at least, what it has become since *Felix*.

Unfortunately, while that analysis solves the *Grady* problem, it exacerbates the difficulties *Blockburger* poses for prosecutions involving CCE/RICO and their predicates: Under *Blockburger*, the predicates are clearly lesser included offenses and, while this is not an insurmountable obstacle for multiple punishment analysis, it is for successive prosecutions.[303] Given the *Blockburger* barrier, *Grady*'s incremental impact on successive prosecutions for CCE/RICO and their predicates may be slight, but by extending the barrier to successive prosecutions for CCE and/or RICO when the "same conduct" is at issue, it complicates the government's ability to use these statutes in sequence.[304] To avoid these restrictions, the lower federal courts are distorting and/or ignoring these standards, thereby adding to the confusion that exists in double jeopardy law.

IV. SCARFACE: A SPECULATION

> In the 1990s, crime became so organized it made the Mafia look like a 'Mom and Pop' shop. Chinese tongs and triads joined Columbian drug cartels, Japanese yakuza, Jamaican posses and our 'biker gangs' to create an international 'crime net.' Aside from its geographical scale, the net was so diversified in its activities that it successfully fought off most law enforcement attacks.[305]

This section describes forces that could create the "crime net" hypothesized above and uses SCARFACE, a fictitious weapon against such an entity, to consider the prohibitions of the double jeopardy clause and how they impact on compound criminal liability.

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been based on one of Corbin's wrongful acts or on both, as either would violate the act-offense correlation.

Grady, therefore, extended the lesser included offense rule to encompass identical or lesser conduct, as least in successive prosecution analysis. As explained earlier, its outcome is consistent with a theory of criminal collateral estoppel, but poses difficulties when dealing with compound offenses. *See infra* section IV for a dicussion of an alternative approach.

302. *See* discussion *supra* part III(B)(2)(b).

303. *See* discussion *supra* part III(C)(1).

304. *See* discussion *supra* part III(C)(1)(b)(ii); *see generally* United States v. Johnson, 967 F.2d 594 (9th Cir. 1992) (CCE prosecution following RICO prosecution in another district).

305. Warren, *supra* note 1. *See also infra* note 306.

A. *SCARFACE*

Early this year, Attorney General William Barr assigned three hundred FBI agents to a new program targeting street gangs, noting that the "increasing sophistication and scope" of their activities demands more expertise and "jurisdictional flexibility" than local law enforcement can provide.[306] In the 1950s and 1960s, the threat was La Cosa Nostra.[307] In the 1990s, it is likely to be an as yet unnamed multicultural, multinational combine that will be far more violent and far more sophisticated in its depredations than any of its predecessors.[308] Assume, therefore, that the 1990s saw the rise of such an entity, a "crime net" linking groups united only by their desire to earn the fabulous profits to be made in the illegal activities available in the late twentieth century. To combat this menace, Congress adopted a new statute, SCARFACE.[309]

SCARFACE was created for use against crime that operates on a national and international level. Its drafters believed that the scope of multinational crime put it beyond the effective reach of RICO or CCE. One problem was that CCE/RICO indictments against participants in the "crime net" tended to be so complex and require the joinder of so many defendants that processing and trying them burdened the judicial system; also, juries acquitted because they could not understand the charges or were angry at the length of the trial.[310] Another problem

306. *A New Look for Organized Crime*, SAC. BEE, Jan. 15, 1992 at B8. *See also id.* (estimated 350,000 U.S. gang members "working in organized criminal units" that cross state boundaries; some "are becoming international"; *see also* 137 CONG. REC. S8310-01 (daily ed. June 20, 1991) (statement of Sen. Specter) ("a subculture with a national market, international connections, incredibly complex strategies"). Six years ago, a Presidential Commission identified these groups as active in this country: La Cosa Nostra; tongs and triads; "outlaw motorcycle gangs;" Columbian cartels; the Japanese Yakuza; Jamaican Posses; and Russian, Irish, Cuban, Vietnamese, and Canadian gangs. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, THE IMPACT: ORGANIZED CRIME TODAY 33-128 (1986).

307. *See* discussion *supra* part III(A)(1).

308. *See, e.g.*, PINO ARLACCHI, MAFIA BUSINESS 213 (Martin Ryle trans., 1987) ("*large-scale crime* has recently emerged as a real and pressing problem on a global scale"); *see also id.* at 213-33; *see generally* 134 CONG. REC. S3127-01 (daily ed. Mar. 25, 1988) (statement of Sen. Graham) (new gangs "far more violent than the Mafia" and "increasingly expert in exploiting loopholes in the law").

309. *See* Warren, *supra* note 1.

310. *See generally* Anthony DeStefano, *The Prosecution's Restless: RICO Statute Again Suffers Legal Setback*, NEWSDAY, Oct. 20, 1991, at 7 ("mega-trials" can "be disastrous for the government"); Jerry Seper & Michael Hedges, *Acquittal Shakes up Investigators*, WASH. TIMES, July 17, 1990, at B1 (" 'jurors don't like complex cases, and this acquittal certainly attests to that' "); Marcia Chambers, *The Frailties of Megatrials are Numerous*, NAT'L L.J., Oct. 3, 1988, at 13 (after 21 month RICO trial, "jury deliberated less than 14 hours and acquitted all the defendants, including one . . . who admitted his guilt.").

was configuring an indictment that imposed liability commensurate with the defendants' culpability.

To understand why that was a problem, consider this example: the government wants to prosecute A and B for being executives in the "crime net." Along with directing the international activities of that operation, each led a domestic criminal organization, A in Chicago and B in Boston. In this country, each committed crimes that are predicates for substantive RICO or CCE charges; these are the "domestic predicates." In working with the "crime net," each was involved in similar activities, but these predicates arose from facts that differ in varying degrees from those at issue in the "domestic predicates"; these are the "multinational predicates." Assume this activity spanned six years and that the predicates are factually divisible into these categories:[311]

	A	B
DOMESTIC PREDICATES	12	15
Involving A/B	9	9
Not Involving A/B	3	6
Involving Crime Net	5	7
Not Involving Crime Net	7	8
MULTINATIONAL PREDICATES	16	18
Involving A/B	14	14
Not Involving A/B	2	4
Involving Domestic Group	4	3
Not Involving Domestic Group	10	11

Finally, assume that each was associated with the following persons in the course of these criminal ventures: In leading her Chicago organization, A associated with j, k, l, m, n and o; in leading his Boston organization, B associated with p, q, r, s, t and u.[312] In their respective roles in the "crime net," A associated with B, C, D, E and w; B associated with A, C, D, E, F, w and x.

Imagine the complications confronting a prosecutor who wants to

311. In the table on the next page, "involving A/B" denotes that a predicate act primarily committed by A or B implicated the other, as when, for example, A engages in a drug offense in concert with B. "Not involving A/B" denotes that one committed a predicate act without involving the other. "Involving crime net" denotes that a domestic predicate somehow implicated the affairs or facilities of the international organization. "Not involving crime net" indicates the contrary, i.e., that A or B committed the offense purely for the aggrandizement of their domestic crime organization. "Involving domestic group" denotes that A or B committed the offense in his/her role as a servant of the "crime net" but it also implicated his/her own domestic crime organization. "Not involving domestic group" indicates the contrary, i.e., A or B took advantage of his/her position with the "crime net" to commit offenses that were for his or her own personal aggrandizement.

312. Upper-case letters indicate crime "managers;" lower-case letters indicate "staff."

bring RICO and/or CCE charges based on all this activity. On the premise that both A and B were engaged in distinct spheres of criminal conduct, she might structure charges in this fashion:

	RICO COUNT #1—1962(c)
Persons:	A, B, C, D, E, F, w, x, j, k, l, m, n, o, p, q, r, s, t, u
Enterprise:	Crime Net
Predicates:	14 Multinational Predicates
Charge:	Using the predicates to conduct the enterprise
	RICO COUNT #2—1962(c)
Persons:	A, j, k, l, m, n, o
Enterprise:	Chicago Organization
Predicates:	12 Chicago Predicates
Charge:	Using the predicates to conduct the enterprise
	RICO COUNT #3—1962(c)
Persons:	B, p, q, r, s, t, u
Enterprise:	Boston Organization
Predicates:	15 Boston Predicates
Charge:	Using the predicates to conduct the enterprise
	RICO COUNT #4—1962(c)
Persons:	A, B, j, k, l, m, n, o, p, q, r, s, t, u
Enterprise:	Association in fact of these persons
Predicates:	9 Domestic + 14 Multinational
Charge:	Using the predicates to conduct the enterprise
	RICO COUNT #5—1962(c)
Persons:	A, B, j, k, l, m, n, o, C, D, E, w
Enterprise:	Association in fact of these persons
Predicates:	5 Domestic + 4 Multinational
Charge:	Using the predicates to conduct the enterprise
	RICO COUNT #6—1962(c)
Persons:	B, p, q, r, s, t, u, A, C, D, E, F, w, x
Enterprise:	Association in fact of these persons
Predicates:	7 Domestic + 3 Multinational
Charge:	Using the predicates to conduct the enterprise

These counts do not exhaust the permutations that can be derived from the facts above, but they serve to illustrate the problems that arise when RICO is applied to a complex factual situation.[313]

Assume that the prosecutor obtains an indictment that includes all these counts; A and B are convicted on all counts in which each is named and given consecutive sentences for each offense. They argue that this violates the multiple punishment prong of double jeopardy because it carves one crime into several, and thereby subjects them to multiple punishment for the "same offence."

313. Other charges could be assembled under 18 U.S.C. § 1962. *See infra* notes 317 & 318.

How would a court resolve this argument? The counts allege the "same" offense in that each charges a violation of the same statute, but it is permissible to convict and punish a defendant for committing multiple violations of one statute.[314] The issue, then, is whether these counts charge distinct violations of this statute, and it highlights a limitation of RICO: The scenario above suggests that A and B were participating in the "crime net" when they were acting as its executives *and* when each was leading their domestic criminal organization; in other words, it seems that the Chicago and Boston organizations were part of the "crime net." Indeed, the prosecutor has conceded as much in her first count, charging that all the Boston and Chicago personnel were involved in the operation of an enterprise consisting of the "crime net."

But by doing this, she has reduced the other charges to lesser included offenses: The conduct charged in Count 1 subsumes that charged in Counts 2-6, so each of the latter is a lesser included offense just as attempting murder is a lesser included offense of committing murder; in each instance, one charge relies on conduct of a lesser magnitude than that alleged in the other.[315] Under *Blockburger*, Counts 2-6 are the "same offence" as Count 1, which creates a presumption against multiple liability; Congress did not specify that one RICO offense can support multiple liability and punishments, and the Court has not spoken to this issue, so Counts 2-6 fail under extant double jeopardy tests.[316]

Even if the prosecutor avoided this problem by combining Count 1 with charges based on other provisions of RICO, any count based on activities attributable to the "crime net" will subsume counts based on the activities of its components.[317] Consequently, she must elect be-

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314. *See, e.g., supra* note 31.

315. *See supra* note 155 and accompanying text. To use the Court's phrase, Counts 2-6 are a "species of lesser included offense." *See* discussion *supra* parts III(B)(2)(b), III(C)(1).

316. *See, e.g.*, discussion *supra* Part III(C)(1)(a).

317. If, for example, a prosecutor charged that A and B violated 18 U.S.C § 1962 (b) by using a pattern of racketeering activity composed of various of the predicates listed above to maintain control of an enterprise consisting of the "crime net," this would subsume any charges based on analogous activity as to their respective domestic organizations. That is, if this charge included activities of the Boston and Chicago organizations, it would subsume the activity at issue in any other § 1962(b) charges: A prosecutor could not charge that A and B used a pattern of racketeering activity to maintain control of an enterprise consisting of a "crime net" which is comprised, in part, of the Boston and Chicago criminal organizations, and then bring additional § 1962(b) charges alleging that the defendants used the same pattern of racketeering activity to maintain control of enterprises consisting of the Boston and Chicago organizations. In this instance, the latter would be at least a "species of lesser included offenses" of the "crime net" charge. *See supra* note 199 and accompanying text. It might be possible to bring additional 1962 § (b) charges if the prosecutor (a) used a pattern of racketeering activity distinct from that at

tween (a) charging "crime net" offenses and their predicates or (b) neglecting the "crime net" offense for a series of counts, each based on conduct which would have been a component of that offense. If she chooses (a), her indictment will charge, at most, three RICO substantive counts, a RICO conspiracy count and the predicates; she may include one or more CCE counts, if they do more than reiterate the substance of the RICO counts.[318] If she chooses (b), she may not be able to bring all the charges in one proceeding, which will bring successive prosecution challenges.[319]

Under either alternative, the prosecutor cannot bring charges that are commensurate with the blameworthiness of the defendants' conduct. Concerned that this hampered the prosecution of intricate criminal organizations, Congress adopted SCARFACE, which resolves the problem by giving the prosecutor the option of combining RICO and/or CCE charges with a new charge: The statute makes it a crime to

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issue in the "crime net" charge, and (b) could somehow differentiate the Chicago and Boston organizations from the "crime net," perhaps by basing these charges on a time frame distinct from that at issue in the "crime net" charge.

318. Depending on the predicates available, she might be able to charge that A, B and their cohorts used the same pattern of racketeering activity (a) to violate 1962 § (a) by generating income used to operate an enterprise consisting of the "crime net" and (b) to violate 1962 § (b) by maintaining an interest in or control of the enterprise. *See* discussion *supra* part II(A)(1). Conduct which generates income used to operate an enterprise is at least arguably distinct from that used to maintain an interest in it. *See generally id.* It might not, however, be possible to add a 1962 § (c) count based on the same enterprise and pattern of racketeering activity, as this would require distinguishing "conducting" the affairs of the enterprise from (a) operating it and (b) maintaining an interest in or control of it. *See id.*

319. *See generally* FED. R. CRIM. P. 8(a), 8(b) (joinder of offenses and defendants); *see also* discussion *supra* part III(C)(1)(b). The text has implicitly assumed that if she were to pursue the "crime net" charges, she would do so in one proceeding. If she pursued them in different proceedings, they would presumably succumb to collateral estoppel under the rationale of *Ashe* and *Grady*. *See* discussion *supra* part III(C)(1)(b)(ii). If she pursued the "crime net" charges in one proceeding and the other, lesser RICO charges in subsequent proceedings, the latter would fail for the same reason. *See id.* If she pursued the lesser RICO charges in one proceeding and then charged the "crime net" offenses, the same result would ensue. *See id.* The distinction between the last scenario and decisions which hold that it is permissible to prosecute RICO predicates after prosecuting the RICO offense is that the lower federal courts hold that predicates are not lesser included offenses of a compound offense, so they can be pursued sequentially. *See* discussion *supra* part III(C)(1)(b). Even if one accepts this highly problematic premise, the same is not true of the greater-lesser RICO charges: they stand in the same relationship to each other as did the six robbery charges at issue in *Ashe*. *See supra* note 209; *see also* discussion *supra* part III(C). In each instance, the government has chosen to pursue part of a criminal transaction, rather than pursuing the transaction in its entirety. *See id.* Allowing the state to pursue the lesser RICO charges and then to prosecute the greater would be analogous to allowing it to prosecute for attempted murder and then to seek a conviction for having successfully completed that murder. *See, e.g., supra* note 29 and accompanying text.

"participate in a criminal syndicate and thereby facilitate the commission of at least three substantive violations of 18 U.S.C. § 1962 and/or 21 U.S.C. § 848 by the syndicate or by all or any of its members or associates."[320]

"Criminal syndicate" is defined as "a combination of persons, groups or composite legal or *de facto* entities, so structured that the combination its operations continue when members enter or leave it, which engages in and/or has the purpose of engaging in activity proscribed by the laws of the United States or any of its states if that activity is punishable by a term of imprisonment of not less than one year."[321] "Participate" is defined as:

> organizing, managing, directing, supervising or financing a criminal syndicate; engaging in or inducing others to engage in violence or intimidation to further its objectives; providing funds, resources, advice or expertise to be used in conducting, financing or managing its affairs; furthering its activities by soliciting or inducing an act or omission by a public servant in violation of his official duty."[322]

Individual violators are sentenced "to life imprisonment or death"; artificial entities can be "dissolved, reorganized or placed under government control for a specified period."[323]

SCARFACE's premise is that it is a distinct offense to participate in a criminal organization of sufficient complexity to perpetrate at least three substantive RICO and/or CCE offenses.[324] It adds a new increment to federal compound liability: Presently, one can be convicted of a RICO/CCE offense and the predicates on which it rests; under SCARFACE, one can be convicted of a SCARFACE offense plus the

320. 18A U.S.C. § 666(a) (West 1999). There is also a SCARFACE conspiracy provision. *See* 18A U.S.C. § 666(y) (West 1999).

321. 18A U.S.C. § 666(b) (West 1999). The definition is based on a Nevada statute. *See* NEV. REV. STAT. ANN. § 207.370 (Michie 1991).

322. 18A U.S.C. § 666(c) (West 1999). This definition is based on an Arizona statute. *See* ARIZ. REV. STAT. ANN. § 13-2308 (1991).

323. 18A U.S.C. § 666(e) (West 1999); *see generally* OHIO REV. CODE ANN. § 2923.34 (Baldwin 1992).

324. In a sense, SCARFACE makes a crime to be an accomplice to the commission of multiple RICO/CCE offenses. As noted earlier, criminal law holds an accomplice liable for offenses that he facilitates, but it has not imposed a distinct liability for the act of doing so. *See supra* note 163. *See also* MODEL PENAL CODE § 2.06(1); ROLLIN PERKINS & RONALD BOYCE, CRIMINAL LAW 757-58 (3d. 1982). *Pinkerton* also does this by holding a conspirator liable both for conspiracy and for substantive offenses which result from that conspiracy. *See supra* note 163. SCARFACE achieves an analogous result by imposing liability for the conduct that facilitated the commission of the CCE/RICO offenses, as well as Liability for those offenses. Federal criminal law presently recognizes that one can be held liable as an accomplice to CCE/RICO offenses, but this merely allows the imposition of liability for that offense. *See, e.g.*, United States v. Pungitore, 910 F.2d 1084, 1132 n.68 (3d Cir. 1990). The virtue of SCARFACE is that it allows imposition of a distinct liability in addition to that for the substantive offenses.

RICO/CCE offenses it gave rise to plus their predicates. SCARFACE avoids the difficulties involved in trying to combine RICO and/or CCE to address the activities of a criminal network, while retaining the efficiencies of pleading and proof common to those statutes.

B. *Double Jeopardy—Double Standard?*

The statute hypothesized above has a pragmatic aspect in that it remedies a flaw in RICO and CCE: the virtue of both statutes is that because each is composed of generalized elements, they permit a prosecutor to tailor the definition of an offense to the facts at issue in a given situation, thus giving her the ability to address unique permutations of "organized" conduct; the defect they share is the implicit premise that organization, or "complexity," is a unitary phenomenon, so that crime is divisible into "complex" and "simple" behavior. This premise makes it difficult to use them, singly or in combination, to address the harms produced by a multiplex criminal confederation, which is comprised of several organizational layers and engaged in activities that vary as to nature and location. A statute such as SCARFACE remedies this, providing a weapon to be used against such an entity.[325]

SCARFACE was not, however, created for pragmatic reasons, but as a device to explore the interaction between double jeopardy and compound liability. Earlier, this article critiqued how the prohibitions on multiple punishment and successive prosecution for the "same offence" have been applied to CCE and RICO; the sections below consider how this analysis might be improved.[326]

1. Multiple Punishment

This standard can be formulated as follows: The double jeopardy clause prohibits imposing multiple, cumulative punishments for the "same offence" [unless the legislature has authorized this result].[327] The last phrase seems anomalous—how can a legislature override a constitutional prohibition? The Eighth Amendment has not, for example, been interpreted as outlawing "cruel and unusual punishments except when authorized by the legislature."[328]

The phrase becomes reasonable if this standard is construed as re-

325. It is possible to imagine statutes that go beyond SCARFACE, making it a crime to commit multiple SCARFACE offenses, but there is a point of diminishing returns in terms of sanctions: Of what utility is it to impose multiple sentences of life imprisonment or death? The severity of the sanctions imposed for such offenses may return this aspect of double jeopardy analysis to where it began centuries ago: when offenses are capital offenses, there is little need to consider multiple punishment and/or successive prosecution issues. *See, e.g.*, *supra* note 20.

326. *See* discussion *supra* part III(C) (critique of extant analysis).

327. *See* discussion *supra* parts II(A), III(B).

328. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

quiring that punishment be *legal*, rather than as formulating an acceptable crime-punishment ratio. It derives from the proposition that fixing punishment is a legislative function; the Court's role is to ensure that lower courts do not deviate from legislatively established punishments, and thereby impose "illegal" punishments. This was *Lange's* premise; it simply held that a court cannot impose punishment different in amount or in kind from what the legislature prescribed.[329] The Court has said that the double jeopardy clause does not limit a legislature's ability to set punishments, though other constitutional provisions do so.[330]

If setting punishments is a legislative function, and double jeopardy merely limits a sentencing court to penalties defined by the legislature, why has imposing cumulative punishments for the "same offence" been regarded as problematic? Why has the Court made explicit legislative authorization a condition for such punishment? The answer lies in the historic assumptions that punishment should be both legal and proportional.

Under the double jeopardy clause, punishments are legal if they are fixed by the legislature.[331] Multiple punishment analysis assumes that legislatures ordinarily set one punishment per crime; from this, it follows that cumulating punishments for a crime is an extraordinary occurrence.[332] This analysis does not question a legislature's ability to impose multiple sanctions for *a* crime.[333] What it sees as problematic is the situation in which a legislature has created distinct offenses, each of which applies to specific conduct and carries an additive penalty.

This is problematic because criminal law traditionally relied on the "one act-one crime" model of liability detailed earlier.[334] That model

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329. *See Ex Parte* Lange, 85 U.S. (18 Wall.) 163, 178 (1871) (sentance "pronounced without authority" was void); *accord* Jones v. Thomas, 491 U.S. 376, 383 (1989) (*Lange* established "that the Double Jeopardy Clause prohibits punishment in excess of that authorized by the legislature," not "the broader rule suggested by its dictum."); *see also* discussion *supra* part II(A).

330. *See Whalen*, 445 U.S. at 689 n.3 (due process and the Eighth Amendment); Bell v. United States, 349 U.S. 81, 82 (1955) (punishment for federal crimes "is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment.").

331. *See supra* notes 324-25 and accompanying text; *see also* discussion *supra* part III(B).

332. *See, e.g, Whalen*, 445 U.S. at 691-92 ("assumption . . . is that Congress ordinarily does not intend to punish the same offense under two different statutes").

333. It is, for example, common to impose both a fine and a term of imprisonment for committing an offense. *See, e.g., Hunter*, 459 U.S. at 370 (Marshall, J., dissenting) (acceptable to prescribe fine and prison term for one offense); *accord Whalen*, 445 U.S. at 688 (CCE and RICO also provide forfeiture as a third alternative.). *See* discussion *supra* part III(A).

334. *See* discussion *supra* part II(A); *see also Hunter*, 459 U.S. at 370-71 (Marshall, J., dissenting):

> [A] State cannot be allowed to convict a defendant two, three, or more times simply by . . . defining nominally distinct crimes . . . . [T]here would

is adequate for a simple society.[335] Although American society has become complex and legislatures have created offenses that deviate from this model, it remains the working assumption of multiple punishments analysis. Its effect is to cast doubt on the legality of the practice noted above, in which a legislature compounds the liability for specific conduct by making it the focus of distinct criminal statutes.

The logic involved here is as follows: Punishment is legal if it is prescribed by a legislature; a punishment is imposed for a crime. Crimes are defined to prohibit socially undesirable behavior; by defining a crime and setting punishment for it, the legislature has [sufficiently] addressed such a behavior. It is, therefore, not reasonable to assume that a legislature repeatedly addressed the same category of socially undesirable behavior. Since this assumption cannot be made, cumulative punishments for offenses that target the same conduct are impermissible unless a legislature explicitly authorized this result. If it did so, such punishment is legal under the double jeopardy clause; if it did not do so, the punishment may not be legal and cannot be imposed.

The issue left unresolved by this syllogism is the reason for assuming that a legislature articulates only one offense for each category of socially undesirable behavior. The solution, aside from efficiency, lies in the idea that punishment should be proportional to the crime.[336] This concept was a feature of the common law and is encompassed by the Eighth Amendment's prohibition on "cruel and unusual punishments."[337] Factoring it into the analysis above reveals why legislatures

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be no limit to the number of convictions that a State could obtain on the basis of the same act, state of mind, and result. A State would be free to create substantively identical crimes differing only in name, or to create a series of greater and lesser[-]included offenses, with the first crime a lesser[-]included offense of the second, the second a lesser[-]included offense of the third, and so on.

335. *See* dscussion *supra* part II(B).

336. This example illustrates the efficiency factor: assume that a legislature enacted five different statutes, each of which made it a different crime to park in front of a hospital; someone who parked in front of a hospital could be charged with, convicted of and punished for all five offenses or any subset thereof. This would be an inefficient way to reach the conduct at issue, both because of the legislative effort involved in enacting the five statutes and because of the complications that could arise in bringing prosecutions for a "set" or "subset" of offenses. Also, while this would not violate the double jeopardy clause, it could offend other constitutional guarantees, notably the protection against vague statutes. *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

337. *See supra* note 325. For the common law rule and its effect on the Eighth Amendment, *see, e.g.*, Solem v. Helm, 463 U.S. 277, 284-86 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted . . . in common-law jurisprudence."); Weems v. United States 217 U.S. 349, 372-73, 377 (1910). On its origins, *see, e.g.*, Carmona v. Ward, 576 F.2d 405, 426 n.6 (2d Cir. 1978) (common law "policy against disproportionate punishment, the ancient origins of which can be traced to the laws of Moses"); *see also* Anthony F. Granucci,

use one offense per type of behavior: conduct is defined as "criminal" in order to control it; this is done by imposing punishment.[338] The reasons for punishing vary, but all assume an equivalence between the punishment assessed and the gravity of the conduct.[339] This equivalence is essential if punishment is to be "effective" under any criteria; the premise is that when a legislature outlaws a variety of conduct, it fixes a punishment sufficient to discourage persons from engaging in it.[340]

From this, it follows that when a legislature has affixed a punishment, it is presumptively sufficient; it is not reasonable to assume that a legislature would set a penalty that was insufficient to accomplish the purpose of inflicting punishment. From the aim of assessing sufficient punishment, it follows that a legislature will articulate only one offense per undesirable conduct, as doing otherwise poses the risk that offenders will be held liable under only part of the applicable offense categories, and thereby avoid all of the punishment warranted by their conduct.[341] The premise that legislatures assess punishment sufficient for each offense produces the assumption that a legislature's directing multiple offenses and multiple punishments against a single category of conduct may not have been the intended result and so may not be "legal." Courts cannot, therefore, impose punishment of this sort unless the legislature explicitly identified it as legal.

Assuming that these premises are valid, how do they implicate double jeopardy? It derived from the *autrefois* pleas, which sought to bar repetitive prosecutions.[342] The concern here is with the legality and proportionality of punishment, both issues that are analyzed under the Eighth Amendment.[343] If multiple punishment is properly an as-

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"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CAL. L. REV. 839 (1969).

338. *See* discussion *supra* part II(A).

339. *See supra* note 17 and accompanying text. As to what is meant by the "gravity" of the conduct, *see infra* notes 375-78 and accompanying text.

340. "Discourage" encompasses all the ends of punishment, i.e., deterrence, incapacitation, rehabilitation and/or retribution. *See supra* note 17 and accompanying text.

341. The premise that legislatures articulate only one offense per category of undesirable conduct does not exclude the use of lesser included offenses. *See, e.g., Jeffers*, 532 F.2d 1101, 1109-10 ("different degrees exist . . . not so that numerous convictions can be obtained against one defendant, but so that for one homicide, the proper degree of censure and punishment can be meted out"). Since they are alternatives, lesser included offenses are not redundant offenses targeting identical conduct. *See* discussion *supra* part III(B).

342. *See* discussion *supra* part II(A).

343. In *Harmelin*, Justice Scalia demonstrated that historically, "cruel and unusual" denoted punishments that were "illegal because not sanctioned by common law or statute." *Harmlin*, 111 S. Ct. at 2696 n.10. *Accord* Furman v. Georgia, 408 U.S. 238, 317-18 (1972) (Marshall, J., concurring); Granucci, *supra* note 337 at 839, 860; *see also* United States v. Zavala-Serra, 853 F.2d 1512, 1518 (9th Cir. 1988) (If

pect of double jeopardy, it must reach an interest distinct from those cognizable under the Eighth Amendment; if not, these issues are better analyzed under that amendment.[344]

Since the Court has said that the double jeopardy clause does not limit a legislature's ability to assess punishment, it would not seem to include a distinct proportionality principle.[345] If, therefore, multiple punishment analysis encompasses an interest distinct from those analyzed under the Eighth Amendment, it must implicate the legality of punishment.

Since *Lange* was decided, the Eighth Amendment has become the means for challenging punishments that deviate from those set by a legislature.[346] The premise is that punishments which are within legislatively prescribed penalties for an offense are legal; those which are not, are illegal.[347] Arguably, this Eighth Amendment jurisprudence does not reach the unique issues posed by compounding liability, which raises the legality of cumulating sanctions *across* offense categories.[348] Multiple punishment analysis does address these matters, probably because compounding can be considered to involve some of the evils inherent in successive prosecutions.[349] In order, therefore, to decide if this analysis is sufficiently distinct to warrant its retention as a separate

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sentence "does not exceed statutory limits, we will not overturn it on eighth amendment grounds."); United States v. Jumper, 898 F.2d 157 (9th Cir. 1990) (sentence within statutory limits "may not be overturned as a violation of the eighth amendment"). As to proportionality analysis under the Eighth Amendment, *see supra* note 17.

344. *See* WESTEN & DRUBEL, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 114-15.

345. *See supra* note 334 and accompanying text; *see also* discussion *supra* part III(B). *Cf.* United States v. Halper, 490 U.S. 435, 450 (1989) (double jeopardy protects against "a sanction so disproportionate to the damages caused that it constitutes a second punishment"). *See also infra* notes 371-72 and accompanying text.

346. *See supra* note 329.

347. *Id.*

348. *Id.* Eighth Amendment analysis focuses on the correlation between *an* offense and *a* punishment but does not consider the cumulative effect that compound liability can have. *See* discussion *supra* part III(A). It has, however, addressed a type of compound liability in considering the permissibility of recidivist sentencing provisions. *See* Solem v. Helm, 463 U.S. 277, 288-99 (1983). Such provisions cumulate penalties based on an offender's prior criminal conduct and, therefore, represent a type of compound liability, although one outside the scope of this essay.

349. *See supra* note 21 and accompanying text. The liability that results from given conduct can be compounded: (a) by using multiple prosecutions to impose liability for several discrete offenses or (b) by doing this in one proceeding. *See id.* Since the double jeopardy clause was intended to prevent (a), it was easy to assume it was also meant to prohibit (b). *See supra* note 300. When the double jeopardy clause was adopted, multiple felonies could not be pursued in one proceeding, which made it unnecessary to consider if it was permissible to compound liability in the absence of successive prosecutions. *See supra* note 38.

aspect of double jeopardy, it is necessary to consider the scope of that protection.

Double jeopardy's distinguishing characteristic is its focus on the "same offence."[350] The successive prosecution ban furthers unique policies by prohibiting repetitive attempts to pursue such an offense, and so is peculiar to the Fifth Amendment.[351] Multiple punishment analysis is more difficult to bring within the ambit of the clause: It does not limit the amount of punishment that can be imposed for the "same offense"; even if it did, this would be an issue of proportionality subsumed by the Eighth Amendment.[352] At the moment, it merely requires that legislative intent to cumulate liability for the "same offence" be made explicit; in other words, it bars "inadvertent" compounding.

The requirement that compounding be "advertent" is the product of applying the syllogism described above to compound liability.[353] Liability can be compounded in three ways: the oldest method is to divide one offense into several; this is "temporal" compounding.[354] Another method, used for RICO and CCE, creates layers of liability by making it a separate offense to commit other crimes in a given context; this is "vertical" compounding.[355] The final alternative is to define several unrelated offenses, all of which apply to a category of conduct; this is "lateral" compounding.[356] Each violates the premise that legislatures address undesirable conduct by articulating one offense for each variety of such conduct; temporal compounding splits one crime into several, vertical and lateral compounding use one course of conduct as

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350. *See* discussion *supra* part III(C).

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

352. *See supra* note 337 and accompanying text; *see also* discussion *supra* part III(C).

353. *See supra* page 337.

354. *See generally supra* notes 43 and 49.

355. *See, e.g.*, discussion *supra* part II(A).

356. For an example of this, see State v. Wolske, 420 N.W.2d 60 (Wis. 1988) which upheld convictions for homicide by operating a motor boat while intoxicated and for homicide by negligent operation of a motor boat even though both were based on the death of one person.

> [T]he nature of the conduct proscribed by each statute protects a distinct interest. . . . Where the statutes intend to protect multiple . . . interests of the victim and the public, multiple punishments are appropriate. . . . The intoxication statutes are grounded on the principle that persons should be punished for operation of a vehicle while intoxicated because it creates 'a risk that will not be tolerated.'. . . The negligence statutes are grounded on the principle that persons should be punished for operation of a vehicle in a highly negligent manner creating unreasonable risk and high probability of death or harm to another.

Id. at 62-63 (citations omitted). *See also* Craig Albee, Note, *Multiple Punishment in Wisconsin and the Wolske Decision: Is It Desirable to Permit Two Homicide Convictions for Causing a Single Death?*, 1990 WIS. L. REV. 553.

the predicate for multiple offenses.[357]

Multiple punishment analysis requires that compounding under any of these methods be advertent in order to ensure that the result is legal. Since it subscribes to the "one act-one offense" premise, it assumes that the legislature did not mean for identical conduct to provide the predicate for multiple offense liability; from this, it follows that imposing such liability absent explicit legislative approval would inflict illegal punishment, in that the sentencing court would be assessing a sanction not prescribed by the legislature.[358] The only effect of extant multiple punishment analysis is, therefore, to require that compounding be explicit.

Even if one accepts the "one act-one offense" premise, this analysis includes a flaw that has produced much of the confusion that presently exists in double jeopardy jurisprudence.[359] That flaw lies in its definition of "offense," which is the *Blockburger* test.[360] *Blockburger* is an antiquated standard, the product of concerns which are no longer relevant.[361] Its defect is that by using a "fact" test, it makes conduct the measure of an offense.[362] The problem with equating "conduct" and "offense" is that it assumes an incident of criminal conduct pro-

357. *See* Albee, *supra* note 356 at 668; *see also supra* note 325.

358. *See, e.g., supra*, note 327 and accompanying text. When a legislature enacts a "layering" statute or splits one offense into several, there should be no doubt that it intended to compound the liability that results, because it is the product of a conscious legislative choice. The issue is more uncertain when such liability results from the apparent fortuity that several statutes reach the same conduct. Since the legislature did not specifically approve compounding in this instance, it is uncertain as to whether it is legal to do so. In stating that the conduct in question merits X quantum of punishment under statute A and Y quantum under statute B, the legislature has created this conundrum: Does its failure to specify that liability may be compounded under these provisions signify that the legislature regarded the punishment prescribed by each as "enough" for the conduct at issue, so that compounding produces punishment beyond that which the legislature deemed sufficient? Or does each address distinct aspects of this conduct, so that cumulating the penalties they respectively prescribe produces a sanction equivalent to the evils of that conduct?

359. As long as the offenses at issue are the "same," this premise is not problematical, both because of the efficiency issues noted above and because there does not seem to be any reason for making conduct the predicate for two identical offenses. *See supra* note 334 and accompanying text. To use the example given above, no benefit would ensue if a legislature were to make parking in front of a hospital five identical offenses: Under the Eighth Amendment, the penalty that could be imposed for conviction of all five could not differ markedly from that which could be imposed if this were one offense. *See also* Rummel v. Estelle, 445 U.S. 263 (1980) (cannot make "overtime parking a felony punishable by life imprisonment"). And if the offenses were identical, it would not be possible to pursue them in sequential prosecutions. *See generally* discussion *supra* parts II(A), III(B).

360. *See* discussion *supra* part II(A).

361. *See supra* note 292 and accompanying text; *see also* discussion *supra* part II(B).

362. *See* discussion *supra* part II(A); *see also Whalen*, 445 U.S. at 693-94 (rape "same" as felony-murder because "[a] conviction for killing in the course of a rape

duces only one socially undesirable consequence, so that it is sufficient if an offender is convicted of, and punished for, *one* offense.[363] This ignores the realities of modern criminal law, which recognizes that acts can have several consequences, each warranting a distinct sanction.[364] The Supreme Court has recognized this, holding that there is no limit on the number of offenses which can result from a course of conduct.[365] Because it realizes the flaw in *Blockburger*'s conduct test, the Court has reduced it to a rule of statutory construction which is overridden by demonstrable legislative intent.[366]

Unfortunately, that tactic creates an uncertain standard which can produce arbitrary and clearly incorrect results, especially when compound liability is at issue.[367] Because, as is explained below, multiple punishment analysis serves a distinct interest, the Court should discard *Blockburger* and adopt a "legal identity" test which focuses on whether offenses target the same "harms."

This test is the product of two premises, the first of which settles the purpose of a multiple punishment inquiry. The premise is that only one legislatively established "punishment," which can consist of several discrete sanctions, can be assessed for each offense of which an offender is convicted. It clarifies what has heretofore been implicit, which is that a double jeopardy multiple punishment analysis concerns the legality of punishment in a sense distinct from that addressed by the Eighth Amendment.

An Eighth Amendment legality analysis considers whether a punishment is authorized by statute.[368] A multiple punishment analysis considers whether multiple statutory punishments are imposed for one crime. Its "legality" principle is concerned with *procedural* proportionality, which derives from the proposition that there is *a* punishment for each crime.[369] This common law postulate was incorporated into the

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cannot be had without proving all the elements" of rape.); *see* discussion *supra* part II(B).

363. *See* discussion *supra* part II(B).

364. *Id. See also supra* note 349.

365. *See, e.g., Hunter,* 459 U.S. at 368-69 (legislature can authorize cumulative punishment under two statutes even though they "proscribe the 'same' conduct under *Blockburger*"); *accord supra* note 66; *see also* discussion *supra* part III(B).

366. *See* discussion *supra* part III(B). This is not true for successive prosecution analysis, which also uses *Blockburger. Id. See also* discussion *infra* part IV(B)(2).

367. *See* discussion *supra* part III(B); *see also* People v. Robideau, 355 N.W.2d 592, 603 (Mich. 1984) ("The difficulties with the *Blockburger* test lead us to the conclusion that it should be abandoned.").

368. *See supra* notes 341-42 and accompanying text.

369. *See supra* note 300 and accompanying text; *see also* IV BLACKSTONE, *supra* note 10, at *315 ("No man is punished twice for the same offense"), as translated in BLACK'S LAW DICTIONARY 1189 (Rev. 4th ed. 1968). "Procedural" proportionality focuses on whether a punishment was correctly prescribed. *See supra* note 300 and accompanying text.

double jeopardy clause but its role has never been defined.[370] It does not limit the amount of punishment a legislature can inflict for an offense; this is an issue of substantive proportionality analyzed under the Eighth Amendment.[371] And its insistence on a 1:1 correlation between crime and sanction appears irrelevant, since it seems absurd that a legislature would split the punishment it assesses for a crime into parts in order to impose multiple punishments.[372]

But the premise noted above does have a distinct function; it extends the principles of double jeopardy to include punishment, as well as prosecution, and thereby creates at least two important protections: One is that the state cannot use a proceeding which would not trigger the successive prosecution prohibition to impose a second punishment for an offense that has been sanctioned in a criminal prosecution. Though not articulated as such, this was the rationale of *United States v. Halper*, which held that double jeopardy barred the government from using a civil proceeding to collect a penalty that served only punitive purposes.[373] *Halper* was couched as a proportionality decision, but it actually applied this principle.[374] The second protection that emanates from this premise of the "legal identity" test is described below, in the discussion of the test's second premise.

The second premise is that an "offense" is the violation of a law which the legislature enacted in order to discourage specific conduct; such conduct is outlawed because it produces socially undesirable "harms."[375] Since offenses are created to prevent the infliction of "harms," it follows that they are discrete to the extent that they target discrete "harms." This aspect of the test replaces *Blockburger*'s "fact" analysis with a "harms" analysis.

It uses "harm" as a barometer of legislative intent: When offenses target identical "harms," punishment for each is barred; when they do

370. *See* discussion *supra* notes 19, 20.

371. *See supra* note 337 and accompanying text; *see also* discussion *supra* part III(B). "Substantive" proportionality focuses on the "fit" between a punishment and a crime; as opposed to procedural proportionality, which is concerned with the process by which a punishment was adopted, substantive proportionality examines its relationship to the gravity of the crime. *See, e.g.*, Solem v Helm, 463 U.S. 277, 288-99 (1983).

372. *See* Sigler, *supra* note 11, at 302.

373. *Halper*, 490 U.S. at 446-50. "[U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 448-49; *accord* United States v. La Franca, 282 U.S. 568, 573, 575 (1931).

374. *See supra* note 345; *see also Halper* 490 U.S. at 450 (penalty impermissible if it constitutes a "second punishment").

375. *See generally* Payne v. Tennessee, 111 S. Ct. 2597, 2605 (1991) (" 'true measure of crimes is the injury done to society' ") (quoting J. Farrer, CRIMES AND PUNISHMENTS 199 (London 1880)).

not, punishment for each is acceptable.[376] If, for example, one statute made it an offense to *attempt* murder and another made it an offense to *commit* murder, a "harms" analysis would establish that the attempt is a lesser included offense of the completed offense because it involves infliction of a lesser degree of the same "harm." Sanctioning both violates the first premise of this test by imposing two punishments for one crime.

Aside from barring the use of another proceeding to impose a second punishment, that premise prohibits imposing punishment for an offense and a lesser offense subsumed by it. This is the second protection noted above; the premise that each crime warrants only one punishment bars the imposition of punishment for both a greater offense and its component offenses. Doing this would contravene the principle of procedural proportionality which is the focus of multiple punishments analysis. In the example above, imposing cumulative punishment for attempting and committing murder would be illegal because the statutes reflect a hierarchy of "harms"; punishing an offender under two of these statutes is outside the legislative purpose of sanctioning the "harm" of causing death.[377] If, however, one statute made it an offense to commit murder and another made it an offense to buy an illegal firearm to be used in killing another human being, punishment could be imposed for both because each targets a distinct "harm," one being the death of a human being and the other being the fostering of an illegal trade in deadly weapons.[378]

The advantage of this approach is that it shifts the focus from *Block-*

376. *See, e.g.*, United States v. Woodward, 469 U.S. 105, 109 (1985) (intent to punish under two statutes established because they were " 'directed to separate evils' ") (quoting Albernaz v. United States, 450 U.S. 333, 343 (1981)); Ball v. United States, 470 U.S. 856, 864 (1985) (no such intent when "independent but overlapping statutes" were "not 'directed to separate evils' "); *see also Albernaz*, 450 U.S. at 343 (permissibility of cumulative punishment "reinforced" by fact that statutes "[are] directed to separate evils presented by drug trafficking.").

To some extent, the "legal identity" test transposes the rationale of the "dual sovereignty" exception to instances in which offenses are defined by the laws of a single sovereign. *See* discussion *supra* part II(B); *see generally* Moore v. People, 55 U.S. 13, 20 (1852) ("cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable"). *Id.* at 19 ("An offence . . . means the transgression of a law.").

377. *See supra* note 336. It would also be possible to bring a substantive proportionality challenge under the Eighth Amendment, arguing that punishing both the attempt and the completed crime inflicts a punishment disproportionate to the "harm" inflicted. *See supra* note 359 and accompanying text. If, however, the legislature determined that attempting to commit murder involved the commission of a "harm" distinct from that inflicted when the attempt was successful, it could provide for cumulative punishments for both offenses. *See supra* note 372; *see also* discussion *supra* part III(B).

378. *See supra* note 356.

burger's abstract, often arbitrary application to the purposes of the criminal law.[379] This avoids the unfortunate results that can occur under *Blockburger*, as when the *Whalen* majority found that rape was a lesser included offense of felony-murder.[380] A "harms" test eliminates this potential and facilitates the use of compound liability by allowing an offender to be punished for every offense attributable to her that involves the infliction of a discrete "harm."[381] Because it focuses on "harms," rather than "facts," it does not construe predicates as included offenses.

A "legal identity" test sees compound offenses as addressing multiple, distinct "harms." Temporal compounding dissects a course of conduct into separate offenses according to the respective "harms" involved. Vertical compounding approaches criminal conduct as layered, with predicates reaching the "harms" that are directly caused by the predicates and compound offenses reaching those that result from the committing predicates in a specified context.[382] Since each targets distinct "harms," neither is subsumed by the other. Finally, lateral compounding addresses conduct which can result in the coincident commission of multiple "harms:" when this occurs, compound liability is proper.[383]

The Court has used a version of this test on at least two occasions.[384] Adopting it would eliminate much of the confusion that surrounds the law of double jeopardy, as well as facilitating the use of compound liability as a necessary component of criminal law in an increasing complex society.

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379. *See Whalen,* 445 U.S. at 712 (Rehnquist, J., dissenting) ("applied to compound and predicate offenses, the *Blockburger* test has nothing whatsoever to do with legislative intent, turning instead on arbitrary assumptions and syntactical subtleties").

380. *Id.* at 694 n.8. Obviously, rape involves infliction of a "harm" distinct from that at issue in felony-murder, even when the latter is predicated on rape. The Court found that it was included under the statute at issue because a "conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." *Id. See also Robideau,* 355 N.W.2d at 597 (under *Blockburger* compound crime of first-degree criminal sexual conduct "same" as predicates of robbery or kidnapping). *Accord id.* at 604 ("If we were to conclude that only one conviction could result . . . the defendants, having completed the predicate felonies of kidnapping and robbery, could then embark on one of the most heinous crimes possible, with no risk either of a second conviction"). The *Robideau* court abandoned *Blockburger* because it found that it was unsuited for analyzing compound offenses. *Id.* at 603.

381. *See supra* note 341.

382. *See* discussion *supra* part III(A).

383. *See supra* note 349.

384. *See supra* note 373. The Second Circuit considered the "harms" each addresses in holding that cumulative punishment can be imposed for RICO and CCE. *See* United States v. Muhammad, 824 F.2d 214, 218 (2d Cir. 1987) ("directed to separate evils").

2. Successive Prosecution

If the Court were to reject *Blockburger*'s multiple punishment analysis for a "legal identity" test, what, if any, impact would this have on successive prosecution analysis? Since successive prosecution inquiries involve a "same offence" determination, the test could be used in this area. On the *Felix* facts, for example, it would permit prosecution of the conspiracy charge because conspiring to commit drug offenses involves a "harm" distinct from that involved in attempting to commit them.[385]

If, on the other hand, the government were to bring a prosecution for attempting to commit drug offenses after prosecuting the defendant for succeeding in that attempt, the second prosecution would be barred because no additional "harm" was at issue.[386]

The more interesting issue is how it might constrain the use of statutes such as RICO and CCE. In exploring this, it is helpful to return to the charges given in the SCARFACE hypothetical earlier in this section. Assume, then that the government did not pursue all the charges in one action but, instead, proceeded under three alternative scenarios: In scenario #1, it brought three prosecutions, the first for selected predicates, the next for RICO offenses and the third for SCARFACE. In scenario #2, it brought two prosecutions, the first for SCARFACE and the second for the RICO offenses and their predicates. In scenario #3, it brought three prosecutions, the first for RICO, the second for predicates and the third for SCARFACE. The text below considers how each of these fares under a double jeopardy successive prosecution analysis incorporating a "harms" test, and then under collateral estoppel.

(a) Double Jeopardy

Scenario #1: Here, the government prosecuted in order of increasing "harms," beginning with the predicates and progressing through to SCARFACE. If a "legal identity" test is used to identify offenses, the prosecutions are permissible because the predicates inflict "harms" that are distinct from those encompassed by RICO or SCARFACE, and each compound offense addresses "harms" distinct from those targeted by the other.[387] This test incorporates a factor lower federal courts have relied on to uphold prosecutions such as this; in characterizing

385. *See* discussion *supra* part III(B)(2)(b).

386. *See generally supra* notes 373-74 and accompanying text.

387. *See* discussion *supra* part IV(B)(1). SCARFACE differs from substantive RICO offenses in reaching the "harm" of facilitating the commission of multiple RICO offenses. *See* discussion *supra* part IV(A). It also targets a "harm" distinct from that at issue in RICO conspiracy; the latter consists of agreeing to the commission of one or more substantive RICO offenses, while SCARFACE is committed by facilitating the commission of a specified number of RICO offenses, of CCE violations or of a combination of RICO and CCE offenses. *See id.* As noted earlier, SCARFACE is more analogous to complicity than conspiracy. *See supra* note 320.

RICO and CCE as reaching "layered" conduct, these courts are actually citing the incremental "harms" addressed by compound offenses.[388] It replaces the dichotomy that some courts are using with a single standard; aside from consistency, the advantage of one test is that it preserves the appearance of fairness by avoiding a "double standard" for "simple" and "complex" offenses.[389] Also, if the Court were to adopt this "double standard," would it be necessary to articulate a third standard for "multiplex" offenses such as SCARFACE?

Scenario #2: Here, the government prosecuted in order of descending harms, beginning with SCARFACE and then pursuing the RICO and predicate offenses in one subsequent prosecution. This sequence would not be barred as a successive prosecution for the "same offense" under a "harms" approach to double jeopardy because in this analysis predicates are not lesser included offenses, for reasons which were explained above.[390] Just as RICO predicates are not lesser included offenses of RICO, RICO/CCE violations are not lesser included offenses of SCARFACE; since none of the offenses at issue in the second prosecution are included offenses of SCARFACE, that prosecution was not for the "same offence" as the first and is not, therefore, barred by double jeopardy.[391]

Scenario #3: Here, the government proceeded in no discernible order, commencing with RICO, followed by the predicates and then a prosecution for SCARFACE. For the reasons explained above, under a "legal identity" test, none of these prosecutions are for the "same offence" and, consequently, none offend the prohibition on double jeopardy.

(b) Collateral Estoppel

Even if a "legal identity" test were adopted, it would not alter collateral estoppel analysis because this aspect of double jeopardy is based on a policy of finality that is independent of the policies that underlie substantive criminal law.[392] But, as the discussion below illustrates, the

388. *See* discussion *supra* part III(C)(2). As is explained above, *Grady* is no bar because this is not a circumstance in which collateral estoppel would apply. *Id.*

389. It also avoids the complexities that arise in this situation: Assume the government prosecutes a defendant for a substantive RICO offense and its predicates; after this prosecution ended, it brought a second prosecution for a different substantive RICO offense and predicates, some of which were at issue in the first prosecution. Both prosecutions arose from the same course of criminal activity. In deciding whether the second prosecution is barred by double jeopardy, does the court (a) apply the "simple" test to the predicates and the "complex" test to the respective RICO offenses, or (b) apply the "complex" test to all offenses?

390. *See supra* notes 379-80 and accompanying text.

391. *See generally supra* note 379. The second prosecution may be barred by collateral estoppel. *See* discussion *infra* part IV(B)(2)(b).

392. *See* discussion *supra* part III(C)(2).

availability of an additional compound offense can alter the results of the analysis.

Analyzing scenario #1 produces the same conclusion that was reached in § III(C)(2) as to the permissibility of bringing a RICO prosecution that relies on predicates which were the subject of a prior prosecution. In each instance, the subsequent prosecution is not barred by criminal collateral estoppel because, under *Grady*, it does not involve the relitigation of an issue of ultimate fact that was resolved in the first proceeding.[393] Instead, as was explained in an earlier section, a subsequent prosecution for a more complex offense, whether RICO or SCARFACE, uses the conduct at issue in the predicates as "evidence," and criminal collateral estoppel does not extend to evidentiary facts.[394]

The second prosecution in scenario #2 is barred because it implicates the ultimate fact at issue in the SCARFACE proceeding. It does so because this prosecution involves nothing more than the conduct which was at issue in the first proceeding.[395] Under *Grady*, when a prosecution is based on "the entirety" of conduct at issue in a prior criminal proceeding, it is barred under *Ashe*.[396]

In scenario #3, the prosecution for the predicates is barred for the same reason that the second prosecution in scenario #2 is barred, i.e., it involves nothing more than the relitigation of the ultimate fact at issue in the RICO prosecution. The prosecution for SCARFACE can, however, proceed under the rationale governing scenario #1; that is, it does not involve relitigating an issue of ultimate fact resolved in a prior proceeding. Instead, it uses the conduct at issue in the first two prosecutions as "evidence" and, as noted above, criminal collateral estoppel does not extend to evidentiary facts.[397]

V. Conclusion

Though SCARFACE may be fictitious, compound liability is an established feature of federal criminal law, one that will be more widely used as criminal activity becomes more complex. Compound liability is a means of adapting criminal law to a world in which the primary concern is organized, rather than individual, criminal activity.

This liability is a source of difficulty for extant double jeopardy analyses because it gives the appearance of "doubling up" on the liability, and punishment, that results from one or more prosecutions. This appearance is produced by the unique structure of the varieties of compound liability identified in this article. Although this structure conforms to the basic requirements for imposing any type of criminal

393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*

liability, it resists analysis under the *Blockburger* test because that test reflects the assumptions of an older model of criminal liability. In order to alleviate the confusion that plagues double jeopardy analysis and facilitate the use of compound liability, it is necessary to discard *Blockburger* and replace it with a test that more accurately reflects the model of criminal liability that has emerged in the last fifty years.

Zarin v. Commissioner: Does a Gambler Have Income From the Cancellation of a Casino Debt?

I. INTRODUCTION

David Zarin, the Petitioner in *Zarin v. Commissioner*,[1] was a gambler who, entirely on credit, wagered and lost an enormous amount of money in an Atlantic City casino and then refused to pay the debt.[2] He later settled with the casino for a greatly reduced amount.[3] By all accounts, it appeared that David Zarin had finally beat the odds. However, the Commissioner of the Internal Revenue Service held the trump card. In a reviewed Tax Court decision it was determined that Zarin had realized income from the cancellation of indebtedness to the casino.[4] On appeal, the Third Circuit overruled the Tax Court decision, Zarin had again won.[5]

Zarin's entire ordeal with the Internal Revenue Service lasted almost ten years. He is now 72 years old and has lost both a decade of his life and his once thriving real estate development business.[6] While his story appears to be a sad tale of a compulsive gambler[7] crippled by a decade of bureaucracy, it is really a story of greed and excess ultimately saved by the system.[8] This case comment will present the facts of *Zarin*

1. 916 F.2d 110 (3d Cir. 1990) [hereinafter *Zarin II*]. Louise Zarin, David's wife, is also a party to the suit because the Zarins filed joint tax returns. *Id.* at 111 n.1.

2. *Id.* at 111-12.

3. *Id.* The sum of Zarin's troubles was $3,435,000 in gambling debt owed to Resorts International Hotel, Inc. *Id.*

4. Zarin v. Commissioner, 92 T.C. 1084 (1989) [hereinafter *Zarin I*]. Initially the Commissioner determined that Zarin had income from larceny by trick and deception but abandoned this claim in favor of the income from cancellation of debt argument. *Id.* at 1085.

5. *Zarin II*, 916 F.2d at 117.

6. *Old Sins Cast Long Shadows: An Atlantic City Developer's Tax Ordeal*, PR Newswire Association, Inc., Oct. 15, 1990, *available in* LEXIS, Nexis Library [hereinafter *Old Sins*]; *Today's News Update*, N.Y. L.J., Oct. 16, 1990, at 1.

7. *Zarin II*, 916 F.2d at 112. Though not a factor in this case, for a discussion of possible legal defenses of a compulsive gambler see Ann H. Rubin, Note, *Beating The Odds: Compulsive Gambling As An Insanity Defense*, 14 CONN. L. REV. 341 (1982).

8. Zarin was also saved by the system when his former girlfriend unsuccessfully sued him to seek recovery of over $13 million she had loaned him during 1978-80. Nemtin v. Zarin, 577 F. Supp. 1135 (D.N.J. 1983).

II in Part II,[9] and analyze the Third Circuit's decision in Part III.[10] In Part IV,[11] it will argue that although the end result of the Zarin II court's decision is correct, its rationale is questionable. In Part V,[12] this comment will present alternative arguments and policy considerations that yield the same result as the Third Circuit, but with hopefully a less questionable approach. Finally, the comment will conclude with Part VI.[13]

II. THE FACTS OF THE CASE

David Zarin, a developer and professional engineer, built and developed multi-family housing and nursing homes.[14] During 1978, two years after gambling was legalized in Atlantic City by the passing of the New Jersey Casino Control Act[15], he began work on housing projects in Atlantic City.[16] While working on these projects he occasionally stayed at the Resorts International Hotel (Resorts) in Atlantic City, New Jersey.[17]

In June 1978, Zarin applied for credit from Resorts to use for gambling.[18] After a credit check, Resorts granted him a $10,000 line of credit.[19] When gambling at Resorts, Zarin would usually play craps, his preferred game.[20] Most often, he would wager the full table limit, and as a result quickly developed a reputation as an extravagant "high roller".[21]

In the late summer of 1978, Resorts began to provide Zarin with the complimentary use of a three-room suite at the hotel.[22] By November 1979, the complimentary privileges and services had been expanded to include free meals, entertainment, and a limousine available twenty-

9. *See infra* notes 14-57 and accompanying text.
10. *See infra* notes 58-98 and accompanying text.
11. *See infra* notes 99-139 and accompanying text.
12. *See infra* notes 140-98 and accompanying text.
13. *See infra* note 199 and accompanying text.
14. *Zarin I*, 92 T.C. at 1085 (1989).
15. N.J. STAT. ANN. § 5:12-101 (West 1988).
16. *Zarin I*, 92 T.C. at 1085. Zarin was instrumental in building a significant portion of Atlantic City's low-income housing and received civic awards for his work. *Old Sins*, *supra* note 6.
17. *Zarin I*, 92 T.C. at 1085.
18. *Id.*
19. *Id.* The line of credit was granted even though derogatory information was received on Zarin through "Credit Central," a company that provides records of individuals who have gambled at casinos. *Id.*
20. *Id.*
21. *Id.* Indeed, Resorts considered Zarin to be a "valued gaming patron" who would attract large crowds to his table. *Id.* at 1086. The crowd, excited by his "high rolling," would often wager more than they would otherwise have gambled. *Id.*
22. *Id.*

four hours a day.[23] These privileges were even provided to Zarin's guests.[24] Casinos such as Resorts extend such "comps" to "retain the patronage of their best customers."[25]

During this same period, June 1978 to November 1979, Zarin's permanent line of credit was steadily increased to $200,000.[26] These increases were granted without any additional credit investigation by Resorts.[27] Zarin obtained gambling chips by signing "counter checks,"[28] known as "markers,"[29] for amounts up to his available line of credit.[30] While the markers did not reference chips, they did state that cash had been transferred.[31]

David Zarin had entered into an agreement with Resorts which called for them to hold his markers for the full ninety days allowed by law after which time he would redeem them with a personal check.[32] At all times during his gambling at Resorts, Zarin intended to repay any credit that was extended to him.[33] Between June 1978 and November 1979, Zarin had lost, on credit, $2,500,000 at the craps table.[34] He paid these debts in full.[35]

However, in October 1979 the New Jersey Division of Gaming Enforcement filed a complaint with the New Jersey Casino Control Commission against Resorts which alleged 809 violations of the casino regulations against credit abuses.[36] One hundred of these allegations pertained specifically to Zarin.[37] The Commission then issued an emergency order which effectively made further extensions of credit to Zarin illegal.[38] Despite the order from the Commission, Resorts continued to make credit extensions to Zarin under "considered cleared"[39]

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23. *Id.*
24. *Id.*
25. *Id.*
26. *Zarin II*, 916 F.2d at 112.
27. *Id.* at 111-12.
28. *Zarin I*, 92 T.C. at 1086.
29. *Zarin II*, 916 F.2d at 111. "A 'marker' is a negotiable draft payable to Resorts and drawn on the maker's bank." *Id.* at n.2. A gambler had to either issue a marker or pay cash to obtain gambling chips. *Zarin I*, 92 T.C. at 1086. Under New Jersey law gamblers in casinos may only gamble with chips, currency can't be used. *Id.*; *see also* N.J. STAT. ANN. § 5:12-101 (West 1988).
30. *Zarin II*, 916 F.2d at 111.
31. *Zarin I*, 92 T.C. at 1086.
32. *Id.*
33. *Id.*
34. *Id.* at 1087.
35. *Zarin II*, 916 F.2d at 112.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* "Considered cleared" credit treated Zarin's personal checks as a cash transaction and therefore the amount of the check was not included in determining when he had reached the extent of his available credit. *Id.* at n.3.

and "this trip only"[40] arrangements.[41] These practices, which in effect ignored the emergency order, were subsequently found to be illegal.[42]

By January 1980, Zarin had become a compulsive and uncontrollable gambler.[43] He was gambling at the craps tables as much as sixteen hours a day seven days a week.[44] Even though Zarin was consistently wagering up to $15,000 on each simple roll of the dice, he was not aware of the actual magnitude of his gambling debts.[45]

In the beginning of April 1980, Resorts again raised Zarin's credit line, this time to $215,000.[46] The same month, Zarin delivered personal checks and counterchecks to Resorts in the amount of $3,435,000.[47] The checks were all returned because they were drawn on insufficient funds.[48] By late April, Resorts completely cut off credit to David Zarin.[49]

Although Zarin indicated that he intended to fully honor his obligations, Resorts filed a complaint in New Jersey state court seeking payment on the unpaid checks.[50] Zarin denied liability by contending that the $3,435,000 debt was unenforceable under state regulations intended to protect compulsive gamblers.[51] In September 1981, Zarin and Resorts settled their dispute for $500,000.[52]

Subsequently, the Commissioner of the Internal Revenue Service determined that Zarin had a deficiency in his 1981 federal income taxes.[53] The Commissioner contended "that Zarin had recognized $2,935,000 of income [] from the cancellation of indebtedness" as a result of settlement with Resorts.[54] The Tax Court, in an eleven to eight decision, agreed with the Commissioner that Zarin had realized

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40. *Id.* at 112. "This trip only" credit extended Zarin temporary credit increases for his current trip to the casino but were required to be reduced before his next return. *Id.* at n.3.

41. *Id.* at 112. The action of these two practices led Zarin to believe that he no longer had a credit limit. *Id.* at n.3 (citing *Zarin I*, 92 T.C. at 1087).

42. *Id.* at 112. In July 1983, the New Jersey Casino Control Commission fined Resorts $130,000 after determining that the casino had violated the emergency order on thirteen occasions. Nine of the thirteen applied directly to Zarin. *Id.* at n.4.

43. *Id.* at 112. Zarin also claimed that "at the time he was suffering from a recognized emotional disorder that caused him to gamble compulsively." *Id.* at n.5.

44. *Zarin I*, 92 T.C. at 1087.

45. *Id.* at 1087-88.

46. *Id.* at 1088.

47. *Zarin II*, 916 F.2d at 112.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* (This settlement amounted to approximately fourteen cents on the dollar.).

53. *Id.*

54. *Id.* The gambling debt of $3,435,000 minus the settlement amount of $500,000 results in a difference of $2,935,000.

income from a discharge of debt.[55] His additional 1981 tax liability in his seventy percent bracket was found to be $2,047,245.[56] However, with accured interest, Zarin's tax liability had risen to over five million dollars by April 1990.[57]

III. The Third Circuit Decision

The sole issue before the Third Circuit was "whether the Tax Court correctly held that Zarin had income from discharge of indebtedness."[58] The lower court decision, which agreed with the Commissioner's argument, was entirely based on the "general rule that gross income includes income from the discharge of indebtedness."[59] This argument allows for the contention that when Zarin received the gambling chips worth $3,435,000, it was the functional equivalent of cash, and therefore he had not received income because he recognized an offsetting obligation to repay.[60] The Commissioner argued that since he owed $3,435,000 and only repaid $500,000 the difference represented income from the cancellation of indebtedness.[61] If a debt owed to a party is discharged, either in whole or in part, the debtor may realize income.[62]

A. *The Third Circuit Finds the Commissioner's Position Flawed*

The court emphatically stated that the Commissioner's income from discharge of indebtedness argument, which relied on Internal Revenue Code §§ 61 and 108, was misguided because § 61 does not define indebtedness, while § 108(d)(1) defines it only as a debt "(A) for which the taxpayer is liable, or (B) subject to which the taxpayer holds property."[63] The court held that "[i]n order to bring the taxpayer within the sweep of the discharge of indebtedness rules . . . the IRS must show that one of the two prongs in the § 108(d)(1) test is satisf[ied]. It has not been demonstrated that Zarin satisfied either."[64]

Under the first prong of § 108(d)(1), the court defined liability to be

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. I.R.C. § 108(e)(1) (CCH 1991) ("Except as otherwise provided in this section, there shall be no insolvency exception from the general rule that gross income includes income from the discharge of indebtedness.").
60. *Zarin II*, 916 F.2d at 113.
61. *Id.* at 112-13.
62. Treas. Reg. § 1.61-12(a) (1980) ("The discharge of indebtedness, in whole or in part, may result in the realization of income . . . . A taxpayer may realize income by the payment or purchase of his obligations at less than their face value.")
63. *Zarin II*, 916 F.2d at 113.
64. *Id.*

a "legally enforceable obligation to repay."[65] The court found that Zarin did not fit this definition because, as a matter of New Jersey law, the debt to Resorts was unenforceable and as such it was "clearly not a debt for which [he was] liable."[66]

Under the second prong of § 108(d)(1), the court focused on the section's requirement that the taxpayer hold property.[67] In particular, the court had to determine whether the gambling chips, held by Zarin, were "property" within the intent of the code section.[68] The Third Circuit agreed with the Tax Court's analysis concerning the property characteristics of chips, and concluded that the chips themselves had no economic substance.[69] As such, the court found that the chips were "nothing more than an accounting mechanism, or evidence of a debt, designed to facilitate gambling in casinos where the use of actual money was forbidden. Thus, the chips which Zarin held were not property within the meaning of I.R.C. § 108(d)(1)(B)"[70]

Since the loan was unenforceable, Zarin was not liable for the debt under the first prong, nor did he hold "property" under the second prong of § 108(d). Therefore, the court found that "Zarin cannot have income from the discharge of his debt."[71]

B. *The Third Circuit Applied a Disputed Debt Argument to Find for the Taxpayer*

Instead of finding the settlement with Resorts to be income to Zarin from cancellation of his debt, the court applied a rare, judicially created

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65. *Id.*

66. *Id.* The Tax Court held that the Commissioner had not met its burden of proof to show that the debt to Resorts was enforceable. *Zarin I*, 92 T.C. at 1090. The Third Circuit concurred with this finding and added that New Jersey law supports the conclusion that the debt was unenforceable. "Under N.J. Stat. Ann. § 5:12-101(f), any credit violation is 'invalid and unenforceable for the purposes of collection . . . [.]' " *Zarin II*, 916 F.2d at 113 n.7; *see also* Resorts Int'l Hotel, Inc v. Salomone, 429 A.2d 1078, 1082 (N.J. Super. Ct. App. Div. 1981) ("[C]asinos must comply with the Legislature's strict control of credit for gambling purposes. Unless they do, the debts reflected by players' checks will not be enforced . . . .").

67. *Zarin II*, 916 F.2d at 113-14.

68. *Id.*

69. *Id.* The Tax Court held that "the 'property' argument simply overemphasizes the significance of the chips. As a matter of substance, the chips in isolation are not what petitioner purchased. . . . Obviously the chips in this case were a medium of exchange within the Resorts casino and in that sense were a substitute for cash." *Zarin I*, 92 T.C. at 1099-1100.

"Despite the taxpayer's attempts to sway them, both courts avoided being distracted from the form of the loan." Lee A. Sheppard, *A Gambling Exception to Cancellation of Indebtedness Income?*, 49 TAX NOTES 1516, 1516 (1990).

70. *Zarin II*, 916 F.2d at 114.

71. *Id.*

exception to cancellation of debt income.[72] The disputed debt or contested liability doctrine, relied on by the court, is premised on the rationale that "if a taxpayer, in good faith, disputed the amount of a debt, a subsequent settlement of the dispute would be treated as the amount of debt cognizable for tax purposes. The excess of the original debt over the amount determined to have been due is disregarded . . . ."[73] The court illustrated this approach with a "simple" example:

> [I]f a taxpayer took out a loan for $10,000, refused in good faith to pay the full $10,000 back, and then reached an agreement with the lendor that he would pay back only $7000 in full satisfaction of the debt, the transaction would be treated as if the initial loan was $7000. When the taxpayer tenders the $7000 payment, he will have been deemed to have paid the full amount of the initially disputed debt. Accordingly, there is no tax consequence to the taxpayer upon payment.[74]

The court relied most heavily on *N. Sobel, Inc. v. Commissioner*[75] to underscore its argument for contested liability.[76] In *Sobel*, a bank sold the taxpayer 100 shares of its stock in exchange for his note of $21,700.[77] However, a year later in 1930, the taxpayer sued the bank for rescission asserting that the bank failed to perform promises under their contract.[78] After five additional years, during which time the bank became insolvent,[79] the dispute was finally settled for one-half the original value of the note.[80] This amount the taxpayer paid in full.[81] The Board of Tax Appeals held that the taxpayer could deduct the amount paid as a loss in the year that the dispute was settled.[82] Of additional importance to the *Zarin II* court,[83] the *Sobel* court also held that "the release of the note was not the occasion for a freeing of assets and that there was no gain [for the taxpayer] under the doctrine of *Kirby Lumber Co. v. United States* . . . ."[84]

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72. William R. Culp, Jr. & Richard E. Marsh, Jr., *Avoiding Cancellation of Debt Income Where the Liability is Disputed*, J. TAX'N, May 1991, at 288.

73. *Zarin II*, 916 F.2d at 115.

74. *Id.*

75. 40 B.T.A 1263 (1939).

76. *Zarin II*, 916 F.2d at 115.

77. *Sobel*, 40 B.T.A. at 1264.

78. *Id.*

79. *Id.* When the bank became insolvent, the 100 shares of stock became worthless. *Id.* at 1265.

80. *Id.* at 1264.

81. *Id.* at 1264-65.

82. *Id.* Whatever the cost of the stock, whether the full or a reduced amount, it was a complete loss to the stockholder because the shares were worthless. *Id.* at 1265. The main issue decided was that the taxpayer's loss deduction would be available only in 1935, the year that the liability on the note was liquidated. *Id.*

83. *Zarin II*, 916 F.2d at 115.

84. *Sobel*, 40 B.T.A at 1265 (citing Kirby Lumber Co. v. United States, 284 U.S. 1 (1931)).

In *Kirby Lumber*, a company sold its own bonds and then later that year repur-

The Third Circuit asserted that "[t]here is little difference between the present case [*Zarin*] and *Sobel*."[85] The court stated that the disagreement between Resorts and Zarin was grounded on a disputed liability based on unenforceablity.[86] The settlement merely fixed the amount of the debt: "No income was realized or recognized. When Zarin paid the $500,000, any tax consequence dissolved."[87]

The *Zarin II* court also noted that the Tenth Circuit decision in *United States v. Hall*,[88] addressed a case with "a factual situation strikingly similar to the one at issue."[89] In *Hall*, the Tenth Circuit was confronted with a situation where a taxpayer owed an unenforceable gambling debt.[90] This debt was originally owed to the Las Vegas Club, a Las Vegas, Nevada gambling establishment.[91] A private individual

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chased them for less than their original sale price. The court held that this action resulted in a realization of income to the company. *Kirby Lumber*, 284 U.S. at 1. The basic doctrine derived from this holding is that income is realized by a discharge of indebtedness at less than its face amount, at least to the extent that assets are freed. *See* Vukasovich, Inc. v. Commissioner, 790 F.2d 1409, 1415 (9th Cir. 1986).

Kirby Lumber has spawned widespread discussion and many court cases concerning questions of cancellation of indebtedness income. *See* Boris I. Bittker & Barton H. Thompson, Jr., *Income from the Discharge of Indebtedness: The Progeny of United States v. Kirby Lumber Co.*, 66 CAL. L. REV. 1159 (1978). Of these, the "freeing of assets" language in *Kirby Lumber*, especially in relation to issues of recourse verses non-recourse debt and transactional analysis, appears to be the most problematic. *See* Commissioner v. Tufts, 461 U.S. 300 (1983); Bowers v. Kerbaugh-Empire Co., 271 U.S. 170 (1926); Vukasovich, Inc. v. Commissioner, 790 F.2d 1409 (9th Cir. 1986); Commissioner v. Rail Joint Co., 61 F.2d 751 (2d Cir. 1932); Gershkowitz v. Commissioner, 88 T.C. 984 (1987); Fulton Gold Corp. v. Commissioner, 31 B.T.A. 519 (1934).

The Internal Revenue Service has recently attacked the issue of nonrecourse debt cancellation head-on by stating that such debt cancellation will result in income even without any "freeing of assets" of the debtor. Rev. Rul. 91-31, 1991-20 I.R.B. 4.; *see also* John G. Schmalz et al., *IRS Insists That Reduction or Cancellation of Nonrecourse Debt Always Results in Income*, J. TAX'N, Aug. 1991, at 68.

For a general commentary on the complexity surrounding the issue of discharge of indebtedness, see Fred T. Witt, Jr. & William H. Lyons, *An Examination of the Tax Consequences of Discharge of Indebtedness*, 10 VA. TAX REV. 1 (1990); Kimberly S. Blanchard, *Discharge of Nonrecourse Debt: A Reexamination of the Distinction Between Recourse and Nonrecourse Debt and Related Issues*, 50 TAX NOTES 773 (1991); Louis A. Del Cotto, *Debt Discharge Income: Kirby Lumber Co. Revisited Under the 'Transactional Equity' Rule of Hillsboro*, 50 TAX NOTES 761 (1991).

85. *Zarin II*, 916 F.2d at 115.

86. *Id.* at 115-16.

87. *Id.*

88. 307 F.2d 238 (10th Cir. 1962).

89. *Zarin II*, 916 F.2d at 116.

90. *Hall*, 307 F.2d at 239. While at the time of the case licensed gambling was legal in Nevada, a gambling debt was nevertheless unenforceable. *Id.* at 239 n.2.

91. *Id.* at 239 ("The exact amount of the debt was not determined at the trial and the rather sketchy evidence touching the amount mentioned varying sums from a high of $478,000 to a low of $145,000.")

and associate of the club took over the debt by paying $225,000 to the club.[92] The taxpayer then transferred an interest in cattle worth $148,110 to the new creditor in complete satisfaction of his debt.[93] The court held that the taxpayer did not have any income from cancellation of indebtedness.[94]

The *Zarin II* opinion states that the basic holding in *Hall* was that: "In effect . . . because the debt was unenforceable, the amount of the loss and resulting debt cognizable for tax purposes were fixed by the settlement . . . ."[95] In addition, the *Zarin II* majority contends that *Hall* "lent its endorsement to the use of the 'contested liability doctrine.' "[96]

By treating the transaction between Zarin and Resorts as a disputed debt or contested liability, the court held that the $500,000 settlement merely "fixed the amount . . . of debt cognizable for tax purposes."[97] Since Zarin, in good faith, disputed his liability for the debt, settled his dispute with Resorts, and paid the settled amount, then "no adverse tax consequences attached to Zarin as a result."[98]

IV. Analysis of the Third Circuit Decision

The Third Circuit took a convoluted and somewhat questionable approach in its reasoning to reach the right conclusion: David Zarin should not be liable for income taxes on the losses that he incurred at the craps tables.

The *Zarin II* court identified the issue before it as "whether the Tax Court correctly held that Zarin had income from discharge of indebtedness."[99] In determining that the Tax Court's holding was incorrect, the court relied on an analysis of I.R.C. §§ 61(a)(12) and 108(d).[100] How-

92. *Id.*

93. *Id.* at 240. Prior to the transfer, the jury found that the parties had orally agreed that the amount of the gambling debt was $150,000. *Id.* at 239.

94. *Id.* at 241-42.

> A gambling loss is a hard reality but a[n unenforceable] gambling debt . . . has but slight potential and does not meet the requirements of debt necessary to justify the mechanical operation of general rules of tax law relating to cancellation of debt. It is only by the operation of the most artificial of standards that a gain based on cancellation of debt can be created from the transaction consummated by the transfer of cattle . . . . The cold fact is that the taxpayer suffered a substantial loss from gambling, the amount of which was determined by the transfer . . . . Courts need not apply mechanical standards which smother the reality of a particular transaction.

Id. at 241.

95. *Zarin II*, 916 F.2d at 115.

96. *Id.* at 115-16.

97. *Id.*

98. *Id.*

99. *Zarin II*, 916 F.2d at 112.

100. *See supra* notes 63-71 and accompanying text.

ever, by undertaking this analysis, the court stretched the meaning of the code sections to fit its desired end result.

The Internal Revenue Code states that gross income includes "all income from whatever source derived"[101] and specifically includes cancellation of indebtedness in gross income.[102] In addition, § 61 gross income has been judicially defined to include all "instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[103] However, the *Zarin II* court was confronted with the problem that although § 61 identifies cancellation of indebtedness within its inclusions in gross income,[104] "[s]ection 61 does not define indebtedness."[105] The court relied on the definition of indebtedness found in § 108(d)(1) to substitute for the lack of definition in § 61.[106] The court's reliance on § 108 was too much of a stretch.[107] "Section 108(d) expressly defines indebtedness solely for the purposes of § 108 and not for the purposes of § 61(a)(12)."[108]

> This is not so niggling an objection as it may initially sound. Section 61(a) is a provision of broad inclusion, listing items within the ambit of gross income, while § 108 serves to carve out specific exceptions to the broad reach of § 61(a). It is plausible that only a subset of all cancellation of indebtedness income, conceived in the broadest sense, would be made eligible for the carveout.[109]

The court, it seems, strained the confines of the code in its haste to equitably find that Zarin realized no gross income by reason of cancellation of indebtedness. This haste to back off from the Tax Court's cancellation of debt argument locked the court into its discussion of § 108(d) and into the convoluted rationale it applied to remedy the problems this argument caused.

By finding Zarin not liable for his debt because it was unenforceable under the first prong of I.R.C. § 108(d),[110] the court arrived in the awk-

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101. I.R.C. § 61(a) (CCH 1991).

102. *Id.* § 61(a)(12); *see, e.g.,* Treas. Reg. § 1.61-12(a) (as amended in 1980) ("The discharge of indebtedness, in whole or in part, may result in the realization of income."); *see* United States v. Kirby Lumber Co., 284 U.S. 1 (1931); *see also* Bittker & Thompson, *supra* note 84, at 1165 ("Debtors who ultimately pay back less than they received enjoy a financial benefit whether the funds are invested successfully, lost in a business venture, spent on food or clothing, or given to charity.").

103. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

104. I.R.C. § 61(a)(12) (CCH 1991).

105. *Zarin II*, 916 F.2d at 113.

106. *Id.*

107. Daniel Shaviro, *The Man Who Lost Too Much:* Zarin v. Commissioner *and the Measurement of Taxable Consumption*, 45 TAX L. REV. 215, 253 (1990) The stretch "reflected a lapse in judicial temperament: a haste to honor the equities of the case without thinking through how this could best be done." *Id.* at 254.

108. *Zarin II*, 916 F.2d at 118 n.3 (Stapleton, J., dissenting).

109. Shaviro, *supra* note 107, at 253.

110. *See supra* notes 65-66 and accompanying text for a discussion of the first prong of I.R.C. § 108.

ward situation of having to deal with Zarin's receipt of the $3,435,000 worth of gambling chips from Resorts in 1980. Normally, a borrower's receipt of loan funds is not treated as income since the borrower incurs a corresponding obligation to repay the loan.[111] Zarin did, however, receive $3,345,000 worth of credit from Resorts evidenced by his receipt of gambling chips.[112] He "correctly reported in that year no income from his dealings with Resorts. He did so *solely* because he recognized, as evidenced by his notes, an offsetting obligation to repay Resorts $3.4 million in cash."[113] The Third Circuit's finding of unenforceability of the debt merely negated Zarin's obligation to repay,[114] it did not negate the fact that he received the $3,435,000.[115] As such, Zarin would seem to have had a tax liability for at least $2,935,000 in gross income in 1980.[116]

The court agreed with the basic premise of this problem but stated that if their decision turned merely on unenforceablity, Zarin would have owed all or nothing.[117] The court reasoned that the fact there was a settlement between the parties meant that they attached value, albeit a low value, to the debt despite its apparent lack of enforceability.[118] To rationalize the settlement and the fact that Zarin still received at least $2,935,000 of unaccounted for funds in 1980, the court relied on an additional argument grounded on disputed debt or contested liability.[119]

Here again, however, the court stretched to fit the facts of the case within the narrow confines of the doctrine. The court described the doctrine by stating that when "a taxpayer, in good faith, disputed the amount of a debt, a subsequent settlement of the dispute would be treated as the amount of the debt cognizable for tax purposes."[120] The court relied on *Sobel* and *Hall* for support of the application of this doctrine.[121] The flaw in such an application of the contested liability doc-

111. Commissioner v. Tufts, 461 U.S 300, 307 (1983).

112. *Zarin II*, 916 F.2d at 114-16.

113. *Id.* at 117 (Stapleton, J. dissenting). Zarin recognized an obligation to repay the full amount and stipulated to this fact in the proceedings. *Zarin I*, 92 T.C. at 1092.

114. *See Zarin II*, 916 F.2d at 116-17 n.12.

115. *Id.*

116. The $2,935,000 represents the $3,435,000 debt less the $500,000 that he actually repaid. *See also* Sheppard, *supra* note 69, at 1517 ("Had the parties been treating any part of the loan as unenforceable, Zarin presumably should have recognized income to that extent upon receipt of the proceeds.").

117. *Zarin II*, 916 F.2d at 116-17 n.12.

118. *Id.* at 116.

119. *See supra* notes 72-98 and accompanying text for a discussion of the disputed liability doctrine.

120. *Zarin II*, 916 F.2d at 115.

121. *See supra* notes 75-96 and accompanying text.

trine was described by the Tax Court[122] and is also found in the very description of the doctrine offered by the Third Circuit.[123] The problem is that the cases relied upon by the court, and the court's own description of the doctrine, require a dispute as to the *amount* of the debt, that is an unliquidated debt,[124] in order to be applicable.[125] The Tax Court, in finding that both parties agreed and stipulated to the amount of the debt,[126] held "that Zarin's debt was liquidated, and therefore barred the application of *Sobel* and the contested liability doctrine."[127] In addition, the *Zarin II* court stated that the court in *Hall* "in effect" held that due to the unenforceability of the debt, the amount of the debt was fixed by settlement.[128] But the *Hall* court actually held that "[u]nder the circumstances of the case . . . the amount of the gambling debt . . . has no significance for tax purposes."[129]

It readily appears that the Third Circuit sidestepped from both the rationale of these contested liability cases and from the parties' own stipulated agreement as to the amount of the debt. Instead, the court decided that "[w]hen a debt is unenforceable, it follows that the amount of the debt, and not just the liability thereon, is in dispute."[130] This statement by the Third Circuit was completely conclusionary[131] and is not directly supported in the cases or the code.[132] In so holding, the court strained not only the general tax treatment of unenforceable debts[133] but also the basic doctrine of contested liability.[134]

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122. *Zarin I*, 92 T.C. at 1095-96.

123. The Third Circuit defined the doctrine as arising when a taxpayer "disputed the *amount* of a debt." *Zarin II*, 916 F.2d at 115 (emphasis added).

124. An unliquidated debt is one which is not fixed or determined. *See* BLACK'S LAW DICTIONARY 838 (5th ed. 1979).

125. *See, e.g., Zarin II*, 916 F.2d at 116; Colonial Sav. Ass'n v. Commissioner, 85 T.C. 855, 862-63 (1985), *aff'd* 854 F.2d 1001 (7th Cir 1988) (The application of the *Sobel* contested liability doctrine requires an unliquidated debt.); N. Sobel, Inc. v. Commissioner, 40 B.T.A. at 1265 (There was "question as to [the debt's] liability and the amount thereof.").

126. *Zarin I*, 92 T.C. at 1095-96.

127. *Zarin II*, 916 F.2d at 116 (interpreting the Tax Court's holding).

128. *Id.* at 115.

129. *Hall*, 307 F.2d at 242; *see also* Susan Clark Taylor, Note, *Income Taxation—* Zarin v. Commissioner: *The Viability of the Transactional Approach to Discharge of Indebtedness Income*, 20 MEM. ST. U. L. REV. 235, 250 (1990) (addendum discussion of *Zarin II* in her article on the transactional approach to cancellation of indebtedness in *Zarin I*).

130. *Zarin II*, 916 F.2d at 115.

