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From the Asphalt Jungle to the Glasshouse: New Communities and Urban Growth Policy†

*Eugene Carr-Fanning**

A government program encouraging new community development emerged in the 1960's because of a concern with national urban growth. In this essay, Mr. Fanning reviews the recent history of federally supported new communities, and analyzes why the program has proven unsuccessful. The nature of the present legislative machinery is discussed and problems in the area of land, finance, and management are explored. The significance of and prospects for new communities are examined both for the United States and abroad. Finally, the author recommends necessary, comprehensive reforms, both immediate and long term, which are designed to rescue and strengthen new communities in the United States.

Have you ever heard of Garden City?
D'ye mane Heaven?[1]

---

†The author wishes to thank Professor Charles M. Haar, of Harvard University, who read an earlier draft of this article for his helpful criticisms and comments.

*Doctoral Candidate, Harvard University; B.C.L., National University of Ireland, 1973; LL.M. National University of Ireland, 1976; LL.M. Harvard University, 1977; Assistant Lecturer in Law, University College, Dublin (1974-76); Solicitor of the Superior Courts in Ireland.

1. G. B. SHAW, JOHN BULL'S OTHER ISLAND, Act 1 (1904). This dedication quotation sets in contrast "Garden City" and "Heaven" with tongue in cheek. It is sought thereby to indicate tensions that exist between ideals and reality, and start the reader thinking of some of the forces at play in this area. Many other opposing concepts can be discovered through a close reading of the text, one of the most obvious being asphalt jungle and glasshouse; Thomas More and Ebenezer Howard may also qualify. More of the above dialogue from the play is revealing:

> BROADBENT. Heaven! No; it's near Hitchin. If you can spare half an hour I'll go into it with you.
> TIM. I tell you what. Gimme a prospectus. Lemmee take it home and reflect on it.
> BROADBENT. You're quite right: I will. (*He gives him a copy of Mr. Ebenezer Howard's book, and several pamphlets.*) You understand that the map of the city — the circular construction — is only a suggestion.
> TIM. I'll make a careful note o that (*looking dazedly at the map*).
> BROADBENT. What I say is, why not start a Garden City in Ireland?
> TIM.(*with enthusiasm*). That's just what was on the tip o me tongue to ask you. Why not? (*Defiantly.*)Tell me why not.
> BROADBENT. There are difficulties. I shall overcome them; but there are difficulties.

In times of national crisis, people often turn to so-called "ideal" ways of living. This was true of Plato,[2] Thomas More,[3] Francis Bacon[4] and Ebenezer Howard.[5] Dissatisfied with their perceived surroundings, they constructed blueprints for an alternate reality which they hoped would not manifest the same faults.[6]

Many of these individuals have been called "Utopians." Most were infamous for grand visions which lacked practicality. Howard, on the other hand, invented his Garden City down to the last financial, adminstrative and legal detail. Utopia had descended from the clouds and the fertile soil of human imagination to the hard ground of fact. Howard became the father of modern, large scale, urban development carried on according to a preconceived plan. He stands at the beginning of the new town movement in Western democracy.

So far in the twentieth century, England, France, The Netherlands, Sweden, Finland, the U.S.S.R., Israel and the United States have used the new town concept to a considerable degree. In foreign nations, these communities were built in pursuit of national policies.[7] In America, however, when some policy has existed, it has been unsupported and

2. PLATO, THE REPUBLIC (D. Lee trans. 1974) (n.p. c. 375 B.C.).

3. T. MORE, UTOPIA (P. K. Marshall trans. 1965) (n.p. 1516) [hereinafter cited as UTOPIA].

4. F. BACON, NEW ATLANTIS (1924), *Reprinted in* THE COMPLETE ESSAY OF FRANCIS BACON (Introduction by H. Finch 1963).

5. E. HOWARD, GARDEN CITIES OF TOMORROW (1965 ed.); *see especially,* Petersen, *The Ideological Origins of Britain's New Towns,* 34 J. AM. INST. OF PLANNERS 160 (1968). The list of gentlemen in the text is surely in descending order of intellectual importance.

6. The 'ideals' have been described in the following way:

> [P]erhaps the most striking feature the ideal images have in common is that they are based on a belief in betterment, either on this earth or in the hereafter. They illuminate an attitude emphasizing not only personal happiness, but the overriding significance of the communal or community factors, for their own as well as for the individual's sake. Ideal images emerged in periods of social change, such as the early Renaissance or the Age of Enlightenment, when the breaking up of an older economic order facilitated cultural experimentation. The ideal plan refers to the site as a unity and expresses the aspirations rather than the achievements of any particular civilization; it is intended for and applicable to varying circumstances. . . . The image of the ideal city thus seeks the universal answer to temporary problems, and by doing so reflects as well as challenges its social background.

H. ROSENAU, THE IDEAL CITY IN ITS ARCHITECTURAL EVOLUTION 4-5 (1959) [hereinafter cited as ROSENAU]. *See also* W. ASHWORTH, THE GENESIS OF MODERN BRITISH TOWN PLANNING 118-119 (1954) [hereinafter cited as ASHWORTH].

7. In England, new towns were used to disperse population from congested centers and to benefit poorer regions of the country. F. SCHAFFER, THE NEW TOWN STORY 1-2 (1970) [hereinafter cited as SCHAFFER]. France used them to rationalize the urban population of the Paris region, and to develop the southern part of the French Riviera, the Languedoc-Roussillon area, and also the Lyons Centre. A. STRONG, PLANNED URBAN ENVIRONMENTS 366-77 (1971) [hereinafter cited as STRONG]. Sweden and Finland built satellite towns to disperse population and rationalize urban transportation. *Id.* at 35-36, 87-88. In Israel, they are built for internal colonization and defense concerns. *Id.* at 183-90. Of course, new towns have been built in these countries for more than one or two reasons. *See generally* P. MERLIN, NEW TOWNS 3-241, 255 (1971); Cave, *An English View,* in Merlin, *New Towns in France in the Beginning,* 44 TOWN & COUNTRY PLAN. 74, 74-77 (1976). Yet, it is possible to indicate the major concerns which preceded their construction.

often confused. This essay attempts to indicate the reasons for a lack of clear policy, specifically focusing on the government program which sponsored American new communities between 1968 and 1977.[8] Insight is offered both into the current state of land-use in the United States and into mechanisms of government finance in land development.

First, the universal characteristics of new town construction are considered. While no two towns have been alike, all have exhibited certain features which give meaning to the synonomous terms "new town" and "new community."[9] Second, an overview of American new towns is presented, and reasons advanced as to why that experience is important. Third, difficulties with the new communities program are examined from many viewpoints including the role of private enterprise, the legislation itself, and current and possible future policies. Fourth, there is an assessment of the future significance of new towns in light of major social changes since the program's origin in the 1960's. The fifth section discusses possible reforms to the program in the areas of land assembly, finance and management. Sixth, the nature of a recent antipathy to new town construction both in England and the United States is considered. The essay concludes with observations concerning immediate steps which should be taken to insure against the total collapse of new community projects.[10]

I. CHARACTERISTICS OF A NEW TOWN

There are many types of new towns which are created for different purposes. Discovering common essentials among the variations is difficult. Some writers are skeptical of ever producing a valid definition.[11]

8. Urban Growth and New Community Development Act of 1970, § 701(b), 42 U.S.C. § 4501 (1970).

9. The phrases "new towns" and "new communities" are treated as synonyms in the legal sense that those are the legislative descriptions used in the United States and England and are appropriate to designate the results of these, and other, national programs. Theoretically, there may be a large gap between them. A community implies a place that is pleasant and desirable to live in. It implies group activities, common interests and social interactions. The word can be used *descriptively*, meaning a place, but invariably is used *evaluatively*. The word town is purely descriptive and while it also may be a community it need not be one invariably. Therefore, it may be more profitable to use the phrase "new community" as a propaganda tool to disarm potential opponents. This shift in phrases has an analogy in the literature which today no longer refers to "master plans" (*i.e.*, with associations of authoritarianism) but rather uses the term "comprehensive plans."

10. The text mainly is concerned with American new communities, but contains references to the English experience and that of other nations where there is a direct analogy or where one system might gain something from another. The footnotes contain extensive comparative material.

11. J. CLAPP, NEW TOWNS AND URBAN POLICY 43 (1971) [hereinafter cited as CLAPP]. Chapter

In the United States, no statute or set of regulations precisely define a new community, but certain criteria are applied to developments.[12] The following, however, is an excellent attempt of definition.

> New towns are planned communities consciously created in response to clearly stated objectives. Town creation as an *act of will* presupposes the existence of an authority or organization sufficiently effective to secure the site, marshal resources for its development, and exercise continued control until the town reaches viable size.[13]

There are six major elements in any new community project. Each of these universal factors must be considered.

(1) *Any new community must be pre-designed.* This means that there must be a master plan for all physical, economic, political and social aspects of the program.[14] There also must be guidelines for every stage of development. These plans, however, need not be rigid but should of-

---

3 of CLAPP offers the reader a collection of various definitions of the new town concept.

In England in the 1950's, the essential element was felt to be that the development was self-contained. SCHAFFER, *supra* note 7, at 115, 120; R. THOMAS & P. CRESSWELL, THE NEW TOWN IDEA 26-33 (1973) [hereinafter cited as THOMAS & CRESSWELL]. This meant that all needs of residents were to be met in and through the new community. By the 1960's, this was seen to be an impossible ideal and the second generation of English new towns catered to commuters. Innovations in transportation and communication had shrunk distances to an extent that hardly could have been forseen (one is reminded of Marshall McLuhan's vision of the Global Village). Increasingly, jobs and industry have become so specialized that if workers are to have an effective choice, they have to look far afield. It was felt then that a rural location was the common denominator. Experience, however, has shown that locations are as variable. New towns are created in-towns, as satellites to existing urban areas, as well as free-standing in rural areas.

12. Location and containment are among these. Urban Growth and New Community Development Act of 1970, § 712, 42 U.S.C. § 4513 (1970).

13. E. GALANTAY, NEW TOWNS: ANTIQUITY TO THE PRESENT 1 (1975) [hereinafter cited as GALANTAY]. This definition also is selected because of its conciseness which allows ease of analysis. An equally good, though longer, description of new community criteria can be found in the Federal Regulations, 24 C.F.R. §§ 710.5, 710.6 (1974). *See also* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH 63-64 (1968) [hereinafter cited as ACIR REPORT].

14. The very essence of a new town is that it is preconceived and built according to plan. The opposite is the spontaneous and ad hoc growth of a town. As stated by C. CAMPBELL, NEW TOWNS: ANOTHER WAY TO LIVE (1976) [hereinafter cited as CAMPBELL]:

> The central ideas behind the New Town concept are those of structuring a *definite plan for development* over a predetermined time period, balancing the delivery of services with the needs of the resident population, establishing limits for growth, incorporating multiple uses for the land (residential, commercial, industrial, and open space), and developing a largely self-sustaining economic base.

Id. at 18 (emphasis added). *See also* ROSENAU, *supra* note 6, in which

> [A]n ideal city represents a religious vision, or a secular view, in which social consciousness of the needs of the population is allied with a harmonious conception of artistic unity.

Id. at 4. For a general discussion on the use and philosophy behind ideal communities, *see* T. REINER, THE PLACE OF THE IDEAL COMMUNITY IN URBAN PLANNING (1963).

fer alternative policy models which may be employed as the project proceeds and new problems arise.

(2) *Such towns must be "consciously created in response to clearly stated objectives."*[15] This involves two considerations. Initially, creation should take place in a regional or national policy framework.[16] There must be an answer to the question "why this site?" apart from the parochial "it was the cheapest." In addition, the purposes to be accomplished by creating the town must be articulated clearly. This is the policy axis where local and national interests must meet and blend.[17]

(3) *There will be a long development period.* New town financing in England is for a sixty year period. This is, perhaps, too long an interval, but new town development takes much more time than the three to five years required for ordinary tract and commercial development. Sales in a new town may not occur until the seventh year and cash flow may not be positive until the tenth to the twelfth year.[18] On this basis, American new communities are still in their infancy and thus their success cannot be judged until the early 1980's.

(4) *The sponsor will control land use through the development period or until the community's character has been established.*[19] It has been observed that "in all Utopias the right to have plans of any significance belongs only to the planners in charge."[20] Some means must be found to counter this tyranny and allow public participation. Planning and democracy always are suspicious of each other.[21]

---

15. GALANTAY, *supra* note 13, at 1. The creation of a new town is far too major an undertaking to lack a reason for being. These reasons, and the problems sought to be overcome by the town's creation, must be articulated clearly or the new town will not gain the political acceptance necessary for survival. In the pre-design stage, certain agreed upon objectives will emerge which may be modified through changing circumstances or as the town is built. This last fact, however, does not detract from the value of primary objectives.

16. For example, the policy may be to distribute population and industry or to prevent overcongestion of either of these factors. *See* note 75 and text accompanying notes 144-47 *infra*.

17. In the United States, a lack of well-defined goals has been one of the deficiencies in new community growth and urban development. The most pervasive policy has been the attempt to make money. While profits are an invariable result of success, they do not necessarily mean a successful new community.

18. *See generally* S. WEISS, NEW TOWN DEVELOPMENT IN THE UNITED STATES: EXPERIMENT IN PRIVATE ENTREPRENEURSHIP 22-26 (1973) [hereinafter cited as WEISS]. The economic principles specifically concerned with new town development are discussed in A. ROBINSON, ECONOMICS AND NEW TOWNS: A COMPARATIVE STUDY OF THE UNITED STATES, THE UNITED KINGDOM, AND AUSTRALIA (1975); R. HEROUX & W. WALLACE, FINANCIAL ANALYSIS AND THE NEW COMMUNITY DEVELOPMENT PROCESS 67-88 (1973).

19. This is usually until 50-70% of the residential units have been sold.

20. J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 27 (1961).

21. The classic work on planning's threat to democracy is F. HAVEK, THE ROAD TO SERFDOM 56-71 (1944). *See generally* C. HAAR, LAND–USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 1018-72 (3d ed. 1976) [hereinafter cited as HAAR ON LAND USE]. It is interesting to observe that when Lewis Silken, the English Minister of Town and Country Planning, visited Stevenage in 1946, which was to become the site of the first New Town, he was greeted with

Residents' associations[22] and the free circulation of information represent a form of compromise. This is an area with which government must become concerned.[23]

(5) *Whether the sponsor is public, private, or a mixture of both, there will be multiple participants in the project.* There are many threads in new town construction,[24] and each factor must be considered whenever such towns are built in a Western democracy. All of these factors will involve encounters and interactions. As a result, there will be complex financing and decision-making throughout the development process.

(6) *Finally, all new towns should be diversified.* A new community cannot be designed for and occupied by any one class or group.[25] Unfortunately, most new towns do not reflect their societies' balance, having usually both a preponderance of the young, well-educated middle class, and little representation of ethnic groups.[26] A true social balance of all ages and incomes should be planned for and its attainment made a measure of the new community's success.

All of the above characteristics should be present in any new town's policy. Of course, purposes and objectives will vary depending on what the society views as problems and how best the new community development can solve them. Nevertheless, in whatever social and political environment the concept emerges, these characteristics can be isolated and experience or policy analyzed accordingly.

---

cries of Gestapo! Dictator! The tires of his car were deflated and sand put in the petrol tank. The railway station's name boards were replaced with ones marked "Silkengrad." *See* H. ORLANS, STEVENAGE: A STUDY OF A NEW TOWN 60-67 (1952). Upon completion of an English new town, management and control is not given to the inhabitants or to the local council, but is transferred to the New Town Commission, established initially under the New Towns Act 1959, 7 & 8 Eliz. 2, c. 62, § 2.

22. Pioneered in Columbia, Maryland.

23. *See* notes 227-35 and accompanying text *infra*.

24. These factors include: financial institutions, marketing mechanisms, investing schemes, public utility construction and public service programs, insurance, patterns of land ownership (both before and after land development), private property and public powers (*e.g.*, eminent domain), building technology, practices and supplies, realtor's practices and consumer preferences, land use controls and law, and lastly society's ideology.

25. Social stratification and segregation is a major defect in American cities and towns. The educational, social and economic consequences are a fact of everyday life. New towns, reflecting the aspirations of a nation, should seek to obviate these problems. Practically balanced diversity in a new town will relieve existing pressure and ensure a healthier internal growth. Thus, the poor, old, and black will not be isolated, and the worker need not spend hours journeying to his or her job. Lastly, the economic base must be diverse. The people and their jobs should not be controlled by a single firm. "[The] veritable saturation by company business of everything" is a genuine problem. J. ALLEN, THE COMPANY TOWN IN THE AMERICAN WEST 107 (1966). In a community with a variety of industries, paternalism and over-dependence will not arise. *See* R. BURBY & S. WEISS, NEW COMMUNITIES USA 99-101 (1973) [hereinafter cited as BURBY & WEISS]. For a discussion of social balance in an English context, *see* THOMAS & CRESSWELL, *supra* note 11, at 33-40.

26. *See generally* ARE NEW TOWNS FOR LOWER-INCOME AMERICANS TOO? (J. Boer & A. Greendale ed. 1974).

II. THE AMERICAN EXPERIENCE: AN OVERVIEW

As a relatively new country, America is typified by new development. Such activity has been spontaneous and haphazard.[27] Rapid expansion and colonization ensured that little time was spent on planning. In its first one hundred years, America was predominantly agricultural with building and settlement patterns functional to that type of society.[28] In the second hundred years, the nation became primarily industrial.[29] Cities grew larger as people migrated to them. Rapid industrialization resulted once again in little or no time spent on pre-designing these often bleak environments. At most a grid pattern was imposed on "asphalt jungles."[30]

America was not alone in this heritage of rapid industrialization but arguably suffered most from it. While it became the most successful industrial power of the new age, the United States lacked many established urban structures on which to build. In the early part of the present century, numerous remedial and innovative solutions were attempted throughout the Western world. One such innovation was a return to the concept of building new towns.[31]

A. Early Attempts at New Town Construction

In twentieth century United States, new community policy has made three starts. The first attempt was in the 1920's. Under the influence of Howard's American disciples,[32] Radburn, New Jersey was built, but the

27. For an Anglo-American comparison of growth patterns, *see* M. CLAWSON & P. HALL, PLANNING AND URBAN GROWTH 9-86 (1973) [hereinafter cited as CLAWSON & HALL].

28. *See generally* M. CLAWSON, THE LAND SYSTEM OF THE UNITED STATES (1968); M. CLAWSON, AMERICA'S LAND AND ITS USES 16-29 (1972) (*e.g.*, contains a capsule history of land in the United States); J. DELAFONS, LAND-USE CONTROLS IN THE UNITED STATES 1-31 (2d ed. 1969).

29. CLAWSON & HALL, *supra* note 27, at 2.

30. The term "asphalt jungle" is defined as "the crowded city, especially regarded as a place of predatory behavior in a struggle for survival." WEBSTER'S NEW WORLD DICTIONARY 82 (2d College ed. 1974).

31. Traditionally, this "discovery" is credited to Howard who along with a few disciples, propagated the idea in England at the turn of the Nineteenth Century (*i.e.*, GARDEN CITIES OF TOMORROW was first published in 1898). If new towns first came to light there, however, it was a concept which soon appeared in all industrial countries.

32. Howard's American disciples were Lewis Mumford and Clarence Stein; Mumford authored THE HIGHWAY AND THE CITY (1953) and THE STORY OF UTOPIAS (1922). Stein authored TOWARD NEW TOWNS FOR AMERICA (1966), *originally printed as Toward New Towns for America,* 20 TOWN PLAN. REV. 167 (1949); as Stein wrote:

> After the First World War there was a strong surge of enthusiasm for a better world. A group of us, including Lewis Mumford . . . formed the Regional Planning Association of America, to discuss regional development, geotechnics and New Communities. . . . Up to that time in America our attack on Housing had been regulatory — legal dont's. I went abroad in search of more constructive action. In England 'New Towns'. . . were attempting to chart a new way; the second Garden City, Welwyn, was being built. I returned to America a disciple of Ebenezer Howard and Raymond Unwin.
>
> That is how it started. We intended to create a Garden City in America. But time

Great Depression ruined any chance for success. The second occurred during Roosevelt's New Deal days when the government built three green-belt towns. Policy was articulated clearly before construction.[33] Large tracts of land were acquired publicly to avoid fragmented ownership, and to insure that the state kept the increase in the land's value. Dwellings were to be leased, not sold, primarily to families of modest income. These developments, however, were akin to large suburban tracts, since they did not provide for social or economic balance. Generally, they stagnated in the succeeding twenty years. The third attempt occurred during World War II, when the federal government created three so-called atomic towns.[34] These were mainly living and recreational facilities for the scientists who worked to develop the atomic bomb. They were not designed as communities, and where they became such, it was largely a cosmetic afterthought. Both the greenbelt and atomic towns succumbed to the post-war determination to get government out of land development. Houses, land and public facilities all were sold.

The greenbelt towns remain the only direct American government initiative to create better environments through new communities. If continued, they might have been an example to the nation and the world. In contrast, England, though left in penury after the war, executed a program which captured the world's attention. Development in the United States was left to the small developer spurred on by private enterprise and profit.[35] Consequently, urban development was seriously affected.[36]

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and place and the so-called economic cycle mould the ultimate reality of our dreams. Stein, *Toward New Towns for America,* 20 TOWN PLAN. REV. at 203 (1949).

33. *See* Mayer, *Greenbelt-Towns in U.S.A.*, 37-38 TOWN & COUNTRY PLAN. 35 (1969-70). These towns were Greenbelt (Washington), Greenhills (Cincinnati), and Greendale (Milwaukee). Government control of these towns was divested completely under Pub. L. No. 65, ch. 127, 63 Stat. 68 (1949).

34. These were Los Alamos, New Mexico; Oak Ridge, Tennessee; and Richland, Washington. *See generally* Mayer, *Greenbelt Towns Revisited, in Search of New Directions for New Towns for America,* 24 J. OF HOUSING 12 (1967); McFarland, *The Administration of the New Deal Greenbelt Towns,* 32 J. AM. INST. OF PLANNERS 217 (1966). *See also* Berger, *New Communities in the U.S. — A Survey,* 46 ST. JOHN'S L. REV. 694 (1972).

35. The 1950's in the United States was an era of successful suburban development carried out mostly by small to middle size developers. *See generally* F. WIRT, B. WALTER, F. RABINOVITZ & D. HENSLER, ON THE CITY'S RIM: POLITICS AND POLICY IN SUBURBIA 20 (1972); SUBURBIA: THE AMERICAN DREAM AND DILEMMA 200 (P. Dolee ed. 1976); C. HAAR, THE END OF INNOCENCE 15-17 (1972); H. GANS, THE LEVITTOWNERS: HOW PEOPLE LIVE AND POLITIC IN SUBURBIA (1967) [hereinafter cited as THE LEVITTOWNERS]. Through their building, the rise in living standards and the motorcar's availability, the suburbs became the preserve of the white middle class. Center city was left with the problems of old buildings, ethnic groups and a diminishing tax base.

36. By the 1960's, center city problems had reached the national consciousness as a crisis. While dislike of center city was not new in the American psyche, the size of its difficulties could not be ignored. By that time also, the faith most people had placed in suburbia was shattered. The recent suburban expansion had shown how wasteful a form of development it really was. Land

B. The Later New Town Experience

From the optimistic Democratic administrations of the 1960's, two urban affairs programs were to emerge: the model cities[37] and new communities projects. The first program was to revitalize the old urban cores and suburbia. Large tracts of urbanscape were to be redeveloped through federal aid. Simultaneously, new communities were to be built to handle the then projected population increase. The model cities scheme was to provide a facelift for American Cities; the new communities program was to guarantee the construction of new towns so that existing city populations would not increase in such a fashion as to exacerbate existing problems.[38] In addition, new towns were to become laboratories to produce new techniques for future urban life.[39] Unfortunately, the 1970's are proving to be an era of depression and pessimism. The model cities project is now history.[40] Does this fate await the new community project?

The task force on new towns reporting to the President in 1967[41] concluded that "building new communities is a movement whose time has come."[42] Where was the movement, and what were its origins and purposes? An answer begins in the private sector.

With suburban expansion, post World War II developers had tended to grow in scale.[43] Larger and larger tracts were developed as a unit. Recognizing that people would pay more for carefully planned and attractive environments,[44] developers began to sponsor additional

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was wasted through low density building and the prevalent practice of "leapfrogging" (*i.e.*, the practice of developing land further out on the perimeter of cities, rather than in the inner city, where there are empty sites available for use; it occurs when it is just as cheap for the developer to build anew rather than clear an old site and build on that. What is least expensive for the developer is usually the most costly for the municipality.). Public utilities and services became expensive owing to "ribbon development" (*i.e.*, the practice of building houses in a narrow strip adjacent and parallel to highways and roads). Time was wasted owing to increased commuting distance. Moreover this factor, coupled with car ownership, wasted energy. Besides, suburbia was a dreary place to visit, and perhaps, more dreary to live in.

37. Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. No. 89-754, §§ 101-1020, 80 Stat. 1255 (1966).

38. *See generally* NATIONAL COMMITTEE ON URBAN GROWTH POLICY, THE NEW CITY (D. Canty ed. 1969) [hereinafter cited as THE NEW CITY].

39. *See generally* R. HANSON, NEW TOWNS: LABORATORIES FOR DEMOCRACY 9-11 (1971).

40. *See generally* C. HAAR, BETWEEN THE IDEA AND THE REALITY: A STUDY IN THE ORIGIN, FATE, AND LEGACY OF THE MODEL CITIES PROGRAM (1975). *See also* B. FRIEDEN & M. KAPLAN, THE POLITICS OF NEGLECT: URBAN AID FROM MODEL CITIES TO REVENUE SHARING (1975) [hereinafter cited as FRIEDEN & KAPLAN].

41. Unpublished Memorandum from the Presidential Task Force on New Towns (Oct. 16, 1967) [hereinafter cited as Task Force Report]. For a description of the Task Force, *see* FRIEDEN & KAPLAN, *supra* note 40, at 36-43.

42. Task Force Report, *supra* note 41, at 3.

43. R. BABCOCK, THE ZONING GAME 41-61 (1966) [hereinafter cited as BABCOCK].

44. It is to this notion that the popularity of the Planned Unit Development as a development

facilities, such as shopping centers. As the scale of developers expanded, some conceived of whole new communities. Then, the corporate developer emerged with larger and more stable resources for such development. The prospect of large profits enticed many corporations into the land development field, including the building of new communities.[45]

In 1960, the "Year 2000 Plan" for Washington, D.C. was published.[46] This blueprint contained one of the first appearances of planned new communities. Radial corridors were envisaged with new communities being built along them.[47] Two developers seized upon the notion, and during the 1960's constructed new satellites along the lines indicated without federal aid.[48] Despite some philanthropic sentiments and a desire to innovate,[49] the underlying purpose in building was private profit. Although these projects were begun in a decade of property boom,[50] they were not insulated from extreme financial difficulties.[51] Other developers, however, grew interested in the concept.[52]

An interest was also kindled in the federal government. In 1964, a bill was introduced to provide mortgage insurance for land development of new subdivisions and new communities but was not enacted.[53] The following year it was reintroduced, but only the subdivision provisions were passed.[54] In that year, bills to grant loans to state land development agencies for land acquisition for new towns were not enacted.[55] In 1966, Congress passed Title X of the Demonstration Cities and Metropolitan Development Act which provided mortgage insurance for

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device may be traced. *See* note 127 *infra*.

45. *See* G. BRECKENFIELD, COLUMBIA AND THE NEW CITIES 122-26 (1971).

46. NATIONAL CAPITAL PARK AND PLANNING COMMISSION, A POLICIES PLAN FOR THE YEAR 2000 (1961).

47. *Id.* at ix, 46.

48. These communities were Columbia, Maryland and Reston, Virginia.

49. It has been observed that:

> Developers universally believe that they are providing consumers with a better product than can be obtained in conventional suburban communities. In addition to pride in their product, some developers have been characterized as social visionaries. They believe that new community development is the best way for new urban growth to occur in the United State and have widely espoused the new community cause.

BURBY & WEISS, *supra* note 25, at 48.

50. Land prices soared in a short time, and speed of return is essential in new community development.

51. WEISS, *supra* note 18, at 10-16.

52. BURBY & WEISS, *supra* note 25, at 50-53.

53. *Congressional Record*, S. 3049, 88th Cong., 2d Sess., 110 CONG. REC. 17325 (1964).

54. *U.S., Congress, House, Housing and Urban Development Act of 1965: Hearings Before the Subcommittee on Housing of the Committee on Banking and Currency*, 88th Cong., 1st Sess. (1965).

55. This was similarly unsuccessful in 1966 and 1967. *Congressional Record*, S. 2680, 90th Cong., 1st Sess., 113 CONG. REC. 33441 (1967).

land development of new communities.[56] In 1968, the first real support for new community assistance arrived in Title IV of the Housing and Urban Development Act.[57] It gave federal guarantees to new community developers' bonds, debentures and other securities. In 1970, this assistance was expanded and supplemented in Title VII of the Urban Growth and New Communities Development Act.[58]

All this legislation was merely a back-up to private development and emerged from the political process not without struggle. In all, seventeen projects received approval from HUD which administered Titles IV and VII before the program was effectively halted in 1975.[59]

C. In Failure's Aftermath

It is important to discuss and examine new community policy during 1968-77. Much can be learned about planning and the legal framework from studying the wreckage.

1) In a real sense, planners always contemplate some form of ideal spatial structure. Normally, this becomes complicated when dealing with existing situations, such as the present pattern of ownership or investment. Planners argue that given virgin tracts, ideal cities can be built to last generations. Is the planning profession capable of achieving such an ideal?[60] Have they sufficient legal tools to accomplish it?[61]

2) In the United States, new town experience to date illustrates the basic public/private conflict in land development and control which pervades planning law in Western civilization. Nowhere else is private profit given so central and crucial a role.[62] Elsewhere, new town initiative has come through government sponsorship with sectors being leased to private developers.[63] In the larger sense, however, planning law always has existed in the midst of private enterprise. New communities in the United States offer a microcosm in which the mix of planning and free enterprise can be studied.

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56. The Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3301 (1966). This act was administered by the F.H.A.

57. New Communities Act of 1968, § 402, 42 U.S.C. § 3901 (1968).

58. Urban Growth and New Community Development Act of 1970, § 701(b), 42 U.S.C. § 4501 (1970).

59. *See generally* 6 *HUD* NEWSLETTER, No. 4 (Jan. 27, 1975).

60. Ideal new towns vary from generation to generation. Compare English Mark I and Mark II towns. *See* SCHAFFER, *supra* note 7, at 59.

61. This essay will argue that new legal tools must be introduced.

62. Tapiola in Finland is the only other new town wholly built through private finance, but there the developer is a non-profit co-operative. *See* H. VON HERTZEN & P. SPREIREGEN, BUILDING A NEW TOWN, FINLAND'S NEW GARDEN CITY, TAPIOLA (rev. ed. 1973); Grimshaw, *Tapiola: The Image and the Reality,* 44 TOWN & COUNTRY PLAN. 315, 315-21 (1976).

63. As in Sweden, Finland and Israel. STRONG, *supra* note 7, at 35-36, 87-88, 183-90.

3) Despite losing a battle, the war for new communities will continue. The population will still rise though not as dramatically as expected. Urban development hardly will slacken. Although suburbia and existing cities will accommodate much of this growth, new and improved means must be found to live. New communities offer a qualitatively different way to live.[64] New towns, however, are mainly important as processes. Although they will never be a finished product, the tools used to create and develop them remain significant.

4) The lawyer always is concerned with translating policy into working fact, ideas into acceptable deeds.[65] From past experience, the lawyer should appreciate the vital importance of a national or regional policy to control land use.[66] He or she also should note the role of both specific development organizations and public participation. Many of these facets were missing in the recent history of new communities.

III. EXAMINING THE FAILURE OF AMERICAN NEW COMMUNITIES

In the United States, application of land use controls has unfortunately put the cart before the horse. The starting point in planning was the introduction of zoning.[67] There is no element of planning in a zoning map. It is a frozen snapshot of existing uses or desired future use. In a short time, it does not conform to reality. Only recently has the concept of the master or comprehensive plan[68] gained ground.[69] The zoning map altered nothing. It relied on the existence of a state of affairs brought about by the private land market.[70] Similarly, new community aid relied on the private market.

A. The Role of Private Enterprise.

The task force reporting to the President in 1967 concluded "that the creation of ... new communities can be encouraged and established *largely through the workings of the private enterprise system.*"[71] The

64. CAMPBELL, *supra* note 14, at 27.

65. *See generally* A. LYONS, L. MOSKOF *et al.*, NEW TOWNS AND PLANNED COMMUNITIES (1971).

66. From a comparative viewpoint, the essential differences in legal environment appear: free enterprise, the federal system of power fragmentation and the lack of national policy. The new community experience in the United States reflects mainly local problems rather than any national or regional policy.

67. Ambler Realty Co. v. Village of Euclid, 272 U.S. 365 (1926).

68. The landmark decision in Baker v. City of Milwaukie, 271 Or. 500, 533 P.2d 772 (1975), recognized the controlling use of the comprehensive plan.

69. Of course the same is true in England, but to a much lesser extent, in the difference between the Development Plan and the new Structure Plan, under the Town and Country Planning Act, 1968, c. 72.

70. *See, e.g.*, Rockhill v. Chesterfield Township, 23 N.J. 117, 128 A.2d 473 (1957).

71. Task Force Report, *supra* note 41, at 3-4.

report further stated that "the central problems of private New Town development — high initial capital requirements and cash flow pressure — are fiscal problems susceptible to solutions that involve a limited Federal presence."[72] This federal presence would be:

> (1) to make some rather modest remedies for present flaws in the capital market and (2) provide incentives to assure that existing Federal grant-in-aid and loan programs are harnessed to further new community development.[73]

This hardly could be said to be a strong policy.[74] Of course, there must have been a political motive for framing it in such weak terms. This was a program which many people could support, and the previous three years had seen many defeats. Although both Europe and America had rejected a totally unregulated private property market in urban growth, neither continent had established clearly what it wished to achieve through controls.[75]

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72. *Id.* at 6.

73. *Id.* at 4.

74. Of course, there was an inarticulate policy at work, which was the traditional commitment to free enterprise coupled, perhaps, with a suspicion of all forms of national planning. For an excellent account of this trend, *see* O. GRAHAM, JR., TOWARD A PLANNED SOCIETY: FROM ROOSEVELT TO NIXON (1976) [hereinafter cited as GRAHAM]. In contrast to Europe, where new town building has been preceded by ideological debate, such development occurred in the United States in a pragmatic fashion. It was less the action of ideologues and more the thrust of private developers. Despite the warnings of academics, as able ideologues as found elsewhere, federal efforts at new community building have been sporadic and largely reactions to the urgencies of the moment.

75. The European new town experience has been the exception. However, this comment is made in the context of a comparison between English and American experience. The aim is to highlight a weakness in the United States program. On the other hand, the English policy has not always been well-defined. Their New Towns program began as a continuing concern for the decentralization of population and industry from the South East. *See* text accompanying notes 144-45 *infra*. The problem was accentuated in the post World War II era through a concern for defense matters. Over-accumulation of industry made an easy target for Nazi bombers. Policy was specific in the terms of reference laid down by Lewis Silken, Minister of Town and Country Planning, for the Reith Committee:

> To consider the general questions of the establishment, development, organization and administration that will arise in the promotion of New Towns *in furtherance of a policy of planned decentralisation from congested urban areas;* and in accordance therewith to suggest guiding principles on which such Towns should be established and developed as *self-contained and balanced communities* for work and living.

Interim Report of the New Towns Committee, Cmd. 6759, at 2 (March, 1946) [hereinafter cited as Reith Report I]. Thus, the primary purpose of these new towns was to provide for the overspill of industry and population. The Reports, Interim and Final, went on to discuss the practicalities of actual creation in detail. However, to locate the sites of new towns was to prove a matter of national concern and on that the Reith Committee had little to offer. The Final Report states that:

> The policy as to the places from which population has to be dispersed and as to the areas in which its settlement should be fostered, is a national matter involving wide political, social, economic, and strategic considerations.

Final Report of the New Towns Committee, Cmd. 6876, at 11 (July, 1946) [hereinafter cited as Reith Report II].

The New Towns Acts of 1946, 9 & 10 Geo. 6, c. 68, and of 1968, c. 59 have been just as vague

In the United States, the weak and vague new community aid program suffered directly from a lack of goals. They were "communities for the future" or "laboratories for democracy," but underneath these elusive phrases what was their purpose? Was it only private profit? The social purposes in Title VII often were confusing and, at times, contradictory. Weak and vague legislation has its dangers. In the absence of demonstrable success, it lacks popular support and is liable to be repealed. Such a fate may await the Title VII program, and there have been many reports calling for its demise. A broad national urban

in locating new towns in a national urban growth policy. Site designation is accomplished by the Minister (now the Secretary of State for the Environment) when he is "satisfied that it is expedient in the national interest." New Towns Act of 1965, c. 59, § 1(1). The initial policy of decentralization and dispersion of people and jobs, chiefly from the South East to the Northern parts of England, seems to have been taken for granted. This vision really was established by the Royal Commission on the Distribution of the Industrial Population, Cmd. 6153 (1938-40) [hereinafter cited as The Barlow Report]. That Committee envisaged satellite communities and the post World War II government expanded the concept by the addition of economic redistribution. This initial policy, tacit though most of it was, was not followed through consistently. In the generation of English new town construction there have been three phases of new towns each displaying widely different policy: 1946-51, 1961-66, and 1967-76. For a brief description of each phase *see* J. CULLINGWORTH, TOWN AND COUNTRY PLANNING IN BRITAIN 232-37 (4th ed. 1972) [hereinafter cited as CULLINGWORTH]. This indicates changes in policy, gained through experience, which is analogous to the American experience during 1968-77. Secondly, the Reith Committee recommended the establishment of a Central Advisory Commission, both for "harmonising policy and practice and also for pooling information and experience." Reith Report II, at 62. This was never implemented and yet such research, monitoring and policy formulation only occurred on an extremely small scale in the Ministry (now the Department of the Environment). Again a direct analogy can be made to the United States recommendation of creating a policy organ in the Executive Department of the President (*see* p. 22 *infra*). Lastly, the new towns were to be only part of the English answer. As Frank Shaffer puts it, "New Towns are but one aspect only of the revolution that culminated in the famous Silken legislation of 1946-8." *See* SCHAFFER, *supra* note 7, at 25: They were only part of a wider policy of distribution of industry and population. The other aspects of this policy were greenbelts, industrial location control (through Industrial Development Certificates, *see* note 199 *infra*) and expanded towns. New town creation was a part of this wider policy, which, however meagre, was a national growth policy. Decongestion and dispersion became, in the long run, the non-partisan handle on which to hang the English new town program, a linchpin which is lacking in the United States. A major part of the explanation, of course, springs from the differences in size between England and America. There is no pressing congestion even now in the United States.

Statements of United States policy have, on the whole, proved far richer and more ambitious. Besides reaffirming a belief in channeling growth and providing community balance, urban growth has been linked with the environmental ethic, undoubtedly an essential relationship. *See* New Communities Act of 1968, § 402, 42 U.S.C. § 3901 (1968); Urban Growth and New Community Development Act of 1970, §§ 701(b), 702, 42 U.S.C. §§ 4501, 4502 (1970). Both Title IV and Title VII contain broad policy goals which because of their number and range may come into conflict. For example, § 702(c) of Title VII states that the "Federal government . . . must assume responsibility for the development of a national urban growth policy which shall incorporate social, economic, and other appropriate factors." It was to provide a framework in which divergent interests were to be harmonized and a common policy developed. Primary responsibility was to be assumed by the President. Thus far, his reports have proven unhelpful. As the text suggests, public support is essential for the success of a new town program. While the legislation does provide a rich policy, its public "saleability" is defeated by it. In this case, one single overriding goal could be sold to the public and in the long run guarantee public support. This is the essential point in the text and the comments therein are limited to this context.

growth policy is needed in which new communities will have a role. Such a policy can be supplemented by regional and state studies which would be more detailed. Without such a framework, little can be achieved.

The above critique and recommendation is not meant to disparage the role of private enterprise.[76] The language of Title VII demands that a new town be economic and ultimately profitable,[77] and similar provisions can be found in most new town programs.[78] In meeting these goals, the private developer has the most to offer. Initially, however, private developers cannot "go it alone."

Many factors will dictate the correct public/private sector mix in creating a new community. In most countries, the mix often has been dictated by historical accident rather than careful financial analysis.[79] In post-war England, there was a scarcity of private capital and, in any event, rebuilding and building were too important to be left solely to private initiative.[80] For the decade immediately following the war, buildings and materials were controlled strictly by the government. In

76. All new town building allows private enterprise some role. In England, until recently, its scope was very restricted. There, policy dictated that most housing was "council housing" publicly built and for rent. Consequently, many of the early new towns were dull and dreary, reminiscent of nineteenth century bye-law housing. *See* ASHWORTH, *supra* note 6, at 90-91. Up to 1970, of all the 142,000 dwellings built in the new towns of England and Wales, private builders had contributed under 8%. *See The Role of Private Enterprise,* 36-37 TOWN & COUNTRY PLAN. 99 (1968-69). This was a very small share. In the late 1960's, this policy was changed by Whitehall to achieve a fifty-fifty division between public and private enterprise. Now the percentage of privately built owner-occupied dwellings is on the increase.

This will insure that new towns do not continue to be artificial when compared with the rest of the country. Next to Ireland, England has the highest percentage of owner-occupied dwellings in Europe. Tapiola, on the other hand, is largely composed of high rise rented accommodation. *See generally* STRONG, *supra* note 7. It was cheaper to build than single family dwellings. Such accommodation, however, is more usual in continental Europe. Private enterprise is also utilized to a large extent in France, especially in the Languedoc-Roussillon projects and in Israel. Usually it is relegated to building housing but this is not always the case. Often commercial centers will be built by private enterprise as in Farsta, Stockholm. These areas are usually the most profitable ventures, and where there is public sponsorship, it is usual for such authority to develop it themselves. Speed in return is, however, often the key to financial success, and private developers tend to work at a faster pace than the authority.

77. In determining acceptability for assistance, the Secretary of HUD must find that the new community "will be economically feasible in terms of economic base or potential for growth." Urban Growth and New Community Development Act of 1970, § 712(a)(2), 42 U.S.C. § 4513(a)(2) (1970). The Act also stipulates that no loan or guarantee will be given to a development unless it "represents an acceptable financial risk." *Id.* at § 716(a).

78. In England, it is a condition that advances and grants only may be for development which is "approved by the Minister with the concurrence of the Treasury as being likely to secure for the corporation a return which is reasonable, having regard to all the circumstances, when compared to the cost of carrying out the proposals." New Towns Act, 1965, c. 59, § 42.

79. In England, public sponsorship was recommended mainly because the experts who testified before the Reith Committee could not envisage private development at the scale obviously required. Reith Report I & II, *supra* note 75.

80. Reith Report I, *supra* note 75, at 8-9.

the United States, on the other hand, ideology favored the role of private enterprise. Strong dislike of central planning and support for local initiative, especially when profit seemed high, culminated in new communities being privately sponsored.

While there is much to be said in support of an increased governmental role in American new community development, the following three points should be considered in favor of private capital:

1) Public resources are always scarce. The use of private capital can ensure construction at minimal cost to the state.[81] This economy is always wise politically in the United States as it will guarantee the program a broader acceptability. In any event, there are limits to what a government can or will do. Given the quantitatively low results of new communities, there is an argument against massive public capital outlays. If private capital is used, government action can be focused on those problem areas which only public intervention can solve. Moreover, employing private capital will mean that any local initiative will be captured.[82] This is especially important in a large federal country.

2) An essential requirement in new community development is speed. A serious weakness of American new community administration has been its delay and inaction.[83] When applications were being received it took an average of 36 months for the developer to complete all stages. During this time, interest charges were running and the developer found himself or herself in a holding process. If money flows out at such a rate and for a long time, it is easy to reach a point where the outflow on borrowing multiplies so fast that the eventual positive income could never catch up. Logically then, the rate of progress must be accelerated. Private capital should be introduced and not hampered excessively. The review process and environmental impact assessment must be altered so as to interfere as little as possible with the developer.

3) A private developer has more incentive to be efficient than the government. The private concern cannot afford holding costs for too long, and thus, will develop more rapidly. It also is probable that the private developer will tend to be more economical and respond more quickly to consumer preference in the housing market.[84]

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81. *See, e.g.*, Reilly & Schulman, *The State Urban Development Corporation: New York's Innovation*, 1 URB. LAW. 129, 134 (1969).

82. Note the French experience in this regard. *See* STRONG, *supra* note 7, at 366-77.

83. Was it a prophecy when Professor Haar stated "Indecisiveness and delay in effectuating the program can amount to its abandonment?" *House Hearings on The Quality of Urban Life*, 91st Cong., 1st & 2d Sess. 240 (1970).

84. *See generally*, U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, FINANCING NEW COMMUNITIES: GOVERNMENT AND PRIVATE EXPERIENCE IN EUROPE AND THE U.S. (1973) [hereinafter cited as HUD REPORT].

Based on the above observations, it is clear that while the private market has its weaknesses,[85] its strengths should not be overlooked. However, it should not be assumed that every land developer will be capable of undertaking a new community project.

B. Qualities of a New Community Developer

The new community developer will need to have certain characteristics. The ordinary suburban developer is a packager and producer who need build no services nor expend large sums in market research. On the other hand, the new community developer requires an extensive organization consisting of agents, representatives, and a large selling staff. To deal with the inevitable major financing and land problems, he or she must be able to wait many years before taking his or her profits.

Unfortunately, the Title VII program did not attract the best type of developer. A recent policy study noted that the "program offers the largest benefits to those developers who are inexperienced in large scale real estate development, lack equity capital, or contemplate projects which are perceived by lenders to be especially risky."[86] Unless changes are made, the Title VII program may attract relatively more of these developers.

Such developers were in a dilemma. They could not make a profit without the federal assistance, but in return for such aid, were burdened with up to a three year delay (the application review process), and the obligation to fulfill a social program.[87] Because of these disadvantages, developers lost any hope of financial success. In reality, the federal government was entering into competition with land developers in seeking partnerships. The government needed to be attractive to good developers to avoid being left with those who could not otherwise compete. A good developer who is efficient on a small scale and wants to expand will join only with an efficient government which will provide grants and offer strong leadership. On all these points the new community administration sadly failed and, accordingly, received the type of developers it deserved.

C. Weaknesses of New Community Legislation

The main object of Title IV and Title VII was to correct what was

85. One of these is that private developers are subject to market fluctuations, a large factor in the failure of new communities to date.

86. OFFICE OF POLICY DEVELOPMENT RESEARCH, EVALUATION OF THE NEW COMMUNITIES PROGRAM 1, 94 (1976). [hereinafter cited as RESEARCH REPORT].

87. Urban Growth and New Community Development Act of 1970, § 710(a-f), 42 U.S.C. § 4511(a-f) (1970).

termed a "capital market imperfection."[88] This phrase referred to the non-availability of capital finance for new community development. The development period was far longer than the standard three to five years. This fact coupled with the risk of default meant that finance was obtained either at interest rates far above the normal or by the financing institution taking a share of the equity, or both. The danger in combining the roles of creditor and equity holder is that the lender might lose its objectivity, and in feeling committed to a project throw good money after bad. The federal government loan guarantee[89] reduced the risk of default and, accordingly, the interest percentage and the necessity of dual roles. Moreover, attached to loan guarantees is the additional benefit that it is a non-budgetary item. Congress might limit the total amount of guarantee but need not appropriate one penny for it.

It should be recognized that these were not the only financial difficulties in development, and the Title VII program authorized direct federal aid for the following:

Interest loans[90] — These were to be used for the refinancing of projects which ran into liquidity problems after starting. However, HUD never sought any appropriation for these loans.[91] The probable reason for this inaction was a belief by the agency that since the guarantee system could cover interest payments, this loan provision was unnecessary. In hindsight, such additional financing would have proven valuable.

Supplemental grants[92] — These grants were to be given to public authorities in constructing a front-end infrastructure.[93] The federal government was to be responsible for eighty per cent of the capital cost. This section was never funded by Congress although such grants were essential. The local public authority, probably rural, usually was unable to afford its share of the cost of such facilities. If it could, the projects would have to be financed by a bond issue which would be repayable out of general tax revenues. In effect, the residents of new communities would be subsidized by all residents. To some extent, this result might

88. RESEARCH REPORT, *supra* note 86, at 12-16. "One rationale for Federal support of new community development could be based on the existence of an imperfection which hinders the private market from adequately responding to consumer demand." *Id.* at 13.

89. *Id.* at 16-19. *See also* Urban Growth and New Community Development Act of 1970, § 713, 42 U.S.C. § 4514 (1970).

90. Urban Growth and New Community Development Act of 1970, § 714, 42 U.S.C. § 4515 (amended 1974).

91. *See* 3 HOUS. & DEV. REP. 120.0013 (Mar. 14, 1977).

92. Urban Growth and New Community Development Act of 1970, § 718(a), 42 U.S.C. § 4519(a) (amended 1974).

93. The phrase 'infrastructure' includes common public services such as lighting, roads, sewers, fire departments, etc.

have been offset by spill-over benefits from the new community. However, there were often limitations on bond issues such as a restriction based on a percentage of the tax revenue. This effectively precluded the public authority from undertaking the necessarily expensive works.

Public service grants[94] — These grants were to be provided for the revenue costs of these capital projects. They were to last for a period not exceeding three years. Once again, no funding by Congress was forthcoming for this section.

Innovation grants[95] — This section authorized a two-thirds grant to assist in planning development programs which the HUD secretary considers of special value for achieving social, environmental, or technological objectives in new communities. The purpose of this funding was to aid and encourage new communities to become laboratories for testing social and physical innovations. Such grants were to be available for projects under consideration but prior to final approval for guarantee assistance. Unfortunately, these grants were never available.

Technical grants[96] — Finally, this section provided grants for technical assistance which was lacking in both the public and private sectors at that time. However, no effective funding was ever given. In 1971, HUD established a revolving fund to retain outside consultants to give technical aid to developers. This resource was used only once, in advising Soul City in 1971.

From the above, it is clear that the federal new community program was never funded properly. As soon as it appeared on the statute book, its heart was ripped out. Burby and Weiss make the following comment:

> In short, while the federal new communities program promised to close the gap between the rhetoric of the new community movement and the realities of community development in the United States, the degree of commitment from the federal government has never lived up to the potential of the program.[97]

On its own, the guarantee was undoubtedly a great help, but without the other aids it hardly could be successful. In return for the guarantee, the developer had to enmesh himself or herself in the red tape of HUD and the Office of New Community Development for a period of three years. In seeking to relieve developers of financial burdens, Title VII

94. Urban Growth and New Community Development Act of 1970, § 715, 42 U.S.C. § 4516 (amended 1974).

95. *Id.* at § 720(a), 42 U.S.C. § 4521(a) (amended 1976).

96. *Id.* at § 719, 42 U.S.C. § 4520 (1970).

97. BURBY & WEISS, *supra* note 25, at 438.

placed squarely on their shoulders the problem of attaining public objectives: economic, social, environmental, and governmental. Thus, it is little wonder that original economic models proved woefully inaccurate.

A lack of federal funding and unrealistic bureaucratic expectations were not the program's only shortcomings. An early assumption that the problem was merely fiscal can be seen in retrospect as not the whole story. Initially, there was the problem of land assembly and finance. Large areas of land would be necessary, entailing problems of fragmented interests and multiple local jurisdictions. Governmental relations both inside the new community and in interaction with existing local units were to prove problematic.[98] Even if all the grant provisions had been funded, it is arguable that more could have been done.[99]

The new communities program was taking its first steps when the adverse economic conditions of 1973 arrived. The property bubble burst. Money became scarce, interest rates rose and actual costs inflated. Shortly thereafter, a bureaucratic cut-off forced the program into legal limbo.[100]

D. Weaknesses in Government Policies

Two questions emerged in the aftermath. What was to be done about the seventeen guaranteed projects, many of which at this stage were in danger of going bankrupt? What policy should there be concerning new communities? This section attempts to isolate certain policy issues which argue in favor of renewing federal commitment to new communities. Also, it will indicate certain essential steps which the government must undertake to ensure the success of any such program.

Under the new towns program of 1970, the federal government was willing to leave initiative and primary responsibility for development in the hands of private developers. They were to select the site, draw up the plans and then having obtained federal guarantees, marshall their resources. The developer was to be responsible for all interaction with local and state government and for compliance with all local and state laws.[101] The federal government, acting through the New Communities

98. For example, *see* R. BROOKS, NEW TOWNS AND COMMUNAL VALUES: A CASE STUDY OF COLUMBIA, MARYLAND 58-76 (1974), which details a new community's external relations concerning its zoning administration. *See also* 5 HUD REP. 229 (Aug. 22, 1977).

99. In many cases, finance is not the only problem. Although the new community developer was given access to money, he or she was responsible for dealing with the local public authorities. In addition to causing delay, these public authorities were inadequate for the task. The program's structure should have received as much attention as did the financial provisions.

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

101. Urban Growth and New Community Development Act of 1970, § 712(a)(5), 42 U.S.C. § 4513(a)(5) (1970).

Administration and Community Development Corporation located within HUD, merely assisted in correcting the "capital market imperfection"[102] and in supplying some grants. Even these weak measures never achieved strong support in the government.

The Urban Growth and New Communities Development Act of 1970 emerged as a compromise. The new Nixon administration of January, 1969, did not support the embryonic growth of an urban policy, of which the new communities were to be a part. Under the earlier administrations of Kennedy and Johnson, urban problems were met with a grant-based policy. In many cases, specific problems were met with direct cash inflows regardless of the wider implications.[103] This policy led to a rapid increase in involvement of the federal government in urban affairs, long the exclusive province of local municipalities.

Near the end of the 1960's, groups began to study urban problems seriously and reports and tentative proposals appeared. The National Commission on Urban Problems reporting in 1968[104] recommended ways in which federal policies would be improved, but did not suggest the adoption of a national urban growth policy. One of the most important documents of this period was the Report of the Advisory Commission of Intergovernmental Relations which recognized:

> [a] specific need for immediate establishment of a national policy for guiding the location and character of future urbanization, involving Federal, State and local governments in collaboration with the private sector of the national economy.[105]

These reports were concerned with formulating principles for some type of national settlement pattern and population distribution. There was also much concern with differences in inter-regional social welfare structures. In 1969, the Report of the National Committee on Urban Growth Policy[106] recommended a massive federal program to construct one hundred new towns with populations of 100,000 each and ten new cities of 1,000,000 each. Other influential books appeared at this time advocating the adoption of a national policy.[107] The construction of new communities was to be a major element in such a policy.

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102. *See* note 88 *supra*.

103. Thus, for example, in the 1960's there was a rural-urban migration to the cities of the Northeast predominantly composed of Southern Blacks. Grants given to ease the plight of inner city Blacks only increased the magnetic effect of these cities and in the long run exacerbated the problem. Similarly, construction grants to build highways and large turnpikes, in an effort to avoid traffic congestion, led to ever-increasing suburban fringes. Also, grants to construct sewer lines added to this particular problem. Under the administrations of Kennedy and Johnson, available grants grew from 161 in 1962 to 429 by 1969. FRIEDEN & KAPLAN, *supra* note 40, at 3.

104. H.R. DOC. NO. 91-34, 91st Cong., 1st Sess. (1968).

105. ACIR REPORT, *supra* note 13, at 129.

106. THE NEW CITY, *supra* note 38, at 172.

107. *See, e.g.*, TOWARD A NATIONAL URBAN POLICY (D. Moynihan ed. 1970).

Under the early Nixon administration, a task force was established to study new communities and recommend action. This group never submitted a written report. In the January, 1970, State of the Union message, President Nixon proposed a national growth policy for the United States suggesting that the "Federal Government must be in a position to assist in the building of new cities."[108] This sentiment was reaffirmed in President Nixon's introduction to the first annual report of the Council for Environmental Quality, in which he said:

> I believe that the problems of urbanization..., of resource management, and of land and water use generally can only be met by comprehensive approaches which take into account the widest range of social, economic, and ecological concerns. I believe we must work toward development of a National Land Use Policy. . . .[109]

The Republican view of growth policy was summed up in the political catch-cry "New Federalism." This meant that the states were to be primarily responsible for distributing grants. Block grants would be allocated by the federal government, and the states would distribute the money from these funds. However, while this Nixonian New Federalism reshaped the distribution, still problems were being met with cash inflows. At this stage, a Democratic Congress sought to take the policy initiative and force its will upon the President. Legislation was introduced which was designed to expand greatly the assistance already available under Title IV of the 1968 Act.[110] It sought to give new community developers direct loans and grants.[111] From a policy perspective, two new bodies were envisaged. First, in the Executive Office of the President, a Council on Urban Growth was to be established which would have responsibility for formulating national growth policy and overseeing state and local initiative in that area. Second, the legislation proposed the creation of an independent Community Development Corporation whose task would be to administer the new communities programs. Both the President and HUD opposed these proposals. The latter wished to retain control of new communities and continue the system of guarantees, while at the same time increasing the total financial commitment.

Title VII was passed as a compromise. The system of guarantees was continued and substantially increased, and HUD retained control of the program. A Community Development Corporation was organized

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108. The State of the Union, 6 WEEKLY COMP. OF PRES. DOC. NO. 4, at 64 (Jan. 26, 1970). The President also noted that "the Nation must develop a national growth policy." *Id.*

109. COUNCIL FOR ENVIRONMENTAL QUALITY, ANNUAL REPORT xiii (1970).

110. New Communities Act of 1968, §§ 401-16, 42 U.S.C. § 3901 (1968).

111. U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, NEW COMMUNITIES: PROBLEMS AND POTENTIALS 15-23 (1976) [hereinafter cited as HUD/NCA REPORT].

within HUD to administer the assistance and oversee development.[112] This corporation presently consists of seven members: the Secretary of HUD ex officio, five nominees of the Secretary and a member appointed by the President.[113] It scarcely can be called an independent body. No council was set up under the President. Instead, Title VII imposed on him a single duty:

> [T]he President shall utilize the capacity of his office...as will enable him to transmit to the Congress during the month of February in every even-numbered year beginning with 1972, a Report on Urban Growth for the preceding two calendar years which shall include...recommendations for programs and policies for carrrying out such policy, including such legislation and administrative actions as may be deemed necessary and desirable.[114]

To assist him in this task, the President may establish an advisory board drawn from private citizens and public officials familiar with the problems of urban growth.[115] This is not a particularly significant requirement, and the victory of the 1970 Act, which was "to provide for the development of a national urban growth policy,"[116] is a hollow one.[117]

1. Impact of policy weaknesses on Title VII

Lacking any clear overall policy, the government attempted to implement Title VII. The Community Development Corporation had no staff of its own, and therefore relied on the people who had administered the previous Title IV program. This was the Office of New Communities Development, organized within the office of the HUD

112. Urban Growth and New Community Development Act of 1970, § 729, 42 U.S.C. § 4532 (1970).

113. Housing and Community Development Act of 1974, §§ 1-822, 42 U.S.C. § 4512 (1974). Section 803(a)(1)(e) of the Act renamed it the New Community Development Corporation.

114. Urban Growth and New Community Development Act of 1970, § 703(a)(7), 42 U.S.C. § 4503(a)(7) (1970).

115. *Id.* at § 703(c).

116. *Id.* at § 701(b). *See also* Housing and Community Development Act of 1974, the Preamble, 42 U.S.C. § 5301 (1974).

117. An excellent account of the passage of the 1970 Act, in the context of a national growth policy, is given in GRAHAM, *supra* note 74, at 188-263. Reports issued by the Domestic Council were full of interesting statistics, but failed to show any enthusiasm for a growth policy. *See* U.S. DOMESTIC COUNCIL, REPORTS ON NATIONAL GROWTH (1972 & 1974). The 1972 Report stated:

> Our planning for national growth must rather seek to help individual Americans develop their unique potential and achieve their personal goals.

Id. at xi. The second was no better. Two economists have observed:

> The path to improvement, however, is not likely to be the Utopian imposition of a national policy, but rather the continued recognition of interdependencies, marginal improvements in existing policies, and the restructuring of the public sector to increase individual decision-makers' relationship to the consequences of their decisions.

R. BISH & R. KIRK, ECONOMIC PRINCIPLES AND URBAN PROBLEMS 193 (1974).

Assistant Secretary for Metropolitan Development. In 1973, however, this staff became the New Communities Administration (NCA) within HUD.

In the years 1971 and 1972, this staff grew from 31 to 40, and it presently consists of 65 members.[118] This is an amazingly small number for such a task. It again indicates the lack of governmental support for the new community program. This factor must have played a decisive role in the delay that applicants experienced. It also prevented the growth of an internal policy within NCA. Everyone was overworked.

Notice the change in policy in the following two excerpts. In the program's early days, the NCA was organized into three functional divisions:

> (1) Application review; (2) project monitoring; and (3) intergovernmental liaison and administration of the supplementary grant program.[119]

As the application review process grew in importance, the third division was dissolved and its staff divided among the other two functions. This resulted from a lack of finance to pay for new staff. The reorganizations reflected the difficulties encountered in the changes of the market. With the economic recession, the functions of the staff were again changed. The present structure is:

> (1) a finance and operation staff which oversees the physical development and financial operations of the new town projects, and plans and negotiates the physical and financial restructuring of distressed projects; (2) a project support and development staff, which carries out intergovernmental liaison functions, and provides projects with financial (grant) and technical assistance; and (3) a program policy and management staff, which evaluates program policy and which is responsible for internal administration.[120]

With such a small staff, the NCA was purely reactive. Developers not only seized the initiative with choice of site, but their technical plans and proposals also were accepted by the NCA. The NCA depended on the studies presented by developers simply because it did not have its own technical resources. This was disastrous. An analogy may be drawn to the rule against a federal agency adopting an applicant's environmental impact statement as its own. In *Greene County Planning Board v. Federal Power Commission,*[121] where the Federal Power Commission

118. An optimistic account of this office, and the new community movement in 1971, can be found in Carruth, *The Big Move to New Towns,* FORTUNE, September, 1971, 95, 95-97, 147-51 [hereinafter cited as Carruth].

119. HUD/NCA REPORT, *supra* note 111, at 36.

120. *Id.* at 37.

121. 455 F.2d 412 (2d Cir. 1972).

had adopted the statement of an applicant power authority, the court made the following criticism.

> The Federal Power Commission has abdicted a significant part of its responsibility by substituting the statement of [the applicant] for its own. . . . The danger of this procedure, and one obvious shortcoming, is the potential, if not likelihood, that the applicant's statement will be based upon self-serving assumptions.[122]

Unfortunately, the NCA never had the resources to do otherwise. The chance to channel growth slipped by, while neither HUD nor Congress nor the Executive formulated any national policy.

When the assisted projects ran into difficulties in 1973, the NCA attempted to save them.The criteria for recovery support included overall financial feasibility, the likelihood of transferable innovations and the amount of building already done.[123] This last concern was a species of moral obligation by which the NCA felt obligated to a developer who had made a serious commitment and altered his or her position in reliance on federal support. At the same time, the NCA found itself in the position of equity holder rather than guarantor. Some developers went bankrupt and the NCA staff had to step in and administer the project until a new backer could be found.[124] Direct development by the NCA was impossible due to a lack of finance and expertise. The new communities program had become a rescue operation. At the same time, between 1973 and 1976, various policy options began to emerge.

2. Policy alternatives

In the early 1970's, the University of North Carolina at Chapel Hill undertook research on the various federally assisted new communities. One of the projects initiated during this period was an evaluation of new community experience based on interviews with new community residents. The results of this investigation could be questioned because of a methodology using such subjective (soft) data. However, it must not be forgotten that this university already had spent many years pursuing research on the program and had formulated numerous hypotheses. A conclusion of the report which appeared in 1975 favored reestablishing a more energetic program with greatly increased resources.[125]

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122. *Id.* at 420.

123. HUD/NCA REPORT, *supra* note 111, at 36. These factors were emphasized by Professor Haar, a member of the New Community Development Corporation, in a discussion with the author at Harvard University, Cambridge, Massachusetts, in December, 1976.

124. *See* 47 HOUSE & HOME, January, 1975, at 13.

125. BURBY & WEISS, *supra* note 25, at 435-38, 482, 485-94.

From December 1973 to June 1974, the NCA authorized a study by the Buffalo Organization for Social and Technological Innovation which set out major policy options through the use of policy evaluation models. The BOSTI study offered no single policy, but instead, was useful as an analytical tool in making policy choices.

In April 1975, the Policy Development and Research body (PDR) presented a report which came to the following conclusions concerning the new community program:

> 1) the existing benefits do not warrant the cost of the program;[126]
> 2) well planned suburban development, through the device of the Planned Unit Development, can produce results comparable to those which had been obtained;[127] and
> 3) that innovation, especially economic and racial, could be better achieved through a grant program.[128]

The report concluded that since the program benefited mostly local areas, there was no justification for federal support.

Many of the precise conclusions were rebutted by the staff of the NCA. It should be pointed out, however, that the PDR report was based on insufficient evidence about a program which was never really supported. Concerning a full implementation of a new towns program, it offered little help. In its assumption that federal support benefits purely local areas, one might ask what governmental program does not primarily do this? The whole concept of new communities was preventative: in immediate action the further spread of the suburbs and slums could be avoided. Assistance was to be applied locally but for a much broader objective.

On July 1, 1975, the Report of the Academy for Contemporary Problems appeared.[129] It favored continuing support for the program. However, it offered the following conclusions:

> 1) existing new communities in difficulty should be salvaged and refinanced;
> 2) the administration of the program had to be improved;
> 3) all sections of Title VII should be funded;

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126. RESEARCH REPORT, *supra* note 86, at 11.

127. *Id.* at 57-64. "Planned Unit Developments are a type of zoning that allows for a more flexible land use pattern than does conventional zoning. Rather than forcing the developer to fit into the rigidity of a zoning map, PUD zoning allows him to negotiate a total package with the municipality." *Id.* at 62.

128. *Id.* at 86. "Innovation in a new community produces benefits both in the new community and through replication in other communities in the form of potential cost savings or expanded consumption opportunities. *Id.* at 75.

129. ACADEMY FOR CONTEMPORARY PROBLEMS, NEW COMMUNITIES AND NATIONAL URBAN GROWTH POLICY: AN ASSESSMENT OF THE FEDERAL NEW COMMUNITIES PROGRAM UNDER TITLE VII OF THE URBAN GROWTH AND NEW COMMUNITY DEVELOPMENT ACT OF 1970 (July 1, 1975) [hereinafter cited as ACADEMY REPORT].

4) there should be no further new commitments to developers until there is more state participation;[130] and
5) any new revision of Title VII must be preceded by an "overall review of national urban policy."[131]

All of these recommendations should have been incorporated into the original program.

IV. THE FUTURE SIGNIFICANCE OF NEW TOWNS

Before continuing to discuss further reforms and innovations, two fundamental questions must be posed. Is there a need for the creation of new towns in a national growth policy? If the answer is yes, then is there a necessity for federal and state assistance and direction?

A. Reassessing Our Growth Needs

Many of the presumptions which grounded the initiation of Title IV and Title VII have in a short space of time proved not to be fully correct. For example, in the early 1960's, the prediction of the future American population was between 275 and 300 million people in the year 2000. When the results of the 1970 census became available, this estimate had to be altered to around 256 million.[132] This revision was due primarily to low fertility[133] and limited net immigration. The urgency of having to house vast numbers of new citizens is no longer felt so acutely. This fact, of course, does not seriously weaken the argument in favor of accommodating new development by creating new towns. The housing demand increase is due to falling household size and not to population growth.

In addition to a drop in the future population, there also was a marked shift in population distribution. Between the early 1960's and the mid-1970's, the urban population of the United States began to spread. Between 1950 and 1970, 91% of total growth occurred in the urban areas of the Northeast, California and Florida. It was hoped that new communities would scatter the anticipated increase in these areas of ur-

130. Although there was provision for full aid to assist public land development agencies, the NCA received very few applications and none had been approved before January, 1975. *See* note 59 *supra*.

131. ACADEMY REPORT, *supra* note 129, at 9.

132. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1970, at 6 (91st ed. 1970). This figure is still falling. *See* U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1975, at 6 (96th ed. 1975).

133. In 1957, the birth rate was 3.8 children per woman; by 1974, it had dropped to 1.9. *See House Hearings on Population*, 94th Cong., 1st & 2d Sess. 86 (Oct. 23, 1975-July 20, 1976). *See also* U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1975, at 53 (96th ed. 1975); HAAR ON LAND USE, *supra* note 21, at 12.

ban population. But a combination of new highways and a reorientation of the American character to appreciate rural environment naturally dispersed the predicted increase in urban density. Between 1970 and 1975, only 64% of total growth occurred in these areas.[134] The respective figures in those years for the rural areas rose from 9% growth to 36%.[135] Among others, new communities sought to solve the problems of population size and distribution by creating low density growth, equally distributed.

In one sense, the creation of new communities always will reflect the problems of their times. They are alternatives to present deficiencies. Much of the movement to abandon the creation of new towns is based on the assumption that the problems of the 1960's are no longer severe, and therefore, their solution is today inappropriate.[136] Sadly, this mistakes the nature of planning, and restricts the scope of the utility of new towns.

Unsolved problems do not go away. Their complexion may change and priorities may alter, but to ignore basic problems is a disastrous policy. The creation of new communities is never really a quantitative exercise. In England, where the creation of new towns has been most intensive only one person in thirty is a new town resident.[137] In the United States, even if the recommendations of the National Committee on Urban Growth Policy had been implemented, only a fraction of future growth could have been accommodated.[138] For this reason, new towns are only a part of the answer in producing a national urban growth policy.[139] But they have a part, and its importance should not be ignored. They offer a qualitative form of life.

The very basis of land use planning is to look ahead. In the United States planners have failed to meet this task. Now they must consider how the population will live in the third century. They must meet the problem before the crisis.

The pace of inner city drift to suburbia and exurbia has quickened in the 1970's. Effective channeling of growth could have occurred through

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134. *House Hearings on Population*, 94th Cong., 1st & 2d Sess. 110 (Oct. 23, 1975-July 20, 1976).

135. *Id.*

136. This fact may well be part of the unspoken philosophy behind the contemporary shift, occurring both in the United States and England, to emphasize aid to inner city areas.

137. *See generally New Towns Inner Cities: An Interlocking Relationship*, 26 HOUSING REV. 25 (1977).

138. *See* text accompanying note 106 *supra*. *See also* Alonso, *The Mirage of New Towns*, 19 PUB. INTEREST 3, 3-17 (1970) [hereinafter cited as Alonso].

139. *See* Alonso, *supra* note 138, at 3-17. See also Downs, *Alternative Forms of Future Urban Growth in the U.S.*, 36 J. AM. INST. OF PLANNERS 3 (1970); NATIONAL POLICY FOR URBAN AND REGIONAL DEVELOPMENT (D. Rothblatt ed. 1974).

a rational new community program. Instead, development consumes more of nature's resources than necessary. The sunbelt areas of the United States are now growing faster than any other area,[140] but is that growth rational and controlled? Will these regions suffer the same fate as the Northeast? The only problem of the 1960's which did not appear fully in the present decade was the massive population growth. However, this does not mean that development will abate. The living standards of people rise and their use of resources increases. Indeed, the 1970's have brought their own problems.

Arguably, the most important of these current problems is the energy crisis. The suburbs represent a tremendous waste of energy. The private motor car creates economic and ecological problems, particularly when it is needed even to buy a loaf of bread. Well-designed new communities would represent a major energy saving for the United States.[141]

Another factor to be weighed by planners of this decade is the likelihood that all future communities will have to offer greater services to their residents than before. With the fall in the birth rate and the achievement of zero growth, there will be less emphasis on home centeredness in American society. This change in values has been hastened by the breakdown of traditional marital roles. Today both parties often continue to pursue post-nuptial careers. The old familial structure gave rise to the suburbs, where one of the major benefits for some people was peace and security to rear a family.[142] In addition, the social life of these families often centered around the home. In the future, pressure will mount for planners to provide more public facilities than the present suburbs could sustain, and new communities could provide these facilities easily and economically.

In summary, conservation of resources and the provision of services are two arguments for a viable new communities program in the 1970's. Doubtless each decade produces new problems in urban living, but by definition, planning will be able to solve them. The new town concept is not static but changing.[143]

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140. *See generally* K. SALE, POWER SHIFT: THE RISE OF THE SOUTHERN RIM AND ITS CHALLENGE TO THE EASTERN ESTABLISHMENT (1974). *See also* Kristof, *Housing Policy in a Non-growth Era: Problems of the Northeast U.S.*, 5 J. AM. REAL EST. URB. ECON. A. 171, 174, 176 (1977).

141. A land use policy and program will be essential components in any energy or environmental initiatives. Unfortunately, the present energy proposals of President Carter fail to reflect this, continuing in the stream of cosmetic and "add-on" control. For a brief summary of the President's energy proposals, *see Carter Pledges Strong Backing For Environment*, 3 ENV'T PROTECTION AGENCY J. No. 6, June, 1977, at 2.

142. THE LEVITTOWNERS, *supra* note 35, at 36.

143. In England, there are major differences between the Mark I (1946-52) and the Mark II (1961-66) new towns. CULLINGWORTH, *supra* note 75, at 232-37.

B. Distribution of Population and Industry

Perhaps more important than these internal reasons for creating new towns is the role that new communities can play in shaping national geography. Four factors have been common to most new town construction: decongestion, decentralization, social and economic balance, and amenity value.

1. Decongestion and decentralization

Decongestion, the dispersal of population from centers of overcrowding, has played an important part in new town construction.[144] In England, the Barlow Report recommended the dispersion of the industrial population,[145] and this suggestion became a tenet of the whole English scheme. In the United States, however, this need is not as pressing since the spatial problem is less acute than in England.[146] Similarly, decentralization is the breaking up of accumulations of people and businesses to distribute them more widely.[147] Its aim is to prevent overcrowding and to ensure that all areas receive a share of development.

The principal difference between these two concepts is that decongestion is pursued to relieve the "exporting area", while decentralization is utilized to benefit the disadvantaged "importing area." Thus, the former aids a small area, but the latter distributes benefits throughout the jurisdiction.

Decentralization has already begun in the 1970's. Unfortunately, it has been unplanned and unchanneled. Moreover, due to the structure of the American program, neither decongestion nor decentralization has played a part on the national level. This is directly counter to most European experience.

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144. GALANTAY, *supra* note 13, at 53.

145. The Barlow Report, *supra* note 75, at 197.

146. The United Kingdom has a population of about 55 million or approximately 2.5 persons per hectare, while in the United States, with a population of about 210 million, there is about 0.2 persons per hectare. *See* E.C.E. SYMPOSIUM ON PROBLEMS RELATING TO THE ENVIRONMENT 23, U.N. DOC. ST/ECE/ENU/1 (1971). On a quantitative basis, the density of population in relation to urban land in the United Kingdom is 32 persons per hectare, while the figure for the United States is about 5.5 persons. *Id.* Eight percent of the United Kingdom is for urban purposes; in the United States, it is four percent. But the significance of these figures should not be over-estimated. Urban area in the United States is much smaller proportionately, and the figures do not take into account the nature of the land, and the economy, or the different types of settlement pattern. *See generally* CLAWSON & HALL, *supra* note 27, at 9-83.

147. The concept of decentralization has been used frequently in land use law. L. RODWIN, NATIONS AND CITIES: A COMPARISON OF STRATEGIES FOR URBAN GROWTH 4-8 (1970); R. BLACK, THE DECENTRALIZATION OF URBAN GROWTH: A SYSTEMS APPROACH, IN EMERGING PATTERNS IN URBAN ADMINISTRATION 222-47 (F. Brown & T. Murphy ed. 1970).

2. Balance and amenity value

In America, much attention has been given to the functions of balance and amenity value.

The concept of balance means that the new community should be in a state of equilibrium similar to other towns, cities, and the general population.[148] A community with an excessive proportion of young, old, minority, highly educated, economically advantaged or disadvantaged persons compared to the national population mix is unbalanced. Joining disparate groups in a living situation is perhaps the most pressing task for American planning.

To an extent, new communities have achieved a better racial balance.[149] In the early days of a new community, there will tend to be a predominance of young, middle-class Caucasians. With federal standards for racial, social and economic balance, this situation should improve. In England, there has been similar attention given to attaining economic balance in the Northeast, and sectarian mix in the new towns being created in Northern Ireland, Craigavon, Ballymena, and Antrim. The distribution of industry evenly throughout a country has been a European concern in achieving balance. Without such a policy in their creation, the new towns become only dormitory suburbs for commuters.[150]

The word "amenity" is perhaps the most overworked phrase in the literature of planning and land use law.[151] It covers all aspects of a plea-

148. For an excellent discussion of "balance" in the English context, *see generally* Herand, *Social Class and the New Towns,* 5 URB. STUD. 33 (1968). In the words of the Social Development Officer of Hemel Hempstead New Town "New Towns are not settlements of any narrow range of the working class. They are occupied by a considerable range of the total *income* and *social* structure scale of the metropolitan area." *Id.* at 40 (emphasis added). *See also* THOMAS & CRESWELL, *supra* note 11, at 33-40. For a discussion of the American efforts, *see* BURBY & WEISS, *supra* note 25, at 99-116.

149. BURBY & WEISS, *supra* note 25, at 99-101. *See also* note 26 *supra.*

150. A. ROBINSON, ECONOMICS AND NEW TOWNS 136 (1975).

151. Anyone who seeks even a partial definition of amenity will be disappointed. It is a word which essentially relates to an idea rather than an object. Yet the following generalizations may prove helpful.

First, most people can agree that "mere existence"is not amenity. On the other hand, living in a comfortable house and pleasant area is amenity. Therefore, it can be said that amenity is what is agreeable rather than what is necessary. This "agreeableness" may take many and varied forms. Second, it may be noted that general planning texts and journals use the word liberally, while the legal texts rarely mention it, and then, only in passing. Lawyers who are fond of definition apperently must give up on this concept. Perhaps also, it is a concept (like charity) whose usefulness would be curtailed if it was defined precisely. Finally, it should be realized that there is both a negative and positive function to amenity. There is the negative factor of freedom from physical discomforts (*e.g.*, noise, litter), and from the more glaring instances of un-amenity activity (*e.g.*, advertisement boardings). Amenity also relates to the preservation of a house, neighborhood or scenic area. This positive aspect ranges from the conservation of a wildlife sanctuary to the maintenance of a historic building. The negative component is concerned primarily with control of

sant environment and relates to subjective standards. In America, new communities were to provide an alternative to the slums and the "slurbs."[152] One of the program's outstanding features was an innovative interior policy. The constructed environments of new communities were progressive and attractive, and the federal scheme viewed new towns as laboratories for tomorrow's building and social techniques.

It is difficult to describe briefly the achievement thus far. However, certain common facilities can be discovered in present status reports.[153] One of the major aims of new towns was to produce a true community and this was reflected in the built environment which emphasized clusters rather than ribbon development. Amenities included emphasis upon leisure and recreational facilities. Great attention was given to water, planned green spaces, and the pedestrian. A balance was sought between public and private transport. Generally, a high quality environment was the goal.[154]

No two new towns are alike, but from the foregoing discussion some idea can be gained of the range of problems which they seek to correct. The remedy will differ in each case. For this reason, programs have varied among countries and continents. New towns offer hope of solutions to a broad range of problems, and while not the panacea in urban growth, there certainly is a place for them in present urban strategy. Putting the matter concisely, a recent HUD/NCA Report stated:

> [T]he evidence to date indicates that well planned, financed, managed and supported new towns are cost and energy efficient, environmentally sound, and offer better housing and community opportunities for minorities...and people seem to enjoy living in them as much or more than in conventional sprawl subdivisions.[155]

V. PROPOSED REFORMS

Many of the defects of the Title VII program can be traced to a lack of government support and coordinated activity. Perhaps a more important reason was the lack of government initiative. The federal government produced no national and regional policy and had no voice in choosing the site. It relied initially on the resources of developers which again proved to be fatal. The public/private partnerships never

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the new development, while the positive seeks to preserve what is already comfortable, edifying and pleasant in the widest sense.

152. The word "slurb" refers to slums in the suburbs.

153. HUD/NCA REPORT, *supra* note 111, at 55-77.

154. From a European viewpoint, few of the ideas were very original, but they were opposed completely to the natural pattern of American urban development.

155. HUD/NCA REPORT, *supra* note 111, at 55-77.

materialized. Private profit and social concerns were not reconciled, and the federal government abandoned developers to their struggle with local government. Developers felt "hard done by" and the NCA was justly exasperated.

While the federal government should have played a larger role, there are, of course, constitutional limitations on what it could do. Primary jurisdiction over land use lies within the states, and they must seize the initiative in this field.[156] A sensible division of powers would be for the federal government to create broad national policies while the states work out the details. Local government will have a secondary role in contributing to the creation, but is unsuited for a primary role because of its parochial interests.

The way people live is governed by economics and political power.[157] Broad social purposes and the pleasant environments of the architect and planner have to be translated into effect through multi-plex technical, legal and administrative structures. Rarely have private persons been able to marshal sufficient resources to build a new community to the critical stage where it takes on a life of its own.[158] As a rule, the most successful new towns constitute part of a national plan and are initiated and developed by public corporations. Until the United States Congress recognizes this fact, its urban policy and new community program will be aimlessly adrift in a sea of past laws, administrative decisions and regulations, and judicial rulings which have accumulated in the last fifty years. In the following discussion of proposed reforms, the truth of this last statement is borne out time and time again.

The main problems emerging from American new community experience to date can be classified under land, finance and administration.[159]

A. Problems with Land

The most successful new towns have been built by bodies that already

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156. NATIONAL RESOURCES DEFENSE COUNCIL, LAND USE CONTROLS IN THE UNITED STATES 252-95 (1977) [hereinafter cited as NRDC HANDBOOK].

157. "A new society and a better life are not built by visionaries." SCHAFFER, *supra* note 7, at 1.

> The entire plan of the city right from the beginning was laid out by Utopus himself. But he left it to later generations to embellish and adorn it further, as he realised that this could hardly be done in a single life span.

UTOPIA, *supra* note 3, at 48. More's Utopia remained an ideal. Similar fates awaited Plato's ideal city and Bacon's New Atlantis. Even Ebenezer Howard's Garden Cities, Welwyn and Letchworth, were seriously transformed in reality. *See* SCHAFFER, *supra* note 7, at 1-7. The visions of Americans James Rouse and Robert Simon were not realised fully in Columbia and Reston. *See generally* BRECKENFELD, *supra* note 45.

158. It has occurred in rare instances (Tapiola, Finland and Columbia, Maryland).

159. "Contrary to the prevailing emphasis on physical planning, the major elements of a successful development seem to be political, financial and managerial." Rehfuss & Stowe, Symposium on *The Governance of New Towns*, 35 PUB. AD. REV. 221, 222 (1975).

owned the site[160] or could easily acquire the land.[161] Land is best acquired by public authorities exercising the power of compulsory purchase or eminent domain.[162]

Public land ownership is thoroughly American. The federal government owns 34% of the total United States area while state and local government own another 5%.[163] Nevertheless, Title VII preferred to rely on private land assembly, with money obtained on the market albeit guaranteed by the federal government. Despite the "capital market imperfection"[164] it was felt that the private market was adequate. This turned out to be false. Appropriate sites are held in fragmented ownership and assembly entails high transaction costs. Moreover, purchase must proceed in secrecy to prevent inflated cost due to people's expectations, and thus, the whole site must be purchased before the work begins.[165] This secrecy prevents open and full public participation in determining new community policy. Finally, there is always the danger of the hold-out. Although a particular parcel of land may have a transfer earning value approaching zero, its cost would be enhanced by purchase for a new community. When the landowner refuses to sell, however, the parcel's market price becomes exorbitantly inflated.

Direct purchase by the state and subsequent sale or lease to private developers would circumvent all of these problems. The state is, perhaps, the most appropriate level of government to exercise the power of eminent domain. In a valid taking under eminent domain, there must be a public purpose and payment of just compensation. In the Nine-

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160. As in Irvine, California.

161. As in Tapiola, Finland, where the whole 670 acre site was held in only two lots.

162. *See generally* Wells, *Compulsory Land Acquisition for New Communities and Redevelopment in Great Britain and the U.S.*, 6 J. INT'L. L. & ECON. 77, 77-111 (1971).

> Public landownership has been a crucial element of almost all successful European planning. Tapiola is a major exception, although public acquisition of land prior to development is common in Finland. Stockholm's satellite centers, the British and Israeli new towns, the older new towns in the Netherlands, Rotterdam's port development and urban expansion, and the Languedoc-Roussillon resort towns and coastal development share the common element of public land acquisition in advance of development. In most of these instances, as well as in much of the European planning of which they are illustrative, the land is leased rather than sold for development. If the desired use of the land changes over time, the public can secure the altered use — as well as increments in land values — through negotiation of new lease terms.

STRONG, *supra* note 7, at xxxi-ii.

163. STRONG, *supra* note 7, at xxxiii. *See also* NRDC HANDBOOK, *supra* note 156, at 252-95. For single ownership of parcel site, *see* THOMAS & CRESSWELL, *supra* note 11, at 16-17. The site was acquired from a single owner in the cases of Foster City, Leguna Niguel, Rancho Bernardo and Sunset Sacramento. All these new communities are in California. Robert E. Simon, the developer of Reston, Virginia, acquired 6,750 acres from a single owner at a cost of $13 million.

164. *See* note 88 and following text *supra*.

165. Sometimes this problem was circumvented by buying options on the development rights of the surrounding land.

teenth Century, public purpose was interpreted as use by the public [166] and, accordingly, land could only be taken to build schools, churches and other facilities which could be directly used by all persons. The modern interpretation of public purpose is public benefit, so that if the taking can be shown to benefit the public, albeit through a chain of circumstances, the taking is valid. This view received its classic statement by Mr. Justice Douglas in *Berman v. Parker*.[167]

The *Berman* case involved the taking of a generally blighted area for redevelopment. The purpose was to abolish slums. An owner of a building, which itself was in good repair but was located in the area, objected to the taking and claimed that the purpose was not a public use. Justice Douglas found against him stating that the area had to be planned as a whole. He ruled:

> It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[168]

If land can be taken to redevelop slums, there is no broad conceptual leap to the proposition that it can be taken to prevent slum conditions from arising in the first place.

S. T. Schulman goes even further in his interpretation of public use:

> Public use has become public purpose and is now being broadly expressed by the phrase public benefit. There is no clear indication of the ultimate extent to which eminent domain may be used by the municipalities in their capacities as developers or as aids to private developers so long as the concept of public benefit is being even more broadly interpreted and applied. There seems to be no limit now to the authority of government to acquire any lands, whatever their characteristics may be, in order to undertake direct public development or in order to assemble such land for subsequent development by private individuals, for whatever purpose.[169]

Apparently, all that is required is that the legislature declare a taking to be for a public use. As Justice Douglas said in *Berman v. Parker* "subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[170]

Is there any limit to the concept of public use? In an analogous Irish

166. *See generally* Nichols, *The Meaning of Public Use in the Law of Emminent Domain*, 20 B.U.L. REV. 615 (1940); E. Morgan, Certain Legal Problems Suggested by the Creation of New Towns in Massachusetts (Apr. 15, 1969) (unpublished essay in Harvard Law School Library).

167. 348 U.S. 26 (1954).

168. *Id.* at 33.

169. Schulman, *The Public's Responses: Planning For and Against Development*, 1 LAND USE CONT. No. 2, 21-22 (1967).

170. 348 U.S. at 32.

case, *Central Dublin Development Association v. A.G.*,[171] a dispute arose as to the inclusion of a retail section in an obsolete area on a development plan. The retail owners unsuccessfully contested the constitutionality of the enabling provision. The court held that such action was authorized by the government being consistent with "the exigencies of the common good" as required by the Constitution.[172] Such inclusion, however, had to be reasonable in light of all the circumstances.

Arguably, a determination of public use cannot be "manifestly arbitrary or unreasonable,"[173] and where there is delegation it must be exercised prudently and lawfully. Of course, the actual operation of this principle depends on the facts in each case. However, the purchase of land for new communities is well within the power. Naturally, much also will depend on the relationship between the public authority, landowners and developers. An amicable relationship will prevent long delay caused by protracted court cases.

One limit on governmental activity, however, is that no court would countenance the taking of land from one private person to be given to another. This would run counter to all Lockeian notions of property. However, if land were given to private enterprise as the best means available for development, this would be valid. The redevelopment statute in *Berman v. Parker* provided for a lease or sale of "the remainder as an entirety or in parts to a redevelopment company, individual, or partnership."[174] Justice Douglas observed:

> Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government....[175]

The courts have repeatedly noted that it is valid for private enterprise to

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171. 109 ILTR 69 (1975).

172. BUNRACHT NA L EIREANN, art. 43 (Ireland 1937).

173. Housing and Redevelopment Authority v. Greenman, 255 Minn. 396, 96 N.W.2d 673, 679 (1959). In this case, the Supreme Court of Minnesota observed:

> It is within the province of the legislature to declare a public use or purpose, subject of course to a review by the courts, and such determination by the legislative body will not be overruled by the court except in instances where that determination is manifestly arbitrary or unreasonable.

Id. 96 N.W.2d at 675.

174. 348 U.S. at 30, *citing* the Redevelopment Act of 1945, D.C. Code § 7(b), (f) (1951).

175. *Id.* at 33-34.

make a profit out of supplying public goods.[176] Thus, there appears to be no legal objection to a state selecting the development site, acquiring it compulsorily, and then selling or leasing it to developers.

The use of a lease, rather than a sale, ensures that the land bank or development agency retains greater control. Under a lease, both positive and negative convenants will bind the land. Additionally, through careful planning, leases covering sectors will expire at the same time. This will guarantee comprehensive redevelopment, and prevent the leapfrogging effect[177] found so often in the modern United States suburbs. Private developers will become lessees either by bidding at an auction or through a process of negotiation.[178] Each state should run its own land bank, federally financed, and the bank should have no other function but to buy, store and release the land. This will ensure that its operations do not become associated with any single program which may hinder its public effectiveness.

Rather than relying on one developer, the state should perhaps lease to many with each responsible for a sub-project. This procedure would ensure that overall control remained in the public body. It would also be more consistent with present real estate practices on behalf of developers. Private developers would not have to provide extensive infrastructure, and would be more responsive to short-term projects with

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176. In Miller v. City of Tacoma, 61 Wash.2d 374, 378 P.2d 464 (1963), the court upheld exercise of eminent domain with a subsequent resale to private developers. Their eventual profits were only incidental to the over-all constitutionally valid purpose.

In Pressman v. City of Baltimore, 222 Md. 330, 160 A.2d 379 (1960), Chief Judge Brune said:

> We also find appellant's contention that the rezoning is invalid spot zoning because it is solely for the benefit of the proponents and hence is not in accordance with a comprehensive zoning plan or the general welfare, is not sustainable. Doubtless the proponents deemed it to their advantage to seek and obtain the rezoning, and it may very well be. Certainly, they would be unlikely to venture the large amounts of money required for the establishment of shopping centers unless they so believed.

Id. at 339, 160 A.2d at 383.

In Bowie v. Board of County Comm'rs of Howard County, 253 Md. 602, 253 A.2d 727 (1967), an application to reclassify property for industrial development was challenged unsuccessfully by residents of Howard County. Judge McWilliams said:

> The reclassification is invalid, say appellants, because it is special legislation for a private corporation and not for the general welfare. . . . It would have to be conceded that at some future time G.E. and perhaps H.R.D. [Howard Research and Development Corp., which is 50% owned by C. Rouse, the developer of Columbia, Maryland] may become the beneficiaries of this reclassification but appellants have not come near showing that the public interest and welfare may not also be served. Indeed, there are pages of testimony concerning benefits expected to inure to Howard County and its citizens.

Id. at 616, 253 A.2d at 735.

177. *See* note 36 *supra.*

178. *See generally* M. CLAWSON, SUBURBAN LAND CONVERSION IN THE UNITED STATES 323-41 (1971). The English Community Land Act of 1975 will utilize the lease extensively. *See* V. MOORE, COMMUNITY LAND ACT ¶ 6-09, at 57 (1976). For an introduction to this statute from an American perspective *see* Duerksen, *England's Community Land Act: A Yankee's View,* 12 URB. L. ANN. 49 (1976).

necessarily reduced risks of loss. In addition, acquiring land under eminent domain powers would be much cheaper. The hold-out problem is obviated when the owner cannot refuse to sell. On the open market, this is a powerful mechanism in negotiating price. Even when a party voluntarily sells land to a public agency the threat of eminent domain, where available, will lower the price paid. That is why eminent domain is invariably cheaper whenever it is used. Also, it is generally true that existing use value is the measure of fair market value.[179] This equation, however, does not take into account the effect on use value which occurs when land is designated solely for the purposes of new community creation. This limiting of use value as well as the lowering of acquisition price through the process of eminent domain will benefit any new community program.

The use of eminent domain will abolish the necessity for secrecy. There no longer will be any need for dummy buyers and front organizations.[180] At the site selection stage, the state body could consider all environmental impact alternatives under the National Environmental Policy Act. This would alleviate the present problem of delay[181] where a developer who obtains a commitment (the "major federal action")[182] must then go through the Environmental Impact Statement procedure, which seems ludicrous since the site is irrevocably chosen. By allowing public participation at an early stage, the process becomes more democratic, and thus gains strong public support which will ease the new community's development.

After site selection, land assembly can proceed. This may be part of a process of land banking [183] by which a public body purchases land and stores it for further use.[184] Since the public welfare is composed of many purposes, a specific use need not be designated initially. Thus, proof of immediate necessity is not required, and condemnation based upon

179. These valuation terms are explained in HAAR ON LAND USE, *supra* note 21, at 692-726.

180. In England, site selection is made carefully. The Environment Secretary makes a provisional designation and a local hearing is held at which all parties can be heard. This allows for proper public interest representation of all parties. *See generally* B. ACKERMAN, S. ROSE-ACKERMAN, J. SAWYER JR. & D. HENDERSON, THE UNCERTAIN SEARCH FOR ENVIRONMENT QUALITY 136-46 (1974).

181. *See* Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974), *cert. denied,* 421 U.S. 994 (1975);Watterson, *NEPA and Title VII: The Environment Meets New Communities at San Antonio Ranch,* 8 ST. MARY'S L.J. 69 (1976).

182. Under the National Environmental Policy Act of 1969, § 101, 42 U.S.C. §§ 4321-55 (1970), *as amended,* §§ 4321-72 (Supp. II, 1972), an environmental statement must be prepared for any "major Federal action." *Id.* at § 102(c).

183. *See* Fishman & Grozz, *Public Land Banking,* 23 CASE W. L. REV. 897 (1972); N. ROBERTS, REFORM OF PLANNING LAW 242-79 (1976) and his article entitled *Swedish Land Banking,* 38 MOD. L. REV. 121 (1975). *See also* HAAR ON LAND USE, *supra* note 21, at 683-92.

184. There is little doubt that land banking is constitutional. *See generally* Commonwealth of Puerto Rico v. Jorge Rosso, 95 P.R.R. 488 (1967).

reasonable projections of future needs is pemissible.[185]

During the time between acquisition and construction, the land will have to be properly managed. It is doubtful that such land will produce much interim income, and this will make the financing of the land bank politically unfavored. If local funds are used in the purchase of a low or non-income producing capital asset, local politicians may object. Land bank financing should be federally funded. During this interim period, there should also be a waiver of real estate taxes. Presently, new community land is untaxed.

While land is being assembled through the bank for a new community, there should be an interim freeze on zoning within the potential area and in the locality. This will only be a temporary restriction and is valid.[186] It may properly last for quite a long period of time provided permanent restrictions are not imposed.[187] Since land will be purchased cheaply, sites nearer the center of metropolitan areas will be obtainable. Thus, as new communities are being constructed, original residents can easily commute. At the moment, most developers must look far from urban centers to find land they can afford. Good planning principles, however, should dictate the site and not the best market deal. At the same time, the developer's capital investment need not be tied up in land. Through public ownership of land, the developer's front-end costs can be reduced, and the overall success of the project ensured.

Single ownership of land should be accompanied by the power to plan comprehensively and control zoning. These matters are discussed below.

B. Financial Aspects

The most obvious flaw in the Title VII program was that most of its sections never were funded effectively. This lack of financial support destroyed any hope of success for the scheme, and rested the fate of the new community program solely on the guarantee mechanism. Thus, a fundamental question is whether the guarantee system was an adequate means of financing new town construction?[188]

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185. In Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923), the Court stated that "[i]n determining whether the taking of property is necessary for public use not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered." *Id.* at 707.

186. As was stated in Averne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938), "even without such compensation, the individual owners might be compelled to bear a temporary burden in order to promote the public good." *Id.* at 232, 15 N.E.2d at 593.

187. In Golden v. Planning Board of Town of Ramapo, 30 N.Y.2d 359, 334 N.Y.S.2d 138 (1972), planning restrictions of 18 years were held to be valid, since "timed growth . . . does not impose permanent restrictions upon land use." *Id.* at 379, 334 N.Y.S.2d at 149.

188. To a limited extent, this question was raised and considered previously. *See* p. 21 *supra*.

Undeniably, the guarantee system had a number of positive features. First, it worked well to the extent that it attracted seventeen developers who were financed because of it.[189] Second, it was inexpensive for the government in that the government could give "full faith and credit" and not appropriate a single penny. Moreover, this last fact postponed the federal day of reckoning, and was inevitably a popular move. Finally, the guarantee system utilized the private money market, and therefore, did not tie up government funds.

The principal advantage of the federal guarantee was that it gave the developer access to the capital market. Unfortunately, it did not insulate the developer from the fluctuations of that market. The recession found the new community developer vulnerable, and there was no government money to bring projects to a conclusion. By itself, the guarantee system was ineffective. Thus, our next question is whether there is a better way to finance the building of new towns? It is submitted that there are strong arguments in favor of direct government loans.

First, the government can obtain money less expensively than a private developer. This fact has allowed planners much greater design freedom in the English new towns.[190] Second, one of the soundest economic arguments in favor of building new towns is that land can be bought cheaply, and through the development process appreciate many times in value, providing a handsome return. Direct state involvement in the equity of the operation would ensure recapture of a portion of this profit for the community. Money expended in subsidies would be recaptured many times in this process.

The advantages of direct government loans should not obscure the fact that this method might bring some disadvantages. If direct loans were granted by the federal government as recommended by the Advisory Commission on Intergovernmental Relations,[191] it would mean that all of society would in effect be subsidizing a small and privileged sector, namely the new town residents. This would have been an unpopular political action.[192]

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189. RESEARCH REPORT, *supra* note 88, at 18.

190. *See generally* Bonwell, *The Economics of Building New Towns*, 40 TOWN & COUNTY PLAN. 18 (1972).

191. ACIR REPORT, *supra* note 13, at 152.

192. An idea of the expense of new towns can be gained from the fact that in England, by 1968, a total of $22,400 of public money had been invested in a new town for every dwelling unit provided. *See* The New Town Report, Cmd. (1968). This figure, however, includes subsidies for utilities and industrial development as well as housing. Subsidies have become a fact of the modern welfare state, with most sectors of society benefitting from them. Farmers, middle-income mortgage owners, the elderly and the poor all to a greater or lesser extent are subsidized. Nevertheless, with the quantitative limitation of new towns and the expense involved, such a huge subsidy seems unlikely.

It may be that direct government loans are necessary, whether they be to a private developer or to a public body. In England, private investment is not permitted in a new town until its population has reached a substantial number.[193] Until this threshold point is achieved, the venture is simply unprofitable. As the American experience has shown,[194] the front-end capital costs are enormous. In addition, expenses involved in planning and building must be added. This development process requires vast amounts of credit over a long period of time which on the commercial market may only be obtained by sacrificing eventual profits. Most of the American new communities went bankrupt or were massively refinanced. In any event, high credit burdens inflate the plot price to all purchasers. The higher the federal contribution, the less likely this is to happen. Government can afford the carrying costs, and in the long run, its investment will increase. During the initial development period, generally a minimum of fifteen years, the federal government should make loans directly available at low interest rates and increase its contributions, through grants, for the non-profitable parts of the project. The project's total financing should take into account the new community's budget, so that the community can increase its participation in line with its growing tax revenues. Obviously, there would be opposition to allocating vast amounts of money, but the long-run success of any program depends on it. In addition, this would further stimulate private investment in new towns.

All supplemental grants under Title VII should be funded, and the state, with federal funding, should ensure the prompt creation of services. At the moment, the only supplemental assistance available to new community developers is from the discretionary fund established under the Housing and Community Development Act of 1974.[195] Under section 107, two percent is the appropriation for fiscal years 1975, 1976 and 1977 which is reserved in a special discretionary fund from which the Secretary of HUD *may* make grants. Unfortunately, there are six categories which may benefit.[196] New communities is only one of these,

193. This administrative practice is noted by Sir Wells, *Agencies and Finance*, in NEW TOWNS: THE BRITISH EXPERIENCE 29, 32-34 (H. Evans ed. 1972) and Thomas, *The Management Task*, in NEW TOWNS: THE BRITISH EXPERIENCE 46, 52 (1971).

194. *See generally* BURBY & WEISS, *supra* note 25, at 47-65; 47 HOUSE & HOME, January, 1975, at 13.

195. Housing and Community Development Act of 1974, 42 U.S.C. §§ 4501-532 (Supp. 1974).

196. Section 107(a) provides:

> Of the total amount of authority to enter into contracts approved in appropriation Acts under section 103(a)(1) for each of the fiscal years 1975, 1976, and 1977, an amount equal to 2 per centum thereof shall be reserved and set aside in a special discretionary fund for use by the Secretary in making grants. . . .
>
> (1) in behalf of new communities assisted under Title VII . . . ;

and any money going to them will be a very small portion. A new community developer has to apply for such funding.

Metropolitan areas, states and units of local government are entitled to what the Act terms block grants.[197] It is difficult to understand why block grants should not be given to new community developers. This would compensate them for the spillover benefits to the areas surrounding the new towns and for their work on innovative techniques. These public advantages as well as all services and subsidized housing are presently the responsibility of state and federal government. In creating a new town, policies with respect to these aspects must be carried on vigorously.[198]

As well as making a financial commitment to the new town from the beginning, there must be plans to make the project internally financially feasible. This is not simply a question of overall survival, but also bears on the question of balance between homes and jobs. A new community must have its own industry and business to supply jobs and give the town a tax and economic base.[199]

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(2) to States and units of general local government which join in carrying out housing and community development programs that are area-wide in scope;

(3) in Guam, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands;

(4) to States and units of general local government for the purpose of demonstrating innovative community development projects;

(5) to States and units of general local government for the purpose of meeting emergency community development needs caused by federally recognized disasters; and

(6) to States and units of general local government where the Secretary deems it necessary to correct inequities resulting from the allocation provisions of section 106.

Id. at § 107(a), 42 U.S.C. §§ 5307, 4501, 3901.

197. The Housing and Community Development Act of 1974 is stated to be for the purpose of establishing "a program of community development block grants. . . ." *Id.* at the Preamble, PUB. L. No. 93-383, 88 Stat. 633 (1974).

198. In the words of two commentators:

> If the federal new communities programme is to produce a truly new generation of new communities some means must be found to match the private sector's capacity to design and produce high quality housing and neighborhood environments with an improved capacity of the public sector to plan for and provide equally high quality community service systems!

BURBY & WEISS, *supra* note 25, at 435.

199. In England, this concern with industry went hand in hand with the new towns policy. The Barlow Report, *supra* note 75, initially recommended a new towns policy. *See* Self, *Introduction: new towns in the modern world,* in NEW TOWNS: THE BRITISH EXPERIENCE 1, 6-9 (H. Evans ed. 1972); CULLINGWORTH, *supra* note 75, at 61-67. In England in the 1930's, both industry and people had become congested in the London and Birmingham areas. In 1934 the Special Areas (Development and Improvement) Act, 1934, 25 Geo. 5, c. 21, had designated "special areas" of the country which received economic assistance to relieve unemployment. The government was responsible for the creation of industrial estates in these areas and industries locating there received special benefits. In addition the government introduced special training schemes to prepare people in these areas to work in the factories. *See generally* R. HAMILTON, GUIDE TO DEVELOPMENT AND PLANNING 147-52 (6th ed. 1975). Besides these incentives the Barlow Report recommended extensive negative control. This was enacted in the Distribution of Industry Act, 1945, 8 & 9 Geo. 6, c. 36, which introduced the Industrial Development Certificate. *See* Town and Country Planning

Industry is the heart blood of any town. A top priority of any new town must be to attract industry as quickly as possible.[200] Along with effective public relations, this goal can be achieved through a variety of incentives and aids.[201] The design of Title VII failed to comprehend this, and no special grants were made available for the preparation of industrial areas in a new community. In October 1976, it was announced that the N.C.A. is setting up a program to help federally assisted new towns in their attempts to attract new industry.[202] This program will concentrate on providing information and marketing analysis to developers who want to attract industry. It is a belated recognition. A developer under Title VII had to spend money to attract industry without direct return.

The revolution in transportation systems and communication means that all industry need not accumulate in inner city areas. In selecting locations, an industry may make trade-offs between rents and distance from markets. A new community situated near efficient transportation is competitive with its counterpart in the city. Many economies successfully have dispersed light and secondary industry with a road and

Act, 1971, c. 78, §§ 67-70. Any person wishing to build a factory of more than 500 square meters must obtain an I.D.C. from the Department of Industry, and he can receive it only if he satisfies the government that the location of his factory is in the best interests of the country as a whole. The policy of the government has been to grant I.D.C.'s freely only to factories wishing to locate in new towns. There is now a similar provision with regard to office development, namely, the office development permit. *Id.* at § 74; *see also* CULLINGWORTH, *supra* note 75, at 66-67. This latter policy, however, is exercised by the Department of the Environment. This negative power has another counterpart in the Western world, namely in France. *See* STRONG, *supra* note 7, at 359-62. Other countries with an industrial location policy offer incentives and designate under-developed regions. Ireland is an example of the former and the E.E.C. has quite an extensive regional development program. CULLINGWORTH, *supra* note 75, at 280-84. This negative control may be accounted for by the fact that in both France and England, industry is attracted to the two metropolitan areas of London and Paris.

200. Experience in the United States with economic policy has been similar to early Irish and English policy. In 1961, the Area Development Program was begun in the United States and it was continued under the Economic Development Administration in 1965. This was designed to promote the economic growth of rural areas and stop the rural-urban migration. It shared a similar ulterior policy as new community creation, that is, reversing the flow to the metropolitan areas. Growth poles were selected and funds were made available to create economic development districts. A growth pole was a small city which had potential for growth if it could get an initial financial boost. Too little money, however, was spread over too many growth areas. By the 1970's the Economic Development Administration had turned its attention to areas of high unemployment which were in the cities. In 1972, rural areas were provided with grants and loans which were designed to stimulate business activity, encourage industrialization and create jobs in underdeveloped sectors of the country. *See* The Rural Development Act of 1972, 7 U.S.C. § 1921 (1972). Some of this money found its way to new community developers. By and large, these programs were not successful. It was another instance of an unsuccessful national policy of the 1960's. But the idea was a good one and there is much new towns can learn from it.

201. Incentives may prove sufficient without using negative controls since "such controls on industrial location . . . would be totally out of character with the traditions of the nation." CLAWSON & HALL, *supra* note 27, at 225.

202. [1976] URB. AFF. REP. (CCH) No. 446.

air transport complex.[203] Administrative office activity may also be dispersed with no decrease in efficiency. Many routine and administrative jobs can be carried on without regard to location.

Such a dispersion, of course, should only occur in the context of a national or regional transportation policy. Many of the locations of federally assisted new communities were disastrous from a transportation viewpoint. Obviously, the problem of where such a policy is to be created presents itself again. It will be expensive to establish and maintain a national policy. However, in the interim, new communities should be developed only in areas which are already linked to some major transportation grid, be it road or air. If this was done, industry and offices could locate and provide growth points for whole regions. Federal and state relocation of administrative services could set an example and be an incentive for such a policy. There is no reason why many government administrative services must take place in Washington or in state capitals. Executive Order 11512 of 1972 encouraged the location of federal facilities in new towns, but none were ever located in any of the federally guaranteed new towns.[204] This order was made as a direct result of a recommendation of the Presidential Task Force on Suburban Problems.[205]

There are many methods of inducing industrial location which are in accord with American law and policy.[206] Industrial estates or parks can be designated in new communities and locating industries could receive free sites together with grants. This sort of aid is, however, likely to attract industries with shaky futures, and it entails immediate expenditure on the part of the new community. For both of these reasons, more indirect ways of assisting industries are preferable. The usual method is by granting tax exemptions both on real estate and on corporate profits (state tax). This foregoing of a benefit by the new community will, in the end, be recouped many times. Such exemptions could be for a period of up to ten years. A distinction should be drawn between industries which merely supply goods or services to the inhabitants of the new community and those which primarily produce goods for "export" outside the community. The latter are more important in the growth stage since they ensure a flow of "foreign" money into the new town.

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203. This has been the case in the United Kingdom (*i.e.*, Northern Ireland and the Northeast of England) and Ireland, where the connection of light industry and air routes has been a notable success. *See* PLANNING FOR URBAN GROWTH: BRITISH PERSPECTIVES ON THE PLANNING PROCESS 95-108 (T. Taylor ed. 1972).

204. 6 WEEKLY COMP. OF PRES. DOC. 286-87 (Feb. 27, 1970).

205. The President's Task Force on Suburban Problems, Final Report, 82-93 (1968).

206. *See generally* Note, *Legal Limitations on Public Inducements to Industrial Location*, 59 COLUM. L. REV. 618 (1959).

This money in turn will circulate inside the town and give its economy a boost. A significant tax exemption on such income should continue indefinitely.

In addition to these industrial incentives, the following aids should be given. First, subsidies should be provided for those factories and industries which employ new town residents and give them occupational training. Second, there should be a public industrial development authority which could assist industries with immediate difficulties such as refinancing those industries in new towns which had encountered short term fiscal problems. Finally, there should be some system of direct industrial development grants for such uses as installation of capital improvements. This would be preferable to a taxation provision which, for example, allows a quick depreciation for capital outlay. The new town developer, as indicated above, should receive grants for the preparation and servicing of industrial estates and for energetic public relations programs. Attracting industry should also become a public (state) priority for the new towns in its area. It is interesting to note that the N.C.A. is concentrating effort in this area.[207] Invariably, it is one of the first policies which an emerging and developing country formulates. It ensures long-range stability and an initial flow of foreign currency. This is precisely what American new communities have lacked.

C. Problems with Management.

The management aspect of the new community program includes two interesting areas: the national institutions created to carry out the scheme and the process of internal management. The latter has received more attention in the legal and planning literature,[208] but the former is more important from an overall perspective.

At the present, the small N.C.A. staff operates from within HUD. This environment has often proven hostile to its aims. The New Community Development Corporation is dependent also on HUD with most of its members being appointed by the Secretary. HUD has a wide range of responsibilities across its many programs (over 70), and the new community scheme is not one of its priorities. Its history to date has not been encouraging, and results can only be measured in the long term. HUD has many pressing matters vying for its attention, and the ex-

207. *See* note 202 *supra.*

208. *See generally* Gasaway, *New Community Development Districts: A Proposal to Aid New Town Developers,* 9 HOUS. L. REV. 1032 (1972); Burke & Dienes, *Creating a Community: Processes of Land Development for Urban Growth,* 9 HOUS. L. REV. 189 (1971); Kraemer, *Developing Governmental Limitations in New Communities,* 1 URB. LAW. 268 (1969) [hereinafter cited as Kraemer]; 36 U. CHI. L. REV. 379 (1969); Mullarkey, *The Evolution of a New Community: Problems of Government,* 6 HARV. J. LEGIS. 462 (1969) [hereinafter cited as Mullarkey].

pected support from state and local governments never materialized.

Some states created their own public development authorities[209] such as the New York Urban Development Corporation (N.Y.U.D.C.), established in 1968. Other states passed assisting legislation.[210] The state government is the appropriate level to carry out a new towns program. The United States is too large a country for the federal government to play the only role, and local government is too parochial to play a major one. The state is an excellent lead unit when working under strong direction and assistance from the federal government.

The best example so far of a state development agency is the N.Y.U.D.C. When this agency commenced activities in 1969,[211] it had a mandate to combine public and private activities to help renew New York's cities and to assist in the orderly growth of new urban areas. This orderly growth included a program for the construction of new communities.

The N.Y.U.D.C. has several unique features.[212] First, it has statewide jurisdiction[213] and the power to acquire land by eminent domain.[214] These helped speed up the development process. Urban programs must also be planned on a regional basis and thus cannot stop at the city or town line. The N.Y.U.D.C. has the power to override local jurisdictions, especially in their zoning functions.[215] Second, it has a private developer's full range of development powers,[216] and the financial resources to support them.[217] Third, the N.Y.U.D.C. has a wide range of administrative flexibility. It is free to devise its own organizational solutions. Finally, a state agency dealing directly with the developers will provide continuity in the program.

In 1971, the N.Y.U.D.C. successfully marketed its first bond issue for $250 million.[218] However, the N.Y.U.D.C. lacks its own subsidy money to use, for example, in underwriting the cost of land or to reduce

209. *See, e.g.*, OHIO REV. CODE ANN. § 349.02 (Page 1972) and New York, note 211 *infra*.

210. *See, e.g.*, Tennessee's New Community Development Act, TENN. CODE ANN. § 13-1501 (1974), which provides for innovative governance provisions. Maryland, Arizona and Kentucky have similar legislation.

211. *See* New York Urban Development Corporation Act, N.Y. UNCONSOL. LAWS §§ 6251-85 (McKinney Supp. 1975). Latter provisions expressly included the creation of new communities among the powers of the N.Y.U.D.C. *Id.* at §§ 6253(16), 6265(b). For a brief survey of state action to date, *see* Murray, *New Communities: In Search of Cibola—Some Legislative Trails,* 12 URB. L. ANN. 177, 177-219 (1976).

212. *See* N.Y. UNCONSOL. LAWS. §§ 6251-85 (McKinney Supp. 1975).

213. *Id.* at § 6255.

214. *Id.* at § 6263.

215. *Id.* at § 6255.

216. *Id.*

217. *Id.* at § 6252.

218. *See generally* HUD REPORT, *supra* note 84.

the interest rate on mortgages. Subsidy support is only available from the federal government, though unfortunately not in sufficient amounts. The N.Y.U.D.C. program also was to be a recipient of Title VII grants, but these never materialized. For state effort to be successful, there must be strong support from the federal government.

The local level must also be considered. Problems have emerged concerning relationships with the local units of government and the internal administration of the new town. From a local perspective, the creation of a new town can be expected to have many benefits: an increased tax base, industrial development and various other economic spillovers. On the other hand, there will be disadvantages. From an environmental viewpoint, all development is potentially dangerous. A local politician may fear the influx of a large body of voters who may vote him or her out of office.[219] Initially, the costs of increased services will have to be borne by the local unit. All the problems associated with urbanization will follow from the construction of a new town.

From a local perspective, the disadvantages loom larger then the benefits. Usually these benefits will be national and cannot be expected to have direct impact on the local jurisdictions. Local government, therefore, often will hinder the developer by such actions as the power to deny the necessary rezoning of the site. Usually through a process of bargaining the rezoning is obtained, but this process has caused delay. Thus, it is submitted that a state development agency with the power to override local zoning is desirable. Such an agency should have the power to designate a district, a new community development area (N.C.D.A.), and establish some form of committee to administer internal land use controls.

Traditional land use controls[220] will be of little effect inside the N.C.D.A. Internal land use policies for new communities should be designed with an awareness of the relatively disorganized state of land use law in the United States. Since land will be virgin and in single ownership the use district zoning need not include any pre-construction regulation. Use district zoning received its classic definition in *Rockhill v. Chesterfield Township.*[221] In that case, the ordinance consisted of one all-encompassing classification, namely "normal agricultural uses." Certain other uses, set out in a schedule to the ordinance, were permitted but only on conditions and after receipt of an application for such use. Thus, before an application for some use was made, the

219. This is equally true in the United States and England. *See* LAW AND LAND xi (C. Haar ed. 1964); Raynsford, *New Towns and London's Housing Problems,* 26 HOUSING REV. 35 (1977).

220. Mullarkey, *supra* note 208, at 496.

221. 23 N.J. 117, 128 A.2d 473 (1956).

applicant did not know what use, other than agriculture, was permissible. The court invalidated this ordinance and stated:

> The scheme of the ordinance is the negation of zoning. It overrides the base concept of use zoning by districts, that is to say, territorial division according to the character of the lands. . . .[222]

The "character of the lands" in this case was typified by fragmentation of private ownership, and such "fragments" had to be classified and grouped in advance in order to define and stabilize values. Zoning was defined as:

> a separation of the municipality into districts for the most appropriate use of the land, by general rules according to a comprehensive plan for the common good in matters within the domain of the police power.[223]

If the ordinance had been found valid, the problem of unequal treatment of the property owners, contrary to the Fourteenth Amendment of the United States Constitution, might have remained.[224] Courts would lean against the high discretionary element in allowing the scheduled uses,[225] and there seems to be no way of ensuring equal treatment of property owners.

In an N.C.D.A., however, there would be two crucial differences. First, the land would be in single ownership and control. As a result, there could be no difficulty with equal treatment. Second, the property would be virgin territory, unrelated to anything there presently. Flexibility is essential in new town building. It is an ongoing process, and plans must allow for feedback and replanning. A rigid land use map would be disastrous. However flexible, there will be a comprehensive plan, perhaps consisting mainly of policy statements, and it will contain alternatives as the development changes and adjusts. Initial zoning will

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222. *Id.* at 127, 128 A.2d at 478-79.

223. *Id.* at 129, 128 A.2d at 480.

224. *See generally* Mullarkey, *supra* note 208, at 478. Property owners could not be treated equally where each application is considered individually on an ad hoc basis.

225. The case law requires that the use of a special permit system contain certain standards. These were lacking in the *Rockhill* case. In People v. Perez, 214 Cal. App.2d Supp. 881 (1963), a district zoned R.9 agricultural, in which all other uses were by special permit, had a prohibition on signs which were of a size greater than one square foot. The defendant erected an illegal sign and was charged with a violation. He contended that the restriction was unreasonable and that the conditional use provisions were unconstitutional. No standards for granting the permits were laid down except that they were to promote the "health, safety, peace, morals, comfort or general welfare." *Id.* at 886. The Court held the restrictions unreasonable and the zoning district unconstitutional for the lack of standards. The delegation of power to a board of planning commission, the Court said, cannot be absolute since it in effect would create a mini legislature. *Id.* at 886. In Murphy v. Zoning Board of Appeals, 1974 Mass. Adv. Appeals Sh. 890, 317 N.E.2d 90 (1974), the court said "the use of a board's special permit power is discretionary but not without limits. Adequate standards of guidance for the board must be set forth in the ordinance." *Id.* at 891.

be through the floating zone concept. This means that the mix of uses will be decided early on but the order and organization will emerge along with the development.[226] A full zoning map can be prepared much later. From a practical standpoint, any other approach is difficult to imagine.

The problem of participatory democracy has emerged in new town construction as it has in other areas of law and bureaucracy. A governmental organization must be developed which will allow the developer to retain control of the project, but will permit the residents an effective voice in their own affairs.[227] This system would enable the overall plan to be implemented, but not thwart the evolution of succeeding mechanisms.[228]

The interests of the planners and the incoming residents may conflict. For example, in land use control, if the initial residents incorporate themselves, they will gain control of planning, land use and financial policy. If they sought to continue the upper class development in which they lived, there would be nothing to deter them from employing a growth control device such as was used in *Golden v. Planning Board of Town of Ramapo.*[229] Safeguards must be built into the governance mechanism to prevent this possibility.[230]

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226. *See generally* Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957); Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968). *See also* Reno, *Non-Euclidian Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963). In BABCOCK, *supra* note 43, the term "floating zone" is defined as a "technique where a particular category of uses was identified in the text of the ordinance but no equivalent area was found on the map. Given the 'right' proposal put forward by the 'right' developer, this textual reference would descend from the firmament and settle on the lucky owner's land — but only after extensive and careful bargaining between the applicant and municipal legislature." *Id.* at 8.

227. The following definition may be useful:

> By system of governance is meant both the formal and informal structures and processes (and the rules which govern them) by which decisions are made and carried out concerning the disposition of a community's human and non-human resources.... [It] includes formally constituted governments, quasi-governmental units such as the neighborhood associations, and rules by which a community regulates itself.

Kraemer, *supra* note 208, at 271.

228. *See* F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS: CASES, COMMENTS, QUESTIONS 145 (1970); Richman, *Private Residential Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976); Hemingway, *Legal Problems Confronting the Effective Creation and Administration of New Towns in the U.S.*, 10 AKRON L. REV. 93 (1976); Brooks, *Policy Issues of New Towns: One Failure of Law to Guide Planning in America*, 8 URB. LAW. 94 (1976) [hereinafter cited as Brooks]; Heap, *New Town Planning in the United Kingdom*, 4 URB. LAW. 484 (1972); *Administrative Procedures Employed in New Town Planning in the United Kingdom*, 4 URB. LAW. 489 (1972); Kroath, *Control of Land Use in the U.S.: Statutory Developments and the Case of New Communities*, 4 URB. LAW. 519 (1972); De Lucia, *New Communities and Small Town America*, 4 URB. LAW. 735 (1972); Gibron & Simms, *New Community Development*, 11 WASHBURN L. J. 227 (1972). *See also* McFarland, *Administration of Alberta New Towns Program*, 5 DUQ. U. L. REV. 377 (1967).

229. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

230. It has been stated that popular participation:

When the new town is substantially completed, final governance will reflect democratically the interests of its inhabitants. In the development stage, there will be an interim governance which cannot be truly democratic. It has been stated that:

> [T]he planning and construction of a new town is such an expensive, complicated process that there may be no feasible way to combine a developmental period with meaningful resident participation.[231]

This interim government will have to make many important decisions concerning future values and future residents. The interest of the developers will play a large part in the decisions which are made.

Both corporate government by the developer and private government by a homeowners' association have their disadvantages. With corporate government, there is usually no public participation, and rule becomes a hopefully benevolent despotism. In a private government, there is the danger that upper and middle-income residents may dominate and gain control. There is also the difficulty of enforcement. Moreover, the association structure and tasks are determined by the developer long before any residents move in. This will tend to alienate residents. Finally, a homeowners' association is really only suited for small localities.[232]

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must not become a divisive and exclusive authority, ducking out from the costs of urban society and refusing a human mix of classes, cultures and races. Participation by the citizen, which is essential to liveliness and freedom of choice in the local community, has to take place within broad public guidelines of equity and equality.

Campbell, *Insights on the City of Man,* CITY MAGAZINE, Winter 1971, at 18.

231. Comment, *Democracy in the New Towns,* 36 U. CHI. L. REV. 379, 394 (1968-69).

232. In Columbia, Maryland and Reston, Virginia, a great deal of day-to-day government is delegated to homeowners' associations. There are four stages in creating such an association. First, the plots of land are recorded. Second, covenants and restrictions are declared on the land. These are both positive and negative undertakings, easements, liens and charges. They bind all purchasers and run with the land. Third, the association incorporates itself, drawing up articles of association and by-laws. Finally, these plots are sold to the new residents. The association is financed by a tax levy of so many cents per $100.00 valuation. Utilizing this resource, it is likely to maintain parks, pools, courts, lakes, community buildings and services such as preschools for children and local bus service. It is best suited to provide such services for a small local area. The association is administered by a board of directors which in the initial phase is composed of appointees of the developer who are progressively replaced by resident elections usually on the basis of "one plot, one vote." The advantage of such an organization is that it ensures developer control, yet provides for a slow transfer of power to the residents. A grave danger, however, with private planning arrangements, such as a homeowners' association, is in seeking to enforce the scheme against persons who fail to cooperate. Ultimately, the community is thrown back upon private property devices, and the expense of litigation. There will be difficulties in organization and transaction costs even before getting to court, however sympathetic it may prove to be in the long run. These problems should not be underestimated. By providing one vote for each plot, the scheme probably is unconstitutional as being in contravention of the "one man, one vote" principle. Citizens of new towns are still citizens of the United States. The Fourteenth Amendment guarantees equal protection of the law, Marsh v. Alabama, 326 U.S. 501 (1946), and Mr. Justice

Public government, on the other hand, avoids these problems, but is difficult to organize. If the new town utilizes existing local government units, then once more the problems of parochial interests arise, and at most, the new town will be treated as a suburb. Services such as water, sewers, police protection and schools will be required, but these should be provided on a contract basis.[233] Incorporation as a new unit has many advantages. It provides a sense of identity, and the town can issue bonds and receive federal grants. Rarely, however, will a new town be able to incorporate in the early stages of development.[234]

A public development corporation would seem to be best suited for the interim governance of a new community. It could be incorporated at the initial development levels and could pursue broad aims. Then, at a point when the town is substantially completed, it could hand over control to the residents. Where land is designated an N.C.D.A., the unit can be given multi-purpose administrative powers and can become the local government for the new town.

In all forms of government, information flow to the residents is essential, as well as resident participation. Participation might be facilitated by having local representatives on the board of the public development corporation. This form of residents representation could be expanded as the new town is built. Title VII conspicuously lacks any concern with the social development of a new community. Both English and American new towns have social aims and the creation of a new community, by definition, is a social act. Yet, the matter is totally ignored in the United States and remedied in only some instances in England by the appointment of social development officers in new towns.[235] Information, participation and organization should be planned for and encouraged from the start. On both sides of the Atlantic, attention has been focused on the physical nature of new towns at the direct expense of the social milieu.

From this discussion, it is obvious that a new organizational structure is required for the new towns program. It must be strong and central,

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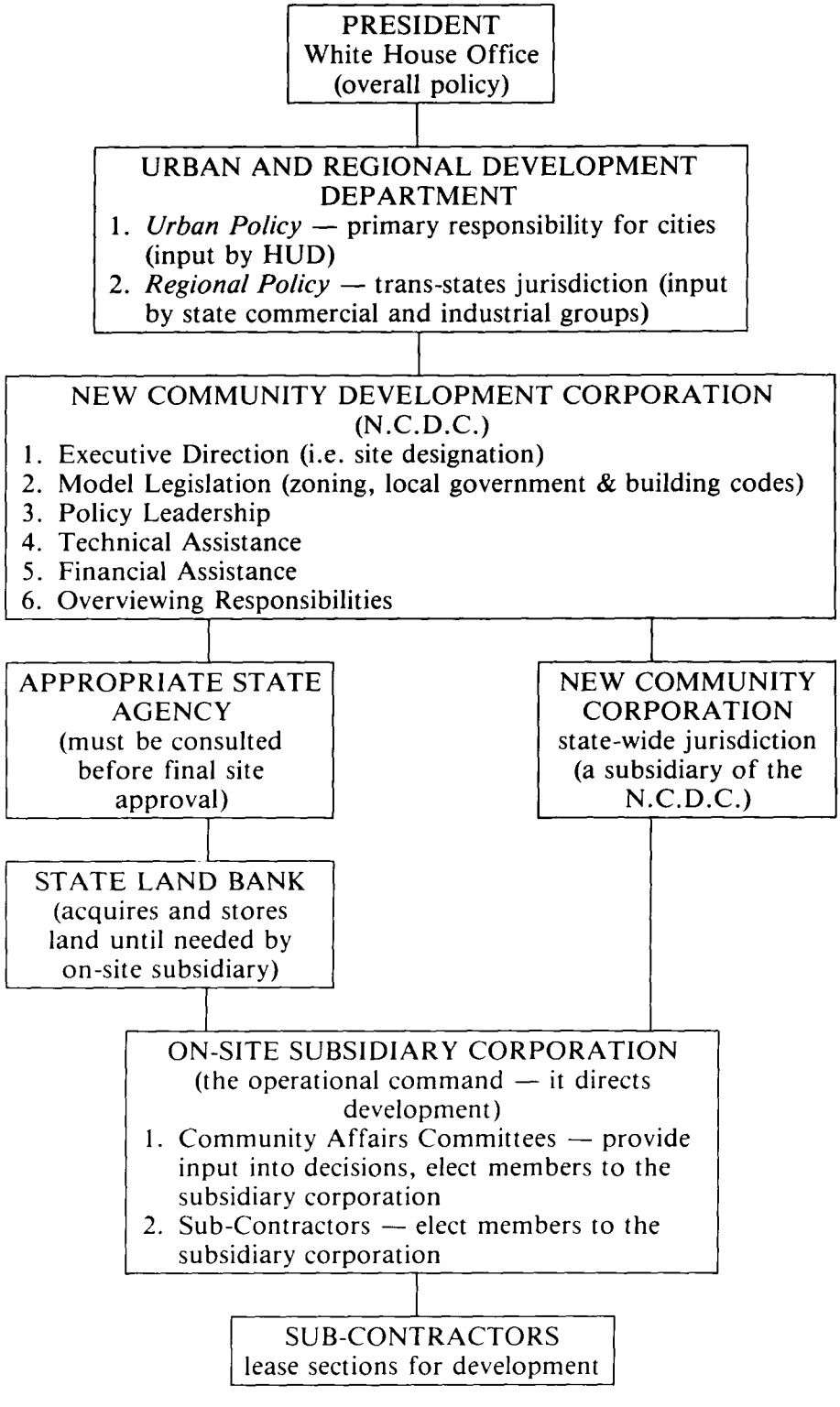
Douglas in Garner v. Louisiana, 368 U.S. 157 (1961), stated that privately owned new towns "perform municipal functions and are held to the same constitutional requirements as ordinary municipalities." *Id.* at 181. Therefore, the "one plot, one vote" rule is unconstitutional. It is unconstitutional to require ownership as a prerequisite for voting. *See* Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Landes v. Town of North Hempstead, 20 N.Y.2d 417, 231 N.E.2d 120, 284 N.Y.S.2d 441 (1967). *But see* Sailors v. Board of Education of the County of Kent, 387 U.S. 105 (1967). Moreover, such a prerequisite gives the small household an advantage over the large. It also gives the multi-unit landlord, who gets the votes, an inflated voice in the association.

233. Annexation to such units provides the same difficulties.

234. *See* State *ex rel* Davis v. Town of Lake Placid, 109 Fla. 419, 147 So. 468 (1933).

235. MINISTRY OF HOUSING & LOCAL GOVERNMENT, THE NEEDS OF NEW COMMUNITIES 49-52, 67-69 (1967).


PRESIDENT
White House Office
(overall policy)
URBAN AND REGIONAL DEVELOPMENT DEPARTMENT
1. Urban Policy — primary responsibility for cities (input by HUD)
2. Regional Policy — trans-states jurisdiction (input by state commercial and industrial groups)
NEW COMMUNITY DEVELOPMENT CORPORATION (N.C.D.C.)
1. Executive Direction (i.e. site designation)
2. Model Legislation (zoning, local government & building codes)
3. Policy Leadership
4. Technical Assistance
5. Financial Assistance
6. Overviewing Responsibilities
APPROPRIATE STATE AGENCY
(must be consulted before final site approval)
NEW COMMUNITY CORPORATION
state-wide jurisdiction
(a subsidiary of the N.C.D.C.)
STATE LAND BANK
(acquires and stores land until needed by on-site subsidiary)
ON-SITE SUBSIDIARY CORPORATION
(the operational command — it directs development)
1. Community Affairs Committees — provide input into decisions, elect members to the subsidiary corporation
2. Sub-Contractors — elect members to the subsidiary corporation
SUB-CONTRACTORS
lease sections for development

yet allow for a wide scope of action on the part of the states and the residents of new towns. It also must make provision for operational management at the local, on-site level. This is lacking in the present scheme. It must take place as part of an ongoing urban and regional policy. Title VII abdicated responsibility and left the field open for trade-offs between many and varied power centers. The unhappy balance between social planning and private enterprise was struck in a relative vacuum, and the basic prejudices of both activities resulted in a situation where there was little advancement. The chart on the opposite page represents a schematized attempt to construct an overall organization.

Under the President, there should be created an office charged with executive responsibility for urban and regional development policy as well as for the new community program. The New Community Development Corporation (N.C.D.C.) and the N.C.A. should be taken out of HUD and placed under this central policy office. These groups should be given sole responsibility for the new community program. Their goals will be more easily achieved if they are not tied to a complex program or trapped inside a multi-purpose government agency. These major moves as well as the program's entire reconstitution should be done under new legislation. Title VII should be repealed and a fresh start made. The New Community Development Corporation should both provide strong leadership and be responsible for central policy and site selection and designation in the New Community Development Area (N.C.D.A.). Before final selection, however, the state in whose territory the new town is to be located should be consulted. Between selection and designation, public hearings should be held and environmental assessments made. After designation, the land can be acquired through the state land bank according to the use value at date of selection. Financing will be provided directly by the New Community Development Corporation and the land leased to the state development authority, called on-site subsidiary corporation in the preceding chart. The functions of developer and lender or financier should be separate so that the lender may keep a critical eye on the investment through all stages. Besides land assembly and finance, the New Community Development Corporation should also be responsible for preparing model zoning and local government codes for the internal use of new communities. Their adoption should be a condition of federal aid. Technical and financial assistance should also be provided, and the N.C.D.C. should have general overviewing and regulatory powers.

Each state will have a New Community Corporation (N.C.C.) modeled on the better aspects of the N.Y.U.D.C. such as speed, independence, and statewide powers, but having the exclusive power to

build new towns. A new community site selection should be made only in a state which has passed appropriate legislation creating such a corporation. The board of directors, however, will be composed predominantly of N.C.D.C. appointees who are accountable to it. The New Community Corporation will be a subsidiary of the New Community Development Corporation. The N.C.C. will have statewide jurisdiction and powers corresponding with all the powers of the N.Y.U.D.C. In addition it will be able to designate the N.C.D.A. as a multi-purpose local government unit and to establish an on-site subsidiary corporation to create the new community. The board of the subsidiary initially will be appointed by the N.C.C. but residents and subcontractors will have the right to elect members to it. Subcontractors will have a fixed number appointed, but representation by the residents will increase as development of the new town continues. Ultimately, the subsidiary will be democratically controlled by the residents.

At many points, this organizational structure will allow for innovations. No two new town governments need be the same. Reliance will be placed on contracts between the residents and the bureaucracy, and the developers and the government.[236] Employing the corporate structure will provide flexibility while at the same time retaining strong central control. The use of government-owned corporations will mean that the government can circumvent a lot of bureaucratic red tape, approach the private market on its terms, and retain all public advantages such as cheap money.

It seems unlikely that the new community program has any future other than as a rescue operation until these or similar reforms are adopted. The structural reorganization would give prominence to urban growth and new communities. In the first three months of the Carter administration, Congress passed the Executive Reorganization Act. This legislation makes it easier for a President to transfer, abolish, and create agencies. President Carter has also implemented a Department of Energy. There seems to be no reason why national growth should not rank as high as energy in his political goals.

Of course it is possible to extrapolate reasons in support of new town creation by studying current urban facts and figures. Certain hypotheses may then be projected into the future which will serve as strong arguments for building new towns. However, if these theories are the only reasons relied upon, then long-term support is unlikely.

236. The emergence of bargained contracts to provide planning gain is a new development emerging now both in the United States, Brooks, *supra* note 228, at 118-22, and Western Europe. *See generally* PLANNING LAW IN WESTERN EUROPE (J. Garner ed. 1976); also note planning agreements under the Local Government (Planning and Development) Act, 1963, c. 28, § 34. (Ireland, 1963).

Facts and figures will change rapidly causing people to lose faith in the hypotheses.

A successful new town program needs to be justified by internal and external reasons. Moreover, to guarantee long-term support, plans for new towns must be part of a regional or national policy. One or two fundamental policies should be stressed which can gain bipartisan support and are easily understood by the public. This emphasis will ensure the program's continuity despite the many difficulties which will arise.[237]

There may be fears that the real problems of existing cities will be ignored in directing aid to new towns. However, these towns are only one element in a growth policy. It must be remembered that new towns are an alternative to the suburbs, and that neither is a solution to inner city problems. The same growth policy will have to provide remedial planning for these areas. What is the likelihood of a national growth policy emerging in the near future? If one does emerge will there be a place for new towns? These questions really concern the old problem of planning vis-a-vis the "invisible hand" of capitalism.

A national urban growth policy would require agreement upon objectives and the integration of minor policies not only in urban renewal, new town and area development, but also in housing, welfare, transportation, environmental programs, grant programs, fiscal relations and the structure of government itself. Under certain conditions in the United States, national policies have emerged. The national environmental commitment was begun only in 1969, and yet it is arguably one of the main political factors in American life today.[238] America is now moving towards a national energy policy.[239] The key element is overwhelming public support for the policies. Without such popular approval, it is unlikely that an urban growth policy will arise. In Britain and France, the salient factor is a unitary system of government with an orderly bureaucracy where bureaucrats follow central directions. In

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237. As Lewis Mumford cautions:

> Without a common design, without a grand design, all our little bricks of reconstruction might just as well remain in the brickyard; for a disharmony between men's minds betokens, in the end, the speedy dilapidation of whatever they may build.

L. MUMFORD, THE STORY OF UTOPIAS 307-08 (1922).

238. By 1977, the E.P.A. staff has grown to over 10,000 with plans for substantial increases. *See* BUSINESS WEEK, April 4, 1977, at 72. This work force should be compared to the N.C.A.'s minute staff. *See* text accompanying note 118 *supra*.

239. Government always has been involved directly in energy, but the 1973 Arab oil embargo and the subsequent price inflation will ensure strong government policy and the people's acceptance of it. *See* The Department of Energy Organization Act, PUB. L. No. 95-91, Stat. 565 (1977), which declares in the statement of purpose that Congress "declares the establishment of a Department of Energy [which] is in the public interest and will promote the general welfare by assuring coordinated and effective administration of Federal energy policy and programs." *Id.* at § 102.

America power is fragmented, and the bureaucrats operate independently in response to their working situations.[240] It seems improbable that an overall national urban policy will emerge in the near future, unless a catastrophe arouses the public. Failing this, the most that can occur is incremental improvements to existing programs such as the new towns project.

VI. THE NEW TIDE AGAINST NEW TOWN PROGRAMS

This essay has examined many of the reasons why the new town program was unsuccessful. We have analyzed the particular Title VII program and its history between 1970 and 1977. There are, however, large societal forces which militate against new towns:

1) The majority of society has a vested interest in the old ways of doing things, and thus, will oppose new methods. Over three-quarters of the American population lives in existing metropolitan areas and will view money going to new towns as funds they have lost. As a result, Title VII created the artificial "new-town-in-town" in appeasement.[241]

2) New towns run counter to a dominant characteristic of American governmental activity. The history of government response to urban problems is

> characterized by an ad hoc, incremental, and cautious approach to urban problems and reflects the fact that there is no widespread agreement as to what urban problems require attention, or how they should be attended, or in what order of priority. They are also reflective of the fact that such policies are formulated in an atmosphere of competition and compromise among various interests, ideologies and levels of government.[242]

It is hardly surprising that commitment to new towns did not emerge from such a scenario. In reality, capitalism gave birth to new towns in America in the 1960's. Small man capitalism is not geared to such a pro-

240. For a comparison of both public services, *see* B. SCHWARTZ & H. WADE, LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE U.S. 3-25 (1972).

241. *See* Carruth, *supra* note 118, at 95-101. It also should be noted that in England most city governments dislike new towns. The only major exceptions are the London County Council, until its abolition in 1963, and the Manchester County Borough, until its abolition in 1974. These were the only city governments which consistently favored new town expansion. Both were high density areas bounded by other high density areas, where population overspill was the *only* possible way to solve housing problems. This was and is a rational fear but is, perhaps, the greatest fallacy connected with new towns. In 1976, a designated Scottish new town, Stonehouse, was abandoned in the face of arguments that new industry would be stolen from Glasgow. The new town was not built and the industry left Scotland. *See* Ash, *Viewpoint 1: The New Towns and The Nation,* 45 TOWN & COUNTRY PLAN. 58, 59 (1977); the February, 1977 issue is devoted to a survey of current English New Towns experience. For those interested, each February issue of this journal contains an annual survey.

242. CLAPP, *supra* note 11, at 285.

gram. But the growth of the new town developers really attested to how capitalism had grown since the Second World War. The "invisible hand" nearly made it, and in some cases, such as Irvine, California, it was successful.[243] However, all developers have experienced difficulties in the 1970's.

3) New towns were often developed for the wrong reasons. For example, new towns were urged to save the inner cities. This resulted in a false antithesis. The attitude was like taking a mistress to save a marriage. New towns were set over against inner cities in such a way that one had to be true and the other false. Each jealously vied for industry and people. In reality, both new towns and inner cities are necessary, and they would not have become enemies if new towns were seen primarily for their intrinsic values and principles. Both must be treated in the larger regional context, each with individual problems.[244]

4) For many of the enthusiasts, desire far exceeded reality. Utopia will not be found in a new town, for it is part of real life with real problems. Too much reliance also was placed in physical structure. It may take fifteen years to build a town but thirty years to create a community. Title VII has few social and economic provisions, and any community which grows from such law will be spontaneous.

5) It is fashionable to denigrate new towns. In the United States, the popular press views new towns as aggravating the malaise of the inner city. New towns are characterized as being inhabited by middle class and skilled workers who are bent on consumption and materialism.[245] In England, new towns are soulless places full of people dragged from the happy life (glorifying the red brick "back-to-backs") of the inner city. Sociological writing tends to emphasize the break-up of old communities. Cultured liberals and armchair commentators find many aspects distasteful. These descriptions and opinions, in turn, tend to make residents feel guilty about living in a new town.

6) In the United States, the early failure of Title VII will discourage any new active support for new towns. A future new town program will have to overcome this pessimism by carefully avoiding prior mistakes.

As always, new towns represent different ways to live, whether they be colonial, industrial, capital or post-industrial new communities.[246]

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243. *See* text accompanying note 160 *supra.*

244. This false antithesis also occurred in England, and was the chief cause for the cancellation of Llantrisant, South Wales (1975), *see* note 241 *supra,* and Stonehouse, Scotland. Smith, *From New Towns to Inner Areas: The Scottish Experience,* 26 HOUSING REV. 34 (1977). In the long run, it is a shortsighted view for without new towns, a society will lack the instruments to guide the change which must come about in the inner cities.

245. NEWSWEEK, Nov. 29, 1976, at 90.

246. *See generally* CAMPBELL, *supra* note 14.

People have always desired an improvement in the quality of living offered by our post-industrial societies. Margaret Mead has said:

> New Towns are necessary to a society that has lost its way-lost its way in building segregated suburbs, in driving freeways through the centers of old neighborhoods, in tearing down the heart of cities and leaving only a gaping vacuum of high rise office buildings where people once lived.... New Towns are a kind of light that beckons us ahead, that shows that it can be done; that are a reassuring first step.[247]

If societal goals are posited, the pragmatism of the American system will have an opportunity to do the job. New ideas and concepts will be accepted in a *new* place. These goals and the structures to achieve them must be designed by politicians, planners and lawyers as well as developers.

New towns are a part of the history of societies, but their creation is inconsistent. Waves of new town building have occurred at transitional times in societies, such as the English new town movement after World War II. There are some signs that such a period is emerging in the United States.[248] In the long run, the experience of accepted national policies will ensure a national growth policy. Solutions to pressing problems such as the environment ultimately depend on a national plan for land use and urban growth. At the moment, some of the difficulties are seen and articulated clearly, and solutions are increasingly recognized to be interdependent. These perceptions are always a prelude to a genuine solution. Simultaneously, people's living preferences have changed. The new town is neither an idea whose time has come[249] nor one whose time has passed,[250] but is in that rather unenviable position in America in the 1970's of having to run faster to stay where it is.

VII. CONCLUSION

Ultimately a more comprehensive new communities program will emerge in the context of a national growth policy. The fragments of such a policy exist today and, in reality, have been present in one form

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247. *Id.* at 267. (Epilogue by M. Mead).

248. National policies on the environment and energy have and are being accepted. While plans for national land use have been disappointed, it seems that action at the state level is on the increase. HAAR ON LAND USE, *supra* note 21, at 585-603; R. HEALY, LAND USE AND THE STATES (1976). Such comprehensive legislation is being accepted by the public and the courts. All the elements of comprehensive national planning are there. The United States is in a somewhat similar position to England in the 1920's and 1930's, with a host of particular programs but lacking real coordination. The difference is that the promise in America is infinitely richer. *See generally* Rothblatt, *National Development Policy,* 34 PUB. AD. REV. 369 (1974) [hereinafter cited as Rothblatt], and references therein.

249. Task Force Report, *supra* note 41, at 3.

250. CLAPP, *supra* note 11, at 287.

or another since Roosevelt's New Deal days.[251] An attempt was made to forge them[252] together during the late 1960's and early 1970's but was dashed to failure by a lack of government support and coordination, and the unforeseen circumstances of the recession. America, however, cannot afford to let the opportunity go by for too long. It is in the absence of a unified policy that problems such as the environment currently loom so large in the country. Rational land-use and growth is the key to the pollution problem, among others. In the resulting policy, there can be little doubt that new communities will have a substantial role to play.

In April of 1977, a cabinet-level Urban and Regional Policy group was appointed by President Carter. He designated HUD Secretary Harris as chairman of this policy group whose responsibilities include all aspects of regional and urban development. The group's task is expected to include a comprehensive review of all federal programs that affect urban and regional matters.[253] A national urban growth policy should be on its agenda. What will President Carter's policy be on urban growth and new communities? That is the important question in the immediate future. T.R. Howard predicts that President Carter's urban, and consequently regional, agenda will be "essentially incrementalist."[254] Howard concludes that many of the President's programs are likely to be built upon, and become extensions of, Great Society formulas. The new administrators, however, must not repeat the recent mistakes of the new communities program. Is that program likely to be revived by President Carter? In the immediate future, the answer unfortunately seems to be no.

The establishment of an urban and regional study group does not indicate direct action. As Professor Haar comments, "when a problem arises, there are two alternatives — either do something about it, or appoint a commission."[255] Task forces, study groups and commissions may in this context be taken as synonymous. A study group requires

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251. *See* GRAHAM, *supra* note 74, at 1-68.

252. Specifically, urban center aids, rural development and new communities programs (the last is the youngest of the trio). *See generally* Wingo, *Issues in National Development Strategy for the U.S.*, 9 URB. STUD. 3 (1972).

253. *See* 8 HUD NEWSLETTER, No. 5 (Apr. 11, 1977). In addition to Secretary Harris, the group includes the Secretaries of Treasury, Labor, Commerce and Health, Education and Welfare.

254. Howard, *Carter's Plan for the Cities*, 7 DESIGN & ENVT. 10, 48 (1976). The most recent and important developments in the new community program may be found in [1977] 5 HOUS. & DEV. REP. (BNA) 19, 51, 230. *See also* [1976-77] 4 HOUS. DEV. REP. (BNA) 293, 370, 475, 691, 882, 1076.

255. C. HAAR, THE END OF INNOCENCE: A SUBURBAN READER iii (1972). Examples of ulterior purposes behind the creation of task forces, *etc.* may be found in Harari, *Japanese Politics of Advice in Comparative Perspective*, 22 PUB. POL'Y 537 (1974).

little funding in comparison to a full implementation of the recommendations in this essay. Presently, there are too many programs clamoring for limited available funds.[256] Areas of high priority such as welfare and tax reform have had to be postponed. For the moment, it seems unlikely that a reformed new communities scheme will emerge. Apart from the present financial crisis, there is little support in the aftermath of what some consider failure. Also, the administration has other policy priorities.

In the interim what can be done? Resources should be marshaled to rescue the seventeen federally assisted new communities. Many of this essay's recommendations such as the policy of attracting industry, require little or no expenditure, and these should be immediately implemented. Where, however, it seems unlikely that a particular project will be successful, serious consideration should be given to continued federal presence. In such a case, alternative measures, including termination, should be considered. It is useless throwing good money after bad.[257] As well as an intensified rescue operation, there exists great scope for coordination of federal activities. Government planners should consider new communities when allocating funds for a variety of federal projects, including the location of federal facilities. This comprehensive view would foster economic growth of existing new communities. A renewed program should be located in growth focal points. It should take advantage of federally owned lands or be used in conjunction with other federal programs, such as coal exploitation.[258]

Such activity must be coordinated, and therefore a plan, however broad, is necessary. This should come from the President in his or her

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256. While I have argued that the national experience with an energy policy will ease the path of formulating new policies, the results are not always positive. In 1977, the areas of concern are the economy and energy; policies on national land use and growth seem to have been forgotten. Otto Graham points to this fact when he states:

> While Ford concentrated upon immediate economic issues, and for relief upon Arabs and Russians and Cambodians, the important Planning-related issues of the Nixon years quitely slipped from White House concerns. National land-use legislation, reorganization of the executive branch, national growth policy, national population policy, national goals, and social reporting, all lost their places on the presidential agenda and went up for grabs to congressmen or extra-mural crusaders.

GRAHAM, *supra* note 74, at 274.

257. A fact England and France failed to realize in the long development of the SST Concorde.

258. The creation of such a "coal" town would be analogous to company towns of the Nineteenth Century, or demonstration towns in Alaska, ALASKA STAT. §§ 29.18.220, 260 (1975), which were and are linked to the exploitation of natural resources. The growth center idea would capitalize on nascent growth possibilities, on pre-existing infrastructure and on an established network of friends and relatives, so essential for in-migration. *See* Morrison, *A Demographic Assessment of New Cities and Growth Centers as Population Redistribution Strategies*, 21 PUB. POL'Y 367 (1973). This linking of new towns and growth centers occurred in England with the Mark III towns, beginning in Washington New Town.

Urban Growth Report, and could take the form of general policy statements. State land use plans also should be made consistent with the appropriate policy. State plans should designate potential growth areas where new communities could locate. The fiscal power of the federal government can be used to bring this about through a strings-attached policy.[259]

How can all this be accomplished? The new community activity between 1968 and 1977 resulted from academic and public input into the bureaucratic system through the Johnson task force. Would such a task force wield similar power today? Will President Carter's Urban and Regional Policy Group, the creation of a Democratic President, have such an effect? The success of the federal rescue operation, or that of a state which effectively carries through its own program, may ensure renewed federal commitment. Perhaps the federal government is waiting for just such a springboard. State action to date has been uneven, but in some cases innovative legislation has been passed.[260] Unfortunately, national governments tend to react to failures, not successes.

In the immediate future what is essential is the rescue operation. If America does not save what it already has, the experience will have been a complete failure. In such an event, the rebirth of a new community program will be far off, and in all likelihood it will have to go through the same growing pains.[261] Rehfuss and Stowe are very shortsighted

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259. *See* Rabinowitz, *Criteria for Federal Revenue Sharing*, 37 PLAN. 44, 44-56 (1971).

260. The following statutes are innovative: KY. REV. STAT. ANN. §§ 108A.010-130 (Baldwin 1970); OHIO REV. CODE ANN. § 349.01-16 (Page 1972); TENN. CODE ANN. §§ 13-1501-17 (1974); FLA. STAT. ANN. §§ 163.601-33 (West 1975). In other states, new communities have received some legislative attention: ALASKA STAT. §§ 29.18.220-60 (1975); ARIZ. REV. STAT. ANN. §§ 11-771-771.45 (1970); N.Y. UNCONSOL. LAWS §§ 6251-85 (McKinney Supp. 1975), see especially *id.* §§ 6253(1b), 6265(b); ILL. ANN. STAT. ch. 67½, §§ 303, 307.22 (Smith-Hurd); Cal. Health and Safety Code §§ 33250-54, 33298 (West).

261. It should be emphasized that the U.S. is committed to such a policy. In the Implementing Memorandum of the U.S.-U.S.S.R. Bilateral Agreement on Co-operation in the Field of Environmental Protection (1972), *see* BARROS & JOHNSON, THE INTERNATIONAL LAW OF POLLUTION 332-34 (1974), it is stated:

> Both sides will designate new communities in each country as a means of examining the environmental, physical, social, economic and other factors considered in the design and development of satellite and free standing new communities.

Id. at 339.

There is also the possibility of an American commitment to establishing a national policy on human settlements. See Report of Habitat: United Nations Conference on Human Settlements U.N. Doc. A/Conf. 70/15 at 12, recom. A.1(b) (1976). The conference's recommendation at Vancouver reads:

> All countries shall establish *as a matter of urgency* a national policy on human settlements, embodying the distribution of population, and related economic and social activities, over the national territory. (Emphasis added)

This directive has been adopted by the United Nations. From an attorney's viewpoint, neither the Bilateral nor the recommendation offer much of a basis upon which to take the federal govern-

when they state that there are "only two basic policy options: spend enormous sums of money both in subsidizing developers and for planning aid to localities or abandon national land-use policy and let the private market operate."[262] In the long run, their first alternative is unavoidable. The fact that the county cannot presently afford such expense, however, is no reason to abandon everything. In the interim, new town advocates must bide their time and consolidate any gains. The prospect ahead is a two-tier policy of making do before making new.

In light of the present experience of the program, certain assumptions which were made need to be examined. The most obvious assumption was the desirability of a private enterprise system receiving incentives and being primed with guarantees. Undoubtedly, this is the most unique feature of the American experience. A second assumption was that there would be more commitment from the administration and from Congress. The program received little national support and not much money. It was assumed also that financial and social returns would be quicker in coming. This ignored the magnitude of such a program and the commitment necessary to maintain it in a society where social change occurs both frequently and rapidly. Lastly, the problems of fragmentation of power at the federal and state level were left unattended. Reliance was placed on central directions from HUD while the developer was more or less left to fend for himself or herself in the field.

Rethinking some of these assumptions of the program is a completely different task, however, from the job of assessing new communities. The achievements of new towns can be related to stated aims, whether the needs of the inhabitants are met, how far they contribute to a resolution of metropolitan or suburban problems or simply as financial return on investment. The emphasis on achievements necessarily will reflect the importance of these goals in a society. It is the answer to this larger assessment that will create skepticism or inspire action for the future.

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ment to court seeking mandamus. Nonetheless, they provide a context in which political and public support might be brought to bear. At a minimum, it is not unreasonable to suggest that these guidelines preclude the government from foreclosing on new communities and national growth policies.

262. *Symposium on the Governance of New Towns*, 35 PUB. ADM. REV. 221, 222 (1975).

The Participation of National Banks in Private Placements of Corporate Securities

*Dale S. Miller**

Generally, expansion of commercial bank services is opposed by interested competitors. A significant area of resistance concerns bank participation in the private placement of corporate securities. In his article, Mr. Miller examines the major legislation in the field, the Glass-Steagall Act. Both sides to the controversy contend that the Act supports their views regarding the propriety of such activity. This article submits that traditional standards of interpretation indicate that bank involvement in private placements violates the securities provisions of Glass-Steagall. The author suggests, however, that a more thoughtful application of the judicial standard, justified by the availability of alternative safeguards, could continue to effectuate the policies of the Act and benefit the public by allowing corporate-issuers commercial bank assistance.

In recent years, national banks[1] have attempted to expand the breadth of their commercial activities to encompass more than the acceptance of deposits and the payment of interest on notes. Bank services have been broadened to include activities which banking interests contend are incidentally related and "necessary to carry on the business of banking."[2] This policy has been challenged vigorously by competing

*A.B. U.C.L.A., 1972; J.D. Pepperdine University, 1976; LL.M. New York University, 1977.

1. Hereinafter, unless otherwise specified, the terms "national bank," "commercial bank," and "bank" are used interchangeably. As used herein, they specifically exclude bank holding companies. However, see [1977] 388 SEC. REG. & L. REP. (BNA) A-9 for a discussion of the application of the Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933) (codified in scattered sections of 12 U.S.C.), to bank holding companies. *See also* 12 C.F.R. § 225.125 (1977) containing interpretations of the Federal Reserve Board concerning Regulation Y, which lists Board approved non-banking activities for national banks.

2. The Glass-Steagall Act provides, in pertinent part, that:

[A] national banking association . . . shall have power —

. . . .

industries. Bank infiltration into various spheres of economic life has caused considerable government scrutiny and investigation.[3] Banks have sought entry into business areas including, but not limited to, acting as travel agents, selling insurance, providing courier services, sponsoring and operating mutual funds, administering automatic investment services, underwriting municipal revenue bonds, and merchant banking.[4]

Current controversy has focused on bank participation in a particular method of non-bank financing:[5] the direct or private placement. In a private placement, a corporate-issuer which desires to raise capital will,

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> Seventh. To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this chapter.

12 U.S.C. § 24 (Supp. V 1975).

An examination of commercial bank power under 12 U.S.C. § 24 (Supp. V 1975) is beyond the scope of this article. *See* American Soc'y of Travel Agents v. Smith, 409 F. Supp. 376 (D.D.C. 1976); National Retailer Corp. of Ariz. v. Valley Nat'l Bank, 411 F. Supp. 308 (D. Ariz. 1976); M & M Leasing Corp. v. Seattle First Nat'l Bank, 391 F. Supp. 1290 (W.D. Wash. 1975); American Soc'y of Travel Agents v. Bank of Amer. Nat'l Trust & Sav. Ass'n, 385 F. Supp. 1084 (N.D. Cal. 1974); Arnold Tours, Inc. v. Camp, 338 F. Supp. 721 (D. Mass. 1972), *aff'd,* 472 F.2d 427 (1st Cir. 1972). *See generally* Beatty, *What Are The Legal Limits To The Expansion Of National Bank Services?,* 86 BANKING L. J. 3 (1969); Huck, *What Is The Banking Business?,* 83 BANKING L. J. 491 (1966).

3. The banking system is currently under review by the Subcommittee on Financial Institutions Supervision, Regulation and Insurance of the House Banking, Currency and Housing Committee. Also, the Securities Subcommittee of the Senate Committee on Banking, Housing and Urban Affairs is studying bank securities activities. The Securities and Exchange Commission is undertaking a congressionally mandated study of persons excluded from the definition of "broker," 15 U.S.C. § 78c-(a)(4) (1970), and "dealer," 15 U.S.C. § 78c-(a)(5) (1970), pursuant to the directive of § 11A (e) of the Securities Exchange Act of 1934, *as amended* 15 U.S.C. § 78k-1(e) (Supp. V 1975). Chairman Henry S. Reuss (D-Wis.) of the Committee on Banking, Currency and Housing has asked the Federal Reserve Board to investigate the possible conflicts of interest and economic implications of bank dealings in private placements. *See* [1976] 383 SEC. REG. & L. REP. (BNA) A-15. The Federal Reserve Board study has been completed. *See* FEDERAL RESERVE BOARD STAFF STUDY, COMMERCIAL BANK PRIVATE PLACEMENT ACTIVITIES (June 1977) [hereinafter cited as COMMERCIAL BANK ACTIVITIES].

4. *See* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971) (sponsoring and operating a mutual fund); First Nat'l Bank v. Dickinson, 396 U.S. 122 (1969) (setting up armored car service and deposit receptacles); Independent Bankers Ass'n of Amer. v. Smith, 534 F.2d 921 (D.C. Cir. 1976) (customer bank communication terminals); Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1968) (acting as travel agent); Saxon v. Georgia Ass'n of Indep. Ins. Agents, 399 F.2d 1010 (5th Cir. 1968) (selling life insurance); Port of N.Y. Auth. v. Baker, Watts & Co., 392 F.2d 497 (D.C. Cir. 1968)(sale of municipal revenue bonds); New York Stock Exch., Inc. v. Smith, 404 F. Supp. 1091 (D.D.C. 1975) (automatic investment service). *See also* Barfield, *The Legal Status of a National Bank's Automatic Stock Investment Service Under Sections 16 and 21 of the Glass-Steagall Act of 1933,* 27 VAND. L. REV. 1217 (1974); Welch, Jr., *Bank-Sponsored Investment Services: Statutory Proscriptions, Jurisdictional Conflicts and a Legislative Proposal,* 27 U. FLA. L. REV. 776 (1975); Note, *The Legality of Bank-Sponsored Investment Services,* 84 YALE L. J. 1477 (1975); COMMERCIAL BANK ACTIVITIES, *supra* note 3.

5. *See* BUS. WEEK, April 19, 1976, at 54 [hereinafter cited as BUS. WEEK]. *See generally* NEW YORK CLEARING HOUSE ASSOCIATION, COMMERCIAL BANK PRIVATE PLACEMENT ADVISORY SERVICES

either directly or indirectly through an agent, place its debt or equity securities with a small group of sophisticated investors.[6] Many corporations which pursue a private offering employ the services of an agent who has expertise in this form of financing.[7]

If a corporation seeks to raise capital through the issuance of its securities, it must comply with the registration requirements of the Securities Act of 1933[8] unless such issuance is exempt. A private placement that complies with either section 4(2) of the Securities Act[9] or Securities and Exchange Commission Rule 146[10] exempts the corporation from registering the securities it plans to offer. This has the significant advantage of lowering the transaction costs compared with those of a registered offering.[11]

(April 1977); Department of the Treasury, Public Policy Aspects of Bank Securities Activities — An Issues Paper (Nov. 1975) *reprinted in Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. (Dec. 9-10, 1975) [hereinafter cited as Public Policy Aspects]. *See also* N. WOLFSON, CONFLICTS OF INTEREST: INVESTMENT BANKING (1976).

6. *See* Securities Act of 1933, § 4(2), 15 U.S.C. § 77e (1970), and SEC Rule 146, 17 C.F.R. § 230.146 (1977).

7. The majority of private placements are assisted by advisors. *See* COMMERCIAL BANK ACTIVITIES, *supra* note 3, at 28.

> Sometimes an issuer knows pretty well in advance which type of transaction it wishes. More often this is not determined until every angle has been explored. In either event, the methods to be followed present a complex series of possibilities, many of which involve intricate calculations of the effective cost of the money and a host of other features affecting the capital structure of the issuer, plans for future financing, problems of operation of the business and so on.

United States v. Morgan, 118 F. Supp. 621, 651 (S.D.N.Y. 1953).

8. Securities Act of 1933, §§ 5-9, 15 U.S.C. §§ 77e-77i (1970).

9. 15 U.S.C. § 77d(2) (1970) provides:

> The provisions of section 77e shall not apply to —
>
> . . . .
>
> (2) transactions by an issuer not involving any public offering.

See SEC v. Ralston Purina Co., 346 U.S. 119 (1953).

10. 17 C.F.R. § 230.146 (1977). SEC Rule 146 was promulgated by the SEC pursuant to § 4(2) of Securities Act of 1933. It provides specific requirements as to the manner of offering, the nature of the offerees, access to or furnishing of information, and number of purchasers.

11. It has been observed that:

> To the issuer, private placements of straight debt are advantageous because of their lower transaction costs in comparison with the costs of a registered, underwritten public offering, as well as the ease of adapting the terms of the indenture to the requirements of the borrower and lenders. These advantages permit the issuer to offer a somewhat higher yield on privately placed debt. To the lenders, usually one or more insurance companies and to a lesser extent foundations, employee benefits funds (both self and bank-administered), and other institutions, the higher yield outweighs the relative illiquidity of these securities since these institutions have little inclination to trade these securities in any case. In this respect these placements are similar to longer term bank loans, although the debt securities acquired in private placements generally have longer maturities. Private placements may be particularly advantageous to issuers whose financial status falls short of the standards set by most public offerings of debt securities, although in some cases financial status is not a factor in the decision to privately place the bonds. Institutions can obtain the higher yield on these securities, higher because of the restrictions on trading as well as any quality differentials that may pertain, while alleviating any ad

Private placements were almost nonexistent in 1900,[12] but drastically increased between 1934 and 1939 because of the uncertainties and increased risk of public offerings created by the Securities Act.[13] Bank involvement in the private placement of corporate securities, however, is a relatively recent phenomenon. Whereas prior to 1970 banks were not involved in the placement of these securities, in 1975 they placed over 35 issues involving more than $500 million.[14] Small and medium sized corporations form the major market for bank private placement services in the United States. These corporations are not large enough to receive adequate attention from investment bankers, but are too large to utilize long term bank loans for all their financing needs.[15]

The Glass-Steagall Act[16] is designed to separate the business of commercial banking from investment banking. It has been contended that bank participation in private placements may be a distribution of securities in violation of Glass-Steagall,[17] and raises questions concerning conflicts of interest and financial risk that the Act seeks to prevent.[18] Others argue, however, that bank involvement in private placements is a specifically recognized agency activity which is part of the traditional services that banks have always performed: advising customers concerning their financial needs.[19]

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ditional risks due to illiquidity or financial problems of the issuer after the purchase by maintaining contact with the issuer, arranging for restrictive covenants in the indenture in anticipation of contingent events, and diversifying their holdings.

INSTITUTIONAL INVESTOR STUDY REPORT, VOL. 5 H.R. DOC. NO. 64, 92d Cong., 1st Sess. 2414 (1971).

12. V. CAROSSO, INVESTMENT BANKING IN AMERICA 501 (1970) [hereinafter cited as CAROSSO].

13. *Id.* at 367-68. *See generally* BUS. WEEK, *supra* note 5, at 57.

14. *See* BUS. WEEK, *supra* note 5, at 57, 64. "Since 1965, funds raised privately have fluctuated considerably, reaching a high of nearly $20 billion in 1976." COMMERCIAL BANK ACTIVITIES, *supra* note 3, at 15.

15. COMMERCIAL BANK ACTIVITIES, *supra* note 3, at 17-22. Interview with Donald Dixon, Official of First National City Bank, in New York City (March 30, 1977). *See* BUS. WEEK, *supra* note 5, at 64.

16. Chapter 89, 48 Stat. 162 (codified in scattered sections of 12 U.S.C.). Among the major differences between investment and commercial banks are that investment banking firms engage in the underwriting of *public* offerings and the making of markets in securities. On the other hand, commercial banks offer deposit services and make extension of credit from their own resources.

17. *See* Investment Co. Inst. v. Camp, 401 U.S. 617 (1971).

18. *See Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 1st Sess. (Dec. 9, 1975) (statement of Carl M. Meuller, Vice Chairman of the Board, Securities Industry Ass'n and managing partner of Loeb, Rhoades & Co.); *id.* (statement of I. W. Burnham II, Chairman of Board, Securities Industry Ass'n, and Chairman of the firm Drexel, Burnham & Co., Inc.); [1976] 383 SEC. REG. & L. REP. (BNA) A-15 (statement of Henry S. Reuss, Chairman of the House Comm. on Banking, Currency and Housing).

19. Note, for example, a hypothetical situation presented in an address (entitled "Glass, Steagall and the Benchley Principle") given by Walter B. Writson, Chairman of Citicorp, before the Reserve City Bankers Ass'n, New York (Jan. 31, 1977):

A customer comes into your bank and says to you, I need $10 million to expand my

This article examines the legal impact of the securities provisions[20] of the Glass-Steagall Act upon the private placement services provided by national banks. First, a discussion is presented concerning the nature of the service that banks may provide to corporate-issuers that wish to obtain non-bank financing through a private placement of their securities. This section delineates the limits of bank involvement in such private placement activities. Second, the regulation of commercial banks and investment bankers is compared. Third, the article considers the regulation of private placement activities of commercial banks by the Glass-Steagall Act. Our initial concern is to explain the Act's securities provisions in two contexts: (1) when such activities are performed by the bank itself, and (2) when such activities are performed by a bank subsidiary. Application of sections 16, 20, 21, and 32 of the Act to bank participation in private placements is examined. The limitations imposed by these provisions are considered in view of regulatory and judicial interpretation. An analysis based on the Securities Act definition of these terms is rejected; it is submitted that the standards for interpretation are based on the policies of Glass-Steagall itself. It is further suggested that to determine whether bank activity is prohibited by the securities provisions of the Act, there is a judicial test focusing on two policies: (1) financial stability, and (2) potential conflicts of interests. Finally, these two policies are examined. It is concluded that, although

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business. You look over his plans and say, what you really need is a $2 million line of credit and an $8 million 25-year loan. You have just entered the field of financial advisory service. . . . [Y]ou just did what bankers have always done. What happens now? Since commercial banks as a matter of policy don't make 25-year loans, you suggest he might try some insurance companies, and he says, how do you do that? You say, well you should have five years of financial statements, cashflow projections, a written description of your business and of your competition, and a set of suggested terms. Then, you ought to shop around among a few insurance companies for the best deal. Your customer says he is good at manufacturing widgets, but all this sounds pretty complicated, can you help me? And you say sure, we can help you get the material together, and maybe even put you in touch with some insurance companies and help you explain your needs to them. Bankers have been doing this for years — it is part of our business. Since you have spent a lot of man-hours and have performed a real service, you charge a fee. The completed process has now been given a name: private placement. Despite the name, it is just old wine in new bottles.

The SIA [Securities Industry Association] contends that this activity is forbidden by the Glass-Steagall Act, which raises an interesting question. If it is illegal, at what point did it become illegal? When you charged a fee? When you talked to the insurance companies to introduce the corporation? When you suggested to the corporation where to look for the money? Or did you take you (*sic*) first step into crime when you gave your customer some advice?

[A copy of this speech was obtained by the author from an officer of the Chase Manhattan Bank, N.A.]. *See* R. JENNINGS & H. MARSH, SECURITIES REGULATION: CASES AND MATERIALS 27 at n.18 (4th ed. 1977), stating that private placements are within the proper scope of bank's agency authority; Securities Act of 1933 Release No. 5491 FED. SEC. L. REP. (CCH) ¶ 79,767 (April 30, 1974).

20. The securities provisions of the Act are: § 16, *as amended,* 12 U.S.C. § 24, para. (Seventh) (Supp. V 1975); § 20, *as amended,* 12 U.S.C. 377 (1970); § 21, *as amended,* 12 U.S.C. 378 (1970); and § 32, *as amended,* 12 U.S.C. § 78 (1970).

bank participation in private placement activities does not impair the bank's financial well-being, it does give rise to potential conflicts of interest which prevent involvement in such securities activities from meeting the standards of Glass-Steagall.

I. DESCRIPTION OF NATIONAL BANK PARTICIPATION IN PRIVATE PLACEMENT ACTIVITIES

The private placement service offered by national banks[21] can be divided into four different components: (1) financial counseling; (2) referrals; (3) solicitations; and (4) negotiations.[22] Each of these may be offered separately or in combination with any other.

The first, financial counseling, provides analysis of the corporation's needs and objectives for short and long term borrowings as well as permanent capital. Alternative financing plans may be formulated and presented to the client. The bank also assists in the preparation of a proposal which is presented to potential investors. Additionally, advice may be given concerning a marketing strategy in order to facilitate the placement of the securities. The bank also aids its corporate client in complying with the necessary legal rules of the SEC and the various state Blue Sky laws.[23]

The referral component requires the bank to recommend potential investors to its clients. The bank, through its access to the needs and investment requirements of possible purchasers, has knowledge of potential investors. This information comes to the bank through its vast reservoir of customers using its loan, trust, and other departments.[24]

The solicitation portion of the service consists of bank inquiry of potential investors to determine whether there is interest in the client's securities. This may require the bank to bring together the potential in-

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21. National banks generally offer private placement and consulting services through nonbank subsidiaries. *See* Public Policy Aspects, *supra* note 5, at 312; *Sections 20 and 32 — Bank Subsidiaries; Closing the Back Door and The Separate Entity Theory,* § III(A)(2) *infra.*

22. COMMERCIAL BANK ACTIVITIES, *supra* note 3, at 27.

23. *Id.* Interview with Donald Dixon, Official First National City Bank, in New York City (March 30, 1977); Interview with Illene Labowitz, Officer of Chemical Bank National Trust & Savings Association (March 14, 1977). *See also* United States v. Morgan, 118 F. Supp. 621, 652 (S.D.N.Y. 1953); SECURITIES INDUSTRIES ASS'N MEMORANDUM FOR STUDY AND DISCUSSION ON BANK SECURITIES ACTIVITIES 5-6 (Aug. 1976) [hereinafter cited as MEMORANDUM].

Blue Sky laws are state laws that regulate the distribution of securities. Section 18 of the Securities Act of 1933, 15 U.S.C. § 77(r) (1970), expressly permits states to formulate such regulations. Therefore, when a security is sold, the distribution must be in compliance with both federal and state laws. For a brief overview of state blue sky laws see R. JENNINGS & H. MARSH, SECURITIES REGULATION: CASES AND MATERIALS 1263-72 (4th ed. 1977).

24. Interview with Donald Dixon, Official First National City Bank, in New York City (March 30, 1977); Interview with Illene Labowitz, Officer of Chemical Bank National Trust & Savings Association (March 14, 1977).

vestor and the client so that they may discuss the transaction.[25]

Finally, the negotiation phase of the bank's private placement service may involve the bank, albeit insignificantly, in negotiation with the potential investors on the client's behalf.[26]

II. COMPARISON BETWEEN THE REGULATION OF COMMERCIAL BANKS AND INVESTMENT BANKERS

While commercial banks and investment bankers are in direct competition when assisting corporations that raise capital through the private placement process,[27] they are subject to different regulatory bodies. In pursuing their objectives of underwriting and distributing securities, investment bankers are bound by the rules and regulations of the SEC and the federal securities laws. On the other hand, commercial banks come under the overlapping jurisdiction of three regulatory agencies:[28] (1) the Comptroller of the Currency,[29] (2) the Federal Reserve Board,[30] and (3) the Federal Deposit Insurance Corporation.[31]

Commercial banks, however, are specifically exempted from direct regulation by the SEC[32] and the federal securities laws, except for the antifraud provisions.[33] Section 3(a)(2) of the Securities Act exempts "any security issued or guaranteed by any bank,"[34] and sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 specifically exclude banks from the definition of the terms "broker" and "dealer."[35] Section 3(a)(3) of the Investment Companies Act excludes banks from the definition of "investment company,"[36] and section 2(a)(11)(A) of the

25. It has been said that it is common for investors to be brought to the transaction by the bank. *See* Public Policy Aspects, *supra* note 5, at 314.

26. *See* Letters from Deputy Comptroller of the Currency (Nov. 11, 1974 & Jan. 15, 1975), *reprinted in* ALI-ABA COURSE OF STUDY MATERIALS, FEDERAL SECURITIES MARKET REGULATION 316-22 (1976) [hereinafter cited as ALI-ABA].

27. *See* United States v. Morgan, 118 F. Supp. 621, 651-52 (S.D.N.Y. 1953); CAROSSO, *supra* note 12, at 367, 502. *See also* note 39 *infra*.

28. *See* W. BROWN, THE DUAL BANKING SYSTEM IN THE UNITED STATES (1968).

29. The Comptroller is their most pervasive regulator. *Id.* at 38-39.

30. National banks must be members of the Federal Reserve System and therefore are subject to supervision by the Board. *Id.* at 38.

31. National banks must obtain insurance from the FDIC, and thus, are subject to its regulation. *Id.* at 38.

32. *See* Securities Act of 1933 Release No. 5491 (April 30, 1974). *But see* Evans, *Regulation of Bank Securities Activities,* 91 BANKING L. J. 611 (1974). *See generally* Public Policy Aspects, *supra* note 5, at 334-36 (concluding that the SEC should have jurisdiction over all financial institutions relative to their participation in securities transactions).

33. *See* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 154 (1972); Carroll v. First Nat'l Bank of Lincolnwood, 413 F.2d 353, 358 (7th Cir. 1969), *cert. denied,* 396 U.S. 1003 (1970).

34. 15 U.S.C. § 77c (a)(2) (1970).

35. 15 U.S.C. § 78c(a)(4) (1970) and 15 U.S.C. § 78c(a)(5) (1970).

36. 15 U.S.C. § 80a-3(c)(3) (1970).

Investment Advisers Act excludes banks from the definition of the term "investment advisor."[37]

It is important to note that regardless of the type of institution assisting in the private placement, an issuer of securities is subject to the regulation of the securities laws. When the bank acts as an agent in providing the private placement service, the transaction must comply with the exemption requirements of the Securities Act for the private offering to avoid registration.[38] Therefore, to the extent that both commercial banks and investment bankers perform the same services — assisting in the private placement of corporate securities — they are equally regulated because the client's private offering exemption must be preserved.[39]

III. REGULATION OF PRIVATE PLACEMENT ACTIVITIES OF COMMERCIAL BANKS

A. The Securities Provisions of the Glass-Steagall Act

1. Sections 16 and 21 — authorization and limitation

Section 16 of the Glass-Steagall Act[40] expressly authorizes banks to

37. 15 U.S.C. § 80b-2(a)(11)(A) (1970).

38. *See* 2 S. GOLDBERG, PRIVATE PLACEMENTS AND RESTRICTED SECURITIES 2-112 to 2-112.1 (1977 rev.). *See also* Securities Act of 1933 Release No. 4552 (Nov. 6, 1962); RESTATEMENT OF AGENCY § 1 (1933).

39. There is no difference in regulatory burdens in private placement activities between investment bankers and commercial banks. *See* COMMERCIAL BANK ACTIVITIES, *supra* note 3, at 55.

The investment banker has a greater range of financing alternatives through securities offerings than does the commercial bank. Typical transactions of an investment banker are:

1. A negotiated underwritten public offering.
2. An underwritten public offering awarded on the basis of publicly invited sealed bids, an investment banker having been retained on a fee basis to shape up the issue.
3. A negotiated underwritten offering to existing security-holders. Here the investment banker enters into a commitment to "stand-by" until the subscription or exchange period has expired, at which time the investment banker must take up the securities not subscribed or exchanged.
4. An underwritten offering to existing security-holders awarded on the basis of publicly invited sealed bids, an investment banker having been retained on a fee basis to render the necessary assistance.
5. A non-underwritten offering to existing security-holders, with an investment banker acting as agent of the seller on a negotiated basis.

United States v. Morgan, 118 F. Supp. 621, 651 (S.D.N.Y. 1953).

40. The statute provides that:

> [National banks shall have the power to exercise] all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers; and in no case for its own account; and the association shall not underwrite, any issue of securities or stock. . . .

12 U.S.C. § 24, para. (Seventh) (Supp. V 1975).

engage in three categories of securities activities:[41] (1) agency transactions; (2) purchasing certain securities for their own account; (3) purchasing and underwriting particular obligations.

The first category can be described as a transaction exemption from the prohibitions of Glass-Steagall, while the latter two represent exempted securities. In this article, the scope of permissible securities activities granted to banks under section 16 will refer to agency transactions alone and not to exempt securities.[42]

The agency transaction exemption permits banks to engage in the business of dealing in the purchase or sale of debt or equity[43] securities if each of four conditions are satisfied:[44]

(a) the bank acts as agent for a customer;
(b) the transactions are without recourse;
(c) the transactions are initiated solely upon the order of the customer; and
(d) the transactions are for the account of the customer and not for the bank's account.

Section 21 of the Act[45] separates the business of "issuing, underwriting, selling or distributing" securities from the business of receiving deposits, subject to check, repayment, or the like. This provision expressly prohibits banks from underwriting, issuing, selling or distributing securities unless permitted under section 16. Thus, sections 16 and 21 are compatible: the latter provision allows banks to engage in the securities activities authorized under section 16.[46]

When construed to be "dealing in securities,"[47] bank participation in

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41. *See Glass-Steagall Act — A History of its Legislative Origins and Regulatory Construction,* 92 BANKING L. J. 38, 40-42 (G. Dunne ed. 1975).

42. Exempt securities under the Glass-Steagall Act present no problem to the question of private placements and, thus, are of no moment for the purposes of this analysis.

43. *See* H.R. REP. NO. 742, 74th Cong., 1st Sess. (1935).

44. These four conditions are directly quoted from New York Stock Exch. v. Smith, 404 F. Supp. 1091, 1097 (D.D.C. 1975), but such interpretation is unequivocally supported by the face of the statute. Notably, the court also relied on legislative history to show that banks can engage in those areas of agency activity to the extent that they were permitted prior to the Glass-Steagall Act. *Id.* at 1097-99. However, the clear language of § 16 indicates that the bank is limited to the specific conditions of agency set forth by the statute, which does not necessarily encompass its traditional role.

45. 12 U.S.C. § 378 (1970) provides:

> [I]t shall be unlawful
>
> (1) For any person, firm, corporation, association, business trust or other similar organization, engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor . . . .

46. *See* H.R. REP. NO. 742, 74th Cong., 1st Sess. (1935).

47. 12 U.S.C. § 24 (Supp.V 1975).

private placements is permitted if the activity qualifies as an agency transaction. If the agency transaction requirements are not met, the activity violates both section 16 (because it limits "dealing in securities" to the activities expressly authorized) and section 21 (because it prohibits securities activities that are not permitted by section 16). This result assumes that if the bank's participation in private placements does not qualify as an agency transaction it would come within the defined terms in section 21 and thus be prohibited.[48] If most of the bank's participation in securities activities satisfies the agency requirements yet one component does not,[49] then the entire activity fails to satisfy the agency authorization.

Briefly, bank participation in private placements of corporate securities does not violate the securities provisions of Glass-Steagall in three situations. The first is where the bank's activities are limited to the conditions of the "section 16-type" agency transaction and such terms are satisfied. The second is where the private placement activity does not involve selling, issuing, distributing, or underwriting. Finally, the third refuge from the prohibitions of Glass-Steagall turns upon whether the activity in question involves a "security" within the meaning of the Act.

2. Sections 20 and 32 — Bank Subsidiaries; Closing the Back Door and The Separate Entity Theory

In many instances private placement activity is not conducted directly through the bank, but rather through a bank subsidiary. Sections 16 and 21 define the proper scope of national bank securities activities when the bank and the association that performs such services constitute a "single entity."[50] The bank and association are so characterized if the securities activities are performed by "an arm or department of the bank."[51] If the association is considered a "separate entity," distinct from the national bank itself, the proper scope of securities

48. This assumes that § 21 covers all conceivable security transactions, except isolated sales, *i.e.*, ventures where the participant would not be in the business of dealing in securities. Since the Glass-Steagall Act was meant to separate the business of banking from the business of investment banking, this assumption seems reasonable. *See also* Board of Governors of the Federal Reserve System v. Agnew, 329 U.S. 441, 448 (1947).

49. *See Description of National Bank Participation in Private Placements Acitivities*, § I *supra*.

50. In Investment Co. Inst. v. Camp, 401 U.S. 617, 626 n.12 (1971), the Court approved the Federal Reserve Board's construction of the concept. *See* note 53 *infra*. *Cf.* Note, *Bank-Sponsored Investment Services: Statutory Proscriptions, Jurisdictional Conflicts, and a Legislative Proposal*, 27 U. FLA. L. REV. 776, 799-800 (1975) (describing the SEC's view that the distinction between the entities has blurred in recent years).

51. Investment Co. Inst. v. Camp, 401 U.S. 617, 626 n.12 (1971). *See* note 53 *infra*.

activities as defined in sections 16 and 21 are inapplicable.[52]

Sections 20[53] and 32[54] of Glass-Steagall were intended to prevent back door entry into securities activities by banks through separate entities.[55] Section 32 forbids the use of interlocking directors, officers and employees between banks and associations "primarily engaged in the issue, flotation, underwriting, public sale, or distribution" of securities.[56] Section 20 prohibits banks from affiliation with any association that is "engaged principally in the issue, flotation, underwriting, public sale, or distribution" of any security. This section defines an affiliate with reference to section 221a(b).[57] Generally, under section 221a(b) an affiliate either controls the bank or is controlled by it through a majority of voting shares or directors.[58] Alternatively, a bank acting through a separate entity which is not an affiliate under section 221a(b) can engage in underwriting and distributing securities.[59] In other words, when a bank cannot engage in securities activities as a single entity it is permitted to do so through a separate entity which is not an affiliate. But in the situation where the bank is conducting securities activities through a separate entity non-affiliate, section 32 prohibitions against interlocking directors, employees and officers apply because this provision is not conditioned on affiliation.

The language of sections 20 and 32, which operates to impose limitations on the activities of separate entity affiliates, does not contain the express agency transaction exemption that is available to single entities

52. The petitioners in Investment Co. Inst. v. Camp, 401 U.S. 617, 626 n.12 (1971), contended that the bank violated sections 20 and 32 of the Glass-Steagall Act because the bank and the common investment fund were "distinct entities." The Court approved the Federal Reserve Board's construction of this problem indicating that § 32 is violated where officers of the bank's trust department simultaneously serve as officers of the investment fund. According to the Board "the fund and the bank constitute a single entity, and the fund would be regarded as nothing more than an arm or department of the bank." *Id.* at 626 n.12. The separate entity theory also is referred to in lower court decisions. *See* National Ass'n of Sec. Dealers, Inc. v. SEC, 420 F.2d 83 (D.C. Cir. 1969), *rev'd on other grounds,* 401 U.S. 617 (1971); Investment Co. Inst. v. Camp, 274 F. Supp. 624 (D.D.C. 1967), *rev'd* 420 F.2d 83 (D.C. Cir. 1969), *rev'd* 401 U.S. 617 (1971).

53. 12 U.S.C. § 377 (1970).

54. 12 U.S.C. § 78 (1970).

55. *See* National Ass'n of Sec. Dealers, Inc. v. SEC, 420 F.2d 83 (D.C. Cir. 1969), *rev'd on other grounds,* 401 U.S. 617 (1971).

56. This provision allows the Federal Reserve Board discretionary authority to promulgate regulations allowing common directors, officers or employees to interlock when it "would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments."

57. 12 U.S.C. § 221a(b) (1970).

58. One definition of an affiliate, conspicuously absent from this section, is a situation in which the affiliate and the bank are under common control, more appropriately described as a bank holding company. *See* note 1 *supra.*

59. A separate entity is covered by § 20 only to the extent that it is an affiliate under 12 U.S.C. § 221a(b) (1970).

through sections 16 and 21.[60] The conspicuous absence of such express statutory language raises the question of whether a "section 16-type" agency transaction, which exempts banks acting through single entities from the prohibitions of Glass-Steagall, also applies to banks acting through separate entity affiliates.[61] In both sections 20 and 21, Congress specified the activity it sought to prevent. An explicit authorization was given for certain agency transactions in section 16, applicable to banks acting through single entities, which specifically exempted such transactions from the prohibitions in section 21. The language of section 20 does not mention any authorized securities activities for bank relationships involving affiliates. Absent any express language or legislative history, no authorization may be implied.[62] Thus, under Glass-Steagall, the proper scope of securities activities for a bank may differ depending upon whether such activities are conducted by a single entity, an affiliate, or separate entity non-affiliate. If participation in private placements is a legitimate affiliate activity, then its shield from the prohibitions of Glass-Steagall must come from something other than the agency transaction.

B. An Application of the Glass-Steagall Act to Bank Participation in Private Placement Activities

1. Section 16 Agency Transactions

The four components that comprise bank participation in the private placement of corporate securities must individually and collectively conform to the agency transaction requirements. If a transaction satisfies the conditions of section 16, an independent exemption from the prohibitions of Glass-Steagall is created.

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60. Although §§ 20 and 32 directly limit the conduct of banks and only indirectly provide limitations on the affiliate or separate entity, it is recognized that the same restrictions will ensue regardless of which perspective is taken. *See* Investment Co. Inst. v. Camp, 401 U.S. 617, 626 n.12 (1971).

61. Agency transactions can be considered a distribution of securities under the Securities Act. "Best efforts" underwritings are an example of the performance of a pure agency function that is a distribution. *See* Dale v. Rosenfeld, 229 F.2d 855 (2d Cir. 1956). A best efforts underwriting occurs when the investment banker sells the corporate-issuer's securities as an agent as opposed to purchasing the securities from the issuer and selling them as a principal. *See* 1 L. LOSS, SECURITIES REGULATION 171 (2d ed. 1961).

62. In Investment Co. Inst. v. Camp, 401 U.S. 617, 629 (1971), the Court stated that the Glass-Steagall Act sought to eliminate the security affiliates from national banks. The argument in this article is consistent with the Court's interpretation. Our analysis indicates that the limitations placed on the security affiliate are more restrictive than banks because affiliates cannot engage in agency transactions. This view comports with the policy underlying the Glass-Steagall Act of eliminating security affiliates. *But see id* at 401 U.S. at 626, n.12, where the Court asserted that "the limitations that the banking laws place on the activities of national banks are at least as great as the limitations placed on the activities of their affiliates."

The bank's role in placing securities may involve financial counseling, referrals, solicitations, and negotiations.[63] In performing such functions, the bank acts as an agent for its client.[64] It does not assume an economic risk as to the securities sought to be placed. The bank does not purchase the private placement for its own account. This arrangement must be distinguished from a "firm commitment" underwriting in which the issuer is assured a specific amount of money because the risk of sale is shifted to the underwriter.[65] The bank, as agent, is without recourse to the client's securities.[66]

It could be argued that the bank's analysis and advice concerning the client's financing needs is not a private placement transaction "initiated solely upon the order of the customer" as required by section 16.[67] Two reasonable interpretations could be given to the meaning of the word "solely." The first is that the client is not to receive advice concerning the undertaking of a private placement alternative. This restrictive view interprets the word "solely" in isolation from the phrase "upon the order of the customer." The second position construes the word "solely" in conjunction with the phrase "upon the order." This would allow the bank to advise the client provided that the bank does not exercise discretionary authority over the decision to proceed with the private placement. The total discretion to undertake the placement must rest with the corporate client. The latter interpretation is preferred because it assumes that Congress intended all the words to be integrated.

Before bank participation in private placements can be deemed to comport with section 16, three other problems must be considered. First, since the agency transaction is applicable only to the "business of dealing in securities," does the bank's private placement activity constitute "dealing" within the terms of the statute? Second, does the bank's private placement activity violate the absolute prohibition on underwriting contained in the "Section 16-type" agency transaction exemption? Third, is the bank's tender of its private placement service for

63. *See Description of National Bank Participation in Private Investment Activities,* § I *infra.*

64. *See* Restatement of Agency §§ 1, 17, and 50 (1933).

65. "The issuer simply sells the entire issue outright to a group of securities firms, represented by one or several 'managers' or 'principal underwriters' or 'representatives'. They in turn sell at a price differential to a larger 'selling group' of dealers and they sell at another differential to the public." 1 L. LOSS, SECURITIES REGULATION 164 (2d ed. 1961).

66. This assumes that the bank has not contracted to repurchase the placed securities from the investor.

67. 15 U.S.C. § 24 (Supp. V 1975). *See* notes 43-44 and accompanying text *supra.* The question of what constitutes a customer relationship for compliance with § 16 remains unresolved. In New York Stock Exch., Inc. v. Smith, 404 F. Supp. 1091, 1097 (D.D.C. 1975) the plaintiffs argued that for a bank service to satisfy the agency exemption it cannot be used initially to attract customers.

a fee a "security" within the meaning of Glass-Steagall?

2. Standards for Interpretation of the Securities Provisions

If bank participation in private placement activities does not involve the issuance, sale, distribution, dealing, or underwriting of a security and the bank's tender of its private placement service is not itself a security, then such participation is outside the prohibitions of sections 16 and 21, and 20 and 32 of Glass-Steagall.[68] There are three potential sources for interpreting these terms: (1) the face of the act and its legislative history; (2) pronouncements by the supervisory agencies; and (3) judicial decisions. Since neither the Act itself nor its legislative history provides adequate guidelines for interpreting these specific securities terms, this article will focus on the latter two categories.

a. regulatory interpretation

Two private letters from the Deputy Comptroller of the Currency interpreted the impact of the section 20 and 21 type limitations on bank participation in private placements.[69] These letters responded to requests by two banks which sought permission to form and operate a subsidiary[70] that would participate in private placements.

The Deputy Comptroller stated that a bank's counseling which includes preparation of alternative plans of financing and advice concerning the selected plan's execution does not contravene Glass-Steagall. These activities do not involve issuing, underwriting, selling or distributing securities.[71] On the other hand, the Deputy Comptroller contended that banks cannot engage in "firm commitment" or "best efforts" underwriting. "These activities rest at the very heart of the business known as investment banking and undoubtedly constitute a proscribed underwriting, selling, or distribution of securities."[72]

The extent to which a bank may (1) solicit potential investors for its client's securities, (2) participate in the negotiations between the client and the potential purchaser, and (3) charge its client a fee is described as "the 'twilight zone' of acceptable banking practices under Glass-

68. *See Sections 16 and 21 — Authorization and Limitation,* § III(A)(1) *supra.*

69. *See* ALI-ABA, *supra* note 26, at 316-22 (Nov. 11, 1974 letter from John D. Owin, Deputy Comptroller of the Currency; Jan. 15, 1975 letter from Justin T. Watson, Deputy Comptroller of the Currency).

70. The fact that the proposed private placement activity was to take place in an affiliate may account for why the agency transaction was not interpreted.

71. ALI-ABA, *supra* note 26, at 320. *But see* Nov. 11, 1974 letter which stated that the detailed financing plans created by the bank were "close to the borderline between the permissible activity of financial counseling and the business of investment banking." *Id.* at 317.

72. *Id.* at 320.

Steagall."[73] While the referral and solicitation components of the bank's service were not deemed in conflict with Glass-Steagall, the Deputy Comptroller did observe that "[a] banker who participates to any substantial degree in the direct negotiations between client and purchaser may well be engaged in underwriting, selling or distributing securities in violation of the Glass-Steagall Act."[74]

A contingent fee charged by the bank based on the success of the placement was considered inconsistent with the Deputy Comptroller's prohibition against best efforts underwritings.[75] The letter indicated that a contingent fee arrangement would produce strong promotional pressures for the bank to locate an investor.[76] Therefore, the fee must be based on criteria other than the placement's success.[77]

Although these interpretative letters sought to define the limitations of bank participation in private placements, they left unanswered the propriety of certain bank activities, primarily those falling within the "twilight zone." The Deputy Comptroller presented no standards for interpreting the meaning of the specialized words used in sections 20 and 21.[78] However, such guidelines are essential to determine the impact of Glass-Steagall on banks' private placement activities.

b. judicial interpretation

To date, the crucial case construing the securities provisions of Glass-Steagall is *Investment Company Institute v. Camp.*[79] Here the Supreme Court confronted the issue of whether a national bank had the authority under the terms of Glass-Steagall to operate a collective investment fund. The fund was a service of the bank's trust department. Customers would deposit a minimum amount of money under an authorization allowing the bank to commingle and invest their money with that of other participants in the plan. The customer would receive from the bank a unit of participation representing an undivided interest in the assets of the fund.[80]

73. *Id.* at 321.

74. *Id.* at 318. The logic of the Deputy Comptroller appears inconsistent in allowing the bank to participate in negotiations to even an insubstantial degree. *See id.* at 321. *See also* MEMORANDUM, *supra* note 23, at 10.

75. *See* note 69 *supra.*

76. ALI-ABA, *supra* note 26, at 321.

77. The Deputy Comptroller has suggested that time expended is a proper basis for the fee. *Id.*

78. These specialized words are "underwriting," "distribution," "selling," "issuing," and "security." *See* 12 U.S.C. §§ 20, 21, 32 (1970).

79. 401 U.S. 617 (1971).

80. The Court of Appeals in National Ass'n of Sec. Dealers v. SEC, 420 F.2d 83 (D.C. Cir. 1969), *vacated,* 401 U.S. 617 (1971), described the operation of the plan as follows:

> Under the Bank's plan, a customer deposits a minimum of $10,000 under a broad

The Court evaluated the impact of Glass-Steagall on the involvement of the bank in the common investment fund through two methods of analysis. First, it looked to the express language of the statute, and second, the policy considerations contemplated by Congress when the Act was passed. The Court found that the bank's involvement in the investment fund was in contravention of sections 16 and 21.[81] It stated:

> No provision of the banking law suggests that it is improper for a national bank to pool trust assets, or to act as a managing agent for individual customers, or to purchase stock for the account of its customers. But the union of these powers gives birth to an investment fund whose activities are of a different character.[82]

The purchase of stock by the fund was viewed as a purchase for the bank's own account.[83] This was held to be in violation of the section 16 agency transaction, which limits the purchasing and selling of stock to "the account of customers, and in no case for its [the national bank's] own account . . . ."[84] The written evidence of participation, i.e., the units of participation, in the fund's assets given to the customer was deemed an "issuing" and "selling" in violation of the section 21 limitations.[85]

The petitioners further contended that operation of the fund constituted "underwriting" and "distribution" in violation of sections 16 and 21.[86] While the Court did not discuss this question directly, it did hold, after the propriety of the bank's investment fund had been analyzed through the policy considerations underlying the Act, that the

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authorization permitting the Bank to invest the funds with those of other participants in the plan. The customer is a principal, and the Bank, his managing agent. The customer receives an undivided interest in the fund, expressed as a unit of participation. These units are redeemable at net asset value, and are not transferable except to other participants in the plan. No sales load or redemption charge can be imposed.

The Account is registered as an investment company under the Investment Company Act, and the units of participation are registered as securities under the Securities Act of 1933, 15 U.S.C. Sec. 77a *et seq.* (1964). The Bank is both investment advisor to the Account and statutory underwriter for the units of participation issued. . . . The Comptroller's regulations provide that the units of participation or shares may not be marketed through regular channels of public distribution; participation is offered and publicized only through the Trust Department. 12 C.F.R. § 9.18(b)(5)(iii) and (iv) (1968). The Bank's compensation is limited by regulation to the sum of the fees normally charged for separate management of such accounts, namely, ½ of 1 percent per annum of the average net asset value of the fund. 12 C.F.R. § 9.18(b) (12). Finally and most important, the Account is under the supervision of the Comptroller like other banking functions. This includes review of the fund's investments to see that they are in accordance with sound fiduciary principles.

420 F.2d at 86.

81. 401 U.S. at 625.

82. *Id.* at 624-25. *But see id.* at 645 (Blackmun, J., dissenting).

83. *Id.* at 625.

84. *See* Glass-Steagall Act of 1933, § 16, 12 U.S.C. § 24 (Supp. V 1975).

85. 401 U.S. at 625.

86. Section 16 of the Glass-Steagall Act of 1933, 12 U.S.C. § 24 (Supp. V 1975), states that a bank "shall not underwrite any issue of securities or stock."

bank's involvement constituted an "*underwriting,* issuing, selling, and *distributing* of securities in violation of §§ 16 and 21 of the Glass-Steagall Act."[87] However, no express rationale was given to support the finding that the bank's involvement in the fund came within the underwriting and distributing prohibitions. Thus, there is a strong argument that the Court arrived at this determination based solely on a policy analysis. It construed the common investment fund as the sale of an investment rather than the sale of a fiduciary service[88] and stated that:

> [Fiduciary services], unlike the operation of an investment fund, do not give rise to a promotional or salesman's stake in a particular investment; they do not involve an enterprise in direct competition with aggressively promoted funds offered by other investment companies; they do not entail a threat to public confidence in the bank itself; and they do not impair the bank's ability to give disinterested service as a fiduciary or managing agent.[89]

In *Investment Company Institute,* the Comptroller contended that the units of participation issued by the bank's investment fund were not a "security" within the meaning of Glass-Steagall.[90] The Court, in determining this issue, neither cited the definition of a security contained within the Securities Act[91] nor discussed the eminent test set out in *Securities Exchange Commission v. W. J. Howey*[92] and its progeny. Rather it analogized the prohibition against investment trusts to com-

87. 401 U.S. at 639.

88. *Id.* at 638 ("In short there is a plain difference between the sale of fiduciary services and the sale of investments.") *But see id.* at 645 (Blackmun, J., dissenting).

89. *Id.* at 638.

90. *Id.* at 634-35.

91. *See* Securities Act of 1933, § 2(1), 15 U.S.C. § 77b(1) (1970). It has been contended that the Securities Act of 1933 is the standard for interpreting the meaning of the terms within Glass-Steagall. *See* Brown, *The Legality of Bank-Sponsored Investment Services,* 84 YALE L. J. 1477 (1975). Not only did the same Congress enact both pieces of legislation, but common terminology (including "security," "sale or sell," "issuer," "underwriter," and "dealer") is specifically addressed in each. *See* note 100 *infra.* In the absence of either adequate legislative history or statutory definitions to interpret the concepts within Glass-Steagall, one might reasonably assume an interrelationship between the standards for interpretation of both acts. *See* Investment Co. Inst. v. Camp, 274 F. Supp. 624, 642 (1967), *rev'd,* 420 F.2d 83 (D.C. Cir. 1969), *rev'd,* 401 U.S. 617 (1971). Judicial authority, however, militates against this conclusion. *See* notes 93-101 and accompanying text *infra.*

92. 328 U.S. 293 (1946). Under § 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1) (1970), an "investment contract" is one of many terms used to define a "security." The Supreme Court of the United States, in SEC v. Howey, 328 U.S. 293 (1946), defined the meaning of an investment contract as a scheme that involves "an investment of money in a common enterprise where the investor is led to expect profits solely from the efforts of others." *Id.* at 293. Other cases generally have followed *Howey* in attempting to define the meaning of the term "security" for the purposes of the federal securities laws. *See* United Housing Foundation v. Forman, 421 U.S. 837 (1975); Grenader v. Spitz, 537 F.2d 612 (2d Cir. 1976); SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974).

mon investment funds.[93] The importance of this argument was diminished by the Court's assertion that "in any event," whether or not its analogy was correct, the policies for which Glass-Steagall was enacted left no doubt that a unit of participation in the investment fund was security.[94] Thus, without benefit of explanatory comment, the standard of interpretation of "security" was based on the policies of the Act.[95]

Following this precedent, the District Court for the District of Columbia, in *New York Stock Exchange, Inc. v. Smith,*[96] reasoned that the underlying policies of Glass-Steagall are different from those of the Securities Act[97] and, therefore, the definitions provided in the Securities Act cannot be used to interpret the meaning of Glass-Steagall. It found decisive that the Supreme Court in *Investment Company Institute* did not refer to the *Howey* test.[98] The court stated that the material question in determining the impact of the provisions of Glass-Steagall is whether such activity comports with the policies of the Act.[99]

We have seen a judicial unwillingness to interpret the meaning of the word "security" in the Glass-Steagall Act in relation to the Securities Act definition. Thus, it should be noted that by analogy, this repudiation of the Securities Act standard also may extend to the other terms that are in common between the two Acts.[100]

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93. 401 U.S. at 635.

94. *Id.* In the lower court decision, National Ass'n of Sec. Dealers v. SEC, 420 F.2d 83, 89 (D.C. Cir. 1969), *vacated,* 401 U.S. 617 (1971), the Court of Appeals stated that the specialized and expansive definitions of the words "security" and "underwriter" under the Securities Act "cannot be imported wholesale into the Glass-Steagall Act. . . ." The court reasoned that each act serves different purposes and was enacted to protect against different risks. *Id.* The Securities Act was designed to protect investors through disclosure of information. The Glass-Steagall Act sought to protect banks and bank depositors from insolvencies caused by the investment of bank assets in speculative securities. *Id.*

The district court in Investment Co. Inst. v. Camp, 274 F. Supp. 624 (D.D.C. 1967), *rev'd,* 420 F.2d 83 (D.C. Cir. 1969), *rev'd,* 401 U.S. 617 (1971), left open the question of whether the standards for interpretation of the Securities Act and the Glass-Steagall Act are co-extensive. The district court without referring to authority or utilizing analysis, asserted that nothing in §§ 16 and 21 suggests that the word "security" should be given a narrow construction. The court's opinion concluded that the units of participation in a bank-operated investment fund were a "security" because it comported with the policy and purposes for which Congress enacted the Glass-Steagall Act. 274 F. Supp. at 639.

95. 401 U.S. at 635-36.

96. 404 F. Supp. 1091 (D.D.C. 1975).

97. *Id.* at 1101.

98. *Id.*

99. *Id.*

100. This is not to say that other common terms could not have identical definitions, but only that such identity must derive from different sources, *i.e.,* the same policy determination must be found to underlie the relevant portions of each act. The Securities Act has the following terms in common with Glass-Steagall: (1) "security," § 2(1), 15 U.S.C. § 77b(1) (1970); (2) "sale or sell," § 2(3), 15 U.S.C. § 77b(3) (1970); (3) "issuer," § 2(4), 15 U.S.C. § 77b(4) (1970); (4) "underwriter," § 2(11), 15 U.S.C. § 77b(11) (1970); (5) "dealer," § 2(12), § 77b(12) (1970).

The Supreme Court in *Investment Company Institute* appeared to be using a two-step analysis: first, a construction based on the face of the statute, and second, one urged by the policies of Glass-Steagall.[101] This article, however, has indicated that this two-step approach is actually a one-step analysis based solely on the policies of the Glass-Steagall Act. If this is the case, then the meanings of the specialized terms within the securities provisions, which include "underwriting," "distributing," "issuing," "selling," "dealing" and "security," are to be determined with referrence to the underlying policy considerations of Glass-Steagall as interpreted by the Supreme Court.

IV. POLICY CONSIDERATIONS

In *Investment Company Institute v. Camp,*[102] the Court identified the policy considerations underlying the securities provisions of Glass-Steagall. As the Court observed:

> The Glass-Steagall Act reflected a determination that policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the investment banking business were outweighed by the "hazards" and "financial" dangers that arise when commercial banks engage in the activities proscribed by the Act.[103]

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101. *See* Barfield, *The Legal Status of a National Bank's Automatic Stock Investment Service Under Sections 16 and 21 of the Glass-Steagall Act of 1933,* 27 VAND. L REV. 1217 (1974); COMMERCIAL BANK ACTIVITIES, *supra* note 3, at 85.

In his brief dissent, Mr. Justice Blackmun argued that the Court's opinion was "based more on what is deemed to be appropriate and desirable national banking *policy* than what is a necessary judicial construction of the Glass-Steagall Act of almost four decades ago." 401 U.S. at 642-43. He reasoned that such a policy determination was beyond the province of any judicial authority, and "would leave to Congress the privilege of now prohibiting such national bank activity if that is its intent and desire." *Id.* at 644.

102. 401 U.S. 617 (1971).

103. *Id.* at 630. There are other policy considerations not discussed in the *Camp* decision:

(1) *Tying Arrangements*

> Tying arrangements are possible where the seller possesses substantial market power or monopoly power over a particular product (tying product) so that it can use its power over that product to acquire market power over another product (tied product). Since banks possess substantial market power with respect to a variety of financial services especially credit, banks may be encouraged to use that market power to increase their power with respect to other financial services which they are authorized to provide.

Public Policy Aspects, *supra* note 5, at 21. This above-described activity is in violation of the federal antitrust laws. *See* Sherman Antitrust Act, § 1, 15 U.S.C. § 1 (1970). *But see* H.R. REP. NO. 1747, 91st Cong., 2d Sess. 18 (1970) for possibilities of voluntary tie-in which are not illegal. For possibilities of tying arrangements with trust department managed accounts see Lybecker, *Regulation of Bank Trust Department Investment Activities: Seven Gaps: Eight Remedies,* 2 SEC. REG. L. J. 122 (1974).

(2) *The Chinese wall problem. See* Hanly v. SEC, 415 F.2d 589, 595-97 (2d Cir. 1969); Chazen, *Reinforcing the Chinese Wall: A Response,* 51 N.Y.U. L. REV. 552 (1976); Lipton & Mazur, *The Chinese Wall: A Reply to Chazen,* 51 N.Y.U. L. REV. 579 (1976).

These concerns can be categorized conveniently under the general headings of impairment of the bank's financial stability and conflicts of interest. In this section, the Court's discussion is presented and examined.

A. Impairment of Financial Stability

The stability impairment policy focuses on preserving the solvency of the bank by prohibiting activities which may potentially weaken its financial position. Congressional concerns in enacting Glass-Steagall were not limited to the possibility of unwise stock or security investments by banks, but also included the likelihood of more subtle difficulties which arise when a commercial bank enters the field of investment banking.[104] The Court emphasized four principal threats to the financial solvency of a bank which are posed by the relationship between an investment fund and a commercial bank.[105]

First, promotional pressures produced by competition between the common investment fund and mutual funds may lead to imprudent practices by the bank in attempting to out-perform mutual funds.[106] Second, promotional incentives created by the "salesman's stake" in the securities activities may tempt the bank into making unsound "loans to customers with the expectation that the loan [will] facilitate the purchase of stock and securities."[107] Furthermore, credit may be made more freely available to companies in whose stock the bank and the fund have invested.[108] Third, the bank's solvency is dependent on public confidence. Faith in the bank's reputation for restraint would be jeopardized through unsuccessful management of its securities activities.[109] The necessity to maintain public trust may give rise to the inclination to strengthen its securities investments through unsound

104. *Id.* at 630-31.

105. It should be noted that when the Court discussed some of these dangers, it was actually referring to bank security affiliates. Nevertheless, the Court emphasized that "the promotional and other pressures incidental to the operation of an investment fund . . . involve the same kinds of potential abuses that Congress intended to guard against when it legislated against bank security affiliates." *Id.* at 637.

106. *Id.* at 636-37. A bank which operates an investment fund is subject to different factors which create promotional pressures. First, since the bank would be in the business of interesting prospective customers in its mutual fund, it would be concerned that the fund would perform well. *Id.* In addition, the Court noted that the mechanics of running an investment fund also might generate promotional incentives. In the case where interests in the fund were redeemed, the bank would have to choose between "selling stocks from the fund's portfolio or of selling new participations to cover redemptions. The bank might have a pecuniary incentive to choose the latter course in order to avoid the cost of stock transactions undertaken solely for redemption purposes." *Id.* at 636.

107. *Id.* at 632.

108. *Id.* at 631.

109. *Id.* at 632, 634, 637.

loans. Finally, the possibility exists that the goodwill of general depositors may be impaired if such customers suffer loss on securities investments purchased from, or in reliance on, the bank or its affiliate.[110]

1. Application to Bank Private Placement Activity

The bank's facilitation of private placements presents no risk of investment loss. The bank neither purchases the security from the issuer-client as in a "firm commitment" underwriting[111] nor guarantees the successful completion of the placement. Therefore no threat is posed to bank solvency from assets at risk in securities investments by either the bank or its affiliate from the participation in private placement activities.[112]

Due to the extensive supervision and regulation of national banks by various federal agencies, there is little temptation to make unsound loans to facilitate or complete successful private placements. National banks must periodically report their condition to the Comptroller of the Currency, exhibiting in detail their resources and liabilites.[113] The Comptroller can order thorough examinations of the affairs of member banks and their affiliates.[114] The Federal Reserve Board monitors the character and amount of the loans of its member banks to insure that extensions of credit are not imprudent.[115] If the Federal Deposit Insurance Corporation (FDIC) finds that the bank's directors or trustees have engaged in unsound methods of banking, the bank's insurance may be terminated.[116] In addition, the FDIC has the power to issue cease and desist orders if the bank is involved in unsound or illegal banking practices.[117]

As noted earlier,[118] the Deputy Comptroller's interpretation of Glass-Steagall prohibits the bank from charging a contingent fee based on the successful completion of the private placement. A contingent fee would strongly promote the pressures that may give rise to unsound loans in the manner described. The fee must be based on considerations other than the success of the offering, such as the time expended.[119] If the

110. *Id.* at 631.
111. *See* note 65 and accompanying text *supra.*
112. *See* COMMERCIAL BANK ACTIVITIES, *supra* note 3, at 64.
113. 12 U.S.C. § 161 (1970).
114. 12 U.S.C. § 481 (1970).
115. 12 U.S.C. §§ 301, 483 (1970).
116. 12 U.S.C. § 1818 (1975).
117. *Id.*
118. *See Regulatory Interpretation,* § III(B)(2)(a) *supra,* and ALI-ABA, *supra* note 26, at 325.
119. *See* note 77 *supra.*

bank's compensation is based on those other factors, promotional pressures, which may cause the bank to make unsound loans, are greatly lessened.

Bank participation in the private placement of a particular issuer will not weaken public confidence in the event the issuer fails or its security performs poorly. A private placement is not exposed to public scrutiny. The issuer's securities are placed with a small group of sophisticated investors,[120] thus avoiding the public disclosure of a registration statement ordinarily required by the Securities Act.[121]

The loss of customer goodwill by those investors who purchased part of the client's offering in reliance on the bank's participation is inapplicable to private placements. The investors who purchase the client's securities must be sophisticated and have the ability to "fend for themselves,"[122] if the transactions are to be exempt from the federal securities laws. The reduction of customer goodwill contemplated by the Court in *Investment Company Institute* involved general depositors and members of the public sufficiently distinguishable from the small group of sophisticated investors who purchase private offerings.

The type of competition between the commercial bank and the investment banker for the private placement market does not create the financial dangers contemplated by Congress in Glass-Steagall since the competition does not concern investment decisions.[123] The bank would be competing with the investment banker only as to the quality and cost of the advice given to the client, as opposed to competing over an investment decision between a bank owned investment fund and a mutual fund as recognized by the Court in *Investment Company Institute.*[124]

B. Conflict of Interest Policy

The term conflicts of interest is meant in its *potential* sense: a potential conflict of interest exists when the possibility of an active conflict choice might be expected to develop from a given relationship.[125] This

120. *See* Securities Act of 1933, § 4(2), 15 U.S.C. § 77d(2) (1970), and SEC Rule 146, 17 C.F.R. § 230.146 (1977). *See also* Securities Act of 1933 Release No. 5491 (April 30, 1974). For discussion of the requirements of the statutory nonpublic offering exemption pursuant to § 4(2), *see* SEC v. Ralston Purina Co., 346 U.S. 119 (1953); Woolf v. S. D. Cohn & Co., 515 F.2d 591 (5th Cir. 1975).

121. *See* § 5, 15 U.S.C. § 77e (1970).

122. *See* Securities Act of 1933, § 4(2), 15 U.S.C. § 77e (1970), and SEC Rule 146, 17 C.F.R. § 230.146 (1977).

123. *See* New York Stock Exch., Inc. v. Smith, 404 F. Supp. 1091 (D.D.C. 1975).

124. 401 U.S. at 636-37.

125. *See* E. Herman, Conflicts of Interests: Commercial Bank Trust Departments 8 (1975) (published report to Twentieth Century Fund Steering Committee on Conflicts of Interests in the Securities Markets) [hereinafter cited as Conflicts of Interests].

situation differs from an actual conflict of interest where conflict choices have already been made.[126]

In *Investment Company Institute,* the Supreme Court noted three conflict of interest situations that may arise in a relationship between a commercial bank and a common management fund. First, the Court stated that where the bank has a promotional interest in selling the fund's services to its customers, pressures are created which conflict with the bank's ability to give disinterested advice.[127] Second, due to the possibility that the bank would unload the fund's holdings on its managed trust accounts, a potential conflict exists in the bank's relationship between the investment fund and the managed trust assets.[128] Third, the bank, through its relationship with creditors and debtors in its commercial banking function may exploit confidential information for the benefit of the fund.[129]

1. Application to Bank Private Placement Activity

A potential conflict of interest may arise when the bank pursues its financial counseling role. The bank in designing alternatives for long-term financing has a bias in favor of private placements in which its participation would generate a further fee as opposed to the recommendation of a public offering, an alternative in which the bank cannot participate.[130] The force of this potential conflict is mitigated because many corporations have only a limited range of long-term financing options. They may be neither financially secure enough nor sufficiently large to be a candidate for a public offering, which takes considerable time and expense. If a corporation's capital requirements were immediate, then, a public offering might be unsuitable. No potential conflict exists when banks advise clients without a public offering alternative.[131]

A potential conflict could arise where the bank participates in a private placement to bolster the client's loan commitments to the bank. This situation might occur where the bank initially made a loan to a corporate-borrower whose financial stability has subsequently eroded. The bank, not wishing to commit any more of its funds to help secure its initial loan, may advise the borrower to raise additional capital through a private placement. This occurrence is unlikely because the investors who purchase stock subject to private placements are sophisticated investors and have access to information concerning the

126. *Id.* at 7.
127. 401 U.S. at 633, 636.
128. *Id.* at 633.
129. *Id.* at 637-38.
130. *See* BUS. WEEK, *supra* note 5, at 64.
131. *See* note 14 *supra,* and Public Policy Aspects, *supra* note 5, at 328-329.

issuer which enables them to fend for themselves.[132]

Bank placement of a portion of those private offerings in which it participates into trust accounts under the management and control of the bank gives rise to a potential conflict of interest.[133] This situation can be prevented by specific administrative regulation.[134] The bank is a fiduciary while acting in the capacity of a trustee.[135] Funds held by the bank as fiduciary are prohibited from being invested in the securities of an organization in which the banks' "best judgment" might be influenced.[136] One might argue that the relationship between an issuer attempting a private placement and a bank in participating in such placement may affect the "best judgment" of the bank in acquiring the securities on behalf of trust accounts. Under these circumstances securities placed by the bank in its managed trust accounts could be viewed as a prohibited self-dealing.[137]

The bank through its financial counseling may have access to confidential information concerning its client. This knowledge could be exploited by the bank's trust department.The use of such inside information is prohibited by the anti-fraud provisions of the federal securities laws to which the bank's activities are subject.[138] The potential for acquiring and ultimately misusing inside information is no greater with respect to private placement activity, than many other commercial bank activities, such as loan services.

The weakness of the conflicts of interest aspect of the policy test is

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132. *See* Securities Act of 1933, § 4(2), 15 U.S.C. § 77d(2) (1970), and SEC Rule 146, 17 C.F.R. § 230.146 (1977). *See, e.g.*, COMMERCIAL BANK ACTIVITIES, *supra* note 3, at 70 ("In no instances was any surveyed placement used to pay down a loan that had been classified as substandard or worse by the bank, its auditors, or examiners. Nor were there any cases in which the loans paid down had been renegotiated to accommodate financial difficulties of the issuer.").

133. The subcommittee which considered the Glass-Steagall Act prior to its passage believed that the separation of banks from security affiliates would alleviate the fear that the independent judgment by which the fiduciary services were exercised would be affected adversely by the security affiliate. *See Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency,* 71st Cong., 3d Sess., Part 1 at 1064 (1931). On occasion banks have unloaded a portion of the private placement in which they had participated on portfolios under their control. *See* Conflicts of Interests, *supra* note 125, at 47-48; MEMORANDUM, *supra* note 23, at 8; BUS. WEEK, *supra* note 5, at 56. *But see* COMMERCIAL BANK ACTIVITIES, *supra* note 3, at 65, 78-79.

134. For examples of administrative regulations concerning national banks with regard to private placement activities, *see* COMMERCIAL BANK ACTIVITIES, *supra* note 3, at 79-80.

135. 12 C.F.R. § 9.1(c) (1977).

136. 12 C.F.R. § 9.12(a) (1977) ("Unless lawfully authorized by the instrument creating the relationship, or by court or by local law . . .").

137. 12 C.F.R. § 9.12(b)(1) (1977) ("[unless] lawfully authorized by the instrument creating the relationship or by court order or by local law . . .").

138. *See* SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1977); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974); Financial Industries Fund, Inc. v. McDonnell Douglas Corp., 474 F.2d 514 (10th Cir. 1973); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969).

realized because potential conflicts can be envisioned in almost every circumstance where an enterprise performs two or more closely related functions for different clients.[139] Potential conflicts of interest ought not to be a sufficient ground in itself to prohibit bank involvement. The conflicts of interest policy considerations should be limited to actual conflicts in which the activity clearly does not serve the public interest, as opposed to prohibiting various arrangements of hypothetical conflicts which have only the potential of becoming abusive.[140]

V. CONCLUSION

This article has assessed the impact of the securities provisions of Glass-Steagall on bank participation in the private placement of corporate securities. We have examined the Act itself and its application to bank securities activities conducted through the bank or a subsidiary. The propriety of bank securities activities, particularly private placements, cannot be determined without examining the meaning of the specialized terms used in the provisions.

Neither the Act nor its legislative history provide an adequate source for interpretation. Moreover, this article has rejected the use of a definition analysis based on the Securities Act of 1933. We have looked to the Supreme Court of the United States in its role as the final authority interpreting legislative intent. Through examining the Court's opinion in *Investment Company Institute v. Camp,* we have noted the emergence of a policy test which provides guidelines for judging the legality of bank involvement in securities activities. This standard consists of two different policy considerations. The first is whether such securities activities impair the financial stability of the bank, and the second is whether they give rise to potential conflicts of interest between the bank and other relevant parties.

It has been submitted that although bank participation in private placement activities does not impair the financial health of the banking enterprise, it appears to offend the conflicts of interest aspect of Glass-Steagall as determined by the Court. If this policy test were to be applied strictly to private placements, then such activities would be prohibited to banks because of apparent potential conflicts of interest. Nonetheless, the application of this test may produce an untenable result. While one can conceive of many potential conflicts of interest where a bank performs private placement services for corporate clients, regulatory safeguards should mitigate the likelihood that potential con-

139. Conflicts of Interest, *supra* note 125, at 8-9.

140. *See* Note, *The Legality of Bank-Sponsored Investment Services,* 84 YALE L. J. 1477, 1500 (1975).

flicts will lead to actual abuses.The interest of the public may be better served by permitting banks to perform the capital raising function of private placements despite potential conflicts rather than eliminating such activity completely.

A Different Look at the Taxation of Corporate Distributions and Shareholder Gain

Charles R. O'Kelley, Jr. *

The taxation of corporate distributions and shareholder gain is an area of the Internal Revenue Code which has fostered a seemingly never-ending yet never-successful attempt by the Courts and Congress to design a coherent, non-discriminatory regime. In this article, Mr. O'Kelley sets forth a proposal for a logical system for treating corporate distributions to shareholders which would strengthen the double tax scheme, and eliminate its present loopholes.

The present scheme of corporate-shareholder taxation subjects a corporation's taxable income to the corporate tax.[1] The after-tax earnings of the corporation may be accumulated provided the corporation is not a personal holding company[2] or is not subject to the accumulated earnings tax.[3] Upon distribution of a corporation's after-tax earnings in the form of a dividend, each non-corporate recipient shareholder includes in his or her gross income the dividend's fair market value.[4]

The burden of this double taxation of the gain recognized by a corporation may be greatly reduced if the distribution qualifies as a redemption under section 302(a) of the Internal Revenue Code, as a partial liquidation under section 331(a)(2), or as a complete liquidation under section 331(a)(1). Such distributions are treated as being in part

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1. Pursuant to I.R.C. § 11 corporate earnings are subject to a flat rate tax at the corporate level. For taxable years ending after December 31, 1974 and before January 1, 1979, § 11 provides for a tax equal to the sum of (1) 20% of the portion of taxable income not in excess of $25,000, (2) 22% of the portion of taxable income in excess of $25,000, but not in excess of $50,000, and (3) 48% of the portion of taxable income in excess of $50,000.

2. I.R.C. §§ 541-547.

3. I.R.C. §§ 531-537.

4. I.R.C. §§ 301, 316. The first $100 of a dividend may qualify for exclusion. I.R.C. § 116.

or full payment in exchange for the stock of the recipient shareholder, and the shareholder is, therefore, entitled to capital gains treatment for any gain, rather than being required to include in his or her gross income the distribution's value.[5] Concerning complete liquidations, Code section 337 allows a further reduction in the burden of the double-tax system by exempting from the corporate tax most gain recognized by a corporation after the adoption of a plan of complete liquidation. Likewise, Code sections 311 and 336 exempt a corporation from taxation of the appreciation in value of its property if such property is distributed to its shareholders with respect to its stock or in partial or complete liquidation. Together, sections 311, 336, and 337 provide significant opportunities for a corporation to avoid taxation on the appreciation in value of its assets.

These present provisions discriminate against continuing corporations,[6] and Congress has been unable or unwilling to eliminate this inequity by strengthening the double tax system.[7] For instance, Code section 341 requires that a shareholder's gain from the liquidation of a "collapsible corporation" shall be treated as ordinary income. A "collapsible corporation" is one used by its shareholders for the purpose of converting ordinary income into capital gains.[8] From section

5. Capital gains and losses are governed by I.R.C. subch. P. Stock normally will be a capital asset under I.R.C. § 1221. I.R.C. § 1222(3) defines long term capital gain as "gain from the sale or exchange of a capital asset held for more than 6 months [9 months for taxable years beginning in 1977; 1 year for taxable years beginning after December 31, 1977]." Net capital gains are taxed more favorably than ordinary income under I.R.C. §§ 1201 and 1202. The exact extent of the preference resulting from capital gains treatment over ordinary income treatment depends on the application of the minimum tax provisions of I.R.C. §§ 56-58 and to the circumstances of each taxpayer.

6. The phrase "continuing corporation" is used in this article to refer to corporations which, assuming their business is successful, are not formed or availed of with a view to liquidation, and are operated in a manner which periodically results in the payment of corporate tax by the corporation and income tax on dividends by the shareholders. The antithesis of a continuing corporation is a collapsible one. *See* note 8, *infra*.

7. In the judgment of one commentator:

> [These sections] hardly pay lip service to the 'double-tax system.' Congress has sawed off the tailgate of the corporate tax wagon. In so doing, it has weighted the tax system in favor of business liquidators and traders and against continuing owners. The latter are exposed to the double tax; the former (provided they escape that erratic policeman, the 'collapsible corporation' provision) are not.

JAMES B. LEWIS, A PROPOSED NEW TREATMENT FOR CORPORATE DISTRIBUTIONS AND SALES IN LIQUIDATION, HOUSE COMM. ON WAYS AND MEANS, COMPENDIUM OF PAPERS ON BROADENING THE TAX BASE, 86th Cong., 1st Sess. 1644-45 (1959).

8. According to I.R.C. § 341(b)(1), a

> collapsible corporation is a corporation formed or availed of principally for the manufacture, construction or production of property, for the purchase of property . . . or for the holding of stock in a corporation so formed or availed of, with a view to —
>
> (A) the sale or exchange of stock by its shareholders (whether in liquidation or otherwise), or a distribution to its shareholders, before the realization by the corporation . . . of a substantial part of the taxable income to be derived from such property, and
>
> (B) the realization by such shareholders of gain attributable to such property.

341, it is clear that Congress felt a corporation must be used for more than the conversion of ordinary income into capital gains.[9] While commentators have argued that the only difference between a "collapsible" and other corporations is that the former was established with liquidation in mind,[10] it is probable that almost all corporations are formed with a view to this possibility.[11] Thus, by focusing on a narrow problem, the collapsible corporation provision attacks only a small number of the areas where corporate liquidators are favored over continuing corporations. As with section 341, other Code provisions[12] collectively demonstrate that Congress, when faced with the reality of blatant conversion of ordinary income into capital gains, has moved to plug the hole. In each instance, however, an emphasis on the immediate problem may have blinded Congress to the fact that after each hole has been repaired, the continuing corporation is still discriminated against.

One way to eliminate this discrimination would be to provide that all distributions by a corporation to its shareholders and all gain realized by a shareholder upon the sale of his or her stock would be treated as ordinary income or that all such gains would be treated as capital gains.[13] However, major philosophical and practical considerations would be faced by Congress if it considered ending the capital gains preference.[14] This article solely concentrates on the problems which the

9. Abuse in this area became apparent in the motion picture industry. *See* O'Brien v. Commissioner, 25 T.C. 376 (1955).

10. Bittker and Redlich, *Corporate Liquidations and the Income Tax,* 5 TAX L. REV. 437, 439 (1950).

11. The incorporators will be concerned about whether to issue § 1244 stock in order to preserve the possibility of ordinary loss in the event the corporation is unsuccessful, about the possibilities of putting in some of their investment as debt to protect them in relation to outside creditors in the event of bankruptcy, and about the various possibilities of terminating their investment at low tax cost. *See* Costello v. Fazio, 256 F.2d 903 (9th Cir. 1958), for an excellent discussion of the issues involved when a bankruptcy court attempts to subordinate the claims of shareholders of a failed venture. Most taxpayers will submit to the corporate form only after taking a good look at all possible tax consequences including liquidation, and will conduct its corporate affairs in a manner likely to minimize its ultimate tax burden.

12. *See* I.R.C. §§ 305, 306, 302(b) and 318.

13. I.R.C. § 331 provides that amounts distributed in partial or complete liquidation of a corporation shall be treated as payment in exchange for stock. I.R.C. § 302 provides that amounts distributed in a qualified redemption shall be treated as payment in exchange for stock. Under I.R.C. subch. P, such gains are entitled to capital gains treatment. Under I.R.C. § 301 the amount of dividend distributions is included in the gross income of the recipient, and therefore is subject to taxation at ordinary income rates. Because of this advantage resulting from the successful characterization of a distribution as being in redemption or in partial or complete liquidation, as opposed to its characterization as a dividend, much tax planning and litigation has its origin in the attempt to cloak a corporate distribution in other than the form of a dividend. If the capital gains preference is eliminated, then the importance of such characterizations will be greatly reduced as will be the discrimination against continuing corporations.

14. The major reasons for and against preferential tax treatment of capital gains are summarized in Blum, *A Handy Summary of the Capital Gains Arguments,* 35 TAXES 247 (1957). *See*

preference creates within the corporate tax scheme and suggests that such difficulties can be obviated without terminating the capital gains preference in its entirety. Thus, a major focus is the development of a logical system for determining when capital gains treatment is to be afforded to a shareholder upon his or her receipt of a corporate distribution with respect to, or in exchange for, his or her stock.

A proposal is set forth for treatment of corporate distributions to shareholders which is based on the promise that continuing corporations and its shareholders should be favored by the tax laws rather than temporary corporations. The proposal is based on the assumption that the double taxation of corporate gain is the desired system,[15] that shareholders normally should receive corporate distributions as dividends treated as ordinary income, but that in some cases the gains realized by shareholders upon their receipt of distributions in redemption, or in partial or complete liquidation, should be entitled to capital gains treatment rather than as ordinary income. Thus, there is no attempt to consider the relative merits of various integration proposals as opposed to the double tax system or the comparative advantages of preferential as opposed to ordinary tax treatment of capital gains. Instead, this article seeks to develop a proposal which strengthens the double tax system by affording preferential treatment of shareholder gain on corporate distributions in redemption or liquidation only to shareholders whose corporations ("Fully Qualified Corporations" or "Fully Qualifying Corporations") have been operated in a manner, justified by its dividend history, to qualify its shareholders for such preferential treatment.

First, this article offers a proposed test for determining whether a corporation is Fully Qualified. Next, we develop and test the proposal

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also TREASURY TAX STUDY, FEDERAL INCOME TAX TREATMENT OF CAPITAL GAINS AND LOSSES (1951). Though the Carter administration apparently will recommend the abolishment of the capital gains preference, Boston Globe, Sept. 25, 1977, at C1 col. 2; TIME, Sept. 26, 1977, at 85, it is impossible to predict whether Congress will concur. Certainly, there will be stiff opposition to such proposal based upon the need for such treatment to foster capital investment. One reason given for preferential treatment of capital gains is that it compensates for the distortion to an individual's tax burden resulting from the lumping of a capital gain entirely into one year and compensates for the unfairness of taxing as gain what is, in reality, only inflation. Another problem with eliminating the preferential treatment of capital gains is the fear that such will discourage prompt realization of gains, and thus actually decrease the taxes collected.

15. An in depth analysis of the desirability of the double tax system is beyond the scope of this article. If the burden of the corporate tax is totally shifted from the shareholders to others, there is, in reality, no double taxation. If such a result occurs, then, the present system of "double taxation" becomes merely an efficient method by which the government collects taxes; it becomes a system the worth of which is difficult to challenge. *See* M. KRZYZANIAK & R. A. MUSGRAVE, THE SHIFTING OF THE CORPORATION INCOME TAX (1963); Goode, *Who Bears the Corporation Income Tax?* 32 U. CHI. L. REV. 410 (1969); Stiglitz, *The Corporation Tax,* 5 J. PUB. ECON. 303 (1976).

by examining its application to the treatment of corporate distributions to shareholders: A) in complete liquidation of the corporation, including discussion of problems created by the sale of stock and presentation of an alternative provision to replace present Code section 331(a)(1); B) in redemption with an analysis of bootstrap acquisitions; C) in partial liquidation; D) which except for the absence of earnings and profits would be treated as dividends; E) in complete liquidation under Code section 333; F) which are now governed by Code section 341; and G) which constitute boot received in connection with an otherwise tax-free reorganization. Third, this article examines the need for allocation of contributed capital among shareholders caused by different issue prices of stock within the same class, convertible stock, reorganizations, and sections 305 and 306. Moreover, different methods for effecting such allocations are discussed. Finally, potential tax avoidance difficulties which adoption of this proposal may create are considered and possible solutions explored.

I. THE FULLY QUALIFIED CORPORATION

The proposed test for determining whether a corporation is a Fully Qualified Corporation is based on the ratio of lifetime dividend payments of a corporation over the capital contributed by its shareholders. Payment of dividends as defined in section 316 results in the inclusion in the gross income of non-corporate shareholders the amount of such dividends.[16] A corporate distribution can only be a dividend, as opposed to a return of capital or gain in excess of return of capital, if the corporation has sufficient earnings and profits. Corporate earnings and profits bear a fixed relationship to the corporation's taxable income and to its earned surplus, and each item can be derived from the other.[17] The existence of earnings and profits normally will indicate that a corporation has earned profits which have been subjected to the corporate tax. Thus, the payment by a corporation of dividends is a cornerstone of the double tax system, and the amount of

16. I.R.C. § 316(a) defines "dividend" as

> any distribution of property made by a corporation to its shareholders —
> (1) out of its earnings and profits accumulated after February 28, 1913, or
> (2) out of its earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

I.R.C. § 301(c)(1) states that "that portion of the distribution which is a dividend (as defined in § 316) shall be included in gross income." I.R.C. § 301(b)(1)(A) states that the amount of a distribution to a non-corporate distributee is "the amount of money received, plus the fair market value of the other property received."

17. B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS § 7.03 (3d ed. 1971).

dividends paid will constitute a handy tool for measuring the extent to which a corporation and its shareholders have submitted to the double taxation of corporate gain or have avoided it.[18]

What ratio of lifetime corporate dividend payments to the excess in value of such corporation's assets over the capital contributed by its shareholders (such excess in value being sometimes hereinafter referred to as "net asset value"), should make a corporation Fully Qualified (one whose shareholders are entitled to capital gains treatment on corporate distributions)? A satisfactory ratio should be one which is attainable by a continuing corporation upon its liquidation.[19]

While not conclusive, the ratio of dividend payments to net earnings under present law suggests that an average corporation could be expected to pay out fifty per cent of its net earnings in dividends.[20] Since present law favors the distribution of a corporation's assets to its shareholders as other than a dividend,[21] it seems probable that an even higher percentage of an average corporation's net earnings directly benefits its shareholders. Nevertheless, to illustrate this article's proposal, a one-to-one ratio of dividends to net asset value will be required of a Fully Qualifying Corporation.[22] Thus, a Fully Qualified Corpora-

18. The fact that a shareholder is not required to include in gross income his or her pro rata share of retained corporate earnings constitutes a substantial economic benefit to shareholders.

In Eisner v. Macomber, 252 U.S. 189 (1920), the Supreme Court rejected the contention that under the sixteenth amendment a shareholder should be taxed on his share of retained corporate earnings. To date, Congress has not attempted to institute such a system.

Appreciation in asset value goes untaxed at the corporate level until a taxable event occurs which is of assistance to corporations since it prevents capital needed in the business from being diverted to the payment of taxes on appreciation which has not been translated into money or its equivalent. Accordingly, the growth corporation which profits from the deferral of tax on asset appreciation, and whose shareholders profit from the deferral of taxation on undistributed earnings, should pay its dues while it continues to exist by paying out dividends if it wishes preferential treatment upon liquidation. Other corporations may not pay out dividends because no profits are made and no net appreciation in asset value occurs. Such corporations will be unconcerned with the need to earn preferential treatment for their liquidating distribution since they should not realize gain on liquidation. In between is the corporation which defers paying dividends for no corporate business purpose, but only to shield its shareholders from dividend treatment of its earned surplus. Such shareholders cannot complain that the earned capital gain concept for redemptions or liquidations is inequitable, since they are merely being charged for previous deferral.

19. *See* note 6 *supra.*

20. This ratio has fluctuated. According to one commentator, American industrial corporations normally have paid out between fifty to seventy per cent of net earnings as dividends. G. L. LEFFLER, THE STOCK MARKET at 26 (1963). The average dividend payout as a percentage of profit for all American companies for each of the years from 1956 through 1960 was respectively 52%, 56%, 65%, and from 1940 through 1954 averaged 45%. H. E. DOUGALL & H. G. GUTHMANN, CORPORATE FINANCIAL POLICY at 540 (1962).

21. *See* note 13 *supra.*

22. In the discussion which follows in Section II, the reader should keep in mind that a higher required ratio of dividends to net asset value would result in a greater lifetime tax burden to a lifetime shareholder of a liquidating corporation, and that a lower required ratio would result in a

tion shall refer to a corporation whose lifetime dividend payments equal its net asset value.

II. CORPORATE DISTRIBUTIONS

A. Complete Liquidation

The proposed treatment of corporate distributions in part or full payment in exchange for stock of its shareholders will be developed first by considering the treatment of distributions in complete liquidation of a corporation. Four types of corporations might be involved with a complete liquidation under the corporate dividend ratio to net asset value test. The corporation might be: (1) a Fully Qualified Corporation (lifetime dividend payments equal or exceed the corporation's net asset value), (2) a corporation which has not paid sufficient dividends to be Fully Qualified, but has enough earnings and profits to make up the deficit in dividend payments, (3) a corporation which is neither Fully Qualified nor possessed of sufficient earnings and profits to recoup the deficit in dividend payments but has paid or could pay some dividends, or (4) a corporation which is not Fully Qualified, has no earnings and profits and has paid no dividends.

The treatment of shareholders of each of these corporations (hereinafter referred to as category 1, 2, 3, or 4 Corporations respectively) can be understood best by considering a few concrete examples.

EXAMPLE 1: A contrast between Corporation A (category 1) and Corporation B (category 2) is instructive. Assume that both have been in existence and actively operated for twenty years. Since their respective incorporations, all of the outstanding stock of Corporations A and B has been owned by the original incorporator.

Corporation A was formed by its sole shareholder A-1 for an original capital contribution of $10,000. It has paid lifetime dividends in the amount of $100,000, and has a fair market value for its assets of $110,000. Thus, Corporation A has a net asset value (fair market value of $110,000 less contributed capital of $10,000) of $100,000. Since the lifetime dividends paid by Corporation A equal its net asset value, it is Fully Qualified. Corporation A adopts a plan of complete liquidation, sells its assets and then distributes to A-1 in exchange for his stock the sum of $110,000. Under present section 331, A-1 would be entitled to treat his gain of $100,000 as a capital gain.[23] Under the proposed treatment of liquidations, A-1 will also be entitled to treat his gain of $100,000 as a capital gain since Corporation A is a Fully Qualified Cor-

lower lifetime tax burden to a lifetime shareholder of a liquidating corporation. The effect of using any ratio is discussed in Section II *infra*.

23. *See* note 6 and note 13 *supra*.

poration.

Like Corporation A, Corporation B was formed by its sole shareholder B-1 for an original capital contribution of $10,000; unlike Corporation A, Corporation B has paid no dividends, though it has earnings and profits of $200,000. Corporation B has a fair market value for its assets of $210,000 and thus a net asset value of $200,000. Corporation B adopts a plan of complete liquidation, sells its assets and then distributes to B-1 in exchange for her stock the sum of $210,000. Under present section 331, B-1 would be entitled to treat her gain of $200,000 as a capital gain.

The disparity in the treatment of A-1 and B-1 is evident. Assume that A-1 and B-1 for all years in question would have been taxed on any income from Corporation A or Corporation B, respectively at the marginal rate of seventy per cent.[24] Corporation A had a lifetime net asset value of $200,000, half of which was distributed to A-1 as a dividend and half of which was the gain recognized by A-1 upon the liquidation of Corporation A. Under present law, A-1 paid taxes in the amount of $70,000 for the dividends received and $35,000 (capital gains treatment) for the liquidating distribution. Corporation B had a lifetime net asset value of $200,000, all of which was recognized by B-1 upon the liquidation of Corporation B. Under present law, B-1 paid taxes in the amount of $70,000 on the liquidating distribution. Though Corporation A and Corporation B had the same lifetime net asset value, A-1 has paid taxes in the amount of $105,000, while B-1 has paid taxes in the amount of $70,000. Thus, present law has enabled Corporation B to manipulate its affairs in a manner which greatly reduces the double tax burden for Corporation B and for its shareholder B-1; whereas, Corporation A has been penalized for its submission to the double tax system.

Under the proposed system, Corporation B is not a Fully Qualified Corporation, but has sufficient earnings and profits to pay a qualifying dividend. Thus, under the proposed system, Corporation B would have to pay out $100,000 in dividends thereby decreasing its net asset value to $100,000 in order to become a Fully Qualified Corporation. The gain of $100,000 on the subsequent liquidating distribution would then be entitled to capital gains treatment. Alternatively, B-1 could be required to treat $100,000 of the liquidating distribution as a dividend with the remainder of the distribution being entitled to capital gains treatment, and Corporation B would not be required to issue a formal

24. Seventy per cent is the top tax rate provided by I.R.C. § 1 and all examples in this article assume that the individual affected takes a given item into gross income at that marginal rate. For ease of illustration all computations in this article are made without taking into account the minimum tax provisions of I.R.C. §§ 56-58, the maximum tax provisions of I.R.C. § 1348, or the

dividend. It is debatable whether to require a corporation to pay out qualifying dividends or to treat automatically an appropriate portion of the liquidating distribution as a dividend up to the amount of the corporation's earnings and profits. Essentially, however, this question is secondary to a consideration of the main proposal. Therefore, it is hereinafter assumed that a corporation has paid out the maximum dividends which its earnings and profits would allow, up to the amount needed to become Fully Qualified.

EXAMPLE 2: Consider now Corporation D (category 4). Assume Corporation D has been in existence for one year and was formed by its sole shareholder D-1 for an original capital contribution of $10,000. Corporation D used the contributed capital to make a motion picture which upon its completion is determined to have a fair market value of $210,000, having a basis to the corporation of $10,000.[25] Assuming Coporation D is a collapsible corporation, if it adopts a plan of complete liquidation and distributes the motion picture to D-1 in exchange for her stock, then D-1 will be required to treat her gain of $200,000 as gain from the sale or exchange of property which is not a capital asset. Under the proposed treatment of complete liquidations, Corporation D is not a Fully Qualified Corporation since it has paid no dividends, and has no earnings and profits out of which to pay them. Accordingly, D-1 is not entitled to preferential treatment on her liquidating gain of $200,000 under the proposal. Corporation D would be able to become a Fully Qualified Corporation if it sold the motion picture before adopting a plan of complete liquidation since it would then have earnings and profits out of which to pay qualifying dividends. Of course, Corporation D would be subject to corporate tax on the gain realized on the sale of its sole asset.[26] Whether under the proposed treatment of liquidating distributions it would be preferable for a collapsible corporation to become a Fully Qualified Corporation or merely to distribute its assets after adoption of a plan of complete liquidation will depend on the rate at which the corporation's sale of its assets would be

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twenty-five per cent tax ceiling of I.R.C. § 1201(b).

25. I.R.C. §1012 provides that the basis of property is its cost.

26. To illustrate this point, assume that Corporation D sells the movie with the $200,000 gain being taxed at the rate of 30%. Half of the after tax earnings of $140,000 are distributed to D-1 as a dividend which results in D-1 being a Fully Qualified Corporation because total dividends ($70,000) equal corporate net asset value (fair market value of remaining assets less contributed capital). The remaining $80,000 is distributed to D-1 in exchange for her stock, resulting in a $70,000 capital gain. Assuming D-1 is taxed at the rate of 70%, *see* note 24 *supra*, the taxes paid on such transactions are $60,000 in corporate tax, $49,000 tax to D-1 on the dividend received, and $24,500 tax to D-1 on her gain on the liquidating distribution. Total taxes paid by D and D-1 would thus be $133,500, a slight savings over the $140,000 in tax to D-1 which would result under the proposal if Corporation D had merely distributed the motion picture to D-1 in complete liquidation. Such result is not objectionable since it is a consequence of D and D-1 submitting cor-

taxed and the rate at which shareholders will be taxed on receipt of a dividend or liquidating distribution.

EXAMPLE 3: The final situation is that of a category 3 corporation. Assume Corporation C was formed by its sole shareholder C-1 for an original capital contribution of $10,000, and that C-1 has remained the only shareholder of the corporation during its ten year existence. Corporation C owns real property which has greatly appreciated in value. The corporation has operated a drive-in movie theater on the property with the expectation of selling such property for development when growth of the community made it profitable. Corporation C has paid lifetime dividends of $50,000, has no earnings and profits, and has a fair market value for its assets of $160,000. Thus, Corporation C has a net asset value of $150,000, and is not a Fully Qualifying Corporation because its dividends paid and payable (zero dividends are payable without earnings and profits) do not equal or exceed its net asset value.

Under present law, if Corporation C adopts a plan of complete liquidation, sells its assets, and then distributes to C-1 in exchange for his stock the sale proceeds of $160,000, C-1 will be entitled to treat his gain of $150,000 as a capital gain. Under the proposal, C-1 will not be entitled to treat his gain of $150,000 as a capital gain. Unlike Corporations A and B, Corporation C has not earned such preferential treatment for its shareholder C-1 because it has not submitted its appreciation in asset value to double taxation. However, unlike Corporation D, Corporation C has submitted to the double tax system to some extent as its dividend payments indicate, and it would be inequitable to deny C-1 credit for such dividend payments. Therefore, C-1 should be entitled to treat $50,000 of his liquidating gain as capital gain since such is the amount of Corporation C's dividend payments.[27] The remaining gain of $100,000 should be treated as gain from the sale or exchange of a non-capital asset. Thus, assuming C-1 will be taxed at a rate of seventy per cent, the proposed treatment would result in a tax to C-1 upon his liquidating gain of $87,500; whereas, present law would result in a tax of $52,500.

If the proposed treatment discussed in Examples 1, 2, and 3 were adopted, then the following picture of the resulting corporate-shareholder tax system would emerge. The continuing corporation which submits to the double tax system would be favored over the corporation which liquidates without permitting double taxation of corporate appreciation in value. To accomplish this favoritism of the con-

porate gain to the double tax burden.

27. If the ratio of dividends to net asset value required of a Fully Qualified Corporation was made less than one-to-one, then the credit for dividends paid would decrease. Likewise, if the ratio was made greater than one-to-one, the credit would increase.

tinuing corporation, a shareholder will be entitled to capital gains treatment of his or her gain on liquidation only to the extent of such shareholder's pro rata share of the lifetime dividends paid by the corporation, with any excess of such liquidating gain being considered as gain from the sale of a non-capital asset.

1. Problems Created by Sale of Stock

The key to the proposed system is the government's expectancy that liquidating gains will be treated as gain from the sale of a non-capital asset, or as ordinary income, to the extent such liquidating gains are unmatched by dividends paid by the corporation during its lifetime (or by such shareholder's pro rata share in the case of multiple shareholders).[28] Thus far, this article has considered the treatment upon liquidation of a shareholder who was the original incorporator of his or her corporation, and who has owned all of the shares since incorporation. In such original owner cases, the government anticipates that the corporation's lifetime appreciation in value will result in ordinary income treatment of liquidating gains to the extent not matched by dividends, with liquidating gains meaning the excess in value of liquidating distribution over the corporation's contributed capital or the original shareholder's basis for his or her shares.[29] In other words, the shareholder's basis in his or her stock and the capital contributed for such stock are identical. This is not so once the original owner has sold or otherwise disposed of his or her shares. Under existing law, originally contributed capital is the measure of gain upon liquidation only if the original shareholders have not sold their shares for an amount other than the original capital contributed for them.[30] In the present system of corporate shareholder-taxation, there is no relation between the cost basis for stock and the original capital contributed for that stock.[31]

It is important to recognize that a purchaser of stock does not invest

28. *See* discussion of FULLY QUALIFIED CORPORATION, Section I *supra*.

29. *Id.*

30. I.R.C. § 1001 provides that "the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis" of such property. I.R.C. § 1012 provides that, with certain exceptions, "the basis of property shall be the cost of such property." Thus, if a sale has occurred for an amount other than the original capital contributed for such share, the resulting cost basis will be used to measure gain upon liquidation. *See also* note 13 *supra* for discussion of the operation of I.R.C. § 331 which governs liquidations.

31. Hereinafter the original capital contribution attributable to a given share of stock shall sometimes be referred to as the "capital component" of such share, and the cost to a given purchaser of his shares shall be referred to as such shareholder's basis in such shares. Thus, if an original incorporator received one share of the stock of X Corporation for a contribution to its capital of $500 and later sold such share of stock to Y for $1,000, then such share of stock would have a capital component of $500 and a basis to Y of $1,000.

money directly in the issuer, but rather buys the investment represented by the stock purchased. A sale of shares by an original incorporator represents a realization by the selling shareholder of his or her portion of the increase in value of the corporation's underlying assets resulting from the retention or increase in value of property in excess of the original capital contributed for his or her shares. Though share price may reflect anticipated future earning power or items other than true asset value,[32] such difference presumably evaporates at the point of business cessation. Thus, sales of shares are but a stage in the ultimate liquidation of the enterprise which, in effect, enables the seller to liquidate his or her investment, under present law as capital gain, before the corporation is itself liquidated.

In considering the problem caused by the sale of stock, let us again refer to Corporation C which was formed by C-1 for an original capital contribution of $10,000. It has been in existence for ten years, has paid lifetime dividends of $50,000, has no earnings and profits, and has a fair market value of $160,000. Following the proposed scheme,[33] if Corporation C adopts a plan of complete liquidation, sells its assets and distributes the sale proceeds of $160,000 to C-1, then C-1 will treat $50,000 of his gain as capital gain and $100,000 as ordinary gain from the sale of a non-capital asset. Suppose C-1 sold all of his shares to C-2 for $100,000 five years after the incorporation of Corporation C. C-2 operates Corporation C for five years and then elects to adopt a plan of complete liquidation, sell the assets of Corporation C and distribute the sale proceeds of $160,000 in exchange for the stock of C-2. What is the amount of gain realized by C-1 on his sale of stock and C-2 on her liquidating distribution and how are such gains to be treated?

Assume that C-1 and C-2 will be taxed on all income at the rate of seventy per cent. If C-1 had retained the ownership of his stock and liquidated the corporation, then upon liquidation, his gain of $150,000 would have been treated as capital gain to the extent of the lifetime dividend payments of Corporation C ($50,000), yielding a tax of $17,500, and as ordinary gain for the portion of total gain unmatched by dividends ($100,000), yielding a tax of $70,000, for a total tax of $87,500. What is the result when C-1 has sold to C-2 for $100,000 as outlined in the immediately preceding paragraph? If we allow capital gains treatment of the sale of shares, then C-1 pays a tax of $31,500 on his capital gain from the sale of his stock. If we allow earned capital gains treatment to C-2, then C-2 has a liquidating gain of $60,000 which is capital gain to the extent of the $50,000 of dividends paid, yielding a

32. *See generally* G. D. McCarthy & R. E. Healy, Valuing A Company (1971).
33. *See* discussion of Fully Qualified Corporation, Section I *supra*.

tax of $17,500, and is ordinary gain to the extent of $10,000, yielding a tax of $7,000. Thus, the total tax received by the government from C-1 upon liquidation in the first case is $87,500; while, in the second case the government would receive from C-1 and C-2 only $56,000 in tax. As a result, the government's expectancy that one-half of lifetime corporate appreciation will be paid out as dividends, and that to the extent of a short-fall in such dividend payments liquidating gains will be treated as ordinary gain,[34] will be defeated by a sale of shares unless a change is made in the proposal to account for such possibility.

There are two possible ways to modify the earned capital gains concept to handle the problem caused by the sale of shares. One is to test each sale of a share for its qualification for capital gains treatment. The other is to burden the holder of shares when liquidation occurs with an additional tax based on the tax revenue lost by the government as a result of the automatic capital gains treatment afforded the various sellers of shares.

The first possibility is that instead of allowing capital gains on all sales of shares with a reckoning for the consequences of insufficient dividend payment only upon liquidation, a seller of shares should be entitled to capital gains treatment only if and to the extent that the dividend payments of the issuer to the date of sale entitle him under the earned capital gains approach. Thus, if at the time of C-1's sale of his stock to C-2 for $100,000, Corporation C had paid $25,000 in dividends, then the gain of $90,000 recognized by C-1 would be treated as a capital gain to the extent of $25,000 and as ordinary gain to the extent of $65,000.

At least six objections can be made to treating sales of shares in this manner: (1) it would create a bias against earnings retention which might be inconsistent with the capital needs of the economy; (2) it would make it more difficult for growth companies to raise equity capital; (3) no corporate assets actually leave corporate solution on a sale of shares; (4) such treatment would discriminate against purchasers of stock who sell out at times of dividend deficiencies which are later eradicated; (5) many more sales occur than do liquidations and each of these sales would become a matter of complexity; (6) the corporation would be required to make complicated adjustments to its bookkeeping to keep track of the dividend account.

The second possibility is to allow capital gains treatment of all shares in a going enterprise with a reckoning for the consequences of insufficient dividend payment only upon liquidation. Under such an approach, the purchaser of shares in a non-Fully Qualified Corporation

34. *Id.*

would be thought of as having assumed the tax liabilities owed by the previous owners of such shares, if any, or as having purchased his or her shares subject to a contingent tax liability. Upon the sale of C-1's stock, the government allowed C-1 to treat his gain of $90,000 as a capital gain even though the corporation had not paid dividends in such amount. At liquidation, Corporation C has paid dividends of $50,000, which means that $40,000 of C-1's gain was treated as capital gain rather than the ordinary gain to which the government was entitled under the proposed scheme. To give the treasury the tax which it is due and to make the earned capital gains concept work, C-2 must recognize an imputed ordinary gain sufficient to produce the tax which has otherwise been lost because of (a) the capital gains treatment afforded C-1 on his sale of stock, and (b) the failure of Corporation C to pay dividends sufficient to become a Fully Qualified Corporation. C-1 paid a capital gains tax of $14,000 on the $40,000 of gain not ultimately matched by corporate dividend payments. This gain should have been taxed as ordinary income yielding $28,000 in tax. This tax may be recouped upon liquidation by requiring C-2 to pay a tax of $14,000, the actual amount of the contingent tax liability which she assumed or took subject to upon her purchase from C-1. Thus, C-2 upon liquidation will be required to report as an imputed ordinary gain the sum of $20,000. The dividends of Corporation C are exhausted by application against the gain of C-1, leaving no dividends to match against C-2's liquidating gain of $60,000 which is treated, therefore, as ordinary gain. The result is a tax to C-2 of $14,000 on the imputed ordinary gain (the contingent tax liability of C-1 which C-2 is deemed to have assumed or taken subject to) and a tax to C-2 of $42,000 on her liquidating gain. When C-2's total tax of $56,000 is added to the $31,500 in tax paid by C-1 for his gain upon the sale of his shares, the total tax recovered by the government from liquidating and quasi-liquidating (sales of shares) distributions is $87,500, the same amount of tax as the government would have recovered if C-1 had remained the owner of Corporation C until its liquidation.

Obviously, in any given corporation, the government will not receive the same amount of lifetime tax from shareholder gain when sales of stock occur as it would receive if there were no sales, unless the tax rates are identical for all shareholders at all times. Nonetheless, looking at all liquidations, the rates should average out so that the total receipts by the government should be roughly the same under the modified proposal whether sales of shares occur or not. Additionally, the proposed imputation of ordinary gain in an amount equal to one-half of the prior capital gains unmatched by dividends at liquidation is slightly unfair to corporate shareholders since they receive less than a fifty per cent

capital gains preference. This, however, would constitute simply another factor in corporate share purchase decisions.

Each purchaser of shares will be interested in the dividend payments of a given corporation and the capital component of the shares which he or she contemplates buying. A purchaser would take his or her shares with a contingent imputed ordinary gain having a maximum amount equal to one-half of the amount by which the excess of the purchase price paid for his or her shares (the purchaser's basis) over the capital component of such shares exceeded the share of corporate dividend payments attributable to such shares. Thus, when C-2 purchased C-1's shares for $100,000, the purchase price exceeded the capital component of such shares by $90,000, and there was only $25,000 in dividend payments, giving C-2 a contingent imputed ordinary gain in the maximum amount (if no further corporate dividends were paid) of $75,000. It will be a simple matter for a non-Fully Qualified Corporation to make available for dissemination to potential market investors the capital component of its share and the dividends paid which are attributable to a share. This proposal leaves to each purchaser of shares the task of evaluating the risk of liquidation, the corporation's past dividend history and its future prospects. Presumably, the purchaser of shares will be willing to pay less to the extent of the risk of liquidation. Thus, the owner of shares in a non-Fully Qualified Corporation will be unable to enrich himself or herself unjustly. It seems more consistent with the purpose of the earned capital gains treatment proposal of favoring continuing corporations that sellers of shares be allowed capital gains treatment regardless of the corporation's dividend payment status at that time, with the accounting for dividend deficiencies postponed until liquidation. This allows a corporation to structure its dividend payouts as its business needs require and does not penalize shareholders who sell out at periods when an ultimately Fully Qualified Corporation is dividend deficient. Therefore, further references in this article to the treatment of liquidations will assume that such approach has been adopted, rather than the approach testing each sale of shares.

Thus far, the analysis has considered the application of the earned capital gains concept in the case of liquidations where: (1) the shareholder's basis for stock to be surrendered equalled the capital component of such shares and (2) the value of the liquidating distribution exceeds the shareholder's basis for stock to be surrendered and (3) the basis exceeds the capital component of such shares. There are two other possible situations. The first is where a shareholder's basis for his or her shares exceeds both value of the liquidating distribution and the capital component of such shares. The second is where the capital com-

ponent of shares exceeds its basis.

EXAMPLE 1: Assume that C-2 purchased the stock owned by C-1 for $100,000, that Corporation C paid out lifetime dividends of $50,000, but unlike the earlier case, Corporation C upon its liquidation has a fair market value of $90,000. As in all previous examples, C-1 and C-2 are taxed at the rate of seventy per cent. If C-1 had retained the ownership of his shares, then, upon receipt of a liquidating distribution of $90,000, his gain of $80,000 would under the earned capital gains formula be treated as a $50,000 capital gain and a $30,000 ordinary gain, yielding a total tax of $38,500. To insure equivalent tax burdens regardless of the sale of shares, C-2 will be treated as follows: C-2 will receive a capital loss of $10,000, representing the difference between her basis and the value of the liquidating distribution, a potential tax benefit of $3,500; C-2 will recognize an imputed ordinary gain of $15,000, representing one-half of the excess of the difference between the value of the liquidating distribution and the capital component of surrendered shares, over the lifetime dividend payments of the corporation, a tax cost to C-2 of $10,500. Thus, the net tax cost to C-2 is $7,000 which when added to the total $31,500 of capital gains tax paid by C-1 on his gain of $90,000 from the sale of his shares results in a total tax yield to the government of $38,500, the same amount as would have resulted had C-1 remained the owner of his shares until the liquidation of Corporation C.

EXAMPLE 2: There may be cases where a shareholder will purchase shares for less than its capital component. Suppose C-2 purchased the shares of C-1 for $5,000 one year after the formation of Corporation C, at which time no dividends had been paid and Corporation C was worth only $5,000. C-1 obtained a capital loss on the sale of his stock, a potential tax benefit of $1,750.

If Corporation C were ultimately liquidated having a fair market value of $2,500, then C-2 would suffer a capital loss of $2,500, a potential tax benefit of $875. The total potential tax benefit derived from Corporation C would thus be the same whether or not C-1 had sold his shares. If instead, Corporation C is liquidated after the payment of $50,000 in lifetime dividends and at a time when its fair market value is $160,000, then the following treatment of C-2's gain of $155,000 will result: C-2 will receive a capital gain of $5,000 representing the difference between her basis and the capital component of her shares, yielding a tax of $1,750 (and off-setting the tax benefit afforded to C-1 on the capital loss resulting from the sale to C-2); C-2 will receive a capital gain of $50,000 (amount equal to dividend payments) yielding a tax of $17,500; the remaining gain will be treated as ordinary gain yielding a tax of $70,000. This brings the same total tax yield to the

government as would have resulted had C-1 retained his shares rather than selling out to C-2.

2. Proposed Section in Lieu of Section 331(a)(1)

The preceding examples have demonstrated the application of the earned capital gains concept to liquidating distributions. Without at this point attempting to define further the concepts developed above, consider how such a provision might look upon its codification. The following proposed section would be substituted for present section 331(a)(1) of the Internal Revenue Code:

(1) COMPLETE LIQUIDATIONS —

(A) Upon the receipt of a distribution in complete liquidation of a corporation, the recipient shall recognize an imputed ordinary gain equal to one-half of the amount, if any, by which the lifetime dividend payments attributable to his shares surrendered in such complete liquidation are exceeded by the difference, but not less than zero, obtained by subtracting the capital component of such surrendered shares from the lesser of the shareholder's basis for such surrendered shares or the fair market value of the liquidating distributions.

(B) If amounts distributed in complete liquidation of a corporation are exceeded by the surrendering shareholder's basis for the stock for which such distributions are made, such deficit shall be treated as loss from the sale of a capital asset. If amounts distributed in complete liquidation of a corporation are in excess of the surrendering shareholder's basis for the stock for which such distributions are made, and if the capital component of the surrendered shares exceeds the shareholder's basis for such shares, then such portion of the excess of the value of the liquidating distribution over the shareholder's basis as does not exceed the excess of the capital component of the surrendered shares over the shareholder's basis for such shares shall be treated as gain from the sale of a capital asset. If amounts distributed in complete liquidation of a corporation are in excess of the surrendering shareholder's basis for the stock for which such distributions are made, then the excess of the value of the liquidating distribution over the greater of the capital component of such shares or the shareholder's basis therefor shall be treated as gain from the sale of a capital asset to the extent such excess does not exceed the difference obtained by subtracting from the lifetime corporate dividend payments attributable to such share, the amount, if any, by which the basis of the surrendered shares exceeds the capital component thereof. If after application of the immediately preceding two sentences, there remains untreated as capital gain any portion of the excess of the amounts distributed in complete liquidation of

a corporation over the shareholder's basis for the shares surrendered, then such remaining gain shall be treated as gain from the sale of a non-capital asset.

3. Effect of Proposal on Tax Burdens

As a final point, it might be helpful to consider the tax burden resulting in various situations under the proposal by examining the following tables. The Tables deal with a corporation which is an amalgamation of the various corporations which we have examined in this section. The corporation involved was formed by its original incorporator A-1 for a capital contribution of $10,000. Table I shows the tax consequences to A-1 upon liquidation under various corporate dividend histories, which dividend payments are presumed to exhaust the earnings and profits of the corporation. Table II shows the treatment of A-2 upon liquidation, where A-2 has purchased all of A-1's shares for $60,000. Notice that under the proposed treatment the total lifetime tax burden (tax on dividends, gains on sales of shares and liquidation) is greatest when the corporation has paid no dividends and decreases as dividends are paid. In contrast, under present law, the total lifetime tax burden is least when no dividends have been paid, and increases as dividends are paid. Thus, the proposal rewards submittal to the double tax system where present law penalizes such action. Note that columns one and three of Table I should be read as part of Table II as well.

TABLE I

1	2	3	4	5	6	7
F.M.V. of Liquidating Distribution	Lifetime Dividends Paid or Payable	Tax on Dividends (@ 70%)	Tax to A-1 on Liquid. Gain Under Proposal	Tax to A-1 on Liquid. Gain Under Present Law	Total Tax Burden Under Proposal	Total Tax Burden Under Present Law
110,000	100,000	70,000	35,000	35,000	105,000	105,000
120,000	90,000	63,000	45,000	38,500	108,000	101,500
130,000	80,000	56,000	56,000	42,000	112,000	98,000
140,000	70,000	49,000	66,500	45,500	115,500	94,500
150,000	60,000	42,000	77,000	49,000	119,000	91,000
160,000	50,000	35,000	87,000	52,500	122,500	87,500
170,000	40,000	28,000	98,000	56,000	126,000	84,000
180,000	30,000	21,000	108,500	59,500	129,500	80,500
190,000	20,000	14,000	119,000	63,000	133,000	77,000
200,000	10,000	7,000	129,500	66,500	136,500	73,500
210,000	—0—	—0—	140,000	70,000	140,000	70,000
					(3 + 4)	

TABLE II

8	9	10	11	12	13
Tax to A-1 on Sale of Shares to A-2	Tax to A-2 on Imputed Ordinary Gain Under Proposal	Tax to A-2 on Liquidating Gain Under Proposal	Tax to A-2 Upon Liquid. Under Present Law	Total Tax Burden Under Proposal	Total Tax Burden Under Present Law
17,500	—0—	17,500	17,500	105,000	105,000
17,500	—0—	28,000	21,000	108,500	101,500
17,500	—0—	38,500	24,500	112,000	98,000
17,500	—0—	49,000	28,000	115,500	94,500
17,500	—0—	59,500	31,500	119,000	91,000
17,500	—0—	70,000	35,000	122,500	87,500
17,500	3,500	77,000	38,500	126,000	84,000
17,500	7,000	84,000	42,000	129,500	80,500
17,500	10,500	91,000	45,500	133,000	77,000
17,500	14,000	98,000	49,000	136,500	73,500
17,500	17,500	105,000	52,500	140,000	70,000
				(3 + 8 + 9 + 10)	(3 + 8 + 11)

B. Corporate Distributions in Redemption

The model for treatment of complete liquidations suggests that gain on redemptions[35] should be entitled to capital gains treatment only to a limited extent. It should be entitled to such treatment when the corporation's dividend history would result in capital gains treatment if a complete liquidation were carried out on the date of such redemption, with the excess gain being treated as ordinary income.

As long as sales of shares to third parties are entitled to capital gains treatment, how does one justify denying such treatment to a shareholder who has part or all of his or her shares purchased by the issuing corporation? As discussed earlier,[36] treatment of the gain (purchase price minus basis) realized by a seller of shares as automatically entitled to capital gain treatment is preferable to requiring that the gain from such sale be entitled to capital gains tax treatment only to the extent that the corporation's dividend history would qualify distributions in complete liquidation occurring on the same date. However, a redemption is much more akin to the final reckoning which takes place upon complete liquidation than it is to a sale of shares to outsiders.[37]

35. I.R.C. § 317(b) defines a redemption as follows: "stock shall be treated as redeemed by a corporation if the corporation acquires its stock from a shareholder in exchange for property, whether or not the stock so acquired is cancelled, retired or held as treasury stock."

36. *See* discussion in Section II(A)(1) *supra*.

37. In a redemption, corporate assets leave corporate solution while in a sale of shares they do not. In a sale of shares, each purchaser is accountable to the government for any existing or future deficiencies in the corporation's dividend account, while in a redemption, no one will ever

It has been argued that denying capital gains treatment to sellers of shares in non-Fully Qualifying Corporations would be both a deterrent to the ability of growth companies to raise equity capital and an unhealthy inducement to management to pay out as dividends earnings needed in the business.[38] Neither of these concerns would be present in the case of redemption which represents an attempt by management to reduce capital. The use of the earned capital gains treatment concept will create no information dispersal or administrative difficulty in the case of a Fully Qualified Corporation[39] since it will be unnecessary to inform a prospective redeemed shareholder of the status of the corporation's dividend account. Redemptions by less than Fully Qualified Corporations would have to be preceded by transmitting to persons whose shares the corporation wishes to redeem, information concerning the income tax consequences of tendering such shares for redemption.[40] Because redemptions by Non-Fully Qualified Corporations would result in a greater tax to the seller of shares than would result from sales to outsiders, Non-Fully Qualified Corporations wishing to redeem shares probably would have to pay a premium over the market value of their shares to induce shareholders to tender shares for redemption. This loss of opportunity to redeem shares freely in the market would not seem an unfair burden to place on such non-Fully Qualified Corporations.

To the extent that a corporation does redeem shares, an appropriate reduction in the corporation's dividend account would be required to prevent unwarranted benefit by the remaining shareholders from such redemption. Without a reduction, a corporation could become Fully Qualified by a series of redemptions instead of making dividend payments as contemplated by the earned capital gains concept. Accordingly, each redemption should result in the dividend account of the redeeming corporation being reduced by the product obtained by multiplying the amount of the dividend account prior to the redemption

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be called upon to account to the government for the tax lost on such distribution if the corpo ation is eventually liquidated with an insufficient dividend account.

38. *See* discussion of methods to modify earned capital gains concepts, Section II(A)(1) *supra.*

39. In this context, a Fully Qualified Corportion is one which has paid out dividends which on the date of the redemption equal the fair market value of the corporation minus the total capital component of its outstanding shares.

40. A legislative by-product of instituting the proposed changes would almost certainly be a requirement that publicly-traded companies provide information to a prospective redeemed shareholder if a redemption would subject a redeemed shareholder to a greater tax burden than would result from a sale of such shares to other than the corporation. Since a redemption by a Fully Qualified Corporation would not bring a greater tax, no disclosure would be necessary. However, a redemption by a less than Fully Qualified Corporation would result in a greater tax, and advance disclosure of this fact would be necessary.

by a fraction, the numerator of which is the number of shares redeemed and the denominator of which is the number of shares outstanding prior to the redemption. This formula will also prevent a corporation with excess dividends paid from increasing the disproportion of such excess to its fair market value as a result of a redemption.

The earned capital gains concept would work in the same manner for redemptions as for complete liquidations.[41] Thus, it might be helpful to review the various cases of complete liquidation examined earlier.[42] The treatment of a redeemed shareholder under the earned capital gains concept would be identical to that which resulted in those examples. As a result, the statutory revision which would be required to implement the proposal would be identical to that for a complete liquidation except for: (a) reference to redemption instead of liquidation, and (b) retention of the standards by which dividend equivalence are measured.

1. Bootstrap Acquisitions

The earned capital gains treatment of redemptions would be useful in the type of bootstrap purchase situation typified by *Zenz v. Quinlivan*[43] where continuing corporations are now disfavored. In *Zenz,* a corporation, the stock of which was wholly owned by one individual, had substantial accumulated earnings and profits which were unneeded in the business. In order that neither the buyer nor seller of the corporation's stock would be required to recognize these accumulated earnings and profits as a dividend taxable as ordinary income, the sale transaction was structured so that the buyer bought part of the seller's stock for cash, and then a short time later, the corporation redeemed the seller's remaining shares using up in the process most of the accumulated earnings and profits. The seller treated the gain on such redemption as capital gain.[44] The Internal Revenue Service argued that

41. Suppose Corporation E was formed in 1963 by two non-related individuals E-1 and E-2, each receiving 50 shares of common stock for a capital contribution of $5,000 each. In 1967, E-2 sold his shares to E-3 for $50,000. In 1977, Corporation E then having paid out dividends in the amount of $50,000, redeems E-3's shares for $80,000. E-3's pro rata share of lifetime corporate dividend payments is $25,000. As with complete liquidations, E-3 purchased her shares subject to a contingent imputed ordinary gain. Since E-2 received a capital gain on the sale to E-3 of $45,000, and since E-3's share of lifetime dividends is only $25,000, E-3 is charged with an imputed ordinary gain in the amount of $10,000 (one-half of the amount by which the difference obtained by subtracting the capital component of the redeemed shares from the lesser of such share's basis or the value of the liquidating distribution, exceeds such share's pro rata share of lifetime corporate dividend payments). E-3's gain on the redemption of $30,000 is treated as ordinary gain since not matched by corporate dividend payments. As a result of such redemption, the dividend account of Corporation E is reduced to $25,000.

42. *See* discussion of *Complete Liquidation,* Section II(A) *supra.*

43. 213 F.2d 914 (6th Cir. 1954).

44. *Id.* at 916.

the proceeds of the redemption should be treated as a dividend since if the prearranged redemption had preceded the sale of part of the shares such would have been the result. The Sixth Circuit Court of Appeals held in favor of the taxpayer.[45] The I.R.S. has announced that such a transaction will be treated as meeting the requirements of Code section 302(b)(3).[46]

To appreciate how this article's proposal would affect the bootstrap purchase situation, consider the following example. Assume that A is the sole shareholder of corporation XYZ. A has a $10,000 basis and capital component for her shares. XYZ has a book value of $400,000 allocated as follows: operating assets $100,000, and cash $300,000 ($50,000 needed in the business). XYZ has earnings and profits of $300,000. B has $250,000 to invest, and is willing to buy XYZ's operating assets for $200,000 or to have A take down a $250,000 dividend, and then sell her shares to B for $250,000. Instead, to come within the *Zenz* sale followed by redemption formula, B buys fifty per cent of A's shares for $250,000, and the corporation then redeems A's remaining shares for $250,000. Under existing law, this transaction would result in capital gains treatment for A's gain of $490,000. Under the proposed treatment of redemptions, A still would obtain capital gains treatment on her sale of shares; the redemption would be taxed to A as a gain, the character of which under the earned capital gains concept would be subject to the corporation's dividend history. If XYZ has paid no dividends, then A will incur ordinary income treatment on the redemption gain of $245,000, a result similar to the dividend treatment which would have occurred if a $250,000 dividend had preceded the purchase by B of the shares of A.

Under the proposed earned capital gains treatment of redemptions, the purchaser will not be disinterested in the form of the purchase transaction. Since a purchaser of shares takes them subject to a contingent imputed ordinary gain, the capital component of such shares and the

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45. The court stated "[w]e are satisfied that where the taxpayer effects a redemption which completely extinguishes the taxpayer's interest in the corporation, and does not retain any beneficial interest whatever, that such transaction is not the equivalent of the distribution of a taxable dividend to him." *Id.* at 917-18.

46. *See* Rev. Rul. 55-745, 1955-2 C.B. 223. The relevant parts of I.R.C. § 302 reads as follows:

(a). GENERAL RULE. — If a corporation redeems its stock (within the meaning of, section 317(b)), and if paragraph (1), (2), (3), or (4) of subsection (b) applies, such redemption shall be treated as a distribution in part or full payment in exchange for the stock.

(b). REDEMPTIONS TREATED AS EXCHANGES. —

(3). TERMINATION OF SHAREHOLDER'S INTEREST — Subsection (a) shall apply if the redemption is in complete redemption of all the stock of the corporation owned by the shareholder.

dividend account of the issuer will be of substantial importance. Assuming that XYZ has a zero dividend account, if B goes along with the purchase-redemption scheme, B will own all of the outstanding shares of XYZ having a capital component of $5,000 and XYZ will have a zero dividend account; the redemption of A's remaining shares providing no addition to XYZ's dividend account since the payments to A were not a dividend. B would thus take his stock subject to a contingent imputed ordinary gain in the maximum amount of $245,000. The proposed treatment of redemptions thus puts A and B in the same position as if A and B had been the original incorporators of XYZ, contributing for their shares $5,000 each. Unless XYZ has a $250,000 dividend account, B will not be willing to pay $250,000 for the shares of A in either the bootstrap purchase or retiring original incorporator situation, nor will B be willing to have XYZ redeem A's shares for $250,000. The price B would be willing to pay or to have XYZ pay in redemption would be subject to negotiation. However, assuming similar tax situations for A and B, it seems clear that B would require XYZ to have a dividend account which makes it a Fully Qualified Corporation before B would be willing to buy A's shares for $250,000.[47] Thus, the proposed earned capital gains treatment of redemptions should eliminate the situations where a so-called bootstrap purchase has been thought to constitute an unwarranted conversion of ordinary income into capital gains.

C. Partial Liquidations

Partial liquidations would be handled in the same way as the proposed treatment of complete liquidations or redemptions. A

47. The following table illustrates the transaction structure which likely would occur under the proposed redemption treatment in three cases where B is the purchaser:

	XYZ's Dividend Account Prior To Transaction		
	$100,000	$490,000	$ 0
Fair Market Value of XYZ's Assets Before Transaction	500,000	500,000	500,000
Dividend To A	197,000	0	245,000
Redemption of A's Shares As Capital Gain	50,000	250,000	0
Purchase Price For Remainder of A's Shares	255,000	250,000	255,000
Capital Component of B's Shares	8,000	5,000	10,000
Dividend Account and B's Basis Minus Capital Component After Transaction	247,000	245,000	255,000

downward adjustment in the corporate dividend account would be made in an amount equal to the dividends used to determine the character of gain. It would be possible to limit the dividends which could be used to qualify a gain for capital gains treatment or to avoid the imputation of ordinary gain, to an amount bearing the same relationship to the lifetime dividend payments as the fair market value of the liquidating distribution bears to the pre-distribution fair market value of the corporation. This would be in keeping with the proposed treatment of redemptions which allows a redeemed shareholder to use only his or her pro rata share of lifetime dividend payments.

D. Distributions with Respect to Stock

The model developed has dealt with distributions by a corporation in exchange for its own stock. The model assumes that, to the extent of a corporation's earnings and profits, a dividend or an essentially equivalent distribution shall be included in a recipient's gross income.[48] The earned capital gains concept would be applicable to the determination of the extent to which a distribution which exceeds both earnings and profits and the basis of the stock on which it is made would be treated as a capital gain. In addition, shareholders other than the original owner of stock who receive such a distribution will in some cases be required to recognize an imputed ordinary gain. Unlike redemptions and complete liquidations, a shareholder receiving a distribution with respect to his or her shares does not surrender them, which under the proposed treatment will require an adjustment to capital component as well as to basis.[49] As with complete liquidations,

48. This accords with the present I.R.C. § 301(c)(1) which reads in relevant part: "That portion of the distribution which is a dividend (as defined in section 316) shall be included in gross income."

49. The modification required by the earned capital gains treatment can best be illustrated by example.

> Assume Corporation F was formed in 1964 by F-1 for an original capital contribution of $10,000. In 1970, F-1 sells his shares to F-2 for $100,000. F-1 and F-2 will be assumed subject to a seventy per cent rate of taxation at all times. In 1974, the corporation has a fair market value of $160,000, has paid out lifetime dividends in the amount of $50,000, but has no earnings and profits. If Corporation F distributes $10,000 to F-2 such distribution would constitute a return of capital reducing F-2's basis for her stock to $90,000, reducing the fair market value of Corporation F to $150,000, and also reducing the capital component of F-2's stock to zero. That such distribution would result in no recognition of imputed ordinary gain under the earned capital gains approach is seen by considering the liquidation of Corporation F. If immediately after such distribution Corporation F adopts a plan of complete liquidation, sells its assets and distributes $150,000 to F-2 for her stock, then F-2 will recognize an imputed ordinary gain of $20,000 (one-half of the excess of basis minus capital component over lifetime dividends), yielding a tax of $14,000. F-2 will recognize a liquidating gain of $60,000 which will be ordinary in nature because not matched by dividends, yielding a tax of $42,000. Thus the taxes on F-2 of $56,000 and the tax to F-1 of $31,500 on the sale of his shares to F-2, total $87,500. This is the same total tax which would have resulted had F-1 retained the ownership of his shares until

however, if the stock's capital component is greater than a shareholder's basis for such stock, then, any distribution in excess of basis but not in excess of capital component should be treated as a capital gain regardless of the status of the corporation's dividend account.[50]

Thus, distributions or portions of them which but for the absence of earnings and profits would be treated as dividends will be tested for earned capital gains treatment in the same manner as redemptions and complete liquidations. Any excess in value of a distribution over earnings and profits will reduce basis and at the same time reduce first capital component and then the dividend account. The excess of any distribution over a shareholder's basis will be capital gain to the extent matched by dividends, and ordinary gain to the extent unmatched by dividends. The excess of any distribution over both capital component and dividends paid will result in an imputed ordinary gain unless basis has been, or is simultaneously, exhausted. Distributions which represent the recovery of the excess of capital component over basis will constitute capital gain irrespective of the status of the corporation's divi-

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liquidation.

If Corporation F makes a second distribution of $10,000 to F-2 shortly after the first distribution, then the fair market value of the corporation will be reduced to $140,000 and the basis of F-2's stock will be reduced by $10,000 to $80,000. Since the capital component of F-2's shares is already zero, a reduction of $10,000 in the dividend account of Corporation F should be made. Again we can test the appropriateness of this treatment by looking at the tax consequences of the liquidation of Corporation F immediately after such second distribution. F-2 will recognize an imputed ordinary gain of $20,000 (one-half of basis minus capital component over dividend account, or one-half of, $80,000 minus zero, minus $40,000), yielding a tax of $14,000. F-2 will also recognize an ordinary gain on liquidation of $60,000 yielding $42,000 in tax. Again, the tax consequences of a liquidation would be the same as if F-1 had retained the ownership of his shares until liquidation.