131. *Id.* at 116.

132. *See supra* notes 101-29 and accompanying text.

133. Taylor, *supra* note 129, at 250 & n.127 (For tax purposes, a debt unenforceable due to a tolling of a statute of limitations while affecting liability for repayment does not lead to a disputed amount of the debt itself); *see also* Securities Co. v. United States, 85 F. Supp. 532, 532-33 (S.D.N.Y. 1948) ("The release of plaintiff's assets from liability on the notes [barred by the statute of limitations] represents taxable income."); Carl T. Miller Trust v. Commissioner, 76 T.C. 191 (1981) (dece-

Noticeably absent from the court's decision was any discussion or definition of the requirement of "good faith"[135] on the part of the petitioner in making a disputed liability argument.[136] It would appear that the lack of definition by the court, leaves a back door open to future litigants. "[I]n a litigious society that believes that equitable law must be fluid, bona fide disputes are not hard to create."[137] Indeed, the Third Circuit readily accepted that Zarin had a good faith belief that the debt liability was disputed[138] even though he stipulated that he owed the casino the full $3.4 million.[139]

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dent's estate realized discharge of indebtedness income when a claim against the estate was barred by the statute of limitations); Schweppe v. Commissioner, 8 T.C. 1224 (1947), *aff'd*, 168 F.2d 284 (9th Cir. 1948) (indebtedness of $400,000 owed by corporation on a note was taxable as "earnings and profits" once the statute of limitations barred collection of the note).

The *Zarin I* court also reviewed several cases which discuss the issue of enforceability of debt in relation to its taxability.

> Legal enforceability of an obligation to repay is not generally determinative of whether the receipt of money or property is taxable. *James v. United States*, 366 U.S. 213, 219 (1961). Under the "all events test," only the fact of liability and the amount owed need be fixed as of the end of taxable year in order to give rise to a deduction by an accrual basis taxpayer; legal liability is not required. *Burlington Northern Railroad v. Commissioner*, 82 T.C. 143, 151 (1984). Unenforceability of an underlying gambling debt is not a bar to the recognition of income by an accrual method gambling casino. *Flamingo Resort, Inc. v. United States*, 664 F.2d 1387 (9th Cir. 1982). Enforceability may affect the timing of recognition of income; other factors fix the amount to be recognized. *Cf. United States v. Hughes Properties*, 476 U.S. 593, 602-04 (1986).

Zarin I, 92 T.C. at 1094-95.

134. *See supra* notes 117-26 and accompanying text.

135. Good faith is defined as "an intangible and abstract quality" which in common usage "is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation." BLACK'S LAW DICTIONARY 623-24 (5th ed. 1979).

136. *See supra* note 72 and accompanying text.

137. Calvin H. Johnson, *Zarin and the Tax Benefit Rule: Tax Models for Gambling Losses and the Forgiveness of Gambling Debts*, 45 TAX L. REV. 697, 699 (1990).

Professor Johnson warns:

> [T]he Third Circuit's resolution of the issue, broadly read, might swallow much of the forgiveness of indebtedness doctrine, even for cash borrowing, far beyond the relatively unimportant case of one compulsive gambler. The opinion may do even more mischief by becoming "substantial authority for a taxpayer's failure to report cancellation of indebtedness or by giving a taxpayer "a realistic possibility" of success so that his attorney can advise him not to report the cancellation of debt.

Id. (citation omitted).

138. *Zarin II*, 916 F.2d at 116 ("After Zarin in good faith disputed his obligation to repay the debt, the parties settled for $500,000, which Zarin paid."). *Id.*

139. *See supra* note 113.

V. Alternative Arguments and Policy Considerations

Despite the efforts of the Third Circuit to force the facts of the case to fit the confines of the disputed liability doctrine,[140] one is still left feeling that the Commissioner's argument that Zarin had income from cancellation of indebtedness[141] has merit and a simple ring of fairness to it. Many people would believe that Zarin abused the system and got away with something that they would not have.

Whether inherently palatable or not, the ultimate decision of the court did yield the correct result. However, the court's methodology used to arrive at its conclusion, through use of the rare disputed liability doctrine,[142] was strained at best and leaves one feeling that there was something tainted or wrong with the result.

Instead, the court could have arrived at its desired end result by other means that would not require straining doctrine and code to accommodate the facts. The Third Circuit majority completely ignored the provision of I.R.C. § 108(e)(5),[143] which was discussed in the Tax Court dissent of Judge Ruwe.[144] The Third Circuit also missed the opportunity to apply the facts of the case to the policy issues underlying consumption, bargain purchase and the unique way that gambling is treated in the code.

By utilizing an application of § 108(e)(5), the court could have still concluded that Zarin should not have any further tax liability, but it could have done so completely within the code without the application of obscure doctrine. Even a holding based on the tax policy grounds of nontaxable consumption and bargain purchase would have been preferable to the approach they employed.

A. *The Exclusion Under I.R.C. § 108(e)(5) for a Reduction in Purchase-Money Debt*

The basic exclusionary rule promulgated by § 108(e)(5) is that a reduction in purchase-money debt will be treated under the section as a purchase price adjustment rather than a discharge of indebtedness, and therefore, will not constitute income to the debtor.[145] The following

140. *See supra* notes 72-98 and accompanying text.

141. *Zarin II*, 916 F.2d at 113. The Commissioner's assertion that "Zarin owed $3,435,000, paid $500,000, with the difference constituting income [was] initially persuasive." *Id.*

142. *See supra* notes 72-98 and accompanying text.

143. *See Zarin II*, 916 F.2d at 112-14.

144. *Zarin I*, 92 T.C. at 1107-16 (Ruwe, J., dissenting).

145. I.R.C. § 108(e)(5) states that:

> (5) Purchase-money debt reduction for solvent debtor treated as a price reduction. —If—
>
> (A) the debt of a purchaser of property to the seller of such property which arose out of the purchase of such property is reduced,

example illustrates this situation:

> If Zarin had made a rash promise to pay $3.4 million for an oceanfront condominium, and had then negotiated the price down to $500,000 after discovering serious defects in the construction or legal lapses in the seller's sales practices, he would have had no income, even if the original promise to pay had been fully enforceable. Section 108(e)(5) provides a reduction-of-purchase-price exception for this case.[146]

The legislative history of the section shows that it was enacted "to eliminate disagreements between the Internal Revenue Service and the debtor as to whether, in a particular case to which the provision applies, the debt reduction should be treated as discharge income or a true price adjustment."[147] Judge Ruwe, in his Tax Court dissent, stated affirmatively that "this case presents the very controversy that the . . . legislative history says Congress tried to eliminate by enacting section 108(e)(5)."[148]

It would appear that to simply decide the case would only require a straightforward application of § 108(e)(5) to the facts. Indeed, proper application of the section requires the taxpayer to meet only three conditions.[149]

> For a reduction in the amount of a debt to be treated as a purchase price adjustment under section 108(e)(5), the following conditions must be met: (1) The debt must be that of a purchaser of property to the seller which arose out of the purchase of such property; (2) the taxpayer must be solvent and not in bankruptcy when the debt reduction occurs; and (3) except for section 108(e)(5), the debt reduction would otherwise have resulted in discharge of indebtedness income.[150]

Both the second and third conditions are readily met and will be discussed before the first. In respect to the second condition of solvency, the stipulated facts of the case did not specifically include a statement that Zarin was "solvent and not in bankruptcy when the debt reduction occurred."[151] "However, [Zarin's] opening brief stated that

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(B) such reduction does not occur —
(i) in a title 11 case, or
(ii) when the purchaser is insolvent, and
(C) but for this paragraph, such reduction would be treated as income to the purchaser from the discharge of indebtedness, then such reduction shall be treated as a purchase price adjustment.

I.R.C. § 108(e)(5) (CCH 1991).

146. Alan Gunn, *Another Look at the Zarin Case*, 50 TAX NOTES 893, 895 (1991).

147. S. REP. No. 1035, 96th Cong., 2d Sess. 16 (1980).

148. *Zarin I*, 92 T.C. at 1113 (Ruwe, J., dissenting).

149. *See* I.R.C. § 108 (e)(5) (CCH 1991)..

150. *Zarin I*, 92 T.C. at 1113 (Ruwe, J., dissenting) (citing I.R.C. § 108(e)(5); 1 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶¶ 6.40-6.41 (2d ed. 1989)).

151. *Id.* (Ruwe, J., dissenting).

[Zarin] was solvent at the time the debt was reduced and neither [the Commissioner's] opening nor reply brief disputes this."[152] Therefore, the second condition would have been easily satisfied.

As to the third condition, Zarin received $3,435,000 of gambling opportunity on credit and only paid $500,000 to satisfy his debt. Clearly, some doctrine or rationale must be employed to account for this reduction of debt. The Tax Court majority found that Zarin had a reduction of debt that resulted in cancellation of indebtedness income.[153] The Tax Court's rationale was straightforward and very appealing, but it simply stopped short of the right conclusion by not then applying § 108(e)(5). It is therefore reasonable to conclude, based on the Tax Court majority's findings, that there was a debt reduction and that, but for an application of § 108(e)(5) the debt reduction, would have resulted in cancellation of indebtedness income to Zarin. This reasoning would satisfy the third condition of § 108(e)(5).

The application of the first condition of § 108(e)(5) is, however, more difficult. Whether Zarin held property, as required by the section,[154] is the issue that must be resolved. Both *Zarin* Courts had considerable trouble reconciling the property question. The Tax Court majority found that "[a]s a matter of substance, chips in isolation are not what petitioner purchased,"[155] but that the chips were merely a "medium of exchange within the . . . casino, and in that sense [] were a substitute for cash."[156] The majority held that while the term property, as used within § 108 (e)(5) may include both tangible and some forms of intangible property,[157] "the opportunity to gamble"[158] that Zarin purchased was, "something other than normal commercial property."[159] The Third Circuit agreed "with the gist of these characteriza-

152. *Id.* (Ruwe, J., dissenting) (footnote omitted). If Zarin had been in bankruptcy or insolvent, the debt discharge could possibly have been entirely excluded from income under § 108(a)(1)(B). *Id.* (Ruwe, J., dissenting) & n.5; *see also Zarin II*, 916 F.2d at 112 n.6. ("Subsequent to the Tax Court's decision, Zarin filed a motion to reconsider, arguing that he was insolvent at the time Resorts forgave his debt, and thus, under I.R.C. section 108(a)(1)(B), could not have income from discharge of indebtedness. . . . The Tax Court denied the motion for reconsideration.").

153. *See supra* notes 58-62 and accompanying text.

While the Third Circuit did not find that Zarin had cancellation of indebtedness income, the court did so only after a convoluted and strained argument. *See supra* notes 99-116 and accompanying text. The court was forced to back off from a cancellation of indebtedness argument simply because it wanted to hold for Zarin, and did so through an awkward application of the contested liability doctrine. *See supra* notes 117-31 and accompanying text.

154. *See, e.g., Zarin I*, 92 T.C. at 1097; I.R.C. § 108(e)(5)(A) (CCH 1991).

155. *Zarin I*, 92 T.C. at 1099.

156. *Id.* at 1100.

157. *Id.* at 1099-1100.

158. *Id.* at 1099.

159. *Id.* The Tax Court majority reasoned that an "opportunity to gamble" is not "normal commercial property," but is more akin to intangible property. *Id.* at

tions,"[160] but then "performed substantial legal gymnastics to find that the chips received by Zarin were not 'property' ",[161] but were instead "merely an accounting mechanism to evidence debt."[162]

Reviewing the two court's majority discussions of the merits of the gambling chips, it is reasonable to conclude that the chips themselves are not the important item to consider since they merely evidence Zarin's purchase of an "opportunity to gamble." Since Zarin's purchase of the gambling chips was merely a medium of exchange, his actual purchase was that of an end product.[163] Judge Ruwe, in his Tax Court dissent concluded that the chips evidenced the casino's promise to provide the end product; in this case, a gambling opportunity.[164] "In that sense, the opportunity is no different than any other valuable and assignable contract right which we would surely recognize as property."[165]

While "property" is not specifically defined in § 108(e)(5), the "term 'property' is generally understood to be a broad concept."[166] It regularly includes such items as licenses and options.[167] "A license is nothing more than a grant of an opportunity to the licensee to do something which he would otherwise be prohibited from doing. Nevertheless, a license is considered property."[168] In a similar sense, "an option, which can also be characterized as nothing more than a grant of an opportunity, constitutes property."[169] Given the broadly encompassing use of the term property, it seems to be a much more reasonable to conclude that an "opportunity to gamble" is a form of property,

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1099-1100. The court stated that while the terminology employed in § 108(e)(5) is "readily understood with respect to tangible property and may apply to some types of intangibles, [a]bstract concepts of property are not useful . . . in deciding whether what [Zarin] received [was] within the contemplation of the section." *Id.*

160. *Zarin II*, 916 F.2d at 113.

161. Culp & Marsh, *supra* note 72, at 289. Indeed, the Third Circuit held "that gambling chips are merely an accounting mechanism to evidence debt . . . [i]n short, the chips had no economic substance. . . . Not only were the chips non-property in Zarin's hands, but upon transfer to Zarin, the chips also ceased to be the property of [the casino]." *Zarin II*, 916 F.2d at 113-14 (the court took two and a half columns in the Federal Reporter to convince itself that the chips were "non-property").

162. *Zarin II*, 916 F.2d at 113.

163. Shaviro, *supra* note 107, at 248.

164. *Zarin I*, 92 T.C. at 1109 (Ruwe, J., dissenting).

165. *Id.* (Ruwe, J., dissenting)

166. *Id.* at 1110 (Ruwe, J., dissenting).

167. *Id.* at 1109 (Ruwe, J., dissenting).

168. *Id.* at 1109 (citing Barry v. Barchi, 443 U.S. 55, 64 (1974) (state racing and wagering license); Wolfe v. United States, 798 F.2d 1241, 1245 (9th Cir. 1986) (ICC license); Aqua Bar & Lounge, Inc. v. United States, 539 F.2d 935, 937-38 (3d Cir. 1976) (liquor license)).

169. *Id.* at 1109-10 (Ruwe, J., dissenting) (citing Helvering v. San Joaquin Fruit & Investment Co., 297 U.S. 496, 498 (1936)).

rather than the Third Circuit's strained efforts to conclude that gambling chips are "non-property." Therefore, since Zarin purchased property, albeit, intangible property,[170] it would appear that the first condition of § 108(e)(5) would also be satisfied.

While the three statutory conditions of § 108(e)(5) have been satisfied, the legislative history indicates that for the section to apply, the following requirements must also be met:

> (a) The price reduction must result from an agreement between the purchaser and the seller and not, for example, from a discharge as a result of the running of the statute of limitations on enforcement of the obligation; (b) there has been no transfer of the debt by the seller to a third party; and (c) there has been no transfer of the purchased property from the purchaser to a third party.[171]

Each of these requirements was also met. First, the parties mutually agreed to reduce the debt in order to settle their lawsuit.[172] Second, the seller, Resorts, did not transfer the debt to a third party.[173] Finally, Zarin did not transfer the intangible property, or the chips for that matter, to a third party.[174] At best, he transferred the property back to the casino, and at worst, he consumed it. Neither scenario is one which the legislative history indicates it meant to avoid.[175]

Overall, § 108(e)(5) provides a plausible solution to find that Zarin did not realize income from cancellation of indebtedness.[176] The Third Circuit could have easily found that an "opportunity to gamble" is a form of property, and therefore have been able to apply the statu-

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170. *See* Shaviro, *supra* note 107, at 248 ("Might not the legal disputes that Congress sought to forestall arise with respect to debt financed purchases of intangible property?")

Professor Alan Gunn, a *Zarin II* commentator, further asserts that the section's application to buyer's of property would be equally applicable to a purchaser of services. In assuming that Zarin purchased services from the casino, the commentator states that:

> There is no reason for thinking that Congress' codification of the purchase-price rule for property should prevent the development by the courts of a similar rule for services. Until 1980, the purchase-price rule existed only in the cases, and it could easily have been extended to cover a situation like Zarin's. Congress codified the rule for no apparent reason other than that it was there. To think that anyone responsible for the enactment of section 108(e)(5) intended by that enactment to prevent the extension of the rule to services is fantastic.

Gunn, *supra* note 146, at 895.

171. *Zarin I*, 92 T.C. at 1114 (Ruwe, J., dissenting) (citing S. Rep. No. 1035, 96th Cong., 2d Sess. (1980); Bittker & Lokken, *supra* note 150, ¶ 6.4.

172. *See supra* text accompanying note 51; *see also Zarin I*, 92 T.C. at 1114 (Ruwe, J., dissenting).

173. *Zarin I*, 92 T.C. at 1114 (Ruwe, J., dissenting).

174. *Id.* (Ruwe, J., dissenting).

175. *Id.* (Ruwe, J., dissenting)

176. *See id.* at 1116 (Ruwe, J. dissenting).

tory "safe-harbor"[177] exclusion of the section. Using this method the court could have come to its same result,[178] but entirely within the confines of the code and without having to resort to a rare and infrequently applied doctrine.

B. *Tax Policy Considerations of the Measurement of Consumption and the Doctrine of Bargain Purchase*

The Third Circuit seems to have rushed to back off from fitting Zarin in the appealing concept of discharge of indebtedness income. In most situations, a discharge of a debt at less than its face amount would yield income to the debtor.[179] In that regard, a person who borrowed $3.4 million from a bank, spent it on personal consumption, and then only repaid $500,000 in full satisfaction of the debt, would certainly be found to have realized income.[180] "The balance sheet theory of cancellation of indebtedness would suggest that any cancellation leads to an increase in net worth, whether the loan proceeds were used for consumption or investment."[181] It is precisely this increase in net worth, or accession to wealth, which forms the basis for the tax on income.[182]

The code treats certain losses as deductible from income[183] but, in particular, treats gambling losses as deductible only to the extent of gambling gains.[184] Any excess of gambling loss over gain represents

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177. Culp & Marsh, *supra* note 72, at 291.

178. One commentator describes the application of § 108(e)(5) as follows:

> One could draw the § 108(e)(5) line either way, treating Zarin either as having purchased the opportunity to gamble (in which case § 108(e)(5) would apply), or as having in effect borrowed money (in which case the provision would not apply). . . . [N]o clear technical grounds require a decision one way or the other.

Shaviro, *supra* note 107, at 249.

179. BITTKER & LOKKEN, *supra* note 150, ¶ 6.4.1.

180. Gunn, *supra* note 146, at 893.

181. Joel S. Newman, *Five Will Get You Ten: You Haven't Heard the Last about 'Zarin'*, 50 TAX NOTES 667, 667 n.7(a) (1991).

182. *See* Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

> But is a bet, or for that matter, winning a bet an accession to wealth that constitutes income? "If I make a bet with you, neither one of us should have income or loss unless and until the bet is actually paid off. If no money every [sic] changes hands, there should be no taxable event, because neither party has had any accession to wealth."

Stephen D.D. Hamilton, *Third Circuit's Contingent Liability Theory Produces Correct Result in Gambling Debt Discharge Case*, 50 TAX NOTES 409, 409 (1991).

183. *See* I.R.C. § 165 (CCH 1991).

184. *Id.* § 165(d). In addition, Tres. Reg. § 1.165-10 further limits the deductibility of gambling losses to the extent of gains from transactions that occur during the same taxable year.

While § 165(d) and Tres. Reg. § 1.165-10 govern the treatment of wagering losses, § 165(c)(1) allows individuals a deduction for losses incurred in a trade or business. A person who gambles for amusement is certainly not in a trade or business. However, the United States Supreme Court has held that if a person gambles

nondeductible consumption.[185] Following that logic, then, since Zarin had no gambling gains to offset, his losses would have been all nondeductible consumption.[186]

1. The Value of Zarin's Consumption

Zarin did not borrow cash and then purchase chips, rather, he gambled on credit.[187] This presents a different twist on what and how much he actually consumed.[188] As Judge Tannenwald in his Tax Court dissent points out: "The concept that [Zarin] received his money's worth from the enjoyment of using the chips (thus equating the pleasure of gambling with increase in wealth) produces the incongruous result that the more a gambler loses, the greater his pleasure and the larger the increase in his wealth."[189] Zarin "might have 'enjoyed' a

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on a full-time basis in pursuit of his livelihood, he is engaged in a trade or business. Commissioner v. Groetzinger, 480 U.S. 23, 35 (1987). *See generally* Alexander R. Jampel, Comment, *Gambler Finds Better Odds against the Internal Revenue Service*, 8 LOY. ENT. L.J. 429 (1988).

A plausible argument could be made that Zarin was not gambling for amusement but rather on a full-time basis. *See* Zarin v. Commissioner, 92 T.C. 1084, 1087-88 (1989) (Zarin was gambling 12-16 hours a day seven days a week). If he was gambling to such an extent that it constituted a full-time pursuit of a livelihood, he may have been eligible to offset the gambling business loss ($3.4 million) against his gambling business gain ($2.9 million from discharge of indebtedness) under I.R.C. § 165(c)(1).

185. *See, e.g,* Gunn, *supra* note 146, at 894.

186. It is very tempting under I.R.C. § 165(d) to apply Zarin's $3.4 million gambling loss to his arguable $2.9 gain from the cancellation of the debt to the casino. However, this raises the question of whether the cancellation of indebtedness income could be considered gambling gains. In addition, since the losses and "gains" occurred in separate years, this would not meet the requirements of same year transactions found in Tres. Reg. § 1.165-10. *See* Zarin v. Commissioner, 92 T.C. 1084, 1096 (1989) (*Zarin I*); *see also* Calvin H. Johnson, *Zarin and the Tax Benefit Rule: Tax Models for Gambling Losses and the Forgiveness of Gambling Debt*, 45 TAX L. REV. 697, 705 (1990) (utilization of the tax benefit rule will treat multi-year transaction as occurring in the same year and will thus allow application of § 165); Taylor, *supra* note 129, at 245-46 (the disparate treatment of gambling losses under § 165(d) is mollified by application of the transactional approach to cancellation of indebtedness income).

187. Gunn, *supra* note 146, at 894.

188. Zarin's attorney in the Third Circuit, Stephen D.D. Hamilton, in answering a criticism of the Third Circuit decision, stated that the critic's assertion that Zarin got chips or "whatever" from the casino worth in excess of $3 million:

> [I]gnores the difference between chips acquired on credit from a casino and chips purchased for cash. When a gambler purchases chips for cash, he is free at any time to cash in his chips and walk away with the gross amount of his gambling proceeds. By contrast, a person who gambles on credit will generally only be able to walk away from the casino with cash equal to the excess, if any, of his gross gambling proceeds over the amount of credit extended.

Hamilton, *supra* note 182, at 409.

189. *Zarin I*, 92 T.C. at 1101 (Tannenwald, J. dissenting).

great deal of consumption, but psychic goods are not the measure of the tax base, directly or indirectly."[190] Rather, as a general rule, consumption is measured under the income tax by the amount spent for it.[191] Consumption itself is essentially taxed because under I.R.C. § 262 it is not deductible.[192] Treating Zarin's gambling on credit as what he consumed, then the measurement of that consumption was what he paid for it, namely $500,000 and not $3.4 million.[193] The purchase of consumption is certainly not income and does not give rise to a tax liability. As such, Zarin would not have any income or accessions to wealth upon which to base an income tax.

2. The Doctrine of Bargain Purchases

A bargain purchase is essentially a purchase at a discount to fair market value.[194] Assuming that Zarin's gambling consumption had a value of $3.4 million,[195] and he purchased it for only $500,000, he would arguably have $2.9 million in gain. However, under the doctrine, "arm's length bargain purchases are not treated as creating gross

190. Joseph M. Dodge, Zarin v. Commissioner: *Musings About Debt Cancellation and "Consumption" in an Income Tax Base*, 45 TAX L. REV. 667, 681 (1990). For commentary on "psychic" income, *see generally* Shaviro, *supra* note 107, at 223-29, 236-39.

191. *See, e.g.*, Dodge, *supra* note 190, at 681. This measurement reflects the design of the income tax to tax an individuals "ability to pay." *See* Gunn, *supra* note 146, at 894. By following that design rather than a tax on the value of the enjoyment of consumption, the system doesn't "impose a heavier tax on a poor person who enjoys life a great deal than on a high-income person who derives little enjoyment from that income." *Id.*

192. Dodge, *supra* note 190, at 681.

193. Zarin's attorney asserts that it is arguable that the consumption was not even worth the $500,000 that Zarin ultimately paid for it in that:

> [A]t best, what Zarin received when the [casino] gave him $3,435,000 of chips on credit was the potential up-side from the opportunity to make $3,435,000 of bets at the casino. The value of this potential up-side necessarily was substantially less than $3,435,000 — just as the value of an option to purchase a share of stock is substantially less than the value of the share of stock itself.
>
> Moreover, it is highly relevant that Mr. Zarin lost the $3,435,000 of chips at the craps table, and . . . could never bet more than the $15,000 table limit on any one throw of the dice. To exhaust $3,435,000 of chips, Zarin had to make many, many separate bets. Because the odds on every bet at craps favor the house, the chance that Mr. Zarin might actually come out ahead overall was miniscule [sic]. The more bets you make when the odds are against you, the lower your percentage chances of coming out ahead overall. Thus, on an objective basis, it is doubtful that the opportunity to gamble with up to $3,435,000 of chips was, in fact, even worth . . . $500,000.

Hamilton, *supra* note 182, at 409.

194. *See* Dodge, *supra* note 190, at 680.

195. This assumption is of course purely for sake of argument. It is much more likely that the value of the gambling consumption was much less than $3.4 million. *See* Hamilton, *supra* note 182.

income."[196] A plausible rational for such treatment is that recognition of the gain is deferred because the purchaser may not have the cash to pay the tax because the acquired wealth is inherent in the item purchased. When the item is eventually sold, the income will then be realized.[197] This scenario captures the gain if the item purchased is an appreciable asset. However, if the asset purchased is consumption, "which declines in value with use, the gain will never be taxed."[198] Applied to Zarin, the doctrine of bargain purchase would relieve him from any realization of income because the opportunity to gamble that he purchased was a consumption asset. Since he depleted the asset, the capture of the gain is lost and Zarin would have no tax liability.

Under either policy argument, the value of consumption or the bargain purchase, Zarin would come out essentially the same. He would have no tax liability and would be out a net $500,000 to the casino. This is exactly the same result that the Third Circuit came to after application of substantial "legal gymnastics" to back Zarin out of a cancellation of indebtedness situation and into a questionable application of the disputed liability doctrine. While neither of these policy arguments are preferable to a solution based on the code such as the above mentioned application § 108(e)(5), they do, however, illustrate the inherent problems and considerations that future applications of the Tax Code to issues involving gambling must address.

VI. Conclusion

The Third Circuit decision in *Zarin II* is an example of the judicial system straining to fit the evolving problems of the taxation of gambling within the rigid confines of the Internal Revenue Code. Even through use of alternative solutions, the case would still be lacking in a well founded and lasting resolution. It would appear that the only real solution would be for Congress to address the issue of the treatment of gambling within the Internal Revenue Code. It would seem that with the continued onslaught of public gambling through state sponsored lotteries, casino cruises and even high stakes bingo, in addition to the proliferation of the Atlantic City and Las Vegas casinos, our historic social, moral and economic views of gambling are changing. The system of taxation must evolve to keep up with these changing social needs.

Perhaps the real importance of the case will be to illustrate the destructive powers of compulsive gambling. While Zarin may have won in his battle with the Internal Revenue Service, overall he lost millions to

196. Dodge, *supra* note 190, at 680.

197. *Id.*

198. *Id.* If there is any fault with this rational, it "lies not with the bargain-purchase rule, but with the principle that imputed income from consumer durables should escape tax." *Id.*

the casino and ten years of his life while fighting the ramifications of his excessive habit. The pitfalls of excessive gambling are lessons that seems to need to be constantly re-learned. As Adam Smith admonished over 200 years ago: "Adventure upon all the tickets in the lottery, and you lose for certain; and the greater the number of your tickets the nearer you approach to this certainty."[199]

Mark J. Marroni

199. ADAM SMITH, THE WEALTH OF NATIONS 1.10 (1776).

COMMENTS

McDermott International v. Wilander: Seaman Status Revisited

I. INTRODUCTION

The United States Supreme Court recently attempted to put to rest the legal confusion which has plagued both the courts and the legislature regarding the requirements for seaman status. In 1991, the Court held that one need not aid in the navigation of a vessel in order to qualify as a "seaman" under the Jones Act.[1] A unanimous Court[2] determined "that, at the time of its passage, the Jones Act established no requirement that a seaman aid in navigation."[3] Moreover, the Court stated that "the aid in navigation test had no necessary connection to the Jones Act."[4] The rule for seaman status now hinges on the employee's connection to the vessel as opposed to any navigational duties requirements as previously thought.[5] The holding in *Wilander*[6] is significant because the Court has now determined that the requirement of contribution to the operation of the vessel is "not confined to those who 'hand, reef and steer,' but is applicable to all whose duties contribute to the operation and welfare of the vessel."[7]

Part II of this Comment will focus on the factual background of the litigation along with the history of the case prior to certiorari being granted by the United States Supreme Court.[8]

Part III of this Comment will discuss the case law decided prior to enactment of the Jones Act and the Longshore and Harbor Workers'

1. McDermott Int'l, Inc. v. Wilander, 111 S. Ct 807 (1991). The Jones Act is also known as the Merchant Marine Act of 1920 and is codified at 46 U.S.C. App. § 688 (1989).

2. The decision in *Wilander* was delivered by Justice O'Connor. *Wilander*, 111 S. Ct. at 809.

3. *Id.* at 813.

4. *Id.* at 815.

5. *Id.* at 817.

6. 111 S. Ct. 807 (1991).

7. Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959). The "hand, reef and steer" language pertained particularly to the navigational requirements of a seaman whose function it was to actually assist in the navigation of the vessel as opposed to another function. *Id.* at 775.

8. Wilander v. McDermott Int'l, Inc., 887 F.2d 88 (5th Cir. 1989), *cert. granted*, 496 U.S. 935 (1990); *see infra* notes 27-70 and accompanying text.

Compensation Act (LHWCA).[9] Part III will also discuss how the courts have defined a seaman and to what recovery they have historically been entitled. The case from which many others stemmed, including *Wilander*, was *The Osceola*.[10] In *Wilander*, the Supreme Court relied heavily on *The Osceola* in determining that the term " 'seaman is a maritime term of art.' "[11]

Part IV will discuss the legislative history of the Jones Act and the subsequent case law which helped to define it.[12] Policy reasons behind the enactment of the Jones Act, which set the stage for the enactment of the LHWCA, will also be discussed.[13]

Part V will discuss the ways in which the legislature has attempted to distinguish between land and sea-based employees and to provide recovery for those who were not engaged in employ at sea.[14] This part will show that the LHWCA was enacted to limit recovery by non-sea-based employees and, thus, must have its requirements applied stringently.[15]

Part VI will discuss why the United States Supreme Court had to necessarily choose between the Jones Act and the LHWCA when determining who is entitled to recovery under each.[16] Two basic tests were used by the courts to determine seaman status between the time the Jones Act and LHWCA were enacted and the time the Supreme Court decided *Wilander*.[17] The Seventh Circuit and its followers relied heavily upon *Johnson v. John F. Beasley Construction Co.*,[18] which held that in order to qualify as a seaman under the Jones Act, one must actually aid in the navigation of the vessel.[19] The Fifth Circuit, however, followed *Offshore*

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9. Longshore and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901-950 (1984)) [hereinafter LHWCA]; *see infra* notes 71-89 and accompanying text.

10. 189 U.S. 158 (1903).

11. *Wilander*, 111 S. Ct. at 811.

12. *See infra* notes 90-120 and accompanying text.

13. Kenneth G. Engerrand & Jeffrey R. Bale, *Seaman Status Reconsidered*, 24 S. TEX. L.J. 431, 437 (1983); Peter Beer, *Keeping Up With the Jones Act*, 61 TUL. L. REV. 379 (1986); Brief for Respondent on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 9, McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807 (1991) (No. 89-1474) [hereinafter Brief for Respondent].

14. See generally Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946). The *Swanson* court held that the enactment of the LHWCA following the decision in International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926), mandated that Jones Act remedies be reserved for "the members of the crew of a vessel plying in navigable waters" and that longshoremen receive "only such rights to compensation as are given by the Longshoremen's Act." *Swanson*, 328 U.S. at 7; *see infra* notes 121-30 and accompanying text.

15. *See supra* note 9.

16. *See infra* notes 131-56 and accompanying text.

17. 111 S. Ct. 807 (1991).

18. 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

19. *Id.* at 1062-63. The Seventh Circuit stated:

Co. v. Robison[20] which held that one merely had to make a contribution to the operation or welfare of the vessel and did not have to actually assist in the vessel's navigation.[21]

Part VII will center upon the Supreme Court's interpretations of the Jones Act and the LHWCA.[22] Particular attention will be given to the Supreme Court's reasoning that it is the LHWCA which defines a seaman, not the Jones Act and its subsequent ramifications.[23]

Part VIII will discuss the circuit court cases which have been decided after *Wilander* and will focus on how the Supreme Court failed to respond fully to the question of seaman status under the Jones Act, because no determination regarding permanent attachment to the vessel was discussed.[24]

Part IX will discuss how the Supreme Court decision may affect future litigation and the seaman status of pilots since the Court failed to define a seaman's employment connection to a vessel in navigation for purposes of seaman status.[25]

Part X argues that the *Wilander* decision has the effect of finding per se that pilots are seaman for purposes of recovery under the Jones Act, but are possibly precluded from recovery under said Act because, due to the very nature of their jobs, pilots are not permanently attached to a vessel.[26]

II. Statement Of The Case

A. *Factual Background*

Jon Wilander was a paint foreman employed by McDermott Interna-

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> [there was] an evidentiary basis for submitting to the jury the question whether the person was a member of the crew of the vessel at the time of the injury if: (1) the person injured had a more or less permanent connection with a vessel in navigation; and (2) the person injured made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel.

Id.

20. 266 F.2d 769 (5th Cir. 1959).

21. *Id.* at 775.

22. 111 S. Ct. 807 (1991); *see infra* notes 157-75 and accompanying text.

23. The fact that the United States Supreme Court believes that it is the LHWCA which defines a seaman and not the Jones Act is important because the Jones Act was passed prior to the enactment of the LHWCA. The stated purpose of the LHWCA was to limit Jones Act remedies to the master or members of the crew of a vessel and provide recovery for shore-based maritime workers. Should the Supreme Court be correct in its assumption that the LHWCA defines a seaman, the Jones Act legislation is inadequate because one of its most necessary terms is defined in legislation enacted to limit recovery under the Jones Act.

24. *See infra* notes 176-211 and accompanying text.

25. *See infra* notes 212-18 and accompanying text.

26. *See infra* note 219 and accompanying text.

tional, Inc. in the Middle East at the time his injury occurred.[27] Mr. Wilander was injured on July 4, 1983, while he was on a platform inspecting a pipe for leaks.[28] During his inspection, a bolt which was serving as a plug in the line blew out, striking him in the head.[29]

As part of his duties as a paint supervisor, Mr. Wilander generally worked on a project which involved a derrick barge[30] or a derrick barge and a paint boat.[31] When a particular assignment required Mr. Wilander to remain offshore overnight, he stayed aboard a derrick barge.[32] Mr. Wilander's employer, McDermott, assigned him to various paint boats during his tenure with the company, one of which was the M/V Gates Tide.[33] Mr. Wilander used the Gates Tide as a means of transportation to and from the derrick barge[34] and as a primary support station in furtherance of his fixed offshore platform painting duties.[35] All the equipment used in painting and sandblasting the platforms was kept aboard the Gates Tide.[36] The Master of the GATES TIDE did not consider Wilander a member of his crew;[37] however, the Captain of the Derrick Barge DB-9 did consider him a member of his crew.[38] Following his injury, Mr. Wilander instituted suit.

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27. Brief for Petitioner on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 3, McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807 (1991) (No. 89-1474) [hereinafter Brief for Petitioner].

28. *Id.* at 4-5. Petitioner contends that the injury occurred when a co-worker requested that Wilander inspect the pipe. *Id.* at 5. Respondent contends, however, that the injury occurred as a result of miscommunication among the McDermott supervisors because the pipe was being hydrotested at the time. Brief for Respondent, *supra* note 13, at 2.

29. Brief for Respondent, *supra* note 13, at 2.

30. The derrick barge acted as a home base for Wilander and his crew and was owned by McDermott, Inc. Brief in Opposition to Petition for Writ of Certiorari of McDermott Int'l, Inc. to the United States Court of Appeals for the Fifth Circuit at 1, McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807 (1991) (No. 89-1474) [hereinafter Brief in Opposition].

31. *Id.* at 1. A paint boat was used to transport the paint crew, including Wilander, to the platform which was to be painted, and Mr. Wilander supervised the painting of the platform from the deck of the boat. *Id.* at 2.

32. Brief for Petitioner, *supra* note 27, at 4. The name of the derrick barge in this instance was the Derrick Barge DB-9. *Id.*

33. Brief for Respondent, *supra* note 13, at 1. Mr. Wilander was assigned to various vessels serving as paint boats during his employment. *Id.* However, he only utilized the Gates Tide for five days of the total time he spent in the Middle East. Brief for Petitioner, *supra* note 27, at 4.

34. Brief for Petitioner, *supra* note 27, at 4.

35. *Id.*

36. Brief for Respondent, *supra* note 13, at 1-2.

37. Brief for Petitioner, *supra* note 27, at 4-5.

38. Brief for Respondent, *supra* note 13, at 1. Presumably, Wilander was considered a member of the crew of the derrick barge because this was the vessel which acted as home base for Wilander and his crew. Brief in Opposition, *supra* note 30, at 1.

B. *Procedure*

On August 2, 1984, Mr. Wilander filed suit against McDermott International, Inc., in the United States District Court of Louisiana[39] asserting that he was entitled to recover pursuant to the Jones Act due to his status as a seaman.[40] Defendant McDermott challenged Wilander's seaman status by a motion for summary judgment[41] and the United States Magistrate ruled in favor of Wilander.[42] "The case then proceeded to trial in bifurcated fashion, with the issues related to Wilander's status under the Act being tried first."[43]

Following the first trial regarding Wilander's seaman status, the jury found that Wilander had seaman status because he was substantially connected to both the Gates Tide and the Derrick Barge DB-9 and because he contributed to the function of both vessels.[44] The case then proceeded to trial on the issues of liability and damages, and the same jury awarded damages in the amount of $450,000.00, which was reduced by twenty-five percent due to Wilander's contributory negligence.[45] Defendant McDermott appealed the judgment,[46] and the plaintiff cross-appealed,[47] in the United States Court of Appeals for the Fifth Circuit.[48]

On appeal, the court cited both *Barrett v. Chevron, U.S.A., Inc.*[49] and *Offshore Co. v. Robison.*[50] The *Barrett* holding was significant in that the court held that one qualifies for seaman status if "the employee . . . [is]

39. Wilander v. McDermott Int'l, Inc., 887 F.2d 88 (5th Cir. 1989). At the time of Jon Wilander's injury, McDermott International, Inc., maintained its principal place of business in New Orleans, Louisiana. Brief in Opposition, *supra* note 30, at 1.

40. Brief for Petitioner, *supra* note 27, at 5.

41. *Id.*

42. *Id.* at 6. The Magistrate did not so much rule in favor of Jon Wilander as to decide that "McDermott had not satisfied the existing test for *excluding* Wilander from status, expressed in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959)." Brief for Petititoner, *supra* note 27, at 6 (emphasis added).

43. Brief for Petitioner, *supra* note 27, at 6; Wilander v. McDermott Int'l, Inc., 887 F.2d 88 (5th Cir. 1989). Had Wilander been found ineligible for seaman status recovery under the Jones Act, a trial determining his damages would have been futile. *Id.* at 89.

44. *Wilander*, 887 F.2d at 89.

45. *Id.*

46. *Id.* Defendant McDermott contended that the district court should have granted its motion for summary judgment regarding the question of seaman status instead of submitting the issue to the jury. *Id.*

47. *Id.* Plaintiff Wilander contended that the jury finding of contributory negligence on his part was not supported by sufficient evidence in that the admission of a statement made by the barge captain was hearsay and, therefore, erroneously admitted. The court rejected plaintiff's argument. *Id.* at 91-92.

48. *Id.*

49. 781 F.2d 1067 (5th Cir. 1986).

50. 266 F.2d 769 (5th Cir. 1959).

assigned permanently to a vessel or perform[s] a substantial part of his work on the vessel."[51] Moreover, in *Robison*, the court adopted a broad test of seaman status that held that there was:

> an evidentiary basis for a Jones Act case to go to the jury . . . if the capacity in which . . . [the worker] was employed or the duties which [the worker] performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.[52]

The court determined that the plaintiff performed a substantial part of his work from The Gates Tide and, thus, his duties contributed to the function of the vessel.[53] McDermott urged the Fifth Circuit to reject the *Robison* test[54] and adopt a more stringent test,[55] set out by the Seventh Circuit in *Beasley*,[56] which requires that the complainant actually aid in the navigation of the vessel. The court stated that it was offered a similar opportunity in *Barrett v. Chevron, U.S.A., Inc.*[57] and declined en banc,[58] noting that "later Supreme Court cases require such a broad definition of 'aid to navigation' that the test proposed . . . is entirely inconsistent with them."[59] The court went on to state that, without a Supreme Court holding that the Fifth Circuit's test for determining seaman status is incorrect, the court must adhere to its en banc decision in *Barrett*.[60] As a result, the court using the *Robison* test must affirm that there was sufficient evidence to support the jury's finding that Wilander was a seaman for inclusion under the Jones Act.[61] This was the court's holding despite the fact that Wilander would not qualify as a seaman under the *Beasley* test because he did not "perform significant navigational function or further the 'transportation function'

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51. *Barrett*, 781 F.2d at 1073.

52. *Robison*, 266 F.2d at 779.

53. Wilander v. McDermott Int'l, Inc., 887 F.2d 88, 90 (5th Cir. 1989). The court further found that since Plaintiff Wilander performed a substantial part of his work from The Gates Tide, there was sufficient evidence under the *Robison* test to uphold the jury's finding that he had attained seaman status for Jones Act purposes. *Id.*

54. *Wilander*, 887 F.2d at 90; *see also* Brief for Petitioner, *supra* note 27, at 5.

55. The test set forth in Johnson v. John F. Beasley Const. Co., 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985), commands that one " 'perform[ ] significant navigational functions or further the "transportation function" of the vessel' " in order to attain seaman status under the Jones Act. *Wilander*, 887 F.2d at 90 (quoting Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1073 (5th Cir. 1986)).

56. 742 F.2d at 1060.

57. 781 F.2d 1067 (5th Cir. 1986).

58. *Wilander*, 887 F.2d at 90.

59. *Id.* (citing Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1073 (5th Cir. 1986)).

60. 781 F.2d 1067 (5th Cir. 1986).

61. *Wilander*, 887 F.2d at 90-91.

of the vessel."[62]

Defendant McDermott then petitioned the United States Supreme Court for Writ of Certiorari to determine whether Wilander would qualify as a seaman when he did not meet the transportation function requirements set out in *Beasley*[63] and by the Third Circuit in *Simko v. C&C Marine Maintenance Co.*[64] In its petition, McDermott argued that the split among the circuits included as seamen those who merely had a cursory connection with a vessel,[65] as well as those who were members of a ship's crew.[66] McDermott argued that the inclusion of employees such as Jon Wilander under the Jones Act served to weaken the effect of the Act for those for whom it was intended.[67] McDermott requested that the United States Supreme Court adopt a uniform test to be applied in determining seaman status because no uniform American law existed.[68]

In his Opposition to McDermott's Petition for Writ of Certiorari, Wilander stated that the Supreme Court had previously declined to "address the question of whether the *Barrett/Robison* rule should be modified, . . . [and] [t]here are certainly no circumstances which would justify the granting of a writ of certiorari present in this case which were absent in those cases."[69] The Supreme Court disagreed and certiorari was granted.[70]

III. Common Law Status Of Seamen

During its early days, admiralty law employed the concept that a seaman's remedies should be limited to those who were able to 'hand, reef and steer.' This was considered the "ordinary test of seamanship."[71] Applying that formula however, often led to several different classifica-

62. *Id.* at 90.

63. *See supra* note 55 and accompanying text.

64. 594 F.2d 960 (3d Cir. 1979), *cert. denied*, 444 U.S. 833 (1979). The *Simko* decision established that "a maritime worker who does not actually go to sea but who is injured while performing duties on a navigable vessel must establish that he performed significant navigational functions with respect to that vessel in order to recover under the Jones Act." *Id.* at 964-65.

65. Brief for Petitioner, *supra* note 27, at 14.

66. *Id.*

67. *Id.* at 15.

68. *Id.* at 15-16.

69. Brief in Opposition, *supra* note 30, at 5.

70. McDermott Int'l, Inc. v. Wilander, 496 U.S. 935 (1990). The United States Supreme Court granted certiorari in part "to resolve the conflict between the *Robison* and the *[Beasley]* tests on the issue of the transportation/navigation function requirement" in determining seaman status under the Jones Act. McDermott Int'l., Inc. v. Wilander, 111 S. Ct. 807, 810 (1991).

71. The Canton, 5 F. Cas. 29, 30 (D. Mass. 1858) (No. 2388) (The Court stated that the claimants in this case, in order to 'hand, reef and steer,' had to have skill in navigation and perform the duties associated with navigation.).

tions of employees aboard the same ship.[72] With the advent of the steam engine, the doctrine began to change to meet the varying needs of an evolving industry.[73] The test was altered [74] so that "[w]hen the 'crew' of a vessel is referred to, those persons are naturally and primarily meant [to be those] who are on board her aiding in her navigation, without reference to the nature of the arrangements under which they are on board."[75]

This "aid in navigation" test was challenged from the very moment of its inception by persons attempting to fit into the scheme.[76] In order to satisfy this test, workers on ships emphasized their duties which were related to the navigation of the vessel, even though those duties were incidental.[77] Eventually, the aid in navigation test was stretched to include all those who were " 'co-laborers in the leading purpose of the voyage.' "[78] After all, the voyage depended upon them as much as

72. Black v. The Lousiana, 3 F. Cas. 503, 503 (D. Pa. 1804) (No. 1461). In this case, as the "ordinary test of seamanship" dealt with navigational duties, the court made a distinction between a cook or a steward and those actually employed in the navigation of the vessel, although all were employees aboard the same vessel. *Id.*

73. Engerrand & Bale, *supra* note 13, at 432 n.7 (quoting H. Farnam, The Seamen's Act of 1915, S. Doc. No. 333, 64th Cong., 1st Sess. 13 (1916)):

> A great change has taken place in the last half century in the functions of seamen on steamboats. Long after steam had become the main motive power, ocean-going ships were equipped with masts and sails, which were frequently used to supplement the steam. The deck hand was a sailor as well as a seaman. He had to understand how to handle the rigging of a ship and know the technique of his calling. Now, as has been frequently pointed out, the steamships make practically no use of sails and the seaman is mainly occupied in cleaning the decks, polishing the brasses, and acting as lookout. Comparatively few men are needed for this purpose, and it is not especially important that they should either be able to understand the officers or that they should have had experience in their calling in normal times.

Id.

74. *Id.* at 433. The authors note that the 'aid in navigation' test was "subtly modified almost from its inception." *Id.*

75. The Bound Brook, 146 F. 160, 164 (D. Mass. 1906), *quoted in* Engerrand & Bale, *supra* note 13, at 432.

76. Engerrand & Bale, *supra* note 13, at 433. In Trainer v. The Superior, 24 F. Cas. 130 (E.D. Pa. 1834) (No. 14,136), musicians on a canal boat made a claim for seaman's wages because they assisted in rowing and in attending the sails during the movement of the ship. The court stated: "The broadest principle, however, that has yet been recognized is, that the services rendered must be necessary, or at the very least, contribute to the preservation of the vessel, or of those whose labor and skill are employed to navigate her." *Trainer*, 23 F. Cas. at 131, *quoted in* Engerrand & Bale, *supra* note 13, at 433.

77. Engerrand & Bale, *supra* note 13, at 433.

78. *Id.* at 434 (quoting *The Ocean Spray*, 18 F. Cas 558 (D. Or. 1876)(No. 10,412)). *The Ocean Spray* involved sealers on a fishing vessel who attempted to fulfill the navigation requirement by stating that they performed various functions necessary to the operation of the vessel such as procuring water and heaving the anchor. Because the vessel's purpose was to capture and club seals, however, the

those who were involved in the actual navigation of the vessel. The door was thus opened to permit such workers as bartenders,[79] cooks, and stewards[80] to achieve seaman status.[81] Uniformity was not acheived by merely awarding seaman status to more persons aboard ship.[82] There was still no definitive ruling on who was a seaman.

In *The Osceola*,[83] the Supreme Court summarized the pre-legislative status of a seaman's possible remedies under maritime law and stated that both the English and American authorities agreed in several aspects:

> 1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
> 2. That the vessel and her owners are . . . liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship . . . .
> 3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.
> 4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.[84]

The Osceola court "affirmed a seaman's general maritime right to maintenance and cure, wages, and to recover for unseaworthiness, but *excluded seamen from the general maritime negligence remedy.*"[85] In deciding *The Osceola*, the court did not have to define "seaman."[86] "Seaman" had been, for all intents and purposes, defined previously in *The Minna*:[87]

Court went on to state that their duties in capturing and clubbing the seals were the only assistance necessary to the ship. The Ocean Spray, 18 F. Cas. at 560, *cited in* Engerrand & Bale, *supra* note 13, at 433.

79. The J.S. Warden, 175 F. 314, 315 (S.D.N.Y. 1910).

80. The Wanderer, 20 F. 655, 656 (C.C.D. La. 1880).

81. *See* Engerrand & Bale, *supra* note 13, at 434-35.

82. *Id.*

83. 189 U.S. 158 (1903). *The Osceola* was an action to recover for personal injury sustained by a seaman aboard the vessel which occurred due to the negligence of the Master. Although there were, at that time, no statutes dealing with the subject of liability of the ship or her owners for negligence caused by a captain to a member of the crew, the Court followed the English codes which limited recovery to wages and the expenses of maintenance and cure. *Id.* at 172.

84. *Id.* at 175 (citations omitted).

85. *Wilander*, 111 S. Ct. at 810 (emphasis added).

86. *Id.* at 807.

87. 11 F. 759 (1882). The claimant in the case was employed solely as a fisherman aboard a fishing vessel and did not assist with the vessel's navigation. The Court held that those so employed were entitled to proceed against the vessel for

> [A]ll hands employed upon a vessel, except the master, are entitled to a lien if their services are in furtherance of the main object of the enterprise in which she is engaged. . . . The test is whether the services are for the benefit of a vessel engaged in commerce and navigation.[88]

This test was consistent with the expanding "aid in navigation" doctrine, but still left unresolved the problem faced by those who were denied recovery because they were injured by a "fellow seaman."[89] It was in light of the decision rendered in *The Osceola* and later historical events that Congress enacted the Jones Act.

IV. THE JONES ACT

After the sinking of the Titanic in April, 1912, the issue of safety of vessels at sea and their crew came to the forefront.[90] The issue was addressed by Congress in the Merchant Marine Act of 1915.[91] Section 20 of the Act was intended to abolish the fourth proposition of *The Osceola*[92] and provide that seamen could recover for the negligence of fellow seamen.[93] "[S]ection 20 of [the] Act was specifically intended to overrule *The Osceola*."[94] In *Chelentis v. Luckenbach*,[95] however, the Court held that "the Seaman's Act of 1915 in abolishing the fellow-servant rule had imposed no additional liability upon the shipowner beyond the existing liabilities of the general maritime law."[96] To overrule *Chelentis*,

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recovery of wages despite the fact that they had no navigational duties and performed part of their duties on shore. *Id.* at 760.

88. *Id.* at 760. The Court gives the example of whalers engaged in a whaling expedition: the whalers should be regarded as mariners and entitled to the same remedies as those who are assisting with the actual navigation of the vessel despite the fact that whalers have nothing to do with the navigation of a vessel. *Id.*

89. Beer, *supra* note 13, at 383. Although the Master of a vessel may have been negligent in giving the claimant an order, this order was merely from one "fellow seaman" to another. As such, the vessel could not be responsible for this negligent order. *Id.*

90. Engerrand & Bale, *supra* note 13, at 437.

91. *Id.*; Beer, *supra* note 13, at 384; Brief for Respondent, *supra* note 13, at 9; Act of March 4, 1915, ch. 153, 38 Stat. 1164 (1915).

92. *See supra* notes 83-86 and accompanying text.

93. Merchant Marine Act of March 4, 1915, ch. 153, § 20, 38 Stat. 1164 (1915); Engerrand & Bale, *supra* note 13, at 437.

94. Beer, *supra* note 13, at 384; *see also* Engerrand & Bale, *supra* note 13, at 437. Section 20 provided "[t]hat in any suit to recover damages for any injury sustained on board [a] vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority." Act of March 4, 1915, ch. 153, § 20, 38 Stat. at 1185.

95. 247 U.S. 372 (1918). The claimant in *Chelentis* was a fireman who suffered a broken leg when he was knocked down by a wave. He claimed his injury resulted from an order issued negligently by a superior, but the trial court directed a verdict against him. *Id.* at 378-79.

96. MARTIN J. NORRIS, THE LAW OF SEAMEN 326 (4th ed. 1985) (citing *Chelentis*, 247 U.S. at 384-85).

Congress passed the Merchant Marine Act of 1920 (The Jones Act), which states in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the Unites States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply . . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.[97]

Under this Act, only seamen may maintain an action for damages.[98] The Jones Act, however, fails to define the term "seaman."[99] Furthermore, no attempt was made either in the preliminary provisions of the Act or during the hearings held in conjunction with the passage of the Act to legislatively define the term.[100] It was, however, the intent of Congress to afford a recovery to those who made their living at sea and had to live daily with the perils of their employ.[101] As such, seamen were distinguished from shore-based workers who did not face the same perils.[102]

The Jones Act was intended as remedial legislation[103] and, as such, the Supreme Court has repeatedly held that it is to be construed liberally.[104] According to Justice Stone in *The Arizona v. Anelich*,[105] "[t]he legislation was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it."[106]

Since seaman status was not defined, the determination of whether the litigant was or was not a "seaman" became paramount in discerning if the injured party had the necessary legal standing to maintain the suit.[107] In the days prior to the advent of the steam engine, "seaman" meant one who was capable of moving the ship and giving it direc-

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97. The Jones Act, 46 U.S.C. § 688 (1988).

98. *Id.*

99. *Id.*; Brief of Association of Trial Lawyers of America as Amicus Curiae in Support of Respondent on Writ of Certiorari in the Supreme Court of the United States at 6, McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807 (1991) (No. 89-1474) [hereinafter Brief of A.T.L.A.].

100. 59 CONG. REC. 2535 (1920).

101. Brief of A.T.L.A., *supra* note 99, at 6-10 (citations omitted).

102. *Id.* at 20 (citations omitted).

103. Brief of Louisiana Trial Lawyers Association as Amicus Curiae in Support of Respondent on Writ of Certiorari in the Supreme Court of the United States at 3, McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807 (1991) (No. 89-1474) [hereinafter Brief of L.T.L.A.] (citations omitted).

104. *Id.* (citations omitted); NORRIS, *supra* note 96, at 337-39.

105. 298 U.S. 110 (1936).

106. *Id.* at 123, *quoted in* NORRIS, *supra* note 96, at 339.

107. NORRIS, *supra* note 96, at 341.

tion.[108] However, as a ship's propulsion was changed with the advent of the steam engine, the word "seaman" became enlarged in order to meet the changing demands of progress.[109] Thus, seaman status had grown to include a radio operator,[110] bartenders,[111] cooks,[112] and pursers.[113]

To determine who would be allowed standing for recovery under the Jones Act, the Supreme Court, in *Desper v. Starved Rock Ferry Co.*,[114] set out the following criteria: (1) that the vessel be in navigation; (2) that there be a more or less permanent attachment to the vessel; and (3) that the worker be aboard primarily to aid in navigation.[115] Additionally, seaman status was held in *Desper* to be a question "largely [dependent] on the facts of the particular case."[116] Although the Supreme Court wrestled with all three of the elements for seaman status set out in *Desper*,[117] the "aid in navigation" language gave the courts the most cause for concern, as workers employed aboard the ship increasingly attempted to stretch the definition to include themselves.[118] When a longshoreman was held to be a seaman in 1926,[119] the stage was set for further Congressional action to alleviate the confusion regarding seaman status.[120]

V. The Longshore And Harbor Workers' Compensation Act

In *International Stevedoring Co. v. Haverty*,[121] the Supreme Court held that longshoremen injured in navigable waters were seamen and, therefore, within the Jones Act.[122] Within six months following the *Haverty* decision, Congress enacted a federal compensation act for land-based maritime workers, such as longshoremen, called the Longshore and

108. The Buena Ventura, 243 F. 797, 799 (S.D.N.Y. 1916).

109. *Id.*

110. *Id.* at 799-800.

111. *Id.* at 799 (citing The J. S. Warden, 175 F. 314, 315 (S.D.N.Y. 1910)).

112. *Id.* (citing Allen v. Hallet, 1 F. Cas. 472 (No. 223) (S.D.N.Y. 1849)).

113. The Wanderer, 20 F. 655, 656 (C.C.D. La. 1880).

114. 342 U.S. 187 (1952). *Desper* involved a claimant injured while repairing sightseeing boats. The boats were on blocks for the winter and the repairs were made in preparation for the vessel's use during the summer. *Id.* at 188-89.

115. *Id.* at 190-91.

116. *Id.* at 190.

117. *See, e.g.*, Butler v. Whiteman, 356 U.S. 281 (1958); Grimes v. Raymond Concrete Piling Co., 356 U.S. 252 (1958); Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957); and Gianfala v. Texas Co., 350 U.S. 879 (1955).

118. *See infra* notes 131-56 and accompanying text.

119. International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926).

120. *See* Engerrand & Bale, *supra* note 13, at 445-46.

121. 272 U.S. 50 (1926). In *Haverty*, a longshoreman was injured by another employee's negligence and sought to recover from his employer, a stevedoring company, under the Jones Act. *Id.* at 52.

122. *Id.* at 52.

Harbor Workers' Compensation Act (LHWCA).[123] The Act statutorily restricts recovery up to predetermined amounts and states in pertinent part:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include. . .
>
> (G) a master or member of a crew of any vessel.
>
> . . .
>
> Compensation for disability or death. . .shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage.[124]

As with other workmen compensation statutes, one may recover under either the Jones Act or the LHWCA but may not recover under both.[125]

The Supreme Court addressed the relationship between the Jones Act and the LHWCA in *Swanson v. Marra Brothers, Inc.*[126] There, the Court held that the enactment of the LHWCA, following the *Haverty* decision, mandated that Jones Act remedies would be reserved for "the members of the crew of a vessel plying in navigable water" and longshoremen would receive "only such rights to compensation as are given by the Longshoremen's Act."[127] Thus, under *Swanson*, the Jones Act and the LHWCA are considered mutually exclusive.[128]

The *Swanson* court went no further than previous case law in determining who was and who was not a seaman under the Jones Act for purposes of coverage. The circuits were thus left to sort out the question of seaman status[129] without Supreme Court direction until 1991.[130]

VI. The Conflict Among The Circuits

Although the Supreme Court has addressed the issue of seaman status,[131] the task of finding a workable standard to apply to determine

123. Longshore and Harbor Workers' Compensation Act of March 4, 1927, ch. 509, 44 Stat. 1424 (codified as amended at 33 U.S.C. §§ 901-950 (1988) (*as cited in* Engerrand & Bale, *supra* note 13, at 445).

124. 33 U.S.C. § 902(3) (1986 & Supp. 1992).

125. Engerrand & Bale, *supra* note 13, at 445-46.

126. 328 U.S. 1 (1946). The plaintiff was a longshoreman who attempted to sue his employer under the Jones Act as in the *Haverty* case. The *Swanson* employee was injured on the docks, however, whereas the *Haverty* plaintiff was on board ship at the time of injury. *Id.* at 2-3.

127. *Id.* at 7.

128. *Id.*

129. Brief for Respondent, *supra* note 13, at 23.

130. McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807 (1991).

131. *See, e.g.*, Butler v. Whiteman, 356 U.S. 281 (1958); Grimes v. Raymond Concrete Piling Co., 356 U.S. 252 (1958); Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957); Gianfala v. Texas Co., 350 U.S. 879 (1955); Desper v. Starved Rock

seaman status has mostly fallen to the circuit courts.[132] The Fifth Circuit, in which a plethora of seaman's cases have arisen, established the test for seaman status in *Offshore Company v. Robison.*[133] The plaintiff in *Robison* was allowed recovery under the Jones Act after he sustained injuries aboard a mobile drilling platform which was towed to a well located in navigable waters. Plaintiff Robison was working as a driller's helper when the incident occurred and had never carried seaman's papers.[134] Because the platform's operation consisted of drilling oil and Robison was working as a driller's helper at the time of the incident, the court allowed recovery under the Jones Act.[135]

The *Robison* case relied heavily upon *Carumbo v. Cape Cod S.S. Co.,*[136] which set out the following test to be applied in determining whether a plaintiff is a "seaman" and a "member of the crew":[137] (1) the person injured had a more or less permanent connection with a vessel in navigation; and (2) the person injured made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel.[138] In *Carumbo,* the plaintiff worked in the engine room of an excursion vessel which ran between Boston and Provincetown during the summer season.[139] At the end of the season, the plaintiff was making repairs in the engine room of the vessel, which was tied up, when he was scalded by hot water and steam.[140] Although the plaintiff was not aboard a ship in navigation at the time of the incident and was merely preparing the ship for winter, the court allowed recovery and concluded that "one who does any sort of work aboard a ship in navigation is a 'seaman' within the meaning of the Jones Act."[141]

In deciding *Robison,* the Fifth Circuit expanded the *Carumbo* test and stated that the requirement of contribution to the operation of a vessel is "not confined to those who 'hand, reef and steer,' but [is] applicable to all whose duties contribute to the operation and welfare of the vessel."[142] The *Robison* court's broad interpretation of the elements of seaman status has been followed by the First, Second, Fourth, Fifth and

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Ferry Co., 342 U.S. 187 (1952); Norton v. Warner Co., 321 U.S. 565 (1944); and South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940).

132. Brief for Respondent, *supra* note 13, at 23. It has been left to the Circuit Courts to apply the guidelines as set out in *Desper* and each subsequent Supreme Court case. *Id.*

133. 266 F.2d 769 (5th Cir. 1959).

134. *Id.* at 771.

135. *Id.* at 781.

136. 123 F.2d 991 (1st Cir. 1941).

137. *Id.* at 994 (explaining the difference between a "seaman" and a "member of the crew" and the applicability to the Jones Act and Longshoreman's Act).

138. *Id.* at 995.

139. *Id.* at 993.

140. *Id.*

141. *Id.* at 995.

142. *Robison,* 266 F.2d at 775.

Ninth Circuits.[143]

On the other hand, the Seventh Circuit has staunchly maintained its narrow holding in *Johnson v. John F. Beasley Const. Co.*[144] In *Johnson*, the plaintiff was the foreman of a crew of ironworkers who were transporting construction materials by barge to the bridge on which they were working.[145] On the day Johnson was injured, the tugboat guiding the barge collided with a steel beam protruding from the edge of the barge. The beam struck Johnson's leg causing injury.[146]

The Seventh Circuit admitted freely that "[c]laims brought under the Jones Act have not been litigated frequently in this circuit."[147] Despite that observation, the court decided that the *Robison* interpretation of the Jones Act was too broad in that it accorded insufficient weight to the relationship between the employee and the transportation function of the vessel.[148] The *Beasley* Court stated that "significant navigational functions"[149] must be involved. It further noted that "emphasis on activities contributing to the operation and welfare of the vessel as a means of transport on water are critical to jurisdiction under the Jones Act."[150] In light of this strict construction, the plaintiff Johnson was found not to be a seaman for coverage under the Jones Act.[151]

In *Lormand v. Aries Marine Corp.*,[152] Justice White dissented from the Court's denial of a petition for certiorari and recognized that a conflict existed between the strict "navigation requirement" of the Seventh Circuit and the broader "aid to the operation or mission" of the vessel construction used by other circuits.[153] Strangely enough, it was the Fifth Circuit in *Wilander v. McDermott Int'l, Inc.*[154] which noted that the Supreme Court had not held either test to be incorrect.[155] It is upon this stage that the United States Supreme Court granted certiorari in

143. *See, e.g.*, Chauvin v. Sanford Offshore Salvage, Inc., 868 F.2d 735 (5th Cir. 1989); Omar v. Sea-Land Service, Inc., 813 F.2d 986 (9th Cir. 1987) (citing Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952)); Bennett v. Perini Corp., 510 F.2d 114 (1st Cir. 1975); Lewis v. Roland E. Trego & Sons, 501 F.2d 372, 374 (4th Cir. 1974) ("[O]ne who works aboard a ship in navigation is usually considered to be a seaman if his duties are essential to some purpose of the vessel."); Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165 (2d Cir. 1973).

144. 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

145. *Id.* at 1056.

146. *Id.*

147. *Id.*

148. *Beasley*, 742 F.2d at 1061.

149. *Id.*

150. *Id.*

151. *Id.* at 1064.

152. 484 U.S. 1031, 1031 (1988) (White, J., dissenting).

153. *Id.* (White, J., dissenting).

154. 887 F.2d 88 (5th Cir. 1989), *cert. granted in part*, 496 U.S. 935 (1990), *and aff'd*, 111 S. Ct. 807 (1991).

155. *Wilander*, 897 F.2d at 90-91.

McDermott Int'l, Inc. v. Wilander.[156]

VII. The Rationale Behind *Wilander*

The Supreme Court had to decide "whether one must aid in the navigation of a vessel in order to qualify as a 'seaman' under the Jones Act."[157] The Court began its voyage into the realm of seaman status with a discussion of *The Osceola.*[158] The Court stated that although *The Osceola* "excluded seamen from the general maritime negligence remedy,"[159] the Jones Act removed the bar to negligence actions contained therein.[160] The Court stated that the Jones Act, in responding to *The Osceola*, adopted the term "seaman"[161] which was used therein. Moreover, the term 'seaman' is "a maritime term of art."[162] Following this pronouncement, the Court assumed that when a statute uses such a term, Congress intended it to have the meaning which was established prior to Congressional action.[163] The Court, therefore, turned to a discussion of who was a seaman at the time the Jones Act was passed.[164]

In its discussion, the Supreme Court stressed that in the last century, seamen's benefits have been consistently awarded to those on board ship who did nothing to direct the vessel's navigation.[165] In addition, by the 19th century, admiralty courts did not require that seamen have a connection to navigation.[166] After examining the navigational requirement, the Court concluded that "at the time of *The Osceola* and the passage of the Jones Act . . . general maritime law did not require that a seaman aid in navigation. It was only necessary that a person be employed on board a vessel in furtherance of its purpose."[167] The Court thus established that the Jones Act, at the time of its passage, contained no requirement that to be a seaman, one had to aid in navigation.[168]

The Court then examined case law and the LHWCA to determine

156. 496 U.S. 935 (1990).
157. *Wilander,* 111 S. Ct. at 809.
158. *Id.* at 810; *see supra* notes 83-86 and accompanying text.
159. *Wilander,* 111 S. Ct. at 810.
160. *Id.*
161. *Id.* at 811.
162. *Id.* The Court stated that when the Jones Act was enacted the term "seaman" was adopted without elaboration because it was a "term of art" due to common usage prior to statutory construction. *Id.*
163. *Id.* The Court does not state on what it bases this assumption; it merely assumes a term should have its established meaning absent any contrary indication. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 812.
167. *Id.* at 813.
168. *Id.*

the requirements of seaman status.[169] The Supreme Court concluded that the Jones Act and the LHWCA are mutually exclusive and the "key requirement for Jones Act coverage now appears in another statute."[170] The Court then came to the conclusion that "[t]here is nothing in [the] . . . cases, or the LHWCA, to indicate that members of a crew are required to navigate . . . . '[M]aster or member of a crew' restates who a 'seaman' under the Jones Act is supposed to be: a sea-based maritime employee."[171]

The Supreme Court, in its decision, stated that "the time has come to jettison the aid in navigation language."[172] The key to seaman status has thus become the "employment-related connection to a vessel in navigation."[173] The Court believes that it was "not called upon here to define this connection in all details," but holds that "a necessary element of the connection is that a seaman perform the work of a vessel."[174] As the Court was merely requested to decide if Plaintiff Wilander should be precluded from seaman status because he did not perform transportation-related functions of the vessel, it considered its job finished and responded in the negative.[175]

VIII. CIRCUIT COURT INTERPRETATIONS OF *WILANDER*

Since the Supreme Court did not take the opportunity to respond fully to the question of seaman status under the Jones Act, the courts are still wrestling with the issue.[176] *Bach v. Trident Steamship Company,*[177] for example, concerned the survivors of a river pilot who suffered a fatal heart attack after boarding.[178] The Court of Appeals for the Fifth Circuit (the harbingers of the *Robison* test for seaman status), found that

169. *Id.* at 813-16.

170. *Id.* at 813. The Court thus established that " '[M]aster or member of a crew' is a refinement of the term 'seaman' in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act." *Id.*

171. *Id.* at 814.

172. *Id.* at 816.

173. *Id.* at 817. The Court, in so saying, is reaffirming that it is an employee's connection with a vessel which is determinative of the employee's status as a seaman and not the actual navigational functions he performs.

174. *Id.*

175. *Id.* at 818.

176. *See generally* Bach v. Trident Steamship Co. Inc., 920 F.2d 322 (5th Cir. 1991), *cert. granted and judgment vacated,* 111 S. Ct. 2253 (1991); Evans v. United Arab Shipping Co., 767 F. Supp. 1284 (D.N.J. 1991); Harwood v. Partredereit AF 15.5.81, 944 F.2d 1187 (4th Cir. 1991).

177. 920 F.2d 322 (5th Cir. 1991), *cert. granted and judgment vacated,* 111 S. Ct. 2253 (1991). *Bach* was decided by the Fifth Circuit on January 10, 1991 and was remanded to the Court of Appeal for further consideration in light of *Wilander* which was decided by the Supreme Court on February 19, 1991. On remand, the Fifth Circuit affirmed its earlier decision. Bach v. Trident Steamship Co. Inc., 947 F.2d 1290 (5th Cir. 1991), *cert. denied,* 112 S. Ct. 1996 (1992).

178. *Bach,* 920 F.2d at 324.

a pilot is not a seaman as a matter of law for purposes of the Jones Act.[179] The court stated that while the pilot failed the vessel connection prong of the *Robison* test, the decision in *Barrett v. Chevron, U.S.A., Inc.*[180] left open a possible exception: "We do not decide whether the same principle governs the crewmember status of the maritime worker who spends virtually all of his time performing traditional seaman's duties—work closely related to the movement of vessels—but does his work on short voyages aboard a large number of vessels."[181] The Fifth Circuit thus had to decide in *Bach* what it previously left open in *Barrett.*[182]

In its discussion, the court stated that Bach's case for seaman status was very persuasive in that: (1) his sole job was to perform the traditional seaman function of steering a vessel through navigable waters; and (2) Bach regularly faced the perils of the sea while performing his job.[183] However, despite the court's initial assumption that Bach should qualify as a seaman,[184] the court found that Bach did not qualify for coverage under the Jones Act.[185] The court reasoned that if Bach were granted an exception to the vessel connection requirement, the Fifth Circuit would be drawn further away from the navigational tests in use.[186] The court concluded that granting Bach an exception to the vessel connection requirement would make the Fifth Circuit's test for seaman status vague and ambiguous.[187] In his dissent, Justice Brown[188] summed up the problem with the court's logic:

> Disregarding nearly a thousand years of maritime lore, enactments and codes of worldwide maritime nations, congressional enactments and Supreme Court decisions, the Court holds that a state compulsory pilot—the preeminent, indispensable member of the ship's company in controlling and directing the immediate navigation of a vessel—is not a statutory Jones Act seaman. I cannot turn my back on this maritime tradition and compelling precedent. I am compelled to dissent.[189]

Because *Wilander* did not consider the requirement of permanent attachment to a vessel,[190] the Fifth Circuit will have no more direct gui-

179. *Id.* at 326. Decedent Bach was not a seaman for purposes of the Jones Act as a matter of law because he lacked permanent connection to the vessel at the time of his injury. *Id.*

180. 781 F.2d 1067 (5th Cir. 1986).

181. *Id.* at 1075 n.13.

182. *Bach*, 920 F.2d at 324.

183. *Id.*

184. *Id.* at 324-25.

185. *Id.* at 326.

186. *Id.* at 325.

187. *Bach*, 920 F.2d at 326.

188. Justice Brown, a Circuit Judge for the Fifth Circuit, filed a dissenting opinion in *Bach*. *Id.* at 327 (Brown, J., dissenting).

189. *Id.* at 327-28 (Brown, J., dissenting).

190. *Wilander*, 111 S. Ct. at 818.

dance when it attempts to further consider the impact of *Wilander* on the seaman status of pilots.[191]

One of the first cases to be decided regarding pilots and their status (or non-status) as seaman following the *Wilander* decision was *Evans v. United Arab Shipping Co.*[192] In *Evans*, the court specifically stated that "the court must confront an issue explicitly left open by the Supreme Court's recent decision in *McDermott Internation[al], Inc. v. Wilander* . . . whether a river pilot who is not permanently attached to a ship is a Jones Act seaman."[193]

The plaintiff in *Evans* argued that the Supreme Court's decision in *Wilander* leads to the conclusion that the attachment prong of seaman status is no longer required as it is enough that the plaintiff was employed to assist in the vessel's main purpose or function.[194] The court moreover viewed the *Bach* case with suspicion due to the Supreme Court's decision to remand it "for further consideration."[195]

The United States District Court for the District of New Jersey began its discussion in *Evans* with an overview of the *Wilander* decision and concluded that the Supreme Court itself actually answered the question of the seaman status of a river pilot when it stated that pilots were considered seamen at the time of the passage of the Jones Act.[196] The court remarked that the federal agency charged with enforcing the LHWCA, the United States Employee's Compensation Commission, issued a ruling in 1927 that a river pilot is a master or member of a crew and therefore excluded from coverage under the LHWCA.[197] The Commission concluded that " 'the pilot merely takes over for the time being some of the duties pertaining to navigation which devolve upon the master.' "[198] Due to the Commission's findings, the Court held that a river pilot is a master or member of a crew and therefore qualifies for coverage under the Jones Act.[199]

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191. *Id.* at 817.

192. 767 F. Supp. 1284 (D. N.J. 1991).

193. *Id.* at 1285.

194. *Id.* at 1288. Plaintiff argued that the Supreme Court in *Wilander* failed to address the issue of seaman status as it applied to an employee's permanent attachment to a vessel. *Wilander*, 111 S. Ct. at 809.

195. *Evans*, 767 F. Supp. at 1288.

196. *Id.* at 1289.

197. *Id.* at 1290 (citing Longshoremen's Act, Op. # 22, 1928 AMC 263 (U.S. Employee's Comp. Comm. 1927)).

198. *Id.* (quoting Longshoremen's Act, Op. 22, 1928 AMC 263, 264 (U.S. Employee's Comp. Comm. 1927)).

199. *Id.* at 1291. The court also noted Judge Brown's dissent in *Bach* in that the pilot is indispensable to a vessel's mission: "That pilot is in supreme command of the basic function of the vessel—to navigate in maritime commerce. That person is a seaman or he/she is nothing." *Id.* at 1291 (quoting Bach v. Trident Steamship Co., 920 F.2d 322, 333 (5th Cir. 1991) (Brown, J., dissenting)).

Most recently, in *Harwood v. Partredereit AF 15.5.81*,[200] the Fourth Circuit struggled with the status of pilots as seamen. Plaintiff Harwood was injured while attempting to board a vessel for pilotage. He brought an action under the Jones Act and for unseaworthiness.[201] The Virginia district court granted summary judgment on the Jones Act claim but denied the motion for summary judgment on the claim of unseaworthiness.[202] The Court of Appeals for the Fourth Circuit determined that the granting of the motion for summary judgment on the claim brought under the Jones Act was proper.[203]

Chief Judge Ervin, in a lengthy dissent, argued that the plaintiff was not entitled to recovery under the LHWCA but was instead a Jones Act seaman.[204] Judge Ervin restated the opinion of the United States Employees' Compensation Commission that a temporary pilot of a vessel *is* included in the term "master or member of the crew."[205] The judge went on to state that of the three federal cases which have addressed the question of whether pilots are covered by the Jones Act,[206] only one has held that a pilot is not a master or member of the crew.[207] Additionally, Judge Ervin furthered the assertion that harbor pilots should be considered seamen for purposes of the Jones Act by using the Supreme Court's own logic in *Wilander*:[208] "[T]here is nothing in the statute or the legislative history to support the contention that, in order to qualify for status as a 'master or member of the crew' under the Act, a maritime worker *must* meet the Jones Act test."[209] *Wilander* makes much the same point, but with less clarity, when the Court states: "[t]here is nothing in the . . . cases, or the LHWCA, to indicate that members of a crew are required to navigate . . . . '[m]aster or member of a crew' restates who a 'seaman' under the Jones Act is supposed to

200. 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992).

201. *Id.* at 1189.

202. *Id.* The defendant alleged that the district court erred in instructing the jury that the plaintiff was owed the warranty of seaworthiness as he was a pilot and not a member of the crew of the vessel. *Id.*

203. *Id.* at 1192. The Court determined that the granting of the motion for summary judgment was proper because a pilot is not more or less permanently attached to the vessel he is piloting. *Id.*

204. *Id.* at 1193 (Ervin, J., dissenting).

205. *Id.* at 1194 (emphasis added) (Ervin, J., dissenting).

206. Bach v. Trident Steamship Co., 708 F. Supp. 772 (E.D. La. 1988), *aff'd on other grounds*, 920 F.2d 322 (5th Cir. 1991), *cert. granted and judgment vacated*, 111 S. Ct. 2253 (1991); Ringering v. Compania Maritima De-La-Mancha, 670 F. Supp. 301 (D. Or. 1987); Clark v. Solomon Navigation, Ltd., 631 F. Supp. 1275 (S.D.N.Y. 1986).

207. *Harwood* 944 F.2d 1187, 1194 (Ervin, J., dissenting) (citing Bach v. Trident Steamship Co., 708 F. Supp. 772 (E.D. La. 1988), *aff'd on other grounds*, 920 F.2d 322 (5th Cir.), *cert. granted and judgment vacated*, 111 S. Ct. 2253 (1991)).

208. McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807 (1991).

209. *Harwood*, 944 F.2d at 1195, *cert. denied*, 112 S. Ct. 1265 (1992) (Ervin, J., dissenting).

be: a sea-based maritime employee."[210] Who is more of a sea-based maritime employee than a pilot who controls the vessel through the navigational pathway and makes his living solely at sea?

Judge Ervin went on to discuss the *Wilander* decision in his dissent and noted that "[n]othing in the Court's opinion prevents the conclusion that harbor pilots, who are land-based but perform navigational duties and serve under the working conditions dictated solely by a vessel, may be 'members of the crew' even if they do not qualify as Jones Act seamen."[211] Additionally, by the LHWCA's very exclusion of masters or members of the crew from coverage, pilots would be left without a remedy if they additionally had to qualify as Jones Act seamen.

IX. CRITICISMS OF *WILANDER*

Based on the foregoing analysis, it is clear that the United States Supreme Court, in deciding *Wilander* and attempting to establish a specific test for seaman status under the Jones Act, has failed.[212] Where the Court could have finally and definitively asserted a uniform test for seaman status, it has further muddied the navigational waters.[213]

Although the Supreme Court was on the right track in attempting to clarify the status of seamen by discussing what the term "seaman" meant at the time the Jones Act and LHWCA were passed, it missed the boat by not totally closing the circle of seaman status and leaving a loophole through which pilots may pass. Although pilots should be considered seaman under the definitions propounded by the Supreme Court, the Court has failed to include them in a definitive statement to lower courts. That failure will merely promulgate the plethora of continued litigation until the United States Supreme Court again speaks.

The Supreme Court in *Wilander* held that "[i]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work."[214] To merely address the aid in navigation requirement in a vacuum without considering the permanent attachment prong of either test leaves pilots, who *do* aid in a ship's navigation, without the life preserver of the

210. *Wilander*, 111 S. Ct. at 814.

211. *Harwood*, 944 F.2d at 1196 (Ervin, J., dissenting).

212. *See generally* Harwood v. Partredereit AF 15.5.81, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992); Bach v. Trident Steamship Co., 920 F.2d 322 (1991), *cert. granted and judgment vacated*, 111 S. Ct. 2253 (1991); Evans v. United Arab Shipping Co., 767 F. Supp. 1284 (D. N.J. 1991).

213. *See generally* Harwood v. Partredereit AF 15.5.81, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992); Bach v. Trident Steamship Co., 920 F.2d 322 (1991), *cert. granted and judgment vacated*, 111 S. Ct. 2253 (1991); Evans v. United Arab Shipping Co., 767 F. Supp. 1284 (D. N.J. 1991).

214. McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807, 817 (1991) (citing Maryland Casualty Co. v. Lawson, 94 F.2d 190, 192 (5th Cir. 1938)).

Jones Act because they are not permanently attached to a vessel nor a fleet of vessels.

It is fundamentally inequitable to deny pilots—the seminal maritime navigators—protection of the Jones Act that is afforded other workers who, in the wake of *Wilander*, are deemed to assist in the navigation of the vessel no matter how attenuated their function from the engine room, pilot house, or the mechanical plant. Bartenders,[215] cooks, and stewards[216] are deemed seamen whereas the pilot—the one individual who begins and ends a voyage from port—would be denied seaman status if a permanent attachment to the vessel is required in addition to status as a seaman as defined in *Wilander*. Had the Court defined a new test, instead of merely attempting to clear up the two previous interpretations of the tests promulgated by the Fifth[217] and Seventh Circuits,[218] the Circuit Courts would not be in the position of having to decide what the Supreme Court has failed to address directly.

X. Conclusion

The United States Supreme Court, in deciding *Wilander*, stated that the key to seaman status was an employee's "employment-related connection to a vessel in navigation . . . [and it was] not called upon to define this connection in all details."[219] However, by failing to define the connection in all details (i.e., by failing to address the permanent attachment prong promulgated by the Circuit Courts), the Supreme Court has left it to the Circuit Courts to determine whether pilots, the sine qua non of a voyage, qualify as seamen under the hybrid test of seaman status promulgated by *Wilander*. Until a determination is made that a seaman does not have to have a permanent attachment to a vessel in navigation, pilots will be precluded from recovery under the Jones Act despite the finding that they are indeed seaman for purposes of said Act. Having left the precise definition of seaman status to be refined in future cases, the United States Supreme Court merely resolves the conflict among the circuits as opposed to resolving the issue.

*Nancy J. Fugleberg**

215. The J.S. Warden, 175 F. 314, 315 (D.C.N.Y. 1910).

216. The Wanderer, 20 F. 655, 656 (C.C.D. La. 1880).

217. *See generally* Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).

218. *See generally* Johnson v. John F. Beasley Const. Co., 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

219. *Wilander*, 111 S. Ct. at 817.

* To Jonathan and Eric whose love and support made law school and this work possible, to my parents, brothers and sister for their lifelong encouragement, and to Andrew C. Mason, Sr. whose inspiration has not been forgotten.

Angelini v. OMD Corporation: Consortium Claimants and the Abandonment of Discerning Caution

I. INTRODUCTION

The Supreme Judicial Court of Massachusetts has expanded the class of children who may bring claims for loss of parental consortium to include a child who was a non-viable fetus at the time of the injury to the parent.[1] A child conceived before the parent's injury and subsequently born alive need only establish "a reasonable expectancy of a dependent relationship with the injured parent."[2] This is a substantial change from what the law previously required: that the child actually be dependent at the time of the injury and be a household member.[3]

Section II of this article covers the facts of *Angelini* and sets out the court's decision. Section IIIA examines the history of loss of consortium claims in Massachusetts. Section IIIB discusses the prenatal injury cases which the Supreme Judicial Court relied on in reaching its decision in *Angelini*. Section IIIC discusses loss of parental consortium claims in other jurisdictions where such claims are allowed and where they are prohibited.

The analysis of the *Angelini* decision in Section IV will demonstrate the flaws in the court's reasoning in light of the traditional bases for loss of consortium claims and in light of the facts of the case.

II. MAIN CASE

On September 25, 1985 plaintiff Jeremy Michael Angelini[4] (Jeremy)

1. Angelini v. OMD Corp., 410 Mass. 653, 575 N.E.2d 41 (1991). Prior to *Angelini* the Supreme Judicial Court had consistently noted its intent, when faced with the issue of whether to create a new class of consortium claimants, to "proceed from case to case with discerning caution." Norman v. Massachusetts Bay Trans. Auth., 403 Mass. 303, 304, 529 N.E.2d 139, 139 (1988) (denying parents' claim); Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 516, 413 N.E.2d 690, 696 (1980) (creating dependent minor child's claim); Diaz v. Eli Lilly & Co., 364 Mass. 153, 165, 302 N.E.2d 555, 563 (1973).