If immediately after the second distribution, Corporation F makes a third distribution to F-2 in the amount of $50,000, then the fair market value of the corporation will be reduced to $90,000 and the basis of F-2's stock will be reduced to $30,000. Capital component has already been reduced to zero. Forty thousand dollars of the distribution will be applied to dividend account reducing it to zero. The $10,000 by which the distribution exceeds both capital component and dividend account will therefore trigger an imputed ordinary gain in an amount equal to one-half of the difference obtained by subtracting capital component from the lesser of such excess or the basis of the shares on which the distribution is made. Accordingly, F-2 will recognize an imputed ordinary gain of $5,000, yielding a tax of $3,500. If Corporation F liquidates immediately after such third distribution then F-2 will recognize an imputed ordinary gain in the amount of $15,000 (one-half of excess of basis minus capital component over dividend account), yielding $10,500 in tax. F-2 will again recognize an ordinary gain of $60,000 on the liquidating distribution ($90,000 minus $30,000, unmatched by dividends). Thus the requirement that F-2 recognize imputed ordinary gain after the exhaustion of capital component and dividend account operates to preserve the integrity of the proposed earned capital gains treatment.

50. To illustrate this point, assume that Corporation G is formed by G-1 for a capital contribution of $10,000. G-1 sells his shares to G-2 for $5,000. If Corporation G distributes $10,000 to G-2 at a time when the corporation has a fair market value of $20,000 and a zero dividend account, then capital component is reduced to zero and G-2's gain of $5,000 is treated as capital gain despite the absence of matching dividends.

dend account.

E. Distributions under Section 333

Section 333 of the Code allows a corporation to distribute all of its property in complete liquidation with gain recognized only to the extent of the corporation's earnings and profits and with the distributed assets taking a basis in the hands of the distributee shareholders equal to their basis in the stock surrendered less money received and plus gain recognized. However, section 333 may not be used by a collapsible corporation other than one meeting the requirements of section 341(e).[51] This exclusion indicates a lack of Congressional sentiment for the formation of corporations with the intention to liquidate them shortly thereafter. Bittker states that section 333 was "enacted in 1938 primarily to permit the liquidation of personal holding companies that had been recently subjected to unexpectedly heavy tax burdens"[52] and was intended to be only a temporary provision. Thus, section 333 may be viewed as an anachronism which has outlived its purpose, and therefore, should be repealed. Moreover, its present form is certainly at odds with the concept of earned capital gains treatment developed to this point.

This article does not advocate section 333's retention. If, however, Congress periodically adds relief provisions to the Code or if it elects to allow shareholders to withdraw their assets from the corporation with a deferral of gain, such provisions must be consistent with the earned capital gains concept. For instance, it would be possible to modify section 333 so that if a corporation could be completely liquidated under section 331(a) at full capital gains treatment because of its dividend history, shareholders could elect to receive and retain the corporation's assets, postponing until later their recognition of capital gain.[53]

51. As stated in B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS, § 12.07 at 12-23:

> It is perilous to summarize the fearfully intricate conditions of § 341(e), but its underlying theory is that the collapsible corporation provisions should not be applicable if the net unrealized appreciation in the corporation's 'subsection (e) assets' (roughly speaking, property held by the corporation which would produce ordinary income if sold by the corporation itself or by its principal shareholders) amounts to less than 15 per cent of the corporation's net worth.

52. *Id.* at § 11.20 n.29.

53. For example, assume Corporation XYZ was formed in 1964 to construct and operate a shopping center. The original incorporator A had a capital component for her shares of $50,000. B purchased A's shares in 1970 for $450,000. The shopping center is XYZ's sole asset and has a net fair market value of $750,000. XYZ has no money or earnings and profits. XYZ has paid out $70,000 in dividends each year from 1966-75 for a total dividend account of $700,000, which equals the corporate net asset value ($750,000 fair market value of assets minus $50,000 capital component). Thus XYZ is a Fully Qualified Corporation and B would qualify for full capital gains treatment on a liquidating distribution, resulting in a capital gain of $30,000. A revision of I.R.C. § 333 which allowed B to receive the shopping center in liquidation without recognition of

F. Section 341

The proposed treatment of distributions in complete or partial liquidation, in redemption, and of distributions which would be dividends but for the absence of earnings and profits, and the suggested deletion of section 333, provide an objective test for determining when and to what extent preferential tax treatment is to be extended to corporate distributions. The test would apply to all corporations regardless of the subjective inquiry which the present section 341 employs,[54] and would turn on actual use of the corporate form. This article does not purport to analyze the complexities of section 341, but suggests that adoption of the earned capital gains concept would make its elimination possible.[55]

G. Boot in Reorganizations and Corporate Divisions

Boot received in connection with a tax-free reorganization or corporate division is treated presently under Code sections 356(a) and 356(b).[56] It is beyond this article's scope to evaluate the merits of this treatment under the present corporate taxation scheme. It is relevant, however, to illustrate how the treatment of boot in such sections could be made consistent with the proposed treatment for other corporate distributions.

Section 356(a) deals with the taxation of gains to a shareholder upon receipt of money or property ("boot") not entitled to be received without recognition of gain under section 354(a). Gain is measured by subtracting the transferor shareholder's basis in the shares which he or she surrenders from the fair market value of the property received in exchange, and then taxing, as either capital gain or ordinary income, the amount of the shareholder's gain, but not in excess of the boot

gain and with a basis to B of $450,000 would not be inconsistent with the earned capital gains concept.

54. Collapsible corporation status turns on whether a corporation is formed or availed of with the requisite "view." The determination of whether the requisite "view" existed and when such "view" existed are inherently subjective issues. The relevant portion of I.R.C. § 341(b)(1) is set out in note 8 *supra*.

55. Consider the classic motion picture collapsible corporation. If a corporation, formed with an original capital contribution of $10,000, produced a movie having a fair market value of $1,000,000, and before receiving any earnings distributed the movie in complete liquidation, then, the earned capital gains treatment of complete liquidation would result in $990,000 of ordinary income to the shareholders because of the lack of dividends. If the shares of the corporation were sold for more than the capital component, then, to the extent of such excess the purchaser would be subject to a contingent imputed ordinary gain. If the movie were distributed as a dividend, then, the proposed revision to I.R.C. § 301(c), *see*, Section II(D) *supra*, would result in ordinary gain treatment for the distributor since the excess of distribution over basis would be unmatched by dividend payments.

56. The term "boot" refers to property received in an exchange which is not entitled to be received without the recognition of gain. I.R.C. §§ 354 and 355 set forth the conditions under which stock and securities may be received without the recognition of gain. I.R.C. §§ 356(a) and

received. The following example demonstrates how section 356(a) works.[57]

In an exchange to which section 354 would apply but for the prohibited boot involved, A receives in exchange for a share of stock having an adjusted basis to A of $85:

One share of stock worth	$100
Cash	25
Other property (basis $25) fair market value	50
Total fair market value of consideration received	$175
Adjusted basis of stock surrendered in exchange	85
Total Gain	$ 90
Gain to be recognized, limited to cash and other property to be received	$ 75
A's pro rata share of earnings and profits (taxable dividend)	$ 30
Remainder to be treated as gain from the exchange of property	$ 45

Under the proposed treatment of exchange transactions, gain in excess of A's ratable share of earnings and profits will be entitled to capital gains treatment only to the extent qualified by the dividend account of the issuer of A's shares. Assume that the issuer of A's share prior to the exchange had a dividend account of $10,000 and that A's pro rata share of this account was $20. Application of the earned capital gains concept to the $45 excess of boot over dividend will result in A recognizing a $20 capital gain and a $25 ordinary gain, rather than the $45 capital gain which would result under present section 356(a).

Current section 356(b) treats boot as a distribution of property subject to section 301. Earlier, this article outlined a suggested amendment of section 301.[58] Thus, for purposes of the proposal, the reference in section 356(b) would refer to the amended section 301.

III. ALLOCATION OF CONTRIBUTED CAPITAL AMONG SHAREHOLDERS

To this point, the article has assumed a corporation simple in its capital structure. Now, attention is directed to the problems of complexity. Initial focus will be on corporations coming into existence after the enactment of the proposed legislation. Implementation of the

356(b) govern the treatment of "boot."

57. This illustration is taken from Treas. Reg. § 1.356-1(c), *Example 1.*

58. *See* discussion of amendment of I.R.C. § 301, in Section II(D) *supra.*

earned capital gains systems which looks to originally contributed capital in measuring imputed gains upon exchange transactions (whether in partial or complete liquidation or in redemption) requires a method of allocating contributed capital among shareholders so as to avoid hindering the stock market's functioning.

To illustrate the problem, this section will first consider the allocation made necessary by different issues of the same class of stock being made at different issue prices. In connection with this, the two best methods for effectuating such allocation — the "immediate averaging of capital component method" and the "sliding capital component method" — will be set forth. This section will then examine the problems of allocation which may arise in connection with convertible securities, reorganizations, stock outstanding on the effective date of legislation incorporating the article's proposal, and sections 305 and 306. For purposes of discussing the allocation of contributed capital, the amount of money or fair market value of property originally contributed for a stock or security shall continue to be termed the "capital component" of such share.

A. Capital Component and Different Issues of Stock

The necessity of allocating the capital component will often arise because of the possibility of many different issues of the same class of stock being made at different issue prices. If these issue prices are to have importance upon the complete liquidation of the corporation, and for other transactions, then either a separate market must be developed for trading in each issue of stock or a method of allocating capital among shareholders of different issues of the same class of stock must be developed.

Consider a publicly held corporation with one outstanding class of common stock issued for, and having a capital component of, $100 per share. No need for allocation is present as each purchaser of a share will take such share with its capital component of $100. In almost every case, however, a company going public will have existing shares outstanding of the class of stock being offered to the public, which existing shares will normally have a capital component different than the price at which the public offering is being made. Indeed, a portion of the public offering is often composed of the shares previously outstanding which are owned by the original investors. Hypothesizing that there are existing and outstanding 1000 shares of the common stock of Corporation A with a capital component of $50 per share, and that a public offering is made of 2000 shares of common stock (including 500 of the originally outstanding shares) at $100 per share, then, the prob-

lem of different issue prices becomes clear. What is to be the capital component of a share purchased from the previously outstanding category? If we are to avoid the necessity of creating separate markets for different issues of stock, and in this case separate markets even within the same issue, then, it is necessary to avoid treating each share sold as having a capital component of $50 per share if it happens to have been owned by an original incorporator, and $100 per share if it happens to be a newly issued share.

1. Immediate Averaging of Capital Component

There are two ways of treating the capital component of the shares involved in this transaction. The first would require that each of the purchasers of shares in the public offering be viewed as buying newly issued shares and previously outstanding shares in the same proportion as the total of such newly issued shares in the public offering bears to the total of such previously outstanding shares in the offering, with the capital component of such shares then being the average capital component of the shares included in the public offering. Thus, a purchaser of all 2000 shares in the public offering would take such shares with a capital component of $87.50 per share (1500 shares at $100 per share and 500 shares at $50 per share). A purchaser of any lesser number of shares would also take such lesser number of shares with a capital component of $87.50 per share.

A problem remains in connection with the 500 shares having a capital component of $50 which were not involved in the public offering. At some point, these shares may also be offered in the public market again creating the need for either a separate market or a further method of allocating the capital component. The second possibility, then, for treatment of the public offering is to include the capital component of all previously outstanding shares in the capital component computation made as a result of the public issue whether any or all of such previously outstanding shares are included in the public offering. In the example above, this would result in a capital component of $80 per share.

As theoretical justification for averaging the capital component of all outstanding shares of a class, whether included in the public offering or not, one could look at the public offering as having occurred as follows. The holders of the existing 1000 stock shares purchase from the corporation 1.5 newly issued shares at $100 per share for each share which they presently hold. This gives each pre-offering shareholder shares with an average capital component of $80 per share. The holders, then, elect to retain 500 of their shares with a capital component of $80 and to sell in the public offering 2,000 of their shares, having the same capital

component. The sellers of the 1500 shares purchased for $100 would have no gain upon its resale for $100 in the public market.[59] Thus, the public offering could have been arranged as a secondary offering by the original shareholders with the same financial results to both the corporation and the holders of stock outstanding prior to the issue as would occur in a public offering made directly by the corporation. Since the transaction could have been arranged as a secondary offering by the original shareholders, there should be no objections to treating the transaction as if it had, in fact, so occurred for purposes of determination of the capital component of outstanding shares, unless there are possibilities of unfairness from such treatment.[60]

2. Sliding Scale Capital Component Approach

Nonetheless, some may be unpersuaded by such characterization of the public offering, feeling that the original shareholders are in fact getting something — a step-up in capital component — for nothing. These people would insist on looking at the "actual" contribution of capital. With such concern in mind, if the corporation is not a Fully Qualified Corporation and is liquidated while any of such pre-offering shareholders who has received the increase in capital component is still a shareholder, or if any of such pre-offering shareholders have their shares redeemed in a transaction not essentially equivalent to a dividend at a time when the corporation is not a Fully Qualified Corporation, then such shareholder will be viewed as recognizing either less imputed

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59. Treas. Reg. § 1.1012-1(c) provides in relevant part as follows:

> If shares of stock in a corporation are sold or transferred by a taxpayer who purchased or acquired lots of stock on different dates or at different prices, and the lot from which the stock was sold or transferred cannot be adequately identified, the stock sold or transferred shall be charged against the earliest of such lots purchased or acquired in order to determine the cost or other basis of such stock and in order to determine the holding period of such stock for purposes of subchapter P, chapter 1 of the Code. If, on the other hand, the lot from which the stock is sold or transferred can be adequately identified, the rule stated in the preceding sentence is not applicable.

60. No objection can be made to such a system on behalf of purchasers of stock in such offering since the capital component possibilities presumably will be disclosed adequately as a result of the requirements of the federal and state securities laws. In theory, the issue price of such stock will be discounted by an amount necessary to reflect the risk of liquidation and the difference between issue price and capital component and dividend history. It will be noted that the holders of common stock unsold in the offering have obtained a step-up in their capital component without any additional capital contribution on their part. No one, however, has been defrauded by such step-up. The purchasing shareholders were aware of this result before their purchase. The total tax upon liquidation of the corporation will be based on the total contributed capital of the corporation and thus the treasury will not be shortchanged. Additionally, the step-up is merely incident to an issuance of shares for the business purpose of enhancing the continued operation of the corporation. Upon a sale by the continuing shareholders their basis in the shares will have been unaffected by the step-up in the capital component and their gain on such shares will be the excess of sale price over basis. Thus, since the transactions will not occur in contemplation of liquidation, objection to a step-up in the capital component of the shares held by shareholders prior to and after a new offering may be regarded as an insignificant problem.

ordinary gain than his or her own "actual" capital contribution would entitle him or her. Conversely, the purchaser of shares in the public offering will recognize more imputed ordinary gain than his or her "actual" contribution ($100) would entitle him or her. Under such view it would be appropriate, therefore, to require each pre-offering shareholder in the event of an exchange transaction to use the capital component which his or her own actual capital contribution entitles him or her (in this case $50). In the event of his or her sale of the shares, the purchaser would take the shares with the same capital component as the other publicly traded shares, which capital component would, however, depend on the number of pre-offering outstanding shares still in the hands of its original owners.[61]

The problems resulting from the sliding capital component approach can be shown by considering two subsequent public issues of treasury stock by Corporation A, the first being 1,000 shares at $200 per share, and the second being 2,500 shares at $75 per share. The following table illustrates the capital component effect of these issues under both approaches to capital component outlined above.

TABLE III

Capital Component of	1st approach*	2nd approach**
AFTER FIRST ISSUE		
original 500 shares	$ 80	$50
purchasers of first issue	$ 80	$80-$ 87.50
AFTER SECOND ISSUE		
original 500 shares	$114.29	$50
purchasers of first issue	$114.29	$80-$ 87.50
purchasers of second issue	$114.29	$114.29-$200.00
AFTER THIRD ISSUE		
original 500 shares	$ 97.92	$50
purchasers of first issue	$ 97.92	$80-$ 87.50
purchasers of second issue	$ 97.92	$114.29-$200.00
purchasers of third issue	$ 97.92	$75-$ 97.92

*The first approach is the method whereby the capital component of all outstanding stock is averaged.

**The second approach is the averaging of only those shares actually included in the issue.

61. This approach can be theoretically justified by picturing the original public offering as including all 2,500 shares of the corporation, with the purchasers to be construed as buying 1,000 shares from the old shareholders and 1,500 shares from the corporation with the resulting capital component for each share of $80. However, 500 of the shares of stock (that not included in the public offering) is not to be sold until some later date. If none of the withheld shares are sold before liquidation, or are redeemed, then the capital component of the shares actually sold in the public offering would be $87.50. If some, but not all of the withheld shares are sold before

3. Comparison of Two Methods of Allocation

The above chart shows that the use of the sliding capital component calculation would create extensive bookkeeping problems for companies. More importantly, it indicates that in the publicly held corporation the sliding capital component system is not more equitable than the immediate averaging of capital component system. While the sliding capital component may prevent the pre-offering continuing shareholders from, in the view of some, obtaining an unjustified step-up in their capital component, it does not solve the problem of subsequent purchasers after the public issue. Are these subsequent purchasers to be given an average capital component or are they also to be given a sliding capital component depending on which shares are ultimately sold? If they are to be given an average capital component, then the total contributed capital of the corporation will not equal the total capital component of its outstanding shares until all outstanding shares have changed hands once. If they are to be given a sliding capital component, then the amount of their capital component will not only be uncertain, but the investor will lack knowledge as to the likelihood of sale by holders of low capital component or high capital component shares. It is submitted that it is equitable to use the average capital component approach whereby the capital component of all outstanding shares are averaged with the capital contributed for newly issued shares, and the use of such approach for publicly-held corporations is the only feasible means of implementing a system which attempts to take into account originally contributed capital in measuring imputed ordinary gains on redemptions, liquidations, or distributions which would be dividends but for the absence of earnings and profits.

It should be remembered that a publicly-held corporation will still have a means of preventing the averaging of capital components upon a new issue of stock. For instance, a company having a low capital component for its existing shares, a deficient dividend account, and a somewhat speculative future, might feel that a new issue would find greater investor acceptance if the shares to be issued were to take a capital component equal to the issue price, rather than a lower averaged capital component. Such a corporation could accomplish the capital component-issue price equivalency by issuing a new class of stock.

The situation of the small closely-held, privately traded corporation

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liquidation then the capital component would be adjusted downward accordingly. Thus, purchasers take their shares with a sliding capital component, the parameters of which are known, but the exact amount of which varies depending from time to time on the number of originally withheld shares still unsold. This approach would seem to be equitable, but one would have grave doubts as to its practicality.

is different. Since buyers and sellers have a direct relationship, and since complex capital structures are unlikely to arise, it is suggested that closely-held, privately traded corporations would be able to use the actual contributed capital for their shares as its capital component, rather than the average capital component method. Each closely-held corporation could elect the method of capital component computation by which it wished to be governed, such election to be accomplished by such methods as the Internal Revenue Service should direct. Upon going public, a corporation would be governed by the average capital component method.[62]

B. Capital Component and Convertible Stock

Convertible stock or securities presents a different problem. Suppose Corporation ABC has since its incorporation had outstanding 100 shares of common stock having a capital component and original fair market value of $10 per share, and 100 shares of preferred stock having a capital component and original fair market value of $20 per share which preferred stock is convertible one share for one share into common stock. If the corporation is privately held and on the actual capital component method, the conversion of forty shares of preferred into common will result in the newly outstanding common having a capital component of $20, the same as the preferred from which it was converted.

If ABC were publicly held and forty preferred shares were converted to common, is there a way to justify the use of the average capital component netted? One possibility would be to require the averaging of the capital component upon the issuance of the convertible securities as if the securities holders had received common stock at the outset. The later conversions would cause no change in the capital component. This approach might be acceptable for corporations with

62. Suppose that a privately-held Corporation XYZ has elected to use the actual capital component method, and has three shareholders A, B, and C owning ten shares of common stock each. A's shares have a capital component of $10 per share, B's shares have a capital component of $20 per share and C's shares have a capital component of $25 per share. XYZ plans to go public by issuing 100 shares of common stock at $100 per share. None of the original shareholders is selling any of his or her shares in such public issue. The capital component of the 130 shares which will be outstanding after the public offering will be $81.15 determined by dividing the total contributed capital of the corporation by the number of outstanding shares. The result is understood by visualizing the capital formation history of XYZ as follows: A forms XYZ for a capital contribution of $100, receiving in exchange 10 shares of XYZ common; XYZ issues 10 shares of common to A for $20 per share, giving A an average capital component of $15 per share for each of his 20 shares; XYZ issues 10 shares of common to A and 5 shares to B for $25 per share, giving both A and B an average capital component of $18.33 for their shares; A and B each sell their last acquired 5 shares to C at their cost of $25 per share; XYZ issues 33⅓ shares of common stock each to A, B, and C for $100 per share, giving A, B, and C an average capital component of $81.15 for their 43⅓ shares; A, B, and C each sell their last acquired 33⅓ shares in a public offering for their cost of $100.

clearly sufficient dividend accounts since the preferred shareholders would not, therefore, face a risk of imputation of ordinary gain on redemptions, an event quite likely to occur in case of preferred stock. For corporations which are not Fully Qualified Corporations, there would always be the possibility of creating a new class of common into which the preferred may be converted. Still the feeling remains that perhaps convertible stock is a unique animal which should retain its actual capital component until conversion occurs. Unlike the case of various issues of the same class of stock with different capital components where resale cannot be predicted, and where fluctuations in the capital component of shares would occur almost daily in the absence of the immediate average capital component approach, convertible securities are likely to be limited as to the period in which conversion may occur, to all be converted when the market price of the stock into which it is convertible becomes attractive, and, in any event, to be redeemable enabling the corporation to eliminate capital component problems by redemption if it wishes. Moreover, the likely timing of a change in capital component and its effect on the capital component of the shares of the same class into which it is converted, can be much more readily described to, and understood by, investors. Accordingly, it would appear appropriate to allow a publicly-held corporation to elect to have capital component adjustments in the case of convertible securities made either on their issuance (average capital component method) or upon actual conversions.

C. Capital Component Computations in Reorganizations

Another concern in the use of the capital component concept is the area of reorganization. Tax-free reorganizations may be broken down into two categories — those resulting in the amalgamation of previously existing corporations[63] and those resulting in the division of an existing corporation.[64] In the latter category of tax-free divisive transactions, there also may be included divisions of a corporation in transactons other than a reorganization.[65]

From a capital component standpoint, divisive transactions are less troublesome than amalgamating ones. Divisive transactions will require the allocation of existing equal capital components among the shares of the resulting entities so as to retain the equality within each class of stock and securities. Amalgamating transactions will result in exchanges of stock having different capital components, and will

63. Tax-free amalgamating transactions are reorganizations defined in I.R.C. § 368(a)(1)(A), (B), (C), (D) (but only if the requirements of I.R.C. § 354(b)(1) are met), and (F).

64. Tax-free divisive transactions are those which meet the requirements of I.R.C. § 355.

65. I.R.C. § 355(a)(2)(C).

require a method of amalgamating the capital component of the resulting outstanding shares. As with new issues and convertible stock, the treatment of capital component will be critical in the case of publicly held corporations, with the average capital component approach being applied where necessary to avoid impairment of the stock market.

The capital component of stock or securities distributed in a tax-free corporate division should, as with the basis of such stock or securities, be determined in accordance with the general principle of section 358 of the Internal Revenue Code. Thus, the capital component of the stock and securities previously held by the recipients of the divisive distribution will be allocated in accordance with relative fair market value among the newly received stock and securities and the retained stock and securities, subject to additions and subtractions as described in section 358(a)(1)(A) and (B). Since an amalgamation is not involved, such allocation presumably will involve stock and securities, each class of which has a common capital component for its constituent securities. The allocation of capital component between stock and securities received in exchange for existing stock or as a distribution in respect thereof, and the existing or retained stock, will not cause the capital component of particular shares of stock within a class of new or retained securities to differ from one another.

An amalgamating transaction will often result in stock of different corporations, and thus different capital components, being exchanged for shares of the same class of stock of one corporation. In a privately traded corporation, the general rule of section 358 may be extended to the determination of capital component so that the capital component of a share received in a tax-free amalgamating exchange will retain the capital component of the stock surrendered. As with new issues of stock, such a result would be unworkable in a publicly traded corporation. A look at various amalgamating transactions and their effect on the capital component of the shares of the resulting corporation will show how capital component problems must be handled in amalgamating reorganizations. In this regard, the following example is illustrative:

Corporation A
10,000 shares of common stock
Capital component — $50,000 ($5 per share)
Fair Market Value — $500,000 ($50 per share)
Corporation B
20,000 shares of common stock
Capital component — $400,000 ($20 per share)
Fair Market Value — $1,000,000 ($50 per share)

Consider first an A reorganization, where A and B are to be consolidated into AB, with shareholders of A and B receiving one share of the common stock of AB for each share of A and B, respectively, surrendered in exchange. A closely held corporation would be entitled to use the actual capital component method. Under the actual capital component method each share of A common stock would be exchanged for a share of AB common stock having a capital component of $20 per share.

Publicly held companies would use either the two class common approach or the average capital component approach. Under the two class common approach, a corporation would achieve the same actual capital component result as outlined in the immediately preceding paragraph, with each surrendered share's capital being passed on to the shares of AB common received in exchange. Former A shareholders would hold AB class A common and former B shareholders would hold AB class B common. Under the average capital component approach the shareholders of A and B would receive one share of AB common stock having a capital component of $15 per share for each share of A or B common stock, respectively, surrendered. This result is justified by the rationale that the shareholders of A and of B have decided to pool their investment.[66]

D. Capital Component and Stock Outstanding Prior to Effective Date of Proposal.

Having examined the effect of the capital component concept on share transactions occurring after the effective date of any new legislation, it is now necessary to consider the consequences of such a change on existing outstanding stock issued at many different prices and with many different bases. Assume a corporation with one class of common stock outstanding, which stock was issued as follows: 1,000 shares at $50 per share; 1,500 shares at $100 per share; 1,000 shares at $200 per share; 2,500 shares at $75 per share. Immediately allocating the capital component on an averaging approach among all shares would result in a capital component of $97.92 per share.

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66. Thus it is as if the A shareholders transferred pro rata ⅔ of their shares (6,666⅔ shares worth $50 per share) for ⅓ of the shares of B (6,666⅔ shares worth $50 per share) also transferred pro rata by the B shareholders. The effect of such hypothetical transaction is that the former shareholders of A now own 3,333⅓ shares of A and 6,666⅔ shares of B. The former shareholders of B now own 6,666⅔ shares of A and 3,333⅓ shares of B. The fair market value of the holdings of each set of shareholders is unchanged, but the average capital component of the holdings of each set of shareholders is now $15 per share. The shareholders of A and B now exchange their mixture of ⅓A and ⅔B shares for shares of AB. Similar analysis applied to B and C reorganizations and to amalgamating D and F reorganizations would yield the same treatment options for the corporations and shareholders involved.

Objection on equitable grounds might be made to legislation resulting in the immediate use of $97.92 as the capital component of stock held by existing shareholders, since shareholders have purchased shares in the anticipation that such purchase price will be their basis for section 331 exchanges in complete liquidation. Accordingly, shareholders who purchased or were issued their shares at prices above the average capital component will feel that such purchase price should constitute the capital component of their shares.

A delayed form of implementation would allow all present holders of stock to use as the capital component of their stock the price at which it was purchased. Purchasers after the effective date would take the stock purchased with an average capital component (of $97.92 in the above example). This approach, however, would result in the total contributed capital and the total capital component of all shares being unequal until all shares held before the effective date have been sold. Moreover, allowing holders of stock on the effective date of any legislation introducing the capital component concept to continue indefinitely to utilize their present bases in lieu of capital component would be an unhealthy inducement to such shareholders to retain shares they might otherwise sell. Accordingly, it might be appropriate to stay the effective date of the earned capital gains treatment proposed in this article until a period of years after its passage, with the averaging of all existing shares within a class resulting even for pre-legislation shareholders on such effective date. This would allow time for the impact of such legislation to be explained to investors and allow investors an opportunity to adjust portfolios. The Commissioner could be authorized to grant exceptions to such averaging of capital components in appropriate situations. Regulations also might be necessary to handle the problem of corporations, if any, whose records do not contain all information necessary to trace back capital component; it would seem unlikely that many corporations would be unable to determine their total capital component.

The above analysis of the capital component problems caused by various issues of stock of the same class, by conversions of stock from one class into another, and by amalgamating reorganizations, suggests that such concept, while certain to produce complexity of definition and example in the Internal Revenue Service Regulations, could be utilized without unduly impairing the functioning of the stock market. The general principle would be to require each share of a class of stock to have a common capital component with other shares in such class, except for stock of privately-held companies which elect to use the actual contributed capital approach. Implementation of such proposal would be delayed for a period of time to allow the effect of such

changes to be understood and adjusted for by investors.

E. Capital Component and Sections 305 and 306

An area of concern in utilizing the capital component concept is sections 305 and 306 stock. What is the capital component of stock distributed in a distribution described in section 305(b) of the Internal Revenue Code? Upon formation of a corporation, the capital component of shares issued in exchange for contributed property is the amount of the money plus the basis in the hands of the transferor of other property contributed. Such money or property to the extent of its basis in the hands of the transferor has been fully taxed. Stock distributed in a distribution described in section 305(b) will be taxed to a recipient as if he or she had received from the corporation a money dividend equal to the fair market value of the stock received and had then purchased from the corporation, with fully taxed funds, the stock so distributed. Accordingly, the capital component of stock distributed as described in section 305(b) should equal its fair market value. As we have seen with the public issue of shares where existing shares are outstanding,[67] the possibility of different capital components for stock of the same class must be avoided. The types of situations covered by section 305 and the capital component adjustments necessitated by each situation are discussed below.

The first situation is two class common stock where each share of each class is entitled to share equally in the assets and earnings of the corporation.[68] If one class receives a dividend payable in cash and one class receives a dividend payable in additional shares of such class, then the additional shares are treated as a distribution of property under section 301 to the extent of their fair market value. Accordingly, the capital component of all shares of the class receiving such stock dividend should be determined immediately after such dividend by adding the contributed capital of such class before the dividend and the total fair market value of the stock dividend, and then dividing the sum so obtained by the total number of shares of such class outstanding after such stock dividend.

The second situation would be distributions of convertible preferred stock treated under section 305(b)(5) as a distribution of property to which section 301 applies. Such convertible preferred will take as its capital component its fair market value, and the stock as to which it was issued will take a sliding capital component with adjustments occurring upon conversions. The limits of the changes in capital component

67. *See* discussion of Publicly Held Corporations, Section III(A)(3) *supra*.
68. *See* Treas. Reg. § 1.305-3(e), *Example 1*.

which will result if conversion ultimately occurs can be set at the time of the issuance of the convertible stock.[69] Since convertible preferred stock will not be subjected to treatment as a distribution subject to section 301 unless it appears likely that some of such convertible stock will be converted into stock and some into money, and since a short duration of the right of conversion is one of the factors leading to such a conclusion, the sliding capital component will likely become an average capital component within a reasonable time after the dividend.

A third area covered by section 305(b)(2) is distributions resulting in the receipt of property by some shareholders and an increase in the proportionate interests of other shareholders. In a privately traded corporation electing actual capital component treatment, the shareholders receiving stock have their capital component allocated between the old and new stock in the same manner as stock distributed in the two-class common situation described above. Subsequent purchasers of such class of stock take such stock with a sliding capital component which adjusts as subsequent sales are made. In electing privately held corporations and in publicly traded corporations, unless the two-class common approach was used, the transaction would be viewed as a pro-rata stock dividend to all shareholders resulting in an average capital component, followed by a sale of the dividend stock to the actual stock dividend recipients.

Section 305 also deals with the consequences of increasing and decreasing conversion ratios, and the issuance of common on common where no adequate anti-dilution provision exists for outstanding convertible securities. The capital component of stock whose conversion ratio is increased would be adjusted by increasing such capital component by an amount equal to the increase in the fair market value of such stock treated as a distribution of property subject to section 301. If the conversion ratio of convertible stock is decreased, the capital component of the stock into which it is convertible is increased by the fair market value of such change (the amount treated as distribution of property subject to section 301). In the absence of adequate anti-dilution provisions for outstanding convertible securities, the capital component of common stock will be the capital component of the pre-dividend shares averaged as in the two class common example. In the case of a proscribed original issue discount, the capital component will be increased as, and to the extent that, such premium is treated as a distribution of property subject to section 301. Stock which is not pursuant to section 305(b) or (c) treated as a distribution of property subject to section 301 will not be subject to taxation upon distribution.

69. *See* Section III(B) *supra.*

Some of such stock (section 306 stock) will later be subject to dividend treatment under section 306 upon its disposition, while other of such stock will not. Additionally, section 306 stock includes certain stock received in a reorganization or in an exchange under section 355. Section 306 stock is not subject to dividend taxation until it is disposed of and then only if it is not disposed of in a transaction satisfying one of the exceptions set forth in section 306(b) or (c). Because the eventual tax burden imposed on section 306 stock cannot be determined until its disposition, it seems essential administratively to require that the capital component of all stock or stock rights received in a distribution to which section 305(a) applies be determined by allocating between the old stock and the new stock the capital component of the old stock. This could be accomplished pursuant to regulations of the Commissioner as under section 307.[70] The consequence of such a structure is that a purchaser of section 305(a) stock will take such stock with a capital component other than the purchase price which he or she pays, even though the seller will have incurred dividend treatment on the sale proceeds. Under the suggested treatment of section 305 transactions as being the equivalent of a section 351 contribution of tax paid funds, a purchaser of section 306 stock ideally would be entitled to a cost capital component for his or her shares, but such is not feasible. Presumably this fact will be considered by a purchaser if the purchaser is other than a tax-exempt entity. Of course, if the corporation is by its dividend history a Fully Qualified Corporation, then a purchaser of section 306 stock would not be concerned by this problem.

IV. TAX AVOIDANCE AND CARRYOVER OF DIVIDEND ACCOUNT

A proposition often cited by those commenting on the practicability of treating the gain realized on liquidating distributions as other than capital gain is that such proposals are "open to ready avoidance by sales in anticipation of liquidation to low-bracket or charitable entities."[71] To this and other possible tax avoidance problems which must be anticipated in implementing the proposals, this article now turns.

If one rejects scrutinizing each sale of shares of an on-going corpora-

70. I.R.C. § 307(a) sets forth the following general rule:

If a shareholder in a corporation receives its stock or rights to acquire its stock . . . in a distribution to which section 305(a) applies, then the basis of such new stock and of the stock with respect to which it is distributed . . . respectively, shall, in the shareholder's hands, be determined by allocating betweeP the old stock and the new stock the adjusted basis of the old stock. Such allocation shall be determined by allocating between the old stock and the new stock the adjusted basis of the old stock. Such allocation shall be made under regulations prescribed by the Secretary.

71. H. CALKINS, 86TH CONG. 1ST SESS., CORPORATE DISTRIBUTIONS AND ADJUSTMENTS AND THE HARD ROAD TO A BROADER TAX BASE 1639 (Comm. Print 1959).

tion for its then eligibility for full capital gains treatment based on the dividend history of the corporation at such time,[72] the problem of anticipatory sales or gifts to low-bracket or tax-exempt entities may be approached in one of two ways. Emphasis may be placed either on the treatment of recipients of such sales or gifts, or upon the transferors, based upon a general notion that it is not acceptable to obtain tax benefits by participating in transfers made in anticipation of liquidation or redemption.

Looking first at charitable gifts to tax-exempt entities, if one wishes to prevent charitable gifts being made in anticipation of liquidation by focusing on the donor, then what should the protective measure be? Present law favors charitable contributions of stock by allowing a deduction against ordinary income in the amount of the fair market value of stock, rather than in the amount of the shareholder's basis for these shares.[73] One way of stating this is that Congress will allow an individual to receive a deduction against ordinary income for the value of contributed shares by foregoing the opportunity to sell such shares with gain, if any, being entitled to capital gains treatment. Contributions of shares in collapsible corporations or of section 306 stock would infringe on this *quid pro quo* since the gain being foregone would not have been entitled to capital gains treatment. However, section 170(e)(1)(A) of the Tax Reform Act of 1969, reduced the charitable deduction available by the amount of ordinary income which a sale of the contributed property by the donor would have produced. A gift in anticipation of the liquidation of a Non-Fully Qualified Corporation would involve the avoidance of ordinary income, the exact problem which Congress addressed in section 170(e)(1)(A). Accordingly, it is suggested that section 170(e)(1) be amended so that the charitable deduction for any donation of shares of stock in a Non-Fully Qualified Corporation should be reduced by the amount of ordinary income which would be realized by such donor if the corporation were completely liquidated on the date of such gift.[74] Such a provision should deal effectively with the possible tax avoidance problem of gifts to tax-exempt entities by the

72. *See* discussion of *Complete Liquidation,* Section II(A) *supra.*

73. Treas. Reg. § 1.170-1(c) provides as follows: "If a contribution is made in property other than money, the amount of the deduction is determined by the fair market value of the property at the time of the contribution."

74. Thus if shareholder H-1, the original incorporator of Corporation H which has a zero dividend account, donates his shares in H (having a capital component of $100 and a fair market value of $2,300) to a charitable institution, his deduction will be $100 since the amount of ordinary income recognized in the event of complete liquidation would have been $2,200. If H had paid dividends of $500 prior to the gift, making the fair market value of H $1,800, then H-1 would be entitled to a deduction of $500, the fair market value of his stock less the amount of ordinary income which would have been incurred in a complete liquidation occurring on the date of the gift.

shareholders of Non-Fully Qualified Corporations.[75]

Focusing preventive measures on the recipient of stock in such a tax avoidance situation seems unnecessary since the preventive measure aimed at donors just described effectively deals with the possible problem. Moreover, a mere recipient of a gift may be thought of as an inappropriate entity to tax, as opposed to the donor, where the recipient has not participated in the transaction in any manner other than would be thought appropriate of a charity.

The measures necessary to prevent sales to low bracket or tax-exempt entities would depend on the situations in which such sales are likely to occur. In a closely-held corporation, these sales would likely occur as an integral part of the liquidation process. The shareholders of a closely-held Non-Fully Qualified Corporation desiring to liquidate, but not wishing to bear the tax burden resulting from the corporation's dividend history, would attempt to find an entity, probably tax-exempt, which would purchase their shares, giving the sellers capital gains treatment. The tax-exempt entity would subsequently liquidate the corporation recovering tax-free its investment plus the negotiated premium.

In the publicly-held situation, the anticipatory sales are more likely to involve the dumpings of shares on the public market by high bracket entities and people whose cost basis for shares exceeds the capital component. Corporation H with a fair market value of $2300 and a capital component of $100 for its outstanding shares, all held by the original incorporator and sole shareholder H-1, shows the tax advantages which would cause shareholders to wish to sell their shares in contemplation of liquidation. The tax to H-1 if he caused corporation H to liquidate would be $1540, whereas if he sold his shares for $2200 (a liquidating distribution would be $2300) to a tax-exempt entity, then his tax is $735. The after tax yield to H-1 is $705 more if he sells his shares instead of liquidating. The tax-exempt entity will then liquidate H receiving tax-free the return of its $2200 investment plus a $100 premium.

Focusing preventive measures on the seller of stock in contemplation of liquidation would require a provision that any sale in contemplation of liquidation would be allowed capital gains treatment only to the extent that the dividend history of the corporation would have qualified an exchange in liquidation occurring on the date of sale for capital gains treatment. In a closely-held business, particularly one where the corporation's value is largely in passive investments such as real estate, it may be difficult to determine whether sales have occurred in contempla-

75. In addition, such a provision, coupled with the earned capital gains tax treatment for redemptions concept, might be helpful in the life income cases. *See, e.g.*, Grove v. Commissioner, 490 F.2d 241 (2d Cir. 1973).

tion of liquidation. Suppose the major asset of H, other than cash, is a shopping center managed by a management company unrelated to H-1. If H-1 sells his shares to a tax-exempt entity for $200, the transferee may well be prepared to wait several years before liquidating the corporation. Accordingly, it may be necessary to provide that any sale of shares to a tax-exempt entity, other than sales which are made over the counter or on a public exchange, should result in capital gains treatment to a seller of shares only to the extent qualified by a dividend deduction determined as of the date of sale, regardless of whether such sales are made in contemplation of liquidation.

Sales by shareholders of a publicly-traded corporation would be easier to police. The disclosure requirements of the various securities laws will require notice of any planned liquidation.[76] From the date knowledge of a possible liquidation is disseminated, all sales of shares should be entitled to capital gains treatment only to the extent of the corporation's dividend account, with imputed ordinary gain if applicable, except that if a decision is made not to liquidate then such seller of shares would be entitled to full capital gains treatment. A purchaser of shares during such a limbo period would be entitled to use his or her cost basis as capital component if liquidation in fact occurred, but not otherwise.

Redemptions will create a different problem in some respects than liquidations. A person who sells his or her shares in the market with knowledge that an offer to redeem is outstanding, must be thought to be selling in contemplation of such redemption. To taint all such sales would inhibit the stock market. Perhaps the best course is to impose a seventy per cent tax on the gain (redemption price minus capital component) of all shares voluntarily tendered for redemption by a tax-exempt entity, unless all of such shareholder's holdings in such company were acquired prior to the making of such tender offer and prior to such entity's knowledge that then an offer would be made, or unless the corporation has been a Fully Qualifying Corporation since the shareholder became a shareholder. Another possibility is to suspend the automatic full capital gains treatment for sales of shares during periods in which an offer to redeem is outstanding. Thus, a company would be reluctant to attempt to redeem its shares unless such redemption would be a fully qualifying one. Since automatic capital gains treatment on sales of shares is extended under the proposals made earlier in this paper on the understanding that such treatment will result in imputed ordinary gain upon liquidation if dividends have not been sufficient, it seems wholly appropriate to suspend such privilege when a

76. *See* note 52 *supra*, where the need for additional legislation is explained.

portion of the corporation's assets are permanently leaving the corporation without the required settling up.

The value of a dividend account under the proposed earned capital gains concept will make necessary rules governing the carryover of such attribute in the event of corporate divisions, mergers and other reorganizations, and will make necessary rules governing other transactions whereby individuals or corporations attempt to avoid the tax consequences of the lack of a sufficient dividend account.

The shareholders of a corporation having a poor dividend history but substantial asset value who wished to cash in their investment at capital gains rates, and without recognition of imputed ordinary gain, would attempt to find a purchaser for their shares. If such purchaser were other than a corporation then there would be no objection to such transaction since corporate assets would not thereby leave corporate solution and their future leaving of corporate solution by way of liquidation or redemption would remain subject to the sufficiency of the dividend account for any capital gains treatment and subject to imputed ordinary gain. Earlier in this section,[77] the possible ways of penalizing shareholders who transferred shares to a tax-exempt entity in order to avoid the tax consequences of an insufficient dividend account were discussed. Would such measures apply if a shareholder sold all of his or her shares to Corporation X in contemplation of liquidation and X did in fact liquidate under section 332 and step-up the basis of the old corporation's assets under section 334(b)(2)? The answer may differ depending on the circumstances. If a corporation is closely-held, it is difficult to believe that negotiations between seller and purshaser would not cover all factors affecting the value of the seller's property, including the intended use of such property by the purchaser. If the purchaser expected a cost basis for its assets, as opposed to a continued operation of the corporation in its present form, such fact would likely be available to the seller. Clearly not covered by the above-described methods for attempting to prevent the avoidance of tax by transfers in contemplation of liquidation would be transactions in which the purchasing corporation operates the sold corporation for several years and then liquidates under Code section 332.

Sales to a corporation would of course be a problem under present law because section 332 allows a corporation to receive a distribution in complete liquidation of an eighty per cent subsidiary without recognition of gain or loss. Section 332 is a logical provision when one considers subsidiaries of a corporation formed by its parent, but it makes very little sense in the case of a corporation which purchases an existing

77. *See* pp. 129-32 *supra*.

corporation which does not fully qualify for capital gains treatment for its own exchange transactions. The dividend account of the purchased corporation would be carried over as discussed immediately below.

It is suggested that section 332 should be amended so that upon liquidation of a corporation which was not formed by its parent and which was dividend deficient upon its purchase, the parent shall recognize gain under section 331. Code section 243 must also be amended to prevent a corporation from distributing the property of a purchased subsidiary to itself over a period of time to avoid the consequences of the proposed revision of section 332. The benefits of section 243 should be unavailable to a corporate purchaser of eighty per cent of the shares of a Non-Fully Qualified Corporation, and all distribution by such subsidiaries should be subject to treatment under section 301 as if the parent were a non-corporate distributee until such time as the corporation becomes a Fully Qualified Corporation (its dividend account matches its net asset value). The amended sections 243 and 332 would be inapplicable to such a corporate purchaser once its subsidiary became fully qualified.[78]

Because of the danger of a corporation acquiring less than eighty per cent of the stock of a Non-Fully Qualified Corporation and before reaching eighty per cent causing such corporation to pay dividends to its parent which qualify for the eighty-five per cent dividend deduction of section 243, until sufficient dividends have been paid to make such corporation Fully Qualified, it is suggested that section 243 be further amended to be inapplicable to any distributions to a corporate shareholder by a corporation which was non-fully qualifying on the date such corporate shareholder became the owner, including attribution under section 318, of twenty per cent or more in value of the stock of such distributing corporation. These further provisions of section 243 would not apply to shares received by a corporation in a tax-free exchange or after the time when the distributing corporation becomes a Fully Qualifying Corporation.

A similar type of treatment could be used for tax-exempt purchasers of stock in a Non-Fully Qualifying Corporation. Such a provision would in effect say to tax-exempt entities, "your tax-exempt privilege does not extend to certain transactions where you assist, knowingly or unknowingly, the avoidance by individuals of the tax burden which Congress wishes to impose on certain distributions of corporate

78. Thus if X Corporation purchased all of the stock of Y Corporation from the Y shareholders, and if Y Corporation has a net asset value of $200 (fair market value minus total capital component), a dividend account of $160, and earnings and profits of $20, then the distribution of a $20 dividend by Y immediately after the purchase by X would make Y a Fully Qualified Corporation and would make the special provisions of the amended §§ 243 and 332 inapplicable thereafter.

assets." No great burden is placed on tax-exempt entities by such a provision since their exposure is determinable and fixed as of the date of their purchase of a share.

Reorganizations create problems of how to carryover the dividend account in a way which will prevent the trafficking in dividend accounts. This is important so that the concept of a minimum requirement which must be satisfied to warrant full capital gains treatment does not become a measure of maximum burden. It is suggested that in a B or E or non-amalgamating F reorganization the dividend account should carryover, with the B reorganization acquiring corporation being subject to the special provisions of sections 243 and 332 if the acquired corporation were not fully-qualified on the date of the transfer. A D reorganization constituting a "split-up" or involving the transfer of operating assets only, rather than substantially all of the transferor's assets would result in allocation of the dividend account as with earnings and profits under section 312(i) of the Internal Revenue Code. An A, C, D (not described in the preceding sentence), or amalgamating F reorganization would result in a carryover of the dividend account, but to the extent that the acquiror or acquiree (or both if a consolidation) was not a Fully Qualified Corporation prior to the reorganization, then the resulting entity's dividend account shall reflect such prior deficits. Such post-reorganization deficits should be capable of alleviation only by post-reorganization dividends which, pursuant to regulations of the Commissioner, are determined to be attributable to the assets of the pre-organization entity to whom the deficits are attributable.

V. CONCLUSION

The present system of corporate-shareholder taxation favors corporate liquidators, and provides no rewards to the continuing corporation which submits to the double taxation of corporate gain. This article has demonstrated that the double tax system can be strengthened, and the bias against continuing corporations alleviated, by allowing corporate distributions which are not dividends to be treated as capital gains only to the extent that the gains on such distributions are matched by lifetime dividend payments made by the corporation.

Certainly, this proposal would introduce into the tax system some new complexity. However, this proposal would make possible the elimination of the extremely intricate and overly broad collapsible corporation provisions. Thus, it may reasonably be argued that no overall net increase in complexity would result by the proposal's adoption.

One effect of this proposal would be the imposition of equal tax burdens on like corporations or their shareholders regardless of the manner in which the corporation is organized or its affairs conducted. Finally, the proposal provides a much needed theoretical justification for the preferential treatment of corporate distributions which are other than dividends.

An Overview of the Treatment of Return Preparers Under the 1976 Tax Reform Act

*Thomas J. Ryan**

The Tax Reform Act of 1976 added numerous provisions to the Internal Revenue Code which regulate the conduct of professional tax return preparers. In this piece, Mr. Ryan outlines those new sections, and the procedures for assessing penalties. In addition, he suggests a way of strengthening the deterrent value of these reforms.

According to estimates of the Internal Revenue Service, half of all taxpayers who filed returns in 1972 "sought some form of professional or commercial tax advice in preparing" them.[1] The sheer number[2] and sophistication of those who prepare tax returns for a fee has led to considerable abuses from careless omissions[3] to fraud. Examples of deception include the preparer's advice that a taxpayer sign his or her return before it was completed, and the assurance that the person will receive a refund due to the preparer's professional skill.[4] Such practices created the need for regulatory legislation which was met partially by the enact-

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1. SENATE FINANCE COMMITTEE, S. REP. NO. 94-938, 94th Cong., 2d Sess. 349 (1976) [hereinafter cited as SENATE FINANCE REPORT].

2. For 1972, the Internal Revenue Service stated that "approximately 250,000 people were engaged in the business of preparing income tax returns." *Id.* at 349. H & R Block is the largest company in the tax preparation field, having 7500 offices and over 9,000,000 clients. CHANGING TIMES: THE KIPLINGER MAGAZINE, February 1977, at 7.

3. There are indications that preparers have been guilty of numerous errors.

> The California Department of Consumer Affairs has concluded that taxpayers in that state have less than a 50 per cent chance of getting an accurate return from tax-prep companies. . . . Similarly, a study in Suffolk County, N.Y., revealed that ten tax-preparation firms made anywhere from six to thirteen errors on a sample return.

NEWSWEEK, March 21, 1977, at 73.

4. SENATE FINANCE REPORT, *supra* note 1, at 349-50. "In some of these cases, the preparer either claimed fictitious deductions or increased the number of exemptions claimed in order to achieve the refund or tax liability which was promised to the taxpayer." *Id.* at 350.

ment of the 1976 Tax Reform Act.

Before the Act, return preparers were subject to very few provisions of the Internal Revenue Code. Thus, the behavior expected of those in the preparation industry was unclear. Also, it was difficult for the government to identify blatant offenders since they were required neither to sign the return nor to reveal any other identifying information.[5] Moreover, the enumerated sanctions for improper preparation were difficult to enforce and hardly served to deter future misconduct.[6] The overwhelming majority of penalties were directed to the taxpayer, and not to the paid preparer.[7] Simply stated, the old Code was ineffective in controlling the increasing problems.

Provisions of the 1976 Tax Reform Act demonstrate a positive step forward. Preparers must now satisfy disclosure requirements and particular standards of conduct or be liable for stiff civil penalties and the possibility of an injunction. Whether these provisions will be genuinely effective in protecting the taxpayer/consumer can only be answered at a later date.

This brief comment seeks to provide a roadmap to the still unfamiliar sections of the new law applicable to income tax return preparers. In addition, it will highlight difficulties in anticipating how some of these untested sections will be applied.

I. DEFINITION OF AN INCOME TAX RETURN PREPARER

Newly enacted Internal Revenue Code section 7701(a)(36) defines an income tax return preparer as "any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by subtitle A or any claim for refund of tax imposed by subtitle A."[8] A person is not considered a return preparer when he or she is covered by one of the four exceptions set out

5. *Id.* at 350. "The tax return forms generally required that anyone preparing a return for another sign the return, but there were no penalties for failure to do so." Austin, Forster & Rosen, *Tax Reform: The New Perspective,* 1977 J. ACCOUNTANCY 48, 49; No I.R.C. provisions obligated a return preparer to disclose to the Service whether he or she prepared returns professionally or to identify which returns he or she had prepared. SENATE FINANCE REPORT, *supra* note 1, at 349.

6. Only I.R.C. §§ 7216 and 7206 applied to income tax return preparers before the Reform Act. Both sections are still valid. Section 7216 imposes a fine (not exceeding $1,000) and/or imprisonment (not greater than one year) where a preparer wrongfully discloses or uses information provided by the taxpayer in the return's preparation. Section 7206 authorizes a fine (not exceeding $5,000) and/or imprisonment (not greater than three years) for those committing the felony of giving fraudulent or false tax advice to a taxpayer in preparing his or her return.

7. Austin, Forster & Rosen, *Tax Reform: The New Perspective,* 1977 J. ACCOUNTANCY 48, 49. Taxpayers are subject to criminal fraud penalties (I.R.C. § 7201) and civil fraud penalties (I.R.C. § 6653).

8. Subtitle A is the income tax chapter.

in Code section 7701(36)(B)[9] or when a return is prepared gratuitously.[10]

To be classified as a return preparer, one need only complete a *substantial portion* of a tax refund or refund claim.[11] This is sufficient to consider the return or refund as completed in its entirety by the return preparer.[12] What comprises a *substantial portion* is established by studying in each case the amount of tax liability and the length and intricacy of the parts professionally prepared.[13] For example, handling a single schedule of a return normally would not be significant enough "unless that particular schedule was the dominant portion of the entire tax return."[14]

The provisions of the Reform Act apply to all return preparers regardless of their educational qualifications or professional background.[15] Thus, lawyers, accountants and certified public accountants are covered.[16] In addition, new Code section 6107(c) provides that the Secretary may issue regulations which define those situations where two persons may be considered preparers of the same income tax return while only one preparer may have: 1) furnished a copy of the return to the taxpayer,[17] or 2) kept a copy or list of the returns prepared.[18] In

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9. This provision provides that a person is not a return preparer simply because he or she:

(i) furnishes typing, reproducing, or other mechanical assistance,

(ii) prepares a return or claim for refund of the employer (or of an officer or employee of the employer) by whom he is regularly and continuously employed,

(iii) prepares a return or claim for refund for any trust or estate with respect to which he is a fiduciary, or

(iv) prepares a claim for refund for a taxpayer in response to any notice of deficiency issued to such taxpayer or in response to any waiver of restriction after the commencement of an audit of such taxpayer or another taxpayer if a determination in such audit of such other taxpayer directly or indirectly affects the tax liability of such taxpayer.

I.R.C. § 7701(36)(B).

10. A return preparer is one who is compensated for his or her services. The Senate Committee offered some interesting examples. An individual is not considered a preparer if he or she completes a return without payment for a friend or relative. Moreover,

a person who fills out a return for a friend or neighbor with no explicit or implicit agreement for compensation will not be considered to have prepared the return for compensation even though that person receives an expression of gratitude (such as an invitation to dinner or a returned favor from the taxpayer).

SENATE FINANCE REPORT, *supra* note 1, at 351-52.

11. I.R.C. §§ 7701(a)(36)(A). The final sentence of this subsection states that "the preparation of a substantial portion of a return or claim for refund shall be treated as if it were the preparation of such return or claim for refund."

12. SENATE FINANCE REPORT, *supra* note 1, at 352.

13. *Id.* at 351.

14. *Id.*

15. *Id.*

16. Gadarowski, *Regulation of Tax Preparers under the Tax Reform Act of 1976*, 51 CONN. B.J. 21, 25 (1977).

17. The obligation to provide a copy comes from I.R.C. § 6107(a) which requires that "[a]ny person who is an income tax return preparer with respect to any return or claim for refund shall

other words, if only one return preparer has satisfied these requirements, the other return preparer also will be deemed to be in compliance.

II. IDENTIFICATION OF INCOME TAX RETURN PREPARERS

To regulate the conduct of return preparers, it is essential that the Internal Revenue Service be able to identify them. New section 6060(a) provides that employers of preparers file an annual information return which lists the name, taxpayer identification number, and place of work of each return preparer employed during the year. To this end, form 5717 must be sent to the Internal Revenue Service by an employer of return preparers or by a preparer who is self-employed.[19] Alternatively, section 6060(b) allows the Secretary to approve a different reporting method where "the necessary information is available to him from other sources."[20]

If an employer fails to comply with a proper reporting procedure, he or she is subject to penalties. New section 6695(e) establishes a one hundred dollar fine for every unfiled information return as well as a five dollar charge for each omission of a required item, (name, I.D. number, and place of work) with a maximum yearly penalty of twenty thousand dollars. Thus, each incomplete return would result in a fine not greater than fifteen dollars. However, the failure to file any report would bring a fine of one hundred and fifteen dollars.

Although the general rule is that return information is confidential,[21] new section 6103(k)(5) allows the Service to provide state agencies with taxpayer identity information regarding return preparers (derived from the annual report) and whether any penalty has been assessed against them. This information may be used only to license, register or regulate return preparers. Pursuant to new section 7213(a)(2), an employee of any state or local agency who discloses such information without authorization commits a felony punishable by a maximum fine of five thousand dollars or imprisonment for a period not to exceed five years or both, together with the costs of prosecution.

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furnish a completed copy of such return or claim to the taxpayer not later than the time such return or claim is presented for such taxpayer's signature."

18. The responsibility to retain a copy or list by a preparer is found in I.R.C. § 6107(b).

19. Treas. Reg. § 404.6060-1(4)(1976).

20. An example of an alternative reporting method is the consistent filing of all information required by I.R.C. § 6060 on magnetic tape. Treas. Reg. § 404.6060-1(4)(b)(1976).

21. I.R.C. § 6103(a).

III. DUTIES OF AN INCOME TAX RETURN PREPARER

An individual who qualifies as a return preparer must follow specific procedures and standards established by the Reform Act or be subject to penalties. Unlike the preceding discussion of the employer's responsibility to file an annual return, the duties set out below are those of the preparer, and may be avoided only if that individual shows reasonable cause for non-compliance.

A. Identification of the Preparer on Individual Returns

One obligation of a preparer is to provide certain information on a return which would enable the Internal Revenue Service to determine who prepared it. New section 6109(a)(4) states that, if required by regulations prescribed by the Secretary,[22] every prepared return must contain the preparer's identification number or that of his or her employer or both. This number is the person's social security number. New section 6695(c) establishes a twenty-five dollar penalty for each failure to supply the identification number. In addition, new section 6695(b) provides that a failure by a return preparer to sign any return, if required to do so under regulations prescribed by the Secretary,[23] will result in a twenty-five dollar penalty.

B. Copy of the Final Return

1. Duty to present a copy to the taxpayer

Under new section 6107(a), the return preparer must present a completed copy of the tax return to the taxpayer at the time the taxpayer signs the return. The purpose of this provision is to prevent a taxpayer from signing a return before it is completed by the preparer and also provide the taxpayer with an opportunity to inspect the return for an inaccuracy.[24] Under new section 6695(a), a return preparer who fails to

22. Treas. Reg. § 404.6109-1(a)(1976).

23. Treas. Reg. § 404.6695-1(a)(1976) requires that the preparer sign the return or claim for refund. This regulation also provides other directives for handling situations which might arise concerning this responsibility.

> If the preparer is unavailable for signature, another preparer must so advise the taxpayer, must review the entire preparation of the return or claim, and then must sign the return or claim. The signature of the preparer should be affixed after the return or claim is completed and is ready to be submitted to the taxpayer for signature. . . . If more than one income tax return preparer is involved in the preparation of the return or claim for refund, the individual preparer who has the primary responsibility as between or among the preparers for the overall accuracy of the preparation of such return or claim for refund shall be deemed to be the income tax return preparer for purposes of this section.

24. SENATE FINANCE REPORT, *supra* note 1, at 354. Gadarowski, *Regulation of Tax Preparers under the Tax Reform Act of 1976,* 51 CONN. B.J. 21, 27 (1977).

provide the taxpayer with a copy of the return at the appropriate time is subject to a twenty-five dollar penalty for each failure, unless it is shown that failure was due to reasonable cause and not willful neglect.

2. Duty to retain a copy

Reform Act section 6107(b) requires the income tax preparer to retain a copy of the return or refund for the period ending three years after the close of the return period. In lieu of retaining copies of returns or refunds, the preparer may keep a list of all taxpayers and their identification numbers. Retention of this list must also comply with the three year rule.

The purpose of section 6107(b) is to provide a mechanism for the Service to identify all the returns prepared by any individual who has improperly prepared some returns.[25] Section 6695(d) provides that a preparer who fails to comply with section 6107(b) shall be penalized fifty dollars for each failure with a maximum penalty not greater than $25,000. This fine will not be applied if the preparer can show that the failure to satisfy section 6107(b) is due to reasonable cause and not willful neglect.

C. Duty to Follow Rulings and Regulations

As well as the responsibilities to disclose identity and retain information, the return preparer has the primary duty to follow the Internal Revenue Service revenue rulings and treasury regulations;[26] failure to do so results in the imposition of penalties. Provisions of the Reform Act impose fines aimed at those return preparers who understate tax liability as a result of negilgence or willfulness.[27] These civil penalties are designed to act as a deterrent to return preparers generally and specifically to those who do a large volume of return preparation.

1. Negligent and fraudulent returns

Section 6694(a) added by the Act establishes a one hundred dollar penalty for each return prepared where there is an understatement of tax because of a preparer's negligence or intentional disregard of Internal Revenue Service rulings or regulations. The Senate Report con-

25. SENATE FINANCE REPORT, *supra* note 1, at 353.

26. Treas. Reg. § 404.6694-1(a) (answer to Question #2)(1976).

27. SENATE FINANCE REPORT, *supra* note 1, at 355. "The negligence penalty applies to the specific income tax return preparer who negligently or intentionally disregards rules or regulations." *Id.* Willful (fraudulent) understatement is illustrated by reference to examples where: a. the preparer disregards facts supplied to him or her by the taxpayer, and b. the preparer ignores particular items of income given to him or her by the taxpayer. *Id.* at 355-56.

siders the question of the liability of an employer of a tax return preparer. Unless the employer or its main officers have disregarded the rules or regulations either negligently or intentionally, they will not be held liable for an employee's action. The employer may incur liability in two ways: by direct supervision of employees in a specific practice that violates rules and regulations or if the employer was aware that the rules and regulations were not being observed by his or her employee return preparers.[28] In essence, employer liability does not result solely because of the employer-employee relationship, but rather because the employer is negligent in supervision or has direct knowledge of an existing practice or preparation.

Code section 6694(b) establishes a five hundred dollar penalty for each return prepared where an understatement of tax liability results from a preparer's willful attempt to disregard Service tax rules or regulations. As the section states, however, this penalty "shall be reduced by the amount of the penalty paid by such person by reason of subsection (a)." Subsection (b) normally applies in those situations where the preparer disregards income items or facts supplied to him or her by the taxpayer or others in an attempt to reduce the tax. An example of a willful attempt to understate tax liability occurs if the preparer reports more dependents on a return than the taxpayer actually has reported to the return preparer.[29]

A willful understatement of tax can also include an intentional disregard of rules and regulations, such as when a preparer deducts all of a taxpayer's charitable contributions, intentionally disregarding the fifty per cent level of adjusted gross income regarding contributions to section 170(b)(1)(A) organizations. The Senate Report indicates that in this type of situation, the Internal Revenue Service can assess either or both penalties against the preparer.[30] However, the maximum penalty that can be assessed is five hundred dollars.

Where the Service imposes a penalty based on a preparer's willful understatement of tax liability ($500 penalty), the Service bears the burden of proof.[31] On the other hand, the preparer must meet the burden of proof in those instances where negligence or intentional disregard ($100 penalty) is involved.[32] The preparer will satisfy the burden of proof requirement if he or she can show the normal practice

28. *Id.* at 355.

29. *Id.* at 356.

30. *Id.* The Senate Report provides the example of a preparer "who deducts all of a taxpayer's medical expenses, intentionally disregarding the per cent of adjusted gross income limitation." *Id.*

31. I.R.C. § 7427.

32. SENATE FINANCE REPORT, *supra* note 1, at 357.

was followed for the treatment of a particular item and also that the treatment was not negligent.[33]

A three year statute of limitations exists for the one hundred dollar penalty, although there is no statute of limitations for the application of the five hundred dollar penalty.[34] The return preparer under section 6696(d)(2) has three years from the time a one hundred or five hundred dollar penalty is paid to file a claim for refund. This three year rule also applies to all other penalties assessed under sections 6694 or 6695.

The fines for negligent and willful understatement arise only in instances where there is an understatement of tax liability or a refund overstatement.[35] In the application of the willful and negligence sections, it is unnecessary that the Service resolve the final liability of the taxpayer before proceeding against the return preparer. It is sufficient that an understatement of tax is proven in the proceeding against the preparer.[36]

IV. APPLICATION OF INTERNAL REVENUE SERVICE STANDARDS

To determine what behavior by the return preparer will constitute a violation of the new Code provisions, it is necessary to examine the language of the committee reports. Both the House and the Senate Finance Committees properly exclude from the category of negligent or intentional disregard of rules or regulations "a good faith dispute by an income tax return preparer about an interpretation of a statute."[37] According to the Conference Committee reports, section 6694(a) is to be given an interpretation similar to that placed on section 6653(a) which imposes directly on the taxpayer a penalty for negligent or intentional disregard of rules and regulations without fraudulent intent.[38]

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33. *Id.* For both willful and intentional/negligent understatements, the reasons for the particular allocation of the burden of proof between the return preparer and the Service is not contained in the Committee Reports. It may be that Congress sought to avoid a potential enforcement problem in cases where the preparer's negligent or intentional disregard of rules and regulations is alleged. In such instances, the preparer should have the responsibility of proof because he or she has the best access to the evidence needed to sustain this evidentiary burden. If the burden of proof were placed on the Service its enforcement effectiveness would be weakened, thus diluting the statutory intent of deterrence. On the other hand, the IRS should have the burden in cases where willfulness must be shown since such a charge is much more serious.

34. I.R.C. § 6696(d)(1).

35. SENATE FINANCE REPORT, *supra* note 1, at 356. "An understatement of tax liability occurs when any net amount payable with respect to any tax imposed by subtitle A . . . is understated or when any net amount of such tax which is refundable or creditable against future taxes is overstated." *Id.*

36. *Id.*

37. *Id.* at 355; H.R. REP. NO. 658, 94th Cong., 1st Sess. 278 (1975).

38. H.R. CONF. REP. NO. 1515, 94th Cong., 1st Sess. 484 (1976).

The Senate Finance Report went further, however, and would have required that the return preparer submit points and authorities with the return in support of his or her "good faith" disagreement.[39] If adopted, this requirement would have necessitated burdensome and lengthy justification statements by practitioners which would have been impractical and from a technical standpoint unnecessary. Eventually, the problem was resolved by the conferees of the House Conference Committee who noted that "such disclosure is not required to avoid penalties under section 6653(a) of the Code, and the Committee did not intend that more stringent requirements be applied under the new section 6694(a)."[40]

As an example of negligence, the Senate posed the following example:

> [I]f a tax return preparer prepared returns for 10 years based on a revenue ruling which the Service revoked during the fifth year, the preparer would be considered negligent at least with regard to returns prepared in accord with the rulings for the sixth, seventh, eighth, ninth and tenth years, and (depending upon the facts and circumstances) perhaps also for the fifth year.[41]

Notably, the Senate never discussed the possibility that the preparer may have, in good faith, determined that the original position taken was correct.

A recent temporary regulation discusses the meaning of a "good faith disagreement."[42] Accordingly, the interpretation of this term is similar to that given a disagreement under Code section 6653(a) which concerns the negligent or intentional disregard of rules and regulations by taxpayers who prepare their own returns.[43] In addition, the regulation

39. SENATE FINANCE REPORT, *supra* note 1, at 355.

40. H.R. CONF. REP. NO. 1515, 94th Cong., 1st Sess. 484 (1976).

41. SENATE FINANCE REPORT, *supra* note 1, at 357.

42. Treas. Reg. § 404.6694-1(a) (answers to Question #5) (1976).

43. Although not defined specifically by the regulations under I.R.C. § 6653(a), the meaning of the phrase "good faith disagreement" is addressed inferentially in several cases. Two are illustrative of possible standards of interpretation. In Scott v. Commissioner, 61 T.C. 654 (1974), the court indicated that where a taxpayer took a charitable deduction that eventually was disallowed, there was no negligence since "there was clearly a bona fide dispute which presents substantial issues of law and fact and which consequently prevents any imposition of an addition to tax under section 6653(a)." *Id.* at 663. In this case, there were no cases or revenue rulings directly covering the particular situation. *Id.* at 654. Thus, the tax court based its finding by analogy to prior cases which considered similar deductions in other contexts. In Kappel v. United States, 369 F. Supp. 267 (W.D.Pa. 1974), the district court considered a suit for refund of the overpayment of federal income taxes. Deficiencies had been assessed by the Service in complex areas (one of which was the failure to include pension-annuity income in a plaintiff's gross income), and a negligence penalty had been assessed under I.R.C. § 6653(a). Concerning all deficiency items except the pension-annuity income issue, the district court found that:

> [T]he taxpayers have carried their burden of proof of overcoming the presumption of negligence. It appears that with all of these items ordinary business care and prudence

states that a return preparer may prepare a return without fear of penalty, if he or she believes in good faith that there is adequate case law which conflicts with one or more sections of the Internal Revenue Code.

Willful understatement of tax liability is not as difficult to determine. Committee report examples have been previously discussed.[44] Similar to those situations in which fraudulent conduct is alleged, the Service has the burden of proof as to willful understatement of tax liability at trial.[45]

In addition to the new treatment of willful understatement, an Internal Revenue Service regulation requires the person who prepares a return for compensation to verify it.[46] Section 7206(1) provides that it is a felony for a person to verify a return "which he does not believe to be true and correct as to every material matter." The fact that a person signs a return as a preparer can be construed by the Service to mean that some attempt has been made to guarantee that the return is correct and complete. Thus, to sign a return without such an effort would be wrong.[47]

D. Prohibition Against Negotiating a Taxpayer's Refund Check

Improper check cashing is a prime example of the abuse which prompted legislative action under the Tax Reform Act. An extreme illustration is when a preparer obtains a taxpayer's signature on a blank tax return and also secures the taxpayer's authorization to cash a refund check. The preparer would then create non-existent deductions which produce a refund and then flee the jurisdiction. As a result, the preparer could conceivably perpetrate this fraud for a considerable period before being discovered by the Internal Revenue Service.

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has been observed . . . it appears that taxpayers have reasonable grounds to differ from the conclusions of the IRS and should suffer no negligence penalty because of those items.

Id. at 272.

Regarding the annuity-income question, the court found no negligence, noting that:

The funds received were income and were required to be reported as such, but it would hardly be recognized as such by laymen, even sophisticated business executives . . . The taxpayers, without negligence, had a mistaken concept of the law, derived from an acknowledged expert. They are liable for the tax, but not for a penalty for negligence.

Id. at 273.

These standards are vague at best, and suggest that the meaning of a "good faith disagreement" can be resolved only on the facts of each case.

44. One instance is the number of dependents a taxpayer may claim, and another is the intentional disregard of the 50% requirement for charitable contributions. *See* notes 29 and 30 *supra* and accompanying text.

45. SENATE FINANCE REPORT, *supra* note 1, at 357.

46. Treas. Reg. § 1.6065-1 (1959).

47. Corneel, *Ethical Guidelines for Tax Practice*, 28 TAX L. REV. 1, 6 (1972).

The Tax Reform Act precludes a preparer from endorsing or otherwise negotiating any income tax check issued to a taxpayer. Section 6695(f) also provides a five hundred dollar penalty for violation of that section. In temporary regulations,[48] and in a recent revenue ruling,[49] the Service stated clearly that section 6695(f) was not intended to apply to endorsements in the check clearing process subsequent to an initial proper endorsement.

V. INTERNAL REVENUE SERVICE REMEDIES

A. Procedures for Assessing Penalties

The general procedure for assessing a penalty against a return preparer is outlined in the Committee Reports.[50] This section offers a brief summary of that process.

First, prior to assessment, the Interal Revenue Service conducts an investigation. Next, a revenue agent files a report which is followed by a thirty day letter sent to the return preparer. This letter serves the dual purpose of notifying the preparer of the recommended fine and allowing him or her a chance to seek administrative remedies before it is imposed. Third, if the administrative remedies by the return preparer prove unsuccessful, the Service can assess the penalty by a statement of notice and demand.

At this point, if the return preparer wishes to pursue the matter further, he or she has two alternatives. First, the preparer can pay the penalty and file a refund claim for the amount with the Service. If that claim is denied, the preparer may appeal in federal district court. Alternatively, under section 6694(c), the preparer may contest the assessment if he or she pays at least fifteen per cent of the fine within thirty days of receipt of the notice and demand, and files a refund claim for the amount paid. If the preparer elects to proceed in this way, the Internal Revenue Service may not attempt to collect the balance of the penalty until the preparer has exhausted his or her remedies. This restraint on non-collection also applies if the preparer satisfies new section 6694(c)(2). This section provides that upon denial of a claim for

48. Treas. Reg. § 404.6695-2 (answer to Question #6) (1977).

49. Rev. Rul. 77-184, 1977-21 I.R.B. 21, at 23. In the facts presented for this ruling, an income tax return preparer ran a check cashing agency on the same premises as its tax return preparation business. In this check cashing business, the agency accepted a variety of checks for cashing. The agency was operated separately from the return preparation business except that on occasion, the check cashing agency cashes a tax refund check mailed to, and received and endorsed by the preparer. The Service held that the preparer is not liable for the penalty provided by § 6695(f) since the penalty under that section "was not intended to apply to endorsements in the check clearing process subsequent to an initial proper endorsement." *Id.*

50. SENATE FINANCE REPORT, *supra* note 1, at 356-57.

refund, the preparer will have to pay the Service the remaining eighty-five per cent of the penalty assessed unless he or she files suit in federal district court within thirty days of the denial. In addition, the preparer automatically has thirty days to file in federal district court if the Service has failed to act upon his or her refund claim within six months.

The Internal Revenue Service may resume its collection activities regarding the remaining eighty-five per cent of the penalty only upon final resolution of the matter. A final resolution includes any of the following: 1) settlement between the Service and the return preparer; 2) a final court decision; 3) a determination under section 1313(a), and 4) closing agreements under section 7121.[51] It should also be noted that under section 6694(e)(3) the statute of limitations will be suspended where the Internal Revenue Service is prevented from pursuing collection of the remainder of the penalty as a result of the preparer's pursuit of administrative or judicial remedies.

B. Injunctive Relief

The Tax Reform Act now gives the Service the power to obtain injunctive relief against certain return preparers. The grounds upon which this relief can be granted are contained in Code section 7407(b).[52] Depending upon the frequency of the proscribed conduct, the court may either prohibit the preparer from engaging in the business of preparing tax returns altogether or prohibit the return preparer from engaging in specific conduct.[53] It is not necessary, however, for the return preparer to have been assessed with penalties prior to the prayer for injunctive relief. Injunctive relief is not dependent upon either an actual assessment of penalty or a final resolution of an assessed penalty.

Finally, the injunctive relief sought must be tailored to the abuse sought to be curbed. The return preparer can avoid the wrath of being

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51. *Id.* at 357.

52. This section states that an injunction may issue where a preparer has:

> (A) engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by this title,
>
> (B) misrepresented his eligibility to practice before the Internal Revenue Service, or otherwise misrepresented his experience or education as an income tax return preparer,
>
> (C) guaranteed the payment of any tax refund or the allowance of any tax credit, or
>
> (D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and
>
> (2) that injunctive relief is appropriate to prevent the recurrence of such conduct....

I.R.C. § 7407(b).

53. I.R.C. § 7407(b) states in pertinent part:

> If the court finds that an income tax return preparer has continually or repeatedly engaged in any conduct described in subparagraphs (A) through (D) of this subsection and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, the court may enjoin such person from acting as an income tax return preparer.

enjoined by posting a fifty thousand dollar bond which will provide surety for any penalties that are ultimately assessed.[54]

VI. CONCLUSION

The reform provisions concerning tax return preparers are long overdue. Hopefully, the establishment of specific duties and standards for preparers together with the active enforcement of civil and criminal penalties will deter those unqualified to prepare returns or those who attempt to deceive the taxpayer/consumer. The revised Code, however, may be incomplete.

The new provisions seem designed to collect the tax due with the consumer's protection an incidental by-product. It can be argued that the new Code provisions act as a threat to the return preparer that accuracy is necessary in order to avoid the imposition of penalties. Thus, only to the extent that professional behavior is encouraged,will the taxpayer/consumer benefit.

This author believes that the new reforms would be strengthened by the inclusion of direct statutory remedies for the taxpayer/consumer against an incompetent return preparer. It might be contended that conceptually such remedies do not belong in the Code. However, there is some support for private remedies based on common law theories of deceit, misrepresentation or negligence with an award of damages being appropiate.[55]

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54. I.R.C. § 7407(c).

55. One can find support for the proposition that a taxpayer be granted a cause of action against a return preparer by analogy to securities law. First, the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1970), authorizes civil actions in certain instances. Section 11, 15 U.S.C. § 77k(a)(1)-(5) (1970) permits any person who acquired a security for which a false registration statement had been filed to sue those involved with the filing and drafting of the statement. Section 12, 15 U.S.C. § 771 (1970), establishes that anyone who offers or sells securities by using any means or instruments of transportation or communication in interstate commerce or the mails by means of a false stock prospectus or oral communication:

> [s]hall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Second, consider rule 10b-5, 17 C.F.R. § 240.10b-5 (1976), which was enacted by the SEC pursuant to section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970). While the rule does not provide private parties with a cause of action for damages, courts have held that such an action exists under the rule for the purpose of adequately enforcing the federal securities laws. Shapiro v. Merrill, Lynch, Pierce, Fenner and Smith, 495 F.2d 228, 241, n.18 (2d Cir. 1974). *See* Note, *The Development of a Flexible Duty Standard of Liability Under SEC Rule 10b-5,* 32 WASH. & LEE L. REV. 99, 99, 100 (1975). Of course, reliance by analogy on rule 10b-5 would be questionable if arguing for the propriety of a negligence action against a return preparer because *scienter* is a necessary element of a private damage claim under the rule. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). For an excellent discussion of what constitutes *scienter* under the rule, *see,* Floor, *The Scienter Requirement Under Rule 10b-5 and Reliance on Advice of Counsel After Hochfelder,* 12 NEW ENGLAND L. REV. 191 (1976).

Even if it were determined that granting taxpayers a cause of action against return preparers under federal law was undersirable, the taxpayer always can investigate the possibilities of bring-

The primary purpose of giving a taxpayer/consumer a remedy against preparers would be to foster professionalism. If remedies specifically addressed the question of standard of care to be exercised by preparers, then preparers would likely aspire to a higher level of competence in order to avoid liability. Moreover, such remedies would be very useful in deterring possible improprieties by those smaller preparers who might believe that the Internal Revenue Service would be handicapped administratively in enforcing the Code provisions against them. With the prospect of a taxpayer/consumer suit, a preparer's belief that the Service would be unable to proceed against him or her would carry little weight.

As with any recommendation, potential difficulties can be raised. One is that some honest preparers might be discouraged from continuing in business because of increased liability; another is the possibility of an unwielding number of taxpayer lawsuits in the federal courts.[56] Nevertheless, it is conceivable that Congress could draft Code provisions which balance the need for regulating return preparers against the severity of taxpayer/consumer remedies. In any event, the government must be responsive to the interests of both the taxpayer and the return preparer. In their present form, the newly enacted provisions of the Reform Act regulating return preparers can be considered a positive step forward.

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ing suit based on state common law actions for deceit, misrepresentation, and negligence. As a basis for such an approach, one can again look to precedent in the securities field. *See* Note, *Common Law Corporate Recovery for Trading on Non-Public Information,* 74 COLUM. L. REV. 269, 273 (1974). In addition, one should examine state legislation regulating return preparers which may authorize a private cause of action. For example, in the California Tax Preparer's Act, CAL. BUSINESS AND PROFESSIONS CODE §§ 9891-9891.40 (West), it is stated that: "Nothing in the provisions of this chapter shall prohibit the bringing of a civil action against a tax preparer by an individual." *Id.* at § 9891.32. In addition, the Act requires that the preparer:

> [w]ill pay all damages occasioned to any person by reason of misstatement, misrepresentation, fraud, deceit or any unlawful acts or omissions by the tax preparer, or its agents or employees while acting in the scope of their employment or agency.

Id. at § 9891.35.

56. This raises the additional question of whether a federal righ can be enforced in the state courts. As one commentator has observed: "The Supreme Court has not yet considered whether Congress can require state courts to entertain federal claims when there is no analogous state-created right enforceable in the state courts." C. WRIGHT, LAW OF FEDERAL COURTS 195 (3d ed. 1976). Thus, an issue presented by my proposal is whether companion state legislation should be enacted to provide consumers with access to state courts as a forum for their federal rights.

CASE COMMENTS

TSC Industries, Inc. v. Northway, Inc.:[1] The Developing Standard of Materiality in Rule 14a-9 Actions

The Supreme Court first recognized a minority shareholder's right to maintain a cause of action for violations of federal securities laws in *J.I. Case Co. v. Borak.*[2] Since then, one of the most popular means of compelling full disclosure of proposed corporate transactions has been private action by the minority shareholder[3] for defects in proxy solicitations[4] mandated[5] by the Securities Exchange Act of 1934.[6] Although the Supreme Court attempted to delineate the elements of this cause of action under section 14(a)[7] and rule 14a-9[8] of *the 1934 Act* in *Mills v.*

1. 426 U.S. 438 (1976), *motion of respondent to retax costs denied*, 429 U.S. 810 (1976) [hereinafter cited as *TSC*].

2. 377 U.S. 426, 430-31 (1964).

3. R. JENNINGS & H. MARSH, SECURITIES REGULATION: CASES AND MATERIALS 1352 (3d ed. 1972) [hereinafter cited as JENNINGS & MARSH]; 2 L. LOSS, SECURITIES REGULATION 1027 (2d ed. 1961).

4. Proxy statements are used by corporate management in connection with a variety of proposed transactions, both to notify the investor that certain action is being considered and to enable him or her to cast an informed vote on the basis of the information contained therein.

5. Federal securities laws apply to proxy solicitations with respect to shares registered under § 12, 15 U.S.C. § 78*l* (1964) (*i.e.*, listed shares or shares of any company having more than 500 shareholders and $1,000,000 in assets). *See* rule 14a-2, 17 C.F.R. § 240.14a-2 (1976).

6. 15 U.S.C. §§ 78a-78hh (1970) [hereinafter cited as *the 1934 Act*].

7. Section 14(a) provides:

> (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or

Electric Auto-Lite Co.,[9] uncertainty remained as to certain elements necessary to establish a rule 14a-9 action.[10]

This article examines the Supreme Court's decision in *TSC Industries, Inc. v. Northway, Inc.*,[11] which purported to announce a uniform materiality standard as a limitation on rule 14a-9 actions.[12] The effect of this decision on recent federal securities law cases is considered, and the implications for practitioners explored. Also, a discussion of the potential impact of the decision on the other elements of a rule 14a-9 action is presented.

I. THE CASE

A. *The Facts*

Early in 1969 National Industries, Inc. (hereinafter, "National") acquired approximately 34% of the outstanding common stock of TSC Industries, Inc. (hereinafter, "TSC"), primarily from TSC's founder and principal shareholder, Charles E. Schmidt. After disposing of his interest, Mr. Schmidt and his son promptly resigned from TSC's board of directors; subsequently, five National nominees were placed on the nine member board. On October 16, 1969, a proposal to liquidate and dissolve TSC and sell all its assets to National[13] was adopted by the

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authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* (78e) of this title.

15 U.S.C. § 78n(a) (1970).

8. Rule 14a-9 provides:

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 C.F.R. § 240.14a-9 (1976).

Other anti-fraud provisions of *the 1934 Act* which compel disclosure are § 10(b), 15 U.S.C. § 78j(b) (1970), and rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5 (1976) (in connection with the purchase or sale of any security), and § 14(e), 15 U.S.C. § 78n(e) (1970) (in connection with any tender offer).

9. 396 U.S. 375 (1970).

10. Conclusions differing from that in *Mills* were arrived at by some courts as to the appropriate standard for the materiality element in rule 14a-9 actions. *Compare* Northway, Inc. v. TSC Industries, Inc., 512 F.2d 324 (7th Cir. 1975) [hereinafter cited as *Northway*] *with* Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir. 1974), *cert. denied*, 419 U.S. 873 (1974) *and* Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973).

11. 426 U.S. 438.

12. *Id.* at 449.

13. The proposal ultimately was consummated by an exchange of securities in which no National common stock was involved. Each share of TSC common was exchanged for 0.5 share of National Series B preferred and 1.5 National warrants, while each share of TSC Series 1 preferred

affirmative votes of four of the eight directors present at the meeting. Only those directors who were not National nominees, however, actually participated in the voting.

On November 12, 1969, TSC and National issued to TSC shareholders a joint proxy statement concerning the proposed liquidation and sale. Among those shareholders was Northway, Inc. (hereinafter, "Northway"), a holder of two hundred (200) shares of TSC common stock. A cover letter urging the shareholders to vote *for* the proposal outlined in the statement was included with the joint proxy statement. Sufficient proxies were received by management to approve the proposed transaction. The shares were exchanged, and the transaction completed.

B. The Issues and Holding

Northway filed a complaint against the corporate defendants[14] seeking restitution and money damages[15] pursuant to section 27 of *the 1934 Act*. The complaint charged that the joint proxy statement issued by the defendants was materially false and misleading in violation of certain sections of the federal securities laws.[16] The District Court denied plaintiff's motion for summary judgment on all counts,[17] granting leave to appeal pursuant to 28 U.S.C. section 1292(b). The Court of Appeals reversed the District Court's decision on the issue of rule 14a-9 liability and held that the following *omissions* from the joint proxy statement were materially misleading as a matter of law:

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brought 0.6 share of National Series B preferred and 1 National warrant. One (1) National Series B preferred, however, is convertible to 0.75 share of National common. A National warrant entitles the holder to purchase one (1) share of National common at $21.40 until October 31, 1978. *Id.* at 441 n.1.

14. Northway also brought suit against Charles E. Schmidt and his family, charging them with violations of § 10(b) and rule 10b-5 of *the 1934 Act*. The District Court, however, granted the Schmidt defendants' motion for summary judgment. Northway, Inc. v. TSC Industries, Inc., 361 F. Supp. 108, 117-20 (N.D. Ill. 1973). This judgment was affirmed on appeal, 512 F.2d at 338-42, and was not at issue before the Supreme Court. 426 U.S. at 441 n.3.

15. Northway's original complaint sought injunctive relief, but the plaintiff never so moved. In 1972, Northway amended its complaint to seek money damages, restitution and other equitable relief. 426 U.S. at 443.

16. In addition to the rule 14a-9 action, Northway also charged the defendants' failure to disclose that a change in control of TSC in fact had occurred when National acquired 34% of TSC's voting stock was an omission of the specific information required by Schedule 14A under rule 14a-3. *See* rule 14a-3, 17 C.F.R. § 240.14a-3 (1976). The District Court found that the degree of control National actually exercised over TSC was a genuine issue of fact and, accordingly, denied plaintiffs' motion for summary judgment on this count. Northway, Inc. v. TSC Industries, Inc., 361 F. Supp. at 110-11. The Court of Appeals agreed with the lower court that summary judgment was inappropriate on this claim, 512 F.2d at 329, hence the claim was not before the Supreme Court. 426 U.S. at 443.

17. Northway, Inc. v. TSC Industries, Inc., 361 F. Supp. at 111, 112, 114, 115, 116, 117.

(1) A conclusory remark made by the defendants in a special report filed with the SEC that National "may be deemed to be a 'parent' of TSC."[18] Northway claimed that disclosure of this remark would have demonstrated that the defendants at least *thought*[19] a change in control of TSC had occurred.[20]

(2) The fact that National officers, named as TSC directors in the proxy statement, also held the positions of chairman of the TSC board of directors and chairman of its executive committee, both when the proposal was considered, and when the joint proxy statement was issued.[21]

(3) The existence of a letter from TSC's investment bank notifying the defendants that the firm now expected the price of National warrants to fall prior to the exchange of shares. The earlier favorable opinion of the investment firm, however, was highlighted in the joint proxy statement without mention of the firm's subsequent change of opinion.[22]

(4) The fact that a series of open market purchases of National common stock was made by National and by Madison Fund, Inc., a diversified investment company, during the two years preceding the issuance of the proxy statement. These purchases were allegedly collusive and indicative of market manipulation.[23]

In other words, the Court of Appeals found that the defendants, by omitting from the joint proxy statement the aforementioned remark and the positions certain National officers held in TSC, had failed to disclose adequately the degree of potential influence National exercised over TSC.[24] The court also found that the defendants had omitted data relevant in determining the fairness of the proposed exchange to TSC shareholders.[25]

The Supreme Court granted certiorari[26] to review the standard of materiality used by the Court of Appeals to impose liability on the corporate defendants.[27] In a unanimous decision,[28] the Supreme Court

18. *Northway*, 512 F.2d at 332 n.14.

19. Although the defendants had no duty to state without qualification that a change in control of TSC *in fact* had occurred upon National's initial acquisition of TSC voting stock, *supra* note 16, Northway contended that the joint proxy statement failed to disclose adequately the relationship between TSC and National by the omission of this remark, in violation of rule 14a-9. Northway, Inc. v. TSC Industries, Inc., 361 F. Supp. at 111.

20. *Northway*, 512 F.2d at 332.

21. *Id.* at 332-33.

22. *Id.* at 333-35.

23. *Id.*

24. *Id.* at 332.

25. *Id.* at 333.

26. 423 U.S. 820 (1975).

27. 426 U.S. at 443.

28. All the members of the Court joined in this opinion except Justice Stevens, who took no part in the deliberation or opinion in this case.

held that the materiality standard used was erroneous and, accordingly, reversed the grant of summary judgment entered against the defendants.[29]

C. *The Court's Rationale*

Speaking for the unanimous Court, Justice Marshall first noted that the concept of materiality had assumed a heightened significance in rule 14a-9 actions since the Supreme Court's decision in *Mills*.[30] In *Mills* it was held that, to establish causation in a rule 14a-9 action, it was unnecessary to show that the omission[31] from the proxy statement actually influenced the outcome of the voting.[32] To establish causation, the Court said in *Mills*, it is sufficient to show that the proxy statement itself was "an essential link in the accomplishment of the transaction,"[33] which can be demonstrated by showing that the proxies voting *for* the proposal were necessary to approve the transaction.[34] After *Mills*, Justice Marshall stated, the central issue in a rule 14a-9 action is whether the proxy solicitation, in light of the circumstances existing at the time of its issuance, is false or misleading in either its presentation or its omission of a material fact.[35]

Justice Marshall next noted that the Court of Appeals had adopted a materiality standard which included "all facts which a reasonable shareholder *might* consider important."[36] Such a test, the Court stated, has been "explicitly rejected by at least two courts[37] as setting too low a threshold for the imposition of liability under Rule 14a-9."[38] An unnecessarily low criterion for materiality, the Court added, not only may subject corporate management "to liability for insignificant omissions or misstatements,"[39] but also may cause management to include literally reams of trivial information in proxy statements, making such statements "hardly conducive to informed decisionmaking."[40]

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29. 426 U.S. at 463-64.

30. *Id.* at 444.

31. Although *Mills* specifically dealt with an omission from a proxy statement, its rationale applies to material misstatements as well. 396 U.S. at 384.

32. *Id.*

33. *Id.* at 385.

34. *Id.* at 386. For a discussion of the rule 14a-9 causation requirement in "management control" situations (*i.e.*, those in which the minority shareholders' proxies were not necessary to approve the transaction), *see* § III(B) *infra*.

35. *TSC*, 426 U.S. at 445.

36. *Id. citing Northway*, 512 F.2d at 330 (emphasis added).

37. *Id. citing* Gerstle v. Gamble-Skogmo, Inc., 478 F.2d at 1301-02 *and* Smallwood v. Pearl Brewing Co., 489 F.2d at 603-04.

38. *Id.*

39. *Id.* at 448.

40. *Id.* at 448-49.

Observing that the Court of Appeals, in arriving at its broad definition of a material fact, had relied heavily upon Justice Harlan's language in *Mills,*[41] the Court declared: "[t]hat reliance [is] misplaced....*Mills* did not intend to foreclose further inquiry into the meaning of materiality under Rule 14a-9."[42] The Court then held that the following definition is best suited to the policies of rule 14a-9:

> An omitted fact is material if there is a *substantial likelihood* that a reasonable shareholder *would* consider it important in deciding how to vote.[43]

Concerning the appropriateness of summary judgment in determining the question of materiality, the Court held:

> Only if the omissions are "so obviously important to an investor, that reasonable minds cannot differ on the question of materiality" is the ultimate issue of materiality appropriately resolved "as a matter of law" by summary judgment.[44]

Applying the above standard to the omissions[45] complained of by the plaintiff, the Court found that none were material as a matter of law and, accordingly, reversed and remanded the case to determine whether the omissions were material as a matter of fact.[46]

II. DISCUSSION

A. An Appropriate Standard of Materiality

Section 14(a) of *the 1934 Act* "was intended to promote 'the free exercise of the voting rights of stockholders' by ensuring that proxies would be solicited with 'explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.'"[47] The proxy rules adopted by the SEC pursuant to this broad grant of authority[48] have been praised by commentators as being one of the most effective disclosure devices in the SEC's regulatory scheme.[49] Adherence to the proxy rules assures investors an adequate amount of

41. Justice Harlan characterized a determination of materiality as at least "embod[ying] a conclusion that the defect was of such a character that it *might* have been considered important by a reasonable shareholder who was in the process of deciding how to vote." *Mills,* 396 U.S. at 384 (emphasis added).

42. *TSC,* 426 U.S. at 446-47.

43. *Id.* at 449 (emphasis added).

44. *Id.* at 450.

45. *See* notes 18-25 and accompanying text *supra.*

46. 426 U.S. at 463-64.

47. *Mills,* 396 U.S. at 381, *quoting* H.R. REP. NO. 1383, 73d Cong., 2d Sess. 14; S. REP. NO. 792, 73d Cong., 2d Sess. 12.

48. The SEC's general rulemaking authority is contained in § 19(a) of the Securities Act of 1933 and § 23(a)(1) of *the 1934 Act.*

49. *See* note 3 *supra.*

information to cast an informed vote.[50]

The central issue[51] before the Court in *TSC* concerned the extent of this assurance of adequate information; that is, whether section 14(a) and rule 14a-9 require disclosure of all *relevant* facts which a reasonable shareholder *might* consider important in deciding how to vote, as was held by the lower court[52] and a number of district courts.[53] To support its adoption of a "might" standard of materiality as the threshold level of probability[54] for triggering rule 14a-9 liability, the Court of Appeals raised three separate arguments.

The first argument was premised on the belief that resort to the other provisions of the federal securities law to ascertain either congressional intent for particular sections, or SEC intent for particular rules should not control the interpretation of a particular section or rule.[55] The Court of Appeals, by relying on the overriding purpose of section 14(a),[56] thus was able to adopt a "might" standard of materiality[57] without considering the other sections and rules of *the 1934 Act* which make use of a materiality concept. The court then explained its adoption of a "might" standard by stating, "[i]t would make little sense to hold that causation is established by a more lenient standard than materiality."[58] In other words, the Court of Appeals inferred that since probability is not an element of causation,[59] it is not, a fortiori, an element of materiality. The court thus held that materiality may be established by a mere possibility that the challenged omission actually

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50. J. I. Case Co. v. Borak, 377 U.S. at 431.

51. Definitions of materiality vary as a function of their three component elements, namely, the type of investor, the kind of impact on the investor's decisional process, and the degree of certainty that such an impact has occurred. The Supreme Court stated in *TSC* that the test of materiality is an objective one, directed to the "reasonable investor." 426 U.S. at 445. The standard the Court apparently adopted for the "impact" element of materiality is whether "the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." *Id.* at 449. Therefore, the central issue before the Court in *TSC* was "how *certain* it must be that the fact would affect a reasonable investor's judgment." *Id.* at 445 (emphasis added). *See generally* Hewitt, *Developing Concepts of Materiality and Disclosure*, 32 BUS. LAW. 887, 892-99 (April, 1977).

52. *Northway*, 512 F.2d at 330-31.

53. SEC v. Gen. Refractories Co., 400 F. Supp. 1248, 1257 (D.D.C. 1975); Ross v. Longchamps, Inc., 336 F. Supp. 434, 441 (E.D. Mo. 1971); Berman v. Thomson, 312 F. Supp. 1031, 1033 (N.D. Ill. 1970); Beatty v. Bright, 318 F. Supp. 169, 173 (S.D. Iowa 1970).

54. *See* note 60 and accompanying text *infra*.

55. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 200 (1976); Gould v. American Hawaiian Steamship Co., 351 F. Supp. 853, 861 (D. Del. 1972), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976).

56. *Northway*, 512 F.2d at 331 n.13.

57. *Id.* at 332.

58. *Id.* at 331.

59. *See Mills*, 396 U.S. at 384-85.

influenced the vote of a reasonable shareholder.[60]

The rationale of the Court of Appeals, however, ignores the principle that an insight into the meaning of the materiality concept of section 14(a) can be gleaned from a consideration of the other disclosure and anti-fraud provisions in federal securities law, since the interdependence of the various sections permits their use as an interpretive aid for the particular section under consideration.[61] By applying this principle, it can be seen that a "would" standard, requiring disclosure of those facts which would be considered *important* by a reasonable shareholder in determining a course of action with regard to a proposed corporate transaction, has been adopted in determining liability for a defective tender offer under section 14(e) of *the 1934 Act.*[62] A "would" test also has been used to impose liability for misleading statements and omissions in connection with the sale of securities under section 12(2) of the Securities Act of 1933.[63] Furthermore, a "would" test has been adopted by the courts[64] in determining liability under rule 10b-5 and section 10(b) of *the 1934 Act,*[65] provisions which provide in many instances an

60. It is clear that *Mills* eliminated the requirement of independent proof of causation in certain situations in rule 14a-9 actions, *supra* note 59. The Court of Appeals in *Northway* extended this holding to materiality by reasoning that if the challenged omission need not have a probable impact on the transaction itself (*i.e.,* causation), it also need not have a probable impact on the reasonable shareholder (*i.e.,* materiality). The court thus held that materiality may be established by a mere possibility, as indicated by the following passage.

> We believe that relevancy alone is the critical test of materiality and that when relevant facts are withheld from a proxy solicitation, materiality is established independent of any proofs of probable reliance or causation.

512 F.2d at 331 n.13.

61. SEC v. National Securities, Inc., 393 U.S. 453, 466 (1969).

62. Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973), *cert. denied,* 414 U.S. 910 (1973), *cert. granted,* 425 U.S. 910 (No. 73-154, 1974 Term renumbered No. 75-353, 1975 Term); Gulf & Western Industries, Inc. v. Great A.&P. Tea Co., Inc., 476 F.2d 687 (2d Cir. 1973).

63. Johns Hopkins University v. Hutton, 422 F.2d 1124 (4th Cir. 1970), *reargued,* 488 F.2d 912 (4th Cir. 1973), *cert. denied,* 416 U.S. 916 (1974).

64. Titan Group, Inc. v. Faggen, 513 F.2d 234 (2d Cir. 1975), *cert. denied,* 423 U.S. 840 (1975); Robinson v. Cupples Container Co., 513 F.2d 1274 (9th Cir. 1975); Harnett v. Ryan Homes, Inc., 496 F.2d 832 (3d Cir. 1974). *But cf.* Affiliated Ute Citizens of the State of Utah v. United States, 406 U.S. 128, 153-54 (1972) (dictum indicates a "might" standard of materiality).

65. Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
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> . . . .
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> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (1970).

Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or

alternate basis for imposing liability for proxy rule violations to rule 14a-9 and section 14(a).[66]

It has been the policy of the courts to use the materiality concept contained in other sections of federal securities law to limit the corporate disclosure burden to *important* facts, that is, facts which would have an actual impact on a reasonable shareholder's course of action with regard to a particular transaction. It also has been the policy of the SEC to use the concept of materiality to regulate the desired amount of disclosure, as shown by its definition of the term "material."[67] In light of these policies, the Supreme Court had ample justification for limiting the corporate disclosure burden under section 14(a) and rule 14a-9 to facts which would have assumed some actual importance to a reasonable shareholder in deciding how to vote.[68]

The Court of Appeals next supported its adoption of the "might" test by analogy to the factual situation in *Mills.* Proof of materiality under a "would" test, the court argued,[69] would engender the same difficult proofs[70] the Supreme Court sought to avoid in *Mills* by eliminating the requirement of independent proof of causation or reliance in rule 14a-9 actions.[71] Yet, this tenuous analogy was properly rejected by the Supreme Court in *TSC,* as demonstrated by Justice Marshall's conclusion that materiality may be established *abstractly* under a "would" test by:

> delicate assessments of the inferences "a reasonable shareholder" would draw from a given set of facts . . . peculiarly ones for the

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instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or,

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1976).

66. SEC v. National Securities, Inc., 393 U.S. at 467-68; Swanson v. American Consumer Industries, 415 F.2d 1326, 1330 (7th Cir. 1969). *See also* note 103 *infra.*

67. Rule 405(1) provides:

The term "material," when used to qualify a requirement for the furnishing of information as to any subject, *limits the information required* to those matters as to which an average prudent investor ought reasonably to be informed before purchasing the security registered.

17 C.F.R. § 230.405(1) (1970) (emphasis added).

68. *TSC,* 426 U.S. at 449.

69. *Northway,* 512 F.2d at 331 & n.13.

70. The Supreme Court in *Mills* eliminated the need for independent proof of causation in order to avoid the impracticalities of determining how many votes actually were affected by a materially defective proxy statement. 396 U.S. at 385.

71. *Id.* at 384-85.

trier of fact.[72]

Therefore, the Court of Appeals' concern over the difficulty of proof of materiality under a "would" test is unwarranted, as materiality may be established under either test without determining how many votes in fact were influenced by a defective proxy statement.[73]

The final argument made by the Court of Appeals concerned the proper interpretation of Justice Harlan's language in *Mills*,[74] language which the court used to substantiate its "might" formulation.[75] Since the central issue in *Mills* clearly concerned the standard of proof of the causation element,[76] and not the materiality element,[77] *Mills* does not provide an authoritative definition of materiality for rule 14a-9 actions.[78] Even when the courts rely upon Justice Harlan's language, they generally interpret it as embodying, at most, a minimal rather than an absolute standard of materiality.[79] Moreover, the Court of Appeals based its interpretation on the first part of Justice Harlan's statement, disregarding the sentence immediately following it,[80] even though this sentence gave a more realistic standard of materiality.[81]

The Supreme Court's decision in *TSC* to reject a "might" probability standard for rule 14a-9 actions was justified by the policy of the courts

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72. 426 U.S. at 450.

73. *Id.* at 449.

74. Justice Harlan characterized a determination of materiality as:

> [E]mbod[ying] a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote. This requirement that the defect have a significant *propensity* to affect the voting process . . . .

396 U.S. at 384.

75. *Northway*, 512 F.2d at 329-31.

76. 396 U.S. at 377.

77. *Id.* at 381 n.4.

78. *TSC*, 426 U.S. at 447; Gerstle v. Gamble-Skogmo, Inc., 478 F.2d at 1301. *Accord*, JENNINGS & MARSH, *supra* note 3, at 1354; Hewitt, *Developing Concepts of Materiality and Disclosure*, 32 BUS. LAW. 887, 902.

79. Gerstle v. Gamble-Skogmo, Inc., 478 F.2d at 1301; JENNINGS & MARSH, *supra* note 3, at 1354-55. The most concise explanation of this proposition appeared in an article by James O. Hewitt, Esq., in which the author states:

> The term "embodies" means "includes." Since the "might have" standard represents the lowest degree of certainty, and the greater includes the lesser, necessarily any showing of materiality includes the "conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder." 396 U.S. at 384. This statement is true regardless of what the Court thought was an appropriate standard of materiality.

Hewitt, *Developing Concepts of Materiality and Disclosure*, 32 BUS. LAW. 887, 903.

80. "This requirement that the defect have a significant *propensity* to affect the voting process is found in the express terms of Rule 14a-9. . . ." 396 U.S. at 384.

81. *TSC*, 426 U.S. at 447; Gerstle v. Gamble-Skogmo, Inc., 478 F.2d at 1302. *Accord*, Kirkland, *Misleading Proxy Statements — The Seventh Circuit Strengthens the Minority Stockholder's Rule 14a-9 Action: Northway v. TSC Industries, 512 F.2d 324 (7th Cir. 1975)*., 31 BUS. LAW. 1449, 1452 (April, 1976).

and the SEC in using the materiality concept to limit required disclosure,[82] and by the precedent established by *Mills*.[83] Furthermore, the *TSC* decision should resolve the debate on the appropriate standard of certainty for the materiality requirement in rule 14a-9 actions.[84]

B. The Impact of TSC in Practice

Although the *TSC* decision should reduce the confusion over the appropriate standard for the certainty element needed to satisfy the rule 14a-9 materiality requirement,[85] the decision left unclear the appropriate standard for the "impact" element[86] also a part of the rule 14a-9 materiality requirement. After adopting a principal definition of materiality,[87] the Supreme Court attempted to rephrase it by saying:

> Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[88]

The Supreme Court, rather than clarify its definition of materiality, raised doubt concerning the impact[89] necessary to satisfy the rule 14a-9 materiality requirement, as shown by the rationale of two recent federal securities law cases.[90] The ultimate resolution of this uncertainty,

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82. *See* pp. 158-59 *supra*.

83. *See* p. 160 *supra*.

84. Since the standard of certainty for the materiality requirement in rule 14a-9 actions in *TSC* spoke in terms of both a "would" standard and a "substantial likelihood" standard, 426 U.S. at 449, it has been argued that to the extent "substantial likelihood" falls short of "would" as a standard of certainty, the scope of the standard of materiality is expanded. Hewitt, *Developing Concepts of Materiality and Disclosure*, 32 BUS. LAW. 887, 897. Since "would" and "substantial likelihood" both connote a probability, as opposed to the "might" connotation of a mere possibility, it is suggested that the distinction in degree of certainty between "would" and "substantial likelihood," if any, will be disregarded by the courts in future cases involving the *TSC* definition of materiality.

85. *Id.*

86. *See* note 51 *supra*.

87. The Supreme Court gave the following formulation as their principal definition of materiality: "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." 426 U.S. at 449.

88. *Id.*

89. In attempting to define the kind of impact on the investor's decisional process necessary to maintain a rule 14a-9 action, the Court stated the test to be whether "the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." *Id.* The Court then tried to clarify this standard by rephrasing it as whether "the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* It remains to be seen whether the lower federal courts will treat these two formulations at being synonymous with respect to the impact element, as they clearly will be with respect to the standard of certainty. *See* note 84 *supra*.

90. Galfand v. Chestnutt Corp., 545 F.2d 807, 813 (2d Cir. 1976) (*i.e.*, emphasized the "total mix" formulation in finding a material omission from the proxy statement); Freedman v. Barrow, 427 F. Supp. 1129, 1140 (S.D.N.Y. 1976) (*i.e.*, relied upon the secondary "total mix" formulation

however, lies in future cases which apply the *TSC* definition of materiality.

The Supreme Court's decision in *TSC* generally will operate to preclude summary judgment on the question of materiality in future rule 14a-9 litigation.[91] Justice Marshall's opinion stressed that the question of whether a reasonable shareholder would consider omitted information important generally should be left to the trier of fact.[92]

It is not clear whether *TSC* applies to misstatements as well as omissions, since the Court's holding was solely in terms of "omitted facts."[93] A "might" standard for material misstatements, it has been argued,[94] would neither result in liability for insignificant defects, nor bloat proxy statements with trivial details.[95] Since the Court's rational in *TSC* spoke in terms of "omitted or misrepresented facts,"[96] it is suggested that the courts will extend application of the *TSC* materiality definition to misstatements, as was done with the *Mills* causation definition.[97]

It remains to be seen whether *TSC* will have an effect on the development of the materiality concept in section 10(b) and rule 10b-5 by the courts,[98] an issue which the Supreme Court declined to answer in *TSC*.[99] It has been suggested that since scienter is a necessary element in rule 10b-5 actions,[100] there is no need for a "would" standard of materiality.[101] The better reasoned view applies a uniform standard of materiality to both cases.[102] Under this approach, difficulties encountered in adjudicating facts to which either section can apply are avoided.[103]

The Supreme Court's announcement of a uniform standard of certainty for the materiality element in rule 14a-9 actions should prove beneficial not only to the drafters and issuers of proxy solicitations, but also to the recipients of proxy statements. Drafters of proxy statements, freed from the necessity of accumulating mountains of "relevant"

while ignoring the primary definition).

91. *See* 90 HARV. L. REV. 255, 262 (1976).

92. *See* note 44 and accompanying text *supra*.

93. 426 U.S. at 449.

94. 90 HARV. L. REV. 255, 262.

95. *Id.*

96. 426 U.S. at 445-48.

97. *See* note 31 *supra*.

98. *See* notes 64 & 65 *supra*.

99. 426 U.S. at 441 n.3.

100. Ernst & Ernst v. Hochfelder, 425 U.S. at 215.

101. *See* 90 HARV. L. REV. 255, 262.

102. 1 A. BROMBERG, SECURITIES LAW FRAUD: RULE 10b-5 § 4.7(550) (Supp. 1972-73).

103. Proxy-related omissions or misstatements, when accompanied by "scienter" in "connection with a purchase or sale" of securities, are subject to attack under § 10(b) and rule 10b-5 thereunder. *See* cases cited at note 66 *supra*.

data,[104] and reciting it in ever lengthening solicitations,[105] now can prepare proxy statements with a view toward the ultimate reader, rather than ultimate litigation. The SEC's policy of requiring meaningful disclosure through concise, readable statements[106] also will be furthered by the uniform *TSC* standard. Management, no longer in fear of triggering rule 14a-9 liability for trivial defects,[107] will be encouraged to include in proxy statements only what is necessary for the stockholder to make an informed choice of action.[108]

III. FUTURE IMPACT

A. The Standard of Culpability

A discussion of the elements needed to maintain a civil action under the statutes and SEC rules regulating the solicitation of proxies is necessarily incomplete without a consideration of the standard of conduct imposed by such provisions on the issuers[109] of proxy statements. Since the statute itself fails to make any reference to a defendant's knowledge or state of mind,[110] it may be argued that the appropriate standard of conduct is one of absolute liability for statutory violations.[111] Yet it was held in *Gould v. American Hawaiian Steamship Co.*[112] that issuers of proxy solicitations are not strictly liable for inaccuracies or omissions from proxy statements.[113] This decision was reached notwithstanding the court's recognition that a standard of absolute liability would protect the investor most fully in instances where a violation had occurred.[114]

The reasons advanced by the District Court in *Gould* for rejecting a standard of absolute liability concerned the serious practical problems

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104. *TSC*, 426 U.S. at 448-49.

105. The joint proxy statement issued by the defendants in *TSC* was 80 pages in length. Petitioners' Brief at 3, *TSC*, 426 U.S. 438 (1976).

106. Schedule 14A, Item 14 requires:

> (a) Outline *briefly* the material features of the plan.
>
> (b) . . .What is required is information *essential* to an investor's appraisal of the action proposed to be taken.

Schedule 14A, 17 C.F.R. § 240.14a-101 (1970) (emphasis added).

107. *TSC*, 426 U.S. at 448-49.

108. *Id.*

109. The term "issuers" is used herein to refer to all persons who would be *primarily* liable for the issuance of a materially defective proxy statement under § 14(a) and rule 14a-9.

110. *See* notes 7 & 8 *supra*.

111. Gould v. American Hawaiian Steamship Co., 351 F. Supp. at 857.

112. 351 F. Supp. 853.

113. *Id.* at 858, 865. *See also* Chris-Craft Industries, Inc. v. Independent Stockholders Committee, 354 F. Supp. 895, 915 (D. Del. 1973). It also should be noted that those cases which adopt a negligence standard of liability in rule 14a-9 actions, *see* note 136 *infra*, reject a standard of absolute liability by inference.

114. 351 F. Supp. at 858-59.

such a holding would create for corporate directors. The court stated that whenever possible, the liability sections of *the 1934 Act* "should be interpreted to afford incentives to directors to undertake active and rigorous scrutiny of corporate activities,"[115] rather than to impose liability for defects against which they reasonably could not protect.[116] Directors, the court declared, should not be placed in the role of guarantors or insurers of the accuracy of proxy statements.[117] The court concluded that such a burden could not be placed on corporate directors without a clear congressional mandate,[118] a mandate not contained in section 14(a) of *the 1934 Act.*[119]

After *Gould,* the threshold question becomes what degree of culpability must be established to maintain a civil action under section 14(a) and rule 14a-9 against the issuer of a defective proxy statement. The Supreme Court specifically declined to adopt a standard of conduct in *TSC,*[120] but did note with seeming approval two decisions which held a showing of negligence to be sufficient to maintain a rule 14a-9 action.[121] Yet, somewhat paradoxically, the Court also cited its own decision[122] which held some showing of scienter to be necessary to maintain a private action under rule 10b-5 and sections 10(b) of *the 1934 Act.*[123] It can be inferred from this confusing citation in *TSC* that the Supreme Court would consider an argument for making some showing of scienter a requirement in rule 14a-9 actions, as it is in rule 10b-5 actions.[124] This inference is supported by dictum in *Gerstle v. Gamble-Skogmo, Inc.,*[125] which held that negligence was sufficient to maintain a rule 14a-9 action on the facts before it.[126] This holding, Judge Friendly cautioned in *Gerstle,* "does not mean that scienter should never be re-

115. *Id.* at 859.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. 426 U.S. at 444 n.7.
121. *Id. citing* Gerstle v. Gamble-Skogmo, Inc., 478 F.2d at 1298-301; Richland v. Crandall, 262 F. Supp. 538, 553 n.12 (S.D.N.Y. 1967).
122. *Id. citing* Ernst & Ernst v. Hochfelder, 425 U.S. 185.
123. The paradox contained in the Court's footnote in *TSC* arises from the Court's use of Ernst & Ernst v. Hochfelder, 425 U.S. 185, a rule 10b-5 action, to develop a standard of culpability for rule 14a-9 actions in *TSC,* notwithstanding the fact that in *Hochfelder,* the Court declared that the appropriate standard of *conduct* for a particular section of the federal securities laws should be determined by reference to that section alone, and not by analogy to the generalized considerations pertinent to other, and perhaps significantly different sections. 425 U.S. at 200.
124. *Id.* at 215. *See generally* Floor, *The Scienter Requirement Under 10b-5 and Reliance on Advice of Counsel After Hochfelder,* 12 NEW ENGLAND L. REV. 191, 200-13 (1976).
125. 478 F.2d 1281.
126. *Id.* at 1300-01.

quired in an action under rule 14a-9."[127]

One strong ground the courts[128] have used to reject the tenuous analogy between section 10(b) and section 14(a) is that section 10(b) uses language associated with an intent to defraud,[129] while section 14(a) does not.[130] Another ground is that the scope of the SEC's rulemaking authority under section 14(a) is very broad,[131] and is not limited by any words connoting fraud or deception, as under section 10(b).[132] Furthermore, to avoid deterring voluntary disclosure through statements issued by corporations without legal obligation to do so,[133] the courts have been reluctant to impose a negligence standard of liability in rule 10b-5 actions.[134] This consideration clearly is inapplicable to proxy statements, which are required literature.[135]

It appears that negligence, rather than a modified form of scienter, should be the standard of liability in rule 14a-9 actions against the issuers of defective proxy statements. This conclusion has been reached by substantially all of the courts which have dealt with the question of issuer liability for defective proxy solicitations.[136] In addition, under tort law, negligence has been held to be sufficient to establish liability for providing false information to another with intent to influence a transaction in which the defendant had a pecuniary interest,[137] a situation which is clearly analogous to the typical fact pattern presented in rule 14a-9 actions.

A negligence standard of culpability also is supported by the Supreme Court's very adoption of the "would" test of materiality in *TSC*. Before arriving at a decision on the appropriate standard of materiality in a rule 14a-9 action in *Gerstle*, Judge Friendly *first* considered the question of the appropriate standard of culpability since "the very fact that negligence suffices to invoke liability argues for a realistic standard of materiality."[138] In other words, Judge Friendly used his prior adop-

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127. *Id.* at 1300.

128. *Gould*, 351 F. Supp. at 862 & n.10; Richland v. Crandall, 262 F. Supp. at 553 n.12.

129. *See* note 65 *supra* (*i.e.*, "any manipulative or deceptive device or contrivance").

130. *See* note 7 *supra*.

131. J. I. Case Co. v. Borak, 377 U.S. at 431-32.

132. *Gerstle*, 478 F.2d at 1299; *Gould*, 351 F. Supp. at 862.

133. Section 10(b) and rule 10b-5 apply to any omissions or misstatements made "in connection with the purchase or sale of any security," *supra* note 65 (*i.e.*, "any untrue statement").

134. *See, e.g., Gerstle*, 478 F.2d at 1300.

135. *See* note 5 *supra*.

136. *Gerstle*, 478 F.2d 1281; *Gould*, 351 F. Supp. 853; Norte & Co. v. Huffines, 304 F. Supp. 1096 (S.D.N.Y. 1968), *aff'd in pertinent part*, 416 F.2d 1189 (2d Cir. 1969), *cert. denied*, 397 U.S. 989 (1970); Richland v. Crandall, 262 F. Supp. 538.

137. Gediman v. Anheuser Busch, Inc., 299 F.2d 537, 543-46 (2d Cir. 1962). *See generally* W. PROSSER, TORTS § 107, at 706-09 (4th ed. 1971).

138. 478 F.2d at 1302.

tion of a negligence standard of liability to support his latter adoption of a "would" standard of materiality. Conversely, it is submitted that the Supreme Court's decision in *TSC* to adopt the "would" test as a uniform standard of certainty for the rule 14a-9 materiality requirement necessarily argues for a realistic standard of culpability, namely, negligence.

It has been suggested by some courts that while negligence is the appropriate standard of liability for inside directors[139] and management, scienter should be required to hold outside directors (*i.e.*, non-management) secondarily liable for violations of the proxy rules.[140] The better approach extends negligence liability to all defendants in a rule 14a-9 action.[141]

A negligence standard of liability clearly would serve to protect the principal recipient of proxy statements (*i.e.*, the unsophisticated investor) better than one which required scienter.[142] It also would not impose a significantly greater burden on corporate management in light of the higher standard of certainty now required to satisfy the rule 14a-9 materiality requirement in all jurisdictions.[143] Thus, negligence is the most appropriate standard of liability in rule 14a-9 litigation as to both inside and outside directors to protect the minority shareholders' right to be informed.

B. The Standard of Causation

In rule 14a-9 litigation, causation deals with whether a proxy defect had an actual impact on the outcome of the voting;[144] materiality deals with whether a proxy defect would influence a reasonable shareholder's vote.[145] Although causation and materiality generally have been treated as separate elements,[146] they have been held to merge when there is a bit of inside information,[147] or when the case involves a close corpora-

139. "Inside" directors are those who actively participate in the management and direction of the corporation.

140. *See, e.g., Gerstle,* 478 F.2d at 1300-01; H. L. Federman & Co. v. Greenberg, 405 F. Supp. 1332, 1336-38 (S.D.N.Y. 1975).

141. *Gould,* 351 F. Supp. at 865. It should be noted that under this approach, an individual would be liable for a materially false or misleading proxy statement "if he knew or should have known that the statements were false or misleading." *Id.* at 860.

142. J. I. Case Co. v. Borak, 377 U.S. at 431; *Gould,* 351 F. Supp. at 864.

143. *TSC,* 426 U.S. at 449.

144. *Mills,* 396 U.S. at 384-85.

145. *TSC,* 426 U.S. at 445.

146. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied sub nom.,* Coates v. SEC, 394 U.S. 976 (1969), *rehearing denied,* 404 U.S. 1064 (1972).

147. SEC v. Lum's, Inc., 365 F. Supp. 1046, 1059 (S.D.N.Y. 1973).

tion.[148] In class actions, materiality has been held to establish not only a presumption of causation,[149] but also causation itself by virtue of its nature as a principle of constructive reliance.[150] The above cases recognize that materiality is defined in terms of its potential causative effects,[151] so that one may conclude the two elements are indeed interrelated.

It already has been shown that a minimal standard of causation (*i.e.*, a possibility) is not supported by a low standard of materiality (*i.e.*, a "might" standard).[152] Yet a maximal standard of causation arguably is unnecessary when combined with a high standard of materiality (*i.e.*, a "would" standard).[153] Therefore, it is submited that the Supreme Court's announcement in *TSC* of a uniformly high standard of certainty for the rule 14a-9 materiality requirement[154] necessarily argues for a realistic standard of causation.

The Supreme Court held in *Mills* that independent proof of causation (*i.e.*, by a probability) in rule 14a-9 actions is unnecessary in non-management control situations.[155] The question remaining after *Mills* is whether its rationale can be extended to include "management control" situations.[156] Since the Supreme Court specifically left this question unanswered in *Mills*,[157] two conflicting interpretations of the *Mills* rationale have emerged from the lower federal courts. One line of authority, which requires a plaintiff to allege and prove "but for" causation,[158] deems it impossible to establish a causal relation for situations in which management holds a controlling number of votes.[159] A

148. Thomas v. Duralite Co., Inc., 524 F.2d 577, 584 (3d Cir. 1975).

149. *Mills*, 396 U.S. at 385.

150. Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d at 374.

151. *Northway*, 512 F.2d at 329.

152. *See* notes 55-68 and accompanying text *supra*.

153. 1 A. BROMBERG, SECURITIES LAW FRAUD: RULE 10b-5 § 4.7(556) (Supp. 1972-73).

154. 426 U.S. at 449.

155. 396 U.S. at 384-85.

156. "Management control" situations are those in which management controls enough votes to secure approval of a proposed transaction without the votes of the minority stockholders, with the actual number of votes needed by management to ensure control being a function of state law and the type of action to be taken.

157. 396 U.S. at 385 n.7.

158. Barnett v. Anaconda Co., 238 F. Supp. 766, 770-72 (S.D.N.Y. 1965); Hoover v. Allen, 241 F. Supp. 213 (S.D.N.Y. 1965).

159. Causation is established under traditional tort law concepts by asking whether the event would have occurred *but for* the violation, or, more precisely, whether the violation was a substantial factor in producing the event. W. PROSSER, TORTS § 41, at 236-41. Application of these traditional principles to securities law anti-fraud cases results in the impossibility of proof of causation in majority control situations, since the event (*i.e.*, the proposed transaction) would have occurred regardless of how the minority shareholder voted (*i.e.*, notwithstanding the alleged violation). *See generally* 1 A. BROMBERG, SECURITIES LAW FRAUD: RULE 10b-5 § 4.7(550-53).

second line of authority, requiring only that the solicitation of proxies served "some cognizable function"[160] in the completion of the transaction,[161] would allow proof of a causal relation despite the fact that management is in control.

The policy reasons behind this second line of authority, those decisions extending the penumbra of section 14(a) to management control situations, pose a persuasive argument for the extension of the availability of a rule 14a-9 action to shareholders in such situations. Without the protection of section 14(a), which guarantees investors the right to make an informed choice of action,[162] minority shareholders may be deprived of their "recourse to measures other than the casting of proxies."[163] For instance, in jurisdictions where a minority shareholder has appraisal rights,[164] a shareholder may be precluded from exercising those rights if he fails to vote *against* the proposal,[165] a distinct possibility when the proxy solicitation omits some essential information. A misleading proxy statement also may preclude the uninformed shareholder from seeking either modification or reconsideration of the terms of the transaction by utilizing such means as adverse publicity.[166] Finally, a misleading proxy statement may prevent both the market and the misinformed shareholder from making accurate decisions about buying, selling and holding the securities involved in the transaction.[167]

The most compelling reason for extending the protection of section 14(a) to investors in management control situations is that the broad remedial purposes of *the 1934 Act,*[168] which guarantee investors the right to make an informed choice of action,[169] would otherwise be

160. Some examples of the "cognizable function" an unnecessary proxy solicitation might serve are to achieve a shareholder consensus, to forestall litigation of the proposed transaction and to preclude the exercise of appraisal rights by obtaining shareholder approval. *See generally* Note, *Causation and Liability in Private Actions for Proxy Violations,* 80 YALE L. J. 107, 112-23 (1970).

161. Swanson v. American Consumer Industries, 415 F.2d at 1331-32; Laurenzano v. Einbender, 264 F. Supp. 356, 360 (E.D.N.Y. 1966), *aff'd on other grounds,* 448 F.2d 1 (2d Cir. 1971).

162. *TSC,* 426 U.S. at 448, *citing Mills,* 396 U.S. at 381.

163. Heyman v. Heyman, 356 F. Supp. 958, 968 (S.D.N.Y. 1973).

164. In a number of jurisdictions, dissenting shareholders are given the right to be paid in cash the appraised value of their shares upon the occurrence of certain events enumerated by statute.

165. Swanson v. American Consumer Industries, 415 F.2d at 1332; Rosenblatt v. Northwest Airlines, Inc., 435 F.2d 1121, 1124 (2d Cir. 1970).

166. Laurenzano v. Einbender, 264 F. Supp. at 361. *See also* Note, *Causation and Liability in Private Actions for Proxy Violations,* 80 YALE L. J. 107, 116-17.

167. Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 384 (2d Cir. 1974), *cert. denied,* 421 U.S. 976 (1975).

168. *See* text accompanying note 47 *supra.*

169. *See* text accompanying note 162 *supra.*

frustrated, as:

> In effect, section 14(a) would be a dead letter, the fraudulent proxies permitted, whenever the majority stockholder has sufficient votes of his own to control the corporation.[170]

The extension of section 14(a) protection to cover all investors is more viable after the Supreme Court's decision to adopt the "would" test of materiality in *TSC,* as the limitation of rule 14a-9 actions no longer need be done by an artificial dichotomy in the standard of causation which discriminates against an entire class of shareholders.

IV. CONCLUSION

This article has demonstrated that the "would" standard of certainty for the rule 14a-9 materiality requirement, now uniformly recognized as the threshold level of probability for imposing liability for proxy rule violations after the Supreme Court's decision in *TSC,* will readily fit into the regulatory scheme of the SEC. The "would" standard is clearly in line with the general policy of the courts, and will provide corporate management with a realistic norm for soliciting stockholder approval. The limitation of required disclosure to important facts, which would have an actual impact on the investment decisions of a reasonable shareholder, will benefit not only the drafter and issuer of proxy statements, but also the corporate investor who will be encouraged to read the concise statements in their entirety, and to vote properly.

The limitation *TSC* uniformly places on rule 14a-9 actions also should allow the extension of section 14(a) protection to areas which are currently left uncovered. Minority shareholders in management control situations can be afforded section 14(a) protection by a relaxation of the *Mills* causation requirement, a standard which heretofore has denied such protection to an entire class of investors. Secondary liability for defective proxy statements may be imposed on outside corporate directors and the drafters of such solicitations through the adoption of a negligence standard of culpability, an implicit, yet unstated standard of conduct in rule 14a-9 actions today. Hopefully, the wisdom and viability of the Supreme Court's decision in *TSC* will be extended to cover the above situations as logic clearly demands.

NICHOLAS A. NESI

170. Browning Debenture v. DASA Corp., 524 F.2d 811, 815 (2d Cir. 1975).

Aldinger v. Howard:[1] Pendent Party Jurisdiction in Federal Question Cases[2]

The limited jurisdiction of federal courts is a fundamental principle of federalism.[3] However, early in American judicial history, Chief Justice Marshall observed that it was essential to the functioning of the federal courts that they have the power to decide non-federal issues incidental or pendent to the federal ones.[4] This power was considered necessary in *Osborn v. Bank of the United States* since "[t]here is scarcely any case, every part of which depends on the constitution, laws or treatises of the United States."[5]

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1. 427 U.S. 1 (1976).

2. The concept of pendent parties has been used in three different situations, *see generally* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567 (1975).

(1) In diversity of citizenship cases some federal courts have exercised pendent jurisdiction over a related claim involving an additional party where the claim does not meet the $10,000 jurisdictional amount of 28 U.S.C. § 1332. *See, e.g.,* Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969) (opinion by Justice Blackmun); F.C. Stiles Contracting Co. v. Home Ins. Co., 431 F.2d 917 (6th Cir. 1970); and Stone v. Stone, 405 F.2d 94 (4th Cir. 1968). *See also* Comment, *Pendent Jurisdiction and Minimal Diversity,* 59 IOWA L. REV. 179 (1973). However, these decisions were greatly undermined as authority in Zahn v. International Paper Co., 414 U.S. 291 (1973) (Brennan, Douglas and Marshall dissenting), where by applying a strict construction of 28 U.S.C. § 1332 the Court required that each plaintiff in a class action have a distinct claim which meets the $10,000 jurisdictional amount. *See* United Pacific/Reliance Ins. Co. v. City of Lewiston, 372 F. Supp. 700 (D. Idaho 1974); and Osbahr v. H & M Constr. Inc., 407 F. Supp. 621 (N.D. Iowa 1975).

(2) In diversity of citizenship cases some courts have exercised pendent jurisdiction over related claims involving a non-diverse party. *See, e.g.,* Wittersheim v. General Transportation Services, Inc., 378 F. Supp. 762 (D.C. Va. 1974). In some instances the exercise of pendent jurisdiction was due to the relationship between the non-diverse pendent party and a diverse party, par-

One hundred forty-four years later in *United Mine Workers of America v. Gibbs,*[6] the Supreme Court established modern guidelines[7] for exercising pendent jurisdiction by stating "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, *parties* and remedies is strongly encouraged."[8] Like earlier cases,[9] *Gibbs* did not concern

ticularly in the Third Circuit, *i.e.,* parent and subsidiary company, Campbell v. Triangle Corp., 336 F. Supp. 1002 (D.C. Pa. 1972); guardian and minor, Newman v. Freeman, 262 F. Supp. 106 (D.C. Pa. 1966). *See also* Borror v. Sharon Steel Co., 327 F.2d 165 (3d Cir. 1964). Section 1301(e) of the ALI Study of the Division of Jurisdiction Between State and Federal Courts advocates the exercise of pendent jurisdiction in these special relationship cases. Generally, however, the courts have refused to undermine the complete diversity rule of Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), by exercising pendent jurisdiction in diversity actions over non-diverse parties. *See, e.g.,* Fawvor v. Texaco, Inc., 546 F.2d 636 (5th Cir. 1977) where the court found the "rationale of *Aldinger* . . . persuasive" in refusing to extend pendent jurisdiction; Seyler v. Steuben Motors, Inc., 462 F.2d 181 (3d Cir. 1972); and Lawes v. Nutter, 292 F. Supp. 890 (D.C. Tex. 1968). *See also* Bratton, *Pendent Jurisdiction in Diversity Cases — Some Doubts,* 11 SAN DIEGO L. REV. 296 (1974); and Fortune, *Pendent Jurisdiction — The Problem of "Pendenting Parties",* 33 U. PITT. L. REV. 1 (1972).

(3) In federal question cases a number of courts have exercised pendent party jurisdiction over a related federal claim not meeting the $10,000 jurisdictional amount of 28 U.S.C. § 1331(a) or over a related state law claim involving an additional party.

The scope of this article is limited to this third category. The Supreme Court has addressed the issue of pendent parties on only two occasions, in both instances federal question cases. Moreover, although some feel the concepts of ancillary and pendent jurisdiction are so interrelated as to render them indistinguishable, this is not so.

In its traditional sense, pendent jurisdiction enables a plaintiff in a federal question suit also to assert any state law claims the plaintiff may have against the defendant which are based on the same factual circumstances as the federal question claim. The rationale behind the doctrine is convenience to the plaintiff and judicial economy.

By contrast, ancillary jurisdiction arises after the law suit has been commenced. Generally it is invoked in diversity suits by the defendant. Its purpose is fairness to the parties: it enables them to assert other claims arising from the same factual circumstances which do not meet the $10,000 jurisdictional amount; allows the defendant to assert claims based on the same facts against third parties; and permits third party claims against the original parties. However, ancillary jurisdiction does not usually permit the joinder in diversity actions of parties whose citizenship is not completely diverse or whose claim is for less than the required jurisdictional amount.

See generally Blake v. Pallen, 554 F.2d 947, 956 n.11 (9th Cir. 1977); and Bay Guardian Co. v. Chronicle Publishing Co., 340 F. Supp. 76, 79 (D.C. Cal. 1972).

3. U.S. CONST. art. III, § 2.

4. Chief Justice Marshall stated:

> [S]everal questions may arise in [a case] which depend on the general principles of the law, not on any act of Congress.
>
> If this were sufficient to withdraw a case from the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing.

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 819-20 (1824).

5. *Id.* at 820.

6. 383 U.S. 715 (1966).

7. *See* discussion of *Gibbs* at § II of the text *infra.*

8. 383 U.S. at 724 (emphasis added).

9. Notably, *Osborn,* 22 U.S. (9 Wheat.) at 819-20; Siler v. Louisville and Nashville R.R. Co., 213 U.S. 175 (1909); Hurn v. Oursler, 289 U.S. 238 (1933).

joinder of parties, but rather claims, specifically whether the federal district court in the exercise of federal question jurisdiction had the power to exercise jurisdiction over a related state law claim involving the same parties. Thus, the concept of a federal court deciding pendent issues normally decided in the state courts had evolved from one of necessity in *Osborn* to one of convenience and judicial economy in *Gibbs.*

Most federal courts have come to apply the *Gibbs* reasoning to the exercise of pendent jurisdiction over a related state law claim involving an *additional party* not before the court.[10] In *Aldinger v. Howard,*[11] however, a Supreme Court particularly sensitive to principles of federalism arrested this evolution by upholding the decision of the Ninth Circuit Court of Appeals not to extend the *Gibbs* rule to pendent parties. In *Aldinger,* the Court declined to acknowledge definitively the existence of pendent party jurisdiction and merely stated that on the facts presented there was none.

This Comment analyzes the *Aldinger* decision. After discussing the concept of pendent jurisdiction, it examines the majority's reasoning, and, based on the Court's narrow holding and its observations, considers how the Court will approach pendent party jurisdiction in other contexts.

I. STATEMENT OF THE CASE

Petitioner, Monica Aldinger, was terminated from her position in the Spokane County Treasurer's Office by the Treasurer because she was allegedly living with her boyfriend. She filed a civil action in the United States District Court for the Eastern District of Washington alleging a violation of her civil rights by the defendant-Treasurer pursuant to 42 U.S.C. § 1983[12] and 28 U.S.C. § 1343(3).[13] She also asserted a state law

10. *See* Amenarea v. Wyman, 453 F.2d 1075 (2d Cir. 1975); Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971); Stone v. Stone, 405 F.2d 94 (4th Cir. 1968); Connecticut Gen. Life Ins. Co. v. Craton, 405 F.2d 41 (5th Cir. 1969); Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122 (6th Cir. 1970); Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809 (8th Cir. 1969).

Only the Seventh and Ninth Circuits have refused to recognize pendent party jurisdiction, in both instances relying upon decisions prior to *Gibbs*: Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973) (opinion written by now Justice John Paul Stevens did not even mention *Gibbs*); and Hymer v. Chai, 417 F.2d 136 (9th Cir. 1969), respectively.

11. 427 U.S. 1.

12. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

13. 28 U.S.C. § 1343(3) provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to

claim based on the same facts against Spokane County, contending that under *Gibbs* the District Court had pendent jurisdiction over the state law claim and defendant Spokane County.[14] The District Court dismissed the state law claim against Spokane County, refusing to recognize pendent party jurisdiction. The Ninth Circuit Court of Appeals upheld the District Court and affirmed its own holding in *Hymer v. Chai*[15] that pendent party jurisdiction is not within the purview of *Gibbs*. Since this reluctance to recognize the concept of pendent parties differed from the position of most Circuit Courts of Appeal, the United States Supreme Court granted certiorari.

The Supreme Court upheld the Ninth Circuit in a 6-3 decision authored by Mr. Justice Rehnquist. The Court stated that before applying the *Gibbs* rule one must first consider whether Congress has expressly or implicitly proscribed the exercise of such jurisdiction. The Court followed its interpretation that Congress did not include municipalities as "persons" against whom a § 1983 civil action could be brought,[16] and in *Aldinger,* reasoned that Congress, by implication, has precluded the federal courts from exercising pendent jurisdiction over a municipality in a § 1983 action. Its narrow holding was:

> that where the asserted basis of federal jurisdiction over a municipal corporation is not diversity of citizenship, but is a claim of jurisdiction pendent to a suit brought against a municipal officer within § 1343, the refusal of Congress to authorize suits against municipal corporations under the cognate provisions of § 1983 is sufficient to defeat the asserted claim of pendent party jurisdiction.[17]

To appreciate the implications of the Court's decision, it is necessary to first examine the development of the concept of pendent jurisdiction. Traditionally, pendent jurisdiction enables a plaintiff in a federal question case in federal court to join a related state law claim in the same proceeding.[18] The adoption of the Federal Rules of Civil Procedure in 1938 was a significant departure from the previous rigid concept of a cause of action. It was not until the Court in *Gibbs* brought pendent jurisdiction in line with these Rules that this concept became flexible

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be commenced by any person: . . . (3) to redress the deprivation, under color of any State law, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

14. 513 F.2d 1257, 1258 (9th Cir. 1975).

15. 407 F.2d 136 (9th Cir. 1969). *See* note 10 *supra.*

16. Monroe v. Pape, 365 U.S. 167 (1961) (municipality not a "person" in civil action for damages pursuant to 42 U.S.C. § 1983); City of Kenosha v. Bruno, 412 U.S. 507 (1973) (municipality not a "person" in equitable action pursuant to 42 U.S.C. § 1983).

17. 427 U.S. at 17-18 n.12.

18. *See* note 2 *supra.*

enough to accommodate pendent state law claims against a new party. The section following will delineate this progression more fully.

II. THE EVOLUTION OF PENDENT JURISDICTION

The decision in *Obsorn v. Bank of the United States*[19] was inevitable. In *Osborn,* the appellant contended that the federal court lacked jurisdiction to enjoin him from levying and collecting taxes from the Bank of the United States because the case involved general principles of law not conferred by any Act of Congress upon the federal courts. Therefore, the appellant argued, the case was not one arising under the laws of the United States even though the Bank was created by an Act of Congress and was authorized to sue and be sued in the circuit courts of the United States. To have held that the presence of general principles of law precluded a federal court from exercising jurisdiction over the case would have rendered the federal courts totally ineffective. Thus, Chief Justice Marshall concluded that when a federal court has federal question jurisdiction, it has the power to exercise jurisdiction over that cause of action "although other questions of fact or of law may be involved."[20]

Though lacking the element of necessity present in *Osborn,* the rationale of the Court in approving the federal court's exercise of pendent jurisdiction in *Siler v. Louisville and Nashville Railroad Co.*[21] nevertheless was compelling. The court exercised judicial restraint and avoided the constitutional issues by deciding the case on the basis of state law. In *Siler,* the respondents sought to enjoin the enforcement of an order of the Kentucky railroad commissioner establishing maximum rates. The respondents contended both that the commission was not empowered by the state statute creating it to give such an order and that the order was unconstitutional. The Court determined that provided the federal question was not fraudulently alleged, the federal court had jurisdiction and therefore "the right to decide all the questions in the case . . . even if it omitted to decide [the Federal questions] at all, but decided the case on local or state questions only."[22]

Hurn v. Oursler[23] presented an even less compelling factual situation for the exercise of pendent jurisdiction than did *Siler* or *Osborn.* Nevertheless, the Court approved the federal court's acceptance of jurisdiction over a state law claim. It is submitted that the policy justification

19. 22 U.S. (9 Wheat.) 738.

20. *Id.* at 823.

21. 213 U.S. 175 (1909).

22. *Id.* at 193. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 921-22 (2d ed. 1973).

23. 289 U.S. 238 (1933).

for this result was that convenience to the parties and judicial economy could be achieved by avoiding piecemeal litigation.[24]

In *Hurn,* the plaintiff attempted to join with his claim for breach of federal copyright law: (a) a state law claim for unfair competition with regard to the copyrighted play; and (b) another state law unfair competition claim involving an uncopyrighted revision of the copyrighted play. The trial court dismissed the federal copyright claim on its merits and both of the unfair competition claims for lack of jurisdiction. The Supreme Court said that although it was proper to dismiss the unfair competition claim as to the uncopyrighted revision for lack of jurisdiction, the trial court erred as to the copyrighted version because the unfair competition concerning it "results from the same acts which constitute the infringement and is inseparable therefrom."[25] The Court reasoned that with respect to the copyrighted version, the unfair competition claim represented another ground for the same cause of action based on a violation of federal copyright law. However, the claim with respect to the copyrighted revision was another cause of action altogether and needed an independent basis of federal jurisdiction. Thus, when a federal court had jurisdiction based on a federal question, it could also exercise pendent jurisdiction over a state law claim which was another ground for the same cause of action, but not over another cause of action even though based on the same facts. Since a new party would mean another cause of action, the concept of pendent parties was nonexistent.[26]

Five years after *Hurn,* the Federal Rules of Civil Procedure were adopted. In light of the liberal joinder provisions of the Federal Rules,

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24. Notable among the commentators who have so concluded is Charles Alan Wright. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 19 (3rd ed. 1976) [hereinafter cited as WRIGHT].

25. 289 U.S. at 240.

26. The difficulty with *Hurn* was that it was based on the elusive concept of "cause of action." *See* WRIGHT, *supra* note 24, at § 19. The language of the *Hurn* Court is confusing.

> A cause of action does not consist of facts but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong.

Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927), cited in *Hurn,* 289 U.S. at 246.

In considering the legal effect of a new party under *Hurn,* the following example might be useful. Z, a Black, is denied employment by the state budget department. Z brings an action against X, the personal officer, for deprivation of her 14th Amendment Constitutional rights and violation of a state civil rights ordinance. The federal court could exercise jurisdiction over both causes of action because of the presence of a federal question on which to hang the state claim. The two claims are different grounds for the same cause of action. If during pre-trial discovery it became apperent that Y, the department head, established the discriminatory policy and thus should also be a defendant, the federal court must have independent federal jurisdiction over him. Although it is the same transaction (violation of Z's rights), Y's presence constitutes a distinct cause of action. If the court lacks federal jurisdiction as to Y, it cannot decide his case.

the Supreme Court in *Gibbs* found the *Hurn* criterion "unnecessarily grudging"[27] and enunciated the present two-part standard of power and discretion. First, if the federal court has obtained jurisdiction over a substantial federal question,[28] then it has the *power* to adjudicate related state law claims, provided the claims derive from a "common nucleus of operative facts" with the federal claim.[29] Second, such power is not a right accorded the parties, but a matter of discretion exercised by the court. The court shall consider such factors as judicial economy, convenience and fairness to the litigants; the avoidance of needless decisions of state law; whether the state issues predominate; whether the court would have to apply an unsettled area of state law; whether the state claim is closely tied to questions of federal policy; and the probability of jury confusion.[30]

As noted earlier, only two of the Courts of Appeals have failed to extend *Gibbs* to the concept of pendent parties.[31] The conflict between the Circuits on the question of pendent party jurisdiction was previously before the Supreme Court in *Moor v. County of Alameda.*[32] In that case, the plaintiff brought suit in federal district court against county employees pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). Since *Monroe v. Pape*[33] had held that a municipality was not a "person" against whom a § 1983 action could be brought, plaintiff sought to have the district court assert pendent jurisdiction over the related state law claim against the municipality. The district court said it was without power to exercise pendent party jurisdiction over the county, and the Court of Appeals for the Ninth Circuit affirmed.

Acknowledging that the existence of pendent parties was a "subtle and complex question with far-reaching implications,"[34] the Court nevertheless avoided resolving the issue saying that "even assuming, *arguendo,* the existence of power to hear the claim, the District Court, *in exercise of its legitimate discretion,* properly declined to join the claims agains the County in these suits."[35]

This dicta did not persuade the Ninth Circuit Court of Appeals to

27. 383 U.S. at 725.

28. In Hagens v. Levine, 415 U.S. 528 (1974), it was determined that the federal claim is substantial so long as it is sufficient to confer jurisdiction over the federal claim and avoids a dismissal on the fact of the pleadings.

29. 383 U.S. at 725.

30. *Id.* at 726-27. For a good discussion of power and discretion to hear a pendent claim, *see* Tully v. Mott Supermarkets, 540 F.2d 187 (3rd Cir. 1976); Brown v. Knox, 547 F.2d 900 (5th Cir. 1977).

31. *See* note 8 *supra.*

32. 411 U.S. 693 (1974).

33. 365 U.S. 167 (1961).

34. 411 U.S. at 715.

35. *Id.* (emphasis added).

reconsider its position on pendent party jurisdiction when hearing *Aldinger.*[36] In adhering to its previous decisions, the Ninth Circuit Court put the Supreme Court on notice that it would consider itself bound to alter its position only upon a clear mandate by the Court to do so.

III. ANALYSIS OF THE DECISION

A. The Court's Reasoning - Frustration of Congressional Intent

The Supreme Court's holding in *Aldinger,* however, did not provide the federal courts with such a mandate. Rather, the Court's decision was based on its finding that the exclusion of municipal corporations from § 1983 actions implied congressional intent to withhold Article III, Section 2 judicial power from federal courts to assert pendent party jurisdiction over a municipality in a § 1983 action.[37]

The dissent in *Aldinger* contested the implication that Congress did not intend to extend pendent jurisdiction to include municipal corporations. Mr. Justice Brennan argued that the majority "wholly disregard[ed] the congressional intent and policy in enacting the various Civil Rights Acts including . . . § 1983."[38] Moreover, previous Supreme Court decisions emphasized the congressional intent behind the enactment of § 1983. Justice Brennan found support for his views in *Monroe v. Pape*[39] in which the Court stated it was "abundantly clear that one reason the legislation was passed was to afford a federal right in the federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced. . . ,"[40] and thus, citizens' Fourteenth Amendment rights might be abridged by state courts.

The dissent also relied on *Mitchum v. Foster*[41] in which the Court observed that the legislative history of § 1983 shows:

> Congress clearly conceived . . . it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; [Congress] was concerned that state instrumentalities could not protect these rights; it realized that state officers might, in fact, be antipathetic to the vindication of these

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36. The Ninth Circuit Court stated: "[I]t seems clear to us that we are not bound by any of the . . . dicta in *Moor v. County of Alameda* to reconsider our decisions in *Hymer v. Chai* and *Moor v. Madigan.*" 513 F.2d at 1261-62 (9th Cir. 1975).

37. 427 U.S. at 17.

38. *Id.* at 31 (dissent of Mr. Justice Brennan).

39. 365 U.S. 167 (1961).

40. 427 U.S. at 33, *quoting* Monroe v. Pape, 365 U.S. at 180.

41. 407 U.S. 225 (1972).

> rights; and it believed that these failing extended to the state courts.
>
> . . . .
>
> Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century.[42]

Clearly, Congress could proscribe the exercise of pendent party jurisdiction by federal courts. It has not expressly done so. Yet in *Aldinger,* Justice Rehnquist, writing for the majority, holds that Congress has impliedly done so.[43] In effect, the majority is imposing its concept of federalism by supplanting the discretionary exercise of power in *Gibbs* with a tenet of law that such power does not exist in the first place. The decision frustrates Congress' expressed intention that one be able to litigate their civil rights claims in a federal forum by creating serious impediments to a plaintiff wishing to pursue simultaneously their federal and state remedies for civil rights violations by municipal officers.[44]

Under the Court's holding, if petitioner wants to avoid the expense and inconvenience of two law suits she must forgo bringing her § 1983 claim in federal court. Also, if she were to bring two separate actions,

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42. 427 U.S. at 34, *quoting* Mitchum v. Foster, 407 U.S. at 242.

43. In a review of the cases in which Justice Rehnquist has taken part, Prof. David L. Shapiro notes three basic propositions guiding Justice Rehnquist's votes:

> (1) Conflicts between an individual and the government should, whenever possible, be resolved against the individual;
> (2) Conflicts between state and federal authority, whether on an executive, legislative or judicial level, should, whenever possible, be resolved in favor of the states; and
> (3) Questions of the exercise of federal jurisdiction, whether on the district court, appellate court or Supreme Court level, should, whenever possible, be resolved against such exercise.

Shapiro, *Mr. Justice Rehnquist: A Preliminary View,* 90 HARV. L. REV. 293-94 (1976). Commenting further Prof. Shapiro concludes:

> [u]nyielding insistence on a particular result appears to have contributed to a wide discrepancy between theory and practice in matters of constitutional interpretation, to *unwarranted relinquishment of federal responsibilities* and deference to state law and institutions, to tacit abandonment of evolving protections of liberty and property, to sacrifice of craftsmanship, and to distortion of precedent. . . . [I]n the respects described, Justice Rehnquist's performance has been markedly below his own substantial capabilities and has in large part been attributable to the inflexibility of his ideological commitments.

Id. at 299 (emphasis added).

44. In an article reviewing the decisions of the 1975 term of the Supreme Court in the area of federal jurisdiction, Prof. David P. Currie of the University of Chicago Law School commented:

> In deciding between conflicting venue statutes, in denying pendent jurisdiction over counties in civil-rights cases, and in upholding a doctor's standing to assert patients' rights [the Court] made arguments that were patently fallacious . . . .
>
> The[se] opinions . . . bespeak, in my judgment, a distressing lack of craftsmanship in the legal arts. It is the function of judicial opinions to explain and to persuade. Naked conclusions, transparently fallacious arguments, and the failure even to advert to important issues can only impair the respect in which the Court is held . . . . More disturbing . . . is the fact that in so many of [the opinions] the defects were plainly pointed out by dissenting justices . . . . Disturbing, too, is the lack of candor in dealing with precedent and with legislative history.

Currie, *The Supreme Court and Federal Jurisdiction: 1975 Term,* 1976 SUP. CT. REV. 218.

one in federal court and the other in state court, one action could only hurt and not help the other[45] due to the application of the principle of collateral estoppel.[46]

Furthermore, the Court's holding places a non-resident relying on diversity jurisdiction in a better position to vindicate his or her federal rights than a resident relying on federal question jurisdiction. The purpose of diversity jurisdiction is to avoid possible prejudice against a non-resident in the state courts. Provided the § 1332 jurisdictional amount is met, the non-resident can bring the state law claim into federal court under the federal court's diversity jurisdiction. Yet, by its holding, the *Aldinger* Court impedes § 1983's purpose of avoiding the potential and arguably more realistic prejudices and injustices of state court enforcement of federal civil rights by discouraging the resident from bringing his or her claim in federal court.

B. Subject Matter Jurisdiction Under Gibbs and Pendent Parties

By concentrating on congressional implication the majority discounted the language in *Gibbs* which encouraged the joinder of parties.[47] Mr. Justice Rehnquist found "[t]he situation with respect to the impleading of a new part . . . factually and legally different from the situation facing the Court in *Gibbs*. . . ."[48] The fine distinctions drawn by the majority preclude meaningful discussion of the joinder of parties alluded to in *Gibbs* and supported by a majority of the circuits.[49] It is submitted that merely because a pendent claim involves another party, the power of the federal court to exercise pendent jurisdiction should not be affected.

For a court to render a valid judgment it must have been conferred by the sovereign with jurisdiction over the subject matter. With the exception of the Supreme Court's original jurisdiction,[50] the judicial power of the federal courts is limited to whatever cases or controversies Congress has entrusted to the federal judiciary by statute. The lack of sub-

45. *See* Fortune, *Pendent Jurisdiction — The Problem of "Pendenting Parties"*, 33 U. PITT. L. REV. 1, 8-9, wherein it is also pointed out that in state court the plaintiff is confronted with a situation where the local townspeople comprising the jury are more likely to take the word of the municipal employee over that of the plaintiff, often a member of a minority group, and where any judgment of damages against a municipality will indirectly come out of the jurors' pockets. *See also* Note, *Federal Pendent Party Jurisdiction and United Mine Workers v. Gibbs — Federal Question and Diversity Cases,* 62 VA. L. REV. 194, 209 (1976).

46. Collateral estoppel cannot generally be used offensively (except in multiple claimant cases arising from mass disasters such as airplane crashes), but nevertheless can be used defensively. *See* M. GREEN, BASIC CIVIL PROCEDURE ch. 8, § 4 (1972).

47. "[J]oinder of . . . parties . . . is strongly encouraged." 383 U.S. at 724.

48. 427 U.S. at 14.

49. *See* note 2 *supra.*

50. U.S. CONST. art. III, § 2.

ject matter jurisdiction cannot be waived, and if at any time during the course of a proceeding the court becomes aware, either by motion of the parties or *sua sponte,* that such jurisdiction is lacking, it must dismiss the case.[51]

In addition to the necessity of subject matter jurisdiction, the federal court must have the power to acquire jurisdiction over the parties and must meet the requirements of procedural due process in doing so. Unlike lack of subject matter jurisdiction, if a party does not make a timely objection to jurisdiction over his person, the defense is deemed to be waived.[52] Except in rare instances where the grant of subject matter jurisdiction defines the cause of action in terms of the parties, the power to obtain jurisdiction over the parties is determined by the nexus between the parties (physical presence, domicile, doing business) and the state where the federal court is located. With few exceptions,[53] the power of the federal court to obtain jurisdiction over the parties by service of process is the same as that of the courts of the state in which the federal court is located.[54]

Therefore, under *Gibbs,* if the federal court has subject matter jurisdiction over a federal question, it has power over a state law claim arising out of the same transaction. Jurisdiction over the parties to the state law claim is not a question of subject matter jurisdiction, but an instance where the federal court must obtain jurisdiction over the parties by proper service of process.[55] Just as the federal cause of action cannot define the state cause of action, if a party is exempted expressly from the federal cause of action, such an exemption should not determine the scope of the pendent state law claim. That exemption, however, is a factor which should be considered in the discretionary determination of whether pendent jurisdiction should be invoked.[56]

Thus, the *Aldinger* Court should have used the *Gibbs* two part test of

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51. F.R.Civ.P. 12(h)(3) provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

52. F.R.Civ.P. 12(h)(1).

53. 28 U.S.C. § 2361 authorizes service of process throughout the territorial United States in Statutory Interpleader cases pursuant to 28 U.S.C. § 1335. Rule 4(e) of the Federal Rules of Civil Procedure aids third party practice pursuant to Rules 14 (impleader) and 19 (joinder of necessary parties) of the Federal Rules of Civil Procedure by authorizing service of process within 100 miles of the federal forum regardless of state boundaries.

54. F.R.Civ.P. 4(f).

55. Fortune, *supra* note 45, at 2 ("the concept is one of subject matter jurisdiction and that the fact that the pendent claim is asserted against a new party is irrelevant.").

56. Another related consideration is whether pendent party jurisdiction should be exercised over a third party to a state law claim over whom service of process would not have been obtained but for the 100 mile provisions of Rule 4(e) of the Federal Rules of Civil Procedure. *See* note 53 *supra.*

power and discretion. It should have recognized the existence of pendent party jurisdiction and then applied the discretionary criteria: weighing the plaintiff's interest in being able to litigate her § 1983 claim in a federal forum against the state's interest in having municipal liability determined in a state court. In this way the Court's review would have been limited to determining whether the Ninth Circuit Court abused its discretion in dismissing the pendent claim.

IV. THE FUTURE OF PENDENT PARTY JURISDICTION

The *Aldinger* Court did not render a definitive statement on pendent party jurisdiction, but rather limited its holding to the facts of the case and stated that "[o]ther statutory grants and other alignments of parties and claims might call for a different results."[57]

A. Potential Pendent Party Situations

The Court generally observed that where a new party is to be brought in, "there is a more serious obstacle to the exercise of pendent jurisdiction than if the parties already before the court are required to litigate a state law claim."[58] From these observations, three general classes of pendent party jurisdiction can be discerned:[59] (1) where the statutory grant of federal judicial power defines the cause of action in terms of the parties against whom it can be brought; (2) where the federal district

57. 427 U.S. at 18. Commenting on the *Aldinger* decision in their 1977 Supplement to § 3567 of FEDERAL PRACTICE AND PROCEDURE, Wright, Miller and Cooper state: "The *Aldinger* decision leaves much still to be answered on when 'pendent parties' may be brought into a federal action. Its cautious attitude, however, is likely to be read as a signal that courts should go slowly in exercising such jurisdiction."

58. 427 U.S. at 18.

59. In Zahn v. International Paper Co., 414 U.S. 291 (1973) the Supreme Court refused to permit the members of a class to aggregate their claims to meet the $10,000 jurisdictional amount required by 28 U.S.C. § 1332 in diversity actions in deference to the Congressional purpose of thereby limiting the number of diversity cases subject to federal jurisdiction. This decision has been construed to preclude the exercise of pendent jurisdiction in diversity cases over a claim not meeting the jurisdictional amount. *See* note 1 *supra*.

However, the majority in *Zahn*, substantially the same majority as in *Aldinger*, indicated that it would apply the jurisdictional amount rule of 28 U.S.C. § 1331 in federal question cases in the same fashion 414 U.S. at 294, n. 11. The dissent, written by Justice Brennan in which Justices Douglas and Marshall joined, contended in a footnote, *id.* at 304, n. 5, that § 1332 warrants different consideration from § 1331 in the application of jurisdictional amount rules.

Section 1311 of the ALI Study of the Division of Jurisdiction Between State and Federal Courts proposes that the jurisdictional amount in controversy requirement be dropped altogether from the few remaining federal question statutes still requiring it. *See generally* WRIGHT, *supra* note 24, at § 32, and the articles cited in note 43 also urging the abolishment of the jurisdictional amount requirement in federal question cases.

Nevertheless, based on *Zahn*, it appears that the present Court will not extend pendent jurisdiction to federal questions not meeting the jurisdiction amount requirement of § 1331.

courts have exclusive jurisdiction; and (3) where the federal district courts have concurrent jurisdiction with the state courts.

1. Cause of Action Defined in Terms of Party-Defendant.

The majority in *Aldinger* stated:

> [b]efore it can be concluded that [pendent party] jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence.[60]

Of course, unless Congress expressly proscribed the exercise of pendent party jurisdiction in a particular instance, the ultimate issue is: when is the Court likely to find that such an implication exists? Based on *Aldinger,* one can be reasonably certain that where the statute conferring federal subject matter jurisdiction excludes a party from the scope of the cause of action, then a federal court is also precluded, as a matter of power, not discretion, from exercising jurisdiction over that person as a pendent party. However, it is possible that given such a statute, this Court might be more hesitant to find such an implication as to a party or situation which is less appealing to the majority's sense of federalism,[61] as where the federal court has exclusive jurisdiction over the federal question.

2. Exclusive Federal Question Jurisdiction

The Supreme Court indicated that the most compelling situation for recognizing pendent party jurisdiction is when the federal district court has exclusive federal jurisdiction over the federal question.[62] In this circumstance, as the majority observed, "the argument of judicial

60. 427 U.S. at 18.

61. Federal courts have acknowledged *Aldinger* as evidencing the importance of the concept of federalism to the present Supreme Court. In Jones v. McElroy, 429 F. Supp. at 860 (E.D. Pa. 1977) (action for damages against municipality based on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 288 (1971), the Court noted: "The second additional factor is federalism . . . . The importance of this factor has been increasingly emphasized by the Supreme Court."

Compare, Edelman v. Jordan, 415 U.S. 651 (1974) where the majority (note that except for Justice Stevens who replaced Justice Douglas, the Justices in this decision sided exactly as they did in *Aldinger*), in an opinion by Justice Rehnquist, reversed the trend in previous cases stating:

> Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law. Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument we disapprove the Eleventh Amendment holdings of those cases to the extent that they are inconsistent with our holding today . . . .

The Court *refused to recognize an implication* that the States had waived immunity to suit under the Eleventh Amendment by participating in the federal Aid to the Aged, Blind, and Disabled Program.

62. 427 U.S. at 18.

economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together,"[63] the plaintiff otherwise being forced to bring two separate actions. Thus, it is most likely that in such a context the Court will acknowledge clearly the existence of pendent party jurisdiction.[64]

3. Concurrent Federal Question Jurisdiction

Situations where there is concurrent federal question jurisdiction are ripe for the majority's injection of considerations of federalism into the *Gibbs* criteria of judicial economy, convenience and fairness to the parties. While some commentators view a congressional grant of concurrent jurisdiction as evidencing a congressional policy of entrusting these claims to the state courts,[65] others consider it "an affront to federalism . . . in any case where, as practical matter, a federal right cannot be vindicated in a federal court."[66] *Aldinger* demonstrates that the present Supreme Court is more inclined to the former interpretation. Accordingly, at the very least it is likely that this Court will more readily hold that a federal court has abused its discretion by exercising pendent party jurisdiction in these cases.

V. CONCLUSION

In two recent decisions[67] the Ninth Circuit Court of Appeals has reaffirmed its refusal to recognize pendent party jurisdiction. In *Ayala v. United States*[68] the Ninth Circuit Court stated:

> We concluded in *Aldinger* that this court was not bound by Supreme Court dictum in *Moor* with respect . . . to the trend toward hearing pendent claims involving additional parties. . . . Similarly, we conclude here that we are not bound by new dictum in *Aldinger* which, in any event, merely suggests that "[o]ther statutory grants and other alignments of parties and claims *might* call for a different result."[69]

Thus, it is likely that the continuing conflict between the circuits will again confront a Supreme Court which has been reluctant to render a

63. *Id.*

64. *See* Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STANDFORD L. REV. 262 (1968). Even this commentator, noted for his arguments that *Gibbs* is too broad and that a more restrictive view of pendent jurisdiction is needed, recognizes pendent jurisdiction to be appropriate where there is exclusive federal jurisdiction.

65. *Id.* at 262.

66. Fortune, *supra* note 45, at 11.

67. Ayala v. United States, 550 F.2d 1196 (9th Cir. 1977); Blake v. Pallen, 554 F.2d 947 (9th Cir. 1977).

68. 550 F.2d 1196 (9th Cir. 1977).

69. *Id.* at 1200.

comprehensive decision on that matter. In considering future appeals the Court has two options short of completely discarding the *Gibbs* criteria. First, it could find some basis for holding that the federal court lacks subject matter jurisdiction to hear the pendent party claim,[70] such as construing congressional intent as was the case in *Aldinger*. Second, the Court could hold that the federal court abused its discretion in exercising pendent party jurisdiction by not requiring a higher showing of judicial economy, convenience and fairness to the parties. Regardless of which option the Court chooses, it is likely to consider: (1) whether there is exclusive or concurrent federal question jurisdiction; and (2) whether exercising pendent jurisdiction would involve a new party to the action which is precluded from being a party to the federal cause of action.

However, so long as the exercise of pendent jurisdiction remains a matter of discretion, a definitive answer may be long coming as the Court may continue to uphold the Ninth Circuit as not having abused its discretion. Nevertheless, there are strong considerations favoring the exercise of pendent party jurisdiction when there is exclusive federal question jurisdiction. If such a case came before the Court by virtue of the Ninth Circuit's refusal to recognize pendent party jurisdiction,[71] the Court might be compelled to definitively acknowledge the existence of pendent party jurisdiction.

Finally, one must keep in mind that the application of the criteria set forth in *Gibbs* for the discretionary exercise of pendent jurisdiction is tempered by the present Court's concept of federalism. Justice Brennan, the author of the *Gibbs* opinion, and Justice Rehnquist represent significantly different views of federalism and it is not Justice Rehnquist who is writing the opinions for the relatively youthful majority in these jurisdictional cases.

ROBERT A. DEFRINO

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70. In Long Prarie Packing Co. v. Midwest Emery Freight System, Inc., 429 F. Supp. 201, 203-204 (D. Mass. 1977), where plaintiff-consignor sought to exercise pendent party jurisdiction against the consignee based on a federal commerce act claim against the shipper, the court concluded that "[s]uch an exercise of pendent jurisdiction . . . is foreclosed by . . . *Aldinger* . . . . [T]he Congress has refrained from undertaking to legislate as to the rights and duties between consignor and consignee which relationship traditionally has been governed by State law. By not moving in this area Congress, by implication, has negated the existence of pendent jurisdiction."

71. Both *Ayala* and *Blake*, *supra* note 67, presented situations where there was concurrent state court jurisdiction.

BOOK REVIEW

THE AGES OF AMERICAN LAW
By Grant Gilmore. New Haven, Conn.
Yale University Press. 1977. Pp. x, 154. $10.00.

Professor Grant Gilmore has published another slim, thought-provoking volume of lectures. Like his 1970 book, *The Death of Contract, The Ages of American Law* is historical in approach. Unlike *The Death of Contract,* however, *The Ages of American Law* essays far beyond Gilmore's fields of principal expertise, commercial and general contract law,[1] and thus is not based on his own original resource. Consequently, the current volume's failings are largely attributable to its overbroad scope.

In identifying the "ages of American law," Gilmore eschews consideration of the colonial period and of the earliest decades of American independence on the grounds that in the absence of published appellate court opinions, "there was nothing which could rationally be called a legal system" in America until the early nineteenth century. Thus, the first period which Gilmore discusses stretches from the early 1800's until the Civil War. These years, which Gilmore identifies as the age of discovery, comprise the period that William Nelson described as "The Americanization of the Common Law."[2]

Unlike Nelson, however, Gilmore gives almost no attention to the process by which American judges and legal scholars of the early nineteenth century chose between pre- and post-revolutionary English materials, generally unavailable colonial materials, and their own imaginations. Instead, Gilmore devotes most of the chapter on the "age of

1. Gilmore is also an authority on the law of admiralty. *See* G. GILMORE AND C. BLACK, THE LAW OF ADMIRALTY (2d ed. 1975).

2. *See* W. NELSON, THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975).

discovery" to recounting various efforts to achieve national legal uniformity through treatise writing (*e.g.*, Chancellor Kent, Justice Story), Supreme Court decision (*e.g.*, Story's opinion for the U.S. Supreme Court in *Swift v. Tyson*), and the state codification movement. This material, which Gilmore previously had discussed in more orderly fashion in another, less readily available publication,[3] seems to add little to the thesis of the current volume. At no point does Gilmore differentiate between the various "ages of American law" in terms of their dedication to the pursuit of legal uniformity.

In the next chapter, Gilmore describes the period from roughly the Civil War to World War I as the "age of faith," or as a time of exaggerated formalism or conceptualism in legal scholarship and judicial opinions. While other scholars have suggested that during the early nineteenth century American judges imaginatively evolved new legal rules protective of American industry, which they later defended as dogma in formalistic fashion,[4] Gilmore offers no historical explanation for the shift from precedent-ignoring innovation to precedent-bound formalism at this particular point in American history, other than to suggest that the first half of the century was a period of rapid technological change, but the latter half was not.

Instead of exploring causes, Gilmore devotes most of his chapter on the "age of faith" to describing legal formalism. He briefly characterizes judicial opinions of the period as redolent with string citations and conclusory statements of law. The greater part of the chapter he devotes to analyses of Justice Holmes' 1881 book, *The Common Law,* and of the published scholarship of Dean Langdell of the Harvard Law School. Although Holmes did not share Langdell's belief that law was a science and that appellate court opinions could be treated meaningfully as laboratory specimens, Gilmore notes that both Langdell's and Holmes' writings shared apparent common premises. The first is that the great multitude of litigable societal problems could be reduced to a relatively small number of fundamental issues. The second is that over time there could be only one correct legal resolution to each of these fundamental issues.

Finally, Gilmore describes the period since the First World War as the "age of anxiety." He treats Judge Benjamin Cardozo's *The Nature of the Judicial Process* (1920) as a seminal work corresponding to Holmes' *The Common Law* in the earlier period. While Cardozo's book is little

3. Gilmore, "Commercial Law in the United States: its Codification and Other Misadventures," in J. ZIEGEL AND M. F. FOSTER, ASPECTS OF COMPARATIVE COMMERCIAL LAW: SALES, CONSUMER CREDIT AND SECURED TRANSACTIONS 449 (1969).

4. *See generally* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977).

read today, and seems very tame indeed in contrast with the later writings of "legal realists" like Frank[5] and Arnold,[6] Gilmore notes that it was enormously controversial at the time of its publication, due to Judge Cardozo's frank confession that the process of deciding common law appeals on issues not previously decided "is not discovery, but creation."

In perhaps the most interesting portion of his book, Gilmore goes on to argue that the neo-positivist realization that law is made by humans, not by God, has made the task of legal scholarship, as well as judging, vastly more difficult in the modern period. In contrast to Langdell, a 1930's scholar like Wesley Sturges could write an entire casebook which consisted not of seriously examined laboratory specimens, but "of the most absurd cases, along with the most idiotic law review comments, which he was able to find." If the law lacked an inner logic or system, what use was there in spending a lifetime trying to discover it?

Just as his characterization of later nineteenth century judges is less developed than his view on Holmes' and Langdell's scholarship, Gilmore's description of law-making in the "age of anxiety" is less decisive than his picture of contemporary legal scholarship. Although he notes the increasing importance of statutory law in the present century, Gilmore fails to provide a satisfactory theoretical explanation for the twentieth century retreat from late nineteenth century legal formalism. Much of the chapter is again devoted to materials on uniformity of laws and federalism that are only superficially integrated into the structure of the book.

In his final chapter, "On Looking Backward and Forward," Professor Gilmore evaluates current legal scholarship. He praises contemporary legal historians for their celebration of legal diversity and criticizes scholars like Richard Posner of the University of Chicago, who are attempting to import into legal thinking and practice the public policy analysis tools of economics and other social sciences. Posner, Gilmore charges, is a part of a modern throwback to the legal pseudoscience of Dean Langdell.

This is unfair. Gilmore is entitled to dislike systematic thinking in general, but he cites no evidence that Posner's application of economic analysis to legal issues[7] shares the pretensions and arbitrariness that he assigns to Langdell's work. Nor does he make a convincing general argument that systematic, analytical thinking by scholars about the law

5. Jerome Frank (1889-1957). *See* J. FRANK, LAW AND THE MODERN MIND (1930) and J. FRANK, COURTS ON TRIAL (1940).

6. Thurman Arnold (1891-1969). *See* T. ARNOLD, THE FOLKLORE OF CAPITALISM (1937).

7. *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW (1973).

is either detrimental or avoidable.

In summary, Gilmore's book is both fragmented and occassionally distorted by his idiosyncratic thinking. However, opinionated writing can be very engaging even when it makes one angry at the author. *The Ages of American Law* is fast reading, and I doubt if many people interested in American legal history will want to miss it.

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BOOK REVIEW

REVERSE DISCRIMINATION.
Edited by Barry Gross. Buffalo, N.Y.
Prometheus Books. 1977. Pp. viii, 401. $14.95.

One of the more troublesome problems that has emerged from the civil rights struggles of the 1960's has been the granting of preferential treatment to victims of discrimination. The concept of affirmative action, which arose as a result of the federal government's requirement, under Executive Order 11246, that its contractors practice a policy of non-discrimination, has evolved into a fear of reverse discrimination. In simple terms, the argument goes that granting special consideration to minorities with respect to admissions programs to educational institutions, hiring, seniority or the like, results in discrimination against whites which is both unconstitutional and morally indefensible. The contrary position is that affirmative action is legally permissible because its consideration of race, ethnicity or sex is benign and because it is necessary to effect any significant changes in the status of minorities in this country.

Even those individuals who favor a form of preferential treatment for minorities disagree as to the specifics of the policy. Should preferential treatment be granted to all members of disfavored minorities or only to those people who have personally been the victims of discriminatory treatment? Even if one assumes, *arguendo,* that an individual has been given shoddy treatment, should an "innocent" member of the majority group suffer some disadvantage precisely because of his own immutable characteristics? And how should society decide who shall be entitled to special treatment — does that depend on a group's powerlessness, its numbers, its socialization, the history of its reception into American society? The questions are easy to formulate but difficult to answer.

Reverse discrimination is a topic in legal as well as philosophical circles. The issue of preferential treatment for minorities has now reached the United States Supreme Court in connection with admissions

policies of graduate schools. In *DeFunis* v. *Odegaard,*[1] the Court was asked to consider whether a white male was denied equal protection of the laws because minority students with admittedly lower academic records were admitted to law school ahead of him, resulting in his failure to be admitted. As DeFunis was later admitted to the University of Washington Law School under court order and would complete his program regardless of the outcome of the case, the Court declined to decide the case, claiming that there was no case or controversy. In a vigorous dissenting opinion, however, Mr. Justice Douglas argued that consideration of applicants at publicly supported universities must be done in a racially neutral way to be consistent with the requirements of the Fourteenth Amendment. More recently, the Court has agreed to review the case of *Bakke v. The Regents of the University of California,*[2] in which the plaintiff has argued that he was denied equal protection by a preferential minority admissions program of the medical school of the University of California at Davis. Both the trial court and the California Supreme Court have held that the minority admissions program is unconstitutional.

The United States Supreme Court has also determined that Title VII of the Civil Rights Act of 1964[3] and 42 U.S.C. § 1981, which primarily relate to employment discrimination, protect whites as well as non-whites.[4]

Reverse Discrimination is an attempt to gather in one source many of the arguments, pro and con, on the subject of affirmative action and reverse discrimination. The book is an anthology of thirty-two articles, written primarily by professors of philosophy and law. All but two of the articles have been reprinted from other sources.

The book is organized into three arbitrary and frequently overlapping categories: "Facts and Polemics," "The Law" and "Value." The editor has prepared a short general introduction which attempts to define for the reader the meaning of reverse discrimination and to prepare him or her for the type of questions which are raised in the subsequent articles. Preceding each category of essays is a brief introduction which purports to capsulize the essays which follow. In my judgment, the general introduction is a fair statement of the issues presented in the book but the article summaries are inadequate and frequently misleading.

The first section, "Facts and Polemics," contains ten articles. This

1. 416 U.S. 312, (1974).
2. 18 Cal.3d 34, 553 P.2d 1152 (1976), *cert. granted.*
3. 78 Stat. 253, *as amended by* 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. IV).
4. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

section is the liveliest of the three, containing articles espousing the broad policy arguments on each side of the issue.

One of the more entertaining articles in the first section is an exchange of letters between Milo M. Todorovich, professor of physics of the Bronx Community College of the City of New York and coordinator of the Committe on Academic Non-Discrimination and Integrity, and Howard A. Glickstein, Director of the Center for Civil Rights at the University of Notre Dame. Mr. Todorovich initiated the exchange by a mass mailing requesting colleagues in the academic community to write to senators and congressmen expressing concern about reverse discrimination. Though not an attorney, he argues that preferential treatment for minorities is expressly forbidden by statutes and Executive Order 11246, and that color-consciousness, even for benign purposes, is impermissible. He emphasizes the need for strict merit decisions in academic hiring. Mr. Glickstein counterattacks with letters outlining the legal and moral justification for affirmative action.

Another set of opposing articles is written by F.K. Barasch and Thomas Sowell. Mr. Barasch demonstrates that affirmative action is necessary to correct discrimination against women in faculties of higher education, as women are now concentrated in the least well paying and less prestigious positions in universities. Mr. Sowell, on the other hand, argues that affirmative action programs were begun before any facts had been gathered to determine if women were indeed being discriminated against in academia. His analysis indicates that the current position of minority and female faculty members is actually far better than had been popularly supposed. He argues that any lack of status by women academics is caused by their own personal histories, including marriage and childraising.

The other significant article in section one is by Professor Nathan Glaser of Harvard University. Professor Glaser argues that preferential treatment of certain minority groups will result in disadvantage to other minority groups who are also competing for the limited benefits available in our society. He argues that the United States is not composed of whites and certain clearly defined and disadvantaged minorities, but rather is a collection of minorities. Thus, special advantage to any minority group will result in special disadvantage to others.

Attorney Robert M. O'Neil, Vice President of the Bloomington campus of Indiana University, in his article "The Case for Preferential Admissions," suggests that preferential admissions for minority students to law schools are necessary to increase minority income, provide adequate legal services for minorities, compensate for the effects of past discrimination and segregation and create diversity in the univer-

sity itself. He argues that such diversity is beneficial not only to minority students admitted under preferential programs but also to other students on the campus as it improves the educational experience of white-Anglo students. Mr. O'Neil also alleges that traditional entrance criteria to law schools exclude disproportionate numbers of minority students because they fail to take into account the special cultural disadvantages of minority students.

The other articles in section one can be discussed rather summarily. J. Stanley Pottinger, former director of the Office of Civil Rights of the Department of Health, Education and Welfare, in his article "The Drive Toward Equality," justifies HEW's reliance on affirmative action to increase the role of minorities in American society and argues that "quotas," the bane of the anti-reverse discrimination proponents, has never been required by any federal guidelines. Lee Nesbit discusses the reaction of friends and colleagues to his own experience as a white academic seeking an educational appointment. Sidney Hook, in two articles published in this volume, argues that those responsible for issuing affirmative action guidelines are guilty of fostering the racism and discrimination that Executive Order 11246 was designed to correct. Finally, Paul Seabury argues in his article, "HEW and Universities," that affirmative action when applied to universities creates many costs and burdens: the authoritarian nature of bureaucratic review of university hiring practices, the conflict affirmative action creates between minority groups, the underpinning of the merit concept, and injustice.

The second section of *Reverse Discrimination* concerns the application of law to concepts of preferential treatment for minorities. The section is the shortest of the major divisions of the book and is the least satisfying for attorneys. The section contains six articles including excerpts from the Harvard College amicus brief in *DeFunis* v. *Odegaard* and Mr. Justice Douglas' dissenting opinion in that case.

In her article "The Erosion of Legal Principles in the Creation of Legal Policies," Virginia Black argues that affirmative action programs will result in social disorder. She argues that to combat discrimination against minorities by engaging in discrimination against whites is totalitarian and inconsistent. She states that a case can be made for voluntarily accepting discriminatory treatment so long as there are no legal sanctions for non-compliance. However, Ms. Black infers that use of government compulsion to remedy discrimination by quotas and other coercive means will result in dissatisfaction among the favored groups and ultimately in violence and economic chaos. The article is the worst of the volume: diffuse, illogical, and poorly written.

John Hart Ely, in his article "The Constitutionality of Reverse Racial

Discrimination," makes some of Ms. Black's points in a more logical and interesting way, although he comes to a different conclusion. Professor Ely argues that reverse racial discrimination is constitutional, provided that the legal requirement of such discrimination is created by the favored majority. A classification that disfavors those in power is not suspect, he argues, and therefore, is acceptable under constitutional standards provided there is a valid state interest in the discriminatory conduct. Discrimination adopted by the majority against itself is not invidious and therefore, does not deserve review under a strict scrutiny test.

Professor Kent Greenawalt argues in his article that benign racial classifications should be subjected to a constitutional review based on substantial reasonableness rather than a rational relationship or strict scrutiny test. This constitutional standard, which has been applied by the United States Supreme Court in sex discrimination cases,[5] requires that the state's interest be "important" but not "compelling" and further demands that there be a substantial relationship between the objectives of the law and the means used to attain those objectives. He argues that preferential admissions to law schools can be justified under such a test when the state's goals are to ameliorate harmful stereotypes and to compensate for injustice. Under balancing tests required by the substantial reasonableness test, the Court would ordinarily uphold benign racial classifications.

The third division of the book is entitled "Value." The section purports to discuss the moral ramifications of reverse racial discrimination. The selections are generally written by and for philosophers.

The first eleven articles in this section deal with the logical question of whether or not differential treatment of minority groups for purposes of reparation and distributive justice are based on an irrelevant characteristic or a relevant characteristic. That is, if one assumes that the consideration of race as a characteristic in hiring is morally *irrelevant,* is it morally *relevant* to consider race in formulating a remedy for the discrimination? This portion of the section is of interest only to logicians.

The other articles discuss whether or not reverse racial discrimination is morally permissible and, if so, whether or not it is impermissible to discriminate against individuals who themselves are not the perpetrators of the original discrimination.

Robert Hoffman, in his article "Justice, Merit and the Good," argues that compensatory justice for groups is immoral if it contravenes decisions based purely on merit. Hardy E. Jones suggests that there are

5. *See, e.g.*, Reed v. Reed, 404 U.S. 71, (1971).

reasons to justify preferential treatment: to ensure that past discrimination does not continue, to denounce symbolically our recent past, to provide role models and to compensate victims of discrimination. He then analyzes the objections to reverse discrimination and concludes that a cost benefit analysis requires the institution of programs of affirmative action. Using Aristotelian concepts of justice, Lisa H. Newton in her essay, "Reverse Discrimination is Unjustified," argues that reverse discrimination violates public equality and justice and replaces those noble concepts with power struggles and popularity contests among disadvantaged groups. Barry Gross, the editor of this publication, argues that there are at least three difficulties with reverse discrimination. First, that it is inconsistent, second, that it licenses discrimination and third, that it is unfair.

Reverse Discrimination is an unsatisfactory volume. The book is needlessly repetitive and the articles are, in general, poorly written. The organization of the book is of little help to readers; articles could be arbitrarily placed in almost any of the existing categories. Some of the articles, particularly those in the "Value" section, are excessively technical and do not aid the general reader in coming to any conclusions about this complicated issue.

On the other hand, *Reverse Discrimination* is a compilation of much of the thought on the topic of preferential treatment for minorities. It is not likely that an attorney reading through the legal literature would be exposed to such a wide diversity of essays on the subject. In short, a discerning reader could find articles of value in *Reverse Discrimination,* but the attempt is probably not worth the effort.

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BOOKS RECEIVED

BARRON'S HOW TO PREPARE FOR THE MULTI-STATE BAR EXAMINATION by Victor E. Schwartz. Woodbury, N.Y.: Barron's Educational Series, Inc. 1977. Pp. 256. $4.95. Paperback.

CLASSICS OF FREE THOUGHT edited by Paul Blanshard. Buffalo, N.Y.: Prometheus Books. 1977. Pp. 204. $12.95. Cloth.

THE FENCE: A NEW LOOK AT THE WORLD OF PROPERTY THEFT by Marilyn E. Walsh. Westport, Conn.: Greenwood Press. 1977. Pp. 217. $13.95. Cloth.

THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW by Eugene Bardach. Cambridge, Mass.: The MIT Press. 1977. Pp. 315. $17.95. Cloth.

THE LABOR RELATIONS LAW OF CANADA prepared by the International Labor Law Committee Section of Labor Relations Law, American Bar Association. Washington, D.C.: The Bureau of National Affairs. 1977. Pp. 240. $15.00. Cloth.

OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES by Earl Johnson, Jr., Valerie Kantor, and Elizabeth Schwartz. Denver, Colo.: National Center for State Courts. 1977. Pp. 107. $6.50. Paperback.

TAX REFORM ACT OF 1976, VOL. 1, INCOME TAX PROVISIONS prepared by the A.L.I.-A.B.A. Committee on Continuing Professional Education. Philadelphia, Pa.: A.L.I.-A.B.A. 1976. Pp. 583. $16.00. Paperback.

TAX REFORM ACT OF 1976, VOL. 2, ESTATE AND GIFT TAX PROVISIONS prepared by the A.L.I.-A.B.A. Committee on Continuing Professional Education. Philadelphia, Pa.: A.L.I.-A.B.A. 1976. Pp. 247. $9.00. Paperback.

TAX CONSEQUENCES OF MARRIAGE, SEPARATION AND DIVORCE by Lowell Thomas, Jr. (2d Edition). Philadelphia, Pa.: A.L.I.-A.B.A. Committee on Continuing Professional Education. 1976. Pp. 198. $10.00. Paperback.

Editor's Page

This issue of the *Review* is not a symposium on legal education, nor was it intended to be. Nevertheless, as lead articles arrived over several months, we were pleased to discern a number of common themes. Many manuscripts demonstrated similar philosophical concerns: the proper objectives and methodology of legal education, the nature of the interrelationship between law and other disciplines, and the appropriate role of attorneys. In addition, some authors offered specific recommendations on how to improve legal training and the practical skills of lawyers.

An overriding concern expressed in several pieces is the need for a multidisciplinary approach in both classroom and clinical programs. Professor Bratt introduces this discussion by examining weaknesses of the traditional law school curriculum as well as the parochialism of the typical legal clinical experience. She suggests the implementation of a model clinic which brings together law students and graduate students in non-legal disciplines to help solve clients' problems. While focusing on an interdisciplinary clinical offering within law school, she recognizes the desirability of a multidisciplinary emphasis in the classroom as well. Professor Field's article fits that latter need by examining the importance of exposing law students to the interactions of law and science in an academic setting. After a succinct critique of current law/science teaching models, he recommends the development of a course which acquaints students with the nature and operation of the scientific method in a variety of scientific disciplines. In contrast, Doctor Buxton and Professor Dubin detail the workings of a law/science course which attempts to familiarize law students with aspects of psychiatric education significant to legal practice.

Attorney Carlson's examination of the best mode disclosure requirement in patent law underscores Professor Field's concern that lawyers and judges become technically literate in handling increasingly complex scientific issues. Mr. Carlson's article convincingly illustrates the significance of a practitioner's mental receptivity to the scientific

method; moreover, his discussion of recent patent decisions highlights the importance of judicial sensitivity to technological advancement.

The necessity for enhancing the communicative skills of attorneys is also addressed. By several different methods, Professors Bratt, Field, Dubin, and Doctor Buxton expressly or impliedly advocate reducing barriers to interdisciplinary communication. Attention is directed to sharpening the interviewing and counselling techniques of lawyers. Finally, Professor Closen and Attorney Ginsberg stress the critical significance of an articulate dialogue between counsel and court of appeals.

A theme underlying all these articles is the attempt to define the modern lawyer's professional role. Different models are suggested: the skillful advocate on appeal, the competent practitioner aware of the technical as well as legal concerns of the client, the concerned pragmatist who strives to fulfill the clients' particular needs by drawing on all necessary resources, and the counsellor who seeks to understand the emotional dilemmas of the individual to be helped.

Beyond the Law School Classroom and Clinic — A Multidisciplinary Approach to Legal Education†

*Carolyn S. Bratt**

Legal education has never been without its critics. A persistent argument has been that law schools have failed to provide students with the lawyering skills needed to effectively practice law. The most frequently proposed solution is that law schools should offer legal clinical programs. In this article, Professor Bratt goes beyond this recommendation and proposes the adoption of a multidisciplinary clinical approach for the education of lawyers.

It has been written that "[l]egal education trains people to fill the needs of the legal profession."[1] As the needs of both the legal profession and individuals are not always synonymous, a logical corollary is that legal education does not necessarily train lawyers to fill the needs of other people.[2] This article demonstrates that a multidisciplinary

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†The invaluable work of my research assistants Christine A. Macaluso, J.D. 1976, University of Kentucky and Timothy Shane O'Neill, third year law student, University of Kentucky in the preparation of this article deserves special recognition.

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1. Rockwell, *The Education of the Capitalist Lawyer: The Law School,* in LAW AGAINST THE PEOPLE ESSAYS TO DEMYSTIFY LAW ORDER AND THE COURTS 90, 91 (R. Lefcourt ed. 1971).

2. A more basic issue is what role law and the legal system should serve in a society. Many philosophical positions postulate answers to this question. *See, e.g.,* E. BODENHEIMER, JURISPRUDENCE THE PHILOSOPHY AND METHOD OF THE LAW 161-266 (1962). Whether one believes that the law's function is to meet the needs of the individual; to protect society; to preserve values; to resolve disputes when other means have failed; to see that justice is done or to play some other function or combination of functions, the end result is that the law's operation affects individuals. My quarrel with the traditional legal curriculum is its failure to integrate this realization into the training of young lawyers. As future attorneys, legislators, jurists or all three, law students must be imbued with the awareness that the law is not a sterile abstraction. Its impact is felt by people who deal with concrete problems, and too much of the American legal education system ignores or deprecates this reality. Casebooks, law classes and libraries are not per se the evil. The evil is the separation of the intellect from human concerns. While abstract scholarly pursuits have a place in the training of lawyers, rigorous intellectual examination of and firsthand practical experience with the law, in the context of the problems confronting individuals in this society, is the answer.

approach can meet this deficiency in legal training. A threefold analysis is presented. First, the objectives of the traditional law school curriculum and the methods used to achieve those goals are examined. Certain fundamental problems are isolated. Next, the basic legal clinical educational program is seen as a traditionalist response to these shortcomings. While this is a positive step, the limitations of this approach are also considered. Finally, this article presents a model for a multidisciplinary clinical program which provides better service to clients as well as a more fulfilling experience for the student.

I. THE TRADITIONAL LAW SCHOOL CURRICULUM

Law schools are oriented toward providing lawyers for business and government. "The training of 'business' lawyers and government technicians has been the silent premise underlying legal education in this country for a century or more."[3] A cursory review of the offerings of any American law school shows that courses in taxation, corporations, commercial transactions, contracts, and property outnumber those which deal with the legal problems of consumers, minorities, and low to middle income groups.[4]

In addition, law schools tend to produce lawyers who are aggressive and competitive,[5] and thus prepared to do battle at the bar of justice. This perspective prepares lawyers to be advocates for a legal position. These law school graduates may not, however, be sensitive to the full range of an individual client's needs or to non-judicial means of solving a client's problem. Typically, law schools introduce students to the lawyer's role through a moot court competition which maximizes both the competitive and the courtroom aspects of a lawyer's job. Very seldom are courses or programs offered in interviewing or counseling techniques. Little mention is made of the possibility or desirability of finding out-of-court solutions to a client's problems. Training in the use of non-legal material to assist in delineating a problem and proving a case is almost non-existent.[6]

Finally, the most prominent objective of the traditional law school curriculum is the development of that group of talents and habits of

3. Kinoy, *The Present Crisis in American Legal Education,* 24 RUTGERS L. REV. 1, 5-6 (1969). *See also* Borosagc, *Can the Law School Succeed? A Proposal,* 1 YALE REV. L. & SOC. ACT. 92, 93 (1970); Hervey, *What's Wrong with Modern Legal Education,* 6 CLEV.-MAR. L. REV. 381, 385 (1957); Rockwell, *supra* note 1, at 91.

4. Rockwell, *supra* note 1, at 98-99.

5. *See, e.g.,* Borosagc, *supra* note 3, at 93; Kennedy, *How the Law School Fails: A Polemic,* 1 YALE REV. L. & SOC. ACT. 71, 77 (1970); Stevens, *Law Schools & Law Students,* 59 VA. L. REV. 551, 673-78 (1973).

6. For example, the following materials demonstrate how statistical proof can be generated and used by an attorney in employment discrimination cases. However, they are exceptions to typical law school casebooks and classroom material. G. COOPER & H. RABB, EQUAL EMPLOYMENT LAW AND LITIGATION 80-89 (1972); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1161-95 (1976). *See also* casebooks cited at note 16 *infra.*

mind which is referred to as analytical skills, or colloquially, as thinking like a lawyer. This particular mode of thought involves "tough-minded analysis of cases."[7] It is the method which a lawyer uses to isolate from the large number of cases and principles which possibly are relevant to the problem under consideration, those few which are most appropriate, given the particular situation and desired goal.[8] The ability to think like a lawyer is perceived by law students and their teachers as very important;[9] it is posited that as the range of problems with which the lawyer must deal expands "it becomes less feasible for law schools to impart the information students will need as professionals, and, by the same token, it becomes more important that law schools train students in the methodology of analysis."[10] However, what is often overlooked by teachers and students alike, is that thinking like a lawyer and the use of analytical skills is only one of a variety of methods that could be utilized to help solve people's problems.[11] As currently taught, it may not be the best method of dealing with all the problems a lawyer confronts.

Today, as for the last one hundred years, law students are taught analytical skills and lawyer-like thinking by means of the case method and the Socratic style of classroom instruction. The case method and the Socratic style were first proposed and used by Christopher Columbus Langdell in the 1870's at Harvard.[12] In combination, they have been

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7. Richardson, *Does Anyone Care for More Hemlock?*, 25 J. LEGAL EDUC. 427, 435 (1973). Such analysis involves, among other things, identifying the important facts (*i.e.*, the facts which have an impact on the outcome), determining the legal issues, and attempting to find those features which distinguish cases that, although seemingly similar, have differing results, and attempting to find the principles which bind together cases that, although superficially very different, have similar results.

8. One author insists that teaching people to think like lawyers is actually a method of producing practitioners who conform to the expectations of the profession.

> We pride ourselves in teaching students how to "think like lawyers." But our present educational processes do more to effect thought reform than to offer instruction in logical analysis. Teaching how to "think like a lawyer" is closer to building character than it is to constructing syllogisms. That captivating phrase defines not an intellectual process, but a process of socialization enforced by putting students through some form of suffering aimed at the production of reliable and predictable people who will be readily assimilated into the Bar Association.

Savoy, *Toward a New Politics of Legal Education*, 79 YALE L. J. 444, 460 (1970) (footnote omitted).

It seems likely that thinking like a lawyer involves both the socialization function pointed out by Professor Savoy, and the intellectual process referred to in the text.

9. Stevens, *supra* note 5, at 593.

10. Gross, *On Law School Training in Analytic Skill*, 25 J. LEGAL EDUC. 261, 265 (1973). *See also* Reich, *Toward the Humanistic Study of Law*, 74 YALE L. J. 1402-03 (1965).

11. *See* Mohr & Rodgers, *Legal Education: Some Student Reflections*, 25 J. LEGAL EDUC. 403, 407-08 (1973); Richardson, *supra* note 7, at 435-36.

12. Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

Langdell, who apparently loved nothing so much as books and who was very withdrawn, was described by Judge Frank as "a brilliant neurotic" who seduced American legal education. Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303 (1947).

the primary teaching methods used by American law schools ever since. The objective, of course, is to train students to think like lawyers, and to that end the case method[13] presents to the student the published decisions of courts so that the student will learn the basic principles of a given area of law, and will learn to analyze cases in terms of their relationship to other cases in the same area.

The traditional law school curriculum relies upon analysis of published opinions. As the great majority of written decisions are from appellate courts, the student receives a distorted view of the lawyer's role. At the appellate level the facts of a case have already been determined; the only questions are those of law. Thus, the study and analysis of appellate court cases provides very little instruction in how the litigants came to that point. The trial court preparation and presentation of the issues and facts are that part of legal practice that will be of great interest and importance to most young lawyers.[14] Those cases that reach the appellate courts are more likely to involve business or government, simply because business and government are better able to afford the expense involved.[15] Thus, because the materials presented are not truly representative, the case method presents an inaccurate picture of the types of disputes that will be encountered in practice.

When one realizes that over 40 years ago Judge Frank criticized the case method and the Socratic style on many of the same grounds put forth today, and that he advocated the same types of reforms that are being urged in the 1970's, one can only wonder why it has taken so long to achieve so little change.

Jerome Frank was an author, essayist, lawyer and jurist. He viewed himself as a "trimmer" — one who takes a relatively exteme position on one side or the other to restore equilibrium. In the 1920's he was an outspoken leader of the "legal realist" school. He inveighed against the mechanical conceptualism of legal thinking which was caused by undue belief in and reliance upon fixed rules. Later, he moved from this rule-skepticism to fact-skepticism because of his belief that while the legal community had reached a healthy skepticism toward rules, it had failed to recognize the inherent unreliability and uncertainty of judicial fact finding. In his book, LAW AND THE MODERN MIND (1930), he argued in favor of the applicability of Freudian concepts to the judicial process, but in FATE AND FREEDOM (1945), he attacked the dangers he perceived to individual freedom and moral responsibility in Freudianism, Hegelianism and Marxism. In spite of his being an early advocate of the use of the social sciences by courts and legislatures, he also saw it necessary later in his career to warn of the dangers of uncritical receptivity to social science data by the legal community. B. KRISTEIN, THE PHILOSOPHY OF JUDGE JEROME FRANK: A MAN'S REACH ix-xvi (1965).

13. Judge Frank pointed out that the "case method" is actually the "opinion method." Students do not study cases, or even the records of cases, but instead study judicial opinions, which do not and cannot set forth all of the factors which went into the ultimate decision that was reached by the court. Frank I, *supra* note 12, at 910.

14. However, as Judge Frank observed:

> [T]he Langdell system . . . concentrates attention on the so-called legal rules and principles found in or spelled out of the printed opinions. Now no sane person will deny that a knowledge of those rules and principles . . . is part of the indispensable equipment of the future lawyer . . . .

Frank I, *supra* note 12, at 910; Rockwell, *supra* note 1, at 96. "But the tasks of the lawyer do not pivot around those rules and principles. The work of the lawyer revolves about specific decisions in definite pieces of litigation." Frank I, *supra* note 12, at 910.

15. *See* Rockwell, *supra* note 1, at 91-92.

In keeping with Langdell's theory that the proper study of law is the study of written decisions, there has been relatively little use of other kinds of materials in the traditional law school curriculum. The attempts to use additional sources have not been very successful. "[W]here modern casebooks have attempted to introduce materials from other disciplines, they have done so at a level that is so elementary and piecemeal that it has little value. Casebook social science usually consists of truncated excerpts from secondary sources, inserted into the notes in small type."[16]

The Socratic style is the second component of the traditional law school methodology. By its use of inductive reasoning and open discussion between teacher and student it, too, is supposed to help students learn to think like lawyers. However, as it is used in today's law schools, the Socratic style is actually "more an authoritarian lecture than an educational dialogue. The law professor decides what shall or shall not be discussed and determines what is or is not relevant to the discussion . . . ."[17] Furthermore, while the Socratic style is theoretically an endeavor on the part of the teacher and student jointly to discover the truth, "the professor in some cases has it down to how many minutes it will take to 'discover' this piece of doctrine or that."[18] Thus, instead of a partnership in the learning process and a method by which teacher and student discuss a problem in order to further the understanding of each, the Socratic style in law schools is merely a means to direct the student to a position predetermined by the teacher.

The case method and the Socratic style are, of course, both law school classroom techniques. The law student's legal education takes place, for the most part, literally *in* the law school with the result that legal education is physically separated from the outside world. To an amazing extent, it is also removed from the life that is led by practicing attorneys.

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16. Reich, *supra* note 10, at 1403. *See also* Rockwell, *supra* note 1, at 96-97. Since these articles were written there has been some improvement in terms of including more useful and meaningful material from other disciplines in casebooks. *See* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW (1975); H. EDWARDS & J. WHITE, THE LAWYER AS A NEGOTIATOR (1977); C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW (1976); D. RICE, CONSUMER TRANSACTIONS (1975).

It is interesting to note, however, that there has been little comment on the notion that only material from the social sciences is appropriate for inclusion in casebooks. Surely the humanities and the physical sciences have something of value to offer law students.

17. Rockwell, *supra* note 1, at 94.

18. Richardson, *supra* note 7, at 438. It is questionable whether the Socratic method even succeeds in conveying the information thought to be important by the teacher. Professor Savoy isolates a set of "games" played by both students and teachers alike which frustrate genuine learning when using the Socratic method. Savoy, *supra* note 8, at 457-59. Part of the problem is the degrading way in which the Socratic dialogue is employed in the first year of law school where some "exceptionally creative students emerge from classes in pieces after having been decimated by the ridicule of a professor." *Id.* at 460.

In an even broader sense, the traditional law school curriculum separates legal education from life. By focusing on classroom discussion of individual cases and problems, it "tends to discourage an analysis in which each decision or at least each major doctrine is given the context of its relation to other aspects of the social order."[19] Students are not given the opportunity to relate their learning to human experience.[20] "[S]tudents are given an isolated, constricted picture of the law. This not only denies them an opportunity to cope with and understand the interrelationships between legal application and human experience, but denies the day to day realities with which both the law and lawyers are constantly confronted."[21]

To the extent that facts are examined by the case method, the law student is studying a recorded experience: the history of the dispute. As such, the traditional curriculum does not allow for discussion of

> [p]roblems currently in litigation . . . ; cases are selected because they can be discussed in terms of prevailing legal doctrine or interest. . . . By ignoring such areas of reality, casebooks, as well as most of the other teaching methods used by law professors, contribute to a disastrous type of tunnel vision in which vital problems of human survival are peripheral. . . .[22]

The failure to recognize and confront crucial social issues carries beyond the law school, and is a crisis which faces not only legal education, but the entire legal profession.[23]

Ultimately, the traditional curriculum, with its emphasis on cases and principles, trains law students to view problems only from a legal perspective. Even more narrowly, the traditional curriculum tends to focus on resolving disputes from a litigation perspective. Little is done to make law students aware of alternate methods of problem solving, and law students do not become sensitive to the non-legal aspects of situations. Nor are they able to transcend the individual case to focus on the larger, societal forces that create the conditions which, in turn, cause the problems.

The failure of the traditional law school curriculum to provide law students with practical legal skills, which was pointed out over forty years ago,[24] has not yet been rectified. Law schools emphasize

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19. Rockwell, *supra* note 1, at 96.

20. Leleiko, *Legal Education — Some Crucial Frontiers*, 23 J. LEGAL EDUC. 502, 508 (1971).

21. *Id.*

22. Rockwell, *supra* note 1, at 97. *See also* Brown, *Recent Trends in United States Legal Education*, 26 J. LEGAL EDUC. 283, 284-85 (1974).

23. Kinoy, *supra* note 3, at 2-5.

24. This lack of actual legal experience hampers the start of one's professional career. With the practical working of the law [the law graduate] has little or no familiarity. He may come to the bar almost ignorant of how the law should be applied and is applied in

analytical techniques, and leave the student to gather the more practical skills, such as drafting documents, interviewing clients, negotiation, and mediation, while on the job.[25] The initial years of practice actually form the young lawyer's apprenticeship. Thus, it seems that the traditional curriculum, which supposedly replaced the apprentice system of legal education,[26] has in fact merely postponed the apprenticeship.[27]

II. THE TRADITIONAL CLINICAL PROGRAM: A RESPONSE

In an attempt to alleviate some of the problems created by the traditional law school curriculum, many schools have turned to clinical programs. These programs, which exist in a wide range of forms and contexts, are best described by the phrase "law in action."[28] They involve the student in supervised contact with clients who have genuine problems which require practical solutions. Such programs contrast markedly with the traditional sterile classroom situation.[29]

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daily life. It is, therefore, not unusual to find the brightest student the most helpless practitioner, and the most learned surpassed in the profession by one who does not know half as much.

Judge Crane of the New York Court of Appeals, *quoted in* Frank I, *supra* note 12, at 919.

25. As Professor Savoy noted from personal experience:

> There is not a single lawyer I know with whom I went to law school who feels that his legal education adequately prepared him for the practice of law (or anything else for that matter). My experience in one of the larger post-graduate educational institutions in America — the New York District Attorney's Office — was sobering. Trying to reconstruct an incident from interviews with witnesses, awakening to the ritualistic performance of police officers on the witness stand; plumbing the subtleties of the plea-bargaining process; learning the nuances of communication between judges and attorneys, I became suddenly aware of the unforgivable irrelevance of my legal education to what was happening in my head, in the courtroom and in the streets of our cities. The first case I tried was a numbing experience. My only consolation was that the Legal Aid lawyer who represented the defendant was as woefully untutored as I.

Savoy, *supra* note 8, at 446. *See also* Kennedy, *supra* note 5, at 83; Richardson, *supra* note 7, at 427-29.

26. Frank I, *supra* note 12, at 909-10.

27. There is in my opinion a need in legal education to strike a balance between the "why" and the "how" of the law. A law school curriculum which merely provides students with educational activities aimed at teaching techniques of legal practice without exploring the multitude of philosophical assumptions underlying the law is as one-sided as a system in which a law student is never exposed to anything but books and the classroom. The law school fails at either extreme. Likewise, this author is not suggesting that there should be any lessening of the law school's role in the academy as a critic of the law or as the catalyst for new legal thought. The classroom, the library and the clinic are not antagonistic but are mutually compatible and integral parts in the total education of a lawyer. *See* Allen, *The New Anti-Intellectualism In American Legal Education*, 28 MERCER L. REV. 447 (1977) for a response to the attacks currently being made on legal education in this country.

28. Frank II, *supra* note 12, at 1305. The phrase is attributed to Dean Pound. For an excellent statistical overview of clinical legal education in the United States, *see* COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1976-1977 (May 1, 1977).

29. This article's explicit focus on the desirability of a multidisciplinary clinical offering within the law school is not meant to be made at the expense of the classroom component. Implicit in the thesis of this article is a plea for a drastic reorganization and revitalization of the classroom

Judge Jerome Frank[30] was among the most ardent supporters of the clinical concept of legal education,[31] and he suggested that by actually participating in the legal process, "[t]he student would be made to see, among other things, the human side of the administration of justice. . . ."[32] By this he meant that law students would come to appreciate the importance of factors never mentioned in the classroom, such as the irrational grounds upon which juries sometimes base their decisions, the frustrations of lost papers, missing witnesses, perjury, the significance of the psychological make-up of the judge, and the minimal impact of jury instructions.[33] By placing the student in an actual situation, the clinical approach insures that the student's experience will be relevant to life in the community. The problems presented in a clinical exposure will be of a type currently facing people in the community, rather than the outdated variety which are often retained in casebooks.[34]

Putting the student in a position to deal with people demonstrates a further advantage of clinical programs.

> By having students participate in actual law practice experiences, the objective of developing human-relations understanding is achieved. . . . Developing keen lawyer-client skills concomitantly results in gaining an understanding of how human beings interrelate. Similarly, acquiring knowledge about one's self in the context of law practice involves learning about human relations.[35]

By participating in a clinical program, the law student is given an

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portion of legal education incorporating a multidisciplinary approach within that setting. One writer, dissatisfied with the current nature of the law school classroom, suggests that a curriculum revision is needed which treats the subject matter of law in greater depth and with reference to a variety of extra-legal disciplines. Reich, *supra* note 10, at 1403-06. Another emphasizes "the need for feeling in the process of learning law," and suggests the use of role playing to achieve that end. Savoy, *supra* note 8, at 468-69. These kinds of suggestions are neither mutually exclusive nor in opposition to the positions contained in this article. A humanistic and intellectual training of lawyers should include: the use of materials from other disciplines; a greater variety of teaching techniques and course offerings; rigorous training in the basics of legal analysis and synthesis; greater opportunities to develop legal writing skills and practical lawyering skills, and philosophical inquiries into the meaning and function of law itself. This training can occur within and without the classroom. Ideally, the only limitation on the variety of approaches used within the law school classroom is the ingenuity of legal educators. But the classroom is only one of many forums where the law student may be exposed to the law. The classroom, the clinic, the library, the courts, the practitioner's office can all be utilized in combination with the expertise of other professions in this educational process. One setting in and of itself is not inherently better than the others. True education is multidimensional as well as multidisciplinary.

30. *See* note 12 *supra.*

31. *See, e.g.,* Frank I & Frank II note 12 *supra.*

32. Frank I, *supra* note 12, at 918.

33. Frank II, *supra* note 12, at 1317.

34. Gorman, *Clinical Legal Education: A Prospectus,* 44 SO. CAL. L. REV. 537, 551 (1971).

35. Vetri, *Educating the Lawyer: Clinical Experience as an Integral Part of Legal Education,* 50 ORE. L. REV. 57, 68 (1970).

opportunity to engage in person to person, professional relationships, within a structured and supervised setting.

Another major advantage of clinical programs is the greater opportunity offered to the student to acquire and sharpen practical legal skills.[36] Although the traditional curriculum offers training in such skills as memo and brief writing, research, and oral argument, it is often assumed that the student will pick up the more practical skills, such as interviewing, local court procedures, drafting pleadings, negotiating, and developing case strategies, while on the job. This attitude is responsible for the relatively low esteem in which new lawyers' technical skills have been held.[37] This is also a disservice to those who, for social or economic reasons, must depend upon the professional assistance of the newly-graduated lawyer.[38] Young lawyers who may often have little supervision have developed no clear idea from their legal education of how to do what is necessary for a client.[39] In a clinical program, however, one is able to develop the practical skills[40] within a supervised framework.[41] In this manner, the student learns to function like a lawyer, as well as to think like one; the quality of legal services is improved while at the same time the new lawyer's level of self-confidence and ability is enhanced.

While the introduction of clinical programs into the law school curriculum has had the effect of lowering the barrier between the law student and the practicing legal community, such programs still have not successfully addressed the problem of the isolation of the legal community from the other professions. Law students in these traditional clinical programs remain in an environment where attention is focused on legal solutions to problems and where all problems are characterized within a legal context. The perceptions and expertise offered by other professions have not been integrated into this aspect of the law student's education, just as they have been ignored in the classroom curriculum.

III. A MULTIDISCIPLINARY CLINICAL PROGRAM: THE CENTER FOR LEGAL SERVICES FOR THE AGING[42]

In recognition of and in response to the inadequacies of the tradi-

36. *See* Ferren, *Goals, Models & Prospects for Clinical-Legal Education,* in CLINICAL EDUCATION & THE LAW SCHOOL OF THE FUTURE 94 (E. Kitch ed. 1970) for a summary of the skills to be pursued in the clinical setting.

37. *See* notes 33-35 *supra* and accompanying text.

38. *See* note 34 *supra.*

39. *See* Mohr & Rodgers, *supra* note 11, at 407; Vetri, *supra* note 35, at 63.

40. Redlich, *Perceptions of a Clinical Program,* 44 SO. CAL. L. REV. 574, 584 (1971).

41. Ferren, *supra* note 36, at 109-20.

42. Prior to becoming an assistant professor of law, the author was a law student who par-

tional law school curriculum and the myopia of the typical clinical experience, the Center for Legal Services for the Aging was established in Syracuse, New York. The Center was to be used as a vehicle for delivering legal services to the aging poor in Syracuse within the framework of the Syracuse All-University Gerontology Center.[43] This clinic, by employing a multidisciplinary approach to delivering legal assistance, provided a unique model for clinical programs. The program brought law students to work in concert with graduate students in public administration, social work, nursing, architecture and other non-legal professions. The law students were exposed to the full range of needs of the aging and their training was not confined solely to identifying legal problems or legal solutions. Emphasis was placed on learning to recognize non-legal aspects of problems and discovering where to obtain community assistance in solving the client's total problem.

The law students in the clinic outgrew the narrow confines of the traditional lawyer's approach to clients. They began to appreciate that many clients have more than just a "legal" problem. They realized that there were issues presented in an individual context which transcend the individual — that certain problems were societal. As a result of acquiring these new perspectives, there was a growing involvement with, and respect for, the expertise of the other professionals assigned to the clinic.

An example of this multidisciplinary approach is demonstrated by the methods taken to aid one of the clinic's aging clients who had fallen into arrears in paying her real property taxes. A home visit by one of the law students revealed that the client's living arrangements were so inadequate that intervention by a social work student was indicated. Investigation of the individual's problem suggested that her non-payment of the property tax was a result of a local tax system which notified property owners of tax arrearages by publication in newspapers.[44] Not only were the immediate legal and social problems of this client identified and solved, but the clinic students became involved in an attempt to effectuate legislative change to insure that a more effective method of

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ticipated in the Syracuse All-University Gerontology Center's Center for Legal Services for the Aging. The opinions expressed in the text are, for the most part, based on personal experience from working in the clinic.

43. Because of funding problems, the Center for Legal Services for the Aging was integrated into the Civil Clinic Program of the Syracuse University College of Law in the fall semester of 1975.

44. No statutory provisions required either that notice of a forced sale for delinquent property tax payments or notice of the expiration of the one year allowed for redemption of lands sold for taxes, be sent directly to the owner or occupant of each parcel of land involved. The county treasurer was merely required to cause notice to be published once a week for six successive weeks in two designated newspapers. N.Y. REAL PROP. TAX LAW §§ 1002(1), 1014(1)-(2) (McKinney, 1972) (amended 1976).

notice of property tax arrearages was adopted — a recognition of the "larger" problem.[45]

In a more traditional legal clinic setting, the law student, having had the initial contact with this client, would probably not have been trained to see this client's living arrangements as part of the legal problem presented. Even if the law student had been able to recognize this additional dimension, the immediate assistance of a social work student trained in crisis intervention and familiar with the community's social service programs would not have been readily available. Some clients, and particularly the elderly, are more comfortable characterizing their problems as objective legal ones rather than facing the integral non-legal aspects. Pride and suspicion of "welfare" and agencies impede their willingness to seek help. Yet these people are often in need of assistance beyond legal solutions. The experiences with a multidisciplinary team approach demonstrated that it was easier and less threatening to offer the client non-legal assistance simultaneously with legal advice. A non-legal team member could be more readily and effectively introduced into the situation than a referral to a social service agency could be made.

Many of the clients' problems offered the potential for legislative reform. This, too, was an integral part of the total clinic experience. With small caseloads, there was time and encouragement to look beyond the individual problem. In team meetings, the position of the problem was explored within a larger context. Always the question was asked: Is this the type of problem likely to be experienced by other people in the community? If so, would a case by case solution help the community and others who are confronting the same situation, or is legislative reform the more appropriate vehicle? The constant emphasis and insistence upon exploration of why this individual was confronting this particular problem coupled with the input of the other disciplines represented on the team did much to insure that the law student's ability to see a problem in a wider context was expanded.

The Center for Legal Services for the Aging played a variety of roles on behalf of the aging. Instead of limiting the law student to the traditional role of individual advocate, team problem solving with community based groups and other academic disciplines became an integral part

45. This included publication of a law review article concerning the insufficiency of notice by publication. *See,* Comment, *Due Process in Tax Sales in New York: The Insufficiency of Notice By Publication,* 25 SYRACUSE L. REV. 769 (1974). The two statutes involved were amended in 1976 in response to this problem. The county treasurer is now required to cause notice of tax sale and notice of expiration of the one year redemption period to be sent by first class mail to the name and address of the owner or occupant, as shown on the assessment roll as well as giving notice by publication. N.Y. REAL PROP. TAX LAW §§ 1002(4), 1014(3) (McKinney Supp. 1976) (amending N.Y. REAL PROP. TAX LAW §§ 1002, 1014 (McKinney 1972)).

of the law student's training. The clinic became a resource for other community groups which had identified particular problem areas affecting the aging. Where appropriate, legislative reform on both the local and state level was pursued to alleviate the identified problems. Unlike most attempts at legislative reform, where those trained in the law become the focal point of the group because of their technical expertise in bill drafting and familiarity with memorandum writing, the law students involved in these groups learned both to function as part of a team and to use a team approach to problem solving. Those team members who had closer contact with the elderly and more training in gerontology than did law students used their knowledge and training to identify issues as well as to postulate ideal solutions; then, law students researched the possibility of legislating the proposed solutions. As the project continued, there was much role reversal and role integration. For example, the non-legal professionals, faculty and students drawn from other academic disciplines, performed what would ordinarily be legal tasks — legal-type research, brief writing and bill drafting. The law students, on the other hand, participated actively in policy development and implementation as well as merely formalizing these ideas and suggestions into a legal framework. Yet each discipline contributed its own particular expertise to the team.

Work at the Center for Legal Services gave the participating law students the opportunity to put theory into action. This experience had a positive personal effect upon them and helped to counteract the discontent they felt concerning the adequacy and relevancy of a law school education.[46] The excitement of involvement with real people and real problems as well as the opportunity to put training into supervised practice, helped satisfy "the hunger to bear actual responsibility and see one's learning put to meaningful use."[47]

The participating law students were further enriched by their exposure to non-legal graduate level courses. The law students were required to take courses in other academic disciplines such as social work and public administration in addition to their normal class load.

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46. This malaise is pervasive.

> For many [law students] who have no contact with the real world of the lawyer, the clinical course is an oasis in a man-made desert. As they proceed in their law school careers, the fears and frustrations caused by not understanding what is to confront them in their imminent professional lives make students look at law school as irrelevant.
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> . . . .
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> Their boredom with law school after the first year and a half is a reflection not of a failure by either students or faculty. Rather it indicates success in teaching basic reasoning processes and student recognition of the immediacy of life to law.

Leleiko, *The Clinic and N.Y.U.*, 24 J. LEGAL EDUC. 429, 443, 461 (1972). *See also* Dunn, *Legal Education and the Attitudes of Practicing Attorneys*, 22 J. LEGAL EDUC. 220 (1969); Mohr & Rodgers, *supra* note 11.

47. Leleiko, *supra* note 46, at 461.

They discovered not only new material and different problem solving methods, but also pedagogical techniques that were foreign to them, such as role playing, simulations and non-verbal communication. This exposure forced some law students to challenge not only the traditional methods of educating lawyers, but also the product: a class of myopic, tunnel-visioned professionals incapable of seeing social inequities and contemporary problems in other than a narrow legal context.

The legislative reform program undertaken by the All-University Gerontology Center had the additional effect of helping those participating law students shape a new perception of the proper function of the lawyer. A legal education unfortunately carries with it an implicit message that lawyers alone have the ability to solve any legal or legally related problem. However, after interaction with the non-legal members of their teams, the law students were able to overcome this provincialism, and soon reevaluated their own abilities in light of the new and different perspectives that other disciplines can bring to bear on a problem.[48]

An example of this new perspective was the work done by one team on the New York State residency requirement for property tax relief for the aging homeowner.[49] New York at that time required an elderly homeowner to own his or her home for five years prior to qualifying for property tax relief.[50] When the problem first came to the attention of the team, the law student[51] immediately characterized the problem as involving a potential abridgment of a person's constitutionally protected right to travel. Not hampered by this narrow legal view, the non-law students on the team defined the problem differently. Putting this requirement into a socio-economic framework, the property tax relief structure was an inadequate attempt to answer the larger problem of how to maintain the aging in their homes and apartments considering the inordinately high property tax burdens (or rent in lieu of property tax) they bear in relation to their total household incomes. The outgrowth of this concerted review was the development of a proposal for a comprehensive reform of the New York state property tax relief structure.[52] However, the learning process did not cease with the com-

48. As one commentator has noted:

> The law school clinic provides an opportunity for the incipient lawyer to study the integration of the law with the social and physical sciences . . . [and] better see, the full complexities of human existence which the law and lawyer must treat for human life preserving values to preserve in our society.

Id.

49. N.Y. REAL PROP. TAX LAW § 467 (McKinney Supp. 1976) (amending N.Y. REAL PROP. TAX LAW § 467 (McKinney 1972)).

50. N.Y. REAL PROP. TAX LAW § 467 (3)(b) (McKinney 1972) (amended 1976).

51. The author.

52. This proposal was modeled after the Wisconsin "circuit-breaker" approach to property tax relief for the aging. WIS. STAT. ANN. ch. 71, § 71.09(7) (West Supp. 1977) (amending WIS. STAT.

pletion of the proposal. Upon completion it was submitted for review to the state agency that had sponsored the group's work. The team was then introduced to the concept of political reality. The political viability of such a drastic restructuring of the state's property tax relief structure as suggested, was very small. The team did not abandon the plan; the proposal was introduced into the New York State Legislature as a study bill in the hope that support for it could be generated or that, at least, the proposal would focus attention on the problems inherent in the existing property tax relief structure.

Without a few caveats, this author would be misleading the reader to think that a multidisciplinary approach to legal education within the context of a clinical program serving the aging poor is easily implemented. There are, of course, the basic problems of proper planning and adequate financing. Beyond these initial considerations, proper staffing is the crucial component of a successful multidisciplinary project. The supervisors of the student trainees must be competent within their own disciplines and interested in areas outside of their professional concern. The academicians who serve as student supervisors must be active participants in the project. Lacking people with eclectic interests and training, a multidisciplinary project would founder.

Furthermore, it is no easy task to achieve cooperation in a group of professional individuals with different educational backgrounds, value systems and problem solving methods to move toward a common goal or to solve a common problem.[53] One reason why this cooperation is so difficult to achieve is the inherent communication barrier imposed by the lack of a common vocabulary among professionals and students from different disciplines. Initially, the participants in such a project have to consciously avoid the use of the short hand jargon of their own field and struggle for common linguistic ground. The longer the team members work together and learn from each other, the less acute the language problem becomes. Some might fear this commonality will co-opt the participation of the group's members. To prevent a loss of expertise, the team members are required to strongly advocate their particular professional insight as it relates to the problem. The "group" dynamic cannot be allowed to subsume the goal of the group — to deal effectively with a given client's problem.

To successfully achieve a truly interdisciplinary approach to any problem, it is necessary to be alert to the professional sensibilities of all of

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ANN. ch. 71, § 71.09(7) (West 1969).

53. For a look at the differing educational backgrounds, and as a result, the differing value systems and problem solving techniques of lawyers and social scientists, *see* Ohlin, *Partnership with the Social Sciences,* 23 J. LEGAL EDUC. 204 (1970); Rosenberg, *Comments,* 23 J. LEGAL EDUC. 199 (1970); Scriven, *Methods of Reasoning and Justification in Social Science and Law,* 23 J. LEGAL EDUC. 189 (1970).

those involved in such a project. Professor Lloyd E. Ohlin, of Harvard University has suggested:

> If interdisciplinary collaboration is to bear fruit it will become increasingly more important to define what each discipline might bring to the study of a particular problem and what each in turn may get out of it. . . . [S]ocial scientists and lawyers have different career commitments and colleague groups to which they must be responsive. In collaborative work there is a common area of activity and concern which they can share but each must then be free to address the specialized audience toward which his own career and professional identifications are oriented.[54]

Professor Ohlin's remarks do not go far enough; the goal of any professional group must be to deal effectively with the client's needs, not to minister to the self-perpetuation of the profession. This realization returns us to the point where this discussion began. The goal of legal educators ought not be to maintain outmoded traditions of law schools or to protect, as if sacrosanct, the standard curriculum. The major educational goal is to provide law students the opportunity to develop the skills necessary to fulfill their clients' needs. Part of this growth is the ability to realize when the skills and expertise offered "as a lawyer" are inadequate because the problem is not wholly a legal one.

The clinical experience, especially when placed in a multidisciplinary setting, offers a unique opportunity to enhance the sensitivity of those involved to the respective inadequacies of their vocations as well as to develop those skills indigenous to their particular professions. For those who from the outset of their law school education plan to enter the more conventional practice of large firms, corporations or government, the multidisciplinary clinical setting provides an environment for enriching such students' human experience. Perhaps these are the students who will most benefit from this enrichment. They will learn not only how the law and institutions of society affect individuals, but also how the entities they will serve operate as a part of a larger milieu. Providing clients and society with lawyers sensitive to human problems is a goal worthy of the effort required to achieve it. Until this integration of experience is included in the law school curriculum, law students will rightly continue to complain of the irrelevancy of what they are required to learn and the inadequacy of their training.

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54. Ohlin, *supra* note 53, at 207.

Science, Law and Public Policy: Meeting the Need in Legal Education†

*Thomas G. Field, Jr.**

Reviewing the need for attention to science and technology in legal education and the strategies presently employed in meeting that need, Professor Field submits that what is presently being done in the name of "law and science" in legal education is ineffective, and may actually be counterproductive. After analyzing some of the possible sources of failure in interdisciplinary communication, he concludes that legal curricula must insure that graduates, in order to be effective, have an opportunity to acquaint themselves with the scientific method and its implementation in various sciences (physical and health as well as social sciences). Only with the perspective acquired from a broad exposure to the methods of science, can tomorrow's lawyers be prepared to cope with increasingly interdisciplinary professional demands.

The impact of science and technology upon matters of legal interest has long been recognized. As early as 1895, Mr. Justice Holmes observed that "[a]n ideal system of law should draw its postulates and justifications from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom."[1] Seventy years later, Professor Cavers, introducing a symposium on science and the law, questioned whether scientific development and "its effects . . .

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1. O. W. HOLMES, *Learning and Science,* in COLLECTED LEGAL PAPERS 139 (1920). In writing of the role of the judiciary, Mr. Justice Holmes also noted the importance of science. *See* Holmes, *Law in Science and Science in Law,* 12 HARV. L. REV. 443, 460-62 (1899).

carry with them a corresponding diminution in the importance . . . of law . . .'"[2] He also wondered about the implications of the ascendancy of science for legal education.[3] In the same symposium, Professor Frampton forthrightly responded to this concern raising some rather grim conclusions concerning the future of legal education because of the unevenness of academic resources and offerings.[4] Professor Cavers, however, noted in reply that

> [c]ertain subjects which are or will probably be confined to a relatively small number of schools are likely in practice to remain the concern of only a limited number of lawyers. . . . Few lawyers have constitutional cases and still fewer practice international law. . . . Perhaps the study of the interactions of law and science should be recognized as having a corresponding place in the training of tomorrow's lawyers. If so, ways must be found to extend the reach of the curricular experimentation that is now confined to a relatively few students in a relatively few law schools.[5]

Five years later, in another symposium on science and the law, Dean Yegge underscored the growing need to deal with such problems stating that

> [o]ur primary aim is to look at the directions which legal education might take. . . . *Hopefully what legal education does, the law will do also.* Right or wrong, we feel that as an institution committed to training future generations of law men . . . , we should be . . . in the business of considering the implications of science-technology on legal process.[6]

Notwithstanding the three-quarters of a century since Justice Holmes' pioneering observations and the years since the publication of the two symposia noted above, little seems to have been accomplished in achieving the ends set forth — either in the law or in legal education. If Dean Yegge's thesis is accepted, this negligible impact of science on the law is not surprising; for what legal education neglects, the law will neglect also.

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2. Cavers, *Introduction: Science and the Law Symposium,* 63 MICH. L. REV. 1325, 1331 (1965).

3. Specifically, Professor Cavers posed the following question: "If such a development seems at all possible, what should be its consequences for legal education; and how, if at all, have the law schools been adapting their curricula . . . ?" *Id.* at 1331-32.

4. Frampton, *Scientific Éclat and Technological Change: Some Implications for Legal Education,* 63 MICH. L. REV. 1423, 1442-46 (1965). Professor Frampton suggests that "[t]here are now approximately twenty-five private and publicly-supported law schools which are better financed than the others to meet requirements thrust upon them by recent developments." *Id.* at 1443 (footnote omitted).

5. Cavers, *supra* note 2, at 1332-33. In support of this argument, Professor Cavers analogizes to the rise in law school accounting courses. "This was done, not because the lawyer needed to be trained as an accountant, but because he needed to know the accountant's language." *Id.* at 1333.

6. Yegge, *Introduction: The Implications of Science-Technology for the Legal Process,* 47 DENVER L. J. 549, 550-51 (1970) (emphasis added).

If lawyers and, ultimately, judges, are not acquainted with scientific methodology and technology, serious social consequences will follow. Consider, for example, the appraisal of Circuit Court Judge Bazelon:

> [J]udges are, for the most part, "technically illiterate," and I certainly include myself in that category. But whatever our limitations, the judiciary is increasingly being asked to grapple with scientific and technological issues of great complexity. Some two-thirds of the D.C. Circuit's caseload now involves review of action by federal administrative agencies, and more and more of such cases relate to matters on the frontiers of technology.[7]

Acknowledging substantial diversity of opinion among even his colleagues,[8] Judge Bazelon indicated an inclination to have judges require of administrators a "framework for principled decision making."[9] This view is based on his belief that "substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable."[10]

Judge Bazelon's counterpart on the Court of Customs and Patent Appeals,[11] Judge Markey, would disagree to some extent with that assessment:

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7. Bazelon, *Coping with Technology Through the Legal Process,* 62 CORNELL L. REV. 817, 817 (1977) (footnote omitted). In support of this statement, Judge Bazelon cites cases concerning the environmental effects of the trans-Alaskan pipeline and the safe storage of nuclear waste, as well as those relating to bans on DDT, the Concorde SST and leaded gasoline. *Id.* at 817-18 (footnotes omitted).

Before the turn of the century, Mr. Justice Holmes was concerned with the importance of science to the judiciary.

> But inasmuch as the real justification of a rule . . . is that it helps to bring about a social end . . . those who make and develop the law should have those ends articulately in mind. I do not expect or think it desirable that judges should undertake to renovate the law. That is not their province . . . . But I think it most important to remember whenever a doubtful case arises . . . that what is really before us is a conflict between two social desires. . . . The social question is which desire is strongest at the point of conflict. . . . Where there is doubt, the simple tool of logic does not suffice. . . .
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> I have had in mind an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our different social ends. . . .

Holmes, *Law in Science and Science in Law,* 12 HARV. L. REV. 443, 460-62 (1899).

8. Bazelon, *supra* note 7, at 822 n.19. *Cf.* Leventhal, *Environmental Decisionmaking and the Role of the Courts,* 122 U. PA. L. REV. 509 (1974). Judge Leventhal observes that necessity for supervision of technical decisions may be related to the degree to which the agency had delegated expertise in the technical area involved. *Id.* at 515.

9. Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir. 1976) (en banc) (concurring opinion, Bazelon, C.J.), *cert. denied* 426 U.S. 941 (1976). In an article written after the decision in *Ethyl Corp.*, Judge Bazelon outlined the proper role for courts and judges who must review administrative decisions involving scientific issues. He wrote that their role is to "scrutinize and monitor the decisionmaking process to make sure that it is thorough, complete, and rational: that all relevant information has been considered; and that insofar as possible, those who will be affected by a decision have had an opportunity to participate in it." Bazelon *supra* note 7, at 823.

10. Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir. 1976) (en banc) (concurring opinion, Bazelon, C.J.), *cert. denied* 426 U.S. 941 (1976).

11. The two Chief Judges also have co-equal and alternative jurisdiction in review of decisions of the Patent and Trademark Office. *See* 35 U.S.C. §§ 141 and 145 (1977).

> [L]awyers and judges must be disabused of the notion that science and technology are so esoteric and mysterious, so surrounded by incomprehensible jargon, that it is beyond their capacity to understand or use it. Patent lawyers know that one need not be a graduate chemist to understand a chemical invention. We should spread the word that what counts most is *mental receptiveness* to technical facts and relationships. . . . And we can work to facilitate clear communications between scientists and those who bear the decisional responsibility in our democracy.[12]

Remarkable as it may seem, there is a sizeable measure of truth in *both* of these assertions. However, this is not the place to debate the issues; the point is that such matters need more attention in legal curricula. The inadequate treatment of science and technology in law schools is producing a failure to deal satisfactorily with them in administrative agencies and courts. This, in turn, is resulting in mounting pressure to resolve highly technical and controversial issues by means which are quite unlikely to offer much improvement.

Consider the attitudes of both scientists and the general public toward governmental incompetence in resolving scientific and technical issues. The anxiety of the scientific community has generated a proposal for a "Science Court."[13] The concern of the public has produced grass roots political pressure to overturn important regulatory decisions;[14] state and federal legislatures have been forced to respond with action difficult to justify on other than emotional grounds.[15]

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12. Markey, *Science and Law — Toward a Happier Marriage,* 59 J. PAT. OFF. SOC'Y. 343, 354 (1977) (published remarks given to the N.J. Patent L. Assn., June 3, 1977, after having received the Jefferson Medal). However, in the same speech, Judge Markey "doubt[ed] that 5% of the lawyers attending an ABA convention could even begin to define the empiric method." *Id.* at 353.

For another view, expressing more or less the same philosophy, *see* Loevinger, *Jurimetrics: The Next Step Forward,* 33 MINN. L. REV. 445 (1949). In that article, the author appears to have coined the widely used term *jurimetrics. Id.* at 483. However, the term seems to have been more narrowly construed over the years, partly as a result of its usage as the title of the ABA periodical. Perhaps now that JURIMETRICS has become the section publication for the recently created ABA Section on Law, Science and Technology, it will again come to suggest more than the use of computers and formal logic in the legal process. *See id.* at 484-88. *Compare* sources cited in note 38 *infra.*

13. *See, e.g.,* U.S. DEPT. OF COMMERCE, PROCEEDINGS OF THE COLLOQUIUM ON THE SCIENCE COURT, NTIS PB-261-305 (1977). *See also* Nelkin, *Thoughts on the Proposed Science Court,* Newsletter on Science, Technology & Human Values No. 18, at 20 (Jan., 1977) (Harvard).

14. *See, e.g.,* (1) Discussion on public demonstrations against the Seabrook Nuclear facility, Seabrook, N.H. in New York Times, May 2, 1977, at 1, col. 2; (2) Discussion of ten states having ignored the Food and Drug Administration's position on Laetrile by allowing intrastate production and distribution in New York Times, July 15, 1977, at 30, col. 6; *also in Laetrile: The Political Success of a Scientific Failure,* 42 CONSUMER REP. 444 (1977); and (3) Discussion of Congressional moves to override the so-called Delaney Clause, 21 U.S.C. § 348(c)(3-4) (1958), in regard to saccharin in *The Great Saccharin Snafu,* 42 CONSUMER REP. 410 (1977). *See generally* May, *Resolving Highly Technical Disputes: A Survey of Alternatives,* IDEA, April, 1976, at 7.

15. *See, e.g.,* Nelkin note 13 *supra; see* Bazelon note 7 *supra.* For example, Judge Bazelon argues for more openness in public decision making, *id.* at 825; he supports the aims of the Science Court proposal but states:

Perhaps procedural reforms or new institutions are necessary; but unless these are at least partially the product of informed legal participation, the likelihood of their being better than what we have is slim indeed.[16] Moreover, if the capacity for informed participation is not acquired in law schools, where will tomorrow's lawyer receive it?

I. THE COMMUNICATIONS BARRIER

Many of the problems involving science and public policy are the product of ineffective interdisciplinary communication. Solutions to such difficulties require the cooperation of scientists, lawyers and others who must be able to communicate with each other.[17] It is thus necessary to consider three more or less distinct, alternative explanations for communications difficulty: cognitive style, jargon and perspective. Solutions can only follow careful problem identification.[18]

A. Cognitive Style

Cognitive style is used here to describe the intellectual process that a particular discipline follows in doing its work. At its extremes lie intuition and rigorous logic. It seems clear, for example, that a person relying only on intuition is unlikely to understand a position which has been reached by means of logic. In considering whether law and the various sciences are separated on such a scale, it is important to distinguish between praxis and theory.

Writers suggesting that legal thought is somehow alien to scientific thought often fail to recognize that distinction.[19] This conceptual flaw is illustrated by the following comment:

> I find some of its features troubling. First I fear that a lengthy adversary proceeding, limited solely to factual issues, might well exaggerate the importance of those issues, and might tend to diminish the importance of the underlying value choices. A factual decision by a Science Court, surrounded by all the mystique of both science and the law, might well have enormous, and unwarranted, political impact.
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> Moreover, it is not entirely clear to me that all disputes among experts either could or should be resolved. Experts usually disagree not so much about the objectively verifiable facts, but about the inferences to be drawn from those facts.

Id. at 827.

16. Bazelon note 7 *supra*. For discussions of possible legal procedural reforms, *see* Leventhal, *supra* note 8, at 542; and Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080, 1101 (1966).

17. *See, e.g.*, Curlin, *Law, Science and Public Policy: A Problem in Communication*, in SCIENTISTS IN THE LEGAL SYSTEM 35 (W. A. Thomas, ed., 1974).

18. *See, e.g.*, C. WALES & R. STAGER, Guided Design at 14 (Aug. 1976). (available from Professor Charles Wales, West Virginia University, Morgantown, West Virginia, 26506) (to be published in April, 1978 as THE GUIDED DESIGN APPROACH).

19. *See, e.g.*, J. M. ZINMAN, PUBLIC KNOWLEDGE 13 (1968); *see also* Samuelson, *The Convergence of the Law School and the University*, 44 AM. SCHOLAR 256, 270-71 (975). *Cf.*, Scriven, *Methods of Reasoning and Justification in Social Science and Law*, 23 J. LEGAL EDUC. 189 (1970) (The concepts and processes of social science and the law are similar). *See* Vanyo, *The Legal*

> The adversary method, I understand, is one method of arriving at the truth. Apparently it is a good enough method for all those fifty-odd legal systems that the lawyer has to grapple with. Yet, is it not curious that science, which is supposed to be the search for truth pure and simple, does not rely on the adversary method as it is known in a court of law? Or to put it differently: *All* scientists sit in judgment on the work of *any* scientist. Indeed, as Sir Karl Popper has so nicely put the matter, each scientist tries to be his own most devastating critic. . . . A lawyer might properly be disbarred for interrupting his eloquent discourse to say, "Oh, I've discovered the nonsequitur in my syllogism. . . ." Yet a Gallileo achieves immortal fame when he discovers that what he believed thirty years earlier . . . is false. . . .[20]

On the one hand, there is confusion between the method of seeking the law and the method of applying it. On the other, there is confusion between law and fact. The adversary method is more useful for the latter,[21] but even in this instance a lawyer is apt to be his or her own most devastating critic. The lawyer knows that if there is a flaw in the case as presented, his or her opponent will capitalize on it. Particularly with respect to the evolution of the law by the common law method, such criticism is not well taken. The process of refining the law, literally by *trial* and error, is similar to that used by scientists in developing scientific theories.[22] At least within the legal community, *all* appellate judges sit in judgment on the work of *any* appellate judge. Furthermore, with increasing frequency, the entire society sits in judgment.[23]

While there are pragmatic and ethical distinctions between the practice of law and the practice of science, they have little bearing on the in-

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System: Can It Be Analyzed to Suit the Scientist?, in SCIENTISTS IN THE LEGAL SYSTEM 55, 57 (W. A. Thomas, ed., 1974).

20. Samuelson, *supra* note 19, at 270-71.

21. *See, e.g.*, Korn, *supra* note 16, at 1088, wherein the author points out that the adversarial process (to the extent this means confrontation and cross examination of witnesses) is not even a particularly good vehicle for determining *facts* underlying a value choice. *Id.* at 1089. Such facts are ordinarily denominated as "legislative facts." Scientists discussing the potential use of the "adversarial process" are unlikely to be aware of this potentially important consideration. *See* Allen, *Scientific Versus Judicial Fact Finding in the United States*, IEEE TRANSACTIONS ON SYSTEMS, MAN AND CYBERNETICS, SMC-2, No. 4 (Sept., 1972) (Institute of Electrical and Electronics Engineers). *See also* COLLOQUIUM ON THE SCIENCE COURT, *supra* note 13, at 43, and 39 (Dr. Margaret Mead). *Compare* Bazelon note 6 *supra*, *with* the speech given by Columbia University President William McGill, 198 SCIENCE 275 (1977) ("[T]he use of the adversary legal process to control scientific research is likely to lead to serious scientific errors and to badly thought-out policy. . . ." *Id.*).

22. *See* Platt, *Strong Inference*, 15 JURIMETRICS 146 (1975), *reprinted from* 146 SCIENCE 347 (1964). This was a major theme in Mr. Justice Holmes' article *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 447 (1899). *See also*, Pound, *Mechanical Jurisprudence*, 8 COL. L. REV. 605 (1908).

23. Consider the great public debate engendered by the criminal procedure decisions of the Warren Court.

tellectual process involved.[24] Moreover, there is considerable evidence that similar problem solving methods are used by all of the disciplines of concern here.[25]

Law professors share a great deal of the blame for general confusion about legal process and thought. While they often flatter themselves by maintaining that a major function of legal education is training tyros to "think like lawyers," to the extent that this suggests that there are differences in ways of thinking, it is erroneous. There are strong indications that the inability to analyze and synthesize or to engage in independent problem solving is endemic to beginning graduate and professional students regardless of discipline.[26] Certainly, the lawyer has no monopoly on the style.

B. Jargon

In stark contrast, jargon or vocabulary differences are certain to contribute to many instances of poor communication.[27] Every discipline develops its own technical language to facilitate intraprofessional discussion and, perhaps, to keep out interlopers.[28] While some terms can be translated quite easily into standard English (writ, demurrer, organoleptic), others may prove to be more elusive (bona fide purchaser, valence, psychosis). At some point, it becomes impossible to *translate* in the sense that English is translated into French. This is not only because the word is foreign, but, in addition, everything it stands for is equally alien. There is little peer reward for attempting to translate more difficult concepts into terms easily understood by those outside of a particular discipline.[29] Thus, although jargon itself presents

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24. *See* Allen note 21 *supra* and Scriven note 19 *supra. Compare* Rosenberg, *Comments,* 23 J. LEGAL EDUC. 199 (1970).

25. Perhaps the strongest case is presented by the fact that role modeling exercises for a large number of disciplines, ranging from English to physics, have been written around the same Guided Design format (note 18 *supra)* in the materials discussed *infra* at note 69 and following. *See also* Platt *supra* note 22.

26. The problem is sufficiently severe that the Exxon Education Foundation has funded development of not only Guided Design, note 18 *supra*, but also a computer-assisted program to teach these skills. The latter is titled *Exper Sim,* and information is available from Dr. Dana Main, Div. of Behavioral Studies, W.V. College of Graduate Studies, Institute, W.V. 25112.

27. *See, e.g.,* Curlin, *Saving Us From Ourselves: The Interaction of Law and Science-Technology,* 47 DENVER L. J. 651, 661 (1970).

28. It may serve other ends as well. Consider, *e.g.,* the discomfort one would feel upon hearing one's physician discussing with another medical professional "that funny little bone in your knee."

29. *See, e.g.,* Holton, INTRODUCTION — DISCOVERIES AND INTERPRETATIONS: STUDIES IN CONTEMPORARY SCHOLARSHIP, VOL. II DAEDALUS, Fall, 1977, at v, vii. *See also* Curlin, *supra* note 16, at 43. This has required a different approach to the problem; *see, e.g.,* HOUSE SUBCOMM. ON HEALTH AND ENVIRONMENT, COMM. ON INTERSTATE AND FOREIGN COMMERCE, A DISCURSIVE DICTIONARY OF HEALTH CARE, 94th Cong., 2d Sess. (1976). Indeed, in most disciplines writing of text books is not a quick route to advancement. Samuelson, *supra* note 19, at 260.

a barrier to interdisciplinary communication, more than mere jargon impedes the process.

C. *Perspective*

Establishing the word in context presents a major problem in translating professional jargon. It is likely to require considerable effort to convey what, for want of a better term, can be called *perspective.* Consider, again, Judge Markey's comments quoted above.[30] He argues that receptivity is critical, and, inferentially, that sufficient competence is acquired easily enough since

> most lawyers and judges and legislators of good will, good conscience, and open minds, can carry the burden of making valid judgments on matters technical. We may not all be a combination lawyer and scientist, but we can all be lawyers who understand the methods, philosophical concepts, and thought processes of science.[31]

It is not clear what is meant by the term "thought processes," but it is certain that what he has in mind is something other than a complete intellectual reorientation.

The problem which he does not address is a critical one. Where and how is a non-technically-trained lawyer to acquire the necessary understanding? One author candidly "suspects that more law is read in magazines like *Time* and *Newsweek* by scientists, and more knowledge about science is gleaned from the same magazines by lawyers, than from any other source."[32] After noting the need for interdisciplinary literature and abstracting services, he concludes that "a summer spent in association with scientists and engineers at a large laboratory or within an institute or agency dealing with science problems could be most beneficial for both law students and scientists."[33]

II. THE OPTIONS BROADLY

The amount of material dealing with law, science and public policy or the "law-science confrontation" is growing at a frantic pace.[34] It seems that every day there is a new problem with which to cope.[35] What can

30. Markey note 11 *supra.*

31. *Id.* For example, he does not seem to regard jargon as a critical hurdle.

32. *Saving Us From Ourselves, supra* note 27, at 662.

33. *Id.* at 663.

34. *See, e.g.,* Cohen and Stephan, *Literature of the Law-Science Confrontation, 1965-75,* Program on Public Conceptions of Science Newsletter, No. 12, at 28-54 (June, 1975) (Harvard), *Id.* No. 14, at 32-84 (Feb., 1976), *Id.* No. 15, at 18-46 (April, 1976) [The newsletter has since been retitled Newsletter on Science, Technology & Human Values].

35. *See, e.g., Can Scientists Help the Animal Kingdom?* 30 F.A.S. PUBLIC INTEREST REPORT 1 (1977).

law schools do about it? As Professor Cavers points out

> it is easy to underestimate the difficulty of the law school's educational problem; the very diversity in points of confrontation . . . makes it very hard to design places . . . within a crowded curriculum — except by resort to . . . a new seminar. Moreover, in the study of the interaction of law and science, another problem must be reckoned with: student preparation — or the lack of it.[36]

Not only does he mention diversity in points of law/science confrontation, but he also offers a useful classification scheme. It has six components:[37] (1) scientific knowledge used to make adjudicatory determinations; (2) scientific knowledge compelling the re-examination of established legal doctrines; (3) scientific developments creating hazards which require state intervention; (4) governmental action affecting inducements and subsidies for scientific research — including (5) tax exemptions, and (6) scientific developments requiring new international relationships. He also refers, at another point in his article,[38] to a further law/science interaction, which is not a "confrontation": an attorney's use of technology to achieve a specific result (e.g., using a computer for data analysis). It is interesting that of these seven matters of current law/science concern only the second was sufficiently prominent at the time Holmes wrote to merit his attention.[39]

However, while Professor Cavers mentions a problem of law student preparation in regard to science, he neglects to note that it is largely caused by a diversity at least as complex as that with regard to subject matter. Law students' prior exposure to scientific theory may vary greatly: some individuals possess almost a total lack of technical familiarity; others have one or more degrees in science or engineering, a Ph.D. and college teaching experience. In addition to this disparity, even among those law students with prior scientific background, their experience may lie anywhere along the full spectrum of scientific disciplines including: economics and other social sciences (empirical or not), health or biological sciences, physical sciences, mathematics, every kind of engineering imaginable, as well as various combinations embodied in new areas such as environmental sciences, communications, or sociobiology.

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36. Cavers, *supra* note 2, at 1332.

37. *Id.* at 1326. These are increasingly inseparable. *See, e.g.*, Brooks, *Technology Assessment in Retrospect*, Newsletter on Science, Technology & Human Values, No. 17, at 17 (Oct., 1976) (Harvard); *see also* Morison, Commentary on the "*Boundaries of Scientific Freedom*", Newsletter on Science, Technology & Human Values, No. 20, at 22, 24 (June, 1977) (Harvard).

38. Cavers, *supra* note 2, at 1333. For articles discussing later developments in the use of computers, *see Litigation Support Systems*, 14 JURIMETRICS (Special Issue, 1974) and McGonigal, *Implementation of Cost Effectiveness of Computerized Legal Research*, 18 IDEA 51 (1976). *See also* Loevinger note 12 *supra*.

39. *See* note 1 *supra* and accompanying text.

Notwithstanding this diversity, law schools have three basic options for law/science programs. First, there can be a format, such as a patent law program, which takes advantage of technical training earlier received. Second, there is an interdisciplinary model which can be divided into three categories involving programs: (1) pursued within the law school; (2) resulting in a joint degree; and (3) involving interdepartmental courses and/or research. Lastly, there are more or less traditional programs with law/science courses which are not part of any overall interdisciplinary scheme.

The first type of program is quite uncommon. Because it needs a certain number of similarly trained people to be economically viable, it is rarely found outside of a large urban area, and is rare enough *in* a large urban area.[40]

The second type of program is almost as uncommon. Moreover, as recently noted by Professor Ladinsky, it is fraught with difficulty.[41] While he addressed only law and *social* science programs, one might reflect on the extent to which his observations are at least as true in regard to those involving other sciences. In a recent article he observed that

> There are three major problems confronting law and social science . . . which I shall call the *heterogeneity problem,* the *resistance problem,* and the *miseducation problem.* All three problems stem from the American law school's evolution as a professional training program for practicing lawyers . . . . [T]he law school intellectually isolated itself from the mainstream of social science. At its worst, the American law school became hostile to social science . . . . Sporadic efforts at bridging the fields were attempted at various universities over the past 40 years, but these efforts failed . . . . [T]he use of social science in law was extremely limited until about 1960. This remains generally true in the majority of the ABA approved . . . schools today.
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> *Heterogeneity.* . . . In courses like the sociology of law, where law students, and non-law undergraduates and graduate students are brought together, the heterogeneity problem is particularly acute . . . .
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40. In that respect Franklin Pierce Law Center is quite unique, but it attempts to attract technically trained people in order to be able to offer its patent and related courses and programs. Indeed, by attempting to focus its discretionary resources, the Law Center attempts to overcome some of the very real problems catalogued by Frampton, *supra* note 4, at 144.

41. He certainly speaks with authority. At the time he made the remarks quoted, *infra,* he was Director, Center for Law and Behavioral Science and Professor of Sociology, University of Wisconsin. For a more comprehensive treatment of law and social science, *see* the report of the AALS Symposium, *Social Research and the Law,* 23 J. LEGAL EDUC. 1 *passim* (1970).

> *Resistance to social science.* Ask American law professors who use social science explanations or theories in their teaching, and they will tell you despairingly how law students resist social science content in their courses.
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> . . . .
>
> . . . So long as legal education is "parsing a case" and mastery of rule application, law and social science will remain outside the core curriculum. It will continue to be offered as an elective and will be bootlegged into a few . . . courses by devotees who have the doggedness and the popularity to counter the tide.
>
> *The miseducation problem.* The development of law and social science programs has created a myth — the myth of the joint degree. The idea sounds good. . . . The fact is that it is a long and arduous path to follow, and it is not at all clear that when you get there you have a saleable product.[42]

Perhaps the programs are not fully equivalent,[43] but it is worthwhile to attend to the other side of the ledger as reported by Dean Yegge. Writing about the seven year attempt to establish a law and behavioral science program at the University of Denver, he recorded the following observations:

> First, we have found . . . full and equal colleagueship of . . . behavioral scientists and legal scholars to be . . . desirable. . . .
>
> Second, we have found that introduction of experimental . . . courses . . . has been frustrating but . . . productive . . . .
>
> Third . . . , we have learned that clinical legal education plays an important part. . . . While it was somewhat unexpected, we have found that the real and lasting merger . . . comes when real life legal problems are actually confronted, particularly in the area of the public interest law suit.
>
> Fourth, our students have observed . . . that law is inadequate to handle all social problems.[44]

Unfortunately, there is the matter of expense. Many of these interdisciplinary models flourish if outside funding is available, but once it is

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42. LEARNING AND THE LAW, 7 and 52-53 (ABA: Summer, 1975). In regard to the first paragraph of the quoted remarks, *see* Samuelson *supra* note 18. In his article, Curlin observes that "disparate logic is not the cause of breakdowns in communication — the cause is segregation of the disciplines. . . . There may even be institutional policies which encourage the interaction among departments, but generally these efforts fail . . . because of insistence that disciplinary bonds be maintained." *Saving Us From Ourselves, supra* note 27, at 660. For a discussion echoing those sentiments, *see* Scriven note 19 *supra*. *Compare* Rosenberg, *supra* note 24, at 199. Both of these views were expressed as part of the AALS Symposium note 41 *supra*.

Finally, for a detailed discussion of an attempt to establish an interdepartmental program, *see* Willrich, *The Law School as a Base for Interdisciplinary Studies in a University*, 26 J. LEGAL EDUC. 213 (1974).

43. It cannot be determined from Dean Yegge's remarks whether joint degrees are conferred or not.

44. Yegge, *supra* note 6, at 551-52.

terminated, the program dies.[45] Unlike most graduate and professional programs, legal education tends to be self-supporting.[46] Worse, in some instances, tuition is funnelled off to meet fractional university overhead allocated to the law school. For this reason, the optimum a typical school can hope for is to offer the third program option — a few courses in an otherwise traditional curriculum. It is in attempting to weigh the potential offerings in such a context that the diversity of student backgrounds and law/science interactions poses the most difficulty.[47]

In evaluating potential options, one might attempt to do a rough cost/benefit analysis. For example, the cost (other than sunk cost in physical plant) is generally equal to the fractional salary of the faculty member teaching it — assuming that he or she is not carrying a pet course as an overload. On the other side of the balance, the number of student-credit-hours the course wins in the free market of elective options can be calculated. Certainly that is not the only concern, otherwise a course in banana peeling and the law (where the professor is a charmer and gives good grades) could rank high in a list of potential choices. But obviously there is more.

In spite of the fact that clinical programs are notoriously expensive (primarily as a result of enrollment ceilings), they continue to be offered.[48] Indeed, the number seems to grow larger. Thus there is a notion that some benefit outweighs the extraordinary cost. A new law/-science offering is justified to the extent that the new course tends to better prepare lawyers for practice and, with increasing frequency,[49] for interdisciplinary work with scientists and engineers. More specifically, to the extent that law/science programs enables tomorrow's lawyers to better communicate with technical people, they are supportable.

III. AN ANALYSIS OF LAW/SCIENCE COURSES

Earlier the diversity of law/science subject matter and of students' technical preparation to deal with such subject matter was discussed — particularly with reference to the cost-effectiveness of various

45. *See, e.g.*, Willrich note 42 *supra*.

46. *See* Samuelson, *supra* note 19, at 261. *See also* Frampton, *supra* note 4, at 1436.

47. For one thing, the diversity in student interests and backgrounds tends to keep the enrollment per course down.

48. An interesting report of experience at New York University School of Law is set forth in the January, 1972 Newsletter of the Council on Legal Education for Professional Responsibility. Not only is the cost in dollars per student-credit-hour computed and compared to the cost of other types of courses, but an analysis of non-quantifiable benefit is attempted. *See also* Dean Yegge's remarks *supra* page 224 and those of James Curlin *supra* page 221.

49. *See* Cohen & Stephan *supra* note 34. *See also Saving Us From Ourselves, supra* note 27, at 656.

approaches in meeting diverse needs and backgrounds of students in law school. It was also hypothesized that some attention to the nature of interdisciplinary difficulty would be helpful in making an assessment of potential ways of meeting those needs.

With few exceptions,[50] the diversity of students' technical backgrounds has precluded the offering of courses designed to make the most of their expertise. While a sizeable number of students have had some technical exposure, heterogeneity is a serious problem.[51] It is difficult to assemble enough students with a similar background to make offering a course which builds upon it worthwhile. Thus, most curricula treat all students as though they were utterly lacking in technical competence.

There is another justification for this approach. It is rare that a problem of concern to lawyers does not require information derived from several disciplines. Consequently, expertise in one non-legal discipline may be of little value in placing the entire problem in legal perspective.[52] Therefore, for the moment, the law student population will be regarded as homogeneously ignorant of science and technology.

This leaves the dilemma of diversity in "points of confrontation." Aside from lawyers using technology in a jurimetric way,[53] it appears that Professor Cavers' six points can be condensed into two.[54] From the legal perspective, the scientist's contribution to the generation and implementation of public policy can be seen as that of establishing facts. In regard to generating policy, whether old policies are falling or new ones are being established, it is still a matter of establishing and using legislative facts.[55] Likewise, in regard to implementing policy, it is a matter of establishing and using adjudicative facts, regardless of

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50. *See* discussion at page 222 *supra*.

51. *See* the Ladinsky quotation pages 223-24 *supra*.

52. Consider, for example, the host of technical issues involved in something as mundane as nutritional labeling. In regard to fat content alone, there are many questions about *which* fats are related to serum cholesterol levels and *how*. Further, there is considerable doubt as to the relationship of the latter to atheriosclerosis; *see, e.g.*, Benditt, *The Origin of Atheriosclerosis,* SCIENTIFIC AMERICAN, February, 1977, at 74. And, finally, there is the matter of effectively conveying accurate information to the consumer.

53. *See* discussion in note 38 *supra*.

54. *See* note 37 *supra* and accompanying text.

55. Davis has defined legislative facts as follows:

> When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts.
>
> Legislative facts are ordinarily general and do not concern the immediate parties. In the great mass of cases decided by courts and agencies, the legislative element is either absent or unimportant or interstitial, because in most cases the applicable law and policy have been previously established.

Davis, 2 ADMINISTRATIVE LAW § 15.03, at 353 (1958).

whether they are being employed in solving an old problem or a new one.[56]

Consequently, examination of law school courses is useful in determining the extent to which they help prepare tomorrow's lawyer to marshall those two kinds of facts with the aid of a non-lawyer. As developed above, this translates roughly into enabling those lawyers to be able to grasp technical vocabulary in context.[57]

In evaluating the effectiveness of courses in serving those ends, one must distinguish between those which offer implicit contact with science and those which offer explicit treatment. When considered in that way, it becomes apparent that many of the so-called law/science courses add little to courses traditional in legal curricula.

The frequency with which technical issues arise distinguishes those courses from ones such as property or criminal law.[58] Thus, while courses in food and drug, environmental, or even patent law may deal more frequently with legislative and adjudicative technical facts, they are unlikely to offer much more opportunity for studying how those facts are obtained or tested for veracity than are other substantive courses. Primarily, it is a matter of time. Time which is allotted to implicit law/science courses tends to preclude other than the most superficial treatment of such matters. This results in the acceptance or rejection of often hotly contested technical facts on the basis of crude generalizations.[59]

Such courses certainly do not foster a mental receptivity to technical issues.[60] They not only may fail to contribute to a capacity to deal with such issues, but they may also actually detract from it. This follows from the fact that many implicit law/science courses focus on the legal regulation of science and technology-run-amok. Indeed, one might speculate whether such a course will point out either that concerned scientists or engineers may have initially flagged the problem or that they are necessary to its solution.[61]

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56. Davis has defined adjudicative facts as follows: "When a court or agency finds facts concerning the immediate parties — who did what, where, when, how, and with what motive or intent — the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts." *Id.* For present purposes, this distinction seems to be critical in every phase of the legal process. *See* note 20 *supra.*

57. The significance of this is perhaps best discussed in Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425, 450, 456 (1974).

58. In regard to the former, consider, *e.g.*, the problems involved in applying the rules for lateral and subjacent support. In regard to the latter, the problems range from ballistics to competence.

59. *See, e.g., The Great Saccharin Snafu*, 42 CONSUMER REP. 410 (1977).

60. *See* the remarks of Judge Markey page 217 *supra.*

61. *See, e.g.*, Brooks, *Technology Assessment in Retrospect*, Newsletter on Science, Technology & Human Values, No. 17, at 25 (Oct., 1976) (Harvard).

Further, once a problem has been identified and a normative judgment made, usually on the basis of facts supplied by non-lawyers, it has to be implemented. Frequently, in recent history, proposed solutions to problems have predated technological capacity.[62] Thus, in the absence of still more technical assistance, the normative judgment cannot be enforced.

However, the problem is more serious: when would-be lawyers repeatedly consider scientists and technologists only as sources of problems, it is difficult to convince them that such persons are capable of generating *solutions.*[63] The problem is aggravated if students are not afforded an opportunity elsewhere to learn something about what scientists do, how they do it, and how to communicate with them.[64]

This should be the function of explicit law/science courses. Because it is difficult to learn much from course titles or from catalog descriptions, an illustration may be helpful in sorting out such courses.

About one year ago, a course was offered at Franklin Pierce under the title, *Selected Topics in Chemical Regulation.*[65] The original plan was to choose particular substances and examine their regulation by several agencies. For example, vinyl chloride could be studied from the perspective of EPA, FDA or OSHA. The goal was to determine whether all of the agencies use essentially the same regulatory strategy when faced with identical evidence of potential for harm. The course would have been an exercise in comparative domestic regulatory law.

If there is a consensus in legal education on the use of the word, "forensic," it would probably support retitling that course *forensic chemistry.*[66] However, because many of the students were interested in consumer law, the focus of the course was changed, and a number of papers were written on substances such as vitamins, sugar, milk, and eggs. Had all of the papers dealt with such problems, a more apt title might have been, *forensic nutrition.*[67]

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62. *Id.*

63. This is bound to be compounded by the fact that scientists usually have occasion to see lawyers only in such a light. *See, e.g.,* Curlin, *supra* note 16. However, to the extent that people teaching these subjects have at least disciplinary training, the risk is probably lower. *See, e.g.,* Vanyo, *supra* note 19, at 55, 57.

64. *See* Dean Yegge's remarks *supra* page 224; *see also* Mr. Curlin's comment at page 221 *supra.*

65. By this writer.

66. If there is a consensus in legal education, it is somewhat at odds with the term "forensic science" as used elsewhere. *See, e.g.,* J. PETERSON FORENSIC SCIENCE (1975). There has been a trend toward use of the word "criminalistics" in the latter context, however. *See, e.g.,* Kirk, *The Ontology of Criminalistics,* 54 J. CRIM. L.C. & P.S. 235 (1963).

67. *See* note 52 *supra.* Nutrition is a considerably more technically expansive subject than chemistry. In fact, the closer one gets to "real world" problems, the less likely it is that a single technical discipline (at least as traditionally construed) will serve as an adequate base. *See, e.g.,* Wolman, *Interdisciplinary Education: A Continuing Experiment,* 198 SCIENCE 800 (1977).

In either form, there would have been considerable difficulty in achieving great technical depth. While a technical classification, rather than a legal one, dictates the content of such a course, the word "forensic" seems to denote considerable attention to the law. Such a course ought to be distinguished from one in which there is an attempt to teach a technical subject.

Consider, for example, what a course entitled, *Chemistry for Lawyers* might involve. For this writer, the title conjures up a vision of a watered down undergraduate chemistry course, with topics selected to be of maximum potential relevance to lawyers.[68] It is in such a course that heterogeneity becomes a problem. While it would have maximum value for students with no prior exposure to chemistry, they would probably not elect it. Students with considerable prior exposure would be bored by it.

Assuming, for the purpose of discussion, that the latter type of student could be excluded and enough of the former induced to take the course to make it worth offering, what would it accomplish? Perhaps this question can be answered best by asking two more questions: (1) How much chemistry does the typical lawyer need to know in order to deal effectively with a chemist in securing necessary facts? (2) What will a lawyer, who used precious elective hours to take such a course, do when he or she is confronted with the need to consult a psychologist, an economist or an electrical engineer?

Any attempt to answer those questions is pointless. They almost answer themselves — and to the extent that they do not, there are no easy solutions. Their function, rather, is to highlight the difficulty in meeting the need to expose law students to science while they are in law school if attention is directed toward particular technical disciplines.

On the whole, it seems that the forensic science courses are superior to those attempting to teach much detail about a particular discipline. First, they are apt to focus on the use of a scientist in solving legal problems. Second, they are usually team taught and offer exposure to at least one practitioner of a non-legal discipline.[69] Third, they are likely to use the language of the discipline in context and allow more difficult concepts to be used in other than parrot-like fashion. However, to the extent that they focus on a particular non-legal discipline, they nevertheless fail to apprise law students of the diversity of the constraints

68. For example, such a course might devote considerable attention to methods of analysis and ways in which errors can creep into the results — either in terms of *what* is present or *how much* is present.

69. *See, e.g.*, ASSOCIATION OF AMERICAN LAW SCHOOLS, REVISED LIST OF LAW TEACHERS BY SUBJECT, 1146-7 (1977). Note the member of M.D.s listed.

under which various disciplines operate.[70] In this failure, there is a risk that lawyers trying to deal with a physical scientist on the same terms as they have been accustomed to dealing with a social scientist may encounter more difficulty than if they were totally ignorant.[71]

IV. THE LOEVINGER PROPOSAL

The most promising avenue for avoiding such problems is contained in a proposal made by Lee Loevinger:

> The obvious method of making science more useful in the legal process . . . is to require all law school graduates to have a basic knowledge of science. *Demonstration of the relevance to law, and exploration of the nexus between science and law, will probably require that the subject be taught in law schools* rather than as a more generalized course at the undergraduate level. *At a minimum, law school graduation should require a general knowledge of scientific method.* . . . As lawyers and judges become more familiar with scientific principles and attitudes, it seems likely that they will be more inclined to employ [them] . . . and to seek scientific data in dealing with [public policy issues]. . . .[72]

Unfortunately, there was no suggestion of how these ends might be attained. Nevertheless some progress has been made in identifying and testing one particular strategy for pursuing them. Materials have been developed for teaching a multidisciplinary undergraduate course which, with little modification, could be adapted to law school curricula.[73]

Last year those materials were used with moderate success in a course at Franklin Pierce, and it seems likely that they could be employed elsewhere.[74] They are available under a remarkably apt title, *The Nature*

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70. For example, the ethical constraints in the health or social science fields, *see, e.g.*, Field and Piacenza, *Informed Consent and the Investigational Use of Medical Devices*, to be published in 19 IDEA (1978). *See also* Thomas, *Biostatistics in Medicine*, an editorial in 198 SCIENCE 675 (1977); indeed, most of the November 18, 1977 issue is devoted to statistical and ethical problems in medical research.

71. Scientists seem to have as many problems communicating with *each other* as with lawyers. *See Saving Us From Ourselves*, *supra* note 26, at 660. *See also* Holton *supra* note 29.

72. Loevinger, *Jurimetrics: Science in Law*, in SCIENTISTS IN THE LEGAL SYSTEM at 7, 15-16 (W. A. Thomas, ed., 1974) (emphasis added). It is interesting to compare the author's remarks with those made approximately 20 years earlier. *See* note 12 *supra*.

73. It is D'Amour and Wales, *The Nature of Evidence*, and is based on the Guided Design format for teaching decision making and problem solving. *See* note 17 *supra*.

74. The course was offered by this writer under the title, *Science in the General Practice*. Its evolution is being described in a separate manuscript, in preparation. However, in brief, the course consisted of use of the introductory and philosophy projects described in note 74, *infra*, as well as the chemistry and psychology projects. Aside from the problem-solving method of Guided Design, the course is devoted to comparing and contrasting the evidentiary strategies of various disciplines. Although the material is not designed for use in legal education and is, thus, not as directly relevant as it might be, there is ample time in a two hour course to consider material of more immediate legal impact. *See, e.g.*, Sears, Roebuck & Co. v. Allstate Driving School, 301 F.

of Evidence, and use, *inter alia,* a Popperian analysis in considering short projects which have been written for a number of disciplines.[75] Starting with an exercise in philosophy, the core concern is the degree to which the various disciplines are "scientific." Ultimately, the critical question is "Who to believe?" One would be hard pressed to think of a more central theme in the area of science and public policy.

While there have been some problems with the use of the materials in a law school course,[76] they present an option which is quite attractive on balance — and one which deserves more widespread attention in legal teaching circles. Perhaps it is premature, but tentative data collected in teaching the course the first time indicates that, regardless of its value in overcoming law/science communications problems, first year students were able to improve their grades in other, *traditional* law courses as a result of having taken it.[77]

In short, it is submitted that Loevinger's suggestion can no longer go ignored for want of means to implement it.

V. CONCLUSION

This article has attempted to survey briefly the need for exposing law students to science and the effort which has been directed to that end, both programatic and non-programatic. It has also sought to suggest matters which deserve greater attention in meeting a growing need with dwindling resources.

It has concluded that explicit attention to science ought to precede implicit attention, and that general treatment ought to precede more specific efforts. Only with broad exposure to the institutional interactions of law and science and to the commonalities and differences of the various technical disciplines can tomorrow's lawyers be prepared to

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Supp. 4 (E.D.N.Y., 1969) *or* Field & Field, *An Empirical Assessment of Two Labor Relations Propaganda Films,* 1 PEPPERDINE L. REV. 21 (1973). However, notwithstanding such diversions, the goal of the course is not to teach law but rather to illustrate the ethical and pragmatic constraints under which *various* technical disciplines operate and the ways in which such differences may effect the immediate social utility of the current state of the art in any of them. *See, e.g.,* Greely, *In Soft Defense of Sociologists,* 23 N.Y.U.L.SCH. BULLETIN, No. 2, at 26 (1977).

75. They include a first project involving a simple civil engineering problem to introduce GUIDED DESIGN and a sequel involving analytic philosophy which lays out a conceptual framework for tying the subsequent projects together. Only the first two are necessary; beyond those, the teacher has a choice of projects covering such disciplines as psychology, anthropology, geology, chemistry, or physics. Each has been prepared by a subject specialist. The two initial exercises and one each from the social and physical sciences can easily be covered in a two-semester-hour course. Total cost, per student, for the materials would be about $10.00. For more information, contact Dr. Gene D'Amour, Philosophy Dept., W.V.U., Morgantown, W. Va. 26506.

76. These are addressed in the manuscript, note 73, *supra.* I will be glad to share information with anyone who is interested in possibly using the materials.

77. *See* Field, *Comment: Serendipitous Result Obtained in Developing Science Literacy Course,* to be published in 19 IDEA (1978).

meet the diversity of problems which require solution. Moreover, it has indicated that materials are becoming available which law professors can use in approaching this important task. Until lawyers are given a broad framework for viewing problems of science and public policy, enhanced interdisciplinary communication and effective interdisciplinary cooperation will remain a dream.

Teaching Psychiatry to Law Students: Towards A Replicable Model

*Martin Buxton**
*Lawrence A. Dubin***

While many law schools do not have a full-time psychiatrist on their faculties, this absence does not lessen the need for law students to learn and understand principles of human behavior. In this article, Dr. Buxton and Professor Dubin share their experience in teaching a seminar on law and psychiatry at a particular law school. This course could be offered by any law school, and the authors present an outline of their proposed model.

Since practicing attorneys constantly encounter psychiatric issues in representing their clients, they should be sophisticated regarding human behavior.[1] However, there is no consensus about the manner in which such knowledge might be imparted.[2] The alternatives for providing psychiatric eduction are relatively circumscribed: (1) law schools could require a certain degree of pre-law study in human behavior as a prerequisite for admission; (2) law schools could provide psychiatric education as part of their curricula, or (3) lawyers could be expected to attain sufficient psychiatric sophistication through continuing education programs after completion of law school. In our judgement, the most effective and pragmatic alternative is for law schools to add psychiatric

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1. Dubin, Buxton & Haller, *Improving the Relationship Between Mental Health Workers and Lawyers,* 2 PSYCHOLOGY, PSYCHIATRY & BEHAVIOR 27 (1977).

2. For a discussion of some of the problems encountered in law schools when teaching Professional Responsibility from the clients' perspectives, *see* Dubin, *Professional Irresponsibility of Lawyers: Conversations with Victims,* 1977 NATIONAL CONFERENCE ON TEACHING PROFESSIONAL RESPONSIBILITY 675 (S. Goldberg ed. 1977) (The video tape which is the subject matter of this article is distributed by Centerpoint Productions, Box 12, Arlington Heights, Mass. 02175).

education to their academic programs.

As undergraduate college courses in psychology are not uniform in subject matter, sometimes lacking in their depth of exploration, and often deficient in their clinical focus, prerequisite pre-law study in human behavior appears to be an unreliable approach. Similarly, continuing legal education programs do not represent a reasonable option as they often attract only those lawyers who already have some interest in understanding human behavior, rather than those more in need of such exposure. Furthermore, it would seem preferable to have all aspects of legal education under the aegis of law school faculties, not only to promote quality control, but also to secure meaningful application of psychiatric principles to the practice of law.

Assuming that a knowledge of human behavior would best be taught as part of law schools' curricula, a suitable format must be developed. Two renowned legal-psychiatric educators have addressed this challenge and offer different viewpoints.

Professor Alan Stone[3] proposes utilizing law school clinics as vehicles for teaching an understanding of human behavior.[4] Arguing that this setting offers the law student first-hand contact with psychiatric issues arising from direct client contact, he suggests combining these clinical experiences with careful psychiatric supervision, so that the law student would gain both a didactic and experiential familiarity with human behavior.

Professor Andrew Watson[5] has proposed a different method. He advocates utilizing the law school classroom as an instrument for teaching mental health concepts.[6] By skillfully identifying psychological dynamics of the students, including slips of the tongue, distortions,[7] and psychophysiologic responses,[8] during classroom discussion, Watson believes law students can be provided with didactic and experiential

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3. Professor of Law and Psychiatry in the Faculty of Law and Medicine, Harvard University. A.B., Harvard, 1950; M.D., Yale, 1955.

4. Stone, *Legal Education On The Couch,* 85 HARV. L. REV. 392, 428-40 (1971).

5. Professor of Law and Psychiatry at the University of Michigan. B.S., University of Michigan, 1942; M.D., University of Michigan, 1950; M.Sc., Temple University, 1954.

6. Watson, *The Quest For Professional Competence: Psychological Aspects Of Legal Education,* 37 U. CIN. L. REV. 3, 150-57 (1968). *See also* Watson, *The Law And Behavioral Science Project At The University Of Pennsylvania: A Psychiatrist On The Law Faculty,* 11 J. LEGAL EDUC. 73 (1958).

7. The term *distortion* is defined as a "[m]isrepresentation of reality . . . based on unconsciously determined motives." A. FREEDMAN, H. KAPLAN & B. SADOCK, MODERN SYNOPSIS COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/II 1296 (1976) [hereinafter cited as MODERN SYNOPSIS].

8. A *psychophysiological disorder* is "characterized by physical symptoms of psychic origin. It usually involves a single organ system innervated by the autonomic nervous system. The physiological and organic changes stem from a sustained emotional disturbance." MODERN SYNOPSIS, *supra* note 7, at 1324. Examples of such responses include increased heart rate, paliptations, disturbed breathing, trembling, sweating, blushing, etc.

understanding of human behavior.

Thus, law schools which endeavor to teach psychiatric principles must decide which of these two perspectives, among others,[9] to follow or they must devise their own methodologies. Both the Watson and Stone models advocate utilizing psychiatrists as full-time faculty members to enable on-going collaborative relationships between lawyers and psychiatrists to develop. However, many law schools do not have psychiatrists on their faculties.[10]

This article offers a detailed account of a seminar on psychiatry for law students that we taught during the spring semester of 1976 at the University of Detroit School of Law. This seminar, while borrowing certain aspects from both the Stone and Watson methods, was innovatively designed to meet budgetary and curricular constraints. Although we feel the presence of a staff psychiatrist is preferable, even if this is not feasible, we believe it unwise to forego the opportunity of offering such a seminar. We suggest the following detailed course outline to aid legal-psychiatric educators who may wish to initiate or modify their own human behavior curricula.

I. COURSE DESCRIPTION

A. An Overview

This seminar in psychiatry for law students met for two hours, once a week, for fourteen weeks. It was offered as an elective to fourteen second and third year students, many of whom had participated in law clinic and/or a clerkship.

The seminar was taught by a lawyer, who was a full-time faculty member, and a psychiatrists, who was not a regular member of the faculty but who was retained to jointly teach this seminar. Both professors had long-standing interests in psychiatry and law but had never collaborated before in such an effort. A legal-psychiatric educator[11] was consulted during the preliminary planning stages to help gain familiarity with the literature in this area. It was extremely helpful that the

9. *See generally* Clancy, Brodland & Fahn, *A Psychiatric Clerkship For Law Students,* 129 AM. J. PSYCH. 98 (1972); Katz, *The Law And Behavorial Science Program At Yale: A Psychiatrist's First Impression,* 12 J. LEGAL EDUC. 99 (1959); McCoid, *A Proposal For An "Ideal" Course In Law And Medicine,* 16 J. LEGAL EDUC. 433 (1964); McDonald, *The Teaching of Psychiatry in Law Schools,* 49 AM. J. CRIM. L. C. & P. S. 310 (1958); Schwartz, Stoller & Walters, *The UCLA Medical-Legal Seminar,* 15 J. LEGAL EDUC. 67 (1962); Suarez, *Reciprocal Education — A Key To The Psychiatrico-Legal Dilemma,* 17 J. LEGAL EDUC. 316 (1965); Zusman & Carnahan, *Psychiatry And The Law: Changing The System Through Changing The Training,* 131 AM. J. PSYCH. 915 (1974).

10. This was the case at the University of Detroit School of Law prior to 1976.

11. We express our gratitude to Andrew Watson for the guidance and cooperation he gave us in planning this seminar. *See* note 5 *supra.*

psychiatrist had extensive training in child as well as adult psychiatry,[12] and that the attorney had substantial experience in the practice of law.[13]

The following is a list of the legal-psychiatric subject matters selected for exploration through classroom discussions, presentations, assigned readings and/or required papers:

1) Interviewing and the Unconscious;
2) Paper on "Why I Chose to Become a Lawyer";
3) Readings in Psychiatry with Particular Attention to Healthy and Pathological Personality Development;
4) Classroom Observations of Normal Children;
5) Counseling;
6) Divorce and Custody;
7) Not Guilty by Reason of Insanity Defense;
8) Student Presentations of Selected Topics in Psychiatry and Law;
9) Videotaped Lawyer-Client Interviews;
10) Paper on "Analyzing Your Psychology with Respect to Potential Work and Client Conflicts."

B. A Detailed Outline

1. Interviewing and the Unconscious

An understanding of the unconscious is essential to utilizing and comprehending psychiatric principles.[14] Law students often lack awareness as to their own motivations for becoming lawyers.[15] In an effort to dramatize this point and to employ interviewing skills, the

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12. The doctor's background was particularly helpful. From July, 1974 to June, 1976, he completed a fellowship in child and adolescent psychiatry at the Children's Psychiatric Hospital, University of Michigan Medical Center. At that time, he was also Chief Resident of the Youth Services, Department of Psychiatry, University of Michigan Medical Center. Presently, he is certified by the Committee on Certification in Child Psychiatry, the American Board of Psychiatry and Neurology as well as a Diplomat of the American Board of Psychiatry and Neurology.

13. In addition to his academic involvement, the attorney had practiced law for ten years in the Michigan area as a partner with Brukoff, Dubin, Beras, & Stewart. The portion of his practice which is relevant to this seminar includes extensive work and litigation in juvenile criminal defense, domestic relations (particularly child custody proceedings), and tort cases involving psychiatric related injuries.

14. C. BRENNER, AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS 4-5 (1957).

15. For a personal account of a law student's unconsciousness, *see* Savoy, *Toward a New Politics of Legal Education,* 79 YALE L. J. 444 (1970).

> I recall what it was like being a law student. That incredible boredom of the second and third years drove me from the classroom into the sanctuary of the Law Review where I sought an intense involvement and an excitement that the rest of the law school did not offer. The major difference between me then and dissident students today, I suspect, is that I lacked the cultural maturity or whatever gift it is that enables them to see things as they really are.

Id. at 446.

seminar participants were asked, during the first session, to select and interview another student whom they did not know as to why he or she went to law school. After each student had interviewed his or her selected partner for a half hour, the learned information was shared with the class. Each interviewer introduced the interviewee to the group by telling the class why this person had chosen to attend law school. Then the interviewee briefly responded to the accuracy of these statements and made any necessary corrections. The professors advised students to observe any contradictory material, slips of the tongue, errors of omission, and distortions.[16] Throughout the exercise, it was repeatedly emphasized that successful interviewing requires skillful observation of verbal and non-verbal communication. This demonstration illustrated that there is an "unconscious" operating in each of us and that our own unresolved psychiatric conflicts, if we are not aware of them, can strongly interfere with our capacity to hear and understand answers to questions. To further emphasize the significance of the "unconscious" and to experientially convey what we meant by the terms "anxiety"[17] and "conflict,"[18] we assigned a paper for the next class on "Why I Chose to Become a Lawyer."

2. Paper on "Why I Chose to Become a Lawyer"

This paper served to facilitate reflection on the students' understanding of why they had chosen to enter the legal profession. This assignment was designed to elicit possible internal and external conflicts about becoming lawyers, and the psychological needs which were being gratified by such a career selection.

Interestingly, the reasons given for choosing law seemed to reflect the socio-economic background of a large segment of the student population of the University of Detroit School of Law, as well as some personality characteristics which are generally common to law students everywhere.[19] Specifically, many of the students described their aspira-

16. *See* note 7 *supra.*

17. The term *anxiety* can be defined in the following way:

> Unpleasurable affect consisting of psychophysiological changes in response to an intrapsychic conflict. In contrast to fear, the danger or threat in anxiety is unreal. Physiological changes consist of increased heart rate, disturbed breathing, trembling, sweating, and vasomotor changes. Psychological changes consist of an uncomfortable feeling of impending danger, accompanied by overwhelming awareness of being powerless, inability to perceive the unreality of the threat, prolonged feeling of tension, and exhaustive readiness for the expected danger.

MODERN SYNOPSIS, *supra* note 7, at 1283.

18. This is defined as the "[c]lash of two opposing emotional forces." MODERN SYNOPSIS, *supra* note 7, at 1291.

19. For an excellent discussion of the background and personality traits common to law students, *see* Watson, *supra* note 6, at 94-106. *See also* Katz & Denbaux, *Trust, Cynicism and Machiavellianism Among Entering First Year Law Students,* 53 J. URB. L. 397 (1976) (thorough

tions for upward social mobility, stemming from blue collar family backgrounds. Such comments as having a "deep respect for law and order" and desiring to be a "law abiding and promoting citizen" were commonplace. A desire to change social ills and represent consumer or minority viewpoints were, with one exception, unmentioned.[20] In addition, many students expressed uncertaintly as to whether their personal goals for choosing law would be met. The professors futher observed a tendency for law students to desire certainty and to employ the defenses[21] of intellectualization[22] and rationalization.[23]

3. Readings in Psychiatry with Particular Emphasis on Healthy and Pathological Personality Development

A suitable reading was necessary to examine psychiatric principles and to learn their application for the practicing lawyer. Therefore, an excellent treatise[24] by Andrew Watson was used as the basic text. The readings, which were assigned prior to class discussions, demonstrated how personalities are in a constant state of flux as a result of unresolved conflicts, anxieties, fixation points[25] and regressions.[26] The developmental tasks for each stage of personality growth were reviewed. Actual psychiatric cases were provided to underscore these unresolved areas, that although having had their origins in the past, continued to affect contemporary behavior. The value of this material was visible when some students resisted and debated certain psychiatric principles[27]

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original study on particular attitudes of beginning law students at one school).

20. It is interesting to contrast this finding with Professor Stone's discussion of the activist law student. Stone, *supra* note 4, at 395-98. In the early 1970's, he identified these students as "a vocal and growing minority," *id.* at 393 n.3, who held in part, a humanitarian perspective. Our result may be limited to the particular group with which we dealt or it may indicate that in the years since Professor Stone's observations there has been a marked shift in social concern of law students.

21. A *defense mechanism* is defined as an "[u]nconscious intrapsychic process. Protective in nature, it is used to relieve the anxiety and conflict arising from one's impulses and drives." MODERN SYNOPSIS, *supra* note 7, at 1294.

22. This is "[a]n unconscious defense mechanism in which reasoning or logic is used in an attempt to avoid confrontation with an objectionable impulse or affect. It is also known as brooding and thinking compulsion." MODERN SYNOPSIS, *supra* note 7, at 1310.

23. This is "[a]n unconscious defense mechanism in which an irrational behavior, motive, or feeling is made to appear reasonable." MODERN SYNOPSIS, *supra* note 7, at 1325.

24. A. WATSON, PSYCHIATRY FOR LAWYERS (1972).

25. The word *fixation* can be defined as a relative "arrest of psychosexual development at any stage before complete maturation" is attained which can be regressively returned to when under stress. MODERN SYNOPSIS, *supra* note 7, at 1301 (This definition was modified partially by the authors). *See also* the definition of *regression* provided in note 26 *infra*.

26. The word *regression* is defined as an "[u]nconscious defense mechanism in which a person undergoes a partial or total return to earlier patterns of adaptation." MODERN SYNOPSIS, *supra* note 7, at 1325.

27. The developmental stages of the personality threatened some students' concepts of self-determinism and free will.

which created involved discussions.

4. Classroom Observations of Normal Children

To establish an understanding of personality development and the significance of childhood events on the formation of adult personality traits, several normal children of varying ages and their parents were invited to the class. Through direct observations of these children at play and from the data derived from interviewing their parents, the characteristics of the various developmental phases of childhood were highlighted. Later, these observations were linked with various adult behaviors which the students witnessed during client interviews and case presentations, *e.g.*, competitiveness, narcissism,[28] ego defenses.[29]

5. Counseling

This subject was explored through selected readings[30] and clinical vignettes Particular attention was paid to potential areas of conflict for lawyers.[31] A paper was assigned to encourage self-reflection of the student's individual blocks to counseling.[32]

6. Divorce and Custody

Divorce and custody are legal proceedings which commonly present

28. The term *narcissism* can be defined as

> [s]elf-love. It is linked to autoerotism but is devoid of genitality. The word is derived from Narcissus, a Greek mythology figure who fell in love with his own reflected image. In psychoanalytic theory, it is divided into primary and secondary types. Primary narcissism refers to the early infantile phase of object relationship development, when the child has not differentiated himself from the outside world. All sources of pleasure are unrealistically recognized as coming from within himself, giving him a false sense of omnipotence. Secondary narcissism results when the libido once attached to external love objects is redirected back to the self.

MODERN SYNOPSIS, *supra* note 7, at 1317. It should be noted that essentially *narcissism* is a healthy concept but when experienced in extremes, it can impair one's own concept of self as well as gratifying relationships with other people.

29. The term *ego* can be defined in the following way.

> One of the three components of the psychic apparatus in the Freudian structural framework. The other two components are the id and the superego. Although the ego has some conscious components, many of its operations are automatic. It occupies a position between the primal instincts and the demands of the outer world; therefore, it serves to mediate between the person and external reality. In so doing, it performs the important functions of perceiving the needs of the self, both physical and psychological, and the qualities and attitudes of the environment. It evaluates, coordinates, and integrates these perceptions so that internal demands can be adjusted to external requirements.

MODERN SYNOPSIS, *supra* note 7, at 1298. *See also* the definition of *defense mechanism* provided in note 21 *supra*.

30. A. WATSON, YOU AND YOUR CLIENTS: THE PROCESS OF INTERVIEWING AND COUNSELING (Preliminary material for book used with the permission of the author, August, 1975).

31. A. WATSON, KNOW THYSELF KNOW THY CLIENT (16 mm. movie available from the Communications Service of the University of Miami, Coral Gables, Florida).

32. *See* § I(B)(10) *infra*.

many psychiatric issues.[33] Doctor Buxton explained the relevant psychological concerns for children whose parents are undergoing divorce. An informative book[34] was reviewed and assigned for reading. Various case examples were presented, emphasizing the significance of the "psychological parent"[35] for healthy child development.[36] The controversy in child psychiatry, regarding visitation for the non-custodial parent was discussed,[37] as well as the lawyer's role in meeting the emotional needs of his or her client within the adversary process.[38]

Most importantly, the potential psychological impact on all involved in divorce and custody decision-making was studied. Particular attention was focused on the judges' behavior.[39] The professors selected and analyzed certain appellate cases[40] demonstrating how some judges have decided custody and visitation questions based upon their own moral indignations or unresolved emotial conflicts.

7. Not Guilty by Reason of Insanity Defense

Issues of competency and sanity can arise in many different legal contexts, *e.g.*, will contests, commitment hearings, juvenile dispositional cases. Whenever a lawyer needs psychiatric assistance or testimony for the benefit of the client, the attorney must have sufficient understanding of psychiatric principles to properly perform his or her task. Professor Dubin reviewed the historical development of the law pertaining to the defense of insanity.[41] "Temporary insanity," "competency" and "not guilty by reason of insanity" (NGRI) were all discussed with particular emphasis on the psychiatric concepts of psychosis,[42] hysterical

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33. Watson, *Contested Divorces and Children: A Challenge for the Forensic Psychiatrist,* 1973 LEGAL MED. ANN. 487, 488-89.

34. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

35. A *psychological parent* can be defined as the adult from whom the child primarily seeks love and support. In other words, it is the person to whom the child would generally turn if he or she was in need of comforting.

36. Buxton, *Applying the Guidelines of "Beyond the Best Interests of the Child,"* 7 CHILD PSYCH. & HUMAN DEV. 94 (1976).

37. Buxton, *Controversy In Child Psychiatry: Non-Custodial Parent Visitation Rights,* 82 N.J. ST. BAR J. 18 (1978).

38. *See* note 1 *supra.*

39. *See* M. Buxton & L. Dubin, Judges Are People Too, (unpublished manuscript available upon request from the authors).

40. The following court decisions were analyzed from the viewpoint of the role the judge's psychology played in the ultimate result: Zawisa v. Zawisa, 61 Mich. App. 1, 232 N.W.2d 275 (1975); Parrott v. Williams, 53 Mich. App. 635, 220 N.W.2d 176 (1974).

41. *See generally* Bazelon, *The Concept of Responsibility,* 53 GEO. L. J. 5 (1964); Shadoan, *Raising the Insanity Defense: The Practical Side,* 10 AM. CRIM. L. REV. 533 (1972).

42. A *psychosis* can be defined as any mental disorder in which a person's capacity to discern real from unreal is severely impaired.

depersonalization reactions[43] and fugue states.[44]

A detailed case presentation, in which the accused pleaded NGRI for a murder, was utilized as a vehicle for teaching how a lawyer and psychiatrist should prepare for expert testimony.[45] The professors engaged in a simulated direct examination of the expert witness, and volunteers from the class were subsequently able to cross-examine the expert.[46] The demonstration and ensuing class discussion emphasized the need for careful pre-trial preparation by the lawyer and expert.

8. Student Presentations in Selected Areas of Law and Psychiatry

Students were required to select a topic dealing with legal and psychiatric concerns, subject to the approval of the professors. During the last four weeks of class, each student was required both to write a fifteen page research paper and to deliver a presentation of the topic to the class. An outline of the subject was provided to each seminar member one week prior to the oral presentation. Subsequent to every offering, the students had an opportunity to challenge or inquire further about the presented material.

In our seminar, the following topics were selected and approved for presentations:

a) Optimal Use of Psychiatric Data in the Criminal Justice System;
b) Psychiatry and Workman's Compensation: A Focus on Cases Where There Are Pre-Existing Problems;
c) Involuntary Committment Standards and the Constitution;
d) A Family Court for Michigan: A Means for Effectuating the Guidelines of Beyond the Best Interests of the Child;
e) Investigation into the Potential Use of Psychiatric or Psychologic Evaluation in the Michigan Pre-Parole Process;

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43. This can be defined as a sensation of unreality concerning oneself, parts of oneself, or one's environment.

44. The word *fugue* is defined as "[a] long period in which a person has almost complete amnesia for his past. Habits and skills are usually unaffected. He leaves home and starts a new life with different conduct. Afterward, earlier events are remembered, but those of the fugue period are forgotten." MODERN SYNOPSIS, *supra* note 7, at 1302. Epilepsy is sometimes thought to be the cause.

45. This case was from an actual file from the Washtenaw County, Michigan, Circuit Court. The case involved Buxton as the psychiatrist establishing the defendant's not guilty by reason of insanity defense.

46. This techinque, due to the students' inexperience, proved most effective in illustrating the skill and knowledge the cross-examiner must possess to successfully elicit helpful information from an expert.

f) An Overview of the Development of the Insanity Defense: Past and Present;
g) Prisoners' Rights vs. Psycho-Surgery and Behavior Modification;
h) House Bill 4008 — Michigan's Decriminilization of Public Intoxication;
i) The Development of the Present Sense Impression and Excited Utterance Exceptions to the Hearsay Rule and Their Validity in Light of Psychological Studies on Testimony;
j) Hearsay and Human Behavior;
k) The Possible Uses of Psychology and Psychiatry in Jury Selection Process;
l) Addiction (Drug Abuse) and the Law;
m) The Juvenile Justice System — The Use of Psychological and Psychiatric Information;
n) Human Relations, Skills, Training: An Essential Part of Legal Education.

9. Videotaped Lawyer-Client Interviews

As discussed earlier,[47] selected videotapes of lawyer-client interviews[48] were shown as a tool to explore interview techniques and such psychological issues as transference,[49] countertransference,[50] ego Defenses[51] and psychodynamic formulations.[52]

10. Personal Conflict Paper

The following instructions were given during the second week of class for a paper to be submitted at the end of the semester: "Understanding that every individual has areas of conflict which are only resolved to varying degrees, reflect on yourself in terms of what kind of clients, cases, and employment situations might present personal conflicts. Ex-

47. *See* § I(B)(5) *supra.*

48. The students were afforded the opportunity to show videotapes of their own interviews with clients from the Urban Law Clinic, University of Detroit School of Law.

49. The word *transference* is defined as an "[u]nconscious phenomenon in which the feelings, attitudes, and wishes originally linked with important figures in one's early life are projected onto others [*e.g.*, therapists, lawyers] who have come to represent them in current life." MODERN SYNOPSIS, *supra* note 7, at 1334.

50. The word *countertransference* is defined as a "[c]onscious or unconscious emotional response of the therapist to the patient. It is determined by the therapist's inner needs, rather than by the patient's needs, and it may reinforce the patient's earlier traumatic history if not checked by the therapist." MODERN SYNOPSIS, *supra* note 7, at 1292-93.

51. *See* notes 21 and 29 *supra.*

52. *Psychodynamic formulations* may be defined as working hypotheses of the unconscious and conscious forces and realities of the external environment which are responsible for what a person is and does.

plore this in light of your past and current awareness of your own personality." We would like to note that the students were assured of confidentiality regarding these papers and were not permitted nor requested to discuss them in class.

One student found his attempts at writing this paper so anxiety producing that he was excused from the requirement. Our goal was to encourge the students to use the didactic and experiential knowledge acquired during the seminar as a structure for their introspection. In addition to the one student who found the assignment unmanageable, all the students appeared to have difficulty with this paper compared to the other written assignments. Examples of the issues which students raised as potentially psychologically problematic were:

a) Clients who would not be entirely cooperative or diligently work with their lawyer in their own best interest.
b) The legal responsibility of representing a client whose position the prospective lawyer feels is wrong.
c) Struggling with their own inhibitions regarding appropriate assertiveness and aggression.
d) Facing involvement with alcoholic clients who might evoke the prospective lawyer's suppressed feelings about his own alcoholic relatives.
e) Encountering pained children of divorce which would exacerbate the feelings of guilt one prospective lawyer had regarding his own recent divorce.
f) Having to deal with authoritative, unyielding individuals which would risk evoking unresolved feelings one student had for his own unduly authoritative father.

II. CONCLUSION

This seminar attempted within fourteen sessions to familiarize upper class law students with psychiatric theory and to identify the specifics of working in the interface between psychiatry and law. The major emphasis was placed on imparting an understanding of the dynamic functioning of the healthy personality.

It is our belief that such an understanding would enable the law student to approach his or her professional contacts with a foundation for knowing when to seek psychiatric consultation and for comprehending some of the apparently illogical behavior of clients. Also by struggling with one's own psychological make-up, one can be more sensitive to the emotional needs of future clients. Consequently, a strong emphasis was also placed on awareness of one's own reaction to people,*i.e.*, the psychiatric concept of countertransference. A combination of didactic

and experientially focused activities was utilized in our effort to accomplish these goals. Some of the methods of Professors Stone and Watson were implemented with the addition of several innovations.[53]

One such innovation was to use a child psychiatrists. This seemed to provide greater appreciation for the importance of child development in determining adult personality traits. The exposure to healthy children and the characteristics of each stage of child development helped the students gain insight into the psychological phenomena of developmental arrests, fixation, regression and object constancy. The child psychiatrist, by virtue of his or her expertise, was very comfortable in having such live demonstrations and was able to provide a longitudinal perspective to personality development.

Another innovation was to assign thought and feeling evoking assignments. As already mentioned, the students found the assignment on delineating areas of potential personal conflicts the most difficult. We believe this "difficulty" reflected what we intended to accomplish, namely, that the student examine his or her own unresolved conflicts. Such capacity for reflection is essential to successful interaction between people and therefore, imperative for lawyers to develop.[54]

Believing that the best way to teach effective communication skills and to stress the importance of empathy is through modeling, we continually endeavored to provide adequate personal consultation to each student regarding his or her work. As a consequence of our deliberate effort in this area, we were periodically approached by students for informal counseling.

In order to assess the students' reactions to our efforts, we utilized a follow-up questionnaire, one year after the seminar was offered, in addition to the university's student evaluation forms for the faculty.[55] The consensus from our follow-up questionnaires was that the seminar had been highly valuable in helping the students to recognize psychiatric issues as well as providing a reasonable basis for thoughtful introspection.

Finally, we believe the most significant innovation of this seminar was the fact that it took place at all. Specifically, the literature on psychiatric education in law schools has largely been contributed by eminent educators from prestigious law schools. In those academic

53. We attempted to incorporate aspects of Professor Stone's clinical emphasis by presenting videotaped interviews of students involved in a law clinic. In addition, some students submitted papers which were based upon their *experiences* in a clinical program or a clerkship. Our goal of using part of Professor Watson's model was perhaps more direct since in our initial session we focused upon people's unconscious slips.

54. Watson, *The Lawyer as Counselor*, 5 J. FAM. L. 7, 19-20 (1965).

55. Our numerical evaluations by the students from the university's evaluation forms was superior, registering an average 6.1 score out of a possible 7.

enclaves, the luxury of developing continuous collaborative relationships between full-time psychiatrists and lawyers on the law faculties has been financially and philosphically possible. As previously noted, we did not have the benefit of such on-going collaboration but still managed to devise a course outline and to teach cooperatively. From our experience, we conclude that teaching psychiatry to law students can and ought to be accomplished within the constraints of already crowded law school curricula and limited budgets. We believe this course could be successfully offered by any law school and propose this outline as a recommended model.

The Best Mode Disclosure Requirement In Patent Practice

*Dale Lynn Carlson**

Best mode presents issues of unprecedented importance for the patent system. To resolve these issues, concepts in patent law must be interfaced with aspects of antitrust and trade secrecy law. In this article, Mr. Carlson presents a conservative approach to the resolution of best mode problems, together with a proposal for reform at the patent office level which would produce much-needed harmony with the courts.

Acting within the scope of the Congressional mandate to "promote the Progress of Science and the useful Arts,"[1] Congress has given to inventors a limited monopoly in the form of a right to exclude others from making, using or selling their inventions[2] in exchange for public disclosure sufficient to enable one skilled in the relevant art to practice the invention.[3] However, beyond such an "enabling disclosure" requirement, Congress has specified that the embodiment of the public

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1. U.S. CONST., art. I, § 8, cl. 8.

2. 35 U.S.C. § 154 (1970). Section 154 reads:

> Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, subject to the payment of issue fees as provided for in this title, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

It is apparent that the patent grant is a "limited" monopoly as opposed to an absolute monopoly in view of the fixed seventeen year duration of the grant from the time the patent issues.

3. 35 U.S.C. § 112 (1970).

disclosure, the patent application, must describe the "best mode contemplated by the inventor in carrying out his invention."[4]

Until about 1960,[5] failure to satisfy the "best mode" disclosure requirement was seldom asserted as a defense to patent infringement. In 1965, a patent was held to be invalid for failure to comply with the best mode disclosure requirement,[6] thus setting the stage for significant changes in the practice of patent law. Today, the attorney must be aware of all aspects of the requirement in order to insure that the inventor will benefit from the rewards associated with the invention.

This article fully analyzes the best mode disclosure requirement. First, the public policy basis for the best mode disclosure requirement and the corresponding inventor and attorney obligations is explored. The relevant court decisions rendered during the last decade are discussed with emphasis on the most recent cases. The position of the Patent and Trademark Office on the best mode disclosure requirement is considered. Best mode is examined in the broader context of current patent conflicts. Illustrative examples of best mode problems are set forth and resolved. Finally the outlook for the future of the best mode disclosure requirement is determined.

I. PUBLIC POLICY BASIS AND IMPLICATIONS

The best mode disclosure requirement strikes a balance between the competing societal needs of encouraging invention by the grant of a limited monopoly and fostering free competition by preventing the misuse of the monopoly grant.[7] Assume, for the sake of argument, that the inventor discloses only the second-best means of carrying out the in-

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4. *Id.* The relevant portion of section 112, which contains both the "enabling disclosure" requirement and the "best mode" disclosure requirement, reads:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Id. It should be noted that the best mode requirement was originally established by Congress in 1870. Act of July 8, 1970, ch. 230, § 26, 16 Stat. 201. Although the determination of which of several modes is "best" is a subjective one, based on the state of mind of the inventor at the time of filing the patent application, commercial potential is often an objective measure of the best mode. Such factors as process efficiency, raw materials cost, process yield, process simplicity, and equipment cost would be important considerations in a best mode determination.

"Carrying out" and "practicing" an invention are terms of art. As used herein, they refer to the series of steps necessary to produce the invention. This series of steps is embodied in the patent application.

5. *See In re* Nelson, 280 F.2d 172 (C.C.P.A. 1960).

6. Flick-Reedy Corp. v. Hydro-Line Mfg. Co., 351 F.2d 546 (7th Cir. 1965), *cert. denied,* 383 U.S. 958 (1966).

7. Such misuse would result if the patent monopoly were unlawfully extended beyond the seventeen year statutory period.

vention in the patent application. If a patent were granted in this instance, the patentee would enjoy patent and trade secrecy protection[8] for the single invention. The best mode disclosure requirement effec-

8. A common law trade secret

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

RESTATEMENT OF TORTS § 757, Comment b (1939).

In contrast, the subject matter which is patentable is limited to a "process, machine, manufacture, or composition of matter or . . . improvement thereof," 35 U.S.C. § 101 (1970), which fulfills the conditions of novelty and utility as specified in 35 U.S.C. §§ 101 and 102, and nonobviousness as set forth in 35 U.S.C. § 103.

Section 101 states:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

35 U.S.C. § 101 (1970).

Section 102 states:

> A person shall be entitled to a patent unless —
> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or
> (c) he has abandoned the invention, or
> (d) the invention was first patented or caused to be patented, or was the subject of an inventor's certificate, by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application for patent or inventor's certificate filed more than twelve months before the filing of the application in the United States, or
> (e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or . . .
> (f) he did not himself invent the subject matter sought to be patented, or
> (g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

35 U.S.C. § 102 (Supp. V 1975).

Section 103 states:

> A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

35 U.S.C. § 103 (1970). Patent and trade secrecy protection are mutually exclusive, and the inventor or the corporate proprietor of the invention must choose one form of protection for a given invention. Trade secrecy protection can be elected for all of the following: (a) clearly patentable inventions that are not patented, (b) doubtfully patentable inventions, and (c) clearly unpatentable inventions. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974). Patent misuse results, however, when the inventor or corporate proprietor of the invention attempts to enjoy the benefits of both forms of protection simultaneously for a single invention, and this can result if there is a deliberate withholding of the disclosure of the best mode from the patent application in contravention of 35 U.S.C. § 112.

tively obviates this problem by insuring that the most preferred means of carrying out the invention is disclosed in the patent application. Thus, it is wise from a public policy viewpoint that the inventor be required to set forth in the patent application the *best* mode for practicing the invention.

The burden of insuring that the substantive disclosure requirement has been satisfied falls jointly upon the inventor and the attorney. The inventor has the obligation of sufficiently informing the attorney who is writing the patent application as to the best mode of carrying out the invention so that the attorney can properly incorporate this information into the application. The standard for measuring the sufficiency of the information is that knowledge possessed by the inventor at the time of filing the patent application.[9] Thus, information relevant to best mode not known to the inventor at the time of filing is outside the scope of the disclosure requirement. In this regard, the inventor is at all times held to a good faith standard[10] in the role as applicant for a patent in order to preclude the concealment of any information within the inventor's knowledge that might have a bearing on full disclosure of the best mode.

The attorney has an affirmative duty to insure that the best means of practicing the invention has been incorporated into the patent application prior to filing. Such a duty requires that the attorney become thoroughly familiar with the invention and the inventor's thoughts regarding the best means, of carrying out the invention. From a procedural standpoint, in view of the time period between the inventor's written invention disclosure and the filing of the completed patent application, it is suggested that the attorney consult with the inventor just prior to filing the application in order to obtain a confirmation that the best mode has been included in the application. Of course, a timely filing of the application after receipt by the attorney of the invention disclosure will minimize the likelihood of changes in the best mode.

By way of illustration, assume that an inventor conceives of an invention on May 1, and reduces it to practice on May 15, using laboratory experiments. An invention disclosure detailing the conception and reduction to practice is completed by the inventor on May 20 and

9. *See* note 4 *supra.*

10. The good faith standard requires honesty and candor as to both disclosures that relate to the invention and disclosures that have a bearing on relevant prior art. As is discussed below, a violation of the good faith standard that is tantamount to intentional fraud provides a basis for the assertion of an antitrust violation under the landmark Supreme Court case of Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1975). *See* discussion p. 260 *infra.* In contrast, not only will an honest mistake by the inventor as to best mode not provide a basis for assertion of an antitrust violation under *Walker Process,* but also such a mistake will not provide a basis for a holding of patent invalidity, *see* note 35 *infra.*

received by the attorney on June 1. The attorney consults with the inventor and is assured that the project report includes a best mode example. The attorney completes the preparation of a patent application containing the best mode example on August 15 and arranges a conference with the inventor the following day for the signing of the inventor's declaration.[11] At the conference, another best mode check is made, this time in order to determine whether a better means of practicing the invention has been devised by the inventor during the period from the writing of the invention disclosure (May 20) to date (August 16). Such an improvement might result, for example, from additional experimental work conducted by the inventor for the purpose of removing flaws from the invention prior to scale-up from the laboratory to the production plant and subsequent commercial production.[12]

By the above procedure, the attorney can preclude the successful assertion of best mode as a defense to patent infringement. In other words, the attorney can assure that the patent owner will not lose the right to enforce the patent against infringers for failure to disclose best mode.

II. INTERPLAY WITH ANTITRUST LAW AND TRADE SECRECY

A. Antitrust Law

There is an apparent conflict between the public policy objective of free competition in the marketplace and the goal of protecting the proprietary interests of the inventor. Antitrust laws such as the Sherman Act[13] and the Clayton Act,[14] and supplements to antitrust legislation such as the Federal Trade Commission Act,[15] seek to promote the

11. 35 U.S.C. § 115 (1970).

12. In actual practice, multiple informational exchanges between the attorney and the inventor and re-drafting of the application are usually necessary. In this respect, the illustration in the text is simplified.

13. Sherman Act, 15 U.S.C. §§ 1-7 (1970). Section 1 states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations is declared to be illegal. . . ." *Id.* Section 2 states: "Every person who shall monopolize, or attempt to monopolize, or combine with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ." *Id.*

14. Clayton Act, 15 U.S.C. §§ 12-27 (1970). Although there is considerable overlap, the Clayton Act is generally more specific in its prohibitions than is the Sherman Act. The provision related to patents is section 3 of the Clayton Act, 15 U.S.C. § 14 (1970). Section 3 states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . whether patented or unpatented, for use, consumption, or resale within the United States . . . or fix a price charged therefor . . . where the effect of such lease, sale, or contract . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Id.

15. 15 U.S.C. §§ 41-58 (1970). This act broadly prohibits unfair and deceptive trade practices and unfair competition.

former objective, while the patent statutes are directed toward the latter.[16] Absent best mode, such a dichotomy would operate in full force: the inventor could secure statutory patent protection by means of a second-rate public disclosure in the patent, thereby preventing others from practicing the invention. The best mode disclosure requirement resolves apparent patent monopoly/free competition conflict by providing a touchstone[17] for competitors who might seek to improve upon the method set forth by the inventor in his or her filing.[18]

B. Trade Secrecy

As has been indicated above, the best mode disclosure requirement prevents the simultaneous enjoyment of both patent and trade secrecy protection for a single invention.[19] Without such regulation, the inventor (or corporate proprietor) would enjoy statutory patent protection for a seventeen year period[20] in exchange for disclosure of an inferior mode.[21] At the same time, the inventor would enjoy trade secrecy protection for a period of unlimited duration on the best mode. Since there is no preemption of state trade secrecy by the federal patent laws,[22] the result would likely be the demise of both systems of protection. In the presence of best mode, however, the conflict disappears and the inventor must elect one form of protection[23] or the other. In the instance where trade secrecy is chosen, the inventor has one year of use of a patentable invention under secrecy before there will be forfeiture of any right to patent protection.[24] Adherence to the best mode disclosure requirement, therefore, actually promotes competition by providing individual and corporate competitors with information of great commer-

16. There are clear personal property rights in a patent. 35 U.S.C. § 261 (1970). Section 261 states:

> Subject to the provisions of this title, patents shall have the attributes of personal property.
>
> Applications for patent, patents, or any interest therein, shall be assignable in law by any person by an instrument in writing. The applicant, patentee, or his assigns or legal representatives may in like manner grant and convey an exclusive right under his application for patent, or patents, to the whole or any specified part of the United States.

17. *See* note 4 *supra* and accompanying text.

18. A competitor can in this manner obtain a patent on the new invention provided that it is patentably distinct from the original patent.

19. *See* note 8 *supra* and accompanying text.

20. 35 U.S.C. § 154 (1970).

21. What is being postulated here is the absence of the best mode disclosure requirement. In the face of the requirement, the inventor would not necessarily have his cake inasmuch as the failure to disclose best mode would, if discovered, provide a basis for a holding that the patent is invalid and unenforceable against an alleged infringer.

22. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 491-92 (1974), *rev'g* 478 F.2d 1074 (6th Cir. 1973).

23. *Id.*

24. 35 U.S.C. § 102(b) (1970).

cial potential[25] that otherwise would no doubt be concealed under a trade secrecy agreement.[26]

Thus, one cannot enjoy both patent and trade secrecy protection for the elements of best mode prior to the filing date. However, improvements made after filing would be prime targets for trade secrecy protection. In light of this consideration, good corporate planning would militate in favor of an early filing after reduction to practice in order to maximize the amount of information (*e.g.*, pilot plant and full-scale processing information) that would be protectible under trade secrecy.

C. Enforcement

Further possibilities for the interplay among antitrust, trade secrecy and the best mode requirement are available in the area of enforcement. Under current law, an alleged infringer may challenge the validity of a patent on best mode grounds.[27] As a logical extension, equitable relief is presumably available on the theory of patent misuse when the patentee attempts to enforce patent rights while, at the same time, retaining protection for the best mode under trade secrecy. In such an instance, an alleged infringer can arguably go beyond asserting failure to disclose best mode as a defense and can raise an antitrust violation as a counterclaim.[28] For example, the alleged infringer might assert that the

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25. *See* note 4 *supra.*

26. Secrecy agreements are commonly used to preserve a trade secret. A typical secrecy agreement is given below:

> Company X and Company Y covenant and agree on behalf of their companies, officers, directors, employees and agents that each will maintain in strict confidence all technical information relating to Process A; with the proviso that each company is not precluded from disclosing information that was known to that company prior to the time of a disclosure by the other company.
> No license to any patents of Company X or Company Y is granted by virtue of the disclosures of said technical information pursuant to this agreement.
> This agreement shall terminate Z years from the date given below.
>
> _____
> Signature (Company X)
>
> _____
> Signature (Company Y)
>
> Agreed to this_____day of _____19____.

27. Statutory basis for asserting the defense for failure to comply with 35 U.S.C. § 112 is provided in 35 U.S.C. § 282 (1970).

28. To date there has been no case in which an antitrust counterclaim has been coupled with a best mode defense in an infringement suit. However, in the future such a defense should be recognized where the failure to disclose best mode rises to the level of an antitrust violation. If the counterclaim is based on section 2 of the Sherman Act, as would most probably be the case, all of the elements of at least one of the three types of monopoly offenses (*i.e.*, monopolization, attempt to monopolize or conspiracy to monopolize) would have to be proven. If the counterclaim is based

patentee's wrongful conduct amounted to an unreasonable restraint of trade in violation of section 1 of the Sherman Act[29] and/or a monopoly offense in violation of section 2 of the Sherman Act.[30] To sustain a cause of action for one of these antitrust violations, the defendant counterclaimant must prove all of the necessary elements of the offense, *i.e.* competitive injury resulting from the anticompetitive conduct proscribed by law. Proof of such an antitrust violation would give rise to the recovery of treble damages under section 4 of the Clayton Act.[31]

To date, defendants in infringement suits who have raised best mode as a defense appear to have done so, almost as an afterthought, in connection with other arguments such as anticipation by prior art or obviousness over prior art. However, since some circuit courts have been receptive to the best mode defense, as demonstrated by case law set forth below, it can be expected that defendants will be encouraged to use it more extensively in the future.

III. RECENT CASE LAW

A substantial body of case law concerning the meaning of the best mode requirement has developed at federal district court and the court of appeals levels during recent years. One significant piece of dictum suggested that the best mode requirement does not allow the inventor to disclose only the "second-best embodiment, retaining the best for himself."[32] In another case, the court addressed the public policy of requiring best mode disclosure in order to prevent the concealment of "preferred embodiments" of the invention.[33] These statements provided the foundation for the increased assertion of failure to disclose best mode as a defense to a suit for patent infringement.

In *Benger Laboratories Ltd. v. R.K. Laros Co.*,[34] the defendants asserted undisclosed best mode as a defense to patent infringement. The federal district court found that, at the time the patent application was filed, there was an active in-house dispute between the plaintiff's manufacturer and the inventor as to which of two methods of practicing the invention was preferred. In fact, the dispute was not settled until

on section 1 of the Sherman Act, it would be necessary to prove an *actual* unreasonable restraint of trade resulting from concerted action involving the patentee.

29. *See* note 13 *supra.*

30. *Id.*

31. 15 U.S.C. § 15 (1970).

32. *In re* Nelson, 280 F.2d 172, 184 (C.C.P.A. 1960).

33. *In re* Gay, 309 F.2d 769 (C.C.P.A. 1962). The court stated: "Manifestly, the sole purpose of this latter requirement [the best mode] is to restrain inventors from applying for patents while at the same time concealing from the public preferred embodiments of their inventions which they have in fact conceived." *Id.* at 772. *See also In re* Bosy, 360 F.2d 972 (C.C.P.A. 1966).

34. 209 F. Supp. 639 (E.D.Pa. 1962), *aff'd*, 317 F.2d 455 (3d Cir.), *cert. denied*, 375 U.S. 833 (1963).

two years after the patent application was filed. The court held that in view of the inventor's doubt as to which mode was better, the disclosure of one mode was sufficient to satisfy the disclosure requirement. The court pointed out two important factors regarding the best mode disclosure: (a) that there be disclosure of the best mode *known* to the inventor at the time of filing, and (b) that the inventor act in good faith in his patent disclosure.[35] The court of appeals affirmed, stating that there had been "sufficient disclosure, good faith and no concealment"[36] on the plaintiff's part.

In *Flick-Reedy Corp. v. Hydro-Line Mfg. Co.*,[37] patent invalidity was asserted as a defense to alleged patent infringement of two patents by Hydro-Line. The best mode issue was raised with respect to one of the patents which encompassed a sealing device for preventing the escape of fluid from pressurized hydraulic cylinders. The device employed a machined surface which had a sealing relationship with another surface "described in terms of 'absolute concentricity,' 'zero clearance' and a 'metal to metal contact . . . [which] performs the function of sealing against fluid leakage. . . .' "[38] The patent specification did not indicate how this machined surface was produced except by saying that a "special tool"[39] was used. The president of plaintiff's company indicated that plaintiff had elected to keep the "special tool" a trade secret and that one skilled in the relevant art would not know what was meant by the term "special tool."[40] In affirming the district court's holding that that patent was invalid for failure to disclose the best mode, the court of appeals stated that to accept the patent monopoly and withhold the full disclosure required by 35 U.S.C. § 112[41] is the "selfish desire" against which this section is directed.

35. *Id.* The District Court stated:

> A patentee must disclose the best method known to him to carry out the invention. Even if there is a better method, his failure to disclose it will not invalidate his patent if he does not know of it or if he does not appreciate that it is the best method. It is enough that he act in good faith in his patent disclosure. On the other hand, if he knows at the time the application is filed, of a better method to practice the invention and knows it for the best, it would make no difference whether or not he was the discoverer of that method.

Id. at 644.

36. 317 F.2d 455, 456 (3d Cir. 1963).

37. 351 F.2d 546 (7th Cir. 1965), *cert. denied*, 383 U.S. 958 (1966).

38. *Id.* at 550.

39. *Id.*

40. Flick-Reedy's president stated:

> Your Honor, there are times when you could apply for a patent, I believe, but the enforcement thereof, where it is a tool used for an exclusive purpose in a plant, the enforcement thereof would be most difficult, and you may try to keep the information of a secret nature. . . . This is what we elected to do.

Id.

Obviously, Flick-Reedy was attempting to enjoy patent protection and trade secrecy protection simultaneously. *See* note 8 *supra* and accompanying text.

41. *See* note 4 *supra*.

The difference in the court's holding in *Flick-Reedy* from that in *Benger* is attributable to the differences in (a) the inventor's conception of the best mode at the time of filing the patent application, and (b) the inventor's reason for non-disclosure. In *Benger,* where the inventor was not certain as to which of two modes was the best, the non-disclosure was apparently in good faith. The inventor in *Flick-Reedy,* however, knew what the best mode was and intentionally attempted to conceal it.

In *Engelhard Industries, Inc. v. Sel-Rex Corp.,*[42] plaintiff brought an action in federal district court for a declaratory judgment on the validity of defendant's patent, alleging: (a) insufficient disclosure,[43] (b) failure to particularly point out and distinctly claim the subject matter of the invention,[44] (c) anticipation[45] and (d) obviousness.[46] Although the best mode question was not expressly raised by the plaintiff, the court held that it was impliedly brought into issue by reference to the appropriate statutory section,[47] since laboratory experiments showed the product produced by the invention to be of poor quality. The court, relying on *Benger,*[48] ruled the patent invalid for failure to disclose the best method known by him at the time of filing. The district court also held the patent to be invalid on the basis of obviousness, and the court of appeals affirmed on that basis, without discussing best mode.

Another court went even further in extending the best mode disclosure requirement by holding a patent invalid for failure to disclose the "specific recipe" of a given composition, even though such a composition fell within the preferred ranges given in the patent application. In *Indiana General Corp. v. Krystinel Corp.,*[49] the invention, which related to ferrite materials, was disclosed in terms of broad ranges of the elements of the preferred composition, ranges which the federal district court found "extended beyond the area representing significant technological advancement."[50] The patent was held invalid for failure to disclose best mode, and this holding was affirmed by the court of appeals with no discussion of best mode.

The *Indiana General* decision demonstrates courts' concern that the public not be prevented from duplicating a patentee's most preferred form of the invention because of an obscure disclosure in the patent

42. 253 F. Supp. 832 (D.N.J. 1966), *aff'd,* 384 F.2d 877 (3d Cir. 1967).
43. 35 U.S.C. § 112 (1970). *See* note 4 *supra.*
44. 35 U.S.C. § 112, para. 2 (1970).
45. 35 U.S.C. § 102(e) (1970). *See* note 8 *supra.*
46. 35 U.S.C. § 103 (1970). *See* note 8 *supra.*
47. 35 U.S.C. § 112 (1970).
48. 209 F. Supp. 639 (E.D.Pa. 1962), *aff'd,* 317 F.2d 455 (3d Cir.), *cert. denied,* 375 U.S. 833 (1963).
49. 297 F. Supp. 427 (S.D.N.Y. 1969), *aff'd,* 421 F.2d 1023 (2d Cir. 1970).
50. *Id.* at 439.

application, especially if such unclear disclosure is intentionally made in order to prevent discovery by the public of a product or process having commercial value.

The unclear disclosure problem was extended to unintentional failure to disclose in a more recent decision. In *Dale Electronics, Inc. v. R.C.L. Electronics,*[51] the court of appeals affirmed the district court's holding and stated the "unintentional obtuseness might be reason not to penalize someone; we do not see it as a reason for granting a seventeen year monopoly."[52]

The invention in *Dale Electronics* involved a beryllium oxide-core electrical resistor. The patentee knew at the time of filing, but did not disclose, that a commercial resin composition "Rogers RX 600" was a particularly preferred insulator for their resistors. After the district court's holding of invalidity for failure to disclose best mode, appellant filed to reissue the patent. In *In re Hay,*[54] the Court of Customs and Patent Appeals affirmed the rejection by the Board of Appeals of the Patent and Trademark Office of the reissue applications, holding that granting a reissue application would violate the "no new matter" clause in the relevant statutory provision.[55]

Two more recent decisions further delineate the limits of the best mode disclosure requirement with respect to the inventor's knowledge at the time of filing.

Union Carbide Corp. v. Borg-Warner Corp.[56] concerned a suit brought by Union Carbide in federal district court[57] for alleged patent infringement by Borg-Warner. The district court found in favor of the defendants, holding: (a) claim 1 of the patent in issue was invalid because the process disclosed had been anticipated by prior art[58] and was obvious[59] in view of prior art, and (b) the patent was invalid in its entirety for failure to disclose the best mode contemplated to carry out

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51. 488 F.2d 382 (1st Cir. 1973), *modifying* 356 F. Supp. 1117 (D.N.H. 1973).
52. *Id.* at 389.
53. 35 U.S.C. § 251 (1970). Section 251, para. 1 states:

Whenever any patent is, through error without any deceptive intention, deemed wholly or partly inoperative or invalid, by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than he had a right to claim in the patent, the commissioner shall, on the surrender of such patent and the payment of fee required by law, reissue the patent for the invention disclosed in the original patent, and in accordance with a new and amended application, for the unexpired part of the term of the original patent. No new matter shall be introduced into the application for reissue.

54. 534 F.2d 917 (C.C.P.A.) *cert. denied,* 429 U.S. 977 (1976).
55. 35 U.S.C. § 251 (1970). *See* note 53 *supra.*
56. 550 F.2d 355 (6th Cir. 1977), *aff'g,* 430 F. Supp. 1 (N.D. Ohio 1975).
57. 430 F. Supp. 1 (N.D. Ohio 1975).
58. 35 U.S.C. § 102(e) (1970). *See* note 8 *supra.*
59. *Id.* § 103. *See* note 8 *supra.*

the invention.[60] The Court of Appeals for the Sixth Circuit affirmed on the basis of best mode.

Union Carbide's patent[61] contained process claims for the molding of foamed thermoplastic articles. The claimed process was carried out using an apparatus that was illustrated by a drawing and description given in the specification as containing, *inter alia,* an extruder and a valve.[62] The facts brought out at trial indicated that a specially designed extruder and an improved valve had been developed, subsequent to the reduction to practice but prior to the filing of the patent application, for use in a pilot plant installation. The court of appeals held that, since the undisclosed improved valve and the undisclosed specially designed extruder were part of the best mode contemplated by the inventor to carry out the invention at the time of filing the patent application, the failure to disclose best mode caused the patent to be invalid.

In *Lockheed Aircraft Corp. v. United States,*[63] Lockheed sought compensation from the United States for use of a patented radar device. Disclosure was made in the patent specification of a broad band height finding receiver and a range detection receiver for use in the

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60. *Id.* § 112. *See* note 4 *supra.*

61. U.S. Patent 3,268,637. Claim 1 of the patent reads:

> 1. Process for molding foamed thermoplastic articles which comprises the steps of
> (a) melting a mixture of a blowing agent and a foamable thermoplastic material in an extruder at a temperature above the foaming temperature of said blowing agent and at a pressure above the foaming pressure thereof;
> (b) extruding the resulting molten mixture into an expanding accumulation zone while maintaining said mixture therein in the molten state and at a pressure above the foaming pressure thereof;
> (c) establishing communication between said accumulation zone and a mold maintained at a pressure no greater than the foaming pressure of said molten mixture;
> (d) rapidly forcing said molten mixture from said accumulation zone into said mold whereby the pressure differential between said accumulation zone and said mold causes said mixture to rapidly expand in said mold.

Union Carbide Corp. v. Borg-Warner Corp., 550 F.2d 355, 356-57 (6th Cir. 1977).

62. *Id.* The extruder is referred to specifically in steps (a) and (b) of claim 1, and the valve is referred to generically in steps (c) and (d) of claim 1. Thus claim 1 defines a system including the specifically mentioned extruder, the valve disclosed in the specification, and any equivalents of the valve disclosed in the specification.

This author feels that no proper analogy can be drawn between the specially designed extruder and improved valve of the instant case and the "special tool" of *Flick-Reedy,* 351 F.2d 546 (7th Cir. 1965), *cert. denied,* 383 U.S. 958 (1966). Rather, the extruder and valve are analogous to the "improved equivalent" discussed in Lockheed Aircraft Corp. v. United States, 553 F.2d 69 (Ct. Cl. 1977), *modifying* 190 U.S.P.Q. 134 (Ct. Cl. 1976), in connection with pulse compression. That is, those of ordinary skill in the art would be able to design an "improved equivalent" extruder or valve if given the information that an extruder and valve are required in a given system, whereas one of ordinary skill in the art would have little knowledge of what is meant by the vague term "special tool." The difference in outcome between the instant case and *Lockheed Aircraft* appears to be attributable to the fact that the inventor in *Lockheed* was not "personally familiar" with pulse compression at the time of filing, whereas the Court in the instant case found evidence that the inventor was familiar with the improved valve and specially designed extruder.

63. 553 F.2d 69 (Ct. Cl. 1977), *modifying* 190 U.S.P.Q. 134 (Ct. Cl. 1976).

radar device,[64] and the issue was whether the patent was infringed by government radar equipment that used pulse compression for height and range detection.[65] The court concluded that there was equivalence of the devices within the system disclosed in claim 1 of Lockheed's patent, and held the United States was liable for compensation.[66] In addressing the best mode disclosure requirement, the court referred to *Jack Winter, Inc. v. Koratron Co.*,[67] asserting that the patentee need not disclose all conceivable modes for practicing the invention but only the mode considered to be best at the time of filing.[68]

It is clear that the courts recognize an obligation to disclose all pertinent information known by the inventor regarding best mode at the time of filing. Failure to disclose any such information, whether intentional or inadvertent, will result in a holding of patent invalidity if the patent is contested. However, the circuit courts do not agree as to what constitutes "pertinent" information. The courts appear to balance the equities on a case-by-case basis, often following lines of authority that are the opposite of those followed by other courts. The problem of conflicting decisions is compounded by the fact that the United States Supreme Court is loath to hear patent litigation, so that forum shopping will tend to continue in the best mode area.

IV. POSITION OF THE PATENT AND TRADEMARK OFFICE

The Patent and Trademark Office,[69] in its *ex parte* examination of applications for patentability, does not have access to the extensive

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64. Claim 1 of Lockheed's patent recited the elements of the radar device in "means plus function" terminology. For example, the disclosed broad band height finding receiver corresponded to the following recitation in claim 1:

> receiving means connecting with said antenna means and being responsive to the electromagnetic energy reflected by the remote object from two energy paths, one path being on a direct line of sight between the antenna means and the remote object and the other path being indirect from the object to the antenna means via a reflection off the surface of the earth, ...

Id. at 82. Likewise, the disclosed range detection receiver corresponded to the following recitation in claim 1: "means responsive to both the transmitted and received energy and providing an output representing the range of the remote object, ..."
Id.

65. In determining whether or not the pulse compression radar equipment infringed claim 1 of Lockheed's patent, the Court applied the "doctrine of equivalents" and concluded that pulse compression is the equivalent of the broad band height finding receiver and the range detection receiver within the "means plus function" terminology of claim 1. *Id.* at 82-83.

66. In order to be equivalents, the infringing device must perform substantially the same work in substantially the same manner to achieve substantially the same result. For a discussion of the "doctrine of equivalents," *see generally* Tektronix Inc. v. United States, 445 F.2d 323 (Ct. Cl. 1970).

67. 375 F. Supp. 1 (N.D. Cal. 1974).

68. *See* text accompanying note 4 *supra* and discussion p. 251 *supra*.

69. The Patent and Trademark Office is also referred to herein as "the Office."

discovery available in *inter partes* courtroom proceedings. In view of this fact, the current rule governing examiners is that "[o]ffice practice is to accept an operative example as sufficient to meet this requirement of the [s]tatute in the absence of information to the contrary."[70] The Board of Appeals has indicated that the Patent and Trademark Office does not currently inquire as to whether any mode "adequately disclosed" is the best mode.[71] Consequently, the presence of at least one working example in a patent application will result in a *prima facie* presumption that the best mode requirement has been satisfied. Furthermore, the absence of a working example does not remove, or in any way alter, this presumption.[72]

The patent office policy concerning best mode disclosure was obviously borne out of necessity. First, each examiner spends an average of only about seventeen hours on the examination of an application,[73] devoting half of that time to a prior art search, and therefore, no time exists for a best mode investigation. Second, the examiner does not have access to such information as laboratory notebooks and project reports that would have a bearing on the best mode issue. Third, the examiner has no laboratory in which to independently verify that the applicant's preferred embodiments of the invention produce the most effective result. Provided current office practice remains in force, patents will be granted on applications regardless of best mode requirements.

In the future, however, as the best mode defense becomes increasingly asserted in the courts, there will undoubtedly be an impetus to gain assurance of best mode compliance at the application stage. This can be obtained by requiring submission to the examiner of either evidence bearing on the best mode, such as laboratory notebooks and project reports, or an inventor's declaration of compliance. Considering the stringent time constraints under which examiners work,[74] the inventor's declaration is probably the most practical means of obtaining assurance of compliance. It could be implemented by a simple averment.[75] Naturally, a good faith standard would apply to such a statement.

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70. Manual of Pat. Examiner's Proc. § 608.01(h) (Rev. 44, Apr. 1975).

71. *In re* Brebner, 455 F.2d 1402 (C.C.P.A. 1972).

72. *In re* Honn, 364 F.2d 454 (C.C.P.A. 1966). The Board of Appeals stated: "Certainly the absence of a specific working example is not necessarily evidence that the best mode has not been disclosed, nor is the presence of one evidence that it has." *Id.* at 462.

73. Address by C. Marshall Dann, former Commissioner of Patents and Trademarks, Wichita Manufacturers Association, *quoted in* 254 PAT., T.M. & COPYRIGHT J. A-16 (BNA Nov. 20, 1975).

74. *See* Dann, *supra* note 73, and accompanying text.

75. An appropriate statement would be the following which is contained on all declaration filing forms pursuant to 37 C.F.R. 1.65: "that I acknowledge a duty to disclose the best mode for carrying out the invention of which I am aware."

The declaration requirement would have a positive effect on the patent system. First, the "double standard" that presently exists with respect to best mode between the application and validity stages would be eliminated, thus producing consistent application of the best mode clause of section112.[76] Second, the legal sanctions associated with a fraudulent declaration, as set forth below, would insure a strengthened presumption of validity[77] upon patent issuance. Third, a false declaration by the inventor would provide a basis for an allegation of fraudulent procurement of the patent and, hence, fraud on the Patent and Trademark Office. In this regard, a distinction must be made between intentional fraud and a good faith honest mistake or so-called "technical fraud." Under the rationale of *Walker Process Equipment, Inc. v. Food Machinery & Chemicals Corp.*,[78] a patent obtained by intentional fraud can be the basis both for a counterclaim for a declaratory judgment of patent invalidity and for a counterclaim of antitrust violation under section 2 of the Sherman Act.[79] As has been previously stated,[80] provided that monopolization or an attempt to monopolize under section 2 is established, the treble damage provisions of section 4 of the Clayton Act would be available. Instead of awaiting the filing of a threatened suit by the patentees in the instance where the patent has been obtained by intentional fraud, the injured party can bring an action for a declaratory judgment.[81]

V. A GREATER CONFLICT

The differences between the policies of the Patent and Trademark Office and those of the courts lead to unsatisfactory situations. A patent is granted on an application that does not satisfy the best mode requirement, and only after extended litigation and many thousands of dollars in legal fees is the patent ruled invalid. In this regard, however, best mode does not stand alone. It is part of a more pervasive problem, termed "the crisis of law in patents,"[82] which arises because patents are subjected to different standards in the courtroom than those used during the application stage. Furthermore, the standards vary among the courts. As a result, at least fifty percent of litigated patents are held in-

76. *See* notes 3 and 4 *supra.*
77. 35 U.S.C. § 282 (1970).
78. 382 U.S. 172 (1975).
79. 35 U.S.C. § 115 (970). *See* note 13 *supra.*
80. *See* discussion p. 253 *supra.*
81. 28 U.S.C. § 2201 (1970).
82. I. KAYTON, *The Crisis of Law in Patents,* in PATENT PROPERTY: CASES AND READINGS 214 (5th ed. 1975). Professor Kayton discusses mainly differences in circuit court standards regarding the section 103 "nonobviousness" defense. However, the term is equally applicable to the different standards among the Office and the various circuit courts applied to best mode.

valid.[83] Considerable criticism,[84] of the patent system has been accompanied by numerous reform proposals.[85] Two are relevant to best mode. Under one plan, a National Court of Appeals - composed of judges having expertise in patent law and technology - would provide uniform application of the patent laws.[86] The second proposal suggests the use of *inter partes* proceedings to permit third party participation in validity determinations before the Patent and Trademark Office.[87] The suggested *inter partes* proceedings are mainly directed toward uncovering prior art not considered by the examiner or prior use or sale. Absent rather extensive discovery provisions, these proceedings would not be effective in uncovering best mode problems.

Although commentators have suggested that the patent bar is opposed to the implementation of any legislation that would strengthen the presumption of patent validity,[88] such assertions are of questionable merit. Rather, there seems to be no clear consensus within the bar as to the best means of strengthening the presumption without damaging the patent system as a whole.

VI. ILLUSTRATIVE EXAMPLES

In order to expand upon previously discussed case law, the following illustrative examples are offered.

Example A: Inventor A, employed by Company X, is involved in a heated dispute with Company X's manufacturer concerning which of two methods is better for practicing his invention. Will the disclosure of only the inventor's preferred method satisfy the disclosure requirement?

The answer according to *Benger*[89] is yes. However, this case cannot be relied upon with any degree of assurance today. In view of the trend toward the increasing assertion of disclosure requirements at the validity stage, good practice would require the disclosure of both methods. Extending this reasoning, the applicant should disclose in detail

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83. *See* Dann, *supra* note 73. This is a conservative estimate. Some commentators have suggested that as many as seventy percent of litigated patents are held invalid.

84. *See* remarks by Mr. Tom Arnold, American Patent Law Association Symposium: Improving the Patent System, Wash., D.C. (Oct. 20, 1972), *quoted in* AM. PAT. L. A. BULL. 662 (Oct.-Nov. 1972).

85. *See generally* Pegram, *Current Proposals for Inter-Partes Proceedings*, 4 AM. PAT. L.A.Q.J. 56, 66-76 (1976).

86. *Id.* at 59.

87. *Id.* at 66-76.

88. *See* remarks of Mr. Bernard Nash, Assistant Counsel for the Senate Subcommittee on Antitrust and Monopoly, Industrial Research Institute (Oct. 18, 1976), *quoted in* 301 PAT., T.M. & COPYRIGHT J. (BNA Oct. 28, 1976).

89. 209 F. Supp. 639 (E.D. Pa. 1962), *aff'd*, 317 F.2d 455 (3d Cir.), *cert. denied*, 375 U.S. 833 (1963).

elements of the invention that are considered to be "more desirable," "more preferred," or "most advantageous." If there is any doubt as to the significance of any particular element, disclosure should be made.

Example B: A patent owned by Company Y is declared invalid in district court for failure to satisfy the best mode disclosure requirement. May Company Y obtain a reissue patent on a reissue application that incorporates the inadvertently omitted material into the reissue application?

No. *In re Hay*[90] should control. Assume further that the patent does contain the best mode disclosure, but in the validity proceedings it is determined that an earlier filed application, upon which the patentee has relied for priority purposes under section 120,[91] did not satisfy the best mode requirement. Does the patentee have the benefit of the application for priority? Although no court has yet considered this question, the answer is probably negative, especially if the nondisclosure in the application was intentional.

Example C: Company Z owns a patent on a device. A part for the device is produced according to the specification using a "special tool." Company Z intended to retain trade secrecy protection for the "special tool," and therefore provided no description in the patent of the tool. Is the patent invalid for nondisclosure of best mode?

On the basis of *Flick-Reedy,*[92] an affirmative answer should be given. However, it should be noted that in *ITT Corp. v. Raychem Corp.,*[93] an opposite result is reached on a similar set of facts. Despite these opposing lines of authority, good practice requires that disclosure be made on any similar factual context. However, in the instance where the "special tool" is well-known by those skilled in the art to which the invention pertains, a brief description of the nature of the tool would suffice.

Example D: Inventor B is aware of certain apparatus improvements made in a pilot-plant scale-up of an invention on a process that was reduced to practice without the improvements. The improvements were made prior to the filing of the patent application, but they were not in-

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90. 534 F.2d 917 (C.C.P.A.), *cert. denied,* 429 U.S. 977 (1976).

91. 35 U.S.C. § 282 (1970).

92. 351 F.2d 546 (7th Cir. 1965), *cert. denied,* 383 U.S. (1966).

93. 538 F.2d 453 (1st Cir. 1976), *cert. denied,* 429 U.S. 886 (1977). This case concerned a patent on insulated wire. The argument of patent invalidity for non-disclosure of a compound used in the process of manufacturing the wire was rejected by the court of appeals because (a) the patent claims covered the wire itself and not the process of manufacture and (b) the resulting properties of the wire were unaffected by the use of the non-disclosed compound. The conflict of this holding with *Flick-Reedy,* 351 F.2d 546 (7th Cir. 1965), *cert. denied,* 383 U.S. 958 (1966), is apparent. This author believes the holding in *Flick-Reedy* to be the better result, since it compels full disclosure of all information closely related to a patented product that is likely to give the patent owner a competitive advantage in product manufacture over one who does not have such information.

cluded in the apparatus and process description provided in the patent application. Is the subsequently obtained patent invalid for failure to disclose best mode?

Union Carbide[94] indicates that the patent would be invalidated. The inventor must set forth all information relative to best mode known to her personally prior to the filing of the patent application. However, based upon *Lockheed,*[95] information not known to her personally need not be disclosed. As has been stated, although there is no clear-cut rule as to the requisite extent of disclosure, a common sense approach to the inventor's knowledge at the time of filing is suggested. Some commentators have taken a conservative position toward best mode compliance — a position that this author fully supports.[96] Others argue that section 112 should be construed narrowly in order to maximize the amount of information protectible under trade secrecy before the filing date.[97] For example, it has been suggested that section 112 "does not require a disclosure of the best mode of *making* the invention."[98] Using this reasoning, it is asserted that in the instance where the claimed invention encompasses a process, the apparatus employed therein would be a candidate for trade secrecy protection.[99] Such an assertion is untenable in view of *Union Carbide*[100] where it is pointed out in substance that a claimed process cannot be carried out in a vacuum but must employ *some* apparatus, and the preferred aspects of the apparatus constitute an inherent part of the best mode disclosure. Thus, an extremely conservative posture should be taken regarding the withholding of *any* element of best mode for trade secrecy purposes prior to the filing date.

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94. 550 F.2d 355 (6th Cir. 1977), *aff'g* 430 F. Supp. 1 (N.D. Ohio 1975).

95. 553 F.2d 69 (Ct. Cl. 1977), *modifying* 190 U.S.P.Q. 134 (Ct. Cl. 1976).

96. *See generally* McDougall, *The Courts Are Telling Us: 'Your Client's Best Mode Must Be Disclosed,'* 59 J. PAT. OFF. SOC'Y 321 (1977); Bjorge, *Editorial Epilogue,* 59 J. PAT. OFF. SOC'Y 336 (1977).

97. *See* Honeycutt, *Preserving Know-How and Trade Secrets While Complying with Section 112, Fifteenth Southwestern Patent Conference,* 1977 PAT. L. ANN. 205 (BENDER 1977). Professor Roger M. Milgrim, the leading authority on trade secrets, endorses an approach that would achieve compliance with the patent statute while maximizing trade secrecy retention. *See* remarks by Prof. Roger M. Milgrim, A.B.A. Section of Patent, Trademark and Copyright Law (August 8, 1977), *quoted in* 1977 PROC. A.B.A. SECTION PAT., T.M. & COPYRIGHT J. 131, 138-43 (1977).

98. Honeycutt, *supra* note 96, at 212. Mr. Honeycutt distinguishes between "make and use" in the enablement portion of section 112, on the one hand, and "carrying out" in the best mode portion. *Id.* at 211. This distinction, although novel, does not stand up to an analysis of the plain language of the statute. Clearly, best mode requires a disclosure of the series of steps necessary to produce the claimed invention, and this disclosure would correspond to "making" the invention.

99. *Id.* at 214.

100. *See* discussion pp. 256-57 *supra.* Mr. Honeycutt relies on a restrictive interpretation of case law, *see, e.g.,* ITT Corp. v. Raychem Corp., 538 F.2d 453 (1st Cir. 1976), that does not represent the prevailing view. In light of Union Carbide Corp. v. Borg-Warner Corp., 550 F.2d 355 (6th Cir. 1977), an extremely conservative position toward disclosure is in order.

VII. CONCLUSION

The district and circuit courts have indicated that they are increasingly willing to entertain the best mode defense. The present liberal federal discovery rules[101] will facilitate the use of that defense in the future. Coupled with the possibility of antitrust counterclaims,[102] the best mode defense raises the probability of a further weakening of an already feeble presumption of patent validity.[103]

The outlook for the future, however, is far from hopeless. Admittedly, there is a need for both increased attorney sensitivity to best mode issues at the application stage, and for reform at the patent office level. No longer can the office rely on the practice of accepting an operative example as sufficient to satisfy the best mode requirement.[104] Rather, the best mode and "enabling disclosure" requirements of section 112[105] are distinct entities that must be given separate consideration by the office. Aside from strengthening the presumption of validity,[106] patent office inquiry into best mode might help to reduce litigation where best mode is the only defense available to an alleged infringer.[107]

The author favors reform by the patent office at the application stage through the requirement of an inventor's declaration of best mode compliance. The declaration requirement would be relatively easy to implement and would place virtually no additional demand upon the examiner. Abuse of the declaration requirement by the applicant would carry stiff sanctions based on fraudulent procurement and possible antitrust violations. The adoption of such a requirement would contribute to the smoother operation of our incredibly complex, yet remarkably adaptive, system for protecting and encouraging invention.

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101. *See, e.g.*, FED. R. CIV. P. 26(b).

102. *See* discussion p. 253 *supra.*

103. *See* note 82 *supra and accompanying text.*

104. *See* discussion p. 259 *supra.*

105. *See* note 4 *supra.*

106. *See* discussion p. 260 *supra.*

107. In view of the Speedy Trial Act of 1974, 18 U.S.C. §§ 3152-3156, 3161-3174 (Supp. IV 1974), which has effectively forced civil litigation to the bottom of the district court calendar, such a reduction, however small, would save the parties time and considerable expense.

Preparation and Presentation of the Oral Argument in a Court of Review†

*Michael Closen**
*Marc Ginsberg***

In this article, Professor Closen and Attorney Ginsberg address the widespread problem of deficient oral arguments in courts of review. Attention is given to the rules of procedure governing oral argument as well as an appropriate format for the arguments. Further, the authors offer practical suggestions designed to help one achieve skillful oral advocacy with special emphasis upon questions from the bench.

Increasing numbers of appellate cases are being decided without oral argument either because the parties decline to argue orally or the courts deny them the opportunity.[1] Furthermore, a few courts have reduced the amount of time allowed for the parties to argue.[2] This is a regrettable trend.

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†Due to the focus of this article, it was necessary to use personal pronouns frequently. For style and clarity, the authors have chosen to employ one gender referent throughout. Accordingly, all male pronouns should be read to include the female referent as well.

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1. *See* ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, *Standards Relating to Appellate Courts* (1977), § 3.35 "Oral Argument," pp. 56-57; Godbold, *Twenty Pages And Twenty Minutes — Effective Advocacy On Appeal,* 30 SW. L. J. 801, 801-02 (1976); Haworth, *Screening and Summary Procedures in the United States Courts of Appeals,* 1973 WASH. U.L.Q. 257, 265-69 (1973); *SJC To 'Summarily Affirm,'* MASS. L. WEEKLY, Dec. 5, 1977, at 1, col. 3.

2. In certain instances, the time limits for oral arguments have been reduced from the usual 30 minutes to only 15 or 20 minutes. "The Fifth Circuit, of necessity, now schedules the majority of its oral argument cases for twenty minutes to the side." Godbold, *supra* note 1, at 816. An earlier authority reported that to facilitate a determination on the advisability of oral argument, the Fifth Circuit has delineated four classes of cases, including those "in which the court concludes

> [O]ral argument gives important service to the imperatives of appellate justice. Specifically, it heightens the judges' sense of personal responsibility. It provides them with an opportunity to test their own thinking in a direct way with counsel available to correct error. Some judges assimilate ideas more readily by oral than by written transmission; and some ideas are more readily transmitted by oral means. Thus, the quality of decisions is likely to be enhanced.[3]

Although brief writing is the key medium for argument by the parties on appeal,[4] oral argument can enhance the decision-making process[5] if counsel artfully prepares and makes the presentation. Unfortunately, counsel does not often achieve this goal,[6] and therefore, more attention should be directed to the art of developing and presenting the oral argument.[7] While the general lack of skill in appellate practice has been attributed to the belief of many attorneys that the preparation of a record and brief is dull and uninteresting,[8] this explanation obviously has no application to the oral argument, which should be an exciting and challenging element in the appellate process.

The purposes of the oral argument are to supplement the persuasive impact of the briefs and to provide the court with the opportunity to clarify and test the arguments. These goals can be accomplished by counsel's selective emphasis of the important portions of the briefs and by explaining arguments in response to questions from the court. The reason that counsel may desire to orally supplement the briefs or that the court may need to verbally examine the theories of a party is that frequently the briefs are not well-written. Indeed, the oral argument "is a medium of communication that is superior to written expression for

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only 15 minutes oral argument per side would be helpful." Haworth, *supra* note 1, at 275.

3. P. CARRINGTON, D. MEADOR, AND M. ROSENBERG, JUSTICE ON APPEAL 17 (1976).

4. This article will not directly discuss brief writing. On that subject, *see generally* BOARD OF STUDENT ADVISORS, HARVARD LAW SCHOOL, INTRODUCTION TO ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT IN MOOT COURT COMPETITION (1970); M. PITTONI, BRIEF WRITING & ARGUMENTATION (3d ed. 1967); E. RE, BRIEF WRITING AND ORAL ARGUMENT (4th ed. 1974); F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS (1967).

5. ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, *supra* note 1, at 56; oral argument not only improves the appellate decision-making process but also contributes to the public visibility of the appellate process and, thus, to judicial accountability. *Id. See also* Jacobson, *The Arizona Appellate Project: An Experiment in Simplified Appeals,* 23 U.C.L.A. L. REV. 480, 481-82 (1976).

6. In 1947, Mr. Justice Wilkins of the Supreme Judicial Court of Massachusetts commented that "[a]lthough appellate argument is a common occurrence and represents the culminating competitive effort in the legal contest, it is probably a fact that this is the least qualitative accomplishment of the bar as a whole." Wilkins, *The Argument of an Appeal,* 33 CORNELL L. Q. 40, 44 (1947). Similar remarks have been made over the years. *See* Honigman, *The Art of Appellate Advocacy,* 64 MICH. L. REV. 1055, 1068 (1966); Jacobson, *supra* note 5, at 484.

7. For further reading on the subject of oral argument, *see* note 4 *supra.* Regrettably, the trend away from oral argument is likely to have a negative, rather than a positive, impact upon its quality.

8. Honigman, *supra* note 6, at 1068.

many appellate counsel and many judges."[9]

Although oral argument occurs in an adversary setting, counsel should strive to foster a conversational atmosphere. The oral presentation should approximate a discussion, a free exchange of ideas between counsel and the court. Certainly, the oral argument should not be a speech *to* the judges but rather a conversation *with* them. Only where a dialogue develops will counsel be able to fully achieve the objectives of emphasizing and clarifying issues.

Of course, counsel must be cautioned that to appeal a case is not necessarily synonymous with an obligation to argue it orally. In the interest of judicial economy, counsel should stand on the brief particularly in those instances in which there is no significant controversy.[10] Thus, if the facts are simple or undisputed, or if there is a clear legal precedent, a case should be submitted, if at all, on the briefs alone.

On the other hand, the great majority of cases will involve factual disputes and uncertainties concerning controlling precedents and will, therefore, be appropriate for oral argument. This article attempts to guide counsel in the preparation and presentation of the oral argument in a court of review. First, the general rules of court are considered along with the format for the arguments. Next, suggestions are made with respect to the appellant's argument, the appellee's argument, and the appellant's rebuttal. Then, various categories of common questions frequently asked by courts are identified and discussed. Finally, comments are offered regarding the actual delivery of the oral presentation.

I. RULES OF COURT

Many of the rules governing oral argument have been codified, and counsel should be certain to become familiar with the rules of the court in which he will argue. Thorough knowledge of the rules of appellate practice will spare counsel the substantial embarrassment of finding that he has violated a clear procedural rule. Although each jurisdiction, and even the courts of review within a jurisdiction, may have adopted individual appellate rules governing oral argument, there exists considerable uniformity throughout the country in both the state and federal courts.[11]

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9. ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, *supra* note 1, at 56.

10. If a potential appellant realizes that there is no major controversy presented by the adverse judgment of the trial court, a frivolous appeal should not be filed. The subject of frivolous appeals has received recent comment, Godbold, *supra* note 1, at 805, including the sanctioning of the frivolous appellant. *See* Note, *Heller v. Osburnsen: Slapping Down the Frivolous Appellant,* 38 MONTANA L. REV. 377 (1977).

11. *Compare* (in terms of time allowed, content of argument, stylistic requirements, etc.) SUP. CT. REV. R. 44, 45 *and* FED. R. APP. P. 34 (including the rules pertaining to the individual circuits); *and* CAL. PRAC. C. R. 22, 28(f); *and* ILL. SUP. CT. R. 352; *and* MASS. R. APP. P. 22, *and* N.Y. R. APP. P. ¶¶ 600.11(f), 670.22, 731.6, 732.6.

In almost every appellate court, a party who has filed a brief is automatically entitled to exercise the privilege of presenting an oral argument and will be informed of the actual date and time by the clerk.[12] Some courts have the additional requirement that a party make a formal request for oral argument.[13] However, in either instance, the filing of a brief is a condition precedent to entitlement to argue orally.[14] Within a reasonable time prior to the date set for oral argument, counsel may by motion or notice seek postponement of, or withdrawal from, the argument.[15] Certainly, to relinquish the opportunity will not constitute a waiver of the issues on appeal or a voluntary dismissal of the appeal, for the case is then submitted exclusively upon the briefs. Only one side in a particular case may choose to present an oral argument, and such procedure is recognized and approved by the rules.[16]

Oral argument is a privilege and not a right.[17] Therefore, a court of review may deny the parties an opportunity for an oral argument and dispose of the case solely upon the written briefs. While this procedure should be used sparingly, it will be employed in those cases which involve no substantial question.[18] Although one may decline to present an oral argument (or fail to request that opportunity where necessary), the appellate court may nevertheless order the parties to argue orally.[19] Such a mandate may issue where a case is especially significant or controversial and the court determines that it would be assisted by counsel's arguments.

The length of the oral arguments varies somewhat from court to court. However, as a general proposition, each side is allowed thirty minutes to argue its position.[20] If only one party is to present an argu-

12. *See, e.g.*, SUP. CT. REV. R. 44(6) (oral argument will not be heard if there is no brief filed) *and* 45(1) (the Court looks with disfavor on the submission of cases without oral argument); TEX. R. C. P. 423.

13. *See, e.g.*, ILL. SUP. CT. R. 352(a).

14. *See* Jacksboro Nat'l Bank v. Signal Oil & Gas Co., 482 S.W. 2d 339, 342 (Tex. Civ. App. 1972); Smith v. Virginia Transit Co., 206 Va. 951, 147 S.E. 2d 110, 112 (1966); ILL. SUP. CT. R. 352(a).

15. *See* FED. R. APP. P. 34(a) (postponement); ILL. SUP. CT. R. 352(a) (waiver); MASS. R. APP. P. 22(e) (postponement), 22(g) (waiver).

16. Such recognition and approval is evidenced by reduced time limits for oral argument if only one side argues. *See* ILL. SUP. CT. R. 352(b). *See also* MASS. R. APP. P. 22(e) (permits the appellate court to hear the oral argument of one side if the other fails to appear).

17. *See* F.C.C. v. W.J.R., The Goodwill Station, Inc., 337 U.S. 265 (1949); Sabatinelli v. Travelers Insurance Co., 1976 Mass. Adv. Sh. 384 (1976), 341 N.E. 2d 880, 882 (1976) (no constitutional right to appellate oral argument), and cases cited therein. *But see* Note, *Oral Argument — A New Constitutional Right?*, 37 LA. L. REV. 1260 (1977).

18. *See* ILL. SUP. CT. R. 352(a).

19. *See, e.g.*, SUP. CT. REV. R. 45; FED. R. APP. P. 34(f); ILL. SUP. CT. R. 352(g); MASS. R. APP. P. 22(g).

20. *See* SUP. CT. REV. R. 44(3); FED. R. APP. P. 34(b); CAL. PRAC. C. R. 22; ILL. SUP. CT. R. 352(b); MASS. R. APP. P. 22(b); TEX. R. C. P. 498. In the Texas Courts of Civil Appeals, each side may be permitted an hour for oral argument with an additional twenty minutes in conclusion by

ment, slightly less time may be allotted.[21] The appellant presents the argument first, and the appellee or respondent follows. The appellant is then given additional time for a rebuttal (generally limited to ten or fifteen minutes).[22] Although a specified amount of time may be established by rule, there is no requirement that a party use all of it, and as will be recommended later,[23] counsel should not prolong the argument simply to use unexpired time. Furthermore, the court may terminate an argument in progress when in its discretion greater discussion is deemed unnecessary.[24] Although the rules permit counsel, in advance of the date of oral argument, to request additional time for presentation,[25] courts seldom grant such petitions. If, during the course of the argument, the court recognizes that counsel needs additional time, the court may continue to question beyond the established time limits or inform counsel that additional time will be permitted to complete the argument. Otherwise, counsel is obliged to conclude immediately at the end of the allotted time.

While there may be a temptation to read at length from case law, briefs, or the record on appeal, such practice is usually ineffective and almost universally prohibited by rule.[26] This prohibition is not designed to hamper counsel in making a thorough presentation, but rather to encourage explanation and clarification of his own theories. Issues or arguments which counsel attempts to raise but which are unmentioned in the briefs will be prohibited or disregarded by the court.[27] This principle seeks to protect one's opponent from surprise and allows the adversary an opportunity to prepare a response in advance.

II. THE FORMAT FOR THE ARGUMENTS

At oral argument, the appellant is given the opportunity to speak first followed by the appellee or respondent, and the appellant is given the opportunity to speak last in a rebuttal presentation to the court. Although no specific format for each presentation is prescribed by the rules, it should generally follow the organization of the briefs.[28]

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appellant. TEX. R. C. P. 426.

21. *See, e.g.*, ILL. SUP. CT. R. 352(b).

22. SUP. CT. REV. R. 44(2); FED. R. APP. P. 34(c); CAL. PRAC. C. R. 22; ILL. SUP. CT. R. 352(b); MASS. R. APP. P. 22(c).

23. *See* p. 274 *infra*.

24. *See* FED. R. APP. P. 34(b); ILL. SUP. CT. R. 352(b); MASS. R. APP. P. 22(b).

25. *See* SUP. CT. REV. R. 44(3); FED. R. APP. P. 34(b); ILL. SUP. CT. R. 352(b); MASS. R. APP. P. 22(b).

26. *See* SUP. CT. REV. R. 44(1); FED. R. APP. P. 34(c); ILL. SUP. CT. R. 352(c); MASS. R. APP. P. 22(c).

27. *See* Henningson, Durham and Richardson v. Prochnow, 13 Ariz. App. 411, 477 P.2d 285, 289 (1970); Marr v. Postal Union Life Ins. Co., 40 Cal. App. 2d 673, 105 P.2d 649, 656 (1940).

A. Appellant's Argument

The appellant's first presentation should contain the following elements. First, it is appropriate to give a short introductory greeting to the court. Counsel's first words might be the traditional "May it please the Court" or the less formal "Good morning, Your Honors" or some other fitting remark. Next the attorney should announce his name and identify the client whom he represents.

Second, a statement of the nature of the case should be presented. This should be a very short summary of one or two sentences identifying the kind of action involved and the judgment or order being appealed.

Third, the issues to be discussed should be listed. This procedure allows counsel to inform the court of the organization to be used during the argument. Counsel should number and state each of the issues in the sequence in which they will be argued. Furthermore, counsel should identify any issue which will not be mentioned but upon which he will stand on the brief. In this way, counsel alerts the judges to those issues which he does not care to address (and concerning which he does not wish to be questioned). Of course, the judges are not bound to comply and may question counsel about any matter.

Fourth, a brief statement of the facts should be given. A careful presentation of the facts is critical to an effective oral argument because the appellate court will decide the case based upon its unique facts and not upon abstract legal propositions.[29] In addition, a clear statement can be significant in creating an excellent first impression, especially in those courts where the judges are unfamiliar with the case. Although the summary should be thorough and objective, it should also be concise in order to allow sufficient time to present the argument of the case. However, a statement of the facts should not be made to those courts which study a case before oral argument and inform counsel that they have done so.[30] Unfortunately, not all courts warn counsel in advance, and therefore, the advocate should be aware that the recital may be interrupted by the court with instructions to forego further summary. While such a comment should not be viewed as a criticism of the presentation, counsel should move directly into the argument.

Fifth, the substantive argument is given. Counsel should begin by restating the first issue in declarative form and then presenting the argu-

28. *See, e.g.*, ILL. SUP. CT. R. 341(e); SUP. CT. REV. R. 40; FED. R. APP. P. 28.

29. The context of the controversy is extremely important.

> It is not enough that counsel understands perfectly what he is saying in his written and spoken words. All is in vain unless the court understands . . . . But in a significant percentage of cases the advocate is so intent upon the ultimate aim of persuasion that he overleaps the threshold step of making clear to the court what he complains of, how it came about, what he wants the court to do about it, and why.

Godbold, *supra* note 1, at 803.

30. *See* p. 272 *supra*.

ment on that point. After finishing the first point, counsel should restate the second issue, argue it, and so on until the conclusion of the entire argument or until the time has expired. Each issue should end with a summary statement or conclusion which ties the argument together and allows counsel to move smoothly into the next issue.

Sixth, counsel should present a conclusion at the end of the entire argument requesting the specific relief sought. This conclusion should be only one or two sentences long. Even if time for the oral argument has expired, counsel should still provide a conclusion (which takes only a matter of seconds), thus leaving a favorable last impression and emphasizing the relief desired.

B. Appellee's Argument

The format of the appellee's presentation (which is the appellee's only opportunity to address the court) should be as follows. First, the appellee should present opening remarks similar to those given by the appellant including greeting the court, announcing his name, and identifying whom he represents. Second, the appellee should number and state the issues to be argued. Also, the appellee should identify any issues which will not be argued but upon which he will rely on the brief. Third, he should consider the statement of facts if one was presented by the appellant. Appellee may agree with the appellant's statement and indicate this agreement expressly or impliedly by omitting this segment of the argument. If the appellee does not fully agree, he should note any inaccuracy or omission of the appellant's statement (with the caveat that 'nit-picking' is counter productive). However, the appellee should never attempt to repeat the entire statement of facts. Such duplication merely wastes time which can more effectively be devoted to the argument itself. Fourth, the appellee should present the arguments on the issues. He should number and state each contention and then argue it in the same format followed by the appellant. Fifth, the appellee should present a conclusion requesting the appropriate relief, which is usually to affirm the trial court. However, there will be instances in which the appellee will be able to partially concede the relief sought by the appellant.[31]

C. Appellant's Rebuttal

After the appellee has concluded the presentation, the appellant has the opportunity to give a rebuttal if desired. This should be a very brief

31. In a civil case, a defendant-appellee might concede that there is liability but argue that the relief sought is inappropriate. In a criminal case, the government-appellee might argue that there is criminal liability but concede that the sentence imposed is excessive. Of course, both parties should seek relief in the alternative wherever appropriate.

address. Indeed, the appellant should dispense with the amenities used to introduce the appellant's and the appellee's arguments. If given, a rebuttal must be strictly limited to a refutation of those arguments raised by the appellee during the oral presentation. Counsel should begin immediately to refute the opponent's arguments point-by-point, following the organizational pattern of appellee's issues. Appellant may not use the rebuttal to reargue the case or to raise points which were not covered during the first presentation. Although there is no requirement that appellant give a rebuttal (even if rebuttal time has been reserved), it should be presented if the appellee has said anything to which a response appears necessary.

III. SUGGESTIONS FOR THE ARGUMENTS

This section offers certain pertinent suggestions regarding the preparation and presentation of the oral argument. These guidelines apply equally to the arguments of the appellant, the appellee, and the appellant's rebuttal.

Since there is usually a period of time between the filing of the briefs and the oral argument, counsel must be certain to update the research relied upon in the brief. This includes verification of the continued validity of authorities cited and examination of recent developments in case and statutory law. However, because the scope of oral argument is limited to theories and authorities raised in the briefs,[32] counsel should file a motion to supplement the briefs when it is determined that additional cases should be argued.[33]

Counsel should be advised that a court's pre-oral argument preparation of the case spans a wide range: from a total lack of familiarity to a thorough knowledge. The extent of judicial preparedness can at times be discerned from personal experience with the court, from the experiences of other attorneys, or from a direct inquiry with the clerk of the court. In the absence of reliable contrary information, counsel's safest strategy is to assume that the court is unfamiliar with the case and to present a comprehensive argument, including a detailed statement of the facts.

Although the thirty minutes for argument theoretically may seem more than sufficient, most advocates will find it barely adequate for a superficial discussion of their cases, due to questioning from the court. However, a skillful advocate will not be frustrated by time constraints but will structure the argument to accommodate them. Counsel must be highly selective in choosing which issues, theories, and authorities to develop, recognizing that although several may have been examined in

32. *See* p. 269 *supra.*

33. FED. R. APP. P. 27, 28(c) (and notes of Advisory Committee Rules); ILL. SUP. CT. R. 361.

the briefs, only a few can be argued effectively. Thus, only the most significant theories and authorities can be discussed. In addition, it must not be forgotten that considerable emphasis should be placed upon the facts of the case. The greatest concern of the court of review is to decide the case before it, and that case is defined by its peculiar facts.[34]

The most important points should be at the top of the list of issues to be argued. In this way, should time expire before counsel has completed the argument, counsel can be confident that the critical issues will have been discussed, and must simply rely upon the brief as far as the remaining points are concerned. To do so will not result in a waiver of those remaining points.

Both parties should present affirmative and negative arguments. An affirmative argument is made when counsel asserts legal theories in support of his case without attacking the argument of opposing counsel. A negative argument is an attack upon opposing counsel's legal theories and authorities. Employing both techniques is more effective than using either alone, particularly when these arguments are clearly delineated rather than muddled together.

Counsel must refrain from interrupting the oral argument of his opponent. Objections similar to those made at the trial level are not permitted during the oral argument. Therefore, counsel must be attentive to the opponent's address, including questions from the court and the answers provided, so that counsel can adapt the argument to emphasize points of judicial concern and to rebut the responses of the opponent to the court's inquiries. In this manner, counsel can capitalize on a unique opportunity to rebut directly his opponent's case, an opportunity which may be lost if counsel merely rehearses the argument silently while the opponent addresses the court. The following procedure is recommended. While the appellant is speaking, appellee should follow along on an outline of material for presentation and add notations at appropriate places concerning significant points disclosed during the opponent's argument. Of course, appellant will not have prepared an outline for the rebuttal before the oral argument actually begins, because the rebuttal is restricted to refuting points presented by appellee during his oral argument. Thus, until the appellee addresses the court, appellant will not know what to rebut. Appellant's outline for the rebuttal speech must be prepared while the appellee speaks and in response to what the appellee argues. The skillful advocate will refer to specific points raised by the opponent. This technique will not only impress the judges but also will identify and contrast the positions of the parties more clearly than if each side merely had presented its argument

34. *See* p. 270 *supra.*

with no mention of the opponent's viewpoint.

Although not required, appellee should address at least the same issues as addressed by the appellant, although not necessarily in the same order. Appellee's omission of any issues argued by appellant would clearly disclose weaknesses in the appellee's position. While appellee is not required to follow the organization of issues established by the appellant, he should follow the general rule, suggested earlier, that the most important issues be argued first.

Finally, counsel should sit down when he has completed his planned presentation and has nothing more to say. To ramble on solely to fill the time remaining for the argument is to invite disorganization, contradictions, and confusion.

IV. QUESTIONS FROM THE COURT

The characteristic which distinguishes an oral argument from other kinds of public speaking situations is the opportunity of the judges to interrupt counsel to ask questions. Although this fact tends to incite anxiety in counsel, an attorney should welcome questions. When a judge asks a question, he indicates an interest in the case and identifies those portions of the argument which he considers significant. Counsel then knows where to place the emphasis of the argument. Moreover, questions from the court help counsel to clarify the arguments. The judges will tend to ask questions in areas of uncertainty and controversy.

On occasion, appellate judges assume the role of devil's advocate by aggressively questioning one side in order to ensure that no flaws exist in that party's position. Judges will usually have a preliminary sense of which side should win, and they may wish to test that side in order to convince themselves that they are correct. Therefore, the attorney who suffers the most brutal questioning will frequently be the one who wins. On the other hand, there will be occasions when judges will assist counsel by asking helpful questions which lead to favorable responses (questions which move the argument forward or suggest a new way to explain a point).[35] Counsel need not be reluctant to accept such assistance.

When asked a question by the court, counsel must answer directly and immediately. If counsel attempts to evade a question, the judge will simply ask again and tell counsel to answer the question as asked. When an appellate judge makes an inquiry, he considers it relevant at that point, and thus does not want to be told that the question will be answered later. Counsel must be cautious not to antagonize the judges, for they will always win an argument. Indeed, counsel must be respectful and courteous to the court at all times (even when counsel believes

35. Godbold, *supra* note 1, at 818.

that the judges are not comprehending the argument or are suggesting irrational, unsupportable, or inequitable positions). On the other hand, there is no requirement that counsel withdraw from a position simply because the court displays some opposition to it. Counsel should stand his ground firmly. Also, counsel must not attempt to question the judges. Judges question, counsel answers, and these roles do not change.

In preparation for the argument, counsel should attempt to anticipate the questions that are commonly asked. In this regard, there are several categories of common questions which can be identified.[36]

(1) *Facts of the Case.* Because the court is most concerned with the disposition of the particular case at hand (as opposed to a hypothetical legal proposition), inquiries from the court will most frequently be directed to the facts of the case. Questions of this sort will be directed toward both the procedural occurrences in the lower courts and the facts which precipitated the suit. Of course, counsel should be completely familiar with the facts of his case, but in order to assure that he can quickly obtain any factual information requested, he should have the record, the excerpts, and the briefs readily at hand at the podium. Also, the court will occasionally ask counsel where a certain fact can be located in the briefs or record, and counsel must be ready to quickly refer to the record or briefs to find it.

(2) *Information about Authorities.* At oral argument, counsel should not present the full citation for the authorities he argues. Instead, counsel should refer to authorities by name only. If the court wishes to have more information about an authority, the court will ask for it or will ask counsel where the authority appears in the brief or an opponent's brief. Counsel should have available full information regarding cases, statutes, and other forms of authority. Regarding cases, counsel should know the case names, citations, years of decisions, and courts which decide the cases. Because counsel does not memorize such information, counsel should write the necessary data on paper or note cards and have them available at the podium for quick reference. Again, the briefs should be at the podium so that counsel can note the location of certain authorities in the briefs if asked to do so by the court.

(3) *Supportive Case Analogies.* When counsel cites a key case in support of his position, the court will frequently question him to test the validity of the analogy between the cited case and the one on appeal. Counsel should be ready to completely analyze such case authorities, in-

36. A partial list of categories of questions to be anticipated can be found in INTRODUCTION TO ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT IN MOOT COURT COMPETITION, *supra* note 4, at 77-80.

cluding their facts, reasoning, and holdings. Information in this regard should be included on the notes prepared by counsel (with reference to category No. 2 above).

(4) *Controlling Statutes and Constitutional Provisions.* Because a court of review prefers to defer to the legislature whenever possible, it will want assurance if a statute or constitutional provision governs the procedural or substantive aspects of the case. Counsel should be familiar with any applicable statutes or constitutional provisions, and should have a full text copy of them available at the podium, including committee comments and legislative histories when available.

(5) *Opponent's Argument.* If counsel has not thoroughly attacked his opponent's case, or before counsel has had an opportunity to do so, the court may inquire of counsel as to the validity of a particular case analogy or theory of his opponent. Counsel must be thoroughly familiar with his opponent's argument and prepared to rebut it.

(6) *Policy Considerations.* Courts of review are always concerned with the consequences of their decisions (even though they may not articulate such interests in their published opinions). Thus, the policy considerations involved in a case on appeal as well as policy questions of "where to draw the line" regarding the causes of action on appeal are frequently the subject of questions during oral arguments. Generally, counsel will be well-advised to keep the policy lines drawn as closely as possible to the boundaries of the case, for to admit that expansive policy effects will result from a favorable decision is to assume a burden substantially greater than that directly associated with the case on appeal.

(7) *Relief Sought.* The court will be concerned with the question of what specific relief is sought by a party as to each of the issues argued. Counsel should be prepared to identify and justify any relief requested as well as alternative forms of relief which might be available to satisfy his client. After all, the fundamental reason for arguing on appeal is to seek some form of relief from the court of review, and counsel must therefore understand fully the relief available to both parties.

Apart from the difficulty of dealing with the answers to the questions themselves, there is the problem of the impact of the questions on counsel's prearranged organization of the argument. Seldom will a judge's questions perfectly fit into the organization planned by the advocate. Questions will deal either with material that has already been covered or with issues not yet treated. The skillful advocate will be flexible and will adapt the organization to the questioning of the court. Counsel should attempt to use the questions of the court to develop the argument and to keep the argument flowing as though the questions sought answers which comport precisely with counsel's organization. In

this manner, counsel can use the questions to his advantage. Certainly, the effectiveness of counsel's argument will be damaged if it becomes a series of abrupt questions and answers lacking continuity.

To assist in overcoming any organizational problems created by judicial interruptions, counsel should prepare enough material to exhaust nearly all of the allotted time for the oral argument. Counsel should then determine what material is especially important for presentation and what is less significant. Identifying material in this fashion will help counsel recognize what material may be deleted from the presentation if considerable time is spent with questioning by the court. Counsel should avoid repetition of ideas. Thus, if counsel has been asked by the court about a point which was to be covered later in the argument, counsel should not treat that point again when he later comes upon it.

Once counsel's time has expired, he is obliged to sit down. Thus, if he has not had the opportunity to discuss some issues, they will simply not be discussed at all. While it is within the court's discretion to give counsel more time to discuss such issues, counsel cannot depend upon the court's exercise of that discretion.

V. MANNER OF DELIVERY

The final subject is the actual manner of delivery. Naturally, counsel should abide by the usual formalities of the courtroom setting, such as showing respect to the judges (by referring to them as "Your Honor," "Mr. Justice," or "Judge"), by dressing appropriately, and by rising when the court enters and leaves the courtroom.

As noted earlier,[37] reading at length is prohibited by the rules. Reading from a manuscript would deprive counsel of the spontaneous, conversational effect desired. Counsel should use only brief notes, such as an outline of the key points to be covered. Also as noted above, counsel should take the record, briefs, abstracts, practice rules, and any other important materials to the podium for quick reference when necessary during the course of the argument.

In presenting the oral argument, counsel should speak in a voice which is loud enough to be heard and confident in tone but which does not amount to shouting to the court. The "calm voice of reason" should predominate in the court of review rather than the dramatic presentations observed by some juries. Similarly, counsel's gestures should be reserved, and the advocate should restrain from pacing. A podium or table will be present in the courtroom, and counsel should restrict himself to the area immediately behind the podium or table. If

37. *See* note 26 *supra* and accompanying text.

counsel has a tendency to gesticulate or pace, he might restrain himself from such gesturing or pacing by placing his hands on the podium or table. Counsel should maintain eye contact with the judges in order to read their feedback. If counsel notes that the facial expressions of the judges show uncertainty or disagreement, he should attempt to explain his points more completely or differently. If counsel observes that the judges are smiling or nodding their heads as he is discussing an issue, he will know not to treat that issue in greater detail but to move on to a more controversial point.

Finally, rehearsal of the oral argument should be done in moderation — once or twice at most. Rehearsal is largely a useless effort because counsel's organization and presentation will be disrupted by questions from the court. Furthermore, too much will tend to make one's presentation of an argument stale rather than spontaneous and interesting. The best preparation counsel can do will be to become completely familiar with the facts of the case and the theories to be argued.

VI. CONCLUSION

The trend away from oral argument (both its elimination and the reduction of the time allowed) should be accepted with great caution and with narrow limitations, should be studied carefully, and should be reversed where possible. Although the written brief is the primary method for presenting a case to a court of review, the oral argument can be a significant element in the decision-making process on appeal. "[A]n appellate judge knows that he cannot cross-examine a brief; he knows that he cannot obtain from a printed document the clarification of issues and positions that the questioning of counsel will afford."[38]

If the advocate adheres to the suggestions for preparation and presentation of oral argument offered in this article, he will be more likely to make this oral presentation the significant element it was intended to be. This skillful advocate will demonstrate (1) an understanding that a conversational atmosphere should be fostered, (2) an appreciation for the severe time limitation imposed by the rules of appellate practice, (3) a thorough familiarity with the case, (4) an understanding that the facts of the case should receive the greatest emphasis, (5) an understanding of how to deal with questions from the court, and (6) the ability to recognize significant material which should be presented (and less important material which should be deleted) during the oral argument.

38. F. WIENER, *supra* note 4, at 278.

NOTES

Constitutional and Legislative Challenges to the Federal Pre-Market Proof of Drug Effectiveness Requirement

Until recently, the general public was unaware of the particular provisions of the complex federal regulations governing the marketability of drugs. Lately, however, in response to the mandate of an increasingly knowledgeable public, state legislatures have begun to challenge the federal prohibition against the marketing of drugs which have not been proven effective.[1] A number of states have legalized substances which the Food and Drug Administration has banned for lack of proof of effectiveness.[2] Furthermore, a move to repeal this requirement of pre-market proof of drug efficacy is underway in Congress.[3]

1. This prohibition is pursuant to the federal requirement that before a new drug can be marketed in interstate commerce, it must be proven both safe and effective for its intended use. Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 355(a)-355(b) (1972) (original version at ch. 675, §§ 505(a)-505(b), 52 Stat. 1052 (1938)).

2. Nevada has legalized the manufacture and sale of Gerovital, Act of May 20, 1977, ch. 601, § 3(1), 1977 Nev. Stats. (to be codified as NEV. REV. STAT. ch. 585, § 1), a drug found by the FDA to be ineffective for its intended use of retarding the aging process. *Damn the Doctors — And Washington*, TIME, June 20, 1977, at 50, 53; N.Y. Times, June 8, 1977, at 16, col. 1. Over an FDA ban, Oregon has approved the production and availability of Dimethyl Sulfoxide (DMSO), Act of May 25, 1977 (to be codified in OR. REV. STAT.), a substance alleged to relieve ills from arthritis to cold sores. TIME, *supra* at 16. And over its federal prohibition, thirteen states, *see* notes 7-19 and accompanying text *infra*, have enacted legislation legalizing laetrile — the generic name of a drug which is generally recognized as safe but ineffective for its intended use in treating cancer. *See* note 5 and accompanying text *infra*.

3. *See* note 61 and accompanying text *infra*. It is interesting to note that this is not the only federal restriction on the availability of food and drugs which recently has been challenged in Congress. Public outcry has prompted suspension of the ban on saccharin planned by the FDA Saccharin Study, Labeling, and Advertising Act, S. Res. 203, 95th Cong., 1st Sess., 123 CONG. REC.

The FDA ban on laetrile, for want of proof of its effectiveness against cancer, has been a major force behind the mounting public and legislative resistance to government interference with the availability of health-care treatments.[4] This note examines state statutes legalizing laetrile despite the federal prohibition. Whether such state legislation is likely to be found to be an unconstitutional interference with Congress' exercise of its commerce powers is considered. The laetrile controversy is also used as a vehicle to analyze whether the federal pre-market proof of drug effectiveness requirement itself will fail as intruding unconstitutionally upon a privacy right of freedom of choice in health-care treatment. A legislative alternative is proposed which would advance the government interests served by the effectiveness requirement while permitting the individual access to the health-care treatment of choice. For purposes of the following discussion, it will be assumed that laetrile is a safe substance but ineffective in the control and cure of cancer.[5]

I. FEDERAL VERSUS STATE REGULATION OF DRUGS OF UNPROVEN EFFECTIVENESS

A. State Legislation Legalizing Laetrile

In the most widespread attempt by states to circumvent a federal ban under the pre-market proof of drug effectiveness requirement,[6] Alaska,[7] Arizona,[8] Delaware,[9] Florida,[10] Indiana,[11] Louisiana,[12]

11110 (1977). This ban is pursuant to the federal prohibition against food manufacturers' use of any additive which "is found to induce cancer when ingested by man *or animal.*" Food, Drug, and Cosmetic Act, 21 U.S.C. § 348(c)(3)(A) (1972) (emphasis added). The Saccharin Act provides for evaluation of animal studies as reliable indicators of saccharin's carcinogenicity in man. 123 CONG. REC. at 11110. *See A Bitter Reaction to an F.D.A. Ban,* TIME, March 21, 1977, at 60.

4. *See* notes 6-19 *infra.*

5. This assumption is made only for the sake of argument and to facilitate analysis. The's safety and ineffectiveness in fact. *See, e.g.,* Lewis, *Laetrile,* 127 WEST. J. MED. 55, 55-62 (1977) (description of thirteen independent studies in which laetrile was concluded to be ineffective). For accounts that laetrile use is safe, *see, e.g.,* C. V. MOSBY COMPANY, SYNOPSIS OF MATERIA MEDICA, TOXICOLOGY AND PHARMACOLOGY 33 (1940); A. OSLO & G. FARRAR, THE DISPENSATORY OF THE UNITED STATES 40 (1950 ed.); Krebs, *The Nitrilosides (Vitamin B-17) Their Nature, Occurrence and Metabolic Significance,* 22 No. 3 & 4 J. APPLIED NUTRITION 75, 78 (1970); *The Laetrile Nightmare,* 127 WEST. J. MED. 39, 39 (1977); *Harmless but Ineffective Remedies,* 64 No. 10 J. PHARM. SCI. I (1975). *See also* Rutherford v. United States, 438 F. Supp. 1287, 1296-98 (W.D. Okla. 1977). *But see, e.g.,* Lewis, *supra* at 58-60 (description of studies in which laetrile was concluded to be toxic).

6. *See* notes 1-2 and accompanying text *supra.*

7. Act of September 19, 1976, ch. 227, § 1, ALASKA STAT., 1976 Temporary and Special Acts and Resolutions.

8. Act of May 20, 1977, ARIZ. REV. STAT. § 32-1962B (Supp. 1977).

9. Act of June 20, 1977, § 2 (to be codified as DEL. CODE tit. 16, § 4901).

10. Act of May 13, 1977, ch. 77-30, § 1, 1977 Fla. Sess. Law Serv. (West) (to be codified as FLA. STAT. § 395.066).

11. Act of April 30, 1977, IND. CODE ANN. §§ 16-8-8-1 to 16-8-8-7 (Burns) (Supp. 1977).

12. Act of June 22, 1977, LA. REV. STAT. ANN. § 40-676 (West).

Nevada,[13] New Hampshire,[14] New Jersey,[15] Oklahoma,[16] Oregon,[17] Texas,[18] and Washington[19] have enacted legislation legalizing laetrile.[20] There are major similarities among these state enactments. Significant areas of common concern are: (1) availability of laetrile; (2) physician liability for the prescription and administration of the substance; (3) labelling requirements; (4) intrastate restrictions on its sale and manufacture; and (5) legislative intent behind legalization.

1. Availability of Laetrile

With the exception of the Arizona and Oregon statutes,[21] each of the state acts legalizing laetrile makes it available on a prescription basis only. The Arizona and Oregon statutes merely legalize the substance and leave its regulation and administration to the state department of health.[22]

Before a prescription for laetrile can be obtained under the Indiana, Louisiana, Nevada, New Jersey and Oklahoma legislation, the patient must sign a written request form.[23] While the Louisiana and Nevada statutes provide only for the necessity of a signed affidavit,[24] the Indiana, New Jersey and Oklahoma bills actually set out its terms.[25]

13. Act of May 20, 1977, ch. 601, § 3(1), 1977 Nev. Stats. (to be codified as NEV. REV. STAT. ch. 585, § 1).

14. Act of June 28, 1977, ch. 323, § 1 (to be codified as N.H. REV. STAT. ANN. § 329.30(I)).

15. Act of January 10, 1978, New Jersey Assembly No. 3295.

16. Act of June 15, 1977, OKLA. STAT. ANN. tit. 63, §§ 2-313.1-.6 (West) (Supp. 1977).

17. Act of June 28, 1977, ch. 611, § 2 (to be codified as OR. REV. STAT. § 689.720).

18. Act of May 20, 1977, ch. 204, § 1, 1977 Tex. Sess. Law Serv. (Vernon) (to be codified as TEX. REV. CIV. STAT. ANN. art. 4476-5a, § 1 (Vernon)).

19. Act of June 1, 1977, ch. 122, § 2, 1977 Wash. Legis. Serv. (West) (to codified as WASH. REV. CODE § 70.54).

20. A principal ingredient of laetrile is the compound amygdalin. Greenberg, *The Vitamin Fraud in Cancer Quackery,* 122 WEST. J. MED. 345, 345 (1975). Amygdalin, which contains hydrogen cyanide, is found naturally in bitter almonds and apricot and peach pits. Liener, *Cyanogenetic Glycosides,* in TOXICANTS OCCURRING NATURALLY IN FOODS 58, 58-59 (National Academy of Sciences ed. 1966). Laetrile proponents maintain that the hydrogen cyanide in the substance controls cancer by poisoning diseased cells. Allegedly, the cyanide is rendered harmless in healthy cells through the presence of an enzyme which detoxifies it. Krebs, *supra* note 5 at 75-76.

21. ARIZ. REV. STAT. § 32-1962B; Act of June 28, 1977, ch. 611, § 2(3) (to be codified as OR. REV. STAT. § 689.720).

22. *See* note 21 *supra.*

23. IND. CODE ANN. § 16-6-6-1; No. 99, § 2B, 1977 La. Sess. Law Serv. (West) (to be codified as LA. REV. STAT. ANN. § 37:1285.1B (West)); Ch. 601, § 4, 1977 Nev. Stats. (to be codified as NEV. REV. STAT. ch. 630); Act of January 10, 1978, § 1, New Jersey Assembly No. 3295; OKLA. STAT. ANN. tit. 63, § 2-313.1. Under the Indiana and Louisiana provisions, copies of this signed consent form must be filed with the state board of medical examiners and under the Oklahoma act with the state department of health. The Nevada statute does not provide what is to be done with the affidavit.

24. No. 99, § 2B, 1977 La. Sess. Law Serv. (West); Ch. 601, § 4, 1977 Nev. Stats.

25. IND. CODE ANN. § 16-8-8-5; Act of January 10, 1978, § 1, New Jersey Assembly No. 3295; OKLA. STAT. ANN. tit. 63, § 2-313.5.

The Indiana, New Jersey and Oklahoma forms state that the patient knows of the FDA ban on laetrile and that cancer societies and medical associations do not recommend its use in the treatment of cancer. These forms also provide a blank space in which any "alternative recognized treatments" offered by the physician must be listed. Declarations of proposed orthodox treatments on the Indiana and Oklahoma forms, however, are superfluous since sections of those acts provide that a physician may treat a patient exclusively with laetrile.[26] None of the state statutes in fact condition laetrile use on receipt of supplemental orthodox treatments.[27]

Before laetrile may be prescribed under the Florida and Washington statutes, the patient must be given information in writing by the physician.[28] Under the Florida act this need only be a statement that the FDA has not approved the substance,[29] while the Washington statute ambiguously requires that all information necessary to the patient's reaching an informed decision must be disclosed.[30] Both provisions are deficient in not requiring the patient to demonstrate by signed affidavit or otherwise, that the required information indeed has been received.

2. Physician Liability

Under the statutes of Alaska, Delaware, Florida and Texas, physician liability for administration of laetrile requires proof that treatment with laetrile actually harmed the patient.[31] These statutes do not address the important issue of liability where only laetrile has been prescribed and the failure to administer orthodox treatments has resulted in deterioration of the patient's health.[32]

3. Labelling Requirements

The Delaware and Nevada enactments require that laetrile bear labelling that the federal government has not approved the substance as

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26. IND. CODE ANN. § 16-8-8-3; OKLA. STAT. ANN. tit. 63, § 2-313.1.

27. While the Indiana and Oklahoma statutes provide that a physician may administer laetrile in lieu of "customary or accepted modes of therapy", *see* note 26 *supra*, the other state enactments, by failing to address the issue of supplemental orthodox treatments, impliedly permit the physician to rely on the use of laetrile alone.

28. Ch. 77-30, § 3, 1977 Fla. Sess. Law Serv. (West) (to be codified as FLA. STAT. § 459.24(3)); Ch. 122, § 2, 1977 Wash. Legis. Serv. (West).

29. Ch. 77-30, § 3, 1977 Fla. Sess. Law Serv. (West).

30. Ch. 122, § 2, 1977 Wash. Legis. Serv. (West).

31. Ch. 227, §§ 1-2, ALASKA STAT., 1976 Temporary and Special Acts and Resolutions; Act of June 20, 1977, § 2 (to be codified as DEL. CODE tit. 16, § 4903); Ch. 77-30, § 2(1), 1977 Fla. Sess. Law Serv. (West) (to be codified as FLA. STAT. § 459.24(1)); Ch. 204, § 1(d), 1977 Tex. Sess. Law Serv. (Vernon) (to be codified as TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon)).

32. *See* notes 109-113 and accompanying text *infra*.

a cancer treatment.[33] These provisions do not warn the prospective laetrile user adequately of the federal prohibition against the drug. The reason for withholding of federal approval, i.e., that laetrile has not been proven effective in the treatment of cancer, also should be required to appear on the label.

4. Intrastate Restrictions

The Delaware and Oregon statutes prohibit the sale or transportation of laetrile beyond their borders.[34] The Oregon bill, in addition to restricting laetrile sales to within the state, also requires that none of the ingredients used in its manufacture have been transported in interstate commerce.[35] Clearly such provisions attempt to avoid interference with Congress' exercise of its commerce powers.[36]

5. Legislative Intent

Generally, state legalization of laetrile is not founded on legislative belief in the curative powers of the substance. In fact, several statutes expressly withhold indorsement of laetrile use.[37] The enactments of Alaska, Delaware, Florida, Indiana, New Hampshire and Washington suggest that the legislative intent behind laetrile legalization is to reserve choices among health-care treatments to determination within the context of the individual physician-patient relationship.[38] It is suggested that expression of this general sentiment has centered on laetrile in particular, due to the inadequacies of orthodox medicine in dealing with the notorious and devastating disease of cancer[39] and the extraordinarily effective and far-reaching campaign in which laetrile has been promoted.[40]

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33. Act of June 20, 1977, § 2 (to be codified as DEL. CODE tit. 16, § 4902); Ch. 601, § 9(2), 1977 Nev. Stats. (to be codified as NEV. REV. STAT. ch. 639. § 9(2)).

34. Act of June 20, 1977, § 2 (to be codified as DEL. CODE tit. 16, § 4901); Act of June 28, 1977, ch. 611, § 2 (to be codified as OR. REV. STAT. § 689.720).

35. Act of June 28, 1977, ch. 611, § 2 (to be codified as OR. REV. STAT. § 689.720).

36. *See* notes 41-53 and accompanying text *infra.*

37. Ch. 601, § 3(1), 1977 Nev. Stats. (to be codified as NEV. REV. STAT. ch. 585, § 1); OKLA. STAT. ANN. tit. 63, § 2-313.4; Ch. 122, § 1, 1977 Wash. Legis. Serv. (West).

38. Ch. 227, § 1, ALASKA STAT., 1976 Temporary and Special Acts and Resolutions; Act of June 20, 1977, § 2 (to be codified as DEL. CODE tit. 16, § 4904); Ch. 77-30, § 1, 1977 Fla. Sess. Law Serv. (West) (to be codified as FLA. STAT. § 395.066); IND. CODE ANN. § 16-8-8-1; Act of June 28, 1977, ch. 323, § 1 (to be codified as N.H. REV. STAT. ANN. § 329.30(I)); Ch. 122, § 2, 1977 Wash. Legis. Serv. (West). The Washington statute is explicit that the legislature's intent in legalizing laetrile was not to endorse the substance but rather to protect the patient's "freedom of choice". The Alaska, Delaware, Florida, Indiana and New Hampshire enactments are similarly motivated in that their stated focus is on prohibiting "interferences with the physician-patient relationship."

39. *See* notes 108 and 112 and accompanying text *infra.*

40. *See* notes 108 and 117 and accompanying text *infra.*

B. Commerce Clause Analysis

Federal authorities will not allow state legalization of drugs of unproven effectiveness to go unchallenged.[41] Such statutes may be attacked as unconstitutionally interfering with Congress' authority under the commerce clause to control the interstate marketing of drugs.[42] In support of such state legislation, it may be argued that the power to regulate intrastate production and sale of ineffective drugs has been reserved to the states under the tenth amendment[43] and left to them by judicial circumscription of the Congress' commerce powers.[44]

Congress undertook extensive food and drug regulations as a result of the states' inability to protect the public adequately in this area.[45] The states initially resisted this interference in a sphere they considered to be their own,[46] but the right of the federal government to control the sale and manufacture of food and drugs has by now become well recognized as within the scope of Congress' power over commerce.[47]

Because the protection of its citizens' health has fallen within the most traditional concept of the states' police power,[48] Congressional regulation of food and drugs has not been found to supercede state legislation in this field but merely to be concurrent with it.[49] But where a state food or drug regulation has an effect on interstate commerce[50] and

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41. FDA actions challenging the Florida and Texas statutes legalizing laetrile, *see* notes 10 and 18 *supra*, are pending. Private communication with Paul Ragan, Associate Chief Counsel for Enforcement, Office of the Chief Counsel, Food and Drug Division, Dept. of Health, Education, and Welfare (January 20, 1978). The agency contends that these statutes unconstitutionally regulate matters affecting interstate commerce. *Id. See* TIME, *supra* note 2, at 53.

42. U.S. CONST. art. I, § 8. *See* notes 48-53 and accompanying text *infra*.

43. U.S. CONST. amend. X.

44. *See, e.g.*, Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949) ("This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the states while generally supporting their right to impose even burdensome regulations in the interest of local health and safety.").

45. *See* note 56 and accompanying text *infra*. *See also* Woods, *State Safety Standards and Federal Preemption*, 28 FOOD DRUG COSM. L. J. 279, 280 (1973).

46. *See, e.g.*, McDermott v. Wisconsin, 228 U.S. 115 (1913) (state law defining labelling in conformity with federal law as misbranding held to conflict unconstitutionally with Congress' exercise of its commerce powers).

47. *See, e.g.*, United States v. Sullivan, 332 U.S. 689 (1948) (removal of federally required labelling from drug no longer in interstate commerce held to be misbranding).

48. Barsky v. Board of Regents of University of State of New York, 347 U.S. 442, 449 (1955) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its border relative to the health of everyone there. It is a vital part of a state's police power.").

49. *See, e.g.*, Savage v. Jones, 225 U.S. 501, 533 (1912) ("But the intent to supercede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field."). *See generally* Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963); Kelly v. Washington, 302 U.S. 1, 10 (1937).

50. *See* Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (wheat grown wholly for farm's consumption held to be within the reach of Congress' commerce powers on grounds that it has a substantial economic effect on interstate commerce).

conflicts with federal law, the federal act controls under the authority of the supremacy clause.[51] State legalization of federally prohibited substances is likely to be held an unconstitutional interference with Congress' exercise of its commerce powers. This is due to the impact that manufacture, sale and promotion of ineffective drugs will have on the supply and demand of interstate goods and services.[52] Furthermore such state legislation seems to conflict with the federal pre-market proof of drug effectiveness requirement.[53]

Though state attempts at circumventing the federal prohibition of the marketing of drugs of unproven efficacy will probably fail in a determination of federal versus state regulatory powers, the more interesting question of whether the effectiveness requirement itself violates a constitutional right of privacy must be considered. Before addressing the constitutional issue posed by the requirement, its development and nature is examined.

II. THE FOOD, DRUG, AND COSMETIC ACT

The first legislation to regulate drugs nationally was the Food and Drug Act of 1906.[54] While this Act established certain standards in the interstate marketing of drugs, it did not provide for any pre-market review.[55] Such an after-the-fact approach made it impossible to prevent unsafe or ineffective drugs from reaching the market and in 1938, in the aftermath of over one hundred deaths resulting from use of a poisonous sulfur drug,[56] the present Food, Drug, and Cosmetic Act was passed.[57] This Act mandates that "new drugs" must be proven safe before they may be marketed in interstate commerce.[58] The Kefauver-Harris Drug Amendments of 1962[59] amended the 1938 Act to require that "new drugs", in addition to being proven safe, must also be proven effective

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51. U.S. CONST. art. VI, § 2. *See* McDermott v. Wisconsin, 228 U.S. at 131-32. *See generally* Kelly v. Washington, 302 U.S. at 11; California v. Zook, 336 U.S. 725, 733 (1949), *reh'g denied,* 337 U.S. 921 (1949).

52. It has been suggested that laetrile could not be profitably manufactured and sold, even where there was high intrastate demand, without relying on interstate imports. TIME, *supra* note 2, at 53.

53. *See* note 60 and accompanying text *infra.*

54. Ch. 3915, 34 Stat. 768 (1906).

55. The 1906 Act set down drug purity standards, *id.* § 7, 34 Stat. 769, and labelling requirements, *id.* § 8, 34 Stat. 770, that were enforceable through libel actions which could only be brought after a drug had been marketed, *id.* § 10, 34 Stat. 770.

56. Note, *Drug Efficacy and the 1962 Drug Amendments,* 60 GEO. L. J. 185, 186 n.13 (1971).

57. Ch. 675, 52 Stat. 1040 (1938) (current version at 21 U.S.C. §§ 301-92 (1972)).

58. *Id.* §§ 201(p), 505, 52 Stat. 1041 (1938) (current version at 21 U.S.C. §§ 321(p), 355 (1972)).

59. Pub. L. No. 87-781, 76 Stat. 780 (1962) (amending Food, Drug, and Cosmetic Act of 1938, ch. 675, 52 Stat. 1040, codified at 21 U.S.C. §§ 301-92 (1972)).

for their intended use.[60] Though the 1962 Amendments remain in force, federal legislation has been proposed which would repeal the pre-market proof of drug effectiveness requirement while retaining the proof of safety provision.[61]

60. 21 U.S.C. §§ 321(p), 355 (1972). A "new drug" cannot be introduced into interstate commerce unless it is the subject of an approved new drug application (NDA). 21 U.S.C. § 355(a) (1972). This application must evidence the safety and effectiveness of the drug under consideration. 21 U.S.C. § 355(b) (1972). Where there is "substantial evidence" of safety and efficacy, the NDA will be approved. 21 U.S.C. § 355(d) (1972). Where an NDA is rejected, the applicant has a right of judicial appeal. 21 U.S.C. § 355(h) (1972). *See* Rutherford v. United States, 438 F. Supp. at 1290-91. For a detailed description of the new drug application and approval process, *see generally Drug Efficacy, supra* note 56.

61. Rep. Steven D. Symms (R-Idaho) has introduced this "Medical Freedom of Choice" bill. H.R. 53, 95th Cong., 1st Sess. (January 4, 1977). *See Battle to Legitimize Laetrile Continues Unabated,* 196 SCIENCE 854, 854 (1977); N.Y. Times, July 19, 1977, at 13, col. 1; *id.* June 8, 1977, at 16, col. 1; Hoar, *The F.D.A. is Dangerous to your Health!,* 19 AMERICAN OPINION 7, 96 (1976). Although the bill has 97 co-sponsors, SCIENCE *supra* at 854, it has been in committee for over a year and Congressional sources are doubtful that it will ever reach the House floor. Private communication with the office of Rep. Thomas P. O'Neill, Jr. (D-Mass.) (December 16, 1976); N.Y. Times, July 19, 1977, at 13, col. 1.

A more comprehensive proposal to overhaul the Food, Drug, and Cosmetic Act has been drafted by the Carter Administration. N.Y. Times, December 9, 1977, at 1, col. 5. The Administration's bill leaves the pre-market proof of drug effectiveness requirement unchanged. A major focus of this "Drug Regulation Reform Act of 1978" is a recasting of the meaning of "safety". "Safety" is not defined in the present Act and has been interpreted in absolute terms. In the proposed legislation, "safety" is given a meaning which takes into account the relative weight of benefits versus risks associated with a drug's use in a given situation. The Drug Regulation Reform Act provides for stringently limited distribution of a drug which has been proven beneficial, i.e., effective, although its absolute safety has not been shown. For example, cancer patients under strictly controlled conditions might be treated with a "new drug" which has been proven effective against cancer but which has not undergone many years of testing required to discover any long term side effects from its use. This approach would encourage much earlier distribution of "breakthrough" drugs than is possible under the present NDA application procedure. Private communication with Gregory Spence, Counsel, U.S. Senate Committee on Human Resources, Subcommittee on Health and Science (January 16, 1978).

62. Only "drugs" are subject to the proof of effectiveness requirement. The onerous burden of proving effectiveness therefore may be avoided by showing that the substance in question is not a "drug". Comment, *Government Regulation of Health-care Drugs of Questionable Efficacy,* 14 SAN DIEGO L. REV. 378, 384-86 (1977). A "drug" is defined as an article "intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or animal." Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(g)(1)(B) (1972) (original version at ch. 675, § 201(g), 52 Stat. 1041 (1938)). Sources for determining whether a substance is "intended" for such uses include labels, promotional claims and advertisements. *See, e.g.,* United States v. An Article . . . Sudden Change, 409 F.2d 734, 739 (2d Cir. 1969) (advertisements in various media); United States v. Millpax, Inc., 313 F.2d 152, 154-55 (7th Cir. 1963), *cert. denied,* 373 U.S. 903 (1963) (letters and oral representations); V. E. Irons, Inc. v. United States, 244 F.2d 34, 39-40 (1st Cir. 1957), *cert. denied,* 354 U.S. 923 (1957) (statements of authorized distributors).

Despite the contention that laetrile is a vitamin, Krebs, *supra* note 5, at 75, the courts unanimously have concluded that it is a "drug" and thus subject to the 1938 Act and 1962 Amendments. Hanson v. United States, 417 F. Supp. 30, 35 (D. Minn. 1976), *aff'd,* 540 F.2d 947 (8th Cir. 1976) (injunction against federal interference with commercial importation of Vitamin B-17 denied); United States v. Spectro Foods Corp., 544 F.2d 1175, 1179-80 (3d Cir. 1976) (injunction giving FDA control of drug manufacturing business in matters beyond amygdalin production vacated for overbreadth); Gadler v. United States, 425 F. Supp. 244, 246-47 (D. Minn. 1977) (injunction against federal interference with cancer patient's importation of laetrile for personal use

Once a substance is defined as being a "drug",[62] it must be classified as either "old" or "new". "New drugs" are required to be proven safe and effective before they may be marketed while "old" ones are exempted from these burdens of proof.[63] To avoid having to prove safety and effectiveness, a drug's proponents may argue that the drug in question is an "old" one under the grandfather clause of either the 1938 Act or the 1962 Amendments. To qualify as an "old drug"under the 1938 Act, it must be shown that the identical drug, bearing labelling containing the same representations concerning use, was introduced into interstate commerce after June 30, 1906 but prior to June 25, 1938.[64] To be an "old drug" under the 1962 Amendments, a drug must be proven to be presently used, formulated and labelled identically as it was prior to October 9, 1962. Furthermore, on that date it must have been generally recognized by scientific experts as safe for use.[65] In different contexts at least five courts have considered whether laetrile is an "old drug" within the meaning of either of these grandfather clauses.[66] There is agreement that laetrile is not exempted under the 1938 Act.[67]

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denied); United States v. Mosinee Research Corp., No. 77-C-285, slip op. at 14 (E.D. Wis., filed July 29, 1977) (conclusions of law) (injunction against commercial distributors' interstate sale and shipment of laetrile ordered); Rutherford v. United States, 438 F. Supp. at 1292 (laetrile held exempted from proof of effectiveness requirement). *See generally* Jukes, *Laetrile for Cancer,* 236 J.A.M.A. 1284, 1285 (1976); Greenberg, *supra* note 20, at 345. It is unlikely that these decisions defining laetrile as a "drug" will be overturned, given the broad definition of the term set out by the Congress in the Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(g)(1)(B) (1972), and the expansive interpretation its meaning has been given by the courts. *See, e.g.,* United States v. An Article of Drug . . . Bacto-Unidisk . . . . , 394 U.S. 784, 793-98 (1969). *See also Drugs of Questionable Efficacy, supra* at 385-86.

63. 21 U.S.C. §§ 321(p), 355 (1972).

64. 21 U.S.C. § 321(p)(1) (1972). *See* Rutherford v. United States, 438 F. Supp. at 1298. *See also* 42 Fed. Reg. 39768, 39778 (1977), in which FDA Commissioner Donald Kennedy reports on the status of the federal ban on laetrile. This compilation resulted from a F.D.A. rule-making proceeding pursuant to the order of the District Court in Rutherford v. United States, 424 F. Supp. 105 (W.D. Okla. 1977), as required by the Circuit Court of Appeals in Rutherford v. United States, 542 F.2d 1137 (10th Cir. 1976). Over 400 submissions by proponents and opponents of laetrile legalization were received into evidence. In addition, oral testimony of 40 persons was taken at a May 2, 1977 hearing in Kansas City. The 5,500 page record assembled includes the views of cancer patients, consumers, experts in drug testing and cancer therapy, physicians, state governments, universities, hospitals, and interested organizations. 42 Fed. Reg. 39768, 39768 (1977).

65. 21 U.S.C. § 321(p)(2) (1972). *See* 42 Fed. Reg. 39768, 39790 (1977).

66. Gadler v. United States, 425 F. Supp. at 247-48; Hanson v. United States, 417 F. Supp. at 35-36; United States v. Spectro Foods Corp., 544 F.2d at 1179-80; United States v. Mosinee Research Corp., No. 77-C-285, slip op. at 10 (E.D. Wis. July 1977); Rutherford v. United States, 438 F. Supp. at 1294-98.

67. Gadler v. United States, 425 F. Supp. at 247-48 (In cancer patient's action for a preliminary injunction restraining governmental interference with his importation of laetrile for personal use, plaintiff failed to demonstrate substantial probability of success with respect to his claim that laetrile was not a "new drug" within the meaning of the 1938 Act); Hanson v. United States, 417 F. Supp. at 35 (In an action by commercial distributors for a preliminary injunction restraining governmental interference with their importation of laetrile, plaintiffs failed to demonstrate substantial probability of success with respect to their claim that laetrile was not a "new drug" within the meaning of the 1938 Act); United States v. Spectro Foods Corp., 544 F.2d

This is due to insufficient knowledge of the details of the substance's use during the relevant period.[68] Opinion is divided, however, on whether it is exempted under the 1962 Amendments.[69]

By virtue of the fact that a drug is not classified as being "old" within the meaning of the 1938 Act or the 1962 Amendments, it is "new" and as such is subject to the pre-market proof of safety and effectiveness requirements.[70] Whether laetrile meets these safety and effectiveness standards is the subject of much debate,[71] but, as previously noted, it is assumed for purposes of this note to be safe for use but ineffective in the treatment of cancer.[72]

III. THE RIGHT OF FREEDOM OF CHOICE IN HEALTH-CARE TREATMENT

The Supreme Court recently has recognized a constitutional right of privacy.[73] Rather than establish an undifferentiated "right of privacy", the Court has treated the varying facets of personal privacy individually.[74] Moreover, these different privacy interests have been

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at 1179-80 (FDA affidavits regarding defendant's manufacture and distribution of laetrile held to be sufficient to establish the substance's status as a "new drug" and to support issuance of a preliminary injunction against defendant's sale of laetrile); United States v. Mosinee Research Corp., slip op. at 14 (E.D. Wis. July 29, 1977) (conclusions of law) (In action enjoining commercial distributors' interstate sale and shipment of laetrile that substance was found not to be grandfathered under the 1938 Act); Rutherford v. United States, 438 F. Supp. at 1298 (Cancer patient plaintiffs failed to produce evidence sufficient to overcome the FDA's ruling that laetrile is not exempted under the 1938 Act).

68. Rutherford v. United States, 438 F. Supp. at 1298.

69. In *Gadler* and *Hanson,* the plaintiffs were held not to have demonstrated the probability of success with respect to their claim that laetrile is an "old drug" within the meaning of the 1962 Amendments which is requisite to the issuance of a preliminary injunction. Gadler v. United States, 425 F. Supp. at 248; Hanson v. United States, 417 F. Supp. at 36. The court in the *Spectro Foods Corp.* case found laetrile to be a "new drug" without consideration of how the grandfather clauses of the 1938 Act and 1962 Amendments apply to the substance. United States v. Spectro Foods Corp., 544 F.2d at 1179-80. In United States v. Mosinee Research Corp., the court concluded that laetrile was not grandfathered within the meaning of the 1962 Amendments. No. 77-C-285, slip op. at 14 (E.D. Wis. July 29, 1977). But most recently, in Rutherford v. United States, laetrile was held to be an "old drug" under the 1962 Amendments and therefore exempted from the pre-market proof of drug effectiveness requirement. 438 F. Supp. at 1294-98.

70. *See* note 63 and accompanying text *supra.* For an explanation of the procedures and burdens of proof in determining safety and efficacy of a "new drug", *see Drug Efficacy, supra* note 56, at 192-222. *See also* Weinberger v. Hynson, Wescott & Denning, Inc., 412 U.S. 609 (1973); Ciba Corp. v. Weinberger, 412 U.S. 640 (1973); Weinberger v. Bentex Pharmaceuticals, Inc., 412 U.S. 645 (1973); USV Pharmaceutical Corp. v. Weinberger, 412 U.S. 655 (1973); 42 Fed. Reg. 38769, 39775 (1977).

71. Rutherford v. United States, 438 F. Supp. at 1293.

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

73. *See* Barrett, *Judicial Supervision of Legislative Classification — A More Modest Role for Equal Protection?,* 1976 B.Y.U. L. REV. 89, 129.

74. Aspects of privacy which have been recognized as constitutionally protected include "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing," Paris Adult Theater v. Slayton, 413 U.S. 49, 65 (1973), a physical zone of privacy in which

found to have different constitutional sources. For search and seizure purposes, the right of privacy has been held to have its basis in the fourth and fifth amendments.[75] In matters of freedom of expression, it has been predicated on the first amendment.[76] In cases involving marital rights, some Justices have found it within the ninth amendment[77] while others have seen it within the "penumbras" of the Bill of Rights.[78] More recently, the Court has held that rights of personal privacy are implicit in the concept of "liberty" within the protection of the fourteenth amendment due process clause.[79]

Arguably, there is a constitutional privacy right of freedom of choice in health-care treatment.[80] Suggested constitutional sources of this right are the liberty interest of the fourteenth amendment and the penumbral protections of the Bill of Rights.[81] By way of dictum in *Rutherford v. United States*[82] a "right of privacy . . . to use a nontoxic substance in connection with one's own personal health-care" has been recognized.[83] The *Rutherford* court reasons that decisions in matters of health are so highly personal and basically determinative of the course

one has the right to rely on freedom from intrusion, Katz v. United States, 389 U.S. 347, 351-53 (1967), and privacy of belief and thought, Stanley v. Georgia, 394 U.S. 557, 564-65 (1969).

75. Katz v. United States, 389 U.S. at 350-51; Terry v. Ohio, 392 U.S. 1, 8-9 (1968).

76. Stanley v. Georgia, 394 U.S. at 564.

77. Griswold v. Connecticut, 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring).

78. Griswold v. Connecticut, 381 U.S. at 484-85.

79. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

80. *See Drugs of Questionable Efficacy, supra* note 62, at 383.

81. *See* notes 78-79 and accompanying text *supra.*

82. Rutherford v. United States, 438 F. Supp. 1287. The *Rutherford* case has a complicated history. Suit was originally brought by a cancer patient seeking injunctive relief from federal interference with his importation and use of laetrile. 399 F. Supp. 1208 (W.D. Okla. 1975). The district court held that the onerous expense of complying with the pre-market proof of drug safety and effectiveness requirements deprived the plaintiff of his Fifth Amendment right of life, liberty and property without due process of law. *Id.* at 1213. It further found that laetrile was a safe and effective drug and ordered a temporary injunction. *Id.* at 1211-12. Later this ruling was expanded to allow nineteen other cancer victims to obtain and use laetrile. N.Y. Times, Apr was modified to include only those patients who produced sworn affidavits from their doctors evidencing that they were terminally ill and would use the substance merely as a supplement to orthodox treatments. *Id.* On appeal, the 10th Circuit affirmed issuance of the temporary injunction. 542 F.2d 1137 (1976). The appeals court remanded to the district court, however, on the question whether a permanent injunction should be granted. The lower court was ordered to determine laetrile's status as an "old" or "new drug" under the Food, Drug, and Cosmetic Act. *Id.* at 1143-44. The district court remanded to the FDA for compilation of an administrative record supporting the agency's ruling that laetrile is a "new drug". 424 F. Supp. 105 (W.D. Okla. 1977). The FDA assembled a record and submitted it to the court. *See* note 64 *supra.* The district court held that the FDA had not presented "substantial evidence" that laetrile is a "new drug" and found it to be an "old drug" and hence exempted from the proof of drug safety and effectiveness requirements. 438 F. Supp. at 1292-98. The FDA's designation of laetrile as a "new drug" was vacated and a permanent injunction ordered. *Id.* at 1301. The case is currently on appeal to the 10th Circuit. Private communication with Paul Ragan, Associate Chief Counsel for Enforcement, Office of the Chief Counsel, Food and Drug Division, Dept. of Health, Education, and Welfare (January 20, 1978).

83. 438 F. Supp. at 1301.

of a person's life, that they must be left to the individual.[84] Further support for recognition of a right of choice in health treatment is found in judicial treatment of the analogous tort doctrine of informed consent[85] and privacy rights to abortion and contraception.[86]

A. Informed Consent

A patient's right to bodily control in the area of health-care has been recognized in the tort doctrine of informed consent.[87] Under this doctrine, no medical procedure may be performed upon a competent adult unless that person has consented to it after being informed of the nature of the treatment, any substantial risks involved and the availability of alternative treatments.[88] The doctrine recognizes that a patient may refuse treatment and choose to risk possible harm which might result from such refusal.[89] In such a situation, the physician must defer to the patient's decision even if beneficial or life-saving assistance is rejected.[90]

The principle underlying the doctrine of informed consent is the preeminence of self-determination in matters of bodily integrity.[91] It recognizes that the final decision on whether to undergo a particular course of health treatment must rest with the individual who is to be treated: that a patient's right to control his or her own body supercedes

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84. The court reasons that:

> Doubtless FDA desires to protect the public. Such good intention, however, is not the overriding issue. Many of us allocate time and money and other resources in ways susceptible to just criticism by many standards. Nonetheless, our political ideals emphasize that the right to freely decide is of much greater significance than the quality of those choices actually made. It is never easy for one who is concerned and feels himself particularly knowledgable [*sic*] to observe others exercise their freedom in ways that to him appear unenlightened.
>
> As a nation, however, historically and continuously we are irrevocably committed to the principle that the individual must be given maximum latitude in determining his own personal destiny.
>
> To be insensitive to the very fundamental nature of the civil liberties at issue in this case, and the fact that making the choice, regardless of its correctness, is the sole prerogative of the person whose body is being ravaged, is to display slight understanding of the essence of our free society and its constitutional underpinnings. This is notably true where, as here, there are no simple answers or obvious solutions, uncertainty is pervasive, and even the best efforts leave so much to be desired.

Id. at 1301.

85. *See* notes 87-92 and accompanying text *infra.*

86. *See* notes 93-101 and accompanying text *infra.*

87. W. PROSSER, J. WADE & V. SCHWARTZ, TORTS: CASES AND MATERIALS 107 n.7 (6th ed. 1976).

88. Wilson v. Scott, 412 S.W.2d 299, 301 (Tex. 1967). *See* Comment, *Informed Consent as a Theory of Medical Liability,* 1970 WIS. L. REV. 879, 880; Note, *Failure to Inform as Medical Malpractice,* 23 VAND. L. REV. 754, 755 (1970).

89. *See Informed Consent, supra* note 88, at 883, 891.

90. *See* Natanson v. Kline, 186 Kan. 393, 406-07, 350 P.2d 1093, 1104 (1968); Woods v. Brumlop, 71 N.M. 221, 226-27, 377 P.2d 520, 524 (1962); Schloendorff v. New York Hospital, 211 N.Y. 125, 129-32, 105 N.E. 92, 93-94 (1914).

91. Natanson v. Kline, 186 Kan. at 406, 350 P.2d at 1104. *See Failure to Inform, supra* note 88, at 755.

a physician's determination of what is medically desirable.[92] The doctrine of informed consent thus provides a strong philosophical basis for recognition of a right of freedom of choice in health-care treatment.

B. Rights to Abortion and Contraception

The cases of *Griswold v. Connecticut,*[93] *Eisenstadt v. Baird,*[94] and *Roe v. Wade*[95] established that a constitutional right of privacy protects the personal intimacies of marriage, procreation and childbirth. In *Griswold* the Court struck down a state law that made it a crime for any person to use contraceptives on the ground that it infringed upon a constitutionally protected marital "zone of privacy".[96] Later in *Eisenstadt,* the zone of personal privacy delineated in *Griswold* was extended to include the right of single persons to use and obtain contraceptives.[97] *Roe* expanded the right of privacy beyond contraception to encompass a woman's right to decide whether to have an abortion in the first trimester of pregnancy.[98] In all of these cases, there were individual privacy interests involved which outweighed government interests.[99]

The abortion and contraception decisions are significant in evidencing the great judicial weight attached to the individual's right to decide personal destiny in matters of bodily integrity.[100] The availability of abortion determines not only whether an operation will take place or a birth proceed, but whether there will be an offspring to nurture, support and raise. The personal consequences of deciding when and whether to conceive are obvious. These holdings are precedents for recognition of an analogous right of freedom of choice in health-care treatment in that choices among health treatments are as personal and

92. *See generally* cases cited at note 90 *supra.*

93. 381 U.S. 479 (1965).

94. 405 U.S. 438 (1972).

95. 410 U.S. 113 (1973).

96. 381 U.S. at 484.

97. 405 U.S. at 454-55.

98. 410 U.S. at 163.

99. The Court in *Griswold* and *Roe* applied a strict scrutiny test to the state regulations in question while arguably a means-oriented standard was used in *Eisenstadt, see* note 139 and accompanying text *infra.* In *Roe* a sliding-scale approach was adopted which limited government interference with a woman's abortion decision in the first trimester of pregnancy, but found compelling government interests which justified regulation during the second and third trimesters. 410 U.S. at 164-65. *See* note 153 and accompanying text *infra.*

100. *See* Doe v. Bolton, 410 U.S. 179 (1973) (state statute conditioning access to abortion on two physicians and the hospital's approval violated mother's constitutional right of privacy), where Mr. Justice Douglas found that "the freedom to care for one's health and person" is a constitutionally guaranteed privacy right. *Id.* at 213 (concurrence). Justice Douglas concluded that, "The right of privacy has no more conspicuous place than in the physician-patient relationship," *id.* at 219, and "the right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic. . . ." *Id.* at 219-20.

far-reaching as deciding whether to give birth or conceive.[101]

IV. CONSTITUTIONAL ANALYSIS

None of the privacy interests which have been recognized is absolute. Where government regulations are alleged to interfere with the exercise of constitutional privacy rights, the courts, borrowing from the equal protection cases, will test such measures under a rational basis or a means-oriented or a strict scrutiny standard, depending on the nature of the privacy interest involved.[102]

The pre-market proof of drug effectiveness requirement has been challenged as interfering with a constitutional privacy right of freedom of choice in health-care treatment.[103] Whether this restriction will be sustained, depends upon where the individual and governmental interests involved are placed within the framework of equal protection standards.

Prior to discussion of the application of these equal protection tests to the drug effectiveness requirement, the government interests allegedly served by that regulation must be considered. The general government policy behind drug regulation is examined briefly and then those government interests upon which the efficacy provision is based specifically are analyzed.

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101. One student author has suggested that the Court's recognition of fundamental rights to abortion and contraception is strong precedent for finding a fundamental privacy right of freedom of choice in health-care treatment. *Drugs of Questionable Efficacy, supra* note 62, at 396-99. He reasons that since the fundamental privacy rights found in the abortion and contraception decisions are "within the general spirit of health care", it is likely that these holdings will be extended and a fundamental right of choice in health-care explicitly set out. *Id.* at 397, 399. This analysis ignores the real thrust of the abortion and contraception cases. The fact that by having different choices open in matters of abortion and contraception, the individual's health might be affected differently depending on the choices made from among the various alternatives, is not a significant factor in the reasoning of these cases. It is suggested that the abortion and contraception decisions do have significant bearing on the question of whether a privacy right of health-care choice is likely to be recognized, however. *See* Rutherford v. United States, 438 F. Supp. at 1299-1300. It is further submitted that there is little evidence to support the author's assertion that the right of freedom of choice in health-care treatment is likely to be classified as being a fundamental right, *Drugs of Questionable Efficacy, supra* note 62 at 396-99, 407-08. *See* notes 127-128 and accompanying text *infra.*

102. Barrett, *supra* note 73, at 120. *See generally* Gunther, *The Supreme Court, 1971 Term — Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

103. Rutherford v. United States, 438 F. Supp. at 1299-1301. *See also* People v. Privitera, 55 Cal. App. 3d Supp. 39, 128 Cal. Rptr. 151 (1976), where a state statute prohibiting the administration of ineffective cancer drugs was upheld on grounds that the state interest in preventing harmful reliance on such substances outweighs any individual privacy right involved. *Id.* at 51-52, 128 Cal. Rptr. at 158-59.

A. Government Interests

1. Drug Regulation Generally

Government regulation of drugs is undertaken with the objective of preventing the public from exposing itself to risks which the government deems inadvisable.[104] Since most individuals are not in a position to evaluate drugs, the government puts national resources to work to determine the value of drugs for them.[105] The philosophy behind restricting the availability of drugs is that rational persons with a full understanding of the facts would not choose to use drug products which the government finds objectionable.[106]

Similarly, this is the reasoning behind the government's prohibition of drugs of unproven effectiveness. It is assumed that rational persons would not wish to use drugs which have not been proven effective.[107] The FDA thus suggests that the current demand for laetrile is attributable to the inability of cancer patients to make rational choices due to the enormous physical and emotional stresses which they are under and the overbearing laetrile promotions to which they are subjected.[108]

2. Specific Interests

The pre-market proof of drug effectiveness requirement allegedly furthers two government interests: (1) preventing individuals in poor health from harmfully delaying treatments of proven benefit, and (2) protecting them from fraudulent health-care promotions.

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104. Kaplan, *The Role of the Law in Drug Control,* 1971 DUKE L. J. 1065, 1089-92.

105. *See* Wilcox, *Public Protection, Private Choices and Scientific Freedom: Food, Drugs and Environmental Hazards,* 18 FOOD DRUG COSM. L. J. 321, 322-23 (1963).

106. *See generally* Dworkin, *Paternalism,* MORALITY AND THE LAW 107, 110 (R. Wasserstrom ed. 1971). This approach incorrectly assumes that rational persons always will accept the relative weights the government has given to the various issues associated with a drug's use. It may well be that a rational physician and patient, knowledgeable of that particular individual's circumstances, will balance the benefits of use of a drug of unproven effectiveness against its disadvantages differently than would the government. *See* Helms, *A Proposal to Save Lives,* THE REVIEW OF THE NEWS, July 13, 1977, at 8. Under the pre-market proof of drug effectiveness requirement, however, such a physician-patient decision-making process is precluded. For a discussion of the varying weights that an individual might assign to competing elements of maintaining good health, *see* Dworkin, *supra* at 120-23.

107. The FDA has stated that, "To the extent that any freedom has been surrendered by the passage of the legislation which bans from the marketplace drugs that have not been proven to be effective, that surrender was a rational decision which has resulted in the achievement of a greater freedom from the dangers to health and welfare represented by such drugs." 42 Fed. Reg. 39768, 39804 (1977).

108. In its report on the status of laetrile, the FDA attempts to account for the popularity of the substance in spite of its well-publicized ineffectiveness:

> Why do people use laetrile? . . . The answer lies in the fear that cancer engenders — and that proven therapies engender — and the need of patients and their families for hope in a situation where the hope offered by the legitimate therapies is often modest. The use of

a. prevention of harmful delay

The most common argument against legalization of ineffective drugs is that their availability would cause harmful delay in procuring treatments of proven benefit.[109] The persuasiveness of this argument rests on three assumptions: (1) that the individual initially could be medically aided; (2) that his or her condition worsened as a result of reliance on the ineffective drug, and (3) that as a result of this delay, the patient's conditions became less responsive to orthodox treatment.[110] It has been suggested that these premises are not borne out in the case of laetrile use given the prevalent pattern of that drug's employment as a supplemental treatment only[111] and the relatively low success rate in the treatment of cancers through orthodox means.[112] Consideration of the facts and figures which have been offered to support this position, however, reveals that there are a significant number of cancer victims who can be medically helped but who will choose to rely exclusively on laetrile to the detriment of their health, should that substance be made available without restriction.[113]

'unproven' remedies is, in the opinion of observers, in large part attributable to the loved ones of the cancer victim, in whom both fear and the need for hope are magnified by sympathy and by the guilt that one feels at being unable to relieve the suffering of a person one loves. This situation is, unfortunately, skillfully exploited by the purveyors of 'unproven' cancer remedies, of which Laetrile is only the most publicized.

42 Fed. Reg. 39768, 39797-98 (1977). *See The Laetrile Nightmare*, 127 WEST. J. MED. 39, 39-40 (1977).

109. *See, e.g.*, 42 Fed. Reg. 39768, 39804 (1977). This is the basis of the support of the American Cancer Society, the American Medical Association and many state medical societies for the ban on laetrile. N.Y. Times, June 18, 1977, at 9, col. 1.

110. *Cf. Drugs of Questionable Efficacy, supra* note 62, at 401.

111. It is estimated that 80-85% of those who use laetrile do so as a supplement to more conventional treatments or have turned to it after recognized remedies have failed. N.Y. Times, February 28, 1971, at 52, col. 3. *See* Rutherford v. United States, 438 F. Supp. at 1295-96 n.18.

112. When sworn in as Director of the National Cancer Institute, Dr. Frank Fauscher, Jr. stated, " 'that of the one hundred cancers that afflict man, about 15 percent of these can be treated extremely well, to the point of at least 50 percent 5-year survivals'." Stang, *Laetrile: Freedom of Choice in Cancer Therapy?*, 17 AMERICAN OPINION 49, 49-50 (1974). This works out to a 7.5 percent (50 percent of 15 percent equals 7.5 percent) success rate for orthodox cancer treatments. *Id.*

113. It is estimated that only 15-20% of those who use laetrile do so to the exclusion of orthodox treatments. *See* note 111 *supra*. But when compared to the approximately 50,000 laetrile users annually, Rutherford v. United States, 438 F. Supp. at 1295-96 n.18 (referring to N.Y. Times, June 18, 1977, at 9, col. 1), it is seen that a significant 7,500 to 10,000 individuals are foregoing accepted remedies to rely on laetrile alone (15-20 percent of 50,000 equals 7,500-10,000). And though the 7.5% 5-year survival rate for cancer patients treated through orthodox means is not as high as we might wish, *see* note 112 *supra*, it does represent substantial improvement in established medicine's ability to treat cancers. Great progress in treating the seventeen common tumor types indexed in the National Cancer Institute publication "Recent Trends in Survival of Cancer Patients" has been made. DHEW Pub. No. (NIH) 76-767, National Institute of Health, NationalRecent Trends in Survival of Cancer Patients" has been made. DHEW Pub. No. (NIH) 76-767, National Institute of Health, National Cancer Institute, Bethesda, Md. (1975). The average increase in 5-year survival of patients suffering from these seventeen types of cancer is 75% higher than it was twenty years ago. Lewis, *supra* note 5, at 55. And the overall picture is one of continued forward movement. *See* AMERICAN CANCER SOCIETY, INC., LAETRILE: BACKGROUND INFORMATION 22 (August 1977).

b. protection from fraud

The government interest in protecting individuals in poor health and their families from fraudulent promotions of health treatments is allegedly served by the prohibition on the marketing of ineffective drugs.[114] It has been suggested that this argument is particularly persuasive in the case of ineffective cancer "cures" given the uncertainties of that disease, the harsh orthodox treatment often prescribed to deal with it and the particularly fertile climate cancer quackery is currently enjoying due to increasing distrust of government.[115] Legalization of ineffective drugs purportedly would give them respectability and would cause patients to improvidently channel their hopes and resources into useless treatments presented in a false aura of benefit.[116] It has been argued further, that making drugs of unproven effectiveness available rather than promoting the exercise of free choice would leave those in poor health open to pressures from drug promoters which would impair their ability to make free decisions.[117]

Wholly prohibiting drugs of unproven effectiveness in order to advance the government interest of protecting the public from fraud is an undesirably broad approach to meeting that end. The public can be safeguarded adequately from fraud while permitting the use and availability of drugs of questionable efficacy. This could be accomplished through establishment and enforcement of strict branding and advertising standards in the promotion and marketing of ineffective drugs.[118]

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114. 42 Fed. Reg. 39768, 39804 (1977).

115. *See id.* at 39798, 39803; People v. Privitera, 55 Cal. App. 3d Supp. at 52, 128 Cal. Rptr. at 160; *Laetrile: Should It Be Banned?,* NEWSWEEK, June 27, 1977, at 48, 49; N.Y. Times, July 19, 1977, at 13, col. 1.

116. 42 Fed. Reg. 39768, 39805 (1977).

117. 42 Fed. Reg. 39768, 39804 (1977). Accusations of widespread fraud in the promotion of laetrile have been made. *See, e.g., Laetrile Smuggling Drama Hits Courts,* MED. WORLD NEWS, June 28, 1976, at 17-20. Though proponents insist that laetrile has not been promoted as a cancer cure, *see, e.g.,* N.Y. Times, June 18, 1977, at 9, col. 2 (in which laetrile manufacturer Andrew R. L. McNaughton says, "I shudder whenever I hear the words 'cancer cure' because we who have had the most experience with the substance have never made that claim. Laetrile is not a magic bullet. It is, however, the central jewel in a treatment made up of lesser jewels including nutrition, vitamins, minerals and exercise."), it is so identified in the public's mind. Hanson v. United States, 417 F. Supp. at 35. Laetrile distributors are reported to be making hundreds of thousands of dollars annually on the drug's sale, Brown, *Laetrile: It Can Kill,* 31 CANCER NEWS 5, 6 (1977); Jukes, *Ice Tea or Laetrile?,* 269 NATURE 283 (1977), through a well-organized advertising campaign which is so persuasive that scientific and government statements against its usefulness often go unheeded. 42 Fed. Reg. 39768, 39799, 39803 (1977).

118. *Drugs of Questionable Efficacy, supra* note 62, at 408. In Rutherford v. United States, the court suggests that the FDA is empowered adequately already "to combat false or fraudulent advertising of ineffectual or unproven drugs." 438 F. Supp. at 1301.

B. Competing Interests

If the right to the health treatment of one's choice is recognized as being fundamental,[119] the federal ban against drugs of unproven effectiveness will be struck down as unconstitutionally interfering with this right unless it is (1) necessary to promote some compelling government interest and (2) so narrowly drawn as to express only that particular government interest at stake.[120] If the right of choice in health-care treatment is not found to be fundamental, a rational basis standard may be applied under which the effectiveness requirement will be sustained if there is any conceivable government interest which might rationally be served by it.[121] It is suggested that the most likely standard by which the efficacy provision will be scrutinized is the means-oriented test employed in *Eisenstadt v. Baird,*[122] the more recent sex discrimination decisions,[123] and in the cases dealing with the rights of illegitimate children.[124] Under this standard the pre-market proof of drug effectiveness requirement will be upheld if it is "substantially related" to achieving the actual government purposes for which it was enacted[125] and is not overly inclusive in meeting those ends.[126]

1. Strict Scrutiny

The courts have shown reluctance to increase the number of fundamental rights.[127] Furthermore, a right of choice in health-care treat-

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119. *See* notes 127-128 and accompanying text *infra.*

120. Roe v. Wade, 410 U.S. at 155. Where a statutory classification interferes with a fundamental right, *see, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (right of interstate travel), or involves a suspect criterion, *see, e.g.,* Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (alienage), it will be tested by this so-called strict scrutiny standard.

121. *Drugs of Questionable Efficacy, supra* note 62, at 389. *See* Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955). This rational basis standard traditionally has been applied to state regulations affecting economic and property interests. B. SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK 296-97 (1972).

122. 405 U.S. at 446-55. *See* note 139 *infra.*

123. *See* Reed v. Reed, 404 U.S. 71, 76 (1971) ("A classification [by sex] must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."); Craig v. Boren, 429 U.S. 190, 197 (1976), *reh'g denied,* 429 U.S. 1124 (1977) (classification by sex "must serve important governmental objectives and must be substantially related to achievement of those objectives"); Stanton v. Stanton, 421 U.S. 7, 14 (1975) (*Reed* standard affirmed). *See also* Gunther, *supra* note 102, at 35.

124. *See* Mathews v. Lucas, 427 U.S. 495, 513 (1976) (legislative classification based on illegitimacy must bear a substantial relation to the government purposes which it is intended to serve and must not "broadly discriminate" but be "carefully tuned to alternative considerations"); Trimble v. Gordon, — U.S. —, 97 S. Ct. 1459, 1466 (1977) (*Mathews* standard affirmed).

125. *See* note 123 *supra.*

126. *See* note 124 *supra.*

127. *See, e.g.,* Mathews v. Lucas, 427 U.S. at 504, 506 (strict scrutiny will not be applied to classifications based on illegitimacy); Reed v. Reed, 404 U.S. at 75-76 (classifications based on sex are not subject to strict scrutiny). *See also* Gunther, *supra* note 102, at 12-15.

ment is unlikely to be classified as being a fundamental right given the judicial deference which government measures regulating the health-care field traditionally evoke.[128] Were such a fundamental right to be found, however, it is questionable whether there is a sufficiently compelling government interest served by the pre-market proof of drug effectiveness requirement to sustain it.[129] Of the two government interests on which the regulation is based, protection of the public from fraud hardly seems overriding; less burdensome governmental provisions would accomplish that same end.[130] Furthermore, the government interest in preventing harmful delay in the procurement of beneficial treatment has been held insufficient to justify prohibition of the marketing of health-care products.[131] But even if the government's interest in preventing harmful delay should be found to compel restriction on drugs of unproven effectiveness, the efficacy requirement is still likely to fail under strict scrutiny analysis.[132] It is overly broad in including those supplemental users who have not delayed in seeking proven treatments and thus who have not been persuaded through fraudulent promotions to place great reliance on the ineffective drug in

128. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 151-52 (1938); Williamson v. Lee Optical, 348 U.S. at 487-88. *See also* Gunther, *supra* note 102, at 32.

A San Diego Law Review comment suggests that there are only two possible standards by which the constitutionality of government measures interfering with a right of freedom of choice in health-care treatment may be tested, i.e., rational basis scrutiny and strict scrutiny. *Drugs of Questionable Efficacy, supra* note 62, at 389. That author further contends that strict scrutiny is clearly the more likely of these two standards to be applied. *Id.* at 399. This analysis overlooks the possible application of a means-oriented standard. *See* notes 122-126 and accompanying text *supra*. *See also* Lewis v. Cohen, 417 F. Supp. 1047, 1051-60 (E.D. Pa. 1976) (outlining the development and nature of means-oriented scrutiny). It is submitted that there is little support for the contention that a right of choice in health treatments will be found to be fundamental, *see* notes 127-128 and accompanying text *supra*, and it is suggested that governmental intrusions upon this right most probably will be scrutinized under a means-oriented standard. *See* notes 122-126 and accompanying text *supra*. *But see* Rutherford v. United States, 438 F. Supp. at 1300-01.

129. In Rutherford v. United States, where in dictum a fundamental right to use non-toxic health-care treatments was recognized, the court failed to identify any compelling government interest which justified interference with this right. 438 F. Supp. 1300-01. It is clear however, that sufficiently compelling government interests are served by the pre-market proof of drug *safety* requirement to sustain that provision even under strict scrutiny. Protection of public health and safety has been held to compel government interference with even fundamental rights. *See* Roe v. Wade, 410 U.S. at 163 (the high mortality rate of women undergoing abortions in the second trimester of pregnancy held to compel reasonable government interference with the woman's abortion decision at that point during pregnancy).

130. The enactment and enforcement of strict labelling requirements is an apparent such alternative. Comment, *Restrictions on Unorthodox Health Treatment in California: A Legal and Economic Analysis*, 24 U.C.L.A. L. REV. 647, 694 (1977).

131. *Drugs of Questionable Efficacy, supra* note 62, at 404-05 (discussing United States v. Articles of Drug Labeled "Quick-O-ver", 274 F. Supp. 443, 449 (D. Md. 1967); United States v. Article of Drug Labeled Decholin, 264 F. Supp. 473, 482-83 (E.D. Mich. 1967)). *But see* People v. Privitera, 55 Cal. App. 3d Supp. 39, 128 Cal. Rptr. 151, where the court held that it was sufficient justification for a state ban on laetrile that the substance's availability might induce medically aidable patients to delay in obtaining proven treatments. *Id.* at 52, 128 Cal. Rptr. at 159.

132. *See Drugs of Questionable Efficacy, supra* note 62, at 407-08.

question.[133] Prevention of harmful delay could be accomplished through less burdensome means.[134]

2. Rational Basis Scrutiny

Those health regulations which do not affect fundamental rights will be upheld where there is a rational relationship between the regulation adopted and any legitimate government objective which the court might identify.[135] Under this standard, even if there is no articulated government interest behind the regulation's enactment, it is enough that the court might find a reasonable governmental goal which it serves.[136] Government regulations will rarely be invalidated under this test.[137] The interests enunciated as justifying the ban on drugs of unproven effectiveness[138] are rationally related to those ends and the regulation probably would be affirmed under this standard.

3. Means-Oriented Scrutiny

There is precedent for applying a means-oriented approach to health-care regulations.[139] Classification under this standard strikes a middle ground between the interventionist approach of strict scrutiny and the deferential one of rational basis scrutiny. While less rigorous than strict scrutiny, the means-oriented standard is stringent enough to strike down legislation which is not "substantially related" to accomplishing those ends which it was intended to serve[140] or which is overinclusive in accomplishing those purposes.[141] The government interests on which the effectiveness requirement is based do not apply to individuals who use ineffective drugs only supplementally.[142] Supplemental users, however, are included within the prohibition's scope. Under the means-

133. *Id.* In Rutherford v. United States, the court suggested that even if the right to nontoxic health treatments was not held to be a fundamental one, "it would appear that Laetrile's use by... cancer patients interested in using Laetrile only in conjunction with conventional methods would be constitutionally protected." 438 F. Supp. at 1301 n.28 (dictum).

134. *See* notes 145-154 and accompanying text *infra.*

135. *See* Gunther, *supra* note 102, at 32; United States v. Carolene Products Co., 304 U.S. at 152; Williamson v. Lee Optical of Oklahoma, 348 U.S. at 487-89.

136. *See, e.g.,* United States v. Carolene Products Co., 304 U.S. at 152.

137. Schwartz, *supra* note 121, at 296-97.

138. *See* notes 109-118 and accompanying text *supra.*

139. *See* Eisenstadt v. Baird, 405 U.S. at 446-55. Although Justice Brennan writing for the majority in *Eisenstadt,* purports to use the old rational basis standard in striking down a state law prohibiting a single person from obtaining contraceptives, his analysis does not focus on identifying some government interest that reasonably might be served by such prohibition but rather on uncovering the actual government purpose which in fact had been pursued, and is therefore a means-oriented approach. Gunther, *supra* note 102, at 35.

140. *See* note 125 and accompanying text *supra;* Gunther, *supra* note 102, at 34-36.

141. *See* note 126 and accompanying text *supra.*

142. *See* note 133 and accompanying text *supra.*

oriented standard therefore, the efficacy provision is overbroad in accomplishing those government purposes which it is intended to serve and is likely to be held to interfere unconstitutionally with a right of choice in health-care treatment. It is suggested that this means-oriented approach is the most probable of the three equal protection standards to be applied, given the movement away from classifying rights as being fundamental[143] and the recent precedent which exists where important individual rights are concerned, to take a more judicially interventionist approach than rational basis scrutiny affords.[144]

V. ALTERNATIVE PROPOSALS

Under the 1962 Amendments, all individuals, regardless of their circumstances, are denied access to ineffective drugs. This total prohibition is overbroad in accomplishing those government purposes which it is intended to serve.[145] Less inclusive regulatory possibilities have been suggested which would advance the government interests of preventing harmful delay in procuring proven treatments and protecting the public from fraud, while recognizing the individual's right, on a limited basis, to obtain and use safe but ineffective drugs.[146] This may be accomplished by narrowly defining that class of individuals who, on grounds of the various government interests involved, will be prohibited access to ineffective drugs.

One alternative approach would prohibit non-terminal patients from using ineffective drugs while permitting them to terminal patients.[147] Basing access to laetrile on this criterion has been adopted by at least one court[148] and considered by the New York legislature.[149] Another

143. *See* note 127 and accompanying text *supra*.

144. *See* notes 122-126 and accompanying text *supra*.

145. *See* note 133 and accompanying text *supra*.

146. *See Drugs of Questionable Efficacy, supra* note 62, at 408; *Unorthodox Health Treatment, supra* note 130, at 694-95.

147. For favorable reviews of this proposal, *see* N.Y. Times, June 4, 1977, at 45, col. 1; *id.* May 5, 1977, at 26, col. 2; *id.* February 11, 1977, at A26, col. 1.

148. *See* note 82 *supra*. For discussions of this ruling, *see* N.Y. Times, May 10, 1977, at 18, col. 6; *id.* April 10, 1977, at 14, col. 6; NEWSWEEK, *supra* note 115, at 48.

149. This legislation would have permitted a terminal cancer patient to receive laetrile if that person's doctor certified that all medically-accepted treatment had been exhausted and the patient acknowledged in writing the substance's unproven effectiveness. N.Y. Times, June 25, 1977, at 44, col. 2.

The FDA finds approval of laetrile for terminal patients to be unacceptable on grounds that:

> (1) it would constitute sanction of an inhuman fraud upon the patients involved, one which wastes the financial resources of the patients and their families uselessly, (2) the distinction of 'terminal' patients from 'non-terminal' patients may not be wholly determined and an assumption that laetrile may be given to such patients with impunity may deprive such patients of therapeutic measures which could help them, (3) it would give credence among the public at large that will expand the drug's use in early cases for peo-

proposal would permit safe but ineffective drugs to be used only where they were administered as a supplement to proven treatments.[150] A third, less restrictive scheme would make ineffective drugs available to anyone who, with knowledge of their lack of proof of effectiveness, still chooses to use them. This could be accomplished through requiring written acknowledgments to that effect[151] or labelling requirements.[152]

These alternative regulatory possibilities recognize that the justification of governmental restrictions on the availability of drugs of unproven effectiveness varies with the individual's health and the degree of reliance which he or she places on the drug in question. They suggest that government intrusions on the individual's right to obtain and use an ineffective drug might be undertaken on a sliding-scale approach similar to that adopted in *Roe v. Wade.*[153] Such an approach to laetrile availability would take into account the strong government interest in preventing non-terminal patients from relying on laetrile use alone (i.e., preventing harmful delay in receiving treatments of proven benefit), the

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ple who will prefer taking a 'vitamin' to confronting the surgeon's knife, and (4) it would be extremely difficult to enforce.

42 Fed. Reg. 39768, 39805 (1977). *See also* Brown, *supra* note 117, at 7.

150. *See Drugs of Questionable Efficacy, supra* note 62, at 408, 413. One physician has suggested that making laetrile available by prescription only would accomplish this in that doctors could be relied on to treat their patients primarily with orthodox medicines and use laetrile only as an adjunct "medication". Crile, *Legalization of Laetrile — A Suggestion,* 295 NEW ENGLAND J. MED. 116 (1976) (letter to the editor).

The FDA claims that permitting supplemental use of laetrile is unacceptable since, it alleges, there is no proof that its administration in conjunction with orthodox therapy is safe. 42 Fed. Reg. 39768, 39805 (1977). *But see* N.Y. Times, June 16, 1977, at A18, col. 1, where it is reported that after four years of testing laetrile in animals at the Memorial Sloan-Kettering Cancer Center, the addition of laetrile to drugs known to be effective against cancer did not impair their benefits or influence their toxicity.

151. *See* note 149 *supra.*

152. *Unorthodox Health Treatment, supra* note 130, at 694.

The FDA finds labelling regulations ineffective: "There can be few patients taking Laetrile in this country today who do not know that the government and most experts consider it worthless. Yet the drug continues to be used to the detriment of cancer patients who might otherwise be helped by conventional treatment." 42 Fed. Reg. 39768, 39803 (1977). *See also Freedom of Choice and Apricot Pits,* TIME, June 20, 1977, at 54.

153. 410 U.S. at 162-65. In *Roe,* the Court held that a woman's decision to terminate her pregnancy could not be interfered with unless there were compelling government reasons for doing so. While it was held that there was no government interest which justified interference with the abortion decision in the first trimester of pregnancy, it was found that the government's interest in protecting the health of the mother in the second trimester (when the mortality rate from abortions is higher than from giving birth), and the protection of the life of the baby in the third trimester (when the baby becomes viable), were sufficiently compelling to permit reasonable government regulation of access to abortion during these last six months of pregnancy. *Id. See also* Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), where the court reasoned that in those cases where the medical procedure required constitutes a minimal bodily invasion and the chances of recovery and return to functioning life are very good, the government can compel a patient against his will to receive treatment. However, it held, "the State's interest *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims." *Id.* N.J. at 40-41, 355 A.2d at 664.

lesser interest in restricting non-terminal cancer patients who use the substance supplementally (i.e., protecting the public from fraud), and the minimal interest in limiting terminal patients from using laetrile as a last resort.[154] Thus while there are government interests which would justify some limitations on the availability of ineffective drugs, a regulation more narrowly drawn than the present efficacy provision could leave the individual more self-determination in matters of health-care while not impairing any significant state interest.

VI. CONCLUSION

Precedent exists which supports recognition of a constitutionally protected privacy right of freedom of choice in health-care treatment. Given the Courts' reluctance to increase the number of fundamental privacy interests and the movement away from rational basis scrutiny where important individual rights are concerned, government regulations which interfere with this right are likely to be scrutinized under a means-oriented standard. The pre-market proof of drug effectiveness requirement probably will fail under such a means-oriented standard due to its overinclusiveness in accomplishing those governmental purposes which it is intended to serve. It is suggested, however, that abandonment of the efficacy provision would be improvident in that it would shift the great burden of determination of drug value to the individual physician and patient. The potential waste of time and money of such an ad hoc approach makes it undesirable.

It is recommended that the proof of efficacy requirement be amended to allow administration of safe but ineffective drugs as a supplement to orthodox treatment. Requiring physician and patient to file with a designated governmental or medical agency a written acknowledgment of (1) a drug's unproven effectiveness, and (2) its use only as a supplemental treatment, is suggested.

In addition to encouraging medical consultation, this procedure would permit the final decision concerning a drug's use to be made in the context of the individual physician-patient relationship. The formalities of the acknowledgment process would insure that the patient, with the guidance of his or her physician, would consider carefully the competing interests involved in using an ineffective drug. The government interests in preventing harmful delay and protecting against fraud

154. The Rutherford court in dictum stated that, "Even if no such [fundamental] right [to use a nontoxic health-care substance] existed generally, it would appear that Laetrile's use by terminally ill cancer patients who have exhausted orthodox approaches or cancer patients interested in using Laetrile only in conjunction with conventional methods would be constitutionally protected." 438 F. Supp. at 1301 n.28.

would be served through the necessarily active participation of the physician, while a limited right of freedom of choice in health-care treatment would be recognized.

SUSAN J. TIUS

The Regulation of Mopeds: A Legislative Proposal

The motorized bicycle, commonly referred to as a moped,[1] is a recent addition to the American transportation market. Although popular in Europe for approximately thirty years,[2] mopeds first appeared in the United States in late 1974, when the Department of Transportation-National Highway Traffic Safety Administration (hereinafter, NHTSA) eased federal safety standards by classifying them as a sub-

1. Moped and motorized bicycle are synonymous but the latter is more commonly adopted in legislative enactments. *See, e.g.*, Act of June 29, 1977, ch. 402, 1977 Me. Acts; NEV. REV. STAT. § 482.069 (Supp. 1976); MASS. GEN. LAWS ANN. ch. 90, § 1 (West Supp. 1976); LA. REV. STAT. ANN. § 32.1 (West 1976).

Moped is a contraction of the words motor and pedal which reflects the hybrid character of the vehicle — a cross between a bicycle and a motorcycle. National Safety Council, Safety Education Data Sheet No. 101: Mopeds 1 (1977) [hereinafter cited as Data Sheet 101]. The moped is a two-wheeled device with sixteen or seventeen inch wheels which either may be pedalled like a bicycle or propelled by a motor, or both. The moped is equipped with a one cylinder engine of up to a fifty cubic centimeter piston displacement (as compared to the 70cc-1200cc engines found on motorcycles), capable of delivering between 0.8 and 2.0 brake horsepower. The engine may be mounted centrally on the vehicle or over the front wheel and is capable of propelling the moped at top speeds of between eighteen and thirty miles per hour on a flat surface. The vehicle can travel between 120 and 200 miles per gallon of gasoline and weighs between 60 and 100+ pounds (compared with the average bicycle weight of twenty-five to thirty-five pounds and motorcycle weight of between 300 and 700 pounds), and costs between $300 and $500. Additionally, the moped is equipped with caliper hand and drum brakes, lights, speedometer and horn, which must meet federal safety standards, and an automatic transmission. Some models may be equipped with shock absorbers, a battery, turn signals and other devices. Environmentally, the moped is extremely fuel-efficient and a low polluter. The noise level at twenty-five miles per hour is 73dbA compared with 84 and 82, respectively, for motorcycles and automobiles. Exhaust emissions are so low that mopeds are exempt from federal anti-pollution regulations. *Id.;* Motorized Bicycle Association, The Motorized Bicycle 4 (1977); Roddin, Meko, Raphael, Personal Transportation (1977) (Executive Summary of Research Report No. 591 prepared by Stanford Research Institute International, Business Intelligence Program) [hereinafter cited as Personal Transportation]; T. ARTHUR, THE MOPED HANDBOOK (1977) [hereinafter cited as HANDBOOK]; Licht, *Moped? What's A Moped?,* FAM. SAFETY, Spring 1977, at 24; U.S. NEWS & WORLD REPORT, October 17, 1977, at 74.

2. HANDBOOK, *supra* note 1, at 9, 18.

category of motorcycles.[3] Their increasing popularity,[4] however, has created a plethora of legal problems ranging from conflicting statutory definitions to inadequate registration and safety regulations.

This note analyzes the various legislative approaches to the moped and the apparent conflicts between jurisdictions. The goal of this study is model legislation which will serve as a guide for states seeking to create or amend moped laws. The recommended provisions were developed with a view toward different geographical regions, and may, of course, be modified according to the needs of a particular jurisdiction. Predominantly rural states with comparatively small urban centers tend to regulate motor vehicles less than states with sprawling urban areas. As the rural regions become more urbanized and the concentration of motor vehicles increases, there tends to be a proportionately greater need to regulate motor vehicles and motor vehicle traffic.

This article focuses on definitional conflicts and regulations, specifically those governing registration, certificate of title, licensing, age, insurance, speed, equipment, and inspection. Each section will conclude with a suggested provision. A threshold classification of the moped is necessary, however, before analyzing the applicability or appropriateness of regulation.

I. DEFINING THE MOPED

There are various legislative approaches employed in defining mopeds. These approaches present a spectrum, ranging from the viewpoint that the moped is a bicycle[5] to the motor vehicle concept.[6] The gray area between these extremes is a source of constant confusion.[7] In-

3. Prior to 1974, the moped was classified as a motorcycle and the strict federal safety standards made it economically unfeasible for manufacturers to produce for the American market. In late 1974, the National Highway Traffic Safety Administration (a branch of the Department of Transportation), reclassified the moped as a "motor-driven cycle," a subcategory of motorcycles, and eased lighting, braking and other requirements which made importation of the moped economically feasible. Federal Motor Vehicle Safety Standards, 49 C.F.R. §§ 571.3b, 571.108, 571.122, 571.123 (1974); NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, SAFETY REQUIREMENTS FOR MOTOR DRIVEN CYCLES (1977); BUS. WEEK, June 20, 1977, at 33.

4. The number of mopeds now in the United States is estimated at over 100,000 and is expected to grow rapidly to approximately 1.36 million by 1990. Personal Transportation, *supra* note 1, at 22. *See also* Data Sheet 101, *supra* note 1, at 1; Carter, *City Wheels,* APARTMENT LIFE, November, 1977, at 22.

5. Those states which define the moped as a bicycle include, among others, Connecticut, Florida, Hawaii, Maryland, Ohio, North Carolina, South Carolina and Virginia.

6. Those states defining it as a class of motor vehicle include, among others, Illinois, Iowa, Maine, Nevada, New York and Pennsylvania.

7. The problem is that many states, including California, Ohio and New Jersey, have defined the moped somewhere between a bicycle and a motor vehicle and then regulate it in some aspects as a bicycle and in others as a motor vehicle. *See, e.g.,* Act of Oct. 19, 1977, ch. 267, 1977 N.J. Laws. An individual could read the entire vehicle code and still be unclear as to which regula-

adequate definitions often create problems in determining the applicability of other provisions.[8] A study conducted by the NHTSA[9] found that among state definitions, "there is no general agreement as to what type of vehicle should be considered a motorized bicycle."[10] Terms including moped, motorized bicycle, motor-assisted bicycle, motor-driven cycle, and even bicycle are "commonly used... to denote anything from mini-bikes, to small motorcycles, to bicycles with helper motors on them."[11] The result is that an individual can consult the codes of two different states for the same vehicle and be unable to find consistent definitions or descriptions.[12] The way a state chooses to define the moped sets the stage for the regulatory scheme.[13]

A related problem is exemplified by states which define the moped as a bicycle with a helper motor[14] but do not specifically define "helper motor." This definitional approach leaves unclear whether a bicycle which has been converted into a motorized device by the owner is to be

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tions are applicable to his or her moped. In addition, defining the moped as a bicycle rather than a motor vehicle generally will yield a different result as bicycles are relatively unregulated in comparison to motor vehicles. This is not to say, however, that if the moped is defined as a motor vehicle it will automatically be regulated. The moped may be defined as a motor vehicle but nonetheless be unregulated, just as it may be defined as a bicycle and be regulated. Yet the definition inherently connotes different degrees of regulation and imparts the necessity for different treatment.

8. *E.g.*, S.C. CODE §§ 56-5-150, 56-5-160 (Supp. 1976); *see* discussion pp. 306, 308-09 and note 19 *infra*. In South Carolina the bicycle definition includes mopeds of a specific design. By inference, this means that a moped with a 1.0 or greater brake horsepower motor or one capable of exceeding the prescribed speed is to be considered either as a motor-driven cycle or a motorcycle. The laws applicable to the different classifications (bicycle vs. motorcycle) are vastly different.

9. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, MOTORIZED BICYCLE (MOPED) FINDINGS OF A SURVEY (1976).

10. *Id.* at 2.

11. *Id.*

12. *Compare* Act of August 11, 1977, ch. 931, § 3, 1977 N.Y. Laws *with* CAL. VEH. CODE § 406 (West Supp. 1976), *with* Act of August, 1977, File 89, 1977 Ohio Legis. Bull.

13. *See generally* discussion pp. 306-08 *infra*.

Additionally, where the state has defined the moped as something other than a bicycle or motor vehicle, *see, e.g.*, Act of October 19, 1977, ch. 267, 1977 N.J. Laws; Act of August, 1977, File 89, § 4501.01, 1977 Ohio Legis. Bull., a legislature implicitly has decided to establish a new body of regulation to cover the vehicle.

14. *See, e.g.*, ARIZ. REV. STAT. § 28-101(31) (Supp. 1977); MASS. GEN. LAWS ANN. ch. 90, § 1 (West Supp. 1977); FLA. STAT. ANN. § 316.003 (West Supp. 1976):

> (2) Bicycle — Any device propelled by human power, or any 'moped' propelled by a pedal-activated helper motor with a manufacturer's certified maximum rating of 1½ brake horsepower, upon which any person may ride, having 2 tandem wheels, either of which is 20 inches or more in diameter, and including any device generally recognized as a bicycle though equipped with two front or 2 rear wheels.

Note the apparent conflict within this definition. No moped has a wheel diameter greater than seventeen (17) inches. *See* note 1 *supra*. Obviously, the Florida statute only intended this restriction to apply to non-motorized devices commonly known as bicycles and not to mopeds. Technically, though, no moped can be considered a bicycle. Careful drafting would have avoided this contradiction. *See* Act of May 6, 1976, ch. 64, § 2, 1976 R.I. Pub. Laws:

"(s) Motorized Bicycles — Pedal bicycles which may be propelled by human power or helper motor, or by both, with a motor rated no more than 1.5 brake horsepower which is capable of a maximum speed of not more than twenty-five miles per hour."

included and, therefore, treated in the same manner as a device manufactured and sold as a motorized bicycle.

Other states have defined the moped as a bicycle,[15] or pedal bicycle with motor attached,[16] or as a motor-driven cycle.[17] One state defining the moped as a bicycle[18] separately classifies "motor-driven cycle," a category which includes "every bicycle with a motor attached."[19] The problem here is obvious: the moped fits within two polar classifications— as a bicycle one set of regulations applies,[20] while as a motor-driven cycle and, hence, a motor vehicle, other rules govern.[21]

A minority of jurisdictions have not enacted any legislation to deal specifically with mopeds.[22] In some of these states, the moped falls within the definition of a motorcycle,[23] in others within the definition of

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15. *See, e.g.*, MD. ANN. CODE art. 66½, § 1-104 (Supp. 1976):

> 'Bicycle' means a vehicle that is designed to be operated by human power or with assistance of a motor that has a capacity of less than fifty cubic centimeters piston displacement or rated less than one brake horsepower, that has two or three wheels of which one is more than 14 inches in diameter, that have a rear drive. . . . ;

Act of June 7, 1977, Public Act No. 77-375 § 1, 1977 Conn. Pub. Acts:

> The term 'bicycle,' as used in this section, includes all vehicles propelled by the person riding the same by foot or hand power or a helper motor having a capacity of less than fifty cubic centimeters piston displacement and rated not more than two brake horsepower and capable of a maximum speed of no more than thirty miles per hour and equipped with automatic transmission and operable pedals.

16. *See, e.g.*, S.C. CODE § 56-5-160 (Supp. 1976) and note 8 *supra;* VA. CODE § 46.1-1 (Supp. 1976).

17. *See, e.g.*, Act of June 29, 1977, ch. 402, 1977 Me. Acts; 75 PA. CONS. STAT. ANN. § 102 (Purdon Supp. 1977); Act of August 20, 1977, P.A. 80-262, §§ 1-148, 1-148.2, 1977 Ill. Legis. Serv. (West).

18. S.C. CODE § 56-5-160 (Supp. 1976).

19. *Id.* at §§ 56-5-150, 56-5-160:

> Motor-Driven Cycle: Every motorcycle, including every motor scooter, with a motor which produces not to exceed five horsepower, and every bicycle with a motor attached. Bicycle: Every device propelled by human power upon which any person may ride, having 2 tandem wheels. The definition of a bicycle shall include pedal bicycles with helper motors rated less than one brake horsepower which produce only ordinary pedalling speeds up to a maximum of twenty miles per hour.

20. *Id. See* note 10 *supra.* States like South Carolina, which define the moped as a bicycle, generally will not require registration, insurance, etc. *See, e.g.*, VA. CODE § 46.1-1-15 (Supp. 1976); FLA. STAT. ANN. §§ 322.01, 324.021 (West Supp. 1976). More specifically, traffic regulation provisions provide that bicycles must ride as far to the right as practicable, while motorcycles and motor-driven cycles are entitled to the full use of a traffic lane, *see* note 66 and accompanying text *infra.*

21. *Compare* note 19 *supra, with* TEX. CODE ANN. tit. 116, § 6701d (Vernon Supp. 1977) where the definition of motor-driven cycle has specifically excluded the moped thereby resolving any doubt: "Motor-driven cycle means every motorcycle, . . . and every bicycle with a motor attached other than a motor-assisted bicycle. (N) Motor-assisted bicycle means a bicycle which may be propelled by human power or a motor, or by both . . . ."

22. *E.g.*, Georgia, Missouri, Utah, West Virginia, Washington, and Wisconsin.

23. *E.g.*, GA. CODE ANN. § 68-101 (1975): "Motorcycle — any motor vehicle having but two main wheels in contact with the ground, upon which the operator sits astride. Motor Vehicle — any vehicle . . . propelled by power other than muscular power . . . ."; MO. ANN. STAT. § 301.010 (Vernon 1972); W.VA. CODE § 17A-1-1 (1974).

a motor-driven cycle,[24] and in still others, it evades classification entirely.[25] Where a state has separate definitions for motorcycles, motor-driven cycles, mini-bikes and bicycles as part of its vehicle code,[26] the legal implications for the moped owner are clear: without a specific classification the individual will be unable to discern laws applicable to the moped.

The lack of uniformity among statutory definitions also creates a multitude of problems for the interstate traveler. There presently exist a number of moped designs based upon such criteria as braking horsepower or speed.[27] Several states have chosen to define the moped by these design characteristics,[28] limiting the braking horsepower, speed, or both. Therefore, one who owns a moped with a maximum design speed of thirty miles per hour might well enter a state where such a vehicle is no longer considered a moped.[29] The problem would be identical with horsepower restrictions.[30] Owners of automobiles[31] and

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24. *E.g.*, WIS. STAT. ANN. § 340.01 (West 1971): "(33) Motor driven cycle means a motor vehicle designed to travel on not more than three wheels in contact with the ground and having a seat for the use of the rider, including motorcycles, power driven cycles, and motor bicycles but excluding tractors."

25. *E.g.*, N.C. GEN. STAT. §§ 136-71.7, 20-8, 20-50.1, 20-4.01 (1974). This statute presents an interesting problem. The definition of bicycle is "a non-motorized vehicle." However, a moped seems to be referred to as a "pedal bicycle with helper motor" but there is no definition within the code of "pedal bicycle with helper motor." It appears to be defined within the context of other sections (*i.e.*, § 20-8). Furthermore, the definitions of motor vehicle and motorcycle specifically exclude bicycles with helper motors.

26. *See, e.g.*, NEB. REV. STAT. §§ 39-602, 60-301 (1943).

27. Specifically, the design possibilities are 1.0, 1.5, or 2.0 horsepower and twenty, twenty-five, or thirty miles per hour maximum speed. HANDBOOK, *supra* note 1, at 38-63.

28. The majority of the states with a moped law have defined the vehicle as to design speed and/or horsepower. *See, e.g.*, notes 14, 15 and 19 *supra*.

29. *E.g.*, Rhode Island and South Carolina. This is also true within the state itself where the moped is defined as to design speed or horsepower. By limiting the speed to twenty or twenty-five miles per hour by design, the state has effectively placed those mopeds capable of achieving greater speeds in another category, (*i.e.*, motorcycles). The moped, therefore, may be subject to more stringent regulation solely on the basis of a five mile per hour speed differential; *see* note 8 *supra*.

30. Maryland has complicated the definition further by defining the moped as a bicycle with a rear drive, MD. ANN. CODE art. 66½, § 1-104 (Supp. 1976), thus excluding all front-drive models (those with the engine mounted over the front wheel) from the definition. The basic difference between the front-drive model and those with the engine centrally mounted is that the front-drive model is only capable of a maximum speed of twenty miles per hour as compared with the thirty mile per hour maximum available on the other models. The centrally mounted models also have a lower center of gravity, thus making the vehicle more stable. *See* HANDBOOK, *supra* note 1, at 23-26. Excluding the front-drive model on the basis of speed arguably serves no purpose. The only rationale for the restriction, other than a drafting error, would be based on the difference in the stabilities of the models. However, if the state interest is to prohibit the sale of the front-drive models, the definition does not accomplish this goal. All it does is remove the front-drive models from the moped definition and place it with another class of vehicles. While this may deter people from purchasing those models it does not prohibit it. Therefore, the distinction in the definition is meaningless. If the desire is to prohibit the sale of the front-drive models, and it is a reasonable objective of the state interest, then the state should specifically enact a provision establishing such a prohibition.

motorcycles[32] do not experience this difficulty, since no state law uses design characteristics such as speed or horsepower to define these vehicles.

One solution to this problem would be to define the moped based on the thirty mile per hour maximum speed and two (2.0) maximum brake horsepower common to many models available on the market.[33] States then could establish their own speed restrictions (a problem which will be explored in detail in the regulation section) as the legislature deemed appropriate. Such a definition would satisfy one object of the model legislation: to classify the moped by design and thereby put manufacturers on notice that the moped should not be altered to the extent that it becomes virtually identical to a motorcycle.[34]

Further confusion for the interstate traveler arises where some states define the moped as a bicycle[35] and classify a bicycle as a vehicle,[36] and others define the moped as a bicycle and specifically exclude bicycles from the vehicle definition.[37] In fact, a few states even define the moped sui generis,[38] falling neither within the definition of a bicycle, motor vehicle, or vehicle. New Jersey,[39] while not defining the moped as a vehicle,[40] purports to regulate it in some respects as it regulates a *motor* vehicle.[41]

Conflicting definitions also make interpretation of regulatory provisions more difficult. Maine,[42] for example, has separate classifications

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31. *See, e.g.*, MINN. STAT. ANN. § 168.011.7 (West Supp. 1977); Act of October 19, 1977, ch. 267, 1977 N.J. Laws; MASS. GEN. LAWS ANN. ch. 90, § 1 (West Supp. 1977). The majority of states do not have a specific definition for "automobile" but the motor vehicle definitions cover it; such definitions do not specify any design characteristics.

32. *See, e.g.*, CAL. VEH. CODE § 400 (West 1971); FLA. STAT. ANN. § 316.003(22) (Supp. 1976); MINN. STAT. ANN. § 168.011.2 (West Supp. 1977); S.C. CODE § 56-5-140 (Supp. 1976); S.D. COMPILED LAWS ANN. § 32-20-1 (1976).

33. *See generally* HANDBOOK, note 1 *supra.*

34. Without such a classification as to design, manufacturers or dealers may begin to modify the moped, perhaps at the request of consumers, so as to increase its speed capabilities and give it greater power. Such a change would then remove the "moped" from the classification of motorized bicycle and place it, properly, with motorcycles.

35. *See* notes 5, 15 and 19 *supra.*

36. *E.g.*, California and Minnesota.

37. *E.g.*, Florida and Massachusetts, note 14 *supra.*

38. *E.g.*, Act of October 19, 1977, ch. 267, 1977 N.J. Laws. The definitions of motor vehicle and vehicle specifically exclude mopeds. The bicycle definition, N.J. STAT. ANN. § 39:4-14.5 (West Supp. 1977), also excludes mopeds by providing that "bicycle means any two-wheeled vehicle having a rear drive wheel which is solely human-powered. . . . Interesting to note is that the bicycle is referred to as a "vehicle" while the moped is not!

39. *Id.* ch. 267, 1977 N.J. Laws.

40. *Id.*

41. *Id.* at §§ 2, 7 and 8.

42. Act of June 29, 1977, ch. 402, 1977 Me. Acts.

for motorcycles,[43] motor-driven cycles,[44] and mopeds.[45] The moped is defined in part as a motor-driven cycle.[46] One regulatory provision[47] refers to motorcycles, motor-driven cycles, and mopeds. Within this regulation, motorcycles and motor-driven cycles are required to ride with a headlamp illuminated, and may be operated in the same lane in single or double file only.[48] Mopeds, under this same rule, must ride as far to the right as possible and may not ride abreast.[49] Left unclear, is whether mopeds are required to have a lighted headlamp when in motion. This problem is apparent in other provisions as well,[50] where the reference is solely to motorcycles and motor-driven cycles, and raises the possibility that a moped operator could be served with a summons for a violation of the vehicle code which he or she did not understand to apply.

Examination of various legislative enactments also reveals other problems[51] which the model proposed below attempts to resolve. The great weight of authority supports the classification of the moped as a subcategory of motor vehicle.[52] The majority of the states defining the moped establish it as something more than a bicycle if not, in fact, as a subcategory of motor vehicle.[53] The moped is clearly *not* a bicycle as that word is commonly understood[54] but rather is a hybrid, somewhere

43. ME. REV. STAT. tit. 29, § 1 (1964).

44. *Id.*

45. *See* note 42 *supra.*

46. *Id.*

47. *Id.* at § 4: "In addition to the requirements of this chapter, motorcycles and motor driven cycles shall be operated on the highway with a lighted headlamp on when in motion. Motorcycles and motor driven cycles shall be operated in such manner that no more than 2 such vehicles shall be operated abreast within the same lane of operation. Mopeds shall be operated in single file only and as far as practicable to the right side of the roadway at all times, except when making a left turn as described in section 1961."

48. *Id.*

49. *Id.*

50. *See* note 43 *supra* at §§ 1367-A, 1373, requiring rear view mirrors and helmets, respectively, for motorcycles and motor-driven cycles and their operators.

51. *E.g.*, Act of June 7, 1977, Public Act No. 77-375, 1977 Conn. Pub. Acts, which defines motor vehicle as "any vehicle suitable for operation on a highway . . . except . . . bicycles with helper motors. . . ." The definition of highway, CONN. GEN. STAT. ANN. § 14-1(16) (West 1958), "includes any state or other public highway, road, street, avenue, alley, driveway, parkway or place, under the control of the state or any political subdivision thereof, dedicated, appropriated, or opened to public travel or other use." The problem with the definition is that mopeds appear to be considered vehicles not suitable for operation on the highway. If so, then by the definition of highway, mopeds may not be operated on any road in Connecticut. Obviously, such a result was not intended by the legislature but exemplifies the need for precise definitions and careful drafting.

52. *E.g.*, California, Illinois, Maine, New Jersey, New Hampshire, New York, Ohio and Pennsylvania are among the states defining the moped as other than a bicycle.

53. *Id.*

54. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE

between a bicycle and a motorcycle.[55] The moped's closest link to a bicycle is its capacity to be pedalled. Other characteristics tend to place the moped in the motorcycle class: the moped is self-propelled and is used for transporting persons or things upon the highways (the two most common requirements for a device being classified as a motor vehicle or vehicle[56]); the moped is two to four times heavier than the average bicycle[57] and is capable, unlike a bicycle, of maintaining a constant speed over considerable distances; the moped is equipped with a power drive system (transmission); the moped is equipped with drum brakes and brake-activated stop lights;[58] and the moped is operated like a motor vehicle on the public highways.[59] Based upon these distinctions, the classification of the moped as a motor vehicle is appropriate.

The following proposed legislation draws on those jurisdictions defining the moped as something other than a bicycle or as a motor vehicle.[60] The definitions of other types of vehicles have been included to clarify them in relation to the moped.[61]

MODEL MOTORIZED BICYCLE (MOPED) LAW

Part 1: Definitions

§ 1.1 — "Bicycle" means every device propelled exclusively by human power upon which a person or persons may ride, having two tandem wheels either of which is more than sixteen inches in diameter or having three wheels in contact with the ground any of which is more than sixteen inches in diameter.

§ 1.2 — "Mini-Bike" means any two or three-wheel motor-driven cycle having a total wheel and tire diameter of less than 14 inches or a forty inch or less wheel base, a seat height of less than twenty-five inches from the ground and a propelling motor having a piston displacement of forty-five cubic centimeters or less, or any other two or three-wheel

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UNABRIDGED 212 (8th ed. 1971) defines bicycle as: "1: a vehicle that has two wheels one behind the other, a steering handle, and a saddle seat or seats and is usu. propelled by the action of the rider's feet upon pedals." The majority of state laws are consistent with this definition. *See, e.g.*, N.J. STAT. ANN. § 39:4-14.1 (West Supp. 1977) which defines bicycle as "any two-wheeled vehicle having a rear drive wheel which is solely human-powered . . ."; CAL. VEH. CODE § 21200 (West Supp. 1977); Act of August, 1977, File 89, 1977 Ohio Legis. Bull.; IDAHO CODE § 49-505 (Supp. 1977); 75 PA. CONS. STAT. ANN. § 102 (Purdon Supp. 1977).

55. *See* note 1 *supra*.

56. *See, e.g.*, ARIZ. REV. STAT. § 28-101 (Supp. 1977); CAL. VEH. CODE §§ 415, 670 (West Supp. 1976); IDAHO CODE § 49-578 (1949).

57. *See* note 1 *supra*.

58. *See generally* HANDBOOK, *supra* note 1.

59. Data Sheet 101, *supra* note 1, at 3; *see* discussion pp. 311-13 *infra*.

60. *See* note 52 *supra*.

61. These definitions were developed utilizing the fifty state vehicle codes which are relatively similar in wording.

motor-driven cycle designed by the manufacturer thereof for off-road use only.[62]

§ 1.3 — "Motorcycle" means a motor vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three wheels in contact with the ground, but excluding a tractor, mini-bike, and motorized bicycle (moped).

§ 1.4 — "Motor-Driven Cycle" means every motorcycle and every motor scooter with a motor which produces not to exceed five brake horsepower, but excluding motorized bicycles (mopeds). The definition of motor-driven cycle includes every bicycle with a motor attached which motor was not originally an integral part thereof.

§ 1.5 — "Motorized Bicycle (Moped)" means a motor vehicle designed to travel on not more than two wheels in contact with the ground, having fully operable pedals, which may be propelled by human power or a motor, or both, and having a fuel-powered motor with a capacity of fifty cubic centimeters or less piston displacement - or an electric motor of equivalent capacity - and a maximum of two (2.0) brake horsepower, which is capable of a maximum design speed of no more than thirty miles per hour on a flat surface; and is equipped with a power drive system that functions directly or automatically only and which does not require clutching or shifting by the operator after the drive system is engaged.

§ 1.6 — "Motor Vehicle" means every vehicle propelled otherwise than exclusively by human or animal power and not operated exclusively upon stationary rails or tracks.

§ 1.7 — "Vehicle" means every device in, upon, or by which a person or property is or may be transported or drawn upon a public highway, excepting devices moved exclusively by human power or used exclusively upon stationary rails or tracks.

II. REGULATION

A. In general

Defining the moped as a motor vehicle does not necessarily subject it to regulation. Regulatory provisions are based on the concept that the operation of a motor vehicle is not a natural right but a privilege which can be regulated under the state's police power[63] for the protection and

62. This definition represents a consolidation of the Nebraska and Connecticut definitions of mini-bikes. CONN. GEN. STAT. ANN. § 14-1 (West Supp. 1978); NEB. REV. STAT. § 39-602 (1943).

63. Popp v. Motor Vehicle Dep't., 211 Kan. 763, 766, 508 P.2d 991, 994 (1973); *see* Nichols v. Marshall, 491 F.2d 117 (10th Cir. 1974); People v. Fite, 267 Cal. App.2d 685,73 Cal. Rptr. 666 (1968); Campbell v. State Dep't. of Revenue, 176 Colo. 202, 491 P.2d 1385 (1971); Cave v. Col-

safety of people at large.[64]

Obviously, due to the nature of the moped, there is a need for some regulation (not even bicycles are totally unregulated,[65]) though perhaps less extensive than that pertaining to other motor vehicles. While the moped can be and is used for "recreational" purposes, it is not used only in this manner.

Furthermore, the moped has a wider range of uses than a bicycle, and its regulation must be assessed with a practical eye toward the increased potential for harm. Mopeds travel in the normal flow of traffic and in regular traffic lanes where bicycles are generally, by statute, specifically excluded.[66] Thus, the moped operator is exposed to a greater risk of ac-

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orado Dep't. of Revenue, 31 Colo. App. 185, 501 P.2d 479 (1972); Dennis v. State, 226 Ga. 341, 175 S.E.2d 17 (1970); Haswell v. Powell, 38 Ill.2d 161, 230 N.E.2d 178 (1967); Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974).

64. People v. Duell, 1 N.Y.2d 132, 134, 151 N.Y.S.2d 15, 15, 134 N.E.2d 106, 108 (1956).

65. Generally, traffic regulations are applicable to bicycles. There are, however, specific provisions in the state codes regulating bicycle operation. *See* note 66 *infra.*

One interesting point is that in some states purporting to treat a moped like a bicycle, and even defining it as such, the moped is prohibited from paths or roadways set aside for the exclusive use of bicycles. *See, e.g.,* ARIZ. REV. STAT. § 28-302.02 (9) (1976); FLA. STAT. ANN. §§ 316.003-.111 (Supp. 1976). *See also* MASS. GEN. LAWS ANN. ch. 90, §1B (West Supp. 1977) which excludes mopeds from off-street recreational bicycle paths but allows them on bicycle lanes adjacent to the various ways.

66. By statute in nearly every state, bicycles must stay as far to the right side of the roadway as practicable or ride on a usable shoulder. *See, e.g.,* CAL. VEH. CODE § 21207.5 (West Supp. 1977); IDAHO CODE § 49-743-(a) (1967); N.Y. VEH. & TRAF. LAW § 1234 (McKinney Supp. 1977); DEL. CODE tit. 21, § 4196(a) (Supp. 1976); OHIO REV. CODE ANN. § 4511.55 (Page Supp. 1977); OKLA. STAT. ANN. tit. 47, § 11-1205 (West 1962); 75 PA. CONS. STAT. ANN. § 3505(a) (Purdon Supp. 1977); MINN. STAT. ANN. § 169.221 (4) (West 1960). In those states where the moped falls within the motor-driven cycle or motorcycle classification (either by statute or by inference), it is geneally under no such restriction. *See, e.g.,* 75 PA. CONS. STAT. ANN. § 3523 (Purdon Supp. 1977), which specifically states that motorcycles are entitled to a full use of a lane. Since mopeds are classified as motor-driven cycles which are defined as motorcycles, this provision applies to mopeds; IDAHO CODE § 49-538 (Supp. 1977); *see also* CAL. VEH. CODE § 406 (West Supp. 1977), which defines the moped as something other than a bicycle or motor-driven cycle but which does not include it in the lane prohibition provision, *id.* at § 21202. In fact, the moped is specifically excluded from bicycle lanes unless that lane is within or adjacent to a roadway, *id.* at § 21207.5; Act of August, 1977, File 89, § 4501.01 1977 Ohio Legis. Bull., which defines the moped as a vehicle and, like California, does not include it within the bicycle prohibition; OKLA. STAT. ANN. tit. 47, §§ 1-136, 11-1205 (West 1962); W.VA. CODE §§ 17A-1-1, 17C-11-5 (1974); Act of August 11, 1977, ch. 931, 1977 N.Y. Laws, which provides that limited use motorcycles (New York's phraseology for mopeds) be operated in the right lane available for traffic or on a usable shoulder. The New York vehicle code provides, however, that bicycles shall ride as near to the right as practicable or upon a usable shoulder. Bicycles are not entitled even to the single lane that is allowed for moped operation.

A few states which have defined the moped as something other than a bicycle have, however, provided that bicycle regulations will apply to the operation of mopeds on the public highways. *See, e.g.,* Act of June 29, 1977, ch. 402, 1977 Me. Acts; Act of October 19, 1977, ch. 267, 1977 N.J. Laws; Act of April, 1977, P.A. No. 439, 1977 Mich. Pub. Acts, which specifically provides that mopeds will ride as far to the right as practicable, *id.* at § 9.2360. Finally, in those states defining the moped as a bicycle, the riding-to-the-right provisions will inferentially apply to mopeds.

cidents with other vehicles and more hazardous road conditions.[67] Such circumstances demand greater ability of the moped operator in handling the varying situational hazards which may be encountered. Also, the moped is heavier than a bicycle and capable of maintaining greater constant speeds.[68] The result is an increased momentum with a greater risk of serious injury upon impact. In addition, the moped has a lower silhouette than a bicycle, making it harder to see and thus more vulnerable.[69] This vulnerability is not reduced by the fact that the moped is noisier than a bicycle. Other motor vehicles generate more noise,[70] and the moped may go unnoticed. Finally, the low acceleration of the moped may disrupt the normal flow of traffic, exposing the moped operator to a greater risk of collision.[71] A bicyclist, not operating in the regular flow of traffic is not exposed to such risks. To reduce the vulnerability of the moped operator it is suggested that moped operation be restricted to the right lane of traffic where possible. The general provision set out below reflects this concern.

The distinctions outlined above between mopeds and bicycles seem to justify greater regulation of mopeds. Moped accident statistics also indicate the need for greater regulation. Statistics from Europe[72] and New

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See, e.g., FLA. STAT. ANN. § 316.003-.111 (Supp. 1976); TEX. VEH. CODE ANN. tit. 6701d, §§ 178(d), 182(a) (Vernon Supp. 1977).

67. The moped operator will be encountering situations not normally encountered by bicyclists. For example, a normal hazard of riding in traffic is the exposure to a sudden stop by a vehicle in front or to a sudden change in lanes by a vehicle to the right or left.

68. *See* note 145 and accompanying text *infra*. A study conducted by the Department of Transportation found that 85% of bicyclists travel at a speed below twenty miles per hour. The study further found that bicycles and motor vehicles are not compatible except on surface streets where motor vehicle speeds are constrained, on long downgrades, or on lightly travelled roads. In addition, the fact of human propulsion versus motive power leads to conflicts between bicyclists and motor vehicles: "Because bikes are propelled by human effort there is a very natural and strong desire to maintain momentum. This desire leads to a number of facets of operating behavior which bring bicyclists to conflict with motor vehicles." FEDERAL HIGHWAY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, SAFETY AND LOCATION CRITERIA FOR BICYCLE FATALITIES, Report No. FHWA-RD-75-112 (1976). The moped operator will not be subject to these conflicts because the vehicle is self-propelled.

69. Stone, *Mopeds 100+ mpg, but how safe — or legal?*, POP. SCI., July, 1977, at 133; Data Sheet 101, *supra* note 1, at 3; U.S. NEWS & WORLD REPORT, October 17, 1977, at 74.

70. *See* note 1 *supra*.

71. *See* notes 123 and 171 and accompanying text *infra*.

72. A study of 1,206 accidents (912 moped and 294 motorcycle) in West Germany found that only about 5% of the drivers remain uninjured and

> [t]he distribution of overall injury in respect of motorcyclists and moped drivers is almost identical. Thus, upon a collision occurring, the drivers of both categories are exposed to the same risk of serious injury. The lower speed of mopeds does not lead to a reduction in injury risk in a collision — consequently the same safety criteria, especially the wearing of helmets, must be postulated for both motor-cyclists and moped drivers.

K. Langwieder, Collision Characteristics and Injuries to Motorcyclists and Moped Drivers 267

Jersey[73] along with national accident statistics[74] for motorcycles,

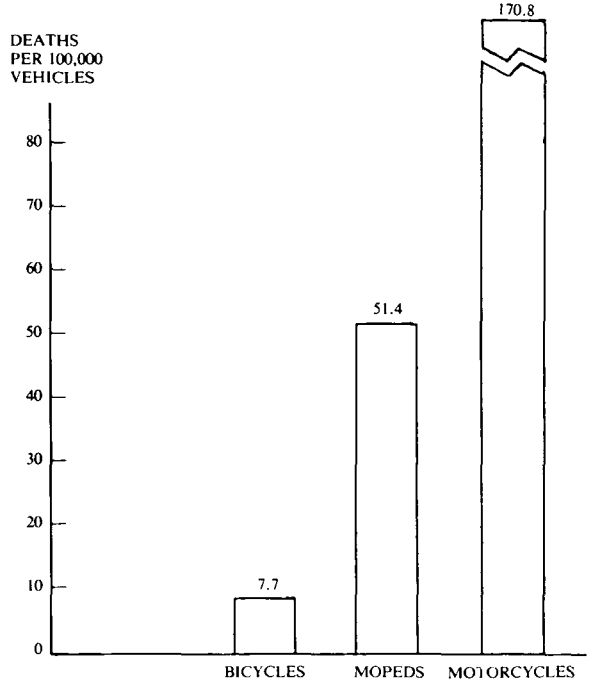
(October 19, 1977) (Report from Dept. of Automotive Engineering Association of German Automobile Insurers presented at the Twenty-First Stapp Car Crash Conference) (New Orleans).

Furthermore, the study found that the differing driving performances between moped and motorcycle operators have no great influence on the degree of injuries and the need for equal safety measures is apparent. *Id.* at 270. In fact, in accidents between motorized two-wheelers and the lateral front areas of cars, "motor-cyclists are often thrown over the impacted car by their higher actual speed, as opposed to moped drivers, who by virtue of their lower speed level more often impact directly on the struck car. . . ." *Id.* at 285. As a result, the risk of fatal injuries to moped operators increases four-fold and serious and critical injuries one and a half-fold. *Id.* In these types of accidents, therefore, mopeds are more dangerous than motorcycles. *Id.* at 298.

Finally, the study states that while "[i]n relation to the total number of registered mopeds, moped drivers have a lower frequency of accidents" the injury risk for two-wheeled motor vehicles is at least ten to fifteen times greater than for car passengers. *Id.* at 298.

The European data is based, in part, on a report by the European Conference of Ministers of Transport, Report By The Committee Of Deputies On Road Safety Problems Concerning Two-Wheeled Vehicles (1974) (Paris). The following table was reported in INSURANCE INSTITUTE FOR HIGHWAY SAFETY, STATUS REPORT, November 24, 1975, at 3:

BICYCLE, MOPED AND MOTORCYCLE DEATHS PER 100,000 VEHICLES, 1971
GERMANY, BELGIUM, DENMARK, FRANCE, NETHERLANDS, SWITZERLAND*



*EUROPEAN CONFERENCE OF MINISTERS OF TRANSPORT, REPORT BY THE COMMITTEE OF DEPUTIES ON ROAD SAFETY PROBLEMS CONCERNING TWO-WHEELED VEHICLES, PARIS, 1974.

73. New Jersey appears to be the only state with any relevant data. *Proposed Motorized Bi-*

bicycles and other motor vehicles indicate that, while mopeds may not be as dangerous as motorcycles, they are more dangerous to the operator and others than are bicycles.[75]

One factor to consider in developing moped regulations is the government policy and public interest in promoting the use of fuel-efficient and environmentally safe vehicles. Greater regulation may discourage the purchase of this environmentally desirable vehicle, not only by placing restrictions upon its use but by making it more costly.[76] Such regulation, therefore, might tend to defeat the governmental policy of promoting fuel-efficiency. However, while the government may have an interest in promoting the use of the moped as a low-polluting, energy-saving vehicle, safety factors must be considered.

By limiting regulation and encouraging its use as an alternative means of travel, the moped will appeal to those people who normally walk or ride mass transportation, and to youngsters now riding bicycles. The result may be a substantial increase in the use of mopeds, and proportionately greater energy consumption. This situation would be contrary to an energy-saving policy, and would likely lead to an accelerated accident rate.

Furthermore, the moped cannot replace the automobile. Such considerations as family travel and inclement weather make clear the limited utility of mopeds. Thus, while some fuel savings may be experienced through wise and appropriate moped use, inherent highway dangers will remain, and the need for regulation will not be diminished.

Regulations must be developed which promote moped safety without discouraging its use. Government policy to date seems to reflect this concern. Recommendations for legislation developed by the NHTSA[77] support a policy of comprehensive but moderate regulation.[78]

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cycle Bills: Public Hearing On S.1386 and S.904 Before the Senate Law, Public Safety And Defense Committee 26 (June 23, 1976) (statement of Anthony Parenti) [hereinafter cited as *N.J. Hearing*]. One possible reason for this is that present accident reporting procedures do not distinguish between mopeds and motorcycles or bicycles. Data Sheet 101, *supra* note 1, at 2.

74. FEDERAL HIGHWAY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, TRAFFIC SAFETY '76 (1976) (A Report By The President On The Administration Of The Highway Safety Act Of 1966, As Amended) [hereinafter cited as TRAFFIC SAFETY]; NATIONAL SAFETY COUNCIL, ACCIDENT FACTS, (1974). *See* note 140 *infra* for a discussion of these statistics.

75. *See* §§ II(D), II(E) *infra.*

76. Licensing and registration fees and insurance premiums, for example, will effectively increase the cost of the moped.

77. National Highway Traffic Safety Administration, U.S. Department of Transportation, Recommendations For Moped Regulation (November, 1977) (Internal Document for Discussion).

78. *Id.* Recommendations propose, among others, the following:

(1) Each moped be registered and licensed;

Before proceeding with an analysis of the specific areas of regulation referred to in the introduction,[79] it would seem appropriate to offer a general regulatory provision covering the rules of the road and operator duties.

MODEL MOTORIZED BICYCLE (MOPED) LAW

Part 2: Rules of the Road

§ 2.1 — A motorized bicycle (moped) may not be operated upon any path reserved exclusively for bicycles or pedestrians and is subject to the same rules of the road and traffic regulations applicable to other motor vehicles except that motorized bicycles (mopeds) shall be operated in the right hand lane of traffic only, subject to provisions regarding left turns.

§ 2.2 — Operators of motorized bicycles (mopeds) shall be subject to the same duties and shall be granted all of the rights as other motor vehicle operators.

B. Registration

Registration laws are designed primarily to enable the state to exercise control over the use of the highways[80] and to have a public record for identification of vehicles and their owners.[81] A secondary purpose of such laws is the production of revenue through collection of an annual fee.[82] The interests served by the ability to identify vehicles and their

(2) Moped operators have valid drivers licenses;

(3) Liability insurance or financial responsibility be applicable to mopeds;

(4) Minimum age for moped operator licensing be the same as for automobile operator licensing;

(5) All traffic rules and regulations apply to mopeds;

(6) Mopeds prohibited from using roadways with speed limits over thirty-five miles per hour; and

(7) Moped operators required to wear helmets in states requiring motorcyclists to wear them. In other states, bicycle or motorcycle helmet use should be encouraged.

While the above recommendations may seem restrictive, it should be noted that the NHTSA was the agency responsible for the moped's appearance in the American market. *See* note 3 *supra.*

79. *See* discussion p. 304 *supra.*

80. State v. Smolenn, 4 Conn. Cir. 385, 232 A.2d 339, *cert. denied,* 389 U.S. 1044 (1967); State *ex rel.* Dyke v. Spradling, 536 S.W.2d 839 (Mo. App. 1976); People v. Dantschisch, 153 N.Y.S.2d 519 (Traf.Ct. 1956); Erosion Control Corp. v. Evans, 58 Tenn. App. 90, 426 S.W.2d 202 (1967).

81. Brodmerkle v. Gorolosky, 293 Mass. 517, 200 N.E. 274 (1936); State *ex rel.* Dyke v. Spradling, 536 S.W.2d 839 (Mo. App. 1976); American Motorist Ins. Co. v. Snyder, 63 Misc.2d 690, 313 N.Y.S.2d 200 (Sup. Ct. 1970).

82. *In re* Jackson, 268 F. Supp. 434 (D.Mo. 1967), *aff'd sub nom.* Zuke v. Mercantile Trust

owners "is to afford ready information to those injured by motor vehicles concerning persons liable under owner's liability statutes,"[83] and "to prevent the sale of stolen or other unregistered vehicles in the State."[84] Additionally, the fees exacted are often used to pay for highway upkeep[85] and are, thus, a valid revenue measure.[86] The registration laws, developed to protect those drivers and pedestrians who use the public highways, are clearly a valid enactment in the interest of the public safety and welfare.[87]

A number of factors must be considered in determining whether to subject mopeds to the registration laws. As a motorized vehicle, moving in the flow of urban traffic, it is anticipated that the urban accident rate for mopeds will be similar to that of motorcycles.[88] Therefore, to the extent that motorcycle registration has proved effective in controlling the use of the highways, the ability to determine the number of mopeds on the road will likewise aid the state in developing regulations, as necessary, to respond to increasing moped traffic. These facts, together with accident statistics from Europe[89] and New Jersey[90] support a finding that the state interest is served by having a ready means of identifying mopeds and their owners. In addition, the state interest in preventing the sale of stolen vehicles will also be served by having mopeds registered.[91] Finally, since mopeds will be traveling on most public highways[92] they should be subject to the same requirements as other motor vehicles, registration revenue should be exacted from moped owners on a basis similar to the rate schedules applicable to other vehicle owners.

Co. Nat'l Assn., 385 F.2d 775 (8th Cir. 1967); State *ex rel.* Dyke v. Spradling, 536 S.W.2d 839 (Mo. App. 1976).

83. Laureano v. Christensen, 18 Cal.App.3d 515, 95 Cal.Rptr. 872, 873 (1971).

84. United States Fidelity and Guaranty Co. v. Trussel, 208 F.Supp.154, 158-59 (W.D.Va. 1962).

85. State *ex rel.* Metropolitan Throughfare Auth. v. Nutting, 246 Ind. 105, 116, 203 N.E.2d 192, 198-99 (1964)

86. *Id.*

87. *Id.*

88. Buchanan, Mopeds: a Calculated Risk, in National Highway Safety Newsletter at 9 (September, 1977) (National Highway Traffic Safety Administration). Speed, size and acceleration similarities suggest this conclusion and are factors likely to effect the seriousness of an accident. *See* K. Langwieder note 72 *supra.*

89. *See* note 72 *supra.*

90. *See* note 73 *supra* and note 144 *infra.*

91. A few states provide for bicycle registration but this seems impractical. Bicycles, for example, are less distinguishable than mopeds and easier to convert or disguise and their large numbers would place an extraordinary burden upon registration facilities. In addition, the difficulty in enforcing such a provision would outweigh the state interest involved in having them registered.

92. Data Sheet 101, *supra* note 1, at 3.

Among the current state laws covering mopeds, the majority do not require registration.[93] Massachusetts, which is among the states requiring registration,[94] has alleviated the burden on both the registration facilities and the owner by allowing initial registration upon purchase at the dealership.[95] Generally, registration provisions are either amended to include mopeds or supplemented by a separate section covering mopeds.[96] No change is necessary where the moped is defined within an existing category already subject to registration,[97] unless, of course, to specifically exempt them.[98] Difficulties arise where the law specifies neither registration nor exemption, and the definition of the moped is such as to make the applicability of the registration provisions vague. In South Carolina,[99] for example, the moped may fall within two classifications, one requiring registration, the other exempting it.[100] Thus, the owner is unable to determine his or her liability with respect to the registration provisions. Defining the moped as a subcategory of motor vehicle and specifically requiring registration would eliminate this confusion. The registration provision adopted in New York[101] best serves the state interest in that it requires registration,[102] and excludes out-of-state unregistered mopeds from the state public highways.[103] These provisions are incorporated, in part, in the model legislation.

MODEL MOTORIZED BICYCLE (MOPED) LAW

Part 3: Registration

§ 3.1 — Except as hereinafter provided, no person shall operate any motorized bicycle (moped) on a public highway or street within this state unless such motorized bicycle (moped) has been registered in accordance with the provisions of this article, and the registration for such vehicle is in full force and effect and the registration number (plate, sticker, decal) is displayed as hereinafter provided.[104]

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93. *See, e.g.*, California, Florida, Maryland and Massachusetts.

94. *See, e.g.*, Maine, New York, Rhode Island and Vermont.

95. MASS. GEN. LAWS ANN. ch.90, § 1D (West Supp. 1976).

96. *See, e.g.*, Arizona, Illinois and New York vehicle codes.

97. *See, e.g.*, Iowa, Maine and Pennsylvania.

98. *See, e.g.*, California, Nevada and North Carolina. Note that the Maryland law defines mopeds as bicycles and then makes bicycle registration optional: MD. ANN. CODE, art. 66½ §§ 11-104, 3-401.2 (Supp. 1976).

99. S.C. CODE §§56-5-150, 56-5-150-160 (Supp. 1976).

100. *See* notes 8 and 19 *supra.*

101. Act of August 11, 1977, ch. 931, 1977 N.Y. Laws; Act of July 26, 1976, ch. 869, 1976 N.Y. Laws.

102. *Id.* 1976 N.Y. Laws § 2261.1.

103. Act of August 11, 1977, ch. 931,§ 15, 1977 N.Y. Laws.

104. Individual states will, of course, establish their own registration procedures, fee schedules and means of identification.

§ 3.2 — The registration provisions of this article shall not apply to a non-resident who has registered his motorized bicycle (moped) in compliance with the registration or licensing laws of the state, province, or country of his residence, provided that the motorized bicycle (moped) so registered is appropriately identified by an identification plate, sticker, or other identifying device issued by such state, province, or country.

C. Certificate of Title

A title certificate provides prima facie proof of ownership of a motor vehicle, thus insuring a purchaser's right to possession. As stated in *Switzer v. Carrol,*[105] "The purpose of the ... Certificate of Title Act is to prevent the importation of stolen motor vehicles and to protect ... bona fide purchasers against theft and wrongdoers, and to create an instrument evidencing title which would more adequately protect innocent purchasers."[106] Many state laws require a person registering a vehicle to procure and produce a certificate of title.[107]

Certificate of title laws appear to be particularly useful as applied to mopeds. It is still too early to determine the extent of the used moped market, and conclusive theft statistics are unavailable. As the number of mopeds on United States roads increases, the number of thefts is likely to increase proportionately. Mopeds, due to their weight and size, are easier to steal and conceal than automobiles or motorcycles. While this is probably even more true for bicycles, requiring certificates of title for bicycles would be impractical. Without requiring the registration of bicycles, which would be a costly and burdensome process, a certificate of title provision would be unenforceable. The value of most bicycles (new and used) is not great enough to justify the increased burden on the state. In contrast, the greater value of mopeds may provide an incentive for theft. There is also a likelihood that purchasers will finance their mopeds. These financing agreements, which give the lender a chattel mortgage on the moped, would be recorded on the certificates of title, thus protecting innocent purchasers who might otherwise have difficulty ascertaining whether there is a security interest in the vehicle. It seems clear, therefore, that certificates of title should be required for mopeds. Some states with moped laws currently exempt mopeds from

105. 358 F.2d 424 (6th Cir. 1966).

106. *Id.* at 428. *See* Osland v. Mansfield, 107 F.Supp. 220 (D.Alas. 1952); Price v. Universal C.I.T. Credit Corp., 102 Ariz. 227, 427 P.2d 919 (1967); Kutner Buick Inc. v. Strelecki, 111 N.J. Super. 89, 267 A.2d 549 (1970); Murry v. Kraft, 288 S.W.2d 523 (Tex. Civ. App. 1956).

107. *E.g.*, ALASKA STAT. § 28.10.270 (Supp.1976); IDAHO CODE § 49-402 (1949); IOWA CODE ANN. § 321.20 (1966); LA. REV. STAT. ANN. § 32:701 (1963); S.C. CODE § 56-3-200 (Supp. 1976).

their certificate of title regulations.[108] The following provision is intended to resolve the aforementioned problems and clarify existing laws.

MODEL MOTORIZED BICYCLE (MOPED) LAW

Part 4: Certificates of Title

§ 4.1 — Every owner of a motorized bicycle (moped) shall be subject to the certificate of title provisions contained in this article.[109]

D. Licensing and Age Requirements

Laws pertaining to licensing and age are grouped together in this section because they are closely related and are based upon similar rationales. Motor vehicle licensing statutes were designed to protect the public against death or serious injury[110] by requiring a minimal level of competence and skill on the part of operators.[111] Procurement of a license is minimum proof of capability. Age classifications were enacted in light of the potential power of motor vehicles to harm when improperly operated.[112] A legislature is justified in establishing a minimum age for licensing provided that this age can be shown to be reasonably related to the task of dividing the mature from the immature, reckless and incompetent individuals.[113]

Factors entering into the determination of whether moped operators should meet such minimum licensing and age requirements include the speed and difficulty of operation of the vehicle, and the operating en-

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108. *E.g.*, ARIZ. REV. STAT. § 28-302.02 (Supp. 1977); Act of April, 1977, P.A. No.439, § 9.1916, 1977 Mich. Pub. Acts; VT. STAT. ANN. tit. 23, § 2012 (Supp. 1977). Additionally, in states which do not require moped registration the inference is that certificates of title need not be procured.

109. Each state will establish its own procedure for compliance with this provision. Some may wish to make compliance concurrent with registration while others may require it separately.

110. People v. Duell, 1 N.Y.2d 132, 134, 151 N.Y.S. 2d 15, 15, 134 N.E. 2d 106, 108 (1956). "The licensing system is the keystone of all the legislative safeguards deemed necessary to protect the public against death or mutilation." *Id.*

111. Mundy v. Pirie-Slaughter Motor Co., 146 Tex. 314, 317, 206 S.W.2d 587, 589 (1947).

112. Dinger v. Burnham, 360 Mo. 465, 469, 228 S.W.2d 696, 700 (1950).

113. *Id;* People v. Joy, 50 Misc.2d 690, 692, 271 N.Y.S.2d 15, 19 (D.C. Nassau Cnty. 1966). *See generally* cases stating that a classification will be upheld only if it reasonably relates to the object of the legislation and is not arbitrary or capricious:

> The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that a classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 527 (1959) (Citations omitted); Morey v. Doud, 354 U.S. 457, 463-464 (1957); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 415 (1935); Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). *See also* Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); Hendrick v. Maryland, 235 U.S. 610 (1915); Schultz v. Morrison, 91 Misc. 248, 154 N.Y.S. 257 (Sup. Ct. 1915), *aff'd* 172 App. Div. 940, 156 N.Y.S. 1144 (1915); Plunkett v. Heath, 1 N.Y.S.2d 778, 782 (Rochester City Ct. 1938).

vironment.[114] While a minority of states have concluded that the moped is sufficiently like a bicycle not to require licensing,[115] there are strong arguments to the contrary:

(1) Like any two-wheeled vehicle, mopeds are especially unstable on slippery surfaces.[116] However, the speed, acceleration and weight of mopeds tend to increase the risk of losing control.

(2) Mopeds, unlike bicycles, will be operating in regular traffic lanes[117] and at a greater constant speed.[118] Consequently, moped operators will be exposed to various traffic hazards not normally experienced by bicyclists. Thus, the moped operator must demonstrate his or her ability to respond to those hazards.

(3) As already noted,[119] the moped has a lower silhouette than a normal bicycle, increasing its vulnerability.

(4) Although banned on expressways having minimum speeds which mopeds cannot achieve,[120] these vehicles will be used on major thoroughfares, secondary roads[121] and in regular traffic lanes from which bicycles are generally excluded.[122] The low acceleration of the moped may disrupt the normal flow of traffic, exposing the moped operator to a greater risk of collision.[123]

(5) Mopeds, while less dangerous to others than motorcycles, are more dangerous than bicycles. The moped's constant speed, weight and mechanical operation affect the operator's ability to control the vehicle, and hence, require a certain degree of manual dexterity.

It is apparent from the above analysis that the degree of care, judgment and skill needed to operate a moped surpasses that necessary for a bicycle. Mopedists will be encountering situations not unlike those faced by other motor vehicle operators. It is submitted, therefore, that the license and age requirements for moped operation be the same as those for the operation of other motor vehicles.[124] By requiring that

114. Note that every state with a moped law specifies a minimum age for moped operation regardless of whether or not licensing is required.

115. Generally, the states defining the moped as a bicycle are apt to forego licensing requirements, *i.e.*, Florida and Virginia.

116. Data Sheet 101, *supra* note 1, at 3.

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

118. *See* note 68 *supra.* On downhill roads, bicyclists will be operating at relatively the same speed as mopeds and in those situations the risks may be similar. A less serious injury will result from an impact with a bicycle, however, because the bicycle is so much lighter than the moped and the force on impact is correspondingly less.

119. *See* note 69 *supra.*

120. Data Sheet 101, *supra* note 1, at 2.

121. *Id.* at 3.

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

123. *See* Licht, *The Mopeds Are Coming,* TRAFFIC SAFETY, April, 1977 at 15; *N.J. Hearing, supra* note 73, at 4 (statement by S. Lozowick).

124. Out of forty-nine reported accidents in New Jersey, eighteen involved operators under seventeen years of age. *N.J. Hearing, supra* note 73, at 26. If the moped is to be safely operated it must be under the firm physical control of the operator. Physical incapacity such as failing

moped operators meet minimum age and licensing standards the state is insuring that individuals are familiar with rules of the road and the safe operation of the vehicle. Without a license requirement a person whose license had been revoked or suspended could operate a moped.[125]

A driving test and written examination for individuals without any class of license would be appropriate to insure their ability to operate the moped.[126] While the skill required to operate a moped may differ from that needed for other vehicles, a majority of legislatures have concluded that a person capable of operating another motor vehicle can safely operate a moped.[127] Those legislatures have provided that any valid driver's license will be accepted in lieu of a specially endorsed moped license.[128] The legislation developed herein is consistent with such provisions.[129]

MODEL MOTORIZED BICYCLE (MOPED) LAW

Part 5: Age

§ 5.1 — Motorized bicycles (mopeds) shall not be operated by any person under ( ) years of age.
(Note: The number in brackets corresponds to the state's minimum age requirement for motor vehicle operation.)

Part 6: Licensing

§ 6.1 — No person shall operate a motorized bicycle (moped) unless such person is in possession of a valid driver's license or learner's permit of any class or a motorized bicycle (moped) license which shall be issued by the (Director, Registrar, Commissioner) of Motor Vehicles to any person ( ) years of age or older after such person has passed a satisfactory examination as to his ability as an operator. Such examination shall include a test of the applicant's knowledge of such portions of the mechanism of motorized bicycles (mopeds) as is necessary to insure their safe operation and of the laws and ordinary usages of the road and

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eyesight is as dangerous when operating a moped as it is when operating any other motor vehicle because the moped will be expected to integrate with the traffic mix at considerable speeds. *N.J. Hearing, supra* note 73, at 4 (statement by S.Lozowick). This view is supported by the NHTSA. *See* note 77 *supra*.

125. *N.J. Hearing, supra* note 73, at 3.

126. Licht, *supra* note 123, at 13.

127. A majority of the jurisdictions requiring licenses accept any valid license or permit as a substitute for a specially endorsed moped license. Those jurisdictions include, among others, Arizona, California, Connecticut, New Jersey, New York (for class B and C limited use motorcycles), Pennsylvania and Washington, D.C.

128. *Id.*

129. These regulations are taken in large part, verbatim, from the New Jersey law. Act of Oct. 19, 1977, ch. 267, § 2d, 1977 N.J. Laws.

a demonstration of the applicant's ability to operate a motorized bicycle (moped).

E. Insurance

The Financial (Safety) Responsibility Acts[130] were enacted to insure that users of the public highways do not suffer due to the negligence of operators of motor vehicles. If the acts do not discourage careless driving, they at least mitigate its consequences.[131] As was stated in *Manzanares v. Bell:*[132]

> Under the police powers the state may regulate travel upon the public highways... The state has an interest in protecting those who use the public highways and that interest is not limited to accident prevention... The purpose of the Safety Responsibility Act was to afford members of the public protection from irresponsible drivers by requiring financial security from drivers and motor vehicle owners involved in vehicle accidents.[133]

In *Argenzio v. Aetna Casualty and Surety Co.,*[134] the court said: "[T]his State has a compulsory insurance law enacted to implement the public policy of the state which seeks to protect the public against the operation of motor vehicles by financially irresponsible persons."[135] The compulsory motor vehicle insurance statute, however, does not disregard the right of the insured to obtain indemnity.[136]

The State, therefore, has a definite interest in requiring motor vehicle owners to obtain liability insurance. Whether this interest should encompass moped owners can only be determined from available information. Statistics in Europe[137] and New Jersey[138] provide indices of the risks involved in operating mopeds. The 1974 report by the European Conference of Ministers of Transport indicates the death rate for moped operators is approximately six times higher than for bicyclists and only about three times less than for motorcyclists.[139] These figures are death rates only and it is reasonable to assume that the injury rates

130. *See, e.g.,* MD. ANN. CODE art.66½ § 7-101 (Supp. 1976); N.J. STAT. ANN. § 39:6-23 (West 1973); N.Y. VEH. & TRAF. LAW §§ 330-368 (McKinney 1970); S.C. CODE § 56-9-10 (1976); S.D. COMPILED LAWS ANN. § 32-35 (1976); VA. CODE § 46.1388 (1974).

131. Byers v. Justice Court for Uriah Judicial Dist. 80 Cal. Rptr. 553, 458 P.2d 465 (1969); Agee v. Kansas Highway Comm'n. Motor Vehicle Dep't., 198 Kan. 173, 422 P.2d 949 (1967); Erie Ins. Exch. v. Gosnell, 246 Md. 724, 230 A.2d 467 (1967); Fidelity & Casualty Co. of N.Y. v. N.C. Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 192 S.E.2d 113 (1972).

132. 214 Kan. 589, 522 P.2d 1291 (1974).

133. *Id.* at 600, 601 & 605, 522 P.2d at 1302 & 1305 (citations omitted).

134. 65 Misc.2d 813, 318 N.Y.S.2d 64 (Civ. Ct. N.Y.C. 1971).

135. *Id.* at 815, 318 N.Y.S.2d at 67.

136. Brown v. Great American Indemnity Co., 298 Mass. 101, 104, 9 N.E.2d 547, 549 (1937).

137. *See* note 72 *supra.*

138. *N.J. Hearing, supra* note 73, at 26-27.

139. *See* chart at note 72 *supra.*

are much higher.[140] In New Jersey, where recent moped accident statistics were voluntarily reported over a six month period[141] the following facts emerged:[142] Out of forty-nine accidents reported, one moped rider was killed, thirty-two received moderate to incapacitating injuries, eleven received minor injuries, four received no injury and one was unknown.[143] The extent of injury to persons or property other than the moped operator is unclear from the data.[144] As discussed earlier,[145]

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140. A 1974 report by the National Safety Council indicated that in 1973 out of a total of 16,600,000 (rounded) accidents, 48,100 (0.3% rounded) were fatal, 1,300,000 (7.8% rounded) involved disabling injuries, and 15,300,000 (92% rounded) involved non-disabling injuries and property damage. Computing the death and injury rates (rates expressed per 100,000 vehicles) based on a total number of registered vehicles of 128,700,000 the following facts emerge: The death rate in 1973 was approximately 35; the disabling injury rate was approximately 1000; and the total disabling and nondisabling injury rate was approximately 15,000. Clearly, injury rates far exceeded the death rate. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 40 (1974). The report also indicated that out of the total of 16,600,000 accidents, 13,000,000 were between motor vehicles and 300,000 were between motor vehicles and pedestrians. The risk of injury for operators of motor vehicles is obviously greater than the risk to pedestrians of being involved in a motor vehicle accident. *Id.* at 47. Bicycle deaths in 1973 were significantly lower than motor vehicle deaths. The death rate for bicycles was 1.44 (per 100,000 bicycles in use) compared to 35 for motor vehicles. *Id.* at 47. The risks to moped operators would, therefore, be significantly greater than for bicyclists.

A 1976 report by the U.S. Department of Transportation, *see* note 74 *supra,* indicated that between 1950 and 1976, motorcycle deaths rose more rapidly than either bicycle or pedestrian (involved with motor vehicle) deaths. TRAFFIC SAFETY, *supra* note 74, at A-12. The findings also indicated that the largest number of fatalities occurred in the 15-19 year age bracket and that nearly one-third of all fatalities occurred amongst persons under nineteen years of age. *Id.* at A-38.

141. December, 1975-June, 1976. *N.J. Hearing, supra* note 73, at 26.

142. *Id.* at 26-27.

143. These statistics are offered to give an indication of the risks involved in operating a moped. If the New Jersey figures were to be assumed representative of the rest of the states, then by multiplying this data, the annual national moped accidents can be roughly estimated. If the number of mopeds were to remain at the level presently existing (somewhere between 100 and 200 thousand), the annual number of accidents would be somewhere in the neighborhood of 5000. This means that about one in thirty moped operators will be involved in an accident.

144. The following are the breakdowns of the reported New Jersey accidents: *N.J. Hearing, supra* note 73, at 26:

ACTION OF THE MOTORIZED BICYCLE	NUMBER
Involved with a motor vehicle going in the same direction	11
At right angles with a motor vehicle	12
While making a left turn	5
Operators that fell off the motorized bicycle	9
Bicyclists who struck a fixed object off road	7
Struck motor vehicle on the road	1
Struck a pedestrian	1
Head on with a motor vehicle	1
Struck a defect in the road	1
Unknown (Moped operator fled scene and left cycle)	1
Accidents in municipality where operator resides	36
Accidents where operator from out-of-town	12
Unknown	1

the moped is able to maintain a sustained force and momentum with little operator effort,[146] and the potential for personal injury and property damage exceeds that for a bicycle.[147] The moped also is much heavier than a bicycle[148] making greater damage upon impact foreseeable.

At what point, however, should insurance be required? Mandatory insurance coverage on everything people undertake is impractical. Although current information and statistics seem to indicate that mopeds are more dangerous than bicycles, such data is insufficient to determine definitively the moped's potential for harm. To require compulsory liability insurance at this point without further evidence may unnecessarily place the moped beyond the reach of thousands of individuals who could not afford the premiums. Until sufficient statistics become available compulsory liability insurance should not be required.[149] If such information eventually points to the need for insurance, a provision similar to the one proposed at the end of this section should be adopted.

A minority of states already have taken measures aimed at requiring moped owners to procure liability insurance coverage.[150] Some have compulsory liability insurance provisions[151] while others only demand proof of financial responsibility after an initial accident.[152]

ACTION OF THE MOTORIZED BICYCLE	NUMBER
Operators under 17 years of age	18
Operators 17 years or older	30
Unknown	1
Operators that lost control of the bike	21
Operators committing traffic violations	21
Operators not seen by motor vehicle driver	2
Accidents fault of motor vehicle driver	3
Unknown	2

145. *See* note 68 and accompanying text *supra.*

146. *N.J. Hearing, supra* note 73, at 26.

147. Bicyclists cannot maintain constant high speeds without expending great amounts short periods of time. *N.J. Hearing, supra* note 73, at 17-18 (statement by S.Weeks).

148. *See* note 1 *supra.*

149. A state may, of course, choose to adopt, in the interim, a provision requiring proof of financial responsibility for any moped operator involved in an accident. The state also should encourage people to purchase liability insurance for their own benefit. Additionally, some states may determine at this point, based on their limited accident experience, that insurance is necessary. The provision included herein is meant to serve as a guide for those states as well.

150. New York and New Jersey, for example, now mandate compulsory liability insurance coverage.

151. *E.g.,* Act of Oct. 19, 1977, ch. 267, 1977 N.J. Laws.

152. *E.g.,* VT. STAT. ANN. tit. 23, § 364b (Supp.1977).

If insurance is deemed necessary, it is submitted that the state interest is best served by requiring compulsory liability insurance. Otherwise, the first accident victim is exposed to the risk of financial loss if the tort feasor is unable to satisfy an adverse judgment. The initial victim should not be subject to such a burden. The model legislation reflects this concern.

In states which lack insurance provisions covering mopeds,[153] an individual may reasonably believe his or her vehicle is covered under a homeowner's insurance policy, particularly where the state has defined the vehicle as a bicycle.[154] While there is no case law dealing specifically with this issue,[155] present insurance company policies consider a moped a motor vehicle and, thus, excluded from coverage under a homeowner's policy. One company is offering coverage under its "Recreational Vehicle Policy,"[156] while another is issuing policies designed exclusively for mopeds.[157] Others include mopeds within existing motorcycle policies.[158] Recreational vehicle policies often lead to conflicts with state laws since insurance company definitions of these vehicles,[159] including mopeds, do not agree with the state definitions.[160] Coverage under a motorcycle policy may be prohibitive in relation to the cost of the moped.[161] A possible solution to this problem would be to enable the state insurance boards to act as rate-setting bodies for moped insurance.[162] Present computerized accident investigation forms, however, do not differentiate between mopeds and other classes of motor vehicles,[163] thus compounding the problem of determining "reasonable" insurance rates. A modification in present accident reporting procedures is necessary to gain some practical accident experience, and the model legislation proposed below reflects this concern. If the information gathered under Part 8 indicates a need for insurance, a Part 7 type provision should be enacted.

153. *E.g.*, FLA. STAT. ANN. § 324.021 (West Supp. 1975).

154. *Id.* at § 316.003.

155. A similar issue was raised in Lalomia v. Bankers & Shippers Ins. Co., 58 Misc. 2d 530, 296 N.Y.S.2d 464 (Sup. Ct.Special Term 1968), *modified by* 35 App. Div. 2d 114, 312 N.Y.S.2d 1018 (1970), at 116-17,312 N.Y.S.2d at 1020, in which the court held that a bicycle converted into a "contraption" by the addition of a gasoline motor was a motor vehicle within the existing law and, therefore, not covered under a basic homeowner's insurance policy. This case is at best weak authority. The moped is not a "contraption" but rather a device manufactured as a motor vehicle. As such, it would in all likelihood not be covered under a homeowner's policy, but rather under a motor vehicle insurance policy.

156. Fireman's Fund American Insurance Companies, Personal Recreational Vehicle Policy, No. 5920-4-73.

157. American Reserve Insurance Company, Moped Policy, Form No. 31 122 (11/76).

158. *E.g.*, Midwest Mutual Insurance Company (Iowa), Progressive Insurance Company (Ohio) and Universal Underwriters (Mo.).

159. *See* Fireman's Fund Policy, *supra* note 156, at § 4(b).

160. *E.g.*, "Recreational vehicle" means a vehicular type unit primarily designed as temporary living quarters. . . ." Act of 1977, ch. 2, § 44-1701, 1977 Ariz. Legis. Serv.

161. In Massachusetts, for example, comprehensive liability insurance coverage can cost anywhere between $42, for a motorcycle costing up to $100, and over $500 for a motorcycle valued at over $2000. At these rates, therefore, insurance on a moped costing between $300 and $500 could be upwards of $100 annually. *See* note 1 *supra.*

162. The New Jersey law, for example, contains a provision which allows the Commissioner of Insurance to approve all provisions of a liability insurance policy. Act of Oct. 19, 1977, ch. 267, 1977 N.J. Laws. That provision has been adopted as part of the model legislation.

163. Data sheet 101, *supra* note 1, at 2; *N.J. Hearing, supra* note 73, at 26.

MODEL MOTORIZED BICYCLE (MOPED) LAW

Part 7: Insurance

§ 7.1 — Every owner of a motorized bicycle (moped) principally garaged or operated in this State and every person in the business of rent ing motorized bicycles (mopeds) shall maintain liability insurance coverage, under provisions approved by the Commissioner of Insurance, insuring against loss resulting from liability imposed by law for bodily injury, death and property damage sustained by any person arising out of the ownership, operation, or use of a motorized bicycle (moped). The Commissioner of Insurance, in consultation with the (Director, Commissioner, Registrar) of the Division of Motor Vehicles, shall by regulation fix the amounts and limits of coverage of, and requirements for, such insurance.

Part 8: Accident Reports

§ 8.1 — Accident reporting procedures shall be applicable to all accidents involving motorized bicycles (mopeds). Any law enforcement officer investigating an accident in which a motorized bicycle (moped) is involved shall report the accident to the Division of Motor Vehicles. This report shall include information relating to the cause of the accident and extent of injury, if any, to the operator and any other person or property and such other information as may be required.

F. Speed Regulations

Limitations of vehicular speed, and the roads upon which a moped may travel, are included in these regulations. Since mopeds are incapable of operating as presently designed at minimum expressway speeds, they are banned from these roads.[164] Problems arise in determining what other roads, if any, should be prohibited to moped operation. The speed of the vehicle is a major factor in this decision. Present moped legislation has attempted to regulate speed within the definition itself.[165] A better way to approach this problem[166] is to define the moped at the maximum design speed of thirty miles per hour and establish moped speed limits. This procedure would not only avoid the definitional problems previously noted[167] but would also serve the

164. Mopeds are incapable of speeds over thirty miles per hour on a flat surface and, therefore, will not be allowed on roads with a minimum speed exceeding thirty miles per hour. *See* note 1 *supra;* Data Sheet 101, *supra* note 1, at 2.

165. *See* discussion pp. 307-08 *supra.*

166. *Id.*

167. *Id.*

legitimate state interest[168] of limiting vehicular speed.

An additional problem arises where legislation uses speed (for example twenty miles per hour) to define the moped, and then allows the moped to operate on public highways with speed limits up to fifty miles per hour. Under such circumstances, the state has exposed the moped operator to increased risk of collision.[169] A vehicle traveling twenty miles per hour slower than immediate traffic presents an inherently unsafe condition:[170] "obviously, slow-moving mopeds will become a hazard when not capable of safely entering the traffic mix when other vehicles are lawfully proceeding at a fifty mile per hour rate."[171] Therefore, if the state imposes a twenty or twenty-five mile per hour speed limit on mopeds, it should also restrict the moped from those roads which are unsafe for its operation (*i.e.*, where the speed differential exceeds twenty miles per hour). Since no available moped is capable of exceeding thirty miles per hour, a general provision restricting operation to roads with no greater than a fifty mile per hour speed limit[172] will help alleviate an inherently unsafe condition. The Director of Motor Vehicles should be allowed to restrict the operation of the moped from any other road with a speed limit in excess of forty miles per hour which, due to the volume of traffic, is determined to create an unsafe condition for the operation of the moped.[173] While the above provisions will not prohibit owners of mopeds capable of a twenty mile per hour maximum speed from operating on non-restricted fifty mile per hour roads, they represent, it is submitted, the best compromise. The codification of the proposed regulations would appear as follows:

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168. In Opinion Of The Justices To The House Of Rep., 1975 Mass. Adv. Sh. 2456, 333 N.E.2d 385 (1975), the court said: "[T]he object of the bill is to promote public safety by limiting vehicular speed. This is a permissible legislative objective." *Id.* at 2458, 333 N.E.2d at 386 (citations omitted).

169. *See* note 123 *supra*.

170. *Id.; N.J.Hearing, supra* note 73, at 3.

171. *N.J.Hearing, supra* note 73, at 4.

172. A regulation limiting the moped to roads with speed limits of forty miles per hour or less (desirable, perhaps, in the case of the moped capable of a maximum speed of twenty miles per hour) would automatically result in the situation of a person living on a fifty mile per hour road being prohibited from driving a moped out of his or her driveway. *Id.* at 8.

173. Forty miles per hour is the lowest speed which will automatically create a twenty mile per hour speed differential (some mopeds are only capable of a maximum speed of twenty miles per hour). A road with a lower speed limit will not present any problem, even for the lowest design speed mopeds, so there is no reason to restrict the vehicles from these roads. Of course, the moped operator can create the twenty mile per hour speed differential as can any other motor vehicle operator. There is no way to regulate such behavior other than to establish minimum speed limits on every road. Not only would this be impractical, it would be virtually unenforceable. It would be likewise impractical to prohibit mopeds from roads where the speed limit exceeds the design speed of the modped by more than twenty miles per hour. Such a provisions would be unenforceable because a traffic officer would have to stop the vehicle just to determine what type of moped was being operated.

MODEL MOTORIZED BICYLE (MOPED) LAW

Part 9: Speed Limits and Restricted Road Use

§ 9.1 — Motorized bicycles (mopeds) shall not be operated upon any public highway within this state with a speed limit in excess of fifty miles per hour nor at a speed in excess of (twenty, twenty-five, thirty) miles per hour.

§ 9.2 — The (Director, Commissioner, Registrar) of Motor Vehicles is authorized to adopt regulations either prohibiting the operation of any motorized bicycle (moped) on any public highway with a speed limit in excess of forty miles per hour which in his discretion is hazardous for the operation of motorized bicycles (mopeds), or permitting the operation of motorized bicycles (mopeds) on any highway, upon which the operation of motorized bicycles (mopeds) is otherwise prohibited by the provisions of this section, which in his discretion are safe for the operation of motorized bicycles (mopeds). In no case, however, shall the (Director, Commissioner, Registrar) adopt a regulation permitting motorized bicycles (mopeds) to be operated upon any highway with a posted speed in excess of fifty miles per hour.[174]

G. Equipment

Federal safety standards[175] specify equipment to be included with any moped sold within the United States. However, the federal regulations do not require the purchase or use of helmets nor do they control the use of mandatory equipment, particularly headlights.[176] These matters are generally left for state regulation.

Due to the low silhouette of the moped,[177] state law should require a lighted headlamp when in motion.

Helmet laws address certain dangers inherent in operating a motorcycle as compared to an enclosed motor vehicle.[178] Flying stones or other objects could result in a blow on the head of a cyclist, causing injury to himself and other users of the public highways.[179] The prevention of such occurrences is a valid objective of legislation under the state's police powers.[180] In *Simon v. Sargent*,[181] the court said: "[t]he

174. This provision is modelled after the recent New Jersey enactment, Act of October 19, 1977, ch. 267 1977 N.J. Laws.

175. *See* note 3 *supra*.

176. The regulations only establish adequate safety standards that the equipment must meet before being approved for use. *See* note 3 *supra*.

177. *See* note 69 and accompanying text *supra*.

178. People v. Schmidt, 54 Misc.2d 702, 703, 283 N.Y.S.2d 290, 292 (Erie Cnty. Ct. 1967).

179. *Id.*

180. *Id. See also* Love v. Bell, 171 Colo. 27, 465 P.2d 118 (1970); State v. Anderson, 275 N.C. 168, 166 S.E.2d 49 (1969); State v. Quinnam, 89 Misc.2d 382, 391 N.Y.S.2d 506 (Albany Cty. Justice Ct. 1977); State v. Solomon, 128 Vt. 197, 260 A.2d 377 (1969); *Cf.* State v. Eitel, 227 So.2d 489, 490, 491 (Fla. 1969), where the court said that while an injury to the cyclist's eye from a

Legislature is not unreasonable in linking protective headgear to safer motorcycling"[182] and "the public has an interest in minimizing the resources directly involved in an accident of a motorcyclist without a helmet."[183] Finally, in *People of the City of Adrian v. Poucher,*[184] the court stated:

> More is involved than the unfettered freedom of the cyclist. For example, the ordinance benefits the driver of a vehicle which may accidentally collide with a motorcyclist. Since the helmet is designed to reduce injury to the cyclist, it also has a concomitant effect on the status of the automobile driver. If the helmet succeeds in mitigating what would otherwise be a fatal injury, then not only has the cyclist survived, but the automobile driver has not killed anyone.[185]

The dangers discussed in the above considerations of motorcycle helmet laws also pertain to moped operation. Mopeds, as already noted,[186] will be mixing with the normal flow of traffic in both urban and rural settings, and the operator will be exposed to the dangers of flying objects from the wheels of other vehicles. A helmet requirement, therefore, would not be unreasonable. Only one state currently regulating mopeds requires the operator to wear a helmet,[187] and then only for the class of mopeds with a design speed of over twenty miles per hour.[188] The provisions set out below will hopefully be adopted by the remaining jurisdictions.

MODEL MOTORIZED BICYCLE (MOPED) LAW

Part 10: Equipment

§ 10.1 — Every motorized bicycle (moped) operated upon a public highway within this state shall have its headlight illuminated at all times.

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flying object may create a potential hazard to others, "we ought to admit frankly that the purpose of the helmet is to preserve the life of the cyclist, and ... society has an interest in the preservation of the life of the individual for his own sake."

181. 346 F.Supp. 277 (D.Mass. 1972), *aff'd,* 409 U.S. 1020 (1972), (Aff'd on appeal from the district court).

182. *Id.* at 278-79.

183. *Id.*

184. 398 Mich. 316, 247 N.W.2d 798 (1976).

185. *Id.* at 320, 247 N.W.2d at 800.

186. *See* note 72 and accompanying text *supra.* The Langwieder study reported that the risk exposure to serious and fatal injuries is four times greater for non-helmeted drivers than for helmeted ones. *Id.* at 297.

187. Act of August 11, 1977, ch. 931, § 18, 1977 N.Y. Laws.

188. *Id.* (Class C Limited Use Motorcycle.) According to M.Paley, the legal counsel in the office of the sponsor of the New York bill, this section was the result of a compromise between two bills, one requiring helmets on all moped operators, the other not requiring them on any operators. The end result, however, is that a five mile per hour design speed difference is the determinative factor in which moped operators will wear helmets and which ones will be exempt.

§ 10.2 — Every person, while operating a motorized bicycle (moped) upon any public highway within this state, shall wear a helmet which meets federal safety standards.
(Note: Obviously, states which do not require motorcyclists to wear helmets will not require moped operators to wear them. That is a policy decision made by the state legislature.)

H. Inspection

Inspection laws are designed to insure that motor vehicles operating on the public highways meet at least some minimal safety standard and that their operation poses no danger to the safety of the people and property in the state.[189] "A motor vehicle that is mechanically defective is more prone to be involved in a traffic accident than one that functions normally, excluding, of course, driver error."[190]

Mopeds are subject to similar mechanical defects found in other motor vehicles, and these defects may not be apparent to the untrained eye. Therefore, an inspection of mopeds should be required at a state certified inspection station, at such intervals as the Director of Motor Vehicles deems appropriate. Only three states at present specifically require mopeds to be inspected.[191]

MODEL MOTORIZED BICYCLE (MOPED) LAW

Part 11: Inspection

§ 11.1 — Motorized bicycles (mopeds) shall be inspected under requirements and at such periodic intervals as the (Director, Commissioner, Registrar) of Motor Vehicles shall deem appropriate.
(Note: States not following a periodic inspection policy[192] will not, of course, require mopeds to be inspected.)

IV. CONCLUSION

A moped clearly fits into the general category of motor vehicles and should be defined as such within state codes. In addition, the moped

189. Campbell v. LeClaire Wrecking Service, 380 F.Supp. 555, 558 (S.D.Iowa 1974); *see also* Miller v. State 503 P.2d 886 (Okla. Crim.App. 1972).

190. State v. Diamondstone, 132 Vt. 303, 305-6, 318 A.2d 654, 657 (1974).

191. Pennsylvania, Washington, D.C. and New York (only for Class A limited use motorcycles). In states requiring all registered vehicles to be inspected (*i.e.*, Mississippi, New Mexico, Oklahoma and Utah), if the moped is subject to the registration provision it is apparently subject to inspection as well. *See* Denis & Kearney, State Laws on Mopeds and Motorized Bicycles 7 (January, 1978)published in TRAFFIC LAWS COMMENTARY NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION.

192. *E.g.*, MD. ANN. CODE art. 66½, § 13-106 (1957) only requires vehicles to be inspected upon sale or transfer.

should be subject to all rules of the road applicable to other types of motor vehicles. Furthermore, registration, licensing, age, certificate of title, speed limit, equipment, and inspection provisions applicable to other motor vehicles and operators should be amended to include mopeds. Insurance regulations, as discussed earlier, should await further statistical analysis.

This article was not designed to cover all motor vehicle regulations, but rather to concentrate on a few major areas with a view toward resolving apparent conflicts and discrepancies. All of the provisions herein proposed are supported at least in part by recommendations for moped regulation being considered for approval by the NHTSA.[193]

Thirty-three states[194] have already enacted some type of moped legislation and the remainder will probably pass similar laws within the next two years, especially if the moped becomes as popular as estimates predict.[195] If adequate safety measures are promulgated under these laws the moped could be an invaluable aid in reducing motor vehicle exhaust emissions and possibly decreasing energy consumption. The states, therefore, should encourage the use of the moped as an alternative means of transportation while at the same time promoting the safety of the vehicle through adequate statutory provisions.

RICHARD P. WEISS

193. *See* notes 77 and 78 *supra.*

194. The following list indicates only the year of initial legislation: 1971-Michigan; 1973-Indiana, Ohio, South Carolina and Texas; 1974-North Carolina; 1975-California, Hawaii, Nevada, New Jersey and Virginia; 1976-Arizona, Connecticut, Florida, Iowa, Kansas, Louisiana, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania and Rhode Island; 1977-Arkansas, Colorado, Delaware, District of Columbia, Illinois, Maine, Minnesota, New Mexico, Tennessee and Vermont. This list was compiled by the NHTSA.

195. *See* note 4 *supra.*

Trustee Removal and Appointment Mechanisms in Massachusetts

Individuals establishing a trust relationship, either through a testamentary trust or some inter-vivos vehicle, often overlook the importance of providing a method for removal of the trustee. The need to remove a trustee, however, can and often does arise. If the drafter does not choose a method for removal of the trustee, and appointment of a successor, the courts of the Commonwealth will provide a method. The diligent draftsperson should carefully consider the alternatives available for removal of the trustee and the subsequent appointment of a successor. He or she should then choose a removal scheme which best furthers the intention of the donor.

This note examines the existing processes which will be employed if the donor does not provide for removal of trustees[1] and appointment of successors. It also considers some possible mechanisms for removal and appointment which might be included in a trust instrument. Other drafting considerations which can affect a removal situation are also examined.

I. Removal Mechanisms

Removal is the most drastic form of control which can be exercised over a trustee.[2] The mechanism employed will depend upon the dictates

1. A detailed discussion of the grounds for removal which have been applied in Massachusetts is beyond the scope of this article. Some grounds, however, are misappropriation of trust assets, Billings v. Billings, 110 Mass. 225 (1872), a failure to keep accounts, Cooney v. Montana, 347 Mass. 29, 196 N.E.2d 202 (1964), or a refusal to account to the beneficiary, Kinion v. Riley, 310 Mass. 338, 37 N.E.2d 984 (1940). A trustee's failure to segregate the trust assets from his or her own will be entertained as a ground for removal also. Horowitz v. Horowitz, 1975 App. Adv. Sheets 719, 327 N.E.2d 918 (Mass. App. 1975); Sparhawk v. Sparhawk, 114 Mass. 356 (1874). If there is hostility between the trustee and beneficiaries, the court will consider removal. Gordon v. Gordon, 332 Mass. 210, 124 N.E.2d 236, *cert. denied*, 349 U.S. 947 (1955); Shirk v. Walker, 298 Mass. 251, 10 N.E.2d 192 (1937). Additionally, if the trustee is unsuitable for administration of the trust, Quincy Trust Co. v. Taylor, 317 Mass. 195, 57 N.E.2d 573 (1944), or becomes identified with the adverse interests of a beneficiary, Scott v. Rand, 118 Mass. 215, 218 (1875), he or she will be removed. A. Scott, The Law of Trusts § 107 (3d ed. 1967).

of the trust instrument. The process, however, will take one of three basic forms. The trustee can be removed by application of the general removal statute. Alternatively, the removal can take place through a suit in equity,[3] which enforces the provisions of the trust instrument. Finally, it can be strictly extrajudicial, with the entire procedure set out and administered under the trust instrument. These mechanisms will be discussed seriatim.

A. Removal Pursuant to the Statute

Massachusetts, like many other jurisdictions, has a statutory trustee removal system.[4] The removal is effectuated by a civil suit brought pursuant to Massachusetts General Laws chapter 203, section 12.[5] There is no limitation stated as to the type of trust relationship which comes within its purview. It has been applied in cases involving both voting trusts[6] and business trusts,[7] as well as testamentary[8] and inter-vivos trusts.[9]

This is the method of removal which will be employed if no other suitable method is provided in the instrument.[10] Issues regarding notice and the discretion of the court have arisen in the litigation under this statute. Also present is a question involving the standing of a party to

2. Other methods of control available are "(1) direct the trustee to act . . . ; or (2) enjoin him from acting . . . ; or (3) compel him to make reparation. . . ." A. SCOTT, THE LAW OF TRUSTS § 187.1 (3d ed. 1967).

3. Historically, removal petitions were addressed to the equity side of the court. J. POMEROY, TREATISE ON EQUITY JURISPRUDENCE § 1086 (5th ed. 1941). Since the joinder of law and equity in Massachusetts, however, the removal is a civil action. MASS.R.CIV. P. 1. *Cf.* Perry v. Perry, 339 Mass. 470, 484, 160 N.E.2d 97, 106 (1959) (removal of a testamentary trustee is addressed to probate side of court).

4. MASS. GEN. LAWS ANN. ch. 203, § 12 (West 1970). *See also* CONN. GEN. STAT. ANN. § 45-263 (West); N.Y. EST., POWERS & TRUSTS LAW § 7-2.6 (McKinney 1974); VT. STAT. ANN. tit. 14, § 2313 (1974).

5. MASS. GEN. LAWS ANN. ch. 203, § 12 (West 1970) provides:

> The supreme judicial court, the superior court or the probate court may, upon written petition of a party beneficially interested in a trust under a written instrument, and after notice to the trustee and all persons interested, remove the trustee if it finds that such removal is for the interests of the beneficiaries of the trust or if he has become insane or otherwise incapable or is unsuitable therefor. If the petition for removal contains a prayer therefor, the court may, upon such notice as it considers reasonable, appoint a successor to fill the vacancy caused by such removal, without the filing of a separate petition for that purpose.

6. *See, e.g.*, Massa v. Stone, 346 Mass. 67, 190 N.E.2d 217 (1963). A voting trust is established when the owners of stock in a corporation appoint a trustee to vote their shares. H. HENN, THE HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 390 (2d ed. 1970).

7. *See, e.g.*, Shirk v. Walker, 298 Mass. 251, 10 N.E.2d 192 (1937). A business trust is a business which is operated by a trustee or trustees, usually under a declaration of trust. MASS. GEN. LAWS ANN. ch. 182, §§ 1-14 (West Supp. 1976).

8. *See, e.g.*, Attorney General v. Olson, 346 Mass. 190, 191 N.E.2d 132 (1963).

9. *See, e.g.*, Gorman v. Stein, 1 Mass. App. Ct. 244, 295 N.E.2d 178 (1973).

10. The instrument can provide a removal mechanism which is operational outside the judicial system. A. SCOTT, THE LAW OF TRUSTS § 107 (3d ed. 1967). *See* discussion p. 338 *infra*.

bring a removal petition. If the draftsperson decides to make use of this mechanism (by not including a removal clause) or if an attorney faces litigation under the statute, the following three elements should be considered.

1. Standing

The statute allows a removal petition to be brought by any person "beneficially interested"[11] in the trust.[12] Although this term "beneficially interested" has never been specifically construed with respect to this section, it has been defined in a related section. Under Massachusetts General Laws chapter 205, section 5,[13] which deals with exemptions from giving sureties on a fiduciary's bond, "beneficially interested" has "been construed to mean persons having a present vested interest in the trust estate."[14] This clearly applies to any present beneficiary,[15] including a settlor who has retained a beneficial interest under an instrument.[16] It also applies to beneficiaries with a vested remainder interest, even though they may not be entitled to benefits at present.[17]

In many cases, however, the beneficiaries may be unaware of the need to remove a trustee, as in the case of a vested remainder interest. It is often a cotrustee who first becomes aware of the need to remove a trustee. Yet, a problem arises in the case of cotrustees.[18] A trustee does not, merely by virtue of the office, have a beneficial interest in the estate.[19] This would seem to preclude standing to bring a removal peti-

11. MASS. GEN. LAWS ANN. ch. 203, § 12 (West 1970).

12. A petition for the removal of the trustee of a charitable trust can be brought by the Attorney General. Attorney General v. Olson, 346 Mass. 190, 191 N.E.2d 132 (1963).

13. MASS. GEN. LAWS ANN. ch. 205, § 5 (West 1970) provides:

> A testamentary guardian and a trustee under a will shall be exempt from giving sureties on his bond, if the testator has ordered or requested such exemption, or that no bond be required, or in the case of a trustee, if all the persons beneficially interested in the trust, of full age and legal capacity, other than creditors, request such exemption; but not until the guardian or conservator of any person under disability interested therein and such other persons as the court orders have been notified and has opportunity to show cause against the same. . . .

14. Waitt v. Harvey, 312 Mass. 384, 391, 45 N.E.2d 1, 5 (1942) *citing* Dexter v. Cotting, 149 Mass. 92, 21 N.E. 230 (1889).

15. *See, e.g.*, Gordon v. Gordon, 332 Mass. 210, 124 N.E.2d 236, *cert. denied*, 349 U.S. 947 (1955).

16. *See, e.g.*, Gorman v. Stein, 1 Mass. App. Ct. 244, 295 N.E.2d 178 (1973).

17. *See, e.g.*, Holyoke National Bank v. Wilson, 350 Mass. 223, 214 N.E.2d 42 (1966).

18. The system of cotrustees is a frequently used tool in the administration of trusts. *See* A. SCOTT, THE LAW OF TRUSTS § 194 (3d ed. 1967). In the ordinary case, one trustee will be corporate, usually a trust company, with all powers appurtenant to the trustee office. MASS. GEN. LAWS ANN. ch. 172, § 70 (West 1970). The other will be an individual, usually a friend, relative or attorney. *See, e.g.*, Wilson v. Stump, 310 Mass. 614, 29 N.E.2d 416 (1942). These trustees normally hold property as joint tenants. *See* A. SCOTT, THE LAW OF TRUSTS § 194 (3d ed. 1967). Upon the death, resignation or removal of one, the other can fulfill all duties until a successor is chosen. *Id.*

19. Lord v. Miller, 277 Mass. 276, 277, 178 N.E. 649, 650 (1931).

tion pursuant to the statute if the trustee is not also a beneficiary. For instance a corporate fiduciary rarely has a beneficial interest in the trust estate which it administers.

This language should be contrasted with that of the New York statute, which allows "any person interested" to bring a removal action.[20] Although the language in the New York statute appears broader, a cotrustee without a beneficial interest is prohibited from bringing a removal action in New York.[21] If the settlor determines that the trust relationship being established will benefit from allowing cotrustees to remove each other, the problem can be alleviated through drafting.

2. Notice

The removal of a trustee chosen by a settlor or appointed by the court affects all persons involved in the trust, hence the statute requires that notice of the proceedings be given.[22] No successful action under the statute can be brought without notice to "the trustee and all persons interested."[23] This phrase includes only beneficiaries whose interest has vested and not contingent beneficiaries.[24] It includes a cotrustee, for he or she is "interested" although not "beneficially interested."[25]

Failure to give the notice required is fatal to the proceedings,[26] and any decree entered without such notice will be vacated upon appeal.[27] A collateral attack via another suit, however, cannot be maintained on the basis of lack of notice.[28]

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20. N.Y. EST. POWERS & TRUSTS LAW § 7-2.6 (McKinney 1974) provides:

> Resignation, suspension or removal of trustee (a) Subject to the relevant provision of the civil practice law and rules, the supreme court has power: . . . (2) On the application of any person interested in the trust estate, to suspend or remove a trustee who has violated or threatens to violate his trust, who is insolvent or whose insolvency is imminent or apprehended or who for any reason is a person unsuitable to execute the trust.

21. *In re* Braloff's Estate, 3 App. Div. 2d 912, 162 N.Y.S.2d 620 (1957); Matter of Bloomingdale's Estate, 171 Misc. 843, 13 N.Y.S.2d 674 (1939), *aff'd,* 258 App. Div. 952, 17 N.Y.S.2d 1018 (1940).

22. MASS. GEN. LAWS ANN. ch. 203, § 12 (West 1970). In the case of the removal of a trustee of a public charity the Attorney General must also be notified of the proceedings. MASS. GEN. LAWS ANN. ch. 12, § 8g (West 1970).

23. MASS. GEN. LAWS ANN. ch. 203, § 12 (West 1970).

24. Dexter v. Cotting, 149 Mass. 92, 21 N.E. 230 (1889), *limited in* Young v. Tudor, 323 Mass. 508, 83 N.E.2d 221 (1948) (excluding probate accounts).

25. The difference in these requirements should be compared with the appointment statute, MASS. GEN. LAWS ch. 203, § 5, set out in note 50 *infra,* which requires notice to "all persons interested." These requirements are consistent with a desire to have all persons presently concerned in the trust before the court.

26. Clarke v. Andover, 207 Mass. 91, 92 N.E. 1013 (1910) (vacating decree entered without notice).

27. *Id.*

28. Gallagher v. Sullivan, 251 Mass. 552, 146 N.E. 769 (1925) (dismissing suit which was a collateral attack on decree).

3. Discretion

The unraveling of most fact patterns and application of grounds for removal is left to the reasonable discretion of the court.[29] If it finds that the removal is in the best interests of the beneficiaries,[30] or that the trustee is incapable or unsuitable for his or her office,[31] the trustee will be removed. Insanity is the only specific ground mentioned in the removal statute.[32] The absence of other specific grounds allows the judge the widest possible latitude in making the determination. This discretion is exercised through an examination of the trust instrument and a review of the facts upon which the action is based.[33] A judge's determination that the facts warrant a removal will be overturned only if the appellate court finds that it was "plainly wrong."[34]

B. Judicial Removal Pursuant to the Instrument

Under its equity jurisdiction, the court is given the power to provide "relief relative to . . . trusts created by will or other written instrument."[35] A settlor can include a provision in the instrument which gives a cotrustee, or some other person, the power to bring a removal action, whether or not the individual would have standing to bring a petition under the general statute.[36] The proceeding is then an action to enforce the trust provisions,[37] rather than an action under the removal statute. This alleviates the problem which would be encountered if the removal statute alone were being employed to effectuate the change of trustee. As will be seen below, the problem for cotrustees can also be remedied by application of an extrajudicial mechanism.

It should be noted that a court considering removal pursuant to a provision in the instrument still must ascertain whether the facts

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29. Scott v. Rand, 118 Mass. 215 (1875).

30. Gordon v. Gordon, 332 Mass. 210, 124 N.E.2d 236, *cert. denied,* 349 U.S. 947 (1955); Scott v. Rand, 118 Mass. 215 (1875).

31. MASS. GEN. LAWS ANN. ch. 203, § 12 (West 1970).

32. *Id.*

33. Gordon v. Gordon, 332 Mass. 210, 124 N.E.2d 236, *cert. denied,* 349 U.S. 947 (1955).

34. Stillman v. Watkins, 1975 Mass. Adv. Sh. 515, 325 N.E.2d 294 (1975). *Cf.* MASS.R.CIV.P. 52(a) (findings of fact must be clearly erroneous).

35. MASS. GEN. LAWS ANN. ch. 215, § 6 (West Supp. 1976).

36. A. SCOTT, THE LAW OF TRUSTS § 107.2 (3d ed. 1967).

37. A court, however, will not enforce a provision of a trust instrument which is contrary to public policy. Briggs v. Crowley, 352 Mass. 194, 224 N.E.2d 417 (1967). An example of this is a non-accounting clause, which attempts to limit the beneficiaries' right to force an accounting from the trustee, either on a regular basis or in toto. If the clause attempts to entirely eliminate the beneficiaries' right to get an accounting, it will not be enforced because it is void as against public policy in Massachusetts. *Id.* at 200, 224 N.E.2d at 421. When a clause such as this exempts the trustee from making a *regular* accounting to the beneficiary, it will not be struck down by the court. A. SCOTT, THE LAW OF TRUSTS § 172 (3d ed. 1967).

presented warrant removal.[38] These facts will be judged against the intent of the settlor as expressed in the instrument, as well as the grounds for removal which are commonly applied.[39]

C. *Extrajudicial Removal Pursuant to the Instrument*

The two previous methods use the judicial system to effect the removal of the trustee. A settlor may wish to remove a trustee without judicial intervention.[40] The implementation of such a system, mandated by the controlling instrument, has both positive and negative attributes. Extrajudicial removal can save the cost, time, headache and publicity of a court action. On the other hand, it can lead to more arbitrary action and can be completed without the safeguards of the legal system. If the settlor wishes to provide a method whereby a trustee can be removed more readily (for example, removal without cause) the draftsperson should include an extrajudicial removal mechanism. Several are available to a settlor.

1. Removal by Persons Involved in the Trust

A settlor can provide that the trustee be removed solely upon the written decision of a given number of persons. The individual situation will determine to whom this power should be given.

If the trust is established for a relatively small number of beneficiaries having differing interests, because of age, financial means, etc., a unanimity requirement will help balance the vote to remove the trustee.[41] A draftsperson should be aware, however, that this may cause the trustee to be too attentive to the present beneficiaries, to the detriment of those with remainder interests.

If a large number of people are beneficially interested, a unanimity requirement for removal may be counterproductive, since it may be too difficult to obtain the required vote. In this situation the settlor can provide for removal by a majority vote of the beneficiaries.[42] By using this

38. *See* discussion p. 337 *supra*.

39. *See* note 1 *supra*.

40. A. SCOTT, THE LAW OF TRUSTS § 107.2 (3d ed. 1967).

41. A suggested clause in this regard is:

> The trustee hereunder can be removed by delivery of the written consent to removal of each and every present adult beneficiary and guardians of minors and incompetents to the successor trustee. This removal shall be effective upon mailing, by the successor trustee, of a written notice of removal, by certified mail, return receipt requested, to the trustee being removed.

The reader should note that the suggested clauses set out in this article are of general application. In choosing a removal mechanism, the drafter must consider tax consequences which may arise and judge their importance in light of the relationship created. The wide variety of trust relationships in which these clauses can be employed put a tax analysis beyond the scope of this article.

42. A suggested clause in this regard is:

> The trustee hereunder can be removed by delivery of the written consent to removal of a

means, the settlor can provide that his or her intentions for the majority of the beneficiaries will be carried out.

In some cases a certain beneficiary may have such a large interest in the trust estate that the settlor would like to grant this person the power to remove a trustee.[43] If, for example, the settlor is establishing an inter-vivos trust, and he or she retains an interest under the instrument, this settlor may wish to retain the power of removal.

If the settlor establishes a system of cotrustees, he or she may wish to grant one or both of them the power to remove the other. This can be done whether or not one of the trustees is a corporation. If, for example, the settlor serves as one trustee, he or she may retain this power.[44] Another situation in which this can arise is where there are corporate and non-corporate trustees. In this case the settlor may wish to give one of them a removal power.

2. Removal by a Third Party[45]

An alternative to the foregoing possibilities is to have removal problems or other areas of confrontation decided by a referee or through arbitration.[46] The time and expense involved is similar to that for commencing a court action. Unlike the court suit, however, this method of removal does not generate public records, thus avoiding potential publicity.

3. Impact of Other Removal Methods

If an extrajudicial means is employed, a disgruntled beneficiary or

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simple majority of the present adult beneficiaries and guardians of minors and incompetents to the successor trustee. This removal shall be effective upon mailing, by the successor trustee, of a written notice of removal, by certified mail, return receipt requested, to the trustee being removed.

43. A suggested clause in this regard is:

The trustee hereunder can be removed in the following manner: the settlor, (name), in her absolute and uncontrolled discretion, shall have the power to remove the trustee. This removal shall be effective upon mailing, by the successor trustee, of a written notice of removal, by certified mail, return receipt requested, to the trustee being removed.

44. A suggested clause in this regard is:

The corporate trustee hereunder can be removed in the following manner: the cotrustee (name), in her absolute and uncontrolled discretion, shall have the power to remove the corporate trustee. This removal shall be effective upon mailing, by the successor trustee, of a written notice of removal, by certified mail, return receipt requested, to the trustee being removed.

45. A. SCOTT, THE LAW OF TRUSTS § 107.2 (3d ed. 1967).

46. A suggested clause in this regard is:

Any disputes between the trustee and beneficiary hereunder which arise from administration of this trust shall first be presented to a referee, who shall make determinations in his or her absolute discretion which best conform to my purposes and intentions under this instrument. He or she shall be chosen by consent of the parties. If the parties cannot agree upon a referee, the (X) county bar association president, or his nominee, shall serve as referee. All costs and fees shall be borne by the trust estate.

other interested person would still have the option of employing the legal system.[47] The settlor cannot remove the court's jurisdiction by application of the instrument, since the power to remove a trustee is an equitable remedy which cannot be retarded by a settlor.[48]

II. SUCCESSOR APPOINTMENT MECHANISMS

As initially stated, removal of a trustee is merely one side of the coin. When a vacancy occurs in the trustee's office, the settlor will usually want the position to be filled. This can be done in one of two ways: either the controlling instrument can establish an appointment mechanism which will operate outside the judicial system, or the statutory mechanism can be employed.

A. Statutory Appointment

As with removal, Massachusetts provides a statutory scheme for appointment of trustees.[49] It is a statute of general application, with no limitation stated as to the type of trust relationship in which it can be employed. The statute, Massachusetts General Laws chapter 203, section 5,[50] empowers the court to appoint a successor upon the death, resignation or removal of any trustee. Because of its wide application, several aspects of this law will be discussed.

1. Application

The appointment statute is only applied where no "adequate mechanism"[51] is provided in the instrument. This problem generally arises in two contexts. One situation is where there is no mechanism whatsoever provided in the trust instrument. This can be the result of a drafting oversight or an intentional omission from the instrument. A settlor establishing a testamentary trust, for example, may wish to have a court's objective imprimatur on the choice of a trustee. The application of this statute provides such a safeguard.

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47. MASS. GEN. LAWS ch. 203, § 12 states no limitation as to when a person can exercise this remedy, unlike the appointment statute, MASS. GEN. LAWS ch. 203, § 5, which can only be employed if no other "adequate mechanism" is present.

48. *See* Briggs v. Crowley, 352 Mass. 194, 224 N.E.2d 417 (1967) (equitable right to force an accounting by the trustee cannot be abrogated).

49. MASS. GEN. LAWS ANN. ch. 203, § 5 (West 1970).

50. The statute provides:

> If a trustee under a written instrument declines, resigns, dies or is removed before the objects of the trust are accomplished and no adequate provision for filling the vacancy is made therein the supreme judicial court, the superior court or the probate court shall, after notice to all persons interested, appoint a new trustee to act solely or jointly with the others as the case may be.

Id.

51. *Id.*

The statute has been construed to apply where a mechanism is provided in the instrument, but the circumstances prevent its operation.[52] This can be due to a refusal to act by the person in whom the appointment power is vested or where the person who has the power dies or becomes incapable of exercising it.

2. Standing and Notice

Unlike the removal statute, the appointment section has no limitation with respect to the question of standing.[53] The petition is usually brought by a beneficiary[54] or one wishing to be appointed as the successor trustee.[55]

When applied, the statute has a notice requirement which is similar to the one enunciated for a removal action.[56] In addition, the court will appoint a *guardian ad litem* for beneficiaries who are minors or unascertained.[57]

3. Discretion in Choice

A final consideration with respect to the statute involves the exercise of the court's discretion in the choice of a new trustee. If various persons interested under a trust instrument (either beneficially or as cotrustees) suggest different persons to serve as trustee, the court can exercise its discretion among the qualified choices.[58] In this situation the court also has the option to choose someone else if it determines that such a choice will best serve the interests of all the beneficiaries.[59] However, if all parties beneficially interested assent to the choice of one person, and it is found that this person is qualified to serve as trustee, it is an abuse of the court's discretion to appoint anyone else.[60] This recent decision, in the case of *In re Lovejoy*,[61] is founded on the belief that a trustee must interact with the beneficiaries, and frequently work

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52. Dixon v. Homer, 66 Mass. (12 Cush.) 41 (1853).

53. The statute does not state that the person petitioning the court must be "beneficially interested" or "interested." MASS. GEN. LAWS ANN. ch. 203, § 5 (West 1970). *See* note 50 *supra*.

54. *See, e.g., In re* Lovejoy, 352 Mass. 660, 227 N.E.2d 497 (1967) (beneficiary and potential trustee petitioned court).

55. *See, e.g., In re* Home Nat'l Bank of Brockton, 341 Mass. 286, 168 N.E.2d 267 (1960).

56. *See* note 25 *supra*.

57. *See, e.g., In re* Lovejoy, 352 Mass. 660, 227 N.E.2d 497 (1967) (guardian *ad litem* appointed in successor trustee action).

58. Black v. Dobbins, 325 Mass. 587, 91 N.E.2d 782 (1950).

59. *Id. See also In re* Wilson, 1977 Mass. Adv. Sh. 692, 361 N.E.2d 1281 (1977) *and* A. SCOTT, THE LAW OF TRUSTS § 108 (3d ed. 1967).

60. *In re* Lovejoy, 352 Mass. 660, 665, 227 N.E.2d 497, 500 (1967).

61. *Id.*

with a cotrustee.[62] If all parties feel that a person will work well in the fiduciary office, that determination must be respected.[63]

B. Extrajudicial Appointment

As stated above, the appointment statute is only applied where no adequate mechanism is provided in the instrument.[64] Several alternative extrajudicial mechanisms are possible.

If there is a surviving trustee, the trust instrument can grant him or her the power to choose a cotrustee to replace one which has been removed.[65] This choice can be made independently, or be made subject to ratification by a certain number or percentage of the present beneficiaries.[66]

Alternatively, a certain key beneficiary can be given the power to name the successor.[67] This method is useful, for example, where the settlor retains an interest under the instrument and wants to retain this control over the trust.

A disinterested third party can also be given the power to name a successor trustee.[68] This method is shown in cases in which the instrument

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62. *Id.*

63. *Id. Cf. In re* Wilson, 1977 Mass. Adv. Sh. 692, 361 N.E.2d 1281 (1977) (holding that in the case of a charitable trust, the suggestion of the Attorney General as to a new trustee need not be accepted, even though he acts as *parens patrie* of the public, the beneficiaries of a charitable trust).

64. *See* note 50 *supra.*

65. A. SCOTT, THE LAW OF TRUSTS § 108 (3d ed. 1967). The instrument in Collier v. Naperinski, 357 Mass. 516, 519, 258 N.E.2d 789, 790-91 (1970) provided:

> 12. The trustee herein named may with the consent of the beneficiaries, nominate such person or persons as he desires to be a co-trustee, or, his successor as trustee in case of resignation or death and the appointment shall be complete upon a written notice of said appointment and the acceptance thereof by the new trustee being filed in the Essex South District Registry of Deeds. If there should be a vacancy in the office of any trustee without a trustee having been appointed as above described, then the holder of the beneficial interest therein may: (1) appoint a new trustee by instrument in writing which shall become effective when said instrument and acceptance by the new trustee shall have been recorded with the Essex South District Registry of Deeds. . . .

The draftsperson may wish, as was done above, to provide for alternative mechanisms in case the one chosen is not exercised.

66. A suggested clause in this regard is:

> Upon the death, resignation or removal of a trustee under this instrument, the remaining trustee shall have the power (by appropriate mechanism) to appoint a successor. Such appointment shall take effect upon the mailing to (trustee removed), by certified mail, return receipt requested, of the written consent of the successor trustee, subsequent to the delivery to the successor trustee of the written consent to the choice by all present adult beneficiaries and guardians of minors and incompetents.

67. A. SCOTT, THE LAW OF TRUSTS § 108.4 (3d ed. 1967). A suggested clause in this regard is:

> Upon the death, resignation or removal of a trustee under this instrument, (name) shall have the power (by appropriate mechanism) to appoint a successor. Such appointment shall take effect upon the delivery to (name) and mailing to (trustee removed), by certified mail, return receipt requested, of the written consent of the successor trustee.

68. *Id.*

provides that the successor is to be chosen by "the judge of Probate"[69] of a given county.[70] Although on the surface this appears to be an iteration of the statute, it has been held that such a provision is a nomination under the instrument, not the statute.[71] The difference is crucial in terms of procedure.

If the appointment is under the instrument, the action is by the judge in a personal, not judicial capacity.[72] By characterizing the appointment in this case as one carried out by the individual, outside the judicial system, the statutory notice requirement need not be followed, and the appointment is valid without notice.[73] Furthermore, since the procedure is outside the judicial sphere, there is no chance for appellate review of the appointment if the trustee is chosen under the instrument.[74] The appointee, naturally, is still subject to removal in proper circumstances.

The advantage of granting an officeholder the power to name a trustee is obvious. There will always be someone in this office, although the identity of the individual will change from time to time. Rather than be saddled with an individual, who may die or retire during the trust administration, a class of individuals is chosen.[75] A settlor can be assured that there will always be someone to name a successor.

III. OTHER DRAFTING CONSIDERATIONS

Since a court considering removal of a trustee will examine the instrument in light of the facts involved in a controversy, a settlor's intentions should be explicitly stated in the instrument. Situations which may raise questions regarding appointment and removal should be considered and set out in the controlling instrument. These areas include hostility which may arise during trust administration, the nature of the trustee and unique problems arising from the specific fact pattern present.

A. Hostility

A fertile area of litigation in trust administration is hostility[76] which arises between the trustee and beneficiary, or vice versa.[77] Generally, it

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69. *See* National Webster Bank v. Eldridge, 115 Mass. 424 (1874); Shaw v. Paine, 94 Mass. (12 Allen) 293 (1866).

70. National Webster Bank v. Eldridge, 115 Mass. 424 (1874).

71. Shaw v. Paine, 94 Mass. (12 Allen) 293 (1866).

72. National Webster Bank v. Eldridge, 115 Mass. 424 (1874).

73. *Id.*

74. *Id.*

75. The class chosen, of course, should be one which suits the settlor. The example in the text, the "Judge of Probate" is just one possibility.

76. A. SCOTT, THE LAW OF TRUSTS § 107 (3d ed. 1967).

77. *Compare* Rogers v. Rogers, 258 Mass. 228, 154 N.E. 833 (1927) (individual hostility insufficient) *with* Scott v. Rand, 118 Mass. 215 (1875) (mutual hostility sufficient).

is based on either ill feelings which result from determinations made within the administration of the trust[78] (*e.g.*, that discretionary payments will not be made), or personal hostilities which arise outside the context of the trust.[79] In either case, the decision by the court is grounded on the consideration that the hostility will prevent the trustee from making the objective determinations necessary to the proper administration of the trust.[80] There need not be a showing that actual bias or lack of objectivity has occurred, only a strong potential that it may take place.[81]

The hostility which will usually enable a removal petition to succeed is either mutual in nature, *i.e.*, the inimical feelings emanate from both the trustee and beneficiary,[82] or a showing that the trustee is hostile to the beneficiary.[83] The court will not normally remove a trustee where the hostility emanates from the beneficiary, if the trustee is faultless, since this usually will not affect the administration of the trust.[84]

This is not to say that a court will remove the trustee in any case where there are disagreements between the parties.[85] The courts recognize that many of the decisions which must be made by a trustee in the course of his or her fiduciary endeavor will result in determinations which will apparently favor one beneficiary over another.[86] Although a beneficiary may feel that the problems so arising warrant removal, they must be examined by the court in light of the entire administration of the trust. Their proper perspective is understood when judged from this vantage point. Also, a court will be less willing to use this drastic measure against a trustee who has been chosen by a settlor than against one appointed by the court.[87] Again, the court takes into consideration the fact that this individual or corporation was chosen because the settlor had faith in its sound judgment, and would best serve his or her in-

78. Rogers v. Rogers, 258 Mass. 228, 154 N.E. 833 (1927).

79. Scott v. Rand, 118 Mass. 215 (1875) (identification with one of two contending parties sufficient).

80. *See* Gordon v. Gordon, 332 Mass. 210, 124 N.E.2d 236, *cert. denied*, 349 U.S. 947 (1955).

81. *Id.* at 212, 124 N.E.2d at 237.

82. Wilson v. Wilson, 145 Mass. 490, 1 N.E. 521 (1888). *See* Gordon v. Gordon, 332 Mass. 210, 124 N.E.2d 236, *cert. denied*, 349 U.S. 947 (1955).

83. *See* Rogers v. Rogers, 258 Mass. 228, 154 N.E. 833 (1927) (holding that the hostility shown was insufficient to require removal).

84. Gorman v. Stein, 1 Mass. App. Ct. 244, 295 N.E.2d 178 (1973).

85. *Compare* Shirk v. Walker, 298 Mass. 251, 10 N.E.2d 192 (1937) (long history of bad tempers, no removal) *with* Gordon v. Gordon, 332 Mass. 210, 124 N.E.2d 236, *cert. denied*, 349 U.S. 947 (1955) (dissension sufficient).

86. Shirk v. Walker, 298 Mass. 251, 10 N.E.2d 192 (1937).

87. Massa v. Stone, 346 Mass. 67, 75, 190 N.E.2d 217, 223 (1963) and authorities cited. Note also that the court will be less likely to remove a trustee if the ground being asserted was present at the time the trust was established. A. SCOTT, THE LAW OF TRUSTS § 107.1 (3d ed. 1967).

terests and intentions.[88] The fact that the beneficiary does not like the person chosen is not as important a consideration.[89]

Since a court will consider the instrument as a whole to discern the settlor's intent when establishing the trust,[90] the drafter may want to include a hostility clause. This clause can serve to explain how important the choice of a certain trustee is to the settlor, and how much weight should be given to the trustee's position relative to that of the beneficiary if problems arise.[91] The settlor may feel that the position of one or the other of these parties should be given greater weight, thus providing guidance for the court.[92] The settlor may wish to set out specifically whether the beneficiary will be able to assert his or her own hostility to the trustee as a ground for removal.[93]

B. Nature of the Trustee

Difficulties regarding removal and appointment of trustees have also centered upon the nature of the trustee. "Nature" is used here in two contexts. One is a question of the makeup of the corporate entity which was originally appointed as trustee. The other involves questions regarding an individual versus corporate trustee.