2. *Angelini*, 410 Mass. at 662, 575 N.E.2d at 46.

3. *See, e.g., Ferriter*, 381 Mass. 507, 413 N.E.2d 690; Glicklich v. Spievack, 16 Mass. App. Ct. 488, 496 452 N.E.2d 287, 292 (1983). The *Ferriter* court protected the *living* "child's reasonable expectation of parental society when the parent suffer[ed] negligent injury." *Ferriter*, 381 Mass. at 515-16, 413 N.E.2d at 695.

4. *Angelini*, 410 Mass. at 653, 575 N.E.2d at 41. Jeremy was a nonviable fetus on the date of the accident. *Id.* at 657, 575 N.E.2d at 43. His mother, Susan Beth

was *en ventre sa mere.*[5] On that date, his father Leo LePage (LePage) was injured while a passenger in a one car accident.[6] LePage brought suit, alleging negligence against the driver of the automobile (Laberge) as well as against the OMD Corporation (OMD) and the Hoy Tin Restaurant (Hoy Tin).[7] The complaint was filed on December 10, 1985.[8] Baby LePage, the as yet unborn Jeremy, also brought claims in this complaint.[9] The essence of Baby LePage's claim was loss of parental consortium.[10]

Some eleven weeks later, on February 23, 1986, Jeremy was born alive.[11] Subsequently, defendants OMD and Hoy Tin moved for summary judgment, arguing that as a matter of law, a loss of parental con-

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Angelini, brought his claim as his mother and next friend. *Id.* at 653 n.1, 575 N.E.2d at 41 n.1. Susan was not involved in the accident. *Id.* at 654 n.4, 575 N.E.2d at 41 n.4. Susan and Jeremy's father were never married to each other. *Id.* at 662, 575 N.E.2d at 46. The court noted that a child plaintiff's consortium claim was not defeated by the fact that he is illegitimate. *Id.* at 662-63, 575 N.E.2d at 46. "The trend of the law has been to treat illegitimate children in the same way as legitimate children." *Id.* at 662, 575 N.E.2d at 46. Legitimacy status thus does not affect a child's standing to bring a loss of consortium claim. *Id.* at 663, 575 N.E.2d at 46. *See generally* Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship,* 51 IND. L.J. 590, 620-22 (1976).

5. *Angelini,* 410 Mass at 654, 575 N.E. 2d at 41. The phrase "en ventre sa mere" is defined as "[i]n its mother's womb." BLACK'S LAW DICTIONARY 534 (6th ed. 1990).

6. *Angelini,* 410 Mass. at 654, 575 N.E.2d at 41.

7. *Id.* The twelve count complaint, brought by LePage, Jeremy and Shawn Lewis, another passenger, alleged that Laberge had negligently operated the automobile and that defendants OMD and Hoy Tin had negligently served alcoholic beverages to Laberge, shortly before the accident. *Id.*, 575 N.E.2d at 42. Dram Shop Act violations were also alleged. *Id.* The Dram Shop Act prohibits sale or delivery of an alcoholic beverage, on a licensed premise, to an intoxicated person. MASS. GEN. L. ch. 138, § 69 (1988). LePage and Laberge were both inebriated from hours of drinking, allegedly at establishments owned by OMD and Hoy Tin. Brief for the Plaintiff-Appellant, Jeremy Michael Angelini at 4, Angelini v. OMD Corp., 410 Mass. 653, 575 N.E. 2d 41 (1991) (No. SJC-5397) [hereinafter Brief for Plaintiff].

8. Joint Brief for the Defendants-Appellees, O.M.D. Corp. d/b/a B.B. Binks and Hoy Tin Restaurant, Inc. at 3, Angelini v. OMD Corp., 410 Mass. 653, 575 N.E.2d 41 (1991) (SJC-5397) [hereinafter Brief for Defendants].

9. *Id.*

10. *Angelini,* 410 Mass. at 654, 575 N.E.2d at 42. The unborn child " 'has been and will be in the future deprived of the regular and reasonable support, maintenance and comfort that [he] would have received but for the accident.' " *Id.*, 575 N.E.2d at 42 (quoting Compl. ¶¶ XI-XII). The term parental consortium describes the rights and duties joining parents and children to each other: "The important aspects of the . . . relationship, apart from the parent's duty of support, are the intangibles which follow from living together as a family, the affection, society, companionship, the mutual learning, the moral support given and received." HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § II.I at 383 (2d ed. 1988).

11. Brief for Plaintiff, *supra* note 7, at 5.

sortium claim could not be brought by one who was a nonviable fetus at the time of the injury to the parent.[12] The motion for summary judgment was allowed as was a motion for entry of separate and final judgment which enabled Jeremy to appeal.[13] Five justices of the Supreme Judicial Court heard arguments on January 10, 1991.[14] Chief Justice Liacos delivered the court's opinion on July 15, 1991,[15] holding "that a child who was (1) conceived *before* his or her parent suffered non-fatal injuries caused by the negligence of a defendant, and (2) subsequently born alive, is not as a matter of law precluded from recovering for loss of parental consortium."[16]

In reaching its decision the Supreme Judicial Court surveyed the development of loss of consortium claims in Massachusetts from the creation of a wife's claim for loss of her husband's consortium,[17] to a dependent minor's claim for loss of parental consortium,[18] to a dependent adult child's claim for loss of parental consortium.[19] The court acknowledged that policy considerations prevent extending loss of consortium claims to unmarried cohabitants,[20] or unadopted stepchildren of an injured stepparent.[21] The court considered whether children conceived after the injury to the parent may bring a loss of consortium claim and concluded that such children may not bring a claim because the duration of liability must be limited.[22]

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12. *Angelini*, 410 Mass. at 654, 575 N.E.2d at 42.

13. *Id.* at 654-55, 575 N.E.2d at 42.

14. *Id.* at 653, 575 N.E.2d at 41. Chief Justice Liacos and Justices Wilkins, Nolan, O'Connor and Greaney were present. *Id.*

15. *Id.*

16. *Id.* at 661-62, 575 N.E.2d at 45-46.

17. *Id.* at 655, 575 N.E.2d at 42 (citing Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973)).

18. *Id.* (citing Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980); Glicklich v. Spievack, 16 Mass. App. Ct. 488, 452 N.E.2d 287 (1983)).

19. *Id.* at 656, 575 N.E.2d at 42 (citing Morgan v. Lalumiere, 22 Mass. App. Ct. 262, 493 N.E.2d 206 (1986)).

20. *Id.*, 575 N.E.2d at 43 (citing Feliciano v. Rosemar Silver Co., 401 Mass. 141, 514 N.E.2d 1095 (1987)). The cohabitants in *Feliciano* lived together as a de facto married couple for twenty years before Mr. Feliciano was injured, but were not legally married until two years after the injury. *Feliciano*, 401 Mass. at 141-42, 514 N.E.2d at 1096.

21. *Angelini*, 410 Mass. at 656, 575 N.E.2d at 43 (citing Mendoza v. B.L.H. Elec., 403 Mass. 437, 530 N.E.2d 349 (1988)). The issue presented in *Mendoza*, was whether an eighteen year old adult stepchild could recover for loss of parental consortium from a third party who negligently injured his stepparent. *Mendoza*, 403 Mass. at 438, 530 N.E.2d at 349. The court's holding that a stepchild whose relationship has not been formalized by adoption may not recover for loss of parental consortium arguably applies to stepchildren of all ages. *Id.* at 439, 530 N.E.2d at 350 (Liacos, J., concurring).

22. *Angelini*, 410 Mass. at 658, 575 N.E.2d at 43. The court indicated that it would not be persuaded by an argument that children conceived after the parent's

The *Angelini* Court sought guidance from a line of cases involving prenatal injury to a fetus in deciding that fetal viability at the time of the injury to the parent should not be the determinative factor in deciding whether a child has a loss of consortium claim.[23] The court concluded that because the viability/nonviability distinction is not dispositive in cases of prenatal injury followed by live birth, it should not be dispositive where, as in *Angelini*, the injury to the child occurs after birth.[24]

An understanding of the development of loss of consortium claims in Massachusetts is necessary in order to appreciate the significance of the rule created in *Angelini*.

III. BACKGROUND

A. *Loss of Consortium Claims in Massachusetts*

Prior to 1971, only a husband could bring a claim for loss of spousal consortium.[25] Elements of the loss of consortium claim included the husband's loss of the wife's society and impairment of their sexual relationship.[26] An intentional act such as adultery or assault on the wife as

injury will suffer the same harm as the child who was a nonviable fetus at the time of the injury. *Id.* at 657, 575 N.E.2d at 43. Without some restriction, a defendant could be liable for many years into the future. *Id.* at 658, 575 N.E.2d at 43.

23. *Id.* at 660, 575 N.E.2d at 44-45 (citing Mone v. Greyhound Lines Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); Leccese v. McDonough, 361 Mass. 64, 279 N.E.2d 339 (1972); Torigian v. Watertown News. Co., 352 Mass. 446, 225 N.E.2d 926 (1967); Keyes v. Construction Serv. Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884)).

24. *Angelini*, 410 Mass. at 661, 575 N.E.2d at 45.

25. Lombardo v. D.F. Frangioso & Co., 359 Mass. 529, 269 N.E.2d 836 (1971) (finding neither spouse has claim for loss of consortium when other has been negligently injured); Feneff v. New York Cent. & Hudson River R.R. Co., 203 Mass. 278, 89 N.E. 436 (1909) (holding wife may not maintain loss of consortium action when husband has settled his claim, because court fears double recovery); Duffee v. Boston Elev. Ry., 191 Mass. 563, 77 N.E. 1036 (1906) (upholding consortium action when wife was negligently injured); Kelly v. New York, N.H. & H.R.R. Co., 168 Mass. 308, 46 N.E. 1063 (1897). (finding husband may be entitled to bring an action for loss of consortium against negligent defendant who injured wife):

> In olden days, when married women were under legal disabilities corresponding to their inferior social status, any action for personal or other injuries to the wife was brought in the names of the husband and wife, and the husband was ordinarily entitled to the avails of the action as of his own property.

Diaz v. Eli Lilly & Co., 364 Mass. 153, 154, 302 N.E.2d 555, 556 (1973). The basis of loss of consortium claims "was the deprivation of the wife's services conceived to be owing by the wife to the husband." *Id.* at 154-55, 302 N.E.2d at 556.

26. *Diaz*, 364 Mass. at 155, 302 N.E.2d at 556. Loss of a wife's services and earning capacity were deemphasized as loss of society and sexual relationship became grounds for a loss of consortium claim. *Id.* After passage of the Married Women's Acts in the mid-nineteenth century, the wife's services and earnings belong to her while the consortium rights of society, companionship, assistance and sexual availability remained with the husband. *Id.* at 155-56, 302 N.E.2d at 556.

well as a negligent injury to her could be the nexus for a loss of consortium claim by the husband.[27] A wife, however, had no analogous claim when the injury was to her husband. [28] After *Lombardo* was decided in 1971,[29] neither spouse had a claim for loss of consortium until 1973 when the Supreme Judicial Court gave each spouse a cause of action when the other was negligently injured.[30] In *Diaz,* the court specifically noted:

> Nor does it follow that if the husband-wife relationship is protected as here envisaged, identical protection must be afforded by analogy to other relationships from that of parent-child in a lengthy regress to that of master-servant; courts will rather proceed from case to case with discerning caution.[31]

It was not until 1980, seven years later, that the Supreme Judicial Court considered the question of whether a loss of consortium claim could be brought by a child whose parent had been negligently injured.[32] The *Ferriter* Court's decision to allow dependent minor children to bring a claim was based in part on the belief that a minor child's interest in parental society is no less intense than a wife's interest in the society and companionship of her husband.[33]

The common law protection afforded a parent's sentimental interest in the parent-child relationship also factored into the *Ferriter* Court's decision to provide similar protection to a dependent minor child,[34] as did the fact that a child is entitled to recover loss of society under the Wrongful Death Statute.[35] The court noted with approval that the Legislature had acted to protect a "child's need for parental love and nurture."[36]

The *Ferriter* Court found that none of the objections traditionally

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27. *Id.* at 155, 302 N.E.2d at 556.

28. *Id.* "[T]here was no thought that the wife had any legal claim . . . in the form of a cause of action for third-party damage to the relationship." *Id.*

29. *See supra* note 25.

30. *Diaz,* 364 Mass. at 165, 302 N.E.2d at 563. The danger of double recovery could be adequately controlled by joinder of the spouses' claims and by careful jury instructions. *Id.* at 162, 302 N.E.2d at 561-62.

31. *Id.* at 165, 302 N.E.2d at 563.

32. Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980). The court held that minors dependent on a parent who is negligently injured may bring a claim for loss of parental society. Dependency must be not only economic but also grounded on "filial needs for closeness, guidance, and nurture." *Id.* at 516, 413 N.E.2d at 696.

33. *Id.* at 510, 413 N.E.2d at 692.

34. *Id.* at 512-13, 413 N.E.2d at 694.

35. *Id.* at 515, 413 N.E.2d at 695 (citing MASS. GEN. L. ch. 229, § 2 (as appearing in St. 1973 c. 699, § 1)).

36. *Ferriter,* 381 Mass. at 516, 413 N.E.2d at 695; *see also* MASS. GEN. L. ch. 119, § 1 (1972), which relates to the care and protection of children, which declares that the policy of the Commonwealth is "to direct its efforts . . . to the strengthening and encouragement of family life for the protection and care of children[.]" *Id.*

raised to deny loss of consortium claims were strong enough to limit, or overcome, a child's right to bring a claim for loss of consortium.[37] In creating this cause of action the court echoed the *Diaz* court and said, "[i]n so holding we do not abandon our determination to 'proceed from case to case with discerning caution' in this field."[38]

The next step was taken in 1983.[39] Notwithstanding the specific holding in *Ferriter* that claims could be brought by minors who were economically dependent and who also had needs for closeness, guidance and comfort, the *Glicklich* Court found it clear that economic dependence on the injured parent was not required.[40]

In 1986 the Massachusetts Appeals Court expanded the class of child plaintiffs to include children who are not minors but who are handicapped, reside with the injured parent and are dependent physically, emotionally and financially.[41] The court justified this expansion

37. *Ferriter*, 381 Mass. at 516, 413 N.E.2d at 695; *see* Berger v. Weber, 267 N.W.2d 124 (Mich. Ct. App. 1978), (*modified*, 303 N.W.2d 424 (Mich. 1981)). The *Berger* Court considered and dismissed seven objections to allowing a child to bring a claim for loss of consortium. *Berger*, 267 N.W. 2d at 128-130. First, denying the claim because of lack of precedent was rejected as it would prevent evolution of the law and result in a static body of law. *Id.* at 128. Second, the problem of uncertainty of damages was found to be no more difficult than in a spousal claim or wrongful death action; an intangible loss should not be denied simply because money damages are inadequate. *Id.* at 128. Third, the problem of double recovery by the injured parent and the child claimant can be handled by having loss of economic support recoverable by the parent only and instructing the jury to consider the child's emotional loss separately. *Id.* at 129. Fourth, the risk of creating an unwieldy class of plaintiffs was dismissed; the court noting that the parent-child relationship is crucial, and confining its holding to that relationship. *Id.* at 129. Fifth, the Court found that a child's interest in recovery on his own cause of action would promote joinder of claims rather than an increase in suits. *Id.* at 129. Sixth, the court was not persuaded that it was anomalous to allow a cause of action based on negligence but not on an intentional tort. *Id.* at 129-30. Seventh, the court found that lack of a sexual aspect of the parent-child relationship did not defeat a consortium claim when the child had lost the society and companionship of a parent. *Id.* at 130.

38. *Ferriter*, 381 Mass at 516, 413 N.E.2d at 696 (quoting *Diaz*, 364 Mass. at 165, 302 N.E.2d at 563).

39. Glicklich v. Spievack, 16 Mass. App. Ct. 488, 452 N.E. 2d 287 (1983).

40. There was no evidence in *Glicklich* that the child was economically dependent on his mother. *Id.* at 496, 452 N.E.2d at 292. A child who lives in the household of the injured parent and depends on the parent for management of his needs and emotional guidance and support is a proper plaintiff in an action for loss of parental consortium. *Id.* The injured parent does not have to be the principal wage earner. *Id.*

41. Morgan v. Lalumiere, 22 Mass. App. Ct. 262, 269-70, 493 N.E.2d 206, 211 (1986). In this case the thirty year old child-plaintiff suffered from blindness, cerebral palsy and mental retardation. *Id.* at 269, 493 N.E.2d at 211. He lived at home where his mother took care of him. *Id. But see* Barbosa v. Hopper Feeds, Inc., 404 Mass. 610, 537 N.E.2d 99 (1989) (severely disabled minor child who required institutional care and did not live in the home was not precluded as a matter of law from bringing a loss of consortium claim when her parent was injured).

as in keeping with "the humane policies underlying *Ferriter*,"[42] and with laws regarding the rights of adult handicapped children.[43]

The following year the Supreme Judicial Court declined to further expand the class of consortium claimants to include unmarried cohabitants.[44] This decision was grounded on the fact that the Commonwealth considers marriage to be more than a contract between two parties.[45] "It is the foundation of the family. It is a social institution of the highest importance."[46] Almost all jurisdictions require that a valid marriage exist at the time of the injury to a spouse.[47] Where parties have not taken on the responsibilities of marriage, they do not have the rights of marriage.[48] The court further noted that as a matter of policy the extension of tort liability should be limited.[49]

In 1988 the Supreme Judicial Court faced the question of "whether a parent may recover for the loss of a child's consortium due to injuries negligently inflicted on the child by a third party."[50] The court found that parents enjoy the consortium of their children but do not depend

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42. *Morgan*, 22 Mass. App. Ct. at 270, 493 N.E.2d at 211.

43. *Id.*

44. Feliciano v. Rosemar Silver Co., 401 Mass. 141, 514 N.E.2d 1095 (1987). The couple in *Feliciano* had lived together as husband and wife for twenty years prior to the injury. *Id.*, 514 N.E.2d at 1096. They were not legally married until approximately two years after the injury. *Id.* at 142, 514 N.E. 2d at 1096.

45. *Id.* at 142, 514 N.E. 2d at 1096.

46. *Id.* No other state court of last resort was found to allow a loss of consortium claim by a cohabitant. *Id.*

47. *Id.*; Gurliacci v. Mayer, 590 A.2d 914, 931-32 (Conn. 1991).

48. *Feliciano*, 401 Mass. at 142, 514 N.E.2d at 1096; *see Gurliacci*, 590 A.2d at 932 (holding that the formal marriage relation is evidence of commitment between two people; the commitment gives rise to the consortium between them); Sprague v. Kaplan, 572 A.2d 789, 790 (Pa. Super. Ct. 1990) (holding the husband does not have loss of consortium claim where wife was injured just hours before the wedding, even though marriage license had already been obtained, because marriage at the time of injury is required). *But see* Moss v. Pacquin, 455 N.W.2d 339, 343 (Mich. Ct. App. 1990) (where neither party knew or should have known of the injury at the time of the marriage, a loss of consortium claim may be brought based on an injury occurring before the marriage); Stahl v. Nugent, 514 A.2d 1367, 1368 (N.J. Super. Ct. Law Div. 1986) (husband allowed to prove his loss of consortium damages since the marriage when wife was injured two months prior to the marriage; the marriage was the basis of the claim even though damages did not commence until the time of the marriage); Reygaert v. Palmer, No. 9296, 1986 WL 1340, at *4 (Ohio App.) (finding, in dicta, strong logic in extending loss of consortium claims to cohabitants with longstanding relationships).

49. *Feliciano*, 401 Mass. at 142, 514 N.E.2d at 1096. "Distinguishing between the marriage relationship and the myriad relationships that may exist between mere cohabitants serves the purpose of limiting protection to interests and values that are reasonably ascertainable." *Id.*

50. Norman v. Massachusetts Bay Transp. Auth., 403 Mass. 303, 303 529 N.E. 2d 139, 139 (1988). The complaint did not reveal whether the injured child was a minor or an adult, but the court did not find the issue essential to deciding the case. *Id.* at 304, 529 N.E.2d 140.

on it in the same fashion as a spouse depends on a spouse or a minor or disabled child depends on a parent.[51] Because a parent's dependency on a child is not intrinsic to the relationship, the court distinguished the situation from those in *Diaz*, *Ferriter*, and *Morgan*.[52] The court noted that society faces the threat of financial ruin unless there is limitation on the situations in which a defendant who has negligently injured someone may be liable to third persons who are affected by that injury.[53] The predictability of harm to the other party to the relationship that was found in *Diaz*, *Ferriter* and *Morgan* was not identified by the court in *Norman*.[54] Furthermore, the court felt that opening the door to plaintiff-parents would destroy all defensible reason to deny a cause of action to "other relatives or even to friends who can establish that a defendant's conduct has adversely interfered with their relationship with the physically injured person."[55]

In a case argued just days before *Norman* was handed down, the Supreme Judicial Court held that an adult step-child may not recover for loss of parental consortium when his step-parent is negligently injured.[56] The denial of the claim was based on the lack of a unique dependency relationship and on the fact that the child plaintiff did not have a legal relationship with the injured parent.[57] In a concurring opinion, Justice Liacos noted that the stepparent-stepchild relationship is not a legally cognizable one.[58] "Limiting loss of consortium claims to members of legally cognizable relationships provides a clear, principled, easily ascertainable standard which adequately distinguishes those entitled to recover from those involved in the 'myriad relation-

51. *Id.* at 306, 529 N.E.2d at 141.

52. *Id.* The common thread in those case was "the unique and intense dependency intrinsic in the relationship of the parties." *Id.*

53. *Id.* at 305, 529 N.E.2d at 140.

54. *Id.* at 306, 529 N.E.2d at 141.

55. *Id.* at 306-07, 529 N.E.2d at 141. Justice Liacos, in a strong and lengthy dissent in which he was joined by Justices Wilkins and Abrams, said that the different ways in which parents might depend on children should not preclude a parent's right to recover for loss of a severely injured child's consortium. *Id.* at 315, 529 N.E.2d 145-46 (Liacos, J., dissenting). He noted that the cause of action was allowed in other jurisdictions' and then pointed out that drawing a line that excluded parent claimants was neither principled nor defensible and in fact harmed the Commonwealth's policy of protecting the family unit. *Id.* at 313, 529 N.E.2d at 144 (Liacos, J., dissenting).

56. Mendoza v. B.L.H. Electronics, 403 Mass. 437, 438, 530 N.E.2d 349, 350 (1988).

57. *Id.* at 439, 530 N.E.2d at 350. The plaintiff was the injured party's stepson; he was not her natural son, nor had he been formally adopted. *Id.*, 530 N.E.2d at 349.

58. *Id.* at 440, 530 N.E.2d at 350-51. "[T]he stepparent-stepchild relationship does not trigger certain well-established rights and duties under Massachusetts law." *Id.*, 530 N.E. 2d at 350; *see supra* note 15 and accompanying text. *Contra* Magnuson v. O'Dea, 135 P. 640 (Wash. 1913) (when a stepparent assumes the duties of a parent, the benefits and rights of a parent follow).

ships' which exist in society."[59]

In response to the *Norman* decision, the Legislature enacted MASS. GEN. L. ch. 231, § 85X (1989) which gives parents a cause of action for loss of consortium.[60] The statute reads: "The parents of a minor child or an adult child who is dependent on his parents for support shall have a cause of action for loss of consortium of the child who has been seriously injured against any person who is legally responsible for causing such injury."[61] The key to a parental loss of consortium claim is whether the child, of any age, is dependent on the parents for support.[62] Several issues of public interest may have motivated the Legislature to adopt this new law.[63]

Thus, in Massachusetts, spouses and children have a cause of action for loss of consortium that was created by the courts.[64] A parent's cause of action for loss of consortium is of statutory origin.[65] The *Angelini* Court faced the issue of whether the common law cause of action should be expanded to include children who were nonviable fetuses at the time of a parent's injury.[66]

B. *Prenatal Injury Cases*

The *Angelini* Court examined a line of cases that discuss the significance of fetal viability in wrongful death cases, in order to decide whether the test to apply to determine eligibility of a child consortium

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59. *Mendoza*, 403 Mass. at 437, 530 N.E.2d at 351.

60. Monahan v. Methuen, 408 Mass. 381, 388, 558 N.E.2d 951, 956 (1990).

61. MASS. GEN. L. ch. 231, § 85X (1989). The statute applied retroactively to all causes which accrued on or after September 1, 1986, as well as all like causes of action then pending in the Commonwealth. *Monahan*, 408 Mass. at 389 n.6, 558 N.E.2d at 956 n.6.

62. *Monahan*, 408 Mass. at 389, 558 N.E.2d at 956. Financial dependence on the parent either before or after the injury or both is required in order to show dependence on the parents. *Id.* at 389-90, 558 N.E.2d at 957.

63. Leibovich v. Antonellis, 410 Mass. 568, 574 N.E.2d 978 (1991). In discussing why the statute will be applied retroactively, the court enumerated the policy reasons for its adoption; (1) protection of the integrity and sanctity of the family unit, a well-established policy in Massachusetts and (2) correction of the anomaly that allows a parent to recover loss of consortium damages in a wrongful death action but not when the child is negligently injured. *Id.* at 577-78, 574 N.E.2d at 985. That very anomaly had been before the court the previous year. Schultz v. Grogean, 406 Mass. 364, 548 N.E.2d 180 (1990). In *Schultz* the parent plaintiffs were allowed to bring a claim for loss of consortium damages under the wrongful death act even though they would not have had a loss of consortium claim if their independent adult child had been injured instead of killed. *Id.* at 367-68, 548 N.E.2d at 182.

64. Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980); Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973).

65. MASS. GEN. L. ch. 231, § 85X. (1989).

66. Angelini v. OMD Corp., 410 Mass. 653, 654, 575 N.E.2d 41, 41 (1991).

claimant is "viability at the time of injury."[67] The first reported case considering the issue involved a mother, approximately five months pregnant, who was negligently injured.[68] The fetus was subsequently delivered and found not to be a person under the then existing Wrongful Death Statute.[69] The *Deitrich* rule, that no liability attaches for negligent injury to a fetus, was followed for decades in Massachusetts and other jurisdictions.[70]

In 1960 the Supreme Judicial Court allowed the administratrix of the estate of a child to bring a wrongful death claim based on injury suffered when the child was a viable fetus in his mother's womb.[71] The *Keyes* decision noted that advances in medical science had facilitated the determination of whether a causal relation exists between a prenatal injury and the resulting condition of the child.[72] The court adopted what was then the law in a majority of states: a child who was a viable fetus at the time of the injury has a cause of action for injuries sustained while in the mother's womb at the age of viability.[73] In adopting this view the court explicitly refrained from overruling *Deitrich* but "limited [it] to cases where the facts are essentially the same," [74] that is, where

67. *Id.* at 658, 575 N.E.2d at 44. It is undisputed that Jeremy was a nonviable fetus of approximately sixteen weeks gestation at the time of the injury to Leo. Brief for Defendants, *supra* note 8, at 5. A fetus is not considered to be viable before twenty-three weeks gestation. F. GARY CUNNINGHAM, WILLIAMS OBSTETRICS 747 (18th ed. 1989).

68. Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884). The injury to the mother resulted in a miscarriage; the fetus may have survived for ten or fifteen minutes. *Id.* at 15.

69. *Id.* at 17. Justice Holmes noted the lack of precedent for allowing an infant, injured in its mother's womb to bring an action if it survived. *Id.* at 15. The question of the maturity of the embryo created difficulty in determining liability. *Id.* at 16. The decision also indicated that in order to find for the plaintiff in this case the assumption would have to made that "a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being." *Id.* at 16.

70. Cavanaugh v. First Nat'l Stores, 329 Mass. 179, 180 107 N.E.2d 307, 308 (1952). At the time of the *Cavanaugh* decision, twenty jurisdictions had considered the issue of liability for negligent injury to a fetus; twelve followed the rule in *Deitrich*; eight did not. *Id.* at 180-81, 107 N.E.2d at 308. Massachusetts was not prepared to upset nearly seventy years of precedent. *Id.* at 181, 107 N.E.2d at 308; *see* Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946) (first case to hold that a viable fetus who suffers injury and is subsequently born alive has her own cause of action against the tortfeasor).

71. Keyes v. Construction Serv. Inc., 340 Mass. 633, 165 N.E.2d 912 (1960). The child's right of action for prenatal injury was recognized because (1) natural justice gives a child the right to start life free of physical or mental defects caused by another's negligence, (2) wrongs should be redressed, and (3) the criminal law and laws of descent benefit unborn children. *Id.* at 635, 165 N.E.2d at 914.

72. *Id.* at 636, 165 N.E.2d at 914.

73. *Id.* at 637, 165 N.E.2d at 915. This "conditional prospective liability," *Deitrich*, 138 Mass. at 16, attached when injury was inflicted on a fetus who had attained the gestational age of viability. *Keyes*, 340 Mass. at 636, 165 N.E.2d at 915.

74. *Keyes*, 340 Mass. at 637, 165 N.E.2d at 915.

the fetus is non-viable.

The viable/non-viable distinction was explicitly abandoned seven years later.[75] Relying on the majority of cases from other jurisdictions, the *Torigian* Court found no reason to distinguish a viable fetus from a non-viable fetus.[76] Commentators were united in their view that non-viability should not prevent recovery.[77] With advances in medical science the court believed that these cases had no more risk of speculation than any other tort case where medical evidence must be evaluated to decide causation.[78] Thus, *Torigian* adopted causation as the critical element rather than the viability of the fetus at the time of injury.[79]

In 1972 the Supreme Judicial Court made clear that a fetus must be born alive to be considered a person for the purposes of the Wrongful Death Statute.[80] This rule was adopted as "sensible and easily administered."[81] However, just three years later *Leccese* was overruled in *Mone v. Greyhound Line, Inc.*.[82] The *Mone* Court held that viability of the fetus at the time of injury was the determinative factor in deciding whether a wrongful death claim could be brought.[83] The danger of double recovery or speculative damages is no greater if viability is the standard rather than live birth.[84]

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75. Torigian v. Watertown News Co., Inc., 352 Mass. 446, 225 N.E.2d 926 (1967). The mother was injured at three and a half months gestation when the fetus was not viable; she subsequently delivered prematurely and the child, who was liveborn, died. *Id.* at 447, 225 N.E.2d at 926.

76. *Id.* at 448, 225 N.E.2d at 927. "There is no longer lack of precedent . . . . The element of speculation is not present to any greater extent than in the usual tort claim where medical evidence is offered and the issue of causation must be weighed." *Id.* at 448-49, 225 N.E.2d at 927.

77. *Id.* at 448, 225 N.E.2d at 927.

78. *Id.* at 448-49, 225 N.E.2d at 927.

79. *See also* Sylvia v. Gobeille, 220 A.2d 222, 224 (R.I. 1966) ("[T]he test will not be viability but causation.").

80. Leccese v. McDonough, 361 Mass. 64, 67, 279 N.E.2d 339, 341 (1972) (no recovery under Wrongful Death Statute when injury to viable fetus caused it to die in the mother's womb); *see also* Henry v. Jones, 306 F. Supp. 726, 727 (D. Mass. 1969) (holding that a stillborn is not a person under Massachusetts Wrongful Death Statute).

81. *Leccese*, 361 Mass. at 67, 279 N.E.2d at 341.

82. Mone v. Greyhound Line, Inc., 368 Mass. 354, 331 N.E.2d 916. (1975). A viable eight and a half month fetus is a person for purpose of the wrongful death statute. *Id.* at 355, 331 N.E.2d at 916.

83. *Id.* at 355, 331 N.E.2d at 917; *see* Akl v. Listwa, 741 F. Supp. 555 (E.D. Pa. 1990) (nonviable eight week fetus not a person under Pennsylvania Wrongful Death Act; any damages for death of a nonviable fetus are too speculative). *But see* Seef v. Sutkus, 562 N.E.2d 606, 612 (Ill. App. Ct. 1990), *aff'd*, 583 N.E.2d 510 (Ill. 1991) (in the context of a wrongful death action, brought by the parents of a stillborn fetus that had achieved a viable gestational age, the court found that how, or if, a fetus relates to its parents prior to birth, is a question of fact that the plaintiff may try to prove).

84. *Mone*, 368 Mass. at 361, 331 N.E.2d at 919. An anomaly would exist if an injury severe enough to kill a fetus did not give rise to liability, but an injury which

Mone, however, did not affect the holding in *Torigian* that viability or non-viability at the time of the injury is irrelevant if the fetus is subsequently born alive.[85] From this the *Angelini* court found that "[t]he case law suggests . . . that, if a fetus is injured while it is nonviable, a cause of action will lie under the wrongful death statute if the fetus continues to develop and is eventually born alive."[86] Further, the court reasoned, "[i]f the viability of the fetus is not dispositive in cases of prenatal injury when the infant is born alive, then viability should not be dispositive in cases, such as the present one, where the alleged injury occurred *after* birth."[87]

The *Angelini* Court considered the facts of other loss of consortium cases,[88] but did not address policy issues pertinent to the expansion of the class of child consortium claimants.[89]

C. *Loss of Parental Consortium Claims in Other Jurisdictions*

Since 1980, when the Massachusetts Supreme Judicial Court became the first state court of last resort[90] to hold that a child may bring a claim for loss of parental consortium, the issue has come before courts in at least thirty-two other jurisdictions.[91] Only thirteen have allowed

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allowed a child to be born alive and then die could support a claim. *Id.*, 331 N.E.2d at 920.

85. *Id.*, 331 N.E.2d at 920.

86. *Angelini*, 410 Mass. at 660, 575 N.E.2d at 45.

87. *Id.* at 661, 575 N.E.2d at 45.

88. *Id.* at 655-56, 575 N.E.2d at 42-43.

89. *See infra* notes 118-125 and accompanying text.

90. In 1978 the Court of Appeals of Michigan held that a child could maintain a cause of action for loss of parental society and companionship. Berger v. Weber, 267 N.W.2d 124, 125 (Mich. Ct. App. 1978), *aff'd as modified*, 303 N.W.2d 124 (Mich. 1981). That decision, cited with approval in Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 515, 413 N.E.2d 690, 695 (1980), was on appeal to the Supreme Court of Michigan at the time of the *Ferriter* decision in September, 1980. Berger v. Weber, 303 N.W.2d 424, 424 (Mich. 1981) (*Berger II*, which affirmed the lower court, was argued on October 3, 1979 and decided eighteen months later on March 30, 1981.).

91. Courts are split; however, most have decided against allowing a child to bring a loss of parental consortium claim. Claims are not recognized in nineteen jurisdictions. Green v. A.B. Hagglund and Soner, 634 F. Supp 790 (D. Idaho 1986); Wollam v. Kennecott Corp., 648 F. Supp. 160 (D. Utah 1986); Lewis v. Rowland, 701 S.W.2d 122 (Ark. 1985); Nix v. Preformed Line Products Co., 216 Cal. Rptr. 581 (Cal. Ct. App. 1985); Lee v. Colorado Dep't of Health, 718 P.2d 221 (Colo. 1986); Mahoney v. Lensink, 550 A.2d 1088 (Conn. App. Ct. 1988), *cert. granted*, 554 A.2d 742 (Conn. 1989), *and aff'd in part, rev'd in part*, 569 A.2d 518 (Conn. 1990); Zorzos v. Rosen, 467 So.2d 305 (Fla. 1985); W.J. Bremer Co., v. Graham, 312 S.E.2d 806 (Ga. Ct. App. 1983), *cert denied*, 312 S.E.2d 787 (Ga. 1984); Mueller v. Hellrung Constr. Co., 437 N.E.2d 789 (Ill. App. Ct. 1982); Dearborn Fabricating & Eng'g Corp., Inc. v. Wickham, 551 N.E.2d 1135 (Ind. 1990); Durepo v. Fishman, 533 A.2d 264 (Me. 1987); Gaver v. Harrant, 557 A.2d 210 (Md. 1989); Salin v. Kloempken, 322 N.W.2d 736 (Minn. 1982); Barbera v. Brod-Dugan Co.,

such a claim to be brought and six of those decisions were rendered after 1988.[92] An examination of the reasoning of courts on both sides of the issue serves as a useful basis for analyzing the *Angelini* decision.[93]

1. Jurisdictions Where a Child May Not Bring a Claim for Loss of Parental Consortium

Practical and policy reasons led the Appellate Division of the Supreme Court of New York to deny a claim for loss of parental consortium even though the court recognized that loss of parental care, guidance and training causes real harm to a child.[94] In limiting consortium losses to the spousal relationship[95] the court stated that "not every loss can be made compensable, and the courts must draw the line where liability terminates."[96] The potential for double recovery also concerned this court which felt that children were frequently considered when juries made awards to injured parents.[97]

The Supreme Court of Oregon left to the legislature the pragmatic considerations of multiple suits, double recovery, increased insurance rates and difficulty assessing damages that surround a child's loss of

770 S.W.2d 318 (Mo. Ct. App. 1989); DeAngelis v. Lutheran Med. Ctr., 445 N.Y.S.2d 188 (N.Y. App. Div. 1981), *aff'd*, 449 N.E.2d 406 (N.Y. 1983); Ipock v. Gilmore, 354 S.E.2d 315 (N.C. Ct. App. 1987), *cert. denied*, 358 S.E.2d 51 (N.C. 1987); Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318; (Or. 1982); Schroeder v. Ear, Nose & Throat Assoc., 557 A.2d 21 (Pa. Super. Ct. 1989) *appeal denied*, 567 A.2d 653 (Pa. 1989); Still v. Baptist Hosp., Inc., 755 S. W.2d 807 (Tenn. Ct. App. 1988).

Thirteen jurisdictions have allowed the claim. Leach v. Newport Yellow Cab, Inc. 628 F. Supp. 293 (S.D. Ohio 1985), *aff'd*, 815 F.2d 704 (6th Cir. 1987); Hibpshman v. Prudoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987); Villareal v. State, Dep't of Transp., 774 P.2d 213 (Ariz. 1989); Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981) *overruled by* Audobon-Exira Ready Mix, Inc. v, Illinois Cent. Gulf. R. Co., 335 N.W.2d 148 (Iowa 1983) (finding consortium damages recoverable under special damages statute); Berger v. Weber, 303 N.W.2d 424 (Mich. 1981); Pence v. Fox, 813 P.2d 429 (Mont. 1991); Williams v. Hook, 804 P.2d 1131 (Okl. 1990); Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1991); Hay v. Medical Ctr. Hosp., 496 A.2d 939 (Vt. 1985); Ueland v. Reynolds Metal Co., 691 P.2d 190 (Wash. 1984); Belcher v. Goins, 400 S.E.2d 830 (W.Va. 1990); Theama v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984); Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171 (Wyo. 1990).

92. *See supra* note 91.

93. *See generally* David P. Dwork, Note, *The Child's Right to Sue for Loss of A Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U. L. REV. 722 (1976) for a discussion of both sides of the issue prior to *Ferriter*.

94. DeAngelis v. Lutheran Medical Center, 445 N.Y.S.2d 188, 190 (N.Y. App. Div. 1981), *aff'd* 449 N.E.2d 406 (N.Y. 1983).

95. *Id.* at 192.

96. *Id.* at 191. The line drawn by the court also excluded "brothers, sisters, cousins, inlaws, friends and others who would be deprived of a person's companionship." *Id.* at 192.

97. *Id.* at 193 (citing Russell v. Salem Transp. Co., 295 A.2d 862 (N.J. 1972)).

consortium claim.[98] The basic principle cited for not allowing the claim was "that ordinarily negligence as a legal source of liability gives rise only to an obligation to compensate the person immediately injured, not anyone who predictably suffers loss in consequence of that injury . . . ."[99] The court also dismissed plaintiff's equal protection argument finding no constitutional obligation to treat the parent-child relationship the same as the spousal relationship.[100]

The oft mentioned fear of increasing litigation is generally based on the likelihood that, though a tort victim will have one spouse who may become a plaintiff, there may be many more children, all of whom may bring their own claim.[101] There is also concern about the possibility that, after allowing children a loss of consortium claim, the claim will be extended to other " 'household [members], such as cousins, grandchildren and foster children' ".[102]

Illinois courts have consistently refused to allow a claim in the absence of legislative approval.[103] Expansion of the law in the area of family relationships is believed to be best left to the legislature, which is in a better position to consider relevant factors "such as double damages recovery, increased litigation, remoteness of damages as well as possible adverse effect on the family of separate or segregated awards to children."[104]

In the absence of a statutory cause of action for loss of parental consortium, the Court of Appeals of Georgia held that consortium was, by definition, limited to the marital union.[105] The type of companion-

98. Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 323 (Or. 1982). *See generally* Joseph H. Skerry, III, Comment, *Child's Cause of Action for Loss of Parental Society and Companionship Due to a Negligently Caused Nonfatdal Injury to a Parent*—Norwest v. Presbyterian Intercommunity, 17 SUFFOLK U. L. REV. 776 (1983) (comment on *Norwest* case).

99. *Norwest*, 652 P.2d at 333.

100. *Id.* at 332; *see also* Salin v. Kloempken, 322 N.W.2d 736, 742 (Minn. 1982). In *Salin* the equal protection argument was also rejected because children and spouses are not similarly situated. The *Salin* court recognized the logical and sympathetic appeal of a child's loss of consortium claim, *id.* at 737, but denied a cause of action because of a fear of increasing numbers of suits, potential for fraudulent claims and dual recovery. *Id.* at 739-40.

101. Mueller v. Hellrung Const. Co., 437 N.E.2d 789, 791 (Ill. App. Ct. 1982) (citing Berger v. Weber, 303 N.W.2d 424 (Mich. 1981)).

102. *Id.* (citations omitted).

103. Hearn v. Beelman Truck Co., 507 N.E.2d 1295, 1297 (Ill. App. Ct. 1987), *appeals denied*, 515 N.E.2d 108 (Ill. 1987); Block v. Pielet Bros. Scrap & Metal, Inc., 457 N.E.2d 509, 512 (Ill. App. Ct. 1983).

104. *Block*, 457 N.E.2d at 512.

105. W. J. Bremer Co., Inc. v Graham., 312 S.E.2d 806, 808 (Ga. Ct. App. 1983), *cert. denied*, 312 S.E.2d 787 (1984). Consortium is defined as "[c]onjugal fellowship of husband and wife, and the right of each to the company, society, co-operation, affection and aid of the other in every conjugal relation." BLACK'S LAW DICTIONARY 309 (6th ed. 1990); *see* Mahoney v. Lensink, 550 A.2d 1088, 1094 (Conn. App. Ct. 1988), *cert. granted*, 554 A.2d 742 (Conn. 1989), *and aff'd in part, rev'd in part*, 569

ship and love and affection that spouses share is different than that in the parent-child relationship.[106]

The Supreme Judicial Court of Maine likewise noted the failure of the Legislature to enact a statute allowing a child to recover for loss of consortium.[107] Finding the Legislature to be the proper body to make public policy decisions, the court declined to depart from the rule followed in a majority of jurisdictions.[108] Such policy judgments should be made only upon "[f]ull consideration of legislative or non-adjudicative facts."[109]

In the opinion of the Court of Appeals of Tennessee, a minor child is not a foreseeable consortium plaintiff.[110] The court noted that a spouse is a foreseeable plaintiff under *Palsgraf*.[111] The court feared that addition of another level of plaintiffs, whose damages would be speculative, would lead to allowing friends, relatives and employees to bring claims for damages.[112]

Concern for potential harm to the family relationship persuaded the Supreme Court of Indiana to deny a minor child's loss of consortium claim.[113] The opportunity for a defendant to trivialize or attack a child's relationship with a parent by pretrial investigation and trial testimony could expose a child plaintiff to additional emotional damage.[114]

A.2d 518 (Conn. 1990) (consortium does not extend to the parent-child relationship because it exists in the context of the civil contract of marriage).

106. Ipock v. Gilmore, 354 S.E.2d 315, 317 (N.C. App. 1987). *But see* Elaine T. McParland, Comment, Ipock v. Gilmore: *North Carolina's Refusal to Extend Recovery to the Infant Secondary Tort Victim*, 66 N.C. L. REV. 1337 (1988) which takes the position that *Ipock* was wrongly decided, in part because aside from the sexual aspect, consortium damages to spouse or child are not so different.

107. Durepo v. Fishman, 533 A.2d 264, 265 (Me. 1987).

108. *Id.* The rule the *Durepo* Court refers to is found in the Restatement (Second) of Torts. RESTATEMENT (SECOND) OF TORTS, § 707A (1977) (entitled Action by Child for Harm Caused by Tort Against Parent). The rule states: "[o]ne who by reason of his tortious conduct is liable to a parent for illness or other bodily harm is not liable to a minor child for resulting loss of parental support and care." *Id.; see also* Vaughn v. Clarkson, 376 S.E.2d 236, 238 (N.C. 1989) which cites the majority of jurisdictions refusing to allow the claim as the better view and as reason to deny a child's loss of consortium claim.

109. *Durepo*, 533 A.2d at 265. *See generally* Nancy Wanderer MacKenzie, Comment, *Maine Refuses to Recognize a Cause of Action for Loss of Parental Consortium*: Durepo v. Fishman, 41 ME. L. REV. 165 (1989). The author urged the Legislature to develop a comprehensive plan to protect relationships beyond the spousal relationship. Also suggested was consideration of granting consortium claims in non-traditional relationships such as single-parent families, and unmarried homosexual and heterosexual couples.

110. Still v. Baptist Hospital, Inc., 755 S.W.2d 807, 813 (Tenn. Ct. App. 1988).

111. *Id.* (citing Palsgraf v. Long Island R.R., 162 N.E. 99 (1928)).

112. *Id.*

113. Dearborn Fabricating & Eng'g Corp. v. Wickham, 551 N.E.2d 1135, 1137-38 (Ind. 1990).

114. *Id.*

Thus the court based its decision on a desire to protect the child.[115]

In summary, the basic reasons for denying a child's consortium claim include limitation of liability[116] and a belief that the complexity of the issues are better addressed by Legislatures than the judiciary.[117]

2. Jurisdictions Where a Child May Bring a Claim for Loss of Parental Consortium

Courts that have allowed a child to bring a claim for loss of parental consortium have been willing to address the concerns that other jurisdictions have left to the Legislatures. These courts have justified doing so for a variety of reasons: (1) a belief that the love, companionship, affection and solace in the parent-child relationship are not so dissimilar from that in a marital relationship that the absolute of a sexual aspect from the parent-child relationship defeats consortium;[118] (2) that it would be anomalous to allow recovery for loss of consortium when negligent acts cause the death of a parent but not when they cause injury short of death;[119] (3) that a child's injury is neither too remote nor too speculative for damages to be awarded;[120] (4) that the mere risk of multiple suits can be reduced by joinder of claims and should not prevent a class of plaintiffs from having their cases tried on the merits;[121] (5) that the risk of increased insurance premiums should not influence the law;[122] (6) that legislative action is not necessary to create this common law cause of action;[123] (7) the ease of restricting consortium claimants to the spousal and parent-child relationships;[124] and (8) that the trend in the law is toward recognizing that minor children have constitutional rights and protections.[125]

The aspects of "love, companionship, affection, society, comfort, services and solace"[126] are similar in both the spousal and parent-child relationship.[127] The lack of a sexual element in a parent-child relationship should not be invoked to strip the relationship of protection.[128] There is little trouble in granting a child's claim where the parent's interest in the parent-child relationship is already protected by judicial

115. *Id.*
116. *See supra* notes 96, 99 and accompanying text.
117. *See supra* notes 98, 103-04 and accompanying text.
118. Berger v. Weber, 303 N.W.2d 424, 426 (Mich. 1981).
119. Ueland v. Reynolds Metal Co., 691 P.2d 190, 192 (Wash. 1984).
120. Hay v. Medical Ctr. Hosp., 496 A.2d 939, 943-44 (Vt. 1985).
121. Hibpshman v. Prudoe Bay Supply, Inc., 734 P.2d 991, 997 (Alaska 1987).
122. *Ueland*, 691 P.2d at 195.
123. Pence v. Fox, 813 P.2d 429, 432 (Mont. 1991).
124. Reagan v. Vaughn, 804 S.W.2d 463, 466 (Tex. 1991).
125. Theama v. Kenosha, 344 N.W.2d 513, 517 (Wis. 1984).
126. Berger v. Weber, 303 N.W.2d 424, 426 (Mich. 1981).
127. *Id.*
128. *Id.*

recognition of the parent's claim for loss of a child's consortium.[129] Additionally, a child is in less of a position to make up for the loss of a parent than an adult is to make up for the loss of a spouse.[130]

Courts have perceived an anomaly in allowing child claimants to recover for loss of parental consortium when a parent is negligently killed but not when the parent is negligently injured.[131] When a wrongful death statute allows recovery for loss of parental consortium, it is inconsistent to prohibit recovery for the same loss if it results from mere injury.[132] "[O]ften death is separated from . . . injury by mere fortuity."[133] A child may suffer an even greater loss when the parent is injured rather than killed.[134] Statutory support for allowing a loss of consortium claim has also been found outside of the wrongful death statutes.[135]

The harm to a child when his parent is negligently injured is neither so speculative[136] nor remote[137] as to deny a claim for damages. Calculating damages in loss of parental consortium cases should pose no

129. *Theama*, 344 N.W.2d at 515, 516.

130. Hay v. Medical Ctr. Hosp., 496 A.2d 939, 942 (Vt. 1985).

131. Ueland v. Reynolds Metal Co., 691 P.2d 190, 192 (Wash. 1984). The child's loss may be nearly equivalent whether the parent is killed or so severely injured that he is in a persistent vegetative state. *Id.*

132. Hibpshman v. Prudoe Bay Supply, Inc., 734 P.2d 991, 994 (Alaska 1987). The Alaska court notes that a spouse may recover whether the loss of consortium is due to injury or death. *Id.; see also* Donald L. Dionne, Comment, *Tort Law-Minors Have Independent Cause of Action For Loss of Parental Consortium Resulting From Injuries Inflicted Upon a Parent by Negligent Third Party*, Hibpshman v. Prudoe Bay Supply, 18 CUMB. L. REV. 473 (1988) for a full discussion of *Hibpshman* and the conclusion that the Alaska Legislature, by explicitly allowing a loss of consortium claim to be brought under the wrongful death statute, had implicitly allowed a loss of consortium claim associated with negligent injury to a parent.

133. Villareal v. State, Dep't of Transp., 774 P.2d 213, 218 (Ariz. 1989) (citing Frank v. Superior Court, 722 P.2d 955, 957 (Ariz. 1986)).

134. Williams v. Hook, 804 P.2d 1131 (Okla. 1990). "Because a child has to deal with the day-to-day realities of the disabilities of a severely injured parent, the child may suffer more intense and enduring mental anguish and suffering than would be the case if the parent died." *Id.* at 1136.

135. Pence v. Fox, 813 P.2d 429, 432 (Mont. 1991). The Supreme Court of Montana allowed a child's loss of consortium claim in part because it found an inherent obligation of parental support in MONT. CODE ANN. § 40-6-211 (1992), which reads, "[t]he parent . . . entitled to custody of a child must give him support and education." The rights of the child derive from the statute as well from case law. *Pence*, 813 P.2d at 432-33.

136. Ueland v. Reynolds Metal Co., 691 P.2d 190, 194 (Wash. 1984). A child's consortium loss is no more speculative than other consortium losses already recognized. *Id.*

137. Hay v. Medical Ctr. Hosp., 496 A.2d 939, 943 (Vt. 1985). The problem of remoteness exists only in the relationship of the tortfeasor and primary victim. *Id.* As a derivative action brought by a secondary victim, a consortium claim is "distinguishable from . . . underlying negligence claims in the principal action." *Id.* at 942.

greater problem than calculating damages in spousal consortium claims, wrongful death consortium claims, emotional distress claims or claims for pain and suffering.[138]

The potential for multiple suits exists, especially considering that each child of a negligently injured parent might bring his own claim.[139] The risk of a single act by a tortfeasor generating multiple suits is easily addressed by requiring joinder of claims.[140] The specter of increased litigation is frequently raised by defendants when a new cause of action is allowed, but the procedural safeguard of joinder in child consortium claims weakens the strength of such an argument.[141]

Risk of increased insurance premiums and costs is also invoked as a reason to deny a child's loss of parental consortium claim.[142] This risk has been weighed against the perceived benefit of compensating a child for his loss.[143] Compensation may provide the means for a child to adjust to his loss and thus a benefit will inure to society if the child can function without emotional sequelae from his parent's injury.[144] Furthermore, liability under the law should not hinge on the cost of insurance.[145]

Jurisdictions which allow a child's loss of parental consortium claim have not been deterred by the failure of Legislatures to enact statutes.[146] Though the Legislature may be the proper body to weigh economic and social factors before creating a cause of action, the consortium cause of action was originally created by the courts and can

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138. Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1176 (Wyo. 1990).

139. *Ueland*, 691 P.2d at 193; *Hay*, 496 A.2d at 943.

140. *Ueland*, 691 P.2d at 194 (claims should be joined whenever feasible; burden is on child to show why joinder is not feasible); *see also* Villareal v. State Dep't of Transp., 774 P.2d 213, 220 (Ariz. 1989). If joinder is not requested by defendant or is not feasible, the statute of limitations will be tolled during a child's minority. *Id.*

141. Hibpshman v. Prudoe Bay Supply, Inc., 734 P.2d 991, 996 (Alaska 1987) (citing Theama v. City of Kenosha, 344 N.W.2d 513, 521 (Wis. 1984)).

142. *Ueland*, 691 P.2d at 195.

143. Berger v. Weber, 303 N.W.2d 424, 426 (Mich. 1981).

144. *Id.* at 426; *Theama*, 344 N.W.2d at 521.

145. Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 323 (Or. 1982). "A person's liability in our law still remains the same whether or not he has liability insurance; properly, the provision and cost of such insurance varies with potential liability under the law, not the law with the cost of insurance." *Id.* "Insurance is a loss-spreading device by design. Increases in premiums are unwarranted only when it is decided that the innocent victim will bear the loss rather than the guilty tortfeasor, his insurer, and the public." Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1176 (Wyo. 1990).

146. Pence v. Fox, 813 P.2d 429, 431 (Mont. 1991). Judicial recognition does not prevent the Legislature from addressing the issue. *Id.* (citing Hay v. Medical Ctr. Hosp., 496 A.2d 939, 945-46 (Vt. 1985)).

be modified by them.[147] The judiciary has responsibility for effecting modifications in common law when society and the times so require.[148]

Courts recognizing a child's cause of action have differed on what class of children may bring a claim for loss of parental consortium. Some jurisdictions limit recovery to minor children;[149] some allow minor children and adult children who are dependent or handicapped to bring a claim;[150] and some simply allow children to bring a claim without restriction on age or dependency status.[151]

Because the spousal and parent-child relationships are most likely to be affected when a party is negligently injured by another, courts have been confident that loss of consortium claims can be restricted to those contexts.[152] Consortium claims based on injury to grandparents, siblings, other relatives and close friends have been specifically excluded.[153]

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147. *Hay*, 496 A.2d at 945-46; Ueland v. Reynolds Metal Co., 691 P.2d 190, 193 (Wash. 1984).

148. *Hay*, 496 A.2d at 945.

149. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 997 (Alaska 1987); *Pence*, 813 P.2d at 433; *Hay*, 496 A.2d at 943; *Nulle*, 797 P.2d at 1176.

150. Williams v. Hook, 804 P.2d 1131, 1132 (Okl. 1990); Belcher v. Goins, 400 S.E.2d 830, 840 (W. Va. 1990). *But see* Lewis v. Rowland, 701 S.W.2d 122, 122 (Ark. 1985). The child in *Lewis* was a thirty-seven-year-old quadriplegic who was economically independent. *Id.* He was dependent on his injured mother for personal needs and transportation and sought a ruling from the court that he was as dependent as a minor child. *Id.* The court stated that minor children were entitled to support from their parents but that parents had no legal duty to love a child, thus the plaintiff who was self-supporting was not legally entitled to anything from his mother. *Id.* at 124.

151. Berger v. Weber, 303 N.W.2d 424, 427 (Mich. 1981); Reagan v. Vaughn, 804 S.W.2d 463, 466 (Tex. 1991); *Ueland*, 691 P.2d at 195; Villareal v. State Dep't of Transp., 774 P.2d 213, 219 (Ariz. 1989). Prior to Angelini v. OMD Corp., 410 Mass. 653, 575 N.E.2d 41 (1991), only one court had encountered a child-plaintiff who was unborn at the time of the injury to his parent. Roquet v. Jervis B. Webb Co., 436 N.W.2d 46, 47 (Iowa 1989). In *Roquet*, the court did not reach the question of whether a child who was a viable fetus at the time of the parent's injury could bring a claim, because the injury to the parent and settlement of the parent's claim occurred before Iowa recognized child consortium claims. *Id.* The court was not willing to give retroactive effect to the change in the law. *Id.* at 49.

152. Theama v. City of Kenosha, 344 N.W.2d 513, 521 (Wis. 1984); *Reagan*, 804 S.W.2d at 466. Limiting consortium claims to the nuclear family avoids the risks of extending liability to other relatives and friends. HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, § II.4, at 404 (2d ed. 1988). The nuclear family is generally made up of husband, wife and children. UNDERSTANDING THE FAMILY 418 (Cathleen Getty *et al.* eds., 1981).

153. *Villareal*, 774 P.2d at 219; *see also* Hutchinson v. Broadlawns Med. Ctr., 459 N.W.2d 273, 278 (Iowa 1990) (granddaughter could not bring claim for loss of consortium when grandfather was negligently injured even though he was her custodian and provided the care and support of a parent; to allow this claim would be to allow actions for injury to stepparents and others standing in loco parentis); Malik v. William Beaumont Hosp., 423 N.W.2d 920, 923 (Mich. Ct. App. 1988) (sibling may not bring claim for loss of sibling's consortium; sibling relationships

The final reason relied on by courts that allow child loss of consortium claimants is the growing recognition that children are "persons deserving of legal rights and protections."[154] Children have been accorded due process, equal protection and First Amendment rights under the United States Constitution.[155] Additionally, a child's interest in his family's integrity is fundamental.[156]

IV. ANALYSIS

The extension of a loss of consortium claim to Jeremy Michael Angelini, who was a non-viable fetus at the time of the injury to his father, was unwarranted both under the law and on the facts of the case. The Supreme Judicial Court's reliance on the line of prenatal injury cases[157] is fundamentally misplaced. Those cases all arose in the context of actual, direct physical harm to the fetus through the mother's body.[158] The court failed to appreciate the distinction[159] between direct physical injury and the indirect non-physical emotional injury that Jeremy alleged.[160] The loss of closeness, guidance and nurture that are the basis

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do not have the financial, legal, and emotional aspects of the parent-child relationship). *But see* Harley v. Druzba, 560 N.Y.S.2d 959 (1990) where, in the context of a divorce case, a sibling was allowed to maintain what the court characterized as a claim for loss of sibling consortium against a social worker whose allegedly negligent counselling deprived the plaintiff of visitation with her sisters. *See also* Azzolino v. Dingfelder, 322 S.E.2d 567, 578 (N.C. Ct. App. 1984), *aff'd in part, rev'd in part on other grounds*, 337 S.E.2d 528 (N.C. 1985), *cert. denied*, 479 U.S. 835 (1986) and cases cited therein where children have not been allowed to maintain causes of action for loss of parental consortium when additional children were born into the family because of another's negligence.

154. *Theama*, 344 N.W.2d at 517. *Cf.* MASS. GEN. L. ch. 119, § 1 (1972) ("It is hereby declared to be the policy of this commonwealth to direct its efforts, . . . to the strengthening and encouragement of family life for the protection and care of children.").

155. *Villareal*, 774 P.2d at 217 (citing Goss v. Lopez, 419 U.S. 565 (1975) (due process right); Gomez v. Perez 409 U.S. 535 (1975) (equal protection)); *see also* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (First Amendment).

156. Williams v. Hook, 804 P.2d 1131, 1137 (Okl. 1990). The right to associate with one's family is fundamental. Stanley v. Illinois, 405 U.S. 645 (1972).

157. *Angelini*, 410 Mass. at 658, 575 N.E.2d at 44.

158. *See supra* notes 67-89 and accompanying text; *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 367 (5th ed. 1984).

159. The court glossed over the distinction stating "[i]f the viability of the fetus is not dispositive in cases of prenatal injury when the infant is born alive, then viability should not be dispositive in cases, such as the present one, where the alleged injury occurred *after* birth." *Angelini*, 410 Mass. at 661, 575 N.E.2d at 45.

160. Factors such as "where, when, and how the injury to the third party entered into the consciousness of the claimant," Dziokonski v. Babineau, 375 Mass. 555, 568, 380 N.E.2d 1295, 1302 (1978), should be considered in deciding liability for emotional injuries. The class of persons suffering vicarious emotional injury may be large, *id.* at 567, 380 N.E.2d at 1302, and so these factors should be considered in determining the "limits of liability for emotionally based injuries resulting from a

for a loss of consortium claim[161] are clearly emotional losses. Such emotional losses must "follow 'closely on the heels of' the negligent act."[162] Even assuming that Jeremy could have been cognizant of an emotional loss at birth, his birth was five months after the accident and so, according to *Miles* and *Cohen*, too remote for recovery for emotional injury.[163]

A. *Under the Law*

The result in *Angelini* conflicts with the Supreme Judicial Court's holding in a previous case where a loss of consortium claim was denied to a spouse who had married after the injury to the other spouse.[164] The court denied the spouse's claim in *Feliciano* because the marriage relationship did not exist at the time of the tort.[165] In *Angelini,* no parent-child relationship existed at the time of the injury to LePage, thus Jeremy had no interest in the continuation of such a relationship.[166] By definition "loss" means "being deprived of . . . something that one has had."[167] Jeremy never enjoyed the consortium of his father and so can not have suffered its loss.

The reasoning in *Angelini* if applied to a situation where a married

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defendant's negligence." *Id.* at 568, 380 N.E.2d at 1302. Loss of consortium, like emotional distress is a non-physical injury to the claimant. *Id.*

> Although consideration of these other factors may in some cases result in the imposition of an arbitrary cut off on the scope of liability,. . . these factors, nevertheless, must be employed for policy reasons to prevent an unreasonable expansion of liability for the multitude of injuries that could fall within the bare principle of reasonable foreseeability.

Cohen v. McDonnell Douglas Corp., 389 Mass. 327, 341, 450 N.E.2d 581, 588-89 (1983).

161. *See supra* note 32.

162. Miles v. Edward O. Tabor, M.D., Inc., 387 Mass 783, 789, 443 N.E.2d 1302, 1305 (1982) (quoting Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980)). In *Miles,* emotional injury that commenced two months after the physical injury to the third party was too remote to support a claim for emotional distress based on that physical injury. *Id.* at 788, 443 N.E.2d at 1305; *see also Cohen,* 389 Mass. 327, 450 N.E.2d 581 (emotional distress which commenced seven hours after the physical injury to the third person, and which led to death was not close enough, temporally, to support claim).

163. *Miles,* 387 Mass. at 789, 443 N.E.2d at 1305; *Cohen,* 389 Mass. at 341, 450 N.E.2d at 589.

164. Feliciano v. Rosemar Silver Co., 401 Mass. 141, 514 N.E.2d 1095 (1987).

165. *Id.* at 142, 514 N.E.2d at 1096.

166. *Cf.* Butcher v. Superior Court, 188 Cal. Rptr. 503 (Cal. Ct. App. 1983) (cited with disapproval by the Supreme Judicial Court in *Feliciano*). An anomalous case where an unmarried cohabitant was allowed to maintain a consortium claim because the eleven year relationship which had produced two children was "stable and significant." *Id.* at 512. The real damage was to the interest in continuing the relationship undisturbed. *Id.* at 505; *see also* Sawyer v. Bailey, 413 A.2d 165, 167 (Me. 1980) (interest is in continuation of the marital relationship).

167. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 792 (1968).

person sues for loss of consortium based on physical injury to the other spouse during their engagement, would compel allowing the claim because of the subsequent marriage.[168] Just as a nonviable fetus who develops into a liveborn child has an expectancy of parental consortium, so does the engaged couple whose relationship develops into marriage.[169] A child's expectation of parental consortium, however, does not necessarily create a right to it.[170]

Prior to *Angelini*, the question of whether one who was a fetus at the time of injury to the parent may bring a loss of consortium claim, had been raised in only one other jurisdiction.[171] The *Roquet* Court did not reach the question because the parent's injury occurred prior to Iowa's recognition of a child's consortium claim.

Dependency is a critical element in establishing a child's right to bring a loss of consortium claim.[172] The definition of dependent child has been found to exclude an unborn child.[173] Neither is an unborn

168. The Appellate Court of Illinois has considered the effect of a potential loss of consortium claim on the decision to marry. Sostock v. Reiss, 415 N.E.2d 1094, 1099 (Ill. App. Ct. 1980). They concluded that there is no relational interest prior to marriage and so injury to one spouse, prior to the marriage, does not interfere with the other spouse's rights. *Id.* at 1098-99. Thus, any decision to marry subsequent to an injury should be based on "mutual love, affection and respect, not on a mercenary motive." *Id.* at 1099. The Illinois court's reasoning is applicable in the case of a nonviable fetus; a parent, especially an unwed mother who does not have her own consortium claim, may succumb to mercenary motives and continue a pregnancy that otherwise would have been terminated.

169. New Jersey has approved this result. Stahl v. Nugent, 514 A.2d 1367 (N.J. Super. Ct. Law Div. 1986) (wife was injured during the engagement two months prior to marriage; husband allowed to claim damages commencing at the time of the marriage).

170. *See* Cox v. Stretton, 352 N.Y.S.2d 834, 840 (N.Y. Sup. Ct. 1974) (children have no vested right in "care, affection, training and financial support" from a parent beyond what must be provided to keep them off public assistance).

171. Roquet v. Jervis B. Webb Co., 436 N.W.2d 46 (Iowa 1989); *see also* Crumpton v. Gates, 947 F.2d 1418 (9th Cir. 1991). The plaintiff, who brought a civil rights action pursuant to 42 U.S.C. § 1983, was a two month fetus when his father was allegedly killed by Los Angeles police officers. *Id.* at 1419. The Ninth Circuit, citing *Angelini* with approval, reversed summary judgment for defendants holding that the injury, and so the cause of action, did not arise until the plaintiff was born. *Id.* at 1422. "If an injury does not result immediately, the cause of action arises upon its occurrence." *Id.* at 1423 (citing Vaughn v. J.C. Penney, Inc., 822 F.2d 605, 609-10 (6th Cir. 1987)). By so holding the court disposed of defendants' argument that the fetus who was not a "person" entitled to Fourteenth Amendment protection, could not bring a § 1983 claim, which requires the plaintiff to be a United States citizen or other person. *Id.* at 1424.

172. *See supra* note 62 and accompanying text.

173. Burns v. Alcala, 420 U.S. 575 (1975). The Supreme Court took on this question of statutory interpretation of 42 U.S.C. § 406(a) to resolve conflict in the lower federal courts. *Burns*, 420 U.S. at 577. In the statute, dependent child is defined as one who "has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a par-

child necessarily included in the definition of child and, to the extent that the *Angelini* Court accepted the plaintiff's assertion that the definition of "child" includes a non-viable fetus,[174] such acceptance was of an incomplete definition. Black directs the reader to the definition of "viable child" which reads: "[v]iable unborn child, within protection of constitutional provision affording every man remedy for injury done to him in his person, is child which has developed in its mother's womb to point that it is capable of independent existence outside its mother's womb."[175] Clearly, Jeremy was not included in this category at the time of LePage's injury.

Fetal viability has been used in other areas to determine whether a cause of action exists; wrongful death,[176] motor vehicle homicide,[177] and manslaughter.[178] These situations differ from *Angelini* because they involve direct, contemporaneous injury to the fetus, not the indirect, remote injury complained of by Jeremy.[179]

The *Angelini* Court determined that excluding children who are both conceived after and born after the injury to the parent is justified as a matter of policy.[180] This is so even though the actual harm to a child born after a parent's injury is not affected by whether the injury occurred before or after conception of the child.[181] The duration of a tortfeasor's liability must be limited.[182] The court noted that in the absence of such a restriction, liability could extend for decades.[183] The court's holding,[184] however, failed to achieve the goal of limiting liabil-

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ent, and who is . . . under the age of eighteen." *Id.* at 578. The Court held that unborn children are not included in the definition of dependent children. *Id.* at 578-79.

174. Brief for Plaintiff, *supra* note 7, at 36. "Child. Progeny; offspring of parentage. Unborn or recently born human being." BLACK'S LAW DICTIONARY 239 (6th ed. 1990).

175. BLACK'S LAW DICTIONARY 1566 (6th ed. 1990).

176. Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975) (viable eight and one half month fetus is a person for purpose of wrongful death statute).

177. Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984) (eight-month fetus, viable at time of injury, is a person for purposes of motor vehicle homocide statute).

178. Commonwealth v. Lawrence, 404 Mass. 378, 536 N.E.2d 571 (1989) (viable twenty-seven week fetus of murdered mother could be victim of involuntary manslaughter).

179. *See supra* note 160 and accompanying text.

180. *Angelini*, 410 Mass. at 657-58, 575 N.E.2d at 43.

181. *Id.* at 657, 575 N.E.2d at 43.

182. *Id.* at 658, 575 N.E.2d at 43. Thus, the court will not allow Jeremy's half sibling, who arguably suffers the same loss as Jeremy but who was conceived and born after LePage's injury to bring a loss of consortium claim. *Id.* at 662 n.10, 575 N.E.2d at 46 n.10. This child was also born out of wedlock. Brief for Defendants, *supra* note 8, at 5.

183. *Angelini*, 410 Mass. at 658, 575 N.E.2d at 43.

184. *Id* at 663, 575 N.E.2d at 46. "[A] child conceived before his or her parent

ity. A literal reading of the court's holding, includes children who were conceived by means of assisted reproductive technology and were frozen embryos for some period of time before their actual births.[185] Such children may be born years after they were conceived.[186]

It is incongruous to bestow a cause of action, even one contingent on livebirth, on a non-viable fetus who has no constitutionally protected right to be born.[187] The interests of the non-viable fetus have not always been given such deference by the Supreme Judicial Court as they were in *Angelini*.[188] Additionally, the rights of the parents and fe-

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suffered non-fatal injuries . . . and subsequently born alive, is not as a matter of law precluded from recovering for loss of parental consortium." *Id.* at 661-62, 575 N.E.2d at 45-46. The court did not address how this rule would apply to children who were adopted by an injured parent. Neither did it address the difficulty of proving that the child had actually been conceived at the time of the parent's injury in the situation where the date of conception may be at issue either because of premature or postmature delivery.

> [H]ow can there ever be a definite time fixed when the egg in the body of the mother is fertilized by the father's spermatozoa? Does it take place in 1 minute, or 2 hours, or 2 days, or 2 weeks after copulation? The time the foetus first stirs in the mother. . .the mother knows, but neither the mother nor anyone else can fix the exact time or date of conception.

Hornbuckle v. Plantation Pipe Line Co., 93 S.E.2d 727, 730 (Ga. 1956) (Almand, J., dissenting).

185. *See* 55 FERTILITY AND STERILITY No.1 20 (1991). In 1989 there were 23,468 frozen embryos created in the United States. *Id.* In 1989 eight percent of frozen embryos actually transferred to their mother resulted in a successful pregnancy. *Id.* Eight percent of 23,468 represents 1877 potential *Angelini* plaintiffs who may not be born for an indeterminate period of time. In 1990 an additional 23,865 frozen embryos were created in the United States. 57 FERTILITY AND STERILITY No.1 15 (1992). *See generally* Tzivia Schwartz, *Frozen Embryos: The Constitution on Ice,* 19 LOY. L.A. L. REV. 267 (1985) (discussion of the rights of women to control the fate of their frozen embryos); Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection,* 95 YALE L.J. 599 (1986) (discussion of constitutional limitations on recognition of fetal rights).

186. York v. Jones, 717 F. Supp. 421, 424 (E.D. Va. 1989) (the frozen embryo which was the subject of the litigation had been frozen for over two years at the time the litigation commenced); *see also* Philip Elmer-Dewitt, *Making Babies,* TIME, Sept. 13, 1991, at 63 (couple has twelve embryos that have been frozen for over two years).

187. Roe v. Wade, 410 U.S. 113, 163 (1973) (states may regulate to protect the fetus after it has reached viability; prior to viability the abortion decision may be made without consideration of the fetus). *See generally* ASSESSMENT AND CARE OF THE FETUS 931 (Robert D. Eden, ed., 1990). Generally, fetuses may not be the subject of a wrongful death claim. Rambo v. Lawson, 799 S.W.2d 62 (Mo. 1990) (en banc); *see supra* note 83.

188. Taft v. Taft, 388 Mass. 331, 446 N.E.2d 395 (1983). The Supreme Judicial Court held that a competent adult woman, who objected on religious grounds, could not be forced to have a simple operation that would enable her to carry her four month pregnancy to term. *Id.* at 332-33, 446 N.E.2d at 396. The interests of the non-viable fetus, who was at the same gestational age as Jeremy, were not even mentioned by the court. *Id.* Neither does the Commonwealth treat all fetal deaths in the same manner. MASS. GEN. L. ch. 111, § 202 (1978). Fetal deaths which oc-

tus may be at odds in the situation where the father has an interest in a relationship with the unborn child,[189] the mother has the right to terminate the pregnancy,[190] and the fetus has an interest in parental consortium contingent on its live birth.[191]

B. *On the Facts*

Thirty years prior to *Ferriter*, the Supreme Judicial Court considered the question of whether a child could recover damages for loss of parental society.[192] The *Nelson* decision, in addition to raising some practical objections to allowing a child's claim[193] implied distaste for tort litigation among family members.[194] The *Ferriter* court discounted this concern, "when . . . negligence causes injury to a parent and the child suffers loss of society, the litigation does not typically pit family members against each other."[195] In the context of Jeremy's family situation there is significant potential for strife over the litigation. Jeremy's mother, Susan, has brought his claim as his next friend.[196] Susan was never married to Jeremy's father, she does not have her own loss of consortium claim.[197] Susan and Jeremy have always maintained their own household apart from LePage.[198] To the extent that a finite amount of insurance coverage is available that must be allocated among LePage, Jeremy and the third plaintiff Lewis, the interests of Jeremy and his father may become adverse.[199] Thus, the very situation that the

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cur prior to twenty weeks gestation are not subject to the same reporting and disposition requirements as fetal deaths occurring after twenty weeks gestation. *Id.*

189. *See supra* note 83.

190. *See supra* note 187. A woman who is herself negligently injured while carrying a nonviable fetus might also succumb to the mercenary motives that troubled the court in Sostock v. Reiss, 415 N.E.2d 1094, 1099 (Ill. App. Ct. 1980).

191. *Angelini*, 410 Mass. at 661-62, 575 N.E.2d at 45-46.

192. Nelson v. Richwagen, 326 Mass. 485, 95 N.E.2d 545 (1950) (minor child brought claim against third party for causing desertion by his mother).

193. *Nelson*, 326 Mass. at 487, 95 N.E.2d at 546. The objections were "(1) [p]ossibility of a multiplicity of suits . . . ; (2) [p]ossibility of extortionary litigation . . . ; (3) [i]nability to define the point at which the child's right would cease . . . ; (4) [i]nability of a jury adequately to cope with the question of damages." Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 513-14, 413 N.E.2d 690, 694 (1980) (citing *Nelson*, 326 Mass. 487, 95 N.E.2d 546 (1950)). The *Ferriter* Court noted that these practical concerns had been addressed in Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973). *Ferriter*, 381 Mass. at 515, 413 N.E.2d at 694.

194. *Nelson*, 326 Mass. at 486-88, 95 N.E.2d at 546.

195. *Ferriter*, 381 Mass. at 514, 413 N.E.2d at 694.

196. *See supra* note 4.

197. *See supra* note 44 and accompanying text.

198. Brief for Defendants, *supra* note 8, at 13-14.

199. Jeremy sought $500,000 from each defendant. *Id.* at 3. A consortium claimant is considered a separate person with respect to the per person coverage under Massachusetts automobile policies. Bilodeau v. Lumberman's Mut. Cas. Co., 392 Mass, 537, 543, 467 N.E.2d 137, 142 (1984).

Ferriter court dismissed as inconsequential takes on significance in the facts of *Angelini*.

There is no showing, on the facts of *Angelini*, of the economic dependence and need for closeness, guidance and nurture that were found critical by the *Ferriter* Court a minor child to show in order to recover for loss of parental consortium.[200] Communication and interaction between parent and child, the foundation of the parent-child relationship, do not begin until a child is born.[201] The facts show that since the time of Jeremy's birth, LePage has not provided either financial or other support to Jeremy.[202] Though the holding in *Glicklich* effectively eliminated the requirement that the minor child be financially dependent on the injured parent,[203] there are no facts heres that show LePage has ever provided Jeremy "with any emotional guidance, support or nurture."[204]

Both the *Ferriter* and *Glicklich* Courts assumed that a child claimant would live in the same household as the injured parent.[205] *Glicklich* makes it a condition: "it is sufficient if the child is living in the injured parent's household *and* is dependent on the parent for . . . emotional guidance and support."[206] The condition that a child be a household

200. *See supra* note 40 and accompanying text. Jeremy has never been economically dependent on LePage, he is supported by Social Security benefits, AFDC and a housing allotment. Brief for Defendants, *supra* note 8, at 14.

201. Justus v. Atchison, 565 P.2d 122, 133 (Cal. 1977). *But see supra* note 83.

202. Brief for Defendants, *supra* note 8, at 13-14.

203. Glicklich v. Spievack, 16 Mass. App. Ct. 488, 496, 452 N.E.2d 287, 292 (1983). "[T]he injured parent need not be the principal wage earner in order for the child to recover for loss of parental society." *Id.*

204. Brief for Defendants, *supra* note 8, at 14. Defendants further assert that Jeremy's needs are met by his mother because of the disintegration of LePage and Susan's relationship and LePage's failure to even visit Jeremy. *Id.* at 15; *see also* Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1990). This case, reported before *Angellini* was decided, also involved a child's claim for loss of parental consortium from a negligently injured father who had abandoned her. *Id.* at 470 (Hecht, J., concurring & dissenting). In *Reagan*, Texas first recognized a child claimant's right to recover loss of consortium when a parent is negligently injured. *Id.* at 466. A vehement dissent criticized the majority for recognizing this right on the facts of *Reagan*. *Id.* at 469 (Hecht, J., concurring & dissenting). The injured father had abandoned his family, and the only evidence offered regarding the child's relationship with her father related to the father's feelings for the child. *Id.* at 472 (Hecht, J., concurring & dissenting). Because the parents were divorced and lived apart there was no evidence that the child would have had any consortium with her father had he not been injured. *Id.* at 469 (Hecht, J., concurring & dissenting).

205. *See* Ferriter v. Daniel O'Connell's Sons, Inc, 381 Mass. 507, 516-17, 413 N.E.2d 690, 696 (1980); *Glicklich*, 16 Mass. App. Ct. at 496, 452 N.E.2d at 292.

206. *Glicklich*, 16 Mass. App. Ct. at 496, 452 N.E.2d 287. *But see* Barbosa v. Hopper Feeds, Inc., 404 Mass. 610, 537 N.E.2d 99 (1989). The court was not willing to rule, as a matter of law, that a child who does not live in the home of the parent may not bring a claim. *Id.* at 618, 537 N.E.2d at 104. *Barbosa* is distinguishable, however, because the child had severe disabilities that required her to be institutionalized. *Id.* at 617, 537 N.E.2d at 104. No such special circumstance exists in *Angelini*.

member was also imposed when a loss of consortium claim was extended to adult handicapped children.[207] In modern society the likelihood that a child will live in a household with both parents is diminishing.[208] With that diminishing likelihood, Jeremy's reasonable expectation that he would live in a household with his father, as assumed in *Ferriter* and required in *Glicklich*, fades.

V. CONCLUSION

In *Angelini*, the Supreme Judicial Court has done away with the established requirements that a child consortium claimant 1) must actually be dependent on a tortiously injured parent at the time of the injury and 2) must be a household member of that parent. Now, in place of these requirements, a child who was a nonviable fetus at the time of the parent's injury need only show that he had a reasonable expectancy of a dependent relationship with the injured parent. By doing away with the traditional requirements, the court now allows loss of consortium claims to be brought by child consortium claimants based on a relationship that did not exist at the time of the injury to the parent. Consortium claimants in other relationships, such as engagement or cohabitation, are not allowed to bring claims even though their expectancy of a relationship with the injured party may be equal to or greater than that of a nonviable fetus.

The court has also created the situation where a child who sustains an emotional injury may recover even though the injury comes into his consciousness at a point in time that is remote from the subject injury to the parent. This result is inconsistent with established principles that require emotional injury to occur soon after the physical injury to the third party in order to be compensable.

In becoming the first state to allow a nonviable fetus to bring a loss of consortium claim, Massachusetts has expanded the duration of tort liability for a negligent act far beyond reasonable limits. Under *Angelini* a tortfeasor may be liable for up to nine months, or longer in the case of a frozen embryo, after his negligent act. Additionally, liability may ultimately depend on another's decision to continue or terminate a pregnancy. Public policy goes against such unrestricted liability.

Martha E. Krache

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207. Morgan v. Lalumiere, 22 Mass. App. Ct. 262, 270, 493 N.E.2d 262, 211 (1986). "[O]ne who is not a minor but who is a handicapped person who resides in the house of his wrongfully injured mother *and* who is dependent on her physically, emotionally and financially," may bring a loss of consortium claim. *Id.* (emphasis added); *see supra* note 10.

208. The percentage of households headed by married couples fell from 74.8% to 65.4% between 1960 and 1975. GEORGE MASNICK ET AL., THE NATION'S FAMILIES: 1960-1990 45-47 (1980). By 1990 the percentage was expected to fall to 55%. *Id.* at 47.

United States v. Verdugo-Urquidez: Extending the *Ker-Frisbie* Doctrine to Meet the Modern Challenges Posed by the International Drug Trade

I. INTRODUCTION

For several years now, the United States government has committed itself to fighting a "war on drugs."[1] Although Congress has sponsored increased legislation to punish drug offenders,[2] and has also appropriated substantial funds to this cause and to the various government agencies responsible for narcotics enforcement,[3] the drug problem in this country has continued to grow and has reached a point where it is unmanageable.[4] Part of the reason for the United States government's

1. In September of 1989, President Bush referred to the drug problem as "the toughest domestic challenge we've faced in decades," and proposed a new drug control policy with strong emphasis on increased law enforcement efforts. Bernard Weinraub, *President Offers Strategy For U.S. On Drug Control*, N.Y. TIMES, Sept. 6, 1989, § 1, at 1. During his televised speech on September 5, 1989, the President detailed four major areas of concentration for his National Drug Control Strategy: 1) Increased law enforcement efforts (at all levels - local, state and federal); 2) Increased interdiction efforts aimed at international drug traffickers; 3) Expansion of drug treatment systems; and 4) Increased prevention and education programs. *Text of President's Speech on National Drug Control Strategy*, N.Y. TIMES, Sept. 6, 1989, § 2, at 6.

2. The American Bar Association's Office of Governmental Affairs in Washington, D.C. has reported that 356 of the 7,000 congressional bills introduced in 1989 were drug-related. Charles-Edward Anderson, *Uncle Sam Gets Serious*, A.B.A. J., Feb. 1990, at 61.

3. Federal spending on drug programs has increased steadily over the past decade. In 1981, combined spending for both law enforcement and treatment and education programs was slightly over $1 billion, while the 1990 federal drug control budget proposed by President Bush totalled nearly $8 billion. *Federal Spending On Drug Programs* (chart), N.Y. TIMES, Sept. 6, 1989, § 2, at 7.

4. Statistics from 1985-1988 show that every day in America, an average of 1,027 babies are born drug- or alcohol-exposed in utero, and an average of 211 children are arrested for drug abuse. L. Stanley Chauvin, Jr., *Startling Statistics About Children*, A.B.A. J., Feb. 1990, at 8. The failure of domestic and international efforts to control the drug problem has led some politicians, administrators, and legal scholars to advocate the legalization of drugs. *See* Steve France, *Should We Fight Or Switch?*, A.B.A. J., Feb. 1990, at 43. In the federal court system, the filing of drug cases increased 270 percent from 1980-1990, and 55 percent of all criminal appeals in 1989 were for offenses involving drug violations. Anderson, *Uncle Sam Gets Serious*, *supra* note 2, at 62. State courts have been similarly overloaded with drug

ineffectiveness in this battle against drugs is that many major drug suppliers reside outside of the jurisdiction of the United States.[5] Tremendous quantities of illicit drugs flow into the United States every day from foreign countries.[6] Yet, many of the major distributors have no ties to the United States other than their narcotics smuggling, and they therefore cannot be subjected to the jurisdiction of United States courts unless they are formally extradited or otherwise brought within the boundaries of the United States.[7]

When a foreign national commits a serious crime in violation of United States law, such as murder or narcotics trafficking, and our government is not satisfied with the punishment, if any, imposed on the foreign national by his or her own government, the United States government may attempt to subject the foreign national to the jurisdiction of United States courts through the traditional legal process of extradition.[8] Our government has followed this course of action on numerous

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cases, and both state and federal prisons have experienced extreme overcrowding problems, with some prisons operating at up to 175 percent of capacity. *Id.* at 63. Local jails have also been severely overcrowded, with some operating at up to 358 percent over capacity. Barbara Flicker, *To Jail Or Not To Jail?*, A.B.A. J., Feb. 1990, at 66.

5. The Medellin Cartel, which is operated by Columbian drug lords, is responsible for producing most of the world's cocaine. Bradley Graham, *Impact of Columbian Traffickers Spreads*, WASH. POST, Feb. 24, 1988, § 1 at 1. In the past several years, the Medellin Cartel's operations have allegedly expanded significantly into other countries outside of Colombia, including Panama, Honduras, the Bahamas, Haiti, and Cuba. *Id.*

6. In 1984, for example, 68 percent of the heroin smuggled into the United States came from Asia, while 32 percent was supplied by Mexico. David L. Westrate, *Drug Trafficking and Terrorism*, 12 DRUG ENFORCEMENT 20, Summer, 1985. Mexico continues to be a major supplier of various other illegal drugs. Mexico has been known as "the largest supplier of illegal amphetamine to the United States," and the country also serves as a distribution point for cocaine being smuggled into the United States from South America. *Mexico-A Profile*, 12 DRUG ENFORCEMENT 17, Summer, 1985. Marijuana grows abundantly all over the country, *id.* at 16, and during 1984 it was the "most frequently encountered drug . . . along the U.S./Mexico border," with nearly 200,000 pounds having been seized by United States officials. *Id.* at 12. Given the nearly 2,000 mile open border between Mexico and the United States, which is very hard to patrol, *id.* at 11, the large quantities of seized marijuana suggest that significantly larger amounts successfully arrive in the United States without being intercepted.

7. "Jurisdiction of the person is the power of a court to bring before it the person to be affected by the judgment . . . and to render a judgment binding upon such person." 21 C.J.S. *Courts* § 11 (1990) (footnotes omitted). "If a court having jurisdiction of the subject matter acquires jurisdiction of the person it has the right and power to hear and determine the particular case, but a court which lacks jurisdiction over either subject matter or persons has no power to act . . . ." *Id.* § 16 (footnotes omitted). United States courts must therefore acquire personal jurisdiction over these offenders before they can be prosecuted. *Id.*

8. "Extradition is the normal process by which individuals charged with or convicted of a crime against the law of one state and found in a second state are

occasions, and has a detailed set of extradition procedures which must be followed in these instances.[9]

Sometimes, however, extradition may not be possible.[10] As a result, the United States government has, on sporadic occasions, authorized or sponsored the kidnapping of foreign suspects who cannot be subjected to the jurisdiction of U.S. courts through normal legal channels.[11]

The United States Court of Appeals for the Ninth Circuit recently addressed the issue of government-sponsored kidnapping in *United States v. Verdugo-Urquidez.*[12] This *Comment* analyzes the *Verdugo* decision, and examines the issue of government-sponsored kidnapping in light of all relevant treaties and provisions of international law, as well as the criminal and constitutional aspects of our own domestic law. Part II discusses the historical background of government-sponsored kidnapping and the traditional attitude of United States courts toward this procedure; Part III discusses the facts of the *Verdugo* case and the particular circumstances surrounding the apprehension of Rene Martin Verdugo-Urquidez; Part IV analyzes the *Verdugo* decision and the reasoning of the Ninth Circuit Court of Appeals; and Part V offers the

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returned by the second state to the first for trial or punishment." BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 787 (1991).

9. The Office of International Affairs (OIA) in the United States Department of Justice publishes a manual, titled *Procedure for Requesting International Extradition*, which sets forth the procedural requirements for extraditing a suspect. OIA also has a staff of attorneys who are available to consult with prosecutors requesting extradition. Thomas G. Snow, *International Extradition: Guidelines for the Practitioner*, 22 TRIAL 56, Sept. 1986.

10. For example, there may not be an extradition treaty in force between the United States and the foreign government, and that government may not be willing to voluntarily turn the suspect over absent a treaty or otherwise assist in U.S. prosecution efforts.

11. See M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 201-12 (2d ed. 1987). "The United States increasingly resorts to extraordinary rendition devices, including abduction, thus circumventing traditional extradition processes." *Id.* at 207. In discussing irregular rendition practices, Professor Bassiouni distinguishes between the terms "abductions," which do not involve participation by agents of the invaded state or knowledge on the part of that state's government, and "seizures," which do include either participation or knowledge on the part of such state. *Id.* at 189. The terms "abduction" and "seizure" are used synonymously throughout this article, without adhering to this distinction. Part IV addresses the issue of government-sponsored abduction, both with and without participation by agents of an asylum state. See *infra* notes 89-140 and accompanying text.

12. 939 F.2d 1341 (9th Cir. 1991), *vacated*, 112 S. Ct. 2986 (1992). The Ninth Circuit's decision was vacated as a result of the Supreme Court's ruling in United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992). This *Comment* discusses both of these decisions, as well as the common factual background leading up to them. The prosecution of Rene Martin Verdugo-Urquidez resulted in two separate series of cases, one dealing with a search and seizure issue and the other dealing with a kidnapping issue. This *Comment* focuses on the series of cases addressing the kidnapping issue.

author's point of view regarding government-sponsored kidnapping in general and the validity of the *Verdugo* decision.

II. Historical Background Surrounding Government-Sponsored Abductions

A. *Traditional Method of Acquiring Jurisdiction Over Foreign Fugitives: Extradition Treaties*

When a resident of a particular nation violates the laws of that country, the sovereign has the capacity to punish the individual for the violation through its police powers.[13] However, when the violator flees, is not a resident, or is otherwise outside the physical boundaries of the sovereign, the nation will lack personal jurisdiction over the violator and not have the capacity to prosecute.[14] In order to effect prosecution and punishment, the sovereign will have to seek a return of the offender from the second country in which he or she has subsequently been located, either through extradition or an informal rendition procedure.[15] International law dictates that the second sovereign is only required to return the individual being sought if there is an extradition treaty in force between the two nations.[16] It is possible for a nation to voluntarily surrender a fugitive upon request, even if there is no extradition treaty in force, but in actual practice this normally does not occur.[17]

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13. The term "police power" is defined as:

> The power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health and morals or the promotion of the public convenience and general prosperity. The police power is subject to limitations of the federal and State constitutions, and especially to the requirement of due process. Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals and general welfare within constitutional limits and is an essential attribute of government.

Black's Law Dictionary 1041 (5th ed. 1979) (citation omitted). The terms "sovereign," "nation," "state," and "country" are used synonymously throughout this article.

14. Personal jurisdiction is required in order to prosecute a criminal defendant. *See supra* note 7 and accompanying text.

15. Extradition would be the standard legal process for returning the offender. See Carter & Trimble, *supra* note 8. Irregular rendition procedures sometimes involve abductions, but more frequently would include informal negotiations between authorities from the two nations.

16. "Despite occasional statements to the contrary, there is no duty to extradite in the absence of a treaty." Michael Akehurst, A Modern Introduction to International Law 107 (6th ed. 1987) (footnote omitted); *see also* United States v. Rauscher, 119 U.S. 407, 411-12 (1886); Factor v. Laubenheimer, 290 U.S. 276, 287 (1933).

17. Carter & Trimble, *supra* note 8. The United States, for example, has a statutory provision which proscribes extradition without a treaty. *See* 18 U.S.C. § 3184 (Supp. III 1991). "Whenever there is a *treaty* . . . for extradition . . . any

Even when an extradition treaty does exist between two nations, limitations may make it impractical or even impossible to return the individual through formal extradition procedures.[18] Many extradition treaties contain exceptions which prohibit the surrender of a fugitive in various circumstances.[19] Some of the more common exceptions include: 1) when the crime committed was a political offense; 2) when the statute of limitations has expired in the requesting state; and 3) when the offense is not also considered a crime in the requested state.[20] In addition, the "doctrine of specialty" mandates that an extradited individual can only be prosecuted in the requesting nation for the offenses(s) for which the requested nation agreed to extradite.[21]

Despite these occasional drawbacks, extradition treaties are in force between many nations, and they continue to be a common method of acquiring criminal jurisdiction over individuals who are beyond the territorial reach of a sovereign.[22]

B. *Development of the* Ker-Frisbie *Doctrine*

Legitimate interests in prosecuting a criminal offender may be frustrated when the offender takes refuge in a foreign country that does not have an extradition treaty in force with the nation seeking prosecution, particularly if the foreign country is not willing to informally surrender the violator to the requesting nation as a matter of comity, or prosecute the offender itself.[23] One response to this problem has been for the government seeking prosecution to authorize or sponsor the abduction and transportation of the individual to its borders.[24] United States courts, without condoning this method of apprehension, have tradi-

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justice or judge . . . may . . . issue [a] warrant for the apprehension of [a person charged with criminal conduct by a foreign government]. *Id.* (emphasis added); *see also* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 8-9 (1936). The government will not issue arrest warrants or otherwise comply with informal requests from another country with which it does not have an extradition treaty in force. However, this statute has not precluded the United States from complying with informal requests from countries with which it does have extradition treaties in force. See *infra* note 119 and accompanying text.

18. CARTER & TRIMBLE, *supra* note 8, at 787-88.

19. *Id.*

20. *Id.* at 788.

21. United States v. Caro-Quintero, 745 F. Supp. 599, 607 (C.D. Cal. 1990) (citations omitted); *see also* United States v. Rauscher, 119 U.S. 407 (1886).

22. "[T]he law of extradition has developed largely by means of international treaties and domestic legislation. The United States alone has entered into extradition treaties with almost 100 countries (or approximately three-fifths of the world's nations)." A. Rusis, *Extradition Laws and Treaties of the U.S.*, 16 INT'L LAW., Spring, 1982, at 418 (book reviews); *see also* 18 U.S.C. § 3181 (Supp. III 1991).

23. A country is not required to return a fugitive under international law unless it has committed itself to do so pursuant to an extradition treaty. See *supra* notes 16 and 17 and accompanying text.

24. See *supra* note 11 and accompanying text.

tionally taken the position that a forcible abduction, standing alone, will not defeat the personal jurisdiction of a court over the defendant.[25] This rationale is based upon two United States Supreme Court decisions, *Ker v. Illinois*[26] and *Frisbie v. Collins*.[27]

In *Ker v. Illinois*, the defendant was kidnapped from Peru and transported to the United States, where he was wanted on larceny and embezzlement charges.[28] In rejecting the defendant's challenge to the court's jurisdiction, the Supreme Court held that "such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court . . . and presents no valid objection to his trial in such court."[29]

In *Frisbie v. Collins*, the defendant was seized from Illinois by Michigan police officers, blackjacked, and brought to Michigan, where he was convicted of murder.[30] In reversing the United States Court of Appeals decision granting the defendant a writ of habeas corpus, the Supreme Court reaffirmed the holding of *Ker*, that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'."[31]

The holdings of these two cases have come to be known as the "*Ker-Frisbie*" doctrine.

C. *Application and Refinement of the* Ker-Frisbie *Doctrine*

The United States Supreme Court has consistently accepted the *Ker-Frisbie* doctrine and affirmed the holdings of the *Ker* and *Frisbie* decisions.[32] However, an exception to this doctrine has developed in numerous lower courts.

In *United States v. Toscanino,*[33] the defendant was abducted from Uruguay and transported to the Brazilian border. In addition to being knocked unconscious when initially captured, he was interrogated and tortured for several weeks and denied sleep, food and water during the

25. Matta-Ballesteros *ex rel.* Stolar v. Henman, 697 F. Supp. 1040 (S.D. Ill. 1988). "The long-standing rule of law is that a forcible abduction does not offend due process nor does it require that courts dismiss an indictment for loss of jurisdiction on those grounds." *Id.* at 1045.

26. 119 U.S. 436 (1886).

27. 342 U.S. 519 (1952).

28. *Ker*, 119 U.S. at 437-38.

29. *Id.* at 444.

30. *Frisbie*, 342 U.S. at 520.

31. *Id.* at 522. The Court further stated: "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Id.*

32. *See, e.g.*, I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984); United States v. Crews, 445 U.S. 463 (1980); Stone v. Powell, 428 U.S. 465 (1976); Gerstein v. Pugh, 420 U.S. 103 (1975); Pettibone v. Nichols, 203 U.S. 192, 215-16 (1906); Cook v. Hart, 146 U.S. 183 (1892); Mahon v. Justice, 127 U.S. 700 (1888).

33. 500 F.2d 267 (2d Cir. 1974).

course of these proceedings.[34] Based on allegations that United States agents were present and had participated in these actions, the United States Court of Appeals for the Second Circuit adopted an exception to the *Ker-Frisbie* doctrine, holding that a court should not exercise personal jurisdiction over a defendant when the government's methods of apprehension substantially deprive the defendant of his or her due process rights.[35] Two requirements must be met in order for a court to refuse personal jurisdiction over a defendant under this exception. First, the government must have participated in the conduct which is alleged to be a denial of due process.[36] Second, the conduct must be of such an outrageous nature that it "shocks the conscience."[37]

At least two circuits have refused to accept the *Toscanino* exception.[38] Indeed, even the Second Circuit has retreated somewhat from its holding in *Toscanino* by subsequently recognizing that the exception will only be applicable in extremely limited circumstances.[39]

While the Ninth Circuit initially rejected the exception,[40] it has since reversed its stance and decided to accept this limitation on the *Ker-Frisbie* doctrine.[41]

III. FACTUAL BACKGROUND OF *UNITED STATES V. VERDUGO-URQUIDEZ*

In order to fully understand the Ninth Circuit's reasoning in rendering the *Verdugo* decision, it is necessary to first examine four related series of events. These are: (1) the murder of DEA Special Agent Enrique Camarena Salazar; (2) the initial investigation of Camarena's murder; (3) the apprehension of Rene Martin Verdugo-Urquidez; and (4) the prosecution efforts that occurred in the United States.

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34. *Id.* at 268-70.

35. *Id.* at 275. The court stated: "[W]e view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Id.*

36. Matta-Ballesteros *ex rel.* Stolar v. Henman, 697 F. Supp. 1040, 1046 (S.D. Ill. 1988).

37. *Id.*

38. The Fifth Circuit rejected *Toscanino* in United States v. Winter, 509 F.2d 975, 986-88 (5th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975). Likewise, the Eleventh Circuit also rejected *Toscanino* in United States v. Darby, 744 F.2d 1508, 1531 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985).

39. In United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), the Second Circuit noted: "[W]e are forced to recognize that . . . not every violation by prosecution or police is so egregious [as to require] nullification of the indictment." *Id.* at 66. This decision was rendered less than seven months after *Toscanino*.

40. *See* United States v. Cotten, 471 F.2d 744 (9th Cir. 1973), *cert. denied*, 411 U.S. 936 (1973).

41. *See* United States v. Valot, 625 F.2d 308, 309 (9th Cir. 1980).

A. *The Murder of Special Agent Camarena*

Enrique Camarena Salazar was born in Mexicali, Mexico in 1947 and, after being naturalized as a United States citizen, dedicated himself to a career in law enforcement.[42] After working as an investigator for several police departments in California, he was appointed as a Special Agent for the United States Drug Enforcement Administration (DEA) in 1974.[43] Agent Camarena was eventually assigned to "Operation Padrino," where he became actively involved in the investigation of a Guadalajara-based drug cartel in Jalisco, Mexico, run by Rafael Caro-Quintero,[44] "one of the most powerful and feared Mexican drug traffickers."[45]

In November, 1984, Agent Camarena participated in a huge drug raid on one of Caro-Quintero's plantations in Chihuahua, Mexico.[46] Caro-Quintero allegedly vowed revenge against Camarena for initiating this raid.[47]

On February 7, 1985, Agent Camarena was kidnapped in front of the United States Consulate in Guadalajara.[48] Alfredo Zavala Avelar, a Mexican pilot and confidential DEA informant who had assisted Camarena in locating Caro-Quintero's marijuana cultivation operation, was also abducted from a separate location in Guadalajara.[49] Approximately one month later, the bodies of Camarena and Zavala were discovered at a remote ranch outside of Guadalajara.[50] Both had been tortured and murdered.[51] Camarena's skull had been fractured in multiple places,[52] and an examination revealed that both individuals had been "brutally beaten" and choked to death.[53]

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42. Richard J. Meislin, *U.S. Agent's Body Firmly Identified*, N.Y. TIMES, Mar. 8, 1985, § 1, at 3.

43. *Id.*

44. Ronald J. Ostrow, *U.S. Charges Mexico Let Suspect Flee*, L.A. TIMES, Feb. 25, 1985, § 1, at 1.

45. Ronald J. Ostrow and Paul Houston, *Camarena Case Suspect Caught in Costa Rica*, L.A. TIMES, Apr. 5, 1985, § 1, at 4. According to United States officials, Caro-Quintero's extensive drug empire had been known to have employed in excess of 5,000 people. Hector Tobar, *Drug Lord Convicted In Camarena's 1985 Murder*, L.A. TIMES, Dec. 13, 1989, § 1, at 32.

46. Stephen J. Hedges, Gordon Witkin, and Anne Moncreiff Arrarte, *Kidnapping Drug Lords*, U.S. NEWS & WORLD REP., May 14, 1990, at 29. According to United States officials, "10,000 tons of marijuana [were] seized and burned" during this raid on the plantation. John Gavin, *Mexico: The Drug Connection*, 12 DRUG ENFORCEMENT 7, Summer, 1985.

47. Tobar, *Drug Lord Convicted In Camarena's 1985 Murder*, *supra* note 45, at 25.

48. *Trial Opens in Death of Tortured Drug Agent*, N.Y. TIMES, July 31, 1988, § 1, at 25.

49. *Id.*

50. Meislin, *U.S. Agent's Body Firmly Identified*, *supra* note 42.

51. *Trial Opens in Death of Tortured Drug Agent*, *supra* note 48.

52. *Id.*

53. Meislin, *U.S. Agent's Body Firmly Identified*, *supra* note 42.

B. *Early Investigation Efforts*

According to Mexican authorities, Rafael Caro-Quintero had expressed a desire on numerous occasions to kill Agent Camarena.[54] Although Caro-Quintero was suspected of ordering the kidnappings of Camarena and Zavala, Mexican police officials allowed him to flee from the country shortly after the abductions took place.[55]

Following the grisly discovery at the Mexican ranch, United States Justice Department officials launched a massive investigation into the murders.[56] In April of 1985, Rafael Caro-Quintero was apprehended in Costa Rica[57] and extradited to Mexico.[58]

Mexican authorities indicted Caro-Quintero and numerous other individuals, including several Jalisco police officers, for their roles in the murders, and they were convicted and sentenced by Mexican courts in 1989.[59] After the various suspects indicted by Mexico for the murders had been sentenced, the Mexican Attorney General closed the case, based on the belief that "all the guilty parties have been apprehended and convicted."[60]

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54. *Prime Suspect in Murder of U.S. Drug Agent Is Extradited to Mexico*, L.A. TIMES, Apr. 6, 1985, § 1, at 14.

55. Ostrow, *U.S. Charges Mexico Let Suspect Flee*, *supra* note 44. Caro-Quintero was briefly detained at an airport in Guadalajara by members of the Mexican Federal Judicial Police, and was then allowed to board a private plane and take off. He was being escorted at this time by officials from the Mexican Department of Federal Security. The Federal Judicial Police and the Department of Federal Security are separate Mexican law enforcement organizations having related powers similar to the Federal Bureau of Investigation (FBI) in this country. *Id.*

56. The efforts of the DEA in seeking to bring the responsible parties to justice, known as "Operation Leyenda," were commanded by Special Agent Hector Berrellez. United States v. Caro-Quintero, 745 F. Supp. 599, 601 (C.D. Cal. 1990).

57. Ostrow and Houston, *Camarena Case Suspect Caught in Costa Rica*, *supra* note 45. At the time of his arrest, Caro-Quintero was accompanied by four bodyguards, the group was heavily armed, and Caro-Quintero possessed a handgun bearing the seal of a Mexican police agency. *Id.*

58. *Prime Suspect in Murder of U.S. Drug Agent is Extradited to Mexico*, *supra* note 54.

59. Larry Rohter, *Mexico Arrests Six in Abduction Case*, N.Y. TIMES, Apr. 29, 1990, § 1, at 9. A total of twenty-five people, all Mexican nationals, were convicted by Mexican judge Tomas Hernandez Franco of the Fourth Criminal Court in Guadalajara, and they were sentenced in December of 1989. Caro-Quintero and Ernesto Rafael Fonseca-Carillo (Caro-Quintero's "enforcer") were each sentenced to forty years in prison for ordering the killings. Since both Caro-Quintero and Fonseca-Carillo must finish serving terms imposed for earlier convictions before they can begin serving the forty-year sentences, they will not be eligible for release until their total sentences of seventy-four years and fifty-three years, respectively, have been served. The United States has requested that Caro-Quintero be extradited to this country to stand trial, but the Mexican government has refused to comply with this request. Tobar, *Drug Lord Convicted In Camarena's 1985 Murder*, *supra* note 45, at 3.

60. Rohter, *Mexico Arrests Six In Abduction Case*, *supra* note 59.

C. *The Apprehension of Verdugo-Urquidez*

Rene Martin Verdugo-Urquidez, a Mexican national, was a reputed narcotics smuggler and ranking member of the Caro-Quintero drug cartel.[61] After investigating Verdugo-Urquidez for quite some time,[62] the DEA filed a criminal complaint against him in August of 1985 in the United States District Court for the Southern District of California for assorted drug law violations, and a warrant was issued for his arrest.[63] Although it was later determined that Verdugo had actively participated in the Camarena and Zavala killings,[64] the initial complaint did not allege any involvement with respect to these crimes.[65]

Verdugo was known to enter the United States regularly, but the DEA was unsuccessful in locating him in this country after the arrest warrant was issued.[66] Upon contacting Mexican police officials, representatives from the United States Marshal's Service were informed that Verdugo could be arrested in Mexico based on a validly issued American arrest warrant.[67] After verifying the existence of the United States warrant, Mexican police arrested Verdugo on January 24, 1986, and transported him to the United States.[68]

DEA agents and Mexican police officers searched several Mexican residences belonging to Verdugo during the two days following his arrest.[69] Verdugo was later indicted in southern California, along with numerous other defendants, for various narcotics violations, and he was also eventually indicted for his role in the Camarena torture-murder.[70]

D. *Prosecution Efforts in the United States*

In the United States, investigation of the Camarena kidnapping and

61. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1215 (9th Cir. 1988) [hereinafter *Verdugo (search and seizure) II*].

62. The Drug Enforcement Administration had been investigating Verdugo's smuggling activities for over five years, and filed a sealed complaint against him after learning of a planned shipment of several tons of marijuana to the United States. *Id. See also infra* note 63.

63. Appellee's Supplemental Brief at 2-3, United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991) [hereinafter Appellee's Supplemental Brief].

64. *Verdugo (search and seizure) II*, 856 F.2d at 1215.

65. Appellee's Supplemental Brief, *supra* note 63, at 2.

66. *Id.* at 3.

67. *Id.*

68. *Id.* Verdugo was apprehended by six Mexican law enforcement officers in San Felipe, blindfolded, and transported to the United States border in the back seat of an unmarked police vehicle. Once inside Calexico, California, Verdugo was placed under arrest by United States Marshals, and subsequently transferred to the custody of the DEA. Verdugo remains incarcerated at the Metropolitan Correctional Center in San Diego, California. See *id.* at 3-4.

69. *Id.* at 4.

70. *Id.* at 5.

murder initially led to the prosecution and conviction of three individuals, one of whom was Verdugo-Urquidez.[71]

By January, 1989, sixteen United States indictments had been returned in the Camarena case.[72] The following January, six more Mexican nationals (including two high-ranking Mexican law enforcement officials) were indicted by a federal grand jury,[73] bringing the total

71. Tobar, *Drug Lord Convicted in Camarena's 1985 Murder*, *supra* note 45, at 32. These three individuals were Verdugo-Urquidez; Raul Alvarez-Lopez, a Mexican state police officer; and Jesus Felix-Gutierrez. *Id.* All three were convicted in federal district court in Los Angeles in October of 1988. Verdugo-Urquidez and Alvarez-Lopez, who had both participated in the killings, were each sentenced to prison for life plus two hundred and forty years. Felix-Gutierrez was sentenced to ten years in prison for being an accessory after the fact to murder. *Id.* Felix-Gutierrez appealed his conviction and it was subsequently affirmed by the United States Court of Appeals for the Ninth Circuit. United States v. Felix-Gutierrez, 940 F.2d 1200 (9th Cir. 1991).

Prior to trial, Verdugo made motions to dismiss both of the indictments against him. With respect to his indictment on narcotics charges in the United States District Court for the Southern District of California, Verdugo initially argued that the court should deny jurisdiction over him because of the method by which he was apprehended. *Verdugo (search and seizure) II*, 856 F.2d at 1215. This motion was denied by the district court and it was never appealed. *Id.* Verdugo also moved to suppress evidence seized from his home in Mexicali, Mexico during the search that was conducted by DEA agents and Mexican police, based on the fact that the DEA had never obtained a search warrant. The district court granted this motion, ruling that notwithstanding the propriety of the search under Mexican law and the granting of permission by Mexican police to the DEA to conduct the search, the protection of the Fourth Amendment extended to Verdugo, and the evidence seized therefore had to be suppressed because the search had been warrantless and was conducted unreasonably. See *id.* at 1215-17.

The United States Court of Appeals for the Ninth Circuit affirmed the district court. *Id.* at 1230. The United States Supreme Court then reversed the court of appeals, ruling that the Fourth Amendment does not apply to searches conducted outside the United States of residences of foreign citizens who have no voluntary attachment to this country. United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1061 (1990) [hereinafter *Verdugo (search and seizure) III*].

With respect to his indictment for kidnapping and murder in the United States District Court for the Central District of California, Verdugo again challenged the jurisdiction of United States courts to prosecute him. Verdugo first argued that his apprehension violated due process, and also argued that the murder prosecution violated the extradition treaty in force between Mexico and the United States, because under the doctrine of specialty, *if* he had been formally extradited, then the government would have only been able to prosecute him on the drug charges (for which the arrest warrant had been issued), and not for the Camarena murder. See Appellee's Supplemental brief, *supra* note 63, at 5-7 (emphasis in text). Both of these arguments were rejected by the district court. *Id.* at 17-18.

Verdugo subsequently raised the argument that his seizure in Mexico itself violated the terms of the extradition treaty, and should therefore operate to divest the court of jurisdiction over him. *Id.* at 7-8. This issue was addressed by the Ninth Circuit Court of Appeals in the decision that is the focus of this *Comment*.

72. Tobar, *Drug Lord Convicted in Camarena's 1985 Murder*, *supra* note 45.

73. Included in the six were Miguel Aldana Ibarra, former chief of Interpol's

number of individuals indicted in the United States for crimes related to the Camarena murder up to twenty-two by the summer of 1990.[74] Of these twenty-two, only eight have actually been brought to stand trial in the United States.[75] Three of the eight were apprehended "by means of covert forcible abduction from their homelands."[76]

Mexican headquarters; and Manual Ibarra Herrera, formerly in charge of the Mexican Federal [Judicial] Police. See Michael Isikoff, *Mexican Doctor's Arrest Triggers "Kidnap" Charges*, WASH. POST, Apr. 17, 1990, § 1, at 14. The Mexican government stated at this time that it did not intend to surrender either Aldana, who was awaiting trial on narcotics charges in Mexico, or Ibarra to United States authorities. *Id.*

74. United States v. Caro-Quintero, 745 F. Supp. 599, 602 (C.D. Cal. 1990). Three individuals had been tried and convicted in 1988. See *supra* note 71 and accompanying text. Of the nineteen remaining individuals who had been indicted as of April, 1990, three had been killed mysteriously by Mexican police, seven were incarcerated in Mexico, four were still at large, and five were in custody in the United States awaiting trial. William Branigin, *Kidnapping Of Doctor Riles Mexico*, WASH. POST, Apr. 18, 1990, § 1, at 33. The five individuals awaiting trial in United States custody were Doctor Humberto Alvarez-Machain; Juan Ramon Matta-Ballesteros; Ruben Zuno-Arce; Juan Jose Bernabe-Ramirez; and Javier Vasquez-Velasco. United States v. Caro-Quintero, 769 F. Supp. 1564, 1568 (C.D. Cal. 1991). The charges against Doctor Alvarez-Machain were dismissed in August, 1990 for lack of personal jurisdiction, and the court ordered that he be returned to Mexico. United States v. Caro-Quintero, 745 F. Supp. at 614. See also *infra* note 76. That decision was affirmed in United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), but has subsequently been overturned by the United States Supreme Court. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992). See *infra* note 76 for a complete discussion of the Alvarez-Machain case. The remaining four individuals awaiting trial with Dr. Alvarez-Machain were all convicted. United States v. Caro-Quintero, 769 F. Supp. at 1568. A joint motion for a new trial based on juror misconduct, filed by all four of these defendants, was denied. *Id.* at 1584. A later motion for a new trial filed by defendant Zuno-Arce was allowed, however. See United States v. Zuno-Arce, 958 F.2d 380 (No. 91-50351) (Mar. 27, 1992) (unpublished decision, text in WESTLAW). Zuno-Arce allegedly owned land upon which the bodies of Camarena and Zavala Avelar had initially been buried. The bodies were allegedly removed from this area and re-buried on the location at which they were later found by authorities, so as to eliminate the possibility of Zuno-Arce being linked to the murders. See *id.* at *3.

Zuno-Arce was convicted again in December of 1992. According to witnesses, he had helped plan Camarena's kidnapping and was present during the interrogation of Camarena. *See* Don J. DeBenedictis, *Scant Evidence Frees Abducted Doctor*, A.B.A. J., Feb. 1993, at 22. Zuno-Arce is the brother-in-law of former Mexican President Luis Echeverria. See *Man Is Convicted in Drug Agent's Torture Death*, N.Y. TIMES, Feb. 22, 1992, § 1, at 18.

75. See *supra* notes 71 and 74 and accompanying text.

76. United States v. Caro-Quintero, 745 F. Supp. at 602. These three individuals were Rene Martin Verdugo-Urquidez; Juan Ramon Matta-Ballesteros; and Doctor Humberto Alvarez-Machain. *Id.* at n.5.

Matta-Ballesteros, a Honduran national, was the second Camarena defendant to be abducted. Like Verdugo, he was initially apprehended for narcotics violations, among other crimes, and was later charged with involvement in the Camarena murder. On April 5, 1988, Matta-Ballesteros was forcibly seized in Tegucigalpa, Honduras, by Honduran military officials and placed under arrest. Matta-Ballesteros *ex rel.* Stolar v. Henman, 697 F. Supp. 1040, 1041-42 (S.D. Ill.

Following Verdugo's arrest on narcotics charges, but prior to his

1988). Deputy United States Marshals were present during this seizure, and subsequently drove Matta-Ballesteros to an air base, accompanied by Honduran officers, where he was later flown to the United States to be tried on indictments in Illinois (alleging escape from a United States prison in 1985), and in California (alleging drug law violations). *Id.* Matta claimed that he was shocked numerous times by a "stun gun" (an electronic device sometimes used by law enforcement personnel to subdue prisoners), and beaten by the officers that accompanied him to the air base. An initial medical examination corroborated this claim. The United States agents involved in his apprehension testified that they did not participate in any of this alleged conduct. *See id.* at 1042-43.

Matta-Ballesteros petitioned for a writ of habeas corpus, claiming that the abduction violated the extradition treaty in force between Honduras and the United States, and also violated his Fifth Amendment due process rights under the United States Constitution. *Id.* at 1043. The district court denied his habeas corpus petition. *Id.* at 1048. The court ruled that, absent a protest by the Honduran government regarding his abduction, Matta lacked standing to challenge the court's jurisdiction based on a violation of the extradition treaty. *Id.* at 1043-44. The court also ruled that Matta's allegations of abuse, even if true and performed by United States agents, did not rise to a level outrageous enough to trigger the *Toscanino* exception. The court therefore concluded, based on the *Ker-Frisbie* principle, that the abduction should not serve to defeat jurisdiction. *Id.* at 1045-48. The district court's ruling was affirmed in Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990).

The third Camarena defendant to be abducted, Doctor Humberto Alvarez-Machain, was a Mexican national, like Verdugo. Alvarez-Machain, a gynecologist in Guadalajara, was known to provide medical services for the Caro-Quintero drug cartel. Isikoff, *Mexican Doctor's Arrest Triggers Kidnap Charges, supra* note 73. He allegedly assisted the traffickers after Camarena's abduction by injecting Camarena with drugs to keep him alive for prolonged torture and interrogation. *Id.* Alvarez-Machain was indicted in the United States, along with five other Mexicans, on January 31, 1990. *Id.*

Arrangements had initially been made between Mexican Federal Judicial Police officials and the DEA to swap Alvarez-Machain for two Mexican fugitives allegedly hiding within the southern United States. See Henry Weinstein, *DEA Operative Details His Role In Kidnapping*, L.A. TIMES, Apr. 28, 1990, § 1, at 33. When the Mexican officials did not follow through and deliver Alvarez-Machain, DEA agents opted to pursue an abduction plan proposed by Antonio Garate Bustamonte, a DEA operative and former Mexican police officer. *Id.*

On April 2, 1990, Doctor Alvarez-Machain was kidnapped from his office in Guadalajara and flown to Texas, where DEA agents placed him under arrest. The DEA had agreed beforehand to pay the kidnappers $100,000.00 for Doctor Alvarez-Machain's capture. Although several of the kidnappers were Mexican police officers, no DEA agents participated in the actual abduction. See *id.*, § 1, at 1 and 33. The Mexican government strongly protested the seizure, and subsequently arrested six of the ten Mexican kidnappers for charges related to the incident. See David Lauter, *Mexico Leader Scolds Quayle over Abduction*, L.A. TIMES, Apr. 27, 1990, § 1, at 1.

The United States District Court for the Central District of California dismissed the charges against Doctor Alvarez-Machain for lack of personal jurisdiction in August of 1990, and ordered his return to Mexico. United States v. Caro-Quintero, 745 F. Supp. at 614. The district court ruled that his abduction violated the extradition treaty between the United States and Mexico. *Id.* at 610. This decision

conviction for the Camarena murder, the Mexican government protested his "abduction."[77]

The United States Court of Appeals for the Ninth Circuit reviewed Verdugo's murder conviction, and ruled that the United States would violate its extradition treaty with Mexico by "authoriz[ing] or sponsor[ing] the forcible taking of a Mexican national from that country without the consent of the Mexican government."[78] The court also held that a formal protest by Mexico would be sufficient to divest

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was subsequently affirmed by the United States Court of Appeals for the Ninth Circuit. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991).

On June 15, 1992 the United States Supreme Court reversed the Ninth Circuit Court of Appeals. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992). The Supreme Court held that the extradition treaty had not been violated, because it does not specifically prohibit abductions by either country, and that jurisdiction over Alvarez-Machain existed pursuant to the *Ker-Frisbie* doctrine. *Id.* at 2193-97.

The charges against Doctor Alvarez-Machain were subsequently dismissed for lack of evidence, however, and he returned to Mexico in December, 1992. Upon his return, Mexican officials stated that he would not be prosecuted for the Camarena murder. See *Judge Says U.S. Was Told It Held Wrong Doctor in Agent's Killing*, N.Y. TIMES, Dec. 17, 1992, § 1, at 27.

77. *See* Addendum to Appellee's Supplemental Brief, *supra* note 63, at A23-A24 and A27-A28. The Mexican Embassy sent two letters to the United States Department of State regarding the *Verdugo* case. The first letter, dated April 23, 1986, characterized Verdugo's arrest on narcotics charges as an "abduction" which was carried out without the knowledge of the Mexican government, and asked for a clarification as to the circumstances of the apprehension. *Id.* at A23-A24. In response, the United States Department of State informed the Mexican government that Verdugo had been apprehended by Mexican state police officers and turned over to United States authorities "pursuant to the longstanding local practice of cooperation between law enforcement agencies of the United States and the Republic of Mexico." *Id.* at A25.

Mexico sent a second letter to the State Department on August 26, 1987. This letter alleged that, based on Mexico's interpretation of rulings made by the Southern California District Court on April 11, 1986, DEA agents had hired the Mexican police officers to kidnap Verdugo. The letter further alleged that the abduction was a violation of both international law and the United States/Mexico extradition treaty, and stated that the April 23, 1986 letter had been a "formal complaint regarding the kidnapping of [Verdugo]." *Id.* at A27-A28. In response to this letter, the State Department assured Mexico that the police officers who abducted Verdugo had not been hired by United States officials (this had been determined by the district court in its findings of fact), and also informed Mexico that the transfer of Verdugo had been made on a good faith belief that the decision to surrender him was made by the "appropriate Mexican authorities." *Id.* at A29-A32.

The allegation that DEA agents had hired the Mexican police officers was based in part on the fact that the officers who apprehended Verdugo later came to the United States with their families following his arrest, and were given temporary economic support by United States officials, because of receiving death threats while in Mexico. All six were later charged with kidnapping by a prosecutor in Baja California, Mexico, the state where the apprehension took place. *See Verdugo (search and seizure) II*, 856 F.2d 1214, 1216 n.1 (9th Cir. 1988).

78. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1342-43 (9th Cir. 1991) [hereinafter *Verdugo (kidnapping) II*].

United States courts of personal jurisdiction, as long as Mexico would agree to a return of the seized offender.[79] With respect to Verdugo specifically, the court ruled that: (1) The *Ker-Frisbie* doctrine does not stand for the "very broad proposition that a court may exercise jurisdiction over a defendant who appears in that forum regardless of the circumstances under which he was brought there";[80] (2) "[E]xtradition treaties proscribe government-sponsored kidnappings . . . .";[81] (3) The two letters of protest from Mexico regarding Verdugo's apprehension constitute a formal protest, and are sufficient to confer standing on Verdugo to challenge the court's exercise of personal jurisdiction over him;[82] and (4) If the United States authorized or sponsored Verdugo's kidnapping, in violation of the treaty, then the appropriate remedy would be to return Verdugo to Mexico.[83] Accordingly, the court remanded the case to the district court for an evidentiary hearing to determine whether the United States authorized or sponsored Verdugo's abduction.[84] The prosecution subsequently petitioned the United States Supreme Court for a writ of certiorari.[85]

On June 15, 1992, the United States Supreme Court ruled that the 1990 abduction by United States agents of another suspect in the Camarena murder, Dr. Humberto Alvarez-Machain,[86] did not violate the extradition treaty between Mexico and the United States.[87] As a result, the Ninth Circuit's decision in *Verdugo* was vacated and remanded for further consideration.[88]

IV. ANALYSIS

In analyzing the *Verdugo* decision and government-sponsored abductions in general, four basic areas will be examined: (1) the impact of international law on government-sponsored abductions; (2) United States interpretation of international law and the surrounding history of informal rendition practices; (3) the feasibility of extradition in the *Verdugo* case; and (4) the involvement of Mexico in Verdugo's apprehension.

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79. *Id.* at 1343.

80. *Id.* at 1345.

81. *Id.* at 1351.

82. *Id.* at 1355-57.

83. *Id.* at 1359-62.

84. *Id.* at 1362.

85. The petition for certiorari (No. 91-670) was filed on October 21, 1991. See *U.S. Asking High Court To Condone Arrest Of Crime Suspects Abroad*, BOSTON GLOBE, Oct. 29, 1991, § 1, at 20.

86. See *supra* note 76 for a discussion of the Alvarez-Machain abduction.

87. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2197 (1992).

88. United States v. Verdugo-Urquidez, 112 S. Ct. 2986, 2986-87 (1992) [hereinafter *Verdugo (kidnapping) III*].

A. *International Law Violations*

When a country sends its agents into a foreign nation to forcibly retrieve an individual, without the consent of that foreign nation, the country has breached the sovereignty of the nation, and a violation of international law has occurred.[89]

The Ninth Circuit Court of Appeals examined several important sources of international law in rendering the *Verdugo* decision, and properly concluded that the United States would violate international law by kidnapping a criminal fugitive from foreign soil.[90]

Treaties are an important source of international law,[91] and they are also considered to be a significant source of United States domestic law.[92] The United States and Mexico have entered into an extradition treaty, which was in force at the time Verdugo was abducted.[93] The Ninth Circuit spent significant time analyzing the provisions of this treaty, and concluded that by its terms, it prohibits abductions conducted outside the scope of the document.[94] Although the United States Supreme Court has since overruled this decision, the Supreme

89. See BASSIOUNI, *supra* note 11, at 194. "[S]overeignty over territory means 'the right to exercise therein, to the exclusion of any other state, the functions of a state'[.]" AKEHURST, *supra* note 16, at 143, quoting *Island of Palmas* case, *UNRIAA* II 829, 838 (1928). Sovereignty is "the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation[.]" BLACK'S LAW DICTIONARY 1252 (5th ed. 1979).

90. *Verdugo (kidnapping) II*, 939 F.2d 1341, 1351-52 (9th Cir. 1991); see also *supra* notes 78 and 81 and accompanying text.

91. AKEHURST, *supra* note 16, at 23. Dr. Akehurst sets forth four primary sources of international law, based on Article 38(1) of the Statute of the International Court of Justice: (1) treaties and international agreements; (2) custom; (3) "general principles of law recognized by civilized nations;" and (4) "judicial decisions" and the opinions of recognized international scholars. AKEHURST, *supra* note 16, at 23.

92. Treaties are considered to be one of the highest forms of law recognized in the United States, equal to congressional legislation and the Constitution itself. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made . . . shall be the supreme Law of the Land*[.]" U.S. CONST., art. VI, cl. 2 (emphasis added).

93. Extradition Treaty Between the United States of America and the United Mexican States, May 4, 1978, U.S.-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656 [hereinafter U.S.-Mexico Extradition Treaty].

94. *Verdugo (kidnapping) II*, 939 F.2d at 1351-52. Although the extradition treaty itself does not specifically prohibit abductions, the Court of Appeals concluded that this result is implied because of the underlying purpose of extradition treaties. The court stated:

> Our conclusion that extradition treaties proscribe government-sponsored kidnappings gains support from general principles of international law . . . . When it is recognized that international law does not permit one nation forcibly to remove an individual from another, the reason that extradition treaties typically do not expressly deny nations this power is apparent: it is assumed that such conduct is impermissible.

Id.

Court's analysis was directed specifically toward the U.S.-Mexico Extradition Treaty, and arguably would not be applicable to extradition treaties in force with other countries.[95]

Formal agreements between groups of nations constitute another important source of international law.[96] The United States is a signatory to two significant international agreements which forbid the forcible invasion of another sovereign's territory.[97]

The U.N. Charter[98] has specific provisions which state that territorial sovereignty must be respected by all member nations.[99] The United States is a signatory to the U.N. Charter, and is obviously a leading member of the United Nations. Therefore, it has a responsibility to the world community to advance, rather than frustrate, the goals of this important international organization.

Another important international agreement which denounces the forcible invasion of another country's territory is the OAS Charter.[100]

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95. The Supreme Court examined the specific historical background of the U.S.-Mexico Extradition Treaty, and persuasively noted that Mexico has been aware of the *Ker-Frisbie* doctrine and its applicability to forcible abductions for almost a century. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2194, n.11 (1992). Despite this knowledge, the treaty has never been amended to prohibit abductions or otherwise limit the *Ker* doctrine. *Id.* at 2194-95. The majority therefore concluded that an implicit prohibition on abductions does not exist in this particular treaty. *Id.*

The dissent made a strong counter-argument that specific knowledge of the *Ker-Frisbie* doctrine would be relevant only to the question of the applicability of the doctrine in the case of a private kidnapping, and not to a case in which the kidnapping had been performed by United States agents. *See id.* at 2203-05 (Stevens, J., dissenting).

Notwithstanding this distinction between private kidnappings and government-sponsored kidnappings, the majority most likely would have recognized an implicit prohibition had it not been for the noted knowledge of the *Ker* doctrine by Mexico. The Ninth Circuit's conclusion in *Verdugo* that extradition treaties implicitly prohibit government-sponsored abductions was logical and justifiable, and should generally be recognized as a governing principle absent specific facts to the contrary.

96. *See supra* note 91 for a discussion of the principal sources of international law.

97. These two agreements are the United Nations Charter [hereinafter U.N. Charter], June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, and the Charter of the Organization of American States [hereinafter OAS Charter], Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361.

98. U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153.

99. Respect for territorial sovereignty is one of the underlying principles advocated by the United Nations. "All Members shall refrain in their international relations from the . . . use of force against the territorial integrity . . . of any state . . . ." U.N. CHARTER, art. 2, § 4.

100. "International order consists essentially of respect for the . . . sovereignty of states . . . and the faithful fulfillment of obligations derived from treaties and other sources of international law." OAS Charter, Apr. 30, 1948, art. 3(b), 2 U.S.T. 2394, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27,

The United States has also signed this document, and is a member of the Organization of American States.[101]

Custom is yet another source of international law.[102] Customary international law further supports the concept of inviolability and respect for the territory of foreign nations.[103]

It is therefore evident that government-sponsored abductions which involve physical breach of another nation's territory, without the consent of that nation, are clearly in violation of international law. A remaining question is whether an abducted offender has standing to challenge an alleged violation of international law by the United States government.

It has long been recognized that standing to challenge violations of international law (including violations of an extradition treaty) is generally extended only to the government of the offended nation, and not to the affected individual.[104] The Ninth Circuit Court of Appeals, however, ruled that Verdugo did have standing to challenge the court's exercise of personal jurisdiction over him.[105] Although this conclusion is not directly supported by legal precedent, the court made a persuasive analogy involving the doctrine of specialty,[106] and its finding is reasonable.[107]

1967, 21 U.S.T. 607, T.I.A.S. No. 6847. "The territory of a State is inviolable; it may not be the object . . . of measures of force taken by another State, directly or indirectly, on any grounds whatever." *Id.*, art. 20.

101. The United States and Mexico are both signatories to the OAS Charter. A 1985 Protocol, 25 I.L.M. 529 (1986), was also signed by Mexico, but this Protocol has not been ratified by the United States.

102. *See supra* note 91. "Until recent times, international law consisted for the most part of customary rules. These rules had generally evolved after a long historical process culminating in their recognition by the international community." JOSEPH GABRIEL STARKE, INTRODUCTION TO INTERNATIONAL LAW 34 (9th ed. 1984).

103. This principle was recognized prior to the turn of the century. "A sovereign, according to modern international law, can not exercise the prerogatives of sovereignty in any dominions but its own. No principle is better established than that no government has a right to pursue offenders against its laws . . . into the dominions of another[.]" JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, Vol. II, 362 (1906) (citations omitted).

104. This principle has also been recognized since the turn of the century:

> Where a fugitive is wrongfully taken from the jurisdiction of another country, it belongs exclusively to the government of such country to complain of the violation of its territory; the fugitive cannot set it up, even though there exists an extradition treaty between the two countries, if he was not extradited under the treaty.

MOORE, *supra* note 103, Vol. IV, at 331, citing Ker v. Illinois, 119 U.S. 436 (1886).

105. *Verdugo (kidnapping) II*, 939 F.2d 1341, 1355-57 (9th Cir. 1991).

106. The doctrine of specialty "means that an extradited person cannot be tried for a crime other than that for which he was extradited, until he has been given a chance to leave the country to which he was extradited." AKEHURST, *supra* note 16, at 108. See also *supra* note 21 and accompanying text.

107. The court logically pointed out that if an extradited offender has standing

B. *United States Law Permits Irregular Renditions*

Although the Ninth Circuit concluded that extradition treaties implicitly prohibit government-sponsored abductions, the court did recognize the validity of consensual informal rendition practices.[108] The United States has utilized and approved of various types of irregular rendition, as alternatives to formal extradition, in both its own attempts to extradite fugitives to the United States, as well as other countries' attempts to extradite fugitives from the United States.[109] These other forms of irregular rendition have included abductions,[110] despite the

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to challenge jurisdiction based on a violation of the doctrine of specialty, an offender who has been kidnapped should likewise have standing to object to jurisdiction, if the foreign nation protests, because of a more egregious injury occurring to both the foreign nation and the offender. *See Verdugo (kidnapping) II*, 939 F.2d at 1356.

Two diplomatic notes were sent to the United States State Department by the Mexican Embassy in 1986 and 1987. The content of these notes indicated obvious dissatisfaction on the part of Mexican diplomatic officials with Verdugo's apprehension, based on their interpretation of the facts and circumstances surrounding the seizure. *See supra* note 77 and accompanying text. The notes were sent through diplomatic channels, and should therefore be deemed a formal protest by Mexico and evidence of Mexico's intent that Verdugo be allowed to raise a violation of the extradition treaty as an objection to his criminal prosecution.

108. *Verdugo (kidnapping) II*, 939 F.2d at 1351.

> As a general matter, the rules governing extradition procedures set forth in treaties only make sense if they are understood as *requiring* each treaty signatory to comply with those procedures whenever it wishes to obtain jurisdiction over an individual who is located in another treaty nation, *unless the host country* waives its treaty rights or *consents to the obtaining of jurisdiction in a different manner.*

Id. (emphasis added).

109. *See* BASSIOUNI, *supra* note 11.

> Extradition treaties normally consist of commitments between governments to the effect that each *will return* those accused of certain crimes [upon] the request of the other. Nothing in the treaty prevents a sovereign nation from deporting foreign nationals for other reasons and in other ways should it wish to do so . . . . To hold that extradition treaties *forbid* foreign nations [from returning] criminal defendants except in accordance with the formal procedures they contain, would . . . represent a novel interpretation of those treaties.

Id. at 210-11 (emphasis in text) (quoting United States v. Cordero, 668 F.2d 32, 37-38 (1st Cir. 1981) (citations omitted)).

110. The practice of abducting criminal fugitives as a method of irregular rendition dates back to at least the 19th century, if not earlier, and has been employed by various countries other than the United States. See generally MOORE, *supra* note 103, Vol. IV, at 329-31. Some early examples involving other countries include the abduction from Louisiana of a Cuban refugee by Spanish authorities; the kidnapping from Michigan of two fugitives by Canadian police; the seizure from Florida of an alleged murderer by Spanish agents; the kidnapping from New York of a delinquent child by Canadian officials; and the abduction from (Alaska) of a criminal fugitive by a Canadian police detective. *See id.*

Some early examples specifically involving Mexico include the kidnapping

questionable validity of this practice.[111]

Treaties are an important source of international law, but they are frequently limited in force by the domestic law of the contracting nations.[112] An accurate assessment of international obligations stemming from an extradition treaty therefore necessitates consideration of domestic interpretation and application of the terms of the agreement.[113]

The history of United States extradition practice demonstrates that the United States has never intended to limit itself, by entering an extradition treaty, to having its only remedies provided for within the terms of the treaty itself.[114] In addition to the common law decisions that support this notion,[115] official statements from the Executive Branch also support this position.[116]

The United States has historically looked to alternative methods of

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from Texas, arrest, and subsequent killing of a fugitive by Mexican law enforcement officials; and the seizure from Arizona of a Mexican military officer, who was in United States custody awaiting trial, by Mexican soldiers. *Id.*, Vol. II, at 373-78.

Although abduction is obviously not the most appropriate method of apprehending a criminal fugitive, the historical practices of various countries indicate that it is not a completely unacceptable alternative.

111. For a detailed discussion criticizing abduction as a method of apprehension, *see generally* Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151 (1991).

112. In the United States, for example, treaties and other international agreements are invalid if they contain provisions which are contrary to the Constitution. *See* Missouri v. Holland, 252 U.S. 416 (1920); Reid v. Covert, 354 U.S. 1 (1957).

113. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1986). Comment b to § 111 of the Restatement notes: "A . . . provision of an international agreement derives its status as law in the United States from its character as an international legal obligation of the United States. [It] . . . has no status as law of the United States if the United States is not in fact bound by it[.]" *Id.* at cmt. b. Comment h further provides:

> In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action.

Id. at cmt. h.

114. See *supra* note 109 and accompanying text.

115. *See* United States v. Valot, 625 F.2d 308 (9th Cir. 1980); United States v. Lovato, 520 F.2d 1270 (9th Cir. 1975); United States v. Hamilton, 460 F.2d 1270 (9th Cir. 1972); Stevenson v. United States, 381 F.2d 142 (9th Cir. 1967); Wentz v. United States, 244 F.2d 172 (9th Cir. 1957); *Ex Parte* Lopez, 6 F. Supp. 342 (S.D. Tex. 1934).

116. *See* letter from Mr. Edwin D. Williamson, United States State Department legal advisor, to Attorney General Thornburgh, September 26, 1990, Addendum to Appellee's Supplemental Brief, *supra* note 63, at A34-A35.

> Extradition treaties do not . . . constitute the exclusive means of recovering fugitives. The United States has . . . relied on other means. . .to obtain a fugitive, even when an extradition treaty existed. Nothing in the text or negotiating history of the United States-Mexico Extradition Treaty varies from this general approach by suggesting that it was intended to place

rendition when extradition treaties have been unavailable or impractical.[117] One alternative has been to seek informal surrender of foreign fugitives, either through formal diplomatic channels or through the mutual cooperation and assistance of foreign law enforcement agencies.[118] The validity of informally surrendering a fugitive, without adhering to the technical terms of an extradition treaty, has been acknowledged by United States courts.[119]

In addition, the United States government has, in limited instances, authorized or sponsored the abduction of fugitives from foreign nations.[120] This has been accomplished both with and without the assistance of agents from the foreign countries involved.[121] The United States is not the only country known to have engaged in this practice,[122] and U.S. courts have consistently ruled that an abduction of this nature will not be considered a violation of international law, provided that the invaded country either has acknowledged or acquiesced in the

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> an affirmative limitation upon alternate means of rendition or apprehension. . . .
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> . . .
>
> In the case of a rendition wholly outside the terms of an extradition treaty . . . it is . . . well-established that the treaty has no bearing on either the court's jurisdiction over the defendant or the government's capacity to prosecute him. . . .

Id.(citations and footnotes omitted). This letter was written in response to a request from the Attorney General for an opinion on the legality of Dr. Alvarez-Machain's abduction. *Id.* at A33.

117. *See id.* at A34.

118. *Id.*

119. *See, e.g.,* United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986). "The Supreme Court has explicitly rejected the contention that a treaty of extradition creates a right not to be taken from the asylum country except in accordance with the provisions of the treaty." *Id.* (citing Ker v. Illinois, 119 U.S. 436, 441-42 (1886)).

> While the formalities of extradition may be waived by the parties to the treaty, a demand in some form by the one country upon the other is required, in order to distinguish extradition from the unilateral act of one country, for its own purposes, deporting or otherwise unilaterally removing unwelcome aliens.

Stevenson v. United States, 381 F.2d 142, 144 (9th Cir. 1967) (citations omitted). According to Professor Bassiouni, such informal surrenders generally occur between neighboring countries, particularly Canada, Mexico and the United States. *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 128-30 (1974).

120. MOORE, *supra* note 103, Vol. II, at 379-82. Some early examples include the forcible capture of a fugitive from Mexico by a Nogales, Arizona deputy sheriff; and the seizure of an individual from Canada by a United States deputy collector of customs. *Id.* The most recent example is obviously the highly-publicized kidnapping of Dr. Humberto Alvarez-Machain. See *supra* note 76.

121. BASSIOUNI, *supra* note 11, at 196-200.

122. See *supra* note 110 and accompanying text for a discussion of abductions by other countries as a form of irregular rendition.

abduction, or has not otherwise protested the seizure.[123] The United States government, in recognition of its obligations under international law, has also voluntarily turned over perpetrators of unlawful abductions when the foreign nations involved have protested seizures.[124]

Over the years, there has been some conflict within the federal government as to the propriety of extraterritorial seizures.[125] However,

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123. *See* United States v. Lovato, 520 F.2d 1270 (9th Cir. 1975). This recognition is based on solid principles of law and international practice.

> It only remains to be emphasized that by no means every irregularity in the recovery of a fugitive from criminal justice is a "recourse to measures in violation of international law or international convention." If the State in which the fugitive is found acquiesces or agrees, through its officers or agents, to a surrender accomplished even in the most informal and expeditious way, *there is no element of illegality.*

EDWIN D. DICKINSON ET AL., *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 631 (Supp. 1935) (emphasis added). The Ninth Circuit recognized this in *Verdugo*, when it noted that the "Mexican government [may have] in fact participated in and therefore consented to Verdugo's apprehension and removal." *Verdugo (kidnapping) II*, 939 F.2d 1341, 1359 (9th Cir. 1991).

124. *See* Kear v. Hilton, 699 F.2d 181 (4th Cir. 1983); Villareal v. Hammond, 74 F.2d 503 (5th Cir. 1934); Collier v. Vaccaro, 51 F.2d 17 (4th Cir. 1931).

125. Congress has expressed a desire to limit law enforcement efforts abroad. The federal statutory provision which addresses police action outside of United States jurisdiction is the Mansfield Amendment [§ 481(c) of the Foreign Assistance Act of 1961, now embodied in 22 U.S.C. § 2291(c), the International Narcotics Control statute]. The former version of this legislation provided, in part:

> (1) No officer . . . may directly effect an arrest in any foreign country . . . with respect to narcotics control efforts . . . . This paragraph does not prohibit an officer or employee from assisting foreign officers who are effecting an arrest.
>
> (2) *Unless the Secretary of State, in consultation with the Attorney General, has determined that [this limitation] would be harmful to the national interests of the United States*, no officer . . . may engage or participate in any direct police arrest action in a foreign country with respect to narcotics control efforts . . . .

22 U.S.C. § 2291(c) (1988)(emphasis added). Congress had previously found it necessary to amend this legislation in 1978 (under the International Securities Assistance Act of 1978) and again in 1986 (under the International Narcotics Control Act of 1986), to restrain increased law enforcement action by narcotics agents in foreign countries.

> The committee is concerned with reports that agents of the Drug Enforcement Administration in their overseas work may have violated the Mansfield amendment which prohibits any U.S. agent from participating in any direct police arrest action . . . . The committee feels that DEA's primary emphasis overseas should be on intelligence gathering and analysis, especially intelligence gathering related to organizations involved in major drug trafficking.

International Securities Assistance Act of 1978, Pub. L. No. 95-384, § 3, 92 Stat. 764 (1978) (codified in scattered sections of 22 U.S.C.).

In June of 1989, however, the United States Department of Justice issued a confidential legal opinion, contrary to this legislation, allowing federal law enforcement agents to make arrests in foreign countries without prior approval from foreign governments. Ronald J. Ostrow, *FBI Gets OK For Overseas Arrests*, L.A. TIMES,

the President is constitutionally charged with conducting foreign affairs,[126] and there is evidence from the Executive Branch acknowledging the validity of these seizures in certain limited situations.[127] This acknowledgement appears not to be an attempt to condone or encourage abductions, but rather to preserve this option as a viable, last-resort alternative in extreme circumstances.[128]

Oct. 13, 1989, § 1, at 1. This decision, written by William P. Barr, overruled a prior legal opinion issued during the Carter administration which was deemed to be "flawed." Ruth Marcus, *Justice Dept. Says FBI Can Seize Fugitives Overseas*, WASH. POST, Nov. 9, 1989, § 1, at 72. In support of the policy, State Department legal advisor Abraham D. Sofaer stated that overseas arrests could be justified on a self-defense theory, due to the danger posed by drug traffickers. *Id.*

Congress reacted to this opinion later that year by further amending the International Narcotics Control Statute, and eliminatintg the provision which permitted Executive Branch discretion. The amended statute reads:

> No officer may directly effect an arrest in any foreign country . . . with respect to narcotics control efforts. . . . [This legislation] does not prohibit an officer . . . with the approval of the United States chief of mission, from being present . . . or from assisting foreign officers who are effecting an arrest.

22 U.S.C §§ 2291(c)(1), 2291(c)(2) (Supp. III 1991). The legislative history describes the purpose of this amendment as follows:

> Section 488(a) combines and clarifies paragraphs (1) and (2) of section 481(c) of current law. Those paragraphs also prohibited U.S. officials from effecting narcotics arrests overseas, and permitted such officials to be present at or assist in such arrests if the Secretary of State and the Attorney General determined that it would not be harmful to the national interest of the United States. However, a lack of clarity in the wording of the law led to considerable confusion among DEA agents overseas as to what actions were permissible under what circumstances. Section 488 clarifies what has long been U.S. policy and is contained in DEA regulations: that *DEA agents (and other U.S. officials) cannot arrest foreign nationals*, that they may be present and assist at arrests carried out by their foreign counterparts if the U.S. Ambassador approves, and that they may take action to protect life and safety if emergency situations arise.

H.R. REP. No. 342, 101st Cong., 1st Sess. 22-23 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1425-26 (emphasis added).

126. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936).

127. Assistant U.S. Attorney (and former Associate Deputy Attorney General) Andrew McBride has noted three situations in which abduction of foreign fugitives by the United States would be appropriate: "[W]hen the foreign nation sponsors terrorism, when the nation cannot control its own borders[,] and when a drug cartel runs the nation's law enforcement." DeBenedictis, *Scant Evidence Frees Abducted Doctor, supra* note 74. Whether the Executive Branch will continue to maintain this position is an open question. Attorney General Janet Reno has initiated a review of the Justice Department kidnap policy. *Reno Vows to Press Rostenkowski Case*, BOSTON GLOBE, Apr. 14, 1993, § 1, at 11.

128. *See* DeBenedictis, *Scant Evidence Frees Abducted Doctor, supra* note 74. For a detailed discussion advocating the preservation of government-sponsored abduction as a viable last-resort alternative in certain limited instances, *see generally* An-

C. *Extradition as a Remedy in* Verdugo

In the *Verdugo* case (as well as in the *Alvarez* case), extradition was not a viable alternative. The extradition treaty between the United States and Mexico states that neither country will be required to extradite one of its own nationals, but either country may voluntarily decide to extradite a national upon request.[129] Mexico has a law, however, which prohibits nationals from being extradited, thereby rendering the voluntary extradition provision of the treaty meaningless with respect to Mexican nationals (such as Verdugo and Alvarez).[130] Although an extradition exception for nationals is common in many extradition treaties, so as to ensure governments the option of punishing nationals in the courts of their own countries,[131] in this case the provision operated in conjunction with Mexican law to effectively deny the United States the opportunity to punish Camarena's murderers for their criminal actions.[132]

Even if it is assumed that Mexico would have prosecuted Verdugo in its own courts, a strong argument can be made that this would be an

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drew B. Campbell, Note, *The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs*, 23 VAND. J. TRANSNAT'L L. 385 (1990).

129. "Neither Contracting Party shall be bound to deliver up its own nationals, but . . . [may] deliver them up if . . . it be deemed proper to do so." U.S.-Mexico Extradition Treaty, *supra* note 93, art. 9, § 1.

130. "The Mexican Extradition Law of 1975 prohibits the government of Mexico from extraditing its own nationals." *Verdugo (kidnapping) II*, 939 F.2d 1341, 1363 (9th. Cir. 1991) (Browning, J., concurring in part and dissenting in part), citing Ley de Extradicion Internacional, Diario Official de la Federacion Mexicana (Dec. 29, 1975).

131. AKEHURST, *supra* note 16, at 108.

132. At least one scholar has advocated reliance on the Mexican Criminal Code as a remedy in this type of situation. Article Four of the Mexican Criminal Code states: "Crimes committed in *foreign* territories by a Mexican against . . . foreigners . . . may be prosecuted in the Republic (of Mexico) . . . ." Raquel Arellano, *Article 4 of the Federal District Criminal Code of Mexico: An Alternative to Extradition to the United States*, ARIZ. J. INT'L & COMP. L., ANN. 1988, at 183 (emphasis added). The murder of Special Agent Camarena occurred in Mexico, so this provision would be inapplicable.

Although the treaty mandates domestic prosecution of a national if the requested nation refuses extradition (*see* U.S.-Mexico Extradition Treaty, *supra* note 90, at art. 9, § 2), and Mexico might therefore have chosen to prosecute Verdugo under some other criminal statute, the facts suggest that Mexico would not have complied with this treaty provision by pursuing prosecution in Mexican courts. At the time Verdugo was apprehended, the Caro-Quintero drug cartel had some obvious influence over corrupt government officials. *See supra* notes 45, 46, 55, and 73. The extent of Caro-Quintero's trafficking empire suggests that it would not have been possible for the operation to function at such a rate without some type of government oversight or protection. *Id.* It is therefore questionable as to whether Verdugo would have been punished by Mexico, on its own initiative, for either narcotics violations or participation in the Camarena murder. Mexico was very slow in taking any initial action at all to investigate the Camarena murder. *See* Rohter, *Mexico Arrests Six In Abduction Case*, *supra* note 59.

insufficient remedy, because of differences between the criminal justice systems of the two countries.[133] By choosing to pursue an informal method of rendition, the United States justifiably utilized its only realistic means of acquiring custody over Verdugo and punishing him.

D. *Mexican Participation in Verdugo's Apprehension*

The evidence available supports the notion that Verdugo's apprehension resulted from an informal, yet completely legitimate, surrender rather than an illegitimate "abduction."[134] The Ninth Circuit noted that if Mexico had participated in the apprehension, then it may have acquiesced in and hence impliedly consented to the seizure.[135] This decision is supported by legal precedent both in the United States and under principles of international law.[136] Although Verdugo's seizure was requested by the DEA, the facts nevertheless demonstrate that the apprehension was actually carried out by agents of the Mexican government while acting in their official capacity.[137] The Mexican government later condemned the actions of these officers, but this may be attributable to factors other than the wrongfulness of their actions under Mexican law; the condemnation alone does not conclusively establish that the police officers were acting in an unofficial capacity or illegal manner when they apprehended Verdugo.[138]

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133. An extreme disparity between punishments for the same crime in each country is obvious. Caro-Quintero and Fonseca-Carillo were both sentenced in Mexico to forty year prison terms. *Supra* note 59. Verdugo-Urquidez and Alvarez-Lopez, on the other hand, each received sentences of imprisonment for life plus two hundred and forty years in the United States. *Supra* note 71.

134. Based on the facts presented, it appears that the apprehension of Verdugo resulted from informal cooperation between United States and Mexican law enforcement agents. According to State Department officials, the DEA did not offer any reward to Mexican police in exchange for the capture of Verdugo. "The U.S. request for the surrender of Mr. Verdugo was made in good faith to the Mexican authorities and the U.S. government reasonably believed that the action taken by the Mexican officers in response to that request reflected a law enforcement decision of the appropriate Mexican authorities." Kim Murphy, *Mexico Hits Arrest in Killing of U.S. Drug Agent*, L.A. TIMES, Jun. 22, 1988, § 2, at 3.

135. *Verdugo (kidnapping) II*, 939 F.2d 1341, 1359 (9th Cir. 1991).

136. *Id.* Professor Bassiouni notes that a seized individual's challenge will generally be unsuccessful when the abduction resulted from "connivance between agents" of the two nations, under both international law and the law of most countries. BASSIOUNI, *supra* note 11, at 196.

137. All six of the abductors were Mexican police officers, and at least one of the officers showed Verdugo a badge when he was arrested. Appellee's Supplemental Brief, *supra* note 63, at 3. *See also supra* note 68 and accompanying text. In addition, he was transported to the border in a Mexican police vehicle. *Id.* These facts alone demonstrate significant, if not exclusive, involvement by Mexican officials.

138. It appears as though the Caro-Quintero cartel had a significant amount of influence on certain government officials. *Supra* note 132. Members of the cartel would be likely to retaliate against any low ranking police agents who attempted to apprehend leading cartel members or otherwise interfere in trafficking operations,

In addition, other evidence shows that the involvement of Mexican police was not limited to the actions of these six officers. After Verdugo was arrested, Mexican police officials granted permission to the DEA to search Verdugo's residences for evidence linking him to narcotics trafficking.[139] Mexican police officers assisted DEA agents in performing these searches.[140] It seems unlikely that both the abduction and the subsequent searches could have been carried out without the knowledge of top officials in the Mexican government, since high-ranking Mexican police officials both authorized and participated in the actions.

V. EXTENDING THE *KER-FRISBIE* DOCTRINE TO MEET THE MODERN CHALLENGES POSED BY THE INTERNATIONAL DRUG TRADE

The *Verdugo* apprehension appears to have been legitimate under accepted principles of international law. Although the propriety of the *Alvarez* abduction has been seriously questioned by legal scholars, and the action has been condemned by many,[141] it is important for the

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and any retaliation would arguably include exerting pressure on corrupt government officials to publicly condemn the officers' actions as wrongful. The government officials linked to the cartel could then have supplied false or misleading information to legitimate government officials, resulting in a distorted interpretation of the incident and subsequent official condemnation.

This seems particularly evident in light of previous retaliatory acts of violence committed by the cartel against narcotics agents, and in light of the fact that Verdugo was one of the first cartel members to be captured by police. The Caro-Quintero cartel and government officials with ties to its members were apparently very intolerant of investigation and prosecution efforts on the part of outsiders. In 1990, an informant testified that the cartel and several high-ranking Mexican politicians held meetings in 1984 to discuss how to handle the aggressiveness of Agent Camarena. *See* Henry Weinstein, *Camarena Trial Witness Says Drug Lords Held Meeting On DEA Agent*, L.A. TIMES, May 24, 1990, § 2, at 3. Kidnapping, torturing, and murdering Camarena was obviously the decided-upon resolution to the problem. In addition, two American tourists were allegedly killed by the traffickers prior to Camarena's abduction, because the traffickers mistook them for DEA agents. *Id.* The DEA has also reported that in 1984, shots were fired at an agent's vehicle in Guadalajara. This occurred just prior to the huge drug raid on Caro-Quintero's plantation in November, 1984. *See* Gavin, *Mexico: The Drug Connection*, *supra* note 46, at 7.

139. Permission for the searches was given by the Director General of the Mexican Federal Judicial Police. *Verdugo (search and seizure) III*, 110 S. Ct. 1056, 1059 (1990).

140. *Id.*

141. The abduction of Doctor Alvarez-Machain created significant tension between Mexico and the United States. Shortly after the incident took place, the Mexican government informed the United States State Department that the abduction had been illegal, and that its occurrence threatened relations between the two countries with respect to narcotics control. *See, e.g.*, United States v. Caro-Quintero, 745 F. Supp. 599, 604 (C.D. Cal. 1990).

This tension spread throughout the international community when the Supreme Court eventually ruled that the abduction did not violate the U.S.-Mexico

courts and governments of all countries to look beyond this incident and remain focused on working together to solve the compelling problems that face the world today.

Regardless of whether or not one agrees with the ruling announced in *United States v. Alvarez-Machain*,[142] few would contest the fact that international drug trafficking has become a major concern for many nations over the past decade.[143] World populations have experienced a dramatic increase in drug abuse and dependency, and many nations have felt the effect of the violence that goes hand-in-hand with narcotics smuggling.[144] Criminal activity related to drug trafficking has become so pervasive in many nations that it may reach a level of

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Extradition Treaty. *See* David O. Stewart, *The Price of Vengeance*, A.B.A. J., Nov. 1992, at 50. Criticism of the decision was advanced by numerous countries, including Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Jamaica, Paraguay, and Uruguay. Mexico continued to condemn the abduction, and characterized the Supreme Court's ruling as "invalid and illegal." *See id.* In response to a joint request by various countries, the Organization of American States (OAS) Inter-American Juridical Committee reviewed the *Alvarez-Machain* decision. The OAS Committee concluded that the *Alvarez-Machain* holding was clearly in violation of international law, and recommended that the United States return Doctor Alvarez-Machain to Mexico. *Id.*

President Bush, in response to fierce criticism of the decision, informed Mexican President Salinas de Gortari that the United States would "neither conduct, encourage nor condone" abductions from Mexico. *Id.* at 52.

142. 112 S. Ct. 2188 (1992).

143. *See* J. Martinez Vera, *The World's Biggest Business, in* THE INTERNATIONAL DRUG TRADE 11-12 (Gary E. McCuen ed., 1989).

144. The most prevalent violence has occurred in the South American country of Colombia, where hundreds of people have been killed in drug-related bombings and assassinations. The victims have included journalists, police officials, and judges. See *Drug Cartel Figure Slain by Police*, L.A. TIMES, Dec. 17, 1989, § 1, at 1. Pablo Escobar, the leader of the Medellin Cartel, has allegedly sought to re-emphasize the Cartel's power over the Colombian government recently by increasing terrorist activity in the region. Escobar is believed to be responsible for a series of bombings in January which killed twenty people. See *3 Bombs Explode in Colombia Cities*, N.Y. TIMES, Feb. 1, 1993, § 1, at 8.

Drug related violence has not been limited to Colombia, however. *See* James A. Baker III, *The U.S. Fight Against International Drug Cartels Is Sincere, in* WAR ON DRUGS: OPPOSING VIEWPOINTS 145-46 (Neal Bernards ed., 1990).

> The most effective tool we have in this effort is the growing realization among foreign governments that narcotics trafficking is not just an American problem, but a universal threat. . . . Countries in which narcotics are produced or which are part of the international trafficking pattern now recognize the unacceptably high risk that narcotics pose to their own societies.
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> These risks range from increases in violent crime to national security threats by narco-terrorist groups. The international community is finally recognizing the challenge we all face. That is the first and most important step in winning the battle.

John C. Whitehead, *Growing Success in the Narcotics Interdiction Program, in* THE INTERNATIONAL DRUG TRADE 93 (Gary E. McCuen ed., 1989).

condemnation in the international community equivalent to *jus cogens.*[145] Indeed, the United States has a responsibility as a world leader to advocate this goal. A necessary step in achieving this goal is to extend the *Ker-Frisbie* doctrine to reflect universal condemnation of drug trafficking.

When government agents become so substantially involved in narcotics-related criminal activity that the government itself has essentially participated in the criminal conduct, the government should not be able to benefit from international law and extradition treaties by having the capacity to preclude transfer of an offender to another country for prosecution.[146]

The United States recognizes principles of agency within its own domestic law, and the liability of a principle for its agents' actions.[147] Despite a comprehensive criminal justice system directed toward the preservation of individual rights, United States laws recognize the applicability of agency principles in the field of criminal law through accomplice liability statutes.[148] Thus, an individual can be convicted of

145. *Jus Cogens* is a universally recognized, peremptory norm of general international law. "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/CONF. 39/27. Terrorism is a practice that has been increasingly condemned in the international community, and some scholars have suggested universal condemnation. *See generally,* Abraham D. Sofaer, *Terrorism, The Law, And The National Defense,* 126 MIL. L. REV. 89 (1989). International condemnation could arguably be extended to drug trafficking as well, because acts of terror are frequently employed by traffickers to intimidate and discourage prosecution efforts. The recent bombings of courthouses, assassinations of judges and politicians, and related acts of narco-terrorism in Colombia offer startling proof of this frightening prospect. See *supra* note 144. Making drug trafficking a universal crime would be a positive step toward ending this reign of terror and violence.

146. The Camarena murder and subsequent investigation revealed evidence of substantial involvement between drug traffickers and Mexican officials. *See supra* notes 55, 57, 71, 73, 132, and 138. Indeed, it is believed that Mexican officials actually participated in the murder. *See infra* note 153. Even after the Camarena slaying, additional evidence of narcotics-related corruption continued to surface. In 1986, DEA Agent Victor Cortez was allegedly kidnapped and tortured by Mexican state police in Guadalajara. See *Cortez Happy to Be Home, Praises Other DEA Agents,* L.A. TIMES, Aug. 19, 1986, § 1, at 5. In addition to beatings, his torture consisted of "electrical shock treatment" with cattle prods. *Id.* According to DEA Administrator John C. Lawn, Cortez had interfered with the operations of drug traffickers by seizing large amounts of cocaine during the month preceding his abduction. *Id.*

147. United States criminal law recognizes the theory of accomplice liability, and United States tort law recognizes the theory of vicarious responsibility. See *infra* notes 148 and 151 and accompanying text.

148. "It may generally be said that one is liable as an accomplice to the crime of another if he (a) gave assistance or encouragement or failed to perform a legal duty

criminal conduct without being the actual perpetrator, as long as two essential elements, actus reus and mens rea, have been established.[149] This agency concept should be extended to the domestic application of international law, when it can be established that a government has engaged in serious criminal activity, such as murder or narcotics trafficking, through the purposeful and intentional actions of its agents.

The United States has also recognized a similar agency principle with respect to civil liability in the area of negligence, and this concept should be incorporated into international law as well. For example, based on United States tort law, a party can be held responsible for harmful activity if it had a legal duty, it breached that duty, and breach of the duty caused harmful conduct.[150] Mexico, the United States, and all other countries have a duty to the international community as a whole to prevent significant narcotics-producing operations from developing and being harbored within their borders. Negligence theory also incorporates principles of agency, and an individual or entity can be held responsible for the negligent acts of its agents.[151]

In recent years, the Mexican government has cooperated with the United States in trying to eliminate the drug problem, and it has been successful in reducing illegal smuggling operations and ferreting out government corruption.[152] Nevertheless, evidence related to the Camarena case suggests that the Mexican government at least acted negligently during the mid-1980's when it allowed extensive corruption to exist within its administration.[153] A legitimate argument therefore

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to prevent it (b) with the intent thereby to promote or facilitate commission of the crime." WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 576 (2d ed. 1986).

149. *Actus reus* (guilty act) and *mens rea* (guilty mind) are both basic requirements for finding one responsible for a crime. *Id.* at 8.

150. *See generally* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 235-38 (5th ed. 1984).

151. The concept of vicarious liability, or "respondeat superior," which forms the basis for holding a third party responsible for the tortious acts of another, is frequently encountered in employer/employee situations. It derives from the "general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss." *Id.* at 500.

152. Both the DEA and the State Department have acknowledged that Mexican President Carlos Salinas de Gortari, who took office subsequent to the Camarena killing, has been aggressive in fighting drug trafficking. Isikoff, *Mexican Doctor's Arrest Triggers 'Kidnap' Charges*, *supra* note 73.

153. The facts surrounding the Camarena killing indicate extensive involvement of police officials and politicians in both drug trafficking operations and the murder conspiracy. According to witnesses, Mexican officials received bribes from the Caro-Quintero cartel, and were present with cartel members when Camarena was tortured. The group of officials allegedly involved in the slaying included former Defense Minister Juan Arevalo Gardoqui; former Interior Minister Manuel Bartlett Diaz (now Governor of Puebla); and Jalisco Governor Enrique Alvarez del Castillo. See *2 Place Mexican Officials at '85 Killing*, N.Y. TIMES, Feb. 10, 1992, § 1, at 20. Two

could have been made in the *Alvarez* case, even if the extradition treaty had been violated, that application of the *Ker-Frisbie* doctrine would have still been appropriate. A ruling of this nature would have sent a clear message to the international community that government sponsored narcotics trafficking should not, and will not, be tolerated.

Since World War II, there has been a significant effort to promote world peace and maintain strong political, social, and economic relations between the many countries of the world.[154] The United States has an important role to play in ensuring that it furthers this objective by respecting the territory of other nations and helping other nations strengthen their economic stability.[155] The Ninth Circuit Court of Appeals was therefore correct in ruling that the *Ker-Frisbie* doctrine should generally not apply in cases where a criminal defendant had been abducted in violation of international law, and the offended country has protested the abduction.

Mexico has demonstrated a recognition of its responsibility to stop the flow of illicit drugs from its borders.[156] However, other nations must also live up to similar responsibilities by actively fighting to re-

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top Mexican law enforcement officials, Miguel Aldana Ibarra and Manual Ibarra Herrera, were also allegedly involved in the conspiracy. See *supra* note 73.

154. CARTER & TRIMBLE, *supra* note 8, at 6-8.

155. Strengthening the economic stability of drug-producing countries and helping these countries to advance technologically may lessen reliance on narcotics for income. "The drug trade, with a volume of $300 billion a year, is the world's biggest business." Martinez Vera, *supra* note 143, at 10. The largest export product in Colombia is cocaine. *Id.* at 13. Without creating alternative resources, or enhancing existing ones, fighting the drug war in narcotics-producing countries will continue to be an uphill battle.

> The United States could make a major contribution by helping to provide programs for crop-and-income substitution to drug farmers in economically depressed Latin American nations. Similarly, new economic opportunities could be made available by the simple lowering of import barriers on legitimate Latin American exports - textiles, sugar, coffee, flowers, and so forth . . . .

Bruce Michael Bagley, *The Essential Ingredient, in* WAR ON DRUGS: OPPOSING VIEWPOINTS 176 (Neal Bernards ed., 1990).

On December 17, 1992, the North American Free Trade Agreement was signed by the United States, Mexico, and Canada. This accord, once it is implemented by legislators, will eliminate trade tariffs between the three countries. *See* Thomas L. Friedman, *Clinton Says U.S. Will Act Fast on Trade Pact If. . .*, N.Y. TIMES, Jan. 9, 1993, § 1, at 8. Although this agreement is a positive step toward improving economic stability in the North American region, additional steps will be necessary in order to impact international drug trafficking operations.

156. In 1990, Mexico announced the beginning of "a new era of cooperation between American and Mexican law enforcement authorities in the war on drugs." This declaration followed an extradition proceeding in which a Mexican court upheld the formal extradition of an alleged drug trafficker to the United States. According to U.S. officials, this was believed to be the first formal extradition from Baja California to the United States since the 19th century. Dan Weikel, *Drug-Ring Suspect Extradited From Mexico*, L.A. TIMES, Jul. 3, 1990, § 1, at 25.

duce drug trafficking and terrorism. For this reason, a further refinement of the *Ker-Frisbie* doctrine is necessary. When the country protesting an extradition treaty violation has been substantially involved in criminal conduct, and the treaty was violated in pursuance of prosecuting that criminal conduct, then the *Ker-Frisbie* doctrine *should* apply, and the offender who has been abducted or otherwise apprehended in violation of the treaty should not be able to defeat the personal jurisdiction of the prosecuting court.

The United States also has a significant responsibility, which has not yet been met, to decrease the enormous use of narcotics by our population which leads to the great demand for these substances.[157] The United States has no right to condemn other countries for their wrongful actions related to drug trafficking, unless it also makes an effort to live up to its own responsibility in the international community of reducing internal drug dependency and abuse through additional treatment and education programs.[158]

By working in unison, all of these factors combined should help the

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157. According to Irving G. Tragen, secretary of the Inter-American Drug Abuse Control Commission at OAS, the United States provides approximately $375 billion in profit to the drug trade every year, by providing a market for nearly three-fourths of the world's illegal drugs. *See* Charles Edward Anderson, *Fighting the International Drug War*, A.B.A. J., Jan. 1991, at 25.

158. Efforts to reduce drug use in the United States have been generally unsuccessful to date. The Classical theory of criminology, upon which most modern penal systems are based, generally proposes that human beings are capable of rational thought and control over their actions, and that in order to prevent crime, society must make the punishment for committing crime outweigh the perceived benefits. *See generally* GEORGE B. VOLD AND THOMAS J. BERNARD, THEORETICAL CRIMINOLOGY 18-35 (3d ed. 1986). Narcotics control efforts in this country, as well as others, seem to operate on this basic proposition.

On June 26, 1992, twenty seven drug traffickers were executed in China during public sentencing rallies. Many more were sentenced to prison, and thousands of pounds of narcotics were burned by officials. These rallies were held in recognition of International Anti-Drug Abuse Day. According to Secretary General Yu Lei of the National Narcotics Control Commission, 866 death sentences were imposed in China last year for drug-related crimes. See *China Executes 27 Drug Traffickers*, BOSTON GLOBE, June 27, 1992, § 1, at 4.

Although punishment has not been as extreme in the United States as it has been in China, Presidents Reagan and Bush have followed this basic Classical philosophy by placing blame for the drug problem on individuals, and directing resources toward punishing offenders rather than treating and educating them. Throughout the past decade, federal spending on narcotics control has increased significantly, but only a third of these funds have been devoted to treatment and education programs. *See* Dan Baum, *Tunnel Vision: The War on Drugs, 12 Years Later*, A.B.A. J., Mar. 1993, at 70-71. Unfortunately, this disproportionate emphasis on law enforcement does not seem to have been successful in reducing drug abuse in this country. Between 1988 and 1992, approximately $100 billion was devoted to narcotics control in the United States. Yet, drug use has increased tremendously in urban areas during this period, and the overall decline in drug use that the country

international community to reduce drug trafficking and its damaging effects on our citizens.