1. The Corporate Entity

The nature of the corporate entity which serves as trustee may be examined. In *Major v. State Street Bank & Trust Company,*[94] the trust instrument provided that the beneficiaries had the right to petition the court to remove the trustee upon its merger.[95] The court enforced this provision when a consolidation took place, deciding that the term "merger" should be used in a broad sense, not a strict one.[96] The rationale behind this decision was based upon the theory that a settlor

88. Massa v. Stone, 346 Mass. 67, 190 N.E.2d 217 (1963).

89. *Id.*

90. *See* discussion p. 338 *supra.*

91. A suggested clause in this regard is:

It is my intention that the trustee not be removed for hostility with any person arising from his duties under this instrument, unless (person considering removal: court or referee) finds that the hostility so affects administration of it that to keep him as trustee would be wholly unconscionable.

92. A suggested clause in this regard is:

It is my intention that the beneficiary hereunder shall enjoy the benefits of this trust without hindrance arising from hostility with the trustee. Problems involving hostility between these parties should be resolved with this intention in mind.

93. A suggested clause in this regard is:

If (name) determines, in her absolute and uncontrolled discretion, that hostile feelings exist between herself and the trustee, it shall be a ground for removal (by appropriate mechanism).

94. 346 Mass. 441, 193 N.E.2d 588 (1963).

95. *Id.* at 441-42, 193 N.E.2d at 589.

96. *Id.* at 444, 193 N.E.2d at 590.

has chosen a certain corporate fiduciary because of its management and investment decisions. If a merger takes place, these elements may be changed, and the resulting entity is different from the one originally contemplated.[97]

A settlor should determine whether a clause permitting removal under such circumstances should be included in the instrument.[98] Note, however, that in the case of a court appointed fiduciary, the court will exercise this power if it is deemed appropriate, even if no provision is made for it in the instrument.[99]

2. Individual v. Corporate Fiduciary

Another question which a settlor may wish to answer in the instrument is that of the type of fiduciary to be appointed. In *Wilson v. Stump,*[100] the instrument provided that the named trustee could appoint a "person"[101] as cotrustee.[102] This was sufficient to allow the named trustee to appoint a corporation.[103] Therefore, if the settlor wishes to always have a corporate fiduciary or an individual fiduciary, that fact should be stated in the controlling instrument.[104]

C. *Unique Situations*

The draftsperson must be attuned to the specific fact pattern presented in a trust arrangement, so that unique situations can be identified and provided for in the instrument. *Gordon v. Gordon*[105] presents an excellent illustration of this point. There, the trust instrument pro-

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97. *See* Petition of Commonwealth Atl. Nat'l Bank, 261 Mass. 217, 158 N.E. 780 (1927).

98. A suggested clause in this regard is:

> The beneficiaries hereunder shall have the right, upon the merger, consolidation, dissolution or takeover of the corporate trustee, to remove it (by appropriate mechanism) and choose a successor (by appropriate mechanism).

99. *See* Petition of Commonwealth Atl. Nat'l Bank, 261 Mass. 217, 158 N.E. 780 (1927).

100. 310 Mass. 614, 39 N.E.2d 416 (1942).

101. An ancillary consideration is the number of "persons" to be appointed. A settlor should clearly state the number of trustees which are to serve under the instrument. Problems have arisen where an attempt was made to vary the number of trustees. *See, e.g.,* Greene v. Borland, 45 Mass. (4 Metc.) 330 (1842). The court attempts to ascertain the settlor's intent, and it is an abuse of the court's discretion to appoint a greater or lesser number of trustees. *In re* Home Nat'l Bank of Brockton, 341 Mass. 286, 168 N.E.2d 267 (1960) and authorities cited. If the number is unascertainable from the controlling instrument, the court will appoint as many trustees as are necessary to protect the beneficiaries' interests. *Id.*

102. 310 Mass. at 615, 39 N.E.2d at 417.

103. *Id.*

104. A suggested clause in this regard is:

> It is my intention that there shall always be one corporate trustee and one individual trustee under this instrument.

Under a clause that stated that my trustee shall name a person to serve as cotrustee, a corporation was chosen without objection. Wilson v. Stump, 310 Mass. 614, 615, 29 N.E.2d 416, 417 (1942).

105. 332 Mass. 210, 124 N.E.2d 236, *cert. denied,* 349 U.S. 947 (1955).

vided that if the beneficiary thereunder should marry a person outside the Hebrew faith, he should be divested of his beneficial interest.[106] The beneficiary in question was the son of the settlor as well as the trustee under the instrument.[107] He married a non-Jewish woman, which defeated his interest.[108] The court removed him because it found that the potential ill feeling which could develop between him and the remaining beneficiaries made him unsuitable for his fiduciary office.[109] Although this decision may have been correct under the facts presented, the settlor in a similar case may wish to retain this person as trustee. The trust instrument should be drafted to reflect this intent. Unless the draftsperson carefully examines the relationships and parties involved, however, he or she will be unable to spot potential problems.

IV. CONCLUSION

The careful draftsperson should be aware of the eventuality of removal of a trustee and the ensuing need to appoint a successor. He or she should carefully weigh the entire fact pattern involved in a trust instrument. This should include a consideration of the nature of the trust, the type and number of trustees and beneficiaries, as well as the desires of the settlor.

Once these items have been identified, the draftsperson should attempt to provide a comprehensive instrument which will enable the trust to be administered in a way which best suits the situation. No precise rules can be established for choices in removal mechanisms and other considerations; they must be tailored to meet the facts presented. By being aware of the alternatives, however, the draftsperson can best serve the client's interests.

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106. *Id.* at 212, 124 N.E.2d at 237.
107. *Id.* at 210, 124 N.E.2d at 236.
108. *Id.* at 212, 124 N.E.2d at 237.
109. *Id.*

CASE COMMENT

Warner-Lambert Co. v. FTC:[1] The Possibilities and Limitations of Corrective Advertising

In *Warner-Lambert Co. v. FTC*[2] the United States Court of Appeals for the District of Columbia upheld the power of the Federal Trade Commission to order "corrective advertising." Since 1969, when the concept of corrective advertising was first introduced,[3] its legality has been considered in light of the remedial authority granted the Commission under section 5 of the Federal Trade Commission Act.[4] Section 5 empowers the Commission upon finding an "unfair or deceptive act or practice" to order a violator to "cease and desist."[5] Read literally the

1. 562 F.2d 749 (D.C. Cir. Aug. 2, 1977). Supplemental Opinion on Petition for Rehearing, 562 F.2d 768 (D.C. Cir. Sept. 14, 1977). On April 2, 1978, the Supreme Court denied Warner-Lambert's petition for certiorari. N.Y. Times, April 3, 1978, at 47, col. 2 (city ed.).

2. *Id.*

3. The remedy was first proposed to the FTC by a group of law students — Students Opposing Unfair Practices, Incorporated ('SOUP') who sought intervention in a Commission proceeding concerning deceptive advertising by Campbell Soup Co. *See* 77 F.T.C. 664 (1970). For the early history of corrective advertising, *see generally* Thain, *Corrective Advertising: Theory and Cases*, 19 N.Y.L.F. 1 (1973).

4. The Commission's power to regulate advertising stems from the Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (1970 & Supp. V 1975) which states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Authority also flows from § 12 of the Act, 15 U.S.C. § 52 (1970 & Supp. V 1975) which makes false advertising of food, drugs, devices or cosmetics an "unfair or deceptive act or practice" under § 45. *See generally* Cornfeld, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 IOWA L. REV. 693 (1976) *citing* E. COX, R. FELLMETH & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969); G. HENDERSON, THE FEDERAL TRADE COMMISSION (1924); Jones, *To Tell the Truth, the Whole Truth. . . .*, 26 FOOD DRUG COSM. L. J. 173 (1971); Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969); *Symposium — Federal Trade Commission Regulation of Deceptive Advertising*, 17 U. KAN. L. REV. 551 (1969); Kintner, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269 (1966); *Symposium — The Fiftieth Anniversary of the Federal Trade Commission*, 64 COLUM. L. REV. 385 (1964); *Developments in the Law — Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967). *See also* THE SECTION OF ANTITRUST LAW, THE AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENT, ch. 5 (1975).

5. 15 U.S.C. § 45(b) (1970 & Supp. V 1975) states that when the Commission has "reason to believe" that there is being used an "unfair method of competition or unfair or deceptive act or practice" and a proceeding "would be to the interest of the public, it shall issue a complaint. . . ."

statutory language contemplates FTC authority to terminate illegal conduct. However, a Commission order that includes a corrective requirement not only mandates the cessation of a deceptive advertisement, but directs that there be a future disclosure rebutting the deceptive claims previously made. Thus, the legality of such an order is dependent upon whether section 5 grants broader remedial authority than that suggested by a literal interpretation of the statute.[6]

While the legality of these disclosures must initially be based upon congressional authorization, recent developments concerning first amendment freedoms also require consideration of constitutional mandates. In *Warner-Lambert* the District of Columbia Circuit upheld a Commission order which prohibited truthful Listerine advertising unless a corrective statement was included in a specified amount of future ads.[7] Since the Supreme Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[8] that commercial speech was entitled to first amendment protection, the validity of any impositions upon truthful speech must meet constitutional requirements.

While the court in *Warner-Lambert* upheld the Commission's order with respect to both these issues, the decision reflects obstacles which will affect the future utilization of the remedy. After viewing the holding in *Warner-Lambert,* and analyzing the concept of corrective advertising, this comment demonstrates that there still remains a question as to the FTC's statutory authority to impose the remedy. It is also shown that the Commission may be severely restricted as to when such orders may be imposed and the nature of the disclosures that can be required.

I. STATEMENT OF THE CASE

Since it first appeared on the market in 1879, Listerine has been promoted as beneficial in the treatment and prevention of colds, cold

After a hearing, the Commission may order "such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint."

6. The Commission has consistently said that it does possess such remedial power. *See* Campbell Soup Co., 77 F.T.C. 664, 669 (1970); Firestone Tire & Rubber Co., 81 F.T.C. 398, 464-74 (1972) ITT Continental Baking Co., 83 F.T.C. 865, 971 (1973). Numerous commentators also have considered the legality of corrective advertising. *See generally* Note, *"Corrective Advertising" Orders of the Federal Trade Commission,* 85 HARV. L. REV. 477 (1971) [hereinafter cited as *Corrective Advertising*]; Note, *Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways,* 70 MICH. L. REV. 374 (1971); Cornfeld, *supra* note 4; Comment, *Corrective Advertising — The New Response to Consumer Protection,* 72 COLUM. L. REV. 415 (1972); Comment, *Corrective Advertising: The FTC's New Formula For Effective Relief,* 50 TEXAS L. REV. 312 (1972).

7. *Warner-Lambert,* 562 F.2d at 753.

8. 425 U.S. 748 (1976).

symptoms and sore throats.[9] Direct advertising to this effect began in 1921.[10] In a complaint filed June 27, 1972, the FTC alleged a violation of section 5.[11] The complaint stated that contrary to its advertising Listerine will not cure or prevent colds or sore throats or cause them to be less severe.[12] Also averred was that the slogan "Kills Germs by the Millions on Contact," falsely represented that such ability is of medical significance in curing, preventing or treating colds or sore throats.[13] The order proposed in the complaint prohibited the alleged misrepresentations, and required that at least twenty-five per cent of all advertising for Listerine for one year consist of a clear disclosure that the previous advertising was false.[14]

In his Initial Decision, the Administrative Law Judge sustained the allegations in the complaint.[15] He ordered *Warner-Lambert* to cease and desist from making these claims and required that a corrective ad be placed in all advertising for the next two years.[16] On appeal, the Commission entered an order affirming the Administrative Law Judge's decision.[17] However, it modified the corrective ad by deleting the word "cure,"[18] and ordered that the ad appear, not for two years, but until Warner-Lambert spent "a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972."[19]

Upon review, the United States Court of Appeals for the District of Columbia affirmed the order while modifying it in part.[20] The court

9. 562 F.2d at 752.

10. *Id.*

11. (1970-1973 Transfer Binder) TRADE REG. REP. (CCH) ¶ 19,838.

12. *Id.*

13. *Id.* at 21, 860. Another charge in the complaint concerning false representation of tests was dismissed by the Administrative Law Judge. *See* 86 F.T.C. at 1466 n.20.

14. *Id.*

15. 86 F.T.C. 1398, 1405 (1975). Prior to this decision, a number of objections were raised by Warner-Lambert. In particular, it was asserted that FTC dismissal of previous complaints cocerning Listerine's efficacy precluded the present proceeding. *See* 38 F.T.C. 726 (1944). These affirmative defenses were struck by the Administrative Law Judge. *See* (1970-73 Transfer Binder) TRADE REG. REP. (CCH) ¶ 20,264.

16. 86 F.T.C. at 1484-86. The corrective ad read: "Contrary to prior advertising of Listerine, Listerine will not prevent or cure colds or sore throats, and Listerine will not be beneficial in the treatment of cold symptoms or sore throats." *Id.* at 1485.

17. *Id.* at 1486.

18. *Id.* at 1505. n.29. The Commission found the record did not demonstrate that consumers believed in the curative powers of the product. *Id.*

19. *Id.* at 1515. This requirement has been determined to be approximately $10 million. *See* 562 F.2d at 752 n.1. The corrective ad read: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." 86 F.T.C. at 1514.

20. 15 U.S.C. § 45(c) (1970) grants a respondent a right to appeal from a cease and desist order in the United States court of appeals in any circuit where "the act or practice in question was used or where such person . . . resides or carries on business. . . ." Presently pending before Congress are proposed amendments to the Federal Trade Commission Act. H.R. 3816, S. 1533 95th Cong., 1st Sess. (1977). This legislation would limit appeals to "the circuit within which a person . . . resides or maintains its principle place of business, or in the U.S. Court of Appeals for the

held that the use of corrective advertising as a remedy for a previous unlawful act was not beyond the scope of the Commission's power and did not infringe first amendment rights. Initially, the District of Columbia Circuit stated that the FTC's finding, that Listerine is not an effective cold or sore throat remedy, was supported by substantial evidence.[21] It was also found that a Food and Drug Administration report concerning over-the-counter drugs did not contradict Commission findings and that the FTC did not err in refusing to reopen its proceedings to consider the FDA report.[22]

Turning to a consideration of the Commission's section 5 powers, the court found that the FTC's remedial authority was not confined to the imposition of "simple" cease and desist orders.[23] As to whether corrective advertising was a "permissible" remedy the court stated that neither the first amendment[24] nor the legislative history of the Federal Trade Commission Act, particularly the 1975 Amendments,[25] precluded

District of Columbia. . . ." *Id.* The purpose of such action as stated in the House Report is to provide for more efficient review and to prevent forum shopping. H.R. REP. NO. 339, 95th Cong., 1st Sess. 28-29 (1977). *See* notes 105 and 106 *infra.*

21. 562 F.2d at 753-54. 15 U.S.C. § 45(c) (1970) states that Commission findings will be upheld "if supported by evidence." *See, e.g.,* Thiret v. FTC, 512 F.2d 176, 179 (1975).

22. 562 F.2d at 754-56. In 1972, the Food and Drug Administration established procedures for the purpose of promulgating regulations concerning over-the-counter drugs. The procedures required a panel of experts to be appointed to study the safety, efficacy and proper labeling of these products and to submit a report of their conclusions and recommendations to the Commissioner. 37 Fed. Reg. 85 (1972); 21 C.F.R. § 330 (1977). On the basis of these reports, drugs recognized as safe and effective and not misbranded are to be placed in category I, those not safe and effective in category II, and those for which the available data is insufficient to classify under I or II, in category III. 21 C.F.R. § 330.10(a)(6) (1977).

On September 9, 1976, a proposed regulation containing the recommendations of the Advisory Review Panel on Over-the-Counter (OTC) Cold, Cough, Allergy, Bronchodilator and Antiasthmatic Products was published. This regulation placed the ingredients of Listerine in category III. Products in this category were permitted to remain in use pending future testing. 41 Fed. Reg. 38312 (1976).

Since the FTC's order had been previously entered, Warner-Lambert petitioned the Commission to re-open the record and consider the FDA report. On March 26, 1976 the FTC denied the petition to re-open stating that the FDA report was still in draft form and not yet adopted so as to constitute a "finding." Order of March 26, 1976. *See generally* Harlow, *The FDA's OTC Drug Review: The Development and an Analysis of Some Aspects of the Procedure,* 32 FOOD DRUG COSM. L. J. 248 (1977).

On November 11, 1975, the FTC proposed a Trade Regulation Rule that would prohibit advertising claims for over-the-counter drugs which did not conform to FDA findings. 40 Fed. Reg. 52631 (1975).

23. 562 F.2d at 756-57.

24. *Id.* at 758-59.

25. *Id.* at 757-58. The court agreed that FTC authority to impose penalties other than a cease and desist order (*e.g.,* civil penalties) was not granted in the original Act of 1914, 38 Stat. 717 (1914), or the Wheeler-Lea amendments in 1938, 52 Stat. 111 (1938). *Id.* at 757. While the court found that this fact did not prevent the use of the remedy, it devoted greater emphasis to amendments embodied in the Magnuson-Moss-Warranty-Federal Trade Commission Improvement Act. 88 Stat. 2183 (1975).

Specifically, a new consumer redress provision was added to the Act. 15 U.S.C. § 57b (Supp. V 1975). This section empowered the Commission, following a final cease and desist order, to

its use. Furthermore, it found ample precedent supporting the proposition that affirmative disclosures may be required to counteract false impressions created by prior advertising.[26] After upholding the validity of corrective advertising, the District of Columbia Circuit examined whether its use was appropriate in the present case.[27] By combining a traditionally limited judicial review of Commission orders[28] with Warner-Lambert's extensive market surveys showing high consumer belief in Listerine's cold and sore throat efficacy,[29] the court concluded that the order was justified. However, the court did modify the order by striking the words "[c]ontrary to prior advertising." It found the preamble was not necessary to attract attention to the correction, and that there was no need to "humiliate" the wrongdoer.[30]

Following the decision, both the Commission[31] and Warner-Lambert[32] petitioned the court for a rehearing. Warner-Lambert's petition included a Suggestion for Rehearing En Banc. Although the court denied these requests, it responded to Warner-Lambert's arguments by issuing a Supplemental Opinion on Petition for Rehearing.[33] Concentrating almost exclusively on the first amendment issues, the court held that on the facts before it the FTC had met its constitutional burden.[34]

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commence a civil action in federal district court. If the court found the violator had acted in bad faith it could grant relief including "recission or reformation of contracts, the refund of money or return of property, the payment of damages, and *public notification* respecting the . . . unfair or deceptive act. . . ." 15 U.S.C. § 57b(b) (Supp. V 1975) (emphasis added). Basing its decision in part on congressional intent, the court held that the grant to a court of the power of notification did not preclude FTC corrective orders. 562 F.2d at 757-58.

There is additional support for this holding with regard to intent. A report of the Senate Commerce Committee in referring to this provision stated: "[t]his section would not affect whatever power the Commission may have under section 5 of the FTC act to fashion relief in its initial cease-and desist order, such as *corrective advertising* or any other remedy, which may be appropriate to terminate effectively unfair or deceptive acts or practices." S. REP. NO. 151, 93rd Cong., 1st. Sess. 28 (1973) (emphasis added). *See generally* (1974) U.S. CODE CONG. & AD. NEWS 7702.

26. 562 F.2d at 759-61.

27. *Id.* at 762.

28. *Id.*

29. *Id.* at 762-63.

30. *Id.* at 763.

31. The FTC sought to have the langauge returned. It claimed that the purpose was to prevent consumer confusion which would result from the correction appearing in an advertisement that made no mention of cold or sore throat claims. Respondents Brief for Rehearing at 2.

32. In its petition, Warner-Lambert claimed that the corrective order infringed upon first amendment rights. It asserted that there existed a genuine scientific controversy concerning the efficacy of Listerine as evidenced by the FDA report. *See* note 22 *supra.* Thus the FTC may not require it to state as "fact" a viewpoint which it is entitled to oppose. Petitioner's Brief for Rehearing at 3. Furthermore, it claimed that the first amendment precluded the burdening of truthful advertising with a corrective statement. *Id.* at 7. Finally, it was asserted that the court did not give adequate consideration to the FDA report, and that corrective orders were beyond the FTC's statutory power. *Id.* at 10, 13.

33. 562 F.2d 768 (D.C. Cir. Sept. 14, 1977).

34. *Id.* On Dec. 13, 1977, Warner-Lambert filed with the United States Supreme Court a Petition for a Writ of Certiorari. 46 U.S.L.W. 3409 (U.S. Dec. 13, 1977) (No. 77-855). On April 3,

II. CORRECTIVE ADVERTISING

Prior to *Warner-Lambert,* corrective advertising had only been imposed through FTC consent orders.[35] While some consent orders have mandated the dissemination of separate disclosures or retractions,[36] others have placed restrictions upon future truthful advertising unless corrective statements were made.[37] The fundamental rationale behind the use of corrective advertising is that there are certain "residual effects" which emanate from advertising.[38] Once customers are exposed to an ad, some impressions or facts concerning it remain with them for some period of time.[39] Read literally though, the Commission's cease and desist power seems limited solely to compelling the abandonment of illegal conduct. It has been consistently held that such authority was not "intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."[40] However, in the case of a corrective order, the FTC demands more than the discontinuance of the initial deception. Since the unlawful act has left an impact such orders affirmatively require a future disclosure to advise consumers of the past falsehood or deception. By imposing a

1978 the Supreme Court declined to review the decision. The questions put forward by Warner-Lambert in their petition were identical to those advanced in its Petition for Rehearing and Suggestion for Rehearing En Banc. Petitioner's Brief for Certiorari at 2-3.

It should be noted that between Jan. 1, 1971 and May 1977 eighty Commission orders were issued which have so far resulted in the filing of 13 petitions for certiorari. All 13 petitions have been denied. H.R. REP. NO. 339, 95th Cong., 1st Sess. 28 n.41 (1977).

35. While the Commission seems to have recognized that corrective statements have been imposed only through consent orders, 86 F.T.C. at 1498, the District of Columbia Circuit found past judicial recognition of the remedy. *See* note 59 *infra.* A party who enters into a consent order agreement admits proposed Commission findings, waives the right to challenge the FTC order, and is legally bound to obey once the agreement is finally accepted by the Commission. *See* 16 C.F.R. §§ 2.31-35 (1977). *See generally* Cornfeld, *supra* note 4, at 696-97.

36. Matsushita Electric of Hawaii, Inc., 78 F.T.C. 353 (1971); Sugar Information, Inc., 81 F.T.C. 711 (1972); Pay Less Drug Stores Northwest, Inc., 82 F.T.C. 1473 (1973); Boise Tire Co., 83 F.T.C. 21 (1973); Wasem's, Inc., 84 F.T.C. 209 (1974); Lens Craft Research & Dev. Co., 84 F.T.C. 355 (1974).

37. ITT Continental Baking Co., 79 F.T.C. 248 (1971); Ocean Spray Cranberries, Inc., 80 F.T.C. 975 (1972); Amstar Corp., 83 F.T.C. 659 (1973); Wasem's, Inc., 84 F.T.C. 209 (1974). These consent orders gave the violator a choice of either discontinuing all advertising for one year or devoting 25% of advertising expenditures, for that period, to a corrective statement.

38. It has been stated "that advertisements seek to penetrate the memory of the consumer so that at some time they will trigger or increase the likelihood of a purchase by that consumer of the advertised products." Firestone Tire & Rubber Co., 81 F.T.C. 398, 431 (1972) (Comm. Jones dissenting).

39. Although advertisements may produce residual effects "there is today very little research and virtually no empirical studies which can establish or demonstrate the actual way in which information gleaned from an advertisement . . . operates to trigger in that consumer an intent to purchase the advertised product." *Id.* at 432. However, for an interesting discussion concerning the impact of advertising on human behavior, *see generally* W. B. KEY, SUBLIMINAL SEDUCTION AD MEDIA'S MANIPULATION OF A NOT SO INNOCENT AMERICA (1973).

40. FTC v. Ruberoid, 343 U.S. 470, 473 (1952). *Accord,* Coro, Inc. v. FTC, 338 F.2d 149, 153 (1st Cir.), *cert. denied,* 380 U.S. 954 (1964); Niresk Industries, Inc. v. FTC, 378 F.2d 337, 343

corrective statement as part of its order the Commission thereby exceeds the literal boundaries of the statute since it is not just preventing future deceptive practices, but is seeking to counteract the effects of past deception.

Various justifications for the imposition of a corrective ad have been advanced in light of the statutory proscription. Since section 5 clearly prohibits future illegal acts, it has been argued that future truthful ads would stimulate and reinforce deceptive beliefs and buying habits.[41] Therefore, these ads would actively deceive, and disclosures may be required to prevent the future deception. Another view advanced is that corrective advertising may be analogized to divestiture and utilized in order to "expunge" the illegal market share obtained as a result of the deception.[42] Most recently, the authority for these disclosures has been deemed to emanate from the fact that section 5 not only prohibits deception, but "unfair . . . acts or practices" as well.[43] Under this rationale there is no need to find a deceptive act. Given the presence of residual effects it is an "unfair act" when a violator makes sales to consumers who are still being influenced by the prior deception. Thus future sales may be prohibited unless the disclosures are made.[44]

Although each of these approaches provide a rationale for the imposition of a corrective ad, the reasoning asserted by the FTC is based upon a broad interpretation of its section 5 authority to terminate deception. Once an illegal act has been found, courts have held that "[t]he Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed."[45] Thus, orders have been upheld which prohibited the illegal activity with respect to products not involved in current proceedings,[46] or which prohibited violations that were never committed.[47]

(7th Cir.), *cert. denied*, 364 U.S. 883 (1960).

41. *See Corrective Advertising, supra* note 6, at 494.

42. *See* Note, *Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways*, 70 MICH. L. REV. 374 (1971). Orders of the FTC requiring divestiture have been upheld by the courts. *See* note 55 *infra*.

43. 15 U.S.C. § 45(a)(1) (1970 & Supp. V 1975). *See* Cornfeld, *supra* note 4, at 711-13.

44. The Supreme Court in FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972), appears to have expanded the Commission's ability to define practices as "unfair." *Id.* at 244 n.5. *But see* Heater v. FTC, 503 F.2d 321 (9th Cir. 1974), in which the Commission's order of restitution to injured consumers, based upon the finding that retention of the money received through the deception would be "unfair," was reversed on appeal. However, in a footnote the court recognized the FTC's power to order corrective advertising, and distinguished restitution on the basis of congressional intent. *Id.* at 324-25 n.13. *See generally* Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976) (Mail order retailer's practice of using state long-arm statutes against distant customers held "unfair"). *See also* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 680-87 (1977).

45. Jacob Siegel Co. v. FTC, 327 U.S. 608, 612 (1946).

46. *See, e.g.*, Johnson Products Co. v. FTC, 549 F.2d 35, 41 (7th Cir. 1977); Benrus Watch Co. v. FTC, 352 F.2d 313, 324 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966).

Such orders expand the literal cease and desist power by going beyond the mere cessation of the particular illegal conduct which gave rise to the complaint. However, since they only prohibit future illegality, they do not provide support for FTC authority to order affirmative acts to remedy the effects of past violations. In *Warner-Lambert* the Commission cites seven cases in order to support this more expansive power.[48] Referring to these cases, the Commission sets out its authority to impose the corrective order:

> Simply stated, the common thread linking these cases is the principle that the Commission has authority to order the relief necessary to adequately protect the public from the effects of a law violation. Thus, if a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.[49]

A brief analysis of the cases cited reveals the nature of the "common thread" referred to.

Four of the cases[50] reflect the Commission's power to order what is termed "affirmative disclosures." An "affirmative disclosure" involves the statement of some fact, in future advertising, without which the ad *itself* would be misleading or deceptive.[51] It is clear however, that an affirmative disclosure is different from a corrective ad. The former is aimed at preventing future deception, while the latter is required to terminate effects of a past deception. Nevertheless, such disclosures "at least establish that affirmative provisions do not of themselves in-

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47. *See, e.g.*, Slough v. FTC, 396 F.2d 870, 872 (5th Cir.), *cert. denied*, 393 U.S. 980 (1968).

48. 86 F.T.C. at 1499 (1975).

49. *Id.* at 1499-1500.

50. J. B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967); Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960); Ward Laboratories, Inc. v. FTC, 276 F.2d 952 (2d Cir.), *cert. denied*, 364 U.S. 827 (1960); Waltham Precision Instrument, Co. v. FTC, 327 F.2d 427 (7th Cir.), *cert. denied*, 377 U.S. 992 (1964).

51. Originally affirmative disclosures were based on § 12 of the FTC Act. 15 U.S.C. § 52 (Supp. V 1975). This section makes false advertising of food, drugs, devices or cosmetics an "unfair or deceptive act or practice" under § 45. 15 U.S.C. § 55(a)1 (1970) defines a false advertisement as one "misleading in a material respect" including a failure to reveal. Subsequently, affirmative disclosures have been ordered in cases brought exclusively under § 45. *See*, Feil v. FTC, 285 F.2d 879 (9th Cir. 1960); Kerran v. FTC, 265 F.2d 246 (10th Cir.), *cert. denied*, 361 U.S. 818 (1959). *See generally* Lemke, *Souped Up Affirmative Disclosure Orders of the Federal Trade Commission*, 4 U. MICH. J. L. REF. 180 (1970).

validate a remedy framed in cease and desist form."[52]

Since it is still incumbent on the Commission to demonstrate its broad remedial power the case of *Luria Bros. & Co. v. FTC*[53] is cited. In that decision the Third Circuit affirmed an order which found certain steel mills guilty of monopolistic practices, and which prohibited them from purchasing more than fifty percent of their scrap from Luria for five years.[54] Although not requiring an affirmative act, the Commission prohibited lawful activity which otherwise would have prevented a termination of the restraint of trade. The case thereby illustrates FTC power to frame relief which focuses on lingering effects of a past violation. It is in *Charles Pfizer & Co. v. FTC*[55] and *L.G. Balfour Co. v. FTC,*[56] however, where the Commission combines affirmative requirements with its power to effectively bring violations to an end. In *Charles Pfizer,* the Sixth Circuit upheld a Commission order which required a drug company to issue licenses for a patent it obtained by fraud. The Seventh Circuit in *L.G. Balfour* upheld an order which prohibited the company from entering into certain contracts and making certain acquisitions for a period of years, and which also required divestiture of a subsidiary. In both cases the initial illegal activity was brought to a halt. Yet the Commission was able to mandate affirmative relief in order to terminate what in effect was a continuance of the initial violation. Thus, it is upon this rationale that the Commission based its power to order corrective advertising.[57]

III. THE CASE ANALYZED

A. Past Precedent

In upholding the *Warner-Lambert* order the court of appeals appears to have extended the "common thread" which reflects the FTC's broad

52. *Corrective Advertising, supra* note 6, at 491. In Alberty v. FTC, 182 F.2d 36 (D.C. Cir. 1950), the court refused to uphold an order requiring affirmative disclosure. Subsequent decisions, including *Warner-Lambert,* have not interpreted that case as a denial of FTC authority in this area. *See* 562 F.2d at 759 n.52. *But cf.* FTC v. Simeon Management Corp., 532 F.2d 708 (9th Cir. 1976) (no showing of need for affirmative disclosure).

53. 389 F.2d 847 (3d Cir.), *cert. denied,* 393 U.S. 829 (1968).

54. *Id.* at 861-63. *See also* FTC v. National Lead, 352 U.S. 419 (1957) (restrictions on use of a legal pricing system); Arthur Murray Studio of Washington, Inc. v. FTC, 458 F.2d 622 (5th Cir. 1972) (prohibiting contracts for dancing instruction from exceeding $1500); Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964) (prohibiting unilateral refusal to sell to price-cutting distributors or dealers).

55. 401 F.2d 574 (6th Cir. 1968), *cert. denied,* 394 U.S. 920 (1969).

56. 442 F.2d 1 (7th Cir. 1971). *See also* Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (9th Cir. 1972), *cert. denied,* 412 U.S. 918 (1973).

57. *See also* Tashof v. FTC, 437 F.2d 707 (D.C. Cir. 1970) (subjecting retailer to possible civil penalties if it advertised discount prices without first taking a survey of prevailing prices, even if the ads were true).

remedial power. Yet the approach adopted is different from that taken by the FTC, and this fact may force the Commission, in subsequent cases, to articulate the basis upon which its power rests. After recognizing that the "modern view" affords the FTC great discretion in framing its remedies,[58] the District of Columbia Circuit found authority for the order in "earlier corrective advertising cases."[59] Principal reliance was placed upon *Royal Baking Powder Co. v. FTC*[60] and *Waltham Watch Co. v. FTC.*[61]

In *Royal,* a baking powder that was known for sixty years as being made from "Cream of Tartar," was changed to a phosphate powder.[62] *Waltham* involved a famous century old Massachusetts watch and clock maker that sold its trademarks and name to a newly organized Delaware corporation.[63] All watches and clocks sold by the new company were imported from Europe.[64] In both these cases the reviewing court ordered that future advertising contain disclosures concerning the change in the products. The District of Columbia Circuit, in *Warner-Lambert,* found that the *Royal* and *Waltham* disclosures were required solely to dispel lingering beliefs attributable to the products prior character.[65] It concluded therefore, that disclosures may be required to correct false impressions concerning Listerine.[66]

It appears however, that reliance on these past cases is misplaced. The *Warner-Lambert* court recognized that the disclosures in *Royal* and *Waltham* were necessary to prevent future advertising from being deceptive.[67] However, there was no such finding by the Commission[68] in *Warner-Lambert* since the need for a corrective order arises solely out of a past deceptive act. Furthermore, it appears that the new labeling and advertising in *Royal* and *Waltham* demanded clarification since it actively sought to create the impression that the products had never changed.[69]

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58. 562 F.2d at 756-57.
59. *Id.* at 761 n.59.
60. 281 F. 744 (2d Cir. 1922).
61. 318 F.2d 28 (7th Cir.), *cert. denied,* 375 U.S. 944 (1963).
62. 281 F. at 747.
63. 318 F.2d at 30.
64. *Id.*
65. 562 F.2d at 760-61.
66. *Id.* at 761.
67. *Id.* at 760 n.57.
68. *See* note 77 *infra.*
69. *See* 562 F.2d at 767-68 (Robb, J., dissenting). In *Royal,* the new labels were so like the old ones as "to confuse and mislead purchasers familiar with the former product as to the character of the contents of the new cans." 281 F. at 748. In addition, the company had begun an advertising campaign which promoted the lower price of the new product but "[i]n some instances . . . failed to make any mention whatever of the change from cream of tartar to phosphate." *Id.* In Waltham a typical ad read: "FAMOUS 109-YEAR FIRM ANNOUNCES NEW EXPANSION FRANCHISE PLAN." 318 F.2d at 30.

Thus, the methodology of the District of Columbia Circuit in upholding the order does not reflect the Commission's view concerning its statutory authority to issue a corrective ad.[70] The FTC had stressed that the "common thread" in past cases established that its power to shape remedies was not confined to the literal boundaries of a cease and desist order. This fact was demonstrated by affirmative orders which were upheld on review as being necessary to bring to an end the continuing effects of a prior illegal practice. While it cannot be denied that the holding in *Warner-Lambert* establishes the power of the FTC to order corrective ads, nevertheless, the courts' reliance on strained interpretations of past cases does not give explicit approval to a broad remedial power of the FTC to impose a corrective remedy which is aimed at the continuing effects of a deceptive act.[71] Therefore, in subsequent cases, although armed with a precedent in *Warner-Lambert,* the Commission may still be confronted with the task of demonstrating its statutory authority to issue corrective orders.

B. An Alternative Rationale

A more significant difficulty that will be present when imposing future corrective orders, arises out of the approach adopted in the Supplemental Opinion.[72] Here, although it discussed the first amendment, the District of Columbia Circuit appeared to base a need for the disclosure on the ground that future ads themselves will continue "the deception, albeit implicitly."[73] It came to the conclusion that "Listerine's current advertising, if not accompanied by a corrective message, would *itself* continue to mislead the public."[74]

Since a finding that an ad is itself misleading invokes the established remedy of affirmative disclosure, such a determination in this case would destroy its precedential value with regard to corrective advertising. The Commission itself recognized the possibility of a diluted precedent. In his Initial Decision the Administrative Law Judge stated that

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70. In its opinion, the Commission also held that "the continued *sale* of a product under false pretenses is itself a violation of the FTC Act. . . ." 86 F.T.C. at 1500 (emphasis added). This language suggests the use of "unfair" acts as an alternative justification. *See* notes 43 and 44 *supra.* In a footnote, the District of Columbia Circuit noted Warner-Lambert's objections to this holding and to the fact that there were no findings that future truthful ads would be deceptive absent a disclosure. 562 F.2d at 761 n.59. In essence, these arguments assert that there is no present practice which needs to be brought to a halt. The court disposed of these objections by equating such findings to the Commission's statement of "continuing injury," and thereby ignores the FTC rationale. *Id.*

71. Aside from affirmative disclosure cases, the court's only recognition of the powers exhibited through the "common thread" occurs in a brief mention of Charles Pfizer & Co., 562 F.2d at 761 n.60.

72. *Id.* at 768.

73. *Id.* at 769. *See* Petitioner's Brief for Certiorari at 18-19.

74. 562 F.2d at 770 (emphasis added).

Listerine would still be able to be advertised as efficacious for killing germs.[75] However, it was found that contrary to public belief, viruses, not germs are the leading cause of colds.[76] Therefore, since Listerine had previously advertised its germ killing ability in conjunction with its cold claims, the Judge concluded that any future germ advertising would "automatically constitute, or remind the public of cold claims, even in the absence of any reference to colds."[77]

The Commission explicitly did not rely on this finding which in effect created an ad misleading on its face.[78] Yet this is precisely the basis utilized by the court of appeals in finding the ad misleading:

> [I]t is worth noting that Warner-Lambert currently advertises Listerine's ability to kill germs that cause bad breath. While we have no reason to doubt the truth of this claim, the emphasis on Listerine's germ-killing ability does seem to tie in closely with prior false advertising as to its capacity to alleviate health problems.[79]

Thus it is possible for *Warner-Lambert* to be seen as involving a remedy other than corrective advertising.

IV. THE ORDER

Disregarding the inconsistencies in the decision itself, the order as framed in *Warner-Lambert* points to obstacles presented in using the remedy in the future. When calling for corrective advertising, the Commission must find: (1) that the deceptive claims gave rise to consumer beliefs, (2) that these beliefs linger on after the eradication of the initial deception, and (3) that consumers will continue to rely on these beliefs when making purchasing decisions.[80] The FTC made these necessary determinations by relying on *Warner-Lambert's* own market research reports ("Product Q" reports) and expert testimony.[81] In its order the Commission stated that it substituted the two year duration imposed by the Administrative Law Judge with the ten million dollar requirement,

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75. 86 F.T.C. at 1480.

76. *Id.* at 1419.

77. *Id.* at 1480.

78. 86 F.T.C. at 1504 n.28. "The ALJ justified the corrective advertising order on the additional ground that future representations of Listerine as a germ killer would automatically remind the public of false cold claims. We need not consider at this time this additional rationale." *Id.*

79. 562 F.2d at 769 n.2.

80. The court in *Warner-Lambert* stated that in some cases these findings may be presumed. *Id.* at 749, 771. *See also* Pitofsky, *supra* note 44, at 696-700; Cornfeld, *supra* note 4, at 713-19.

81. 562 F.2d at 762 n.65. The "Product Q" tests measured product awareness, use and consumer attitudes concerning the "Mouthwash Market." The results of these tests showed that a majority of persons believed Listerine to be "effective for colds and sore throats," that other mouthwashes were not perceived as having this effect, that this theme tended to linger during non-advertising months, and that these attributes played an important role in consumers' purchase of a mouthwash. 86 F.T.C. at 1501-04.

to prevent Warner-Lambert from avoiding the order by simply not advertising for two years.[82] Thus, in its present form the order is calculated to counteract a precise amount of deception with an equal amount of correction, without having a limit in terms of years.[83] For this reason, it may be contended that such an order is not related to remedying a deception since "residual effects" have a limited existence. Once the beliefs have faded there will be nothing to correct.[84]

Furthermore, the District of Columbia Circuit noted that a ten year advertising campaign costing ten million dollars is presently equivalent to one year's worth of Listerine advertising.[85] In a smaller campaign, future use of a monetary equivalent may require a corrective ad for only one week, or even one day. Although the FTC may feel the necessity to set a longer duration in order to inform all those persons holding false beliefs, such orders would appear excessive in light of the monetary formula adopted by the Commission in *Warner-Lambert.* Finally, it must be remembered that *Warner-Lambert* involved an advertising campaign that spanned half a century and produced a marked impact, as evidenced by the market research reports. In a smaller campaign the residual effects will be present but the widespread impact, so apparent with Listerine, will not. Therefore, courts may be reluctant to allow the imposition of such derogatory disclosures absent a showing of extensive deception.

In *National Commission On Egg Nutrition and Richard Weiner, Inc. v. FTC,*[86] the National Commission on Egg Nutrition (NCEN), a trade association of egg producers formed in 1971, made newspaper advertisements to the effect "that there is no scientific evidence that eating eggs increases the risk of . . . heart [and circulatory] disease . . . ."[87] Following a 1974 complaint[88] charging a violation of sections 5 and 12 of the Act, the Commission in 1976 issued an order requiring petitioners to cease and desist from making these and other statements.[89] The

82. 86 F.T.C. at 1505.

83. 562 F.2d at 771.

84. Brief for Petitioner at 55-58. "The order should instead set a fixed maximum period, shown by the evidence to be sufficient to dispel the lingering effects even in the absence of corrective advertisements. . . ." *Corrective Advertising, supra* note 6, at 504-05. The absence of a specific time limit, though, may not prevent the use of a monetary formula. Since § 45 (b) allows the Commission to modify its orders, courts have refused to strike them down on the basis of hypothetical situations and have required the individual to seek modification by the Commission in the event of such contingencies. *See, e.g.,* FTC v. National Lead Co., 352 U.S. 430, 431 (1957); Sunshine Art Studios, Inc. v. FTC, 481 F.2d 1171, 1175 (1973). *See also* 16 C.F.R. 3.72 (1977).

85. 562 F.2d at 763-64. By the time the appellate process is complete and compliance occurs, this period may be reduced even more due to inflation. Brief for Respondent at 77 n.68.

86. Nos. 76-1969 and 76-1975 (7th Cir. Nov. 29, 1977).

87. *Id.* at 3.

88. (1973-1976 Transfer Binder) TRADE REG. REP. (CCH) ¶ 20,683.

89. (1976) 3 TRADE REG. REP. (CCH) ¶ 21,184.

Commission found that there was a scientific controversy concerning the effects of eating eggs, and to deny its existence was false and misleading.[90] It also found that it would be deceptive for NCEN to advertise that "[e]gg consumption, even in quantity, will not increase the risk of heart disease . . . ."[91] Therefore, it ordered that any future statements concerning the relationship between eggs and disease be accompanied by a disclosure "that many medical experts believe that existing evidence indicates that consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease."[92]

The court of appeals upheld the Commission, but modified the disclosure requirement stating that:

> [t]he desired preventative effect can be achieved by requiring the disclosure that there is a controversy among the experts and NCEN is presenting its side of that controversy. The additional statement in the form now ordered by the FTC should be required only when NCEN chooses to make a representation as to the state of the available evidence or information concerning the controversy.[93]

In viewing the FTC remedy, the Seventh Circuit based its holding on first amendment grounds. It noted that corrective advertising was permissible, citing *Warner-Lambert,* when aimed at correcting "the effects of past deception."[94] Nevertheless, the court concluded that NCEN's right to assert its non-deceptive position could not be burdened with the disclosure on this ground since "[t]he record here, unlike that in *Warner-Lambert Co. v. FTC,* . . . does not show a long history of deception which has so permeated the consumer mind that the 'claim was believed by consumers after the false advertising had ceased' . . . ."[95] Thus "[w]e are concerned primarily with preventing future deception."[96]

There are additional considerations which may prompt both the courts and the FTC to limit the application of corrective advertising. A

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90. *Id.* at 21,094.

91. *Id.* at 21,098-99.

92. *Id.* at 21,099.

93. Slip op. at 13. The court reiterated the position it previously took in directing that NCEN be temporarily enjoined from continuing such advertising. FTC v. National Commission On Egg Nutrition, 517 F.2d 485 (7th Cir. 1975), *cert. denied,* 426 U.S. 919 (1976).

94. Slip op. at 13.

95. *Id.*

96. *Id.* It is significant to note that the Commission did not base the disclosure upon residual effects, but deemed it necessary to prevent the ads themselves from being deceptive. ¶ 21,184 at 21,099.

Responding to the Seventh Circuit's decision, the Commission submitted to the court a proposed order which reflected the necessary modifications. In a Supplemental Opinion, the court enforced the modified order. Notably, in its decision, the Seventh Circuit seems to have softened its requirement that the FTC prove the presence of extensive deception in order to impose corrective advertising. [1978] 5 TRADE REG. REP. (CCH) ¶ 61,877.

primary rationale for advocating this remedy has been that a cease and desist order usually commands only that a violator stop his illegal practices. Due to the fact that FTC detection and adjudication procedures are usually inadequate or lengthy,[97] consumers are being deceived from the time the campaign is initiated until the rendition of a final order.[98] Since it has been argued that present FTC remedies such as injunctions[99] or consumer redress[100] are inadequate to provide appropriate prevention and deterrence,[101] corrective advertising is necessary in order "to eliminate this vacuum in enforcement."[102] While the FTC cannot immediately obtain the efficiency necessary to adequately regulate deceptive advertising, there are signs of improvement.

On October 13, 1977 the United States House of Representatives passed legislation containing amendments to the Federal Trade Commission Act.[103] Included in this legislation is a provision which would amend section 45(g) to provide that a cease and desist order would become effective within sixty days, unless it was stayed by either the Commission or the appeals court.[104] The legislation would also seek to strengthen the FTC's ability to obtain information by compulsory process. On October 20, 1977 the United States Senate passed legislation containing similar provisions.[105] While the precise form of the final law is as yet undetermined, it is probable that these features would be included.[106] Such changes certainly would not eliminate a need for the

97. *See generally* E. COX, R. FELLMETH & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969); REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969).

98. 15 U.S.C. § 45(g) states that cease and desist orders do not become final, and therefore, effective until the appeals process is exhausted.

99. *See* 15 U.S.C. § 53 (Supp. III 1973).

100. *See* note 25 *supra*. The Commission has filed only two actions seeking restitution under this section. *See* Las Animas Ranch, Inc., [1978] TRADE REG. REP. (CCH) ¶ 21,377; Koscot Interplanetary, Inc., [1978] TRADE REG. REP. (CCH) ¶ 21,378.

101. Cornfeld, *supra* note 4, at 696-707.

102. Pitofsky, *supra* note 44, at 694. The District of Columbia Circuit recognized this rationale. *See* 562 F.2d at 761-62 n.60.

103. H.R. 3816, 95th Cong., 1st Sess. (1977).

104. At present orders do not become effective until after appeal. *See* note 98 *supra*.

105. H.R. 3816, 95th Cong., 1st Sess. (1977). S. 1288 originally containing the FTC amendments was added to S. 1533, a measure authorizing funds for the FTC and requiring recodification of its rules. The Senate then passed the House bill after substituting for it the language in S. 1533. It should be noted that there are differences between the House and Senate bill concerning a number of other provisions.

106. Since there existed differences between the bills passed by the House and Senate cocerning a number of other provisions, the bills were submitted to a Conference Committee. Although the conference report was accepted by the Senate, 124 CONG. REC. S. 2014 (daily ed. Feb. 22, 1978), the report was rejected by the House and sent back to conference, 124 CONG. REC. H 1570 (daily ed. Feb. 28, 1978).

The report had adopted the provisions concerning the effective date of cease and desist orders, the enforcement of compulsory process, and the designation of forums for appeals. 124 CONG. REC. H1343 (daily ed. Feb. 22, 1978). The principal reason for rejection was dissatisfaction

corrective advertising remedy. Nevertheless, continued improvements in detection and adjudication may at least lessen the likelihood of the *extensive deception* courts may require when reviewing a corrective order.

V. THE FIRST AMENDMENT

The order in *Warner-Lambert* prohibited future truthful Listerine advertising unless a corrective disclosure appeared in a specified amount of such advertising.[107] In its initial decision, the court of appeals found that the first amendment[108] freedoms granted to commercial speech were not infringed by imposition of the corrective order.[109] Such a conclusion would not have been a difficult one to arrive at in the past, since there was a clear precedent in *Valentine v. Chrestensen*[110] for broad control of commercial speech, unencumbered by the protections afforded views in the political or social arena.[111] However, the *Warner-Lambert* court was faced with the Supreme Court decisions in *Bigelow v. Virginia*[112] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[113] the latter holding that commercial speech was to be afforded first amendment protection.[114] In *Virginia Citizens* a state statute prohibited licensed pharmacists from advertising the price of prescription drugs.[115] The Supreme Court, while holding the restriction unconstitutional, recognized a difference between purely commercial speech and "other varieties."[116] While the Court held that the state

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with the conferees elimination of a House provision which would have authorized congressional veto of FTC rules. Exception was also taken to the adoption of a Senate provision which would allow the Commission to go to court to prevent a company from wasting its assets in order to avoid redressing consumers. 124 CONG. REC. H1570 (daily ed. Feb. 28, 1978).

107. 562 F.2d 753.

108. "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The first amendment is applied to the states via the due process clause of the fourteenth amendment. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 811 (1975).

109. 562 F.2d at 758-9.

110. 316 U.S. 52 (1942). "We are equally clear that the Constitution emposes no such restraint on government as respects purely commercial advertising." *Id.* at 54.

111. *See generally* Note, *The Consumers' Right To Know: An Analysis of* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. *and the Effect of the First Amendment Right to Receive Information on Lawyer's Advertising*, 12 NEW ENGLAND L. REV. 991, 999-1000 (1977); Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205, 207-09 (1976); *Developments in the Law — Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027-29 (1967).

112. 421 U.S. 809 (1975).

113. 425 U.S. 748 (1976).

114. *See also* Linmark Assocs., Inc. v. Township of Willingboro, 97 S. Ct. 1614 (1977) (held as violative of first amendment town ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs); Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977) (holding state restrictions on advertising of legal services violative of first amendment).

115. 425 U.S. at 752.

116. *Id.* at 771 n.24.

may not arbitrarily restrict commercial speech, it stated that such differences "suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired."[117] Thus, the Court concluded that it may be "appropriate to require that a commercial message appear in such form or include such additional information, warnings and disclaimers, as are necessary to prevent *its* being deceptive."[118]

Despite this "different degree of protection," the first amendment requires a court to make at the outset a searching inquiry into the conflicting interests involved.[119] Since the first amendment protects fundamental rights, restrictions must be framed so as to accommodate those rights, using the least restrictive means available,[120] while advancing compelling state interests.[121] Applying this framework to the corrective advertising order in *Warner-Lambert* raises immediate concerns due to the restrictions that were placed upon future truthful advertising. While application of first amendment principles here may in fact find such impositions to be unconstitutional, such a conclusion does not have to be reached in order to assess the difficulties presented to future use of the remedy.

Examining first the reasoning in the initial *Warner-Lambert* decision, the rationale utilized by the District of Columbia Circuit was faulty. The court relied on language in *Virginia Citizens* authorizing restrictions on presently deceptive advertisements.[122] It failed to recognize that there was no present deception involved. In its Supplemental Opinion,[123] however, the implications raised by the first amendment were confronted. While again rejecting the contention that the first amendment prohibited such impositions,[124] the District of Columbia Circuit relied on two separate and distinct rationales.

The opinion begins by outlining the holding in *Virginia Citizens,* and recognizing that restrictions may be placed on false or misleading advertising.[125] Applying these principles to the instant case the District of

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117. *Id.*

118. *Id.* (emphasis added). *See also* Bates v. State Bar of Arizona, 97 S. Ct. at 2708-09.

119. Bigelow v. Virginia, 421 U.S. at 826. "Regardless of the particular label asserted by the State — whether it calls the speech commercial . . . a court may not escape the tasks of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Id.*

120. *See, e.g.*, Elrod v. Burns, 96 S. Ct. 2673, 2684 (1976).

121. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (1968).

122. 562 F.2d at 758-59. Commercial messages may be required to include "disclaimers, as are necessary to prevent *its* being deceptive." 425 U.S. at 771 n.24 (emphasis added). *See* Petitioners Brief for certiorari at 16-17.

123. *Id.* at 768.

124. *Id.* at 769-71.

125. *Id.* at 768-69.

Columbia Circuit found the FTC's legitimate role to be the regulation of false and misleading advertising.[126] Using a factual basis not adopted by the Commission, it held that future ads would themselves be misleading.[127] Since the ads were facially deceptive, the court had no trouble in upholding the Commission's action, since *Virginia Citizens* explicitly allows "such additional information."[128] The court then turned to a consideration of the first amendment protection in a corrective order context.[129] After finding the government's interest in protecting citizens against deception to be substantial, when balanced against the rights protected, it concluded that "this interest will not be substantially served by the less restrictive remedy - a cease and desist order."[130] Thus, the corrective ad was the least restrictive means of achieving that goal and was upheld.

Despite the rejection of the proposition that the first amendment precludes the remedy, the emerging constitutional protections are going to have a limiting effect in the future. As a starting point, such effect is apparent in the *Warner-Lambert* decision itself. In reviewing the appropriateness of the remedy the District of Columbia Circuit modified the Commission's order by striking the phrase "[c]ontrary to prior advertising."[131] It held that such wording was "not necessary"[132] since its only purpose would be to humiliate the violator. While the court stated that such language may be used to call attention to the correction, it found that the clear disclosure requirements of the order adequately served the purpose.[133] In its petition for rehearing Warner-Lambert noted that such action "paid deference to first amendment principles."[134] This point is well taken since the court's language mirrors that in *Virginia Citizens* which allows only "necessary" regulation.[135]

Notably though, the court refused to completely rule out such a purpose. It stated that while humiliation may be allowed in an

126. *Id.* at 769.

127. *See* notes 73-79 and accompanying text *supra.*

128. 425 U.S. at 771 n.24.

129. 562 F.2d at 770-71. "Even if, in the circumstances of this case, the current and future advertising of Listerine is considered constitutionally protected speech, however, we think the corrective advertising order in this case remains appropriate." *Id.* at 770.

130. *Id.* at 771.

131. *Id.* at 763.

132. *Id.*

133. *Id.*

134. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc at 4.

135. 425 U.S. at 771 n.24. In support of its conclusion the court cites United States v. National Soc'y of Professional Eng'rs, 555 F.2d 978 (D.C. Cir. 1977), *cert. granted,* 46 U.S.L.W. 3214 (1977) (No. 76-1767) and Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), *cert. denied,* 45 U.S.L.W. 3707 (1977). In both of these cases first amendment protections were recognized.

"egregious"[136] case, it would reserve judgment as to whether such future action would be "so punitive as to be outside the Commission's proper authority."[137] Disregarding the first amendment issues, this possibility does not seem very feasible. If a clear and conspicuous disclosure will adequately call attention to a correction, humiliation, despite a gross violation, serves no purpose with respect to terminating the lingering effects of a deception.

Although the first amendment protections did not result in a total rejection of the Commission's order in *Warner-Lambert,* it is apparent that future orders will be subjected to a more vigorous standard of judicial review. Traditionally, the courts have given deference to the Commission's power to frame appropriate remedies.[138] Such deference, however, was abandoned in *Beneficial Corp. v. FTC.*[139] In *Beneficial,* a lending institution decided to enter the tax return preparation field.[140] To promote its lending business to tax return customers, an ad campaign was instituted which offered an "Instant Tax Refund."[141] The purpose of this service was to provide a cash advance to those persons eligible for tax refunds.[142] The FTC found the advertising to be false and misleading in violation of section 5.[143] After finding that qualifying language alone would not alleviate the deception in the phrase, "Instant Tax Refund," the Commission required its total excision from all advertising.[144] On appeal the Third Circuit set aside the order of excision and held that the less restrictive requirement of qualifying language should have been imposed.[145] The court found that when considering government restrictions on speech "[t]he First Amendment requires . . . an examination of the Commission's action that is more searching than in other contexts."[146] The court concluded that in making its review the appropriate premise is that prior restraints are suspect and that the least restrictive means must be employed.[147]

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136. 562 F.2d at 763.

137. *Id.* at n.69. It has been suggested that use of confessional disclosures are beyond the FTC's statutory authority. *See* Note, *The Limits of FTC Power To Issue Consumer Protection Orders,* 40 GEO. WASH. L. REV. 496, 519-24 (1972).

138. *See, e.g.,* FTC v. Ruberoid, 343 U.S. 470 (1952); Jacob Siegel Co. v. FTC, 329 U.S. 608 (1946).

139. 542 F.2d 611 (3d Cir. 1976), *cert. denied,* 45 U.S.L.W. 3707 (1977).

140. *Id.*

141. *Id.* at 613-14.

142. *Id.* at 613.

143. *Id.* at 614. The Commission found that the refund plan was really Beneficial's ordinary loan service and that qualification was based upon credit rating rather than the tax refund expected. The Commission also found that Beneficial violated § 5 through its unauthorized use of tax information. *Id.* at 616-18, 620-21.

144. *Id.* at 614.

145. *Id.* at 618-19.

146. *Id.*

147. *Id.* at 620. The decision in *Beneficial* has recently been criticized, not because of its

What emerges from *Beneficial* is a judicial recognition that even in the area of deception and falsity first amendment protections will be given full consideration.[148] Perhaps a reflection of the application of such review to corrective advertising may be found in *National Commission On Egg Nutrition.*[149] While that case did not involve corrective advertising,[150] the Seventh Circuit was faced with FTC ordered disclosures. In dealing with the first amendment issue, the court noted *Beneficial,* and stated that corrective ads may at times be imposed.[151] It found the concept of corrective advertising to be inappropriate in this instance, however, since there was no evidence of extensive impact as shown in *Warner-Lambert.*[152] Thus it appears that absent extensive deception courts may be unable to find a substantial government interest which would outweigh the first amendment protections. Given the nature of Listerine's long-term campaign and its market surveys documenting consumer beliefs, few cases may be able to survive such scrutiny.

This result is buttressed by the fact that even where strong government interests are present, the first amendment requires that the least restrictive remedy be employed. Thus, in *National Commission On Egg Nutrition,* the FTC could not impose a remedy that was broader than necessary. It could not require NCEN to state a position it did not hold since a mere disclosure that a controversy existed was enough in most instances to prevent deception.[153] In *Warner-Lambert* the court stated that while a less restrictive remedy was available in the form of a simple cease and desist order, this would not protect the government interests.[154] The flaw in the court's conclusion is that there may be alternative approaches. As a guide, the Commission and the courts need look no further than consent orders accepted in the past. In these orders the FTC required separate disclosures, but did not place restrictions upon future truthful advertising.[155] Disclosures of this type have been

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recognition of first amendment rights, but because the court trespassed upon Commission judgment in setting out what it believed to be adequate qualifying language. *See* Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?* 61 MINN. L. REV. 705, 740 (1977).

148. *See also* FTC v. Simeon Management Corp., 532 F.2d 708 (1976) (denying FTC preliminary injunction and recognizing first amendment restrictions as requiring independent court review).

149. Nos. 76-1969 and 76-1975 (7th Cir. Nov. 29, 1977).

150. *See* note 96 *supra.*

151. Slip op. at 13.

152. *Id.*

153. In its Petition for Writ of Certiorari, Warner-Lambert has argued, in part, that in light of the current FDA study it is being forced to state one side of a scientific controversy. *See* note 32 *supra.*

154. 562 F.2d at 771.

155. *See* note 36 *supra.*

recognized by courts.[156] Another possibility might be to require that the disclosure be placed in a sign at the point of purchase.[157]

VI. CONCLUSION

While *Warner-Lambert* represents a judicial recognition of the FTC's power to order corrective advertising, the decision also offers insight into difficulties which await the future utilization of the remedy. Initially, it appears that the Commission may have to frame its orders so as not to require more correction than is necessary to counteract the deception. More significant though, are the limitations that may be imposed by the language of the first amendment and the Federal Trade Commission Act. It has been suggested that the District of Columbia Circuit sought to uphold the order because "if ever there was a case for a corrective advertising order, *Listerine* is it."[158] Since this factor may explain the court's search for past precedent and the use of factual bases not relied on by the Commission, *Warner-Lambert* emphatically demonstrates the impact such limitations may have in future litigation.[159]

JULES MARTIN HAAS

156. Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (order requiring a newspaper to publish for 25 weeks the terms of a court judgment); United States v. National Soc'y of Professional Eng'rs, 555 F.2d 978 (D.C. Cir.), *cert. granted,* 46 U.S.L.W. 3214 (1977) (No. 76-1767) (professional organization may be required to publish an advice that its rules violated antitrust laws).

While the first amendment also protects a person from being compelled to speak, the issues raised by this protection will not be dealt with. *See generally* Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

157. A number of recent consent orders have required store owners to post store signs giving information as to advertised items. *See* Melvin S. Landow [1977] 3 TRADE REG. REP. (CCH) ¶ 21,199; Sears, Roebuck & Co., [1977] 3 TRADE REG. REP. (CCH) ¶ 21,210; Walgreen Co., [1977] 3 TRADE REG. REP. (CCH) ¶ 21,308; Zayre Corp., [1977] 3 TRADE REG. REP. (CCH) ¶ 21,339. *See also* Grand Spaulding Dodge, Inc. [1977] TRADE REG. REP. (CCH) ¶ 21,258 (requiring the company to post a notice where sales agreements are negotiated, advising Spanish-speaking customers of possibility of receiving Spanish translation of financing statement). *See generally* N.L.R.B. v. Express Pub. Co., 312 U.S. 426, 438 (1941) (the National Labor Relations Board may order the posting of notices under the National Labor Relations Act).

158. Address by Philip Elman, Conference on Food Advertising and Labeling, (October 27, 1977) (on file with the New England Law Review).

159. Recently the FTC was petitioned by a public interest group to adopt an interpretive rule concerning corrective advertising. In response the Commission has solicited written views concerning the remedy. *See* [1977] 4 TRADE REG. REP. (CCH) ¶ 39.046.

BOOK REVIEW

THE TRANSFORMATION OF AMERICAN LAW, 1780-1860. By Morton J. Horwitz. Cambridge, Massachusetts: Harvard University Press. 1977. Pp. xviii, 356. $16.50 cloth.

In *The Transformation of American Law, 1780-1860,* Morton J. Horwitz presents an interpretation of antebellum American legal history which draws on the insights of both lawyers and historians. Such a synthesis is the rationale of a growing body of work often referred to as a "new legal history." Professor Horwitz has made a major contribution to this nascent genre.

The lawyerly strain in the interpretation of the period is represented by Roscoe Pound's *The Formative Era of American Law* of 1938. When dealing with the private law decisions, which constitute the core of Horwitz's work, Pound emphasized doctrinal continuity and the autonomous nature of legal thought, thus deliberately slighting interpretations based on economic interests.[1] Historians who have dealt with the legal aspects of the period — Oscar and Mary Handlin, Louis Hartz, Leonard Levy — were primarily concerned with finding precedent for governmental intervention in the supposedly free economy.[2] Thus, in Horwitz's words, "the New Deal was provided with its own historical pedigree."[3] Horwitz denies neither of these broad views — he freely admits that to some degree law is an autonomous intellectual development and that there are many examples of state intervention in the antebellum economy. His peculiar contribution is to establish a pattern which strongly indicates that many judicial decisions were designed to facilitate economic development. He reminds us too that not all

1. R. POUND, THE FORMATIVE ERA OF AMERICAN LAW 81-92 (1938).

2. O. & M. HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY, at vii-xii (rev. ed. 1969); L. HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860 (1948); L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957).

3. TRANSFORMATION OF AMERICAN LAW at xiii.

governmental intervention is intervention in the interest of all the public. Horwitz's primary contention is that the crucial characteristic of early nineteenth century American political economy was the determination to finance economic growth through the legal system and not through the tax system. Demonstrating that assertion and pointing out the effect that such a policy has on the distribution of the rewards and burdens of development is the task of this work.

The bulk of *The Transformation of American Law* is devoted to prodigiously researched discussions of various doctrinal subjects designed to establish the pattern of result-oriented judicial behavior. Property, contract, and commercial law each has a chapter. "Subsidization of Economic Growth through the Legal System" discusses eminent domain and negligence; "Competition and Economic Development" concerns the law of franchises and corporations.

A good example of Horwitz's technique in these chapters is his treatment of the rise of negligence. Traditionally, obliteration of the difference between trespass and trespass on the case in *Brown v. Kendall*[4] has been the key event in the history of negligence in America.[5] For Horwitz, however, Lemuel Shaw's opinion is part of a much larger transformation of negligence brought about by the modernization of society. In an increasingly active world, strangers more and more frequently came into damaging contact. The sudden appearance of collision cases in the early nineteenth century required courts to separate proof of injury from proof of carelessness. Thus, old conceptions of negligence based on pre-existing duties gradually became untenable. "After 1840 the principle that one could not be held liable for socially useful activity exercised with due care became a commonplace of American law."[6] Older ideas of strict liability and quiet enjoyment of property had been dealt a serious blow as much through the changing nature of society as through any internal dynamic of the legal system.[7]

Horwitz uses the same technique of thorough research in the cases and their creative relation to social change to show the transformation of other areas of law into fit servants of an increasingly impersonal market economy. The rise of "incorporated insurance companies with large pools of capital" obscured the urgency of the personal interests involved and encouraged judges to think of risk in abstract terms and of insurance "as a general policy of indemnity."[8] The rise of more extensive markets obscured personal relations between buyer and seller,

4. 60 Mass. (6 Cush.) 292 (1850).
5. O. W. HOLMES, THE COMMON LAW, 84-85 (Howe ed. 1968).
6. TRANSFORMATION OF AMERICAN LAW at 99.
7. *Id.* at 85-99.
8. *Id.* at 232.

destroyed customary prices, and made executory contracts, and thus speculation, possible. In this new situation courts gradually abandoned equitable ideas of fair exchange, refusing to examine the substance of bargains.[9] The same phenomena are reflected in the rise of negotiability and the growing refusal to allow the assertion of defenses against a holder in due course.[10]

Obviously, this tremendous outburst of doctrinal change in private law areas governed by the common law requires explanation in terms of traditional ideas of common law judging. Professor Horwitz addresses this problem in Chapter I, "The Emergence of an Instrumental Conception of Law." He contends that ideas of popular sovereignty and consent growing out of the American Revolution undermined the "original natural law foundation" of common law rules.[11] Judges found themselves more able as well as more willing to choose rules based on considerations of policy.

Chapter V, "The Relation between the Bar and Commercial Interests" tries to provide an explanation of the mechanism which linked economic and legal change. Cooperation between lawyers and commercial men was made easier by shared opposition to jury discretion and shared admiration for Lord Mansfield and made necessary by judicial hostility to extra-legal means of resolving disputes such as arbitration. In this way an emerging bar linked its fortunes to an emerging economic power.

The last chapter of the work, "The Rise of Legal Formalism," completes the picture by suggesting that instrumentalism came to an end when it was no longer useful. Once those who benefited from and believed in development oriented rules had gotten what they wanted, the legal system tried to freeze the status quo.

Chapter V clearly illustrates the extent to which Horwitz has written a doctrinal history. Although the pattern of judicial change indicates that development was favored by the judges, the links between the business community and the reported cases are not totally clear. The problem can be seen most clearly in the discussion of water rights and economic development. After showing that reasonableness became the final doctrinal test, Horwitz writes: "Once the question of reasonableness of use became a question of efficiency, legal doctrine enabled common-law judges to choose the direction of American economic development."[12] When judges begin to make choices based on their conceptions of effi-

9. *Id.* at 177-88.

10. *Id.* at 212-26; *cf.* Freyer, *Negotiable Instruments and the Federal Courts in Antebellum American Business,* 50 BUS. HIST. REV. 435 (1976).

11. TRANSFORMATION OF AMERICAN LAW at 17.

12. *Id.* at 42.

ciency they can behave like social engineers. On the other hand, they are not the only parties to cases. Their choices are at least somewhat limited by litigants and their lawyers as well as by the particular social and political setting of each case. One suspects that such factors played a part in the New York courts' extremely confused record of decisions on the State's liability for damages arising from the construction of the Erie Canal,[13] and the generally unsettled state of the doctrine of prescription.[14]

Whatever relative weights are assigned to particular influences entering into any one decision, it is clear that the bar must play a crucial role in the creation of legal doctrine favoring development. It is accordingly unfortunate that Chapter V is by far the weakest link in Horwitz's argument. The cause of this weakness, however, is the woefully inadequate state of our knowledge of the antebellum legal profession. We know a good deal of the intellectual formulations put forward by the speaking aristocracy of the bar to justify their social position.[15] We know also that many lawyers of the time saw law as a less than satisfying occupation and longed for other forms of distinction, especially literary.[16] On the other hand, Maxwell Bloomfield has found that for most antebellum lawyers such intellectual exertions were not necessary. For the "rank and file who patronized the law magazines . . . legal practice was a bread and butter concern, a daily business in which intellectual refinements found little place."[17] Indeed, contradictory impulses could inhabit one human breast. One of the most successful attorneys of the age, William Wirt, harbored a strong desire for literary distinction while confiding to a friend that he had accepted the attorney generalship of the United States because it meant he could pursue his profession " 'on a more advantageous ground — *i.e.* more money for less work.' "[18]

In short, whatever the actual shape of any lawyer's practice, the attitude towards legal work expressed by at least some members of the bar lends support to Horwitz's ideas. Unashamed of the financial rewards of legal practice they could see the benefits of destroying the old order which stood in the way of economic expansion.

The ultimate relationship between the legal system Horwitz describes and the larger society of which it was a part is yet to be fully explored.

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13. *Id.* at 68.

14. *Id.* at 42-47, 262 n.67.

15. *See* P. MILLER, THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR, 99-265 (1965).

16. *See* Robert A. Ferguson, The Legal Mind in Early American Literature (Ph.D. Diss. Harvard Univ., 1974); Botein, *Review Essay: Professional History Reconsidered,* 21 AM. J. LEGAL HIST. 60, 67-68 (1977).

17. M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at 151 (1976).

18. 2 J. P. KENNEDY, MEMOIRS OF THE LIFE OF WILLIAM WIRT 67, 58-61, 122, 137, 141 (rev. ed. Philadelphia 1856).

Professor Horwitz has had the last word, however, on the pattern of legal doctrine in the period. As other historians use his broader assertions in their own investigations, Horwitz's work will become an important part of the general historiography of the period.

The Transformation of American Law is not a book solely for the historian of antebellum American society and economy. One of the hallmarks of good history is the disquieting effect it has on the settled and the accepted. The careful demonstration that things were once different from what they now are can have the most far-reaching results. Professor Horwitz's study takes on, and successfully unsettles, the idea of the rule of law. Judicial adaptation to the impersonal market system eventually prevented "particularized equitable inquiries into the circumstances of individual cases and . . . destroyed more particular legal rules in the name of promoting the 'rule of law.' "[19] By showing that the system we take for granted is built on the rubble of one in which substantive justice had a greater role, Horwitz provides something for every citizen to ponder, especially those who act in the legal system. As more and more of the "new legal history" appears, the material to ponder will certainly increase. It takes little prescience to assert that *The Transformation of American Law* will be at the epicenter of the debate.

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19. TRANSFORMATION OF AMERICAN LAW at 263-64.

BOOK REVIEW

BLACK WORKERS IN WHITE UNIONS:
JOB DISCRIMINATION IN THE UNITED STATES
By William B. Gould. Ithaca, N.Y.:
Cornell University Press. 1977. Pp. 506. $12.50 cloth.

The monthly unemployment figures from the Bureau of Labor Statistics have shown a general downward trend recently, with occasional small fluctuations.[1] A more dramatic story is told by the figures which compare the rates of unemployment of blacks and whites. Black workers appear to suffer consistently higher unemployment rates than do whites, in numbers disproportionate to their representation in American society and the labor market.[2] Unquestionably, this is, in part, a function of a somewhat depressed economy. The lack of skills necessary to obtain employment may be another factor fueling such a disparity. But the determinative factor may well be the continuing discrimination against minority workers by those in control of the hiring process.

In his book, *Black Workers in White Unions: Job Discrimination in the United States,* William Gould addresses the issue of denial of access to jobs suffered by black Americans. The focus of the book is the participation of unions in the hiring process, particularly in the construction industry. Specifically, Gould examines the perpetuation of discriminatory practices in job referrals, union membership, promotions, transfers, seniority, apprenticeship programs, and the exclusion

1. The year-end unemployment figures for 1977 show a gradual decline from 7.6% unemployment in February to 6.7% in November and 6.4% in December. N.Y. Times, Jan. 12, 1978, at A-1, col. 4 (city ed.).

2. The latest unemployment figures show that the percentage of unemployed persons in all groups (adults, youths, men, women, whites, blacks) has declined. Yet, the December 1977 unemployment figures indicate that the percentage of unemployed black adults is twice as high as that for white adults (12.5% for black adults, 5.6% for white adults). Unemployment for black youths is nearly three times that experienced by white teenagers (37.3% for black teenagers, 12.6% for white). N.Y. Times, Jan. 12, 1978, at A-11, col. 4 (city ed.).

of blacks from leadership and policy-making positions within the unions themselves. Although his actual figures are a few years out of date, Gould documents a history of evasion and delay in meeting the obligations imposed by Title VII of the 1964 Civil Rights Act that rivals the record of the most recalcitrant of school systems seeking to avoid the impact of *Brown v. Board of Education.*

There have been exceptions to this posture of resistance and Gould does give credit where it is due. For example, he cites the record of the Meatcutters and Furniture Workers Unions. He does not merely single out organized labor for sole responsibility for the lamentable lack of progress in achieving equal employment opportunity. A number of federal agencies have or have had a hand in administering the mandate of Title VII: the Federal Office of Contract Compliance, the Justice Department, the National Labor Relations Board and, of course, the Equal Employment Opportunity Commission. Each agency in its turn comes under Gould's scrutiny, and in his opinion, none passes muster.

Particular attention is focussed on the EEOC and the NLRB. Gould summarizes the genesis of employment discrimination law, with its roots in the Civil Rights Act of 1866 (as "revealed" in 1968 in *Jones v. Mayer*[3]), *Steele v. Louisville & Nashville Railroad*[4] (the 1944 case decided under the Railway Labor Act), the 1964 Civil Rights Act, and the 1972 amendments to Title VII. The circuit courts of appeals have had to wrestle with knotty procedural problems, as well as develop a body of substantive precedent.

The legal process from the discriminatory act or practice to a final judgment in court is tortuous, lengthy and expensive. These considerations alone, which are inherent in a system which puts primary emphasis on judicial remedies (contrast Title VII judicial remedies with the role of the NLRB in administering general labor law and policy), dictate that relief will be hard to come by. Yet the ultimate impact of civil rights legislation, whether it be intended to provide compensation for harmed individuals or to deter illegal conduct, is dependent upon the actual effectiveness of the remedies provided.

Gould's position is that the back and front pay awards, cease-and-desist orders and other remedies that the courts have been willing to provide do not go far enough, in light of the broad scope of discretion given the courts by Title VII — "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate. . . or any other equitable relief as the court deems appropriate."[5] It is clear that some affirmative

3. 392 U.S. 409 (1968).
4. 323 U.S. 192 (1944).
5. 42 U.S.C. § 706(g) (1964).

action may infringe upon the rights of parties other than a respondent. Regardless of the validity of claims by black workers to compensatory seniority credit where the failure to hire them at an earlier date is deemed to have been unlawful, it must be expected that white workers will protest their loss of position on a seniority ladder. Obviously, this will not foster harmonious race relations. Gould is not unaware of this dynamic, but minimizes its significance. It is not suggested that the courts should defer to the distress of any group and deny adequate relief under Title VII, but judicial conservatism in formulating remedies that ruffle the fewest possible feathers is understandable in human terms.

It should be noted that the entire panoply of quota-oriented remedies, a most sensitive issue, may presently be in jeopardy as the Supreme Court considers the *Bakke* case.[6] Although it is speculated that *Bakke* will be decided upon quite narrow grounds, there is an historic interrelation between treatment of school and employment discrimination since the equality of educational and employment opportunity are both seen as prerequisites for full participation in a free society. This suggests that the Court's decision in the approval or disapproval of the plan which sets aside a limited number of places in a professional school exclusively for minorities may have a significant impact on Title VII cases.

Gould also finds general inadequacy with the implementation of Title VII. Just as the medicine a doctor prescribes is only effective if the patient swallows it, an apprenticeship program ordered to recruit blacks only meets its Title VII objective if blacks are actually enrolled. Gould studies the enforcement of a 1970 consent decree involving the Seattle building trades as an example both of remedies which went beyond existing institutions, and effective implementation of those remedies. One factor in implementation was unique: the black community in Seattle, in the form of a black workers' association, was the impetus for the decree and actively involved itself in the implementation. Though dual labor organizations based on racial lines is one of the evils Title VII seeks to eliminate, Gould contends that the established AFL-CIO unions cannot be trusted to promote black workers' interests in ways that will satisfy Title VII: "The primary burden for enforcement of Title VII, therefore, must rest on the shoulders of private parties and, perhaps increasingly, minority workers' associations."[7]

Unions do have specific obligations towards workers with Title VII implications. For one, a union which discriminates against a black worker in the unit it represents breaches its duty of fair representation

6. Bakke v. The Regents of the University of California, 132 Cal. Rptr. 680 (1976); U.S. Supreme Court Docket No. 76-811.

7. BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES at 361.

and violates § 8(b)(1)(A) of the National Labor Relations Act. Gould notes the paucity of cases involving union discrimination that have gone to the NLRB, and his speculations as to the extent to which the Board could exercise influence (as in, finding an affirmative duty to bargain about an employer's discriminatory practices) are particularly interesting.

The author also explores the use of the private dispute resolution processes which the parties negotiate in collective bargaining agreements to settle problems involving discrimination. Non-discrimination clauses are increasingly being included in collective bargaining agreements to comply with federal law, which would make discrimination claims *prima facie* arbitrable. Title VII is written and has been interpreted to foreclose the prospect that an employee could be required to elect one avenue over another (even EEOC or state Fair Employment Practices Commissions determinations are not *res judicata* in federal court). However, if arbitration could offer an aggrieved worker a reasonable opportunity to present his claim, with an expectation that it would be heard in the context of the applicable federal law, there are numerous advantages to the relative informality of an arbitration proceeding as opposed to a full-dress District Court action. The EEOC, currently plagued with an enormous backlog of cases, could turn its attention to non-union situations. The book's most concrete suggestions concern the reform of arbitration so that its presently questionable usefulness in discrimination cases could be enhanced.

It is unfortunate that a startling number of typographical errors detract from the readability of this extremely provocative and interesting work. Although inclusion of the full text of Title VII and relevant sections of the NLRA would have given the reader ready access to relevant material and added to the value of the book, the extensive footnotes and excellent indices make *Black Workers in White Unions* a research and reference asset.

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BOOKS RECEIVED

THE IMPACT OF INFLATION AND DEVALUATION ON PRIVATE LEGAL OBLIGATIONS. By Eliyahu Hirschberg. Ramat-Gan, Israel: Bar Itan University Press. 1976. Pp. 384. In his first book, *The Nominalistic Principle,* Dr. Hirschberg criticized the doctrine that a contract amount remains fixed regardless of the changes that occur in the purchasing power of money due to inflation, deflation, devaluation or revaluation. His argument was that a contract amount at repayment should reflect changes in the purchasing power of money. In his most recent publication, this theory is explored in the context of private legal obligations in contracts and torts. Dr. Hirschberg's criticism centers on the refusal of courts and legislatures to deviate from the unit concept of currency and to adopt a value concept in cases where a gross disparity arises in the expectations of the parties to the contract due to devaluations and inflations in the value of currencies.

JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE JURIES. By John M. Van Dyke. Cambridge, Mass.: Ballinger Publishing Company. 1977. Pp. ix, 426. $15.00. Emphasizing the fundamental role of the jury as the collective conscience of the community, Professor Van Dyke details how the present jury selection system fails to represent significant segments of the American population, *e.g.,* Blacks, Chicanos, women, the aged, the young, and the poor, who would add different perspectives to that collective conscience. To eliminate the demographic distortion that is caused by excuses, challenges, and the use of voter registration lists to determine jury pools, the author suggests several proposals such as establishing a purely random scheme for the initial selection of prospective jurors, limiting excuses only for medical hardship, and sharply curtailing the questioning of jurors

and peremptory challenges. Professor Van Dyke concludes his book with a discussion of "jury nullification" in which he argues that juries should be allowed increased discretion in deciding questions of law.

LABOR RELATIONS YEARBOOK. Prepared by BNA Editorial Staff. Washington, D.C.: Bureau of National Affairs, Inc. 1977. Pp. v, 618. $16.00. The 12th annual volume of the Yearbook provides a record of the developments in labor-management relations during 1976. Contained within is a section analyzing significant decisions handed down by the National Labor Relations Board and the courts during the year. The editors have compiled a chronology of major events, an index of major contract settlements, and a series of tables containing basic economic data used by those engaged in the conduct of labor-management relations. A major portion of the book consists of reports and articles concerning collective bargaining and industrial relations, various labor relations conferences, labor organizations and their activities, and the role the Federal Government plays in labor relations through such agencies as the N.L.R.B., the Equal Employment Opportunity Commission, and the Federal Mediation and Conciliation Service.

PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT. By Gary J. Jacobsohn. Ithaca, New York: Cornell University Press. 1977. Pp. 214. $12.50. Professor Jacobsohn argues that as a judicial philosophy governing constitutional adjudication, "statesmanship" is preferable to either the natural rights approach characterized by *Lochner,* or the pragmatic approach of the Progressive realists as embodied in the opinions of their offspring, the Warren Court. According to Jacobsohn, both of these approaches, "albeit for different reasons, abandoned the public interest." Borrowing from the writings of Alexis de Tocqueville, he defines a judicial statesman as "one who, at a minimum, is 'wise to discern the signs of the times' and yet 'slow to turn away from the current when it threatens to sweep [him] off.'" To rebut the contention that such qualities are only to be found in "Platonic Guardians," Jacobsohn points to Chief Justice Hughes's "masterful opinion in *Home Building and Loan Association v. Blaisdell*" (the Minnesota mortgage moratorium case), as well as other sources. Jacobsohn concludes that a "statesmanlike stance" will better "accommodate the demands of stability and change in constitutional adjudication," while fostering the power of the Court, which depends, in the final analysis, upon public opinion.

THE PUBLIC USE OF PRIVATE INTEREST. By Charles L. Schultze. Washington, D.C.: The Brookings Institution. 1977. Pp. viii, 93. $7.95.

Federal intervention and regulation of the private sector has become strikingly more complex, ambitious and pervasive in the last twenty-five years. Rather than concentrating its efforts at maximizing the use of techniques that modify the structure of private incentives and the subsequent behavior of private producers and consumers, our political system invariably chooses the "command-and-control" method of intervention. In his book, Mr. Schultze analyzes the reasons for that bias, estimates its costs and consequences, and suggests that alternatives that embody incentives, information supplying and institution building would be a superior method of accomplishing the desired results.

Soviet Military Law: Judicial and Non-Judicial Punishment†

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Since the Bolsheviks came to power in Russia in 1918, there have been significant changes in Soviet military law. In this article, Major Sims explores the current Soviet military law in both the areas of judicial and non-judicial disciplinary punishment. The nature of this law, including procedural and substantive provisions, is examined with emphasis upon the disciplinary code of 1975, the derivative law of the republics, and the new Soviet Constitution of 1977. In addition, some pertinent comparisons to United States military and civilian practice are made.

Even in this era of detente, the United States' historic concern with the activities of the Union of Soviet Socialist Republics has not relaxed — primarily because of the Soviet Union's continued pursuit of the Communist objective of maximizing the power of its state and expanding its influence and authority abroad. While a few articles examining the Soviet legal system have appeared in Western publications,[1] there has been surprisingly little written concerning its military legal system.

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1. *See generally* Funk, *Lessons of Soviet Jurisprudence: Law for Social Change versus Individual Rights*, 7 IND. L. REV. 449 (1974); Hazard, *Soviet Model for Marxian Socialist Constitutions*, 60 CORNELL L. REV. 985 (1975); Schröder, *Supremacy of the Communist Party of the Soviet Union Recognized in International Law?*, 70 AM. J. INT. L. 322 (1976); Debate, *Worlds Apart U.S. and Soviet Ideas about Freedom*, 4 CIVIL LIB. REV. 46 (1977); Note, *Civil Procedure in U.S.S.R.*, 7 CASE W. RES. J. INT. L. 211 (1975); Comment, *Death Penalty in the Soviet Union*, 5 AM. J. CRIM. L. 225 (1977).

Admittedly, a troublesome obstacle encountered by those interested in studying Soviet military law is the lack of pertinent material available from Soviet sources. Soviet authorities treat the military,[2] especially information concerning its precise functioning, with the utmost secrecy. Indeed, the paucity of Soviet military legal cases available for study creates an intellectual vacuum in which occasional speculation is necessary. However, a sufficient sampling of codified Soviet law and procedure exists to make possible a reasonably realistic appraisal of the Soviet military legal scheme.

This article attempts to provide a concise survey of the fundamental aspects of Soviet military law and, where appropriate, refers to United States military and civilian practice to present points of comparison. In this way, the reader may begin to appreciate the salient differences and similarities between the two systems. Interestingly, both military legal systems have been affected greatly by the civilian legal structures and prevailing national political philosophies of their respective countries.

The scope of the article includes examination not only of judicial punitive mechanisms but also of the non-judicial disciplinary punishment which can be meted out to Soviet servicemembers. It is seen that military courts in the Soviet Union are empowered to try significantly more numerous classes of nonmilitary citizens than are their American counterparts. In fact, virtually any Soviet citizen may be tried by a military court if he or she acted as an accomplice in committing a military crime. To the contrary, United States military courts do not have absolute jurisidiction over anyone, even servicemembers, and gain their power to adjudicate only where there is a service connection with the crime committed.[3] Thus, in time of peace, the military legal system of the Soviet Union has a potentially greater impact upon its society than that of the United States.

2. The Soviet Military has approximately 3,650,000 members in the armed forces, including 1,825,000 in the Army; 450,000 in the Navy; 450,000 in the Air Force; 6,800,000 reserves; and 350,000 para-military forces. THE WORLD ALMANAC AND BOOK OF FACTS 1978 at 583. In contrast the American armed forces have a total of approximately 2,229,834 members, including 778,839 in the Army; 528,700 in the Navy; 188,938 in the Marine Corps; 580,185 in the Air Force; and 38,918 in the Coast Guard. INFORMATION PLEASE ALMANAC 418 (32d ed. 1978).

3. *See* O'Callahan v. Parker, 395 U.S. 258 (1969), where the court held an offense must be service connected to come under military jurisdiction. However, *O'Callahan* does not apply to offenses committed by a soldier abroad. Wimberly v. Laird, 472 F.2d 923 (7th Cir.) *cert. denied,* 413 U.S. 921 (1973). *See also* United States v. McCarthy, 25 USCMA 30, 54 CMR 30 (1976). Civilian defendants of land and naval forces are also excluded from courts-martial jurisdiction. Kinsella v. U.S. *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957). Nor may a military court have jurisdiction over one discharged from the armed forces even if the offense is committed prior to discharge. United States *ex rel* Toth v. Quarles, 350 U.S. 11 (1955). Arguably, however, military courts have jurisdiction over enemy civilians during time of war. *Ex parte* Milligan, 4 Wall 2 (1866). *See generally* Bishop, *Courts-Martial Jurisdiction Over Military-Civilian Hybrids,* 112 U. PA. L. REV. 317 (1964). Everett, O'Callahan v. Parker: *Milestone or Millstone in Military Justice?* 1969 DUKE L. J. 853 (1969); Mills, *O'Callahan Overseas,* 41 FORD. L. 325 (1972); Annot. 14 ALR Fed. 152 (1973).

I. HISTORICAL PERSPECTIVE

A. Foundations

Shortly after the Bolsheviks came to power, a military order was issued eliminating military ranks, titles and salutes.[4] Subsequently, on January 12, 1918, another order was issued designed to form a socialist army based on the election of officers and "mutual comradely discipline and respect."[5] Any "equalization" was short lived since the realities of the situation, based on military necessity, compelled the recognition of military superior-subordinate relationships.[6] Leon Trotsky early envisioned this and set out to reestablish discipline in the summer of 1918.[7] Military conscription was established on May 29, 1918, with new laws being introduced periodically through 1967.[8] Early in 1919, a code was promulgated so that discipline could be uniformly enforced.[9]

The disciplinary demands of the Soviet military are currently defined in the Disciplinary Code of the Armed Forces of the U.S.S.R., which was issued in 1975.[10] Each code since 1919, although individually reflecting the period of adoption, entrusts to non-commissioned as well as commissioned officers certain disciplinary powers and authority to reward meritorious conduct.[11] Despite these similarities, however, there

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4. Decree on the Equalization of Rights of All Serving in the Army, *as cited in* J. MEISEL & E. KOZERA, MATERIALS FOR THE STUDY OF THE SOVIET SOCIETY 37-38 (1950).

5. E. WOLLENBERG, THE RED ARMY 41 (1973).

6. Gsovshi, Regulation of Service of Higher, Senior, and Middle Commanding Personnel of the Red Army, order of the Military Council of the U.S.S.R., No. 225, of 1938, *as cited in* I SOVIET CIVIL LAW 142-43 (1948).

7. M. FAINSOD, HOW RUSSIA IS RULED 465-66 (1967).

8. The most visible change in the 1967 law is the reduction in the length of military service. Conscripts under the 1967 law are required to serve only two years in the army, navy, air arm, coast guard, and the border and security troops. Three years is the requirement for service on naval ships, vessels, coast guard combat units, and border troops maritime units. Those with higher education serve only one year. Also, the age of induction was reduced from 19 to 18 years with call-ups in May-June and again in November-December to coincide with the completion of agricultural harvests. 19 CURRENT DIGEST OF THE SOVIET PRESS [hereinafter cited as C.D.S.P.] No. 45 at 4 (Nov. 29, 1967). For discussion of the conscript laws through 1939, *see* SOBRANIE UZAKONENII I TASPORIAZHENII RABOCHEGO I KREST IANSKPGO PRAVITEL STVA (COLLECTION OF LAWS AND REGULATIONS OF THE WORKER AND PEASANT GOVERNMENT) art. 518 (1917-1918) [hereinafter cited as COLLECTED LAWS R.S.F.S.R.]; *id.* art. 528 (1922); COLLECTED LAWS U.S.S.R., art. 786 (1925); *id.* art. 463 (1928); *id.* art. 449 (1930); *id.* art. 424 (1930). *Vedomosti,* No. 32 (1939), *as cited in* H. BERMAN & M. KERNER, SOVIET MILITARY LAW AND ADMINISTRATION 35-40 (1955).

9. *See* SOVIET MILITARY CODE (1919).

10. II COLLECTION OF LAWS OF THE U.S.S.R. 339 *as cited in* CODE OF DISCIPLINARY PUNISHMENT OF THE U.S.S.R. ARMED FORCES, (U.S. Dept. of Army translation) [hereinafter cited as CODE 1975].

11. For discussion of the codes from 1919-1946, *see* H. BERMAN & M. KERNER, *supra* note 8, at 44-45. Regulations as amended through 1973 can be found in MILITARY PUBLISHING HOUSE DISCIPLINARY REGULATIONS OF THE ARMED FORCES OF THE U.S.S.R. (1973) (American Bar Associa-

are strikingly dissimilar elements. Certain evolutionary trends display an increase in the severity of disciplinary penalties and increasing emphasis on obedience to orders, military courtesy and distinctions based on rank.

The original Bolshevik theory, embodied in the early codes, was that the Red Army was to be motivated by a tremendous spirit of revolutionary zeal.[12] In contrast, the emphasis in the latest set of disciplinary regulations is an appeal to the patriotism of the military members by calling upon them "to defend the freedom and independence of our Motherland, to defend its national interests and to safeguard the peaceful construction labor of the Soviet people who are building communism. . . ."[13] The focus has thus tended to move away from revolutionary zeal to that of patriotism toward the homeland and communism.

The Communists have called military discipline the "most important condition" of readiness.[14] While recognizing the need for internal discipline to motivate the military, the Communist Party early sought to gain absolute control of the armed forces. In order to instill Communist Party discipline and control, changes in the military were required. Many, if not most, of the early commanders of military units had been Tsarist officers or soldiers.[15] Trotsky installed a system of parallel heirarchies consisting of the military command on one side and political commissars on the other. The political commissars were to guard against treason and sabotage and to insure the political reliability of the armed forces.[16] Military orders were required to be counter-signed by the political commissars. The signature attested that there was no reason to believe that any counterrevolutionary objective existed.[17]

In October 1942, political commissars were abolished. In their place individuals were reappointed as deputies for political affairs under their

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tion Standing Committee on Education about Communism translation) [hereinafter cited as CODE 1973]. The most recent code was approved on July 30, 1975. SBORNIK ZAKONOV S.S.S.R. art. 339 (Supreme Soviet Presidium Ukase), II COLLECTION OF LAWS OF THE U.S.S.R. 339 *as cited in* CODE 1975, *supra* note 10.

12. H. BERMAN & M. KERNER, *supra* note 8, at 45.

13. CODE 1975, *supra* note 10, preamble.

14. *Id.* at 1-4. *See generally* V. I. LENIN, 29 COLLECTED WORKS 226; 30 COLLECTED WORKS 405. The regulations state that although discipline is based on political consciousness and education, where persuasion does not work, compulsion is not precluded. Commanders are admonished to unceasingly support "high military discipline." CODE 1975, *supra* note 10, preamble.

15. H. BERMAN & M. KERNER, *supra* note 8, at 12-21.

16. The order states: "The [political] commissar shall see to it that the army does not become a thing apart from the entire Soviet system and that the various military establishments do not become foci of conspiracies or instruments against workers and peasants." D. WHITE, THE GROWTH OF THE RED ARMY 74-75 (1944).

17. *Id.* at 77.

respective commanders and "strict one-man control" was instituted.[18] Emphasis on political control of the military was not lessened as a result of the downgrading of the commissars. Rather, this action served to increase control and apparently reflected the belief of the Communist Party in 1942 that political control of the military had finally been accomplished.

Today, a complex but extremely integrated system for political control permeates the Soviet military.[19] First, over ninety per cent of all army officers and twenty-two per cent of all army personnel are party members.[20] Second, the Committee on State Security (KGB) operates in special counterintelligence sections through the regimental level, reporting directly to the Committee. This organization is designed to prevent political disloyalty and dissidence.[21] Third, the Main Political Administration (PUR) supervises the Communist Party and Komsomol (Young Communist League) within the military, including all propaganda and educational activities.[22] Fourth, in excess of sixty per cent of the military are Komsomol members.[23] Fifth, Party members are obligated to maximize the Party's influence in the military and to report all deficiencies noted. It is clear, therefore, that the Communist

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18. Order of the Presidium of the Supreme Soviet of the U.S.S.R. *as cited in Vedomosti* No. 38 (1942), *translated in* H. BERMAN & M. KERNER, DOCUMENTS ON SOVIET MILITARY LAW AND ADMINISTRATION 18-20 (1955). Among others, detailed duties were those of agitation-propaganda, cultural-education, and with the commander he was required to attest to the commanding and officer personnel of the unit. In addition, a detailed political characterization of the unit personnel was to be composed.

The proportion of Tsarist officers declined from 76% in 1918 to 10% in 1928 and the Communist Party replaced those officers and non-party officers with party members. M. FAINSOD, *supra* note 7, at 474. *See generally* POLITICAL CONTROLS IN THE SOVIET ARMY (Z. Brezezinski ed. 1954). Thus, the Party felt that the time was ripe to set up a type of unity of command with the political commissars being subordinate to the commanders. D. WHITE, *supra* note 16, at 232.

During the military purges of 1937, the political commissars were restored to equality with the commanders in an effort to provide greater Communist Party control over the Army which was then being purged. Article I of the statute provided that the political commissar had equality with the commander but not superiority. Awards, promotions, and demotions were to be accomplished jointly by the political commissar and the military commander. COLLECTED LAWS U.S.S.R. art. 233 (1937), *translated in* H. BERMAN & M. KERNER, *supra*, at 12-15.

19. PUBLISHING HOUSE OF THE MINISTRY OF DEFENSE U.S.S.R., SPRAVOCHNIK OFITSERA PO SOVETSKOMU ZAKONODATEL' STVU (Officers Handbook on Soviet Legislation) 14-15 (1966), *translated in* UNITED STATES DEPARTMENT OF COMMERCE, JOINT PUBLICATIONS RESEARCH SERVICE [hereinafter cited as J.P.R.S.] 46578 at 16-17 (1968).

20. Major General S. Baranov, *V. I. Lenin Zashchite Sotsialisticheskovo Otechestva* (V. I. Lenin on the Defense of Socialist Fatherland) VOENNYI VESTNIK 8-19 (January 1974). *See also* Krasnava Zvezda, March 24, 1972, at 1 *as cited in* Myer, *Soviet Army Discipline,* 55 MILITARY REVIEW 77-90 (Nov. 1975).

21. Myer, *supra* note 20, at 80.

22. The PUR has a comprehensive and thoroughly supervised program which provides political programs to its chain to include company level units. Additionally, the PUR members report the status of army morale and combat capability in terms of discipline. *Id.* at 79.

23. *Id.*

Party, guided by Marxist-Leninist principles, is the impetus for all legal acts, or at least must give its blessing to Soviet military law and its corresponding implementation.[24]

B. Socialist Legality — The Basis of Soviet Law

It is important for persons studying Soviet law to recognize its basis. The "rule of law," as it is known in the United States and many other countries, is not the cornerstone of the Soviet legal system. Such systems are said by the Soviets to be nothing more than class weapons serving the needs and interests of the dominant class.[25] Although utopian Communist society anticipates no need of law or state, the Soviet Union presently recognizes a need for law to assist in the building of communism by directing all facets of society.[25] In contrast to American law, Soviet law — based on "socialist [legality] — [is] the socially useful instrument for social development and for resolving the tasks of socialist revolution and of communist construction."[27] Basically, "socialist legality" consists of those legal norms and institutions determined by the Communist Party to be compatible with the needs of building communism. In the Soviet Union, the judicial bodies, military officials and other governmental officials are implementers of Party policy, since Party policy is government policy.[28] Thus, Soviet law, even as embodied in the Soviet Constitution, is subordinate to the building of communism.[29] Soviet military law reflects this basic theme. Socialist legality is the guiding light and has largely shaped military application

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24. "The building of communism is the stated goal of the Soviet Union to which all institutions, including state and law are subordinated." B. RAMUNDO, THE SOVIET LEGAL SYSTEM: A PRIMER, 3, 11 (1971). *See also* J. HAZARD, THE SOVIET SYSTEM OF GOVERNMENT 242, 243 (4th ed. 1968). A more detailed history of Soviet military law through the early 1950's can be found in H. BERMAN & M. KERNER, *supra* note 8.

25. K. MARX & F. ENGELS, MANIFESTO OF THE COMMUNIST PARTY, *reprinted in* 50 GREAT BOOKS OF THE WESTERN WORLD 419, 427 (1952).

26. B. RAMUNDO, *supra* note 24, at 4.

27. S. S. Alekseev, *V. I. Lenin v Prave v Sotsialislicheskom Obshchestve* (V. I. Lenin on Law in Socialist Society), S.G.I.P. No. 9 at 3, 5 (1969), *as cited in* B. RAMUNDO, *supra* note 24, at 6; *see also id.* at 23 (definition of socialist legality).

28. Alekseev, *supra* note 27, at 10, *as cited in* B. RAMUNDO, *supra* note 24, at 6.

29. An example of this subordination is demonstrated by the 1936 constitutional guarantees of freedom of speech, press, assembly, street processions, and right of association which are all conditioned by the requirement that they must be "in conformity with the interests of the working people, and in order to strengthen the socialist system." CONST. U.S.S.R. arts. 125-126 (1936). In a report by L. Brezhnev, Communist Party of the Soviet Union (C.P.S.U.) General Secretary and Chairman of the Constitution Commission, on May 24, 1977, he stated that the new constitution reaffirmed the principles in the 1936 version, but that the rights and freedoms "cannot and must not be used against our social system . . . ." 24 NEW TIMES 30 (1977).

Lenin stated that law was directly related to societal processes and that the nature of socialist law depended on the stage of revolution and on the nature and intensity of class strife. B. RAMUNDO, *supra* note 24, at 6.

of law. Thus, the general military regulations which are based on concepts of socialist legality are used to "[strengthen] military discipline, the significance of which is becoming steadily greater in securing combat efficiency and troop combat readiness."[30]

Soviet military commanders have been given a wide range of statutes and regulations by which to accomplish military discipline. The statutes and regulations may be divided into several categories: administrative,[31] non-judicial,[32] and judicial.[33] This article while touching upon administrative powers, primarily addresses non-judicial and judicial powers.

II. NON-JUDICIAL POWERS

A. Policy Basis

Soviet writers consistently state that there are no "trivial items" in military regulations. "Each and every line, each and every provision is of vital importance to the military."[34] Thus, although Soviet military law contemplates using the least corrective action against the transgressor which will remedy the situation,[35] since each provision is thought to be critical, the interests of "the Motherland . . . [require commanders] not to leave uncorrected even one delinquency by a subordinate."[36] The orders of a superior are "law for . . . subordinates

30. Col. Gen. J. Gornyy, Chief Military Procurator, *Obeying Laws and Regulations,* Krasnaya Zvezda, Oct. 24, 1976 at 2, *translated in* J.P.R.S., *supra* note 19, 68517 at 61-65.

31. Administrative acts are those acts not normally considered to be punishment which can be taken outside of the nonjudicial or judicial arenas. These include reassignment, barring a soldier from reenlisting, removing him or her from a promotion list, and similar types of acts. The American military refers to these measures as nonpunitive and American commanders are expected to use them to the maximum extent possible in furthering the efficiency of the command without resorting to the imposition of nonjudicial punishment. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 128c (Rev. ed. 1969) [hereinafter cited as MCM].

32. Nonjudicial power may be used in the case of a minor offense. The formalities are less than those required for a judicial proceeding and, of course, the maximum punishment involved is considerably less than that which can be imposed in a judicial setting. An American Article 15 proceeding is the American counterpart to the Soviet nonjudicial proceeding. 10 U.S.C. § 815 (1970). *See generally* U.S. Army Regulation 27-10, Military Justice, 15 Aug. 1977, ch. 3. Unlike the American Article 15 which is described as normally involving a "minor" offense, but which in actuality could involve even a "major" offense such as murder, Soviet law defines which offenses may be tried judicially or which may be disposed of nonjudicially. *See* R.S.F.S.R. CRIMINAL CODE ch. 12 (1960).

33. *See* CONST. U.S.S.R., § VII (1977). The American military judicial system is described in MCM, *supra* note 31.

34. J.P.R.S., *supra* note 19, at 63. An example cited is that of motor vehicle accidents where non-licensed drivers commit accidents due to poor knowledge of traffic regulations. *Id.* at 64.

35. CODE 1975, *supra* note 10, art. 88.

36. Statute of July 30, 1975, SBORNI ZAKONOV S.S.S.R. art. 339 (Code of Disciplinary Punishment of the U.S.S.R. Armed Forces) (Supreme Soviet Presidium Ukase), II COLLECTION OF LAWS OF THE U.S.S.R. 339 *as cited in* CODE 1975, *supra* note 10.

[and] . . . must be carried out unquestioningly . . . ."[37]

Although some western military forces have permitted their recruits forms of behavior and modes of dress that had previously not been tolerated,[38] the Soviets have been reluctant to make similar concessions. They have youth problems, but have attempted to adapt to them by the application of peer pressure. The Soviet military authorities fear deviations from regulations because they feel that even slight variations might encourage others to similar behavior.[39]

The Soviet's emphasis on peer pressure, "social forces," and "societal consideration" of undesirable conduct constitutes a major difference between the American and Soviet approaches to military discipline.[40] Relying on slogans, lectures and meetings to correct deviant behavior, the Soviets also recognize that commanders must actively supervise and use incentives and other pressure to effect desired changes. Time honored practices change slowly, so general exhortation is predominant.[41] Where public censure of military discipline and social order is desired, meetings to consider the deviation are held by the offender's constituency (collective) in accordance with the decisions of commanders or superiors.[42] Not only are sanctions imposed for violations of military discipline, but also for transgressions considered

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37. *Id.* art. 6. The Code makes no distinction between "illegal" and "legal" orders as enunciated in U.S. military law as well as international law. Thus, the Soviets do not apparently provide the "illegal" order defense. For a related discussion of the failure of the Soviets to enact criminal legislation implementing the "grave breaches" provision of the Geneva Conventions of 1949, see B. Ramundo, Soviet Criminal Legislation Implementing The Rules of Land Warfare, (date unknown) (unpublished manuscript on file at the International Affairs Division, Office of the Judge Advocate General, Dept. of the Army).

38. Among the adjustments made by Western forces, the Dutch allow their soldiers to wear long hair and beards. Also, these soldiers do not have to wear pressed uniforms, helmets, salute officers or shine their brass insignia. The Dutch have also permitted recognition of military unions along with collective bargaining and demonstrations. *See* U.S. NEWS AND WORLD REPORT, May 12, 1975, at 82, col. 2. The U.S. Navy currently allows beards and all American military services now allow moderate length Afro-style haircuts.

39. *See* H. GOLDHAMER, THE SOVIET SOLDIER: SOVIET MILITARY MANAGEMENT AT THE TROOP LEVEL 142-43, 152 (1975). A book review appears in *Literaturnaya Rossiya,* Feb. 1971, at 2, which indicates that some Soviet soldiers misbehave so that they can be discharged. *See* KOMMUNIST VOORUZHENNYKH SIL [KVS] No. 23 at 5-8 (Dec. 1969) where it is stated that clubs were organized for preinduction-age trainees in order to alleviate some of the youth problems.

40. *See, e.g.,* arts. 5, 43, 44, CODE 1975, *supra* note 10. The 1975 Code mentions as a goal the solidifying of the "military collective", whereas the 1973 version does not. *See* art. 5, CODE 1973, *supra* note 11, (1960 version).

41. *Pravda,* Sept. 18, 1971, at 2. "[The] primary task of the political worker is persistently to master the propagandist's art of speech." MILITARY PUBLISHING HOUSE, MILITARY PEDOGOGY 313 (U.S. Dept. of Air Force translation 1973).

42. CODE 1973, *supra* note 11, art. 44 (1960 version). The offending acts of soldiers and sailors are considered by a meeting of their unit personnel, non-commissioned officers by meetings of other non-commissioned officers and officers by meetings of other officers. In addition, the acts of officers and some enlisted persons may also be considered by Officers' Comrades' Courts of Honor or Comrades' Courts of Honor, respectively. *Id.* art. 44.

detrimental to Soviet military or civil society. Where such violations occur, a superior is admonished to "remind the offenders of their service obligations and, if necessary, subject them to disciplinary punishment."[43]

The materials available for study do not allow quantitative estimates to be made for the frequency of violations of military discipline. Also, no data is available on what punishments have been imposed. It is reasonable to believe, however, that violations occur frequently since Soviet writers consistently emphasize the need and the means for tightening conformity with regulations.[44] Among the disciplinary problems often mentioned are: insubordination;[45] violations of technical regulations;[46] slander;[47] falsifying records;[48] exploiting inductees and younger soldiers and sailors;[49] property offenses;[50] hooliganism;[51]

43. *Id.*, article 43. This article replaced article 30 of the 1973 Code, and has no reference to "transfer [of] the matter for societal consideration." A review of the current article 44 shows, however, that "societal consideration" is still very much in vogue.

44. H. GOLDHAMER, *supra* note 39, at 145. The U.S. military estimates that during a 12 month period there are approximately 330,000 impositions of punishment under article 15. *See* Barnett v. Scott, Misc. Docket No. 77-80, Navy gov't motion to supplement appendix at 2 (C.M.A. 1978).

45. A naval aviator had a tendency to be impertinent to seniors and did not completely understand the necessity of military subordination and, thus, had to be corrected. Krasnaya Zvezda, Aug. 18, 1971, at 2. In some cases, the command of a superior officer can be resisted where it is "foolish." Such resistance was condoned where the commanding officer required subordinates to sign a form that they had been warned against alcoholism and must not allow drunkenness in their subordinates. The commander was reprimanded for attempting to solve the alcohol problem by "paper work." Krasnaya Zvezda, Dec. 9, 1973, at 3. The Communist Party has eroded the authority of the commander since subordinates can criticize their commanders at Party meetings as long as the subordinates do not criticize direct orders. *See* H. GOLDHAMER, *supra* note 39, at 145.

46. An example is where a commander allowed only 40 minutes for weapon cleaning when the regulations required one hour. Krasnaya Zvezda, August 22, 1971, at 2.

47. This is felt by the Soviets to be one of the most objectionable types of violations for several reasons, the most important being that it weakens the surveillance value of the intelligence system. KVS No. 15 at 25-32 (Aug. 1971).

48. These violations are no doubt based on the incentive to excell. Krasnaya Zvezda, July 26, 1973, at 2.

49. More experienced soldiers often treat inductees and younger soldiers with contempt and otherwise "exploit" them. Since the conscription age of Soviet military is now 18 years, this problem had reached awesome proportions. KVS No. 19 at 71-75 (Oct. 1972).

50. Most crimes against property are state crimes since there is no private property in the Communist system. There is, however, personal property which is to be distinguished from private property. Most offenses in the military occur in the post-exchange system, procurement and military goods' inventory, and military pay offices. H. GOLDHAMER, *supra* note 39, at 150.

51. *Id.* at 152. The term "hooliganism" had become popular with Russian legal scholars even before the revolution to describe misconduct of a disorderly, rowdy, malicious and purposeless nature. It is one of the most frequently committed crimes in the Soviet Union. *See* H. BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE 34 (1966). The term currently defines a wide range of "intentional actions [which violate the] public order in a coarse manner and [express] a clear disrespect toward society." R.S.F.S.R. CRIMINAL CODE, art. 206 (1966). The United States Supreme Court would no doubt hold such a statute to be unconstitutionally vague. *See* Palmer v. City of Euclid, Ohio, 402 U.S. 544 (1971).

uniform offenses;[52] military courtesies;[53] drunkenness;[54] and absence without leave.[55]

Where an act is criminal in nature, the law provides various penalties according to the degree of culpability and some sanctions may be imposed by either judicial or by non-judicial disciplinary procedures. A superior authority has discretion to refer the matter to military investigative channels or to sanction the accused by non-judicial punishment.[56] Where judicial proceedings are considered appropriate by the military procurator (the Soviet equivalent of an American prosecutor), a military commander cannot insulate his subordinates from judicial sanction by imposing non-judicial punishment.[57] Under the American system, a commander who has been designated a courts-martial convening authority for the level of courts-martial which is desired can authorize the judicial proceedings. The trial counsel (American military prosecutor), however, does not have independent authority either to convene the court or to refuse to prosecute.[58]

In regard to similar umbrella type statutes applying to the United States military, see U.C.M. J. Arts. 133, 134, 10 U.S.C. §§ 933, 934 (1970). Both articles have been attacked as being void for vagueness and facially invalid due to overbreadth. The claim was that art. 133 punishes commissioned officers for "conduct unbecoming an officer and a gentleman," and, among other provisions, art. 134 punishes "all disorders and neglects to the prejudice of good order and discipline in the armed forces. . . ." The United States Supreme Court, however, has sustained these articles because the United States Court of Military Appeals and the MCM, *supra* note 31, had construed each article in a narrow and constitutionally permissible manner. Parker v. Levy, 417 U.S. 733 (1974). The Supreme Court also went on to state that the proper standard of review for a vagueness challenge to U.C.M.J. articles is the standard that applies to criminal statutes regulating economic affairs. 417 U.S. at 756-57.

52. About two thirds of all military personnel detained by Moscow military police patrols had violated uniform regulations. Many complain that some uniform items were not available and were upset about being reprimanded for manufacturing their own. Krasnaya Zvezda, July 13, 1972, at 4.

53. H. GOLDHAMER, *supra* note 39, at 148. This is thought by many to be surface evidence of a deeper problem. One-sixth of all officers stopped by military police patrols are detained for offenses involving saluting. *Id.*

54. *Id.* at 152. On alcohol problems in Soviet civilian society, see Connor, *Alcohol and Soviet Society*, 30 Slavic Review 570 (1971).

55. H. GOLDHAMER, *supra* note 39, at 152.

56. CODE 1975, *supra* note 10, art. 45. The actual referral can only be accomplished by the superior who has the legal authority to refer the material to military investigative agencies. Although the Soviet commander can refer the case for investigation, whether the case is referred to trial apparently depends on the procurator who operates independent of the commander. The procurator's function is discussed more thoroughly elsewhere in this article. *See* § IV(B) *infra*.

In the American system, an authorized commander can begin an investigation and if regulations allow convene a courts-martial. *See* U.C.M.J. arts. 32, 34, 10 U.S.C. §§ 832, 834 (1970).

57. CODE 1975, *supra* note 10, art. 46. An American serviceperson cannot be tried by a courts-martial for an offense where he or she was given nonjudicial punishment and the maximum punishment which could be imposed by a courts-martial was less than a year's confinement and no punitive discharge. *See* MCM, *supra* note 31, *para.* 68*g*.

58. J. Cooke, Ethics of Trial Advocates (Army Lawyer, Dept. of Army Pamph.) No. 27-50-60 (Dec. 1977) at 7. *See also* MCM, *supra* note 31, *para.* 44*f*(5); United States v. Phare, 21 U.S.C.M.A. 244, 45 C.M.R. 18 (1972); United States v. Whittingon, 36 C.M.R. 691 (A.B.R.

Whatever disciplinary sanction is imposed must conform to the degree of culpability and the seriousness of the offense.[59] It should be kept in mind that the Soviet system is based primarily on a requirement of precise and unswerving obedience to orders, and the emphasis is on prompt retribution, deterrence and education. Accordingly, a Soviet soldier cannot refuse to accept non-judicial punishment and demand a trial as can his American counterpart.[60]

B. Sanctions

The Code as originally promulgated in 1960 made confinement an "extreme" sanction to be used only when other measures employed by the superior have proven unsuccessful.[61] Confinement to the stockade for up to ten days can be imposed on soldiers, sailors and non-commissioned officers depending on the rank and position of the superior.[62] Females cannot be non-judicially confined.[63] Male junior officers can be arrested with accompanying confinement in the stockade for up to ten days, while senior officers may only be confined for up to five days.[64] The right to non-judicially confine subordinate officers extends to commanders and superiors having equivalent authority of

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1966). Although technically the American military prosecutor does not have power to convene the courts-martial, or to refuse to prosecute, in actual practice the convening authority follows the advice of the prosecutor in the vast majority of cases. Also, the American convening authority is under a duty not to refer unfounded charges to trial. United States v. Duncan, 46 C.M.R. 1031 (N.C.M.R. 1972); art. 30(b), U.C.M.J., 10 U.S.C. § 830(b) (1970).

59. CODE 1975, *supra* note 10, art. 88. Factors which determine the type and means of sanction are: the character of the act, the circumstances of its commission, the previous conduct of the offender, his length of service as well as his degree of knowledge of service procedure. Article 90 cautions a superior not to be hasty in imposing the sanction, in degrading the personal dignity of the deviate or in being rude. Many commanders also apparently determine the guilt of military members when such commanders are not empowered to do so. *See* Gornyy, *supra* note 30, at 63.

60. *See generally* CODE 1975, *supra* note 10. Americans can demand trial by courts-martial in lieu of punishment imposed under U.C.M.J. art. 15, 10 U.S.C. § 815 (1970) except when attached to or embarked in a vessel. MCM, *supra* note 31, *para.* 132.

61. CODE 1960 as amended to 1973; the current Code continues this provision. *See* CODE 1975, art. 89.

62. CODE 1975, *supra* note 10, arts. 48, 49, 50, 51, 70. An army or flotilla commander, commander of a military region, front or fleet commander, is authorized to exercise disciplinary authority to the full extent of the confinement power. Under the 1973 Code, division level commanders, who were lower in rank than the previously mentioned commanders, could exercise these prerogatives to the full extent of that Code. Apparently, the currrent Code removes some of the power previously held by division commanders. *See* CODE 1973, *supra* note 11, art. 46.

63. The special treatment for women appears to conflict with articles 34 and 35 of the new Soviet Constitution approved on October 7, 1977. Article 34 provides that "[c]itizens of the U.S.S.R. shall be equal before the law, irrespective of . . . sex . . ." and art. 35 provides that women shall have equal rights with men. Const. U.S.S.R. art. 35 (1977).

64. CODE 1975, *supra* note 10, art. 69. Under the Code as amended through 1973, there was no distinction between junior and senior officers regarding the length of time for confinement. CODE 1973, *supra* note 11, arts. 54-59.

regimental commander and above.[65]

The confinement provisions of the Soviet Disciplinary Code provide certain time limits and constraints on Soviet military authorities when imposing non-judicial punishment on their subordinates. Whether these provisions are observed as precisely as they are written is speculative. There are indications that commanders regularly fail to observe these time limitations and often exceed the allowable time to impose sanctions. Additionally, there is some evidence that punishment is imposed which is of greater duration than authorized by the Code.[66]

Non-judicial confinement, commonly translated as "arrest" in Soviet documents, is administered under austere conditions. Soldiers, sailors and non-commissioned officers can be confined in either general or solitary cells at the direction of their superiors. Under the 1960 Code, as amended in 1973, these confinees slept on bare cots and were assigned labor for ten hours a day. The 1975 revision makes no mention of these earlier terms.[67] Apparently, the guardhouse is frequently filled to capacity since persons given responsibility to confine are obligated to check for the availability of space.[68]

There are a variety of "educational" non-judicial punishments which can be imposed on male enlisted personnel: admonition; reprimand; severe reprimand; deprivation of the next pass; extra duty for up to five details; subjection to arrest (confinement) for up to ten days; deprivation of the award of "outstanding" soldier; prevention of a promotion to private first class; reduction in position of responsibility of re-enlisted personnel; and reduction in rank for one grade.[69] For male of-

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65. CODE 1975, *supra* note 10, art. 73. The regimental commander's authority allows him to impose confinement on junior officers for only three days. Previously he had been allowed confinement authority for up to five days. *See* CODE 1973, *supra* note 11, art. 54. A division level commander is authorized to impose such confinement for five days. CODE 1975, *supra* note 10, art. 74. He had earlier been allowed to do so for up to ten days. CODE 1973, *supra* note 11, art. 55.

66. The Chief Military Procurator cited officers A. Grudovin, Y. Kisinas, and I. Snopok for regularly exceeding their disciplinary authority. Additionally he observed that there were "gross violations" of the law as to regulations on guardhouse facilities and procedures of receiving and handling gross violations of the law. Gornyy, *supra* note 30, at 62-63.

67. CODE 1975, *supra* note 10. The procedure for confinement is described in appendix 4 of both 1973 and 1975 codes.

68. First term soldiers, sailors, sergeants, and petty officers are not allowed tobacco, matches, lighters or other unspecified articles. They must possess, however, a towel, handkerchiefs, etc., as well as one change of underwear if they are going to be confined for more than seven days. *Id.* Para. 4, app. 4 at 42. Prior to transfer to confinement, all must surrender their service bars, ribbons, decorations and medals of the U.S.S.R. Although enlisted persons and non-commissioned officers are escorted to the stockade, officers are required to proceed without escort. *Id.* Para. 5, app. 4 at 42-43.

69. *Id.* ch. 3. Extra duty is authorized only for enlisted men below the rank of sergeant. The 1975 amendments reduced the maximum punishment which could be imposed by superiors. Maximum confinement under the 1973 Code was 15 days. Additionally, restriction of lower ranking

ficers, with the exception of flag officers, applicable punishments are: admonition; reprimand; severe reprimand; formal notification of substandard performance of service obligation; confinement in stockade of junior officers for up to ten days, and of senior officers for up to five days; reduction in position of responsibility; and reduction in military rank by one level.[70]

Soviet military non-commissioned officers and junior officers have been delegated authority to administer some forms of non-judicial punishment.[71] This is contrary to American practice where a company or equivalent unit commander is the lowest level individual normally authorized to administer non-judicial punishment.[72] Also contrary to American practice is the authority of any Soviet direct superior, and some indirect superiors, to impose punishment.[73] Thus, the Soviet military has authorized not only many lower level non-commissioned officers to impose sanctions, but also a great many more superiors than the American system.

C. Procedure

Although the Code has a section which prescribes the procedure for imposing disciplinary punishments, the section does not provide the detailed due process provisions and written record required by the American system.[74] In fact, this section offers no clue as to what occurs

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enlisted persons to the unit area for one month is not mentioned in the 1975 Code although it was in the 1973 version. *See* CODE 1973, *supra* note 11, art. 36(c). Non-commissioned officers could be restricted under the earlier Code for up to three weeks. *Id.* art. 37. Under the new Code there is no such provision. Moreover, whereas the earlier Codes distinguished between first term lower ranking enlisted and extended term enlisted, the current Code makes no distinction. *See* arts. 36, 37, 38, 49 Code (1960) as amended through 1973.

70. CODE 1975, *supra* note 10, arts. 69, 70. Previously, certain senior officers were not subject to confinement under the Code. CODE 1973, *supra* note 11, art. 50. Currently, regimental commanders, first class warship commanders, and similar senior officers such as colonels and captains first rank are not subject to confinement in the stockade. Notwithstanding the Soviet claim of equal treatment of the sexes, female enlisted and officer personnel are also not subject to arrest with confinement in the guardhouse. CODE 1975, *supra* note 10, art. 70.

71. *Id.* arts. 52-56. Where the Code does not confer specific authority, a superior may employ punishment authority contemplated for the following: junior sergeants, sergeants, and sergeants-major have the authority of squad leaders; senior sergeants and chief sergeants-major possess the powers of deputy platoon commanders; sergeants-major and naval warrant officers have the authority of company or command sergeants-major. *See* CODE 1975, app. 1.

72. U.C.M.J. art. 15, 10 U.S.C. § 815 (1970).

73. CODE 1975, *supra* note 10, arts. 8, 9, and 80. Certain officers who are not direct superiors can impose disciplinary sanctions on military personnel who are not subordinate to them when the violation: involves a breach of the public order; takes place during garrison guard duty or garrison duty; takes place on leave, separate assignment, during treatment in a medical institution, or while incarcerated in the garrison stockade; takes place while traveling on the railroad, by ship or other means. Under earlier Codes, these superiors could impose punishment if the offender's "direct" superior had less authority than the "indirect" superior. *See* CODE 1973, *supra* note 11, ch. 11.

74. MCM, *supra* note 31, para. 133.

when non-judicial punishment is being imposed. Although it appears that a proceeding is virtually whatever a superior deems is necessary, Soviet superiors are cautioned to consider the "nature of the infraction; circumstances under which it was committed; previous conduct of the culprit; and also the period of time he has served and his degree of knowledge of service procedures."[75] Superiors are authorized to punish certain types of offenses more severely, such as committing an offense while intoxicated.[76] The only written requirement is that the punishment imposed be annotated in the offender's service record.[77]

Where a punishment is imposed by a junior commander within the authority granted, a superior commander cannot rescind or reduce the punishment based on its severity. However, a superior can impose a more severe punishment if he finds that the punishment imposed by the junior fails to correspond to the gravity of the offense. This practice is exactly the reverse of the American system where a superior can lessen or rescind the punishment but cannot non-judicially increase it.[78]

D. Execution of Sanctions

In the Soviet socialist state, punishment is said to be aimed at educating the offender and others as well as compelling individuals to obey the law.[79] Since publicity and speed of imposition are important, a disciplinary punishment is executed immediately, or in exceptional cases, not later than one month after imposition. Where the imposed punishment is not carried out through someone's fault, that person can be held liable.[80] Commanders who do not punish errant soldiers can be

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75. CODE 1975, *supra* note 10, art. 88.

76. *Id.* arts. 88,92. The severity of the punishment is increased when the infraction is a repeated one, when it is committed in the performance of official duties, during combat watch, or in an intoxicated condition, or when the infraction is a substantial violation of order. Undoubtedly, the Soviet military has as significant an alcohol problem as the civilian sector since a favorite target of Soviet writers commenting on the crime problem is the presence of alcohol as a causal or precipitating factor in many offenses. *See* W. CONNOR, DEVIANCE IN SOVIET SOCIETY, CRIME, DELINQUENCY, AND ALCOHOLISM (1972).

77. CODE 1975, *supra* note 10, app. 2. All disciplinary punishments, except deprivation of the rank of warrant officer and reduction of officers, not removed by the date of the serviceperson's release to the reserve or their retirement, lose their force at the expiration of one year from date of release. When a serviceperson becomes a warrant officer or officer, he or she gets a new service record with no annotation of punishments and the previous record is destroyed. The United States Army trend is to the contrary, currently making the Article 15 a permanent part of a serviceperson's record. *See* note 106 *infra.* Army Regulation 27-10, Military Justice, 15 Aug. 1977, ch. 3.

78. CODE 1975, *supra* note 10, art. 95. *See also* U.C.M.J. art. 15, 10 U.S.C. § 815 (1970).

79. CODE 1975, *supra* note 10, art. 43. *See generally* Gornyy, *supra* note 30, at 61-65.

80. CODE 1975, *supra* note 10, art. 99. *See also* H. GOLDHAMER, *supra* note 39, at 161. Lenin was quoted in *Voyennoistoricheskiy zhurval,* Feb. 1971, at 13-21, as saying that the deterrent value (of publicity) is "one thousand times greater than the Party cell-Central Committee idiotic quiet handling, without publicity, of a case of criminal procrastination." Imposition of the punishment as distinguished from execution must be accomplished within ten days from the day the infraction

punished under the disciplinary code for a violation of article 6.[81]

Announcement of the punishment imposed is made by written order, in private, in a conference, or before a formation. Such announcements are not made when subordinates to the offender are present.[82] Notwithstanding this practice, however, it is common to cite real names of offenders in published articles, even though subordinates presumably have access to these publications. In fact, where the name is not mentioned the writer often feels compelled to explain his or her reasons such as "he is not doing a bad job now."[83]

One major change between earlier codes and the 1975 version is that an imposed punishment is not "halted" when an appeal (petition) is submitted to the senior commander until the senior rescinds the punishment. The 1960 Code, as amended through 1973, provided that the

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became known to the commander, or from the day that an investigation is completed. CODE 1975, *supra* note 10, art. 96.

81. CODE 1975, *supra* note 10, art. 6. U.S. military practice does not have a comparable provision as to nonjudicial punishment. However, the effective date of a U.S. art. 15 punishment is the date that it was imposed. *See* Army Regulation 27-10, Military Justice, 15 Aug. 1977, para. 3-10a. Thus, if a U.S. commander has imposed any restriction on liberty such as restriction to the unit area or correctional custody (generally an intensive training situation), the sentence begins running, unless the commander prescribes otherwise, even though the soldier may not actually be under restraint.

If a U.S. soldier appeals the art. 15, the execution of any sentence of a nature which could not be returned to him or her, *i.e.*, restriction, extra duty, correctional custody, will be stayed pending the outcome of the appeal. *Id.* Other punishments which are not suspended, such as reduction in rank or forfeiture of pay, will not be stayed because if the appeal is granted, these items can be returned. *Id.* Among the military due process features of the art. 15 are the following:

1) The individual must be notified of the commander's intent to impose nonjudicial punishment upon him or her. *Id.* paras. 3-12.

2) The individual has the right to consult with legal counsel (unless a lawyer is not physically available), and must be given time to do so and must be told of the location of counsel. *Id.* paras. 3-13.

3) The individual must have the right to fully present his or her case in the presence of the officer who intends to impose the punishment. *Id.* para. 3-13a.

4) The individual has the right to (but not limited to):

a. call witnesses;

b. present evidence; and

c. be accompanied by a person to speak on his or her behalf. *Id.* para. 3-14b.

5) The individual has the right to a public proceeding when requested, except where military exigencies or security interests preclude public disclosure. *Id.*

6) The individual has the right to decline to accept an art. 15 and demand trial by either a summary courts-martial (no representative need be legally trained), or special courts-martial (lawyer counsel required unless such counsel cannot be obtained because of physical conditions or military exigencies). MCM, *supra* note 31, para. 6c. (In some limited instances, an individual cannot refuse an art. 15 when they are "attached to or embarked in a vessel. . . .") *Id.* para. 132.

For a recent case involving discussion of arts. 15 and 20 (nonjudicial punishment and summary courts-martial, respectively) see United States v. Booker, 3 M.J. 443 (C.M.A. 1977).

82. CODE 1975, *supra* note 10, art. 101.

83. H. GOLDHAMER, *supra* note 39, at 161. *See generally,* Gornyy, *supra* note 30, at 61-65, where a number of names of officers are cited for deficiencies.

punishment was held in abeyance pending review by the appeal authority.[84]

Although this article has referred to appeals, the Soviet military offender has only limited rights to such redress. One may petition or complain about the violation of his or her personal rights only, not about the severity of a disciplinary punishment unless the commander has exceeded disciplinary authority.[85]

The code does provide that commanders who have allowed an "injustice" or an illegal act to be committed against a subordinate for submitting a complaint shall bear "strict liability" for such act.[86] This provision is apparently necessary to encourage military members to make complaints, suggestions, or petitions in regard to illegal activities or deficiencies. The complainant can send these reports and written suggestions to a senior commander up to and including the U.S.S.R. Minister of Defense.[87] This type of system is designed less to insure the individual rights of servicepersons than it is to check on military administration and to uncover fiscal and property crimes against the State.[88]

III. QUASI JUDICIAL AND OTHER ENFORCEMENT ACTIVITIES

A. Officers' Comrades' Courts of Honor

In addition to the procedures and methods previously discussed, Officers' Comrades' Courts of Honor are empowered to examine infractions of officers, warrant officers and extended term personnel.

84. CODE 1975, *supra* note 10, art. 100; *contra* CODE 1973, *supra* note 11, art. 84 (1960). The reason for this change can only be speculated upon, but a soldier could apparently defer his or her punishment under the old Code. The appeal authority had to take some action to start the punishment whereas he now has to do nothing unless he wants to stop it. The current Code appears to be consistent with Soviet thought on imposition of nonjudicial punishment and its deterrent effect.

85. CODE 1975, *supra* note 10, arts. 111-117. Article 117 which prohibits complaining about the severity of a punishment which is within legal limits probably severely limits the number of petitions or complaints in this regard. Most appeals under the American practice, in the author's experience, are based upon complaints about the appropriateness of the sentence.

86. CODE 1975, *supra* note 10, art. 124. U.C.M.J. art. 138, 10 U.S.C. § 938 (1970) allows U.S. military members to file complaints.

87. CODE 1975, *supra* note 10, arts. 110-111. Units are required to keep records of suggestions, petitions, and complaints and the action taken upon them. *See* CODE 1975, *supra* note 10, app. 3.

88. Lenin required good Communists to "check people and to verify the actual fulfillment of their work . . . . In this, still in this, and only in this lies the crux of all work, of all policy." V. I. LENIN, 45 COMPLETE WORKS OF LENIN 16 *as cited in* KVS No. 4 at 87-92. There is little or no privacy for most servicemembers. This is true in most military organizations, but it is even more the case in the Soviet military since soldiers on pass must travel in a group with a senior in command. Also, Soviet officers are encouraged to travel in groups. The purpose of this arrangement is to effect surveillance and control. While economy is desirable, one commentator observed that "the assignment of a group Party organizer to a collective of officer Communists departing on detached duty trips is also justified." *See* Krasnaya Zvezda, Jan. 13, 1970, at 1.

"Extended term" refers to those individuals who have been retained voluntarily or involuntarily beyond the first term of military service. Referral to the Comrades' Court is made by the commander of the *chast'* (unit which has a banner) in which the offender is serving, or another senior in the chain-of-command.[89] The Soviets have encouraged greater use of this elected court and the 1975 version of the Code has given it jurisdiction over construction unit enlisted members. Prior law limited its jurisdiction to officers.[90]

Normally, subject matter jurisdiction of the court involves minor offenses that violate military honor and dignity, and which are "irreconcilable with the concept of Communist morality."[91] Although Communism disavows any association with Tsarist institutions, the Comrades' Courts of Honor have roots in the pre-revolutionary Officers' Courts of Honor.[92]

The Courts of Honor are directed to consider the nature of the infraction, its circumstances and consequences, the previous behavior of the military member, and finally the serviceperson's maturity and service experience. However, the principles of socialist legality is the key consideration since the court is further required to be "guided exclusively by the aims of Communist education of officers and by an awareness of military duty."[93]

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89. CODE 1975, *supra* note 10, art. 44. For a more detailed study of Comrades' Courts, see Ramundo, *The Comrades' Courts: Molder and Keeper of Socialist Morality,* 33 GEO. WASH. L. REV. 692, 695 (1965). The U.S. summary courts-martial, presided over by one officer, is roughly comparable, but it has no jurisdiction over officers. Also, an enlisted person can refuse trial by a summary court and can demand trial by a special courts-martial in which, legally trained judge and defense counsel are provided. *See* U.C.M.J. art. 20, 10 U.S.C. § 820 (1970). For a discussion of the manner in which the United States Supreme Court views summary courts-martial, see Middendorf v. Henry, 425 U.S. 25 (1976) (holding that summary courts-martial proceedings were not criminal prosecutions within the meaning of the Sixth Amendment, thus not requiring counsel).

90. Officer Comrades' Courts of Honor in the Soviet Army and Navy, U.S.S.R. Minister of Defense Order, No. 212, (Dec. 19, 1956) *as translated in* J.P.R.S., *supra* note 19, 46578 at 518, 519. (Oct. 9, 1968) [hereinafter cited as Honor Courts]. These courts' "judges" consist of five primary and two alternates who must have served in the unit for at least six months at the time of election. One or two senior officers are elected to consider junior officers' misdeeds. However, officers equivalent to colonel apparently do not have elected officers in their courts, but instead have five members who are appointed by other authorized commanders. *Id.* at 520. U.S. summary courts-martial can try any noncapital offense punishable under the U.C.M.J. *See* U.C.M.J. art. 20, 10 U.S.C. § 820 (1970).

91. H. BERMAN, *supra* note 8, at 50. Professor Berman feels that such distinctions as the establishment of schools for the sons of officers and others may create a hereditary officer class in the Soviet Union. *Id.* at 51.

92. Honor Courts, *supra* note 90, at 521. U.S. courts-martial find their roots in the Code of Gustavus Adolphus of 1621 and the British Articles of War of 1774. T. DAVIS, A TREATISE OF THE MILITARY LAW OF THE UNITED STATES 340-41 and 581-601 (3d ed. 1915); W. WINTHROP, MILITARY LAW AND PRECEDENT 19 (2d ed. 1920).

93. Honor Courts, *supra* note 90, at 521.

Challenges of court members by the "summoned" officer, verdicts and sentences are all determined by majority vote. Decisions must be in writing, have no set format, and the penalty is limited to: public admonition; public reprimand; recommendation that the officer be reduced in military rank or duty assignment by one grade; transfer to the reserve; and, in the case of officer students, expulsion from a higher military educational institution.[94] Since the court can only recommend reduction or transfer to the reserve, the commander responsible for assigning the "summoned" officer to duty may reject the court's recommendation.[95]

No appeals are allowed concerning the merits of a case. However, appeals are allowed where procedural rules have been violated. Since procedural rules are minimal, it is suggested that there are in fact very few appeals.[96]

An interesting feature of Honor Courts is their jurisdiction to resolve certain noncriminal matters. They can dispose of civil cases concerning property if the amount involved does not exceed 100 rubles.[97]

As stated earlier, the role of the Honor Courts is not only to compel individuals to observe the law and to be worthy soldiers and officers, but to educate as well. To that end, punishments of individuals are announced only within the ranks of their contemporaries. Junior members

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94. *Id.* at 522. A U.S. summary court can impose confinement for not more than 30 days, hard labor without confinement for 45 days, restriction to specified limits for two months, forfeiture of two thirds pay for one month and reduction in rank. MCM, *supra* note 31, para. 16b. The MCM, promulgated by the President, has constricted the U.C.M.J. provisions by not allowing summary courts to impose confinement, hard labor without confinement, or reduction except to the next inferior grade on enlisted members above the fourth enlisted pay grade. *Id.;* U.C.M.J. art. 20, 10 U.S.C. § 820 (1970). The U.C.M.J., enacted by Congress, does not contain the MCM provision.

95. Honor Courts, *supra* note 90, at 523. Removal of the penalty can be initiated by the officer convicted, by the offender's superior, or at the initiative of the court itself. In the U.S. system, the commander who convened the court has the absolute discretion to approve only the findings and sentence which he or she determines should be approved. U.C.M.J. art. 64, 10 U.S.C. § 864 (1970). The convening authority can also disapprove all or any part of the findings or sentence for any or for no reason. This discretion is absolute. In this regard, the discretion cannot be used to increase the punishment. *Id.*

96. Honor Courts, *supra* note 90, at 523. There is a mandatory supervisory review of all U.S. summary courts-martial. U.C.M.J. art. 65, 10 U.S.C. § 865 (1970). Concerning the Soviet military, personnel of military construction units have similar Honor Courts which were approved by the Presidium of the U.S.S.R. on September 30, 1965. Honor Courts, *supra* note 90, at 523-30. The construction Honor Courts consider both officer and enlisted member misdeeds. The Soviet emphasis on labor is reflected in these courts since construction soldiers can remove penalties by a "conscientious attitude toward labor . . . ." *Id.*

97. Although U.S. military courts do not have this authority, the U.C.M.J. authorizes deduction from the pay of a military member for willful and wanton destruction of private property after investigation by a specially convened board. *See* U.C.M.J. art. 139, 10 U.S.C. § 939 (1970). The U.S. courts can also impose forfeiture of pay in criminal cases. MCM, *supra* note 31, ch. 23.

do not attend sessions involving senior members.[98] Administrative punishment in the form of a transfer to the infantry may also be employed.[99] Other means of enforcing discipline through Soviet control measures include: family pressures;[100] naming offenders in publications;[101] insisting on a continuous study of regulations and laws;[102] criticism and self-criticism;[103] behavior modification;[104] and probably the most extensive is that of surveillance.[105]

The Communist Party also plays a part in dealing with transgressions by commanders and other Party members. In fact, such violations are normally handled by the Party rather than other military organs. This extraordinary role is indicative of the Party's careful control over the military and of members who commit such violations. Thus, offenders are responsible primarily to the Party and secondly to their commanders.[106]

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98. Honor Courts, *supra* note 90, at 522. At the discretion of the commander, the court's decision may be announced at meetings of officers of comparable rank. *Id.*

99. An officer complained of a discipline problem and drunkard who, after confinement and reduction, was sent to the infantry. He stated that it hardly "helps to receive misfits from the other services." Krasnaya Zvezda, September 13, 1973, at 2, *cited in* H. GOLDHAMER, *supra* note 39, at 156.

100. Not only are awards and commendations of a military member made known to the individual's family, but also his or her misdeeds. It is not uncommon for commanders to threaten to inform families of errant behavior. There is, however, some evidence that telling families of misdeeds is viewed as objectionable by some. KVS No. 29, Oct. 1971 at 66-72 *as cited in* H. GOLDHAMER, supra note 39, at 160.

101. "For those who violate the laws or ethical norms, publicity is sometimes more effective than administrative measures." Krasnaya Zvezda, Mar. 14, 1972, at 3 *as cited in* H. GOLDHAMER, *supra* note 39, at 161.

102. Gornyy, *supra* note 30, at 65.

103. Krasanya Zvezda, October 27, 1976, at 2 *as translated in* J.P.R.S., *supra* note 19, 68517 at 66. *See generally* Ramundo, *They Answer (to) Pravda,* U. ILL. L. F. 103-27 (1964). Criticism and self-criticism are only allowed where it has a pro-regime bias. Such selectivity is described as "principled" and "constructive" in the building of communism. Failure to be principled could result in a prosecution for slander or other repression. *See* B. RAMUNDO, *supra* note 24, at 35 (1971).

104. Communist behavior is the desired result and although this is affected by many other scriptions, the aim is to have the Soviet military members internalize these dictates. Examples are often publicized where there is a "rapid metamorphosis in the behavior of . . . former [violators] of military discipline . . . [after transfer to a unit where] the order of the day is observed without fail, each man is neat and smart in appearance, and every military ritual is carried out in precise accord with the given regulations." Krasnaya Zvezda, Jan. 9, 1970, at 2. Ultimately, it is hoped, an orderly environment in the military "collective" will change the miscreant's attitude so that he becomes "ashamed of [his] misdeeds." *Id.; see* Krasnaya Zvezda, Sept. 10, 1969, at 2.

105. Not only is surveillance used to uncover behavior unbecoming a Communist but continuous close surveillance is effective in deterring violations of the law. The importance of this control technique was emphasized by a military procurator who cautioned other procurators to concentrate "on enhancing the role and effectiveness of general surveillance of the fulfillment of military regulations among the troops . . . [since] [p]reventing violations of the law is the main avenue of prosecution activity." H. GOLDHAMER, *supra* note 39, at 165. Justification for this intrusive intervention is based on Lenin's often repeated statement that controls should be universal and complete. *Id.*

106. *Id.* at 156.

B. Mitigating Punishment

Soviet writings calling for "exactingness" in obedience to law convey the impression that the Soviets are strict disciplinarians. These types of admonitions undoubtedly encourage rigor on the part of authorities. There is, however, some evidence of a tendency by military commanders to be less severe.[107]

Perhaps the excessive emphasis on strict obedience in some earlier publications has led recent authors to frequently state that a certain moderation is also necessary to avoid negatively affecting morale and discipline. Of late there has been a trend to recognize that "exactingness," no matter how categorical, "must not have anything in common with rudeness and with demeaning the personal dignity of subordinates . . . . Everyone has to keep well in mind that the Soviet soldier is a literate, cultured, and conscientious person."[108] Since publications consistently mention the need to be less rude, to use less foul language, and to avoid related undesirable behavior on the part of noncommissioned officers and officers, it is submitted that such behavior often occurs.[109]

IV. JUDICIAL PUNISHMENT

A. Source of Law

The Soviet legal system while unique in many respects is basically a continental civil law system with additional socialist features. Altera-

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107. Krasnaya Zvezda, Jan. 22, 1970, at 2. Under Soviet civilian criminal practice, higher levels of responsibility call for more severe punishment for the same offense. Offenders may be fined two to five times more than other citizens for certain offenses. Sel'skaya zhizn', August 15, 1972, at 4, *cited in* H. GOLDHAMER, *supra* note 39, at 157 n.81 (1975). Gornyy, *supra* note 30, at 63, relates examples of commanders who are in "virtual connivance with lawbreakers [since the commanders] engender in the latter the attitude that they are immune to punishment, undermine the authority of the law, regulations and the commander himself, and fail to promote strengthening of military discipline." Nonjudicial punishment is used in both the Soviet and U.S. military to dispose of infractions of a minor nature. In each system the allowable punishments have been modified as conditions changed. In the U.S., the procedure has become more formal and restrictive, and additionally becomes a permanent part of the record, in the case of U.S. Army members who have over three years of active federal military service at the time of the offense. *See* Army Regulation 27-10, Military Justice 15 Aug. 1977, at para. 3-15b. The permanent filing of this record of nonjudicial punishment serves to stigmatize a servicemember and, in many cases, could have a detrimental impact on promotion opportunities and other favorable personnel actions. The *MCM* does not require the permanent filing of these records and the Army Regulation is thus an imposed restriction which could be easily countermanded. *See MCM, supra* note 31, para. 133.

108. KOMMUNIST VOORUZHENNY KH SIL [KVS] No. 12 at 48-55 (June 1971).

109. H. GOLDHAMER, *supra* note 39, at 157 (1975); Gornyy, *supra* note 30, at 62 (1976). The chief military procurator admonished commanders that "efforts to maintain a high level of military discipline and order [will] not produce the desired result if the commander himself does not always offer his subordinates an example of observance of moral and ethical standards of conduct . . . ."

tions in this system have been wrought by the Communist Party based on "socialist legality" and the needs of national planning. "Thus, although the 'red thread' which pervades and distinguishes the Soviet legal system involves ideology, party rule, socialism, national planning, 'socialist legality' and 'socialist democracy' the *key,* in the final analysis, is Communist Party rule."[110]

Soviet military criminal law, with some very important exceptions which will be discussed more fully below, is administered by military tribunals organized along civilian court lines. The military courts apply the substantive law of the republic in which the tribunal is located, unless there is a conflict with the "fundamental law."[111] It is important to understand that although there is a "fundamental law" enacted at the national Union level, it acts only as a source of law for the republic concerned. The "fundamental law" is a mandatory guide to all the republics of the U.S.S.R.[112] With some slight adjustments due to local custom, these laws are reenacted by each republic. Thus, procurators do not have to decide whether the federal system (U.S.S.R.) or the republic has jurisdiction since only this reenacted law applies.

Three military members, one legally trained judge and two lay assessors chosen by military personnel, constitute a military tribunal of first instance.[113] The Supreme Court, in the administration of "socialist

110. B. Ramundo, *supra* note 24, 39 (1971).

111. *See* Const. U.S.S.R. art. 152 (1977); H. BERMAN, SOVIET CRIMINAL LAW AND PROCEDURE 108 (1966). For a discussion of earlier Soviet military law, see H. BERMAN & M. KERNER, SOVIET MILITARY LAW AND ADMINISTRATION (1955). The Soviet court is claimed by the Communists to be the antithesis of imperialist nation courts which serve as "an apparatus of suppression, an apparatus of bourgeois exploitation." *See Foundations of Soviet Military Law,* excerpts from *Osnovy Sovetkogo Voyinogo Zakonodatel'stva* (1962) *as translated in* J.P.R.S., *supra* note 19, 19814 at 121, 124 [hereinafter cited as *Foundations*]. U.S. military courts apply federal law under the U.C.M.J., State law or foreign law incorporated as federal law under 18 U.S.C. § 13 (1970), and certain federal laws relating to noncapital crimes and offenses denounced by the U.S. Code, such as counterfeiting (10 U.S.C. § 471), the Narcotic Drugs Import and Export Act, 21 U.S.C. §§ 171-85 (1970), and others.

112. The Union of Soviet Socialist Republics includes: Russian Soviet Federative Socialist Republic [hereinafter cited as R.S.F.S.R.); Ukrainian Soviet Socialist Republic; Byelorussian Soviet Socialist Republic; Uzbek Soviet Socialist Republic; Kazakh Soviet Socialist Republic; Georgian Soviet Socialist Republic; Azerbaijan Soviet Socialist Republic; Lithuanian Soviet Socialist Republic; Moldavian Soviet Socialist Republic; Latvian Soviet Socialist Republic; Kirghiz Soviet Socialist Republic; Tajik Soviet Socialist Republic; Armenian Soviet Socialist Republic; Turkmen Soviet Socialist Republic, and the Estonian Soviet Socialist Republic. CONST. U.S.S.R. art. 71-72. The Soviet Union describes itself as an "integral, federal, multinational state formed on the principle of socialist federalism. . . ." *Id.* art. 70. It is interesting to note that each republic apparently retains "the right freely to secede from the U.S.S.R." *Id.* art. 72. When reading this secession provision, one should be reminded of the Soviet intervention in a non-Union satellite, Czechoslovakia, in 1968.

113. Statute on Military Tribunals, arts. 3, 4 (Supreme Soviet *Presidium Ukase*) (Feb. 21, 1968) [hereinafter cited as Military Tribunals] *as cited in Vedomosti* No. 1 at 14 (1959) *as translated in* J.P.R.S., *supra* note 19, 46578 at 444. *See also* CONST. U.S.S.R. art. 155 (1977). Military judges are elected by the Presidium of the Supreme Soviet for a term of five years and the

justice," supervises these tribunals through its military division. The tribunals are instructed to "wage a struggle against infringements on the security of the U.S.S.R., the fighting capacity of its Armed Forces, military discipline, and the established procedure for performing military service in the Armed Forces of the U.S.S.R."[114]

Although tribunals of first instance have laymen on the panel, the bench which considers cases on appeal, including interlocutory appeals, consists of three military judges.[115] While the professed aim is that all judges be legally trained, it is unknown whether all military judges are in fact qualified attorneys. However, since articles have voiced concern over attorney shortages in other areas of law,[116] it is not unreasonable to suggest that some military judges may not be lawyers.

B. The Procuracy

The military procurator, who has duties roughly corresponding to the American trial counsel or prosecutor, is the Procurator-General of the U.S.S.R. The Procurator-General has authority over all military and civilian procurators.[117] Additionally, in order to provide more centralized control over the procurators, they are subordinate only to the Procurator-General and are independent of any local organs.[118] The

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people's assessors are elected for two and one-half years by "meetings of servicemen." *Id.* art. 152. The influence of the military judges over the people's assessors is thought to be great since the Presidium is the most influential body in the Soviet Union. Also, people's assessors can be recalled by the "meetings of servicemen," but the military judges can only be deposed by the Presidium. *Id.*

114. Military Tribunal, *supra* note 113, art. 2.

115. *Id.* art. 3. *See* § IV(E) *infra,* for a more detailed discussion of protests. U.S. Courts of Military Review (intermediate appellate courts) have three military judges who compose a panel. They may on occasion sit *en banc. See* U.C.M.J. art. 66, 10 U.S.C. § 866 (1970). A unique feature of the U.S. Courts of Review as compared to U.S. civilian courts is that the Courts of Review are specifically empowered to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact . . . ." *Id.* The highest U.S. military court is composed of three civilian judges, appointed by the President with the advice and consent of the Senate, for a term of fifteen years. U.C.M.J. art. 67, 10 U.S.C. § 867 (1970).

116. Vyshinsky, *The Improvement of Economic Legislation and Questions of Training Legal Cadres,* 6 *Sovelskoye gosudarstvo i pravo* 59 (June, 1977), 39 CURRENT DIGEST OF SOVIET PRESS [hereinafter cited as C.D.S.P.] No. 30 at 1.

117. Principles of Criminal Trial Procedures of the U.S.S.R. and Union Republics, art. 20 (Supreme Soviet *Presidium Ukase*) (Dec. 25, 1958) *as cited in Vedomosti* No. 1 at 15 (1959), *as translated in* J.P.R.S., *supra* note 19, 46578 at 453 [hereinafter cited as U.S.S.R. Trial Procedures]. The Procurator-General is appointed by the Supreme Soviet (the highest legislative body) and is responsible to it or to the Presidium (a select portion of the Supreme Soviet) when the Supreme Soviet is not in session. CONST. U.S.S.R. arts. 164, 165 (1977).

118. CONST. U.S.S.R. arts. 164-68 (1977); *see also* CONST. U.S.S.R. art. 117 (1936). This insures a purity of interpretation of "socialist legality," control by the Communist Party from the upper hierarchy, and freedom from the possible adulteration of doctrine at local levels. This "independence" from local control was established by Lenin whose aim was complete control and direction of prosecution activities by the Communist Party. *Foundations, supra* note 111, at 121.

procuracy is the only Soviet governmental agency not subordinated to a dual system including local and higher authority.[119] All procurators are either appointed by the Procurator-General or must be approved by him or her. This includes not only military procurators, but also every civilian procurator regardless of the jurisdiction. Thus, independence is assured from local control since the procurator command structure extends from the Procurator-General at the top to the lowest procurator at the city level.[120]

It must be emphasized that the procuracy is the "watchdog of legality" for the Communist Party and never operates against the Party.[121] "The procurator has the obligation not only to suppress violations of legality but also, with the assistance of commanders, political organs and the community at large, to undertake measures to prevent violations of the law."[122]

The duties of the procuracy include: (1) institution of criminal proceedings against persons accused of crimes; (2) supervision of the validity and legality of decisions, rulings, judgments and judicial decrees; (3) supervision of the strict execution of the laws promulgated by ministries and departments including their subordinate activities, agencies of local soviets by officials, by citizens, as well as by social organizations and collectives; (4) overseeing activities of agencies of inquiry and also conducts preliminary investigatons; (5) supervision of the execution of judgments; and also (6) supervision of the treatment of prisoners.[123]

The tremendous power of the military procurator as well as the civilian procurator is shown by his power to "demand and obtain orders . . . and acts" promulgated by other organs of the central and local governments as well as public organizations "in order to verify the legality of these acts . . . [and] demand . . . audits [of] organizations . . . [as well as] demand that officials and citizens give personal explanations

119. H. BERMAN, *supra* note 111, at 110.

120. CONST. U.S.S.R. art. 166 (1977). Certain so-called autonomous republics, regions or areas are constituent parts of republics, territories or regions. The Procurator-General controls these procurators as an integral part of the federal organization. CONST. U.S.S.R. arts. 82-88 (1977). These geographic areas are treated somewhat differently by being allowed limited self-government since they are considered by the Soviets to have special needs due to their distinctive nationality or culture. An example of an autonomous region within the R.S.F.S.R. is the Jewish autonomous region. *Id.* art. 87.

121. H. BERMAN, *supra* note 111, at 121. In order to be a military procurator, the candidate must be at least 25 years old and must have advanced legal training unless a waiver is granted for the training. *Foundations, supra* note 111, at 123.

122. H. BERMAN, *supra* note 111, at 110.

123. *See* CONST. U.S.S.R. art. 164 (1977), which gives the procurator's office "supreme power of supervision over the strict and uniform observance of laws. . . ." *See* H. BERMAN, *supra* note 110, at 111; Loever, *The Soviet Procuracy and the Rights of the Individual Against the State*, 1 J. INT. COMM. OF JURISTS 59 (1957).

concerning law violations."[124] The military procurator is said to operate independently of military commanders since the procurator command structure is not a part of the military command structure.[125] A measure of the importance of the procuracy in career development is shown by the fact that it has more prestige and attracts more able young lawyers into its ranks than any other legal activity including the judiciary.[126]

Integration of military and civilian law is achieved not only by requiring the tribunals to apply the law of the republic in which they are sitting, but also through their organizational structure.[127] As mentioned previously, the U.S.S.R. operates under a type of federalism with the Supreme Soviet enacting "fundamental principles" and the republics enacting "codes" which incorporate those principles.[128] Thus, some republics, based on special needs such as local custom or requirements such as geographical differences, may enact codes which make certain acts criminal which are not criminal in other republics.[129] However, these special laws cannot be contrary to the "fundamental" Soviet law.

Unlike the civilian courts which operate within a republic's own system of courts (which are also tribunals but with a civilian judge and two law assessors), the military tribunals are organized within nine military districts.[130] The districts apparently are devised strictly for the convenience of military control. These courts look to the law of the republic within which they are sitting. The procurator considers the "fundamental law" of the Soviet Union only to insure that the law of

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124. Law of December 28, 1955 (Supreme Soviet *Presidium Ukase*), *amended* March 3, 1960 *as translated in* J.P.R.S., *supra* note 19, 46578 at 467, 468; *see particularly id.* art. 11.

125. *Id.*

126. H. BERMAN, *supra* note 111, at 117. The procuracy has antecedents dating back to tzarist Russia. Although the Bolsheviks eliminated the procuracy upon their ascendancy, Lenin revived it in 1922. Curiously, he restored it to its pre-1864 form. *Id.* Unlike the American military prosecutor, the Soviet military procurator has broad power to prosecute or not to prosecute. *See* note 59, *supra*. However, in view of the aims of the Soviet government, the military, and the Communist Party, it is unlikely that there is any great tension between the military and the procuracy. There are occasionally references to commanders who do not want to uphold the law by prosecuting. *See generally* Gornyy, *supra* note 30.

127. The three members of the military tribunal are military personnel and thus would bring to the court knowledge of the customs and needs of the military service.

128. CONST. U.S.S.R. ch. 8 (1977); CONST. U.S.S.R. arts. 14, 19, 20, 32 (1936). The specific promulgations made by the Supreme Soviet are the Fundamental Principles of Criminal Legislation in the U.S.S.R. and the Union Republics; Fundamental Principles of Criminal Procedure of the U.S.S.R. and the Union Republics; Fundamental Principles of Court Organization of the U.S.S.R. and the Union Republics; U.S.S.R. Statute on Crimes Against the State; U.S.S.R. Statute on Military Crimes, and the U.S.S.R. Statute on Military Tribunals. *See generally* H. BERMAN, *supra* note 111, at 15.

129. *See* R.S.F.S.R. CRIMINAL CODE ch. 11 (1960), which prohibits blood feuds, sale of brides, and polygamy. These are examples of crimes which have no counterparts in the codes of the other republics.

130. H. BERMAN, *supra* note 111, at 17.

the republic has been faithfully reproduced in accordance with "socialist legality." This is one of the prime reasons for the specific federal structure of the procuracy.[131] In the unlikely event that there is a discrepancy between the law of the republic and the "fundamental" all-union law, the law of the U.S.S.R. prevails.[132]

In order to insure uniformity and protect federal legal policy, there are a number of organs and organizations beside the procuracy which exercise a supervisory function. The Supreme Court of the U.S.S.R., the Supreme Soviet, and, most importantly, the Communist Party, which under both the 1936 Constitution as well as the 1977 Constitution is the "leading and guiding force of Soviet society and the nucleus of its political system,"[133] all have a role in assuring adherence to pure socialist legality.

C. A Representative Code

The scope of this article does not lend itself to a complete study of the criminal law of each republic; rather, the Russian Soviet Federative Socialist Republic Criminal Code (hereinafter, R.S.F.S.R. Code) will be used as a representative example. The R.S.F.S.R. Code, which was enacted from the U.S.S.R. Criminal Code, requires that in order for

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131. Even though the military courts have civil jurisdiction over noncriminal matters, *see* note 180, *infra,* the military lawyer need not be concerned with the emergence of a Russian Erie R. Co. v. Tompkins since the Soviets have only one set of courts in the republics in the civilian sector; rather than the two track judicial system, federal and state, in the United States. Thus, while American law students continue to study the implications of the *Erie* case, Soviet law students must be content with investigations of the meaning of "socialist legality" and other Soviet innovations on the civil law system. *See* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), in which the United States Supreme Court attempted to solve the problem of which law to apply in diversity cases brought in federal courts. The court declared that it was the duty of federal courts to follow state decisions on matters of general law since there was no federal common law. *Id.* at 79. *Erie* offers little aid to the U.S. military attorney since military jurisdiction is strictly criminal and with the exception of certain federal or state statutes under which a military accused can be prosecuted, the military attorney relies on provisions under the U.C.M.J. *See* note 111, *supra.* Unlike his or her Soviet counterpart, the U.S. military prosecutor must prove military jurisdiction by showing that the offense occurred on a military reservation or by demonstrating an adverse impact on the military mission which cannot be adequately vindicated by the civilian courts. *See generally* Relford v. Commandant, 401 U.S. 355 (1971); United States v. Alef, 3 M.J. 414 (CMA 1977).

132. CONST. U.S.S.R. art. 74 (1977).

133. CONST. U.S.S.R. art. 6 (1977); CONST. U.S.S.R. art. 126 (1936). The 1977 Constitution goes on to state in article 6 that the ". . . Communist Party shall determine the general perspective of society's development, and the internal and external policy line of the U.S.S.R. . . . ." Some authorities have suggested that the Party will wither away at a mature state of Communism, but Krushchev hinted that the Party would not disappear as would the state. Romashkin, *The Party and the State, reprinted in The Future of Communist Society* 114-15 (W. Laqueur & L. Labedz eds. 1962) (former view); The Times (London) March 28, 1958, at 20 (latter view). For a polemical narrative of how the Soviet Army and Navy "owe their invincible might, great morale, high fighting qualities and victories over [their] country's numerous enemies solely to the leadership of the Communist Party. . . ." *See* V. TALMY, THE SOVIET ARMY 344 (1971).

criminal responsibility to attach there must be corresponding "social danger."[134] Additionally, under the 1960 R.S.F.S.R. Criminal Code (hereinafter, 1960 Criminal Code), there must also be a violation of a specific provision of that Code.[135] The 1960 Criminal Code eliminated the doctrine of analogy which allowed a person to be punished for a socially dangerous act not specifically mentioned in the Criminal Code, but analogous to a listed offense.[136] The doctrine was originally praised by Soviet jurists since it was viewed as unlike the "bourgeois" principle of "no crime, no punishment without a law."[137]

Emerging trends include the removal of petty offenses, increasing the jurisdiction of administrative and quasi-judicial bodies such as Comrades' Courts, and more severe treatment of serious offenses against the person, state agencies and property.[138] Contrary to these trends,

134. Fundamentals of Criminal Legislation of the U.S.S.R. and Union Republics (Supreme Soviet *Presidium Ukase*) Dec. 25, 1958 *as cited in Vedomosti* No. 1 art. 6; *see id.* arts. 1, 3 *translated in* J.P.R.S., *supra* note 19, 46578 at 382.

135. *Id.* Under the 1926 Criminal Code, the only requirement was a socially dangerous act. The person represented "a danger because of [his or her] connection with a criminal environment or because of their past activity, measures of social defense of a judicial-correctional, medical, or medico-educational character shall be applied." R.S.F.S.R. CRIMINAL CODE art. 14 (1926). This provision appears to sanction commitment to mental institutions as well as other compulsory medical treatment.

136. Art. 16 of the 1926 Criminal Code provided: "If any socially dangerous act is not directly provided for by the present Code, the basis and limits of responsibility for it shall be determined by application of those articles of the Code which provide for crimes most similar to it in nature." On the doctrine of analogy, see H. Berman, *Justice in Russia* 27, 47 (1950); B. Ramundo, *Analogy Reincarnated: A Note on the Form and Substance of Soviet Legal Reform,* Mil. L. Rev. 157-66 (Jan. 1963).

137. H. BERMAN & M. KERNER, *supra* note 8, at 69, 70. The doctrine of analogy is unlike the United States doctrine of a statute being void if it is "vague" or "overbroad." *See* note 50 *supra.* Under this Soviet concept, even a statute which was narrowly drawn and expressly applied only to certain classes or prohibited acts could be used to prosecute someone for an act which the regime wanted to punish or discourage. H. BERMAN & M. KERNER, *supra* note 8, at 71. This doctrine was designed to avoid the letter of the law and was used in both civilian as well as military prosecutions. *Id.* at 69-71.

A 1948 Soviet textbook on military criminal law prescribed three requirements for invoking the doctrine of analogy: the criminal act must be an infringement of the military order by a person subject to military criminal law; the Criminal Code must contain no provision directly applicable to the act sought to be punished; and the act must be similar to a particular crime defined in the Criminal Code. V. Chkhikvadze, *Sovetskoe Voennougolovnoe Pravo* (Soviet Military Criminal Law) 152 (1948), *as cited in* H. BERMAN & M. KERNER, *supra* note 8, at 190 n.11. During World War II, the U.S.S.R. Supreme Court held that by analogy servicemen performing functions usually assigned to officers could be punished for excessive use of authority, neglect of authority, abuse of authority, or negligent attitude toward duties even though the Criminal Code expressly applied only to officers. Decree of the Plenum of the Supreme Court of the U.S.S.R., Apr. 6, 1945, *Sudebnaia Pratika Verkhovnogo Suda S.S.S.R.* (Judicial Practice of the Supreme Court of the U.S.S.R., 1945), III(XIX), 3, *as cited in* H. BERMAN & M. KERNER, *supra* note 8, at 191. Because of later attacks on the doctrine and emphasis upon judicial form, the doctrine was finally abolished.

138. 27 Soviet Studies 500, U. Glasgow (1975); *see generally* H. BERMAN & J. SPINDLER, SOVIET CRIMINAL LAW AND PROCEDURE: THE R.S.F.S.R. CODES 77-81 (2d ed. 1972). For a discussion of the Comrade's Courts, see § III(A) *supra.*

punishment of "parasitism," which is described as a lack of recognized employment, has been made a more serious criminal offense.[139]

Some of the procedural changes enacted in the 1960's have been described as being part of a "due process revolution."[140] Although these changes provide more protection for the Soviet citizen, they are not based on a desire to embrace the rule of law.[141] This is evidenced by the manner in which the Soviets use the law — primarily to fulfill the needs of Communism.[142] The Soviet Supreme Court, therefore, makes "recommendations" to the Presidium of the Supreme Soviet of the U.S.S.R. in regard to needed legislation or "interpretations" of the law.[143]

Discussion thus far has perhaps conveyed the impression that Soviet military law provides significant protection for the military member

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139. R.S.F.S.R. CRIMINAL CODE art. 209-1. Parasitism is not likely to be tried by military tribunals in regard to military personnel because they have gainful and socially useful employment. Since the tribunals do try civilians who are accomplices, it is conceivable that this crime could be tried by the military. *See* Fundamental Criminal Legislation of the U.S.S.R. and Union Republics, art. 17 *as translated in* J.P.R.S., *supra* note 19, 46578 at 385. The rationale for trying the civilian accomplice by the military tribunal is the belief that it would be an unnecessary depletion of judicial resources to have more than one court hear the same evidence.

140. Quillin, *Soviet Death Penalty,* 5 AM. J. CRIM. LAW 225, 230 n.44 (1977). *But see* I. LAPENNA, SOVIET PENAL POLICY 43 (1968).

141. Lecture by Dr. Bernard A. Ramundo, The National Law Center, George Washington University (Sept. 7, 1977), where he stated that legal reforms were based on revulsion with the Stalinist practices and were not to be viewed as a move toward the rule of law.

142. *See generally The 100 Anniversary of the Date of Birth of Vladimir Illich Lenin, Theses of the Central Committee of the Communist Party of the Soviet Union, Pravda,* Dec. 23, 1969, at 1-4; J. HAZARD, THE SOVIET SYSTEM OF GOVERNMENT (1968).

143. Statute on the Supreme Court of the U.S.S.R. art. 2 (Supreme Soviet *Presidium Ukase*) art. 2 (Feb. 12, 1957) *amended by edict* of the Presidium of the Supreme Soviet of the U.S.S.R. on Sept. 10, 1967. This article provides that the Court is responsible to the Supreme Soviet and to the Presidium when the Supreme Soviet is not in session. In the next paragraph of the article, the provision states that members and people's assessors of the Supreme Court shall be independent and subordinate only to law. The sole body authorized to "interpret" the law is not the Supreme Court, but the Presidium of the Supreme Soviet. *See* CONST. U.S.S.R. art. 121(5) (1977). The Supreme Court's explanations of the law are technically not "interpretations" but "applications." Article 9, of the Statute on the Supreme Court provides that the Plenum of the Supreme Court of the U.S.S.R. shall ". . . make recommendations to the Presidium of the Supreme Soviet of the U.S.S.R. concerning questions of interpretation of the U.S.S.R. laws." The Presidium of the Supreme Soviet or the Supreme Soviet itself is the final authority on the correct interpretation of Soviet statutes. This distinction is probably overly technical, however, since, in effect, the Supreme Court's "guiding instructions" do interpret the law. *See generally* K. GRZYBOWSKI, A CONTRAST BETWEEN THE LEGAL SYSTEMS IN THE UNITED STATES AND IN THE SOVIET UNION 285 (ABA Standing Committee on Education About Communism and Its Contrast with Liberty Under Law) (1968). The preeminence of the Supreme Soviet is based on the fact that the Soviets are mainly concerned with pro-regime legality and stability. The U.S. practice is entirely different since the United States Supreme Court can find congressional enactments unconstitutional. Another distinction is that American federal courts do not give advisory opinions. *See* McGrath v. Kristensen, 340 U.S. 162 (1950); Muscrat v. United States, 219 U.S. 346 (1911). The justification for the U.S. practice is the understanding that the Constitution allows the federal judiciary to decide only actual "cases" or "controversies." *Id.* at 361.

from purely arbitrary action. It is true that in recent years authority has been wielded less capriciously. Nonetheless, an important feature of "socialist legality" is that protections are precarious and dependent upon the special concerns of the Party at any particular time. Areas which tend to be stable and not subject to dilution are purely military offenses. Political offenses tend to be unstable.[144] It is difficult, however, to draw any definitive conclusions in this area because of a lack of published military judicial opinions.[145] Without these, one can only surmise how procedures are actually being applied and interpreted.

The military, however, is an area of special concern since its proper functioning is thought necessary to the survival and integrity of the system and the security of the Communist regime.[146] One can, therefore, expect the military legal system to reflect the stability or instability of the time and to vary its values and protections according to the needs of Communism. This should not be construed to mean that the military law is unstable since the Party has an interest in maintaining stability.[147]

Article 7 of the Criminal Code provides an unstated hierarchy of Soviet values with the first priority being the protection of the "Soviet social or state system, the socialist system of economy, [and] socialist property. . . ."[148] The Code further provides that crimes against state property and economic crimes are among the most serious.[149]

Punishment may be enhanced where there are aggravating circumstances such as: recidivism; where the crime is committed by an organized group; when it is committed with mercenary or similar motives; where the crime causes grave circumstances; where the crime is committed against a young person, a person advanced in years, a helpless individual or one dependent on the accused; causing minors to

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144. B. RAMUNDO, *supra* note 24, at 27. As Dr. Ramundo points out, "[the] Soviet legal system still more frequently than not operates quite respectably because the basic regime interest in stability is not outweighed by special needs." *Id.*

145. In the United States, military judicial decisions have generally been available, and are currently published by the West Publishing Company in the Military Justice Reporter. Frequently, reports of trial proceedings in the civilian sector are published in Soviet newspapers and periodicals providing insight into the workings of the civilian courts. *See, e.g., Pravda,* September 20, 1960, at 4, 12 C.D.S.P., *supra* note 39, at 14, where it was reported that one trial was attended by an estimated 1,500 people; *Izvestia,* August 21, 1975, at 5, 27 C.D.S.P., *supra* note 35, at 18, where two defendants received the death penalty for a machine gun murder; *Izvestia,* September 17, 1960, at 4, 12 C.D.S.P., *supra* note 39, at 21, where the killer of a people's volunteer was sentenced to death by shooting because he had lost "his last trace of humanity." There are also legal periodicals which report civilian legal proceedings. *See generally Biulleten' Verkhovnogo Suda S.S.S.R.*

146. B. RAMUNDO, *supra* note 23, at 27.

147. *Id.*

148. R.S.F.S.R. CRIMINAL CODE art. 7.

149. *Id.* art. 89-101, 152-69.

participate in crime; where the crime is committed in a manner especially cruel or humiliating for the victim; when the crime exploits a condition of public disaster; where commission of the crime involves general danger; where the crime is committed by an intoxicated person; when denouncing a person known to be innocent; and when committing a new crime while on bond or within a year after expiration.[150]

Mitigating circumstances include: commission of the crime under duress; grave family or personal circumstances; commission by a minor; commission by a pregnant woman;[151] sincere repentance; and assisting in exposing the crime.[152] Notably, committing an act while intoxicated does not free that party from criminal responsibility and under some circumstances may be an aggravating factor.[153]

Recognized defenses to criminal liability are a lack of ability by the offender to recognize the significance of his or her actions or to control them because of a chronic mental illness, temporary mental derangement, mental deficiency, or other condition of illness;[154] committing a crime while "protecting the interests of the Soviet State, social interests, or the person or rights of the defender" or another person against a socially dangerous infringer, provided that the limits of necessary defense are not exceeded;[155] and committing a crime to protect the in-

150. *Id.* art. 39.

151. *See* note 62 *supra.*

152. R.S.F.S.R. CRIMINAL CODE art. 38.

153. *Id.* arts. 12, 39. A 1969 amendment allows the court, depending on the character of the crime, to not treat this as an aggravating circumstance. In the U.S. voluntary intoxication is a defense to crimes that require specific intent. MCM, *supra* note 31, para. 154. *But see* E. VAN DEN HAAG, PUNISHING CRIMINALS 124-32 (1975), where the author argues that alcoholism starts as a voluntary act and if it is to be eliminated there should be punishment applied by society to reduce such behavior.

154. *Id.* art. 11. Compulsory measures of a medical character may be applied to such a person by order of the court. *Compare* art. 11 *with* United States v. Freeman, 357 F.2d 606, 622-25 (2d Cir. 1966). In the Soviet case of Akmatov, reported in 1 *Biulleten' Verkhovnogo Suda S.S.S.R.* 29 (1960), the defendant had killed two members of a collective after they had all been drinking vodka. During the killing which occurred after insults and a fight had ensued, the defendant exhibited bizarre behavior by cursing, tearing his shirt to shreds, and other unusual acts. At trial the defendant asked for additional investigation because of this strange conduct as well as the fact that the defendant had suffered grave wounds in the "Great Fatherland War" and had been confined in a hospital for a year and a half due to shell shock. He also requested a psychiatric examination. The trial court refused both petitions on the ground that at the moment of commission of the crime the defendant was "fully conscious of his acts, as he admitted, and so there was no basis to think that [the defendant] committed the crime in an irresponsible condition." The chairman of the Supreme Court of the U.S.S.R. protested this verdict to the criminal college of the Supreme Court of the Kirghiz S.S.R. The protest was sustained and that college concluded that art. 63 of the Kirghiz Criminal Code was violated. This article states that, in the event of doubt, experts must be called to determine the mental condition of an accused. The sentence was set aside and the case was remanded for rehearing beginning with the preliminary investigation stage. *See* § IV(*D*) *infra,* for a detailed discussion of criminal procedure.

155. R.S.F.S.R. CRIMINAL CODE art. 13. The limits of the "necessary defense [are] exceeded if the defense is clearly disproportionate to the character and danger of the infringement." *Id.*

terests enumerated above "if the harm caused is less significant than the harm prevented."[156]

Although the military courts follow the republics' criminal code, there are some crimes which are thought to be more military oriented.[157] The R.S.F.S.R. Code, therefore, includes the 1958 U.S.S.R. Statute on Military Crimes.[158] Again, the 1958 Statute on Military Crimes (the "fundamental" law on military crimes of the Soviet Union) is the basis for the R.S.F.S.R. Code and all codes of the republics.[159] The 1958 Statute distinguishes between intentional and negligent failure to carry out an order whereas prior law did not.[160] The punishment for negligent

156. R.S.F.S.R. CRIMINAL CODE art. 14.

157. *See, e.g.,* R.S.F.S.R. CRIMINAL CODE art. 138. One such offense is called insubordination and is punished in peacetime by deprivation of freedom for one to five years, and in war or combat, by death or deprivation of freedom for a term of five to ten years.

158. *See* R.S.F.S.R. CRIMINAL CODE arts. 237-69, which includes the Fundamental Law on Criminal Responsibility for Military Crimes, (Supreme Soviet *Presidium Ukase*) (Dec. 25, 1958) *as cited in Vedomosti* No. 1, at art. 10 (1959) *as translated in* J.P.R.S., *supra* note 18, 46568, 399-412.

159. *Id.*

160. *Compare* R.S.F.S.R. CRIMINAL CODE art. 239 *with* Fundamental Law on Criminal Responsibility for Military Crimes, *supra* note 157, art. 3 at 400. The ultimate source of all law in the Soviet Union is the Communist Party since is operates the government, judiciary, administration, military, workers' unions and organizations, and social organizations. Its Constitution is not the primary source of legality that the U.S. Constitution is for Americans. *See* U.S. CONST. art. 6, § 2. It is important to remember that the previous Soviet Constitution was enacted in 1936 and established, *inter alia,* certain rights: to have a defense (not necessarily a defense counsel) in criminal prosecutions, art. 111; to enjoy equal rights regardless of sex, nationality or race, arts. 122, 123; to enjoy freedom of religious worship (note that this did not include proselytizing, just worshipping) and anti-religious propaganda, art. 124; to enjoy freedom of speech, press, assembly and street processions in conformity with the interests of the working people and to strengthen socialism, art. 125; and to be secure from arrest unless approved by decision of a court or of a procurator, art. 127. Significantly, the Soviet Constitution of 1936 was in existence at a time of widespread purges. An example of Stalin's excesses, notwithstanding the Soviet Constitution, was an amendment in 1937 whereby counterrevolutionary "diversionists and wreckers" were to receive their indictment only 24 hours before trial, could not appeal, and were to be executed immediately if their plea for mercy was denied. *See* 1 *Sob. Zak. S.S.R.,* Sept. 14, 1937, No. 61, item 266, *as cited in* J. HAZARD & I. SHAPIRO, THE SOVIET LEGAL SYSTEM 82 n.12 (1962). Soviet institutions are generally respected, not because the Soviet Constitution enjoys any special eminence as a fundamental legal document, but because the practicalities of the situation demand stability. The current emphasis on proper legal procedures and concern for treatment of individuals (outside the special interest areas such as Jewish activism) stems in large part from dissatisfaction with the excesses experienced by Soviets during the years Stalin was in power. In 1956, after Nikita Khrushchev had exposed Stalin's violation of and disregard for the Criminal Code, a new campaign of legality was initiated. However, one is cautioned that the Soviet jurist approaches the concept of justice from the standpoint of "socialist legality." *Id.* at 82. *See generally* B. RAMUNDO, *supra* note 24; K. GRZYBOWSKI, *supra* note 143, at 285 (1968). An instructive example of how "socialist legality" works occurred in 1961. The Soviets, although purporting to be engaged in legal reform and aware of a statutory prohibition against retroactive application of increased penalties, secretly enacted a decree to permit the retroactive application of the death penalty for a case of foreign currency speculation. At the time of trial the sanction was limited to imprisonment and the death penalty was enacted subsequently. Thus, the interest of the Soviets in using this case as an example to others was considered greater than the provisions of the Criminal Code. *Id.* at

failure to obey is substantially less.[161]

Absence without leave for more than twenty-four hours is a criminal offense if it is unwarranted.[162] Where an individual fails to meet his or her appointed duty or leaves that duty, presumably the Soviets would try the offender for failure to obey an order because there is no separate crime for failure to report or for leaving a place of duty without authority, as in the American system.[163]

There are thirty-two crimes listed in chapter 12 of the R.S.F.S.R. Criminal Code which enumerates military crimes, and the following fourteen, if committed under mitigating circumstances, may be disposed of under nonjudicial action: insubordination;[164] failure to execute an order;[165] threatening a superior;[166] insulting a superior by a subordinate or insulting an equal by forcible action;[167] unwarrented absence;[168] dissipation or loss of military equipment;[169] violation of service regulations for guard duty,[170] border duty,[171] combat lookout,[172] or interior duty;[173] divulging privileged military information not constituting a state secret;[174] abusing or exceeding authority and neglecting one's duty;[175] and mistreatment of prisoners of war not under aggravating circumstances.[176]

The above fourteen crimes and the remainder of the thirty-two crimes may be investigated with possible referral to a military tribunal. A table

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138-41. Also the Soviets have been known to use commitment to mental institutions as a technique to silence dissidents without having to resort to the use of a criminal prosecution. *See* Washington Post, July 9, 1970, at A14; *id.* Aug. 2, 1970, at B5. For the U.S. view of civil commitment, *see* O'Connor v. Donaldson, 422 U.S. 804 (1975); *Symposium: mental illness, the law and civil commitment,* 13 SANTA CLARA LAWYER 367-612 (1973). *But see Izvestia,* August 11, 1973, at 4, 25 C.D.S.P., *supra* note 8, No. 32, at 5, for a Soviet psychiatrist's rebuttal to allegations that the Soviets use unwarranted psychiatric procedures to silence dissidents.

161. R.S.F.S.R. CRIMINAL CODE art. 239. During non-combat or peace, the maximum punishment is deprivation of freedom for a term of three months to three years. During war or combat, the punishment is from three to five years.

162. *Id.* art. 245.

163. *Id.; see also* U.C.M.J. art. 86, 10 U.S.C. § 886 (1970), which provides for failure to go to an appointed place of duty or going from an appointed place of duty in regard to American military personnel. The maximum penalty which can normally be imposed under the American system is one month confinement.

164. R.S.F.S.R. CRIMINAL CODE art. 238.

165. *Id.* art. 239.

166. *Id.* art. 241.

167. *Id.* arts. 243, 244.

168. *Id.* art. 245.

169. *Id.* art. 250.

170. *Id.* art. 255 (1965).

171. *Id.* art. 256.

172. *Id.* art. 257.

173. *Id.* art. 258.

174. *Id.* art. 259.

175. *Id.* art. 260.

176. *Id.* art. 268.

showing the various Soviet military offenses and their minimum and maximum punishments is provided below.

TABLE OF SOVIET MILITARY PUNISHMENTS*
(Authorized by the 1960 R.S.F.S.R. Criminal Code as amended)

ARTICLE	WARTIME OR COMBAT		PEACE
	Deprivation of Liberty	*Death*	*Deprivation of Liberty*
art. 238 - Insubordination	5-10 years	Yes	1-5 years[a]
art. 239 - Failure to execute order	3-10 years	No	3 months-3 years[b]
art. 240 - Resisting superior or coercing him	5-15 years	Yes	1-5 years[a & c]
art. 241 - Threatening superior	3-10 years	No	3 months-3 years[b]
art. 242 - Forcible actions against superior	5-15 years	Yes	2-10 years
art. 243 - Insult superior or subordinate		No	3 months-6 months[b & d]
art. 244 - Insult by service member on another		No	3 months-1 year[b]
art. 245 - Unwarranted absence	2-10 years	No	3 months-2 years in disciplinary battalion[b]
art. 246 - Unwarranted abandonment of unit	5-10 years	No	1-10 years
art. 247 - Desertion	7-10 years	Yes	5-7 years (officer on extended term) 3-7 years (regular term)
art. 248 - Unwarranted abandonment of unit in combat	7-10 years	Yes	
art. 249 - Malingering or deception in evading military service	5-10 years	Yes	3-7 years
art. 250 - Dissipation or loss of military property: Clothing, noncombat equipment, etc.	1-5 years	No	3-months-1 year in disciplinary battalion[b]
Ammunition, weapons	2-7 years	No	1-3 years

* This table does not include other offenses against the state for which soldiers could also be punished such as treason and espionage, which are included in nonmilitary portions of the code.

a) Punishment is enhanced if committed by a group.
b) Infraction may also be disposed of by administrative action.
c) Death is authorized if homicide.
d) Punishment is enhanced when aggravating circumstances exist.
e) Where there is no indicia of an especially dangerous crime against state.
f) Where the infraction results in grave consequences.

ARTICLE	WARTIME OR COMBAT		PEACE
	Deprivation of Liberty	*Death*	*Deprivation of Liberty*
art. 251 - Destruction or damage of military property	5-10 years	Yes	1-5 years[e] 3-10 years[f]
art. 252 - Violating rules of driving		No	2-10 years[f]
art. 253 - Violating rules of flight		No	3-10 years
art. 254 - Violation of rules of navigation		No	3-10 years[f]
art. 255 - Violating rules for guard duty	2-7 years	No	6 months-3 years[b]; 1-5 years or assignment to disciplinary battalion for 3 months-2 years;
If on watch or convoy duty	3-10 years	Yes	1-10 years[f]
art. 256 - Violation of border duty rules		No	1-3 years[b] 3-10 years[f]
art. 257 - Violation of rules for combat lookout		Yes	1-5 years[b] 5-15 years[f]
art. 258 - Violation of rules for interior guard duty	1-5 years	No	3-6 months[b] 6 months-2 years[f]
art. 259 - Divulging military secret or loss of document		No	2-5 years[b & e] 1-3 years if violation of rules for handling document 5-10 years[f]
art. 260 - Abuse of or exceeding authority and neglectful attitude toward duty	3-10 years	Yes	6 months-10 years[b]
art. 261 - Surrendering or abandoning military equipment	3-10 years	Yes	
art. 262 - Abandonment of sinking warship	10-15 years	Yes	5-10 years
art. 263 - Unwarranted abandonment of battlefield or refusal to use weapon	15 years	Yes	
art. 264 - Voluntary surrender	15 years	Yes	

ARTICLE	WARTIME OR COMBAT		PEACE
	Deprivation of Liberty	*Death*	*Deprivation of Liberty*
art. 265 - Criminal actions as prisoner of war (POW's) working in activities with military significance; harmful action toward other POW's	3-10 years	No	
art. 266 - Pillage	3-10 years	Yes	
art. 267 - Force against population	3-10 years	Yes	
art. 268 - Mistreatment of POW's	1-3 years	No	
art. 269 - Illegal wearing or abuse of Red Cross or Red Crescent	3 months-1 year	No	

Treason is not listed in the military crimes section of the Criminal Code. It is defined, however, as an act intentionally committed by a

> Citizen of the U.S.S.R. to the detriment of . . . state independence, the territorial inviolability, or the military might of the U.S.S.R.: going over to the side of the enemy, espionage, transmission of a state or military secret to a foreign state, flight abroad or refusal to return from abroad to the U.S.S.R., rendering aid to a foreign state in carrying on hostile activity against the U.S.S.R., or a conspiracy for the purpose of seizing power. . . .[177]

Brought forward from the earlier Code is a provision stating that a "failure to return from abroad to the U.S.S.R." is treason.[178] This provision reflects the fear on the part of the government that contacts with the West will cause a number of their citizens to defect.

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177. *Id.* art. 64 (1962). Punishment for this offense is listed as death, or deprivation of freedom for 10-15 years with confiscation of property, with or without additional exile for a term of two to five years.

178. *Compare* R.S.F.S.R. CRIMINAL CODE art. 64 (1962) *with* R.S.F.S.R. CRIMINAL CODE art. 58 (1)(a) (1952 version). *See* H. BERMAN & M. KERNER, *supra* note 16, at 95. Article 58 (1)(c) of the 1952 Code punished adult members of the defecting party's family by deporting them to Siberia for five years simply because they were unfortunate enough to be related to him. Commendably, this provision is not included in the most recent Code. It cannot be gainsaid, however, that this provision did deter actions the Soviets considered to be against the interest of the regime. There are a number of crimes against the U.S.S.R. which are considered to be especially dangerous. The following are found in the R.S.F.S.R. Criminal Code: treason, art. 64; espionage, art. 65; act of terrorism, art. 66; terrorist act against representative of foreign state for the purpose of provoking war or international complications, art. 67; sabotage, art. 68; wrecking directed toward the subversion of a state economic activity for the purpose of weakening the Soviet state, art. 69; anti-Soviet agitation and propaganda, art. 70 (note: it is against the law to circulate,

D. Criminal Procedure

Certainly one of the most important areas of judicial application of the law is the procedure by which it is administered. One feature of Soviet procedure not found in the American system is that the number of participants in a trial and the extent of their involvement is increased. The victim has rights beyond simply giving testimony. Such a person is actually a party to the trial and may appeal from the judgment or rulings of the court.[179] Additional parties to a Soviet criminal trial not found in American criminal trials are civil plaintiffs,[180] civil defendants,[181] their representatives, and representatives of work collectives.[182] The additional parties are present to afford socialist legality, justice, and to consolidate all criminal and civil actions in one trial.

A judge may not participate in a case where he or she has a conflict, such as being an investigator, an accuser, related to one of the parties to the trial, or other unnamed circumstances.[183] The following persons can also be challenged on similar grounds: procurator,[184] investigator,[185] recorder,[186] interpreter,[187] or expert.[188]

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prepare or keep literature which contains "slanderous fabrications which defame the Soviet state") propagandizing of war, art. 71; organizational activity directed to commission of especially dangerous crimes against the state and also participation in anti-Soviet organizations, art. 72, and especially dangerous crimes against the state committed against another "working people's state," art. 73 (this provision results from the Soviet view of its role as protector of the socialist camp). In regard to the theory of the socialist camp, *see* B. RAMUNDO, PEACEFUL COEXISTENCE 10 (1967).

179. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 53.

180. *Id.* art. 54.

181. *Id.* art. 55.

182. *Id.* art. 56; *see also* CONST. U.S.S.R. art. 162 (1977), which provides that "representatives of public organizations and of work collectives may take part in civil and criminal proceedings."

183. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 59 (1966). *See generally* Code of Judicial Conduct (United States) (1972), which governs the conduct of military trial judges in the United States. Basically, the standards are similar to that of the Soviets since the U.S. judge is obligated to excuse himself or herself whenever he or she cannot be impartial. *See* United States v. Massa, 49 C.M.R. 586 (A.C.M.R. 1974).

184. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 63. In addition to the circumstances listed which would bar the procurator from participating in the trial, *see* note 183 and accompanying text *supra,* the procurator may be challenged by any of the following: accused, defense counsel, victim, civil plaintiff, civil defendant, or by their representatives. If the challenge occurs during a preliminary investigation, it is resolved by a higher procurator. If the challenge occurs during the trial, it is resolved by the court. *Id.*

185. *Id.* art. 64. An investigator can be challenged for the same reasons and by the same parties mentioned in notes 183 and 184 and accompanying text *supra.* However, the investigator's participation in a "previous inquiry or preliminary investigation in a given case shall not be a ground for challenge." *Id.*

186. *Id.* art. 65.

187. *Id.* art. 66. Grounds for challenging an interpreter are the same as those for challenging the judge, except that previous participation in a case will not disqualify the interpreter.

188. *Id.* art. 67 (1966). In addition to the grounds for challenge described at note 187 *supra,* an expert can be challenged if: "he has been or is occupationally or otherwise dependent upon the

Pending investigation or trial, an accused can be restrained if there are sufficient grounds to believe that the defendant will "hide from an inquiry, preliminary investigation or court, . . . hinder the establishment of the truth in a criminal case, or . . . engage in criminal activity. . . ."[189] Restraint can range from a signed promise to appear to confinement under guard. Surveillance is authorized for military members.[190] Persons who can authorize restraint are: the person conducting the inquiry, investigator, commander, procurator, or the court.[191]

Preliminary investigations may last more than two months.[192] During this period the accused is not entitled to counsel.[193] However, where no preliminary investigation is conducted defense counsel can participate from the outset.[194] Thus, the right to counsel does not attach until the

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accused, victim, civil plaintiff, or civil defendant; [or] if in the given case he has carried out an inspection, materials of which have served as a ground for initiating the criminal case. . . ." *Id. See also id.* art. 66-1 (1966), providing for removal of a specialist on similar grounds.

189. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 89. In the United States, the appropriate concerns in determining whether pretrial confinement is necessary are: to assure the accused's presence at trial and to protect the safety of the community. Pretrial confinement cannot be used unless lesser forms of restriction or conditional release have been found inadequate. The consideration whether "lesser forms of restriction or conditions on release" must be used on one accused of multiple murders was not made clear by the United States Court of Military Appeals. United States v. Heard, 3 M.J. 14 (C.M.A. 1977). It is believed by the author that the weighing process is strictly mental in reaching a determination that pretrial confinement is warranted and that no other lesser form of restriction will suffice.

190. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 89. Confinement under guard is authorized only for offenses for which punishment in the form of deprivation of freedom is provided by law. *Id.* art. 96.

191. This provision conflicts with the new Constitution. *Compare* CONST. U.S.S.R. art. 54 (1977) *with* R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 89. The Soviet Constitution provides that "Citizens of the U.S.S.R. are guaranteed inviolability of the person. No one may be arrested except by a court decision or on the warrant of a procurator." CONST. U.S.S.R. art. 54 (1977).

192. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 133.

193. *Id.* art. 47. During the period when the "fundamental" law was being drafted (art. 22), which was the basis for art. 47 of the R.S.F.S.R. CODE OF CRIMINAL PROCEDURE, it was proposed that art. 22 give permission to a lawyer in all cases, other than just cases involving minors or other special cases involving handicapped parties, to enter the preliminary investigation from the moment of presentation of the charge. This proposal was rejected "since it would lead to lengthening the period of the preliminary investigation and . . . would put fetters on the efficiency of the investigator in gathering the evidence." Evteev, *On the Work of the Legislative Drafting Commission with the Draft of the Fundamental Principles of Criminal Procedure of the U.S.S.R. and of the Union Republics,* published in *Voprosy Sudoproizvodstva i Sudoustroistva v Novom Zakonodatel'stve Soiuza S.S.R.* (Questions of the Court Procedure and the Judicial System in the New Legislation of the U.S.S.R.) 437 (1959) *reprinted in* THE SOVIET LEGAL SYSTEM, at 83.

194. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 47. It is believed that few defendants go without a preliminary investigation. Under the common law system, the full examination of the case begins at the trial. The grand jury procedure in the civilian sector is used to determine only if the prosecutor has a *prima facie* case. In the Soviet courts, which use a civil law system embellished with trappings fashioned from notions of "socialist legality," a full review of both sides of the case is made by an investigator and the trial itself usually becomes a procedure whereby the record prepared by the investigator is verified. *See generally* R. DAVID & H. DEVRIES, THE FRENCH LEGAL

preliminary investigation is complete and formal charges are filed.[195] The Soviets recognize exceptional circumstances where counsel may be required during the preliminary investigation, such as where the defendant is dumb, deaf, blind, physically or mentally deficient, or a minor.[196]

The accused has the right to "legal assistance" under the Soviet Constitution.[197] Under certain circumstances, defense counsel is provided at no cost to the accused.[198] There is evidence that some investigators have urged those accused to waive their right to a lawyer.[199] Additionally, clients are obligated to pay for legal services unless released from payment. The fees are normally quite low. Some Soviets have interpreted this provision to mean that an accused is not entitled to a lawyer unless he or she can pay for one.[200]

SYSTEM: AN INTRODUCTION TO CIVIL LAW SYSTEMS (1958). Thus, the preliminary investigation is an extremely critical portion of the total criminal proceedings being instituted against an accused. The case of Krasavin, reported in 12 Sovetskaia 29 (1960), illustrates the principle that the trial court must either confirm the evidence at trial, or it must acquit the accused since it cannot rely on the investigation alone. This case is also reported in J. HAZARD & I. SHAPIRO, *supra* note 159, at 100-01. Although the investigation is important, the trial must independently verify the investigator's findings. *Id.*

195. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 46. American military accused are entitled to appointed military counsel (legally trained if the case is to be referred to either a special courts-martial or a general courts-martial), as well as their choice of a military counsel from anywhere in the world in any military service, if reasonably available, and civilian counsel if provided at no cost to the government. *See* U.C.M.J. art. 38(b), 10 U.S.C. § 838(b) (1970). An art. 32 investigation (preliminary) cannot be held without counsel unless the accused knowingly, intelligently, and voluntarily waives counsel. United States v. Maness, 48 C.M.R. 512 (1974).

196. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 49(2)(3). The United States Supreme Court has held that an accused has a right to counsel when he or she is in custody, Miranda v. Arizona, 384 U.S. 436 (1966); at a lineup after indictment, United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); at a preliminary hearing, Coleman v. Alabama, 399 U.S. 1, (1970); White v. Maryland, 373 U.S. 59 (1963); at trial Gideon v. Wainwright, 372 U.S. 335 (1963), or at trial of misdemeanor if loss of liberty is imposed, Argersinger v. Hamlin, 407 U.S. 25 (1972). *But see* Middendorf v. Henry, 425 U.S. 25 (1976), which held that summary courts-martial, even though they can impose 30 days confinement, do not require counsel for the accused. Right to counsel does not depend upon a request, Kitchens v. Smith, 401 U.S. 847 (1971); and waiver of counsel must be intelligently and understandingly made on the record, Barker v. Wingo, 407 U.S. 514 (1972).

197. CONST. U.S.S.R. art. 158 (1977).

198. *Id.* art. 160; CONST. U.S.S.R. art. 161 (1977) states that "[colleges] of advocates are available to give legal assistance to citizens and organizations." In certain political or special interest cases, finding a lawyer may prove to be difficult. Anatoly Shcharansky, an imprisoned dissident accused of treason, did not want a lawyer who had been picked for him by the KGB. The family had been under orders to find a Moscow lawyer to defend Shcharansky, but about twenty had been contacted and all refused to take the case because they (the attorneys) considered it to be political and feared that they would "lose their jobs" if they agreed to defend the dissident. At the time of the newspaper article, Shcharansky had not been charged, but the report observed that Soviet press accounts had accused him of treason. *Washington Star,* January 15, 1978, at A2, col. 1.

199. I. Kaganovich, *Violation of the Accused's Right to Defense,* 3 *Sotsialislicheskaia Z akonnost'* 27 (1960) at 27 *as cited in* J. HAZARD & I. SHAPIRO, *supra* note 160, at 92.

200. V. Romanov, *First Steps in application of the New Codes,* 4 *Sovetskaia Iustitsiia* 13 (1961) *as cited in* J. HAZARD & I. SHAPIRO, *supra* note 160, at 93. *See also id.* at 94-95, where con-

At the conclusion of the investigation, the procurator must determine whether there is sufficient evidence on which to indict.[201] If the accused is indicted, the case is referred to a military tribunal with corresponding notification to the accused.[202]

During the trial the accuser, the accused, the defense counsel, the victim, civil defendant, civil plaintiff and representatives of public organizations may participate. They all "enjoy equal rights in regard to the introduction of evidence, participation in the introduction of evidence, participation in the examination of evidence, and the filing of petitions."[203] The accused's appearance is obligatory unless exceptional circumstances exist.[204]

The accused's rights are described as the right

> to know what he is accused of and to give explanations concerning the accusation presented to him; to submit petitions; to become acquainted with all the materials of the case upon completion of the preliminary investigation or inquiry; to have defense counsel (when the preliminary investigation is completed); to participate in the judicial examination in the court of first instance; to submit challenges; and to appeal from the actions and decisions of the person concluding the inquiry, the investigator, procurator, and court.[205]

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victions were set aside for failure to provide a lawyer for a defendant. For a discussion of the U.S. standard of indigency, *see* Adkins v. Du Pont, 335 U.S. 331, 339-40 (1948) (one need not be absolutely destitute to enjoy the benefit of the *in forma pauperis* statute). U.S. military accused are provided legal counsel at no cost before all special courts-martial and general courts-martial.

201. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 213. The U.S. art. 32 investigation is a probable cause hearing and affords the accused more protections than does either the Soviet preliminary investigation or the U.S. grand jury. In the author's view, even the Soviet system appears to provide more protection and information to an accused than does the U.S. grand jury system. *See* U.C.M.J. art. 32, 10 U.S.C. § 832 (1970). Under article 32, an accused has the right: to be advised of the charges; to counsel; to cross-examine witnesses against him or her; to present matters in his or her behalf; to request that witnesses be called to appear. *See* United States v. Garner, 40 C.M.R. 778 (A.C.M.R. 1969) (the lack of an adequate article 32 investigation required reversal of an accused's conviction). Where trial by a special courts-martial (sentence is limited in a special courts-martial to a bad conduct discharge, six months confinement at hard labor, and other accessory punishments), or summary courts-martial is contemplated, an art. 32 investigation is not required. U.C.M.J. art. 30, 10 U.S.C. § 830 (1970).

202. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 217.

203. *Id.* art. 245; CONST. U.S.S.R. art. 162 (1977).

204. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 246. This article provides for trial in the accused's absence under exceptional circumstances. Such circumstances are described as those where the prisoner is outside the U.S.S.R. and evades punishment. Another situation is when punishment in the form of deprivation of freedom may not be assigned and the accused petitions for examination of the case in his or her absence. *Id.*

205. *Id.* arts. 46, 47. Under a similar article in the Georgian Soviet Socialist Republic, a sentence was set aside and the case remanded by the Georgian Supreme Court when the civil plaintiff, the victim's mother, made the final speech in which she asked that the accused be punished and her civil claim satisfied. Case of Inaneishvili, 1 *Biulleten' Verkhovnogo Suda S.S.S.R.*, 23 (1958) *as cited in* J. HAZARD & I. SHAPIRO, *supra* note 160, at 106.

The accused also has the last word at the trial, and along with the tribunal and other parties to the trial has the right to interrogate witnesses.[206] Additionally, the accused and the witnesses can be examined by the judges at any point in the proceeding.[207]

At the conclusion of the trial all parties are given another opportunity to supplement the judicial investigation and to submit petitions.[208] Oral argument consists of "speeches" of the accuser, civil plaintiff, civil defendant or their representatives, the accused or his or her defense counsel, and, in certain cases, the victim or his or her representatives. Reference may not be made in these "speeches" to evidence not before the court.[209] Rebuttals are allowed and the last rebuttal belongs to the accused.[210]

The tribunal deliberates *in secret* and resolves the following during that session:

> (1) whether the act which the prisoner is accused of committing has taken place;
>
> (2) whether such act contains the elements of a crime and exactly which criminal law provides for it;
>
> . . . .
>
> (4) whether the prisoner is guilty of committing such crime;
>
> . . . .
>
> (6) whether punishment should be assigned to the prisoner. . . ;
>
> (6-1) whether there are grounds for deeming the prisoner an especially dangerous recidivist. . . ;
>
> (7) whether the civil suit is subject to satisfaction, in whose favor, and to what extent, and also, if a civil suit has not been brought, whether the material loss is subject to compensation;
>
> (8) how to deal with real evidence;
>
> (9) on whom and in what amounts court costs must be imposed;
>
> (10) the measure of restraint with respect to the prisoner.[211]

In regard to the types of judgments which are issued in the name of the U.S.S.R.,[212] the tribunal can either acquit or convict.[213] The accused

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206. Among the judicial rights specified by the 1977 Soviet Constitution to a defendant are: public trial with *in camera* proceedings in limited cases such as state security, art. 157; conducted in the "language of the Union Republic, Autonomous Republic, Autonomous Region, or Autonomous Area, or in the language spoken by the majority of the people in the locality," art. 159; review of the materials in the case by the accused, art. 159; an interpreter if needed, art. 159; findings and sentence to punishment as a criminal only by a court "and in conformity with the law," art. 160.

207. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE arts. 283, 287, 280.

208. *Id.* art. 294.

209. *Id.* art. 295.

210. *Id.* arts. 296, 297.

211. *Id.* art. 303.

212. *Id.* art. 300.

213. *Id.* art. 309 (1963).

is to be acquitted when: (1) the event of the crime is not established; (2) all elements of the crime are not proved; or (3) the accused's participation in the crime is not proved.[214] Even if convicted, the Criminal Code provides that no punishment will be assessed if at the time of trial, the act has "lost its social danger or the person who has committed it has ceased to be socially dangerous."[215]

E. Appeal

As at trial, numerous parties have the right to appeal or to protest. Appeals and protests are lodged with the appropriate tribunal or with the procurator within the Military Division of the Supreme Court of the U.S.S.R.[216] Civil and criminal parties, including the victim, can appeal from the judgment of the tribunal.[217] The procurator, however, is "obliged to protest . . . every illegal or unfounded judgment."[218] Appeals and protests allowed by the Code must be submitted within seven days of the judgment or, in case the convicted person is confined, within seven days of notice of the judgment.[219] All parties who par-

214. *Id.*

215. *Id.*

216. *See* Military Tribunals, *supra* note 113.

217. *Id.* arts. 20, 21, at 209, 210. Civil parties can appeal only the judgment as it relates to the civil suit. *See* R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 325.

218. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 325.

219. *Id.* art. 328. A protest or an appeal shall suspend the execution of the judgment. *Id.* art. 330. The following rulings and decrees are not appealable but may be protested: excluding individual sections of an accusation or applying a criminal law involving a less "grave" crime, art. 227; decree and ruling to bring the accused to trial, art. 230; returning a case for supplementary investigation, art. 232; initiating a criminal case upon a new accusation *sua sponte,* art. 255; referring a criminal case for supplementary investigation based on circumstances discovered during the trial, *compare* art. 258 *with* art. 232 (art. 232 applies only when the court is in administrative session); reopening the judicial investigation or referral of the case for supplementary investigation if the court deems it necessary after the court is closed and judges are in conference, art. 308; special ruling of the court as to the causes and conditions which have facilitated the commission of the crime and which require that appropriate measures be taken, art. 321; relief from punishment because of the illness of the prisoner, art. 362 (1971), and order granting early release and conditional early release from punishment and replacement of punishment by a milder one, art. 363 (1970).

Certain rulings and decrees can neither be appealed nor protested: transfer of a criminal case to another jurisdiction, art. 43; transfer of a criminal case from a court having jurisdiction to another for the purpose of providing the most "speedy, complete, and objective consideration of a case, as well as to best secure the educational role" of the case, art. 44; denial of a petition, art. 223; suspending a case based on the absence of the accused, illness of the accused, or in order to transfer the case to another court, art. 231; postponing a case based on nonappearance of a prisoner, art. 247; permitting representatives of social organizations of "working" people to participate in the judicial examination of criminal cases as social accusers or social defense counsel, art. 250; postponing examination due to the absence of the accused, the witness, or the necessity of acquiring new evidence, art. 257; selecting, changing or cancelling restraint of accused, art. 260; removing persons who violate order during the judicial session, art. 263; certification by the presiding judge that the record of the judicial session is correct, art. 266; denial of petitions re-

ticipated at the trial level may participate in the *cassation* (appeal) although their presence is not required.[220] The judgment may be changed where: (1) the inquiry or trial was inadequate;[221] (2) the court's findings did not correspond with the evidence;[222] (3) there was an incorrect application of the criminal law;[223] (4) there was a substantial violation of criminal procedure;[224] or (5) the punishment was inappropriate.[225]

The appeal tribunal is not authorized to increase the punishment, but it can review the findings of the lower tribunal and mitigate the sentence imposed.[226] This is the same practice followed in a United States courts-martial. However, a major difference between the practice of the American courts-martial and that of the Soviet appeal tribunal is the ability of the latter to vacate a judgment of acquittal on the protest of

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questing new witnesses and experts or to acquire real evidence and documents, art. 276 (1966); deciding to continue or not to continue a case in the absence of any of the participants, art. 277 (1966); establishing the sequence of analyzing the evidence, art. 279; requiring interrogation of the prisoner, art. 280; interrogation of a minor witness in the absence of the accused, art. 285; conduct of an expert examination in court, art. 288; replacing confinement in prison by sentence to punishment in a colony and vice versa, transfer from a colony of special regimen to one of strict regimen, and determination of the type of colony for persons who have attained the age of eighteen years, art. 364; replacing correctional tasks and fine by other types of punishment, art. 365 (1970); deducting the time spent in a medical institution from the period of sentence, art. 366; executing judgment when there exist other unexecuted judgments, art. 367; granting or denying a petition to "cancel the record of conviction," art. 370; a decision to apply educational measures to a minor rather than criminal sanctions, art. 402 (1968), and removing a minor accused from the courtroom when trial or circumstances would have a negative impact upon him or her, art. 401.

220. *Id.* art. 338.

221. *Id.* art. 343.

222. *Id.* art. 344.

223. *Id.* art. 346.

224. *Id.* art. 345.

225. *Id.* art. 342.

226. *Id.* art. 340. Under the United States system, neither the authorities convening the courts-martial nor the appellate courts can increase the punishment adjudged. In fact, each appellate level can only approve or decrease legal punishments approved by the subordinate authority. There is a mandatory review by a United States Court of Military Review of any sentence in which a general or flag officer is involved as accused or in any of the following situations: death; dismissal of a commissioned officer, cadet or midshipman; dishonorable or bad conduct discharge, or confinement for one year or more. *See* U.C.M.J. art. 66, 10 U.S.C. § 866(b) (1970). Statistics compiled by the United States Army Court of Military Review for the period Apr. 1, 1977-Sept. 30, 1977, show that some favorable action was taken by that court in modifying the findings or sentence in 19.9% of the cases reviewed.

Most civilian appellate courts have held that they lack the power to review the appropriateness of a sentence. *See* A.B.A. Standards, Appellate Review of Sentences § 1.1a, *Commentary* a Background: availability of review, at 13-15 (Approved Draft, 1968). The military courts of review are specifically empowered to review facts, law, and the appropriateness of the sentence. *Id.*

The United States Court of Military Appeals, which is the supreme court of the military, is a discretionary body composed of three civilian judges. U.C.M.J. art. 67, 10 U.S.C. § 867 (1970). It has recently imposed the most stringent inquiry by military judges in guilty plea pretrial agreement cases of any U.S. jurisdiction. *See* United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Green, 1 M.J. 453 (C.M.A. 1976); United States v. Elmore, 1 M.J. 262, 264 (1976) (Fletcher, C. J., concurring).

the procurator or on the appeal of either the victim or of the person acquitted.[227] Upon vacation and reconsideration by the trial court, a sentence can be increased only if: (1) the original judgment was vacated because of the mildness of the punishment; (2) the law for a graver crime is applied; or (3) there is evidence that the accused committed a more serious crime.[228]

A ruling of the tribunal upon reconsideration (*cassational* instance) is final and subject only to protest.[229] One of the problems with the Soviet military legal system is the number of upper echelon Communist Party leaders who can protest the decisions, judgments and rulings of military tribunals. The protests are lodged by these leaders in their official capacity as court officials or procurators.[230] Setting aside a judgment by way of protest for the reasons previously mentioned may subject the convicted soldier to much harsher punishment. This practice may be used as a tool of oppression especially in such a sensitive special interest area as the military. This is true notwithstanding the statement that judges and people's assessors of military tribunals "shall be independent and subordinate only to law."[231] This goal might be achieved provided the case has no special interest to the Party. However, where there is a special interest in a particular case, it is likely that the Party can assert its will.

F. Sanctions

Soviet military law envisions that a sanction should function not only as punishment for a committed crime, but also as a means of reformation, education, development of obedience, and deterrence of crime.[232]

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227. R.S.F.S.R. CODE OF CRIMINAL PROCEDURE art. 341.

228. *Id.* art. 353.

229. *Id.* art. 354.

230. Military Tribunals, *supra* note 113, arts. 20, 21. Protests are not necessarily detrimental to the accused. An accused had been sentenced to death for premeditated murder, since a new statute enacted subsequent to the offense but before trial authorized the punishment. The previously authorized maximum punishment for this crime was ten years. The Armenian SSR Supreme Court reduced the sentence to 15 years confinement based on the new statute which instead of death also allowed 15 years confinement to be imposed. The Procurator General of the U.S.S.R. protested the 15 year punishment as being illegal and the Supreme Court of the U.S.S.R. agreed with the protest and affirmed only a ten year penalty stating that the new law which increased the penalty had no retroactive application. *See* case of Nikolaev, 2 *Biulleten' Verkhovnogo Suda S.S.S.R.*, 9 (1960).

231. Military Tribunals, *supra* note 113, art. 6. *See* CONST. U.S.S.R. art. 155 (1977), which states that "Judges and people's assessors are independent and subject only to the law."

232. Fundamental Principles of Criminal Legislation of the U.S.S.R. and Union Republics art. 20 (Supreme Soviet *Presidium Ukase*) (Dec. 25, 1958) *as cited in Vedomosti* No. 1, at 6 (1959) *as translated in* J.P.R.S., *supra* note 18, 46578 at 385. *See also Izvestia,* November 22, 1971, at 4, 13 C.D.S.P., *supra* note 8, No. 47 at 41 ("The chief task of Soviet justice is not vengeance.").

Punishments which are allowed to be administered to servicemembers who have committed crimes are: (1) confinement; (2) exile; (3) banishment; (4) correctional labor without confinement; (5) deprivation of certain positions or activities; (6) fine; (7) public censure; (8) assignment to a disciplinary battalion; (9) confiscation of property; (10) deprivation of military or special rank; and (11) death.[233] The R.S.F.S.R. Code additionally provides that the duty to make amends for harm caused may also be imposed.[234]

At least thirty-five crimes are punishable by death in the Soviet Union.[235] The death penalty is not mandatory under the current code and is said to be an "exceptional measure of punishment, until its complete abolition. . . ."[236] Although Soviet law apparently attempts to rehabilitate offenders, the death penalty is often employed where deterrence is desired and the individuals cannot be rehabilitated.[237] Since 1972, ten persons have been convicted of war crimes relating to World War II and have been sentenced to death.[238] Based upon the massive publicity accorded these sentences, one might surmise that the State is primarily seeking a form of retribution. While this objective is philosophically debatable, a desire for retribution may be understandable when one considers the lingering psychological impact on living Soviets of the millions of Russian citizens killed during the last world war.[239]

Concommitant with the exceptional nature of the death sentence, which is normally accomplished by firing squad, it should be emphasized that it is most frequently authorized only where there are

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233. Fundamental Principles of Criminal Legislation, *supra* note 232, art. 21.

234. R.S.F.S.R. CRIMINAL CODE, arts. 21, 22.

235. L. GSOVSKY, GOVERNMENT, LAW, AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE 939-40 (1959). This is a far cry from the 1930's when 74 crimes were punishable by death and 35 provided for a mandatory death penalty. *Id.*

236. R.S.F.S.R. CRIMINAL CODE art. 23. The textual reference to abolition reflects the Communist belief in the withering away of state and law, *see* note 26 and accompanying text *supra*, when Communism reaches its ultimate stage. In the near future, the Soviets anticipate a reduced need for law as the Soviet man or woman is re-educated. M. Pisotkin, *et al. Soviets, Democracy, Self-Government* (1962) *as translated in* J.P.R.S., *supra* note 19, 13503 at 16. Pisotkin maintains that the police, the army, and the formal court system are the only existing state institutions which will disappear completely and not be transformed into agencies of public self-government. *Id.*

The death penalty in U.S., although frequently imposed, has become rarely used in practice. The last execution was in early 1977. J. Nordheimer, "Gilmore is Executed After Stay is Upset," New York Times, Jan. 18, 1977, at 1, col. 4.

237. B. RAMUNDO, CAPITAL PUNISHMENT IN THE BUILDING OF COMMUNISM 215, 216 (A.B.A. 1963).

238. *See, e.g., Izvestia,* Nov. 23, 1972, at 6, 24 C.D.S.P., *supra* note 8, No. 47 at 23; I. Vinogradov, "Retribution," *Pravda,* June 14, 1973, at 6. C.D.S.P., *supra* note 8, No. 24 at 23; I. Novikov, "Traitors Unmasked," *Pravda,* Aug. 11, 1973, at 6, 25 C.D.S.P., *supra* note 8, No. 23 at 15.

239. *Id.* Army Times, Oct. 31, 1977, at 42, col. 1.

aggravating circumstances.[240] Drunkenness, which is a major problem in the Soviet Union, is a prominent example in cases where the drunkard uses a "source of heightened danger."[241] The 1952 Code provided only one punishment for treason where servicemen were concerned — death. The recent Code also provides for the alternative of deprivation of liberty from ten to fifteen years, including confiscation of property with or without exile for a term of two to five years.[242]

The Soviets stress the desirability of work in both their punishment and rehabilitation programs. This is due in part to their labor-poor economy. According to the Soviets, most civilian offenders sentenced to deprivation of freedom currently serve their terms in "corrective-labor colonies" separated according to the character of the crime and the personality of the offender.[243] Recent changes in Soviet law allow for a probationary sentence with accompanying mandatory work assignments for all persons sentenced to deprivation of freedom for a period of less than three years and for persons convicted of a crime due to negligence if sentenced for as long as five years.[244] Additionally, criminal proceedings may be terminated and administrative penalities may be imposed if the offender has committed an act for which a penalty of less than a single year's deprivation of freedom is authorized.[245]

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240. R.S.F.S.R. CRIMINAL CODE, art. 23 (1962). A list of aggravating circumstances will be found at p. 408 *supra.*

241. R.S.F.S.R. CRIMINAL CODE, art. 39(10) (1969); *accord, Pravda,* Mar. 23, 1975, at 3, 27 C.D.S.P., *supra* note 8, No. 12 at 21. In some American jurisdictions, drunkenness constitutes a valid defense to specific intent crimes, including some forms of murder based on the inability of the actor to form the requisite intent.

242. R.S.F.S.R. CRIMINAL CODE art. 64 (1962). *See also* note 177 *supra.*

243. *See* A. Natashev, *Legality and Humanism are the Basis for Reforming and Rehabilitating Convicts, Sovetskoye gosudarstvo i pravo,* No. 3 (March, 1976), 29 C.D.S.P., *supra* note 8, No. 10 at 15. The policy on corrective-labor is spelled out in a Supreme Soviet decree of 1972 amending the Principles on Corrective-Labor Legislation. *See* 24 C.D.S.P., *supra* note 8, No. 28 at 1-6. Whether military servicepersons in the Soviet Union are benefited by the correctional labor statute is not clear since the Fundamental Principles of Criminal Legislation, *supra* note 232, art. 29 specifically provides that "[correctional] labor without confinement is replaced by confinement in the guardhouse. . . ." *See also* R.S.F.S.R. CRIMINAL CODE art. 34.

244. *See* V. Terebilov, The Force of Law, *Pravda,* May 20, 1977, at 3, 29 C.D.S.P., *supra* note 8, No. 20, at 1. Terebilov, the U.S.S.R. Minister of Justice states that the government has

> ordered the ministries and departments and the managers of enterprises and construction projects not only to ensure the correct utilization of probationers, but also to see to it that they are imbued with the spirit of an honest attitude toward work, the precise fulfillment of the laws, respect for the rules of the socialist community and a solicitous attitude toward the people's property.

Id.

245. *Id.* Being a "parasite" is an example of an act for which an administrative sanction can be imposed. The CONST. U.S.S.R. art. 60 (1977) provides:

> It is the duty of, and a matter of honor for, every able-bodied citizen of the U.S.S.R. to work conscientiously in his chosen, socially useful occupation, and strictly to observe labor discipline. Evasion of socially useful work is incompatible with the principles of socialist society.

Currently, a second act of petty "hooliganism" no longer constitutes a criminal offense but the amount of fine that can be imposed has been increased.[246]

A unique punishment available only to the military tribunal is assignment to a disciplinary battalion or separate disciplinary company.[247] This sanction can be imposed on regular-service personnel for a period of three months to two years for all crimes even though the Code does not specify this punishment for any particular offense.[248] Normally, time spent in a disciplinary unit does not count toward the offender's military commitment but exceptions can be made by the military command.[249] The privileges of the offender's family, by virtue of his or her penalty, are discontinued from the "moment [his or her] sentence becomes effective until [he or she is] released from the disciplinary battalion."[250] One humane feature of this sentence is that those who suc-

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The last sentence of the preceding art. 60 was added to the 1977 Constitution before it was adopted since it was not contained in the draft. *Compare* CONST. U.S.S.R. art. 60 (1977), *with* CONST. U.S.S.R. (draft, 24 New Times 28, 1977).

246. V. Terebilov, *supra* note 245. Petty "hooliganism" is a category that covers many undesirable acts such as: "violation of public order and peace, displaying abusive disrespect for citizens, use of foul language, and other unworthy acts . . . ." *See generally* Decree of December 19, 1956 On Responsibility for Petty Hooliganism (Presidium of the R.S.F.S.R. Supreme Soviet) *amended* April 19, 1961 *as cited in Vedomosti* No. 16, art. 246 (1961) *as translated in* J.P.R.S., *supra* note 19, 46578 at 434. *See also* R.S.F.S.R. CRIMINAL CODE art. 206 (1966).

Placing petty "hooliganism" in the administrative area where "popular" justice is imposed, is further evidence of an increasing tendency to remove offenses from the criminal arena. Administrative proceedings are more likely to be less "due process" oriented and more polemical. When more than one act of administrative pressure against "hooliganism" has been applied within a year, criminal sanctions may be imposed. *See* R.S.F.S.R. CODE OF CRIMINAL PROCEDURE arts. 414-417.

247. R.S.F.S.R. CRIMINAL CODE, art. 34. The U.S. allows enlisted military members to attend retraining units where they are "to be trained continuously, guided constantly, counseled as necessary, and encouraged to demonstrate leadership." Army Regulation 190-47, *The United States Army Correctional System* para. 6-12 (December 15, 1975) describes the Army Retraining Brigade program located at Fort Riley, Kansas. Unit cadre are cautioned to "not only instruct, but carry out the essential correctional treatment, custody, control and supervision functions." *Id.* para. 6-12a. The Army "training" period is described as being an "indefinite length depending on individual needs and rates of progress." The emphasis is upon motivating the individual to resolve his or her personal problems and to develop insight into those difficulties. *Id.* para. 6-12b. Notwithstanding the Army characterization of the training as being of "indefinite" length, the United States Court of Military Appeals recently held that a soldier cannot be held in the Retraining Brigade beyond the sentence adjudged. Whitfield v. United States, Misc. Doc. No. 78-2 (C.M.A. Feb. 21, 1978), *citing* United States v. Robinson, 3 M.J. 65, 67 (C.M.A. 1977).

248. On the Procedure for Imposing on Regular-Service Personnel the Punishment of Assignment to a Disciplinary Battalion, decree of February 15, 1957 (Presidium of U.S.S.R. Supreme Court) *as translated in* J.P.R.S., *supra* note 19, 46578 at 412.

249. *Id.* art. 3.

250. *Id.* art. 4. An American servicemember's family is still entitled to all privilege such as medical, commissary, and post exchange until the service person is discharged. Additionally, one aspect of the American system is that if a servicemember is sentenced by a special courts-martial to a period of confinement, the convicted party must receive at least one-third pay plus all allowances. Sentence by a general courts-martial could subject the offender to total forfeitures of

cessfully survive have their criminal records for that offense erased.[251]

In summary, as far as the punishment of deprivation of freedom is concerned, the Principles of Criminal Legislation establish ten years as the maximum term with fifteen year sentences reserved only for those who commit especially dangerous crimes and for recidivist criminals.

V. CONCLUSION

The Soviet military is strikingly similar to military organizations throughout the world in its need for discipline and motivation. As an integral part of Soviet society, the military reflects many of the same concerns as well as the problems experienced by the Soviet civilian. Soviet society functions exclusively toward the building of communism and any behavior which tends to further "socialist legality" is encouraged. Any deviant conduct is corrected by means considered appropriate under the circumstances. Although all societies have need of law to further the collective and individual aims of their citizens, the Soviet Union's laws are particularly responsive to the special needs of communism based on the structure within which it operates.

There are numerous safeguards within the Soviet military judicial system which serve to provide something akin to Anglo-American notions of due process. It is likely that if the Soviets adhere to their rules of procedure, then, with the exception of some problem areas previously mentioned, the military offender probably receives reasonably

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all pay and allowances. In either event, the offender's family is entitled to all privileges at least until the sentence is final. In the author's experience, it normally takes from one to two years for a sentence to complete the appeals process in cases where an offender has received a punitive discharge and decides to pursue all military avenues of relief.

251. *Id.* art. 6. Confinement in the disciplinary unit is under austere and presumably harsh conditions. Entry gates are always locked, and the unit is surrounded by a double wooden fence or barbed wire at least 2.5 meters high. The windows are required to have metal grills, and "light is not extinguished in the premises at night . . . ." After all offenders are in the premises where billeted, at night, the premises are locked. Convicts are required to take "a conscientious attitude toward work, . . . not shirk it, and . . . not fraternize with outsiders." In the event a convict attempts to escape, weapons to prevent such escape are authorized. A prisoner's day is rigidly prescribed: "production work — six hours; combat and political training — three hours; sleep — seven hours; eating — three times a day." There is great emphasis on political-educational activities using a "skillful combination and proper application of measure of persuasion and coercion." *See* Regulation on the Disciplinary Battalion in the U.S.S.R. Armed Forces, implemented by order No. 71, U.S.S.R. Minister of Defense, April 5, 1961 *as translated in* J.P.R.S., *supra* note 18, 46578 at 417-19. Under U.S. law, while there is no general expungement from the records upon completing a tour in a retraining unit, any part of the unexecuted sentence may be remitted or suspended. U.C.M.J. art. 74, 10 U.S.C. § 874 (1970). Normally, U.S. trainees, if they successfully complete the program are retained in the military service. Considering the Soviet expungement, such practice may be worthy of emulation. Whether such expungement would actually aid a Soviet ex-convict or be buried in his or her past is subject to speculation. The Soviet Union keeps careful account of all its citizens. *See, e.g.*, 153 National Geographic 9 (Jan. 1978), where it was stated that in order for a person to become a resident of Moscow, a resident permit must be obtained.

good protection. It is impossible to determine from evidence available precisely how the Soviets implement their law and procedure in the military because of their reluctance to release data and their tendency to treat military trials as a state secret. Thus, it is reasonable to believe that the implementation probably does not fulfill the high proclamations of Soviet law. How far actual practice falls below the ideal is unknown, but it is clear that numerous reforms have been introduced into the system since the 1950's.

In recent years, the Soviets have increased their emphasis on administrative actions. Indeed, "due process" type procedures have become less evident in this area, and as the Soviets rely more heavily upon "popular justice" abuses will undoubtedly multiply. Thus, the Soviet military system with its proliferation of supervisors and superiors who can impose nonjudicial punishment creates the potential for abuses. Additionally, the Communist Party with its overseeing control wields preeminent influence over the military. Officially orchestrated "peer" and "societal" pressures are greatly relied upon as official molders of "correct" behavior. All in all, Soviet military law has potential for some arbitrary and capricious operational impact. Before unduly emphasizing these features of the Soviet military system, however, it is important to remember the special orientation, values and priorities of Soviet society which are intended to be served.

Transkei: A Legitimate Birth†

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Discussing the status of Transkei under principles of international law, attorneys deKieffer and Hartquist respond to the arguments presented by Geoffrey E. Norman in Volume 12 of this journal. The discussion focuses on four aspects of Transkeian independence: recognition, racial discrimination, self-determination and citizenship. Since Transkei Independence Day, October 26, 1976, only South Africa has formally recognized Transkei. The authors argue that non-recognition of Transkei is being used as a political sanction against South African apartheid and cannot be rationalized as an application of principles of international law. Further, they contend that an examination of the international legal concepts employed to justify non-recognition suggests that Transkeian independence is in substantial conformity with current application of those concepts.

Geoffrey E. Norman, the author of "The Transkei: South Africa's Illegitimate Child,"[1] discusses the status of Transkei[2] in international

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1. Note, *The Transkei: South Africa's Illegitimate Child,* 12 NEW ENG. L. REV. 585 (1977) [hereinafter cited as *Transkei*].

2. The Republic of Transkei, a territory of 17,000 square miles on the southeastern coast of Africa was declared independent from South Africa as of October 26, 1976 by the Republic of Transkei Constitution Act, 1976, Art. 1 (Transkei Legislative Assembly, April 23, 1976) and Status of Transkei Act, (Act 100 of 1976, July 9, 1976), *reprinted in* 15 INT'L. LEGAL MATS. 1136 and 1175 (1976).

law. Mr. Norman begins with a summary of the political and historical background of Transkei[3] and concludes that an independent Transkei, although satisfying the objective criteria for statehood,[4] should not be recognized or allowed to assume the role of a state in international society in that its creation violated principles of international law. There are several problems with this approach. Mr. Norman's analysis is deficient *inter alia* in that it gives insufficient weight to the historical background leading to development of the homelands policy; it fails to consider the political and economic realities in Southern Africa; and, it fails to offer an alternative which will maintain order. The most fundamental criticism of his argument, however, is that its conclusions regarding the application of international law to the independence of Transkei are based on subjective, normative judgments.

Mr. Norman divides his discussion of the status of Transkei under international law into four parts: recognition, racial discrimination, self-determination and nationality. This reply attempts to present an alternative interpetation of the Transkei situation, framed in terms of the questions which he posed.

I. Is Transkei Entitled to Recognition as an Independent State under Principles of International Law?

Mr. Norman argues that Transkei should be denied recognition under international law, primarily because of past ties between Transkei and South Africa. Our examination of the prevailing theories of recognition under international law leads to the conclusion that Transkei satisfies the requirements of statehood and is therefore entitled to recognition as an independent state. Thus, the refusal to recognize Transkei is the result of decisions made on a state-by-state basis and not an application of principles of international law.

The issue of whether Transkei is entitled to recognition as an independent state actually raises two separate questions. First, is Transkei an independent state? Second, is Transkei entitled to recognition? The answer to the first question is undoubtedly yes. A state exists as a subject of international law when four criteria are satisfied. They are: a defined territory, a settled population, a government capable of effective control over its territory, and the ability to conduct relations with other states in the international community.[5] These criteria are objective in that the form of government or the nature of its policies are

3. *Transkei, supra* note 1, at 589-614.

4. *Id.* at 619.

5. Convention on the Rights and Duties of States, Montivideo, Article 1 (Dec. 26, 1933); C. N. Okeke, Controversial Subjects of International Law at 22, 87 (1974) [hereinafter cited as Okeke]; *Transkei, supra* note 1, at 619.

irrelevant. Mr. Norman admits that Transkei satisfies these requirements,[6] and others who have considered the question agree.[7] Despite Transkei's legitimacy as a state according to these criteria, Mr. Norman advocates — and thus far, prevailing world policy has been — to deny Transkei a role in the international society of nations.

Mr. Norman suggests that recognition can be used as a tool to prevent Transkei from entering the international community. In fact, he argues that Transkei *should not* be recognized.[8] An exploration of prevailing recognition theory reveals the flaw in this conclusion. The most commonly accepted are the constitutive theory and the declaratory theory.[9] The declaratory theory maintains that recognition has no legal effect on the existence of a state. In contrast, the constitutive theory posits that a state does not exist for purposes of international law until it is recognized.[10] Mr. Norman acknowledges that the declaratory theory is more widely accepted and more in keeping with the modern practice of states,[11] and yet he attempts to deny Transkei an existence under international law, a position much more in keeping with the constitutive theory.

The constitutive theory has been criticized as a means to restrict the "family of nations" to a "mutual admiration society."[12] In contrast, the advocates of the declaratory theory emphasize its objective nature. The declaratory theory automatically confers the rights and duties of international law when a state satisfies the conditions of membership in the international community.[13] No action by pre-existing states is necessary. Thus, recognition indicates a "willingness to deal".

It has also been argued that recognition is both declarative and constitutive in nature.[14] Lauterpacht, for example, proposes a modified

6. *Transkei, supra* note 1, at 619.

7. R. LACOUR-GAYET, A HISTORY OF SOUTH AFRICA, at 345 (1977) [hereinafter cited as LACOUR-GAYET]; *Recognition: Time Will Tell,* TO THE POINT, October 8, 1976 (supplement) at 11; 123 CONG. REC. E 4045 (daily ed. June 23, 1977) (remarks of Rep. Edwards).

8. *Transkei, supra* note 1, at 614-24.

9. Mexico follows neither, considering recognition unnecessary. This policy, termed the "Estrada Doctrine," advocates dealing with whatever government has power without political preconditions or express declarations. This is not widely employed, however. Morrison, *Recognition in International Law: A Functional Reappraisal,* 34 U. CHI. L. REV. 857, 862 (1967) [hereinafter cited as Morrison]; H. B. JACOBINI, INTERNATIONAL LAW at 46 (1962) [hereinafter cited as JACOBINI].

10. JACOBINI, *supra* note 9, at 46; *see also* Morrison, *supra* note 9, at 859-61. Both theories have a respected group of advocates: for the constitutive theory: Kelsen, Anziloti, Triepel, Wheaton and Oppenheim; and for the declaratory theory: Brierly, Moore, Verdross, Chen, Kunz and Briggs.

11. *Transkei, supra* note 1, at 621.

12. Morrison, *supra* note 9, at 861.

13. *Id.*

14. JACOBINI, *supra* note 9, at 46. Chen makes a similar argument, stating "recognition is both a declaration of fact and an expression of the intention to enter into political relations. . . . As a declaration of fact it is both irrevocable and incapable of being subject to conditions; as an ex-

constitutive theory which imposes a duty on pre-existing states to recognize a new community which satisfies certain objective criteria.[15] The idea of a duty to recognize is not generally accepted,[16] as a state may exist without being recognized under the declaratory theory.[17] For example, states such as the People's Republic of China, North Vietnam, North Korea and East Germany have been refused recognition.[18]

Recognition is frequently employed to serve political and diplomatic objectives. This is consonant with the prevailing view of recognition as a voluntary act. As Starke points out:

> States have frequently delayed, refused or eventually accorded recognition . . . . for reasons that lacked strict legal justification. For example, in the First World War, Great Britain, France, the United States and other powers recognized Poland and Czechoslovakia before these latter actually existed as independent States or Governments. Political and diplomatic considerations also explain the puzzling divergencies among States since 1948 so far as recognition of the newly emerged State of Israel and of the communist Government of China.[19]

Mr. Norman describes this as a trend "to use recognition as a political stamp of approval."[20] Others have called it a "requirement of good government" and have attempted to add it as a fifth criteria for the existence of a state.[21] This subjective approach has been criticized as contrary to the custom of states to treat one another's internal structures as domestic matters.[22] The idea that a government or state must satisfy a test of democratic legality to have a legitimate existence as a state has not been consistently applied nor has it become one of the standard prerequisites for recognition.[23] However, even if the requirement of good government is utilized, Transkei would be entitled to recognition provided that the test is applied equally. Transkei compares favorably with most of the recognized States in Africa on civil and political rights.[24]

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pression of the intention to enter into political relations it is both revocable and capable of being subject to conditions." 2 WHITEMAN, DIGEST OF INTERNATIONAL LAW 119 (1963).

15. H. LAUTERPACT, RECOGNITION IN INTERNATIONAL LAW (1947), *see* Morrison, *supra* note 9, at 863.

16. OKEKE, *supra* note 5, at 92.

17. *Id.* at 81.

18. *Id.* at 82. For an explanation of U.S. refusal to recognize Communist China *see* 39 DEPT. ST. BULL. 385 (1958).

19. J. G. STARKE, INTRODUCTION TO INTERNATIONAL LAW, 125-26 (1967) [hereinafter cited as STARKE].

20. *Transkei, supra* note 1, at 621.

21. J. E. S. FAWCETT, LAW OF NATIONS, at 41-53 (1968).

22. Devine, D. J., *The Requirements of Statehood Re-examined,* 34 MOD. L. REV. 410 (1971) [hereinafter cited as Devine].

23. OKEKE, *supra* note 5, at 82.

24. Gastil, *The Comparative Survey of Freedom,* 39 FREEDOM AT ISSUE 5-7 (Jan.-Feb. 1977).

The requirement of good government is totally rejected by Mexico and other Latin American countries which follow the "Estrada Doctrine." Under this approach, the external State deals with whatever government has power in the "recognized" state without any political preconditions or express declarations.[25] Recognition is considered an "insulting practice" which "offends the sovereignty of other nations" by passing judgment on internal affairs.[26] This alternative, although not widely adopted, clearly represents a rejection of the constitutive function of recognition in international law.

Mr. Norman insists upon taking the "stamp of approval" idea one step further by arguing that it should be collectively conferred or withheld.[27] Southern Rhodesia is relied upon as an example of collective nonrecognition. First, although Rhodesia has been refused recognition on a global scale, nonrecognition has had only marginal effects on the government and economy of that country.[28] Second, nonrecognition does not affect the status of Rhodesia as a state.[29] Attempts to urge states to conform to certain principles of good government expressed in majority resolutions of the General Assembly do not affect the objective existence of the characteristics of independence.[30] A state which disregards principles of good government or fails to observe human rights is still a state.[31] East Germany is another example of collective nonrecognition. Again, the Western policy of nonrecognition does not affect the objective existence and domestic authority of the East German state.[32]

Collective nonrecognition, particularly through the General Assembly, has not achieved the status of a customary rule of international law.[33] The resolutions expressing nonrecognition are not viewed as legally binding. Recognition and conduct of diplomatic relations are still the prerogative of individual states. The resolutions pur-

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The Freedom House survey divides all countries into seven categories ranked from "most free" to "least free." Transkei is in the sixth category on political rights and the fifth category on civil rights, but very few African nations are listed in higher categories. For example, included with Transkei in the sixth category on political rights are such states as Gabon, Ivory Coast, Malagasy Republic, Senegal and Swaziland. Seventeen African nations are listed in the seventh political category, below Transkei.

25. Morrison, *supra* note 9, at 862.

26. 2 M. M. WHITEMAN, DIGEST OF INTERNATIONAL LAW at 85 (1963). These statements were made on Sept. 27, 1930, by the Secretary of Foreign Relations for whom the Doctrine is named when he instructed the Ministers or charges d'affaires in countries affected by political crises that no declaration or grants of recognition would be issued.

27. *Transkei, supra* note 1, at 621-22.

28. Morrison, *supra* note 9, at 872.

29. Devine, *supra* note 22, at 412-13.

30. *Id.*

31. *Id.*

32. *Id.* at 414-15.

33. *Id.*

porting to refuse Transkei recognition[34] do not contain sanctions for states which choose to extend recognition on an individual basis. In short, "[n]o collective organic procedure for granting recognition based on established legal principles has yet been evolved by the international community. . . ."[35]

Further, United Nations membership is not a reliable indicia of statehood or collective recognition, primarily because it is inconsistently conferred. Two examples, the Ukraine and Taiwan, reveal the politicking behind United Nations membership. The Ukraine and Byelorussia became founding members of the United Nations in 1945.[36] Both are components of the federal system of the Soviet Union, which conducts their external relations. Only in the United Nations and nowhere else is the Ukraine vested with an international legal personality. The United States does not recognize the Ukraine or Byelorussia as separate entities[37] but considers them constituent parts of the Soviet Union. The membership of these two "federal states" in the United Nations raised the question of recognition through a vote to confer membership. This question was considered in a 1950 memorandum titled "Legal Aspects of Problem of Representation in the United Nations" prepared for Secretary General Trygve Lie. The conclusions were (1); that a member could properly vote to accept a representative of a government which it did not recognize or with which it had no diplomatic relations, and (2); that such a vote did not imply recognition or a readiness to assume diplomatic relations.[38] If a vote to confer membership does not imply recognition, a vote to exclude a non-member should not foreclose it.

Similarly, as illustrated by the dispute over membership for Taiwan and the People's Republic of China (PRC), resolutions refusing membership or recognition do not prevent the existence of a legitimate state. Although Taiwan occupied the "China seat" in the United Nations for many years, the PRC maintained effective control over the bulk of Chinese territory. This *de facto* situation was "recognized" by the granting of United Nations membership for the PRC in 1971,[39] and

34. G. A. Res. 3411D, 34 U.N. GOAR Supp. (No. 34) 37, U.N. Doc. A/10342 (1975); G. A. Res. A/31/L.5 (XXXI), Oct. 26, 1976. *See Transkei, supra* note 1, at 614-22.

35. STARKE, *supra* note 19, at 126.

36. K. SAWCZUK, UKRAINE IN THE UNITED NATIONS ORGANIZATION, STUDY IN SOVIET FOREIGN POLICY 1944-1950, at 44 (1975).

37. *Id.* at 130.

38. *Id.* at 138, note 46. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 105 (1965).

39. G. A. Res. 2758, 26 U.N. GOAR, Supp. (No. 29) 2, U.N. Doc. A/L.630/Add. 1 & 2 (1971), cited in: D. DJONOVIH, UNITED NATIONS RESOLUTIONS. SERIES I: RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY VOLUME XIII, 1970-1971 (1976). The resolution recognized the representatives of the Government of the Republic of China as the only lawful representatives of China to the United Nations and was expressed as a "restoration of lawful rights" of the People's Republic of China.

Taiwan subsequently withdrew from the United Nations. As the United States moves towards recognition of the PRC, a new form of recognition may be devised for Taiwan. It may be possible to extend *de jure* recognition to the PRC and continue a *de facto* relationship with Taiwan, or conduct relations with Taiwan on a basis short of recognition as a separate state.[40] The alternative ways to deal with an entity such as Taiwan affirm the wisdom of designating recognition a function of individual states and highlight the potential problems in conferring any sort of collective recognition.

Finally, the status of statehood could arguably be collectively conferred on an entity which failed to satisfy the objective criteria for a state. The Palestinians, for example, do not currently control a defined territory, but consider themselves an identifiable entity represented by the Palestine Liberation Organization (PLO).[41] The League of Arab States has recognized the representative capacity of the PLO. The PLO maintains offices in a number of these states which grant diplomatic status to PLO officials. The People's Republic of China extended recognition to the PLO in 1965.[42] If the Palestinians were granted full membership in the United Nations or otherwise collectively recognized, would Mr. Norman argue that the PLO *a fortiori* represented an independent state?

The remaining criticisms of Transkei as an independent state are particularly weak. Transkei is considered too small or too dependent on South Africa to be truly independent.[43] These criteria are not appropriate standards for evaluating the legitimacy of a state. No minimum size is prerequisite to becoming an independent state. "Communities with small populations, small landmass, underdeveloped industries and high illiteracy rates are emerging as full-fledged independent sovereign states. . . ."[44] General Assembly Resolution 1514 supports the right of these small units to independence by stating that "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."[45]

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40. V. H. LI, DE-RECOGNIZING TAIWAN: THE LEGAL PROBLEMS 10-11 (1977) [hereinafter cited as LI]. We have eliminated the possibility of extending *de jure* recognition to both as the Chinese adamantly insist that there is only one China. *Id.* For a discussion of the different ways the terms *de jure* and *de facto* are utilized with respect to recognition, *see* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 96, reporters notes at 312-13 (1965).

41. Tolin, *The Palestinian [Refugees] People and Their Political, Military, and Legal Status in The World Community*, 5 N.C. CENTRAL L. J. 326 (1974).

42. *Id.* at 343-44.

43. *Transkei, supra* note 1, at 588.

44. Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L. L. 779, 835 (1976).

45. Declaration on the Granting of Independence to Colonial Countries and Peoples, G. A. Res. 1514, 15 U.N. GOAR, Supp. (No. 16) 66, 67, U.N. Doc. A/4684 (1960). This will be elaborated on in Section III, *infra*.

If minimum standards of size and development could be ascertained, Transkei would meet them. Transkei is no smaller or more economically dependent than other states which are participants in the international community. In 1969, seventeen members of the United Nations had populations of less than one million.[46] Transkei, with a population approaching three million[47] is much larger than member states such as the Maldive Islands with 100,000 people or Equatorial Guinea with 272,000.[48]

Furthermore, Transkei is relatively no more dependent on South Africa than other neighboring states such as Lesotho, Botswana, and Swaziland. The workers of all these nations, in addition to Mozambique workers,[49] contribute revenue to their countries from employment in South African mines.[50] As much as half of Lesotho's government revenues result from the customs union with South Africa, and 130,000 of Lesotho's 900,000 population work in South Africa.[51] This dependency does not prevent Lesotho, which received its independence from Great Britain in 1966, from participating in the international community in its own right.[52] Thus, treating Transkei as anything but a fully sovereign state cannot be justified on the basis that it has a migrant worker population.[53]

Finally, based on factors such as quality of land and accessibility to markets, Transkei is a potentially viable economic unit. Transkei has high agricultural and industrial potential and could reasonably achieve economic self-sufficiency.[54] It has been noted that Transkei is in a better economic position than about 85 per cent of African countries with a per capita income above the "backward country" level established by United Nations criteria.[55] In addition to this starting position, industrial development in Transkei is rapidly increasing. The Transkei Develop-

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46. Emerson, *Self-Determination,* 65 AM. J. INT'L. L. 459, 470 (1971) [hereinafter cited as Emerson].

47. *Road to Self-Determination,* TO THE POINT, October 8, 1976 (supplement) at 4. The resident population alone is 1.7 million.

48. Emerson, *supra* note 46, at 469.

49. LACOUR-GAYET, *supra* note 7, at 333.

50. I. KAPLAN, *et al.,* AREA HANDBOOK FOR THE REPUBLIC OF SOUTH AFRICA 410 (1971).

51. *Id.*

52. *Id.* at 663. The Lesotho was admitted to United Nations membership by G.A. Res. 137, 21 U.N. GOAR, Supp. (No. 16) 2, U.N. Doc. A/L.485 (1966). Botswana was admitted the same year by G.A. Res. 2136, 21 U.N. GOAR, Supp. (No. 16) 2, U.N. Doc. A/L.484 (1966). Swaziland was admitted by G.A. Res. 2376, 23 U.N. GOAR, Supp. (No. 18) 1, U.N. Doc. A/L.551/Add. 1 (1968).

53. *Dissent on Transkei,* NATIONAL REVIEW, April 29, 1977 at 483-84.

54. *Economic Prospects: Bright if Rightly Handled,* TO THE POINT, October 8, 1976 (supplement) at 14. "Backward Country" status as used here refers to an average per capita income of R143 or less. In 1973, Transkei had an average per capita income of R175.

55. *Id.*

ment Corporation assists in the establishment of indigenous private enterprise by providing working capital and training.[56] A comparison of statistics on Transkei with those on other African states shows that Transkei is in a strong position with respect to per capita income, size and gross national product.[57] Denying Transkei its rightful status as an independent state clearly cannot be based on quantitative measurements such as these.

If Transkei's economic position improves, or it maintains an autonomous status over a continuous period of time, will recognition be forthcoming? It is useful to distinguish different forms of recognition. Recognition of the existence of a state should not be confused with recognition of a new head or government of an existing state, recognition of an entity entitled to rights of belligerency, recognition of an insurgent government or recognition of a territorial change.[58] This range of alternatives makes it possible for quasi-states such as Biafra[59] or the Palestine Liberation Organization[60] to claim international recognition.

If nations choose to recognize Transkei, this may be extended in a variety of ways. United States policy has been to distinguish between *de jure* and *de facto* recognition. The *de facto* approach has been utilized to extend recognition on a tentative basis, as when the United States first recognized Israel in 1948.[61] Conducting relations with a sovereign government without extending formal or *de jure* recognition may also be considered *de facto* recognition. Thus, the existence of states such as Cuba and Albania, not formally recognized by the United States,

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56. *TDC: Key to Development,* TO THE POINT, October 8, 1976 (supplement) at 15.

57. *Transkei in Transition,* Association of Third World Affairs, Washington, D.C. (October 26, 1976). *Road to Self-Determination,* TO THE POINT, October 8, 1976 (supplement) at 5 provides the following comparison:

	Total Surface Area (1000ha)	Gross National Income (R million)	GNI per capita (Rands)
Transkei	4,379	407.3	175
Lesotho	3,033	62.8	70
Swaziland	1,736	94.2	204
Tanzania	93,797	1,234.0	94
Zaire	234,451	1,506.8	78
Nigeria	92,377	7,337.9	102
Ghana	23,854	2,119.0	235
Ivory Coast	32,246	1,440.0	267
Sudan	250,581	1,593.1	94

58. STARKE, *supra* note 19, at 125.

59. Biafra was recognized by Tanzania, Gabon, Ivory Coast, Zambia and Haiti although its status as a state was questionable. *See* Note, *Was Biafra at Any Time a State in International Law?,* 65 AM. J. INT'L. L. 551 (1971) [hereinafter cited as Note]; and Nayar, *Self-Determination Beyond the Colonial Context: Biafra in Retrospect,* 10 TEX. INT'L. L. J. 321 (1975) [hereinafter cited as Nayar]. The Biafran situation will be discussed more fully in Section III, *infra.*

60. *See* note 35 *supra. See also* discussion p. 434 *supra*..

61. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 96 (1965), Illustration 5 quoting 18 DEPT. ST. BULL. 673 (1948).

should not be denied. Although either form implies the existence of a government or state, *de jure* recognition is used as a policy tool.[62] *De jure* and *de facto* recognized countries receive similar treatment in United States statutes.[63] Some states may choose to recognize a new nation such as Transkei on a *de facto* basis until autonomy is clearly established.[64] This procedure allows dealings on a tentative basis, while power is consolidated by the new entity.[65] For example, Great Britain recognized the Soviet government on a *de facto* basis on March 16, 1921, but did not extend *de jure* recognition until February 1, 1924.[66] International law is flexible enough to allow a variety of dealings among states. If it is politically undesirable to extend recognition to Transkei at this time, states may choose to pursue limited contacts such as exchange of information or private investment.

If nonrecognition continues, two more questions are posed. What disabilities accompany nonrecognition? How does the status of a recognized state differ from that of an unrecognized state? Both recognized and unrecognized states are subject to the rights and duties of states defined by international law.[67] The unrecognized state must respect the territory of a foreign state, observe neutrality rights and adhere to the laws of war.[68] For example, insurgent captives are to be treated as prisoners of war.[69] It has been noted that the actions of an unrecognized government in its own territory are not likely to be successfully contested in foreign courts.[70] These rights and duties arise because of the existence of the states as judged by objective criteria rather than recognition as states by others. The sovereign immunity of

62. LI, *supra* note 40, at 6-7.

63. *Id.* at 14-15. The distinctions placed on de facto recognized governments include less prestigious visa status, the entry of foreign diplomats under a different category and registration of foreign propaganda agents.

64. STARKE, *supra* note 19, at 139.

65. *Id.* at 143. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 96, reporters notes at 2 (1965).

66. *Id.* at 140.

67. OKEKE, *supra* note 5, at 91. This confirms the conclusion that recognition does not determine the existence of a state.

68. Morrison, *supra* note 9, at 865. The anamolous results accruing if unrecognized states did not have such duties were also mentioned in Barrie, *A Legal View of Transkeian recognition and so-called 'statelessness'*. 3 POLITIKON No. 2 at 32 (Oct. 1976).

69. JACOBINI, *supra* note 9, at 256.

70. *Id.* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 113 (1965) states that:

> A court in the United States will give the law of an unrecognized entity or regime which satisfied the requirements for recognition specified in §§ 100 and 101. The effect which it would have under the rules of conflict of laws if the entity or regime were recognized, to the extent only that such law relates to: (a) matters of an essentially private nature within the effective control of the unrecognized entity or regime. . . .

For a discussion of cases applying this rule *see* 2 M. M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 69 (1963).

unrecognized states has received judicial protection in both United States and British courts.[71] Thus, principles of international law are applied on the basis of the objective existence of a state as the subject of international law.[72]

Nonrecognition does involve certain handicaps. The citizens of an unrecognized state may not be protected in international law[73] since it is the role of the state to protect them. Mr. Norman may be unwittingly arguing to foreclose the Xhosa's best chance for protection against deprivation of their human rights, by insisting that Transkei is not a legitimate state. Is Mr. Norman arguing that South Africa should reassert control over Transkei? If so, he is supporting a broader application of the South African policies he condemns. As an independent state Transkei has the opportunity to establish a course of conduct which radically departs from that of South Africa. If Transkei were recognized, it could actively pursue the human rights issue on behalf of its citizens.

Other disabilities of an unrecognized state are: it cannot sue in the courts of a state which has not recognized it; acts of an unrecognized State or Government will not generally be given the effect customarily accorded through the rules of "comity"; its representatives cannot claim immunity from legal process; and property may be recovered by the parent state.[74] These disabilities do not prevent an unrecognized State from conducting its internal business, but relate primarily to the conduct of international relations. An unrecognizing State is thus "refusing to deal" with the unrecognized State.

Nonrecognition will undoubtedly obstruct the conduct of international relations by Transkei and hamper its economic development unless nations choose to participate in trade or investment without formal recognition. Mr. Norman is presumably not advocating these results. He is urging nonrecognition as a political sanction against South Africa.[75] The actual effects of such a policy would be much more to the detriment of Transkei and its citizens than to the detriment of

71. Morrison, *supra* note 9, at 867-68; Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 139 N.E. 732 (1923); *The Christina* [1938] A.C. 485 and *The Arantzazu Mendi* [1938] A.C. 256 are British cases recognizing the sovereign immunity of the Spanish Nationalist Government, although the British refused to recognize it diplomatically.

72. Inter-American Convention On the Rights and Duties of States, Montivideo, Art. 3 (26 December 1933) which states, "The political existence of the state is independent of recognition by other states. Even before recognition, the state has the right to defend its integrity and independence, to provide for its conservation and prosperity and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services. . . ." *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 107 (1965).

73. Morrison, *supra* note 9, at 861.

74. STARKE, *supra* note 19, at 144-45. The latter is generally applied to insurgent governments which have overthrown existing regimes.

75. *Transkei, supra* note 1, at 614-24.

South Africa. Nonrecognition simply does not have the requisite leverage to challenge South Africa's homeland policy.

The purpose of this discussion has been to acknowledge nonrecognition of Transkei for what it really is: a political statement that apartheid and South African homelands are disliked. In addition, an attempt has been made to dispel the myth that an unrecognized state is a nullity and without status under international law. The alternative, an objective approach, acknowledges that Transkei satisfies the criteria for statehood and evaluates alternative forms of association with the state which exists.

II. IS TRANSKEI AN OUTGROWTH OF SOUTH AFRICAN APARTHEID?

Mr. Norman starts from the premise that apartheid violates international law. He then argues that Transkei, as an end-product of separate development, is an extension of apartheid and therefore an illegal state.[76] One defect in this argument is that Mr. Norman is blaming Transkei for the violations of international law allegedly committed by South Africa. Another flaw is the characterization of the racial situation in South Africa as a black/white dichotomy analagous to American racial problems. This generalization patently contradicts the multiracial diversity in South Africa. Furthermore, the conclusion that separation based on tribal ties violates international law is inconsistent with international practice which has recognized other ethno-centric nationalist movements.

First, Mr. Norman ignores the historical basis for an independent Transkei, particularly the fact that Transkei existed before South Africa. Similar historical claims to territory were recognized at the Paris Peace Conference in 1919, especially in combination with ethnic unity. For example Lithuania asserted that since "time immemorable" certain lands have been inhabited by Lithuanians.[77] The Lytton Commission's recognition of the Chinese historical connection to Manchuria was an admission by an authoritative neutral body that earlier possession tends to create a bond between peoples that should be respected in map-making.[78] The people of Transkei had independent chiefdoms with their own legal system, language and social organization before Europeans settled in the area.[79] Much of this infrastructure was preserved during the period of British annexation and the political formation of the Union of South Africa.[80] Transkei independence is therefore closely

76. *Id.* at 624-31.

77. N. HILL, CLAIMS TO TERRITORY IN INTERNATIONAL LAW AND RELATIONS 81, 127 (1945) [hereinafter cited as HILL].

78. *Id.* at 83.

79. K. D. MATANZIMA, INDEPENDENCE MY WAY 26 (1976) [hereinafter cited as MATANZIMA].

80. *Id.* at 26-28.

analagous to the cession by the British of Lesotho, Botswana and Swaziland since Transkei is more appropriately viewed as a colony rather than as an integrated part of South Africa.[81]

Perhaps more importantly, the argument that Transkei is an outgrowth of South African apartheid looks to the racial policy of South Africa rather than to that of Transkei in forming a basis for determining Transkei's legitimacy. Transkei itself does not follow apartheid. Mr. Norman may be technically correct when he states that the Transkei constitution does not contain a "Bill of Rights."[82] However, the Preamble of the Transkei Constitution embraces many of the principles found in the first ten amendments to the United States Constitution. It states that "its citizens and all others who dwell lawfully within its borders are assured of social, political and economic justice, freedom of speech, assembly and worship, and unimpeded access to and equality before the Law."[83]

This broad policy statement has been carried out in Schedule 11 of the Transkei Constitution Act which repeals all or part of 122 racial laws of South Africa,[84] including the Reservation of Separate Amenities Act, the Group Area Act and the Prohibition of Political Interference Act.[85] Thus, even assuming that South African apartheid violates international law, Transkei is arguably attempting to comply with international law by repealing racially discriminatory legislation.[86] In addition, since anyone living in Transkei, including whites, may apply for

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81. This will be discussed more fully under Section III, *infra*. *See We Shall Be a Truly Free, Sovereign State,* (interview with Paramount Chief Kaiser Matanzima), TO THE POINT, October 8, 1976 (supplement) at 2, 123 CONG. REC. E 4045 (daily ed. June 23, 1977) (remarks of Rep. Edwards). G.A. Res. 2134 advocated the prompt admission of Lesotho, Botswana, and Swaziland suggesting that participation of those countries in the United Nations was one form of fulfilling the United Nations' policy favoring independence of former colonies. G.A. Res. 2134, 21 U.N. GOAR, Supp. (No. 16) 67, U.N. Doc. A/6448 (1966).

82. *Transkei, supra* note 1, at 613.

83. Preamble, Republic of Transkei Constitution Act, 1976, *reprinted in* 15 INT'L. LEGAL MATS. 1136 (1976). *See* Breytenbach, *The Transkeian Constitution in the African Context,* 7 & 8 BULLETIN OF THE AFRICA INSTITUTE OF SOUTH AFRICA 247 (1976).

84. Republic of Transkei Constitution Act, 1976, Art. 74, and Schedule 11, *reprinted in* 15 INT'L. LEGAL MATS. 1136, 1164 and 1171-74 (1976).

85. Stultz, *Transkei Independence in Separatist Perspective,* 8 S. AFR. INT'L. Q. 10, 19-20 (1977).

86. G.A. Res. 1904 (XVIII), 20th Nov. 1963 Article 4 states that:

> All states shall take effective measures to revise governmental and other public policies and to rescind laws and regulations which have the effect of creating and perpetuating racial discrimination wherever it still exists. They should pass legislation for prohibiting such discrimination and should take all appropriate measures to combat those prejudices which lead to racial discrimination. Article 5 states: An end shall be put without delay to governmental and other public policies of racial segregation and especially policies of apartheid, as well as all forms of racial discrimination and separation resulting from such policies.

Cited in: O. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS 200 (1966) [hereinafter cited as ASAMOAH].

naturalization, it is not exclusively a "black" state.[87] Transkei should be judged on the basis of its own policies and practices rather than condemned for racial policies practiced elsewhere. Mr. Norman's concern for human rights might be better served by considering the moderate racial approach taken by Transkei a step in the right direction. Surely he does not advocate that South Africa reassert control over Transkei if that involves a return of the harsher racial laws he condemns?

Finally, the creation of an independent Transkei can be viewed as a legitimate result of ethno-centric nationalism. The characterization of South Africa as a state with two "racial" groups, blacks and whites, is sociologically unsound. The blacks are members of many unique cultures. The population of Transkei is actually composed of several different tribes who speak the Xhosa language.[88] Language and ethnic ties are recognized under international law as legitimate bases for territorial separation.[89] It is important that the Xhosa peoples "share the same national background and aspirations."[90] Modern parallels of ethno-centric nationalism include Eritrean nationalists, Quebequois, Scottish separatists, and Puerto Rican secessionists.[91]

Assuming *arguendo* that Transkei is a product of apartheid, the idea that an allegedly illegal act cannot create a legitimate state is not confirmed in practice. Many of the newly independent nations of Africa achieved their status through bloody revolutions, some with outside interference such as the Cuban assistance to Angola,[92] yet these nations were given full status as sovereigns. Northern Ireland was separated on the "suspect" ground of religion, but its legal existence as a separate entity is not challenged. In short, "acts illegal in origin can create valid effects in the field of status."[93]

III. IS TRANSKEI'S DECLARATION OF INDEPENDENCE AN EXPRESSION OF SELF-DETERMINATION?

Self-determination is a political right of all peoples under international law. Although Mr. Norman acknowledges the existence of this right, he gives it a very cursory treatment in relation to Transkei.[94] He

87. Booysen, Wiechers, VanWyk & Breytenbach, *Comments on the Independence and Constitution of Transkei* 2 S. AFR. YEARBOOK OF INT'L. LAW 18-20. (1976), referring to The Transkei Constitution §§ 57-58 [hereinafter cited as Booysen].

88. MATANZIMA, *supra* note 79, at 19-24.

89. HILL, *supra* note 77, at 121-23.

90. *Id.* at 119.

91. Suzuki, *supra* note 44, at 781; 122 CONG. REC. H 10637 (daily ed. Sept. 21, 1976) (remarks of Rep. Crane).

92. *Dissent on Transkei,* NATIONAL REVIEW, April 29, 1977 at 483.

93. OKEKE, *supra* note 5, at 86-88. Mr. Okeke was referring specifically to the effect of Rhodesia's unilateral declaration of independence.

94. *Transkei, supra* note 1, at 629-31.

gives undue weight to the fact that no referendum on the issue of independence occurred. As we shall see, the will of a body politic does not have to be expressed in a referendum, but self-determination may be exercised in a variety of ways. The involvement of the Transkeian Legislative Assembly in the decision to establish a separate state conforms to the principle of self-determination. Even the United States Declaration of Independence, Articles of Confederation and Constitution were enacted by representative bodies rather than popular vote.

Self-determination is a relatively new concept in international law. The Declaration on the Granting of Independence to Colonial Countries and Peoples[95] provides only a starting point in defining and applying this right.

Self-determination involves both the right of people within a country to freely choose their political institutions (an internal constitutional aspect), and the right to establish a new entity through independence or some other form of self-government (an international aspect).[96]

The right of self-determination was affirmed in 1970 as one of the seven principles of international law.[97] Although several modes of implementation are possible,[98] the establishment of sovereign and independent states has been most frequently employed.[99] Over 50 states have come into being since 1960.[100] In essence, self-determination exists when a subgroup of the body politic expresses its preference for a decisionmaker to represent its territory and inhabitants.[101]

Mr. Norman emphasizes that the principle of maintaining territorial integrity and the international opinion of apartheid combine to present a bar to Transkei independence, citing United Nations resolutions which condemn the bantustans.[102] However, the principles of territorial integrity and the condemnation of apartheid are somewhat incompatible in that together they foreclose what may be the most practical remedy for abating oppression, creation of an independent state where the formerly oppressed group will have full political and social rights.

95. G. A. Res. 1514, 15 U.N. GOAR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1960).

96. ASAMOAH, *supra* note 86, at 167.

97. G. A. Res. 2625, 25 U.N. GOAR, Supp. (No. 18) 121, U.N. Doc. A/8082 (1970).

98. The alternatives include: (1) the establishment of a sovereign and independent state, (2) the free association or integration with an independent state, or (3) the emergence into any other political status freely determined by a people. Johnson, *Toward Self-Determination — A Reappraisal as Reflected in the Declaration on Friendly Relations,* 3 GA. J. INT'L. & COMP. L. 145, 146 (1973).

99. *Id.* at 149.

100. *Id.* at 158.

101. Suzuki, *supra* note 44, at 788.

102. *Transkei, supra* note 1, at 630, citing G. A. Res. 1514, 15 U.N. GOAR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1960); G. A. Res. 2775E, 26 U.N. GOAR, Supp. (No. 29) 41, 42-43, U.N. Doc. A/8504/Add. 1 (1971); G. A. Res. 2923E, 27 U.N. GOAR, Supp. (No. 30) 24, 25, U.N. Doc. A/8879/Add. 1 (1972); and G.A. Res. 3411D, 30 U.N. GOAR, Supp. (No. 34) 36, 37, U.N. Doc. A/10342 (1975).

Creation of an independent state, even along racial lines may be justifiable under international law where necessary to protect human rights. For example, while both General Assembly Resolutions 1514 and 2625 seemingly limit the right of self-determination where a need exists to preserve territorial integrity, Resolution 1514 stresses that only nations conducting themselves in compliance with certain principles are entitled to protection of their territorial integrity[103] because the protection of human rights is of greater importance. In addition, a distinction should be made between isolating a portion of the population in order to deny that group political participation and a move for independence by a group seeking full political rights.

By setting up both apartheid and territorial integrity as bars to independence, Mr. Norman is thus put in the difficult position of defending both sides of the question. He argues both that South Africa denies its citizens basic human rights, and that the territorial integrity of South Africa must be preserved.

The principle of territorial integrity requires some refinement in order for it to be a useful concept. If territorial integrity is not established by the mere creation of a body politic,[104] it may be said to require the representation of a significant segment of the population.[105] The concept implies a cohesiveness or unity supported by similar claims of the population. Before a country is entitled to protection of its "territorial integrity," this unity must be present.

Preservation of territorial integrity in another context is a restatement of the principle of non-intervention, which prohibits interference in the domestic jurisdiction of a State.[106] The background of self-determination as part of the process of decolonization suggests that the United Nations, in drafting Resolution 1514, was concerned with outside interference by third parties.[107] Territorial integrity should not be fragmented by outside powers. This does not prevent legitimate self-help by groups within a country exercising their self-determination. As the Biafra leader Ojukwu stated: "[T]erritorial integrity can legitimately be invoked if one member-state attempts to enlarge its territory

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103. G. A. Res. 1514, *supra* note 95, at para. 7 reads

all States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity, and the resolution specifically states at paragraph 6 that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

104. Suzuki, *supra* note 44, at 842.

105. *Id.* at 816.

106. *Id.* at 842-43.

107. *Id.* at 807-08.

at the expense of another member-state, but certainly not in respect of the emergence of new states arising from the disintegration of a member state."[108]

Territorial integrity is not an absolute, nor is it the most important principle of international law. Thus, just as nonintervention gives way to humanitarian intervention to protect human rights, territorial integrity gives way to separatist movements to preserve their own human rights.[109] The implementation provisions of General Assembly Resolution 2625 therefore provide that the right of self-determination can be executed by the peoples themselves.[110]

A people justifiably invoke the right to self-determination primarily in two contexts: the assertion of independence by a former colony and the secession of a portion of a country. Either could apply to Transkei. One author suggests the following three criteria:

> 1. The people asserting the right must be culturally antithetic to those administering the government of the state.
> 2. There must be concrete evidence that the people are being denied basic human rights — as shown, for example, by discriminatory laws or economic exploitation. . . . For example, violations of various covenants concerning human rights . . .
> 3. If the mode of implementation is to be complete independence or even a semi-autonomous political status, the people must be situated in an area that is geographically distinguishable from the rest of the state . . . However, this last criterion must not be allowed to prejudice accessibility of the right in situations where the people in question meet the first two criteria . . .[111]

Secession is recognized as a justifiable form of self-determination under these circumstances. This type of claim is frequently made today. An exploration of two recent examples, Biafra and Pakistan, reveals some of the characteristic attributes of groups claiming self-determination.

Although the Biafran claim did not succeed in that Biafra is not an independent state today, it raised the question of the legitimacy of secession as an exercise of self-determination. The Biafran attempt to exercise self-determination was legitimate in that the Ibo were denied equal protection in the election process and held a subordinate status in

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108. Nayar, *supra* note 59, at 327.

109. Suzuki, *supra* note 44, at 847-49. *See also* Booysen, *Convention on the Crime of Apartheid*. 2 S. AFR. YEARBOOK OF INT'L. L. 66, 70 (1976). Mr. Booysen discusses the tension between promoting self-determination and condemning apartheid. He concludes, "The mere act of dividing the population along racial lines, which also correspond to cultural, language and social differences, is not and cannot always be illegal according to international law. It may be necessary to implement a group's right to self-determination." *Id.* at 76.

110. Johnson, *supra* note 98, at 147-49.

111. *Id.* at 161-62.

Nigeria in terms of power.[112] In addition, the population was effectively organized and firmly identified with the Biafran leadership in contrast to the Katangese dependence on backing from a metropolitan power.[113] Biafra was recognized by several states,[114] and had substantial potential to develop a "stable and politically sophisticated" government.[115]

The lesson from the Biafran experience is that revolutionary or secessionist self-determination may be acknowledged when it succeeds, but outside powers will probably not support a separatist's claim, even if justified by the denial of human rights. The Organization of Africa Unity (OAU), for example, favors reconciliation of differences within existing national boundaries.[116] Although the OAU never condemned the nations which recognized Biafra,[117] it took a strong stand in favor of Nigeria.[118] This is understandable as representative of the desire of those with power to maintain the status quo. As Emerson points out:

> no state will accept the principle that at their own choosing some segment of its own people will be free to secede either to become independent or to join a neighbor. Similarly, no organization of states is in the least likely to lay down the law that its members must yield if they are challenged by an internal demand for self-determination.[119]

Yet, the modern experience has been that most new states emerged from pre-existing states.[120] International law appears to operate on the principle of "survival of the fittest."

The Pakistani example provides a sharp contrast to Biafra's failure to establish permanent control. Several factors of East Pakistan's claim to independence coincide with those of Biafra. For example, both groups had linguistic, cultural and ethnic differences; both were politically suppressed or under-represented in the existing governments; and both were denied basic human rights.[121] Two distinguishing characteristics were East Pakistan's physical separation from West Pakistan, and the fact that its independence did not undermine that of West Pakistan, because West Pakistan did not depend on East Pakistan for its political

112. Suzuki, *supra* note 44, at 799.

113. *Id.* at 800-01.

114. Note, *supra* note 59, at 553-54. The states included: Tanzania, Gabon, Ivory Coast, Zambia and Haiti. Mr. Ijalaye argues that recognition was premature and itself illegal. Others argue that Biafra met the objective criteria for statehood. *See* OKEKE, *supra* note 5, at 165.

115. Suzuki, *supra* note 44, at 804.

116. Nayar, *supra* note 59, at 327.

117. *Id.*

118. Note, *supra* note 59, at 556.

119. Emerson, *supra* note 46, at 464.

120. OKEKE, *supra* note 5, at 165.

121. For a discussion of these factors *see:* Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities — Islamabad (West Pakistan) and Dacca (East Pakistan)* 66 AM. J. INT'L. L. 321, 328-34 (1972) [hereinafter cited as Nanda]; and Suzuki, *supra* note 44, at 798-811.

or economic stability.[122] Forty-seven states extended Bangladesh recognition by the end of February 1972.[123] This reflects the policy of the international community to support successful attempts at self-determination in order to vindicate human rights, even if violence is necessary to succeed.[124]

In Transkei, independence was achieved through peaceful means, furthering the policy of the United Nations to maintain world order. Transkei independence is a legitimate exercise of self-determination whether considered as an example of secession or colonial independence. Since the principle of self-determination was developed in the context of decolonization, that view will be considered first.

When a colony is granted independence, it is not viewed as a violation of territorial integrity but as the "restoration of a rightful sovereignty of which the people have been illegitimately deprived. . . ."[125] Transkei considered itself such a colony.[126] A large number of ethnic units in Africa were consolidated by the European Convention of 1885.[127] The identifiable, homogenous groups in South Africa should rightfully be recognized as separate peoples or nations.[128] Transkei was incorporated in the Union of South Africa in 1910 rather than receiving separate protectorate status as did Botswana, Lesotho and Swaziland.[129] For this reason, Transkei received its independence from the Republic of South Africa rather than from Great Britain. However, Transkei is conceptually in the same position as these former British colonies in that it was never completely integrated into South Africa.[130]

Alternatively, Transkei independence can be justified on secessionist grounds. Transkei meets the criteria for secession enumerated above. The Xhosa are a "people" entitled to exercise their self-determination. Characteristics such as a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, common economic interests and the quantitative factor, that is the number of people, appear to be satisfied.[131] The only characteristic

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122. Nanda, *supra* note 121, at 334.

123. *Id.* at 336.

124. *Id.*

125. Emerson, *supra* note 46, at 465. Similarly, G. A. Res. 3382 (5), 30 U.N. GOAR, Supp. (No. 34) 84, 85, U.N. Doc. A/10309 (1975),"*strongly condemns* all governments which do not recognize the right to self-determination and independence of peoples under colonial and foreign domination and alien subjugation, notably the peoples of Africa and the Palestinian people."

126. MATANZIMA, *supra* note 79, at 26.

127. W. P. YARBOROUGH, TRIAL IN AFRICA: FAILURE OF U.S. POLICY 8 (1976).

128. Botha, *Bantu Fatherlands and Separate Development,* SOUTH AFRICAN DIALOGUE 113, passim (1972).

129. Mulder, *Rationale of Separate Development,* SOUTH AFRICAN DIALOGUE 54 (1972).

130. MATANZIMA, *supra* note 79, at 28.

131. Nayar, *supra* note 59, at 340.

in question is strict geographical contiguity, and it has been argued that failure to meet this requirement should not bar an otherwise valid claim.[132]

Mr. Norman suggests that Transkei's claim is invalid because the majority of the population did not support the drive for independence.[133] Although a referendum on the question of independence was not held, elections in 1963, 1968, and 1973 resulted in victories for the Transkeian National Independence Party represented by Kaizer D. Matanzima.[134] Xhosa in urban areas participated in large numbers in these elections.[135] The Transkei Legislative Assembly requested independence in 1972.[136] Transkei is in fact, the eighth multiparty state in Africa. The Xhosa thus exercised the self-implementation provision of General Assembly Resolution 2625[137] and selected independence as the mode best expressing their self-determination. Independence achieved through negotiation should be no less meritorious than independence achieved through bloody revolution. Botswana, Malawi, Lesotho, Swaziland, Zambia and Tanzania, which are all members of both the U.N. and the OAU, negotiated for their independent status.[138] Transkei independence fulfills rather than violates the principle of self-determination and Transkei is therefore entitled to participation in the community of nations with others of the same genre.

IV. DO TRANSKEI CITIZENSHIP LAWS EXCEED THE AUTHORITY OF A SOVEREIGN TO DEFINE ITS NATIONALS?

Under international law, sovereign states have broad discretion in defining their nationals.[139] According to the Hague Convention of 1930: "It is for each State to determine under its own law who are its nationals. Any question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the laws of

132. Johnson, *supra* note 98, at 162-63. Mr. Johnson argues that self-determination can justifiably be employed to break up an existing territorial unit when three criteria are satisfied: (1) cultural differences, (2) denial of human rights, and (3) a geographically distinguishable area.

133. *Transkei, supra* note 1, at 631.

134. Breytenbach, *The Political System of the Republic of Transkei — An Overview*, 3 POLITIKON NO. 2, 36, 42-45 (Oct. 1976).

135. 122 CONG. REC. H 10637 (daily ed. Sept. 21, 1976) (remarks of Rep. Crane). MATANZIMA, *supra* note 79, at 60-65. LACOUR-GAYET estimated that 475,932 Africans voted in township in 1969 elections out of a total of 1,501,000 votes cast representing six homelands. LACOUR-GAYET, *supra* note 7, at 346.

136. MATANZIMA, *supra* note 79, at 60-65.

137. G. A. Res. 2625, 25 U.N. GOAR Supp. (28) 121, U.N. Doc. A/8082 (1970); *see* MATANZIMA, *supra* note 79, at 65.

138. LACOUR-GAYET, *supra* note 7, at 326-27; C. MULLER, FIVE HUNDRED YEARS, A HISTORY OF SOUTH AFRICA 400-01 (1969).

139. McDougal, Laswell & Chen, *Nationality and Human Rights: The Protection of the Individual in External Areas*, 83 YALE L. J. 909 [hereinafter cited as McDougal].

that State."[140] This principle was recognized in the United States as early as 1898 in *U.S. v. Wong Kim Ark.*[141]

The authority to define nationals is limited by international conventions, customs, and generally recognized principles of law.[142] Mr. Norman criticizes Transkei nationality laws on two counts. First, he argues that many urban Xhosa will lose their South African citizenship without acquiring Transkei citizenship and therefore will be "stateless."[143] Secondly, he argues that the urban Xhosa are forced to become Transkei citizens, having no legitimate affiliation with the Transkei.[144]

It is true that international law espouses a broad policy of avoiding statelessness.[145] Applying the concept of statelessness to the Transkei situation requires an examination of its content. A person could be considered stateless either when he lacks the attributes of citizenship or when he is not identified by a particular state as one of its nationals. The distinction between citizenship and nationality is important when exploring the status of persons under municipal and international law. Citizenship is defined by municipal law and designates those persons who enjoy certain political rights such as the right to vote.[146] Nationality refers to those persons who belong to a certain state as opposed to any other state.[147] Nationality is also conferred by municipal law, but international law seeks to identify a government with authority over a particular person, able to act in his behalf.[148] Statelessness thus refers to persons who cannot be "assigned" to a country.

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140. *Article I Convention on Conflict of Nationality Laws, April 12, 1930,* 5 HUDSON, INT'L. LEGIS. 359 (1936) [hereinafter cited as HAGUE CONVENTION]; *cited in* 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW, at 421-22 (1940).

141. 169 U.S. 649, 668 (1897) cited in: STARKE, *supra* note 19, at 291.

142. HAGUE CONVENTION, *supra* note 140, art. 1.

143. *Transkei, supra* note 1, at 635-37.

144. *Id.* at 642-44.

145. 8 M. M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 84-85 (1963). The United Nations Department of Social Affairs Study of Statelessness conducted in 1949 provided two definitions of statelessness. *De jure* statelessness exists when an individual is not a national of any State "either because at birth or subsequently they were not given any nationality, or because during their lifetime they lost their own nationality and were not given a new one." *De facto* statelessness occurs when they "left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities either because these authorities refuse to grant them assistance. *See also* Convention on the Reduction of Statelessness. A/CONF. 9/15, Aug. 29, 1961 (held under mandate of G. A. Res. 896 (IX)) *cited in* 8 M. M. WHITEMAN at 91-96. This convention did not come into force because of insufficient ratification within the prescribed period.

146. Oliver, *Aspects of Transkeian Citizenship and Nationality,* 3 POLITIKON NO. 2 at 76-77 (Oct. 1976) [hereinafter cited as Oliver].

147. McDougal, *supra* note 139, at 901 states that: "Individuals are said to be the 'nationals' of a state when that state asserts, and the larger world community honors, claims to protect and control such individuals for all the comprehensive purposes of states. . . ."

148. Oliver, *supra* note 146, at 76.

Mr. Norman's treatment of Transkeian nationality seems to be primarily concerned with its citizenship laws. In this regard it is important to understand that blacks in South Africa are merely "nationals" rather than citizens because they do not enjoy full political and social status.[149] Thus, although urban Xhosa lose their South African nationality, they acquire the more privileged status of citizenship in Transkei. The rights of the Xhosa to participate equally in the political process are more perfectly enjoyed as Transkei citizens than as South African nationals.

When considering whether any Xhosa are "stateless" during this transfer of nationality, the intent of the corresponding South African and Transkeian legislation should be analyzed. The loss of South Africa nationality seems to depend on simultaneous acquisition of Transkeian nationality and citizenship.[150] This is a legitimate procedure under international law.[151] A person would thus have one nationality or the other, but never have both at the same time or none at all. The Status of Transkei Act provides for the resolution of doubtful cases by a citizenship board.[152] At this point, we feel that Mr. Norman's fear of a mass of stateless persons is premature.

Mr. Norman's second argument, that urban Xhosa have no allegiance to Transkei, also has several defects. The urban Xhosa participated in the elections which led to Transkei independence.[153] Thus, although their nationality is determined on a group rather than individual basis, they had a say in determining that nationality. They also have a genuine affiliation with the Transkei. Authorities agree that nationality is a bond between the individual and the state,[154] involving the will of the people to "stick together" as a nation.[155] The "genuine link" theory applied in the *Nottebohm* case, confirms this idea.[156]

In *Nottebohm,* a German citizen who established residence in Guatemala in 1905, applied for Liechtenstein citizenship at the out-

149. *Id.* at 79. Mr. Oliver specifically discusses the status of persons in preindependent Transkei in terms of South African nationality and Transkei citizenship. This principle would also apply to other black nationals in South Africa.

150. Booysen, *supra* note 87, at 18-21.

151. H. F. VAN PANHUYS, THE ROLE OF NATIONALITY IN INTERNATIONAL LAW 150 (1959) [hereinafter cited as VAN PANHUYS].

152. Oliver, *supra* note 146, at 81 referring to section 6(2) of the Status of the Transkei Act of 1976.

153. *See* text at note 131, *supra. See also* Breytenbach, *The Political System of The Republic of Transkei — An Overview,* 3 POLITIKON No. 2 at 42-45 (Oct. 1976). Mr. Breytenbach points out that "a total of 952,000 people (447,000 men and 505,000 women) had registered as voters [1974 election] 750,000 of whom were present in Transkei on polling day. The percentage poll was, as mentioned, 43%." *Id.*

154. G. VON GLAHN, LAW AMONG NATIONS 198 (3d ed. 1976).

155. VAN PANHUYS, *supra* note 151, at 156.

156. *Guatemala v. Liechenstein,* [1955] I.C. J. 4 *cited in Transkei, supra* note 1, at 643.

break of World War II. This naturalization did not bar his arrest in Guatemala as an enemy alien, however, because the naturalization was not coupled with sufficient ties to Liechtenstein, Nottebohm might have been more successful had he been naturalized in Guatemala where he had lived and conducted business for 34 years. Nottebohm had no ethnic or historical ties with Liechtenstein, while the Xhosa do have such ties with Transkei. The urban Xhosa who become citizens of Transkei are no different from Turkish workers in Germany who retain their "native" nationality.[157]

The Transkei nationality laws are arguably in conformity with principles of international law. Both of the methods commonly employed to confer nationality, *jus soli* and *jus sanguinis,* were utilized.[158] However, international law does not limit the definition of nationality to these two methods. The reference in The Hague Convention to "customary law" as a limiting factor does not make new methods of defining nationality, such as Israel's law of return, illegitimate.[159] Further, if customary law focuses on regional customs, Transkei may justifiably claim the allegiance of tribal members working elsewhere on the premise that tribal affiliations preceded formation of modern nation states and that under African custom, sovereignty attaches to the tribe wherever the people are.[160]

International law also traditionally confers the nationality of the recipient or new state on inhabitants of territory ceded by the original state.[161] The allegiance of those associated with the ceded territory is transferred with the territory. Thus, nationality may legitimately be conferred by birth, naturalization, or cession.[162] The transfer of Xhosa allegiance from South Africa to Transkei at the time Transkei gained independence upholds this principle.