VI. SUMMARY

Informal agreements for the surrender of foreign fugitives continue to be an effective and accepted method of acquiring jurisdiction over criminal offenders who are otherwise outside the territorial reach of the United States. The seizure of Rene Martin Verdugo-Urquidez appears to have been proper and acceptable under current standards of both international and domestic law, and it is therefore unlikely that his conviction would have been overturned even if the Supreme Court had not overruled the Ninth's Circuits findings with respect to the U.S.-Mexico Extradition Treaty. Formal extradition continues to be yet another important method of acquiring jurisdiction, and it should be relied upon whenever possible. Absent *compelling* circumstances, however, government-sponsored abductions and other methods which involve the physical breach of another country's territory are unacceptable alternatives for apprehending offenders. When a United States court is presented with a case involving a government-sponsored abduction in violation of international law, regardless of whether the abduction violates a specific treaty itself or merely general principles of international law, the court should normally deem the *Ker-Frisbie* doctrine to be inapplicable. Generally, the United States will have an obligation to make reparations[159] to the foreign government, and these reparations may include the return of any seized fugitives.[160] This is a fundamental principle of international law which the United States has long recognized, but not always adhered to. The United States has a substantial obligation to both the world community and to its neighbors to obey international legal principles, not only at times when it is convenient or beneficial to do so, but also at times when it may adversely affect our interest in punishing criminal offenders.[161] Only by limiting its own domestic law

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has experienced has been relatively insignificant. As a result, our criminal justice system has been severely overburdened with narcotics cases. *See id.*

Even if a policy directed at increasing punishment to decrease use would be effective if carried to extreme levels, the Constitutional protections provided to individuals in this country prohibit such extreme measures from being imposed. The government should therefore continue to combat the drug problem with strong law enforcement efforts, but also match these efforts with equally strong treatment and education programs, as this appears to be the only realistic alternative available.

159. BASSIOUNI, *supra* note 11, at 236.

160. *Id.* The United States has recognized this obligation, as demonstrated by the order of the Ninth Circuit Court of Appeals in the *Alvarez-Machain* case, prior to being overruled by the Supreme Court. *See* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991).

161. The United States has obligations to the world community which should be carefully considered before any decision is made to engage in unilateral action. Although it can be argued that the United States does have the right to kidnap

enforcement zealousness will the United States be able to advance these same interests on a broader scale by improving its reputation in the international community and increasing the cooperation of other nations on law enforcement matters.

However, modern international obligations among nations also necessitate an exception to this rule and further refinement of the *Ker-Frisbie* doctrine, in order to effectively advance the interests of the international community in ensuring that all nations do their part to eliminate the evils of drug trafficking. If a United States court is confronted with an abduction case in which it appears that the country protesting the abduction has itself been involved in the criminal conduct being prosecuted, then the court should hold a preliminary evidentiary hearing to determine the extent of that involvement. If the involvement is substantial, the country should be estopped from denying jurisdiction, and the *Ker-Frisbie* doctrine *should* be applied notwithstanding any international law or treaty violations. When a nation has become substantially involved in the narcotics trade, either through direct intentional involvement by its agents, or through irresponsibility and failure to actively prosecute drug offenders, then the nation should not be able to benefit from international law by shielding narcotics offenders from punishment and frustrating prosecution efforts in other countries. This refinement of the *Ker-Frisbie* doctrine is a necessity if we hope to have any substantial victory in the international war on drugs.

*Peter S. McCarthy**

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fugitives from other countries in limited circumstances, *see supra* notes 120-28 and accompanying text, the question of whether or not to exercise this authority is an issue that deserves close attention by the Executive Branch before the option is actually pursued in the future. The interest of the Justice Department in wanting to apprehend Agent Camarena's murderers is admirable, and a strong argument can be made that abducting Dr. Alvarez-Machain was the only way to obtain custody of him. As the case demonstrates, however, actions of this nature can backfire on the United States, by strengthening the perception that many countries already have of the United States as an international bully. *See supra* note 141 and accompanying text. For example, following the *Alvarez-Machain* ruling by the Supreme Court, two Chilean justices dissented from a ruling allowing an extradition from Chile to the United States. They cited the United States' disregard for its own treaty obligations as a basis for their dissent. *See* Stewart, *The Price of Vengeance*, *supra* note 141, at 50.

The Executive Branch should therefore consider the possible collateral effect that a kidnapping might have on relations between the United States and other countries, and take unilateral action in the future only if the perceived benefits of the abduction clearly outweigh these possible secondary consequences.

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Commonwealth v. Hutchins: A Defendant Is Denied the Right to Present a Medical Necessity Defense

I. INTRODUCTION

The Massachusetts Supreme Judicial Court recently denied a criminal defendant the right to raise a recognized defense in *Commonwealth v. Hutchins*.[1] Joseph Hutchins, suffering from the ravages of scleroderma,[2] was arrested and charged with possessing and cultivating marihuana.[3] At his trial the defendant offered to prove, as part of a necessity defense, that marihuana was the only medicine which successfully treated the symptoms of his disease.[4] Even though he made an offer of proof meeting the requirements of the defense as previously announced by the court,[5] the majority held that Hutchins did not, as a matter of law, establish the necessity defense.[6]

The right to present a recognized defense in a criminal trial is a fundamental constitutional right of every criminal defendant in this country.[7] When this right has been denied to any citizen, the court's reasoning must be explored and the conclusions examined; for when an individual is denied the right to defend criminal charges, more than that person's freedom is at stake. Society's expectation that the criminal justice system is fair and consistent becomes subject to genuine doubts. When a lawgiver forsakes simple human compassion because of a politically fashionable cause, everyone should be made aware of the casualties.

This Comment will examine the defense of medical necessity as a justification to a criminal charge of cultivating and possessing marihuana. The Comment will argue that the *Hutchins* Court erred by denying Hutchins the right to present the necessity defense because the court's decision is not in accord with a defendant's right to present a

1. 410 Mass. 726, 575 N.E.2d 741 (1991).

2. *Id.* at 727-28, 575 N.E.2d at 742-43. For a description of scleroderma and its effects, see *infra* notes 51-62 and accompanying text.

3. *Hutchins*, 410 Mass. at 726-27, 575 N.E.2d at 742.

4. *Id.* at 727, 575 N.E.2d at 742.

5. *See infra* note 29 and accompanying text.

6. *Hutchins*, 410 Mass. at 732, 575 N.E.2d at 745. See *infra* notes 88-108 and accompanying text for a discussion of the majority opinion.

7. *See infra* notes 129-40 and accompanying text.

defense to a jury of his peers, the law of necessity, Massachusetts defense law in general, or the proper application of the necessity defense.

Section II of this Comment will explore the policy and case law of the necessity defense. Section III will examine the facts and majority and dissenting opinions of the *Hutchins* case. Section IV will analyze these opinions as they apply to past case law and law on the defense of necessity. Finally, Section V will give this author's conclusion.

II. BACKGROUND

A. *Policy Behind the Necessity Defense*

Necessity has been defined as an "irresistible compulsion; a power or impulse so great that it admits no choice of conduct."[8] At common law the necessity defense was known as the "choice of evils" defense because the actor was usually in the position of being immediately threatened by a dangerous force which could only be overcome by violating the law.[9] When such a person is faced with an immediate evil, the deterrent effect of a criminal law disappears because:

> [a] man may have motives adverse to the law of such strength as to overcome any fear that can be inspired by the terror of any legal punishment. He may be urged to the commission of a crime by motives more proximate and imperious than any sanction the law can hold out. In such cases, as the threats of the law are necessarily ineffective, they should not be made, and their fulfillment is gratuitous cruelty—the infliction of needless and uncompensated evil.[10]

The defense of necessity, like the English criminal law system itself,[11] was founded on the theory of free will and the accompanying aversion of punishing individuals who have not acted out of free choice.[12]

The other foundational underpinning of the necessity defense emerges from the recognition that "the law ought to promote the achievement of higher values at the expense of lesser values, and some-

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8. BLACK'S LAW DICTIONARY 1030 (6th ed. 1990).

9. W.H. Hitchler, *Necessity as a Defense in Criminal Cases*, 33 DICK. L. REV. 138, 139-40 (1928). In Massachusetts, the necessity defense is also called the "competing harms" defense. Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 376, 433 N.E.2d 457, 460-61 (1991).

10. Hitchler, *supra* note 9, at 148.

11. 1 WILLIAM BLACKSTONE, COMMENTARIES *57.

12. Blackstone wrote that necessity is:

> a restraint upon the will, whereby a man is urged to do that which his judgment disapproves, and which it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will which God has given man, it is highly just and expedient that a man should be excused for those acts which are done through inevitable force and compulsion.

4 BLACKSTONE, *supra* note 11, at *28 (*quoted in* Hitchler, *supra* note 9, at 143); *see also* Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 289 (1974).

times the greater good for society will be accomplished by violating the literal language of the criminal law."[13] The necessity defense justifies[14] a defendant's criminal act based on the overriding public policy that such an act averts more harm than would result from compliance with the law.[15] The defense has been part of the common law since at least 1551.[16]

The competing harms defense has become deeply ingrained[17] in American jurisprudence.[18] Most early American courts were willing to

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13. WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 50, at 382 (1972).

14. See Arnolds & Garland, *supra* note 12, at 289-91 for an analysis of necessity compared to mistake and duress, which are defenses based on excuse. "The difference is the same as between being forgivably wrong and being right or between being pardoned and being praised. Neither pardon, mitigation nor excuse can substitute for justification for where a person has acted meritoriously (justification) he has no need of forgiveness." *Id.* at 290; *see also* Robin Isenberg, *Medical Necessity as a Defense to Criminal Liability:* United States v. Randall, 46 GEO. WASH. L. REV. 273, 274-75 (1978).

15. Arnolds & Garland, *supra* note 12, at 290. "What is involved may be described as an interpretation of the law of the offense, in light of the submission that the special situation calls for an exception to the prohibition that the legislature could not reasonably have intended to exclude, given the competing values to be weighed." MODEL PENAL CODE § 3.02 cmt. 1(a) (Proposed Official Draft 1962).

16. Reninger v. Fagossa, 1 Plowden 1, 75 Eng. Rep. 1 (1551). This case stated:

> [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 . . . .

Id. at 18, 75 Eng. Rep. at 29 (*quoted in* Benjamin Reeve, *Necessity: A Recognized Defense*, 24 NEW. ENG. L. REV. 779, 781 (1985-1986)). For an analysis and exploration of English common law necessity cases, see Reeve, *supra*, at 780-84.

While many commentators do not question the existence of the necessity defense at common law, the issue is not beyond debate. Arnolds & Garland, *supra* note 12, at 291; *see also id.* at 291 n.20. Until the last century, the exact requirements of the defense were unclear because of the small number of cases in which necessity was discussed. *Id.* at 291. Commentators attribute this shortcoming to the failure of judges to discuss the defense in their opinions, and the fact that many cases were not prosecuted once the defense was raised. *Id.*

17. Necessity has been "anciently woven into the fabric of our culture." JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 416 (2d ed. 1960).

18. *See* United States v. Ashton, 24 F. Cas. 873 (C.C.D. Mass. 1834) (No. 14,470) (sailor mutiny justified because the ship was unseaworthy); The William Grey, 29 F. Cas. 1300 (C.C.D. N.Y. 1810) (No. 17,694) (violation of embargo justified due to necessity of escaping inclement weather); State v. Jackson, 53 A. 1021 (N.H. 1902) (father illegally kept daughter away from school justified due to the necessity of protecting her ill health). Not all necessity defense claims were successful. *See* The Diana, 74 U.S. (7 Wall) 354 (1864) (assertion of necessity due to storm rejected as a pretense for trading with the enemy); United States v. Holmes, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383) (necessity defense rejected where sailors indiscriminately threw passengers off life boat to keep it from sinking); Bice v. State, 34 S.E. 202 (1899) (man not justified in bringing liquor to church as medicine for his wife when other options open to him).

find necessity justifications if the defendant was threatened with immediate harm, the defendant had little choice or few alternatives to choose from, and the choice eventually made was the lesser of two evils.[19] Today at least 34 states have a choice of evils defense in their criminal law statutes.[20]

B. *Development of the Necessity Defense in Massachusetts*

The Massachusetts Legislature has not passed a choice of evils statute.[21] The present Massachusetts defense of necessity can be traced back to at least the mid 19th-century.[22] Because of a recent spate of

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19. Isenberg, *supra* note 14, at 278-79. For a more in depth analysis of these requirements, see LAFAVE & SCOTT, *supra* note 13, at 385-88.

20. Reeve, *supra* note 16, at 786 n.42. The vast majority are based on MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962):

> Justification Generally: Choice of Evils.
>
> (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 or other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> (c) a legislative purpose to exclude the justification claimed 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.

MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962).

21. The Massachusetts Legislature did, however, propose a choice of evils defense based on section 3.02 of the Model Penal Code. *See* MODEL PENAL CODE § 3.02 cmt. n.21 (1972).

Because Massachusetts relies on the common law for the foundation of the necessity defense, this Comment will focus primarily on necessity cases from jurisdictions which also follow the common law necessity defense.

22. Commonwealth v. Blodgett, 53 Mass. (12 Met) 56, 84 (1846). In *Blodgett*, Rhode Island soldiers were ordered to pursue and arrest rebel Rhode Island citizens who had been promoting insurrection in Rhode Island. *Id.* at 86-87. The soldiers eventually caught the rebels in Massachusetts. *Id.* at 87. The soldiers, however, were arrested by Massachusetts authorities for crossing the border under arms and violating Massachusetts' sovereignty. *Id.* at 81. The Supreme Judicial Court upheld the trial judge's jury instruction, which said:

> That if there existed a necessity, for the defense or protection of the lives and property of the citizens of Rhode Island, or for the defense of the State of Rhode Island, that the defendants do the acts complained of in the indictments, or if there was probable cause to suppose, at that time, the existence of such a necessity, and the jury found such necessity or probable cause, they were to acquit them . . . .

Id. at 84. The court ruled "the question was rightly submitted to the jury, as one of

"competing harms" litigation, the law has become more clearly defined. The Massachusetts courts have explicitly accepted the defense in prison escape cases[23] and illegal firearm possession cases.[24]

During the 1980s, Massachusetts witnessed a large number of protests aimed at shutting down nuclear power plants or ending the nuclear arms race. After being arrested for performing illegal acts at these protests, numerous defendants attempted to justify their actions based on the defense of necessity.[25] In response to these cases, the

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strictly necessary defence." *Id.* at 85; *see also* Commonwealth v. Brooks, 99 Mass. 434 (1868) (vegetable wagon driver not liable for stopping in street in violation of law where stop was made out of necessity due to crowded roads); Commonwealth v. Wood, 77 Mass. (11 Gray) 85, 92 (1858) (concluding that an abortion is not unlawful if necessary to save the life of the mother).

23. Commonwealth v. Thurber, 383 Mass. 323, 418 N.E.2d 1253 (1981). In *Thurber*, the defendant escaped from prison because fellow inmates were threatening him with a knife attack. *Id.* at 329, 418 N.E.2d at 1255-56. In affirming the trial court's necessity instruction, the Supreme Judicial Court set forth a five part test delineating the circumstances in which a defendant may raise the defense:

> (1) when the prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
> (2) there is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
> (3) there is no time or opportunity to resort to the courts;
> (4) there is no evidence of force or violence used towards prison personnel or other 'innocent' persons in the escape; and
> (5) the prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

Id. at 330, 418 N.E.2d at 1256 (quoting People v. Lovercamp, 43 Cal. App. 3d 823, 831-32 (1974)).

The defendant is entitled to have the jury instructed on the law of necessity "only if there is evidence that would warrant a reasonable doubt whether the escape was justified by necessity." *Id.* at 331, 418 N.E.2d at 1256. The court ruled that the necessity instruction was proper in *Thurber* despite the defendant's admission that he had no intention of returning to the authorities. *Id.* at 329-31, 418 N.E.2d at 1255-56. Once the defense has been successfully raised, the burden is placed on the Commonwealth to convince the jury beyond a reasonable doubt that the escape was not rooted in necessity. *Id.* at 331, 418 N.E.2d at 1256-57. For the *Hutchins* Court's discussion of *Thurber*, see *infra* notes 94-98; *see also* Commonwealth v. O'Malley, 14 Mass. App. Ct. 314, 439 N.E.2d 832 (1982) (defendant has right to present the necessity defense if he can introduce some evidence on each element).

24. In Commonwealth v. Lindsey, 396 Mass. 840, 489 N.E.2d 666 (1986), the defendant carried a gun because threats had been made against his life by a coworker. *Id.* at 842, 489 N.E.2d at 667. The Supreme Judicial Court rejected the defendant's proffered defense of necessity because the defendant was not acting out of necessity the entire time he was in possession of the gun. *Id.* at 845, 489 N.E.2d at 669. In denying the defense, however, the court recognized that circumstances might arise where the carrying of a firearm may be justified. *Id.*; *see also* Commonwealth v. Iglesia, 403 Mass. 132, 525 N.E.2d 1332 (1989) (necessity defense for firearm possession). For the *Hutchins* Court's discussion of *Iglesia*, see *infra* notes 99-103 and accompanying text.

25. *See* Commonwealth v. Schuchardt, 408 Mass. 347, 557 N.E.2d 1380 (1990);

Supreme Judicial Court outlined the precise circumstances in which a defendant might raise the necessity (competing harms) defense.[26] In *Commonwealth v. Hood*[27] the Supreme Judicial Court reaffirmed the competing harms legal test previously set forth by the Massachusetts Appeals Court in *Commonwealth v. Brugmann*.[28] The court held that the defense could only be raised in the following circumstances:

(1) the 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.[29]

The court stated that the necessity defense cannot be claimed every time a defendant feels threatened. It only "deals with obvious and generally recognized harms, not with those which are debatable and, indeed, the subject of legislation and government regulation."[30] Furthermore, a judge should instruct the jury on a competing harms defense only when the defendant has introduced evidence on each of the four required elements.[31]

Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188 (1983); Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982); Commonwealth v. Averill, 12 Mass. App. Ct., 423 N.E.2d 6 (1981). For an argument in favor of nuclear protesters being able to claim the defense of necessity, see Reeve, *supra* note 16, at 787-90.

26. The court stated that " 'the application of the defense is limited to the following circumstances.' " Commonwealth v. Hood, 389 Mass. 581, 591, 452 N.E.2d 188, 195 (1983) (quoting Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 379, 433 N.E.2d 457, 461 (1982)). See text accompanying *infra* note 29 for a listing of these circumstances.

27. 389 Mass. 581, 452 N.E.2d 188 (1983). The defendants in *Hood* were arrested for trespassing and handing out leaflets at a nuclear technology laboratory. *Id.* at 583, 452 N.E.2d at 190. The Commonwealth, prior to trial, filed a motion in limine to have evidence of defendant's defense of justification excluded. *Id.* at 584, 452 N.E.2d at 191. Though the court stated that it would be more prudent to allow evidence of the defense into the record, it was proper in this instance to exclude it because the defendants had failed to introduce evidence on all the elements. *Id.* at 595, 452 N.E.2d at 197.

28. 13 Mass. App. Ct. 373, 379, 433 N.E.2d 457, 461 (1982). The defendants in *Brugmann* were arrested for trespassing into a restricted area of a nuclear power plant during a protest. *Id.* at 374, 433 N.E.2d at 459. Defendants failed to establish the necessity defense because they had not explored the legally viable alternatives before violating the law. *Id.* at 379, 433 N.E.2d at 462.

29. *Hood,* 389 Mass. at 591, 452 N.E.2d at 195 (alteration in original) (quoting *Brugmann*, 13 Mass. App. Ct. at 379, 433 N.E.2d at 461).

30. *Id.* at 592, 452 N.E.2d at 195 (quoting Commonwealth v. Averill, 12 Mass. App. Ct. 260, 262-63, 423 N.E.2d 6, 8 (1981)).

31. *Id.* at 595, 452 N.E.2d at 197. The judge correctly withheld the defense in

The *Hood* Court reaffirmed the competing harms defense because it:

> "exonerates one who commits a crime under the 'pressure of circumstances' if the harm that would have resulted from compliance with the law . . . exceeds the harm actually resulting from the defendant's violation of the law. At its root is an appreciation that there may be circumstances where the value protected by the law is, as a matter of public policy, eclipsed by a superseding value."[32]

When an individual is faced with two competing harms, the court supports the violation of a law if the harm avoided clearly exceeds the harm resulting from the violation.[33]

C. *Medical Necessity as a Defense to Criminal Charges*

Despite an increase in litigation concerning the necessity defense, a medical necessity case was not reviewed by a Massachusetts appellate court until *Commonwealth v. Hutchins*.[34] Other jurisdictions have discussed and accepted the defense of medical necessity when an ill defendant has been arrested for possessing or cultivating marihuana. The first case to recognize such a defense was *United States v. Randall*.[35] Defendant Randall suffered from glaucoma.[36] By 1974 Randall had lost all vision in his right eye and had serious visual impairment in his left eye.[37] Because conventional drugs were no longer effective in treating his failing eyesight, Randall turned to smoking marihuana cigarettes.[38] He was soon thereafter arrested for possession of marihuana.[39]

Hood because the defendants failed to produce evidence on the third element. *Id.*, 452 N.E.2d at 196-97.

32. *Id.* at 590, 452 N.E.2d at 194 (quoting *Brugmann*, 13 Mass. App. Ct. at 376-77, 433 N.E.2d at 460). The court further elaborated by citing Section 40 of Chapter 263 of the Proposed Criminal Code of Massachusetts which required that the "harm sought to be avoided must be clearly greater." *Id.* at 590-91, 452 N.E.2d at 194 (citing Proposed Criminal Draft of Mass. ch. 263, § 40 (1972)).

33. *Id.* at 591, 452 N.E.2d at 194.

34. When abortions were illegal, the Massachusetts courts repeatedly ruled that an abortion may be lawful if in good faith the doctor felt it was necessary to save the mental or physical health of the mother. *See e.g.*, Commonwealth v. Wheeler, 315 Mass. 394, 395, 53 N.E.2d 4, 5 (1944). The statute which these cases interpreted outlawed "unlawful" miscarriages through devices or drugs. MASS. GEN. L. ch. 272, § 19 (1942). In these cases, the court concluded that abortions performed to save the mother's physical or mental health were lawful. *E.g.*, *Wheeler*, 315 Mass. at 395, 53 N.E.2d at 5.

35. 104 Daily Wash. L. Rep. 2249 (D.C. Super. Ct. Nov. 24, 1976).

36. *Id.* at 2249. Glaucoma is "a disease of the eye characterized by the excessive accumulation of fluid causing increased intraocular pressure, distorting vision and, ultimately, blindness." *Id.*

37. *Id.*

38. *Id.* Marihuana has been proven to relieve the intraocular pressure within the eye without the major side effects and tolerance problems of conventional drugs. *See generally* II MARIJUANA, MEDICINE & THE LAW (R.C. Randall ed. 1989).

39. *Randall*, 104 Daily Wash. L. Rep. at 2249.

At trial, Randall relied on the defense of medical necessity.[40] After examining the common law defense of necessity, the court concluded that medical necessity fit within its parameters.[41] The court then focused on the two "competing harms" at issue in the case.[42] Randall's interest in health and bodily integrity was seen as extremely important in light of the then recent *Roe v. Wade*[43] and *Doe v. Bolton*[44] decisions.[45] The court also found a strong state interest in enforcing drug laws to protect the public.[46] The court, in balancing the harms, found that:

> [N]o direct harm will be visited upon innocent third parties; any major ill effects from the inhalation of marijuana smoke will occur to the defendant alone. Furthermore, defendant, by growing marijuana for his own consumption cannot be said to be contributing to the illegal trafficking in this drug, and thus injuring, however nebulously, innocent members of the public. In any event, it is unlikely that such slight, speculative and undemonstrable harm could be considered more important than defendant's right to sight.[47]

Based upon this favorable weighing of the competing harms, the court found Randall not guilty of possessing marihuana.[48] This decision to accept medical necessity as a defense to charges of marihuana possession has been followed by at least four other jurisdictions.[49] It has also

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40. *Id.*

41. *Id.* at 2249-52.

> [D]efendant alleges that he is suffering from glaucoma, an incurable eye disease which results inevitably in loss of sight. While conventional medications and surgery offer little hope of improvement, defendant contends that the inhalation of marijuana smoke has a beneficial effect on his condition, relieving the symptoms and retarding the progress of the disease . . . . The Court finds upon these facts that the defendant has established the basic elements of the traditional necessity defense.

Id. at 2252.

42. *Id.* at 2252.

43. 410 U.S. 113 (1973).

44. 410 U.S. 179 (1973).

45. *Randall,* 104 Daily Wash. L. Rep. at 2253.

> The right of an individual to protect his body has been weighed by several courts against the interest of the government in guarding the health and morals of the general public. . . . These decisions recognize first that a woman may at any stage end a pregnancy which threatens her own existence, her right to life being more significant than that of the fetus, however close to term. The opinions go on to affirm the prerogative of a woman during the first three months of pregnancy to terminate it for any reason whatsoever, establishing that she may control her body at the expense of the life of a fetus less than four months old. The significance of these decisions to the instant case lies in the revelation of how far-reaching is the right of an individual to preserve his health and bodily integrity.

Id. at 2252-53.

46. *Id.* at 2253.

47. *Id.* For an analysis of the *Randall* decision see Isenberg, *supra* note 14.

48. *Randall,* 104 Daily Wash. L. Rep. at 2254.

49. In Jenks v. State, 582 So.2d 676 (Fla. App. 1 Dist. 1991), a husband and wife

been rejected by other courts.[50]

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who both suffered from AIDS were arrested for cultivating and possessing marihuana. *Id.* at 677. The defendants offered to prove that marihuana was the only drug which effectively and safely helped them to control nausea and weight loss. *Id.* at 679-80. In denying the prosecutor's claim that the Legislature had foreclosed the defense by scheduling marihuana as a drug with no currently accepted medical use, the court stated that statutes "should not be construed as abrogating the common law unless it speaks unequivocally, and should not be interpreted to displace common law more than is necessary." *Id.* at 679. Because the defendants met their burden of producing evidence in support of their necessity for marihuana, the trial judge erred in excluding the defense. *Id.* at 679-80; *see also* State v. Hastings, 801 P.2d 563 (Idaho 1990). The Supreme Court of Idaho, in recognizing the common law right of an individual to raise the defense of necessity, held that the medical necessity defense was available to an arthritic defendant who had been arrested for possession of marihuana. *Hastings*, 801 P.2d at 565. The court left it to the trier of fact to determine, among other elements, whether "the harm caused was not disproportional to the harm avoided." *Id.* at 564; *see also* State v. Diana, 604 P.2d 1312, 1317 (Wash. App. Ct. 1979) (multiple sclerosis sufferer arrested for marihuana possession had the right to present a medical necessity defense).

Hawaii, a state with a necessity defense statute, has recognized that a defendant may raise the defense to a charge of marihuana possession. State v. Bachman, 595 P.2d 287, 288 (Haw. 1979) (medical necessity was an allowable defense to a marihuana charge, but defendant failed to present medical testimony as to his need for the drug).

50. State v. Hanson, 468 N.W.2d 77 (Minn. App. 1991). The *Hanson* Court rejected the defendant's defense of medical necessity when he claimed the marihuana he was growing was necessary to treat his epilepsy symptoms. *Id.* at 77. The court found that the Legislature had already spoken on the subject by passing the Therapeutic Research Act "exempting from criminal sanctions possession or use of marijuana for cancer patients undergoing chemotherapy who are receiving the drug under the strict controls of an approved medical research program." *Id.* at 78. Because the Legislature had specifically addressed the medical uses of marihuana, the common law defense of necessity was unavailable. *Id.* at 78; *see also* Kauffman v. State, 1992 WL 345587 (Ala. Ct. App.) (denying medical necessity defense to paraplegic because the legislature had already addressed the issue in passing the Controlled Substances Therapeutic Research Act).

The New Jersey Supreme Court rejected a quadriplegic's medical necessity defense to a marihuana charge in State v. Tate, 505 A.2d 941 (N.J. 1986). New Jersey has a necessity statute which allows the defense unless the legislature has previously provided exceptions or a "legislative purpose to exclude the justification claimed [has] otherwise plainly appear[ed]." *Id.* at 944 (quoting N.J. STAT. ANN. § 2c:3-2(a) (West 1982)). The court ruled that the New Jersey Legislature had already weighed the competing values associated with the medicinal uses of marihuana. *Id.* at 945. The Legislature had established the Controlled Dangerous Substances Therapeutic Research Act (TRA) as a means for individuals to gain access to marihuana for experiments in treating various medical problems. *Id.* Also, in the drug offense statute, the legislature outlawed dangerous controlled substances " 'unless such substance[s] [were] obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice.' " *Id.* at 944 (quoting N.J. STAT. ANN. § 24:21.20(a) (West 1982), repealed by 1987 N.J. LAWS ch. 106, § 25). The defendant failed to obtain a prescription or apply to the TRA, and was therefore in violation of the law when arrested with marihuana. *Id.* at 945. Because the Legislature had foreclosed the assertion of the common law de-

III. STATEMENT OF THE *HUTCHINS* CASE

A. *Facts*

Joseph Hutchins, a forty-eight year old Navy veteran, suffers from scleroderma and Raynaud's phenomenon.[51] Scleroderma is a chronic disease which causes scar tissue to build up throughout the body of the sufferer.[52] Neither the cause nor a cure for the disease has been discovered.[53] To date, no effective scleroderma treatment plan has been formulated.[54] In extreme cases the disease can result in death.[55] The court found that Hutchins' medical history included the following symptoms and occurrences:

> episodes of fatigue, hypertension, loss of appetite, weight loss of up to twenty-five pounds, diarrhea, nausea, vomiting, reflux of food and stomach acid into the mouth, reduced motility and constriction of the esophagus, extreme difficulty and pain in swallowing, and swollen, painful joints and extreme sensitivity to the cold in his hands and feet. He also suffers from severe depression, related at least in part to his disease, and was briefly hospitalized after attempting suicide.[56]

The effect of the disease on Hutchins' gastrointestinal tract had been especially severe.[57] In 1974, about ten years after the onset of the

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fense of necessity by these acts, the defendant was unable to introduce any evidence of the "competing harms" defense. *Id.*

Jurisdictions which deny the defense usually do so because the legislature has specifically excluded the defense in a statute, or because the legislature has established a Research Act providing access to marihuana for certain patients. *Hanson*, 468 N.W.2d at 78; *Tate*, 505 A.2d at 944-45; *see also* United States v. Burton, 894 F.2d 188, 191 (6th Cir. 1990) (rejecting glaucoma victim's medical necessity defense because of his failure to apply to a government program established to study the effects of marihuana on glaucoma patients). *But see* State v. Diana, 604 P.2d 1312 (Wash. App. Ct. 1979) (medical necessity for multiple sclerosis patient *because* the legislature enacted Controlled Substances Therapeutic Research Act to study effects of marihuana on glaucoma and cancer patients, thus recognizing some medical benefits in marihuana).

51. Commonwealth v. Hutchins, 410 Mass. 726, 575 N.E.2d 741 (1991). Raynaud's phenomenon causes hands to turn blue or pale when they are exposed to the cold. Brief of the Appellant at 10, Commonwealth v. Hutchins, 410 Mass. 726, 575 N.E.2d 741 (1991) (No. SJC-5414) [hereinafter Appellant's Brief].

52. *Id.* at 727, 575 N.E.2d at 742. The disease is defined as "a generalized disorder of connective tissue characterized by thickening and fibrosis of the skin (scleroderma), prominent abnormalities of the small arteries and microvasculature, and by distinctive patterns of involvement of internal organs including the gastrointestinal tract, heart, lungs, and kidneys." Appellant's Brief, *supra* note 51, at 9 (quoting JAMES B. WYNGAARDEN & LAWRENCE SMITH, CECIL'S TEXTBOOK OF MEDICINE 1932 (1985)).

53. *Hutchins*, 410 Mass. at 727, 575 N.E.2d at 742.

54. *Id.*

55. *Id.* at 727-28, 575 N.E.2d at 742.

56. *Id.* at 728, 575 N.E.2d at 742-43. Due to the extreme nature of the symptoms, Hutchins had been unable to work since 1978. *Id.* at 728, 575 N.E.2d at 743.

57. Appellant's Brief, *supra* note 51, at 10.

disease, Hutchins' esophagus became so thick and constricted that he was unable to swallow solid food.[58] Doctors at the Veterans Administration, in an attempt to alleviate the effects of the disease on Hutchins, prescribed at least sixteen different medicines.[59] None of these drugs were effective.[60] After dilation treatment[61] failed to cure Hutchins' esophagus problem, his doctor recommended surgery to replace the esophagus with a section of Hutchins' own intestine.[62] Such an operation was shown to have a mortality rate of between 12.1 and 15.9 percent.[63]

At about this time Hutchins learned informally that smoking marihuana might be helpful in alleviating his symptoms.[64] Based on this information, Hutchins began using marihuana.[65] He subsequently reported to his doctors that his use of marihuana, instead of antidepressants and surgery, had "alleviate[d] certain symptoms of his illness including nausea, loss of appetite, difficulty in eating, drinking or swallowing, loss of motility of the esophagus, spasticity, hypertension, and anxiety."[66] An affidavit was presented by two of Hutchins' physicians stating that "although they are unable to 'confirm [the defendant's] claim that his use of mari[h]uana has caused his remarkable remission, . . . it does appear that his use of mari[h]uana does alleviate the previously mentioned symptoms.' "[67]

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58. *Hutchins*, 410 Mass. at 728, 575 N.E.2d at 742-43.

59. Appellant's Brief, *supra* note 51, at 13-14 ("including Valium, Dalmane, Reser pine, Cimetidine, Seconal, Tylenol, Darvon, Ritalin, Motrin, Lomotil, Amphogel, aspirin, Trilisate, Gaviscon, Nortryptiline, Imipramine").

60. *Id.* at 14.

61. Hutchins described the treatment as follows:

> Dilation of the esophagus requires threading a flexible but firm cylindrical instrument called a bougie down the patient's throat, through the esophagus, to the pyloric valve connecting the lower end of the esophagus with the stomach. The patient is sedated with intravenous Demoral and Atropine to prevent gagging on the bougie. Dilation is achieved by the insertion of a tapered bougie, or of successive bougies of increasing diameter, thereby pushing back the muscular walls of the constricted esophagus. Mechanical dilation of the esophagus can result in perforation of the organ, making it 'a potentially hazardous therapeutic technique.'

Id. at 12 n.4 (citations omitted) (quoting SEYMOUR I. SCHWARTZ ET AL., SURGERY 894 (1969)).

62. *Hutchins*, 410 Mass. at 728, 575 N.E.2d at 743.

63. Appellant's Brief, *supra* note 51, at 11 (quoting SCHWARTZ, *supra* note 61, at 894).

64. *Id.*

65. *Id.*

66. *Hutchins*, 410 Mass. at 728, 575 N.E.2d at 743.

67. *Id.* (alterations in original). The two physicians also advised the court that there was sufficient grounds for the establishment of medical and scientific research into the use of marihuana in treating victims of scleroderma. *Id.* The court added that "[a] research study of its therapeutic potential and medical uses indicates that the use of marihuana, indeed, may be effective to treat loss of appetite, nausea,

Hutchins made numerous attempts to secure a legal supply of marihuana. He contacted his physicians, the Veterans Administration,[68] and members of the Massachusetts Legislature[69] and United States Congress[70] in a vain attempt to obtain a prescription or permission to be part of a research investigation into the effects of marihuana on scleroderma patients.[71] Meanwhile, Hutchins continued to smoke marihuana to alleviate the excruciating effects of scleroderma even though it "created another anxiety: using mariju[a]na illegally."[72]

B. *Procedural History*

On October 29, 1984, Hutchins was arrested for the crime of manufacturing THC,[73] and cultivating and possessing two pounds of marihuana, with the intent to distribute.[74] In a motion prior to trial, Hutchins attempted to present the defense of medical necessity as a justification for his marihuana possession and cultivation.[75] Hutchins requested the court to state, as a matter of law, that it was going to deny him the right to present such a defense.[76] This would save Hutchins the expense of calling paid medical witnesses to testify in an "idle ceremony" on his behalf.[77] After a hearing, the judge ruled that Hutchins would be denied the right to present a necessity defense.[78] After stipu-

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vomiting, and weight loss and may relieve severe anxiety and depression." *Id.* For an excellent analysis of the medical uses of marihuana, *see generally* II MARIJUANA, *supra* note 38.

68. *Hutchins*, 410 Mass. at 729, 575 N.E.2d at 743. The Veterans Administration refused to dispense marihuana for Hutchins' symptoms because no research has been done on treating scleroderma with marihuana. *Id.*

69. *Id.* The Massachusetts Legislature on a number of occasions had considered, but not enacted, a bill that would have allowed for research into the medicinal qualities of marihuana. *Id.* On December 23, 1991, the Massachusetts Legislature passed the Controlled Substance Therapeutic Research Act allowing for chemotherapy, glaucoma, and asthmatic patients to gain access to marihuana. MASS. GEN. L. ch. 94D, § 2 (1991). Governor Weld signed the bill into law on December 31, 1991. *Wrapup of Action in the Legislature*, BOSTON GLOBE, Jan. 1, 1992, at 36.

70. *Hutchins*, 410 Mass. at 729, 575 N.E.2d at 743.

71. *Id.* At the time of the *Hutchins* decision, thirty-four states allowed patients with certain medical conditions to legally obtain and smoke marihuana. Judy Foreman, *Medical Marijuana—A Cure or a Curse?*, BOSTON GLOBE, Oct. 7, 1991, at 25.

72. Appellant's Brief, *supra* note 51, at 16 (quoting Letter from Hutchins to Barbara Small, Director, Boston Veterans Administration Medical Center).

73. THC is an intoxicating chemical found in marihuana. JOHN KAPLAN, MARIHUANA: THE NEW PROHIBITION 57 (1970).

74. Brief for the Commonwealth-Appellee at 2, Commonwealth v. Hutchins, 410 Mass. 726, 575 N.E.2d 741 (1991) (No. SJC-5414) [hereinafter Commonwealth's Brief].

75. Appellant's Brief, *supra* note 51, at 3.

76. *Hutchins*, 410 Mass. at 727, 575 N.E.2d at 742.

77. *Id.*

78. *Id.*, 575 N.E.2d at 742. The trial court judge rejected Hutchins' defense without laying any basis for his decision. Appellant's Brief, *supra* note 51, at 22.

lating to growing and possessing marihuana,[79] in exchange for reduced charges,[80] Hutchins waived his right to a jury trial.[81] Because the only issue left to be resolved was Hutchins' right to raise the necessity defense—a matter of law—there was no need for a jury.[82] Hutchins was subsequently found guilty of both charges at the bench trial.[83] The sentence was stayed pending an appeal of the conviction.[84] The appellate process was delayed for over four years due to lost transcripts and exhibits.[85] Eventually it was docketed at the Appeals Court in January of 1990.[86] The Supreme Judicial Court, on its own initiative, ordered direct appellate review on June 7, 1990.[87]

C. *The Majority Opinion*

The majority[88] of the Supreme Judicial Court held that Hutchins' offer of proof to the trial court did not, as a matter of law, raise the defense of necessity.[89] After reiterating the same components of a "competing harms" defense previously stated in *Hood*, *Schuchardt*, and *Brugmann*,[90] the court announced that the defense of necessity is not available whenever the defendant has met his burden of introducing evidence on each element.[91]

> Rather, the first question always is whether the harm that would have resulted from compliance with the law significantly outweighs the harm that reasonably could result from the court's acceptance of necessity as an excuse in the circumstances presented by the particular case. Only

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"The judge's written ruling stated simply: 'Def[endant] will not be allowed to introduce evidence re defense of medical necessity.' " *Id.*

79. Appellant's Brief, *supra* note 51, at 6. Hutchins stipulated to growing and possessing marihuana in exchange for the reduced charges. *Id.* This was the usual procedure for a necessity defense, because "[i]n a plea of necessity, the defendant admits performing the act charged and admits the act technically violated a law. The defendant contends that the conduct was justified because it was the only feasible way to avoid a greater evil . . . ." Arnolds & Garland, *supra* note 12, at 295.

80. The Commonwealth reduced the charges to simple possession and cultivation of marihuana. *Hutchins*, 410 Mass. at 727, 575 N.E.2d at 742.

81. *Id.* at 735 n.2, 575 N.E.2d at 746 n.2 (Liacos, C.J., dissenting).

82. *Id.* at 727, 575 N.E.2d at 742.

83. *Id.* Hutchins was sentenced to thirty days in the House of Correction, with the remainder of the two year sentence suspended. Appellant's Brief, *supra* note 51, at 7. On June 10, 1992, Hutchins' sentence was commuted due to the severity of his medical condition. Toni Locy, *Man's 30-day Drug Sentence Commuted Due to Illness*, BOSTON GLOBE, June 11, 1992, at 87.

84. *Hutchins*, 410 Mass. at 727, 575 N.E.2d at 742.

85. *Id.*

86. Appellant's Brief, *supra* note 51, at 9.

87. *Hutchins*, 410 Mass. at 727, 575 N.E.2d at 742.

88. Justice O'Connor wrote for the majority and was joined by Justices Wilkins, Abrams, Lynch, and Greaney. *Id.* at 726, 575 N.E.2d at 741.

89. *Id.* at 730, 575 N.E.2d at 745.

90. *See supra* note 29 and accompanying text.

91. *Hutchins*, 410 Mass. at 730, 575 N.E.2d at 744.

> when a comparison of the "competing harms" in specific circumstances clearly favors excusing what would otherwise be punishable conduct, is it appropriate then to inquire whether the standards enumerated in the cases cited above, standards which themselves do not call for a comparison of competing harms, have been met.[92]

In justifying its position, the court examined two recent "competing harms" cases.[93] In *Commonwealth v. Thurber*,[94] the court recognized that there may be instances when a prisoner's escape from prison could be justified under the necessity defense.[95] The reason the escape would be justified is because "[t]he extent of public harm likely to attend a peaceful escape from prison, followed by the prisoner's prompt submission to the authorities, would be minimal compared to the likely harm to the prisoner, as demonstrated by the defendant's evidence in *Thurber*, if he were to comply with the law."[96] Rather than identify the entity (judge or jury) in charge of weighing the competing harms, the court just "assumed" that in a proper prison escape case the prisoner would be justified in raising the necessity defense.[97] Because the assumption was so obvious, the court had no reason to even mention the harm-weighing process.[98]

In *Commonwealth v. Iglesia*,[99] the defendant was charged with unlawfully carrying a handgun.[100] Iglesia offered evidence that he wrestled the gun away from an assailant and immediately took it to the police station.[101] As in *Thurber*, the court "assumed" that such possession might be lawful because the harm to society in this factual setting was significantly outweighed by the possible harm to the defendant.[102] In both of these cases, the court reasoned that, "[i]t is fair to assume, in

92. *Id.* at 730-31, 575 N.E.2d at 744. This threshold requirement emerges from that "oft-repeated principle, that the necessity defense is limited to certain specified circumstances, [and] does not mean that, whenever those circumstances obtain, the defense automatically applies." *Id.* at 730, 575 N.E.2d at 744. For a discussion of how "often" this principle has been stated, see *infra* notes 166-82 and accompanying text.

93. *Hutchins*, 410 Mass. at 731, 575 N.E.2d at 744-45.

94. 383 Mass. 328, 418 N.E.2d 1253 (1981). Thurber and two other prisoners escaped when inmates pulled knives on them in the workout yard. *Id.* at 329, 418 N.E.2d at 1255-56.

95. *Hutchins*, 410 Mass. at 731, 575 N.E.2d at 744 (citing *Thurber*, 383 Mass. 328, 418 N.E.2d 1253). For the requirements of a necessity defense in a prison escape case, see *supra* note 23 and accompanying text.

96. *Hutchins* 410 Mass. at 731, 575 N.E.2d at 744.

97. *Id.* (quoting *Thurber*, 383 Mass. at 331, 418 N.E.2d at 1256).

98. *Id.* "Common sense tells us that, in the absence of a clear and specific contrary statutory expression, the court would not frustrate legislative intent in a *Thurber*-type situation by recognizing a necessity defense." *Id.*

99. 403 Mass. 132, 525 N.E.2d 1332 (1988).

100. *Id.* at 133, 525 N.E.2d at 1332.

101. *Id.*, 525 N.E.2d at 1333.

102. *Id.* at 134, 525 N.E.2d at 1333.

the absence of a specifically expressed contrary legislative intent, that judicial recognition of a necessity defense in the circumstances of [*Thurber* or *Iglesia*] would not contradict any legislative policy determination."[103]

In *Hutchins*, however, the court decided that the defendant's medical condition "would not clearly and significantly outweigh the potential harm to the public were we to declare that the defendant's cultivation of marihuana and its use for medicinal purposes may not be punishable."[104] The court was extremely concerned that such a court declaration would have a negative impact on drug enforcement.[105]

The court ruled that the trial court's denial of Hutchins' proffered defense of necessity, was appropriate because "a properly instructed fact finder could [not] determine that the defendant had established the defense which he asserts."[106] The majority reached this conclusion because it felt the interest of the government in enforcing the drug laws was not clearly outweighed by Hutchins' suffering and his need for marihuana.[107] Since the issue of competing harms is a threshold question of admissibility which must first be answered by the court, and because

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103. *Hutchins*, 410 Mass. at 732, 575 N.E.2d at 745.

104. *Id.*

105. *Id.* The majority cited Commonwealth v. Nissenbaum, 404 Mass. 575, 583, 536 N.E.2d 592, 596 (1989), to support its contention that the government has an "overriding interest in the regulation of such substances." *Hutchins*, 410 Mass. at 731, 575 N.E.2d at 745. In *Nissenbaum*, the court rejected the claim of a married couple that their use of marihuana was for religious purposes and therefore protected under article 2 of the Declaration of Rights of the Massachusetts Constitution. *Nissenbaum*, 404 Mass. at 583, 536 N.E.2d at 596. To examine the breadth of the defendant's right to practice religion, the court analogized to First Amendment cases in which the free rights to exercise religion were curtailed because of compelling state purposes. *Id.* at 578-79, 536 N.E.2d 594-95. The court then balanced Massachusetts' interest in law enforcement (protecting the public peace) against the interest of this couple in practicing their religion (by smoking marihuana as a sacrament). *Id.* at 579, 536 N.E.2d at 594. The court ruled that the state's interest in protecting the public peace outweighed a defendant's article 2 claim even if the defendant was motivated by a sincere religious purpose. *Id.* at 581, 536 N.E.2d at 595. The court recognized "both an overriding governmental interest in regulating such substances and the practical impossibility of doing so and at the same time accommodating religious freedom." *Id.* at 583, 536 N.E.2d at 596. The court articulated the "practical impossibility" of allowing drugs to be used for religious purposes when it queried:

> Why, for example, if art. 2 might protect the possession of marihuana or hashish for good faith religious purposes, would it not also protect a parent who would possess marihuana in order to distribute it to his child whom he wishes to raise in the same religion? Also, why would art. 2 not protect one who cultivates marihuana, or possesses it with the intent to distribute it to consenting adults when the cultivation or possession have as their purpose the sharing, and perhaps spreading, of the faith?

Id. at 577, 536 N.E.2d at 593.

106. *Hutchins*, 410 Mass. at 729, 575 N.E.2d at 743.

107. *Id.* at 732, 575 N.E.2d at 745.

the defendant had not made the requisite showing, there was no error in denying the defendant the right to present the defense of medical necessity to a jury.[108]

D. *The Dissenting Opinion*

The dissent[109] found Hutchins' offer of proof to be sufficient on each of the four components of the necessity defense.[110] A clear and imminent danger was supported by the affidavits from Hutchins' two physicians stating that his esophagus was dangerously constricted to such a point that eating and drinking would be impossible without severe pain and difficulty.[111] Hutchins offered evidence on the second element ("defendant can reasonably expect that his action will be effective . . . [in] abating the danger")[112] by presenting the doctors' opinion " 'that it does appear that [the defendant's] use of mari[h]uana does alleviate [his nausea, loss of appetite, difficulty in swallowing, spasticity, hypertension, and anxiety].' "[113] The requirement that there be no legal alternative was met by Hutchins' proof of numerous attempts made at procuring a legal supply of marihuana through the Veterans Administration, the Federal government, and his state and federal legislators.[114] The final element was met "since the Legislature has not precluded the medical necessity defense by clearly and deliberately choosing among the values at stake."[115]

Chief Justice Liacos said that because Hutchins met his burden of production on the defense of necessity, a jury should have been allowed to determine whether he was justified in cultivating or possessing marihuana.[116] By excluding the defense, the dissent felt that the trial judge "improperly prevented the jury from exercising their vital functions of '[1] temper[ing] the application of strict rules of law by bringing the common sense judgment of a group of laymen to the case [and] . . . [2] stand[ing] as a check on arbitrary enforcement of the law.' "[117] The dissent further reasoned that the people's fear of unhar-

108. *Id.* at 729, 732, 575 N.E.2d at 743, 745.

109. Chief Justice Liacos wrote the dissenting opinion and was joined by Justice Nolan. *Id.* at 733, 575 N.E.2d at 745 (Liacos, C.J., dissenting).

110. *Id.* at 734, 575 N.E.2d at 746 (Liacos, C.J., dissenting).

111. *Id.* (Liacos, C.J., dissenting).

112. *Id.* at 730, 575 N.E.2d at 744.

113. *Id.* at 735, 575 N.E.2d at 746 (Liacos, C.J., dissenting) (quoting Appellant's Brief, *supra* note 51, at 11-12).

114. *Id.* (Liacos, C.J., dissenting); *see supra* notes 68-71 and accompanying text.

115. *Hutchins*, 410 Mass. at 735, 575 N.E.2d at 746 (Liacos, C.J., dissenting); see *supra* note 50 for cases where courts have held that the legislature had precluded the defense.

116. *Hutchins*, 410 Mass. at 733, 575 N.E.2d at 745 (Liacos, C.J., dissenting). "Neither the judge below nor this court should substitute its judgment for the sound deliberation of the jury." *Id.* (Liacos, C.J., dissenting).

117. *Id.* at 736, 575 N.E.2d at 747 (Liacos, C.J., dissenting) (quoting Common-

nessed power in the State and Federal government "in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."[118]

Chief Justice Liacos accused the majority of "speculative judicial fact finding"[119] because of their conclusion that the harm to Hutchins did not clearly outweigh the potential harm to the public if his marihuana charges were to go unpunished.[120] While recognizing the importance to the public of enforcing the drug laws, Chief Justice Liacos stated, "I do not believe that the interest would be significantly harmed by permitting a jury to consider whether the defendant cultivated and used marihuana in order to alleviate agonizing and painful symptoms caused by an illness."[121]

The dissent further criticized the majority for failing to give adequate consideration to the policies supporting the common law defense of necessity.[122] The defense "is based on the recognition that, under very limited circumstances, 'the value protected by the law is, as a matter of public policy, eclipsed by a superseding value which makes it inappropriate and unjust to apply the usual criminal rule.' "[123] As viewed by Chief Justice Liacos, the:

> humanitarian and compassionate value in allowing an individual to seek relief from agonizing symptoms caused by a progressive and incurable illness in circumstances which risk no harm to any other individual[,] . . . may well outweigh society's generalized interest in prohibiting him or her from using marihuana in such circumstances.[124]

In cases where a defendant is on trial for marihuana possession or cultivation, Chief Justice Liacos would recognize the defense of medical necessity on a proper offer of proof. The Chief Justice believed that the fear of seeing every drug defendant claim medical necessity was unfounded because of the burden on the defendant to introduce evidence on all four necessity requirements.[125] Failure to satisfy these elements would result in the denial of the defense.[126] Furthermore, Chief Justice Liacos was "confident that juries would apply their wisdom and common sense in making sure that the necessity defense is not successfully utilized by defendants who use marihuana for purposes other than to

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wealth v. Schuchardt, 408 Mass. 347, 353, 557 N.E.2d 1380, 1384 (Liacos, C.J., concurring in part and dissenting in part) (1990) (quoting Commonwealth v. Hood, 389 Mass. 581, 597, 452 N.E.2d 188, 198 (Liacos, J., concurring) (1983))).

118. *Id.* at 735-36, 575 N.E.2d at 747 (Liacos, C.J., dissenting).

119. *Id.* at 733, 575 N.E.2d at 745 (Liacos, C.J., dissenting).

120. *Id.* (Liacos, C.J., dissenting).

121. *Id.* (Liacos, C.J., dissenting).

122. *Id.* (Liacos, C.J., dissenting).

123. *Id.*, 575 N.E.2d at 745-46 (Liacos, C.J., dissenting) (quoting Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 377, 433 N.E.2d 457, 460 (1982)).

124. *Id.* at 734, 575 N.E.2d at 746 (Liacos, C.J., dissenting).

125. *Id.* at 746 (Liacos, C.J., dissenting).

126. *Id.* (Liacos, C.J., dissenting); *see supra* notes 29-31 and accompanying text.

alleviate agonizing and painful medical symptoms."[127]

IV. ANALYSIS

A. *Consequences of Having the Court Weigh the Competing Harms*

1. Defendant Loses Right to Present a Recognized Defense

By denying the jury the duty of weighing the competing harms,[128] the *Hutchins* court precluded a criminal defendant from introducing a long recognized defense.[129] The right of a Massachusetts citizen to present a defense in a criminal trial is guaranteed by the Declaration of Rights in the Massachusetts Constitution.[130] Of course there can be no absolute right to present an unrecognized, unsupported, or frivolous defense,[131] but "[a] defendant must be given the opportunity to establish even a tenuous defense if his right to have his day in court is to be guaranteed."[132]

The Supreme Judicial Court has repeatedly recognized the necessity defense and has explicitly described the circumstances in which it may be asserted.[133] The court has said that "[i]f the defendant presents

127. *Hutchins*, 410 Mass. at 734, 575 N.E.2d at 746 (Liacos, C.J., dissenting).

128. *Id.* at 734 & n.1, 575 N.E.2d at 746 & n.1 (Liacos, C.J., dissenting).

129. The court added an additional threshold determination to the necessity defense by requiring the court to first weigh the competing harms itself. *Id.* at 731, 575 N.E.2d at 744. This resulted in Hutchins being denied the defense because the court held, as a matter of law, that the harm to society from his use of marihuana was greater than Hutchins' medical need for marihuana. *Id.* at 732, 575 N.E.2d at 745. Because the harm to society was greater, Hutchins' proffered evidence on medical necessity could not possibly be legally sufficient to raise the defense. *Id.*; *see supra* notes 104-08 and accompanying text.

130. "All people are born free and equal and have certain, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties . . ." MASS. CONST. art. I. "[E]very subject shall have a right to produce all proofs, that may be favorable to him, . . . and to be fully heard in his defense. . . . And no subject shall be . . . put out of the protection of the law, . . . deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land." MASS. CONST. art. XII.

131. In terms of allowing a defendant to raise the defense of necessity:

> [A] trial judge should only decide whether or not the question of values presented by the defendant is frivolous. If the values are so bizarre as to be clearly unacceptable to any significant portion of the community, the defense should not be allowed. In the United States for example, a defendant should not be allowed to raise as a defense to homicide the necessity of saving a cow.

Arnolds & Garland, *supra* note 12, at 296.

132. Commonwealth v. Noble, 24 Mass. App. Ct. 421, 422, 509 N.E.2d 930, 931 (1987). "Although a defendant is not entitled to a charge on a hypothesis which is not supported by the evidence, it is also true that, if any view of the evidence would provide support for an affirmative defense, a defendant is entitled to such an instruction." Commonwealth v. Monico, 373 Mass. 298, 299, 366 N.E.2d 1241, 1242 (1977) (citation omitted).

133. *See supra* notes 29-31 and accompanying text.

'some evidence' on each element of a defense, he is entitled to an instruction thereon based upon the hypothesis that the testimony, 'however incredible,' is entirely true."[134] In a justice system founded upon due process[135] and the illegality of ex post facto laws,[136] it would be expected that compliance with the defense's requirements would amount to a successfully proffered defense.

The Supreme Judicial Court has held that "[w]hen evidence concerning a critical issue is excluded and when that evidence might have had a significant impact on the result of the trial, the right to present a full defense has been denied."[137] The *Hutchins* court excluded evidence by adding an additional threshold requirement to the necessity defense without citing *any* sources for this radical change.[138] Hutchins was therefore denied the right to have his doctors testify as witnesses in favor of a medical necessity defense.[139] This decision approaches constitutional proportions considering the fact that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."[140]

2. Factual Issue Taken Away From the Jury

In making the conclusive assertion that the Commonwealth's interest in enforcing the drug laws exceeded Hutchins' medicinal need for marihuana,[141] the majority makes a critical factual determination.[142] This conclusion infringes on the function of the jury to make all factual

134. Commonwealth v. O'Malley, 14 Mass. App. Ct. 314, 323, 439 N.E.2d 832, 837 (1982) (citations omitted).

135. The Supreme Court has stated that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

136. The Supreme Judicial Court has stated that the ex post facto clause, as applied to the judicial branch, "should be seen as intended to discourage badly motivated or erratic action improper in a lawgiver." Commonwealth v. Lewis, 381 Mass. 411, 418, 409 N.E.2d 771, 775 (1980). To further support this explanation, the court cited Commonwealth v. Davis, 380 Mass. 1, 16 n.22, 401 N.E.2d 811, 821 n.22 (1980), where it was written that "the [ex post facto] doctrine appears to look not to the effects on the individual but to a notion of the just ordering of a legal system which is suspicious of a lawmaker who seeks to switch penal rules after the event." *Id.*

137. Commonwealth v. Bohannon, 376 Mass. 90, 94, 378 N.E.2d 987, 990 (1978).

138. *See Hutchins*, 410 Mass. at 731, 575 N.E.2d at 744.

139. *Id.* at 727, 575 N.E.2d at 742.

140. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

141. *Hutchins*, 410 Mass. at 732, 575 N.E.2d at 745; *see supra* notes 104-108 and accompanying text.

142. *Hutchins*, 410 Mass. at 732, 575 N.E.2d at 745 (Liacos, C.J., dissenting); *see* Arnolds & Garland, *supra* note 12, at 296. While the value issue may be a "mixed question[] of fact and law," the jury usually makes such determinations. Arnolds & Garland, *supra* note 12, at 296. Examples include negligence, the reasonable man standard, reasonable doubt, and obscenity determinations. *Id.*

decisions.[143] It also resulted in Hutchins being unable to defend his liberty by raising a recognized and well presented defense.[144]

The dissent stressed that a jury functions as a body of peers who temper strict rules by applying their own common sense judgments.[145] This assures criminal defendants, and society in general, that the government will not arbitrarily or oppressively find individuals guilty of crimes.[146] Massachusetts recognized this principle in *Commonwealth v. Bellino*:[147]

> The substance of the right to be tried by jury consists of those elements in that method of trial which tend to protect the citizen against arbitrary power and to insure to him that issues of fact shall be determined by the composite judgment of a fairly numerous and representative body of impartial residents . . . rather than the judgment of one or a small number of single individuals who may be subject to peculiar prejudices or whose station and personal experiences in life may have failed to provide them with sufficient understanding of the conditions and circumstances in which the parties acted.[148]

By performing the factual inquiry into the competing harms, and making their own conclusions as to their weight, five persons on the Commonwealth's highest court decided the fate of this defendant. Twelve fellow citizens were never permitted to draw from their diverse experiences to determine whether Hutchins and society were better off because the law had been broken in this particular instance.[149]

The court's declaration that the issue of competing harms must first be decided by the court cannot be squared with past necessity defense case law.[150] Since the time of Massachusetts' earliest cases, the jury has been the entity to balance the competing harms.[151] In *Blodgett*, the two competing harms were the need for Rhode Island to protect against insurrection and the right of Massachusetts to protect its sovereignty

143. Commonwealth v. Bellino, 320 Mass. 635, 639, 71 N.E.2d 411, 415 (1947).

144. *See supra* notes 109-21 and accompanying text.

145. *Hutchins*, 410 Mass. at 735, 575 N.E.2d at 747 (Liacos, C.J., dissenting). The Supreme Court has stated that "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from the group's determination of guilt or innocence." Williams v. Florida, 399 U.S. 78, 100 (1970).

146. The Supreme Court, in Duncan v. Louisiana, 391 U.S. 145 (1968), stated that "[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Id.* at 155. The right to a jury of one's peers reflects "a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.* at 156.

147. 320 Mass. 635, 639, 71 N.E.2d 411, 415 (1947).

148. *Id.*

149. *Hutchins*, 410 Mass. at 735-36, 575 N.E.2d at 747 (Liacos, C.J., dissenting).

150. *See id.* at 733, 575 N.E.2d at 745 (Liacos, C.J., dissenting).

151. Commonwealth v. Blodgett, 53 Mass. (12 Met) 56 (1846).

against invasion.[152] In determining whether there existed a necessity for the defendants to violate Massachusetts' "peace," the court left it to the jury to decide "this question of fact."[153] The Supreme Judicial Court stated that the "question was rightly submitted to the jury, as one of strictly necessary defense."[154] In *Commonwealth v. Hood*,[155] the Court laid out the four elements of the necessity defense.[156] The court stated that if a defendant produces evidence on all four elements, the judge should instruct on the defense.[157] The court never mentioned a threshold "harm-weighing" requirement to be performed by the court.[158]

In another recent case, *Commonwealth v. Iglesia*,[159] the issue on appeal was whether the trial court had correctly instructed the jury on the necessity defense.[160] In approving the trial judge's instruction, the court wrote:

> The judge did not misstate the applicable standard of proof. First, he discussed the law of necessity from a substantive point of view. He correctly instructed the jury with regard to the matters they should consider in determining whether "in terms of a balancing of harms," the defendant's conduct represented "the better choice."[161]

Previous to *Hutchins*, the jury was given the duty of weighing the competing harms once the defendant had successfully presented evidence on the four necessity requirements.[162] Based on the evidence presented at trial, the jury was left to determine the facts of the case

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152. *Id.* at 84.

153. *Id.*

154. *Id.* at 85.

155. 389 Mass. 581, 452 N.E.2d 188 (1983).

156. *Id.* at 591, 452 N.E.2d at 195; *see supra* notes 26-29 and accompanying text.

157. Commonwealth v. Hood, 389 Mass. 581, 595, 452 N.E.2d 188, 197 (1983). The *Hood* Court said that the only time a judge should deny a defendant an instruction on the necessity defense is if "the defendant has failed to produce some evidence on each element of the defense." *Id.*

158. In *Hutchins*, the majority stated that in previous cases of necessity it just "assumed" the harm to the defendant clearly and significantly outweighed the harm to society. *Hutchins*, 410 Mass. at 730-31, 575 N.E.2d at 744. Considering the significance of this element—its existence denies Hutchins a defense—it is amazing that it was never mentioned before.

159. 403 Mass. 132, 525 N.E.2d 1332 (1988). For the facts of *Iglesia*, see *supra* notes 99-101 and accompanying text.

160. *Iglesia*, 403 Mass. at 135, 525 N.E.2d. at 1333-34. The trial judge's instruction included these passages:

> Necessity is defined in terms of a balancing of harms where the criminal conduct represents the better choice. . . . It is for you to say what actually happened, and it's for you to say whether based on the circumstances that were developed during the trial—whether the conduct of this defendant . . . represented the better choice.

Id.

161. *Id.*

162. *Hood*, 389 Mass. at 595, 452 N.E.2d at 197.

and whether the harm to the defendant would have significantly outweighed the harm "actually resulting from the defendant's violation of the law."[163] No requirement of a threshold weighing by the court[164] was ever articulated in any previous necessity defense case.[165]

In supporting its claim that the necessity defense requires the court to first weigh the competing harms, the majority stated that the four necessity requirements do not themselves involve a weighing of the harms.[166] This analysis ignores the application of the defense.[167] Because of the four *Hood* requirements,[168] the test essentially requires that the defendant break the law because there was no other alternative. This means that the defendant must have *no choice* but to break the law or suffer the injurious consequences.[169] The court ignores this fact,[170] thereby defeating the purpose of the necessity defense[171] and stripping it of its utility.[172]

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163. *Hutchins*, 410 Mass. at 730, 575 N.E.2d at 744 (quoting *Brugmann*, 13 Mass. App. Ct. at 377, 433 N.E.2d at 461). The added court-performed weighing process does make some sense when viewed in conjunction with the newly defined parameters of the harms to be weighed. Now, when weighing the harms, the court takes into account the harm that "reasonably could result from the court's acceptance of necessity as an excuse in the circumstances presented by the particular case." *Id.* at 730, 575 N.E.2d at 744. Previous to *Hutchins*, the jury weighed the harm which resulted from the defendant's act, not the harm which would result from a judge's acceptance of the defense. *Iglesia*, 403 Mass. at 136, 525 N.E.2d at 1334. For a discussion of this issue, see *infra* notes 203-09 and accompanying text.

164. Of course the defendant must present enough evidence on the defense to allow a rational jury to find in his favor. Commonwealth v. Houston, 332 Mass. 687, 690, 127 N.E.2d 294, 296 (1955). However, the court did not deny Hutchins the defense based on such a procedural weighing. *Hutchins*, 410 Mass. at 732, 575 N.E.2d at 745. The majority held that because *they* reached an unfavorable decision on the weight of the harms, Hutchins' offer of proof could not possibly meet the requirements of the necessity defense. *Id.*

165. *See* Commonwealth v. Schuchardt, 408 Mass. 347, 557 N.E.2d 1380 (1990); Commonwealth v. Iglesia, 403 Mass. 132, 525 N.E.2d 1332 (1989); Commonwealth v. Hood, 389 Mass. 581, 452 N.E.2d 188 (1983); Commonwealth v. Thurber, 383 Mass. 328, 418 N.E.2d 1253 (1981); Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 433 N.E.2d 457 (1982).

166. *Hutchins*, 410 Mass. at 730-31, 575 N.E.2d at 744.

167. *Id.* at 733, 575 N.E.2d at 745 (Liacos, C.J., dissenting).

168. *See supra* note 29 and accompanying text.

169. *Hutchins*, 410 Mass. at 730-31, 575 N.E.2d at 744.

170. *Id.* at 733-35, 575 N.E.2d at 745-46 (Liacos, C.J., dissenting).

171. One of the purposes behind the defense as recognized by the Supreme Judicial Court is that it protects individuals from punishment when it is "inappropriate and unjust to apply the usual criminal rule." *Id.* at 730, 575 N.E.2d at 744. When could it be more inappropriate to deny the defense than to an individual suffering from an overpowering and potentially deadly disease?

172. "It is possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined beforehand, and must be adjudicated by a *jury* afterward . . . ." HERBERT STEPHEN & HARRY L. STEPHEN, DIGEST OF CRIMINAL LAW Art. 32 (5th ed. 1894) (*quoted in* Hitchler, *supra* note 9, at 147) (emphasis added).

Despite the claim of the *Hutchins*' majority,[173] other jurisdictions almost universally allocate the function of balancing the harms to a jury.[174] The majority has no support for requiring the court to make a threshold balancing of the harms in other jurisdictions which have dealt with the medicinal use of marihuana as a defense to possession charges.[175] Even the Supreme Court, in rejecting a medically related claim of necessity,[176] approves of a defense instruction when evidence

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173. *Hutchins*, 410 Mass. at 730-31, 575 N.E.2d at 744.

174. When the necessity defense was based on the common law in New Hampshire, "upon [the] question of reasonable necessity [the defendant] would be entitled to the judgment of his peers." State v. Jackson, 53 A. 1021, 1023 (N.H. 1902).

The Vermont courts also leave it to a jury to decide the issue of competing harms. State v. Shotten, 458 A.2d 1105, 1107 (Vt. 1983). In *Shotten*, the defendant, charged with driving under the influence, claimed she was driving to the hospital because her husband had severly injured her by throwing her down the stairs. *Id.* at 1106. A trip to the emergency room revealed that the defendant had suffered multiple rib fractures which required five days of hospitalization. *Id.* In Vermont, one of the necessity elements is that "the injury impending from the emergency must be of sufficient seriousness to outmeasure the criminal wrong." *Id.* The court does not have any discretion to measure the harms because it is the "function of the jury to determine . . . whether she was justified in [driving under the influence of alcohol] because of necessity." *Id.* at 1107. The judge's duty in a necessity case is " 'to charge fully and correctly upon each point indicated by the evidence, material to a decision of the case.' " *Id.* at 1106 (quoting State v. Gokey, 383 A.2d 601, 602 (Vt. 1978)). Once the defendant offers evidence on all the necessity elements, the judge is *required* to instruct the jury on the defense and allow it to weigh the competing harms. *Id.* at 1106-07. This is diametrically opposed to the *Hutchins* Court position that the issue of competing harms must always first be decided by the court. *Hutchins*, 410 Mass. at 731, 575 N.E.2d at 744.

175. In Jenks v. State, 582 So. 2d 676 (Fla. Dist. Ct. App. 1991), the court reversed the two defendants' possession convictions because the trial court had no authority to reject the witnesses' unchallenged testimony that marihuana alleviated some of their AIDS related symptoms. *Id.* at 679-80. In Idaho, one of the four common law necessity defense elements is whether "[t]he harm caused was not disproportionate to the harm avoided." State v. Hastings, 801 P.2d 563, 564 (Idaho 1990). At trial, "[i]t is for the trier of fact to determine whether or not she has met the elements of that defense." *Id.* at 565. In State v. Diana, 604 P.2d 1312 (Wash. Ct. App. 1979), the court remanded a marihuana conviction back "to the trial court, here the trier of fact, for determination of whether medical necessity exists. . . . In reaching its decision, the court must balance the defendant's interest in preserving his health against the State's interest in regulating the drug involved." *Id.* at 1317. The court was to weigh the harms as "the trier of fact," not as a means of denying the defense to the trier of fact.

In those states which rejected the defense of medical necessity, none based it on a court imposed balancing of the harms. *See supra* note 50 and accompanying text. In Spillers v. State, 245 S.E.2d 54 (Ga. Ct. App. 1978), the court held that there was no affirmative defenses to marihuana possession because those "are issues involving safety, health and community morals within the police power of the state posing questions for resolution by the General Assembly rather than by the courts. For us to rule otherwise would be a judicial usurpation of a legislative prerogative." *Id.* at 55.

176. United States v. Bailey, 444 U.S. 394 (1980). The defendants in *Bailey* were

on all of the elements has been introduced.[177] Commentators generally assign the task of weighing the competing harms to a jury.[178] The Model Penal Code takes no position on the issue.[179]

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escaped prisoners who claimed to be subject to lingering smoke from fires set by guards, beatings from guards, and inadequate medical treatment. *Id.* at 398.

177. *Id.* at 415. "[P]recisely because a defendant is entitled to have the credibility of his testimony, or that of witnesses called on his behalf, judged by the jury, it is essential that the testimony given or proffered meet a minimum standard as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense—here that of duress or necessity." *Id.* In *Bailey*, the Court held that the defendant prison escapees were not entitled to a necessity instruction because they had failed to offer evidence on one of the required elements of the defense. *Id.* But once a prison escapee has presented evidence on all the elements of the defense, the Court would permit an instruction. *Id.*

178. In its decisions in recent necessity defense cases, and in *Hutchins* itself, the Supreme Judicial Court has cited with approval articles on necessity by Arnolds and Garland and LaFave and Scott. *See Hutchins*, 410 Mass. at 730, 575 N.E.2d at 744. The *Hutchins* Court appeared to imply that these sources support the court's contention that an initial balancing must be made by the court. *See id.* To the contrary, Arnolds and Garland state that as long as the question of values is not 'frivolous,' "the jury should be allowed to decide not only if the facts alleged by the defendant were as extreme as the defendant said they were, but if they were, whether the defendant made the correct choice." Arnolds & Garland, *supra* note 12, at 296. Because "[w]hen a defendant raises a good faith defense of necessity . . . the jury as the representative of the community should be allowed to decide the issue of relative values." *Id.*

LaFave and Scott leave it to "the court," not the defendant, to decide the issue of competing harms. LAFAVE & SCOTT, *supra* note 13, at 386. They state that "to allow the defense the court must conclude that the harm done by the defendant in choosing the one alternative was less than the harm which would have been done if he had chosen the other." *Id.* As an example of a disproportionate choice, LaFave and Scott selected a person who would choose to save a painting over a human life. *Id.* at 387. The authors implicitly leave the harm balancing issue to the jury as an issue of fact. *Id.* at 386; *see also* 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 124(d)(1), at 51 (1954) (in deciding the lesser evils issue, "the jury is relied upon to represent the community's views").

A number of commentators fail to discuss the weighing of the harms in their treatises and books. But from their description of the defense, the defendant deserves an instruction on necessity if his violation of the law was reasonably necessary and did not put another's life in jeopardy. ROLLIN M. PERKINS, ON CRIMINAL LAW 956 (2d ed. 1957) ("Where the act done was necessary, or reasonably seemed necessary, to save life or limb or health, and did not in itself in any way endanger life, or limb or health, the exculpatory effect of necessity is too clear for argument . . . ."); RICHARD C. DONNELLY ET AL., CRIMINAL LAW 662 (1962) ("pressure of natural physical forces which causes the actor reasonably to believe that his act is the only means of preventing . . . imminent death or great bodily harm to himself or another, is a defense to a prosecution for any crime based on that act except murder").

179. MODEL PENAL CODE § 3.02 cmt. 1 n.1 (Proposed Official Draft 1962) ("The draft does not attempt, however, to resolve how far the issue raised by the defense should be determined by the court as one of law or submitted to the verdict of the jury. The Council thought this question best remitted to the law that generally governs the respective functions of the court and jury.") Given the division of func-

The only authority this author could find supporting the majority's assertion that the competing harms must first be weighed by the court[180] was in three states' necessity statutes.[181] The fact that the *Hutchins* court finds support *only* in separate jurisdictional statutory law adds little credence to its claim that such a requirement is found at common law and is binding on the court. It actually undercuts the majority's position because these legislatures had to statutorily give that power to the courts, implying that the courts would not ordinarily have the right to perform a threshold weighing of the harms.

3. Court's Usurpation of Jury Function Is Inconsistent with Other Established Common Law Defenses

Prior to *Hutchins*, the Supreme Judicial Court had consistently allocated to juries the burden of deciding whether a criminal defendant's acts were reasonable in light of the circumstances. In duress cases,[182] the jury must determine whether the defendant was threatened with immediate harm and whether there was any opportunity to escape the coercive situation.[183] The defenses of duress and necessity have repeatedly been compared to each other because of their similar elements.[184] But the court treats them differently by requiring a judicial

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tions in all other Massachusetts common law defense cases, the natural conclusion would be that the jury should weigh the harms to see if the defendant's violation of the law was reasonable. *See infra* notes 182-202 and accompanying text.

180. *Hutchins*, 410 Mass. at 730-31, 575 N.E.2d at 744; *see supra* notes 90-92 and accompanying text for the court's discussion of the issue.

181. COLO. REV. STAT. § 18-1-702 (1986); MO. REV. STAT. § 563.026 (1979); N.Y. PENAL LAW § 35.05 (McKinney 1987). For example, New York's statute states that "[w]henever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense." N.Y. PENAL LAW § 35.05 (McKinney 1987).

182. The court has stated that " 'duress' is usually taken to require a present, immediate, and impending threat of such a nature as to induce a well-founded fear of death or of serious bodily injury if the criminal act is not done; the actor must have been so positioned as to have had no reasonable chance of escape." Commonwealth v. Robinson, 382 Mass. 189, 199, 415 N.E.2d 805, 812 (1981).

183. *Id.*

184. The Supreme Judicial Court has stated that "[n]ecessity is similar to duress, and differences have sometimes been blurred." Commonwealth v. Thurber, 382 Mass. 328, 330, 418 N.E.2d 1253, 1256 (1981). Commentators LaFave and Scott note that:

> The defense of necessity is, of course, clearly related to that of duress (or coercion), where the pressure on the defendant's will comes from human beings rather than from physical circumstances. It is generally regarded as a separate defense, but it would doubtless be possible to treat it as a branch of the law of necessity.

LAFAVE & SCOTT, *supra* note 13, at 383.

The United States Supreme Court has stated that "[m]odern cases have tended

screening of the competing harms in necessity cases[185] while mandating a duress instruction even when "the evidence may not be of a character to inspire belief."[186] This distinction lacks rational support. If Hutchins had asserted that he smoked marihuana because a third person held a gun to his head and forced him to do so, he would, under *Robinson*, have been entitled to present a duress defense to a jury of his peers.[187] The disease of scleroderma represented an equally powerful and deadly coercive force to Hutchins.[188] As such, his use of marihuana was motivated by the same exact force as the hypothetical gun-to-the-head case: self-preservation.[189] In both cases a jury should be permitted to sift through the evidence and determine whether the defendant was truly placed in a position where smoking marihuana was the reasonable response to a potentially deadly threat.[190] This has always been a well accepted function of Massachusetts juries.[191]

In self-defense cases it is the jury's function to determine whether the defendant's use of force against an alleged aggressor was reasonable under the circumstances.[192] The comparison between the threat to the defendant and his response—which would ordinarily be an illegal use of force—is extremely similar to the necessity defense.[193] In

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to blur the distinction between duress and necessity. United States v. Bailey, 444 U.S. 394, 410 (1980).

185. *Hutchins*, 410 Mass. at 731, 575 N.E.2d at 744; *see supra* note 92 and accompanying text.

186. *Robinson*, 382 Mass. at 200, 415 N.E.2d at 813.

187. *See id.*, 415 N.E.2d at 812.

188. For the purposes of Hutchins' appeal, the court must accept Hutchins' offer of proof. *Hutchins*, 410 Mass. at 732, 575 N.E.2d at 745. The majority claims to do so. The majority must therefore accept Hutchins' evidence on the horrible symptoms of scleroderma and the disease's ability to cause death. *Id.* at 727-28, 575 N.E.2d at 742. For a description of the disease, see *supra* notes 51-62 and accompanying text.

189. *Hutchins* 410 Mass. at 729, 575 N.E.2d at 743.

190. *See id.* at 735, 575 N.E.2d at 746 (Liacos, C.J., dissenting).

191. *See* Commonwealth v. Moreira, 388 Mass. 596, 601, 447 N.E.2d 1224, 1228 (1983); Commonwealth v. Shaffer, 367 Mass. 508, 512-13, 326 N.E.2d 880, 883-84 (1975); Commonwealth v. Kendrick, 351 Mass. 203, 212-13, 218 N.E.2d 408, 414 (1966); Commonwealth v. Pimental, 5 Mass. App. Ct. 463, 465, 363 N.E.2d 1343, 1346 (1977).

192. Commonwealth v. Shaffer, 367 Mass. 508, 512-13, 326 N.E.2d 880, 883 (1975) ("To what extent one who is threatened may go in defending himself and whether he has availed himself of all proper means of escape ordinarily are questions of fact for the jury, to be decided in light of all the existing circumstances.").

193. LaFave and Scott note that:

> The defense of self-defense and defense of others are also related to the defense of necessity, justifying intentional infliction of bodily injury in cases where it is necessary to save the life of, or to prevent bodily injury to, the defendant or another. It has been said that self-defense and defense of others constitute a part of the law of necessity which has attained relatively fixed rules.

LAFAVE & SCOTT, *supra* note 13, at 383.

fact, the Supreme Judicial Court has stated that "[t]he right of self-defense arises from necessity, and ends when the necessity ends."[194] In such cases, the court requires an instruction on self-defense if there is "some evidence" which would allow a jury to find that the defendant acted in self-defense.[195] Now, in necessity cases, the defendant can introduce overwhelming evidence on every single element of the necessity defense and still be denied an instruction on it.[196] This distinction cannot be justified. In both instances the defendant is breaking the law to avoid grave personal harm. In actuality, a stronger case could be made for a *Hutchins*-type necessity case because no tangible injury occurs to any other member of society.[197] In a self-defense case someone else will almost always be dead or injured. If the court allows a jury to decide whether a battery or homicide was justified, it appears anomalous that the court cannot rely on a jury in the less serious matter of marihuana possession.[198]

Other recognized common law defenses are also inconsistent with the *Hutchins* formulation of the necessity defense. When a defendant uses force in response to a police officer's alleged use of excessive force, the court requires the jury to sort out the reasonableness of each party's actions.[199] The law allows a citizen to use reasonable force to apprehend a fleeing felon.[200] In all these other defenses, and in necessity cases prior to *Hutchins*, the issues of reasonableness and competing values are left to the jury.[201] The *Hutchins* decision alters this long established and pervasive distribution of jury and judge functions to the

194. *Shaffer*, 367 Mass. at 511, 326 N.E.2d at 883.

195. Commonwealth v. Houston, 332 Mass. 687, 690-91, 127 N.E.2d 294, 296 (1955).

196. *Hutchins*, 410 Mass. at 732, 575 N.E.2d at 745.

197. *Id.* at 734, 575 N.E.2d at 746 (Liacos, C.J., dissenting) (these "circumstances which risk no harm to any other individual").

198. *See id.* at 734 n.1, 575 N.E.2d at 746 n.1 (Liacos, C.J., dissenting).

199. Commonwealth v. Moreira, 388 Mass. 596, 602, 447 N.E.2d 1224, 1228 (1983). The court stated that:

> The questions whether the officer used excessive force and whether the arrestee used reasonable force to resist the excessive force are questions of fact to be resolved by the jury on proper instruction by the trial judge. Application of this rule will not require that the arrestee act in a manner commensurate with such action as would follow detached and reasoned reflection. Some recognition must be given to the frailty of human nature. The rule merely requires the finder of fact to determine whether the arrestee's conduct was reasonable in light of all the circumstances.

Id. (citations omitted).

200. Commonwealth v. Klein, 372 Mass. 823, 830, 363 N.E.2d 1313, 1318 (1977). Once the defendant has raised the issue by presenting supporting evidence, the Commonwealth has the burden of disproving the defense beyond a reasonable doubt. *Id.* at 831, 363 N.E.2d at 1319. Only when the defendant fails to present evidence on all the elements of the defense will the court deny an instruction. *Id.*

201. *See supra* notes 150-65, 183-200 and accompanying text.

prejudice of this diseased and sickly man.[202]

B. *Majority Improperly Applied the Competing Harms Defense*

1. The Majority Erred in Balancing the Harms

In balancing the harms to society and Hutchins, the majority took into account the ramifications of the court's decision as one of the harms to be considered.[203] This was the first time the court had ever taken such a broad view of the harm caused by the defendant's act.[204] While the court has support from a few commentators on broadly viewing the harm caused by the defendant,[205] the better view has been said to focus only on the harm actually resulting from the defendant's illegal act.[206] The latter view compares more favorably with the overall theory behind the necessity defense.[207] Because the majority excluded the defense based on the "possible negative impact of such a judicial declaration on the enforcement of our drug laws,"[208] it may be safe to

202. For a critique of the majority's position, see *Hutchins*, 410 Mass. at 733-36, 575 N.E.2d at 745-47 (Liacos, C.J., dissenting).

203. The court stated the test to be "whether the harm that would have resulted from compliance with the law significantly outweighs *the harm that reasonably could result from the court's acceptance of necessity as an excuse* in the circumstances presented by the particular case." *Id.* at 730, 575 N.E.2d at 744 (emphasis added).

204. In all previous necessity cases, and in the *Hutchins* Court's own general description of the defense, the court discussed whether the harm which would have resulted from compliance with the law exceeded "the harm *actually* resulting from the defendant's violation of the law." Commonwealth v. Hood, 389 Mass. at 590, 452 N.E.2d at 194 (quoting Commonwealth v. Brugmann, 13 Mass. App. Ct. at 376-77, 433 N.E.2d at 460) (emphasis added).

205. 2 ROBINSON, *supra* note 178, § 124(g)(1), at 61 (Tangible as well as intangible harms should be considered. "Thus, in a prison escape case the intangible harm created by the escape, such as general encouragement of other escapes, as well as the immediate harm caused by the escape should be considered."); *see also* MODEL PENAL CODE, *Commentary* § 3.02 cmt. 2 n.5 (Proposed Official Draft 1962) ("The harm sought to be prevented by the law defining the offense may be viewed broadly enough to permit judicial attention to the effects on law enforcement of allowing the defense in the particular circumstances involved. . . . It may well be, however, that such possible encouragement could be sufficiently deflected by a requirement that actors who escape to avoid assaults must turn themselves in at the earliest safe opportunity.") The court has made such a deflection in prison escape cases. *See supra* note 23 and accompanying text. Courts have also raised such screening requirements in marihuana related medical necessity cases. *See infra* note 239 and accompanying text.

206. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.4(d)(4), at 636 n.45 ("The proper view of course, is that the harm *actually* caused by the defendant should be balanced against that prevented."); *see also* Arnolds & Garland, *supra* note 12 (generally assuming throughout article that the actual harm caused by the actor be compared to the harm avoided).

207. *See supra* notes 8-12 and accompanying text.

208. *Hutchins*, 410 Mass. at 732, 575 N.E.2d 741, 745. Chief Justice Liacos disagreed with this conclusion by writing, "[i]n my view, this court's recognition of a medical necessity defense in the circumstances of this case would have a negligible

conclude that Hutchins could have presented the defense to a jury had the narrower view been retained.[209]

The *Hutchins* Court placed an exaggerated emphasis on the harm being done to the Commonwealth while devaluing the harm being avoided by Hutchins.[210] The *Commonwealth v. Nissenbaum*[211] decision is the only support the majority finds for the governmental interest.[212] That decision, however, was based on the "impossibility of [enforcing drug laws while] at the same time accommodating religious freedom."[213] With medical necessity cases, the concern that users will lie or give marihuana to other individuals is reduced by the strict requirements of the defense.[214] Only an individual who truly needs marihuana for a medical disorder, and who presents the proper evidence to qualify for the defense, would be able to claim necessity.[215] Therefore, reliance on *Nissenbaum* is misplaced. Without *Nissenbaum*, the majority is left without any factual or legal support for its conclusions.[216]

For the purposes of appeal, the majority must, and did, accept Hutchins' offer of proof.[217] Hutchins offered evidence that marihuana helped to relieve the symptoms of scleroderma,[218] a disease which can result in death.[219] Therefore, not only was Hutchins attempting to escape agonizing symptoms, his very life was at stake.[220] Despite this risk, the majority concluded that Hutchins' need to save his own life by cultivating and smoking marihuana did not clearly and significantly outweigh the harm to drug enforcement and the government's interest in regulating drugs.[221] The majority must have thought there were other

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impact on the enforcement of drug laws." *Id.* at 734 n.1, 575 N.E.2d at 746 n.1 (Liacos, C.J., dissenting).

209. The majority does not mention any direct harm which resulted or could result from Hutchins growing and smoking marihuana at home. *See generally id.* at 726-32, 575 N.E.2d at 742-45.

210. *Id.* at 734, 575 N.E.2d at 746 (Liacos, C.J., dissenting).

211. 404 Mass. 575, 536 N.E.2d 592 (1989). For a description of the *Nissenbaum* decision, *see supra* note 105 and accompanying text.

212. *Hutchins*, 410 Mass. at 732, 575 N.E.2d at 745.

213. *Nissenbaum*, 404 Mass. at 583, 536 N.E.2d at 596. The *Nissenbaum* Court was concerned that religious users of marihuana could give (or sell) the drugs to other adults or children and claim such distribution was made with the intent on converting others to their faith. *Id.* at 577, 536 N.E.2d at 593.

214. *Hutchins*, 410 Mass. at 734, 575 N.E.2d 741, 746 (Liacos, C.J., dissenting).

215. *Id.* (Liacos, C.J., dissenting).

216. *See id.* at 732, 575 N.E.2d at 745.

217. *Id.*

218. *Id.* at 726-30, 575 N.E.2d at 742-43. For a description of the symptoms of scleroderma, see *supra* notes 52-56 and accompanying text.

219. *Hutchins*, 410 Mass. at 727-28, 575 N.E.2d at 742 ("scleroderma may result in death").

220. *Id.* The dissent found Hutchins' interest in using marihuana to alleviate the specific scleroderma symptoms to be adequate. *Id.* at 734, 575 N.E.2d at 746 (Liacos, C.J., dissenting).

221. *Hutchins*, 410 Mass. at 732, 575 N.E.2d at 745.

options available to Hutchins which could have equally alleviated the agonizing symptoms and risk of death.[222] Otherwise, by taking over the balancing function, and unfavorably weighing the harms, the court essentially says to Hutchins, "we feel it is better that you risk death than grow and smoke marihuana to save your life."[223] This conclusion, besides violating the court's own "recognition [of] the value of human life,"[224] denied Hutchins an opportunity to have the defense of necessity applied fairly and accurately.[225]

2. Majority Inconsistent in Viewing Legislative Intent

The majority, in rejecting Hutchins necessity defense, claimed that the court would be violating an overriding legislative policy decision by allowing an illicit drug user to raise the defense of necessity.[226] This analysis is in error in at least three respects. First of all, criminal statutes, like the one forbidding the possession of marihuana, "are not to be construed as taking away a common law right, unless the intention is manifest."[227] Because the legislature did not explicitly (or even implicitly) deny a drug defendant the right to raise the defense of necessity, that common law right should have been found.[228] Second, legislative silence on the values at issue is already part of the four requirements of the necessity defense.[229] Therefore, once Hutchins presented credible evidence that the legislature had not already precluded the defense, he met his entire burden of production on the issue of legislative preclusion.[230]

Also weakening the majority's position is the fact that the court has previously found necessity exceptions to laws which were intentionally

222. The court stated it could not excuse "one who cultivates and uses marihuana in the circumstances of this case." *Id.*

223. *See id.* at 732, 575 N.E.2d at 745.

224. Commonwealth v. Shaffer, 367 Mass. 508, 511, 326 N.E.2d 880, 883 (1975).

225. For the view of a court that came to the opposite conclusion, see United States v. Randall, 104 Daily Wash. L. Rep. 2249, 2252-53 (D.C. Super. Ct. Nov. 24, 1976). For a discussion of the *Randall* case, see *supra* notes 35-48 and accompanying text.

226. *Hutchins*, 410 Mass. at 732, 575 N.E.2d at 745.

227. Melody v. Reab, 4 Mass. 471, 473 (1808) (cited with approval in Wood v. Commissioner of Correction, 363 Mass. 79, 81, 292 N.E.2d 712, 714 (1973)).

228. *See* MASS. GEN. L. ch. 94C, § 34 (1990).

229. *Hood*, 389 Mass. at 591, 452 N.E.2d at 195 (quoting Commonwealth v. Brugmann, 13 Mass. App. Ct. 373, 379, 433 N.E.2d 457, 461 (1982) ("the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue").

230. Hutchins introduced evidence that the "Massachusetts Legislature has considered a bill providing for the use of marihuana in therapeutic research on more than one occasion, but no such statute has been enacted in the Commonwealth." *Hutchins*, 410 Mass. at 729, 575 N.E.2d at 743. Chief Justice Liacos found this evidence to be sufficient on the issue of non-preclusion. *Id.* at 735, 575 N.E.2d at 746 (Liacos, C.J., dissenting).

harsh and inflexible.[231] In firearm possession cases,[232] the court has allowed defendants to claim the defense of necessity even though "[t]he history of Massachusetts gun control legislation in this century show[s] an unwavering legislative intent that one may carry a firearm only if he has a license or qualifies for a specific statutory authorization."[233] Based on the two crimes' punishments, an argument could easily be made that the legislature intended firearm possession cases be treated more strictly than those involving marihuana possession.[234]

It is somewhat perplexing for the court to recognize justifications for carrying a firearm in public but not for growing and possessing marihuana in private.[235] Surely the court feared it might cross the boundaries of what Massachusetts citizens would find acceptable considering the political climate surrounding this country's "War on Drugs."[236] The court probably feared being viewed as a promotor of marihuana in today's "just say no" America.[237] This attitude ignores the fact that it would be a jury which would make the ultimate decision on Hutchins'

231. *See* Commonwealth v. Iglesia, 403 Mass. 132, 525 N.E.2d 1332 (1988) (recognizing defense of necessity for illegal possession of firearm); Commonwealth v. Thurber, 383 Mass. 328, 418 N.E.2d 1253 (1981) (recognizing necessity defense in cases of prison escapes).

232. MASS. GEN. L. ch. 269, § 10(a) (1990) mandates a one-year prison sentence for any individual found in possession of an unauthorized firearm in public.

233. Commonwealth v. Lindsey, 396 Mass. 840, 842, 489 N.E.2d 666, 667 (1986). In creating a viable exception to this harsh law, the court simply stated, "[w]e shall assume, without deciding, that because of reasonable statutory implication, or because of constitutional or common law principles, unlicensed temporary possession of a firearm in a public place might be lawful in spite of G. L. c. 269, sec. 10 (a), in certain necessitous circumstances." *Id.* at 845, 489 N.E.2d at 669 (citations omitted).

234. A first time offender of the firearm statute must serve a mandatory one year jail sentence. MASS. GEN. L. ch. 269, § 10(a) (1990). Contrast this with the punishment for a first time violation of the law against possessing marihuana: imprisonment for not more than six months or a five hundred dollar fine, or both. MASS. GEN. L. ch. 94C, § 34 (1990).

235. In a possible reaction to the *Hutchins* case, the Massachusetts Legislature passed a law on December 31, 1991, allowing marihuana to be given to "patient[s] . . . threatened by loss of life or sight, or asthmatics who experience severe respiratory problems or discomfort." MASS. GEN L. ch. 94D, § 2 (Supp. 1992). Considering the legislature had rejected a similar bill in five of the past six years, it might be safe to conclude that the law finally passed because of the unfairness of the *Hutchins* decision. *See* Commonwealth's Brief, *supra* note 74, at 24.

236. Yet "[t]he case for recognizing the . . . necessity defense[] is even more compelling when it is society, rather than private actors, that creates the coercive conditions. In such a situation it is especially appropriate that the jury be permitted to weigh all factors and strike the balance between the interests . . . ." United States v. Bailey, 444 U.S. 394, 435-36 (1980) (Blackmun, J., dissenting).

237. To Chief Justice Liacos, "[t]he court seems to suggest that we should not condone the use of marihuana, regardless of a particular individual's reasons for using the drug." *Hutchins*, 410 Mass. at 733, 575 N.E.2d at 745 (Liacos, C.J., dissenting).

use of the drug. Such use is not lacking active support.[238] To further alleviate the majority's apprehension are the numerous methods of limiting the application of the medical necessity defense to those who truly deserve it.[239] This technique has been repeatedly utilized by the Supreme Judicial Court to restrict criminal defenses.[240] But even these

238. There have been a number of recent publications which support some form of legalized drug use. *See generally* THE CRISIS IN DRUG PROHIBITION (David Boaz ed., 1990); THE DRUG LEGALIZATION DEBATE (James A. Inciardi ed., 1991); RICHARD L. MILLER, THE CASE FOR LEGALIZING DRUGS (1991); MARIJUANA, MEDICINE & THE LAW (R.C. Randall ed., 1989); STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY (1990).

239. The dissent stated that requiring the defendant to introduce evidence on each of the four elements would sufficiently weed out false claims. *Hutchins*, 410 Mass. at 734, 575 N.E.2d at 746 (Liacos, C.J., dissenting). See *supra* notes 107-113 and accompanying text for the type of evidence which would be required to garner a necessity instruction. It is a burden which the overwhelming majority of drug users could not even begin to meet.

The dissent also places confidence in the jury to distinguish between legitimate and illegitimate medical necessity claims. *Hutchins*, 410 Mass. at 734 n.1, 575 N.E.2d at 746 n.1 (Liacos, C.J., dissenting).

The dissent in State v. Tate, 505 A.2d 941 (N.J. 1986), suggested a seven part standard which would effectively limit the scope of the defense to those who truly qualify:

> (1) the defendant must be suffering from a condition that involves insufferable pain, or an immediate, actual, or substantial threat to his life, health, vital senses, or basic physical or mental wellbeing;
> (2) the suffering experienced by the defendant from the harmful condition necessitates resort to unlawful conduct involving the prohibited controlled dangerous substance[;] . . . .
> (3) there must be an absence of any other lawful treatment . . . that could similarly relieve the harmful condition[;] . . . .
> (4) [defendant must make] a good-faith effort to relieve the harmful condition through normally-accepted medical treatment;
> (5) competent expert medical evidence must be submitted demonstrating [three specific requirements;] . . . .
> (6) [need for the illegal drug must not be defendant's fault; and]
> (7) it must appear that from a social standpoint, under the circumstances, the criminal punishment of the defendant for the unlawful conduct is less important than allowing the defendant to obtain relief from the harmful condition.

Id. at 955 (Handler, J., dissenting). The court could always fashion other limiting requirements such as denying the defense to a defendant who has sold the drug or who has allowed others to use it.

240. In a prison break necessity case, besides establishing the equivalent of the *Hood* requirements, the defendant must introduce evidence that the escape was peaceable and that the escapee immediately reported to the proper authorities. Commonwealth v. Thurber, 383 Mass. 328, 332, 418 N.E.2d 1253, 1256 (1981). In a self-defense case, the defendant must exhaust all avenues of safe escape before being privileged to use force on the attacker. Commonwealth v. Shaffer, 367 Mass. 508, 511, 326 N.E.2d 880, 883 (1975). Furthermore, the defendant must use only that force which is reasonably necessary to prevent the attack. *Id.* at 513, 326 N.E.2d at 884.

type of requirements are not applied retroactively against defendants.[241] Doing so might violate the due process clause of the United States Constitution.[242]

If the *Hutchins* court wanted to make a rule change requiring the court to first weigh the competing harms, it should have done so prospectively to protect Hutchins' rights.[243] By applying the new threshold requirement retroactively, the *Hutchins* court violated one of its own precepts in applying the common law.[244] The court's best option was to leave the competing harms determination to the community, in the form of a jury, to decide *in this instance*, whether the use of marihuana was the better choice for this defendant.[245]

IV. CONCLUSION

The Supreme Judicial Court has recognized the defense of necessity repeatedly. It even established a list of four elements which must be met before the jury can receive an instruction on the defense. The court has said that once these requirements are met, it is for the jury to decide if the defendant's actions were justified. The court, however, faced with the controversial subject of illicit drugs, completely changed its application of the necessity defense. Suddenly the court decided

241. When the Commonwealth abolished a person's right to resist unlawful arrest except in cases of excessive force, the court refused to apply the new rule to the defendant. Commonwealth v. Moreira, 388 Mass. 596, 601, 447 N.E.2d 1224, 1227-28 (1983). When the Commonwealth altered a citizen's right to use deadly force against a fleeing felon by adding various requirements, it refused to apply the law in the case before the court. Commonwealth v. Klein, 372 Mass. 823, 833, 363 N.E.2d 1313, 1320 (1977).

242. *Klein*, 372 Mass. at 833, 363 N.E.2d at 1320 (citing Marks v. United States, 430 U.S. 188 (1977); Lanzetta v. New Jersey, 306 U.S. 451 (1939)).

243. The court would in essence adopt the New York statutory necessity defense into the Massachusetts common law. For the language of this statute *see supra* note 181 and accompanying text.

244. The Supreme Judicial Court has said that " '[t]he rules and principles of the common law . . . are broad and expansive enough to embrace all new cases as they arise.' " Commonwealth v. Golston, 366 N.E.2d 744, 749, 373 Mass. 249, 254 (1977) (quoting Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 322 (1850)). The key to an alteration of the law is that it be an " 'evolutionary restatement' of the rule rather than a substantively new rule." *Id.* In cases of substantive changes in the law, the court does not retroactively apply the law to the defendant. *See* Commonwealth v. Cass, 392 Mass. 799, 804, 467 N.E.2d 1324, 1327 (1984) ("[W]e note that when we clarify an evolving or unsettled area of the law, we can make our decisions prospective in order to ensure fairness to the defendant."); *see also* Commonwealth v. Lewis, 381 Mass. 411, 418, 409 N.E.2d 771, 775 (1980); Commonwealth v. Klein, 372 Mass. 823, 833, 363 N.E.2d 1313, 1320 (1977).

245. "[W]here disagreement exists in a society about a moral issue or the extent to which a value is absolute (admitting no exception) or relative, there seems to be little reason why a defendant should not be allowed in the first instance to have the jury as the 'conscience of the community' and his peers decide whether he made an objectively correct choice of values." Arnolds & Garland, *supra* note 12, at 296.

whether the harm to the defendant clearly outweighed the harm to the Commonwealth. This sudden swerve in jurisprudence is unjustifiable. Yes, this country has a horrible drug problem. But in fighting this scourge let us not lose sight of other important humane considerations.

*Todd H. Whilton**

* To Annemarie whose undying support and selflessness made this all possible.

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.

I. INTRODUCTION

James Madison stated in *The Federalist*:

> The legislative department derives a superiority in our government from other circumstances. Its constitutional powers being at once more extrusive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real-nicety in legislative bodies, whether the operation of a particular measure, will or will not extend beyond the legislative sphere.[1]

The Constitution of the United States provides the basic outline for how our federal government is to operate. The Constitution defines three branches of government, and "vests" specific powers in each of these branches.[2] This division of power was to prevent one branch from becoming too powerful.[3]

The Supreme Court, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,[4] held that the creation of a Board of Review violated the separation of powers doctrine. Congress, in creating the Board of Review in the Metropolitan Washington Airports Act of 1986,[5] (Transfer Act) attempted to "mask" their encroachment by stating the members of Congress were to sit on the Board "in their individual capacities."[6]

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1. THE FEDERALIST No. 48, at 334 (James Madison) (Jacob Cooke ed., 1961).

2. U.S. CONST. art. I, § 1 ("All Legislative Powers herein granted shall be vested in a Congress of the United States . . . . "); U.S. CONST. art. II, § 1, cl. 1 ("The Executive Power shall be vested in a President of the United States of America"); U.S. CONST. art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

3. THE FEDERALIST No. 47, at 324 (James Madison) (Jacob Cooke ed., 1961). "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." *Id.*

4. 111 S. Ct. 2298 (1991).

5. Pub. L. No. 99-591, 100 Stat. 3341 (1986) (codified as 49 U.S.C. app. §§ 2451-2461 (1988)).

6. *See infra* notes 41-46 and accompanying text.

This decision illustrates an extension of the separation of powers doctrine. In the past, the doctrine was limited to conflicts between branches of the federal government.[7] However, the Supreme Court in *Metropolitan Washington*, for the first time, used the separation of powers doctrine to strike down an entity created by state law.[8] In *Metropolitan Washington*, the Court employed the separation of powers doctrine since the "entity necessarily exercises sufficient federal power as an agent of Congress to mandate separation-of-powers scrutiny."[9]

Section II of this Comment will discuss the Transfer Act, the creation of the Board of Review, and the actions of the Board of Review.[10] Section III will discuss the two different application of the separation of powers doctrine, and cases which have demonstrated the use of each analysis.[11] Section IV will discuss the historical procedure of the present case.[12] Section V will discuss the majority and dissenting opinions of the Supreme Court.[13] Lastly, Section VI will analyze the majority and dissent, and discuss the impact of this decision on the separation of powers doctrine.[14]

II. FACTS

In June of 1984, Secretary of Transportation Elizabeth Dole created an Advisory Committee to develop a proposal for transferring Washington National Airport and Dulles International Airport from federal control to state or local control.[15] The airports were under the control of the Federal Aviation Administration (FAA), a component of the Department of Transportation.[16] The Commission was to decide not whether to transfer the airports, but how to transfer the airports.[17]

The idea of transferring the airports to local control had been discussed for many decades.[18] Due to financial conditions, the federal

7. 111 S. Ct. at 2313 (White, J., dissenting).
8. *Id.* (White, J., dissenting).
9. *Id.* at 2308.
10. *See infra* notes 15-62 and accompanying text.
11. *See infra* notes 63-217 and accompanying text.
12. *See infra* notes 218-59 and accompanying text.
13. *See infra* notes 260-347 and accompanying text.
14. *See infra* notes 348-401 and accompanying text.
15. Joint Appendix at 12, Plaintiff's Exhibit no. 2, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298 (1991) (No. 90-906).
16. Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Auth., 718 F. Supp. 974, 976 (D.C. Cir. 1989).
17. Joint Appendix at 12, *Metropolitan Washington* (No. 90-906).
18. *Id.* The government has operated Washington National Airport since it opened in 1941. *Id.* As far back as 1949, with the Hoover Commission, there has been discussion as to the inappropriateness of the federal government operating the airport. *Id.* The government has operated Dulles International since it opened in 1962. *Citizens*, 718 F. Supp. at 975-76.

government decided Congressional action was needed to create capital to maintain the operation and maintenance of the airports.[19] Realizing the transfer of the airports was "essentially a political issue,"[20] Secretary Dole knew that in order to muster support for this venture, the transfer had to address the best interests of the public, the users of the airport, and Congress, who would authorize the transfer.[21]

The Advisory Committee, in its report to Secretary Dole, recommended that the airports should be leased by the government to a regional authority created by Virginia and Washington, D.C.[22] The governing board of this authority was to be composed of 11 members appointed by the Governors of Virginia and Maryland, and the Mayor of Washington, D.C., with one member being appointed by the President.[23] This original recommendation by the Commission provided no mechanism for federal oversight of the regional authority.[24] There was opposition to the transfer in the House of Representatives, where members wished to retain federal control over the airports.[25] The House, in drafting its proposal for transferring the control of the airports, attempted to retain federal control over the authority through the implementation of a Board of Review.[26] The House Subcommittee on Aviation sent three versions of the proposed legislation[27] to the Department of Justice for an advisory opinion as to the legislation's

19. Brief of Respondents at 5, *Metropolitan Washington* (No. 90-906). The brief stated although the airports were projected to make an annual profit of 21-24 million dollars between 1987-91, "inclusion of the airports in the unified Federal budget has generally stymied most efforts to improve or expand facilities at either airport to keep pace with the growing commercial and air travel needs of the Washington area." *Id.* (quoting S. Rep. No. 193, 99th Cong., 1st Sess. 2 (1985)).

20. Joint Appendix at 13, *Metropolitan Washington* (No. 90-906).

21. *Id.*

22. *Id.* at 16.

> The Commission, in its conclusion "recommends . . . legislation authorizing the transfer of the Metropolitan Washington Airports (Washington National and Dulles) to an independent authority to be established by interstate compact between the Commonwealth of Virginia and the District of Columbia. The transfer should be made only if the two jurisdictions enact legislation establishing such an authority . . . ."

Id. at 19.

23. *Id.* at 6.

24. Brief of Respondents at 5, *Metropolitan Washington* (No. 90-906).

25. Brief in Response to Petition for a Writ of Certiorari at 5, *Metropolitan Washington* (No. 90-906). Representative Sundquist stated, "Local residents opposed to nearby noise have, for years, attempted to close National Airport . . . . If we transfer this airport to local control, what assurance do we have that local residents will now, all of a sudden, start supporting these improvements at National?" *Id.* (quoting 99th Cong., 2d Sess. 22 (1986)).

26. Brief in Response to Petition for a Writ of Certiorari at 5, *Metropolitan Washington* (No. 90-906).

27. H.R. 5040, 99th Cong., 2d Sess. (1986).

constitutionality.[28]

All three proposals for this Board of Review required the Board to be composed of members of Congress.[29] Assistant Attorney General John R. Bolton's advisory opinion stated that two of the proposals presented serious constitutional problems.[30] The first proposal, which would have explicitly stated in the legislation that the Board was to be appointed by congressional leadership, was clearly unconstitutional and the Department of Justice strongly opposed the legislation.[31] Bolton stated that a "colorable argument" could be made for the second proposal,[32] which would have required the District of Columbia and Virginia to establish the Board under state law, rather than the federal government establishing it under the legislation.[33] The establishment of the Board by Virginia and the District of Columbia would be a prerequisite to the actual transfer of control.[34] Bolton, though, advised against the proposal because: 1) the Board would be considered an "agent of Congress,"[35] and 2) the Board would consist of members of Congress, sitting in their official capacity and were to be appointed and removed by congressional leadership.[36]

As to the third proposal, Bolton suggested that Congress "mask" their true intention to retain control over the airports.[37] Bolton stated it may be constitutional to require the states to enact legislation requiring the Board members to be representatives of users of the airports.[38]

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28. Joint Appendix at 26, *Metropolitan Washington* (No. 90-906).

29. *Id.* The proposed Board of Review was to:

> consist[] of members of the House and Senate, which would have the authority to disprove certain decisions made by the Airport Authority, including the adoption of an annual budget, the issuance of bonds, the adoption, amendment or repeal of a regulation, the adoption of development plans and plans for land acquisition, and the appointment of General Manager.

Id.

30. *Id.*

31. *Id.* The Department of Justice held this would be a violation of INS v. Chadha, 462 U.S. 919 (1983). For a discussion of *Chadha*, see *infra* notes 91-109 and accompanying text. The Advisory Opinion stated, "Congress cannot directly vest the Federal Board to veto decisions made by the Airport Authority any more than it can authorize one House, one committee, or one officer to overturn the Attorney General's decision to allow a deportable alien to remain in the United States." Joint Appendix at 26, *Metropolitan Washington* (No. 90-906).

32. *Id.* at 30.

33. *Id.* at 19.

34. *Id.*

35. *Id.* at 32 n.16. The Board would be "acting on Congress's behalf and bequest." *Id.*

36. *Id.*

37. *Id.* at 32. "If it were not as clear that this proposed alternative is intended to give Congress, *qua* Congress, continued direct control over operation of the airports, the argument in favor of its constitutionality would be strengthened." *Id.*

38. *Id.*

These "representatives" could be members of Congress sitting in their individual capacity.[39] However, it would be necessary for the legislation to disassociate the Board of Review from Congress.[40] By clearly indicating the Board's independence, through stating that the members are in their individual capacities, the legislation should withstand a constitutional challenge.[41] However, to fully "mask" their true intention of retaining control, Bolton stated, "[w]e assume that this understanding will be discussed in some detail in the legislative history of the bill."[42]

The House and Senate both added this third proposal for the Board of Review to their legislation.[43] Although Congress took the advice of the Department of Justice in using the term "individual capacity" in writing the actual legislation,[44] numerous members of Congress failed to follow their advice during the floor debate.[45] Various members forgot to "mask" their comments during the debate on the legislation, and stressed not that the members were to sit in individual capacities, but spoke of the usefulness of the Board of Review as a method of retaining control over the airports.[46]

Eventually, the Transfer Act was signed into law.[47] As enacted, the Act required the Board of Directors to establish a nine member Board of Review as a condition of the transfer of authority.[48] Additionally, the Act requires the Board of Review to have veto power over virtually all of the Director's decisions.[49] On March 2, 1987, the Secretary of

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39. *Id.*

40. *Id.* at 32-33. The best way to effectuate this "disassociation" would be to stress in the language of the bill that the members were to be sitting in their individual capacities and place the appointment and removal authority in a body other than Congress. *Id.*

41. *Id.* at 34.

42. *Id.*

43. Brief of Respondents at 10-12, *Metropolitan Washington* (No. 90-906).

44. *See* 49 U.S.C. app. § 2456(f)(1) (1988).

45. Brief of Respondents at 10, *Metropolitan Washington* (No. 90-906).

46. *Id.* at 9. One of the most candid remarks came from Representative Smith, who stated, "[u]nder this plan, Congress retains enough control of the airports to deal with any unseen pitfalls resulting from this transfer of authority . . . . We are getting our cake and eating it too . . . . The beauty of the deal is that Congress retains control without spending a dime." *Id.* (quoting 132 CONG. REC. H11,100 (daily ed. Oct. 15, 1986)). For similar statements, see 132 CONG. REC. H11,098-104 (daily ed. Oct. 15, 1986).

47. Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, 100 Stat. 3341 (1986) (codified as 49 U.S.C. app. §§ 2451-2461 (1988)).

48. 49 U.S.C. § 2456(f)(1) (1988). "The Board of Review shall be established by the Board of Directors and shall consist of the following, in their individual capacities, as representatives of users of the Metropolitan Washington Airports." *Id.* Sections 2456(f)(1)(A),(B) and (C) state the committee affiliations of the members and the fact that the Directors shall select the members from a list provided by the Speaker of the House and the President pro tempore of the Senate, respectively.

49. 49 U.S.C. app. § 2456(f)(4)(B) (1988). Under this section, the adoption of an annual budget, issuance of bonds, adoption of regulations, acquisition of land,

Transportation and the Airports Authority entered into a lease which required the Airports Authority to establish this Board of Review,[50] and two days later, the Airport authority adopted in its by-laws the Board of Review's provisions.[51]

On March 16, 1988, the Board of Directors approved a Master Plan for renovation of Washington National Airport.[52] Under the Transfer Act, the Directors were required to submit the plan to the Board of Review for approval.[53] On April 13, 1988, the Board of Directors met to discuss the Master Plan, and the details of the renovations were discussed by the Directors and James A. Wilding, General Manager of the Authority.[54]

The Master Plan was eventually approved by the Board of Review on August 9, 1988.[55] On November 16, 1988, the Citizens for the Abatement of Aircraft Noise, Inc. (CAAN),[56] John W. Hechinger, Sr., and Craig H. Baab, filed suit against the Metropolitan Washington Airports Authority.[57] Hechinger, a member and honorary co-chairman of CAAN, and Baab, both reside under the flight path to Washington National.[58] CAAN sought to improve health, safety and environmental conditions at National Airport.[59] CAAN commented on the Master Plan, objecting to the use of wide bodied aircraft at National, the lack of environmental impact analysis, the failure to decrease noise levels from the airport, and the overall expansion of Washington National.[60]

In their complaint, the Plaintiff's contended that the Board of Review's veto power violated the bicameralism requirement, the Present-

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revision of the master plan, and appointment of the chief executive officer are all subject to the Board of Review's veto. *Id.*

50. Brief of Respondents at 11, *Metropolitan Washington* (No. 90-906).

51. *Id.*

52. Joint Appendix at 43, *Metropolitan Washington* (No. 90-906). Plans for the renovation of Washington National Airport began in 1982, before the Airports Authority gained control of the Airports. *Id.* The Master Plan consisted of a land use plan, an airport layout plan, and a terminal area site plan, all of which had been presented to the public for their input. *Id.*

53. 49 U.S.C. app. § 2456(f)(4)(A) (1988).

54. Joint Appendix at 44-49, *Metropolitan Washington* (No. 90-906).

55. *Id.* at 49.

56. "CAAN" is a non-profit organization composed of individuals and citizen's groups from Maryland, Virginia, and Washington, D.C. Joint Appendix at 4, *Metropolitan Washington* (No. 90-906).

57. *Id.*

58. *Id.*

59. *Id.* "Its primary purpose is to develop and implement a rational transportation policy for the Metropolitan Washington D.C. area, which would include balanced service of the area's three airports, reduce aircraft operations at Washington National Airport, and alleviate the noise, safety problems, and air pollution that results from such operation." *Id.*

60. *Id.* at 6.

ment Clause, and the separation of powers doctrine.[61] The plaintiffs charged that since the Board of Review was unconstitutional, the Airports Authority had no power to act under section 2456(h) of the Transfer Act.[62]

III. Analysis of Past Separation of Powers Decisions

A. *Introduction*

Section III will compare and contrast the two different approaches employed by the courts in evaluating the doctrine of separation of powers. Subsection B will briefly outline the formalist approach to separation of powers, with examples of the Supreme Court employing this approach following.[63] Subsection C will briefly outline the alternative, that of the functionalist approach, with examples of the Supreme Court employing this approach also following.[64]

B. *Formalist Approach*

The formalist approach takes the view that the Constitution of the United States divides national power into three separate spheres: the legislative, executive, and judicial branches.[65] The Constitution's three "vesting" clauses[66] act as a line of demarcation between the branches.[67] Each branch has its own distinct and separate functions as set forth by the Constitution. To be Constitutional under formalist analysis, the power being exercised must fit into the formal category delegated to that branch by the Constitution.[68] In separation of powers analysis, the question asked by the formalist is whether one branch

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61. *Id.* at 7.

62. *Id.* at 6-7. 49 U.S.C. app. § 2456(h) (1988) states, "[i]f the Board of Review . . . is unable to carry out its functions under this subchapter by reason of judicial order, the Airports Authority shall have no authority to perform any of the actions that are required . . . to be submitted to the Board of Review."

63. *See infra* notes 65-123 and accompanying text.

64. *See infra* note 124-217 and accompanying text.

65. M. David Gelford & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents From Justices O'Connor and Scalia,* 64 Tul. L. Rev. 1443, 1464 (1990).

66. U.S. Const. art. I, § 1 ("All Legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); U.S. Const. art. II, § 1, cl. 1 ("The Executive Power shall be vested in a President of the United States of America."); U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

67. Gary Lawson, *Territorial Governments and the Limits of Formalism,* 78 Cal. L. Rev. 853, 858 (1990).

68. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?,* 72 Cornell L. Rev. 488, 489 (1987). Professor Strauss states the "formalistic approach to separation-of-powers issues [is] grounded in the perceived necessity of maintaining three distinct branches of gov-

has wrongly seized the Constitutionally allocated power of another branch.[69]

The formalists, however, recognize that the Constitution does permit, in certain situations, a "blending" of power between the branches.[70] There are certain government activities that are associated with more than one branch of government.[71] These constitutionally sanctioned shared powers do not violate the doctrine of separation of powers.[72] However, the only acceptable sharing or overlap is that which is expressly authorized in the Constitution.[73] Thus, the inquiry is whether the power being exercised by the branch is one stated in the vesting clause or that of a constitutionally acceptable overlap.[74] This approach does not allow for flexibility; conversely, it is very rule-like.[75] It holds that all powers designated to a certain branch must be exercised only by that branch.[76]

1. *Myers v. United States*

In *Myers v. United States*,[77] the Court addressed the issue of whether the President has the constitutional power to exclusively remove execu-

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ernment (and consequently appearing to draw rather sharp boundaries)." *Id.* at 489.

69. Gelford & Werhan, *supra* note 65, at 1464; *see, e.g.*, Bowsher v. Synar, 478 U.S. 714, 733-34 (1986).

70. Lawson, *supra* note 67, at 858.

71. *See* U.S. CONST. art. I, § 3, cl. 6. This clause gives the Senate the power to try impeachments, although this is normally considered a judicial function. Lawson, *supra* note 67, at 858 n.19.

72. Lawson, *supra* note 67, at 858 n.19. Lawson emphasizes that the formalist view does not require a "pure" division among the branches, but rather a recognition of the "impure" separation structure of the Constitution. *Id.* Lawson uses Article I, section 3, clause 6 as an example of this sharing of power. The Senate has the power to try impeachments, which appears to be an exercise of judicial power by the legislative branch. *Id. See* Arnold I. Burns & Stephen J. Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575, 578-85 (1987) (discussing the formalist view of separation of powers and powers that are not clarified in the text of the Constitution).

73. Lawson, *supra* note 67, at 859.

74. *Id.* at 858.

75. Keith Werhan, *Toward an Eclectic Approach to Separation of Powers:* Morrison v. Olson *Examined*, 16 HASTINGS CONST. L.Q. 393, 403 (1989). "Formalists" advocate decision making by rules. *Id. See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988):

> At the heart of the word 'formalism,' in many of its numerous uses, lies the concept of decision making according to rule. Formalism is the way in which rules achieve their 'ruleness' precisely by doing what is supposed to be the failing of formalism: screening off decision making factors that a sensitive decisionmaker would otherwise take into account.

76. Mary Buffington, Comment, *Separation of Powers and the Independent Governmental Entity After* Mistretta v. United States, 50 LA. L. REV. 117, 123 (1989).

77. 272 U.S. 52 (1926).

tive officers which he has appointed.[78] In 1917, Myers was appointed for a four year term as a postmaster first class.[79] However, before he completed his term, he was removed by the Post Master General at the direction of the President.[80] Although Myers was appointed with the advice and consent of the Senate, the Senate did not consent to Myers' removal prior to the completion of his term,[81] which was required by the Act of July 12, 1876.[82]

In *Myers*, the Court used a formalist analysis to strike down the provision of the Act which required Congressional approval of the President's removal of a postal service employee.[83] The Court reasoned that "as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible."[84] In requiring Congressional approval for the removal of an executive officer, the Court reasoned the act interfered with the "unrestricted power" of the President.[85]

Under formal analysis, one branch may not intrude into the constitutionally defined powers of another branch, unless there are explicit exceptions set forth in the Constitution.[86] In *Myers*, Congress was attempting to participate in executive branch functions that were not specifically provided to the legislature in the Constitution.[87] The Legislative power to remove through impeachment is specifically stated in the text,[88] and is an example of the legislature wielding executive power. However, the power to remove an officer of the executive branch is not provided to the legislature in either the "vesting clause"[89] or the specific overlap areas, and thus was unconstitutional under the formal analysis.[90]

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78. *Id.* at 106.
79. *Id.*
80. *Id.*
81. *Id.* at 107.
82. Act of July 12, 1876, ch. 179, 19 Stat. 79, 80. The Act states, "[p]ostmasters of the first, second and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law." *Id.*
83. *Myers*, 272 U.S. at 176.
84. *Id.* at 117.
85. *Id.* at 134. The Court reasoned that the removal power was provided to the President under Article II, section 3, since he "shall take care that the laws be faithfully executed." *Id.* at 133-35 (quoting U.S. CONST. art. II, § 3). Without the power to remove an officer "he does not discharge his own constitutional duty of seeing that the laws be faithfully executed." *Id.* at 135.
86. *See supra* notes 72-73 and accompanying text.
87. *Meyers*, 272 U.S. at 107.
88. U.S. CONST. art. 1, § 3, cl. 6 states the Senate alone has the power to try impeachments. *See supra* note 72.
89. *See supra* note 2 and accompanying text.
90. *Meyers*, 272 U.S. at 161. The Court stated that to allow Congress to "draw

2. *Immigration and Naturalization Service v. Chadha*

In *INS v. Chadha*,[91] the Court considered the constitutionality of a provision of the Immigration and Nationality Act[92] which authorized a single House of Congress to veto an executive branch decision ("legislative veto")[93] allowing a deportable alien to remain in the United States.[94] Chadha, who held a non immigrant student visa which had expired,[95] admitted that he was deportable, and filed for a suspension of his deportation under section 244(a)(1) of the Act.[96] The Immigration Judge found that Chadha met the criteria,[97] and suspended his deportation.[98] As required by the Act,[99] the Immigration judge sent a report of the suspension to Congress.[100] Congress then had the option, under the Act,[101] to veto the Attorney General's decision not to deport Chadha.[102] The House vetoed the decision of the Attorney General, and Chadha challenged the constitutionality of the veto.[103]

Using the formalist analysis, the Court held the legislative veto unconstitutional since it, in effect, permitted Congress to take legislative

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to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers." *Id.*

91. 462 U.S. 919 (1983).

92. Immigration and Nationality Act, ch. 477, § 244, 66 Stat. 163, 216, (1952) (codified as amended at 8 U.S.C. § 1254(c)(2) (1988)).

93. *See* Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 723 (1990). ("The legislative veto is a generic term that describes a statutory provision allowing Congress, by a vote of one house, both houses, or sometimes a committee, to prevent a particular action [from being] taken by the President or an executive agency or independent regulatory commission from going into effect."); *see also* BARBARA H. CRAIG, THE LEGISLATIVE VETO 1-4 (1983).

94. *Chadha*, 462 U.S. at 923.

95. *Id.*

96. *Id.* 8 U.S.C. § 1254(a)(1)(ii) allows the Attorney General the discretion to suspend the deportation of a lawfully admitted alien and sets forth the criteria used by the Immigration Judge in determining whether to suspend the deportation.

97. *Chadha*, 462 U.S. at 924. "[H]e had resided continuously in the United States for over seven years, was of good moral character, and would suffer 'extreme hardship' if deported." *Id.*

98. *Id.*

99. 8 U.S.C. § 1254(c)(1) (1988). "If the deportation of any alien is suspended . . . a complete and detailed statement of the facts and pertinent provisions of the [law] in the case shall be reported to the Congress with the reasons for such suspension." *Id.*

100. *Chadha*, 462 U.S. at 924.

101. 8 U.S.C. § 1254(c)(2) (1988). "[If] either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation, the Attorney General shall thereupon deport such alien." *Id.*

102. *Chadha*, 462 U.S. at 925.

103. *Id.* at 928.

action[104] without complying with the procedures set forth in the Constitution.[105] This is not to say that all action taken by the legislature is legislative in nature and therefore must comply with Article I, section 7.[106] However, under the formalist view, since the action executed by Congress did not fit into one of the exceptions stated in the Constitution, the action was deemed to be legislative and therefore, had to comply with the bicameralism and presentment clauses.[107] The Court held that the action was essentially legislative since the "House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch."[108]

Chadha is an example of the formalist reliance on the text of the Constitution in deciding separation of powers issues, stating, "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process."[109]

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104. *Id.* at 954. "The nature of the decision implemented by the one-House veto . . . manifests its legislative character . . . . Disagreement with the Attorney General's decision on Chadha's deportation . . . involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President." *Id.* at 954-55.

105. *Id.* at 955. The majority held that the Framers intended to allow the legislature to act outside its Legislative role, but only within explicitly and narrowly prescribed provisions in the Constitution. *Id.* Article I, section 2, clause 5 gives the power to initiate impeachments solely to the House of Representatives. Article I, section 3, clause 6 gives the Senate the sole power to conduct trials after the House has initiated impeachment proceedings. Article II, section 2, clause 2 gives the Senate the sole power to ratify treaties. Article II, section 2, clause 2, gives the Senate the sole power to approve of appointments of the President. *Id.*

106. U.S. CONST. art. I, § 7, cl. 2 states, "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States." U.S. CONST. art. I, § 7, cl. 3 states:

> [e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

107. *Chadha*, 462 U.S. at 956-57. "These exceptions are narrow, explicit, and separately justified; none of them authorize the action challenged here." *Id.* For the text of the Constitution defining the Bicameralism Clause, Article I, section 7, clause 2, and the Presentment Clause, Article I, section 7, clause 3, see *supra* note 106.

108. *Chadha*, 462 U.S. at 952. For criticism of this view, see Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 471-72 (1987).

109. Werhan, *supra* note 75, at 401 (citing *Chadha*, 462 U.S. at 945).

3. *Bowsher v. Synar*

In *Bowsher v. Synar*,[110] the issue before the Supreme Court was the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985,[111] more commonly known as the Gramm-Rudman-Hollings Act. The Act gave the Comptroller General the power to prepare reports after evaluating figures submitted to him by the Director of the Office of Management and Budget and the Director of the Congressional Budget Office.[112] He would then use this report of deficit figures to carry out the provisions of the Gramm-Rudman-Hollings Act.

Although the duties assigned to the Comptroller General were considered "ministerial and mechanical," "these functions . . . plainly entail[ed] execution of the law in constitutional terms."[113] Since the Comptroller General was given the ultimate authority to make the budget cuts, the functions were executive in nature.[114]

After concluding that the Comptroller General was an Executive Branch figure,[115] the Court examined the removal provisions of the Act. According to these provisions, the Comptroller General was to serve a fifteen year term, but could be removed by impeachment or a joint resolution of Congress "for cause."[116] The Court held this removal policy to be a violation of separation of powers.[117]

In *Bowsher*, like in *Chadha*, the Court reached this decision by applying the rigid, rule like text of the Constitution and historical precedents.[118] According to Article II, section 2 of the Constitution, the President is to appoint "[o]fficers of the United States" with the "Advice and Consent of the Senate."[119] However, once an officer has been appointed and confirmed, the only removal power given to the legislative branch is that of "impeachment by the House of Representatives and conviction by the Senate."[120] The Court concluded, using the formalistic approach, that since the legislative action did not fit into one of

110. 478 U.S. 714 (1986).

111. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. § 901 (1988)).

112. *Bowsher*, 478 U.S. at 732.

113. *Id.* at 732-33.

114. *Id.* at 733.

115. *Id.* "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law. . . . [He] must exercise judgement concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required." *Id.*

116. 31 U.S.C. § 703(e)(1)(B) (1984). The statute was subsequently amended and this provision was removed. 31 U.S.C. § 703(e)(1)(B) (1988).

117. *Bowsher*, 478 U.S. at 734.

118. *Id.* at 721-27.

119. *Id.* at 722-23 (quoting U.S. CONST. art. II, § 2).

120. *Id.* at 723; *see supra* note 88.

the constitutionally allocated exceptions,[121] the Act was in violation of the separation of powers doctrine.[122] Through the removal provision, Congress "in effect . . . retained control over the execution of the Act and . . . intruded into the executive function."[123]

C. *Functionalist Approach*

The functionalist view is an alternative to formalism. Functionalism minimizes the significance of the legal categories of the Constitution: legislative, executive, and judicial.[124] It approaches the legal analysis with less concern for definitions and rules, focusing instead on the outcome and the value of the act.[125]

Functionalism espouses the view that our system is one of checks and balances, which requires interaction and tension among the branches of government.[126] Functionalists, like the formalists, acknowledge there is an area of overlap that allows certain powers to be shared among the branches.[127] However, while the formalists believe that only certain "kinds" of powers can be shared by the branches,[128] the functionalists extend this principle.

The functionalists treat this "sharing" principle not as one of "kind", but as one of degree.[129] One branch may exercise the power of another branch, as long as it does not encroach on a "core function."[130] To the functionalist, whether or not the act violates the three branch structure is irrelevant. Unless a core function of a branch has been encroached upon and has shifted the balance of power among the

121. *See generally* Burns & Markman, *supra* note 72. Examples of shared powers stated in this article were presidential veto of bills passed by Congress, the Senate consenting to treaties and presidential appointments, Congress establishing the jurisdiction of the courts, and the judiciary declaring legislation and executive acts unconstitutional. *Id.* at 581-82.

122. *Bowsher*, 478 U.S. at 723. "A direct congressional role in the removal of officers charged with the execution of the laws beyond [impeachment and removal] is inconsistent with separation of powers." *Id.* The Court also relied on the historical debate on this issue stating, "James Madison urged rejection of a congressional role in the removal of Executive Branch officers, other than by impeachment. . . . Madison's position ultimately prevailed, and a congressional role in the removal process was rejected." *Id.*

123. *Id.* at 734.

124. Werhan, *supra* note 75, at 426; *see also* Sargentich, *supra* note 108, at 439.

125. Sargentich, *supra* note 108, at 439; *see also* EDWARD PURCELL, THE CRISIS OF DEMOCRATIC THEORY 23 (1973).

126. Sargentich, *supra* note 108, at 433.

127. Buffington, *supra* note 76, at 122-23.

128. Lawson, *supra* note 67, at 860.

129. *Id.*

130. *Id.* "In its simplest formulation, functionalism asks 'whether the exercise of the contested function by one branch impermissibly intrudes into the *core* function or domain of [another] branch.' " *Id.* (quoting Harold J. Krent, *Separating the Strands of Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1255 (1988)).

branches, the act will be constitutional.[131] The functionalists believe that the balance of power is checked by the structure of the Constitution itself.[132]

1. *Commodity Futures Trading Commission v. Schor*

On the same day the Court decided *Bowsher*, the Court also decided *Commodity Futures Trading Commission v. Schor*.[133] Unlike the *Bowsher* decision, the Court in *Schor* did not embrace the formalist view of separation of powers. The Court used a functionalist methodology to uphold the constitutionality of the Commodities Exchange Act.[134]

The issue before the Court in *Schor* was whether granting the Commodity Futures Trading Commission (CFTC) the power to adjudicate state law counterclaims in reparation proceedings was constitutional.[135] Schor filed a complaint against ContiCommodity Services, Inc. with the CFTC for numerous Commodity Exchange Act violations.[136] After an Administrative Law Judge ruled against Schor in the proceedings, Schor challenged the authority of the CFTC's adjudicatory powers under the separation of powers doctrine.[137]

The Supreme Court held that the act which gave the CFTC the power to adjudicate state law counterclaims did not violate the separation of powers.[138] The Act, the Court held, was not to be evaluated under the formalist analysis.[139] The Court stated that it "has declined to adopt formalistic and unbending rules. . . . Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers."[140]

The Court did not use a strict interpretation of the Constitution in evaluating the Act. Rather, the Court looked to the practical effects of this legislation. Although the Court recognized the administrative agency would be performing a "core" judicial function,[141] it stated that the agency "shared the function in only a very narrow group of inquiries."[142] There was "little practical reason to find that this single devia-

131. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977). The key question is whether the act "disrupts the proper balance [of power among] the coordinate branches," thus preventing the branch "from accomplishing its constitutionally assigned functions." *Id.*

132. Buffington, *supra* note 76, at 123.

133. 478 U.S. 833 (1986).

134. *Id.* at 847-58. *See* 7 U.S.C. §§ 1-26 (1988).

135. *Schor*, 478 U.S. at 835-36.

136. *Id.* at 837.

137. *Id.* at 838.

138. *Id.* at 858-59.

139. *Id.* at 851.

140. *Id.*

141. *Id.* at 853.

142. *Id.* at 852-53.

tion from the agency model is fatal to the congressional scheme."[143]

2. *Morrison v. Olson*

The factual predicate of *Morrison v. Olson*[144] began in 1982 when two House of Representative subcommittees investigated the Environmental Protection Agency's enforcement of the Superfund project.[145] President Reagan, acting upon the Justice Department's advice, ordered the Administrator of the EPA to withhold documents during the subcommittee investigation.[146] Although the documents were eventually released, the House Judiciary Committee began an investigation into the Justice Department's role in the withholding of the documents.[147]

After compiling a lengthy report which included an allegation that Olson "had given false and misleading testimony to the subcommittee,"[148] the Judiciary Committee sent a copy to the Attorney General, pursuant to the Ethics in Government Act provision,[149] seeking the appointment of an independent counsel to investigate Assistant Attorney General Theodore B. Olson.[150] The Attorney General then requested the Special Division[151] to appoint an independent counsel.[152] The Special Division appointed James C. McKay as independent counsel to investigate whether Olson's alleged false testimony violated any provisions of federal criminal law.[153]

McKay later resigned and was replaced by Alexia Morrison, who caused a grand jury to subpoena Olson and two other attorneys at the Justice Department.[154] The three moved to quash the subpoenas and claimed the independent counsel provisions were unconstitutional because they violated the separation of powers doctrine.[155]

The district court, in applying a functional analysis, upheld the constitutionality of the Ethics in Government Act.[156] The *Morrison* Court

143. *Id.* at 852.
144. 487 U.S. 654 (1988).
145. *Id.* at 665.
146. *Id.*
147. *Id.*
148. *Id.* at 666.
149. 28 U.S.C. § 592(g) (1988).
150. *Morrison*, 487 U.S. at 666.
151. The Special Division was the Public Integrity Section of the Justice Department. *In Re* Olson, 818 F.2d 34, 36 (D.C. Cir. 1987).
152. *Morrison*, 487 U.S. at 667.
153. *Id.*
154. *Id.* at 667-68.
155. *Id.* at 668.
156. Ethics in Government Act of 1982, 28 U.S.C. §§ 591-599 (1988). The Ethics in Government Act gave the power to an independent counsel to investigate "any Federal Criminal law other than a violation classified a Class B or C misde-

held the Act was not violative of the Appointments Clause,[157] the judicial limitations set forth in Article III, or the Executive Branch powers of Article II.[158]

The Court held that the appointment of the independent counsel[159] did not violate the Appointments Clause of the Constitution.[160] The Court was forced to distinguish between "principle officers" and "inferior officers."[161] Stating the "principle" and "inferior" distinction is unclear from the Framers' intent,[162] the Court employed a functional analysis to determine that the prosecutor is an inferior officer.[163] The Court concluded that the independent counsel is "inferior" because: 1) she is removable by a higher ranking member of the Executive Branch,[164] 2) she performs only limited duties,[165] 3) she has a limited scope of jurisdiction,[166] and 4) she is of limited tenure.[167] The Court did not state that the Congressional power to appoint "inferior officers" was unlimited, but in light of the practical concerns of Congress in this instance,[168] the provisions did not violate the Appointments Clause.[169]

The Court rejected the claim that the "various powers and duties in relation to the independent council"[170] vested in the Special Division

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meanor or an infraction. 28 U.S.C. § 591(c). Under 28 U.S.C. § 591(b), high ranking executive branch officials may be the target of the investigations.

157. U.S. CONST. art. II, § 2, cl. 2.

158. *Morrison*, 487 U.S. at 659-60.

159. *Id.* at 661. "[T]he Special Division 'shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction.' " *Id.* (quoting 28 U.S.C. § 593(b) (1988)).

160. *Id.* at 667.

161. *Id.* at 670. In interpreting the Appointments Clause, the Court relied on Buckley v. Valeo, 424 U.S. 1, 132 (1976). *Buckley* concerned the Federal Election Campaign Act Amendments of 1974. The Court held that Congress had usurped the President's power under article II, section 2, of the Constitution to appoint "officers of the United States" in reserving for itself the power to appoint members to the Federal Election Commission. *Id.* at 161-62.

The *Buckley* Court distinguished between "principle officers" and "inferior officers" stating, "[p]rincipal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Id.* at 132.

162. *Morrison*, 487 U.S. at 671.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 672.

167. *Id.*

168. *Id.* at 677. "Congress of course was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officer." *Id.*

169. *Id.*

170. *Id.* at 680.

was a violation of the limitation of judicial power set forth in Article III.[171] Generally, " 'executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution,' "[172] and "judicial power of the United States is limited to 'Cases' and 'Controversies.' "[173] Using the functional analysis, the Court inquired into the degree that the Special Division wielded executive power and the practical consequences and reasons for the power.[174] Emphasizing the degree of the encroachment[175] and the reasons behind the legislation,[176] the Court held this was not a violation of Article III.

In considering the Act's constitutionality under separation of powers principles, the Court addressed two questions: whether the "good cause" removal by the Attorney General unconstitutionally encroached on Executive power and whether the Act as a whole, unconstitutionally interfered with the President's prosecutorial powers.[177] In addressing the "removal" question, the Court distinguished *Bowsher* and *Myers*, stating that this was not "an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction."[178] Clearly, there was no aggrandizement by Congress. The removal power was still in the Executive branch with the Attorney General, even though the Attorney General could remove " 'only for good cause.' "[179]

The Court rejected the formal distinction of removal of "purely executive" figures versus "quasi-legislative" or "quasi-judicial" figures.[180] Instead, the Court focused not on "rigid categories of those officials who may or may not be removed at the will of the President,"[181] but the degree to which Congress interferes with executive

171. *Id.*

172. *Id.* at 677 (quoting Buckley v. Valeo, 424 U.S. 1, 123 (citing United States v. Ferriera, 54 U.S. (13 How.) 40 (1851); Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792))).

173. *Id.*; *see* Muskrat v. United States, 219 U.S. 346, 356 (1910).

174. *Morrison*, 487 U.S. at 678-85.

175. *Id.* at 680. "[T]he Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated as inconsistent with Article II." *Id.* at 683. The "powers described above do not impermissibly trespass upon the authority of the Executive Branch." *Id.* at 681.

176. *Id.* at 679. The "appointment" of inferior officers may, in some instances, give Congress discretion in defining the official's authority, "[p]articularly, when, as here, Congress creat[ed] a temporary 'office' the nature and duties of which will by necessity vary with factual circumstances giving rise to the need for an appointment in the first place." *Id.*

177. *Id.* at 685.

178. *Id.* at 686.

179. *Id.* (quoting 28 U.S.C. § 596(a)(1) (1988)).

180. *Id.* at 689.

181. *Id.*

power.[182] Given the situation, the Court stated, "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority"[183] since the Attorney General still retains "ample authority" over the independent counsel.[184]

Lastly, the Act overall did not prevent the President from "perform[ing] his constitutionally assigned duties."[185] Neither Congress nor the Judicial branch had usurped Executive branch power.[186] Besides the appointment, Congress' role is limited to that of receiving reports.[187] The Judicial branch, under the Act, cannot control or supervise the counsel, and cannot appoint the counsel without being requested to do so by the Attorney General.[188] The Court found the Act did not " 'impermissibly undermine' " the Executive branch power or " 'disrupt the proper balance [of power] between the coordinate branches.' "[189]

3. *Mistretta v. United States*

In *Mistretta v. United States*,[190] the petitioner challenged the constitutionality of the sentencing guidelines promulgated by the United States Sentencing Commission.[191] The Commission was created by the Sentencing Reform Act of 1984 (the Sentencing Act).[192] The Commission was to be "an independent commission in the judicial branch of the United States,"[193] charged with "promulgat[ing] determinative-sentence guidelines."[194]

Mistretta pleaded guilty to one count of conspiracy and agreement to distribute cocaine,[195] and was sentenced to 18 months imprisonment pursuant to the sentencing guidelines.[196] Mistretta claimed the Sentencing Commission violated the separation of powers doctrine and was an excessive delegation of authority by Congress.[197]

The *Mistretta* Court also embraced a functionalist methodology, thus proving that *Morrison* was a change in doctrine and "not a mere aberra-

182. *Id.* at 689-90.
183. *Id.* at 691.
184. *Id.* at 692.
185. *Id.* at 696.
186. *Id.* at 694-95.
187. *Id.* at 694.
188. *Id.* at 695.
189. *Id.* (citations omitted).
190. 488 U.S. 361 (1989).
191. *Id.* at 370.
192. Sentencing Reform Act of 1984, Pub L. No. 98-473, § 217, 98 Stat. 2017 (codified as amended at 28 U.S.C. §§ 991-998 (1988 & Supp. II 1990)).
193. 28 U.S.C. § 991(a) (1988).
194. *Mistretta*, 488 U.S. at 369.
195. *Id.* at 370.
196. *Id.* at 371.
197. *Id.* at 370.

tion."[198] The Court set out the test for the constitutionality of the Sentencing Act by endorsing elements of both *Morrison* and *Schor*.[199] The Judicial branch cannot perform " 'tasks that are more properly accomplished by [other] branches' "[200] and the Act cannot " 'impermissibly threaten . . . the institutional integrity of the Judicial Branch.' "[201]

The Court, like in *Morrison*, stated although judges cannot generally be given duties that are nonjudicial in nature,[202] there are "significant exceptions" to this proposition.[203] Although Article III specifically limits the Judicial Branch to "Cases" and "Controversies," the Court has never held that the Congress is prohibited by the Constitution from delegating rulemaking or administrative duties to the Judicial Branch.[204]

The *Mistretta* Court likened the creation of the sentencing guidelines to the creation of the rules of procedure.[205] The Court rejected the formal distinction between "procedural rules" and "political" sentencing guidelines, stating "[o]ur separation-of-powers analysis does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural,' or 'political' as opposed to 'judicial.' "[206]

The establishing of guidelines, the Court held, is not something that belongs more appropriately to another branch,[207] since the Judicial branch has always had a role in sentencing.[208] With the Commission, they continue to have a role in the sentencing procedures.[209] In addition, the practical consequences do not expand the Judicial branch's authority—the Commission does not do any more than what the judges did individually.[210] Although textually limited to "Cases" and "Controversies," the Court found the Commission does not perform a task that is more appropriately accomplished by another branch.

198. Lisa A. Cahill & J. Russell Jackson, Note, *Nondelegation After Mistretta: Phoenix or Phäethon?*, 31 WM. & MARY L. REV. 1047, 1070-71 (1990).

199. *Mistretta*, 488 U.S. at 383.

200. *Id.* (quoting Morrison v. Olson, 487 U.S. 654, 680-81 (1988)).

201. *Id.* (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1988)).

202. *Id.* at 385.

203. *Id.* at 386. Congress, in certain circumstances, is permitted to give rulemaking authority to the Judicial Branch. *Id.* at 387; *see* Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) (upholding the delegation of power to the Judicial Branch for the purpose of promulgating the Federal Rules of Civil Procedure).

204. *Mistretta*, 488 U.S. at 389; *see, e.g.*, Morrison v. Olson, 487 U.S. 654, 679 n.16 (1988). "We do not think that judicial exercise of the power to appoint, *per se*, is in any way inconsistent as a functional matter with the courts' exercise of their Article III powers." *Id.*

205. *Mistretta*, 488 U.S. at 391.

206. *Id.* at 393 (citing Bowsher v. Synar, 478 U.S. 714, 749 (1986)).

207. *Id.* at 390.

208. *Id.* at 390-91.

209. *Id.* at 391.

210. *Id.* at 395.

The Commission also did not undermine the integrity of the Judicial Branch, as argued by the Petitioner.[211] Unlike the legislature, the Judicial branch is not subject to the Incompatibility Clause of the Constitution.[212] Here, they served on the Commission not as Article III judges, but as individuals who were appointed by the President.[213] The voluntary service of the judges doesn't have a "constitutionally significant practical effect on the operation of the Judicial Branch."[214]

The Court also found the President's removal power does not threaten the integrity of the Judicial Branch since the members can be removed as members of the Commission, but not as judges,[215] and the removal power is only for good cause.[216]

IV. Historical Procedure

A. *District Court:* Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Authority[217]

After concluding the case was justiciable,[218] the court's analysis of the merit's of the case began with the language of the Transfer Act.[219] The court found that the language clearly demonstrated the Board's independence and that it was not controlled by Congress.[220] Although the language was unambiguous, the court noted " 'separation of powers analysis does not turn on the labelling of an activity,' but rather 'focus[es] on the "unique aspects of the congressional plan at issue and its practical consequences." ' "[221]

The structure of the Transfer Act, the court stated, also demonstrated the independence of the Board of Review.[222] Although the Board members were Congressmen, Congress had neither appoint-

211. *Id.* at 397.

212. *Id.* at 398. "[T]he Constitution . . . does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time." *Id.* at 404.

213. *Id.* at 404.

214. *Id.* at 406.

215. *Id.* at 410.

216. *Id.*

217. 718 F. Supp. 974, 981 (D.D.C. 1989).

218. *Id.* (applying the standing test set forth in Allen v. Wright, 468 U.S. 737, 751 (1984)). A party must allege " 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Id.* at 980. The court held the Master Plan would lead to increased air travel to and from the airport, and this would lead to the " 'fairly traceable' " injuries of noise, safety problems and air pollution. *Id.* at 981.

219. *Id.* at 983.

220. *Id.* It is " 'independent of the Commonwealth of Virginia and its local governments, the District of Columbia, and the Federal Government.' " *Id.* (quoting 49 U.S.C. app. § 2456(b)(1) (1988)).

221. *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 393 (1989) (quoting Commodity Futures Trading Comm'n v. Schor 478 U.S. 833, 857 (1986))).

222. *Id.* at 984.

ment power nor removal power.[223] This lack of removal power was especially important to the court since it made *Bowsher* distinguishable.[224] The court concluded that the Board was not an agent of Congress for the purposes of separation of powers analysis.[225]

The court also rejected argument that Transfer Act mandates the Board of Review.[226] The states freely entered into a lease with the federal government and passed legislation that established the Airports Authority.[227] The court reasoned that the Airports Authority would not have existed if Virginia and the District of Columbia had not enacted enabling statutes.[228] This fact demonstrates, the court held, that the Board is not a creature of federal law but state law.[229]

The court concluded that under the functionalist test set forth in *Mistretta*,[230] the Board of Review neither accumulated power that should more appropriately be diffused nor undermined the prerogative of another branch.[231] Congress cannot exceed its constitutional limits when it exercises no federal power.[232] Additionally, since separation of powers applies only to the federal branches, and not between the state government and federal government, the Act is not a violation of separation of powers.[233] Lastly, the Court rejected the claims of violation of the Appointments Clause, Presentment Clause, and Incompatibility Clause. These were inapplicable, the court stated, since the Board of Review was not created under authority of the United States, but was pursuant to an independent Airports Authority.[234]

B. *Circuit Court:* Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Authority[235]

The court of appeals reversed the decision of the district court. The court determined the separation of powers doctrine does apply to the

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223. *Id.*

224. *Id.*; *see* Bowsher v. Synar, 478 U.S. 714, 727 (1986); *see supra* notes 115-17 and accompanying text.

225. *Citizens*, 718 F. Supp. at 985.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 382 (1989); Morrison v. Olson, 487 U.S. 654, 680-81 (1988)). " '[T]hat either accrete to a single branch powers more appropriately diffused among separate branches or undermine the authority and independence of one or another coordinate branch.' " *Id.*

231. *Id.*

232. *Id.*

233. *Id.* (citing INS v. Chadha, 462 U.S. 919, 951 (1983); Nixon v. Administrator of Gen. Servs., 433 U.S. 443, 425 (1977); Buckley v. Valeo, 424 U.S. 1, 122 (1976)).

234. *Id.* at 987.

235. 917 F.2d 48 (D.C. Cir. 1990).

creation of the Board of Review.[236] Not determining the issues of the Incompatibility[237] and Ineligibility Clauses[238], the court held the Board of Review violated the separation of powers doctrine in having executive functions performed by legislative agents.[239] Applying *Buckley v. Valeo*,[240] the court determined that the Board of Review exercised federal power.[241] As in *Buckley*, the critical question was whether the source of the power was in federal authority.[242] The power to build and operate an airport is federal, and in essence, once the states agreed to the creation of the Airports Authority, it was the federal law which established the Board of Review.[243] The court of appeals noted that the district court looked to the "practical consequences"[244] of the Act.[245] However, this court held the consequences of the Transfer Act were "to maintain in place by federal law a body composed exclusively of members of Congress that exercises operational control over the airports."[246]

Also, the Property Clause[247] was not a protection from separation of powers analysis. The Airports Authority argued that the creation of the Board of Review was a lawful exercise of power under the Property Clause and *South Dakota v. Dole*.[248] The court stated, "[i]f federal power is wielded, then that power must be wielded in a constitutional man-

236. *Id.* at 55-56.

237. U.S. CONST. art. I, § 6, cl. 2. "No Senator or Representative shall, for the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time." *Id.*

238. *Id.* "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." *Id.*

239. *Citizens*, 917 F.2d at 57.

240. 424 U.S. 1 (1976); *see supra* note 161 for a discussion of *Buckley*.

241. *Citizens*, 917 F.2d at 57. Federal power is "exercising significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126.

242. *Citizens*, 917 F.2d at 54.

243. *Id.*

244. *Id.* (citing Mistretta v. United States, 488 U.S. 361, 393 (1989)). The Court held "separation-of-powers analysis does not turn on the labelling of an activity, but rather focuses on the unique aspects of the congressional plan at issue and its practical consequences." *Id.*

245. *Id.*

246. *Id.* at 54-55.

247. U.S. CONST. art. IV, § 3, cl. 2. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *Id.*

248. *Citizens*, 917 F.2d at 55. In South Dakota v. Dole, 483 U.S. 203 (1987), the Court upheld a federal law which directed the Secretary of Transportation to withhold highway funds allocated to states of highway maintenance. *Id.* at 206. The withholding was to occur when the state did not have a minimum drinking age of at least twenty-one years. *Id.* at 205. The Court in *Dole* concluded, that although Congress' spending power was not unlimited, it was broad enough to sustain this condition of federal funds, even though Congress could not accomplish this under its own authority. *Id.* at 207-08.

ner."[249] The court reasoned that the "independent constitutional bar" provision of the spending power test[250] prevented Congress from circumventing its constitutional constraints.[251]

After concluding the separation of powers doctrine does apply,[252] the court examined whether the Board was exercising legislative or executive power.[253] Due to the veto power over virtually all management functions, the court held the power of the Board of Review to be "quintessentially executive."[254]

The court also stated that since the members were required to come from certain committees that had jurisdiction over aviation, this demonstrated a "direct congressional interest" in the operations of the Authority, thus proving the members were not "independent," but actually agents of Congress.[255] This, coupled with the "de facto" removal power by Congress, through the selection of committee assignments, led to the Act being struck down.[256]

The court concluded, in applying *Bowsher*,[257] that the Board of Review violated the separation of powers doctrine, since it required legislative agents to perform executive functions.[258]

V. OPINION

A. *Majority*

Justice Stevens, writing for the majority,[259] held the Board of Review of the Airports Authority was subject to separation of powers anal-

249. *Citizens*, 917 F.2d at 55.

250. *Id.* (quoting *Dole*, 483 U.S. at 210); *see also Dole*, 483 U.S. at 206-07. The Spending Clause test requires the spending (i) be for the "general welfare"; (ii) have clear and unambiguous conditions; (iii) be for a legitimate federal interest; (iv) and may not be barred by some other part of the Constitution. *Dole*, 483 U.S. at 207-08.

251. *Citizens*, 917 F.2d at 55.

252. *Id.* at 54. "[I]t is federal law that resulted in the establishment of the Board of Review with its particular composition and authority. . . . In this light, it is wholly unrealistic to view the Board of Review as solely a creature of state law immune to separation-of-powers scrutiny." *Id.*

253. *Id.* at 56.

254. *Id.* The Board of Review had power "over adoption of an annual budget, the authorization of the issuance of bonds, the adoption, amendment, or repeal of any regulation, the adoption or revision of a master plan for airport expansion." *Id.*; *see* 49 U.S.C. app. § 2456(f)(4)(B) (1988).

255. *Citizens*, 917 F.2d at 57.

256. *Id.*

257. 478 U.S. 714 (1986). *Bowsher* states "because Congress had retained removal authority . . . [the Comptroller General] may not be entrusted with executive powers." *Id.* at 732; *see supra* notes 110-23 and accompanying text.

258. *Citizens*, 917 F.2d at 57.

259. Joining in the majority decision were Justices Stevens, Blackmun, O'Connor, Scalia, Kennedy and Souter. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2301 (1991).

ysis.[260] Here, the Court extended separation of power analysis to a body created by a state.[261] There were many factors which led the Court to this unprecedented decision.

The Court gave great weight to the fact that the Federal Government, although transferring the airports to the Airports Authority, retained virtually complete control over their operations through the Board of Review. Under the terms of the Transfer Act, the Airports Authority's powers were to be voided in the event the Board of Review was unable to perform its oversight duties.[262] The majority believed this "kill switch" evidenced Congress' intent to retain control through the Board of Review. [263]

The majority was not swayed by the fact that the legislation transferring the airports stated the Board of Review members (Congressmen) were not to be sitting as Members of Congress, but as "representatives of users",[264] thus not acting in their official Congressional role.[265] The fact that the legislation claims the members are acting "individually" on this Board is irrelevant according to the majority, for "separation-of-powers analysis does not turn on the labeling of an activity."[266] Moreover, the assertion of acting "individually" was contradicted by the fact the legislation: 1) did not require the Board members to prove that they actually use the airports and 2) required the Members of the Board to be sitting on certain transportation-related committees in Congress.[267]

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260. *Metropolitan Washington*, 111 S. Ct. at 2306-07.

261. *Id.* "[W]e believe the fact that the Board of Review was created by state enactments is not enough to immunize it from separation-of-powers review." *Id.*

262. 49 U.S.C. app. § 2456(h) (1988). "If the Board of Review . . . is unable to carry out its functions under this subchapter by reason of judicial order, the Airports Authority shall have no authority to perform any of the actions that are required by paragraph (f)(4)." *Id.*

These actions, which required submission to the Board of Directors for approval under 49 U.S.C. app. § 2456(f)(4)(A), were specifically stated in § 2456(f)(4)(B). These include "(i) the adoption of an annual budget; (ii) the authorization of the issuance of bonds; (iii) the adoption, amendment, or repeal of a regulation; (iv) the adoption or revision of a master plan, including any proposal for land acquisition; and (v) the appointment of the chief executive officer." 49 U.S.C. app. § 2456(f)(4)(B) (1988).

263. *Metropolitan Washington*, 111 S. Ct. at 2307.

264. 49 U.S.C. app. § 2456(f)(1) (1988).

265. *Metropolitan Washington*, 111 S. Ct. at 2307. "[S]erv[ing] 'in their individual capacities, as representatives of users' of the airports, [49 U.S.C. app. § 2456(f)(1) (1988)] does not prevent this group of officials from qualifying as a congressional agent exercising federal authority for separation-of-powers purposes." *Id.*

266. *Id.* (quoting Mistretta v. United States, 488 U.S. 361, 393 (1989)).

267. *Id.* The composition of the Board of Directors, as stated in § 2456(f)(1), was to be two members from (i) the Public Works and Transportation Committee of the House of Representatives; (ii) the Appropriations Committee of the House of Representatives; (iii) the Commerce, Science and Transportation Committee of the Senate; (iv) the Appropriations Committee of the Senate; and another member

Another factor in the Court's conclusion that the Board members were not sitting "in their individual capacities", but actually as Congressional agents, was various statements made by Congressman while debating the Transfer Act in the House.[268]

The Court held that Congress retained power over the appointment and removal of the Board Members.[269] By submitting a list to the Board of Directors, from which the directors were required by the legislation to chose, Congress, in effect controlled the composition of the Board of Review.[270]

In analyzing all the above mentioned factors, the majority concluded that the Board of Review was subject to separation of powers analysis.[271] The majority rejected the petitioners argument that under *South Dakota v. Dole*[272] the Board of Review was created under Con-

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selected from a list provided by the Speaker of the House of Representatives or the President pro tempore of the Senate. The members from the above mentioned committees were to be selected by a list comprised by the Speaker of the House and the President pro tempore, respectively. 49 U.S.C. app. § 2456(f)(1) (1988).

268. *See* Cong. Rec. H11,098-104 (daily ed. Oct. 15, 1986). Statements made by Congressmen alluded to the fact that Congress would effectively retain control of the airports through the powers that were to be delegated to the Board of Review. *Id.*; *see, e.g., supra* note 46 and accompanying text.

269. *Metropolitan Washington*, 111 S. Ct. at 2308.

270. *Id.* The Court contrasted the wording of the Transfer Act with the wording of the Sentencing Reform Act (*Mistretta*) and the Gramm Rudman Hollings Act (*Bowsher*). The Transfer Act states, "[s]uch Board of Review shall be established by the board of directors and shall consist of the following." 49 U.S.C. app. § 2456(f)(1) (1988). This provision in effect mandates the composition of the Board to the names of the Members of Congress selected by the Speaker of the House and the President pro tempore, thus ensuring Congressional satisfaction with the Board.

However, no such mandate is required in the Sentencing Reform Act or the Gramm Rudman Hollings Act. The Sentencing Reform Act does not direct the President to choose, but only to "consider a list," thus leaving the President with the prerogative to reject the candidate. 28 U.S.C. § 991(a) (1988). Similarly, the Gramm Rudman Hollings Act executes no mandate either, with Congress "recommend[ing]" candidates for the position of Comptroller General. 31 U.S.C. § 703(a)(3) (1988).

271. *Metropolitan Washington*, 111 S. Ct. at 2308. The Court reasoned that, were they to allow Congress to delegate the power to execute national policy to the states, checked by a veto power over the state actions, the Court would, in effect, be letting "Congress . . . evade the 'carefully crafted' constraints of the Constitution." *Id.* (citing INS v. Chadha, 462 U.S. 919, 959 (1983)).

The Court concluded this was a matter of national policy when analyzing the preamble to the Transfer Act, 49 U.S.C. app. § 2451(3) (1988). *Metropolitan Washington*, 111 S. Ct. at 2312. This section states, "the Federal Government has a continuing but limited interest in the operation of the two federally owned airports, which serve the travel and cargo needs of the entire Metropolitan Washington region as well as the District of Columbia as the national seat of government." 49 U.S.C. app. § 2451 (1988).

272. 483 U.S. 203 (1987). See *supra* notes 249-51 and accompanying text for a discussion of *Dole*.

gress' power to dispose of federal property,[273] thus insulating it from constitutional scrutiny.[274]

The Court concluded that *Dole* did not apply to the instant case. The majority stated that *Dole* concerned not separation-of-powers principles but federalism principles.[275] The petitioners claimed that Congress' powers under the Property Clause,[276] were as broad as their power under the Spending Clause,[277] making the Board of Review a valid exercise of Congressional power.[278] The Court conceded that a state may relinquish rights, if not coerced into relinquishing them.[279] However, this did not concern a state ceding rights and powers, but the federal establishment of a review board over a state-created entity.[280] The Court states, "[n]othing in our opinion in *Dole* implied that a highway grant to a State could have been conditioned on the State's creating a 'Highway Board of Review' composed of Members of Congress."[281]

Once the Court determined that the separation of powers principles applied to the Board of Review,[282] the question was limited to whether it was constitutional for the Congress to give decision making authority to the Board of Review.[283]

The majority, in discussing the theoretical aspects of separation of powers, relied on *The Federalist*.[284] The Court noted that although the fear of abuses of power by the executive branch was evident in the Declaration of Independence, James Madison recognized the same potential for abuse regarding the legislature in his famous work.[285]

Two basic constitutional constraints on Congress were outlined by the majority.[286] These two limits prevent any "encroachment 'beyond the legislative sphere.' "[287] The first constraint is that Congress "may

273. *See supra* note 248.
274. *Metropolitan Washington*, 111 S. Ct. at 2309.
275. *Id.* See *supra* notes 249-51 and accompanying text for a discussion of *Dole*.
276. *See supra* note 248.
277. *See supra* note 251.
278. *Metropolitan Washington*, 111 S. Ct. at 2309.
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.* at 2308. "Such an entity necessarily exercises sufficient federal power . . . to mandate separation-of-powers scrutiny." *Id.*
283. *Id.* at 2310.
284. *Id.*
285. *Id.*; *see also* THE FEDERALIST No. 48, at 332-34 (James Madison) (Jacob Cooke ed., 1961). "They seem never to have recollected the danger from legislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations." THE FEDERALIST No. 48, at 333 (James Madison) (Jacob Cooke ed., 1961).
286. *Metropolitan Washington*, 111 S. Ct. at 2311.
287. *Id.* (quoting THE FEDERALIST No. 48, at 334 (James Madison) (Jacob Cooke ed., 1961)).

not 'invest itself or its Members with either executive power or judicial power.' "[288] Two examples of this constraint on Congress are *Springer v. Philippine Islands*[289] and *Bowsher v. Synar*.[290] In *Springer*, the Court held that a statute which permitted legislators to perform executive functions violated the separation of powers doctrine.[291] The other example of this constraint, *Bowsher*, concerned the constitutionality of the Comptroller General's power to revise the federal budget.[292] The Court held in *Bowsher* that since the Comptroller General was an agent of Congress, his exercise of executive power was a violation of separation of powers.[293]

The second constraint on Congress, the Court stated, pertained to Congress' legislative power.[294] When Congress is exercising its legislative power, it must adhere to the principles outlined in Article I of the Constitution, "single, finely wrought and exhaustively considered, procedure[s]."[295] In *Chadha* the Court stated, "[t]o accomplish what has been attempted by one House of Congress in this case [legislative power] requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President."[296]

However, after outlining the two basic constraints, the majority never explicitly stated which one applied in the instant case.[297] The majority noted that the court of appeals held the power of the Board of Review to be executive.[298] The Court, though, declined to affirm the Court of Appeals finding, stating, "[w]e need not agree or disagree

288. *Id.* (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)).

289. 277 U.S. 189 (1928). In *Springer*, the act in question was the Organic Act, which permitted legislative officials to vote corporate stock owned by the Philippine Government. *Id.* at 201-03.

290. 478 U.S. 714 (1986); *see supra* notes 110-23 and accompanying text.

291. *Springer*, 277 U.S. at 209. "[T]he power must be exercised directly by the Governor-General or by his appointee, since he is the only executive now definitely authorized by law to act." *Id.*

292. *See supra* notes 110-12 and accompanying text.

293. *Bowsher*, 478 U.S. at 726. "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. . . . To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto." *Id.*

294. *Metropolitan Washington*, 111 S. Ct. at 2311.

295. *Id.* (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)); *see* U.S. CONST. art. I, § 7.

296. INS v. Chadha, 462 U.S. 919, 958 (1983).

297. *Metropolitan Washington*, 111 S. Ct. at 2312; *see infra* note 323 and accompanying text.

298. *Metropolitan Washington*, 111 S. Ct. at 2312 (citing Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Auth., 917 F.2d 48, 56 (D.C. Cir. 1990)). "This authority over key operational decisions is quintessentially executive." *Id.*; *see also* 49 U.S.C. app. § 2456(f)(4)(B) (1988).

with . . . the Court of Appeals to conclude that the Board of Review's power is constitutionally impermissible."[299] The majority never concluded which power—legislative or executive—Congress was exercising.[300]

The Court concluded that were it to hold this act constitutional, it would lay the foundation for future aggrandizement by Congress outside the normal legislative process.[301]

B. *Dissent*

The dissent, comprised of Justices White, Marshall, and Chief Justice Rehnquist, argued that the majority applied an exclusively federal doctrine to a state enactment, and also ignored the fact that both the executive and legislative branches argued for constitutionality of the legislation.[302] The majority wrongly applied separation of powers analysis to strike down a body created by state law.[303]

First, the dissent argued, the doctrine of separation of powers does not apply to state law.[304] The Airports Authority and the Board of Review are clearly state instruments.[305] In fact, both Virginia and the District of Columbia amended their enabling legislation to ensure that the Airports Authority could create the Board of Review.[306] Additionally, the Transfer Act specifically stated that the authority was to be "independent of the . . . Federal Government."[307] Although the dissent acknowledged that the state authority and the Board of Review may have existed due to Congress' initiatives, this fact does not mandate analysis under the separation of powers doctrine.[308]

The federal interest in the airport was only that of its nationwide

299. *Metropolitan Washington*, 111 S. Ct. at 2312.

300. *Id.* The Court merely stated, "[i]f the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7." *Id.*

301. *Id.* "Congress could . . . retain control . . . of the activities of state grant recipients charged with executing virtually every aspect of national policy." *Id.*

302. *Id.* at 2313 (White, J., dissenting).

303. *Id.* (White, J., dissenting). The dissent claimed the application to state law is the "first time in its history" and an "unprecedented step." *Id.* (White, J., dissenting).

304. *Id.* (White, J., dissenting).

305. *Id.* (White, J., dissenting) (quoting 1985 Va. Acts 598, § 2 and 1985 D.C. Stat. 6-17, § 3). The body was to be "independent of all other" and have the powers "conferred upon it by the legislative authorities of both the Commonwealth of Virginia and the District." *Id.* (White, J., dissenting).

306. *Metropolitan Washington*, 111 S. Ct. at 2314 (White, J., dissenting) (citing 1987 Va. Acts 665, § 5(A), para. 5; 1987 D.C. Stat. 7-18, § 3(c)(2)).

307. 49 U.S.C. app. § 2456(b)(1) (1988).

308. *Metropolitan Washington*, 111 S. Ct. at 2314 (White, J., dissenting). "Congressional suggestion does not render subsequent independent state actions federal ones." *Id.* (White, J., dissenting).

users. This was evidenced by statements made by various Members of Congress.[309] The Board of Review members were on the Board to protect the interests of all of the users from around the nation, as evidenced by the Transfer Act.[310] Additionally, since the Board has been created by state law, it is not a violation of the Incompatibility[311] or Ineligibility Clauses[312] of the Constitution for Congressional members to sit on it.[313]

The dissent also argued that the Transfer Act was constitutional under the Property Clause[314] and *South Dakota v. Dole*.[315] It was their contention that the Court misconstrued the elements of the spending power test as set forth in *Dole*.[316] The dissent reasoned that *Dole* merely stands for the proposition that the federal government cannot induce a state to do something that would be unconstitutional if the government was not inducing it.[317] The dissent, therefore, held that since Virginia and the District of Columbia were not constitutionally barred from creating the Board of Review comprised of Members of Congress, then the states were not induced into doing something unconstitutional by the Transfer Act.[318] Secondly, the dissent argued, even if the Court applied the doctrine of separation of powers, the Transfer Act and the Board of Review were still constitutional.[319] The dissent attacked the majority view that the Board of Review was unconstitutional whether the power wielded by the Board of Review was characterized as executive or legislative.[320]

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309. *Id.* at 2315 (White, J., dissenting) (citing 132 Cong. Rec. H11,098-104 (1986)).

310. 49 U.S.C. app. § 2456(f)(1) (1988) states, "[t]he Board of Review shall be established to represent the interests of users of the Metropolitan Washington Airports."

311. U.S. CONST. art. I, § 6, cl. 2.

312. *Id.*

313. *Metropolitan Washington*, 111 S. Ct. at 2315 (White, J., dissenting). The Incompatibility Clause states that "[n]o Senator or Representative shall, for the Time for which he is elected, be appointed to any civil office *under Authority of the United States*, which shall have been created, or the Emoluments whereof shall have been increased during such time." U.S. CONST. art. I, § 6, cl. 2 (emphasis added). The Ineligibility Clause states that "no Person holding any Office *under the United States*, shall be a Member of either House during his Continuance in Office." *Id.* (emphasis added).

314. U.S. CONST. art. IV, § 3, cl. 2.

315. 483 U.S. 203 (1987).

316. *Id.*; *see supra* note 251.

317. *Metropolitan Washington*, 111 S. Ct. at 2316 (White, J., dissenting). "The decision does not indicate that Congress can act only when its actions implicate 'the allocation of powers between the Federal Government and States.' " *Id.* (White, J., dissenting) (quoting *id.* at 2309).

318. *Id.* at 2316 (White, J., dissenting).

319. *Id.* at 2317 (White, J., dissenting).

320. *Id.* (White, J., dissenting). The dissent argues this is the first occasion that neither the legislative branch nor the executive branch opposed the action, yet the

The dissent charged that the Court's vague reasoning as to the Board's exercise of executive power suggests it may not in fact be comfortable with this position.[321] The Court did not state that constitutional limitations were violated by the Board.[322] This failure to take a stand, the dissent stated, demonstrates the weakness in the Court's position.

The dissent next analyzed the Board's removal power. The Board of Review, the dissent argues, is not "subservient to Congress."[323] As *Bowsher* states, "the critical factor" in deciding whether an official is "subservient to Congress is the degree to which Congress maintains the power of removal."[324] The dissent distinguished *Bowsher* from the instant case since *Bowsher* made specific provisions for removal[325] while the Transfer Act itself was silent on this issue.[326] The Court's view that Congress retained "effective removal power"[327] through committee assignments was rebutted by the fact no member has lost his spot on the Board because of a committee change.[328]

Regarding the appointment power,[329] which is less significant than the removal power in separation of powers analysis, the dissent stated that this was not improperly influenced by Congress.[330] The dissent attempted to differentiate the appointment provisions of *Bowsher*[331]

Court struck down the act as a violation of the separation of powers doctrine. *Id.* (White, J., dissenting).