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157. Conversation with German Embassy Information Officer, Oct. 17, 1977. There are 2.8 million workers of (5 million total) foreign nationality in Germany. Children of these foreign nationals born in Germany do not become German nationals.

158. Republic of the Transkei Constitution Act, 1976 on *jus soli:* section 57(a)(i) "born in any district of the former Transkeian territories." Section 57(b) "every person born in Transkei." On *jus sanguinis:* section 57(c) "every person . . . whose father was at the time of the birth a citizen of Transkei." *Reprinted in* 15 INT'L. LEGAL MATS. 1136, 1156-57 (1976).

159. *See* text at notes 140, 142 *supra,* on Hague Convention; VAN PANHUYS, *supra* note 151, at 160 on Israel's law of return.

160. C. RHYNE, INTERNATIONAL LAW § 1-5.81.

161. McDougal, *supra* note 139, at 924 states that: "When one state cedes a territory to another, the ceding state is considered competent to transfer the allegiance of the inhabitants and the transfer is deemed an automatic consequence of the cession."

162. STARKE, *supra* note 19, at 295.

V. CONCLUSION

The conclusion presented by Mr. Norman that Transkei independence is not legitimate under international law is unpersuasive. Even assuming that South African apartheid violates international law as Mr. Norman asserts, it does not follow that a legitimate state cannot originate from that violation. International law does not use "parenthood" as a test for determining the validity of statehood. Instead, once an entity claiming to be a state is created, it is evaluated on its own merits. The primary test of Transkei's existence as a separate state will be whether the Transkei government maintains effective control over its territory and conducts its own international relations.

Rather than allow Transkei to suffer the test of time, Mr. Norman proposes presenting the questions of Transkei's statehood and citizenship laws to the International Court of Justice (ICJ) for an advisory opinion.[163]

Setting aside problems of jurisdiction and appropriateness of the forum, this raises several questions: If the ICJ rules in favor of Transkei, would recognition and equal status as a state be forthcoming or would the situation remain as it is? If the ICJ rules against Transkei, what further sanctions could be utilized? Could South Africa be forced to reassert control over Transkei?

Individual states must evaluate their positions *vis a vis* Transkei until such an advisory opinion is issued or in the event that no advisory opinion is forthcoming. There are many alternatives including the following: (1) The most extreme position would be to continue severe sanctions against both South Africa and Transkei. This might include demands for return of the Homelands and integration of South Africa. This is apparently the solution advocated by Mr. Norman, but it is unrealistic for several reasons. If Transkei is to be dissolved or reconstituted as a federal component of South Africa it will require a voluntary act by Transkei and/or an assertion of power by South Africa. Transkei is unlikely to willingly give up its independent status. The privileges enjoyed by Transkei citizens were not available to them in South Africa. The political leaders of Transkei worked hard for independence and would not relinquish it lightly. South Africa is unlikely to attempt to reverse the process of decolonization, especially with regard to Transkei where full sovereignty has already been established.[164] A military takeover of Transkei by South Africa would probably succeed, but that is both an improbable occurrence as long as

163. *Transkei, supra* note 1, at 645.

164. M. P. Vorster, *Freedom once conferred cannot be revoked,* 1 POLITIKON No. 2, at 27 (Dec. 1974). Mr. Vorster expresses the view that transfers of sovereignty are irrevocable.

Transkei and South Africa peacefully coexist and an unsavory activity to encourage. By suggesting that Transkei remain part of South Africa, Mr. Norman is also implicitly encouraging a broad application of the South African policies he condemns. (2) Nations could adopt a "wait and see attitude" initiating only limited contacts with Transkei such as investment. (3) Nations could view Transkei as remaining in the status of other Homelands in a "federation" similar to the Soviet Union. The Homelands would be delegated a role as limited sovereigns similar to the Ukraine. This approach ignores the existence of separate political institutions in the Transkei and South Africa's recognition of Transkei as a separate state. (4) Some states may choose to establish full diplomatic relations with Transkei and confer *de facto* or *de jure* recognition. States should have this option available as one of a broad range of policy alternatives.

Mr. Norman rejected Transkei because of South African apartheid without examining the consequences of that rejection. It is unlikely that an advisory opinion would effectuate the internal changes in the South African government necessary to ensure the equal participation and protection of human rights which he desires. We submit that cooperation with Transkei will create greater opportunities to effectuate those goals, and can be accomplished in a manner consistent with principles of international law.

NOTES

Property Rights of Nonmarital Partners in Meretricious Cohabitation

Meretricious cohabitation describes a relationship in which the partners live together with full knowledge and belief that they are not legally married.[1] When property is acquired during such a relationship and held in the name of only one of the cohabitants, the other cohabitant does not acquire any interest in the property by reason of the relationship alone.[2] The rights of the cohabitants in the accumulated property are solely dependent on principles of contract law. In contrast, the legal status of marriage itself gives rise to certain rights and liabilities between the parties.[3]

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1. A variety of terms have been used to describe unmarried heterosexual unions. A recent student note, disturbed by the negative moral connotations of the word "meretricious" preferred to use the phrases "de facto" marriage and "quasi-marital" relationship to "refer to nonmarital unions in which both parties, although fully aware that there has been no legal marriage, cohabit for a significant length of time while 'attesting' or presenting themselves to the relevant community as husband and wife." Note, *Beyond Marvin: A Proposal for Quasi-Spousal Support,* 30 STAN. L. REV. 359, 360 n.6 (1978). Despite the author's legitimate concern, this note uses the phrase meretricious cohabitation for two reasons. First, meretricious cohabitation covers a broader range of relationships: from those of short duration without "attestation" up to and including the "de facto" or "quasi-marital" relationships described above. Second, although courts have enforced property rights only between those nonmarital partners who qualify as "de facto" spouses, enforcement is not expressly limited to these relationships. In the future, courts may extend the principles explored in this note to meretricious cohabitants who do not fit within the definition of "de facto" spouses.

2. *See, e.g.,* Tyranski v. Piggins, 44 Mich. App. 570, 573, 205 N.W.2d 595, 596 (1973) (citations omitted); Cargill v. Hancock, 92 Idaho 460, 465, 444 P.2d 421, 426 (1968); Humphries v. Riveland, 67 Wash. 2d 376, 389, 407 P.2d 967, 973 (1965); Stevens v. Anderson, 75 Ariz. 331, 336, 256 P.2d 712, 715 (1953); Vallera v. Vallera, 21 Cal. 2d 681, 684-85, 134 P.2d 761, 763 (1943).

3. The right to receive alimony, the right to receive benefits payable on the death of a deceased spouse, and the right to an intestate or a forced share of a deceased spouse's estate are a few examples of the rights that arise out of the legal relationship of marriage. Status, as used throughout this note, refers to the fact that the state acts as a third party in a legally binding marriage. The state must consent to a dissolution of the relationship and has the power to determine the property rights between the parties upon dissolution through divorce statutes. *See, e.g.,* MASS. ANN. LAWS ch. 208, §§ 28, 34 (Michie/Law Co-op 1969); CAL. CIV. CODE §§ 4700-4704 and 4800-4812 (West

Courts have traditionally played a limited role in resolving disputes between cohabitants because their property rights are dependent on contract law and cohabitation is illegal in many jurisdictions. However, the increase in the number of couples living together without the benefit of a legal marriage is bringing an increase in the number of cases which seek judicial intervention to resolve these disputes.[4] The growing public acceptance of meretricious cohabitation is reflected in the few jurisdictions that have re-examined their past positions and have attempted to reach more equitable results by employing the full range of their equitable powers to resolve these disputes.[5]

The scope of this note is twofold. First, it will describe the traditional theories of recovery that have been available to cohabitants and the limitations on those theories. Second, it will discuss the few recent cases that have expanded the theories of recovery upon which a division of the accumulated property can be predicated and the prospective impact of those decisions on the rights of meretricious cohabitants in other jurisdictions. Before discussing those rights, however, it is important to explain the basic differences between common law marriage, the putative spouse, and meretricious cohabitation to avoid some of the confusion these terms often generate.

I. COMMON LAW MARRIAGE AND THE PUTATIVE SPOUSE DISTINGUISHED

A. Common Law Marriage

The term common law marriage is often mistakenly used to refer to meretricious cohabitation. In jurisdictions that continue to recognize the validity of common law marriages[6] they are valid legal marriages.[7] A relationship of cohabitation may rise to the status of a common law

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1970). *See generally* C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 560-65 (2d ed. 1976).

4. The census figures indicate that the number of unmarried couples living together in the United States increased eightfold between 1960 and 1970. 2 U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, PERSONS BY FAMILY CHARACTERISTICS, Table 11, at 4B; 2 U.S. BUREAU OF THE CENSUS, 1960 CENSUS OF POPULATION, PERSONS BY FAMILY CHARACTERISTICS, Table 15, at 4B. The number of people cohabitating and the social groups within which cohabitation is a growing practice are well documented in Glendon, *Marriage and the State: The Withering Away of Marriage,* 62 VA. L. REV. 663, 685-91 (1976). *See also* Richards, *Discrimination Against Married Couples Under Present Income Tax Laws,* 49 TAXES 526 (1971); Comment, *In re Cary, A Judicial Recognition of Illicit Cohabitation,* 25 HASTINGS L. J. 1226 (1974).

5. The jurisdictions which have recently expanded the rights of meretricious cohabitants are California, Minnesota and Oregon. *See* notes 30-35 and 69-94 and accompanying text *infra.*

6. The jurisdictions that continue to recognize common law marriages as valid are Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas and the District of Columbia. H. CLARK, DOMESTIC RELATIONS 67 (2d ed. 1974). New Hampshire has enacted a statute that in effect revives the concept of common

marriage only in those jurisdictions that recognize their validity and then only if the particular jurisdictional requirements of a common law marriage are fulfilled. These requirements vary greatly according to jurisdiction, but generally include criteria such as continued cohabitation for a specific period of time, acknowledgment of a family relationship, and reputation as husband and wife in the community.[8] Whether the requirements are met or not is a question of fact that must be determined in a court of law.[9] Since judicial determination is requisite to a legally binding common law marriage, the validity of the marriage is usually not determined until a dispute arises between the parties.

Once a common law marriage is judicially determined to be valid, the marriage is the legal equivalent of a traditional civil marriage.[10] The status of the individuals is the same and hence their rights with respect to property, alimony and death benefits are determined by their status as marital partners.

B. The Putative Spouse

The putative spouse doctrine is a judicial invention to protect the rights of a spouse who in good faith believes he or she has entered into a valid marriage. The cases in which one or both spouses believe a valid marriage exists, but in fact they are not validly married, fall into two categories. In one case both parties believe in good faith that they are validly married. The putative spouse doctrine thus applies to the parties when one enters the marriage believing that there is a valid divorce from

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law marriage. *See* N.H. REV. STAT. ANN. § 457:39 (1968) which provides that a legal marriage will be declared after three years of cohabitation, acknowledgment and reputation as husband and wife.

7. *See, e.g.*, DeMedio v. DeMedio, 215 Pa. Super. 255, 257 A.2d 290 (1969); Baker v. Mays & Mays, 199 S.W.2d 279 (Tex. Civ. App. 1946). *See generally* M. PLOSCOWE, H. FOSTER & D. FREED, FAMILY LAW at 84 (1972).

8. Since the requirements of a valid common law marriage are dependent on the particular jurisdictions' case law, a general definition is difficult, if not impossible to postulate:

> A valid definition of common law marriage without infinite qualifications can hardly be found. All we have are approximations which demonstrate ambiguous and vacillating notions of some more or less informal kind of marital status. Whatever hazy notions we have vary not only from jurisdiction to jurisdiction but from case to case within a recognizing jurisdiction.

Weyrauch, *Informal and Formal Marriage — An Appraisal of Trends in Family Organization*, 28 U. CHI. L. REV. 88, 91 (1960).

9. *See* note 8 and accompanying text *supra*. The validity of a common law marriage depends on the jurisdictional requirements. However, a de facto marriage may be recognized for the limited purpose of determining eligibility for public assistance benefits. New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973). *See generally* Glendon, *Marriage and the State: The Withering Away of Marriage, supra* note 4 at 711-13.

A de facto family is a family that possesses all the attributes necessary to a common law marriage (continued cohabitation, acknowledgment and reputation as husband and wife), but does not necessarily fulfill the jurisdictional requirements for length of cohabitation.

10. Once a common law marriage is determined to exist, the partners are legally married and hence subject to the applicable divorce statutes. *See* note 7 *supra*.

a former spouse, but the final decree has not been entered or the statutory waiting period has not passed.[11] In the other case one party fraudulently misrepresents that there is a divorce from a former spouse and the innocent party is induced thereby to enter into a void marriage.[12] As the examples above indicate either one or both spouses may be "innocent." However, when one learns of the fraud or other infirmity voiding the marriage, that spouse's rights under the doctrine are frozen as of that time because there is no longer a good faith belief that a valid marriage exists. This doctrine provides the innocent party an interest in the accumulated property and other relief such as alimony and child support.[13] The remedies available to the putative spouse vary according to jurisdiction. The spouse may be entitled to all the remedies available to a traditionally married spouse[14] or may be limited to a fair and equitable distribution of the property accumulated during the relationship.[15]

C. Meretricious Cohabitation

A meretricious relationship is one in which both parties are fully aware that no valid marriage exists. In the jurisdictions that continue to recognize common law marriages, a meretricious relationship may ripen into a legally binding marriage if the jurisdictional requirements for such a marriage are met.[16] In the remaining jurisdictions a meretricious relationship will never rise to the status of a valid legal marriage.[17] The distinguishing feature then, is whether the state will or will not become a third party to the relationship by making the divorce statutes applicable when the relationship dissolves.[18] While the rights of the traditionally married spouse, the common law spouse and the putative spouse are

11. *See, e.g.,* Buck v. Buck, 19 Utah 2d 161, 427 P.2d 954 (1967); Ah Leong v. Ah Leong, 27 F.2d 582 (9th Cir.), *cert. denied,* 278 U.S. 636 (1928).

12. Sclamberg v. Sclamberg, 220 Ind. 209, 41 N.E.2d 801 (1942); Buckley v. Buckley, 50 Wash. 213, 96 P. 1079 (1908).

13. *See, e.g.,* MASS. ANN. LAWS ch. 207, § 6 (Michie/Law Co-op 1969), which provides that if one party enters a void marriage in good faith, the marriage will become legally binding after the original impediment is removed. *See generally* C. FOOTE, R. LEVY & F. SANDER, *supra* note 3, at 698-701.

14. *See* note 13 *supra.* The rights of a putative spouse in California are the same as the rights of a marital partner with the exception that the putative spouse is not entitled to receive alimony, but is entitled to restitution for the value of services performed less the value of support received. Comment, *Rights of the Putative and Meretricious Spouse in California,* 50 CAL. L. REV. 866 (1962).

15. Poole v. Schrichte, 39 Wash. 2d 558, 236 P.2d 1044 (1951) (under the putative spouse doctrine in Washington, a just and equitable distribution is allowed in equity; the divorce statutes are inapplicable).

16. *See* notes 7 and 8 and accompanying text *supra.*

17. However, the relationship may affect the right to public assistance benefits. *See* note 9 *supra.*

18. *See* notes 3 and 7 and accompanying text *supra.*

protected by the divorce statutes,[19] the rights of cohabitants continue to be determined solely on the principles of contract law, thus denying any legal status to the relationship itself.

II. TRADITIONAL CONTRACT RIGHTS OF COHABITANTS

A. Limitation on Consideration

When an unmarried couple lives together, but the relationship does not qualify as a common law marriage, the cohabitants have no interest in the accumulated property held in the name of the other partner in the absence of an agreement to that effect.[20] While meretricious cohabitants are competent to dispose of their property by contract,[21] a bargain based on an illegal consideration will not be enforced under contract law.[22] Since cohabitation was at one time illegal in all the states and still is in a number of states,[23] this illegality has severely limited the enforceability of cohabitation agreements.[24] In some jurisdictions no part of the consideration may consist of the sexual relations or the entire agreement will fail.[25]

In a recent Georgia case, *Rehak v. Mathis,*[26] the couple lived together for eighteen years during which time they acquired a home, taking title in the man's name. The woman had paid the total amount of the installment payments on the house for the first two years and one-half the payments from 1959 to February 1975. In December, 1975 the man moved out of the house and told the woman to vacate. When he refused

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19. *See* notes 3 and 13 and accompanying text *supra.*

20. *See e.g.,* Kienitz v. Sager, 40 Haw. 1 (1953); Cargill v. Hancock, 92 Idaho 460, 444 P.2d 421 (1968); Baker v. Baker, 222 Minn. 169, 23 N.W.2d 582 (1946); Beuck v. Howe, 71 S.D. 288, 23 N.W.2d 744 (1946). Smith v. Smith, 255 Wis. 96, 38 N.W.2d 12 (1949).

21. Unmarried people are competent to contract. *See* 6A A. CORBIN, CORBIN ON CONTRACTS § 1476 at 622 (1962) where Professor Corbin states:

> A bargain between two persons is not made illegal by the mere fact of an illicit relationship between them, so long as that relationship constitutes no part of the consideration bargained for and no promise in the bargain is conditional upon it. . . . Agreements made by the parties with respect to money or property are enforceable if they are quite independent of the illicit relationship.

Id. (footnote omitted).

22. The restatement of contracts states:

> A bargain in whole or in part for or in consideration of illicit sexual intercourse is illegal; but subject to this exception such intercourse between parties to a bargain previously or subsequently formed does not invalidate it.

RESTATEMENT OF CONTRACTS § 589 (1932).

23. *See, e.g.,* IDAHO CODE § 18-6604 (Reenacted 1972); MASS. ANN. LAWS ch. 272, §§ 14, 16, 18 (Michie/Law Co-op 1968); FLA. STAT. ANN. §§ 798.02, 798.03 (West 1976).

24. *See, e.g.,* Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977); Hill v. Westbrook's Estate, 95 Cal. App.2d 599, 213 P.2d 727 (1950); Baker v. Baker, 222 Minn. 169, 23 N.W.2d 582 (1946).

25. *See, e.g.,* Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953); Mitchell v. Fish, 97 Ark. 444, 134 S.W. 940 (1911); Vincent v. Moriarty, 31 App. Div. 484, 52 N.Y.S. 519 (1898).

26. 239 Ga. 541, 238 S.E.2d 81 (1977).

to reimburse her for her contribution to the purchase of the house she brought suit for $100 a month for each month of their cohabitation and title to the house, alleging that he had promised to provide her with support and a house to live in in return for caring for him.

The Supreme Court of Georgia held that prior case law prohibited the enforcement of a contract founded upon the immoral consideration of the woman's promise to cook, clean, and care for the comforts, needs and pleasures of the man while they cohabitated.[27] Thus the woman was denied any benefit from her 18 years of payments toward the purchase of the home.

In other jurisdictions, only that part of the agreement which is explicitly dependent on sexual relations for consideration is unenforceable. In *Hill v. Westbrook's Estate*[28] the decedent had promised to provide for the woman in his will, but failed to do so. The consideration for his promise had been the woman's assistance in the decedent's rooming house and hamburger stand, her contribution of wages earned during a period of outside employment, and her promise to live with him as his wife and bear children. The lower court held this to be an agreement for concubinage and thus, unenforceable. However, on appeal the court stated that if the agreement were severable as to the consideration of living together and bearing children, it would uphold that part of the agreement that did not depend upon this consideration.[29]

The Supreme Court of Oregon recently relaxed its position on the unenforceability of cohabitation agreements in *Latham v. Latham.*[30] In this case, the defendant defaulted on his promise to divide all the accumulated property equally when the parties separated. The court enforced the agreement although based on the consideration of "living with defendant, caring for and keeping after him, and furnishing and providing him with all the amenities of married life."[31] The court found that the general rule, that an agreement based on cohabitation for its consideration is void, had been avoided in previous cases when necessary to protect the expectations of the injured party.[32] After reviewing prior case law,[33] the court in *Latham* "conclude[d] that we

27. *Id.* at 541-42, 238 S.E.2d at 81-82.

28. 95 Cal. App.2d 599, 213 P.2d 727 (1950).

29. *Id.* However, on retrial the court found it could not sever the agreement and the decision for the estate was affirmed. Hill v. Westbrook's Estate, 39 Cal. 2d 458, 247 P.2d 19 (1952).

30. 274 Or. 421, 547 P.2d 144 (1976).

31. *Id.* at 426, 547 P.2d at 144-45.

32. Traver v. Naylor, 126 Or. 193, 268 P.75 (1928) (the Supreme Court of Oregon found no evidence of cohabitation in this case despite the fact that Mr. Naylor had previously been indicted and convicted of lewdly and lasciviously cohabitating with Miss Traver).

33. Only two prior Oregon cases had addressed this issue. Traver v. Naylor, 126 Or. 193, 268 P.75 (1928); Dannells v. U.S. Nat'l. Bank of Portland, 172 Or. 213, 138 P.2d 220 (1943).

should abandon dubious legal distinctions to accomplish what this court has believed in the past to be a just result. We hold that an agreement such as that pleaded in this case, is not void as against public policy."[34] The court was persuaded to abandon such "dubious legal distinctions" in part by the repeal of the Oregon statute against lewd or lascivious cohabitation.[35] As other states repeal similar statutes,[36] the policy grounds of voiding cohabitation agreements on the illegal nature of the relationship should become of diminished importance.

B. Express Agreements

1. Pooling Earnings, Partnership, and Joint Enterprise

Cohabitants possess a great amount of freedom to order their economic affairs as they see fit. They may devise property to one another by will or may agree to keep all their property and earnings separate.[37] In addition, if the parties agree on a division of their accumulated property at the time of separation the courts will uphold their division in the event of a subsequent dispute.[38] Finally, when the parties have the foresight to make an express agreement as to the division of their property, the courts will enforce the agreement subject to the limitation on illegal consideration. However, problems in proving the existence of the agreement may be considerable when the agreement is oral.[39]

34. Latham v. Latham, 274 Or. 421, 426, 547 P.2d 144, 146-47 (1976).

35. 1971 Or. Laws ch. 732, § 432 (repealing OR. REV. STAT. § 167.015).

36. *See e.g.*, 1976 Ind. Acts, P.L. 148, § 24 (repealing IND. CODE ANN. § 35-1-82-2); 1975 Me. Acts, ch. 499, § 11 (repealing ME. REV. STAT. tit. 17, § 2151); 1975 Cal. Stats. ch. 71 (repealing CAL. PENAL CODE §§ 269a-269b); 1973 Mont. Laws tit. 94 (repealing MONT. REV. CODES ANN. tit. 94, § 407); P.A. STAT. ANN. tit. 18, § 4505 (repealed 1972).

The remaining statutes may be subject to attack as a denial of the Constitutionally protected right to privacy as developed by Griswold v. Connecticut, 381 U.S. 479 (1965) and Eisenstadt v. Baird, 405 U.S. 438 (1972). *See* State v. Saunders, 4 FAM. L. REP. (BNA) 2137 (N.J. 1977) in which the Supreme Court of New Jersey held the New Jersey statute against fornication by a man and an unmarried woman to be an unconstitutional violation of the right to privacy. *But see* Hollenbaugh v. Carnegie Free Library, 3 FAM. L. REP. (BNA) 2716 (D.C.W. Pa. 1977) (not a denial of equal protection to dismiss cohabitants from the employ of a library when one party was still married and the couple was living in "open adultery").

37. *See, e.g., In re* Sloan's Estate, 50 Wash. 86, 96 P. 684 (1908) (separate property); McAllen v. Souza, 24 Cal. App. 2d 247, 74 P.2d 853 (1937) (separate property); Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953) (devise of $5,000 and a life estate in a furnished home upheld).

38. *See, e.g.*, Hughes v. Kay, 194 Or. 519, 242 P.2d 788 (1952).

39. An oral agreement may be difficult to prove if the adversary denies its existence. If the partner is deceased a Dead Man's Statute may prevent the surviving party from testifying against the estate. *See, e.g.*, N.Y. CIV. PRAC. LAW § 4519 (McKinney 1963) which provides in part:

> Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person. . . .

The courts have enforced express agreements of three types: agreements to pool earnings and share in accumulations, agreements of partnership, and agreements of joint enterprise or joint venture. When one or both cohabitants are employed as wage earners and agree to share their accumulated property equally the agreement is one to pool earnings and share accumulations.[40] Where the partners run a business concern together such as a rooming house, cleaning business, or saloon, and agree to share their profits and losses it is in effect a partnership agreement.[41] An agreement of joint enterprise or joint venture is essentially the same as a partnership with the distinguishing feature that a joint enterprise usually refers to a single transaction which may take place over a period of years.[42] However, since courts will limit their enforcement to the precise contractual terms, it is the content of the agreement which is important rather than its characterization.

2. Services in the Home as Consideration

The consideration for an express agreement is limited only by general principles of contract law: *i.e.*, it must be something of value and cannot be illegal.[43] Nonetheless, even these liberal restrictions can prove troublesome.

There are usually no illegal consideration difficulties when there is a partnership agreement or joint enterprise as the basis of the agreement is the joint effort of the parties. The question of illegal consideration arises frequently however, when one partner is the sole wage earner and the other partner contributes services in the home in exchange for an interest in the accumulated property. That services in the home are a valuable consideration can hardly be doubted today.[44] Such services have been held to constitute an adequate and valuable consideration to support an express contract.[45] However, problems arise because they

40. *See, e.g.*, Bridges v. Bridges, 125 Cal. App.2d 359, 270 P.2d 69 (1954); Garcia v. Venegas, 106 Cal. App.2d 364, 265 P.2d 89 (1951); Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761 (1943); Walker v. Walker, 330 Mich. 332, 47 N.W.2d 633 (1951); Fowler v. Fowler, 97 N.H. 216, 84 A.2d 836 (1951).

41. *See, e.g.*, Fernandez v. Garza, 88 Ariz. 214, 354 P.2d 260 (1960); Mitchell v. Fish, 97 Ark. 444, 134 S.W. 940 (1911).

42. *See, e.g.*, Muller v. Sobol, 277 App. Div. 884, 97 N.Y.S.2d 905 (1950); Bracken v. Bracken, 52 S.D. 252, 217 N.W. 192 (1927).

43. *See* notes 21 and 22 and accompanying text *supra.*

44. For a discussion of the time involved and value of such services see Havighurst, *Services in the Home — A Study of Contract Concepts in Domestic Relations,* 41 YALE L. J. 386 (1932) and Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services,* 10 FAM. L. Q. 101 (1976).

45. *See* Taylor v. Taylor, 66 Cal. App.2d 390, 398, 152 P.2d 480, 484-85 (1944) ("A promise to perform services is, of course, a lawful and adequate consideration for a contract."); Tyranski v. Piggins, 44 Mich. App. 570, 574, 205 N.W.2d 595, 597 (1973) ("Services such as cooking meals, laundering clothes, 'caring' for the decedent through sickness, have been found to be adequate

are seldom recited as the sole consideration for an agreement. Usually, the recitation of services is made in conjunction with other promises such as living with the partner, bearing children or caring for the needs and pleasures of the partner. Any mention of sexual relations, however tenuous, may be enough to void an agreement in many jurisdictions.[46]

C. *Implied Agreements*

Courts intervene in disputes between cohabitants even less frequently when the parties fail to expressly provide for the division of their accumulated property.[47] When the facts of the particular case warrant finding an implied agreement, the only possible justification for refusing to enforce the agreement is that the agreement is based on an illegal consideration.[48] However, it can be expected that a growing number of courts will find implied agreements as cohabitation becomes a more accepted form of relationship.[49] The types of implied agreements that

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and independent considerations in cases where there is an express agreement.") *citing* Wurche v. Stenzel, 270 Cal. App.2d 499, 504-05, 75 Cal. Rptr. 856, 859-60 (1969) (caring for the decedent); Merchant's National Bank of Mobile v. Cotnam, 250 Ala. 316, 325-26, 34 So.2d 122, 129-30 (1948) (service as attendant or friend) and Lynch v. Rogers, 177 Md. App. 478, 10 A.2d 619, 624 (1940) (domestic and housekeeper).

46. *See* notes 24-29 and accompanying text *supra*.

47. *See* Stevens v. Anderson, 75 Ariz. 331, 256 P.2d 712 (1953) in which the court stated:

> Generally the conscience of the court is not aroused to invoke equitable powers to rescue those from the results of their illegal practices when that is the only basis for granting relief. The parties here not only violated the permanent established public policy of all society but violated the expressed criminal statutes of the State of Arizona.

Id. at 335-36, 256 P.2d at 715.

48. In Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761 (1943) the majority followed prior case law in California in holding that a meretricious spouse acquires no interest in the property of the other cohabitant in the absence of an express agreement. Numerous cases had arisen in California and in other jurisdictions on similar fact patterns. The typical case is one in which the cohabitants have separated after a relationship of several years or more. The male generally is employed outside the home and the accumulated property is purchased with his earnings and title placed in his name while the woman performs the usual duties of housewife and mother. Upon termination of the relationship the woman is left with virtually nothing in her own name and no claim to any of the accumulated property absent an express agreement. In effect the man is rewarded for not marrying by being allowed to keep all the accumulated property and the woman is punished by the courts refusal to employ the principles of implied contract or quasi-contract to protect her interests arising out of her efforts and services contributed to the relationship. Justice Curtis criticized this inequity in his dissent in Vallera: "[I]f an express agreement will be enforced, there is no legal or just reason why an implied agreement to share the property cannot be enforced." *Id.* at 686, 131 P.2d at 764 (Curtis, J. dissenting).

Thirty-three years later this opinion was expressed by a majority of the California Supreme Court: "By enforcing an express contract between non-marital partners unless it rested upon an unlawful consideration, the courts applied a common law principle as to contracts. Yet the courts disregarded the common law principle that holds that implied contracts can arise from the conduct of the parties." Marvin v. Marvin, 18 Cal.3d 660, 678, 557 P.2d 106, 118, 134 Cal. Rptr. 815, 827 (1976).

49. While several courts have stated that they will enforce implied agreements, these courts rarely find the evidence sufficient to warrant finding such an agreement. *See, e.g.*, Kienitz v. Sager, 40 Haw. 1 (1953); Smith v. Smith, 255 Wis. 96, 38 N.W.2d 12 (1949); Brill v. Salzwedel, 235

have been enforced when no illegal consideration was found are implied partnership, joint enterprise and resulting trust.

The type of conduct that evidences an implied partnership or a joint enterprise is the contribution of money, property or services on a regular basis in the business or profit-making activity of the partner.[50] Where the contribution of money or property is a contribution toward the acquisition of real property the applicable theory is the resulting trust.[51] A resulting trust arises where one has contributed substantial funds toward the acquisition of the property held in the name of another. The implied intention of the parties is that the titled party holds the non-titled party's contribution toward the purchase price in trust.[52]

Albae v. Harbin[53] and *Creasman v. Boyle*[54] represent the jurisdictional conflicts in how real property will be apportioned upon dissolution of cohabitation. While some courts will look to the contributions of each party to the purchase price of the property, others will leave the possession and enjoyment of the property with the party holding legal title on the presumption that the contribution of the non-titled party was gratuitous.[55]

In *Albae,* where the woman paid the entire purchase price for the property and placed title in the man's name, the court imposed a resulting trust on the property in favor of the woman. However, in *Creasman* the court declined to impress a trust in favor of the plaintiff on property purchased with his earnings, but titled in the woman's

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Wis. 551, 292 N.W. 908 (1940); Ah Leong v. Ah Leong, 27 F.2d 582 (9th Cir.) *cert. denied* 278 U.S. 636 (1928); Morales v. Velez, 18 F.2d 519 (1st Cir. 1927).

50. *See, e.g.,* Whitney v. Whitney, 192 Okla. 174, 134 P.2d 357 (1942) (quasi-partnership); Poole v. Schrichte, 39 Wash.2d 558, 236 P.2d 1044 (1951) (implied joint venture); *In re* Estate of Thornton, 81 Wash.2d 72, 499 P.2d 864 (1972) (implied business partnership where the couple worked the cattle farm together); Davis v. Cummins, 195 S.W. 752, (Mo. 1917) (service by one partner in managing the other's property raised an interest in the property). *Cf.* Kientz v. Sager, 40 Hawaii 1 (1953) (mere sporadic services of a "wife" in her "husband's" business will not raise an implied agreement of joint venture).

51. A purchase money resulting trust "arises, presumptively, when one person pays the purchase price for property but title is taken in the name of another." E. SCOLES AND E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 216 (2d ed. 1973) [hereinafter cited as SCOLES & HALBACH].

52. *See, e.g.,* Walberg v. Mattson, 68 Wash.2d 808, 232 P.2d 827 (1951) (evidence that one partner put title to the property in the other's name to avoid difficulties in transferring or encumbering the property due to his unsettled marital status); Williams v. Bullington, 159 Fla. 618, 32 So.2d 273 (1947) (partner contributed delinquency payments with the understanding and intention that she would get a one-half interest therein); Worsche v. Kranning, 353 Pa. 481, 46 A.2d 220 (1946) (cohabitants considered themselves partners and kept joint bank accounts; the court found that they intended to share their property equally).

53. 249 Ala. 201, 30 So.2d 459 (1947).

54. 31 Wash.2d 345, 196 P.2d 835 (1948).

55. *See, e.g.,* Wellmaker v. Roberts, 213 Ga. 740, 101 S.E.2d 712 (1958) (presumed a gift to the woman). *See generally* SCOLES & HALBACH, *supra* note 51, at 216-17.

name. The court presumed the intention of the parties to confer the beneficial ownership of the property on the party holding legal title. The presumption prevailed in the absence of evidence of a contrary intention.

The presumed gift is the most anomalous approach. The presumed gift theory arises out of the relationship of the parties. In a close family relationship courts will presume a gift of any assets placed in another family member's name.[56] While most courts do not acknowledge the family-like relationship of cohabitation, some will at the same time presume a gift of property which assumes the existence of a close relationship.[57]

If the courts were to presume simply that the parties intended to deal fairly with one another an equitable distribution of the property could be based on a presumed equal interest in the property modified by such factors as the actual intention of the parties and the respective contributions of each party toward the accumulated property. In addition, the way in which title is taken between cohabitants may be more indicative of their intentions towards creditors and the rights of prior spouses than it is of their intentions with respect to one another.

If the title to the property is held in both names other problems arise. When property is held as joint tenants or as tenants by the entireties, some courts will deem it to be held by the parties as tenants at common and divide it according to their respective contributions,[58] unless there is an express provision of survivorship.[59] The confusion over the intention

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56. *See, e.g.*, Keene v. Keene, 57 Cal.2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962); Wellmaker v. Roberts, 213 Ga. 740, 101 S.E.2d 712 (1958).

57. *Compare* Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761 (1943) (the equitable considerations that arise from the reasonable expectation of the continuation of benefits attending the status of marriage are not present in the case of meretricious cohabitation) *with* Keene v. Keene, 57 Cal.2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962) (strong implication that any services performed are intended as a gift to the other partner).

58. *See, e.g., In re* Meyron's Estate, 6 Misc.2d 673, 164 N.Y.S.2d 443 (Sup. Ct. 1957); Walberg v. Mattson, 68 Wash.2d 808, 232 P.2d 827 (1951); Williams v. Bullington, 159 Fla. 618, 32 So.2d 273 (1947). A tenancy by the entirety includes the right of survivorship by definition. "A tenancy by the entirety is an estate held by husband and wife as a unity. It is usually an estate in land, and may exist . . . in any interest in land which may be owned by the marital unity subject to survivorship." 2 AMERICAN LAW OF PROPERTY § 6.6(a) at 23 (Little-Brown 1952) (footnote omitted). However, if the parties are not legally married they cannot hold title in a tenancy by the entirety. The definition of joint tenancy also includes a survivorship provision. However, statutes have been enacted in many states which disfavor the creation of joint tenancies. In those states an express provision of survivorship will overcome the presumption that tenants hold in common. *See, e.g.*, MASS. ANN. LAWS ch. 184, § 7 (Michie/Law Co-op 1977). *See generally* 2 AMERICAN LAW OF PROPERTY § 6.1 (Little-Brown 1952).

59. *See, e.g.*, Young v. Young, 3 FAM. L. REP. (BNA) 2721 (Md. Ct. Sp. App. 9/9/77) (property held as tenants by the entireties with provision of survivorship converted into a joint tenancy); *In re* Jackson's Estate, 112 Cal. App.2d 16, 245 P.2d 684 (1952) (property held in joint tenancy as husband and wife and the court held that the wife took by survivorship, not by inheritance when the husband died). Some jurisdictions will look to the intentions of the parties

of the parties could be simplified by adopting the view expressed in *Weak v. Weak,*[60] where the court held that, "[T]he fact that a deed is taken in joint tenancy establishes a prima facie case that the property is actually *owned* in joint tenancy."[61]

The fact that a deed is taken in joint tenancy or in a tenancy by the entireties would rationally point to the conclusion that the parties intended to share an equal interest in the property. It would seem highly unlikely that either party was overreaching the other in inducing that party to place title in joint tenancy. To the contrary, the logical implication of taking title in joint tenancy is that the cohabitants expected to enter a long term relationship in which both would have rights in the property.

D. Equitable Theories

Until recently the equitable theories of constructive trust[62] and quasi-contract have not been used by the courts to protect a non-titled partner's interest in property accumulated during a meretricious relationship.[63] The prospective usefulness of these theories lie in those cases in which one partner is the sole wage earner or business proprietor and the other partner contributes services in the home.

The equitable theories are generally invoked by the courts to prevent the unjust enrichment of one party at the expense of the other where no valid contract has been entered into.[64] Constructive trust and quasi-contract are applied regardless of the intentions of the parties.[65] Where there is no valid contract to enforce and a resulting trust is inapplicable,

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regardless of the existence of a survivorship clause. *See, e.g.,* Worsche v. Kranning, 353 Pa. 481, 46 A.2d 220 (1946) (where the cohabitants considered themselves partners and kept joint bank accounts the court found that they intended to share their property equally despite the lack of a survivorship clause). *See generally* I. BAXTER, MARITAL PROPERTY § 35.7 at 563-66 (1973); Annot., *Rights and Remedies in Respect of Property Accumulated by Man and Woman Living Together in Illicit Relations or Under Void Marriage,* 31 A.L.R.2d 1255 (1953).

60. 202 Cal. App.2d 632, 21 Cal. Rptr. 9 (1962).

61. *Id.* 21 Cal. Rptr. at 12.

62. Constructive trust is a "remedial or restitutionary device under which a person who has obtained the title to property by reason of fraud or overreaching or some other unlawful or improper means is considered as holding the property for the person who has been wrongfully deprived of its ownership." SCOLES & HALBACH, *supra* note 51, at 215. For a thorough discussion of the theories of resulting and constructive trust *see* Folberg & Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families,* 12 WILLAMETTE L. J. 453, 470-74 (1976).

63. *See* West v. Knowles, 50 Wash.2d 311, 311 P.2d 689 (1957).

64. G. GILMORE, THE DEATH OF CONTRACT 73-74 (1974); RESTATEMENT OF RESTITUTION § 155 (1) (1937).

65. In implied-in-fact contract theory the courts imply a contract based on the conduct of the parties that demonstrates their apparent intent, while quasi-contract disregards the parties intent altogether. Henderson, *Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts,* 57 VA. L. REV. 1115, 1140-42 (1971).

the contribution of services in the home can be recognized as a contribution to the couple's assets by impressing a constructive trust on the accumulated property or by requiring the title holding party to reimburse the contributing party for the value of the services rendered. Such a result would be justifiable since the contribution of such services frees the wage earner to devote more time to profit making activities.[66] In addition, if the wage earner were to hire a domestic worker to perform such services the cost would be considerable.[67]

III. RECENT DEVELOPMENTS

Because of the failure to recognize services in the home as valid consideration, the expansive interpretation of spousal care and comfort to include sexual relations (thus illegal consideration) and the willingness to presume gifts between cohabitating partners, harsh results have attended the dissolution of meretricious relationships. A few recent cases have sought more equitable results where previously no relief would have been available.[68] Various theories have been employed to achieve this result, but the common thread in the cases is the fact that one partner's sole contribution to the accumulation of property was the performance of services in the home.

A. In re Marriage of Cary[69]

In *Cary* the California Court of Appeals addressed the question of

66. *See, e.g.*, Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemaker's Services*, 10 FAM. L. Q. 101 (1976); Havighurst, *Services in the Home — A Study of Contract Concepts in Domestic Relations*, 41 YALE L. J. 386 (1932).

67. There is a trend toward recognizing the role of a spouse as a homemaker, parent or contributor to the other spouse's career as a contribution to the assets of the family. Massachusetts recently amended its alimony statute to include homemaker's services as a consideration in determining the amount of alimony and/or property to be assigned to the parties.

> Upon divorce or upon motion in an action brought at any time after a divorce, the court may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other. In determining the amount . . . the court . . . shall consider . . . the contribution of each of the parties as a homemaker to the family unit.

Act of August 16, 1977, ch. 467, 1977 Mass. Adv. Legis. Serv. (amending MASS. ANN. LAWS ch. 208, § 34 (Michie/Law Co-op 1969)).

See also DEL. CODE tit. 13, § 1513(a)(b) (Supp. 1977); IND. CODE ANN. § 31-1-11.5-11(a) (Burns Supp. 1977); KY. REV. STAT. § 403.190(1)(a) (Supp. 1976); ME. REV. STAT. tit. 19, § 722-A(1)(A) (Supp. 1977); MONT. REV. CODES ANN. § 48-321(1) (Supp. 1977); NEB. REV. STAT. § 42-365 (Supp. 1976); OHIO REV. CODE ANN. § 3105-18(B) (11) (Anderson, Supp. 1976); VA. CODE § 20-107 (5a) (Supp. 1977).

68. *In re* Marriage of Cary, 34 Cal. App.3d 345, 109 Cal. Rptr. 862 (1973); Marvin v. Marvin, 18 Cal.3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977).

69. 34 Cal. App.3d 345, 109 Cal. Rptr. 862 (1973).

whether the Family Law Act[70] was applicable to a de facto family.[71] In that case Paul Cary and Janet Forbes lived together unmarried for over eight years and raised four children. The couple held themselves out to family and friends as married, conducted all their business as husband and wife, and on the children's birth certificates and school registration were listed as the parents of the children in the names Janet and Paul Cary. Paul worked outside the home while Janet took care of the home and the children.

Under the traditional theories of contract as applied to cohabitants in California prior to this case, Janet had no basis for a claim to any property purchased with Paul's earnings since they had no express agreement with respect to the division of their property. In the past California courts had held that equitable considerations were not present in the case of meretricious cohabitants because both parties were guilty of knowing that their relationship was not a legal marriage.[72]

The *Cary* court looked to the Family Law Act and found that where one partner qualifies as a putative spouse the other "guilty" partner is not penalized by an unequal division of the accumulated property.[73] The court determined that since the concept of guilt was no longer relevant in determining property rights when one partner acts in bad faith, it would be inconsistent to hold that property distribution would be affected when neither partner acts in bad faith in deceiving the other into believing that a valid marriage exists.[74] To avoid this inconsistency, the court in *Cary* held that meretricious cohabitants in an actual family

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70. CAL. CIV. CODE §§ 4000-5138 (West 1970 & Supp. 12A 1978).

71. *See* note 9 *supra* for the definition of de facto family.

72. Keene v. Keene, 57 Cal.2d 657, 21 Cal. Rptr. 593, 371 P.2d 329 (1962); Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761 (1943); Lazzarevich v. Lazzarevich, 88 Cal. App.2d 708, 200 P.2d 49 (1948).

73. "Sections 4452, 4509 and 4800 assure that the parties, without 'punishment' or 'reward' to either, shall receive an equal division of that which would have been community property had they been validly married." *In re* Marriage of Cary, 34 Cal. App.3d at 351-52, 109 Cal. Rptr. at 865.

74. The court in *Cary* also noted that doing away with the concept of "guilt" would not discourage an employed partner from entering into a marital relationship. "But with equal or greater force the point might be made that the pre-1970 rule was calculated to cause the income producing partner to avoid marriage and thus retain the benefits of all of his or her accumulated earnings." *In re* Marriage of Cary, 34 Cal. App.3d at 353, 109 Cal. Rptr. at 866. *Accord,* West v. Knowles, 50 Wash.2d 311, 311 P.2d 689 (1957):

> The unannounced but inherent rule is simply that the party who has title, or in some instances who is in possession, will enjoy the rights of ownership of the property concerned. The rule often operates to the great advantage of the cunning and the shrewd, who wind up with the possession of the property, or with title to it in their names, at the end of a so-called meretricious relationship.

Id. at 316, 311 P.2d at 692-93 (Finley, J., concurring). *See also* Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976): "The application of the principle that such a contract will not be enforced has often resulted in the male keeping the assets accumulated in the relationship and the female being deprived of what she jointly accumulated." *Id.* at 427, 547 P.2d at 147.

relationship were within the purview of the Family Law Act, and as such their property should be divided equally as quasi-community property.[75]

After *Cary,* two other appellate districts in California passed on the same question, one district following[76] and the other rejecting *Cary.*[77] In 1976, the Supreme Court of California resolved this issue.

B. Marvin v. Marvin[78]

In *Marvin* the Supreme Court of California squarely faced the issues of implied contract and equitable remedies as bases of recovery for a nonmarital partner whose contribution toward the accumulation of property consisted solely of services in the home.

Michelle Triola[79] and Lee Marvin lived together for seven years without marrying. Michelle Triola alleged that during this time they entered into an oral agreement to combine their efforts and earnings and to share equally any property accumulated as a result of their efforts. She further agreed to "give up her lucrative career as an entertainer [and] singer" in order to "devote her full time to defendant . . . as a companion, homemaker, housekeeper and cook. . . ."[80] In return, Lee Marvin allegedly agreed to "provide for all of plaintiff's financial support and needs for the rest of her life."[81] All the property acquired during this time was taken in Lee Marvin's name. The question before the court was whether the allegations stated or could be amended to state a cause of action. The court took this opportunity to settle much of the conflict over these issues in California.

The court first addressed the issue of illegal consideration by examining prior case law. It found that "The decisions instead disclose[d] a narrower and more precise standard: a contract between non-marital partners is unenforceable only *to the extent* that it *explicitly* rests upon the immoral and illicit consideration of meretricious sexual services.[82] The court then discussed the decision in *Cary,* finding persuasive the argument that guilt does not justify an unequal distribution of the accumulated property, but rejecting *Cary's* application of community property standards to unmarried cohabitants by bringing them within the Family Law Act. The court stated that, "We need not treat non-

75. 34 Cal. App.3d at 353, 109 Cal. Rptr. at 866.

76. *In re* Estate of Atherly, 44 Cal. App.3d 758, 119 Cal. Rptr. 41 (1975).

77. Beckman v. Mayhew, 49 Cal. App.3d 529, 122 Cal. Rptr. 604 (1974).

78. 18 Cal.3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

79. Since Michelle Triola had used the name Marvin while living with Lee Marvin, she brought suit in the name she was then known by.

80. Marvin v. Marvin, 18 Cal.3d at 666, 557 P.2d at 100, 134 Cal. Rptr. at 819.

81. *Id.* at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819.

82. *Id.* at 669, 557 P.2d at 112, 134 Cal. Rptr. at 821.

marital partners as putatively married persons in order to apply principles of implied contract or extend equitable remedies; we need to treat them only as we do any other unmarried persons."[83] The implication of this language in *Marvin* is that household services are an adequate and valuable consideration for an implied agreement to share in accumulated property and may give rise to a constructive trust.[84]

The conduct of the parties in *Marvin* upon which an implied agreement could be raised consisted of a seven year relationship, holding themselves out as husband and wife, Triola's giving up her singing career, and her assumption of the duties of housewife. The actions seem to evidence a traditional family relationship lacking only the legal certification of the state. The vagueness of the *Marvin* opinion is whether a de facto marriage such as Triola and Marvin had is a prerequisite to implying an agreement[85] or whether the California courts will interpret *Marvin* liberally to include other alternate living situations such as a homosexual family relationship.[86]

The *Marvin* court went even further when it addressed the question of whether a recovery for the value of services in the home could be based on the equitable theory of quasi-contract. "Finally, a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward."[87] *Marvin* provides a precedent in California for the theories advanced, yet the lack of guidelines in the type of conduct or tacit understanding required to evidence an implied agreement and the requirement of expectation of monetary reward for recovery in quantum meruit may still prove to be obstacles to a nonmarital partner whose only contribution to the accumulated property is the performance of household services.[88]

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83. *Id.* at 682, 557 P.2d at 121, 134 Cal. Rptr. at 830 (footnote omitted).

84. "[W]e hold only that she has the same rights to enforce contracts and to assert her equitable interest in property acquired through her efforts as does any other unmarried person." *Id.* at 684 n.24, 557 P.2d at 122 n.24, 134 Cal. Rptr. at 831 n.24.

85. *See* Comment, *Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 HARV. L. REV. 1708 (1977) for a criticism of the lack of guidelines in *Marvin* and a thorough discussion of *Marvin's* treatment of the illegality doctrine.

86. While nonmarital heterosexual unions are gaining public acceptance, same-sex unions are still looked upon with disfavor by a large segment of the public. Therefore, it is doubtful that the courts will extend the holding of *Marvin* to same-sex relationships in the immediate future. *See* Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) (no constitutional protection or sanction of a right of marriage between persons of the same sex); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971) (state statute prohibiting the marriage of persons of the same sex does not offend the first, eighth, ninth or fourteenth amendments to the United States Constitution).

87. Marvin v. Marvin, 18 Cal.3d 660, 684, 557 P.2d 106, 122-23, 134 Cal. Rptr. 815, 832 (1976).

88. An interesting quirk regarding the language "expectation of monetary reward" is that *Marvin* borrowed the language from the opinion in Hill v. Westbrook's Estate, 39 Cal.2d 458, 247

A few other cases have suggested that recovery in quantum meruit might be available under proper circumstances.[89] However, no case, including *Marvin,* had in fact allowed recovery to a meretricious spouse for the value of household services rendered either on the basis of an implied contract or in quasi-contract until 1977.[90]

C. Carlson v. Olson[91]

Only one subsequent case can be found which dealt with these same issues. In *Carlson v. Olson*[92] the Supreme Court of Minnesota upheld the trial court's finding an implied agreement to share the accumulated property. In *Carlson,* Oral Olson had paid for the acquisition of the property in question with the exception of one thousand dollars supplied by Laura Carlson's mother for a remodeling project. During the time the couple lived together, Olson worked outside the home while Carlson assumed the duties of homemaker. As in *Cary,* the couple had no express agreement as to the division of their property in the case of separation. However, the *Carlson* court looked to the conduct of the parties and found an implied agreement to share the property equally. The conduct of the parties that evidenced the agreement was their living together for over twenty-one years, raising a son to maturity, and holding themselves out to the public as husband and wife. In addition, their home and some personal property were held in joint tenancy.[93]

The opinion relies heavily on *Marvin* for its reasoning and may serve to dispell some of the vagueness of *Marvin* by establishing another set of similar circumstances under which an implied agreement has been found. In both cases, the conduct that evidenced the agreement consisted of the parties living together for a significant period of time and holding themselves out to the public as husband and wife. Still undetermined, however, is whether the courts will extend the principles of contract to protect the property interests of nonmarital partners who live

P.2d 19 (1952). In that case the question arose in relation to the attempt to prove an express agreement; "whether plaintiff sustained her burden of proving that decedent promised to compensate her and that she rendered her services because of expectation of monetary reward and not because of her regard for decedent." *Id.* at 462, 247 P.2d at 21. It may be questioned whether this language is proper in consideration of a quasi-contractual theory (quantum meruit) when quasi-contract is a device for allowing recovery regardless of the intent of the parties.

89. *See, e.g., In re* Estate of Thornton, 81 Wash.2d 72, 75, 499 P.2d 864, 855 (1972) (in which the court suggested that a long term meretricious relationship alone might support a claim in implied contract or quasi-contract); Middlecoff v. Middlecoff, 160 Cal. App.2d 22, 324 P.2d 669 (1958) (dictum); Hill v. Westbrook's Estate, 39 Cal.2d 458, 462, 247 P.2d 19, 21 (1952) (dictum).

90. Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977).

91. 256 N.W.2d 249 (Minn. 1977).

92. *Id.*

93. *Id.* at 255.

together for a shorter length of time or do not present themselves to the community as husband and wife.[94]

IV. FUTURE TRENDS IN THE LAW

It has been observed that sister states increasingly tend to rely on each other's case law in the area of family law.[95] It is hoped that this tendency will continue and give added impetus to other jurisdictions to follow the lead of California and Minnesota in extending the principles of implied contract and equitable remedies to nonmarital partners in meretricious cohabitation.

Whether remedies outside contract law are to be extended to meretricious cohabitants, depends upon whether this kind of relationship is to be granted some of the status of marriage. Alimony, death benefits and the right to an intestate or forced share of a decedent's estate traditionally flow from the legal recognition of the relationship. With the exception of one Workman's Compensation case,[96] none of these "status rights" have ever been awarded to a meretricious partner. Perhaps the only way to retain a distinction between cohabitation and marriage while affording an adequate measure of relief to cohabitants is to retain the distinction between status and contract.

Another basic question left unanswered is whether these remedies will be available to persons other than meretricious cohabitants in a de facto family relationship. The emphasis on a de facto family relationship in *Cary, Marvin* and *Carlson* would seem to indicate, however, that the courts are not yet ready to extend the available remedies to persons other than those in a de facto family relationship.

Finally, the question of what effect cohabitation has on the rights to continue to receive alimony from a previous spouse has been raised in a few jurisdictions. In Arkansas,[97] Illinois,[98] New Jersey,[99] Kansas[100] and

94. The conduct of the parties in *Marvin* and *Carlson* that influenced the courts to protect the rights of the cohabitants is similar to the type of conduct that evidences a common law marriage in the jurisdictions that still recognize their validity. *See* notes 6-8 and accompanying text *supra*. While this is not a return to bringing the parties within the purview of the divorce statutes, it does seem to evidence a reluctance on the part of the courts to grant relief to parties other than those in a long term family-like relationship.

95. *See Interstate Citation Survey*, 3 FAM. L. REP. (BNA) 2066 (1976).

96. West v. Barton-Malow Co., 394 Mich. 334, 230 N.W.2d 545 (1975) (death benefits under the State Workman's Compensation Act awarded to the surviving cohabitant). *But see* Powell v. Rogers, 496 F.2d 1248 (9th Cir.), *cert. denied* 419 U.S. 1032 (1974) (no death benefits for a surviving cohabitant under the Longshoreman's and Harbour Workers Compensation Act, but the children of the deceased were entitled to the benefits to surviving children under the act.)

97. Sturgis v. Sturgis, 1 FAM. L. REP. (BNA) 2042 (Ark. Sup. Ct., 1974) (court does not have authority over divorced spouse's moral conduct).

98. Atwater v. Atwater, 18 Ill. App.3d 202, 309 N.E.2d 632 (1974) (former spouse is not precluded from recovering back alimony when former spouse and cohabitation partner made no attempt to get married).

New York[101] the courts have continued alimony payments to a former spouse who cohabits with another. In *Fahrer v. Fahrer,*[102] however, the Ohio appeals court allowed an ex-husband to terminate alimony payments to his ex-spouse. In that case the divorce decree provided for the termination of alimony upon the death or remarriage of the former wife. The former wife moved to Florida and began living with a man in such a manner that they would have been common law married if domiciled in Ohio. The court interpreted "remarry" in the divorce decree to include remarry in a manner which would constitute a valid marriage in Ohio, thereby bringing Mrs. Fahrer within the ambit of the clause in the decree allowing termination of her alimony upon her common law remarriage. In *Taake v. Taake,*[103] Mrs. Taake had been awarded custody of the children, the family home and alimony. When Mrs. Taake voluntarily gave custody of the children to Mr. Taake, sold the home and moved in with another man the Wisconsin court held this to be a material change in circumstances sufficient to amend the divorce decree to delete the provision for alimony. However, the court reversed the lower court's decision in so far as it barred future alimony. The court in *Taake* held that a future material change in circumstances could entitle Mrs. Taake to receive alimony again.

At present cohabitation by a divorced spouse has a limited effect on that spouse's rights under a divorce decree.[104] However, there is little

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99. Eames v. Eames, 4 FAM. L. REP. (BNA) 2061 (N.J. Super. Ct. 1977) (former wife owes no duty of chastity to former husband); Garlinger v. Garlinger, 137 N.J. Super. 56, 347 A.2d 799 (1975) (unchastity alone is not a cause for terminating or reducing alimony, but may be considered to the extent it bears upon the amount of, and necessity for, the allowance).

100. Fleming v. Fleming, 221 Kan. 290, 559 P.2d 329 (1977) (no termination of alimony in the absence of evidence that the other person is supporting the former spouse or that they have entered into a relationship which would constitute a common law marriage).

101. Northrup v. Northrup, 4 FAM. L. REP. (BNA) 2249 (N.Y. Ct. App. Feb. 24, 1978) (court will not modify an award of alimony upon proof of the former spouse's habitual cohabitation with another absent proof that they also hold themselves out as married). In response to this case, three bills have been introduced (S.8592, S.8225 and S.5824) to amend the statute relied on by the court (N.Y. DOM. REL. LAW § 248 (McKinney 1977)) to allow modification upon a showing of habitual cohabitation alone. Personal communication with the New York Legislature's "Hotline" (March 22, 1978).

102. 36 Ohio App.2d 208, 304 N.E.2d 411 (1973). *See also* Latzky v. Latzky, 2 FAM. L. REP. (BNA) 2168 (N.Y. Sup. Ct. 1976).

103. 75 Wis.2d 115, 233 N.W.2d 449 (1975).

104. Child custody held not affected by cohabitation. S v. J, 81 Misc.2d 828, 367 N.Y.S.2d 405 (Sup. Ct. 1975); Christensen v. Christensen, 31 Ill. App.3d 1041, 335 N.E.2d 581 (1975); Wildermuth v. Wildermuth, 14 Wash. App. 442, 542 P.2d 463 (1975); Torrance v. Torrance, 1 FAM. L. REP. (BNA) 2465 (Minn. 1975) (cohabitating father retains custody of the child). Child custody found affected by cohabitation; *see, e.g.,* Brim v. Brim, 532 P.2d 1403 (Okla. App. 1975) (found to be in the best interest of the child to transfer custody from a former spouse whose paramour appeared to be married).

A nonmarital partner may not be liable for the other partner's debts; Mintz & Mintz, Inc. v. Color, 250 So.2d 816 (La. 1971).

case law on the subject at this time and a stipulation in the separation or divorce agreement that an alimony award would terminate upon death, remarriage or cohabitation could be upheld.

V. CONCLUSION

Although California and Minnesota have taken a liberal view toward the protection of the interests of cohabitants in the property accumulated during the relationship, there still remain implicit limitations. Both jurisdictions seem to emphasize the existence of a de facto family relationship evidenced by considerations such as the partners holding themselves out to the public as husband and wife, doing business or owning property as husband and wife, and raising children. These considerations are similar to those that evidence a common law marriage in jurisdictions that still recognize such marriages.[105] However, the rights of cohabitants are still based in contract which should preclude the recognition of rights that are traditionally associated with the status of marital partners.[106] It seems doubtful that the courts will in the forseeable future recognize a de facto family as having the same legal status as marital partners. On the other hand, it can be argued that the increasing freedom of marital partners to contract out of the rights and liabilities that traditionally adhere to the status of marriage, is eroding that status.[107] In this sense marriage and cohabitation may be said to be converging. However, California and Minnesota are a small minority of jurisdictions and whether others will follow is purely speculative. The majority of jurisdictions still recognize no rights between cohabitants in the absence of an express agreement, and even with the decriminalization of sexual relations between consenting adults, some jurisdictions may still consider cohabitation to be immoral and against public policy and refuse to extend the principles of implied contract and equitable remedies on that basis.

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105. *See* notes 6-8 and accompanying text *supra*.

106. One author has argued that support should be awarded to a de facto spouse in need of rehabilitative assistance. Note, *Beyond Marvin: A Proposal for Quasi-Spousal Support* 30 STAN. L. REV. 359 (1978).

107. Antenuptial agreements that specify how property will be disposed of upon death or divorce are gaining acceptance in the courts. *See, e.g.*, Schutterle v. Schutterle, 4 FAM. L. REP. (BNA) 2118 (S.D. Nov. 17, 1977) (antenuptial agreements are favored as a means of protecting the rights of the children of a former marriage); Huffman v. Peterson, 4 FAM. L. REP. (BNA) 2133 (Cal. Nov. 23, 1977) (oral antenuptial agreement upheld). *See generally* McDowell, *Contracts In The Family*, 45 B.U. L. REV. 43 (1965); Foster, *Marriage and Divorce In The Twilight Zone*, 17 ARIZ. L. REV. 462 (1975); Note, *Marriage as Contract: Towards a Functional Redefinition of the Marital Status*, 9 COLUM. J. L. SOC. PROB. 607 (1973).

The Concorde and Local Control of Airport Noise: Federal Preemption?

The recent case of *British Airways Board v. The Port Authority of New York and New Jersey*[1] concerning landing rights for the supersonic transport jet (hereinafter, SST or Concorde) at John F. Kennedy Airport in New York, vividly illustrates the struggle between local and federal authorities over the right to regulate noise, and concomitantly, landing at airports. The legal basis of this controversy has focused upon whether the right to regulate airport noise has been federally preempted by statute or case law. The United States Court of Appeals for the Second Circuit, although ultimately permitting the Concorde to land, determined that the field of airport noise control was not federally preempted.[2] In so finding, the Second Circuit has significantly helped to define the permissible extent of noise regulation by local authorities.

This note seeks to trace the doctrine of preemption in airport noise control from its inception to its modern status. It is hoped that this analysis will clearly define the present role reserved for local authorities in noise control. Three basic themes are developed: the rationale for the distinction between regulation by a city or municipality that is the proprietor of an airport (as opposed to regulation by a non-proprietor); the nature of regulation enacted as a delineating factor in the local proprietor's role; and three grounds for contesting a local noise regulation — preemption, commerce clause and direct conflict with a federal regulation.

First, the problem[3] in the *Concorde* case[4] is discussed. Next an historical background of the preemption doctrine is developed. In-

1. 431 F. Supp. 1216 (S.D.N.Y.), *rev'd* and *rem'd*, 558 F.2d 75 (2d Cir.), 437 F. Supp. 804 (S.D.N.Y.), *aff'd*, 564 F.2d 1002 (2d Cir. 1977).

2. At least as to local authorities who are proprietors of an airport.

3. For an overview of the environmental and legal aspects of the *Concorde* case, *see* Rosenfield, *The Concorde v. The United States*, 2 AIR LAW 126 (1977); Comment, *Legal and Environmental Ramifications of the Concorde*, 42 J. AIR L. & COMM. 433 (1976).

cluded is a discussion of the concept of liability for "takings"; in addition, case law and statutory regulations dealing with airport noise control are examined. Finally, the court of appeals disposition of the *Concorde* case is seen as a statement of the current role reserved for local airport proprietors.

I. THE PROBLEM PRESENTED BY THE CONCORDE CASE

In 1962 Great Britain and France began development of a supersonic jet airline, the Concorde (SST). For more than thirteen years, the two nations spent approximately three billion dollars on this project. Over one hundred million dollars was used simply to reduce the noise of the aircraft. In 1975 the Concorde was ready for commercial operation. Thereafter, British Airways and Air France petitioned the Federal Aviation Administration (hereinafter, FAA) to amend their operations specifications[5] and allow landings of the SST in the United States. Before this decision was made, an elaborate environmental impact statement was prepared in accordance with the requirements of the 1969 National Environmental Policy Act (hereinafter, NEPA).[6] Various factors were considered: international treaty commitments, safety regulation and potential environmental problems arising from the operation of the SST.[7]

On February 4, 1976, the Secretary of Transportation, William T. Coleman issued a permit[8] authorizing British Airways and Air France to conduct flights on a trial basis for sixteen months: two flights each day into John F. Kennedy Airport in New York, and one each day into Dulles International Airport serving Washington, D.C. The Secretary's order reserved the right to revoke the landing privileges of the SST "at any time upon four months notice, or immediately in the event of an

4. Adapted from the court of appeals decision 558 F.2d 75 (2d Cir. 1977) unless otherwise specified.

5. "Operations specifications" indicate the type of aircraft to be flown, the airports served, and the routes and flight procedures adhered to. Before a foreign air carrier can commence commercial service to the United States an application for operations specifications or an amendment to existing operations specifications must be approved and issued by the FAA. *See* 14 C.F.R. § 129 (1977). *See also* 49 U.S.C. 1372 (1970) which discusses permits to foreign carriers and 49 U.S.C. § 1508(b) (1970) which sets forth conditions under which foreign aircraft can be operated in the United States.

6. 42 U.S.C. §§ 4321-4327 (1970 & Supp. V 1975).

7. *See generally* discussion of international agreements, ability of Concorde to comply with FAA safety requirements and environmental considerations of effect of Concorde on (1) air quality, (2) energy consumption, (3) the stratosphere (*i.e.*, ozone reduction), and (4) noise in Rosenfield, *supra* note 3, at 128-37.

8. The permit was issued pursuant to statutory authority in 49 U.S.C. § 1354(a) (1970) allowing him to do so. Note that various functions, powers and duties of the Federal Aviation Agency Administration and the Chairman of the Civil Aeronautics Board were transferred to the Secretary of Transportation. *See* 48 U.S.C. §§ 1655(c)-(d), 1657(f) (1970).

emergency deemed harmful to the health, welfare of safety of the American people."[9] To lessen the anticipated impact of the Concorde's noise, the decision stipulated that no flights were to land or depart before seven a.m. or after ten p.m. In accordance with a federal regulation,[10] the Concorde was prohibited from supersonic flight over the United States or any of its territories. Noise monitoring systems were to be installed at JFK and Dulles airports. Furthermore, the FAA was granted authority to prescribe any "additional noise abatement procedures as are safe, technologically feasible, economically justified and necessary to minimize the noise impact, including but not limited to, the thrust cut back on departure."[11]

Secretary Coleman believed that actual testing was necessary to provide for a fair and informed evaluation of the Concorde. He acknowledged that the sound of the Concorde differed from conventional jets in its relatively low pitch. The deeper rumble could cause incidental structural rattling and also increased the likelihood of sound penetration into buildings. However, after closely scrutinizing the evidence, Secretary Coleman concluded that "these vibrations do not present any danger of structural damage and little possibility of annoyance."[12] Further, the Secretary believed that the addition of eight Concorde flights a day under the constraints in his order would have very little impact on the noise environment.

The Concorde began commercial flights to Dulles Airport[13] in May of 1976. The Port Authority of New York and New Jersey,[14] however, felt that its perceived noise decibel level standard of 112,[15] applicable to conventional jets, would be inadequate to regulate the special characteristics of the SST's low frequency sound. Moreover, it was feared that the noise of the Concorde would affect a far greater area than the sounds produced by subsonic flights. Therefore, on March 11, 1976, the Port Authority banned all Concorde flights pending a six month study designed to secure additional information concerning the Concorde's environmental impact based upon the operating experiences at Dulles Airport serving Washington, D.C., Heathrow Airport in England, and DeGaulle Airport in France.

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9. Department of Transportation, The Secretary's Decision on Concorde Supersonic Transportation at 3 (February 4, 1976) [hereinafter cited as Secretary's Decision].

10. 14 C.F.R. § 21.55 (1977).

11. Secretary's Decision, *supra* note 9, at 4.

12. *Id.* at 43.

13. Dulles Airport is owned and controlled by the federal government.

14. Operators of John F. Kennedy Airport in New York.

15. The noise level of 112 PNdB was established in 1956 by the Port Authority of New York and New Jersey and was based on the perceived noise level of a DC-6B propeller plane at takeoff. *See* 558 F.2d at 79.

On March 17, 1976, Air France and British Airways sought to enjoin and declare invalid the Port Authority's ban on Concorde flights.[16] The plaintiffs claimed that the ban (1) violated certain international treaties and agreements, and (2) encroached upon an area of regulation (airport noise regulation) which had been preempted by the federal government, and was specifically preempted by Secretary Coleman's order which allowed trial Concorde landings at JFK.

The defendants argued that as the airport proprietor it had the legal right to examine the noise produced by the Concorde while simultaneously banning commercial flights. They further asserted that without an express announcement by federal authorities of an intent to preempt, local authority was not displaced as to regulation of airport noise. The defendants maintained that "Congress had not clearly preempted a local airport operator's powers to accept or reject aircraft from landing and taking off at its airport . . . [and that] there was no express federal preemption with respect to regulation of noise by local airport operators."[17] On a motion for summary judgment, the district court held for the plaintiffs, British Airways Board, stating that federal statutory authority and specifically the Secretary's order authorizing experimental flights by the Concorde, preempted regulation by the Port Authority.

II. HISTORICAL BACKGROUND ON THE PREEMPTION DOCTRINE

The district court's finding of preemption was reversed by the Court of Appeals for the Second Circuit.[18] It was held that the district court's conclusion was premised upon an excessively narrow interpretation of federal statutory authority[19] and case law,[20] which ignored both congressional intent and prevailing practice.

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16. British Airways Board v. Port Auth. of N.Y. & N.J., 431 F. Supp. 1216 (S.D.N.Y. 1977).

17. *Id.* at 1217.

18. 558 F.2d at 78.

19. The district court examined the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1970) and the express noise abatement provision to the act added in 1968, 49 U.S.C. § 1431 (1970). This provision was amended by PL. 92-574, § 7(b), 86 Stat. 1239, in 1972, 49 U.S.C. § 1431 (Supp. III 1973). In reference to the original Federal Aviation Act of 1958 the court said: "The statute is broadly drafted and as expressed leaves no doubt of adequate statutory authority to land the Concorde at JFK." 431 F. Supp. at 1220.

In reference to the noise abatement provision of 1968 the court said: "This statute again was broadly drafted and its express provisions leave no doubt of adequate statutory authority paramount to that of airport proprietors in the regulation of noise and noise abatement." *Id.* at 1220-21.

The court brushed off the Senate report in connection with the enactment expressing the view that:

> This congressional statement refers, not to any restriction on the pervasive power granted in the statute, but to the voluntarily granted authority as a matter of FAA policy, delegated to local airport proprietors in the matter of regulating noise. This delegation

To fully appreciate the rationale of the court of appeals, a thorough examination of the controversy concerning airport noise regulation and the preemption doctrine is essential. When determining the proper entity to be vested with the power to regulate noise at airports (local or federal authority), several considerations must be balanced: (a) the liability for "takings"[21] due to aircraft noise, (b) proximity to the noise problem and the community affected thereby, and (c) the need for safety and efficiency in airspace management.

Beyond the fundamental question of federal preemption, consideration must be given to additional grounds by which a local attempt to regulate airport noise may be invalidated. They are: (1) whether the local regulation conflicts with a particular federal regulation or (2) whether the regulation is an undue burden on interstate commerce.

A finding of preemption is grounded in the supremacy clause.[22] A court generally finds "preemption" when it determines from an examination of statutory language, history or administrative behavior that Congress intended its legislation to be complete and exclusive in a given field.[23] This broad ground allows a court to avoid examining dif-

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was at will and subject to the ultimate pervasive federal control.

Id. at 1221.

The Senate report had expressly concluded that:

> [T]he proposed legislation [49 U.S.C. § 1431] will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations as long as such exclusion is nondiscriminatory.

S. REP. NO. 1353, 90th Cong., 2d Sess. 7, *reprinted in* [1968] U.S. CODE CONG. & AD NEWS 2688, 2694 (citing letter of Secretary, Department of Transportation). As will be discussed in section III *infra,* the court of appeals drew a completely different inference from this statement of legislative intent.

The district court also warned that the local proprietor must not regulate so as to (1) impose an undue burden on foreign or interstate commerce or (2) unfairly discriminate against particular aircraft. 431 F. Supp. at 1221.

20. The court relied on Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), and also Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (cited in *Burbank*) for the proposition that when local action produces a result inconsistent with a federal ruling under relevant federal statutes federal action will under the supremacy clause invalidate local action. 431 F. Supp. at 1222. Accordingly, the court found that the Port Authority ban was in "irreconcilable conflict" with the federal regulation and the order of the Secretary of Transportation and therefore the Port Authority resolution must fall. 431 F. Supp. at 1226. This conclusion was in addition to the preemption finding.

21. *See* definition of "taking" in note 31 *infra.*

22. U.S. CONST. art. VI, § 2 declares: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ."

23. *Compare* Campbell v. Hussey, 368 U.S. 297 (1961) (in which a state statute requiring certain identifying tags on tobacco was held preempted by federal legislation) *with* Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (where a federal regulation was held not to preempt a California statute which barred the sale of avocados which met the minimum federal standards but not the state standards). Commenting on the preemption doctrine the Supreme Court in City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973) said "prior cases on

ficult questions of law.[24] By contrast, the "conflict" ground requires a finding of a "direct and positive inconsistency" between state and federal law, based on a close examination of the factual setting.[25] The commerce clause ground[26] also requires a weighing of burdens and interests based on a careful scrutiny of the factual context.[27]

Decisions based on preemption, with which most of the significant case law in the field of airport noise control has dealt, may present certain disadvantages or dangers.[28] For example, if there is incomplete federal regulation in an area, there may be room for states to enact non-conflicting or reinforcing regulations. These regulations would be permissible after a finding of conflict but not after a determination of preemption. In essence, the "preemption" ground forecloses an analysis of both the type of regulation enacted, and its reasonableness. Accordingly, this ground would seem to work a great injustice on local authorities who attempt to regulate noise for the health and safety of inhabitants near an airport, especially in light of the liability they face for "takings."[29] The court of appeals in the *Concorde* case squarely confronted this problem and rejected the preemption ground, at least as it applies to municipalities or cities which are the proprietors of an airport.[30]

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preemption are not precise guidelines . . . for each case turns on the peculiarities and special features of the federal regulatory scheme in question." 411 U.S. at 638.

24. Warren, *Airport Noise Regulation: Burbank, Aaron and Air Transport,* 5 ENV. AFF. 97, 103 (1976).

25. For some "conflict" cases, *see, e.g.,* Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) (Florida Oil Prevention and Pollution Control Act conflicts with Federal Water Quality Improvement Act); Perez v. Campbell, 402 U.S. 637 (1971) (state motor vehicle statute which authorized withholding of driver's license as a sanction for non-payment of tort judgment conflicts with the Federal Bankruptcy Act); *see also* Kelly v. Washington *ex rel* Foss Co., 302 U.S. 1 (1937) where the court pointed out that "exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'." 302 U.S. at 10.

26. U.S. CONST. art. I, § 8, cl. 3, states "The Congress shall have Power To . . . regulate Commerce with foreign Nations and among the several States . . . ."

27. *See, e.g., Burbank,* 411 U.S. at 634 (dissenting opinion). Although the question of burden on interstate commerce was not reached in *Burbank,* Justice Rehnquist writing for the dissent commented, "the proper determination of the question turns on the evaluation of the facts of each case . . . ." *Id.*

Some commerce clause cases exemplifying this balancing test are Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (state statute which required trucks to use a particular mudguard held excessively burdensome on interstate commerce); Southern Pacific Co. v. Arizona *ex rel* Sullivan, 325 U.S. 761 (1945) (state law limiting train lengths held to interfere with free flow of interstate commerce); and South Carolina State Highway Dep't. v. Barnwell Bros., 303 U.S. 177 (1938) (upheld a state regulation which set the maximum width and weight of trucks allowed on its highways).

28. *See* Warren, *supra* note 24, at 104.

29. *See* discussion of liability for takings in section II(A) *infra.*

30. 558 F.2d 75 (2d Cir. 1977). See further discussion in section III *infra.*

A. Liability for Taking

One important factor to consider in determining who is to regulate airport noise — local or federal authorities — is who should bear the liability for "takings"[31] due to airport noise. In the case of *Griggs v. County of Allegheny,*[32] the Supreme Court held that the county was liable to the plaintiff landowner for a taking of an air easement over his property. This was the finding even though the defendant county had constructed its airport, including takeoff and landing areas, conforming with federal requirements and under the supervision and subject to the approval of the Civil Aeronautics Administration. The Court reasoned that "[t]he Federal Government takes nothing; it is the local authority which decides to build an airport vel non, and where it is to be located."[33]

As a result of the *Griggs* decision, complaining landowners must now sue local airport proprietors for "takings."[34] License to limit its liability

31. United States v. Causby, 328 U.S. 256 (1946) was the first case to discuss liability for a "taking" under a theory of inverse condemnation. In that case low flying military aircraft over Causby's chicken farm had so disturbed the Causby's and frightened the chickens that the court found there had been a "taking" of a flight easement for which just compensation was required under the fifth amendment. The question of who should bear the liability for the taking did not arise in the case because the airport and planes were federally controlled. The answer is found in Griggs v. Allegheny County, 369 U.S. 84 (1962), where the court held that local authorities should bear the liability for these takings.

Federal courts have generally required actual physical invasion of the airspace directly above the landowner's property thereby granting recovery only on a strict trespass theory. *See, e.g.,* Batten v. United States, 306 F.2d 580, 584 (10th Cir. 1962), *cert. denied,* 371 U.S 955 (1963). On the other hand, state courts have generally allowed recovery based on a nuisance theory and have not required direct overflight. *See e.g.,* Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (Ct. App. 1974), *cert. denied,* 419 U.S. 1122 (1975) *and* Martin v. Port of Seattle, 64 Wash.2d 309, 391 P.2d 540 (Sup. Ct. 1964), *cert. denied,* 379 U.S.989 (1965).

The California Court of Appeals set forth the following definition of a taking in *Aaron:*

> [T]he municipal operator of an airport is liable for a taking or damaging of property when the owner of property in the vicinity of the airport can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property, and the interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking. Whether the interference is substantial enough to meet this standard is a mixed question of fact and law for the trial judge to determine. The owner need not prove there were direct overflights of the property. The fact that the federal government controls the flight of aircraft does not relieve the airport owner and operator of liability where the operation of the airport is a substantial cause of the property owner's damage.

40 Cal. App. 3d at 493, 115 Cal. Rptr. at 177.

The whole issue of "takings" constitutes a separate topic beyond the scope of this Note. For a good starting point, *see generally* J. HILDEBRAND, NOISE POLLUTION AND THE LAW (1970), especially Part II. *See also* Note, *Nuisance Actions Against Municipal Airports,* 48 WASH. L. REV. 904 (1973); Note, *Governmental Nuisance Liability: An Inadequate Remedy for Aircraft Noise,* 9 CAL. WEST. L. REV. 310 (1973).

32. 369 U.S. 84 (1962).

33. *Id.* at 89.

34. *See* Yost, *Aircraft Noise Liability and Regulation,* TRIAL, September, 1977, at 34; Note. *Aircraft Noise Abatement: Is There Room For Local Control?,* 60 CORNELL L. REV. 269, 294

by circumscribing the use of its airport and employing other techniques to minimize noise has been thought a fair extension of the principle that a local proprietor is liable for takings.[35] In fact, federal authorities have permitted at least some concurrent local regulation, principally for fear of having *Griggs* overruled thereby bringing liability upon themselves.[36] Thus, as will be demonstrated,[37] the *Griggs* decision continues to be a moderating factor in the struggle between local and federal authorities over airport noise regulation.[38]

B. Federal Preemption of Airport Noise Regulation?[39]

For purposes of discussion, the topic of airport noise regulation can be divided into four conceptual categories. They are: (1) case law dealing with attempts to regulate airport noise prior to the Supreme Court case of *City of Burbank v. Lockheed Air Terminal,*[40] (2) the *Burbank* decision,[41] (3) federal statutes dealing with airport noise regulation,[42]

(1975) [hereinafter cited as *Aircraft Noise Abatement*].

35. 558 F.2d at 83. Also the California Court of Appeals for the Second District adopted this rationale as a justification for imposing liability on local authorities. They pointed out that

> California law recognizes that a city as owner and operator of an airport has power to make reasonable rules regulating the use of the airport . . . . There is no issue in this proceeding as to the validity of California's noise standards or of any rule or regulation adopted by the City as proprietor of the airport. *We mention these matters only to suggest that the City is not powerless to take steps to alleviate the problem of jet noise.*

40 Cal. App.3d at 490-91, 115 Cal. Rptr. at 175 (emphasis added). *See also* part II(B)(4) *infra.*

36. Note discussion at page 496 *infra* dealing with the Secretary of Transportation's comments regarding Concorde jet landings at Kennedy Airport. Also the Environmental Protection Agency (EPA) in a 1973 report to Congress suggested that if a federal airport noise certification procedure was used, it might shift liability from local airport owners to the federal government. EPA Report To The Senate Comm. On Public Works, 93d Cong. 1st Sess., Report on Airport Noise 112-13 (Comm. Print. 1973) [hereinafter cited as EPA Report].

Further, the Federal Aviation Administration in its Noise Standards Regulations has included the following limitation on the applicability of the noise standards:

> Pursuant to 49 U.S.C. § 1431(b)(4), the noise levels in this part have been determined to be as low as is economically reasonable, technologically practicable, and appropriate to the type of aircraft to which they apply. No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, any airport.

14 C.F.R. § 36.5 (1977).

37. *See* sections II(B)(4) and III *infra.*

38. One possible problem with introduction of the Concorde is the fear that the different noise produced by its engines will expose the Port Authority to additional inverse condemnation suits. *See* British Airways Board v. Port Auth. of N.Y. & N.J., 564 F.2d 1002, 1016 (2d Cir. 1977) (Mansfield, Circuit Judge, concurring in part). There is authority for the contention that the introduction of larger, heavier, noisier aircraft can constitute a fifth amendment taking of an additional easement even though the new aircraft does not go beyond the boundaries of the original easement. *See* Avery v. United States, 330 F.2d 640 (1964).

39. *See generally* Note, *Federal Preemption of Local Airport Noise Regulation,* 25 CATH. U.L. REV. 580 (1976) [hereinafter cited as *Local Airport Noise*]; Warren, note 23 *supra; Aircraft Noise Abatement,* note 34 *supra.*

40. 411 U.S. 624 (1973). *See* section II(B)(1) *infra.*

41. *See* section II(B)(2) *infra.*

42. *See* section II(B)(3) *infra.*

and (4) cases dealing with airport noise regulation after *Burbank*.[43]

1. Case Law Prior to *Burbank*

Cases dealing with noise regulation prior to *Burbank* suggested that local governments near an airport, but not owning it, could not enact rules pursuant to their police power which affected aircraft in flight. This proscription applied whether the regulations restricted flight height over the town or imposed absolute noise limits.[44]

For example, in the case of *Allegheny Airlines v. Village of Cedarhurst*,[45] the citizens of Cedarhurst, New York passed an ordinance prohibiting flights at less than 1000 feet over their town.[46] The district court struck down the ordinance even though federal regulations required all flights over populated areas to fly at an altitude over 1000 feet. The court specifically found that Congress had preempted the regulation of aircraft in flight both above and below 1000 feet. Moreover, the court pointed out that because the federal regulations (unlike the Cedarhurst ordinance) did not apply the 1000 foot limit to takeoff and landing zones, there was a conflict between the state and federal regulations. A similar ordinance adopted by some cities close to the airport in Newark, New Jersey which disallowed flights below 1200 feet was invalidated in *City of Newark v. Eastern Airlines, Inc.*[47] This case also adopted the rationale that by enactment of the Civil Aeronautics Act[48] the Civil Aeronautics Board had preempted the field of prescribing air traffic rules needed to govern aircraft in the public airspace.[49]

In *American Airlines, Inc. v. Town of Hempstead*,[50] the town enacted a noise ordinance forbidding anyone from operating a mechanism or device (including airplanes) which created a noise within the town exceeding a certain ground level decibel limit. This ordinance would have restricted landing and takeoff patterns into JFK Airport

43. *See* section II(B)(4) *infra*.

44. Yost, *supra* note 34, at 35.

45. 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956).

46. A similar ordinance enacted by a Kentucky city which prohibited flights below 750 feet was declared void because it conflicted with FAA regulations which required aircraft to approach the airport at a glide path of less than 750 feet. *See* American Airlines, Inc. v. City of Audubon Park, 407 F.2d 1306 (6th Cir. 1969). Note that the ground of this decision was a narrower one (*i.e.*, conflict with FAA regulations) than was that of the *Cedarhurst* case (*i.e.*, preemption).

47. 159 F. Supp. 750 (D.N.J. 1958).

48. 49 U.S.C. §§ 401-403. The court said about this act: "This legislation clearly evidenced the intent of Congress to preempt the exclusive power of regulation and control in the field of interstate air commerce." 159 F. Supp. 750, 755. These statutes were repealed by Pub. L. No. 85-726, § 1401(b), 72 Stat. 806 (1958).

49. 159 F. Supp. at 757.

50. 398 F.2d 369 (2d Cir. 1968).

and would have necessitated diverting flights to avoid the town.[51] The district court found that the ordinance: unconstitutionally burdened interstate commerce; invaded an area preempted by federal legislation and regulation; and directly conflicted with relevant federal regulations.[52] The court of appeals affirmed but based its decision on the narrow ground that the ordinance was in conflict with federal law,[53] thereby passing over the preemption doctrine set forth in *Cedarhurst*.[54] The court relied in part on a California case, *Loma Portal Civic Club v. American Airlines, Inc.*,[55] which had likewise rejected the federal preemption theory in the field of flight control.[56] On the particular facts of the case, however, the *Loma* court declined to issue a requested injunction of flights into San Diego Airport.[57] The *Loma* court had also

51. As the court pointed out "some noise ordinances necessarily regulate flight paths and the District Court found that Hempstead's is one of those." *Id.* at 376.

52. *Id.* at 372.

53. The court noted that:

> In view of the conflict between the ordinance and the federal regulation we need not consider the questions of federal pre-emption, and undue burden on interstate commerce. In some situations, federal legislation and regulation is deemed so pervasive as to rule out all state and local attempts to regulate in the areas thus "pre-empted" by the federal government. *See, e.g.,* Campbell v. Hussey, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed. 2d 299 (1961). The area of flight patterns and procedures may be one of these; this court's opinion in the *Cedarhurst* case implies that it is, where as the California Supreme Court's opinion in Loma Portal Civic Club v. American Airlines, Inc. says that it is not. *See also* City of Newark, New Jersey v. Eastern Airlines, Inc., 159 F. Supp. 750 (D.N.J. 1958).
>
> The third point involves the question whether the ordinance unduly burdens interstate commerce. If it was an undue burden on commerce for the State of Arizona to regulate the length of trains operating within the state, *see* Southern Pacific Co. v. State of Arizona, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945), it may be that this particular ordinance, found to regulate aircraft flight paths and procedures, is an undue burden on commerce. But the problem arises that it is this particular noise ordinance in this particular setting which is found to regulate flight paths and procedures; another noise ordinance might not have that effect.

Id. at 376 n.4.

54. Commenting on the *Cedarhurst* case the *Hempstead* court said:

> The opinion can be read either as a holding that the entire field of regulation of aircraft has been preempted by the federal government, or as a holding that the particular ordinance involved was in conflict with the federal regulatory scheme. . . . Whichever reading is accepted it is clear that Cedarhurst is square precedent for holding the Hempstead ordinance invalid, for in effect there is a square conflict between the local ordinance and federal regulation in each case. . . .

Id. at 375.

55. 61 Cal.2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).

56. Commenting on the preemption ground the court said that:

> [a] holding of federal preemption would have the effect of disabling the state from any action in the entire field. . . . [U]nless Congress had in fact intended such preclusion of state regulation and were to carry out its responsibility, there would result within that state a lacuna which the state would be powerless to fill.

Id. at 591, 394 P.2d at 554, 39 Cal. Rptr. at 714.

57. Summarizing the circumstances of the case the court concluded that:

> under the facts of this case, *i.e.,* the operation of aircraft with federal airworthiness certificates in federally-certificated, scheduled passenger service, in conformity with federal safety regulations, in a manner not creating imminent danger, and in furtherance of the public interest in safe, regular air transportation of goods and passengers, an injunction is not available.

interpreted the *Cedarhurst* case as one in which the ordinance "plainly conflicts with federal statutes and regulations"[58] notwithstanding the preemption language in *Cedarhurst.*

Clearly, the pre-*Burbank* case law demonstrates differing views on whether local attempts to control aircraft noise should be handled on preemption or conflict grounds. Yet, not all attempts by local authorities to regulate noise were struck down prior to *Burbank* because of preemption or conflict with a specific regulation. In some cases no preemption was found and if the local regulation was reasonable and not in conflict with federal regulation, it was permitted.

One of the few types of local noise abatement measures which could potentially have resisted an attack on the ground of conflict, was a curfew system whereby planes would be denied landing during certain hours.[59] Prior to *Burbank,* which invalidated such a scheme on the ground of preemption, several cases in fact upheld this manner of regulating noise. For example in *Stagg v. Municipal Courts of Santa Monica,*[60] the court sustained a curfew ordinance finding that its subject matter was not preempted by state or federal law and that the curfew was a legitimate use of the municipality's police power. Quoting the *Loma* decision, the court observed, "noise abatement is a federal as well as a state aim, and when not inconsistent with safety . . . would not necessarily present a conflict with federal law but might well reinforce it."[61] Therefore, the court felt that regulation of flight takeoff by time would not be precluded; although such a regulation may "incidentally affect" the "right of flight," it would not "impair it."[62] Likewise in a New Jersey case, *Township of Hanover v. Town of Morristown,*[63] the court issued an injunction which required a jet curfew as a compromise to abate noise near the airport. However, the court refused to restrain the extension of a runway, close down flights to the airport entirely, or interfere with landing or takeoff procedures issued by the FAA. Nevertheless, it felt that prohibiting the landing of jet aircraft during certain hours would not conflict with the safety regulations of the FAA and would therefore be a permissible way in which to diminish the noise.[64]

Id. at 591, 394 P.2d at 554, 39 Cal. Rptr. at 714.

58. 61 Cal.2d at 593, 394 P.2d at 555, 39 Cal. Rptr. at 715 (quoting *Cedarhurst,* 238 F.2d at 814).

59. *Aircraft Noise Abatement, supra* note 34, at 284.

60. 2 Cal. App.3d 318, 82 Cal. Rptr. 578 (1969).

61. 2 Cal. App.3d at 321, 82 Cal. Rptr. at 580, (*citing* Loma Portal Civic Club v. American Airlines, 61 Cal.2d at 592, 394 P.2d at 554, 39 Cal. Rptr. at 714 (1964).)

62. 2 Cal. App.3d at 321, 82 Cal. Rptr. at 580. That court distinguished regulations which regulated the time, manner and place of takeoff which would not interfere with the right of flight from those regulations which would alter the flight paths altitudes set by the FAA for safety. *Id.*

63. 108 N.J. Super. 461, 261 A.2d 692 (1969).

64. *Id.* at 491, 261 A.2d at 708.

In *Port of New York Authority v. Eastern Airlines, Inc.*,[65] the district court upheld a Port Authority regulation which required airlines using LaGuardia Airport to comply with a preferential runway system in order to abate noise while other runways at the airport were being extended. The court, however, emphasized that the FAA had not specifically required landing on the runways for safety. Therefore, the question of whether the FAA had the power to preempt the regulation of the runways for the purpose of air traffic control was not reached.[66]

Generally, pre-*Burbank* case law invalidated most but not all attempts at local noise regulation. Any regulation based solely on a municipality's police power was struck down, particularly if it had the effect of regulating aircraft in flight. However, in some cases, the attempted regulation survived attack. When the city or municipality was also an airport proprietor, as in *Eastern Airlines,* the regulation was sustained provided it was reasonable and did not directly conflict with a federal mandate. It is submitted that the general judicial policy to look critically upon any attempted noise regulation which would result in regulating aircraft in flight, was an acknowledgment that the need for safety and efficiency in airspace management clearly put flight management in the sphere of federal control.

2. The *Burbank* Decision

Probably the most important case dealing with the question of federal preemption of airport noise regulation is the Supreme Court decision of *City of Burbank v. Lockheed Air Terminal.*[67] The case is significant not only for what it said but also for what it did not say.[68]

Suit was brought by the private owners of an airport against the city of Burbank, California to enjoin an ordinance enacted by the City Council which made it illegal for a jet to take off from the Hollywood-Burbank Airport between eleven p.m. and seven a.m. The ordinance also made it unlawful for the operator of the airport to permit such departures. The ordinance affected only one intrastate flight from Oakland, California to San Diego, California at eleven-thirty each night.[69] It was struck down by the district court for violating both the commerce and supremacy clauses of the United States Constitution. The court of appeals affirmed on the basis of the supremacy clause, finding that the ordinance sought to regulate an area which was both

65. 259 F. Supp. 745 (E.D.N.Y. 1966). Note that in this case the regulation is by an airport proprietor and not by a municipality's police power.

66. *Id.* at 752.

67. 411 U.S. 624 (1973).

68. *See* discussion p. 487 *infra.*

69. 411 U.S. at 625-27.

federally preempted and in conflict with a federal regulation.[70] The Supreme Court affirmed on the preemption ground, holding that state and local regulation of aircraft noise had been preempted by the FAA in conjunction with the Environmental Protection Agency.[71]

Although preemption was not expressly stated in the Federal Aviation Act of 1958,[72] as amended by the Noise Control Act of 1972,[73] and the regulations pursuant to it,[74] the Court found that this was not conclusive. To resolve the issue, it looked to congressional intent using the tests set forth in *Rice v. Santa Fe Elevator Corporation.*[76] In *Rice,* the Court said that when "Congress [has] legislated in a field which . . . States have traditionally occupied, the assumption [is] that the historic police powers of the States were not superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[77] The intent to preempt may be evidenced in several ways:

> [1] the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . [2] the Act of Congress may touch a field in which the federal interest is so dominant that it will be assumed [that the federal system precludes] enforcement of state laws on the same subject . . . [3] the state policy may produce a result inconsistent with the objective of the federal statute.[78]

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70. In its opinion, the Supreme Court stated that:

> The Court of Appeals held that the Burbank ordinance conflicted with the runway preference order, BUR 7100.58, issued by the FAA Chief of the Airport Traffic Control Tower at the Hollywood-Burbank Airport. The order stated that, 'procedures established for the Hollywood-Burbank Airport are designed to reduce community exposure to noise to the lowest practicable minimum . . .' The Court of Appeals concluded that the ordinance, 'interferes with the balance set by the FAA among the interests with which it is empowered to deal, and frustrates the full accomplishment of the goals of Congress'. 457 F.2d 667, 676. *In view of our disposition of this appeal under the doctrine of preemption, we need not reach this question.*

411 U.S. at 626 n.2 (emphasis added).

71. *Id.* at 633.

72. 49 U.S.C. §§ 1301-1542 (1970).

73. 42 U.S.C. §§ 4901-4918 (Supp. III, 1973). The section which deals specifically with aircraft noise standards and reads as follows:

> The Administrator, after consultation with appropriate Federal, State, and local agencies and interested persons, shall conduct a study of the (1) adequacy of Federal Aviation Administration flight and operational noise controls; (2) adequacy of noise emission standards on new and existing aircraft, together with recommendations on the retrofitting and phaseout of existing aircraft; (3) implications of identifying and achieving levels of cumulative noise exposure around airports; and (4) additional measures available to airport operators and local governments to control aircraft noise. He shall report on such study to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committees on Commerce and Public Works of the Senate within nine months after October 27, 1972.

42 U.S.C. § 4906 (Supp. III, 1973).

74. 14 C.F.R. §§ 71, 73, 75, 77, 91, 93, 95, 97 (1977).

75. 411 U.S. at 633.

76. 331 U.S. 218 (1947).

77. *Id.* at 230.

78. *Id.*

After examination of the *Rice* tests, the Court concluded that the scheme of federal control over aircraft noise was so pervasive as to preempt any state regulation.[79] The majority interpreted expressions of congressional intent as suggesting that the 1968 Noise Abatement Act, as amended by the Noise Control Act of 1972, was designed to preempt the field of airport noise regulation.[80] The dissent, by scrutinizing the congressional record, made a convincing argument that this was not in fact the case.[81] While the federal government may have preempted the field of noise regulation insofar as it involved controlling the flight of aircraft, this would not preclude any other efforts of local authorities to

79. 411 U.S. at 633-34. The Burbank court also cited the opinion of Justice Jackson concurring in Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) in which he commented:

> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.

322 U.S. at 303.

80. *See* the majority's discussion, 411 U.S. at 634-38.

81. The dissent concluded that:

> The history of Congressional action in this field demonstrates . . . an affirmative Congressional intent to allow local regulation. But even if it did not go that far, that history surely does not reflect 'the clear and manifest purpose of Congress' to prohibit the exercise of 'the historic police powers of the States' which our decisions require before a conclusion of implied preemption is reached. Clearly Congress could pre-empt the field of local regulation if it chose, and very likely the authority conferred on the administrator of the Federal Aviation Administration by 49 U.S.C. § 1431, is sufficient to authorize him to promulgate regulations effectively pre-empting local action. But neither Congress nor the Administrator has chosen to go that route. Until one of them does, the ordinance of the city of Burbank is a valid exercise of its police power.

Id. at 653.

Also the dissent quoted an especially revealing source of congressional intent, S. REP. NO. 1353, 90th Cong., 2d Sess. 7 (1968) (citing a June 22, 1968 letter from the Secretary of Transportation to the Senate Commerce Committee), in which the following opinion was expressed with regard to the effect of the 1968 Noise Abatement Act 49 U.S.C. § 1431 as it amends the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1970):

> " 'HR 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft. . . . Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. *Likewise, the Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements.* The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. *In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government* who, for the most part, own and operate our Nation's airports. *The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.'* Of course, the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers is not diminished by the bill."

411 U.S. at 649 (emphasis added).

respond to the noise problem.[82] The dissenting opinion largely relied on a letter from the Secretary of Transportation to the Senate Commerce Committee,[83] which expressed the view that:

> the proposed legislation will not affect the rights of a State or local public agency, *as the proprietor of an airport,* from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.[84]

The majority, however, emphasized in a footnote[85] that here they were *not* dealing with a case where an "ordinance is imposed by the City of Burbank as 'proprietor' of the airport."[86] Instead, this was viewed as a situation where a town is attempting to regulate airport noise at a privately[87] owned airport through the use of its police power. Thus the court concluded "authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor."[88]

The *Burbank* decision has been criticized.[89] It has been argued that the legislative history relied upon was not sufficiently clear to establish preemption.[90] Moreover, it has been contended that the limitation of *Burbank* to a municipality's exercise of its police power to control local airport noise creates an anomolous result. The rationale is that since most airports are owned and operated by a municipality and are not privately owned as in *Burbank,* the vast majority of cases would not be affected by the decision. Thus, that aspect of *Burbank* which stressed the need for a uniform and exclusive system of federal regulation to ensure safety and efficiency in airspace management would be undermined.[91]

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82. 411 U.S. at 652.

83. *See* Transportation Secretary's Letter cited in note 81 *supra.*

84. *Id.* (emphasis added).

85. 411 U.S. at 635 n.14.

86. *Id.*

87. The court also suggested that "[w]hile the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example the principal airport serving Cincinnati is located in Kentucky." *Id.* at 636 n.14.

88. *Id.* It is important to note that in the *Concorde* case the airport (JFK) is owned and operated by a municipal agency (the Port Authority of New York and New Jersey).

89. Warren, *supra* note 23, at 104.

90. *Id.* The dissent in *Burbank* also expressed this view. *See* 411 U.S. at 653.

91. The District Court in the *Burbank* case had determined that the "imposition of curfew ordinances on a nationwide basis would result in a bunching of flights [thereby] increasing congestion" and would worsen the noise problem by "increasing flights during the period of greatest annoyance." Further the court found that the imposition of such a curfew "would cause a serious loss of efficiency in the use of navigable airspace"; all results wholly inconsistent with the objec-

It is submitted that a local regulation which interferes with this system should be equally abhorrent whether it is based upon the state's police power or the owner's proprietary power. Even if the decision were read as a restriction on the *nature* of power exercised rather than on the category of airport ownership, problems may arise because the roles of police and proprietorship powers can overlap.[92]

These ambiguities have been noted and discussed by the lower courts in decisions subsequent to *Burbank*.[93] The delineation of "what limits, if any, apply to a municipality as a proprietor" are evolving and have found their latest and most definite exposition in the *Concorde* case.

Along with the cases thus far developed, an examination of the federal statutory scheme indicates further problems in defining the role that local authorities should play in regulating noise. Inadequacies or deficiencies in the federal scheme would present opportunities for local regulation provided there was neither conflict with federal efforts nor an unreasonable burden on interstate commerce.[94]

3. Federal statutes

The federal statutes which deal with airport noise regulation are the Federal Aviation Act of 1958,[95] the Noise Abatement Amendments of 1968,[96] and the Noise Control Act of 1972.[97] In this section, a brief outline of the significant portions of these statutes is presented; moreover, a critique of these procedures is made.

Pursuant to the Federal Aviation Act of 1958, the FAA is empowered to regulate the use of navigable airspace. Section 1508 provides in part that "the United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States. . . ."[98] Section 1348(a) has given the administration broad authority to regulate the use of the navigable airspace, "in order to insure the safety of aircraft and the efficient utilization of such airspace. . . ."[99] Moreover, the administration is authorized "to

tives of the Federal statutory and regulatory scheme. 411 U.S. at 627-28. This formed the basis of the underlying rationale for invalidating the curfew ordinance.

92. Warren, *supra* note 23, at 107. For example, in an attempt to lessen airport noise, police and proprietorship powers might merge in designating preferential runways or in restricting the number of landings and takeoffs.

93. *See* § II(B)(4) *infra*. Of course, some courts have applied *Burbank* and found preemption. *See, e.g.*, 431 F. Supp. 1216; Village of Bensenville v. City of Chicago, 16 Ill. App. 733, 306 N.E.2d 562 (1973).

94. These grounds would come into play assuming courts decided there was no federal preemption of noise control, at least in respect to municipalities or cities as proprietors.

95. 49 U.S.C. §§ 1301-1542 (1970).

96. 49 U.S.C. § 1431 (1970 & Supp. III 1973).

97. 42 U.S.C. §§ 4901-4918 (Supp. III 1973).

98. 49 U.S.C. § 1508 (1970).

99. 49 U.S.C. § 1348(a) (1970).

prescribe air traffic rules and regulations governing the flight of aircraft . . . for the protection of persons and property on the ground . . . including rules as to safe altitudes of flight. . . ."[100]

In 1968 an express noise abatement amendment was added to the Federal Aviation Act.[101] This act was further changed by the Noise Control Act of 1972[102] which brought the EPA's involvement into federal control of aircraft noise.

The amended act provides that the FAA, after consulting with the Secretary of Transportation and the EPA, shall set standards for the measurement of aircraft noise and sonic boom. Also the FAA is to prescribe needed regulations for controlling and reducing noise created by aircraft. In turn, these standards and regulations are applied to the issuance, amendment, modification, or revocation of any certificate authorized by this subchapter.[103] Also in subsection 1431(b)(2) it is stated that future aircraft certificates granting permission to operate shall not be issued unless the new aircraft noise requirements are met.[104] Subsection (d) of section 1431 enumerates several factors which the FAA must consider in prescribing and amending standards and regulations under this section; *i.e.*, it must evaluate relevant data, safety fac-

100. 49 U.S.C. § 1348(c) (1970).

101. 49 U.S.C. § 1431 (1970 & Supp. III 1973).

102. 42 U.S.C. §§ 4901-4918 (Supp. III 1973).

103. 49 U.S.C. § 1431 (Supp. III 1973). Sections (a) and (b) of the act read:

(a) For purposes of this section:

(1) The term "FAA" means Administrator of the Federal Aviation Administration.

(2) The term "EPA" means the Administrator of the Environmental Protection Agency.

Consultations; standards; rules and regulations; aircraft certificates

(b)(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification suspension, or revocation of any certificate authorized by this subchapter. No exemption with respect to any standard or regulation under this section may be granted under any provision of this chapter unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

(2) The FAA shall not issue an original type certificate under section 1423(a) of this title for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d) of this section.

104. *See* note 103 *supra*. This has been a bone of contention in the *Concorde* case. The FAA has not issued noise standards applicable to supersonic jets. In the interim, normal jet noise standards are being applied. However, recently, proposed regulations applicable to supersonic aircraft have been issued. *See* FAA Civil Supersonic Airplanes Proposed Noise and Sonic Boom Requirements, 42 Fed. Reg. 55176 (1977); 14 C.F.R. §§ 21, 36, 91 (1977).

tors, economic feasibility and the extent to which such standards or regulations contribute to the carrying out of the purposes of the section. Further subsection (d)(2) specifically states that the FAA shall "consult with such Federal, State and interstate agencies as he deems appropriate."[105]

Thus, it is evident from the face of the statute that Congress did not intend to omit local authority from the regulatory process.[106] Subsection (c) of 1431 provides for the EPA to submit such proposed regulations as it determines necessary to protect the public health and welfare. These may then be adopted, modified or rejected as determined by the FAA. If the FAA decides not to prescribe the recommended regulations, it must give a detailed explanation for its decision. The section also establishes an appeals procedure whereby the EPA can request a reconsideration of its proposed regulations.[107]

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105. 49 U.S.C. 1431(d) (1970). The section reads in full:

Considerations determinative of standards, rules, and regulations.

(d) In prescribing and amending standards and regulations under this section, the FAA shall —

(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;

(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

106. *See also* note 36 *supra*.

107. 49 U.S.C. 1431(c) (Supp. III 1973). The section reads in full:

(c)(1) Not earlier than the date of submission of the report required by section 4906 of Title 42, EPA shall submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, publish the proposed regulations in a notice of proposed rule making. Within sixty days after such publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within a reasonable time after the conclusion of such hearing and after consultation with EPA, the FAA shall —

(A) in accordance with subsection (b) of this section, prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or

(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations.

(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1)(A)(ii) or (1)(B) of this subsection does not protect the public health and welfare from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and

In practice these procedures have encountered numerous difficulties. First, regulations[108] have been issued and finalized only after a substantial delay. Second, they have dealt with aircraft certification and not airport standards.[109] These rules were limited by statute to standards that were only "economically reasonable, technologically practicable, and appropriate."[110] As a result, these regulations were very lenient.[111] Furthermore, numerous categories of craft have been exempted from the regulations.[112] Consequently, less than ten per cent of the aircraft in service were affected.[113] Third, the record of FAA enforcement of existing regulations has been less than satisfactory.[114] Finally, the FAA has specifically declined to say that the "proposed noise regulations are or should be acceptable or unacceptable for operation at, into, or out of, any airport."[115] These problems suggest that the federal scheme for regulating airport noise, especially as implemented by the regulations, leaves considerable room for improvement and local input.

Advocates of local regulation have criticized congressional attempts to deal with noise pollution on a national level. They argue that the

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may request the FAA to review, and report to EPA on, the advisability of prescribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 4332(2)(C) of Title 42 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 4332(2)(C) of Title 42, the report of the FAA indicates that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

108. *Noise Standards,* 14 C.F.R. § 36 (1977).

109. *See* Warren, *supra* note 24, at 113.

110. 49 U.S.C. § 1431 (Supp. III 1973).

111. Warren, *supra* note 34, at 113.

112. For example military aircraft, supersonic aircraft, carriers in international commerce and carriers already in service as of issuance of the regulations.

113. EPA Report, *supra* note 36, at 31-32.

114. *See* Warren, *supra* note 24, at 113-115. *See also* Comment, *Toward The Comprehensive Abatement of Noise Pollution: Recent Federal and New York City Noise Control Legislation,* 4 ECOL. L. Q. 109 (1974); Comment, *Port Noise Complaint,* 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 61 (1970).

115. 14 C.F.R. § 36.5 (1977). This limitation was put in so that liability would continue with local authorities for takings. *See* discussion at II(A)(1) *supra.*

FAA, which is in control of implementing the act, is insensitive to the problems of residents who suffer from airport noise.[116] Indeed an EPA report[117] supported this contention, but still maintained that the FAA should have primary authority to regulate noise since it was responsible for flight safety. However, the report also suggested that local authority should have considerable input.[118] Ways of dealing with noise at existing airports would be more limited. For example they recommended placing restrictions on types of aircraft, number of operations per day, hours of operation, or noise limits or landing fees based on noise levels emitted by the landing aircraft. These recommendations would necessarily be limited by court decisions and considerations of burdens on interstate commerce.[119]

4. Case Law after *Burbank*

Several cases after *Burbank* have considered the question of federal preemption with regard to airport noise regulation by a municipal proprietor. Differing views as to the implication of the majority's footnote 14 have been expressed. Of particular interest are two recent California cases which held that the area of airport noise control by a municipality which was also the proprietor of the airport was not preempted by federal regulation: *Air Transport Association of America v. Crotti*[120] and *National Aviation v. City of Hayward.*[121]

In *Crotti,* the plaintiff airlines contended that certain sections of the Public Utilities Code[122] and the implementing regulations[123] were invalid and unenforceable on both supremacy and commerce clause grounds. These regulations set noise standards for the operation of aircraft at all airports operating under a permit from the California Department of Aeronautics. The challenged noise regulations were of two types: (1) Community Noise Equivalent Level (CNEL) standards which sought to reduce airport noise to an established level through monitoring and limitations on land use near the airports; and (2) Single Event Noise Exposure Levels (SENEL) prohibitions which prescribed a

116. *See Local Airport Noise, supra* note 39, at 590-92.

117. EPA Report, *supra* note 36, at 112-13.

118. For example, the EPA report recommended that in building new airports, zoning and planning could be more effectively employed by local government to minimize noise irritation to residential communities. *Id.* at 101.

119. *Id.* at 112-13. For a comprehensive summary of specific techniques for controlling noise at airports, *see* Vittes, *Airport Noise Control — Can Communities Live Without It? Can Airlines Live With It?,* 38 J. AIR L. & COMM. 473 (1972).

120. 389 F. Supp. 58 (N.D. Cal. 1975).

121. 418 F. Supp. 417 (N.D. Cal. 1976).

122. CAL. PUB. UTIL. CODE §§ 21669-21669.4 (West Supp. 1978).

123. CAL. AD. CODE §§ 5000-5080.5 (West Supp. 1978) (referred to as the California Noise Standards).

maximum level for aircraft noise emission by aircraft in flight.[124] The airlines relied on *Burbank* in contending that any regulation of noise produced by aircraft in direct flight is preempted by the federal government and, accordingly, the CNEL and SENEL are per se void and unenforceable.

The court found that the airlines' total reliance upon *Burbank* was "misplaced."[125] Emphasizing that *Burbank* should be strictly limited to its facts,[126] the court stated "we take as gospel the words in footnote 14 in *Burbank*: [A]uthority that a municipality may have as landlord is not necessarily congruent with its police power. *We do not consider here what limits, if any, apply to a municipality as a proprietor.*"[127]

The *Crotti* court also expressed the view that since the airport proprietor is saddled with the consequences (*i.e.*, takings) which arise in running a public airport, it must have the accompanying right to limit its use.[128] "That correlating right of proprietorship control is recognized and exempted from judicially declared federal preemption by footnote 14."[129] The ultimate holding of the court was that the CNEL provisions and regulations were not in themselves invalid because they did not attempt to govern aircraft in direct flight (a federally preempted area). On the other hand the SENEL provisions were void because they directly interferred with the federal regulatory scheme by trying to prescribe noise levels for aircraft in flight. The court also found that the imposition of criminal fines for violations was an illegal exercise of police power in the federal domains of aircraft flight control, air space management and interstate and foreign commerce.[130]

The court in *Hayward* upheld an ordinance which prevented aircraft that exceeded 75 dBA from taking off between eleven p.m. and seven a.m. from the Hayward Air Terminal. The ordinance had been enacted by the city of Hayward in its capacity as an airport proprietor. This factor was the key difference between *Hayward* and *Burbank,* where the Supreme Court invalidated an almost identical ordinance. The Hayward court cited *Crotti* as authority in support of the proprietorship distinction drawn in footnote 14 of the *Burbank* case. The *Hayward* court went further and sought to determine whether the Supreme Court intended such a distinction. In reaching its decision, the court noted that if a curfew such as the one *Burbank* had enacted were

124. 389 F. Supp. at 62.

125. *Id.*

126. In *Burbank,* a municipality enacted an ordinance controlling airport noise by its police power rather than its proprietary power.

127. 389 F. Supp. at 63. (Citing *Burbank,* 411 U.S. at 636 n.14).

128. *Id.* 63-64. *See also* p. 479 *supra.*

129. 389 F. Supp. at 64.

130. *Id.*

upheld, it would substantially circumvent the FAA's ability to control air traffic flow and would significantly add to the difficulty of planning flights to diminish congestion and assure safety.[131] Therefore, to allow municipal airport proprietors to curtail the use of their facilities by curfew or other noise regulations would conflict with this rationale. On the other hand, the court realized that Congress intended that airport proprietors be permitted to restrict the use of their airports on the basis of noise considerations, provided this restriction was non-discriminatory.[132] The justification for special treatment of airport proprietors is the holding of the *Griggs* decision[133] which placed liability for "takings" on the proprietor of the airport (as opposed to the federal government).[134] Pulled between these conflicting rationales, the court admitted that it was on the "horns of a particularly sharp dilemma."[135]

The court ultimately resolved its conflict by relying on the expression of congressional intent and footnote 14 in *Burbank* and held that the area of airport noise control, as it applies to a city which is the proprietor of an airport, has not been preempted by Congress and the FAA at this time.[136] Therefore, the city of Hayward would not be precluded from enforcing the ordinance as the proprietor of the Hayward Air Terminal because of federal preemption.[137]

A third California case rejected the proprietor exception as adopted in *Hayward.* In *San Diego Unified Port District v. Superior Court for the County of San Diego,*[138] the state court ruled on the question of "whether federal law in the field of airport noise regulation preempts

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131. *See* 411 U.S. at 638-39.

132. *See* discussion p. 487 *supra.*

133. *See* discussion p. 479 *supra.*

134. 418 F. Supp. at 424.

135. *Id.* The court commented:

> If on one hand, we follow the dicta in footnote 14 of the *Burbank* opinion, which is intended to comport with the court's holding in *Griggs,* we will severely undercut the rationale of *Burbank's* finding of preemption. If on the other hand, we disregard the proprietor exception as dicta in order to fully effectuate the *Burbank* rationale, we impose upon airport proprietors the responsibility under *Griggs* for obtaining the requisite noise easements, yet deny them the authority to control the level of noise produced at their airports. This is, of course, exactly what the Senate Commerce Committee indicated that the 1972 amendment to section 611 of the Federal Aviation Act was *not* intended to do.

Id.

136. *Id.* at 424-25. The court also said that "[i]f Justice Douglas' comments regarding the need for an (sic) 'uniform and exclusive system of federal regulation' prove correct, Congress and the FAA can take the appropriate steps to provide such a regulatory system." *Id.* at 424. (footnote omitted).

137. The court also rejected arguments that the ordinance infringed on interstate commerce and also that the ordinance breached prior federal agreements to prevent land use within or outside the boundaries of the airport which would limit its usefulness as an airport. *Id.* at 425-30.

138. 67 Cal. App.3d 361, 136 Cal. Rptr. 557 (4th Dist. Ct. App. 1977).

all state and local controls [thereby] preclud[ing] civil actions based upon common law or statutory causes of action."[139] The homeowners in this action sought damages from the Port District, which was the municipal airport proprietor, based on causes of action for nuisance, negligence and trespass. The court held that federal laws had preempted local control of aircraft in flight and that flights which complied with the federal laws and regulations could not be characterized as being a nuisance, negligent or a trespass. Thus, the airport operator could not be held liable for tort damages. In reaching its decision, the court rejected the *Hayward* distinction with respect to municipalities as airport proprietors. They reasoned that it was inconsistent with the rationale of *Burbank,* which had expressed the need for a uniform and exclusive system of federal aircraft noise regulation and airspace management. The *San Diego* court commented:

> If a curfew interferes with this perceived requirement of uniformity, it should make no difference whether the curfew is imposed on the authority of local police power or the owner's proprietary power. The impact of the curfew remains the same — interference with flight schedules at other airports and local flight congestion immediately before and after the hours of the curfew.[140]

Thus, the *San Diego* court suggested that if the footnote 14 limitation was based only on the distinction between police versus proprietorship power, the *Burbank* decision would have a narrow, if not unique, application. This is because most airports are controlled by municipalities, cities or states and not private parties.[141]

The *San Diego* court, however, approved of the *Crotti* court's use of the proprietorship exception as one which "achieves some accommodation between state and federal interests."[142] In that case, the emphasis was not on the type of power being exercised, but instead on the activity regulated. The *San Diego* court reasoned that if, as *Hayward* had implied, the category of power exercised is determinative, both the CNEL and the SENEL regulations in *Crotti* should have been voided because they were applications of state police power as opposed to proprietary power. Instead the CNEL regulations which attempted to mitigate noise through land use planning were upheld while the SENEL regulations dealing with noise from aircraft in flight were found to be preempted.

While some of the *San Diego* court's reasoning is persuasive, it virtually ignores the rationale for the proprietorship distinction. That is, a proprietor's power to regulate noise should not be preempted because it

139. *Id.* at 364, 136 Cal. Rptr. at 559.
140. *Id.* at 368, 136 Cal. Rptr. at 561.
141. *Id.*
142. *Id.* at 372, 136 Cal. Rptr. at 564.

is liable in inverse condemnation proceedings for "takings." The court did concede that if there had been a "taking" of the property, the plaintiff could recover in an inverse condemnation proceeding from the Port District of San Diego as mandated by *Griggs* and *Aaron*. It is ironic that in this case, the municipality as a proprietor (the Port District) is arguing for the proposition of federal preemption in order to absolve itself from possible negligence, nuisance, or trespass tort claims, while in other cases, such as *Hayward* and *Concorde* the proprietor is arguing against federal preemption so that it can regulate noise. By holding that there is federal preemption, the *San Diego* court has vitiated the whole need for the proprietorship distinction — liability.

In order to give proper weight to the proprietor's liability for takings, it is suggested that a finding that noise regulation was not federally preempted would be required (at least with respect to municipalities which are proprietors of airports). This would allow a determination of whether the regulation is reasonable and nondiscriminatory, and is not a burden on interstate commerce. This, of course, would entail greater examination of the facts of each case, but would seem a fairer method of dealing with the problem than a broad finding of preemption. In fact, the Second Circuit Court of Appeals has squarely confronted this problem and evolved such a test in the *Concorde* case.

III. THE PRESENT DAY ROLE OF THE AIRPORT PROPRIETOR IN REGULATING NOISE

As mentioned previously, the Court of Appeals for the Second Circuit held that the initial ban by the Port Authority was not preempted by the Secretary of Transportation's order.[143] The court noted that Secretary Coleman openly acknowledged the Port Authority's right to deny landing privileges to the Concorde in his order when he stated:

> The FAA is the proprietor of Dulles and it is therefore part of my decision today to direct the Federal Aviation Administration to permit one Concorde flight per day at Dulles by each carrier under the conditions noted. The situation with respect to JFK may be complicated by the fact that under federal policy that has hitherto prevailed a local airport proprietor has had authority under certain circumstances to refuse landing rights.[144]

As further indication of the federal government's intent in this area, the amicus brief of the United States expressed the view that Secretary Coleman's order was never intended to prevent the Port Authority from conditioning the Concorde's landing on adherence to reasonable

143. 558 F.2d 75 (2d Cir. 1977). *See also* discussion p. 476 *supra*.
144. The Secretary's Decision, *supra* note 9, at 3 n.6.

noise limitations. The government went even further and asserted that under present law the executive could never preempt the airport proprietor's right to enact its own noise regulations.[145] The court of appeals also pointed to a statement made by Secretary Coleman before the House Committee on Public Works and Transportation to the effect that the imposition of a "nondiscriminatory" ban on supersonic transports by a proprietor airport would not be preempted by FAA action as long as it did not constitute an "unreasonable burden on interstate and foreign commerce."[146] This policy was affirmed by the Secretary two weeks after the Port Authority imposed its ban and has been accepted by the Carter administration.[147] The court of appeals viewed the regulation of aircraft noise as a "cooperative enterprise, in which both federal authorities and local airport proprietors play an important part."[148] Although safety and efficiency demand that airspace management be controlled at the national level, the intrinsically local nature of noise control is best left to the local authority which handles airport access.[149]

Contrary to the district court's reading of the Federal Aviation Act and its noise abatement amendments, the appeals court found that the legislative history indicated the statute[150] was designed to bolster the regulatory role of the FAA in the area of controlling flights through navigable airspace (which is preempted by federal control). However it would not prevent a local airport proprietor from promulgating regulations or setting permissible noise levels which can be emitted by aircraft using the airport.[151] The Senate report explicitly recognized that airport owners acting as proprietors can presently prevent aircraft from using an airport on the basis of noise, so long as the exclusion is nondiscriminatory.[152]

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145. This point was emphasized to make clear that the Federal government does not want an overturning of *Griggs* which, if reversed, would bring liability for "takings" on the federal authorities.

146. *Aircraft Noise Policy Hearings,* 94 Cong. 2d Sess. 705 (1975-1976).

147. President Carter and Transportation Secretary Brock Adams have also supported what the court called "the traditional policy" of refusing to preempt the local airport operator's right to establish permissible noise levels. *See* 558 F.2d 75 (2d Cir. 1977).

148. *Id.* at 83.

149. *Id.*

150. 49 U.S.C. 1431 (1970).

151. 558 F.2d at 83. *See* excerpt from Senate Report, note 81 *supra.* Also, support for the historic cooperative relationship is found in the House and Senate Reports accompanying the 1972 amendment to the Noise Control Act. *See* H.R. REP. NO. 92-842, 92d Cong., 2d Sess. 10 (1972), S. REP. NO. 92-1160, 92d Cong., 2d Sess. 10-11 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD NEWS 4655.

152. S. REP. NO. 1353, 90th Cong., 2d Sess. 7 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD NEWS 2688, 2694 (citing letter of Secretary of Department of Transportation, note 81 *supra*).

The appeals court also cited footnote 14 of the *Burbank* case in support of allowing some noise regulation by a proprietor.[153] In summary, the court concluded "[i]n view of the repeated disavowal by federal officials of any attempt to preempt the Port Authority's right to subject the Concorde to reasonable noise regulations we are compelled to hold the Secretary's order did not preclude the exercise of power by the Authority."[154] This holding was limited and qualified by the requirement that any noise regulations adopted by the Port Authority must be, "reasonable, nonarbitrary and nondiscriminatory."[155] Otherwise the statutory scheme would be frustrated and an unconstitutional burden on commerce would result.

The court also examined the impact of the ban on international bilateral commitments between the United States and France. Air carriers of these countries are subject to "evenly-applied laws and regulations"[156] of the landing country. However, British Airways and Air France contended that the Port Authority's ban was merely a special rule directed against them and was therefore not a valid regulation of general application.[157] While acknowledging that failure to enact a noise regulation which would apply equally to both domestic and foreign carriers would suggest discrimination disallowed under binding treaty commitments, the court refused to say that foreign airlines could not be affected by any local controls.[158] The court felt that local government need not ignore significant differences in noise produced by aircraft only because they have a foreign operator.[159] In effect, the court reiterated its position that even in light of possible treaty commitments, an initial ban or study would not be precluded so long as it was reasonable. The court did not rule on the reasonableness of the ban itself but said that if the Port Authority's action was found "to be arbitrary and capricious, a serious question would be raised concerning its compatibility with American treaty arrangements."[160]

The court, while holding that the Port Authority's ban was not preempted by the Secretary's order, remanded the case to the district court for an evidentiary hearing on the reasonableness of the thirteen

153. 558 F.2d at 84.

154. *Id.* at 82.

155. *Id.* at 84.

156. Air Transport Services Agreement, March 27, 1947, United States-France, Art. V, 61 Stat. 3445, T.I.A.S. No. 1679; Bermuda Agreement, February 11, 1946, Art. 5, 60 Stat. 1499, T.I.A.S. No. 1507. *See also* Convention on International Civil Aviation (Chicago Convention), August 9, 1946, 61 Stat. 1180, T.I.A.S. No. 1591 (all cited by the court, 588 F.2d at 85).

157. 588 F.2d at 85.

158. *Id.*

159. 588 F.2d at 96. For example all aircraft, both foreign and domestic, have had to comply with a regulation at JFK excluding aircraft which produce more than 112 PNdB.

160. *Id.*

month delay in promulgating noise regulations applicable to the SST. It was also remanded to determine whether the delay was so excessive as to be discriminatory and unduly burdensome on interstate commerce.[161]

On remand, the district court found that the Port Authority's excessive delay in setting noise standards "applicable to the Concorde was unreasonable, discriminatory, unfair, and an impingement on commerce and the national and international interests of the United States."[162] The court reached this conclusion through a detailed analysis of the noise and vibration data known or available to the Port Authority when the ban was imposed and the steps which were taken by the Port Authority subsequent to the ban. After consideration of the facts, the court determined that the Port Authority, instead of making any significant progress, had been merely reploughing old ground and doing reviews of scientific and theoretical data previously available.[163] Indeed, the court emphasized that the authority

> ha[d] abdicated the limited cooperative authority delegated to it as an airport proprietor and has forfeited its privilege to establish noise regulations for the Concorde other than those applicable to jet aircraft at JFK and those embraced in the amended federal specifications granted to the plaintiffs for the puposes of the experimental tests.[164]

This decision also was appealed by the Port Authority. The Court of Appeals for the Second Circuit affirmed the district court decision with slight modifications.[165] The court described the role reserved for airport proprietors in the system of aviation management as "extremely limited."[166] The court reiterated that the role contemplated confines the airport operator to the "issuance of reasonable, nonarbitrary, and nondiscriminatory rules defining the permissible level of noise which can be created by aircraft using the airport."[167] The court further stated that, "the proprietor's intimate knowledge of local conditions, as well as his ability to acquire air easements and assure compatible land use, . . . will result in a rational weighing of the costs and benefits of proposed service."[168] These rules must then be scrutinized not on the ground of preemption, but in light of the facts of the case at hand to determine

161. The court of appeals did not decide on the reasonableness of the delay because it was only brought up at the appeals stage by an amicus brief of the United States and, "[b]asic tenets of fairness require that a federal appellate court should not consider an issue involving questions of fact not resolved below." *Id.* at 82.

162. 437 F. Supp. 804, 805 (S.D.N.Y. 1977).

163. *Id.*

164. *Id.* at 818.

165. 564 F.2d 1002 (2d Cir. 1977).

166. *Id.* at 1010.

167. *Id.* at 1011.

168. *Id.*

whether there is an unconstitutional burden on interstate commerce.[169] In the present case, the court of appeals agreed that the Port Authority had delayed too long in fixing reasonable, nondiscriminatory standards for the Concorde. Accordingly, the order of the district court which dissolved the ban was affirmed. Yet the court also added that its holding

> does not deny the Port Authority the power to adopt a new, uniform and reasonable noise standard in the future, assuming the longstanding 112 PNdB rule . . . is deemed inadequate. The district court's order is modified insofar as it fixes 112 PNdB as the only possible standard against which the Port Authority legally can measure the permissible noise of supersonic aircraft as JFK.[170]

The court emphasized the potential liability it faces for suits due to "takings" in upholding the right of a city or municipality to establish reasonable regulations as the proprietor of an airport.[171]

Subsequent to the Second Circuit Court of Appeals' decision which opened the way for Concorde flights to JFK airport, Justice Thurgood Marshall of the United States Supreme Court reimposed a temporary ban on Concorde flights until the full court could consider whether to keep in force the ban while a decision by the Supreme Court was pending on the overall merits of the *Concorde* case.[172] On October 17, 1977 the Supreme Court issued a one sentence procedural opinion rejecting the Port Authority's request for the temporary ban.[173]

Accordingly, the first trial flight was flown into Kennedy on Wednesday, October 19, 1977. The first takeoff from Kennedy took place on Thursday, October 20, 1977. In both instances the Concorde was below the legal noise limit at JFK of 112 perceived noise decibels.[174] Commercial flights to Kennedy began November 22, 1977.[175]

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169. *Id.*

170. *Id.* at 1013 (footnote omitted). The court's opinion warns that the Concorde must also be given a fair and equal opportunity to meet the requirements of any future noise rule. *Id.* n.12.

171. *Id.* at 1011. *See also* Judge Mansfield (concurring in part) who stated: "[t]he authority faces possible exposure to millions of dollars in damages in suits by residents in the vicinity of JFK based on 'takings' or 'nuisance' theories, unless it adopts carefully considered reasonable regulations tailored to the unique environmental problems created by the SST." *Id.* at 1016.

172. N.Y. Times, October 8, 1977, at 35, col. 1.

173. N.Y. Times, October 18, 1977, at 28, col. 4. The one sentence rejection read, "The application for a stay, presented to Mr. Justice Marshall and by him referred to the Court, is denied." *Id.*

174. N.Y. Times, October 21, 1977, at 1, col. 2.

175. A capsule summary of events dealing with the history of the SST is reproduced below from *Milestones in Emergence of Controversial Jetliner,* N.Y. Times, October 18, 1977, at 28, col. 1:

> Following is a chronology of the development of the Concorde supersonic airliner and the litigation over United States landing rights before yesterday's Supreme Court ruling permitting flights into Kennedy International Airport:
>
> 1956 — Start of SST research in Europe.
>
> Nov. 29, 1962 — French and British Governments sign agreement for joint design

IV. CONCLUSION

The Concorde case presented a unique set of facts. First of all, a foreign carrier was involved. Furthermore, there was a direct order from the Secretary of Transportation to begin trial flights of the SST. In spite of these factors, the Court of Appeals upheld the Port Authority's initial ban on flights and indicated it might support a future

and development of SST.

Dec. 11, 1967 — Rollout of first prototype, the 001 (French), at Toulouse.

March 2, 1969 — First flight, from Toulouse.

Oct. 1, 1969 — First Concorde supersonic flight.

Nov. 4, 1970 — The 001 exceeds twice the speed of sound for first time.

July 18, 1972 — British Airways orders five Concordes and Air France four.

January 1973 — Pan American World Airways and Trans World Airways decide not to buy Concordes.

Sept. 20, 1973 — French Concorde lands at Dallas, Fort Worth for first visit to United States.

June 5, 1976 — French Concorde flies from Paris to Rio de Janeiro to Paris, 11,450 statute miles, in 11 hours 28 minutes.

Jan. 21, 1976 — Start of scheduled supersonic passenger service. French SST flies from Paris to Rio in 7 hours 5 minutes, and British SST flies from London to Bahrain in 4 hours 10 minutes.

Feb. 4, 1976 — United States Secretary of Transportation William T. Coleman, Jr. authorizes a 16-month test of passenger flights, one a day, into Washington's Dulles International Airport and two a day into New York's Kennedy International Airport.

Feb. 28, 1976 — New York State Legislature votes to ban SST landings in the state.

March 11, 1976 — Port Authority of New York and New Jersey bans SST landings at Kennedy pending a study of at least six months of tests elsewhere.

May 24, 1976 — Test flights start into Dulles.

Nov. 15, 1976 — United States Supreme Court leaves standing Secretary Coleman's decision on test flights.

April 2, 1977 — President Valery Giscard d'Estaing of France meets with Secretary of State Cyrus R. Vance to urge acceptance of the Concorde in the United States.

May 11, 1977 — Federal District Court Judge Milton Pollack rules Port Authority ban on SST landings illegal, finding it in 'irreconcilable conflict' with Federal perogatives.

June 14, 1977 — United States Court of Appeals for the Second Circuit modifies lower court ruling, finding that the Port Authority has the right to set 'fair, reasonable and nondiscriminatory' noise standards for landings. Case sent back to the lower court to decide whether the authority's ban meets that test.

July 7, 1977 — Port Authority extends SST ban indefinitely.

Aug. 17, 1977 — Federal Judge Pollack rules the Port Authority is engaging in 'excessive and unjustified delay' in setting noise standards for the SST.

Sept. 23, 1977 — United States Secretary of Transportation Brock Adams proposes SST landings — unless banned by fair and nondiscriminatory local standards — at 11 additional airports: Philadelphia, Boston, Miami, Chicago, Houston, Dallas, San Francisco, Los Angeles, Seattle, Anchorage, and Honolulu.

Sept. 29, 1977 — United States Court of Appeals for Second Circuit upholds lower court, finding Port Authority ban unreasonable and discriminatory.

Oct. 7, 1977 — Associate Justice Thurgood Marshall of United States Supreme Court reimposes landing ban temporarily to give full court time to rule.

For additional cases of interest dealing with the SST *see* Opinion of the Justices, 359 Mass. 778, 271 N.E.2d 354 (1971) which was an opinion by the Massachusetts Supreme Court to the House of Representatives on the constitutionality of legislation which would have prohibited the landing of any commercial supersonic transport aircraft in the Commonwealth. The court acknowledged that the legislative history of the 1968 amendment to the Federal Aviation Act contains some indication that Congress did not intend to completely exclude all state action in the field of aircraft noise control. *Id.* at 781, 271 N.E.2d at 357. Yet it felt that the legislation would probably be invalid because of the comprehensive character of the Federal air statutes. The court doubted that even if the bill was framed in terms of "airport proprietors" that it would be con-

reasonable, nondiscriminatory rule to regulate airport noise. Thus, the ground of preemption, no longer seems to be a valid basis of analysis at least where a city or municipality which is also the proprietor of an airport is concerned.

At first blush, the distinction between airport noise regulation based upon a municipality's proprietary power and that founded upon its police power seems inconsistent with the rationale of *Burbank*. Such an analysis would make *Burbank* a case of almost unique application and would also undermine the perceived need for a uniform system of airspace management. However, since local authorities bear the liability for "takings" due to aircraft noise, they should have some say in the regulation of airport noise. Rejection of the proprietorship distinction as suggested by the *San Diego* court is neither necessary nor wise. A proprietor deserves the special status afforded by "footnote 14" of the *Burbank* decision and the *Hayward* and *Concorde* cases because of its liability for "takings." Presuming no preemption as to a proprietor, courts will be forced to examine the nature of the proposed regulation to determine whether it is reasonable, nonarbitrary, and nondiscriminatory and does not unduly burden interstate commerce.

This case by case decisionmaking process appears to be a fairer and more appropriate manner of dealing with airport noise regulation than the broad preemption ground. Also, it allows input from local authorities which are closest to the problem and which are responsible to local inhabitants for protection from excessive noise. Other more specific types of permissible regulation will have to await a case by case review by the courts. A tentative regulation proposed by the Port Authority to ban the SST by 1985 would be implemented by adopting a stricter standard of perceived noise decibel level for all jets landing at JFK.[176] Unlike the federal standards[177] which would exempt the first generation Concorde from this limit, the Port Authority would make it applicable to the Concorde, thereby theoretically ending Concorde service by 1985. This proposal has yet to be formally adopted. Also the rule would have to withstand the "nonarbitrary, nondiscriminatory"

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stitutional. *Id.* at 784, 271 N.E.2d at 358. The court did not reach the issues of whether the legislation would be a burden on interstate commerce or whether it conflicts with any treaty obligation of the U.S. Government. *See also* Board of Supervisors of Fairfax County, Va. v. John L. McLucas, 410 F. Supp. 1052 (D.D.C. 1976) which was an action to enjoin the SST until the United States had established supersonic noise regulations. (Also a writ of mandamus compelling the FAA to issue noise regulations applicable to the SST was requested. The FAA is required under § 611 of the Federal Aviation Act, 49 U.S.C. 1431 (1970), to issue these regulations but had failed to do so.) The mandamus action was not decided on and the injunction request was dismissed because an appeal had been taken on the Secretary's order which would involve the same issues.

176. *Port Agency Plans to Bar SST's in 1985,* N.Y. TIMES November 19, 1977, at 26, col. 1.

177. *See* note 104 *supra.*

test enunciated by the Second Court of Appeals.[178] Furthermore, it would have to withstand the "undue burden on interstate and foreign commerce" attack.

The proprietor distinction of the *Burbank* decision seems to be generally accepted. It has been adopted by several leading courts in the country and has in effect been indirectly affirmed by the Supreme Court.[179] The preemption ground for dealing with airport noise control is not a fair or intelligent basis for decision. The standard as developed by the Second Circuit gives greatest leeway in representing both federal and local interests, and is thus an equitable and reasonable solution to the airport noise control struggle.

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178. In Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) the Supreme Court held that localities may require federal licensees to observe conservation and environmental protection regulations so long as these measures were reasonable and nondiscriminatory. Presumably this holding adds greater credence to the standard developed by the Second Circuit Court of Appeals as to regulations promulgated by local airport proprietors.

179. *See* discussion p. 500 *supra*.

A Graduated Income Tax or Municipal Income Tax for Massachusetts? Legislative Possibilities

On four occasions[1] since 1960, the voters of Massachusetts have been presented with a constitutional amendment permitting some form of graduated state personal income tax. On each occasion the amendment, having easily passed two successive sessions of the General Court,[2] was defeated by the voters. The recurrent experience has been that early pre-election polls show substantial public support for the graduated tax concept, but this support diminishes as the election nears and as organized groups on both sides of the issue mount media campaigns which are not altogether enlightening.[3]

At the same time that the General Court has engaged in repeated attempts to modify the state income tax structure, representatives of the City of Boston have sought to relieve their city's dependence on the property tax by submitting legislation to permit some form of locally-imposed wage or income tax.[4]

An obstacle to legislative enactment of both of these forms of tax modification has been found in the tax provisions of the Massachusetts constitution and in the decisions and opinions of the Supreme Judicial Court which have interpreted those provisions. It is said that Massachusetts has consistently viewed an income tax as a property tax.[5] As such, an income tax is subject to the limitations placed on a property

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1. Constitutional amendments to permit a graduated income tax appeared on the Massachusetts ballot in 1962, 1968, 1972, and 1976.

2. R. Torto, E. Sclar, M. Edid, and T. Behr, The Graduated Income Tax Referendum in Massachusetts (Nov., 1973), Report No. 7, Mass. Public Finance Project, Lynn, Mass. (mimeo) at 5.

3. *Id. passim.*

4. *See, e.g.,* Mass. House Bill No. 1867 (1977).

5. Mass. Sen. Doc. No. 126, *Constitutional Limits on the Tax Power* at 46 (1970) [hereinafter cited as Mass. Sen. Doc. No. 126]. *See, e.g.,* Opinion of the Justices, 220 Mass. 613, 108 N.E. 570 (1915).

tax by article 4 of the Massachusetts constitution,[6] except insofar as those limitations are altered by amendment article 44.[7] The "proportionality" requirement of article 4 has been interpreted to mean that property taxes must be levied at the same rate on all property within the taxing district.[8] In recent years, article 4 has been seen to require the valuation of all property at "full and fair cash value," so that differences in effective rates of taxation may not be accomplished by varying the percentage valuation of different types of property.[9] This "proportionality" requirement of article 4 has thus been interpreted as a "uniformity" requirement.

A graduated income tax, to the extent that it was levied on income from property, would violate the requirement of article 44 that income from the same class of property be taxed at the same rate.[10] This objection would be valid even if the tax on this income were *not* considered to be a property tax. If a graduated tax were imposed on earned income, and were therefore arguably exempt from the article 44 uniformity requirement, the traditional view would still regard it as a property tax, subject to the article 4 "uniformity" requirement. Indeed, it has been held that one's labor is property, so that even earned income becomes income derived from property,[11] which consequently may be taxed only at a uniform rate.

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6. MASS. CONST. pt. 2, c. 1, § 1, art. 4 provides in relevant part:

> [F]ull power and authority are given to the general court . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon the inhabitants of, and persons resident, and estates lying, within said commonwealth; and also to impose and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; . . . . And while the public charges of government, or any part thereof, shall be assessed on polls and estates, *in the manner that has hitherto been practiced,* in order that such assessments may be made with equality, there shall be a valuation of estates within the commonwealth taken anew once in every ten years at least. . . . (emphasis added).

7. MASS. CONST. amend. art. 44 provides in relevant part:

> Full power and authority are hereby given and granted to the general court to impose and levy a tax on income in the manner hereinafter provided. Such tax may be at different rates on income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property. The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements. . . . This article shall not be construed to limit the power of the general court to impose and levy reasonable duties and excises.

8. Opinion of the Justices, 220 Mass. 613, 621, 108 N.E. 570, 573 (1915); P. NICHOLS, TAXATION IN MASSACHUSETTS 112 (3d ed. 1938).

9. Town of Sudbury v. Commissioner of Corp. & Taxation, 366 Mass. 558, 321 N.E.2d 641 (1974); Bettigole v. Assessors of Springfield, 343 Mass. 223, 178 N.E.2d 10 (1961).

10. *See generally* discussion of graduated tax on income from property in Opinion of the Justices, 266 Mass. 583, 586-87, 165 N.E. 900, 902 (1929).

11. Raymer v. Tax Comm'r, 239 Mass. 410, 132 N.E. 190 (1921). The cases cited by the *Raymer* court are early organized labor cases in which the issue was one of deprivation of "property," in the form of the right to work, without due process. Bogni v. Perotti, 224 Mass. 152, 112 N.E. 853 (1916), for instance, considered a statute which provided that the right to labor was not to be recognized as property which could be protected by an injunction when assailed by a labor

Objections to a local option municipal income tax are made on similar grounds. The exercise of the option by some municipalities and not by others would give rise to a situation where income was taxed at different rates in different parts of the state, thus violating the uniformity requirement of article 44.

Despite the broad acceptance of these conclusions, recent cases indicate that it may be possible for the legislature to enact a state-wide graduated tax on earned income, or to empower municipalities to tax such income, without resorting to the politically unpredictable amendment process.[12] As there has been no change in the constitutional tax provisions since the ratification of the income tax amendment in 1916,[13] these cases suggest that such a constitutional possibility has existed at least since that date. It therefore seems clear that the present Supreme Judicial Court would not be prevented from approving such legislation by the Constitution or by the opinions of earlier courts which were not favorably disposed to such concepts.

After a brief review of the sources of state and local taxing authority in Massachusetts, this article examines the historical background of the adoption of the income tax amendment to the Massachusetts constitution.[14] Any discussion of possibilities for income tax modification must consider the substantial revision of the income tax statute enacted in 1971,[15] and this article does so by comparing its provisions to those of the former statute. This approach establishes the foundation for a consideration of the possible effect of the 1971 amendment, and the court's interpretation of it to date, on the traditional limitations on the taxing power.

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combination. The statute thus denied equitable relief to those whose right to labor was obstructed by a rival labor organization. The court held that the right to labor was a property right protected by the Fourteenth Amendment. This does not seem to be compelling authority for the proposition that labor is property for tax purposes. Clearly, it cannot be said that a tax on anything which would be considered property in a Fifth or Fourteenth Amendment context is a property tax, for the constitutionally protected property right is broader than the concept of property which underlies the property taxes. For instance, the United States Supreme Court has held that trade routes are property for which compensation is required under the Fifth Amendment. Kimball Laundry Co. v. U.S., 338 U.S. 1, 10-11 (1949). "The term 'property' . . . embraces all valuable interests which a man may possess outside of himself — outside of his life and liberty." 11 AM. JUR. *Constitutional Law* § 334 (1937). A corporate franchise is considered to be personal property and subject to taxation, Horn Silver Mining Co. v. New York, 143 U.S. 305 (1892), but Massachusetts regards a tax on such a franchise as an excise, not a property tax. Eaton, Crane & Pike Co. v. Commonwealth, 237 Mass. 523, 130 N.E. 99 (1921).

12. *See* notes 1-3 and accompanying text *supra.*

13. MASS. CONST. amend. art. 44.

14. *Id.*

15. 1971 Mass. Acts ch. 555, § 5 (codified with amendments at MASS. ANN. LAWS ch. 62, § 1-8 (Michie/Law. Co-op. Supp. 1977)). *See* discussion at notes 55-61 *infra.*

A caveat is needed. It is not the purpose of this article to discuss in detail the political and economic factors which would necessarily enter into a legislative decision on whether either of these taxes should be enacted. The objective here is merely to present constitutional possibilities.

I. THE TAXING POWER: AN OVERVIEW

The powers of the Commonwealth to raise funds for the operation of its government are delineated in the constitution of Massachusetts, adopted in 1780. The general rationale underlying the taxing power is found in Part I, article 10,[16] while specific taxing provisions are set forth in Part II, chapter 1, section 1, article 4[17] and amendment article 44.[18]

The taxing power of municipalities is derived entirely from that of the Commonwealth, as they are considered subdivisions of the state, rather than independent entities. The Home Rule Amendment to the Massachusetts constitution in specific terms does not include a grant of independent taxing power to home rule municipalities,[19] so that cities and towns may exercise only those taxing powers granted them by the state.

Neither a state-wide graduated income tax nor a municipal income tax has been the subject of a decision by the Supreme Judicial Court, as neither of these taxes has ever been enacted, but in 1929 the court issued an advisory opinion regarding the constitutionality of the former.[20] In that *Opinion* the Justices, without distinguishing between a tax on

16. MASS. CONST. pt. 1, art. 10 provides in relevant part: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection."

17. MASS. CONST. pt. 2, ch. 1, § 1, art. 4. *See* note 6 *supra.*

18. MASS. CONST. amend. art. 44. *See* note 7 *supra.* The italicized phrase makes a brief consideration of the pre-constitutional practice desirable. The Province charter of 1691 granted to the General Court the power to "impose and levy proportionable and reasonable assessments Rates and Taxes upon the Estates and Persons of all and every the Proprietors and Inhabitants of our said Province or Territory." 1 *Acts and Resolves of the Province of Massachusetts Bay* 16 (1869). It should be noted that the 1780 constitution virtually repeats this provision of its predecessor and adds thereto a new grant of power to levy excises. The patterns of taxation under the later years of this charter assessed livestock at fixed valuations, personal property at market value, and real estate at a specified multiple of its rent or annual value. In addition, personal income from business or employment "and all profits which may or shall arise by money or other estate not particularly otherwise assessed" was taxed at the same rate as other personal property. 2 *Acts and Resolves of the Province of Massachusetts Bay* 934 (1874) (Province Laws of 1738-9, ch. 1, § 14). Note that not all forms of tax are assessed at the same rate or on the same basis, although taxes are related to the value of that on which they are assessed and are thus, in some sense, "proportional."

19. MASS. CONST. amend. art. 2, § 7 ("Nothing in this article shall be deemed to grant to any city or town the power to . . . levy, assess and collect taxes").

20. Opinion of the Justices, 266 Mass. 583, 165 N.E. 900 (1929).

earned income and one on income derived from property, declared unequivocally that "[a]n income tax is a tax on property and under . . . [article 4] must be proportional and reasonable,"[21] as the proportionality requirement had been interpreted to mean that all property must be taxed at the same rate within the taxing district. The purpose of the forty-fourth amendment, the court said, was to escape the proportionality requirement of article 4 as applied to taxes on income,[22] *i.e.*, to permit different forms of income to be taxed at different rates and at rates different from the local property tax rate. The Justices stated that it could not have been the understanding of the legislators or the voters that the words of article 44 permitted a tax on incomes graded as to amount.[23]

II. THE TAXING PRACTICE: AN HISTORICAL PERSPECTIVE

The actual practice of taxation during the provincial period and until shortly before the drafting of the 1780 constitution was that of assessing different forms of property or estate at different rates.[24] In addition, the rate for a given form of property varied from town to town, depending on local need and on the tax base available to meet that need. Massachusetts under the Province charter also levied a variety of excises on numerous occupations or trades, despite the absence from the charter of any authorization for such a power.[25] The practice continued under the 1780 constitution with its added excise clause,[26] arguably on the assumption that this clause merely enacted past practice.[27] The

21. *Id.* at 585, 165 N.E. at 902. The opinion in the 1917 case of Perkins v. Westwood, 226 Mass. 268, 115 N.E. 411, cited by the Justices in 266 Mass. at 585, 165 N.E. at 902, sheds some light on the authority to be accorded such advisory opinions. This case considered a tax statute which raised certain of the issues considered by the court in the Opinions of the Justices of 1908, 195 Mass. 607, 84 N.E. 499; of 1911, 208 Mass. 614, 94 N.E. 1043; and of 1915, 220 Mass. 613, 108 N.E. 570. The Justices in *Perkins* reaffirmed the conclusions of the earlier *Opinions*. Perhaps by way of explaining their willingness to reconsider the same issues, however, the court noted that advisory opinions are purely advisory, are not to be considered binding authority, and are subject to reconsideration. When the Justices are later called upon to decide an actual controversy, they must "sedulously guard against any influence which might flow from . . . previous consideration" of the same issues in an advisory role. 226 Mass. at 271-72, 115 N.E. at 412.

22. 266 Mass. at 588, 165 N.E. at 903.

23. *Id.*

24. In 1777, the system of classifying property for taxation was abandoned (5 *Acts and Resolves of the Province of Massachusetts Bay* 756 (1886) (Province Laws of 1777-78, ch. 13, § 2)), probably for pragmatic reasons. P. NICHOLS, *supra* note 8, at 110 n.1 (3d ed. 1938).

25. Maguire, *Taxing the Exercise of Natural Rights*, in HARVARD LEGAL ESSAYS 273, 275 (1934).

26. MASS. CONST. pt. 2, ch. 1, § 1, art. 4. The "excise clause" reads: "and also to impose and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the [commonwealth]." *See* full text of the relevant portions of art. 4 at note 6 *supra*.

27. In the early case of Portland Bank v. Apthorp, 12 Mass. 252 (1815), the Supreme Judicial

drafters of the constitution apparently felt no need to make the tax provisions of the new document substantially different from those of the Province charter, and in particular did not feel compelled to comment on the recent change in assessment practice by making either the former or the newly adopted system compulsory.[28]

Under the new constitution taxes were imposed by statute at a uniform rate on real and personal property, assessed at market value, and on occupational income.[29] A poll tax[30] was levied, continuing the colonial practice. State and county taxes were apportioned to the towns and assessed with the town taxes.[31]

This system of taxation served the needs of an age when the property or "estate" which comprised a person's wealth was readily visible to the local assessors and not likely to escape taxation. As the life of the Commonwealth became more urban, more commercial, more industrial, a greater portion of its private wealth was held in the form of intangible personal property,[32] which was invisible to the assessors.[33] Various means were found of avoiding payment of tax on property of this nature[34] and as a result it was estimated that barely one fifth of the personal property in Massachusetts was reached by taxation.[35] On the other hand, when it is recalled that taxes on such property were based on its capital value, rather than on the income it produced or on the revenue it yielded when sold, it can be seen that the ratio between the property tax due on, and the income from, these investments could be very high indeed.[36]

Court held that the word "commodity" in the excise clause permitted the imposition of an excise on the amount of original paid-in stock of every bank in the Commonwealth. The term, the court said, "will perhaps embrace every thing, which may be a subject of taxation and has been applied by our legislature, from the earliest practice under the constitution, to the privilege of using particular branches of business or employment." *Id.* at 256.

28. Art. 4 merely states that assessments on polls and estates are to be made "in the manner that has hitherto been practiced." MASS. CONST. pt. 2, ch. 1, § 1, art. 4.

29. P. NICHOLS, *supra* note 8, at 110 n.1.

30. A poll tax, sometimes called a capitation or "head" tax, is a flat fee levied on every person, or on every adult male, as was the early practice. The poll tax in Massachusetts survived well into this century.

31. P. NICHOLS, *supra* note 8, at 220-21.

32. For the purposes of this article, "intangible personal property" will refer to shares of stock, bonds, notes, and other evidences of debts owed to the taxpayer.

33. P. NICHOLS, *supra* note 8, at 463.

34. Owners of such property who lived in Boston, for instance, often owned summer homes or other real estate in more rural towns of the Commonwealth, where tax rates were lower. It was a common practice for such a person to declare his primary residence to be in this town and thereby accomplish several beneficial results. He withdrew his investments from the reach of the more sophisticated assessors of Boston. The assessors at his summer home may well have been unaware of the existence of the taxpayer's investments, in which case they escaped taxation altogether. Even if the taxpayer were taxed for his investments by the smaller town, the rate would generally be lower than that of Boston, resulting in a considerable tax saving.

35. P. NICHOLS, *supra* note 8, at 464-65.

36. This represents one of the principal inequities of the property tax. Every homeowner ex-

In the early years of the twentieth century, the legislature began to search in earnest for ways of enacting a tax on intangible property which could be enforced consistently and which would not be confiscatory.[37] This effort resulted in a series of *Opinions of the Justices*[38] in response to legislative inquiries as to the constitutionality of proposed legislation. A three mill per dollar tax on the cash value of certain types of investments was held to be a violation of the proportionality requirement.[39] A tax on sales of shares of stock was also found to be violative of the proportionality requirement and thus invalid as a tax, but was sustained as an excise on the exercise of the right to sell shares of stock, including shares in voluntary associations.[40] A proposal to tax all personal property at the average rate of local taxation of real estate did not meet the proportionality requirement for taxes, and was not sustainable as an excise, because "[t]he authority to levy an excise tax did not include a right to tax the mere ownership or possession of personal property of every kind."[41]

The most interesting and comprehensive of these *Opinions* is that of 1915,[42] where all the Justices found a variety of taxing proposals unconstitutional,[43] with the exception of an excise on income from "professions, trades, and employments," on which they reasoned that their opinion was not actually required by the legislature.[44] All of the

periences an example of the imposition of a property tax based on the full value of property which produces no income. However, investors holding bonds, notes, stock in foreign corporations and other property purchased for its income-producing capability were apparently successful in persuading their legislators that a tax based on the capital value of such property was inequitable when the annual tax paid on the investment might equal, or even exceed, the annual income from it.

37. P. NICHOLS, *supra* note 8, at 467.

38. 195 Mass. 607, 84 N.E. 499 (1908); 196 Mass. 603, 85 N.E. 545 (1908); 208 Mass. 616, 94 N.E. 1043 (1911); 220 Mass. 613, 108 N.E. 570 (1915).

39. 195 Mass. 607, 84 N.E. 499 (1908).

40. 196 Mass. 603, 85 N.E. 545 (1908). *See also* Gleason v. McKay, 134 Mass. 419 (1882), where the levy was directly on the association with the transferrable shares, and was held unconstitutional. The inquiry in 196 Mass. 603 was concerning the constitutionality of a tax on *sales* of such shares, as well as of shares of stock in corporations.

41. 208 Mass. at 618-19, 94 N.E. at 1044 (1911).

42. 220 Mass. 613, 108 N.E. 570 (1915).

43. The General Court had inquired as to the constitutionality of 1) the assessment of certain forms of property at market value and others at a multiple of annual value, with the total of such assessments to be taxed at the local real property tax rate; 2) imposition of an excise on income from intangible personal property; 3) imposition of an excise, at a rate uniform throughout the Commonwealth, on incomes derived from "professions, trades, and employments;" 4) allowing owners of certain intangible property secured by or representing tangible property taxable where located to exempt such personal property from taxation by establishing the fact of the local taxation of the underlying property and paying an excise on the privilege of this registration and resulting exemption; and 5) exempting from taxation all debts due a resident from a foreign corporation or a non-resident, and stock owned by residents in foreign corporations, and the imposition of an excise on the income derived therefrom. *Id.*

44. Interestingly, the question of whether a tax on earned income may be levied under the excise power of art. 4 has not yet been conclusively answered by the Court.

proposed departures from the prevailing system of taxing intangible property on its capital value were said in some way to violate the proportionality requirement of article 4. A levy on income from intangible property could not be sustained as an excise, for "when coupled with exemption from all other taxation of the principal from which such income flows, [it] is in substance and effect a tax upon the property from which it is derived,"[45] and thus was subject to the proportionality requirement.[46]

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45. 220 Mass. at 623-24, 108 N.E. at 574. In ruling thus, the court relied heavily on the holding of the U.S. Supreme Court in Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895). In *Pollock,* the Court held that a proposed federal income tax, insofar as it fell on income of real estate and personal property, was a direct tax, and therefore constitutionally prohibited because it was not apportioned. However, the task of the Court in deciding whether the proposed tax was direct or indirect was somewhat different from that of the Massachusetts court in deciding whether a tax would be a property tax or an excise. The U.S. Court stated its conclusion: "[W]e are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property . . . is so different from a tax on the property itself that it is not a direct, but an indirect, tax in the meaning of the constitution." *Id.* at 618.

Five months after the Massachusetts *Opinion,* however, the Supreme Court, in Brushaber v. Union Pacific R. Co., 240 U.S. 1 (1915), interpreted the *Pollock* holding somewhat more narrowly than had the Massachusetts court, stating that the earlier case had *not* held that income taxes were "generically and necessarily" property taxes, but on the contrary were to be assumed to be excises "unless and until" their terms were such as to make them virtually equivalent to direct, or property, taxes. The Court pointed out, further, that *Pollock* had specifically upheld the tax there in question insofar as it applied to income from "professions, trades, employments, or vocations," and that such taxes had in the past been sustained as excises. 240 U.S. at 16-17. In N.Y. *Ex rel.* Cohn v. Graves, the Court further interpreted the *Pollock* holding:

> In holding that the tax was "direct," the Court did not rest its decision upon the ground that the tax was a tax upon the land. . . . It determined only that for purposes of apportionment there were similarities in the operation of the two kinds of tax which made it appropriate to classify both as direct, and within the constitutional command.

300 U.S. 308, 315 (1937).

The result of these holdings is to undercut the precedential foundation for the 1915 *Opinion,* which was in any case merely advisory. *See* note 21 *supra.*

46. In response to an observation that under the Province charter proportional taxation clause, classified assessment of property had been practiced, the Justices cited their *Opinion* of 1908, 196 Mass. 603, 85 N.E. 545, as authority for the proposition that the taxing power was "greatly restricted by the Constitution," 220 Mass. at 622, 108 N.E. at 574, although some classified assessment persisted after 1780. They pointed out that the validity of this practice under the constitution had never been tested, and that the classification had been abandoned in 1828. It should be noted, however, that the *Opinion* of 1908 was a divided one, in which three of the Justices, only one of whom sat on the 1915 court, had put forward the position cited in the 1915 *Opinion.* Three other Justices, of whom one also sat in 1915, had adopted another view. After an exhaustive treatment of the history of taxation in England and the Province, those Justices had concluded, "[w]e are of opinion that when it added [the excise] clause, the Constitutional Convention intended to give to the General Court power and authority to exercise that system of taxation (*and every part of it*) which theretofore had been exercised in England and in the Province of Massachusetts Bay." 196 Mass. at 613, 85 N.E. at 549 (emphasis added). This view, having been rejected by subsequent courts, probably no longer represents a viable interpretation of art. 4, but makes it clear that more judicial flexibility in the early twentieth century would have permitted far greater fiscal flexibility for the Commonwealth and its cities and towns in the late twentieth century.

The income tax amendment, article 44,[47] followed shortly after this *Opinion*. Chapter 62, the statute[48] effectuating the amendment, established the form and philosophy of the Massachusetts individual income tax as it existed until the major revision of 1971.

III. THE INCOME TAX STATUTES UNDER ARTICLE 44

The individual income tax provisions of chapter 62 of the Massachusetts Annotated Laws, before the 1971 revision, were found in sections one to eight.[49] The format of the statute was to treat "taxation of income from certain intangibles" in sections one to four, and to provide therein for the taxation of interest from "bonds, notes, money at interest, and all debts due" the taxpayer, and for the deduction of interest paid on certain classes of debts. Interest from certain other classes of investments, however, was not taxed. Exempted from taxation was interest on deposits in Massachusetts banks, on mortgages secured by real estate taxed in Massachusetts, and dividends on shares of Massachusetts banks and on shares of business entities whose property was taxed or specifically exempted from taxation in Massachusetts. Sections five through seven, on the other hand, dealt with "taxation of income from annuities, professions, employments, trade and business," which was taxed at different rates,[50] and from which certain personal exemptions were allowed. In computing net income from "the profession, employment, trade or business, and from transactions entered into for profit, except the net income from intangible personal property," the taxpayer could deduct from the gross amount of such income various business expenses, depreciation, depletion of wasting assets, and taxes paid to other jurisdictions.

Several characteristics of this scheme of taxation should be noted. Two categories of income were separately defined. Deductions allowable against one class of income could not be claimed against the other class. This treatment of deductions was the basis of the frequently made statement that the Massachusetts income tax before 1971 was not a single general income tax, but rather a set of separate taxes on different classes of income.[51]

The scheme of taxation of income from intangibles indicates that the legislature viewed this portion of the statute as imposing a property tax

47. MASS. CONST. amend. art. 44. *See* relevant text of art. 44 at note 7 *supra*.

48. 1916 Mass. Acts ch. 269, §§ 1-7. *Cf.* MASS. ANN. LAWS ch. 62, §§ 1-8 (Michie/Law. Co-op. 1971).

49. MASS. ANN. LAWS ch. 62, §§ 1-8 (Michie/Law. Co-op 1971).

50. Annuities were taxed at 2%, business income at 4%, and capital gain at 8% (the same rate as income from intangibles).

51. P. NICHOLS, *supra* note 8, at 467.

on the property which produced the income in question. The statute generally avoided taxation of income from investments whose principal had been reached by the property tax, or was specifically exempted from that tax, thus avoiding possibly unconstitutional double taxation in the form of two property taxes levied on the same property.[52] The statute was construed in this fashion in *DeBlois v. Commissioner of Corporations and Taxation,*[53] where the court noted that the General Court had been "scrupulous in so framing statutes as to make plain its purpose to avoid double taxation on real estate."[54] It is clear that both the legislature and the court viewed the pre-1971 tax as in fact a tax on the property which produced the income being taxed.

The 1971 revision of chapter 62,[55] however, appears to represent an entirely different legislative view of the nature of the tax being imposed. The analogy to the Internal Revenue Code of the United States is established in section one, where numerous terms used in the Massachusetts statute are defined to have the same meaning as when used in the federal statute. Massachusetts gross income is declared to mean federal gross income, with certain additions and deductions.[56] Gross income is then divided into two classes: the total interest, dividends, and net captial gains included in Massachusetts gross income, with certain exceptions (Part A income);[57] and the remainder of the Massachusetts gross income (Part B income). From Part B income may be subtracted various deductions allowed under the Code. Part A taxable income is computed by reducing Part A adjusted gross income by certain exemptions and deductions. Here an exemption is allowed equal to the amount by which exemptions from Part B exceed the

52. The taxation of both principal and income, where the tax on the income was seen as falling on the underlying principal, would represent double taxation in the sense that "the same property is taxed twice by authority of the same state, while other like property is taxed but once." *Id.* at 68. *See also* Wolcott v. State Tax Comm'r, 341 Mass. 409, 169 N.E.2d 860 (1960). This double taxation of property would be unconstitutional under the art. 4 proportionality requirement, as interpreted in the cases, because property thus taxed would bear a heavier tax burden than property not so taxed.

53. 276 Mass. 437, 177 N.E. 566 (1931).

54. *Id.* at 440, 177 N.E. at 567.

55. 1971 Mass. Acts ch. 555 (codified with amendments at MASS. ANN. LAWS, ch. 62, §§ 1-8 (Michie/Law. Co-op. Supp. 1977)).

56. To be added are: interest on governmental obligations, except for those of the Commonwealth or its subdivisions, which are exempt from taxation; certain contributions for annuity contracts; dividends excluded under § 116 of the Code; certain earned income from foreign sources; and amounts excluded under Subchapter S of the Code. To be deducted are: interest on obligations of the U.S. exempt from state income taxation; amounts included in gross income under Subchapter S of the Code; income received from a fiduciary, where that income has been taxed to the fiduciary; income from contributory retirement or pension plans; and income, up to a certain amount, from other types of retirement plans as described in §§ 403-404 of the Code.

57. Not included are: interest and dividends from savings accounts in Massachusetts banks, and interest on loans made by pawnbrokers.

amount of Part B adjusted gross income less deductions from that income.[58] To the extent that deductions allowable against Part B income exceed that income, those deductions are allowed against Part A income.[59] Where the earlier statute provided separately for the assessment of tax on two separately defined and computed income bases, the present statute begins with a single definition of income, which is later divided into two parts. The definiton is borrowed from the Internal Revenue Code: "all income from whatever source derived."[60] By subjecting Part A and Part B income to different rates of taxation, the legislature has achieved, as did the drafters of the previous statute, a degree of progressivity within the rather narrow confines of article 44,[61] since Part A income generally makes up a larger portion of the income of wealthier taxpayers. The allowance of cross deductions makes clear, however, that the taxation of the two types of income at different rates does not represent a legislative conception of the two as completely separate taxable entities.

The new statute also eliminates its predecessor's avoidance of double taxation with respect to income from real estate and other property which is either taxed or specifically exempted from taxation in Massachusetts. The drafters of the 1971 revision of chapter 62 thereby made clear their intention that the new tax on income from such property be interpreted simply as a tax on the income, rather than a tax on the underlying property.[62]

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58. MASS. ANN. LAWS, ch. 62, § 3 (A) (Michie/Law. Co-op. Supp. 1977). Deducted are: Part A income of trustees which is payable to persons not inhabitants of Massachusetts, to the extent that the income is derived from sources outside the Commonwealth; Part A income of fiduciaries which is payable to or set aside for charitable purposes. The exemption allowed by § 3(A)(a) operates similarly to the cross-deduction of § 2(c)(1). *See* note 59 *infra.*

59. MASS. ANN. LAWS, ch. 62, § 2(c)(1) (Michie/Law. Co-op. Supp. 1977).

60. I.R.C. § 61(a).

61. Moscovitch, *State Graduated Income Taxes — A State-Initiated Form of Federal Revenue Sharing,* 25 NAT'L. TAX J. 53, 56. A progressive tax is one which imposes a greater tax burden on those with higher incomes. In calculations based on 1973 income, Moscovitch found that Massachusetts taxpayers in income brackets of $5300 and under paid no tax and that state income tax as a percentage of actual income ranged from 2.6% for the $5300-$6600 bracket to 7.8% for the $2,000,000 and over bracket. Interestingly, when net cost to the taxpayer of Massachusetts tax after the federal income tax deductions was calculated, the corresponding percentages were 2.6% for the $5300-$6600 bracket, and 2.3% for the $2,000,000 and over bracket, with a high of 3.1% for the $26,000-$33,000 bracket. This regressive effect of the Massachusetts tax, when the federal tax deduction is considered, results from the graduated nature of the federal tax. Moscovitch cites the example of an average taxpayer in the $66,000-$130,000 bracket whose actual Massachusetts tax paid in 1973 would have been $5,451. This taxpayer, however, is in the 55% federal tax bracket, so his federal taxes are reduced by 55% of the $5,451, or $2,998. The actual burden of his Massachusetts income tax, then, is only $2,453.

62. Interview with Mass. Sen. Counsel George V. Kenneally, Jr., and Frederic W. Schlosstein, Jr., Fiscal Advisor to the House Committee on Taxation, in Boston (Mar. 30, 1978). Sen. Kenneally was chairman and Rep. Schlosstein a member of the Master Tax Commission which produced Mass. Sen. Doc. No. 126, note 5 *supra,* and which drafted the 1971 revision of chapter 62.

This statute, then, appears to be at odds with the often-repeated statement that Massachusetts law regards the income tax, at least as applied to income from intangibles, as a tax on the property which produces the income, and thus a property tax.[63] However, in the 1975 case of *Ingraham v. State Tax Commissioner,*[64] the court upheld the statute as it applied to income from out-of-state land, and in doing so made explicit the suggestion that had been present in the cases dating back to the beginning of the income tax controversy. In *Ingraham* the court in effect held that the nature of the Massachusetts income tax is not some mystical quality evoked by the mere words "income tax," but that it is determined by the provisions of the particular statute in question, with the constitutional provisions setting only the outer limits of the taxing power.[65] Ever-helpful hindsight therefore tells us that sixty years of judicial hair-splitting and legislative frustration could have been avoided by more daring and imagination on the part of the General Court. Even with the example before it of the federal income tax, the legislature was not able until 1971 to break the habit of viewing revenue-raising levies as necessarily either *excises* or *taxes,* with *taxes* being by definition imposed on property.[66] Certainly, the 1780 constitution delineated these two powers, with different restrictions on each. It is also true that the Supreme Judicial Court had interpreted as property taxes various legislative proposals which would reach by taxation the income produced by various forms of intangible property. However, it must be remembered that in each of these instances, the Justices were presented, not with a comprehensive scheme of income taxation, but with isolated proposals to tax either the income from, or the value of, certain types of property.[67] The Justices had answered the questions in the terms in which they had been asked.

63. Mass. Sen. Doc. No. 126, *supra* note 5, at 46.

64. 1975 Mass. Adv. Sh. 2160, 331 N.E.2d 795 (1975).

65. *Id.* at 2166, 331 N.E.2d at 797.

66. The Massachusetts legislature was not alone in this view, for the dichotomy between property and "non-property" taxes figured prominently in the opinions of many state courts as they struggled repeatedly to decide whether a given form of taxation was a property tax and therefore subject to some form of constitutional uniformity requirement, or a non-property tax which was subject to less stringent requirements. *See generally* W. J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION (1959).

67. A three-mill-per-dollar tax on the cash valuation of certain classes of intangible property, which would then be exempt from all other taxation, Opinion of the Justices, 195 Mass. 607, 84 N.E. 499 (1908); a tax on sales of shares of stock, which was upheld as an excise, Opinion of the Justices, 196 Mass. 603, 85 N.E. 545 (1908); exemption of personal property from local property taxation and the taxation of such personal property at a uniform rate throughout the Commonwealth, Opinion of the Justices, 208 Mass. 616, 94 N.E. 1043 (1911). The package of questions which the Court answered in 1915, 220 Mass. 613, 108 N.E. 570, was presented in the form of separate legislative proposals which could have been passed individually (1915 Senate Documents Nos. 446, 438, 439) and therefore could be viewed as requiring individual consideration. The joint order of the legislature requesting the opinion of the Justices recited the inequities

In holding that the nature of the tax is determined by the nature of the statute, as limited by the constitution, rather than by the constitution alone, the *Ingraham* court was hardly breaking new ground. Such a position was implied in earlier decisions, beginning with *Tax Commissioner v. Putnam,*[68] the first case interpreting article 44 and the statute passed under its authority. The argument had been made that no valid excise could be imposed on the exercise of a natural right, and it was therefore necessary to determine whether this tax on capital gains as "income" could be interpreted as an excise. The court asked itself whether "the tax authorized by the Forty-fourth Amendment *and levied by the instant statute* is wholly a property tax . . . or whether in some aspects and applications it may be an excise. . . ."[69] *Hart v. Tax Commissioner*[70] stated that "our income tax, *under the present statutes at least,* is not an excise."[71] In *Riesman v. Commissioner of Corporations and Taxation,*[72] the taxpayer challenged the taxation of a certain interest in foreign real estate which he had received in the liquidation of a foreign corporation of which he had been a stockholder. The court noted that the statute[73] taxed only certain types of gains which accrue to a taxpayer, and not all such gains, and said that therefore "[o]ur *statutes* authorize the assessment of a tax 'upon the income of property [which] is in reality a tax upon the property itself.' "[74] More recently, in

of the then-existing property tax and spoke in terms of modification of the property tax. 220 Mass. at 615, 108 N.E. at 570-71 (1915).

68. 227 Mass. 522, 116 N.E. 904 (1917).

69. *Id.* at 531-32, 116 N.E. at 910 (emphasis added). The court dealt with this issue ambiguously. The Justices apparently decided that the tax was not an excise, but did not find it necessary to decide what the tax *was.*

70. 240 Mass. 37, 132 N.E. 621 (1921).

71. *Id.* at 39, 132 N.E. at 622 (emphasis added). The courts of several states with constitutional "uniformity" clauses similar to that of Massachusetts have not hesitated to declare an income tax to be an excise, or a non-property tax, and therefore not subject to the uniformity required of property taxes. *See, e.g.,* Stanley v. Gates, 179 Ark. 886, 19 S.W.2d 1000 (1929) (not a property tax); Featherstone v. Norman, 170 Ga. 370, 153 S.E. 58 (1930) (not a property tax); Opinion of the Justices, 133 Me. 525, 178 A. 621 (1935) (not a property tax); State *Ex rel.* Knox v. Gulf, M. & N. R. Co., 138 Miss. 70, 104 So. 689 (1925) (excise); Hattiesburg Grocery Co. v. Robertson, 126 Miss. 34, 88 So. 4 (1921) (excise).

Professor Newhouse, *supra* note 66, at 701, 707, sees these decisions as part of a pattern in which state courts during the 1920's and 1930's determined the nature of the income tax in such a way as to sustain the tax statute then under consideration. In most cases, this required a finding that the income tax was a non-property tax. In Delaware and New Hampshire, however, unusual constitutional provisions necessitated a finding that an income tax *was* a property tax, in order to sustain the tax. State v. Pinder, 30 Del. (7 Boyce) 416, 108 A. 43 (1919); Conner v. State, 82 N.H. 126, 130 A. 357 (1925). It is said that an income tax is now generally seen as being in the nature of an excise, as distinct from a property tax, and that "one jurisdiction [Massachusetts] has taken the view that an income tax is a property and not an excise tax." 71 AM. JUR. 2D *State and Local Taxation* § 443 (1973).

72. 326 Mass. 574, 95 N.E.2d 656 (1950).

73. 1945 Mass. Acts ch. 735, § 1.

74. 326 Mass. at 575-76, 95 N.E.2d at 659.

State Tax Commissioner v. Wheatland,[75] the court considered a taxpayer's challenge to the application of the income tax to income derived from real estate in Maine. The taxpayer had claimed that the tax imposed by the statute then in effect[76] was a tax on the property producing the income, which property had at all times been located in Maine and was therefore not subject to the taxing jurisdiction of Massachusetts.[77] The court held that the tax statute under consideration did not authorize taxation of income from foreign real estate, emphasizing that the statute showed "no clear legislative intention" to impose such a tax.[78] The court thus by implication informed the legislature that it would be possible to draft a valid statute which provided for such a tax, but that the intention to do so must be clear on the face of the statute.

In 1971, the General Court took the hint and perceived an avenue which had been open to it since the adoption of the income tax amendment in 1915. As a result, taxpayer Wheatland and his nephew Timothy Ingraham were back before the court in 1975,[79] but this time were unsuccessful in challenging the new statute's application to income derived from the same Maine real estate discussed in the earlier *Wheatland* case. In 1975, the court noted that prior to the 1971 revision of chapter 62, the only income taxed by statute was that which came within certain classes of income, which classes were defined by the source of the income. The statute in effect in 1975, however, dealt with "all income from whatever source derived,"[80] unless exempted, and clearly was intended to tax rental income. Citing United States Supreme Court opinions, the court found no federal constitutional barrier to the taxation of income from foreign real estate, and held that the 1971 statute, by enacting a general income tax, came within the scope of the federal decisions. The federal question was deemed dispositive of the issue, and the court felt no need to address the "question whether the tax imposed by chapter 62 remains, as a matter of State law, essentially a property tax as well as an income tax."[81]

IV. CONSTITUTIONAL LIMITS

If the message of *Ingraham* is that the Massachusetts constitution does not require that an income tax levied under its authority be

75. 343 Mass. 650, 180 N.E.2d 340 (1962).

76. MASS. ANN. LAWS, ch. 62, §§ 5(b), 6 (Michie/Law. Co-op. 1953-56).

77. 343 Mass. at 652, 180 N.E.2d at 341.

78. *Id.* at 653, 180 N.E.2d at 342.

79. Wheatland v. Commissioner of Corp. & Tax., 1975 Mass. Adv. Sh. 2171, 331 N.E.2d 799 (1975); Ingraham v. State Tax Comm., 1975 Mass. Adv. Sh. 2160, 331 N.E.2d 795 (1975). *See* note 64 and accompanying text *supra.*

80. Ingraham v. State Tax Comm., 1975 Mass. Adv. Sh. 2160, 2163, 331 N.E.2d 795, 796.

81. *Id.* at 2169, 331 N.E.2d at 798. *See* discussion at notes 64-65 *supra.*

characterized as a tax on the property which produces the income, the question then arises whether other forms of income tax, previously considered unconstitutional, might not also be possible. To determine this, it is necessary to take a closer look at what limitations are actually imposed by the constitution on the legislative taxing power and to consider what types of taxes may be imposed within those limitations.

In *Putnam,*[82] the court faced the task of interpreting that fundamental word, "income." The Justices held that the word "was there used with the purpose of setting at rest any doubt about the full and complete power of the Legislature to deal with 'income' as a subject of taxation,"[83] and concluded that the word "income" was used in the amendment to distinguish the property which *flows from* an investment from property which *is* an investment and is already taxed. The federal income tax law, adopted in 1913, and which may be assumed to have been familiar to the legislature and voters who adopted article 44, the court reasoned, defined "income" as including "income derived from . . . dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property . . . or gains or profits and income derived from any source whatever."[84] Professor Brown, in 1933, proposed that an income tax be considered *sui generis,* and not simply a variation of an excise, capitation, or property tax.[85] This view has great appeal, as income differs from property in some of its fundamental aspects. Property, in the usual sense, has a static quality: an intrinsic value which can be measured as of a given "tax day." As Brown pointed out, earning power may be an element in the value of property, but actual earnings are not decisive.[86] Income, however, is fluid and can only be measured over time. The Massachusetts court noted, in *Wilcox v. County Commissioners,*[87] that "[t]he income from a 'profession, trade, or employment' . . . is an entirely different thing from the capital invested in the business. . . . The income . . . is the income for the year, and is the result of the year's business. It is the net result of many combined influences."[88] The United States Supreme Court said in *Cohn v. Graves,*[89]

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82. 227 Mass. 522, 116 N.E. 904 (1917). *See* note 68 and accompanying text *supra.*

83. *Id.* at 525-26, 116 N.E. at 907.

84. *Id.* at 528, 116 N.E. at 908. *See also* Maguire v. Tax Comm'r., 230 Mass. 503, 512, 120 N.E. 162, 166 (1918).

85. Brown, *The Nature of the Income Tax,* 17 MINN. L. REV. 127 (1933). Professor Newhouse states that "the [Missouri] court verged closer to finding the tax *sui generis,* as, indeed, later states expressly decided." W. J. NEWHOUSE, *supra* note 66, at 694.

86. Brown, *supra* note 85, at 130.

87. 103 Mass. 544 (1870). *See* discussion at note 98 *infra.*

88. *Id.* at 546.

89. N.Y. *Ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).

> The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed although it produces no income. The two taxes are measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date. Income is taxed but once; the same property may be taxed recurrently.[90]

If an income tax is not *necessarily* either a property tax or an excise, but *may* be either of these, or neither of them, depending on its terms, it then seems possible to read article 44 as granting to the legislature nothing more nor less than the power to tax income, without requiring that such a tax be of a type which would necessarily be considered a property tax or an excise. In other words, article 44 can be read as an independent grant of the power to levy an income tax, which power is not subject to the article 4 restrictions on the taxing power, and is limited only by the terms of article 44 itself.[91] The second sentence of the amendment[92] sets forth a uniformity requirement for taxes levied on income from the same class of property, but permits income from different classes of property to be taxed at different rates. It is this sentence which alters the article 4 proportionality requirement as it had been applied to a tax on income from property. The following separate sentence[93] of the amendment deals with income *not* derived from property, which *may* be taxed at a rate lower than that imposed on income which is so derived. The juxtaposition of these two sentences leaves their relationship to each other unclear. Does the uniformity requirement of article 44 also apply to the earned income dealt with in the latter sentence? Historically, the chief concern of the drafters of article 44 was to provide for the equitable and effective taxation of unearned income.[94] Earned income was already taxed at the property tax rate and the provision of article 44 dealing with this income may reasonably be read as answering the anticipated question of whether unearned income could be taxed more heavily than earned income. The provision does not clearly apply the uniformity requirement of the previous sentence to taxation of earned income. Therefore, it seems that article 44 itself does

90. *Id.* at 314.

91. All constitutional grants of taxing power must be considered to be subject to an implied requirement of reasonability.

92. MASS. CONST. amend. art. 44 ("Such a tax may be at different rates upon income derived from different classes of property, but shall be levied at a uniform rate throughout the commonwealth upon incomes derived from the same class of property.").

93. *Id.* ("The general court may tax income not derived from property at a lower rate than income derived from property, and may grant reasonable exemptions and abatements.").

94. P. NICHOLS, *supra* note 8, at 467.

not require that earned income be taxed "at a uniform rate throughout the commonwealth." As a result, a legislature which wished to enact a graduated tax on earned income would not find an absolute constitutional bar to such a tax.[95]

Similarly, a legislature or court which, for policy reasons, was inclined to look favorably upon such a proposal, might find fewer obstacles in the path of a local option municipal wage tax than had been predicted by writers considering the subject before the 1971 tax revision.[96] The authors of Senate Document No. 126 of 1970 were of the opinion that the provision of article 44 dealing with income not derived from property did not authorize a tax on such income but rather empowered the legislature to substitute for the traditional local occupations tax a uniform statewide tax at a "proportional" rate.[97] However, local taxing powers are always considered to be derivative from state powers, so the existence since at least 1780 of the local occupations tax would normally imply that the state has always had the power to levy such a tax. On the other hand, it may be countered that the occupations tax as it was levied before 1916 was in fact a property tax,[98] and as such was subject to the article 4 "uniformity" requirement, which the court in all likelihood would have interpreted as preventing the state from singling out this particular form of property (income) to be taxed on a statewide basis at a rate which necessarily would differ from the property tax rate in the great majority of cities and towns. In 1915, the court

95. A graduated tax which reached unearned as well as earned income, however, would face such an obstacle in the art. 44 uniformity clause. This means that Massachusetts cannot, without a constitutional amendment, enact a "piggy-back" income tax in which the state income tax would be a flat percentage of a taxpayer's federal income tax liability. This type of tax would offer the advantage of making it easier for the taxpayer to calculate his Massachusetts income tax and for the state to administer its collection. However, a change to such a tax from the present Massachusetts tax would result in substantial changes in the incidence of the state income tax because it employs a somewhat different system of exemptions and deductions from that used in the Internal Revenue Code. Moscovitch, *supra* note 61, at 60.

96. *See, e.g.*, Muchnick, *A Municipal Income Tax for Boston*, 5 SUFFOLK L. REV. 1, 11-12 (1970); Mass. Sen. Doc. No. 126, *supra* note 5, at 49-50.

97. Mass. Sen. Doc. No. 126, *supra* note 5, at 46. The authors do not specify what "proportional" means in this context.

98. The historic tax on incomes from trades and professions was clearly based on the assumption that such income was itself property, for it was taxed at the same rate as other forms of real and personal property. P. NICHOLS, *supra* note 8, at 110. It was never decided whether this tax was an excise or a property tax, *see* Opinion of the Justices, 220 Mass. 613, 625, 108 N.E. 570, 575 (1915), but if the nature of a tax is to be determined by its actual terms, then to call a tax on income, levied in each town at the same rate as that on property, anything but a tax on that income *as* property is an exercise in verbal sleight of hand. *See* Wilcox v. County Commissioners, 103 Mass. 544 (1870), where the town of Medford sought to tax its resident, Wilcox, on income earned from his business located in Boston, where its stock in trade was subject to property tax. Wilcox claimed the income itself was not taxable by Medford as it was derived from property already taxed. The court upheld the tax, distinguishing between income (apparently regarded as property) and the property which produces the income. *See* note 87 and accompanying text *supra*.

had declined to give an opinion as to whether a statewide tax on earned income might be considered an excise and therefore not subject to the article 4 proportionality requirement.[99] So there remains the possibility that such a tax might have been levied prior to the passage of article 44, and that an amendment granting this power would be superfluous. Under such an interpretation, article 44 arguably leaves unchanged the local power to levy a tax on earned income.

However, if article 44 is seen as a grant of the power to levy an income tax which is neither a property tax nor an excise, the constitutionality of a local option municipal wage tax does not depend on the acceptance by the court of the designation of such a tax as an excise.[100] Instead, the power to tax incomes in this fashion is derived from and limited by article 44 itself, which does not in terms require that taxation of earned income be uniform.[101]

If the legislature has the power to enact a local option wage tax, how should it provide for the taxpayer who lives in one municipality and works in another? Where may this taxpayer's income be taxed? Municipalities such as Boston, which daily service thousands of non-resident commuters, would clearly prefer to tax the wages of all those who work in the city, and not be restricted to taxing the wages of residents only. If the taxpayer's wages are regarded as property for tax purposes, the traditional view would have them taxed in the municipality where the wage-earner resides, under the doctrine of *mobilia sequuntur personam*. However, if income is merely income, might not the legislature empower municipalities to tax wages and salaries earned within their boundaries? The United States Supreme Court has adopted such a view of taxing jurisdiction in upholding the power of a state to tax the income of a non-resident earned within the state.[102] It seems, therefore, that a court which views article 44 as a grant of the power to levy an income tax which is *sui generis* could apply similar reasoning to approve legislation granting localities the authority to tax wages and salaries earned within their borders and under their protection.

V. CONCLUSION

The 1971 tax revision, and the judicial response to it, have clarified several aspects of Massachusetts income tax law. The nature of the income tax imposed by a given statute is determined by the terms of that

99. Opinion of the Justices, 220 Mass. 613, 108 N.E. 570 (1915). *See* note 44 and accompanying text *supra*.

100. The likelihood that such a tax could successfully be characterized as an excise is thoroughly explored in Muchnick, *supra* note 96, at 14-19.

101. *See* notes 93-95 and accompanying text *supra*.

102. *See, e.g.*, Travis v. Yale and Towne Co., 252 U.S. 60 (1920).

statute. Once the nature of the tax has been determined, then the tax provisions of the constitution must be examined to see what requirements must be met by such a tax. Article 44 appears to grant a general power to tax income, which power may be exercised in the form of an income tax which is a tax on incomes as property, a tax on property which produces income, or a general income tax. A general income tax on earned income, levied under article 44, is arguably not subject to that article's uniformity requirement, and therefore may be levied on such income at graduated rates or in the form of a local-option municipal wage tax.

A sympathetic court would not be prevented by any compelling precedent from approving either of the tax proposals under discussion here, but action by the legislature is needed to bring about a resolution of the issues.

MARGARET K. WHEELER

CASE COMMENTS

Natural Resources Defense Council, Inc. v. SEC:[1] Environmental Disclosure Under the Federal Securities Laws

During the 1960's the quality of the environment became a primary concern for the American people. Much of the blame for the environmental deterioration that had occurred was placed on the inaction of government institutions.[2] Congress responded by passing the National Environmental Policy Act (hereinafter, NEPA)[3] "to mobilize the resources of the Federal Government behind a consistent policy of environmental protection."[4] The Act obliges all federal agencies "to use all practicable means, consistent with other essential considerations of national policy,"[5] to maintain and improve the condition of the environment. To ensure the advancement of environmental protection, NEPA requires that "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act."[6] In particular, the Act promotes environmental protection by requiring

1. 432 F. Supp. 1190 (D.D.C. 1977) [hereinafter cited as NRDC v. SEC II].

2. *See* 115 CONG. REC. 29,067 (1969) (remarks of Sen. Jackson); *id.* at 26,577 (remarks of Rep. Farbstein); *id.* at 26,575 (remarks of Rep. Mailliard); F. ANDERSON, NEPA IN THE COURTS 6 (1973).

3. 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975). NEPA was signed into law by President Nixon on January 1, 1970. The purpose of the Act is "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment." NEPA § 2, 42 U.S.C. § 4321 (1970).

4. Sonde & Pitt, *Utilizing the Federal Securities Laws to "Clean the Air! Clean the Sky! Wash the Wind!"*, 16 HOW. L. J. 831, 838 (1971).

5. NEPA § 101 (b), 42 U.S.C. § 4331 (b) (1970).

6. NEPA § 102 (1), 42 U.S.C. § 4332 (1) (1970).

All agencies are required to "review their present statutory authority, administrative regulations, and current policies and procedures," in order to cure any deficiencies or inconsistencies therein which would prevent it from carrying out, to the fullest extent possible, the environmental protection policies of NEPA. NEPA § 103, 42 U.S.C. § 4333 (1970).

In furtherance of the purpose and policy of NEPA, President Nixon issued Executive Order

the development of methods which take into account environmental considerations along with economic and technical considerations in agency decision-making,[7] and by the dissemination of information which is useful in protecting the environment.[8]

The "sweeping, almost poetic language of the Act . . . has engendered controversy in both the agencies, to which many of its provisions are directed, and the courts, upon which the responsibility for interpretation necessarily devolves."[9] One agency which is currently involved in the controversy over the effect of NEPA is the Securities and Exchange Commission (hereinafter, SEC).[10] The primary responsibility of the SEC is to administer the federal securities laws, the main thrust of which is to impose certain disclosure requirements on public corporations.[11] In broad terms, the SEC is empowered to require public corporations to disclose such information as the Commission finds to be "necessary or appropriate in the public interest or for the protection of investors."[12]

For the last eight years, the SEC has attempted to fulfill its obligation under NEPA's mandate.[13] Its odyssey began when a number of public interest groups filed a rulemaking petition with the Commission.[14] The petition claimed that the SEC's disclosure rules did not fulfill the Commission's obligations under NEPA.[15] The SEC denied the petition. The resulting controversy most recently culminated in a second opinion by the District Court for the District of Columbia in *Natural Resources*

11514. 35 Fed. Reg. 4247 (1970). The order required each agency to submit a report on its review and proposed corrective measures required by section 103 of NEPA to the Council on Environmental Quality (CEQ) by September 1, 1970.

The CEQ was created by NEPA to evaluate the policies and activities of the federal government directed toward the protection and enhancement of the environment and to develop and recommend to the President and to the agencies, policies and programs to foster and promote the improvement of environmental quality. NEPA §§ 201-202, 42 U.S.C. §§ 4341-47 (1970).

7. NEPA § 102(2)(B), 42 U.S.C. § 4332 (2)(B) (1970).

8. NEPA § 102(2)(G), 42 U.S.C. § 4332 (2)(G) (1970 & Supp. V 1975) (originally enacted as NEPA § 102(2)(F)).

9. McGarity, *The Courts, The Agencies, and NEPA Threshold Issues*, 55 TEXAS L. REV. 801, 803 (1977).

10. *See* notes 19-61 and accompanying text *infra*.

11. For the purposes of this Comment, the federal securities laws refer to the Securities Act of 1933 [hereinafter cited as the Securities Act], 15 U.S.C. §§ 77a-77aa (1976), and the Securities Exchange Act of 1934 [hereinafter cited as the Exchange Act], 15 U.S.C. §§ 78a-78hh (1976).

12. Securities Act §§ 7, 10(c), 15 U.S.C. §§ 77g, 77j(c) (1976); Exchange Act §§ 10(b), 12(b)(1), 14(a), 15 U.S.C. §§ 78j(b), 78*l*(b)(1), 78n(a) (1976). Section 19(a) of the Securities Act further authorizes the Commission to promulgate such rules "as may be necessary to carry out the provisions of this [title]." 15 U.S.C. § 77s(a) (1976). Section 23(a) of the Exchange Act authorizes such rules "as may be necessary or appropriate to implement the provisions of this [title] for which [the Commission is] responsible . . . ." 15 U.S.C. § 78w(a)(1) (1976).

13. *See* notes 19-61 and accompanying text *infra*.

14. *See* notes 21-23 and accompanying text *infra*.

15. *See* notes 24-25 and accompanying text *infra*.

Defense Council, Inc. v. SEC.[16] The court held that the SEC failed to meet its obligations under NEPA and that the SEC's denial of the rulemaking petition was arbitrary and capricious.

The Commission has appealed the district court's decision.[17] The appeal poses two major issues for the court of appeals. The court must first determine whether the Commission's decision denying the rulemaking petition was properly subject to judicial review.[18] Assuming the court finds that the SEC's decision was properly subject to judicial review, it must then determine the effect that NEPA has on the SEC's disclosure rules under the federal securities laws.

The purpose of this comment is to discuss the issues that confront the court of appeals, their probable resolution and the future impact the case may have on SEC disclosure requirements. The history of the controversy is reviewed in Section I. The effect of NEPA's mandate on the federal agencies, in general, is discussed in Section II. After examining the relevant statutes and case law regarding judicial review of agency rulemaking, Section III concludes that the district court's review was proper. An analysis of the present scope of SEC disclosure requirements and a proposed framework for environmental disclosure are provided in Section IV.

I. THE FACTUAL BACKGROUND OF THE CONTROVERSY

On July 19, 1970, approximately six and one-half months after NEPA became law, the SEC completed a review of its obligations under that Act. The conclusion reached by the SEC was that no changes to its existing rules and regulations were necessary to comply with NEPA's mandate. In Securities Act Release No. 5170,[19] the Commission stated that it would only require disclosure of environmental matters if they were material as defined under the SEC's rules and regulations.[20]

However, even before the review was completed, there were those who believed that NEPA required the Commission to expand its disclosure requirements to include certain environmental matters. On June 1, 1971, the Natural Resources Defense Council, Inc. (hereinafter,

16. 432 F. Supp. 1190 (D.D.C. 1977).

17. Natural Resources Defense Council, Inc. v. SEC, No. 77-1761 (D.C. Cir., filed October 1977). At the time of this writing, the author has been informed by the SEC that both parties have filed their briefs with the court of appeals but that a decision is not expected in the near future unless the parties ask the court for expedited treatment of the case.

18. The resolution of this issue necessarily involves a two tier analysis. The court of appeals must initially decide whether the Commission's decision was committed to agency discretion and, therefore, not subject to judicial review. Assuming, however, that the court finds that the SEC's decision was not committed to agency discretion, it must then determine the proper scope of judicial review.

19. 36 Fed. Reg. 13989 (1971).

20. *See* note 143 and accompanying text *infra*.

NRDC)[21] and the Project on Corporate Responsibility, Inc. (hereinafter, the Project)[22] filed a rulemaking petition[23] with the SEC. The petition charged that investors had no ready and dependable means of appraising the environmental effect of the practices of a particular corporation. As a result, petitioners claimed, "it is difficult for investors to make either socially responsible or financially sound investment decisions."[24] The petitioners proposed that the SEC modify its disclosure rules to require reporting companies to delineate with respect to each major enterprise or product, among other things, "(1) the nature and extent (quantified to the extent feasible) of the resulting pollution or injury to natural areas and resources, and (2) the feasibility of, and plans for, correcting the same."[25]

On December 21, 1971, the SEC rejected the petitioners' proposals. The Commission stated, however, that it would "actively consider amendments to [its disclosure rules and regulations] in the near future."[26] Securities Act Release No. 5170 remained in force.

On February 16, 1972, the Commission issued Securities Act Release No. 5235[27] in which it proposed amendments to its rules and solicited public comment.[28] Over one year later, at the close of the proposal-and-

21. "NRDC is a non-profit membership corporation organized under New York state law and is comprised of lawyers, scientists, and other private citizens who use and enjoy our natural resources and who seek to protect these resources from encroachment and destruction." Natural Resources Defense Council, Inc. v. SEC, 389 F. Supp. 689, 693 (D.D.C. 1974) [hereinafter cited as NRDC v. SEC I].

22. The Project engages "in public interest proxy contests, research, litigation, agency proceedings, and education activities, in furtherance of corporate responsibility." *Id.* at 693.

23. The petition was filed pursuant to Rule 4(a) of the SEC's Rules of Practice, 17 C.F.R. § 201.4 (1977).

24. NRDC v. SEC I, 389 F. Supp. at 694.

25. *Id.* The petition also proposed that companies be required to disclose any production or policy changes regarding environmental issues or concerns.

26. *Id.*

27. 37 Fed. Reg. 4365 (1972). Two days after the publication of Securities Act Release No. 5235, NRDC sought judicial review of the denial of its petition in the Court of Appeals for the District of Columbia Circuit. The Court of Appeals denied review, holding that the SEC's action was not a final agency action. Natural Resources Defense Council, Inc. v. SEC, No. 73-1148 (D.C. Cir. Feb. 8, 1973).

28. The proposed amendments required:

> (1) with respect to the description of a company's business, disclosure of the material effects which compliance with environmental laws and regulations may have upon the capital expenditures, earnings and competitive position of the [company] and its subsidiaries.

Securities Act Forms S-1, Item 9(a); S-7, Item 5(a); S-9, Item 3(c); 17 C.F.R. §§ 239.11, 239.26, 239.22 (1977). Exchange Act Forms 10, Item 1(b); 10-k, Item 1(b)(7); 17 C.F.R. §§ 249.210, 249.310 (1977).

> (2) with respect to the company's legal proceedings, disclosure of pending governmental or private legal or administrative enforcement proceedings arising under environmental laws or regulations and any such proceedings known to be contemplated by governmental authorities.

Securities Act Forms S-1, Item 12; S-7, Item 5(e); 17 C.F.R. §§ 239.11, 239.26 (1977). Exchange Act Forms 10, Item 10; 10k, Item 5; 8-k, Item 3; 17 C.F.R. §§ 249.210, 249.310, 249.308 (1977).

comment procedure, the SEC issued Securities Act Release No. 5386[29] in which it adopted certain amendments to its disclosure rules. The amendments generally included the modifications proposed by the SEC in Securities Act Release No. 5235 but "in no way enlarged, and in some respects retreated from,"[30] those proposals. The Commission believed that these changes fully met its obligations under NEPA.[31]

The petitioners were unsatisfied by these amendments. Viewing NEPA's mandate as requiring greater disclosure of environmental matters, petitioners sought and gained review in the District Court for the District of Columbia.[32] Petitioners challenged the procedures the SEC used in adopting the amendments and the alleged narrowness of the required disclosure. On December 9, 1974, in an opinion written by Judge Charles R. Richey, the district court stated that

> the SEC is empowered to exercise its informed discretion about which information will be required to be disclosed in the various corporate filings . . . [However, s]uperimposed upon this grant to the SEC . . . is the Congressional mandate . . . to interpret the securities laws to the fullest extent possible in accordance with the overriding Congressional mandate of NEPA . . . [since] the dissemination of information . . . can aid the purpose of NEPA.[33]

The court went on to hold that the SEC had failed to comply with the procedural requirements of the Administrative Procedure Act (hereinafter, "APA")[34] in adopting the amendments to its regulations. First, the court stated that the SEC had failed to give notice of the proposed rules so that interested persons would have an opportunity to participate in the rulemaking.[35] Second, the court held that the Commission had failed to give a succinct statement of its basis and purpose in adopting the rules.[36] The SEC was directed to provide a more com-

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Additionally, the amendments admonished that such government environmental proceedings shall not be deemed "ordinary or routine litigation incidental to the business," although such exclusion is allowed respecting non-environmental government proceedings. Environmental proceedings brought by other than a governmental authority "shall be described if such proceeding is material to the business or financial condition of the [company] or if it involves primarily a claim for damages exceeding 10 per cent of the current assets . . . ." Securities Act Form S-1, Item 12, 17 C.F.R. § 239.11 (1977); Exchange Act Form 10, Item 10, 17 C.F.R. § 249.210 (1977).

29. 38 Fed. Reg. 12,100 (1973).

30. NRDC v. SEC I, 389 F. Supp. at 695.

31. *Id.*

32. NRDC v. SEC I, 389 F. Supp. 689. After initiating the action in the district court but prior to that court's decision, petitioners again sought review in the court of appeals, of the amendments adopted by the SEC in Securities Act Release No. 5386. The court of appeals dismissed the proceeding for lack of jurisdiction. Natural Resources Defense Council, Inc. v. SEC, No. 73-1591 (D.C. Cir. June 14, 1974).

33. 389 F. Supp. at 695.

34. 5 U.S.C. §§ 551-559 (1976).

35. 389 F. Supp. at 699. *See* 5 U.S.C. §§ 553(b) & (c) (1976).

36. 389 F. Supp. at 701. *See* 5 U.S.C. §§ 553(c) (1976).

plete statement so that the court could determine the extent of the Commission's obligations under NEPA, the factors taken into account during the rulemaking and the rationale for the conclusions reached.[37]

In response to the district court's decision, the SEC began another round of rulemaking. On February 11, 1973, the Commission issued Securities Act Release No. 5569[38] giving notice of new public proceedings to determine whether its present disclosure rules were sufficient in light of NEPA's mandate and what further rulemaking action should be taken if the rules proved inadequate.[39] The SEC may have foreshadowed the outcome of the proceeding, however, when it stated that its primary responsibility was "to require disclosure of information that the investing public generally would find material in making their investment decisions."[40]

The SEC held extensive hearings[41] which culminated in the issuance of Securities Act Release No. 5627[42] on October 14, 1975. The release classified the proposals concerning environmental disclosures into five major categories:

> (1) comprehensive disclosure of the environmental effects of corporate activities, (2) disclosure of corporate non-compliance with applicable environmental standards, (3) disclosure of all pending environmental litigation [and proceedings], (4) disclosure of general corporate environmental policy, and (5) disclosure of all capital expenditures and expenses for environmental purposes.[43]

In addressing the five proposed categories, the SEC was of the opinion that it could require disclosure by public corporations only if the infor-

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37. 389 F. Supp. at 701. The court instructed the SEC to resolve two overriding factual issues: (1) the extent of interest in environmental disclosures by investors similarly situated with the petitioners and (2) the avenues available to such investors which will aid in eliminating corporate activities which are deleterious to the environment. *Id.*

The court included petitioners in a group characterized as "ethical investors." "The term ethical investor describes those investors who base their investment or [corporate suffrage] decisions partially or wholly on information which the [SEC] has characterized as nonfinancial." Note, *The Ethical Investor and the SEC: Conflict over the Proper Scope of the Shareholder's Role in the Corporation*, 2 J. OF CORP. L. 115 (1976).

38. 40 Fed. Reg. 7013 (1975).

39. In delineating the scope of inquiry, the Commission welcomed views concerning:

> (1) the advisability of its requiring disclosure of socially-significant matters, (2) whether and on what basis these disclosures might be viewed as being material, particularly where these matters may not be considered material in an economic sense, (3) the basis and extent, if any, of the Commission's authority to require disclosure of matters primarily of social concern but of doubtful economic significance, and (4) the probable impact, if any, of such disclosure on corporate behavior.

Id. at 7014.

40. *Id.*

41. The hearings were held on 19 separate days in which the SEC received 54 oral presentations and 353 written comments. NRDC v. SEC II, 432 F. Supp. 1190, 1195 (D.D.C. 1977).

42. 40 Fed. Reg. 51,656 (1975).

43. *Id.* at 51,662.

mation sought is necessary or appropriate for the protection of investors; it also believed it could not require disclosure solely for the regulation of corporate conduct, although such results incidentally may follow from required disclosures.[44]

Upon reaching these conclusions, the SEC rejected proposals: (1) concerning environmental effects, (4) regarding corporate policy and (5) respecting capital expenditures, because the disclosures they required were subjective and did not provide a meaningful index to judge a corporation's environmental activities.[45] The SEC rejected the proposal (3) concerning pending litigation because, to the extent such proceedings are material, its present rules already require disclosure.[46] With respect to proposal (2) regarding corporate non-compliance, the Commission issued a proposed amendment which would require public corporations to file a list of recent environmental compliance reports which indicate non-compliance with federal environmental standards.[47] However, on May 12,1976, Securities Act Release No. 5704[48] was issued in which the amendment based on proposal (2) was rejected. The Commission stated that the disclosure contemplated by the amendment would be of minimal value and potentially misleading.[49]

The conclusions the SEC reached concerning its disclosure rules were basically the same as those reached in Securities Act Release No. 5386.[50] Thus, the SEC presently requires disclosure of information regarding: the material effects that compliance with federal, state and local environmental protection laws may have upon capital expenditures, earnings and competitive position of public corporations; all litigation commenced or known to be contemplated against the company by a governmental regulatory authority; and all other environmental information of which the average, prudent investor ought to be informed.[51] Disclosure of such information, the Commission concluded, is of interest to investors and, at the same time, beneficial to the environment.[52]

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44. *Id.* at 51,660.
45. *Id.* at 51,662-63.
46. *Id.* at 51,663.
47. *Id.*
48. 41 Fed. Reg. 21,632 (1976).
49. *Id.* at 21,634.
50. *See* notes 29-31 and accompanying text *supra.*
51. 41 Fed. Reg. at 21,632.
52. *Id.* For analysis of the litigation and proceedings up to but not including the second district court opinion, *see generally,* Stevenson, *The SEC and the New Disclosure,* 62 CORNELL L. REV. 50 (1976); Hewitt, *Developing Concepts of Materiality and Disclosure,* 32 BUS. LAW. 887 (1977); Manko, *Environmental Disclosure — SEC v. NEPA,* 31 BUS. LAW. 1907 (1976); Note, *Disclosure of Corporate Payments and Practices: Conduct Regulation Through the Federal Securities Laws,* 43 BROOKLYN L. REV. 681 (1977); Comment, *Toward Corporate Environmental Disclosure: NRDC v. SEC,* 6 ENV. AFF. 155 (1977).

Petitioners, NRDC and the Project, still believed that the SEC had not sufficiently expanded its disclosure rules so as to comply with NEPA's mandate. Judicial review was sought and granted in the District Court for the District of Columbia.[53] Petitioners admitted that the Commission's rulemaking proceeding had complied with the procedural requirements of the APA and that the Commission had provided a statement of the basis of its actions adequate to permit judicial review.[54] However, the Commission's decision was contested on two grounds. Petitioners first asserted that NEPA's mandate requires the Commission to impose substantial disclosure requirements on public corporations in order to advance the Act's environmental protection policy.[55] It also was argued that even if NEPA does not compel such disclosures, the Commission's decision not to require the additional disclosures under its necessary or appropriate authority was arbitrary and capricious.[56]

In rejecting petitioners' first argument, the court stressed the fact that "Congress did not establish environmetal protection as an exclusive goal." The substantive policy of NEPA does not demand a "particular outcome on the merits," rather it requires, "careful and informed decision-making to enlighten the decision-maker and the public."[57] Whether a particular action is to be taken is generally committed to agency discretion.

In upholding petitioners' second argument, the court stated that the broad discretion of an agency cannot be exercised in an arbitrary or capricious manner. NEPA requires that an agency fully consider alternatives to its actions which will reduce environmental degradation. NEPA's procedural mandate[58] is neither equivocal nor highly flexible. It enjoins the agencies to consider environmental factors in their decision-making.[59] The court concluded that the SEC acted arbitrarily and capriciously because it did not fully consider possible alternatives to its actions which would promote environmental protection and because the Commission's rejection of the proposed amendments failed to give sufficient weight to environmental values.[60] Judge Richey remanded the

53. NRDC v. SEC II, 432 F. Supp. 1190.
54. *Id.* at 1194.
55. *Id.* at 1197.
56. *Id.*
57. *Id.* at 1198 (Richey, J.) (citations omitted).
58. *See* notes 73-76 and accompanying text *supra.*
59. *See, e.g.,* Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976), where the Supreme Court stated that NEPA's procedural mandate is: "neither accidental nor hyperbolic. Rather, [it] is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." *Id.* at 787.
60. 432 F. Supp. at 1205-08.

case to the SEC for reconsideration in accordance with the court's opinion.

The SEC has appealed the district court's decision to the Court of Appeals for the District of Columbia Circuit.[61] An analysis of the issues raised by the appeal follows.

II. NEPA'S MANDATE

To fully understand the effect of NEPA's mandate on the federal agencies, and in particular on the SEC, a brief discussion of the Act's provisions as well as applicable judicial interpretations is necessary.

In enacting NEPA, Congress resolved that it was to be the policy of the federal government to use all practicable means to promote environmental protection.[62] To ensure that the policy of NEPA is effectuated, Congress added certain "action-forcing" provisions[63] which require all federal agencies, "to the fullest extent possible," to administer and interpret federal laws and regulations in accordance with NEPA.[64] The federal agencies were also directed to review and revise their statutory authority and policies, respectively, to determine any deficiencies or inconsistencies which would prevent full compliance with NEPA.[65] However, Congress did not seek to repeal existing law;

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61. *See* note 17 and following text *supra.*

62. NEPA § 101, 42 U.S.C. § 4331 (1970). As originally passed by the House of Representatives, NEPA provided that, "[t]he Congress recognizes that each person has a fundamental and inalienable right to a healthful environment." In the Conference Committee the language was changed to, "[t]he Congress recognizes that each person should enjoy a healthful environment." The Committee changed the language to avoid creating a court-enforceable right. H.R. REP. NO. 91-765, 91st Cong., 1st Sess. 3 (1969) [hereinafter cited as CONFERENCE REPORT].

63. NEPA § 102, 42 U.S.C. § 4332 (1970 & Supp. V 1975).

64. *See* notes 6-8 and accompanying text *supra.* In addressing the intended effect of the "action-forcing provisions," Congress expressed the view that

> the . . . language does not in any way limit the congressional authorization and directive to all agencies . . . unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible . . . . Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in Section 102. Rather, the language in Section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

CONFERENCE REPORT, *supra* note 62, at 4.

65. NEPA § 103, 42 U.S.C. § 4333 (1970). With respect to § 103 the Conference Committee stated:

> [i]t is the understanding of the conferees that an agency shall not construe its existing authority in an unduly narrow manner. Rather . . . all Federal Agencies shall comply with the provisions of Section 102 "to the fullest extent possible," unless, of course, there is found to be a clear conflict between its existing statutory authority and the bill.

CONFERENCE REPORT, *supra* note 62, at 5.

rather it intended that the policies and goals of NEPA supplement existing law.[66]

Initially, the courts read NEPA's mandate in a limited manner.[67] The seminal case of *Calvert Cliffs' Coordinating Committee v. AEC*[68] began a trend[69] which militated against such a constricted reading. In that case, petitioners challenged rules promulgated by the AEC in order to meet its obligations under NEPA. The rules governed the consideration to be given to environmental values in granting construction permits and operating licenses for individual nuclear power facilities. The court, in an opinion by Judge Skelly Wright, rendered the first comprehensive interpretation of NEPA's provisions. First, Judge Wright addressed section 101 of EPA,[70] which sets forth the Act's substantive policy. He stated that "Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations."[71] Thus, the substantive policy of NEPA was characterized as flexible. It "leaves room for a responsible exercise of discretion and may not require particular substantive results in particular problematic instances."[72]

Turning his attention to the procedural provisions of NEPA, which are intended to force the federal agencies to exercise the substantive discretion granted them, Judge Wright noted that they "are not highly flexible. Indeed, they establish a strict standard of compliance."[73] In passing NEPA, Congress intended to make environmental protection a part of the charge of every agency.[74] All agencies are required to comply with NEPA's procedural directives unless there is a clear conflict between the Act and the agency's enabling statutes. Administrative costs or inconvenience will not suffice to excuse compliance.[75] Focusing

66. NEPA § 105, 42 U.S.C. § 4335 (1970). In discussing § 105, the Conference Committee warned: "[the] section does not . . . obviate the requirement that the Federal agencies conduct their activities in accordance with the provisions of the bill unless to do so would clearly violate their existing statutory authorizations." CONFERENCE REPORT, *supra* note 62, at 5.

67. *See, e.g.*, Daly v. Volpe, 326 F. Supp. 868 (W.D. Wash. 1971); Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alas. 1971).

68. 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972).

69. *See* F. ANDERSON, *supra* note 1, where the author states: "[d]espite certain important modifications and extensions, the *Calvert Cliffs'* interpretation has been accepted as the definitive judicial gloss on NEPA. It has been more frequently cited, analyzed, and relied upon than any other NEPA decision. . . ." *Id.* at 247 (footnotes omitted).

70. NEPA § 101, 42 U.S.C. § 4331 (1970).

71. 449 F.2d at 1112.

72. 449 F.2d at 1112. *Accord*, Environmental Defense Fund, Inc. v. Corps of Engineers (Tennessee-Tombigbee Waterway), 492 F.2d 1123,1139 n.33 (5th Cir. 1974).

73. 449 F.2d at 1112. *Accord*, Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 787 (1976).

74. 449 F.2d 1112.

75. *Id.* at 1115.

on the statutes "action-forcing" phrase (*i.e.*, "to the fullest extent possible"), Judge Wright continued:

> We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.[76]

Judge Wright concluded his analysis of NEPA by outlining the function to be performed by the courts. NEPA's procedural mandate requires a "careful and informed decision-making process and creates judicially enforceable duties."[77] NEPA's substantive provisions, however, do not provide a basis upon which a reviewing court can reverse an agency decision on the merits, "unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[78] If the agency's decision was reached "without individualized consideration and balancing of environmental factors — conducted fully and in good faith — it is the responsibility of the courts to reverse."[79] In short, Judge Wright declared that environmental protection under NEPA was to be achieved by adequate decision-making procedures, rather than by assuring particular substantive results.

III. JUDICIAL REVIEW

Whether the SEC reached its decision not to promulgate new disclosure rules in a manner which complied with NEPA's mandate is one of the issues which the court of appeals must decide in the *NRDC v. SEC II* appeal. The district court opined that the SEC had not complied.[80] In light of the SEC's challenge to the district court's decision, two questions must be answered by the court of appeals. First, whether the SEC's decision is subject to judicial review? Second, if subject to judicial scrutiny, what is the proper scope of review?

It is generally stated that in the absence of a statutory prohibition[81] there is a strong presumption that Congress did not intend to preclude judicial review of an agency decision.[82] An agency bears a heavy burden

76. *Id.* at 1114.
77. *Id.* at 1115.
78. *Id.*
79. *Id.*
80. *See* notes 58-60 and accompanying text *supra.*
81. APA § 701(a)(1), 5 U.S.C. § 701(a)(1) (1976).
82. Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). "The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial

of overcoming the presumption in favor of reviewability.[83] Moreover, the mere absence of a grant of judicial review will not preclude it.[84] The general rule of reviewability is not, however, without exception. Where action is committed to agency discretion by law, judicial review is precluded.[85]

The federal securities laws contain no express preclusion of judicial review.[86] Accordingly, whether the Commission's decision not to promulgate new disclosure rules is committed to agency discretion by law is determinative of the availability of judicial review.

This issue was addressed by the court of appeals when NRDC attempted to obtain direct judicial review of Securities Act Release No. 5235.[87] The court of appeals ultimately dismissed the petition for review on the ground that the SEC's failure to grant NRDC's rulemaking petition was not a final order entitled to direct review in that court.[88] In so holding, the court did not decide that the Commission's action was committed to agency discretion by law. Rather, it merely held that the court of appeals was the wrong court to review the SEC's decision. The court stated:

> [w]hether the Commission has improperly delayed its action under NEPA or has improperly interpreted that Act are issues which may be resolved in the United States District Court for the District of Columbia where petitioner may proceed by appropriate action under the APA or by way of an action for declaratory judgment.[89]

The district court, in *NRDC v. SEC I,* found that underlying the court of appeals' conclusion was the strong implication that the SEC's decision not to promulgate new disclosure rules was not committed to agency discretion by law.[90] Accordingly, the district court granted review.

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review of final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." *Id.*

83. Dunlop v. Bachowski, 421 U.S. 560, 567 (1975).

84. Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.*

85. APA § 701(a)(2), 5 U.S.C. § 701(a)(2) (1976). Although this exception appears to "make action committed to agency discretion immune from judicial review . . . [s]uch an interpretation ignores the traditional prohibition against arbitrary and unreasonable exercises of discretionary authority. When the APA speaks of action committed by law to agency discretion, it means discretion to act reasonably." B. SCHWARTZ, ADMINISTRATIVE LAW 452 (1976). Accordingly, the Supreme Court has restricted the scope of the preclusion. *See, e.g.,* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

86. NRDC v. SEC I, 389 F. Supp. at 697.

87. *See* note 27 *supra.*

88. *See* 15 U.S.C. §§ 77i(a), 78y(a) (1976).

89. Natural Resources Defense Council v. SEC, No. 72-1148 (D.C. Cir. February 8, 1973).

90. 389 F. Supp. at 697. *See* Independent Broker-Dealer Trade Ass'n v. SEC, 442 F.2d 132 (D.C. Cir. 1971).

The district court's grant of review is amply supported by the APA and relevant case law. In addressing the exception from judicial review for action committed to agency discretion the Supreme Court has stated: "This is a very narrow exception . . . it is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "[91] Moreover, the Supreme Court has held that nonreviewability of agency action on the ground that there is no law to apply will not be lightly inferred. In *Barlow v. Collins,*[92] the Court allowed review of administrative action where the Secretary of Agriculture was empowered "to prescribe such regulations as he may deem proper to carry out the provisions of this chapter." In so holding, the Court rejected the Secretary's argument that by this broad grant of authority Congress had committed the content of the regulations wholly to his discretion. The Court stated that judicial review would be restricted "only upon a showing of 'clear and convincing evidence' of contrary legislative intent."[93]

Should the court of appeals ultimately reach the merits of the *NRDC v. SEC II* appeal it must decide the effect of NEPA on the SEC's disclosure rules. That determination necessarily involves an interpretation of NEPA's provisions as well as an analysis of the SEC's disclosure authority under the federal securities laws.[94] As for the courts role in interpreting the meaning of and the interplay between different federal legislation, the Supreme Court has stated:

> The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise. '[W]here the only or principal dispute relates to [statutory interpretation] . . . [the controversy]

91. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

92. 397 U.S. 159 (1970).

93. *Id.* at 167.

94. Additionally, the court must weigh opposing economic and social interests in light of a Congressionally declared national policy. As one commentator has stated:

> the bulk of the important questions in environmental cases call more for the talents and training of the courts and judges than for those of the administrative agencies and administrators. The basic reason is the very breadth of the questions, the requirement of balancing opposing economic and social interests. Such balancing and weighing require more art than science. There is no technical formula under which "the preservation of natural beauty and historic shrines" can be weighed against "the cost of a project." Whether construction of a major roadway, the effects of which are far beyond the capacity of a mere engineer to measure, would be in accordance with "the national policy that special efforts should be made to preserve the natural beauty of the countryside" is more for a court than a transportation department. Similarly, a court is better able, at least until definite standards have been worked out, to weigh the wilderness value of a national forest against the dollars to be realized from the cutting of its trees. It is also important to bear in mind what Professor Jaffe has described as the effort of the administrative agency, the "expert," to "advance [its] conception of policy, and to give it greater sanctity by embodying it in the seeming objectivity of an 'expert discipline.' "

Sive, *Some Thoughts of An Environmental Lawyer in the Wilderness of Administrative Law,* 70 COLUM. L. REV. 612, 629-30 (1970).

> presents issues on which the courts, and not [administrators], are relatively more expert.[95]

Keeping in mind the strong presumption in favor of reviewability, the narrowness of the exemption from review for matters committed to agency discretion,[96] and the court of appeals' decision which forcefully implies that the SEC failed to carry the burden of overcoming the presumption, it is submitted that the SEC's action was properly subject to judicial review.

In reviewing informal rulemaking proceedings,[97] such as that conducted by the SEC, the courts have invariably applied the "arbitrary and capricious" standard of review.[98] In the context of such proceedings the arbitrary and capricious standard is applied in reviewing an agency's factual basis for its decisions and in determining whether an agency's policy choice is rationally related to that factual basis.[99] Traditionally, the arbitrary and capricious standard was considered soft or cursory and required only that an agency act with rationality and consistency.[100] However, there has been a noticeable trend to apply the standard more rigorously.[101] This new approach was given its greatest effect in *Citizens to Preserve Overton Park v. Volpe*[102] in which the Supreme Court stated: "the generally applicable standards [of judicial review under the APA] require the reviewing court to engage in a *substantial inquiry.* Certainly, the [administrator's] decision is entitled to a presumption of regularity. . . . But that presumption is not to shield his action from a *thorough, probing, in-depth* review."[103] In determin-

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95. Barlow v. Collins, 397 U.S. 159, 166 (1970).

96. *See, e.g.,* Associated Elec. Co-op., Inc. v. Morton, 507 F.2d 1167 (D.C. Cir. 1974), *cert. denied,* 423 U.S. 830 (1975).

97. APA § 553, 5 U.S.C. § 553 (1976).

98. Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977); Amoco Oil Co. v. EPA, 501 F.2d 722 (D.C. Cir. 1974); City of Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972); Automotive Parts & Accessories Ass'n, Inc. v. Boyd, 407 F.2d 330 (D.C. Cir. 1968). It is apparent that the arbitrary and capricious standard applies to an agency's decision to promulgate rules as well as to an agency's decision not to promulgate rules. *See* Dunlop v. Bachowski, 421 U.S. 560 (1975).

99. The arbitrary and capricious standard is applied to agency policy choices however formal the proceeding. It also is applied in reviewing factual determinations in informal rulemaking proceedings. It is not applied in reviewing factual determinations in formal rulemaking proceeding. In that instance, the substantial evidence test is applied. *See* Note, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard,* 84 YALE L. J. 1750, 1751 (1975).

100. *See, e.g.,* Superior Oil Co. v. FPC, 322 F.2d 601 (9th Cir. 1963), *cert. denied,* 377 U.S. 922 (1964).

101. *See* South Terminal Corp. v. EPA, 504 F.2d 646, 655 (1st Cir. 1974); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 921 (1974); Essex Chem. Corp. v. Ruckelshaus, 486 F.2d 427, 434 (D.C. Cir. 1973); City of Chicago v. FPC, 458 F.2d 731, 742-43 (D.C. Cir. 1971); Automotive Parts & Accessories Ass'n, Inc., 407 F.2d 330, 338 (D.C. Cir. 1968).

102. 401 U.S. 402 (1971).

103. *Id.* at 415 (emphasis added).

ing whether an agency decision is arbitrary and capricious, the reviewing court "must decide if the agency failed to consider all relevant factors in reaching its decision, or if the decision itself represent[s] a clear error in judgment."[104] Where NEPA is involved, the court must resolve two questions. First, it must "determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors."[105] Second, the court must determine, according to the standards set forth in NEPA's substantive and procedural provisions, "whether the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[106]

Judicial resolution of the first question provides the means by which the courts can scrutinize the adequacy of agency procedures employed in effectuating NEPA's mandate. NEPA demands agency procedures which take into account environmental values in the decision-making process. The courts have held that the most effective method of ensuring the integrity of the decisional process envisaged by NEPA is to open the procedure to public scrutiny.[107] However, the courts must be cognizant of the policy compromises that take place in the decisional process. "The acceptability of these policy compromises must be tested by the public and the executive and legislative branches of the government in the political crucible."[108] It is incumbent upon the courts, however, to ensure that the procedures followed by an agency in its decisional process result in a candid disclosure of the environmental considerations taken into account. If the record reveals that the agency has, in good faith, taken a "hard look" at all environmental factors, the court should not interject itself into the province of the administrative agency.[109] However, if the court is unsatisfied that the agency has objectively considered all environmental factors, it should remand to the agency for more complete justification.

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104. Environmental Defense Fund, Inc. v. Corps of Eng'rs (Gillham Dam), 470 F.2d 289, 300 (8th Cir. 1972).

105. *Id.*

106. *Id.*

107. Environmental Defense Fund, Inc. v. Corps of Eng'rs (Gillham Dam), 325 F. Supp. 728, 759 (E.D. Ark. 1970), *aff'd,* 470 F.2d 289 (8th Cir. 1972); Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 351 (8th Cir. 1972); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972); (S.D. Tex. 1973), *rev'd on other grounds sub nom.* Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974).

108. Comment, *Implementing the National Environmental Policy Act Through Rulemaking: The Implications of Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission,* 126 U. PA. L. REV. 148, 177 (1977) [hereinafter cited as *Implementing NEPA*].

109. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972); Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 353 (8th Cir. 1972); Scientists' Inst. For Pub. Info., Inc. v. AEC, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

Judicial resolution of the second question allows the courts to ensure that some minimum regard for NEPA's substantive policy has been shown by the agency.[110] Although NEPA's substantive policy is broad and stated in general terms, it does set forth sufficiently clear criteria to permit meaningful, but limited, judicial review.[111] A court is required to make a "searching and careful inquiry"[112] into the facts supporting the agency's decision. The purpose of the inquiry is to determine if the agency's decision is based on a consideration of relevant factors and if there is a rational relation between the facts found and the ultimate decision.[113] However, "[t]he court is not empowered to substitute its judgment for that of the agency."[114] Nevertheless, where an agency decision is at odds with NEPA's environmental protection policy, the courts should require the agency to justify the benefits of its decision against the costs. The extent of justification required should be "tempered [by] a full understanding of the institutional limitations"[115] of an agency, yet bolstered by a recognition of "the bureaucracy's previous poor environmental track record."[116]

The court in *NRDC v. SEC II* concluded that the procedures used by the SEC in reaching its decision were defective and that the reasons given to support that decision were not sustainable by the record.[117] First, the court found that the SEC had not complied with the required full, good faith consideration. Specifically, the court held that the Commission had failed to consider environmental disclosures to shareholders in the context of proxy solicitation[118] apart from disclosures to investors in the context of securities purchases.[119] As a result, in light of the SEC's own admission that the two different types of disclosure have different emphasis,[120] the Commission's failure to separately assess the cost-benefits of each was held to be arbitrary and capricious.[121]

Second, the court concluded that the Commission's rejection of the proposed disclosure rules was not "supported by any underlying find-

110. *See, e.g.*, Environmental Defense Fund, Inc. v. Corps of Eng'rs (Gillham Dam), 470 F.2d 289 (8th Cir. 1972).

111. Environmental Defense Fund, Inc. v. Corps of Eng'rs (Tennessee-Tombigbee Waterway), 492 F.2d 1123, 1139 (5th Cir. 1974).

112. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

113. Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976).

114. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

115. *Implementing NEPA, supra* note 107, at 182.

116. *Id.*

117. 432 F. Supp. at 1205.

118. *Id. See* Exchange Act § 14(a), 15 U.S.C. § 78n(a) (1976).

119. 432 F. Supp. at 1205.

120. Securities Act Release No. 5627, 40 Fed. Reg. at 51,659.

121. 432 F. Supp. at 1205-06.

ings of fact."[122] Additionally, the Commission was held to have acted arbitrarily and capriciously in failing to engage in a consideration of the costs versus the benefits of developing alternative disclosure standards or guidelines and in failing to seek outside assistance in order to develop disclosure standards.[123]

Third, the court concluded that the SEC was arbitrary and capricious in failing to comply with NEPA's strict procedural mandate. The court stated that, "[a]t the very least, NEPA requires the Commission either to develop such expertise as is necessary to consider fully the benefits and costs of environmental disclosure or to involve in its decision-making process such other agencies as have the requisite expertise."[124] Therefore, the Commission's assertion of a lack of expertise as justification for not developing fully the factual record and its deference to other agencies which it believed responsible for establishing environmental disclosure requirements were insufficient to support its conclusions.[125]

Judge Richey's opinion in *NRDC v. SEC II* exemplifies the thorough, probing and in-depth review that was contemplated by the Supreme Court in the *Overton Park* case. The detailed findings set forth in the court's opinion evidence serious defects in the SEC's decisional process. To sustain the SEC's argument that it has fully complied with NEPA's mandate would make the Commission the final arbiter of its obligation under that Act. Such a result surely was not contemplated by Congress in passing NEPA or by the Supreme Court in the *Overton Park* case.[126]

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122. *Id.* at 1206.

123. *Id.*

124. *Id.* at 1207.

125. *Id.* at 1207-08.

126. The recent Supreme Court case of Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 46 U.S.L.W. 4301 (April 3, 1978), does not compel a different resolution of the administrative law issue raised in the *NRDC v. SEC II* appeal. The *Vermont Yankee* case arose when various petitioners challenged: 1) the AEC's promulgation of a rule regarding the environmental effects associated with the uranium fuel cycle for nuclear power reactors and 2) the AEC's ruling that energy conservation need not be considered in its grant of a construction permit for the particular reactor in question.

The Court of Appeals for the District of Columbia Circuit held that although the procedures used by the AEC in its rulemaking complied with the procedures required by the APA, 5 U.S.C. § 553 (1976), the proceedings were insufficient. The court also held that the AEC's justification for its failure to consider energy conservation in its grant of the construction permit was inadequate.

In overturning the court of appeals decision, the Supreme Court held that where an agency's rulemaking proceeding complies with the procedural requirements of the APA, a reviewing court cannot invalidate the rule promulgated because the court believes that the agency should have adopted procedures in excess of the minimum required by the APA. However, the Supreme Court stated that if the reviewing court finds that the rule promulgated by the agency was arbitrary and capricious within the meaning of the APA, 5 U.S.C. § 706 (1976), the reviewing court can and should hold the rule invalid. With regard to the AEC's failure to consider energy conservation in its grant of the construction permit, the Supreme Court stated that "[c]ommon sense . . . teaches us that the detailed statement of alternatives cannot be found wanting simply because the agency

It must be noted that the court of appeals will reach a consideration of the effect of NEPA's mandate on the SEC's disclosure requirements only if it first concludes that the district court properly subjected the Commission's decision to judicial review. Additionally, the court of appeals may sustain the district court on the issue of judicial review and remand the case to the SEC for further consideration in accordance with the district court's opinion. However, should the court of appeals decide to provide the SEC with guidelines as to NEPA's effect on the Commission's disclosure rules the following analytic framework is suggested.

IV. SCOPE OF SEC DISCLOSURE

The federal securities laws empower the SEC to regulate public offerings of securities as well as subsequent trading in already issued securities. The Securities Act of 1933, which regulates initial public offerings of securities, prohibits offers and sales of securities which are not registered with the SEC.[127] The Securities Exchange Act of 1934, which regulates trading in already issued securities, governs the different participants in the securities trading process.[128] In order to ensure that the basic purposes of the federal securities laws — public availability of adequate reliable information about publicly offered securities and companies with publicly traded securities — are carried out, each act imposes substantial disclosure requirements on registering corporations.[129] Additionally, each act contains provisions subjecting

failed to include every alternative device and thought conceivable by the mind of man." 46 U.S.L.W. at 4309. The Court went on to observe that the concept of energy conservation was "an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood." *Id.* In such situations it is incumbent on the petitioners to bring to the attention of the agency the various alternatives "before any lack of agency response or consideration becomes of concern." *Id.* As the petitioners failed to do so, the AEC's decision not to consider energy conservation was justified.

In the *NRDC v. SEC II* appeal the procedures used by the SEC are not at issue. The question which must be resolved is whether the SEC was arbitrary and capricious in failing to promulgate the proposed disclosure rules. And, as the Supreme Court stated, that is a proper decision for a reviewing court. Additionally, the SEC was not asked to consider all alternatives known to man; rather, it was asked to evaluate five proposals. The concept involved in the proposals — full disclosure under the federal securities laws — is not an evolving one vis a vis energy conservation, and the petitioners did not fail to bring to the attention of the SEC the various alternatives.

127. Securities Act § 5, 15 U.S.C. § 77e (1976).

128. Exchange Act § 12, 15 U.S.C. § 78*l* (1976) (requires any issuer which has securities traded on a national securities exchange to register with SEC); Exchange Act § 13, 15 U.S.C. § 78m (1976) (requires registrants under § 12 to file periodic reports with SEC); Exchange Act § 14, 15 U.S.C. § 78n (1976) (regulates solicitation of proxies from shareholders); Exchange Act § 15, 15 U.S.C. § 78o (1976) (requires officers, directors and 10% shareholders of a § 12 registrant to report his or her purchases and sales of registrant's securities); Exchange Act §§ 5, 6, 19, 15 U.S.C. §§ 78e, 78f, 78s (1976) (requires national securities exchanges to register with SEC).

129. *See, e.g.*, Securities Act Forms S-1, S-7, S-9, 17 C.F.R. §§ 239.11, 239.26, 239.22 (1977); Exchange Act Forms 10, 10k, 8k, 17 C.F.R. §§ 249.210, 249.310, 249.308 (1977).

registrants to specified civil liabilities for filing or disseminating required disclosure documents which contain false or misleading statements,[130] as well as general provisions prohibiting fraudulent, manipulative and deceptive practices in the issuance, purchase and sale of securities.[131]

Since the federal securities laws are "quite sketchy or ambiguous in many important areas" the SEC is invested with broad rulemaking authority.[132] The federal securities laws generally empower the Commission to require public corporations to disclose such information as it finds to be "necessary or appropriate in the public interest or for the protection of investors."[133] All rules promulgated by the SEC under this authority, as well as the various disclosure documents which the Commission's rules require to be filed, have the force of law.[134] As a result, filing corporations are subject to legal sanctions for omissions or misstatements of fact which are required to be disclosed under the Commission's various disclosure rules. The type of the legal sanction which is imposed for such omissions or misstatements depends on the nature of the compelled disclosure. If the disclosure involves information which the Commission deems material,[135] the registering corporation will be subject to civil liability.[136] On the other hand, if the disclosure involves information which the Commission deems "necessary or appropriate in the public interest or for the protection of investors," a registrant will only be subject to SEC enforcement proceedings.[137] As will be seen from the following discussion, the nature of the legal sanction which will be imposed on registrants for omissions or misstatements of required disclosure is of primary importance in determining the extent of required disclosure.

The conceptual foundation underlying the federal securities laws' disclosure scheme has been traced to Louis D. Brandeis.[138] In theory, by requiring full disclosure, investors would be better able to make in-

130. Securities Act §§ 11, 12, 15 U.S.C. §§ 77k, 77*l* (1976); Exchange Act §§ 13, 14, 15 U.S.C. §§ 78m, 78n (1976).

131. Securities Act § 17, 15 U.S.C. § 77q (1970); Exchange Act §§ 9, 10, 15 U.S.C. §§ 78i, 78j (1976).

132. D. RATNER, SECURITIES REGULATION 17 (1975).

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

134. D. RATNER, *supra* note 130, at 18.

135. *See* notes 143-50 and accompanying text *infra.*

136. *See* note 130 *supra.*

137. Securities Act § 20, 15 U.S.C. § 77t (1976); Exchange Act § 21, 15 U.S.C. § 78u (1976).

138. 1 L. LOSS, SECURITIES REGULATION 124 (2d ed. 1961).

In *Other People's Money,* published in 1914, (Brandeis) had strongly urged publicity as a remedy for social and industrial diseases generally, and excessive underwriters' charges specifically. "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." At the same time, the law should not try to keep investors from making bad bargains; it should not even undertake (except incidentally in connection with railroads and public service corporations) to fix bankers' profits. He cited the Pure Food

formed investment decisions.[139] Moreover, individuals and companies involved in questionable practices would be deterred from engaging in such conduct in light of public disclosure.[140] However, a law based upon disclosure as a means of affording public protection has certain limitations. Full disclosure under the federal securities laws, if taken literally, would be too time consuming, expensive and unmanageable to accomplish the laws' principal purpose.[141] In order to limit the amount of information that must be disclosed, thereby assuring the efficacy of the disclosure system, the SEC has formulated the concept of materiality as the determinant of required disclosure.[142]

The concept of materiality is nowhere mentioned in the federal securities laws. However, as the concept is the cornerstone of the disclosure system, the SEC has attempted to broadly define the term in its rules and regulations. Material information is that about which the average prudent investor ought reasonably be appraised before buying or selling the security registered.[143] Whether information is material in a particular context is determined by reference to a three part test.[144]

The significance of information initially depends on to whom the information is to be disclosed. Consistent with the principal purpose of disclosure — protection of investors — the materiality test first looks to the impact the disclosure will have upon the average prudent investor. The test is objective in that it focuses on the reasonable investor rather than the subjective predilections of an individual investor.[145] Next, the materiality test considers the kind of impact the information will have on an investor's decisional process in the particular context. It has been held that the average prudent investor need only have added such information to his or her general fund of knowledge in making the decision for it to be material.[146] The information need not have caused the in-

Law as an example: it does not guarantee quality or prices, but it does help the consumer to judge quality by requiring the disclosure of ingredients.

Id.

139. Hewitt, *Developing Concepts of Materiality and Disclosure,* 32 BUS. LAW. 887, 891 (1977).

140. *Id.*

141. *Id.* at 892.

142. *See* HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95th Cong., 1st Sess., REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION (Comm. Print 1977). "[Materiality] serves a variety of functions, operating both as a principle for inclusion and exclusion of information in investor oriented disclosure documents and as a standard for determining whether a communication (filed or otherwise) omits or misstates a fact of sufficient significance that legal consequences should result." *Id.* at 320.

143. Securities Act Rule 405, 17 C.F.R. § 230.405(*l*) (1977); Exchange Act Rule 12b-2, 17 C.F.R. § 240.12b-2(j) (1977); SEC Regulation S-X, Rule 1-02, 17 C.F.R. § 210.1-02(n) (1977).

144. *See* Hewitt, *supra* note 139, at 892-97. For a discussion of this test in the context of proxy solicitation *see generally TSC Industries, Inc. v. Northway, Inc.: The Developing Standard of Materiality in Rule 14a-9 Actions,* 13 NEW ENGLAND L. REV. 151 (1977).

145. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976).

146. *Id.* at 449; Mills v. Electric Auto-Lite Co., 396 U.S. 375, 384 (1970).

vestor to change his or her decision about the particular transaction.[147] Finally, the significance of a particular fact depends upon the degree of probability that the fact has had an impact on the investor's decisional process. It has recently been determined that for a fact to be material there must be "a substantial likelihood that, under all the circumstances, the . . . fact would have assumed actual significance in the deliberations of the reasonable [investor]."[148] A fact that satisfies the three part test is deemed material and must be disclosed under the federal securities laws.[149]

While materiality serves as a basis for required disclosures and resulting liability, it basically "limits the disclosure of facts to those which are 'material,' or 'significant,' or 'important.' "[150] The SEC has concluded, however, that investors are primarily interested in information which is economically significant.[151] As a result, the Commission has exercised its disclosure authority primarily "to require the dissemination of information which is or may be economically significant."[152] In so doing, the SEC has inextricably intertwined considerations of materiality and economic significance.

When a particular fact is both economically significant and material the Commission requires it to be disclosed.[153] In making that determination, the SEC has implicitly concluded that the costs of economically significant, material disclosures to registrants and their shareholders (*i.e.*, potential civil liability) is not unreasonable as the disclosure of such information is necessary to ensure investor protection.[154]

At the other end of the disclosure spectrum, the SEC does not require registrants to disclose non-economically significant, non-material information. The issue of whether NEPA authorizes the Commission to impose non-economically significant, non-material environmental disclosures on corporations solely to promote environmental goals was

147. TSC Indus., Inc. v. Northway, Inc., 426 U.S. at 449; Mills v. Electric Auto-Lite Co., 396 U.S. at 384 (1970).

148. TSC Indus., Inc. v. Northway, Inc., 426 U.S. at 449.

149. NRDC v. SEC II, 432 F. Supp. at 1200.

150. Hewitt, *supra* note 139, at 892.

151. Securities Act Release No. 5627, 40 Fed. Reg. at 51,664 (1975).

152. *Id.* at 51,658.

153. The Commission has stated:

> The Commission's experience over the years in proposing and framing disclosure requirements has not led it to question the basic decision of the Congress that, insofar as investing is concerned, the primary interest of investors is economic. After all the principal, if not the only reason, why people invest their money in securities is to obtain a return. A variety of other motives are probably present in the investment decisions of numerous investors but the only common thread is the hope for a satisfactory return, and it is to this that a disclosure scheme intended to be useful to all must be primarily addressed.

Id. at 51,664.

154. *Id.* at 51,659.

recognized by the court in *NRDC v. SEC II.* The court ultimately did not decide the issue "for the Commission itself recognized that those investors interested in environmental disclosure were 'virtually unanimous' in stating that such disclosure would reveal information of *economic significance* to them as investors."[155] However, the court added "there is no reason to think that NEPA does not confer such substantive authority on the Commission."[156] Notwithstanding the courts dicta that the Commission is authorized to require disclosures of this nature, registrants should not be compelled to disclose such information. In reviewing the disclosure of environmental matters the Commission must keep in mind the primary purpose of the federal securities laws — investor protection and promotion of the public interest. Although the dual nature of that purpose may not be promoted by disclosure of the same types of information, neither end would be advanced by the disclosure of voluminous information that has no relation to the goals of the federal securities laws. The costs of such disclosures to corporations would be prohibitive and the benefits to investors and the public would be minimal at best.

Where the nature of the information sought to be disclosed places it at either extreme of the disclosure spectrum, the aforementioned suggested results comport with the SEC's conception of its disclosure authority. However, where the nature of the information is such that it falls somewhere in between the two extremes of the disclosure spectrum, the SEC's interpretation of its disclosure authority is at odds with the purpose of the federal securities laws. For the sake of clarity, the following analysis divides the latter type of desired information into two categories: economically significant, non-material information and non-economically significant, material information.

A. Economically Significant, Non-Material Information

The SEC generally has not required disclosure of information that it does not consider material.[157] For example, the Commission's present disclosure rules require that environmental proceedings brought by other than a governmental authority "shall be described [by the registrant only] if such proceeding . . . involves primarily a claim for damages exceeding 10 percent of the current assets" of the company.[158] Just how economically significant such a proceeding may be and yet still be below the SEC's conception of materiality is best exemplified by a

155. 432 F. Supp. at 1204-05 n.56.
156. *Id.*
157. NRDC v. SEC II, 432 F. Supp. at 1200-01 n.26.
158. *See* note 28 *supra.*

minor intrusion into the discipline of statistics. At the close of the 1976 fiscal year the 500th largest[159] industrial corporation in the United States — Foxboro — had current assets of $280,272,000.[160] For an environmental proceeding brought by a non-governmental authority to be material under the SEC's present rules, the damage claim would have to exceed $28,027,200. Any damage claim for less than that amount would not have to be disclosed by that particular company. It is doubtful that anyone, including the SEC, would maintain that the disclosure of the proceeding is not material.

Notwithstanding the obvious economic significance of such a proceeding, the SEC generally has not required disclosure based on the purported non-materiality of such information. Yet the SEC does have broad authority under the federal securities laws to require disclosure of economically significant, non-material information.[161] In *NRDC v. SEC II,* the Commission expressly adopted that position and the court agreed that the SEC has the power to require such disclosure.[162] In support of its conclusion, the court cited *TSC Industries, Inc. v. Northway, Inc.,*[163] in which the Supreme Court stated that the Commission has the authority to promulgate disclosure rules "even absent a showing that, in every case, the matter rises to the level of being economically material."[164]

The SEC should not be deterred from requiring disclosure because the information sought does not always rise to the level of being material. Even if the Commission determines that the costs to corporations in designating the information material (*i.e.,* civil liability) outweigh the benefits of the disclosure to investors, it need not refrain from requiring such disclosure. In instances where the Commission reaches that determination, it can require disclosure as being "necessary or appropriate in the public interest or for the protection of investors."[165] By so doing, the Commission will not expose corporations to potential civil liability.[166]

B. Non-Economically Significant, Material Information

The disclosure of material information in the absence of economic impact generally is not required by the Commission.[167] For example,

159. The Fortune Directory of the 500 Largest U.S. Industrial Corporations, FORTUNE, May 11, 1977, at 365.
160. *Id.* at 384.
161. NRDC v. SEC II, 432 F. Supp. at 1200-01 n.26.
162. *Id.*
163. 426 U.S. 438 (1976).
164. *Id.* at 463.
165. *See* note 12 and accompanying text *supra.*
166. NRDC v. SEC II, 423 F. Supp. at 1200-01 n.26.
167. Securities Act Release No. 5627, 40 Fed. Reg. at 51,658-60 (1975).

one of NRDC's proposed disclosure amendments sought "comprehensive disclosure of the environmental effects of corporate activities."[168] The SEC rejected the proposal because the disclosure sought did not provide a meaningful economic index upon which to judge a corporation's environmental activities.[169] Implicit in the SEC's decision was a reluctance to expose registrants to potential civil liability where the information sought, while being material, was not economically significant. The Commission stated that "the additional costs and burdens [of such disclosure] greatly outweigh resulting benefits to investors and to the environment."[170]

The SEC's conclusion can be criticized on two grounds. First, the Commission takes an inordinately circumscribed interpretation of its disclosure authority where the information sought is non-economically significant. Second, the Commission's conclusion unjustifiably assumes that economic significance is of primary importance regardless of the context in which the disclosure is sought. The following analysis suggests a framework in which the SEC can require disclosure of non-economically significant, material information without modifying its interpretation of the term "material" and without unjustly exposing registrants to potential civil liability.

The Commission interprets its disclosure authority as not extending to the promotion of "goals unrelated to those underlying"[171] the federal securities laws. Furthermore, the Commission construes this grant of authority to require disclosure solely for investor protection.[172] By so defining its authority, the SEC has read "disclosure necessary or appropriate in the public interest or for the protection of investors" as a *single* standard. Disclosure which is necessary or appropriate in the public interest is that which is necessary or appropriate for the protection of investors. Since the Commission has determined that investors are primarily interested in economically significant information, it generally requires disclosure of that type of information.[173] However, the Commission seems to have taken an unduly restricted position in interpreting its grant of authority.[174] Environmental disclosures resulting

168. *See* note 43 and accompanying text *supra*.

169. *See* note 45 and accompanying text *supra*.

170. Securities Act Release No. 5627, 40 Fed. Reg. at 51,662 (1975).

171. *Id.* at 51,660.

172. *Id.*

173. *See* notes 151-52 and accompanying text *supra*.

174. *See, e.g.*, Flint Ridge Dev. Corp. v. Scenic Rivers Ass'n, 426 U.S. 775 (1976). In *Flint Ridge*, the Supreme Court interpreted the grant of rulemaking powers to the Department of Housing and Urban Development (HUD) under the Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720 (1970). HUD's rulemaking powers under the Act were adopted from the SEC's rulemaking authority under the federal securities laws. The Court specifically stated that HUD could adopt a broad spectrum of rules requiring the disclosure of environmental information if it

in indirect regulation of corporate conduct are appropriate in the public interest.[175] NEPA attests to this fact. While the court in *NRDC v. SEC II* held that NEPA alone cannot force the Commission to impose substantial environmental disclosure requirements on corporations,[176] NEPA can and should require the SEC to give effect to its grant of authority which provides for disclosure in the public interest.[177]

Even though the Commission has required disclosure only when the information sought is economically significant — as that is the type of information in which investors are allegedly interested — somewhat different considerations must be taken into account when disclosure is made to shareholders in a situation involving a proxy solicitation.[178] Disclosure made in this context is "intended to promote 'the free exercise of the voting rights of stockholders.' "[179]

Fair exercise of corporate suffrage is achieved by requiring disclosure of matters that will be acted upon at the shareholders' meeting[180] and by publicizing shareholders' proposals.[181] The proxy rules require management to include shareholders' proposals when soliciting proxies if the proposals are significantly related to the business of the issuer.[182] And, as the Commission has stated, "the primacy of economic matters, particularly with respect to shareholders proposals, is somewhat less."[183] The legislative history of the proxy rules also indicates that economically significant matters are not the only information required to be disclosed when soliciting proxies.

> In order that the stockholder may have adequate knowledge as to the manner in which his interests are being served, it is essential that he be enlightened not only as to the financial condition of the corporation, but also as to the major questions of policy, which are decided at stockholders' meetings.[184]

Although the Commission refrained from requiring certain environmental disclosures because they lacked economic significance,[185] it appears that such information is material, within the accepted meaning

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determined that such disclosure would protect investors *or* be in the public interest. *Id.* at 792.

175. *See, e.g.*, Note, *The Ethical Investor and the SEC: Conflict over the Proper Scope of the Shareholder's Role in the Corporation*, 2 J. CORP. L. 115 (1976).

176. 432 F. Supp. at 1198.

177. For an article which develops this point, *see* Sonde & Pitt, *supra* note 4.

178. Exchange Act § 14(a), 15 U.S.C. § 78n(a) (1970).

179. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 (1970).

180. Exchange Act Rule 14a-3, 17 C.F.R. § 240.14a-3 (1977).

181. Exchange Act Rule 14a-8, 17 C.F.R. § 240.14a-8 (1977).

182. *See* Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

183. Securities Act Release No. 5627, 40 Fed. Reg. at 51,659 (1975).

184. S. REP. NO. 73-792, 73d Cong., 2d Sess. 12 (1934).

185. *See generally* Securities Act Release No. 5627, 40 Fed. Reg. 51,656 (1975).

of that term,[186] in the context of proxy solicitation. It also is apparent that economic significance is not a prerequisite to disclosure in that context.[187] As the court in *NRDC v. SEC II* opined, the SEC's restricted interpretation of its authority to require disclosures in the proxy context "was not the product of the 'imaginative exercise' of its rulemaking authority envisioned by NEPA."[188] Moreover, there is a strong argument that economic significance is not necessary to require disclosure in the investment decision context. A broad interpretation of its disclosure authority to require disclosure in the "public interest" and a recognition that NEPA's mandate promotes the "public interest," provide a sufficient basis upon which the SEC may predicate environmental disclosure.

The Commission must be sensitive, however, to the fact that corporations will be exposed to potential civil liability if it requires disclosure by deeming the information material.[189] In the context of proxy solicitation, where economic significance is admittedly less than in the investment context, there appears to be no unfairness in subjecting a corporation to civil liability for omissions or misstatements of non-economically significant, material information. Additionally, a registrant is more aware of the significance of non-economic matters in the proxy solicitation context.[190] However, in the investment decision context it may not be fair to subject a corporation to civil liability for omissions or misstatements of non-economically significant, material information. The Commission may avoid this potential unfairness by requiring such disclosure as in the "public interest," rather than by deeming the information material. In so doing, the Commission would merely subject a corporation to potential enforcement proceedings.[191] However, in order to delimit the bounds of the "public interest," the Commission should require an affirmative Congressional mandate such as NEPA before requiring disclosure under this construction of its authority. In this manner, the SEC can distinguish from many non-economic concerns those matters which will be required to be disclosed as appropriate in the "public interest."

V. CONCLUSION

In the *NRDC v. SEC II* appeal, the court must resolve two major

186. *See* notes 143-50 and accompanying text *supra.*

187. *See* notes 183-84 and accompanying text *supra.*

188. 432 F. Supp. at 1208.

189. *See* notes 135-36 and accompanying text *supra.*

190. *See, e.g.,* Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot,* 404 U.S. 403 (1972).

191. *See* note 137 and accompanying text *supra.*

issues which will have substantial impact in the fields of administrative law and securities law. Initially, the court must address the administrative law issue. Although the proper standard of review is the "arbitrary and capricious" standard, it remains to be seen whether the court will conduct a searching and careful inquiry in its application of that standard. Hopefully, the court will, for if not, affirmative declarations of Congressional policy, such as NEPA, will be no more than mere utterances in the halls of the bureaucracy.

If the court sustains NRDC's argument it must decide the extent to which NEPA requires the SEC to impose environmental disclosures. It is submitted that both the interests of investor and environmental protection would be promoted by interpreting the Commission's disclosure authority as requiring disclosures which are either economically significant or material, but not necessarily both. By so construing its disclosure authority, the Commission could fulfill its obligation under the federal securities laws as supplemented by NEPA.

ARTHUR H. MILLER

Wolman v. Walter:[1] State Aid to Parochial Schools — Is the Wall Between Church and State Crumbling?

For years, the Supreme Court of the United States has grappled with the distinction between state aid to nonpublic schools that is constitutionally permissible and that which exceeds the outermost limits of the establishment clause.[2] The Court's recent decision in *Wolman v. Walter*[3] clearly illustrates that the constitutional mandate, "Congress shall make no law respecting an establishment of religion"[4] is not an absolute edict of *no law,* but rather an equivocal provision subject to the Court's interpretation.[5] As a result of the Court's liberal construction of the establishment clause in cases concerning state aid to nonpublic schools, the wall between church and state has ceased being the "high and impregnable"[6] obstacle Justice Black noted in *Everson v. Board of Education*[7] and has become a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[8]

Wolman v. Walter originated in the United States District Court for the Southern District of Ohio.[9] Citizens and taxpayers of Ohio sought a permanent injunction against expenditures of state funds for various nonpublic school programs.[10] In addition to a permanent injunction, they sought a declaratory judgment that the pertinent Ohio statute

1. 433 U.S. 229 (1977).
2. U.S. CONST. amend. I.
3. 433 U.S. 229 (1977).
4. U.S. CONST. amend. I.
5. *See* Kauper, *The Supreme Court and the Establishment Clause: Back to Everson,* 25 CASE W. RES. L. REV. 107, 128 (1974).
6. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).
7. *Id.*
8. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).
9. Wolman v. Essex, 417 F. Supp. 1113 (S.D. Ohio 1976).
10. *See* OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1976).

violated the establishment clause of the first amendment applicable to states via the fourteenth amendment.[11] The district court denied these requests.[12] As appellants, they faired poorly in the Supreme Court. A permanent injunction did not issue, many facets of the statute were upheld,[13] and the Court permitted substantial aid to flow to nonpublic schools which were ninety-six per cent sectarian.[14]

This comment begins with the historical development of the constitutional test regarding state aid to nonpublic schools.[15] The *Walter* decision is then discussed in conjunction with the present standard of review. Test alternatives are suggested, and the potential dangers to minority religious groups and the possibility of inadvertently establishing *one* religion with tax supporting dollars are explored.[16] The comment concludes with a brief analysis of the prospects for state aid to nonpublic schools.

I. HISTORICAL BACKGROUND

The Court's present standard of review regarding state aid to nonpublic schools was developed in a series of cases beginning with the general welfare model of *Everson v. Board of Education*[17] and culminating in the three-part test used in *Lemon v. Kurtzman.*[18]

A. The General Welfare Model

In *Everson v. Board of Education,*[19] the Supreme Court first articulated its policy of maintaining a "high and impregnable"[20] wall between church and state in cases concerning state aid to nonpublic schools. A New Jersey statute[21] authorized local school districts throughout the state to provide transportation for all children to and from school. Nonpublic school children were included under the

11. The first amendment was made applicable to the states via the fourteenth amendment in Cantwell v. Connecticut, 310 U.S. 296 (1940).

12. 417 F. Supp. at 1125.

13. *See* notes 86-88 and accompanying text *infra.*

14. *See* note 166 *infra.*

15. For the purposes of this article, nonpublic schools will include only sectarian elementary and secondary schools. The issues arising in regard to state aid to nonpublic, nonsectarian schools or to colleges and universities will not be considered. For cases involving state aid to higher education, *see* Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); and Tilton v. Richardson, 403 U.S. 672 (1971). For articles involving nonpublic, nonsectarian schools, *see* Note, *The Ivory Tower Under Siege,* 23 LOY. L. REV. 264 (1977); Hilton, *Race, Religion, and the Constitutional Restraints on Private Schools,* 30 RUTG. L. REV. 329 (1977).

16. *See* p. 568 *infra.*

17. 330 U.S. 1 (1947).

18. 403 U.S. 602 (1971).

19. 330 U.S. 1 (1947).

20. *Id.* at 18.

21. 18 N.J. REV. STAT. ch. 14, § 8 (West Cum. Supp. 1941).

statute, and their parents were reimbursed for money spent for public transportation. The Court, stating that, "[n]either a state nor the Federal Government can set up a church"[22] emphasized that the first amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers."[23] The statute was upheld as a neutral measure since it neither aided nor penalized the sectarian schools but was designed to afford safe travel for all school children.[24]

B. Secular Legislative Purpose and Primary Effect

In 1963, in *School District of Abington v. Schempp,*[25] the Supreme Court was asked to rule on the constitutionality of a Pennsylvania statute which required "[a]t least ten verses from the Holy Bible [to] be read without comment, at the opening of each public school day. . . ."[26] The Court held the statute violative of the first amendment[27] despite a clause authorizing children to be excused from the readings. In its rationale, the Court utilized a two-part test.[28] The first component required that the statute have a secular legislative purpose; the second required that the purpose and the primary effect of the enactment neither advance nor inhibit religion.[29]

Five years later, the Supreme Court decided *Board of Education v. Allen.*[30] In the majority opinion written by Mr. Justice White, the Court upheld the constitutionality of a New York statute which authorized each school district to purchase textbooks, for the purpose of lending them to nonpublic school pupils in grades seven through twelve, upon the individual request of the students or their parents.[31] The two-part test developed in *Schempp* was employed.[32] In ruling that

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22. 330 U.S. at 15.

23. *Id.* at 18.

24. Justice Black wrote for the majority. In upholding the bus transportation statute as a health and welfare measure he stated: "[W]e must not strike [a] state statute down if it is within the State's constitutional power even though it approaches the verge of that power." *Id.* at 16.

25. 374 U.S. 203 (1963).

26. PA. STAT. ANN. tit. 24, §§ 15-1516 (Purdon 1960).

27. 374 U.S. at 226-27.

28. *Id.* at 205.

29. *Id.* at 222.

30. 392 U.S. 236 (1968).

31. The statute states in pertinent part that:

> 3. In the several cities and school districts of the state, boards of education, trustees or . . . such boards shall have the power and duty to purchase and loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. . . .

N.Y. EDUC. LAWS § 701 (McKinney Supp. 1967).

32. 392 U.S. at 243. (The *Allen* case quotes *Everson. Everson* developed the test from *Schempp*). In Justice Harlan's concurring opinion in *Allen,* he suggested that the contested activ-

the statute met the constitutional requirements under this test, the Court followed the benefit to the child rationale initiated in *Everson.*[33] It presumed that textbooks were capable of a secular function,[34] that funds and books were not furnished to the parochial schools themselves and that the financial benefit flowed only to the parents and children.[35]

C. The Excessive Entanglement Test

In 1970, a third part was added to the constitutional test regarding state aid to nonpublic schools. In *Walz v. Tax Commission,*[36] tax exemptions for property used solely for religious purposes were held constitutionally permissible.[37] The Supreme Court went beyond the consideration of a secular legislative purpose and a primary effect which neither advanced nor inhibited religion, and further required that the end result or effect must not be an "excessive government entanglement with religion."[38] The Court reasoned that greater governmental involvement would result if the state were to tax the church since continuous surveillance is involved in taxation.[39]

This standard of excessive government entanglement was expanded in *Lemon v. Kurtzman.*[40] In that opinion, both the Rhode Island act authorizing state officials to supplement nonpublic school teachers' salaries[41] and the Pennsylvania act authorizing state reimbursement to nonpublic schools for textbooks, instructional materials and secular educational services[42] were found unconstitutional by the Supreme Court.[43] Chief Justice Burger, writing the majority opinion, added to the excessive governmental entanglement test a second prong, which he called "divisive political potential."[44] This new prong focuses on the likelihood for political debate and division along religious lines which will endanger the normal political process. The Court's inclusion of this factor as a ground for striking down the statutes stemmed from the large annual expenditure of public funds necessary to implement and

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ity may not involve the state with religion to a point which would give rise to "divisive influences". *Id.* at 249.

33. *See* note 22 and accompanying text *supra.*
34. 392 U.S. at 245.
35. *Id.* at 243-44.
36. 397 U.S. 664 (1970).
37. *Id.* at 680.
38. *Id.* at 674.
39. *Id.*
40. 403 U.S. 602 (1971).
41. R.I. GEN. LAWS ANN. §§ 16-51 (1971).
42. PA. STAT. ANN. tit. 24, §§ 5601-5609 (Purdon Supp. 1971).
43. 403 U.S. at 625.
44. *Id.* at 622-23.

maintain the statutes.[45] The Chief Justice observed that "we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[46] In this case, the potential for aligning and voting according to religious sympathies was great enough to hold that there would be excessive governmental entanglement with religion.[47]

D. No New Aid

Two months after *Lemon v. Kurtzman,* the Pennsylvania legislature enacted a statute[48] which authorized the partial reimbursement of tuition expenses incurred by parents in sending their children to nonpublic schools. By reimbursing parents rather than the nonpublic school, Pennsylvania officials attempted to avoid the objection of excessive governmental entanglement. In *Sloan v. Lemon,*[49] the Court, ignoring the benefit to the child rationale outlined in *Allen,*[50] held that the Pennsylvania statute had "failed to satisfy the parallel bar against laws having a primary effect that advances religion"[51] and therefore violated the establishment clause.

The Court, in *Levitt v. Committee for Public Education and Religious Liberty,*[52] continued to maintain the wall of separation between church and state and followed its policy of denying new aid by holding a New York statute[53] violative of the first amendment.[54] The Court disallowed lump sum payments by the state to nonpublic schools

45. The stakes are high in these state aid — establishment clause cases. The arguments and challenges are not over petty sums but over many tax dollars. In *Walter,* the initial biennial appropriation was eighty-eight million dollars. 433 U.S. at 233. In Levitt v. Committee for Public Education, 413 U.S. 472, 474 (1973), the appropriation was twenty-eight million, and in Lemon v. Kurtzman, 403 U.S. at 610, it was five million dollars. When millions of tax dollars are involved, it can hardly be said that church and state are truly separate.

46. 403 U.S. at 615.

47. *Id.* at 622-23.

48. Parent Reimbursement Act for Nonpublic Education, PA. STAT. ANN. tit. 24, §§ 5701-5709 (Purdon Supp. 1973-74).

49. 413 U.S. 825 (1973).

50. *See* 392 U.S. at 243-44.

51. 413 U.S. at 835.

52. Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973).

53. 1970 N.Y. LAWS ch. 138, § 2 (McKinney 1970). An appropriation of twenty-eight million dollars was made to reimburse nonpublic schools within the state

> for expenses of services for examinations and inspection in connection with administration, grading, and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation.

Id.

54. *Id.* at 482.

for expenditures made in connection with administration, grading, compiling and reporting of examinations and tests and in record-keeping. The statute failed as having a primary effect of advancing religion,[55] since there were no means available to assure that religious instruction would not appear in the internally prepared tests.[56]

In *Committee for Public Education and Religious Liberty v. Nyquist,*[57] three financial aid programs to nonpublic schools were found unconstitutional as having an "impermissible effect of advancing religion."[58] The disallowed aid included: the maintenance and repair of nonpublic school facilities,[59] tuition reimbursement grants to parents with an annual gross income under five thousand dollars,[60] and tax relief allowing parents to subtract a designated amount from their adjusted gross income for state income tax purposes for each dependent in a nonpublic school.[61] Since the aid failed under the primary effect of advancing religion branch of the test, there was no need to determine the divisiveness issue. The Court observed, however, that the types of assistance sanctioned by the statute would carry serious potential for entanglement in the form of continuous political debate and division along religious lines.[62]

In 1975, *Meek v. Pittenger*[63] appeared to close the door securely on any new forms of state aid to nonpublic schools. In *Meek,* the Pennsylvania legislature enacted a statute[64] authorizing the State Secretary of

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55. *Id.* at 480.

56. *Id.*

57. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

58. *Id.* at 794.

59. Health and Safety Grants for Nonpublic School Children. 1972 N.Y. LAWS ch. 414, § 1 (McKinney 1972), *amending* N.Y. EDUC. LAW § 550(5).

60. Elementary and Secondary Education Opportunity Program. 1972 N.Y. LAWS ch. 414, § 2 (McKinney 1972), *amending* N.Y. EDUC. LAW §§ 559-63.

61. Elementary and Secondary Education Opportunity Program. 1972 N.Y. LAWS ch. 414, §§ 3, 4, 5 (McKinney 1972), *amending* N.Y. TAX LAW § 612(c)(j).

62. 413 U.S. at 734. Mr. Justice Powell expanded upon the issue of divisiveness stating,

> where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a "warning signal" not to be ignored.

Id. at 797-98 (citation omitted).

63. 421 U.S. 349 (1975). *Meek* is a plurality decision in which the Chief Justice and Justices Brennan, Douglas, Marshall, and Rehnquist filed separate opinions.

64. PA. STAT. ANN. tit. 24, § 9-972 (a), (c), (e) (Purdon 1972). Subsection (c) provided in relevant part:

> Loans of Textbooks. The Secretary of Education . . . shall have the power and duty to purchase textbooks and, upon individual requests to loan them to all children . . .

Subsection (e) provided:

> Purchase of Materials and Equipment. Pursuant to requests from the appropriate nonpublic school pupils, the Secretary of Education shall have the power and duty to purchase . . . and to loan such nonpublic schools, instructional materials and equipment. . . .

Education to loan textbooks to children in nonpublic schools and to loan instructional materials and equipment (including periodicals, photographs, maps, charts, or other printed and published materials) directly to nonpublic schools. In addition, the legislature authorized the Commonwealth to provide auxiliary services including counseling, testing, and psychological services to students within the nonpublic schools.[65]

The textbook provision was upheld by the Court on the authority of the *Allen* decision.[66] The loan of instructional materials and equipment was found unconstitutional as having an "impermissible primary effect of advancing religion"[67] since the nonpublic schools were deemed to be the direct beneficiaries of the state aid.[68] The auxiliary services within the nonpublic schools were believed to foster an "intolerable degree of entanglement,"[69] since continuous surveillance by the state would be necessary to insure that a subsidized counselor's secular purpose was not influenced by the religious environment.[70]

It appeared that after *Meek,*[71] only *Everson*-type general welfare benefits and *Allen*-type[72] textbook programs would meet the constitutional requirements.[73]

E. The Present Three-Part Test

A three-part test for determining the constitutionality of state aid to nonpublic schools has emerged from this line of cases: (1) the state aid must have a secular legislative purpose, (2) the aid must have a primary effect which neither advances nor inhibits religion, and (3) the aid must not cause excessive governmental entanglement with religion, in the form of surveillance necessary to assure secular function, or potential for political divisiveness.[74] This test was employed by the Court in *Wolman v. Walter.*

II. THE CASE

A. The Context

In 1975, the Ohio General Assembly enacted a statute[75] similar to that

65. PA. STAT. ANN. tit. 24, § 9-972 (a) (Purdon 1972).
66. *See* discussion p. 552 *supra.*
67. 421 U.S. at 366.
68. *Id.* at 364.
69. *Id.* at 370.
70. *Id.* at 366, 370.
71. *See* note 63 and accompanying text *supra.*
72. *See* note 30 and accompanying text *supra.*
73. *See* McCann, *Parochial School Aid; A Public Perspective,* 35 OHIO ST. L. J. 104, 132 (1974).
74. 433 U.S. at 236.
75. OHIO REV. CODE ANN. § 3317.062 (Page 1975).

in *Meek*.[76] In a challenge to the validity of the statute, a three-judge United States district court refused to issue an injunction against its implementation finding the statute constitutional.[77] While a direct appeal to the Supreme Court was pending, *Meek* was decided and the Ohio case remanded.[78] Ohio's General Assembly repealed the statute and, in an attempt to avoid the objections expressed in *Meek*,[79] enacted different legislation which became the subject of plaintiff's challenge in *Walter*.[80] The new statute authorized the expenditure of state funds to nonpublic schools for a variety of programs including subsidized loans of secular textbooks, instructional materials and instructional equipment, diagnostic and therapeutic services, standardized tests and scoring services, and field trip transportation.

Once again, a three-judge court was convened in the United States District Court for the Southern District of Ohio[81] to decide whether the enactment violated the establishment clause of the first amendment and whether a permanent injunction against implementation of the enactment should issue. The district court held the entire statute constitutional on its face,[82] determining that it neither had a primary effect of

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76. *See* note 63 and accompanying text *supra*.

77. Wolman v. Essex, No. 73-292 (S.D. Ohio, July 1, 1974).

78. Wolman v. Essex, 417 F. Supp. 1113, 1114 (1976).

79. The Court's objection in *Meek* was that the instructional materials and equipment were loaned to the nonpublic schools rather than to the students. 421 U.S. at 364-65.

See L. PFEFFER, GOD CAESAR, AND THE CONSTITUTION (1975). Pfeffer contends that there is a "game" that is followed by New York, Pennsylvania, Ohio, and Connecticut. He writes that the "game" is to pass a law providing aid to parochial schools, start paying as soon as possible and continue paying until the Supreme Court finally declares the act unconstitutional. When the law is held unconstitutional, the legislature rushes some variation of the law through and the process begins again. "It may take a year or more before a suit is started to challenge the law, and perhaps another two years until the case gets to the Supreme Court. In the meantime [the states] keep paying [the parochial schools]." *Id.* at 282.

This process was recently found unconstitutional in State of New York v. Cathedral Academy, 46 U.S.L.W. 4023 (1977). In that opinion, New York was not allowed to reimburse the nonpublic schools for funds expended prior to the striking down of the statute in issue.

80. OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1976).

81. The three judge court was convened pursuant to 28 U.S.C. § 2281. This subsection provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application thereof is heard and determined by a district court of three judges under section 2284 of this title.

This section was repealed in 1976.

82. Wolman v. Essex, 417 F. Supp. 1113, 1125 (1976).

advancing religion nor would it foster excessive governmental entanglement.[83]

B. The Holding

On direct appeal to the Supreme Court,[84] the district court's holding was reversed in part.[85] The Court, in a plurality opinion, held that field trip transportation services to nonpublic schools and the loan to nonpublic school students of instructional materials and equipment were unconstitutional.[86] The remaining subsections, including textbook loans to nonpublic school children, diagnostic services within the nonpublic schools, therapeutic services off the nonpublic school premises, and standardized tests and scoring services, were deemed to have met the requirements of the three-part test.[87] This decision permitted more state aid to nonpublic schools than had ever been sanctioned.

C. Analysis

Walter is a plurality opinion[88] in which each of the Justices aligned himself along the spectrum of permissible state aid to nonpublic schools. Justices Brennan and Marshall represent one end of the spectrum: they favored a "high and impregnable" wall of separation between church and state and opposed any state aid to nonpublic schools. Justice Stevens joined Justices Brennan and Marshall in regard to financial matters:[89] he disfavored the type of aid permitted in *Allen,* but approved of general health and welfare programs for nonpublic school children. Justices Blackmun and Stewart appeared to be equivocal: uncomfortable with extending the rationale of *Allen* any further than permitting textbook loans, but favoring general health and welfare programs. Chief Justice Burger and Justices Powell, Rehnquist and White characterize the opposite end of the spectrum, favoring all forms of aid proposed by the Ohio statute.

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83. *Id.*

84. 28 U.S.C. § 1253 provides:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

85. 433 U.S. at 255.

86. *Id.*

87. *Id.*

88. Justice Blackmun spoke for the Court. Chief Justice Burger, and Justices Brennan, Marshall, Powell, and Stevens each submitted a separate opinion.

89. Mr. Justice Stevens opposed any measure that involved supplying schools with textbooks, materials, standardized tests, or field trip transportation.

In *Walter,* the Court utilized the three-part test.[90] The Ohio statute met the secular legislative purpose branch as the Court found that it represented a legitimate state interest in protecting the health of its youth and in providing a "fertile educational environment for all the school children of the State."[91] However, in regard to the primary effect and excessive governmental entanglement aspects, the Court noted that the "wall" between church and state was indistinct,[92] and, therefore, ruled upon each subsection of the statute individually. Justice Blackmun wrote the Court's opinion and the remaining Justices either joined or concurred to provide a majority for each of the following holdings.

1. Textbooks

Subsection *A* of the Ohio Statute[93] appropriated funds to purchase secular textbooks available for loan to nonpublic school pupils or their parents. The loans were to be made upon individual requests submitted to the local public schools. However, "for administrative convenience,"[94] these requests were to be prepared and submitted collectively by the nonpublic schools.[95] The texts selected needed the approval of the superintendent of public instruction and only those books available in the public schools of the district would be funded.

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90. *See* note 74 and accompanying text *supra.*

91. 433 U.S. at 236.

92. *Id.*

93. The statute provides for:

> Distribution of payments for special programs.
>
> Moneys paid to school districts under division (P) of section 3317.124 (3317.02.4) of the Revised Code shall be used for the following independent and fully severable purposes:
>
> (A) To purchase such secular textbooks as have been approved by the superintendent of public instruction for use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents. Such loans shall be based upon individual requests submitted . . . to the local public school district in which the nonpublic school is located. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or parent to the nonpublic school which shall prepare and submit collective summaries of the individual requests to the local public school district. As used in this section, "textbook" means any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends.

OHIO REV. CODE ANN. § 3317.06 (Page Supp. 1976).

94. *Id.*

95. Under the Ohio statute, nonpublic schools have the power to select the books; the public school district only approves them. 433 U.S. at 258 n.2. (Marshall, J., concurring in part and dissenting in part). The nonpublic schools collect the "loan request" forms and submit them to the local school district. *Id.* The statute is silent as to where the books shall be stored during summer recess. In *Allen,* nonpublic schools were permitted to store on their premises, textbooks being loaned to students, 421 U.S. at 379, and there is no reason to expect that the situation in Ohio will be different.

The Court upheld this subsection of the statute because the system of textbook loans resembled those in *Allen* and *Meek*.[96] Appellants argued that the Ohio enactment was broader than those presented in these decisions since textbook substitutes were included.[97] Textbooks and textbook substitutes were defined by stipulation of the parties as books, reusable textbooks and manuals.[98] The Court accepted the stipulation as the Board of Education's reading of the statute and was unpersuaded that this aspect distinguished Ohio's loan system from those in *Allen* and *Meek*.[99] The Court refused the appellant's request to overrule *Allen* and found the subsection constitutional.[100]

Although the textbook loans were upheld on the authority of *Allen*, the majority opinion overlooked a significant point. *Allen* was decided under the former two-part test requiring that the form of aid have a secular legislative purpose and that it neither advance nor inhibit religion.[101] Excessive governmental entanglement was not raised in *Allen* and in that case, only Justice Harlan had noted the danger of "divisive influences"[102] in his concurring opinion. Under the Court's present three-part standard, it is suggested that the textbook loans should have been rejected because they will lead to governmental entanglement due to the potential for political divisiveness.

Political fragmentation along religious lines is imminent as a result of upholding textbook loans to nonpublic schools. Nonpublic schools must periodically submit loan requests and the local school district must approve them and expend funds for their purchase.[103] As the demand for additional texts increases, along with costs, there will be as much potential for debate and division along religious lines as was found in regard to the salary appropriations for nonpublic school teachers in *Lemon*.[104]

Religion will undoubtedly enter the political forum if nonpublic school standards vary from those of the public schools. Debate will ensue if the nonpublic school updates its texts more often or if it selects texts which are objectionable in the public schools for other than religious reasons. Voters will debate and divide along religious lines and will advocate or bitterly argue against the appropriations. It is suggested that since religion is intensely emotional and is colored by deeply rooted

96. 433 U.S. at 237-38.
97. Brief for Appellant at 34.
98. *Id.*
99. 433 U.S. at 238.
100. *Id.*
101. 392 U.S. at 243.
102. *Id.* at 249 (Harlan, J., concurring opinion).
103. 433 U.S. at 258 (Marshall, J., concurring in part and dissenting in part).
104. *See* 403 U.S. at 607.

convictions, it is bound to enter into the outcome regarding the appropriations made to the religious schools.

Justices Brennan, Marshall, and Stevens opposed the constitutionality of textbooks and textbook substitutes. Justice Brennan noted that the amount of funds involved would lead to "divisive political potential of unusual magnitude."[105] Justice Stevens argued that financing books was monetary aid "to the school's educational mission, which at heart is religious."[106] Justice Marshall argued in favor of overruling *Allen,* calling it "largely responsible for reducing the 'high and impregnable' wall between church and state erected by the First Amendment . . . to a 'blurred, indistinct and variable barrier'."[107]

2. Instructional Materials and Equipment

Subsections *B* and *C* of the statute[108] authorized expenditures by the school districts for the purchase of secular, neutral and nonideological instructional materials and equipment (*e.g.,* maps, models, puzzles, projectors and screens). The materials and equipment were to be loaned to the nonpublic school pupils or their parents, upon request and in kind. Both subsections were found unconstitutional.[109] The majority declined to extend the presumption found in *Allen* regarding the secular function of textbooks to materials and equipment.[110] Justice Blackmun, writing the opinion in which Justices Brennan, Marshall, Stevens, and Stewart joined, stated, "[i]n view of the impossibility of separating the secular educational function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools."[111] *Allen* remains good law, but the Court limited its effect by refusing to uphold the instructional materials and equipment subsections of the statute.[112]

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105. 433 U.S. at 256 n.2 (Brennan, J., concurring in part and dissenting in part).
106. *Id.* at 265 (Stevens, J., concurring in part and dissenting in part).
107. *Id.* at 257 (Marshall, J., concurring in part and dissenting in part).
108. OHIO REV. CODE § 3317.06 (B) authorized the local school districts:

> To purchase and to loan to pupils attending nonpublic schools within the district or to their parents upon individual request, such secular, neutral, and nonideological instructional materials as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending programs.

Subsection (C) authorized the local school districts:

> To purchase and to loan to pupils attending nonpublic schools within the district or their parents, upon individual request, such secular, neutral and nonideological instructional equipment as is in use in the public school within the district and which is incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

109. 433. U.S. at 251.
110. *Id.* at 251 n.18.
111. *Id.* at 251.
112. *Id.* at 252 n.18.

Justice Blackmun's opinion pointed out that the instructional materials and equipment were, in effect, loaned to the nonpublic schools;[113] the equipment would be used in the same manner whether the borrower was the school or the student.[114] In fact, the Ohio legislature had previously authorized direct loans to the nonpublic schools.[115] After this type of loan was held unconstitutional in *Meek,* the Ohio legislature "channeled" the materials and equipment through the nonpublic school pupils and parents.[116] Thus, there was only a "technical change in legal bailee"[117] and the Court's holding reflects its awareness that the program was essentially the same as before.

Instructional materials and equipment and textbooks do not seem significantly different. Textbooks are used in the same manner whether loaned to students or to their schools. They are no more capable of a solely secular function than are instructional materials and equipment. A map of the Middle East in a geography book is as appropriate a tool to illustrate the site of a religious event as a wall map. The Court has acknowledged the impossibility of separating secular from sectarian educational function.[118] Therefore, it is submitted that it should overrule *Allen* and follow its own more recent conclusion.

The Chief Justice and Justices Rehnquist and White dissented from this part of the holding. Justice Powell concurred only in the holding, claiming to be unpersuaded that all loans of instructional materials and equipment had an inescapable primary effect of aiding religion.[119] It is suggested that Mr. Justice Powell's comment asserts that if materials and equipment are capable of being taken home and used individually by students, this area of state aid to nonpublic schools will be found constitutionally permissible in the future. Finding loans of materials and equipment constitutional will extend the rationale of *Allen* beyond textbooks and will be one more step toward completely removing the wall of separation between church and state.

3. Tests and Scoring Services

Subsection *J* of the statute[120] authorized expenditures of state funds to supply nonpublic schools with standardized tests and scoring serv-

113. *Id.* at 250.
114. *Id.*
115. *Id.*
116. *Id.* at 250.
117. *Id. See also id.* at 263-64 (Powell, J., concurring in part and dissenting in part).
118. *Id.* at 251.
119. *Id.* at 263. (Powell, J., concurring in part and dissenting in part).
120. OHIO REV. CODE § 3317.06 (J) authorized the local school districts "[t]o supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state."

ices. This provision was found constitutional,[121] since only those tests and scoring services used in the public schools were to be funded. Ohio legislators had met the constitutional objection in *Levitt*[122] by excluding funds for tests prepared and scored by nonpublic school teachers.[123]

The Court determined that the statute provided for the legitimate interest of the state in insuring that its youth were receiving an adequate secular education. It also found that nonpublic schools had no control over the tests; therefore, the need for the continuous surveillance that leads to excessive governmental entanglement was avoided.[124] Justices Brennan, Marshall, and Stevens dissented. Justice Brennan contended that the entire statute established religion.[125] Justice Stevens objected (here and throughout the decision) to the financial support of nonpublic schools.[126] Justice Marshall dissented because the statute did not state whether the measurements were for compliance with state standards or for the nonpublic school's "internal administrative purposes."[127]

4. Diagnostic Services

Subsections *D* and *F* of the statute[128] authorized school districts to provide speech, hearing, and psychological, diagnostic testing services to be administered to nonpublic school pupils within the nonpublic schools. In addition, subsection *E* provided physician, nursing, dental and optometric services.[129] Appellants only challenged subsections *D* and *F*. The Court reasoned that subsection *E* was not challenged because appellants realized that health services would be upheld as neutral measures which do not have a primary effect of aiding religion.[130] The Court saw no distinction between the types of diagnostic services in issue and those in subsection *E*. Thus, speech,

121. 433 U.S. at 241.

122. *See* note 53 and accompanying text *supra*.

123. 433 U.S. at 240.

124. *Id.*

125. *Id.* at 255-56 (Brennan, J., concurring in part and dissenting in part).

126. *Id.* at 263-64 (Stevens, J., concurring in part and dissenting in part).

127. *Id.* at 261-62 (Marshall, J., concurring in part and dissenting in part).

128. OHIO REV. CODE § 3317.06 (D) authorized local school districts "[t]o provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district. Such service shall be provided in the nonpublic school attended by the pupil receiving the service."