321. *Id.* (White, J., dissenting).

322. *Id.* (White, J., dissenting). The Court merely stated: "If the power is executive, the Constitution does not permit an agent of Congress to exercise it." *Id.* at 2312. In addition, the Court states, "We need not agree or disagree with the characterization [that the power exercised is 'quintessentially executive'] to conclude that the Board of Review's power is constitutionally impermissible." *Id.* (quoting Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Auth., 917 F.2d 48, 56 (D.C. Cir. 1990)).

323. *Id.* at 2318 (White, J., dissenting) (quoting Bowsher v. Synar, 478 U.S. 714, 727 (1986)).

324. *Id.* (White, J., dissenting) (quoting Bowsher v. Synar, 478 U.S. 714, 727 (1986)).

325. *Id.* (White, J., dissenting); *see also Bowsher*, 478 U.S. at 727; 31 U.S.C. § 703(e) (1988).

326. *Metropolitan Washington*, 111 S. Ct. at 2318 (White, J., dissenting); *see also* 49 U.S.C. app. § 2456(f)(1) & (f)(2) (1988). However, it should be noted that Airports Authority Resolution No. 87-12 granted a "for cause" removal power to the Board of Directors. Joint Appendix at 29, *Metropolitan Washington*, (No. 90-906). "The terms of each of these appointments is as follows, except that the Board of Directors may remove for cause an appointee to the Board of Review prior to the conclusion of his term." *Id.* (quoting Resolution No. 87-12).

327. *Metropolitan Washington*, 111 S. Ct. at 2318 (White, J., dissenting).

328. *Id.* (White, J., dissenting).

329. 49 U.S.C. app. § 2456(f)(1) (1988).

330. *Metropolitan Washington*, 111 S. Ct. at 2318 (White, J., dissenting).

331. 31 U.S.C. § 703(a) (1988). "The Comptroller General . . . [is] appointed by the President, by and with the advice and consent of the Senate." *Id.*

and *Mistretta*[332] from that of the Transfer Act.[333] Here, the dissent weakly stated, "it is perfectly plausible to infer that the Directors are free to reject any and all candidates until acceptable names are submitted."[334]

As to the appointment of members from specific transportation related committees, the dissent justified this in light of *Mistretta*.[335] In *Mistretta*, federal judges were permitted to exercise their expertise on the Sentencing Commission.[336] Therefore, the dissent reasoned, the Members of Congress should not be prohibited from using their expertise gained by specific committee assignments on the Board of Review.[337]

The dissent argued that the power exercised by the Board was not legislative, and thus is not subject to analysis under *Chadha*.[338] It pointed to the fact that the court of appeals deemed the Board's power to be "quintessentially executive"[339] and that the airports were previously managed by the Civil Aeronautics Agency and the Federal Aviation Administration, who exercised executive power.[340]

The Board's power is also not "legislative" in the form of a Congressional agent. The dissent reasoned that in *Bowsher*, where the Comptroller General had specific obligations to Congress,[341] the act was not deemed unconstitutional for presentment clause reasons, but for removal power reasons.[342] In the Transfer Act, there are no specific obligations to Congress; in fact the language specifically stated that the Board members are to sit "in their individual capacities,"[343] giving

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332. 28 U.S.C. § 991(a) (1988). "There is established as an independent commission in the judicial branch . . . a United States Sentencing Commission . . . . The President, after consultation with . . . others interested in the criminal justice process, shall appoint the . . . members of the Commission, by and with the advice and consent of the Senate . . . ." *Id.*

333. *Metropolitan Washington*, 111 S. Ct. at 2319 (White, J., dissenting).

334. *Id.* (White, J., dissenting).

335. *Id.* (White, J., dissenting). The majority argued that the fact that members were to be comprised of specific transportation related committees in some way mitigated the fact that the Board member were acting "in their own capacities." *Id.* at 2307.

336. *Id.* at 2319 (White, J., dissenting).

337. *Id.* (White, J., dissenting).

338. *Id.* (White, J., dissenting).

339. Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Auth., 917 F.2d 48, 56 (D.C. Cir. 1990).

340. *Metropolitan Washington*, 111 S.Ct. at 2320 (White, J., dissenting).

341. Bowsher v. Synar, 478 U.S. 714, 743 (1986) (Stevens, J., concurring). "Numerous other provisions strongly support the conclusion that one of the Comptroller General's primary responsibilities is to work specifically on behalf of Congress." *Id.* (Stevens, J., concurring); *see* U.S.C. § 717(b)-(d) (1988).

342. *Metropolitan Washington*, 111 S. Ct. at 2320 (White, J., dissenting); *see Bowsher*, 478 U.S. at 727-34.

343. *Metropolitan Washington*, 111 S. Ct. at 2320 (White, J., dissenting) (quoting 49 U.S.C. app. § 2456(f)(1) (1988)).

it even less reason to be evaluated under the presentment clause.[344]

The dissent concluded the separation of powers doctrine does not apply to state enactments.[345] However, even if it did apply, this particular enactment did not violate the doctrine.[346]

VI. ANALYSIS

The majority opinion in *Metropolitan Washington* applied the functional standard in reviewing the constitutionality of the Board of Review. The Court, although beginning its separation of powers analysis with a discussion of the Framers intent and the Federalist,[347] in essence, rejects the formalist standard.[348]

This analysis used by the Court to strike down the Board of Review as unconstitutional is unique. The Court uses the functional analysis not only to strike down the Board, but also to decide the preliminary question of whether to even evaluate this seemingly state-created Board under the separation of powers doctrine.[349] In deciding this preliminary issue, the Court held, "[s]uch an entity necessarily exercises sufficient federal power as an agent of Congress to mandate separation of powers scrutiny."[350] The Court then struck down this "practical accommodation between the Legislature and the Executive" since the statute "provide[d] a blueprint for the extensive expansion of the legislative power beyond its constitutionally-confined roles."[351] The Court specifically rejected the need to place the Board's action in the functional dichotomy of either "legislative" or "executive" in order to hold it unconstitutional.[352]

This application is unique for a few reasons. The Court has in the past applied both the functional and formal approach to separation of powers cases. Recently, however, there appears to be a trend as to which of these two the Court would apply.[353] When evaluating the impact of legislation on its own functions, the Court has routinely applied the functional test.[354] On the other hand, when evaluating the impact

344. *Id.* (White, J., dissenting). "There may well be instances in which a significant congressional presence would mandate an extension of the principals set forth in *Chadha*. This, plainly, is not one." *Id.* (White, J., dissenting).

345. *Id.* at 2313 (White, J., dissenting).

346. *Id.* at 2317 (White, J., dissenting).

347. *Id.* at 2310-11.

348. *Id.* at 2312. "We need not agree or disagree with the characterization [that the Board is "executive" in nature] by the Court of Appeals to conclude that the Board of Review's power is constitutionally impermissible." *Id.*

349. *Id.* at 2308.

350. *Id.*; *see supra* note 283.

351. *Metropolitan Washington*, 111 S. Ct. at 2312.

352. *Id.*; *see supra* note 301.

353. Strauss, *supra* note 68, at 515-16.

354. *Id.* at 515-16. See *supra* notes 133-217 for cases using the functional analysis.

on legislation affecting Congress and the President, the Court has applied the formal test.[355]

This decision by the Court is essentially a tactical one.[356] The use of the formal, rule-like analysis as to the legislative/executive issues has a two-fold effect. First, it gives the two branches a "bright line" to use in planning future actions, and also gives the effect that the personal views of the judges were not a factor in the decision.[357] In using the deferential functional test to evaluate judicial matters, the Court makes a conscious effort to back away from confrontation with the other branches.[358]

The Court in *Metropolitan Washington* has not followed the recent trend of cases in making its decision as to which view to apply.[359] It appears that the Court has not only uncharacteristically applied the functional analysis to an executive/legislative matter, but also applied this normally deferential test to strike down the Board of Review. The Court's decision to apply the functional test in this case can be interpreted two different ways. One possibility is the Court will now use the functional test for all cases involving separation of powers. The other possibility is that the Court is just telling Congress that it is overstepping its boundaries in attempting to "aggrandize" power at the expense of both the executive and the states.

Throughout the late 1980s, the Court had been very deferential to Congressional enactments, as long as there was no aggrandizement by one branch at the expense of another.[360] The decisions of *Morrison*[361] and *Mistretta*[362] involved the transferring of powers among the federal government. In giving Congress this great latitude to enact new and innovative legislation, the Court had implicitly invited Congress to attempt new experiments involving these transfers and dispersions of power.[363] However, neither *Morrison* nor *Mistretta* involved expansion of federal power; they involved the re-assignment of power.[364]

The Supreme Court decisions of *Morrison*[365] and *Mistretta*[366] enticed

355. Strauss, *supra* note 68, at 515-16. See *supra* notes 77-123 for cases using the formal analysis.

356. Strauss, *supra* note 68, at 516.

357. *Id.* Strauss likens this to saying, "It isn't that I wanted to do this, but I had no choice." *Id.*

358. *Id.* at 517.

359. *See supra* notes 353-58.

360. *See* Morrison v. Olson, 487 U.S. 654, (1988); Mistretta v. United States, 488 U.S. 361 (1989).

361. *See supra* notes 144-89 and accompanying text.

362. *See supra* notes 190-217 and accompanying text.

363. Stephen L. Carter, *Constitutional Improprieties; Reflections on* Mistretta, Morrison *and Administrative Government*, 57 U. CHI. L. REV. 357, 404 (1990).

364. *Id.*

365. *See supra* notes 144-89 and accompanying text.

366. *See supra* notes 190-217 and accompanying text.

Congress to attempt the Transfer Act.[367] But unlike the two above cases, Congress, in the Transfer Act, was not merely "re-assigning" the powers among the federal government.[368] Here, Congress was attempting to increase the authority of the federal government; expanding its power beyond the limits of the federal government and aggrandizing power for itself in the form of the Board of Review.[369] The Court has attempted to put the brakes on the runaway train it created through the *Morrison* and *Mistretta* decisions.

The Court, however, in striking down the Board of Review, employed the functional analysis.[370] This does not explain, though, whether the Court had a specific design behind using this normally deferential test or whether it demonstrated that all future separation of powers cases will be evaluated under this analysis. One possible explanation is that the Court used the analysis to specifically send Congress a clear message—you have overstepped your bounds with this experiment of transferring power to a state-created authority. The functional test, which increases the sense that the judges are personally responsible for the outcome,[371] may have been employed to, in effect, slap Congress in the face and say not only can't you do this, but "We won't let you do this!"

The dissent argued that striking down this "innovative . . . governmental experiment"[372] was an "unprecedented step."[373] It is interesting that the dissent is written by Justice White. Justice White appears to be an everlasting functionalist.[374] Justice White not only joined the majority in both *Morrison*[375] and *Mistretta*,[376] but also wrote dissents in the formalist cases of *Chadha*[377] and *Bowsher*.[378]

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367. Carter, *supra* note 364, at 404.

368. *Id.* "Neither involves an expansion of the federal government as a whole; no one denies that the power to investigate and prosecute executive malfeasance rests somewhere, nor that the political branches can set sentencing guidelines binding the judiciary." *Id.*

369. *Metropolitan Washington*, 111 S. Ct. at 2312. The Court states "[g]iven the scope of the federal power to dispense benefits to the States in a variety of forms . . . Congress could, if this Board of Review were valid, use similar expedients to enable its Members or its agents to retain control, outside the ordinary legislative process, of the activities of state grant recipients charged with executing virtually every aspect of national policy." *Id.*

370. *See supra* note 350 and accompanying text.

371. Strauss, *supra* note 68, at 517.

372. *Metropolitan Washington*, 111 S. Ct. at 2312-13 (White, J., dissenting).

373. *Id.* at 2314 (White, J., dissenting).

374. Strauss, *supra* note 68, at 520.

375. Morrison v. Olson, 487 U.S. 654 (1988) *see supra* notes 144-89 and accompanying text.

376. Mistretta v. United States, 488 U.S. 361 (1989) *see supra* notes 190-217 and accompanying text.

377. INS v. Chadha, 462 U.S. 919, 967-1003 (1983) (White, J., dissenting).

378. Bowsher v. Synar, 478 U.S. 714, 759-75 (1986) (White, J., dissenting).

In *Chadha*, Justice White's dissent stressed the need to retain the legislative veto in certain circumstances, since it was an "important if not indispensable political invention,"[379] and that flexibility in the government was needed due to the growth in size and responsibilities of the federal government in the last half century.[380] The Framers anticipated the growth and future problems, and therefore built in flexibility to our federal government so that it would be "workable."[381]

In *Bowsher*, Justice White's dissent claimed that striking down "one of the most novel and far-reaching legislative responses to a national crisis" was a "distressingly formalistic view of separation of powers."[382] As in *Chadha*, Justice White quoted the "Steel Seizure Case"[383] in stating, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."[384]

Justice White, who consistently embraces the functional view, does not join in the majority in *Metropolitan Washington*. Justice White still appears to embrace this view, however, he is not willing to extend it to a creature of state law. He readily admits, "that the separation of powers analysis 'does not turn on the labeling of an activity,' but instead looks to 'practical consequences.' "[385] However, he qualifies this by stating, "[this] does not give the Court a license to supplant the careful work of the Airports Authority, Virginia, the District, the Federal Executive, and Congress."[386]

It is interesting to look at the dissent's argument as to the removability of the Board of Review. It was held in *Bowsher* that, "control[] by Congress" was determined by the "critical factor" of "removability."[387] In rebutting the majority's opinion that Congress had retained de facto removal power of the Board through the selection and removal of committee assignments,[388] the dissent only argues that the Act does not state that the Board member is required to be removed if he no longer

379. *Chadha*, 462 U.S. at 972 (White, J., dissenting).

380. *Id.* at 978 (White, J., dissenting).

381. *Id.* (White, J., dissenting) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

382. Bowsher v. Synar, 478 U.S. 714, 759 (1985) (White, J., dissenting).

383. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). This case is commonly refereed to as the Steel Seizure Case since it involved President Truman's attempt to take federal control of the steel plants around the nation. *Id.*

384. *Bowsher*, 478 U.S. at 760 (White, J., dissenting) (quoting *Youngstown Sheet & Tube*, 343 U.S. at 635 (Jackson, J., concurring)).

385. *Metropolitan Washington*, 111 S. Ct. at 2314 (White, J., dissenting) (quoting Mistretta v. United States, 488 U.S. 361, 393 (1989)).

386. *Id.* at 2314 (White, J., dissenting).

387. *Bowsher*, 478 U.S. at 727.

388. *See* Cong. Rec. H11,098-104 (daily ed. Oct. 15, 1986); *supra* note 268 and accompanying text.

had a particular committee assignment.[389]

Although the dissent states,"the Secretary of Transportation and the Authority negotiated a lease that defined the powers and composition of the Board to be established,"[390] it makes no reference to the removal power argument as advanced by the state of Virginia. The argument on behalf of the Commonwealth of Virginia was that the removal power was not in Congress, but in the Board of Directors, the appointing body.[391] According to the Transfer Act, the federal interest was to be governed by the lease.[392] The Act authorized the Secretary of Transportation to enter into a lease,[393] which defined the Authority as a "public body to be created by the Commonwealth of Virginia, and the District of Columbia consistent with the requirements of section 2456."[394] The lease, however, did not state the Board of Review "shall consist of" but instead stated, the " 'Board of Directors shall appoint' members from certain congressional committees."[395] The Bylaws of the Authority contained the same provisions as the lease—not the language that Congress desired.[396] It was the Commonwealth's contention that since the public officer's term was established under the bylaws, and not the Transfer Act itself, the removal of that officer was governed by the Virginia Code Annotated sec. 24.1-79.6.[397] Under this law, the removal power was vested in either the appointing authority or by a petition signed by the person who made the appointment.[398] However, the dissent failed to address this issue of removal by the appointing board.

VII. Conclusion

This Supreme Court decision has had an impact on both the doctrine of separation of powers and the types of innovative legislation that Congress will attempt in the future. For the first time in the history of the United States, the separation of powers doctrine has been applied to a creature of state law. This is because, as the majority stated, under the given facts, "[s]uch an entity necessarily exercises sufficient federal

389. *Metropolitan Washington*, 111 S. Ct. at 2318 (White, J., dissenting).
390. *Id.* at 2313 (White, J., dissenting).
391. Brief for Commonwealth of Virginia at 16-17, *Metropolitan Washington*, (No. 90-906).
392. *Id.* at 17; *see* 49 U.S.C. app. § 2451(10) (1988).
393. Brief for Commonwealth of Virginia at 17, *Metropolitan Washington*, (No. 90-906); *see* 49 U.S.C. app. § 2454(a) (1988).
394. Brief for Commonwealth of Virginia at 17, *Metropolitan Washington*, (No. 90-906); *see* 49 U.S.C. app. § 2453(2) (1988).
395. Brief for Commonwealth of Virginia at 18, *Metropolitan Washington*, (No. 90-906).
396. *Id.* at 19.
397. *Id.*
398. *Id.*

power as an agent of Congress to mandate separation-of-powers scrutiny."[399]

How much effect this decision has on the doctrine of separation of powers is yet to be seen. One can only hypothesize about the future enactments of Congress. If and when the next challenge to this doctrine is initiated, we may see whether or not there has been a fundamental shift in the doctrine. Until the next separation of powers case comes along, we will be unable to conclude whether the Supreme Court has decided to use a functional analysis in all cases, or just used it here to try to tame an innovative Congress.

However, one thing is certain from *Metropolitan Washington Airports Authority v. Citizens For The Abatement of Aircraft Noise, Inc.* The doctrine of separation of powers will be extended to state created entities when they exercise "sufficient federal power"[400] and Congress must take this fact into account in future legislation.

Richard A. Silva

399. *Metropolitan Washington*, 111 S. Ct. at 2308.
400. *Id.*

NOTES

An Analysis of the Legal Issues Surrounding the Forced Use of Ritalin: Protecting a Child's Right to "Just Say No"

I. INTRODUCTION

It is estimated that between four and ten percent of all school age children currently suffer from Attention Deficit-Hyperactivity Disorder, commonly referred to as hyperactivity.[1] Characteristics of this disorder are restlessness and continued overactivity by the child, coupled with an extremely short attention span.[2] In the school environment, teachers quickly become frustrated with children who are unable to conform to the rigors of the classroom environment,[3] and therefore they label

1. There is some controversy about the exact numbers. This is due in large part to disagreement among professionals as to the exact nature of the disorder, its symptoms, and even the possibility of there being several different disorders to which we currently apply the label hyperactivity. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 50 (3d ed. rev. 1987) [hereinafter DSM-III-R]; AMERICAN MEDICAL ASSOCIATION, ENCYCLOPEDIA OF MEDICINE 552 (Charles B. Clayman ed., 1989) [hereinafter AMA ENCYCLOPEDIA]; PETER SCHRAG & DIANE DIVOKY, THE MYTH OF THE HYPERACTIVE CHILD 16 (1975); DOROTHEA M. ROSS & SHEILA A. ROSS, HYPERACTIVITY: CURRENT ISSUES, RESEARCH AND THEORY 1 (2d ed. 1982); DANIEL J. SAFER & RICHARD P. ALLEN, HYPERACTIVE CHILDREN: DIAGNOSIS & MANAGEMENT 21 (1976); Dennis P. Cantwell, *Epidemiology, Clinical Picture and Classification of the Hyperactive Child Syndrome, in* THE HYPERACTIVE CHILD 4 (Dennis P. Cantwell ed., 1974); Carol K. Whalen & Barbara Henker, *The Social Ecology of Psychostimulant Treatment: A Model of Conceptual and Empirical Analysis, in* HYPERACTIVE CHILDREN: THE SOCIAL ECOLOGY OF IDENTIFICATION AND TREATMENT 4 (Carol K. Whalen & Barbara Henker eds., 1980) [hereinafter HYPERACTIVE CHILDREN]; RUSSELL A. BARKLEY, HYPERACTIVE CHILDREN: A HANDBOOK FOR DIAGNOSIS AND TREATMENT 7 (1981); PAUL H. WENDER, M.D., MINIMAL BRAIN DYSFUNCTION IN CHILDREN 60 (1971).

2. DSM-III-R, *supra* note 1, at 50; *see also* AMA ENCYCLOPEDIA, *supra* note 1, at 552. The condition seems to worsen when the child is forced to work in group conditions such as a classroom. *Id.*

3. *See* Barbara K. Keogh & Catherine J. Barkett, *An Educational Analysis of Hyperactive Children's Achievement Problems, in* HYPERACTIVE CHILDREN, *supra* note 1, at 259. "[F]or some teachers the primary goal of intervention [with Ritalin or behavior

many of these children "learning disabled."[4] Such labelling can produce an almost automatic reaction by school administrators and parents for special educational services and medical treatment.[5] The impact of this reaction is twofold: first, once a determination of a child's possible hyperactivity is made, treatment of the child tends to be narrowly focused on curing their symptoms, rather than determining the underlying cause;[6] second, the criteria for the child's "cure" from the disorder thereafter becomes his ability to conform to the demands of the classroom environment.[7]

Stimulant drug therapy is one of the most popular and effective methods of treating a hyperactive child.[8] Methylphenidate hydrochlo-

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modification] with hyperactive children is to gain behavioral control and to improve [the] child['s] classroom social behavior." *Id.* at 282.

4. SCHRAG & DIVOKY, *supra* note 1, at 65. Schrag and Divoky also trace this labelling of children to ad campaigns run by drug companies which manufacture the "cures" for such behavioral disorders. "In many respects, the cure preceded the ailment. . . . CIBA-Geigy promoted Ritalin—its league-leading drug for hyperactive children—for use with children who exhibited 'functional behavior problems,' a category so vague that no child need be excluded." *Id.* at 57. Since 1972, the federal government has prohibited such drug companies from promoting drugs like Ritalin directly to teachers and schools. *Id.* For a further history of the drug's development, promotion and regulation, see BARKLEY, *supra* note 1, at 190.

5. SCHRAG & DIVOKY, *supra* note 1, at 65; *see also* Valerie J. v. Derry Coop. Sch. Dist., 771 F. Supp. 483 (D.N.H. 1991).

6. *See* ROSS & ROSS, *supra* note 1, at 17. Ross and Ross argue that, although children generally share the same characteristic symptoms of hyperactivity, there are numerous and unique underlying causes. Psychostimulant treatments like Ritalin produce a dramatic drop in these symptoms, satisfying the demands of an educational setting. However, such treatments do little, if anything, to actually cure a child. *See also* Arthur M. Bolter, *The Therapeutic Use of Methylphenidate (Ritalin) in the Private Practice of Pediatrics*, *in* AMPHETAMINE USE, MISUSE, AND ABUSE 153-54 (David E. Smith ed., 1979):

> [H]yperkinesis is a symptom of an underlying disorder for which we still do not have a total understanding or management. . . .
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> . . . [I]n Britain this syndrome is rarely diagnosed in children of normal intelligence . . . . The diagnosis is most often made in mentally retarded children, and it is felt that hyperkinesis may not constitute a distinct syndrome.

Id.

7. SCHRAG & DIVOKY, *supra* note 1, at xiv-xv:

> [There is] a spreading ideology of "early intervention" and "treatment" in which the language, and often, the techniques of medicine are used extensively to serve the purposes of social control. . . . [I]ncreasingly it pervades all the major institutions dealing with the young: schools, probation departments, clinical, the federal government and [the] growing scientific and corporate establishment conducting research in the proliferating "syndromes" and "diseases" of nonconformity.

Id.

8. ROSS & ROSS, *supra* note 1, at 181; SAFER & ALLEN, *supra* note 1, at 47; BARKLEY, *supra* note 1, at 189.

ride, better known by its brand name Ritalin,[9] is the most widely prescribed stimulant drug for this purpose.[10] Stimulant drug treatment has the twin virtues of producing almost immediate results,[11] while at the same time being inexpensive.[12] However, the treatment has some drawbacks. The drug Ritalin, in essence, does little more than keep a child still.[13] Whether a child is learning anything, or simply staring off into space, has been the subject of controversy since the introduction of these drugs in the late 1960s.[14] Sitting still, following instructions, and not causing a disruption in routine are the qualities of a chemically cured hyperactive child.[15] For some children, the use of stimulant drugs is an appropriate treatment. These children show marked improvement in many behavioral aspects.[16]

There is, however, another side to the story. The side-effects of stimulant drugs on a growing child's brain are not completely known.[17] In response to their desire to rely on alternative forms of treatment,[18] some parents state that school administrators have pressured them to continue the administration of drugs such as Ritalin.[19] These parents claim these educational procedures have presented the threat of isolation and stigmatization of their children, and ultimately, exclusion from

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9. As manufactured by the CIBA-Geigy Pharmaceutical Company, Summit, New Jersey. 46 PHYSICIANS' DESK REFERENCE 880 (1992).

10. SCHRAG & DIVOKY, *supra* note 1, at 89; SAFER & ALLEN, *supra* note 1, at 52; ROSS & ROSS, *supra* note 1, at 181.

11. BARKLEY, *supra* note 1, at 189; SAFER & ALLEN, *supra* note 1, at 47; Barbara Fish, *Stimulant Drug Treatment of Hyperactive Children*, *in* THE HYPERACTIVE CHILD 109, 111 (Dennis P. Cantwell ed., 1975).

12. *See* BARKLEY, *supra* note 1, at 190.

13. BARKLEY, *supra* note 1, at 197; *see also* Fish, *supra* note 11, at 115.

14. *See* BARKLEY, *supra* note 1, at 188-89 (chart listing twelve different studies finding Ritalin to have had no significant effect on academic performance); ROSS & ROSS, *supra* note 1, at 207.

15. SCHRAG & DIVOKY, *supra* note 1, at 80; BARKLEY, *supra* note 1, at 197.

16. SAFER & ALLEN, *supra* note 1, at 50. "Those [children] who improve, improve in nearly all measurable categories of behavior, at school and at home . . . . Adults find that they can better tolerate the child on medication, and can help him more. The child becomes happier, more motivated, more successful, and better accepted." *Id.*

17. SCHRAG & DIVOKY, *supra* note 1, at 84; SAFER & ALLEN, *supra* note 1, at 58; BARKLEY, *supra* note 1, at 193. Such side-effects include loss of appetite and weight, incoherent babbling, paranoia, lethargy, irritability, increased aggression, weakness, uncontrollable screaming, and visual and tactile hallucination. In addition, there is evidence indicating long-term exposure leads to psychological dependence. SCHRAG & DIVOKY, *supra* note 1, at 85-86.

18. Such alternatives include special education for both parents and child, behavior modification therapy and structured learning environments. *See* SCHRAG & DIVOKY, *supra* note 1, at 71; ROSS & ROSS, *supra* note 1, at 213; Plaintiff's Trial Memorandum at 27, Valerie J. v. Derry Coop. Sch. Dist., 771 F. Supp. 483 (D.N.H. 1991).

19. SAFER & ALLEN, *supra* note 1, at 56; SCHRAG & DIVOKY, *supra* note 1, at 74.

educational services altogether.[20] Forcing the use of drugs, such as Ritalin, solely to control disruptive students[21] is a violation of the constitutionally protected liberty interests in one's privacy and bodily integrity.[22] Furthermore, forcing a hyperactive child to take Ritalin violates his or her right to an education under current federal law by preconditioning that education.[23]

This Note will first provide background on the development and use of Ritalin as a tool in the treatment of hyperactivity.[24] It will then explore the existence of a child's right to receive public educational services unconditioned on the use of mind-altering medication.[25] Although the United States Supreme Court has yet to comment on this issue specifically, the Court has in recent years established a right for both incompetent and mentally ill patients to be free from unnecessary restraints absent special circumstances.[26] The United States Supreme Court has also recognized the right of involuntarily committed mental patients and imprisoned criminal offenders to be free from the arbitrary administration of antipsychotic drugs.[27] This Note will demonstrate that the issues addressed in these cases are analogous to those present in cases involving hyperactive children. Moreover, this Note will show

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20. SCHRAG & DIVOKY, *supra* note 1, at 74; Valerie J. v. Derry Coop. Sch. Dist., 771 F. Supp. 483 (D.N.H. 1991); Randall Richard, *Drugs for Children—Miracle or Nightmare?*, PROVIDENCE J., Feb. 8, 1972, at 1; *see also* Andrew Blum, *Legal Fight Looms over Ritalin*, NAT'L L.J., Nov. 16, 1987, at 3; Andrew Blum, *Legal Attack on Ritalin Expands*, NAT'L L.J., Nov. 23, 1987, at 16; Lisa Berg, *Ritalin Under Fire*, A.B.A. J., Nov. 1, 1988, at 19; Andrew Blum, *Lawsuits over Ritalin Expand to Massachusetts*, NAT'L L.J., Mar. 28, 1988, at 41.

21. *See* SCHRAG & DIVOKY, *supra* note 1, at 74; SAFER & ALLEN, *supra* note 1, at 56.

> School pressure on the physician to prescribe usually occurs in association with a suspension. Infrequently, some school officials may even indicate to parents that the child will only be readmitted to school if he is on medication. Others forcefully indicate the child *must* behave differently in school when (and if) he returns; otherwise he will be suspended quickly again and possibly expelled. This threat challenges the doctor and parents to think of a dramatic, rapid, relatively inexpensive solution. In this age of high drug use, pills come to mind quickly.

SAFER & ALLEN, *supra* note 1, at 56.

22. See *infra* notes 71-113 and accompanying text for a discussion of these rights.

23. The legislation referred to is the Education of the Handicapped Act, 20 U.S.C. §§ 1400-1420 (1991). See *infra* notes 134-89 and accompanying text for an overview of the Act. See *infra* notes 259-87 and accompanying text for an analysis of how the Act applies in the case of students whose handicap causes them disciplinary problems.

24. *See infra* notes 33-70 and accompanying text.

25. *See infra* notes 71-133 and accompanying text.

26. Youngberg v. Romeo, 457 U.S. 307 (1982); *see infra* notes 120-26 and accompanying text.

27. Washington v. Harper, 494 U.S. 210 (1990); *see infra* notes 98-113 and accompanying text.

that the state interests of protecting the public, that allow the state to require the restraint of both body and mind in the case of a violently insane inmate, are not present in the case of an annoying six-year-old.[28] Next, the issue of whether and when a state can mandate medication for hyperactive children will be addressed. A brief exploration of the federal law that entitles such special needs children to a public education,[29] followed by a discussion of the foremost case on the use of Ritalin as a precondition to education.[30] Finally, this background will be juxtaposed against several possible legal theories under which challenges to this practice may be brought.[31] This Note does *not* seek to undermine the recognized legitimate efforts made by physicians and parents in treating hyperactive children. The focus of this Note is to address the legal repercussions of allowing the school district, as the embodiment of state authority and control, to decide on who it should and should not control with drugs.[32]

II. RITALIN

Children have been running, screaming and getting into every conceivable kind of trouble throughout time. This does not make them hyperactive.[33] Attention Deficit-Hyperactivity Disorder requires a behavior pattern of constant overactivity and inability to concentrate on one activity.[34] It is also known as hyperkinetic syndrome, and is four to five times more common in boys than in girls.[35] Some suggest that hyperactivity, especially when combined with excess clumsiness by children, is the result of some minimal form of brain damage, though no conclusive proof has ever been presented.[36] While hyperactivity by itself is not necessarily indicative of the condition, minimal brain dysfunction is generally considered the most common diagnosis once

28. *See infra* notes 218-57 and accompanying text; *see also* Plaintiff's Trial Memorandum at 24-28, Valerie J. v. Derry Coop. Sch. Dist., 771 F. Supp. 483 (D.N.H. 1991).

29. Education of the Handicapped Act, 20 U.S.C. §§ 1400-1420 (1991).

30. Valerie J. v. Derry Coop. Sch. Dist., 771 F. Supp. 483 (D.N.H. 1991); *see infra* notes 191-218 and accompanying text.

31. *See infra* notes 218-95 and accompanying text.

32. LAWYERS' MEDICAL CYCLOPEDIA *Drugs in Litigation* 419 (Richard M. Patterson ed., 1990) [hereinafter *Drugs in Litigation*]. There are, however, certain instances in which use of the drug is contraindicated, such as where the patient displays marked anxiety, tension, agitation or glaucoma. *Id.*

33. *See* SCHRAG & DIVOKY, *supra* note 1, at 43.

34. DSM-III-R, *supra* note 1, at 50; *see also* AMA ENCYCLOPEDIA, *supra* note 1, at 552.

35. AMA ENCYCLOPEDIA, *supra* note 1, at 552. The primary complications of the syndrome are academic and social difficulties, as the hyperactive child is unable to meaningfully interact with teachers or other students in a traditional classroom setting. DSM-III-R, *supra* note 1, at 51.

36. AMA ENCYCLOPEDIA, *supra* note 1, at 552; *see also* BARKLEY, *supra* note 1, at 38; Ross & Ross, *supra* note 1, at 12.

factors such as in-home stress have been eliminated and any overactivity and reckless behavior continue after the child's fourth year.[37] The leading theory on the cause of hyperactivity is that the condition is neurobiological in nature.[38] Experts now believe that, in truly hyperactive children, the midbrain is for some reason underaroused, leading to an absence of its damping effects on movement and sensation.[39] This has lead experts in the field to rely on chemical intervention, in the form of stimulant drugs, as the primary method of treatment[40] in trying to stimulate the midbrain into activity.[41] Ritalin is the most common amphetamine prescribed to hyperactive children for this purpose.[42] By 1974 Ritalin had beaten out the once popular and less expensive drug Dexedrine as the drug of choice in treating hyperactive children.[43] Ritalin is classified as a nerve stimulant,[44] along with other amphetamine drugs such as caffeine, dextroamphetamine, and methylphenidate.[45] Such stimulants produce an increase in neural activity which, in most people, results in an actual increase in motor activity.[46] Nobody knows exactly why Ritalin produces the opposite result in hyperactive children.[47] Generally accepted theory presumes that it somehow activates the brain stem arousal system and cortex, stimulating the underaroused portions of the child's brain, thereby allowing it to better regulate the child's motor functions.[48] This lack of understanding has led to some controversy regarding Ritalin's safety, and the ethics of

37. AMA ENCYCLOPEDIA, *supra* note 1, at 552.

38. *See supra* notes 36-37 and accompanying text.

39. AMA ENCYCLOPEDIA, *supra* note 1, at 552.

40. *See* SCHRAG & DIVOKY, *supra* note 1, at 71.

41. *See* AMA ENCYCLOPEDIA, *supra* note 1, at 552.

42. *See* SAFER & ALLEN, *supra* note 1, at 52. Other popular drugs for this use are Cyclert and Dexedrine. *Id.*

43. SCHRAG & DIVOKY, *supra* note 1, at 89. Schrag and Divoky credit this success on an aggressive marketing campaign by Ritalin's manufacturer, CIBA-Geigy, aimed at pediatric physicians, emphasizing not only the drug's efficacy, but its wide range of applications. *Id.* Certainly another reason, however, is the fact that Ritalin is far more effective than Dexedrine, while having fewer side-effects. *See* SAFER & ALLEN, *supra* note 1, at 52.

44. AMA ENCYCLOPEDIA, *supra* note 1, at 942.

45. *Id.* These drugs "reduce drowsiness and increase alertness by their action on the reticular activating system in the brain stem. . . . [Possible adverse effects] include shaking, nervousness, sleeping problems, hallucinations, paranoid delusions, and seizures. Long-term use may lead to tolerance . . . and drug dependence." *Id.* It should be noted that clinical names for drugs are never capitalized (being nothing more than chemical designations), whereas brand names for such drugs, like Ritalin and Dexedrine, are always capitalized.

46. *Drugs in Litigation, supra* note 32, at 419.

47. *Id.*; SCHRAG & DIVOKY, *supra* note 1, at 84; L. Alan Stroufe & Mark A. Stewart, *Treating Problem Children with Stimulant Drugs*, 289 NEW ENG. J. MED. 407 (Aug. 1973). "Some researchers think that hyperactive children are overaroused and that amphetamines reduce arousal; others believe the opposite." *Id.*

48. *Drugs In Litigation, supra* note 32, at 419.

prescribing it to children.[49] The facts, however, clearly indicate that in most cases, Ritalin treatment works without any adverse affects.[50]

Ritalin comes equipped with two varieties of controversy. The first involves the issues of misdiagnosis of hyperactivity, and the over-presciption of stimulant drugs as a treatment. Lawsuits involving these issues began in 1987.[51] *Parker v. American Psychiatric Ass'n,*[52] an unreported case, was a class action against the Gwinnett County, Georgia school board for violating approximately 20,000 children's constitutional right to be free from Ritalin, and for misrepresenting the drug's effects to parents.[53] The plaintiffs in this suit charged that the school board coerced these children into taking Ritalin.[54] They also charged the American Psychiatric Association with fraud and misrepresentation for its overly broad definition of hyperactivity,[55] claiming it was legally void for vagueness—causing normal children to be misdiagnosed as having the syndrome.[56]

The second controversy, and one that is only ancillary for purposes of this Note, involves the potential for dangerous (and possibly psychotropic) side-effects allegedly produced by the drug. This issue was highlighted in Massachusetts in 1988, when attorneys for Rod Matthews argued that Ritalin, through its altering of brain chemistry, had exacerbated Matthews' mental illness, leading him to become obsessed with the idea of killing another child.[57] This argument has become widely known as the "Ritalin defense," and it exemplifies an extreme, but valid, concern regarding the adverse potential of widespread drugging.[58]

Issues regarding the dangerous side-effects of such treatment,[59] however, are best left for the medical profession to resolve. As a legal issue, it is the reliance on such drugs by school administrators that is

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49. BARKLEY, *supra* note 1, at 227-28.

50. *Id.* at 228; *see also* SAFER & ALLEN, *supra* note 1, at 50; WENDER, *supra* note 1, at 90.

51. *See* Andrew Blum, *Legal Attack on Ritalin Expands*, NAT'L L.J., Nov. 23, 1987, at 16.

52. *Id.*

53. *See id.*; *see also* Virginia S. Cowart, *The Ritalin Controversy: What's Made this Drug's Opponents Hyperactive?*, JAMA, May 6, 1988, at 259.

54. *See* Blum, *supra* note 51, at 16.

55. See *id.* *See supra* note 1 for the DSM-III-R definition of hyperactivity that is at issue in this case.

56. *See* Blum, *supra* note 51, at 16.

57. Commonwealth v. Matthews, 548 N.E.2d 843 (Mass. 1990). Rod Matthews was convicted as an adult of murdering his friend and classmate Shaun Ouillette with a baseball bat. Lawyers for Matthews argued diminished capacity brought on by the mind-altering affects of Ritalin. The jury was not convinced. *Id.*

58. *See* Cowart, *supra* note 53, at 259.

59. See *supra* note 17 for an illustrative listing of such side-effects.

the prime concern.[60] Prescribing stimulants to hyperactive children is often the first therapeutic step taken by physicians,[61] and the initial results are both positive and dramatic in terms of school discipline.[62] Some argue that some school administrators have come to regard it as essential to the education of hyperactive children,[63] at the expense of other, equally valid forms of therapy.[64]

Sometimes, parents' decisions to remove their children from Ritalin treatments result in increased pressure from school administrators to reinstate the treatment.[65] If the parents refuse, their child may be threatened with the stigmatization of placement in isolated environments[66] or even expelled.[67] The schools complain that, unless certain children receive the drug, education of the remainder of the class becomes impossible.[68] While this could be true in some cases, it should be the parent, not the school, who determines the appropriate program of treatment for the child. There also exists the possibility that school administrators, faced with increasingly difficult operations in these days of shrinking budgets and program downsizing, are overusing the drug in their effort to comply with the demands of federal special education legislation.[69] The school's authority to require, and the constitutional

60. *See* SAFER & ALLEN, *supra* note 1, at 56; SCHRAG & DIVOKY, *supra* note 1, at 74-75.

61. *See* BARKLEY, *supra* note 1, at 189 (also noting a 400% increase in the number of children taking stimulant drugs between 1970 and 1981).

62. Fish, *supra* note 11, at 111-12. "The change is very rapid when it works, and one doesn't have to keep children on medication for a long time to find out whether it is the right drug or not." *Id.*

63. SCHRAG & DIVOKY, *supra* note 1, at 73; SAFER & ALLEN, *supra* note 1, at 56 (noting that such reliance occurs only infrequently).

64. SCHRAG & DIVOKY, *supra* note 1, at 73. See *supra* note 18 for an illustrative listing of some alternative forms of therapy.

65. SCHRAG & DIVOKY, *supra* note 1, at 74; Richard, *supra* note 20, at 1.

66. SCHRAG & DIVOKY, *supra* note 1, at 74. One child was placed in a large cardboard box during school hours. *Id.*

67. SCHRAG & DIVOKY, *supra* note 1, at 75 (citations omitted).

68. *Id.* at 76.

69. *Id.* at 106.

> The question of dependency on [drugs such as Ritalin] quickly turns from a medical into a political question whose very definition involves not merely the psychological state of the patient but also the social and political impositions of the society and its institutions. . . . [I]n all such cases of liberty, this one has implications for every member of the population, not merely those who are chemically incarcerated. . . . It is the ideology of drugging, the idea that people can and should be chemically managed, that represents the most pervasive imposition on personal liberty and the most dangerous extension of authority. The . . . counterargument that a certain drug isn't hurting a certain child . . . and that one should not sacrifice his well-being to some political abstraction, is itself a disguised political argument in defense of the standards that determine his . . . success. The argument seems to prove that while the child may not become dependent on the drug, those who recommend and defend it already are.

right to refuse, such mind-altering medication, are in direct conflict.[70]

III. The Constitutional Right to Refuse Mind-Altering Medication

The United States Supreme Court recognized that an individual has a privacy right to refuse unwanted medical treatment, ranging from such simple procedures as blood transfusions[71] to major surgery.[72] The basis for this right can be found in the penumbral right to privacy first recognized in *Griswold v. Connecticut*.[73] The privacy right recognized in *Griswold* can act as a bar to unwanted medical procedures unless there is a legitimate state interest in the procedure and there are no less intrusive methods available to accommodate this interest.[74] With

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Id.

70. *See infra* notes 71-133 and accompanying text.

71. *See* Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2866 n.6 (1990).

> Under traditional tort law, exceptions have been found only to protect dependent children. *See* Cruzan v. Harmon, 760 S.W.2d 408, 422 n.17 (Mo. 1988) (citing cases where Missouri courts have ordered blood transfusions for children over the religious objection of parents); *see also* Winthrop University Hospital v. Hess, 490 N.Y.S.2d 996 (Sup. Ct. Nassau Co. 1985) (court ordered blood transfusion for religious objector because she was the mother of an infant and had explained that her objection was to the signing of the consent, not the transfusion itself); *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) (blood transfusion ordered for mother of infant). *Cf. In re* Estate of Brooks, 205 N.E.2d 435, 441-42 (1965) (finding that lower court erred in ordering a blood transfusion for a woman—whose children were grown—and concluding: 'Even though we may consider appellant's beliefs unwise, foolish or ridiculous, in the absence of an overriding danger to society we may not permit interference therewith in the form of a conservatorship established in the waning hours of her life for the sole purpose of compelling her to accept medical treatment forbidden by her religious principles, and previously refused by her with full knowledge of the probable consequences.').

Id. at 2866 n.6; *see also* Tune v. Walter Reed Army Med. Hosp., 602 F. Supp. 1452, 1455 (D. D.C. 1985) ("[It is] a well-established rule of general law . . . that it is the patient, not the physician, who ultimately decides if treatment—any treatment—is to be given at all. . . . The rule has never been qualified in its application by either the nature or purpose of the treatment, or the gravity of the consequences of acceding to or foregoing it."); Downer v. Veilleux, 322 A.2d 82, 91 (Me. 1974) ("The rationale of this rule lies in the fact that every competent adult has the right to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks, however unwise his sense of values may be to others.").

72. Winston v. Lee, 470 U.S. 753 (1985) (surgical operation to remove a bullet from a criminal suspect's body implicated Fourth Amendment rights against unreasonable searches and seizures).

73. 381 U.S. 479 (1965).

74. Winston v. Lee, 470 U.S. 753 (1985); *see also* Washington v. Harper, 494 U.S. 210 (1990); Youngberg v. Romeo, 457 U.S. 307 (1982); Vitek v. Jones, 445 U.S. 480 (1980). This right may only be exercised by parents on behalf of their

regard to procedures involving an unwanted physical or chemical restraint of a resident of a state penal or psychiatric facility, state interests that have outweighed such privacy rights are driven by a desire to protect violent patients from harming themselves or others.[75] Furthermore, such situations also implicate a liberty interest under Fourteenth Amendment due process rights.[76]

A. *Liberty Interests and Mental Patients*

The legal theories surrounding the exercise of these privacy and due process rights by patients/inmates are best articulated in the areas of psychological treatments such as behavior modification treatment for dangerous criminals,[77] electroshock therapy,[78] and the use of antipsychotic drugs.[79] The issues surrounding the use of Ritalin on hyperactive children are most analogous to the use of antipsychotic drugs—in particular concerning the similar rationales used by both institutions of correction and education for the drugging of their populations.[80]

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child if such refusal does not endanger the health and welfare of the child. *See supra* note 71.

75. Washington v. Harper, 494 U.S. 210 (1990); Youngberg v. Romeo, 457 U.S. 307 (1982). See *infra* notes 120-26 and accompanying text for a discussion of *Youngberg* and notes 98-113 and accompanying text for a discussion of *Harper*.

76. *See* Vitek v. Jones, 445 U.S. 480, 491-94 (1980); Youngberg v. Romeo, 457 U.S. 307, 316 (1982); Parham v. J.R., 442 U.S. 584, 600-01 (1979).

77. Vitek v. Jones, 445 U.S. 480 (1980).

78. *Cf. In re* Schuoler, 723 P.2d 1103 (Wash. 1986) (right to refuse electroconvulsive therapy is a fundamental liberty).

79. Washington v. Harper, 494 U.S. 210 (1990); Mills v. Rogers, 457 U.S. 291 (1982); *In re* Guardianship of Roe, 421 N.E.2d 40 (Mass. 1981); Large v. Superior Court, 714 P.2d 399 (Ariz. 1986) (en banc); Riese v. St. Mary's Hosp. & Med. Ctr., 243 Cal. Rptr. 241 (Cal. Ct. App. 1988), *review granted but dismissed*, 774 P.2d 698 (1989); People v. Medina, 705 P.2d 961 (Colo. 1985) (en banc); Rogers v. Commissioner of Dep't of Mental Health, 458 N.E.2d 308 (Mass. 1983); Rivers v. Katz, 495 N.E.2d 337 (N.Y. 1986); *In re* Mental Health of K.K.B., 609 P.2d 747 (Okla. 1980).

80. The decision to forcibly medicate involuntary patients or inmates is generally made by medical personnel who take into account the nature of the prisoner's illness and the needs for institutional safety. In the majority of cases, the treatment does indeed provide the patient with genuine relief. However, arguments have been made that prisons and mental hospitals, facing budgetary problems, rely on such chemicals, without regard to medical consequences, primarily to mentally "hobble" patients. *See Harper*, 494 U.S. at 244-45 (Stevens, J., dissenting). "Use of psychotropic drugs, the State readily admits, serves to ease the institutional and administrative burdens of maintaining prison security and provides a means of managing an unruly prison population and preventing property damage." *Id.*; Jami Floyd, Comment, *The Administration of Psychotropic Drugs to Prisoners: State of the Law and Beyond*, 78 CALIF. L. REV. 1243, 1248 (1990).

> The widespread use of psychotropic drugs in prisons presents a correspondingly high opportunity for abuse. The drugs themselves are highly dangerous, and they may be forced onto prisoners for behavior control or administrative convenience and not necessarily for medical treatment. . . . Prisons are institutions of discipline and control; psychotropic medication

The liberty interest of mental patients to be free from the forced administration of psychotropic medication[81] was first addressed in a federal court in *Rogers v. Okin.*[82] In *Rogers*, the United States Court of Appeals for the First Circuit delineated the exact nature, under the federal constitution, of the individual's right to be "left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs."[83] Noting with some surprise that the precise textual source of this right was unclear, and that authoritative support for this finding was scant, the court nevertheless characterized the right as intuitively obvious.[84] The most likely source for such a liberty interest was the penumbral right to privacy, bodily integrity, or personal security.[85] The trial court decision referred to a First Amendment right to

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should be offered in an atmosphere of treatment and consent. The line between the treatment of mental illness and the chemical control of behavior is a fine one and the temptation to use psychotropic drugs improperly in prison is great: drugs are more efficient than physical restraints and require less commitment of staff and time. Furthermore, prisons are closed institutions to which the public and media have limited access, such that abuses can go unnoticed.

Id. Similarly, arguments that stimulant drugs such as Ritalin benefit the child academically seem unfounded. The chief reason for the drugs' popularity appears to be the "chill out" effect on children. *See* BARKLEY, *supra* note 1, at 197-201:

> [N]either short-term nor long-term studies supports any utility of the stimulants in improving academic performance. . . . [S]tudies of teacher-child interactions bear out our original findings that the stimulant drugs improve compliance to commands to hyperactive children and increase their responsiveness to interaction with others. . . . [B]ehavioral approaches can produce remarkable improvements in academic achievement and productivity—something that remains to be demonstrated for the stimulant drugs.

Id.

81. Psychotropic medication refers to any drug prescribed to modify behavior, thinking, or feelings. Antipsychotic, mood stabilizers, antidepressants, and antianxiety/sedative agents are specific classes of psychotropic drugs. Robert Byck, *Drugs and the Treatment of Psychiatric Disorders*, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 152 (Louis S. Goodman & Alfred Gilman eds., 5th ed. 1975). Though antipsychotic drugs are a subclass of psychotropic drugs, these terms are often used interchangeably. *Id.*; FREDERICK MEYERS ET AL., REVIEW OF MEDICAL PHARMACOLOGY 251 (7th ed. 1980).

82. 634 F.2d 650 (1st Cir. 1980).

83. *Id.* at 653.

84. *Id.*

85. *Id.* (citing Parham v. J.R., 442 U.S. 584, 626 (1979) (Brennan, J., dissenting on other grounds)); Rennie v. Klein, 462 F. Supp. 1131, 1144-45 (D.N.J. 1978) (on motion for preliminary injunction); *In re* Mental Health of K.K.B., 609 P.2d 747 (Okla. 1980); Superintendent of Belchertown v. Saikewicz, 370 N.E.2d 417 (Mass. 1977); *cf.* Ingraham v. Wright, 430 U.S. 651, 673 (1977) ("Among the historic liberties [protected by the Due Process Clause] was a right to be free from . . . unjustified intrusions on personal security."); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) (right of an individual that his person be held inviolable). *See generally* Note,

be free to generate ideas.[86] The Court of Appeals decided the case instead under the right to privacy, and therefore declined to address the First Amendment issue.[87] Once the right to be free from forced medication was recognized, the Court of Appeals turned its attention to circumstances under which the right could be overcome.[88] The court concluded that the individual's liberty interest to be free from unwanted medication could be overcome under two legal theories. Under the first theory, state police power would prevail in emergency situations, where failure to medicate might result in injury to the patient or others.[89] The second theory applies only in cases of incompetent patients. Under this theory, the state has a *parens patriae* power[90] to administer mind-altering drugs when there is a substantial possibility that such treatment could relieve the suffering of the incompetent patient.[91]

Although the United States Supreme Court granted certiorari in this

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Developments in the Law: Civil Commitment of the Mentally Ill, 87 HARV. L. REV. 1190, 1194-96 (1974).

86. Rogers v. Okin, 478 F. Supp. 1342, 1367 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *cert. granted*, 451 U.S. 906 (1981), *and vacated sub nom* Mills v. Rogers, 457 U.S. 291 (1982). "[T]he power to produce ideas is fundamental to our cherished right to communicate and is entitled to constitutional protection." *Id.; see also* Scott v. Plante, 532 F.2d 939, 946 (3d Cir. 1976); Winters v. Miller, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); Bee v. Greaves, 744 F.2d 1387, 1392-94 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) (constitutional right to refuse medication grounded in right to be free from government interference with production and communication of ideas, right to privacy, right to be free from bodily restraints, right to make one's own decisions, and right to personal dignity and bodily integrity). *See generally* Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1 (1989).

87. Rogers v. Okin, 634 F.2d 650, 654 n.2 (1980), *cert. granted*, 451 U.S. 906 (1981), *and vacated sub nom* Mills v. Rogers, 457 U.S. 291 (1982).

88. *Id.* at 654.

89. *Id.* at 654, 656.

90. *See id.* at 654-57.

91. *Id.* at 657.

> Today, however, due in large part to the development of numerous drugs for treating mental illness, the possibility of improvement as a result of forced treatment is relatively substantial. Given such a possibility, and confronted with the often severe suffering of individuals afflicted with mental illness, the state today finds its interest in being able to offer meaningful assistance to the individual even more substantial than it was in previous times. However, for the state to invoke this interest as a justification for the administration of treatment that could represent substantial intrusions upon the individual, the individual himself must be incapable of making a competent decision concerning treatment on his own. Otherwise, the very justification for the state's purported exercise of its *parens patriae* power—its citizen's inability to care for himself would be missing. Therefore, the *sine qua non* for the state's use of its *parens patriae* power as justification for the forceful administration of mind-affecting drugs is a determination that the individual to whom the drugs are to be administered lacks the capacity to decide for himself whether he should take the drugs.

Id. (citations omitted).

case [92] and recognized the validity of the Court of Appeal's reasoning,[93] it declined to clearly define the substantive limits of the right to be free from forced medication under the United States Constitution.[94] It so declined because an intervening case decided by the Massachusetts Supreme Judicial Court[95] called into question the extent of state law protection of such a liberty interest.[96] Because the protection afforded to the patients in this case may have been greater under Massachusetts state law than under corresponding federal law, the Supreme Court decided that the rights of these patients might be better served by vacating the decision of the Court of Appeals, and remanding the case for further proceedings.[97]

B. *Restraint of Dangerous Inmates: Institutional Safety*

Institutional concerns for order and safety played an even greater role in the Supreme Court's decision in *Washington v. Harper*.[98] In *Harper*, the Court ruled that institutional considerations of order and, especially safety, outweighed the prisoner's liberty interest in refusing antipsychotic medication.[99] Harper suffered from schizophrenia,[100] and under a Washington state penal policy, prison authorities could

92. Okins v. Rogers, 451 U.S. 906 (1981), *vacated sub nom* Mills v. Rogers, 457 U.S. 291 (1982).

93. Mills v. Rogers, 457 U.S. 291, 297-98 (1982).

94. *Id.* at 305.

95. *In re* Guardianship of Roe, 421 N.E.2d 40 (Mass. 1981). The Massachusetts Supreme Judicial Court determined that a non-institutionalized but mentally incompetent person had a protected liberty interest in refusing antipsychotic medication both under the common law of Massachusetts as well as under federal and state constitutional grounds. *Id.* at 42.

96. Mills v. Rogers, 457 U.S. 291, 300-01 (1982).

97. *Id.* at 303, 306. The Court remanded the case in order to provide *greater*, not less, protection to the liberty interest of patients to refuse antipsychotic medication. The existence of such a right has never seriously been doubted by the courts. The issue, rather, has been the level of state interest necessary to overcome such a right, as well as the procedural due process an individual must receive before he may justly be deprived of it.

98. 494 U.S. 210 (1990).

99. *Id.* at 222. "The extent of a prisoner's right under the [Due Process] Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement." *Id.*

> Prison administrators have not only an interest in ensuring the safety of prison staffs and administrative personnel, but the duty to take reasonable measures for the prisoners' own safety. These concerns have added weight when a penal institution, like the [Special Offender Center], is restricted to inmates with mental illnesses. Where an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness.

Id. at 225-26 (citations omitted).

100. *Id.* at 214 n.2.

medicate him with antipsychotic drugs if a psychiatrist determined that he was dangerous to himself or to others.[101] Harper brought a civil rights action under 42 U.S.C. § 1983 claiming that such forced medication was a violation of his liberty interest under the Due Process Clause.[102] Harper also claimed that procedural due process required a judicial hearing before any inmate could be placed against his will on such mind altering drugs.[103] Under SOC Policy 600.30, Harper was entitled to an administrative hearing prior to his being placed on the antipsychotic.[104] This review was supposedly comprised of disinterested parties, although there was evidence in the record that each member of the reviewing panel had some connection with, and perhaps a vested interest in keeping order within the institution.[105] Harper was

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101. *Id.* at 214-16.

> [Special Offender Center Policy 600.30 (SOC Policy 600.30) has both] substantive and procedural components. First, if a psychiatrist determines that an inmate should be treated with antipsychotic drugs but the inmate does not consent, the inmate may be subjected to involuntary treatment with the drugs only if he (1) suffers from a "mental disorder" and (2) is "gravely disabled" or poses a "likelihood of serious harm" to himself, others, or their property. Only a psychiatrist may order or approve the medication. Second, an inmate who refuses to take the medication voluntarily is entitled to a hearing before a special committee consisting of a psychiatrist, psychologist, and the Associate Superintendent of the Center, none of whom may be, at the time of the hearing, involved in the inmate's treatment or diagnosis. If the committee determines by a majority vote that the inmate suffers from a mental disorder and is gravely disabled or dangerous, the inmate may be medicated against his will, provided the psychiatrist is in the majority.

Id. at 215-16 (footnote omitted).

102. *Harper*, 494 U.S. at 217.

103. *Id.* at 217.

104. *See supra* note 101. The hearing was to determine the medical necessity of drugging the inmate. Harper contended that the rules of evidence should apply, and that a "clear, cogent and convincing" standard be used in making the decision to drug. *Harper*, 494 U.S. at 235. The Supreme Court rejected this analysis, stating that "[t]his standard is neither required nor helpful when medical personnel are making the judgment required by the regulations here." *Id.* (citing Vitek v. Jones, 445 U.S. 480, 494-95 (1980); Youngberg v. Romeo, 457 U.S. 307, 321-23 (1982)).

105. *See Harper*, 494 U.S. at 251 (Stevens, J., dissenting).

> These decisionmakers have two disqualifying conflicts of interest. First, the panel members must review the work of treating physicians who are their colleagues and who, in turn, regularly review their decisions. Such an in-house system pits the interests of an inmate who objects to forced medication against the judgment not only of his doctor, but often his doctor's colleagues. Furthermore, the Court's conclusion that "[n]one of the hearing committee members may be involved in the inmate's current treatment or diagnosis," overlooks the fact that Policy 600.30 allows a treating psychiatrist to participate in all but the initial *7-day* medication approval. This revolving door operated in Harper's case.

Id. at 251-52 (Stevens, J., dissenting) (quoting *Harper*, 494 U.S. at 233) (alterations in original); *see also id.* at 251-52 n.22.

also entitled to have his forced medication decision reviewed on a regular basis to determine both its continued efficacy and safety.[106]

The Supreme Court agreed that Harper possessed a liberty interest in being free from the arbitrary administration of such medication,[107] but found that the treatment here was not arbitrary.[108] Harper had in the past posed a serious danger to others,[109] and the Court reasoned

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> As regular SOC staff, 600.30 committee members are: "susceptible to implicit or explicit pressure for cooperation ('If you support my orders, I'll support yours'). It is instructive that month after month, year after year, this 'review' panel *always* voted for more medication—despite the scientific literature showing that periodic respites from drugs are advisable and that prolonged use of antipsychotic drugs is proper only when the medical need is clear and compelling."

Id. at 251-52 n.22 (quoting Brief for American Psychological Association as Amicus Curiae, at 26-27, Washington v. Harper, 494 U.S. 210 (1990) (No. 88-599)).

106. *Id.* at 216.

107. *Id.* at 221-22. "We have no doubt that, in addition to the liberty interest created by the State's Policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Id.* (citing Vitek v. Jones, 445 U.S. 480, 491-94 (1980); *see* Youngberg v. Romeo, 457 U.S. 307, 316 (1982); Parham v. J.R., 442 U.S. 584, 600-01 (1979)); *see also* Floyd, *supra* note 80, at 1267-68.

> Justice Kennedy recognized the prisoner's privacy right in *Harper*, relying several times upon *Vitek v. Jones*, where the Court had earlier held that there was a protected liberty interest in avoiding transfer from a prison to a mental hospital. "[T]he stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitutes the kind of deprivations of liberty that requires procedural protections."
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> The *Vitek* Court did not address the possibility of forced treatment with psychotropic drugs. However, such treatment is a far greater intrusion on privacy than the behavior modification at issue in *Vitek*, because the latter does not touch the body and has no chemical effect on the brain. Discussing the 'grievous loss' incurred by an inmate transferred to a mental hospital and subjected to behavior modification, the Court noted that the due process clause would protect an ordinary citizen subjected to these consequences. The Court concluded that "a convicted felon also is entitled to the benefit of procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital. If the transfer to a mental hospital in *Vitek* was not 'within the range of conditions of confinement to which a prison sentence subjects an individual,' then nor should the more intrusive forced administration of psychotropic drugs be within that range. The liberty interest that protects prisoners and ordinary citizens alike provides a basis for the prisoner's rejection of the unwanted administration of psychotropic medication."

Floyd, *supra* note 80, at 1267-68 (quoting Vitek v. Jones, 445 U.S. 480, 492 (1980)).

108. *Harper*, 494 U.S. at 222. The Court found that the policy comported with Harper's due process rights to be free from such medication because it was reasonably related to the state's legitimate interest in combatting the danger posed by a violent, mentally ill inmate. *Id.* at 222-23.

109. *Id.* at 217.

that the legitimate institutional concern for the safety of other inmates and staff, along with a valid, but secondary concern for control of the prison population, outweighed his liberty interest.[110] Furthermore, the Court concluded that the administrative hearing process that the prison engaged in satisfied the requirements of procedural due process, negating the need for a judicial hearing.[111]

The Court was very careful to note that it based its decision on concerns for safety and treatment.[112] Even in the case of dangerous criminals, such forced medication could be used only when it was in the medical interest of the prisoner, and could never be used solely for punishment or institutional order.[113]

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110. *Id.* at 236. The dissent criticized the Court's decision, arguing that the valid state interest in restraining violent prisoners had been corrupted by institutional convenience:

> The State, and arguably the Court, allows the SOC to blend the state interests in responding to emergencies and in convenient prison administration with the individual's interest in receiving beneficial medical treatment. The result is a muddled rationale that allows the "exaggerated response" of forced psychotropic medication on the basis of purely institutional concerns. So serving institutional convenience eviscerates the inmate's substantive liberty interest in the integrity of his body and mind.

Id. at 249-50 (Stevens, J., dissenting).

111. *Id.* at 231.

> Notwithstanding the risks that are involved, we conclude that an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge. The Due Process Clause "has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." *Parham*, 442 U.S. at 607. Though it cannot be doubted that the decision to medicate has societal and legal implications, the Constitution does not prohibit the State from permitting medical personnel to make the decision under fair procedural mechanisms.

Id. (citing *Parham*, 442 U.S. at 607-09; Youngberg v. Romeo, 457 U.S. 307, 322-23 (1982)).

112. *See id.* at 225.

> There are few cases in which the State's interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, which, "by definition," is . . . made up of persons with "a demonstrated proclivity for antisocial criminal, and often violent, conduct." We confront here the State's obligations, not just its interests. . . . Prison administrators have not only an interest in ensuring the safety of prison staffs and administrative personnel, but the duty to take reasonable measures for the prisoners' own safety. These concerns have added weight when a penal institution . . . is restricted to inmates with mental illnesses. Where an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness.

Id. at 225-26 (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984)) (citations omitted).

113. *Id.* at 227.

C. *Physical Restraint of the Handicapped*

There are also Supreme Court decisions dealing with the constitutional right of committed children and incompetent mental patients to be free of bodily restraints which are applicable through analogy to a child's right to be free of intellectual restraint. Although the Court in *Parham v. J.R.*[114] declined to allow a child a hearing before a tribunal before he could be committed to a mental institution,[115] the Court did recognize the child's liberty interest being free from bodily restraints and from the emotional harm that can result from such commitment.[116]

> We hold that, given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest.

Id.; *see also* Vitek v. Jones, 445 U.S. 480 (1980), in which the Court, in dicta, stated:

> None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime. Our cases recognize as much and reflect an understanding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. . . . A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.

Vitek, 445 U.S. at 493-94 (citing Baxstrom v. Herold, 383 U.S. 107 (1966); Specht v. Patterson, 386 U.S. 605 (1967); Humphrey v. Cady, 405 U.S. 504 (1972); Jackson v. Indiana, 406 U.S. 715, 724-25 (1972)). The intrusiveness of forced drugging has been compared to both electroshock therapy and lobotomy:

> The Washington Supreme Court properly equated the intrusiveness of this mind altering drug treatment with electroconvulsive therapy or psychosurgery. It agreed with the Supreme Judicial Court of Massachusetts' determination that the drugs have a " 'profound effect' " on a person's " 'thought processes' " and a " 'well-established likelihood of severe and irreversible adverse side effects,' " and that they therefore should be treated " 'in the same manner we would treat psychosurgery or electroconvulsive therapy.' " There is no doubt, as the State Supreme Court and other courts that have analyzed the issue have concluded, that a competent individual's right to refuse such medication is a fundamental liberty interest deserving the highest order of protection.

Harper, 494 U.S. at 240-41 (Stevens, J., dissenting) (quoting Harper v. State, 759 P.2d 358, 362 (Wash. 1988) (quoting *In re* Guardianship of Roe, 421 N.E.2d 40, 53 (Mass. 1981))) (citations omitted) (footnote omitted). For a list of cases holding that an individual has a fundamental liberty interest in refusing medication, see *Harper*, 494 U.S. at 241 n.9 (Stevens, J., dissenting).

114. 442 U.S. 584 (1979).

115. *Id.* at 608.

116. *Id.*

In this case, an entire class of children brought a civil rights action under 42 U.S.C. § 1983, claiming that the procedure prescribed for such commitment under Georgia law violated their procedural due process rights under the United States Constitution.[117] The Court, while recognizing that children have such a liberty interest,[118] nevertheless held that the Georgia Code adequately protected these rights.[119]

Like a prisoner's right to be free from forced medication, a handicapped patient's right to be free from bodily restraint can be outweighed by institutional concerns for safety, though not for purposes of discipline or punishment. In *Youngberg v. Romeo*,[120] a mother filed a suit on behalf of her incompetent, committed son.[121] Romeo demonstrated a propensity for violence against himself and others.[122] Hospital staff confined Romeo with cloth restraints at certain times during the day—such as when he or other patients were receiving intravenous medication or tests.[123] The Court ruled that the test for determining whether an individual's substantive liberty interest to be free from bodily restraints had been violated was to "balance 'the liberty of the individual' and 'the demands of an organized society.' "[124] In this case, the Court found that the reasons for confining Romeo were "reasonably related to legitimate government objectives and not tantamount to punishment."[125] The court also suggested that the use of such a procedure as a disciplinary measure would be impermissible.[126]

Similar constitutional protections apply to schoolchildren as well.

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117. *Id.* at 587-88. J.R. sought a "declaratory judgment that Georgia's voluntary commitment procedures for children under the age of 18 violated the Due Process Clause of the Fourteenth Amendment, and requested an injunction against their future enforcement." *Id.* at 588. Section 88-503.1 of the Georgia Code provided that:

> The superintendent of any facility may receive for observation and diagnosis . . . any individual under 18 years of age for whom such application is made by his parent or guardian . . . . If found to show evidence of mental illness and to be suitable for treatment, such person may be given care and treatment at such facility and such person may be detained by such facility for such period and under such conditions as may be authorized by law.

GA. CODE § 88-503.1 (1975). Section 88-503.2 provided that "[t]he superintendent of the facility shall discharge any voluntary patient who has recovered from his mental illness or who has sufficiently improved that the superintendent determines that hospitalization of the patient is no longer desirable." *Id.* § 88-503.2.

118. *Parham*, 442 U.S. at 600.

119. *Id.* at 606-07.

120. 457 U.S. 307 (1982).

121. *Id.* at 309.

122. *Id.*

123. *Id.* at 310-11.

124. *Id.* at 320 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

125. *Id.*

126. *Id.* at 321.

The Court in *Goss v. Lopez*[127] ruled that constitutional protection of liberty interests reached into the classroom.[128] The plaintiffs in *Goss* were students who had been suspended, without notice, for participating in a protest on school grounds.[129] The Court held that the Due Process Clause of the Fourteenth Amendment required that these students receive some type of administrative hearing prior to their denial of educational services.[130] The Court reasoned that:

> [t]he authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.[131]

Whereas a routine suspension of a student for disciplinary reasons required only the most rudimentary form of such protection,[132] the Court

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127. 419 U.S. 565 (1975).

128. *Id.* at 574. "[These] young people do not 'shed their constitutional rights' at the school house door." *Id.* (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).

129. *Id.* at 568-71.

130. *Id.* at 581.

> [R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

Id. at 583-84.

131. *Id.* at 574.

132. *Goss*, 419 U.S. at 579.

> [S]tudents facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing . . . . [T]he timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved . . . . The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted . . . . The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process . . . . Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action . . . . The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammeled power to act unilaterally, unhampered by rules

did note that a more lasting, or even permanent exclusion from the regular classroom environment called for more careful, detailed procedures.[133]

The proposition that the implementation of radical behavioral controls, such as drugging or restraint, be used primarily for purposes of health and safety, and never purely as a means of maintaining order, is central to the Court's reasoning in the preceding cases. This, coupled with the impermissibility of depriving a student's educational entitlement in response to his exercise of a constitutional right, strongly suggests the illegality and impropriety of state mandated drugging of hyperactive children.

VI. State Mandated Drugging of Hyperactive Children

A. *Background: The Right of Learning Impaired Children to a Special Education*

A learning impaired child's entitlement to a special education, and the procedures used to formulate that education, are codified in the Education of the Handicapped Act (EHA).[134] Parallels can be drawn between the procedural rights of hyperactive children under this act, and the rights of patients/inmates who are subjected to behavioral control.[135] The EHA sets forth the procedural hurdles the state must clear

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> about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done . . . . Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

Id. at 579-81 (citations omitted).

133. *Id.* at 584. "We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Id.*

134. 20 U.S.C. §§ 1400-1485 (1988 & Supp. II 1990). The Act was amended in 1990 and renamed The Individuals with Disabilities Act, or IDEA. 20 U.S.C. § 1400(a) (Supp. II 1990). The 1990 Amendment changed all references to "Children with Handicaps" or "Handicapped Children" to "Children with Disabilities." *See* Pub. L. 101-476 § 901(a)(3) (1990). Since the events which are the subject matter of this article occurred under EHA rather than IDEA, the analysis will deal primarily with EHA.

135. The right to a hearing and the right to periodic review of the program in question are examples of the procedural rights available to both classes. See *supra* notes 71-131 and accompanying text for a discussion of these rights.

as it formulates a particular child's special education.[136] Congressional intention in passing the EHA was to ensure that thousands of handicapped children who were receiving little or no education, and indeed, were being shut away in institutions without any chance of meaningful interaction with the outside world, would receive a "free appropriate public education"[137] that would provide them with some educational benefit.[138] To facilitate this goal, although not mentioning the term specifically, the EHA incorporates the concept of "mainstreaming" handicapped individuals to the greatest extent possible.[139] To maximize his or her integration into society, a mainstreamed child is placed in the same classroom with other, non-handicapped children.[140] Although mainstreaming has always been a controversial practice, and the subject of many parents' misunderstandings and fears,[141] proponents believe that it serves the important function of providing children, whose only "crime" is being different, with education and interaction among peers in the least restrictive environment possible.[142] Two landmark decisions of the United States' Federal Courts preceded the EHA. The first of these two cases, *Pennsylvania Ass'n of*

136. 20 U.S.C. § 1401.

137. 20 U.S.C. § 1401 (a)(18).

> (18) The term "free appropriate public education" means special education and related services that
>
> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary or secondary school education in the state involved, and
>
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Id. For a discussion of the United States Supreme Court's interpretation of this provision, see *infra* notes 172-89 and accompanying text.

138. 20 U.S.C § 1400(c).

139. STEVEN S. GOLDBERG, SPECIAL EDUCATION LAW: A GUIDE FOR PARENTS, ADVOCATES, AND EDUCATORS 21 (1982) "[T]hat to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped. . . ." *Id.* at 21-22 (citing 20 U.S.C. § 1412(5)(B) (1991)); *see also* 34 C.F.R. § 104.34 (1991). "A recipient . . . shall provide for the education of . . . each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person." *Id.*

140. GOLDBERG, *supra* note 139, at 22. The use of Ritalin may indeed be helpful in making such integration possible in more cases. There is no dispute regarding the positive role Ritalin may play in such circumstances. The position of this note is that the choice of treatment belongs to the child, or at the very least to the parents. If such a decision is left to educational institutions, it is logical that economic considerations, rather than individual need, could unduly influence such a decision.

141. GOLDBERG, *supra* note 139, at 21-22. Such fears are usually the product of misunderstandings regarding the particular handicap at issue, and the discomfort most people feel in the presence of handicapped individuals. *Id.*

142. *Id.* at 38 (citing 34 C.F.R. § 300.550-556 (1991)).

Retarded Children v. Commonwealth of Pennsylvania (PARC),[143] dealt with provisions of Pennsylvania educational law that operated to exclude retarded individuals from access to public education.[144] Under Pennsylvania law, an exclusion could occur when a psychological evaluation had concluded that a child could not benefit from such access;[145] when a child had exceeded the maximum age requirement for public education (seventeen);[146] when a child "has not attained a mental age of five years";[147] or when a child has been deemed "uneducable and untrainable" by a public school psychologist.[148] The court, in striking down these laws,[149] recognized the legal right of retarded children in Pennsylvania to a public education that addressed their individual needs.[150] The decision of and guidelines set out by the *PARC* court were to become the framework around which the EHA was to develop.[151]

The second of these two landmark cases was *Mills v. Board of Education*.[152] The plaintiffs in this case, a group of seven children with "behavioral problems,"[153] claimed they had been wrongfully excluded from District of Columbia Public Schools.[154] The court held that the exclusion of children in need of special education was violative of the Equal Protection and Due Process Clauses of the United States Constitution.[155] The school district's defense was that it lacked sufficient funds to provide these children with an education.[156] The court rejected this argument, stating that such financial hardship did not allow the district to exclude an entire class of children from educational services.[157] The court then went even further. It issued a directive for the

143. 343 F. Supp. 279 (E.D. Pa. 1972).
144. *Id.* at 282.
145. *Id.*
146. *Id.* at 283.
147. *Id.*
148. *Id.*
149. *Id.* at 302.
150. *Id.*; *see also* GOLDBERG, *supra* note 139, at 2.
151. *PARC*, 343 F. Supp. at 302-16; *see also* GOLDBERG, *supra* note 139, at 4. Most, if not all, of the procedural requirements incorporated into the EHA are from *PARC*. GOLDBERG, *supra* note 139, at 23.
152. 348 F. Supp. 866 (D.D.C. 1972).
153. *Id.* at 868.
154. *Id.*
155. *Id.* at 874-75 (citing Vought v. Van Buren Pub. Sch., 306 F. Supp. 1388 (E.D. Mich. 1969); Williams v. Dade County Sch. Bd., 441 F.2d 299 (5th Cir. 1971); *cf.* Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd* 418 F.2d 163 (7th Cir. 1969); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Goldberg v. Kelly, 397 U.S. 254 (1970)).
156. *Id.* at 875-76.
157. *Id.* at 876:

> [T]he District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds

identification of all such special needs students and the implementation of procedural guidelines designed to safeguard their due process rights.[158] Cases such as *PARC* and *Mills* demonstrated to federal lawmakers the need for a uniform approach to the education of the handicapped.[159]

In response to this need, the United States Congress passed the EHA.[160] The purpose of the EHA was, and continues to be, to ensure that all handicapped children receive a "free appropriate public education" (FAPE).[161] The meaning of this term has been the subject of heated debate for some time, and the EHA has been criticized for its ambiguity in this regard.[162] Although at first glance the definition appears comprehensive, it becomes obvious upon closer examination that subsection (C) never defines the "appropriateness" of the learning disabled child's education. Such a definition was left to state and local educational authorities.[163] As will later be demonstrated, this has lead to less than satisfactory results.[164]

The mechanism designed by the EHA to protect a handicapped child's right to a FAPE is the Individualized Educational Program.[165] Although special educators have utilized this concept for years, the term itself is unique to the statute.[166] Individualized Educational Programs (IEP) must be developed for every handicapped schoolchild prior to the beginning of the school year.[167] Furthermore, they must be reviewed and revised if necessary at the minimum of once a year.[168] A conference between educators, parents and, where appropriate, the child, is the preferred method of developing an IEP, so that the input and needs of all may be shared and accommodated to the greatest extent possible.[169] It is at these proceedings that parents, as well as

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> must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child.

Id.

158. *Id.* at 877-83.

159. *See* GOLDBERG, *supra* note 139, at 19.

160. 20 U.S.C. §§ 1400-85 (1988 & Supp. II 1990); *see* GOLDBERG, *supra* note 139, at 19.

161. 20 U.S.C. § 1400(c) (Supp. II 1990).

162. *See* Board of Educ. v. Rowley, 458 U.S. 176 (1982); GOLDBERG, *supra* note 139, at 25-28.

163. *See* GOLDBERG, *supra* note 139, at 25-28.

164. *See infra* notes 172-217 and accompanying text.

165. GOLDBERG, *supra* note 139, at 29.

166. *Id.*

167. *Id.* at 30.

168. *Id.* at 31.

169. *Id.* at 30.

others who possess a legitimate interest in the child's educational development, are to make requests concerning any specialized services they feel are necessary to enable the child to benefit from the IEP.[170] The law prohibits state and local educational authorities from refusing special educational services to children for the sole reason that they are not currently being provided to any other student or because doing so would require them to hire additional personnel.[171]

Problems soon arose, however, in part because courts generally were more likely to favor an analytical framework that stressed procedural compliance in the formulation of the IEP, rather than substantive merit of the educational program being offered to the child. In *Board of Education v. Rowley*,[172] the petitioner was a deaf girl who had been denied the use of a sign language interpreter in her academic studies, despite the fact that she understood "considerably less of what [went] on in class than she would if she were not deaf."[173] In accordance with the EHA, the school district of Hendrick Hudson, New York had provided Amy Rowley with an IEP.[174] While the IEP allowed Amy the continued use of a special hearing aid, which enabled her to attend classes with other children,[175] it failed to grant her parents' request that she be provided with a special sign language interpreter in her academic classes.[176] The United States Supreme Court, in an opinion by Justice Rehnquist,[177] upheld the IEP,[178] stating that the concept of a "free appropriate public education" does not require providing a handicapped child with an opportunity to maximize his or her potential " 'commensurate with the opportunity provided other children.' "[179] It was for

170. *See* 20 U.S.C § 1415 (1988); GOLDBERG, *supra* note 139, at 32.

171. GOLDBERG, *supra* note 139, at 20. Educational authorities are also prohibited from placing these children on waiting lists for these services. *Id.*

172. 458 U.S. 176 (1982).

173. *Id.* at 185 (quoting Rowley v. Board of Educ., 483 F. Supp. 528, 532 (S.D.N.Y. 1980)).

174. The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency . . . the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include—(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs . . . and (F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(a)(20) (Supp. II 1990).

175. *Rowley*, 458 U.S. at 184.

176. *Id.* at 184-85.

177. *Id.* at 179.

178. *Id.* at 209.

179. *Id.* at 198-99 (quoting Brief for Respondents at 35, *Rowley*, (No. 80-1002)).

the state and local educational authorities to establish the substantive level of education that must be achieved by an IEP. The purpose of the EHA was to insure that all necessary procedural mechanisms were employed, allowing students and parents to participate in the decision making process to ensure that no violation of due process rights would occur.[180] Although Amy had shown great promise as a student,[181] it was not the responsibility of the State to make the most of her potential.[182] The Court reasoned that states were under no obligation to provide exactly equal levels of opportunity for handicapped children and their non-handicapped peers. [183] The Court concluded that the

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> [C]ongress sought "to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws." But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services. The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go.

Id. at 198-99 (quoting S. REP. No. 142, 94th Cong., 1st Sess. 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1437).

180. *Id.* at 208-09.

> Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies . . . and in the formulation of the child's individual educational program. As the Senate Report states: "The Committee recognizes that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome. By changing the language [of the provision relating to individualized educational programs] to emphasize the process of parent and child involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child."

Id. (quoting S. REP. No. 142, 94th Cong., 1st Sess. 11-12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1435).

181. *Id.* at 185.

182. *See id.* at 185-86, 209-10.

183. *Rowley*, 458 U.S. at 198-99.

> [T]he educational opportunities provided by our public school systems undoubtedly differ from student to student, depending on a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. . . .

EHA provided only a "basic floor of [educational] opportunity" for handicapped children, beneath which the states should not fall if they wish to retain federal educational funding.[184] This floor consists of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child."[185] The Court refused to define substantively how large a benefit the child must receive from this educational access,[186] but preferred to confine its analysis to children who, like Amy Rowley, could be successfully mainstreamed into normal classrooms.[187] In such circumstances, the Court reasoned, the educational system itself provides the proper measure of educational benefit the child receives.[188] When a child receives passing grades and advances from grade to grade along with his peers, as did Amy Rowley, then that child is receiving an educational "benefit" of sufficient nature as to comply with the EHA.[189]

The statutory directive for identifying and accommodating all handicapped children, the requirements of mainstreaming these children whenever possible, and the analysis of IEP development used by the courts, have all played a part in the problematic education of the hyperactive child. It is the position of this note that, given such a large task and limited resources, the school system has unwittingly become "addicted" to the use of Ritalin as an "easy" solution to the difficult problem of educating hyperactive children.

B. *The Jesson Case*

Casey Jesson was first diagnosed as suffering from Attention Deficit-

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> [F]urnishing . . . every special service necessary to maximize each handicapped child's potential is . . . further than congress intended to go.

Id. Neither did the Court feel that Congress intended Constitutional Equal Protection to provide a basis for requiring federally mandated equal educational opportunities for the handicapped: "[A]t the time of enactment of this Act this Court had held at least twice that the Equal Protection Clause of the Fourteenth Amendment does not require States to expend equal financial resources on the education of each child." *Id.* at 199-200 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom* McInnis v. Olgilvie, 394 U.S. 322 (1969)).

184. *Id.* at 201.

185. *Id.* (footnote omitted). "Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203.

186. *Id.* at 202. *But see id.* at 201 n.23 (the Court indicates that benefit is something less than would render the handicapped child self-sufficient as an adult).

187. *Id.* at 202.

188. *Id.* at 202-03.

189. *Id.* at 203. The Court was, however, careful to note that by this decision it was not holding that every handicapped child who advances from grade to grade is automatically receiving a FAPE, but was relying in part upon the facts of the case at bar to help it reach its conclusion. *See id.* at 203 n.25.

Hyperactivity Disorder (ADHD) in July, 1985.[190] His parents voluntarily put him on Ritalin, even though a neurological examination turned up nothing unusual.[191] In September 1985, Casey started the first grade, and received his Ritalin doses from the school nurse.[192] When Casey's parents began noticing that he was engaging in new, disturbing patterns of behavior - behavior that involved lying, stealing and fighting - they enrolled him in counselling.[193] Ritalin had lowered Casey's activity level, however, so he continued to receive it.[194] When reading tests were administered to Casey's second grade class in 1986, he scored so low that it didn't even appear on the charts.[195] Although Ritalin appeared to be aiding his concentration, there was no improvement in his grades.[196] Furthermore, Casey's behavior problems at home continued to worsen.[197] His self-esteem began to suffer as he recognized his own destructive tendencies and his inability to control them.[198] In May 1987, a Derry School District psychologist, who had been aware of Casey's difficulties but had not attempted to develop an IEP for him, administered tests to Casey.[199] The results showed, surprisingly, that "Casey had average to high intelligence and good reasoning."[200] Boston's Children's Hospital then performed a full evaluation on Casey. The hospital report stated that, although Casey suffered symptoms characteristic of ADHD, no neurological basis for the disorder could be found.[201]

By now Casey was eight years old, and his parents had become opposed to treating him with Ritalin because of adverse side-effects.[202] The team at Children's Hospital issued sixteen separate recommendations for treatment, including "cooperative learning, structured rather

190. Valerie J. v. Derry Coop. Sch. Dist., 771 F. Supp. 483, 484 (D.N.H. 1991).
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 485. Casey was so inactive that he was described as spacey, drugged, and lethargic. *Id.*
195. *Id.*
196. *Id.* This is not an uncommon occurrence. As previously noted, Ritalin seems to have no significant effect on academic achievement. *See supra* note 14. Rather, it enhances the *manageability* of a child. The primary beneficiary of such drug therapy, therefore, would appear to be third parties. *See* BARKLEY, *supra* note 1, at 197-202; WENDER, *supra* note 1, at 89-93; WHALEN & HENKER, *supra* note 1, at 11; ROSS & ROSS, *supra* note 1, at 207.
197. *Valerie J.*, 771 F. Supp. at 485. At one point Casey became so destructive that he ruined $3,500 worth of furniture. According to the Jessons, his pre-Ritalin behavior never approached this level of aggression. *See also* Bob Hohler, *Judge Says N.H. Can't Order Ritalin Use*, BOSTON GLOBE, August 8, 1991, at 23.
198. *Valerie J.*, 771 F. Supp. at 485.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* Such side effects include extreme weight loss and destructive behavior.

than competitive education, and the trial use of the drug Cyclert."[203] The Derry School District incorporated some of these suggestions into a preliminary IEP for Casey to be implemented that year.[204] Under the EHA, both parties asked the State of New Hampshire, in August, for a Due Process hearing.[205] The State granted the hearing and scheduled it for the following December.[206] The Jessons were pleased with the structured educational program in which Casey was enrolled and believed that it was benefiting Casey.[207] However, when the Jessons requested that the State postpone the Due Process hearing, the Derry School Superintendent ordered that Casey be removed from the special program and returned to mainstream classroom education.[208] Furthermore, at a January 1988 meeting, held to develop a more permanent IEP for Casey, the Superintendent informed the Jessons that, because of their refusal to accept an IEP that included the requirement that Casey take Ritalin,[209] he "would have no choice" but to suspend Casey for the remainder of the year.[210] At a hearing before the entire school board, the suspension was reduced to twenty days, commencing on April 12, 1988.[211] At the Due Process Hearing, held on April 26, 1988 at Mrs. Jesson's request, the Hearing Officer found that Casey's suspension violated his Due Process rights.[212] The officer also concluded that the imposition of forced days off was a violation, but found that the rest of the IEP, including the compulsory administration of medication, was appropriate.[213] The Jessons appealed.[214]

At trial, several experts testified about the dangers of indiscriminate Ritalin treatment, and voiced their opinion that the Derry School District had not adequately researched Casey's troubles before requiring

203. *Id.* Cyclert can adversely affect the liver, requiring periodic monitoring by a qualified physician of anyone taking it. *Id.*

204. It was 1987, and Casey was entering the third grade. *Id.* The plan required the use of either Ritalin or Cyclert, as well as placement in a temporary structured education program similar to the one mentioned in the Children's Hospital recommendations. *Id.*

205. *Id.* at 485. The Due Process hearing is required when parents wish to challenge part of their child's IEP. Under the EHA, when a portion of the child's IEP is challenged, that portion is suspended pending the result of the Due Process Hearing. This does not affect the child's continued participation in any unchallenged portion of the IEP. *See* 20 U.S.C § 1415(e)(3) (1990).

206. *Valerie J.*, 771 F. Supp. at 486.

207. *Id.*

208. *Id.*

209. The Superintendent's IEP also included forced days off and suspensions for up to 20 days. *Id.* at 485.

210. *Id.* at 486.

211. *Id.*

212. *Id.* This portion of the ruling was not challenged by Derry School District on appeal. *Id.*

213. *Id.*

214. *Id.*

his medication.[215] The court found that, whereas the recommendations made by the team at Children's Hospital called for the administration of chemical intervention by trained professionals, with concomitant observation and modification of treatment as circumstances demanded, it was inappropriate for the Derry School District to condition Casey's education on the use of a treatment that his parents opposed.[216] The court held that Casey Jesson's right to a "free appropriate public education" could not be premised on the condition that he be medicated in such manner.[217]

VII. DISCUSSION

As the foregoing cases illustrate, absent a legitimate state interest,[218] an individual possesses the right to be free from forced administration of psychotropic drugs.[219] This right is recognized as an aspect of the constitutional right to privacy[220] and bodily integrity.[221] There

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215. *Id.* at 486-87.

216. *See id.* at 490.

217. *Id.* The court also struck down the decision of the hearing officer which allowed the imposition of forced days off. *Id.*

218. Washington v. Harper, 494 U.S. 210 (1990); Mills v. Rogers, 457 U.S. 291 (1982); *see also supra* notes 73-113 and accompanying text.

219. Mills v. Rogers, 457 U.S. 291 (1982); *see also* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds"); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id.

220. *See supra* notes 71-113 and accompanying text. A supplementary argument may be that forced administration of Ritalin, with its related side effects, operates as an exclusionary measure prohibited by § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), by disallowing full participation of hyperactive children in the educational process. By focusing on the needs of the educational institution itself to maintain order, over the needs of those it was established to serve, an entire class of chemically created minorities who receive a unfairly disproportionate benefit of the educational process may be in the process of being created, just as surely as they may be created through the socio-economic forces that lead to racial discrimination. Similarly, parents could also argue that the entire IEP process prescribed in the EHA operates to violate a child's procedural due process rights. However, given the heavy emphasis on procedure evident EHA cases so far, success on such an argument alone would be atypical. The *Jesson* Court, much like the *Harper* Court, held that the hearing procedures set up by school policy sufficiently protected Casey's procedural due process rights. Of all possible approaches, this is perhaps the weakest for combatting forced drugging.

have been to date only two legal theories under which the United States Supreme Court has found that state interest is sufficiently legitimate to justify forced drugging: the states' police power[222] and its parens patriae power.[223] In addition, the EHA requirement that the state provide an education to all handicapped children in the least restrictive environment possible[224] may provide the state with a legitimate economic interest in keeping victims of such a comparatively trivial handicap in mainstream classrooms.[225] These three rationales are all potentially at work in the involuntary use of Ritalin on hyperactive children.

A. *The Police Power*

The Supreme Court has approved the use of physical[226] or chemical[227] restraints in situations where the restrained individual poses a threat to himself or others.[228] However, the courts have flatly rejected the use of restraints solely for the purpose of institutional convenience. Purely economic considerations, such as the need to hire more guards or to provide additional training to existing staff fall under this prohibition.[229] The question with hyperactive children is whether their behavior reaches a level that is so disturbing that it constitutes the threat of violent behavior, either to themselves or others, sufficient to warrant these types of restraint.

Hyperactive children are by nature overtly physical.[230] They can find it difficult to deal with stressful situations,[231] and usually revert

221. *See supra* notes 71-113 and accompanying text.

222. *See supra* note 89 and accompanying text.

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

224. *See supra* notes 134-70 and accompanying text.

225. *See supra* notes 170-89 and accompanying text.

226. Youngberg v. Romeo, 457 U.S. 307, 320 (1982); *see supra* notes 120-26 and accompanying text.

227. Washington v. Harper, 494 U.S. 210, 223 (1990); *see supra* notes 98-119 and accompanying text.

228. Parham v. J.R., 442 U.S. 584, 603 (1979); *Youngberg*, 457 U.S. at 320; *Harper*, 494 U.S. at 223; *see supra* notes 71-125 and accompanying text.

229. Mills v. Rogers, 457 U.S. 291 (1982); *see also* Davis v. Hubbard, 506 F. Supp. 915, 926 (N.D. Ohio 1980) (court found use of drugs was countertherapeutic and that only justifications for use were convenience of staff or punishment); Rennie v. Klein, 476 F. Supp. 1294, 1299 (D.N.J. 1979) (director of psychiatric hospital admitted drugs were used "as a form of control and as a substitute for treatment"), *modified*, 653 F.2d 836 (3d Cir. 1981), *vacated and remanded*, 458 U.S. 1119 (1982); Rogers v. Commissioner of Dep't of Mental Health, 458 N.E.2d 308, 320-21 (Mass. 1983) (drugs used to foster obedience or passivity in patients).

230. *See* BARKLEY, *supra* note 1, at 20 (noting that, although related, there is no discernable correlation between severity of hyperactivity and level of aggression).

231. See *id.* at 22 for a discussion of the social immaturity observed in hyperactive children.

swiftly to crude, physical means of achieving their goals.[232] It is not inconceivable that such a propensity for physical violence could in extreme circumstances justify the use of some form of restraint on students wishing to participate in public education.[233] If this restraint takes the form of drug therapy, it should necessarily involve periodic reviews by qualified physicians to determine whether the drug is having the desired effect, or whether it is still necessary at all.[234] This was the same type of procedure used by the defendants in *Harper*.[235] The *Harper* Court found that such a procedure provided an adequate safeguard against the use of drugs solely as a means of administrative convenience.[236]

The *Harper*[237] and *Romeo*[238] decisions are particularly well suited to provide comparative analogies between the use of the police power to justify the forced use of drugging in a hospital or prison setting, and the same practice in an educational setting. The concerns for treatment and institutional control play a central role in all three settings.[239] Each institution is trying to use the most efficient means at its disposal to deal with the problem of an unruly denizen. In *Romeo*, the solution was physical restraint during critical times.[240] Harper received drugs that produced a dramatic change in his very consciousness.[241] Both practices had the desired effect of neutralizing the threat posed by the patient/inmate.[242] Hyperactive children fall somewhere in between these two scenarios, and in cases where a child poses a threat of extreme violence, it is difficult to argue against the state's police power to restrain him or her in some way. However, in the overwhelming majority of cases, the potential for violence is not nearly as immediate in the case of hyperactive children as in violent patients or prisoners.[243] This

232. *See id.* at 20.

233. *Compare* Washington v. Harper, 494 U.S. 210, 210 (1990) and Youngberg v. Romeo, 457 U.S. 307, 309 n.2 (1982) *with* Honig v. Doe, 484 U.S. 305, 325 (1988).

234. Louis Lasagna, *Proper Prescribing Practices for Therapeutic Uses of Amphetamines, in* AMPHETAMINE USE, MISUSE, AND ABUSE 109 (David E. Smith ed., 1979).

235. Washington v. Harper, 494 U.S. 210, 222 (1990).

236. *Id.* at 235.

237. *See supra* notes 98-113 and accompanying text.

238. *See supra* notes 120-25 and accompanying text.

239. See *supra* notes 98-113 and notes 190-213 and accompanying text for a discussion of these issues.

240. Romeo had broken his arm, and it was the doctor in charge of his recovery ward that instructed he be restrained. Youngberg v. Romeo, 457 U.S. 307, 310 (1982).

241. Washington v. Harper, 494 U.S. 210, 214 (1990).

242. *See supra* notes 98-113 and 120-25 and accompanying text.

243. Cantwell, *supra* note 1, at 6-7.

> Careful clinical studies reveal that only a small—but significant—minority of hyperactive children present with antisocial behavior . . . . [I]t could be hypothesized that the antisocial behavior develops as a reaction to the primary symptoms [of the] syndrome. Children who are unable to develop

presents an entirely different situation from that of an adult with an established pattern of violent behavior. Harper was a full grown man with a history of violence.[244] Romeo had previously reacted violently to other patients and staff—punching and kicking—and had landed himself in a medical ward with a broken arm when the restraints were first applied.[245] The Court, in upholding the validity of each type of restraint,[246] used a rational basis test,[247] premised upon the state's legitimate interest in protecting other patients and staff.[248]

However, with most hyperactive children, the actual threat of violence is greatly reduced.[249] The fact that a hyperactive child may resort to a physical solution may make them bullies, but it should not put them in the same class as the violently insane. Annoying they may be, but "it is clear that the threat of harm to self or others does *not* include the mere potential for throwing pen caps or erasers."[250] While it may justify the forced use of Ritalin in extreme cases, the police power does not grant the state across the board authority to require restraint—chemical or otherwise—of hyperactive children.

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satisfactory peer relationships, who find rejection at home and at school, are likely prospects to act out and rebel against the values of society.

Id.

244. *See Harper*, 494 U.S. at 213-14.

245. Youngberg v. Romeo, 457 U.S. 307, 310 (1982). In fact, between July, 1974 and November, 1976, Romeo had succeeded in hurting himself no fewer than sixty-three times. *Id.*

246. *See supra* notes 108-10, 125 and accompanying text.

247. *Harper*, 494 U.S. at 223.

> [T]he proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is "reasonably related to legitimate penological interests." This is true even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review.

Id. (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)); *Youngberg*, 457 U.S. at 324:

> In deciding this case, we have weighed those postcommitment interests cognizable as liberty interests under the Due Process Clause of the Fourteenth Amendment against legitimate state interests and in light of the constraints under which most state institutions necessarily operate. . . . The State . . . has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution. And it may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training.

Id.

248. *See supra* notes 108-10, 125 and accompanying text. The Court also required that there be evidence that the drug treatment actually have some therapeutic value to Harper. *Harper*, 494 U.S. at 222-27. The use of forced drugging as purely an economic aid has never been recognized in and of itself.

249. *See supra* notes 98-113 and notes 120-25 and accompanying text.

250. Plaintiff's Trial Memorandum at 26, Valerie J. v. Derry Coop. Sch. Dist., 771 F. Supp. 483 (D.N.H. 1991).

B. *The* Parens Patriae *Power*

The requirement that a child take Ritalin also could be based on the state's *parens patriae* power.[251] This authority requires the state to show that the incompetent patient would submit to the treatment were he able to make the choice himself.[252] There are, however, two fundamental flaws in this rationale when dealing with hyperactive schoolchildren. The first is that in order for it to be a valid exercise of *parens patriae* power, there must be a showing that the proposed treatment is in the best medical interest of the recipient.[253] In the case of hyperactive children, medical and educational findings do not support this requirement.[254] Studies show that while the child may sit still longer, he may not be absorbing information in any meaningful way.[255]

The second flaw is less abstract. In cases involving an exercise of the *parens patriae* power, the affected individual is usually a ward of the state, with no one to speak on their behalf.[256] The state is essentially acting as a guardian of the incompetent patient when it exercises this power.[257] With many hyperactive children, such guardianship is unnecessary given that a parent will usually be available to fulfill this role. State "protection" in such cases is redundant, and may in effect act only as an encumbrance to the will of both parent and student. For the forgoing two reasons, it is unlikely that the *parens patriae* power by itself could ever justify state drugging of a hyperactive child.

C. *Educational Rights Under the EHA v. Economic Considerations*

The narrow range of circumstances under which the state can forcibly require the use of behavior modifying drugs suggests that the number of hyperactive children involuntarily placed on Ritalin should be extremely small. The numbers, however, show skyrocketing Ritalin use,[258] and increased parental complaints of pressure by school administrators to keep their children on the drug.[259] Is such an occurrence the result of flagrant disregard for the protections afforded by the

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

252. See *supra* note 90 and accompanying text for a discussion of the state's authority to drug an incompetent person under its *parens patriae* powers.

253. *Id.*

254. See *supra* notes 3-17 for studies indicating Ritalin's lack of effectiveness at improving academic performance.

255. *Id.*

256. *Parens patriae* literally refers to the state's power to act as "the general guardian of all infants, idiots, and lunatics." Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *47).

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

258. *See* SAFER & ALLEN, *supra* note 1, at 47; Cowart, *supra* note 53; Philip Elmer-DeWitt, *Why Junior Won't Sit Still*, TIME, Nov. 26, 1990, at 59; Alfie Kohn, *Suffer the Restless Children*, ATLANTIC MONTHLY, Nov. 1989, at 90.

259. *See supra* notes 51-56 and accompanying text.

EHA? There does appear to be evidence suggesting this may indeed be happening in some circumstances.[260] But there may also be a deeper reason underlying this short-circuiting of the EHA. This effect may be a result of the sweeping design of the EHA itself, and will be addressed at the end of this section.[261]

The EHA, as currently interpreted, provides only that children be given equal access to educational training.[262] There is no requirement that this access be at all participatory. When a hyperactive child's parents decide that they would rather not medicate their child, they are generally afforded two alternatives.[263] Their child may either be suspended for the disciplinary problem he creates in the classroom, or he can be placed in a remedial class, which may or may not provide an educational program appropriate for his needs.[264] This choice, or lack thereof, constitutes a type of "constructive coercion" against the parents to maintain their child on the drug. Although the Supreme Court has yet to rule on this type of constructive coercion, case law to date indicates that neither of the two non-Ritalin alternatives is legal under the EHA.[265]

In *Honig v. Doe*,[266] the Court held that, prior to being suspended for disciplinary reasons, a student receiving an education under the EHA was entitled to prior notice and hearing.[267] Doe was an emotionally disturbed child who experienced extreme difficulty socializing with his peers.[268] His suspension was precipitated by two rather noteworthy violent attacks. The first attack occurred when Doe tried to strangle one of his classmates during an argument.[269] Doe was removed from class, and the second of these attacks occurred as a teacher was escorting him to the principal's office. Apparently deciding to make a break for it, Doe assaulted the teacher and broke one of the school's windows.[270] His attempt was unsuccessful.[271]

Doe was first suspended, then expelled.[272] He filed suit claiming that his suspension and possible expulsion was in violation of the EHA, and that he was entitled to stay in school pending the outcome of these

260. *See infra* notes 275-85 and accompanying text.
261. *See infra* notes 286-92 and accompanying text.
262. *See* Board of Educ. v. Rowley, 458 U.S. 176 (1982); *see supra* notes 170-88 and accompanying text.
263. *See supra* notes 65-68 and accompanying text.
264. *Id.*
265. *See infra* notes 262-83 and accompanying text.
266. 484 U.S 305 (1988).
267. *Id.* at 323-24.
268. *Id.* at 312.
269. *Id.* at 313.
270. *Id.*
271. *Id.*
272. *Id.*

proceedings.[273] The Supreme Court agreed.[274] Procedural imperatives under the EHA are not satisfied with the mere design and implementation of an IEP. When a child's education deviates from the plan—for any reason—he is entitled to additional procedural protection under *Honig*.[275] Such protections include notice and a hearing which includes parties involved in the initial IEP development for the child,[276] not merely the perfunctory procedure mandated in *Goss v. Lopez*.[277] In the case of hyperactive children wishing to discontinue medication, constructive coercion in the form of automatic suspension or removal to any other educational setting is a violation of the procedural safeguards given by the EHA.

Furthermore, there are substantive considerations that can play a part. Even in cases where school districts do adhere to EHA procedural requirements, there is still an issue as to the appropriateness of such disciplinary action where the complained of behavior—here the constant activity and inattention of the hyperactive child—is a result or manifestation of the child's handicap itself.[278] Although the *Honig* Court did not engage in such an analysis, the lower court did. In *Doe v. Maher*,[279] the United States Court of Appeals for the Ninth Circuit held that the EHA prohibits a handicapped student from being expelled for behavior which was a manifestation of his handicap.[280] The court arrived at this conclusion through an analysis of the purpose, history and application of the EHA.[281] Like the plaintiffs in the *Honig* case, hyper-

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273. *Id.* at 314.

274. *Id.* at 323-24.

> We think it clear . . . that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.

Id.

275. *Id.* at 328. "[EHA Section] 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others." *Id.*

276. *See id.* at 326.

277. 419 U.S. 565 (1975); *see also supra* notes 126-32 and accompanying text.

278. *See infra* notes 279-85 and accompanying text.

279. 793 F.2d 1470 (9th Cir. 1986).

280. *Id.* at 1481. Such behavior was defined by the court as "conduct that is caused by, or has a direct and substantial relationship to, the child's handicap. Put another way, a handicapped child's conduct is covered by this definition only if the handicap significantly impairs the child's behavioral controls." *Id.* at 1480 n.8.

281. *Id.* at 1481. "We agree that the EAHCA prohibits the expulsion of a student for misbehavior that is a manifestation of his handicap. This proscription, although nowhere directly stated in the EAHCA, may be inferred from the Act's

active children engage in disruptive behavior as a manifestation of their handicap.[282] They too face exclusion from education in the form of serial suspensions throughout the school year.[283] In *Doe*, the court noted that the plaintiff's guardians had not been informed of their right to challenge the school board's decision.[284] It is conceivable that this same problem could be occurring where parents decide to discontinue Ritalin treatment.[285] This possibility is enhanced by the novelty of drug treatments as a component of an IEP.[286] Proper procedure in such a situation could well be confusing, both to school administrators as well as parents, and could cause parents to unquestioningly accept the school's authority in such circumstances.

Although more problematic, the same analysis also applies to the hyperactive child who is allowed to remain in school, but is placed in a class that doesn't meet his needs. Placement in a class that fails to meet his needs would surely constitute a change in placement under the EHA, and should be impermissible if it is based on behavior that is a manifestation of the hyperactivity.[287] Determination of whether such a class fulfills or fails the needs of a hyperactive child are probably best made on a case by case basis, with the ideal being a class specifically designed for hyperactive children, structured to their needs. Economic burden alone is an insufficient excuse for school districts to refuse such accommodation.[288]

One problem may be that the EHA, a sweeping piece of legislation designed to completely revolutionize the education of handicapped youngsters,[289] may actually be too inclusive for its intended purpose.[290] The statute's mandate to identify and accommodate each and

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history, purpose, terms, and accompanying regulations." *Id.* (citing Kaelin v. Grubbs, 682 F.2d 595, 602 (6th Cir. 1982); S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981); Doe v. Koger, 480 F. Supp. 225, 228 (N.D. Ind. 1979)).

282. *See supra* notes 2-7 and accompanying text.

283. *See supra* note 67 and accompanying text.

284. Doe v. Maher, 793 F.2d 1470, 1477 (9th Cir. 1986).

285. The Jessons appear to have been well informed as to their rights under the EHA. *See supra* notes 203-10 and accompanying text.

286. An expert in the Jesson court knew of no other cases in which such treatment was actually an explicit requirement of an IEP. *See* Valerie J. v. Derry Coop. Sch. Dist., 771 F. Supp. 483, 485 (D.N.H. 1991).

287. *See supra* notes 262-83 and accompanying text.

288. *See supra* note 169 and accompanying text.

289. *See supra* notes 133-69 and accompanying text.

290. James H. Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142*, 14 CONN. L. REV. 477 (1982).

> [I]t is my conviction . . . that key goals of the [EHA] are not being fully realized. The expansive objectives of the Act are fundamentally at odds with the financial limitations that American public schools encounter in the 1980s. Resource scarcity is always a chronic problem, but the resources available today to states and localities for education and other so-

every learning impaired child[291] may be too broad, and produce an unanticipated strain on a system whose resources are notoriously limited.[292] As noted in *Rowley*,[293] our educational system cannot adequately cope with the burden that an idealistic reading of the EHA would impose.[294] Consequently, administrators have come to regard cost effectiveness as one of the more important criteria in evaluating a given educational plan.[295] This cost-benefit approach to educating our children is legitimate; given the sheer number of students the system must cope with, it is rational to attempt to provide the greatest number of them with the most adequate education feasible. However, such a practice ceases to be a solution when cost-cutting practices violate not only the laws under which they evolved, but also underlying Constitutional rights that in many ways form the basis for a free society.

VIII. CONCLUSION

The decision whether to drug a child is, and should be, a difficult one. Such a decision affects the child's present educational opportunity and, more importantly, his health. It may also affect the child's ability to come to grips with his own personal developmental challenges. Any state attempt to regulate a child's behavior through chemical means, absent exigent circumstances, is a violation of the United States Constitution and should not be allowed.

More fundamentally, the legal issues surrounding the uses and abuses of Ritalin itself may ultimately be of little significance. The underlying political and social causes of such practices—the idea that to be different is to be bad, and that the State is to be the maker of such decisions—are potentially of much more consequence for a free society. Such concepts are antithetical to the moral and ethical foundations of our legal system. It should disturb and alarm us that, whether intentionally or not, such lessons are now part of the curriculum in our schools.

*James C. O'Leary**

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cial services seem especially limited. These fiscal pressures threaten continued progress toward the ambitious goal of providing quality education for all handicapped children.

Id. at 478.

291. *See supra* notes 157-60 and accompanying text.

292. *See supra* notes 157-60, 287 and accompanying text.

293. 458 U.S. 176 (1982); *see supra* notes 170-88 and accompanying text.

294. *See supra* notes 170-88 and accompanying text.

295. *See* Stark, *supra* note 291, at 478-79.

* For my father.

A Massachusetts Real Estate Broker's Duty to Disclose: The Quandary Presented by AIDS Stigmatized Property

I. INTRODUCTION

In Massachusetts, a real estate broker[1] owes a minimum duty to a prospective buyer of residential property to inform the buyer of any material defect which might affect the buyer's decision to consummate the transaction.[2] As applied to intrinsic material defects of the property, the standard is objective. When the reputation of the premises or the background of the seller comes into question, however, the standard becomes more subjective.[3] Indicative of the latter are cases decided in California and New York which held that sellers had a duty to inform the prospective buyers of multiple murders that took place in a house[4] and of ghosts that allegedly haunted a house.[5] However, these cases centered on events occurring on the property offered for sale. Exactly what the broker has a duty to disclose to the buyer becomes much more complex when the subject of the disclosure concerns the

1. For the purposes of this Note, a real estate broker will be assumed to be the representative of the seller, as is usually the case in real estate transactions. HAROLD G. REUSCHLIEN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 17(A) (1990). When the broker makes a listing agreement with the seller, an express agency contract arises between the broker and the seller resulting in a fiduciary relationship. PATRICK J. ROHAN ET AL., REAL ESTATE BROKERAGE LAW AND PRACTICE § 3.03 (1991). Unfortunately, most buyers rely upon the broker as their primary source of expertise and advice without realizing that the primary duty of the broker is owed to the seller. *Id.* § 3.01. Massachusetts attempts to cure this misunderstanding by requiring the broker to furnish potential buyers with a disclosure statement which outlines the duties and loyalties of the broker. MASS. REGS. CODE tit. 254, § 2.05(15) (1990).

2. DeCandia v. Barry, 1989 Mass. App. Div. 92, 94-95 (1989).

3. Intrinsic material defects in a property may be objectively evaluated because they relate to the physical nature of the property. However, a property considered stigmatized by virtue of its previous occupant or past events is so because of the buyer's preferences, prejudices, or ignorance. Such a subjective evaluation may vary from buyer to buyer. To quote Aesop, "One man's food is another man's poison."

4. Reed v. King, 193 Cal. Rptr. 130 (1983) (cause of action sustained because buyer not informed of house's past negative history).

5. Stambovsky v. Ackley, 572 N.Y.S.2d 672 (1991) (cause of action sustained because buyer not informed of alleged haunting).

previous occupant or owner. This complexity arises from the privacy rights which the previous owner or occupant may possess.[6] The crux of the issue is not only whether the broker has a duty to inform a prospective buyer of a stigma which may be attached to a house by virtue of its owner or occupant, but also whether the broker can legally disclose such information to the public. The issue becomes particularly contentious when the previous occupant of the property had AIDS[7] or died thereof. Does the real estate broker have a duty to so inform a potential buyer?

This Note will attempt to reconcile the duty of the real estate broker to disclose and the seller's privacy rights[8] versus the buyer's right to know. Part II will discuss the background of the broker's duty to disclose.[9] Part III will define the current legal duty of a real estate broker in Massachusetts to disclose defects in the property offered for sale. Section A examines applicable Massachusetts case law and statutes.[10] Section B discusses whether the previous occupant's affliction with or death from AIDS is a material fact.[11] Section C discusses proposed legislation in Massachusetts concerning the duty of a real estate broker to disclose the existence of an AIDS stigmatized property.[12] Section C also examines the statutory approach taken by other states.[13] Part IV explores the privacy rights of the seller as defined by state and federal statutes.[14] Finally, this Note will conclude by stating potential courses of action for the real estate broker under current and proposed law.

II. BACKGROUND

In past years, the only person a consumer could look to for protection was himself.[15] Caveat emptor was clearly the rule and nowhere was this principle more evident than in the conveyance of real property.[16] As one commentator noted, the "law offers greater protection to the purchaser of a seventy-nine cent dog leash than it does to the

6. *See infra* notes 149-188 and accompanying text.

7. In the context of this Note, AIDS will be used as a term descriptive not only of those individuals with Acquired Immune Deficiency Syndrome, but also those people who have tested positive for the Human T-Lymphotropic Virus Type III or the Lymphadenopathy-Associated Virus.

8. The term "seller" includes either the prior occupant of the residence who has AIDS or the prior occupant who died of AIDS.

9. *See infra* notes 15-36 and accompanying text.

10. *See infra* notes 37-89 and accompanying text.

11. *See infra* notes 90-119 and accompanying text.

12. *See infra* notes 133-48 and accompanying text.

13. *See infra* notes 120-32 and accompanying text.

14. *See infra* notes 149-88 and accompanying text.

15. William D. Grand, *Implied and Statutory Warranties in the Sale of Real Estate: The Demise of Caveat Emptor*, 15 REAL EST. L.J. 44, 44-45 (Summer 1986).

16. *Id.*

purchaser of a 40,000-dollar house."[17] Generally, caveat emptor provides that the "purchaser must examine, judge, and test for himself."[18] Because the buyer and the seller were considered to be on equal footing, each was expected to look out for his own interests.[19] As the sophistication of products offered for sale increased, the buyer became less able to maintain equal ground with the seller.[20] This resulted in the passage of federal legislation to protect the consumer,[21] which has been replicated by the states.[22] Unfortunately, until relatively recently, the courts have moved to apply consumer protection statutes to the sale of realty at the same speed as the movement of the tectonic plates upon which the realty rests.[23] However, an aggrieved buyer of property is not completely without hope. The concept of caveat emptor has been severely criticized in most jurisdictions[24] and is being steadily eroded by a stream of judicial decisions in others. Examples of the latter include successful actions by the buyer where the court found an

17. Paul G. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 633 (1965). This statement was made in reference to consumer protection laws which protected the consumer in sales of personalty, but not realty. *Id.*

18. BLACK'S LAW DICTIONARY 114 (abridged 5th ed. 1983). This Note does not attempt to provide other than a cursory overview of caveat emptor. For an exhaustive, frequently cited exposition of the history of caveat emptor, see Walter H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931). For a more modern analysis, see Richard M. Jones, *Risk Allocation and the Sale of Defective Used Housing in Ohio—Should Silence be Golden?* 20 CAP. U. L. REV. 215, 216-21 (1991).

19. Jones, *supra* note 18, at 216.

20. *See, e.g.*, 15 U.S.C. § 2051(a)(2) (1988). "The Congress finds that . . . complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately." *Id.*

21. Consumer Product Safety Act, 15 U.S.C. § 2051 (1988).

22. For example, Massachusetts passed its consumer protection act in 1967. *See* MASS. GEN. L. ch. 93A, § 1 (1989).

23. Weintraub v. Krobatsch, 317 A.2d 68 (N.J. 1974). "[O]ur law has progressed more slowly in the . . . property field than in other fields . . . ." *Id.* at 75. "[C]hange occurs with glacial speed, if at all." Dale A. Whitman, *Home Transfer Costs: An Economic and Legal Analysis*, 62 GEO. L.J. 1311, 1336 (1974) (referring to changes needed to reduce title search costs).

24. *See, e.g.*, Beavers v. Lamplighters Realty, Inc., 556 P.2d 1328 (Okla. Ct. App. 1976) (fraudulent statement by realtor to induce a sale was actionable). Caveat emptor is "one of the less admirable hand-me-downs of our Anglo-Saxon common law heritage . . . that exalts deceit, condemns fair dealing, and scorns the credulous." *Id.* at 1331; Humber v. Morton, 426 S.W.2d 554 (Tex. 1968) (action for damages caused by a defective fireplace). "The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices." *Humber*, 426 S.W.2d at 562; Wilhite v. Mays, 232 S.E.2d 141 (Ga. Ct. App. 1976) (action for overflowing septic tank). "[T]he type of transaction to which caveat emptor originally addressed itself—is very different from the sale of a modern home . . . ." *Wilhite*, 232 S.E.2d at 142-43. *But see* Laymann v. Binns, 519 N.E.2d 642 (Ohio 1988) (caveat emptor bars recovery where the purchaser could have discovered the defect with reasonable inspection).

implied warranty in new housing,[25] where the builder-seller was held to be responsible for injuries resulting from defectively built housing,[26] and in cases of misrepresentation.[27]

The aforementioned examples refer to the duty of a seller not represented by a real estate broker to disclose defects within residential property. When the owner is represented by a broker, the analysis is somewhat different. At common law, given that the real estate broker was the seller's representative, the duty of the broker to disclose was no greater than that of the principle (seller) whom the broker represented.[28]

In Massachusetts, the duty of the homeowner was clearly and explicitly enumerated by the Massachusetts Supreme Judicial Court in *Swinton v. Whitensville Savings Bank*.[29]

In *Swinton*, the defendant homeowner sold his house to the plaintiff without disclosing that the house was completely infested with termites.[30] The court found that because the parties had dealt with each other at arms length, the homeowner had no duty to disclose that the house had termites — in fact, the homeowner had no duty to voluntarily disclose any facts whatsoever.[31] The court's reasoning in *Swinton*

25. *See, e.g.*, Johnson v. Graham, 679 P.2d 1090 (Colo. Ct. App. 1983) (action against contractor and real estate broker for negligent construction and concealment of defects); Thacker v. Tyree, 297 S.E.2d 885 (W.Va. 1982) (lower court reversed for reliance on caveat emptor); Elderkin v. Gaster, 288 A.2d 771 (Pa. 1972) (builder's failure to provide potable water fell within the ambit of an implied warranty of habitability). *See also* Annotation, *Liability of Builder Vendor or Other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned by Defective Condition Thereof*, 25 A.L.R.3d 383, § 6 (1969 & Supp. 1992).

26. *See, e.g.*, Coporaletti v. A-F Corp., 137 F. Supp. 14 (D.D.C. 1956) (woman injured when the staircase in her new house fell apart), *rev'd on other grounds*, 24 F.2d 53 (D.C. Cir. 1957); Belote v. Memphis Dev. Co., 346 S.W.2d 441 (Tenn. 1961) (attic floor fell apart and injured a child).

27. Although misrepresentation would seem to be an offense unshielded by caveat emptor, caveat emptor is an often cited (yet unsuccessful) defense in cases involving allegations of misrepresentation in the sale of real property. *See* Kannavos v. Annino, 356 Mass. 42, 247 N.E.2d 708 (1969) (misrepresentation by real estate broker as to zoning provisions resulted in recision); Maxwell v. Ratcliffe, 356 Mass. 560, 254 N.E.2d 250 (1969) (broker's incorrect answer to direct question by buyer about the dryness of the cellar was actionable).

28. *See generally* RESTATEMENT (SECOND) OF AGENCY § 343 (1958); DeCandia v. Barry, 1989 Mass. App. Div. 92, 93 (1989). In order for a broker to act as a dual agent, the agent should first obtain the consent of both parties. D. BARLOW BURKE, JR., LAW OF REAL ESTATE BROKERS 206 (1982). Because of the conflicts of interest which may arise (the most obvious being price negotiations), most states have prohibited brokers from acting as an undisclosed dual agent. *Id.* at 207.

29. 311 Mass. 677, 42 N.E.2d 808 (1942) (*digested* in E.T. Tsai, Annotation, *Duty of Vendor of Real Estate to Give Purchaser Information as to Termite Infestation*, 22 A.L.R.3d 972, 977-78 (1968)).

30. *Swinton*, 311 Mass. at 677-78, 42 N.E.2d at 808.

31. *Id.*

was based upon the fear that the buyer, if successful in this action, would then have a cause of action for every "nonapparent defect known to [the seller] in the subject of the sale which materially reduces the [house's] value and which the buyer fails to discover."[32] The court went on to conclude that "the law has not . . . reached the point of imposing upon the frailties of human nature a standard so idealistic as this."[33] Notwithstanding professional ethics and statutes providing otherwise, the duty of the real estate broker to disclose in this situation would be no greater than that of the represented seller.[34] As time and courts have passed since *Swinton,* the duty of the homeowner in Massachusetts to disclose defects has apparently remained unchanged.[35] However, due to the passage of the Massachusetts Consumer Protection Act, real estate brokers have assumed a weightier duty.[36]

III. THE DUTY TO DISCLOSE

A. *Massachusetts General Law Chapter 93A*

The passage of the Massachusetts Regulation of Business Practice for Consumers Protection Act in 1967[37] changed the nature of the real estate broker's duty to disclose.[38] The heart of the Act is chapter 93A § 2(a) which states that "[u]nfair methods of competition and unfair or deceptive practices in the conduct of any trade or commerce are hereby declared unlawful."[39] The legislature undoubtedly intended chapter 93A to apply to real property transactions because the definitional section of the Act provides that " '[t]rade' and 'commerce' shall include the advertising, the offering for sale, rent or lease . . . [of] any property,

32. *Id.*

33. *Id.* at 678-79, 42 N.E.2d at 808-09. Least one think that this Massachusetts decision exemplifies a discordant and particularly unenlightened view, other jurisdictions have reached the same result on similar fact patterns. *See* Pywell v. Haldane, 186 A.2d 623 (D.C. 1962); Hendrick v. Lynn, 144 A.2d 147 (Del. 1958); Fegeas v. Sherrill, 147 A.2d 223 (Md. 1958).

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

35. *See* Solomon v. Birger, 19 Mass. App. Ct. 634, 477 N.E.2d 137 (1985) (no homeowner liability exists for bare nondisclosure); Henshaw v. Cabeceiras, 14 Mass. App. Ct. 225, 227, 437 N.E.2d 1072, 1074 (1982) ("homeowner who sells his house not liable for bare nondisclosure"); Murphy v. Passalacqua, 1990 Mass. App. Div. 210 (1990) (private homeowner not engaged in the business of real estate transactions not liable for failure to disclose known defects). See also Marianne T. McCabe, *Sale of Real Estate — Caveat Emptor Reaffirmed,* 30 ANN. SURV. MASS. L. 191, 193 (1983) for a general discussion of the non-liability principle.

36. Mary Sit, *What a Broker Should Tell You,* BOSTON GLOBE, June 8, 1991, at 41. See Diane M. Allen, Annotation, *Real Estate Broker's Liability to Purchaser for Misrepresentation or Nondisclosure of Physical Defects in Property Sold,* 46 A.L.R.4th 546 (1986 & Supp. 1992) for a discussion of the case law in other states.

37. 1967 Mass. Acts 813.

38. *Id.*

39. MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 1984).

tangible or intangible, real, [or] personal."[40]

From the onset, one should note that the passage of chapter 93A has caused a divergence in the duties to disclose of the real estate broker and the privately selling homeowner.[41] As the following case law demonstrates, the real estate broker now has a much higher duty than existed before the passage of chapter 93A, and has a higher duty than the privately selling homeowner.

One of the first Massachusetts cases to deal with the question of broker liability for nondisclosure under chapter 93A was *Heller v. Silverbranch Const. Corp.*[42] In *Heller*, the plaintiff buyers specifically informed their real estate broker that they did not want to buy any property which had water on it.[43] This desire was also communicated to the president of the corporation that built the house.[44] After the plaintiffs closed the sale and moved to the property they discovered, much to their surprise and chagrin, that their lot was filled with standing water.[45] Pursuant to a chapter 93A action against the builder and the broker, the lower court found that the builder's nondisclosure constituted a "wilful and knowing violation of § 2 [of ch. 93A]."[46] The broker escaped liability because the court found that she was not aware of the drainage problem on the land, and apparently, had no duty to in-

40. *Id.* § 1(b)

41. In residential property transactions where the homeowner conducts the sale, caveat emptor, unhindered by chapter 93A, is still the rule. In Lantner v. Carson, 374 Mass. 606, 373 N.E.2d 973 (1978), the plaintiff buyers discovered, contrary to the representations made by the defendant homeowners, that the house had an inadequate water supply and that a second floor fireplace was partially constructed with paper bricks. *Id.* at 608-09, 373 N.E.2d at 975. In holding that the plaintiffs had stated no cause of action, the court held that "the remedial provisions of c. 93A were [not] available to a consumer as against an individual, nonprofessional seller." *Id.* at 612, 373 N.E.2d at 977. The court saw allowing the consumer to use chapter 93A against the nonprofessional private seller as tilting the playing field too much in favor of the consumer. *Id.* Apparently the court believed that the proper action lay in tort or contract law. *Id.*

This principle was affirmed in the now notorious (among consumer advocates) case of Nei v. Burley, 388 Mass. 307, 446 N.E.2d 674 (1983) (private owner-seller was able to cast aside the shroud of chapter 93A to his financial gain). *See infra* notes 57-69 and accompanying text for a detailed discussion of *Nei v. Burley*.

Professional private sellers, i.e., owner-sellers who were also real estate agents, have been held to be within the ambit of chapter 93A. *See* Rousseau v. Gelinas, 24 Mass. App. Ct. 154, 507 N.E.2d 265 (1987) (owner-seller who was a real estate broker liable for misrepresentations made in reference to zoning law); Piccuirro v. Gaitenby, 20 Mass. App. Ct. 286, 480 N.E.2d 30 (1985) (liability for improperly conducted percolation test).

42. 376 Mass. 621, 382 N.E.2d 1065 (1978).

43. *Id.* at 623, 382 N.E.2d at 1068.

44. *Id.*

45. *Id.*

46. *Id.* at 628, 382 N.E.2d at 1070.

vestigate.[47] The *Heller* Court suggested that the broker would have been liable if she had known about the problem which the buyers specifically wished to avoid,[48] because failing to inform the buyers of a known condition which the buyers specifically desired to avoid would have constituted a "deceptive act or practice" under chapter 93A.[49]

The case of *Mongeau v. Boutelle*[50] represents the next major refinement in Massachusetts of broker liability for nondisclosure. The real estate broker in *Mongeau*, who closed the deal with the plaintiff buyers, failed to inform the buyers "that the property was encumbered by a right of way."[51] In evaluating whether the plaintiffs had an actionable grievance, the court applied section 3.16(2) of Title 940 of the Code of Massachusetts Regulations.[52] Section 3.16(2) states that a violation of chapter 93A occurs when "[a]ny person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction."[53] Although this standard had previously been applied to the sale of chattels and personal goods, *Mongeau* marked the first time that a Massachusetts court used section 3.16(2) of Title 940 to interpret chapter 93A regarding the sale of residential realty.[54] Of further significance is the subjective nature of the court's interpretation of the statute: "[f]ailure to disclose [*any*] material fact which *may influence* the buyer is actionable."[55] The court left undecided the question of the extent that the real estate agent had a duty to investigate the property and its conditions so as to be in a position to disclose all material facts.[56]

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47. *Id.* at 624, 382 N.E.2d at 1068.

48. *Id.*

49. MASS. GEN. LAWS ANN. ch. 93A, § 2(a) (West 1984).

50. 10 Mass. App. Ct. 246, 407 N.E.2d 352 (1980).

51. *Id.* at 248, 407 N.E.2d at 355.

52. MASS. REGS. CODE tit. 940, § 3.16(2) (1978). The power of the Attorney General to promulgate such rules was ruled to be constitutional by the Massachusetts Supreme Judicial Court in Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, 407 N.E.2d 297 (1980). "These rules and regulations have the same force of law as those of any 'agency' as defined in G.L. c. 30A, § 1(2)." *Id.* at 775, 407 N.E.2d at 306.

53. MASS. REGS. CODE tit. 940, § 3.16(2) (1986).

54. *Mongeau*, 10 Mass. App. Ct. at 248, 407 N.E.2d at 355. In *Purity Supreme Inc.*, the Massachusetts Supreme Judicial Court affirmed the validity of section 3.16 of Title 940 as applied to chapter 93A for the sale of groceries and household items. *Purity Supreme, Inc.*, 380 Mass. at 783, 407 N.E.2d at 310.

55. *Mongeau*, 10 Mass. App. Ct. at 248, 407 N.E.2d at 355 (emphasis added).

56. Realtors do have a duty to investigate. Realtors are specifically and solely those licensed by the National Association of Realtors (NAR), which constitutes 10-20 percent of real estate agents. Sit, *supra* note 36, at 41. Realtors must comply with the Code of Ethics promulgated by the NAR. Article 9 of the Code states that "[t]he Realtor . . . has an affirmative obligation to discover the adverse factors that a reasonably competent and diligent investigation would disclose." Easton v. Strassburger, 199 Cal. Rptr. 383, 389-90 (1984) (quoting National Assoc. of Realtors,

The expansive interpretation of chapter 93A by the Supreme Judicial Court abruptly halted in *Nei v. Burley*.[57] The plaintiff in *Nei* sued the seller of a tract of land and the broker who represented the seller.[58] The tract in question could not satisfactorily be built upon until large amounts of fill were added to permit a septic system to be installed.[59] The plaintiffs contended, *inter alia*, that the broker violated chapter 93A by not informing them of the significance of a percolation test[60] conducted by the sellers[61] and that a previous prospective purchaser withdrew his agreement to buy after an inability to perform a percolation test on the land due to the presence of too much surface water.[62] The court held that the buyers had ample opportunity to inquire as to the significance of the percolation test results with which they were furnished, but failed to do so to their own detriment.[63] Furthermore, the court did not believe that the failure of the broker to inform the buyers of the inability of the previous potential buyer to perform a percolation test was a deceptive act.[64] This latter finding was based on the fact that the broker did not know that a culvert which fed into the property was the cause of the flooding.[65] Although the court predicated the nonliability of the real estate agent on lack of knowledge,[66] the court intimated that the plaintiffs might have had a better case had they alleged that the "broker should reasonably have known and should have disclosed the significance of the [percolation] test results."[67] The significance of *Nei* to the real estate broker is two-fold: liability will not be imposed for facts of which the real estate broker is unaware,[68] but a

interpretations of the Code of Ethics (7th ed. 1978) art. 9). Furthermore, at least one court has used this section of the Code as the justification for imposing liability on a real estate agent who was not a Realtor. *See id.*

57. 388 Mass. 307, 446 N.E.2d 674 (1983).

58. *Id.* at 308, 446 N.E.2d at 675.

59. *Id.* at 309, 446 N.E.2d at 675-76.

60. A percolation test measures the degree to which soil is porous. Telephone Interview with John Hess, professional engineer, Van Zelm, Heywood & Shadford, Inc. (Oct. 26, 1991). The soil must meet a certain standard before a septic system can be installed. *Id.* Obviously, a plot of land that fails to achieve this standard so that a septic system cannot be installed is a less than rosy place to build a house.

61. *Nei*, 388 Mass. at 315, 446 N.E.2d at 679.

62. *Id.* at 316, 446 N.E.2d at 679.

63. *Id.* at 311, 446 N.E.2d at 677.

64. *Id.* at 316, 446 N.E.2d at 679.

65. *Id.* The findings of the court can be criticized because the court ignored the purpose of a percolation test. A percolation test cannot be performed on soil saturated with water. Hess, *supra* note 60. That the possibility existed that the land for sale might be subject to periodic flooding was a material fact known by the real estate agent. *Nei*, 388 Mass. at 310, 446 N.E.2d at 676. Periodic flooding bore tremendous relevance to the plaintiff's ability to have a septic system installed and consequently, the desirability of the land to them. *Id.* at 308-09, 446 N.E.2d at 675.

66. *Id.* at 316-17, 446 N.E.2d at 679-80.

67. *Id.*

68. *Id.*

duty may be imposed to investigate if the fact is one the broker should have known.[69]

Sheehy v. Lipton Industries, Inc.[70] involved charges brought by a buyer after finding out that the land he agreed to purchase was contaminated with hazardous waste.[71] The court held that the buyer might have a cause of action for nondisclosure against the real estate broker if the buyer could prove that the broker was deceitful or made a misrepresentation.[72] The elements defined by the court for a successful action predicated under the auspices of chapter 93A were as follows: (1) the broker knew that the defect existed; (2) the defect, if known to the buyer, would have adversely affected his decision to purchase; (3) there was a failure to disclose by the broker; and (4) "that the transaction took place in a business context."[73] Unfortunately, the court again left undecided the extent of the duty of the broker to investigate for defects, and seemed to discourage investigation by stating "the obvious principle that someone should not be liable for not disclosing what he does not know."[74]

The holdings in the preceding cases were capsulized in *DeCandia v. Barry*,[75] an action against a broker for nondisclosure of the existence of ureaformaldehyde foam insulation.[76] The *DeCandia* court affirmed that a real estate broker's liability would be predicated upon knowledge of undisclosed facts and active participation by the broker in the negotia-

69. *Id.* at 317, 446 N.E.2d at 680. The real tragedy in *Nei* was not so much the great lengths reached by the court to avoid imposing broker liability, but the court's affirmance of the concept of caveat emptor between a private non-professional seller and a buyer. *Id.* This decision left the Massachusetts home buyer outside the protection of the Massachusetts Consumer protection Act when buying directly from the homeowner. McCabe, *supra* note 35, at 198.

70. 24 Mass. App. Ct. 188, 507 N.E.2d 781 (1987), *appeal denied*, 24 Mass. App. Ct. 188, 509 N.E.2d 1202 (1987).

71. *Id.* at 190, 507 N.E.2d at 782.

72. *Id.* at 195, 507 N.E.2d at 785.

73. *Id.* The requirement that the transaction take place in a business context has been the central focus of two recent cases in Massachusetts where the plaintiffs attempted to use chapter 93A against non-broker sellers. *See* Murphy v. Passalacqua, 1990 Mass. App. Div. 210 (1990); DiBlasi v. Hern, (Agnus, J.) (Dedham District Court), CA-90-54-CV-0388 (reported in MASS. LAW. WKLY., No. 16-039-91) (liability incurred by sellers because the transaction was held to be within a business context). Both of these cases turned on whether the seller of the property was one who could be considered to be engaged in the business of selling property and thus falling under the business context auspices of chapter 93A. One commentator has suggested that as the economy continues to decline, the courts will continue to expansively interpret "business context" so as to provide greater protection to the consumer. *Seller of Home Found Liable Under C.93A*, MASS. LAW. WKLY., Jan. 6, 1992, at 1.

74. *Sheehy*, 24 Mass. App. Ct. at 195, 507 N.E.2d at 785.

75. 1989 Mass. App. Div. 92 (1989).

76. *Id.* at 92. The issue of ureaformaldehyde foam insulation is now specifically dealt with by MASS. GEN. LAW ch. 255, § 12I (1989).

tions.[77] However, the court found that as a matter of fact, the broker did not know about the existence of the insulation and therefore was not liable.[78]

Finally, in *Underwood v. Risman*,[79] the Supreme Judicial Court addressed the broker's duty to investigate. In *Risman*, an "experienced owner and broker of residential property" rented an apartment with lead painted walls to a childless couple.[80] The apartment was later sold to another person who continued the couple's lease.[81] The couple subsequently had a child, discovered the lead paint, and had the apartment deleaded.[82] The child became poisoned during the lead removal process and the couple sued under chapter 93A for failure to disclose the presence of lead based paint.[83]

Risman did not have actual knowledge of the lead paint in the apartment.[84] The trial court found Risman liable "not on [his] knowledge, but on his experience in real estate, his testimony that he was aware of the hazards associated with lead-based paint and his awareness that older houses have a higher liklihood of lead-based paint. Thus, the judge imposed liability because of a suspicion or a likelihood, rather than knowledge."[85] Implicit in the trial court's decision was that Risman either had constructive notice or a duty to investigate. However, the Supreme Judicial Court overturned the decision, stating that "[Massachusetts has] never imposed liability of nondisclosure for a fact not known by the person against whom liability is sought."[86] Therefore, despite earlier intonations by the Supreme Judicial Court that a broker might have a duty to investigate, when presented with the opportunity to set a standard, the Supreme Judicial Court has instead seemed to reject the duty.

The aforementioned statutes and case law present a number of factual issues to be decided by the fact finder in a chapter 93A action regarding broker liability in a non-disclosure action.[87] The most important issues to resolve are broker participation in the sale, and broker knowledge of the defect.[88] However, the broker is still left with the question of what magnitude of a defect should be disclosed to a buyer. In *Risman*, the Supreme Judicial Court stated that "[a] duty exists under

77. *DeCandia*, 1989 Mass. App. Div. at 95.
78. *Id.* at 96.
79. 414 Mass. 96, 605 N.E.2d 832 (1993).
80. *Id.* at 97-98, 605 N.E.2d at 834.
81. *Id.* at 98, 605 N.E.2d at 843.
82. *Id.* at 98-99, 605 N.E.2d at 834-35.
83. *Id.* at 99, 605 N.E.2d at 835.
84. *Id.* at 100, 605 N.E.2d at 835.
85. *Id.*
86. *Id.*
87. In a chapter 93A action, the fact finder will be a judge. Nei v. Burley, 388 Mass. 307, 311-15, 446 N.E.2d 674, 677-79 (1983).
88. *See supra* notes 37-77 and accompanying text.

c. 93A to disclose *material* facts."[89] Thus, a threshold question is whether the fact that the previous occupant of a property is afflicted with or died of AIDS is of sufficient materiality to warrant disclosure for the buyer's consideration.

B. *Is AIDS a Material Fact?*

The transmission of Human Immunodeficency Virus (HIV) from one human to another may occur in one of three ways: sexual intercourse, contact with the blood of an infected individual, or in utero from mother to fetus.[90] As has been well documented, AIDS is not transmitted by casual contact.[91] For this reason, at least one commentator has set forth an argument that AIDS need not be recognized as a material fact to a real estate transaction.[92] This reasoning is apparently based upon the premise that when a buyer refuses a property sale upon finding out that the previous occupant had AIDS, the refusal is premised upon a perception that HIV can be contracted from the previous occupant.[93] Since this belief is grounded in ignorance rather than fact, the buyer need not be informed.[94]

However, the opposing point of view is that "subjective and emotional" valuations may not be founded in fact, yet may still be of great importance to a specific buyer with a discrete set of values.[95] If the undisclosed fact is likely to provoke a strong, albeit subjective, response, that fact is likely to be determined as material.[96] In such a case, the broker would then be required to disclose the fact to the buyer.[97] This latter assertion, that the previous occupant had AIDS is a material fact that should be disclosed, may be supported on several grounds.

First, state courts in California and New York have pressed the outer limits of the law to determine what constitutes a material fact in reference to the duty to disclose. In *Reed v. King*,[98] a buyer sought rescission of a realty transaction for nondisclosure of multiple murders which had occurred in the house.[99] The court reasoned that if the five murders which took place in the house could be shown to have had an adverse

89. *Risman*, 414 Mass. at 99, 605 N.E.2d at 835 (emphasis added).
90. C. Everett Koop, *How Do You Get AIDS?*, U.S. DEP'T OF HEALTH AND HUMAN SERV., PUB. HEALTH RPRT. 1988, No. 103:330 (1988).
91. C. Everett Koop, *You Won't Get AIDS From Insects—Or a Kiss*, U.S. DEP'T OF HEALTH AND HUMAN SERV., PUB. HEALTH RPRT. 1988, No. 103:331 (1988).
92. John S. Baen & Hugh O. Nourse, *AIDS and the Broker's Quandary*, 19 REAL EST. REV., Winter 1990, at 81.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. 193 Cal. Rptr. 130 (1983).
99. *Id.* at 130.

affect on the house's value, then the occurrence of the murders was a material defect.[100] Although the court tied value to determination of materiality, it noted that value may fluctuate on the most subjective perceptions.[101] Furthermore, the court recognized the potential psychic disturbance to the buyers by stating that the buyers "may be unable to reside" where such occurrences have taken place.[102]

In *Stambovsky v. Ackley*,[103] a New York court reinstated an action for rescission brought by a buyer for nondisclosure of a material fact.[104] The buyer, despite conducting a thorough inspection, did not discover ("to his horror") that the house was haunted until after contracting to buy.[105] The rest of the local community was apparently well aware of the house's spectral infestation.[106] The court reasoned that the effect of the reputation of the house on the sale went to the essence of the contract and should have been disclosed to the buyer.[107]

In each of the preceding cases the buyer was able to successfully maintain an action for rescission because of a failure to disclose. The defendants in the cases maintained that the defects did not represent material facts because the defects were not intrinsic[108] to the property in question. Yet, because of the potential effect on the buyers' psyches and the properties' values, the courts allowed the actions. Because AIDS falls into the same category (an extrinsic fact with no relation to the physical part of the property, but with a possible effect on a buyer's psyche and the property value), it would follow that the existence of AIDS is a material fact which should be disclosed.[109]

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100. *Id.* at 133.

101. *Id.* In further support of demonstrating how subjectivity affected housing values, the court cited W.W. Allen, Annotation, *Eminent Domain: Elements and Measure of Compensation for Oil or Gas Pipeline Through Private Property*, 38 A.L.R.2d 788, 801-04 (1954) (unreasonable fears of the buying public depressed the value of property near gas pipelines and entitled those property owners to greater compensation for the land lost to eminent domain). *Reed*, 193 Cal Rptr. at 133.

102. *Reed*, 193 Cal. Rptr. at 133.

103. 572 N.Y.S.2d 672 (1991).

104. *Id.* at 676.

105. *Id.* at 674.

106. *Id.*

107. *Id.*

108. For the purposes of this Note, an intrinsic defect is one that relates to the physical nature of the property or a cloud on the property's alienability. An extrinsic defect is a defect solely because of the buyer's own preferences, prejudices, and desires.

109. After news of his death from AIDS, the value of Rock Hudson's house dropped from $4 million to $2 million. Gary Taylor, *Is Having AIDS a Material Fact?*, NAT'L L.J., Mar. 28, 1988, at 3. A study in Texas (albeit of only seven homes) found that homes where the prior occupant had AIDS sold for less than market value. Baen, *supra* note 92, at 81, *citing* John S. Baen, Potential Effects and Policy Implications of Acquired Immunodeficiency Syndrome (AIDS) in the United States Real Estate Industry 1987 (unpublished paper presented to the American Real Estate Society, Washington, D.C., Apr. 15, 1989).

Second, the wording of section 3.16(2) of Title 940 of the Code of Massechusetts Regulations is also dispositive: "fail[ure] to disclose any fact, the disclosure of which may have influenced the buyer . . . not to have entered in the transaction" is an unfair trade practice.[110] As the preceding cases have shown, buyers' decisions may be based on very subjective and intangible beliefs. The use of the words "any fact" and "may have influenced" in section 3.16(2) set a low threshold in determining whether a fact should be told to a buyer.[111] This threshold is so low that the buyer should be told any fact which may influence the decision to buy, no matter how subjective the analysis may be.[112]

Third, the Restatement (Second) of Torts states that a material fact is one which:

> (a) a reasonable [person] would attach importance to its existence or nonexistence in determining [a] choice of action in the transaction in question; or
>
> (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable [person] would not so regard it.[113]

The comment to the section states that "[t]here are many persons whose judgement, even in important transactions, is likely to be determined by considerations that the normal [person] would regard as altogether trivial or even ridiculous."[114] These passages would lend support to the premise that all facts which may conceivably affect a buyer's decision to close are material, even if such 'facts' are actually fiction.

Thus, given the foregoing arguments, case law, and statutory construction, the disclosure that a previous occupant had AIDS should be made because it is material fact to the transaction.

A Massachusetts' real estate broker's duty may now be described as follows. Under chapter 93A, an act or omission may be described as deceptive if it "could reasonably be found to have caused a person to have acted differently from the way he otherwise would have acted" given the act or omission.[115] Under section 3.16(2) of Title 940 of the

110. MASS. REGS. CODE tit. 940 § 3.16(2) (1986).

111. *Id.*

112. The perplexing problem then presented to the broker is determining which facts known by the broker might conceivably affect a buyer's decision on disclosure, and which facts would constitute mindless minutia that would only overwhelm the already overburdened buyer.

113. RESTATEMENT (SECOND) OF TORTS § 538(2) (b) (1977).

114. *Id.* § 538, cmt f. A more recent authority has stated that "there is a much greater likelihood of the existence of a duty to disclose the non-discoverable and intrinsic defect than there would be to disclose something extrinsic likely to affect market value." W. PAGE KEETON, THE LAW OF TORTS § 109 (1984).

115. DeCandia v. Barry, 1989 Mass. App. Div. 92, 94 (1989) (quoting Lowell Gas Co. v. Attorney Gen., 377 Mass. 37, 51, 385 N.E.2d 240, 249 (1979)).

Code of Massachusetts Regulations, "failure to disclose a material fact which may influence the buyer is actionable"[116] providing that the broker had knowledge of the fact and was an active participant in the sale.[117] Given that the prior occupant's AIDS or death from AIDS is a material fact, the real estate broker has a clear duty, assuming knowledge, to inform a potential buyer of the occupant's misfortune or suffer the risk of a lawsuit.[118] A risk of liability was recognized by the Massachusetts Association of Realtors, and was demonstrated by the fact that the group petitioned the Massachusetts Legislature to enact a law which would relieve them of the possibility of liability resulting from nondisclosure.[119]

C. *Statutory Relief from the Duty to Disclose*

1. Other States

At least sixteen other states and the District of Columbia have specifically addressed the broker's duty to disclose by enacting legislation to protect the broker from the specific nondisclosure that the previous occupant of a sale property was afflicted with AIDS or died of AIDS.[120] The scope of these statutes ranges from minimal to comprehensive.

Florida's nondisclosure statute, representative of the more simple statutes, provides that the affliction of a previous occupant with AIDS is not a material fact and that no liability exists for the broker's nondisclosure.[121] Tennessee's nondisclosure statute covers not only the same situations as Florida's statute, but also eliminates other deaths (suicidal or homicidal) and felonies from the list of stigmatizing disclosures that

116. *Id.* (citing Slaney v. Westwood Auto, Inc., 366 Mass. 688, 702-03 322 N.E.2d 768, 778 (1975)).

117. *Id.* at 96.

118. *See supra* notes 37-117 and accompanying text.

119. Sit, *supra* note 36, at 41.

120. *See* CAL. CIV. CODE § 1710.2 (West Supp. 1992); COLO. REV. STAT. § 38-35.5-101 (1992); CONN. GEN STAT. § 20-329dd (West Supp. 1992); D.C. CODE ANN. § 45-1936(f) (1991); FLA. STAT. ANN. § 689.25 (West Supp. 1992); HAW. REV. STAT § 467-14(18) (Supp. 1991); ILL. ANN. STAT. ch. 111, para. 5831.1 (Smith-Hurd Supp. 1992); KY. REV. STAT. ANN. § 207.250 (Michie/Bobbs-Merrill 1991); NEV. REV. STAT. ANN. § 40.565 (Michie Supp. 1991); N.M. STAT. ANN. § 47-13-2 (Michie Supp. 1992); OKLA. STAT. ANN. tit. 59, § 858-513 (West Supp. 1993); OR. REV. STAT. § 93.275 (1991); R.I. GEN. LAWS § 5-20.5-23 (1991); S.C. CODE ANN. § 40-57-270 (Law. Co-op Supp. 1991); TENN. CODE ANN. § 66-5-110 (Supp. 1992); TEX. REV. CIV. STAT. ANN. art. 6573a § 15(C) (West Supp. 1991); UTAH CODE ANN. § 57-1-37 (Supp. 1991). Utah's statute is the only statute that does not specifically mention AIDS or HIV. UTAH CODE ANN. § 57-1-37 (Supp. 1991). Instead, the statute generally precludes liability for nondisclosure that a property was stigmatized. *Id.*

121. FLA. STAT. ANN. § 689.25 (West Supp. 1992). "(1) The fact that an occupant of real property is infected or has been infected [with AIDS or HIV] is not a material fact that must be disclosed in a real estate transaction. (2) No cause of action arises . . . for the failure to disclose . . . ." *Id.*

a broker should make.[122] This statute would eliminate a possible *Reed v. King* situation.[123] Providing the most comprehensive nondisclosure coverage to brokers is Illinois.[124] In addition to the above, the Illinois statute provides that the broker will not be liable for any "act or occurrence which had no effect on the physical condition of the property or its environment or the structures located thereon."[125]

These state statutes address the broker's problem as a "failure to disclose" so that the broker is protected from nondisclosure. However, with the exception of Oklahoma, Connecticut, and Texas, they leave open the question of whether the broker should respond to a direct question.[126] This ignores any potential liability of the real estate broker to the previous occupant for invasion of that person's privacy rights.[127] If a right to privacy does exist, a broker may still be liable for breach of the seller's rights even though the broker was in compliance with state law.[128]

Oklahoma provides explicit protection to the previous occupant afflicted with AIDS by (1) requiring the buyer to state in writing that he believes such information to be material and (2) requiring the broker to get written consent from the occupant that such information may be disclosed.[129] Written consent from the concerned individual is required whether the answer is affirmative or negative.[130] This requirement sidesteps any potential right to privacy issue (assuming that the written consent acts as a waiver of any right to privacy).

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122. TENN. CODE ANN. § 66-5-110 (Supp. 1992). "No cause of action shall arise . . . for the failure to disclose . . . [that the] real estate was, or was at any time suspected to have been, the site of a suicide, homicide or other felony." *Id.*

123. See *supra* notes 98-102 and accompanying text.

124. ILL. ANN. STAT. ch. 111, para. 5831.1 (Smith-Hurd Supp. 1992).

125. *Id.*

126. OKLA. STAT. ANN. tit. 59, § 858-513 (West Supp. 1993); CONN. GEN. STAT. § 20-329dd (West Supp. 1992); TEX. REV. CIV. STAT. ANN. art. 6573a § 15(C) (West Supp. 1991).

127. These rights are discussed *infra* in notes 149-88 and accompanying text.

128. *See infra* notes 149-88 and accompanying text.

129. OKLA. STAT. ANN. tit. 59, § 858-513 (West Supp. 1993). Connecticut's statute parallels Oklahoma's. CONN. GEN. STAT. § 20-329dd (West Supp. 1992). However, Texas mandates disclosure upon the buyer's request with or without seller's permission. TEX. REV. CIV. STAT. ANN. art. 6573a § 15(C) (West Supp. 1991).

130. OKLA. STAT. ANN. tit. 59, § 858-513 (West Supp. 1993).

> C. Notwithstanding the fact that this information is not a material defect or fact, in the event that a purchaser or lessee, who is in the process of making a bona fide offer, advises the owner's agent, in writing, that knowledge of such factor is important to his decision to purchase or lease the property, an agent shall make inquiry of the owner and report any findings to the purchaser or lessee with the consent of the owner and subject to and consistent with applicable laws of privacy; provided further, if the owner refuses to disclose, the owner's agent shall so advise the purchaser or lessee.

Id.

California's legislature recognized that disclosure might violate the AIDS afflicted occupant's right to privacy, but unlike Oklahoma, chose to limit its cautionary language to the historical notes of its statute.[131] Texas took a completely opposite tack and would require the broker to disclose any knowledge of the previous occupant's AIDS if the buyer specifically requests such information.[132] The question now becomes: How has the Massachusetts Legislature reacted to these examples?

2. Massachusetts

House Resolution (H.R.) 2844, introduced during the 1991 legislative session, was a partial solution to the Massachusetts brokers' problems. The proposed text of the resolution read as follows:

> Chapter 112 of the General Laws is hereby amended by adding a new Section 87ZZ§ as follows:—
>
> (1) The fact or suspicion that a property might be or is psychologically impacted,[133] such impact being the result of facts or suspicions, including, but not limited to:
>
> (a) that an occupant of real property is, or was at any time suspected to be, infected with Human Immuno Deficiency Virus or diagnosed with Acquired Immune Deficiency Syndrome, or any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place; or
>
> (b) that the property was, or was at any time suspected to have been, the site of a homicide or other felony or of a suicide: is not a material fact which must be disclosed in real estate transaction.
>
> (2) No cause of action shall arise against an owner or landlord of real estate or his or her agent for the failure to disclose to the transferee or occupant that the property was psychologically impacted.[134]

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131. CAL. CIV. CODE § 1710.2 (West Supp. 1992). "Disclosures relating to AIDS involve potential issues of invasion of privacy, confidentiality of medical information, informed consent, and civil rights." *Id.*, historical note d.

132. TEX. REV. CIV. STAT. ANN. art. 6573a § 15(C) (West Supp. 1993).

> A person who has actual knowledge that the previous or current occupant of real property had or has AIDS, HIV-related illnesses, or HIV infection shall provide that information to a potential purchaser or lessee of the real property on receiving a specific request for the information from the potential purchaser or lessee.

Id. This requirement puts the Texas real estate brokers in a very untenable position given the possible existence of the occupant's right to privacy. Baen, *supra* note 92, at 83. If brokers do make a disclosure without the owner or occupant's permission, then the brokers could be in violation of a right to privacy. *Id.*

133. "Psychologically impacted" is not defined within the text of the bill, but a reasonable definition of the phrase (based on the statutes listed *supra* note 120) would be property stigmatized by facts or events extrinsic to the physical nature of the property (e.g., murder, AIDS, etc.) and not related to the alienability of the property's title. *See, e.g.*, OKLA. STAT. ANN. tit. 59, § 858-513 (West Supp. 1993); R.I. GEN. LAWS § 5-20.5-23 (1991); S.C. CODE ANN. § 40-57-270 (Law. Co-op Supp. 1991).

134. H.R. 2844, 177th Leg. (1991).

A similar resolution was introduced in the Massachusetts State Senate.[135] However, both resolutions, when sent from their respective committees for consideration, were sent with seventeen other resolutions accompanying H.R. 222.[136] Unfortunately for Massachusetts real estate brokers, H.R. 222 dealt with a physician's duty to inform and obtain consent in relation to HIV testing.[137] H.R. 222 contains no language which would specifically protect real estate brokers.[138] Therefore, passage of H.R. 222 will provide no protection to real estate brokers unless it is construed by the Massachusetts' courts to apply to real estate transactions.[139] Aside from the general legislative practice of combining seemingly like bills,[140] no mandate was given to the courts by the Legislature in H.R. 222 to make such an interpretation.

Furthermore, as previously noted, changes to the law of real property occur in a notoriously slow fashion.[141] The Massachusetts Supreme Judicial Court has not shown an overwhelming willingness to construe new rights for the buyer in property transactions.[142] Because the specific content of H.R. 222 deals with the field of medicine, Massachusetts courts may be reluctant to apply the resolution (assuming it is enacted) to the sale of realty.

In any event, H.R. 222 did not become law during the 1991 legislative session. Both it and H.R. 2844 were separately reintroduced in 1992 to the Massachusetts legislature as H.R. 5966[143] and H.R. 5050

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135. S. Res. 311, 177th Leg. (1991).

136. *House Bill Status* (unpublished listing at the Massachusetts State Capital Library) Nov. 16, 1991. Regarding the Massachusetts legislative process, when a bill is sent accompanying another bill, only the text of the latter is likely to be passed by the legislature. Interview with Ellen Sandler, Massachusetts House Health Care Committee, in Boston, Massachusetts (Oct. 16, 1991). This process is used when a number of bills all pertain to the same general subject matter and one bill is deemed to satisfactorily represent the others. *Id.* The only way the specific language of H.R. 2844 will be enacted is in the event a legislator specifically pulls H.R. 2844 for consideration. *Id.*

137. H.R. Res. 222, 177th Leg. (1991). The applicable part of the bill is as follows:

> No health care facility, as defined in section 70E, and no physician or health care provider shall disclose the results of an HIV antibody or antigen test to any one other than the subject thereof without first obtaining his or her written informed consent, except [in situations relating to the subject's current sexual partner].

Id. § 1(c).

138. H.R. Res. 222, 177th Leg. (1991).

139. An obvious indication that the doctors have a better lobby/Political Action Committee than the realtors.

140. *See supra* note 136.

141. *See supra* note 23.

142. *See supra* notes 57-69 and accompanying text.

143. H.R. 5966 was amended to become H.R. 5984 and then amended again to become S.R. 1676. *House Bill Status* (unpublished listing at the Massachusetts State Capital Library), Jan. 24, 1993. S.R. 1676 also failed to become law during the

respectively.[144] In 1992, H.R. 5050 was again sent from committee accompanying another bill, H.R. 5972.[145] H.R. 5972 is "an act relating to the possible exposure to HIV."[146] Although the subject matter is exposure, H.R. 5972 provides no statutory language that could even be remotely construed to provide a real estate broker protection from liability for nondisclosure.[147] H.R. 5972 also failed to become law in 1992.[148]

Thus, although the Massachusetts legislators may purport to be interested in protecting brokers from liability and stopping this particular form of AIDS discrimination, their actions speak otherwise. Twice bills have been introduced to cure the problem and twice the bills have been buried by sending them from committee as accompanying other bills. Furthermore, the inadequacy of the latest bill (as a solution to the broker's problem) that H.R. 5050 accompanied indicates that the legislature is moving away rather than towards a workable solution.

Finally, a conflict may still arise (in the absence of specific consent) regarding the AIDS afflicted individual's right to privacy because the broker may be violating the law by making the disclosure.

IV. The Seller's Right to Privacy

A real estate broker who discloses to the buyer that the previous occupant was afflicted with AIDS or died of AIDS may be potentially liable for violating the occupant's right to privacy.[149] This violation may be founded on both state and federal statutory grounds.[150]

1992 legislative session. *Senate Bill Status* (unpublished listing at the Massachusetts State Capital Library), Jan. 24, 1993.

144. *House Bill Status* (unpublished listing at the Massachusetts State Capital Library), Jan. 24, 1993.

145. *Id.*

146. H.R. Res. 5972, 178th Leg. (1992).

147. *Id.*

148. *House Bill Status* (unpublished listing at the Massachusetts State Capital Library), Jan. 24, 1993.

149. Cal. Civ. Code § 1710.2, historical note d (West Supp. 1992).

150. The United States Supreme Court has also found a constitutional right to privacy; however, this applies only to state action. *See, e.g.*, Carey v. Population Services Int'l, 431 U.S. 678 (1977) (minors' right to use contraceptives derived from their right to privacy); Roe v. Wade, 410 U.S. 113 (1973) (right to privacy found in Fourteenth Amendment guaranteed woman's right to abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (unmarried couple's right to use contraceptives derived from their right to privacy); Griswold v. Connecticut, 381 U.S. 479 (1965) (married couple's right to use contraceptives derived from their right to privacy). Because action by real estate brokers is private rather than state action, the right to privacy as derived from the United States Constitution could not be used to stop disclosure.

A. *Federal*

The federal statutory cause of action for the breach of an aggrieved occupant's privacy right is derived from two areas: fair housing law and medical consent law. The federal Fair Housing Act[151] (FHA) provides that it shall be unlawful:

> [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of (A) that buyer or renter; (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter.[152]

This section immediately raises two questions. First, whether the statute can be applied against those who would discriminate against *sellers* as well as buyers or renters, and second, whether the definition of "handicapped" includes individuals afflicted with AIDS.

Two federal district courts have held that an AIDS afflicted individual falls within the FHA's definition of handicapped. In *Baxter v. City of Belleville,* [153] a real estate developer sued the city because the city would not grant him a license to open a residence for people with AIDS.[154] In determining that people with AIDS were handicapped, the court looked to the definition of handicapped under the FHA[155] and the legislative history of the FHA.[156]

The FHA defines handicapped as "with respect to a person: (1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment."[157] The legislative history of the FHA provides for "[a repudiation of] the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion."[158] Applying this definition and legislative history, the *Baxter* court concluded that "it is clear . . . Congress intended to include among handicapped persons those who are HIV-positive."[159] In a similar case,[160] the federal district court for Puerto Rico also concluded that individuals afflicted with AIDS were

151. 42 U.S.C. § 3601-31 (1988).
152. *Id.* § 3604(f)(1).
153. 720 F. Supp. 720 (S.D. Ill. 1989).
154. *Id.* at 721-22.
155. *Id.* at 728-29.
156. *Id.* at 729.
157. 42 U.S.C. § 3602(h) (1988). Massachusetts statutes use substantially the same wording. MASS. GEN. LAWS. ANN. ch. 151B, § 1(17) (West Supp. 1991).
158. Act of 1988, Pub. L. No. 100-430, 1988 U.S.C.C.A.N. (1619 Stat.) 2179.
159. *Baxter,* 720 F. Supp. at 729.
160. A.F.A.P.S. v. Regulations & Permits Admin., 740 F. Supp. 95 (D.P.R. 1990) (delay of license for establishment of an AIDS hospice violative of the FHA).

within the definition of handicapped and thus protected by the provisions of the FHA.[161]

Given that those afflicted with AIDS are handicapped within the definition of the FHA, the more difficult argument would be to convince a court to apply the scope of the FHA to the seller. Admittedly, within this author's knowledge (*de minimis* as it may be), no such argument has ever been made.[162] However, some basis for the argument does exist.

The thrust of the FHA is to prevent discriminatory practices against the handicapped with reference to housing.[163] Section 3601, the FHA's declaration of policy, states: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[164] One of the few cases interpreting this provision is *United States v. City of Parma*.[165] The *Parma* Court stated that the FHA "was enacted to ensure the removal of artificial, arbitrary and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics."[166] The court further stated that "the [FHA], therefore, is to be construed generously to ensure the prompt and effective elimination of all traces of discrimination . . . ."[167] These passages support an interpretation of the FHA which would include sellers.

Another argument supporting inclusion of sellers within the ambit of the FHA may be made on the basis of the statutory language. The applicable part of the FHA states it shall be unlawful to "discriminate in the sale or rental, or."[168] Because of the use of the disjunctive 'or,' the clause "discriminate in the sale or rental" may be read to stand alone. Since the clause makes no reference to either buyers or sellers, it could presumably be used to advocate the seller's case.

Finally, informing a buyer that the previous occupant had AIDS or died therefrom only promotes the misconception that AIDS can be transmitted by casual contact or by living in a space previously occu-

161. *Id.* at 103. Further support for these two decisions comes from the Federal Eastern District Court of Pennsylvania: "[c]onsensus of opinion holds [that] AIDS qualifies as a handicap or disability under various federal and state antidiscrimination laws." Cain v. Hayatt, 734 F. Supp. 671, 678 (E.D. Pa. 1990).

162. In Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) and Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979), the Supreme Court dealt with the issue of standing to sue under the FHA, but did not address the issue of whether a complainant had to be a buyer or renter. The essence of law is its malleability and no reason exists why the argument couldn't be made that the FHA should apply to sellers.

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

164. 42 U.S.C. § 3601 (1988).

165. 494 F. Supp. 1049 (1980) (N.D. Ohio 1980).

166. *Id.* at 1053.

167. *Id.*

168. 42 U.S.C. § 3604(f) (1) (1988). See *supra* text accompanying note 152 for the entire regulation.

pied by an individual with AIDS. Encouraging such misconceptions to continue to exist promotes further discrimination against those individuals with AIDS who may be buying or selling property. If discrimination against AIDS victims is to be eliminated, the discrimination must be stopped on both sides of the transaction. A drop of ink in a glass of water cannot be kept from coloring the whole glass. So it is with discrimination as well. Discrimination in one transaction cannot help but contaminate others. Therefore, the courts should be willing to expansively interpret the FHA to protect sellers of property.

Various sections of the United States Code are a second statutory source in support of the AIDS afflicted seller's right to privacy.[169] These provisions all provide for the confidentiality of the identity of a person with AIDS.[170] Arguably, the right to privacy regarding nondisclosure of AIDS should not be denied merely because the holder of the information is not within the medical profession. The purpose of the aforementioned statutes is to protect the privacy of the individual. Application of this principle to real estate brokers regarding AIDS disclosure ensures that the person's rights are protected. Therefore, the statutes should be applied to real estate brokers.[171]

B. *Massachusetts*

Although the FHA and Title 42 of the United States Code are federal acts, they would apply to Massachusetts because of the Supremacy Clause of the United States Constitution.[172] The arguments raised

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169. In reference to subsidizing housing opportunities for individuals with AIDS, the United States Code states that "the recipient shall agree to ensure the confidentiality of the name of any individual assisted . . . under this chapter and any other information regarding individuals receiving such assistance." 42 U.S.C.A. § 12905(e) (West Supp. 1991).

Under grants for testing for HIV the United States Code provides:

> The secretary may make grants to the States for the purpose of providing opportunities for individuals (1) to undergo counseling and testing with respect to the etiologic agent for acquire immune deficiency syndrome without being required to provide any information relating to the identity of individuals; and (2) to undergo such counseling and testing through the use of a pseudonym.

42 U.S.C.A. § 300dd-31 (West Supp. 1991); *see also* 42 U.S.C.A. § 300ff-61 (West Supp. 1991) (concerning confidentiality and informed consent); and 42 U.S.C.A. § 1320b-11(g) (West Supp. 1991) (concerning nondisclosure of blood donors' addresses).

170. *See supra* note 169.

171. In support of this change, the policy argument may be made that discrimination against AIDS-inflicted sellers is ignorance based. By disallowing this type of information as immaterial and a breach of privacy, the courts may chip away at the ignorance. Furthermore, as previously stated, allowing discrimination on one side of a sale and disallowing it on the other is inconsistent.

172. U.S. CONST. art. VI, § 2. The Supremacy clause dictates that unless otherwise stated, federal law pre-empts state law. *Id.*

above could also be predicated upon Massachusetts law. The Massachusetts statutory definition of "handicapped" is nearly identical to that of the FHA.[173] The Massachusetts version of the FHA similarly prohibits discrimination against the handicapped.[174] Thus, the same argument made by using federal statutes can be made in Massachusetts using state statutes.

Another statutory based right to privacy for a Massachusetts seller is General Law chapter 214, section 1B.[175] Chapter 214 states that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy."[176] This statute has been used primarily against public officials regarding disclosure of private information,[177] employers seeking or disclosing employee information,[178] and physicians who divulge confidential patient information.[179] Public policy supports the imposition of liability on those who would invade the privacy of another.[180] Likewise, a broker's disclosure that a property was inhabited by someone with AIDS may be construed as an unreasonable intrusion or disclosure.[181] Given that AIDS is not transmitted by casual contact, and certainly not by moving into the residence formally occupied by an AIDS sufferer, one could argue that no substantial reason exists for such a disclosure.[182]

However, counter-arguments do exist. In addition to the potential psychic disturbance[183] and value decrease,[184] section 33.16 of Title 950 of the Code of Massachusetts Regulations permits disclosure when "the

173. *See supra* note 157.

174. *See* MASS. GEN. LAWS ANN. ch. 151B, § 4(7) (West Supp. 1991).

175. MASS. GEN L. ch. 214, § 1B (1991).

176. *Id.* Other states have recognized the common law tort of invasion of privacy by oral declarations. *See* Annotation, *Invasion of the Right to Privacy by Merely Oral Declarations*, 19 A.L.R.3d 1318 (1968 & Supp. 1992).

177. *See, e.g.*, Pottle v. School Committee of Braintree, 395 Mass. 861, 482 N.E.2d 813 (1985) (disclosure of school employees' addresses not invasion of privacy); Attorney General v. Collector of Lynn, 377 Mass. 151, 385 N.E.2d 505 (1977) (delinquent taxpayers tax records not exempt from disclosure).

178. *See, e.g.*, Flesner v. Technical Communications Corp., 410 Mass. 805, 575 N.E.2d 1107 (1991) (invasion of privacy claim unsupported by inadmissible evidence); O'Connor v. Police Comm'r of Boston, 408 Mass. 324, 557 N.E.2d 1146 (1990) (unreasonably intrusive inquiries not permitted).

179. *See, e.g.*, Tower v. Hirschhorn, 397 Mass. 581, 492 N.E.2d 728 (1986) (neurologist liable for divulging confidential medical information; Bratt v. International Business Machines Corp., 392 Mass. 508, 467 N.E.2d 126 (1984) (employee's right to privacy balanced against the employer's need to know).

180. An individual has "the right to be left alone." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

181. *See, e.g.*, Koop, *supra* notes 90-91 and accompanying text.

182. Public policy further supports broker nondisclosure of an AIDS afflicted owner or occupant because such disclosures only help feed the public's hysteria about AIDS. *See, e.g.*, Taylor, *supra* note 109, at 46.

183. *See supra* notes 102, 105 and accompanying text.

184. *See supra* notes 100-01 and accompanying text.

[individual] or his authorized representative consents to such disclosure."[185] Although this section actually applies to disclosure by a public agency,[186] it is illustrative of the general principle of waiver.[187] By putting the property up for sale, the seller could be said to implicitly consent to disclosure of those facts which a buyer might consider material.[188]

In summation, an AIDS afflicted seller may have a right to nondisclosure based upon his right to privacy. This right to privacy is predicated upon various state and federal statutory constructions. Given such a right to privacy, a real estate broker might be found liable for nonconsensual disclosure.

V. Conclusion

The answer to the Massachusetts broker's quandary is best found in the text of the Oklahoma and Connecticut nondisclosure statutes. Massachusetts House Resolution 5050 (an act relative to the further disclosure of information in real estate transactions) should be amended to include a provision for consent by the seller or previous occupant. Furthermore, H.R. 5050 should be considered separately from other House and Senate resolutions to ensure that real estate brokers have statutory protection without having to rely upon a court's interpretation.

Failing passage of any such law, chapter 93A may be construed to impose liability on a real estate broker for nondisclosure to a buyer that the previous occupant of a sale property had AIDS. Conversely, nonconsensual disclosure may expose the broker to liability from the seller or previous occupant for invasion of privacy or discrimination. The safest route for the truly cautious and concerned real estate broker may be to ask the seller if he cares to make any such disclosure—affirmative, negative, or not at all. Such an answer would then be communicated to the potential buyer.

Of course, these elaborate and somewhat ludicrous remedies point out the need for one further remedy—education. If the ignorance concerning AIDS is eliminated, then likewise would be the broker's quandary.

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185. Mass. Regs. Code tit. 950, § 33.16 (1986).

186. *Id.*

187. Waiver is "[t]he intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." Black's Law Dictionary 1580 (6th ed. 1990).

188. The obvious flaw to this line of reasoning is that it can continue *ad infinitum* by pandering to all the possible prejudices that a buyer might have.