Subsection (F) authorized the local school districts "[t]o provide diagnostic psychological services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the pupil receiving the service."

129. OHIO REV. CODE § 3317.06 (E) authorized the local school district "[t]o provide physician, nursing, dental, and optometric services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the nonpublic school pupil receiving the service."

130. 433 U.S. at 242.

hearing, and psychological, diagnostic testing services were deemed constitutional,[131] with Justice Brennan as the only dissenter.

Since the nature of the relationship between the diagnostician and child was an objective and professional one, the Court held there would be no "impermissible risk of the fostering of ideological views."[132] Thus, there would be no need for continuous surveillance, and, therefore no "impermissible entanglement."[133] The Ohio legislature had complied with the objection in *Meek*[134] by separating diagnostic services available in the nonpublic schools from therapeutic services available away from the nonpublic school premises.

5. Therapeutic Services

Subsections *G, H, I,* and *K*[135] authorized expenditures by the state for therapeutic, guidance, and remedial services for students with special needs attending nonpublic schools. The services would be performed in public schools, public centers or in mobile units located off the nonpublic school premises. Appellants conceded that the services would be constitutional if both public and nonpublic school pupils were served simultaneously.[136] They focused their challenge upon the isolation of the sectarian students. If sectarian students are isolated, the argument

131. *Id.*

132. *Id.* at 244.

133. *Id.*

134. *See* notes 67-70 and accompanying text *supra.*

135. The statute allows funds:

(G) To provide therapeutic psychological and speech and hearing services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(H) To provide guidance and counseling services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(I) To provide remedial services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(K) To provide programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school, in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

OHIO REV. CODE § 3317.06.

136. Brief for Appellant at 41-42, 46.

went, the public employee might alter his or her approach and advocate the religious doctrine of the school attended by the child.[137]

In holding that the therapeutic services were constitutional, the Court stated that there was no impermissible effect of advancing religion provided services were at a neutral site off the nonpublic school premises. It further stated that there would be no excessive entanglement because the "public employees [would be] performing public functions on public property."[138] In *Meek,* therapeutic services being performed in the sectarian atmosphere were found unconstitutional because of a danger that the pressures of the environment might alter the therapist's behavior.[139] The Court did not respond to the suggestion that the public center or mobile unit may act as an annex of the nonpublic school that it services, noting, "in its present posture the case does not properly present any issue concerning the use of a public facility as an adjunct of a sectarian educational enterprise."[140]

Justice Stevens joined the Court's opinion upholding therapeutic services, as he was unwilling to state that the services were not public health and welfare provisions.[141] Justice Brennan dissented to all forms of state aid but did not articulate his specific difficulty with therapeutic services.[142] Justice Marshall, in his dissent, argued that the therapeutic services were more like educational assistance than general welfare provisions because the services provided by the therapists would offer direct support to the educational program of the nonpublic schools.[143]

6. Field Trips

Field trip transportation and services to nonpublic school students, authorized by subsection *L,*[144] were found to violate the first amendment[145] even though the trips "would consist of visits to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students."[146] The district court held the subsection constitutional because it was unable to distinguish bus transportation on a daily

137. 433 U.S. at 246.
138. *Id.* at 248.
139. 421 U.S. at 371.
140. 433 U.S. at 246.
141. *Id.* at 266 (Stevens, J., concurring in part and dissenting in part).
142. *Id.* at 255-56 (Brennan, J., concurring in part and dissenting in part).
143. *Id.* at 261 (Marshall, J., concurring in part and dissenting in part).
144. OHIO REV. CODE ANN. § 3307.06 (L): "To provide such field trip transportation and services to nonpublic school students as are provided to public school students in the district. School districts may contract with commercial transportation companies for such transportation service if school district busses are unavailable."
145. 433 U.S. at 255.
146. Appendix to Appellant's Complaint at 49.

basis from bus transportation on an occasional basis.[147] Although Justice Powell agreed with the district court,[148] the majority[149] saw a distinction.

In *Everson,*[150] bus transportation was unrelated to the curriculum and the nonpublic schools had no control over the expenditure of funds.[151] In *Walter,* the schools were the actual recipients. Therefore, there was impermissible direct aid to religion.[152] The majority used the "unacceptable risk"[153] concept in holding that field trips were an integral part of the educational experience. Since the nonpublic school teacher would select the location and make the trip meaningful, there would be an "unacceptable risk of fostering . . . religion."[154]

III. ALTERNATIVE TESTS

The Court has decided the constitutionality of Ohio Statute section 3317.06 in *Walter.* The many opinions submitted by the Justices not only demonstrate the difficulty of applying the three-part test but also show the dissention among the members of the Court as to whether the evolution of this standard has weakened the wall between church and state. In its present posture, *Walter* gives rise to many potential dangers. However, it is possible to alleviate these perils with a new approach.

The Court's present three-part test does not offer adequate protection to the constitutional mandate that "Congress shall make no law respecting an establishment of religion."[155] There are viable alternative tests, however, that would afford more protection for and give more respect to the edict. One such alternative test was proposed by an Amicus Curiae in *Walter.*

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147. 417 F. Supp. at 1124.

148. 433 U.S. at 264 (Powell, J., concurring in part and dissenting in part).

149. The majority consisted of Justices Blackmun, Brennan, Marshall, Stevens, and Stewart.

150. 330 U.S. 1 (1947). *See also* notes 19-24 and accompanying text *supra.*

151. *See* 433 U.S. at 253.

152. *Id.*

153. *Id.* at 254.

154. *Id.* The permissible-impermissible approach seems to be heading away from a neutrality between church and state towards a permissible level of involvement. The Court used the term impermissible four times in *Walter.* The first was in regard to diagnostic services, in which there was no impermissible risk of fostering ideological views, therefore no impermissible entanglement. 433 U.S. at 241-42. The second time, in regard to therapeutic and remedial services, the Court felt that there was not the impermissible effect of advancing religion. *Id.* at 248. The third was in regard to Instructional Materials and Equipment, where the grant of funds for them was impermissible. *Id.* at 249. The fourth concerned the "impermissible direct aid to sectarian education" found here. *Id.* at 254. If there is an impermissible risk of fostering religion, there also must be a permissible risk of doing so. Where there is a permissible risk of advancing religion, there is the potential for the wall between church and state to dissolve.

155. U.S. CONST. amend. I.

An Amicus Curiae Brief (Amicus) was submitted by the State Convention of Baptists in Ohio, the Ohio Free School Association, and the Ohio Conference of Seventh Day Adventists.[156] In the brief, a new test derived from *Everson v. Board of Education*[157] was suggested. The new test would allow state aid to the nonpublic schools if: the benefit conferred by the aid was a by-product of unintended aid, such as police and fire protection, or if the aid did not directly or indirectly cross the threshold of the religious institution; and the sole beneficiary of the aid was the student.[158] This test is a true child benefit or general welfare model. Under this standard, the child could ride the bus to and from school and could receive diagnostic and therapeutic services off the nonpublic school premises. There would be no intended benefit to the nonpublic school and no aid would cross its threshold. The Amicus test would allow the wall of separation between church and state to remain "high and impregnable."[159]

Mr. Justice Douglas offered a similar approach in his dissent in *Allen*.[160] Justice Douglas felt that "there is nothing ideological about a bus . . . a school lunch, . . . a public nurse, or a scholarship."[161] Using this health and welfare test, state aid would be permitted to transport nonpublic school children to and from school, to supply school lunches to these children[162] and to provide diagnostic testing within the nonpublic school. This test is more liberal than the former in that various programs will be allowed within the nonpublic schools if the benefit is directed primarily toward the child.

Between the alternatives proposed by Justice Douglas and the Amicus, it is suggested that the Amicus test offers greater protection to the establishment clause and, at the same time, allows the type of health and welfare benefits that all children deserve. Health and welfare benefits promote the physical, mental and emotional well-being of children. These benefits include: proper diet, proper exercise, diagnostic testing to detect physical, psychological, and emotional difficulties, and fire, police and public protection from harm. Under the Amicus test, the state can offer all of these advantages to nonpublic school children; the only requirement is that nonpublic school students leave the religious premises and come to the usual public facility. One may argue that this procedure would be burdensome and time consum-

156. Brief Amicus Curiae for the State Convention of Baptists in Ohio, the Ohio Free School Association, and the Ohio Conference of Seventh Day Adventists at 29-30.

157. *See* notes 19-24 and accompanying text *supra*.

158. *See* Brief Amicus Curiae, *supra* note 156, at 29-30.

159. 330 U.S. at 18.

160. 392 U.S. at 254-69 (Douglas, J., dissenting).

161. *Id.* at 257.

162. *Id. See* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1691 (1969).

ing. It is suggested that freedom from governmental intrusion in religious liberty afforded by this type of arrangement outweighs the inconvenience. Few people would wish to see children go without basic medical care and welfare benefits. The Amicus test strikes a balance between benefits to the child and the separation between church and state.

If the test proposed by the Amicus were implemented, textbook loans would be found unconstitutional as would standardized tests and scoring services. Diagnostic services would not meet the constitutional requirements if performed within the nonpublic schools, and therapeutic services would be allowable but not in mobile units parked off the nonpublic school premises. Mobile units would pose a problem if public and nonpublic school children were not treated simultaneously. If the units were used solely for nonpublic school children, they would act as extensions of the nonpublic schools and the pervasive religious environment problem present in *Meek* would arise again.[163]

Many problems are resolved by allowing nonpublic school children to receive general welfare benefits within the *public* schools. The question of secular legislative purpose is easily answered in the affirmative; the state has an interest in securing the health and welfare of its children. The issues of advancing or inhibiting religion and surveillance to assure secular function are tremendously reduced when the nonpublic school has no control over the public school program. Divisive political potential is greatly diminished when no funds or benefits cross the threshold of the nonpublic schools. Finally, the argument of the taxpayers who send their children to nonpublic school, that they should not have to pay taxes as well as full tuition, loses its bite when the children receive benefits from the public schools.

IV. MINORITY RELIGIONS AND THE POSSIBILITY OF INADVERTENTLY ESTABLISHING ONE RELIGION

"The First Amendment mandates governmental neutrality between religion and religion and between religion and nonreligion."[164] The state cannot, consistent with the Constitution, aid one denomination rather than another.[165] This raises an interesting issue because approximately ninety-two per cent of the nonpublic schools in Ohio (and in other states where aid has been challenged) are Catholic.[166] If the non-

163. 421 U.S. at 366.

164. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

165. *See* 330 U.S. at 15-16.

166. In Lemon v. Kurtzman, 403 U.S. at 608, 95% of the pupils attending nonpublic schools in Rhode Island attended Roman Catholic affiliated schools, *id.* at 608, and 96% of the nonpublic school enrollment in Pennsylvania was in schools affiliated with the Catholic Church. *Id.* at 610.

public school children receive aid such as textbook loans and standardized tests, the nonpublic school benefits in that it need not expend its own dollars on those items. State aid makes the supported school a viable alternative and therefore advances that institution. If state aid is permitted within the nonpublic school, even if given to the pupils, it is Catholic schools at present that would benefit ninety-two per cent of the time.

In *Walter,* the Amicus opposed state aid claiming, "[t]he First Amendment will indeed be divested of any real meaning or force if it is construed to permit taxes to be levied for the support of allegedly non-religious activities of churches."[167] The brief further argued, "[w]hen the state subsidizes one of the main functions of the largest church in the state, it has gone a long way towards establishing that church as the official tax-supported religion of the land."[168]

The Court's focus in *Walter* was toward state aid for religion in general, not toward state aid for *one* religion. These "loans" of textbooks, in reality, are gifts to the nonpublic schools.[169] It is doubtful whether the state would so willingly appropriate eighty-eight million dollars[170] to schools which meet the compulsory education standards but are run by the Hare Krishna, Jehova Witnesses, Unification Church, or various other unconventional sects. If state aid is technically given to the students, however, the nonpublic schools must meet certain secular standards set by the state.[171] There is a substantial risk that non-Catholic, conventional and unconventional religious schools that do not presently meet the secular standards necessary to receive aid, and that prefer to use their own religiously oriented books, tests, and methods will be forced into compliance and will compromise their beliefs to survive.[172]

In *Nyquist,* 413 U.S. at 768, "all or practically all" of the sectarian schools qualifying for maintenance and repairs were related to the Catholic Church. In *Walter,* the Catholic schools accounted for 92% of the enrollment for nonpublic schools; 4% of the nonpublic school enrollment was all other religions combined. 433 U.S. at 234.

167. *See* Brief Amicus Curiae, *supra* note 156, at 4.

168. *Id.* at 5.

169. *Id.* at 4.

170. The initial biennial appropriation by the Ohio Legislature in *Walter* was $88,800,000. 433 U.S. at 233.

171. In *Walter,* the nonpublic schools had to admit pupils and hire teachers, "without distinction as to race, creed, color or national origin". 433 U.S. at 235 n.3.

172. One of the problems with state aid to nonpublic schools is the problem of the collateral responsibilities that go along with the aid. Obligations similar to that imposed in *Walter,* (*see* note 171 *supra*) interfere with the nonpublic schools' fundamental right of freedom to practice its own religion and to accept only members of its religion. The state can potentially use aid to coerce religious groups into compromising their beliefs in order to be eligible for benefits enjoyed by those sects which previously compromised. *See* 433 U.S. at 266, n.7 (Stevens, J., concurring in part and dissenting in part).

Justice Black's dissent in *Allen* best summarizes the dangers in this area of aid.

> I still believe that the only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide. The Court's affirmance here bodes nothing but evil to religious peace in this country.[173]

V. CONCLUSION

The future of state aid to nonpublic schools is perplexing at best. The Court's plurality opinion in *Walter* attests to the difficulties that the Justices of our Supreme Court are experiencing in the application of the establishment clause. On one hand, there is a willingness on the part of Chief Justice Burger and Justices Powell, Rehnquist and White to increase state aid, while on the other, Justices Brennan, Marshall, and Stevens advocate the strengthening of the wall of separation between church and state.

Certain types of aid have a greater probability of constitutional success than others, but it is apparent that the form of the state statute will bear heavily upon the outcome. The following four types of programs are constitutionally permissible.

Diagnostic services are allowable within nonpublic schools. Eye, ear, dental and general physical examinations are constitutional as are speech and psychological diagnostic testing. Diagnostic services of this sort will meet the constitutional requirements as long as the interaction between the state funded personnel and the nonpublic school children is minimal, objective, and professional.

Therapeutic services including guidance counseling, speech therapy, remedial reading, and various other programs are permissible if administered in public facilities. Although the *Walter* Court did not consider the issue of using a public facility which isolated nonpublic from public school children, it is suggested that in such a case there is a possibility that the Court would consider the facility an adjunct to the sectarian school. However, as long as a facility is not used solely for nonpublic school children, the aid will be sustained.

Textbook loans are firmly rooted as a permissible form of aid. The texts must be acceptable for use in the public schools and they must, in accordance with the statute, be loaned to the nonpublic school children or their parents rather than to the nonpublic school.

Finally, standardized tests and scoring services are constitutional since nonpublic schools have no control over them.

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173. 392 U.S. at 254 (Black, J., dissenting).

Programs including instructional materials and equipment have questionable constitutionality, but they might be sustained if the types of materials and equipment are clearly capable of being loaned to the nonpublic school children. Models, puzzles, and instructional games may be found constitutional, while wall maps and overhead projectors probably will not.

It is likely that field trip transportation will be upheld in the future since it does not appear to be absolutely forbidden. In *Walter,* field trip services were found unconstitutional by a majority of five. The main objection seemed to be that the nonpublic school teacher planned and conducted the activity. Field trip transportation might be upheld if the nonpublic school children merely participate in public school field trips, rather than the trip being solely controlled by the nonpublic school.

The Supreme Court has failed to maintain a "high and impregnable" wall between church and state. Notwithstanding the reservations of a minority of the Justices, it is difficult to ascertain how far the majority of the Court is willing to extend the limits of the establishment clause in permitting state aid to nonpublic schools. The Court's decision in *Walter* illustrates that the first amendment mandate regarding religion[174] is equivocal and subject to judicial interpretation.

SHARON M. WARD

174. U.S. CONST. amend. I.

RECENT DEVELOPMENTS

Civil Procedure — Quasi in Rem Jurisdiction — The "minimum contacts" test, commonly applied in actions in personam, is used to evaluate a state court's exercise of jurisdiction which was based solely on the presence of a nonresident defendant's property within the state. The property was neither the subject matter of the litigation nor related to the underlying cause of action. ***Shaffer v. Heitner.***[1]

Plaintiff Heitner, a nonresident of Delaware owning one share of stock in the Greyhound Corporation, filed a shareholder's derivative suit in that state on May 22, 1974.[2] Defendants were the corporation, a business incorporated under the laws of Delaware having its principal place of business in Phoenix, Arizona, its wholly owned subsidiary Greyhound Lines, Inc.,[3] and twenty-eight past or present directors or officers of the corporation.[4] Shaffer was identified as the president of the parent corporation but, like all the other named defendants, he was a nonresident of the state of Delaware.[5]

Heitner's principal contention was that during the period of 1964 to 1973 Shaffer and the other individual defendants violated duties to Greyhound stockholders by acting "recklessly, negligently and in disregard of [their] obligations as director[s] or officer[s] of Greyhound"[6] and caused it to be liable in both a private antitrust suit[7]

1. 433 U.S. 186 (1977).
2. *Id.* at 189.
3. *Id.* Greyhound Lines, Inc. is incorporated in California and has its principal place of business in Phoenix, Arizona.
4. Brief for Appellants, Appendix at A6, Shaffer v. Heitner, 433 U.S. 186 (1977).
5. 28 THE CORP. J. 58, no. 3, Sept.-Nov. 1977 at 58.
6. Brief for Appellants, Appendix at A10.
7. In the private antitrust suit, Mt. Hood Stages, Inc. v. Greyhound Corp., No. 68-374, D.Ore. (filed Nov. 29, 1973) App. 10; (Mt. Hood Stages, Inc. v. Greyhound Corp., 1972-3 Trade Cas. 91 74,824), *aff'd,* 555 F.2d 687, (9th Cir., June 9, 1977), the U.S. District Court for the Nor-

and in a criminal contempt action.[8]

With his complaint Heitner filed a motion for a sequestration order on the Delaware property of the defendants.[9] After satisfying the conditions of the Delaware sequestration process[10] the court-appointed sequestrator[11] "seized" some eighty-two thousand shares of Greyhound common stock and stock unit credits, valued at approximately one million two hundred thousand dollars, belonging to some of the defendants.[12] None of the stock seized was, in fact, physically present in Delaware; however, it was considered to be there, and thus subject to seizure, under a statute[13] which makes Delaware the state of ownership

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thern District of Illinois entered a decision on the merits and reaffirmed a prior finding of the Interstate Commerce Commission that Greyhound Corp. was guilty of three violations of the antitrust laws for actions which took place against Mt. Hood Stages, Inc. in the state of Oregon. A judgment of over $13,000,000.00, plus reasonable attorneys fees, was entered against Greyhound.

8. In the criminal contempt action, United States v. Greyhound Corp., 363 F. Supp. 525 (N.D. Ill. 1973), 370 F. Supp. 881 (N.D. Ill.), *aff'd*, 508 F.2d 529 (7th Cir. 1974), the U.S. District Court for the Northern District of Illinois issued a memorandum and order on January 22, 1974, and imposed a fine of $100,000 on Greyhound Corp. and a fine of $500,000 on Greyhound Lines for failing to comply with directives of the private antitrust suit. *Id.* at 531.

9. 28 THE CORPORATION JOURNAL 58, *supra* note 5, at 58. DEL. CODE tit. x, § 366 (1974) compels the appearance of a nonresident defendant. It provides:

> (a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

See, e.g., D'Angelo v. Petroleos Mexicanas, 378 F. Supp. 1034, 1039 (D.Del. 1974) ("Sequestration in equity is simply analagous to foreign attachment at law.").

10. Brief for Appellants, Appendix at A24. Both the plaintiff and the sequestrator must file bonds of $1,000 as surety with the National Surety Corporation, an Illinois corporation. Here, a technical adjustment in the complaint caused the first sequestration order to be vacated and replaced by an alias sequestration order identical in its terms to the original. *Id.* at A49.

11. A sequestrator is appointed by the court to serve the sequestration order on a named corporation; to receive from that corporation a listing of property affected by the order; and to file the list with the court. In this instance, because of the technical adjustments made, the sequestrator received a fee of $100 under the original sequestration and $100 under the alias sequestration order. *Shaffer*, 433 U.S. at 191-92 n.6.

12. 433 U.S. at 192.

13. DEL. CODE tit. viii, § 169 (1974) provides:

> For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized

for the capital stock of all businesses incorporated under its laws, regardless of the actual location of the stock certificates.

The Court of Chancery for New Castle, Delaware found that the state's sequestration procedure was not affected by due process requirements.[14] The court reasoned that sequestration is not an attempt to gain possession of property but rather a method of compelling a defendant's general appearance.[15] The property would be released after this appearance.[16] The court explained that this limitation on the duration and use of sequestration made it equitable.[17]

On appeal to the Delaware Supreme Court the judgment of the lower court was affirmed.[18] Emphasis was placed upon the state's continued reliance on the sequestration statute as a constitutional due process remedy.[19] Although the decision focused upon the sequestration procedure's consistency with due process and the state's legitimate public interest in asserting jurisdiction to adjudicate a controversy having a substantial relationship to the forum, little was said concerning the defendant's claim that the forum lacked jurisdiction to adjudicate.[20] The Delaware Supreme Court noted that while there were "significant constitutional questions at issue," they "[did] not deem the rule of *International Shoe* to be one of them."[21]

The United States Supreme Court[22] reversed the decision of the Delaware Supreme Court and held the Delaware sequestration statute[23]

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under this chapter or otherwise, shall be regarded as in this State.

It is interesting to note that of the 50 states that enacted the Uniform Commercial Code, only Delaware did not enact § 8-317 (1) which requires the actual seizure of stock certificates to effect a valid attachment or levy upon an interest in corporate stock. Section 8-317 (1) provides:

> No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.

14. 433 U.S. at 193.

15. *Id.*

16. *Id.*

17. *Id.*

18. Greyhound Corp. v. Heitner, 361 A.2d 225, 237 (1976).

19. *Id.*

20. Brief for Appellants, Appendix at A115-16.

21. *Id.* at A102. The Delaware Supreme Court explained why the test of *International Shoe* 326 U.S. 310 (1945) was inapplicable.

> The reason, of course, is that jurisdiction under sec. 366 remains, as it was in 1963, quasi in rem founded on the presence of capital stock here, not on prior contact by defendants with this forum. Under 8 Del.C. sec. 169 the "situs of the ownership of the capital stock of all corporations existing under the laws of this state is in this state", and that provides the initial basis for jurisdiction.

Greyhound Corp. v. Heitner, 361 A.2d 225, 229 (1976).

22. Justice Marshall delivered the opinion in which Chief Justice Burger, and Justices

violative of the due process clause of the United States Constitution in that the property sequestered was not the subject matter of the litigation and was unrelated to the underlying cause of action.[24] By this holding, the Court rejected the Anglo-American territorialist theories of law and sovereignty developed by the Dutch jurist Ulric Huber in the seventeenth century,[25] and redefined quasi in rem jurisdiction in transitory actions,[26] asserting that "state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[27]

Traditionally, state court authority to adjudicate a case is premised upon its jurisdictional power over persons or property. Where jurisdiction is exercised over the defendant's person, the action is called in personam and the resulting judgment is in the nature of a personal obligation on the part of defendant in favor of the plaintiff.[28] Contrarily, where jurisdiction is founded upon a state's power over property within the confines of its borders, such actions are labeled in rem or quasi in rem.[29] These judgments are limited to the extent of the value of property which provides jurisdiction.[30]

The landmark case of *Pennoyer v. Neff*[31] established the doctrine of physical presence as the necessary foundation for in personam jurisdic-

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Stewart, Blackmun, White and Powell joined. Justice Brennan joined in Parts I-III of that opinion and also filed an opinion concurring in part and dissenting in part. Justices Powell and Stevens filed separate concurring opinions. Justice Rehnquist did not take part in the decision.

23. DEL. CODE tit. 10, § 366 (1974).

24. 433 U.S. 186, 213.

25. *See generally* Hazard, *A General Theory of State-Court Jurisdiction,* 1965 SUP. CT. REV. 241.

26. *Developments in the Law — State Court Jurisdiction,* 73 HARV. L. REV. 909 (1960) at 980-81 (Transitory actions, at common law, could be brought in any forum and could arise anywhere, whereas local actions were concerned with particular land and could only occur where the land was located.).

27. 433 U.S. at 212.

28. *Id.* at 199. As Professor Fleming James observed, in actions in personam "the plaintiff seeks either to subject defendant's general assets to execution in order to satisfy a money judgment, or to obtain a judgment directing defendant to do an act or to refrain from doing an act, under sanction of the court's contempt power." F. JAMES, CIVIL PROCEDURE 612 (9th ed. 1965).

29. *Shaffer,* 433 U.S. at 199.

30. *Id.* In Hanson v. Denkla, 357 U.S. 235, 246 n.12 (1958), the Court explained that:

> A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.

31. 95 U.S. 714 (1877). *See also* McDonald v. Mabee, 243 U.S. 90, 91 (1917) (holding that "the foundation of jurisdiction is physical power").

tion. In other words, the jurisdictional power of a state court could not exceed that state's territorial limits.[32] Subsequent cases dealing with in personam jurisdictional issues used the tests of domicile,[33] consent,[34] in-state tortious acts,[35] and doing business in the state[36] to recognize valid state power.

Harris v. Balk[37] typified those cases which contributed to the development of modern quasi in rem jurisdiction by significantly expanding its scope and applicability. To a certain extent *Harris* counteracted the nonresident defendant bias fostered by *Pennoyer.*[38] It allowed a resident plaintiff to satisfy a claim against a nonresident defendant by attaching his or her property located in the forum state.[39]

State court in personam jurisdiction was evaluated by a different standard in *International Shoe v. Washington*:[40] fundamental fairness

32. Pennoyer v. Neff, 95 U.S. 714 (1877), was an ejectment action brought by Neff against Pennoyer to recover a tract of land located in Oregon. Justice Field, delivering the opinion for the Court, "focused on the territorial limits of the States' judicial powers . . . and found that their jurisdiction was defined by the 'principles of public law.' " *Shaffer,* 433 U.S. at 197. These principles were that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and "that no State can exercise direct jurisdiction and authority over persons or property without its territory." *Pennoyer,* 95 U.S. at 722, *quoted in Shaffer,* 433 U.S. at 197. As Professor James points out, "the *Pennoyer* declaration set the tone of American legal thinking for several generations." F. JAMES, *supra* note 28, at 621.

33. Milliken v. Meyer, 311 U.S. 457 (1940) (Pursuant to a Wyoming statute a resident defendant of that state was served in Colorado. The Supreme Court upheld jurisdiction based on domicile and indicated that notice must be reasonably calculated to apprise the defendant of pending litigation.).

34. National Equipment Rental v. Szukhent, 375 U.S. 311 (1964) (Defendants, Michigan farmers, had signed a leasing contract in which one clause designated a third person to receive process for defendants in New York in the event of litigation. The Supreme Court held that defendants thereby had consented to New York federal district court jurisdiction.).

35. Nelson v. Miller, 11 Ill. 2d 378 (1957) (In order to establish valid jurisdiction under a long-arm statute, plaintiff must initially show only that it is reasonably likely that defendant committed an in-state tortious act; otherwise, the underlying goal of suing defendant where the tort occurred would be defeated.).

36. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (State court jurisdiction was held to be validly based upon the state's power to regulate a particular activity, the sale of stocks, within the state.).

37. 198 U.S. 215 (1905).

38. 433 U.S. at 209. *See, e.g.,* Harris v. Balk, 198 U.S. 215 (1905), where the Supreme Court found that jurisdiction could be exercised quasi in rem over intangible property, a debt, owed to a defendant if personal jurisdiction could be exercised over the defendant's debtor. By compelling defendant to appear in order to protect his or her property this case removed some of the difficulities *Pennoyer* created for the plaintiff. In *Pennoyer,* the principle was articulated that a court could assume personal jurisdiction over a defendant provided that he or she was personally served by process within the state or voluntarily appeared. 95 U.S. 714, 733.

39. Harris v. Balk, 198 U.S. 215.

40. 326 U.S. 310 (1945). In an action to collect unemployment taxes from the nonresident defendant corporation, the state of Washington based its jurisdictional claim upon the defendant's business contacts within the state. The Supreme Court held that Washington could constitutionally exercise personal jurisdiction since the defendant's contacts within the forum were continuous and systematic, and resulted in a large volume of interstate business by which defendant received the benefits and protections of Washington laws. *Id.* at 317. Presence within the forum

and minimum contacts. By analyzing the quality and nature of all the relevant interests and activities in relation "to the fair and orderly administration of the laws,"[41] due process requirements were satisfied. Thus, the rigidly applied sovereignty theory of *Pennoyer* was replaced by the minimum contacts test which facilitated a finding of state court in personam jurisdiction.[42] However, this case made no express holding concerning in rem or quasi in rem actions.

In *Shaffer,* the United States Supreme Court observed that the lower courts rejected the jurisdictional challenge because of the quasi in rem nature of the proceeding.[43] The Delaware courts were following the classical view that quasi in rem jurisdiction is premised upon attachment or seizure of property in the forum state.[44] Thus, it seemed logical that there was no need for the substantive minimum contacts required for in personam jurisdiction under *International Shoe.*[45]

While the Delaware Supreme Court presupposed the continued validity of the conceptual framework of *Pennoyer,*[46] the United States Supreme Court concluded that *Pennoyer* created excessively rigid jurisdictional categories.[47] Noting the chronological changes concerning the nature of in personam jurisdiction since *Pennoyer,* the Court concluded that the nexus between the defendant, the forum and the underlying cause of action "rather than the mutually exclusive sovereignty of the states on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction."[48]

Mr. Justice Marshall, writing for the majority, asserted that jurisdiction over a thing was effectively equivalent to jurisdiction over the interests of a person in a thing.[49] In cases such as *Shaffer* and *Harris* the underlying function of the property, only remotely related to the plaintiff's cause of action, was merely to provide the basis for making the

was no longer held to be essential. The Court formulated a new and flexible jurisdictional rest. "Due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316.

41. *Id.* at 319.

42. *Shaffer,* 433 U.S. at 204-05.

43. *Id.* at 196.

44. *See* note 30 *supra. See also* F. JAMES, *supra* note 28, at 613.

45. *Shaffer,* 433 U.S. at 196.

46. *See* note 31 *supra.*

47. *Shaffer,* 433 U.S. at 201.

48. *Id.* at 204. *See also id.* at n.20 (commenting on the application of Hanson v. Denckla, 357 U.S. 235 (1958)).

49. 433 U.S. at 207.

defendant appear in court.[50] Consequently, in those situations where a direct assertion of in personam jurisdiction would violate a defendant's Constitutional rights, it is fair to conclude that such due process safeguards would also prohibit any indirect assertion of that jurisdiction.[51] The Court then turned to an evaluation of whether the *International Shoe* standard of fairness and substantial justice, long applied to cases involving in personam issues, should now be employed for actions in rem.[52]

The Court refused to accept the argument that jurisdictional gaps in the *International Shoe* minimum contacts doctrine should be filled by traditional in rem methods.[53] Appellees contended that the gap, or the major weakness, was that wrongdoers could avoid their liabilities by removing their assets, the res, to a forum where they were not subject to in personam jurisdiction.[54] These assumptions were summarily dismissed on the basis that the full faith and credit clause requires an in personam judgment valid in one state to be enforced in any other.[55]

The contention that appellants' positions as directors of a corporation in Delaware provided sufficient contacts with that state under *International Shoe* was weakened by the following facts: (1) appellants were not alleged ever to have entered Delaware and (2) the jurisdictional statute, reflecting Delaware's interest, focused on the presence of defendants' property rather than on the existence of any corporate

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50. *See* note 38 *supra*. *See also* Hibou, Inc. v. Ramsing, 324 A.2d 777, 80 (Del. Super. Ct. 1974) (holding that even though unrelated to the case, property (shares of stock) which has its situs in Delaware may be attached under DEL. CODE tit. 8, § 169 (1974). Its seizure subjects the defendants to jurisdiction to the extent of the property interest.).

51. 433 U.S. at 209. The Court recognized that while there had not yet been any significant changes regarding jurisdiction in rem, nor any direct involvement on its own part, lower court opinions were some indicia that the presence of property in a state does not grant jurisdictional power without proof of a meaningful relationship between the property, the forum, and the underlying cause of action. *Id.* at 205-06. *See, e.g.*, United States Industries, Inc. v. Gregg, 540 F.2d 142 (3d Cir. 1976), *petition for cert. pending*, No. 76-359; Jonnet v. Dollar Savings Bank, 530 F.2d 1123, 1130-43 (3d Cir. 1976) (Gibbons, J. concurring); Bekins v. Huish, 1 Ariz. App. 288, 401 P.2d 743 (1965); Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1955), *appeal dismissed & cert. denied sub nom.* Columbia Broadcasting Sys. v. Atkinson, 357 U.S. 569 (1958). *See also* Hazard, *supra* note 25; Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The Power Myth and Forum Conveniens*, 65 YALE L.J. 289 (1965); *Developments in the Law — State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

52. 433 U.S. at 207. International Shoe Co. v. Washington, 326 U.S. 310 (1945), "laid the foundation for the current development of long-arm statutes, predicating jurisdiction on the defendant's activities or minimum 'contacts' with the forum," rather than on a traditional basis or presence or doing business. Gorfinkel & Lavinve, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 HASTINGS L.J. 1163, 1179.

53. 433 U.S. at 210.

54. *Id.*

55. *Id. See* U.S. CONST. art. IV, § 1.

fiduciary relationship.[56] And while it was deemed appropriate for a state to regulate appellants' obligations to the corporation and to its stockholders, such reasoning failed to support the contention that appellants "purposely avail[ed themselves] of the privilege of conducting activities within the forum State"[57] which would justify their appearance in a Delaware court. It was also noted that Delaware had not, like other states,[58] passed a statute holding acceptance of a directorship the equivalent of express consent to jurisdiction in the state.[59] The due process clause "does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties or relations."[60]

In separate concurring opinions Mr. Justice Powell cautioned that a broader than necessary holding should not be interpreted as invalidating in rem jurisdiction where real estate is involved[61] and Mr. Justice Stevens argued that the Delaware statute was unconstitutional on its face.[62] Mr. Justice Brennan both concurred and dissented. He fully agreed with the application of the jurisdictional scheme of *International Shoe* over that of *Pennoyer*.[63] However, his dissent pointed out that the Court had breached its duty in deciding the case when it had been appealed without a full record.[64] Particularly because of the far-reaching implications of the minimum contacts test,[65] he felt that the quasi in rem issue should have been decided only after an elaborate examination of the contacts between the cause of action and the forum state.[66] Crucial to these jurisdictional considerations was that appellants voluntarily availed themselves of the benefits and protections of Delaware law and as a consequence had to assume commensurate responsibilities.[67] Since "minimum contacts" are not "best contacts," Justice Brennan perceived Delaware as a competent forum "for vin-

56. *Shaffer*, 433 U.S. at 213.

57. *Id.* at 216 (*citing* Hanson v Denckla, 357 U.S. at 253.

58. *See, e.g.*, CONN. GEN. STAT. ANN. § 33-322 (West Cum. Supp. 1978); ME. REV. STAT. ANN. tit. 13-A, § 306 (West 1964); N.C. GEN. STAT. § 55-33 (1975); S.C. CODE § 33-5-70 (1976).

59. *Shaffer*, 433 U.S. at 216.

60. *Id.* (*citing* International Shoe, Co. v. Washington, 326 U.S. at 319).

61. *Shaffer*, 433 U.S. at 217.

62. *Id.* at 217-19. Justice Stevens' argument for the invalidity of the statute was supported in the following way: because incorporation in Delaware determined the situs of the property — regardless of the actual location of the shares or the domicile of their owner — the nonresident owner was thereby forced either to generally appear or to forfeit the stock.

63. *Id.* at 219-20.

64. *Id.* at 220-21.

65. Because of the constitutional context of the decision, it would perforce influence the breadth of every state's jurisdictional statutes. *Id.* at 221-22.

66. *Id.*

67. *Id.* at 227-28.

dication of its important public policies directly pertaining to appellants' fiduciary associations with the State."[68]

A major criticism of *Shaffer* might be that it creates an undue bias in favor of defendants, thus compromising the integrity of the minimum contacts theory.[69] This bias is reflected in the plaintiff's difficulty in establishing jurisdiction over defendant's property in the forum state, because of a lack of other, more substantial contacts between the defendant and the forum. Accordingly, it may be "appropriate to preserve some place where the defendant can be sued on any cause of action."[70] This is particularly important, for example, in a shareholder's derivative suit.[71] Equitably, the forum having the most significant interest in litigating the cause of action should have jurisdiction.[72] Consequently, a plaintiff bias in multiple party litigation might be desirable.

The majority in *Shaffer* attempted to avoid such criticism by stating that once a plaintiff holds a valid judgment which establishes the defendant as a debtor of the plaintiff there would "seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter."[73] Additionally, the requirements of the *International Shoe* standard for asserting state court jurisdiction would not necessarily reach every type of action presently brought in rem;[74] for example, in cases where real property forms the basis for the litigation.[75] However, if the defendant

68. *Id.* at 228.

69. *See* Von Mehren & Trautman, *supra* note 51, at 1167. Professors Von Mehren and Trautman submit that consideration of the context of present day litigation and notions of fair play and substantial justice support a shift from defendant bias to a bias favoring the plaintiff. Specifically, "in any class of cases in which the controversy arises out of conduct essentially multistate on the part of the defendant, and essentially local on the part of the plaintiff, an argument exists for reversing the jurisdictional preference traditionally accorded defendants." *Id.* at 1167-68. To illustrate the practical application of this theory they cite the common situation in which the real party in interest is an insurance company having offices and activities in many states while the daily activities of the plaintiff are local. *Id.*

70. *Id.* at 1179.

71. *Shaffer,* 433 U.S. at 215-16; *see also id.* at 222-23. (Brennan, J. concurring and dissenting).

72. Von Mehren & Trautman, *supra* note 51, at 1154.

73. 433 U.S. at 210-11 n.36.

74. *Id.* at 208-09.

75. *Id.* at 207 n.24 (indicating this includes true in rem actions such as proceedings to register title to land and the type one quasi in rem proceedings). *See, e.g.,* Dubin v. City of Philadelphia, 34 Pa. D. & C. 61 (Philadelphia County Ct. 1938), holding that ownership, use or possession of real property is a sufficient basis of jurisdiction in personam for specific actions related to the property.

or his or her domicile cannot be located, a default judgment cannot be entered nor the defendant's assets sold where the property is unrelated to the underlying controversy and the defendant lacks minimum contacts with the forum. Quasi in rem jurisdiction, henceforth, cannot be employed to compel a defendant's general appearance unless the test of minimum contacts is met.

Although appellees in *Shaffer* argued that the *International Shoe* standard was uncertain and ill-defined, thus creating a need for the categorization of in rem jurisdiction in the *Pennoyer* style, the Court felt that this argument skirted the important jurisdictional issue and sacrificed "fair play and substantial justice."[76] And while a long line of cases had endorsed jurisdiction based solely on the presence of property within a state, such precepts must also satisfy the requirements of due process.[77] Accordingly, "traditional notions of fair play and substantial justice can be as readily offended by the perpetuation of ancient forms that are inconsistent with the basic values of our Constitutional heritage."[78]

The Burger Court has been noticeably divided over the extent and manner of the application of procedural due process remedies.[79] This may explain why the Court chose to pursue the minimum contacts route rather than the *Sniadach v. Family Finance Corp.*[80] line of cases in

76. *Id.* at 212.

77. *Id.*

78. *Id.*

79. It has been said that the fundamental concept of due process adjudication traditionally encompasses two analytically distinct issues: (1) whether the substantive right is owing and (2) if so, what procedural right should follow. Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing,* 88 HARV. L. REV. 1510, 1510 (1975) [hereinafter cited as *Interest Balancing*]. A finding as to the first issue requires consideration of the individual's liberty or property interests. *Id. See also* Goss v. Lopez, 419 U.S. 565, 572-76 (1975); Fuentes v. Shevin, 407 U.S. 67, 89-90 (1972). If a deprivation of these specific rights is exacted, particular procedures are required which recognize and address those rights. *Interest Balancing, supra* at 1517. *See, e.g.,* Wolff v. McDonnell, 418 U.S. 539, 560-72 (1974); Morrissey v. Brewer, 408 U.S. 471, 484-90 (1972). This latter analytical construct is particularly significant as applied in quasi in rem jurisdiction litigation: "for quasi in rem jurisdiction requires precisely that which due process prohibits, namely, a seizure of property prior to giving the defendant notice and the opportunity for a hearing." Note, *Quasi In Rem Jurisdiction and Due Process Requirements,* 82 YALE L. J. 1023, 1023 (1973) [hereinafter cited as *Due Process Requirements*].

80. *See generally* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (striking down Wisconsin prejudgment procedures involving a particular type of property wages); Fuentes v. Shevin, 407 U.S. 67 (1972) (striking down Pennsylvania and Florida prejudgment replevin procedures involving household goods); Mitchell v. Grant, 416 U.S. 600 (1974) (sustaining an ex parte prejudgment sequestration statute of Louisiana allowing seizure of household goods, without prior notice or hearing, in order to forestall violent self-help and retaliation by the possessor-debtor). North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (J. Stewart concurring) (rejecting a Georgia garnishment proceeding allowing an affidavit to issue on bare or conclusory allegations and wihtout judicial participation or probable cause). For other types of property affected, see Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Bell v. Burson, 402 U.S. 535 (1971) (driver's license).

deciding *Shaffer*. Nevertheless, such remedies will continue to be an integral part of *Shaffer*-type cases because the balancing of conflicting interests is always at issue.[81] Whether the state interest is the protection of substantive objectives or the relief of administrative difficulties, it must always be carefully weighed against the individual's concern.[82] Even temporary deprivation of individual property interests, without prior notice and a fair hearing (which does not force the defendant to submit to personal jurisdiction), can never be considered de minimis.[83] The essence of due process is precisely the notion with which quasi in rem is at odds and which this legal fiction is aimed at circumventing. Such decisions, whether reflective of new principles or of old ones will necessitate a re-examination of any procedure depriving persons of property without prior notice and a hearing.[84] "Subjecting jurisdictional attachment to such scrutiny reveals that the quasi in rem device, as presently employed in many cases, violates fundamental requirements of due process."[85]

While the *Sniadach* line of cases dealt primarily with the constitutionality of debtor-creditor attachments, their implications, as tangentially affected by *Shaffer,* indicate the need for a close scrutiny of foreign attachment and sequestration statutes used as provisional remedies merely for compelling a court appearance. For example, the United States Court of Appeals for the Third Circuit[86] held that while

81. The present doctrine of due process may be viewed as "a utilitarian balancing of the conflicting interests in which the individual's need for requested procedural safeguards is weighed against the governmental interest in summary or informal action." *Interest Balancing,supra* note 79, at 1510. Understandably, the quality of treatment accorded to these competing interests has been the subject of much Supreme Court litigation. While prior to *Shaffer, Pennoyer* was viewed as a case defining the present theoretical structure of quasi in rem jurisdiction, it carries equal import in describing the governmental interest for summary action. It addressed the problem of lost jurisdiction where the property was removed from the state before a final judgment could be rendered on the merits. To avoid this, as well as to satisfy due process notice requirements the Court concluded an immediate seizure of the property was a necessary prerequisite to jurisdiction. *Due Process Requirements, supra* note 79, at 1024. On the other hand, in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the due process imbalance inherent in *Pennoyer* was remedied by a recognition of individual interests and notice requirements. "Due process . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

82. *Interest Balancing, supra* note 79, at 1515.

83. Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis,* 73 COLUM. L. REV. 749, 761 (1973).

84. *Due Process Requirements, supra* note 79, at 1039.

85. *Id.*

86. Jonnet v. Dollar Savings Bank, 530 F.2d 1123 (3d Cir. 1976). Plaintiff alleged that the New York defendant wrongfully failed to honor a mortgage commitment of $1,100,000 and sought a writ of foreign attachment. The Court of Appeals held that Pennsylvania's foreign at-

the Pennsylvania foreign attachment procedure had enjoyed prior constitutionality,[87] the dynamic concept of procedural due process produces refinements which evolve periodically.[88] While the court did not find foreign attachment procedures unconstitutional per se, it held that courts must scrutinize ex parte procedures which "summarily deprive a party of an interest in property, even though temporarily, without notice, an opportunity for a prompt hearing, or other essential safeguards against wrongful seizure."[89]

As previously noted, the Supreme Court's decision in *Shaffer* was largely based upon the minimum contacts test of *International Shoe,* a primarily substantive analysis. It is submitted that the application of this standard to in rem issues brings into question the validity of attachment or garnishment statutes. Since such state-sanctioned devices are currently employed to acquire jurisdiction,[90] it will be necessary to re-

tachment procedures servd only the potential plaintiff's interests, provided inadequate protection to the prospective defendant against wrongful attachment, and thus, was invalid because it did not afford procedural due process. *Cited with approval in Shaffer,* 433 U.S. at 205.

87. *See, e.g.,* Lebowitz v. Forbes Leasing & Finance Corporation, 456 F.2d 979 (3d Cir.), *cert. denied,* 409 U.S. 843, *rehearing denied,* 409 U.S. 1049 (1972). A Pennsylvania resident brought suit in state court against a former employer, a foreign corporation not registered to do business in Pennsylvania, and alleged invalid discharge. The court held that although the Pennsylvania foreign attachment procedures may initially impair a defendant's ability to take part in judicial proceedings, such procedures, lack of notice in particular, do promote a compensating government interest in compelling the appearance of foreign corporate defendants not registered in the state. Thus, this does not constitute a deprivation of property in violation of due process; "[a]lthough the long-arm statute does replace the necessity for quasi-in-rem jurisdiction in some instances, it does not necessarily obviate the need for attachment prior to a nonresident defendant's general appearance." *Id.* at 982.

88. In *Jonnet,* the Court noted that:

> Pennsylvania foreign attachment procedures authorize the issuance of a writ by the prothonotary without notice to the defendant, without any hearing, without an affidavit of meritorious action, without the posting of a bond and without intervention by a judicial officer. Indeed, the attachment may precede the filing of the complaint by as much as five days. Once the attachment becomes effective, it is not dissolved by the general appearance of the defendant. Rather, dissolution occurs only if, inter alia, the defendant posts an adequate bond or other acceptable security or the plaintiff fails to prosecute his case with due diligence. Also, provision is made that if the defendant can demonstrate that the amount of property attached is excessive when compared to the amount in controversy, he may obtain a reduction.

Jonnet v. Dollar Savings Bank, 530 F.2d 1123, 1124-25 (3d Cir. 1976) (quoting *Lebowitz,* 456 F.2d at 980).

89. *Id.* at 1130.

90. *See, e.g.,* CAL. CIV. PROC. CODE § 483.010a & 492.010 (West 1978); CONN. GEN. STAT. ANN. § 52-279 (West Cum. Supp. 1978); ME. REV. STAT. ANN. tit. 14, § 4101 (1964); MASS. GEN. LAWS ANN. ch. 223, § 42 & ch. 227, § 1 (West 1958); N.H. REV. STAT. ANN. § 511 (1975); R.I. GEN. LAWS § 10-5-1 (1969); VT. STAT. ANN., V.R.C.P. 4.1 (Supp. 1977) (attachment statutes) and CAL. CIV. PROC. CODE § 488.330 (West 1978); CONN. GEN. STAT. ANN. § 52-329 (West Cum. Supp. 1978); ME. REV. STAT. ANN. tit. 14, § 2601 (1964); MASS. GEN. LAWS ANN. ch. 246 (West 1978); N.H. REV. STAT. ANN. § 512 (1975); R.I. GEN. LAWS § 10-5-1 (1969) (garnishment in Rhode Island is treated by statute as attachment); VT. STAT. ANN., V.R.C.P. 4.2 (Supp. 1977) (garnishment is also called "trustee process" in Maine and "foreign attachment" in Connecticut).

The New Hampshire attachment statute, *supra,* provides an excellent example of the potential impact of *Shaffer.* NEW HAMPSHIRE REVISED STATUTES ANNOTATED § 511-A:8 (1975), entitled

examine their purpose and effect within the meaning of *Shaffer* and the fourteenth amendment due process clause when they pose an "unacceptable risk of judgment"[91] to a defendant.

The Delaware foreign attachment statutes, affecting both individuals[92] and corporations,[93] provide an excellent example of such devices since the Delaware courts have upheld their application as constitutional even though they lack provision for notice and are in rem processes affecting absent defendants.[94] To that end, Delaware courts have consistently held that the primary purpose of foreign attachment statutes is to acquire jurisdiction over a nonresident defendant by forcing the defendant to protect property located within the forum state.[95] *Shaffer* now requires state court interpretation of such statutes to comport with the fairness standard applied in personam or risk the possibility of constitutional invalidity.

To the extent that *Shaffer* overshadows the type of quasi in rem actions typified by *Harris v. Balk*[96] one might expect that the full and legitimate potential of due process will rely heavily upon legislatively imposed long-arm statutes as the means to exercise valid state-court jurisdiction.

"Exceptions Prior to Hearing" states that a plaintiff may obtain a pre-judgment attachment upon a showing of probable cause and if there is a substantial danger property will be damaged, destroyed, concealed, or removed from the state (*see* note 80 *supra*), if attachment is necessary to secure an important public interest (*see* Boddie v. Connecticut, 401 U.S. 371 (1971), holding that in extraordinary situations involving valid government interests it is justifiable to postpone the hearing until after the event.), or if an attachment is necessary to vest quasi in rem jurisdiction. This last exception appears to be the one most clearly affected by the *Shaffer* decision.

91. *Shaffer*, 433 U.S. at 218 (Stevens, J. concurring).

92. The statute pertaining to individuals states:

> A writ of foreign attachment may issue against any individual not an inhabitant of this State on any cause of action after proof satisfactory to the court that the defendant cannot be found, that the defendant resides out of the State, and that plaintiff has a good cause of action against the defendant in a sum exceeding $50.

DEL. CODE tit. 10, § 3506 (1974).

93. The statute pertaining to corporations states:

> A writ of foreign attachment may be issued against any corporation, aggregate or sole, not created by or existing under the laws of this State upon proof satisfactory to the court that the defendant is a corporation not created by, or existing under the laws of this State, and that the plaintiff has a good cause of action against the defendant in an amount exceeding $50.

DEL. CODE tit. x, § 3507 (1974).

94. Canady v. Superior Court, 49 Del. 456, 119 A.2d 347 (1955); Blaustein v. Standard Oil Co., 44 Del. 145, 56 A.2d 772 (Super. Ct. 1947); Omnium De Participations Indus. De Luxe v Spoturno, 39 Del. 100, 196 A. 194 (Super. Ct. 1937); McLaughlin v. Bahre, 35 Del. 446, 166 A 800 (Super. Ct. 1933). *See also* Ownbey v. Morgan, 256 U.S. 94 (1921).

95. Kaiser-Frazer Corp. v. Eaton, 48 Del. 236, 101 A.2d 345 (Super. Ct. 1953); Brainard v. Canady, 49 Del. 182, 112 A.2d 862 (Super. Ct. 1955); Chrysler Corp. v. Dann., 53 Del. 430, 171 A.2d 223 (Super. Ct. 1961); United Indus. Corp. v. Nuclear Corp. of America, 237 F. Supp. 971 (D. Del. 1964).

96. 198 U.S. 215 (1905), *see* note 38 *supra*.

A practical purpose of long-arm statutes will be to grant a measure of security to defendants' expectations insofar as their amenability to suit in a specific jurisdiction is concerned. The general language of the minimum contacts theory of *International Shoe* will necessarily evolve into a more particularized test by the application of additional jurisdictional provisions, *e.g.*, tortious act and transaction of business.

While *International Shoe* has become the "master plan according to which all subsequent jurisdictional statutes have been drafted,"[97] and *McGee v. International Life Insurance Co.*[98] is the "leading case on long-arm or single act statutes,"[99] the application of their standards has been noticeably confined to the exercise of in personam jurisdiction over corporate defendants and nonresident individuals. Such changes must be incorporated either in their present form or with modifications into the law governing jurisdiction in rem. Thus, long-arm statutes like that in Illinois[100] and consent statutes like the one recently written in

97. N.Y. CIV. PRAC. LAW § 302 at 61 (McKinney 1972) (practice commentary by Professor McLaughlin).

98. McGee v. International Life Insurance Co., 355 U.S. 220 (1957). The nonresident (Texas) defendant insurance company had taken over the insurance obligations of the deceased California resident's previous insurer. The deceased made the payments on the policy from California until his death. The beneficiary of the policy and the witnesses to the death were California residents. The defendant had no other business contact with California. Jurisdiction was claimed on the basis of a California long-arm statute which conferred jurisdiction in suits on insurance contracts with California residents. In upholding the California court's jurisdiction, the Supreme Court stressed the importance of valid state interest and the substantial connection between the insurance contract and the forum state.

99. N.Y. CIV. PRAC. LAW § 302 at 62 (McKinney 1972) (practice commentary by Professor McLaughlin).

100. The Illinois provision is ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd Cum. Supp. 1978). Enacted in 1955, the Illinois long-arm statute is the model for many such statutes in the country. Based upon the bold principle that one should be amenable to suit in Illinois on any cause of action arising out of certain activities within the state, the statute provides:

> (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:
>
> (a) The transaction of any business within this State;
>
> (b) The commission of a tortious act within this State;
>
> (c) The ownership, use, or possession of any real estate situated in this State;
>
> (d) Contracting to insure any person, property or risk located within this State at the time of contracting;
>
> (e) With respect to actions of divorce and separate maintenance, the maintenance in this State of a matrimonial domicile.
>
> (2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.
>
> (3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.
>
> (4) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

Delaware[101] will address the very real difficulties states have encountered as a result of the territorialist power theory of *Pennoyer.*[102] Yet, they too must satisfy the bipartite due process requirements of *International Shoe* — fundamental fairness to the defendant in light of state interests and minimum contacts.

This two part analysis will have to guide the application of state court jurisdiction toward a more functional and utilitarian approach where

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See generally WIS. STAT. ANN. § 262.05 (West Supp. 1963); IDAHO CODE § 5-514 (Cum. Supp. 1977); R.I. GEN. LAWS § 9-5-33 (1969); MASS. GEN. LAWS ANN. ch. 223A, § 3 (West Supp. 1975).

For cases giving an expansive reading of long-term authority, *see* Nelson v. Miller, 11 Ill. 2d 378, 393-94, 143 N.E.2d 673, 681 (1957) ("an act or omission within the state, in person or by agent, is a sufficient basis for the exercise of jurisdiction. . . ."); Gray v. American Radiator & Standard Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (activities outside the forum causing injury within exhibited continuous and sustained activity to authorize jurisdiction).

For example, compare § 17 of ILL. REV. STAT. (Smith-Hurd Cum. Supp. 1978) with § 302 of N.Y. CIV. PRAC. (McKinney 1963) (entitled "Personal Jurisdiction by Acts of Non-residents"). Although the New York statute was couched in similar, and in some instances, identical language to that of the Illinois long-arm statue, the New York statute was interpreted in Feathers v. McLucas, 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965), as limiting or localizing tortious acts necessary to authorize the exercise of valid state jurisdiction. For cases decided in reliance upon *Feathers,* see Kramer v. Vogel, 17 N.Y.2d 27, 267 N.Y.S.2d 900, 215 N.E.2d 159 (1966); Harvey v. Chemie Gruenthal, 354 F.2d 428 (2d Cir.), *cert. denied,* 384 U.S. 1001 (1965). However, it is also interesting to note that the limiting application of the New York long-arm statute as evidenced by *Feathers, supra,* was alleviated by statutory amendment in 1966. As amended, section 302 (a) (3) of the New York CIVIL PRACTICE LAW allows the exercise of jurisdiction over a nondomiciliary who:

> commits a tortious act without the state causing injury . . . within the state . . . if he
>
> i. regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the state, or
>
> ii. expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce. . . .

N.Y. CIV. PRAC. § 302 (a) (3) (McKinney 1972).

See Pavlo v. James, 437 F. Supp. 125, 127-29 (S.D.N.Y. 1977) (In light of prior case law and *Shaffer,* plaintiff's conclusory allegations failed to show sufficient contacts with New York by the defendant to support long-arm jurisdiction under N.Y. CIV. PRAC. § 302(a)).

101. Immediately after the *Shaffer* decision, the Delaware legislature passed bill No. 341, which amends DEL. CODE tit. 10, ch. 31. Its purpose was to provide a constitutionally acceptable replacement for DEL. CODE tit. 10, § 366 (1974) which was struck down by the *Shaffer* decision. The new legislation was modeled on similar statutes in Connecticut, North Carolina, South Carolina, and Michigan. It provides, in part, that:

> Such acceptance or service as such director, trustee or member shall be a signification of the consent of such director, trustee or member that any process when so served shall be of the same legal force and validity as if served upon such director, trustee or member within this State and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable.

DEL. CODE tit. 10, § 3114(a) (Cum. Supp. 1977).

102. *See, e.g.,* J. Brennan, concurring and dissenting, in Shaffer v. Heitner, 433 U.S. at 227, and *id.* n.6. *Cf.* Hess v. Pawloski, 274 U.S. 352 (1927), holding an out-of-state motorist impliedly consented to process when using the state's roadways.

quasi in rem issues are involved. The rigidity of the traditional approach to in rem and in personam jurisdiction is being replaced by a flexible but complex standard requiring rational evaluation of all the competing interests. Courts will no longer decide issues simply on highly formalized concepts such as presence and sovereignty. Any uncertainty as to the contours of these guidelines has been dispelled, at least insofar as the United States Supreme Court is concerned.[103] All state courts and legislatures must now undertake efforts to insure the development of standards consistent with those enunciated in *Shaffer*.

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103. 433 U.S. at 211. *Cf.* cases decided in reliance upon *Shaffer*, O'Connor v. Lee-Hy Paving Corp., 437 F. Supp. 994 (E.D.N.Y. 1977) holding that in a death action that arose when a New York resident was killed allegedly by a Virginia defendant's negligence in a Virginia accident, the New York court can exercise jurisdiction by attaching contractual obligations of insurance companies, doing business in New York, to defend and indemnify Virginia residents. *See, e.g.*, Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), allowing attachment since the policy obligation is a debt owed to the defendant by the insurer. The *O'Connor* court found that "*Shaffer* does not require rejection of *Seider v. Roth* . . . . The jurisdiction exercised under those cases is one in favor of residents only, is available only against insurers suable in the state, requires giving adequate notice to the insured . . . ." *O'Connor, supra,* at 1004. *Compare O'Connor with* Rush & State Farm Mutual Auto. Ins. Co. v. Savchuk, — Minn. —, 245 N.W.2d 624 (1976) (under Minn. St. 571.41, subd. 2, the obligation owed by an insurance company to its non-resident insured held to be a garnishable res supporting quasi in rem jurisdiction, and that exercise of jurisdiction based on the statute does not violate due process) *vacated & remanded* 433 U.S. 902 (1977) in light of *Shaffer*, 433 U.S. 186 (1977). Carolina Power & Light v. Uranex, — F. Supp. — (N.D. Cal. 1977) (46 U.S.L.W. 2194) in which a suit between North Carolina plaintiff and French defendant is maintained in a forum (New York) consistent with principles of *International Shoe*. Held that a California court can validly exercise jurisdiction to attach, as security for a possible judgment, a debt owed to defendant by a California corporation, even though the French company's limited contacts with California do not support assertion of in personam jurisdiction under *International Shoe* standards. The California court thereby acknowledged the *Shaffer*-made distinction between jurisdiction to adjudicate the underlying merits and jurisdiction to attach property as security for a judgment being sought in another forum.

Recording of Surnames — Clerks have no authority to inhibit the rights of individuals to choose their own and their children's surnames. ***Secretary of the Commonwealth v. City Clerk of Lowell***[1]

This case arose from the refusal of the defendant municipal clerks[2] to follow three opinions of the Attorney General regarding the recording of surnames.[3] The suit was brought by the Secretary of State,[4] who is responsible for keeping the records of the Commonwealth, and the Registrar of Vital Records and Statistics. The purpose of the suit was to determine whether people may freely adopt surnames for themselves or their children. The Supreme Judicial Court took original jurisdiction, thus precluding the necessity for a lower court ruling.[5]

The three opinions of the Attorney General, which were relied upon by the court, had been made known to the clerks by the Registrar of Vital Records and Statistics.[6] The clerks, however, chose to disregard these opinions. On January 14, 1976, the Massachusetts City Clerks' Association, Inc., formally adopted the position that, based upon a 200 year old custom of clerks, a legitimate child's surname would be recorded as that of its father. They also declared that an illegitimate child's sur-

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1. 1977 Mass. Adv. Sh. 1674, 366 N.E.2d 717 (1977).

2. The Registrar of the City of Boston and the clerks of the cities of Lowell, Melrose, Newburyport and Worcester, and the town of Brookline.

3. 29 REPS. ATTY. GEN. 105 (1974); 5 REPS. ATTY. GEN. 48 (1974); 29 REPS. ATTY. GEN. 72 (1974).

4. MASS. CONST. Pt. II, ch. 2, § 4, art. 2. The clerks of the cities and towns in Massachusetts are periodically required to send certified copies of births, intentions of marriages, marriages, and deaths to the Secretary of State. MASS. GEN. LAWS ANN. ch. 46, § 17 (West Supp. 1977).

However, the division of vital statistics was transferred from the Secretary of State's office to the Division of Public Health by St. 1976, ch. 486, effective January 1, 1977. Thus, the Secretary of State became a party in name only because in Massachusetts, substitution of parties is automatic under MASS. R. CIV. P. 25 (d)(1).

5. MASS. GEN. LAWS ANN. ch. 211, § 12 (West 1975).

> The Supreme Judicial Court shall hold sittings for the hearing and determination of questions of law arising in any cases at such times and places as the court shall by rule determine, and any such sittings may be adjourned to such places and times as shall appear to the court to be most conducive to the dispatch of business and to the interest of the public.

6. 1977 Mass. Adv. Sh. at 1679, 366 N.E.2d at 721.

name would be recorded under its mother's surname.[7] The majority of the court decided that: "it is no part of the duty of the clerk to substitute his legal judgment for that of the Attorney General."[8] In open defiance of the Attorney General's opinions, the defendant clerks had assumed the power to determine a person's surname, regardless of the desires of that individual.[9]

There were seven specific instances involved in this case in which the clerks preempted the rights of individuals. These dealt only with the surnames of married or divorced women and legitimate and illegitimate children. A divorced woman was unable to obtain a marriage license in her birth-given surname and was forced to use her former husband's surname.[10] In addition, a husband and wife of Spanish descent, following Spanish tradition, wanted to give their child the mother's surname. The clerk refused to comply with their wishes and recorded the father's last name.[11] In another instance, a husband and wife sought to give their child a hyphenated surname and the clerk refused.[12] Other parents selected a totally different surname for their child and the clerk chose to record the child's surname as that of the father.[13] Similarly, when the mother of an illegitimate child chose a hyphenated surname, the clerk recorded the mother's last name for the child.[14] Another mother of an

7. *Id.* at 1677, 366 N.E.2d at 720.

8. *Id.* at 1679, 366 N.E.2d at 721.

9. *Id.* at 1675, 366 N.E.2d at 719-20.

It is interesting to contrast this practice with the duties of a clerk in Massachusetts which are set out in MASS. GEN. LAWS ANN. ch. 46, § 1 (West 1975) which provides:

> Each town clerk shall receive or obtain and record the following facts relative to births, marriages and deaths in his town:
>
> In the record of births, date of record, date of birth, place of birth, name of child, his sex, names, places of birth and residence of his parents, including the maiden name of the mother and occupation of the father. In the record of birth of an illegitimate child, the name of, and other facts relating to, the father shall not be recorded.
>
> In the record of marriages, date of record, date of marriage, place of marriage, name, residence and official station of the person by whom solemnized, names and places of birth of the parties married, residence of each, age of each, the number of the marriage (as first or second) and if previously married, whether widowed or divorced, the occupation of each and the names of their parents, and the maiden names of the mother. If the woman is a widow or divorced, her maiden name shall also be given.
>
> In the record of deaths, date of record, date of death, name of deceased, sex, color, condition (whether single, widowed, married or divorced), supposed age, residence, occupation, place of death, place of birth, names and places of birth of the parents, maiden name of the mother, disease or cause of death, defined so that it can be classified under the international classification of causes of death, place of burial, name of the cemetery, if any, and if deceased was a veteran, as defined in section ten of chapter forty-six, a recital as required by section ten, and if deceased was a married or divorced woman or a widow, her maiden name and the name of her husband. The word "residence", as used in this section, shall be held to include the name of the street and number, if any, of the house.

10. 1977 Mass. Adv. Sh. at 1676 (example 5), 366 N.E.2d at 720 (example 5).

11. *Id.* (example 1), 366 N.E.2d at 720 (example 1).

12. *Id.* (example 2), 366 N.E.2d at 720 (example 2).

13. *Id.* (example 6), 366 N.E.2d at 720 (example 6).

14. *Id.* (example 3), 366 N.E.2d at 720 (example 3).

illegitimate child attempted to give her child a surname different from her own, but was prevented by the refusal of the clerk to record it.[15] Finally, when the parents of an illegitimate child were later married, one of the clerks refused to register the legitimation of the child unless the child's surname was changed to that of the father.[16] This same clerk also insisted that the affidavit of paternity list the mother's surname as that of the father, even though she had not adopted it at marriage.[17]

In *City Clerk of Lowell,* the Supreme Judicial Court was presented with an "unprecedented situation."[18] They therefore had to decide whether the traditional rules used by the clerks in recording the surnames of children and married and divorced women, were still appropriate in today's society.[19] A primary source relied upon by the court in making this determination was the rationale of the aforementioned opinions of the Attorney General.[20]

The first opinion dealt with the right of a married woman to give her child her birth-given surname rather than her husband's last name.[21] The Attorney General found no law in Massachusetts which compels parents to share a common surname, and therefore reasoned that the state does not have a strong interest in requiring a child, as a matter of law, to be known by its father's surname.[22] He also noted that the duty of a clerk to record surnames is purely ministerial.[23]

The second opinion responded to the question of whether a woman must automatically assume her husband's surname upon marriage, as a matter of law.[24] The Attorney General stated that although Massachusetts had previously adopted the position that a woman's surname became her husband's surname, changes in both popular and

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15. *Id.* (example 7), 366 N.E.2d at 720 (example 7).
16. *Id.* (example 4), 366 N.E.2d at 720 (example 4).
17. *Id.*
18. *Id.* at 1682, 366 N.E.2d at 722.
19. *Id.*
20. *Id.* at 1674, 366 N.E.2d at 719. There is no specific case or statutory law which clearly defines the weight of authority given to opinions of the Attorney General. However, the Attorney General has been found to be the "chief law officer" of the state. Comm. v. Kozlowsky, 238 Mass. 379, 389, 131 N.E. 207, 212 (1921).

Only state officers are entitled to the Attorney General's opinion. If the Attorney General chose to give an opinion to someone other than a state officer, that person would not be bound by the opinion. 1 OP. AG. 562 (1898). The obvious inference from this is that state officers are bound by the opinion of the Attorney General. *City Clerk of Lowell* is the first Massachusetts case to state that city and town clerks should be bound by an opinion given by the Attorney General.

21. 29 REPS. ATTY. GEN. 105 (1974). This opinion was requested by the Hon. John F. X. Davoren, Secretary of the Commonwealth.
22. *Id.* at 107.
23. *Id.* at 105. "The duty is to *record* the 'name' of the child." (emphasis added).
24. 5 REPS. ATTY. GEN. 48 (1974). This opinion was requested by Ms. Regina Healy, Commissioner, Mass. Comm. Against Discrim.

legal thinking have led to the opposite view.[25] A woman has the right to adopt any surname she chooses,[26] there being no Massachusetts statute requiring a woman to adopt her husband's surname.[27]

The third opinion encompassed two issues. The first was whether parents had the right to give their child a hyphenated version of both their names.[28] The Attorney General emphasized that if both parents agree to the hyphenated surname, the clerk could not refuse to record it.[29] The second entailed the propriety of using a mother's birth-given surname on her child's birth certificate without having to petition the probate court for a change of name. This was answered affirmatively.[30]

The Supreme Judicial Court appeared to incorporate these opinions of the Attorney General into their interpretation of Massachusetts law.[31] Indeed, the court admonished the clerks for attempting to substitute their legal judgment for that of the state's chief law officer.[32] Furthermore, they declared that: "[n]o tradition of city and town clerks can override the law or the rights of the people."[33]

The court next examined applicable recent legal developments. Although not considered directly controlling, they contributed to the court's ultimate conclusion that the common law principle of freedom of choice in the area of surnames was "not out of harmony with modern conditions."[34]

The right of women to freely choose their own surnames appeared to be protected by the concept of family autonomy.[35] Hence, the court looked to recent decisions of the United States Supreme Court which held that choices made in the sphere of family life are protected by the due process clause of the fourteenth amendment and are free from interference by the state.[36] As a result, the state cannot interfere with a woman's choice of a surname upon marriage.[37]

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25. *Id.* at 49. *See* Bacon v. Boston Elevated Ry., 256 Mass. 30, 32, 152 N.E. 35, 36 (1926).

26. 5 REPS. ATTY. GEN. at 49.

27. *Id.*

28. 29 REPS. ATTY. GEN. 72 (1974). This opinion was requested by the Hon. John F. X. Davoren, Secretary of the Commonwealth.

29. *Id.* at 73. The Attorney General specifically stated that this opinion did not deal with a dispute between parents as to the surname of the child. *Id.*

30. *Id.*

31. 1977 Mass. Adv. Sh. at 1679, 366 N.E.2d at 721. *See* note 20 *supra.*

32. *Id.*

33. *Id.* at 1682, 366 N.E.2d at 722.

34. *Id.* at 1684, 366 N.E.2d at 723.

35. *Id.* at 1682-83, 366 N.E.2d at 723.

36. *Id. See* Smith v. Organization of Foster Families for Equality and Reform, 97 S.Ct. 2094, 2109 (June 13, 1977); Cleveland Board of Education v. La Fleur, 414 U.S. 632, 639-40 (1974); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

37. The court gave no examples of instances where the state's interest would be so compelling as to inhibit a person's choice of name.

The court focused upon one provision of Massachusetts law as being particularly relevant to the recording of the surname of a married or divorced woman.[38] This provision forbids the recording of a name based solely upon a person's sex or marital status.[39] The court declared that although the plaintiffs did not invoke this statute, the policy contained within it should be considered.[40] The court pointed to other Massachusetts statutory provisions[41] and decided that they do not restrict a woman's choice of a surname.[42] Instead, they assist in securing an "official record that definitely and specifically establishes her change of name."[43]

The court also examined prior case law applicable to statutory interpretation. Justice Braucher referred to *Bacon v. Boston Elevated Railway*[44] which held that a woman's surname becomes that of her husband upon marriage, as a matter of law.[45] Despite this early precedent, however, the court in *City Clerk of Lowell* relied upon the reasoning of *In re Buyarsky*[46] which decided that people may change their names without resorting to statutory procedure, provided there was no intent to deceive.[47] In *Buyarsky,* a petition for a change of name was contested by a person with an identical name, who claimed to have been inconvenienced by the petitioner's use of the same name. Although the probate court denied the petition, the Supreme Judicial Court held that mere inconvenience on the part of the contestant was not a sufficient ground on which to deny the petition.[48] The court stated that the common law allows one to assume a name which that person finds more appropriate and advantageous than his or her birth-given name.[49] The court also reviewed *In re Merolevitz*[50] where it was declared that in

38. MASS. GEN. LAWS ANN. ch. 151B, § 4 (15) (West 1975).
39. *Id.*
40. 1977 Mass. Adv. Sh. 1684, 366 N.E.2d at 723.
41. MASS. GEN. LAWS ANN. ch. 210, § 12 (West 1975) provides:

> A petition for the change of name of a person may be heard by the probate court in the county where the petitioner resides. No change of the name of a person, except upon the adoption of a child under this chapter or upon the marriage or divorce of a woman, shall be lawful unless made by said court for a sufficient reason consistent with public interests.

MASS. GEN. LAWS ANN. ch. 208, § 23 (West Supp. 1977), provides that "[t]he court granting a divorce may allow a woman to resume her maiden name or that of a former husband."
42. 1977 Mass. Adv. Sh. at 1680, 366 N.E.2d at 722.
43. *Id.* at 1686, 366 N.E.2d at 724. *See In re* Buyarsky, 322 Mass. 335, 338, 77 N.E.2d 216, 218 (1948).
44. 256 Mass. 30, 152 N.E. 35 (1926).
45. *Id.* at 32, 152 N.E. at 36.
46. 322 Mass. 335, 77 N.E.2d 216 (1948).
47. *Id.* at 338, 77 N.E.2d at 218.
48. *Id.*
49. *Id.*
50. 320 Mass. 448, 70 N.E.2d 249 (1946).

jurisdictions where surnames were regulated by statutory law, they were designed to supplement but not abrogate the common law.[51] Thus the *Lowell* court found that chapter forty-six of the Massachusetts General Laws[52] should aid, rather than prevent, a person in changing his or her surname. Section one of this statute states that a clerk must record the name of a person on records of births, marriages and deaths.[53] It was acknowledged by the court that there is no rule by which to determine a person's name.[54] Therefore, according to common law, which cannot be abrogated by statutory law, a woman is free to choose her own surname without interference from the municipal clerks.[55]

Similar reasoning was adopted and expanded upon regarding the parental choice of surnames for legitimate children. The Supreme Judicial Court found no statutory provision determinative.[56] The term "family name" which is required to be recorded by clerks when reporting a birth to the local board of health,[57] was found to refer merely to the child's surname.[58] The court acknowledged that it had previously been the custom in this country to give a child its father's surname.[59] However, the court in *City Clerk of Lowell* reversed itself and considered the naming of a child to be a matter of parental choice.[60]

Thus, this decision extended the common law principle of freedom to choose a name to include the right of parents to give their child whatever surname they desire, including one not borne by either parent.[61] It became a "short step" for the court to approve the use of a hyphenated version of both parents surnames in the recording of a child's surname.[62] This freedom and authority stems from the concept of family autonomy.[63] The issue of parents disagreeing as to the appropriate surname for a child was put aside by the court.[64] In order to

51. *Id.* at 450, 70 N.E.2d at 250.
52. MASS. GEN. LAWS ANN. ch. 46, §§ 1-30 (West Supp. 1977).
53. MASS. GEN. LAWS ANN. ch. 46, § 1 (West 1975).
54. 1977 Mass. Adv. Sh. at 1682, 366 N.E.2d at 722.
55. *Id.*
56. *Id.* at 1687, 366 N.E.2d at 725.
57. MASS. GEN. LAWS ANN. ch. 46, § 4A (West 1975) provides in pertinent part that "[t]he said town clerk or registrar shall file daily with the local board of health a list of all births reported to him, showing, as to each, the date of birth, sex, color, birth weight, family name, residence and physician or officer in charge."
58. 1977 Mass. Adv. Sh. at 1687, 366 N.E.2d at 725.
59. *Id.* In fact, the court referred to a prior Massachusetts decision in which the court has assumed that the proper surname for a legitimate child was its father's name. *See* Eaton v. Libby, 165 Mass. 218, 220, 42 N.E. 1127 (1896).
60. *Id.* at 1688, 366 N.E.2d at 725.
61. *Id.*
62. *Id.* at 1689, 366 N.E.2d at 725.
63. *Id.* *See* note 36 and accompanying text *supra.*
64. 1977 Mass. Adv. Sh. at 1689, 366 N.E.2d at 725.

avoid confusion in searching for birth records,[65] the court offered the suggestion that the clerks could cross-index children's surnames under the surnames of their parents.[66]

The same rationale regarding parental authority in the naming of children was employed by the court in its discussion of illegitimate children. It was observed that although illegitimate children usually bear their mothers' surnames,[67] prior Massachusetts case law is inconclusive as to the naming of an illegitimate child.[68] The court concluded that the mother of an illegitimate child has the same right as the parents of a legitimate child to freely select the child's surname, as long as the putative father has no objection.[69] This rationale is appropriate in that it does not discriminate between the rights of a parent of a legitimate child and the parent of an illegitimate child.

In our modern society, married and divorced women have had to overcome the obstacle of custom in order to retain or resume their birth-given surnames. Until the court's decision in *City Clerk of Lowell,* a married woman's surname in Massachusetts became her husband's surname upon marriage, as a matter of law.[70]

Allowing women to decide upon their own surnames is not a novel historical development. Indeed, the court merely revitalized a practice which developed centuries ago but was then discontinued. At the time surnames originated in England,[71] matronymic as well as patronymic cognomens were used.[72] Among the explanations suggested for the use of matronymic names are such factors as illegitimacy,[73] posthumous births,[74] and situations in which the woman was the owner of the

65. *See* note 114 *infra.*

66. 1977 Mass. Adv. Sh. at 1689, 366 N.E.2d at 725.

67. *Id.*

68. *Id.* at 1690, 366 N.E.2d at 726.

69. *Id.* at 1691, 366 N.E.2d at 726. The issue of an illegitimate child being given essentially the same name as its alleged father (*e.g.,* Joe Green, Jr.), was reserved by the court for another day. The putative father's name is not supposed to appear on the record of an illegitimate child's birth. The clerks took this to mean that the child was to bear only its mother's surname. The court disagreed with the clerks' proposition, but realized that there is a chance that a woman might attempt to harass the putative father by giving her child substantially the same name. Therefore, the mother of an illegitimate child may choose any surname for her child, with the possible exception of naming the child substantially after the alleged father.

70. *Id.* at 1680-81, 366 N.E.2d at 722.

71. This was after the Norman Conquest in 1066. P. REANEY, THE ORIGINS OF ENGLISH SURNAMES 82, 83 (1967).

72. P. REANEY, *supra* note 71, at 76.

73. *Id.* at 79.

74. *Id.* at 78.

greater amount of property.[75] In fact, it was not the custom for women to adopt their husband's surnames at all, and records show that husbands and wives were often known by different surnames.[76] Working-class women acquired their names in the same manner as their husbands acquired theirs, that is, by the type of work they performed.[77]

Gradually, the custom arose in England that a wife became known by her husband's surname.[78] This was the result of the common law doctrine that there is a merger between a husband and wife upon marriage. In this merger the husband and wife are one, but

> the very being, or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: . . . [she] is said to be *covert-baron,* or under the protection and influence of her husband, her *baron* or lord; and her condition during marriage is called her coverture.[79]

Prior to the decision in *City Clerk of Lowell,* several states had adopted the view that women assumed their husbands' surnames as a matter of *custom* rather than law.[80] For example, in the case of *Krupa v. Green*[81] an attorney was attempting to run for the office of Judge of the Cleveland Municipal Court under her birth-given name. Before her marriage, she had signed an antenuptial agreement with her husband, in which they both agreed that she would retain her birth-given name. Ultimately, the case came before the Court of Appeals of Ohio which declared that it was only by custom that women adopted their husbands' surnames.[82] The court held that under the common law, as well as statutory law in Ohio, a person is free to choose any name as long as there is no intent to defraud.[83] It was further noted that "the

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75. *Id.*

76. *Id.* at 84-85.

77. *E.g.* "Julia Selkwomman who sold her silk." C. M. MATTHEWS, ENGLISH SURNAMES 51 (1967).

78. When a woman on her marriage assumes, as she usually does in England, the surname of her husband in substitution for her father's name, it may be said that she acquires a new name by repute. The change of name is *in fact,* rather than *in law,* a consequence of the marriage. W. HALSBURY'S LAWS OF ENGLAND 829 (3d ed. 1957) (emphasis added). *See* Cowley v. Cowley, 83 L.T.R. 218 (1901), where the House of Lords refused to enjoin the former wife of the Earl of Cowley from using the title of Countess Cowley, even though she had divorced the Earl and married a commoner which deprived her of all legal right to the title. The House of Lords further refused to require her to adopt her new husband's surname.

79. 1 W. BLACKSTONE, COMMENTARIES 442 (1771).

80. David v. Roos, 326 So.2d 226, (Fla. Dist. Ct. App. 1976); *In re* Natale, 527 S.W.2d 402 (Mo. App. 1975); *In re* Lawrence, 133 N.J Super. 408, 337 A.2d 49 (1975); Dunn v. Palermo, 522 S.W.2d 679 (Tenn. 1975); *In re* Strikwerda, 216 Va. 470, 220 S.E.2d 245 (1975); Doe v. Dunning, 87 Wash.2d 50, 549 P.2d 1 (1976); Kruzel v. Podel, 67 Wis.2d 138, 226 N.W.2d 458 (1975).

81. 19 Ohio Op.2d 341, 177 N.E.2d 616 (1961).

82. *Id.* at 344, 177 N.E.2d at 619.

83. *Id.*

trend against the loss of identity of a woman by marriage has received common acceptance."[84] It was therefore determined that the petitioner had the right to register to vote and run for election under her birth-given name.

The common law right to freely choose a surname was also extended to women in the case of *In re Mohlman.*[85] The Court of Appeals of North Carolina acknowledged that under the common law a wife is not required to assume her husband's surname.[86] However, it refused to allow the petitioners, married women who had instituted proceedings in order to resume their birth-given surnames for personal and professional reasons, to change their surnames due to the fact that they failed to show "good and sufficient reason" for allowing the change of name.[87] Mere desire was not enough. However, in *In re Strikwerda,*[88] the Supreme Court of Virginia allowed the petitioners, who were married women, to resume their maiden names, where the petitions were not filed for "an illegal, fraudulent, or immoral purpose,"[89] and where the petitioners had agreed "that any children born of their marriage would bear the husband's surname."[90] The trial court had denied the petitions on the ground that a Virginia statute allowed a married woman to resume her birth-given name. However, this statute was applicable only upon divorce.[91] The Virginia Supreme Court declared that no statute existed in Virginia which prohibited "a married woman from resuming her maiden name."[92]

The common law right was again invoked in *Kruzel v. Podel,*[93] a Wisconsin case which presented the question of whether a woman was required by law to assume her husband's surname. The plaintiff school teacher consistently used her birth-given name after marriage. The Milwaukee School Board insisted that she either legally change her name to her birth-given name or adopt her husband's name. The trial court concluded that a woman's surname became that of her husband upon marriage.[94] To "change" back to her birth-given name "would be contrary to the best interests of any children that might thereafter be

84. *Id.* at 347, 177 N.E.2d at 622.
85. 26 N.C. App. 220, 216 S.E.2d 147 (1975).
86. *Id.* at 222, 216 S.E.2d at 149.
87. *Id.* at 225, 216 S.E.2d at 152.
88. 216 Va. 470, 220 S.E.2d 245 (1975).
89. *Id.* at 472, 220 S.E.2d at 247.
90. *Id.* at 471, 220 S.E.2d at 246.
91. *Id.* VA. CODE § 20-107 (Supp. 1977) provides in part that "Upon decreeing a divorce from the bond of matrimony, the court may allow either party to resume a former name. . . ."
92. 216 Va. at 471, 220 S.E.2d at 246.
93. 67 Wis.2d 138, 226 N.W.2d 458 (1975).
94. *Id.* at 140, 226 N.W.2d at 460.

born to the marriage."[95] The Supreme Court of Wisconsin determined, however, that English common law did not require that a woman assume her husband's surname, and that when the wife did assume the husband's surname, "it was a matter of *custom* or practice and not law."[96] The court enunciated the common law standard, that there must be a showing of fraudulent intent in order to deny the petition.[97]

Several cases have held that statutory law[98] serves as an aid to common law, and not as a restriction of it.[99] In fact, statutes regarding name changes are designed to provide "for an orderly record of change of name in order to avoid further confusion"[100] and to aid in the "securing of an official record which definitely establishes the change of name."[101] The court in *City Clerk of Lowell* adopted this line of reasoning.[102] Thus, a person residing in Massachusetts would use chapter 210, section twelve of the Massachusetts General Laws[103] to secure an official document which verifies the fact that a person had changed his or her birth-given name to a substantially different name, for example where Mary Smith changed her name to Rachel Roberts. One does not *need* to use the statute in order to use an assumed name, as one always had the common law right to do so.

95. *Id.*

96. *Id.* at 143, 226 N.W.2d at 463 (emphasis added).

97. *Id.* at 146, 226 N.W.2d at 466.

98. For example, in Iowa the statute regulating eligibility for changing one's name formerly read as follows: "Any person under no civil disabilities, who has attained his or her majority *and is unmarried, if a female,* desiring to change his or her name, may do so as provided in this chapter." IOWA CODE ANN. § 674.1 (West 1973) (emphasis added). In its present form the statute reads: "Any person under no civil disabilities, who has attained his or her majority, desiring to change his or her name may do so by filing a verified petition as provided in this chapter." *Id.* (West Supp. 1977-78). The former statute was arguably discriminatory on its face toward married women in that it allowed married men and single women to change their names, while preventing married women from doing the same. The present statute has eliminated the discriminatory reference to married women. In Kentucky the change of name statute provides in part: "Any person at least eighteen years of age may have his name changed by the county court of the county in which he resides." KY. REV. STAT. ANN. § 401.010 (Baldwin Interim Supp. 1977). The first part of that statute previously read: "Any person at least eighteen years of age *who is not a married woman,* . . ." *Id.* (Baldwin 1972) (emphasis added). In Vermont, "a married person shall not change his name without the consent of the other spouse being expressed in such instrument and the same being signed, sealed and acknowledged by such spouse." VT. STAT. ANN. tit. 15, § 811 (1974).

99. Custer v. Bonadies, 30 Conn. Supp. 385, 318 A.2d (1974); Stuart v. Board of Supervisors of Elections for Howard County, 266 Md. 440, 295 A.2d 223 (1972); Krupa v. Green, 114 Ohio App. 497, 177 N.E.2d 616 (1961); Dunn v. Palermo, 522 S.W.2d 679 (Tenn. 1975).

100. *In re* Hauptly, 262 Ind. 150, 152, 312 N.E.2d 857, 859 (1974).

101. *In re* Buyarsky, 322 Mass. 335, 338, 77 N.E.2d 216, 218 (1948). In the case of *In re* Application of Lawrence, the court determined that a change of name statute was actually "remedial legislation establishing a method of judicial recordation of change of name. It has been construed consistently in the light of and not in derogation of the common law, which it does not supercede." 133 N.J. Super. 408, 410, 337 A.2d 49, 50 (1975).

102. 1977 Mass. Adv. Sh. at 1680-81, 366 N.E.2d at 722.

103. MASS. GEN. LAWS ANN. ch. 210, § 12 (West 1975). *See* note 41 *supra.*

There is no statute in Massachusetts which defines what the parents' choice of a child's surname should be. The Massachusetts Attorney General has stated that the duty of the clerk is merely to record the child's name.[104] Similarly, statutes in other states do not contain a definition of what a child's surname should be. They only require that a name be recorded.[105]

The lack of statutory guidance supports the decision of the court in *City Clerk of Lowell* that the custom of giving a child its father's surname was "a matter of parental choice rather than law."[106] The conclusion was thus reached by the court that parents may give their legitimate child the surname they desire, even though neither one of the parents shares that surname.[107] The court's decision regarding parental choice in the naming of their child extends the common law principle of freedom to choose a name in the absence of fraud and follows the traditional approach used by the court system in the area of family autonomy.

Chapter forty-six, section one of the Massachusetts General Laws provides that the name of the father shall not appear on the record of birth of an illegitimate child.[108] The court chose not to decide, at this time, the appropriateness of naming an illegitimate child after its father.[109] However, it would have been a logical progression of the court's rationale regarding parental control over a child's surname to have stated that where a father has openly acknowledged an illegitimate

104. 29 REPS. ATTY. GEN. 105 (1974).

> The statute, G.L. C. 46, § 1, does not require that the name of the child include the father's surname as the baby's surname. Nor does such a requirement exist in any other statute of the Commonwealth. For instance, while the Commonwealth has required certain conditions be met before people marry, G.L. C. 207, there is no requirement that the children born of that marriage bear the father's name. In short, there is no statutory requirement that a baby's surname be identical with its father's surname. *Id.*

105. For example, in Connecticut the registrar of the town in which a birth occurs should receive a certificate from the "physician, midwife, father or mother stating from the best information available, the name, if such a child has a name, . . ." CONN. GEN. STAT. ANN., tit. 7, ch. 93 § 7-48 (West Supp. 1978). Some statutes do not even refer to the word "name". In Illinois the appropriate statute reads in pertinent part: "(1) Each live birth which occurs in this state shall be registered with the local or subregistrar of the district in which the birth occurred as provided in this section, within 3 days after such birth." ILL. ANN. STAT., ch. 111 1/2, § 73-12(1) (Smith-Hurd 1977). The relevant Pennsylvania statute provides only that a certificate be filed with the registrar of the district in which the birth occurred. PENN. STAT. ANN., tit. 35, ch. 2, § 450. 401 (Purdon 1977).

106. 1977 Mass. Adv. Sh. at 1688, 366 N.E.2d at 725.

107. *Id.*

108. MASS. GEN. LAWS ANN. ch. 46, § 1 (West 1975). *See* note 9 *supra.*

109. 1977 Mass. Adv. Sh. at 1691, 366 N.E.2d at 726.

child, the mother may name the child after the father, although there has been no adjudication as to paternity.[110]

Justice Quirico based his dissent[111] on the state's interest in administrative convenience. In his judgment, the common law should not be invoked when the result is difficulty in record-keeping.[112] He observed that the legislative intent in authorizing clerks to record births, marriages and deaths, was that the family name of a child is its father's surname and that a wife assumes her husband's surname at marriage.[113] He argued that freedom to choose any surname one desires will lead to the impossibility of tracing familial relationships.[114] The dissenting opinion concludes with the view that an official, statutory surname could be used for record-keeping purposes, while a different name chosen under the common law principle could still be used by a person outside the realm of official records.[115]

Based upon this reasoning, it is suggested that the dissent offers no viable solution to the problems presented by the seven instances involved in this case but rather attempts to preserve the status quo at the expense of the right of an individual to freely select a surname. The dissenting opinion elevates administrative convenience in record-keeping over the rights of women to choose their own surnames and of

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110. The case of Trimble v. Gordon, 430 U.S. 762 (1977), which was noted by the court in *City Clerk of Lowell,* 1977 Mass. Adv. Sh. at 1683, 366 N.E.2d at 723, supports this proposition. *Trimble* dealt with the right of an illegitimate child to inherit from her father's intestate estate, where her father had openly acknowledged and supported her during his life. The test used by the Supreme Court in applying the equal protection clause of the fourteenth amendment was the means-oriented substantial state interest test. In applying this test, it must be shown that there is a fair and substantial relationship between the object of the classification and the classification scheme adopted. Reed v. Reed, 404 U.S. 71 (1971). This test is the most commonly used test and forms a middle ground between minimal scrutiny, in which there must be a showing of any conceivable relationship between the purpose of the legislation and the legislative scheme adopted, Goesaert v. Cleary, 335 U.S. 464 (1948), and strict scrutiny, Hernandez v. Texas, 347 U.S. 475 (1954). When using strict scrutiny it must be shown that either the state had a compelling state interest in making the classification, or the classification bears no rational relationship to the state's objective. *Id.* Strict scrutiny is only applied when there is a suspect classification, such as race, Bolling v. Sharpe, 347 U.S. 497 (1954), or alienage, Graham v. Richardson, 403 U.S. 365 (1971), or where fundamental interests are involved, such as interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969), privacy, Roe v. Wade, 410 U.S. 113 (1973), or voting, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966). The Supreme Court found in favor of the illegitimate child on the basis of this test, because they could find no rational relationship to a legitimate state purpose. If the same test had been applied to the facts in *City Clerk of Lowell,* the mother of an illegitimate child should be allowed to name her child after the putative father, if he has openly acknowledged the child as his own. Thus, *City Clerk of Lowell* has given the mother of an illegitimate child parental control over her child's surname, with the one possible unadjudicated exception mentioned above.

111. 1977 Mass. Adv. Sh. at 1694, 366 N.E.2d at 727. (Liacos, J. joining in the dissent).

112. *Id.*

113. *Id.* at 1697-98, 366 N.E.2d at 729.

114. *Id.* at 1699, 366 N.E.2d at 729.

115. *Id.* at 1700, 366 N.E.2d at 730.

parents to choose a surname for their child. Moreover, the dissent is incorrect in assuming that the common law right regarding surnames will undermine the quality and consistency of vital records.

Interestingly, this last concern of the dissenting opinion may be responsible for the extensive publicity accorded *City Clerk of Lowell.* The defendant clerks feared that because of the court's holding: voters could register under several subsequently adopted surnames; people would obtain new social security numbers under assumed names; and motor vehicle licenses would be acquired under later surnames and used as a form of positive identification.[116] Contrary to the belief of the clerks, however, the court's decision will not have a "devastating affect on the Commonwealth."[117]

First, it should be emphasized that voters already have the right to use an assumed name, without going to probate court, albeit with the caveat that such voter be "generally known" by that name.[118] This is consistent with recent case law allowing married women to register to vote and run for election under their maiden names.[119]

Prior to the court's decision, the Social Security Administration had solved the problem of fraudulent attempts to procure new social security numbers.[120] The information on form SS-5 is fed into a computer bank in Baltimore and a person is identified by his or her date of birth, his or her parents' dates of birth and his or her parents' birth-given names.[121] Thus a person's name does not enter directly into the identification process.

Finally, a birth certificate plays a limited role in obtaining a motor vehicle license. The case of *Bridges v. Hart*[122] is illustrative of the fact that people in Massachusetts have been allowed to register their cars

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116. Boston Globe, Aug. 18, 1977, at 8, col. 1.

117. *Id.*

118. The statute provides that:

> In completing an affidavit of registration, a person shall enter thereon his name written in full, or instead thereof the surname and first Christian name *or that name by which he is generally known,* written in full, and the initial of every other name which he may have. *A person who has chosen to retain his own surname at marriage shall enter that surname on the affidavit of registration.*

MASS. GEN. LAWS ANN., ch. 51, § 36 (West Supp. 1977) (emphasis added).

119. The case of Custer v. Bonadies, 30 Conn. Supp. 385, 318 A.2d 639 (1974), is particularly apropos in considering the court's rationale in *City Clerk of Lowell,* for in *Custer* the duty of a registrar to register as a voter any person who possessed the necessary, statutory qualifications was found to be *ministerial* and not discretionary. *Id.* at 390, 318 A.2d 644. *See also* Stuart v. Board of Supervisors of Elections for Howard County, 266 Md. 440, 295 A.2d 223 (1972); Krupa v. Green, 114 Ohio App. 497, 177 N.E.2d 616 (1961); Dunn v. Palermo, 522 S.W.2d 679 (Tenn. 1975).

120. Telephone interview with a representative of Social Security Administration, October 12, 1977.

121. DHEW, Soc. Sec. Admin., Form SS-5. *See* note 120 *supra.*

122. 302 Mass. 239, 18 N.E.2d 1020 (1939), *accord,* Korsun v. McManus, 318 Mass. 642, 63 N.E.2d 457 (1945).

under a name other than the one listed on their birth certificates. "It has repeatedly been held that the main purpose of registration is to afford identification of the owner and of the motor vehicle."[123] In Massachusetts it is easy to identify a person by his or her motor vehicle license, even if an assumed or fictitious name is used, for the information on the license includes an address, a date of birth, a picture, and a social security number. This should lay to rest the misgivings of the clerks that "motor vehicle licenses would be obtained under the new names and used as positive IDs even though the surname might change frequently."[124]

The decision in *City Clerk of Lowell* served to align statutory law with common law in the area of choice of names. This reaffirmation of the common law may make it difficult to trace people for inheritance purposes, especially when legitimate children may now be given a surname which is different from either of their parents. Therefore, an efficient system of cross-indexing should be developed which would record any changes of name which have taken place in a person's lifetime. This system should also indicate immediate family relationships.

In this age of computer technology, cross-indexing can be an uncomplicated and extremely efficient means of maintaining accurate records, especially with names. An example of this method is the Basic Courts System which was adopted in San Diego County, San Diego, California, in 1971.[125] This system, which was developed by IBM, "stores, retrieves, and maintains court calendars, case histories, and name and identification number indexes."[126]

Due to the efficiency of the IBM system[127] a name need only be entered into the computer once. Since no paperwork is required, this information can neither be misplaced nor misfiled. An authorized person (such as a clerk) would type in a transaction code and then the name of the person who is being traced.[128] The computer would then produce all the relevant information regarding that particular name, especially any changes of name which had occurred. Where a husband and wife choose to keep their separate, premarital surnames, the computer

123. 302 Mass. at 243, 18 N.E.2d at 1022. *See* MASS. GEN. LAWS ANN. ch. 90, § 2 (West 1975).
124. Boston Globe, Aug. 18, 1977, at 8, col. 1.
125. R. B. James, *In San Diego County Courts — New Computer Program Cuts Backlog Down to Size* 6-7 LAW AND COMPUTER TECH. 30 (1973-74).
126. *Id.*
127. San Diego County uses the 370 Model 155. *Id.* at 31.
128. *Id.*

"would show each person's name before and after marriage, with a section referring to the spouse's name."[129] This would establish a traceable record of the marriage. A computer indexing system would be able to reproduce the entire history of a person, including any changes of name, as well as showing cross-references to parents, children and spouses.[130] This would be a convenient and expedient method of maintaining accurate records.

The court properly held that the clerks in Massachusetts had gone beyond the bounds of their authority when they chose to determine what constituted a person's surname.[131] The duties of a clerk are ministerial and not discretionary.[132] In the absence of fraud, a person has a common law right to choose whatever name he or she wishes. Allowing women to maintain or resume their maiden names after marriage or divorce without having to go through the time, expense, and inconvenience of petitioning the probate court is certainly not unreasonable. Similarly, parents should be allowed to choose whatever surname they want for their child. The administrative problems involved can be overcome by the adoption of a computer system or possibly a manual cross-indexing system which would provide a record of immediate family relationships as well as any changes of name on official records. However, even if this system were not adopted, the argument of administrative convenience is not sufficient to overcome the rights of individuals to change their names.[133]

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129. *Id.*
130. *Id.*
131. 1977 Mass. Adv. Sh. at 1682, 366 N.E.2d at 722.
132. *See* discussion of Custer v. Bonadies at note 119 *supra.*
133. *See* Reed v. Reed, 404 U.S. 71, 76-77 (1971) (holding based on constitutional grounds).

BOOK REVIEW

AMERICAN LAW OF ZONING (Second Edition).
By Robert M. Anderson. Rochester, New York:
The Lawyers Cooperative Publishing Company; San Francisco:
The Bancroft-Whitney Company. 1976. 5 volumes. $162.50.

The appearance of a second edition of Professor Robert Anderson's *American Law of Zoning*[1] within eight years of the original publication of this treatise reflects the burgeoning development of land use law in the nineteen-seventies. New legislative land use controls have been enacted at every level of government and not surprisingly, these statutes have generated an ever-growing body of decisional law. There is little reason to believe that this flood will soon ebb. Legislatures and courts still must struggle to accommodate the needs of land development within the constraints of limited resources. If recent experience is any guide, we will scarcely have time to comprehend, let alone solve, one problem, (for example, the conflict between preserving the character of residential communities and providing homes for low and middle income families) before we become aware of another, (such as the relationship between patterns of land development and energy consumption).

As land use regulation becomes increasingly important, in both economic and human terms, and as the law governing it becomes ever more complex, practitioners and scholars alike recognize the need for a resource which assembles the law to date and signals the way it may change in the future. The revised *American Law of Zoning* may serve the first function fairly well, but is of little use for the second. In part, that is a matter of deliberate choice by the author. The treatise, in both

1. R. ANDERSON, AMERICAN LAW OF ZONING (2d ed. 1976) [hereinafter cited as ANDERSON]. Professor Anderson is Congdon Professor of Public Law and Legislation, College of Law, Syracuse University.

its editions, is originated topically, rather than doctrinally, so that by design it may be of more use to the lawyer who has a specific question regarding the practice of veterinary medicine as a home occupation, than to a student or teacher who wishes a comprehensive assessment of the changing interpretations of general welfare.[2]

One of the author's goals in making the revision was to replace citations "with those of more recent vintage, representative of current practice."[3] The earlier edition had been criticized for overreliance on materials which were already outdated at the time of the first publication.[4] In an apparent attempt to meet this criticism, and to assimilate subsequent sources, the treatise has been expanded from four volumes to five, from 2919 pages to 3271. Like its predecessor, the new edition provides for periodic pocket supplements to keep the work up to date.

The sheer bulk of the treatise is weighty evidence of the extensive research which supports it yet, unfortunately, readers may experience some frustration in locating information which they seek. This sort of shortcoming may be as much the responsibility of the publisher as the author. Though the index runs more than a hundred pages, the reader may have to flip back and forth to find a key entry. For example, transfer of development rights, a much discussed device for preserving agricultural lands and historic buildings, does not appear as such in the index; nor is it listed under development rights transfer, as it is sometimes known. Rather it appears merely as a sub-heading under "Developers and Development." Some simple cross-references would have made the material far more accessible at little cost in added space. Similarly, there is an extensive table of cited cases, but the references are only to sections of the treatise, some of which run a number of pages and are heavily footnoted. The reader thus may have to scan page after page of notes to locate the desired case. Also, although the treatise cites many law review articles and similar sources, there is no coherent bibliography to guide the user who wishes to do further reading. Alone, any of the these failings might be dismissed as an annoying inconvenience, but together they sufficiently impede access to the author's monumental research.

A second goal of the author in his revision was "to reflect the principal developments of the decade."[5] To this end four new chapters have been added, and some of the old ones have been reshuffled. The new chapters are titled, "Exclusionary Zoning," "Growth Controls,"

2. By contrast, Professor Norman Williams' AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER (1975) is organized along somewhat broader themes.

3. ANDERSON, § 1.01 at 2.

4. Simmons, Book Review 19 BUFF. L. REV. 727, 730 (1970).

5. ANDERSON, § 1.01 at 2.

"Planned Limit Development, Floating Zones, and Cluster Development," and "Mobile Homes and Mobile Home Parks." While some of these chapters represent consolidations of sections of the earlier edition, much of the material is new, and thus warrants a closer look by a reviewer.

The author rightfully gives extensive treatment to exclusionary zoning, because it has conceivably created more controversy and confusion than any other land use issue in recent years. Many suburban communities, wishing both to maintain the remaining rustic character of their communities and to avoid the municipal expense of providing schooling and welfare services to more citizens,[6] saw zoning as an effective means of preserving the *status quo*. Outright bans on multi-family development coupled with stringent building codes and large lot requirements for single family homes proved to be an effective means of shifting elsewhere the responsibility to house and care for an ever-increasing population. Indeed, the issue of exclusionary zoning already had surfaced in the mid-nineteen sixties in a Pennsylvania case, *National Land Investment Co. v. Eastown Township,*[7] and was discussed in passing in the first edition.

In the revised edition, treatment of exclusionary zoning is expanded to eighty-four pages. *Southern Burlington County NAACP v. Mount Laurel,*[8] which the author appropriately characterizes as "the most important exclusionary zoning opinion to date,"[9] is discussed at length. Extensive excerpts may give readers who are unfamiliar with the case a fair sense of its underpinnings, yet the author's own concluding assessment seems somewhat off the mark:

> It seems likely that the Mount Laurel decision will have impact beyond New Jersey. The opinion is the most thorough analysis of the exclusionary zoning problem that can be found in the cases. The matter was decided by a unanimous court, and the fact pattern is sufficiently standard to provide a sound basis for analogy. If any aspect of the decision weakens its applicability beyond New Jersey, it is found in the court's specific reliance upon the equal protection language of the New Jersey constitution rather than that of the Constitution of the United States.[10]

While it is true that the court found it unnecessary to reach the federal constitutional questions, the implication that the case rests merely on state equal protection guarantees is misleading, for the court's analysis

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6. In some case this may be an overly charitable characterization of local goals.
7. 419 Pa. 504, 215 A.2d 597 (1965).
8. 67 N.J. 151, 336 A.2d 713 (1975) *cert. denied and appeal dismissed* 423 U.S. 808.
9. ANDERSON, § 8.16 at 43.
10. *Id.* at 48.

ultimately focuses on conceptions of general welfare inherent in the zoning power. This is made clear in a portion of the opinion which the author unfortunately neglected to cite.

> [I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.[11]

In short, a city or town cannot invoke protection of its own welfare to justify a zoning ordinance if its well-being means that others will suffer a reciprocal disadvantage. There is nothing in this analysis which is peculiar to New Jersey's constitution, for promotion of general welfare is a universal test of the validity of a zoning regulation under the police power.

Moreover, time has disproved the author's judgment that the *Mount Laurel* decision would have been strengthened by reliance on the federal constitution. Shortly after the publication of the revised treatise, the United States Supreme Court ruled, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation,*[12] that restrictive zoning may stand even though it has a racially disproportionate impact. Indeed, the court went further, stating that actual discriminatory intent on the part of officials may not necessarily invalidate restrictive zoning.[13]

The author certainly cannot be faulted for failing to anticipate *Arlington Heights* or *Taxpayers Association of Weymouth Township v. Weymouth Township,*[14] in which the New Jersey Supreme Court upheld, in spite of its exclusionary effect, a zoning district essentially limited to residents fifty-two years of age or older. These decisions surely will be included in pocket parts, along with future cases which either expand or contract their holdings. Nevertheless, to the extent that they may be read as limiting the reach of *Mount Laurel,* some of the basic analysis in the treatise may be already outdated. The volatility which makes the field such an intriguing one for the treatise writer may at the same time be his undoing.

If *Mount Laurel* is the landmark exclusionary zoning case then the Massachusetts "snob-zoning act"[15] is the pre-eminent legislative state-

11. 67 N.J. at 177, 336 A.2d at 726.
12. 429 U.S. 252 (1977).
13. *Id.* at 270 n.21.
14. 71 N.J. 249, 364 A.2d 1016 (1976).
15. MASS. GEN. LAWS ANN. ch. 40B, § 20 (West Supp. 1977).

ment on the issue. Although the author includes substantial portions of this statute, a legislative draftsman who is considering adopting some of its provisions is given little guidance as to how they actually work. The law allows a developer of low or moderate income housing to seek municipal approval under a streamlined procedure through the board of appeals. If the board denies a permit, the developer can appeal to a state agency which has the power to order the issuance of a permit even if the project is banned by local zoning. It is instructive that of twenty-four appeals taken to the state agency in the first six years under the new law, all but two local denials were reversed.[16] In the same way that conceptions of welfare enunciated in *Mount Laurel* have implications for all land use regulation, not merely those which may be exclusionary, the over-ride provision of the Massachusetts statute has potential application whenever state control of zoning is desired.

Just as exclusionary zoning received cursory treatment in the first edition, there are contemporary issues which receive little or no attention in the new edition, even though they seem likely to be of great importance in the near future. For example, flood plans zoning is discussed in less than five pages. Federal flood insurance is noted, but without legislative history, so the reader does not learn that the program has been developed to prod municipalities into enacting local zoning ordinances consistent with national policy. A national land use bill may be far from passage, but the flood insurance model is a working example of how federal carrots and sticks can be used to shape local zoning regulations.

The treatise does not consider the use of land use controls to conserve energy, already an important topic. For example, though other researchers have found both statutory and judicial authority on the question of sun rights for solar energy collectors,[17] the author does not explore these statutes and cases, at least in this context.

This review has emphasized what is lacking in the treatise so that potential users will understand the limitations of the work as a resource. There is, of course, a great deal of material which may be of use to the practicing lawyer. Eight of the chapters are devoted to model forms, statutes and ordinances relating to a host of land use problems and procedures. The careful draftsman will always adapt such forms to his or her own needs, but these provide a useful starting point. There are also

16. THE LAND USE CONTROVERSY IN MASSACHUSETTS 121-22 (L. Suskind ed. 1975). This book includes an account of one proposed development which, though denied at the local level, was approved by the state and ultimately constructed. *Id.* at 109-23.

17. *See* W. THOMAS, A. MILLER & R. ROBBINS, OVERCOMING LEGAL UNCERTAINTIES ABOUT THE USE OF SOLAR ENERGY SYSTEMS (1978) (published by the American Bar Foundation) and A. MILLER, G. HAYES & G. THOMPSON, SOLAR ACCESS AND LAND USE: STATE OF THE LAW (1977) (published by the Environmental Law Institute).

extensively documented chapters on the more traditional zoning subjects, such as variances, home occupations and non-conforming uses. While it is interesting to see how courts in different jurisdictions have ruled in these areas, a practitioner may understandably be preoccupied with the law of his or her own state.

There is, in the end, a paradoxical quality about this treatise, which may well reflect the nature of the subject matter. The work is at once overly broad, yet frustratingly narrow. Its collection of materials from all the states appears to be comprehensive, yet there is some question, given the parochial nature of land use law, as to whether this breadth is of value to the lawyer in daily practice. At the same time, the practicing land use lawyer will continually encounter problems which are inextricably tied to zoning, such as eminent domain, environmental controls and urban renewal, yet are not treated in this series. Inclusion of these subjects might well have been a task beyond anyone's capacity, so mention of their omission is meant not as fault-finding, but merely is intended to underscore that supplementary reference material will be needed.

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BOOKS RECEIVED

AFTER LAW SCHOOL? FINDING A JOB IN A TIGHT MARKET. By Saul Miller. Boston, Mass.: Little, Brown and Company. 1978. Pp. xix, 203. $5.95. Paper. At the outset, Saul Miller states that his book is not a guaranteed method for getting a job, but a discussion of different strategies and approaches which are intended to make the student's search for employment more organized, efficient and productive. In the first several chapters, the author gives his general observations on resumes, cover letters and interviews. The remainder of the book is devoted to chapters that examine various areas of practice. Mr. Miller not only deals with traditional types of legal employment — private firms, government agencies, and judicial clerkships — but also gives considerable attention to such less publicized areas as public interest law, corporations, graduate and fellowship programs and alternative careers. The author concludes each chapter with a compilation of available resources that can be utilized to discover job opportunities in those fields. These resources, often overlooked by students, are listed again in the appendix.

CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION, THE. By Judith A. Baer. Westport, Conn.: Greenwood Press. 1978. Pp. x, 238. $16.95. Cloth. Ms. Baer, a specialist in public law and political philosophy, traces the history of special labor legislation within a constitutional framework. She divides her analysis into four time periods, and illustrates through a case-by-case approach that precedents meant to protect women were later used to justify discrimination. The final chapters are devoted to the broader philosophical aspects of the relationships between law and sexual differences. Drawing on such diverse authorities as Aristotle and Simone de Beauvior, the author argues that equality under the law should not be confused with identicality. Providing a fresh approach to the moral issue of sexual equal-

ity, Ms. Baer establishes herself as a creative libertarian as well as a dynamic feminist scholar.

FEDERAL TAXATION OF GIFTS, TRUSTS AND ESTATES. By Douglas A. Kahn and Lawrence W. Waggoner. Boston, Mass.: Little, Brown and Company. 1977. Pp. 848. $18.00. Cloth. This new coursebook by Professors Kahn and Waggoner of the University of Michigan differs from other texts of its kind in its organization. In an attempt to integrate the material "functionally" so that the income, estate, gift and generation-skipping tax consequences of a particular transaction are considered together, the authors have divided the volume into three parts. Part I, entitled "Testamentary Transfers," begins with a discussion of the includibility in the gross estate of property owned at death and property over which the decedent held a power of appointment and generation-skipping transfers. Chapters detailing the estate tax deductions, credits and computation follow. Part II briefly covers the income taxation of estates and "non-grantor" trusts. Finally, Part III, "Inter Vivos Transfers," deals with transfers which are subject to gift tax consequences and explains the gift tax deductions, exclusions and computation. This part concludes with separate chapters on jointly held property, life insurance, and annuities.

FREEDOM TO DIE, MORAL AND LEGAL ASPECTS OF EUTHANASIA. By O. Ruth Russell, Ph.D., New York, New York: Human Sciences Press. Revised Edition 1977. Pp. 413. $14.95. Cloth. Doctor Russell, Professor Emeritus of Psychology, Western Maryland College, argues that the right to die with dignity should be recognized as a basic human right, coexisting with the fundamental human right to live. What is morally right should be made legally permissible. The author gives a historical review of thought and action on euthanasia as well as case histories evidencing changing attitudes by religious, medical and legal leaders who call for a solution to the problem of needless human suffering. While today there is an appeal for new individual freedoms, the right to choose a dignified death is not recognized by the law. To this end it is argued that there exists a need to acknowledge and define psychological death, i.e., death of an individual as a conscious person. The best solution lies in a comprehensive euthanasia law to meet the broad spectrum of needs and to provide adequate safeguards for every case.

HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT, THE. By Hermine Herta Meyer. New York, New York: Vantage Press, Inc. 1977. Pp. 290. $12.50. Cloth. It is the hypothesis of the author that

due to judicial abuse of the fourteenth amendment, the United States Constitution no longer exists. To support this conclusion, Ms. Meyer examines the intent of the framers of the Constitution and gives an in-depth analysis of the specific wording of the fourteenth amendment. The author contends that through the misuse of the equal protection and due process clauses of the fourteenth amendment, the judiciary has undermined the rights of the individual states.

PLANNING AN ESTATE: A GUIDEBOOK OF PRINCIPLES AND TECHNIQUES. By Harold Weinstock. 1977. Colorado Springs, Colorado: Shepard's Citations, Inc. Pp. xxvi, 399. $20.00. Cloth. Mr. Weinstock, a California attorney who has written extensively on estates and trusts, has compiled a practical handbook that can be of use to all professionals involved in estate planning — lawyers, accountants, life insurance underwriters, and trust officers. His book explains planning tools and techniques which are helpful in solving common estate planning problems. Unlike authors of other, larger estate planning texts, Mr. Weinstock refrains from discussing instrument drafting and places a greater than usual emphasis on the community property aspects of estate planning. When read in its entirety, this volume provides the reader with an excellent overview of estate planning from how to plan for the small family estate to the handling of various business interests. Also, the format, the topical index and the appendices enhance the book's value as a quick reference tool for the practitioner.

PRIVATE PROPERTY AND THE CONSTITUTION. By Bruce A. Ackerman. New Haven, Conn.: Yale University Press. 1977. Pp. ix, 303. $12.95. Cloth. Professor Ackerman utilizes political philosophy to discuss the complex legal issues revolving around a private property owner's right to be compensated under the compensation clause of the fifth amendment in relation to, and as a result of, the state's role in the environmental revolution in this country. By using two conflicting, symbolic frames of reference which he refers to as "Scientific Policy-making" and "Ordinary Observing," the professor emphasizes the complexity of the problems involved. The author's use of political theory, economic analysis, and the philosophy of language enhance the reader's appreciation of the difficulty of judicial interpretation in this area.

VICTIM COMPENSATION: ECONOMIC, LEGAL AND POLITICAL ASPECTS. By Roger E. Meiners. Lexington, Mass.: D.C. Heath and Company. 1978. Pp. xv, 123. $13.95. Cloth. In this concise study, Professor Meiners discusses the concept of public compen-

sation for victims of criminal acts and presents new arguments to enable policy makers to devise compensation plans that are equitable as well as economically and politically realistic. After reviewing the historical development of public compensation in the United States and other countries, the author explores the incentives of victims, politicians, lawyers, administrators and criminals under a compensation program similar to the one currently under consideration by Congress. By applying an economic analysis to these considerations, Professor Meiners determines the costs, benefits and future effects of such a plan. The author also examines the effect public compensation may have on private insurance and outlines the novel concept of "public insurance." In the final chapter, the author warns the reader that a comprehensive compensation plan will not deter crime but may in fact result in increased criminal activity.

ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND USE REGULATION. By Robert H. Nelson. Cambridge, Mass.: The MIT Press. 1977. Pp. xiii, 259. $16.95. Cloth. Mr. Nelson, a staff member of the Office of Policy Analysis in the U.S. Department of the Interior, examines the development of zoning — its objectives, myths, successes and failures. Although his focus is on socio-economic consequences of zoning changes, the author also explores the role of planning in zoning and its political and historical aspects. His conclusion is that zoning institutions should allow either full public acquisition of land in transitional areas or full private ownership, including development rights. Accordingly, he envisions a number of future social organizations as determinants of land use and other economic decisions. His preference is for market, not political, decision-making by substituting private tenure for zoning, eliminating community zoning and allowing private competition for land use.

The Place of Wrong Rule: "An Unrepealed Remnant of a Bygone Age, A Drag on the Coattails of Civilization?"†

*Robert E. O'Toole**

Professor O'Toole explores the development and recent decline of the most widely known concept in the tort choice of law field — the "place of wrong rule." Alluding to a lack of guidance from the Supreme Court of the United States, he examines the growing disfavor with the rule and the various alternative approaches suggested by the more progressive state courts and conflicts scholars. Contrasting the results produced by these recent alternatives with those left in the wake of the place of wrong rule, Professor O'Toole concludes that these new avenues better serve justice and equity in individual cases while not detracting significantly from judicial consistency.

This article explores the operation of the "place of wrong" rule. The more particular focus is the impact of the rule on the rights of private litigants powerless to control its limiting effect. Cases are presented in great detail to dramatize the inequities of the rule: to show how it has observed fortuitous events more than the justified expectations of the parties involved in litigation. Writings of conflicts scholars are reviewed and analyzed to discover the foundations of the rule, and early conflict

†The author would like to acknowledge that this title is the language used by Judge Keniston of the Supreme Court of New Hampshire in Clark v. Clark, 107 N.H. 351, 355, 222 A.2d 205, 209 (1966). Although the words belong to another, they hold special meaning for me and express precisely and poetically my view of the place of wrong rule.

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of laws jurisprudence is traced into the eventual formulation of a precept requiring application of that state's law "where the last event necessary to make an actor liable for an alleged tort" occurred.[1]

Why was it necessary to have this place of wrong rule in the first instance? Judge Goodrich stated the traditional defense: "The plaintiff does not sue the defendant for the latter's negligence, but because the negligence has caused the plaintiff harm. The tort is complete only when the harm takes place, for this is the last event necessary to make the actor liable for the tort."[2] Goodrich's explanation primarily echoed the traditional rule, applicable to both torts and crimes, that the legal character of interstate acts is determined and governed by the law of the state where it produces its initial harmful effect.[3]

Under the place of wrong methodology, a court looks to the place where the right has vested, *i.e.,* where the tort occurred, and applies that law whether it benefits the plaintiff or the defendant. This mechanical jurisprudence seeks to achieve an ideal: uniformity and predictability of result. Courts have justified application of this rigid, territorially-oriented choice of law rule to such complex tort issues as measure of damages and vicarious liability.[4] While in theory the rule was applied universally, from time to time it was circumvented by the

1. RESTATEMENT OF CONFLICT OF LAWS § 377 (1934). The rule masqueraded under several names. It was variously referred to as the place of tort, the place of impact and eventually it became the Bealian "last event doctrine." *See* § 377 at 454.

2. H. F. GOODRICH, CONFLICT OF LAWS § 93 at 263 (3d ed. 1949).

3. Rheinstein, *The Place of Wrong: A Study in the Method of Case Law,* 19 TUL. L. REV. 4, 29 (1944).

4. Northern Pacific Railroad Co. v. Babcock, 154 U.S. 190 (1893). (This was an action instituted by the representatives of a railroad employee against the company to recover damages for the employee's death which was caused by an accident while in the company's employ. The action was tried in a different state from that in which the contract of employment was made and in which the accident took place. The court held that the right to recover and the limit of the amount of the judgment were governed by the lex loci and not the lex fori.); Lauria v. E. I. DuPont De Nemours & Co., Inc., 241 F. 687 (E.D.N.Y. 1917) (Action by plaintiff-administratrix for the death of her husband, allegedly caused by the negligence of the defendant. The deceased was employed by defendant in Virginia. The court held that enforcement of the action could be maintained and neither the fact that the jury may apportion the damages among beneficiaries, who may not be the same under each statute, nor that the Virginia statute allows elements of damage unrecognized under the New York statute, was sufficient to defeat the action.); Victor v. Sperry, 163 Cal. App.2d 518, 329 P.2d 728 (1958) (Action for personal injuries sustained by a California plaintiff in an automobile accident in Mexico caused by the negligence of the defendant driver, who was also a California resident. The court held that since the accident occurred in Mexico, the plaintiff's cause of action arose there and the character and measure of damages must be determined by Mexican law.); Young v. Masci, 289 U.S. 253 (1933) (Masci, a citizen of New York sued Young, a New Jersey resident, in New Jersey to enforce liability under a New York vicarious liability statute. Young lent his car to another, without placing restriction on its use, who took the car to New York and negligently injured plaintiff. The New York statute makes mere permission to use the car the basis of liability in the case of negligent injury.); Eskovitz v. Berger, 276 Mich. 536, 268 N.W. 883 (1936) (Defendant and wife left Ohio for a trip to Michigan with plaintiff and wife and defendant's negligence caused the injury to plaintiff. The accident happened in Ohio; the action was brought in Michigan — matters as to rights were governed by Ohio and as to remedy by

use of "escape devices,"[5] thus causing unquestionable harm to private parties.

Even the most persuasive justifications for the rule have been criticized by the commentators.[6] Simplicity and convenience are poor substitutes for a rational and equitable governing principle. The place of wrong rule could not force courts to apply the law of the place of impact: there was no compulsion. A forum could assert public policy to defeat the rule and, within constitutional limitations, apply its own law.[6a] Application of the rule achieved uniformity and predictability in theory only. In addition, and perhaps of prime significance, widespread acceptance of the rule resulted in a distinct lack of judicial creativity.

Opponents of the place of wrong rule acknowledged that uniformity of decision should not be discounted. "But to state this proposition [was] to announce at best a destination, not to provide directions for reaching it."[7] The "uniformity" touted by adherents to the place of wrong did not create a rational and equitable governing rule. By focusing on the fortuitous site of the tort rather than the justified expectations of the parties, uniformity became superficial at best. Professor Rheinstein observed:

> Uniformity of decision has often been represented as the raison d'etre of choice-of-law rules. It has been stated as the ideal of the conflict of laws that a case should be decided in the same way wherever it might happen to come up for decision. However, we ought to go a step further and ask ourselves why uniformity of decision is so desirable. To some minds, to be sure, uniformity appears as a value in itself. With anyone holding that faith, no further argument is possible. . . . [I]t seems that uniformity of decision is a means toward the end of protecting justified expectations. *However, uniformity of decision does not serve this end unless the*

Michigan.); Laughlin v. Michigan Motor Freight Lines, 276 Mich. 545, 268 N.W. 887 (1936) (In an action against the motor freight company for injuries sustained when a truck hired by the company collided with an automobile in Ohio where the company was a common carrier, the laws of Ohio were held to apply.) *See also* Powell v. Great Northern Railway Company, 102 Minn. 448, 113 N.W. 1017 (1907); Cherwien v. Geiter, 244 App. Div. 814, 279 N.Y.S. 553. (2d Dep't 1935); Goodwin v. Young, 34 Hun 252 (N.Y. 1884).

5. *See, e.g.,* Hilton v. Guyot, 159 U.S. 113 (1895) (without reciprocity on the part of the French comity does not require that the French judgment be given conclusive effect); De Brimont v. Penniman, 7 Fed. Cas. at 309, no. 3715, (foreign judgment refused effect because the claim upon which it was founded was opposed to the public policy of the forum); Lauria v. E. I. DuPont De Nemours & Co., Inc., 241 F. 687 (E.D.N.Y. 1917) (foreign judgments will not be enforced if penal or violative of a significant state policy); Powell v. Great Northern Railway Co., 102 Minn. 448, 113 N.W. 1017 (1907) (for foreign judgments to be enforced they must not be contrary to public policy, good morals or natural justice); Intercontinental Hotels Corp. v. Golden, 15 N.Y.2d 9, 254 N.Y.S.2d 527, 203 N.E.2d 210 (1964) (foreign based rights should be enforced unless basically evil or contrary to prevailing moral standards). *See also* Northern Pacific Railroad v. Babcock, 154 U.S. 190 (1894); Carpenter, *New Trends in Conflicts Rules Affecting Torts: A Chronological Review,* 1 LOY. CHI. L. J. 187, 189 (1970).

6. *See* compilation of authors cited in Rheinstein, *supra* note 3, at 16-17, n.22.

7. Freund, *Chief Justice Stone and the Conflict of Laws,* 59 HARV. L. REV. 1210, 1211 (1946).

> *law to be applied uniformly is so chosen as to correspond to the parties' justified expectations.*[8]

Superficial uniformity caters to judicial preference for simplicity and convenience and becomes a crutch allowing courts to ignore their responsibility to see that justice is done in each case. Application of the rule, therefore, resulted in unjust, irrational, and inequitable decisions.[9] Moreover, despite the fact that the place of wrong rule determined tort rights and obligations by mechanically looking to the governing law at the place of impact, its rigidity generated little uniformity in those courts where judges employed escape devices to circumvent its operation.[10]

The place of wrong rule produced a low yield of justice. It was inequitable in its inelasticity and interfered with parties' legitimate expectations by elevating the place of impact above any other factor. It worshiped uniformity for its own sake and in so doing often applied law not reasonably related to the action.

I. IN THE BEGINNING

A. The Doctrinal Seeds — Comity and Vested Rights

1. Comity Theory

Ulric Huber, a seventeenth century Dutch law professor and judge, planted the doctrinal seeds of the place of wrong rule. He compiled a choice of law systematics that centered around three maxims:

> 1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
> 2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
> 3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.[11]

Huber's first two maxims establish state territorial power; that laws "have no force and effect *ex proprio vigore* beyond the limits of the enacting state, but bind all found within the territory."[12] The third maxim "made it clear beyond a doubt, that the recognition in each state

8. Rheinstein, *supra* note 3, at 29 (emphasis added).
9. *See, e.g.*, cases discussed at pp. 619-24 *infra*.
10. *See* § III *infra*.
11. *Lorenzen, Huber's De Conflict'u Legum*, 13 ILL. L. REV. 375, 376 (1919), *reprinted in* SELECTED ARTICLES ON CONFLICT OF LAWS 136-37 (E. Lorenzen ed. 1947).
12. Lorenzen, *supra* note 11, at 376.

of so-called foreign created rights was a mere concession which such state made on grounds of convenience and utility, and not as a result of a binding obligation or duty."[13] It was in the forum's discretion whether to apply foreign law in general and foreign tort law in particular. Enforcement of the foreign right could be denied as contrary to public policy *or prejudicial to forum interests* or *the rights of citizens.*[14] Consequently, under the comity theory, a plaintiff moving between states with a foreign created right could only hope that the right would be enforced by the forum selected.

In the United States, the leading advocate of the comity theory was Joseph Story, acclaimed as "one of the leading personalities of all time in the field of the conflict of laws."[15] He believed that enforcement of foreign created rights "derived altogether from the voluntary consent of the [forum]; and is inadmissible, when . . . contrary to [that forum's] known policy, or prejudicial to its interests."[16] Thus, like Huber, Story operated on the assumption that all foreign law in the multi-state setting was applicable merely as a matter of courtesy. In fact, it has been suggested that "Story's celebrated work on the 'Conflict of Laws' is in reality nothing but a 'paraphrase' of Huber."[17]

2. Vested Rights

In contrast to the comity theory of Huber and Story stands the position advocated by the English scholar and judge, A. V. Dicey. Dicey wrote the seminal work in English Conflict of Laws and played a significant role in the formulation of Anglo-American jurisprudence.[18] He concluded that courts in multi-state contact cases deal with the enforcement of *vested rights.*[19] The concept carried with it — unlike Huber's and Story's — a notion of an imperative. On the one hand, the comity theory argued that the foreign law may be applied in a multi-state setting. Dicey's principles, on the other hand, argued that foreign rights must be applied. Both theories, however, dealt with territoriality. That is to say, in regard to tort actions, it was the law of the place where the tort occurred that defined the rights of the parties.[20]

13. *Id.* at 378.

14. Yntema, *The Historical Bases of Private International Law,* 2 AM. JUR. COMP. L. 297, 306 (1953).

15. Lorenzen, *Story's Commentaries on the Conflict of Laws — One Hundred Years After,* 48 HARV. L. REV. 15, 38 (1934).

16. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 38 (2d ed. 1841).

17. Lorenzen, *supra* note 11, at 375.

18. *See* A. DICEY, CONFLICT OF LAWS (1896).

19. *See* A. DICEY & J. MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 988 (9th ed. 1973).

20. *See id.*

B. The Flower — Territorialism Enshrined in Restatement I

The author of the *Restatement of Conflict of Laws,* Professor Joseph Beale, accepted the Dicey position in regard to the enforcement of foreign created rights. He shunned the comity approach of both Huber and Story and formulated his conflicts methodology within the framework of vested rights. In defense of his position he wrote:

> The existence and nature of a cause of action for a tort is governed by the law of the place where the plaintiff's alleged right to be free from the act or event complained of is alleged to have been violated by a wrongful act or omission. It follows therefore that the law of the place of wrong determines whether or not there is a cause of action for the wrong.[21]

Thus, Professor Beale would have no part of the "may apply" concept that was part of the doctrine of comity. He stressed "shallness" in his systematics: a right which is

> created by a court having jurisdiction, should be recognized and enforced everywhere; and the rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state where this is sought to be done.[22]

This theory of vested rights flowered into the "last event doctrine," enshrined in the *Restatement of Conflict of Laws.* Section 377 amounted to a worship of rulist form over substance in the tort choice of law process.[23] The rule was eventually replaced by the adoption of the *Restatement (Second) of Conflict of Laws* in 1971. The new methodology set out its goal as application of that law that has "the most significant relationship to the occurrence and the parties."[24] However, before this new doctrine is examined certain questions must be asked and answered about the old way. For example, was the place of wrong rule really necessary? How did it lose — if it did — its claimed legitimacy? Where did it go wrong? Did the rule ever depart from its original mandate? In sum, "why did the plot get so thick when the mystery was so thin?"[25]

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21. J. BEALE, 2 CONFLICT OF LAWS § 378.2 (1935).

22. J. BEALE, 2 CONFLICT OF LAWS § 430.1 (1935).

23. RESTATEMENT OF CONFLICT OF LAWS § 377 (1934) provides the following definition: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

24. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

25. Traynor, *Is This Conflict Really Necessary?,* 37 TEX. L. REV. 657 (1959).

II. THE PLACE OF WRONG RULE IN OPERATION

A. Locating the Place of Wrong

In order to apply the law of the place of wrong under the Bealian methodology it is of paramount importance to find the place of the tort. The process may be looked upon as a form of legalistic game, and the rules are simple. The game requires only two conditions for participation: first, a slavish and mechanical attachment to distant real estate, and second, an unbending commitment to fortuitous events. Courts have played the game with abandon.

B. Forum's Policy of Strict Liability Sacrificed to the Place of Wrong Rule

In 1875 the Massachusetts Supreme Judicial Court attempted to locate the place of wrong in *LeForest v. Tolman.*[26] The defendant, who lived in Massachusetts, owned a dog which strayed into New Hampshire and bit the plaintiff, a child living there with his parents. New Hampshire, the place of wrong, followed the common law: in general, no liability existed until there was a showing of dangerous propensity, *i.e.,* a previous bite. However, decisions in Massachusetts, the domicile of the defendant, followed a rule that imposed, with certain exceptions, strict liability on the owner of a domesticated animal.[27] The court's dilemma: whether to apply the common law rule of the place of injury or the strict liability rule of the defendant's domicile.

As the first order of business, the court had to identify the place of impact. Mr. Chief Justice Gray explained that in a tort action arising out of personal injury or property damage, "the act which is the cause of the injury and the foundation of the action must at least be actionable or punishable by the law of the place where it is done, if not also by the law of the place in which redress is sought."[28] The court then put into operation the principle long accepted in criminal and tort law, that when an act operates interstate its character is determined by the law of the state where the harmful effect occurs, in other words, what later emerged as Dicean and Bealian vested rights. Accordingly, after a close examination of the facts, the court ruled, in an opinion marked by its brevity, that there was no wrong at the place of impact; there was no policy in operation in New Hampshire to apply to the case.

26. 117 Mass. 109 (1875).
27. *See, e.g.,* Pressey v. Wirth, 83 Mass. (3 Allen) 191 (1861).
28. 117 Mass. at 109.

It also concluded that the Massachusetts policy of absolute liability did not apply:

> The defendant having done no wrongful act in this Commonwealth, and the injury for which the plaintiff seeks to recover damages having taken place in New Hampshire, and not being the subject of action or indictment by the laws of that state, this action cannot be maintained.[29]

Thus, the court sacrificed the forum's policy of strict liability to the law of the place of injury; it focused solely on the place of impact, the place of the bite; it subordinated Massachusetts' policy in regard to the ownership and possession of domesticated animals. *LeForest* was in fact an unfortunate decision; in applying New Hampshire law the court achieved uniformity at the expense of the parties' justified expectations. That is, it would not have been unreasonable to apply the forum's strict liability law to a dog bite case that took place in another state; it could have been argued that the Massachusetts law covered all dog bites in all states by Massachusetts dogs. It could have been argued also that the law of the place of wrong was totally irrelevant and fortuitous since the vicarious liability imposed by the Massachusetts statute was absolute and required no showing of similar law at the place of wrong as a condition precedent to the plaintiff's recovery.

However, all such arguments would have been in vain. The court ignored Massachusetts' policy in regard to the ownership and possession of domesticated animals. The court was concerned with impact and paid no attention to whether there was a legislative intent to have the Massachusetts law applied extraterritorially. As a result, the law of New Hampshire was applied to deny the plaintiff recovery, and the place of injury ruled the day.

C. Strong and Emerging Policy of Workmen's Compensation Subordinated to the Place of Wrong Rule

In 1892, seventeen years after Justice Gray's decision in *LeForest,* the Supreme Court of Alabama also wrestled with the problems of locating the place of the tort in *Alabama Great Southern Railroad v. Carroll.*[30] Carroll worked as a brakeman on the Alabama Great Southern Railroad. He and the defendant resided in Alabama. Carroll was hired in Alabama; he was injured in Mississippi. The evidence showed that

29. *Id.* at 110.
30. 97 Ala. 126, 11 So. 803.

negligence on the part of railroad employees caused a coupling to give way thereby injuring the plaintiff.

At the time of injury, Mississippi followed the fellow-servant rule, which held that a master was not liable for an injury inflicted on one servant through the negligence of a fellow-servant.[31] By contrast, Alabama had enacted a workmen's compensation law.

Unfortunately for Carroll, the Alabama statute was held to have no extraterritorial effect. The court declared:

> Up to the time this train passed out of Alabama no injury had resulted. For all that occurred in Alabama, therefore, no cause of action whatever arose. The fact which created the right to sue, — the injury —, without which confessedly no action would lie anywhere, transpired in the state of Mississippi. It was in that state, therefore, necessarily that the cause of action, if any, arose; and whether a cause of action arose and existed at all, or not, must in all reason be determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired.[32]

In 1892 the place of impact concept created an undue hardship for the plaintiff in *Carroll*: he found himself injured and without monetary recovery; he had to spend his own monies to pay for outstanding medical expenses, and he may have had to use his savings, if he had any, to compensate for lost wages. However, the competing policies of the fellow-servant rule and workmen's compensation law were not the court's concern. It sacrificed Alabama's strong and emerging policy of strict liability in regard to employment torts to the more archaic rule at the place of injury. The court was interested in neither loss sharing nor the justified expectations of the parties.

In denying extraterritorial effect to the Alabama statute and in finding for the defendant, the court in *Carroll* put into operation the same orthodoxy, that the existence of a tort cause of action is determined by the law of the state where the harmful effect occurs. The lack of rhyme and reason in this mechanical application of the place of wrong rule is underscored by the fact that shortly after the *Carroll* decision, the Alabama statute was amended to apply expressly to out of state injuries.

The court in *Carroll* could have solved the problem presented by merely applying Alabama law: it could have weighed the policies of the fellow-servant rule against the workmen's compensation law and con-

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31. *See, e.g.*, Railroad Co. v. Petty, 67 Miss. 255, 7 So. 351 (1890).
32. 97 Ala. at 134, 11 So. at 806 (1892).

cluded that in regard to injured Alabama citizens the compensation statute should apply. As a result, Carroll would have recovered for his injuries under a statutory scheme which placed risk of loss on the party best able to afford it (the employer) rather than leaving a plaintiff without a remedy through application of an unfair anachronistic concept that required an employee to be his brother's keeper.

D. Holmesian Wisdom: The Place of Wrong Determines Both Right and Remedy

A. V. Dicey, writing in 1896, concluded that "[a]ny right which has been duly acquired under the law of any civilised country is recognised and, in general, enforced by English Courts, and no right which has not been duly acquired is enforced or . . . recognised."[33] No doubt, Dicey had an influence on Anglo-American Conflicts thinking; he may have similarly influenced Mr. Justice Holmes' tort conflicts reasoning.

In 1904 in *Slater v. Mexican National Railroad,*[34] the United States Supreme Court was presented with the following facts: the widow and children of William H. Slater brought a wrongful death action in a Texas federal court against the Mexican National Railroad, a Colorado corporation doing business in both Texas and Mexico. Plaintiffs alleged that Slater was employed by the railroad as a switchman and was killed through the defendant's negligence while he was coupling two freight trains at Nuevo Laredo, Mexico.

The Mexican wrongful death statute did not provide for a lump sum settlement. Instead, it required evaluation of how long the decedent's support obligations would have lasted, by considering the age and health of the decedent and potential events which might cause such support obligations to cease, *e.g.,* marriage, death, or attainment of majority by the decedent's beneficiaries. On the other hand, the Texas statute permitted full recovery regardless of such factors.

The lower court, paying no heed to the place of wrong rule, applied Texas law. Why not? The parties were Texas domiciliaries; the railroad was doing business in Texas. Therefore, in a due process sense, it would not have been unreasonable to apply the forum's law. By contrast, the only connection the parties had with Mexico was that it was the place of injury.

The Supreme Court would have no part in this doctrinal heresy. Mr. Justice Holmes and the majority reasoned:

> The theory of the foreign law is that, although the act complained of was subject to no law having force in the forum, it gave rise to an

33. A. DICEY, CONFLICT OF LAWS 22 (1896).
34. 194 U.S. 120 (1904).

> obligation which follows the person, and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that the law determines, not merely the existence of the obligation but equally determines its extent.[35]

Mr. Justice Holmes concluded that not only did the place of impact determine the existence of the wrong but also the existence, if any, of the remedy. Therefore, if a plaintiff moved with a transitory cause of action his or her wrong was accompanied by all its built-in limitations. Thus, under the *Slater* facts, if Texas could not enforce the provisions of the Mexican law authorizing periodic payments (the remedy for the tort) it could not adjudicate the right. In effect, the court held that the place of wrong's law *must* be applied uniformly in a multi-state tort setting.

By accepting in *Slater* the concept of territorial sovereignty, Mr. Justice Holmes raised A. V. Dicey's vested rights' theory to the position of choice of law dogma. *Slater* and its progeny established a choice of law methodology that short-circuited meritorious claims.

According to Justice Holmes, William Slater's dependents were not remediless. "The defendant always can be found in Mexico, on the other side of the river, and it is to be presumed that the courts there are open to the plaintiffs. . . ."[36] Not only is it obvious that this presumption was of little comfort to these Texas litigants, but, in retrospect, it seems incredible that the Court would send American citizens to the "other side of the river" to a foreign state for adjudication of their tort claim.

Slater, however, was not totally devoid of merit. The decision carried with it an interesting dissent. Chief Justice Fuller, with Justices Harlan and Peckham joining him in dissent, argued that the case should have been decided on a procedural basis.

> It seems to me that the method of arriving at and distributing the damages pertains to procedure or remedy, that is to say, to the course of the court after parties are brought in, and the means of redressing the wrong, and I think the general rule that procedure and remedy are regulated by the law of the forum is applicable.[37]

The suggestion that damages should be characterized as procedural[38] embodied an attempt to avoid the territorial imperative of the place of wrong rule. Such characterization lends credence to the rule's shortcomings. This dissent was a muffled cry in the judicial wilderness: it

35. *Id.* at 126 (citations omitted).
36. *Id.* at 129.
37. *Id.* at 132.
38. *See* discussion § II(E) *infra.*

showed an awareness that a new approach was needed to solve multi-state tort problems. The great sin of *Slater* was the majority's failure to take imaginative advantage of the chance to clear new paths through variegated choice of law problems.

E. The Local Law Theory of Judge Hand — An Alternative to the Mechanical Place of Wrong Rule

To be sure, there were bright spots in the judicial grapplings with the place of wrong rule. For example, in 1938, only four short years after the "last event doctrine" of the First Restatement burst upon the scene,[39] Judge Learned Hand sat in judgment on *Siegmann v. Meyer.*[40] In *Siegmann,* defendant wife travelling without her husband, committed an assault on the plaintiff in Florida. Both defendant spouses were New York domiciliaries; the husband had never been to Florida.

The place of wrong followed the common law, making the husband liaxle in tort for his wihe husband had never been to Florida.

The place of wrong followed the common law, making the husband liable in tort for his wife's assault. The forum, the matrimonial domicile, had abolished this legal anachronism and refused to impute liability to an innocent spouse. The issue presented was whether the place of wrong rule of vicarious liability should be imposed upon the absent husband. For Judge Hand this required the court to decide "whether New York [would] ever accept as a standard any liability created in Florida against one who was never actually present in Florida, or domiciled there, and who did not in any degree procure, incite, or in any other way make himself a party to the tort."[41] Judge Hand said no.[42] He concluded:

> [S]trictly speaking, it is impossible for a court to enforce any liability except one created by the law of the state in which it sits. That state may take for its model a liability created by another state, merely because the other state creates it. Usually indeed it will do so when the other state is civilized; but the liability enforced is the creation of its own will: its law of conflict of laws alone determines when it will fashion a liability after the foreign liability. Thus, except as the law of Florida furnished a pattern which New York accepts, it has nothing whatever to do with the case. . . .[43]

As a result, the court dismissed the complaint against the husband.

In *Siegmann,* the court found an alternative to the mechanical rule of

39. *See* RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

40. 100 F.2d 367 (2d Cir. 1938).

41. *Id.* at 368.

42. It should be noted that Judge Hand was nonetheless aware of the magnetic pull of the place of wrong rule. He stated frankly in *Siegmann:* "The cause has been argued as though the question were whether the courts of New York would enforce a liability created under the law of Florida, and it must be confessed that there is high authority which seems to look that way." *Id.* at 367 *citing Slater,* 194 U.S. 120 (1904).

43. 100 F.2d at 367.

place of impact. In this instance, the inflexible place of wrong rule showed itself vulnerable; it was not some magic talisman nor automatic cure-all for multi-state torts.

In rejecting the place of wrong rule, Judge Hand put into operation his "local law" theory:

> [N]o court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. *A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs.*[44]

What are the requirements of this "local law" theory? It demands: "first, that a *right* be found to have been created in whatever state is selected by the forum's choice of law rule and, second, that this right, when found, should serve as the model for a right created by the forum."[45] The "local law" theory showed that the vested rights theory lacked compulsion; for, in truth, when plaintiffs moved interstate with a foreign cause of action and sought its enforcement, they moved only with a hope that the forum selected would enforce these rights. Although the holding may be explained in terms of agency law or on pure public policy grounds, viewed in its strongest light, *Siegmann* was an example of judicial dissatisfaction with the place of wrong rule.[46]

F. Locating the Wrong in Injuries to the Marital Relationship

Another example of a break with the old choice of law rationale arose in the *Gordon v. Parker*[47] decision. In *Gordon* the court had to decide whether cases dealing with the incidents of marriage presented an exception to the place of wrong rule. The facts placed the court in a dilemma regarding the place of impact.

At the inception of this drama, Charles and Naomi Gordon were

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44. Guinness v. Miller, 291 F. 769, 770 (S.D.N.Y. 1923), *aff'd*, 299 F. 538 (2d Cir. 1924), *aff'd sub nom.* Hicks v. Guinness, 269 U.S. 71 (1925).

45. Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822, 824 (1959) (original emphasis).

46. The effort to replace the rule was to be no easy undertaking. Professor Willis Reese, almost thirty-five years after *Siegmann*, pointed out some of the intricate difficulties inherent in supplanting the place of wrong rule:

> The task of the judge is peculiarly difficult when he is told without further direction to apply the law of the state with the greatest concern in the decision of the particular issue. To ascertain what state that is, first the judge usually must determine what policy or policies underlie the relevant decisional or statutory local law rules of the potentially interested states. This will often prove an onerous, difficult, and frustrating task.

Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 317 (1972).

47. 83 F. Supp. 40 (D. Mass.), *aff'd*, 178 F.2d 888 (1st Cir. 1949).

domiciled in Pennsylvania as husband and wife. When Charles, a lieutenant colonel in the United States Army, was called from the contemplative life in Pennsylvania to duty in India, the plot thickened. While he was stationed abroad, Naomi ventured into Massachusetts. Enter Stanley W. Parker, who stole Naomi's heart and alienated her affections. After his return from India, Colonel Gordon, the outraged husband, brought a tort action against Parker charging the latter with intending "to deprive him [Gordon] of the comfort, society, aid and assistance of Naomi, [enticing] her to continue absent from his home. . . ."[48]

The laws of the competing commonwealths were quite different. Pennsylvania, the matrimonial domicile, had abolished the tort of alienation of affections. In contrast, Massachusetts, the place of the amorous conduct still retained this ancient tort action. Was the wrong in the state of the marital domicile or was it where the defendant acted? In answering these questions, Judge Wyzanski showed his mettle.

The heart of the matter, as seen through Judge Wyzanski's eyes, was "whether Massachusetts would extend the asserted underlying policy of the Pennsylvania statute to bar suit brought in the courts of Massachusetts by a Pennsylvania husband against a Massachusetts paramour on account of conduct within Massachusetts."[49] The court surveyed the relevant policies behind the tort of alienation of affections and concluded:

> [I]n the tort of alienation of affections, the principal reason why the state stamps conduct as wrongful is that so many people regard it as sinful, so many regard it as offensive to public morals, and so many are likely to take matters into their own hands if public tribunals are not available.[50]

Having stated a justification for the existence of the tort action, Judge Wyzanski listed Massachusetts' interests:

> [Massachusetts] is concerned with conduct within her borders which in her view lowers the standards of the community where they occur. She also is concerned when her citizens intermeddle with other people's marriages . . . She has little interest in the degree of affection one Pennsylvania spouse has for another.[51]

The court applied Massachusetts law and held Parker liable for his actions. The law of the forum went into operation after a careful con-

48. *Id.* at 40.
49. *Id.* at 41.
50. *Id.* at 42.
51. *Id.*

sideration of the relevant policies of the competing jurisdictions.[52]

The *Gordon* decision was a relatively early example of a court attempting to resolve a choice of law problem using a methodology concentrating on policies rather than on location. The court had found that the place of wrong rule did not work when the damage asserted was to an intangible: the marriage relationship. The court avoided the impossible task of locating the actual place of wrong or harm in a marriage within the context of alienation of affections. *Gordon v. Parker* is an example of a creative judiciary at work; it should have been a beacon for other courts unhappy with the Bealean view of territoriality.

III. AVOIDANCE OF THE PLACE OF WRONG RULE: HONORED MORE IN THE BREACH THAN IN PERFORMANCE

Theoretically, enforcing a cause of action under the vested rights doctrine was automatic in multi-state tort cases. However, because the doctrine lacked compulsion in a constitutional sense, courts found enormous leeway to avoid its application. This could be accomplished, for example, by asserting that the cause of action was contrary to the forum's "strong public policy." Courts went to great lengths to create and legitimize "escape devices" to circumvent application of the place of wrong rule. As a result, the rule was more dishonored than observed.

This escape process was most unfortunate in delaying the *coup de grace* to the place of wrong rule and in postponing the formulation of a rational, alternate methodology. In the meantime, the supposed *raison-d'etre* of the place of wrong (uniformity of decision), was sacrificed. A frequent method used to effectuate the escape and enforce forum policies has been characterizing the problem so that an alternate rule would govern.

A. Characterization As Contract Rather Than Tort

One of the most disingenuous devices employed by courts has been to characterize the facts as presenting a contract problem rather than one grounded in tort. *Levy v. Daniels' U-Drive Auto Renting Co.*[53] exemplifies such a crafty characterization. Sack, after renting an automobile in Connecticut from Daniels' U-Drive, removed the vehicle to Massachusetts where he was involved in an accident, which injured his passenger, Levy. Levy brought an action in Connecticut, based on a

52. By contrast to Massachusetts' strong concern with the behavior which had occurred within its jurisdiction, Pennsylvania's interest in preventing such "sordid" and "spiteful" actions from cluttering its own courts paled. *Id.* at 43.

53. 108 Conn. 333, 143 A. 163 (1928).

Connecticut statute that imposed liability on an automobile rental agency for injury caused by the lessee. Massachusetts, the place of wrong, imposed no such vicarious liability. Daniels' U-Drive demurred to the complaint arguing that the defendant's liability should be resolved by reference to Massachusetts law. The demurrer was overruled.

The court justified its contract characterization of the basic tort problem by saying that "[t]he statute gives . . . the injured person a right of action against the defendant which rented the automobile to Sack [the bailee], though the injury occurred in Massachusetts."[54] The argument for the deviation from the traditional choice of law rule was based on the police power of the state which had enacted the statute. Its purpose "was not primarily to give the injured person a right of recovery against the tortious operator of the car,"[55] but rather to foster traffic safety on highways everywhere "by providing an incentive to [Connecticut motor vehicle lessors] to rent . . . to competent and careful operators, by making [those lessors] liable for damage resulting from . . . tortious operation. . . ."[56]

Levy exhibited the court's dissatisfaction with a mechanical choice of law rule that perpetuated uniformity of result, but little else. The decision, unfortunately, was not viwed as landmark jurisprudence, but was regarded as cunning.[57] Nevertheless, it is significant that the court made an effort to discover and apply an alternative in the conflict of laws process. While the decision brought about no monumental change, it was an implicit statement that the traditional doctrine was not working.

B. Interspousal Torts Characterized as Family Law Problems

In *Haumschild v. Continental Casualty Co.*[58] in 1959, the Wisconsin

54. *Id.* at 336, 143 A. at 164.

55. *Id.*

56. *Id.*

57. Professors Cheatham and Reese in 1952 voiced some dissatisfaction with the bald-faced extraterritorial application of the Connecticut statute in *Levy*.

> The ultimate wisdom of the decision . . . is open to debate. Granted that the court read the legislative purpose aright, the fact nevertheless remains that this purpose would have been substantially achieved even if the scope of the statute's application had been confined to Connecticut accidents. Was the court therefore justified in departing from the normal choice of law rule which, whatever its demerits may be, does tend toward ease of application and uniformity of result? . . . [T]he weighing process is a delicate one. It is all a matter of degree.

Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 967 (1952). However, with the additional hindsight which may now be applied to the same question, the court's approach in *Levy*, while imperfect, seems due more credit than disparagement. *Cf.* Justice Traynor's explanation for his own methodology in Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953). *See* discussion pp. 631-32.

58. 7 Wis.2d 130, 95 N.W.2d 814 (1959).

Supreme Court applied an avoidance device that was neither false nor spurious to break away from the place of injury methodology. In this case, a couple married and domiciled in Wisconsin were involved in California in a motor vehicle accident caused by the husband's negligent driving. As a result of injuries sustained, the wife brought suit in Wisconsin against her husband. The court had to decide whether to apply the law of the place of wrong, California, which recognized interspousal immunity — arguably as a necessary concomitant to its community property laws[59] — or the law of the forum and marital domicile, Wisconsin, which had abolished the archaic doctrine.

Once again, the territorial beast was howling to be fed. While seeming to nourish it, the court, by an adroit sleight of hand, denied sustenance by a domicile characterization. The court overruled a series of prior cases applying the place of wrong rule[60] and held that in a multi-state tort case interspousal immunity presented a problem in family law and family status, and thus called for the application of domicile law.[61] The court explained that although to stray from the place of wrong rule of the First Restatement "[would disturb] the sought after ideal of establishing some uniformity in the conflict of laws field,"[62] it preferred to recognize the "clearly discernible trend away from the rule of the Restatement insofar as it requires that the law of wrong is to be applied in determining questions of incapacity to sue based on family status."[63] The court somewhat warmly observed that, in conflict of laws, "absolutes should not be made the goal at the sacrifice of progress in furtherance of sound public policy."[64] While this device worked admirably, the majority was not prepared to sever all ties with the past.

Mr. Justice Currie, writing the opinion in *Haumschild,* included a caveat that "the instant decision [was not to be] interpreted as a rejection . . . of the general rule that ordinarily the substantive rights of parties to an action in tort are to be determined in the light of the law of the place of the wrong"[65] but would be limited to questions of marital status.

The court wished to advance. However, in trying to repell the rule, the court sought not to eliminate but only to elude it. As a result, this

59. *See* Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909); Cubbison v. Cubbison, 73 Cal. App.2d 437, 166 P.2d 387 (1946).

60. *See, e.g.,* Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931); Forbes v. Forbes, 226 Wis. 477, 277 N.W. 112 (1938).

61. 7 Wis.2d 130, 95 N.W.2d 814.

62. *Id.* at 138, 95 N.W.2d at 818.

63. *Id.*

64. *Id.*

65. *Id.* at 140, 95 N.W.2d at 819.

decision did not crumble the place of wrong rule, but weakened this stronghold by subtlely carving away another support.

C. Intrafamilial Torts Characterized as Family Law Problems

Three members of a family named Emery suffered a motor vehicle accident in Idaho. The two Emery daughters,[66] passengers injured in the crash, brought suit in California, the Emery family domicile, against their father, owner of the vehicle, and their brother, the driver.[67] The Emery daughters and son were then unemancipated minors. With the inception of this action, the entire family was embroiled on both sides of a tort controversy.

The court, through Justice Traynor, announced that intrafamilial immunity "[was] not . . . a question of tort but one of capacity to sue and be sued and as to that question the place of injury [was] both fortuitous and irrelevant."[68] In justifying its shift from the place of wrong rule, the court explained that

> disabilities to sue and immunities from suit [due to] . . . a family relationship are more properly determined by reference to the law of the state of the family domicile. . . . [T]hat state has the primary responsibility for establishing and regulating the incidents of the family relationship and . . . is the only state in which the parties can, by participation in the legislative process, effect a change in those incidents.[69]

It also emphasized the undesirability of having "the rights, duties, disabilities, and immunities conferred or imposed by the family relationship . . . constantly change as members of the family cross state boundaries during temporary absences from their home."[70]

Then, focusing on the defendants' motion to dismiss, Justice Traynor refuted each argument urged in favor of the intrafamilial immunity. To defendants' suggestion that permitting such suits would disrupt family harmony, the majority responded that "[a]n uncompensated tort [was] no more apt to promote or preserve peace in the family than [was] an action between minor brother and sister to recover damages for that tort."[71] The court found "[t]he interest of the child in freedom from personal injury caused by the tortious conduct of

66. This suit was brought on their behalf by their mother, Esther Emery.

67. Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955). (The second suit by Esther Emery, the one brought on grounds of support and medical care of her daughters is not the subject of discussion here.)

68. *Id.* at 427, 289 P.2d at 222.

69. *Id.* at 428, 289 P.2d at 223.

70. *Id.*

71. *Id.* at 430-31, 289 P.2d at 224.

others"[72] more significant than potential dangers of fraud and collusion between family members. The court refused to "immunize tortfeasors from liability in a whole class of cases because of the possibility of fraud,"[73] and ruled that it would "depend upon the legislature to deal with the problem as a question of public policy."[74] The remainder of defendants' contentions the court termed generally insubstantial in light of the competing policies.[75]

As a result of Justice Traynor's decision, the Emerys, father and son, were not immune from liability and had to face the likelihood of responding in damages to their daughters or sisters, respectively, for the injuries they had suffered. For California, *Emery* was a start in the right direction — away from a slavish acceptance of the old tort choice of law thinking. Fortunately, Justice Traynor's distaste for the place of impact rule and his determination to establish a new approach in conflicts law proved persuasive elsewhere.

D. Survival of a Cause of Action Characterized as Procedural and Governed by Forum Law

The mechanistic place of wrong rule also was avoided by courts characterizing the particular issue as a matter of procedure and, as such, controlled by local law — the traditional substance/procedure dichotomy. In *Grant v. McAuliffe,*[76] Grant and Manchester were passengers in an automobile owned and operated by D. O. Jensen when it collided with a vehicle owned and driven by one Pullen. The accident took place about fifteen miles east of Flagstaff, Arizona. Grant, Manchester and Jensen suffered injuries; Pullen died. Thereafter, McAuliffe was appointed Pullen's administrator. All persons involved in the accident were California domiciliaries. Each plaintiff filed actions against Pullen's estate sounding in tort for negligence. The issue was framed thus: did the cause of action survive the death of the tortfeasor? Survival would occur if domicile law was to govern, but would not if the law of Arizona was to apply. The court selected California law and explained its conclusion in the following terms:

> Survival is not an essential part of the cause of action itself but relates to the *procedures available for the enforcement of the legal*

72. *Id.* at 431, 289 P.2d at 224.

73. *Id.* at 431-32, 289 P.2d at 225.

74. *Id.* at 432, 289 P.2d at 225.

75. The court dismissed as groundless the defendants' fear that allowing such actions would impede proper parental discipline, disposed as without merit their argument that family finances would thereby be unequally allotted, and finally charged as "too remote and speculative" their contention that such actions would be rendered pointless should the minor defendant eventually inherit the recovery sums from the minor plaintiffs. *Id.* at 432, 289 P.2d at 225.

76. 41 Cal.2d 859, 264 P.2d 944, 42 A.L.R.2d 1162 (1953).

> *claim for damages.* Basically the question is one of the administration of decedents' estates, which is a purely local proceeding. . . . When . . . all of the parties were residents of this state, and the estate of the deceased tortfeasor is being administered in this state, plaintiffs' right to prosecute their causes of action is governed by the law of this state relating to administration of estates.[77]

However, the California court was far from unanimous about using an "escape device" to circumvent the inflexible traditional rule. Mr. Justice Schauer, in dissent, chastised his brethren for their conflicts heresy. He admonished his colleagues: "This concept . . . strikes deeply at what has been our proud boast that ours was a government of laws rather than of men."[78] Even Justice Traynor, in retrospect, was not elated with his rationale in *Grant*. Six years after the decision he reflected:

> It may not be amiss to add that although the opinion in the case is my own, I do not regard it as ideally articulated, developed as it had to be against the brooding background of a petrified forest. Yet I would make no more apology for it than that in reaching a rational result it was less deft than it might have been to quit itself of the familiar speech of choice of law.[79]

Admirably, the court in *Grant* reached a "rational" result. It did so precisely because, in selecting the law of California, it had applied the law of the only concerned state. For choice of law purposes in the case, the crash on interstate Route 66, fifteen miles east of Flagstaff, receded in significance: it became just an event — not first and ultimate in importance, but just simply that — an event.

E. "Public Policy" and Measure of Damages Characterized as Procedural to Avoid Application of the Place of Wrong Rule

Courts, at various times, have used with the high-sounding phrase "public policy" or the characterization of an arguably substantive element of a case as procedural to avoid the mandates of the place of wrong rule. In *Kilberg v. Northeast Airlines, Inc.*,[80] both devices were employed simultaneously. First, the New York forum decided not to attack the law of the place of wrong rationale frontally, yet by the guerilla warfare tactic of interposing "public policy" achieved an identical result. Second, it classified the element of measure of damages under the rubric of procedural issues over which it, as forum, had control.

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77. *Id.* at 866-67, 264 P.2d at 949, 42 A.L.R.2d at 1168 (emphasis added).
78. *Id.* at 868, 264 P.2d at 950, 42 A.L.R.2d at 1169.
79. Traynor, *supra* note 25, at 670 n.35.
80. 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

Kilberg lived in New York. He departed from New York's LaGuardia Airport on a Northeast Airlines flight to the isle of Nantucket in Massachusetts. The airplane crashed on Nantucket, and Kilberg lost his life. The New York court's predicament: Massachusetts, the place of wrong, imposed a ceiling on wrongful death recovery whereas New York, under its state constitution, prohibited such a limitation.[81]

Chief Judge Desmond solved the problem by refusing to apply the place of wrong rule. He concluded that any limitation on damages for wrongful death was contrary to the public policy of New York as expressed in the state constitution. Judge Desmond then criticized the place of wrong rule:

> An air traveler from New York may in flight of a few hours' duration pass through several [states]. His plane may meet with disaster in a [s]tate he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one state and end in another. The place of injury becomes entirely fortuitous.[82]

Because of the "unfair and anachronistic treatment [under the place of wrong rule] of the law suits which result from these disasters," the court preferred to enforce the application of forum law to protect its injured citizen.[83]

As further support for its tactic of utilizing "public policy" to block operation of the place of wrong rule, the court pointed out that under traditional choice of law doctrine the law of the forum governs procedural issues. Recognizing that matters of substance and procedure "shade into each other constantly,"[84] the court announced that it would "treat the measure of damages in this case as being a procedural or remedial question controlled by . . . [New York] policies."[85]

Thus, the *Kilberg* court, while clearly aware of the "unfair and anachronistic" qualities of the place of wrong rule, avoided facing the question of the rule's vitality, and, instead, chose to couch its decision in terms of the escape devices of "public policy" and procedural characterization.

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81. New York's Constitution provided that: "The right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the *amount recoverable shall not be subject to statutory limitations.*" N.Y. CONST. art. I, § 16 (1894) (emphasis added). *See Kilberg*, 9 N.Y.2d at 39, 211 N.Y.S.2d at 135-36, 172 N.E.2d at 528.

82. 9 N.Y.2d at 39, 211 N.Y.S.2d at 135, 172 N.E.2d at 527.

83. *Id.* at 39, 211 N.Y.S.2d at 135, 172 N.E.2d at 528.

84. *Id.* at 41, 211 N.Y.S.2d at 137, 172 N.E.2d at 529, *citing* R. LEFLAR, CONFLICT OF LAWS § 60 at 109 (1959).

85. 9 N.Y.2d at 39, 211 N.Y.S.2d at 135, 172 N.E.2d at 529. The court confidently declared "as to conflict of law rules it is of course settled that the law of the forum is usually in control as to procedures including remedies." *Id.* at 41, 211 N.Y.S.2d at 137, 172 N.E.2d at 529.

IV. THE SUPREME COURT AND CONFLICT OF LAWS

After the Supreme Court's decision in *Slater v. Mexican Railroad*[86] courts had a tendency to interpret the place of wrong rule as constitutionally mandated; their interpretation was reinforced by two additional Supreme Court decisions in the following decade. As time wore on, however, inferior courts tested their freedom to escape from the dictates of the rule, and they found it virtually unfettered. Instead of showing the way out of the place of wrong wilderness, the Supreme Court, in a series of decisions characterized by a lack of guidance, left the states to formulate their own approaches. Four interesting avenues of Supreme Court decisions are discussed here: (1) cases adhering to the *Slater* view of the rule as constitutionally mandated, and one, through reinterpretation, confining those cases to torts arising under exclusive federal jurisdiction, (2) the new constitutional limitations on a state's choice of law in multi-state tort cases, (3) application of interest analysis in federal choice of law, (4) limitations imposed by federalism.

A. The Acceptance and Rejection of the Notion that the Place of Wrong Rule is Constitutionally Mandated

In *Western Union Telegraph Co. v. Chiles*[87] and *Western Union Telegraph Co. v. Brown*[88] (the so-called "telegraph cases"), the Court, in essence, concluded that the place of wrong was constitutionally mandated. In *Chiles,* the defendant company received a message in Virginia for transmission to a sailor aboard a ship in the Norfolk Navy Yard. The message never reached him, and, as a result, he commenced an action in a Virginia court, basing it on a Virginia law that imposed a fine for failure to deliver a message. A choice of law conflict immediately arose because the Norfolk Navy Yard was a federal enclave, and there was no federal law imposing liability for failing to deliver a message. The Virginia court allowed recovery. The Supreme Court reversed, citing article I, section 8, clause 17 of the United States Constitution,[89] and held that the operation and effect of Virginia law could not extend

86. 194 U.S. 120 (1904).
87. 214 U.S. 274 (1909).
88. 234 U.S. 542 (1914).
89. This provision states that the Congress shall have the power

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings . . . .

See 214 U.S. at 278.

within the Navy yard where Congress had "exclusive legislative power" and "exclusive jurisdiction."[90] The result reached by the Court in *Chiles* did not turn on the proposition that the Constitution prohibited the application of Virginia law — in a due process sense — but only that federal law — or the lack thereof — covers events or wrongs that take place within or on federal enclaves.

In *Brown,* the Court similarly reversed a judgment founded on a South Carolina law that imposed tort liability for the misdelivery of a message. This particular misdelivery took place in the District of Columbia. The Court ruled that the place of wrong determines liability. Again, the decision was limited in its scope to federal property and focused on the power of Congress to legislate within federal enclaves. Looked upon in its best light, *Brown* held that state law cannot be applied to interfere with Congress' plenary power over federal property. Unfortunately, Mr. Justice Holmes, who penned the *Brown* decision, couched his statement of the rule in the language of vested rights: he stated flatly that the obligation arising at the place of wrong follows that plaintiff and constitutes "not only the ground but the measure of maximum recovery."[91] When the Court then applied this formulation of the rule to the salient facts in *Brown,* (1) that the District of Columbia came within the ambit of congressional legislation and (2) that no law in the District imposed liability for misdelivery, it disapproved of the lower court's application of Virginia law, saying: "[W]hen a state attempts in this manner to affect conduct outside of its jurisdiction or the consequence of such conduct, and to infringe upon the power of the United States, it must fail . . . ."[92] Although *Brown* held that application of the place of wrong rule is constitutionally mandated, later cases viewed it as saying no more than that the Constitution will not permit a state to apply its law and to derogate from the power of the United States to control conduct and impose liabilities within the District of Columbia.

In *Richards v. United States,*[93] the Supreme Court laid to rest any notion, lingering from *Chiles* and *Brown,* that the place of wrong rule is constitutionally mandated. At issue in *Richards* was whether, under the Federal Tort Claims Act (FTCA),[94] federal liability to injured employees acting within the scope of their employment should be determined with reference to the *whole* law of the place of negligence in-

90. 214 U.S. at 278-79.
91. 234 U.S. 542, 547 (1914), *citing* Slater v. Mexican R.R. Co., 194 U.S. 120, 126 (1904).
92. 234 U.S. at 547.
93. 369 U.S. 1 (1962).
94. 28 U.S.C. § 1346(b). *See* 369 U.S. at 2.

cluding its conflicts rules.[95] The Court, in an opinion authored by Mr. Chief Justice Warren, held that under the FTCA the federal court should follow the conflicts laws of the forum state and explained the applicable constitutional limits.

> Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interest possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.[96]

With *Richards,* the due process clause was firmly established as the paradigm for viewing choice of law rules in multi-state tort cases.

B. Creative Methodology in Federal Choice of Law Interest Analysis in Admiralty Tort Cases

The Supreme Court's true judicial craftsmanship in federal choice of law emerged in the admiralty case of *Lauritzen v. Larsen.*[97] Lauritzen well deserves its distinguished reputation; for Mr. Justice Jackson approached the tort problem with neither an addiction to last events nor a dedication to tortuous characterization. He examined the case in the full light of justice, equity, and reason.

During a brief stay in New York, a Danish seaman named Larsen agreed to serve on a ship registered under and flying the Danish flag and owned by a Danish citizen. The ship's articles, which Larsen had signed, were written in Danish and contained a clause stating that all crew members' rights would be determined with reference to Danish law and according to the ship owner's contract with the Danish Seaman's Union, of which Larsen was a member. A short time later, while the ship was moored in Havana harbor, he was negligently injured in the course of his employment. Thereafter, the Danish seafarer brought an

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95. 369 U.S. at 10-13.

96. 369 U.S. 1, 15. The Court, with particular foresight articulated another rationale for having the FTCA follow the conflicts law of the state in which the negligence occurred: such an approach "[would provide] a degree of flexibility to the law to be applied in federal courts that would not [otherwise] be possible." *Id.* at 12. The Court further observed that

> [r]ecently there has been a tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation. We can see no compelling reason to saddle the Act with an interpretation that would prevent the federal courts from implementing this policy in choice-of-law rules where the State in which the negligence occurred has adopted it. Should the States continue this rejection of the older rule in those situations where its application might appear inappropriate or inequitable, the flexibility inherent in our interpretation will also be more in step with that judicial approach, as well as with the character of the legislation and with the purpose of the Act considered as a whole.

Id. at 12-13.

97. 345 U.S. 571 (1953).

action in federal district court in New York under the Jones Act.[98] Lauritzen, as ship owner and employer, argued that the case was governed by Danish law and under it the mariner had been fully and justly compensated. The court held that American law would govern. Defendant appealed.

In considering the applicability of the Jones Act, Mr. Justice Jackson observed that the statutory language, if literally construed, would create an American cause of action in any seaman injured in the course of employment anywhere in the world. Unless a requirement of relationship between mariner, ship, or injury and the United States were not implied, an injury sustained by a crew member "on a Chinese junk, never outside of Chinese waters, would not be beyond its literal wording."[99] The Court pointed out that this type of statutory construction was one frequently encountered in any federal system,[100] and emphasized that international and maritime law in the interests of "comity," "reciprocity," and "mutual forbearance" traditionally had "attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose . . . laws [were] involved."[101]

Accordingly, the Court did not accept the literal meaning of the Act, but sought relevant connections that would direct or deflect application of American law. Among several factors discussed,[102] Mr. Justice Jackson identified and considered the location of the following: the wrongful act — Cuba, the ship's allegiance — Danish, the plaintiff and defendant's citizenship — Danish, the execution of the contract — New York, the contract's language and governing terms — Danish. The Court then found that these factors evinced "an overwhelming preponderance in favor of Danish law."[103]

In his search in *Lauritzen* for the appropriate law to apply, Mr. Justice Jackson did not focus solely on and cleave only to the tradi-

98. The Jones Act, 46 U.S.C. § 688 (1920) states that:

> 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 United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . .

99. 345 U.S. at 577.

100. This common construction problem occurs whenever courts "have to decide whether 'any' or 'every' reaches to the limits of the enacting authority's usual scope or is to be applied to foreign events or transactions." *Id.* at 578-79.

101. *Id.* at 582.

102. The Court also noted two additional factors: (1) the accessibility of the foreign forum, and (2) the standard, more stringent than mere due process, often applied to jurisdictional issues in international maritime matters, *id.* at 589-93; both of these are less germane to choice of law questions within the United States.

103. *Id.* at 592.

tional talisman of place of wrong; instead, he conceived a new approach: one concerned with competing interests, a visionary method which seems to elicit the proper solution for the case presented, a method committed to equity and justice.

C. *Limitations of Federalism on the Supreme Court's Ability to Formulate New Methodologies for Multi-State Tort Problems*

Unfortunately, *Lauritzen's* creativity has had little impact. As direct authority the decision affects only federal choice of law. Because the decision does not bind the states, and federal courts in diversity cases are required to apply the conflicts rules of the state in which they sit, *Lauritzen's* reasoning, in such instances, has been merely persuasive. Mr. Justice Jackson's thoughtful analysis is therefore restricted to multi-state tort problems arising under non-diverse article III, section 2 cases. Such a strict limitation, under the concept of shared-federalism, may cruelly waste the inventive talents of the federal judiciary.[104] Due to this imbalance, the burden of challenging the traditional rule has fallen primarily on the less sluggish state courts and the ever-vocal academe.

D. *Application of Local Law Authorizing Direct Actions: Recognition of Interest Analysis*

Even prior to the *Richards*[105] decision in 1962, the Supreme Court had clearly indicated its willingness to permit the due process clause to serve as the dividing line for the states' choice of law in multi-state tort cases. One 1954 case indicating the suitability of these due process limitations was *Watson v. Employers Liability Assurance Corp., Ltd.*[106] In *Watson,* the Court allowed the application of Louisiana's direct ac-

104. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941) (where the Court observes that "[its] views are not the decisive factor in determining the applicable conflicts rule," but rather that "[s]ubject only to [Supreme Court] review . . . on any federal question that may arise, [a state] . . . is free to determine whether a given matter is to be governed by the law of the forum or some other law." *Id.* at 496-97. *See also* Sampson v. Channell, 110 F. 2d 754, 760-62 (1st Cir.), *cert. denied,* 310 U.S. 650 (1940) (which reached the same conclusion one year earlier by applying the principles expounded by the Supreme Court in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)).

A second drawback to the transparent, alter ego status of federal courts sitting in diversity has been suggested, in that, without *Klaxon,* "the federal courts in diversity cases [were] in a special and strategic position, as a *disinterested* forum, to work out solutions of problems of interstate conflict of laws which are consistent with the presupposition of a federal judicial system." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 716 (2d ed. 1973) (emphasis added).

105. 369 U.S. 1.

106. 348 U.S. 66 (1954).

tion statute to override an insurance contract provision that negated direct suits against the insurance carrier; this was done under a dual rubric of police power and place of injury. The plaintiff, a Louisiana domiciliary, purchased in Louisiana a "Toni Home Permanent" kit. She used the product on her hair with disastrous results to both person and pride. The harmful product was manufactured by Toni Company of Illinois, whose parent corporation was the Gillette Safety Razor Company of Boston. The problem for Mr. Justice Black, the author of the Court's unanimous decision, centered on the application of this Louisiana direct action statute. The other states whose laws were implicated in the suit, Massachusetts and Illinois, both outlawed direct suits, holding them to be contrary to public policy. Moreover, the insurance contract in question specifically prohibited direct actions against the insurance carrier.

Mr. Justice Black chose to resolve the controversy not by falling back on a place of wrong rationale but rather by looking for contacts and interests among the competing jurisdictions.[107] First, Massachusetts and Illinois were reviewed respectively as the place of negotiation and delivery of the insurance contract. Second, Louisiana was identified as the state of injury, sale, and home of the plaintiff. Mr. Justice Black observed that Louisiana's direct action statute was not simply an attempt to "intermeddle" in extraterritorial matters, but rather reflected genuine concern that its injured citizens would be afforded a real remedy — so that they would not become a burden on their relatives, friends, or the state — and that such remedy would be freely available to its citizens when it served as forum. After considering Massachusetts' interest in having contracts executed under its laws enforced according to their terms, the Court found Louisiana's interest significantly greater and commented that, therefore, the "Full Faith and Credit Clause does not compel Louisiana to subordinate its direct action provisions to Massachusetts contract rules."[108]

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107. Mr. Justice Black had followed a similar approach in 1946 when he wrote the majority opinion in Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1946). *Vanston* involved a reorganization proceeding under Chapter X of the Bankruptcy Act, 11 U.S.C. §§ 501-676 in which a question arose regarding the validity of a covenant to pay interest on interest on a first mortgage indenture where such payment would have drastically reduced subordinate creditors' shares in the reorganized corporation. After holding that, because of the lack of overruling federal law, the issue of the covenant's validity would be determined with reference to state law, Mr. Justice Black turned to the question of which state's law, of the four states implicated in the suit, would govern the covenant's validity. In rejecting the "mechanical formulae of the conflicts of law" and the notion that the governing law could be simply and easily determined when dealing with such obligations, Mr. Justice Black emphasized the necessity to first balance "all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states." *Id.* at 161-62.

108. 348 U.S. at 73.

Watson was an interest analysis case couched constitutionally in terms of due process and full faith and credit. Despite Massachusetts' concern for the sanctity of contracts executed there, the Court subordinated that interest not because Louisiana was the place where the last act necessary to create liability occurred but because Louisiana had a paramount interest in the application of its law: protection of its citizens injured within its borders.[109] Sadly, the place of wrong rule long survived the creative analysis present in *Watson.*

V. THE METEORIC FALL OF THE PLACE OF WRONG RULE: RULES VERSUS APPROACHES

Although for certain purposes the use of the place of wrong rule survived review by the Supreme Court, its reputation was tarnished. Its mechanical application became disfavored by many courts which viewed it as a "drag on the coattails of civilization"[110] and "an unrepealed remnant of a bygone age."[111] There emerged a growing consensus that the rule should be supplanted by a methodology concerned with equity, justice and the expectations of the parties.

In the effort to formulate new choice of law guidelines for multi-state tort cases, courts also had to set aside their tendency to resort to the "escape devices" of the past. The characterization technique, while initially expedient, had been doomed from its inception as a serious assault on the Bealian theory of territoriality since it carried with it the assumption of the general suitability and applicability of the place of wrong rule. Although characterization had been helpful in allowing courts to use local law where relevant, at the same time, characterization painted a bleak scene in the tort choice of law process, for it demonstrated that the place of wrong rule and justice too often were alien and adverse. Once courts became aware of this antithesis, they were willing no longer to supinely submit to the rule's automatic application or to furtively circumvent it by employing escape device techniques. Even when this choice of law malady was diagnosed,

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109. One commentator in the year immediately following this decision indicated satisfaction with the rationale and result reached in *Watson* due to the strength of contacts which were present, but warned that a similar determination in an instance where a state's contacts with the foreign contract were "insubstantial" would be unforeseeable and thus clearly unfair to the insurance company in question. Braucher, *Forward to the Supreme Court, 1954 Term,* 69 HARV. L. REV. 119, 142 (1955).

Apparently, the Court has either heeded this advice or followed this approach of its own accord by erecting the due process clause in choice of law as a *barrier* to the application of state law that is unconnected with the particular course of action.

110. Clark v. Clark, 107 N.H. 351, 355, 222 A. 2d 205, 209 (1966).

111. *Id.* at 355, 222 A. 2d at 209.

however, the remedy was in doubt; for there was rampant disagreement among courts and commentators regarding the identity of the replacement.

One of the first questions addressed was whether the new methodology for tort choice of law problems should deal with rules or with principles and approaches. Professor Willis Reese has described the distinctions to be kept in mind while making the initial methodological choice.

> The principal question in choice of law . . . is whether we should have rules or an approach. By "rule" is meant a phenomenon found in most areas of the law, namely a formula which once applied will lead the court to a conclusion. To be sure there will inevitably be questions as to a rule's proper scope of application, including questions of how the words that comprise the rule should be defined or interpreted. Once it has been decided what a rule means and how it should be applied, however, a conclusion will be reached through the rule's application.
>
> By "approach" is meant a system which does no more than state what factor or factors should be considered in arriving at a conclusion.[112]

Decisions exploring this rules/principles dichotomy eventually led to the meteoric fall of the place of wrong.

A. Policy and Interest Analysis as an Alternative to the Place of Wrong Rule — Common Sense Versus Mechanistic Rules

The new rules-versus-approach question was clearly tested in a 1957 case that pitted public policy and interest analysis, both approach methodologies, against the place of wrong rule. Apparently, the court decided that common sense should not be anathema to the tort choice of law process; for though it used no escape devices, it was still able to put into operation policies of compensation and deterrence, and did so in a straightforward manner. Specifically, the Minnesota Supreme Court employed an interest analysis methodology in *Schmidt v. Driscoll Hotel, Inc.*[113] to permit the extraterritorial operation of the Minnesota Dram Shop Act.

Herbert G. Schmidt, a minor, brought suit through his mother, against the Driscoll Hotel for damages he claimed to have incurred as a result of the hotel's illegal sale of intoxicating liquor to a patron named John Sorrenson. Schmidt alleged that the hotel, doing business as the Hook-Em Cow Bar and Cafe in South St. Paul, sold enough drinks to

112. Reese, *supra* note 46, at 315.

113. 249 Minn. 376, 82 N.W.2d 365 (1957).

Sorrenson so that he became inebriated, and continued to sell to him when he was clearly drunk. Sorrenson then drove away from the Cafe and, on his intoxicated route, passed near Prescott, Wisconsin, where he caused the car carrying young Schmidt to overturn. Schmidt alleged that the severe injuries which he sustained were the proximate result of the Cafe's illegal sale of liquor to Sorrenson.[114] This simple sequence of multi-state events presented a typically ironic choice of law conflict.

At that time, Minnesota had a Dram Shop Act which made illegal the sale of alcohol to an intoxicated person and then made such seller directly liable to any person injured as a result of that illegal sale. Had the plaintiff been injured in Minnesota, the act unquestionably would have applied. Schmidt's injury, however, had been sustained in Wisconsin, where no comparable civil damage act existed.

The Minnesota Supreme Court reasoned that the case called for the application of Minnesota law saying that it "would be more in conformity with principles of equity and justice."[115] The court supported its reasoning by citing to the following facts:

> [a]ll parties involved were residents of Minnesota. Defendant was licensed under [Minnesota] laws and required to operate . . . in compliance therewith. [The Hotel's] violation of the Minnesota statutes occurred here, and its wrongful conduct was complete within Minnesota when . . . Sorrenson became intoxicated before leaving its establishment.[116]

The court scrutinized the civil liability statute and its apparent legislative purpose and held that the statute would be given effect even though the injury occurred outside of Minnesota.[117] Accordingly, the court ruled that the sale of alcoholic beverages in Minnesota imposed absolute liability upon the seller for injuries that were the proximate result of such sale no matter where the injuries took place.

With this ruling in *Schmidt,* the Minnesota Supreme Court, rather than following a rule dedicated to territorialism, employed a methodology concerned with relevant forum policies: compensation and deterrence. The court validly perceived in the Dram Shop Act a Minnesota public policy that intended to regulate the conduct of Min-

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114. *Id.*

115. *Id.* at 380, 82 N.W.2d at 368.

116. *Id.* It is also interesting to note that the Minnesota court could claim the situs of the place of wrong on such facts by saying not only that the "wrongful conduct was complete in Minnesota" but also that "therefore" Minnesota was the "place of wrong." It did not take this somewhat deceitful second step.

117. The court cited with approval the Massachusetts Supreme Judicial Court's policy centered approach in Gordon v. Parker, 83 F. Supp. 40 (D. Mass.), *aff'd,* 178 F. 2d 888 (1st Cir. 1949), (*see* discussion pp. 625-27 *supra*), and the result reached by the Connecticut Supreme Court in Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928), (*see* discussion pp. 627-28 *supra*).

nesota bartenders and sought to provide blanket compensation for plaintiffs proximately injured thereby. The fact that Wisconsin, the place of impact, did not impose such civil liability was considered relatively insignificant. The court's acceptance of this policy centered analysis struck a direct blow for freedom from wrongs, impacts, and events. *Schmidt's* approach was a harbinger of decisions to come.

B. The New York Host-Guest Experience

In general, the guest statute problem presented to the various state courts an opportunity to devise new methodologies for replacing the old mechanical rule. For one thing, guest statutes, either precluding liability or raising the standard necessary to be alleged and proved, were widely considered to be anachronistic and unfair.[118] They were viewed as a relic from a quieter time when interstate motor transportation was the exception rather than the rule.[119] While all states have had to decide host-guest issues, few jurisdictions have been faced with the sudden and startling array encountered by New York.

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118. In 1960, Professor Albert A. Ehrenzweig, on the inequity and unpredictability in the current guest statute situation, stated:

> The guest boarding an automobile in the state where it is permanently kept may expect only as much protection as is given to him by the law of that state, and if that law contains a so-called guest statute limiting his host's liability to wilful negligence, this liability is all the guest should be allowed to count on wherever he may be injured. It seems unreasonable to compel the host, as we do now, to buy insurance against a liability that he might incur under the law of a state possibly to be reached on a yet unplanned out-of-state trip. On the other hand, the guest can be expected to be familiar with the guest statute of his host's state and to carry his own accident insurance without regard to more favorable laws prevailing in his own state or in states he might touch on his trip.

Ehrenzweig, *Products Liability in the Conflict of Laws — Toward a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws": II*, 69 YALE L. J. 794, 801 (1960). Another academician assessed the equity and fundamental fairness of such guest statutes with the following ironic remarks:

> Why did our civilized neighbors in Ontario fashion this barbaric law? We are told it was done from a misguided purpose to protect insurance companies from the frauds of insured motorists who otherwise presumably would have had great sport hurtling their cars off high cliffs so their passenger friends might collect easy money as personal injury damages.

Rosenberg, *Two Views on Kell v. Henderson, An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 459 (1967).

119. Recent comments by the Maine Supreme Court in Beaulieu v. Beaulieu, 265 A.2d 610 (1970) illustrate the problem:

> [the] American way of life during the last 30 years has changed so much . . . [with regard to] traveling habits, whether by car, plane or boat, that we are not surprised litigants question the adequacy of [the] ancient [place of wrong] rule of the good old days; [therefore], we must decide anew whether the traditional rule . . . , (the law of the place of the wrong invariably controlling regardless of the issues before the court), fully satisfies the present needs of a motoring society accustomed to fast, frequent and distant travel and at the same time subjected to ever-increasing motor vehicle injuries and fatalities.

Id. at 613.

1. *Babcock v. Jackson*[120] — The Place of Wrong Subordinated to Legitimate State Concerns in Regard to Host-Guest Liability

On Friday, September 16, 1960, an event occurred which may be described as the choice of law equivalent to the shot heard 'round the world. On that day, Georgia Babcock and two friends, Mr. and Mrs. William Jackson, set out from their respective homes in Rochester, New York, for a weekend trip together in Canada. Ms. Babcock was riding as a guest in an automobile owned and operated by Mr. Jackson. A short time after they entered the Province of Ontario, Mr. Jackson lost control of his vehicle which spun off the road and slammed into a stone wall, causing serious injury to Ms. Babcock. She then filed suit in state court in New York.[121]

At that time, Ontario, the situs of the accident, had a guest statute[122] which preserved the archaic notion that a non-paying passenger should not be allowed to recover damages from his or her host for injuries sustained. However, New York, the forum and domicile of the parties, had no such guest statute and allowed recovery on a showing of ordinary negligence. The New York lower court dismissed the complaint as barred by the Ontario statute. Plaintiff appealed.

The New York Court of Appeals had two alternate grounds on which to overturn the lower court's dismissal:[123] it could either refuse to apply the law of the place of wrong on the basis of public policy[124] or follow the law of New York as the jurisdiction most concerned with the particular host-guest issue. Judge Fuld chose the second option. He wrote for the majority:

> The "center of gravity" of "grouping of contacts" adopted by this court in conflicts cases involving contracts impresses us as likewise affording the appropriate approach for accommodating the competing interests in tort cases with multi-[s]tate contacts. *Justice, fairness and the "best practical results"* may best be achieved by giving controlling effect to the law of the jurisdiction which,

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120. 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

121. *Id.*

122. ONT. REV. STAT. ch. 172, § 105, subd. (2) (1960) (Highway Traffic Act) provided in pertinent part, "the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in . . . the motor vehicle."

123. This opinion is being discussed in the context of "which rationale were they going to use to overturn the lower court" because the entire opinion is oriented toward that result. Although the court goes to great lengths to carefully balance the jurisdictions' competing policies it is highly unlikely that the balancing process would have been initiated in this case had it not already known the favorable result.

124. *See, e.g.*, Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961) and discussion of *Kilberg*, p. 632-33 *supra*.

> because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.[125]

Judge Fuld weighed both the contacts and interests of the competing jurisdictions:

> [This] action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a weekend journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there.[126]

On balance, the court viewed New York's interests as "unquestionably the greater and more direct" whereas Ontario's "[were] at best minimal."[127]

As a result, in *Babcock,* the court extended the "grouping of contacts" methodology into the torts field. Henceforth, in host-guest cases, New York courts would not only count "contacts," a quantitative process, but would also consider policies, a qualitative analysis. Although both aspects were evaluated in *Babcock,* the majority, in its consideration of the Canadian law, emphasized that the statute's policies would not be served by its application to New York parties in a New York forum.[128]

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125. 12 N.Y.2d at 481, 240 N.Y.S.2d at 749, 191 N.E.2d at 283 (citations omitted and emphasis added).

The court also took trouble to note that a "variety" of cases, some old and some new, covering a wide spectrum of legal issues had:

> (1) "rejected the inexorable application of the law of the place of the tort where [it] has no reasonable or relevant interest in the particular issue involved" and (2) thereafter courts had "applied the law of some jurisdiction other than the place of the tort because it had a more compelling interest in the application of its law to the legal issue involved."

Id. at 481, 240 N.Y.S.2d at 749, 191 N.E.2d at 283, and cases cited nn. 8-12. Later commentators have labelled such a choice of law process as resolution of a "false conflict." *See* Traynor, *Is This Conflict Really Necessary?,* 37 TEX. L. REV. 657 (1959); Ehrenzweig, *"False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Choice of Law: A Beginning,* 43 WASH. L. REV. 309 (1967); Comment, *False Conflicts,* 55 CALIF. L. REV. 74 (1967); Leflar, *True "False Conflicts" et Alia,* 48 B.U.L. REV. 164 (1968).

126. 12 N.Y.2d at 482, 240 N.Y.S.2d at 750, 191 N.E.2d at 284.

127. *Id.* at 482, 240 N.Y.S.2d at 750, 191 N.E.2d at 284.

128. The court claimed that the purpose of the statute was to " 'prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies' and, quite obviously, the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers, not New York defendants and their insurance carriers." *Id.* at 482-83, 240 N.Y.S.2d at 750, 191 N.E.2d at 284 (citation omitted). *See also* note 118 *supra.*

2. New York's Interest Analysis — Is the Alternative to the Place of Wrong Rule Worse than the Cure?

The reverberations arising from *Babcock* were immediate; only later cases could determine whether the echoes from this novel "shot" would be lasting.

The second chapter of the New York experience began with *Kell v. Henderson.*[129]

A minor child, Stephanie Kell, was injured when the car she was riding in left the road in New York state and hit a bridge. Stephanie was a passenger in a car owned by one Helen Henderson and driven by Mrs. Henderson's son. All parties, both Hendersons and Stephanie, were residents of the Province of Ontario. The trip was to be a short one. It commenced in Ontario and was eventually to end there after a drive into the United States. The automobile was licensed and registered in Ontario. The injured Stephanie Kell brought suit in New York for personal injuries. The defendants argued that the law of Ontario controlled and, as such, it would not allow a guest to recover based on a host's negligence. The plaintiff contended that the New York law applied under a place of injury rationale.[130]

Factually, *Kell* was the perfect inverse of *Babcock v. Jackson,* where the place of wrong rule was abandoned in favor of a scheme that considered relevant contacts and policies. Nonetheless, Stephanie Kell, a Canadian citizen, recovered against the Hendersons, also Canadians. What happened in *Kell* to bring about this anomaly? Why this court had not, as the *Babcock* court had done,[131] follow one noted commentator's suggestion that "[a] guest boarding an automobile in the state where it is permanently kept [should] expect only as much protection as is given to him [or her] by the law of that state"[132] regardless of where vehicle and guest then travel. Canadian law would have offered this Canadian no recovery; why then, New York?

In general, the *Kell* court attempted to answer this nagging question by positing that *Babcock* did not abolish the traditional right of a plaintiff to recover against a defendant for injuries that occurred in New York, and that the case simply indicated that henceforth the place of wrong rule would not be applied automatically.[133] Obviously, such reasoning carried with it new echoes from the era of vested rights.

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129. Kell v. Henderson, 47 Misc.2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965), *aff'd mem.*, 26 App. Div.2d 595, 270 N.Y.S.2d 552 (3d Dep't 1966).

130. 47 Misc.2d 992, 263 N.Y.S.2d 647.

131. 12 N.Y.2d at 483-84, 240 N.Y.S.2d at 751, 191 N.E.2d at 285 (*citing* Ehrenzweig, *supra* note 118, at 603); *see also* note 118 and accompanying text *supra.*

132. Ehrenzweig, *supra* note 118, at 801.

133. 47 Misc.2d 992, 263 N.Y.S.2d 647.

Two noted scholars who commented upon the decision concurred in the application of New York law yet disagreed about the proper reason for that conclusion. Interestingly, although perhaps not surprisingly, the two split along the rules versus approach dichotomy.[134]

Professor Donald T. Trautman viewed *Kell v. Henderson* as being more properly decided by employing a methodology centered on the basic concerns of the competing jurisdictions.[135] He weighed New York's policies of compensation and admonition against those of Ontario in seeking to protect insurance companies from fraudulent suits. Although he admitted that, at times, identifying and balancing state interests might be overly difficult, here, New York's dual policies of compensation and highway regulation were more significant than a nonexistent or weakened Canadian policy[136] of protecting the host from the vengeful guest or insulating insurance companies from fraud and collusion. As a result, he concluded that the forum was correct in applying its own law, primarily because its law was "sounder," but also because it was the most concerned jurisdiction.[137]

Professor Maurice Rosenberg, on the other hand, argued that host-guest cases should be subject to a rule.[138] The rule he suggested was one of "alternative reference": the standard of conduct prescribed between host and guest at the host's domicile would determine the standard for that host except when the place of the accident called for a higher standard. Professor Rosenberg recognized that "the price for having a *rule* [is that] [a]ny rule will work harshly and unsatisfactorily at times."[139] However, he perceived such unfortunate results as necessary by-products of a good system.[140] He agreed that New York law was properly applied in *Kell,* but because the facts fit the rule he was advocating.

Stephanie Kell recovered under the court's reasoning and under either professorial view of her case. The court justified its judgment in place of injury terms; however, as both Professors Trautman and

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134. *See* p. 641 *supra.*

135. Trautman, *Two Views on Kell v. Henderson: A Comment,* 67 COLUM. L. REV. 465 (1967).

136. Trautman, *supra* note 135, at 472 ("[T]he law generally here and in Canada, is moving to that result [imposition of liability] and that is the sounder result.").

137. *Id.*

138. Rosenberg, *supra* note 118, at 463-64.

139. Rosenberg, *supra* note 118, at 463.

140. In Professor Rosenberg's opinion,

> The question is whether an *a priori* choice of law rule — any rule — is worse than none at all; whether, [we should] . . . wait until the accident, then decide which state's decisional law ought to be applied to a particular issue by analyzing and weighing the competing interests, so called.
>
> This would be wrong in my judgment . . . .

Id. at 463-64. He concluded by noting, "I would prefer any . . . sensible rule to no rule, even if it meant Miss Kell fails in her suit." *Id.* at 464.

Rosenberg indicated in their respective articles, *Kell* could be justified and explained by either a "concerned jurisdiction" analysis or by the use of an "alternative reference rule."

Only four years later, in *Arbuthnot v. Allbright,*[141] the same lower court faced facts identical to those presented in *Kell:* plaintiff guest and defendant host were Ontario residents; the automobile was garaged and insured in Ontario; the trip began and was to end in Ontario; and finally, the accident took place in New York.

Logic and order are important parts of our judicial heritage. Accordingly, it could have been assumed that the court in *Arbuthnot* would have applied stare decisis principles and concluded that like controversies should be similarly resolved, thereby applying New York law. Instead, *Kell v. Henderson* notwithstanding, Canadian law was held to control and compensation was denied the injured plaintiff.

The *Arbuthnot* court distinguished *Kell* on procedural grounds. In essence, it declared that the burden had fallen on the *Kell* defendant to both plead and prove the foreign law (the Ontario guest statute); because he had failed to meet this burden, New York law had been applied. Secondly, to deny recovery, the *Arbuthnot* court relied upon a principle enunciated by New York Court of Appeals' Judge Fuld in an intervening case, which basically counted significant contacts, and in the event of host-guest injuries where the passenger, the host, and the incidents of ownership for the vehicle were all located in one state, that state's law was deemed the most appropriate to apply.[142] In *Arbuthnot,* the court then reasoned, Ontario law should govern.

While *Babcock, Kell,* and *Arbuthnot* all consisted of mirror-image fact patterns, several additional cases served to provide New York with further variations on this recurrent host-guest theme. In 1965 in *Dym v. Gordon,*[143] two years after its initial decision in *Babcock* to pursue an interest methodology, the New York Court of Appeals encountered its second opportunity to apply interest analysis to a foreign guest statute issue in a tort action with multi-state contacts.

Rhoda Dym and the defendant, both New York domiciliaries, were students for the summer at the University of Colorado. The defendant gave his guest, Rhoda, a ride in his automobile, which was insured and registered in New York, to a destination in Longmont, Colorado, to attend a class. On the way to Longmont, there was a collision with another vehicle, and Rhoda was injured. She brought a negligence

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141. 35 App. Div.2d 315, 316 N.Y.S.2d 391 (3d Dep't 1970).

142. *Id.* at 316, 316 N.Y.S.2d at 392 (*citing* Tooker v. Lopez, 24 N.Y.2d 569, 585, 301 N.Y.S.2d 519, 532, 249 N.E.2d 394, 404 (1969) (Fuld, J.)).

143. 16 N.Y.2d 120, 262 N.Y.S.2d 463, 209 N.E.2d 792 (1965).

action in New York, claiming that, in light of *Babcock's* interests approach, New York law should determine the proper host-guest standard. The defendant countered with the Colorado guest statute which forced a guest to plead and prove "wilful and wanton" negligence in order to recover against a host-driver. The New York trial court held the Colorado law inapplicable and a judgment for plaintiff resulted. On appeal, the New York Court of Appeals reversed, holding that the Colorado statute governed the host-guest issue.

Judge Burke, speaking for the majority, claimed that the court was following the *Babcock* reasoning. However, in the process of identifying what it perceived were Colorado's interests, the court emphasized not only the prevention of fraudulent claims and the avoidance of suits by "ungrateful" guests, factors similarly noted in *Babcock,* but also preservation of the negligent defendant's assets for innocent Colorado residents injured in the other car, a factor never raised in *Babcock* as no second car had been involved.[144] The second distinction the court stressed was that this trip was not to begin and end in New York, but was a Colorado trip; that the parties' relationship was created in Colorado, where they were living at the time; and that the "accident arose out of Colorado based activity."[145] The court contrasted the completely transitory quality and fortuitous location of the accident in *Babcock* with the more lengthy and substantial Colorado involvement shown by the parties in *Dym.* Judge Burke explained that the *Dym* parties "had acquired so sufficient a nexus with [Colorado] that [the] relationships formed there were in the real sense Colorado relationships."[146] Due to these essentially factual distinctions, Colorado law would be held to apply.

Judge Fuld dissented[147] strenuously, arguing that *Dym* and *Babcock* were indistinguishable on all significant points and that, therefore, New York law should govern. In his view, the majority was parrotting *Babcock* language while totally ignoring the underlying purposes its reasoning sought to serve. He protested that the *Dym* majority was simply substituting one "equally mechanical and arbitrary rule" for another: "special relationship" in place of *lex loci delicti.*[148] He asserted that *Babcock,* properly interpreted, did not provide a formula for solving

144. *Id.* at 124-25, 262 N.Y.S.2d at 466, 209 N.E.2d at 794.

145. *Id.* at 125, 262 N.Y.S.2d at 466-67, 209 N.E.2d at 794.

146. *Id.* at 125, 262 N.Y.S.2d at 467, 209 N.E.2d at 795.

147. Chief Judge Desmond and Judge Bergan joined in Judge Fuld's dissent, *id.* at 129-34, 262 N.Y.S.2d at 470-74, 209 N.E.2d at 797-800. Chief Judge Desmond also wrote a separate dissenting opinion, *id.* at 134-36, 262 N.Y.S.2d at 474-76, 209 N.E.2d at 800-01.

148. 16 N.Y.2d at 129, 262 N.Y.S.2d at 470, 209 N.E.2d at 797.

multi-state tort problems but rather suggested a "conceptual framework" for such resolution.[149]

The inconsistency suggested by the dissent in *Dym* was rapidly put to the test in *Macey v. Rozbicki,*[150] where the majority, speaking through Chief Judge Desmond, spent most of its efforts distinguishing *Babcock* facts from *Dym* facts and vice versa in order to help justify the differing results. All *Macey* parties were New York residents. Defendants had a summer residence in Ontario, where plaintiff went for a ten day vacation. During the course of that visit, the parties decided to take a day-long excursion within Ontario. While plaintiff was riding as a guest in defendant's New York insured and registered vehicle, they were involved in a collision with a car owned and driven by a Canadian. As a result of the injuries plaintiff sustained, she brought suit in New York. For the new "seat of the relationship test," *Macey* thus presented facts which fell conveniently between the "New York day trip to Ontario" facts of *Babcock* and the "summer-long stay, Colorado confined trip" of *Dym.*

In order to find that New York law indeed applied, the *Macey* majority stretched the New York aspects of plaintiff and defendants' relationship over every conceivable facet of the facts including that the "arrangements for [the] visit had undoubtedly been made in New York State."[151] Elements such as the defendants' summer-long contact with Ontario[152] and collision with a Canadian vehicle[153] were ignored by the majority.

In a concurring opinion, Judge Keating pursued his own analysis of the facts of all three cases, *Babcock, Dym,* and *Macey.* He came to two significant conclusions. First, he noted that to decide which state has the greatest interest in having its law govern a particular issue, courts must look to the facts presented and the policies which the laws of the competing states seek to serve.[154] The facts important to Judge Keating were the residence of the parties and the place where the vehicle was registered and insured. In *Macey,* the place which fit each of those descriptions was New York. Judge Keating accordingly felt that neither Ontario's nor New York's policies would be served by denying plaintiff recovery. Second, he found "this case and *Dym v. Gordon* . . . indistinguishable and *Babcock v. Jackson* . . . irreconcilable"[155] and he suggested that *Dym* simply should be disregarded.

149. *Id.* at 129, 262 N.Y.S.2d at 470, 209 N.E.2d at 797.
150. 18 N.Y.2d 289, 274 N.Y.S.2d 591, 221 N.E.2d 380 (1966).
151. *Id.* at 292, 274 N.Y.S.2d at 593, 221 N.E.2d at 381.
152. *Id.* at 296, 274 N.Y.S.2d at 596, 221 N.E.2d at 382 (Keating, J. concurring).
153. *Id.* at 293, 274 N.Y.S.2d at 593, 221 N.E.2d at 382 (Keating, J. concurring).
154. *Id.* at 292-99, 274 N.Y.S.2d at 593-99, 221 N.E.2d at 382-84 (Keating, J. concurring).
155. *Id.* at 298, 274 N.Y.S.2d at 598, 221 N.E.2d at 385 (Keating, J. concurring).

In 1968 in *Miller v. Miller,*[156] yet another host-guest problem, the New York Court of Appeals laconically admitted that its recent decisions had "lacked precise consistency."[157] This time a slightly different host-guest nuance was presented: *Miller* addressed the question whether a limitation on wrongful death recovery imposed by the state where the accident occurred would be applied by the forum state to a tort action with multi-state contacts.

In 1961, a New York guest suffered fatal injury in Maine as the result of the negligence of his host, who happened to be his brother. The host was domiciled in Maine at the time of the accident, but moved with his family to New York several months later. The executrix of the dead passenger's estate brought suit in New York. At the time of the accident, Maine placed a limit on recovery in wrongful death cases; the New York Constitution prohibited any such limitation.[158]

The court applied New York law; it concluded, under an interest analysis approach, that New York was the most concerned jurisdiction. The court considered post-accident events as relevant to the decision. Refusing to be bound by the domicile of the host at the time of the accident, the court focused on the domicile of both parties at the *time of suit, i.e.,* when they were all New York residents. The majority did not view the defendant/brother's post-accident change of domicile as an attempt either to collude or to forum-shop in order to avoid the harsh limitation of the Maine statute. Judge Keating also mentioned that approximately three years after the filing of this suit Maine had repealed all its limitations on wrongful death recovery, so that presently, Maine and New York's policies were the same; accordingly, the limitation should not be imposed.

The New York Court of Appeals' decision in *Babcock v. Jackson* was the precursor of interest analysis as an alternative methodology to the place of wrong concept; however, the decision's aftermath was a chronicle of achievement and misadventure. The New York experience gathered on the judicial stage a cast of plaintiffs and defendants who collectively waged war on the place of wrong rule. For a time, the outcome was dubious; but, even when the defeat of the place of wrong rule was evident, the Court of Appeals' attempts to secure a viable alternative prolonged the sense of uncertainty. Despite the fact that this search cast doubts on New York's judicial consistency, the court persevered.

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156. 22 N.Y.2d 12, 290 N.Y.S.2d 734, 237 N.E.2d 877 (1968).
157. *Id.* at 15, 290 N.Y.S.2d at 737, 237 N.E.2d at 879.
158. N.Y. CONST. art. I, § 16 (1894).

3. Formulation in New York of Hard-and-Fast Rules to Cover Multi-State Tort Problems in Host-Guest Cases

Only a year after *Miller* was decided, the next host-guest case was appealed to New York's highest court. In *Tooker v. Lopez*[159] a divided court again held that New York law should apply to its domiciliaries injured out of state in a New York registered and insured vehicle. *Tooker's* greatest significance lies, however, not in the majority opinion, but rather in the novel analysis proposed by Judge Fuld in his concurrence. Judge Fuld's suggestions were eventually to help the court achieve some consistency.

Catharina Tooker, Marcia Lopez, and Susan Silk all attended Michigan State University, where they lived in the same dormitory on campus. One afternoon, the three students decided to spend a weekend in Detroit. On their way, Marcia, who had agreed to do the driving, lost control of her small Japanese sportscar while she was passing another vehicle. As a result of the accident, both the driver and Catharina Tooker were killed; the third girl was badly injured. Tooker and Lopez were both New York residents, and the Lopez car was registered and insured there. A Michigan statute required a showing of "willful misconduct" or "gross negligence" for a guest to recover against the driver. Notwithstanding this burden, Ms. Tooker's father, as administrator of her estate, brought suit in New York, alleging simple negligence.

The majority completely rejected, as constitutionally unsound, *Dym's* reliance on applying the foreign guest statute so as to preserve the defendant's assets for injured third party non-guests, and ignored *Dym's* so-called "seat of the relationship" test.[160] Judge Keating, writing for the court in *Tooker,* then disapproved of the *Macey* majority's superficial "contact counting."[161]

Consistent with his *Miller* opinion[162] and *Macey* concurrence,[163] Judge Keating applied *Babcock's* policy centered approach. First, he looked to the facts in *Tooker.* He then identified New York's policy as one seeking to provide compensation for injured automobile passengers, an aim which would be served, while Michigan's goals would not be impaired, by the application of New York law. Finally, he noted that Michigan's policy of preventing fraudulent claims against its insurers would be unaffected in this instance regardless of which state's

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159. 24 N.Y.2d 569, 301 N.Y.S.2d 579, 249 N.E.2d 394 (1969).

160. 24 N.Y.2d at 575, 301 N.Y.S.2d at 523-24, 249 N.E.2d at 397.

161. *Id.* at 576, 301 N.Y.S.2d at 524, 249 N.E.2d at 398.

162. 22 N.Y.2d 12, 290 N.Y.S.2d 734, 237 N.E.2d 877 (1968); *see* p. 650 *supra.*

163. 18 N.Y.2d 289, 296-98, 274 N.Y.S.2d 591, 596-98, 221 N.E.2d 380, 382-85, *see* p. 650 *supra.*

law was to govern. Accordingly, New York's simple negligence standard was held to apply.

Judge Fuld, although he concurred in the result in *Tooker,* believed that the time was ripe for the court to formulate rules to guide their host-guest decisions. This rule formulation, Judge Fuld suggested, would provide much needed direction in this troublesome area of conflicts law and also would insulate courts from further charges of *ad hoc* decision-making. Chief Judge Fuld set out the following host-guest choice of law principles for multi-state torts:

> 1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
> 2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not — in the absence of special circumstances — be permitted to interpose the law of his state as a defense.
> 3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.[164]

Judge Fuld viewed these principles as neither inflexible not immutable; they were proferred for future guidance in light of the considerations painstakingly unearthed in the *Babcock-Tooker* series.

a. Fuldian rules adopted in New York

The Fuldian rules were adopted in New York three short years after their creation. In *Neumeier v. Kuehner,*[165] a Buffalo, New York, resident named Arthur Kuehner drove from Buffalo to Fort Erie, Ontario, where he picked up a Mr. Neumeier, who resided in that town. Neumeier and Kuehner planned to drive from Fort Erie to Long Beach and back — a round trip confined to Ontario. En route to Long Beach, the vehicle was hit on a railroad crossing by a Canadian National Railway Company train; Kuehner and his passenger were killed.

164. 24 N.Y.2d at 585, 301 N.Y.S.2d at 532-33, 249 N.E.2d at 404.
165. 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972).

Neumeier's wife brought a wrongful death action in New York against two defendants: Kuehner's estate and the railroad. Both defendants pleaded the Ontario guest statute, that now required an injured guest to show gross negligence as a condition precedent to recovery.[166]

The court selected Mr. Chief Judge Fuld's third principle that called for application of the law of the state where the accident occurred when driver and guest were domiciled in different states.[167] Chief Judge Fuld, speaking for the majority, could find no reason to displace Ontario law:

> [I]gnoring Ontario's policy requiring proof of gross negligence in a case which involves an Ontario-domiciled guest at the expense of a New Yorker does not further the substantive law purposes of New York. In . . . fact, application of New York law would result in the exposure of [New York] domiciliaries to a greater liability than that imposed upon resident users of Ontario's highways.[168]

Similarly, the court found that the application of Ontario law would serve to discourage indiscriminate forum-shopping by plaintiffs hoping for greater recoveries or lower standards of proof.

The Fuldian rules, in spite of their apparent success in *Neumeier* and *Arbuthnot,*[169] were not received with unblemished enthusiasm. Judge Breitel, now Chief Judge, who wrote a separate concurring opinion in *Neumeier,* warned that "it [was] undesirable to lay down prematurely major premises based on shifting ideologies in the choice of law."[170] One academic commentator charged that Fuld's principles were a "pot-pourri of the worst aspects of pure interest analysis and the rigidity of the First Restatement all tied together in one package; [thus] having no philosophical base they cannot stand the test of time."[171] Professor Moffatt Hancock has even suggested that because of the escape devices available to courts using the place of wrong concept, the Fuldian rules are more rigid and inflexible.[172]

b. Fuldian rules further extended

In 1973, the Second Appellate Division of the New York Supreme

166. ONT. REV. STAT. ch. 172, § 105, subd. [2], *as amended by* Stat. 1966, ch. 64, § 20, subd. [2] (Highway Traffic Act). Prior to the 1966 amendment, the Ontario guest statute had conferred absolute immunity on the driver as against his guest.

167. 31 N.Y.2d 121, 128, 335 N.Y.S.2d 64, 70, 286 N.E.2d 454, 458.

168. *Id.* at 129, 335 N.Y.S.2d at 70, 286 N.E.2d at 458.

169. 35 App. Div.2d 315, 316 N.Y.S.2d 391 (3d Dep't 1970), *see* p. 648 *supra.*

170. 31 N.Y.2d 121, 130, 335 N.Y.S.2d 64, 71, 286 N.E.2d 454, 459.

171. Twerski, *Neumeier v. Kuehner: Where are the Emperor's Clothes?,* 1 HOFSTRA L. REV. 104, 105 (1973). *See also* Note, *Tort Choice-of-Law in New York: The Fuldian Guest Statute Rules v. Professor Cavers' Principles in a Hypothetical Case,* 25 SYRACUSE L. REV. 1005, 1035 (1974).

172. Hancock, *Some Choice-of-Law Problems Posed by Antiguest Statutes: Realism in Wisconsin and Rule-Fetishism in New York,* 27 STAN. L. REV. 775, 788 (1975).

Court held that Chief Judge Fuld's third guideline would be used to determine which state's law should apply to a question of imputed negligence in a multi-state tort action arising out of an automobile accident. In *Rogers v. U-Haul Co.*,[173] U-Haul had leased a motor vehicle in New York to the defendant May, a resident of New York, for a one day trip from New York to Alabama. The automobile was registered in the District of Columbia. The decedent, a passenger, was being driven to her home in Alabama by May. Near Bethel, Pennsylvania, May lost control of the car which left the highway and crashed causing the passenger serious injuries from which she died several days later. Thereafter, decedent's administrator brought an action in New York basing the claim on a New York law that imputed the negligence of the driver to the owner. The rental company defended by arguing that the law of the place of injury, which law held the owner harmless unless the driver was acting in an agency relationship and the injury was in the course of employment, properly applied.

The Appellate Division compared the *Neumeier* facts to those in *Rogers* and set out Chief Judge Fuld's third principle, the one previously applied in *Neumeier.* The court noted that in *Rogers* the passenger was not a resident of the place of wrong, as was the passenger in *Neumeier,* a consideration which, if alone, might have weakened arguments for the application of the law of the place of wrong; however, the court also pointed out that in *Rogers* neither was the owner driving nor the vehicle registered in the forum, contacts which, since absent, reduced the applicability of New York law. The court, therefore, discovered no reason under Judge Fuld's methodology for "displacing" the place of injury rule since there existed no New York policy that would, in operation, " 'advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.' "[174] Accordingly, Pennsylvania law was held to govern.

c. Fuldian rule #3 — a wolf in sheep's clothing?

Although one court praised *Neumeier* and the Fuldian rules as "represent[ing] a major effort to achieve consistency in the choice of law process in host-guest conflict cases,"[175] other commentators have not been so complimentary. Mr. Chief Justice Roberts of the Supreme Court of Rhode Island was not timid in expressing his dissatisfaction with Fuld's "rulist" approach. Regarding the third principle, he said:

173. 41 App. Div.2d 834, 342 N.Y.S.2d 158 (1973).
174. 41 App. Div.2d 834, 835, 342 N.Y.S.2d 158, 160.
175. Gross v. McDonald, 354 F. Supp. 378, 380 (E.D. Pa. 1973).

> If the accident occurs in a state which is the domicile of neither the host nor guest, little reason exists to apply the law of that state. Therefore, one must resort to interest analysis to determine whether the law of the domicile of the plaintiff or of the defendant should apply. . . . We agree with Judge Fuld that, if possible, a set of guidelines is preferable to an ad hoc approach. However, his third rule neither avoids case-by-case analysis nor produces the most desired result.[176]

One scholar found the trend exhibited by the Fuldian rules most "regrettable":

> Neumeier not only represents a retreat from interest analysis, but a return to choice of law rules, which, however narrow, are not a substitute for careful consideration of conflicts problems on a case by case basis with reference to considerations of policy and fairness to the parties. It is regrettable that New York has chosen to follow that path.[177]

A most interesting example of dissatisfaction with the third principle enunciated by Fuld emerged in the case of *First National Bank in Fort Collins v. Rostek.*[178] John and Carol Rostek lived in Colorado with their children. On December 29, 1969, Mr. and Mrs. Rostek left Colorado for a brief trip to Iowa and Vermillion, South Dakota. They had planned to attend a board of directors meeting in Vermillion, but the meeting was cancelled. They, therefore, decided to return to their home in Fort Collins. The Rosteks departed from the airport at Vermillion, however, they never reached their destination. The plane was later discovered 500 feet beyond the end of the runway.

The bank, as guardian for the Rostek children, brought a wrongful death action in Colorado against John Rostek's estate. South Dakota, the place where the airplane crashed, had a guest statute requiring the guest to allege and prove willful or wanton misconduct in order to recover against the host.[179] On the other hand, Colorado had no guest statute in effect at the time of the accident.

The latest multi-state tort choice of law questions decided in Colorado had applied the place of wrong rule, so the Colorado Supreme Court initially was undecided as to which approach it would use to solve

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176. Labree v. Major, 111 R.I. 657, 672-73, 306 A.2d 808, 817 (1973). Plaintiffs, a husband and wife, were from Massachusetts; defendants lived in Rhode Island; the accident occurred in Massachusetts. The court applied the lower standard of proof for negligence of defendant's home state even though defendant and plaintiff came from different states and the accident arose in plaintiff's home state.

177. Sedler, *Interstate Accidents and the Unprovided for Case: Reflections on Neumeier v. Kuehner,* 1 HOFSTRA L. REV. 125, 149 (1973).

178. 514 P.2d 314 (Colo. 1973).

179. S. D. COMPILED LAWS ANN. § 50-13-5 (1967) (aircraft guest statute).

the conflict. The court identified four options. First, it could retain the *lex loci delicti.* Second, an escape device [public policy] could be pressed into service to avoid the application of South Dakota law. Third, the court could follow the "interest analysis" approach forged by the New York Court of Appeals in *Babcock v. Jackson.* Finally, it could adopt a "rulist" approach, using *Neumeier v. Kuehner* as a model.

The court chose the fourth option, and explained its preferrence.

> While we recognize that a rational and equitable approach to choice of law is desirable, we now harmonize that approach with the genius of the common law which always sought to provide its consumers some degree of predictability and consistency in application. . . . [A]ccidents occurring in states not the domicile of all of the parties are commonplace in today's society. *The law should not deal with them as if they were rare and exotic hypotheticals, to be solved by exercises in intellectual gamesmanship.* The events in this case, and their probable reoccurrence, are real world concerns, and the law in this area should provide a concrete and viable system for the equal application of just laws.[180]

Mr. Chief Justice Pringle, speaking for the court, then adopted outright the first two principles of Fuld's rules and concluded that the Rostek's case was governed by the first: "When the guest-passenger and the host-driver are domiciled in the same state, and the [vehicle] is there registered, the law of that state should control and determine the standard of care which the host owes to his guest."[181] Accordingly, since both the Rosteks were domiciled in Colorado and the airplane was registered in that state, the case was governed by principle number one.

The court then proceeded to indulge in most interesting prospective decision-making by announcing that, as to Fuld's third rule, it would not be adopted. In justifying the exemption from this third rule, the court concluded that the first two principles met the requirements of "predictability and consistency." But the third principle was too indefinite, too general. In its place, the court announced that it would employ section 145 of the Restatement Second.[182] Regarding the Restatement's concept of "significant contacts" the court explained:

> While this Restatement rule is somewhat broad, it is no less precise than the concepts of "reasonableness" or "due process" which courts have applied for many years. [Therefore,] [h]opefully, at some time in the future, as the body of case law develops, we can lay down more specific choice of law rules governing other areas, as we have done today in the area of guest statutes.[183]

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180. 514 P.2d at 318-19 (emphasis added).
181. *Id.* at 319, *citing Neumeier,* 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972)
182. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).
183. 514 P.2d at 320.

First National Bank in Fort Collins v. Rostek stands as an excellent example of a concerned judiciary searching for a new sensible and just beginning in the tort conflicts process. The court accepted a "rulist" methodology for host-guest cases because "[a]ll of the generally accepted approaches . . . suffer from a similar defect [in that] they are all . . . applied in a more or less *ad hoc* fashion, and [contain] indeterminate language with no concrete guidelines."[184]

VI. NEW APPROACHES IN THE TORT CHOICE OF LAW PROCESS — APPROACHES AS ALTERNATIVES TO THE RULIST PLACE OF WRONG RATIONALE

A. Leflar's Choice Influencing Considerations

For every maverick court that clung to the past, there emerged a creative activist court willing to consider new alternatives to the place of wrong rule. For its remarkable decision in *Clark v. Clark*[185] the New Hampshire Supreme Court qualified as a trailblazer.

In *Clark,* a husband and wife, domiciled in Lancaster, New Hampshire, took a short pleasure trip from Lancaster to Littleton, New Hampshire. The drive took them through Lunenberg, Vermont. While in Vermont, the wife suffered injury as a result of her husband's negligence. Once she returned home, she brought a personal injury action against her husband. Vermont allowed a guest to recover but required proof of gross and willful negligence; New Hampshire had no guest statute.

The New Hampshire Supreme Court chose a methodology of analysis rather than rules to solve the case. Mr. Chief Justice Keniston, speaking for the court, adopted an approach gleaned from Professor Robert Leflar's "Choice Influencing Considerations." Briefly enumerated, these considerations are:

A. Predictability of results;
B. Maintenance of interstate order;
C. Simplification of the judicial task;
D. Advancement of the forum's governmental interests;
E. Application of the better rule of law.[186]

In applying the Leflar principles, Chief Justice Keniston evaluated each one in the light of the *Clark* facts. As to predictability of results, he concluded that "except for the evils of forum shopping, the predictability

184. *Id.* at 318.
185. 107 N.H. 351, 222 A.2d 205 (1966).
186. Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U. L. REV. 267, 282 (1966).

consideration does not have much to do with automobile accident cases; [for] [t]hey are not planned."[187] By the same token, maintenance of interstate order only required a state court to be connected with the issues before it as a condition precedent to application of its own law to interstate automobile trips and accident litigation. The third consideration, simplification, was dismissed as "not the whole end of law, and opposing considerations may outweigh it."[188] As viewed by the court, advancement of the forum's interests simply meant that a court was required implicitly to do justice to each case before it. Finally, the guest statute of Vermont was analyzed under the fifth consideration, the better rule of law. The court considered the Vermont statute out of step with contemporary conflicts thinking. The court explained its view of this fifth consideration:

> If the law of some other state is outmoded, an unrepealed remnant of a bygone age, "a drag on the coattails of civilization," we will try to see our way clear to apply our own law instead; if it is our own law that is obsolete or senseless (and it could be) we will try to apply the other state's law; [for] courts have always done this in conflict cases, but have usually covered up what they have done by emphasizing manipulative techniques such as characterization and renvoi.[189]

Consequently, the court applied New Hampshire law.

Professor Leflar, in discussing the value of his considerations as tools for solving conflicts cases, observed:

> [T]he direct approach should lead courts and lawyers away from mechanical examination of pseudo-rules, sub-rules, and exceptions to non-existent rules; away from ritualized talk about deduced formulae and manipulative gimmicks treated as if they had reality; and away from the contrived artificialities of analytical logic masquerading as conflicts of law, into a fairly simple process of listing and systematically taking into account the policy values that are relevant to a choice-of-law decision.[190]

Leflar's emphasis on realism soon gained acceptance elsewhere.

B. Adoption of Leflar's Choice Influencing Considerations in Other Courts

Although *Clark v. Clark* may have been an easy case in which to succumb to Leflar's choice influencing considerations, this conversion was

187. 107 N.H. at 354, 222 A.2d at 208.

188. *Id.* at 354, 222 A.2d at 208.

189. *Id.* at 354, 222 A.2d at 209 (citations omitted).

190. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1598 (1966).

not isolated to New Hampshire. In *Milkovich v. Saari*[191] the Supreme Court of Minnesota also used the better rule of law approach to settle a host-guest question. In *Milkovich* a host injured his guest in an accident in Minnesota. Both parties were Ontario residents and the vehicle was registered and insured there. In opposition to Minnesota's law, where a guest could recover for ordinary negligence, loomed the familiar spectre of the Ontario guest statute's requirement of gross negligence.[192] The Minnesota court, as the Supreme Court of New Hampshire had done in *Clark,* applied its own law under the better rule of law concept.

Another example of a court's adoption of the Leflar principles arose in the case of *Turcotte v. Ford Motor Co.*[193] In *Turcotte,* a diversity of citizenship case brought in a federal forum, the court was faced with a choice of applying either Rhode Island or Massachusetts law to a wrongful death action arising out of a motor vehicle accident with products liability overtones. Both decedent and driver were Rhode Island residents. Defendant corporation was incorporated under the laws of Delaware but did substantial business in Massachusetts. The site of the accident was the Massachusetts Turnpike. After a careful consideration of the Leflar principles, the federal court decided to apply Rhode Island law.

VII. CONCLUSION

In the cases presented in this paper, an attempt has been made to dramatize the rise and fall of the place of injury rule. To explain its meteoric disappearance and to tell, in essence, the "rags to riches to rags" story of the place of wrong rule — the *lex loci delicti.* The rule was honored more in the breach than in the performance. Manipulative, "escape devices" merely delayed the inevitable: the rule's total repudiation.

The *lex loci delicti* achieved uniformity and simplicity of the judicial task but at too high a price. The rule was truly "a drag on the coattails of civilization." It was mechanical and artificial. It responded little to the injured parties who labored under its yoke. The oppressive yoke, the "drag", has today been alleviated, to some degree, by use of the analysis of the Restatement (Second), by an "interest analysis" approach, by the Fuld principles or by the use of "choice influencing considerations." These rules and approaches collectively helped turn the tide. As a result, there has been a revolution in choice of law processes.

191. 295 Minn. 155, 203 N.W.2d 408 (1973).

192. ONT. REV. STAT. ch. 172, § 105, subd. [2], *as amended by* Stat. 1966, ch. 64, § 20, subd. [2] (Highway Traffic Act).

193. 494 F.2d 173 (1st Cir. 1974). *Cf.* Labree v. Major, 111 R.I. 657, 306 A.2d 808 (1973).

The place of injury rule has been met. It has been examined by looking into the hurts of the Slaters and the Carrolls and the Dyms and all other private litigants who carried its weight. The rule has been found wanting; and it has been relegated to the "junk-heap of rusty boiler plate." The yield of justice was too low. The place of wrong rule was a triumph of formalism over substance. Its application exacerbated the search for new methodologies. Enlightened judges refused to place their imprimatur on the rule. And, in the final analysis, it may be said that the old order had to change. It has, in fact, yielded place to the new. And only time will tell whether the new modes will achieve equity and justice in the tort choice of law process.

Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment-Protected Privacy†

*David M. O'Brien**

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Synopsis

Personal privacy, a complex political ideal with wide symbolic appeal, attains its principal constitutional protection and the closest approximation of express recognition in the guarantees of the fourth amendment. This article examines the basic principles and patterns of judicial construction of fourth amendment-protected privacy. An initial discussion of the political ideal of privacy and the practice of rights provides a theoretical framework for examining the historical basis for and scope of judicial decisions which interpret and enforce claims to privacy under the fourth amendment. By distinguishing between the construction of constitutionally recognizable expectations of privacy and the application of fourth amendment guarantees, Dr. O'Brien reviews the changing scope of fourth amendment-protected privacy, and examines the significance of recent Burger Court rulings.

Introduction

Recently in *United States v. Chadwick,*[1] the Supreme Court reaffirmed the principle that the fourth amendment "protects people, not places," and "more particularly, it protects people from unreasonable governmental intrusions into their legitimate expectations of privacy."[2] As a matter of constitutional history, the Supreme Court's construction

1. 433 U.S. 1 (1977).

2. *Id.* at 7. In this case the respondents, upon arrival by train in Boston from San Diego, were arrested at their waiting automobile by federal narcotics agents, who had been alerted that the respondents were possible drug traffickers. The agents arrested the respondents and seized their automobile and a footlocker, which respondents had transported on the train and placed in the trunk of their automobile, and which the agents had probable cause to believe contained narcotics. At the federal building in Boston, an hour and half after the arrests the agents opened the footlocker without respondents' consent or a search warrant and found large amounts of marijuana in it. The respondents were subsequently indicted for possession of marijuana with the intent to distribute it. The District Court granted their pretrial motion to suppress introduction of the marijuana, holding that warrantless searches are *per se* unreasonable under the fourth amendment unless conducted within the context of a well established exception to the warrant requirement, and, more specifically, that the search of the footlocker was not justified either by the "automobile exception" or as a search incident to a lawful arrest. 393 F. Supp. 763, 773 (D. Mass. 1975). The Court of Appeals affirmed. 532 F.2d 773 (1st Cir. 1976). The Supreme Court held that the respondents were entitled to the protection of the fourth amendment's warrant requirement, and the evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded. 433 U.S. at 1-2. The Court reaffirmed that a fundamental purpose of the fourth amendment is to safeguard individuals from unreasonable governmental invasions of legitimate privacy interests, in holding that

> [b]y placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.

Id. at 11.

and application of fourth amendment guarantees to claims of protected privacy has varied from *Boyd v. United States*[3] and its liberal construction and application, through a strict construction and application fostered by *Olmstead v. United States,*[4] to *Katz v. United States*[5] and its progeny exhibiting liberal construction of fourth amendment-protected privacy but strict application of the amendment's guarantees.

Notwithstanding the vicissitudes of judicial construction and enforcement of fourth amendment-protected privacy, the fundamental principle emerges that constitutionally recognizable claims to privacy are limited to unreasonable governmental intrusions. The reasonableness of those intrusions is determined by the context (the area in which and circumstances under which they take place) and the nexus between individuals' privacy interests and governmental interests in searching and seizing. With varying degrees of enforcement, liberal construction of fourth amendment protection of "the sanctity of a man's home and the privacies of life"[6] emphasizes the fact that the amendment gives constitutional effect to the common law maxim "a man's house is his castle" and thereby serves to protect the core of an individual's engagements and expectations of privacy. The Supreme Court, however, by promoting a conceptualization of constitutionally protected privacy based upon the locus of an individual's activities, strictly applies the amendment's guarantees so as to provide limited protection for interests in informational privacy.[7]

The following analysis seeks to elucidate the principles and patterns of judicial construction of fourth amendment-protected privacy in order to show that the Court historically circumvented the scope of fourth amendment-protected privacy both by inadequately conceptualizing reasonable expectations of privacy and limiting application of fourth amendment guarantees to traditional proprietary concepts and analysis. An initial discussion, in section I, of the political ideal of a right of privacy and the practice of rights provides a framework for examining, in section II, the historical background of the fourth amendment, and, in sections III and IV, the underlying principles and patterns of judicial construction and application of fourth amendment

3. 116 U.S. 616 (1886). *See* discussion pp. 676-80 *infra.*

4. 277 U.S. 438 (1928). *See* note 177 and accompanying text *infra.*

5. 389 U.S. 347 (1967). *See* § IV(D) *infra.*

6. Boyd v. United States, 116 U.S. 616, 630 (1886).

7. For discussions and analyses of informational privacy, *see generally* Bogomolny, *The Right to Nondisclosure,* 5 HUMAN RIGHTS 153 (1976); Leigh, *Informational Privacy: Constitutional Challenges to the Collection and Dissemination of Personal Information by Government Agencies,* 3 HASTINGS CONST. L. Q. 229 (1976); O'Brien, *Privacy and the Right of Access: Purposes and Paradoxes of Information Control,* 30 AD. L. REV. 45 (1978).

guarantees to claims of personal privacy. Having concluded that the Warren Court in a series of cases re-embraced the *Boyd*-fostered liberal construction of fourth amendment-protected privacy by repudiating *Olmstead's* strict construction and application of the fourth amendment, section V discusses recent Burger Court decisions in terms of their continuity with and departure from the Warren Court's construction and enforcement of fourth amendment-protected privacy. Specific attention is given to Warren and Burger Court decisions in the areas of eavesdropping and informers, administrative searches, and informational privacy. The article concludes that although the Warren Court re-embraced a liberal construction of fourth amendment-protected privacy, it narrowly applied fourth amendment guarantees to interests in informational privacy. The Burger Court further circumscribed fourth amendment guarantees and *Katz's* liberal construction and analysis of reasonable expectations of privacy by re-embracing proprietary concepts in determining legitimate privacy interests and areas of fourth amendment protection.

I. THE POLITICAL IDEAL OF PRIVACY AND THE PRACTICE OF RIGHTS

The political ideal of privacy in the sense of freedom from unwanted intrusions by the government may have meaning in any regime because all political regimes govern imperfectly. Since no regime is either omniscient or omnipotent, some individual conduct inevitably escapes the exercise of political power and remains private. In this regard, the American system of free government is perhaps both more imperfect in governance and affords greater protection for individual privacy than most regimes. By design, the legal parchment of the United States Constitution and Bill of Rights consecrated the principle of limited government,[8] which implies that both the governors and the governed are subject to the rule of law and "that governmental powers stop short of certain intrusions into the personal life of the citizen."[9] Indeed, one "purpose of [the] Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[10] The Constitution and Bill of Rights established that individuals are free to enjoy their basic liberties except for

8. The principle of limited government is a cornerstone of the American system. *See generally* THE FEDERALIST PAPERS NOS. 15, 16, 39, 40, 47, 49, 78 (C. Rossiter ed. 1961). *See also* J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett ed. 1960).

9. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965).

10. West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

limitations imposed by the exercise of valid governmental powers derived from the "consent of the people."[11] Thus, the American regime, insofar as it embodies the principle that governmental power is limited, provides for a political ideal of privacy. This ideal represents not merely freedom from governmental intrusions but also a basic liberty and right of privacy.

Since only constitutionally permissible governmental activities may constrain the exercise of fundamental liberties, from the standpoint of the government, citizens have a right of privacy, or what Louis D. Brandeis called "a right to be let alone." According to Justice Brandeis

> [t]he 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.[12]

Brandeis' view and similar judicial characterizations of a constitutional right of privacy as "the beginning of all freedom"[13] and one which "emanates from the totality of the constitutional scheme under which we live"[14] are understandable, if not unqualifiedly justifiable, in terms of the political ideals embodied in the written Constitution.[15] Because "the whole cloth of the Constitution"[16] and Bill of Rights was designed to secure basic civil liberties and, arguably in a broader sense an in-

11. For the Founding Fathers' view of "consent of people" as providing the basis for government, *see* THE FEDERALIST PAPERS, *supra* note 8, NOS. 22, at 152; 23, at 156; 37, at 227; 39, at 241; 49, at 313-14; 78, at 467-68; 84, at 513. For similar arguments regarding privacy as personal freedom, *see* A. Doss & D. K. Doss, *On Morals, Privacy and the Constitution,* 25 MIAMI L. REV. 395 (1971); Ryan, *Privacy, Orthodoxy, and Democracy,* 51 CAN. B. REV. 84-92 (1973); Weiss & Wisner, *Pot, Prayer, Politics, and Privacy: The Right to Cut Your Own Throat in Your Own Way,* 54 IOWA L. REV. 709 (1969).

12. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

13. Public Util. Comm'n v. Pollack, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

14. Poe v. Ullmann, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting).

15. Similarly, Professor William M. Beaney observes:

> Why should one assume that the right to privacy is protected by fundamental law? . . . The answer in a few words must be that our Constitution and our system of constitutional government reflect a decision that government is limited in the powers and in the methods it may use . . . 'Liberty against government,' a phrase used by Professor Corwin, expresses this idea forcefully. In this sense virtually all enumerated rights in the Constitution can be described as contributing to the right to privacy, if by the term is meant the integrity and freedom of the individual person and personality.

Beaney, *The Constitutional Right to Privacy, In the Supreme Court,* 1962 SUP. CT. REV. 212, 214 (1962).

16. C. H. PRITCHETT, THE AMERICAN CONSTITUTION 541 (3d ed. 1977).

dividual's right to be let alone, the absence of any explicit provision insuring a right of privacy necessitated that privacy interests lay dormant until either constitutional interpretation acknowledged and legitimated their connection with those personal liberties afforded explicit constitutional protection, or judicial creativity fashioned a right of privacy and thereby constitutionally recognized what might be termed a constitutional background right of privacy.[17]

Certainly, the herculean exercise of judicial power in translating a political ideal of privacy into a constitutionally protected right is controversial and subject to severe criticism.[18] Thus, evaluation of the Supreme Court's construction of constitutionally protected privacy and criticisms thereof requires closer examination of the political ideal of privacy and the theory of rights implicit in judicial decision making.

In what sense may privacy be regarded as a political ideal? Specifically, how does privacy relate to individual freedom, civil liberties, and legal rights? Traditional analyses often assume not only that privacy is basically chosen, but also that acknowledgement of privacy involves the recognition of individual freedom, liberty, and concomitantly a right of privacy.[19] Accordingly, such analyses idealize privacy politically, in the sense of a liberty or a right of individuals to be free from unwanted access to personal experiences and engagements.[20]

Such a political ideal, however, is impermissibly broad since it col-

17. *See* discussion pp. 670-72 *infra*.

18. *See generally* Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 525 (1965) (Black, J., dissenting). *See also* Ely, *The Wages of Crying Wolf,* 82 YALE L. J. 920 (1973); Henkin, *Privacy and Autonomy,* 74 COLUM. L. REV. 1410, 1426-27 (1974); Miller, *Privacy in the Corporate State,* 25 AD. L. REV. 231 (1973).

19. A significant part of the problems in safeguarding privacy interests lie with the approaches to the concept of privacy. Often, definitional approaches consist of lengthy enumerations of privacy-invading conduct, or unitary definitions which are imprecise, overly broad, or too narrow. *See, e.g.,* Fried, *Privacy* 77 YALE L. J. 475 (1968); Gross, *The Concept of Privacy,* 42 N.Y.U. L. REV. 34 (1967); Parker, *A Definition of Privacy,* 27 RUTGERS L. REV. 275 (1974); Warren & Brandeis, *The Right To Privacy,* 4 HARV. L. REV. 193 (1890). Such definitional approaches — though sometimes offered as competing rationales for privacy protection — do cohere in a legalistic orientation and justification for privacy protection. More specifically, four assumptions are made about the concept:

> (1) privacy denotes the seclusion or withdrawal of an individual from public affairs; (2) privacy is voluntary and is, therefore, basically an aspect of individual freedom and control over personal engagements; (3) privacy is valued for either its intrinsic worth or its instrumental value, but rarely are both of these values considered simultaneously; (4) privacy is voluntary, it is, therefore, basically an aspect of individual freedom and control over personal engagements.

O'Brien, *supra* note 7, at 63. For a discussion and critique of these assumptions, *see generally id.* at 63-74; Garrett, *The Nature of Privacy,* 18 PHILOSOPHY TODAY 263 (1974).

20. That is, definitional analyses often confuse the concept of privacy with that of a right of privacy. *See* note 19 *supra.* Nevertheless, privacy differs in significant ways from the right of privacy: individuals may have a large degree of privacy without having chosen it, and even when individuals voluntarily undertake to secure the privacy of their engagements, their expectations of privacy need not be legally enforced. *See generally* O'Brien, *supra* note 7, at 74-79.

lapses the notion of privacy per se and a right of privacy, thereby obscuring the relationship between privacy, expectations of privacy and its legal recognition.[21] As a logical and practical matter, privacy differs significantly from the right of privacy: a person may have a large degree of privacy without having chosen it, let alone having a right to choose it; rights of privacy are products of social structure, conventions, and legal policy. Moreover, a right of privacy does not necessarily include claims to choose where, when, and how one will have privacy. Traditional analyses obscure the fact that not every assertion of a privacy interest need be legally recognized: some privacy interests are adequately protected by non-legal safeguards,[22] others are guaranteed through their association with more traditional legal categories,[23] and some privacy claims are not of sufficient importance in particular contexts of litigation to justify legal recognition.

Furthermore, a political ideal of privacy in the sense of an unqualified liberty of non-interference, *i.e.*, simply to be let alone, where "to be let alone" has no definition in terms of political or legal rights, appears less than exemplary. As Professor McCloskey points out,

> [w]e are free, in this sense of liberty, if we are let alone. So we are free if we are let to starve, or to die for want of means of subsistence. We are free to read, to write, to acquire learning in a state in which the only education available is private education at a cost beyond our means, provided that no one interferes with us and prevents us seeking education when and if we can afford it. Thus we can enjoy the fullest liberty, yet be unable to do anything we wish to do, for we may lack the means to realize our wishes, but be free because we are let alone.[24]

Conceptually, liberties are circumscribed by rights. Individuals may have a liberty of privacy which is not also a right of privacy, but they may not have a right of privacy which is not also a liberty since rights

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21. Privacy fundamentally relates to an existential condition of limited access to an individual's life experiences and engagements. Contrary to traditional definitional analyses, *see* notes 19 and 20 *supra*, privacy is both a necessary and a contingent condition of individuals' life experiences, which may be valuable for both its intrinsic worth and instrumental value since it gives rise to a broad range of privacy interests — associated with solitude, different kinds of personal engagements, personal information, etc. — and those privacy interests in turn may or may not receive explicit legal recognition and protection with judicial construction and enforcement of a right of privacy. *See generally* O'Brien, *supra* note 7, at 63; Garrett, *supra* note 19, at 266.

22. For a discussion of the non-legal and legal safeguards for personal privacy, *see* Greenwalt, *Privacy and Its Legal Protections,* 2 HASTINGS CENT. STUD. 45, 52 (1974).

23. For example, privacy interests are protected in tort law with regard to (1) intrusions upon individuals' seclusion or solitude; (2) public disclosure of embarrassing facts; (3) publicity which places an individual in a "false light"; and (4) appropriation of an individual's name or likeness. *See* Prosser, *Privacy,* 48 CAL. L. REV. 383, 392 (1960).

24. McCloskey, *A Critique of the Ideals of Liberty,* 74 MIND 483, 487 (1965).

contain liberties as components. The relationship between liberties and rights may be explained in the following manner.

> I have a right to X, then I cannot also have a duty to refrain from doing X. But to say that I lack a duty to refrain is to say that I have a liberty or privilege to do. Hence, if I have a right to do X, I must also be at liberty to do X. What the right adds to the liberty is the duty of others not to interfere.[25]

Liberties are permissions without protections to act in certain ways, while rights are entitlements to exercise, have, and enjoy liberties. Hence, an ideal of privacy in the sense of an absolute liberty of non-interference is unacceptable because of its unconditional nature and due to its failure to provide a basis for entitlement to protected privacy. An acceptable political ideal of privacy requires a theory of rights because rights in a sense contain and limit liberties and an unconditional liberty of non-interference.

Rights in "a strict and narrow sense"[26] are claim rights. "[L]egal claim rights are necessarily the grounds of other people's duties toward the right-holder. A legal right is a claim to performance, either action or forbearance as the case may be. . . ."[27] Rights have an affinity with claims. Claims are often assertions of rights since in claiming an individual exercises his or her rights by presenting a title, *i.e.*, showing that he or she is entitled legally or morally, despite the objections of others, to do or have something. Yet, rights are not the same as claims because rights may be possessed, exercised, or enjoyed, whereas individuals make claims but do not possess, exercise, or enjoy them. Similarly, Professor Feinberg explains that

> [h]aving a claim to X is not (yet) the same as having a right to X, but is rather have a case, consisting of relevant reasons of at least minimal plausibility, that one has a right to X. The case establishes a right, not to X, but a fair hearing and consideration. Claims, so conceived, differ in degree: some are stronger than others. Rights, on the other hand, do not differ in degree; no one right is more of a right than another.[28]

The activity of claiming consists in presenting a case for doing or having something; it involves the assertion of a right, or entitlement, to be at liberty to do or have something without interference. An individual who has a right, as Professor Flathman concisely states, may "decide

25. J. FEINBERG, SOCIAL PHILOSOPHY 66 (1973).

26. *Id.* at 56. For the classic analysis of rights, liberties, powers and immunities, *see* W. N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1919).

27. J. FEINBERG, *supra* note 25, at 58.

28. *Id.* at 66.

whether, when, and how to exercise it, whether to alienate it, how vigorously to defend it, and so forth."[29]

Rights, then, are entitlements signifying that no duty, obligation, or other moral or legal restriction may interfere with an individual's doing or having something. A right of privacy, however, does not include the right or entitlement to legal protection of all privacy expectations because, like most rights, it is not absolute and unqualified in scope; in addition, such a right would entail the protection of an unqualified liberty from non-interference. Instead, the right of privacy is a prima-facie right. "[A] prima-facie right is a right to do X except when there is 'some more urgent moral consideration,' its nature unspecified and open-ended, that stands in the way."[30] A right of privacy as a prima-facie right entitles an individual to the protection of his or her privacy where and when his or her privacy claim or assertion is reasonable and not overridden by legal, moral, or political considerations. That the right of privacy is a prima-facie right derives both from the nature of privacy[31] and the practice of rights generally.[32]

The legal scope of a right of privacy depends largely on the practice of rights in a society, *i.e.*, which claims to particular privacy expectations are legally recognized. The practice of rights involves a certain kind of interaction among people, namely, the activity of formally claiming and legitimizing individual entitlements to do or have something. As Professor Flathman argues

> [r]ights arise out of an area accorded within a rule-governed social practice. But they are accorded to and exercised by individuals whose actions cannot be analyzed without significant remainder in terms of properties of the practices of the society more generally . . . The practice of rights is a social phenomenon. . . . The character of the practice of rights, moreover, is affected in various ways by the particulars of the language, the economic and political institutions, and the traditions of the society or social milieu in which it operates.[33]

A legal right of privacy involves a rule-governed practice by which individuals formally claim entitlement to protection of their privacy. Viewing legal rights as constituting a practice permits examination both of the institutional processes and practices by which interests in privacy are raised to the status of legal rights, and, simultaneously, the legal boundaries of the right of privacy, that is, the occasions when and with

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29. R. FLATHMAN, THE PRACTICE OF RIGHTS 1-2 (1976).

30. J. FEINBERG, *supra* note 25, at 79.

31. *See* note 21 *supra*. *See generally* O'Brien note 7 *supra;* Garrett note 19 *supra;* Greenwalt note 22 *supra*.

32. *See generally* R. FLATHMAN, note 29 *supra*.

33. *Id.* at 6, 65.

regard to what other legal, moral, and political considerations an individual may legitimately assert the right of privacy.

The political ideal of privacy appears in the practice of rights in America as a particular kind of prima-facie right. Specifically, it is a constitutional background right because it attains no explicit recognition in the Constitution, yet remains a presumption or logical entailment of the fundamental purposes and principles of constitutionally limited government, as well as the social and political practices which encourage and maintain the regime and practice of rights in this country.[34]

The right of privacy as a constitutional right is necessarily an abstract prima-facie right which entitles an individual to the protection of his or her privacy when and where his or her claim is reasonable and not overridden by some other legal or political consideration. As a prima-facie right, the right of privacy is necessarily an abstract right which enables individuals to claim protection for particular privacy interests. An abstract right enables individuals in specific cases and controversies to assert concrete rights of privacy, *i.e.*, claim entitlement to particular privacy interests. The distinction between abstract and concrete rights may well be only one of degree and not of kind but it remains crucial for understanding the practice of rights and constitutionally protected privacy. "Abstract rights, like the right to speak on political matters,

34. Historically, privacy never was held to be an absolute value, *e.g.*, an unqualified freedom or liberty from interference. Rather privacy interests competed with other values, such as civic order, sociability, and fraternity. Indeed, early Americans respected privacy, particularly when associated with their moral and religious beliefs and practices. Yet, when a controversy over personal privacy occurred, apart from actual physical assault or destruction of private property, the matter was treated as that of personal honor, which in most instances resulted in a duel, a horsewhipping, or a shooting. An invasion of privacy was treated as a matter of personal honor in part because privacy had not risen to the status of a legal entity in seventeenth century English common law or the Biblical law of the Puritans — nor the mixture of both traditions which characterized the law of the New England colonies. To be sure, colonists through their colonial charters, and later the drafters of the Constitution and Bill of Rights, enlarged upon traditional English liberties; in particular, freedom of religion, freedom of conscience, freedom of assembly, and the freedom from unreasonable searches and seizures, while indirectly covering privacy interests, are at least one conceptual level removed from explicit recognition of a right of personal privacy. As historian Thomas H. O'Connor concludes: "Since American colonists were not yet secure in the fundamental rights themselves, it is obvious that they were not yet ready to concern themselves with a concept which presumes that those basic rights have already been achieved." O'Connor, *The Right to Privacy in Historical Perspective*, 53 MASS. L. Q. 101, 102 (1968). In other words, while social and religious practices of the colonists presupposed and to a degree respected the privacy of individuals and their associations, explicit recognition of a legal right of privacy depended upon first securing basic rights to personal liberty and property. Establishment of legal guarantees of interests in religious freedom, liberty to associate, and the possession of private property was contingent on social practices which evidenced a modicum of respect for the privacy associated with the effective realization of those guarantees remained a prerequisite for legal recognition of privacy itself. *See generally* D. H. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND (1972); D. R. PEMBER, PRIVACY AND THE PRESS (1972).

take no account of competing rights; concrete rights, on the other hand, reflect the impact of such competition.'"[35] Professor Dworkin explains the difference between abstract and concrete rights.

> An abstract right is a general political aim the statement of which does not indicate how that general aim is to be weighed or compromised in particular circumstances against other political aims. . . . Abstract rights in this way provide arguments for concrete rights, but the claim of a concrete right is more definitive than any claim of abstract right that supports it . . . Concrete rights . . . are political aims that are more precisely defined so as to express more definitely the weight they may have against other political aims on particular occasions.[36]

In litigation, the constitutional right of privacy as an abstract prima-facie right entitles individuals to claim that the privacy of their engagements and liberty from unwanted intrusion should be protected, but depending upon judicial construction of these claims along with other legal and political considerations, individuals may or may not have legitimate claims, or concrete rights of privacy. Hence, in the practice of rights, an abstract right of privacy enables individuals to claim entitlement of protected privacy, whereas concrete rights one legitimated signify the scope of the broader abstract right of privacy.

Some judicial decisions interpret the political ideal of privacy as an abstract right of privacy and, thereupon, enforce concrete rights of privacy. These decisions are permissible only if the abstract right of privacy is also a constitutional right, rather than simply a moral or political one. Since the Constitution provides no explicit guarantee of personal privacy, judicial decision making and construction of constitutionally protected privacy necessarily presuppose that the abstract right of privacy is also a background right of the Constitution, a legal right based upon and justifiable in terms of both the general purposes and principles of constitutionally limited government and the specific guarantees of the Bill of Rights. The broad purposes and principles of the Constitution, as suggested earlier,[37] support an abstract constitutional background right of privacy, but do not necessarily dictate the judicial construction of fourth amendment-protected privacy. Hence, an examination of the historic principles and justifications for fourth amendment guarantees remains a prerequisite to examination of the patterns and scope of judicial construction of fourth amendment-protected privacy.

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35. Dworkin, *Hard Cases,* 88 HARV. L. REV. 1057, 1075 (1975).
36. *Id.* at 1070.
37. *See* note 8 and accompanying text *supra.*

II. HISTORY, LANGUAGE, LOGIC AND THE FOURTH AMENDMENT

A. The Historical Background of the Fourth Amendment

Personal privacy attains its principal constitutional protection and closest approximation of explicit recognition in the guarantees of the fourth amendment.[38] The amendment was drafted in response to abuses connected with general warrants and writs of assistance employed by British officials in the colonies prior to the American revolution.[39] The fourth amendment, and similar provisions in state constitutions,[40] provided procedural safeguards against abuse of official discretion under the blanket authorization of general warrants to search and seize. Indeed, as a matter of constitutional history, Jacob Landynski observes that

> [a]lone among those constitutional provisions which set standards for fair conduct for the apprehension and trial of accused persons, the Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England.[41]

The English Parliament authorized searches and seizures as early as 1335 in granting innkeepers in port towns the right to search and seize illegally imported monies;[42] however, during the reign of Charles I, with the cooperation of Parliament, the Privy Council and the Star Chamber, general warrants resulted in "ransacking" and seizure of the personal papers of political dissidents, authors and printers of seditious libel.[43] Not until *Entrick v. Carrington*[44] in 1765 were general warrants held illegal by the English courts; Parliament in the next year declared them illegal.[45]

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38. As the amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

39. *See* United States v. Chadwick, 433 U.S. at 7-8 (1977); Olmstead v. United States, 277 U.S. 438, 463 (1927); Boyd v. United States, 116 U.S. 616, 624-30 (1886); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

40. *See generally* Mancus v. Search Warrant, 367 U.S. 717, 724-25 (1961); Frank v. Maryland, 359 U.S. 360, 363 (1959); R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 25 (1925).

41. J. LANDYNSKI, *supra* note 39, at 19.

42. N. LASSON, *supra* note 39, at 23.

43. *Id.* at 35 *citing* M. HALES, HISTORY OF THE PLEAS OF THE CROWN II 98-104 (1847).

44. 19 Howard State Records 1029, 95 Eng. Rep. 807 (K.B. 1765).

45. Fraenkel, *Concerning Search and Seizure*, 34 HARV. L. REV. 361, 363 (1920).

During this period, colonists complained of the use of writs of assistance by royal officers.[46] In *Paxton's Case,*[47] James Otis declared in a historic indictment against the writs that "[a] man's house is his castle; and while he is quiet, he is well guarded as a prince in his castle."[48] Otis, like Thomas Jefferson — who later in drafting the Declaration of Independence sought to "place before mankind the common sense of the subject"[49] — registered a belief respected in social practices of both Englishmen and colonists. That belief was perhaps most eloquently articulated by William Pitt, the Elder.

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter, the rain may enter — but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement![50]

The allusion of individuals' houses to castles is intelligible not merely because houses are fortresses and bastions of private property but also because they are the principal place in which individuals engage and conduct their affairs in private. Hence, the Virginia Declaration of Rights denounced general warrants as "grievous and oppressive" and later Patrick Henry in urging the adoption of the Bill of Rights argued that

> [t]he officer of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limtations of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restrictions, go into your cellars and rooms, and search, ransack, and measure, everything you eat,

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46. R. RUTLAND, *supra* note 40, at 25.

47. Quincy's Reports 51 (Mass. 1761).

48. T. T. F. RUDOR, LIFE OF JAMES OTIS 66 (1823), *quoted by* Slough, *Privacy, Freedom and Responsibility,* 16 U. KAN. L. REV. 323, 335 (1968). On the maxim, *see* J. CLARKE, PARCEMIOGIA ANGLO-LATINA . . . OR PROVERBS ENGLISH AND LATIN 101 (1639), N. LASSON, *supra* note 39, at 13-16, 34-35. As early as 1605 Sir Edward Coke, arguing before the King's Bench, interpreted the proverb to express "[t]hat the house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence, as for his repose," Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1605). Furthermore,

> [i]t was resolved, that it is not lawful for the sher. [*i.e.* sheriff] . . . to break the defendant's house . . . to execute any process . . . for thence would follow great inconvenience that men as well in the night . . . as in the day should have their houses (which are their castles) broke . . . and so men would not be in safety or quiet in their own houses?

Id. at 198.

49. Jefferson in a letter to Henry Lee, *quoted by* A. MASON, FREE GOVERNMENT IN THE MAKING 85 (1965).

50. Frank v. Maryland, 359 U.S. 360, 378-79 (1959) (quoting Pitt, Speech on the Excise Bill). 15 Hansard, Parliamentary History of England (1753-65) 1307.

> drink, and wear. They ought to be restrained within proper bounds.[51]

James Madison drafted the initial proposal for limiting searches[52] and seizures by the government.

> The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by an oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized.[53]

Madison's proposal was altered when Elbridge Gerry changed "secured" to "secure" and inserted the clause "against unreasonable searches and seizures," and another delegate changed "by warrants issuing" to "and no warrant shall issue."[54] No further significant changes were made, and thus upon adoption of the Bill of Rights, Madison's revised proposal became the fourth amendment to the Constitution.

B. The Language and Logic of the Fourth Amendment

A literal reading of the fourth amendment provides no basis for establishing a right of privacy per se. Yet, the historic Anglo-American concerns and social practices leading to the adoption of the Bill of Rights and, in particular, the fourth amendment, support the conclusion that individuals have legitimate expectations of privacy when connected with the fundamental liberty against arbitrary governmental intrusions. In part the amendment guarantees individuals "the right to be secure in their persons, houses, papers and effects . . . against unreasonable searches and seizures." With the exception of the general right stated in the first clause a literal reading of the amendment provides for only procedural safeguards. However, the procedural safeguards express in negative form the liberty guaranteed by "the right to be secure."

The fourth amendment guarantees freedom from searches and seizures unless they are reasonable and backed by a warrant issued upon "probable cause, supported by an Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The first clause, then, affirmatively states a general right guaranteeing individuals' exercise of their protected liberty, whereas the

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51. *Quoted in* III THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 449 (J. Elliot ed. 1861).

52. *Id.* at 448-49.

53. *Quoted in* J. LANDYNSKI, *supra* note 39, at 41.

54. *Id.*

second clause negatively guarantees the general right by specifying procedural safeguards.[55] The substantive right guaranteed by the fourth amendment therefore may be articulated either as ensuring individuals' liberty to be secure in their persons and property or, alternatively, as safeguarding their liberty from unreasonable governmental intrusions into their private lives and affairs.

Because the fourth amendment guarantees individuals' liberty to be secure from unreasonable governmental intrusions, individuals have legitimate expectations of privacy with regard to the security of their "persons, houses, papers, and effects." The amendment's protections logically extend to those privacy interests associated with or derived from the fundamental liberty guaranteed therein. Hence, the fourth amendment's protection of certain privacy interests follows not only from the historical concerns reflected in the amendment but also from the logic of its language.[56]

Actually, the historic concerns and the logic of the amendment were interrelated in the social practices of early Americans; that interrelationship was most lucidly articulated in Judge Cooley's discussion of invasions of "one's privacy" within the context of that

> maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers even against the process of law, except in a few specified cases. That maxim that "every man's house is his castle" is made a part of our constitutional law in the clause prohibiting unreasonable searches and seizures. . . .[57]

Cooley's discussion of privacy within the context of citizens' houses, the affairs of the household, and the protection afforded by the guarantee against unreasonable searches and seizures not only reiterated the historic concerns with securing personal liberty and property rights, but also anticipated judicial construction of the

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55. *See* Note, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J. L. REF. 154, 156-57 (1972).

56. Similarly, it has been noted that

> [i]n a very real sense, the Fourth Amendment embodies a spiritual concept: the belief that to value the privacy of home and person and to afford it constitutional protection against the long reach of government is no less than to value human dignity, and that this privacy must not be disturbed except in case of overriding social need, and then only under stringent procedural safeguards.

J. LANDYNSKI, *supra* note 39, at 47. *But see* Bruce, *Arbitrary Searches and Seizures as Applied to Modern Industry*, 18 GREEN BAG 273, 274 (1906). It has been argued that the amendment did not purport to create a right but presumed a pre-existing natural right. N. LASSON, *supra* note 39, at 100 n.77.

57. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 305 (1st ed. 1868).

amendment's protection "of the sanctity of a man's home and the privacies of life."[58]

III. BOYD'S LIBERAL CONSTRUCTION AND PROGENY — PRODIGAL SONS?

A. An Expansive Interpretation

While the Supreme Court suggested a relationship between privacy and the fourth amendment in an early decision[59] which held that Congress could not authorize the postal service "to invade the secrecy of letters,"[60] the first discussion of the relationship did not occur until nine years later in *Boyd v. United States.*[61] In holding unconstitutional a statute which permitted the government to order the accused to produce shipping invoices of allegedly illegally imported goods, the Court set a liberal construction as its standard for interpretation of the fourth and fifth amendments: "constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."[62] With a liberal construction privacy interests may be protected when associated with the liberty safeguarded by the fourth amendment. Justice Bradley fervently argued that

> [t]he principles laid down in [*Entrick v. Carrington*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to

58. Boyd v. United States, 116 U.S. 616, 630 (1886).

59. Ex Parte Jackson, 96 U.S. 727 (1878). *See also* United States v. Chadwick, 433 U.S. at 9-10; United States v. Van Leewuen, 397 U.S. 249 (1970).

60. 96 U.S. at 733.

61. 116 U.S. 616 (1886).

62. *Id.* at 635.

> convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.[63]

Justice Bradley's opinion emphatically emphasized an expansive role for the fourth amendment in securing personal privacy; indeed, in an appropriation of Justice Story's terminology, the fourth amendment guarantees an "indefeasible right of personal security, personal liberty and private property."[64] Justice Bradley did not suggest that the efficacy of the fourth amendment depended upon its nexus with the fifth amendment, rather the fourth amendment's guarantee of personal security extended historically and logically to expectations of privacy. Still, some of those privacy expectations may also receive constitutional protection in criminal cases under the fifth amendment.[65]

While Justice Bradley noted the interrelationship of the fourth and fifth amendments, his significant observation was that the intent of the fourth amendment was to protect the security and privacy of "persons, houses, papers, and effects," and, as a corollary, police could seize only instrumentalities of a crime but never an individual's papers as mere evidence of a crime.[66] Actually, Justice Bradley's conclusion followed from his construction of the reasonableness clause of the fourth amendment.[67] He argued that individuals have an "indefeasible"[68] property right at common law[69] and under the fourth amendment[70] which renders unreasonable any governmental search and seizure of private papers or other property for mere evidence of a crime.[71] Accordingly, no warrant or subpoena could be reasonably issued for items not already owned by or forfeited to the state. In this connection, Justice Bradley comments that the " 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment. . . ."[72] The procedure of compelling an individual to produce his or her private papers or other property is inherently unreasonable. Simply stated, it con-

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63. *Id.* at 630. The Court was referring to the case of Entick v. Carrington and Three Other King's Messengers, 19 How. State Trials 1029 [K.B. 1765].

64. COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895 (1st ed. 1833).

65. Boyd v. United States, 116 U.S. at 621-29 (fourth amendment holding), 629-32 (fifth amendment holding).

66. *Id.* at 623.

67. *Id.* at 633.

68. *Id.* at 630.

69. *Id.*

70. *Id.* at 623, 630, 633. *See also* Warden v. Hayden, 387 U.S. 294, 315-17 (1967) (Douglas, J., dissenting); N. LASSON, *supra* note 39, at 103.

71. Boyd v. United States, 116 U.S. at 626-29.

72. *Id.* at 633.

travenes basic liberties and expectations of privacy associated with private property, as defined by common law property rights and as guaranteed by the procedural safeguards of the fourth amendment and protected in criminal cases by the fifth amendment privilege against self-incrimination.

Constitutional protection of privacy does not depend primarily on the existence of an "intimate relationship" between the fourth and fifth amendments. Rather, the amendments independently demarcate and provide alternative guarantees for particular liberties and interests in personal privacy. Justice Bradley's opinion only emphasizes that in some instances privacy claims are especially well founded due to the intersecting and overlapping guarantees of the two amendments. Thus, the "intimate relationship" results from the kinds of privacy expectations individuals may assert under either amendment. In some situations privacy claims may derive constitutional justification from both the fourth and fifth amendments. As one commentator has observed, "[t]hat these two amendments should independently protect a person's books and papers was for Justice Bradley all the more reason to place the individual's private communications in a special position beyond the government's reach."[73]

Because courts often relied upon the interconnection between the two amendments[74] (albeit at times some courts and commentators did lament such reliance)[75] it is critical to observe that assertions of constitutionally protected privacy justifiably rely upon the independent guarantees of either amendment. A "convergence theory"[76] or complete reliance on the mutuality of the fourth and fifth amendments[77] blurs the particular privacy interests associated with each amendment and neglects the significantly distinct functions served by both amendments. To be sure, in some situations intrusions upon individuals' liberties and privacy expectations may suggest an intimate relation between the guarantees of the fourth and fifth amendments, yet that relationship

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73. Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments,* 90 HARV. L. REV. 945, 956 (1977).

74. In Andresen v. State of Maryland, 427 U.S. 463, 472 n.6 (1976), Mr. Justice Blackmun, for the Court, attributed the "convergence theory" of the fourth and fifth amendments to Boyd v. United States, 116 U.S. 616 (1886). Agnello v. United States, 269 U.S. 20 (1925), also illustrates the Court's reliance on a convergence theory. In *Agnello,* the Court permitted the accused to invoke the fifth amendment when the prosecution sought to introduce evidence seized in a search not incident to arrest and otherwise in violation of the fourth amendment.

75. *See* Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment,* 28 U. CHI. L. REV. 664, 695 (1961); J. LANDYNSKI, *supra* note 39, at 58; J. WIGMORE, EVIDENCE § 2264 (3d ed. 1940).

76. Andresen v. State of Maryland, 427 U.S. 463, 472 n.6 (1976).

77. *See* Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause,* 29

follows only because of the independent protections of each amendment. As Justice Clark stated in the majority opinion in *Mapp v. Ohio*:[78]

> [w]e find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation". . . . They express "supplementing phases of the same constitutional purpose — to maintain inviolate large areas of personal privacy." The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence — the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.[79]

Justice Bradley's construction of the fourth amendment as protecting privacy relied strongly on common law property principles in justifying constitutionally protected privacy. Privacy interests traditionally associated with proprietary interests at common law received constitutional legitimacy under the fourth amendment when connected with unreasonable governmental intrusions upon "persons, houses, papers, and effects." Liberally construed, the fourth amendment extends to the broad range of privacy claims associated with the traditional common law maxim "a man's house is his castle."

The Court's initial approach to fourth amendment protection of privacy in terms of places or "zones of privacy"[80] followed from the historic concerns of the amendment. Moreover, in one commentator's words, "the viewing of certain areas as enclosed sanctuaries of private control was not illogical and, up to a point, it was useful in reaching a supportable result."[81] Still, the kinds of legitimate expectations of personal privacy which citizens may assert were found limited by the amendment's applicability to only governmental intrusions. However, at times invasions of privacy do not violate the fourth amendment because in such cases claims to personal privacy are overridden by interests in the prosecution of criminals and, more generally, the values of

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MICH. L. REV. 1, 15-16 (1930).

78. 367 U.S. 643 (1961).

79. *Id.* at 656-57.

80. This term was suggested by Justice Douglas in Griswold v. Connecticut, 381 U.S. 479, 484 (1965), to describe the function of the guarantees of the Bill of Rights in safeguarding personal privacy.

81. Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection,* 43 N.Y. U. L. REV. 968, 971 (1968).

82. 256 U.S. 465, 475 (1921).

crime control.[83] In *Burdeau,* the Court simply stated

> [t]he papers having come into the possession of the Government without any violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the Government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character.[84]

Though the amendment's application was limited to governmental intrusions, the Court never restricted constitutionally permissible claims of privacy against official intrusions to a literal reading of the fourth amendment. Individuals could raise legitimate claims to personal privacy in constitutionally protected areas. While the Court in *Hester v. United States*[85] held that the fourth amendment's protection of "persons, houses, papers, and effects" did not extend to "open fields," subsequent determinations on an area-by-area basis established protection for individuals' houses,[86] business offices,[87] stores,[88] hotel rooms,[89] apartments,[90] automobiles,[91] and taxicabs.[92]

Late nineteenth and early twentieth century Courts thereby protected personal privacy by focusing on the content and area of governmental searches and seizures. Thus, Justice Bradley's determination of an indefeasible right of privacy at common law and under the fourth amendment implied, as subsequent interpretations recognized, the constitutional protection of mere evidence[93] and the exclusion of ill-gotten evidence,[94] thereby establishing two further protections for individual privacy under the fourth amendment.

B. The Mere Evidence Rule

Judicial construction limits protected privacy under the fourth amendment to a prohibition of unreasonable governmental in-

83. *See generally* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-73 (1968).
84. 256 U.S. at 476.
85. 265 U.S. 57 (1924).
86. Weeks v. United States, 232 U.S. 383 (1914).
87. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
88. Amos v. United States, 255 U.S. 313 (1921).
89. Stoner v. California, 376 U.S. 483 (1964); United States v. Jeffers, 342 U.S. 48 (1951); Lustig v. United States, 338 U.S. 74 (1949).
90. Jones v. United States, 362 U.S. 257 (1960).
91. Henry v. United States, 361 U.S. 98 (1959).
92. Rios v. United States, 364 U.S. 253 (1960).
93. Gouled v. United States, 255 U.S. 298, 299 (1921). *See* note 95 and accompanying text *infra.*
94. Weeks v. United States, 232 U.S. 383, 384 (1914). *See* note 120 and accompanying text *infra.*

trusions.[95] Consequently, for almost a century, the Court endeavored on a case-by-case basis to determine what constitutes a reasonable search and seizure.[96] In 1920, the Court reversed a contempt citation issued for refusal to obey a subpoena to produce certain books and papers on the ground that it was based on information illegally obtained.[97] In the next year, in *Gouled v. United States*[98] it held that unlawfully seized papers could be suppressed at trial despite the acquiesced-in denial of the defendant's pre-trial motion for their return.

The *Gouled* decision reaffirmed Justice Bradley's construction of the reasonableness clause and his interpretation that the fourth amendment dovetailed with the fifth amendment privilege against self-incrimination to provide substantial protection of privacy. The Court held that the seizure of private papers violated the prohibition of the fourth amendment and that the introduction of the papers as evidence in the trial violated the fifth amendment. While the absence of a search warrant would have been sufficient grounds for excluding the seized papers, the Court, as in *Boyd,* reasoned that under the fourth amendment the government could permissibly seize only that property over which it could also assert a proprietary interest at common law, as with warrants for stolen property.[99] The Court observed that

> [Search warrants] may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.[100]

In reaffirming the underlying property principles of *Boyd,* the Court fashioned a distinction between "mere evidence" and materials which

95. Burdeau v. McDowell, 256 U.S. 465, 475 (1921); Hale v. Henkel, 201 U.S. 43, 74-76 (1906) (stressing the personal nature of the amendment's protections, and the warrant requirement as an express limitation on the powers of the sovereignty). *See* discussion of the warrant clause at pp. 712-13 *infra.*

96. *See* United States v. Robinson, 414 U.S. 218, 235 (1973), wherein the Court held that as a matter of judicial policy the Court would no longer promote the case-by-case approach in determining reasonableness.

97. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

98. 255 U.S. 298 (1921).

99. In *Gouled,* the government could not dispute the mere evidence rule since at issue was the Espionage Act of 1917, ch. 30, 2 Stat. 217, 218, which provided authority for warrants only for stolen property or property utilized in committing a felony. *Id.* at 306-07.

100. 255 U.S. at 309.

served as "agency or instrumentality" of a crime.[101] It found that the fourth amendment protected solely evidentiary materials but not instrumentalities of crime, fruits of crime or contraband which might be seized by the government "to prevent injury to the public from its use."[102]

As one commentator recently noted, construction of the mere evidence rule as a means of limiting governmental intrusions "apparently constituted a crude attempt by the Supreme Court to strike a fourth amendment balance between the government's interest in gathering evidence of criminal activity and the individual's reasonable expectations of privacy."[103] Subsequent applications of the rule, however, led to inconsistent and illogical results.[104] Thus, although since the 1920's judicial construction had not restricted the fourth amendment to remedies available at common law,[105] not until the 1960's did the Supreme Court reach the same conclusion with regard to the amendment's substantive coverage. In *Jones v. United States,*[106] the Court initially indicated that it might depart from the interpretation of the fourth amendment in *Boyd* and *Gouled.* It suggested that the amendment's protections need not be confined to traditional property rights.

> We are persuaded . . . that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical.[107]

Still, five years later in holding that a search warrant which failed to particularly describe the materials sought violated the guarantee against unreasonable invasion of individual privacy,[108] the Court relied upon an analogous distinction between confidential records and contraband.

101. *Id.* at 310.

102. *Id.*

103. Note, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis,* 69 NW. U. L. REV. 626, 633 (1974).

104. *Compare* Marron v. United States, 275 U.S. 192 (1927) *with* United States v. Lefkowitz, 285 U.S. 452 (1932). Courts often had to strain to make evidence admissible. *See* Note, *Evidentiary Searches: The Ruler and the Reasons,* 54 GEO. L. J. 593, 607-21 (1966).

105. Gouled v. United States, 225 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) as discussed in Warden v. Hayden, 387 U.S. 294, 304-05 (1967). These cases provided remedies which went beyond those of the common law such as actions for trespass. Similarly, the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914), made an exception to common law rules. *See* J. WIGMORE, EVIDENCE, *supra* note 75, § 2183. *See also* Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 334-37 (1841).

106. 362 U.S. 257 (1960).

107. *Id.* at 266.

108. Stanford v. Texas, 379 U.S. 476 (1965).

> [I]t was not any contraband . . . which was ordered to be seized, but literary material — 'books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party. . . .' The indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history.[109]

In 1967 the Court explicitly abandoned property principles as the justification for privacy protection under the Fourth Amendment.[110] In *Warden v. Hayden*[111] the Court observed:

> [t]he premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be "unreasonable" within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.[112]

In the next year, in *Mancusi v. DeForte*[113] the Court reiterated that privacy claims under the fourth amendment depend "not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."[114]

The confusion which arose in distinguishing between mere evidence and instrumentalities eventually resulted in the abandonment of this distinction and contributed to the rejection of the underlying property principles of *Boyd-Gouled.* Yet, in the early twentieth century the *Boyd-Gouled* rationale provided a useful conceptual and constitutional approach to privacy protection. As Justice Marshall noted in his recent dissent in *Couch v. United States*:[115] "those concepts attempted to define, however imprecisely, a sphere of personal privacy that the Government could not enter over objection."[116] Certainly, as more than one scholar has observed, "the *nature* of what is seized is relevant to application of the fourth amendment in cases where the object's nature reveals, on its face, that special expectations of privacy are pres-

109. *Id.* at 486.

110. Katz v. United States, 389 U.S. 347 (1967); Warden v. Hayden, 387 U.S. 294 (1967). *See* discussion pp. 703-04 *infra.*

111. 387 U.S. 294 (1967).

112. *Id.* at 304.

113. 392 U.S. 364 (1968).

114. *Id.* at 368.

115. 409 U.S. 322 (1973).

116. *Id.* at 344, 349 (Marshall, J., dissenting).

ent."[117] The *Boyd-Gouled* rationale not only provided for a limitation on searches conducted under a valid warrant but also for a relatively objective standard for privacy protection,[118] thereby foreclosing the necessity of judicially fashioned formal requirements — such as "compulsion" or reasonable expectations of privacy — and precluding the possibility of governmental seizures of immune personal papers.[119] The shift in judicial protection of privacy away from a rationale which conjoined privacy interests with proprietary interests, however, was concomitant with the Supreme Court's gradual repudiation of the basis for the exclusionary rule, namely, its role in securing constitutionally protected privacy.

C. The Exclusionary Rule

To ensure the fourth amendment's historic purposes of providing safeguards against general warrants issued by the Crown and preventing arbitrary governmental intrusions into the privacy of a man's home,[120] as well as to enforce *Boyd's* liberal construction, the Supreme Court in *Weeks v. United States*[121] adopted the exclusionary rule prohibiting admission in federal courts of illegally seized evidence. In the Court's first case involving a search and seizure in violation of the warrant clause, Justice Day, writing for the majority, refused to distinguish between the seizure and the introduction at trial of evidence[122] and stated that illegally obtained materials must be excluded as evidence.[123] To allow the introduction of illegally seized materials "would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions . . . of the Constitution. . . ."[124] Justice Day, assuming as Justice Bradley had in *Boyd* that the Court has the power to inquire into the source of any evidence,[125] premised the exclusionary rule upon both

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117. Note, *Papers, Privacy and the Fourth and Fifth Amendments,* 69 NW. U. L. REV. 626, 635 (1974). (Emphasis added). It should be emphasized that "courts have consistently been reluctant to uphold the seizure of strictly private papers, like diaries." *Id.* at 635 n.51.

118. For a discussion of objective and subjective approaches to fourth amendment protected privacy, *see* discussion p. 705 *infra.*

119. *See* Note, *Constitutional Law — Search and Seizure — Search and Seizure of Business Records by IRS Does Not Violate Fifth Amendment Privilege Against Self-Incrimination or Fourth Amendment Right of Privacy,* 28 VAND. L. REV. 1361, 1372 (1975).

120. *See* discussion p. 674 *infra.*

121. 232 U.S. 383 (1914).

122. *Id.* at 392-94. *See generally* Schrock & Welsh, *Up From Calandra: The Exclusionary Rule As a Constitutional Requirement,* 59 MINN. L. REV. 251 (1974).

123. 232 U.S. at 393.

124. *Id.* at 394.

125. *Id. But see* Justice Day's opinion in Adams v. New York, 192 U.S. 585 (1904). *See also* Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments,* 90 HARV. L. REV. 945, 957 (1977).

the disapproval of illegal governmental activity and the recognition of the need to preserve the integrity of the judicial system. "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . charged at all times with the support of the Constitution. . . ."[126] *Weeks* clearly indicated that without an exclusionary rule claims against unreasonable "invasions of the home and privacy of the citizens"[127] would have little practical feasibility.

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[128]

Although the rule functions only negatively on the suppression of evidence, its justification in *Weeks* rested with a constitutional right guaranteed by the fourth amendment rather than with a judicial policy.[129] The fourth amendment not only safeguards individuals from unreasonable searches and seizures but requires the exclusion at trial of any evidence unlawfully obtained.[130]

Because the Bill of Rights had been held not to apply directly to the states[131] adherence to the *Weeks*-established exclusionary rule was likewise found not to be required in state courts. Thirty-five years after *Weeks,* in *Wolf v. Colorado*[132] the Court explicitly refused to apply the rule to the states. Moreover, despite its recognition of legitimate privacy claims, the majority held that the rule was a non-constitutional remedy. Justice Frankfurter, however, observed that "[t]he 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. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process Clause."[133] Acknowledging that the

126. 232 U.S. at 392.

127. *Id.* at 390.

128. *Id.* at 393.

129. *Id.* at 389-92, 398. For a discussion of the difference between arguments from principles and policy, *see* DWORKIN, note 35 *supra,* at 1058-68; R. DWORKIN, TAKING RIGHTS SERIOUSLY 14-79 (1977) [hereinafter cited as TAKING RIGHTS SERIOUSLY]. *See also* note 160 and accompanying text *infra.*

130. *See* Agnello v. United States, 269 U.S. 20 (1925) (excluding contraband cocaine seized without a warrant); Amos v. United States, 255 U.S. 313 (1921) (excluding contraband whiskey seized without a warrant).

131. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

132. 338 U.S. 25 (1949).

133. *Id.* at 27, 28.

core of the fourth amendment protects personal privacy, the majority nevertheless declined to suggest a method for enforcing it against the states. Although the fourteenth amendment prohibits affirmative violations by a state of the right of privacy, the Court refused to consider whether the admission of unreasonably obtained evidence in a state court would be such an impermissible state intrusion.[134] Justice Frankfurter, taking a dim view of Justice Day's rationale for the exclusionary rule, termed it a mere "judicial implication"[135] based neither on explicit constitutional requirements nor congressional legislation enforcing the Constitution. In his concurrence, Justice Black reiterated that the "federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."[136]

In contrast, the dissenters argued that the right of privacy as the basis of the fourth amendment required that the state be prohibited from both unreasonable searches and seizures and the introduction of unconstitutionally obtained evidence. They observed that the exclusionary rule is the only means of giving "content to the commands of the Fourth Amendment."[137] Justices Rutledge and Murphy further contended that the Constitution itself requires an exclusionary privilege[138] and expressed their belief that introduction of unconstitutionally obtained evidence compromised judicial integrity.[139]

Eleven years later, in *Elkins v. United States,*[140] the majority of the Court accepted the position of the *Wolf* dissenters concerning the exclusionary rule but not their rationale. The majority eliminated the distinction between fourth amendment requirements against unreasonable searches and seizures imposed on the federal government and those of the due process clause of the fourteenth amendment, imposed on the states. Over the dissenters' assertion that the fourteenth amendment only forbids " 'an arbitrary intrusion' of privacy," while merely "unreasonable" searches are prohibited under the fourth

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134. Here, the majority reaffirmed the Court's approach in Palko v. Connecticut, 302 U.S. 319 (1937), by which the due process clause of the fourteenth amendment was interpreted to embody only those aspects of the Bill of Rights implicit in "the concept of ordered liberty." 338 U.S. at 25-26. Despite his incorporationist view, Mr. Justice Black concurred because he did not find the exclusionary rule commanded by the fourth amendment. Subsequently, states were required to exclude evidence only when acquired in a particularly outrageous manner. *See* Rochin v. California, 342 U.S. 165 (1952). *But see* Irvine v. California, 347 U.S. 128 (1954).

135. Wolf v. Colorado, 338 U.S. 25, 28 (1949).

136. *Id.* at 39-40.

137. *Id.* at 41 (Murphy, J., in accord with Douglas, J., dissenting).

138. *Id.*

139. *Id.* at 46 (Murphy, J., and Rutledge, J., dissenting).

140. 364 U.S. 206 (1960).

amendment,[141] the *Elkins* majority concluded that there is no logical distinction between evidence obtained in violation of the fourth amendment and that acquired in violation of the fourteenth amendment.[142]

The majority thereby overruled *Weeks,* holding that evidence unreasonably seized by state officials was inadmissible in federal courts, and accepted the reasoning in *Wolf* that the exclusionary rule rested on the Court's supervisory power and not upon a constitutional right.[143] Because of "considerations of reason and experience,"[144] the Court found that exclusion from federal courts of evidence illegally seized by state officials was essential to protect privacy. "The rule is calculated to prevent, not repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it."[145] Ironically, the Court extended the exclusionary rule, not by relying on the constitutional principle of exclusion and protected privacy recognized in *Weeks* but by accepting *Wolf's* rationale of a judicial policy aimed at deterring official invasions of privacy and preserving judicial integrity.[146]

Two years after *Elkins,* the Supreme Court nevertheless concluded that the exclusionary rule actually rests on constitutional principles. In *Mapp v. Ohio,*[147] the Court found the rule to extend a constitutional privilege[148] as an "essential ingredient of the Fourth Amendment"[149] and therefore to apply directly to state criminal proceedings.[150] Justice Clark, for the majority, stated that

> [s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's

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141. *Id.* at 238.
142. *Id.* at 215.
143. *Id.* at 216.
144. *Id.* at 222.
145. *Id.* at 217.
146. *Id.* at 222-23.
147. 367 U.S. 643 (1961).
148. *Id.* at 648.
149. *Id.* at 651.
150. *Id.*

> high regard as a freedom "implicit in the concept of ordered liberty."[151]

As in *Boyd,* the Court recognized the "complementary" and "supplementary" phases of the fourth and fifth amendments in constitutionally protecting privacy[152] but relied solely on the fourth amendment as the basis for excluding evidence unlawfully seized.

> Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States . . . we can no longer permit that right to remain an empty promise. . . . Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police not more than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.[153]

Significantly, then, it justified the exclusionary rule upon constitutional principles extending to a right of personal privacy, noting as supplementary justifications the *Elkins* rationale[154] and the policy of preserving judicial integrity.[155]

In contrast, in *Linkletter v. Walker,*[156] decided in the next year, the Court retreated to its former position that claims to constitutionally protected privacy constitute only a privilege and not a right against unreasonable searches and seizures. In *Linkletter,* the Court identified deterrence as the principal rationale for the exclusionary rule, and denied retroactivity to the *Mapp* holding.[157]

> We cannot say that this purpose [deterrence] would be advanced by making the rule retrospective . . . Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of *Mapp.* Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.[158]

While *Linkletter* might have appeared sui generis, the decision actually indicated the Court's preference for a policy rationale as the basis for the exclusionary rule over a constitutional principle. Subsequent decisions not only focused on deterrence as the rationale for the rule but

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151. *Id.* at 655.
152. *Id.* at 657.
153. *Id.* at 660.
154. *Id.* at 656.
155. *Id.* at 659.
156. 381 U.S. 618 (1965).
157. *Id.* at 635.
158. *Id.* at 637.

moreover objected both to the rule and its rationale.[159] Indeed, in *United States v. Calandra,*[160] where the exclusionary rule was held not to apply to questions asked of a grand jury witness which were based on evidence obtained by an illegal search and seizure of his papers, the majority refused to recognize that a private right shielded individuals from having to provide information to grand juries.

> The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as "so necessary to the administration of justice" that the witness' personal interest in privacy must yield to the public's overriding interest in full disclosure.[161]

Hence, as judicial interpretation divorced the exclusionary rule from its initial justification in terms of constitutional rights, the rule's role in safeguarding personal privacy diminished.

Although the rule operates only negatively on the suppression of evidence, the *Weeks-Mapp* rationale that the fourth amendment forbids use of unlawfully obtained evidence permitted extensive protection and legitimization of privacy claims.[162] Admittedly, upon a "personal rights"[163] rationale for the rule the Court might appear to be "making the tail of the exclusionary rule wag the dog of the fourth amendment."[164] As Robert McKay observed:

> [t]he exclusionary rule of *Mapp v. Ohio* is a concededly blunt and somewhat imprecise instrument for the protection of individual privacy against official lawlessness. It is of course easier for law enforcement officers to proceed directly against the homes, the business, the telephones and the persons of those suspected of wrongdoing. But the United States Constitution forecloses that route in its emphasis upon the higher call of privacy of person and effects.[165]

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159. *See* United States v. Calandra, 414 U.S. 338, 347-52 (1974); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 414-17 (1971) wherein Chief Justice Burger outlined his objections to the rule.

160. 414 U.S. 338 (1974).

161. *Id.* at 345, quoting Blair v. United States, 250 U.S. 273, 281 (1919).

162. *See* Mapp v. Ohio, 367 U.S. 643, 648 (1961); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); Weeks v. United States, 232 U.S. 383, 389-92 (1914).

163. *See* Brown v. United States, 411 U.S. 223, 230 (1973); Adderman v. United States, 394 U.S. 165, 174 (1969). The Fourth Amendment, however, speaks of "[t]he right of the people." *See* Amsterdam, *Perspectives On The Fourth Amendment,* 58 MINN. L. REV. 349 (1974), wherein it is argued that the amendment should not be seen "as a collection of protections of atomistic spheres of interest of individual citizens." *Id.* at 367. Indeed, the contention is made that it should be viewed as unitary and regulatory — "the regulation of police behavior is what the Fourth Amendment is all about." *Id.* at 369.

164. Amsterdam, *supra* note 163, at 369.

165. McKay, *Mapp v. Ohio, the Exclusionary Rule and the Right of Privacy,* 15 ARIZ. L.

A jurisprudence which recognizes the practice of rights[166] and, in particular, holds a right of privacy "at the core of the Fourth Amendment"[167] logically requires the exclusion of illegally obtained evidence. The *Weeks-Mapp* rationale therefore followed as a corollary of the liberal construction of the fourth amendment and the underlying principles of *Boyd-Gouled.*

In comparison, the jurisprudence of the Warren and Burger Courts increasingly tended toward a policy orientation and rationalization of the exclusionary rule as promoting judicial integrity and deterrence. By relying upon a theory of judicial integrity, the Courts maintain the appearance and reality of judicial noncomplicity in illegal governmental activities.[168] Similarly, by using a deterrence theory they refuse to find the rule constitutionally required; instead, the rule serves an educative role in that it makes plain to law enforcement officers that unlawful seizures are futile and consequently function as only one possible means of implementing the values of the fourth amendment.[169] With either rationale, since both depend on policy considerations rather than constitutional principles, the rule and its concomitant safeguard of privacy remain contingent upon fundamentally utilitarian calculations as to its effectiveness relative to other societal objectives in achieving either police deterrence or judicial integrity. In recent years, criticisms of the rule's effectiveness from both within[170] and without[171] the Court has led

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REV. 327, 340-41 (1973).

166. *See* TAKING RIGHTS SERIOUSLY, *supra* note 129, at 14-79.

167. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

168. *See* Harrison v. United States, 392 U.S. 219, 224 n.10 (1968); Terry v. Ohio, 392 U.S. 1, 12-13 (1968); Mapp v. Ohio, 367 U.S. 643, 659 (1961); Olmstead v. United States, 277 U.S. 438, 482-85 (1928) (Brandeis, J., dissenting). *See also* Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future,* 12 AM. CRIM. L. REV. 507-17 (1975); Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule,* 20 U.C.L.A. L. REV. 1129 (1973).

169. In United States v. Calandra, 414 U.S. 338 (1974), the Court concluded that: "[i]n sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 348 (footnote omitted). *See also* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting); Terry v. Ohio, 392 U.S. 1, 12-13 (1968).

170. Perhaps the most important criticism has come in Chief Justice Burger's dissenting opinion in Bivens v. Six Unknown Named Agents, 403 U.S. at 414-17.

171. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970). Professor Oaks summarized his conclusions as follows:

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of

to its restrictive application.[172] Privacy claims under the rule will be increasingly denied on the grounds that they are overridden by interests in the prosecution of criminals.[173]

Notwithstanding recent Courts' policy orientations toward the exclusionary rule, the *Weeks* rationale rested upon constitutional principles, as had *Gouled's* mere evidence rule, which logically derived from the underlying jurisprudence of *Boyd's* liberal construction of the fourth amendment. Together the *Boyd-Gouled-Weeks* extension of the amendment's guarantees to constitutionally protected areas, the prohibition of searches and seizures for mere evidence, and the exclusion of illegally obtained evidence at trial promoted extensive safeguards for personal privacy. The *Boyd-Gouled-Weeks* rationale reflected what Alan Westin termed a "propertied privacy"[174] outlook in that the Court's construction of the fourth amendment gave constitutional effect to the common law maxim "a man's house is his castle"[175] by associating privacy interests with proprietary interests at common law.

Fourth amendment protected privacy as developed in *Boyd-Gouled-Weeks* presupposed a spatial conception of privacy. Legitimate claims to the privacy of individuals' engagements arose with regard to and were justifiable in terms of the locus of the individuals' engagements as defined by proprietary interests. Personal expectations of privacy were greatest in so-called "constitutionally protected areas,"[176] particularly

freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.

Id. at 755.

172. *See* United States v. Calandra, 414 U.S. 338 (1974).

173. *See* Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); United States v. Peltier, 422 U.S. 531, 536-39 (1975); United States v. Calandra, 414 U.S. 338 (1974).

In March, 1978 the Supreme Court further refined this process of weighing the benefits to the defendant and the burden to the state posed by the application of the exclusionary rule. Writing for the majority in *United States v. Checcolini,* 98 S.Ct. 1054 (1978), Mr. Justice Rehnquist concluded that "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." *Id.* at 1062. Rejecting a *per se* rule of exclusion, Justice Rehnquist noted that the exclusionary rule has been applied in cases where its deterrant effect has been strongest and, thus, the Court's analysis was directed toward the degree of attenuation between the illegal entry and the proffered evidence. *See* Chief Justice Burger's concurring opinion in *Checcolini,* 98 S.Ct. at 1064. (The Court should "balance the cost to society of losing perfectly competent evidence against the prospect of incrementally enhancing Fourth Amendment values.").

174. A. F. WESTIN, PRIVACY AND FREEDOM 339-41 (1970).

175. *See* discussion pp. 674, 680 *supra.*

176. While the phrase describes the Court's approach to fourth amendment protections and protected privacy, in particular, it was formulated by Judge Frank in his dissenting opinion in United States v. On Lee, 193 F.2d 306, 314 (2d Cir. 1951), *aff'd.,* 343 U.S. 747 (1952), and summarized the view that, "[a] sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *Id.* at 315-16 (footnote omitted).

in one's house, and were protected against unreasonable governmental searches and seizures by the express requirements of the fourth amendment as well as the judicially constructed "mere evidence" and exclusionary rules.

Technological changes in the late nineteenth and early twentieth century posed anew the problem of determining what constitutes an unreasonable search and seizure under the fourth amendment.[177] The way in which the Court dealt with the potential and actual invasions of personal privacy which resulted from law enforcement's adoption of the new technology led to the abandonment of the doctrine of constitutionally protected areas, the repudiation of the "mere evidence" rule, and the subsequent, albeit gradual, changing rationale for the exclusionary rule. Within the practice of rights and the patterns of judicially enforced privacy safeguards, the repudiation of both the *Gouled* and *Weeks* established rules and rationales accompanied the rejection of the underlying jurisprudence of *Boyd,* which spawned the doctrine of constitutionally protected areas and promoted by means of the mere evidence and exclusionaray rules extensive constitutional protection for personal privacy. The next section examines the patterns of judicial construction of the fourth amendment which led to the rejection of *Boyd's* jurisprudence of constitutionally protected privacy and encouraged a conceptual and constitutional approach to protected privacy bearing only a family-resemblence[178] to that fostered by *Boyd.*

IV. FROM *OLMSTEAD* TO *KATZ:* REASONABLE EXPECTATIONS OF PRIVACY

A. Olmstead's Strict Construction and Application

In the early twentieth century the development of new technological equipment such as the telephone and radio made it possible to conduct and eavesdrop on oral conversations at great distances. As a result, the problem posed was whether claims of nontrespassory government intrusions by means of wiretapping, eavesdropping and other electronic

177. *See generally* PRIVACY AND FREEDOM, *supra* note 174; A. MILLER, ASSAULT ON PRIVACY 169-70 (1971). Early cases involved demands for the return of seized articles, since the late nineteenth and early twentieth century courts equated seizability with admissibility. *See* Amos v. United States, 255 U.S. 313, 316-17 (1921); Gouled v. United States, 255 U.S. 298, 311 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Weeks v. United States, 232 U.S. 383, 398 (1914). For popular discussions of the problems which new technology poses, *see* A. BATH, UNCLE SAM IS WATCHING YOU (1971); M. BRENTON, THE PRIVACY INVADERS (1964); J. M. CARROLL, CONFIDENTIAL INFORMATION SOURCES, PUBLIC AND PRIVATE (1975); S. DASH, R. E. KNOWLTON & R. F. SCWARTZ, THE EAVESDROPPERS (1959); E. LONG, THE INTRUDERS (1966); V. PACKARD, THE NAKED SOCIETY (1964); E. A. SHILS, THE TORMENT OF SECRECY (1956).

178. The notion of "family-resemblance" was articulated by L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, paras. 31e-32e, 66, 134-37 (G. E. M. Anscombe trans. 1953).

monitoring devices could be legitimately asserted under the fourth amendment.[179] In the 1928 landmark case *Olmstead v. United States,*[180] the Supreme Court in a five-to-four decision implied that no reasonable expectations of privacy existed with regard to messages passing over telephone lines outside a person's house or office. The Court held that since the interception of such messages is carried on without entry into an individual's premises, there was no "search" of a constitutionally protected area and, further, that telephone messages are not things which can be "seized" under the fourth amendment.[181]

In terms of judicial motivation and policy orientation,[182] the *Olmstead* ruling indicated the Court's increasing reliance on the nineteenth-century philosophy of laissez-faire economics[183] and, more broadly, a conservative reaction to the changes which American society and political ideology was undergoing as a consequence of industrialization, urbanization and mass immigration in the late nineteenth and early twentieth century.[184] In terms of judicial justification, however, the *Olmstead* decision resulted from the Supreme Court's rigid adherence to *Boyd's* jurisprudential basis and emphasis upon property principles in interpreting the reasonableness clause of the fourth amendment. Thus, *Olmstead's* rigid application of *Boyd's* property principles resulted in an illiberal construction of constitutionally protected privacy.[185]

Olmstead denied recognition of expectations of privacy against nontrespassory intrusions because the fourth amendment literally prohibits "unreasonable searches and seizures" and the Court assumed that prior to determining reasonableness there must be a "search" involving physical trespass and a "seizure" of tangible material. Chief Justice Taft's opinion for the majority found the property principles underlying the fourth amendment to imply, first, that listening by means of

179. For discussions of the problems posed by electronic surveillance, *see* references cited in note 177 *supra*. *See also* Buchwald, *Eavesdropping, Informers, and the Right of Privacy: A Judicial Tightrope,* 52 CORNELL L. Q. 975 (1967); Courtney, *Electronic Eavesdropping, Wiretapping and Your Right to Privacy,* 26 FED. COM. B. J. 1 (1973); King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations,* 33 GEO. WASH. L. REV. 240 (1964); Rodgers, *A New Era for Privacy,* 43 N.D. L. REV. 253 (1967); Comment, *The Fourth Amendment, Electronic Eavesdropping and the Invasion of Privacy* 17 S.D. L. REV. 238 (1972).

180. 277 U.S. 438 (1928).

181. *Id.* at 463-66.

182. On the distinction between judicial motivation and judicial justification, *see* R. WASSERSTROM, THE JUDICIAL DECISION 26-27 (1961); Hart, Book Review, 14 STAN. L. REV. 919 (1962).

183. *See* A. F. WESTIN, PRIVACY AND FREEDOM, *supra* note 174, at 338-41; O'Connor, *supra* note 34, at 108-09.

184. *See* D. REISMAN, THE LONELY CROWD 35 (1955); A. F. WESTIN, PRIVACY AND FREEDOM, *supra* note 174, at 337-39; O'Connor, *supra* note 34, at 105, 108; Shils, *Privacy: Its Constitutions and Vicissitudes,* 31 L. AND CONTEMP. PROB. 281-306 (1966).

185. *See* discussion p. 698 *infra*.

electronic devices was not constitutive of a "search" since no physical trespass occurred,[186] and second, that no unconstitutional "seizure" took place as no tangible material was involved.[187]

Justice Taft's strict construction of the amendment and its underlying-property concepts and principles was a retrenchment of *Boyd* inasmuch as the Court refused to recognize claims of privacy which were not identical with proprietary interests in tangible materials. The petitioners admitted that, "[i]t would indeed be difficult to attempt to enumerate all of those things coming within the phrase 'the privacies of life,' "[188] but also observed that, "[i]f a private telephone line into a man's home or office is not one of the 'privacies of life,' then it is difficult for the human mind to conceive what would be included in that phrase."[189] Nevertheless, Justice Taft accepted a strict construction as had the majority in the court of appeals.[190] "Whatever may be said of the tapping of telephone wires as an unethical intrusion upon the privacy of persons who are suspected of crime, it is not an act which comes within the letter of the prohibition of constitutional provisions."[191] Noting that the "common law rule that evidence [is] not rendered inadmissible in a criminal case by illegality of the means by which it was obtained,"[192] Justice Taft refused to find of constitutional significance any difference between gathering evidence by wiretapping and obtaining it by looking through or listening at windows or doors.[193] Thus, accepting the traditional property principles underlying previously liberal interpretations of the fourth amendment, *Olmstead* adopted the strict construction of the amendment urged by the government.

> In every case in which a violation of the Fourth Amendment was found to have occurred the decision without exception dealt with a case in which the object of the search and seizure condemned was

186. Olmstead v. United States, 277 U.S. at 466.

187. *Id.* at 464-65.

188. Brief of Petitioner McInnis *et al.*, at 9, quoted by Beaney, *supra* note 15, at 221.

189. Brief of Petitioner Green, at 10, quoted by Beaney, *supra* note 15, at 221.

190. Olmstead v. United States, 19 F.2d 842 (9th Cir. 1927).

191. *Id.* at 847.

192. Olmstead v. United States, 277 U.S. at 448.

193. At the Court of Appeals, Judge Rudkin argued in his dissenting opinion that the appropriate analogy was between the telephone and the mails.

> [I]t is the contents of the letter, not the mere paper, that is thus protected. What is the distinction between a message sent by letter and a message sent by telegraph or by telephone? True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed; but these are distinctions without a difference.

19 F.2d at 850. *See also* Justice Butler's dissenting opinion, 277 U.S. at 487.

> literally described in the language of the Amendment; that is, "persons, houses, papers, and effects," "effects" used in the sense of tangible personal property.[194]

Strict construction of both the amendment and the nexus between privacy and proprietary interests consequently narrowed constitutionally recognizable claims to personal privacy; as Beaney writes

> [i]n effect, the majority looked upon the Fourth Amendment as a guaranty against a particular method of invading privacy or personal security — as a ban on physical intrusion of the home and seizure of material objects — rather than a protection of the right of privacy itself [*i.e.*, the recognition and protection of interests in the intrinsic worth of privacy].[195]

In his dissent, Justice Butler endeavored to extend traditional property concepts and principles to the problem of wiretapping: "Wiretapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence."[196] Justice Butler attempted to combine a strict construction of property principles with a liberal construction of protected privacy by finding proprietary interests in the wire violated by the tap. A broader range of claims to personal privacy could thereby be accommodated than under Justice Taft's opinion. Yet Justice Butler, like Justice Taft, assumed identification of privacy interests with traditional proprietary interests. Justice Butler permitted more extensive recognition of claims to privacy because of his liberal application of property principles. Still, Justice Butler's position, like Justice Taft's, would prohibit fourth amendment applicability to invaded privacy by the use of detectaphones and electronic surveillance other than wiretaps.[197] Justice Butler's strict construction yet liberal application of the underlying property principles of the fourth amendment represented an untenable compromise between Justice Taft's strict construction and application of the amendment and dissenting Justice Brandeis' liberal construction and application of the amendment.

Justice Brandeis emphasized both a liberal construction and application of the fourth amendment to constitutionally protected privacy. He argued that the amendment's guarantees impose general limitations on the government and those limitations should be interpreted so as to ensure the basic purposes of the amendment in theretofore unforeseen

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194. Brief for the United States, 38-39, quoted by Beaney, *supra* note 15, at 221.

195. Beaney, *supra* note 15, at 219.

196. Olmstead v. United States, 277 U.S. at 487.

197. *See, e.g.*, Goldman v. United States, 316 U.S. 129 (1942). *See also* discussion p. 698 *infra*.

situations.[198] Hence, constitutionally recognizable claims to personal privacy must not be confined to traditional categories of searches involving physical trespass and seizures of tangible materials.

> Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. . . .
>
> . . .Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.[199]

The amendment liberally construed, Justice Brandeis argued, was not limited to trespass on private property nor the seizure of tangible materials, but extended "[t]o protect . . . [against] every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed. . . ."[200] Judicial recognition of constitutionally protected privacy therefore did not depend on the government's violation of an individual's proprietary interests. Claims to protected privacy are not isomorphic with proprietary claims though privacy interests may be, and indeed, historically were associated with citizens' proprietary interests in their persons, houses, papers, and effects. According to Justice Brandeis' liberal construction and application of the fourth amendment, governmental intrusions upon individuals' privacy in their homes, papers, effects, *or personal engagements* would be permissible if and only if the government could establish the reasonableness of the particular form of intrusion.

Historically, the Supreme Court accepted neither Justice Taft's strict construction and application nor Justice Brandeis' liberal construction and application of the fourth amendment and its underlying property principles. Moreover, the Court rejected Justice Butler's version of a compromise, *i.e.*, a strict construction and liberal application of fourth amendment property principles. Instead, the Court gradually adopted a liberal construction of the underlying property principles of the Fourth Amendment but provided less than liberal application to claims of privacy. Specifically, the Court accepted the implications of Justice Brandeis' liberal construction of the nexus between constitutionally recognizable privacy interests and common law proprietary interests by denouncing *Olmstead's* theory of physical trespass as a precondition for

198. 277 U.S. at 472. In support of this proposition, Justice Brandeis cited Buck v. Bell, 274 U.S. 200 (1927), and Euclid v. Amber Realty, 272 U.S. 365, 389 (1926).

199. Olmstead v. United States, 277 U.S. at 473-74.

200. *Id.* at 478. *See Id.* at 473-74, 478-79.

a "search"[201] and rejecting the tangibles requirement for a "seizure" under the fourth amendment.[202] The implications of Justice Brandeis' liberal construction nevertheless were not realized until the mid-1960's and, then, only provided limited protection for personal privacy.

B. Whittling Away at the Trespass Theory

Initially the Supreme Court circumvented *Olmstead's* trespass theory by construing the issue of unwanted access to personal communications by means of wiretaps as posing a problem of interpreting and applying section 605 of the Federal Communications Act[203] rather than the fourth amendment. The Court in *Nardone v. United States*[204] used this Act to evade the question of electronic surveillance, that is, at least with regard to wiretaps.[205]

In 1942, however, the Court extended its trespass theory to the use of detectaphones, devices when placed against a wall detect sounds on the other side of the wall. In *Goldman v. United States,*[206] federal agents without a warrant entered the defendant's office and planted a dictaphone with wires leading to an office next door, but the next day the dictaphone broke and the agents used a detectaphone instead. The Court held that evidence obtained by the use of the detectaphone was admissible since no physical trespass had occurred; by contrast, evidence gathered from the dictaphone would have been inadmissible. Strict construction and application of the trespass distinction in this instance precluded recognition of constitutionally protected privacy. In his dissent, Justice Murphy reminded the Court that "[o]ne of the great boons secured to the inhabitants of this country by the Bill of Rights is the right of privacy guaranteed by the fourth amendment."[207]

Three years later, in *On Lee v. United States,*[208] the Court held that there was no trespass when a narcotics officer listened to conversations between the defendant and an undercover agent as the officer was not present and heard the conversation transmitted from a microphone hid-

201. *See* discussion p. 698 *infra.*

202. *See* note 221 and accompanying text *infra.*

203. 47 U.S.C. § 605 (1934).

204. 302 U.S. 379 (1937).

205. In *Nardone,* the Court interpreted the Act as prohibiting the interception and divulgence of telephone and telegraph communications. Fifteen years later, however, in Schwartz v. Texas, 344 U.S. 199 (1952), it held, upon the assumption that Congress had not pre-empted the area of wiretap legislation, that wiretapped evidence could be "divulged" in state courts if obtained by state agents. Five years later the Court nevertheless extended the Act to exclude illegally state-gathered wiretap evidence in federal courts. Benanti v. United States, 355 U.S. 96 (1957). Finally, in Lee v. Florida, 392 U.S. 378 (1968), the Court overruled *Schwartz,* in holding the Act prohibited the admission of state-gathered evidence even in state courts.

206. 316 U.S. 129 (1942).

207. *Id.* at 136 (Murphy, J., dissenting).

208. 343 U.S. 747 (1952).

den on the undercover agent.[209] The conversation was held admissible because On Lee had spoken voluntarily with the undercover agent. Thus, it did not disturb the court of appeals ruling that the presence of the microphone on the secret agent eliminated any constitutional difficulties. In an important dissent from the Second Circuit majority opinion, Judge Frank reiterated *Boyd's* interpretation that the historic purposes and principles underlying the fourth amendment required the protection of personal privacy rather than merely prohibiting intrusions by physical trespass. Frank eloquently expressed the view that the fourth amendment guarantees personal privacy in constitutionally protected areas.

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty — worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.[210]

While the Supreme Court, by strict application of the trespass distinction, rejected such liberal interpretations and ostensibly confined analysis of intrusions into constitutionally protected areas, *On Lee* in fact did not represent a strict adherence to the Court's property mode of analysis in that the presence of the hidden microphone logically constituted an unconsented invasion and, thus, a trespass.[211]

Although still relying on *Olmstead-Goldman's* rigid trespass distinction, the Court in 1961 did allow the exclusion of a defendant's conversations on fourth amendment grounds. In *Silverman v. United States,*[212] federal agents without a warrant drove a "spike mike" into a wall to overhear conversations. They made contact with a heating duct serving the defendant's house and, thus, were able to monitor conversations throughout the house. The mike's connection with the duct constituted "an actual intrusion in a constitutionally protected area" and not merely a technical trespass.[213] The Court seems to have implicitly adhered to its strict application of property principles and theory of trespass. Yet, Mr. Justice Stewart, writing for the majority, concluded

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209. *Id.* at 751-53.

210. United States v. On Lee, 193 F.2d 306 (2d Cir. 1951) (Frank, J., dissenting).

211. Mr. Justice Burton, dissenting from the majority, called for an overruling of *Olmstead* and noted that the presence of "a radio transmitter surreptitiously introduced and operating without warrant or consent, within petitioner's premises" violated his fourth amendment rights. On Lee v. United States, 343 U.S. at 765.

212. 365 U.S. 505 (1961).

213. *Id.* at 512.

by noting that, "[w]e find no occasion to re-examine *Goldman* here [*i.e.*, to consider the protection of personal conversations absent intrusion into a constitutionally protected area], but we decline to go beyond it, by even a fraction of an inch."[214]

Concurring in *Silverman,* Justice Douglas suggested that the Court renew a liberal construction of constitutionally protected privacy and abandon its trespass distinctions and rigid adherence to property concepts and principles.

> The depth of the penetration of the electronic device — even the degree of its remoteness from the inside of the house — is not the measure of the injury. . . . Our concern should not be with the trivialities of the local law of trespass, as the opinion of the Court indicates. But neither should the command of the Fourth Amendment be limited by nice distinctions turning on the kind of electronic equipment employed. Rather the sole concern should be with whether the privacy of the home was invaded.[215]

Actually, because the Court expressly permitted protection of personal conversations under the warrant clause of the fourth amendment, *Silverman* was half-way between Douglas's demand for a liberal construction of the fourth amendment and the *Olmstead-Goldman* rationale protecting only those aspects of privacy involved with property concepts and principles.

Two years later in *Lopez v. United States*[216] the Court continued its property analysis of fourth amendment protections. Unlike On Lee, Lopez made statements for which he was criminally culpable to a known agent of the Internal Revenue Service. The deception here was not the use of a secret agent but the use of a miniature tape recorder which recorded Lopez's attempted bribe of the agent.[217] The Court found both that the agent's testimony was admissible because the agent was in Lopez's office with his consent, and, more importantly, that the tape recording was admissible as independent evidence because it was on the person of the agent who was lawfully present. Since the agent had not entered or searched in an intrusive manner, the fourth amendment was not applicable. Lopez had no constitutionally recognizable claims to privacy in his conversations, rather he simply assumed the risk that his words would be divulged to others; moreover, that "risk"

214. *Id.*
215. *Id.* at 513.
216. 373 U.S. 427 (1963).
217. *Id.* at 430. The problem of secret agents presents the potential for entrapment. The Court has held that a defense of entrapment is not available unless the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit a culpable offense. *See* Masciale v. United States, 356 U.S. 386 (1958); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

included the possibility that his conversation "would be accurately reproduced in court, whether by faultless memory or mechanical recording."[218]

In his dissent, Justice Brennan rejected the majority's property analysis but apparently relied upon its implication in limiting the range of claims to protected privacy under the amendment. Liberally construed, the fourth amendment protected individuals' privacy including their liberty to limit access by others to their personal communications. Justice Brennan noted that the liberty of personal communications was particularly threatened by electronic devices which potentially could destroy "all anonymity and all privacy" by making the "government privy to everything that goes on."[219] Arguing that "[t]he authority of the Boyd decision has never been impeached,"[220] Justice Brennan proposed that the fourth amendment apply to all electronically secured evidence but not non-electronically gathered evidence. Consequently, evidence obtained by eavesdropping or the testimony of secret agents would not unreasonably invade an individual's privacy since each party risks the divulgence of personal information by the other. Constitutionally recognizable claims of privacy therefore depended upon the manner of divulgence, *i.e.,* the amendment applies only to evidence gathered by electronic means and not that produced by eavesdropping or the testimony of secret agents.

C. Tangibles and Secret Agents

Contrasted with the *Boyd-Gouled-Weeks* rationale[221] and its broad protection for personal privacy, until the mid-sixties the Supreme Court legitimated few privacy claims because of its adherence to *Olmstead's* rigid property analysis. Hence, the Court refused to find fourth amendment protection for the privacy of personal communications and engagements whether access was obtained by electronic means or

218. Lopez v. United States, 373 U.S. at 439.

219. *Id.* at 471 (Brennan, J., dissenting).

220. *Id.*

221. *See* discussion pp. 680-85 *supra.* Gouled v. United States, 255 U.S. 298 (1921), the first secret agent case reaching the Supreme Court, exemplifies the early twentieth century Court's approach in that it blurred two issues: first, whether the agent's deception regarding his true purposes vitiated the defendant's consent, and, second, whether the agent's search for and seizure of papers was proper without the defendant's consent — in decrying the rummaging search of Gouled's desk.

> [W]hether entrance to the home or office of a person suspected of a crime be obtained . . . by stealth, or through social acquaintance, or in the guise of a business call . . . any search and seizure subsequently and secretly made in his ausence, falls within the scope of the prohibition of the Fourth . any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment. . . .

255 U.S. 298 at 306.

eavesdropping and secret agents. In 1966, however, the Supreme Court in three secret agent cases[222] rejected the tangibles requirement which previously had limited the scope of constitutionally recognizable claims of privacy.[223] Still, the Court accepted an exceedingly narrow view of what constituted an invasion of privacy, rendering little more protection for privacy than *Olmstead's* rigid property analysis.

In *Hoffa v. United States*[224] the Court stated that, "the protections of the Fourth Amendment are surely not limited to tangibles, but can extend as well to oral statements."[225] The case arose out of the trial testimony of a Teamster Union official, who while secretly working for the Federal Bureau of Investigation had been a member of James Hoffa's entourage in Nashville, Tennessee, during Hoffa's trial for alleged misappropriation of union funds. The official's testimony concerning statements he had heard in Hoffa's hotel suite was offered in support of the government's case against Hoffa for jury bribery. As in *Silverman,* Justice Stewart, for the Court, indicated a departure from the *Olmstead-Goldman-Lopez* strict construction and application of property principles. Justice Stewart acknowledged that a hotel room could be the "object of Fourth Amendment protection"[226] but focused his discussion of the amendment's protections on the "security a man relies upon when he places himself . . . within a constitutionally protected area. . . ."[227] Since the teamster official was in the hotel room by invitation and had access to only what was "directed to him or knowingly carried on in his presence," Hoffa "was not relying on the security of the hotel room"[228] and, consequently, had no constitutionally recognizable expectation of privacy.

Similarly, in *Lewis v. United States,*[229] the Court rejected the defendant's reliance on *Gouled* in support of his privacy claim to be free in his home from all government entries unless he properly consented. Here, an undercover narcotics agent was admitted to Lewis's house on the pretext of buying marijuana. Chief Justice Warren, for the Court,

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222. Lewis v. United States, 385 U.S. 206 (1966); Hoffa v. United States, 385 U.S. 293 (1966); Osborn v. United States, 385 U.S. 323 (1966).

223. Silverman v. United States, 365 U.S. 505 (1961), held intangibles to fall within the scope of the fourth amendment, and Wong Sun v. United States, 371 U.S. 471, 485 (1963), reiterated its rejection of the tangibles requirement; the Court however continued to base its decision dealing with electronic surveillance upon the requirement of physical trespass, *i.e.,* Clinton v. Virginia, 377 U.S. 158 (1964), until Katz v. United States, 389 U.S. 347 (1967). *See* note 236 and accompanying text *infra.*

224. 385 U.S. 293 (1966).

225. *Id.* at 301.

226. *Id.*

227. *Id.*

228. *Id.* at 302.

229. 385 U.S. 206 (1966).

distinguished *Gouled* as involving a general ransacking search and not merely the guileful entry of a secret agent.[230] Lewis had no constitutionally recognizable claim of privacy since his primary concern was whether the agent was a "willing purchaser who could pay the agreed price" and, further, the agent during his visit did not "see, hear, or take anything that was not contemplated . . . as a necessary part" of the business transaction.[231]

In *Osborn v. United States*[232] the issue was the admissibility of a tape recording of a conversation between Osborn, one of Hoffa's attorneys at the Nashville labor trial, and a Nashville policeman hired by Hoffa as an investigator. The policeman-would-be-investigator subsequently reported to the Justice Department that Hoffa was planning to bribe one of the jurors, whereupon authorization was obtained to hide a tape recorder on his person, which eventually recorded incriminating statements. The Court implied, as it had in *Hoffa,* that the incriminating statements made in the presence of an undercover agent were instances of misplaced confidence and their use as evidence did not violate the fourth amendment.[233] Moreover, the Court reasoned that the case actually did not involve eavesdropping but the "use by one party of a device to make an accurate record of a conversation about which that party later testified,"[234] as had occurred in *Lopez.* Still, Justice Stewart's majority opinion indicated that the decision did not rest on the "broad foundation" of *Lopez* since, here, there had been prior judicial authorization, as Justice Brennan in his dissent in *Lopez* would require.[235] The Court's reliance upon *Lopez's* finding that the amendment was inapplicable, but subsequent assumption that the amendment did apply though the search was found to be reasonable — emphasizes the Court's renewed liberal construction of privacy but continued strict application of the amendment to privacy claims. In other words, although the Court held that the fourth amendment protects "intangibles," such as personal communications, it found no constitutionally significant difference in the privacy compromised by means of tape recordings and the testimony of secret agents; indeed, the recorder

230. *Id.* at 209-10

231. *Id.*

232. 385 U.S. 323 (1966).

233. *Id.* at 326. The use of voluntary statements or other testimonial evidence raises the question of the interrelationship of the Fourth and Fifth Amendments. *See* Mapp v. Ohio, 367 U.S. 643, 646 (1961); Boyd v. United States, 116 U.S. 616 (1886). *See generally* Note, *Consent Searches: A Reappraisal After Miranda v. Arizona,* 67 COLUM. L. REV. 130 (1967).

234. Osborn v. United States, 385 U.S. at 327.

235. *Id.* at 439. *See* Lopez v. United States, 373 U.S. 427, 464-65 (1963) (Brennan, J., dissenting).

was interpreted as simply an aid to the agent's ability to accurately testify.

D. Katz: "The Fourth Amendment Protects People, not Places"

After reaffirming the secret agent cases *Silverman's* rejection of *Olmstead's* requirement that only seizures of tangible materials are constitutionally regulated by the fourth amendment, the Supreme Court in 1967 effectively overruled *Olmstead's* requirement of a physical trespass or penetration of a constitutionally protected area.[236] *Katz v. United States,*[237] along with *Warden v. Hayden's* rejection of the mere evidence rule in the same year,[238] underscored the Court's repudiation of the underlying property principles of the fourth amendment and their strict construction and application to claims of protected privacy. *Katz* is significant in that it is a watershed case for constitutional analysis of protected privacy under the fourth amendment.

In *Katz,* federal agents acting without a warrant attached an electronic listening device, similar to a detectaphone, to the outside of a glass public telephone booth in which the defendant was making incriminating calls by relating gambling information. Counsel for both sides argued the issues of whether the telephone booth was a constitutionally protected area in which Katz had a reasonable privacy claim and whether physical penetration of the booth was necessary to violate Katz's rights under the fourth amendment. Justice Stewart, for the majority, however, rejected the counsels' formulation of the constitutional questions. In Justice Stewart's opinion, analysis of protected privacy in terms of the *Boyd*-fostered doctrine of "constitutionally protected areas" had been deceptive as well as misguided in application.[239] Justice Stewart found that the doctrine was seductive in its implication that the fourth amendment primarily protects personal privacy. He rejected that implication by noting that the amendment should not "be translated into a general constitutional right of privacy."[240] More specifically, according to Justice Stewart, the doctrine was deceptive inasmuch as recognizable claims to privacy were contingent solely upon

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236. Although the interests and claims are identical with regard to wiretapping and so-called "bugging" devices, the Court in Katz v. United States, 389 U.S. 347 (1967), did not completely overrule Olmstead v. United States, 277 U.S. 438 (1928), by extending the scope of the Fourth Amendment to wiretapping since Nardone v. United States, 308 U.S. 338 (1939), held wiretapped evidence inadmissible under section 605 of the Federal Communications Act of 1934. *See* discussion p. 698 *infra.*

237. 389 U.S. 347 (1967).

238. *See* discussion p. 684 supra.

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

240. *Id.*

the locus of individuals' activities. He dispelled that idea by saying that,

> the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[241]

Simply because Katz was in a public telephone booth did not imply *ipso facto* that he had foregone all expectations of privacy and could not assert recognizable claims of privacy.

The doctrine of "constitutionally protected areas" as strictly interpreted and applied by *Olmstead-Goldman* limited fourth amendment guarantees (including protected privacy) to searches involving physical penetration of enclosed areas. *Katz* disposed of the physical trespass requirement as a prerequisite for claims of privacy. Privacy claims under the fourth amendment were constitutionally recognizable independent of physical trespass or penetration into an enclosed area. As Justice Stewart stated:

> [t]he Government's activities in electronically listening to and recording the petitioner's words violate the privacy upon which he justifiably relied while using the telephone booth and thus constitute a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.[242]

The constitutionally significant question in legitimating privacy claims therefore is not "whether there was physical trespass or whether the petitioner was in a constitutionally protected area, but whether the petitioner intended to keep the seized evidence private or not."[243] The public telephone booth constituted an area safe from intrusion not because it was a protected place but because when Katz entered the booth he had a right to rely on the privacy of his conversations.[244]

Instead of the traditional formulation based on constitutionally protected areas, Justice Stewart emphasized that the fourth amendment protects people rather than places and then focused on whether Katz justifiably relied on his privacy. The proposition that the fourth amendment protects people and not places while accurate is nevertheless ambiguous. Moreover, *Boyd* never implied that the fourth amendment

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241. *Id.* at 351.

242. *Id.* at 353.

243. *See* Note, *From Private Places to Personal Privacy: A Post Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 976-77 (1968).

244. Katz v. United States, 389 U.S. at 353.

protects places and not people,[245] rather intrusions upon the security and privacy of people and their possessions were only to be analyzed with regard to common law proprietary interests.

The crucial question left open by *Boyd* and *Katz* is under what circumstances does the fourth amendment protect people and their privacy? On *Boyd's* rationale a relatively objective standard for appraising individuals' privacy expectations could be formulated: constitutionally protected claims of privacy were identifiable with regard to and justifiable in terms of the locus of individuals' engagements as defined by proprietary interests. By comparison, Justice Stewart apparently provided for only a subjective test with his notion of *justifiable reliance:* "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[246]

A completely subjective approach to privacy protection, however, leads, and indeed, in lower courts has led[247] to confusion as to the criteria for a "justifiable reliance" on privacy as well as resulting in restrictive application of the amendment. The Court contributed to the confusion by stressing that analysis of fourth amendment-protected privacy turns on an evaluation of individuals' expectations of privacy and publicity.[248] Constitutionally recognizable expectations of privacy are not contingent on the locus of the person or his or her property because individuals may have expectations of privacy in public places and expectations of publicity in private places. Further, the Court assumed that individuals either have expectations of total privacy or total publicity and it consequently failed to consider the importance of the degree of individuals' expectations of privacy or publicity relative to the locus of their engagements.

Since the Court considered individuals' expectations of privacy and publicity only as contraries, reasonable expectations of privacy per force would effectively block all searches. That is, "[i]f a reasonable ex-

245. Boyd v. United States, 116 U.S. at 630.

246. Katz v. United States, 389 U.S. at 351-52.

247. Courts were concerned with whether defendants "exhibited a reasonable expectation of privacy;" Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); People v. Sirhan, 7 Cal.3d 710, 102 Cal. Rptr. 385 (1972); Pate v. Municipal Ct., 11 Cal. App.3d 721, 724, 89 Cal. Rptr. 893, 895 (1970); "calculated" to limit access to their activities and possessions; United States v. Wright, 449 F.2d 1335, 1364 (D.C. Cir. 1971); made efforts to insure privacy; United States v. Vilhotti, 323 F. Supp. 425 (S.D.N.Y.), *aff'd in part,* 452 F.2d 1186 (2d Cir. 1971); or had "taken reasonable steps" to keep their conversations private; United States v. Case, 435 F.2d 766, 768 (7th Cir. 1970); United States v. Haden, 397 F.2d 460, 465 (7th Cir. 1968). *See* Aynes, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy,* 23 CLEV. ST. L. REV. 63 (1974).

248. Katz v. United States, 389 U.S. 351-52; *see id.* at 361-62 (Harlan, J., concurring). *See also* Note, *Types of Property Seizable Under the Fourth Amendment,* 23 U.C.L.A. L. REV. 963, 970-73 (1976) [hereinafter cited as *Seizable Property*].

pectation of total privacy exists, the fourth amendment prescribes that the search becomes unlawful when the expectation arises; while if there is a reasonable expectation of total publicity, the fourth amendment imposes no restrictions on the search."[249] Under a wholly subjective approach, determination of reasonable expectations of privacy not only validates claims of privacy but also defines the scope and applicability of the fourth amendment. Equating searches and seizures which violate reasonable expectations of privacy with the fourth amendment's guarantee against unreasonable searches and seizures considerably narrows the coverage of the fourth amendment. Indeed, as one commentator noted:

> [a]n equally telling objection to the subjective conception of reasonable expectations of privacy is that it deprives people who clearly merit fourth amendment protection from the benefit of that protection. A person asleep or in a coma, for example, is incapable of entertaining any subjective expectations at all, and his unconscious state may last a lifetime. To deny him freedom from unreasonable governmental intrusion because of his unfortunate condition is absurd.[250]

A completely subjective analysis which equates the reasonableness of expectations of privacy with the fourth amendment's proscription against unreasonable searches and seizures, however, reads too much into *Katz*. Justice Stewart in rejecting the propertied conception of privacy pointed out that the fourth amendment protections "often have nothing to do with privacy at all."[251] More importantly, the Court found electronic eavesdropping unreasonable for precisely the reason that prior judicial approval had not been secured.[252] The Court asserted that without prior judicial approval searches involving electronic eavesdropping are "*per se* unreasonable under the Fourth Amendment;"[253] contrariwise, it would have held lawful under the circumstances of *Katz* electronic eavesdropping backed by a valid search warrant.[254] Judicial approval of a search warrant mitigates individuals' expectations of privacy; privacy claims necessarily yield to valid warrants. Because individuals' expectations of privacy do not change upon the issuance of a warrant, the reasonableness of the search and the applicability of the fourth amendment can not depend on individuals' subjective reliance on privacy. In this regard, Professor Anthony Amsterdam suggests that,

249. *Seizable Property, supra* note 248, at 970.
250. *Id.* at 271 n.41.
251. Katz v. United States, 389 U.S. at 350.
252. *Id.* at 354-59.
253. *Id.* at 357.
254. *Id.* at 354-59.

> 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 [e.g., a psychological expectation], but in the sense of a claim of right. In the end, the basis of the *Katz* decision seems to be that the fourth amendment protects those interests that may justifiably claim fourth amendment protection.[255]

The Court's discussion of privacy expectations upon which individuals may justifiably rely refers to their right under the fourth amendment to claim a right of privacy and not only their actual subjective expectations of privacy. As such, reasonable expectations and claims of privacy are expunged when a valid warrant has been issued.

What then is *Katz's* rationale for constitutionally protected privacy? As Amsterdam has noted,[256] it begs the question to say that the fourth amendment protects reasonable expectations of privacy and reasonable expectations of privacy are those claims protected by the fourth amendment. While tautologically true, such a conclusion provides little insight as to when and under what circumstances claims of privacy are recognizable under the fourth amendment.

Justice Harlan's concurring opinion in *Katz* clarifies and amplifies the majority's rationale for fourth amendment protected privacy by discussing the notion of "reasonable expectation of privacy" in terms of two elements, individuals' actual expectations of privacy and societal recognition of those expectations as reasonable.

> My understanding of the rule [*i.e.*, "the Fourth Amendment protects people, not places"] that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited.[257]

Inasmuch as Justice Harlan obviously intends the first requirement in a subjective sense, he remains vulnerable to the criticism that fourth amendment guarantees are thereby greatly diluted. As Professor Amsterdam observes,

> [a]n actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to fourth amendment

255. Amsterdam, *supra* note 163, at 385 (footnote omitted).
256. *Id.*
257. Katz v. United States, 389 U.S. at 361.

> protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.[258]

Yet, perhaps Justice Harlan, unlike Amsterdam, discerns that the practice of rights depends not only upon judicial legitimization of claims of rights but also on the actual expectations and interests of individuals which led them to demand legal recognition and protection for their interests. What remains valuable in Justice Harlan's first requirement is that it emphasizes that concrete rights of privacy depend on individuals' actual expectations in the sense that their claims to entitlement represent actual personal or proprietary interests.[259] He nevertheless qualifies his subjective conception with a second requirement and thereby improves upon the majority's opinion. Justice Harlan's second requirement that privacy expectations are to be legitimated if and only if "society is prepared to recognize [them] as 'reasonable' " provides the necessary criterion for protected privacy. Not without ambiguity, the second requirement may either note the empirical condition that society in fact evidences approval for certain expectations of privacy or the normative conception that society ought to find some expectations of privacy reasonable. Neither Justice Harlan nor his commentators provide conclusive support for either alternative;[260] the requirement may lie somewhere between both conditions. Determination of reasonable expectations of privacy requires reference to "the structure of society, the patterns of interaction, [and] the web of norms and values"[261] yet the mere fact of societal consensus alone may be normatively objectionable.[262] The standard of "reasonableness" which "society is prepared to recognize" therefore might be akin to that in criminal law: "[a]n act is reasonable in law when it is such as a man of ordinary care, skill, and prudence would do under similar circumstances."[263] Indeed,

258. Amsterdam, *supra* note 163, at 384.

259. In other words, Harlan's opinion may only emphasize that only Hohfeldian plaintiffs may assert claims to protected privacy. The term "Hohfeldian plaintiff" was coined by Louis L. Jaffe and derived from W. N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1946), discussed by C. H. PRITCHETT & W. MURPHY, COURT, JUDGES AND POLITICS 265 n.1 (2d ed. 1974).

260. Justice Harlan apparently altered his subjective conception in United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting). *See Seizable Property, supra* note 248 at 972.

261. Simmel, *Privacy is Not an Isolated Freedom,* in PRIVACY, NOMOS XIII 71 (J. Penncok & J. Chapman eds. 1971).

262. *See Seizable Property, supra* note 248, at 971-72.

263. Howard, *The Reasonableness of Mistake in the Criminal Law,* 4 U. QUEENSL. L. J. 45 (1961). Similarly, in tort law, "reasonableness" applies to behavior which is in accord with community standards of acceptable behavior. W. PROSSER, LAW OF TORTS 149-51 (4th ed. 1971).

Justice Harlan stresses that it would be unreasonable for a person to claim a right to the privacy of his activities if those activities were in "plain view" of the public and he made no attempt to foreclose access by others to his engagements.

Justice Harlan's twin requirements suggest that the reasonableness of privacy claims must be logically related to the time and place of the search relative to individuals' expectations and, ultimately, societal judgments. His opinion, like the majority's, emphasizes that privacy is not protected in the abstract, (that not every nor any expectation deserves recognition) but rather only those expectations of privacy which social practices and institutions generally acknowledge. The problem remains as to which expectations are acknowledged as reasonable. In this regard, Justice Harlan is most illuminating, for he begins by stating that,

> I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, *Weeks v. United States* . . . and unlike a field, *Hester v. United States* . . . a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.
>
> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place."[264]

Justice Harlan implicitly acknowledges that most privacy is contingent upon the circumstances and contexts of individuals' engagements and efforts to limit access by others.[265] By returning to the *Boyd*-fostered doctrine of constitutionally protected areas, he correctly indicates that it would be impossible to determine the reasonableness of privacy expectations without reference to the area and context of individuals' activities. Individuals' actual expectations of privacy and societal judgments as to the reasonableness of those expectations logically presuppose consideration of the context and circumstances of individuals' activities and the intrusions thereupon.

Katz's rationale as elaborated by Justice Harlan bears a family resemblance to *Boyd's* liberal construction of protected privacy and the doctrine of constitutionally protected areas. *Katz's* proclamation that

264. Katz v. United States, 389 U.S. at 360-61 (citations omitted).
265. *See* O'Brien note 7 *supra;* Greenwalt note 22 *supra.*

"the Fourth Amendment protects people, not places" emphasizes that no area is inherently private, rather individuals' actual expectations of privacy are determined to be reasonable and protected by reference to the place and circumstances of their engagements. Hence, "[i]t is not the nature of the area . . . but the relationship between the area and the person incriminated by the search that is critical."[266] As more than one commentator has observed:

> "[d]etermination as to whether the area in question is or is not constitutionally protected is necessary. It is a mistake to view *Katz* as eliminating the latter possibility — all *Katz* dispensed with was slavish adherence to the technicalities of state trespass law."[267]

Katz's holding that "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures"[268] only abandoned *Olmstead-Goldman's* strict construction and application of the underlying property principles of the *Boyd*-fostered doctrine of constitutionally protected areas.[269] Repudiating *Olmstead's* basis for protected privacy, *Katz* places a new focus on reasonable expectations of privacy yet continues to treat searches and seizures as violations of constitutionally protected places. "What [*Katz*] changed are the standards for determining private areas, as well as those for determining private affairs."[270]

Katz departs from *Boyd's* reliance on common law property concepts and principles as determining fourth amendment protected privacy. Whereas *Boyd-Gouled-Weeks* promoted extensive safeguards for privacy by focusing not only on the circumstances and area of the search and seizure but also on the content of the governmental intrusion, *Katz* signifies the Court's approach toward privacy claims by focusing on individuals' expectations within constitutionally protected areas and "the act compelled by a government warrant or subpoena rather than by considering the content of the evidence sought."[271] *Katz's* rejection of strict construction and application of property principles to privacy claims permits protection of intangibles such as con-

266. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 136 (1968).

267. Comment, *Criminal Law — Unreasonable Visual Observation Held to Violate Fourth Amendment*, 55 MINN. L. REV. 1255, 1263 (1971) (footnotes omitted). *See also*, Hendricks, *Eavesdropping, Wiretapping, and the Law of Search and Seizure — Some Implications of the Katz Decision*, 9 ARIZ. L. REV. 428, 434 (1968).

268. Katz v. United States, 389 U.S. at 359.

269. *See* discussion pp. 713-14 *infra*.

270. Comment, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J. L. REF. 154, 176 (1972).

271. Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 946 (1977).

versations and at the same time allows for seizure of evidence which may fall outside the "privacies of life." Consequently, *Katz* provides only a relative guarantee, not an absolute privilege, that the government may not search and seize without justification or in a procedurally improper manner.

Katz is as a landmark of constitutional analysis of privacy, midway between *Boyd's* liberal construction and application of fourth amendment principles and *Olmstead's* strict construction and application of property concepts and principles. Thus, *Katz* provides the jurisprudential basis for the modern Court's liberal construction of an abstract right of privacy protected by the fourth amendment while strictly applying the amendment to concrete rights of privacy.

V. LIBERAL CONSTRUCTION AND ILLIBERAL PROTECTION

Notwithstanding the Supreme Court's shifting rationales for fourth amendment protected privacy, the fundamental principle emerges that constitutional claims of privacy are limited to unreasonable governmental intrusions. The reasonableness of those intrusions is determined by the context, *i.e.*, the area and circumstances, and the nexus between individual privacy interests and the governmental interest in searching and seizing. With varying degrees of enforcement, liberal construction of fourth amendment protection of "the sanctity of a man's home and the privacies of life"[272] emphasizes the fact that the amendment gives constitutional effect to the common law maxim, that a man's house is his castle.[273]

The amendment's prohibition of general warrants was designed to limit only official intrusions and, in particular, rummaging expeditions by government officials.[274] The principal privacy safeguard therefore lies in the requirement that prior to a government search a warrant be obtained enabling a "disinterested determination" of probable cause by a "neutral and detached magistrate."[275] The requirement that a warrant be issued only upon cause itself limits intrusive searches and seizures only to cases where there is reason to believe there is criminal culpability.[276] Justice Douglas' discussion in *McDonald v. United States*[277] exemplifies the Court's view of the relationship between individual

272. Boyd v. United States, 116 U.S. 616, 630 (1886); *see* discussion p. 674 *supra*.

273. Boyd v. United States, 116 U.S. 616, 630 (1886).

274. Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971); United States v. Lefkowitz, 285 U.S. 452, 465 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

275. *See* Aguilar v. Texas, 378 U.S. 108, 110-11 (1964); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

276. *See* Fisher v. United States, 425 U.S. 391, 400 (1976).

277. 335 U.S. 451 (1948). In the same year, the Court reversed the decision holding permissible a search of an apartment after an officer smelled opium from his position in the hallway.

privacy and the warrant requirement.

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe place for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.[278]

The issuance of a search warrant upon determination of probable cause crucially defines the point at which individuals' claims of a right of privacy are overridden by a governmental interest.[279] In the early twentieth century the Court recognized only two exceptions to the requirement that a search be conducted in compliance with the warrant requirement;[280] subsequent judicial policies allowed exceptions to the requirement not only where a search was made incident to arrest[281] but also in so-called "hot-pursuit"[282] and "stop-and-frisk"[283] situations. The increasing number of permissible exceptions reflects the Court's new estimation of fourth amendment guarantees relative to the values of crime control[284] and, significantly, adoption of *Katz's* analytical

> Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.

Johnson v. United States, 333 U.S. 10, 14 (1948). *But cf.* United States v. Santana, 427 U.S. 38, 43 (1976) ("a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place").

278. McDonald v. United States, 335 U.S. at 455-56.

279. A police officer may, however, search without a warrant by exercising his or her own standard of probable cause in exigent circumstances carefully defined by the Supreme Court. *See* Carroll v. United States, 267 U.S. 132, 153-54 (1925) (warrantless automobile search).

280. *See* Greenwalt, *The Right of Privacy,* in RIGHTS OF AMERICANS 303 (L. Dorsen ed. 1970). In Carroll v. United States, 267 U.S. 132, 162 (1965), the Court stated that a search is justified when, "the facts and circumstances within [the officer's] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched."

281. *See* Harris v. United States, 331 U.S. 145, 150 n. 11, 151 nn.12, 13 (1947).

282. Warden v. Hayden, 387 U.S. 294 (1967).

283. Terry v. Ohio, 392 U.S. 1 (1968).

284. *See* H. PACKER, *supra* note 83, at 149-174.

framework for personal privacy.[285]

In 1968, the Court elaborated *Katz's* holding that "wherever an individual may harbor a reasonable 'expectation of privacy,'. . . he is entitled to be free from unreasonable governmental intrusion" by noting that "the specific content and incidents of this right [of privacy] must be shaped by *the context in which it is asserted.*"[286] Contrary to *Katz's* dichotomy of individuals' expectations of privacy (either total privacy or total publicity[287]) *Terry v. Ohio*[288] found individuals' expectations of privacy dependent upon the context and circumstances of their activity.[288] Reasonable expectations of privacy, like the reasonableness of a search, are context-dependent.[289]

Because the present Court pays primary attention to the manner of the search,[290] determination of reasonableness requires juxtaposition of the government's interest in searching and the individual's interests in privacy within the context and circumstances of the intrusion.[291] In balancing the respective interests, *Terry* suggested that a distinction be drawn between the initial intrusion and the scope of the search thereafter.[292] The reasonableness of the intrusion depends on the government's interest outweighing any individual privacy interest and the "scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."[293] In apparent contradiction, however, *Terry* added that the scope of the search need only be "reasonably related"[294] to the justification for the initial intrusion.[295] *Terry* nevertheless embellished *Katz's* analytical framework for

285. *See* Alderman v. United States, 394 U.S. 165, 179 n.11 (1969); *See also* Mancusi v. DeForte, 392 U.S. 364, 368-69 (1968); Terry v. Ohio, 392 U.S. 1, 9 (1968).

286. Terry v. Ohio, 392 U.S. at 9. (emphasis added).

287. *See* notes 247 & 248 and accompanying text *supra.*

288. 392 U.S. 1 (1968). *See also* United States v. Dionisio, 410 U.S. 1, 8 (1973).

289. Cady v. Dombrowski, 413 U.S. 433, 447-48 (1973); Chimel v. California, 395 U.S. 752, 765 (1968); Cooper v. California, 386 U.S. 58, 59 (1967); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1937). *But see* United States v. Robinson, 414 U.S. 218 (1973) (once a suspect is under custodial arrest, he or she may be searched incident to that arrest without inquiry into the circumstances of that search).

290. *See* discussion p. 712 *supra.*

291. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 879-80 (1975); United States v. United States District Court, 407 U.S. 297, 322-23 (1972); Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Municipal Court, 387 U.S. 523, 534-37 (1967).

292. Terry v. Ohio, 392 U.S. at 28-29. *Accord,* Cupp v. Murphy, 412 U.S. 291, 295 (1975); United States v. Dionisio, 410 U.S. 1, 3-9 (1973).

293. Terry v. Ohio, 392 U.S. at 19, *quoting* Warden v. Hayden, 387 U.S. 294, 310 (1967), wherein Justice Fortas, in his concurring opinion, first articulated the principle prescribing that "[t]he scope of the search be strictly tied to and justified by the reason for the initial intrusion."

294. 392 U.S. at 29.

295. Determination of the reasonableness of the intrusion may rely only on information at the outset of the search; information which results from the search may not be used retroactively to justify the intrusion or subsequent search. *See* Terry v. Ohio, 392 U.S. at 21-22; Wong Sun v. United States, 371 U.S. 471, 484 (1963); Harris v. United States, 331 U.S. 145, 167 (1947) (Frankfurter, J., dissenting).

protected privacy[296] by asserting that while citizens may not have valid claims to privacy against every governmental intrusion, they do have legitimate expectations and claims against searches which transcend the justification for the initial intrusion.

Katz's analysis of individuals' privacy expectations was incorporated within the courts' traditional approach of examining the area intruded by a search in reaching a determination of the reasonableness of claims to protected privacy. Courts, for example, found justifiable expectations of privacy against physical intrusions into citizens' homes,[297] apartments,[298] dormitory rooms,[299] business offices,[300] and with regard to materials sent through the mail,[301] stored in rented lockers,[302] and in garbage;[303] but rejected privacy claims in jails,[304] open fields,[305]

296. *See* discussion pp. 705-06 *supra.*

297. United States v. Rubin, 343 F. Supp. 625 (E.D. Pa. 1972) (held Fourth Amendment protection extended to a man's house, even when not being used as his dwelling at that time). *See* Aynes, *supra* note 247, at 67 n.39.

298. Chapman v. United States, 365 U.S. 610 (1961); United States v. Jeffers, 342 U.S. 48 (1951); State v. DiBartolo, 276 So.2d 291 (1973) (locked apartment building); Brown v. State, 15 Md. App. 584, 292 A.2d 762 (1972) (a rented room in a home). *But see* United States v. Wilson, 472 F.2d 901 (9th Cir. 1972) (no justifiable expectation of privacy when the rent is overdue and the door left open). Mercia v. State, 87 Nev. 457, 488 P.2d 1161 (1971) (no justifiable expectation of privacy in screened alcove above heating and air conditioning unit of apartment). *See also* Aynes, *supra* note 247, at 67 n.41.

299. Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971); Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970). *See* Aynes, *supra* note 247, at 67 n.42.

300. General Motors Leasing Corp. v. United States, 429 U.S. 338 (1977); Mancusi v. DeForte, 392 U.S. 364 (1968).

301. Williams v. State, 501 P.2d 841 (Okla. Crim. 1972). *But see* United States v. Ramsey, 431 U.S. 606 (1977); United States v. Doe, 472 F.2d 982 (2d Cir. 1973). *See also* Aynes, *supra* note 247, at 68 n.50.

302. United States v. Durkin, 335 F. Supp. 922 (S.D.N.Y. 1971) (rented locker at a public terminal); United States v. Small, 297 F. Supp. 582 (D. Mass. 1969) (rented locker at a public terminal); People v. Baker, 12 Cal. App. 835, 96 Cal. Rptr. 760 (1970); Wilson v. Commonwealth, 475 S.W.2d 895 (Ky. App. 1971) (locker issued to police officer). *See* Aynes, *supra* note 247, at 68 n.50.

303. People v. Krivda, 5 Cal.3d 357, 486 P.2d 1269, 96 Cal. Rptr. 62 (1971); People v. Edwards, 71 Cal.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969); Croker v. State, 477 P.2d 122 (Wyo. 1970). Under other circumstances, however, one may not have any justifiable expectation of privacy. *See, e.g.,* United States v. Mustrone, 469 F.2d 970 (1st Cir. 1972) (item placed in trash barrel of another person); United States v. Jackson, 448 F.2d 963 (9th Cir. 1971), *cert. denied,* 405 U.S. 924 (1972) (item placed in public trash can in motel hallway); United States v. Stroble, 431 F.2d 1273 (6th Cir. 1970). *See also* Aynes, *supra* note 247, at 69 n.51.

304. United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972), *cert. denied,* 410 U.S. 916 (1973) (documents hidden in cell); Halpin v. Superior Ct., 20 Cal. App.3d 223, 97 Cal. Rptr. 402 (1971), *rev'd on other grounds,* 6 Cal.3d 885, 495 P.2d 1295, 101 Cal. Rptr. 375 (1972) (telephone conversations). *See* Aynes, *supra* note 247, at 68 n.46.

305. United States v. Pruitt, 464 F.2d 494 (9th Cir. 1972) (boxes hidden in a clump of trees in an open field); Patler v. Slayton, 353 F. Supp. 376 (E.D. Va. 1973) (bullets lodged in a tree in a picnic and play area on a private farm); State v. Stanton, 7 Or. App. 286, 490 P.2d 1274 (1971) (marijuana growing in pasture land). *See* Aynes, *supra* note 247, at 68 n.47.

yards,[306] abandoned property,[307] goods under bailment,[308] financial records of bankrupt companies,[309] records of long distance calls,[310] vehicle identification numbers,[311] and social security numbers.[312]

In recent years, the Supreme Court, while maintaining *Katz's* liberal construction of a fourth amendment right of privacy, has nevertheless promoted less than liberal protection for personal privacy. Indeed, although "it is settled for the purposes of the Amendment that 'except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant,'"[313] the Burger Court has weakened this principal safeguard of the fourth amendment for personal privacy by extending the number of exceptions to the warrant requirement[314] and considerably relaxing the standard for probable cause.[315] Consequently, *Katz's* greatest impact in the procedural area appears to be in liberalizing standing requirements with respect to the suppression of evidence.[316]

The 1976 decision of *United States v. Santana*[317] illustrates the cur-

306. People v. Bradley, 1 Cal.3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969) (marijuana growing under fig tree near landlord's back door and tenant's door); People v. Ortega, 175 Colo. 136, 485 P.2d 894 (1971) (narcotics hidden in a weeded area behind an apartment building). *See* Aynes, *supra* note 247, at 68 n.48.

307. United States v. Colbert, 474 F.2d 174 (5th Cir. 1973) (briefcases which defendants claimed did not belong to them); United States v. Edwards, 441 F.2d 749 (5th Cir. 1971) (automobile abandoned during chase). *See* Aynes, *supra* note 247, at 69 n.52.

308. Couch v. United States, 409 U.S. 322 (1973) (tax records given to an accountant). *See also* United States v. Miller, 425 U.S. 435 (1976) (bank records); Fisher v. United States, 425 U.S. 391 (1976); California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974). *See* Aynes, *supra* note 247, at 69 n.53.

309. United States v. Fithian, 452 F.2d 505 (9th Cir. 1971).

310. United States v. Powers, 439 F.2d 373 (4th Cir. 1971), *cert. denied,* 402 U.S. 1011 (1971); United States v. Polk, 433 F.2d 644 (5th Cir. 1970); United States v. Johnson, 431 F.2d 4441 (5th Cir. 1970). *See* Aynes, *supra* note 247, at 69 n.57.

311. Cantor v. Supreme Ct., 353 F. Supp. 1307 (E.D. Pa. 1973). *See* Aynes, *supra* note 247, at 69 n.58.

312. *See* Aynes, *supra* note 247, at 69 n.58.

313. Mancusi v. DeForte, 392 U.S. 364, at 370, *quoting* Camara v. Municipal Court, 387 U.S. 523, at 528-29.

314. United States v. Watson, 423 U.S. 411 (1976) (finding of voluntary consent despite no proof defendant could withhold same); Cardwell v. Lewis, 417 U.S. 583 (1974) (allowed nonexigent seizure of paint sample from car); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (allowed car search by roving border patrol); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (permitted search upon third party consent).

315. United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (no violation of fourth amendment to stop and question occupants of automobile with no reason to believe they were illegal aliens); South Dakota v. Opperman, 428 U.S. 364 (1976) (approved routine warrantless inventory searches of compound automobiles); Texas v. White, 423 U.S. 67 (1975) (warrantless search of car in police custody though procurement of warrant was possible); United States v. Harris, 403 U.S. 573, 580-81 (1971) ("substantial basis").

316. Mancusi v. DeForte, 392 U.S. 364, at 367-70. *But see* California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

317. 427 U.S. 39 (1976).

rent Court's strict application of the fourth amendment to claims of protected privacy.[318] Santana, standing in the doorway of her house holding a paper bag containing envelopes of heroin, retreated upon the approach of police officers into the vestibule where she was subsequently apprehended. Justice Rehnquist, for the Court, observed that while

> under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a "public" place. Santana was not in an area where she had any expectation [*i.e.*, claim] of privacy.[319]

Because the doorway of her house was not an area in which the Court recognized any expectation of privacy,[320] the police, who had probable cause, lawfully made a warrantless arrest. Santana's retreat into the vestibule of her home provided grounds for "hot pursuit"[321] by the police in order to prevent the destruction of evidence and, thus, justified the warrantless entry of her home. Justices Marshall and Brennan dissented on the ground that the majority's decision did not rest upon whether the exigency of the situation required the arrest on private property, but on the fact that notwithstanding Santana's presence in the doorway of her house she was "as exposed to public view, speech, hearing and touch," as to be "in the unprotected outdoors,"[322] *i.e.*, a constitutionally unprotected area in which individuals have no reasonable expectations of privacy.

Santana illustrates that although the present Court has returned to a liberal construction of fourth amendment protected privacy, *Boyd's* liberal application of the amendment's underlying principles has not been accepted. Hence, although Katz had reasonable expectations of privacy in a public telephone booth, Santana did not in the doorway and vestibule of her house, nor do citizens have reasonable expectations of privacy, even though they have assertable proprietary interests, in their family automobiles.[323] Notwithstanding that "[a] search, even of

318. *See* discussion pp. 719, 727 *infra*.

319. United States v. Santana, 427 U.S. at 42. Earlier that term, in United States v. Watson, 423 U.S. 411 (1976), the Court held permissible the warrantless arrest, without probable cause, of an individual in a public place.

320. 427 U.S. at 42.

321. *Id.* The Court distinguished Warden v. Hayden, 387 U.S. 294, 298 (1967), based on the "exigencies of the situations" for warrantless arrests, and Johnson v. United States, 333 U.S. 10, 16 n.7 (1948), which first recognized the element of "hot pursuit" in a chase, and relied only on the latter. *But see* dissenting opinion by Mr. Justice Marshall, 427 U.S. 47 (case should be remanded to determine if exigent circumstances were caused solely by police activity).

322. 427 U.S. at 47 (Marshall, J., dissenting).

323. The Court has contrasted individuals' expectations of privacy in their homes and automobiles in several recent cases involving broader searches. United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Almeida-Sanchez v.

an automobile, is a substantial invasion of privacy,"[324] recent decisions by the Burger Court have reiterated that individuals have "a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."[325] The Court has upheld warrantless searches of automobiles because of their mobility and "because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."[326]

The contemporary Court's renewed liberal construction of the underlying principles of the fourth amendment but strict application to areas and circumstances in which citizens may assert valid claims to protected privacy thus has resulted in limited protection of personal privacy. Ironically, then, whereas *Boyd* promoted extensive protection for personal privacy in constitutionally protected areas upon proprietary concepts and principles, the contemporary Court relying on *Katz's* liberal construction of individuals' expectations of privacy has limited protection of personal privacy, even where individuals may have common law proprietary interests. Strict application of the fourth amendment, however, has characterized the judicial policies of both the Warren and Burger Courts with respect to the areas of eavesdropping and informers,[327] administrative searches, and issues of so-called informational privacy.[327]

A. Eavesdropping and Informers

In 1967, along with *Katz,* the Warren Court in *Berger v. State of New York*[328] decided the question left unanswered by *Silverman's* holding that conversations receive fourth amendment protection; namely, what constitutes a reasonable search and seizure by electronic eavesdropping. The Court voided a New York eavesdropping statute because its requirements for judicial issuance of ex parte orders for electronic eavesdropping were found insufficiently definite as to the alleged crime, the locus of the crime and the items to be seized.[329] Because "eavesdropping involves an intrusion on privacy that is broad in scope,"[330] the Court established specific constitutional requirements:

United States, 413 U.S. 266 (1973).

324. United States v. Ortiz, 422 U.S. 891, 896 (1975).

325. South Dakota v. Opperman, 428 U.S. 364, 368 (1976), *quoting* Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

326. South Dakota v. Opperman, 428 U.S. at 367. The Court found "[t]he expectation of privacy as to autos is further diminished by the obviously public nature of automobile travel." *Id.* at 368.

327. *See generally* Leigh note 7 *supra;* Bogomolny note 7 *supra.*

328. 388 U.S. 41 (1967).

329. *Id.* at 54-60.

330. *Id.* at 56.

(1) authorization to eavesdrop only on a showing of probable cause; (2) description with specificity of the object to be seized; (3) notice to the subject of the search; (4) limitation on the time of the search; and (5) mandatory return to the magistrate specifying the items seized.[331] Recent decisions continue to acknowledge that eavesdropping involves a broad intrusion upon personal privacy but fail to provide effective safeguards against overly broad surveillance and notice to those intruded upon by governmental eavesdropping.[332]

The Burger Court's approach to the problems of personal privacy posed by governmental informers and secret agents, like those involved in eavesdropping, underscores its predominantly strict application of the fourth amendment to claims of constitutionally protected privacy. The Court's decision in *United States v. White*[333] emphasizes its limited application of the amendment's protections, reminiscent of the cases fostered by *Olmstead's* strict application of property principles.[334] Indeed, apparently the Supreme Court refuses to go beyond the *On Lee-Lopez-Hoffa-Lewis-Osborn* focus on the "assumption of risk" individuals make with regard to their personal communications.[335]

The Supreme Court upheld the conviction of White based on evidence gathered by an electronic transmitter concealed on an informer, and reversed the holding of the court of appeals that White "justifiably expected his conversations to be private" in the sense that they would be accessible to only those present.[336] Justice White, for the majority, specifically dealt with *Katz's* holding that what a person reasonably seeks to preserve as private is constitutionally protected, but found no constitutionally significant difference between electronically equipped and non-equipped informers.

> Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. Very probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversation would cease and our problem with these encounters would be nonexistent or far different from those now before us. Our problem, in terms of the principles announced in Katz, is what expectations of privacy are constitutionally "justifiable" — what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the

331. *Id.* at 56-60.
332. *See* United States v. Donovan, 429 U.S. 413 (1977).
333. 401 U.S. 745 (1971).
334. *See* discussion p. 698 *supra.*
335. *See* discussion p. 701 *supra.*
336. United States v. White, 405 F.2d 838, 846 (7th Cir. 1969).

> law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants in the manner exemplified by Hoffa and Lewis.[337]

White implicitly acknowledges that privacy claims against informers involve the assertion of entitlement to control personal information, but finds of no constitutional significance the qualitative difference (in effectiveness and exactitude) between disclosures of personal information by the old-fashioned *Hoffa* type of informer and an electronically equipped informer.

Accepting *Katz's* liberal construction of Fourth Amendment protected privacy, the Court nevertheless continues to limit the amendment's application by following *On Lee's* "assumption of risk" rule rather than the principle of reasonable expectations of privacy. Actually, the Court's restrictive application of the fourth amendment to claims of privacy against bugged informers and the admissibility of evidence gathered by tape recordings, results from its circumventing *Katz's* analysis of reasonable expectations of privacy.

The dissenters argued that the majority opinion in effect allows individual's confidants to waive his or her right of privacy, *i.e.*, allow confidants to publicize personal conversations. In an inspired dissent, recalling that of Justice Brandeis in *Olmstead,* Justice Douglas reiterated the necessity for both liberal construction and application of fourth amendment principles.

> The issue in this case is clouded and concealed by the very discussion of it in legalistic terms. What the ancients knew as "eavesdropping," we now call "electronic surveillance"; but to equate the two is to treat man's first gun powder on the same level as the nuclear bomb. Electronic surveillance is the greatest leveler of human privacy ever known. How most forms of it can be held "reasonable" within the meaning of the Fourth Amendment is a mystery. To be sure, the Constitution and Bill of Rights are not to be read as covering only the technology known in the 18th century. Otherwise its concept of "commerce" would be hopeless when it comes to the management of modern affairs. At the same time the concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them the health and strength to carry on.[338]

337. United States v. White, 401 U.S. 745, at 751-52.
338. *Id.* at 756.

In terms of the scope of constitutionally protected privacy, the fourth amendment does not protect voluntarily relinquished personal information, and citizens have neither reasonable expectations nor valid claims of privacy against loss of personal information by means of a bugged informer or an old trustworthy friend turned informer.

B. Administrative Searches and a Man's House Is His Ruined Tenement

The Supreme Court permits a lower standard of probable cause for issuance of warrants in the area of administrative searches, though such searches arguably affect a potentially greater number of individuals and present more serious invasions of privacy than those searches pursuant to criminal prosecution. In fact, the Supreme Court only recently has entertained privacy claims with regard to administrative searches. Hence, the initial inquiry dealt with whether the fourth amendment had application to administrative searches and, then, whether a particular search was reasonable, *i.e.*, whether "balancing the need to search against the invasions of the search entails"[339] governmental interests outweigh individual privacy interests.[340]

Frank v. Maryland[341] held that the fourth amendment confers no right to forbid warrantless searches conducted at reasonable times and places which are designed to facilitate enforcement of health regulations.[342] Ostensibly the fourth amendment applied only to criminal searches, not civil searches:

> But giving the fullest scope to this constitutional right to privacy, its protection cannot be here invoked. The attempted inspection of the appellant's home is merely to determine whether conditions exist which the Baltimore Health Code proscribes. . . . No evidence for criminal prosecution is sought to be seized.[343]

The majority, in its analysis of the relationship between the fourth and fifth amendments, citing *Boyd* for support,[344] reasoned that,

> [a]gainst this background two protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under

339. Camara v. Municipal Court, 387 U.S. 523, 537 (1966).

340. For an interesting argument that the Supreme Court is evolving a two-step analysis of fourth amendment guarantees, *see* Bergstrom, *The Applicability of the "New" Fourth Amendment to Investigations By Secret Agents: A Proposed Delineation of the Emerging Fourth Amendment Right to Privacy*, 45 WASH. L. REV. 785 (1970).

341. 359 U.S. 360 (1959).

342. *Id.* at 366-67.

343. *Id.* at 366. *But see* Justice Douglas dissenting opinion, *id.* at 374-84.

344. *Id.* at 365.

> proper authority of law. The second, and intimately related protection, is self-protection: the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property.[345]

It was concluded that only searches designed to obtain incriminating evidence impinge on the right of self-protection and require prior judicial approval. Administrative searches, on the other hand, are permissible without judicial safeguards so long as the potential loss of privacy is counterbalanced by gains in social welfare.[346] Although Justice Frankfurter declared that, even "giving the fullest scope to this constitutional right to privacy," administrative searches lie outside the purview of the fourth amendment, he noted that,

> [i]t is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought. While these concerns for individual rights were the historical impulses behind the Fourth Amendment and its analogues in state constitutions, the application of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth are of course not restricted within these historic bounds.[347]

In contrast, Justices Warren, Black, Douglas, and Brennan concluded that, "[t]he decision today greatly dilutes the right of privacy which every homeowner had the right to believe was part of our American heritage."[348] The dissenters argued that the basic fallacy in

345. *Id.*

346. *Id.* at 366-73.

347. *Id.* at 365-66.

348. *Id.* at 374 (Douglas, J., dissenting). Mr. Justice Douglas quoted an earlier case which had expressed the view that "to say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." *Id.* at 378, *quoting* District of Columbia v. Little, 178 F.2d 13, 16-17 (1949).

Although in Zurcher v. Stanford Daily, 46 U.S.L.W. 4546 (1978), the Supreme Court was not reviewing an administrative search, it was deciding the constitutionality of third party searches. The majority in *Stanford Daily* held that requiring a subpoena duces tecum to search for evidence on the property of one not implicated in criminal activity would hamstring law enforcement efforts without significant benefit to an individual's privacy interests. *Id.* at 4549. In dissent, Mr. Justice Stevens characterized an innocent citizen's right to privacy as a liberty right under the fourteenth amendment's Due Process Clause. Thus, notice and opportunity to be heard were required before that right could be invaded. Only in cases where the criminal propensities of the property owner are acknowledged will probable cause reasonably dictate issuance of an ex parte warrant to search a third party's premises. *Id.* at 4555.

the majority's rationale was the insistence that the fourth amendment applies principally to criminal searches thereby providing no safeguards for invasions of personal privacy by other governmental officials. As with Justice Bradley in *Boyd,* Justice Douglas' dissent in *Frank* relies on a liberal construction of the fourth amendment.

> [The amendment] was designed to protect the citizen against uncontrolled invasion of his privacy. It does not make the home a place of refuge from the law. It only requires the sanction of the judiciary rather than the executive before that privacy may be invaded. History shows that all officers tend to be officious; and health inspectors, making out a case for criminal prosecution of the citizen, are no exception.
>
> . . . One invasion of privacy by an official of government can be as oppressive as another . . . It would seem that the public interest in protecting privacy is equally as great in one case as another.[349]

Hence, as the majority in *Frank* imposed limits on the kinds of legitimate privacy expectations individuals may assert under the fourth amendment by distinguishing between criminal and civil searches, so too the dissent without precedent urged that the fourth amendment applies to all official searches.[350]

In the next year in *Abel v. United States,*[351] and *Eaton v. Price,*[352] the dissenters again rejected the formalistic dichotomy between criminal and civil searches pointing out that, "[i]t is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with the intent of the invading officers."[353] The majority in *Abel* accepted the implications of the Court's analysis in *Frank* by upholding the introduction in a criminal trial of incriminating evidence seized without a judicially issued warrant. The search was held permissible on grounds that it was incident to an administrative arrest warrant issued as a "bona fide preliminary step" to deportation, a noncriminal proceeding.[354] While the dissenters believed a search warrant was necessary, the majority argued that the differences between administrative and criminal arrest were not substantial enough to vitiate the right of the government officers to search incident to a lawful arrest.[355] The Court in *Eaton* affirmed *ex necessitate* an Ohio municipal ordinance authorizing housing inspectors to enter homes without warrants, and although the opinion issued by an equally divided court has

349. 359 U.S. at 381-82.
350. *Id.* at 376-81, 383.
351. 362 U.S. 217, 241 (1960) (Douglas, J., dissenting).
352. 364 U.S. 263 (1960).
353. Abel v. United States, 362 U.S. at 255 (Brennan, J., dissenting).
354. *Id.* at 226-28, 230.
355. *Compare id.* at 251-53 (Brennan, J., dissenting) *with id.* at 236-37 (Frankfurter, J.).

no precedential effect, it does reveal the convictions of the members of the Court.[356] Justice Brennan argued that the proper course would be to require inspectors to obtain a warrant whenever a householder objected to the entry.[357]

Seven years later Mr. Justice Brennan's suggestion was adopted by a Supreme Court with two new members joining the *Frank* dissenters in the majority opinion (Justices White and Fortas took the seats of two members of the *Frank* majority). In *Camara v. Municipal Court,*[358] and its companion case, *See v. City of Seattle,*[360] the Supreme Court acknowledged the implications of a liberal construction of the fourth amendment.

> The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. The Fourth Amendment thus gives concrete expression to a right of the people which "is basic to a free society."[361]

The majority ruled, on the one hand, that the fourth amendment bars prosecution of a person for refusing to permit administrative officials to conduct warrantless inspections and, on the other, that although there was no evidence that inspections programs could not "achieve their goals within the confines of a reasonable search warrant requirement,"[362] an administrative warrant nevertheless might be issued on a showing of less than the probable cause required in criminal cases. Justice White outlined the necessary requirements.

> Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the conditions of the particular dwelling. It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a "synthetic search warrant" and thereby to lessen the overall protections of the Fourth Amendment. . . . But we do not agree. The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public in-

356. *Compare* Eaton v. Price, 364 U.S. 263, 264 (1960) (opinion by Brennan, J., joined by Warren, C.J., Black, J., and Douglas, J.) *with* Eaton v. Price, 360 U.S. 246, 248 (1958) (opinion by Frankfurter, J., Clark, J., Harlan, J., and Whittaker, J.).

357. Eaton v. Price, 364 U.S. at 264.

358. 387 U.S. 523 (1967).

359. 387 U.S. 541 (1967).

360. Camara v. Municipal Court, 387 U.S. at 528, *quoting* Wolf v. Colorado, 338 U.S. 25, 27 (1949).

361. Camara v. Municipal Court, 387 U.S. at 533.

362. *Id.* at 538-39 (citation omitted).

> terest justifies the intrusion contemplated, there is probable cause to issue a suitably restricted search warrant.[363]

Upon recognizing the assertions of constitutionally protected privacy, the Court retained the safeguard against official intrusions in the requirement that a warrant be issued upon a showing of probable cause, but permitted the standard of probable cause to vary with the type and manner of the search.

The *Camara* and *See* decisions indicate a hierarchy in the standard of probable cause and concomitantly the relative merits of claims to personal privacy.[364] The traditional standard of probable cause remains required of criminal searches. Privacy attains a high degree of protection because of its association and derivative or instrumental value[365] with the fundamental liberty to be secure from arbitrary governmental intrusions. Administrative searches, however, require a lower standard of probable cause upon a balancing of the relative merits of individual privacy and the public interest in inspection. Ironically, then, in such instances where claims to a right of privacy reflect an individual's concern for privacy's intrinsic worth, the Court permits a lower standard of probable cause.

Administrative searches of commercial property also require a prior determination of probable cause upon a balancing of privacy and societal interests, but, here, claims of privacy have less weight.[366] Thus,

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363. *See* Note, *Administrative Searches and the Right of Privacy in the United States,* 23 INT'L. & COMP. L. Q. 169, 171 (1974).

364. For a discussion of the derivative protection of privacy interests, *see* O'Brien, note 7 *supra.*

365. See v. City of Seattle, 387 U.S. 544 (1966); United States v. Powell, 379 U.S. 48, 57-58 (1964).

366. *See* United States v. Biswell, 406 U.S. 311, 316 (1972) (warrantless inspection where firearms sold); Colonnade Catering Corp. v. United States, 397 U.S. 72, 74, 77 (1970) (warrantless search of premises upon which liquor is sold).

The Supreme Court has recently reaffirmed this right to search in heavily regulated industries by defining the limits of that right. In Marshall v. Barlow's, Inc., 46 U.S.L.W. 4483 (1978), the Court struck down Section 8(a) of the Occupational Safety and Health Act of 1970 [OSHA], 29 U.S.C. § 657(a) (1970). That section permitted warrantless searches of businesses in interstate commerce for the purpose of insuring the safety of workers and patrons. The Court distinguished *Biswell* and *Colonnade* as exceptions to the warrant requirement.

> A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him.

Id. at 4484, *quoting* Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973). In *Barlow,* the Court found the business-person's right to privacy included the right to have a neutral magistrate determine the reasonableness of a search according to an "administrative plan containing specific neutral criteria." *Id.* at 4487. In addition, a warrant would serve to inform the owner of the precise object and extent of the search. *Id.* Writing for the majority, Mr. Justice White found that "[i]f the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory

although administrative searches potentially may seriously jeopardize an individual's privacy expectations — expectations which reflect a normative concern for the intrinsic worth rather than the instrumental value of privacy — judicial construction of probable cause provides a lower threshold requirement for an administrative warrant than required for criminal searches. Legal recognition of privacy claims also varies with the type of administrative program (health inspections,[367] welfare visits,[368] parole and probation searches,[369] airport[370] and border searches[371]) and the manner in which officials conduct the search.[372]

Recent cases, including the unanimous decision in *G.M. Leasing Corporation v. United States,*[373] underscore the Supreme Court's continuing reliance on the doctrine of constitutionally protected areas in deter-

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or regulatory standards." *Id.* at 4484.

One week after *Barlow* was handed down, the Court held that unless the exigencies of proper fire prevention require the presence of firefighters, a warrant is required when fire department personnel conduct a search to determine the cause of a fire. Michigan v. Tyler, 46 U.S.L.W. 4533, 4536-37 (1978). The court concluded that

> there is no diminution in the person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately.

Id. at 4535. The Court noted that "though a fire victim's privacy must normally yield to the vital social objective of ascertaining the cause of the fire, the magistrate can perform the important function of preventing harassment by keeping that invasion to a minimum." *Id.* at 4536. Mr. Justice Stevens concurred in the Court's result. Yet, his concurrence echos the Due Process arguments which he voiced in his dissent in Zurcher v. Stanford Daily, 46 U.S.L.W. 4546, 4555 (1978); *see* note 348 *supra.* In *Tyler,* he wrote that "[t]he Fourth Amendment interests involved in this case could have been protected in either of two ways — by a warrant, if probable cause existed; or by fair notice, if neither probable cause nor a special law enforcement need existed." *Id.* at 4537.

367. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); Camara v. Municipal Court, 387 U.S. 523 (1967).

368. Wyman v. James, 400 U.S. 309 (1966).

369. Until recently parolees and probationers have been denied substantial fourth amendment protections with regard to searches and seizures conducted by their parole officers. Some courts, however, have indicated some degree of freedom from unreasonable searches and seizures. *See, e.g.,* Latta v. Fitzharris, 521 F.2d 246, 250 (9th Cir. 1975) (a "hunch" approved as providing reasonable cause for a parole search); *id.* at 246 (Choy, J., dissenting). *See generally* Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See,* 61 CAL. L. REV. 1011 (1973).

370. *See* Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to Camara and See,* 50 WASH. L. REV. 341, 370-72 (1975).

371. United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

372. United States v. Biswell, 406 U.S. 311, 316 (1972) (warrantless nonforcible searches conducted in random fashion so long as they occur during business hours are permissible under the Gun Control Act of 1968, 18 U.S.C. § 921 (1970)); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (warrantless inspection of federally licensed liquor dealer under 25 U.S.C. § 5146(b) (1970)); Wyman v. James, 400 U.S. 309 (1969); Camara v. Municipal Court, 387 U.S. 523, 539 (1967) (dictum) (warrantless area inspections in certain health emergencies).

373. 429 U.S. 338 (1977). *See also* United States v. Chadwick, 433 U.S. 1 (1977) (privacy interest sufficient to require a warrant when locked trunk is in police possession).

mining the reasonableness of individual's expectations and claims of protected privacy.[374] In reaffirming *Camara's* holding that "except in certain carefully defined classes of cases, as searches of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant,"[375] the Court in *G.M. Leasing* declined to interpret section 6331 of the Internal Revenue Code "as giving *carte blanche* for the warrantless invasions of privacy."[376] The Internal Revenue Service for the purpose of jeopardy assessments may make warrantless automobile seizures occurring in public streets or other open areas since such searches involve no unconstitutional invasion of privacy, but a warrantless entry into the privacy of a business office may not be justified on the grounds that assets are seizable to satisfy tax assessments. Justice Blackmun, for the Court, observed that,

> [i]t is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer.[377]

Not unsurprisingly, the Burger Court upheld claims of protected privacy against the warrantless seizures of private property in constitutionally protected areas. *G.M. Leasing* epitomizes the Court's liberal construction yet strict application of the fourth amendment to privacy claims. The Court unanimously held unlawful the warrantless entry and seizure of assets in a business office by agents of the Internal Revenue Service because the circumstances of the case established a nexus between privacy and proprietary interests.

C. Papers, Property, and Informational Privacy

The so-called "property bias" of the Supreme Court of the nineteenth and early twentieth century continues, but with the opposite effect of promoting strict application of the fourth amendment and illiberal protection for personal privacy. Although following *Katz's* liberal construction and focus on individuals' reasonable expectations of privacy, the Burger Court has continued to apply strictly fourth amendment guarantees in validating claims to informational privacy only when privacy and proprietary interests are conjoined. *California Bankers Association v. Schultz*[378] and *United States v. Miller*[379] are only

374. *See* Michigan v. Tyler, 46 U.S.L.W. 4546 (1978); Marshall v. Barlow's, Inc., 46 U.S.L.W. 4483 (1978); *see also* discussion in note 366 *supra*.

375. G. M. Leasing Corp. v. United States, 429 U.S. at 358, *quoting* Camara v. Municipal Court, 387 U.S. at 528-29.

376. *Id.* at 358.

377. *Id.* at 629-30.

378. 416 U.S. at 21 (1974).

379. 425 U.S. 435 (1976).

two recent instances within the patterns of judicially enforced rights of privacy in which claims to informational privacy have received illiberal protection. As at least one commentator observed; "*Katz* has not eliminated property considerations — ownership, possession, occupancy — but has changed their role from legal touchstones for the Fourth Amendment to standards by which expectations of privacy are evaluated."[380]

Actually, the Supreme Court's strict application of fourth amendment guarantees and illiberal protection for privacy expectations in personal information derives from the interplay of three judicial policies: legitimizing administrative searches and seizures on a lower standard of probable cause than required of criminal investigations; circumventing a privacy analysis by fashioning an assumption of risk rule applicable when individuals disclose personal information to bugged informers or trusted friends-turned-informers; and, most importantly, re-embracing fourth amendment property concepts thereby converting analysis of "expectations of privacy into expectations of ownership, possession, or occupancy."[381] The difficulties in safeguarding individuals' expectations of privacy in personal information, particularly, information held by another, are exacerbated by the insufficient protection against invasions of privacy by administrative summons and subpoena duces tecum compelling parties' production of papers or documents in which individuals claim to have reasonable expectations of privacy and a right to fourth amendment protection.

Individuals' expectations in informational privacy may be compromised in three ways: access to personal information may be obtained directly from an individual by means of electronic eavesdropping or by compelling his disclosure on threat of criminal sanction; recipients of volunteered information may be required by some third party, such as the government, to disclose personal information against their wishes and those of the individuals concerned; and, alternatively, recipients of personal information may voluntarily disclose information to the government against the wishes and privacy expectations of the individual concerned.[382] In the first situation, when personal information is gathered surreptitiously, fourth amendment guarantees provide some protection, but, generally, the principal privacy protection in such situations derives from the fifth amendment.[383] The second situation characterizes that presented in the cases of *California Bankers Association* and *United States v. Miller,* while the third, those in which a

380. Comment, *Government Access to Bank Records,* 83 YALE L. J. 1439, 1461 (1974).

381. *Id.*

382. For a more detailed discussion of the ways in which interests in informational privacy may be compromised *see* O'Brien *supra* note 7.

383. For discussions of the applicability of the fifth amendment to claims of protected

bugged informer or *Hoffa*-type of informer discloses personal information. In the latter two situations the fourth amendment ostensibly provides the principal guarantee for privacy interests.

While analytically distinguishable, privacy interests in all three situations have received illiberal protection. In the first, the Court has fashioned fourth amendment requirements for wiretapping and other forms of electronic surveillance by which access to personal information is gathered directly from but unbeknownst to an individual. Yet, it narrowed the breadth of fifth amendment guarantees protecting against compelled personal disclosures.[384] In the second situation, claims of privacy have been denied since the Court found no legitimate expectations of privacy; rather the Court circumvented an analysis of individuals' privacy expectations by its "assumption of risk" rule. Similarly, in the third situation, the Court has permitted illiberal protection by failing to find any "societal judgment" as to the reasonableness of individuals' privacy expectations and, furthermore, re-emphasized proprietary concepts in application of the fourth amendment.

Notwithstanding the broad range of privacy interests which receive fourth amendment protection under the requirement proscribing unreasonable searches and seizures, and specifying that "no warrant [for search and seizure] shall issue, but upon probable cause," judicial enforcement of the amendment's guarantees leaves open the possibility of serious invasions of personal privacy by administrative summons and subpoena duces tecum[385] of papers in the possession of third parties, but in which individuals retain expectations of privacy.

In *Boyd,* the Supreme Court observed that

> [i]t is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure

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privacy *see* Gerstein, *Privacy and Self-Incrimination,* 80 ETHICS 87 (1970); McKay, *Self-Incrimination and the New Privacy,* 1967 SUP. CT. REV. 209 (P. Kurland ed. 1971); Comment, *The Protection of Privacy by the Privilege Against Self-Incrimination: A Doctrine Laid to Rest?* 59 IOWA L. REV. 1336 (1974).

384. *See* United States v. Miller, 425 U.S. 435 (1976); Fisher v. United States, 425 U.S. 391 (1976); Couch v. United States, 409 U.S. 322 (1973). *See also* Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments,* 90 HARV. L. REV., 945, 956 (1977); Comment, *The Protection of Privacy by the Privilege Against Self-Incrimination: A Doctrine Laid to Rest?* 59 IOWA L. REV. 1336 (1974).

385. The subpoena duces tecum is a traditional common law writ for compelling production of documents. FED. R. CRIM. P. 17(c). Administrative agencies may also issue summonses requiring similar production of documents. *See, e.g.,* 26 U.S.C. § 7602(2) Tax Reform Act of 1976, Pub. L. No. 94-455, § 1205, (1976). *See generally* 8 J. WIGMORE, EVIDENCE 2200 (1961).

> would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.[386]

Nevertheless, the Court subsequently established that the fourth amendment only prohibits overly broad and sweeping summonses.[387] The nature of the papers sought by a subpoena duces tecum usually is not considered in applying the guarantees of the fourth amendment. Instead, subpoenas must only satisfy the requirement that "the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."[388] Hence, administrative subpoenas and summons need only satisfy the fourth amendment requirement that warrants not be overly broad so as to constitute a general search.[389] An Internal Revenue Service summons, for example, need only describe documents and papers sought with "reasonable particularity" so that respondents may produce such records for inspection.[390]

Since the Court has held that administrative investigations are analogous to grand jury proceedings in that both are basically inquisitional,[391] administrative summonses require no showing of probable cause.[392] In *United States v. Powell,* the Supreme Court held that the Internal Revenue Service "need not meet any standard of probable cause to obtain enforcement of [its] summons, either before or after the three-year statute of limitations on ordinary tax liability has

386. Boyd v. United States, 116 U.S. 616, 622 (1886).

387. In FTC v. American Tobacco Co., 264. U.S. 298 (1924), Justice Holmes observed:

> Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.

Id. at 305-06 (footnote omitted).

388. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950). *But see* United States v. Lefkowitz, 285 U.S. 452, 464-65 (1932) (documents of evidentiary value only ruled to be improperly seized). *See also* United States v. Miller, 425 U.S. 435, 442; and discussion p. 735 *infra.*

389. *See* Stanford v. Texas, 379 U.S. 476, 480 (1965); United States v. Powell, 379 U.S. 48 (1964); Hale v. Henkel, 201 U.S. 43 (1906) (holding a subpoena duces tecum, which requires so many documents from a corporation that it would stop the business, represented an overly burdensome request and, thus, was an unreasonable search and seizure). *See also* Andresen v. Maryland, 427 U.S. 463 (1976).

390. *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 273, 186 (1948); Brown v. United States, 276 U.S. 134 (1928) ("specifies a reasonable period of time, and with reasonable peculiarity the subjects to which the documents called for relate"); Wheeler v. United States, 226 U.S. 478 (1912) ("[not] too broad as to be objectionable"); Wilson v. United States, 221 U.S. 361 (1911) ("suitably specific and properly limited in scope").

391. United States v. Morton Salt Co., 338 U.S. 632, 642 (1952). *See also* Blair v. United States, 250 U.S. 273, 281 (1919).

392. United States v. Powell, 379 U.S. 48, 57 (1964); Ryan v. United States, 379 U.S. 61 (1964).

expired."[393] Administrative subpoenas are lawful if: (1) the underlying investigation has a legitimate civil purpose authorized by Congress; (2) the documents sought are relevant and material to the investigation; (3) the subpoena is sufficiently specific so that compliance will not be unreasonably burdensome; and (4) other procedural requirements are met.[394]

Both litigation and statutory scheme[395] have provided broad powers for the Internal Revenue Service to examine papers, books, and records with respect to tax liability or for the purpose of ascertaining the correctness of tax returns.[396] Internal Revenue Service summons, while administratively issued, however, are enforceable only by a federal district court in an "adversary proceeding" affording the opportunity for challenge by and protection of the witness.[397] Consequently, only when the government attempts to obtain papers or documents by judicial enforcement of an administrative summons, may an individual intervene and contest the wrongfulness of the summons.[398] *Donaldson v. United States* illustrates the problems of individuals' intervention with administrative summons as well as the tendency of the Court to focus on proprietary interests in determining the applicability of fourth amendment guarantees.

While *Donaldson* was primarily concerned with the prerequisites of intervention under the Federal Rules of Civil Procedure[399] and not the fourth amendment, the Supreme Court distinguished objects ostensibly protected by the fourth amendment, thereby implying that without a

393. United States v. Powell, 379 U.S. at 57.

394. *Id.* at 57-58. *See also* United States v. Bisceglia, 420 U.S. 141 (1975); Donaldson v. United States, 400 U.S. 517, 530-36 (1971) (subpoena may not be used on support of ongoing criminal prosecution); United States v. Morton Salt Co., 338 U.S. 632, 652-53 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208-11 (1946); FTC v. American Tobacco Co., 264 U.S. 298, 305-07 (1924).

395. *See* I.R.C. §§ 7402, 7602, 7604, 7605. It should be noted that some provisions of the I.R.C. have been amended by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1205, (1976) (administrative summons).

396. *See generally* Flippen, *The Internal Revenue Service Summons: An Unreasonable Expense Burden on Banks and an Invasion of Depositors' Privacy?*, 12 AM. BUS. L. J. 249 (1975); Körner, *Recent Cases Highlight Broad Powers of Service to Examine Taxpayers' Records*, 34 J. TAX. 194 (1971); LeValley & Lance, *The IRS Summons and the Duty of Confidentiality: A Hobson's Choice for Bankers*, 89 BANKING L. J. 979, 980 (1972); Lipton, *How Valid is IRS Use of Search Warrants to Find and Seize Evidence of Fraud in Tax Cases?*, 38 J. TAX. 95 (1974); Segal, *Supreme Court: Fourth Amendment Does Not Bar Subpoena of Taxpayer's Bank Records*, 45 J. TAX. 80 (1976); Note, *Constitutional Law — Searches and Seizures — Banks and Banking — Witnesses — Right to Privacy*, 8 AKRON L. REV. 181 (1974); Note, *The Use of Tax Returns in Non-Tax Prosecutions*, 41 BROOKLYN L. REV. 508 (1975). Note, *IRS Subpoena Power to Investigate Unknown Taxpayers*, 50 N.Y.U. L. REV. 177 (1975).

397. Reisman v. Caplin, 375 U.S. 440 (1964). United States v. United States District Court, 407 U.S. 297, 313-18 (1972).

398. Donaldson v. United States, 400 U.S. 517 (1971).

399. *See* FED. R. CIV. P. 24(a)(2).

proprietary interest no claim under the fourth amendment was permissible against summons or subpoena of records. Here, the Court denied Donaldson's attempt to intervene with an Internal Revenue Service summons directed at his former employer and ordering production of salary payments and other transactions relating to him because he could not demonstrate a "significantly protectable interest."[400] Ruling that the corporate records sought were "records in which the taxpayer has no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer,"[401] the Court emphasized that Donaldson had no significantly protectable interest inasmuch as he did not own or possess the records; indeed, the records were not "in the hands of [his] attorney or his accountant, with the attendant question of privilege, or even in the hands of anyone with whom the taxpayer has a confidential relationship of any kind."[402] *Donaldson* thus suggests that as a prerequisite individuals must have a proprietary interest in papers or documents relating to them but in another's possession before they may interfere with an administrative summons.[403]

Individuals ostensibly have no constitutionally recognizable expectations of privacy under the fourth amendment in documents which they do not own or possess; still, corporate or bank recordkeeping of individuals' transactions may reveal a substantial amount of information about individuals' engagements and associations.[404] The Court nevertheless has long held that Congress may require recordkeeping as part of the requirements of law enforcement and, moreover, those records are subject to government inspection under the conditions as established by the enacting legislation.[405] Audits by bank examiners, for example, are permissible, even if deemed "searches" by depositors. In general, warrantless searches and recordkeeping requirements are reasonable where necessary for governmental supervision of a regulated business, and may be justified by their convenience for the persons regulated as well.[406]

Accordingly, the Supreme Court in *California Bankers Association*

400. Donaldson v. United States, 400 U.S. 517, 531 (1971).

401. *Id.* at 523.

402. *Id.*

403. *See also* California Bankers Ass'n v. Schultz, 416 U.S. 21, 47 (1974); Shapiro v. United States, 335 U.S. 1 (1948); United States v. Darby, 312 U.S. 100 (1941).

404. *See* dissenting opinions in United States v. Miller, 425 U.S. 435, 447-56 (1976); California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974); discussion p. *infra*. *See also* Note, *The 1970 Bank Secrecy Act and the Right of Privacy*, 14 WM. & MARY L. REV. 929 (1973); *Government Access to Bank Records* note 380 *supra*.

405. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973); United States v. Biswell, 406 U.S. 311, 316 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

406. California Bankers Ass'n v. Schultz, 416 U.S. at 45.

v. Schultz upheld the reporting requirements of the Bank Secrecy Act[407] as "controlled by existing legal process."[408] Since it is long established that corporations have no expectations of privacy inasmuch as they may not invoke personal privileges afforded natural citizens,[409] in *California Bankers Association* the Court refused to acknowledge any legitimate privacy expectations on the part of banks or their depositors. Indeed, although the district court dealt squarely with the issue of what "expectations of privacy" are protected by the fourth amendment, Justice Rehnquist, for the Court, held that the fourth amendment claims by California Bankers Association were asserted vicariously, and then evaded the privacy claims of the depositor-plaintiffs by denying standing on grounds that the plaintiffs had not alleged that they had or would engage in transactions involving more than $10,000, which was the only type of domestic transaction the regulations required banks to report.[410] More specifically, Justice Rehnquist rejected the bank plaintiffs' claim that the recordkeeping provisions violated due process "by imposing unreasonable burdens upon them,"[411] citing *Darby* and *Shapiro* in support of Congress's power to require recordkeeping as an aid to law enforcement; adding that such "provision requiring reporting or recordkeeping by the paying institution, rather than the individual who receives the payment, are by no means unique."[412] Justice Rehnquist rejected the argument that the coerced reporting section of the Act constituted an unreasonable search and seizure, citing *Boyd* for the proposition that, "entries . . . in books required by law to be kept for their [revenue officials] inspections, are necessarily exempt out of the category of unreasonable searches and seizures."[413] The bank plaintiffs also challenged the domestic reporting regulations on fourth amendment grounds, but the Court relied on *United States v. Morton Salt Co.*[414] in holding that banks are parties to the transactions and thus reporting requirements are not unreasonable.

Justices Douglas, Brennan, and Marshall dissented. Both Justice Douglas and Justice Marshall focused upon the consequences of the Act's recordkeeping and reporting requirements. Justice Douglas pointed out that "heretofore the Nation has confined compulsory recordkeeping to that required to monitor either (1) the recordkeeper, or (2) his business," but, this Act has neither purpose but instead

407. *Id.* at 35-38, 59-61, 63-75.
408. *Id.* at 52.
409. *Id.* at 65-67.
410. *Id.* at 68.
411. *Id.* at 45.
412. *Id.* at 47.
413. *Id.* at 61, *quoting* Boyd v. United States, 116 U.S. 616, 623-24.
414. 338 U.S. 632 (1952).

requires the bank in keeping records to act as the government's agent in monitoring its customers and clients.[415] Thereupon, Justice Douglas contended that,

> [o]ne's bank accounts are within the "expectations of privacy" category. For they mirror not only one's finances but his interests, his debts, his way of life, his family and his civic commitments . . . A checking account, as I have said, may well record a citizen's activities, opinion, and beliefs as fully as transcripts of his telephone conversations.[416]

Similarly, Justice Marshall pointed out that

> [b]y compelling an otherwise unwilling bank to photocopy the checks of its customers, the Government has as much of a hand in seizing those checks as if it had forced a private person to break into a customer's home or office and photocopy the checks there . . . Our Fourth Amendment jurisprudence should not be so wooden as to ignore the fact that through microfilming and other techniques of this electronic age, illegal searches and seizures can take place without brute force characteristic of the general warrants which raised the ire of the Founding Fathers. . . . As we emphasized in *Katz* . . . the absence of any physical seizure of tangible property does not foreclose Fourth Amendment inquiry. . . . By the same logic, the Fourth Amendment should apply to the recording of checks mandated by the Act here. And such a massive and indiscriminate search and seizure, not only without a warrant but also without probable cause to believe that any evidence to be obtained is relevant to any investigation, is plainly inconsistent with the principles behind the Amendment.[417]

Although the majority opinion in *California Bankers Association* evaded the claims of privacy, the Court in 1976 dealt with the issue of privacy and the Bank Secrecy Act. In *United States v. Miller,*[418] the government appealed a court of appeals ruling that that documents subpoenaed duces tecum under the Bank Secrecy Act fell within a constitutionally protected area of privacy. The Supreme Court reversed, relying on *Hoffa* for the proposition that "[n]o interest legitimately protected by the Fourth Amendment" is implicated by government investigative activities unless there is an intrusion into a zone of privacy, into "the security a man relies upon when he places himself or his property within a constitutionally protected area."[419] Miller argued that the combi-

415. California Bankers Ass'n v. Schultz, 416 U.S. at 86.
416. *Id.* at 89-90.
417. *Id.* at 94-95 (citations omitted).
418. 425 U.S. 435 (1976).
419. *Id.* at 440, *quoting* Hoffa v. United States, 385 U.S. 293, 301-02 (1966).

nation of the Bank Secrecy Act's recordkeeping requirements and the issuance of subpoena duces tecum to obtain those records permits the government to circumvent fourth amendment guarantees which would apply if the government proceeded directly against him.

The Court rejected Miller's argument, first, by distinguishing *Boyd* as well as emphasizing the importance of ownership and possession of documents, and, second, by examining whether depositors have any legitimate expectations of privacy in their banking transactions. While noting *Miller's* reliance on *Katz's* proposition that " 'we have departed from the narrow view' that 'property interests control the right of the Government to search and seize,' and that a 'search and seizure' becomes unreasonable when the Government's activities violate 'the privacy upon which (a person) justifiable relie(s),' " the Court placed greater emphasis on another proposition in *Katz,* namely, "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[420] Thereupon, the Court determined that it "must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate 'expectation of privacy' concerning their contents."[421] Because the checks were found not to be "confidential communications but negotiable instruments to be used in commercial transactions,"[422] depositors were held to have no fourth amendment interests and, consequently, a subpoena to the bank was ruled not violative of any rights "even if a criminal prosecution is contemplated at the time the subpoena is issued."[423] Furthermore, the Court implied that in dealing with personal information contained in or which may be inferred from required records, it might employ the rationale of those cases dealing with informers, in which individuals are held to assume a risk of disclosure and of access to their personal communications.[424] "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government."[425]

Thus, the majority in *Miller,* on the one hand, relying on *Katz's* liberal contruction of fourth amendment guarantees for privacy nevertheless strictly applied the amendment's protections by emphasizing the nature of the documents sought and implicitly assuming that in-

420. United States v. Miller, 425 U.S. at 442, *quoting* Katz v. United States, 389 U.S. 347, at 353, *quoting* Warden v. Hayden, 387 U.S. 294, at 304.

421. United States v. Miller, 425 U.S. at 442. *See also* Couch v. United States, 409 U.S. 322, 335 (1973) (*Couch* is principally a Fifth Amendment case, although *Couch* raised a Fourth Amendment claim in intervening with a subpoena duces tecum of her records held by her accountant); Comment, *The Protection of Privacy by the Privilege Against Self-Incrimination: A Doctrine Laid to Rest?,* 59 IOWA L. REV. 1336 (1974).

422. United States v. Miller, 425 U.S. 435 (1976).

423. *Id.*

424. *Id.*

425. *Id.* at 443.

dividuals have reasonable expectations of privacy in only papers which they also own or possess; and, on the other hand, suggested that its strict application of the fourth amendment could be buttressed by circumventing a privacy analysis with an "assumption of risk" rule. *California Bankers Association v. Schultz* and *United States v. Miller* illustrate the Burger Court's refusal to "conceptualize the intangible nature of the injury, the chilling effect upon privacy, when information systems [are] set up to record"[426] private transactions and the activities of depositors. As the dissenters noted, and one commentator observed: "[t]aking a practical look at the [Bank Secrecy] Act, it is apparent the Government is not interested in the transaction itself, but its real inquiry is into the background of the financial transactions — a background which the individual may seek to keep private."[427] The Court evaded its own privacy analysis by re-emphasizing proprietary concepts and, moreover, by failing to consider not only the value of such personal information per se but also how access to that information may influence individuals' future activities and their expectations of privacy.[428]

Santana and *United States v. Miller* indicates not only that the Court continues to promote a spatial conception of privacy but also a rigid application of fourth amendment guarantees to claims of personal privacy. Notwithstanding the Court's observation in *United States v. United States District Court* that, "[t]hough physical entry of the home is the chief evil against which the wording of the fourth amendment is directed, its broader spirit now shields *private speech* from unreasonable surveillance,"[429] claims to informational privacy which have no clearly established contextual nexus with proprietary interests will fail.[430]

Individuals' expectations of privacy with regard to their banking relationships and transactions arguably are not as great as their expectations of privacy with respect to papers located within the fortress they call "home," and, perhaps, the "incidental exposure of a depositor's financial transactions during a legitimate tax investigation is . . . a tolerable interference with individual privacy, absent an abuse of discre-

426. Comment, *The Constitutional Right of Privacy: An Examination*, 69 NW. U. L. REV. 263, 291 (1974). *See also* United States v. Miller, 425 U.S. 435 (1976); California Bankers Ass'n v. Schultz, 416 U.S. 21 (1973); United States v. United States District Court, 407 U.S. 297 (1972); Laird v. Tatum, 408 U.S. 1 (1972).

427. Note, *Constitutional Law — Searches and Seizures — Banks and Banking — Witnesses — Right to Privacy*, 8 AKRON L. REV. 181, 189 (1974).

428. *See generally* dissenting opinions in United States v. Miller, 425 U.S. 435, 447 (1976); California Bankers Ass'n v. Schultz, 416 U.S. 21, 53-55, 63-67 (1973).

429. United States v. United States District Court, 407 U.S. 297 (1972) (emphasis added).

430. *See* Laird v. Tatum, 408 U.S. 1 (1972); Donaldson v. United States, 400 U.S. 517 (1971). *Compare* G. M. Leasing Corp. v. United States, 429 U.S. 338 (1977) *with* Brown v. United States,

tion."[431] Still, the Court has not addressed the policy issues of recordkeeping and reporting, the potential for discretionary injustice, and the consequences for personal privacy.

Analytically, there are at least two separate issues in governmental requirements for recordkeeping and reporting: (1) what kind of files and information may reasonably be collected and maintained; and (2) what kinds of procedural safeguards should be established for the collection, maintenance, and access to information gathered. In neither *California Bankers Association* nor *United States v. Miller* did the Court entertain an analysis of the reasonableness of bank recordkeeping and reporting, and the potential effect on personal privacy.[432] Rather, the Act's requirements were sustained as "controlled by the existing legal process." As one commentator observed of the Court's strict application of the fourth amendment: "Not only does it provide limited protection against the overly broad collection of personal information, but it provides practically no limitation on what officials may do with information they gather by lawful means."[433]

VI. CONCLUSION

Recent litigation poses constitutional issues not unlike those of the early twentieth century. While fourth amendment privacy issues in the 1920s and 1930s arose with the government's use of electronic surveillance technology, in the 1960s and 1970s the privacy claims revolve around the government's use of third generation computer hardware allowing extensive information collection, maintenance, and exchange. Nevertheless, the present Court, like the Taft Court, fails to "conceptualize Fourth Amendment interests in terms more appropriate to a [increasingly] technological society in which property and privacy are no longer unified."[434] Although the Warren Court in a number of cases[435] re-embraced the *Boyd*-fostered liberal construction of fourth amendment protected privacy by repudiating *Olmstead's* strict construction and application of the fourth amendment and its underlying property concepts and principles, it failed to promote a conceptual framework for constitutional recognition of individuals' expectations

411 U.S. 223, 229 (1973) (defendants not on the premises at the time of a police search, nor having any proprietary interest in the premises, have no standing to challenge the propriety of the search).

431. Flippen, *supra* note 396, at 279.

432. *See generally Personal Privacy in an Information Society, Report of the Privacy Protection Study Commission* (U.S. Printing Office 1977).

433. Bogomolny, *supra* note 7, at 233.

434. Comment, *Government Access to Bank Records*, 83 YALE L. J. 1439, 1474 (1974).

435. *See* Mancusi v. DeForte, 392 U.S. 364 (1968); Katz v. United States, 389 U.S. 347 (1967); Warden v. Hayden, 387 U.S. 294 (1967). *But see* discussion pp. 715-18 *supra*.

of informational privacy. The Burger Court further circumscribed fourth amendment guarantees and *Katz's* analysis of reasonable expectations of privacy by re-embracing proprietary concepts in determining legitimate privacy interests and areas of fourth amendment protection.

Exculpatory Provisions in Leases of Commercial Property— A Realistic Appraisal

*Michael Meyerow**

Judicial interpretations of commercial lease exculpatory provisions have been inconsistent, creating troublesome unpredictability in their enforcement. In this article, Attorney Myerow examines the policy and construction bases relied upon by courts in dealing with such clauses: application of selected aspects of the doctrine of unconscionability; focusing upon the nature of negligent conduct sought to be exculpated; consideration of whether a statute has been violated; and a strained, narrow reading of the contractual language. In addition, a succinct critique of state statutes prohibiting lessors' attempts to exculpate themselves from the consequences of negligent conduct is offered. It is submitted that a comprehensive and reasoned approach to the problems of commercial lease exculpatory provisions can be discerned by identifying the interests of the public and lessors/lessees in exculpation with a view to the underlying goals of the tort compensation system. The author concludes that clauses exculpating a party to a commercial lease from the consequences of negligently caused property damage is both equitable and consistent with the values of compensation while exculpation from personal injury damages should be discouraged.

The employment of exculpatory clauses in real property leases has never been favored by the law.[1] Nevertheless, in the early part of this century dealings between a tenant and landlord were perceived as mat-

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1. *E.g.*, Marshall v. Maryland, D. & V. Ry. Co., 31 Del. 170, 112 A. 526 (Del. Supp. Ct. 1921); Ragland v. Rooker, 124 Ga. App. 361, 366, 183 S.E.2d 579, 585 (1971); Talley v. Skelly Oil Co., 199 Kan. 767, 774, 433 P.2d 425, 431 (1967); Cunningham v. Mutual Reserve Life Ins. Co., 125 App. Div. 688, 689, 109 N.Y.S. 1070, 1072 (1908); N.Y. GEN. OBLIG. LAWS § 5-321 (McKinney 1964). *See* Note, *Exculpatory Clause in Lease Exempting Landlord From Liability For Negligence*, 42 YALE L. J. 139, 141 (1932); *Cf.* Baltimore & Ohio S. W. Ry. Co. v. Voigt, 176 U.S. 498, 505 (1900). *But see* Johnson v. First Nat'l Bank, 415 Ill. 453, 114 N.E.2d 721 (1953); Clarke v. Ames,

ters of purely private concern and, consequently, lease provisions by which either party attempted to avoid the consequences of his or her negligence were uniformly enforced by the courts on the basis of traditional notions of "freedom of contract."[2] However, courts began to recognize the increasing disparity in bargaining positions between landlords and tenants and the fact that more landlords were employing standard form leases which purported to absolve them of virtually all potential liability recognized by law.[3] The apparently harsh results ensuing from enforcement of particular provisions were avoided through resort to a myriad of jurisprudentially dexterous distinctions.

Many recently reported challenges to exculpatory provisions in residential leases[4] have involved personal injuries and enforcement of the particular clauses in these cases would have shocked the consciences of most jurists. Imprecisely defined and often inarticulate concepts of consumer protection and public policy became the rules of the residential exculpatory clause cases, and as a result, it was impossible to determine in advance whether a particular effort at exculpation would run counter to the temperament of a court called upon to enforce it.[5] Quite recently, however, a rise in judicial, legislative, and commentative abhorrence of exculpatory provisions in residential leases has been ac-

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267 Mass. 44, 165 N.E. 696 (1929). A valid exculpatory clause deprives one contracting party, the exculpator, of a right to recover damages for injuries he sustains as a result of future negligent acts or omissions of the other contracting party, the exculpatee. Weaver v. American Oil Co., 261 N.E.2d 99, 102 (Ind. App. 1970), *modified on other grounds*, 257 Ind. 458, 276 N.E.2d 144, 49 A.L.R. 3d 306 (1971); Dilks v. Flohr Chevrolet Inc., 411 Pa. 425, 435 L.C. 11, 192 A.2d 682, 687 n.11 (1963). *See* 2 M. FRIEDMAN, LEASES § 17.1 (1974). Exculpatory provisions should be distinguished from indemnity provisions. Whereas a valid exculpatory clause bars recovery by an injured exculpator an indemnity provision does not affect an injured victim's right to recover, but simply shifts from the indemnitee to the indemnitor the ultimate financial burden of compensating for harm caused to third parties by the indemnitee. Jamison v. Ellwood Consol. Water Co., 420 F.2d 787, 789 (3d Cir. 1970). *See* 11 COUCH, INSURANCE 2d § 44.4 (1963).

2. *See, e.g.*, Checkley v. Illinois Central R. Co., 257 Ill. 491, 100 N.E. 942 (1913); Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929).

3. *See* Note, *The Form 50 Lease: Judicial Treatment of an Adhesion Contract*, 111 U. PA. L. REV. 1197, 1198 (1963); Note, *Exculpatory Clauses in Standard Form Leases: A Need for Direct Judicial Action*, 28 U. PITT. L. REV. 85 (1966) [hereinafter cited as *Direct Judicial Action*].

4. The proliferation of litigation involving exculpatory clauses in residential leases is a product of several factors. First, there are simply more residential tenants than there are commercial ones. Also, landlords are more likely to be responsible for care and maintenance and for common areas in the residential situation. *See generally*, Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?* 1975 WIS. L. REV. 19 (1975). Moreover it is suggested by one empirical study that a majority of residential tenants either do not read or do not understand the terms of their leases other than date of occupancy and rental amounts due, and that about fifty percent of those who in fact read and understand the meaning of exculpatory provisions in their leases wrongly believe that they will not be enforced by the courts of their state. *See* Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 270 (1970).

5. *Compare* Bryans v. Gallagher, 407 Pa. 142, 178 A.2d 766 (1962) *with* Budish v. Sebastian, 113 Pitts. Legal J. 230 (C. P. Allegh. Cty., Pa. (1965). *See generally* Rehberg, *Exculpatory Clauses in Leases*, 15 GA. B. J. 389 (1953).

companied by uniformity and predictability. Ten states, in adopting modified versions of the Uniform Residential Landlord and Tenant Act, have prohibited the use of exculpatory provisions running in favor of residential landlords, and some of those states have also barred clauses running in favor of residential tenants.[7] Similar results have been achieved by statute[8] or judicial decision[9] in several other jurisdictions and many courts, while not expressly declaring all residential exculpatory provisions to be void, have placed severe limitations on their effectiveness or have held them to be presumptively invalid.[10]

Commercial lease exculpatory provisions, although prohibited in a handful of jurisdictions,[11] have not been subjected to the same level of scrutiny. Early judicial sympathy for the plight of the injured and

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6. *See, e.g.*, Tenants Council v. DeFranceaux, 305 F. Supp. 560 (D.D.C. 1969); Mayfair Fabrics v. Henley, 48 N.J. 483, 226 A.2d 602 (1967); Kotwasinski v. Rasner, 436 Pa. 32, 258 A.2d 865 (1969); Crowell v. Housing Authority, 495 S.W.2d 887 (Tex. 1973); Gabl v. Alaska Loan & Inv. Co., 6 Wash. App. 880, 496 P.2d 548 (1972); College Mobile Home Park & Sales, Inc. v. Hoffman, 72 Wis.2d 514, 241 N.W.2d 174 (1976); FLA. STAT. ANN. § 83.47 (West Supp. 1976); OR. REV. STAT. § 91.745 (Supp. 1975); Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 WIS. L. REV. 19, 82-85 (1975); Recent Development, *Exculpation Contrary to Public Policy When It Totally Relieves a Landlord from the Duty to Maintain Common Areas*, 47 WASH. L. REV. 750 (1972); Note, *Uniform Commercial Code — Application by Analogy*, 6 IND. L. REV. 108 (1972).

7. *See* ALASKA STAT. § 34.03.040 (1975) (voids clauses in favor of landlord); ARIZ. REV. STAT. § 33-1315 (1974) (voids clauses in favor of landlord); FLA. STAT. ANN. § 83.47 (West Supp. 6A 1978) (voids clauses in favor of landlord or tenant); HAW. REV. STAT. § 521-33 (1976) (voids clauses in favor of landlord); KY. REV. STAT. § 383.570 (Supp. 1976) (voids clauses in favor of landlord); N.M. STAT. ANN. § 70-7-16 (Supp. 1976) (voids clauses in favor of landlord or tenant); OR. REV. STAT. § 91.745 (1977) (voids clauses in favor of landlord or tenant); TENN. CODE ANN. § 64.2813 (1976) (voids clauses in favor of landlord); VA. CODE § 55.248.9 (Supp. 1977) (voids clauses in favor of landlord).

8. *See* CAL. CIV. CODE § 1953 (West Supp. 1978); DEL. CODE tit. 25 § 5515 (1974); MD. ANN. CODE R. P. § 8-105 (1974); MASS. GEN. LAWS ANN. ch. 186, § 15 (West 1977); N.Y. GEN. OBLIG. LAWS § 5-321 (McKinney 1978); *Cf.* CAL. CIV. CODE § 1668 (1973), which provides:

> All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

That provision has been construed as to limit negligent "violation of law" to statutory law. *See* 1 WITKIN, SUMMARY OF CALIFORNIA LAW 228 (7th ed. 1960); Note, *Contractual Exculpation from Tort Liability in California — The "True Rule" Steps Forward*, 52 CAL. L. REV. 350, 357 (1964). *See also*, Henrioulle v. Dreyer, 135 Cal. Rptr. 767 (1977).

9. *See, e.g.*, Tenants Council v. DeFranceaux, 305 F. Supp. 560 (D.D.C. 1969); Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941); McCutcheon v. United Homes Corp., 79 Wash.2d 443, 486 P.2d 1093 (1971).

10. *See, e.g.*, Spallone v. Siegel, 239 Pa. Super. 474, 362 A.2d 263 (1976); Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (1955); Crowell v. Housing Authority, 495 S.W.2d 887 (Tex. 1973).

11. Even in jurisdictions which have prohibited the use of commercial lease exculpatory provisions, the prohibition has only extended to clauses insulating the landlord from liability, not to those which might shield the tenant. *E.g.*, ILL. ANN. STAT. ch. 80, § 91 (Smith-Hurd Supp. 1978); MD. ANN. CODE R. P. § 8-105 (1974); MASS. GEN. LAWS ANN. ch. 186, § 15 (1977); N.Y. GEN. OBLIG. LAWS § 5-321 (McKinney 1978). *See* Papakalos v. Shaka, 91 N.H. 265, 18 A.2d 377 (1941).

"defendant-less" apartment dweller did not daunt allegiance to "freedom of contract" principles in the commercial sector.[12] As prohibition of residential exculpatory provisions became common, however, the notion that commercial clauses were inherently evil, or at least questionable, also began to spread. Many courts began to apply the same analysis and rules of law to questions of the intended scope or enforceability of commercial as well as residental lease exculpatory provisions.[13] In addition, material differences between the expectations, motivations and situations of parties to a commercial lease, as opposed to those of a residential lease, were often ignored.[14] Thus, commercial lease exculpatory provisions have become the object of inconsistent, unpredictable and inappropriate treatment. By examining the approaches of courts and legislatures in dealing with such provisions and critically evaluating the mechanics applied and rationales proferred, this article outlines, in light of modern insurance practices and primary societal interests to be served by our tort compensation system, the salient general considerations which courts should address concerning injuries to property and persons. Ultimately, predictability of judicial action may be the most significant of those factors.

I. PRESENT METHODS OF ANALYSIS

Attempts to impose contractual provisions which exculpate one party to a contract from liability for damage negligently caused to another party are common in virtually every segment of our economy. In some areas, the principles of "freedom of contract" have for many years succumbed to a policy of protecting individuals needing goods or services from overreaching by those with sufficient economic power to dictate patently unfair bargains.[15] In those areas, parties occupying superior

12. *Cf.* Sannit v. Aarons, 297 F. Supp. 798 (D. Del. 1969); Daltex, Inc. v. Western Oil & Fuel Co., 275 Minn. 509, 148 N.W.2d 377 (1967); Bleakley v. Fixture Exchange Corp., 470 S.W.2d 296 (Tex. Civ. App. 1971).

13. *See, e.g.*, Strombergs v. Victor Gruen & Associates, 384 F.2d 163 (10th Cir. 1967); Covington v. Brewer, 101 Ga. App. 724, 115 S.E.2d 368 (1960). *But see,* Mayfair Fabrics v. Henley, 97 N.J. Super. 116, 234 A.2d 503 (1967).

14. *Cf.* Pan American World Airways v. United Aircraft Corp., 53 Del. 7, 163 A.2d 582 (1960); Winkler v. Appalachian Amusement Co., 238 N.C. 589, 79 S.E.2d 185 (1953). *But cf.* Rock Springs Realty, Inc. v. Waid, 392 S.W.2d 270, 15 A.L.R. 3d 774 (Mo. 1965), where the Supreme Court of Missouri expressly looked to the reasonable expectations of a practical businessman in holding that a clause relieving the lessee from loss by fire was intended to include losses by fire occasioned by the lessee's negligence.

15. Spallone v. Siegel, 362 A.2d 263, 267-68 (Pa. Super. 1976). *See* Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation,* 37 COLUM. L. REV. 248 (1937) [hereinafter cited as *Comparative Bargaining Power*]; Note, *Contractual Limitation of Liability for Negligence,* 28 HARV. L. REV. 520 (1915). While an extended discussion of the origins and development of "freedom of contract" is beyond the scope of this paper, it is noteworthy that it did not serve as a rationale for judicial decisions until the late nineteenth century, and that rather limited commentative effort was directed toward it until the turn of the century. Pound, *Liberty of*

bargaining positions have been denied the use of exculpatory clauses.[16] Complete proscription has occurred almost exclusively in markets where there is some form of compulsion to deal whether with an entire industry[17] or an individual concern.[18] More particularly, the markets have either evidenced a tendency toward monopoly, or have involved allocation of services or goods which are perceived as necessities, which have a relatively inelastic demand curve, and which are viewed as being at least somewhat short in supply.[19] Also, courts have been slightly more prone to prohibit exculpation where the primary foreseeable risks involve injury to the person as opposed to property damage.[20] In the cases of common carriers transporting persons,[21] public utilities providing services to consumers,[22] and employers dealing with employees,[23] it has long been thought that socially undesirable consequences would

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Contract, 18 YALE L. J. 454, 455 (1909). Pound indicated that "freedom of contract" was developed as an instrument to abolish "antiquated institutions that stood in the way of human progress," but that it was quickly latched onto by the judiciary as an end in itself, the rationale of the instrument obscured. *Id.* at 457. Several of Pound's explanations for that phenomenon may be equally applicable in explaining the seemingly blind adherence to the doctrine in many of the exculpatory clause cases today. He noted:

> In my opinion, the causes to which we must attribute the course of American constitutional decisions upon liberty of contract are: (1) The currency in juristic thought of an individualist conception of justice, which exaggerates the importance of property and of contract, exaggerates private right at the expense of public right, and is hostile to legislation, taking a minimum of law-making to be the ideal; (2) what I have ventured to call on another occasion a condition of mechanical jurisprudence, a condition of juristic thought and judicial action in which deduction from conceptions have produced a cloud of rules that obscures the principles from which they were drawn, in which conceptions are developed logically at the expense of practical results and in which the artificiality characteristic of legal reasoning is exaggerated; (3) the survival of purely juristic notions of the state and of economics and politics as against the social conceptions of the present; (4) the training of judges and lawyers in eighteenth century philosophy of law and the pretended contempt for philosophy in law that keeps the legal profession in the bonds of the philosophy of the past because it is to be found in law-sheep bindings; . . . and (7) by no means least, the sharp line between law and fact in our legal system which requires constitutionality, as a legal question, to be tried by artificial criteria of general application and prevents effective judicial investigation or consideration of the situations of fact behind or bearing upon the statutes.

Id. at 457-58.

16. *See, e.g.*, E. L. Bruce Co. v. Leake, 176 Ark. 705, 3 S.W.2d 988 (1928); Denver Consol. Electric Co. v. Lawrence, 31 Colo. 301, 73 P. 39 (1903); Sheridan v. New Jersey R.R., 104 N.J.L. 622, 144 A. 811 (1928). *See generally Comparative Bargaining Power* note 15 *supra.*

17. *See, e.g.*, Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

18. *See, e.g.*, Mohawk Drilling Co. v. McCullough Tool Co., 271 F.2d 627 (10th Cir. 1959); Fairfax Gas & Supply Co. v. Hadary, 151 F.2d 939 (4th Cir. 1945).

19. *Cf. Comparative Bargaining Power* note 15 *supra.*

20. *See, e.g.*, Air Transport Associates, Inc. v. United States, 221 F.2d 467 (9th Cir. 1955) (gov't. airports and public service installations); Fairfax Gas & Supply Co. v. Hadary, 151 F.2d 939 (4th Cir. 1945) (supplier of gas for home use).

21. *See, e.g.*, Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291 (1932); Charlestown & W. C. Ry. Co. v. Thompson, 234 U.S. 576 (1914); Pittsburgh, C.C. & St. L. Ry. Co. v. Higgs, 165 Ind. 694, 76 N.E. 299 (1905). *See also* Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

22. *See, e.g.*, Denver Consol. Elec. Co. v. Laurence, 31 Colo. 301, 73 P. 39 (1903).

23. *See, e.g.*, Second Employers' Liability Cases, 223 U.S. 1 (1911). *See also Comparative Bargaining Power, supra* note 15, at 249.

flow if exculpation from liability for negligence were permitted.[24] In the case of residential tenancies, as previously noted, the policy balance has recently shifted conspicuously in favor of protecting the tenant.[25] In other areas, limited prohibitions have been enforced. Section 2-719(3) of the Uniform Commercial Code, for example, declares limitations on consequential damages for injuries to persons in the sale of consumer goods to be prima facie unconscionable.

Commercial lessors do not form a monopolistic combination, nor are individual transactions involving the rental of commercial property viewed as providing a necessity which is in short supply, and as yet, courts and legislatures have largely been unwilling to totally prohibit the use of exculpatory clauses in commercial leases.[26] A variety of considerations, however, have led courts to approach the enforcement of commercial lease exculpatory clauses with extreme suspicion. There has been an articulated but statistically unsubstantiated belief that negligence would be discouraged and that contracting parties would be more careful if wrongdoers were required to be responsible for the consequences of their acts and omissions.[27] Some courts have either expressly or tacitly concluded that exculpators usually do not intend to absolve exculpatees to the extent sought in litigation.[28] A morality of retribution also appears to have influenced some courts: a belief that one *ought* to be required to pay for damages wrought.[29] In commercial cases where standard form leases are involved, court reasoning often takes on the character of a residential lease dispute involving an adhesion contract, even though there is no compulsion to deal in most commercial instances.[30] In short, the feeling is that such clauses are unfair.

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24. For a scholarly insight into some of the perceived evils, *see* Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

25. *See* cases cited note 6 *supra*.

26. *See, e.g.*, Barclay Woolen Corp. v. W. E. Hulton Dyeing Co., 220 F. Supp. 598 (E.D. Pa. 1963); Mayfair Fabrics v. Henley, 48 N.J. 483, 226 A.2d 602 (1967); Mitchell's, Inc. v. Friedman, 157 Tex. 424, 303 S.W.2d 775 (1957). *But see* statutes and case cited note 11 *supra*. Many of the cases in which commercial lease exculpatory clauses are challenged proceed from stated premises to the effect that such clauses are not opposed to public policy because they relate solely to the risks of private business arrangements which are not matters of public concern, and because they are "fairly and freely entered into," and would "sympathetically be carried out in accordance with the contemplation of the parties." Mayfair Fabrics v. Henley, 48 N.J. 483, 489, 226 A.2d 602, 605 (1967). *See, e.g.*, National Steel Corp. v. L. G. Wasson Coal Mining Corp., 378 F.2d 565 (7th Cir. 1964); Petit Grain & Potato Co. v. Northern Pa. Ry., 227 Minn. 225, 35 N.W.2d 127 (1948).

27. *See* Spallone v. Siegel, 362 A.2d 263, 267-68 (Pa. Super. 1976). *Cf.* Housing Authority v. Morris, 244 Ala. 557, 14 So.2d 179 (1943).

28. *See, e.g.*, Freddi-Gail, Inc. v. Royal Holding Corp., 34 N.J. Super. 142, 144, 111 A.2d 636, 637 (1955); Johnson v. Prange-Guessenhainer Co., 240 Wis. 363, 2 N.W.2d 723 (1942). *See generally* 8 WILLISTON, CONTRACTS § 1751 (3d ed. Jaeger 1972).

29. *See* O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill.2d 436, 443, 155 N.E.2d 545, 549 (1958); Spallone v. Siegel, 239 Pa. Super. 586, 362 A.2d 263, 267 (1976).

30. *See, e.g.*, Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971).

In apparent efforts to avert atrocities perceived as resulting from exculpatory agreements, while at the same time attempting to prevent erosion of freedom of contract, courts have engaged in both policy oriented analysis[31] and in "strict misconstruction"[32] of the particular clause under consideration. Neither approach has provided a comprehensive or consistent decisional framework.

A. Policy Grounds

1. Unconscionability

When a commercial tenant has sustained damages occasioned by landlord negligence, and is confronted with a lease provision indicating that "the tenant shall not hold the landlord liable for injuries to his person or property which may result from the landlord's failure to keep and maintain the demised premises in repair, or from any other cause whatsoever,"[33] the tenant's immediate thought (if uninsured, or the insurer's thought if the tenant is insured) is to assert that the inclusion in commercial leases of provisions exculpating a party from negligence is against public policy, and therefore unenforceable. While that argument is generally rejected,[34] an increasing number of courts are exhibiting a proclivity towards evaluating particular provisions in terms of public policy by using principles derived from doctrines of unconscionability.[35] A number of commentators have urged the advisability of applying the doctrine of unconscionability as contained in the Uniform Commercial Code to the problems presented by exculpatory clauses in leases without distinguishing between commercial and residential situations,[36] and the most recent draft of the Restatement

31. *See* § I(A) *infra.*

32. *See* § I(B) *infra.*

33. Cramer, *Extension of the Uniform Commercial Code's Unconscionable Contract Provision to Exculpatory Lease Clauses,* 5 AM. BUS. L. J. 287 (1967).

34. *Id.* As previously suggested, courts have adhered to notions to the effect that

> if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice.

Baltimore & Ohio S. W. Ry. Co. v. Voigt, 176 U.S. 498, 505 (1900).

35. *See, e.g.,* Talley v. Skelly Oil Co., 199 Kan. 767, 433 P.2d 725 (1967); Cailler v. Humble Oil and Refining Co., 379 A.2d 1253 (N.H. 1977); Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 111 A.2d 425 (1955); Spallone v. Siegel, 362 A.2d 263 (Pa. Super. 1976).

36. *See, e.g.,* Note, *Uniform Commercial Code — Application by Analogy,* 6 IND. L. REV. 108 (1972); Note, *The Form 50 Lease: Judicial Treatment of an Adhesion Contract,* 111 U. PA. L. REV. 1197 (1963); Comment, *A Flexible Approach to the Problem of Exculpatory Clauses in the Standard Form Lease,* 1972 WIS. L. REV. 520 (1972) [hereinafter cited as *Flexible Approach to Exculpatory Clauses*]. Of course, a direct application of Article 2 of the Uniform Commercial Code would necessitate a broadening of its subject matter beyond the "sale of goods." U.C.C. § 2-302 provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have

(Second) of Property advocates that same view.[37]

The courts, however, have tended to consider only selected aspects of the doctrine, together with adhesion contract principles, while ignoring other aspects.[38] Some courts have based their decisions concerning the validity of commercial lease excuplatory clauses on their perceptions of the relative bargaining positions of the immediate parties to the lease.[39] In *Spallone v. Siegal,*[40] for example, a Pennsylvania court recently adopted a rule of presumptive invalidity for exculpatory clauses con-

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been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any inconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

37. RESTATEMENT (SECOND) OF PROPERTY — LANDLORD-TENANT § 5.6 (1977). Comment *e* to that Section provides:

Unconscionable agreement or agreement against public policy. An agreement is unconscionable when it would shock the conscience if enforced. *Cf.* Uniform Commercial Code, § 2-302 and Restatement of the Law, Second, Contracts, § 234 (Tent. Draft No. 5, 1970). This is a concept not capable of precise definition. An agreement between the parties to a lease, designed to shift significantly among the parties responsibility for the condition of the premises (from what it would otherwise be in the absence of such an agreement), must be tested by this somewhat vague and imprecise rule. An agreement or provision may be against public policy if it will materially and unreasonably obstruct achievement of a well defined statutory, regulatory, or common law policy.

Although, in the interest of certainty, the provisions of written lease instruments should not be disregarded lightly for insubstantial reasons, factors which may be considered in determining whether an agreement in a lease is in whole or in part unenforceable, because unconscionable or against public policy, include:

(1) Whether and to what extent the agreement will be counter to the policy underlying statutory or regulatory provisions, especially those relating to the public health and safety and those relating to the tenants of moderate income in multi-unit residential or office properties;

(2) Whether the agreement or provision appears in a lease of commercial or industrial property or of an entire building or a large portion of a building, or of a substantial residence or estate designed for single family occupancy, properties concerning which freedom of negotiation is usually permissible;

(3) Whether and to what extent the agreement or provision serves a reasonable business purpose and appears to have been the result of conscious negotiations for the distribution of risks as part of the total bargain contained in the lease;

(4) Whether the provision appears to be part of an unduly harsh and unreasonable standard, "boilerplate" lease document;

(5) Whether and to what extent the parties or either of them, habitually (or on a discriminatory basis) disregard and do not enforce the agreement or provision in actual operations under the lease or, in the case of a landlord, under similar leases;

(6) Whether and to what extent the agreement or provision (especially if it relates to low or moderate income residential property) imposes unreasonable liabilities or burdens on persons who are financially ill-equipped to assume such burdens and who may have had significant inequality of bargaining power; and

(7) Whether and to what extent the parties were each represented by counsel in the course of negotiating the lease.

38. *See, e.g.,* cases cited notes 39, 43, and 60 *infra.*

39. *See, e.g.,* Talley v. Skelly Oil Co., 199 Kan. 767, 433 P.2d 425 (1967); Mayfair Fabrics v. Henley, 48 N.J. 483, 226 A.2d 602 (1967); Gabl v. Alaska Loan & Invest. Co., 6 Wash. App. 880, 496 P.2d 548 (1972); College Mobile Home Park & Sales, Inc. v. Hoffman, 72 Wis.2d 514, 241 N.W.2d 174 (1976).

40. 239 Pa. Super. 586, 362 A.2d 263 (1976).

tained in standard form leases, whether commercial or residential. The court indicated that the presumption could be overcome if the landlord, or perhaps the tenant if the tenant's form was used, could show that the contract "was the result of such bargaining that it reflects the deliberate desire of both parties."[41] Among the circumstances considered pertinent to that determination were: (1) the relative economic positions of the parties to the lease; (2) whether the bargaining history evidenced a free and conscious acceptance of the risks; (3) whether the clause itself serves a reasonable business purpose as opposed to imposing unreasonable liability on a person financially ill-equipped to assume such burdens; (4) whether the parties were represented by attorneys when the lease was entered; (5) the availability of rental space; and (6) the extent of competition among landlords.[42] Other courts, while not providing such an extensive list of relevant criteria, have simply stated that a commercial lease exculpatory provision will not be upheld where it is imposed on a take-it-or-leave-it basis by a party of superior bargaining strength.[43]

To the extent that courts have either expressly or implicitly relied upon only selected aspects of the doctrine of unconscionability in dealing with commercial lease exculpatory provisions, they have been operating with inappropriate tools for analysis.[44] Unconscionability began as an equitable doctrine employed by courts to void land transfers in cases involving individualized negotiated bargains.[45] It was a method devised to avert "the old being bilked, and farmers [being] sweet-talked into ruinous trades,"[46] and was not primarily concerned with disparities in economic power between the parties.[47] Since exculpation from liability for negligence, in and of itself, has been acknowledged as being within the range of permissible contractual provisions,[48] the equitable doctrine's application to commercial lease exculpatory provisions would seem misplaced.

Section 2-302 of the Uniform Commercial Code, on the other hand, is in part concerned with unfair contractual provisions resulting from

41. *Id.* at 271.

42. *Id.* at 271-72.

43. *E.g.*, Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 584, 111 A.2d 425 (1955); Sweeny Gas & Oil Co. v. Toledo, P. & W. R. Co., 42 Ill.2d 265, 247 N.E.2d 603 (1969). *Cf.* Crowell v. Housing Authority, 495 S.W.2d 887 (Tex. 1973).

44. Express allusion to the Uniform Commercial Code has been made in rather few cases. *But see, e.g.*, O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill.2d 436, 155 N.E.2d 545 (1958); Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971). Undoubtedly, the most recent draft of the Restatement (Second) of Property will provide impetus for courts to expressly rely upon the doctrine.

45. Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485, 537 (1967). *See Flexible Approach to Exculpatory Clauses, supra* note 36, at 529.

46. Leff, *supra* note 45, at 536. (footnotes omitted)

47. *Id.* at 533-37.

48. *See, e.g.*, cases cited note 2 *supra*.

relative disparities in bargaining power, and appears to be the doctrine from which principles applied to commercial lease exculpatory clauses have been appropriated. Unconscionability under the Code has, for purposes of analysis and application, been divided into two facets: procedural unconscionability, which refers to "bargaining naughtiness,"[49] and substantive unconscionability, which refers to the evils in the resulting contract.[50] Substantive unconscionability focuses upon either the overall lopsidedness of an entire agreement or the utter unfairness of a particular provision;[51] however, courts have enforced the vast majority of all commercial lease exculpatory provisions, and the concept of substantive unconscionability has only been applied in rather extreme cases.[52] Procedural unconscionability involves a balancing test which first looks to the *process of contracting* to determine whether an adhesion contract has been made.[53] If so, then the unfair elements of the provision will be considered in light of the circumstances surrounding the making of the contract.[54] Thus, a bargained-for provision might not be so unfair as to cause a court to declare it unconscionable but might be one-sided enough to be so declared if included as part of an adhesion contract.[55] The benefits of the concept of procedural unconscionability are directed primarily toward "the uneducated and often illiterate individual who is the victim of gross inequality of bargaining power, usually the poorest members of the community."[56]

The concept of adhesion contract embraces something more than a standard form instrument in which a relatively poor party accepts terms dictated by a relatively rich one. It envisages a situation where the party in the lesser bargaining position is *compelled,* in one way or another, to deal on the latter's terms.[57] The compulsion to deal may exist either by virtue of inequality of supply and demand or because an entire industry is monopolized, oligopolized, simply local in nature, or dominated by "understandings" which restrain trade.

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49. Leff, *supra* note 45, at 487.

50. *Id. See Flexible Approach to Exculpatory Clauses, supra* note 36, at 531.

51. Leff, *supra* note 45, at 509.

52. Campbell Soup Co. v. Wentz, 172 F.2d 80 (3rd Cir. 1948). *See, e.g.,* Steinberg v. Carreras, 74 Misc.2d 32, 344 N.Y.S.2d 136 (Civ. Ct. 1973), *rev'd on other grounds,* 77 Misc.2d 774, 357 N.Y.S.2d 369 (Sup. Ct. 1974). *See also* Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?,* 71 NW. U. L. REV. 204 (1976). The author notes that substantive unconscionability attacks provisions grossly onesided or harsh, and as a result, leaves a grey area of only mildly unfair provisions untouched. *Id.* at 221.

53. Leff, *supra* note 45, at 487.

54. *Id.*

55. *Compare,* Frostifresh Corp. v. Reynoso, 52 Misc.2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on question of damages,* 54 Misc.2d 119, 281 N.Y.S.2d 964 (Sup. Ct. 1967), *with* Campbell Soup Co. v. Wentz, 172 F.2d 80 (3rd Cir. 1948).

56. Jones v. Star Credit Corp., 59 Misc.2d 189, 190, 298 N.Y.S.2d 264, 265 (Sup. Ct. 1969).

57. Saleilles, the French jurist who coined the term "adhesion contracts," described them as "those in which a single will is exclusively predominant, acting as a unilateral will which dictates its law, no longer to an individual, but to an *indeterminate collectivity*. . . ." SALEILLES, DE LA

It is that compulsion to deal which has been largely ignored by the courts when considering commercial lease exculpatory provisions.[58] There is a tendency to consider only whether a standard form lease was used and the relative economic strengths of the parties.[59] The classification of commercial tenant or landlord has been ignored in favor of viewing the individual strengths or weaknesses of the parties involved[60] due, in part, to a carryover from cases involving residential exculpatory clauses. Because everyone needs a place to live, and because the residential rental market has long been in a state where virtually all leases employed are standard form which contain exculpatory provisions permitted in the jurisdiction,[61] courts have logically assumed that a compulsion to deal existed, and such a showing was often not required, or passed over lightly.[62]

Regarless of the cause, the failure to consider the overall circumstances which motivated an exculpator to lease from a particular exculpatee has produced some rather unsound results.[63] In *Weaver v. American Oil Co.*,[64] for example, American Oil leased filling station

DECLARATION DE VOLONTE § 89 at 229-30 (1901), as translated in Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 856 (1964) (emphasis added).

58. It has not been ignored in areas outside of landlord-tenant situations to as significant an extent. Worthy of note is Manhattan Co. v. Goldberg, 38 A.2d 172 (Mun. Ct. App. D.C. 1944), which involved an exculpatory provision in a contract of bailment. The bailor argued that he was compelled to deal with the particular bailee since he was without transportation owing to the automobile shortage during World War II. The court stated:

> With respect to appellee's claim that he was compelled to do business with this particular laundry and thus the limitations were forced involuntarily upon him, we may judicially recognize the existing difficulties in obtaining laundry service, as well as many other services; but we cannot assume, and it was not shown, that it was impossible for appellee to find another laundry willing and able to accept him as a customer. A glance at the number of laundries listed in the local telephone directory plainly shows nothing monopolistic in the business. There are numerous hand laundries furnishing special service at higher rates, especially catering to the handling of more expensive and unusual articles such as the cloth in question. If the plaintiff was not satisfied to do business with defendant . . . he should have gone elsewhere.

Id. at 175. *See also* Charles Lachman Co. v. Hercules Powder Co., 79 F. Supp. 206 (E.D. Pa. 1948) (action to recover for damages sustained because of using a chemical compound purchased from the defendant). "[T]he parties were both corporations engaged in large scale manufacturing. The plaintiff was under no compulsion to buy from the defendant and, if it desired to buy from it, had the choice of accepting the defendant's terms or going elsewhere." *Id.* at 207.

59. *See, e.g.*, Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 584, 111 A.2d 425, 430-31 (1955); College Mobile Home Park & Sales v. Hoffman, 77 Wis.2d 514, 241 N.W.2d 174 (1976).

60. *See, e.g.*, Stromberg's v. Victor Gruen & Associates, 384 F.2d 163 (10th Cir. 1967); Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971).

61. *Cf.* Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 826-27 (1974).

62. A principal reason why more attention is not paid to a consideration of the market as a whole may be the prohibitive costs involved in such proof. In essence, what must be demonstrated is quite similar to that which must be shown in an antitrust case, and the amount of damages sought in the tort action would rarely justify a comprehensive market analysis being made. Thus, an injured exculpator may often be unable to do more than to request the court to take judicial notice of particular market conditions.

63. *See, e.g.*, Cardona v. Eden Realty Co., 118 N.J. Super. 381, 288 A.2d 34 (1972); Jackson v. First Nat'l Bank of Lake Forest, 415 Ill.2d 453, 114 N.E.2d 721 (1953).

64. 257 Ind. 458, 276 N.E.2d 144 (1971).

premises to Weaver by a standard form lease containing an exculpatory clause purporting to hold American harmless from its employees' negligent acts. Weaver and his assistant were seriously injured by a fire which was alleged to have been caused by the negligence of American's employee. The Supreme Court of Indiana, noting that Weaver had not graduated from high school and could not be expected to understand the technical terms of a lease, that there was no evidence that Weaver had in fact read the lease, and that American was in a patently superior economic position, held that the exculpatory language would not bar Weaver's recovery because the lease was not knowingly entered into. The court made no inquiry into whether all oil companies included exculpatory provisions in their leases, whether negotiations could have resulted in the deletion of the exculpatory provision in consideration of a higher rent, whether appropriate insurance was obtainable, or whether an arrangement could have been structured whereby Weaver would have obtained a filling station apparatus with a lease — free from exculpatory clauses from an oil company and a real property lease — also free of exculpation from another party.[65] Also not considered was the fact that Weaver was an entrepreneur who chose, and was in no way compelled to enter the oil business. A decision which, in effect, rewards a business person for limited education, failure to read a document of great importance to business, and general lack of business acumen, is elusive at best.

Apart from whether the precepts of the Uniform Commercial Code's doctrine of unconscionability are strictly followed, it appears that its application by analogy to commercial lease exculpatory provisions is unsuitable. Despite many years of use, the term "unconscionable" still searches for an acceptable definition, and this lack of precision has

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65. While many of the cases and much of the literature suggest that the non-negotiability of specific terms of residential leases is so widespread and prevalent that judicial notice may be reasonably taken of that fact, *see, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970), Halper, *Sign It or Find Another Apartment, A View of Standard Form Leases,* REAL ESTATE REV., Vol. 2, No. 2, p. 67 (1972), such is not the case in the commercial market generally. *See, e.g.*, Murphey, *It's a Good Form, But Who'll Sign It — The Confessions of a Draftsman of Leases For Commercial Office Space,* 1 REAL ESTATE L. J. 211, 212 (1973). (The author of this latter article notes at 212 that the supply of commercial space — office, factories, ground, stores, shopping centers — had so outdistanced demand that he was tempted "to paraphrase Mr. Halper's title and use 'Sign It or Find Another Tenant' as the title.") While the commercial situation may not have been as open at the time when Weaver signed his lease as it was in 1973 when Murphey wrote the latter article, it was clearly not as tight as the residential market, and it is difficult to determine why the court failed to discuss the then current market situation. *See generally* Cailler v. Humble Oil and Refining Co., 329 A.2d 1253 (N.H. 1977) where the court did examine the market with respect to a factual situation quite similar to that presented in *Weaver* and held the lease not unconscionable owing to, *inter alia,* the absence of a showing of a shortage of alternative rental sights. *Id.* at 1256.

caused the concept to undergo "progressive abstraction, attenuation and eventual destruction of meaning."[66]

Regardless of the degree of unfairness which one considers necessary to warrant application of the doctrine, it is clear that the focus of any inquiry should be upon the terms of the lease at the time it was entered into, rather than upon unusual events which may later transpire to trigger the provision.[67] Though reasonable minds may differ, when the scope and extent of the primary risks assumed by commercial exculpators are analyzed from that standpoint, the characterization of commercial lease exculpatory provisions as unconscionable seems quite strained indeed. The primary importance of the clause to the exculpator in a commercial setting is economic, as opposed to many residential clauses which involve self-preservation. And while it is not suggested that unconscionability is inappropriately applied when "only money is involved," it is submitted that one's conscience is more likely to be shocked by the invasion of rights of preservation than by invasion of a person's pocketbook.

Moreover, courts have consistently held that the rights of the employees[68] and business invitees[69] of a tenant are not affected by an exculpatory provision since those persons are not parties to the lease. In contrast, most courts have held that exculpatory provisions do extend to the residential tenant's immediate family.[70] Furthermore, most of the

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66. Leff, *supra* note 45, at 489. *See* Kirby, *supra* note 40, at 221. *See also* Ellinghaus, *In Defense of Unconscionability,* 78 YALE L. J. 757, 814-15 (1969). The Uniform Commercial Code is itself of little help in formulating a satisfactory definition of unconscionability. The official comments to the Code state only that:

> The basic test [of unconscionability] is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of prevention of oppressions and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.

U.C.C. § 2-302, comment 1 (citations omitted).

67. U.C.C. § 2-302(1) specifically refers to unconscionability "at the time [the contract] was made."

68. *See, e.g.,* Larson v. Santa Clara Valley Conservation Dist., 218 Cal. App.2d 515, 32 Cal. Rptr. 875 (1963); Creek v. Nonpareil Inv. Co., 66 Colo. 550, 185 P. 473 (1919); Springer v. Ford, 189 Ill. 430, 59 N.E. 953 (1901); Commercial Warehouse Co. v. Hyder Bros., Inc., 75 N.M. 792, 411 P.2d 978 (1966). *See also* Texas & Pac. R. Co. v. Watson, 190 U.S. 287 (1902). *But see* Boudreau v. Johnson, 241 Mass. 12, 134 N.E. 359 (1922) (this case involved tort actions for damages sustained for personal injuries resulting from a fall of a freight elevator. Notably, it was decided prior to the legislatively declared invalidity of exculpatory clauses in Massachusetts leases).

69. *See, e.g.,* Larson v. Santa Clara Valley Water Conservation Dist., 218 Cal. App.2d 515, 32 Cal. Rptr. 875 (1963); Siegal v. Detroit City Ice & Fuel Co., 324 Mich. 205, 36 N.W.2d 719 (1949); Whellkin v. Long Branch Trust Co., 121 N.J.L. 106, 1 A.2d 394 (1938).

70. *See, e.g.,* Deen v. Holderfield, 275 Ala. 360, 155 So.2d 314 (1963); Taylor v. Virginia Const. Co., 209 Va. 76, 161 S.E.2d 732 (1974).

reported decisions regarding commercial lease exculpatory clauses involve injuries to property rather than to persons,[71] mildly suggesting that the risks assumed by commercial exculpators do in fact relate primarily to property damage.[72]

The doctrine of unconscionability also introduces a potentially expensive degree of unpredictability into a business area already replete with risks. Landlords may settle solid cases out of court, fearing a decision that the commercial lessee is a consumer requiring protection.[73] If the enforceability of an exculpatory provision cannot be determined in advance, insurance coverages may be duplicated; the duplication may be reflected in a higher rent; and if the landlord does negligently cause damage, in the end, one of the insurance companies asserting its insured's rights by way of subrogation will receive a windfall. Alternatively, a gambling lessee may be prompted to forego necessary protection after considering the possibility that exculpatory language will be held invalid. Something more precise than a system which cannot define unconscionability but "knows it when it sees it" should be relied upon to determine liability for potentially substantial losses in business.

Furthermore, recent excess building has resulted in a supply of commercial real estate exceeding effective demand.[74] Therefore, commercial lessees are often able to bargain over particular terms even if contained in a standard form. If a lessor insists on an exculpatory clause, the lessee may look for a different property, or rent the property and obtain suitable insurance, or choose to rent and to assume the risks. In essence, an insurance premium paid would simply be additional, albeit optional, rent. As one of the central and most costly aspects of business, a lease cannot be properly analogized to the parking stub which disclaims liability or even to the casual sale or purchase of goods by a merchant. Real property remains unique, and the fact that a lessee does not read or

71. *See generally* cases cited in Annot. 49 A.L.R. 3d 321 (1973).

72. In the residential area, by contrast, the vast majority of the reported decisions concern personal injuries. *See id.* That is probably more of a reflection of the relatively low dollar value of property contained in residential apartments (making it impracticable to pursue litigation to the appellate level) than it is of the relative incidence of injuries in the residential area.

73. Interview with Harry Downs, Vice President and General Counsel for Ashland-Warren Inc., Cambridge, Mass. (Dec. 9, 1976). Mr. Downs suggested that although exculpatory provisions are regularly included in commercial leases and contracts, claims clearly encompassed within the language of an exculpatory clause are often settled not only to avoid the possibility of the clause being declared inoperative in that particular case, but also because of the future implications which a declaration of invalidity might have.

74. *See* Poorvu, *Turning Design Ability into Equity in Your Own Development,* ARCHITECTURAL REC., Dec., 1976, at 51; Murphey, *It's Good Form, But Who'll Sign It — The Confessions of a Draftsman of Leases for Commercial Office Space,* 1 REAL ESTATE L. J. 211, 213 (1973); *See also* McMahan, *Tomorrow's Changing Demand for Real Estate,* 6 REAL ESTATE REV. No. 4, pp. 72, 74-76 (1977); Downs, *The Real Estate Outlook Through Mid - 1976,* 4 REAL ESTATE REV., No. 2, pp. 24, 30 (1975); Downs & Lochman, *The Current Climate for Real Estate Investment and Development,* 4 REAL ESTATE REV., No. 1, pp. 28, 31-32 (1974).

understand his or her lease, or is motivated for whatever reason to acquire the use of property which he or she considers so desirable that the lessor can dictate the terms of the bargain, should not, in a business setting, be sufficient reason to place the burden of loss upon the lessor.

2. Type of Negligence

Several courts have examined the nature of the negligent conduct to which application of a particular commercial lease exculpatory provision is sought.[75] A few decisions have been predicated on rather dubious policy based distinctions between active and passive negligence.[76] Those decisions which generally equate active negligence with misfeasance and passive negligence with nonfeasance,[77] hold that public policy prohibits exculpation from responsibility for conduct amounting to active negligence, as opposed to passive negligence, but invariably, the basis for such a policy is nowhere articulated in the opinion.

Such distinctions are arbitrary. In many contexts, a misfeasor may reasonably be thought to be more "at fault," and hence more answerable, than a nonfeasor. For example, a person who negligently fails to discover and disclose the existence of a defect in a firearm loaned to a friend, resulting in the latter being shot, might be considered somewhat less culpable than the person who negligently pulls the trigger and shoots a friend. In the landlord-tenant sphere, however, it is suggested that more often than not, incidents involving nonfeasance appear higher on the reasonable man's culpability scale than those involving misfeasance. Therefore, more protection should not be offered to the landlord who causes injury by negligently failing to discover and repair a defect (or who discovers a defect and negligently fails to repair it) in the common area of an office building for which he or she is responsible than is offered to the landlord who negligently causes injury while attempting to repair that same defect. Protection of the

75. *See, e.g.*, Plastone Plastic Co. v. Whitman & Webb Realty Co., 278 Ala. 95, 176 So.2d 27 (1965); Rodier v. Kline's, Inc., 226 Mo. App. 474, 47 S.W.2d 230 (1932); *See generally Direct Judicial Action* note 3 *supra*.

76. *See* Plastone Plastic Co. v. Whitman & Webb Realty Co., 278 Ala. 95, 176 So.2d 27 (1965); Baker v. Wheeler, Lacy & Brown, Inc., 272 Ala. 101, 128 So.2d 721 (1961); Butt v. Bertola, 110 Cal. App.2d 128, 242 P.2d 32 (1953); Queen Ins. Co. v. Kaiser, 27 Wis.2d 571, 135 N.W.2d 247 (1965). *See also* Werner v. Knoll, 89 Cal. App.2d 474, 201 P.2d 215 (1948) (involving residential tenancy but not limiting rule to that situation); Sabina v. Zytnick, 103 Pitt. Leg. J. 50 (C.P. Allegh. Cty. 1951). *But see* College Mobile Home Park & Sales, Inc. v. Hoffman, 72 Wis.2d 514, 519, 241 N.W.2d 174, 177 (1976), where the Supreme Court of Wisconsin, retreating from its former position, indicated that it was now of the opinion that the active-passive negligence distinction was rather arbitrary and artificial and that each case should be decided with regard to all surrounding circumstances.

77. *See, e.g.*, Rodier v. Kline's, Inc., 226 Mo. App. 474, 47 S.W.2d 230 (1932).

nonfeasor, in essence, may provide an incentive for nonaction by the landlord.[78]

Numerous decisions have declared that the enforcement of an exculpatory clause with respect to acts which violate a statute or ordinance designed for the protection of the public safety is contrary to public policy.[79] Such decisions are sound when applied to situations in which the party seeking recovery is a member of a group for which the protection is primarily intended. For example, a statute requiring installation of fire escapes on certain residential dwellings is obviously designed to protect tenants, their families, and their invitees, all as members of the public. If liability for damages caused by a negligent failure to maintain a fire escape could be avoided through the insertion of an exculpatory provision in the lease, a landlord could subvert "the integrity of the rule expressed by the legislature,"[80] and would have substantial incentive to ignore necessary but costly repairs or additions to buildings.

On the other hand, the proposition that a lessor should not be permitted to exculpate with respect to the consequences of negligent violations of legislation designed to protect the public appears too broad. Certainly, if a provision had as its object, or tended to induce, the violation of a statute designed to protect the public safety, the possibility of the occurrence of the danger would be increased and, consequently, public safety would be jeopardized by sanctioning the use of the provision. Since commercial lease exculpatory provisions usually apply solely to signers of the lease, and since all but one potential plaintiff is thereby unaffected, it is doubtful whether the fact that a landlord would be held harmless from damage suffered by a commercial tenant would in and of itself provide sufficient inducement to avoid responsibilities to safety.[81] Provided violation of a statute is not encouraged by the exculpatory clause, there is little to distinguish it from a policy of liability insurance which provides indemnification for damages arising from violation of the same statute.[82]

78. It is not suggested that the active-passive negligence distinction in fact causes landlords to avoid the performance of duties required by the lease to any great extent. Certainly, the landlord must still consider potential liability to invitees and employees. Moreover, the owner of an office building, particularly one who has purchased a suitable liability insurance policy, would not generally allow his or her actions to be dictated primarily by concern for negligently caused damage. Nevertheless, it is difficult to perceive any basis for allowing the landlord to exculpate himself from liability for nonfeasance but not for misfeasance.

79. *See, e.g.*, American States Ins. Co. v. Hannan Constr. Co., 283 F. Supp. 988 (D. Ohio 1966), *aff'd* 392 F.2d 171 (6th Cir. 1967); Cooper v. Northern P. Ry. Co., 212 F. 533 (D. Mont. 1914); Employer's Liability Assur. Corp. v. Greenville Businessmen's Asso., 423 Pa. 288, 224 A.2d 620 (1966).

80. Boyd v. Smith, 372 Pa. 306, 310, 94 A.2d 44, 46 (1953).

81. *See* Swisscraft Novelty Co. v. Alad Realty Corp., 113 N.J. 416, 274 A.2d 59 (1971), which stated that a commercial lease exculpatory clause would be ineffective if it tended to encourage the violation of statutes.

82. In Checkley v. Illinois Cent. Ry. Co., 257 Ill. 491, 100 N.E. 942 (1913), it was held that a lease provision exempting the railroad from the consequences of its negligence was enforceable

3. Direct Legislative Response

Illinois,[83] Massachusetts,[84] New York,[85] and Maryland[86] have enacted statutes declaring all lessors' attempts at exculpation from the consequences of negligent conduct with respect to a lessee to be against public policy and void. While each statute was enacted shortly after, and partially in response to, particularly harsh judicial enforcement of a residential lease exculpatory clause,[87] their prohibitions apply equally to residential and commercial tenancies.[88]

The major difficulty with those statutes, however, does not involve the lack of distinction between commercial and residential tenancies. Blanket prohibition of commercial lease exculpatory clauses would at least allow an accurate allocation of risks and insurance costs at the inception of the lease. Certainly, some business persons would prefer to forego their freedom to bargain in this area in exchange for certainty. Rather, the most disconcerting aspect of the statutes is that they all expressly declare it to be against public policy for a lease to include exculpatory provisions favoring a lessor, but the prohibition is not extended to the lessee. It is therefore clear that the legislatures did not find exculpation from negligence in general to be inherently evil, but instead, were primarily concerned with overreaching, as a product of superior bargaining power, which would allow one party to dictate the terms of

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with respect to damage to the lessee's right of way from a fire caused in violation of a statute designed to prevent fires on trains. The court noted that the exculpatory provision did not lessen the railway's duty to the public and that, since the railway might purchase insurance to guard against the same risks, there was no reason that it could not do so directly through the exculpatory clause.

83. ILL. ANN. STAT. ch. 80, § 91 (Smith-Hurd Supp. 1976).

84. MASS. GEN. LAWS ANN. ch. 186, § 15 (West Supp. 1976).

85. N.Y. GEN. OBLIG. LAWS § 5-321 (McKinney 1964).

86. MD. ANN. CODE R.P. § 8-105 (1974).

87. *See Flexible Approach to Exculpatory Clauses, supra* note 36, at 527. The Illinois statute was enacted less than a year after the leading decision in O'Callaghan v. Waller & Beckwith Realty Co., 15 Ill.2d 436, 155 N.E.2d 545 (1958), in which the Illinois Supreme Court held exculpatory clauses to be enforceable absent a legislative determination that they were against public policy. *Id.* at 527. The Maryland statute was enacted on the heels of Eastern Ave. Corp. v. Hughes, 228 Md. 477, 180 A.2d 486 (1962), where severe personal injuries were sustained by a residential tenant. The New York statute appears to have gained much of its impetus from the decision in Kirshbaum v. General Outdoor Advertising, 258 N.Y. 489, 180 N.E. 245, 84 A.L.R. 645 (1932), *rehearing denied,* 259 N.Y. 525, 182 N.E. 165, 84 A.L.R. 653 (1932), which enforced a broadly worded exculpatory provision against tenement dwellers. The case was the subject of extensive contemporaneous negative comment. *See, e.g.,* Recent Decisions, 10 N.Y.U. L. REV. 89 (1932); Recent Developments, 39 YALE L. J. 140 (1932). The Massachusetts statute appears to have been more of a response to the housing shortage during World War II than it was to any single decision, but it did follow shortly after the case of *Bacon* v. *Jaques,* 312 Mass. 371, 44 N.E.2d 648 (1942). *See generally* Recent Developments, 25 B.U. L. REV. 374 (1945).

88. The Illinois statute originally extended immunity to business leases in which municipal corporations, governmental units, and certain regulated corporations were lessors. In Sweeny Gas & Oil Co. v. Toledo P. & W. R. Co., 42 Ill.2d 265, 247 N.E.2d 603 (1969), the Illinois Supreme Court found the statute violative of equal protection, there being no rational basis to distinguish between the exempted entities and other business. The present statute contains no exemptions.

the lease. Overreaching clearly exists throughout the residential lease market.[89] As noted earlier, it is not nearly as widespread in the commercial situation,[90] but even where it does exist, it is often the commercial lessee who is able to take advantage of the superior bargaining position. Certainly, automobile manufacturers, oil companies, major chains, major tenants in shopping centers, and other large businesses, as well as concerns operating in areas where the supply of commercial property far exceeds demand, can and do exploit their superior economic positions through inclusion of exculpatory provisions by which they are held harmless from damage negligently caused to the leased premises.[91]

In view of those facts, the four statutes should be amenable to constitutional attack on equal protection grounds. It is difficult to conceive of circumstances or a policy which would justify the distinction made. If the attack were successful, a question would remain as to whether all commercial lease exculpatory provisions should be considered void.[92]

4. Hybrid Distinctions

Two additional methods of dealing with commercial lease exculpatory clauses, based both upon policy considerations and the construction of particular clauses, deserve brief mention. First, all of the infrequent decisions which have addressed the problem have followed the position of the Restatement of Contracts[93] that a party should not be permitted exculpation from the consequences of wanton, willful, or grossly negligent conduct.[94] Obviously, a court could arrive at that same result simply by finding that the language of a clause did not manifest an intention to exculpate from the consequences of such conduct. The latter treatment leaves something to be desired, since the determination of particular acts of negligence as gross is quite subjective. Moreover, it

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89. *See generally* Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791 (1974); Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 NW. U. L. REV. 204 (1976); Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247 (1970); *Direct Judicial Action, supra* note 3.

90. *See* discussion pp. 745-47 *supra*.

91. In most of the reported decisions in which a commercial lease exculpatory provision in favor of a tenant was considered, the particular clause held the tenant harmless from the consequences of fires which it negligently caused. *See, e.g.*, General Mills v. Goldman, 184 F.2d 359 (8th Cir. 1950), *cert. denied* 340 U.S. 947 (1952); McCay v. Big Town, Inc., 293 Ala. 582, 307 So.2d 695 (1975); Gordon v. J. C. Penny Co., 7 Cal. App. 3d 280, 86 Cal. Rptr. 604 (1970); Employers Cas. Co. v. Wainwright, 28 Colo. App. 364, 473 P.2d 181 (1970); Belden Mfg. Co. v. Chicago Threaded Fasteners, Inc., 84 Ill. App.2d 336, 228 N.E.2d 532 (1967); Chazen v. Trailmobile, Inc., 215 Tenn. 87, 384 S.W.2d 1 (1964).

92. *Cf.* Stanton v. Stanton, 421 U.S. 7 (1975) (equal protection challenge to sex classification in a Utah child support statute).

93. RESTATEMENT OF CONTRACTS §§ 572, 574, 575, 576 (1932).

94. *E.g.*, Thomas v. Atlantic Coast Line Ry. Co., 201 F.2d 167 (5th Cir. 1953); Bishop v. Associated Transport Co., 46 Tenn. App. 644, 332 S.W.2d 696 (1959). *See* Gabl v. Alaska Loan &

is submitted that most landlords and commercial tenants would not intend to exculpate each other from the consequences of conduct commonly considered more culpable than negligence. In addition, the possible ramifications of allowing a tenant to be held civilly harmless from such acts as arson, intended to terminate a tenancy, provide a sound basis for voiding such clauses.

Second, it has been held in at least two cases[95] that an exculpatory clause will not exempt a landlord from liability if the negligent conduct complained of did not arise as a normal incident of the landlord-tenant relationship. It would seem that most landlords and tenants would not intend their exculpatory provisions to be removed from the context of the lease and that problems of this nature should be resolved as a matter of construction. However, scant policy reasons justify forbidding a landlord and tenant to so contract, unless the intended scope of protection extends to areas where exculpation has been prohibited because of the nature of the relationship itself.

B. Strict Misconstruction

In a 1939 book review, Professor Llewellyn wrote:

> Our courts are loath indeed to throw out a contract clause under the plain justification that it is contrary to public policy, that it is such a clause as "private" parties cannot make legally effective in the circumstance. Once we admit that it *is* a contract clause, and admit that it does mean what it says, we tend to regret, but to let the clause stand. . . . [W]e have developed a whole series of semi-covert techniques for somewhat balancing these bargains. A court can "construe" language into patently not meaning what the language is trying to say. It can find inconsistencies between clauses and throw out the troublesome one. . . . Indeed, the law of agreeing can be subject to diverse modes of employment, to make the whole bargain or a particular clause stick or not stick according to the status of the party claiming under it. . . .[96]

That passage accurately describes much of the judicial treatment accorded commercial lease exculpatory provisions.[97] While some courts have at least attempted to grapple with issues bearing upon the

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Inv. Co., 6 Wash. App. 880, 496 P.2d 548 (1972); *Cf.* Smith v. General Apartment Co., 133 Ga. App. 927, 213 S.E.2d 74 (1975) (involving a residential lease but not limiting its holding thereto.)

95. *See* Insurance Co. of No. America v. Gulf Oil Corp., 106 Ga. App. 382, 127 S.E.2d 43 (1962); Zimmerman v. Daggett & Ramsdell, Inc., 34 N.J. Super. 81, 111 A.2d 448 (1955).

96. Llewellyn, Book Review, 52 HARV. L. REV. 700, 702 (1939).

97. *See, e.g.*, Hollander v. Wilson Estate Co., 214 Cal. 582, 7 P.2d 177 (1932); Daltex, Inc. v. Western Oil & Fuel Co., 275 Minn. 509, 148 N.W.2d 377 (1967); Nashua Gummed & Coated Paper Co. v. Noyes Buick Co., 93 N.H. 348, 41 A.2d 920 (1945); Employers Liability Assurance Corp. v. Greenville Business Men's Ass'n, 423 Pa. 288, 224 A.2d 620 (1966).

desirability of enforcing commercial lease exculpatory provisions, the most common device employed to avoid results which are perceived as oppressive has been to construe the clause under examination as inapplicable to the factual circumstances presented.[98] Indeed, it is difficult to locate a single opinion in which analysis does not commence with a paying of homage to the rule of strict construction.[99]

Strict construction of exculpatory provisions has been premised on either or both of two grounds: (1) an instrument should be construed most strongly against the person who drafted it;[100] and (2) an agreement exculpating a party from the consequences of negligence must appear clearly and unambiguously from the four corners of the instrument.[101] Unquestioned devotion to those rules of construction can easily result in tortured readings of patently unambiguous clauses and in a proliferation of inconsistent and illogical decisions in which the manifest intentions of the parties to a lease will be ignored.

Some courts have developed rather elaborate systems of misconstruction which apply solely to leasehold exculpatory provisions and which have as their obvious purpose the limitation of the applicability of exculpatory provisions, rather than an inquiry into the intentions of the parties. In Delaware, for example, for a lease provision to be construed to exonerate a party from the consequences of his or her own negligence, the lease must clearly and unequivocally indicate the intent to grant such immunity. If the language used can possibly be construed as not conferring immunity, it will be so construed. Moreover, the absence of the word "negligence" in the particular clause is fatal to the alleged exculpatee's case.[102] Pennsylvania, similarly, has adopted standards of construction providing that: (1) leasehold exculpatory provisions, because not favorites of the law, must be construed strictly; (2) such contracts must state the intention of the parties with the "greatest particularity" and show the intent to release from liability "beyond doubt by express stipulation" and "no inference from words of general import can establish it;" (3) such contracts must be construed with every conceivable intendment against the exculpatee; and (4) the burden to establish immunity is upon the purported exculpatee.[103]

98. *See, e.g.*, cases cited note 97 *supra; See also Direct Judicial Action* note 3 *supra*.

99. *But cf.* Mitchell's, Inc. v. Friedmann, 157 Tex. 424, 303 S.W.2d 775 (1957) (suggesting that the statement that an indemnity contract must be strictly construed against the indemnitor is misleading and should not be the basis of decision).

100. *E.g.*, Goldberg v. Pearl, 306 Ill. 436, 138 N.E. 141 (1923); Sears Roebuck & Co. v. Poling, 248 Iowa 582, 81 N.W.2d 462 (1957).

101. *E.g.*, Daltex, Inc. v. Western Oil & Fuel Co., 275 Minn. 509, 148 N.W.2d 377 (1967).

102. Blum v. Kaufman, 297 A.2d 48, 49 (Del. 1972).

103. Employers L.A.C. v. Greenville Businessmen's Ass'n, 423 Pa. 288, 292-93, 224 A.2d 620, 623 (1960). *See* Kotwasinski v. Rasner, 436 Pa. 32, 39, 258 A.2d 865, 868 (1969).

Even taking into consideration the discretion of a Pennsylvania or Delaware court in determining whether exculpatory language is clear and unequivocal, prospective lessors and lessees in

Other courts appear to prefer to emasculate commercial lease exculpatory provisions on a more ad hoc basis. For example, frequently, when only the word "negligence" is used in a provision, courts have imputed to businesspeople the legal sophistication necessary to intend the provision to apply to passive but not active negligence.[104] Other decisions relate the stories of landlords who, prior to their days in court, were so naive as to believe that clauses holding them harmless "from and against all claims of damage of whatsoever kind or nature or arising in any manner or under any circumstances"[105] sufficiently made clear an intention to exculpate them from the consequences of negligent conduct.[106]

Several of the decisions can only be described as ludicrous. In *Winkler v. Appalachian Amusement Company,*[107] a lease negotiated at arm's length provided that the lessee of a theatre building had agreed "to return the premises in good order, . . . damage by fire . . . excepted," and "to make any and all repairs that may be necessary excepting in the case of damage by fire."[108] The building was damaged by a blaze that was shown to have been negligently caused by one of the lessee's employees, and the lessor's insurer, as subrogee of the lessor, sued the lessee for damages. The Supreme Court of North Carolina, indicating that "[c]ontracts for exemption from liability for negligence . . . are strictly construed against the party asserting it," and that "[t]he contract will never be so interpreted in the absence of clear and explicit words that such was the intention of the parties,"[109] held that the word "fire," as used in the lease, did not comprehend fires negligently caused by the lessee, and that the lessor, or its insurer to the extent that it was entitled to subrogation, could recover from the lessee. Also noteworthy owing to its leap beyond the dictates of common sense is the decision in *Miller DuPont, Inc. v. Service,*[110] where the Colorado Supreme Court construed an exculpatory provision in which the tenant agreed "to

those two states would seem better off than their counterparts in jurisdictions where exculpatory clauses are misconstrued on more haphazard bases, simply because they are presented with rather precise guidelines indicating what is expected of them. While such construction guidelines do introduce a modicum of predictability, they skirt the real problem presented: that courts may do injustice in individual cases where the intention to exculpate is clear but not expressed with "the greatest particularity," and increase (albeit slightly) the work and fees of lawyers. *See* discussion pp. 760-61 *infra.*

104. *E.g.,* Cairnes v. Hillman Drug Co., 214 Ala. 545, 108 So. 362 (1915); Barkett v. Burcato, 122 Cal. App.2d 264, 264 P.2d 978 (1955); Hyman v. 230 So. Franklin Corp., 7 Ill. App.2d 15, 128 N.E.2d 629 (1926); Rolfe v. Tufts, 216 Mass. 563, 104 N.E. 341 (1914).

105. Marshall v. Maryland, D. & V. R. Co., 31 Del. 170, 172, 112 A. 526, 527 (1926).

106. *E.g., Id.;* Parkhill Trust Fund, Inc. v. Carrol, 115 Ga. App. 198, 153 S.E.2d 615 (1967); Meyer Jewelry Co. v. Professional Bldg. Co., 307 S.W.2d 517 (Mo. 1957); Baldwin v. McEldowney, 324 Pa. 399, 188 A. 154 (1936).

107. 238 N.C. 589, 79 S.E.2d 185 (1953).

108. *Id.* at 596, 79 S.E.2d at 190-91.

109. *Id.* at 596, 79 S.E.2d at 191.

110. 120 Colo. 131, 208 P.2d 87 (1949).

neither hold nor attempt to hold the landlord liable for any injury or damage either proximate or remote occurring or caused by any repairs, alterations, injury or accident to the above demised premises . . . or by reason of negligence or default. . . ."[111] as referring only to property damage sustained by the tenant and not to personal injuries.

Those cases and a myriad of others[112] suggest that a systematic analysis of the language employed in commercial lease exculpatory provisions for the purpose of determining which clauses will be held to apply to negligent conduct would not prove fruitful. The language used seems to have rather little to do with how a particular clause will be construed, because, as one court has noted, judges are not impervious to the unequal bargaining positions of the parties in construing their agreements.[113]

Llewellyn[114] considered the chief detrimental effects of misconstruction to be: (1) that it rests upon an admission that the clause being interpreted is permissible in content and purpose, thereby inviting draftsmen to "recur to the attack;"[115] (2) that since it fails to face the real issue presented, it does not provide experience or authority for marking "what the *minimum decencies* are which a court will insist upon as essential to an enforceable bargain;"[116] and (3) that since it purports to construe but really does not, later efforts to arrive at the true meaning of similar phrases in other contracts is unduly hampered.[117] He regarded the net effect of all this as being "unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy."[118] These observations, in varying degrees, reflect the impact which "strict misconstruction" has had on the area of commercial lease exculpatory provisions. Indeed, commentators have attempted to instruct attorneys on the finer points of drafting exculpatory clauses so that courts could not possibly limit their meaning,[119] and some of the distinctions drawn by courts in efforts to apply an exculpatory clause to negligent conduct in the face of an earlier opinion which held the same or similar clause inapplicable to negligent

111. *Id.* at 135, 208 P.2d at 89.

112. *Compare, e.g.*, Cerny-Pickas & Co. v. C. R. Jahn Co., 7 Ill.2d 393, 131 N.E.2d 100 (1955) *and* Galligan v. Arovitch, 421 Pa. 301, 219 A.2d 463 (1966) *with* Baldwin v. McEldowney, 324 Pa. 399, 188 A. 154 (1936) *and* Bleakley v. Fixture Exchange Corp., 470 S.W.2d 296 (Tex. Civ. App. 1971).

113. Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 586, 111 A.2d 425, 431 (1955).

114. Llewellyn note 96 *supra.*

115. *Id.* at 703.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See* Jones, *An Exculpatory Provision That Will Protect the Lessor,* 277 INS. L. J. 79 (1946); Comment, *Drafting Exculpatory Clauses in a Landlord-Tenant Relationship,* 21 U. MIAMI L. REV. 676 (1967).

conduct are nothing short of embarrassing.[120] After scanning these cases, one is left with the impression that the judiciary has found that it can "put one over" on landlords. This situation is able to persist because the issues involved are rather private in nature and do not become the subject of litigation by any single landlord or tenant on a regular basis, and because the real parties in interest are usually insurance companies who, in the final analysis, may actually benefit from uncertainty.[121] To members of the legal profession, however, that treatment should be considered unconscionable in the broadest sense of the word.

II. A DIFFERENT APPROACH

The absence of a comprehensive, predictable, and well grounded approach to the problems presented by commercial lease exculpatory provisions stems largely from an inadequate assessment of the appropriate factors which should be weighed against the desire to allow commercial lessees and their landlords to freely contract. Judicial considerations limited solely to relative economic or bargaining strengths, types of negligence, or whether a statute has been violated fail to adequately perceive exculpation as an interrelated facet of our broadly based tort compensation system. Inquiry must be directed toward the more basic issues, which admittedly are not subject to categorical resolution — how important is it to society and to lessors and lessees that these types of losses be compensated and that the negligent parties provide that compensation?

Concerning damage to the landlord's or tenant's property, while the public's interest in exculpation may be urged on several fronts, it in fact appears to be quite minimal. First, it may be argued that since negligence law requires inattentive parties to compensate their victims, negligent conduct is thereby deterred, and the public subjected to fewer and smaller risks of injury. It would logically follow that exculpation removes deterrent effects, and that a rise in negligent acts by the exculpatee would cause increased harm to the public.

There are several answers to that argument. While some scholars have urged that our negligence system does deter harmful conduct,[122] it has also been argued that, in a commercial setting, the availability of liability insurance negates the incentive for reasonable care.[123] Even if

120. *Compare* Kirshenbaum v. General Outdoor Advertising Co., 258 N.Y. 489, 180 N.E. 245 (1932), *with,* Kessler v. The Ansonia, 253 N.Y. 453, 171 N.E. 704 (1930).

121. So long as lessors and lessees are unable to predict in advance how a particular clause will be construed, they will tend to purchase insurance policies which guard against the same risks.

122. *See, e.g.,* G. CALABRESI, THE COST OF ACCIDENTS 135 *passim* (1970).

123. *See* Bisso v. Inland Waterways Corp., 349 U.S. 85, 118-19 (1955) (Frankfurter, J. dissenting). No conclusive studies appear to have been made since that time. *See also* R. KEETON,

the threat of liability were viewed as deterring negligent conduct, however, since commercial lease exculpatory clauses do not generally apply to third parties,[124] it would seem that the deterrent effects of potential liability to invitees or employees would, in most instances, be sufficient to protect the tenant from a landlord's callousness. Moreover, a builder-developer who had leased all office space prior to construction would not be motivated to use cheap materials or otherwise negligently constuct the building because of (1) liability to third parties; (2) a desire to have tenants renew upon expiration of the leases; (3) the necessity of complying with building codes; and (4) liability in a contract action for failure to deliver the premises as represented.

Even if the existence of a liability-deterrence correlation could be established in a pure negligence system, the fact that a liability insurer will more often than not be responsible for tort judgments against either a landlord or tenant must be recognized.[125] In addition, incentives to care independent of potential liability suggest that the conduct of landlords or tenants renting commercial property would not be dictated by the presence or absence of exculpatory provisions. Accidents disrupt normal business, create a poor public image, involve other costs beyond

J. O'CONNELL, J. MCCORD, CRISIS IN CAR INSURANCE 13-16 (1968). The authors note, in discussing the fault concept as a deterrent to automobile accidents:

> Fear of injury to oneself, habits of caution, concern for the trouble one might have if he is involved in an accident even innocently, simple human decency are all deterrents far more potent than potential liability for fault but only for fault. Moreover, the deterrent effect is greatly lessened by the relative infrequency of accidents — at least serious ones. Each person can say: "It can't (or won't) happen to me."
>
> On the other side, potential liability based on fault can seldom be in the consciousness of the man in a hurry, the show-off, the person with a death-wish. Fault doctrines are deterrents so trivial that they can be safely ignored in any utilitarian evaluation. Moreover, such deterrence as liability might achieve is lessened because the essential causal connections are obscured by the need in the economy of the human psyche for each person unfortunately involved in an accident to remain convinced that not he, but someone or something else, was at fault. The normal person is easy to convince that there has been a miscarriage of justice if he is found at fault. Moreover, that effect is prospective as well as retrospective. For each of us the extra skill with which he drives, his extra perceptiveness and knowledge of the road and his car render the deterrent effect problematical.
>
> Even if one could assume frictionless and impeccably accurate operation of the fault-ascertaining machinery, together with a predictable and substantial awareness by potential fault-doers of what constitutes faulty conduct, one could still not hope for a great deal of deterrence from a system that measured liability by fault. Whatever deterrent effect the present system otherwise might have had is hopelessly compromised by the very existence of liability insurance. . . . If we wanted deliberately to maximize deterrence through compensation rules, insurance would have to be made illegal. . . .

Id. at 14. Certainly, that same logic is applicable to the topic under discussion.

124. *See, e.g.*, cases cited notes 68 and 69 *supra*.

125. *See* R. KEETON, VENTURING TO DO JUSTICE 155 (1969). Keeton notes that "liability insurance itself seriously undercuts the supposed deterrent effect of judgments because it shelters tortfeasors from the very economic consequences that are supposed to be the principal deterrent." *Id.* at 156.

126. James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.

Society also has an interest in minimizing the costs of a compensation system.[127] Actual costs, however, will not be reduced if exculpation is prohibited. Insofar as it may be argued that exculpation contributes to a want of care, an increase in accidents, and therefore more damages which will eventually be passed on from business to the public, the same objections considered with respect to the general deterrent effect may be raised. Differences in administrative costs between a system which permits exculpation and one that does not may, at first glance, appear to be insignificant,[128] but a meaningful reduction in costs could be accomplished if the applicable law was sufficiently predictable, obviating the need for duplication of insurance coverages and decreasing the attraction of litigation.

A societal interest in the "overall fairness" of the compensation system must also be considered.[129] Professor Robert Keeton has suggested that the primary objective of tort law in our system is to provide what is considered fair and just compensation for losses, sometimes shifting a loss and other times leaving it where it falls.[130] Notions of fairness differ among people and over time, and no attempt is made to characterize commercial lease exculpatory provisions as inherently just or unjust. Apart from possible concerns with overreaching which were previously suggested to be unwarranted, however, current perceptions of the justness of structures and workings of our compensation system should not be significantly offended by the inclusion of clauses exculpating a party to a commercial lease from the consequences of negligently caused property damage. Exculpation may be attempted by either landlords or tenants,[131] and in that sense is equitable. Additionally, the idea that parties should not be required to bear the economic burden of damage which they have caused does not outrage our system. Surely the fact that either a landlord or tenant may simply purchase a

J. 549, 558 (1948). Certainly, the deterrence argument would be of extremely limited validity with respect to injuries caused by negligently made repairs or other acts of misfeasance, since in most instances, the negligent acts complained of are committed by an employee, who usually would be unaware of the terms of the lease and whose primary motivation would be to please the employer.

127. *See generally* G. CALABRESI, note 123 *supra*; Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590 (1973).

128. While a prohibition of exculpation would eliminate litigation concerning the validity or construction of such clauses, a concomitant rise in the number of damage actions generally would be expected, since numerous parties would seem to have foregone litigation in the past because of an exculpatory agreement.

129. *See*, Keeton, note 127 *supra*. *But see* G. CALABRESI, *supra* note 122, at 24, where it is suggested that justice cannot be viewed properly as a goal of the compensation system, but rather, should be perceived as a constraint that can impose a veto on systems or the use of particular devices or structures within a given system.

130. R. KEETON, *supra* note 125, at 147.

131. That is untrue in Maryland, Massachusetts, New York, and Illinois, however. *See* discussion pp. 753-56 *supra*.

liability insurance policy to pay such damages evidences the acceptance within our system of such shifts of burdens. Further, indemnity provisions, by which a commercial tenant directly agrees to indemnify the landlord for amounts the landlord becomes liable to pay to third parties on account of negligence, have long been upheld.[132]

Similarly, the lessor may require a lessee to insure the premises and its contents at full replacement value, under an "all risk" policy naming the landlord as an additional insured. Generally, an insurance company will name both the lessee and lessor as insureds in an "all risk" policy at no additional cost, because the value of subrogation is not built into the rate schedules.[133] Both parties being entitled to recover, the insurance company could not seek subrogation, and a claim by a tenant of negligently caused damage in excess of policy limits would admit a breach of the covenant to insure at full value. The damages of each claim, in effect, cancel each other out. Having the option of insurance when confronted with an exculpatory provision, if a particular lessor or lessee chooses to personally assume the risks of the other's negligence (thereby reducing the immediate costs of doing business) the public should not be shocked if such a party is required to shoulder the economic burden of an unfortunate incident.

Although the degree of importance which landlords and commercial tenants attach to the availability of exculpatory provisions is not subject to extensive generalized assessment owing to the diverse natures of the properties and participants,[134] it would appear that such clauses need

132. *E.g.*, Kokusai Kisen Kabushiki Kaisha v. Columbia Stevedoring Co., 23 F. Supp. 403 (S.D.N.Y. 1938), *aff'd*, 100 F.2d 1016 (2d Cir. 1938); Moore v. Standard Paint & Glass Co. of Pueblo, 145 Colo. 151, 358 P.2d 33 (1960); J. W. Grady Co. v. Herrick, 228 Mass. 304, 192 N.E. 748 (1934); Bellmann v. National Container Corp. of Mich., 5 Wis.2d 318, 92 N.W.2d 762 (1958). *See* Hartford Fire Ins. Co. v. Chicago Tunnel Terminal Co., 12 Ill. App.2d 539, 139 N.E.2d 770 (1956).

133. Of course, as the value of the property covered increases, so will the premium, but not proportionately. Interview with R. Wyman, insurance agent at Waverly Insurance Agency, Belmont, Mass. (March 3, 1977).

It is also possible to obtain a waiver of subrogation rights directly from the insurance company, which, depending upon the extent of a party's business with the company, may or may not require payment of an additional premium. 1 M. FRIEDMAN, *supra* note 1, § 9.9. *See* Sacramento-Yolo Port Dist. v. Cargill of Cal., Inc., 4 Cal. App.3d 1004, 84 Cal. Rptr. 822 (1970).

134. Certainly, a large corporation as the major tenant of an office building for a long term will have a different perspective than a dentist renting his office in a converted duplex dwelling, a small retailer renting space in a shopping mall, or a manufacturer of explosives renting a warehouse. Similarly, the small owner will have a different outlook than would the lessor of a small one story building suitable for use as a convenience store. Where a party is solvent and the risks minimal, liability insurance would be considered necessary regardless of the jurisdiction's position with respect to exculpatory provisions. Where risks and premiums are high, exculpatory provisions would be of more concern. The rates to insure a structure may differ dramatically

not be of particularly great concern to most landlords and tenants at the time their leases are being negotiated. There is no evidence suggesting that conflicts over these provisions have proved to be a major stumbling block in the negotiation of mutually agreeable lease terms, largely because attempts at exculpation are undertaken not to deprive the exculpator of damages, but rather to reduce costs which may be incurred by the exculpatee. Those costs may be viewed as insurance premiums or as potential damages arising from a tort action. Thus, there is no sound reason for a party to refuse to excise an exculpatory provision from a lease in consideration for an appropriate increase or decrease in rent which would be used to pay the premium on a suitable liability policy. Also softening the apparent impact of the law regarding exculpatory provisions is the fact that judicial decisions which appear to spell doom for the unwary business person are rather deceptive. In many jurisdictions, an insurance company seeking subrogation must proceed in the name of its insured against a liability insurer in the name of its insured, and it will not be apparent that subrogation is involved.[135] Further, many (if not most) attorneys, understandably unsure about the effect of an exculpatory provision, will advise clients to increase the limits of their liability policies to suitable levels regardless of the intent of favorable exculpatory provisions in the lease.[136]

The greatest concern of most commercial tenants and landlords is not whether exculpatory provisions are enforced, but whether insurance burdens can be knowledgeably assessed and allocated. Where property

depending upon its value, its construction, and the type of activity carried on therein, and in turn, the cost to insure property contained in the structure will vary with the type of structure that it is. Interview with R. Wyman, insurance agent at Waverly Insurance Agency, Belmont, Mass. (March 3, 1977). *See generally* J. MAGEE, PROPERTY INSURANCE (3d ed. 1965).

135. 1 M. FRIEDMAN, *supra* note 1, § 9.9. *See, e.g.*, Gordon v. J. C. Penny Co., 7 Cal. App. 3d 280, 86 Cal. Rptr. 604 (1970); Poslosky v. Firestone Tire & Rubber Co., 349 S.W.2d 847 (Mo. 1961); Mayfair Fabrics v. Henley, 97 N.J. Super. 116, 234 A.2d 503 (1967); Winkler v. Appalachian Amusement Co., 238 N.C. 589, 79 S.E.2d 185 (1953). Also diminishing concern with exculpatory provisions in many instances is the absence of duties of the landlord or tenant which are likely to be breached. In many instances, the only property of the landlord which the tenant is likely to damage is the building, and significant damage is generally caused by fires. Most leases will clearly spell out responsibilities with respect to fire insurance whether or not an exculpatory provision is also included. The landlord's duties to the tenant apart from contract may also be quite limited. *See generally* Love note 6 *supra*.

136. If, because of uncertainty, a prudent party would obtain liability insurance to cover the risks purportedly exculpated against, the question arises as to why exculpatory provisions are so commonly found in commercial leases. The answer is a bit unclear. Doubtless, some clauses are used in lieu of insurance, particularly in marginal operations where the costs might be prohibitive to the lessor and prospective tenants. Also, future insurance premiums might be lowered if injured tenants are actually precluded from reaping the benefits of the policy. More often, it is suspected, an attorney will discover an exculpatory provision in his form book or will have read a recent decision in which financial disaster appears to have struck, and will simply feel that it can't hurt to throw one in. Of course, when a standard form is used, an exculpatory clause will probably be included as a matter of course, and it will be up to the party proffered the form to attempt to negotiate an excision of the provision.

damage insurance is involved, it is submitted that the law ought to encourage the use of exculpatory provisions. In that situation such clauses operate in the same manner as a waiver of subrogation. If parties are certain of the effectiveness of an exculpatory provision, litigation between insurance companies over duplicate coverage and purchases by parties of duplicate coverage could be avoided. In property damage situations, nothing is gained by striking down individual clauses. Rather, efficiency of the system suffers if both parties are obliged to insure against the same risks because of doubt as to the validity of the terms of their lease. Moreover, where a party opts not to purchase property insurance, the decision to bear the risks could be made at least knowledgeably, if not cleverly.

Injuries to the person present a different situation.[137] Current perceptions of fairness, as a goal of our compensation system, do not appear to be served by permitting landlords or tenants to avoid liability for personal injuries which they negligently cause. Other areas of our law, notably section 2-719 (3) of the Uniform Commercial Code, have found what may best be described as a lack of justice in allowing exculpation from personal injury damages, presumably on the grounds that property is replaceable while health is not.[138] As suggested earlier, courts have long been disposed to prohibit exculpation where risks to the person are great. Moreover, the attack can not be completely mollified by insurance. While most property may be insured up to its full value, damages to the person are, at least theoretically, unlimited. More important, some items of damage compensable in a personal injury action, such as pain and suffering, loss of consortium, and in some instances impairment of future earning capacity, cannot effectively be insured against by an injured victim, but they can be insured against by a tort-feasor in the form of a liability policy. Thus, where exculpation seeks to avoid liability for personal injuries, it cannot be viewed simply as a shifting from one party to another of the burden of obtaining insurance. Full compensation, as a legitimate purpose of our system, is thus thwarted in part by allowing exculpation from liability for personal injuries. Moreover, the consequential damages against which a victim

137. It is indeed surprising how few cases have distinguished between exculpation from liability for damages to the person and to property in the commercial situation. *But see* Gabl v. Alaska Loan & Inv. Co., 6 Wash. App. 880, 496 P.2d 548 (1972), where the Washington Court of Appeals, in upholding the validity of a commercial lease exculpatory clause as against the owner of a ski shop on the ground floor of a residential building, noted that the case was concerned with property damage and suggested a different result might obtain if personal injuries were involved. In addition, Miller DuPont, Inc. v. Service, 120 Colo. 131, 288 P.2d 87 (1949), made the distinction, but cast it in terms of construction rubric.

138. Section 2-719(3) of the Uniform Commercial Code renders exculpation from liability for injury to the person in the case of a sale of consumer goods by a merchant prima facie unconscionable.

cannot insure are primarily of a personal, as opposed to a business nature, and the rationale for the law to view the problem as one of business is less strong. It should also be noted that because insurance will not cover many items of damage recoverable in a tort action, the personal injury cases are more than simply battles between self-interested insurance companies. The real parties in interest are liable to be the victim or the victim's family, and most landlords interested in protecting their property interests will have purchased liability insurance covering injuries negligently caused to all third persons on the premises, including the tenant. Finally, predictability of judicial action, while perhaps not as crucial as in the case of property damage, should also be of prime concern in this area. Certain consequential damages may be at least partially insurable in a "business insurance" policy,[139] and if parties know how courts will react, they may be prompted to purchase, or to forego purchasing, certain coverage. These considerations suggest that exculpation from personal injury liability ought to be discouraged.

III. CONCLUSION

Prohibiting exculpation from liability for negligently caused personal injuries could be accomplished relatively easily through enactment of statutes similar to those which forbid all forms of exculpation between landlords and tenants. Implementation of a policy encouraging landlords and commercial tenants to use exculpatory provisions for property damage would be more difficult in view of the long history of judicially declared disfavor. A meaningful remedial statute, after declaring the policy of the state to be encouragement of such forms of exculpation, should define the scope of conduct and damages to which exculpatory clauses would apply and indicate with particularity the language necessary to effectuate exculpation. Such a law would go a long way toward alleviating past uncertainties. Such legislation should be temporal in nature. If the character of the commercial rental market were to change drastically, it might be that exculpation ought to be prohibited. Even if a legislature is not persuaded that allowing exculpation with respect to property damage is in the public and private interests, blanket prohibition would be preferable, in terms of costs, to the situation that now exists. In the final analysis, the decision whether to permit or forbid exculpation is not as significant as the need for a predictable approach to enforcement.

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139. Allied Mutual Casualty Co. v. Askerud, 254 Minn. 156, 94 N.W.2d 534 (1959). *See also* 11 COUCH ON INSURANCE § 44:401 (2d ed. 1963).

Prosecutorial Discretion in Peremptory Challenges: An Empirical Investigation of Information Use in the Massachusetts Jury Selection Process

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The peremptory challenge has been criticized by legal experts who question the fairness and propriety with which it has been employed. In Massachusetts, courts have left the challenge immune from judicial review, generally applying the nonintervention doctrine dictated by Swain v. Alabama. *To examine the way prosecutors employ peremptory challenges, an empirical study of decision making strategies and information usage was undertaken. It was discovered that prosecutors generally process similar types and amounts of information in making this decision, and, further, that they may be greatly influenced by the presence or absence of certain facts.*

Among the issues of great importance to the administration of criminal justice, few have received as much attention in case law[1] and

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1. *See especially* Duncan v. Louisiana, 391 U.S. 145 (1968) (establishes right to jury trial in serious cases); Irwin v. Dowd, 366 U.S. 717 (1961) (establishes the right to an impartial jury); *see also* Kiernan v. Van Scheik, 347 F.2d 775 (3d Cir. 1965). That juries must represent a fair cross-section of the community was determined in Taylor v. Louisiana, 419 U.S. 522 (1975); Turner v. Louisiana, 379 U.S. 466, 471-73 (1965) held that the verdict must be based on an unbiased consideration of evidence.

legal comment[2] as jury selection and the related practices of the peremptory challenge[3] and the challenge for cause.[4] Moreover, the peremptory challenge is of particular interest to those concerned with fairness and propriety in the legal process.[5] This emphasis is due, in no small part, to the realization that the peremptory challenge is one of the few remaining legal institutions in which prosecutorial discretion is relatively absolute.[6] Courts have been cautious when asked to place constraints on the state's decision making powers.[7]

Over the years, critics and proponents of the premeptory challenge have debated its relative merits. Those opposed to its unrestricted use assert that it gives the prosecutor too much power to control jury composition,[8] and that consequently it may be used to exclude jurors by

2. M. BLOOMSTEIN, VERDICT: THE JURY SYSTEM 118-129 (1968); H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966); M. GLEISSER, JURIES AND JUSTICE (1968); S. MCCART, TRIAL BY JURY (1964); Broeder, *The University of Chicago Jury Project,* 38 NEB. L. REV. 744 (1959); Clark, *The American Jury: A Justification,* 1 VALPARAISO U. L. REV. 1 (1966). For a critical look, *see* Harley, *Where Jury Trial Fails,* 55 JUDICATURE 94 (1971); Peck, *Do Juries Delay Justice?,* 18 F.R.D. 435 (1956).

3. *See, e.g.,* Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries,* 86 YALE L. J. 1715 (1977) [hereinafter cited as *Challenge*]; Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges,* 27 STAN. L. REV. 1493 (1975); Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Non-White Jurors: A Valued Common Law Privilege in Conflict With the Equal Protection Clause,* 46 CIN. L. REV. 554 (1977); Comment, *The Right of Peremptory Challenge,* 24 U. CHI. L. REV. 751 (1957).

4. *See generally* Kuhn, *Jury Discrimination: The Next Phase,* 41 S. CAL. L. REV. 235 (1968); Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process,* 56 GEO. L. J. 839 (1968); Comment, *Voire Dire: Strategy and Tactics in the Defense of Social Political Activists,* 5 AKRON L. REV. 265 (1972); Note, *Voire Dire: Exploring Racial Prejudice on Voire Dire: Constitutional Requirements and Policy Considerations,* 54 B. U. L. REV. 394 (1974).

5. Swain v. Alabama, 380 U.S. 202 (1965) sets the standard for use of peremptory challenges (peremptory challenges are only violative of 14th amendment when persistently used to exclude a minority group); for a critical examination *see Challenge, supra* note 3, at 1724; *see also* Van Dyke, *Voir Dire: How Should it be conducted to Ensure that Our Juries are Representative and Impartial?,* 3 HASTINGS CONST. L. Q. 65 (1976); Comment, Swain v. Alabama: *A Constitutional Blueprint For the Perpetuation of the All-White Jury,* 52 VA. L. REV. 1157 (1966).

6. The petitioner in Swain v. Alabama, 380 U.S. 202 (1965) argued that the grand jury and his petit jury veniere had been chosen in a discriminatory fashion. The Court held that petitioner had not carried his burden of proof. *Id.* at 205-209. He also claimed that the prosecution had purposely excluded Blacks over a period of years. Again the Court found that petitioner did not support his burden of proof. *Id.* at 223-24. (The petitioner also claimed exclusion of Blacks at his trial violated the fourteenth amendment, which was also rejected by Court, *Id.* at 210.) Thus, the Court clearly placed the burden of proof on petitioner to determine whether there existed "the prosecutors systematic use of peremptory challenges against Negroes over a period of time." *Id.* at 227.

7. A recent challenge to unrestricted use of the peremptory challenge was first upheld in U.S. v. Robinson, 421 F. Supp. 467 (D. Conn. 1976) but later *vacated sub nom,* U.S. v. Newman, 549 F.2d 240 (2d Cir. 1977).

8. Bradshaw, *Peremptory Challenges in Criminal Cases — Trial By a Jury of Whose Peers?,* MO. BAR J. 170, 177 (1977).

reason of economic,[9] ethnic,[10] or sexual affiliations.[11] This factor has particular relevance for those concerned with the removal of black and other minority group jurors from trials involving criminal defendants of one race and victims of another.[12] Others argue that prosecutorial discretion to exercise the peremptory challenge is highly personal, used without a meaningful basis, and that this results in its being employed in a haphazard dysfunctional fashion.[13] On the other hand, proponents contend that the practice enhances the fairness and individuality of justice,[14] by allowing defense attorneys to remove jurors who may be harmful or prejudicial towards their client.[15] Particular emphasis has been accorded the power of the peremptory challenge to overcome the burden placed on the defense by pre-trial publicity and its resulting bias.[16]

Whatever the relative merits of these arguments, the peremptory challenge continues to enjoy widespread use and judicial acceptance in both civil and criminal trials.[17] It arises at a critical stage of the criminal justice process in a majority of the criminal cases going to jury trial.[18] When viewed in such a context, the nature of this decision process deserves detailed and systematic evaluation.[19]

As the term implies, peremptory challenges are used by both prosecution and defense to shape juries by dismissing potential members without explanation or apparent cause.[20] The process is typically private

9. For supportive evidence, *see* Adler, *Socio-Economic Factors Influencing Jury Verdicts,* 3 N.Y.U. REV. OF LAW AND SOC. CHANGE 1, 6-10 (1973); Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look,* 40 N.Y.U. L. REV. 1079 (1965).

10. F. BAILEY AND H. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS 106 (1971). (Describes ethnic characteristics and their relationship to juror behavior).

11. *Id.* at 104.

12. *Challenge, supra* note 3, at 1715 n.n. 3, 4.

13. *See generally* Note, *Peremptory Challenge-Dividing Rod for a Sympathetic Jury?,* 21 CATH. LAW. 56 (1975). (Describes various haphazard approaches to jury selection employed by prosecution and defense).

14. Nizer, *The Art of the Jury Trial,* 32 CORNELL L. Q. 59 (1946).

15. Babcock, *Voire Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975).

16. Comment, *The Discretionary Power to Grant Additional Peremptory Challenges in Highly Publicized Criminal Trials: Securing a Fair Impartial Trial,* 25 BUFF. L. REV. 545, 567 (1976). ("Since the desirability, effectiveness, and constitutional status of prior restraints upon the media is uncertain it is suggested that innovative procedures such as granting additional peremptory challenges to defendants may be employed to mitigate the adverse effects of pre-trial publicity without unduly restricting the media's function.") *See generally* Stanga, *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage,* 13 WM. & MARY L. REV. 1 (1971).

17. *See,* for a general review, Judicial Conf. of the U.S., *Report of the Judicial Committee on the Operation of the Jury System, The Jury System in the Federal Courts,* 26 F.R.D., 409 (1960); *see also* ABA PROJECT ON THE STANDARDS FOR CRIMINAL JUSTICE — STANDARDS RELATING TO TRIAL BY JURY (approved Draft 1968) [hereinafter cited as ABA STANDARDS].

18. For a discussion of state and federal procedures see J. VAN DYKE, JURY SELECTION PROCEDURES (1977).

19. For a general discussion of the need to evaluate decision making in the criminal justice process, see L. WILKINS, SOCIAL DEVIANCE: SOCIAL POLICY, ACTION AND RESEARCH 294 (1964).

20. ABA STANDARDS, *supra* note 7, at 70.

and secretive and relies heavily on personal discretion.[21] Most prosecutor's offices have not devised any formal procedures governing the exercise of peremptory challenges. Thus, the actual process by which prosecutors reach a decision to accept or reject a juror is for the most part unknown.[22] The amount, type, and relative importance of information used by prosecutors has seldom been analyzed. It is as yet undetermined how information affects their decisions or whether differences exist among individual decision makers. Since the peremptory challenge appears to be a particularly cognitive process, interpreting how information is used to make decisions may be the key to understanding its operation.

Unfortunately, most empirical studies which evaluate decision making within the criminal justice system have generally been limited to the pre-adjudicatory, and post-adjudicatory stages of the criminal process.[23] Despite the recent attention devoted to juries, the majority of previously conducted research has focused on decision making within jury rooms and not on the process by which juries are selected.[24] This is partially explained by the fact that rules relating to the peremptory challenge are not subject to generalization and that prosecutors typically prove to be an inaccessible target population for study. As a result, the need for empirical analyses of how information is used in peremptory challenges is acute if more is to be known about this "low-visibility" decision point, and in determining whether guidelines should be formulated to govern its operation.

The current project was designed to uncover the type and amount of information important to Massachusetts prosecutors when faced with the opportunity to exercise the peremptory challenge. In addition, the research analyzes the varying weight assigned to information topics, the amount of information needed to make a decision, and whether the characteristics of the crime or offender influence challenges. Furthermore, prosecutorial "styles" of information use are explored.

The article is divided into four main sections. The first briefly explores law governing challenges within the jury selection process. The

21. For another empirical exploration of prosecutorial discretion, see Lagoy, Senna & Siegel, *An Empirical Study of Information Usage for Prosecutorial Decision Making in Plea Negotiations,* 13 AMER. CRIM. L. REV. 435 (1976).

22. For a similar view on the secretive nature of criminal justice processing see Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice,* 69 YALE L. J. 543 (1960).

23. *See, e.g.,* Carter, *The Pre-Sentence Report and the Decision Making Process,* 18 CRIME AND DELIN. 253 (1972); Carter and Wilkins, *Some Factors in Sentencing Policy,* 58 J. CRIM. L. C. & P. S. 503 (1967); Siegel, Sullivan & Greene, *Decision Games Applied to Police Decision Making: An Exploratory Study of Information Usage,* 2 J. CRIM. JUST. 131 (1974); Sullivan & Siegel, *How Police Use Information to Make Decisions: An Application of Decision Games,* 18 CRIME AND DELIN. 253 (1972).

24. *See generally* H. KALVEN & H. ZEISEL, note 2 *supra.*

second describes the research method used in this study. The third is devoted to the data derived from the study and the fourth views conclusions which can be drawn from it.

I. JURY CHALLENGES — LEGAL ASPECTS

There are three specific challenges to the composition of a jury in a criminal case. Two of these, challenges to the array and challenges for cause, are constitutionally compelled;[25] while the third, the peremptory challenge, is a privilege accorded by statute or court rule.[26]

Although the Constitution does not require that the jury be comprised of people just like the defendant, the pool from which the jury is chosen must represent a cross-section of the community.[27] The systematic exclusion of one racial group abridges the constitutional rights of the defendant[28] regardless of whether he or she is a member of the group excluded.[29] Challenges to the array based upon such a defect in the selection of jurors seek the disqualification of the entire jury panel. In Massachusetts, a challenge to the array must be made before the trial begins[30] and the moving party shoulders the burden of proving the exclusion of a "distinct and identifiable class of persons."[31]

Challenges for cause, on the other hand, are not directed at the jury

25. The constitutional bases for these challenges are in the sixth amendment right to trial by jury and the due process and equal protection clauses of the fourteenth amendment. The former guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. CONST. amend. VI. This sixth amendment right has been defined as "a fair possibility for obtaining a representative cross-section of the community." Williams v. Florida, 399 U.S. 78, 100 (1970). The fourteenth amendment cautions that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Due process as interpreted by the Supreme Court requires "a fair trial in a fair tribunal." *In re* Murchison, 349 U.S. 133, 136 (1955). Equal protection arguments in this area are grounded on the proposition that all citizens share the "privilege . . . of participating equally . . . in the administration of justice." Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

26. *See* Stilson v. United States, 250 U.S. 583, 586 (1919).

27. The American Bar Association has proposed a rule under which the basis for a challenge to the array is "a material departure from the requirements of the law governing the selection of jurors." ABA STANDARDS, *supra* note 17, at § 2.3. *See* Williams v. Florida, 399 U.S. 78, 100 (1970); Commonwealth v. Mutina, 366 Mass. 810, 818, 323 N.E.2d 294 (1975), Opinion of the Justices, 360 Mass. 877, 271 N.E.2d 335 (1971).

28. *See, e.g.*, Whitus v. Georgia, 385 U.S. 545 (1967); Avery v. Georgia, 345 U.S. 569 (1953); Norris v. Alabama, 294 U.S. 587 (1935); Neal v. Delaware, 103 U.S. 370 (1881).

29. Peters v. Kiff, 407 U.S. 493, 498 (1972).

30. Commonwealth v. Underwood, 75 Mass. Adv. Sh. 1215, 1241, 335 N.E.2d 915 (1975); Commonwealth v. Rodriquez, 364 Mass. 87, 300 N.E.2d 192 (1973).

31. Commonwealth v. Underwood, 75 Mass. Adv. Sh. 1215, 1241, 335 N.E.2d 915, 926 (1975); Commonwealth v. Stone, 366 Mass. 506, 320 N.E.2d 888 (1974); Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 275 N.E.2d 33 (1971), *cert. denied sub nom.* Farrell v. Massachusetts, 407 U.S. 910 (1972), *and sub nom.* Beneficial Fin. Co. v. Massachusetts, 407 U.S. 914 (1972). *See also* MASS. GEN. LAWS ANN. ch. 234, §§ 1, 4, 17, 25, 31, 32 (West 1959).

in its entirety but at specific members of the jury. The essence of this challenge is the defendant's right to an impartial jury.[32] To be assured that a jury stands indifferent, a voir dire is held during which questions are put to the jurors concerning any interest that they may have in the case or any opinion, bias or prejudice they hold toward a party or victim.[33] While such a process is designed to satisfy "essential demands of fairness,"[34] the character and scope of voir dire differs among jurisdictions[35] since the Constitution does not dictate the specific wording or number of questions to be asked.[36]

Some states provide that attorneys may question jurors as to bias under the supervision of the court.[37] Other states require that the judge

32. The right to an impartial jury has its roots in the English common law. Early commentators noted that "the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [an accused's] equals and neighbors, indifferently chosen and superior to all suspicion." 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349-50 (Cooley ed. 1899). In hearing any case a juror must be "indifferent as he stands sworn." COKE ON LITTLETON 155b (18th ed. 1832). *See* Reynolds v. United States, 98 U.S. 145, 148 (1878).

33. The literal translation of voir dire is "to see, to tell."

34. Aldridge v. United States, 283 U.S. 308, 310 (1931); Connors v. United States, 158 U.S. 408, 413 (1895).

35. *Id. Cf.* Ham v. South Carolina, 409 U.S. 524, 526-27 (1973) (*Under the circumstances of the particular case,* due process requires reversal where the defendant civil rights worker was not allowed to question prospective jurors regarding possible racial prejudice).

36. *See* CONN. CONST. art. 1, § 19 ("The right to question each juror individually by counsel shall be inviolate."). The Connecticut statute provides that "[i]n any civil or criminal action tried before a jury, either party *shall* have the right to examine, personally or by his counsel, each juror outside the presence of other prospective jurors as to his qualifications to sit as a juror. . . ." CONN. GEN. STAT. ANN. § 51-240 (West Cum. Supp. 1978) (emphasis added). *See also* State v. Marsh, 168 Conn. 520, 362 A.2d 523 (1975) (The trial judge has wide discretion in limiting the inquiry of counsel).

Compare ME. REV. STAT. tit. 15, § 1258-A (Cum. Supp. 1975) ("Any rule of court or statute to the contrary notwithstanding, the court *shall permit* voir dire examination to be conducted by the parties or their attorneys under their direction.") (emphasis added) *and* N.Y. CRIM. PROC. LAW § 270.15 (McKinney 1971) ("The Court *must permit* both parties to examine the prospective jurors, individually or collectively, regarding their qualifications to serve as jurors. . . . The scope of the examination is within the discretion of the Court.") (emphasis added) *with* MASS. GEN. LAWS ANN. ch. 234, § 28 (West Cum. Supp. 1977) ("the court shall, or the parties or their attorneys *may* under the direction of the court, examine on oath a person who is called as a juror therein. . . . If the court finds that the juror does not stand indifferent in the case, another shall be called in his stead.") (emphasis added) *and* R.I. GEN. LAWS § 9-10-14 (1976) ("The court shall, on motion of either party in a suit examine on oath a person who is called as a juror therein. . . . The court *may permit* the parties or their attorneys to conduct the examination.") (emphasis added).

Compare State v. Mercer, 98 Vt. 368, 127 Atl. 715 (1925) ("A liberal though not unlimited . . . opportunity to examine the jurors drawn, to test and consider their respective qualifications, to assert and exercise the right of challenge given him by the statute, is, no doubt, essential to the full enjoyment of a respondent's right to a jury trial.") *with* N.H. JUDICIAL COUNCIL, 5TH REPORT 12-13 (1954) (voir dire is at the discretion of the court and attorneys may be allowed to question jurors upon a showing of need.).

37. *See* Ham v. South Carolina, 409 U.S. 524, 527-28 (1973); Aldridge v. United States, 283 U.S. 308, 310 (1931); Connors v. United States, 158 U.S. 408, 413 (1895). *Cf.* Rideau v. Louisiana, 373 U.S. 723, 733 (1963) (Clark, J., dissenting) ("The determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge."). *See generally* statutes cited in note 36 *supra.*

ask jurors specific statutory questions.[38] In Massachusetts, the judicial inquiry required by statute concerning impartiality has been phrased as follows:

> If any member of the panel is in any way related to or acquainted with the defendant or the alleged victim, has any interest in this case or has formed or expressed an opinion about the case or is sensible of any bias or prejudice for or against the defendant or the alleged victim, you will make it known to the Court at this time.[39]

If the Massachusetts judge questions whether the deliberations of a juror or jurors will be influenced by extraneous factors he or she must inquire further to ensure the impartiality of the jury.[40] The approval of any questions a Massachusetts attorney wishes the court to address to a juror or jurors which is more specific than those above rests "in the sound discretion of the judge."[41]

In Massachusetts and other jurisdictions, the most prevalent appeals alleging the judge's abuse of discretion in limiting the scope of inquiry concern questions as to possible racial prejudices held by prospective jurors.[42] Constitutional due process, however, does not require such

38. MASS. GEN. LAWS ANN. ch. 234, § 28 (West Cum. Supp. 1977); R.I. GEN. LAWS § 9-10-14 (1969).

39. Commonwealth v. Ryles, 363 Mass. 674, 676 n.7, 296 N.E.2d 816, 819 n.7 (1973). *Accord,* Ristaino v. Ross, 424 U.S. 589, 592 n.3 (1976) (Habeas corpus proceeding following a judgment by the Massachusetts Supreme Judicial Court in Commonwealth v. Ross, 363 Mass. 665, 296 N.E.2d 810, *cert. denied,* 414 U.S. 1080 (1973)).

40. Commonwealth v. Dickerson, 77 Mass. Adv. Sh. 1344, 1355, 364 N.E.2d 1052, 1059 (1977). The statutory provision pertaining to the examination of jurors was recently amended to include the following paragraph.

> For the purposes of determining whether a juror stands indifferent in the case, if it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent, the court shall, or the parties or their attorneys may, with the permission and under the direction of the court, examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may, as aforesaid, cause a decision or decisions to be made in whole or part upon issues extraneous to the issues in the case. Such examination may include a brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issue of such examination. . . .

MASS. GEN. LAWS ANN. ch. 234, § 28 (West Cum. Supp. 1977).

41. Commonwealth v. Killelea, 76 Mass. Adv. Sh. 1793, 1810, 351 N.E.2d 509, 516 (1976) (questions concerning the believability of psychiatrists). *See* Commonwealth v. Silva, 77 Mass. Adv. Sh. 194, 359 N.E.2d 942 (1977) (questions regarding names of prosecution witnesses); Commonwealth v. Bailey, 76 Mass. Adv. Sh. 1420, 348 N.E.2d 746 (1976) (questions concerning police testimony, previous victimization by crime, and reactions to the crime charged and standard of proof to be applied); Commonwealth v. Lumley, 75 Mass. Adv. Sh. 751, 327 N.E.2d 683 (1975) (race); Commonwealth v. Pinckney, 365 Mass. 70, 309 N.E.2d 495 (1974) (political affiliation).

42. *See, e.g.,* Ham v. South Carolina, 409 U.S. 524, 526-27 (1973); Commonwealth v. Lumley, 75 Mass. Adv. Sh. 751, 327 N.E.2d 683 (1975); Commonwealth v. Pinckney, 365 Mass. 70, 309 N.E.2d 495 (1974); Commonwealth v. Bumpus, 365 Mass. 66, 309 N.E.2d 491 (1973); Commonwealth v. Rodriquez, 364 Mass. 87, 300 N.E.2d 192 (1973); Commonwealth v. Ryles, 363 Mass. 674, 296 N.E.2d 816, *cert. denied,* 414 U.S. 980 (1973); Commonwealth v. Ross, 363 Mass.

questions in every case where the defendant and the victim are of different races.[43] They are compelled only in special circumstances where racial prejudice is explicitly or implicitly an issue in the trial.[44]

Once the voir dire is completed, the judge or the attorneys may remove a juror for cause.[45] The attorney's ability to remove a juror for cause is limited only by the judge's ruling that there is no basis for a particular challenge since in his or her view the juror will stand indifferent.[46]

After any challenges to the array or for cause, the lawyers in most jurisdictions may exercise their peremptory challenges. This challenge operates quite differently from the other two: it is made without explanation or justification to the court.[47] Although the origin of the peremptory challenge lies deep within the common law,[48] it is today a creature of statute and its form varies among jurisdictions.[49] Therefore,

665, 296 N.E.2d 810, *cert. denied,* 414 U.S 1080 (1973), *aff'd sub nom.* Ristaino v. Ross, 424 U.S. 589 (1976).

43. Ristaino v. Ross, 424 U.S. 589 (1976).

44. Commonwealth v. Lumley, 75 Mass. Adv. Sh. 751, 753, 327 N.E.2d 683, 685 (1975) ("such questions are constitutionally mandated only when the defendant was a 'special target for racial prejudice'.") (citations omitted). *See also* cases cited in notes 3 & 41 *supra.*

45. MASS. GEN. LAWS ANN. ch. 234, § 28 (West Cum. Supp. 1977). *See* Commonwealth v. Dickerson, 77 Mass. Adv. Sh. 1344, 1355, 365 N.E.2d 1052, 1059 (1977) (a judge may excuse a juror for cause without making the statutory inquiry). *See also* ABA STANDARDS, *supra* note 17, at § 2.5.

46. Commonwealth v. Wygrzyalski, 362 Mass. 790, 291 N.E.2d 401 (1973). In order to preserve the denial of a challenge for cause on appeal counsel must make an offer of proof for the record. *Id. See* Commonwealth v. Dominico, 1 Mass. App. Ct. 693, 306 N.E.2d 835 (1974).

47. Swain v. Alabama, 380 U.S. 202, 220 (1964); Lewis v. United States, 146 U.S. 370 (1892). Although it is a right given by statute and not by the Constitution, the Supreme Court has recognized the peremptory challenge as "an arbitrary and capricious right . . . [which] must be exercised with full freedom or it fails of its full purpose." *Id.* at 378. *Cf.* Hayes v. Missouri, 120 U.S. 68, 70 (1866) ("Experience has shown that one of the most effective means to free the jury box from men unfit to be there is the exercise of the peremptory challenge."); Pointer v. United States, 151 U.S. 396, 408 (1893) ("The right to challenge a given number of jurors without cause is one of the most important rights secured to the accused.").

48. Blackstone called the peremptory challenge "a provision full of that tenderness and humanity to prisoners, for which our laws are justly famous." 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 353 (Cooley ed. 1899). *See* I. STEPHAN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 302-03 (1833). *See also* W. FORSYTH, HISTORY OF THE TRIAL BY JURY 140-50 (2d ed. 1878); J. VAN DYKE, JURY SELECTION PROCEDURES (1977).

Recently, the Massachusetts Supreme Judicial Court characterized the rationale behind the peremptory challenge and challenge for cause.

> Despite his good will, maturity, acumen and sense of civic responsibility and despite his willingness to accept and his efforts to apply judicial instructions, the juror comes to the court room complete with that knowledge and those experiences, expectations, fears and frustrations which have shaped his character and attitudes. Quite apart from questions of obvious bias or admitted prejudice, no juror enters into his temporary judicial service stripped of his background and emotions. To hold otherwise would be to defy human experience. Indeed, the recognition of this fact underlies our system of peremptory challenges and challenges for cause.

Commonwealth v. Mutina, 366 Mass. 810, 819, 323 N.E.2d 294 (1975).

49. *Compare* CONN. GEN. STAT. ANN. §§ 51-241, 51-242, 51-243 (West Cum. Supp. 1978) *and*

few generalizations can be made about the challenges available in a particular court.[50]

The right to challenge peremptorily in Massachusetts trials is given by statute[51] and the rules of court outline the process by which that right is exercised.[52] In a criminal case for a crime punishable by life imprisonment, both defense and prosecution are entitled to twelve peremptory challenges.[53] Before all other criminal trials (and in all civil cases), each party is allowed four such challenges.[54] When a defendant is tried on several indictments in one trial, he or she may employ the greatest number of challenges authorized for any one of the charges.[55] In those cases in which several defendants are being tried together, each defendant is alloted the full number of challenges provided by the statute and the prosecution may exercise challenges equal in number to the

N.Y. CIV. PRAC. LAW § 4109 (McKinney 1971) *and* N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1971) *and* R.I. GEN. LAWS § 9-10-18 (1969) *and* VT. STAT. ANN. tit. 12, §§ 1941, 1942 (1974) *with* N.H. REV. STAT. ANN. § 519:19 (1974) *and* ME. REV. STAT. tit. 15, § 1258 (Cum. Supp. 1975).

50. *See* ABA STANDARDS, *supra* note 17, at § 2.6.

51. The Massachusetts statute provides the following rights.

> Upon the trial of an indictment for a crime punishable by death or imprisonment for life, each defendant shall be entitled to twelve peremptory challenges of the jurors called to try the case, and in other criminal cases each defendant shall be entitled to four such challenges; provided, that each defendant in a capital case in which additional jurors are chosen under section twenty-six B shall be entitled to one additional peremptory challenge for each additional juror; and provided, further, that each defendant in a case in which several indictments are consolidated for trial shall be entitled to no more peremptory challenges than the greatest number to which he would have been entitled upon trial of any one of said indictments alone. In every criminal case the commonwealth shall be entitled to as many such challenges as equal the whole number to which all the defendants in the case are entitled. In a civil case each party shall be entitled to four such challenges. Peremptory challenges shall be made before the commencement of the trial and may be made after the determination that a person called to serve as a juror stands indifferent in the case.

MASS. GEN. LAWS ANN. ch. 234, § 29 (West Cum. Supp. 1976).

52. The rules of the Superior Court set forth the manner in which the peremptory challenge may be exercised.

> The procedure in the matter of peremptory challenges of jurors, except in an indictment for a crime punishable by death, shall be as follows, unless specially otherwise ordered in a particular case. The jurors shall first be called until the full number is obtained. If any examination on oath of the jurors is required, it shall be made, and any challenge for cause shall be acted on, and if any jurors shall be excused others shall be called to take their places. When it has been determined that all the jurors stand indifferent in the case, each plaintiff shall at one time exercise his right of peremptory challenge as to such jurors, and after others have been called to take the places of those challenged, and it has been determined that they stand indifferent in the case, shall at one time exercise his right of challenge of such others, and so on until he has exhausted his right of peremptory challenge or has ceased to challenge. Each defendant shall then exercise his right in the same manner. Each plaintiff, if his right of peremptory challenge has not been exhausted, shall then again exercise his right in the same manner, but only as to jurors whom he has not already had opportunity to challenge; and the parties shall likewise exercise the right in turn, until the right of peremptory challenge shall be exhausted or the parties shall cease to challenge. No other challenging, except for cause shown, shall be allowed.

Rules of the Massachusetts Superior Court, Rule 6.

53. MASS. GEN. LAWS ANN. ch. 234, § 29 (West Cum. Supp. 1976).

54. *Id.*

55. *Id.*

cumulative total given the defendants.[56] Although defendants in a multi-defendant trial may use their peremptory challenges in conflict with each other, such a situation does not necessitate severance of the defendants since the challenge is not a privilege to select but a limited opportunity to reject jurors.[57]

Because the peremptory challenge by definition may be arbitrary and capricious, the scope of appellate review concerning its use is limited. The majority of cases appealing the prosecutor's peremptory challenges involve their application to black or latino jurors.[58] In 1965, the United States Supreme Court considered the constitutionality of such actions in *Swain v. Alabama.*[59]

In *Swain,* the Court upheld the use of peremptory challenges in isolated cases to exclude jurors by reason of racial or other group affiliations.[60] The majority noted that the essence of the peremptory challenge is the assurance of a fair trial through its unfettered exercise.[61] Allowing defense counsel to question the "reasonableness and sincerity" of a prosecutor's peremptory challenges in an individual case, the majority argued, would thwart the pursuit of that goal.[62] Thus, the peremptory challenges of a prosecutor are presumed to have been made to ensure an unbiased jury in each case.[63] The defendant

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56. *Id. See, e.g.,* Commonwealth v. Dominico, 1 Mass. App. Ct. 693, 306 N.E.2d 835 (1974). *Cf.* Hendrickson v. Drewrys Ltd. USA, Inc., 349 Mass. 637, 212 N.E.2d 247 (1965) (civil case).

57. Commonwealth v. Dominico, 1 Mass. App. Ct. 693, 306 N.E.2d 835 (1974).

58. *See, e.g.,* Cunningham v. Estelle, 536 F.2d 82 (5th Cir. 1976); Little v. United States, 490 F.2d 686 (8th Cir.), *cert. denied,* 419 U.S. 861 (1974); Jackson v. Hopper, 232 Ga. 419, 207 S.E.2d 58 (1974); People v. King, 54 Ill.2d 291, 296 N.E.2d 731 (1973); State v. Henry, 219 Kan. 310, 548 P.2d 808 (1976); People v. Redwine, 50 Mich. App. 593, 213 N.W.2d 841 (1973). *Cf.* United States v. Aaron, 553 F.2d 43 (8th Cir. 1977) (systematic exclusion not shown where black left on jury); United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971) (systematic exclusion does not mean 100% exclusion).

59. 380 U.S. 202 (1964).

60. *Id.* at 221-23. In discussing the use of the peremptory challenge to exclude members of one racial group, the court noted that the race of a juror may be considered by an attorney though such a factor is "normally thought irrelevant to legal proceedings." *Id.* at 220. This ruling has been adhered to consistently since it was handed down in both federal and state courts. *See, e.g.,* United States v. LaLaurin, 557 F.2d 1064 (5th Cir. 1977); United States v. Neal, 527 F.2d 63 (8th Cir.), *cert. denied sub nom.* Robinson v. United States, 429 U.S. 845 (1975); cases cited in note 58 *supra.*

61. *Id.* at 219-20. *See also* Lewis v. United States, 146 U.S. 370, 376-78 (1892) (In a criminal case the peremptory challenge is an essential component of the sixth amendment right to trial by jury and the failure to bring the defendant face-to-face with the venire at the time when challenges are made constitutes reversible error). *But see* Commonwealth v. Dominico, 1 Mass. App. Ct. 693, 306 N.E.2d 835 (1974) (in special circumstances the defendant need not be present).

62. 380 U.S. at 221-22. Mr. Justice Goldberg disagreed with the majority as to whether the defendant or the state should bear the burden of proving widespread systematic exclusion of one racial group from petit juries, but he was apparently in agreement that absent such a showing, a prosecutor's action in a given case should be immune from review. *Id.* at 245 (Goldberg, J. dissenting). *See, e.g.,* United States v. Nell, 526 F.2d 1223 (5th Cir. 1976).

63. 380 U.S. at 222.

bears the burden of overcoming this presumption by showing the systematic exclusion of one racial group in many cases over a period of time.[64] Such proof would uncover a violation of the fourteenth amendment equal protection clause, denying to one group of citizens "the same right and opportunity to participate in the administration of justice enjoyed by the white population."[65] The burden of proof imposed by the Court may, however, be "strict in theory and fatal in fact."[66] During the fourteen years since the *Swain* decision, several cases have presented records replete with statistics showing the propensity of prosecutors to peremptorily challenge black jurors in cases with black defendants.[67] Yet, only one court has found systematic exclusion

64. The majority argued that since both defense counsel and prosecution are able to exercise peremptory challenges, the statistics provided by the petitioner-defendant were inconclusive and did not make out a prima facie case of racial discrimination. *Id.* at 223-29. *See, e.g.*, United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976); United States v. Nelson, 529 F.2d 40 (8th Cir. 1976); United States v. Carlton, 456 F.2d 207 (5th Cir. 1972).

65. 380 U.S. at 224.

66. Gunther, *The Supreme Court, 1971 term — Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972). Although Professor Gunther was referring to the strict scrutiny test of equal protection analysis and not the burden of proof in peremptory challenge appeals, his words appear apropos. *See* United States v. Pearson, 448 F.2d 1207, 1217 (5th Cir. 1971) ("[I]t can reasonably be argued that the courts should be liberal in holding that defendants have established the claim of systematic exclusion *prima facie* if *Swain's* approach to the problem is to be workable. The burden of proof faced by defendants is most difficult.").

67. United States v. Newman, 549 F.2d 240 (2d Cir. 1977); United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971); McKinney v. Walker, 349 F. Supp. 1015 (D.C.S.C. 1974), *aff'd.*, 529 F.2d 516 (1975); United States v. McDaniels, 379 F. Supp. 1243 (E.D.La. 1974).

Many of the federal appeals on alleged prosecutorial misuse of the peremptory challenge have arisen in the eighth circuit. As a result, the court of appeals has had at its disposal reports like the one shown below covering a two year period in the circuit.

CASE	# OF BLACKS ON JURY PANEL	# OF BLACKS PEREMPTORILY CHALLENGED BY GOV'T.	# OF BLACKS SEATED ON TRIAL JURY
Carter (1)	4	2	2
Carter (2)	5	5	0
c	5	5	0
d	4	4	0
e	5	5	0
f	6	5	1
g	6	2	4
h	4	2	2
i	4	4	0
j	5	4	1
k	3	3	0
l	6	5	1
m	6	5	1
n	3	2	0*
o	5	4	1

*one black peremptorily challenged by defendant.

United States v. Carter, 528 F.2d 844, 848 n.3 (8th Cir. 1975), *cert. denied,* 425 U.S. 961 (1976). Following the *Carter* decision, the court of appeals again declined to find systematic exclusion but in dicta noted the following reservation.

by a prosecutor[68] and that case was overturned on appeal.[69]

The Massachusetts Supreme Judicial Court has adhered to the standard set forth in *Swain*. Accordingly, it is improper for a judge to ask a prosecutor his or her motive for a peremptory challenge.[70] Although there have been a number of appeals in recent years in cases where the prosecutorial challenges removed all black jurors leaving an all-white jury, no Massachusetts court has found the presumption favoring prosecutorial action to be overcome.[71]

In view of the fact that a court may not ask a prosecutor about his or her motive for an individual peremptory challenge, a study revealing the type and amount of information upon which a prosecutor's decision is based may not only be enlightening, but necessary to guard against prosecutorial misconduct.

II. RESEARCH METHOD

Despite the recognized importance of the peremptory challenge, systematic study of its processes has been rare and research methodology so far unequal to the task.[72] Techniques employed in studies of prosecutorial information usage have been, in most cases, un-

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> While we cannot say that the statistical evidence introduced in *Carter* and referred to in this case overcomes the presumption of propriety surrounding the prosecutor's action, we view with concern the allegations made here and in *Carter* against the prosecutor since those allegations do rest on statistics disclosing that prosecutors very often strike all or most black persons from serving on juries hearing criminal cases of black defendants.

United States v. Nelson, 529 F.2d 40 (8th Cir. 1976).

68. United States v. Robinson, 421 F. Supp. 467 (D.C. Conn. 1976), *rev'd sub nom.* United States v. Newman, 549 F.2d 240 (2d Cir. 1977). *Cf.* United States v. McDaniels, 379 F. Supp. 1243, 1249-50 (E.D.La. 1974) (While the defendant failed to show systematic exclusion, the interests of justice require reversal because the opportunities of the few number of blacks in the jury pool were dilluted by the prosecutor's challenges).

69. United States v. Newman, 549 F.2d 240 (2d Cir. 1977).

70. Commonwealth v. Cook, 364 Mass. 767, 308 N.E.2d 508 (1974).

71. Commonwealth v. Johnson, 77 Mass. Adv. Sh. 516, 366 N.E.2d 212 (1977); Commonwealth v. Mitchell, 75 Mass. Adv. Sh. 1055, 326 N.E.2d 6 (1975); Commonwealth v. King, 366 Mass. 6, 313 N.E.2d 869 (1974), *cert. denied sub nom.* McAlister v. Massachusetts, 419 U.S. 1115 (1975); Commonwealth v. Cook, 364 Mass. 767, 308 N.E.2d 508 (1974); Commonwealth v. Talbert, 357 Mass. 146, 256 N.E.2d 748 (1970); Commonwealth v. Cranshaw, 76 Mass. App. Ct. Adv. Sh. 1115, 356 N.E.2d 708 (1976); Commonwealth v. Anderson, 75 Mass. App. Ct. Adv. Sh. 1082, 334 N.E.2d 61, *cert. denied,* 75 Mass. Adv. Sh. 3187, *cert. denied,* 424 U.S. 926 (1975).

72. For a recent example of empirical research on the peremptory challenge *see* Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court,* 30 STAN. L. REV. 491. Zeisel and Diamond employed experimental juries consisting of individuals who had been excused vis a vis peremptory challenges, and others dubbed "English juries" who had watched the voire dire but had not undergone individual questioning. Though results were not conclusive, Zeisel and Diamond found that some cases are "seriously affected if not determined, by the voir dire." *Id.* at 519. Some attorneys were able to dismiss jurors who would have found unfavorably for them; on the other hand, some attorneys, especially prosecutors, excused jurors who would have eventually been favorable to them. They suggest that one way to overcome the undesirable effects of disparite attorney performance would be to "increase the amount of information on which lawyers base their decisions." *Id.* at 529.

satisfactory in two respects. They lack the degree of control required to establish rigorous experimental conditions for research and they fail to simulate the real-life situations in which decisions are actually made. To remedy these deficiencies, a device developed by Wilkins[73] called the "information board," a sophisticated gaming technique, was applied to the study of prosecutorial decision making. This apparatus is based upon the premise that decision making can be observed by measuring a subject's response to a stimulus presented in the form of pieces of information. Proceeding from this basic concept, we created a research instrument tailored to the particular patterns of jury selection.[74]

It is important to realize that a laboratory device such as Wilkins' decision board does not resolve all the difficulties of data collection and measurement. It cannot, for example, lend itself to special circumstances encountered in criminal cases involving politically known or infamous types of individuals,[75] and, further, some subjects may make decisions using information not contained on the board. Nevertheless, it does allow the opportunity to make valid judgments about "typical" cases under experimental circumstances. By employing the information board technique, we were able to provide our subjects with realistic situations, in which their decision making was monitored with strict controls.

To assemble an information board, a particular decision (in this case the peremptory challenge) is analyzed by a panel of experts and relevant pieces of information employed in making the decision are identified. This first research task was carried out by interviewing several judges, prosecutors, and defense lawyers in various Massachusetts jurisdictions. Prosecutors in Massachusetts were found to have seventeen pieces of information available for consideration, composed of information directly available from the jury list, information inferred from the jury list,[76] and information from visual observations in the courtroom.

The following table sets forth the seventeen pieces of information which comprised the board.

73. L. WILKINS, SOCIAL DEVIANCE: SOCIAL POLICY, ACTION, AND RESEARCH 294 (1964).

74. The information board used was similar to devices used in studies of decision making in a wide variety of junctures in the criminal justice system by Carter. *See* studies listed in notes 21 and 23 *supra*.

75. An example of such an exceptional situation would be the Spiro Agnew case. For an analysis of this case, *see* Kress, *The Agnew Case: Policy, Prosecution and Plea Bargaining*, 10 CRIM. L. BULL. 80 (1974); Newman, *The Agnew Plea Bargain*, 10 CRIM. L. BULL. 85 (1974).

76. An example of information inferred by the jury list would be juror's education, which can be assumed from the juror's occupation.

TABLE I

INFORMATION TOPICS

(Information topics for potential consideration by Massachusetts prosecutors in the decision to exercise a peremptory challenge.)

Juror's name*
Juror's residence*
Juror's sex*
Juror's age***
Juror's race***
Juror's nationality***
Juror's marital status*
Juror's occupation*
Spouse's occupation*
Juror's occupational address*
Spouse's occupational address*
Juror's education**
Juror's employer*
Spouse's employer*
Juror's physical appearance***
Juror's demeanor***
Number of peremptory challenges used****

* Available from jury list directly:
** Inferred from jury list:
*** Observation:
**** Tactical considerations:

Each of the abstracted topics of information was then typed on the bottom of a 3" x 5" index card. On the reverse side, the actual "facts" of the case were reproduced so that a typical card would exhibit the information topic (*e.g.*, sex) printed on the front side and the corresponding topic-specific fact (*e.g.*, male) on the other. The reverse side of each card was also numbered for purposes of identification. The cards were arranged in overlapping fashion in a card-holder so that only the lower edge showing the classification title of each card (*e.g.*, juror's age, juror's occupation), was visible to the reader. Card order was randomly manipulated for each subject in order to avoid any bias caused by topic configuration at the outset.

Twenty prosecutors[77] randomly selected from four counties in and around the Greater Boston Metropolitan area served as subjects for the

77. When the sample size is compared to the total number of potential test participants N = 20 becomes a statistically significant figure and a sample size upon which findings of a reliable nature can be based.

study. The prosecutors were predominantly white males, though a few were female and/or black.[78]

One half of the subjects described their jury trial experience as extensive, but jury trial experience ranged from one individual with more than four hundred jury trials to another with twelve. The range of ages for study participants was twenty-six through sixty-one, with a mean age of thirty-six.

Two typical cases were provided for each subject, in order to determine if prosecutor's decision making and information usage varied according to offender characteristics or offense. The two hypothetical cases are illustrated below.

CASE A

The defendant's name is Harold J. Sisco. He is a 21 year old white male and a college student at a major university in the Boston area. Presently he resides in the home of his parents although for a nine month period he lived in an apartment in Quincy. His parents live in Dedham, and his father is an instructor at Bay State Junior College in Boston. The defendant has been charged with possession of a large quantity of heroin. He is dressed today in an expensive suit and his hair is long, but well groomed.

CASE B

The defendant's name is Jeffrey Moses. He is a 40 year old black male with very little education. Presently he resides in a Boston rooming house for men, but he has lived in a variety of locations for various periods of time and has been labeled a transient. He is charged with assault with intent to rape. The alleged victim of the offense is a former paramour of the defendant and the unmarried mother of several children. He is dressed in an inexpensive and out of date sport jacket and tie.

Each subject was presented with the facts of the first case and asked

78. Randomness is a prerequisite for reliable scientific investigation as it insures no structuring of the study to produce desired results, as opposed to those which actually may occur by chance. In this study to insure randomness the research design provided for random selection of prosecutors tested, random selection of information used concerning prospective jurors from a valid jury list, random reorganization of the test cards after each test to avoid topic configuration biases and alternating which of the two cases prosecutors were presented with first. On the basis of the above the requirements of a random experimental design are fulfilled and consequently experimental results are considered objective and reliable.

to become thoroughly familiar with its content,[79] taking as much time as he or she deemed necessary. They were told that they could return to the facts at any point in their deliberations. The subjects were then requested to familiarize themselves with each category of information on the information board. They were told that these items described a prospective juror who might be impaneled to decide the case at hand. When the subjects indicated that they were sufficiently exposed to the information topics, they were then asked to select, in order of perceived importance, those information topics normally used to decide whether a juror should be challenged. The subjects were informed that the specific piece of information they were looking for was on the back of the card, and that by simply lifting the card up it would become visible. As the prosecutors went through this process the number corresponding to the card was recorded.

As subjects selected information topics and read the relevant (juror) factual material on the reverse side, each was asked by the researcher whether, at that point, a decision could be made regarding the juror's suitability and, if so, to indicate the nature of the decision. The subjects had two possible choices of action; they could allow the juror to sit on the case or remove him by exercising a peremptory challenge. The subjects were told that the only information they could consider was that exhibited on the case fact card and the information board itself.

Once the subjects had indicated that they had processed enough information to make a decision and revealed the nature of their decisions to the researcher, they were asked to select, at their option, up to three additional pieces of information which could be used to support, modify or reject their original decisions. Before selecting this information, the subjects were informed that they were permitted to change their original decisions if they thought that the new information warranted such a change. These pieces of additional information were recorded as part of the subject's overall response to the case.

After the subjects had responded to the first case they received identical instructions and followed the same procedure for the second case. Case order was randomized so that half or the subjects received A first; the other half, B.

79. To insure that the presence of the individual administering the test would have the smallest possible effect on those tested and that the effect (if any) would be consistent, the material was presented to each prosecutor in a similar fashion and their instructions were identical. Each prosecutor was: a) Informed the test was not of a pass/fail variety and its purpose was to study how he/she would handle peremptory challenge decision making, and that their identity was not an aspect of the test; b) Sitting with his/her back to the researcher while the test was in progress so as to avoid the subject attempting to gauge the reseacher's approval or disapproval of the decision making technique; c) Given identical instructions and procedures for the subject's first and second cases; d) To insure that each prosecutor received the same instructions in handling the test problem, they were memorized by the test administrator.

Case A was based on an instance where a youthful, white male from a respected family was charged with possession of a large quantity of heroin. In contrast to case A, case B involved an uneducated, black transient charged with assault with intent to rape. Case A involved no victim whereas case B provided a former paramour of the defendant as the alleged victim of his offense. Both prospective jurors were quite similar. Each was white and had equivalent ages and jobs. Thus, while the offense and offender in both cases were quite dissimilar, differences in juror background could not affect decision outcome.

III. DATA ANALYSIS

The data analysis employed in this study was designed to bring to light information concerning the cognitive processes and procedures used by prosecutors in determining whether to exercise peremptory challenges. Data was assembled to reflect the type and amount of information used, the varying weights assigned to each information topic, the selection order of the information topics, the amount of information considered before a decision was made and any decision making patterns existing among prosecutors.

A. Types of Information and Relative Weights Assigned

A frequency distribution was computed to determine the types of information considered important by individual prosecutors. The data, set forth in Table II, demonstrated that in case A, more than half of the individuals tested chose to consider the juror's age, occupation, demeanor, education, physical appearance, sex, and spouse's occupation. On the other hand, five or fewer chose to consider the juror's occupational address, spouse's employer, and spouse's occupational address, suggesting that these had little influence upon most prosecutors in deciding whether to exercise their peremptory challenge. In case B, more than half chose to consider the juror's age, race, occupation, demeanor, residence, sex, and education, while five or fewer chose to consider nationality, occupational address, spouse's employer, and spouse's occupational address.

TABLE II

INFORMATION DISTRIBUTION

Jury list items:	case A	case B
Juror's name	7	6
Juror's residence	10	14

TABLE II — (Continued)

Jury list items:	case A	case B	
Juror's marital status	10	10	
Juror's occupation	17	15	
Spouse's occupation	11	10	
Juror's occupational address	2	1	
Spouse's occupational address	2	1	
Juror's employer	9	6	
Spouse's employer	5	3	
Juror's sex	11	14	
	84	80	Total: 164
Visual items:			
Juror's age	19	17	
Juror's race	6	17	
Juror's demeanor	15	15	
Juror's physical appearance	14	11	
Juror's nationality	9	5	
	63	65	Total: 128

Note: Juror's education and number of challenges deleted.

The study thus reveals that in both case A and case B, despite their diverse natures, the juror's sex, age, occupation, education, and demeanor were treated as items of importance by prosecutors and were considered without regard to the nature of the case. However, one area that demonstrated considerable divergence by prosecutors in their treatment of the two cases was race. In case A, involving a white defendant, only six individuals considered the juror's race in making their decisions; while in case B, with a black defendant, seventeen prosecutors referred to information concerning the prospective juror's racial background. It is significant, however, that despite other factual differences between the two cases, the number of prosecutors choosing a particular information topic in each instance is remarkably consistent, further supporting the suggestion that prosecutors generally consider the same information.

In case A, thirteen prosecutors indicated that they would allow the juror to remain on the case while the remaining seven indicated that they would excuse the juror by peremptory challenge. To explain this result, it is useful to compare the types of information considered by those who found the juror acceptable against the types considered by those who did not.

Table III depicts the first five pieces of information chosen by

challengers and non-challengers in each case in order of importance. Examination of the data reveals that the same items of information selected most frequently by prosecutors who found the juror acceptable were also selected by those who excused the juror by peremptory challenge. This suggests that, in reaching their decision, the prosecutors processed the same types of information. The only area of significant divergence was juror occupation, which was selected by eleven prosecutors who allowed the juror to remain as opposed to only five who rejected the juror.[80] Keeping in mind that thirteen prosecutors found the juror acceptable while seven did not, the comparison revealing that they considered the same types of information and attached similar weights to each item is surprising.

Case B provided a situation that found the prosecutors overwhelmingly in favor of allowing the juror to hear the case. In this instance, eighteen prosecutors deemed the juror acceptable while only two found a basis to challenge. Despite the disproportionate number who accepted the juror, the data illustrates that those items which ranked with consistency as the five most important pieces of information by those who found the juror acceptable were the same items ranked and considered by those who challenged.

TABLE III
FIRST FIVE PIECES OF INFORMATION SELECTED

Case A, (Case B)

Information Topic	Non-challengers 1st	2nd	3rd	4th	5th	TOTAL
Juror's Name	1(0)	0(0)	1(0)	0(0)	0(1)	2(1)
Juror's Residence	0(1)	2(1)	1(1)	0(0)	0(3)	3(6)
Juror's Sex	1(5)	2(2)	0(3)	1(0)	1(1)	5(11)
Juror's Age	6(3)	1(5)	0(4)	1(1)	1(1)	9(14)
Juror's Race	0(6)	0(2)	0(2)	1(3)	1(1)	2(14)
Juror's Nationality	0(0)	0(0)	2(0)	0(0)	2(1)	4(1)
Juror's Marital Status	0(0)	1(1)	1(1)	1(0)	0(0)	3(2)
Juror's Occupation	3(1)	4(1)	1(4)	2(4)	1(2)	11(12)
Spouse's Occupation	0(0)	0(0)	0(0)	1(1)	0(1)	1(2)
Juror's Occupational Address	0(0)	0(0)	0(0)	0(0)	1(0)	1(0)
Spouse's Occupational Address	0(0)	0(0)	0(0)	0(0)	0(0)	0(0)
Juror's Education	0(0)	1(2)	2(1)	0(2)	1(1)	4(6)
Juror's Employer	0(0)	1(1)	0(1)	0(0)	3(0)	4(2)
Spouse's Employer	0(0)	0(0)	1(0)	1(0)	0(0)	2(0)
Juror's Physical Appearance	0(0)	1(2)	3(0)	2(4)	0(2)	6(8)
Juror's Demeanor	0(1)	0(1)	1(0)	3(3)	1(4)	5(9)
Number of Challenges Used	2(1)	0(0)	0(1)	0(0)	1(0)	3(2)

80. Expressed in percentages, we find that 55% of those who found the juror suitable referred to his employment. Conversely, 25% of those who challenged referred to this item while the

TABLE III — (Continued)

FIRST FIVE PIECES OF INFORMATION SELECTED

Case A, (Case B)

Information Topic	Challengers 1st	2nd	3rd	4th	5th	TOTAL
Juror's Name	1(2)	0(0)	0(0)	0(0)	0(0)	1(2)
Juror's Residence	0(0)	1(1)	0(0)	1(0)	0(1)	2(2)
Juror's Sex	1(0)	1(1)	0(0)	0(0)	0(0)	2(1)
Juror's Age	2(0)	0(0)	1(0)	2(1)	1(0)	6(1)
Juror's Race	0(0)	0(0)	0(1)	1(1)	2(0)	3(2)
Juror's Nationality	0(0)	0(0)	0(0)	0(0)	0(0)	0(0)
Juror's Marital Status	0(0)	0(0)	1(0)	0(0)	1(1)	2(1)
Juror's Occupation	1(0)	3(0)	1(0)	0(0)	0(0)	5(0)
Spouse's Occupation	0(0)	0(0)	0(0)	0(0)	0(0)	0(0)
Juror's Occupational Address	0(0)	0(0)	0(0)	0(0)	0(0)	0(0)
Spouse's Occupational Address	0(0)	0(0)	0(0)	0(0)	0(0)	0(0)
Juror's Education	1(0)	0(0)	0(0)	1(0)	1(0)	3(0)
Juror's Employer	0(0)	0(1)	0(0)	1(0)	0(0)	1(1)
Spouse's Employer	0(0)	0(0)	0(0)	0(0)	0(0)	0(0)
Juror's Physical Appearance	1(0)	1(0)	2(0)	1(0)	0(0)	5(0)
Juror's Demeanor	0(0)	1(0)	2(0)	0(0)	0(0)	3(0)
Number of Challenges Used	0(0)	0(0)	0(0)	0(0)	0(0)	0(0)

Thus, the findings suggest that in all types of cases, prosecutors who view a juror as favorable, or challenge him, consider the same type of information and attach to it the same relative weight.

B. Amount of Information Considered and Its Source

The data suggests that prosecutors who challenge or refrain from challenging a juror consider the same amount of information, overall, before reaching a decision.[81] However, it further appears that a prosecutor would be very reluctant to remove a white juror by peremptory challenge where a black defendant is involved, without first making

remaining 20% did not refer to this item within the first five pieces of information they selected when making their decision.

These figures include the additional three pieces of information which were available to prosecutors to support their decisions. Of course, not all subjects chose the additional three items; some chose 2, 1, or even none.

81. In case A, 8.76 total pieces of information were chosen by prosecutors who allowed the juror to hear the case while those who exercised a challenge considered 7.85. Overall, 8.45 of a possible 17 pieces of information concerning a juror were used by prosecutors in their consideration of the case.

Overall, 8.25 pieces of information were considered before a decision was made in case B.

completely sure that there is solid justification for his removal.[82]

The study also indicates that prosecutors relied on more information from the jury list (in terms of quantity) than from visual observation.[83] This comes as no surprise when one considers Massachusetts procedure for exercising the peremptory challenge, which ensures that the prosecutor must rely heavily on the jury list. Nonetheless, the popularity of visual data should not be underestimated. While the choices were limited, such visual items as juror's age, demeanor and physical appearance were chosen by the prosecutors more often than any jury list item with the exception of juror's occupation. It thus appears that prosecutors tend to rely heavily on their immediate perceptions of jurors in determining whether to exercise a peremptory challenge.

C. Information Selection Patterns

We further sought to determine, through this study, whether prosecutors selected information and made decisions according to a regulated pattern, resulting in a uniform and consistent decisional outcome, or whether, to the contrary, the process of exercising a peremptory challenge was basically random, resulting in decisions that were without significant relationship in terms of the nature and amount of information processed. Analysis of selection sequences for both cases suggests that while the type of information and amount were consistent, the individual ranking of the information topics in order of importance was subject to considerable variation, accounting for dissimilar decisions after the same information had been processed. Our findings further suggest that the decision to exercise a peremptory challenge may be a highly subjective matter, with individual prosecutors engaging in decision making where personal judgment affects the overall procedure and final choice.

The fact that different prosecutors, within the same or contiguous jurisdictions, will formulate different peremptory challenge decisions after considering the same information on equivalent cases, highlights the discretionary nature of this process. Some prosecutors appear to be influenced by the crime itself, while others are more likely to consider the defendant.

Another apparent trend discernible from the data was that the first decision, regardless of what that first decision was, was rarely recon-

82. The prosecutors who challenged a juror in case B considered 13.5 pieces of information before doing so.

83. Table II depicts that in case A, the 20 prosecutors selected a total of 84 pieces of information found on the jury list; in contrast, they selected 63 relating to visual observation. In case B, 80 pieces of information were selected from the jury list while 65 were attributable to visual observation. The grand totals are therefore 164 pieces of information from the jury list for both cases as compared to 128 obtained by visual means for both cases.

sidered or changed. Of the twenty prosecutors tested only one, after making the first choice and then reviewing the three additional pieces of information, changed his mind, and this individual made a second decision different from the first in both case A and case B.

Decision making, information usage, and outcome were analyzed to determine the effect, if any, of the prosecutor's age or the jurisdiction in which he or she served. No significant correlation was found to exist between these variables and decisions concerning juror acceptability. Furthermore, no relationship was found to exist between these variables and the sequence in which prosecutors acquired their information, or in the type or amount of information considered in either case. Thus, subjects in the same jurisdiction and age range analyzed information differently and without any visible pattern.

In a further analysis, prosecutors were separated on the basis of jury trial experience. Prosecutors having had one hundred or more jury trials were placed in an extensive experience category and those with fewer than one hundred were placed in a category for those with limited experience. Of our twenty prosecutors, ten were found to have extensive experience and ten had limited jury trial exposure.

The similarity in the amount of information selected suggests that regardless of experience, prosecutors generally review the same amount of information before deciding whether to challenge.[84] This may be due to the fact that the skills utilized in juror challenges are important and are therefore developed early in the career of the prosecutor.

The similarity between prosecutors of both extensive and limited experience is further evidenced by a comparison of their decisions. In case A those with extensive experience found the juror without basis for challenge in six instances and challenged in four. Those with limited experience did not challenge the juror in seven instances and challenged in three. Decisions in case B produced identical results since those with both extensive experience and limited experience found no basis for challenge in nine instances and challenged in one.

A final analysis examined the information items which triggered an immediate peremptory challenge response. Examination of the data revealed little if any patterning among the subjects. In case A, three subjects made a decision after choosing juror's demeanor; no other case B, four subjects made decisions after choosing juror's occupation, an equal number terminated the decision process after considering

84. In case A, those with extensive experience selected 5.6 pieces of information before making the first decision, while those with limited experience selected 6.3. In case B, those with extensive experience selected 5.8 topics before making their first decision while those with limited experience chose 5.4.

These figures were tabulated solely on the basis of the original decision and do not include the three supportive decision items.

juror's education, while three decided after selecting juror's physical appearance. No single piece of information seemed to have the power of triggering and controlling a peremptory challenge decision. Thus, the decision to make a peremptory challenge appears to be a highly personal one, with little evidence of concordance among prosecutors having similar trial experience, or who practice within a single jurisdiction.

IV. CONCLUSION

The use of the Wilkin's decision game on a sample of Massachusetts prosecutors revealed that the vast majority do not consider some of the information available to them. The data suggested that the type of information relied on by prosecutors is varied, but is primarily related to such factors as sex, age, juror's occupation, education and demeanor. Factors that were thought to produce variability in the decision making process, such as experience and type of case, failed to operate as expected.

While the data did suggest the existence of information processing styles, it did not indicate uniformity of decisions in relation to these styles. This remains as a significant indication that the challenging of a juror is a highly individualistic process, and that there would be considerable divergence among prosecutors in their treatment of particular jurors.

Information concerning race is of particular interest when one examines it in light of the *Swain* decision prohibiting systematic exclusion of blacks by the peremptory challenge. In case B involving a black defendant, seventeen of our sample prosecutors considered his race, and, furthermore, their selection of this factor indicates that they attached to it considerable weight.

In case A involving a white defendant, six prosecutors considered racial information and only after previous consideration of at least three other pieces of information.

In case B, after discovering that the juror was white, only two prosecutors wished to challenge him. The fact that so many prosecutors referred to race in case B, coupled with the lack of challenges after finding the juror to be white, raises concern regarding the presumption in favor of the prosecutors' proper use of the challenge with respect to race. However the case B test problem does this solely by inference. Since the case provided a white juror for the black defendant, we can only assume that this reference to race may have resulted in an immediate challenge had the juror been black. Nevertheless, the test did clearly demonstrate that race is treated differently by the majority of prosecutors when a black as opposed to white individual is on trial.

This project has emphasized a need for more extensive research into

the use of the peremptory challenge and the jury selection process in Massachusetts and throughout the country. Many of the above findings might be applicable to defense attorneys as well as prosecutors but, since defense lawyers were not tested here, that idea is without empirical support. When one considers the similarity of jury information given to prosecutors and defense lawyers, findings that indicated the two groups were alike would be expected.

The decision to make a peremptory challenge is one in which considerable thought is involved, and one as to which patterns of individual action and agency operation may have been developed. Thus, it may be more realistic to view the present research as a measurement of the more typical, patterned, cognitive processes undertaken most frequently in prosecutorial decision making. This project should therefore be seen as the first step in a series of ongoing studies of how peremptory challenge decisions are made.

The Transkei Revisited

*Geoffrey E. Norman**

The issue of the status of Transkei in international law has been debated in this journal. Attorney Norman introduced the discussion with a Note in Volume 12 arguing persuasively that Transkei should be denied recognition as a state in international society because its creation violated well established principles of international law. Replying in Volume 13, Attorneys deKieffer and Hartquist offered an incisive critique. In this rebuttal, Attorney Norman defends his original analysis.

My original writing on the Transkei[1] (designated the Norman article for purposes of this reply) reached a number of conclusions. First, that while satisfying the criteria for statehood, the creation of the Transkei violated principles of international law and hence should not be recognized.[2] The Norman article in fact argued that the principle of collective nonrecognition is being applied to the territory by the international community.[3] In addition, the article questioned the validity of South Africa's attempted denationalization of its Black citizens and concluded that those residents outside the Transkei were actually stateless and remained South African nationals under international law.[4]

Messrs. deKieffer and Hartquist in their recent piece[5] (hereinafter referred to as the deKieffer article) criticize my original arguments on a number of counts: that insufficient weight was given to the historical background leading to the development of the bantustan policy; that the article failed to consider the political and economic realities of South Africa; that no alternative for the maintenance of law and order was offered; and that the conclusions were based on subjective, normative judgments.[6] Of course, these observations are themselves quite

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1. Norman, *The Transkei: South Africa's Illegitimate Child,* 12 NEW ENGLAND L. REV. 585 (1977).

2. *Id.* at 614-24.

3. *Id.* at 621-23.

4. *Id.* at 632-44.

5. deKieffer and Hartquist, *Transkei: A Legitimate Birth,* 13 NEW ENGLAND L. REV. 428 (1978) [hereinafter cited as deKieffer].

6. *Id.* at 429.

subjective and can easily be directed against the deKieffer article.

Structurally, the deKieffer article follows the organization of the second part of my piece and is divided into four categories of international law: recognition, racial discrimination, self-determination and nationality.[7] This brief rebuttal considers the issues raised by Messrs. deKieffer and Hartquist and proposes to show that their arguments, which not surprisingly echo the South African government's position, are without substantial foundation, in many instances misinterpret or ignore key points presented in the Norman article, and are heavily riddled with bias.

I. STATEHOOD AND RECOGNITION

Both articles agree that the Transkei meets the objective criteria for statehood.[8] Nevertheless, the Norman article addressed this question because many of the other bantustans appear to make the issue questionable. Bophuthatswana, the second bantustan to be declared independent,[9] is actually six separate pieces of land scattered across three of the four South African provinces.[10] The only major town in the vicinity, Mafeking, is not part of the bantustan and a new capital, Mmabatho, had to be hurriedly erected three miles away.[11] Furthermore, only approximately 35 percent of the de jure population of the new "state" live within the territory.[12] The remainder reside permanently in South Africa. Chief Buthelezi, head of the Kwazulu homeland, has called homelands such as Bophuthatswana "nonsense states."[13] It would appear the South African government is making a mockery of the criteria which have been established for statehood and the end result is that the criteria may have to be redefined by the international community.

In considering the decision by the international community not to extend recognition to the Transkei, the Norman article proposed that the doctrine of "collective disapproval" or "principle of nonrecognition"

7. *Id.*

8. Norman, *supra* note 1, at 619; deKieffer, *supra* note 5, at 429. *However see* Witkin, *Transkei: An Analysis of the Practice of Recognition — Political or Legal,* 18 HARV. INT'L. J. 605 (1977), where the opposite conclusion is reached. Certainly it is questionable whether the other bantustans would meet the criteria required.

9. New York Times, December 6, 1977 at 3, col. 3; Boston Globe, December 9, 1977 at 1, col. 3.

10. New York Times, December 6, 1977 at 3, col. 3; Boston Evening Globe, December 9, 1977 at 1, col. 3; B. ROGERS, DIVIDE AND RULE SOUTH AFRICA'S BANTUSTANS 18 (1976) [hereinafter cited as ROGERS].

11. Boston Evening Globe, December 9, 1977 at 1, col. 4

12. J. BUTLER, R. ROTBERG, AND J. ADAMS, THE BLACK HOMELANDS OF SOUTH AFRICA: THE POLITICAL AND ECONOMIC DEVELOPMENT OF BOPHUTHATSWANA AND KWAZULU 5, Table 1.3 (1977) [hereinafter cited as BUTLER].

13. Boston Evening Globe, December 9, 1977 at 1, col. 4.

was applicable.[14] While recognition itself has always been considered a unilateral act, the doctrine of "collective disapproval" was an established principle in the early 1930's.[15] After a period of less prominence, the doctrine has again been associated with the situation in Southern Rhodesia[16] and now with the South African homelands.[17] The unanimity adopted by the international community towards the Transkei (and Bophuthatswana) is indicative that the principle is recognized.[18] Recent polemics by Matanzima in claiming he would sever diplomatic ties with South Africa,[19] which was interpreted as an attempt to gain international recognition,[20] failed to draw any response from the international community.

II. HISTORICAL BACKGROUND

The criticism that insufficient weight was given to the historical development of the homelands policy is obviously not made with serious intent. The Norman article spends its initial twenty-nine pages[21] discussing the historical and legislative history of South Africa's homeland policy; if anything, historical background is accorded too much attention. The article covers the early annexation of the area today called the Transkei into the Cape Colony in the latter part of the nineteenth century;[22] the Bunga system of government;[23] the Bantu Authorities System introduced in 1956 and the resistance to it;[24] Proclamation R400 which suppressed the resistance;[25] the Promotion of Bantu Self-Government Act of 1959;[26] the Transkei Constitution Act of 1963[27] and the 1963 election; and finally the movement towards independence subsequent to the 1963 election.[28]

Once considered, the historical background debunks two theories

14. Norman, *supra* note 1, at 621-23.

15. *See* McNair, *The Stimson Doctrine of Non-Recognition, A Note on its Legal Aspects,* 14 BRIT. Y. B. INT'L. L. 65 (1933); O'CONNELL, 1 INTERNATIONAL LAW 141-48 (2nd ed. 1970).

16. *See* Nixon, *The Doctrine of Recognition — A Case Note on Biland v. Rigg,* 7 VICTORIA U. OF WELLINGTON L. R. 477, 481-82 (1975); S.C. Res. 216, November 12, 1965; S.C. Res. 217, November 20, 1965.

17. *See* G.A. Res. A/31/L.5 (XXXI), October 26, 1976.

18. The General Assembly vote on the Transkei resolution was 134-0 with one abstention (The United States). *See* Recent Developments, *Independence: Problems of Nonrecognition and Sovereignty,* 18 HARV. INT'L. L. J. 464 (1977).

19. Rand Daily Mail, April 11, 1978; the Johannesburg Star, April 11, 1978.

20. The Johannesburg Star, April 11, 1978; *See also* Rand Daily Mail, October 26, 1977.

21. Norman, *supra* note 1, at 585-614.

22. *Id.* at 589-90.

23. *Id.* at 590-91.

24. *Id.* at 593-95.

25. *Id.* at 595-97.

26. Act 46 of 1959. *See* Norman, *supra* note 1, at 597-600.

27. Act 48 of 1963. *See* Norman, *supra* note 1, at 600-606.

28. Norman, *supra* note 1, at 606-14.

constantly raised by the Nationalist regime and dutifully espoused by the deKieffer article. The first is that the Transkei has some special claim, outside of the bantustan policy, to be an independent nation. The second is that the process by which the Transkei came to be given its independence represents "self determination."

The argument that the Transkei has similarities to the former British protectorates of Botswana, Lesotho and Swaziland had little basis in fact. The history of the Transkei and the former protectorates is very dissimilar at the pivotal period around the turn of the century. The Transkei never actually existed as a separate British colony but rather the area known as the Transkei was incorporated into the Cape Colony through a series of piecemeal annexations in the late nineteenth century.[29] By 1894 the area had become part of the Cape Colony and thus became part of South Africa when the Union was formed in 1910.[30] The three former protectorates had by 1910 become separate British colonial enclaves and were excluded from the South African union. The former protectorates were not granted self-government as were the four South African provinces by 1910 and were treated very differently in terms of the British colonial structure.[31]

Careful consideration of the above indicates quite clearly that the Transkei has no special historical claim whatsoever as to independent status. Indeed it is doubtful whether the South African government recognizes any such special claim.

III. SELF-DETERMINATION

Another argument raised on occasion by the South African authorities is that the Transkei became independent by operation of the principle of self-determination. The principle is well recognized international law and has been the major foundation of the decolonization movement in Africa.[32] Transkeian independence is contrary to the principle on two grounds. It does not coincide with the wishes of the people themselves, and it destroys the territorial integrity of the country.

The Norman article outlined in detail just how farfetched the applicability of any concept of self-determination was. Initial demands by the Bunga were not in any way reflective of a desire for independence

29. Cape Act 38 of 1877. *See also* Proclamation 112 of 1879 (East Ginqualand); Proclamation 140 of 1885 (Gcalekaland, Kentani and Emigrant Tembuland); Proclamation 174 of 1886 (Mount Aylitt); and Proclamation 339 of 1894 (Eastern and Western Pondoland).

30. *See* 2 OXFORD HISTORY OF SOUTH AFRICA 343-64 (1971); BLACK DEVELOPMENT IN SOUTH AFRICA 3-5 (Benbo, 1976) [hereinafter cited as Benbo].

31. Benbo, *supra* note 30, at 3; 2 OXFORD HISTORY OF SOUTH AFRICA 267-78 (1971).

32. *See* the Declaration on the granting of independence for colonial countries and peoples, G.A. Res. 1514, 15 U.N. GOAR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1960). *See also* Emerson, *Self-Determination*, 65 AM. J. OF INT'L. L. 459 (1971).

but rather a desire for greater rights within South Africa itself.[33] The Bunga protested most strenuously against the removal of the Black voters from the common Voters Roll in 1936.[34] The Bantu Authorities Act, the promotion of Bantu Self-Government Act, and the Transkei Constitution Act were creations of the White South African Parliament and without any impact or encouragement on the part of the Transkeians.[35] In fact, as the Norman article indicates, the apparatus constructed by the Nationalists was resisted most vigorously by the Transkeian population.[36] Victor Poto's victory in the 1963 election was based largely on his platform of a multiracial Transkei as part of a multiracial South Africa.[37] Nothing was heard of independence in the early years of the Matanzima administration. The one member of the Transkei Assembly who did raise the issue was regarded as a maverick.[38] Only when the concept of independence had been raised by the Nationalist Government did Matanzima respond.[39] In 1972 and 1973, Matanzima had continuously espoused the cause of Black unity — a united front with all Black homeland leaders.[40] And as late as October 1974 Matanzima, on his return from the United States, made a call for a national convention of all South Africans to resolve the political situation.[41]

In his call for independence, Matanzima stated that he was responding to the desires of his people. However, as the Norman article pointed out, he ignored numerous calls for a referendum on independence including calls made by other homeland leaders and his own opposition.[42] Speaking in Soweto in March 1976, Chief Gatsha Buthelezi told an enthusiastic audience that "South Africa is one country. It has one destiny. Those who are attempting to divide the land of our birth are attempting to stem the tide of history."[43] Buthelezi continued:

> I challenge anyone to prove to me that the majority of blacks do in fact want the so-called independence which is offered to our

33. *See* G. M. CARTER, T. KARIS AND N. M. STULTZ, SOUTH AFRICA'S TRANSKEI: THE POLITICS OF DOMESTIC COLONIALISM (1967) [hereinafter cited as CARTER], *particularly* Chapter 5; *see also* B. LAURENCE, THE TRANSKEI, SOUTH AFRICA'S POLITICS OF PARTITION 23-24 (1976) [hereinafter cited as LAURENCE]. Both point out that the one issue which occurred repeatedly in Bunga debates was the question of the right of Blacks to vote in elections to the central parliament.

34. Norman, *supra* note 1, at 592; LAURENCE, *supra* note 33, at 24.

35. Norman, *supra* note 1, at 593-603.

36. *Id.* at 594, 600-01.

37. *Id.* at 604; LAURENCE, *supra* note 33, at 67.

38. *See* CARTER, *supra* note 33, at 180; LAURENCE, *supra* note 33, at 91; Norman, *supra* note 1, at 608.

39. Rand Daily Mail, March 7, 1974 *quoted in* Norman, *supra* note 1, at 609-10.

40. M. ROGERS, DIVIDE & RULE, SOUTH AFRICA'S BANTUSTANS 56-57 (1976) [hereinafter cited as ROGERS]; LAURENCE, *supra* note 33, at 98-101.

41. Johannesburg Sunday Times, October 12, 1974.

42. Norman, *supra* note 1, at 611.

43. Rand Daily Mail, March 15, 1976, *quoted in* LAURENCE, *supra* note 33, at 102.

> reserves, now called homelands. The majority of black people do not want to abandon their birthright. They have toiled for generations to create the wealth of South Africa. They intend to participate in the wealth of the land.[44]

In addition, this must be seen in its true political context. The homeland leaders and the Transkeian politicians are themselves, as government created leaders, largely isolated and on the fringe of actual Black South African politics. All major Black political groups both banned or otherwise oppose the entire homeland policy.[45] Most of the leaders of these groups, Nelson Mandela and the late Robert Sobukwe and Steven Biko to name the most prominent, are in fact Xhosa speaking. Thus, all mention of a desire for independence is transparently fraudulent, and I do not believe that even Mr. deKieffer or Mr. Hartquist make such a claim with conviction.

The principle of territorial integrity, admittedly, is not absolute. Nonetheless, it has become the predominant concept in the approach of the African continent towards self-determination.[46] Mr. deKieffer accepts this premise observing that the "Organization of Africa Unity (OAU) . . . favors reconciliation of differences within existing national boundaries."[47] This principle, reflected in the general lack of support extended by African nations and the OAU to Biafra during its attempted secession from Nigeria,[48] has hardened into a firm principle over the past decade. The African, as well as international, response to the Somali invasion of Ethiopia is the most recent example.[49]

U.N. resolutions concerning self-determination in South Africa make constant reference to the territorial integrity of the country.[50] Just as Nigeria or Kenya is seen as one united nation with indivisible boundaries, so is South Africa. Its self-determination must, therefore, be internal, and not white minority created secession movements.

Mr. deKieffer's use of the terminology "ethnocentric nationalism" is little besides Nationalist semantics. South Africa's Black Nationalism has historically been towards a unified Black grouping not based on tribal divisions.[51] The South African government's racial policy, itself,

44. LAURENCE, *supra* note 33, at 102.

45. ROGERS, *supra* note 40, at 12-13; ST. JORRE, A HOUSE DIVIDED: SOUTH AFRICA'S UNCERTAIN FUTURE 37-41 (1977).

46. *See* G.A. Res. 2775E, 26 U.N. GOAR, Supp. (No. 29) 41, 42-43, U.N. Doc. A/8504/Add. 1 (1971); G.A. Res. 2923E, 27 U.N. GOAR, Supp. (No. 30) 24, 25, U.N. Doc. A/8879/Add. 1 (1972); and G.A. Res. 3411D, 30 U.N. GOAR, Supp. (No. 34) 36, 37, U.N. Doc. A/10342 (1975).

47. deKieffer, *supra* note 5, at 445.

48. *See* Nayar, *Self-Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 TEX. INT'L. L. J. 321 (1975).

49. *See* New York Times, January 22, 1978 at 7, col. 1; New York TImes, March 10, at 28, col. 1.

50. *See* United Nations resolutions cited in note 46 *supra*.

51. *See* BENSON, THE STRUGGLE FOR A BIRTHRIGHT (1966).

has been the major motivating force behind this goal. Furthermore, the Transkei itself is not a proper ethnic unit, as Mr. deKieffer attempts to suggest. According to the 1970 census, while 3.0 million Xhosa-speakers were assigned to the Transkei, almost another 1.0 million Xhosa-speakers were assigned to the Ciskei, another homeland.[52] Living within the Transkei were 60,000 Sotho-speakers and 21,000 Zulu-speakers as well as smaller groups of "other" Blacks.[53] Finally, approximately 10,000 whites and 8,000 colored persons remained in the territory.[54] Virtually all the bantustans have similar ethnic minorities.[55] I am not arguing as Mr. deKieffer might ridiculously suggest that any more people be moved[56] in order to create ethnically pure homelands. Rather the point being made is that South Africa today, despite Nationalist efforts to achieve the opposite,[57] is both a geographically and economically integrated country.

IV. RACIAL DISCRIMINATION

The Norman article has been accused of beginning with the premise that South Africa's racial policies violate international law.[58] While this may be a valid assumption, the Norman article advances no such premise. Rather six pages[59] are devoted to developing compelling support for the argument that apartheid does violate international law. Without repeating those contentions, the documentation tends to be overwhelming. Included are General Assembly resolutions, a Security Council resolution, an obiter statement by the International Court of

52. Benbo, *supra* note 30, at 34 (Table B.4.3.). The actual figure from the 1970 Census was 934,000.

53. *Id.* at 34 (Table B.4.3.).

54. *Id.* at 36 (Table B.4.6.).

55. *Id.* at 34 (Table B.4.3.) and 36 (Table B.4.6.); for the 1973 figures *see* BUTLER, *supra* note 12, at 4-5 (Tables 1.2 and 1.3). A total of 653,000 Africans were living in a homeland other than their designated homeland.

56. The story of the removals of Africans pursuant to the grand design of apartheid is one of the least publicized but most tragic episodes in South African history. Dr. Koomhof, Deputy Minister of Bantu Administration, stated in the House of Assembly (February 4, 1969) that approximately 900,000 Africans had been resettled between 1959 and 1969. He was proud of this fact saying "[s]urely this is no mean achievement; on the contrary, it is a tremendous achievement." L. DESMOND, THE DISCARDED PEOPLE 224 (1971) [hereinafter cited as DESMOND].

ROGERS, *supra* note 40, at 26-27 (Tables 3 & 4) estimates the number of Africans resettled between 1960-70 at 1,820,000 with a total of 4,169,000 moved by 1974. There is no question the numbers are enormous, and the resultant human suffering, including death, has been immense. *See generally* DESMOND *supra.*

57. Although Africans have resisted resettlement, M. C. Botha, Minister of Bantu Administration, stated in an interview that all the Africans who moved were volunteers. "On occasions we have to do a good deal of persuasion to get them to move — but they are volunteers." Johannesburg Star, November 21, 1969, *quoted in* DESMOND, supra note 56, at 75.

58. deKieffer, *supra* note 5, at 439.

59. Norman, *supra* note 1, at 624-29.

Justice, the Universal Declaration on Human Rights, and a number of other conventions on racial discrimination and apartheid itself.[60] The deKieffer article attempts to avoid the issue of Transkei as a creation of apartheid by arguing that to punish the Transkei for South Africa's sins would be unreasonable. The Nationalist government would certainly appreciate the international community accepting this rationale. The end result would be one desired by Mr. Voster, of numerous recognized bantustans dotted around the South African landscape and with South Africa remaining an all-White country without any Black citizens and hence not susceptible to any pressure regarding its treatment of Blacks.

The Transkei is itself the essence of apartheid. It is the *sine qua non* of the entire apartheid program. To note, as the deKieffer article does, that the Transkei does not discriminate[61] misses the point entirely. The internal machinations of the Transkei were never meant to be discriminatory. It seeks to establish a permanently inferior political and economic status for Black South Africans simply because of their color by destroying their citizenship and hence their valid claim to an equitable distribution of political and economic power in South Africa. This grand scheme was conceived, designed and perpetrated by the Nationalist government. The role of Matanzima has merely been one of a collaborator and the argument that the motivation came from the other direction has already been well laid to rest.[62]

V. NATIONALITY

Citizenship is largely at the discretion of the country involved. However this is not an absolute. Denationalizations based on arbitrary grounds, such as race, have been widely condemned and held to be

60. *Id.* at 625-28.

61. deKieffer, *supra* note 5, at 440.

62. *See* pp. 795-98 *supra.* John Dugard, Professor of Law at the University of Witwatersrand, said of apartheid legislation:

> Basically, the law fulfills four functions. First, it constructs a legal order based on racial discrimination and differentiation. Secondly . . . by legitimizing discriminatory practices, it neutralizes the immorality of such practices in the eyes of the majority of the White population who accept without question any rule which has been blessed by Parliament. Thirdly, those laws which institutionalize separate development provide a convenient facade for the outside world. The Promotion of Bantu Self-Government Act, the Transkei Constitution and the Bantu Homelands Constitution Act are useful for foreign consumption as they adopt the rhetoric of self-determination and self-government without disclosing the realities of South African life. Legal tinsel is used to conceal the fact that most of the African population lives outside the homelands and cannot in fact participate in the homelands' political process; that the African people themselves have not been consulted about their future; and that self-determination inside or outside the homelands is meaningless while the harsh security laws remain in force. Fourthly, the drastic security laws . . . create a repressive atmosphere in which meaningful political debate and activity is stifled."

John Dugard, *The Legal Framework of Apartheid,* South African Dialogue 98-99 (1972).

without effect and in violation of international law.[63]

The deKieffer article assumes that because South Africa removes *political rights* from its Black citizens, they cease to be South Africans.[64] This is a very ambitious argument and if applied internationally would obviously have very far-reaching implications. Rather the attempted nationalization of Black South Africans does raise the comparison of earlier Nazi denationalizations. These were later struck down by the German Federal Supreme Court as being so arbitrary as to be "non-law" or lacking the "quality of law."[65] May I be so presumptuous as to forecast a similar fate for South Africa's denationalization laws.

In addition, the deKieffer article is unresponsive concerning two critical issues of Transkeian citizenship. First, can South Africa decide who are Transkeian citizens? The answer is obviously no; making a person a Transkeian citizen under South African law does not make them a Transkeian. Second, can the Transkei extend its citizenship to persons over whom it has no jurisdiction? Again the answer is in the negative. Hence the 1.3 million Xhosa-speaking people living in South Africa's cities[66] and who have supposedly been made Transkeians, are in fact stateless having been denationalized by the Nationalist government but not having taken on Transkeian citizenship. These people would continue to be regarded as South African nationals under the terms of the decision in the *Nottebohm* case[67] (*Guatemala v. Liechtenstein*) since their "closest connection" remains with South Africa.

VI. CONCLUSION

This rebuttal has attempted to indicate that the deKieffer article failed to challenge the major points raised in my initial manuscript. Instead, their response misinterpreted and misstated arguments. The historical background clearly indicates that the principle of self-determination is not applicable to the Transkei; rather, the issues of racial discrimination and denationalization are pertinent.

As already has been emphasized the Transkei itself is the ultimate extension of apartheid and recognition of the Transkei, or any of the other bantustans,[68] denotes acceptance of the Nationalist government's

63. Abel, *Denationalization,* 6 MOD. L. REV. 57, 65 (1942).

64. deKieffer, *supra* note 5, at 449.

65. McDougal, Lasswell and Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas,* 83 YALE L. J. 956 (1974).

66. Benbo, *supra* note 30, at 34 (Table B.4.3.). According to the 1970 census there were 1,297,300 Xhosa-speaking people living in "white" areas "attached" to the Transkei. An additional 411,300 Xhosa-speaking people who were living in "white" areas were "attached" to the Ciskei, another homeland.

67. [1955] I.C.J. 4. *See* Norman, *supra* note 1, at 643-44.

68. One other bantustan has already been given its "independence." Bophuthatswana re-

policies and is in no way beneficial to the majority of South Africans. The deKeiffer article is little besides a reiteration of the South African government's position and both parties must consider the international community naive to accept the arguments presented. The boot, of course, is on the other foot.

Finally, Messrs. deKieffer and Hartquist are apparently unable to accept the re-extension of South African authority over the Transkei (as well as other homelands). They seem unwilling to realize the inevitable demise of the present government; but then they would be without a client.[69]

ceived its "independence" on December 6, 1977. It is recognized only by South Africa and the Transkei. New York Times, December 6, 1977 at 3, col. 3.

In addition to the Transkei and Bophuthatswana, there are eight additional homelands, *viz.* Qwaqwa, Ciskei, Gazankulu, Kwazulu, Lebowa, Ndebele, Swazi, and Venda. Only two, Kwazulu and Gazankulu, appear opposed to "independence" at this point in time.

69. Following a scandal concerning South Africa's semi-covert overseas lobbying effort and large amounts of misappropriated money, the Nationalist Government disbanded the Ministry of Information and placed its functions under the control of the Ministry of Foreign Affairs. Time will tell whether Mr. deKieffer will be retained under the new arrangement. The U.S. Congress has already begun an investigation of South African lobbying in this country. New York Times, June 14, 1978 at 8 col. 1-6; New York Times, June 19, 1978 at 6 col. 1-6.

NOTES

Child Abuse and the Law in Massachusetts: In Search of a Proper Defendant†

In recent months, the legal response to child abuse and neglect in Massachusetts has embarked on a new phase of development. With the introduction of a criminal penalty for violation of the child abuse and neglect Reporting Statute[1], the legislature has manifested its intent that the responsibility for the eradication of "battered child syndrome"[2] shall not rest soley with those who mistreat the very young. Two recent cases, *Commonwealth v. Cadwell*[3] and *Commonwealth v. Labbe*[4] suggest the possibility that tort liability may exist for a designated professional's failure to report under the statute.

One of the chief difficulties in formulating an adequate legal remedy to deal effectively with the problem of child abuse and neglect arises from the nature of the phenomenon itself. While the nature of child abuse and neglect closely resembles acts cognizable by common law tort or criminal sanctions, the context within which it characteristically takes place creates a unique matrix of legal and practical problems. This article briefly reviews the basic elements of child abuse and neglect before considering the viability of civil and criminal sanctions against those who commit such acts. Next, the imposition of criminal sanctions

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†Public concern over the ability of the Department of Public Welfare to fulfill effectively its extensive responsibilities prompted the creation of a new state agency as the 1978 legislative session ended. In July, 1978, the Massachusetts General Court enacted Chapter 18B of the Massachusetts General Laws which established the Department of Social Services. After a transitional period from July through December, 1979, the DSS will assume the duties of the DPW concerning child abuse and neglect in the Commonwealth. Although the name of the agency responsible for investigating child abuse and neglect will change, its essential responsibilities will remain constant. Thus, the analysis in this note regarding possible liability of the DPW would seem to apply to the DSS as well.

1. Act of December 22, 1977, ch. 942 (enacted Jan. 5, 1978) (codified in MASS. GEN. LAWS ch. 119, § 51A (West Supp. 1978)) establishes a criminal penalty for those persons who are already required by statute to report instances of child abuse and neglect but who fail to do so.

2. *See* Kempe, Silverman, Steele, Droegmueller & Silver, *The Battered Child Syndrome* 181 J.A.M.A. 17 (1962) [hereinafter cited as Kempe, *et al.*]

3. 1978 Mass. Adv. Sh. 237, — N.E.2d — (1978).

4. 1978 Mass. App. Ct. Adv. Sh. 141, — N.E.2d — (1978).

and civil tort liability on those individuals who are required by statute to report incidents of child abuse and neglect and who fail to do so is discussed. In light of recent developments in the area of municipal immunity, the possibility of maintaining an action in tort against the Department of Public Welfare for failure to adequately investigate those cases of battered child syndrome which are reported is explored. In conclusion, the article demonstrates that either by design or necessity, the focus of responsibility and liability has begun to shift from those individuals who actually commit the abuse or neglect to those who have been chosen to report, investigate, and treat it.

I. THE PHENOMENON OF CHILD ABUSE AND NEGLECT

A. Contemporary Awareness

Contemporary awareness and concern for the plight of the abused and neglected child stems from medical research which began in the 1940's. In 1946, Dr. John Caffey published an article describing six children who suffered from chronic subdural hematomas, and demonstrated how x-rays could effectively be used to detect previously undiagnosed skeletal changes in children where those changes had been caused by trauma.[5] However, Dr. Caffey did not suggest that the trauma had been intentionally inflicted. Nine years later, Dr. Paul Woolley and Dr. Walter Evans were the first to suggest that this type of injury was caused by purposefully inflicted trauma rather than by accidental event.[6]

In 1962, Dr. C. Henry Kempe published a landmark article[7] which coined the term "battered child" and alerted the medical, legal and lay communities to the fact that parents were inflicting serious injury and abuse upon their offspring. The article emphasized the utility of x-rays and other diagnostic techniques for detecting what Kempe termed "battered child syndrome." In the wake of this article, numerous studies on the causes, detection and treatment of battered child syndrome have been published.[8]

B. The Demographics of Battered Child Syndrome

Child abuse and neglect in the United States is a disturbingly widespread phenomenon. The estimated rate of incidence is ten cases of

5. Caffey, *Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma,* 56 AM. J. OF ROENTGENOLOGY 163 (1946).

6. Woolley & Evans, *Significance of Skeletal Lesions in Infants Resembling Those of Traumatic Origin,* 158 J.A.M.A. 539 (1955).

7. Kempe, *et al., supra* note 2.

8. *See generally* Sussman, *Reporting Child Abuse: A Review of the Literature,* 8 FAM. L. Q. 245 (1974).

abuse and neglect per one thousand live births.[9] The number of cases per year is thought to range from a low of seventy thousand to a high of four to five million.[10] A realistic calculation is that one million, six hundred thousand children are abused each year and of these, 2,000 are killed.[11] One study found that the ratio of reported abuse to neglect cases was 1 to 2.[12]

Although data suggest that child abuse and neglect occur more frequently among those families in the lower socio-economic brackets,[13] the phenomenon has been found to cut across all social strata.[14] While poverty in and of itself is not considered to be a principal cause of battered child syndrome,[15] the presence of financial strain on the parents may substantially contribute to an already existing potential for committing abuse.[16] Additionally, more affluent parents may have the opportunity to reduce domestic stress by sending their children to summer camps, boarding schools, and social events. Indeed, these parents may also avail themselves of tension releasing vacations and recreational activities away from the home.[17] Such options are largely unavailable to the poor.[18]

This socio-economic disparity is reinforced by several facts. Private physicians serving middle and upper class families are less likely to report the existence of abuse or neglect because of their personal ties with the parents of the victims;[19] whereas hospital emergency room personnel, to whom the poor most frequently bring their abused and neglected children,[20] are generally more willing to report such cases.[21]

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9. McNeese & Hebeler, *The Abused Child: A Clinical Approach to Identification and Management*, 29: 5 CLINICAL SYMPOSIA 4 (1977).

10. *Id.* at 4.

11. *Id.*

12. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *Child Abuse and Neglect Reports* (DHEW Pub. No. (OHD) 77-30086, Feb. 1977) [hereinafter cited as NATIONAL CENTER].

13. Solomon, *History and Demography of Child Abuse* [hereinafter cited as Solomon] in *1971 Symposium on Child Abuse* [hereinafter cited as *Symposium*], 51 PEDIATRICS 773, 776 (1973).

14. Steele & Pollock, *A Psychiatric Study of Parents Who Abuse Infants and Small Children* [hereinafter cited as Steele & Pollock] in THE BATTERED CHILD 89, 92-94 (2d ed. R. Helfer & C. Kempe 1974) [hereinafter cited as Helfer & Kempe]; Brown, *The Battered Child*, 74 MED. TR. TECH. Q. 272, 275 (1974) [hereinafter cited as Brown]; Grumet, *The Plaintive Plaintiffs; Victims of the Battered Child Syndrome*, 4 FAM. LAW Q. 296, 302-03 [hereinafter cited as Grumet].

15. Steele & Pollock, *supra* note 14, at 93.

16. Brown, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI.-KENT L. REV. 45, 50 (1973) [hereinafter cited as *Medical/Legal*]; Steele & Pollock, *supra* note 14, at 94.

17. *Medical/Legal, supra* note 16, at 50.

18. Kempe, *A Practical Approach to the Protection of the Abused Child and Rehabilitation of the Abusing Parent, 1971 Symposium on Child Abuse*, 51 PEDIATRICS 804 (1973).

19. *Medical/Legal, supra* note 16, at 50; Note, *The Battered Child: Logic in Search of Law*, 8 SAN DIEGO L. REV. 364, 374 (1971).

20. Grumet, *supra* note 14, at 298.

21. *Medical/Legal, supra* note 16, at 51; Solomon, *supra* note 13, at 776.

Additionally, emergency room technicians are often better trained in the detection of battered child syndrome and have greater access to x-ray equipment which is often needed for an accurate diagnosis.[22] They are therefore more likely to discover abuse or neglect.

C. *Characteristics of Battered Child Syndrome*[23]

The abused and neglected child is typically very young, often less than three years old.[24] Despite the presence of siblings, usually only one

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22. Brown, *supra* note 14, at 275. It should be noted, however, that many physicians are reluctant to diagnose battered child syndrome even in the presence of positive x-ray findings. *See* Grumet, *supra* note 14, at 299. *See also* Kempe, *et al.*, *supra* note 2, at 21-23, pointing out the utility of x-ray findings in diagnosis.

23. Child abuse and neglect may take a variety of forms. For the purpose of this discussion, the following definitions, as set forth by the Department of Public Welfare, are adopted:

Abuse: a) A physical injury or emotional injury which causes or creates a substantial risk of death or protracted impairment of the function of any bodily organ; and
b) The commission of sex offense against a child as defined in the criminal laws of Massachusetts.

Neglect: A condition in which a caretaker responsible for the child either deliberately or by extraordinary inattentiveness permits the child to experience avoidable present suffering by failure to provide one or more of the ingredients generally deemed essential for developing a person's physical, intellectual and emotional capacities such as:
a. adequate food, clothing, shelter, or education, or medical care, though financially able to do so or offered financial or other reasonable means to do so; or
b. proper supervision or guardianship; or
c. physical dependence of a child upon an addictive drug at birth.

Procedure for Reporting Suspected Cases of Child Abuse or Neglect to the Department of Public Welfare (Summary of Social Service Letter 1 and The Massachusetts General Laws ch. 119, §§ 51A-G) Page 3, Rules and Regulations for Reporting.

24. Steele & Pollock, *supra* note 14, at 115; *see also* NATIONAL CENTER, *supra* note 12. Solomon, *supra* note 13 at 775, offers the following demographic data:

A. The Abused Child
1. Average Age: under 4 years, most under 2.
2. Average death rate: 5% to 25%.
3. Average age of death: slightly under 3 years.
4. Average duration of exposure to battering: 1 to 3 years.
5. Sex differentiation: none.

B. The Abusive Parent
1. Marital Status: overwhelming majority were married and living together at the time of the abuse.
2. Average age of abusive mother: 26 years.
3. Average age of abusive father: 30 years.
4. Abusive parent: father slightly more often than mother.
5. Most serious abuse: mother more often than father.
6. Most common instrument of abuse: Hair brush.

C. Family Dynamics
1. 30-60% of abusing parents claim to have been abused as children themselves.
2. High Proportion of pre-marital conception.
3. Youthful marriage.
4. Unwanted pregnancies.
5. Illegitimacies.
6. Forced marriages.
7. Social and kinship isolation.
8. Emotional problems in marriage.
9. Financial difficulty.

child is abused because he or she is somehow different.[25] This difference may be real or imagined but reflects the essential instability of the abuser.[26]

Although it has been found that paramours, adult relatives, siblings or even baby sitters may also abuse or neglect children, the most frequent offenders are the child's own parents.[27] While only one parent normally commits the acts, the other passive spouse is generally aware of the abuse but permits it to occur.[28] Abusive parents are typically rigid, emotionally immature individuals who lack sufficient psychological mechanisms for dealing effectively with their own burdens of stress and frustration as well as the normal, everyday needs of their progeny.[29] Frequently, the parents who commit abuse were themselves victims of abuse as children.[30] They are frustrated individuals who seek the warmth, refuge and support in their infant children which they never received from their own parents.[31] Their parental demands, however, far exceed what the children are capable of performing at so young an age.[32] When the child does not meet these expectations, the parent feels betrayed and consequently relives the insecurities and tensions of his or her own childhood.[33] The parent has in effect become a child once again since the child symbolizes his or her own abusive parent; the moment of

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One authority has suggested that the liberalization of abortion laws may result in a decline of undesirable pregnancies and unwanted babies, thus reducing two of the most salient causes of child abuse. *See* Brown, *supra* note 14, at 278.

25. *See* Helfer, *The Etiology of Child Abuse* in *Symposium, supra* note 13, at 779, suggesting that the child may be sickly, hyperactive, or a premature infant who requires a greater degree of attentiveness and care, thereby adding to the parents' tension and strain.

26. It is important to note in this context that abusive parents are found to be excessively stubborn rigid individuals who find adjustment to change to be very difficult. *See* note 28, *infra.*

See also Steele & Pollock, *supra* note 14, at 114-115, suggesting that the child may unwittingly contribute to the attack by simply exhibiting behavioral patterns which his/her parents dislike. The passive child may be resented by his/her parents who wanted a more active child; the hyperactive child may irritate parents who had desired a child with a more restrained activity pattern. Parents may also be disappointed with the gender of the child.

27. *See* NATIONAL CENTER, *supra* note 12.

28. Steele & Pollock, *supra* note 14, at 114.

29. *Medical/Legal, supra* note 16, at 52, 53; Holter & Friedman, *Principles of Management in Child Abuse Cases,* 38 AM. J. ORTHOPSYCHIATRY 127, 130 (1968) [hereinafter cited as Holter & Friedman]; Steele & Pollock, *supra* note 14, at 95, 99, 112.

30. Grumet, *supra* note 14, at 300; Brown, *supra* note 14, at 275; Holter & Friedman, *supra* note 29, at 130; Steele & Pollock, *supra* note 14, at 97.

31. Grumet, *supra* note 14, at 302; *see also* Steele & Pollock, *supra* note 14, at 98, 99 speaking of this phenomenon as a lack of "mothering" — a disruption of the maternal affection system (between the abusive parent and his or her own parent) which is necessary for "normal" emotional development.

32. *See* text at note 24, *supra.*

33. *Medical/Legal, supra* note 16, at 52.

abuse is essentially an act of retribution.[34] This phenomenon has been characterized as "role reversal."[35]

The abuse itself may take a variety of forms ranging from intentional murder[36] to excessive corporal punishment.[37] Resultant major injuries include: bone fractures, subdural hematomas, internal injuries, brain damage, skull fractures, burns and scalding. Minor injuries include: contusions, abrasions, "congenital and environmental" drug addiction.[38]

A predominant characteristic of battered child syndrome is the likelihood of its reoccurrence: once having been abused or neglected, a child is likely to be further mistreated.[39] This element of foreseeability has substantial legal impact on the potential tort liability of those who are required by statute to report child abuse or neglect and fail to do so.[40]

D. The Potential of Accurate Diagnosis

One of the great difficulties in the treatment of battered child syndrome has been accurate diagnosis and identification. Parents who abuse their child usually will not admit it and will attempt to cover up the act with silence or a fabricated explanation.[41] Typically, the child is too young, frightened or both to explain adequately what has occurred.

The most helpful diagnostic tool in detection is the x-ray,[42] with careful observation of the child's physical and emotional characteristics.[43] A physician trained in the detection of battered child syndrome

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34. Steele & Pollock, *supra* note 14, at 116, 117; *Medical/Legal, supra* note 16, at 51.

35. *Medical/Legal, supra* note 16, at 52; Steele & Pollock, *supra* note 4, at 95.

36. *Medical/Legal, supra* note 16, at 53.

37. Weston, *The Pathology of Child Abuse* in Helfer & Kempe, *supra* note 14, at 84.

38. *See* NATIONAL CENTER, *supra* note 12.

39. *See* Fontana, *The Diagnosis of the Maltreatment Syndrome in Children,* in *Symposium, supra* note 13 at 780 [hereinafter cited as *Diagnosis*] stating that one out of every two children dies after being returned to its abusive parents; Kempe *et al., supra* note 2, at 24.

40. *See* text at note 176, *infra.*

41. Weston, *supra* note 36, at 78. *See also Id.* Table 5 at 84 "Contrast Between the Alleged and Confessed Methods of Injury — Group 2"

Alleged Method of Injury (number)		Confessed Method of Injury (number)	
Fell from furniture	10	Struck with fists	15
Fell downstairs	7	Struck with hands	12
Found dead	4	Struck with weapon (belt, cord, switch, ruler, wire coat hanger, strap	10
Beat child	4	Banged head in attempted withdrawal	1
Banged head in attempted withdrawal	2	Burned on gas burner	1
Fell down	1	Burned on radiator	1
Overturned bottle of hot water on baby	1	Burned by immersion in hot water	1
Car bed collapsed	1	Unknown	1
Drowned in bathtub	1	Struck with hands and neglected	1

42. *See* note 22, *supra.*

43. There are many suggested "checklists" for physicians to follow where they suspect child

may often make a diagnosis by comparing the history as supplied by the parent with the results of the x-rays. Where there is sufficient discrepancy,[44] or where x-rays reveal numerous fractures in varying states of healing, abuse may be suspected.[45] While the symptoms of battered child syndrome may at times resemble other "normal" maladies,[46] or may fail to contain the requisite specificity to assure an accurate diagnosis, skeletal manifestations of battered child syndrome are so characteristic, as scarcely to be confused with anything else.[47] Kempe has suggested that battered child syndrome should be considered where other specific characteristics are also present.[48]

II. LEGAL REMEDIES IN MASSACHUSETTS

There are four basic legal responses to the problem of battered child syndrome: (1) imposition of criminal sanction upon those who commit acts of abuse or neglect; (2) imposition of civil tort liability upon those

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abuse. The following is suggested in *Diagnosis, supra* note 39, at 781:

History
1. Parents often relate story that is at variance with clinical findings.
2. Multiple visits to various hospitals.
3. Familial discord or financial stress, alcoholism, psychosis, perversion, drug addiction, etc.
4. Reluctance of parents to give information.
5. Admittance to hospital during evening hours.
6. Child brought to hospital for complaint other than one associated with abuse and/or neglect, e.g. cold, headache, stomachache, etc.
7. Date of injury prior to admission.
8. Parent's inappropriate reaction to severity of injury.
9. Inconsistent social histories.

Physical Examination
1. Signs of general neglect, poor skin hygiene, malnutrition, withdrawal, irritability, repressed personality.
2. Bruises, abrasions, burns, soft-tissue swellings, hematomas, old healed lesions.
3. Evidence of dislocation and/or fractures of the extremities.
4. Coma, convulsions, death.
5. Symptoms of drug withdrawal.

Differential Diagnosis
1. Scurvy and rickets
2. Infantile cortical hyperostosis
3. Syphilis of infancy
4. Accidental trauma

Radiologic Manifestations
1. Subperiosteal hemorrhages
2. Epiphyseal separations
3. Periosteal shearing
4. Metaphyseal fragmentation
5. Previously healed periosteal calcifications
6. "Squaring" of the metaphysis

44. *Id.*

45. *Diagnosis, supra* note 39, at 781; Silverman, *Radiological Aspects of Battered Child Syndrome* in Helfer & Kempe, *supra* note 14, at 42 [hereinafter cited as Silverman].

46. Thus, a differential diagnosis would be generated. Silverman, *supra* note 45, at 51; *Diagnosis, supra* note 39, at 781.

47. Silverman, *supra* note 45, at 51.

48. Kempe, *et al., supra* note 2, at 18.

who commit acts of abuse or neglect; (3) intervention of the Department of Public Welfare (DPW) and the Juvenile and Probate Courts where a child is in need of "care and protection"; and (4) with the introduction of Reporter Statutes, the imposition of criminal sanction and civil tort liability upon those individuals who are required to investigate, detect and report instances of child abuse and neglect but who fail to do so. The following discussion examines each of these areas in an attempt to outline principal considerations and difficulties of a legal treatment of battered child syndrome. Although much of the applicable law is still emerging, it appears that a portion of the legal responsibility for abusive and negligent conduct is being removed from those who commit the acts and placed upon those who must report its effects.

A. Criminal Prosecution of the Offender

Individuals who commit acts of child abuse or neglect may be subject to prosecution for violation of a criminal statute. In approximately one half of the jurisdictions, child abuse and neglect, cruelty to children or similar crimes are specifically prohibited.[49] In the remaining jurisdictions, acts of abuse or neglect usually fall within the scope of other criminal statutes. While statutory schemes may vary among this second group of jurisdictions, the applicable statutes, as exemplified by those in Massachusetts, tend to fall within one of four categories: (1) crimes involving bodily harm to persons, regardless of the victim's age or relationship to the perpetrator;[50] (2) crimes of sexual and moral abuse of minors;[51] (3) crimes consisting of the abandonment, desertion, nonsupport or neglect of infants by their parents or guardians;[52] and (4)

49. *See, e.g.*, CAL. PENAL CODE § 273A (West Supp. 1978); ILL. REV. STAT. ch. 23, § 2368 (West Supp. 1978); N.Y. PENAL LAW § 260.10 (McKinney Supp. 1977); S.C. CODE § 20-7-10.

50. *See, e.g.*, Murder, MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1976); Manslaughter, MASS. GEN. LAWS ANN. ch. 265, § 13 (West 1976); Assault and Assault and Battery, MASS. GEN. LAWS ANN. ch. 265, § 13A (West 1976).

51. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 265, § 13B (West 1976); MASS. GEN. LAWS ANN. ch. 265, § 22A (West 1976); MASS. GEN. LAWS ANN. ch. 265, § 24B (West 1976); MASS. GEN. LAWS ANN. ch. 265, § 23 (West 1976); MASS. GEN. LAWS ANN. ch. 272, § 35A (West 1976); MASS. GEN. LAWS ANN. ch. 119, § 63 (West Supp. 1978). Note that these statutes, generally provide for extended sentences of terms ranging up to life where the perpetrator is a second time offender and/or is over the age of eighteen. Where the victim is an adult, comparable statutes provide for penalties of a maximum of two and one half to five years, depending on the statute. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 265, § 13A (West 1976) which provides for a maximum of two and one half years. *Cf.* MASS. GEN. LAWS ANN. ch. 265, § 22 (West 1976) which provides for a maximum sentence of life imprisonment.

52. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 119, § 39 (West Supp. 1978); MASS. GEN. LAWS ANN. ch. 273, § 1 (West 1976).

Note that California has statutes which specifically prohibit child abuse *e.g.* willful cruelty or unjustifiable punishment of child; endangering life or health. CAL. PEN. CODE ANN. § 273 A. (West Supp. 1978).

kidnapping.[53]

At least one authority has suggested that criminal prosecution of those who abuse or neglect a child may be an effective means of altering the harmful family environment, particularly where there has been serious injury or death or the potential for additional injurious conduct exists.[54] However, authorities caution that criminal prosecution of the perpetrator may result in a reinforcing of those psychological traits which initially generated the harmful conduct.[55] The criminal process may cause greater abuse or neglect due to the aggravating effect of the adversity of the penal system upon the inherent defensiveness of the offender.[56] Consequently, a separation of parent and child should be considered *ab initio* where a criminal action is brought, whatever the final disposition of the case.[57]

In serious situations, prosecution may be the preferred course of action. However, where the injury is less severe and a real potential for rehabilitation of the offending parent exists, authorities suggest that criminal prosecution may not be the wisest choice, especially where preservation of the family unit is sought.[58] The parent may not be able to differentiate adequately between punitive measures of the court and social welfare services offered by the Department of Public Welfare (DPW). Due to increased resentment, the parent may resist the corrective efforts of the DPW, defeating the program of rehabilitation.[59]

Thus, in deciding whether to bring criminal charges, the authorities should consider the likely effect of their actions in addition to the normal considerations of probable cause and corpus delicti. A choice must

53. MASS. GEN. LAWS ANN. ch. 265, § 26 (West 1976).

54. Collins, *The Role of the Law Enforcement Agency* in Helfer & Kempe, *supra* note 14, at 185.

55. *See, e.g.*, Grumet, *supra* note 14, at 307 also quoting the Children's Div. of the Amer. Human. Assoc. Guidelines for Legislation: *To Protect the Battered Child, Basic Principles and Concept*, 4-5 (1962); Steele & Pollock, *supra* note 14, at 130; Helfer, *The Responsibility and Role of the Physician* in Helfer and Kempe, *supra* note 14, at 35; *Report of the New York State Assembly Select Committee on Child Abuse*, April 1972 in Helfer and Kempe, *supra* note 14, at 247; Paulsen, *The Law and Abused Children* in Helfer and Kempe, *supra* note 14, at 154; Isaacs, *The Law and the Abused and Neglected Child*, in *Symposium*, *supra* note 13, at 783-84; Fisher, *Interdisciplinary Management of Child Abuse and Neglect*, 5 PEDIATRIC ANN. 116 (1976); *Torts: The Battered Child — A Doctor's Civil Liability for Failure to Diagnose and Report*, 16 WASHBURN LAW J. 543, 544 (1976) [hereinafter cited as *Torts*]; B. MINTZER & J. CASALY, REPRESENTING THE ABUSED AND NEGLECTED CHILD IN MASSACHUSETTS, 4-5 (1977) [hereinafter cited as MINTZER].

56. *See* note 39, *supra*.

57. Although the issue of violation of due process might be raised, it does not apply in this situation. The Juvenile Court has independent power under *parens patriae* to transfer custody of the child to the DPW where the child is in need of "care and protection." *See* MASS. GEN. LAWS ANN. ch. 119, § 24 (West Supp. 1978). The Court's jurisdiction is over the child's condition, not over the parent. Therefore, the child may be taken from the home, regardless of whether the parent is prosecuted and/or convicted.

58. *See* note 55, *supra*.

59. Steele & Pollock, *supra* note 14, at 130.

be made between the conflicting goals of rehabilitation and retribution. While resolution of this conflict poses little difficulty in the more extreme cases,[60] the decision regarding prosecution in less obvious situations may be based on little more than an educated guess.[61]

A decision to bring criminal charges may pose several evidentiary problems, particularly where one parent is the abuser and the other is the only witness to the act.[62] Not only can the defendant refuse to testify against himself or herself,[63] but the witness spouse may elect not to testify against the defendant spouse in a criminal proceeding.[64] This is significant since most child abuse or neglect occurs within the home, often without additional witnesses.[65] Interspousal communications are absolutely disqualified as evidence at trial in Massachusetts, and the prohibition may not be waived.[66]

Although the child is not barred from testifying against his or her parents, many abused or neglected children are too young to meet the

60. *See, e.g.,* Commonwealth v. Cadwell, 1978 Mass. Adv. Sh. 237, — N.E.2d — (1978); Commonwealth v. Cutler, 356 Mass. 245, 249 N.E.2d 632 (1969) involving a manslaughter conviction of a father who brutally beat his child during punishment. It is significant that *Cutler* is the first case in Massachusetts where the phenomenon of battered child syndrome was judicially acknowledged. *Id.* at 247, 249 N.E.2d at 633; Commonwealth v. Hall, 322 Mass. 523, 78 N.E.2d 644 (1948) involving a murder conviction of a mother who intentionally withheld food, liquid and medicine from her infant child.

61. A wrong guess may have tragic consequences. In one recently publicized case, the decision was made not to prosecute parents who had apparently neglected their child. After an interim separation, the child was returned from a foster home and reunited with her parents. The two year old girl was subsequently beaten and killed by the parents. Her four year old brother was also severely beaten. The parents were subsequently arraigned on charges of manslaughter. *See* BOSTON EVE. GLOBE May 24, 1978 at p. 3, col. 1.

In response to this and other well publicized cases of severe abuse and neglect, the Massachusetts Legislature has begun a series of legislative subcommittee hearings to evaluate the DPW's handling of child abuse and neglect cases. *See* BOSTON EVE. GLOBE May 19, 1978, at p. 3, col. 1. A continuing theme at the hearings has been a lack of available resources in contrast to the sharp increase in reported cases. (5,000 reported cases in fiscal 1976 in contrast with an expected 15,000 cases in fiscal 1978.)

62. Steele & Pollock, *supra* note 14, at 103, 108.

63. Under the Fifth Amendment of the United States Constitution, no person may be compelled to be made a witness against him or her self in any criminal proceeding. Under the Fourteenth Amendment, this is made applicable to the states. *See* Malloy v. Hogan, 378 U.S. 1 (1964); Commonwealth v. Baker, 348 Mass. 60, 201 N.E.2d 829 (1964). Part 1 Article 12 of the Constitution of Massachusetts contains a similar provision, prohibiting the compulsion of a subject to furnish evidence against himself. *See* E. M. Swartz Trial Handbook for Massachusetts Lawyers § 177 Privilege Against Self-Incrimination (1972).

64. MASS. GEN. LAWS ANN. ch. 233, § 20 (West 1976) provides that neither spouse shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other, except as otherwise provided in MASS. GEN. LAWS ANN. ch. 273, § 7 (West 1976), in prosecutions for desertion and nonsupport. Unlike the rule in other jurisdictions, the privilege in Massachusetts runs to the witness spouse rather than the defendant, and the former may testify when willing to do so, irrespective of the wishes of the defendant. Commonwealth v. Barker, 185 Mass. 324, 70 N.E. 203 (1904). *See* Swartz, *supra* note 63, at § 176.

65. *See generally* Brown, *supra* note 14.

66. MASS. GEN. LAWS ANN. ch. 233, § 20 (West 1976) bars a spouse from testifying as to

evidentiary requirements of understanding the difference between truth and falsehood and of appreciating their obligation to tell the truth.[67] Indeed, many are simply not able to give a verbal account of acts which have been committed upon them. Consequently, it may be difficult to prove that the defendant caused the injury.

Owing to the harmful effects which typically result from the institution of criminal proceedings, as well as the evidentiary problems which must be encountered, prosecution of the abusive or neglectful parent is but a minor aspect of the legal apparatus needed to combat battered child syndrome. The insufficiency of criminal prosecution is underscored by the questionable deterrent effect of criminal sanction, because of the crime's highly emotional nature. Ironically, the fear of prosecution may simply insure that the child will not receive necessary medical attention, further aggravating the situation.

The utility of criminal prosecution is further limited by the difficulties of detection which are inherent in battered child syndrome. The child is usually too young or frightened to report the injury to the appropriate authorities.[68] The non-abusive spouse is often unwilling to have the abuser prosecuted and typically fears the loss of the abuser's affection in the event of filing such a report.[69] Therefore, if the criminal system is to respond efficaciously to battered child syndrome, it must be supported by other legal mechanisms which provide for identification and reporting of suspected cases by those outside of the family.[70]

B. Tort Recovery by the Child Against the Offender

A second possible avenue of legal redress of child abuse and neglect is common law tort recovery by the child for the acts of the abuser (*e.g.*,

private communications with the other spouse except in proceedings involving a contract between spouses and except in proceedings enforcing support (MASS. GEN. LAWS ANN. ch. 273A (West 1976)) or prosecuting nonsupport (MASS. GEN. LAWS ANN. ch. 273 §§ 1-10 (West 1976)). Unlike other jurisdictions, the Massachusetts exclusion of private conversations between spouses is a rule of disqualification, not of privilege, and the testimony is inadmissible even when both spouses desire to have the evidence received. Commonwealth v. Cronin, 185 Mass. 96, 69 N.E. 1065 (1904); Kaye v. Newhall, 356 Mass. 300, 249 N.E.2d 583 (1969). *See* Swartz, *supra* note 63, at § 136.

67. Generally, the test of competency of a young child as a witness is whether the child sufficiently understands the difference between truth and falsehood and understands the obligation and duty to tell the truth. *See* Commonwealth v. Tatisos, 238 Mass. 322, 130 N.E. 495 (1921) where a six year old child was permitted to testify. *See also* Malchanoff v. Truehart, 354 Mass. 118, 236 N.E.2d 89 (1968) where the court stated that the test of competency is not the child's age but his or her capacity to understand and communicate coupled with consciousness of duty to speak the truth. It should be noted that most abused or neglected children are under three years of age. *See* note 24, *supra*.

68. *See* note 24, *supra*.

69. *See* Brown, *supra* note 14.

70. *See* text at note 106, *supra*.

assault and battery; willful, wanton and reckless conduct; gross negligence; negligence). The identity of the person who has committed the abuse or neglect (parent or non-parent) may influence the feasibility and desirability of bringing such an action.[71] However, there are several advantages to proceeding in tort which are unavailable in a criminal prosecution.

1. Evidentiary Considerations

The standard of proof for recovery in tort (other than an action for fraud) in Massachusetts is by a preponderance of the evidence.[72] The child's burden of proof in a civil action is therefore substantially easier to meet than that of the prosecution in a criminal case. A second advantage is the absence of interspousal testimonial privilege in the civil action. Despite the fact that in most cases, only one parent commits the abuse, the other parent is usually aware of the abusive conduct.[73] Assuming that the witness spouse does not resort to perjury, this valuable testimony may be elicited.

2. Parent-Child Tort Immunity

Since most child abuse occurs at the hands of the victim's parents,[74] application of the principles of common law tort recovery to this phenomenon presents several legal and practical problems. At the outset, there is a question as to whether the child may bring such an action against either or both parents. Prior to 1975, the doctrine of parent-child tort immunity had served as a total bar to such suits in Massachusetts.

In *Luster v. Luster,*[75] the Supreme Judicial Court held that an infant plaintiff could not recover damages from his father for injuries sustained when his father, acting in the course of business, "backed his truck upon and over the plaintiff."[76] Justifying its holding on "sound public policy," the court stated: "[s]uch actions, at least when not collusive, would almost inevitably tend to the destruction of the peace and

71. Where the offender is not the child's parent, such an action would not be prohibited by law. However, where the child seeks to maintain a suit against his or her own parent, the obstacle of parent-child tort immunity must be surmounted. *See* notes 74-89 and accompanying text, *infra.* Note that this problem may not arise in those situations in which the parent's right to the child has been terminated through an adoption proceeding under MASS. GEN. LAWS ANN. ch. 210 (West 1976). *See* note 92, *infra.*

72. *See* Callahan v. Fleischman Co., 262 Mass. 437, 160 N.E. 249 (1928).

73. *See* Steele & Pollock, *supra* note 14, at 114.

74. *See* note 27, *supra.*

75. 299 Mass. 480, 13 N.E.2d 438 (1938).

76. *Id.* at 481, 13 N.E.2d at 439.

77. *Id.*

unity of family life and to the impairment of parental authority and discipline."[78] In *Oliveria v. Oliveria,*[79] the court reaffirmed the *Luster* principles, barring an action by a mother against her son for personal injuries suffered as a result of his gross negligence.

In *Sorensen v. Sorensen,*[80] the court had occasion to reexamine the rationale for the immunity. In discussing the "family tranquility" argument,[81] the court, through Chief Justice Tauro, stated that: "an absolute parental immunity to actions in negligence is not consistent with contemporary conditions and is no longer required by the necessities of modern family life."[82] The court narrowly limited its abrogation of the doctrine to tort actions for negligence brought by an unemancipated minor against a parent arising from an automobile accident to the extent of the parent's automobile liability insurance coverage.[83] In one sense, the court seemed to stress the point that "[c]hildren enjoy the same right to protection and to legal redress for wrongs done them as others enjoy."[84] On the other hand, however, it rested its holding in part on the fact that, "[w]hen insurance is involved, the action between parent and child is not truly adversary; both parties seek recovery from the insurance carrier to create a fund for the child's medical care and support without depleting the family's other assets."[85]

It is highly unlikely that the issue of insurance would arise in a child abuse case. Thus, despite dicta to the contrary, the court might be very reluctant to extend its abrogation of the doctrine to a situation where the plaintiff alleges simple or even gross negligence. However, if intentionally abusive conduct were present, it would appear that the court might be willing to allow recovery, despite the lack of liability insurance. In a footnote,[86] the *Sorensen* court quoted the New Hampshire Supreme Court which had observed: "[t]he father, who brutally assaults his son or outrages his daughter, ought not to be heard to plead his parenthood and the peace of the home as answers to an action seeking compensation for the wrong."[87]

It is submitted that the doctrine of parent-child tort immunity ought to be abolished in those situations where the condition of the child warrants judicial intervention and permanent commitment of the child to

78. *Id.*
79. 305 Mass. 297, 25 N.E.2d 766 (1940).
80. 1975 Mass. Adv. Sh. 3662, 339 N.E.2d 907 (1975).
81. *Id.* at 3663, 339 N.E.2d at 908.
82. *Id.* at 3664-65, 339 N.E.2d at 908-09.
83. *Id.* at 3665, 339 N.E.2d at 909.
84. *Id.* at 3674, 339 N.E.2d at 912.
85. *Id.* at 3678-79, 339 N.E.2d at 914.
86. *Id.* at 3673, n.10, 339 N.E.2d at 912, n.10.
87. Dunlap v. Dunlap, 84 N.H. 352, 361, 150 A. 905, 910 (1930).

the protective custody of the Department of Public Welfare or when the parent has exhibited intentionally abusive conduct. In both instances, the "family tranquility" argument for maintaining the doctrine is clearly inappropriate. In the former, the family structure, vis-a-vis the plaintiff, has literally ceased to exist. In the latter, the potential for sustaining peace and harmony is highly questionable, regardless of any lawsuit which is brought.[88] As the court in *Sorensen* emphasized

> [t]he argument that parental immunity is necessary to preserve the tranquility and harmony of the domestic life misconceives the facts of domestic life. The primary disruption to harmonious filial relations is not the lawsuit brought for damages after the injury but the injury itself, resulting from the misconduct of the parent.[89]

3. Practical Limitations of Allowing Actions in Tort

A real problem exists for those cases which "fall between the cracks" such as where a child has been neglected and abused but where the DPW seeks to rehabilitate the abusive parent in order to reunite the family. Because abusive parents are typically defensive and frustrated individuals who have themselves been victimized,[90] dragging them into court as defendants may alienate them further from social workers and instill hostility for the system.[91] Additionally, the parents may increase the frequency and severity of abusive conduct where the child has genuinely caused their immediate frustrations, *i.e.*, the lawsuit. For this reason, common law tort recovery is a poor legal tool for dealing with the psychological complexities of child abuse and neglect in those situations where rehabilitation and reunification of abusive parents and victimized children is seen as a viable goal.[92]

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88. *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

89. 1975 Mass. Adv. Sh. 3675, 339 N.E.2d 913 (1975).

90. *See* notes 29, 30 and 31, *supra.*

91. *See* Daly, *Wilful Child Abuse and State Reporting Statutes,* 23 U. OF MIAMI L. REV. 283 at 338 (1969).

92. *Id.*

Perhaps the only situation in which tort recovery for abuse or neglect has any practical value at all is where the child is no longer in the home. This will occur where the child's condition warrants permanent commitment to the care and protection of the DPW (i.e., foster care) or where the child has been adopted. *See* discussion in text at notes 114-124, *infra.* Note that where parental rights to custody are terminated by adoption, the doctrine of parent-child tort immunity may be inapplicable.

For a discussion concerning the ultimate recipients of tort recovery in those cases in which the child has died, particularly in relation to the laws of descent and distribution, *see* notes 183-194 and accompanying text *infra.*

C. *Child Protection Laws: Intervention by the DPW and the Juvenile Court*[93]

The most comprehensive legal apparatus in Massachusetts for dealing with child abuse and neglect can be found in Massachusetts General Laws chapter 119, sections 1-51, under the collective title of Protection for Children. Due to the fact that various sections were enacted decades apart in response to a variety of problems, the provisions appear at times to overlap and to manifest certain incongruities. However, the overall effect is to provide for identification of abused or neglected children,[94] utilization of social services,[95] and transfer of custody where it is deemed appropriate.[96] Where there is no possibility of an offender's rehabilitation, parental rights may be terminated via adoption proceedings.[97] Because these proceedings are final, the care and protection mechanisms of chapter 119 are normally utilized first, thereby protecting parental rights by way of a two-tier system.

1. Reporting Child Abuse and DPW Intervention

The protective devices of chapter 119 are most frequently triggered through chapter 119, sections 51A-51G which provide for reporting abused and neglected children to the DPW.[98] The statute lists two classes of reporters: those persons specifically required to report (mandated reporters)[99] and "any other person" who may report (permissive reporters).[100] Mandated reporters are given absolute immunity from all civil or criminal actions arising out of the filing of the obligatory report.[101] Permissive reporters retain the same immunity where a report has been made in good faith.[102]

The class of mandated reporters consists of "[a]ny physician, medical intern, medical examiner, dentist, nurse, public or private school teacher, educational administrator, guidance or family counselor, probation officer, social worker or policeman" when acting in a "professional capacity."[103] These individuals frequently encounter abused or

93. *See* B. MINTZER & J. CASALY, REPRESENTING THE ABUSED AND NEGLECTED CHILD IN MASSACHUSETTS (1977) for a complete discussion in this area. This authority has provided much of the background information for the discussion which follows.

94. *See* MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1978).

95. *See* MASS. GEN. LAWS ANN. ch. 119, § 51B (West Supp. 1978).

96. *See* MASS. GEN. LAWS ANN. ch. 119, §§ 23(c) and 24 (West Supp. 1978).

97. *See* MASS. GEN. LAWS ANN. ch. 210, § 3, (West Supp. 1978) permitting adoption without parental consent where the parent has neglected to provide proper care and maintenance.

98. MASS. GEN. LAWS ANN. ch. 119, §§ 51A-51G (West Supp. 1978).

99. MASS. GEN. LAWS ANN. ch. 119, § 51A, para. 1 (West Supp. 1978).

100. MASS. GEN. LAWS ANN. ch. 119, § 51A, para. 4 (West Supp. 1978).

101. *Id.*

102. *Id.*

103. MASS. GEN. LAWS ANN. ch. 119, § 51A, para. 1 (West Supp. 1978).

neglected children in their daily routines. In addition, medical personnel are among the most highly trained in detecting abuse and neglect.[104]

Notably, a report is mandated only where there is "reasonable cause to believe"[105] that a child is suffering from certain enumerated injuries. Furthermore, the statute makes no reference to the source of the abuse, thus alleviating the reporter of the burden of determining who caused the injury. Emphasis is placed wholly upon the condition of the child and not on the alleged wrongdoing of the abusive party who is often the child's parent. A condition is reportable where the child is "suffering serious physical or emotional injury resulting from abuse inflicted upon him including sexual abuse, or from neglect, including malnutrition, or who is determined to be physically dependent upon an addictive drug at birth . . . ."[106]

Section 51B provides for the duties of the DPW upon receiving the report.[107] The agency is required to investigate the nature of the information contained in the report[108] and must evaluate the household of the child to determine the risk of future physical or emotional injury. If the report proves to be unsubstantiated, the DPW may terminate the case immediately. However, where the risk of imminent harm is great, the child may be taken into protective temporary custody at once pending the outcome of a Care and Protection hearing (C & P) in the juvenile court under Massachusetts General Laws chapter 119, section 24.[109] The DPW is required to offer the family any social services which it deems necessary to safeguard the welfare of the child and preserve the family unit where possible.[110] Many cases are terminated where the DPW feels that the parents have responded positively to such social services. Where there is an unfavorable response, the DPW may seek court action through a C & P.

If a battered child is brought to a hospital or physician's office, the administrator or doctor files a report[111] and may obtain authorization from the juvenile court to refuse the release of the child to his or her parents.[112] Refusal is authorized where the court "believes such release

104. McCoid, *The Battered Child and Other Assaults Upon the Family*, 50 MINN. L. REV. 1, 27-28 (1965).

105. MASS. GEN. LAWS ANN. ch. 119, § 51A, para. 1 (West Supp. 1978). For a discussion of "reasonable cause to believe" see Paulsen, *The Legal Framework for Child Protection* 66 COLUM. L. REV. 679 (1966) suggesting potential for strict liability in tort for failure to comply with the statute.

106. MASS. GEN. LAWS ANN. ch. 119, § 51A, para. 1 (West Supp. 1978).

107. MASS. GEN. LAWS ANN. ch. 119, § 51B(1) (West Supp. 1978).

108. MASS. GEN. LAWS ANN. ch. 119, § 51B(2) (West Supp. 1978).

109. MASS. GEN. LAWS ANN. ch. 119, § 51B(3) (West Supp. 1978).

110. MASS. GEN. LAWS ANN. ch. 119, § 51B(4) (West Supp. 1978).

111. MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1978).

112. MASS. GEN. LAWS ANN. ch. 119, § 51G (West Supp. 1978).

would be detrimental to the child's health or safety . . . ."[113] This provision is particularly useful if the parents are uncooperative or belligerent. At this juncture in the proceedings, there is no requirement of notice to the parents.

2. Judicial Intervention

Chapter 119, section 24 provides for the jurisdiction of the juvenile courts and juvenile sessions of district courts.[114] Court intervention through a C & P hearing is generally viewed as a "last resort," arising where the application of social services has failed or been deemed useless. The proceedings are informal and there is an attempt to diminish adversarial qualities which might place the parents on the defensive. Section 24 provides that upon the petition of any person alleging that the child:

> [is] without necessary and proper physical, educational or moral care and discipline, or is growing up under conditions or circumstances damaging to a child's sound character development, or . . . lacks proper attention of parent, guardian with care and custody, or custodian, and [whose] parents or guardian are unwilling, incompetent or unavailable to provide such care. . . .[115]

The court may compel the parents to show cause why the child should not be committed to the custody of the DPW or be subject to any other appropriate order. Often, C & P petitioners are hospitals[116] or the DPW itself,[117] although any person who so desires may qualify.[118] Under the doctrine of *parens patriae,* the burden of proof in the C & P hearing is on the parents to establish that their child does not require the care and protection of the court. Considering the practical problems involved, as well as a judicial reluctance to make a determination in the absence of further investigation, the court will usually order a continuance.[119]

Therefore, the initial C & P functions as a preliminary hearing where counsel for the parent and counsel for the child are appointed. An investigator, usually a private social welfare organization, is also designated by the court and ordered to make a fact-finding of the contents of the petition. At this point, the court will grant either temporary legal and physical custody or only legal custody to the DPW, allowing the parents to retain physical custody, subject to immediate termination

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113. MASS. GEN. LAWS ANN. ch. 119, § 51C (West Supp. 1978).

114. There are currently juvenile courts in Boston, Bristol, Springfield, and Worcester. Cases arising in other areas are heard in juvenile sessions of the district courts.

115. MASS. GEN. LAWS ANN. ch. 119, § 24 (West Supp. 1978).

116. MASS. GEN. LAWS ANN. ch. 119, § 51C (West Supp. 1978).

117. MASS. GEN. LAWS ANN. ch. 119, § 51B(4) (West Supp. 1978).

118. MASS. GEN. LAWS ANN. ch. 119, § 24 (West Supp. 1978).

119. Mintzer, *supra* note 93, at 15.

should the DPW feel that the child is in danger.[120]

At a subsequent hearing, the investigator's report will be presented to the court and if the allegations of the original petition are judged to be true, the court may grant permanent custody of the child to the DPW. More often, however, the court will merely grant temporary custody subject to review in six months and the child will be placed in foster care. If the parents cooperate with the DPW by using those social services which the DPW believes are necessary to alleviate the situation (*e.g.*, Alcoholics Anonymous) it is likely that they will regain custody of their child at a subsequent hearing within a period of six to eighteen months. If they fail to cooperate (or if they are judged not capable of rehabilitation), they will lose custody of their child permanently and be compelled to face termination of their rights through an Adoption Proceeding in Probate Court.[122]

Although the juvenile courts have no legal jurisdiction over the parents, they do have control over the custody of the child and may use this as leverage with which to compel the parent to seek rehabilitation or relinquish custody. However, there is great controversy over which "solution" would represent the child's best interests.

Because juvenile courts often view family unity as being congruent with the welfare of the child, they often feel compelled to encourage rehabilitation.[123] To the contrary, some authorities suggest that the child is best served by placement with whomever provides the essential environment of love, warmth, and security.[124] Authorities have therefore urged the courts to look beyond the rehabilitation of the natural parents to determine what is the best solution for the child.

D. Tort Actions Based on Failure to Report

In an effort to detect cases of child abuse and neglect, legislatures of nearly every jurisdiction have enacted statutes requiring certain classes of individuals to report instances of battered child syndrome.[125] To encourage compliance, many jurisdictions have introduced criminal penalties for violation of these reporting statutes.[126] A further development

120. *Id.* at 17.

121. "Temporary custody" has been known to continue for periods of up to 5 years.

122. Adoption proceedings are conducted under MASS. GEN. LAWS ANN. ch. 210 (West Supp. 1958 & 1978).

123. *See* MASS. GEN. LAWS ANN. ch. 119, § 1A, introduction. (West 1969).

124. *See generally* J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

125. For an analysis of the child abuse reporting legislation of every jurisdiction see Fraser, *A Summary of Child Abuse Legislation, 1973,* in Helfer and Kempe, *supra* note 14, at 203.

126. The Massachusetts reporting statute has recently been amended to include, "Any such person so required to make such oral and written reports who fails to do so shall be punished by a fine of not more than one thousand dollars." (1977 Mass. Acts ch. 942).

has been the emergence of tort liability for those individuals who are required to report and who fail to do so.[127]

While the Massachusetts statute requires a wide spectrum of individuals to report,[128] the following discussion addresses itself primarily to its impact upon physicians and other medical personnel. This is due to the fact that physicians frequently encounter abused and neglected children in a professional setting and are best able to utilize a high degree of training and skill to detect battered child syndrome.[129] Furthermore, focussing upon this class effectively demonstrates the existing theories of liability.[130]

1. Duty to Report

At the outset, a plaintiff seeking to recover damages for a physician's failure to report battered child syndrome must establish a duty on the part of that physician to make such a report. Consistent with fundamental principles of tort liability and civil practice, an action alleging negligence for failure to report would be subject to dismissal in the absence of such a duty. The successful resolution of this issue is therefore crucial to the plaintiff's case. In Massachusetts, the battered child plaintiff may approach this threshold from one of two perspectives: that a duty to report exists at common law or that a duty to report is created by statute.

This trend is by no means universal. Where the New York statute expressly provides for a civil cause of action in addition to criminal penalty for failure to report (N.Y. SOC. SERV. LAW tit. 6, § 420(2) (McKinney 1976)), Illinois has recently repealed its provision for criminal sanction (ILL. REV. STAT. ch. 23, § 2041) (West Supp. 1978).

127. Landeros v. Flood, 17 Cal.3d 399, 131 Cal. Rptr. 69, 551 P.2d 389 (1976) is the only litigated case on this issue. In another California case on the issue of a physician's failure to report, the parties settled out of court for $600,000. *See* Robison v. Wical, Civil No. 37607 (Cal. Sup. Ct. San Luis Obispo, filed Sept. 4, 1970), reported in Ramsey & Lawler *The Battered Child Syndrome* 1 PEPPERDINE L. REV. 372 (1974).

128. MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1978).

129. It has been suggested that battered child syndrome:

> "should be considered in any child exhibiting evidence of possible trauma or neglect (fracture of any bone, subdural hematoma, multiple soft tissue injuries, poor skin hygiene or malnutrition) or where there is a marked discrepancy between the clinical findings and the historical data as supplied by the parents. In cases where a history of specific injury is not available, or in any child who dies suddenly, roentgenograms of the entire skeleton should be obtained in order to ascertain the presence of characteristic multiple bony lesions in various stages of healing."

McCoid, *supra* note 104, at 10, n.28, *citing* Kempe, *et al., supra* note 2, at 24.

130. Although there may be no common law duty for other mandated reporters to report (i.e. social workers, teachers, counselors etc.), a duty may arise under the statute (*see* discussion of statutory duty, *infra*). Note that municipal immunity would not extend to cover governmental employees who fail to report as it is a ministerial act under Whitney v. City of Worcester, 1977 Mass. Adv. Sh. 1713, 366 N.E.2d 1210 (1977). For a discussion of municipal immunity as it relates to the DPW's duty to investigate reports of child abuse and neglect, *see* notes 176-81 and accompanying text, *infra*.

a. Duty at common law

At common law, a physician has a duty to diagnose and treat a patient's malady with a "degree of care and skill which is to be expected of the average practitioner of the class to which . . . [the physician] belongs."[131] In maintaining an action of negligence for failure to report, the plaintiff must establish that his or her condition [battered child syndrome] was a malady within the meaning of the rule and that proper medical care would have included a diagnostic investigation and therapeutic report. While these issues have not been specifically addressed by the Supreme Judicial Court, it has been generally recognized by the medical community that battered child syndrome is an illness, subject to proper diagnosis and treatment in much the same manner as any other illness.[132]

In *Landeros v. Flood,*[133] an infant, through a guardian *ad litem* brought an action against a physician who had failed to detect and report battered child syndrome. The trial court dismissed the action and ruled as a matter of law that the physician had no duty to diagnose or treat the condition under either a theory of common law medical malpractice or statutory mandate.

The California Supreme Court reversed this ruling, stating:[134] "the diagnosis of the 'battered child syndrome' has become *an accepted medical diagnosis*. . . . Trial courts have long recognized the 'battered child syndrome' and it has been accepted as a legally qualified diagnosis

131. Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968).

132. *See, e.g.*, Newberger, *The Myth of the Battered Child Syndrome,* 40 CURRENT MED. DIALOGUE 327 (Apr. 1973) who states that: "We are coming to see that the essential element in child abuse is not the intention to destroy a child but rather the inability of a parent to nurture his offspring . . . .

When we at Children's Hospital in Boston reformulated our definition for *trauma x,* our house euphemism for child abuse, we decided to define this diagnostic entity not as inflicted injuries brought on defenseless children by willfully destructive parents, the concept implicit in the "battered child syndrome" diagnosis, but an illness with or without inflicted injury, stemming from situations in his home setting which threatened a child's survival."

See also Commonwealth v. Labbe, 1978 Mass. App. Ct. Adv. Sh. 141, — N.E.2d — (1978) where a stepfather was convicted of manslaughter for causing the death of his infant stepson. Upon considering the issue of expert testimony on the subject of battered child syndrome, the court stated:

> There was no error in permitting the pathologist to give his expert opinion that the cause of death was battered child syndrome. That syndrome has come to be a well recognized medical diagnosis, dependent on inferences, not a matter of common knowledge, but within the area of expertise of physicians whose familiarity with numerous instances of injuries accidentally caused qualifies them to express with reasonable probability that a particular injury or group of injuries is not accidental or is not consistent with the explanation offered therefor but is instead the result of physical abuse by a person of mature strength.

Id. at 145 (citation omitted).

133. 17 Cal.3d 399, 131 Cal. Rptr. 69, 551 P.2d 389 (1976).

134. *Id.* at 412, 131 Cal. Rptr. at 75-76, 551 P.2d at 395-96. The California Court of Appeals had affirmed the dismissal on the malpractice issue but reversed on the issue of statutory violation,

on the trial court level for some time. . . ."[135] The *Landeros* court further noted that, "the trial court could not properly conclude as a matter of law that defendant's standard of professional care did not include the diagnostic and treatment procedures [e.g., taking x-rays and reporting to law enforcement or juvenile authorities] outlined in the complaint."[136] Upon mentioning the proliferation of professional literature on the subject of battered child syndrome, the court acknowledged that it did "not know whether the views espoused in the literature had been generally adopted in the medical profession by the year 1971 [the year in which the cause of action arose] and whether the ordinarily prudent physician was conducting his practice in accordance therewith."[137] Thus, recognition of battered child syndrome was affirmed as a matter of law, while the standard of diagnosis and treatment was remanded as a question of fact.[138]

As previously noted, the Supreme Judicial Court has not yet had occasion to consider a case involving diagnosis and treatment of battered child syndrome. However, in *Commonwealth v. Cadwell,*[139] the court proclaimed its concern with the phenomenon which had originally been recognized in *Commonwealth v. Cutler.*[140] Although both cases involved criminal prosecution of individuals who had actually committed the abusive conduct, the court noted the *Landeros* case and implied that it would entertain an action for negligence based on failure to report.[141]

In light of recent widespread publication of professional medical

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holding that such a duty to report was created by the applicable California reporting statute. Landeros v. Flood, 123 Cal. Rptr. 713 (Ct. of App. 1975). The California Supreme Court upheld the Court of Appeals on the issue of statutory duty to report, but reversed in part stating that a duty to report also exists under the common law in California.

135. 17 Cal.3d at 412, 131 Cal. Rptr. at 75-76, 551 P.2d at 395-96, *quoting* People v. Jackson, 18 Cal. App.3d 504, 505, 95 Cal. Rptr. 919, 921 (1971) (citations omitted).

136. 17 Cal.3d at 410, 131 Cal. Rptr. at 74, 551 P.2d at 394.

137. *Id.*

138. The case has been remanded for a determination on the issues of standard of care and scienter as it relates to violation of statute. It is currently in the pre-trial discovery stage.

139. 1978 Mass. Adv. Sh. 237 — N.E.2d — (1978).

140. 356 Mass. 245, 249 N.E.2d 632 (1969).

141. The court stated that:

> It is a deeply regrettable circumstance that although some five social or welfare agencies were dealing with the Gerwaski family, there is no indication on this record that any observer perceived the likelihood of child abuse, and so none was prompted to report it under G.L. c. 119, § 51A. See Landeros v. Flood, 17 Cal.3d 399 (1976), for the possible tort aspects of a failure to report (or, in the case of an attending physician, of negligent failure to recognize the syndrome and take proper corrective action).

1978 Mass. Adv. Sh. 237, 248 n.8.

See also Judge Brown's concurring opinion in *Labbe,* 1978 Mass. App. Ct. Adv. Sh. 141, — N.E.2d — (1978), where he stated:

literature and dialogue on the subject,[142] a plaintiff might be able to establish that the prevailing standard of diagnosis and treatment requires investigation and reporting of child abuse and neglect. Thus, where physicians have been charged with a reasonable understanding of the general advances of the medical community in which they practice, these physicians would have a duty to report battered child syndrome at common law.

b. Duty to report as created by statute

Despite the fact that violation of a criminal statute does not normally give rise to a civil cause of action in Massachusetts independent of common law,[143] such cause of action may be created where the necessary legislative intent appears "by express language or by clear implication."[144]

Where a duty to report is not found to exist at common law, or where the plaintiff wishes to avoid the evidentiary difficulties of establishing community standards by expert testimony, the Reporting Statute[145] may therefore provide an alternative means of establishing a *prima facie* case of negligence for failure to report.[146] While a common law duty to report may be limited to physicians, nurses, and other medical personnel, the obligation as created by statute would apply to all mandated reporters.[146]

In seeking to establish the requisite legislative intent to create a cause of action with respect to the Reporting Statute, it appears that the "clear implication" test would allow for a greater chance of success than that of "express language." Those statutes which have been found to contain the necessary express language are narrowly construed, expressly providing that a transgressor shall be liable to any person in-

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I note, however, that, most regrettably, none of the doctors or other persons involved in treating Jason on his several visits to the hospital emergency rooms between January and September, 1974, reported the possibility of abuse to the Department of Public Welfare as required by G.L. c. 119, § 51A. Such a report could possibly have saved Jason's life.

A cause of action may lie in tort on behalf of a battered child against persons named in the statute for failure to report a probable case of child abuse, where subsequently there is further injury to the child. See Commonwealth v. Cadwell, — Mass. — n.8 (1978). In addition, an attending physician may be subject to personal liability for the consequences of any negligent failure to recognize the battered child syndrome. See Landeros v. Flood, 17 Cal.3d 399, 408-412 (1976).

Id. at 152 (citations omitted).

142. *See, e.g.*, Landeros v. Flood, 17 Cal.3d at 409, 131 Cal. Rptr. at 73, 551 P.2d at 393.

143. Dolan v. Suffolk Franklin Sav. Bank, 355 Mass. 665, 667, 246 N.E.2d 798, 799 (1969).

144. Hasha v. Bowles, 314 Mass. 738, 741, 51 N.E.2d 454, 455 (1943). *Cf.* Mezullo v. Maletz, 331 Mass. 233, 238, 118 N.E.2d 356, 359 (1954) where no such legislative intent was found to exist.

145. MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1978).

146. Where a common law duty does exist, a statute may be introduced as a codification of that duty within the common law, irrespective of any duty which the statute may create. In Medlin

jured for damages caused by violation of the statute.[147] Such language is noticeably absent from the Reporting Statute.

On the other hand, the "clear implication" test allows for greater latitude in determining legislative intent and opens discussion to a wide range of policy considerations. While these factors have not been delineated with extreme specificity, the applicable cases suggest a few central guidelines. In *Berdos v. Tremont & Suffolk Mills,*[148] the court held that violation of a criminal statute which prohibited the employment in any factory, workshop or mercantile establishment of a child under the age of fourteen gave rise to a civil cause of action, independent of common law. The plaintiff child had sought recovery from his employer for physical injuries sustained during the course of employment. After noting that the statute had been enacted as a declaration of legislative policy to prohibit "children of tender years" from participating in certain types of dangerous employment, the court outlined several indicia for ascertaining whether the legislature had intended to create a new civil remedy. In essence, it found that the statute related to a class of persons who were least able to protect themselves; that its major purpose was to avoid danger and promote public safety; that there would be difficulty in discovering instances of failure to comply with the statute arising from the tendency of both parties to conceal the wrongdoing; that the statute contemplated the protection of childhood; and that it pertained to a subject of "universal interest fundamentally vital in its broader bearings to the future of mankind."[149] The court stated that, "[t]hese considerations require the inference that the remedy intended by the Legislature against the delinquent employer was not confined to the criminal one."[150] After noting that the right of civil action may well have been regarded as a more efficacious means of compelling observance of the law, the court concluded that "while the public purposes of this act are important, any member of the public so situated with reference to its subject-matter as to suffer special damage by its infraction has a right of action against violation of the statute."[151]

v. Bloom, 230 Mass. 201, 119 N.E. 773 (1918), the plaintiff patient alleged negligence on the part of a defendant physician who had failed to report the infant plaintiff's congenital eye deformity to the Board of Health as mandated by statute. While the duty to treat the condition arose out of the common law physician-patient relationship, the court found that the proper manner of treatment would have included filing a report. Failure to do so was evidence of negligence as to the plaintiff's resulting blindness, irrespective of the defendant's efforts to treat the condition himself through the use of chemical procedures. The court stated that, "[t]he evident purpose of this statute is that the board of health may be informed without delay of the existence of a most serious disease with which very young children may be affected, so that immediate and scientific treatment may be received and blindness prevented." *Id.* at 206, 119 N.E. 773 at 775.

147. Aldworth v. F. W. Woolworth, 295 Mass. 344, 3 N.E.2d 1008 (1936).

148. 209 Mass. 489, 95 N.E. 876 (1911).

149. 209 Mass. 489 at 493, 95 N.E. 876 at 877.

150. *Id.*

151. *Id.* Although there is some indication that the court in Johnson v. United States Steel

In applying the *Berdos* indicia to the Reporting Statute, a strong argument could be maintained for finding clear implication of legislative intent to create a civil cause of action. Chapter 119, section one states that:

> [t]he purpose of this chapter is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children.[152]

In addition, the Attorney General of the Commonwealth has stated that, "§51A is intended to protect children from the emotional harm of threatened injury as well as from the physical harm of actual injury.[153] Clearly, battered children, most of whom are less than three years old, are a class of persons least able to protect themselves within the meaning of *Berdos*. While emotional distress might not be categorized as a "danger", it is difficult to distinguish physical injuries inflicted through abuse and neglect from those sustained while employed in a factory. Furthermore, the protection of battered infants would seem to be a subject of "universal interest fundamentally vital in its broader bearings to the future of mankind."[154]

As to the efficacy of remedies test, the Reporting Statute seems to require a civil cause of action to fulfill the legislative goals. Commentators have expressed great dismay at the apparent reluctance of many physicians to comply with the requirements of child abuse reporting statutes generally.[155] Since there have been no reported cases of criminal prosecutions for failure to report, one wonders whether a public prosecutor would be willing to subject an otherwise respected member of the medical community to the stigmatization of the criminal process for such a violation. Thus, where the Reporting Statute is the only effective means for identifying abused or neglected children, and where the

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Corp., 348 Mass. 168, 202 N.E.2d 816 (1964) sought to limit the holding of *Berdos* to violations as evidence of negligence, the court's reluctance to allowing an independent cause of action in *Johnson* for violation of statute may have been due to the facts of the case and the nature of the applicable statute. In *Johnson*, the plaintiff had sought recovery for violation of a statute which had been enacted to prevent the dismissal of or the refusal of employment to any person between the ages of forty-five and sixty-five on the basis of age. Clearly, none of the *Berdos* indicia of public safety, child protection or concealment of the wrongdoing was present. The *Johnson* court did state that a new cause of action would have arisen in the presence of express terms or by clear implication of legislative intent. However, none was found.

152. MASS. GEN. LAWS ANN. ch. 119, § 1A (West Supp. 1978) (emphasis added).

153. 1975 Op. Atty. Gen. 139, 141 (1975).

154. Note that *Berdos* also dealt with a situation involving protection of youth. 209 Mass. 489 at 493, 95 N.E. 876 at 877.

155. *Torts, supra* note 53, at 548.

threat of criminal sanction does not appear to secure compliance, creation of a civil cause of action for a statutory violation may be the only effective means for insuring success. Hopefully, physicians concerned with malpractice suits and other mandated reporters would respond with enlightened self interest under the possibility of financial reprisal.

2. Breach of Duty

Whether the duty to report arises out of common law or statutory law may have an impact on determining what constitutes breach of that duty. The common law standard is simple negligence, requiring the physician to diagnose, analyze and treat the patient's malady with a degree of care and skill expected of the average prudent physician of the same class.[156] In practical terms, this might require the physician to: observe the child's outward appearance; question the parents as to the cause of any injury for which treatment is sought; question the parents concerning any injury of a suspicious nature, even though the child has been brought in for some other purpose; take a complete set of x-rays to determine the existence of any past injuries; compare the examination and test results with any explanation offered by the parents; and consider any secrecy, reluctance, or hostility of the parents to discuss the child's condition.[157] Where the physician knows or should know that the child's injuries resulted from abuse or neglect, satisfactory care might require the filing of a report as well as conventional symptomatic treatment of the injuries themselves.[158] Additionally, where the physi-

156. *See, e.g.*, Brune v. Belinkoff, 354 Mass. 102, 235 N.E.2d 793 (1968); Fitzgerald v. Leach, 337 Mass. 463, 150 N.E.2d 12 (1953); Levenson v. Ruble, 307 Mass. 562, 30 N.E.2d 840 (1941).

157. *See* note 42, *supra*. *See also* Landeros v. Flood, 17 Cal.3d 399, 131 Cal. Rptr. 69, 551 P.2d 389 (1976) where the court observed recommended treatment procedures:

> For example, the leading article by Kempe, *et al.*, *op. cit. supra* 181 A.M.A.J. 17, states that "the diagnosis of the battered child syndrome in instances of subdural hematoma, multiple unexplained fractures at different stages of healing, failure to thrive when soft tissue swelling or skin bruising are present, or in any other situation where the degree, and type of injury is at variance with the history given regarding its occurrence. . . ." (*Id.* at p. 20.) Of the different types of fractures exhibited, an arm or leg fracture caused by a twisting force is particularly significant because "The extremities are the handles' for rough handling" of the child by adults. (*Id.* at p. 22.) The article also contains numerous recommendations to conduct a "radiologic examination of the entire skeleton" for the purpose of confirming the diagnosis explaining that "To the informed physician, the bones tell a history the child is too young or too frightened to tell." (*Id.* at p. 18.)

It should be noted that while Silverman in *Radiologic Aspects in Helfer & Kempe* at 58 does state that the recognition of the radiographic changes does constitute a distinct indication to investigate the circumstances surrounding the injury, however, he does caution that such recognition may not be conclusive. "The epiphyseal separation which results from grabbing the child by a limb to prevent a serious fall is indistinguishable from the epiphyseal separation incurred while the infant is being vigorously shaken or otherwise abused by an irate, distraught adult custodian." *Id.* at 409, n.7, 131 Cal. Rptr. at 73, n.7, 551 P.2d at 393, n.7.

158. *See* Landeros v. Flood, 17 Cal.3d at 410, 131 Cal. Rptr. at 74, 551 P.2d at 394.

cian or hospital has a right to refuse the release of the child because of serious injury, there might be a duty to retain custody pending further investigation.[159] Therefore, failure to follow any of the foregoing procedures might constitute breach of duty. However, strict compliance with the statute might not necessarily be required unless it is found, by law or by expert testimony, that the statutory procedures are followed by the average prudent physician exercising the highest degree of care and skill.[160]

Where the duty to act arises out of the statute, failure to report in the manner prescribed would constitute breach of duty. One question, however, is whether scienter is required to show a violation. The *Landeros* court stated that a physician must be held to a subjective standard of care in light of the applicable language of the California statute which states:

> [i]n any case in which a minor is brought to a physician . . . *and it appears to the physician* . . . from observation of the minor that the minor has physical injury or injuries which *appear* to have been inflicted upon him by other than accidental means by any person . . . he [the physician] shall report such fact . . . ."[161]

Breach of the statutory duty in California, therefore, required a willful violation of the statute.

By contrast, the language of the Massachusetts Reporting Statute reads:

> [a]ny physician . . . who, in his professional capacity shall have *reasonable cause to believe* that a child . . .is suffering serious physical or emotional injury resulting from abuse inflicted upon him . . . or from neglect . . . shall immediately report such condition . . ."[162]

The wording "reasonable cause to believe" suggests a more objective standard upon which to judge the conduct of Massachusetts physicians (and other reporters as well), thereby dispensing with the need to establish scienter in alleging a breach of duty. Where there is no requirement of scienter, expert testimony would be necessary to determine whether the physician should have had "reasonable cause to believe."[163]

3. Types of Injuries to be Reported

Battered child syndrome covers a wide range of injuries, both physical and emotional. Essentially, any non-accidental injury would fall

159. MASS. GEN. LAWS ANN. ch. 119, § 51C (West Supp. 1978).
160. *See, e.g.*, Landeros v. Flood, 17 Cal.3d 399, 131 Cal. Rptr. 69, 551 P.2d 389 (1976).
161. CAL. PENAL CODE ANN. § 11161.5 (West 1977) (emphasis added).
162. MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1978) (emphasis added).
163. Expert testimony, similar to that introduced in *Labbe* might be introduced. *See* note 8, *supra*.

into the category.[164] The Attorney General has stated that "[t]he term 'serious physical or emotional injury' in the context of [the statute] . . . includes *all but the most negligible or de minimus injuries* to children."[165] The burden on the physician is therefore particularly great to identify an unusually broad range of emotional and physical injuries resulting from abuse or neglect.[166]

4. Foreseeable Injury and Proximate Cause

Violation of a criminal statute may be introduced as evidence as to those consequences which the statute was intended to prevent.[167] In the case of the Reporting Statute, the intent is clearly to prevent further harm to the abused or neglected child. However, the injury must have been foreseeable as well as the proximate result of the breach of duty.[168]

As noted by the *Landeros* court, a significant characteristic of battered child syndrome is the likelihood of its recurrence.[169] This is supported by extensive commentary on the subject.[170] Although it has been held that the independent intervening acts of third parties may serve to insulate a defendant from liability for breach of duty,[171] a defendant will not be absolved where the criminal or tortious acts of those third parties are foreseeable.[172] In the case of child abuse or neglect, the conduct of the third party is foreseeable by the very nature of the phenomenon.[173]

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164. For the precise wording of the statute, *see* note 123 and accompanying text, *supra*. *See also* note 23, *supra* for DPW definitions of abuse and neglect.

165. 1975 Op. Atty. Gen. 157, 157 (1975) (emphasis added).

166. Although the statute is rather broad in its description of reportable conditions, it does contain certain limitations. By the doctrine of *expressio unis est exclusio alterius*, it would appear as though a child who has become physically dependent on an addictive drug at any point *after* birth would not be subject to a report. Nor would the child who is adversely affected by alcohol, either at or subsequent to birth.

The age of reportable children presents another limitation. While the age limit was raised from sixteen to eighteen (St. 1975, ch. 276, § 4), mentally and emotionally retarded and dependent persons and spouses who are older than eighteen years of age would not be reportable under the statute, despite the fact that they may be receiving abuse at the hands of a parent, spouse, guardian, or provider.

167. Guinan v. Famous Players — Lasky Corp., 267 Mass. 501, 167 N.E. 235 (1929); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Falvey v. Hamelburg, 347 Mass. 430, 198 N.E.2d 400 (1964).

168. *See, e.g.*, Wilborg v. Denzell, 359 Mass. 279, 268 N.E.2d 855 (1971).

169. *See* Landeros v. Flood, 123 Cal. Rptr. 713, 723, n.8 (1975).

170. *See* note 39, *supra*.

171. *See* Soares v. Lakeville Baseball Camp, Inc., 1976 Mass. Adv. Sh. 681, 343 N.E.2d 840 (1976).

172. *See* Wilborg v. Denzell, 359 Mass. 279, 268 N.E.2d 855 (1971) (third party tortious act); Sojka v. Dlugosz, 293 Mass. 419, 200 N.E.2d 554 (1936) (third party criminal act).

173. *See Torts, supra* note 55, at 547.

The issue of foreseeable acts of third parties in determining the application of a criminal

The question of the causal relationship between breach and injury is intimately related to the foreseeability of acts by third parties. Where the intent of the legislature to avoid further harm to the child has been clearly expressed, and where the duty to report has been imposed for the purpose of attaining that goal, it seems reasonable to infer that a causal relationship exists between failure to report and subsequent abuse or neglect.[174] This is particularly true where the medical community has begun to view battered child syndrome not as a criminal act perpetrated on the child by the abuser, but rather as a bona fide medical/psychological illness, subject to treatment and care.[175]

5. Liability on the Part of the DPW for Failure to Investigate

As the number of child abuse and neglect reports continues to increase, there is a growing concern that the DPW will not be able to fulfill its statutory obligation to investigate the substance of those allegations. The likelihood of successfully maintaining an action in tort against the DPW for failure to adequately investigate cases of child abuse and neglect has increased considerably in recent months. In *Whitney v. City of Worcester,*[176] the Supreme Judicial Court strongly recommended that the legislature redefine the scope of governmental immunity to allow certain types of actions to be brought.[177] In eliminating the long-standing distinction between misfeasance (wherein recovery from a governmental entity had been allowed) and nonfeasance (for which recovery had not previously been allowed), the court suggested that where the particular conduct which caused the injury is one charac-

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statute to a civil cause of action was considered by the court in Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968). In that case, the plaintiff motorist alleged that the defendant bar owner's negligence in serving alcohol to a third party customer who was already intoxicated had been the proximate cause of a subsequent automobile accident between the plaintiff and the third party. It was further alleged that the defendant had been in violation of MASS. GEN. LAWS ANN. ch. 138, § 69, which prohibited the selling of intoxicants to one who is already intoxicated. Upon noting that the defendant drew much of his business from the nearby highway, the court found that the resultant injury had been foreseeable, due in large measure to considerations of public safety on mixing alcohol with gasoline. In conclusion, it stated, "Henceforth in this Commonwealth waste of human life due to drunken driving on the highways will not be left outside the scope of the foreseeable risk created by the sale of liquor to an already intoxicated individual." *Id.* at 501, 233 N.E.2d 18 at 20.

174. *See* Landeros v. Flood, 17 Cal.3d 399, 412, 131 Cal. Rptr. 69, 75-76, 551 P.2d 389, 395-96 (1976).

175. *See* Newberger at note 132, *supra.*

176. Whitney v. City of Worcester, 1977 Mass. Adv. Sh. 1713, — N.E.2d — (1977).

177. *Id.* at 1715. In response to the *Whitney* court's strong admonition that it would totally abrogate the doctrine of municipal immunity in the absence of legislative action, the Massachusetts Legislature has passed into law a statute which abrogates the doctrine of sovereign immunity. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258). It generally conforms to the guidelines set out in *Whitney* as modeled after the Federal Tort Claims Act, 28 U.S.C. ch. 171 (1970). *See* Recent Development p. 876 *infra.*

terized by the high degree of discretion and judgement involved in weighing alternatives and making choices with respect to public policy and planning, governmental entities should remain immune from liability.[178] However, the court stated that where "the particular conduct claimed to be tortious involves the carrying out of previously established policies or plans, such acts should be governed by the established standards of tort liability applicable to private individuals or entities and the governmental entity in question held liable for the injuries resulting from such acts."[179]

It might be argued therefore, that the duty of the DPW to investigate the reported cases of child abuse and neglect under section 51B of the statute requires the implementation of an already existing plan. Consequently, failure to properly investigate would give rise to a viable civil cause of action. The mismanagement of or simple failure to act on reported cases, in direct violation of statutory and regulatory duty, would seem to place the DPW outside the protective umbrella of sovereign immunity. However, the actual construction of those regulations which specify how an investigation shall be conducted would be protected as a decision and policy making activity.[180]

In those cases which are not subject to immunity, liability should be analyzed from the standpoint of an individual.[181] While it is unclear whether the DPW or one of its employees would have a common law duty to investigate, there is no compelling reason to distinguish the DPW's obligation to investigate under section 51B from a physician's (or other mandated reporter's) duty to report under section 51A. Both kinds of obligation are part of the same statute and were enacted for the same purpose: care and protection of children. Clearly, it would be pointless to establish a statutory duty for certain individuals to report without a complementary duty by the DPW or some other agency to investigate the basis of those reports.

6. The Ultimate Beneficiaries upon Recovery

An additional consideration for determining whether to bring an action in tort against an abusive or neglectful parent, a negligent reporter, or the non-investigating DPW is the question of who will ultimately reap the financial benefits of recovery. Where the child is alive, he or she is entitled to a monetary award for damages upon completion

178. Whitney v. City of Worcester, 1977 Mass. Adv. Sh. at 1726.

179. *Id.*

180. *See* Downs v. United States, 382 F. Supp. 713 (D. Tenn. 1974) where the court defined the term "discretionary function" as a "formulation of governmental policy" which would warrant immunity under the Federal Tort Claims Act, 28 U.S.C.S. § 2680(a). *Id.* at 746-47.

181. Whitney v. City of Worcester, 1977 Mass. Adv. Sh. at 1726.

of a successful action.[182] However, where the child has died as a result of the harmful conduct, several factors must be considered in order to ascertain the final recipient of the proceeds of the award. Parenthetically, it should be noted that where the child's injuries are so serious as to warrant the commencement of a civil action against the non-reporting physician, the non-investigating DPW, or the parents themselves, and where the actual abuse or neglect has been committed by the child's parents, the child will most likely be taken out of the home and placed in the protective custody of the DPW.[183]

If the child is dead, two distinct actions may be maintained. First, the administrator may bring an action for conscious pain and suffering on behalf of the child's estate. While actions in tort do not survive the death of the plaintiff at common law,[184] actions "for assault, battery, imprisonment or other damage to the person" do survive pursuant to statute.[185] Damage to the person has been held to include any "damage of a physical character"[186] but does not include non-physical harm such as emotional distress.[187] Consequently, although emotional injury may constitute abuse or neglect under the Reporter Statute, a post mortem tort action may not be brought for such injury. However, where recovery is granted for physical injury, the recovery passes into the child's estate, subject to the laws of descent and distribution.

In the event of death, a second action which may be maintained is a wrongful death suit.[188] While this proceeding is dependent upon whether the child would have had an action in tort if he or she had lived, the action is brought by the administrator for the direct benefit of the statutorily designated beneficiaries.[189]

If death results from abuse or neglect committed by someone other than the child's parents, the parents are entitled to the full financial benefit of both actions. Under statutes regulating descent and distribution, the father and/or mother take the full proceeds of the estate which includes the recovery for conscious pain and suffering.[190] In the event of a wrongful death action, the recovery goes directly to the next of kin who are, in all probability, the parents.[191]

182. However, *see* Daly, *Willful Child Abuse and State Reporting Statutes,* 23 UNIV. OF MIAMI L. REV. 283 at 338 noting that the average abusive parent, young and financially unstable, is not likely to be able to satisfy any sizable judgment.

183. This was the case in both *Landeros* and *Robison.*

184. Connors v. Newton Nat. Bank, 336 Mass. 649, 147 N.E. 2d 185 (1956).

185. MASS. GEN. LAWS ANN. ch. 228, § 1(2)(a) (West 1976).

186. Smith v. Sherman, 58 Mass. (4 Cush.) 408, 413 (1849).

187. Cohen v. Lion Products Co., 177 F. Supp. 486 (D. Mass. 1959).

188. MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1976).

189. MASS. GEN. LAWS ANN. ch. 230, § 1 (West 1976).

190. MASS. GEN. LAWS ANN. ch. 190, §§ 2, 3 (West 1976).

191. MASS. GEN. LAWS ANN. ch. 229, § 1(4) (West 1976).

An additional factor must be assessed where the parents commit the abuse or neglect. While this will not affect the right of the estate itself to recover for conscious pain and suffering, the parents' right to intestate succession will depend upon whether their conduct, vis-a-vis the death of the child, was intentional or non-intentional.[192] On the other hand, any negligent contribution to the injury by a subsequent wrongful death beneficiary will bar that negligent next of kin beneficiary from sharing in the wrongful death recovery, regardless of the question of intent.[193] As long as one next of kin has not contributed to the injury, that individual will recover the entire amount.[194] In such a situation, therefore, the abused child's siblings, if any, would share in the entire wrongful death recovery to the exclusion of the abusive parents.

III. CONCLUSION

Where a child sustains injury as a result of abuse or neglect, several avenues of legal redress are available. The offending party may be prosecuted under a variety of criminal statutes and in certain instances may also be sued in tort. However, these remedies are of limited value due to the fact that most battered child syndrome occurs at the hands of the child's own parent. In the criminal setting, the problems of interspousal evidentiary privileges must be surmounted. In tort actions, the doctrine of parent child tort immunity, unless further abrogated, would preclude recovery. In instances of civil or criminal proceedings against the offender, the potential for subsequent harm may increase by reinforcing the frustration and resentment which gave rise to the initial injurious conduct. Additionally, the election to maintain either a criminal prosecution or a tort action will almost certainly preclude the possibility

192. Minasian v. Aetna Life Ins. Co., 295 Mass. 1, 3 N.E.2d 17. It is interesting to note that many forms of injurious conduct could be classified as "unintentional," especially in the case of neglect. A neglectful parent whose acts or omissions had caused the death of his or her child would therefore be able to sue a non-reporting physician (or other mandated reporter) for conscious pain and suffering of the child and then enjoy the benefits of the recovery. While this result may not have been contemplated by the legislature, parental rights to intestate succession are firmly rooted in both common and statutory law. Note also that the negligence of a parent or guardian will not be imputed to the child in actions for conscious pain and suffering (as distinct from actions for wrongful death). *See* Haddad v. Border Express Inc., 300 F.2d 885 at 886, n.1 (1962) interpreting MASS. GEN. LAWS ANN. ch. 231, § 85D (West 1977). Consequently, where the parents and the physician are both negligent towards the child, it is the physician who is held most responsible.

193. O'Connor v. Benson Coal Co., 301 Mass. 145, 148-49, 16 N.E.2d 636, 637 (1938). Note that under MASS. GEN. LAWS ANN. ch. 231, § 85D (West 1976), the negligence of a parent may not be imputed to the child in the wrongful Death Actions. *See also* Willander v. Faust, 1977 Mass. App. Ct. Adv. Sh. 153, 359 N.E.2d 662 (1977). This may affect recovery under the comparative negligence scheme in Massachusetts. *See* MASS. GEN. LAWS ANN. ch. 231, § 85 (West 1976). However, imputed negligence of a plaintiff will not bar recovery unless the plaintiff's negligence is greater than that of the defendant. *Id.*

194. *See* O'Connor v. Benson Coal Co., 301 Mass. 145, 16 N.E.2d 636 (1938).

for rehabilitation and family reunification. These actions are therefore appropriate only in the most serious of cases.

A more constructive approach lies with the Care and Protection proceedings of the Juvenile Court. The flexibility of this procedure allows legal intervention by the DPW in the family setting with a view toward insuring the safety of the child yet simultaneously encouraging the parents' cooperation in counseling and treatment. Regardless of which legal remedy is sought, the inherent difficulties in detecting battered child syndrome necessitate the utilization of the Reporting Statute. The key to adequate treatment of child abuse and neglect rests initially with those who have been designated by statute to report it.

While the legislature has recently enacted a criminal penalty to ensure adequate compliance with the statutory mandate, it remains to be seen whether the Supreme Judicial Court of Massachusetts will follow the course set by the California Supreme Court in *Landeros* by imposing civil tort liability as well. The dicta in *Cadwell* and *Labbe* suggest that this may indeed occur. Of equal importance will be the manner in which the court discerns a duty to report. Should the duty arise at common law, it would appear to be limited to a duty on the part of medical personnel to diagnose and treat battered child syndrome by way of reporting. However, if the duty is found to originate from the statute itself under the guidelines set out in *Berdos,* every professional class enumerated in the statute would be affected.

Regardless of which tack the court takes, it is the physician who will be most affected. No other professional person is as highly trained in the detection of abuse and neglect or as likely to encounter it. It may indeed seem to be an anomaly that the physician will be held liable for the subsequent criminal or tortious conduct of an abusive or negligent parent where the physician fails to detect and report all but the most negligible injuries of the child. In a sense, the physician becomes the guardian of the child. While this is perhaps the only effective means for detection, prevention and treatment of battered child syndrome, the solution begets its own array of problems. A member of the DPW has suggested that an abusive parent may be reluctant to seek out any symptomatic treatment for the child's injuries where the parent knows that the physician must report the child's condition under penalty of law.[195] Additionally, a physician who otherwise might report may be reluctant to subject a previously nonreporting physician to a civil suit and hence also fail to report.

A more practical problem revolves around the fact that physicians will no longer be reporting solely on the basis of sound medical judg-

195. Telephone conversation with author, Dec. 1977.

ment but out of the fear of being subject to civil liability as well (a not uncommon concern amid members of the medical community). How effectively will the already overburdened DPW be able to investigate the increased numbers of reported cases where physicians file reports as a matter of routine?[196] How will the DPW react where it feels that a particular physician is simply "crying wolf"? In light of the DPW's statutory obligation to adequately investigate all suspected cases of child abuse and neglect,[197] will the focus of liability shift from the nonreporting physician to the non-investigating DPW?[198] By redefining the limits of municipal immunity in *Whitney,* the Supreme Judicial Court has paved the way for such suits.[199]

Regardless of the exact manner with which the law seeks to respond to the problem of child abuse and neglect, it is clear that the legal duty for combatting battered child syndrome in Massachusetts will be placed in some way upon persons other than the actual offenders. As the focus of liability shifts, it is hoped that the threat of civil and criminal sanctions will not serve merely as new ground for potential litigation but rather will generate effective compliance with the requirements of adequate identification and treatment.

ANDREW VELCOFF

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196. DPW *Protective Service Reports,* Nov. 10, 1976 indicates an average of 35 families per case worker. *Id.* at 12. *See also* Memo, *Statewide Protective Services Issues Identified by Central Task Force,* May 14, 1976 which states that, "There are currently over 100 cases [of child abuse and neglect] state-wide, identified as protective services, which have not been assigned to a social worker." *Id.* at 1. Note that the DPW has recently requested a budget increase from the current $7.3 million to $13 million in order to hire more specially trained workers and to expand daycare and homemaker services for troubled families. *See* Editorial, *A Case of Child Abuse,* Boston Evening Globe, March 14, 1978, at p. 2 col. 2.

197. *See* MASS. GEN. LAWS ANN. ch. 119, § 51B (West Supp. 1978).

198. Note that in the *Cadwell* case, there had been six social service workers involved with the family who were aware of the child's condition. Yet, it was found that none adequately reported or investigated the situation. *See Report of Testimony and Evidence of the Hearing Concerning the Death of Walter Gerwaski,* DPW (unpublished report). In a separate case, four social workers were suspended from the DPW after a report was released alleging their failure to investigate properly a case of child abuse which eventually ended with the death of the child. One of the four filed an optimistic report of the child's progress ten weeks after the child is believed to have died. Boston Evening Globe, June 28, 1978, at 18, col. 1.

It is likely that the number of reports would increase substantially with the introduction of a telephone hotline reporting system to be instituted by the end of 1978. A member of the DPW stated that where a similar hotline pilot project was introduced in Springfield, Massachusetts, reports of child abuse and neglect increased approximately 300%. Massachusetts Legislative Subcommittee Hearing and Investigation on Child Abuse and Neglect, May 23, 1978.

199. A suit has already been brought against the DPW for failure to adequately investigate a reported case of child abuse as required by MASS. GEN. LAWS ANN. ch. 119, § 51B (West Supp. 1978). *See* Davis v. Casey, Feeney, Libon and Bowden, Civil Action No. 78-1029-S, U.S. District Court For The District of Massachusetts. The complaint also alleges negligence on the part of the plaintiff's school principal, school teacher and school nurse for failure to adequately report the child's condition as required by MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1978).

A Legislative Approach to Solar Access: Transferable Development Rights

Sunlight radiates, unobstructed, through 93 million miles of space. It is only in the final few hundred feet before it touches earth that its flow is impeded. Although the distance is short, the legal problems of guaranteeing everyone equitable access to this golden bounty are great.[1]

Since the Arab oil embargo of 1973, there has been an attempt by the public and the private sectors to utilize alternative energy resources other than dwindling supplies of crude oil and natural gas. In the United States, per capita consumption of energy increased twenty-five percent between 1960 and 1968. It is projected to rise twenty-one percent between 1968 and 1980, and seventy-six percent by the year 2000. Estimates indicate that the United States will require more energy between 1976 and the end of the century than it has consumed in its entire history.[2] Presently, the heating and cooling of buildings utilizes approximately twenty-five percent of all energy consumed in the United States.[3]

The energy crisis with its inflated prices has been particularly burdensome on New England's economy since the region's industrial and home heating energy sectors "rely on a fuel mix which is dependent upon petroleum products for greater than 80% of required energy."[4] Unfortunately, New England is located far from the sources of its needed fossil fuels (*i.e.*, residual oil from Venezuela and the Middle East, and natural gas from the southwest). Thus, New England pays a premium price for the transportation of oil, gas and coal to its consumers. Also, due to the fact that New England's energy demands are

1. A. MILLER, G. HAYES & G. THOMPSON, SOLAR ACCESS AND LAND USE: STATE OF THE LAW, 1977 3 (1977).

2. Moskowitz, *Legal Access to Light: The Solar Energy Imperative*, 9 NAT. RESOURCES L. 177 (1976).

3. *Preliminary Projections of New England's Energy Requirements*, NEW ENGLAND REGIONAL COMMISSION App. 3 at 52 (1975).

4. *Annotated Index of Energy Facility Related Statutes*, NEW ENGLAND REGIONAL COMMISSION REP. No. 75-4 at i (1976).

> Since petroleum products must be brought in from outside the region, the region's industrial products are placed in an economically poor competitive position and consumers of electricity and heating oil are suffering financially. Therefore, New England's energy dependent position remains as a major problem for the region's economy, especially the industrial and consumer sectors.

Id.

not large enough to influence its suppliers through traditional market mechanisms, it has no choice but to pay the high cost. With little or no energy reserves, the region is barely able to manage the risks of supply interruptions or further price increases.[5]

The use of solar energy would be a viable means of minimizing these risks for New England. It has been estimated that if all residential and commercial buildings constructed in New England between 1980 and 1990 were supplemented with solar heating systems, the potential energy savings would be approximately ten percent of the total energy demands of the residential and commercial sectors.[6] This fact is significant since New England's residential/commercial sector uses almost twice as much energy as the national average, and the region as a whole uses on the average over twice as much oil as does the rest of the nation.[7] Although solar energy has numerous possibilities it cannot be fully utilized as a supplement to conventional energy sources until the legal issues concerning its use are defined and resolved.

The following case studies of New England organizations which have installed solar collectors at various locations, are referred to throughout this note as illustrative of the solar access dilemma and some proposed solutions.

B-L Associates[8] owns a sixteen story apartment building in Brookline, Massachusetts, utilizing eighty-eight solar collectors for the hot water needs of all two hundred thirty apartments. The building,

5. *An Energy Strategy for New England — Objectives and Implementation,* NEW ENGLAND REGIONAL COMMISSION REP. No. 76-4 at 8 (1976). New England uses oil for 88% of its total energy needs. An oil supply interruption or a price increase would place the region in a severe crisis. *See* note 7 *infra.*

6. *Preliminary Projections of New England's Energy Requirements,* NEW ENGLAND REGIONAL COMMISSION App. 3 at 55 (1975). Between 1980 and 1990, new residential construction in the northeast is expected to total 5.3 million year round units or 531,000 new units per year. In 1970, New England had 9.0 million housing units — 24.2% of the total housing units in the northeast. Assuming that this ratio is also valid for new housing between 1980 and 1990, there will be 128,502 new units per year for New England with residential units using an estimated 156 million BTUs annually, every consumption for heating, cooling and hot water will increase by 20.05 trillion BTUs per year. With about two thirds as much energy used for these purposes in commercial establishments, about 13 trillion BTUs will be used each year in new commercial buildings. The annual energy use for space heating, cooling and hot water heating in new commercial and residential construction will be about 330 trillion BTUs. Assuming that solar energy can satisfy 75% of this (the remaining 25% required for auxiliary power) the potential fuel savings realized by solar energy is equivalent to 248 trillion BTUs.

Computation of yearly degree days and solar conversion factors for New England is beyond the scope of this note. *See generally Heating and Air Conditioning Installation Standards for One and Two Family Dwellings and Multifamily Housing Including Solar,* THE BETTER HEATING AND COOLING BUREAU 2.5-2.7, app. A1-17 (1977); *The Use of Solar Energy for Space Heating and Hot Water,* MASSACHUSETTS ENERGY POLICY OFFICE REPORT 1-12 (April, 1976).

7. D. CHAN, L. DICKENSON & K. MEAD, A CONVENTIONAL ENERGY DEMAND PROJECTION FOR NEW ENGLAND 5 (1975). New England residential/commercial energy use is 44% of total energy users compared to the national average of 24%. New England oil demand is 88% of total fuel demand, while the national average is 43%.

8. Interview with Gary Nelson, Senior Vice President (Oct. 24, 1977).

with the collectors located on top, presently stands at the zoning height limitation for that area.

Abt Associates[9] has built an office building in Cambridge, Massachusetts, having twenty-eight solar collectors installed along the side of the three story structure for heating purposes. The building is located in a compact area which is zoned industrial. There are no height limitations since local zoning is based on density rather than height.

South County Hospital[10] in Wakefield, Rhode Island, has installed ten solar panels to supply all the hot water needs of the thirty bed Borda wing of the hospital. A five hundred square foot recreational field is located at the southern exposure of the collectors.

City Savings Bank[11] in Middletown, Connecticut, has installed solar collectors on top of its two story building. These collectors provide all of the bank's hot water needs, forty-eight percent of its heating and twenty-five percent of its cooling needs. The area was recently rezoned from residential to industrial/commercial although there are large set-back requirements.

Modern Continental Development Company[12] is creating a planned residential development in Brewster, Massachusetts, having a majority of the fifty-seven sites heated by solar energy. The sites are half acre lots with various restrictive covenants including limitations on architectural design.

With the exception of the Modern Continental Development Company, all of these organizations have invested large sums of money in the construction of solar collectors. Nonetheless, although the law in each of their respective jurisdictions does not prevent the obstruction of a collector's access to sunlight by an adjoining property owner, no organization has taken any precautions to secure continuing access to the sun.[13] All have agreed, however, that as the existing conditions which presently allow access are modified, an adjoining landowner could develop his or her property and, in so doing, obstruct sunlight radiating to the collector.

At present, there is no common law right to sunlight coming over an

9. Interview with Jim Van, Associate (Oct. 25, 1977).
10. Interview with Walter Kimball, Director of the Solar Project (Nov. 2, 1977).
11. Interview with Robert Geiudici, Architect (Oct. 28, 1977).
12. Interview with Brad Bumpus, Associate (Feb. 25, 1978).
13. In each of the case studies, securing solar access was considered, but determined to be unnecessary at the immediate time. *Abt Associates* maintained an informal agreement with neighbors who stated they had no plans for development or sale of the property. *B-L Associates Apartment Building* is developed up to the highest zoning limit and it was felt there would be no immediate danger of obstruction. The others believed the location of the collector, plus various set back requirements posed little threat to immediate obstruction.

adjoining property.[14] The problem is intensified by the fact that most of the sun's rays reaching a particular piece of property "must necessarily strike it at an angle, thus very little of the sunlight collected by a solar device comes to it from directly above the land on which it rests."[15] Accordingly, in each of the case studies described above, without an existing legal framework as a guide, the possibility lingers that the entire investment could be rendered valueless by an adjoining neighbor's obstruction.

The flurry of federal activity[16] following the 1973 oil embargo illustrated that the development and utilization of alternative energy sources are a prime concern for the 1970's and beyond, but the lag in developing a body of law consistent with that concern could mean a substantial delay in the widespread use of solar energy.

This note offers an acceptable compromise between the public need for solar energy and the traditional recognition of the right to do as one pleases with his or her own land. First, existing legal doctrines having a close relation to solar energy are analyzed. These theories include: ancient lights, easements, restrictive covenants, zoning and transferable development rights. Next, proposed and passed legislation are discussed and, finally, a proposal for New England is presented which utilizes transferable development rights in a building permit plan. It is submitted that transferable development rights[17] (the ability to transfer the right to develop from one piece of land to another) is a method which can equitably balance the right to use solar energy and the right to develop one's land as one pleases. In addition, transferable development rights is an aid in preventing a solar access law from being invalidated as an unconstitutional "taking without just compensation" due to restraints on an adjoining landowner's ability to intensely develop his land.[18]

I. EXISTING LAW RELATING TO SOLAR ENERGY[19]

There is scant judicial and statutory precedent relating to solar

14. Parker v. Foote, 19 Wendall 309 (N.Y. 1838); Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80 (1874); Fountainbleau Hotel Corp. v. Forty-five Twenty-Five, Inc., 181 Fla. Supp. 74, 114 So.2d 357 (1959). *See* note 24 and accompanying text *infra*.

15. Note, *The Allocation of Sunlight: Solar Access and the Prior Appropriation Doctrine*, 47 COLO. L. REV. 421, 422 (1976) [hereinafter cited as *Prior Appropriation*].

16. Solar Heating and Cooling Demonstration Act of 1974, 42 U.S.C. §§ 5501-5517; Solar Research, Development and Demonstration Act of 1974, 42 U.S.C. §§ 5551-5566; Energy Reorganization Act of 1974, 5 U.S.C. §§ 5313-5516, 42 U.S.C. §§ 5801, 5811-5820, 5841-5849, 5891 (Supp. V 1975); Federal Non-Nuclear Energy Research and Development Act of 1974, 42 U.S.C. §§ 5901-5915 (Supp. V 1975).

17. *See* note 96 and accompanying text *infra*.

18. *See* note 72 and accompanying text *infra*.

19. *See generally* PROCEEDINGS OF A FORUM AND ROUNDTABLE DISCUSSION ON LEGISLATIVE APPROACHES TO PROTECTING ACCESS TO SUNLIGHT; A PRELIMINARY REPORT OF THE N.Y. STATE LEGISLATIVE COMMISSION ON ENERGY SYSTEMS, August (1977) [hereinafter cited as PROTECTING

access.[20] Rather than creating new legal principles, in the absence of legislative direction, courts customarily approach new issues by looking to the law governing similar problems and making analogies in applying old concepts to new questions.[21]

A. The Doctrine of Ancient Lights

The English common law Doctrine of Ancient Lights developed to insure that an adjoining landowner would receive the reasonable enjoyment of light and air in his or her home. As a negative prescriptive easement,[22] the doctrine is designed to keep a landowner from using the land in a way that would obstruct the flow of sunlight to a neighbor's property. Upon proof that the adjoining landowner had received sunlight for a certain period of time, an injunction could be obtained against the obstructor. Originally, the landowner had to prove that sunlight had been received from time immemorial.[23] This was later modified to "from when no man could remember."[24] In 1904, the prescriptive period was fixed at twenty years and the doctrine was clearly stated as

> an easement belonging to the class known as negative easements. It is nothing more or less than the right to prevent the owner or occupier of an adjoining tenement from building or placing on his own land anything which has the effect of illegally obstructing or

ACCESS TO SUNLIGHT: NEW YORK]; PROCEEDINGS OF THE WORKSHOP ON SOLAR ENERGY AND THE LAW, AN INTERIM REPORT SUBMITTED TO THE NATIONAL SCIENCE FOUNDATION, March (1975)[hereinafter cited as WORKSHOP ON SOLAR ENERGY]; MILLER, HAYES & THOMPSON *supra*, note 1; Zillman & Deeney, *Legal Aspects of Solar Energy Development*, 1976 ARIZ. ST. L. J. 25; Becker, *Common Law Sun Rights: An Obstacle to Solar Heating and Cooling?*, 3 J. OF CONTEMP. L. 19 (1976); Eisenstadt & Utton, *Solar Rights and Their Effect on Solar Heating and Cooling*, 16 NAT. RESOURCES J. 363 (1976); *Perspectives on Access to Sunlight*, ONTARIO MINISTRY OF ENERGY REPORT, May (1978); *Prior Appropriation, supra* note 15; Moskowitz, *supra* note 2.

20. There is a pre-existing framework of legal doctrines that still prevent or resolve disputes between private landowners . . . and the plans for widespread solar energy use will have to contend with this pre-existing legal framework. Zillman & Deeney, *supra* note 19, at 32.

21. *Prior Appropriation, supra* note 15, at 427.

22. An easement is defined as "[a] right to use another's land for special purposes not inconsistent with the general property interest which the landowner retains." 2 G. THOMPSON, COMMENTARIES ON THE LAW OF REAL PROPERTY § 315 (1961); 3 H. TIFFANY, LAW OF REAL PROPERTY § 756 (1939). An easement "may entitle its [owner] to do acts which he would otherwise not be privileged to do, or it may merely entitle him to prevent the owner of the land subject to the easement from doing acts which he would otherwise be privileged to do." V RESTATEMENT OF PROPERTY § 451 at 2911 (1944).

"A negative easement assures to the owner thereof a particular use or enjoyment of the land subject to the easement by enabling him to prevent the possessor of the land from doing acts upon it which, were it not for the easement, he would be privileged to do." V RESTATEMENT OF PROPERTY § 452 at 2912 (1944). The right to light is considered a negative easement, which mandates that the servient estate (burdened property) refrain from doing certain acts, such as constructing a building, which would interfere with the dominant estate's (owner of the easement) enjoyment of the easement, being the light coming over the servient's property.

23. William Aldred's Case, 9 Co. Rep. 57, 58, 77 Eng. Rep. 816, 817 (K.B. 1610).

24. Moore v. Rawson, 3 B & C 332, 107 Eng. Rep. 756 (1824).

obscuring the light of the dominant tenement.[25]

The owner of the easement was not entitled to the totally unobstructed flow of sunlight across a neighbor's land, but had the burden of proving substantial deprivation, enough to render the occupation of the house uncomfortable or unreasonable for his or her use and enjoyment.[26]

At first, only a few jurisdictions in the United States accepted the Doctrine of Ancient Lights.[27] Then, one by one, each jurisdiction expressly rejected the doctrine and stated that a landowner has no legal right to unobstructed light radiating across an adjoining landowner's property.[28] The policy underlying the rebuff was expressed in the Massachusetts case of *Keats v. Hugo*:[29] "to imply the grant of such a right [to light and air] . . . , without express words, would greatly embarrass the improvement of estates, and, by reason of the very definite character of the right asserted, promote litigation."[30] The prescriptive right to light, it was held, was not adapted to existing conditions in the United States and could not be applied in growing cities and villages without working the most "mischievous consequences."[31] The rejection of the doctrine occurred in the middle of the Industrial Revolution, exemplifying America's fear that such a right could not co-exist with a developing urban society. Thus, it has been firmly established that there can be no prescriptive easement to light in this country.

The primary modern case rejecting the doctrine and prescriptive easements to light was *Fountainbleau Corp. v. Forty-Five Twenty-Five, Inc.*[32] The Fountainbleau Hotel was constructed in 1954 in Miami Beach, and the following year saw the construction of the Eden Roc Hotel immediately north and adjacent to the Fountainbleau. A few years after its construction, the owners of the Fountainbleau decided to add fourteen stories to a portion of the hotel. This caused a shadow to be cast over the Eden Roc swimming pool during most of the afternoons. In its complaint, Eden Roc alleged that it had a right to continue

25. Colls v. Home and Colonial Stores Ltd., 1904 A.C. 179. This time period of 20 years was extended to 27 years in the Right of Light Act, 1959 7 & 8 ELIZ. 2, C. 56 §§ 2, 3.

26. H. TIFFANY, *supra* note 22, at § 783. This deprivation has become known as the "grumble line." This line is the position the room at which an ordinary person reading ordinary print, grumbles and turns on an artificial light. A very hard standard to apply!

27. Clawson v. Primrose, 4 Del. Ch. 643, 15 Am. R.G. (Del. 1817); Robeson v. Pittenger, 2 N.J. Eq. 57, 32 Am. Dec. 412 (1838); Story v. Odin, 12 Mass. 157, 7 Am. Dec. 46 (1815).

28. Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80 (1874); Robinson v. Clapp, 65 Conn. 365, 32 A. 367 (1894); Pierre v. Fernald, 26 Me. 436, 46 Am. Dec. 573 (1847); Hubbard v. Town, 33 Vt. 295 (1860); Parker v. Foote, 19 Wendall 309 (N.Y. 1838). Various states have codified the fact that prescriptive easements to light are prohibited: MASS. GEN. LAWS ANN. ch. 187, § 1 (West Supp. 1977); CONN. GEN. STAT. ANN. § 47-25 (West 1958); R.I. GEN. LAW § 34-7-3 (1969 Reenactment). *See generally* 1 Am. Jur. 2d, Adjoining Landowners, § 89.

29. 115 Mass. 204, 15 Am. Rep. 80 (1874).

30. *Id.* at 215-16, 15 Am. Rep. at 91.

31. *Id.* at 209, 15 Am. Rep. at 86, *citing* Parker v. Foote, 19 Wendall 309 (N.Y. 1838).

32. 181 Fla. 74, 114 So.2d 357 (1959).

receiving the light across the Fountainbleau's property. There also was evidence that the construction was done with malicious intent. The court, however, noted that "no American decision has been cited, . . . in which it has been held that . . . a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor."[33] After stating that the Doctrine of Ancient Lights has been repudiated unanimously in this country, the court held that this universal rule should not be changed.[34]

If courts became willing to modify this holding and recognize a prescriptive easement for solar access to unobstructed light, the prescriptive date would probably accrue from the initial installation of the solar collector, since such an act would put the adjoining landowner on notice of the adverse use.[35] In effect this would create more problems than it would solve, since a solar homeowner would be in the position of installing a collector and then waiting for the prescribed number of years before an easement would arise. In the interim, a neighbor could obstruct the light and thus render the easement worthless. In urban areas, such as Cambridge where *Abt Associates* is located, the ability to develop is extremely valuable. An adjoining landowner to *Abt,* having no limitations on the height of his or her structure, might go to any extent to prevent the birth of an easement which would limit the development potential of the property.[36]

In addition, the prescriptive period is too long to offer any protection to a purchaser considering solar energy in a residential or urban area. In rural areas of Maine, New Hampshire, or Western Massachusetts, where the impetus to develop is less, a prescriptive easement could be accommodated. To enforce the easement, the solar user would have the burden of initiating a lawsuit and proving existence of the easement. With its many disadvantages, the Environmental Law Institute has

33. *Id.* at 7, 114 So.2d at 359. Absent a 20 year prescriptive period.

34. *Id.* Professor Moskowitz notes that the difference between the American and English approaches is that the English Courts stress an enjoyment or benefit on behalf of the dominant parcel as the basis for determining prescriptive rights, while Amercian courts envisage a tangible entry upon the servient tenement. Moskowitz, *supra* note 2, at 192. Professor Moskowitz has suggested that the time has come to reflect upon the policy behind the rejection of the doctrine and with the passage of numerous environmental regulations "impinging on a landowner's once unlimited right to improve as reflecting societal disillusionment with the quality if not physical scope of modern real estate improvement," feels that a prescriptive right to light should accrue in favor of access to light for solar energy. *Id.* at 193.

35. To establish an easement by prescription, there must be an open, visible, continued and uninterrupted use or enjoyment under the claim of right, adverse to and with knowledge of the owner of the property. Ryan v. Stavros, 348 Mass. 251, 203 N.E.2d 85 (1964). With a prescriptive right to sunlight, the only way to inform the adjoining landowner of an adverse use would be the installation of a collector. Otherwise, the use of the light could be considered permissive, since the adjoining property owner would object only if he was on notice that his ability to develop was in jeopardy due to the passing of the prescriptive period. Without adverse use, a right cannot be acquired by prescription. *See* R. POWELL, LAW OF REAL PROPERTY § 413 (1977).

36. *See* A. MILLER, G. HAYES & G. THOMPSON, *supra* note 1, at 8.

recommended that it is not "worth the considerable effort that would be needed to change present law."[37]

A solar user should be entitled to permanent access upon the installation of the collector. The expense of litigation and the fact that access may not be permanently secured upon installation does not enhance the public policy of encouraging solar energy use.[38]

B. Implied Easements

Access to light created by an implied easement has very limited value to solar access. For there to be an implied easement, a court would have to find: (1) that there was unity of ownership just prior to the conveyance of the new adjacent parcel of land; (2) that the parties intended that there be an easement for the specified use; and (3) that there is a need for the easement.[39] The classic example of an implied easement is where a landowner must have ingress and egress to his or her property through an adjoining landowner's property. Generally, however, believing that implied easements unduly burden land and its alienation and proper improvement, courts continue to be reluctant to find that these elements are present.[40]

One of the circumstances which give rise to the inference that the creation of an easement was intended is the "need" for the easement. Need may support an inference that an easement was intended when the parcel was conveyed. The definition of need, or necessity, has been interpreted differently by most jurisdictions. Some jurisdictions stated that the easement to light must be necessary to the proper enjoyment of the land.[41] Others have observed the easement must be necessary to the reasonable[42] or beneficial[43] enjoyment. Still others mandate that the light entering the grantee's building over the grantor's land actually be necessary to the use of such building.[44] Most decisions indicate that the

37. *Id.* at 9.

38. This is also the basic reason why solar access should be secured other than by nuisance actions. A solar user would have to litigate the fact that he or she has permanent access to sunlight and that the adjoining property owner's obstruction is an "interference with the use and enjoyment of land". W. PROSSER, LAW OF TORTS § 89 (4th ed. 1971). *See* Note, *Obstruction of Sunlight as a Private Nuisance*, 65 CAL. L. REV. 94 (1977), for an excellent discussion of the use of nuisance law as a supplement to other means for protection of solar access.

39. Gorton-Pew Fisheries Co. v. Tolman, 210 Mass. 402 (1912). *See also* H. TIFFANY, *supra* note 22, at § 780.

40. Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80 (1874); Fountainbleau Hotel Corp. v. Forty-five Twenty-five, Inc., 181 Fla. Supp. 74, 114 So.2d 357 (1959). *See also* H. TIFFANY, *supra* note 22, at § 783.

41. Evans v. Dana, 7 R.I. 306 (1862).

42. Robinson v. Clapp, 65 Conn. 365, 32 A. 939 (1894); McElroy v. McCleary, 71 Vt. 396, 45 A. 898 (1899); White v. Bradley, 66 Me. 254 (1877).

43. Sandford v. Boss, 76 N.H. 476, 84 A. 936 (1912).

necessity need not be absolute in the sense that no enjoyment whatsoever can be had on the land before an easement is implied.[45] The courts, however, have yet to consider access to light for a solar collector a necessity under any of the tests.

An example of the limited situation where an implied easement might be applicable is where property has a building located upon it equipped with a solar collector and an adjacent parking lot. If the lot is later sold or transferred, the new owner may be unable to block access to the collector. Because of the relatively few situations in which an implied easement can exist and the reluctance of courts to find that the required elements are present, implied easements would offer very little protection to most solar homeowners.

C. *Express Easements*

An express easement to light and air can be granted because the grantor has property rights in the airspace above his or her land and the right to grant an easement is one of the incidents of ownership of the airspace.[46] The right to enjoy the unhindered flow of sunlight across a neighbor's property is considered a negative easement since it does not give the holder a right to actually go on a neighbor's property, but only the power to keep the neighbor from doing anything to block essential sunlight.[47] Since American courts have rejected the Doctrine of Ancient Lights and because implied easements to light are applicable only in limited circumstances, a landowner wanting an easement to light must negotiate an express agreement with adjoining landowners.[48]

44. Tidd v. Fifty Associates, 238 Mass. 421, 131 N.E. 77 (1921).

45. H. TIFFANY, *supra* note 22, at 786.

46. The Supreme Court in U.S. v. Causby, 328 U.S. 256 (1946) modified the common law maxim "he who owns the soil also owns to the heavens and the depths" to include only such airspace as one can occupy or use in connection with his or her land. The phrase comes from the Latin maxim "cujus est solum, ejus est usque ad coleum et ad inferos". 1 COKE, INSTITUTES (19th ch. 1 1(4a) ed. 1832); 2 W. BLACKSTONE COMMENTARIES 18 (Lewis ed. 1902); 3 KENT COMMENTARIES 621.

47. *See* note 22 and accompanying text *supra*.

48. Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80 (1874). "[N]o right of this character [easements for light] can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed." *Id.* at 216, 15 Am. Rep. at 91.

Express easements may be created for the benefit of the land and not merely the building, and drawn with substantial specificity. It can last as long as agreed to by the parties involved and seems to be within the realm of public policy. Ladd v. City of Boston, 151 Mass. 585, 24 N.E. 858 (1891). *See also* 1A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 235 (1964 Replacement). In so doing, it will bind subsequent owners of the land who had notice of its establishment. 3 R. POWELL, LAW OF REAL PROPERTY § 407 (1977); *See also* 142 A.L.R. 467 (1943). The intention of the parties in creating an easement also is important. Only when such an intention is found will the courts enjoin a neighboring landowner from obstructing the light in violation of the easement or award damages to the owner of the easement. 1 Am. Jur. 2d, Adjoining Landowners, § 98, at 758.

The major advantage of an express easement for a solar user is that the agreement allows permanent access to be obtained by an individual through a private voluntary agreement without having to undergo governmental red tape or litigation. Furthermore, easements would provide security in established neighborhoods as well as new ones.

The basic problem with an express easement is that its creation is voluntary.[49] A court cannot compel the sale of an easement even if the neighbor is making no use of his or her property. Also, being wary of negotiating among themselves, neighbors may shun legal formalities. In urban situations such as *Abt Associates* in Cambridge and *B-L Associates* in Brookline as well as suburban areas such as *City Savings Bank* in Middletown, the expense of obtaining an easement may be prohibitive. In these and other developed areas of New England, quite a few property owners may have to be included in the easement negotiation, since the value of the easement could be reduced to zero if a large structure is built on a lot that is not contiguous to the solar collector's lot. This could result in a windfall economic gain to an owner of property who never had intentions of development. Thus, express easements place the entire cost of attaining access on the solar homeowner. The public policy of encouraging solar energy use would be frustrated by the high expense of securing permanent access.

Express easements would still have great value in rural New England where the initiative to develop is not as great as elsewhere making them less expensive and easier to obtain. For *South County Hospital,* an express easement to sunlight over the recreational field would provide inexpensive permanent access due to the lack of development potential and the involvement of only one owner. In urban New England, the high cost, plus the voluntariness of the easement would greatly impair its usefulness to the solar user. Moreover, in any locale, easements should not be viewed as the only method of securing access; because a landowner initially seeking to procure an easement must rely on his or her neighbor's cooperation, in the event that the adjoining landowner refuses to negotiate, additional legal alternatives must be available.

D. Restrictive Covenants

A restrictive covenant is simply a promise restricting the use of land by the landowner. Decisions in recent years which uphold the validity of these covenants reflect the "expansion of the law to meet the demands of homeowners for protection adequate to the more crowded conditions of modern life."[50] The restrictions may be created by reservation

owners, § 98, at 758.

49. *See generally* A. MILLER, G. HAYES & G. THOMPSON, *supra* note 1, at 11. *See also* WORKSHOP ON SOLAR ENERGY, *supra* note 19, at 9.

50. H. TIFFANY, *supra* note 22, at § 858.

in the conveyance, by conditions annexed to the grant or covenant, or even by an agreement independent from the conveyance between adjoining landowners concerning the use of their land.[51]

There are three situations where restrictive covenants may arise: (1) covenants between adjoining landowners; (2) a landowner conveying a portion of his or her property and wishing to protect against adverse uses; and (3) in general development schemes. Since restrictive covenants between adjoining landowners share similar advantages and disadvantages with the private negotiated easements discussed earlier,[52] this section is addressed primarily to restrictive covenants in general development schemes.

Land developers anticipating the use of solar energy collectors in their subdivision developments can have access to solar energy specifically protected in their declaration of covenants and restrictions in the deeds to the parcels, provided the restrictive covenants are reasonably enforced and do not violate public policy.[53]

In building development schemes where restrictive covenants mandate height restrictions to keep a neighbor from obstructing a solar collector, certain facts are needed to justify the existence of a development plan. Most importantly, the grantor must have intended to establish a plan.[54] Once a plan is shown to exist a purchaser can enforce the restrictive covenant as a third party beneficiary.[55] A minority of jurisdictions follow the rule that a purchaser can enforce the restrictive covenant as against other lots by means of an equitable servitude.[56] The duration of

51. Codman v. Bradley, 201 Mass. 361, 87 N.E. 591 (1909).

52. *See* § I(C) *supra.*

53. Shelley v. Kramer, 334 U.S. 1 (1948). *See also* 5 R. POWELL, THE LAW OF REAL PROPERTY § 683 (1977). Due to the fact that these agreements tend to curtail and restrict the full use of land, public policy which favors unhindered land use mandates strict construction of the covenant, R. POWELL, *supra* at Vol. 5, § 673, and the intention of the parties is important. Shorefront Park Improvement Assn. v. King, 157 Conn. 249, 253 A.2d 29 (1969); McDonough v. W.W. Snow Const. Co., Inc., 131 Vt. 436, 306 A.2d 119 (1973).

54. R. POWELL, *supra* note 53, at Vol. 5, § 679. Circumstances which help to establish the existence of a plan include the fact that the common grantor sells or states his intention to put on the market an entire tract of land. Whitton v. Clark, 112 Conn. 28, 151 A. 305 (1930); Hano v. Bigelow, 155 Mass. 341, 29 N.E. 628 (1892). The exhibiting of a map of the entire tract at the time of the sale of one of the parcels of land involved. Varney v. Fletcher, 106 N.H. 464, 213 A.2d 905 (1965). Actual development of the tract in accordance with the restrictions. R. POWELL, *supra* note 53, at Vol. 5, § 677. A substantial uniformity in the restrictions imposed in the deeds executed by the common grantor. *Id.*

The existence of a building development scheme establishes an intent of the grantor to benefit the land (or burden it if a landowner's development potential is restricted) and thus the covenant "runs with the land" and can be enforced either against or by a subsequent purchaser who took with notice. *Id.* at § 673. The notice requirement is satisfied when the covenant is written in clear and unambiguous language. A. MILLER, G. HAYES & G. THOMPSON, *supra* note 1, at 11.

55. RESTATEMENT OF PROPERTY, § 541 comments c & f.

56. Maganini v. Hodgson, 138 Conn. 188, 82 A.2d 801 (1951). The doctrine of equitable servitudes states that "any agreement, whether a valid covenant running with the land at law or not, may be enforced in equity as an equitable servitude against the burdened land as to subsequent

these covenants is set forth by the intent of the parties.[57]

A covenant in a general development scheme which prohibits the obstruction of light radiating to a solar collector by restricting the height of buildings or foliage would be invaluable to the solar user and may be attained simply by adding an appropriate clause to the developer's deeds. This method is illustrated by *Modern Continental Development Company's* planned solar residential community in Brewster, where a clause preventing obstruction of collectors could easily be incorporated in a restrictive covenant. The major drawback to a restrictive covenant is that it offers little help in established neighborhoods and is inapplicable to much commerical and industrial land.

Restrictive covenants are excellent tools to secure access in new developments. It should be noted, however, that although restrictive covenants can be an aid to the solar user, they can also hinder reliance upon solar energy due to covenants in a deed prohibiting structural changes for aesthetic reasons.[59]

E. Solar Zoning

Zoning is basically local control over land use. The power to zone is derived from the police power of the state and is delegated to local governments by means of enabling legislation.[60] The United States Constitution places three basic requirements on a zoning ordinance: the ordinance must bear a rational relationship to the health, morals or general welfare of the community sufficient to comply with the due process requirements of the fourteenth amendment; it must not be so arbitrary and discriminatory that its restrictions are a denial of equal protection of the laws under the fourteenth amendment; and it must not so reduce the value of land as to constitute a taking without just compensation in violation of the fifth amendment.[61]

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purchasers with notice." 2 AMERICAN LAW OF PROPERTY § 9.24 (1952).

57. RESTATEMENT OF PROPERTY, § 554, comment a. Some states by statute limit the permissible duration of enforceable promises respecting the use of land to periods of 20-30 years. In Massachusetts, such a statute has been construed to be applicable only to promises of "unstated duration, by a finding that the original parties, by manifesting such a desire, can cause promises to last longer." Flynn v. Caplan, 234 Mass. 516, 126 N.E. 776 (1920). A restrictive covenant can be abandoned in general development schemes either by a release of a party, First Ecclesiastical Society v. Stoane, 150 Conn. 611, 192 A.2d 645 (1963), or the lack of enforcement by the grantor. R. POWELL, *supra* note 53, at Vol. 5, § 683.

58. A. MILLER, G. HAYES & G. THOMPSON, *supra* note 1, at 12.

59. *See generally,* A. MILLER, G. HAYES & G. THOMPSON note 1 *supra;* Zillman & Deeney, *supra* note 19, at 37.

60. *See generally,* N. WILLIAMS, AMERICAN PLANNING LAW-LAND USE AND THE POLICE POWER (1974); R. ANDERSON, AMERICAN LAW OF ZONING 2d (1976).

61. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . .

A zoning classification must be consistent and reasonably related to some public good and cover a district as a whole rather than a single plot of land.[62] Zoning has been specifically recognized as a means of protecting adequate light and air through maximum height regulations[63] and set back requirements,[64] and as such has been upheld as a valid exercise of the police power.[65] Although light and air considerations have been recognized as valid purposes for a zoning regulation, solar access would necessitate a more comprehensive ordinance in order to provide *unobstructed* sunlight to a collector. While cases recognizing light and air considerations form a solid foundation for the acceptance of zoning for unobstructed sunlight, such an extension has yet to receive judicial approval.[66]

Zoning laws can also hinder the collection of sunlight for heating and cooling structures. Many states have upheld regulations implemented purely for aesthetic purposes under the broad "general welfare" concept.[67] These zoning laws govern where structures can be located, how they can be built, how high or dense they may be, what architectural

require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly burdensome upon individuals." *Id.* at 594 (quoting from Lawton v. Steele, 152 U.S. 133, 137 (1894)). *See also* Eisenstadt & Utton, *supra* note 19, at 379.

62. Nectow v. City of Cambridge, 277 U.S. 183 (1928).

63. Welch v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907), *aff'd.* 214 U.S. 91 (1908). "The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as materially to exclude sunshine, light and air, and thus, to affect the public health. . . . These are proper subjects for consideration in determining whether, in a given case, rights of property in the use of land should be interferred with for the public good." *Id.* at 373, 79 N.E. at 746. Boraas v. Villiage of Belle Terre, 476 F.2d 806 (2d Cir. 1973). (Traditionally a zoning ordinance may be justified by showing that it is related to such matters as adequacy of light and air); Town of Windsor v. Whitney, 95 Conn. 357, 111 A. 354 (1920). (Access to light and air is one of the more important goals of zoning).

64. Sundeen v. Rogers, 83 N.H. 253, 141 A. 142 (1928). Setback requirements are the distance between a street line and the front building line of a principal building or structure, projected to the side lines of the lot, and including driveways and parking areas. *See* R. ANDERSON, AMERICAN LAW OF ZONING 2d § 9.52 (1976).

65. *See generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING 2d § 7.05 (1976); 1 N. WILLIAMS, AMERICAN PLANNING LAW-LAND USE AND THE POLICE POWER, § 9.17 (1974).

66. Eisenstadt & Utton, *supra* note 19, at 384-85. Professors Eisenstadt and Utton argue that zoning is the best method for the creation of solar rights due to the fact that solar rights are property rights and are subject to zoning and eminent domain. *Id.* at 383. The purpose of solar zoning "would be to encourage the use of solar energy for heating and cooling of buildings, thereby reducing consumption of fossil fuels and reducing the outflow of American dollars to the OPEC countries." *Id.* at 381. Such a purpose would fall within the police power's protection of the health and welfare of the community. After a discussion of the constitutional problems of a "taking without just compensation", the authors come to the conclusion that such an ordinance would not be considered a taking, thus there is no need for compensation. The authors argue that the trading of a part of each landowner's airspace estate, in return for a solar right, would satisfy the compensation requirement since the easement traded is a property right having value. *Id.* at 383.

67. Murphy v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944) (forbidding all advertising signs in its business districts); John Donnelly & Sons Inc. v. Outdoor Advertising Board, 1975 Mass. Adv. Sh. 3450, 339 N.E.2d 709 (1975) (upholding a flat prohibition of all advertising signs in Brookline); Suddell v. Zoning Board of Appeals of Village of Larchmont, 36 N.Y.2d 312,

form they may take and what aesthetic concept they must embody.[68] In numerous instances such regulations would preclude the construction of a collector due either to physical impossibility or financial impracticality owing to the high cost of conforming.

A landowner can apply for a variance if his or her proposed construction does not comply with the strict requirements of the zoning law.[69] This is an unsatisfactory way of dealing with aesthetic controls because of the uncertainty inherent in obtaining a variance due to the unwillingness of some states to grant it if the land can reasonably be used for a conforming use.[70] Aesthetic considerations may be accommodated when the cost is not excessive. In other instances, however, architectural controls as determined by the legislature should not be so rigid that solar collectors cannot be used; rather, such controls should be flexible enough to allow the construction of a collector unless the legislature determines that historical or other public benefits justify a total prohibition.[71]

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367 N.Y.S.2d 766, 327 N.E.2d 809 (1975) (upholding on aesthetic grounds a prohibition against outdoor storage of trailers).

68. Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955) (Court approved proposed historic districting regulations of Beacon Hill and Nantucket Island, which would allow an architectural commission to review any new construction in order to preserve the uniformity of the areas); McNeely v. Board of Appeal of Boston, 358 Mass. 94, 261 N.E.2d 336 (1970) (holding invalid a variance to build a larger building at Suffolk University due to frontage restriction which was designed to provide local shopping without condensing Beacon Hill); Town of Deering ex rel. Bittenbender v. Tibbetts, 105 N.H. 481, 202 A.2d 232 (1964) (upholding a prohibition against incompatible buildings which would impair the atmosphere of the town).

69. A variance is defined as the "authority extended to a property owner to use his property in an manner forbidden by the zoning enactment," while a special permit "allows him to put his property to a use which the enactment expressly permits." 3 R. ANDERSON, AMERICAN LAW OF ZONING 2D § 18.03 (1976) (citations omitted). The approval of the zoning board for the construction of a solar collector would be considered a "variance" since a structural appurtenance would be forbidden by the statute for aesthetic reasons.

"In some instances, the enforcement of zoning restrictions may result in hardship to owners of individual plots" in addition to the hardship of not being able to use the property to its most profitable use. 5 N. WILLIAMS, AMERICAN PLANNING LAW — LAND USE AND THE POLICE POWER 4 (1975). In applying for a variance from the zoning regulation, certain tests have developed to determine "hardship" that would occur if the zoning regulation was in effect for a particular landowner.

In Massachusetts, before a variance is granted, it must be shown that the hardship be unique to the particular property and not general in the neighborhood; and that there will be no substantial detriment to the public good. MASS. GEN. LAWS ANN. ch. 40A, § 15 (West 1977). *See* Blackman v. Board of Appeals of Barnstable, 334 Mass. 446, 136 N.E.2d 198 (1956).

Connecticut generally follows the Massachusetts rule, but adds that there is a presumption against the granting of a variance due to thwarting the orderly development of the community. Heady v. Zoning Board of Appeals for Town of Milford, 139 Conn. 463, 94 A.2d 789 (1953).

Rhode Island's criteria is whether the zoning regulation affecting a piece of property deprives the owner of all beneficial use, Berard v. Zoning Board of Review of Town of Berrington, 87 R.I. 244, 139 A.2d 867 (1958), and should not do any harm to the neighborhood. Hazen v. Zoning Board of Review of City of East Providence, 90 R.I. 108, 155 A.2d 333 (1959).

70. Bonaldo v. Zoning Board of Appeals of City of New Haven, 146 Conn. 595, 153 A.2d 429 (1959). Barnhart v. Board of Appeals of Scituate, 343 Mass. 455, 179 N.E.2d 251 (1962).

71. A. MILLER, G. HAYES & G. THOMPSON, *supra* note 1, at 14. "Only the most rabid of the

1. Constitutional Aspects of Zoning and Police Regulations

"The power of the state over private property extends from the regulation of its use under the police power [which does not require compensation] to the actual taking of all or part of the fee under the eminent domain power" [which does require just compensation . . .].[72] The exercise of police power over land use generally restricts a landowner in the use of his or her land. Frequently, this diminishes the value of the land. Despite these effects, police power regulations make no provision for compensation to those regulated.[73]

The power of municipalities to restrict the use of land under the police power was stated strongly in *Euclid v. Ambler Realty,*[74] the first Supreme Court case to uphold the validity of zoning laws. There, the Court noted that

> [b]uilding zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities . . . . [T]he scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.[75]

The power to regulate the use of land, however, is not unlimited. Two years after the historic decision of *Euclid,* the Court in *Nectow v. City of Cambridge,*[76] held a zoning ordinance invalid as applied, stating:

> The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.[77]

The Court thus recognized a municipality's ability to control uses of land for certain purposes. Although *Nectow* placed a limitation on regulations that were arbitrary, later decisions broadly expanded the

police power enthusiasts would insist that government is free to deprive a property owner of the entire development potential of his land without affording him some compensatory relief." Costonis, *"Fair" Compensation and the Accommodation Power,* 75 COLUM. L. REV. 1021 (1975) [hereinafter cited as *Accommodation Power*].

72. Fred French Inv. Co. v. New York, 385 N.Y.S.2d 5, 8, 39 N.Y.2d 587, 593, 350 N.E.2d 381, 384 (1976). "The distinction, although definable, between a compensable taking and a noncompensable regulation is not always susceptible of precise demarcation." *Id.*

73. *Id.*

74. 272 U.S. 365 (1926).

75. *Id.* at 386-87.

76. 277 U.S. 183 (1928).

77. *Id.* at 188.

types of allowable regulations.

In *Berman v. Parker,*[78] the Court enunciated the more conspicuous types of valid police regulations yet based its decision on a standard utilizing the amorphous term "public welfare."[79] The Court went on to elaborate by saying:

> The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.[80]

With these broad definitions of the police power, the legislature has as the appropriate subject of its land use regulations almost anything that it considers within the public welfare.

2. The Taking Controversy

As *Nectow* limits zoning power as ratified in *Euclid,* there are also limitations upon the exercise of general police power regulations. The fifth amendment to the United States Constitution states in part "nor shall private property be taken for a public use, without just compensation." The definition of what has come to be known as a "taking" is one of the most controversial issues of constitutional law.

Originally, the taking clause was defined literally by Justice Harlan in *Mugler v. Kansas.*[81] To be a taking, the government literally had to take the property from its owner for a public use, devolving him of his fee and only then would just compensation have to be paid. However, in 1922 the Court decided *Pennsylvania Coal Company v. Mahan*[82] which has been referred to as "a rewriting of the Constitution."[83] Justice Holmes, writing for the majority, initially stated that government would come to a standstill if it had to pay for all diminished values due to every change in the general law. Nevertheless, the use of government power must not exceed constitutional limits. Holmes felt that the dif-

78. 348 U.S. 26 (1954).

79. *Id.* at 32-33.

80. *Id.* at 33.

81. Mugler v. Kansas, 123 U.S. 623 (1887). As the Court observed:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes is prejudicial to the public interests.

Id. at 668-69.

82. 260 U.S. 393 (1922).

83. F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 124 (1973) [hereinafter cited as the TAKING ISSUE].

ference between a regulation and a taking was a difference of degree and not kind. The test for a taking noted "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[84] Justice Holmes, however, did not define "going too far," and consequently added to the confusion concerning when a taking has occurred.

3. Implementing Solar Access Zoning

The *Euclid* decision put an end to the claim that zoning measures are constitutionally invalid simply because they preclude landowners from devoting their property to its most profitable use. Instead, these regulations are sustained as long as they advance the community's general welfare and the property is susceptible to some reasonable type of development.[85]

The police power cases hold that a property owner cannot make total use of his or her profit expectations in light of general welfare considerations, provided the regulation does not extend too far in depriving an owner of the reasonable use of his or her property.[86] A court would ask "whether, and to what extent, the owner's ability to profit from the piece of property in question, *considered by itself,* has been impaired." If the profit making capacity has been severely reduced, the government is said to have *taken* and the owner is constitutionally entitled to compensation.[87]

Three significant factors in a judicial evaluation of the constitutionality of police power regulations can be discerned.[88] One is the weight to be accorded to the legislative judgment as to public need. A second factor is a balancing of the economic consequences of the regulation with the community goals sought to be achieved. The third element is the fairness of the legislative choice as a means for achieving those goals, and the alternatives available.[89]

In any proposed solar access law, the legislation must have a sufficiently defined policy which reflects the widely shared public benefits of the use of solar energy.[90] The rationale behind the federal Solar Energy Acts supplemented by the fact that New England has an extreme need

84. 260 U.S. at 415.

85. *See* cases cited in note 9 *infra.*

86. Berman v. Parker, 348 U.S. 26 (1954); Pennsylvania Coal Co. v. Mahan, 260 U.S. 393 (1922).

87. Sax, *Takings, Private Property and Public Rights,* 81 YALE L. J. 149, 151 (1971).

88. *See* Van Alstyne, *Taking or Damaging by Police Power — The Search for the Inverse Condemnation Criteria,* 44 S. CAL. L. REV. 1 (1970).

89. *Id.* at 10. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); note 61 *supra.*

90. *See* note 151 *infra,* for National Policy of the Solar Heating and Cooling Demonstration Act of 1974.

for alternative energy sources due to its lack of self sufficiency and its high costs, should provide a sufficient base of public need.

As stated in *Euclid,* the police power must necessarily expand with the changing times.[91] Legal scholars have noted that over the last twenty years, there has been an increasing recognition that the purpose of land regulation should go beyond the protection of the community values of land by focusing upon the consequences of the regulation.[92]

There are certain disadvantages inherent in any approach to zoning for solar access.[93] A zoning ordinance typically would utilize height limitations and set back requirements to assure unobstructed sunlight. This is impractical in areas already developed since structures cannot be moved to meet new requirements for southerly set backs. Blanket zoning for solar access may conflict with other energy conserving techniques such as compact and contiguous development in Boston, which decreases the amount of fossil fuels needed to heat and cool structures for transportation. Indeed, blanket zoning which does not take into account the individualized nature of solar access, can inhibit development where it may be needed. A developer in a blighted area may be restricted in his or her development potential although adjoining landowners have no interest in constructing a solar collector. This does not equitably balance the competing interests of solar energy use and private property rights, and can lead to unconstitutional takings in certain areas which are highly developed and where new zoning requirements prohibit further significant development. At the time a zoning ordinance is passed, few landowners will actually have reached the decision to utilize solar energy. Since no single area besides planned developments will be exclusively solar heated, it would be difficult and very expensive to intelligently redesign a city to insure adequate access to most properties. Indeed, the individualized aspect of solar access necessitates an ex-

91. *See* note 74 and accompanying text *supra.*

92. Sax, *supra* note 87, at 155. "If we wish to cope intelligently with the use of resources, we must focus attention on the nature and degree to which the consequences of any use are disseminated across property, state, and even national boundaries. The law relating to property rights and takings of property ought to begin to reflect this knowledge." *Id. See generally* TAKING ISSUE note 83 *supra. See, e.g.,* Steel Hill Dev. Inc. v. Town of Sanborton, 469 F.2d 956 (1st Cir. 1972) (sustaining a 6 acre min. lot zoning restriction on a track purchased for recreational home development); In re Spring Valley Dev., 300 A.2d 736 (Me. 1973) (sustainng application of Maine Site Location Development Law; almost all development in the state must be approved by the Environmental Commission); Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891, *cert. denied,* 409 U.S. 1108 (1972) (sustaining a virtual prohibition of residential development citing combined flood plain zoning and ecological resource protection); Brecciaroli v. Commissioner of Environmental Protection, 168 Conn. 349, 362 A.2d 948 (1975) (upheld Connecticut's Wetland statute due to the fact that restriction did not deprive owner of all use of his land and public harm had the balance in its favor over benefit of filling land); Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975) (adopted theory of strictly limited development rights in ecologically sensitive land). *See generally* cases cited in the TAKING ISSUE, *supra* note 83, at 230.

93. A. MILLER, G. HAYES & G. THOMPSON, *supra* note 1, at 22.

amination of the surrounding circumstances of a collector's installation. Such an examination would mandate a closer scrutiny than a zoning investigation could provide. Depending on the zoning ordinance adopted, it could be possible for an adjoining landowner to comply with all the zoning requirements but still obstruct the sunlight radiating to the collector.[94] However, this should not preclude zoning ordinances taking into account solar access considerations as a supplement to protecting permanent access. Although zoning alone cannot insure adequate access in all situations in developed New England, it can be a great aid to other methods by creating a comprehensive plan minimizing the conflict between solar access and intensive land development.

F. Transferable Development Rights[95]

The legal concept underlying transferable development rights (hereinafter, TDR) is that "title to real estate is not a unitary or monolithic right, but rather it may be compared to a 'bundle of individual rights' each one of which may be separated from the rest and transferred to someone else, leaving the original owner with all other rights of ownership."[96] Development rights are the rights the owner has to develop unused space within the applicable zoning laws. TDR is in effect, an extension of a negative easement. The latter mandates that the burdened property refrain from development, while the former

94. The legislature of Hawaii has recognized that zoning cannot insure adequate access in all instances:

> As a general rule existing zoning rules for height, set back, and lot density limitations in residential areas are sufficient to permit access to sunlight by each lot without obstruction by adjacent structures. However, where existing zoning is insufficient to provide adequate protection from interference by structures, it is the intent of this Act to provide adequate protection for the use of solar collectors without at the same time causing undue hardships on the rights of property owners.

HAWAII H. B. 2766 § 1 (1st Sess. 1978).

95. Transferable Development Rights are also referred to as Development Rights Transfer and Transfer of Air Rights.

96. Rose, *The Transfer of Development Rights: An Interim Review of an Evolving Concept* in J. ROSE, THE TRANSFER OF DEVELOPMENT RIGHTS — A NEW TECHNIQUE OF LAND USE REGULATION 3 (1975) [Rose's book is hereinafter cited as ROSE]. *See generally* J. COSTONIS, SPACE ADRIFT (1974) [hereinafter cited as COSTONIS]; Costonis, *Development Rights Transfer: An Exploratory Essay,* 83 YALE L. J. 75 (1973) [hereinafter cited as *TDR Essay*]; Note, *The Unconstitutionality of Transferable Development Rights,* 84 YALE L. J. 1101 (1975); 3 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 8.2(2) (1977); 6 R. POWELL, THE LAW OF REAL PROPERTY § 865.2 (1977); Carmichael, *Transferable Development Rights as a Basis for Land Use Control,* 2 FLA. ST. L. REV. 35 (1974); Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks,* 24 BUFF. L. REV. 77 (1975); W. THOMAS, A. MILLER & R. ROBBINS, OVERCOMING LEGAL UNCERTAINTIES ABOUT USE OF SOLAR ENERGY SYSTEMS 69 (1978) [hereinafter cited as OVERCOMING LEGAL UNCERTAINTIES]; Schnidman, *Transferable Development Rights: An Idea in Search of Implementation,* 11 LAND & WATER L. REV. 339 (1976). Pedowitz, *Transfers of Air Rights and Development Rights,* 9 REAL PROP. PROB. & TR. J. 183 (1974); Peterson & McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment,* 26 DEPAUL L. REV. 447 (1977); *Accommodation Power, supra* note 72; A. MILLER, G. HAYES & G. THOMPSON, *supra* note 1; WORKSHOP ON SOLAR ENERGY, *supra* note 19.

shifts that frozen development potential from the burdened property to another site. Assuming that the development potential of a given lot is frozen due to a neighbor having been granted a solar permit,[97] the concept of TDR preserves the solar permit, yet enables the owner of the frozen lot to recover the value of his or her unused development rights by permitting the owner to transfer them to land where their use will not be objectionable due to a solar permit.[98]

Traditional property law assumes "that the development potential of a site may be used only on that particular site," and thus the property system makes a characteristic function inevitable. Thus, a site will contain either an historic monument or a modern office tower; a nature preserve or an industrial plant; a solar collector or an adjoining office building.[99] In allowing development rights to be used elsewhere, the concept avoids the either/or dilemma. The threatened resource is protected and simultaneously, the owner of the restricted site is able to recoup the economic value represented by the site's frozen potential."[100] Professor John Costonis of the University of Chicago has characterized the concept as a tool to balance public interest considerations.

> Land is neither wholly a social resource nor a commodity for trade. Its hybrid character warrants continued, if somewhat modified, recognition of the entitlement of land entrepreneurs to the security of transactions that the American economic system affords to merchants generally . . . . In light of land's hybrid character and the certainty of future growth, it would be tragic to dissipate the opportunities created by America's "new mood" towards its environment by seeking to clamp restraints on the property system that are inequitable and probably unworkable. Instead, these opportunities should be seized to refashion the property system to accommodate the nation's environmental needs with a redefined conception of the legitimate economic expectations of those deriving their wealth from land.[101]

1. Landmark Preservation — The Origins of TDR

TDR was initially used for the preservation of historic buildings or districts under two basic plans: the Chicago Plan and the New York Plan. The problem of urban landmarks was typified by the Old Chicago Stock Exchange Building which had a height of thirteen stories in an area authorized for forty-five stories under existing zoning

97. *See* note 177 and accompanying text *infra*.
98. R. POWELL, *supra* note 96, at § 865.2.
99. *TDR Essay, supra* note 96, at 85.
100. *Id.* at 86.
101. *Id.* at 84-85.

regulations.[102] In utilizing only a fraction of the authorized floor area, it received only a fraction of the rental income that a modern office tower could have as a return. The net income of the site lessened due to rising maintenance costs. The designation as an historical landmark (freezing development due to the building's historical nature) might result in the bankruptcy of a building's owners. Few owners would warmly receive historic designation of their building due to the restrictions placed upon development.

The Chicago Plan would establish one or more "development rights transfer districts"[103] and upon designation as an historical landmark, the landmark owner is entitled to transfer its development rights (unused floor area up to the zoning limit)[104] to other lots in the transfer district, and receive a real estate tax reduction reflecting reduced value of the property.[105] In return for the transfer authorization, the owner and his or her heirs or assigns, would be restricted in the development of the building. If the landmark owner rejects the transfer option the city may condemn a preservation restriction[106] and the landmark's development rights, and the cost of such an action would be funded through a municipal "development rights bank." The bank would be credited with the development rights, to be sold to developers in the transfer districts who would receive government licenses to build larger structures than the zoning in the district otherwise permits.[107] The plan is designed to compensate the landmark owner for the actual losses suffered from frozen development potential. The municipality's share of the costs will be covered by the sale of condemned development rights to the transfer districts. Compensation would be appropriate even where the regulation involves a deprivation which is of less than con-

102. Costonis, *The Chicago Plan: Incentive Zoning and Preservation of Urban Landmarks,* in ROSE, *supra* note 96, at 98.

103. *Id.* at 104 (footnote omitted). A development rights transfer district would serve as a marketing area for development rights and would contain only a small number of buildings of historic character in relation to the total number of buildings.

104. Floor Area Ratio (FAR) $FAR = \frac{\text{Floor Area}}{\text{Lot Area}}$

The FAR is a zoning technique to regulate the physical volume (density) of a building by controlling the relation between the floor area of the building and the area of the lot on which the building stands. *See* Rose, *A Proposal For the Separation and Marketability of Development Rights as a Technique to Preserve Open Space,* in ROSE, *supra* note 96, at 85.

105. Costonis, *The Chicago Plan,* in ROSE, *supra* note 96. "Transfers may be made to one or more transferee lots provided that the constructive lot area of any transferee lot is not increased by more than fifteen percent." *Id.* at 104. The 15% restriction was viewed as a reasonable caution against urban design abuse, but not so low as to deprive the plan of economic appeal for landmark owners. (Cities can either increase or decrease this figure). *Id.* at 118-19, n.55.

106. This procedure is akin to eminent domain and provides that the city would designate the site as an historical landmark, thus freezing development. Due to the loss of anticipated revenue to the owners, compensation would be paid in cash by the city being financed through the sale of development rights.

107. Costonis, *The Chicago Plan,* in ROSE, *supra* note 96, at 105.

stitutional magnitude.

The New York plan permits the owner of a site designated as an historical landmark, to transfer authorized but unused floor area to adjacent parcels for development.[108] At first the landmark owner was permitted to transfer unused development potential to *contiguous* sites provided that both parcels were under the same ownership in the same designated zoning lot.[109] The term contiguous was later broadened to include lots across the street and permitted transfers between separately owned lots.[110] Once development rights are severed due to historic designation, the rights remain in limbo until a transferee lot can be found. The transfers occur exclusively between private landowners subject to general supervision, and the success of the program depends upon whether a developer can be found who happens to own a lot across the street or contiguous to the landmark. Since a municipal development rights bank is not provided for, if the owners and developers refuse to participate, the city must either condemn the property through a normal preservation ordinance at a great expense with no chance for recoupment, or allow the landmark to be demolished, and then redeveloped.

2. Other TDR Plans

Although the Chicago and New York plans are two of the most widely discussed, there are numerous land use goals that can be fortified with TDR's. In the Massachusetts town of Sunderland, a zoning by-law has been passed that would preserve agricultural land, and limit growth in certain areas due to the nearby University of Massachusetts.[111] The theory for the transfer of development rights is the same as the New York Plan but there is no adjacency restriction, and the rights can be sold to any willing purchaser for development in designated transfer districts. In order to make the rights more marketable, for every development right limited in the agricultural area, two development rights may be shifted to the transfer district. A similar plan has been adopted in the Long Island town of Southampton in order to preserve

108. New York City Charter and Administrative Code § 207-5.0a (1).

109. The original 1961 resolution defined "zoning lot" (to which the FAR figure applied, *see* note 104 *supra*) to include not only the project site, but also any other parcel located within the same city block owned by the developer. Thus, by owning (or leasing for 75 years) an adjacent lot which was undeveloped, a developer could add the authorized but unused bulk of the adjacent parcel to the bulk of his or her project site.

110. Richards, *Development Rights Transfer in New York City*, in ROSE, *supra* note 96, at 131. The transferee lot was only allowed a 20% increase in floor area through the transfer and could sell portions of unused development rights to several adjacent owners, but could not sell the same portion more than once. *Id.* at 131.

111. Town of Sunderland Zoning Bylaws 4460 (1975). *See also* THE LAND USE CONTROVERSY IN MASSACHUSETTS 83 (Susskind ed. 1975).

prime agricultural land while providing for suburban growth.[112] Puerto Rico has considered a transfer of development rights from "protected environmental zones" to sites in transfer districts where density will not affect environmental areas but will be consistent with comprehensive planning objectives.[113] Maryland has considered TDR's as a primary system of land use regulation.[114] A similar proposal for such a system of land use regulation has been proposed in Sonoma County, California,[115] and Fairfax County, Virginia.[116] St. George, Vermont, is presently using TDR as a method of regulating the location and timing of community growth.[117] TDR has also been proposed as a method of preserving open space in New Jersey.[118] In the New Jersey proposal, all development other than farming or low intensity recreation use is prohibited. "[F]or each residential dwelling unit eliminated in such a preservation district, a substitute dwelling unit is added to a developable district in the community."[119]

What is common to these plans is that development rights are clearly valuable in an area where virtually all forms of development, whether high, medium or low density, are in great demand in the marketplace. This holds true for urban centers such as Boston and Hartford, as well as small, rural communities exemplified by Sunderland and St. George. The marketability of these development rights is fundamental to the success of each plan. These rights, however, are not intended as exact compensation in the legal sense as under eminent domain. They are rather a substituted form of development potential given to the property owner to reduce the severity of the impact of the police power

112. Southampton, New York Zoning Ordinance § 5.2-40-30.01 (1972).

113. Costonis & Devoy, *The Puerto Rican Plan: Environmental Protection Through Development Rights Transfer,* in ROSE, *supra* note 96, at 232.

114. Maryland S.B. 254 (1972). The planning Commission of each locality would adopt a master plan which would divide the political subdivision into districts. These districts would include the percentage of private land which may be developed, the total number of development rights and their geographic value in each category. After adoption of the district, the local legislative body would apportion all development rights on a geographic basis to all land owners in the district. If an improvement has already been made on the property, the corresponding development rights are considered to have been used up and may not be transferred. No person will be entitled to a permit for development, unless he possesses title to the land and the number of development rights as required by the district. Development rights may be sold or transferred, but not between districts.

115. *The Potential For Density Transfer in Sonoma County,* in ROSE, *supra* note 96, at 233.

116. Moore, *TDR — An Idea Whose Time Has Come,* in ROSE, *supra* note 96, at 221.

117. Wilson, *Precedent Setting Swap in Vermont,* in ROSE, *supra* note 96, at 256. The town purchased land and adopted a plan which would create a compact village where expected further growth would be focused. To achieve this concentration, a developer is asked to transfer development rights in exchange for the opportunity to develop in the core village area. It was decided to allow TDR instead of zoning the entire outer lying area as agricultural or open without any chance for compensation. *Id.* at 256-57.

118. Chavooshian, Norman & Nieswand, *Transfer of Development Rights: New Concept in Land Use Management,* in ROSE *supra* note 96, at 165.

119. *Id.* at 172.

regulation which restricts the use of his or her land. The severity of the police power restriction must be reviewed against the benefit to the public. An examination of the benefits of widespread solar energy use in an era of dwindling supplies will lend credence to any proposal which, although a severe restriction on the ability to develop one's property, falls short of being a taking.

3. Constitutionality of TDR

Scholars differ on how TDR should be viewed.[120] Professor Marcus[121] takes the position that New York's landmark preservation law with provisions for TDR and "similar land use controls which allow a potential for profitable use, do not constitute takings, but are legitimate and justifiable exercises of the states' power to promote the general welfare."[122]

Professor Costonis[123] feels that there should be a third power between the traditional police and eminent domain powers. This would be known as the accommodation power, and would furnish an alternative for curing regulatory measures that cannot be sustained under the police power.[124] In contrast to the extensive theoretical discussion con-

120. For a discussion of constitutional aspects of land use regulations see note 72 and accompanying text *supra*.

121. Marcus, *supra* note 96, at 77.

122. *Id.* at 77-78. Professor Marcus along with Fred Bosselman have urged that *Pennsylvania Coal Co. v. Mahan* be expressly overruled so that the takings test would resume its *Mugler* position of a physical invasion test. *Id.* at 100. *See also* TAKING ISSUE, *supra* note 83, at 326. This would help clear the way for environmental legislation now being discussed, but rarely acted on due to the powerful chilling effect of the taking clause. Professor Marcus feels that TDR does not amount to an uncompensated taking, but, rather

> substantial economic value continues to repose in the property. Obviously, the simplest and most profitable course for the developer would be as of right to development, but the city has found that this course does not promote the general welfare. By mandating that the developer transfer his building rights to other property, the city has not taken his interest in the property; it has regulated his right to build. The transferable development rights need not be measured against just compensation requirements for a "taking." They should be seen as a reasonable development alternative under the regulation of the city's police power, since the developer is left with many valuable development options.

Marcus, *supra* note 96, at 105.

123. *Accommodation Power, supra* note 71, at 1021.

124. Professor Costonis cited *Bauman v. Ross*, 167 U.S. 548 (1892), which invalidated a regulation providing non-dollar compensation (other land) when land was taken for a public use. Costonis points out that the Court emphasized that to qualify for a set off, the benefits conferred must be "capable of present and reasonable compensation" since a landowner should not be in a worse position after condemnation. *Accommodation Power, supra* note 71, at 1040. Thus, Costonis points out that regulations attempting to protect resources which would diminish value of land below that of the reasonable beneficial use standard, should be able to compensate landowners with TDR's through the accommodation power, since without the compensation, the regulation would be invalidated as diminishing the land value below that of a reasonable beneficial use. The TDR's although not "just" compensation as defined under the eminent domain power, would be "fair" compensation under the accommodation power. TDR's benefit is to offset losses as the result of resource protection programs. *Id.* at 1061. These TDR's under the Chicago Plan,

cerning TDR, there has been an extremely limited judicial response to the concept. The New York courts, interpreting the New York plan, are the only judicial bodies to address the issue directly. In a 1972 concurring opinion, Chief Justice Breitel of the New York Court of Appeals observed that TDR is a "valuable asset" and that the municipality had a right to make provisions for the transfer of air rights including special floor area ratios.[125]

In 1976, in *Fred French Investment Company v. New York,*[126] the Court of Appeals again addressed the issue when New York City attempted to create a "special park district," thereby completely freezing development in the Tudor City complex.[127] The city provided TDR to the plaintiffs, but the court held that the regulation "deprived the owner of the reasonable income production or other private use of his property, and thus destroyed all but a bare residue of its economic value."[128] The court stated, however, that although there was a significant diminution of value of the property, there was no actual appropriation or taking. Thus, the court did not even mention the issue of compensation while invalidating the measure as an unreasonable exercise of the police power. Concerning TDR, the court noted that the development rights were "utterly unusable until they could be attached to some accommodating property."[129] In dictum, the Court specifically excluded the Chicago plan from its discussion of the undesirability of development rights transfer since it provides just compensation instantly (the New York plan with no provisions for cash compensation leaves the development rights in limbo).[130] Notably, the court in referring to the Chicago plan stated that the compensation provided was just.[131]

A different perception of TDR was presented in the important case of *Pennsylvania Central Transportation Co. v. New York.*[132] The factual

which would compensate owners either in cash or TDR's to defined transfer districts, would be "capable of present and reasonable compensation" under *Bauman.* Professor Costonis feels that he has offered a compromise position in that:

> private litigants should not be permitted to compel government to compensate for broad regulatory measures, but to deal fairly with landowners and to enhance the prospect for effective regulation, government should resort to the accommodation power (for compensation) whenever it recognizes that restrictions imposed may not be defensible under the police power.

Id. at 1073.

125. Newport Associates, Inc. v. Solow, 30 N.Y.2d 263, 268, 332 N.Y.S.2d 617, 621, 283 N.E.2d 600, 602 (1972).

126. Fred F. French Inv. Co. v. New York, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976).

127. *Id.* at 590, 385 N.Y.S.2d at 6, 350 N.E.2d at 384.

128. *Id.* at 591, 385 N.Y.S.2d at 7, 350 N.E.2d at 385.

129. *Id.* at 597, 385 N.Y.S.2d at 11, 350 N.E.2d at 388.

130. *Id.* at 598, 395 N.Y.S.2d at 12, 350 N.E.2d at 388.

131. *Id.*

132. 42 N.Y. 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977).

context involved the designation of Grand Central Terminal as an historical landmark under the New York plan thus freezing development. The owners had planned to construct an office building above the terminal due to Grand Central's declining income status. The court stated that a government regulation will be invalidated *only if it denies a property owner all reasonable return on his property.*[133] The court noted that TDR were given to Penn Central which owned several specific parcels in accordance with the New York plan, and that they may be computed in the owner's return on the property.[134]

In upholding the regulation as a valid exercise of the police power, the court found that the case did not involve zoning, landmark regulation of a historic district or eminent domain, since the restriction was a limitation on a single owner. Although there was an arguable resemblance to discriminatory zoning, such was not the case since "discriminatory zoning is condemned because there is no valid reason for singling out one particular parcel for different and less favorable treatment."[135] The court then acknowledged the social significance of an historic landmark regulation and observed that such was a valid purpose under the police power. However, the landowner must be allowed a *reasonable return.*[136] In defining reasonable return, the court considered the owner's desire to develop. It stated that the Terminal was capable of making a profit without construction of an office tower noting, among other factors, that due to the well-recognized historical nature of the landmark, the Terminal benefited from the public itself due to development of surrounding areas. To bolster the argument, the court noted that the plaintiffs have not been "wholly deprived" of their development rights since they were given TDR available for use in other parcels owned by Penn Central.[137]

> Development rights, once transferred, may not be equivalent in value to development rights on the original site. But, that alone, does not mean that the substitution of rights amounts to a deprivation of property without due process of law. Land use regulations often diminishes the property of the landowner. Constitutional standards however, are offended only when the diminution leaves the owner with no reasonable use of the property. If the substitute rights received provide reasonable compensation for a landowner forced to relinquish development rights on a landmark site, there has been no deprivation of due process. *The compensation need not be just compensation required in eminent domain for there has*

133. *Id.* at 327, 397 N.Y.S.2d at 916, 366 N.E.2d at 1273.
134. *Id.*
135. *Id.* at 328, 397 N.Y.S.2d at 918, 366 N.E.2d at 1274.
136. *Id.*
137. *Id.* at 334, 397 N.Y.S.2d at 920, 366 N.E.2d at 1277.

been no attempt to take property.[138]

The court distinguished the *French* case[139] noting that in that decision the owners were deprived of *any* return. Because the French Company did not own parcels to transfer the development rights to, there could not be a reasonable return; while in *Penn Central,* the fact that the regulation did not alter the use of the property as it had been for fifty years, plus TDR, allowed Penn Central a reasonable return.[140]

Thus, TDR received its first judicial approval after years of academic discussion. The case was recently affirmed by the United States Supreme Court[141] in what could be the most significant land use decision since the validation of zoning in *Euclid.*

The disadvantages of TDR are dependent upon the methodology used to implement the plan. The New York scheme with its adjacency requirements and need for the voluntary participation of private developers could pose problems of implementation. Yet, even with its deficiencies, the plan has received the approval of the United States Supreme Court, due to the valid public benefits created. The Chicago plan, with its municipal development rights bank and designated transfer districts, has three basic advantages over that of New York. First, the program does not depend upon the voluntary participation of the private sector. This is an important factor due to the cool reception any regulation restricting the use of land would receive from the commercial community. The public policy of encouraging solar energy use necessitates governmental action against recalcitrant property owners. The second advantage is that compensation can be paid either in dollars or development rights, giving the property owner an option rather than an ultimatum. Thirdly, the provisions for designated transfer districts allow TDR to supplement comprehensive land use goals in developing areas vitally in need of development.

However, TDR should not be used automatically upon the installation of a collector. Rather, a program securing solar access should be supplemented with TDR as a basis of balancing the competing interest of solar energy use and private property rights.[142]

II. PROPOSED AND PASSED LEGISLATION

After a brief analysis of the existing law relating to solar energy, it becomes readily apparent that new concepts will have to be formed to

138. *Id.* at 335, 397 N.Y.S.2d at 921, 366 N.E.2d at 1278 (emphasis added).
139. *See* note 126 *supra.*
140. *Id.*
141. 46 U.S.L.W. 4857 (1978).
142. For a full discussion of TDR in a solar access law see pp. 867-74 *infra.*

address this issue.[143] Gail B. Hayes of the Environmental Law Institute has listed some general requirements in any legislative approach to solar access:[144] the legislation must give adequate notice to property owners of their rights, and in specific and understandable language, it should describe what solar skyspace is to remain clear; solar energy collectors should be adequately defined; passive as well as active systems must be protected, since passive elements are usually essential to the success of a solar structure;[145] the legislation should fairly allocate the direct and indirect costs of the solar option, and should only protect those solar systems that are reasonably sized, located, angled and suited to the structure and locale.

In addition, a solar access law should take into account the blockage caused by vegetation — a viable concern in developed areas where trees and shrubs may add thousands of dollars to a parcel's value and cause shading of structures in the summer, thereby saving dollars and fossil fuels needed for air conditioning.[146] Solar access laws should also minimize delay, have a built-in flexibility to adapt to changing technologies and be politically acceptable.[147]

A. Federal Legislation

As for federal involvement, it is possible to argue that because the energy shortage is a nationwide problem, the allocation of sunlight should be subject to uniform regulation throughout the country. The source of authority would be the power to regulate interstate commerce. An American Bar Foundation report argues that under the commerce power, Congress could claim the power to pass a federal act to protect solar skyspace, but the study also states that this is rather unlikely due to the great conflict that would occur with private property rights.[148] The federal government could adopt a national policy of en-

143. One author disagrees and feels that the law of express easements and restrictive covenants is capable of handling the issue. Becker, *supra* note 19.

144. PROTECTING ACCESS TO SUNLIGHT: NEW YORK, *supra* note 19, at 16.

145. An *active solar system* is generally classified as one in which an energy resource — in addition to solar — is used for the transfer of thermal energy. This additional energy, generated on or off the site, is required for pumps or other heat transfer medium moving devices for system operation. Generally, the collection storage and distribution of thermal energy is achieved by moving a transfer medium throughout the system with the assistance of pumping power.

A *passive solar system* on the other hand, is generally classified as one where solar energy alone is used for the transfer of thermal energy. Energy other than solar is not required for pumps or other heat transfer medium moving devices for systems operation. Collection, storage, and distribution is achieved by natural heat transfer phenomena employing convection, radiation and conduction. SOLAR HOT WATER AND YOUR HOME, NATIONAL SOLAR HEATING AND COOLING INFORMATION CENTER PUBLICATION 1 (1977).

146. PROTECTING ACCESS TO SUNLIGHT: NEW YORK, *supra* note 19, at 13.

147. A. MILLER, G. HAYES & G. THOMPSON, *supra* note 1, at 14.

148. OVERCOMING LEGAL UNCERTAINTIES, *supra* note 96, at 12.

couraging solar energy use and subsequently set standards for states to attain, such as mandating that the states establish a plan for securing permanent access upon installation of a collector but leaving to the states the method to be employed. Examples of federal standards as a guideline for state implementation are the Clean Air Act[149] and the Federal Water Pollution Control Act.[150]

The role of the federal government in land use regulation traditionally has been extremely narrow and limited, and due to the practical problems posed by the differing climatic conditions and sunlight variations in different regions of the United States, the federal involvement should be limited. However, the energy crisis of 1973 has led to a national recognition of the need for alternative energy sources. The Solar Energy Acts of 1974 exemplified the national policy of utilizing solar energy as an alternative energy source and its desire to explore the possibilities of widespread use and acceptance.[151] Indeed, the federal government does have a role in providing technical information, as well

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149. 42 U.S.C. §§ 7401-7642 (Supp. 1977).

> Each state shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard under § 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance and enforcement of such primary standard in each air quality control region . . . within such state.

42 U.S.C. § 7410 (Supp. 1977).

150. 33 U.S.C. §§ 1251-1376 (Supp. 1977). Each state may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. 33 U.S.C. § 1316(c) (Supp. 1977). *See also* OVERCOMING LEGAL UNCERTAINTIES, *supra* note 96, at 12.

151. *See* federal statutes cited in note 16 *supra*. The Solar Heating and Cooling Demonstration Act of 1974 provides:

> Congressional findings and declaration of policy;
> a) The Congress hereby finds that —
> 1) The current imbalance between supply and demand for fuels and energy is likely to persist for some time,
> 2) the early demonstration of the feasibility of using solar energy for the heating and cooling of buildings could help to relieve the demand upon present fuel and energy supplies,
> 3) the technologies for solar heating are close to the point of commercial application in the United States,
> 4) the technologies for combined solar heating and cooling still require research, development, testing and demonstration, but no insoluable technical problem is now foreseen in achieving commercial use of such technologies,
> 5) the early development and export of viable solar heating equipment and combined solar heating and cooling equipment, consistent with the established preeminence of the United States in the field of high technology products, can make a valuable contribution to our balance of trade,
> 6) the widespread use of solar energy in place of conventional methods for the heating and cooling of buildings would have a significantly beneficial effect upon the environment,
> 7) the mass production and use of solar heating and cooling equipment will help to eliminate the dependence of the United States upon foreign energy sources and promote the national defense,
> 8) the widespread introduction of low-cost solar energy will be beneficial to consumers in a period of rapidly rising fuel cost,

as incentives for the construction of solar collectors and initiating research and development of solar energy systems.[152] President Carter's energy proposal includes a tax credit for individual residences installing wind or solar equipment of thirty percent on the first $1,500 invested, and twenty percent on the next $8,500. The maximum credit is $2,150. This proposal amounts to a dollar for dollar payback since a tax credit is a direct deduction from taxes and not from income.[153]

B. State Legislation for Solar Access

By far the most popular state proposal concerning the issue of solar access has been legislative recognition of a solar easement, first passed in Colorado in 1975.[154] The statute sets forth the procedures for conveying and recording light and air easements voluntarily negotiated between property owners. As minimal prerequisites, the recording must contain the vertical and horizontal easement angle, the terms for termination, and the amount of compensation given in return for the granting of the easement. Numerous other states have either passed or

9) innovation and creativity in the development of solar heating and combined solar heating and cooling components and systems can be fostered through encouraging direct contact between the manufacturers of such systems and the architects, engineers, developers, contractors, and other persons interested in installing such systems in buildings,

10) evaluation of the performance and reliability of solar heating and combined solar heating and cooling technologies can be expedited by testing under carefully controlled conditions, and

11) commercial application of solar heating and combined solar heating and cooling technologies can be expedited by early commercial demonstration under practical conditions.

b) It is therefore declared to be the policy of the United States and the purpose of this subchapter to provide for the demonstration within a three year period of the practical use of solar heating technology and to provide for the development and demonstration within a five-year period of the practical use of combined heating and cooling technology.

42 U.S.C. § 5501.

152. It should be noted that although federal involvement should be limited, H.R. 11677 proposed in 1976 would "prohibit state and local law from permitting construction which interferes with sunlight necessary for solar heating and cooling equipment." H.R. 11677 94th Cong. (1st Sess. 1976). *See also* S. 985 95th Cong. (1st Sess. 1977).

153. National Solar Heating and Cooling Information Center Bulletin. *See* I.R.C. Subtitle A, Ch. 1A Part IV (July 22, 1977). This proposal however, does not provide for direct subsidies to individuals who cannot afford the initial investment of a solar system, nor does it provide for carryback or carryover of the tax credit.

154. COLORADO REV. STAT. §§ 38-32.5-101,102 (Supp. 1976).

38-32.5-101. Solar easements — creation. Any easement obtained for the purpose of exposure of a solar energy device shall be created in writing and shall be subject to the same conveyancing and instrument recording requirements as other easements.

38-32.5-102. Contents. 1) Any instrument creating a solar easement shall include but the contents shall not be limited to:

a) The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement;

b) Any terms or conditions or both under which the solar easement is granted or will be terminated;

c) Any provisions for compensation of the owner of the property benefitting from the solar easement in the event of interference with the enjoyment of the solar easement

proposed similar legislation.[155]

This legislation does little more than codify an already recognized right to negotiate a private easement for light and has all of the disadvantages of a negotiated express easement.[156] The statute's main advantage would be its applicability to disputes against subsequent purchasers of the property. With such a statute, it would be difficult to argue that the easement was not appurtenant to the property. Thus, it would "run with the land" and bind subsequent purchasers who purchased with notice of the easement.

Although this type of legislation is an excellent political device allowing legislators to claim approval of solar energy, and requires no state expenditure, it makes little headway in solving the solar access dilemma. This type of legislation can be considered a viable statutory scheme, although it cannot be termed a final solution.[157]

Another legislative approach has been passed in Oregon.[158] It is enabling legislation which either allows or directs county, municipal or local planning authorities to include solar access considerations in general land use planning and zoning. Again, this type of legislation does not address directly the solar access issue since solar energy use is only one consideration in a total land use plan. It would not be helpful in specific access questions where a landowner has blocked a solar user's collector but has generally complied with the zoning regulations.

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or compensation of the owner of the property subject to the solar easement for maintaining the solar easement.

155. MARYLAND REAL PROP. CODE ANN. § 2-118 (Cum. Supp. 1977); N.D. CENT. CODE § 47-05-01.1 (Supp. 1977); KANSAS STAT. §§ 58-3801, 3802 (Supp. 1977). Has been proposed in: Florida H.B. 49 (1st Sess. 1978); Arizona S.B. 1087 (1st Sess. 1977); Missouri H.B. 1168 (2d Sess. 1977); Virginia H.B. 311 (1st Sess. 1978); Pennsylvania H.B. 728 (1st Sess. 1977); Illinois H.B. 1512 (1st Sess. 1977); Utah H.B. 349 (1st Sess. 1977); Washington Substitute H.B. (1st Extra Sess. 1977); Hawaii S.B. 1576 (1st Sess. 1978). Minnesota has considered legislation that would grant an easement for sunlight to the owner of a building that used solar energy for heating and cooling purposes and neighbors would not be allowed to erect any object that would interfere with the solar system, and if they did, they would be liable for an amount three times the actual cost of implementing an alternative system. Minnesota H.B. 2064 (1st Sess. 1976).

156. *See* note 46 and accompanying text *supra.*

157. PROTECTING ACCESS TO SUNLIGHT: NEW YORK, *supra,* note 19, at 6.

158. OR. REV. STAT. §§ 215.055-.110 (1975). § 215.055 states in part:

> 1) Any comprehensive plan and all zoning, subdivision or other ordinances and regulations authorized by ORS 215.010 to 215.233 and 215.402 to 215.422 and adopted prior to the expiration of one year following the date of the approval of state-wide planning goals and guidelines under ORS 197.240 shall be designed to promote the public health, safety and general welfare and shall be based on the following consideration, among others: The various characteristics of the various areas in the county, the suitability of the areas for particular land uses and improvements, the land uses and improvements in the areas trends in land improvement, density of development, property values, the needs of economic enterprises in the future development of the areas, needed access to particular sites in the areas, natural resources, *including solar energy and utilization,* of the county and prospective needs for development and utilization thereof, and the public need for healthful, safe, aesthetic surroundings and conditions.

§ 215.110 states in part:

As only a "consideration" in a land use plan, it will not *prevent* an obstruction.

Massachusetts and Rhode Island are the only New England states to propose legislation, both considering very similar bills.[159] The bills require a solar user to apply for a permit at which time a hearing is held to balance solar energy use and private property development. The proposals are essentially a recording system that would perfect one's solar access.

Other minor legislation concerning solar access has been offered in various states. Hawaii,[160] Florida,[161] Illinois[162] and Massachusetts[163] have proposed legislation that directs an administrative body to study the question of solar access and to make appropriate recommendations.

Colorado[164] and New Mexico[165] have introduced bills concerning the shading of existing solar collectors by plants and shrubs between the hours of 9:00 a.m. and 3:00 p.m. Affected solar users could have the shading trees declared a public nuisance. Finally, Michigan has introduced a bill that would forbid passage of solar prohibiting zoning ordinances in counties, municipalities and political subdivisions.[166]

C. Solar Rights Legislation

The state of New Mexico has been the only state to actually pass a sunrights law.[167] It should be noted that this legislation is considered a "sunrights" law as opposed to "solar access." The former recognizes a "right" to sunlight ignoring all other consequences, while the latter considers a right to "reasonable" access to sunlight for a user taking into account surrounding circumstances and environment. The law provides that the right to use the natural resources of solar energy is a trans-

1) The commission may recommend to the governing body ordinances intended to carry out part or all of the comprehensive plan adopted by the commission.

2) The commission may also recommend to the county governing body ordinances renaming public thoroughfares, *protecting and assuring access to incident solar energy,* numbering property, and controlling subdivision and other partitioning of land and the location, construction, maintenance, repair and alteration of buildings, *including height and set back,* and other structures.

Similar legislation has been proposed in: Arizona H.B. 2066 (1st Sess. 1977); Virginia H.R. 147 (1st Sess. 1978); New York H.B. 10478 (1st Sess. 1978); Hawaii S.R. 3 (1st Sess. 1978).

159. Massachusetts S.B. 296 (1st Sess. 1977); Rhode Island S.B. 1242 (1st Sess. 1977). The Rhode Island bill is basically a duplicate of the Massachusetts proposal. The Massachusetts bill has been refiled with minimal revision, Massachusetts S.A. 304 (1st Sess. 1978). *See* note 172 *infra,* and accompanying text for a full discussion of the bills.

160. Hawaii H.R. 79 (1st Sess. 1978).

161. Florida H.B. 49 (1st Sess. 1978).

162. Illinois H.B. 1512 (1st Sess. 1977).

163. Massachusetts H.B. 2533 (1st Sess. 1977).

164. Colorado S.B. (1st Sess. 1977).

165. New Mexico H.B. 325 (1st Sess. 1977).

166. Michigan H.B. 4493 (political subdivisions), H.B. 4494 (Townships), H.B. 4495 (Counties), 4496 (Municipalities) (1st Sess. 1978).

167. NEW MEXICO STAT. ANN. § 70-8-1 to 70-8-5 (1977) (effective July 1, 1978).

ferable property right, the exercise of which is to be encouraged and regulated by the state. Under the law, permit systems for the use and application of solar energy will reside with county and municipal zoning authorities which could adopt such systems voluntarily; it would not be mandatory. The law further provides that prior appropriation of sunlight for use in a solar energy device would entitle the user to the sunlight available at the time of appropriation. The central concept is priority in time for use as in prior appropriation water law in western states.[168]

As the first legislation in the solar rights area, the law faces numerous problems. Its basis is "first come, first served." This could become burdensome on property owners wanting to install solar equipment since the collector might be constructed prematurely just to protect their sunrights. On the other hand, adjoining property owners may develop their property prematurely if their neighbors hint that they may install solar equipment.[169] This race to develop shows little sensitivity to the balancing of public interest in solar energy use and the rights of private property. Moreover severe reductions in property values affected by a prior appropriation could be considered a taking without just compensation. For example, if an owner of a single story residence in an area zoned for ten stories sets up a solar collector, he or she effectively prohibits development on adjoining properties. If the adjoining

168. The "riparian rule" used in many eastern states deals with the landowner's right to use the water. 1 WATERS AND WATER RIGHTS § 52.1 (Clark ed. 1967) [hereinafter cited as WATERS]. Generally, riparian landowners have equal rights no matter how small a portion of the owner's land touches the stream. Under the "natural flow" doctrine of riparian rights, the landowner has the right to the continued natural flow of the system, undiminished in quality. Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825 (1967). Under the "reasonable use" doctrine, the landowner's right is to be free of unreasonable uses of others which cause harm to his own reasonable use of the water. *See, e.g.*, Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636 (1862). The prior appropriation doctrine used in western, arid states deals mainly with priority of right based upon actual use. WATERS, *supra* at Vol. 1, § 51.5. Priority is fixed at the time an application is filed for a permit under an administrative system. WATERS, *supra* at Vol. 1, § 51.6. The appropriation assumes reasonable diligence in putting the water to actual use (diversion). A diversion must be reasonably efficient so as to prevent the waste of water. 5 R. POWELL, LAW OF REAL PROPERTY § 735 (1977). Unlike the riparian rule, the appropriation right which is *separate* from land ownership, may be lost by non-use or abandonment. WATERS, *supra* at Vol. 1, § 51.8. The distinction between riparian and appropriation rights is that appropriative rights do not depend upon land ownership, *i.e.*, the physical location of the land. Appropriation rights are determined by actual use of the water, and are lost if not actually used or "diverted." Riparian rights are vested in the landowner adjoining the water even though the water is not actually diverted. Mary White focuses on water rights as an analogy to solar rights since "sunlight [like water] is used, not captured and sold." *Prior Appropriation, supra* note 15, at 434. She dismisses riparian rights as a possible analogy since all land is "riparian" to sunlight, and all land is entitled to the "reasonable use" or "natural flow" of sunlight, thus we would have to tear down all existing structures blocking sunlight radiating to adjoining lands and prevent all development that would block sunlight. Thus, White dismisses the possibility of using riparian rights in a solar access law, due to a total freeze in development. *See generally Prior Appropriation, supra* note 15, at 434. The proper appropriation doctrine is exemplified by New Mexico's sun rights statute.

169. A. MILLER, G. HAYES & G. THOMPSON, *supra* note 1, at 18.

property is a vacant lot, the solar user could render the development of the property worthless. Although a land use regulation would not generally be considered invalid due to a restriction on a land's most profitable use, the sunrights law in this instance may be invalid because the landowner may not even be able to develop to a reasonable use standard.

The New Mexico law represents extreme intervention in the regulation of solar energy use by the state. "It would reverse the current system of entitlements, which says to a prospective builder that he does not have to be concerned about casting a shadow."[170] In a law concerning solar access, there must be as little conflict as possible with overall land use goals.

III. A LEGISLATIVE APPROACH TO SOLAR ACCESS: TRANSFERABLE DEVELOPMENT RIGHTS

The issue of solar access comes at a time when there is a growing interest in protecting the environment and finding alternative energy sources. Yet, there is an equally strong sentiment for the preservation of traditional private property rights. The proposals for state legislation and existing property law have all centered on an either/or solution. Either a potential solar user will have access to the sun, or the neighboring property owner will have the right to unhindered development of his or her property. Examples of this mutual exclusivity of solar access and intensive development are abundant. For instance, under the sunrights law of New Mexico, once a solar user has claimed a solar right by prior appropriation, the surrounding area's intensive development is forestalled permanently. In Colorado's solar easement law, if a voluntary agreement cannot be reached, intensive development of neighboring properties will render a collector useless.

Yet, there is a danger that in protecting the solar access of a given property, redevelopment will be discouraged in areas where times and community needs change requiring the possible upgrading of densities to provide for greater economic as well as energy efficient use. "Solar access should never become an absolute right."[171] It is an important consideration that must be balanced within the total land use planning process. The result of massively reducing densities so that there will be no shading of a neighbor's property, would be greater urban sprawl and increased energy waste. The energy crisis of the 1970's necessitates innovative ideas to cope with this new dilemma. Solar energy is one answer to the problem, and an objective of this note is to present a workable plan that would encompass the need for solar energy use and

170. PROTECTING ACCESS TO SUNLIGHT: NEW YORK, *supra* note 19, at 35.
171. *Id.* at 5.

yet, attempt to preserve the American foundation of private property rights.

A. Transferable Development Rights in a Building Permit Plan

The solar access bills proposed in Massachusetts[172] and Rhode Island,[173] although entailing a complex procedure, are the only proposals that have reflected the intricate balance between the need for solar energy and the rights of private property owners. However, in their attempt to balance these two considerations, the bills fall short of providing a happy medium.

The bills would require that a solar user have a qualified right to solar access if the proposed system would produce at least twenty percent of the heat or total energy needs. The user must apply for a building permit with the applicant demonstrating that site planning and structural design will minimize conflict with future development in nearby properties. Furthermore, if the solar user wants protection from adjoining vegetation, he or she must negotiate an easement with the neighbor. In areas where zoning plans permit development greater than four stories, a municipal planning agency is charged with balancing public interests in solar energy and intensive development of land. Once a permit is granted, no one will be allowed to obstruct the collector's access by more than ten percent of the sunlight rays. All future applications for development near the collector would be examined by boards and it will be determined whether the proposed construction will interfere with the solar access of the collector. If more than ten percent of the sun's rays are blocked, no permit will be granted for development.

The first shortcoming is the failure of the bills to include in their policy statement which encourages solar energy use, the balancing consideration of private property rights.[174] This can be overcome by utilizing a policy section similar to legislation proposed in Hawaii,[175] which reflects concern with the high costs of traditional energy sources and the need for alternative fuels, while recognizing traditional values in private

172. Massachusetts S.B. 296 (1st Sess. 1977).

173. Rhode Island S.B. 1242 (1st Sess. 1977).

174. Section 25 of the Massachusetts Bill provides: "Whereas it is the policy of this commonwealth to encourage the productive use of solar energy for heating, cooling and the production of electrical and other usable forms of energy . . . ." Massachusetts S.B. 296, § 25 (1st Sess. 1977).

175. Section 1 of the Hawaii proposal states:

> The legislature finds that because of the existing shortage of conventional energy sources, it has been determined to be in the public interest to encourage the use of solar energy for the heating and cooling of buildings and providing hot water for use in buildings or in swimming pools. As a general rule existing zoning rules for height, setback, and lot density limitations in residential areas are sufficient to permit adequate access to sunlight by each lot without obstruction by adjacent structures. However, where existing zoning is insufficient to provide adequate protection from interference by structures, it is the intent of this Act to provide adequate protection for the use of solar collectors without at the same time causing undue hardships on the rights of property owners.

property development. Such as definitive policy articulated by the legislature is necessary to uphold the statute as a valid exercise of the police power.

The bills have a reasonable requirement that certain conditions be met before a permit will be granted for a solar applicant. The applicant must plan the placement of the collector at a reasonable height, location and angle in order to minimize interference due to future development. The applicant also must plan a unit that will be of a size reasonably related to the present and anticipated energy needs of the structure.[176]

The proposals then create two different procedures in obtaining a permit, one for when an area is zoned for four stories or less, and the other for when the area is zoned for development of more than four stories.[177] Section 30(5) of the Massachusetts bill and section 6(5) of the Rhode Island proposal create, in a sense, a presumption in favor of an applicant for a permit in lower zoned areas, unless the notifed adjoining landowner can either show that the requirements of a reasonably sized and placed collector cannot be met or that a "substantial reliance interest" would be destroyed by the granting of a solar permit. This reliance interest may be evidenced by a recent application for a building permit or the expenditure of five hundred dollars.

It is at this point that the proposals seem deficient and upset the delicate balance of competing interests. The presumption in favor of a solar permit could be defeated by the fact that an adjoining landowner

Hawaii S.B. 2766 (1st Sess. 1978).

176. Mass. S.B. 296, § 29; R.I. S.B. 1242, § 5.

177. Mass. S.B. 296, § 30, and R.I. S.B. 1242, § 6 provide:

> If a planned solar energy unit is to be located such that it will only collect solar energy passing over land zoned for development of four stories or less, the solar energy unit building permit applicant shall follow the procedure described below:
>
> (1) The permit applicant shall send written notice to neighboring property owners. He shall notify them of his building permit application if the future development of their land could reasonably be expected to result in an impermissible interference with his solar energy unit. Such notice shall be given no later than thirty days after the building permit application is filed.
>
> (2) All such owners shall have the opportunity to object to the planned solar energy unit insofar as it fails to meet the requirements of section [twenty-nine of the Mass. bill/five of the R.I. bill] of this chapter.
>
> (3) Such owners may also object if they can show that they have proceeded with development plans relying on the existence of full development rights, unimpaired by the solar energy access claims of the permit applicant. Such reliance may be demonstrated by a recent application for a building permit or the expenditure of at least five hundred dollars for development plans or construction consistent with existing zoning. Speculative injury to property value shall not constitute reliance under this section.
>
> (5) The adjudicating official must grant the building permit for the construction of the solar energy unit unless an opposing party proves that the requirements of section [twenty-nine of the Mass. bill/five of the R.I. bill] cannot be met or that a substantial reliance interest would be destroyed by the protection which this chapter grants to holders of building permits for solar energy units.
>
> (6) For each property whose owner was notified of the solar energy unit building permit application, a notice shall be filed in the appropriate registry of deeds declaring that such property may not be developed so as to create an impermissible interference with the solar energy unit.

has recently *considered* developing his or her property to a height that would interfere with the solar collector's access. The ideal situation is for the solar applicant to be granted his or her permit and at the same time, allow the adjoining landowner who has a "substantial reliance interest" to develop his or her land in accordance with his or her plans. Obviously, the two cannot occur simultaneously.

The possibility exists, however, for the ideal situation to materialize. At the hearing to determine the feasibility of granting a solar permit, any landowner who can show "substantial reliance interests" should be given transferable development rights[178] so he or she may be able to intensely develop the property at another location up to the original site's zoning limitation or recoup any loss by selling the rights on the open market. It seems consistent with the law of private property and the value American jurisprudence has placed upon it, to allow these landowners the opportunity to develop their properties pursuant to plans regardless of a solar energy applicant. At the same time, the Commonwealth's policy of encouraging solar energy use should not be thwarted due to plans for future development at a certain site where access to sunlight would be blocked forever. Once the property is developed, the access issue will become moot, since a blocked collector would have zero value.

TDR should be considered in solar permit applications in areas zoned for more than four stories.[179] The distinction between areas zoned for less than four stories and that of areas zoned for more than four stories, is that the presumption in favor of granting the solar permit is no longer applicable. It is felt by the drafters of the bills, that in intensely developed areas, more deference will be given to proposed development in accordance with an overall land use plan, as evidenced by the fact that approval for a permit must come from the municipal planning board. The municipal planning board in its decision to grant or deny a solar permit should consider the use of transferable development rights

178. *See* note 96 and accompanying text *supra*.

179. This is to ensure that the use of solar energy and intensive development of land can exist side by side in the same land use program. R.I. S.B. 1242, § 7, and Mass. S.B. 296, § 31 provide:

> Building permit applications for solar energy units which would collect solar energy passing over land where current zoning maps or master plans permit development more intensive than four stories shall be referred to the municipal planning agency. The building permit applicant shall notify all owners against whose future land development he seeks protection. The planning agency shall hold all necessary hearings and make recommendations concerning the manner by which the requirements of section [twenty-nine of the Mass. bill/five of the R.I. bill] of this chapter may be satisfied. In balancing public interests in solar energy use and intensive development of land, it may modify the protection for the solar energy unit owner which the grant of a building permit would create. No building permit shall be issued for the construction of the solar energy unit unless the municipal governing body either accepts the recommendation of the planning board by a majority vote or considers all relevant factors and approves the solar energy unit building permit and its accompanying protections for the solar energy unit owner.

wherever possible in order to eliminate any presumption favoring intense development. The public policy encouraging the use of solar energy should not be cast aside solely because a permit is applied for in more densely developed areas. In such a situation, the use of TDR as a component of a comprehensive land use program would be appropriate.[180] Again, the ideal situation is not to freeze development for all time, but to encourage and advocate the use of solar energy wherever possible. Additionally, solar energy can be of greater use in urban commercial centers where great amounts of fossil fuels for heating and cooling giant structures are used.

It should be noted, that the use of TDR must coincide with a comprehensive land use plan, since designated transfer districts would have to be provided. This necessitates an area large enough to accommodate the transfer of development rights from all over the city, yet small enough to make solar energy available to a majority of city residents. This also means that solar energy will generally not be available as an energy source in the transfer districts. Further, in transferring development rights to the transfer district, there will be inequitable development in the district. This inequality results from the fact that developers who have purchased development rights will be exempt from the district's general zoning limitations, while developers who have not purchased development rights will be subject to the zoning ordinance. In adopting a TDR plan, the legislature must balance the equities and determine that it is in the "public welfare"[181] to transfer these rights to districts although an inequality must necessarily occur. This inequality is not due to arbitrary or irrational decision making, but rather to a careful balancing of public and private interests.[182]

The permit system encompasses the individualized nature of solar access and the surrounding circumstances of each collector's installation. It functions well in New England's rural, suburban and urban situations. In rural or undeveloped areas, the solar user still has the ability to negotiate an express easement. If that is not possible or feasible, a permit can be applied for without cost to the applicant while securing permanent access. The permit system also considers the availability of transferable development rights in certain situations. In rural areas, where the initiative to intensely develop a site is small, the conflict between solar energy use and private property rights is minimal.

180. Professor John Costonis, *see* WORKSHOP ON SOLAR ENERGY, *supra* note 19, at 21; and The Environmental Law Institute. *See also* A. MILLER, G. HAYES & G. THOMPSON, *supra* note 1, at 10; both agree that TDR in a solar law would have its most useful application as part of a comprehensive land use plan.

181. *See* Nectow v. City of Cambridge, 277 U.S. 183 (1928), note 76 and accompanying text *supra*.

182. *See* Berman v. Parker, 348 U.S. 26 (1954), note 78 and accompanying text *supra*.

Thus, TDR will rarely be given. TDR is not a provision to be handed out immediately upon the installation of a collector to an adjoining property owner but a tool to balance the competing interests. In the case of *South County Hospital,*[183] a solar permit will allow permanent access over the adjoining recreational field. TDR would not be given in this instance since there is no development potential of the recreational field, which has been used as such since the Hospital was built. If it is determined that there is, in fact, development potential of the property, and restricting the use of the land as a recreational field prohibits a reasonable use, then TDR will be given as compensation to avoid a taking.

TDR will be primarily used in urban areas where the competing interests are highlighted. In suburban and urban areas, the permit will again secure permanent access, while neighboring properties substantially affected by the freeze in development will be candidates for TDR. In the case of *Abt Associates*[184] in Cambridge, there are no height restrictions on development since zoning is based on density rather than height. Thus, considering the surrounding circumstances, a freeze in development could mean that the adjoining property owner will be deprived of the reasonable use of his or her property. There, provision for TDR will provide access for the solar user while allowing the adjoining landowner to recoup any losses due to the freeze in development. The same is true for *City Savings Bank*[185] in Middletown. If it is determined that the freeze in development renders the adjoining properties incapable of a reasonable use, or that a neighbor had a "substantial reliance interest," the provision for TDR will be set in motion. Otherwise, no TDR will be given and permanent access will still be secured.

The provisions for the creation of solar access to the permit applicant meet most of the criteria for establishing a good solar access law. The proposals encourage solar energy use for reasonably sized and placed collectors, provide adequate notice to the adjoining landowners and subsequent purchasers of their rights with respect to the solar access permit holder, and with a provision for transferable development rights, would fairly allocate the costs of solar energy use in the balancing of interests of solar energy use as an alternative fuel source and private development potential. Further, the solar user is guaranteed access upon installation of the collector. Finally, the bills provide that if the permit is denied or is not sought, then the solar user can still attempt to secure access by private agreement. The legislature is in effect recognizing the use of express easements in less dense areas where the

183. *See* discussion p. 837 *supra.*
184. *See id.*
185. *See id.*

cost of purchasing such an easement would be less expensive, and for restrictive covenants in new developments where no expense would be had. These private agreements can be used as a supplement or alternative to the permit procedure.

A deficiency in the proposals is that a "solar energy unit" seems to be defined as an "active" system, and thus solar access will be limited only to systems with actual collectors.[186] If the policy of the Commonwealth is to encourage solar energy use, the fact that a "passive" system is used for heating or hot water purposes, should not make a substantial difference in protecting access. If the passive system is designed so as to be reasonably sized, and located, and provide a significant amount of the energy needs, it would defeat the purpose of encouraging solar energy use by limiting access only to "active" systems. Also, the solar user should have the right to trim future adjoining vegetation obstructing more than ten percent of the collector. The provisions for negotiating an easement could render the permit worthless if the neighbor refuses to negotiate. The solar user must be able to secure permanent access from *all* possible obstructions upon installation of a collector.

When considering TDR as a transfer of a valuable property right, the question arises as to who bears the cost for the TDR given to the burdened property owner. As discussed earlier,[187] the Chicago Plan would be the most appropriate method to implement a TDR program. There are four options or alternate methods a city could adopt to fairly allocate the costs.

First, the owner of a solar collector pays a fee to the City for the solar permit in order to compensate for the development rights the burdened property is losing. The difficulty with this method is that if the permit price were too high, the incentive to use solar energy would be reduced. The major advantage of TDR is that compensation to the burdened property is independent from the granting of a permit. Therefore, if it is deemed appropriate for the solar user to pay a permit fee, it should be small enough so that the incentive to utilize solar energy is not reduced.

Second, a credit in local real estate taxes could be allowed to the owner of the burdened property based on the decrease in the land market value due to the freeze in development potential. This is an essential element of the Chicago Plan.[188] A drawback to this option is that this loss in the tax base must be replaced by the remaining com-

186. *See* note 145 *supra,* for distinction between active and passive systems. Section 2(1) of the R.I. bill and section 26(1) of the Massachusetts bill provide: " 'Solar energy unit' shall refer to any structural appurtenance used to collect solar energy for the purpose of heating, cooling or conversion to electrical or chemical energy."

A well designed passive system can supply 60-80 percent of the thermal energy that an active system could supply. *See* THE USE OF SOLAR ENERGY FOR SPACE HEATING AND HOT WATER, MASSACHUSETTS ENERGY POLICY OFFICE 28 (1976).

187. *See* pp. 855-56 *supra.*

munity who may not want to support solar users who lessen their fuel bills, while community members pay for high priced oil.

Third, a tax credit on federal or state taxes could be given to the burdened property owner, so that the cost of encouraging solar use is spread across the nation. This indirect method of subsidizing solar energy would receive less opposition than a direct subsidy.

Fourth, the developer's market would pay. If a developer wishes to construct in a TDR district, he or she must buy TDR from those who have them or from the municipal development rights bank. Putting the total cost on the developer would be inequitable. However, if the developer chooses to construct in the transfer district, he or she must pay for the right to be exempt from general zoning limitations.

The best method to allocate the costs of the solar option would be a combination of the four. While the solar user may be required to pay a fee for his reduced fuel costs, the fee should not be excessive, thus limiting solar energy's advantages. Concurrently, the developer in the transfer district should pay for the right to develop, but not at a rate that would limit development incentive. The tax provisions indirectly spread the cost of solar energy to the community and the nation who would benefit from lower demands upon fossil fuels.

IV. CONCLUSION

The 1960's was a period of growth for the United States. The 1970's brought on a crisis that threatens to change the lifestyle of every American citizen. The 1980's must reflect the thought and research that has been prompted by the energy crisis. Aside from the oil and power industries, there is little argument that our supplies of nonrenewable energy fuels are being depleted at a rate that can be characterized as "catastrophic." Although solar power might not supply our total future energy needs, it has potential to save large amounts of the fossil fuels presently utilized.

We must either reevaluate our goals or change our means to achieve them. Since there has not been an overwhelming public response to alter lifestyles, new methods must be discovered to maintain the way of living to which we have grown accustomed. While the traditional concept of private property rights was a basis for the founding of this nation, this notion today frustrates the widespread use and acceptance of solar energy.

Solar energy use should not be left exclusively to rural or undeveloped areas simply because, thus situated, it will not conflict with nearby development. Urban areas such as Boston, Providence and Hartford have as much, if not a greater, need for alternative energy

188. *See* note 105 and accompanying text *supra*.

sources. Yet, a solar collector on top of a twenty story building and a fifty story office tower cannot co-exist side by side. The solutions proposed to this dilemma by legislatures and commentators have failed to equitably balance the demands of progress with the privileges of private property.

The use of TDR in a New England solar access law would prove invaluable. It would fill the void that zoning laws create. Solar energy is an individual choice, encouraged by the state. Problems of access cannot be solved through general zoning regulations of height, set back and lot densities. TDR is a method applicable on an individual basis. It takes into account the rights of the solar user as well as the private property rights of landowners. This remains true in urban Boston as well as rural St. George. In Boston and other urban areas, the initiative to develop to a site's height limitation is great, which exemplifies the taking problem that might occur due to any restriction of that development potential. A regulation such as solar access would restrict the height attainable on specific lots due to a neighboring solar collector. If the restriction renders the property incapable of a reasonable use, the statute will be held invalid as applied. It is in this situation TDR will save the law from being invalidated. The property owner will be able to recoup his or her losses by developing elsewhere or receiving the value for his or her development rights. The solar user will have unobstructed access to sunlight, thus utilizing this needed alternative energy source to its maximum efficiency. The intricate balance is attained. Further, this method will effectuate the public policy of encouraging solar energy use. Since it guarantees access upon installation of the collector, and does not entail a great expense upon the solar user as do privately negotiated agreements, more people would be willing to invest in solar energy.

In implementing any scheme for solar access, great deference must be given to traditional notions of private property rights. However, it is inevitable that in serving the public interest by conserving our present energy resources and utilizing alternative sources, private property rights must be restricted. Yet, property owners should be afforded an opportunity to recoup their losses through transferable development rights so that they alone will not have to pay for our decisions as a nation.

JESSE L. MATUSON

RECENT DEVELOPMENT

Sovereign Immunity in Massachusetts

Since *Morash & Sons, Inc. v. Commonwealth*,[1] the Supreme Judicial Court of Massachusetts had urged legislative abrogation of the doctrine of sovereign immunity.[2] In *Whitney v. City of Worcester*,[3] the Supreme Judicial Court reiterated this desire and stated its intention to judicially abolish the doctrine if the legislature failed to act by the end of the January, 1978 term.[4] After several attempts to adopt a comprehensive scheme governing this area of law, Senate bill 1647 was endorsed by the House and Senate on July 11, 1978 and signed by the Governor on July 20, 1978.[5] As a result, the doctrine of sovereign immunity appears abrogated, to a limited extent, and modified in accordance with the guidelines established therein.

Legislative inaction would have constituted a decision to permit the future evolution of the law of governmental liability in tort to be guided

1. 363 Mass. 612, 296 N.E.2d 461 (1973).

2. An immunity avoids liability in tort under all circumstances due to the position or status of the favored defendant. RESTATEMENT (SECOND) OF TORTS, Scope Note to ch. 45A, at 1 (Tent. Draft No. 19, 1973); the Supreme Judicial Court of Massachusetts first expressed their dissatisfaction with the doctrine of sovereign immunity in 1973 in the case of Morash and Sons, Inc. v. Commonwealth, 363 Mass. 612, 618, 296 N.E.2d 461, 465 ("the doctrine is an anachronism in American law but despite its tautological justification, the doctrine continues to enjoy current vitality.") Since 1973 numerous bills have unsuccessfully been introduced in the Massachusetts Legislature. *See* Mass. H. 283 (1974); Mass. H. 2396 (1974); Mass. H. 2964 (1974); Mass. H. 5076 (1974); and Mass. H. 5090 (1974). The Judicial Council of Massachusetts, to which these bills were referred, recommended the adoption of a statute limiting the Plaintiff's recovery to $20,000, but otherwise following the model of the Federal Tort Claims Act. The Judicial Council's report was summarily rejected without further study by the Legislature in Mass. H. 6208 (1975). In 1975 three bills were filed, one of which received a favorable report from the Committee on the Judiciary, but which was subsequently rejected by the Ways and Means Committee as too costly. In 1976 S. 695 was introduced with a $100,000 limitation in damages; H. 1774 limited liability of the state and subdivisions to $10,000 and H. 2504 was proposed by the Massachusetts Bar Association without limitations on plaintiff's recovery. *See* letter from Francis X. Bellotti, Massachusetts Dept. of the Attorney General, to Stella E. Smith, Research Director, Senate Ways and Means Committee (August 22, 1977) in which the Office of the Attorney General states: "The most recent case of *Kris Whitney v. City of Worcester*, decided by unanimous opinion of the Supreme Judicial Court makes it imperative that the Legislature act expeditiously." In 1977 Senator Robert E. McCarthy, Democrat - East Bridgewater, sponsored S. 675, later renumbered S. 1878. The bill died in the Senate Ways and Means Committee. It was reintroduced in 1978 as S. 683, subsequently renumbered 1528, and amended as 1647.

3. 1977 Mass. Adv. Sh. 1713, 366 N.E.2d 1219 (1977).

4. *Id.* at 1715, 366 N.E.2d 1212.

5. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258).

by judicial conceptions of sound public policy in a case by case approach. This perspective might have been disadvantageous, inviting expensive litigation which would further congest an already overburdened court system, as well as giving the judiciary responsibility for balancing policy considerations and striking a practical solution to issues which are essentially political in nature and so complex that they are particularly within the competence and experience of legislators. Nonetheless, the bill's language does not adequately define the scope of governmental liability and judicial interpretation will, of necessity, be guided by prior case law, especially the *Whitney* decision.

This recent development examines the future of government responsibility in tort in Massachusetts in light of Senate bill 1647 and the *Whitney* decision. Since the bill was drafted and amended to comply strictly with the *Whitney* decision, the guidelines enunciated are elevated to a fertile source of legislative intent. Further, since there is a conspicuous absence of adequate legislative history for much state legislation, it is hoped that this recent development will serve as an aid in ascertaining legislative purpose.

Historically government entities have been immune from tort liability.[6] The doctrine of sovereign immunity,[7] derived from feudal theory,[8] is deeply implanted in American jurisprudence.[9] How this theory of the sovereign's immunity from suit for tortious acts committed by its agents became part of American jurisprudence is unclear.[10] Nonetheless, it was not until recently that courts and legislators began to recognize the need

6. "The common law . . . is that a federal, state or local government unit is immune from liability in tort." K. C. DAVIS, ADMINISTRATIVE LAW TEXT 466 (3d ed. 1972).

7. For an extensive discussion of the historical underpinnings of this doctrine, *see generally* Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924); Note, *Governmental Tort Immunity in Massachusetts: The Present Need for Change and Prospects for the Future*, 10 SUFFOLK UNIV. L. REV. 521 (1977).

8. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 242 (9th ed. 1783); Blachly & Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 LAW & CONTEMPORARY PROBLEMS 182-83 (1942).

9. Blachly & Oatman, *supra* note 8, at 182; 2 E. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 305 (S. Thorne trans. 1968).

10. One of the outstanding legal scholars in the area of sovereign immunity describes American adoption of this doctrine as "one of the mysteries of legal evolution." Borchard *supra* note 7, at 4. The doctrine evolves from the English maxim "the king can do no wrong" which is attributable to Blackstone writing in the eighteenth century. W. BLACKSTONE, COMMENTARY ON THE LAWS OF ENGLAND 242-46 (1765). Historically, the maxim "applied not only to wrongs done personally by the sovereign, but also to injuries done to a subject by the authority of the sovereign." Not only could the king do no wrong, "but he [could not] authorize wrong, since a wrongful act is

to compensate private citizens for tortious acts committed by governmental agents.[11] In 1946, the Federal Tort Claims Act (FTCA) was enacted[12] and before long most states passed similar statutes.[13] Until recently,[14] Massachusetts was one of only five jurisdictions which retained common law immunity at both state and local levels.[15] The Massachusetts judiciary had condemned the doctrine as "logically indefensible,"[16] and in *Whitney* the Supreme Judicial Court mandated that the legislature abrogate the doctrine by the end of the January, 1978 session. Failure to do so would result in judicial abolition.[17]

The two traditional rationales supporting governmental immunity are spurious. The first, reliance on the maxim "the King can do no wrong," has a tenuous logical basis when applied to a representative

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regarded by law as the act of the one who authorized it." Blachly & Oatman, *supra* note 8, at 183-84. Thus, the maxim "The king can do no wrong" was expanded to prohibit not only the king himself from doing wrong but prohibited the king from authorizing his servants to do wrong. The maxim became further distorted as a result of the procedural rules of the English court. Since the king had no temporal lord, he could not be compelled to answer in his own court. *See* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 465-66 (3d ed. 1927) [hereinafter cited as HOLDSWORTH]; 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 516, 518 (2d ed. 1898) [hereinafter cited as POLLOCK & MAITLAND]. Under the old English system of pleadings, in order to compel the presence of one in the courts a writ had to be issued against that person. However, since writs did not run against the king, there was procedurally no way to compel the presence of the king in any lord's court. *Id.* at 516. Further, by this time it was recognized that if a wrong was done by an agent of the king, the agent alone would be liable since the king could authorize no wrong to be done in his behalf. *See generally* Blachly & Oatman, *supra* note 8, at 185. If an agent of the king or sovereign committed a wrongful act it was presumed to be without the authority of the sovereign and the agent alone would be liable before the ordinary law. They could not plead obedience to royal orders. *See generally* Feather v. The Queen, 122 Eng. Rep. 1191 (Q.B. 1865); Sand v. Child, 3 Lev. 352, 83 Eng. Rep. 725 (K.B. 1855). Admitting its application to the sovereign, it is difficult to understand how such a theory came to be applied in the United States where sovereignty, according to orthodox theory, resides with the people. Yick Wo v. Hopkins, 118 U.S. 356 (1886); United States v. Lee, 106 U.S. 196 (1883). Nonetheless, the king's perogative of immunity from jurisdiction and resulting irresponsibility in tort has by evolution "devolved upon the American people . . . both as citizens of the States and of the United States." Borchard, *supra* note 7, at 5.

11. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 2, at 4.

12. *See generally* Federal Tort Claims Act, 28 U.S.C. ch. 171 (1970). The importance which was attributed to the passage of this act is exemplified by the fact that the FTCA was passed as Title IV of the Legislative Reorganization Act of 1946. It appears that the initial purpose of the FTCA was to decrease the congestion of the legislature prompted by the introduction of numerous private bills to collect damages for "tortious acts" committed by federal employees on private individuals. *Federal Tort Claims Act: Hearings on H.R. 7236 Before the Subcom. on the Judiciary,* 76th Cong., 3rd Sess. 17 (1940).

13. For a compilation of each jurisdiction's position on sovereign immunity, *see* RESTATEMENT (SECOND) OF TORTS, *supra* note 2, 12-21; *see also Governmental Tort Immunity, supra* note 7 at 524.

14. On July 20, 1978 Governor Dukakis signed S. 1647, an act modifying the doctrine of sovereign immunity.

15. *See* note 13 *supra*.

16. Morash & Sons, Inc. v. Commonwealth, 363 Mass. 612, 619, 296 N.E.2d 461, 465-66 (1973).

17. 1977 Mass. Adv. Sh. 1713, 1715, 366 N.E.2d 1210, 1212.

democracy.[18] Second, governmental immunity has sometimes been defended on grounds of public policy.[19] The argument is fourfold: (1) general treasury funds should be devoted to public purposes and not diverted to compensate private citizens for injuries,[20] (2) "public service would be hindered and the public safety endangered if the superior authority could be subjected to suit at the instance of every citizen and consequently controlled in the use and disposition of the means required for the proper administration of the government,"[21] (3) imposition of liability would involve the government "in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests,"[22] and (4) the government, unlike private enterprise, derives no profit from its activities.[23]

These arguments, however, may be rebutted. First, since activity fulfilling public purposes may cause injury, the resulting harm should be viewed as part of the activity's normal costs. Second, while control of government activity by private tort litigation may be involved where the alleged tort is legislative action or the making of some high-level policy decision, no such problem arises in ordinary accident cases. Why public functions cannot be performed properly unless the city is immune is not readily apparent. To the contrary, it might be more convincingly argued that greater efficiency and justice would result from combining power with responsibility. If this does not induce greater respect for law, it would at least be a more satisfactory response to a public sense of justice provided losses inflicted on the individual by the wrongful acts of community agents are distributed throughout the community rather than resting upon the unfortunate victim alone. Third, the direct cost of compensation by the government will not exceed the sum of the losses suffered by the hapless victims of government activity, and it is better to apportion these losses among the beneficiaries of government services. The embarrassments and expenses incidental to

18. The general notion that a sovereign cannot be sued by its subjects has ancient roots in English jurisprudence. While an acceptance of the Crown's infallibility did not come across to America, this derivative doctrine of the sovereign's immunity from suits to which it has not consented did. Strangely enough, however, our early courts offered few reasons for continuing to enforce immunity, and the doctrine enjoyed for years a virtually unchallenged existence. *See* United States v. Lee, 106 U.S. 196, 207 (1883). *See also* Langford v. United States, 101 U.S. 341, 343 (1879), in which Miller, J., remarked that "[w]e do not understand that either in reference to the government of the United States, or of the several states, or of any of their officers, the English maxim has any existence in this country." *But see* Kawananokoa v. Polyblank, 205 U.S. 349, 353 (1907) in which Justice Holmes stated: "[a] sovereign is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. . . ."

19. *See* POLLOCK & MAITLAND, supra note 10.

20. Borchard, *supra* note 7, at 132-33.

21. Field, J., in The Siren, 74 U.S. 152, 154 (1865).

22. Murdock Parlor Grate Co. v. Commonwealth, 152 Mass. 28, 32, 24 N.E. 854, 856 (1890).

23. Borchard, *supra* note 7, at 132-33.

defending accident suits are also a part of the just social cost of operations that cause injuries and seldom stifle comparable private enterprise. Finally, though the government as an entity does not profit from its enterprises, hopefully the taxpaying public does, and it is they who would bear the costs of governmental tort liability.[24]

The *Whitney* court cited two major premises which support the concept of government non-liability in tort. The first reflects the traditional notion that public officers are in fact employed by the public at large, and public funds should not be used to compensate unfortunate tort victims.[25] Second, it has been asserted that activities which are carried on by public officers "often involve a high degree of discretion" and review of such activities by courts "would impede governmental operations by subjecting governmental decision-making to after the fact judicial tort analysis."[26] Beyond this, there has been a general fear that subjecting the government to tort liability would encourage fraud and excessive litigation resulting in unbearable costs to the public.[27] The fear that an unrestrained demand to satisfy tort judgments from public treasuries would impede the Commonwealth's growth by depleting its funds and interfering with its proper administration has supported the notion that the loss should lie where it has fallen in certain instances.

Contemporary society, however, has recognized a new approach in the field of tort law: distribution of unavoidable loss "over as wide an area of absorption as possible."[28] Industrialization and urbanization have complicated life resulting in an allowance for the cost of doing business, including workmen's compensation and pension funds. Capacity to bear the loss has become an important factor in deciding cases. Yet, readjustment to changing values has been slow and hesitant, and Massachusetts had consistently refused to forego the common law defense of sovereign immunity.

Justice and respect for individual rights demanded adoption of necessary legislation which would admit the legal responsibility of the state or city for the torts of its officers. Injuries wrongfully sustained by citizens as a result of tortious conduct by government officers could not be allowed to rest, as they had in the past, at the door of the unfortunate citizen alone.

The case of *Murdock Parlor Grate Co. v. Commonwealth*[29] had

24. Borchard, *supra* note 7; Blachly & Oatman, *supra* note 8; Gellhorn & Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722 (1947).

25. 1977 Mass. Adv. Sh. 1713 at 1723-24, 366 N.E.2d 1215.

26. *Id.* at 1724, 366 N.E.2d 1216.

27. Memorandum by James A. Kelley, Jr., Chairman, Senate Ways and Means Committee, Boston (August 30, 1977); Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941).

28. Repko, *American Legal Commentary on the Doctrine of Municipal Tort Liability*. 9 LAW & CONTEMPORARY PROBLEMS 217 (1942).

29. 152 Mass. 28, 24 N.E. 854.

defined the extent of Massachusetts' liability in tort for nearly eighty-three years. The court was asked to determine whether the Commonwealth was responsible for a tort committed by its servants who negligently managed and overloaded the floor of an apartment rented by the Commonwealth which caused injury to another tenant in the same building.[30] Responding to this claim, the court stated that while the Commonwealth could be sued in its own courts where clear statutory authority of that purpose was given by the legislature, in view of its sovereignty, the intent to confer such authority should be clearly manifested. To ascertain whether such authority had been granted in this particular tort claim, the court examined the legislative history of the provision giving the "Superior Court jurisdiction of all claims against the Commonwealth . . . for the payment of money."[31] It concluded that the statute was confined to actual contracts for monetary payment and did not authorize a suit against the Commonwealth for the negligence of its servants. Since the court assumed that the extension of any waiver must come from the legislature, it ruled that if the legislature had intended to extend liability to tort claims, "it certainly would have done so in express terms."[32] It was not until *Morash* that the court questioned the soundness of this rationale.[33]

Insofar as courts had extended the principle of tort immunity to municipalities, the direction had primarily been in limiting immunity predicated upon the distinction between "governmental" and "proprietary" functions.[34] This division reflects the dual character of the city as an autonomous corporation and as an agent of the state.[35] Consequently, the settled rule of law in Massachusetts had been that the municipal corporation is not liable for torts committed by its agents in the performance of governmental, political or public functions.[36] Yet, it was liable when the tort was committed in the performance of cor-

30. *Id.* at 28, 24 N.E. at 855.

31. Currently Mass. Gen. Laws Ann. ch. 258, § 1 (West Supp. 1978).

32. 152 Mass. at 32, 24 N.E. at 856.

33. In *Morash* the court recognized that sovereign immunity is a judicially created common law concept and expressly rejected the assumption that the consent of the Commonwealth to suit may be derived only from the Legislature. The Court reasoned that since governmental immunity is a judicially created concept, it can be discarded by the courts. 363 Mass. 615, 619, 296 N.E.2d 463, 465.

34. Tooke, *The Extension of Municipal Liability in Tort*, 19 VA. L. REV. 97 (1932).

35. For extensive discussion of the dual nature of the municipal corporation, *see* Borchard, *supra* note 7, 129; Tooke, *supra* note 34; in Lloyd v. New York, 5 N.Y. 369 at 375 (1851), Judge Foote explains that a municipal corporation "possesses two kinds of powers: one governmental and public, and, to the extent that they are held and exercised is clothed with sovereignty, the other private, and to the extent that they are held and exercised, is a legal individual. The former are given and used for public purposes; the latter for private purposes. While in the exercise of the former the corporation is a municipal government and while in the exercise of the latter is a corporate legal individual."

36. Orlando v. Brockton, 295 Mass. 205, 207-08, 3 N.E.2d 794 (1936); Bolster v. Lawrence, 225 Mass. 387, 389, 114 N.E. 722, 723 (1917).

porate, private or ministerial functions.[37] This rule was derived from the English case of *Russell v. Men of Devon*[38] which the Supreme Judicial Court relied upon in *Mower v. Inhabitants of Leicester,*[39] "for the proposition that a municipal corporation is not liable at common law to an individual for neglect of a duty owed to the public generally."[40]

To distinguish between "public" and "ministerial" functions, the courts had focused upon various criteria and justifications which they deemed controlling or persuasive. Thus, aside from the argument derived from the sovereign immunity of the city as agent of the state, immunity had been grounded on the theories that: the city derives no pecuniary benefit from the exercise of public functions;[41] in the performance of public governmental duties, the officers are agents of the state and not of the city, and therefore the doctrine of *respondeat superior* does not apply;[42] cities cannot properly perform their functions if liable for the torts of their employees;[43] the city should not be liable for negligence in the performance of duties imposed upon it by the legislature but only in the case of those acts voluntarily assumed under general powers;[44] powers exercised for the benefit of the public at large are governmental, but those conferred for the government's own benefit and by reason of its nature as a municipal corporation are corporate.[45]

The alleged distinction between acts beneficial to the public at large and those beneficial to the city itself or the local community alone ("public" versus "ministerial" functions) as a test of municipal tort liability lacked substantial foundation.[46] Dissatisfaction with these classifications had been expressed by the Supreme Judicial Court[47] yet,

37. Bolster v. Lawrence, 225 Mass. 387, 390, 114 N.E. 722, 723 (1917.)

38. 100 Eng. Rep. 359 (K.B. 1788). Plaintiff sued the men dwelling in the court of Devon to recover damages for an injury to his wagon as a result of a bridge being out of repair. The court held that although upon principle the plaintiff's were entitled to recover satisfaction, no Act of Parliament had yet made the inhabitants of a county at large liable for negligence. The absence of a statute supplying a remedy was fatal to the cause of action.

39. 9 Mass. 247 (1812).

40. *Governmental Tort Immunity, supra* note 7, at 534-35.

41. Hill v. Boston, 122 Mass. 344 (1877).

42. *Id.*

43. Riddle v. Proprietors of Locks and Canals, 7 Mass. 187 (1810); Coolidge v. Brookline, 114 Mass. 596 (1874).

44. Bigelow v. Randolph, 14 Gray 541 (Mass. 1861); Dickinson v. Boston, 188 Mass. 595, 75 N.E. 68 (1905).

45. Hill v. Boston, 122 Mass. 344 (1877).

46. The absurdity of such a test was pointed out by the *Whitney* court. It is odd that a person may recover against a city or town for an injury caused by a water department employee but not for one caused by a fire department employee. Whitney v. City of Worcester 1977 Mass. Adv. Sh. 1713, 1722, n.9.

47. Starting with Morash and Sons, Inc. v. Commonwealth, 363 Mass. 612, 615, 296 N.E.2d 461, 464 (1973) the court began to recognize the unsoundness of the sovereign immunity doctrine. This view was reiterated in Caine v. Commonwealth, 368 Mass. 815, 355 N.E.2d 340, 341 (1975);

until *Whitney* the Court had deferred the possible abolition of this doctrine to the legislature.[48]

In *Whitney* the Supreme Judicial Court confronted the issue of the continued viability of the existing governmental immunity doctrine in the Commonwealth. Kris Whitney, a six year old first grader who was completely blind in his left eye and with limited vision in his right due to congenital glaucoma was enrolled in the Downing Street School under a program adopted by the school committee members and implemented by the superintendent of schools. The purpose of this program was to integrate handicapped children into the public school system.[49]

On the morning of the incident, Kris' father informed Kris' classroom teacher, also a defendant in the case, that his son's sighted eye was hemorrhaging which further impaired his vision. Nevertheless, the teacher directed Kris to attend afternoon recess which required him to pass through an allegedly defective door without any supervision or assistance. Plaintiff contended that this door had been in a dangerous condition for awhile and that the defective closing mechanism caused it to swing shut, striking Kris on the head. After the incident, Kris sought the aid of his classroom teacher and assistant principal, but was ordered by both to remain in his classroom. Because of the consequent delay in treatment, Kris suffered loss of sight in his right eye and is now totally blind. Kris alleged negligence on the part of (1) his classroom teacher and assistant principal for failure to seek immediate medical attention; (2) the school committee members and the superintendent of schools for failing to provide any particular help or supervision for Kris, or other handicapped children similarly integrated under this program; and (3) the school custodian for failure to repair the defective closing mechanism on the door.[50]

The court expressed its intention to "abrogate the doctrine of municipal immunity in the first appropriate case decided by this court after the conclusion of the next (1978) session of the Legislature, provided that the Legislature has not itself acted definitively as to the doc-

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Hannigan v. New Gamma-Delta Ch. of K.S. Frat. Inc., 367 Mass. 658, 662, 327 N.E.2d 882, 884 (1975); and Kris Whitney v. City of Worcester, 1977 Mass. Adv. Sh. 1713, 1715, 366 N.E.2d 1210, 1212 (1977).

48. Caine v. Commonwealth, 368 Mass. 815, 816, 355 N.E.2d 340, 341 ("we are not at present disposed to attempt by decision to declare how far the Commonwealth's immunity should be eliminated; preferably the matter should be dealt with by the Legislature").

49. 1977 Mass. Adv. Sh. at 1731, 366 N.E.2d at 1218.

50. *Id.*

trine."[51] Further, such abrogation would be retroactive to 1973, the date of the *Morash* decision.[52] The case was remanded to the Superior Court and a continuance was granted until either the Legislature acted or the 1978 Legislative session ended without a statutory enactment.[53] Yet the court went beyond this proclamation and outlined specific guidelines for the imposition of tort liability on a municipality or the Commonwealth which the court found acceptable.[54]

In defining the extent to which the Commonwealth or its municipalities should be liable in tort for the actions of its employees, the court in *Whitney* expressed as the proper dividing line the distinction between "those functions which rest on the exercise of judgment and discretion and represent planning and policy making, and those functions which involve the implementation and execution of such governmental policy or planning."[55] The court justified such separation by relying on its widespread recognition, specifically its adoption in the FTCA's "discretionary function exception."[56]

In essence, the court embraced one of the most highly litigated exceptions of the FTCA, one whose interpretation has been shrouded with ambiguity and uncertainty.[57] In endorsing this limitation on government responsibility for injuries to its citizens, the court reasoned that "when the particular conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning, government entities should remain immune from liability."[58] Further, inquiry into such decisions in a tort suit might jeopardize the quality and efficiency of government itself and endanger the creative exercise of political discretion and judgment through the "inhibiting influence of potential legal liability asserted with the advantage of hindsight."[59] Although the court stated that a new analytical approach to the doctrine of sovereign immunity should now be taken, their analysis was still based "upon considerations of . . . public policy"[60] which have been relied upon in defending government non-

51. *Id.* at 1715, 366 N.E.2d at 1212.
52. *Id.*
53. *Id.*
54. *Id.* at 1726-29, 366 N.E.2d at 1216-1217.
55. *Id.* at 1724, 366 N.E.2d at 1216.
56. *Id.*; The "discretionary function exception" is found in 28 U.S.C. § 2680 (1970).
57. Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception,* 31 WASH. L. REV. 207, 208-09 (1956); for a more detailed discussion of the discretionary function exception and the Massachusetts Supreme Judicial Court's application of it *see* pp. 890-96.
58. Whitney v. City of Worcester, 1977 Mass. Adv. Sh. 1713, 1726, 366 N.E.2d at 1210, 1216 (1977).
59. *Id.* at 1726, 366 N.E.2d at 1216.
60. *Id.* at 1723, 366 N.E.2d at 1215.

responsibility in torts and which will guide the court in interpreting subsequent legislation.

After the *Whitney* decision there were several attempts to adopt a comprehensive scheme modifying the common law doctrine of sovereign immunity. Senate bill 1647 (formerly 1528), introduced by Senator Robert E. McCarthy (Democrat-East Bridgewater) was adopted by the House of Representatives and the Senate on July 11, 1978 and signed into law on July 20, 1978. Its predecessor, Senate 683 (formerly 1878) was originally submitted in December, 1977.[61] It died in the Senate Ways and Means Committee at the end of the 1977 legislative session after a special subcommittee had been established to examine proposals of the bill.[62]

Senate bill 1647 is a comprehensive scheme abrogating the doctrine of sovereign immunity modeled after the FTCA.[63] It basically provides a general waiver of governmental tort immunity limited only by enumerated exceptions. The bill states that "[p]ublic employers[64] shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ."[65] Furthermore, the bill chooses the fault basis of liability.[66] Notably, however, since governmental immunity was not a creature of statute but rather of case law (a common law defense),[67] the court had the power to abrogate and modify the doctrine as it deemed fit. A subsequent statutory enactment supersedes a holding of the Supreme Judicial Court, by virtue of the powers vested in

61. 6 MASS. LAWYERS WEEKLY 25, Col. 2.

62. Interview with office of Senator Robert E. McCarthy, Democrat - East Bridgewater (Jan. 25, 1978).

63. 6 MASS. LAWYERS WEEKLY 25, Col. 2.

64. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 1) defines "public employer" to include "the commonwealth and any county, city, town or district. . . ."

65. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 2).

66. Two basically different philosophic theories of tort liability have been identified by scholars as competing for acceptance in American law today. The older and traditional theory, founded upon common law conceptions of individualism and self-reliance as ultimate standards of social policy, imposes tort liability primarily upon the basis of fault. F.V. HARPER & F. JAMES, THE LAW OF TORT §§ 12.1-4 (1956) and authorities there collected. A more recent tendency as exemplified in the workmen's compensation acts is to impose liability without regard to fault on the theory that the victims of an enterprise should be compensated for their loss and the costs distributed over the beneficiaries of the enterprise which created the risk. *See* K. C. DAVIS, 3 ADMINISTRATIVE LAW TREATISE, § 25.17 (1958); Blachly & Oatman note 8 *supra*.

Leading scholars have suggested that in the law of governmental tort liability there may be even more justification for expanding the risk theory than in respect to private torts, for government is the ideal loss-spreader, especially if its taxes are geared to ability to pay and the government entity is large enough. Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A. L. REV. 463; K. C. DAVIS *supra*.

67. K. C. DAVIS note 6, *supra; see also* Morash & Sons, Inc. v. Commonwealth, 363 Mass. 612, 615, 296 N.E.2d 461, 463.

the Legislature,[68] and the court is bound by such a statute "barring any possible constitutional infirmities."[69]

An extremely controversial issue surrounding passage of legislation governing state and municipal responsibility in tort was the extent to which the government should compensate tort victims.[70] One way of bringing Massachusetts' outdated laws into conformity with contemporary notions of fairness to tort victims is to be generous in formulating standards imposing liability but to limit the amount of recovery.[71] Unlike the FTCA which does not impose a ceiling on the amount an injured person may recover from the sovereign,[72] Senate bill 1647 contains a $100,000 limitation on the amount of recovery.[73] Prior bills provided for a $20,000 limitation established by the Judicial Council[74] and a $25,000 limitation established by the Senate Ways and Means Committee[75] and the Attorney General's Office.[76] While the $100,000 limitation has been criticized as excessive,[77] Senator Robert McCarthy, one of its most outspoken advocates urges otherwise.[78]

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68. "[F]ull power and authority are hereby given and granted to the [legislature] . . . to make, ordain, and establish, all statutes. . . ." Michie/Law Co-op. MASS. ANN. LAWS ch. 1 § 36 (1967).

69. Whitney v. City of Worcester, 1977 Mass. Adv. Sh. 1713, 1718, 366 N.E.2d 1210, 1213 (1977).

70. Memorandum by James A. Kelley, Jr., Chairman, Senate Ways & Means Committee, Boston (Aug. 30, 1977); Interview with James A. Kelley, Jr., Chairman, Senate Ways & Means Committee in Boston (November 10, 1977); letter from Thomas R. Kiley, First Assistant Attorney General, to Joseph Burke, Secretary & Counsel of House Ways & Means Committee (April 28, 1977).

71. Twenty-five states whose statutes provide for governmental responsibility in tort impose limits on the amount of recovery. K. C. DAVIS note 66 *supra* (Supp. 1976).

72. Although initial bills provided for a $7,500 limitation on recovery the final bill was passed without such a ceiling. *Hearings on H.R. 7236 before subcomm. no. 1 of the Comm. on the Judiciary*, 76th Cong., 3rd sess., 882 (1940).

73. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258 § 2) provides:

> Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of one hundred thousand dollars.

74. Memorandum by James A. Kelley, Jr., Chairman, Senate Ways & Means Committee, Boston (Aug. 30, 1977).

75. *Id.*

76. Interview with James A. Kelley, Jr., Chairman, Senate Ways and Means Committee, in Boston (Nov. 10, 1977); letter from Thomas R. Kiley, First Assistant Attorney General, to D. Joseph Burke, Secretary and Counsel of House Ways and Means Committee (April 28, 1977).

77. Letter from Thomas R. Kiley, First Assistant Attorney General, to D. Joseph Burke, Secretary and Counsel of House Ways and Means Committee (April 28, 1977); letter from Robert E. McCarthy, Senator, Democrat - East Bridgewater, to James A. Kelley, Jr., Chairman, Senate Ways and Means Committee (Aug. 29, 1977).

78. Letter from Robert E. McCarthy, Senator, Democrat - East Bridgewater, to James A. Kelley, Jr., Chairman, Senate Ways and Means Committee (Aug. 29, 1977).

A frequent argument supporting a maximum amount of recovery is that compensating victims for injuries caused by government employees would cause "crippling expense" to the state.[79] This contention reflects the underlying rationale relied on in the past to justify governmental immunity in tort: general treasury funds should be devoted to public purposes, not diverted to compensate private citizens for injuries. An examination of the fiscal condition of states which have allowed governmental liability in tort, however, demonstrates that this fear is unfounded.[80] With the availability of insurance[81] the cost of administering a tort liability program is kept at a reasonable level.[82] Although Massachusetts has no record of its total disbursements to claimants "pursuant to special legislation passed on their behalf,"[83] it is estimated that the Commonwealth or its municipalities currently have 300 pending actions, with a turnover of about 150 yearly.[84]

Nevertheless, regardless of the funds needed to compensate individual claimants and to effectively maintain a workable compensation program, the cost argument should not be paramount in determining governmental liability, since the critical question is whether defendant's conduct has fallen below this standard.[85] Although the $100,000 ceiling advocated by Senator Robert McCarthy (sponsor of the bill) is more realistic than a $20,000 or $25,000 limitation, in terms of compensating tort victims for their actual losses, it has been suggested that in fact realistic limits are "probably not low enough to have any significant effect on the amount of claims paid or rate of insurance premiums."[86] Thus, it can be argued that imposing a maximum amount of recovery on claimants is unnecessary, since there would be few cases in which

79. *See Myth of the Crippling Judgment*, 18 ATLA NEWSLETTER 452 (1975); Borchard, *Proposed State & Local Statutes Imposing Public Liability in Tort*, 9 LAW & CONTEMPORARY PROBLEMS 282 (1942); *Governmental Tort Immunity, supra* note 7, at 532; Note, *An Insurance Program to Effectuate Waiver of Sovereign Tort Immunity*, 26 U. FLA. L. REV. 89, 90 (1973).

80. *Myth of the Crippling Judgment*, 18 ATLA NEWSLETTER 452 (1975); *Insurance Program* note 79 *supra*.

81. Senate bill 1647 has a provision granting cities and towns the authority "to pay a proper charge for effecting insurance. . . ." 1978 Mass. Acts ch. 512, § 8 (1) (amending MASS. GEN. LAWS ch. 40).

82. In California, which has maintained an effective insurance program since 1963, the cost to the state, including administrative expense has been approximately $1,198,000 per year. In Hawaii, where there was a statutory enactment abolishing state immunity in tort in 1963, the imposition of liability resulted in claims totalling approximately $120,000 in 1972. *See Insurance Program* note 79 *supra*.

83. *Governmental Tort Immunity, supra* note 7, at 533.

84. Memorandum by James A. Kelley, Jr., Chairman, Senate Ways and Means Committee, Boston (Aug. 30, 1977).

85. *Governmental Tort Immunity, supra* note 7, at 533; Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 23-24, 163 N.E.2d 89, 95 (1959), *cert. denied*, 362 U.S. 968 (1960).

86. Henke, *Oregon's Governmental Tort Liability Law From A National Perspective*, 48 ORE. L. REV. 95, 121 (1968).

liability would exceed the limitation and such a limitation prevents "justified recovery without offering the counterbalancing benefit of reduced insurance premiums."[87]

The attempt to limit the amount an injured citizen may recover for injuries caused by government employees reflects the fear that an unrestrained demand to satisfy tort judgments from public treasuries would adversely affect the Commonwealth's growth. It reflects the traditional rationale in tort law that it is wiser to let the loss lie where it has fallen in certain instances than to risk an obstruction in the development and functioning of government. In tort law, this approach has been replaced by a new rationale, capacity to bear the loss.[88] The nature of governmental action is such that certain types of public functions expose the public to risks which are even greater than is the case with private conduct. The underlying issue is whether the danger of injury from the particular public activity, even where conducted with reasonable and ordinary care, is unusually large or widespread, or the nature of the injury exceptionally severe or permanent in proportion to the social desirability of the activity. An affirmative answer in a particular situation would suggest that the public entity properly should be charged with the risk of loss which resulted from its decision to engage in the activity.

In an attempt to comply with *Whitney*[89] each of the bills which had been introduced into the Legislature subsequent to the decision, had provided that abrogation of the doctrine of sovereign immunity would be retroactive to May, 1973,[90] the date of *Morash*. Senate bill 1647,

87. *Insurance Program, supra* note 79, at 101.

88. Blachly & Oatman, *supra* note 8, at 217.

89. Memorandum by James A. Kelley, Jr., Chairman, Senate Ways and Means Committee, Boston (Aug. 30, 1977); Letter from Robert E. McCarthy, Senator, Democrat - East Bridgewater, to James A. Kelley, Jr., Chairman, Senate Ways & Means Committee (Aug. 23, 1977) in which Senator McCarthy states: "[e]nclosed please find suggested amendments to Senate bill [683] . . . these amendments will bring this legislation into full conformity with the . . . recent decision [of] *Whitney v. City of Worcester.*"

90. S. 1878 (675) and S. 1528 (683) both contained the following provision:

> any claim for damages upon a cause of action arising between May fourteenth, nineteen hundred and seventy-three and December thirty-first, nineteen hundred and seventy-five, inclusive, may be brought . . . by filing a complaint in the court of appropriate jurisdiction on or before December thirty-first, nineteen hundred and eighty, and any claim for damages upon a cause of action arising between January first, nineteen hundred and seventy-six and January first, nineteen hundred and seventy-eight, inclusive, may be brought . . . within four years of the date upon which such cause of action arose.

This section further provides that

> any claim for damages brought against any public employee . . . may be amended pursuant to the provisions of the Massachusetts Rules of Civil Procedure to substitute a public employer, . . . as a party defendant or third party defendant to such cause of action. If such claim has been settled or compromised or has resulted in final judgment . . . no such amendment shall be permitted unless such claim has been dismissed for lack of a proper party defendant or third-party defendant. . . .

Ch. 258 § 18 A.

however, provides for retroactivity to August 16, 1977, the date of *Whitney*.[91] Opposition to retroactivity reflects a fear of the retroactive effect which could create a chaotic system of law that would be burdensome to the government entities concerned.[92]

In *Whitney*, the court presented two main arguments supporting retroactivity. First, it observed that governmental tort liability has been adequately refined by its use in prior cases and its voluntary assumption by the legislature. In addition, the court noted that it had satisfactorily indicated its intention to modify the doctrine to the extent that it need not circumscribe the rules it has outlined exclusively to prospective operation. Second, the court stressed the importance of fairness and justice to tort victims who unsuccessfully challenged the sovereign's immunity from liability after the *Morash* decision.[93]

While the court recognized the potentially enormous fiscal consequences of retroactivity, it explained that the result would not be "disastrous" because not *all* causes of action against the government would be sustainable.[94] Claims would still be subject to the Statute of Limitations, and imposition of liability would result only after a finding that both the government was negligent and the conduct in question did not fall outside the scope of liability as defined by the court, and hence, was not within the sphere of retained immunity.

Basically, five legislative solutions to the common law defense of sovereign immunity have been developed throughout the forty-five states which have considered the problem, none of which impose total liability.[95] Of the five, each of the various bills introduced into the legislature since *Whitney*, including 1647, resemble the method of drafting exemplified by the FTCA.[96] Under this form of statutory waiver, the state accepts liability to the same extent as a private individual, but exceptions are specifically stated in the statute.[97] This method of draft-

91. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 16) provides: "This act shall take effect upon its passage and shall apply to all causes of action arising on or after August sixteenth, nineteen hundred and seventy-seven."

92. Memorandum by James A. Kelley, Jr., Chairman, Senate Ways and Means Committee, Boston (Aug. 30, 1977).

93. 1977 Mass. Adv. Sh. 1713, 1735, 366 N.E.2d 1210, 1220.

94. *Id.*

95. For a compilation and discussion of these five approaches *see Insurance Program, supra* note 79, at 99-103.

96. 28 U.S.C. ch. 171 (1970); in fact both S. 1878 (675) and S. 1647 (1528) are modeled after the FTCA.

97. The specific exemptions are found in 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 10). They are as follows:

a. any claim based upon an act or omission of a public employee when such employee is exercising due care in the execution of any statute or any regulation of a public employer, or any municipal ordinance or bylaw, whether or not such statute, regulation, ordinance or bylaw is valid;

b. any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, act-

ing can be criticized because it does not foreclose the uncertainties inherent in judicial interpretation and thus compounds insurance difficulties.[98] In fact, while there has been scant litigation concerning most provisions of the FTCA, the interpretation and application of the "discretionary function" exception has been strenuously disputed.[99]

The scope of the "discretionary function" exception has been central to numerous cases brought under the FTCA and will likely be determinative in many future Massachusetts cases. In *Whitney*, the Supreme Judicial Court endorsed excluding from liability "those functions which rest on the exercise of judgment and discretion."[100] This represented "the appropriate dividing line" for imposing liability and retaining immunity. Judicial interpretation of when liability begins and discretion ends will be crucial in determining the scope of liability in tort for governmental agents under 1647. The decisions rendered under the FTCA reflect the great difficulty experienced by courts in attempting to delineate precise boundaries for "discretionary activity." Indeed, an analogy may be drawn to litigation arising out of the FTCA's "discretionary function" exception.

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ing within the scope of his office or employment, whether or not the discretion involved is abused;

c. any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations or interference with contractual relations;

d. any claim arising in respect of the assessment or collection of any tax, or the lawful detention of any goods or merchandise by any law enforcement officer.

An exhaustive study of the legislative intent behind passage of these similar exemptions in the FTCA reveal explanations given for these provisions which are often ambiguous or inconclusive. "The exemptions . . . relate to certain governmental activities which should be free from the threat of damage suits...." *Hearings on H.R. Rep. No. 2245,* 77th Cong., 2d Sess. 10 (1942). The legislative history indicates that the purpose behind exemption (a) was to prevent constitutional challenges of statutes, ordinances or bylaws vis-a-vis a tort suit. For a complete development of the intended function of the discretionary function exception (b) *see Hearings on H.R. Rep. No. 2245,* 77th Cong., 2d Sess. 10 (1942). Proponents of an earlier bill seemed to fear the inflamatory nature of some of the intentional torts excluded in (c), such as possible third degree beatings by the FBI. *See Hearings before the Senate Committee on the Judiciary on S. 2690,* 76th Cong., 3d Sess. 39 (1940). The exception (d) from the scope of liability is most probable since the Tax Court of the United States has jurisdiction over claims for rebate of taxes. 26 U.S.C. § 1100 (1940 and Supp. 1946).

98. For a brief discussion of the problems resulting from such a model *see Insurance Program supra* note 99, at 101.

99. The "discretionary function exception" is found in 28 U.S.C. § 2680 (a) (1970). A similar provision is found in 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 10 (b)). It provides for the retention of immunity for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused."

100. 1977 Mass. Adv. Sh. 1713, 1724, 366 N.E.2d at 1210, 1215-16.

Since 1953, *Dalehite v. United States*[101] has been the accepted starting point for determining what activity Congress sought to exempt from tort liability. *Dalehite* involved claims against the United States totalling 200 million dollars for deaths and property loss occasioned by the explosion of a shipload of ammonium nitrate fertilizer produced and distributed under government control and supervision for export to certain occupied countries at the close of World War II.[102] Despite the district court's finding of government negligence, the Supreme Court of the United States denied recovery since the negligent acts were found to have occurred in the performance of a "discretionary function." Of all the factors mentioned in support of this result perhaps most cited[103] is the Court's statement that "the decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the government's fertilizer program."[104]

The "planning-operational" distinction has been given considerable emphasis by numerous courts in setting boundaries for government liability in tort — specifically, the "discretionary function" exception.[105] As an analytical tool, however, the distinction is of marginal value in resolving all but the most obvious cases. For instance, the driving of an automobile by a government employee may quite easily be seen as operational activity as contrasted to the obvious planning level endeavors of the Secretary of State in negotiating a treaty. Between these two extremes, there exists an infinite variety of decisions and decision-makers less susceptible of such characterization; the activity of FBI agents in attempting to apprehend a hijacker is such a case.[106] In any event, to be avoided is what one commentator has criticized as a

> tendency of the . . . courts to emphasize the literal meaning of the term "discretionary," along with a tendency to assume that anything in the nature of "planning" calls for immunity . . . . Those tendencies are undesirable because liability for highly discretionary action can often be imposed without undue judicial

101. 346 U.S. 15 (1953).

102. *Id.* at 17-22.

103. *See, e.g.*, United States v. Gregory, 300 F.2d 11, 13 (10th Cir. 1962); Eastern Air Lines v. Union Trust Company, 95 U.S. App. D.C. 189, 221 F.2d 62, 76 (1955), *aff'd per curiam sub nom.* United States v. Union Trust Co., 350 U.S. 907 (1955).

104. 346 U.S. 15, 42 (1953).

105. *See, e.g.*, American Exchange Bank of Madison, Wis. v. United States, 257 F.2d 938 (7th Cir. 1958); Eastern Air Lines v. Union Trust Co., 95 U.S. App. D.C. 189, 221 F.2d 62 (1955), *aff'd per curiam sub nom.* United States v. Union Trust Co., 350 U.S. 907 (1955). *Cf.* United States v. Gregory, 300 F.2d 11 (10th Cir. 1962).

106. *Compare* United Air Lines v. Weiner, 335 F.2d 379 (1964) *with* Indian Towing Co. v. United States, 350 U.S. 61 (1955).

> assumption of functions that can be better performed by administrators or executives.[107]

A meaningful inquiry into the scope of the "discretionary function" exception must focus upon the reasons for sovereign immunity and purposes sought to be achieved by its qualified abolition.

The legislative history of the FTCA speaks of section 2680(a) as a

> highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the government growing out of an authorized activity such as a flood control or irrigation project where no negligence on the part of any government agent is shown, and the only ground for suit is the contention that the same conduct by a private person would be tortious . . . .[108]

The court in *Dalehite* stressed that the Act's waiver of immunity was not to encompass acts of a governmental nature or function and characterized the "discretion" protected by section 2680(a) as that of the executive or the administrator to act according to one's judgment of the best course . . . ."[109] Although "discretionary" immunity was thus referenced to executive or planning-level activity, the Court made it clear that protection extended to the actions of lesser officials charged with implementation of discretionary plans and programs.

> It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of section 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising perhaps abusing discretion.[110]

While the court in *Dalehite* liberally interpreted the "discretionary function" exception to exempt from liability activities involving a degree of discretion at the policy making level yet carried out by subordinates, the Court in *Indian Towing Co. v. United States*[111] construed the exception narrowly. In imposing liability for damages resulting from Coast Guard negligence in operating a lighthouse, the Court found that while the decision to undertake the lighthouse service was discretionary, there was no discretion to provide the service in a negligent manner.[112] Likewise, the court in *Rayonier v. United States*[113]

107. K. C. DAVIS, ADMINISTRATIVE LAW TREATISE 846 (Supp. 1970).
108. *H.R. Rep. No. 1287*, 79th Cong., 1st Sess. 5-6 (1945).
109. 346 U.S. at 34.
110. 346 U.S. at 36.
111. 350 U.S. 61 (1955).
112. *Id.* at 69.
113. 352 U.S. 315 (1957).

held that the discretionary function exception did not exempt the United States from liability for the negligence of Forest Service employees in fighting a forest fire.[114]

It should be noted that both *Indian Towing* and *Rayonier* are cases concerned primarily with interpreting 28 U.S.C. section 2674.[115] While this may minimize their precedential value, the decisions are an instructive analysis of the policies embodied in the FTCA; and in *Rayonier* the following language reflects what may be viewed as an expanded concept of claims within the Act's coverage.

> It may be that it is "novel and unprecedented" to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all encompassing immunity from tort action and to establish novel and unprecedented government liability.[116]

The rules governing discretionary functions are more easily stated than applied, and where discretion ends and actionable negligence begins must ultimately be determined on a case by case basis. Yet some insight may be gained into how the Supreme Judicial Court will define the scope of liability with respect to 1647 by examining the language used in *Whitney*.

Specific language substantiates the premise that the Supreme Judicial Court's interpretation of the "discretionary function" exception will expand the scope of liability and reflect a broader concept of claims which come within the coverage of Senate bill 1647. In essence, the Supreme Judicial Court's interpretation of the exemption comports with the interpretation expressed in *Indian Towing* and *Rayonier*. Under *Whitney*'s formulation, the focus of attention is shifted from the

> capacity in which the officer/agent was acting to the specific act or omission complained of as tortious. [If] the particular conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices, with respect to public policy and planning, government entities should remain immune . . . . [If] the particular conduct . . . involves the *carrying out of previously established policies or plans*, such acts should be governed by the established standards of tort liability applicable to individuals.[117]

Thus, from the court's perspective, subordinates engaged in activities undertaken in accordance with a plan or program which involved the

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114. *Id.* at 317-18.

115. 28 U.S.C. § 2674 of the FTCA makes the United States liable for the negligence of its employees "in the same manner and to the same extent as a private individual under like circumstances. . . ."

116. 352 U.S. at 319.

117. 1977 Mass. Adv. Sh. 1713, 1726, 366 N.E.2d 1210, 1216 (emphasis added).

weighing of alternatives and a high degree of discretion would be liable if they carried out that activity negligently. Similarly, the Chief Petty Officer of the Coast Guard in *Indian Towing* incurred liability for negligently inspecting the lighthouse at Chandleur's Island (which was imputed to the United States under the doctrine of *respondeat superior*)[118] even though the initial decision to periodically inspect the lighthouse was one involving the weighing of alternatives and a high degree of discretion.

That the court will expand the scope of liability imposed on the Commonwealth and its municipalities is further substantiated by the fact that the court in *Whitney* expressly rejected the traditional "misfeasance - nonfeasance" distinction as a "relevant factor."[119]

In the early common law one who injured another by a positive, affirmative act, was held strictly liable.[120] Courts were more occupied with the flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer harm because of his or her omission to act. Consequently, there arose a distinction between active misconduct causing positive injury to others, and passive inaction or a failure to take steps to protect them from harm.[121] Under the new formulation set out in *Whitney*, a court would not examine whether the conduct consisted of action or inaction but rather whether the conduct took place at the "planning" or the "operational" level.[122]

Recognizing that the discretionary function exception is "hardly a model of precision and predictability,"[123] the *Whitney* court attempted to clarify its formulation by posing a series of questions deemed relevant in determining whether liability should be imposed.[124] The first inquiry, whether the injury producing conduct is "an *integral* part of governmental policy making or planning,"[125] further substantiates the premise that subordinates would be liable for injuries occurring as a result of activities executed pursuant to a prior policy decision. Subordinates carrying on such activities would not be considered engaging in conduct which is an essential aspect of governmental decision making. The next two questions relate to the underlying policy considerations identified and endorsed by the court as significant factors in restricting

118. *See* W.L. PROSSER, THE LAW OF TORTS 458 (1971).
119. 1977 Mass. Adv. Sh. at 1730, 366 N.E.2d at 1218.
120. PROSSER, *supra* note 118, at 338.
121. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219 (1908).
122. 1977 Mass. Adv. Sh. at 1730, 366 N.E.2d at 1218.
123. *Id.*
124. *Id.*
125. *Id.* (emphasis added).

the scope of liability. The principle articulated was that activities which involve a high degree of discretion and judgment "should be insulated from a form of review which might impede governmental operations by subjecting governmental decision making to after-the-fact judicial tort analysis."[126] The court would examine whether "the imposition of tort liability would jeopardize the quality and efficiency of the governmental process" and whether "a judge or jury could review the conduct in question without usurping the power and responsibility of the legislative or executive branches."[127] Reliance on these questions to determine liability also indicates that a broad scope of liability may be recognized judicially in cases interpreting Senate bill 1647. Since liability for certain types of discretionary activity can be imposed without undue judicial assumption or interference with functions performed by administrators or executives, these considerations favor liability in situations where characterization of the function as "discretionary" is uncertain. Further, the court expressly states its position in favor of liability where "such considerations are not determinative."[128]

In applying their formulation to the facts of the *Whitney* case, the court expressly adopted a wide scope of liability. Both Kris' classroom teacher and the assistant principal would incur liability (which would be imputed to the City of Worcester) for ordering Kris (1) to proceed to recess in the course of the normal school routine without supervision and (2) to remain in the classroom after the accident.[129] Although both the teacher and the assistant principal could be considered "subordinates" carrying out a policy which involved a high degree of discretion and therefore within the discretionary function exception, the Supreme Judicial Court chose the interpretation enunciated by *Indian Towing Co.* and *Rayonier*. The *Whitney* court observed that "[w]hile this conduct undoubtedly did involve the exercise of *judgment* and discretion, the nature of that judgment is not qualitatively different from the judgments of private individuals which are reviewed every day through the mechanism of an action in tort."[130] The court stated that Kris' classroom teacher and assistant principal failed to take appropriate action in circumstances which were known or should have been known to them at the time. While under prior decisions the defendant's failure to act would be considered nonfeasance and therefore immunity would attach, under the new *Whitney* formula, both the school teacher and the assistant principal would not be in-

126. *Id.* at 1724, 366 N.E.2d at 1215.
127. *Id.* at 1727, 366 N.E.2d at 1217.
128. *Id.* at 1728, 366 N.E.2d at 1217.
129. *Id.* at 1732, 366 N.E.2d at 1218-19.
130. *Id.* at 1733, 366 N.E.2d at 1210 (emphasis added).

sulated from liability despite the absence of misfeasance. Concerning the allegation of negligence against the school committee members and superintendent for implementing the program by which Kris was integrated into the public school system without supervision, under the principles outlined by the court these defendants would fall outside the scope of liability.[131] The court explained that "the adoption of a plan to integrate handicapped pupils fully into the public schools falls precisely into the area of retained immunity. Such a plan is an integral part of basic educational policy planning involving complex considerations . . . ."[132]

Senate bill 1647 grants jurisdiction to the Superior Court[133] over all money claims for loss of property, personal injury or death[134] caused by the negligent or wrongful act of a government employee acting within the scope of his or her employment or office.[135] Any settlement in excess of $20,000 requires approval by a judge of the Superior Court.[136] The bill also includes a provision allowing the "executive officer of a public employer"[137] to arbitrate, compromise or settle any claim for damages cognizable under the bill provided that any "award, compromise or settlement in excess of two thousand five hundred dollars shall be made only with the prior approval of the public attorney for such public employer; provided further, however, that in any case where the public employer is the Commonwealth, any award, compromise or settlement in excess of twenty thousand dollars shall be

131. *Id.*

132. *Id.* at 1734, 366 N.E.2d at 1219.

133. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258 § 3) provides: "[t]he superior court shall have jurisdiction of all civil actions brought against a public employer." For the definition of "public employer" *see* note 64 *supra*; *see also* 6 MASS. LAWYERS WEEKLY 40, Col. 4.

134. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 3) states: "[a]ll civil actions brought against a public employer on a claim for damages cognizable under this chapter. . . ." The claims cognizable under ch. 258 stated in § 2 are "for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment. . . ."

135. *Id.*

136. Mass. S. 1878 (675) ch. 258, § F provided that any settlement in excess of $5,000 required approval by the superior court. This was raised to $20,000 in 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 7).

137. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 1) defines "executive officer of a public employer" as "the secretary of an executive office of the commonwealth or in the case of an agency not within the executive office, the attorney general; the adjutant general of the military forces of the commonwealth; the county commissioners of a county; the mayor of a city, or as designated by the charter of the city; the selectmen of a town or as designated by the charter of the town...."

made only with the prior approval of the secretary of administration and finance."[138] Any such "award, compromise or settlement . . . shall be made final only after approval of [the] same by a judge of the Superior Court having jurisdiction over the action."[139]

Senate bill 1647, modeled after the FTCA, includes various exceptions to its coverage.[140] To the extent that a claim falls within these exceptions, the Superior Court has no jurisdiction. By analogy to the FTCA, it appears that the defense to such a claim would be jurisdictional. Thus, what was once a substantive common law defense becomes a question of subject matter jurisdiction.

The opening words of 28 U.S.C. section 1346(b) are "subject to the provisions of Chapter 171 of this title" the district court shall have jurisdiction over certain tort claims against the Government. In section 2680 of the FTCA which specifically sets forth the various types of excluded claims the opening words are "the provisions of this chapter [171] and section 1346(b) of this title *shall not apply to* . . ."[141] followed by a list of the excepted claims. From this it has been held that the jurisdictional grant of section 1346(b) has no application to a claim specified in section 2680.[142]

The jurisdictional defense is significant because it cannot be waived by the failure of the Attorney General, adjutant general, county commissioners, or other such "executive officers" defending a tort suit against the Commonwealth or its municipalities to raise it in the government's answer or at the trial in Superior Court. It may be raised by the government for the first time on appeal,[143] or even by a court *sua sponte*.[144]

Senate bill 1647 contains a provision requiring the plaintiff to file, with the appropriate agency, or with the "executive officer of such public employer"[145] an administrative claim as a jurisdictional prerequisite to commencing a civil action.[146] By analogy to the FTCA,[147] if a

138. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 5).

139. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 7).

140. *See* note 97 *supra*.

141. The language of 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258) is virtually identical. The opening words of § 10 are: "The provisions of sections one to eight inclusive *shall not apply to*. . ." (emphasis added).

142. *See, e.g.*, Dalehite v. United States, 346 U.S. 15, 24 (1953); Stepp v. United States, 207 F.2d 909, 910 (4th Cir. 1953); United States v. Taylor, 236 F.2d 629, 652 (6th Cir. 1956), *cert. granted* 352 U.S. 963 (1957), *cert. dism'd* 355 U.S. 801.

143. *See, e.g.*, United States v. Taylor, 236 F.2d 629 (6th Cir. 1956), *cert. granted* 352 U.S. 963 (1957), *cert. dism'd* 355 U.S. 801.

144. For the general proposition that a jurisdictional defense may be raised any time *see* United States v. United States Fidelity and Guaranty Co., 309 U.S. 506, 513 (1940).

145. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 4).

146. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 4) states:

[a] civil action shall not be instituted . . . unless the claimant shall have first presented his

claimant files suit without having first presented it to the proper agency, the suit cannot be held in abeyance until the filing of the administrative claim; rather, it must be dismissed. This requirement is one of subject matter jurisdiction and therefore cannot be waived.[148] The policy behind such a provision is both to afford the city an opportunity to make timely investigation in order to disprove fraudulent claims and to give it a chance to settle meritorious claims out of court.[149] Legal scholars who have considered similar statutory provisions believe that with the tendency toward greater areas of liability, some such mechanism is needed to guard against "trumped-up claims."[150] With such an intended purpose, however, the effectiveness of the provision in 1647 allowing a claimant two years in which to file his or her claim is questionable. If a claimant waits two years before filing a claim, timely investigation will be prohibited; in all probability witnesses will be unavailable or their recollection will be vague. Perhaps a shorter period within which a claimant must file would be more likely to achieve the goal of the provision.[151]

Senate bill 1647 also provides that the remedy against the Commonwealth or municipality is exclusive "of any other civil action or proceeding by reason of the same subject matter. . . ."[152] The exclusiveness of the remedy only applies, however, if the public employee was "acting within the scope of his office or employment."[153] Further, it does not apply to a criminal action. Consequently, if the public employee was acting outside the scope of his employment he may be personally liable. An initial determination must therefore be made as to whether the tortfeasor was acting "within the scope of his authority." Since such a determination would ultimately come from the judiciary,[154] it is possible that an individual litigant could bring an ac-

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claim in writing to the executive officer of such public employer within two years after the date upon which the cause of action arose, and such claim shall have been finally denied by such executive officer in writing and sent by certified or registered mail, or as otherwise provided by this section.

147. The notice of claim provision in the FTCA is found in 28 U.S.C. ch. 171, § 2675.

148. *See* Driggers v. United States, 309 F. Supp. 1377 (1970); Bialowas v. United States, 443 F.2d 1047 (1971).

149. Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability,* 9 LAW & CONTEMPORARY PROBLEMS 230 (1942); *Hearings on S. 2690 before the subcomm. on the Judiciary,* 76th Cong., 3rd Sess. 39 (1940).

150. *See* Sahm, *Tort Notice of Claims to Municipality,* 46 DICK. L. REV. 1 (1942); David, *Municipal Liability in Tort in California,* 7 SO. CALIF. L. REV. 372 (1934).

151. *But see* 60 CORNELL L. REV. 417 (1975).

152. 1978 Mass. Acts ch. 512 (to be codified in MASS. GEN. LAWS ch. 258, § 2).

153. *Id.*

154. Analogy may be had to the FTCA under which the Government's counsel generally makes a determination as to whether or not the "public employee" was acting within the scope of his authority. In McGuire v. Davis, 358 F. Supp. 979 (1973) the court stated that "even though the

tion against the Commonwealth, have a subsequent judicial determination that the tortfeasor was acting outside the scope of his or her authority and be barred from recovery because the statute of limitations on the personal injury claim had run.

A further problem may arise in light of the provision limiting the amount of recovery. If the intention is to make the procedures and remedies against the Commonwealth or its municipalities the sole and exclusive remedy with an accompanying limitation on recovery there may be possible due process implications.[155]

An analysis of the guidelines set out in *Whitney*, and of judicial interpretation of language contained in Senate bill 1647, indicates an expanded scope of liability for government employees. However, admitting responsibility of government employees for injuries caused to private citizens is only the first step. With this recognition comes the difficult task of attempting to delineate the appropriate scope of government liability. Such a task cannot, however, be accomplished by relying on ancient and outdated legal and social themes or by impressing the courts with the contrived task of attempting, on a case by case basis, to balance policy considerations and devise a solution to issues which are essentially political and thus particularly within the competence of legislators.

Senate bill 1647 is an attempt to equitably balance the need to compensate tort victims for actual loss with the desire to minimize governmental responsibility and expenditure. While passage of such legislation is necessary to bring this area of the law into harmony with contemporary society, a bill which merely incorporates into statutory form the

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U.S. Attorney is of the opinion that [the public employee] was acting within the scope of employment, that view is not binding upon third-party plaintiffs, nor is it conclusively established as a fact. . . ."

155. The implication of a statutory change in the common law which imposes upon the injured party a single and exclusive remedy accompanied by a limitation on the amount of recovery when analyzed with regard to traditional notions of fair play and notice and opportunity to be heard deserves merit. If "choice" can be considered a factor to be taken into consideration when analyzing due process problems then imposing upon the individual litigant a *single remedy without their consent* may take on due process dimensions. *See* Taylor v. Cons. Ed. Co. of N.Y., Inc., 552 F.2d 39 (2d Cir. 1977) (statutory changes in common law are relevant to state action in due process context . . . where the thrust of the complaint is that the state has authorized a *nonconsensual* deprivation of property or liberty which does not conform to traditional notions of fundamental fairness as embodied in procedural requisites of constitutional law); letter from George N. Keches, Legislative Counsel to Senator Robert E. McCarthy, Democrat - East Bridgewater (Aug. 30, 1977) (some constitutional questions could arise involving due process). *But see* Duke Power Co. v. Carolina Environmental Study Group, Inc., 431 F. Supp. 203 (1977), *rev'd* 46 U.S.L.W. 4845

disorderly case law, which at times approaches a state of doctrinal chaos, is not an effective response.

Although Senate bill 1647 abrogates the traditional doctrine of sovereign immunity and thus admits responsibility of government employees for their tortious acts, it is no panacea. Reliance on the discretionary function exception to delineate the appropriate boundaries for government liability in tort subjects practitioners, judges, and injured parties to the quagmire of case law which has developed in an attempt to define it. While it is hoped that the courts will interpret the "discretionary function" exemption narrowly, as in *Indian Towing Co.*, exactly when liability will be imposed and immunity retained must still be judicially resolved in a case by case approach.

JOYCE A. FARAONE

(1978) (a North Carolina citizens group sued to overturn the federal Price-Anderson Act. The Act limits any company's liability in the event of catastrophic harm from a nuclear accident to $560 million. The court overturned the Price-Anderson Act stating that since nuclear accidents that wiped out an entire community could cause damage far in excess of the $560 million limit, the Act violated the prospective victims' constitutional rights to due process and equal protection. On appeal to the Supreme Court of the United States it was held that the act did not violate the Due Process clause of the fifth amendment since the act provides a "reasonably just" substitute for common or state tort law remedies).

BOOK REVIEW

A GUIDE TO RULE 144 (2d ed.).
By Dan L. Goldwasser. New York, New York:
Practicing Law Institute. 1978. Pp. 639. Cloth.

Recently, I had the pleasure of attending and participating in several of the Securities and Exchange Commission's "small issuer"[1] hearings held throughout the United States. The hearings were designed to obtain input from the public with respect to the problems faced by small businesses in terms of the impact of federal regulation; needless to say, they were a forum for substantial critical comment. This was to be expected, and indeed it was encouraged. However, I was struck by the fact that witness after witness, no matter how critical, no matter what the recommended alternative, no matter what the suggested amendment, was generally positive in his or her comments with respect to Rule 144 under the Securities Act of 1933.[2]

By way of background, it is unlawful to sell or offer to sell any security by use of the mails or in interstate commerce unless a registration statement is in effect for the security in question.[3] One of the more frequently utilized exemptions from this broad requirement is the so-called "private placement" exemption contained in Section 4(2) of the Securities Act of 1933.[4] Generally speaking, this exemption is available for transactions involving a limited number of people, who are informed and who take the securities in question for investment and not

1. *Examination of the effects of rules and regulations on the ability of small businesses to raise capital and the impact on small businesses of disclosure requirements under the Securities Act,* Sec. Act Rel. No. S914, March 6, 1978.
2. 17 C.F.R. 230.144 (1977).
3. 15 U.S.C. 77e (1976).
4. 15 U.S.C. 77d(2) (1976).

for purposes of resale.[5] A corollary problem arises when purchasers in a private placement attempt to resell their securities. Since the securities they hold are unregistered, such persons must look to Section 4(1) of the Securities Act of 1933, which exempts from the registration provisions of the Act "transactions by any person other than an issuer, underwriter or dealer."[6] In most situations involving Section 4(1), the key concept is that of underwriter. This term is defined in Section 2(11) of the Act as including "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security . . . ."[7] Consequently, in the usual case, a private investor may resell if in so doing he is not deemed an underwriter.

Prior to April 15, 1972, the determination of when one was an underwriter was largely subjective — depending on such amorphous concepts as "investment intent," "holding period" and "change of circumstances." Because of this, the ultimate determination was fraught with confusion, and subject to no small amount of abuse.[8] In an attempt to eliminate some of these problems, the Securities and Exchange Commission on April 11, 1972, adopted Rule 144, which became effective four days later.[9] In effect, the rule defines who is an underwriter, and interfaces with the disclosure philosophy of the Securities Act of 1933.

Although it has proved exceedingly workable, the rule does have interpretative problems, some fuzzy parameters and esoteric nuances. Its utilization, therefore, is not always a simple matter and requires understanding and guidance. Mr. Goldwasser's second edition of *A Guide to Rule 144* provides such guidance, and as is the case in so many Practicing Law Institute publications it does so pragmatically and in straightforward fashion. The book's thirteen chapters take the reader through all aspects of the rule, commencing with its adoption and the statutory milieu from whence it sprang, through its basic requirements, to the proper handling of the mandated notice provision.

In my judgment, an awareness of the problems which dictated Rule 144's ultimate adoption is crucial to an understanding of the rule; the scaffolding of the rule's provisions is the direct result of the questions which arose prior to April 15, 1972. For example, Mr. Goldwasser ex-

5. *See* SEC v. Ralston Purina Co., 346 U.S. 119 (1953). The Securities and Exchange Commission has implemented the judicial and administrative requisites of the exemption with Rule 146 under the Securities Act of 1933, 17 C.F.R. 330.146 (1977).

6. 15 U.S.C. 77d(1) (1976).

7. 15 U.S.C. 77b(11) (1976); *see also,* H.R. Rep. No. 85, 73d Cong. 1st Sess. 13 (1933).

8. *See for example* SEC v. Spectrum, Ltd., 489 F.2d 535 (2d Cir. 1973).

9. Sec. Act Rel. No. 5223 (1972); *see generally,* Posternak, *Rule 144 of the Securities Act of 1933,* 7 NEW ENGLAND L. REV. 179 (1972).

plains the "holding period" dilemma: "[t]he theory of the holding period was that if the purchaser did not in fact resell the shares shortly after his purchase, then he presumably had no intent to do so when he purchased them." But what was the holding period: six months, one year or two years?[10] Citing cases and the views of commentators, the author describes the somewhat tortuous process which evolved into the two year holding period of the rule as currently written.

Chapter 4, in chastely concise language addresses the embarkation problem in any statutory endeavor: definitions. As he does throughout the work, the author views the definitional problems as he sees them and as the staff of the Securities and Exchange Commission does. To illustrate, with respect to the definition of "affiliate," Mr. Goldwasser writes:

> the staff's clear preference has been to leave determinations as to who is an affiliate in the hands of the issuer's and seller's counsel. While it is true that the attorneys, who have the best knowledge of the facts, are in the best position to render a definitive opinion as to whether a seller is an affiliate of the issuer, they can do so only on the basis of established principles. The presumptions utilized by the staff hardly suffice for this purpose.

In broadbrush, Rule 14 permits the resale of restricted securities in a company for which specified public information is available, with certain volume limitations, if they have been owned by the seller for two years and are disposed of in brokerage transactions and notice is given to the Securities and Exchange Commission. This is a patently simplistic summary; but this generally is all that the ordinary practitioner knows about Rule 144. Like any simplification, it is replete with pitfalls and blind alleys. It walks a tight rope between good practice and disaster.

Mr. Goldwasser guides the practitioner through the rule; he explains and illustrates the problems associated with volume limitations; he removes the endemic difficulties with adequate public information; and he tells the practitioner what a brokerage transactions is. Thus, he points out that

> [a] broker, to avail himself of the brokers' exemption, must satisfy three requirements: (1) he must execute the sale as agent receiving only the usual and customary brokerage commission; (2) he must neither solicit nor arrange for the solicitation of buy-orders in anticipation of the sale; and (3) he must conduct a reasonable inquiry to determine that the transaction is not a part of a distribution of securities.

The point to be made is that securities law at best is complicated and technical; its parlance and traditions are not common knowledge to any

10. Sec. Act Rel. No. 1862 (1938).

but the specialist. Mr. Goldwasser, at least with respect to Rule 144, attenuates this problem. The reader will know the rule, he or she will learn its requirements — regardless of whether he or she is a securities specialist.

Whenever one deals with a federal agency, it's helpful to know what the agency thinks about a certain matter; surely such insight can only have a positive effect on preparing one's course of action. The author takes giant steps in insuring that his readers will have a better than fair idea of what the staff of the Securities and Exchange Commission thinks about the provisions of Rule 144. His text is replete with references to staff interpretations and letters to the practicing bar with respect to various factual and legal questions arising under the rule.[11] The lawyer is forewarned, too, as to staff inconsistencies in certain areas. For example, with respect to sales outside of Rule 144 (the rule not being exclusive), and the manner in which they are to be made, Mr. Goldwasser writes:

> [t]he staff's actions with respect to no-action requests are inconsistent on this point. On at least three occasions the staff, as a matter of policy, has declined to grant no-action requests, because of the requesting party's expressed intention to resell. On the other hand, the staff has granted at least five no-action requests despite representations that the requesting party did not contemplate an immediate sale of his shares.

Rule 144, as suggested, is not the only way to sell unregistered securities. Mr. Goldwasser gives a brief but edifying resume of other methods of selling unregistered securities, including pursuant to Rule 237[12] and Regulation A.[13]

Finally, the author includes a set of thirteen appendices which provide illuminating source references to Rule 144 itself and matters impacting the rule.

Physically, Mr. Goldwasser's work is divided into chapters which are, in turn, broken down into numbered sub-sections — all keyed to an easy-to-follow table of contents. In addition to the appendices and table of letters, the accessibility to the contents of the book is further refined by a comprehensive index. The type size makes for easy reading and the practice of "bold-facing" the sections of the rule discussed allows for expeditious reference from the text back to the rule's provisions, and vice-versa.

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11. The author includes a comprehensive table of SEC staff letters, in alphabetical order together with public availability date and CCH ¶, if any.

12. 17 C.F.R. 230.237 (1977).

13. 15 U.S.C. 77c(b) (1976); 17 C.F.R. 230.251, *et seq.* (1977).

Securities law is a dynamic but difficult specialty which in today's world cannot be taken for granted, even by the occasional practitioner. Mr. Goldwasser's book deals with a significant aspect of securities law, and does so in a thoroughly readable and informative manner.

WILLIS H. RICCIO*

*The reviewer is Assistant Regional Administrator for the Boston Regional Office of the United States Securities and Exchange Commission. However, the Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication by any of its employees. The views expressed herein are those of the reviewer and do not necessarily reflect the views of the Commission or of the reviewer's colleagues upon the staff of the Commission.

BOOKS RECEIVED

ASSOCIATIONS AND THE TAX LAWS. By Robert R. Statham and Richard W. Buek. Washington, D.C.: Chamber of Commerce of the United States. 1978. Pp. 157. $12.00. Paperbound. Designed for trade and professional associations and chamber of commerce executives, this guide summarizes the federal income tax laws applicable to national, state, regional and local associations exempt from taxation under section 501(c)(6) of the Internal Revenue Code. The volume first examines methods for achieving and retaining federal tax-exempt status as a trade association or chamber of commerce and outlines the steps that need to be taken to obtain formal recognition from the Internal Revenue Service. The unrelated business income tax as it applies to the income-producing activities of tax-exempt organizations is explained in the next major portion of the book. The remaining chapters outline the tax treatment of specific activities such as trade shows, conventions, lobbying, political action committees, insurance and advertising.

BUSINESS ORGANIZATIONS: BLUE SKY REGULATION, VOLUME 11C. By Hugh L. Sowards and Neil H. Hirsch. New York, New York: Matthew Bender & Company, Incorporated. 1977. Two Volumes (with 1978 Supplement). Clothbound. One of the earliest forms of consumer protection in the United States is blue sky regulation which concerns the sale of securities to the public. The goal of blue sky laws is to protect the investing public from fraud and insubstantial speculative offerings of various securities. This treatise focuses on the Uniform Securities Act, the model on which most state blue sky statutes are based. Throughout the nine chapters of this two part volume, the authors highlight statutory comparisons with non-Uniform Act states as well as the various modifications and differences in the states that have adopted the Act. The volume is updated by a 1978 cumulative supplement.

CONSUMERISM: SEARCH FOR THE CONSUMER INTEREST, 3d EDITION. Edited by David A. Aaker and George S. Day. New York, New York: The Free Press. 1978. Pp. 504. $13.95. Clothbound. According to the editors, the objective of the third edition is to capture the character of consumerism since their work was first published in 1971. Consumerism, which encompasses the activities of government, business, independent organizations and consumers, designed to protect and enhance the rights of consumers, has become an established social movement in the United States. The editors have attempted to resolve the problems created by this institutionalization of consumerism such as the role and effectiveness of the various institutions, the problems of implementation and the trade-offs between costs and benefits that result as consumer rights come into conflict with other rights, particularly those of the business community. The material, of which sixty per cent is new, is organized according to the steps of the purchase process — the prepurchase phase, the purchase phase and the postpurchase phase. To represent the issues, conflicts and effects on the market environment, the editors have selected articles from the current literature that reflect different points of view of consumerism.

GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT. By Raoul Berger. Cambridge, Massachusetts: Harvard University Press. 1977. Pp. 483. $15.00. Clothbound. In his fourth book, Raoul Berger declares that the United States Supreme Court has assumed the role of a superlegislature by effecting policy decisions through its interpretations of the fourteenth amendment. Relying upon his extensive research of legislative history, contemporary commentary and the initial judicial response, Professor Berger persuasively shows that the purpose of the amendment was "tragically limited" and did not confer upon black Americans the right to vote or prohibit segregation. Even though the American system of separation of powers denies the judiciary any policy-making discretion, the Supreme Court, through constitutional interpretations that neglect the intentions of the framers, has been able to initiate and control policy — policy which often lacks the endorsement of the majority of the population. Professor Berger warns that if the Court does not respect these limits on its powers which are essential to our system of government, the entire democratic structure will be undermined.

HONORABLE MEN: MY LIFE IN THE CIA. By William Colby and Peter Forbath. New York, New York: Simon and Schuster. 1978. Pp. 493. $12.95. Clothbound. In his autobiography, William Colby, former Director of the CIA from 1973 to 1975, recounts his 30 year career in American intelligence operations. Colby describes his adventures as an O.S.S. officer during the Second World War, his brief post-war career as an attorney and his return to intelligence with his joining of the infant CIA in 1950. During the Cold War, Colby acted as a CIA operative organizing anti-Communist programs in Scandinavia and Italy. As the Vietnam War intensified, Colby was assigned to Saigon where he continued his political operations in the field and developed a close relationship with the Diem brothers and Madame Nhu. Following his appointment as Director in 1973, Colby was embroiled in the Watergate scandal and the Congressional investigations of alleged misconduct by the CIA in foreign and domestic affairs. In response to critics of the CIA, Colby argues in his epilogue that, with proper administration and regulation, the CIA, with its great capacity for amassing and analyzing information, can become an international resource to help humanity identify and resolve its problems through negotiation and cooperation.

JOHN HENRY WIGMORE: SCHOLAR AND REFORMER. By William R. Roalfe. Evanston, Illinois: Northwestern University Press. 1977. Pp. 340. $17.00. Clothbound. After nine years of research, William R. Roalfe, Professor of Law Emeritus at Northwestern University School of Law and formerly its Chief Librarian, has produced a revealing biography of one of the most prolific and influential scholars of American law, John Henry Wigmore. Drawing from Wigmore's correspondence and papers as well as the commentaries of his contemporaries, Roalfe describes a man possessed of tremendous energy with diverse interests and talents. Although best known for his treatise on the law of evidence, Wigmore was a prodigious scholar and author who contributed to such fields as international law, military law, criminal law, and legal education. Wigmore's tenure as law professor and later dean of Northwestern School of Law exhibited his devotion to teaching and his innovative approach to legal education. Just as Wigmore was a leader in legal education, he was at the forefront in law reform as illustrated by his active involvement in the American Bar Association, the American Law Institute, the Uniform State Laws Commission, the World Court and the Legal Aid Society.

REFLECTIONS WITHOUT MIRRORS: AN AUTOBIOGRAPHY OF THE MIND. By Louis Nizer. Garden City, New York: Doubleday & Company, Inc. 1978. Pp. 469. $10.95. Clothbound. Louis Nizer's ninth book may be described as a "selective autobiography" for the author only highlights those events and experiences in his life that he feels contribute to an understanding of human behavior and contemporary society. An excellent storyteller, Mr. Nizer recounts several of his legal experiences such as his famous libel and obscenity cases as well as his personal relationships with Presidents, mayors, congressmen, movie stars, business tycoons and other celebrities. Although a book of this nature is necessarily anecdotal, Mr. Nizer embellishes his reminiscences with commentary on the human condition and the role of the law in today's world. This book reveals an intelligent and compassionate man gifted with boundless energy and possessed with an inordinate devotion to his profession and his moral convictions.

STATE AND LOCAL GOVERNMENT LAW. By Sho Sato and Arvo Van Alslyn. Boston: Little, Brown and Company. 1977, Second Edition. Pp. xxi, 1153. This textbook undertakes a broad and multidimensional analysis of the function and duties of state and local governments, their resources, limitations on their powers and their relationship with other governmental units. Rapid growth, the mass migration to the suburbs, environmental consciousness and an increase in the functional responsibilities imposed on cities, counties and municipalities have made this area of law ripe for conflict, debate, and innovation among lawyers and legislators.

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ERRATA

Page 170, text, line 8: delete "treaties"; insert "treatises".

Page 175, text, line 17: delete "copyrighted"; insert "uncopyrighted".

Page 184, footnotes, lines 7-8: delete "The's"; insert "There is evidence, however, of laetrile's".

Page 289, footnotes, line 17: delete "Apr"; insert "April 17, 1977, at 28, col. 1. Eventually, the order".